

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2015-CP-07-00913
Appellate Case No. 2017-002019

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SC Court of Appeals

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 a Trustee of the
Trust Agreement of Sally Manning Dated December 6, 2004 Respondent,

v.

The Estate of John J. Manning, Jr.; John J. Manning, III;
Christopher Manning, and Linda Manning, Appellants.

BRIEF OF RESPONDENT

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COUNTER-STATEMENT OF ISSUE ON APPEAL

The statutes relating to the elective share provide a surviving spouse with the right to take one third of a deceased spouse's probate estate. The sole issue in this appeal is:

Whether the circuit court correctly held the elective share is not satisfied by placing a third of the decedent's probate estate in a trust that does not guaranty the surviving spouse will receive any trust benefits and that does not meet the "full value" requirements under federal and state law.

STATEMENT OF THE CASE

This case revolves around statutes dealing with the elective share. The right to an elective share is codified at S.C. Code Ann. § 62-2-201 (Supp. 2017). The statute at issue here is a subsequent provision—section 62-2-207 (Supp. 2017)—dealing with offsets to the share and explaining how to value certain assets and interests passing to a surviving spouse.

The case arises out of John Manning Jr.'s death. The parties call him Jack.

The basic facts are not disputed. Jack and Sally Manning were married in October of 1997. (R.p.73). Sally has resided in a long term care facility since 2008 due to dementia. (R.p.12, ¶15; p.54). Deanna Bushman holds Sally's durable power of attorney. (R.p.4 n.1; p.10, ¶1).

Jack died in September of 2014. (R.p.74). His will was filed with the probate court in October of 2014. (R.p.24, ¶104; p.36, ¶98).

In April of 2015 Bushman filed a petition for an elective share on Sally's behalf. (R.p.53). The case was removed to circuit court. *Id.*

The circuit court record begins with Bushman's amended complaint and petition for elective share filed several months later, in December of 2015. (R.pp.10-25).

Bushman's amended complaint is lengthy and alleges multiple instances of misconduct by Jack's sons John III ("Jay") and Christopher. Bushman claims Jay and Christopher began converting Jack and Sally's assets to their own use when Jack's mental capacity began deteriorating in 2012. (R.pp.14-19). Specific allegations of wrongdoing include taking control of bank accounts Sally held individually and withdrawing roughly \$183,000 from one such account, (R.p.13, ¶¶20-21), taking control of bank accounts Jack and Sally held jointly and withdrawing nearly \$12,000 from one such account, (R.p.14, ¶¶26-33), and withdrawing over \$160,000 from accounts held in Jack's name. (R.p.16, ¶43 & p.17, ¶54). Bushman brought multiple claims including breach of fiduciary duty and conversion. Her eighth cause of action was Sally's claim for an elective share. (R.p.23).

The defendants denied the allegations of misconduct and brought counterclaims against Bushman for conversion and a constructive trust. The counterclaims alleged Bushman improperly withdrew roughly \$14,000 for Sally from one of Jack's accounts. (R.p.38, ¶¶125-126). For ease of reference, this brief refers to all defendants as the Estate.

The Estate's answer denied Sally was entitled to an elective share. (R.p.39, ¶142). The answer alternatively alleged that if Sally *was* entitled to the elective share the assets would not pass to Sally outright but were required to go in a discretionary support trust described in Jack's estate planning documents. (R.p.40, ¶¶149-150). This discretionary support trust was the central issue in the proceedings below.

The discretionary support trust was a fallback for Jack's attempt to disinherit Sally. Jack's will left Sally nothing. (R.p.75) ("Item 1"). Jack's trust documents followed suit, explaining Jack's entire trust estate would pass into the "Manning Family Share" at his death.

(R.p.81) (Article 4B). Jay and Christopher are the sole beneficiaries of the Manning Family Share. (R.pp.78, 82) (Articles 1A & 5). The trust documents acknowledged Jack was not making any provision for Sally. (R.p.81) (Article 4C).

The discretionary support trust minimized any benefit Sally might receive if Jack's attempt at disinheritance failed. Jack's trust document says that in the event any portion of Jack's trust estate "shall be deemed" payable to Sally or for her benefit, "such amount" should not pass directly to Sally but "shall be held, administered and distributed as a separate share," with Jay and Christopher serving as co-trustees. *Id.*

Jay and Christopher are not required to distribute any income or principal to Sally, but are instead empowered to distribute "so much of the income of the separate share, if any" they determine as co-trustees to be "necessary" for Sally's health and support after giving "due regard" for Sally's other income from other sources. *Id.* (Article 4C1). At Sally's death any undistributed trust income and all the trust principal *shall* be added to and become a part of the Manning Family Share, benefitting Jay and Christopher. *Id.* (Article 4C2).

In 2017 the parties filed cross-motions for summary judgment about whether placing a third of Jack's probate estate in the discretionary support trust would satisfy the elective share. The Estate interpreted the probate code as giving full value to "all beneficial interests held in trust for the surviving spouse." (R.p.57). Thus, the argument was that placing a third of Jack's estate in this trust for Sally would satisfy the elective share. *Id.*

Bushman disputed this, arguing Sally had not received anything from Jack's estate even though Jack had been dead for three years and that this trust did not meet the statutory requirements for satisfying the elective share. (R.pp.65-71). Bushman contended the trust

was an invalid attempt to avoid the elective share. *Id.* Distributions were discretionary and tied to necessity. This made it unlikely Sally would receive anything.

The court heard the summary judgment motions on July 11, 2017. (R.pp.100-112).

On September 8, 2017, the circuit court granted Bushman's motion for summary judgment. (R.pp.4-9). The order briefly summarized the case before explaining its analysis in the final three pages. (R.pp.6-8). The court agreed with Bushman's arguments, observing nothing passed to Sally under Jack's will or his revocable trust, that Sally was not guaranteed to receive any benefit from the discretionary support trust, and that the trust did not meet the "full value" requirements for satisfying the elective share. *Id.*

The Estate filed a timely motion to reconsider. (R.pp.95-99). The circuit court entered a form 4 order denying the motion on September 19, 2017. (R.pp.1-3).

The Estate served notice of its appeal September 27, 2017.

ARGUMENT

The circuit court correctly held that placing a third of Jack's estate in the discretionary support trust would not satisfy the elective share.

First, the law entitles Sally to a third of Jack's estate, yet under this trust Sally may not get anything and may not receive any benefit. This contravenes the probate code. The elective share is not conditioned on need.

Second, the discretionary support trust does not satisfy the statutory requirements for counting the full value of the trust assets towards satisfying the elective share. The law allows a testator to reduce the elective share by placing all or part of the elective share amount in trust. The trust must meet certain objective standards set forth in the Internal

Revenue Code. The discretionary support trust does not meet those standards, thus, placing a third of Jack's estate in the discretionary support trust does not satisfy the elective share.

The Estate says this case involves valuing inter vivos trusts (trusts created during the testator's lifetime) and "illusory" trusts. Respectfully, the Estate is incorrect. This case is controlled by the fact that the discretionary support trust fails to comply with the standards for receiving full value—a dollar-for-dollar credit—towards the elective share.

In similar fashion, the Estate's arguments about the trust having discernable standards for management, about expert testimony offered below, and about whether the circuit court correctly said the discretionary support trust was incapable of valuation are either irrelevant, barred from consideration, or wrong. This Court should affirm.

A. The circuit court correctly held this would-be support trust does not satisfy the elective share.

The circuit court correctly held this trust (which had not been created or funded) would not satisfy the elective share. The elective share is not conditioned on the surviving spouse's need. This trust does not satisfy the statutory requirements for "full value" counting towards the elective share. The Estate's arguments about inter vivos trusts are irrelevant.

i. A surviving spouse is entitled to a third of the probate estate but under this trust the surviving spouse potentially receives nothing.

Section 62-2-201(a) says that when a married person domiciled in South Carolina dies "the surviving spouse has a right of election to take an elective share of one-third of the decedent's probate estate[.]" Precedent describes the elective share as a "substantial" right. *Seifert v. S. Nat. Bank*, 305 S.C. 353, 357, 409 S.E.2d 337, 339 (1991).

A testator may not circumvent the elective share. Indeed, a testator's intent to bypass the elective share is irrelevant. This was settled by *Matter of Patrick*, which specifically rejected the argument that enforcing the elective share would be contrary to the decedent's wishes. 303 S.C. 559, 562-563, 402 S.E.2d 664, 665-666 (1991).

No case has held that "taking" the elective share requires the surviving spouse to receive assets in fee simple absolute. In fact, the next section of this brief discusses the probate code's explicit recognition that certain assets count dollar-for-dollar in satisfaction of the elective share even though the surviving spouse does not inherit them outright.

But as the circuit court correctly reasoned here, Sally did not receive anything from Jack's estate in the three years that lapsed between his death and the summary judgment hearing. (R.p.7). Nothing passed to Sally in 2014, 2015, 2016, or 2017. (R.p.110).

The circuit court also correctly reasoned it is entirely possible Sally would continue receiving nothing if the amount of the elective share was placed the discretionary support trust. (R.p.7). The "benefits" this trust provides are conditional and indeterminate. The benefits are conditional because they rely on Jay and Christopher's discretionary determination that a distribution is "necessary" for Sally's health and support. *Id.* The benefits are indeterminate because it is impossible to predict the future and because an insurance policy currently provides for Sally's monthly care at her residential facility. (R.p.105, lines 1-4). Given these circumstances, even if the elective share *had* been put in this trust Sally would effectively get nothing from Jack's estate.

This directly violates the elective share statute. The surviving spouse's right to take an elective share is not based on the surviving spouse's need or on a third party's assessment

of that need. This is no different that the intent argument the Supreme Court rejected in *Matter of Patrick*. See 303 S.C. at 562-563, 402 S.E.2d at 665-666.

The circuit court correctly held the discretionary support trust would not satisfy the elective share statute and did not “entitle” Sally to anything. (R.p.8).

ii. The circuit court correctly held the trust could not satisfy the elective share because the trust does not meet the statutory requirements for “full value.”

Prior to the probate code’s 2013 amendments any benefits a surviving spouse received from a deceased spouse’s non-probate assets were irrelevant to the elective share’s calculation. It did not matter, for example, that the surviving wife in *Gallagher v. Evert* had received over \$219,000 in assets from her deceased husband outside of probate court. 353 S.C. 59, 62, 577 S.E.2d 217, 218 (Ct. App. 2002). This Court explained benefits obtained from non-probate assets “are immaterial” to the elective share. *Id.* at 67, 577 S.E.2d at 221.

After the probate code’s 2013 amendments “certain specific non-probate assets received as a result of the deceased spouse’s death” are counted towards the surviving spouse’s elective share. S. Alan Medlin, *The South Carolina Probate Code Patched and Refurbished: Version 2013*, 65 S.C. L. Rev. 81, 103 (2013). The list of those assets is codified in section 62-2-207(a). Benefits from life insurance, retirement accounts, and benefits passing into a trust count as credits towards the elective share amount. *Id.*

The key part of the statute for this case is the subsection explaining how to value a “beneficial interest” such as Sally’s beneficial interest in a trust. Section 62-2-207(c)(1) says the surviving spouse’s beneficial interest “must be computed at the full value of the qualifying property” if the beneficial interest “qualifies for the federal estate tax marital

deduction pursuant to Section 2056 of the Internal Revenue Code.” In the words of a frequent commentator, this “ allows a deceased spouse to partially avoid the elective share by devising to the surviving spouse a beneficial interest in a trust that qualifies for federal tax purposes.” Medlin, *supra* p.7, at 105. The surviving spouse is “charged” with the full value of the trust property even though the beneficial interest “is for income only and does not include an entitlement to trust principal.” *Id.*

As the circuit court correctly found, the problem with the discretionary support trust is that it does not meet the Internal Revenue Code’s objective requirements to qualify for the federal estate tax marital deduction. In order for assets passing in trust for the surviving spouse to qualify for the marital deduction, and therefore be treated as qualifying property under section 62-2-207, the surviving spouse must be “*entitled to all the income*” or have a “usufruct” interest (the right to use the property) for life. 26 U.S.C. § 2056(b)(5) and 26 U.S.C. § 2056(b)(7)(B)(ii)(I) (emphasis added). One such qualifying trust is a “QTIP trust.” QTIP stands for Qualified Terminable Interest Property as this Court as previously noted. *Green ex rel. Estate of Cottrell*, 346 S.C. 53, 56, 550 S.E.2d 324, 326 (Ct. App. 2001).

Sally is not entitled to all the income from the discretionary support trust. Indeed, Sally is not entitled to any of the trust income. As the circuit court noted, distributions are conditioned on Jay and Christopher’s discretion. (R.p.8). Thus, placing a third of Jack’s estate in the discretionary support trust would not and cannot satisfy the elective share.

Secondary authority identifies an additional statutory reason why the discretionary support trust would be defective as drafted. Recognizing that a beneficial interest in income *only* is not actually worth “the full value of the underlying trust property,” Medlin, *supra* p.7,

at 105, the probate code gives a surviving spouse the right to convert a trust treated as qualifying property to “a total return unitrust.” See § 62-2-207(c)(3). This conversion allows distributions to be based on the total value of property in the trust rather than just the income the trust property produces. Medlin, *supra* p. 1, at 87. Thus, even if the discretionary support trust met the requirements for a trust that qualifies for the deduction under Section 2056 of the Internal Revenue Code—and it does not—Sally’s beneficial interest and distributions could never be tied to her necessity or subordinated to Jay and Christopher’s discretion.

The circuit court correctly held the discretionary support trust did not qualify for “‘full value’ satisfaction” of the elective share. See (R.p.8 n.3). In light of that finding, the court had no choice other than to grant Bushman’s summary judgment motion and deny the Estate’s summary judgment motion.

iii. This case turns on the trust’s failure to meet the “full value” requirements. Arguments about inter vivos trusts or “illusory” trusts are irrelevant.

The Estate argues in its brief that gifts made to a surviving spouse in a revocable inter vivos trust would count towards the elective share. Agreed. Section 62-2-207(a)(8) ensures gifts made to an inter vivos trust during life are counted. Section 62-2-207(b) covers interests that pass under the will to a preexisting inter vivos trust.

The issue on summary judgment does not have anything to do with an inter vivos trust. Jack did not pass anything to Sally in an inter vivos trust. Jack designed his estate planning documents so Sally would not take anything from his estate.

Jack’s backup plan was for the discretionary support trust to be carved out of his inter vivos trust in the event someone determined Sally was entitled to part of his estate. The

controlling question is whether that discretionary support trust would meet the requirements for receiving a dollar-for-dollar credit towards the elective share. It does not.

The Estate also argues in its brief that Jack's trust must be found "illusory" before trust assets can be used to calculate the elective share. This is wrong. Everybody agreed below that the assets held in trust at Jack's death were included in Jack's probate estate. (R.p.8 n.5; p.57).

The summary judgment issue has nothing to do with the issue of "illusory" trusts. That term originated in South Carolina with the Supreme Court's decision in *Seifert v. Southern National Bank*, where the Court rejected a husband's attempt to avoid the elective share by transferring the bulk of his estate to a trust benefitting his children before he died. 305 S.C. at 355, 409 S.E.2d at 338 (1991). The Court deemed the trust illusory because the husband had "extensive control" over it. *Id.* at 355-356, 409 S.E.2d at 338.

The General Assembly responded by enacting a statute explaining this sort of "illusory" trust was a valid trust, that its value may be included in the probate estate, and that trust assets are available to satisfy the elective share if necessary. S.C. Code Ann. § 62-7-401(c) (Supp. 2017). The Supreme Court acknowledged this statute in *Dreher v. Dreher*, a case where (as in *Siefert*), one spouse passed a substantial amount of property into a trust for the benefit of himself and his issue before he died. *Dreher*, 370 S.C. 75, 78, 634 S.E.2d 646, 647 (2006). The statute is referenced in footnote 2. *Id.* at 80, 634 S.E.2d at 648.

Here, the circuit court dealt with a different sort of attempt to get around the elective share—attempting outright disinheritance and then attempting to tie the surviving spouse's benefits from the elective share to her need for those benefits. This Court has already noted

South Carolina's statute does not authorize such a requirement. *Gallagher*, 353 S.C. at 66 n.4, 577 S.E.2d at 220 n.4. The circuit court's grant of summary judgment was correct.

B. The Estate's arguments about the trust having standards for administration, about expert testimony, and about whether the trust is capable of valuation are either not relevant, barred from consideration, or mistaken.

The Estate's brief offers three additional arguments for reversal. It contends the discretionary support trust has "discernable guidelines and standards for administration," that the circuit court relied on improper expert testimony, and that the record fails to support the circuit court's conclusion that the discretionary support trust has no value.

First, it does not matter that the discretionary support trust has discernable guidelines and standards for administration. It does not matter that Sally could hold Jay or Christopher liable if they do not exercise their discretion "as a reasonably prudent man would do with relation to his own affairs." *Cartee v. Lesley*, 290 S.C. 333, 336, 350 S.E.2d 388, 390 (1986); see also S.C. Code Ann. § 62-7-804 (Supp. 2017) (statutory standard for prudent trust administration). Sally won because her right to claim an elective share is not contingent on her need and because the discretionary support trust does not meet the statutory standards for satisfying the elective share.

Second, the Estate never objected to the expert's testimony. Bushman supported her summary judgment motion with an affidavit from a certified specialist in estate planning. (R.pp.91-94). There was no objection to this expert in the Estate's summary judgment memo, (R.pp.53-58), at the hearing, (R.p.111), or in the Estate's post-trial motion. (R.pp.95-99). An argument is not preserved for review if it was not raised to the circuit court and

ruled on by the circuit court. *Mullinax v. J.M. Brown Amusement Co.*, 333 S.C. 89, 94, 508 S.E.2d 848, 850 (1998).

Finally, the circuit court did not determine the discretionary support trust had “no value.” The circuit court found the trust was never set up, funded or transferred, and that even if the trust had been created and funded, the trust’s contingent and discretionary conditions for paying benefits rendered the beneficial interest “incapable of calculation” towards the elective share. (R.p.8). This was not an evidentiary finding or a finding of fact. It was a direct reference to Bushman’s argument that the discretionary support trust was not a qualifying trust under state and federal law.

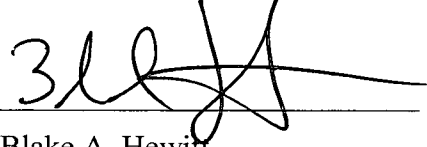
CONCLUSION

For the foregoing reasons this Court should affirm the circuit court’s judgment.

May 17, 2018

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