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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Judge J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2013-CP-10-02243
Appellate Case No. 2014-001085

Popie Lown Roberts, Respondent,

v.

The Health Sciences Foundation of The Medical University of South Carolina and The Franke Home, Inc., d/b/a The Franke Home at Seaside, Appellant.

FINAL REPLY BRIEF OF APPELLANT

Robert M. Kunes, Esq. (SC Bar #3579)
Andrew W. Chandler, Esq. (SC Bar #69388)
David H. Kunes, Esq. (SC Bar #76310)
EVANS CARTER KUNES & BENNETT, P.A.
P.O. Box 369
Charleston, SC 29402
(843) 577-2300
(843) 577-2055 (fax)

Attorney for Appellant

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REPLY STATEMENT OF THE FACTS

To clarify one point presented by the Respondent in the last paragraph on Page 1 of the Brief of the Respondents, Mrs. Roberts did not bring this action in her fiduciary capacity as Personal Representative; rather Mrs. Roberts filed the Petition to Construe the Decedent's Will in her individual capacity. Since Mrs. Roberts served in a fiduciary capacity and was a named devisee of Mrs. Lown's Will, she, as the fiduciary, has a conflict of interest in taking the position that she, as a beneficiary, is entitled to the personal property, one million dollars, and one-third of the residue of the Estate when the plain language of the Will dictates otherwise.

In the lower courts, Respondent has asserted that, because of the Decedent's phrase "less, however, the sum of One Million Dollars," the Decedent's Will does not dispose of this one million dollars and that intestacy would result unless the courts engage in a construction that disposes of the one million dollars in question in favor of the Respondent. Appellant has made two arguments in the case below: (1) the proper construction of the Decedent's Will disposes of all of her property through testacy and that, under the proper construction, Section 62-2-604 is inapplicable because no intestacy results; and (2) if the court determines the Will does not dispose of a portion of the estate, Section 62-2-604 of the South Carolina Probate Code applies to prevent the intestacy. The lower courts repeatedly have reasoned that intestacy would occur if the Decedent's phrase "less, however, the sum of One Million Dollars," is given its ordinary and plain meaning. As this is now the law of the case, Appellant maintains that Section 62-2-604 applies to cause the sum of One Million Dollars to be divided evenly among the two remaining residuary beneficiaries and this results

in the Appellants receiving a larger share of the estate than they would otherwise receive under the proper construction.

Appellant has consistently taken the position that Mrs. Roberts receives the personal property under Article Second and the sum of one million dollars under Article Third. As stated in the Appellant's Initial Brief on Page 19, Appellant concedes that if there were only personal property and the sum of one million dollars in the estate, Mrs. Roberts would receive everything; nothing would pass under the residuary clause of Article Fourth and nothing would pass to either Appellant. It is incorrect to suggest that Appellant has urged the lower courts to invalidate these two gifts so that the entire estate is disposed of under Article Fourth.

Of course, the Decedent was aware of the size of her estate and, at the time of her death, the estate was, in fact, over five million dollars. Therefore, the fundamental question before the probate court was how to construe the language of the residuary clause of Article Fourth in a manner that is most consistent with the Decedent's testamentary intent. Instead of construing the words of the Will as written, Respondent simply concludes in its pleadings that Article Fourth is ambiguous as to the disposition of one million dollars of the residuary and that Respondent is entitled to one-third of the residue of Article Fourth. (R. pp. 038-039, p. 067) (Petition; Amended Petition, ¶ 11). In reaching the conclusion that the one million dollars in question passes to the Respondent, the Probate Court concludes that, since there is "no stated devisee" for the one million dollars, it passes "by intestacy," but, because of the "presumption against partial intestacy," later holds that "it is obvious from reviewing the entire document the true and legal intent and effect of the last will of the decedent was to

devise all personal property and One Million and 00/100 ($1,000,000.00) Dollars to [Respondent] and the remainder after debts, taxes costs and fees, split equally among [the three residuary beneficiaries] . . ." (R. pp. 009 and 013) (Prob. Ct. Order (Jun. 26, 2012), pp. 9 and 13). In its order, the Probate Court ruled that Section 62-2-604 was not applicable to dispose of the one million dollars in favor of the two remaining residuary beneficiaries. (R. p. 009) (Prob. Ct. Order (Jun. 26, 2012), p. 9).

The circuit court, sitting in an appellate capacity, ruled that the one million dollars in question, if withheld, would not pass to the Appellants pursuant to Section 62-2-604 but would rather pass by intestate succession under the so called "English Rule." (R. p. 030) (Cir. Ct. Order (Apr. 10, 2014) p. 8). Since the circuit court was sitting in an appellate capacity, it would have been inappropriate to file a motion to reconsider, alter, or amend under Rule 59 of the South Carolina Rules of Civil Procedure. The Probate Court made a determination that Section 62-2-604 did not apply and the Circuit Court affirmed this determination. These determinations are now the law of the case.

ARGUMENT IN REPLY

I. APPELLANT HAS CONSISTENTLY TAKEN THE FOLLOWING TWO POSITIONS: (1) IF ANY PORTION OF A DEVISEE'S SHARE OF THE RESIDUE FAILS, FOR ANY REASON, SECTION 62-2-604 OPERATES TO CAUSE THE SHARE THAT FAILS TO BE REALLOCATED AMONG THE REMAINING RESIDUARY BENEFICIARIES INSTEAD OF THAT PORTION PASSING UNDER INTESTACY AND (2) THE LANGUAGE OF ARTICLE FOURTH SHOULD BE CONSTRUED AS A "FORMULA" CLAUSE IN A FASHION THAT GIVES EFFECT TO THE DECEDENT'S TESTAMENTARY INTENT BY GIVING THE PHRASE "LESS, HOWEVER, THE SUM OF ONE MILLION DOLLARS" ITS ORDINARY AND PLAIN MEANING, WHICH MEANS THAT THE RESPONDENT'S SHARE UNDER ARTICLE FOURTH IS REDUCED BY ONE MILLION DOLLARS.

A. The lower courts based their conclusions of law on the premise that one million dollars would pass under intestacy, and not pursuant to Section 62-2-604, which Appellant has consistently argued should apply to any portion of the residue that fails.

The question before this Court is whether the lower courts have committed errors of law that require this Court to reverse. The lower courts based their conclusions of law on the premise that intestacy would occur with respect to the one million dollars in question, that Section 62-2-604 does not operate to cause the one million dollars to pass to the remaining residuary beneficiaries, and that it is the court's role, under the guise of construing the will to avoid intestacy, effectively to re-write the words the Decedent used in her Will instead of giving the words their ordinary and plain meaning.

As argued in Appellant's Initial Brief, if this Court finds that the South Carolina legislature intended, by its adoption of Section 62-2-604, to override the premise that intestacy would occur with respect to the one million dollars in question, then Section 62-2-604 operates to cause the two remaining residuary beneficiaries to receive the one million

dollars equally. Through their adoption of the Uniform Probate Code, our elected representatives provided a statutory mechanism that instructs our courts on what to do when a devise, or a portion of a devise, fails for any reason. Our courts have consistently found that judges may not engage in the revision of a decedent's will or the making of a will that the decedent, herself, did not make, and this case is no different, especially in light of a statute that directly governs the disposition of the property in question. *See e.g.*, *Blackmon v. Weaver*, 366 S.C. 245, 621 SE.2d 42 (2005) (reversing the lower court's ruling because "a court may not 'by judicial construction make a will for the decedent that he has not made himself.'"); *Cornelson v. Vance*, 220 S.C. 47, 66 S.E.2d 421 (1951) ("Courts cannot make wills nor can they conjecture as to the intention of the testatrix."); *MacDonald v. Fagan*, 118 S.C. 510, 111 SE 793 (1922) (for the proposition that a court has no power to supply an omitted word in a will). The interests of justice are better and more consistently served by implementing pre-existing, legislatively prescribed rules of interpretation instead of allowing our courts to craft a judicial remedy to a situation like this, which would necessarily be on a case by case basis. The Uniform Probate Code, adopted by our legislature over 25 years ago and prior to the drafting and execution of the decedent's will, should be applied consistently by our courts instead of allowing judicial reformation when the fear of partial intestacy creeps into the courtroom.

From the beginning of this case, Respondent has argued that Article Fourth of the Will does not dispose of the sum of one million dollars and that this sum would pass under intestacy, a result which the Decedent would not have wanted, unless extrinsic evidence is introduced and used by the Court to find a result other than intestacy. (R. pp. 143-147)

(Prob. Ct. Hr'g (Jan. 31, 2012) pp. 17-21). Appellant's response to this assertion is simple. Article Fourth is a residuary clause and, if a portion of a share of the residue fails for any reason, Section 62-2-604 causes the portion that fails to pass to the remaining residuary beneficiaries. (R. p. 083) (Amended Answer, p. 5). The portion that fails does not pass under intestacy.

The action before the Probate Court was an action to construe a Will and this necessarily requires that each of the beneficiaries of the Will put forward its construction of the words contained in the Will. Appellant has repeatedly and consistently argued that its construction of the Will is the correct one and is the only possible construction if the Court gives the phrase, "less, however, the sum of One Million and 00/100 ($1,000,000.00) Dollars, paid to [Respondent], or [Respondent's] issue, under the preceding bequest" its plain and ordinary meaning. Nevertheless, through the efforts of the Respondent, the lower courts have determined the only possible interpretation of this language would cause the sum of One Million Dollars to pass under intestacy–a result that the lower courts wish to avoid and one which directly contradicts the plain application of Section 62-2-604.

Although Appellant remains, and has remained committed, to its construction of the Decedent's Will, the lower courts, through illogic and faulty legal reasoning, have reached their conclusions of law on the premise that Section 62-2-604 is inapplicable, which is now the law of the case and one of the issues to be determined by this Court on appeal.

B. Even if this Court finds that the legislature did not intend for Section 62-2-604 to apply in this situation, Appellant contends that (1) the probate court erred as a matter of law by allowing inadmissible evidence to taint its analysis and determination of the Decedent's testamentary intent and (2) the circuit court, after

excluding such inadmissible evidence, erred as a matter of law in affirming a construction of the Decedent's will that discards an entire phrase "less, however, the sum of One Million Dollars" of the Decedent as meaningless, and (3) the case should be remanded to the Probate Court to give the phrase, "less, however, the sum of One Million Dollars," its plain and ordinary meaning.

As a threshold matter, this Court should reverse a lower court's rulings when the lower courts' findings are based on an error of law. *Polson v. Craig*, 351 S.C. 433, 437-438, 570 S.E.2d 190, 192 (Ct. App. 2002). An appellate court should also disturb a lower court's findings of fact when there is no evidence that reasonably supports those findings. *Id.* The subject matter of this appeal relates to the rulings of the lower courts as set forth in the various Orders.

The Probate Court found that the Respondent is entitled to the personal property, one million dollars and one-third of the residue. The Probate Court reached this conclusion under two different scenarios, one scenario where there is an ambiguity that requires the introduction of extrinsic evidence, later found to be inadmissible, and the other scenario where no latent ambiguity is determined to exist. (R. p. 013) (Prob. Ct. Order (Jun. 26, 2012) p. 13). Appellant urges this Court to consider carefully the logic and reasoning of the Probate Court – is it possible to reach the same conclusion that the Respondent is entitled to one-third of the residue based on the existence, or non-existence, of an ambiguity?

If an ambiguity is determined not to exist, extrinsic evidence is not admissible to determine the Decedent's testamentary intent. *Estate of Hyman*, 606 S.E.2d 205, 207, 362 S.C. 20, 25-26 (Ct. App. 2004). Under this scenario, the Probate Court is required to construe the language of the Decedent's Will based on the four corners of the document itself. Appellant submits that the only way in which a court can reach the conclusion that

Respondent receives an equal one-third of the residue is either to disregard the language of "less, however, the sum of One Million Dollars," or to rely on inadmissible evidence that prejudices the case, both of which are inappropriate and reversible error. *See Blackmon v. Weaver*, 366 S.C. 245, 621 S.E.2d 42 (2005) (reversing the lower court's ruling and stating "[t]o hold, in the face of this language, that Lana was not given the right to dispose of the property would require us to completely ignore this provision as it is written."); *Brown v. Allstate Ins. Co.*, 344 S.C. 21, 542 S.E.2d 723 (2001) (the admission of incompetent evidence would be reversible error if "the trial judge affirmatively relied on the incompetent evidence or could not have reached the same result without relying on the incompetent evidence."). Simply stating that the Court would have reached the same conclusion regardless of the inadmissible evidence does not make the statement true and correct, especially in light of the nonexistence of any competent evidence of the Decedent's testamentary intent other than the actual words she used in her Will. If the Decedent had, in fact, intended to leave one-third of the residue to the Respondent, the Decedent would have stated that Mrs. Roberts receives one-third of the residue without the additional words "less, however, the sum of One Million Dollars."

Once the inadmissible evidence was introduced and used to convince the Probate Court that the Decedent intended a result contrary to the words she used, the Probate Court was influenced into reaching a result that was consistent with the inadmissible evidence. On appeal to the Circuit Court, the Circuit Court found that the evidence was inadmissible and, in the same breath, affirmed the Probate Court's faulty conclusion that, without considering the inadmissible evidence, the Will can be construed so that the Respondent receives one-

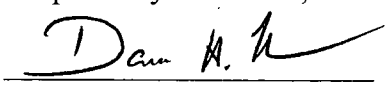
third of the residue. To reiterate, if the Decedent had intended to leave one-third of the residue to the Respondent, she simply would have stated that Mrs. Roberts receives one-third of the residue. The incompetent testimony of the draftsman is the only evidence that supports the conclusion reached by the lower courts and its improper admission and the lower court's reliance thereon is reversible error.

In *Brown v. Allstate Ins. Co.*, 344 S.C. 21, 542 S.E.2d 723, 726 (2001), the Supreme Court addressed a situation in which the court found that the admission of incompetent evidence regarding the lack of criminal prosecution for arson was not prejudicial error because the defendant insurance company otherwise "failed to prove an essential element of its defense." The insurance company refused to make a payment on a insurance claim for loss arising out of the fire of a vehicle and asserted the defense of "arson" as grounds for not paying on the claim. *Id.* at 23, 542 S.E.2d at 724. The defense of arson based solely on circumstantial evidence requires the insurer to show "the fire was of an incendiary origin and the plaintiff had both the opportunity and the motive to set the fire." *Id.* at 25, 542 S.E.2d at 724. The Supreme Court found that because the insurance company had failed to establish motive, the admission of incompetent evidence relating to the prosecution's decision not to prosecute for arson was not prejudicial. *Id.* at 26, 542 S.E.2d at 726. In other words, the incompetent evidence was not determinative of the issue of whether the insurance company established motive.

Here, the only evidence submitted to the Probate Court that is relevant to the construction of the Will was the testimony of the drafting lawyer and this testimony relates directly to how the courts ultimately construed the Will. Unlike *Brown* where "it [was] clear

[the trial judge] is making a judgment based on competent evidence," here, there is absolutely no competent evidence before the court as to the Decedent's testamentary intent that accords with the holding reached by the lower courts. *Id.* at 27, 542 S.E.2d at 726. The lower courts' reliance solely on improper evidence is reversible error.

Respectfully submitted,



Robert M. Kunes, Esq. (SC Bar #3579)
Andrew W. Chandler, Esq. (SC Bar #69388)
David H. Kunes, Esq. (SC Bar #76310)
EVANS CARTER KUNES & BENNETT, P.A.
P.O. Box 369
Charleston, SC 29402
(843) 577-2300
(843) 577-2055 (fax)

Attorney for Appellant, The Health Sciences Foundation of the Medical University of South Carolina, now known as The Medical University of South Carolina Foundation and The Lutheran Homes of South Carolina, Inc., as successor by merger to The Franke Home, Inc.

December 2, 2014

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PROOF OF SERVICE

I, David H. Kunes, certify that I have served the FINAL BRIEF OF APPELLANT and FINAL REPLY BRIEF OF APPELLANT on Respondent Popie Lown Roberts by depositing a copy of the same in the United States Mail, postage prepaid on December 5, 2014, addressed to her attorneys of record, Michael R. Daniel, Esq., 336 Cardinal Rd., Elloree, SC 29047 and James B. Richardson, Jr., Esq., 1229 Lincoln Street, Columbia, S.C. 29201.

December 5, 2014

David H. Kunes, Esq. (SC Bar #76310)
EVANS CARTER KUNES & BENNETT, P.A.
P.O. Box 369
Charleston, SC 29402
(843) 577-2300
(843) 577-2055 (fax)
Attorney for Appellant

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Appellant's Final Brief and Appellant's Final Reply Brief comply with Rule 211(b), SCACR.

Robert M. Kunes, Esq. (SC Bar #3579)
Andrew W. Chandler, Esq. (SC Bar #69388)
David H. Kunes, Esq. (SC Bar #76310)
EVANS CARTER KUNES & BENNETT, P.A.
P.O. Box 369
Charleston, SC 29402
(843) 577-2300
(843) 577-2055 (fax)
Attorney for Appellant

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