

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM FLORENCE COUNTY
CIRCUIT COURT

Thomas A. Russo, Circuit Court Judge

APPELLATE CASE NO. 2018-001144

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JAN 28 2019
SC Court of Appeals

IN THE MATTER OF:
THOMAS G. MOORE (Decedent)

Michael Dennis Moore.....Appellant,

v.

Thomas Paul Moore, Francine Laura Lawhon,
Linda Kaye Moore, Phillip Frederick Moore.....Respondents.

REPLY BRIEF OF APPELLANT

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ARGUMENT

- I. **The lower courts erred in ruling that a separate envelope containing a document with instructions giving a piece of the Testator's estate, should be integrated into the Testator's will when the separate document was not connected to the Testator's will, was not referenced in the said will, and was not attested to by appropriate witnesses that it was present at the time of the signing of the Will.**

The doctrine of integration has never been formally adopted or followed in the State of South Carolina, and therefore the Probate court's recognition of said doctrine should be reversed and the extrinsic documents which sought to devise the subject property should not be considered a part of the Decedent's Will. If this court chooses to formally adopt the doctrine of integration, the Appellant would argue that there is no evidence submitted that reasonably supports the Probate courts finding of the said doctrine.

After setting aside the issue of whether the doctrine of integration is followed in the State of South Carolina, the Respondent argues that the Appellant never put forth any attesting witnesses to prove that the subject document was not identified at the time of the execution of the Will. The Appellant would counter that the burden of proof lies with the party seeking to establish a document as part of the will. The formal execution of the subject document, was never proved or admitted, therefore the burden of proof falls to the Respondent in providing the probate court with the proper evidence of its execution. The Appellant would argue this burden of proof was never met.

The Supreme Court decision in Goethe v. Browning is the South Carolina Authority in which the Respondent relies on in his argument for the doctrine of integration. In Goethe v. Browning the court states that:

When a will is composed of more than one sheet, it may become a question of fact for a jury, in a trial of will or no will, to determine whether the unsigned sheet or sheets composing the purported will is or are in fact a part of the will of a testator. The proof of such fact depends upon the rules of evidence, which require that the separate unsigned sheets be identified at the time of the execution of the will, or upon the probate thereof, by all or any one of the attesting witnesses. Goethe v. Browning, 146 S.C. 7,13-14 (1928).

It is clear in Goethe v. Browning that in proving that a separate unsigned sheet of paper was a part of the will, the court looked to the attesting witnesses. Id. at 14.

One of the subscribing witnesses to the will in question, Johnston, testified at the trial that the said purported will, signed by testatrix in his office and attested and subscribed by himself and the two other witnesses, was composed of the two sheets submitted to the jury as the last will and testament of Mrs. Goethe. Id.

In our case the evidence provided by the Respondent in the Probate hearings fails to provide attesting witnesses as to the unsigned letter they sought to introduce as an integrated document and as to whether or not this unsigned letter was a part of the Decedent's will. Therefore there was not enough evidence submitted by Respondent to reasonably support the Probate courts finding of the doctrine of integration.

For these reasons set forth above the Probate Court erred in ruling that the separate subject document should be integrated into the Decedent's Will.

II. The lower courts erred as a matter of law in ruling that the joint tenancy with a right of survivorship between the Testator and the Appellant was severed at the time of the purchase agreement to sell the property was signed.

The Appellant was the sole owner of the subject property located at Cypress Avenue in Garden City, South Carolina, at the time the subject property was sold, when the Appellant and the Decedent owned the property as joint tenants with a right of

survivorship and the Decedent passed away before the final closing and recording the said property.

The Respondent argues that the Appellant fails to mention any case or statutory law that would counter the Respondent relying on one authority South Carolina Federal Savings Bank v. San-A-Bel Corporation. The Appellant responds by stating that the facts within South Carolina Federal Savings Bank v. San-A-Bel Corporation do not discuss the termination of the rights of survivorship of a Joint tenancy. Therefore, the Appellant would argue the subject case is not controlling authority in determining the rights of Joint tenants with rights of survivorship. The Appellant would call this Court's attention to the statutory authority determining the rights of Joint tenants with rights of survivorship in the Code of Laws of South Carolina 1976 Ann. § 27-7-40(a)(i) and (iv) and § 27-7-40(b).

Code of Laws of South Carolina 1976 Ann. § 27-7-40(a)(i) and (iv) and § 27-7-40(b) and (c) states the following:

(a) In addition to any other methods for the creation of a joint tenancy in real estate which may exist by law, whenever any deed of conveyance of real estate contains the names of the grantees followed by the words "as joint tenants with rights of survivorship, and not as tenants in common" the creation of a joint tenancy with rights of survivorship in the real estate is conclusively deemed to have been created. This joint tenancy includes, and is limited to, the following incidents of ownership:

(i) In the event of the death of a joint tenant, and in the event only one other joint tenant in the joint tenancy survives, the entire interest of the deceased joint tenant in the real estate vests in the surviving joint tenant, who is vested with the entire interest in the real estate owned by the joint tenants.

(iii) The fee interest in real estate held in joint tenancy may not be encumbered by a joint tenant acting alone without the joinder of the other joint tenant or tenants in the encumbrance.

(iv) If all the joint tenants who own real estate held in joint tenancy join in an encumbrance, the interest in the real estate is effectively encumbered to a third party or parties.

(b) The surviving joint tenant or tenants may, following the death of a joint tenant, file with the Register of Deeds of the county in which the real estate is located a certified copy of the certificate of death of the deceased joint tenant. The fee to be paid to the Register of Deeds for this filing is the same as the fee for the deed of conveyance. The Register of Deeds must index the certificate of death under the name of the deceased joint tenant in the grantor deed index of that office. The filing of the certificate of death is conclusive that the joint tenant is deceased and that the interest of the deceased joint tenant has vested by operation of law in the surviving joint tenant or tenants in the joint tenancy in real estate.

(c) Except as expressly provided herein, any joint tenancy severed pursuant to the terms of this section is and becomes a tenancy in common without rights of survivorship. S.C. Code Ann. § 27-7-40

The Probate court cites S.C. Code Ann. § 27-7-40(a)(iv) in its order as stated above. South Carolina Code Ann. § 27-7-40(a)(iv) allows for Joint tenancies with a right of survivorship to effectively encumber property to third parties when all joint tenants sign and agree to encumber the property, while conversely S.C. Code Ann. § 27-7-40(a)(iii) states a joint tenant may not encumber a piece of property individually. In Smith v. Cutler the Supreme Court states, “a joint tenancy with a right of survivorship is capable of being defeated by the unilateral act of one joint tenant.” Smith v. Cutler, 366 S.C. 546, 550 (2005). The Appellant would infer upon reading the face of the South Carolina Code Ann. § 27-7-40(a)(iv), that if legislators intended that when “all the joint tenants who own real estate held in joint tenancy join in an encumbrance” would then sever their rights of survivorship that it would have been stated within the wording of the statute. The Appellant’s inference stems from the legislature’s wording immediately thereafter in S.C. Code Ann. § 27-7-40(a)(v), (vii), and (viii), which states the following about defeating a Joint tenants rights of survivorship:

(v) If real estate is owned by only two joint tenants, a conveyance by one joint tenant to the other joint tenant terminates the joint tenancy and conveys the fee in the real estate to the other joint tenant.

(vii) Any joint tenancy in real estate held by a husband and wife with no other joint tenants is severed upon the filing of an order or decree dissolving their marriage and vests the interest in both the parties as tenants in common, unless an order or decree of a court of competent jurisdiction otherwise provides.

(viii) The interest of any joint tenant in a joint tenancy in real estate sold or conveyed by a court of competent jurisdiction where otherwise permitted by law severs the joint tenancy, unless the order or decree of such court otherwise provides and vests title in the parties as tenants in common. S.C. Code Ann. § 27-7-40(a).

The wording within this very same statute lays out three scenarios in which a joint tenant's rights of survivorship are terminated. However, it does not do so within South Carolina Code Ann. § 27-7-40(a)(iv). Therefore, the Appellant contends that the Probate court incorrectly claimed jurisdiction over a non-probate asset and ruled that the Joint tenancy with the right of survivorship was terminated the moment the contract for sale of the property was signed by both tenants.

For these reasons set forth above, the Probate court erred as a matter of law in ruling that the joint tenancy with a right of survivorship is defeated solely by the signing of a contract to sale real property, when both parties signed the subject agreement.

III. Did the circuit court err in ruling that the Appellant did not preserve the issue for review of prejudicial submission of evidence and allowance of claims the day of trial, when counsel for the Appellant did not object to evidence and claims at time of submission but later requested the ability to respond to Respondents allegations and submission of evidence but was denied by the probate court.

The Appellant did preserve the issue of the prejudicial submission of new evidence and claims by the Respondent on the day of the final hearing, when the

Appellant's request to respond to the Respondent's summary was denied by the Probate court.

The South Carolina Supreme Court in the State v. Dunbar states the following in regards to preservation of an issue for appeal:

A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground. State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001). State v. Dunbar, 356 S.C. 138, 142 (2003).

The Respondent argues that the Appellant request and denial by the probate court, to file a Counter Summary brief to the Respondent's, was not enough to preserve this subject issue on appeal. The Probate court states in the July 27, 2016 the following:

I would like to have a summary of what Mr. Moore's (Respondent Phillip Moore) position is with regard to these checks and monies. July 27, 2016 hearing P. 90.

The checks and monies that the Probate court were referring to, were alleged loans and payments made to Tammy Jackson, the sale of a Jaguar, and loans made to "Moore's Cars" by the Decedent, in which the Respondent claims the Appellant did not account for as the acting Personal representative. The Probate's court's request for the Respondent to provide a "position" to potential claims against the Appellant, while denying the Appellant's request to respond, demonstrates the Appellant's "argument" had "been presented" on that ground.

For the reasons set forth immediately above, the Appellant preserved the issue of prejudicially submitted checks and summary for appeal.

- a. And if the issue was preserved, did the probate court err in allowing the submission of new evidence and claims by the Respondent on the day of the final hearing?**

The Appellant was unfairly prejudiced by the admission of evidence of copies of checks¹ by the Respondent Phillip Moore, who obtained such documents through ways of subpoena, was in possession of such documents before the first hearing on December 22, 2015, and never disclosed such documents to the Personal Representative, his attorney or to the Appellant or his attorney. Further, Appellant was unfairly prejudiced by the Probate court's decision to allow the Respondent Phillip Moore to provide his "position" as to his claims regarding the above referenced checks, without also allowing the Appellant the ability to respond.

The Respondent argues that the Appellant's lack of discovery before trial and Appellant's failure to object to the subject evidence submitted at trial, prevent him from being able to claim unfair prejudiced as to their admission at the hearing.

The Appellant would argue that because the Respondent retrieved the subject copies of checks through subpoena, those checks should have been should have been disclosed to all parties of the probate action upon receipt. These checks never were disclosed until the day of trial. Furthermore, after receipt of these checks, before the first hearing, the Respondent had ample opportunity to amend his complaint to add causes of actions, and put all parties on notice of his position as to the checks he planned to submit. An amended complaint was never filed.

The South Carolina Rules of Evidence Rule 403 states the following:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. South Carolina Rules of Evidence Rule 403.

¹ "Copies of checks" refers to evidence submitted by Respondent Phillip Moore in order to show: (1) loans made by the Decedent to Tammy Jackson; (2) funds received for the repossession and sale of a 2004 Jaguar; and (3) loans to Moore's Car LLC.

For the above stated reasons, the lowers court erred in allowing Respondent Phillip Moore to submit the above stated documents as evidence on the July 27, 2016 hearing, because it was unfair and prejudicial to the Appellant. Further, the Appellant was prejudiced in the allowance of the Respondent Phillip Moore to submit to the court his "position" as to copied checks, without also allowing the Appellant to file a response.

CONCLUSION

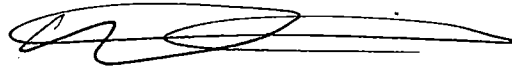
For the abovementioned reasons the Appellant respectfully requests this court to reverse the Lower courts' decision or in the alternative require a new hearing on the above stated issues.

Respectfully submitted,

Dated at Surfside Beach, South Carolina, this 31st day of October, 2018.

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Court of Common Pleas

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Appellant's Reply Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules.

January 25, 2019



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PROOF OF SERVICE

I certify that I have served a copy of the Reply Brief of Appellant, Certificate of Counsel and Proof of Service by depositing a copy in the United States Mail, postage prepaid, on January 25, 2019, addressed to the Deputy Clerk, South Carolina Court of Appeals, 1220 Senate Street, Columbia, SC 29201 and by depositing a copy of same in the United States Mail, postage prepaid, addressed to the following:

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January 25, 2019

Via UPS Next Day Delivery

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**RE: Michael Dennis Moore v. Thomas Paul Moore, et al.
Appellate Case No. 2018-001144**

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Dear Ms. Kitchings:

Enclosed please find the following for filing in the above-referenced case:

1. Reply Brief of Appellant;
2. Certificate of Counsel; and
3. Proof of Service.

By copy hereof, all parties to this action have been served with an unlocked copy of the referenced documents. Once these documents have been filed, we will forward a locked copy to all parties.

Thank you for your assistance in this matter and in the event you require any further documentation, please do not hesitate to contact our office.

In kind regards, I remain

Sincerely yours,



Norwood D. DuRant, Jr.

NDDjr/jlj

Enclosures

cc: C. Pierce Campbell, Esquire (via US Mail)
Francine L. Lawhon (via US Mail)
Linda K. Moore (via US Mail)
James R. Snell, Jr., Esquire (via US Mail)
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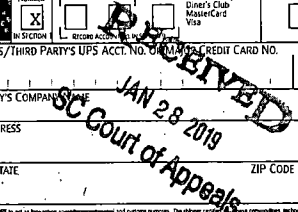
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