

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No.: 2015-001056

Pamela Richey,

Appellant,

v.

Shirley W. Booth, Thomas J. Booth, and Estate of Lee C.
Williams,

Respondents.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT

- I. APPELLANT PROPERLY PRESERVED FOR REVIEW THE ISSUE OF WHETHER THE ESTATE MUST PURSUE FUNDS FOR HER FROM THE BOOTHS.

The state's issue preservation rules require that an issue be raised and ruled upon by the trial court before it can be heard by the appellate courts. Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (citing Wilder Corp. v. Wilkie, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)). "It is axiomatic that an issue cannot be raised for the first time on appeal." Id.

Appellant Penny Richey ("Richey") brought a conversion cause of action against the Estate of Lee C. Williams ("the Estate"). (R. p. 15, ¶10-p. 16, ¶13.) Richey's complaint alleged that Shirley W. Booth and Thomas J. Booth ("the Booths") took the money at issue in this from Lee C. Williams ("Williams"). (R. p. 15, ¶¶8-9.) Richey further produced an affidavit at the summary judgment hearing that she and Williams hired attorney Billy Garret to try to retrieve the money from the Booths, and "it's [Williams's] desire that my personal representative pay my share or the remainder of my share of this money directly to [Richey]." (R. p. 97, ll. 3-4.)

Richey did produce a copy of Williams's will in the rule 59 motion to alter or amend following the summary judgment hearing where the circuit judge questioned Richey's counsel as to why she filed a complaint in circuit court rather than a claim in probate court. (R. pp. 37-50; R. p. 68, l. 11-p. 69, l. 10.) At that point, Richey filed a petition in the probate court that asked the probate court to require the Estate's personal representative to pursue the funds alleged to have been wrongfully taken by the Booths

that Williams's will left to Richey. (R. pp. 37-50.) Richey provided the circuit court with a copy of that petition for its review, but the circuit court denied Richey's motion.

Given all of this evidence and argument presented to the circuit court, Richey presented her argument that the Estate should have to pursue the funds Richey is claiming from the Booths. "Pleadings are to be liberally construed to do substantial justice to all parties." Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 574, 743 S.E.2d 778, 785 (2013). The complaint in this case put the Estate on notice that Richey was seeking money taken from Williams by the Booths. The evidence produced during the summary judgment process shows that Williams intended this money to go to Richey and left it to her as a named beneficiary. (R. p. 97; pp. 41-44.)

If the Court finds the pleadings are not specific enough about Richey's claim against the Estate, then it should remand the matter to circuit court and allow Richey to amend her complaint to conform to the evidence presented below. "[L]eave [to amend] shall be freely given when justice so requires and does not prejudice any other party." SCRCP 15(a). Justice would require such an amendment in this case because Richey is a named beneficiary of Williams's will for this money so his estate should have to pursue the funds. Further, no party would be prejudiced by such an amendment because the Estate would merely be following Williams's wishes, and little discovery has occurred between the parties in this case so far.

II. THE COURT SHOULD REQUIRE THE ESTATE TO PURSUE THE FUNDS AT ISSUE ON RICHEY'S BEHALF AS REQUIRED BY WILLIAMS'S WILL.

The only reasonable action the personal representative in this case can take is to pursue the funds Williams specifically devised to Richey. Williams's last will specified, "I give and bequeath the proceeds, if any, from a lawsuit filed by me against Shirley W. Booth and Thomas J. Booth for the recovery of money which belonged to Hugh A. Williams taken from me to PAMELA "PENNY" RICHEY." R. p. 41, ¶2.)

The Estate's argument that the personal representative can refuse to seek this money because it is acting reasonably is misplaced. The Estate points to section 62-3-715(c) to argue that the personal representative does not have to pursue funds for Richey because when "acting reasonably for the benefit of the interested persons, [the personal representative] may properly: ... refuse performance of the decedent's contracts that continue as obligations of the estate...." S.C. Code Ann. 62-3-715(3) (2009). Richey is an interested person under Williams's will, which leaves her any proceeds from a lawsuit against the Booths. It would, therefore, not be reasonable for the personal representative to fail to pursue the funds left to Richey in Williams's will. A logical reading of the statute excludes specific devisees mentioned in the will from the type of contracts that a personal representative may refuse to perform if reasonable. It is not reasonable for a personal representative to refuse to perform an action specifically mentioned and required in the decedent's will. A personal representative has a duty to settle and distribute the estate based upon the terms of the will. See §62-3-703(a)(2009). Given this duty, the Estate cannot rely on the four grounds it was granted summary judgment on by the circuit court to argue that the personal representative does not have to follow Williams's will. It must follow the will and pursue the money he devised to Richey from the Booths.

The personal representative should be removed from his position if he does not pursue these funds. A personal representative may be removed from office when he has “failed to perform any duty pertaining to the office.” §62-3-611(b)(2009). The Estate’s personal representative has failed to properly settle and distribute the estate as directed by the will and failed to attempt to gain possession of the funds belonging to the Estate in the Booth’s possession. See §62-3-703(a) and §62-3-709. Given this failure, the probate court should remove the personal representative from office unless he attempts to pursue the proceeds from a lawsuit against the Booths because Williams devised these funds to Richey.

The Estate is incorrect to assert that the words “if any” in the devise to Richey mean the personal representative does not have a duty to pursue the funds. This limiting phrase simply acknowledges that at the time Williams executed his will he had not received any proceeds from a lawsuit against the Booths, and lawsuit proceeds are always uncertain. As for the requirement in the will that the proceeds come “from a lawsuit filed by *me* against Shirley W. Booth and Thomas J. Booth,” Williams anticipated he may die before any litigation concluded, but he wanted Richey and his personal representative to continue the litigation. (R. p. 41, ¶2;p. 97.) Williams hired an attorney to pursue the funds and instructed the attorney to continue pursuing the funds should Williams die before the conclusion of litigation. (R. p. 95, ¶20.) The fair construction of this term in the will is that it includes any lawsuit brought to recover the funds taken from Williams by the Booths because Williams foresaw the high possibility that he might die before any such suit was resolved. Such a result is compatible with the probate code, which

specifies that a personal representative has the same ability and standing to bring suit that the decedent had. See 62-3-703(c)(2009).

The non-claim statute in the probate code does not bar Richey's claim in this case. That statute requires claims to be filed within certain time limits after the personal representative has been appointed. See §62-3-803(2009). The definition of a claim "includes liabilities of the decedent ... whether arising in contract, in tort, or otherwise, and liabilities of the estate that arise at or after the death of the decedent...." §62-1-201(4)(2009). The probate code defines a devise as "a testamentary disposition of real or personal property, including both devise and bequest as formerly used...." Id. (7) (2009). Richey's petition to the probate court requesting the Estate pursue the funds at issue in this case is based on what Williams left her in the will so it qualifies as a devise rather than a claim under the probate code. The non-claim statute does not impose time limits for asserting a devise so it cannot be used to bar Richey's action against the Estate. See §62-3-803(2009).

CONCLUSION

Richey properly raised all issues below and put the Estate on notice of the issues it is raising in this case. Further, the will and probate code require the personal representative to carry out Williams's express wishes to pursue the funds at issue for Richey's benefit in a lawsuit against the Booths. The Court should, therefore, reverse the circuit court's granting of summary judgment for the Estate against Richey.

Respectfully submitted,



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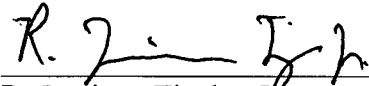
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CERTIFICATE OF COUNSEL

Counsel for the Appellant hereby certifies that the Final Brief of Appellant and Final Reply Brief of Appellant comply with Rule 211(b).



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