

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

**RECEIVED**

**JUN 23 2017**

**SC Court of Appeals**

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 err in failing to find that the testator's intent was served with an 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. 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,".

Joseph S. Smith Jr. had five natural- born children: Patrick S. Smith, Thomas Lewis Smith, Elizabeth S. Kappeler, Joseph Keith Ray and Charles Richard Ray. 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 vested remainder interest to Joseph Keith Ray only.

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. 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." The "Agreement," in the "Whereas" clause, noted that Joseph S. Smith, Jr. had just conveyed to them his life interest. 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. The deed did not convey any remainder interest of Joy Smith as that had become vested in his children at his death.

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

## 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.

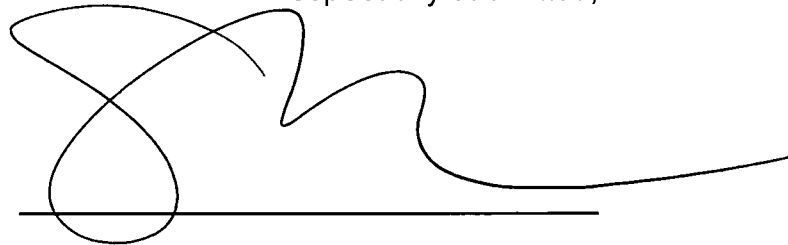
**III. The intent of the testator is served with an All of the children of J.S. Smith, Jr. receiving an equal one seventh interest in the property.**

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,

A handwritten signature in black ink, consisting of a large, stylized 'S' followed by a wavy line that extends to the right. The signature is positioned above a horizontal line.

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South Carolina Court of Appeals  
In the Court of Appeals  
APPEAL FROM WILLIAMSBURG COUNTY  
COMMON PLEAS

W. HAIGE PORTER, PRESIDING JUDGE

Case No. 2010-CP-45-393

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JUN 23 2017

**SC Court of Appeals**

THE ESTATE OF JOSEPH S. SMITH, A.K. J.S. SMITH, JR. BY ITS  
PERSONAL REPRESENTATIVES, GENEVA S. HALL, AND JOSEPH KEITH  
RAY .....Respondent

v.

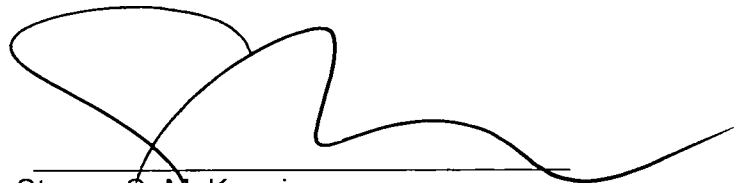
PATRICK S. SMITH, SANDRA B. SMITH, THOMAS LEWIS SMITH, ELIZABETH S.  
KAPPELER, GLORIA, DARLENE HALL SMITH, COURTNEY  
ELIZABETH SMITH, TIFFANY ELAINE SMITH, JOSEPH SAMPSON SMITH, IV  
CHARLES RICHARD RAY, JR., JOHN DOE, AND JAN DOE, ET  
AL.....Appellant

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

AMENDED PROOF OF SERVICE

I certify that I have served the Initial Brief and Designation of Matter on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, on June 17, 2017, addressed to PO Box 1105, Kingstree, SC 29556 and PO Box 10, Hemingway, SC, 29554.

June 17, 2017



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JUN 23 2017

SC Court of Appeals

June 17, 2017

The Honorable Jennie Abbott Kitchings  
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RE: THE ESTATE OF JOSEPH S. SMITH, A.K. J.S. SMITH, JR. BY ITS,  
PERSONAL REPRESENTATIVES, GENEVA S. HALL, AND JOSEPH KEITH  
RAY vs. PATRICK S. SMITH, SANDRA B. SMITH, THOMAS LEWIS SMITH,  
ELIZABETH S. KAPPELER, GLORIA, DARLENE HALL SMITH, COURTNEY  
ELIZABETH SMITH, TIFFANY ELAINE SMITH, JOSEPH SAMPSON SMITH, IV  
CHARLES RICHARD RAY, JR., JOHN DOE, AND JAN DOE, ET AL

Dear Ms. Kitchings:

Enclosed for filing is the Initial Brief of Appellant and Designation of Matters in the  
above case. Also enclosed are the following:

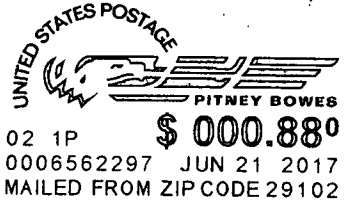
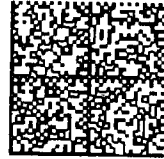
Proof of Service of the Notice of Appeal on the Respondent



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FIRST CLASS



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**SC Court of Appeals**