THE STATE OF SOUTH CAROLINA
In The Supreme Court

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

O. Davie Burgdorf, Master-in-Equity



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Appellate Case No. 2013-001505

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In re: Estate of Atn Burns Livingston.

Emma Lou Livingston Martin as Personal Representative
of the Estate of Atn Burns Livingston and
Emma Lou Livingston Martin,.....Respondents,

v.

Clyde B. Livingston; Miller Communications, Inc.; Citibank
South Dakota, N.A.; Branch Banking and Trust Company
of South Carolina; and American First Federal, Inc.; Defendants,

Of whom Clyde B. Livingston is.....Petitioner.

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# REPLY BRIEF OF PETITIONER

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## STATEMENT OF ISSUES

I. **Have the Respondents conceded that the USDA payments were not property of the Estate?**

II. **Did the Petitioner contract with the USDA as personal representative of the Estate?**

III. **Do the Respondents misconstrue the concept of standing?**

IV. **Do the Respondents improperly claim that the trial court should not have offset a judgment against the Petitioner and in favor of the Estate by taking into account the Petitioner's right to inherit?**

V. **Do the Respondents improperly claim that the application of S.C. Code Ann. § 15-61-25 to this case is inequitable?**

## ARGUMENT

### I. Emma fails to address how the USDA payments supposedly became property of the Estate.

As discussed in the Petitioner (hereinafter "Clyde")'s brief, Clyde received benefits from the USDA because of an agreement he had with that agency as a farm operator. (App. pp. 169, 170, p. 283 ln. 20-25, p. 284 ln. 12-14, p. 290 ln. 21-25, p. 296 ln. 9-12, p. 315 ln. 1-3, p. 321 ln. 22-23, pp. 349-75.) The USDA paid him those benefits because of what he was obligated to do and not do as a farm operator. (App. p. 169, p. 283 ln. 20-25, p. 284 ln. 12-14, p. 290 ln. 21-25, p. 296 ln. 9-12, p. 315 ln. 1-3, p. 321 ln. 22-23, pp. 349-75.)

In the Respondents (hereinafter "Emma")'s brief, Emma fails to address the same question the Court of Appeals failed to address: How did money that the United States Department of Agriculture paid to Clyde under a contract that called for Clyde to be paid the money somehow become property of the Estate? Emma fails to address this because there is nothing for her to argue in this regard.

The USDA payments are Clyde's personal property, paid to him under a contract to perform farm operation. Emma has never offered any legal authority or factual evidence tending to show some basis for her contention that the USDA payments always were or somehow became property of the Estate. Both legal authority and logic are against the notion that the contractual payments to Clyde really belonged to the Estate instead. See Professional Bankers Corp. v. Floyd, 285 S.C. 607, 612, 331 S.E.2d 362 (Ct. App. 1985). Any problems with Clyde's entry into or performance under his contract with the USDA would create a set of rights

and liabilities that would run between Clyde and the USDA. The Estate would not, as they say, have a dog in that fight.

Even if the USDA payments were somehow a profit of land ownership or otherwise part of the land (which they are not), they would still belong to Clyde, as an owner of the land by operation of S.C. Code Ann. § 62-3-101, and not to the Estate. Burkhalter v. Townsend, 160 S.C. 134, 158 S.E. 221, 223 (1931). Emma has never presented any argument to the effect that Burkhalter has been overruled or abrogated, because it has not.

Further, by failing to argue that any law supports her position that the USDA payments were part of the Estate or the land, Emma has abandoned her position on this issue and conceded that Clyde is correct on those points. First Union Nat. Bank v. FCVS Communications, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996)(where respondent fails to respond to issue in respondent's brief, court may treat failure to respond as concession that appellant is correct); see S.C. Dept. of Probation, Parole and Pardon Servs. ex. rel. State v. Reynolds, 343 S.C. 465, 540 S.E.2d 480, 482 n. 1 (Ct. App. 2000) (declining "to consider argument because there is no citation of authority, and it is so conclusory as to be an abandonment of this issue on appeal"). Just as the Court of Appeals was wrong to simply assume (incorrectly) that the USDA payments were part of the Estate and part of the land, Emma cannot simply assume this in her brief to this Court. She has conceded that Clyde is correct on this point. First Union, 321 S.C. at 502.

Since there is nothing to which Emma can point that shows that the USDA payments made to Clyde somehow were or became property of the Estate, and since

she has conceded that Clyde is correct that they were never Estate property, her arguments about whether the Estate held title to the land *cannot* carry the day on the issue central to the USDA-payments portion of this appeal. Those arguments are so much "sound and fury, signifying nothing." William Shakespeare, Macbeth Act V, scene 5 (internal capitalization omitted).

## II. Clyde did not contract with the USDA as personal representative.

Emma writes that Clyde "initially, in 2000, contracted with the USDA in his capacity as Personal Representative of the Estate." (Brief of Respondents p. 8.) That is simply not true, and the record does not support this assertion. The document to which Emma must be referring is the "Lease Statement" from the year 2000. (App. p. 349.) In that document, Clyde signed as personal representative of the Estate to make a factual certification, not to enter into a contract with the USDA. "The necessary elements of a contract are an offer, acceptance, and valuable consideration." Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 406, 581 S.E.2d 161 (2003). Those elements are not shown, by the "Lease Statement" or anything else in the record, to have ever existed between the Estate and the USDA at any time period for which Clyde received benefits as a farm operator.

## III. Emma's argument seems to misunderstand what standing is.

Emma writes that Clyde "had no standing to enter into the USDA contract[.]" (Brief of Respondents p. 9.) Emma seems to have a misunderstanding of what standing is. "Standing refers to '[a] party's right to make a legal claim or seek judicial enforcement of a duty or right.'" Powell ex rel. Kelley v. Bank of America, 665 S.E.2d 237, 241 (Ct. App. 2008) (quoting Black's Law Dictionary 1413 (7th ed.

1999)). Standing goes to the question of a party's right to bring a proceeding. Baird v. Charleston Cnty., 333 S.C. 519, 530 & 530 n. 7, 511 S.E.2d 69 (1999).

The idea of standing is not applicable to the question of whether one can enter into a contract with another. Further, even if it had been *impossible* for Clyde to perform his obligations to the USDA as a farm operator, that does not mean that he could not agree to perform them. Moreover, none of that has anything to do with the outcome of this case, as even if somehow a necessary element of contract between Clyde and the USDA were missing, that would not make the money the USDA paid Clyde belong to the Estate.

## IV. The statutes cited by Emma do not make the real property owned by the Estate or its personal representative.

The statutes Emma cites do not make the real property involved in this case property that is owned by the Estate or by her as personal representative. In the Probate Code sections that deal with a personal representative's power with respect to real and personal property, a distinction is made between personal property, to which title passes to the personal representative by operation of law, and real property the decedent owned at his death, to which title passes to the decedent's heirs and devisees, over which the personal representative can exercise power only under specified circumstances, and to which an estate cannot hold title. S.C. Code Ann. §§ 62-3-101, 62-3-711. That distinction has been a settled part of this state's law since long before the adoption of the Probate Code. See Taylor v. Jennings, 233 S.C. 600, 607, 106 S.E.2d 391, 395-96 (1958); Fischer v. Bennett, 202 S.C. 534, 25 S.E.2d 746, 748 (1943); Carter v. Wroten, 187 S.C. 432, 198 S.E. 13, 15, 16 (1938). Emma's arguments, and the Court of Appeals' decision below, ignore that distinction.

Emma contends that S.C. Code Ann. § 62-3-711(a) means that title to the real property "is currently held by Respondent, as Personal Representative, in trust for the beneficiaries of the Estate[.]" (Brief of Respondents p. 11.) This ignores the plain language of S.C. Code Ann. § 62-3-101, which states that "[u]pon the death of a person, his real property devolves to the persons to whom it is devised by his last will" and ignores the long-standing law of this state that title to realty passes at death to those who inherit it and does not pass to the decedent's estate. Taylor, 233 S.C. at 607; Fischer, 25 S.E.2d at 748; Carter, 198 S.E. at 15. Real property is not "property of the estate" described in S.C. Code Ann. § 62-3-711(a). In fact, that Code section itself distinguishes between real and personal property; subsections (b) and (c) describe limits on the power of a personal representative to act with regard to realty. S.C. Code Ann. § 62-3-711(b) & (c). The reporter's comments to S.C. Code Ann. § 62-3-711 state that "[u]nder this section, Section 62-3-101, and Section 62-3-709, title to personal property (as well as real property) devolves at or soon after death to heirs and devisees, and not to the personal representative." Rptr. Cmt. to S.C. Code Ann. § 62-3-711. This is consistent with the reporter's comments to S.C. Code Ann. § 62-3-101, which state the following:

> Real property devolves to the devisees or substitutes, under the decedent's will, or to his heirs or substitutes, in an intestate estate, at the death of the owner whereas personal property devolves at the expiration of three years after the decedent's death if not yet distributed by the personal representative.
>
> . . .
>
> The devolution of *personal property* to devisees or heirs is expressly made subject to other provisions of

> this Code regarding exempt property, the rights of creditors, and the administration of estates.

Rptr. Cmt. to S.C. Code Ann. § 62-3-101 (emphasis added).

Further, Atn Livingston's will did *not* devise this property to the Estate's personal representative as contemplated by S.C. Code Ann. § 62-3-711(c). *That* would have been accomplished through language like "I devise to my personal representative my real property, to be used for X" or "I devise my real property to my personal representative, to be sold and the proceeds used for Y." This is borne out by South Carolina case law, which indicates that the operation of S.C. Code Ann. § 62-3-711(c) would be triggered by language in a will like a devise "to my executor and executrix hereinafter named, in trust to and for the following purposes," as in Bredenburg v. Bardin, 36 S.C. 197, 15 S.E. 372, 373 (1892), and is consistent with the distinction drawn in S.C. Code Ann. § 62-3-907(B) and (C) between distributions resulting from devises to a personal representative and otherwise. Here, Atn Livingston's will simply devises his property to his "children, Clyde B. Livingston and Emma L. Martin, share and share alike[.]" (App. p. 393.) While the will nominates Clyde and Emma as personal representatives, the devise of their father's property to them is effective regardless of who serves as personal representative. It is, thus, not a devise to the personal representative. Further, the case before this court does not involve a purported sale of the real property by Emma or Clyde.

Emma argues that "[p]rior to the closing of the Estate of Atn B. Livingston, and the issuance of a Deed of Distribution, Petitioner and Respondent are neither joint tenants nor tenants in common." (Respondent's Brief p. 11.) This is wrong.

Emma's argument is against the plain language of S.C. Code Ann. § 62-3-101, which states that *"[u]pon the death of a person*, his real property devolves to the persons to whom it is devised by his last will[.] (Emphasis added.) "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). The statute quite plainly provides that it is at the moment of the decedent's death that title to the decedent's realty passes to those to whom he has devised his real estate. S.C. Code Ann. § 62-3-101. If he has devised his land to more than one person, then those people become cotenants in that realty at the time the decedent dies. Id. "Cotenancy" is any "tenancy with two or more owners who have unity of possession." Black's Law Dictionary 698 (2d pocket ed. 2001). "Examples are a joint tenancy and a tenancy in common." Id. Multiple devisees who inherit real property typically, as here, inherit it as tenants in common, a type of cotenancy. See State v. Singley, 392 S.C. 270, 275-76, 709 S.E.2d 603, 606 (2011); Watson v. Little, 224 S.C. 359, 364-65, 79 S.E.2d 384, 387 (1953).

Emma's argument that the land is owned by the Estate, not Emma and Clyde as individuals who are tenants in common, simply contravenes the law. In addition, a deed of distribution of real property to a person who is devised that realty is not a conveyance; it "constitutes a release of the personal representative's power over the title to the real property[.]" S.C. Code Ann. § 62-3-907(B). It *cannot* be a conveyance, since the devisee is already vested with title to the property as a matter of law. S.C. Code Ann. § 62-3-101. Whether the USDA or even Clyde had the

incorrect impression that the Estate owned the land is simply immaterial and does not change the operation of S.C. Code Ann. § 62-3-101.

## V. No evidence of the existence of estate expenses was ever adduced at trial.

Emma contends that "[t]he Estate owes just debts in an amount exceeding $20,000.00." (Brief of Respondents p. 7.) No evidence tending to support this was ever adduced at trial. Indeed, the portion of the record Emma cites in support of this purported fact (App. pp. 330-31) is just a summary by counsel to the master-in-equity of their positions, discussing that Emma's claim to be owed money on a purported note and mortgage from herself (as personal representative) to herself (individually) is very much contested and is an issue to be tried at a later hearing in this case. Statements of counsel are not evidence. Trivelas v. S.C. Dept. of Transportation, 348 S.C. 125, 141, 558 S.E.2d 271, 279 (Ct. App. 2001); Higgins v. MUSC, 326 S.C. 592, 599 S.E.2d 269, 272 (Ct. App. 1997); Historic Charleston Foundation v. Krawcheck, 313 S.C. 500, 508 n. 7, 443 S.E.2d 401, 406 n. 7 (Ct. App. 1994); Gilmore v. Ivey, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct. App. 1986).

If Emma desired to argue that estate expenses existed that would make an offset in Clyde's favor wrong, impractical, or inequitable, it was incumbent upon her to adduce evidence to the effect that such expenses existed. The master never decided that any such "estate expenses" existed, and Emma never presented any evidence that they did. (App. pp. 157-73, 247-348.) Emma's claims of fact based on purported evidence that does not appear in the record cannot be considered on appeal. Spreeuw v. Barker, 385 S.C. 45, 682 S.E.2d 843, 854 (Ct. App. 2009).

## VI. Offset in favor of Clyde because of his right to inherit was consistent with the Probate Code.

Emma argues in her brief to this Court that "[n]owhere does the South Carolina Probate Code provide for such person [an executor de son tort] to withhold his 'share' (be it half or otherwise) from his obliged repayment." (Brief of Respondents p. 15). Actually, offsetting such a repayment obligation by the executor de son tort's right to inherit is not only consistent with S.C. Code Ann. § 62-3-619, it is also consistent with S.C. Code Ann. § 62-3-903, which states that "[t]he amount of a liquidated indebtedness of a successor to the estate if due, or its present value if not due, shall be offset against the successor's interest[.]"

## VII. In arguing that the operation of S.C. Code Ann. § 15-61-25 produces an inequity, Emma misapprehends the effect of Judge Burgdorf's order.

Emma argues that the application of S.C. Code Ann. § 15-61-25 to this case produces an inequitable result. (Brief of Respondents. pp. 12-13.) Emma is wrong, and she cannot prevail on this argument.

First, Clyde notes that even if the Court were to agree with Emma that the application of the statute is inequitable, that would not mean the statute is invalid or inapplicable to this case, as "equity cannot prevail over a positive legislative enactment." Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100, 108 (2003). Even if Emma were right that the operation of S.C. Code Ann. § 15-61-25 creates inequity in this case, that argument *could not* carry the day for her.

Second, Judge Burgdorf's order ruling that S.C. Code Ann. § 15-61-25 applies to this case and providing for its implementation did *not* produce the inequitable

result that Emma claims it did. If Clyde ultimately purchases the property pursuant to the statutory process, there will still be a trial held about what is to be done with the proceeds of that sale. (App. pp. 161, 164.) Both the time at which the purchase price is set and the trial about the disposition of the sales proceeds will be after the next trial in this trifurcated case. (App. pp. 162-64.) Emma claims to hold a mortgage on the property for estate expenses, and the personal representative's power to invade real estate in furtherance of administration of the estate is something akin to a lien on the realty. See Black's Law Dictionary 419 (2d pocket ed. 2001) (defining "lien" as "[a] legal right or interest that a creditor has in another's property, lasting usu[ally] until a debt or duty that it secures is satisfied"). Judge Burgdorf's order provides that the next trial to be held in this case is upon the claims "that concern the validity, priority, extent, and amount of the alleged liens (or other disputed property interests) in the real property subject of this action[.]" (App. p. 162.) A person in Clyde's position will typically receive a credit toward the purchase price in a partition sale, the amount of the credit being proportionate to the quantum of the purchaser's interest in the property (e.g., a one-fourth owner would get a credit of $25,000.00 toward a $100,000.00 price for the entire interest in a piece of land), to avoid the circuitous result of the purchaser paying money into the court that would only go back to him or her. If, however, legitimate estate expenses are shown to exist in the next trial, the court can easily adjust the amount of the credit Clyde receives as a partial owner to account for any need for proportionate payment of those expenses from Clyde's share of the sales proceeds. (App. pp. 162-164.) Alternatively, the court could require payment of the full proceeds into court and distribute from

Clyde's portion of them any amounts needed to satisfy estate expenses in the fraction properly chargeable to him. (App. pp. 162-164.) Emma's argument that the operation of S.C. Code Ann. § 15-61-25 means that all estate expenses must be paid from her share of the funds from the sale of the property is simply a paper tiger. (Brief of Respondents p. 12.) She would have this Court fear an inequity that does not exist.

Equally false is the dichotomy posited by Emma with regard to the Probate Code and S.C. Code Ann. § 15-61-25. The procedure for partition under S.C. Code Ann. §§ 62-3-1301, *et seq.*, may be "the only procedure for sale of lands by the court," S.C. Code Ann. § 62-3-1301, but that does not mean that other law, whether originating from case law or statute, does not apply in a Probate Code partition action. Part 13 of Chapter 3 of the Probate Code does not speak about how a trial of a case under it is to be conducted or speak of a trial at all. Does that mean that trials are not held in cases brought under this part? Does it mean that the rules of evidence do not apply, or that defendants in those cases do not have the right of cross-examination? Of course not. *Other law*, among it the Due Process Clause and the South Carolina Rules of Evidence, requires that. Moore v. Moore, 376 S.C. 467, 474-75, 657 S.E.2d 743 (2008) ("[p]rocedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses"); Rule 101, SCRE (Rules of Evidence "govern proceedings in the courts of South Carolina").

The Probate Code itself recognizes that it does not stand alone and isolated, alien to and unaffected by the remainder of the law. The Probate Code states that

"[u]nless *displaced by* the particular provisions of this [Probate] Code, the principles of law and equity supplement its provisions." S.C. Code Ann. § 62-1-103 (emphasis added.) It further provides that where nothing to the contrary is provided in the Probate Code or the South Carolina Rules of Probate Court, the rules of civil procedure for the circuit court govern formal proceedings brought under the Probate Code. S.C. Code Ann. § 62-1-304.

The plain words of S.C. Code Ann. § 15-61-25 make it applicable to "a petition for partition of property owned by joint tenants or tenants in common." S.C. Code Ann. § 15-61-25(A). No distinction is made between petitions for partition brought pursuant to the Probate Code and those brought otherwise. Id. In fact, the statute specifically states that "[f]or the purposes of this section, 'joint tenants and tenants in common' include heirs and devisees." Id. The statute unambiguously says it applies to "a petition for partition of property owned by joint tenants or tenants in common[,]" including property of heirs and devisees. S.C. Code Ann. § 15-61-25(A). It applies to this partition action.

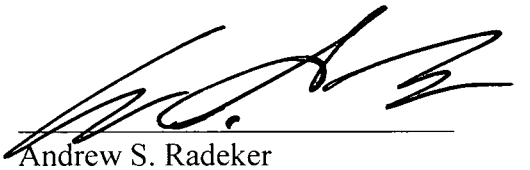
## CONCLUSION

The arguments in Emma's brief do not change the fact that the USDA payments were not estate property. They do not change the fact that Emma knew more than three years before she brought this case that Clyde had been receiving the payments. They do not change the fact that S.C. Code Ann. § 15-61-25 does not exempt partition actions under the Probate Code from its application.

This Court should reverse the Court of Appeals, undo the decisions that court made in favor of Emma, reinstitute the master's ruling that Clyde can avail himself in

this action of the process under S.C. Code Ann § 15-61-25, and provide Clyde with the relief he sought from the Court of Appeals.

Respectfully submitted,



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January 12, 2015

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PROOF OF SERVICE

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I certify that I served the reply brief of petitioner on counsel for the Respondents by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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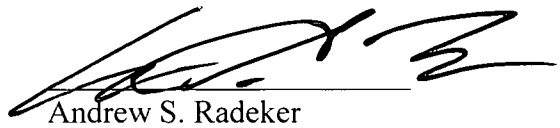

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January 12, 2015

**VIA HAND DELIVERY**
The Hon. Daniel E. Shearouse
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**RE: In re: Estate of Atn Burns Livingston**
**Emma Lou Martin, etc. v. Clyde B. Livingston, et al.**
**Appellate Case No. 2013-001505**

Dear Mr. Shearouse:

Enclosed herewith for filing are an original and 16 copies of the petitioner's reply brief in the above-referenced case, along with an original and one copy of the proof of service for the same. By copy of this letter, I am serving opposing counsel with the petitioner's reply brief.

Kindly file these documents and return a file-stamped copy of the brief and proof of service to the bearer of this letter. Thank you for your attention to this matter. Of course, if you or your staff have any questions or concerns, please do not hesitate to contact me.

With kind regards, I am,

Very truly yours,
**HARRISON & RADEKER, P.A.**

Andrew S. Radeker

ASR/

Enclosures

cc: Richard B. Ness, Esq.