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THE STATE OF SOUTH CAROLINA

In the South Carolina Court of Appeals

Appeal from Greenville County
Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2016-002015

Wilson Garner, Jr., Ruby Lee Douglas, and Hazel Hastings as statutory heirs of the Estate of Nell Gaines, and on behalf of all other remaining statutory heirs who may be determined hereafter,

Appellants,

v.

The Estate of Nell Gaines and John Allen Head, individually and acting as Personal Representative of the Estate of Nell Gaines,

Respondents.

PETITION FOR REHEARING PURSUANT TO SCACR 221(a) FILED BY THE APPELLANTS

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PETITION FOR REHEARING

The decision of the Court *Affirming* the Circuit Court and Probate Court below was filed on April 3, 2019. The single page Opinion of the Court is an unpublished per curiam decision, with Justices Huff, Thomas & Konduras concurring.

Appellants' argument throughout the case has been that the Probate Court Judge in Greenville County failed to properly consider and apply S.C. Code Ann. § 62-2-504(a) in the informal probate of the Last Will and Testament of Nell Gaines. All Wills in question were submitted by the Respondents to the Probate Court. There are no issues of fact in dispute with respect to those Wills. Appellants do not question the factual findings of the probate judge below, only the application of the law to the facts as they appear in the record.

Mrs. Nell Gaines died on August 13, 2014. It is undisputed that Respondents presented the Last Will and Testament of Nell Gaines dated May 7, 2014 to the Probate Court of Greenville County for informal probate.

R. 192-98. It is further undisputed that the May 7, 2014 Will originally submitted to probate was improperly witnessed due to an "interested witness"[2] (as defined by the Probate Code below) signing as one of the two required witnesses. Appellants sought to set aside the devise contained in that Will pursuant to S.C. Code Ann. § 62-2-6504(a). R.24-32.

> "If there are not two disinterested witnesses to a will in addition to an interested witness, then the devise is null and void to the extent the value of the excess property, estate, or interest so devised over the value the property, estate or interest to which the witness, the witness's spouse, or the witness's issue would be entitled upon failure to establish the will. The voided portion of the devise shall pass by intestacy in accordance with S.C. Code Ann. § 62-2-101 et seq., provided the share of the interested witness, the witnesses spouse, or the witness's issue shall not increase due to the devise passingly intestacy." (Emphasis added).

Upon service of Appellant's Petition to Set Aside the Devise pursuant to S.C. Code 62-2-504(a), Respondents then submitted a second Will, relying upon the common law doctrine of "dependent relative revocation" [hereafter "DRR"] all in an effort to avoid the requirements of the statute. R. 33-38. Respondents have argued that the May 7, 2014 Will did not effectively revoke the preceding Will because of the deficiency in

how the most current Will was witnessed. Respondents moved to set aside the entire May 7, 2014 Will in favor of the earlier Will, dated January 9, 2008. R. 33-38.

Appellants have consistently argued that S.C. Code Ann. § 62-2-504(a) saves the deficient May 7, 2014 Will and only invalidates the devise going to anyone related by blood or marriage. In all other respects, the deficiently witnessed Will remains valid and fully enforceable under our statutory laws.

ISSUE OVERLOOKED OR MISAPPREHENDED BY THE COURT

Appellants respectfully submit that the Court of Appeals has failed to apply or otherwise distinguish the applicability of SC Code 62-2-504(a) in its original unpublished Order. Consequently, Appellants respectfully submit that the Court has overlooked controlling statutory law.

MEMORANDUM OF LAW

Is the Court foreclosed from reviewing the decisions of the lower courts?

Early in this Court's unpublished Opinion, reference is made to *Matter of Howard,* 315 S.C. 356, 361, 434 S.E.2d 703, 709 (2005) for the longstanding principle that "if the proceeding in the probate court is in the nature of an action at law, the circuit court and the appellate court may not disturb the probate court's finding of fact unless a review of the record discloses there is no evidence to support them." That principle of law is longstanding, but inapplicable in this case. Appellants respectfully submit that this case turns on a determination of law, which is always reviewable by the appellate courts. The facts are not in dispute. The Respondents submitted a Will for probate dated May 7, 2014 that was witnessed by an "interested witness." R. 202-07. The issue has always been what rule of law controls in light of these undisputed facts. Does the common law rule of DRR control, or does S.C. Code 62-2-504(a)?

Statutory law always controls where the common law conflicts.

Appellants do understand that the first determination to be made on

appeal is whether the common law rule of DRR conflicts with S.C. Code Ann. § 62-2-504(a). In the Circuit Court's Order dated September 14, 2016, Judge Verdin stated "the probate court impliedly and correctly found that S.C. Code Ann. 26(sic)-2-504 and DRR are not in conflict." (emphasis added) R. 2. That, however, is not a finding of fact. Rather, it a reviewable determination of law, and one not actually determined by the probate judge in the first place. Again, Judge Verdin carefully stated that she found that such determination was "implied" by the decision of the probate judge.

In her Order of October 26, 2015, Judge Faulkner made no findings as a matter of law with respect to S.C. Code Ann. 62-2-504(a), but only as to S.C. Code Ann. 62-2-508 R.12. She recognized that under S.C. Code Ann. § 62-2-504(a) the result would be that certain devises would fail. R. 13. She refers to that impact as "obliteration of [the testator's] estate plan." R. 12 It cannot be said that the probate judge did not find that the statute and the common law rule of DRR are in conflict, for indeed she did and made note of it. The probate judge herself points out the drastically conflicting results of applying one rule of law or the other. Rather than

following the statute, however, she instead used that very conflict to justify the application of DRR. Under the holding in *Davis v. Davis,* 208 S.C.182, 37 S.E.2d 530 (1946), that was error on the part of the probate judge. "To construe a will in conformity with the intention of the testator is much favored by the courts but such intention cannot prevail when in conflict with some statute or rule of law." (emphasis added); *see also, In re Estate of Prioleau,* 361 S.C. 627, 631, 606 S.E.2d 769, 772 (2004). On appeal to the Circuit Court, Judge Verdin inferred a decision never made by the probate judge, and one that is actually at odds. That's not a matter of how the facts were found, but how the law was found, which makes this case reviewable by this Court.

In the case of *University of Southern California v. Moran,* 365 S.C. 270, 617 S.E.2d 135 (Ct. App. 2005), cited by this Court as authority for its decision, the Court of Appeals found that statutory laws relevant to matters before the probate court are controlling. The Court in *Moran* recognized that even though "findings of fact" are not to be disturbed on appeal from an action at law decided in probate court, "legislative intent must prevail if it

can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." The Court did an extensive analysis in *Moran* and found that the probate court below had properly interpreted and applied the statute in question. *Moran,* therefore, is authority that the intent of the General Assembly, as expressed in relevant statutory law, cannot be ignored.

The Court's Order of April 3, 2019 recognizes that S.C. Code Ann. § 62-2-504(a) is indeed relevant to the determination of this case. The statute is cited as one of "the following authorities" shaping the Opinion of the Court. If so, then Appellants respectfully submit that either the statute must be followed or distinguished. By affirming the decision of the Circuit Court and Probate Court, this Court has adopted the same error of law made below, i.e., that DRR as a common law remedy is not in conflict with S.C. Code Ann. 62-2-504(a). This Court, however, is not bound by that determination as a consequence of anything said in *Matter of Howard.* It remains a reviewable question of law.

Is DRR actually in conflict with S.C. Code Ann. § 62-2-504(a), under the facts of this case?

Appellants respectfully submit that the decision continues to turn on whether the common law doctrine of dependent relative revocation can be used to avoid the application S.C. Code Ann. § 62-2-504(a). There is no dispute that the May 7. 2014 Will was deficiently witnessed, which placed the disputed Will squarely within the subject matter of the statute. DRR is a common law rule intended to avoid intestacy. Our General Assembly enacted a statute to accomplish that same objective under these same facts. While the intent of the testator is the settled common law rule controlling the disposition of Wills in our state, the intent of the General Assembly overrides the testator's intent when in direct conflict. As the Court said in *Estate of Prioleau,* 361 S.C. 627, 631, 606 S.E.2d 769, 772 (2004), "It is elementary that a testator's intention, as expressed in his will, governs the construction of it if not in conflict with law or public policy and intent is to be ascertained upon consideration of the entire will." (emphasis added). Of course, the statutory law of the General Assembly lays down the public policy of the state.

Respondents seek to avoid that obvious conflict with the statute by withdrawing the deficient Will and asserting another in its place. That clearly was not the recourse and remedy set out in the statute. The General Assembly mandated a course of action when the Probate Court is faced with the deficiency of an "interested witness," and Appellants submit that the Legislature did so to avoid the same intestacy as the common law rule of DRR sought to avoid. The legislative statute says nothing about any exception for cases where there is a prior Will that may be revived. Furthermore, there is no caselaw in South Carolina so interpreting the statute. In that respect, then, this is a case of first impressions, and the bar and these parties stand in need of clear direction.

There has only been one case in almost 80 years interpreting S.C. Code § 62-2-504(a) and its prior codification. That solitary decision enforced the statute. In the case of *Davis v. Davis,* 208 S.C.182, 37 S.E.2d 530 (1946), our Supreme Court held that "[t]o construe a will in conformity with the intention of the testator is much favored by the courts but such intention cannot prevail when in conflict with some statute or rule of

law." (emphasis added); *see also, In re Estate of Prioleau,* 361 S.C. 627, 631, 606 S.E.2d 769, 772 (2004). Again, the *Davis* case was decided after the statute in question was passed by the General Assembly. The original statute was codified four years earlier at S.C. Code of Laws 1942, § 8919. *Charleston Library Society v. Citizens of Southern National Bank,* 200 S.C. 96, 104, 20 S.E.2d 623 (1942), on the other hand, was decided prior to the enactment of the statute. This Court's decision does not explain why the General Assembly's intentions as expressed in the statute aren't relevant and controlling, or how the directives of the General Assembly have been otherwise distinguished or satisfied in this case. The *Moran, Davis, and Prioleau* decisions all say that relevant statutes must be given effect.

The Appellants do not ask the Court to disturb the factual findings of the probate court below. Appellants only ask that the law be properly applied. While the intentions of the testator govern the construction of his Will, they cannot be in conflict with law or public policy. The decisions of the lower courts have not properly applied S.C. Code Ann, 62-2-504(a), and they should be overturned.

Conclusion

In light of the error of law consistently and repeatedly argued by the Appellants in this case, which has been misapprehended by this Court, Appellants respectfully petition this Court for a rehearing of the matter to determine whether DRR and the statute can indeed coexist or are in conflict. If the statute is determined to be in conflict by this Court, Appellants ask that the matter be remanded to the probate court with instructions to follow the dictates of the statute. The decision of the Court on this issue will be dispositive of all issues on appeal as required by SCACR 221(c).

RESPECTFULLY SUBMITTED

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April 18, 2019

CERTIFICATE OF SERVICE

This will certify that the within PETITION FOR REHEARING PURSUANT TO SCARC 221(a), filed by the Appellants, was served upon opposing counsel by depositing a copy of the same into the United States Postal Service, with sufficient postage affixed, and addressed as follows:

Marcus Wesley Meetze
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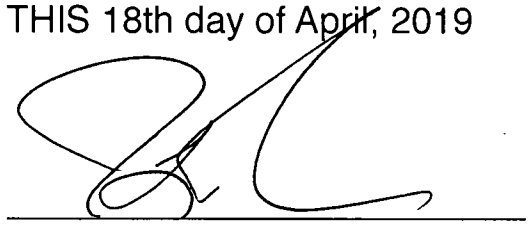
THIS 18th day of April, 2019



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