THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
IN THE COURT OF COMMON PLEAS
THE HONORABLE JOSEPH STRICKLAND
RICHLAND COUNTY MASTER-IN-EQUITY

2009-CP-40-7385

Gregory Brown,

Plaintiff-Respondent

v.

Wilile Brown, Jr., Charles Brown,
Joe Brown, Nellie Brown Boyd, Vivian
Brown Dowdy, First Federal, and
First Financial Holdings, Inc.

Defendants

of whom

Willie Brown, Jr., Charles Brown
Joe Brown, Nellie Brown Boyd, Vivian
Brown Dowdy, are the

Appellants

RECEIVED
JUL 27 2012
SC Court of Appeals

FINAL BRIEF OF APPELLANTS

Gerald D. Jowers
Attorney for Appellants
1802 Sumter Street
Columbia, SC 29201
803-765-9620

TABLE OF CONTENTS

TABLE OF AUTHORITIES	2
STATEMENT OF ISSUES ON APPEAL	3
STATEMENT OF THE CASE	4
ARGUMENT FOR THE FIRST ISSUE	6
ARGUMENT FOR THE SECOND ISSUE	9
ARGUMENT FOR THE THIRD ISSUE	14
CONCLUSION	17
CERTIFICATION	18

TABLE OF AUTHORITIES

Anderson v. Anderson (1989) 299 S. C. 110, 382 S.E.2d 897

S & W Corporation of Inman v. Wells (S.C. App. 1984) 283 S. C. 218, 321 S.E.2d 183

Statutes:

15-61-10
15-61-50
15-61-110
62-3-703 (a)
62-3-711 (a)

Rules of Court

Rule 71 (f) of the South Carolina Rules of Civil Procedure
Rule 201 of the South Carolina Rules of Evidence

STATEMENT OF ISSUES ON APPEAL

I. The Master erred by ordering the tracts of land that are the subject of this action sold at public auction rather than issuing a Writ of Partition pursuant to Rule 71(f) of the South Carolina Rules of Civil Procedure to determine if the tracts could be divided equitably.

II. The Master erred by failing to include in the accounting between the parties all contributions made by Appellants to Respondent, all funds received by Respondent or should have been received by Respondent from third party sources while serving as Personal Representative, and the value of all personal property of the estate converted by Respondent to his own use.

III. The Master erred in awarding attorney fees to the Respondent for bring this action.

STATEMENT OF CASE

The Summons and Complaint in this matter were filed in the Office of the Clerk of Court for Richland County on November 6, 2009. Thereafter, an Amended Summons and Complaint were filed in October 2010. Plaintiff/ Respondent sought in the Amended Complaint the partition or sale of the real property described in the Complaint and in a second cause of action, Plaintiff/Respondent sought an accounting between the parties for expenses that Plaintiff/Respondent claimed he paid in connection with the real property that is the subject of the action. The Appellants in their Answer denied that partition should be ordered but pled that if it was ordered, that such partition should be fair and equitable. The Appellants answered the cause action for an accounting by alleging that the Respondent had never accounted for funds he had received from them and others.

Respondent Gregory Brown and the Appellants, Willie Brown, Jr., Charles Brown, Joe Brown, Nellie Brown Boyd and Vivian Dowdy are children of Willie Brown Sr. who died on June 15, 2005. Mr. Brown left a Last Will and Testament that was filed in the Office of the Probate Court for Richland County. By this Will, Mr. Brown, Sr. devised all his assets to his children who are Appellants and Respondent. Mr. Brown, Sr. further nominated Respondent Gregory Brown as Personal Representative in the Will and he was duly appointed by the Probate Court on October 31, 2005. The assets of the estate consisted of some personal property and two separate tracts of land in Richland County. One of the tracts contained 29 acres and the other contained 40.5 acres. These tracts are the subject of this action. Respondent was discharged as Personal Representative and estate closed on February 5, 2008.

This matter was referred to the Master-in- Equity for Richland County by order of the Clerk of Court. The matter was heard before the Master in two hearing, the initial hearing was

held on February 22, 2011 and the final hearing was held on May 3, 2011. The Master issued an Order that was filed on October 3, 2011 finding among other things that the property should be sold at public auction and awarded to the Respondent Attorney's fees for $21,503.33 but concluded that Respondent and Appellants should each be responsible for one-sixth of the total. The Master further concluded that the Plaintiff had paid cost and entitled to reimbursement from each Defendant for the total cost of $31,026.89 which was $5,171.15 for each Appellant. On October 17, 2011, Appellants filed a Notice of Motion and Motion for pursuant to Rule 59(e) of the SCRCP for an order to alter or amend the Order or in the alternative grant a new trial pursuant to rule 59(a) SCRCP. The hearing was held on November 1, 2011; thereafter the Master issued an Order on December 15, 2011 denying the motions. A Notice of Appeal was served on January 13, 2012 and the Notice was filed on January 18, 2012 with the Clerk of the Court of Appeals and on January 19, 2012 with the Clerk of Court for Richland County.

ARGUMENT I

The Master erred by ordering the tracts of land that are the subject of this action sold at public auction rather than issuing a Writ of Partition pursuant to Rule 71(f) of the SCRCP to determine if the tracts could be divided equitably.

The real property that is the subject of this action consists of two separate and distinct tracts of land in Richland County. One tract contains 29 acres and the other tract located some distance away contains 40.5 acres. Mr. Willie Brown, Sr. resided on the 29 acre tract and farmed one or both parcels in his younger years. Mr. Brown devised the property and the rest of his assets to his children, the Respondent and the Appellants in equal shares. Respondent as Personal Representative did not make any allotment of interest among the beneficiaries as he could have done pursuant to powers granted to him by Mr. Brown's last will (Defendant's Exhibit 4; R. p.314)) and accordingly the Respondent and Appellants own the tracts as tenants in common.

This action for the partition or sale of these tracts of land and for an accounting is as an equitable matter heard by the Master-in-Equity alone and the "... Court on review may find facts in accordance with its view of the preponderance of the evidence. Anderson v. Anderson (1989) 299 S.C. 110, 382 S.E.2d 897.

Section 15-61-10 of the S.C. Code Ann. (1976) provides as follows:

All joint tenants and tenants in common who hold, jointly or in common, for a term of life or years or of whom one has an estate for a term of life or years with the other that has an estate of inheritance or freehold in any lands, tenements or hereditaments shall be

compellable to make severance and partition of all such land, tenements and hereditaments.

Section 15-61-505 of the Code provides:

The court of common pleas has jurisdiction in all cases of real and personal estates held in joint tenancy or in common to make partition in kind or by allotment to one or more of the parties upon their accounting to the other parties in interest for their respective shares or, in case partition in kind or by allotment cannot be fairly and impartially made and without injury to any of the parties in interest, by the sale of the property and the division of the proceeds according to the rights of the parties.

In the Anderson case the Court said as follows:

This Court has previously recognized that partition in kind is favored when it can be fairly made without injury to the parties. Smith v Pearson 210 SC 524, 43 SE2d 479 (1947). This Court's decision in Few v. Few, 242 S.C.433, 131S. E.2d 248(1963), which recognized that in kind partitions are appropriate only where they may be made fairly and impartially without injury to any of the parties, does not vary the statutory preference for in kind partition. Thus, the party seeking partition by sale caries the burden of proof to show that partition and kind is not practicable or expedient. Smith v. Pearson 43S.E. 2d 482.

At the close of the Respondent's testimony in direct examination the following exchange occurred (R. p. 58, Lines 23-25 and p. 59, line 1):

Q. Mr. Brown, you are asking the Court to partition the property and fairly divide these bills and attorney's fees so everybody bears the cost equally?

A: Yes, I am.

Three months later at the continuation of the hearing and in Reply testimony, the following exchange occurred between Respondent and his attorney (R. p. 218 lines 8-25 and p. 219 lines 1-2):

Q: What do you know about whether one of the properties is landlocked?

A: Well, the one parcel, the larger parcel, which was used primarily for farming, there's nothing on it, it has an easement, and easement right. And...

Q: Does it have road access directly, other than through the easement?

A: No. No. Matter of fact, it's landlocked by a railroad on one side...yeah, on one side. And the other three sides, it's private property.

Q: What do you know about whether the county will allow you to subdivide such a property that only has easement access?

A: I have learned since this matter that the county will not approve land that's landlocked to be subdivided.

Q: So was there a way to subdivide this without going through court, to your knowledge?

A: To my knowledge, and I'm on a learning curve with all of this, but to my knowledge it can't be done.

On cross examination in his direct examination, Respondent acknowledged two sketches of the two parcels of land, one of which was prepared by a surveying company at his request. These sketches were admitted into evidence as Defendants Exhibits 10 and 11 (R. pp. 318 and 319). The following exchange occurred (R. p. 44, lines 24-25 and p. 45, lines 1-7):

Q: So the sketch drawing by the surveyor, and that's how I'll describe it since it's not actually measured, indicated the property could be divided equally, is that your understanding, Mr. Brown?

A: Yes, yes.

Q: Okay. And everybody would have road frontage, is that correct?

A: On the 29 acres everyone would have road frontage. The other parcel there is no road frontage.

At the trial of this case, Respondent did not offer any evidence that the tracts could not be equitably divided in kind. The Respondent did not introduce any appraisals or give any estimates of the value of the tracts.

The Order of the Master-in Equity dated August 11, 2011 states the following:

> "6. Because the parties have not agreed on a partition in kind: because valuation and partition in kind is rendered highly difficult in view of the fact that a large tract of the property in question is landlocked with access by an exclusive easement making all but one of the parcels created by a subdivision unmarketable and undevelopable because all but one would lack a legal access; and because there is not adequate evidence to allow valuation of the respective properties, I find, conclude and order that partition in kind is not practicable or expedient." (R. p. 12)

The Record of this matter does not support this finding and conclusion. The stumbling block for this family has been the poor record keeping of Respondent and his failure to keep the Appellants informed of expenses he incurred the funds he received from all sources. Appellant Vivian Dowdy testified that on August 7, 2007 Respondent sent an accounting to Appellants that indicated that each party's share of expenses was $1,674.34 and a few months later on Oct 25, 2007 Respondent sent a revised accounting that the amount supposedly increased to $6,791.00. (R. p. 122 lines 12-25 and p. 123 lines 1-6 and p. 125 lines 13-15). She further testified:

> "Ever since we started this our disagreement with Greg has been how much we actually owe him for expenses of the estate and even though I am hearing otherwise today, that's what I thought we here for, to come up with a fair settlement, because this was what was stopping us from dividing the land." (R. p. 132, lines 2-7)

The evidence is overwhelming that the 29 acre tract may be divided as shown by the sketch referred to above. This tract is separate from the other and can be divided equitably. The 40.5 acres tract, if the unsupported testimony of the Respondent is true which the Appellants do not accept, could still have been used as part of a partition and/or allotment plan for the tracts or that tract alone could have been sold.

The Respondent in his testimony blames the lack of agreement as the reason why he as Personal Representative did not divide the property. The Master apparently accepted this argument that the lack of agreement among the parties as to the division is the basis for ordering the sale of property. This is error. Lack of agreement about the division of jointly owned property is not unusual among tenants in common. This is the reason the statutory remedy and Rule 71 (f) of the South Carolina Rules of Civil Procedure exists. This Rule provides the mechanism to follow in an action for Partition such as this one to determine if the subject property may be fairly and impartially divided and that mechanism is the appointment of commissioners to make the determination of the feasibility of equitably dividing the property. Without evidence concerning value or the feasibility of dividing the property in kind and the parties stated wish not to sell the properties, commissioners are the only way that the matter could have been settled. Division in kind is the preferred method by statute and court decisions and since no evidence was introduced that it could not be done equitably, the Master should have appointed commissioners. The Master's decision to sell the property without dividing in kind or by allotment is contrary to the evidence and the statutory guidelines as well as the guidelines established by Supreme Court. In his original Order, the Master did not give any reasons for not complying with Rule 71(f). This was raised by Appellants' Motion under 59 (e) and argued at the hearing on the Motion. On reconsideration the Master found only that commissioners would be an unnecessary expense. There is no support for this in the record. There is no estimate for the cost of appointing commissioners in the Record.

The stated intent of all of the parties was to divide the property. No one wanted the property sold. The Respondent had the burden of proof to prove that the properties could not be divided equitably and he did not do that. The Master should have followed Rule 71 (f).

ARGUMENT II

The Master erred by failing to include in the accounting between the parties all contributions made by Appellants to Respondent, all funds received or should have been received by Respondent from third party sources while serving as Personal Representative, and the value of all personal property of the estate converted by Respondent to his own use.

The real issue in this case has been the accounting between the parties. The Respondent argued that only expenses related to the properties is proper for consideration in determining the accounting. The Master-in-Equity apparently accepted this argument. In his Order, the Master found that the Respondent had spent $31,026.89 for the subject property including taxes, mortgage payments, and maintenance, but the Master did not allow any offset or credit for monies given by Appellants to Respondent despite the testimony that showed such contributions. That is an error.

Respondent was appointed as Personal Representative of the Estate of Willie Brown, Sr. in October of 2005. Respondent as Personal Representative did not open a separate bank account for the estate and used his personal checking account for estate matters as well as for the expenses relating to the properties. This mistake by the Respondent has led to the confusion as to contributions and mistrust among the parties.

Appellants understood that the estate had little cash to cover various expenses of the estate and the properties. (R. p. 120 , lines 15-25 and p. 121, line 1) Since the death of Mr. Brown, the Appellants made contributions to the respondent for expenses totaling $10,778.00 (Defendant's Exhibit 3; R. p. 312). These contributions were made by checks to "Gregory

Brown" and not the estate and not to "Gregory Brown as Personal Representative." (R. p. 124, lines 23-25 and p. 125, lines 1-2).

Respondent commingled the funds received by him from the Appellants with his personal funds. These contributions were not properly documented. In fact, the first supposed accounting form the Respondent on August 7, 2007 advised the Appellants "if you have made a contribution…" (R. p. 122, lines 17). The lack of proper record keeping by Respondent has led to an unfortunate degree of mistrust among the parties.

The testimony further shows that Respondent received as Personal Representative from third parties a total of $10,178.34 and that most of this money (except for the life insurance that went to a funeral home) were commingled with his personal funds. The testimony of the Appellant Vivian Dowdy shows that there was personal property that the Respondent has retained and not distributed that has an estimated value of $11,250.00. Over six years has passed since the death of Mr. Brown, and Respondent still retains possession of the personal property. This length of time is a clear indication that is has converted this property to his own use and he should account to the Appellants for the value of the property. The list of the income and receipts was compiled by Appellant Vivian Dowdy who is trained in accounting and admitted into evidence as Defendant's Exhibit 3 (R. p. 312).

The Master made the following conclusion:

> "The Family Defendants contended that they made certain payments to Plaintiff during the process of the probate of the estate of their father, Willie Brown Sr. which should be counted as partial payments to the above amounts, and that they desired an accounting to just of the real estate expenses in partition, but also of the probate estate. I find that these payments and activities related to the personal property of the estate of Willie Brown, Sr. (as opposed to the real estate at issue before me), were made as a part of the probate process, and were handled under the direction of the Probate Court. (R. p.11).

This conclusion is unsupported by the record. There was no personal property that any funds were needed to maintain. The funds given by Appellants to Respondent were used by him for his own purposes along with funds received by him as Personal Representative. It is impossible to separate these expenses and payments. The funds received by Respondent as Personal Representative and the funds received by him from the Appellants as well as the expenses that he paid are part of one continuous transaction and cannot be equitably or fairly separated. The Master should have considered all of this in making an accounting.

Surprisingly the Master relied on certain Releases signed by the parties as part of the probate process. These Releases were not introduced at the trial of the case and were, not produced pursuant to Request for Production submitted by Appellants to Respondent. The Master at the close of the case asked for proposed orders from both sides and these documents were submitted by Respondent with his proposed order to the Master without the consent of the Appellants and the Master relied on them without giving the Appellants the opportunity to be heard. The Master said "The court takes judicial notice of those public record filings, which are attached to the Order of Court's Exhibit A (R. p. 9). This is not the kind of fact contemplated by Rule 201 of the South Carolina Rules of Evidence and should not have been admitted without giving the Appellants an opportunity to be heard. This was raised on the Motion to Alter of Amend and argued at the hearing on the Motion. The Master ruled that "...such material was not critical to, but merely supportive of, the Court's Order...."

The evidence offered shows contributions to Respondent from Appellants of $ 10,178.34, funds received from third parties in the amount of $10,178.34, and personal property that the Respondent has converted to his own use in the amount of $11,250.00 for a total of $32,206.34. Further the record shows that there was a substantial amount of valuable scrap metal on the

property that Respondent as Personal Representative should have sold that that would have generated money for the estate that the Appellants have estimated that as $9,461.30. The grand total is $41,667.64. This should have been offset against the funeral expenses, taxes, electric service and mortgage payments proven of $38,168.64 so that the Respondent actually owes the Appellants. (Defendant's Exhibit 3, R. p. 312).

The Respondent does not want his acts and omissions as Personal Representative reviewed as part of the accounting because his actions are indefensible. He failed to perform his fiduciary duties as personal representative of the estate and wants to hide behind the order closing the estate.

ARGUMENT III

The Master erred in awarding attorney fees to the Respondent for bring this action.

Section 15-61-110 of the Code provides:

> The court of common pleas may fix attorneys' fee in all partition proceedings and, as may be equitable, assess such fee against any or all of the parties in interest.

The Court of Appeals in S & W Corporation of Inman v. Wells (S.C. App 1984) 283 S. C. 218, 321 S.E.2d 183 held:

> The fixing and assessing attorney's fee under Section 15-61-110 is a matter with the circuit court's discretion, the exercise of which will not be disturbed absent a showing of abuse thereof.

Appellants contend the Master abused his discretion by awarding the Respondent $21,503.33 because of the peculiar facts of this case.

The Respondent served as Personal Representative of the Estate of Willie Brown, Sr. and he failed to perform his duties in conformity with the statutes and the Will. If he had performed

his duties and kept proper records, this matter would have been settled between the parties long ago and this action would have been unnecessary.

Section 62-3-703A of the Code of Laws of South Carolina, 1976 provides that "a personal representative has a duty to settle and distribute the assets of the decedent in accordance with the terms and probated and effective will and this code and as expeditiously and efficiently as it consistent in the best interest of the estate. Further Section 62-3-711 (a) of the Code provides in part "a personal representative has the same power over the title property of the estate that an absolute owner would have..." and "...this power may be exercised without notice, hearing or order of court."

The will of Mr. Brown specifically gave to the Personal Representative the power to allot among beneficiaries and also to sell assets of the estate. With the powers given to him by his father, the Respondent could have divided the tracts of land among the Beneficiaries without the approval of the Probate Court. Respondent could, as an alternative, have sold some or all of the tracts to pay the expenses and debts of the estate and divide the remaining proceeds among the Beneficiaries. Respondent did nothing. If the Respondent had done his duty as Personal Representative, this lawsuit would have been unnecessary. If the Respondent had done his duty as Personal Representative, he would not have needed to advance any money for the property.

As Personal Representative the Respondent did not open a checking account for the estate. Over the course of the time since the death of Mr. Brown the appellants made contributions to the respondent expenses. These contributions were not properly documented by Respondent and these expenses incurred by Respondent were not properly documented.

An action for partition is essentially a "no fault" action and is not a complicated legal matter. The complicated part of this action was the accounting. According to the Order, more

than half of the attorney fees awarded by the Court to the Respondent were incurred between the first and second hearing and after the Plaintiff/Respondent had rested his case. This was incurred presumably by Respondent's attorney in preparing to defend his lack of performance as Personal Representative and his poor record keeping. The statute provides for the discretionary award of attorney fees to any party in an action for Partition but the statutes do not provide for attorney fees in an action for accounting.

The attorney fee awarded by the Master was unreasonable for a partition action because most of the time spent by Respondent's attorneys was spent unraveling the tangled web of his finances. The granting of the fee is discretionary with the Court and because the blame for this action is squarely on the shoulders of the Respondent, he should not be rewarded. Because of the failure of the Respondent to act as Personal Representative, the Appellants should have been awarded attorney fees and not the Respondent.

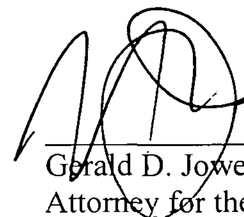
The foregoing was raised in the Appellants' Motion under 59 (e) and argued at the hearing on the Motion. (R. pp. 42-43 and p.223 lines 25-25 and p. 224 lines 1-25 and p. 225 lines 1-10).

CONCLUSION

The Respondent did not prove that the two tracts of land that are the subject of this action could not be equitably divided in kind among the parties. No evidence was produced by either party as to how this division in kind could be made or not made so the Master should have followed the procedures of Rule 71(f) to determine the feasibility of division in kind and make the division if the commissioners found that it was possible. The Order of the Master concerning the sale of the properties should be reversed and the Master should be ordered to issue Writs of Partition pursuant to the Rule 71 (f) and issue a new Order after the report of the commissioners.

The portion of the Order of the Master concerning the accounting should be reversed and this Court should substitute its finding for that of the Master or return the matter to the Master to include an accounting of all funds received by Respondent, the value of all personal property converted to his own use and the value of property that should have been utilized by him as Personal Representative as well as the legitimate expenses paid by Respondent including only the taxes, mortgage payments, and electricity and not any maintenance charges.

The portion of the Order of the Master awarding attorney fees to the Respondent should be reversed and the Appellants should be awarded attorney fees from the Respondent.

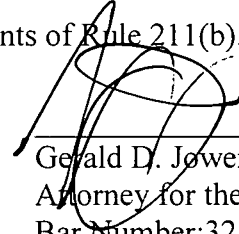


Gerald D. Jowers
Attorney for the Appellants
Bar Number:3236
1802 Sumter Street
Columbia, SC 29201

May 10, 2012

CERTIFICATION

I certify that this Final Brief complies with the requirements of Rule 211(b).



Gerald D. Jowers
Attorney for the Appellants
Bar Number:3236
1802 Sumter Street
Columbia, SC 29201

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
IN THE COURT OF COMMON PLEAS
THE HONORABLE JOSEPH STRICKLAND
RICHLAND COUNTY MASTER-IN-EQUITY

2009-CP-40-7385

Gregory Brown,

Respondent

v.

Willie Brown, Jr, Charles Brown,
Joe Brown, Nellie Brown Boyd, Vivian
Brown Dowdy, First Federal, and
First Financial Holdings, Inc.

Defendants

RECEIVED
JUL 27 2012
SC Court of Appeals

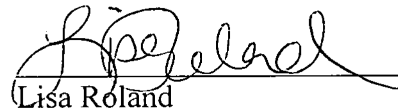
of whom

Willie Brown, Jr., Charles Brown
Joe Brown, Nellie Brown Boyd, Vivian
Brown Dowdy, are the

Appellants

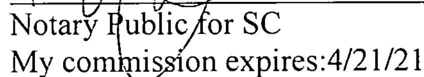
AFFIDAVIT OF SERVICE

I certify that I have served the Final Brief of the Appellant on Counsel for Respondent John E. Schmidt, III and Melissa Copeland by personally delivering a copy of the Brief to their office at 1201 Main Street, Suite 1100, Columbia, SC on July 27, 2012.



Lisa Roland

Sworn to before on July 27, 2012



Notary Public for SC
My commission expires:4/21/21