THE STATE OF SOUT CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Thomas A. Russo, Judge of the Circuit Court
The Honorable Tamara C. Curry, Judge of the Probate Court

Appellate Case No. 2017-001196
Circuit Court Case No. 2015-CP-10-05056
Probate Court Case No. 2007-ES-10-1437

Jacquelin S. Bennett and Kathleen S. Turner
as Personal Representatives of the Estate of
Jacquelin K. Stevenson ..... Appellants

v.

Estate of James Kelly King and Genevieve S. Felder ..... Respondents

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INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Jacquelin K. Stevenson died testate on September 17, 2007 survived by three daughters, Kathleen S. Turner, Jacquelin S. Bennett (the Appellants), and Genevieve S. Felder (Respondent). She was also survived by two sons, Thomas C. Stevenson, III, Daniel R. Stevenson, and a step son, James Kelly King. Each of these are devisees under her will. James Kelly King passed away during the administration of the estate, and his share has been resolved by private agreement. The will originally designated Kathleen S. Turner and Thomas C. Stevenson as Co-Personal Representatives.

The will was admitted to probate in the Charleston County Probate Court in October of 2007. The six individuals named above were the devisees under the will. Among the various assets of the estate are four real properties:

> Lot 19 Dupree Creek Lane, Mt. Pleasant, SC
> ("Paradise Island")
>
> Glascow Island Lane, Edisto Island, SC
> ("Bailey's Island")
>
> Lots 34, 35, 36, and 37, Lake Front Drive,
> Hendersonville, NC ("Lake Summit")
>
> 2414 Rockland Avenue, Rockville, SC
> ("Rockville")

Rockville is a waterfront lot with an upscale vacation and rental home, and a deepwater dock. The Lake Summit property is a long-time family vacation home, also waterfront, with significant rental income. Paradise Island and Bailey's Island are unimproved investment lots. It is the proposed distribution of these properties that is the basis of this dispute.

Pursuant to the terms of the will, Kathleen S. Turner and Jacquelin S. Bennett

were devised the Rockville property. Lake Summit was devised to Daniel R. Stevenson and Thomas C. Stevenson, III. Genevieve S. Felder and James Kelley King received monetary bequests roughly equal in value to the real estate shares. Thomas C. Stevenson, III was subsequently removed as Personal Representative due to malfeasance, and both he and Daniel R. Stevenson lost their inheritance rights to the real properties by order of the Probate Court dated February 11, 2011, also for malfeasance. Accordingly, the disposition of all of the real properties with the exception of Rockville is now governed by the residuary clause, which states:

> All the rest, residue, and remainder of my property and estate real and personal, of whatsoever nature, and wheresoever situate, including any property before mentioned but not effectively disposed of, . . . I give, devise, and bequeath to Kathleen S. Turner, Jacquelin S. Bennett, Thomas S. Stevenson, III, Daniel R. Stevenson, James Kelly King, and Genevieve S. Felder, in equal shares, per stirpes, and not per capita . . .

Jacquelin S. Bennett was appointed Co-Personal Representative in place of Thomas C. Stevenson, Jr., so that she and Kathleen S. Turner are currently Co-Personal Representatives.

By Private Agreement executed in March of 2015, the claims of the Estate of James Kelly King, who died during the administration of the Stevenson estate was resolved by monetary payment. Other disbursements were approved, "with the only exception being that the allocation of the residuary assets between Kathleen S. Turner, Jacquelin S. Bennet, and Genevieve S. Felder (which will be resolved by a subsequent agreement or will be determined by the Charleston County Probate Court). (Parentheses as appearing in the Agreement).

On September 14, 2011, Respondent filed a Demand for Hearing. The requested hearing was held on June 16, 2015. The interested parties were Jacquelin S. Bennett, Kathleen S. Turner, the Co-Personal Representatives, and Genevieve S. Felder. The proposal of the Co-Personal representatives was that they divide Lake Summit equally between themselves. Paradise Island would be divided equally among the three. Genevieve S. Felder would receive the large majority of the Bailey's Island, with the remaining, minor share divided equally between the co-Personal Representatives..

At the hearing, Appellants argued that the will gave the Co-Personal Representatives broad authority to distribute in kind, so that the only consideration is that the distribution "come out equal" based on monetary value, with no other factors being relevant. Appellant argued that while the language in the will clearly grants the Co-Personal Representatives broad authority to distribute in kind, such authority is not absolute, and is constrained by fiduciary principals and the duty to treat all beneficiaries equitably and fairly. Appellant further argued that the determination to what was fair and equitable should, in proper circumstances, include non-economic considerations such as sentimental value, utility, and other intangible factors. The position of the Respondent is that in the particular circumstances of this case, only a pro-rata distribution of the properties could be fair and equitable.

By order dated July 30, 2015, the Probate Judge, Tamara C. Curry, stated that in the absence of an agreement, the Probate Court, as provided by the Private agreement, in would decide the allocation of the remaining real properties, utilizing fiduciary principals. The Court ruled:

> Petitioners . . . acting as Co-Personal Representatives of the Estate of Jacquelin Stevenson, are to divide said

> properties located on Lots 34, 35, 36, and 37, Lakefront Drive . . . , Lot 19 Dupree Creek Lane . . . , and Glascow Island Lane . . . in equity and in good faith among the devisees so that each receives an equal ownership interest in each piece of real estate that is before the Court.

Appellant filed a Motion to Alter or Amend on August 12, 2015, which was denied by order dated September 10, 2015, stating that the language of the residuary clause requires a pro-rata distribution. This appeal followed.

ARGUMENTS

I. The Circuit Court erred in affirming the trial court's holding that Testator's intent was that all real property passing through the Residuary Estate should only pass to each devisee in equal ownership interest shares as opposed to a distribution to each residuary devisee in equal monetary value?

This is not an entirely accurate statement of the holding, either on the part of the Probate Court, or the Circuit Court. Rather, the Probate Court found that the Private Family Settlement Agreement, to which Appellants are signatory, authorized it to make the determination regarding the distribution of the residuary assets "in the event no agreement could be reached." The Private Agreement initially disposed of all estate assets save the residuary, comprised of the three listed properties. The Agreement states (as cited by the Probate Court):

> . . . the residuary assets would either be resolved by subsequent Agreement or will be determined by the Charleston County Probate Court.

The Probate Court made its determination in consideration of standard fiduciary principals, saying:

> Since no subsequent agreement has been presented, the Charleston County Probate Court will make its determination on the residuary assets in light of the duties imposed upon a fiduciary.

This reasoning is beyond dispute, as the Personal Representatives, in their activities regarding the estate, are so bound. In assuming their role, as provided by the Private Agreement, the court merely states the obvious, that the determination will be made in light of fiduciary principals, just as would be required of the Personal Representatives. The court determined, after taking testimony, that, in light of the duties imposed upon a fiduciary, a pro-rata distribution was required in this case. By doing so,

the Probate Court assured an indisputably fair and equal division in all aspects of value, rather than a contrived and self-serving distribution justified by only taking the appraised values into consideration.

Appellant assigns error to the Circuit Court for "failing to determine the testator's intent." This was not the purpose of the Circuit Court's inquiry. Rather, the Circuit Court was charged with determining whether there was any evidence to support the findings of the Probate Court. A case involving the construction of a will is an action at law. *Epting v. Mayer*, 283 S.C. 517, 323S.E.2d 797 (Ct. App. 1984). If the essential nature of the cause of action is legal, the action to be taken by the circuit court is controlled by its determination of whether or not there is any evidence to support the factual findings below. *Dean v. Kilgor*, 313 S.C. 257, 437 S.E.2d 154 (Ct. App. 1993). If so, the (appellate court) may not disturb the findings of the probate court. *Adams v. B & D, Inc.* 297 S.C. 416, 377 S.E.2d 315 (S. Ct. 1989).

Before the Probate Court was evidence of everyone's deep sentimental attachment to Lake Summit, a property purchased by their father, in the family for many years, and where all of the beneficiaries had grown up vacationing. (Pr. Ct. Tr. p. 21 – 24, 28, 29, Also presented to the court was testimony establishing that the property features an existing waterfront vacation home still frequently used by all family members and the fact that the rental income for the property allows it to be held with no out-of-pocket expenditures (Pr. Ct. Tr., p 35, ll. 11 – 25, p. 48, ll. 9 - 14), all as opposed to Bailey's Island and Paradise Island, which are unimproved, rarely, if ever used, provide no income, and require an annual outlay of many thousands of dollars in taxes and regime fees. (Pr. Ct. Tr. p. 25, p. 35, l. 1 – 3, p. 47, ll19 – 25, p. 48, ll. 1 - 14)

Appellants focus on the language of Article 10 of the will, which provides for broad discretion on the part of the Personal Representatives in determining the manner of distributing the residuary assets. This authority is indisputable, but not unlimited. It is, of course, subject to the fiduciary principals. The Probate Court, as affirmed by the Circuit Court, did not, as Appellants suggest, deny this authority, it simply found that in the instant case, in light of fiduciary principals, a pro-rata distribution was the proper exercise of its judicial authority under the Private Agreement. (Probate Court - Order Regarding the Division of Real Property, entered Aug. 12, 2015)

Appellants argue that since the will did not initially make a pro-rata distribution of the real estate, the Testator would not have intended a pro-rata distribution in any case. This is an unwarranted leap of logic. The original set of beneficiaries was radically different from the one now before the courts, in a manner that the Testator could have not imagined. Two of the original six beneficiaries have been barred from inheritance due to malfeasance. Another has died an early, unanticipated death during the administration of the estate. There is discernable reason in not leaving all of the real properties equally to all six beneficiaries. But that the Testator's preference would have been that the Two Personal Representatives would end up, through circumstances that were utterly unpredictable, inheriting both upscale vacation residences, with the third beneficiary consigned to a gerrymandered collection of partial interests in other, less desirable properties is not a valid conclusion. There is no evidence in the will to suggest that the current Personal Representatives would be favored to that extent. The Probate Court found, in light of the evidence presented, and

considering fiduciary principals, that in these circumstances a pro-rata distribution was required.

The Circuit Court heard these arguments, including Appellants' claim to "raw discretion" (Circuit Court Tr. P. 6, ll 11, 12) in the administration of the estate. The Circuit Court observed that section 10.6 still "falls under a fiduciary duty . . . (it) doesn't say y'all can do anything you want, we could care less". (Circuit Court Tr. P. 18, ll 8 – 14). Ultimately, the Circuit Court affirmed the findings and rationale of the Probate Court, stating:

> . . . here, the fiduciary duty in fact requires a pro-rata distribution – to be appropriate in light of the evidence presented. I find that the allocation of Lake Summit by the Personal Representatives to themselves and the division of the remaining properties among all three beneficiaries – particularly in light of the highly disproportionate division of Bailey's Island to force an overall equal valuation of interests – serves no apparent purpose other than to favor themselves . . . at the expense of the remaining beneficiary, which fails the test of equity and good faith.
>
> Circuit Court Order on Appeal,
> Entered April 25, 2017, p. 8.

II. The Circuit Court erred in affirming the trial court's holding that the Co-Personal representatives did not have the broad discretionary authority to make determinations as to what property falls within general descriptions, and to make distributions in any reasonable manner, pursuant to sections 10.1 and 10.6 of the Last will and Testament of Jacquelin K. Stevenson.

Respondent does not argue, and neither the Probate Court, nor the Circuit Court held that the will does not confer broad discretionary authority upon the Personal Representatives to make distributions in any reasonable manner. Nor do Appellants attempt to argue that the authority granted under Article 10 is not subject to the fiduciary principals of good faith, (see Appellant's Brief, p. 16). The distribution

proposed by Appellant Personal Representatives was, at the time of the initial hearing, and as brought to the attention of the Circuit Court:

Paradise Island	
Jaquelin Bennet	$83,000.00
Kathleen Turner	$83,000.00
Genevieve Felder	$83,000.00
James Kelly King	$140,000.00
Bailey's Island	
Jaquelin Bennet	$35,000.00
Kathleen Turner	$35,000.00
Genevieve Felder	$548,500.00
James Kelly King	$106,500.00
Lake Summit	
Jaquelin Bennet	$550,000.00
Kathleen Turner	$550,000.00

Appellants' Proposal for Distribution

(James Kelly King, by agreement, accepted a monetary settlement and is no longer a factor in these deliberations. The buy-out of his share did not otherwise alter this distribution as among the remaining three beneficiaries.)

Such a contrived scheme is devoid of reason, other than the inescapable conclusion that the Personal Representatives are maneuvering to obtain for themselves the most desirable property remaining in the estate to the exclusion of the other beneficiary, a distribution that cannot be seen as anything other than self-serving. When a fiduciary is self-dealing, the standard of scrutiny is enhanced. The transactions "are subject to the closest scrutiny, under the most searching light of truth, and must be characterized by absolute good faith" *Gilbert v. McLeod Infirmary*, 219 S.C. 174, 64 S.E.2d 60 (S. Ct. 1951).

It is a well settled equitable rule that anyone acting

> in a fiduciary relationship shall not be permitted to make use of that relationship to benefit his own interests. It is a doctrine repeatedly announced by the courts of this nation that courts of equity will scrutinize with the most zealous vigilance transactions between parties occupying confidential relations toward each other and particularly any transaction between the parties by which the dominant party secures any profit or advantage at the expense of the person under his influence.
>
> *Island Car Wash, Inc. v. George F. Norris, III, et.al*
> 358 S.E.2d 150, 292 S.C. 595 (Ct. App. 1986).

In the present case, where out of the three remaining beneficiaries, two find themselves as Personal Representatives, there is a clear potential for oppressive conduct. Their decisions in distribution should be subject to no less scrutiny. Yet, Appellants persist in their claim that their authority to distribute in kind is "raw" and absolute, that so long as the distributions can be made equal in terms of monetary value (which, for purposes of this appeal, they equate with appraised value), no other consideration is relevant. (Circuit Ct. Tr. p. 6, ll. 11, 12,)

Respondent has found no probate case considering the issue of non-economic value considerations, but the question has been considered in connection with partition actions, and the courts have held that while not controlling, non-monetary considerations are appropriate. See *Zimmerman v. Marsh*, 618 S.E.2d 898 (S. Ct. 2005). The Supreme Court of West Virginia has said:

> . . . our cases do not support the conclusion that economic value of property is the exclusive test for determining whether to partition in kind or to partition by sale. . . many considerations, other than monetary, attach to the ownership of land.
>
> *Ark land Company v. Rhonda Gail Harper*
> 599 S.E.2d 754 (2004)

(citing supporting cases from Mississippi, South Dakota, North Dakota, North Carolina, Oregon, Connecticut).

Accordingly, Appellants' claim of absolute, "raw" authority is inconsistent with the general law governing fiduciary relations. "While an executor has the power to partition or sell property, we do not suggest that that power is unlimited. The executor is bound by the requirements that the distribution be as equal as possible." *In re: Fitzimmons,* 86 A.3d 1026 (Vt. S. Ct. 2013).

And while Appellants attempt to posture this case as one in which Respondent's concerns are limited to emotional attachment, or simple preference , other weighty concerns clearly exist. Given two properties of equal appraised value, the fact that one carries significant carrying costs (in the case of Bailey's Island $15,000.00 annually (Pr. Ct. Tr. p. 25, p. 35, l. 1 – 3, p. 47, ll19 – 25, p. 48, ll. 1 - 14)) and the other does not would be a matter of very real economic concern to any reasonable person. Likewise, the value of recreational use over and above its relation to appraised value is difficult to quantify, but is real and significant nonetheless.

A further consideration is the fact that while the pro-rata distribution being appealed is unequivocally fair and equitable, the same cannot be said for Appellants proposed allocations. Only a contorted, unreasonable juggling of monetary values is capable of equalizing an in-kind distribution in which Respondent is excluded from Lake Summit. In the proposed distribution before the Probate Court, Baileys Island would be held 88% by Respondent, with Appellants each holding 6%. All three would share Paradise Island in equal shares, a division that Appellants reject for the other properties. Other distribution schemes in which Respondent receives no interest in Lake Summit might be possible, but all would necessarily involve similarly skewed values.

The only discernable reason behind these calculations is that they allow the Personal Representatives to exclude Respondent from the Lake Summit property.

Very valid reasons exist for affording Personal Representatives broad powers to distribute in kind. A beneficiary may have spent years working in a family business. Another may have lived her entire life in a residence owned by her father, and made it her home. The potential situations are limited only by the imagination, and the power to divide in kind is meant to address such considerations as they arise. None of which excuses the Personal Representative from acting reasonably, fairly, and in good faith. For the reasons

CONCLUSION

The Probate Court, after a full evidentiary hearing, found that in the circumstances of this case, only a pro-rata distribution of the real properties constituting the residuary estate could satisfy the requirements of equity, good faith, and fair dealing. The correctness of this ruling is highlighted by the disproportionate allocations proposed by Appellants. The Circuit Court found this approach convincing, reiterating that, in spite of Appellant's claim of unbridled discretion, they were nevertheless constrained by fiduciary principals. In light of these principals, in this case, only a pro-rata distribution can assure a fair and equitable result. Accordingly, the findings of the Probate Court, as affirmed by the Circuit Court, should be AFFIRMED.

Respectfully submitted;

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April 6, 2018
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CERTIFICATE OF SERVICE

I hereby certify that I did, on April 6, 2018, serve the Initial Brief of Respondent upon counsel for Appellants by placing the same in the U.S. Mail, with proper postage attached, addressed as follows:

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Respectfully submitted this 6th day of April, 2018.

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April 6, 2018