

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Tanya A. Gee, Circuit Court Judge

Civil Action No. 2014-CP-40-3104
Appellate Case No. 2015-002485

RECEIVED
AUG 29 2016
SC Court of Appeals

Deborah S. Dubose.....Appellant

vs.

Ashley C. Cone and Branch Banking & Trust Company.....Respondents

APPELLANT'S FINAL REPLY BRIEF

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I.
CONTRARY TO RESPONDENT'S ARGUMENT, S.C. CODE ANN. SECTION 62-6-202(a) IS NOT A DEFAULT STATUTE

Section 62-6-202(a) is not a default statute that applies in the absence of a contract. (R. p. 252, lines 7-16). Section 62-6-202(a) provides:

“Except as otherwise provided in this subpart, on death of a party sums on deposit in a multiple-party account belong to the surviving party or parties. If two or more parties survive and one is the surviving spouse of the decedent, the amount to which the decedent, immediately before death, was beneficially entitled under Section 62-6-201 belongs to the surviving spouse. If two or more parties survive and none is the surviving spouse of the decedent, the amount to which the decedent, immediately before death, was beneficially entitled under Section 62-6-201 belongs to the surviving parties in equal shares, and augments the proportion to which each survivor, immediately before the decedent's death, was beneficially entitled under Section 62-6-201, and the right of survivorship continues between the surviving parties.”

62-6-202 is the applicable “subpart” mentioned above. There is nothing in subpart 62-6-202 that even suggests that it is a default statute. Instead, subpart 62-6-202 says “Except as other provided in this subpart.” Since subpart Section 62-6-202 makes no mention of the contract between the parties. There is no basis for the claim that the contract trumps Section 62-6-202. (R. p. 54, lines 15-21-p. 246).

II.
CONTRARY TO RESPONDENT'S ARGUMENT, SECTION 62-6-202(a) AND SECTION 62-6-203(a) ARE IN DIRECT CONFLICT

If Section 62-6-202(a) prevails, Appellant wins. If Section 62-6-203(a) prevails, Appellant wins. If Section 62-6-203(a) prevails, Respondent wins. This Court must do what the circuit court judge failed to do and reconcile the two statutes, if that is possible. (R. p. 52, 7-8-p. 246-p. 248, lines 13-20).

III.
**CONTRARY TO RESPONDENT'S ARGUMENT, THE LLC ACT HAS
NOTHING TO DO WITH THIS DISPUTE, AND THE PROBATE CODE
GOVERNS AND PROVIDES PROPER GUIDANCE**

Respondent has argued:

“If parties want to determine, themselves, ownership of such funds, they can enter into a contract governing the ownership. This arrangement is contemplated by Section 62-6-203(a). The interplay of these two statutes is akin to the LLC Act’s default statutory scheme and the contractual operating agreement, which allows members of the LLC to contractually add or omit certain rights, obligations, and duties. *See e.g.*, S.C. Code Ann. Section 33-44-103(a) (“To the extent the operating agreement does not otherwise provide, this chapter governs relations among the members, managers, and company.”) In other words, LLC members can let the default provisions of the LLC Act control or they can contract for a more specific governance.” (Initial Br. Of Appellant, p. 8).

However, the language of the LLC act is different and not analogous to nor a guiding light in this Probate Code situation. The facts of this case develop a situation that is more akin to the spousal elective share and other spousal protection statutes. (R. p. 52, lines 13-18-p. 252, lines 15-22). Under the elective share statute the legislature has declared that the spouse is entitled to a 1/3rd share of the probate estate. Likewise, Section 62-6-202(a) protects the spouse as to joint accounts which are non-probate and which are not subject to probate or to the spousal elective share. (R. p. 52, lines 13-18-p. 247, lines 21-23-p. 252, lines 15-22).

Moreover, the Code Sections that provide the best guidance to the handling of the joint account at issue are found in the South Carolina Probate Code. (R. p. 52, lines 13-18-p. 252, lines 15-22). The Code Sections at issue are found in Title 62 of the South Carolina Code of Laws; that is the South Carolina Probate Code.

Consistently, throughout, the Probate Code provides the surviving spouse of a decedent spousal protections and rights, including protections and rights with higher priority than a decedent’s creditors and other third parties. (R. p. 52, lines 13-18-p. 252, lines 15-22).

(1) Elective Share Claim: Section 62-2-201 et. seq protects a surviving spouse from being disinherited. It allows a surviving spouse to claim one-third (1/3rd) of the probate estate of decedent, with some adjustments.

(2) Omitted Spouse Claim: Section 62-2-301, again, protects a surviving spouse from being disinherited where the decedent spouse left a Will, executed prior to marriage, which omits the surviving spouse. This provision actually provides the surviving spouse an intestate share. Therefore, the surviving spouse receives either (a) fifty percent (50%) of the probate estate if the decedent was survived by children or issue; or (b) one hundred percent (100%) of the probate estate if the decedent had no children or surviving issue.

(3) Exempt Property: Section 62-2-401 provides that a surviving spouse is entitled to property from the decedent spouse's estate up to twenty five thousand dollars (\$25,000). This spousal protection and statutory right is afforded greater priority than a creditor's claim against the decedent spouse's estate.

(4) Joint with Right of Survivorship Accounts: Section 62-6-202(a), again, a subpart of the Probate Code, provides the same protections and rights to a surviving spouse as the Probate Code Sections referenced above. As discussed, Section 62-6-202(a) provides protection to a surviving spouse where there are 3 or more joint account holders (here: decedent spouse, surviving spouse, and 3rd party), and the decedent spouse contributed funds to such joint account and then dies. The surviving spouse and 3rd party remain joint account holders over such account with the same access to such account as before, but the statute protects the surviving spouse by providing that the surviving spouse steps into the shoes of the decedent spouse for the purpose of applying the rule of

contribution (e.g. who the underlying funds in a joint account “belong” to). (emphasis added).

Any amounts contributed to the account by the decedent spouse, at his death, are statutorily, by the legislature, contributed to the account by the surviving spouse. Subpart 62-6-201 (the rule of contribution) clearly provides, between joint account holder, that “an account belongs to the parties in proportion to the net contribution of each to the sums on deposit.” (emphasis added). If the decedent spouse contributed all the funds held in such an account, as is the case before this Court, the surviving spouse thereafter is deemed to have contributed all the funds and such funds “belong” to her even though the account remains joint with the 3rd party. The contributing party (the surviving spouse) has a right to reclaim from the 3rd party the amounts which statutorily and rightly belong to her.

In the matter before this Court, Subpart 62-6-202(a) and its incorporation of Subpart 62-6-201, clearly provides the surviving spouse statutory protections, and is legislatively intended to do so, against 3rd parties by immediately giving the surviving spouse, as the deemed contributing party, the statutory right to all the cash upon her spouse’s death.

IV.

THE CIRCUIT COURT JUDGE ERRED IN FAILING TO IDENTIFY THE EVIDENCE THAT SHE FOUND WOULD HAVE BEEN, WHICH PRECLUDES APPELLATE REVIEW OF HER DECISION TO RULE WITHOUT ALLOWING FURTHER DISCOVERY.

The circuit court judge held:

“In sum, summary judgment is not premature. The discovery sought by Deborah does not preclude this Court from granting Ashley summary judgment. None of the alleged testimony is relevant to the issues before this Court. Moreover, the majority of the evidence is inadmissible and cannot be considered. The parties submitted cross motions for summary judgment. There is no issue of material fact, and the purported testimony

would not raise any issues of material fact. Summary judgment is properly granted to Ashley.” (R. p. 10, lines 13-18).

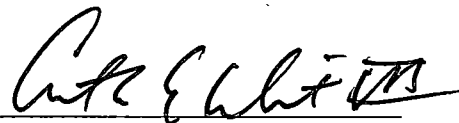
The Respondent, in a footnote, argued:

“Deborah states ‘[t]he Trial Judge, without hearing any of [sic] testimony that Deborah sought to take, found that some testimony could nevertheless be admissible.’ (Initial Br. Of Appellant, p. 8). It is unclear as to what, if any, ‘testimony could nevertheless be admissible.’ Deborah has no citation to the record as to which testimony she is referring, and Ashley’s counsel is unaware of any such testimony.”

The reason the Appellant failed to identify what evidence was admissible is because the circuit court judge failed to do so. Furthermore, the circuit court judge ruled on the admissibility evidence based upon objections which were never made, i.e. the Dead Man’s Statute and the attorney-client privilege. (R. p. 9, lines 22-23–p. 10, lines 1-12-p. 248, 15-22). There is nothing in the record to show that objections would be made based thereon (it appears to have been a mere assumption). (R. p. 248, 15-22). Summary judgment should never be granted where evidentiary rules must be made.

CONCLUSION

The case presents a novel question. While novel questions can be determined on summary judgment, the Court should be slow to affirm the granting of summary judgment motion which would strip the spouse of the protection given by Section 62-6-202(a). The appellate courts of this state have been zealous in protecting a spouse’s right to an elective share of the probate estate. This Court should be zealous in protecting a spouse’s right to a non-probate asset. The order granting summary judgment in favor of the Respondent should be reversed and the action should be remanded for the discovery to be completed, after which there should be a trial on the merits.



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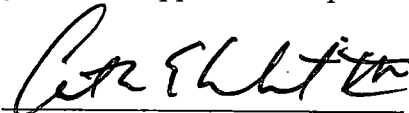
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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Reply Brief of Appellant complies with SCACR 211 (b).



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PROOF OF SERVICE

I, Nicole Chapman, paralegal for Todd and Johnson, L.L.P., hereby certify that I have served Thornwell F. Sowell and Bess Jones Durant, attorneys for the Respondent, Ashley C. Cone, with the foregoing pleading by hand delivery a copy of the same to them at the following address on the 29th day of August, 2016.

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Re: *Deborah S. Dubose vs. Ashley C. Cone and Branch Bank & Trust Co.*
Appellate Case No. 2015-002485
Civil Action No. 2014 CP40 03104
Our File No. 7379-1

Dear Ms. Kitchings:

Enclosed please find twenty (20) copies of the following pleadings in connection with the above referenced matter:

1. Appellant's Final Brief;
2. Appellant's Final Reply Brief;
3. Certificate of Compliance for Appellant's Final Brief;
4. Certificate of Compliance for Appellant's Final Reply Brief;
5. Certificate of Service for Appellant's Final Brief; and
6. Certificate of Service for Appellant's Final Reply Brief.

Please file these instruments in their appropriate positions and clock and return the enclosed copies to me which are being provided by hand delivery.

By copy of this letter, I am serving this pleading on Thornwell F. Sowell, attorney for the Defendant, Ashley C. Cone.

Thank you for this and prior courtesies extended by your office.

Yours truly,

TODD & JOHNSON, LLP



Arthur E. White III

AEW/snc
Enclosures

cc: Pope D. Johnson III, Esq.
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