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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Hon. Thomas A. Russo, Circuit Court Judge
(The Hon. Tamara C. Curry, Probate Court Judge)

Appellate Case No. 2017-001196
(Civil Action No. 2007-ES-10-1437)

Jacquelin S. Bennett and Kathleen S. Turner as
Personal Representatives of the Estate of
Jacquelin K. Stevenson ..... *Appellants.*

v.

Estate of James Kelly King and Genevieve S. Felder..... *Respondents.*

APPELLANTS' PETITION FOR REHEARING

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LEGAL ARGUMENTS IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, Appellants Jacquelin S. Bennett and Kathleen S. Turner, in their role as Personal Representatives of the Estate of Jacquelin K. Stevenson hereby respectfully and humbly petition this honorable Court for a rehearing of this Court's Unpublished Opinion No. 2019-UP-412, dated December 31, 2019 (hereinafter "Opinion") which found no error on the part of the Circuit Court's in affirming the probate court's refusal to allow the Personal Representatives to use their discretion in the allocation of the Residuary Estate. As is more fully detailed herein, Appellants respectfully assert the Appellate Court overlooked or misapprehended several critical points of law with respect to the issues present in the case at bar.

I. This Court overlooked or misapprehended the issue of the trial court's disregard for the testator's intent.

The Circuit Court erred in affirming the Probate Court when there was not sufficient evidence presented to reasonably support a finding that a pro-rata distribution was intended by the Decedent. The trial court, in making the determination on how the residuary estate was to be divided, stated that "[r]egardless of whether [Appellants'] interpretation was actually the testator's intent ... I find ... a pro-rata distribution—to be appropriate in light of the evidence presented."

The Circuit Court, and this Court, have both overlooked a clear error of law by the trial court in refusing to determine the testator's intent in an action to determine the construction of a will. See, e.g. Matter of Clark, 308 S.C. at 330; May v. Riley, 279 S.C. 248; Albergotti v. Summers, 205 S.C. 179. By focusing on an alleged breach in Appellants' fiduciary duty, the Court has been distracted from the principal charge of the trial court: to determine the testator's intent. The trial court's own statements indicate that no analysis of evidence to distill the intent of the testator was performed. Instead, the

Court based their decision on their own view regarding an "equitable" division of remaining assets. As noted by the Court in its Opinion, it is empowered to correct this manifest error of law, and ought to rehear the present matter to address the same.

Appellants, throughout the entire pendency of this matter, are the only persons who have continuously striven to distribute the estate in accordance with testator's intent—even in the face of insinuations of self-dealing by the highest courts of this State. It bears repeating, that a reading of the entire text of the decedent's Will (as is appropriate in a case determining the construction of same) supports the Appellants' proposed plan for distribution. *See, e.g. Matter of Clark,* 308 S.C. at 330; *Allison v. Wilson,* 306 S.C. at 278, 411 S.E.2d at 435; See, also "*Section II*", below.

II. This Court overlooked or misapprehended the significance of the terms of the Will as a whole, which provide a clearly manifested intent.

The Opinion notes that when "construing the language of a will, the appellate court must give words their ordinary, plain meaning unless it is clear the [testatrix] intended a different sense, or unless such a meaning would lead to an inconsistency with the [testatrix]'s declared intention."). The Court concedes there is nothing in either the plain text of the will, or implied by the verbiage therein, that the Testator intended for the property to be passed in equal ownership shares and immediately turns its analysis with respect to the Personal Representatives' requirement to refrain from self-dealing pursuant to S. C. Code Ann. § 62-3-703(a).

This Court, like the Circuit Court, has (a) improperly assumed that Appellants were in anyway unjustly enriched by their proposed course of conduct, and (b) skipped over §62-3-703's requirement that Personal Representatives must act in accordance with **terms of the will**.

A complete reading of the original estate plan of the testator evidenced a clear intent to bequeath **real property** only to the children from her first marriage: Kathleen Turner; Jacquelin Bennett; Thomas Stevenson; and, Daniel Stevenson. *Id.* As to the children of her second marriage, including her stepdaughter, the Respondent, the testator made pecuniary bequests. R. 228. These

bequests in no way reflect an intent to divide all real property in equal ownership interest shares amongst each of the beneficiaries.

Appellants renew their contention that the bequests found in the original Estate planning scheme as evidenced by the terms of the Will itself do not reflect a Testator's intent to divide all real property in equal ownership interest shares amongst each of the children and stepdaughter. Rather, the Testator intended that the real estate properties would go to certain beneficiaries. R. 228. Moreover, the Estate Plan of the Testator included a setoff provision for monies loaned to two of the beneficiaries during her life. *Id.* Accordingly, at the time of drafting, the intent of the Testator was clearly **not** to provide "equal ownership shares" in any certain property, but rather that residuary property should pass in equal monetary shares, after making equitable adjustment for any monies owed to the Estate by a beneficiary. *Id.* A "reading of the will as a whole" and giving "due weight to all its language and provisions, giving effect to every part" reveals that the original intent of the Testator was an equitable, but not identical, division of assets. *See, respectively, Matter of Clark,* 308 S.C. at 330, 417 S.E.2d at 857 (1992); and *King,* 253 S.C. at 649, 173 S.E.2d at 93 (1970). Finally, keeping a property which had specifically been left to children of the first marriage in the hands of children of the first marriage is the only proposed distribution scheme which honors the testator's original intent.

III. This Court overlooks or misapprehended the scope of issues and evidence properly before this Court for its consideration.

The Court correctly notes in the Opinion that "[it] can correct errors of law, but the [probate court's] findings of fact will not be disturbed unless found to be without evidence which reasonably support's the judge's findings." Opinion at p. 2 (citing Blackmon v. Weaver, 366 S.C. 245, 249, 621 S.E.2d 42, 44 (Ct. App. 2005)). However, this Court has overlooked or misapprehended the Circuit Court's failure to properly apply the standard of review, as there was **no** evidence properly before the court which would reasonably support their holding.

The Court references extensive case law and statutory authority regarding the special duty imposed upon Personal Representatives as fiduciaries of the Estate—specifically, that Appellants must effect a distribution according to the "terms of a decedent's will and the law" and in a manner consistent with "the best interests of the Estate and the successors of the Estate, and not for [Appellants'] own personal interests." See, Id. at 3 (citing S.C. CODE ANN. § 62-3-703(a)). Further, Appellants are forbidden from "[using] the [fiduciary] relationship to benefit [their] own interests" or to secure "any profit or advantage at the expense of a person under their influence." Id. (citing Island Car Wash, Inc. v. Norris, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987).

However, this Court in affirming the Circuit Court's holding overlooks or misapprehends the logical fallacy of their holding: If Appellants proposed distribution runs afoul of their fiduciary duties to the Estate when it is undisputed that the Estate is providing, to the penny, equal monetary shares, then we are left with only two logical conclusions: (1) The division actually isn't equal in value; or, (2) the Appellants are required to consider other factors in determining how to distribute assets. There is no evidence in the record before this Court that the values of the property were inequal. In fact, Respondent consented to the valuations proposed by Mr. McGuire. Any appraised valuation of a property would necessarily include things like potential for rental income, and the liquidity of the property. If one property was so much more "desirable" than the others, Respondent had every right to object to the valuation it had previously been assigned. However, Respondent did not, and cannot, show any evidence properly before this court that there is any disparate value between the proposed distribution and an equal share scheme. Given that there was no evidence presented at the hearing for distribution of property that these properties were in anyway more or less valuable than the figures contained in Appellants distribution plan, there is no evidence which would support the court's decision to override the discretion of the personal representatives and embark on a distribution

scheme violative of the testator's intent. Accordingly, this court should grant a rehearing on the matter to address these issues.

So, now, Respondent is instead advocating, and the Court has now adopted, the position that Personal Representatives have a **fiduciary duty** to take into account intangible non-economic factors, including "sentimental value" and "desirability" when dividing estates—a position which has no foundation in the laws of this State, and further, is in fact contrary to the specific terms of "consent not required" and "absolute discretion" terms of the Will which are included precisely to avoid this very situation. Accordingly, this Court should Order a rehearing on this matter to determine whether the Court incorrectly applied South Carolina law.

IV. This Court is incorrect in holding that the discretionary powers in Sections 10.1 and 10.6 do not apply to the residuary estate.

The discretionary powers in Article 10.1 and 10.6 of the will without a doubt apply to the Residuary Estate. As a preliminary matter, the Will specifically states that the section is not intended to limit the powers of the personal representatives as granted by the South Carolina Probate Code. The Probate Code specifically allows for a Personal Representative to use discretion (unless otherwise instructed by the terms of the will) in making the distribution. Further, nowhere in Sections 10.1 through 10.8 is there any mention of, or differentiation between, assets which are part of general and specific devises, or residuary devises. Moreover, the discretionary powers granted by Section 10.1 could only apply to general devises, including the residuary, as a Personal Representative would be bound by the Testator's instructions (and not granted discretion in) the distribution of specific bequests. It is apparent from a plain reading of the text of the will that the testator intended for the discretionary powers to apply to the Estate in its entirety, including the Residuary Estate. To take a position that the Personal Representatives are somehow not entitled to use the discretion and powers granted to them by the will with respect to Residuary Estate is both inconsistent with the terms of the

will, and the laws of this state. In light of the oversight of the testator's clearly stated intent, or misapplication of same, this Court should order a rehearing on this appeal.

V. This Court is incorrect in holding that Personal Representatives are attempting to "divest" Respondent's title to property.

This Court on two separate occasions in the Opinion cites to S.C. Code § 62-3-101 to cite for the proposition that title to the property had already passed to Respondent, and that Personal Representatives could not divest her of same. See, Opinion at 3-4. The Court incorrectly cites only the first portion of the statute, which states that [u]pon the death of a person, his real property devolves to the persons to whom it is devised by his last will or to those indicated as substitutes for them in cases involving lapse, renunciation, or other circumstances affecting the devolution of testate estates...". However, the statute, very importantly, continues on "subject to the ... purposes of administration, particularly the exercise of the powers of the personal representative..." Further, the South Carolina Probate Code makes it clear that the Personal Representative retains power over the title to the property, as an absolute owner would, until the completion of administration and the execution of a deed of distribution. See, S.C. Code Ann. § 62-3-101; 62-3-710; and 62-3-907Accordingly, Respondent did not have title to the property and is not being divested of same. Personal Representatives retained power over the title for purposes of administration. Accordingly, this Court's improper application of the law warrants a rehearing of the matter.

VI. This Court is incorrect in holding that the Personal Representatives have waived their right to use their discretion, or to challenge the court's distribution, in light of the private settlement agreement.

The private settlement agreement entered into by all parties states, in relevant part that:

> [A]ll interested parties have entered into a Private Agreement to resolve all outstanding concerns of the Estate of James Kelly King, and to resolve the majority of the concerns of [Respondent], with the only exception being the allocation of the residuary assets between [Appellants] and [Respondent] [which will either be resolved by a subsequent agreement or will be determined by a later date by the Charleston County Probate Court.

"Order Approving Private Settlement", 2007ES1001437, March 3, 2015.

The "agreement" in its most basic terms says, "We, the parties, are either going to settle the matter on our own, or it will be litigated in front of your honor." The idea that the parties had no say in the process does not comport with the fact that the Probate Court set a hearing for the parties to be heard with respect to same.

If Appellants truly had no more discretion as of the date of an impasse (as this Court appears to be suggesting) then it seems puzzling the Probate Court allowed the parties to be heard, rather than simply issuing a written Order with respect to same. Further, nowhere in the agreement does it state that any party has relinquished its right to challenge the Order of the Court; that such Order is binding and final; that no appeal shall be taken; or any statement to such effect.

Appellants requested court approval of their proposal. Once the Court opted to ignore the plainly stated intent of the testator, to disregard established case law of this state, and apply new, never before applied standards in determining how the property ought to be divided, Appellants were well within their rights to appeal such a ruling. The Court's approval ought to have been deferential to the proposal of the Appellants, as the testator clearly and unequivocally intended for them to have such power. Absent any abuse of their position, (which could not be shown, as the parties were all given equal shares), the Court ought to have approved the proposal. Looking again to the error(s) of law made by the Probate Court (and affirmed by the Circuit Court) including their failure to determine the intent of the testator, and to follow the terms of the Will, it is clear this Court should Order a rehearing on this Appeal.

CONCLUSION

For each of the foregoing reasons, this Court should GRANT the Appellants' Petition, and afford the parties a rehearing on the issues before this Court, along with any other and further such relief as this Court may deem just and proper.

SUGGESTION FOR REHEARING *EN BANC*

Although the Courts generally do not favor rehearing a matter *en* banc, Appellants respectfully submit that consideration by the full court is necessary to secure or maintain uniformity of its decisions given the conflicting rulings between this Opinion and other controlling precedent of the State. Further, this proceeding involves a question of exceptional importance in that the ruling by this Court necessarily will impact Personal Representatives across this State given that the Opinion materially alters the fiduciary responsibilities of a Personal Representative by imposing additional standards previously not required under the law.

Respectfully submitted this **14th** day of **January, 2020**.

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this **Petition for Rehearing** is being submitted in conformance with the requirements of Rule 211(b), SCACR.

Respectfully submitted this **14th** day of **January, 2020.**

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PROOF OF SERVICE

I certify that I have served the **Appellants' Petition for Rehearing** on the Respondent, Genevieve S. Felder, by depositing a copy of same in the United States Mail, postage prepaid, on **January 13, 2020** addressed to their attorney of record, **George R. McElveen, Esquire**, of the law firm, **McElveen & McElveen**, located at **2229 Bull Street, Columbia, SC 29201.**

Respectfully submitted this **14th** day of **January, 2020.**

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