

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SUMTER COUNTY
In the Court of Common Pleas

R. Ferrell Cothran, Jr., Presiding Judge

Appellate Case No. 2014-001903

Milton Oakley Dickson,.....Appellant,

v.

Arthur B. Beasley, Jr.,.....Respondent,

IN Re: Estate of Herbert Franklin Dickson, Sr.

BRIEF OF APPELLANT

S. Jahue Moore, SC Bar #4063
John C. Bradley, Jr., SC Bar #7869
MOORE TAYLOR LAW FIRM, PA
1700 Sunset Boulevard
West Columbia, SC 29169
803-796-9160
Attorneys for Appellant

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Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

STANDARD OF REVIEW 5

ARGUMENTS

I. THE LANGUAGE OF TESTATOR’S WILL WAS CLEAR AND UNAMBIGUOUS 6

II. THE PROBATE COURT ERRED IN ALLOWING EXTRINSIC EVIDENCE OF TESTATOR’S INTENT 7

III. THE EVIDENCE PRESENTED DOES NOT SUPPORT THE COURT’S INTERPRETATION AND ENFORCEMENT 9

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Allison v. Wilson, 306 S.C. 274, 411 S.E.2d 433 (Sup. Ct. 1991)..... 6

Bob Jones University v. Strandell, 344 S.C. 224, 543 S.E.2d 251 (Ct. App. 2001)..... 5

Buist v. Walton, 104 S.C. 95, 88 S.E. 357 (Sup. Ct. 1916)..... 6

Foreign Mission Board of Southern Baptist Convention v. Gaines, 42 F. Supp. 85
(E.D. S.C. 1941)..... 8

Henkel v. Winn, 346 S.C. 14, 550 S.E.2d 577 (2001)..... 8

Holcombe-Burdette v. Bank of America, 371 S.C. 648, 640 S.E.2d 480
(S.C. App. 2006)..... 8

In re The Estate of Hyman, 362 S.C. 20, 606 S.E.2d 205 (Ct. App. 2004) 5, 8

In re Estate of Pallister, 363 S.C. 437, 611 S.E.2d 240 (2005)..... 5

In re Howard, 315 S.C. 356, 434 S.E.2d 254 (1993) 5

In re Thomas, 344 S.C. 564, 544 S.E.2d 854 (Ct. App. 2001) 5

STATUTES

S.C. Code Ann. § 62-1-308 (Supp. 2004)..... 5

STATEMENT OF ISSUES ON APPEAL

- A. DID THE PROBATE COURT AND CIRCUIT COURT ERR IN FAILING TO ENFORCE THE CLEAR AND UNEQUIVICAL LANGUAGE OF TESTATOR'S WILL?
- B. DID THE LOWER COURTS ERR IN ALLOWING EXTRINSIC EVIDENCE OF THE TESTATOR'S INTENT?
- C. DID THE LOWER COURTS ERR IN THEIR INTERPRETATION OF TESTATOR'S WILL?

STATEMENT OF THE CASE

This is an appeal from the Order of the Honorable R. Ferrell Cothran, Jr., Presiding Judge of the Third Judicial Circuit, affirming an Order of the Honorable Dale Atkinson, Sumter County Probate Court Judge, dated September 21, 2011. (R. pp. 1-2, 4-10).

This matter was instituted pursuant to the filing of a Summons and Petition by Appellant/Petitioner ("Appellant") on September 25, 2008, in the Sumter County Probate Court. (R. pp. 11-14). In his Complaint, Appellant Milton Oakley Dickson alleges that Item III, number 2 of Testator Herbert Dickson, Sr.'s will should be declared a nullity, as it purports to will items, specifically property located in Santee, South Carolina ("The Santee Property"), which do not exist, have never existed and, thus, cannot be willed to anyone.

Respondent Arthur B. Beasley, Jr., responded to Appellant's Complaint and denied Appellant's claims relating to the "Santee" property. Respondent also counterclaimed, asserting Appellant was contesting the will of the Testator and was therefore only entitled to One Dollar (\$1.00) based upon the provisions of the will. (R. pp. 15-16). The matters raised in Respondent's counterclaim are not before this Court. (R. pp. 1-2, 4-10).

This matter was heard on two separate hearings before Judge Atkinson in the Sumter County Probate Court. (R. pp. 24-120). On September 21, 2011, Judge Atkinson issued his Order finding that the provisions under Item III, No. 2 of the Last Will and Testament of Herbert Dickson, Sr., describing the "Santee Property" was, in fact, real property and improvements owned by the Testator at the time of his death, located in

Summerton, Clarendon County, South Carolina. (R. pp. 4-10). Judge Atkinson ruled that the Personal Representative may issue a Deed of Distribution in accordance with the terms of Mr. Dickson's will. (R. pp. 4-10).

Appellant moved for reconsideration on October 1, 2011. (R. p. 19). On October 17, 2012, Judge Atkinson denied Appellant's Motion by letter/Order. (R. p. 3). Appellant timely perfected his Appeal in the Court of Common Pleas (R. pp. 21, 375-383). The parties agreed for this appeal to be ruled upon pursuant to the written record. (R. pp. 1-2).

On August 11, 2014, Judge Cothran issued his Order affirming Judge Atkinson's decision. (R. pp. 1-2). Judge Cothran first ruled that the testator's will was "ambiguous." (R. pp. 1-2). Judge Cothran's Order further provided that, "The Sumter Probate Court properly found from the evidence presented that the Testator clearly intended to convey the property he referred to as the 'Santee Property' to the Respondent as evidenced by the language in his last will and testament." Judge Cothran further found that, "This is obvious from the fact he had never owned property in Santee, South Carolina which is agreed to by all the parties concerned." Judge Cothran concluded, "It would have been error to find otherwise." (R. pp. 1-2). This appeal timely followed (R. pp. 375-383).

STATEMENT OF THE FACTS

Appellant Milton Oakley Dickson is the son of the Testator, Herbert Dickson, Sr., who died on August 20, 2008. Appellant's mother divorced Mr. Dickson, Sr., prior to his death, (R. p. 44, ll. 8-18). Testator married four times after the divorce. (R. p. 44, ll. 18-19). Respondent Arthur Beasley, Jr., is the son of one of these marriages. (R. p. 44, ll. 20-23).

Evidence was presented at the hearing that the Testator had a will prior to the one at issue in this case. (R. p. 46, ll. 1-3). Pursuant to the terms of this will, Testator's first wife was to receive property owned by the Testator in Sumter, South Carolina, and Testator's children, including Appellant, were to receive the property at issue in this action. (R. p. 46, ll. 4-7).

The will at issue here was executed on March 9, 2007, and filed on September 5, 2008. (R. pp. 121-129). Item III, Number 2 of this will contains the following language: "In the event my wife, Melba McSween Dickson, predeceases me, I will, give, devise and bequeath *any property which I own at the time of my death in Santee, South Carolina* and its contents to Arthur B. Beasley, Jr., if he shall survive me." (Emphasis added).

The parties to the appeal agree that at the time of Testator's death, Testator owned no property in Santee, South Carolina. (R. p. 66, ll. 4-11): Santee is a municipality and is located several miles from the property purported to be devised. (R. p. 47, ll. 7-11).

At the time of his death, Testator did own, and had for many years owned, property located in Summerton, South Carolina, located in the Goslin Pond subdivision, specifically Goslin Pond Lot #11 and three additional lots on Goslin Pond (Lot #s 9, 10, and 12) ("Goslin Pond"), located miles from Santee, South Carolina. (R. p. 46, ll. 13-22). This property is not located in Santee or Sumter County, but is in Clarendon County and has a Summerton, South Carolina, address. (R. p. 46, ll. 23-25, p. 59, ll. 17-25, p. 67, ll. 18-21). It contains a double wide and several outbuildings on one lot, as well as other surrounding lots. (R. p. 53, ll. 1-8). It is not located on Lake Santee. It is not located on any water. (R. pp. 67, ll. 22-25, 68, ll. 1-3).

STANDARD OF REVIEW

Appeal from the probate court is governed by the provisions of the Probate Code. *In re Howard*, 315 S.C. 356, 434 S.E.2d 254 (1993). The Probate Code requires appeals from the probate court be to the circuit court. S.C. Code Ann. 62-1-308 (Supp. 2004). The Probate Code further instructs the circuit court to “hear and determine the appeal according to the rules of law.” S.C. Code Ann. 62-1-308(d) (Supp. 2004). “As used in this statute, the phrase ‘according to the rules of law’ means according to the rules governing appeals.” *In re Howard*, 315 S.C. at 360, 434 S.E.2d at 257. “[I]f there is neither a statute nor a rule of court expressly prescribing a different standard of review, the circuit court must apply the same standard that [the appellate court] would apply were the appeal taken directly to either [the supreme court or court of appeals].” *Id.* at 361, 434 S.E.2d at 25.

The standard of review applicable to cases originating in the probate court depends upon whether the underlying cause of action is in law or equity. *In re Estate of Hyman*, 362 S.C. 20, 606 S.E.2d 205 (Ct. App. 2004); *In re Thomas*, 344 S.C. 564, 544 S.E.2d 854 (Ct. App. 2001). An issue regarding will construction is a question of law. See, *Bob Jones University v. Strandell*, 344 S.C. 224, 543 S.E.2d 251 (Ct. App. 2001). Thus, the circuit court may not disturb the probate court’s findings of fact unless a review of the record discloses there is no evidence to support them. The standard of review at law is the same whether the facts are found by a jury or by a judge sitting without a jury. *In re Howard*, 315 S.C. at 361, 434 S.E.2d at 257; see also, *In re Estate of Pallister*, 363 S.C. 437, 611 S.E.2d 250 (2005).

ARGUMENT

The Probate Court and Circuit Court erred in failing to enforce the clear and unambiguous will of Arthur Dickson, Sr. Instead of interpreting and enforcing the document as clearly written, the Court created an ambiguity where none was present and erroneously admitted extrinsic evidence in order to give the will an interpretation that the Testator never intended. The Probate Court's Order and the subsequent Order of Judge Cothran affirming it are clearly erroneous and should be reversed by this Court.

I. THE LANGUAGE OF TESTATOR'S WILL WAS CLEAR AND UNAMBIGUOUS.

To determine a testator's intent when referring to property in Santee, South Carolina, testator's intent must be ascertained according to the four corners of the will. *Allison v. Wilson*, 306 S.C. 274, 411 S.E.2d 433, 436 (Sup. Ct. 1991). Based upon the four corners of this document, no land in Goslin Pond was intended to be devised to Respondent. Additionally, when construing a will, "[i]t is the general rule of construction that the words of a will are to be taken in their ordinary plain import." *Buist v. Walton*, 104 S.C. 95, 88 S.E. 357, 358 (Sup. Ct. 1916). When applied to the phrase "property which I own at the time of my death in Santee, South Carolina," the plain-meaning rule prohibits the devise of any property to Respondent because no such property exists.

The Sumter Probate Court and Judge Cothran ignored the plain and clear language of the will and created an ambiguity where none was present. The language contained in the will was clear and unambiguous. There was no need for the Court to look beyond the clear and plain language of Testator's will to determine his intent. Both the Probate Court and Judge Cothran erred by failing to enforce the Testator's will as written.

II. THE PROBATE COURT ERRED IN ALLOWING EXTRINSIC EVIDENCE OF TESTATOR'S INTENT.

The Probate Court and Circuit Court Orders plainly overlooked and ignored the plain, clear and unambiguous language of the Testator's will and considered extrinsic evidence in support of its ruling that the property described and bequeathed in Testator's will was, in fact, the Goslin Pond lots located in Summerton, South Carolina. The Courts, however, overlooked and ignored the will's plain and unequivocal language and held that the property described in Testator's will ("any property which I own, at the time of my death in Santee, South Carolina") was, in fact, the Summerton Property. The Probate Court found that, "it is clear from the evidence presented that the testator clearly intended to convey the property that he referred to as the 'Santee Property,' the property in Clarendon County to the respondent as evidenced by the language in his will." (R. pp. 4-10). The Probate Court further supported this ruling by, "...take(ing) judicial notice of the fact that all property bordering the Lake Moultrie and Lake Marion properties located in Clarendon County are commonly referred to as Santee Property by individuals in Sumter and Clarendon Counties." (R. pp. 4-10).

These rulings are clearly erroneous and misconstrue the language in Testator's will. It should have been reversed on appeal by the Circuit Court.

First, the Testator did not refer to this property as the "Santee property." The language of the will, ignored by the Court, describes this property as, "*any* property which I own, at the time of my death *in* Santee, South Carolina." (Emphasis added). The language used in the will is far more definite and specific than that used by Judge Atkinson in his Order and subsequently affirmed by Judge Cothran.

The Testator, by the clear language of his will, is not bequeathing any specific piece of property. He is bequeathing *any* property that he may or may not own at the time of his death. Judge Atkinson and Judge Cothran misconstrued this provision to, in effect, find that while Testator did not own property at the time of his death in Santee, other property that he did own, but was not described or bequeathed in his will, must be substituted in its place. Judge Atkinson and Judge Cothran in effect rewrote Testator's will and substituted their own interpretation in direct contravention of the language used by the Testator. This is clearly erroneous.

Further, the will bequeaths any property that Testator owns, at the time of his death, in Sumter, South Carolina. As set forth above, at the time of his death the Testator owned no property in Santee, South Carolina. The evidence is clear on this point. (R. pp. 1-2, 4-10). There was no need for the Court to resort to extrinsic evidence to interpret or enforce this clearly written provision.

If a will contains no ambiguity and the testator's intent can be determined from the language of the will, there is no need to resort to extrinsic testimony. *Foreign Mission Board of South Baptist Convention v. Gaines*, 42 F. Supp. 85 (E.D.S.C. 1941); *Holcombe – Burdette v. Bank of America*, 371 S.C. 648, 640 S.E.2d 480 (S.C. App. 2006); *In re Estate of Hyman*, 362 S.C. 20; 606 S.E.2d 205 (2004); *Henkel v. Winn*, 346 S.C. 14, 550 S.E.2d 577 (2001).

In the present instance, the Testator's will was clear and unambiguous. There was no ambiguity in the devisee. The Court erred by resorting to extrinsic evidence to find as a matter of law that the Testator intended to convey the Summerton, South Carolina, property in his will.

III. THE EVIDENCE PRESENTED DOES NOT SUPPORT THE COURT'S INTERPRETATION AND ENFORCEMENT.

Finally, even if intrinsic evidence was necessary to interpret and enforce the Testator's will, which the Appellant argues it was not, the evidence presented before Judge Atkinson and reviewed by Judge Cothran does not support the Courts' rulings in this case.

There is no dispute as to the fact that the Testator owned no property in Santee, South Carolina at the time of his death. (R. pp. 1-2, 4-10). The only property owned by the Testator was located some distance away in Summerton, South Carolina, in Clarendon County.

The Probate Court and Judge Cothran both ignored this fact and held that the Testator "must" have intended to bequeath the Summerton Property instead of the Santee Property in his will. However, there was no evidence presented before Judge Atkinson to support such a contention. The Probate Court and the Circuit Court both substituted their own interpretation of the Testator's intent without any evidentiary support. The record is simply devoid of any evidence upon which either Court could base such an assumption. The Courts' Orders are based solely on conjecture and speculation.

Finally, the Court erred by relying on "judicial notice" that all property bordering the Lake Moultrie and Lake Marion properties located in Clarendon County are commonly referred to as Santee Property by individuals in Sumter and Clarendon Counties." First off, as set forth above, the language of the will is plain and unambiguous and there is no need to resort to extrinsic evidence. Secondly, there is no evidence in this case that the Goslin lots "bordered the Lake Moultrie and Lake Marion properties located in Clarendon County." There is no evidence that this property borders either lake. To the

contrary, Appellant presented evidence that these properties do not border either of these lakes. (R. pp. 44, ll. 18-25, 45, ll. 1-8). There was no evidence presented in the record that these properties were anywhere near either Lake Moultrie or Lake Marion.

CONCLUSION

The Probate Court and Circuit Court erred in failing to rule as a matter of law that Item III, number 2 of Testator's will were an *ineffective* devise of property to Respondent. The Courts erred by failing to enforce the clear and plain language of the Testator's will. The Order of the Sumter County Probate Court, and Judge Cothran's Order affirming it, should be overturned and reversed and this case should be remanded to the Sumter County Probate Court.

MOORE TAYLOR LAW FIRM, PA

By: 

S. Jahue Moore, SC Bar No. 4063
John C. Bradley, Jr., SC Bar No. 7869
1700 Sunset Boulevard
West Columbia, SC 29169
803-796-9160
803-791-8410 (Fax)
john@mttlaw.com
Attorneys for Appellant
Milton Oakley Dickson

West Columbia, South Carolina

March 31, 2015

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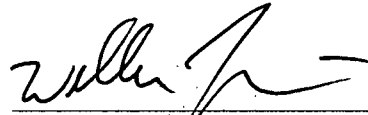
v.

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CERTIFICATE OF COUNSEL

I certify that this Brief of Appellant complies with Rule 211(b), SCACR.



S. Jahue Moore, SC Bar #4063
John C. Bradley, Jr., SC Bar #7869
MOORE TAYLOR LAW FIRM, PA
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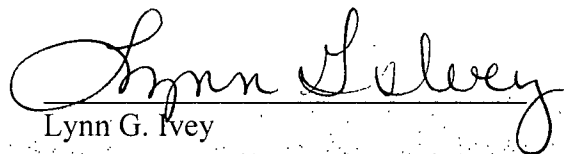
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PROOF OF SERVICE

I certify that I have served the Brief of Appellant on Kenneth R. Young, Jr., Esquire by depositing a copy of it in the United States Mail, postage prepaid, on April 2, 2015, addressed to Kenneth R. Young, Jr., 23 West Calhoun Street, Sumter, SC, 29150.


Lynn G. Ivey

West Columbia, South Carolina
April 2, 2015