STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Probate Court

Amy W. McCulloch, Probate Court Judge

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

Appellate Case No. 2019-000169 (S.C. Ct. App. Order filed April 5, 2019)

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 ..... Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Motion for Reconsideration Pursuant to Rule 221 was summarily denied by the Court of Appeals on April 5, 2019.

QUESTIONS PRESENTED

1. Did the Court of Appeals err by dismissing this Appeal on the basis that the Order of the Probate Court is not a final order?
2. Did the Court of Appeals err in failing to transfer this Appeal to the Supreme Court?

STATEMENT OF THE CASE

The crux of this case is whether a state probate court can force a personal representative to provide federal tax benefits to a decedent's surviving spouse when federal law expressly provides a right of election in the personal representative, and when the provision of benefits is contrary to the premarital agreement between the parties, the Decedent's Will, and the Decedent's expressed wishes.

Marilyn M. White is the Personal Representative of the Estate of Bertha Virginia Maust-Thompson, who died May 28, 2017. (App. p. 2). The Will and First Codicil of Bertha Virginia Maust-Thompson ("Decedent") were admitted to probate by the Probate Court for Richland County, South Carolina, on August 14, 2017. (*Id.*). Robert M. Thompson, Sr., Decedent's surviving spouse, is not a beneficiary under Decedent's Will and Codicil. (App. p. 7).

On November 21, 2017, Robert M. Thompson, Sr., filed an Application in the Probate Court seeking an Order requiring Petitioner to file a federal estate tax return for Decedent's estate, which was not otherwise required by federal law, requiring Petitioner to elect portability of Decedent's unused estate tax exclusion amount to Thompson so that he could use the Decedent's unused exclusion amount to shelter additional funds from the estate tax upon his death and thereby pass more assets to his beneficiaries. (App. pp. 4, 7).

That Application was denied by Petitioner on numerous grounds: one of which is that, while portability to the surviving spouse is allowed pursuant to 26 U.S.C.A. § 2010(c)(4), Congress specifically provided that a decedent's executor has the right to elect to transfer a deceased spouse's unused exclusion amount (the "DSUE") and specifically rejected that the surviving spouse has any right to the DSUE. Further, and more importantly, as Decedent's Personal Representative, Petitioner believed she was bound to follow Decedent's instructions that she did not want her husband to receive the benefit of these tax credits Robert M. Thompson, Sr. died on March 6, 2018, and three of his children were appointed as Co-Personal Representatives of his estate to continue to pursue this matter. (App. p. 4).

The case was tried before Amy W. McCulloch, Richland County Probate Judge, on November 7 and 8, 2018, without a jury. (App. p. 2). On January 26, 2019, Judge McCulloch (the "Probate Court") issued a final order (the "Order") wherein she determined that Petitioner, must, in fact, prepare and file an estate tax return and "elect" to port any of Decedent's unused portion of her estate tax exclusion amount to Robert M. Thompson, Sr. (App. p. 16). According to calculations provided, the Court found that the unused DSUE was about Three Million Dollars ($3,000,000.00) and would have a direct financial benefit to the estate of Robert M. Thompson, Sr. in the amount of approximately One Million, Two Hundred Thousand Dollars ($1,200,000.00). (App. p. 7). In addition to ruling that Petitioner must file the estate tax return and elect portability by May 28, 2019, the tax filing deadline under a federal revenue procedure, the Probate Court also set certain interim deadlines toward preparing such a return and allowing the estate representatives of Robert M. Thompson, Sr. to "comment" on the return. (App. p. 16).

As allowed in S.C. Code Ann. § 62-1-308(l), both parties consented in writing to a direct appeal to the Supreme Court. (App. p. 18). Thereafter, Petitioner filed her Notice of Appeal

reciting the pertinent statute for a direct appeal. (App. p. 1). Petitioner, however, filed the Notice of Appeal in the Court of Appeals rather than the Supreme Court. (*Id.*).

By correspondence dated February 12, 2019, counsel for Respondents informed the Court of Appeals that "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." (App. pp. 20-21). Counsel for Respondents requested transfer of the appeal to the Supreme Court pursuant to Rule 204(a). (*Id.*). By correspondence to the Court of Appeals dated February 14, 2019, received by the Court of Appeals on February 15, 2019, counsel for Petitioner consented to the transfer to the Supreme Court. (App. p. 22). However, rather than transferring the matter to the Supreme Court pursuant to Rule 204(a), SCACR, as requested by the parties, by correspondence dated February 15, 2019, the Clerk of the Court of Appeals stated that counsel should file a motion pursuant to Rule 240 in the Supreme Court in order to have the matter transferred to the Supreme Court. (App. p. 24).

The same day, February 15, 2019, the Court of Appeals dismissed the appeal on the basis that the Order was not an appealable order. (App. p. 25). On February 26, 2019, Petitioner filed her Motion for Reconsideration Pursuant to Rule 221 in the Court of Appeals. (App. p. 27). On March 13, 2019, the Court of Appeals invited Respondents to file a return to this motion (App. p. 31), which Respondents did on March 25, 2019. (App. p. 32). Petitioner filed her Reply on March 28, 2019. (App. p. 36).

While Petitioner was awaiting a determination on her motion for reconsideration, she filed a Motion for Expedited Reinstatement of Appeal and Transfer to the Supreme Court on March 22, 2019. (App. p. 43). Since time was of the essence due to the IRS filing deadline, this motion specifically requested expedited treatment by the Court of Appeals to reinstate the appeal

and transfer the matter to the South Carolina Supreme Court for disposition of the appeal on the merits. (App. p. 44). Respondents filed their Return to Petitioner's Motion, again stating that the Supreme Court was the correct court for this appeal and noting that the Court of Appeals lacked jurisdiction. (App. pp. 49-50).

By Order filed April 5, 2019, the Court of Appeals denied Petitioner's petition for rehearing, and took no action on Petitioner's motion to transfer the appeal to the Supreme Court of South Carolina (App. p. 52).

Petitioner seeks a writ of certiorari to review that decision.

ARGUMENT

1. THE COURT OF APPEALS ERRED IN DISMISSING THE APPEAL.

The Court of Appeals erred in dismissing the Appeal as interlocutory as the Order appealed was a final order, affected a substantial right, and granted an injunction, all of which make it immediately appealable.

a. The Order is a final order after trial, leaving nothing left to be determined.

"An appeal ordinarily may be pursued only after a party has obtained final judgment." *Ex parte Capital U-Drive-It, Inc.*, 369 S.C.1, 6, 630 S.E.2d 464, 467 (2006). "South Carolina case law has established what constitutes an interlocutory appeal. If there is some further act which must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory. If a judgment determines the applicable law while leaving open questions of fact, it is not a final judgment." *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993). "The basic policy behind denying immediate review of pretrial motions is avoidance of piecemeal litigation where the rights of the parties have not

been substantially impacted." *Watson v. Underwood*, 407 S.C. 443, 458, 756 S.E.2d 155, 163 (Ct. App. 2014). "An order is not immediately appealable when appellants have not arrived at the end of the road and would be able to appeal the decision after the trial was finished." *Id.*

In this case, the Order is the result of a trial which took place on November 7 and 8, 2018. (App. p. 2). The Order contains findings of fact and conclusions of law. *Id.* It provides that the "Application for Performance of Personal Representative is GRANTED and Respondent [Petitioner] 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." (App. p. 16) *(emphasis in original).* The Probate Court has entered its Order which requires the very relief Thompson and his Personal Representatives sought—the election of the DSUE.

This court mandate shows that the Order is a final order. There is no further determination to be made on the Application--Respondents have arrived at the end of the road, obtaining the relief they sought. It is this relief that Petitioner has appealed as being in error. There are no additional acts or determinations that must be made by the Probate Court to set out the rights of the parties related to the DSUE. Moreover, once the estate tax return is filed, Respondents have no further involvement in Decedent's estate. The only manner in which Petitioner can avoid compliance with the court mandate affecting her right to port the DSUE is to appeal. Respondents themselves believed this was a final order by agreeing to a direct appeal to this Court and requesting that the Court of Appeals transfer the matter. (App. p. 20). Only after the Court of Appeals dismissed the appeal as interlocutory did Respondents seize upon this issue to thwart Petitioner's appeal.

Additionally, any delay in an appeal would only further prejudice the parties. As is indicated in the Order, the current deadline for filing the estate tax return to elect the DSUE is

May 28, 2019, a deadline that is fast approaching. (App. p. 7). Because of the timing of the Order coupled with the IRS deadline, Petitioner's only remedy is to appeal and to seek prompt consideration by this Court.

In summary, the Order is a final order, leaving nothing left to be determined. It determines the right of the Applicant/Respondents to the portability election and, indeed, Applicant/Respondents have no other claim in this estate since Decedent's surviving spouse is not a beneficiary of the Estate and has waived all right to receive from the estate by virtue of a premarital agreement. The appeal is not interlocutory. This Court should reinstate the appeal and hear the novel questions presented by the merits of this appeal to afford Petitioner (and all other similarly situated personal representatives) the serious consideration this issue deserves.

b. Even if the Order were not a final order, it is immediately appealable.

While Petitioner contends that the Order is a final order and therefore appealable, in the event this Court disagrees, the Court should still allow the appeal to go forward as the Order affected a substantial right and granted an injunction.

S.C. Code Ann. § 14-3-330 provides, in relevant part:

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and **shall review upon appeal**:
>
> (2) An order ***affecting a substantial right*** **made in an action when such order (a)** ***in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action***, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
>
> (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and

> (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.[1]

S.C. Code Ann. § 14-3-330 (1991) (*emphasis added).*

While Section 14-3-330 provides the specifications for review of "law cases", this Court has recognized that that these specifications are applicable to equity cases as well. *Kriti Ripley, LLC v. Emerald Investments, LLC*, 404 S.C. 367, 746 S.E.2d 26 (2013). It therefore does not matter whether the action to require the Petitioner to benefit Respondents is an action at law or in equity. It only matters that the order affects a substantial right.

Sections 14-3-330 (2) and (3) are implicated in this appeal as the determination—the requirement—that Petitioner must elect portability of Decedent's unused exclusion amount to Respondents affects her substantial federal right. It requires Petitioner to port the DSUE, despite federal law which allows for Petitioner to make this election in her discretion. *See* 26 U.S.C.A. 2010(c)(5)(A) ("**Election required.**—A deceased spousal unused exclusion amount may not be taken into account by a surviving spouse under paragraph (2) unless the executor (personal representative) 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...") (*bold in original, underline added*).

Additionally, because of timing, if the appeal is not heard now, Petitioner's rights will forever be lost by the Order. The trial of this matter has already taken place. The Probate Court has issued its ruling, retaining jurisdiction solely to enforce its ruling. If the appeal is dismissed, there is no guarantee that any further and more "final order" will be issued by the Probate Court

[1] While the order was granted by the Probate Court, not a court of common pleas, Petitioner includes this provision as an example of how the order would be immediately appealable if granted by the Court of Common Pleas, and as an example of how an interlocutory injunctive order affects a substantial right.

and no guarantee that such order will be issued by the May 28 deadline. The present deadline for electing the DSUE is within one month and, despite the automatic stay imposed by S.C. Code Ann. § 62-1-308(h), the Probate Court is proceeding with requiring the estate tax return to be filed. The effect of a dismissal will be to render the matter moot, preventing any appeal at all.

While the Order is not an appeal from the Court of Common Pleas, Section 14-3-330 (4) shows the legislature's intent that appeals be taken from injunctions. The Court of Common Pleas is the most likely venue from which an injunction would be issued. However, here, the Probate Court issued the order which required certain acts of Petitioner, mainly the election of portability of the DSUE. This institution of an injunction, albeit a positive, not negative injunction, should likewise be immediately appealable, despite the fact that it is not from the Court of Common Pleas. Therefore, even if the Court were to determine that the Probate Court order is not a final order, the exceptions to the general rule are implicated.

Recently this Court decided *Stone v. Thompson*, No. 2017-000227, 2019 WL 1461581, (S.C. Apr. 3, 2019). Therein the family court determined that a couple was in a common-law marriage, while reserving for later determination the issues of divorce and equitable distribution. Clearly, in that instance, unlike the present case, there were still issues to be decided between the parties. This Court nevertheless determined that the order finding a common law marriage was an appealable order. This Court held that the determination of the existence of a marriage between the parties affected a substantial right. This determination entitled the appellant to immediate review although there were still issues to be decided between the parties.

The instant situation is much clearer than *Stone* since the only relief requested by Respondents was for the Probate Court to require Petitioner to give them Decedent's unused estate tax exclusion amount. There are no further issues between the parties. While Petitioner

continues to contend that the Order is a final order, in the event this Court disagrees, the outcome is as in *Stone*--the determination that Petitioner is required to elect portability of the DSUE affects her substantial right entitling Petitioner to immediate review. This Court should grant the Petition and reverse the decision of the Court of Appeals to allow this appeal to go forward.

2. THE COURT OF APPEALS ERRED IN FAILING TO TRANSFER THIS APPEAL TO THE SUPREME COURT.

Appeals from the probate court are normally to the circuit court. S.C. Code Ann. § 62-1-308(a) (2014). However the parties may agree in writing or on the record for the appeal to be directly to the Supreme Court:

> If the parties not in default consent either in writing or on the record at a hearing in the probate court, a party to a final order, sentence, or decree of a probate court who considers himself injured by it may appeal directly to the Supreme Court, and the procedure for the appeal must be governed by the South Carolina Appellate Court Rules.

S.C. Code Ann. § 62-1-308(l) (2014).

In this case, all parties agreed in writing to an appeal directly to the Supreme Court and the Notice of Appeal references this agreement and cites to the statutory authority for a direct appeal. (App. p. 1). However, the Notice of Appeal was filed in the Court of Appeals. (*Id.*).

The South Carolina Appellate Court Rules provide that "[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 appellate court." Rule 204(a), SCACR (emphasis added).

In addition to Rule 204(a), S.C. Code Ann. § 14-8-260 requires the Court of Appeals to transfer cases to the Supreme Court where the Court of Appeals lacks jurisdiction:

> In all cases within the jurisdiction of the court as provided in this chapter, the notice of appeal must be filed with the court of appeals in the manner provided by the South Carolina Appellate Court Rules. In the event the court of appeals

> determines that a notice of appeal involves a matter over which it lacks jurisdiction pursuant to Section 14-8-200(b), it **shall issue an order transferring the case** to the Supreme Court...

S.C. Code Ann. § 14-8-260 (1999).

S.C. Code Ann. § 14-8-200(a) provides for the jurisdiction of the Court of Appeals, which notably does not include any appeals from the probate court:

> Except as limited by subsection (b) and Section 14-8-260, the court [of appeals] has jurisdiction over any case in which an appeal is taken from an order, judgment, or decree of the circuit court, family court, a final decision of an agency, a final decision of an administrative law judge, or the final decision of the Workers' Compensation Commission. This jurisdiction is appellate only, and the court shall apply the same scope of review that the Supreme Court would apply in a similar case...

S.C. Code Ann. § 14-8-200(a) (2007).

Furthermore, S.C. Code Ann. § 18-9-30 (1999) is not implicated since this appeal is not from a circuit court involving a probate matter, but rather directly from the probate court. Therefore, by law, the Court of Appeals lacked jurisdiction over this appeal and its only responsibility was to transfer the case to the Supreme Court. It had no authority to issue any orders otherwise.

S.C. Code Ann. § 14-3-320 (1983) states that the Supreme Court has appellate jurisdiction in cases of chancery, and S.C. Code Ann. § 14-3-330 (1991) provides the Supreme Court has appellate jurisdiction to review errors of law, as stated above. Therefore, pursuant to the S.C. Probate Code § 62-1-308(l), and Title 14, Chapter 3, Article 3 of the South Carolina Code governing the jurisdiction of the Supreme Court, only the Supreme Court had jurisdiction over this direct appeal.

"All rules of statutory construction are subservient to the one that the 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." *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). In construing a statute, a court must give words "their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Id.* "A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage or superfluous." *Id.* Under the canons of construction "*expression unius est exclusion alterius*" and "*inclusio unius est exclusion alterius*" the Court must construe statutes that include a list, but exclude other items as meaning "to express or include one thing implies the exclusion of another, or of the alternative."

In applying these canons of statutory construction, by excluding orders of the probate court from the jurisdiction of the Court of Appeals in S.C. Code Ann. § 14-8-200, the legislature clearly intended to include them in the Supreme Court's jurisdiction if so elected by the parties. Thus, this appeal was filed in the wrong court. Respondents have so indicated several times in their filings. Therefore, the Court of Appeals lacked jurisdiction to do anything other than transfer the case to the Supreme Court.

In not transferring the appeal to this Court, the Court of Appeals not only erred in failing to follow the statute and rule, but also in exercising jurisdiction at all over the appeal. This Court should review and reverse the Court of Appeals' dismissal, and exercise jurisdiction over the appeal, consistent with Rule 204(a), S.C. Code Ann. § 14-3-320 and 330 and S.C. Code Ann. § 62-1-308(l).

CONCLUSION

The Court of Appeals erred in issuing its order dismissing the appeal. The order appealed was a final order affecting a substantial right and granting a mandatory injunction, entitling Petitioner to appellate review. Furthermore, the Court of Appeals erred in issuing any order

other than transferring the appeal to this Court pursuant South Carolina law and appellate court rules. For these reasons and the reasons set forth above, Petitioner respectfully requests that this Court grant the petition for a writ of certiorari and determine to hear the appeal on this novel issue of law.

Respectfully submitted,

TURNER, PADGET, GRAHAM & LANEY, P.A.

May 2, 2019

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

PROOF OF SERVICE

I certify that I have served the PETITION FOR A WRIT OF CERTIORARI and APPENDIX upon Respondents by depositing copies in the United States Mail, postage prepaid, on May 2, 2019, addressed to their attorneys of record:

John M. S. Hoefer, Esquire
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(Signature page to follow.)

TURNER, PADGET, GRAHAM & LANEY, PA.

May 2, 2019

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May 2, 2019

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 M. Thompson, Jr., as Co-Personal Representatives of the Estate of Robert M. Thompson, Sr. v. Marilyn M. White as Personal Representative of the Estate of Bertha Maust-Thompson
Appellate Case No.: 2019-000169
Richland County Probate Case No.: 2017-ES-40-01330
File No.: 15256.101

Dear Ms. Kitchings:

Pursuant to Rule 242(c), SCACR, enclosed please find two copies of the Petition for a Writ of Certiorari and the Proof of Service for filing with the Court regarding the above-referenced matter. Also enclosed is a copy of our letter of even date to the South Carolina Supreme Court under cover of which the originals of these documents are being filed. I would greatly appreciate your returning clocked copies of the Petition and Proof of Service to my attention via our office courier. Thank you for your assistance with this matter, and please contact me if you have any questions.

Sincerely yours,

TURNER, PADGET, GRAHAM & LANEY, P.A.

Catherine H. Kennedy

CHK/tj
Enclosures

cc: John M.S. Hoefer, Esquire
John W. Roberts, Esquire
South Carolina Supreme Court
(w/enc.)