

STATE OF SOUTH CAROLINA

In The Court of Common Pleas

APPEAL FROM DORCHESTER COUNTY

Probate Court

The Honorable Molly Edwards, Associate Probate Court Judge

Case Number: 2015-ES-18-00616

(Appellate Case Number: 2018-CP-18-01079)

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SC Court of Appeals

IN RE: THE ESTATE OF TWELVER PURNELL ORVIG, II

TWELVER PURNELL ORVING, III,.....APPELLANT,

vs.

JANICE ORVIG,.....RESPONDENT.

**-AFFIRMED-**

**ORDER DENYING APPEAL & REMANDING CASE TO PROBATE COURT TO  
INFORMALLY PROBATE OCTOBER 7, 2015 WILL**

**INTRODUCTION**

Twelver "Purnell" Orvig, Jr. or "Decedent", passed away on October 9, 2015. He was survived by his wife of thirty four (34) years, Janice Orvig or "Respondent." Their marriage ended upon Purnell's death. Decedent was also survived by his four children of his first marriage, John "Randall" Orvig, Sandra Orvig, Judy Miller and Twelver "Terry" Purnell Orvig, III, or "Appellant."

Decedent executed the Will, which is the subject of this action, on October 7, 2015. The Will was admitted into evidence as Respondent's Exhibit 7. In the 2015 Will, Respondent Janice

Orvig was named Personal Representative and received the residuary, which was substantially all of decedent's Estate.<sup>1</sup>

### APPELLATE HEARING

This Appeal from the May 31, 2018, Order of the Probate Court was heard before this Court on July 30, 2019. Karen Dejong, Esquire appearing for the Appellant Twelver Purnell Orvig, III, hereinafter Appellant or Terry Orvig. Michael W. Sautter, Esquire appeared on behalf of Respondent Janice Orvig who is the Personal Representative of the Estate of Twelver Purnell Orvig II or Purnell Orvig.

Both Appellant and Respondent filed briefs with this appellate Court. A Record on Appeal was prepared and submitted for this appellate Court's consideration. Counsel for Appellant and Respondent appeared and ably argued the respective positions of their clients.<sup>2</sup>

### DECISION

After careful and thoughtful consideration of everything in the Record and the arguments of counsel this Court **DENIES** the Appeal and **AFFIRMS** the Order of the Trial Court. This action is **REMANDED** to the Probate Court to Informally Probate the October 7, 2015 Will of Decedent.

### THE ORDER UNDER APPEAL

On May 31, 2018, the Probate Court for Dorchester County issued an order denying Appellant's Motion for Summary Judgment. The court further ruled that the October 7, 2015

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<sup>1</sup> Decedent executed an "Old Will" dated November 25, 1987 which was admitted into evidence without objection as Respondent's Exhibit 8. In the Old Will, Respondent was the Personal Representative and Appellant Randall Orvig was to receive \$2,000, with Terry and his sisters each receiving \$100. Respondent Janice Orvig was to receive the residuary. The trial court evoked the doctrine of dependent relative revocation only as an additional basis in awarding Respondent attorney fees stating, "Therefore, for over two years, Petitioner (Appellant Terry Orvig) has contested a Will that has given him \$ 900 more than he would have received under the 2015 Will."

<sup>2</sup> In their Briefs the parties each set forth a Statement of the Case. In their Briefs each of the parties also alluded to and set forth specific trial testimony of the witnesses and corresponding exhibits in support of their arguments. This appellate court carefully considered the entire Record on Appeal and arguments of able counsel in arriving at the decision herein.

Will of Decedent was valid; that Decedent had testamentary capacity at the time of the making the October 7, 2015 Will; that Decedent was not unduly influenced at the time of the making of the October 7, 2015 Will; that the October 7, 2015 Will of Decedent was not obtained fraudulently; and that within sixty (60) days from the date of the Order, Appellant was to pay Query Sautter & Associates, LLC, attorney's fees in the amount of \$18,550.00 plus \$1,282.44 in costs. (R. p. 17-p. 33)

Appellant did not file any Post Trial Motions in the Probate Court. Appellant filed an appeal to the Court of Common Pleas which is the subject of this Decision and Order.

#### **DENIAL OF APPELLANT'S MOTION FOR SUMMARY JUDGMENT**

In a pre-trial filing Appellant moved for Summary Judgment. Appellant's counsel argued the motion prior to testimony and the introduction of evidence in the case in chief. The trial court considered the affidavits previously filed and arguments of the parties and **DENIED** the motion as there exists a genuine issue of material fact.

The Record on Appeal includes the affidavits of the witnesses to the October 7, 2015 will, to wit Tamara Wilson (R.pp 65-66), Lindsey Davis (R.pp. 67-68) and Elias Coleman Hodges (R.pp. 69-70). All of whom stated under oath that they were present in the hospital and watched Purnell Orvig sign the will.

The Record on Appeal also contains the affidavit of Shelly Valdez (R.pp.52-58). In her affidavit Shelly Valdez states she was presented a paper by Tamara Wilson and asked to sign it. She further states that she noticed that Lindsey Davis had signed it and Tamara Wilson had notarized it. (R.pp. 53).<sup>3</sup>

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<sup>3</sup> Pursuant to S.C. Code § 62-2-502 only two witnesses are required to witness a will.

"Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed." *McClanahan v. Richland County Council*, 350 S.C. 433, 437, 567 S.E.2d 240, 242 (2002). In ruling on a motion for summary judgment, a reviewing court must view the evidence in the light most favorable to the non-moving party. *Id.* at 438, 567 S.E.2d at 242. Summary judgment is a drastic remedy. Thus, it "should be cautiously invoked so that a litigant will not be improperly deprived of trial on disputed factual issues." *Cunningham ex rel. Grice v. Helping Hands, Inc.*, 352 S.C. 485, 491, 575 S.E.2d 549, 552 (2003).

This Court finds and concludes that the trial court was correct in finding there are genuine issues of fact which precluded the granting of summary judgment. The trial court's order denying summary judgment is therefore **AFFIRMED**.

#### **STANDARD OF REVIEW**

The subject of Appellant's appeal is whether the Probate Court properly decided Appellant's claims to set aside the October 7, 2015 Will of Decedent.

Under the Probate Code, a Circuit Court hearing an appeal from the probate court must apply the same rules of law as an appellate court would apply on appeal. S.C. Code § 62-1-308(d) (Supp.1997); *In re Howard*, 315 S.C. 356, 434 S.E.2d 254. *In re Estate of Cumbee*, 333 S.C. 664, 511 S.E.2d 390 (S.C. App., 1999).

The standard of review applicable to cases originating in the probate court is controlled by whether the underlying cause of action is at law or in equity. *Howard v. Mutz*, 315 S.C. 356, 361-62, 434 S.E.2d 254, 257-58 (1993) (noting the circuit court may not disturb the probate court's findings of fact on appeal in an action at law unless there is no evidence to support them

as compared to an equitable action in which the circuit court may make factual findings according to its own view of the preponderance of evidence).

The thrust of all surviving causes of action<sup>4</sup> in Appellant's Amended Petition (R.pp. 71-77), are to set aside the October 2015, Will. It is well settled that an action to contest a will is an action at law. *Johnson v. Johnson*, 235 S.C. 542, 112 S.E.2d 647 (1960); *In re Estate of Weeks*, 329 S.C. 251, 495 S.E.2d 454 (Ct.App. 1997); *Golini v. Bolton*, 326 S.C. 333, 482 S.E.2d 784 (Ct.App. 1997); *In re Estate of Anderson*, 381 S.C. 568, 573, 674 S.E.2d 176, 179 (Ct.App.2009).

As Appellant is contesting the validity of the October 7, 2015 Will, this Court concludes, and so finds, the underlying matter is an action at law.

If the proceeding in the probate court is in the nature of an action at law, the circuit court and this Court may not disturb the probate judge's findings of fact unless a review of the record discloses there is no evidence to support them. See *In re Howard*, 315 S.C. 356, 434 S.E.2d 254 (1993); *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976); *In re Estate of Weeks*, 329 S.C. 251, 495 S.E.2d 454.

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<sup>4</sup> The October 19, 2016, Order of the Probate Court, DISMISSED Appellant's Causes of Action for Forgery pursuant to S.C. Code § 16-13-10 (lack of subject matter jurisdiction); Tortious Interference with Expectancy to Inherit, (S.C. has not adopted this common law tort); and Civil Conspiracy (Rule 12(b)6, SCRPC, failure to state facts sufficient to constitute a cause of action). Despite Notice, neither Appellant nor his counsel appeared at the Motion to Dismiss hearing of August 7, 2016. (See 10-19-2016, Order R. pp. 9-15).

Appellant and his counsel also failed to appear at Petitioner's (Appellant's) Motion for a Temporary Restraining Order. Appellant also failed to serve Mrs. Orvig, therefore the hearing on Appellant's Motion had to be continued and rescheduled.

Appellant's attorney also first requested two days for the trial that is the subject of the Order under appeal. Without leave from the Court, Appellant's witnesses were scheduled to span 3 days. Appellant's witnesses were not available throughout the trial which resulted in the Court adjourning after only a few hours of testimony each day. This resulted in a trial that should have only lasted a day and a half, spanning three days.

The trial court cited all of the above as examples of unnecessary delays and waste of judicial resources in consideration of Mrs. Orvig's request for attorney fees. (See, Order under appeal, R.pp. 30-32).

In the case at bar, the underlying issues were decided by the trial court without a jury. Rule 52(a) SCRCPP mandates that, "... the court shall find the facts specially and state separately its conclusions of law thereon and judgment shall be entered pursuant to Rule 58." Rule 52(b) SCRCPP provides that upon motion made within 10 days after receipt of written notice the court may amend its findings or make additional findings and may amend the judgment accordingly, and the motion may be made with a timely motion for a new trial.

In an action at law, tried without a jury, the judge's findings will not be disturbed unless they are without evidentiary support. *Estate of Revis by Revis v. Revis*, 326 S.C. 470, 484 S.E.2d 112, 115-16 (Ct.App. 1997). In an action at law tried without a jury, the trial court's findings will be upheld if they are supported by any reasonable evidence. *Palmettonet, Inc., v. Tax Comm.*, 318 S.C. 102, 456 S.E.2d 385, 387 (1995).

In the case at bar Appellant did not move post trial for the trial court to amend, make additions to the findings nor to amend the judgment.

**EVIDENCE IN THE RECORD ON APPEAL SUPPORTS  
THE ORDER OF THE TRIAL COURT**

In his Brief, Appellant does not specifically challenge any of the Court's Findings of Facts in the Order of May 31, 2018. Instead, Appellant largely substitutes his version of contested facts, and then assigns error to the trial court's determinations. Appellant cannot create error by creating facts.

The Order on Appeal sets forth 30 separate Findings of Fact upon which the Court made Conclusions of Law. (R. p. 20-p. 25). The Court's Findings of Fact were based upon the testimony and evidence admitted and upon the trial court's observations of the demeanor of all witnesses, including Appellant and his chief witness Shelly Valdez. (R. p. 23-p. 25). "In a law case tried without a jury, questions regarding the credibility and the weight of evidence are

exclusively for the trial judge." *Golini v. Bolton*, 326 S.C. 333, 342, 482 S.E.2d 784, 789 (Ct.App.1997). *In re Estate of Anderson*, 674 S.E.2d 176, 381 S.C. 568 (S.C. App., 2009).

No testimony was presented that supported any allegations that the Decedent did not personally sign the 2015 Will. A handwriting expert was not utilized and there was no testimony that someone other than Decedent signed the Will as the testator." (Finding 9; R. p. 22).

As to Appellant's claim of undue influence, the Court found that, "Both Appellant and Mrs. Orvig described the "Decedent as "alert" in his final days of his life. Appellant Terry Orvig remarked that when he visited his father on October 9<sup>th</sup>, (two days after his father signed the Will and on the day his father died) his father answered his questions and they engaged in meaningful discussions." (Finding 10; R. p. 22). The Court found that, "Petitioner described his father as a "strong willed man." (Finding 11; R. p. 22). All of these findings are supported by the evidence. (See, Appellant Terry Orvig's testimony R.pp. 382-397)

As to Appellant's claim that the 2015 Will was invalid, witnesses Wilson, Davis and Hodges all provided Affidavits (Def Exhibits 1, 2, and 3 respectively; R. p. 667-p. 672), all of the witnesses testified at trial. (See respective testimony of Hodges, Wilson and Davis, R.pp 267-322). The Court found that, "The only thing the Witnesses all agreed upon regarding the signing of the 2015 Will, was that it was done at the hospital and they were all present and witnessed the Decedent sign the will in his hospital room." (Finding 17; R. p. 23).

The Court found that Petitioner offered the testimony of Shelly Valdez ("Mrs. Valdez"), (See, Valdez testimony R.pp. 409-454) ; that Valdez was asked to sign a document she believed to be the 2015 Will already signed by witness Davis and notarized by witness Wilson. (Finding 18; R. p. 23). The Court found that Valdez' deposition testimony as to whether decedent had

signed the document presented to her at her employment was contrary to what she testified to in Court. (Finding 19; R. p. 23). (*See*, Valdez's testimony, R.pp. 436-437).

As to Valdez, the Court found "By observing her mannerisms, demeanor, and tone of voice, the court finds that Ms. Valdez has harsh feelings against decedent and Mrs. Orvig." "... she appears to have a very close relationship with Mr. Wilson, who is employed by one of Mr. Orvig's children. Further, throughout the last days of Decedent's life, she was passing information to Mr. Wilson to share with Decedent's children." (Finding 23; R. p. 24). (*See*, Valdez's testimony upon examination by the Court, R.pp. 452-453). The Court further found that Valdez's testimony is not corroborated by any other person (Finding 24; R. p. 24).

As to Appellant Terry Orvig, the Court found that, "By his tone, demeanor and mannerisms, and testimony, Petitioner (Appellant) has many harsh feelings toward Mrs. Orvig (Respondent). He testified at the hearing that he wanted Mrs. Orvig and Polutta, "to go to jail" and his intent was to take his father's share of the home from Mrs. Orvig." (Finding 26; R. p. 24). (*See*, Appellant Terry Orvig's testimony, R.pp. 375-406; as to Appellant's intent, R.pp. 391-393).

This appellate court has carefully reviewed all of the testimony in the Record, the admitted evidence submitted by both Appellant and Respondent, and the briefs of the parties<sup>5</sup>. This Court finds that on Appellant's key issues to set aside the Will of decedent, such as alleged incapacity of the testator, the alleged undue influence of Respondent over Decedent, and Decedent's execution of the will; there appears to be little if any credible evidence to support Appellant's arguments.

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<sup>5</sup> In their Briefs the parties set forth specific trial testimony of the witnesses and corresponding exhibits in support of their arguments to be considered by this appellate court. This appellate court considered all evidence in the record in arriving at the decision on the appeal.

As to the Fraud Cause of Action, upon inquiry by the trial court after all of the evidence had been submitted, counsel for Appellant was unable to point to any evidence that Respondent Janice Orvig committed the fraud. Counsel for Appellant concluded with, "You understand. But she seems to be the mastermind." (R.p. 593, line 24, p. 594, line 10).

### CONCLUSION

In a careful review of the entire record in the appeal of the case at bar there is sufficient if not overwhelmingly evidence to support the Trial Court's Order that:

- A. The October 7, 2015 Will of Twelver Purnell Orvig, Jr. is VALID; (R. p. 25-p. 27)
- B. Twelver Purnel Orvig, Jr., had capacity at the time of making the October 7, 2015 Will; (R. p. 28-p.29)
- C. Twelver Purnell Orvig, Jr., was not unduly influenced at the time of the making of the October 7, 2015 Will; (R. p. 29)
- D. The October 7, 2015 Will of Twelver Purnell Orvig, Jr., was not obtained fraudulently. (R. p. 29-p. 30)
- E. Petitioner (Appellant) shall pay Query Sautter & Associates LLC attorney fees in the amount of \$ 18,550.00 and costs in the amount of \$ 1,282.44. (R. p. 30-p. 33)<sup>6</sup>

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<sup>6</sup> A careful review of the Record on Appeal and the Order under Appeal, illustrates the patience of the Probate Court and the Trial Judge, and provides overwhelming evidentiary support for the award of attorney fees. In the Order, the trial court provided an analysis of the specific evidentiary support of the basis of the award of attorney fees in the Section entitled "Mrs. Orvig's Attorney Fees." (See, Order, R.pp. 30-33).

**THEREFORE** Appellant's Appeal is **DENIED**. The Order of the Trial Court is **AFFIRMED** and this action is **REMANDED** to the Dorchester County Probate Court to informally probate the October 7, 2015 Will of decedent Twelver Purnell Orvig, II.

**AND IT IS SO ORDERED!**

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Maite D. Murphy  
Presiding Judge of the Court of Common Pleas  
First Judicial Circuit

This \_\_\_ day of \_\_\_\_\_, 2019  
St. George, South Carolina



Dorchester Common Pleas

**Case Caption:** Twelver Purnell Orvig III VS Janice Orvig

**Case Number:** 2018CP1801079

**Type:** Order/Other

So Ordered

s/ Maite Murphy 2166