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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY

Court of Common Pleas

W. Haigh Porter, Circuit Court Judge

Case No. 2010-CP-45-393

Geneva S. Hall and Joseph Keith Ray, As personal representatives of the Estate of Joseph S. Smith A.K. J.S. Smith, Jr. — Respondents,

v.

Patrick S. Smith, Sandra B. Smith, Thomas Lewis Smith, Elizabeth S. Kappeler, Gloria Darlene Hall Smith, Courtney Elizabeth Smith, Tiffany Elaine Smith, Joseph Samson Smith IV, Charles Richard Ray, Jr., John Doe, and Jan Doe, Et Al, — Appellants.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in failing to find that the Will of J.S. Smith, Sr. gave only a contingent remainder interest in the property to the children of J.S. Smith, Jr.?

II. Did the trial court err where it failed to find, as a result of intent of Joseph S. Smith, Sr. to only give a contingent remainder, all conveyances prior to the death of J.S. Smith, Jr. are void ab initio?

III. Did the trial court err in failing to find that the testator's intent was served with all of the children of J.S. Smith, Jr. receiving an equal one seventh interest in the property?

STATEMENT OF THE CASE

This action was commenced on June 14, 2011 by Monty O'Bryan on behalf of Joseph "Keith" Ray and Geneva Hall against all other heirs to the property. The action was for partition in regards to a 185.5 acre tract of land in Williamsburg County, originally owned by J.S. Smith, a/k/a Joseph S. Smith, Sr. A final hearing was held May 16, 2016 before the undersigned pursuant to an Order of Reference dated May 25, 2015. Present at the hearing were the Respondent, Thomas Smith, Personal Representative of the Estate of Joseph S. Smith a/k/a J.S. Smith, Jr. (Pro Se); the Respondent, Joseph Keith Ray and his attorneys, William M. O'Bryan, Jr. and Gregory B. Askins; the Appellant, Patrick S. Smith and his attorney, Steven S. McKenzie. Also present were Appellant, Charles Richard Ray; Appellants Joseph Samson Smith IV, Tiffany Elaine Smith, and Courtney Elizabeth Smith, three children of the deceased Joseph S. Smith III; two children of the deceased Appellee, Geneva Hall; and witnesses, Kevin Wilson, a licensed land surveyor, and Charles O'Quinn, a licensed forester and land surveyor. The subject of this action is a life estate devised to Joseph S. Smith, Jr. by the Will of his father, J.S. Smith a/k/a Joseph S. Smith, Sr., dated February 16, 1939, and recorded in Office of the Judge of Probate for Williamsburg County in Compartment 129, Package 20. Pursuant to the terms of the Will, the children of or the child or children of a deceased child of Joseph S. Smith Jr. had a contingent remainder interest in the property upon his death. J.S. Smith, Jr. died May 4, 2008 and this controversy arose regarding the ownership of the property and a division among the owners.

STATEMENT OF FACTS

In 1942 or 1943, Joseph S. Smith, Sr. died. (R. p.5, line 2). In his Last Will and Testament he left a life estate in his 185.5 acre "Home Place" to his son Joseph S. Smith Jr., with the remainder to the children of Joseph S. Smith, Jr. (R. p.5, line 3-5). The remainder provided "the child or children of any deceased child to take the share that their parent or parents would have been entitled to if living at the time of his death; and in case the said J.S. Smith should die without leaving any child or children or lineal descendant, the said tract of lands shall go to my other children, share and share alike." (R. p.5, lines 5-8).

Joseph S. Smith Jr. had five natural- born children: Patrick S. Smith, Thomas Lewis Smith, Elizabeth S. Kappeler, Joseph "Joey" S. Smith III, and Geneva S. Hall along with two adopted children, Joseph Keith Ray and Charles Richard Ray. (R. p.5, lines 8-13). By Deed dated January 23, 1991 and recorded in Williamsburg County Deed Book A-277 at page 119, Joseph S. Smith, Jr. conveyed 1/5 of **his life estate** to each of his five natural born children. (R. p.5, lines 13-17). His two adopted children were not mentioned in the Deed. (R. p.5, line 17).

Four or five natural-born children then conveyed all of their right, title and interest, which included their fractional interest in the life estate pur autre vie (of J.S. Smith, Jr) and their **remainder interests.** (Order dated Nov. 2, p. 3-4). Geneva S. Hall conveyed her interest to Patrick S. Smith by deed dated November 22, 1999 and recorded in Williamsburg County Deed Book A-485 at page 236. (R. p.5, lines 18-22). Sandra Smith, at the time of the filing of her Answer and Counterclaim and Crossclaim, conveyed her interest back to Patrick S. Smith. (Order dated Nov. 2, p.4).

Two of the natural born children sold all of their right, title and interest, which included their fractional interest in the life estate pur autre vie (of J.S. Smith, Jr) to their father, Joseph S. Smith, Jr. (R. p.5, line 25 & p.6 lines 1-5, 10-14). Elizabeth "Libby" Smith (Kappeler) conveyed her interest in the property to her father, Joseph Smith, Jr. by deed dated July 29, 2004 and recorded in Williamsburg County Deed Book A-545 at page 226. (R. p.5&6, lines 25 & 1-5). Thomas Lewis Smith conveyed his undivided interest in the property to his father by deed dated February 9, 2004 and recorded in the Williamsburg County Clerk's Office in Deed book A-546 at p. 99. (R. p. 6, lines 10-14).

By codicil executed on September 20, 2007, he modified this bequest, Joseph S. Smith, Jr. left a vested remainder interest to Joseph Keith Ray only. (R. p.7, lines 9-12).

In the intervening years between the death of Joseph S. Smith, Sr. and his son Joseph S. Smith, Jr., there were several side agreements between the children and other as to the property. (Exhibit 3). In February of 1992, one year after Joseph S. Smith, Jr. conveyed 1/5 of his life interest to his five natural born children, those children entered in an "Agreement." (Exhibit 3). The "Agreement," in the "Whereas" clause, noted that Joseph S. Smith, Jr. had just conveyed to them his life interest. (Exhibit 3). In the "Agreement," each of the children agreed not to convey their interest in the property to anyone other than each other, until after the death of Joseph S. Smith, the widow of Joseph (Joey) S. Smith III, attempted to convey to Patrick S. Smith, by deed recorded in Williamsburg County Deed Book A-615 at page 211, whatever interest she had in the life estate of Joseph Smith, Jr. (Order dated Nov. 2, p. 4). The deed did not convey any remainder interest of Joey Smith as that had become vested in his children at his death. (Order dated Nov. 2, p.4).

On May 4, 2008, Joseph S. Smith, Jr. died. (Order dated Nov. 2, p.4). This dispute arose following his death. (Order dated Nov. 2, p.3). All parties are seeking a partition in kind of the property, albeit in different proportions and different physical divisions. (Order dated Nov. 2, p.3).

ARGUMENT

I. The Court erred in failing to find that the Will of J.S. Smith, Sr. gave only a contingent remainder interest in the property to the children of J.S. Smith, Jr.

Joseph S. Smith, Sr. died. In his Last Will and Testament he left a life estate in his 185.5 acre "Home Place" to his son Joseph S. Smith Jr., with the remainder to the children of Joseph S. Smith, Jr. The remainder provided "the child or children of any deceased child to take the share that their parent or parents would have been entitled to if living at the time of his death; and in case the said J.S. Smith should die without leaving any child or children or lineal descendant, the said tract of lands shall go to my other children, share and share alike,".

The provision of the Will of Joseph S. Smith, Sr. requires two contingencies before it vest. The remainder required first that Joseph Smith have children and then all of the children must survive him as well as all of his lineal descendants. If the children and lineal descendants didn't survive him, then the property went to his other children. The first contingency is that you had to be a child. The Children of J.S. Smith, Jr. could not be ascertained until his death. While the Plaintiff may argue that this was vested subject to being open, the second contingency defeats that argument. The children had to survive him along with their lineal descendants. If the children and their lineal descendants did not survive J.S. Smith, Jr, then the property goes to the other children

(of Joseph S. Smith, Sr.) and their heirs. In Jones v. Holland, 223 S.C. 500,504-505, 77 S.E.2d 202 (1953), the South Carolina Supreme Court used the following example to define a contingent remainder:

> As an illustration of such remainders (contingent), may be suggested the case of a limitation to A for life, and after A's death. If he have children, to them in fee simple and if he have no children, then to B in fee simple.

The Court went on to say: "The second limitation is a substitute for or an alternative of the other, to take effect after the other, but is contemporary, commencing from the same period, not indeed together, but the one to take effect in lieu of the other, if that failed." A devise to B for life, he being unmarried, remainder to his children, but if he dies without leaving any children, remainder over, both remainders are contingent." Id. at 505. In looking at the plan language of the Will of Joseph S. Smith, Sr., it is clear that he intended that the property not vest in the children of the J.S. Smith, Jr. until he died. The reason for this is clear, the testator's intent was to ensure that the property was vested in the children of J.S. Smith, Jr. or the property was vested in his other children. The Plaintiff would like the Court to stop in that portion of Joseph S. Smith, Sr.'s Will after the granting clause to the children of J.S. Smith, Jr. Clearly the intent of Joseph S. Smith, Sr. was not to stop there but to insure the property vested with his remaining children should J.S. Smith, Jr. not have **any children to survive him or even lineal descendants survive J.S. Smith, Jr**. The only way to know who would survive J.S. Smith, Jr. was to wait until his death and see what heirs if any he had. This scenario was the same one contemplated by the Supreme Court in Jones v. Holland, 223 S.C. 500,504-505, 77 S.E.2d 202 (1953), ." A devise to B for life, he being

unmarried, remainder to his children, but if he dies without leaving any children, remainder over, both remainders are contingent." Id. at 505.

II. The Court erred where it failed to find, as a result of intent of Joseph S. Smith, Sr. to only give a contingent remainder, all conveyances prior to the death of J.S. Smith, Jr. are void ab initio.

By Deed dated January 23, 1991 and recorded in Williamsburg County Deed Book A-277 at page 119, Joseph S. Smith, Jr. conveyed 1/5 of **his life estate** to each of his five natural born children. His two adopted children were not mentioned in the Deed.

Four or five natural-born children then conveyed all of their right, title and interest, which included their fractional interest in the life estate pur autre vie (of J.S. Smith, Jr) and their **remainder interests.** Geneva S. Hall conveyed her interest to Patrick S. Smith by deed dated November 22, 1999 and recorded in Williamsburg County Deed Book A-485 at page 236. Sandra Smith, at the time of the filing of her Answer and Counterclaim and Crossclaim, conveyed her interest back to Patrick S. Smith.

Two of the natural born children sold all of their right, title and interest, which included their fractional interest in the life estate pur autre vie (of J.S. Smith, Jr) to their father, Joseph S. Smith, Jr. Elizabeth "Libby" Smith (Kappeler) conveyed her interest in the property to her father, Joseph Smith, Jr. by deed dated January 29, 2004 and recorded in Williamsburg County Deed Book A-546 at page 99.

The Last Will and Testament of Joseph S. Smith, Jr., the son of Joseph Keith Ray as the life estate would have expired upon his death. However, by codicil executed on September 20, 2007, he modified this bequest, leaving his interest to Joseph Keith Ray

only. If the will of Joseph S. Smith, Sr. provided for a contingent remainder that only vested at the death of J. S. Smith, Jr., then any conveyances made prior to the death of J.S. Smith, Jr. are void including conveyances made by J.S. Smith, Jr. and his children as stated above.

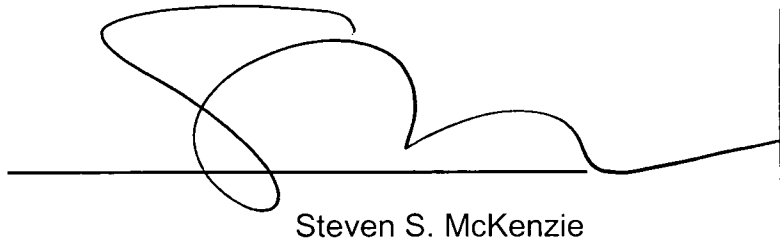
III. The intent of the testator is served with all of the children of J.S. Smith, Jr. receiving an equal one seventh interest in the property.

The intent of the testator, Joseph S. Smith, Sr. was that all of the children of J.S. Smith, Jr. would share equally in the property. Efforts made by J.S. Smith, Jr. and even children to circumvent this intent should be thwarted. The only equitable result would be to provide all seven children (or their estates) with an equal share in the property.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

Respectfully submitted,



June 1, 2017

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