

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS
Ellis B. Drew, Master in Equity

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SC Court of Appeals

Case No. 2014-CP-37-00143
Appellate Case No.: 2015-001860

Polly Thompson,..... Respondent,
v.
Cathy Swicegood,..... Appellant.

INITIAL BRIEF OF APPELLANT

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January 4, 2016.

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S.C. Code Section 63-3-530.	
S. C. Code Section 20-3-630.	
S. C. Code Section 20-3-690.	

Other Authority

Jon P. Thames & W.M. Von Zharen, <i>A Guide to Evidence Law in South Carolina 28 (1987)</i>	
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STATEMENT OF ISSUES ON APPEAL

1. Did the court err in refusing to consider the issue of marriage and stay the action pending a resolution of the marriage issue?
2. Did the court err in the exclusion of evidence proving Appellant's direct and indirect contributions to jointly owned real property?
3. Did the court err in the determination of the Appellant's contribution in jointly owned real property?
4. Did the court apply the appropriate analysis in its determination of the parties' interests in the real property at issue?

STATEMENT OF THE CASE

This is an action for partition of jointly owned real property initiated by the Respondent. Appellant counterclaimed and alleged that the circuit court lacked jurisdiction and that the court should consider the parties' relationship and same sex marriage.

A trial was held before the Honorable Ellis B. Drew, Master in Equity on March 16, 2015 and May 21, 2015. An Order of Partition was entered on June 26, 2015. A timely motion for reconsideration was filed by the Appellant which was denied by order entered August 3, 2015. A timely notice of appeal was filed by the Appellant.

The Respondent was represented below by Margaret Chamberlain of Greenville. The Appellant was represented below by John Reckenbeil. J. Falkner Wilkes represents the Appellant on appeal.

STATEMENT OF THE FACTS

At the beginning of the trial the Respondent moved to exclude any evidence as to the parties' marriage. 5. The Respondent also moved to exclude any evidence as to a claim based on "sweat equity" by the Appellant in any real property other than the two subject of the partition action. 5. Respondent claimed that the indirect "sweat equity" in other property was not properly before the court as it was not raised in the Appellant's Answer and Counterclaim. 5.

Also at the beginning of the trial the Appellant argued a motion to stay the proceedings based on the existence of on-going litigation between the parties arising out of the family court on the issue of marriage, and the potential for exclusive jurisdiction of the family court over the subject real property as part of the parties' marital estate. 7. The court denied the motion stating that it expressed no opinion on whether there was a marriage and, that even if there was, it was still a partition action with two people that jointly owned property. 8. The Respondent renewed the motion at the end of the Plaintiff's case. 73. The court granted the Respondent's motion to exclude indirect contributions including the "sweat equity" in the relationship including other real property that the Appellant claimed was rolled over into the real property subject of this action. 8; 74-75.

The parties agreed as to the basic values of the properties. 14. The

Respondent testified that she added the Appellant's name to the title of both properties so that if anything happened to the Respondent the Appellant would have a place to live. 38. She also testified that she put the Appellant's name on the property because their relationship was deteriorating and that she thought it would help their relationship. 39. She specifically testified that putting the Appellant's name on the titles protected the Appellant in the event of her [the Respondent] death. 39. The properties were titled as joint tenancy with the right of survivorship. 48. Respondent testified thought that despite this she did not intend to convey fifty percent interest to the Appellant or that the Appellant receive fifty percent interest in the event that they "separated". 39.

The Respondent also put the Appellant on a checking account that she had since sometime in the 1990's. 40. Respondent referred to the account in her testimony as "joint checking account". 41, l. 22-25. The Respondent admitted that the Appellant contributed \$22,000.00 to the Lake Hartwell property. 44. At one point the Respondent's counsel sent a letter to the Appellant's counsel telling her she could live in the lake house. 53. Part of the acquisition of the property at issue involved the Appellant's execution of a quitclaim deed to the Respondent on other property in Greenville county for one dollar, love and affection. 55

Appellant's counsel proffered that witness Stephanie Camputaro could have

testified to other properties and the relationship of the parties (evidence that had been excluded under the pre-trial ruling). 75. The court allowed testimony that Camputaro was witness to many conversations about their properties, their life as a whole and what they both achieved together. "Like any other married couple they both contributed different things." 75, l. 20-23. The parties both contributed to the life and properties that they had. 76. That they kept upgrading the equity and properties. 76. Camputaro witnessed the Appellant doing the majority of the work in refurbishing the Hilton Head property. 78; Def. Ex.4. Camputaro equated the parties' relationship financially to a marriage. 84. (The court repeatedly stated that it would not consider evidence of marriage or relationship.)

Appellant's counsel proffered that the Appellant could testify to contributions excluded by the court that she claimed should have been considered in determining her interest in the properties. 86. The court responded that those would be the subject of another case or another court. 86. Appellant testified that she spent a lot of time and effort working on the property which they intended for their retirement. 87. Appellant testified that she was unable to take on other jobs while renovating their properties. 88. The parties continually worked on flipping properties to upgrade to more desirable property for their retirement. 88. The decision to purchase the Hilton Head property was a joint decision. 89. All of the

prior properties rolled forward to help enable the purchase the Hilton Head property. 90. The Appellant testified to the extensive work she performed in renovating property. 92- Def. Ex. 5; 6. Appellant also testified that she paid \$1,300.00 out of pocket for plumbing and electrical work. Appellant prepared a “standard invoice” to list the work and value she put into the Hilton Head property. 101; Def. Ex. 7. Appellant testified to two values constituting some of her direct contributions to the properties, \$13,000 and \$17,490.83. 102.

Appellant testified that each party’s will left everything to the other party. 105. Appellant testified that she drew the plans for the Lake Hartwell home and was there during every single day of construction. 105. Respondent’s involvement in the construction process was minimal. 106. Appellant testified to the work she performed on the lake house. 111- Def. Ex. 9. Appellant’s contribution of \$20,000 in the lake house was on top of the \$22,000 contributions from roll over of appreciation from the prior properties. 106. Appellant said she gave the Respondent the monies left over from the previous properties (two lots and a log cabin) and the \$22,000. 106-107. Appellant testified that she was responsible for a total direct contribution of \$42,000 that was put into the lake house. 109. A summary showing the contribution was proffered as Def. Ex. 8. On cross-examination the \$22,000 was referred to as the “down payment” and the only other

contribution was Appellant's "work and effort going into it as payment." 113.

At the end of the hearing the Respondent's counsel requested partition by allotment of sole title based on the contributions of the parties. 126. Appellant sought 50% interest by sale and right of first refusal. 126-127. The court then gave the parties 20 days to come up with offers to purchase the interest of the other party for the court to consider. 128. The parties agreed on the value of the properties. 129-130. The court discusses getting the bid before considering an order requiring the sale of the property. 130. The hearing was concluded to reconvene at a later date.

When the court reconvened the trial judge asked the parties to each state for the record their offer to buy out the other's interest in the properties. 3. The Appellant offered to purchase the Lake Harwell property for \$175,000. 5 The Respondent offered \$275,100.57 on the Hilton Head property and \$188,407.75 on the Lake Hartwell property. The court found that the Respondent's offer the highest for each of the two properties. 5. The court accepted the offers of the Respondent and divided the net equity in each based on what the court found were the parties' respective direct contributions of cash, excluding roll over appreciation or other indirect contributions that the Appellant had sought to introduce and have considered. 5-11. Although the court mentioned the

Appellant's "sweat equity" it awarded all of the remaining equity in both houses to the Respondent. 11-12. The court denied Respondent damages for ouster. 12. The court awarded the Respondent \$5,000 in attorney fees and costs. 12-13; 24. As part of its reasoning the court stated that the marital claim "makes no difference to me." 15, l. 21-16, l. 9.

Appellant filed a Rule 59 motion raising the following issues: 1) The court's failure to consider the issue of marriage; 2) The court's failure to consider [allow] evidence that would be proper under an equity analysis; 3) That the decision should be vacated and the matter transferred to the family court for equitable division as marital property. (Motion).

ARGUMENT

I. THE COURT ERRED IN REFUSING TO CONSIDER THE ISSUE OF MARRIAGE AND STAY THE ACTION PENDING A RESOLUTION OF THE MARRIAGE ISSUE.

Standard of Review

A partition action is an action in equity. In an appeal from an equitable action, this court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. Doe v. Clark, 318 S.C. 274, 276, 457 S.E.2d 336, 337 (1995); Laughon v. O'Braitis, 360 S.C. 520, 602 S.E.2d 108 (S.C. App., 2004).

The question of subject matter jurisdiction is a question of law for the court. Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009). This Court is free to decide questions of law with no deference to the trial court. Hammer v. Hammer, 399 S.C. 100, 730 S.E.2d 874 (S.C. App., 2012).

Discussion of the Issue

The court's refusal to consider the issue of marriage and stay the trial of the case was error. The parties in this case have pending litigation as to the existence of a marriage in Appellate Case No.: 2014-001109. In the event that the parties are ultimately determined to be married, the circuit court's order will lack subject matter jurisdiction and become void *ab initio*. See DeWitt v. S.C. Dept. of

Highways & Public Transp., 274 S.C. 184, 262 S.E.2d 28 (1980) (all proceedings of a court lacking subject matter jurisdiction are a nullity, and its judgment has no effect). The court therefore erred in staying the trial in this case pending a final determination of the parties' marital status.

Lack of subject matter jurisdiction may not be waived, even by consent of the parties. Anderson v. Anderson, 299 S.C. 110, 382 S.E.2d 897 (1989). Subject matter jurisdiction can be raised at any time. [S]ubject matter jurisdiction may not be waived and the issue may be raised at any stage of the proceeding. Eaddy v. Eaddy, 324 S.E.2d 70, 283 S.C. 582 (S.C., 1984). "[I]ssues relating to subject matter jurisdiction may be raised at any time ... and should be taken notice of by this court on our own motion." Bunkum v. Manor Properties, 321 S.C. 95, 99-100, 467 S.E.2d 758, 761 (Ct.App.1996). Brown v. Greenwood School Dist. 50 Bd., 344 S.C. 522, 544 S.E.2d 642 (S.C. App., 2001).

In the event that the parties are determined to be married pursuant to the common law, then only the family court can determine their respective interests in the real property at issue which, having been acquired during the marriage, would presumptively constitute marital property. See S. C. Code Section 20-3-630 as to martial property and S.C. Code Section 63-3-530 which provides: (A) The family court has exclusive jurisdiction: . . . (2) 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; *emphasis added*. See Hammer v. Hammer, 399 S.C. 100, 730 S.E.2d 874 (S.C. App., 2012). In the event that the separate litigation resolves the marital question in the Appellant's favor, then the circuit court is without subject matter jurisdiction and the order of partition becomes void. As the final ruling on the marital status of the parties could render the decision of the circuit court void, the circuit court erred in failing to stay the proceedings.

In the event that the marriage of the parties is affirmed by the separate appeal, then the Appellant would be prejudiced as the circuit court's analysis and determination of the parties' interests in the real property at issue differs substantially from the analysis applicable in the family's determinations relevant to the equitable division of marital property. See SC Code 20-3-630. The court's exclusion of evidence and refusal of considerations relevant in marital litigation, resulted in the exclusion of substantial value in the Appellant's interest in the properties that otherwise would have been considered by the family court:

In making an equitable distribution of marital property, the court must (1) identify the marital property, both real and personal, to be divided between the parties; (2) determine the fair market value of the property so identified; (3) *apportion the marital estate according to the contributions, both direct and indirect, of each party to the acquisition of the property during the marriage, their respective assets and incomes, and any special equities they may have in marital assets*; and (4) provide for an equitable division of the marital estate, including the manner in which distribution is to take place. Toler v. Toler, 292 S.C. 374, 356 S.E.2d[296 S.C. 294] 429 (Ct.App.1987); Gibson v. Gibson, 283 S.C. 318, 322 S.E.2d 680 (Ct.App.1984).

Johnson v. Johnson, 296 S.C. 289, 372 S.E.2d 107 (S.C. App., 1988), *emphasis added*.

Thus the Appellant was prejudiced by the circuit court proceeding prior to the conclusion of the litigation to settle the issue of marriage.

II. THE COURT ERRED IN ITS DETERMINATION OF THE VALUE OF EACH PARTIES' CONTRIBUTION TO THE PROPERTIES.

The issue of each party's interest in the subject property is a factual determination. Assuming *arguendo* that the partition action is appropriate, the court still erred in excluding relevant evidence of value contributed by the Appellant to each property. In this case the court ruled that it would not consider evidence relating to any properties other than the two directly subject to the partition action. This was error.

The record shows that the parties purchased and sold (flipped) multiple

pieces of real property culminating in the purchase of the Hilton Head property. What little testimony of the Appellant was allowed, shows that appreciation realized from the sequential property sales was attributable directly the efforts of the Appellant in renovating and refurbishing each property. The net gain from that appreciation was then funneled into the purchase money used by the Respondent to purchase each of the subject properties. Appellant sought to offer evidence to as to the chain of sales and resulting build up of equity to show the full extent of value she contributed to the ultimate purchase of the two properties. This evidence was necessary for a proper determination of the Appellant's interest in the subject properties.

The court excluded evidence relevant and necessary to a proper determination of the Appellant's interest in the subject property. Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears. State v. Alexander, 303 S.C. at 380, 401 S.E.2d at 148; State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986)." 'All that is required is that the fact shown legally tends to establish, or to make more or less probable, some matter in issue and to bear directly or indirectly thereon.' It is not required that the inference sought should 'necessarily follow' from the fact proved. Evidence is relevant if it makes the desired inference more probable than it would

be without the evidence." Jon P. Thames & W.M. Von Zharen, A Guide to Evidence Law in South Carolina 28 (1987)(quoting Francis v. Mauldin, 215 S.C. 374, 378, 55 S.E.2d 337, 338 (1949)). Evidence the Appellant sought to introduce relating to other previously "flipped" properties was relevant in determining the amount of appreciation realized in each sale. As a result of the Appellant's efforts the appreciation that accumulated from sale to sale ultimately became a part of the Respondent's purchase money used in one or both of the properties subject of this case. As a result of the exclusion of relevant evidence, the court's valuation is in error. The court's calculation is further in error as it failed to adequately consider the Appellant's contribution of "sweat equity" of approximately \$20,000 Appellant put directly into the Lake Hartwell house. The record simply does not support the circuit court's ruling.

The court erred in excluding relevant evidence that would tend to show the value of the property attributable to the Appellant's long term "sweat equity."The court further erred in failing to consider all of the Appellant's direct "sweat equity" contributions to the subject property. The decision of the trial court should therefore be reversed and the matter remanded to the appropriate court for a determination of the full value of the Appellant's contributions to and interest in the properties at issue based on all of the relevant evidence.

CONCLUSION

The decision of the circuit court should be voided, or in the alternative, reversed and remanded for further findings as to the Appellant's direct and indirect contributions to the value of the property at issue.

Respectfully submitted,



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January 4, 2016.