

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO: 2015-CP-07-00913

IN THE MATTER OF THE ESTATE OF)
JOHN JOSEPH MANNING, JR.)

DEANNA BUSHMAN, as HOLDER OF)
DURABLE POWER OF ATTORNEY FOR)
SALLY MANNING AND AS TRUSTEE)
OF THE TRUST AGREEMENT OF)
SALLY MANNING DATED DECEMBER)
6, 2004,)

**ORDER GRANTING PARTIAL
SUMMARY JUDGMENT AS TO THE
ELECTIVE SHARE CAUSE OF
ACTION
(Not Fully Resolving Case)**

Plaintiff,

vs.

THE ESTATE OF JOHN J. MANNING, JR;)
JOHN J. MANNING, III; CHRISTOPHER)
MANNING; AND LINDA MANNING,)

Defendants.

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SC Court of Appeals

This matter came before the Court on July 11, 2017 for a hearing on Plaintiff's Motion for Partial Summary Judgment as to the Elective Share and Defendants' Motion for Summary Judgment. Present on behalf of Plaintiff Deanna Bushman¹ were J. Ashley Twombly and Jennifer I. Campbell, and present on behalf of Defendants the Estate of John J. Manning, Jr., John J. Manning, III, Christopher Manning, and Linda Manning was Elizabeth B. Mayo.

The issue raised in both motions is whether Sally Manning, Decedent John Manning's surviving spouse, is entitled to take an elective share of one-third of Decedent's estate, or, if the

¹ Sally Manning has been diagnosed with Alzheimer's disease and is *non compos mentis*. Plaintiff Deanna Bushman is the holder of Mrs. Manning's durable Power of Attorney and is the trustee of Mrs. Manning's Trust Agreement.

contingent and discretionary trust described in Decedent's estate planning documents is sufficient to satisfy Mrs. Manning's elective share. For the reasons contained here, Mrs. Manning is entitled to take an elective share of one-third of Decedent's estate, and that the contingent and discretionary trust described in Decedent's estate planning documents does not satisfy the elective share under South Carolina law.

I. Relevant Factual Background

Based on review of both Plaintiff's motion and supporting memorandum and Defendants' motion and supporting memorandum, the parties agree on the relevant facts. Decedent and Sally Manning were married at the time of Decedent's death on September 4, 2014. In his estate planning documents, Decedent made no provisions for Mrs. Manning. In his First Codicil to his Last Will and Testament signed on September 2, 2009, Decedent stated, "I expressly make *no provision* in this Will for my wife, SALLY A. MANNING as she has been provided for by other means." Likewise, in the Third Amendment and Restatement of his Revocable Trust, Decedent again stated "I hereby expressly make *no provision* in this Trust Agreement for my spouse, SALLY A. MANNING." (emphasis added).

Despite the expressed language stating Mrs. Manning was to receive nothing upon Decedent's death, Decedent's Trust included the following provisions: "Notwithstanding the above, in the event any portion of the Trust Estate *shall be deemed* payable to or for the benefit of my spouse, such amount shall be held, administered and distributed as a separate share for the benefit of spouse as provided in this Paragraph (C) of ARTICLE 4. In such event, JOHN J. MANNING, III, and CHRISTOPHER H. MANNING, or the survivor of them, shall serve as trustee of such separate share." (emphasis added).

Paragraph (C) of Article 4 of Decedent's Trust provides as follows:

- (1) The trustee shall pay to, or for the benefit of, my spouse, during her lifetime, so much of the income of the separate share, if any, established in this Paragraph (C) as the trustee shall, from time to time, determine to be necessary for the health and support of my spouse, in accordance with the standard of living to which she has become accustomed, including medical surgical, hospital or other institutional care, due regard being given by the trustee to the amount of income known to the trustee to be available to by spouse from other sources.
- (2) Upon the death of my spouse, the principal and all accrued and undistributed income, if any, of such separate shall be added to and become a part of the Manning Family Share to be held, administered and distributed as provided in ARTICLE 5.

The Decedent died in 2014, and per the terms of his estate planning documents, nothing passed to Mrs. Manning. Moreover, the trust he described in his estate planning documents was never funded and furthermore, nothing has ever been paid to Mrs. Manning from his estate or any related trust thereto.

II. Standard of Review

“Summary judgment is proper if, viewing the evidence in a light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.” Preservation Capital Consultants, LLC v. First American Title Ins. Co., 406 S.C. 309, 315, 751 S.E.2d 256, 259 (2013); Rule 56(c), SCRPC. Since there are no disputed issues of material fact, this case is proper for summary judgment.

III. Analysis

South Carolina Code Ann. § 62-2-201 provides that the surviving spouse of a decedent has “a right of election *to take* an elective share of one-third of the decedent's probate estate.” S.C.

Code Ann. § 62-2-201(a).² Because the elective share is designed to provide for the surviving spouse, the subjective intent of the decedent cannot and does not override the elective share. As the South Carolina Supreme Court stated, “[t]he provisions concerning the elective share do not provide for the testator’s intent to the contrary Therefore, we find that the elective share provision may not be ignored by a testator” Matter of Patrick, 303 S.C. 559, 562-63, 402 S.E.2d 664, 666 (1991).

It is undisputed that nothing has passed to Mrs. Manning under Decedent’s Will and Revocable Trust. In fact, Decedent’s estate planning documents both expressly state that no provision is made for Mrs. Manning. Because nothing has passed to Mrs. Manning under Decedent’s estate planning documents, Mrs. Manning is entitled to take an elective share of one-third of Decedent’s probate estate, free of trust, pursuant to S.C. Code Ann. § 62-2-201.

Defendants argue that the contingent and discretionary trust of Paragraph (C) of Article IV of Decedent’s Revocable Trust is sufficient to satisfy Mrs. Manning’s elective share. This Court disagrees, finding the contingent and discretionary trust does not satisfy Mrs. Manning’s elective share. In terms of satisfying the elective share, South Carolina law provides:

...all property, including any beneficial interest, which passes or has passed to the surviving spouse, or would have passed to the surviving spouse, but was renounced or disclaimed must be applied first to satisfy the elective share...

S.C. Code Ann. Section 62-2-207(a). In the case *sub judice*, the Decedent clearly set forth his intent by providing, in no uncertain terms, that he was making “no provision” for Mrs. Manning. As a result, no beneficial interest passed to Mrs. Manning via Decedent’s revocable trust. The trust only purports to provide for Mrs. Manning at some point in the future and based

² In their Motion for summary judgment filed on March 8, 2017, Defendants concede that (1) Mrs. Manning is entitled to an elective share; (2) Mrs. Manning made a timely claim for an elective share; and (3) the assets of Decedent’s Revocable Trust are included as part of Decedent’s probate estate for purposes of calculating the elective share.

upon a determination, through some unspecified process, that a portion of the estate was “deemed” payable to her. Further, by its terms, payments to, or for the benefit of Mrs. Manning, *if any*, are only to be made upon the trustee's determination that such payments are “necessary for the health and support” of Mrs. Manning. Therefore, Mrs. Manning is not actually “entitled” to any portion of the trust. Further, such contingent and discretionary provisions render any purported beneficial interest incapable of calculation for the purpose of applying toward satisfaction of her elective share.³ Accordingly, the language of the revocable trust, does not and cannot satisfy the elective share under South Carolina law.⁴

IV. Conclusion

For the reasons stated herein, the Court finds that Sally Manning, Decedent’s surviving spouse, is entitled to take an elective share equal to one-third of Decedent John J. Manning, III’s probate estate, which for calculation purposes includes the assets held in trust. Further, Mrs. Manning is entitled to receive her elective share outright and free of trust.⁵ Defendants’ Motion for Summary Judgment is DENIED, and Plaintiff’s Motion for Partial Summary Judgment is GRANTED. This Order does not resolve the case in its entirety, and the case will continue on the remaining causes of actions.

IT IS SO ORDERED.

CARMEN T. MULLEN
Judge, Fourteenth Judicial Circuit

_____, 2017
Beaufort, South Carolina

³ These provisions also preclude the contingent and discretionary trust from qualifying for “full value” satisfaction because distributions are completely discretionary and trustees are also remainder beneficiaries.

⁴ Plaintiff's expert Harley D. Ruff opined that the contingent and discretionary trust a) is of no legal or practical effect, and b) even if recognized, would not satisfy the elective share.

⁵ Defendants do not dispute that the assets held in trust at the Decedent’s death are to be included in the probate estate for purposes of determining the elective share amount.



Beaufort Common Pleas

Case Caption: Deanna Bushman , plaintiff, et al VS John J Manning Jr , defendant, et al
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So Ordered

s/Carmen T Mullen 2142