THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HONORABLE MARVIN I. LAWSON,
THE HONORABLE J. MICHAEL BAXLEY
DARLINGTON COUNTY
TRIAL COURT CASE NO. 2013-CP-16-431

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SC Court of Appeals

APPELLATE CASE NO. 2014-000589

Wilkins Lee Byrd, Kay R. Larsen, John Norwood Klettner, Laura K. Bynum, Ann B. Crump, Robert Larsen, Joan Rutledge Gary, John Robert Stanton, John Robert Stanton, Charles E. Stanton, Byrd L. Thomson, and John Doe and Richard Roe as Representatives of all persons unknown claiming any right, title, estate, interest in or lien upon the real estate described in the Appeal herein, including but not limited to any unknown owners, unknown heirs, unknown devisees of S.W. Byrd, Mary Moore Byrd, Etta B. Klettner, S.J. Klettner, Sr., Susan Wilkins Byrd, Mary M. Byrd, Joseph D. Rutledge, John R. Larsen, Charles E. Byrd, Jewel Butler Byrd, Wilkins Norwood Byrd, Ruth Byrd, Marian Moore Byrd, Mary K. Stanton, S.J. Klettner, Jr., Mary R. Larsen, John Rutledge Gary, Jewel Elizabeth Byrd, or any other person, any unknown infants or persons under disability or persons in the military service designated in a class as Richard Roe, as to the property described in the Petition herein and designated as Tax Map No. 076-00-02-004, ... Appellants.

v.

E. Butler McDonald, ...Respondent.

FINAL BRIEF OF APPELLANTS

Brown W. Johnson
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STATEMENT OF THE CASE

This is an appeal from the Darlington County Probate Court ordering the public sale of property in a partition action brought by the respondent. The Order of the Probate Court was affirmed by the Court of Common Pleas. The appellants are co-tenants and tenants in common of the S. W. Byrd Farm, a tract of land located in Darlington County and owned by the Byrd family for almost 200 years. Appellants contend the Probate Court's Order directing the public sale of the property is in error and should be reversed.

The respondent E. Butler McDonald owns 2.04% of the S. W. Byrd Farm consisting of approximately 240 acres of open fields and pine forest. The

respondent commenced this partition action by summons and petition filed on April 18, 2012 in the Probate Court of Darlington County. The appellants did not want the property sold and expressed interest in purchasing the respondent's interest early in the proceedings. By letter to counsel for the respondent, the appellants suggested the parties obtain an appraisal and a timber cruise and tried to reach an agreement by which appellants would buy respondent's interest. The respondent refused.

The Probate Court scheduled a hearing on December 5, 2012. The appellants sought a continuance of the hearing in order that an appraisal and a timber cruise could be obtained, and again, the respondent objected. Prior to the scheduled hearing, the appellants moved to dismiss the suit contending the Probate Court lacked subject matter jurisdiction. At the December 5, 2012 hearing, the Probate Court denied appellants' Motion to Dismiss. The appellants again moved to continue the case and asked the court to appoint an appraiser in hopes that the appellants could buy respondent's 2.04% interest. The court denied their request to continue.

The respondent testified the property could not be partitioned in kind or by allotment and asked the court to order a public sale. The respondent also took the position the appellants had failed to submit a written offer to purchase pursuant to § 15-61-25(a) and, therefore, the appellants had waived their right to purchase the respondent's interest. At the conclusion of the hearing, the Court took all issues under advisement.

Following the hearing of December 5, 2012, the appellants obtained an appraisal and a timber cruise at their own expense.

On February 20, 2013, the appellants submitted an offer to buy respondent's interest in the S. W. Byrd Farm. When the respondent did not reply, the appellants offered to deed respondent his 2.04% interest in the property.

On April 16, 2013, the appellants filed a "Notice and Motion for Court Appraiser". On April 25, 2013, respondent objected to the motion and again took the position "the respondents failed to timely make a written offer to the petition of their wish to purchase the property."

On May 21, 2013, the Probate Court issued its order directing the S. W. Byrd Farm sold by public auction. The Order provided, "Based on the testimony at the hearing, no interested party had noticed Mrs. Ervin their wish to purchase the same."

The appellants appealed to the Court of Common Pleas which affirmed the Order of the Probate Court holding there is sufficient evidence to support the Probate Court's decision that the appellants failed to timely comply with the dictates of S. C. Code Ann. § 15-61-25(A) and that the property should be sold. The appellants served its Notice of Appeal on March 13, 2014.

ARGUMENT

1. Did the Probate Court lack subject matter jurisdiction to hear this partition action since the Estate of S. W. Byrd was closed in 1948?

The Circuit Court only heard this case on direct appeal from the Probate Court. The statute cited by the Circuit Court, South Carolina Code § 15-61-25, provides for Circuit Court jurisdiction to partition real estate. South Carolina Code § 15-61-50 provides that the Court of Common Pleas has jurisdiction in all cases in which more than one person holds an interest in property, to have the property divided or sold. Only if the property is part of an active estate does the Probate Court have concurrent jurisdiction. South Carolina Code § 62-3-911 provides that partition can only be had in the Probate Court in the following situation:

> "...[T]he personal representative or one or more of the interested heirs or devisees may petition the court prior to the closing of the estate, to make partition."

Appellants Byrd et. al. filed, prior to the hearing in the Probate Court, a Motion to Dismiss for Lack of Subject Matter Jurisdiction, citing Rule 12(b)(1) of the South Carolina Rules of Civil Procedure and § 62-3-911 of the South Carolina Code:

> "This motion is based on the above statutes and the fact that the estate of S.W. Byrd is closed."

The S. W. Byrd Estate was closed in 1948. Counsel for the Appellants read a portion of the order closing the estate into the record. Page 60 of the Record provides as follows:

"MR. JOHNSON: Your Honor, we think that we can find an order in – (STOPS SPEAKING TO THE COURT AND STARTS CONFERRING WITH HIS CLIENT, INAUDIBLE, AND THEN BEGINS SPEAKING TO THE COURT AGAIN) – in S. W. Byrd's Estate closing the file. (STARTS LOOKING AT THE DOCUMENT)

JUDGE: That it right there?

MR. JOHNSON: (STARTS APPROACHING THE BENCH)

JUDGE: Hold in abeyance one (1) minute and let's see what we can find.

MR. JOHNSON: It's signed by the Court by the Honorable Judge Fountain (PHONETIC SPELLING). It says, "That the Petitioner is from henceforth and forever discharged and dismissed from all liability as Administrator of the aforesaid . . ." (THEN HANDS THE DOCUMENT TO THE JUDGE)."

In spite of the fact the S. W. Byrd Estate was closed, and the probate court denied the motion to dismiss.

Section 62-3-911 states that partition can only be made "prior to the closing of the estate." In *Estate of Livingston v. Livingston*, 404 S.C. 137, 744 S.E. 2d 203 (S.C. App. 2013), the Court of Appeals had the converse issue in front of it. In that case, a partition action was brought in an open estate. The case was referred to the Master in Equity, who then applied the Circuit Court statute, South Carolina Code § 15-61-25. The appellant contended that because the action originated in the Probate Court, the Probate Court statute continued to apply to the partition action even though the case was then in effect in Circuit Court. The appellant suggested that the order of priority for abatement would be affected by failure to apply the proper statute. The Court of Appeals held that the Master should have

applied the Probate Code's partition statute. The court noted that in *Waddell v. Kahdy*, 309 S.C. 1, 4, 419 S.E. 2d 783, 785 (1992), the Supreme Court found the Probate Code governs an action when it is removed to the Circuit Court, and remains primarily within the scope of the Probate Code. The Court added that because a partition statute is provided for in the Probate Code, the Master should have relied upon the Probate Code statute in addressing partition. The case was reversed and remanded for the Master to apply the Probate Code statute. Similarly in this case, since the Probate Court never had jurisdiction, the case should be dismissed.

In an unpublished case, *Evans v. Anderson*, 2005-UP-295 (April 25, 2005), the Court of Appeals held in a footnote in a partition matter:

> "We recognize Middlebrooks' claim that the master lacked subject matter jurisdiction can be raised for the first time on appeal. *See*, e.g., *Simmons v. Bellamy*, 349 S.C. 473, 476, 562 S.E. 2d 687 (Ct. App. 2002)."

Although it is acknowledged that Appellants did not raise this issue on appeal from the Probate Court to the Circuit Court, they did initially plead it before the Probate Court, and under the above authority they would not even have been required to do that. This issue of not requiring parties to preserve subject matter jurisdiction was specifically discussed:

> "However, the Probate Court does not have subject matter jurisdiction to determine the question of paternity. § 20-7-420(7) provides the Family Court has exclusive jurisdiction to determine paternity. South Carolina Code Ann. § 20-7-420(7)(1976 & Supp. 2001). While it is true that this issue was not raised in either the Probate Court or the Circuit Court and has not been relied upon by the appellant, 'lack of subject matter jurisdiction can be raised at any

time, can be raised for the first time on appeal, and can be raised *sua sponte* by the Court.' Lake v. Reeder Constr. Co., 330 S.C. 242, 248, 498 S.E. 2d 650, 653 (Ct. App. 1998). Since the Probate Court did not have subject matter jurisdiction to decide paternity, the finding that McCray is the father of Mikayla is a nullity because the Probate Court lacked subject matter jurisdiction to determine paternity, and the order under appeal must vacated. We do not address the issue of whether it was error to reopen the estate."

2. Did the Probate Court commit error by applying § 15-61-25(A) rather than § 62-3-911?

The Circuit Court affirmed the Probate Court based upon South Carolina Code § 15-61-25(A).

However, this would have been the wrong statute even if the Probate Court indeed did have jurisdiction. It is argued above that the Probate Court never did have jurisdiction, but if the Probate Court did have jurisdiction, it applied the wrong statute. If the Probate Court had had jurisdiction, the proper statute would have been South Carolina Code § 62-3-911.

In this context, it should be noted that during the time period at issue, South Carolina Code § 62-3-911 differs markedly from what it states now. In an Amendment effective January 2014, the code section tracks the language of South Carolina Code § 15-61-25. However at that time, effective June 2010, § 62-3-911 did not have the 10 day period of the South Carolina Code § 15-61-25. It merely stated:

"When two or more heirs or devisees are entitled to distribution of undivided interests in any personal or real property of the estate, the personal representative or one or more of the heirs or devisees may petition the Court prior to the closing of the estate, to make partition. After service of summons of petition and after notice to the

> interested heirs of devisees, the Court shall partition the property in kind if it can be fairly and equitably partitioned in kind. If not subject to fair and equitable partition in kind, the Court shall direct the personal representative to sell the property and distribute the proceeds."

Thus, there was no 10 day period to violate. Even though the Circuit Court partition statute should have been applicable, that is irrelevant because if the Probate Court indeed had had jurisdiction to hear the case, then the Probate Court was required to use the Probate Court partition statue as noted above in *Estate of Livingston v. Livingston*, *supra*.

3. *Did the Proabte Court commit error in finding that the Appellants failed to comply with the Probate Order.*

Even if the Probate Court had had jurisdiction, appellants Byrd, et. al. complied with the Probate Court orders.

The Circuit Court found that there is sufficient evidence to support the Probate Court's alleged decision that the appellants failed to timely comply with the dictates of South Carolina Code §15-61-25(A). (Last page of Order of Judge Baxley, dated February 17, 2014). There was no further discussion. The Circuit Court did note that the appellant Byrd had claimed that the Probate Court erred by denying the appellants Byrd et. al.'s right to purchase the respondent McDonald's 2% minority interest in the property as provided by South Carolina Code §15-61-25.

However, the initial Probate Court Order of November 5, 2012 did not cite South Carolina Code § 15-61-25(A). It simply stated that if anyone was interested

in purchasing the property, he or she should notify Gina Ervin as attorney for McDonald by November 21, 2012. When the Probate Court issued its Order on the merits on May 13, 2013, there was no finding that any time period in § 15-61-25 had not been complied with.

The Probate Court Order of May 13, 2013 noted that on November 5, 2012, the Probate Court had issued an earlier Order allowing the respondent McDonald to notify all interested parties of their right of first refusal to purchase the property. The Probate Court then stated:

> "6. Pursuant to the terms of that Order, anyone interested in purchasing the property subject to the action was to notify Mrs. Ervin [the respondent McDonald's attorney] in writing on or before November 21, 2012.
>
> 7. Based on the testimony at the hearing, no interested party had notified Mrs. Ervin of their wish to purchase the same."

This finding was clearly erroneous, because the Order of November 5, 2012 by the Probate Court simply stated:

> "It is therefore, Ordered, adjudged, and decreed that the petitioner [McDonald] shall send a Notice of Right of First Refusal to all interested parties in this matter who shall have until November 21, 2012 to notify Gina Phillips Ervin as attorney for the petitioner if they are interested in purchasing the property that is the subject of this action."

It is clear that not only did appellants Byrd, et. al. comply with this provision, they complied with it multiple times prior to November 21, 2012. All of the following are part of the transcript and are pursuant to appellant Byrd et. al.'s Second Request to Admit:

1. September 21, 2012 letter from Brown Johnson, attorney for appellants to Ervin, attorney for respondent McDonald. (R. 177) This letter states:

> "In the meantime, I wanted to make one more attempt to settle this case. Butler McDonald owns 2.04% of the S.W. Byrd Farm. Do you think he would consider my client buying his interest? If we could agree on a value of the estate, I may be able to find enough buyers to buy his interest. Please give this some thought and let me hear from you at your first convenience."

2. Exhibit 2 of Request for Admission. On September 27, 2012, Gina Ervin, McDonald's attorney, stated that the respondent McDonald would in fact be willing to sell his 2% interest if a settlement could be made on an adjacent property. (R. 178)

3. Exhibit 3 of Request for Admission. On November 1, 2012, Brown Johnson, attorney for appellants, sent a letter to Ervin, attorney for respondent McDonald (R. 179), stating:

> "I would appreciate Mr. McDonald submitting a settlement demand for his interest in the property pursuant to §15-61-25. I look forward to hearing from you."

4. Exhibit 4 of Request for Admission. On November 8, 2012, respondent McDonald's attorney, Ervin, wrote a letter to Brown Johnson, attorney for appellants, stating that "Mr. McDonald says that he is willing to transfer all of his interest in the S.W. Byrd Farm [the property at issue in the case at bar] in return for all respondents transferring their interest in [an adjacent] property to him." (R.182)

5. Exhibit 6 of Request for Admission. On November 14, 2012, Brown Johnson, attorney for appellants, wrote a letter to Gina Ervin, attorney for respondent McDonald, stating that he reiterated his interest in purchasing the property and would like to discuss an appraisal of the property. It should be emphasized that this was after the November 5th initial Order of the Probate Court, and before the November 21, 2012 deadline. (R. 183)

There can be no question that the appellants Byrd et. al. had made known their interest in purchasing the property to respondent McDonald even before the first Probate Court Order. The finding to the contrary by the Court is without substantial evidence and is clearly erroneous.

It is also important to note that correspondence before the first Order of the Probate Judge on November 5, 2012 is relevant. This November 5, 2012 Order by the Probate Judge was not a ruling on the merits. Instead, it was simply an *ex parte* Order issued as a matter of course. The Court was not ruling that there had been no relevant prior expressions of interest, and the Court did not know whether or not such offers had been made. Thus, prior correspondence is relevant to compliance with this Order. The record discloses that in fact such expression of interest had been made since September 2012, as set out in Request for Admission #1.

Based on the finding of the lack of any expression of interest in purchasing the property, the Probate Court found in its second Order that the property should be partitioned and sold at public auction.

Contrary to the Order of the Circuit Court, the Probate Court never found that the appellant Byrd failed to timely comply with the time dictates of South Carolina Code §15-61-25(A). The initial Probate Court Order of November 5, 2012 did not cite this provision and simply stated that if anyone was interested in purchasing the property, he or she should notify Gina Ervin as attorney for McDonald by November 21, 2012. When the Probate Court issued its Order on the merits on May 13, 2012, it simply held that no interested party had notified Mrs. Ervin of his or her wish to purchase this property by November 21, 2012. There was no finding that any time period in §15-61-25 had not been complied with.

Nevertheless, the Circuit Court, while stating that the time limits of the statute were not complied with, did not discuss it any further. It is clear that the Probate Judge had delegated the notification requirement of this section to the attorney for the respondent, Gina Ervin. Rightly or wrongly, this is the law of the case. There was no finding by the Circuit Court that appellant Byrd could not satisfy the time requirement by notifying attorney Ervin. Indeed, the Probate Court specifically found that Ervin was never notified, when the facts clearly demonstrate that she was.

Section 15-61-25 then states what happens if the parties cannot reach an agreement as to the price. This is clearly what happened here, as the correspondence between the attorneys clearly demonstrates that the respondent McDonald would not agree to allow appellant Byrd to purchase McDonald's 2% interest in the property as issue at any price because in effect he was holding hostage the adjacent property. By contrast, appellant Byrd, et. al. owned a 25% interest in the collateral property which McDonald wanted to settle. Page 133, line 17 of the Record.

Section 15-61-25(B) states that when the parties cannot reach an agreement, real estate appraisers shall be appointed. Indeed, this was discussed in the letters from Brown Johnson, attorney for appellants Byrd et. al. to the attorney for the respondent.

The remedy of public sale only applies after the matters in §15-61-25(A) and (B) have not been complied with:

"(E) In the event that the non-petitioning joint tenants or tenants in common fail to pay the purchase price as provided in subsection (D) of this section, the Court shall proceed according to its traditional practices in partition sales."

Thus, it is clear that the right of first refusal is intended to be resolved fully and thoroughly prior to ordering a public sale.

4. ***Did the Probate Court commit error by holding partition of the property by allotment was not practical and ordering the property sold by auction?***

The Order from Probate Court provides, "Partition of the property described in paragraph 4 by physical partition is impractical and therefore should be sold at auction." Such a ruling is unsupported by the evidence and against our court's favored partition by allotment or partition in kind. Partition in kind involves dividing the property among all the owners. Partition by allotment is to "allot" a portion of the property to one of the owners, with the remainder held jointly by the other owners. Zimmerman v. Marsh, 365 S.C. 383, 618 S.E.2d 898 (S.C. 2005).

Our courts have long favored partition by allotment which is statutorily preferred along with partition in kind over a juridical sale of the property. Cox v. Frierson, 316 S.C. 469, 451 SE2d 392 (1994). The party seeking a partition by sale carries a burden of proof to show that partition by allotment is not practicable or expedient. Zimmerman v. Marsh, *Supra.*

The respondent failed to carry the necessary burden of proof. The only evidence presented on this issue was the respondent's own testimony which

amounted to no more than an opinion. McDonald's testimony as found in the Record, beginning on p. 67, l. 22, includes the following:

> "Q. Okay. And you have also requested the Court partition the property. Is that correct?
>
> A. Yes, ma'am.
>
> Q. In your opinion, is the property capable of being divided in kinds, so that ever person with an interest gets a little piece?
>
> A. I – I don't think so.
>
> Q. Okay.
>
> A. I could be wrong, but I don't think so.
>
> Q. And would you request that the – you're requesting the court sell it?
>
> A. I requested.
>
> Q. So, you wish it to be done by public or private sale or do you care?
>
> A. Public sale …
>
> Q. Public Sale?
>
> A. …in front of the Courthouse."

The testimony presented by the respondent on this question is no more than a statement in self-interest, and nothing in the record supports its reliability or the respondent's opinion. There is a complete lack of evidence which would justify our Court abandoning its preference for partition by allotment or partition in kind. Therefore, the Court's finding and ruling that the property should be sold by public auction is an error and should be reversed.

5. ***Did the Probate Court commit error in treating the percentages of ownership as personal property rather than realty in accordance with § 62-3-101and South Carolina common law?***

The Probate Court determined the percentages of ownership of all parties who had an interest in the S. W. Byrd Farm. In his testimony, the respondent McDonald made reference to a family chart listing the owners and their percentages of ownership. Although the chart was discussed by the parties, the chart was not introduced as an exhibit. The respondent simply testified that he was in agreement with the chart although he admitted that one of the appellants, Wilkins Byrd, knew more about the heirs than he did. In its Order, the Probate Court adopted the chart, but the percentages of ownership were treated as personal property and passed under Georgia law rather than South Carolina law. The appellants disagreed and presented evidence to the contrary.

In his testimony, Wilkins Byrd explained the appellants' objections to the proposed percentages of ownership. The Record, p. 112, l. 7 provides as follows:

> "According to this chart, Mrs. Crump and Butler McDonald received their shares amounting to approximately 2%; and the chart also shows the devolution of similar amounts to the other cousins as providing under Georgia law. I would like to explain to the court that – that is one point with which I personally disagree with this chart. This is based on the theory that Betty Byrd's interest in the S.W. Byrd Farm is personal property. In other words, that her interest in the farm was part of a partnership interest; and as a partnership interest, as personal property and passed on to Georgia law because it controlled her personal property. Now, I – do not agree with that; although it is contrary to my own interest; and regrettably, benefits Mr. McDonald. I believe that the property passage of Betty Byrd's interest would be under South Carolina law. I do not believe the S.W. Byrd Farm – well the ownership of the S. W. Byrd Farm was personal property. I believe it is was real

property interest; and so, I believe it should pass into the applicable South Carolina statute."

Mr. Byrd goes on to explain, on page 114, line 4 of the Record as follows:

> "I – I was nearly at the end of kind of confusing issue. But, as I'm sure the Court is well aware, under South Carolina Intestate Distribution, an estate of a person in the position of my cousin Betty would be divided with no children, no spouse, no surviving parents, would be divided half (1/2) to the mother's side, half (1/2) to the father's side, and that would yield a higher percentage of ownership for Mrs. Crump, Mr. McDonald. It would also include, because South Carolina Law does not push overboard descendants of a first cousin who did not survive Betty; it would also include, in a small amount, my Klettner and Larsen cousins down there. Under this structure, it – it would exclude them and would diminish the interests of Mrs. Crump and Mr. McDonald by a small amount, about one percent (1%). As I say, that's a statement against interest, but I feel that my duty to the – to the cousins requires me to state that in the respect, I differ with the characterization of Betty's interest as a personal property interest."

Byrd explained why the property passes under South Carolina Law. He did this in spite of the fact that it was against his interests in that it decreased his share and increased the share of the respondent McDonald. However, his testimony is legally correct, and the ruling of the Probate Court is wrong. It is well established by statute and case law the distribution of real estate in South Carolina is controlled by the law of the South Carolina. Real estate descends according to the law where the land lies. *Stent v. McLeod, et al*, 7 S.C. Eq. 354. Also, under §62-3-101 of the probate code, real estate devolves to the heirs of an intestate at the time of death. The real estate interest in the S.W. Byrd Estate passed at the time of his death to his heirs pursuant to well established South Carolina law. The Probate

Court committed error by ruling the shares of ownership passed as personal property under Georgia law.

6. ***Did the Probate Court commit error by ruling respondent is entitled to reasonable attorney fees and the cost of this action?***

The Probate Court Order held the respondent is entitled to reasonable attorney fees and the cost of this action pursuant to § 15-61-110 of the Code. This statute gives the Court the authority to award attorney fees "as may be equitable." Our Courts have awarded attorney fees against parties who have acted in an inequitable manner.

In *Marichris, LLC vs. Derek*, 384 S.C. 345, 682 S.E. 2d 301, (Ct. App. 209), the court found the conduct of one of the co-purchasers was inequitable and awarded attorney's fees to another co-purchaser.

Respondent McDonald presented no evidence or testimony regarding attorney fees but instead simply requested the court award fees under the above statute. The appellants not only contend there is no evidence to support an award of attorney fees, but on the contrary, his conduct has been inequitable.

At the hearing of December 5, 2012, the Appellants presented the testimony of Ms. Crump, one of the appellants. Ms. Crump testified that she had dealt with respondent McDonald for a number of years, and when Mr. McDonald petitioned the court to be appointed sole executor of another relatives' estate, Ms. Crump sought out another individual to serve as co-personal representative of the estate. Ms. Crump testified Mr. McDonald's involvement in the S.W. Byrd matter

prolonged the strife associated with owning property as co-tenants. Mr. McDonald's attorney objected to this on the basis of Ms. Crump's problems with McDonald did not involve the S. W. Byrd estate and was not relevant. (R. 100-104)

In the case at hand, the respondent owns 2.04% interest in the property, and his actions indicate he is simply using this partition action out of spite. His intentions in bringing this suit are clearly revealed by his failure to respond to a cash buyout of his interest or a deed of property adjacent to another tract of land in which McDonald owns a much larger interest. The respondent is using his 2.04% interest in an attempt to force an unwanted sale of the Byrd's property which has been in the Byrd family for over 200 years.

Prior to the hearing of December 5, 2012, the appellants urged the respondent to agree on an appraiser in hopes the appellants and the respondent could reach an agreement by which the appellants would buy respondent's interest. The appellants also suggested a continuance of the December 5, 2012 hearing and urged the parties to agree on an appraiser. Mr. McDonald opposed a continuance, but through his attorney, in a letter of November 30, 2012, only days before the hearing wrote as follows:

> "... at this time, Mr. McDonald is not interested in continuing the hearing as this matter has been an ongoing problem for a number of years. He is of the opinion that we should go forward with the hearing and the court should determine who will appraise the property and who will be responsible for the payment of the same if such an appraiser is necessary." (R. p. 186)

The respondent seemed amenable to having the property appraised. However, at the December 5, 2012 hearing, his position changed. Mr. McDonald contended the appellants had failed to comply with the statute dealing with the Right of First Refusal, and by not submitting an offer to purchase the property, the appellants had foregone their right to do so and the property had to be sold by public auction. In other words, the appellants had waived their right to purchase McDonald's 2.04% interest.

When McDonald refused to share the expenses of an appraiser and a timber cruise, the appellants agreed to do so on their own. After obtaining an appraisal and a timber cruise, the appellants submitted a cash buyout proposal to Mr. McDonald prior to the Court issuing its Order. When the respondent did not respond to the buyout offer, they offered to deed Mr. McDonald's interest in the S.W. Byrd Farm to him. Again, Mr. McDonald did not respond.

Mr. McDonald's purpose is to use his 2.04% interest to force a public sale against the will of the appellants. The Record, page 51, line 16 provides as follows:

> "Q: Finally, Mr. McDonald do you object to the respondents ... the other owners buying you out?
>
> A: I just like to get this settled, however, we get it settled. And I think the way to get it settled is get it before the courthouse square and let them sell it - - sell the property."

The actions of Mr. McDonald reek of abuse of process, and appellants respectfully submit he is not entitled to attorney fees and costs under *Marichris*.

CONCLUSION

The Probate Court lacks subject matter jurisdiction to hear this partition action. The respondent brought this partition action of the S.W. Byrd Farm in Probate Court. A Probate Court only has jurisdiction to partition property if the property is part of an active estate. The S.W. Byrd Estate was closed in 1948, and there has been no activity in the estate since that time. Therefore, a partition action involving the S.W. Byrd Farm must be brought in the Court of Common Please, and the Probate Court lacks subject matter jurisdiction.

The Probate Court committed error by applying § 15-61-25(A) rather than § 62-3-911. If the Probate Court had subject matter jurisdiction, it should have applied the probate statute governing partition of the real estate as provided by the Probate Code which is § 62-3-911. During the time period at issue, SC Code § 62-3-911 differs markedly from what it states now. During the time period at issue there was no ten day period to violate in regards to a first refusal to purchase. The statute was amended effective January 2014 to include the ten day period. Even if the Probate Court had jurisdiction, it should have applied the probate statute governing partition actions, not § 15-61-25(A).

The Probate Court committed error in finding the appellants failed to comply with the Probate Order. The Circuit Court found there is sufficient evidence to support the Probate Court's alleged decision that the appellants failed to timely comply with the dictates of SC Code § 15-61-25(A). The initial Probate Order of November 5, 2012 did not cite §15-61-25(A). It simply stated that if

anyone was interested in purchasing the property, he or she should notify Ms. Ervin as attorney for McDonald by November 21, 2012. When the Probate Court issued its order on the merits on May 13, 2013, there was no finding that any time period in § 15-61-25 had not been complied with. In addition, the Probate Court order provided no interested party had notified Ms. Ervin of their wish to purchase the same. Such a finding is clearly erroneous in that the appellants, by letter, clearly expressed interest in purchasing the property, tried to reach an agreement regarding an appraiser, and moved to continue the scheduled hearing in order to obtain an appraisal. Appellants clearly complied with the order of the Probate Court by notifying Ms. Ervin of their interest to purchase respondent's interest in the property. There can be no question that the appellants had made known their interest in purchasing the property to respondent McDonald even before the first Probate Court Order.

The Probate Court committed error by holding partition of the property by allotment was not practical and ordering the property sold by auction. Partition in kind and partition by allotment are favored by our courts over judicial sale. The party seeking a partition by sale carries a burden of proof to show that partition by allotment is not practical or expedient. In this case, respondent McDonald failed to meet this burden of proof. The only evidence presented was McDonald's opinion that the property could not be partitioned in kind or by allotment. This testimony is no more than a statement in self-interest and unsupported by additional evidence. The fair and equitable manner to partition the S.W. Byrd

Farm is by allotment which would involve the appellants purchasing McDonald's 2.04% interest or conveying his interest to him by deed. The appellants do not want to sell the property and are perfectly content to continue their joint ownership.

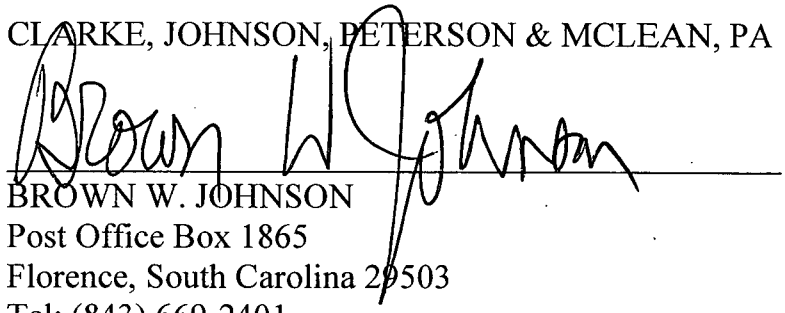
The Probate Court committed error by treating the percentages of ownership as personal property rather than realty in accordance with § 62-3-101 and well established South Carolina Common law. The Probate Court determined the percentages of ownership of all parties in the S.W. Byrd Farm. However, the percentages were determined based on personal property rather than realty. Real estate descends at the time of death and according to the law where the land lies.

The Probate Court committed errors by awarding attorney fees to the respondent pursuant to § 15-61-110 of the Code. The court has authority to award attorney fees "as may be equitable." However, our courts have refused to award attorney fees when a party has acted in an inequitable manner. Appellants contend respondent McDonald has in fact acted in an inequitable manner. McDonald first refused to share the expenses of an appraisal but then led the appellants to believe the court should appoint an appraiser. However, at the hearing, McDonald took the position the appellants had waived their right to purchase the property by not submitting an offer under § 15-61-25(A). Appellants then obtained an appraisal and submitted an offer to buy McDonald interest and later offered to convey by deed McDonald's interest in the property. McDonald refused both offers, a clear indication that he is simply using his 2.04% ownership to force an unwanted sale.

McDonald's actions reek of abuse of process, and he is not entitled to attorney fees.

Respectfully Submitted,

CLARKE, JOHNSON, PETERSON & MCLEAN, PA



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October 3, 2014

Florence, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM DARLINGTON COUNTY
COURT OF COMMON PLEAS

J. MICHAEL BAXLEY, CIRCUIT COURT JUDGE

CASE NO. 2013-CP-16-431

E. Butler McDonald, ...Respondent.

v.

Wilkins Lee Byrd, Kay R. Larsen, John Norwood Klettner, Laura K. Bynum, Ann B. Crump, Robert Larsen, Joan Rutledge Gary, John Robert Stanton, John Robert Stanton, Charles E. Stanton, Byrd L. Thomson, and John Doe and Richard Roe as Representatives of all persons unknown claiming any right, title, estate, interest in or lien upon the real estate described in the Appeal herein, including but not limited to any unknown owners, unknown heirs, unknown devisees of S.W. Byrd, Mary Moore Byrd, Etta B. Klettner, S.J. Klettner, Sr., Susan Wilkins Byrd, Mary M. Byrd, Joseph D. Rutledge, John R. Larsen, Charles E. Byrd, Jewel Butler Byrd, Wilkins Norwood Byrd, Ruth Byrd, Marian Moore Byrd, Mary K. Stanton, S.J. Klettner, Jr., Mary R. Larsen, John Rutledge Gary, Jewel Elizabeth Byrd, or any other person, any unknown infants or persons under disability or persons in the military service designated in a class as Richard Roe, as to the property described in the Petition herein and designated as Tax Map No. 076-00-02-004, ... Appellants,

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief complies with Rule 211(b).

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