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STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
PROBATE COURT

Richland County Probate Case No. 2017-ES-40-01330

Honorable Judge Amy W. McCulloch

Appellate Case No. 2019-000169

In the Matter of the Estate of Bertha Maust-Thompson

Terri Ann Thompson, Wendy K. Thompson, and Robert M. Thompson, Jr., as Co-Personal Representatives of the Estate of Robert M. Thompson, Sr.....Respondents.

v.

Marilyn M. White, As Personal Representative of the Estate of Bertha Virginia Maust-Thompson.....Appellant,

**APPELLANT'S MOTION FOR SUPERSEDEAS
PURSUANT TO RULE 241(c)**

The Appellant, Marilyn M. White in her capacity as Personal Representative of the Estate of Bertha Virginia Maust-Thompson, files this Motion for Supersedeas Pursuant to South Carolina Rules of Appellate Procedure Rule 241(c).

The Order of the probate court appealed from in this case, attached as **Exhibit, A**, included an injunction that Appellant, as Personal Representative of the Estate of Bertha Virginia Maust-Thompson, should file an estate tax return no later than May 27, 2019, and elect portability of the deceased spousal unused exclusion. In that same order, the probate court

established interim steps to be followed. Those steps included the selection of an independent public accountant to prepare the return within fifteen days after the date of the Order (Paragraph II, Pages 15 and 16). Appellant complied with this directive in a timely fashion by designating Burkett, Burkett & Burkett as the accounting firm.

Paragraph III on Pages 15 of 16 directed that a draft of the tax return was to be provided to the court and opposing counsel within forty-five days of the Court's Order, or by March 12, 2019. Appellant has been unable to comply with the requirements of this interim directive because the accounting firm is not able to devote the time necessary to complete its task since they are right in the middle of both partnership and individual tax filing season, concluding on March 15 and April 15. See the attached statement from the Burkett, Burkett & Burkett attached hereto as **Exhibit B**.

Therefore, Appellant seeks a stay of the probate court order as it relates to Paragraphs III and IV to allow the accountants to complete their task by April 26, 2019. Completion by that date would still allow for production, review and comment so that the estate tax return could still be filed by the May 27, 2019 deadline of the appealed order of the probate court if not reversed or modified by then.

Application for a supersedeas under Rule 241 of the South Carolina Rules of Appellate Procedure is made to this Court since an appeal of the probate court order was timely made, vesting this Court with jurisdiction, and no remittitur has been made. The probate court would have no jurisdiction under these circumstances.

(SIGNATURE ONLY ON FOLLOWING PAGE)

Respectfully submitted,

March 12, 2019



W. Duvall Spruill, Esq. (Bar No. 5295)

E-mail: dspruill@turnerpadget.com

Cathy Kennedy, Esq. (Bar No. 3391)

E-mail: ckennedy@turnerpadget.com

P.O. Box 1473

Columbia, South Carolina 29202

Telephone: (803) 254-2200

Fax: (803) 799-3957

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE PROBATE COURT
Estate Number: 2017-ES-40-1330

IN THE MATTER OF THE ESTATE)
FOR BERTHA MAUST-THOMPSON)

Terri Ann Thompson, Wendy K.)
Thompson, and Robert M. Thompson, Jr.,)
as Co-Personal Representatives of the)
Estate of Robert Miller Thompson, Sr.,)

Applicants,)

vs.)

Marilyn M. White,)
as Personal Representative of the)
Estate of Bertha Maust-Thompson,)

Respondent.)
_____)

FILED
2019 JAN 26 P 12:06
AMY W. MCCULLOUGH
PROBATE JUDGE
RICHLAND COUNTY, S.C.

**ORDER GRANTING APPLICATION
FOR PERFORMANCE
OF PERSONAL REPRESENTATIVE**

This matter comes before the Court upon the Application for Performance of Personal Representative (“Application”) against Respondent Marilyn M. White, as Personal Representative of the Estate of Bertha Maust-Thompson, by the above-named Applicants who are the Co-Personal Representatives of the Estate of Robert Miller Thompson, Sr., the surviving spouse of Bertha Maust-Thompson. A hearing on the Application was held on November 7 and 8, 2018, with appearances on behalf of Applicants by attorneys John W. Roberts and John M. S. Hoefler and on behalf of Respondent by attorneys Catherine H. Kennedy and W. Duvall Spruill. For the reasons set forth below, the Application is granted.

Summary of Case and Procedural Background

Decedent Bertha Maust-Thompson A/K/A Virginia L. Thompson (“Decedent”) died on May 28, 2017, survived by her husband Robert M. Thompson, Sr. and four (4) adult children from her first marriage. On August 11, 2017, Respondent and her brother and former Co-Personal Representative, Allan Maust, filed the Application for Informal Probate of Will and Appointment with respect to the estate of the Decedent, which was granted by the Court on August 14, 2017.



Respondent and Mr. Maust were appointed as Co-Personal Representatives of the Decedent's estate.

Under 26 U.S.C.A § 2001, a tax is imposed on the transfer of the taxable estates of United States citizens and residents, which is based on the sum of the taxable value of the estate and the amount of taxable gifts made by the decedent. 26 U.S.C.A. § 2010 provides for a "unified credit against estate tax," which effectively reduces the value of the estate for purpose of calculating the estate tax. The "unified credit" includes both the "basic exclusion amount," and "in the case of a surviving spouse, the deceased spousal unused exclusion amount." 26 U.S.C.A. § 2010(c). The basic exclusion amount for 2017 was \$5,490,000.00.

In the event a first-to-die spouse has not fully used the basic exclusion amount due to the value of the first-to-die spouse's estate, a concept known as "portability" makes the unused portion available to the surviving spouse, if so elected by the deceased spouse's executor. This unused portion is the "deceased spousal unused exclusion," or DSUE, amount. *See* 26 U.S.C.A. § 2010(c)(4). The DSUE amount is only of value to the surviving spouse and cannot be used by any other person. *See Matter of Estate of Vose*, 390 P.3d. 238, 250 (Okla. 2017) (holding that "the only person with an interest in and ability to use the DSUE, if it exists, is the surviving spouse"). However, for a surviving spouse to make use of the DSUE amount, the "executor" of the deceased spouse's estate must make a "portability" election, which is made by completing and timely filing the estate tax return (IRS Form 706). *See* 26 U.S.C.A. § 2010(c)(5)(A). If the "portability" election is not made through the timely filing of the estate tax return, then the DSUE is lost forever. *Id.*; *also see Vose*, 390 P.3d at 250 ("[i]f the election is not made through the timely filing of an estate tax return, then it is lost").

Decedent and Robert Miller Thompson, Sr. were married on July 17, 1993, and were still married at the time of Decedent's death. On October 11, 2017, counsel for Mr. Thompson sent a letter to counsel for the Respondent and Mr. Maust requesting confirmation that they were willing to timely file the estate tax return for Decedent's estate to elect portability. Appl. Ex. 1. Mr. Thompson also offered to pay for the costs associated with preparing and filing the estate tax return and offered to assist, or have his representatives assist, in the preparation of the return. *Id.* By letter dated October 24, 2017, then-counsel for the Respondent and Mr. Maust responded and stated that they were declining to file the estate tax return. Appl. Ex. 2.

On November 21, 2017, Mr. Thompson filed the Application pursuant to S.C. Code Ann. § 62-3-607, seeking an order of the Court requiring Decedent's Co-Personal Representatives to timely prepare and file a federal estate tax return for the Decedent's estate to elect portability of the DSUE amount in accordance with 26 U.S.C.A. § 2010. As required by S.C. Code Ann. § 62-3-607, the Court attempted to hold a hearing within ten (10) days, however, as allowed, the parties agreed to hold the hearing on December 20, 2017. During a meeting in chambers with the attorneys for the Applicant and the attorneys for the Respondent and Mr. Maust at that time, Michael Mueller and G.H. Hal Hanlin, the parties agreed that Respondent and Mr. Maust would request an extension of time to file the estate tax return, as they wanted more time for discovery and evaluation of all litigation pending at that time¹. No hearing was held and an order documenting this agreement was entered on January 5, 2018. Thereafter, the parties conducted discovery and engaged in settlement negotiations.

On February 7, 2018, Respondent and Mr. Maust's then counsel filed a Motion to be relieved as counsel, citing an irreconcilable conflict between Respondent and Mr. Maust, which the Court granted on April 2, 2018. Mr. Maust resigned as Co-Personal Representative on March 21, 2018, and Respondent retained her current counsel.

On March 6, 2018, Mr. Thompson passed away. The Will/Orphans' Court Division of Allegheny County, Pennsylvania, appointed the Applicants, who are three of Mr. Thompson's children and are named as co-executors in Mr. Thompson's Will, as co-executors of Mr. Thompson's estate. Applicants filed their motion for substitution on April 6, 2018, which the Court granted on May 17, 2018.

On July 13, 2018, Respondent filed a Motion to Dismiss² seeking dismissal of the Application on the grounds that (a) Mr. Thompson, and now his estate, was not an "interested person" for purposes of S.C. Code Ann. § 62-3-607, (b) Respondent has the choice not to file the estate tax return to elect portability, and (c) Mr. Thompson relinquished his rights to the DSUE amount through an antenuptial agreement between Decedent and Mr. Thompson dated July 7,

¹ At the time of the December 20, 2017 hearing, a Petition for Elective Share was pending. This action was withdrawn after the death of Robert Thompson, Sr., and matters related to attorney's fees and costs associated with the litigation have been resolved by agreement.

² Respondent also filed a "Reply and Claim" on July 13, 2018, purportedly answering the Application, asserting a "Claim" for attorneys' fees and expenses, and demanding a jury trial. By order dated October 30, 2018, the Court dismissed the "Reply and Claim" as improper and untimely and denied the demand for a jury trial.

1993. Applicants filed and served a Response in opposition to this Motion to Dismiss on July 23, 2018.

On the same date, Applicants filed and served a Motion for Summary Judgment on the Application, in which they asserted, *inter alia*, that there was no genuine issue of material fact and a ruling in their favor was proper because Respondent's refusal to file the estate tax return or elect portability of the DSUE "jeopardizes unreasonably the interest" of Mr. Thompson and his estate as contemplated by S.C. Code Ann. § 62-3-607, and was a breach of fiduciary duty owed to Mr. Thompson and his estate by Respondent.

On August 15, 2018, Respondent filed and served a Reply to the Response in opposition to the Motion to Dismiss and a memorandum in opposition to the Motion for Summary Judgment on the Application. Respondent, as Personal Representative of the Decedent's estate, has asserted that she has a right under federal law to elect to port or not to port the DSUE to Mr. Thompson and that she has chosen not to elect the portability of the DSUE based on her belief that she was following the Decedent's intent that the tax benefits were not to be given to her husband as purportedly expressed in the antenuptial agreement, her Last Will and Testament, and statements attributed to Decedent.

On August 17, 2018, Applicants filed and served a Reply to the opposition to the Motion for Summary Judgment on the Application asserting, *inter alia*, that the question of whether a personal representative with a fiduciary duty has an obligation to file the estate tax return presented an issue of law only and the Decedent's purported intent with respect to the DSUE was immaterial.

The Motion for Summary Judgment and Motion to Dismiss the Application were heard by the Court on August 17, 2018. On September 7, 2018, the Court issued separate orders denying both motions. The Court denied the Motion to Dismiss on a number of grounds, the first of which was that Mr. Thompson was, and now his estate is, an "interested person" as defined in S.C. Code Ann. § 62-1-201 for purposes of being entitled to make the Application under S.C. Code Ann. § 62-3-607(a) because he was Decedent's spouse. Additionally, the Court ruled that the antenuptial agreement entered between Mr. Thompson and Decedent in 1993 did not preclude Mr. Thompson or his estate from using the available DSUE amount because it did not say anything about the DSUE (because DSUE did not exist in 1993) or anything about future tax benefits. The Court also concluded that the antenuptial agreement did not preclude Mr. Thompson from using the DSUE because the DSUE—which was first introduced by Congress in 2010 and only became permanent

in 2012—could not have been known to Mr. Thompson in 1993, and therefore, could not have been waived by him when the antenuptial agreement was signed. Moreover, the antenuptial agreement was found by the Court not to apply to the DSUE because the DSUE was not property of the Decedent (which Respondent conceded), and could not be controlled by the Decedent because the right to the DSUE did not exist until after her death.³ The Court denied the Motion for Summary Judgment on the ground that it was not clear to the Court whether the intention of the Decedent could control the election of portability under South Carolina law and, therefore, an issue of disputed material fact might exist that bore on a determination of whether Respondent had an obligation to Mr. Thompson's estate with respect to the filing of the estate tax return and election of portability of the DSUE.

In addition to the arguments by each party's respective counsel, at the hearing, the Court heard the testimony of one of the Applicants, Robert M. Thompson, Jr., as well as the testimony of Respondent Marilyn M. White. The parties also entered into evidence during the hearing a total of 11 exhibits and published portions of the deposition testimony of six witnesses (including the corresponding deposition exhibits).

Findings of Facts

Having carefully considered all testimony, exhibits, and arguments presented at the hearing and the other submissions of the parties, and having observed the witnesses and taking into account the credibility and accuracy of their testimony, the Court makes the following Findings of Fact:

1. Decedent and Mr. Thompson were married on July 17, 1993. At that time, she was sixty-nine (69) years old and he was seventy-one (71) years old.
2. Prior to their marriage, Decedent and Mr. Thompson signed an Antenuptial Agreement on July 7, 1993, agreeing, among other things, to waive their rights to inherit from each other.
3. Decedent died on May 28, 2017, at the age of 93 years old.
4. Mr. Thompson died on March 6, 2018, at the age of 96 years old.
5. Decedent and Mr. Thompson were still married at the time of Decedent's death, having been married twenty-three (23) years and thus, Mr. Thompson was the surviving spouse of the Decedent.

³ On September 18, 2018, Respondent filed a Motion to Alter or Amend the Order denying the Motion to Dismiss, which the Court denied by Order dated October 12, 2018.

6. Decedent and Mr. Thompson maintained their separate residences during their marriage and in the later years of their marriage lived separately and saw each other sporadically on the weekends when Mr. Thompson would travel from Pittsburgh, Pennsylvania, where he lived, to Butler, Pennsylvania, where Decedent lived.

7. Decedent's Last Will and Testament dated June 25, 2015 (the "Will"), was filed with the Court and admitted to probate and a true and correct copy of Decedent's Will was entered into evidence as Respondent's Exhibit 4.

8. Respondent, the daughter of Decedent and one of two Personal Representatives designated in Decedent's Will, is now the sole appointed Personal Representative of Decedent's estate.

9. While the Decedent's Will contains a section that the Decedent intentionally made no provision for her husband due to a pre-marital agreement, the Will does not contain any specific power or direction given to her estate's Personal Representatives directly related to the DSUE or the portability election or any other provision related to the DSUE or the portability election.

10. The deadline to file the estate tax return to elect portability is May 28, 2019.

11. Prior to his death, Mr. Thompson requested that Respondent, as Personal Representative of Decedent's estate, timely file the estate tax return for Decedent's estate to elect portability and also offered to pay for the costs associated with preparing and filing the estate tax return and to assist, or have his representatives assist, in the preparation of the return. Appl. Ex. 1.

12. Respondent declined Mr. Thompson's request, has not filed the estate tax return for Decedent's estate to elect portability, and has refused to file the estate tax return to elect portability. Appl. Ex. 2.

13. Based on the approximate size of Mr. Thompson's estate, his estate could utilize the available DSUE amount to reduce the amount his estate will owe in federal estate taxes in accordance with 26 U.S.C.A. § 2010.

14. The amount of the DSUE is approximately \$3 million, which equates to a real dollar value of approximately \$1.2 million to Mr. Thompson's estate.

15. If the portability election is not made by the timely filing of the estate tax return for Decedent's estate, Mr. Thompson and his estate will forever lose the DSUE and would thus have to pay approximately \$1.2 million more in federal estate taxes than the Internal Revenue Code would otherwise require to be paid.

16. The testimony of Robert Shott, the attorney who assisted the Decedent in Pennsylvania with her Will, indicates that he went to law school as a second career, had no specialization in tax and estate law matters, would make house visits to meet his clients, did not have a law office, first met the Decedent in 2012, met with her forty (40) to fifty (50) times over the years, drafted five to eight Wills for the Decedent of which she signed four or five, that he did not have copies of any of them because he left them all with the Decedent, that he explained the new law of "pooling of the unified credit" to the Decedent in 2012, that Decedent stated "he is not going to get anything of mine.", and that Mr. Shott believed the article in the Will he drafted and executed with the Decedent, that excluded her husband from inheriting, resolved the matter.

17. Mr. Shott testified that in an effort to protect Decedent, he prepared and had her execute an Affidavit, attached as exhibit 22 to his deposition, dated February 1, 2016. In that Affidavit, the Decedent states that she has only signed two (2) tax returns since 2000, and that she and her husband have no verbal or written agreement about the unified credit.

18. This Court finds the testimony of Mr. Shott concerning Mr. Shott admitted that he never reviewed Decedent's assets or their values. In fact, he testified that it was none of his business. This is contrary to proper estate planning. He should have clarified that what he was explaining as "pooling of the unified credit" was the same as what the Decedent was understanding and acting upon. Additionally, if Mr. Shott believed Decedent felt as strongly as she did about the tax credits, he should have clarified it in the many versions of Wills he drafted, or attempted an agreement with her husband about the unified credit. The fact that he had Decedent sign an Affidavit stating there was no agreement about the unified credit is contrary to Respondent's argument that the 1993 Antenuptial Agreement (Resp. Ex. 1) should control Applicants right to portability.

19. The testimony of David DelFiandra, an attorney who assisted the Decedent in Pennsylvania, indicates that he tried to assist the Decedent at the request of her sons beginning in about 2016, that he met with her approximately three (3) times, that the Decedent believed she was owed money from her husband based on an agreement to pay her monthly (Resp. Ex. 2), and that he attempted to resolve owed amounts by selling her unified credit to her husband but was unsuccessful in a resolution.

20. This Court finds the testimony of Mr. DelFiandra to be an explanation of a situation in which the Decedent and her sons, who attended all meetings with the agreement of their mother,

were primarily focused on getting further lifetime support for Decedent. This is again an opportunity for a self-described estate planning attorney who testified that he too had done estate planning for the Decedent in the early 2000s, to meet with her about her Will and advise her about the additional concerns of the unused tax credits to maximize the benefit for the Decedent and her children. He never indicates in his testimony that he asked to see her current Will.

21. The testimony of Pam Steiner, cleaning lady and care giver for the Decedent, indicates that she began working for Decedent in 2011 or 2012, that she started with one (1) or two (2) days a week but later was working four (4) days a week, that she rarely saw the Decedent's husband, that Decedent complained weekly that Mr. Thompson was not giving her enough money, that the Decedent checked her bank account weekly to see if she had received a deposit from Mr. Thompson, that she did not feel that the Decedent was treated well by her husband, that she heard the Decedent talk to her husband about her tax credits, and that the Decedent said that her husband was not getting them because she was saving them for her kids.

22. While it is clear from Ms. Steiner's testimony that she believed the relationship between the Decedent and her husband was not what she would have wanted, it is not clear that the Decedent and or Ms. Steiner understood what they were discussing in regards to tax credits, as the DSUE would never benefit the Decedent's children.

23. Both Respondent and Rebecca Maust, Decedent's daughter in law, testified that the Decedent did not want Mr. Thompson notified of her death and he was not listed in her obituary.

24. The evidence presented by Respondent regarding the Decedent's intent primarily consisted of testimony by Respondent and her witnesses about conversations they each had with Decedent, which Respondent asserts demonstrated that Decedent and Mr. Thompson had a difficult relationship in the last years of their lives, that Decedent believed he had not paid her monthly as he should have, and that Decedent did not want Mr. Thompson to receive "her tax credits."

25. Respondent did not present evidence of any written document by Decedent that contained any specific direction to Respondent, or anyone else, related to the DSUE or the portability election. Attorneys for Respondent attempted to admit "notebooks" arguably written by the Decedent during Respondents testimony; however, because a proper foundation could not be laid, the request was denied.

26. Respondent argued that the notebooks show that Decedent kept records of amounts Decedent received from her husband and that the notebooks were evidence of the broken promise to pay her certain amounts every month and that this is the reason she felt Mr. Thompson should be denied any benefit at her death.

27. Respondent did not present evidence of any agreement between Decedent and Mr. Thompson related to the DSUE or the portability election.

28. Decedent never filed for a divorce from Mr. Thompson and although legal action for an annulment was discussed with attorney DelFiandra, neither the Decedent nor her agent, at the time Respondent, under a power of attorney, authorized him to proceed. Had the marriage been dissolved, Mr. Thompson's right to DSUE would have been eliminated.

29. Robert Thompson, Jr. testified that any decline in the relationship between Decedent and Mr. Thompson, which he disputed, during the last year or so of Decedent's life would have been caused by their advanced age, deteriorating health, and loss of driving privileges, all of which prevented them from regularly seeing each other because they had maintained separate homes for the entirety of their marriage. He also asserted that the "agreement" to pay certain amounts monthly was only to take affect at his father's death, as everyone expected Mr. Thompson would be the spouse to die first because he had battled cancer during the later years of his life.

Conclusions of Law

Based on the preceding Findings of Fact, the Court makes the following Conclusions of Law:

A. The Court has jurisdiction over the subject matter and parties in this action pursuant to S.C. Code Ann. § 62-1-302(a)(1). Venue is proper as the Decedent was a resident of Richland County at her death.

B. S.C. Code Ann. § 62-3-607(a) provides:

Upon application of any interested person, the court by temporary order may restrain a personal representative from performing specified acts of administration, disbursement or distribution, or exercise of any powers or discharge of any duties of his office, or make any other order to secure proper performance of his duty, if it appears to the court that the personal representative otherwise may take some action which would jeopardize unreasonably the interest of the applicant or of some other interested person.

C. Respondent argues that Applicants have improperly placed this matter before the Court because Mr. Thompson is not an interested person. As the Court previously held, Mr.

Thompson and now his estate are interested persons for purposes of S.C. Code Ann. § 62-3-607(a). *See* S.C. Code Ann. § 62-1-201(23). Respondent continues to dispute the conclusion. Respondent argues a dissection of the definition of interested person in S.C. Code Ann. § 62-1-201(23) requires that for a spouse to be an interested person, they must also have a property right or claim and because Mr. Thompson was excluded in the will, he does not have a property right and therefore, is not an interested person.

“Interested person” includes heirs, devisees, children, **spouses**, creditors, beneficiaries, and any others **having a property right in or claim against a trust estate or the estate of a decedent**, ward, or protected person which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding.

This Court disagrees with Respondent’s argument and conclusion. Instead, this Court believes that the definition clearly recognizes a spouse by relationship, and that after all relationships are listed, then additionally anyone else who may have a property right or claim, may be an interested person. Respondent further argues that under the definition of claim in S.C. Code Ann. § 62-1-201(4), Mr. Thompson would not qualify as one with a claim against the estate because the definition specifically excludes estate or inheritance taxes. To reiterate, this Court concludes that Mr. Thompson is an interested person based solely on the relationship of spouse; however, to address the argument, the right to elect portability or the right to the DSUE is not a tax but a benefit in a taxable situation.

Going further, the last sentence of the statutory definition of “interested person” reflects the intent of the General Assembly that the term not be given a rigid but rather a flexible meaning to meet the particular situation. S.C. Code Ann. § 62-1-201(23) “The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding.” Here, Mr. Thompson, and now his estate, has an interest in the DSUE amount and, correspondingly, the administration of Decedent’s estate. *See Vose, supra*, 390 P.3d at 249 (“[The surviving spouse] may have a pecuniary interest as the surviving spouse in the portability of the DSUE, independent of his ability to take as an heir.”). Indeed, Mr. Thompson, and now his estate, is the only person with an interest in the “Deceased *Spousal* Unused Exclusion” amount and the only person that can benefit from its use.

D. Respondent argues that Applicants have improperly placed this matter before the Court because S.C. Code Ann. § 62-3-607(a) titled "Order restraining personal representative" allows for only a temporary order. This Court disagrees with Respondents argument and believes that Respondent is incorrectly dissecting the statute. While the statute does state the court may issue a **temporary order for restraint** of a personal representative, the statute further states that the court may "**make any other order to secure proper performance....**" This Court is clearly within the authority of this statute to order the personal representative to perform on this issue.

E. It is undisputed, and the Court finds, that the DSUE was not property of Decedent and is not an asset of the Decedent's estate; therefore, the article in the Decedent's Will that specifically disinherits Mr. Thompson is not sufficient to control the DSUE.

F. Primarily for this reason, and that the DSUE is a right created by federal statute that does not exist until the death of the first spouse and inures to the benefit of only a surviving spouse, Applicants contend that the intent of the Decedent is not relevant. The Court disagrees on this point.

G. 26 U.S.C.A. § 2010(c)(5)(A) specifically states that "A deceased spousal unused exclusion amount may not be taken into account by a surviving spouse under paragraph (2) unless the executor of the estate of the deceased spouse files an estate tax return on which such amount is computed and makes an election on such return that such amount may be so taken into account. Such election, once made, shall be irrevocable. No election may be made under this subparagraph if such return is filed after the time prescribed by law (including extensions) for filing such return."

H. Because the election must be made by the executor of the estate, as opposed to the spouse, this Court must conclude that the testator must have the ability to direct the personal representative to withhold this election.

I. The Court finds that a testator has the right to control the portability election in their will, but that it must be a specific power or direction given to the estate's personal representative in the will directly related to the portability election. When the Will is silent on the issue, and the personal representative and spouse are in agreement, then certainly this is a non-issue. Here, it is undisputed, and the Court finds, that the Decedent's Will is clear and unambiguous.

J. Decedent's Will does not contain any specific power or direction given to her estate's personal representatives directly related to the DSUE or the portability election or any other provision related to the DSUE or the portability election.

K. Decedent's Will provides only: "Within this instrument I have intentionally made NO provision for my husband, ROBERT M. THOMPSON, due to an existing Pre-marital Agreement." Resp't Ex. 5, Will, § III. This does not demonstrate that Decedent's intent was for her Personal Representative not to file the estate tax return to elect portability. This is especially so considering that, as the Court previously held and hereby finds, the antenuptial agreement between Decedent and Mr. Thompson in 1993 did not preclude Mr. Thompson or his estate from using the available DSUE amount because it did not say anything about the DSUE (because it did not exist in 1993), and the DSUE could not have been known to Mr. Thompson in 1993 and therefore, could not have been waived by him when the antenuptial agreement was signed.

L. Accordingly, although Decedent had the right to control the portability election in her Will, she had to do so through a specific power or direction given to Respondent directly related to the portability election, which Decedent did not do.

M. Therefore, the Will that disinherits the spouse, can no longer serve as a valid basis for Respondent to refuse to file the estate tax return to elect portability.

N. Because the Will is clear and unambiguous, there is no need for the Court to look outside the Will. *See Hyman*, 362 S.C. at 26 ("Only when the will's terms or provisions are ambiguous may the court resort to extrinsic evidence to resolve the ambiguity."); *Rodarte v. University of South Carolina*, 419 S.C. 592, 603 (2017) ("The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument.").

O. Nevertheless, a review of the testimony and this Court's findings is necessary. As discussed above, Respondent presented testimony and evidence she alleges demonstrates, that Decedent and Mr. Thompson had a difficult relationship in the last years of their lives and that Decedent did not want Mr. Thompson to receive "her tax credits." This Court is convinced that Decedent was extremely frustrated with her husband in the time frame beginning in 2012, primarily focused on the amounts of money he was or was not providing monthly. Further, this Court believes that Decedent clearly did not want Mr. Thompson to benefit from her estate. The Decedent was virtually surrounded by attorneys and her children advocating for her. To what degree Decedent understood the advice she was receiving, and to what degree the advice was accurate and most appropriate, is not clear. Decedent also clearly had multiple opportunities to

clarify her "agreement" with her husband or to change her Will to specifically address her "tax credits". By the testimony, Respondent moved the Decedent to South Carolina in March of 2017 during the negotiations between attorney DeFiandra and Mr. Thompson's attorneys for reimbursements of monies owed and the tax credits. Respondent, as her mother's agent, did not continue the discussions or pursue any action. Decedent and Respondent, as her agent under a Durable Power of Attorney, had many opportunities to resolve this heavily discussed issue and to put something in writing that was signed by the Decedent, notarized, and or witnessed. However, Respondent did not present evidence of any written document from Decedent that contained any specific direction to Respondent, or anyone else, directly related to the DSUE or the portability election. Respondent also did not present evidence of any agreement between Decedent and Mr. Thompson related to the DSUE or the portability election. Decedent also never filed for a divorce from Mr. Thompson nor for an annulment of their marriage, even though the evidence presented by Respondent demonstrated that Decedent contemplated both courses of action. This would have eliminated Mr. Thompson's right to the unused tax credit.

P. Respondent asserts that Mr. Thompson engaged in conduct which was unfair to Decedent which requires the application of the doctrine of "unclean hands" to bar Applicants from obtaining the relief requested. This again refers to "an agreement" to pay monthly support that the Decedent and Respondent believe Mr. Thompson had directly violated. There is no evidence before the Court that there was an agreement that was enforceable and, if there was, there is no evidence that Mr. Thompson did not meet the agreement. There is only testimony that the Decedent was extremely frustrated with what she believed was Mr. Thompson's failure to pay. However, none of the alleged conduct of Mr. Thompson with respect to the Decedent, even if true, had any relation to the DSUE or the portability election. Further, Respondent has not demonstrated that Decedent was prejudiced in any way with respect to the DSUE and cannot because, as a matter of law, the DSUE amount can only benefit Mr. Thompson and his estate. Accordingly, such alleged conduct could not as a matter of law preclude Mr. Thompson or his estate from being able to seek injunctive relief that would enable him to utilize the available DSUE amount. *Straight v. Goss*, 383 S.C. 180, 206-07 (Ct. App. 2009) ("The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.") (quoting *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 568

(Ct. App. 1998); *Wilson v. Landstrom*, 315 S.E.2d 130, 134, 281 S.C. 260, 267 (Ct. App. 1984) (“Prejudice to the defendant is a necessary element of the ‘unclean hands’ defense...”).

Q. Respondent, as Personal Representative of Decedent’s estate, is a fiduciary and owes a fiduciary duty to the estate and all interested persons to the estate. *See* S.C. Code Ann. § 62-1-201(15) (defining “fiduciary” as including “personal representative”); S.C. Code Ann. § 62-3-703(a) (titled, in part, “relation and liability to persons interested in estate,” and providing that “[a] personal representative is a fiduciary...”); S.C. Code Ann. § 62-3-711 (“[A] personal representative has the same power over the title to property of the estate that an absolute owner would have, *in trust* however, for the benefit of the creditors and others interested in the estate.”) (emphasis added); *McNair v. Howle*, 116 S.E. 279, 282–83 (S.C. 1923) (“Under the American system of administering the estates of deceased persons, the administrator is considered the deputy of the probate court, ... to whose jurisdiction is committed by statutory law the care and management of the estate for the benefit of creditors and of all who may be legally entitled thereto.”).

R. Respondent, although having felt compelled to fight vehemently for what she believed were her mother’s wishes, must now recognize that there is a fiduciary duty owed to Mr. Thompson and his estate on this issue. *See* 31 Am. Jur.2d, *Executors and Administrators*, § 368 (“[The personal representative] is held to the standards of a trustee to maintain undivided loyalty to the estate and diligently represent the rights of the heirs, distributees, and creditors, and all parties who have interests in the estate.”); 33 C.J.S. *Executors and Administrators* § 3 (“Executors and administrators are agents or officers of the court, and occupy a fiduciary relation toward all parties having an interest in the estate.”).

S. It is now Respondent’s duty to prepare and timely file the estate tax return to elect portability of the DSUE amount. *See Vose*, 390 P.3d 238 (confirming fiduciary duty of executor to surviving spouse and affirming order requiring the executor of the estate to file the estate tax return and elect portability of the DSUE).

T. The interest to Mr. Thompson’s estate is valued at approximately \$1.2 million and by contrast, the DSUE amount is of no value to the beneficiaries of Decedent’s estate.

U. Any further refusal to file the estate tax return to elect portability of the DSUE amount “jeopardize[s] unreasonably the interest” of Mr. Thompson and his estate because the DSUE will be forever lost if the estate tax return is not timely filed and may be ruled to be a breach

of the Respondent's fiduciary duty, which would require a separate appointment of a fiduciary to perform this duty.

V. At the close of Applicant's case, Respondent moved for a dismissal of the Application, in part based on an assertion that Applicants were required to seek appointment of a Special Administrator to obtain the relief requested. The Court denied this motion. S.C. Code Ann. § 62-3-607(a) clearly contemplates the authority of this Court to Order the Personal Representative to perform or take action, that if not otherwise taken, would jeopardize an interested person and as defined, the Decedent's spouse is an interested person.

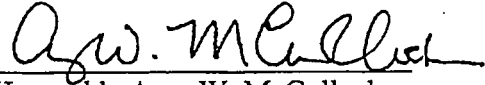
Conclusion

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court orders as follows:

- I. The Application for Performance of Personal Representative is GRANTED and Respondent is hereby required to timely prepare and file the estate tax return of Decedent's estate and elect portability for the benefit of Mr. Thompson and his estate;
- II. In order to carry out her duties under this order, Respondent shall employ a qualified, independent certified public accountant or attorney, who must be unrelated to the parties, any beneficiary of either of the estates which they represent, or their counsel, to prepare the estate tax return and provide proof of such employment to the Court and Applicants within fifteen (15) days of the date of this Order;
- III. Respondent shall provide a draft of the final estate tax return and any supporting documentation, appraisals, and valuations to the Court and the Applicants and their counsel within forty-five (45) days of the date of this Order;
- IV. Unless Applicants and their counsel have any comments or objections to the draft return, or the Court shall find it insufficient, Respondent shall file the estate tax return to elect portability no later than sixty (60) days after the date of this Order;
- V. Applicants shall pay for the reasonable actual costs of preparing and filing the return, which shall be paid within ten (10) days of the accepted filing of the return with the Internal Revenue Service, same to be determined by this Court in the event of any disagreement on the part of Applicants with respect to reasonableness of such costs which is raised to the Court by Applicants; and

VI. Respondent's failure to comply with the directives of this order shall result in the appointment of a Special Administrator to prepare and file the estate tax return to elect portability, the costs of which will be borne by Decedent's estate.

AND IT IS SO ORDERED.



The Honorable Amy W. McCulloch
Richland County Probate Judge

January 26, 2019
Columbia, South Carolina

----- Forwarded message -----

From: **Mark Hendrix** <markh@burkettcpas.com>

Date: Fri, Mar 8, 2019 at 1:12 PM

Subject: RE: Need letter concerning Tax Return for the Estate of Bertha Virginia LeRoy Maust Thompson

To: Marilyn White <lprush2@gmail.com>

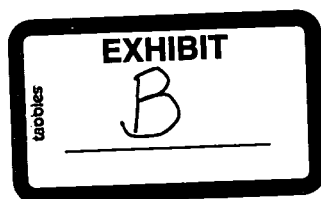
Dear Marilyn

We understand the time constraints before both of us. We will prepare the return as agreed upon. It is now March 8, 2019 and we are under an extra tight schedule to meet the March 15,2019 and April 15,2019 filing deadlines due to the massive law changes related to the TAX CUTS AND JOBS ACT. The IRS has been very slow to get all required regulations and forms to us. This has resulted in a significant compression of our available time and we would ask that the court to allow us until April 26,2019 to complete the return.

Attached you will find a document list to guide you as you begin to gather the information we will need to complete the return.

Thanks

Mark J Hendrix



STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
MAR 12 2019
SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
PROBATE COURT

Richland County Probate Case No. 2017-ES-40-01330

Honorable Judge Amy W. McCulloch

Appellate Case No. 2019-000169

In the Matter of the Estate of Bertha Maust-Thompson

Terri Ann Thompson, Wendy K. Thompson, and Robert
M. Thompson, Jr., as Co-Personal Representatives of the
Estate of Robert M. Thompson, Sr.....Respondents.

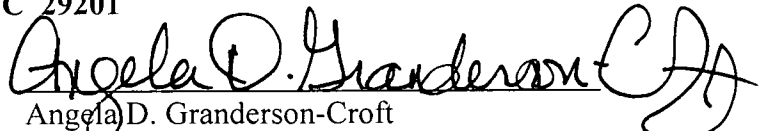
v.

Marilyn M. White, As Personal Representative of the
Estate of Bertha Maust-Thompson.....Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on 12th day of March, 2019, she served a copy of
the foregoing Motion for Supersedeas Pursuant to Rule 241(c) to the following counsel of record
via hand-delivery to:

John M.S. Hoefler, Esquire
John W. Roberts, Esquire
930 Richland Street
Columbia, SC 29201


Angela D. Granderson-Croft
Legal Assistant

Columbia, South Carolina

MAR 12 2019

SC Court of Appeals

REPLY TO:

W. Duvall Spruill

E-Mail: DSpruill@TurnerPadget.com
Writer's Direct Dial: (803) 227-4291
Writer's Direct Fax: (803) 400-1528

March 12, 2019

VIA HAND-DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

**RE: *Terri Ann Thompson, Wendy K. Thompson and Robert Miller Thompson, Jr.,
as Co-Personal Representatives of the Estate of Robert M. Thompson, Sr. vs.
Marilyn M. White, as Personal Representative of the Estate of Bertha Virginia
Maust-Thompson***
Appellant Case No.: 2019-000169
Our File No. 15256.101

Dear Ms. Kitchings:

We enclose for filing Appellant's Motion for Supersedeas along with a Certificate of Service, a check for \$50.00 and seven copies of the motion. We have made the decision to file this motion in the Court of Appeals in spite of the Court's Order of February 15, 2019 dismissing the appeal since no remittitur has been directed because of Appellant's Motion to Reconsider filed on February 26 2019. Respondent submitted no response to Appellant's Motion to Reconsider.

Please return a clocked copy of the motion to our courier.

Yours truly,


W. Duvall Spruill

WDS/adgc

Enclosures

cc: John W. Roberts, Esquire (*Via Hand-Delivery*)
John M.S. Hoefler, Esquire (*Via Hand-Delivery*)
Catherine H. Kennedy, Esquire (*Via E-Mail Only*)