

RECEIVED

JUN 15 2015

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
In the Court of Common Court

The Honorable J. Derham Cole, Circuit Court Judge

Case No. 2014-CP-42-1081
Appellate Case No. 2014-002726

Lenora Whitfield Tucci, Appellant,

v.

April Tucci and Robert D.
Ganyard, Personal
Representatives of the Estate
of Francis Paul Tucci, Jr. Respondents.

FINAL BRIEF OF APPELLANT

Kenneth P. Shabel, Esq.
Campbell & Shabel, Attorneys at Law
175 Magnolia Street, Suite 201
Spartanburg, SC 29306
(864) 583-0001
Fax: (864) 583-1199
Attorneys for Appellant

Other Counsel:
James W. Shaw, Esq.
Heather Gwinn, Attorney
Dennis, Shaw & Drennan, LLC
103 Lafayette Street
Spartanburg, SC 29304
(864) 582-0708
Fax: (864) 582-0934
Attorneys for Respondent

TABLE OF CONTENTS

Table of Authorities1

Statement of Issues on Appeal2

Statement of the Case.....3

Standard of Review.....5

Arguments

I. ALTHOUGH APPELLANT DID NOT FILE THE STATEMENT OF ISSUES ON APPEAL WITHIN THE TIME FRAMES SET FORTH BY STATUTE, SUCH FAILURE DID NOT WARRANT DISMISSAL OF HER APPEAL.....6

II. A PENDING SEPARATE MAINTENANCE ACTION TOLLED THE STATUTE OF LIMITATIONS ON APPELLANT’S ELECTIVE SHARE CLAIM.8

Conclusion14

TABLE OF AUTHORITIES

CASES

<u>Irwin v. Dep't of Veterans Affairs</u> , 498 U.S. 89, 111 S. Ct. 453, 112 L.Ed.2d 435 (1990)	9, 13
<u>Bank of Babylon v. Quirk</u> , 192 Conn. 447, 472 A.2d 21, 22 (1984)	10
<u>Blyth v. Marcus</u> , 322 S.C. 150, 470 S.E.2d 389 (Ct.App.1996).....	8
<u>Cox v. Cox</u> , 290 S.C. 245, 349 S.E.2d 92 (Ct. App. 1986)	7
<u>Dove v. Gold Kist, Inc.</u> , 314 S.C. 235, 442 S.E.2d 598 (1994)	10
<u>First Carolina Nat. Bank v. A & S Enterprises, Inc.</u> , 272 S.C. 339, 251 S.E.2d 762 (1979).....	6
<u>Fisher v. Teachey</u> , 268 S.C. 451, 234 S.E.2d 655 (1977).....	6
<u>Hodge v. Hodge</u> , 305 S.C. 521, 409 S.E.2d 436 (Ct. App. 1991)	10, 11
<u>Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.</u> , 386 S.C. 108, 687 S.E.2d 29 (2009)	9
<u>In re Estate of Cretzmeyer</u> , 365 S.C. 12, 615 S.E.2d 116 (2005)	6
<u>Louden v. Moragne</u> , 327 S.C. 465, 486 S.E.2d 525 (Ct. App. 1997)	10
<u>Matter of Howard</u> , 315 S.C. 356, 360, 434 S.E.2d 254, 257 (1993)	5
<u>McCall v. Finley</u> , 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987)	6, 7
<u>Perry v. Estate of Perry</u> , 323 S.C. 232, 473 S.E.2d 860 (Ct. App. 1986)	11
<u>Plyler v. Burns</u> , 373 S.C. 637, 647 S.E.2d 188, 195 (2007).	7
<u>State v. Brown</u> , 358 S.C. 382, 596 S.E.2d 39 (2004).	6
<u>Theisen v. Theisen</u> , 394 S.C. 434, 440-441, 716 S.E.2d 271, 274 (2011)	10

STATUTES AND RULES

S.C. Code Ann. § 20-3-630(A)10

S.C. Code Ann. § 62-1-302(a)9, 10

S.C. Code Ann. § 62-1-302(a)(1)9

S.C. Code Ann. § 62-1-308(b)..... 4, 6

S.C. Code Ann. § 62-1-308(i)5

S.C. Code Ann. § 62-2-201(a)8

S.C. Code Ann. § 62-2-202(a)8

S.C. Code Ann. § 62-2-205(a)3, 8, 9

S.C. Code Ann. § 63-3-530(A)(2)10

Rule 3(a), SCRCP10

STATEMENT OF ISSUES ON APPEAL

1. DID THE CIRCUIT COURT PROPELRY DISMISS APPELLANT’S APPEAL AFTER APPELLANT HAD ALREADY SERVED ITS STATEMENT OF ISSUES ON APPEAL?

2. DID THE PROBATE COURT PROPERLY DISMISS APPELLANT’S ELECTIVE SHARE PETITION WHEN THERE WAS A PENDING SEPARATE MAINTENANCE ACTION?

STATEMENT OF THE CASE

Francis Paul Tucci, Jr. (hereinafter "Decedent") died on July 29, 2012. His daughter, April Tucci (hereinafter "Respondent"), and Robert D. Ganyard filed a Petition for Informal Probate and Appointment. Decedent named these two individuals as co-Personal Representatives of his Estate in a will that he executed nineteen days prior to his death. The Probate Court appointed these two individuals as Personal Representatives by Order filed September 21, 2012.

Decedent's will left nothing to his wife, Leonora Whitfield Tucci (hereinafter "Appellant"). Appellant and Decedent were husband and wife when Decedent died. They purchased a home together four years before his death, although the mortgage was solely in Appellant's name. Decedent filed a Family Court action for Separate Support and Maintenance against Appellant eight months before his death, but that action remained pending as of the date of Decedent's death. The case was not dismissed until March 29, 2013 – eight months to the date of Decedent's death.

Because she was still married to Decedent on his death, and because Decedent's will failed to provide for her, Appellant filed a Petition for an Elective Share of Decedent's Estate.¹ Respondent filed a Motion to Dismiss the Petition, contending that Appellant did not file the petition timely under South Carolina Code Section 62-2-205(a). Under Respondent's argument, the Petition should have been filed no later than March 29, 2013 -- the same date that the Family

¹ In addition, Appellant filed a Creditor's Claim requesting from the estate one-half of the monthly mortgage payments she'd been paying on the home. However, that claim is not before the Court of Appeals on this Appeal.

Court case was dismissed. Appellant contended that the Family Court had exclusive jurisdiction over the property of the Estate and that the statute of limitations had been tolled.

The Probate Court convened a hearing on February 3, 2014. The Appellant and Respondent both testified, and the Court took the matter under advisement. The Probate Court issued its order on February 28, 2014. In pertinent part, the Probate Court dismissed Appellant's Petition for Elective Share for failure to file timely.²

Appellant filed an appeal to the Circuit Court on March 19, 2014. Appellant filed Statement of Issues on Appeal as required by South Carolina Code Section 62-1-308(b) on May 15, 2014; however, Respondent filed a Motion on May 23, 2014 to dismiss the appeal for failure to comply with the forty-five day requirement of Section 62-1-308(b).³

The parties appeared before the Circuit Court on September 29, 2014. The Court issued its order dismissing Appellant's appeal on September 30, 2014.⁴ Appellant filed a Motion for Reconsideration on October 13, 2014 after receiving the Order on October 2, 2014. The Court denied the Motion by Order filed on November 20, 2014. Appellant perfected her appeal to the Court of Appeals on

² The Probate Court did, however, grant Appellant's mortgage reimbursement claim in the amount of \$3,351.01, to increase as an open claim, as Appellant continues to pay the mortgage.

³ Respondent appealed the allowance of Appellant's mortgage claim. Respondent filed her Statement of Issues on Appeal on May 28, 2014. Appellant filed a Motion to dismiss Respondent's appeal on June 13, 2014.

⁴ The Court also dismissed Respondent's Appeal by the same Order. That dismissal is not before the Court on this Appeal.

December 20, 2014.

STANDARD OF REVIEW

In hearing probate appeals from the Circuit Court, this Court has the authority to hear and determine appeals from the Probate Courts “according to the rules of law,” without presentation of any new evidence. S.C. Code Ann. § 62-1-308(i). The phrase “according to the rules of law” means “according to the rules governing appeals.” Matter of Howard, 315 S.C. 356, 360, 434 S.E.2d 254, 257 (1993).

ARGUMENT

I. ALTHOUGH APPELLANT DID NOT FILE THE STATEMENT OF ISSUES ON APPEAL WITHIN THE TIME FRAMES SET FORTH BY STATUTE, SUCH FAILURE DID NOT WARRANT DISMISSAL OF HER APPEAL.

The Circuit Court erred in dismissing Appellant's Appeal. The dismissal was founded upon Appellant's failure to meet the time deadlines of South Carolina Code Section 62-1-308(b). That statute provides that "within forty-five days after receipt of written notice of the order ... of the probate court, the appellant must file with the clerk of the circuit court a Statement of Issues on Appeal." Id.

The Courts have been strict with filing deadlines when it comes to commencing the appeal. See, e.g., In re Estate of Cretzmeyer, 365 S.C. 12, 615 S.E.2d 116 (2005); First Carolina Nat. Bank v. A & S Enterprises, Inc., 272 S.C. 339, 251 S.E.2d 762 (1979). Appeals that are not timely begun must be dismissed for lack of appellate jurisdiction. Fisher v. Teachey, 268 S.C. 451, 234 S.E.2d 655 (1977). The Circuit Court's decision relies heavily on State v. Brown, 358 S.C. 382, 596 S.E.2d 39 (2004). In that case, the Court noted that "failure to comply with procedural requirements for an appeal divests a court of appellate jurisdiction, not the circuit court's subject matter jurisdiction." Id. at 387. That case, too, focused on the timeliness of beginning the appeal. Id.

When it comes to matters other than the commencement of an Appeal, there must exist an element of prejudice. "Appellate courts recognize--or at least

they should recognize--an overriding rule of civil procedure which says: whatever doesn't make any difference, doesn't matter." McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) (citing Cox v. Cox, 290 S.C. 245, 349 S.E.2d 92 (Ct. App. 1986). Courts should not grant dismissals where a technical violation causes no prejudice. Plyler v. Burns, 373 S.C. 637, 647 S.E.2d 188, 195 (2007).

It is uncontested that Appellant did not file the Statement of Issues on Appeal within the timeframe set forth by statute. The Probate Court issues its Order on February 28, 2014. (R. p. 25, line 23). The Court mailed it to the attorneys of record on March 7, 2014. (R. p. 25, lines 23-24). Appellant received the Order on March 11, 2014 and filed a timely notice of appeal on March 19, 2014. (R. p. 29). Appellant filed her Statement of Issues on Appeal on May 15, 2014. (R. p. 32). May 15 was sixty-nine days after March 11. Day forty-five would have been April 25, 2014.

Although Appellant did not file her Statement of Issues on Appeal until May 15, 2014, this did not prejudice Respondent. Respondent did not file any Motions to dismiss the appeal for failure to cooperate with the statute until May 23, 2014. Respondent's Motion to Dismiss Appeal. This was eight days after being served with the Statement of Issues on Appeal. When Respondent filed their motion, they were already in receipt of the Statement of Issues. Therefore, Respondent was not prejudiced by the delay. Had Respondent filed a Motion to Dismiss prior to receiving the Statement of Issues, then there would have been prejudice. However, that is not the case.

**II. A PENDING SEPARATE MAINTENANCE ACTION
TOLLED THE STATUTE OF LIMITATIONS ON
APPELLANT'S ELECTIVE SHARE CLAIM.**

The Probate Court erred in dismissing Appellant's Petition for Elective Share for failure to file timely.

Under South Carolina Law, a surviving spouse has the right "to take an elective share of one-third of the decedent's probate estate." S.C. Code Ann. § 62-2-201(a). In analyzing the Elective Share, Courts define "probate estate" to include "property passing under the decedent's will" and "property passing by intestacy." S.C. Code Ann. § 62-2-202(a).

A surviving spouse has a limited window in which to enforce this right. According to South Carolina Code Section 62-2-205(a), the Petition must be filed before the latter of one of three dates: (1) eight months after the spouse's death, (2) six months after the informal or formal probate of the will, or (3) thirty days service upon the surviving spouse of a "petition to set aside an informal probate or to modify or vacate an order for formal probate of decedent's will. Section 62-2-205(a) is the equivalent of a Statute of Limitations. These statutes are designed to shorten "the interval between the accrual and commencement of a right of action to a fixed period." Blyth v. Marcus, 322 S.C. 150, 470 S.E.2d 389 (Ct.App.1996).

Decedent died on July 29, 2012. (R. p. 57, lines 20-21). Eight months after date of death was March 29, 2013. (R. p. 58, lines 22-23). The Order for Informal Probate and Appointment came on September 21, 2012. Six months after this would be March 21, 2013. (R. p. 58, line 20). There was no petition to

set aside the Probate. Therefore, under the letter of the Statute, the deadline would have been March 29, 2013.

Despite the strict language of a Statute of Limitations, courts still maintain the ability to carve exceptions. The concept of Equitable Tolling applies “where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.” Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96, 111 S. Ct. 453, 112 L.Ed.2d 435 (1990) (footnotes and citations omitted).

As our Supreme Court has stated:

The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other. Equitable tolling may be applied where it is justified under all the circumstances.

Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 386 S.C. 108, 116-17, 687 S.E.2d 29, 33 (2009) (citation and quotation marks omitted).

Appellant has exceptional circumstances that warrant an Equitable Tolling of the Statute of Limitations created by South Carolina Code Section 62-2-205(a).

Those exceptional circumstances lie with the Family Court litigation between Appellant and Decedent. Respondent stretched this litigation out beyond Decedent's death until it was too late for Appellant to file for her Elective Share.

It is true that Probate Courts have exclusive jurisdiction of the “estates of decedents, including ...determination of property in which the estate of a decedent ... has an interest.” S.C. Code Ann. § 62-1-302(a)(1). However, this exclusive jurisdiction is only unless “otherwise specifically provided.” S.C. Code Ann. §

62-1-302(a). South Carolina law specifically provides jurisdiction over marital property to the Family Court:

The family court has exclusive jurisdiction ... to hear and determine actions for divorce a vinculo matrimonii, separate support and maintenance, legal separation, and in other marital litigation between the parties, and for settlement of all legal and equitable rights of the parties in the actions in and to the real and personal property of the marriage and attorney's fees, if requested by either party in the pleadings.

S.C. Code § 63-3-530(A)(2).

This statute gives the Family Court Subject Matter Jurisdiction over the rights of parties in marital property.⁵ See Theisen v. Theisen, 394 S.C. 434, 440-441, 716 S.E.2d 271, 274 (2011). Subject Matter Jurisdiction gives courts “the power to hear and determine cases of the general class to which the proceedings in question belong.” Dove v. Gold Kist, Inc., 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994) (quoting Bank of Babylon v. Quirk, 192 Conn. 447, 472 A.2d 21, 22 (1984)). Jurisdiction attaches on the filing and service of a summons and Complaint. Louden v. Moragne, 327 S.C. 465, 468, 486 S.E.2d 525, 526 (Ct.App.1997) (citing Rule 3(a), SCRCP). Service brings parties “within the court's jurisdiction and gives the court the power to render a personal judgment against the person served.” Id. (citations omitted).

Marital litigation survives the death of a spouse so long as it was pending at the time of death. It does not cease simply because one of the spouses passes away. Hodge v. Hodge, 305 S.C. 521, 409 S.E.2d 436 (Ct.App.1991). A

⁵ Marital property is defined as “all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation.” S.C. Code Ann. § 20-3-630(A).

spouse's interest in marital property vests upon the commencement of marital litigation. Id. at 525, 409 S.E.2d at 429. Family Court's jurisdiction is continuing after the death of one spouse "to resolve the issues between the parties pertaining to their divorce." Perry v. Estate of Perry, 323 S.C. 232, 236, 473 S.E.2d 860 (Ct. App. 1986).

The on-going Family Court case – and Respondent's desire to keep it open through the expiration of the Statute of Limitations – provide the exceptional circumstances warranting an equitable tolling of the Elective Share Statute of Limitations. Appellant married Decedent on July 2, 2006. (R. p. 69, lines 4-5). They purchased a home in Moore, South Carolina. (R. p. 70, line 17 – p. 71, line 1). There is a Title to that property filed with the Registry of Deeds as of July 10, 2008. (R. p. 118, line 3). Appellant took money she had before the marriage and assets she had before the marriage and put it toward the purchase of the new house. (R. p. 74, lines 21-24). Respondent admitted she made no financial contributions to the home and made no mortgage payments on the home. (R. p. 98, line 22 – p. 99, line 4).

After separating from Appellant, Decedent filed an action for Separate Maintenance in case number 2011-DR-42-3324 in Spartanburg Family Court. (R. p. 60, lines 13-16 and pp. 106-112). After Respondent was served, the Court issued a Temporary Order in that case on February 21, 2012. (R. pp. 113-115). That Order gave Appellant temporary possession of the marital home. (R. p. 60, lines 17-20 and p. 114, lines 2-5). The Decedent agreed to let Appellant have the home. (R. p. 56, lines 1-5). The Decedent's Estate included a one-half interest in

this property. (R. p. 66, lines 10-13).⁶ Therefore, as of at least February 21, 2012, the Family Court had exclusive jurisdiction over the marital property of Appellant and Decedent – including the marital home.

When Decedent died, Appellant and Decedent were legally married. The Family Court case was still pending. (R. p. 69, lines 10-14 and p. 116, lines 15-16). After Decedent's death, Respondent affirmatively engaged the Cate Law Firm to continue the Family Court case. (R. p. 97, lines 12-15). Respondent physically appeared at least two different hearings after Decedent's death. (R. p. 97, lines 16-21). Respondent and Appellant participated in Mediation in December of 2012. (R. p. 97, lines 22-24).

Then, on March 28, 2013, Respondent (through her Family Court attorney) wrote a letter stating that she no longer wished to pursue the Family Court action. (R. p. 61, lines 13-15). The case was dismissed by consent order signed March 29, 2013. (R. p. 61, lines 16-17). This was the same date that the Statute of Limitations on the Elective Share expired.

From July 29, 2012 through March 29, 2012, the Family Court maintained exclusive jurisdiction over the Estate property. The Family Court maintained the power to hear the case, as the Decedent had brought them before the Court's enforcement powers. Respondent kept the case going and allowed it to survive Decedent's death. Respondent became an active participant in the case. This prevented the Probate Court from exercising any jurisdiction over the Estate

⁶ The Marital Home was by far the largest asset of the Estate. Decedent's one-half interest was valued at \$108,750.00. (R. p. 66, lines 10-13). The rest of the Estate included an insurance refund of \$297.00 and personal property valued at \$11,657.00. (R. p. 67, lines 3-12).

Property because jurisdiction had been otherwise specifically provided by the Family Court.

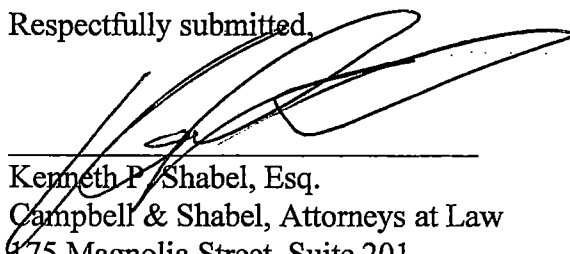
The Probate Court acknowledged that Appellant made “a pretty good argument,” stating that the Court thought the Personal Representatives “suckered” her. (R. p. 63, lines 22-23). By keeping the Family Court case open until the very day in which the Statute of Limitations expired, Respondent performed the kind of trickery that the United States Supreme Court in Irwin found as reason to apply Equitable Tolling. The Family Court action prevented the Probate Court from exercising its authority over the property. That action – and Respondent’s desire to push that action – makes the otherwise cast-iron Statute of Limitations more flexible.

Denying Appellant the right to seek an Elective Share in these circumstances would cause her to suffer a gross harm. If the Court enforces the Decedent’s will as stated – a will drafted nineteen days prior to his death – then Appellant would lose a one-half interest in her home. This is the very home that the Family Court vested upon her a bona fide interest between at least February 2012 and March 29, 2013. The Family Court had exclusive jurisdiction over that property and the parties’ interests in that property until March 29, 2013. That jurisdiction – along with Respondent’s affirmative use of that jurisdiction – gave the Probate Court exceptional circumstances from which to Equitably Toll the otherwise cast-iron Statute of Limitations.

CONCLUSION

For the above stated reasons and on the grounds stated, Appellant respectfully requests that the Court reverse the decision of the Circuit Court dismissing her appeal. Appellant further respectfully requests that this Court subsequently reverse the decision of the Probate Court and grant Petitioner her Elective of the Decedent's Estate (or, in the alternative, remand the case to the Circuit Court for further hearing on the Appeal of her Elective Share Claim).

Respectfully submitted,



Kenneth P. Shabel, Esq.
Campbell & Shabel, Attorneys at Law
175 Magnolia Street, Suite 201
Spartanburg, South Carolina 29306
(864) 583-0001
Fax: (864) 583-1199
Attorneys for Appellant

June 10, 2015

5

APPEAL FROM SPARTANBURG COUNTY
In The Court of Common Court

The Honorable J. Durham Cole, Circuit Court Judge

RECEIVED

Case No. 2014-CP-42-1081
Appellate Case No. 2014-002726

JUN 15 2015

SC Court of Appeals

Lenora Whitfield Tucci,

Appellant,

vs.

April Tucci and Robert D. Ganyard,
Personal Representatives of the Estate
of Francis Paul Tucci, Jr.

Respondents.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

June 11, 2015



Kenneth P. Shabel, Esq.
Campbell & Shabel, LLC
175 Magnolia Street, Suite 201
Spartanburg, S.C. 29306
Telephone: 864-583-0001
FAX: 864-583-1199
Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
In The Court of Common Court

The Honorable J. Durham Cole, Circuit Court Judge

Case No. 2014-CP-42-1081
Appellate Case No. 2014-002726

RECEIVED

JUN 15 2015

SC Court of Appeals

Lenora Whitfield Tucci,

Appellant,

vs.

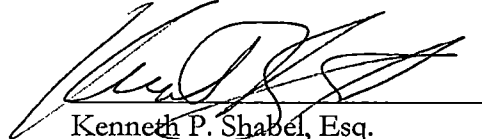
April Tucci and Robert D. Ganyard,
Personal Representatives of the Estate
of Francis Paul Tucci, Jr.

Respondents.

PROOF OF SERVICE

I certify that I have served the foregoing Appellant's Final Brief and Certificate of Counsel upon all counsel of record and/or unrepresented parties by U.S. Postal Service first class mail, postage prepaid, on the 11th day of June, 2015 to the addresses as follows:

James W. Shaw, Esq.
Heather Gwinn, Attorney
Dennis, Shaw & Drennan, LLC
103 Lafayette Street
Spartanburg, SC 29304



Kenneth P. Shabel, Esq.
Campbell & Shabel, LLC
175 Magnolia Street, Suite 201
Spartanburg, S.C. 29306
Telephone: 864-583-0001
FAX: 864-583-1199
Attorney for Appellant