

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Probate Court

Amy W. McCulloch

Richland County Probate Case No. 2017-ES-40-0330

Appellate Case No. 2019-000169

RECEIVED
MAR 28 2019
SC Court of Appeals

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.

**APPELLANT’S REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION
PURSUANT TO RULE 221**

Appellant, Marilyn M. White as Personal Representative of the Estate of Bertha Maust-Thompson, files this Reply in support of her Motion for Reconsideration Pursuant to Rule 221.

The Probate Court issued the appealed order on January 26, 2019 (the “Order”). Appellant timely filed her Notice of Appeal on February 4, 2019. On February 15, 2019, the Court of Appeals dismissed the appeal on the grounds that the Order was not a final order. On

February 26, 2019, Appellant timely filed her Motion for Reconsideration Pursuant to Rule 221 of the South Carolina Appellate Court Rules. By correspondence dated March 13, 2019, the Clerk of Court for the Court of Appeals requested Respondents' counsel to file a return to the Motion for Reconsideration within ten (10) days. Respondents filed their Return on March 25, which was received by Appellant on March 27. Appellant now files her Reply.

In its order dismissing the appeal, the Court of Appeals looked to S.C. Code Ann. § 62-1-308(a) which governs appeals from the probate court and which provides that a person interested in a final order of the probate court may appeal. The Court of Appeals cited *Dorn v. Cohen*, 421 S.C. 517, 809 S.E.2d 53 (2017) and *Fulmer v. Cain*, 380 S.C. 466, 670 S.E.2d 652 (2008) in determining that the Order was not a final order. While both cases interpreted S.C. Code Ann. § 62-1-308(a), both involved interlocutory orders. *Dorn v. Cohen* simply involved the addition of a party in ongoing litigation. No final order ending the litigation had been issued by the probate court. *Fulmer v. Cain* related to the probate court's order denying the appellant's motion to remove the matter to circuit court and denying appellant's motion to dismiss the litigation. Clearly neither denial ended the case. The order denying the motion to remove and denying the motion to dismiss just meant that the litigation continued and it continued in the probate court. The cited cases are inapposite to the present case. Neither order resulted in any finality since each litigation was to proceed on the merits.

In the present case, the relief sought by Respondents was for the probate court to require that Appellant file an estate tax return and elect portability of the Decedent's unused federal estate tax exclusion amount for the benefit of Decedent's husband, Robert Thompson. It is clear from the Order that many motions including motions to dismiss and motions for summary judgement were made and ruled upon by the probate court. None of those orders was appealed

as they were interlocutory in nature. Ultimately a trial on the merits was had and the probate court issued the Order granting Respondents' request. The Order required Appellant to file the estate tax return to elect portability, exactly what Respondents sought, and further gave Appellant a deadline to comply. The Order was an ultimate decision on the merits, unequivocal and final. There is no further legal step to be taken as Respondents have received exactly what was sought in their Application; no further legal action can be taken to avoid the directive of the probate court but to appeal the Order. Respondents themselves thought the Order was final since on January 28, 2019, two days after the Order was entered, they agreed to a direct appeal to the Supreme Court. (See Exhibit B to the Notice of Appeal.)

Respondents now seize upon the Court of Appeals' dismissal to advocate that Appellant has no right to appeal, suggesting that Appellant is not harmed by the Order nor does the Order affect her rights. S.C. Code Ann. § 62-1-308(a) states that "A person interested in a final order, sentence, or decree of a probate court may appeal. . ." Certainly Appellant, being the person who was required by the Order to file the estate tax return to elect portability, was interested in the Order. S.C. Code Ann. § 62-1-308(l) does allow for a party to a final order, sentence or decree of a probate court who considers himself injured by it to appeal directly to the Supreme Court. Federal law in 26 U.S.C. Code Ann. § 2010(c) places the right to elect to file the estate tax return upon the executor, the Appellant. She is therefore manifestly interested in and considers herself injured when that right of election is taken from her.

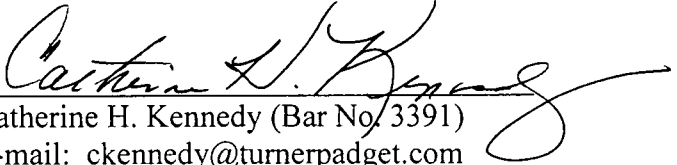
Respondents also request dismissal since the appeal was filed with the Court of Appeals rather than the Supreme Court. The Notice of Appeal filed on February 4, 2019, states that "All parties agree to a direct appeal pursuant to S.C. Code Ann. § 62-1-308(l)." S.C. Code Ann. § 62-1-308(l) authorizes a direct appeal to the Supreme Court if the parties not in default consent

in writing. Respondents did consent as shown by Exhibit B attached to the Notice of Appeal. Dismissal is not warranted if the appeal is filed in the wrong court. Rule 204(a) of the South Carolina Appellate Court Rules provides, “[i]n the event that the notice of appeal is filed in the wrong appellate court, the appellate court in which the matter is filed **shall** issue an order transferring the case to the appropriate court.” (Emphasis added). By correspondence dated February 12, 2019 to the Honorable Jenny Abbot Kitchings, Clerk of Court for the Court of Appeals, Respondents’ counsel indicated that the “appeal has been filed in the wrong appellate court and should be transferred to the Supreme Court to Rule 204(A) [*sic*], SCACR, and S.C. Code Ann. § 14-8-260.” (See attached Exhibit A). Appellant concurs and has previously moved that the appeal, once reinstated, be transferred to the Supreme Court.

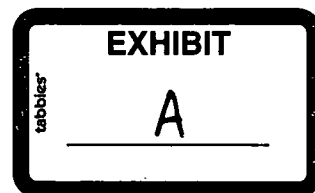
Appellant respectfully requests that the Order of February 15, 2019 be rescinded and that the appeal be allowed to move forward and be transferred to the Supreme Court.

Respectfully submitted,

March 28, 2019


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FEB 12 2019

SC Court of Appeals

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****ALSO ADMITTED IN NORTH CAROLINA

February 12, 2019

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk
The South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: *Marilyn M. White v. Terri Ann Thompson; Appellate Case No. 2019-000169*

Dear Ms. Kitchings:

I am writing to bring to the Court's attention that the above-captioned appeal has been filed in the wrong appellate court and should be transferred to the Supreme Court pursuant to Rule 204(A), SCACR, and S.C. Code Ann. §14-8-260.

Pursuant to S.C. Code Ann. §62-1-308(l), only the Supreme Court has jurisdiction in a direct appeal from an order of the Probate Court where written consent has been given not to have the appeal heard in the circuit court in the first instance. As reflected in Exhibit B to appellant's February 4, 2019, notice of appeal in this matter, respondents have consented to a direct appeal to the Supreme Court pursuant to this statutory provision. See also S.C. Code Ann. §14-8-200(a) (providing for direct appellate jurisdiction of the Court of Appeals in cases not including appeals from Probate Court).

Counsel for appellant has been consulted regarding this issue but appears disinclined to act to correct the erroneous filing. Hence, I am bringing the matter to your attention via this letter.

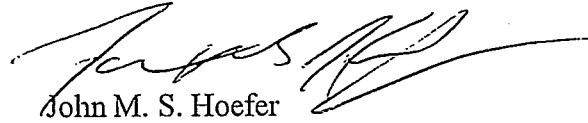
received
2-13-2019

Hon. Jenny Abbott Kitchings
February 12, 2019
Page 2 of 2

If you have any questions, or require additional information, please do not hesitate to contact me. Thanking you for your attention to and consideration of the foregoing matter, I am

Sincerely,

WILLOUGHBY & HOEFER, P.A.


John M. S. Hoefer

cc: W. Duvall Spruill, Esq.
Catherine H. Kennedy, Esq.
John W. Roberts, Esq.

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

Amy W. McCulloch, Probate Court Judge

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

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v.

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 28th day of March, 2019, she served a copy of the foregoing *Reply in Support of Motion for Reconsideration Pursuant to Rule 221* to the following counsel of record via first class mail:

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


Tracy Mattingly, Legal Assistant

Columbia, South Carolina

Turner | Padget

REPLY TO: COLUMBIA OFFICE

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March 28, 2019

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SC Court of Appeals

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

**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. 15256.00101**

Dear Ms. Kitchings:

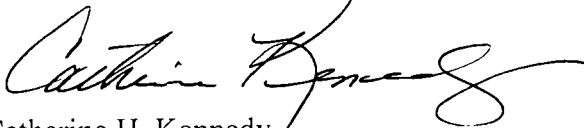
Please find enclosed for filing an original and seven copies of *Appellant's Reply in Support of Motion for Reconsideration Pursuant to Rule 221* along with a Certificate of Service in reference to the above-captioned matter. I would appreciate your having the original filed and a clocked copy returned to me via our courier.

By copy of this letter, I am serving a copy of the aforesaid document upon Mr. Hoefler and Mr. Roberts, counsel for Respondents.

Should you have any questions, please do not hesitate to contact me.

Sincerely yours,

TURNER PADGET GRAHAM & LANEY P.A.


Catherine H. Kennedy

CHK/tlm
Enclosures

Cc: John M.S. Hoefler, Esq. (w/encls.)
John W. Roberts, Esq. (w/encls.)