THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, Circuit Court Judge

Case No. 2017-002344

Donna M. Rosier,

Appellant,

v.

Angelique Michelle Smith,
Alexandria R. Downs,
individually and as personal
representative for the Estate of
Barry E. Rosier, and Savanah
Rosier,

Respondents.

REPLY BRIEF OF APPELLANT

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I. BECAUSE THE PROBATE COURT LACKED JURISDICTION TO DECLARE AN ANULLMENT OR DIVORCE, THE CIRCUIT COURT ERRED IN AFFIRMING THE DECISION OF THE PROBATE COURT.

Respondent first argues that this issue was not preserved for review by this Court. Respondent relies on *State of South Carolina v. Oxner*, 391 S.C. 132, 705 S.E.2d 51 (2011). However, *Oxner* does not apply to the instant case. In *Oxner*, the Respondent was convicted of baiting a dove field in the magistrate's court and appealed the decision to the Circuit Court. *Oxner* at 133, 705 S.E. 2d at 52 (2011). The Circuit Court specifically ruled that the magistrate's court *lacked* subject matter jurisdiction. *Id* (emphasis added). The Supreme Court held that the State did not preserve the issue of subject matter jurisdiction and could not appeal that issue. The dissent in *Oxner* differentiated cases where the decision is an erroneous assumption of jurisdiction: "[South Carolina] case law is clear that an erroneous assumption of jurisdiction [...] may be raised at any time on appeal and addressed *de novo* by the appellate court without regard to our customary issue preservation requirements." *Id.* at 135, 705 S.E. 2d at 52. See also *In re November 4, 2008 Bluffton Town Council Election*, 385 S.C. 632, 686 S.E.2d 683 (2009). In *Bluffton*, the Petitioners challenged the subject matter jurisdiction of the State Election Committee to review a decision by the Beaufort County Board of Elections and Voter Registration. The *Bluffton* Court held that "subject matter jurisdiction may also be raised at any time, and it is properly contested in this appeal even if it was not raised below." *Bluffton* at 637. The majority in *Oxner* does not overrule *Bluffton* or otherwise assert that an erroneous assumption of jurisdiction cannot be challenged at any time.

The instant case is different from *Oxner* because neither the Probate Court nor the Circuit Court made a specific ruling on the issue of lack of subject matter jurisdiction. See Order Den. Pet'r's Pet., Feb. 22, 2017; and Order Affirming Probate Court Ruling, December 5, 2017. The

instant case is one in which the lower court made an erroneous assumption of jurisdiction similar to the decision in *Bluffton* and unlike the decision in *Oxner*. Therefore, *Bluffton,* not *Oxner*, should be applied to the instant case.

Respondent next argues that the Probate Court had subject matter jurisdiction to issue its ruling. Respondent points out that Appellant chose the Court to consider her claims. Respondent frames Appellant's claim in the Probate Court as a determination of entitlement to pension benefits. However, Appellant's claim had nothing to do with the determining the pension beneficiary. Appellant's declaratory judgment action sought a determination by the Probate Court that Appellant was legally married to Decedent at the time of his death. As fully argued in Argument I of the Initial Brief of Appellant, the Probate Court has limited jurisdiction to determine the heirs of an estate and was limited to determining whether Appellant and Decedent were validly married at the time of Decedent's death, whether a Court of competent jurisdiction granted either party an annulment, and whether a Court of competent jurisdiction had granted either party a legal divorce. Respondent is correct in her brief that "given that [Decedent] has died, no Court has the power to issue a decree of divorce between [Decedent] and Appellant." Initial Brief of Respondent, pg. 4. The Probate Court specifically found that there was no evidence of a legal divorce in the state of South Carolina, and instead found the Appellant's marriage to the Decedent ended in separation, which is an error of law. See Order Den. Pet'r's Pet., Feb. 22, 2017. The Probate Court essentially granted Decedent's heirs a posthumous divorce from Appellant, an action even Respondent admits that no Court has the power to do.

Respondent also argues that the Probate Court merely ruled Appellant was not the "lawful wife" of Decedent at the time of his death. As argued in the Initial Brief of Appellant and in Argument III below, the validity of the marriage between Appellant and Decedent is not at issue.

Therefore, the Probate Court necessarily had to find a legal divorce decree from a Court of competent jurisdiction to reach its conclusion that Appellant was not the "lawful wife" of Decedent at the time of his death.

II. BECAUSE THE PROBATE COURT ERRED IN APPLYING THE BURDEN OF PROOF ON THE AFFIRMATIVE DEFENSE OF DIVORCE, THE CIRCUIT COURT ERRED IN SHOWING DEFERENCE TO THE PROBATE COURT.

Respondent merely states Appellant's argument II is without merit. Appellant fully argued this issue in the Initial Brief of Appellant.

III. BECAUSE THERE IS NO EVIDENCE IN THE RECORD THAT APPELLANT AND DECEDENT WERE LEGALLY DIVORCED, THE CIRCUIT COURT ERRED IN FINDING THERE WAS SOME EVIDENCE TO SUPPORT THE DECISION OF THE PROBATE COURT.

Respondent argues that the Probate Court properly relied upon the duration of Appellant and Decedent's marriage, their familial history, and Appellant's purported subsequent marriages to Mr. Hollings and Mr. Morriss in determining Appellant and Decedent were never married. Respondent also points out that the Probate Court had difficulty in being sympathetic to Appellant's pleas. The underlying facts in this case are largely undisputed. However, as fully discussed in Argument III of the Initial Brief of Appellant, none of these facts support a finding that Appellant and Decedent were divorced. There is not even a scintilla of evidence that a legal divorce between Appellant and Decedent was issued by a court of competent jurisdiction. If the Probate Court's order is upheld, it will establish precedent for an individual's legal status as an heir to be determined not by the laws governing the relationship between the decedent and the individual at the time of Decedent's death, but by the strength of the bond between the heir and other potential heirs. Determining an individual's legal status as an heir is governed by the South Carolina Probate Code, not whether the individual can garner sympathy from a court or affection from the other potential heirs.

Respondent argues that Appellant's signature on the subsequent Application, License, and Certificate of Marriage in Rowan County North Carolina ("NC Affidavit") is evidence of a legal divorce. Between her separation from Decedent and signing the NC Affidavit, Appellant applied for a marriage license to marry Carl Holling under threat of losing her children and her sole means of financial support. Tr. of Hr'g at 9. Appellant was finally able to break away from Mr. Holling with the help of DSS. Tr. of Hr'g at 10. When asked about the NC Affidavit specifically, Appellant testified that she thought there was a chance Decedent had received a "publicized divorce or something," adding "twenty something years he is bound to have done something." Tr. of Hr'g at 11. When Appellant signed the NC Affidavit, she had already signed one marriage application, albeit under duress, without any negative legal consequences. Appellant testified that she was not very concerned about it, even though she had never been served with any divorce papers. Tr. of Hr'g at 11-12. Appellant's mistaken belief or assumption that Decedent may have filed for divorce by some means is insufficient to divorce the parties. Further, signing an affidavit that one is divorced and filing it with the probate court is insufficient to actually divorce the parties. By relying on the signed affidavit and other factors, the Probate Court has created a new cause of action in South Carolina for "common law divorce." Based on this ruling, individuals can terminate their status as a lawful spouse simply by living separately and not talking to each other, attempting to marry a subsequent spouse, mistakenly assuming one is divorced, or signing an affidavit to that affect without going through the family court.

Respondent also argues that she did not admit in her initial pleadings that the marriage between Appellant and Decedent was valid. However, Respondent's Initial Brief is full of admissions to this effect: "Mr. Rosier and Appellant resided together as husband and wife for less than two years." Initial Brief of Respondent, pg. 7 (emphasis added). "Respondent Savannah Rosier

was born of their *marriage*." *Id.* (emphasis added). "Neither of these orders specifically states that the parties are divorced, but arguably established permanently the rights of the parties with respect to their *marital rights*, including the division of any *marital* property." *Id.* (emphasis added). "Her *marriage* to Mr. Rosier ended in a legal separation in 1987 after being *married* less than 2 years and approximately twenty-eight years prior to his death." *Id.* (emphasis added). There is no real dispute as to the validity of the marriage. In fact, Respondent did not attack the validity of the marriage in her answer, rather she specifically raised divorce as a defense to Appellant's claim that Appellant and Decedent were legally married at the time of his death. Resp. Alexandria R. Downs Answer ¶ 10-12, Nov. 16, 2016. It's axiomatic the parties could not have legally divorced if they were not first legally married.

Respondents attempt to distract from the lack of a scintilla of evidence of a legal divorce by focusing on Appellant's lack of likability, labeling her as "unsympathetic." However, redirecting attention on Appellant's past decisions and personal relationships with Decedent and Decedent's other heirs does not change the laws governing this case.

IV. BECAUSE THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT ALL OF THE ELEMENTS FOR JUDICIAL ESTOPPEL, THE CIRCUIT COURT ERRED IN AFFIRMING THE PROBATE COURT'S APPLICATION OF THE DOCTRINE OF JUDICIAL ESTOPPEL.

Respondent argues the doctrine of judicial estoppel was properly applied. Appellant fully argued her position on judicial estoppel in Argument IV of the Initial Brief of Appellant.

V. BECAUSE QUASI-ESTOPPEL WAS NOT ARGUED AT THE CIRCUIT COURT LEVEL, IT CANNOT BE RAISED NOW.

Respondent argues as an additional sustaining ground that Appellant should be quasi-estopped. Respondent argues that Appellant entered into lawful marriages with Mr. Holling and Mr.

Morris freely and voluntarily and is therefore estopped from claiming the invalidity of said marriages. First, this argument was not raised at the circuit court level and therefore was not preserved for appeal. Second, Respondent's framing of the subsequent purported marriages is inaccurate as a matter of law. As Appellant was still legally married to Decedent, her attempted subsequent marriages were void *ab initio* and not lawful under South Carolina law. Further, as previously discussed, Appellant's marriage to Mr. Hollings was entered into under duress and Appellant was not concerned about her her marital status with Decedent at the time of her attempted marriage to Mr. Morris.

Finally, Respondent's argument is based on a *North Carolina* case: *Taylor v. Taylor*, 321 N.C. 244, 362 S.E.2d 542 (N.C. 1987). In *Taylor*, the North Carolina Supreme Court applies a specific North Carolina Statute which provides for a bigamous spouse to lose rights to certain property of the prior spouse. South Carolina has a similar statute. Unlike North Carolina, South Carolina's statute does not include a provision for bigamous spouses. See S.C. Code Ann. § 62-2-507 (2014). Therefore, the North Carolina concept of quasi-estoppel as applied in *Taylor* is not contemplated by the South Carolina legislature and should not be applied in South Carolina.

CONCLUSION

For the reasons stated in the Initial Brief of Appellant and herein, we respectfully ask this Court to reverse the Orders of the Circuit Court and the Probate Court. We respectfully request this Court find the Probate Court and Circuit Court erred as a matter of law and find the Appellant was legally married to the Decedent at the time of Decedent's death. In the alternative, we respectfully request this Court remand the matter to the Probate Court for a specific determination of whether the Marriage was terminated by an annulment or legal divorce issued by a court of competent jurisdiction.

Respectfully submitted,

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April 19, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Appellate Case Number 2017-002344

Donna M. Rosier, Appellant

vs.

Angelique Michelle Smith, Alexandria R. Downs, Individually and as Personal Representative of the Estate of Barry E. Rosier, and Savannah Rosier, Respondents

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PROOF OF SERVICE

The undersigned hereby certifies that a copy of the Reply Brief of Appellant in the above captioned matter was served on Arthur W. Rich and Clarke W. McCants, III, attorneys for Alexandria R. Downs, by mail on the date below:

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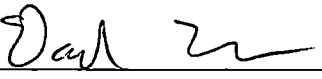

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April 20, 2018

Hon. Jenny Abbott Kitchings
SC Court of Appeals
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RE: Rosier v. Smith, et al.
Appellate Case No.: 2017-002344
Our File No.: 021734-00002

Dear Ms. Kitchings,

Enclosed please find the original and one copy of the Reply Brief of Appellant and Certificate of Service in the above referenced appeal. Please file the enclosed documents and return the copies in the self-addressed return envelope enclosed for your convenience. By a separate letter I am serving the same on Arthur W. Rich and Clarke W. McCants, III, attorneys for Respondent Downs.

Should you have any questions concerning this matter, please do not hesitate to contact me at (803) 563-5163 or by e-mail at David@LawyerLisa.com.

Sincerely,

David Ziegler
(SC Bar # 102415)

DZ/jl
Enclosures
cc: Arthur W. Rich, Esq.
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