

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

J.C. Nicholson, Jr. Circuit Court Judge

Opinion No. 2018-UP-365 (S.C. Ct. App. Filed Sep. 19, 2018)

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S.C. SUPREME COURT

In RE: Estate of Norman R. Knight, Jr., (deceased), and Estate of Mildred C. Knight,  
(deceased), and Norman Robert 'Bobby' Knight, III, Petitioners,

v.

Beatrice A. Whitten, as a Special Administrator, and Chloe Knight-Tonney, Claimant,  
Respondents,

**PETITIONERS' REPLY TO KNIGHT-TONNEY**

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## ARGUMENTS

### I. **THERE IS NO WAIVER OF NULL AND VOID PROCEEDING.**

“In South Carolina , a civil action is commenced by filing and serving a summons and complaint. Until an action is commenced, there is no proceeding pending and, thus, nothing to refer.” Chabek v. Nationwide Mutual Fire Ins. Co., 303 S.C. 26, 28, 397 S.E.2d 786, 787 (Ct. App. 1990). Rule 3 (a), SCRPC. Since 1985, the South Carolina Rules of Civil Procedure, through Rules 1 and 81, and pursuant to S. C. Code sec. 14-23-280 and sec. 62-1-304, have always required the filing of a summons and complaint in Probate Court matters. See, In Re: Estate of Timmerman, 331 S.C. 455, 502 S.E.2d 920, 922 (Ct. App. 1998); Weeks v. Drawdy, 495 S.E.2d 454 (Ct. App. 1997); Truluck v. Synder, 362 S.C. 108, 606 S.E.2d 792 (Ct. App 2004); LaFaye v. Timmerman, 502 S.E.2d 920 (Ct. App. 1998). See Summons Subcommittee: Probate, Estate Planning and Trust Section, Summons in Probate Court, p. 5-7 (January 21, 2010) (R. p. 283).

“ A void judgment is one that, from its inception, is a complete nullity and is without legal effect and must be distinguished from one which is merely voidable. 46 AmJur 2d, Judgments 331 (1994). Generally, a judgment is void only if a court acts without jurisdiction. Ross v Richland Co., 270 S.C. 100, 240 S.E.2d 649 (1978). The Law provides that once State and Federal jurisdiction has been challenged, it must be proven. Main v. Thiboutot, 448 U.S. 1, 100 S. Ct. 2502, 65 L.Ed.2d 55 (1980). Respondent Knight-Tonney did not file and serve a summons with her petition. Respondent, Chloe Knight-Tonney, did not commence an action in the probate court and nothing that occurred has legal substance. Ms. Knight-Tonney’s claim is **void ab initio**. Chalek v. Nationwide Mutual Fire Ins. Co., *id.*

## **II. S. C. SUPREME COURT CHIEF JUDGE'S POWER TO APPOINT A SPECIAL PROBATE COURT JUDGE IS GUIDED BY STATUTORY REQUIREMENTS.**

S.C. Const. art. V.12 states as follows “ Jurisdiction in matters testamentary and of administration, in matters appertaining to minors and to persons mentally incompetent, shall be vested as the General Assembly may provide, consistent with the provisions of Section 1 of this article.” As the Probate court was formalized, the General Assembly set the parameters for the qualifications of a probate court judge and how those judges would be selected. S.C. Code Ann. 14-23-1040 ( 1976) sets a clear standard for who may serve as a judge in the probate court: no person is eligible to hold the office who has not become a qualified elector of the county in which he is to be a judge.

Knight-Tonney cites S.C. Code Ann. 14-23-1080 (1976) as controlling this issue, but the bases for acting pursuant to sec. 1080 do not apply to the probate judges who recused themselves in this claim. The judges were somehow named in a pro se action involving the parties and recognized that it would be more appropriate for them to withdraw from the matter. Their reasoning is not covered by S.C. Code Ann. 14-23-1080 (1976).

The Chief Judge's authority is subject to statutory interpretation because of the nature of the probate court. The probate court is headed by an elected official and its parameters are all statutory.

Petitioner did not waive this issue at the trial court. ( R.p. 97, “NEW TRIAL”). In a motion hearing on July 17, 2013, Judge Fulp asks Petitioner's Counsel “ But are you challenging my... because I didn't... the Chief Justice appointed me.” Petitioner's counsel answered. “ I'm making these points as a matter of law.” (Trp.p 45, L.7-11).

Any special Judge for the probate court must be a qualified elector of the county in which he is to be judge. Any rulings by a non-resident Special Judge are void.

Elliott v. Perisol, 1 Pet. 328, 340, 26 U.S. 328, 340, 7 L.Ed. 164(1828).

**III. PETITIONERS ARE PREJUDICED BY LOWER COURTS' FAILURE TO UNREDACT DOCUMENT AND QUASHING SUBPOENA.**

At Trial, the letter that Knight-Tonney now argues is irrelevant was offered by Knight-Tonney to substantiate her claim ( R.p.ii, item 8.3) (R.p.105). At trial, counsel for Knight-Tonney argued that “ The purpose of this letter is to show that Ms. Tonney was paying fees to Mr. Vincent, was to pay Mr. Vincent all expenses claimed.”

Earlier in discovery, the Probate Judge upheld the redaction of information in the letter as protected by attorney-client privilege. The attorney writing the letter was hired by Knight-Tonney, but the letter in question was written to Knight-Tonney and a non-client third-party. The sums mentioned in the letter began at \$2,800.00 and included an amount of \$5,000.00. The redacted language must be relevant and more likely than not persuasive on the issues raised by the claim. This ruling is wrong on its basis and prevented the discovery of material or information that would be useful to the defense of this claim. The Probate Judge ruled without viewing an unredacted copy of the letter.

In this case, lack of disclosure - another form of notice failure and due process defect - left Mrs. Knight without a defense. The Probate Judge quashed a subpoena that would clarify who was the actual payor for expenditures claimed by Knight- Tonney. The judge accepted the withdrawal of items linked to the subpoenaed material and based his ruling on that withdrawal.

Knight-Tonney had testified that the “Queenie” account was an account used for the care of an elderly lady name Louise Reynolds. “Queenie” is Knight-Tonney’s nickname for Louise Reynolds. Knight-Tonney testified to setting-up a bank account for the benefit of Louise Reynolds. The names on the particular account were Linda Jones, Chloe Tonney, and Queenie. The initial discovery responses were redacted to show only the name of Chloe Tonney. Motions had to be filed to obtain the other names. The subpoena sought information on the “Deposit and Withdrawal Activity /Records including identity of depositors and payees for the years beginning 2004 through 2009.” The records would establish whose funds were used to pay for what expenditures; when these funds were used to pay for what expenditures; and where these funds originated. This information was determined to be irrelevant without viewing the material. This information was crucial to the devisee’s defense and the estate’s protection.

#### **IV. KNIGHT-TONNEY’S CLAIM IS AN EQUITABLE ACTION.**

Knight-Tonney did intend to seek restitution of money she expended on the costs of various bills created by unlawfully removing her father from his marital home.

Ms. Tonney’s expectation resulted from her unilateral actions that created the circumstances giving rise to these expenditures. There was no formal agreement and no sum certain creating an actual contract to pay. At best, the understanding for repayment is a quasi-contractual agreement. “Quantum meruit, quasi-contract, and implied by law contract are equivalent terms for an equitable remedy.” QHG of Lake City, Inc. v. McCutcheon, 360 S.C. 196, 202, 600 S.E.2d 105, 108 (Ct.App.2004). Restitution and disgorgement are equitable remedies. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 215-216 (2002);

Key Corporate Capital, Inc. v County of Beaufort, 373 S.C. 55, 63, 644 S.E. 2d 675, 679 (2007). Restitution is an equitable remedy. Wallace v Milliken. & Co., 305 S.C. 118, 120, 406 S.E. 2d 358, 359 (1991).

Characterization of an “action as equitable or legal depends on the [appellants’] “main purpose” in bringing the action.” Ins. Fin. Services., Inc. v. S.C. Ins. Co., 271 S.C. 289,293,247 S.E. 2d 315, 318 (1978). The nature of the issues raised by the pleadings and character of relief sought under them determines the character of an action as legal or equitable. Bell v. Mackey, 191 S.C. 105, 119-20,3 S.E. 2d 816, 822 (1939).

**V. THE LAW OF AUTOMATIC STAY APPLYS TO KNIGHT-TONNEY’S CLAIM.**

On October 5, 2005, Circuit Court Judge, Roger M. Young, issued an order that clarified the implications of the S. C. Code Ann. 62-1-308 (c) automatic stay and assigned certain responsibilities to the litigants and others. (R.p. 219-220). The order was issued pursuant to matters in the appeal filed approximately thirty-four days earlier. ( R.p. 163). Because the order appealed effected Mrs. Knight’s Guardianship, Judge Young addressed that issue directly and made it clear what changes were stayed. All parties and participants were aware of their respective status.

In their opinion on this appeal, the Court of Appeals confused the automatic stay issue regarding the September 1, 2005 circuit court appeal with the automatic stay application to the present appeal filed September 3, 2014.

Petitioner’s contention is that Knight-Tonney violated the automatic stay of September 1, 2005 and filed a claim in January, 2009 for expenses she created by violating the automatic stay of September 1, 2005. Knight-Tonney now argues, without

authority, that Petitioner's timely filed and served Notice of Motion and Motion for New Trial regarding Judge Goode's order was defective and therefore Judge Goode's ruling became the law of the case. (R.p. 161-162). See Rule 59 (a)(2), SCRCF.

Knight-Tonney was notified through counsel ( R.p.174) and all others through the Guardian ad Litem ( R.p.169) of this post trial motion. (R.p.92, L. 1-11). Although Knight-Tonney and Kaufman raised unfounded allegations of abuse, their illegal actions were intended to obtain and secure visitation.(R.p. 86, L. 8-10) (R.p. 91, L. 13-21). The visitation issue was clearly under appeal, so no action could be taken to secure any visitation. Moreover, Kaufman was specifically removed as Guardian as outlined in Judge Young's order of October 5, 2005. Judge Young's order said that Mildred Knight should remain Guardian and Conservator pending the appeal.

The law on the automatic stay must be enforced. Although a ruling had been issued initially, a timely motion to reconsider had been filed and the automatic stay was still in place at the time Knight-Tonney acted to remove Mr. Knight. 62-1-308(c). Knight-Tonney knew that the matter was under review as indicated by her Motion to Dismiss (R.p. 174). Moreover, according to a response to the GAL letter of January 9, 2006, the GAL was advised to prepare a Rule to Show Cause (R.p. 170), an approach consistent with the automatic stay. Walter Kaufman admitted that Judge Young had displaced him (and any other new appointees) by enforcement of the automatic stay. (R.p. 92, L.12-22). The stain of disregarding the automatic stay can be purged only by rescinding all acts taken without authority.

## **VI. ELEMENTS OF FRAUD ARE WELL ESTABLISHED.**

Knight-Tonney, Kaufman, and Albright acted intentionally. Their failure to act placed an onerous and substantial burden on Mrs. Knight. In order to establish a claim of

fraud in the inducement to enter a contract, the proponent must demonstrate the following: (1) a representation, (2) its falsity, (3) its materiality, (4) knowledge of its falsity or reckless disregard of its truth or falsity, (5) intent that the representation be acted upon, (6) the hearer's ignorance of its falsity, (7) the hearer's reliance on its truth, (8) the hearer's right to reliance on its truth, (9) the hearer's consequent and proximate injury. M.B. Kahn Const. Co. v. South Carolina Nat. Bank of Charleston, 275 S.C. 381, 271 S.E.2d 414 (1980).

The representation in this fact pattern was conduct, a non-statement, an omission that caused Mrs. Knight to think that she was not in jeopardy, so she would acquiesce to the arrangements. LoPresti v. Burry, 364 S.C. 271, 612 S.E.2d 730 (2005); Masonic Temple, Inc. v. Ebent, 199 S.C. 5, 18 S.E.2d 584 (1942); Corley v. Ott, 326 S.C. 89, 92, 485 S.E.2d 97, 99 (1997).

This unstated representation began the inducement. Certainly, the existence of a loan is material to Mrs. Knight as an heir to Mr. Knight, Albright's and Kaufmann's and Knight-Tonney handling of the knowledge of the existence of this "loan" was a disregard for the truth or falsity of the representation. The intent that the representation be acted upon is clear. Mrs. Knight was totally ignorant regarding the falsity of her and her husband's situation. Mrs. Knight relied on what was said, and she had a right to rely on the presenters. The consequential and proximate inquiry is well established at this point. See M.B. Kahn Const. Co. v. South Carolina Nat. Bank of Charleston, *id.* Mrs. Knight, at the least, is a stakeholder in the estate of Mr. Knight.

At the time of this incident, she was a recognized participant in the management of Mr. Knight's estate. She was, essentially, a recognized co-participant and third party beneficiary to the matters involving the management of Mr. Knight's estate. As it turns out, she relied on her status and co-participants to her detriment.

**VII. STANDARD OF REVIEW FOR EQUITABLE ACTION IS PREPONDERANCE OF THE EVIDENCE.**

In equitable actions, South Carolina appellate courts may find facts in accordance with their own view of the preponderance of the evidence. Townes Assoc. Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976). De novo review permits appellate court fact finding, notwithstanding the presence of evidence supporting the trial court's findings. Lewis v. Lewis, 392 S.C. 381, 390, 709 S.E.2d 650, 654-55 (2011).

Petitioners placed in evidence two letters from reputable physicians that found Norman R. Knight, Jr. not to be incapacitated at the time relevant to Respondent Tonney's efforts to cast him as being gravely ill and abused. (R.p.157-158). These letters are a clear indication that Mr. Knight, Jr. was doing fine and was expected to progress and thrive. Both letters are written to Mrs. Knight's attorney and detail specifics of his condition. Dr. Derrick said, "I find him to be more alert and talkative than usual and feel that his general mental and physical health is improved." Dr. Smith found his "iron deficiency to be abated," his mental status intact," and "his energy level dramatically improved, "with adequate therapy, he has done extraordinarily well." This evidence is a direct conflict with the allegations of Tonney and they highlight inconsistencies in Tonney's own testimony. In the March 31, 2014 hearing, Tonney testified that her father was subject to a number of what she "deemed atrocities in terms of physical, financial, and psychological abuse" and in the same line of questioning, she admitted that as a result of her [petition] her mother, Mildred C. Knight was appointed guardian for her father. (R.p. 84: tr.p. 12 L.10-24) Later she admitted her sister made allegations that were determined to be unfounded. There is no conclusive evidence in the entire record for all these years of litigation that substantiate physical, financial, and psychological abuse of N. R. Knight, Jr.

The failure to establish necessity to remove Mr. Knight from his home means that any expenditure for his shelter outside of his home is unreasonable. Merely declaring that funds were expended or presenting the existence of expenditure in this context will not satisfy the reasonableness requirements. Howard, Matter of, 315 S.C. 356, 434 S.E.2d 254 (1993) 66 Am.Jur.2d Restitution and Implied Contracts Section 2 (1973) The only professional to testify on Mr. Knight's home situation was Cary Fechter, M.D. who thought that his home placement was supportive and preferable to outside placement. (R.p. 64-65: p. 383 L.18 – . p. 384 L.1-20). Dr. Fechter had attended to Mr. Knight for several years.

Moreover, a reasonable expenditure will not be exorbitant. Appellants offered professional testimony that, medically and ethically, less expensive care was available for Mr. Knight's outside placement. Gloria Johnston, Community Residential Care Facility Administrator for the Disability Board of Charleston County, testified that appropriate care was available for \$3,000.00 to \$4,000.00 per month, a figure significantly below the \$6,000.00 minimum that Tonney was spending. Ms. Johnston made it clear that Mr. Knight could have been cared for at home. (R.p. 66-69: p. 309 L.3- p. 312 L.8). Mr. Knight was cared for at home. (R.p. 70: tr.p. 212 L.2-8; 71: tr. p. 221 L.10- L.25).

Mr. and Mrs. Knight have not received notice and an opportunity to be heard on many material issues. After the removal of Mr. Knight from his home, there were no S.C. Code Ann. 62-5-310 and 62-5-311 proceedings provided by the probate court. The other similar defects of this claim have been discussed earlier. A de novo review would yield a result more consistent with the preponderance of the evidence.

### **VIII. KNIGHT-TONNEY DID NOT FILE HER CLAIM TIMELY**

Petitioners did not concede the contest of Knight-Tonney's timely filing of her claim. (R.p. 41-42). The trial court denied Petitioners' motion to dismiss the claims as being time-barred. Following that ruling, the Special Administrator disclosed that the Petition to Allow Sale of Real Estate would need to be refiled and the parties agreed that the issue was moot and withdrawn. Knight-Tonney did not file her claim in a timely manner.

### **IX. ATTORNEY FEES NOT ALLOWED FOR KNIGHT-TONNEY**

Attorney fees are a peculiar item according to law. Prevatte v. Asbury Arms, 302 S.C. 413, 396 S.E.2d 642 (Ct.App.1990). It is well established that attorney fees are not recoverable unless authorized by contract or statute. Jackson v. Speed, 326 S.C. 289, 307, 486 S.E.2d 750, 759 (1997). Knight-Tonney cannot meet this test for receiving attorney fees. There is no contract or statute that provides her eligibility for attorney fees.

The Family Court did not award attorney fees in this matter, and the case was dismissed at the passing of Mr. Knight. Mrs. Knight was successful in obtaining temporary relief. Respondent Knight-Tonney offered no evidence to establish that her expenditures on attorney fees benefitted her father, was necessary for his care and sustenance, and was a reasonable expenditure of his resources.

Moreover, her approach to the family court matter cannot be justified by any of the circumstances existing at the time the money was spent. Mr. Knight's net monthly income was never more than \$5,728.27 ( R.p. 93; tr. p.102 L. 4). Attorney fees in this family court matter are not a part of the care scenario. This expenditure did nothing for her father's health. Knight-Tonney acted unilaterally and did not deposit money with

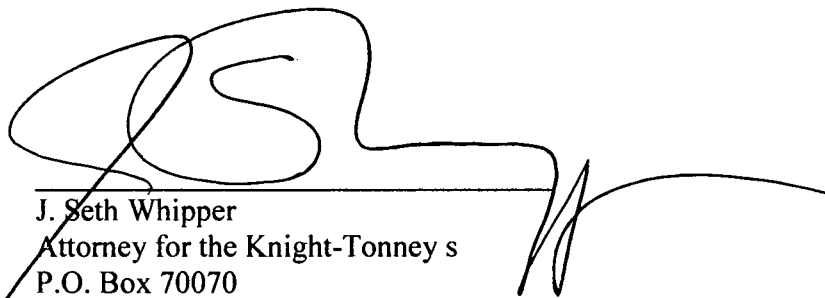
the Conservator. She made payments to an Attorney outside of the structure established by the Probate Court, court oversight, and notice to Petitioners. Knight-Tonney should not be allowed to do what a licensed attorney could not do when a client dies in the midst of family court litigation. The moneys she seeks are solely attorney fees from start to finish. Family Court attorney fees in this situation are provided according to S.C. Code Ann. 20-3-145 (1979). Matter of Jennings, 321.S.C. 440, 468 S.E.2d 869, rehearing denied (1996) and Huff v. Jennings, 319 S.C. 142, 459 S.E. 2d 886, rehearing denied, appeal dismissed (Ct.App.1995) are cited to demonstrate the requirements for recovery of attorney fees, i.e. Respondent Knight-Tonney is not an attorney. There is no basis for Knight-Tonney to recover attorney fees or the money used to hire an attorney.

### CONCLUSION

For the reasons stated, Petitioners ask the court to grant the petition for a writ of certiorari.

Respectfully Submitted,

February 7, 2019



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THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL from Court of Common Pleas of CHARLESTON COUNTY

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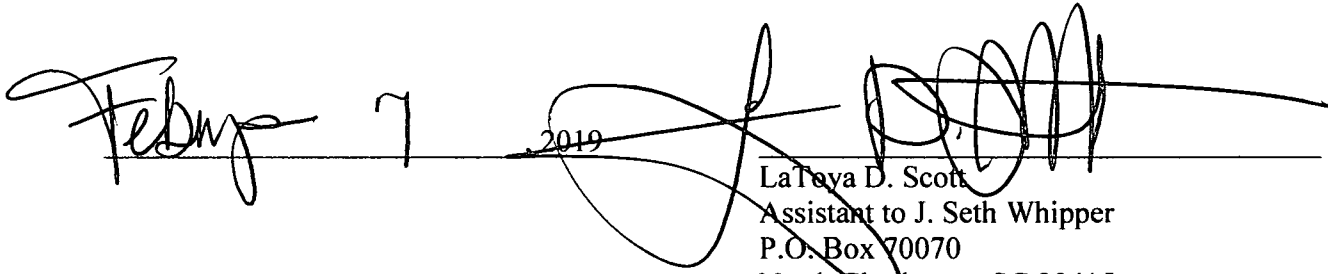
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v.

Beatrice E. Whitten, as a special administrator, and Chloe Knight-Tonney, Claimant,  
Respondents,

PROOF OF SERVICE

I certify that I have served 1 Original Petitioners' Reply to Knight-Tonney, 1 Original Proof of Service, and 6 Copies on the South Carolina Supreme Court by depositing a copy to them in the United States Mail, postage prepaid, on February 7, 2019, addressed to: Daniel Shearouse, Clerk, South Carolina Supreme Court, Post Office Box 11330, Columbia, South Carolina 29211 and served the Petitioners' Reply to Knight-Tonney on: Beatrice E. Whitten, Special Administrator, 1110A Queensborough Blvd., Mt. Pleasant, SC 29464; and C. Mac Gibson, Jr., 1473 Stuart Engles Blvd. Mt. Pleasant, SC 29464.

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