IN 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

RECEIVED
OCT 23 2014
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 devises 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, Mariam 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 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 RESPONDENT

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

3. Did the Probate Court commit error in finding that the appellants failed to comply with the Probate Court orders?

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?

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

STATEMENT OF THE CASE

On April 18, 2010 the Respondent filed a Summon, Lis Pendens, and Petition for Determination of Heirs and for Partition of Real Property in the Darlington County Probate Court. All Appellants were served by Certified Mail on April 25, 2012. The Respondent then made a Motion for Appointment of a Guardian Ad Litem Nisi and Order for Publication which was granted by Order of the Darlington County Probate Court pursuant to S.C. Code Ann. § 15-61-25 on April 26, 2012. The Appellants' Answer and Counterclaim was served on June 26, 2012. A reply to the Answer and Counterclaim was filed on July 31, 2012. The Guardian Ad Litem filed an answer dated September 24, 2012.

Pursuant to S.C. Code Ann. § 15-61-25, the Respondent made a motion to notify tenants in common of their right of first refusal on October 31, 2012. This motion was granted by the Court on November 5, 2012. A copy of the Order granting the motion and a letter notifying the

tenants in common of their right of first refusal was served on Appellants on November 8, 2012. The Order and letter gave Appellants until November 21, 2012 to notify the Respondents Attorney in writing if they had any interest in purchasing the property. No definite offer to purchase was received by the Respondent prior to the deadline.

On November 8, 2012 the Appellants filed a Motion to Dismiss the Respondent's Petition for lack of subject matter jurisdiction. A hearing on the motion and the original petition was held on December 12, 2012. Prior to hearing the Court denied the Appellants' motion to dismiss. On May 21, 2013 the Probate Court issued its Order determining the heirs of S.W. Byrd and partitioning the property by sale. Appellants filed a Notice of Intent to Appeal from that Order. A hearing on that appeal was held before the Honorable J. Michael Baxley on October 7, 2013. The Circuit Court issued an order affirming the decision of the Probate Court on February 17, 2014. This order was filed in the office of the Clerk of Court for Darlington County on February 28, 2014. The Appellants filed a Notice of Intent to Appeal from the Circuit Court's decision on March 14, 2014.

ARGUMENT

1. The Probate Court had subject matter jurisdiction to hear this action.

The appellants' filed a Notice of Motion and Motion to Dismiss for Lack of Subject Matter Jurisdiction in the Darlington County Probate Court in November, 2012. (R. p. 40) The motion was heard on December 5, 2012. After arguments were made, the Court denied the motion. (R. p. 57, line 9- p.61 Line 20) The appellants' failed to appeal from the Probate Court's decision.

Appellants are again arguing that the Probate Court lacked jurisdiction to hear this matter pursuant to SCRCP, Rule 12(b)(1) and S.C. Code Ann. § 62-3-911, because the Estate of S.W. Byrd was previously closed in 1948. However, the Respondent's original petition had two (2) causes of action. The first requested that the Court determine the heirs of S. W. Byrd. (R. p. 15) The second asked the Court to Partition the property. (R. p. 17) Both of these causes of action may be brought in the Probate Court. The subject matter jurisdiction of the Probate Court is set forth in S.C. Code Ann. § 62-1-302. Subsection (a) (1) provides that the Probate Court has jurisdiction over "estates of decedents, including...determination of heirs and successors of decedents...." In *Neely v. Thomason*, 365 S.C. 345, 618 S.E. 2d 884(2005) the Supreme Court found that the Probate Court had subject matter jurisdiction over all subject matter relating to the determination of heirs. In addition, S.C. Code Ann. § 62-3-911 gives the Probate Court the authority to partition real property.

The filing of the petition to determine the heirs of S. W. Byrd caused an active and open matter to be pending in the Probate Court. Therefore, pursuant to the S.C. Code Ann. § 62-3-911 the Court would have the authority to partition the property for purpose of distribution once the heirs had been determined.

2. The issue of whether the Probate Court committed error by applying § 15-61-25(A) is not properly before the Court.

In this issue, the appellants' argue for the first time that the Probate Court committed error by applying S.C. Code Ann. § 15-61-25(A) rather than § 62-3-911. The appellants failed to plead this issue in their answer and counterclaim. In addition, this argument was never made to the Probate Court or to the Circuit Court in the appeal. In *Dawkins v. Mozie et.al,* 399 S.C. 290, 731 S.E. 2d 342(Ct. App. 2012) the Court held that an issue raised for the first time in a post–trial brief is not properly preserved.

It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellant review. *Wilder Corporation f/k/a Wilder Mobile Homes, Inc. v. Wilke, et. al,* 330 S.C. 71, 497 S.E. 2d 731 (1998). In *Herron,* the Supreme Court found that:

> Issue preservation rules are designated to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellant review." *Queens Grant II Horizontal Property Regime vs. Greenwood Development Corp.*, 368 S.C. 342, 373, 628 S.E. 2d 902, 919 (Ct. App. 2006). At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. *Wilder Corp. v. Wilkie, 330 S.C.71, 76, 497 S.E.2d 731, 733 (1998).* "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. *Id.* Imposing such requirements on the appellant "is meant to enable the lower court to rule properly after it has considered all relevant facts, law, arguments ."*I'On, L.L.C. v. Town of Mount Pleasant*, 338 S.C. 406, 422,526 S.E. 2d 716,724 (2000). *Herron et. Al vs. Century BMW a/k/a Sonic Automotive, et al,* 395 S.C. 461, 465, 719 S.E 2d 640, 642 (2011) See also *Turpin et. al. v. Lowther, et.al.* 404 S.C. 581, 745 S.E. 2d 397 (Ct. App. 2013)

A review of the Transcript of the Hearing before the Circuit Court shows that not only was the issue never raised but that the Appellants arguments were replete with references to with

§15-61-25. (R. p. 147, lines 104; p. 148, lines 3-5; p. 149, lines 6-8; p. 152, lines 11-14) Since this argument was never made before either the Probate Court or the Circuit Court this issue has not been preserved for appealed and should be dismissed.

3. The Probate Court did not commit an error in finding the Appellant failed to comply with the Probate Court Order.

The Appellants argue that the Probate Court committed an error in finding the Appellants failed to comply with "the Probate Court Order." It is unclear what order they are addressing or which Court made the error.

On November 5, 2012 the Probate Court issued an order stating the Respondent's requested manner of providing the Notice of the Right of First Refusal was fair and equitable to all parties. (R. p. 2). It went on to provide that all interested parties had until November 21, 2012 to provide notice to the Respondent's attorney if they were interested in purchasing the property. (R. p. 3) The November 5th Order, as well as the approved letter were served upon the appellants' attorney on November 8, 2012. (R. p. 5)

A review of transcript of testimony of the hearing in the Probate Court shows that no definite offer to purchase was made by any appellant prior to the November 21st deadline. (R. p. 6). Although there were requests to settle the matter, no firm offer was timely made any appellant. In fact, the appellants' attorney states prior to the hearing "we don't want to purchase the property outright" (R. p. 51 lines 23-24). In addition, the transcript shows that Appellants' Attorney stated they must first obtain an appraisal prior to being able to make an offer. (R. p. 52, lines 21 – 25). The Probate Court found that no interested party notified the Respondent of their wish to purchase to property. (R. p. 6)

The Appellants in their argument attempt to use as evidence the Appellants' Second Request to Admit. However, none of these requests were ever admitted nor were they in evidence before the Probate Court. In fact they were dated May 8, 2013 after the Order was filed. (R. p. 48). In addition, the Exhibits attached to the Requests to Admit dealt with offers to settle the matter, which were not admissible pursuant to SCRE, Rule 408.

The Appellants next argue that the remedy of public sale applies only after §15-61-25(A) and (B) have not been complied with. However, a review of the statute shows that only once an offer has been made pursuant to Subsection (A) does Subsection (B) come into play. Subsection (B) applies only if an offer has been made and the parties are unable to agree on a price. In the hearing before the Probate Court, Appellants' attorney informed the Court that Appellants must obtain an appraisal prior to being able to make an offer. R. p. 52, lines 21 – 25).

The order of the Circuit Court affirmed the judgment of the Probate Court ordering the property be sold at auction. (R. p. 9-11). In doing so the Circuit Court found that the partition is a matter in equity. *Campbell v. Jordan*, 382 S.C. 445, 675 S.E. 2d 801(S.C. App. 2009). In appeals of equitable actions the Circuit Court may find facts in accordance with its view of the preponderance of the evidence. However, the appellant court is not "required to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility." *Marichrias, LLC. Vs. Derrick,* 384 S.C. 345, 351, 687 S.E. 2d 301, 305 (Ct. App. 2009). The Court further held that the factual findings and legal conclusions of the court were both in accordance with the evidence of the case, South Carolina real property, estate law and in the interest of justice. (R. p. 10). It is well established that in cases of equity when findings of fact have been found by a trial judge and concurred in by a circuit judge, those findings will not be disturbed by a higher court unless it appears that such findings are without

evidence or support or against the clear preponderance of the evidence. *Watson et. al, v. Little,* 229 S.C. 486, 93 S.E. 2d 645 (1956), See also *Peoples National Bank of Greenville v. Manos Brothers et. al*, 226 S.C. 257, 84 S.E. 2d 857 (1954); *Archambault et. al. v. Sprouse*, 218 S.C. 500, 63 S.E. 2d 459 (1951)

Appellants go on to argue that based on S.C. Code Ann. § 15-61-25 they were entitled to have an appraiser appointed. However, a review of that statute shows that only if an offer has been made pursuant to § 15-61-25(A) **and** the parties are unable to agree on a purchase price is the value of the interest to be sold to be determined by one or more competent real estate appraisers. In this case there was no offer timely made, therefore § 15-61-25(B) never came into play. In their own argument the appellants state that the remedy of public sale only applies after matters in § 15-61-25(A) and (B) have not been complied with. By statements previously made on the record it is obvious that appellants did not comply with the statute and therefore, the remedy of public sale is appropriate.

4. The issue of whether the Probate Court committed error by ordering that partition by allotment was not practical and that the property be sold at auction is not properly before the Court.

Appellants argue that the Probate Court erred in in failing to allow partition by allotment rather than ordering the property be sold at auction. However, the issue of allotment was not plead in the Appellants' answer and counterclaim, nor was any motion to amend made at trial. (R. p. 132 line 15 – P. 133, line 4; p. 136, lines 1-2). This argument was not preserved because the Probate Court did not rule on it and it was not raised by the appellants in a motion to alter or amend. *Brown v. Brown et al.*, 402 S.C.

202, 740 S.E. 2d 507 (Ct. App. 2013). See also, *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 602 S.E. 2d 772 (2004).

Appellants further argue that there was insufficient evidence offered by the Respondent to show that the property was not divisible in kind. However the only testimony before the Court was that the property was incapable of division in kind due to the number of heirs involved. There was no testimony introduced by the Appellants to show that the property was in fact capable of division in kind. They instead chose to merely attempt to discredit the Respondent. The Appellants cannot sit back at trial without offering evidence and then complain of the insufficiency of evidence to support the court's findings. *Honea v. Honea,* 292 S.C. 456, 357 S.E. 2d 191(Ct. App. 1987) Based on the evidence presented, the court was correct in concluding that property could not be divided in kind.

Both the Probate Court and the Circuit Court found that the property was incapable of partition in kind and that it was fair and reasonable to partition the property by public sale. It is well established that in an equity case findings of fact made by the trial court and then concurred in by a circuit judge will not be disturbed by an appellant court unless it appears that such findings were without evidentiary support or against the clear preponderance of the evidence. *People's National Bank of Greenville, supra.*

5. The Court did not treat the percentages of ownership as personal property rather than realty.

The first cause of action in the original petition was for a determination of the heirs of S.W. Byrd. In its order the court found that all of the children of S.W. Byrd were

deceased leaving various children, spouses, and other heirs. In most cases no estate had been opened and more than ten years had passed since the death of the original heirs of S.W. Byrd. As a result these estates could not now be probated pursuant to S. C. Ann. § 62-3-108.

Based on the pleadings and the evidence presented at the time of the hearing the court determined the interests of the various heirs of S.W. Byrd. (R. p 7-8). The order makes no mention of a partnership or personal property interest. One of the appellants' witnesses spent much time on the issue of partnership and personal property. However, it was merely the testimony of one of the appellants that he disagreed with a chart of the heirs of S.W. Byrd and their respective interests because **he felt** one heir's interest in the property was determined based on the idea that it was personal property. (R. p. 112, lines 12 – 16) That same witness later stated that he was satisfied with the heirs that were listed in the S.W. Byrd estate and believed that the identities of all heirs were correct. (R. p. 122, line 25 – p. 123, line 3 See also, p.124, lines 18-22.)

The determination of heirs is a matter at law. When a probate court proceeding is an action at law, the circuit court and the appellant court may not disturb the probate court's finding of facts unless a review of the record discloses there is no evidence to support them. *Matter of Howard,* 315 S. C. 356, 434 S.E. 2d 254 (1993)

6. The probate court did not commit error by finding the respondent was entitled to reasonable attorney fees and costs of this action.

The determination of whether or not to award attorney's fees in partition action rests within the sound discretion of the trial court. The court has the ability to award fees in all partition proceedings and, as may be equitable, assess such fees against any or all of

the parties in interest. *Laughon v. O'Baritis*, 360 S.C. 520, 602 S.E. 2d 108 (Ct. App. 2004). The fixing and assessing of attorneys' fees and costs is a matter within the court's discretion, the exercise of which will not be disturbed absent of showing of abuse. *Inman et. al v. Wells*, 283 S.C. 218, 321 S.E. 2d 183 (Ct. App. 1984) See also, *Briggs et. al v. Jackson et. al* 275 S.C. 523, 273 S.E. 2d 532 (Ct. App 1981)

The appellants argue the court should not have awarded attorney fees in favor of the Respondent because of his "inequitable conduct". However, a review of the transcript of the Probate Court hearing shows that no evidence was presented by the Appellants establishing that the Respondent acted in an inequitable manner in this case. None of the testimony presented by the appellants dealt with any actions taken by the Respondent in this action. In fact, the testimony involved instances in which both the Respondent and one of the Appellants were required to act together as they were Co-Personal Representatives in another estate. (R. p. 101, line 13 – p. 107, line 10.)

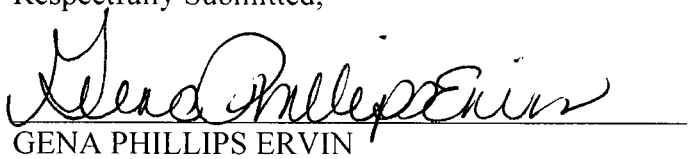
The Probate Court saw and heard the witnesses and is therefore in a much better position to judge their credibility in this matter. Even taking everything testified to by the appellants as true would not bar attorney fees in this matter. There was no evidence introduced of improper behavior by the Respondent in this case. The Respondent was merely exercising his statutory right to partition property as a co-tenant.

CONCLUSION

The Respondent contends that for the reasons above stated this Court should

affirm the judgment of the Circuit Court.

Respectfully Submitted,



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October 21, 2014

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CERTIFICATE OF COUNSEL

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

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