

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM HORRYCOUNTY

COURT OF COMMON PLEAS

RALPH P. STROMAN, SPECIAL REFEREE

RECEIVED
JUN 04 2015
SC Court of Appeals

APPELLATE CASE NO. 2014-002593

Dewey Lee Small,.....Respondent,

v.

Maxine Johnson a.k.a. Maxine McQueen a.k.a. Maxcine Johnson,
Ernestine Small Bass, Rose Small a.k.a. Rosemary Mary McQueen,
Kassandra D. Odom a.k.a. Kassandra D. Shea, Michelle D. Odom
a.k.a. Michelle D. DeLa Cort, Queenie Small a.k.a. Queenie B.
Arnold a.k.a. Qunnie Arnold, Lewis Filton Small, Jr., a.k.a. Pete
Small, William Franklin Small, a.k.a. Danny Small, Patsy Ann
Small a.k.a. Patsy Small Crock a.k.a. Patsy Ann Small Pierick
Crock a.k.a. Patsy Pierick, Donald Lee Small, Janava Small,
a.k.a. Janava Small Lonneux a.k.a. Candy Small, Daisy Dean
Small, a.k.a. Dean Small, Sandra Small, a.k.a. Sandra Howard,
Jacqueline L. White, Jimmy Prince, Jr., Veretta Norman, Venata
Small Olivera, Marcus Johnson, Jr., Dewey Jerome Johnson,
John Doe, and Jane Doe, Representatives of any unknown Heirs,

In Re: The Estate of Lewis Small, Defendants,

of whom Patsy Ann Crock and Fulton Louis Small, are.....Appellants.

REPLY BRIEF OF APPELLANTS

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June 1, 2015
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SOUTH CAROLINA RULES OF CIVIL PROCEDURE

Rule 17(f)(4), South Carolina Rules of Civil Procedure 4

STATEMENT OF ISSUES ON APPEAL

- I. DOES THE RELIEF GRANTED IN THE FINAL ORDER FILED OCTOBER 16, 2014, EXCEED THE SCOPE OF THE PLEADINGS BY REQUIRING THE CONVEYANCE OF PROPERTIES NOT SUBJECT TO THE PARTITION ACTION BY "CROSS-OVER DEEDS" AS A CONDITION OF RECEIVING AN UNDETERMINED PORTION OF THE PROCEEDS GENERATED BY THE SALE OF THE PROPERTY SUBJECT TO THE PARTITION ACTION?
- II. IS A PORTION OF THE AWARD OF ATTORNEY FEES NOT SUPPORTED IN THE RECORD AND INEQUITABLE TO THE PARTIES, AS WELL AS MAJORITY OF THE EXPENSES AWARDED, AND IS THE CONCURRENT APPROVAL OF THE PROBATE COURT REQUIRED AS A CONDITION FOR THE DISTRIBUTION OF A PORTION OF THE ATTORNEY'S FEES AND A MAJORITY OF THE EXPENSES REFLECTED IN THE FINAL ORDER FILED OCTOBER 16, 2014?

STATEMENT OF THE CASE

Appellant adopts the Statement of the Case and the Statement of Facts within the Initial Brief of Appellants, and would respectfully clarify the following points within the Statement of the Case.

An action was commenced in the Court of Common Pleas to quiet the title to and partition one (1) tract of land by private sale, one (1) of two (2) tracts wholly owned by Lewis Small at his death. Prior to the commencement of the action, Dewey Lee Small, as personal representative of the Estate of Lewis Small, commenced an action to sell the subject property in the Probate Court for the County of Horry, hereinafter "the Action to Sell Land." Thereafter, Dewey Lee Small, individually and not as personal representative of the Estate, commenced an action to partition and sell the subject property in the Court of Common Pleas for the County of Horry, hereinafter "the Quiet Title and Partition Action." The Action to Sell Land filed in the Probate Court, was dismissed as reflected on an ORDER OF DISMISSAL WITHOUT PREJUDICE filed on September 5, 2013.

The Action to Sell Land filed in the Probate Court was dismissed and not removed, after Dewey Lee Small, the individual and not the fiduciary, commenced the Quiet Title and Partition Action. The Quiet Title and Partition Action to partition the single tract in the Court of Common Pleas was filed after an action filed in the Probate Court to sell the same single tract, presumably in aid of assets, an action which was later dismissed, and not removed from the Probate Court to the Court of Common Pleas. The findings and conclusions of the Special Referee are reflected in a Final Order filed October 16, 2014, which amends a Final Order filed June 19, 2014. In the Motion to Alter or Amend the Final Order filed June 19, 2014, the trial attorney, a person other than the undersigned, asserted the action filed in the Court of Common Pleas, hereinafter "the Quiet Title and Partition Action", was one to quiet title to one specific tract of land, 60

acres, more or less, as described in the Complaint, hereinafter “the Subject Property”, and to partition the Subject Property by sale; therefore, he argued, the only issues before the Special Referee were the ownership of the tract, the partition of the tract, and equitable attorney’s fees and costs of the action as determined pursuant to S.C. Code Ann §15-61-110, Code of Laws of South Carolina, 1976 as amended. Much, if not all of the relief ordered by the Special Referee, Appellants contend, are in need of the approval by the Probate Court based on the blending of jurisdiction, and the pleadings, and issues and jurisdiction of the Special Referee. The Special Referee amended the Final Order filed June 19, 2014, as reflected by a Final Order filed October 16, 2014. This appeal follows, and Appellants respectfully asserts the Final Order filed October 16, 2014, should be reversed and remanded as outlined herein.

LEGAL ARGUMENT

I. THE RELIEF GRANTED IN THE FINAL ORDER FILED OCTOBER 16, 2014, EXCEEDS THE SCOPE OF THE PLEADINGS BY REQUIRING THE CONVEYANCE OF PROPERTIES NOT SUBJECT TO THE PARTITION ACTION BY “CROSS-OVER DEEDS” AS A CONDITION OF RECEIVING AN UNDETERMINED PORTION OF THE PROCEEDS GENERATED BY THE SALE OF THE PROPERTY SUBJECT TO THE PARTITION ACTION.

Under the Final Order filed October 16, 2014, the Special Referee authorized the personal representative of the Estate to sell the subject property by private sale, and required the personal representative of the Estate to “coordinate with all the heirs to the property for the execution of the cross-over deeds pursuant to the Lewis Small Estate, and shall further coordinate the distribution of the appropriate sums of money from the net Estate Account for each person’s interest as set forth in Exhibit H of this Order.” Absolutely no detail is given or provided by the Special Referee with regard to these “cross-over deeds.” Respectfully, Appellants assert the Special Referee lacks the subject matter jurisdiction and/or authority to

impose this relief, or erred when he required the execution of the cross-over deeds, and erred when he allowed attorney's fees and expenses to be distributed without first obtaining the concurrent approval of the Probate Court.

Section 15-61-10, et seq., Code of Laws of South Carolina, 1976 as amended, is the statutory complex which establishes the right of partition in the State of South Carolina.

Section 15-61-10, in pertinent part, states:

All joint tenants and tenants in common who hold, jointly or in common, for a term of life or years or of whom one has an estate for a term of life or years with the other that has an estate of inheritance or freehold in any lands, tenements or hereditaments shall be compellable to make severance and partition of all such lands, tenements and hereditaments.

Section 15-61-50 confers jurisdiction upon the Court of Common Pleas ". . . to make partition in kind or by allotment [and] in case partition in kind or by allotment cannot be fairly and impartially made and without injury to any of the parties in interest, by the sale of the property and the division of the proceeds according to the rights of the parties." Respectfully, the Special Referee does not have the requisite authority not to partition the Property in kind, and to order a private sale and thereafter, without a special return, issue an order which is tantamount to an inequitable result. In the event a division of the Property could not fairly and impartially have been made without injury to the other parties in interest, as the Special Referee conclude, then the Special Referee should have required a partition of the Property by public auction.

The Court favors partition in kind when it can be fairly so made without injury to any other parties in interest. Although not universal, the general rule is that, until the contrary is made to appear, the presumption prevails that partition in kind is feasible and should be made, and that the burden is on those who ask a sale of the premises in lieu of a partition in kind or by allotment to show the existence of a statutory ground for a sale.

A co-tenant may compel partition. S. C. Code Ann. § 15-61-10 (2005). With emphasis added, a court may order partition in kind, that is, divide the property among all the owners, or by allotment, that is, to “allot” a portion of the property to one of the owners, with the remainder held jointly by the other owners or sold with the proceeds divided among the owners, or by judicial sale of the entire parcel. S. C. Code Ann. § 15-61-50 (2005). Partition by private sale rather than a public sale is not a form of partition recognized in this jurisdiction absent a special return by five commissioners acting upon a writ of partition. § 15-61-50 (2005).

If it shall appear to the court that it will be for the benefit of all parties interested in the ... property that it should be vested in one or more of the persons entitled to a portion of it, on the payment of a sum of money ..., the court shall determine accordingly, and the person or persons, on the payment of the consideration money, shall be vested with the [property]. But if it shall appear to the court that it would be more for the interest of the parties interested in the ... property that it should be sold and the proceeds of sale be divided among them, then the court shall direct a sale to be made upon such terms as the court shall deem right.

Rule 71(f)(4), SCRCF. Further, § 15-61-100, entitled “Sale may be ordered without writ upon testimony taken,” states as follows:

Nothing in §§ 15-61-60 to 15-61-90 shall be construed to affect the power of the Court of Common Pleas to dispense with the issuing of a writ of partition when, in the judgment of the court, it would involve unnecessary expense to issue such writ. And the court may in all proceedings in partition, without recourse to such writ, determine by means of testimony taken before the proper officer and reported to the court whether a partition in kind among the parties be practicable or expedient and, when such partition cannot be fairly and equally made, may order a sale of the property and a division of the proceeds according to the rights of the parties.

When the court determines a partition cannot be fairly and equally made, the court may order a sale of the property and a division of the proceeds according to the rights of the parties. S. C. Code Ann. § 15-61-100 (2005). See also S. C. Code Ann. § 15-61-50 (2005). The record within the Estate clearly reflects the personal representative first commenced an action

within the Probate Court to be authorized to sell the property (one of many tracts within the estate) but this action was dismissed; the personal representative, acting wholly as an individual and not as a fiduciary, while the Probate Court action was then and there pending, filed and commenced an action to partition the property in the Court of Common Pleas; thereafter, under the auspices another action was simultaneously pending between similar parties in a different court, filed a Rule 12(b)(8) motion in the Probate Court to dismiss the Probate Court action; the Probate Court, at the request of the personal representative, dismissed the action commenced in the Probate Court.

It is important to note the Probate Court action was not removed to the Court of Common Pleas; therefore, the jurisdiction within the Court of Common Pleas is severely limited by statute. While Dewey Lee Small should be held to the consequences of shopping for relief between two (2) forums, Appellants and all the other heirs at law should not be unfairly prejudiced by his actions. The ownership of the property which was sold, and the entitlement to the funds generated by the sale of the property, is based on the interpretation of the Last Will and Testament of Lewis Small. It is clear the Order issued by the Special Referee is based on a fundamental lack of the requisite subject matter jurisdiction insofar as it first orders a private sale, and then interprets the Last Will and Testament of Lewis Small by the Court of Common Pleas, and reflects vague and ambiguous directives concerning "cross-deeds." The suggested distributions of a substantial portion of the funds generated by the sale of real property to each devisee and/or heir at law of Lewis Small is erroneous and is wholly based on the interpretation of the Last Will and Testament of Lewis Small by the Court of Common Pleas, a court which at the time of the issuance of the Partition Orders now on appeal, was wholly without the requisite subject matter jurisdiction to interpret the Last Will and Testament of Lewis Small.

The attorney for Dewey Lee Small, individually (as opposed to the attorney for Dewey Lee Small, the Personal Representative for the Estate of Lewis Small), are one and the same attorney. The Partition Action Orders are on appeal, the Orders are the product of an action commenced by Dewey Lee Small, individually and not as a fiduciary, and they are jurisdictionally flawed for the reasons expressed herein. Appellants respectfully suggest the Special Referee lacked the power to order a transfer of the subject property by private sale, relief which was available in the Probate Court prior to the dismissal of the action seeking to sell the property in aid of assets, but relief which was not available under the partition statutes in the Court of Common Pleas based on the failure to remove the action which did not originate in the Probate Court; in the alternative, Appellants respectfully assert the interpretation of the Last Will and Testament of Lewis Small is wholly within the province of the Probate Court, and the Special Referee left the tracks of the pleadings and ordered relief for which no jurisdictional foundation exists. To this extent, the Orders on appeal should be reversed and/or vacated, because the Special Referee had no authority to authorize the personal representative to transfer title to the subject property. Thornton v. Thornton, 328 S.C. 96 492 S. E. 2d 86 (1997).

CONCLUSION

The heirs at law of Mattie Small and Lewis Small need to be declared with certainty, and it is necessary to appoint fiduciaries to administer the Estates of these deceased persons; further, the Last Will and Testament of Lewis Small needs to be jurisdictionally and judicially interpreted to allow for the proper distribution of a substantial amount in liquid assets and real property. Appellants therefore raise the need for a comprehensive and enforceable order, on remand, which:

- a. Addresses the issues related to subject matter jurisdiction, and requires the Court of Common Pleas, and the Probate Court to take actions in compliance with the rulings on appeal; and
- b. Interprets the Last Will and Testament of Lewis Small as it relates to the ownership and/or entitlement to all and portions of all the funds generated from the sale of the Subject Property, including any amount which may have to be disgorged depending on the results of the appeal of the order issued in the Quiet Title and Partition Action, the Final Order filed October 16, 2014; and
- c. Directs and controls the apportionment of the expenses between the heirs at law of Mattie Small and the devisees of Lewis Small which recognizes funds used from the sale of the Subject Property are being used to fund the expenses related to properties whose ownership is uncertain, and the abatement of the assets under the Last Will and Testament of Lewis Small; and
- d. Interprets the Last Will and Testament of Lewis Small as it relates to the property wholly owned by Mattie Small, and the property wholly owned by Lewis Small; and
- e. Reflects the terms and conditions to be imposed on the distribution of funds generated from the sale of the Subject Property; and
- f. Reflects the ownership of the remaining property wholly owned by the heirs of Mattie Small, and the devisees of Lewis Small.

Respectfully submitted.

Dated at Georgetown, South Carolina, this 15th day of June, 2015.

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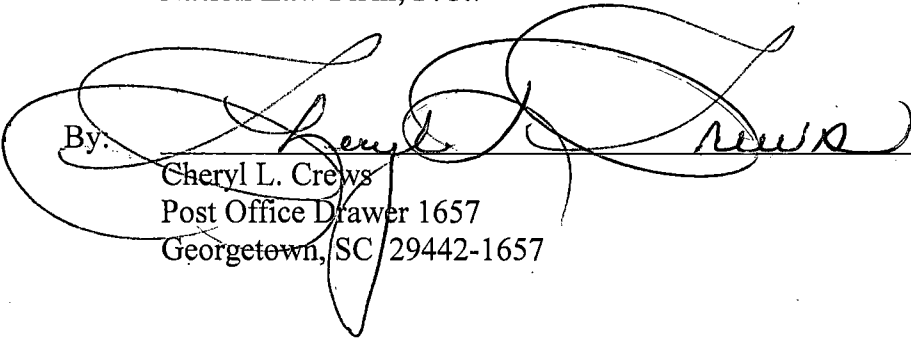
PROOF OF SERVICE

I, the undersigned employee of the attorney for the Appellants, certify I have served a copy of the **Reply Brief of Appellant** dated June 1, 2015, by regular mail on June 1, 2015, on Respondent, Dewey Lee Small, by depositing a copy of these documents in the United States Mail, postage prepaid, **addressed to** N. David Durant, Esquire, Law Offices of N. David Durant and Associates, Post Office Box 14722, Surfside Beach, SC 29587, attorney of record for Dewey Lee Small, **and to** the Honorable Jenny Abbott Kitchings, Clerk, South Carolina Court of Appeals, P.O. Box 11629, Columbia, SC 29211, on January 27, 2015.

Dated at Georgetown, South Carolina, this 1 day of June, 2015.

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