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**S.C. SUPREME COURT**

**THE STATE OF SOUTH CAROLINA  
In the Supreme Court**

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**APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas**

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The Honorable Thomas A. Russo, Judge of the Circuit Court  
The Honorable Tamara C. Curry, Judge of the Probate Court,

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Unpublished Opinion No. 2019-UP-412  
Appellate Case No. 2017-001196  
Circuit Court Case No. 2015-CP-10-05056  
Probate Court Case No. 2007-ES-10-1437

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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

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**RESPONDENT'S RETURN TO  
APPELLANT'S PETITION FOR CERTIORARI**

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## QUESTIONS FOR REVIEW

1. Whether the Court of Appeals erred in affirming the Probate Court's finding that Testatrix intended all real property passing through the residuary estate to pass to each devisee in equal ownership shares when such an interpretation runs contrary to the existing decisions of this court?
2. Whether the Court of Appeals erred in affirming the Probate Court's finding that the will does not grant Appellants broad discretionary authority with respect to distribution of the residuary estate when such a position is contrary to both previous decisions of this court and the laws of this state?
3. Whether the Court of Appeals erred in affirming the Probate Court's holding that the Personal Representatives' proposed distribution was a violation of their fiduciary duty of good faith when such a holding runs contrary to previous decisions of this court?
4. Whether the Court of Appeals erred in holding that title to property had already passes to the Respondent?
5. Whether the Court of Appeals erred in holding that the Private Family Settlement Agreement divested the Personal Representatives of their discretionary powers and precludes a challenge to the Probate Court's plan of distribution?

## STATEMENT OF THE CASE

Jacquelin K. Stevenson died testate on September 17, 2007 survived by three daughters, Kathleen S. Turner, Jacquelin S. Bennett (the Appellants), and Genevieve S. Felder (Respondent). She was also survived by two sons, Thomas C. Stevenson, III, Daniel R. Stevenson, and a step son, James Kelly King. Each of these are devisees under her will. James Kelly King passed away during the administration of the estate, and his share has been resolved by private agreement. The will originally designated Kathleen S. Turner and Thomas C. Stevenson as Co-Personal Representatives.

The will was admitted to probate in the Charleston County Probate Court in October of 2007. The six individuals named above were the devisees under the will. Among the various assets of the estate are four real properties:

Lot 19 Dupree Creek Lane, Mt. Pleasant, SC  
("Paradise Island")

Glascow Island Lane, Edisto Island, SC  
("Bailey's Island")

Lots 34, 35, 36, and 37, Lake Front Drive,  
Hendersonville, NC ("Lake Summit")

2414 Rockland Avenue, Rockville, SC  
("Rockville")

Rockville is a waterfront lot with an upscale vacation and rental home, and a deepwater dock. The Lake Summit property is a long-time family vacation home, also waterfront, comprised of a home on one lot, and 4 adjacent undeveloped waterfront lots. The property earns significant rental income, which covers all of its expenses. (R. p. 35, ll. 11 – 25, p. 36, ll. 1 – 10, p. ), still affording time for the enjoyment of its owners. (R. p. 145, l. 25, p. 146, ll. 1 – 3). Bailey's Island and Paradise Island are vacant lots with

significant carrying costs, exceeding \$25,000.00 annually. (R. p. 33, 34). It is the proposed distribution of these properties that is the basis of this dispute.

Pursuant to the terms of the will, Kathleen S. Turner and Jacquelin S. Bennett were devised the Rockville property. Lake Summit was devised to Daniel R. Stevenson and Thomas C. Stevenson, III. Genevieve S. Felder and James Kelley King received monetary bequests roughly equal in value to these real estate shares. Thomas C. Stevenson, III was subsequently removed as Personal Representative due to malfeasance, and both he and Daniel R. Stevenson lost their inheritance rights to the real properties by order of the Probate Court dated February 11, 2011, for the same reason. Jacquelin S. Bennett was appointed Co-Personal Representative in place of Thomas C. Stevenson, Jr., so that Appellants now find themselves as Co-Personal Representatives, with only Respondent as an additional beneficiary. The disposition of all of the real properties with the exception of Rockville is now governed by the residuary clause, which states:

All the rest, residue, and remainder of my property and estate real and personal, of whatsoever nature, and wheresoever situate, including any property before mentioned but not effectively disposed of, . . .  
I give, devise, and bequeath to Kathleen S. Turner,  
Jacquelin S. Bennett, Thomas S. Stevenson, III,  
Daniel R. Stevenson, James Kelly King, and Genevieve  
S. Felder, in equal shares, per stirpes, and not per capita . . .

By Private Agreement executed in March of 2015, the claims of the Estate of James Kelly King, who died during the administration of the Stevenson estate was resolved by monetary payment. Other disbursements were approved, "with the only exception being that the allocation of the residuary assets between Kathleen S. Turner,

Jacquelin S. Bennet, and Genevieve S. Felder (which will be resolved by a subsequent agreement or will be determined by the Charleston County Probate Court). (Parentheses as appearing in the Agreement).

On September 14, 2011, Respondent filed a Demand for Hearing. The requested hearing was held on June 16, 2015. The interested parties were Jacquelin S. Bennett, Kathleen S. Turner, the Co-Personal Representatives, and Genevieve S. Felder. The proposal of the Co-Personal Representatives was that Lake Summit be equally divided between themselves. Paradise Island would be divided equally among the three. Genevieve S. Felder would receive the large majority of Bailey's Island, with the remaining, minor share divided equally between the co-Personal Representatives.

At the hearing, Appellant's sole argument was that the will gave the Co-Personal Representatives unfettered authority to distribute in kind, their only consideration being that the distribution "come out equal" based on appraised monetary value, with no other factors being relevant. (R. p. 138, l. 78 – p.141, l. 15). Respondent argued that while the language in the will clearly grants Personal Representatives broad authority to distribute in kind, such authority is not absolute, and is constrained by fiduciary principals and the duty to treat all beneficiaries equitably and fairly. Respondent further argued that the determination as to what was fair and equitable should, in proper circumstances, include non-economic considerations such as sentimental value, utility, the burden of significant annual expenses, and other intangible factors. The position of the Respondent is that in the particular circumstances of this case, only a pro-rata distribution of the properties could be fair and equitable.

In its Order Regarding the Division of Real Property dated July 30, 2015,

the Probate Judge, Tamara C. Curry, referencing the terms of the Family Settlement Agreement, noted that in the absence of an agreement as to the disposition of the residuary properties, the Probate Court, would decide the allocation of the remaining real properties in light of fiduciary principals.

The Court ruled:

Petitioners . . . acting as Co-Personal Representatives of the Estate of Jacquelin Stevenson, are to divide said properties located on Lots 34, 35, 36, and 37, Lakefront Drive . . . , Lot 19 Dupree Creek Lane . . . , and Glasgow Island Lane . . . in equity and in good faith among the devisees so that each receives an equal ownership interest in each piece of real estate that is before the Court.

\ Appellant filed a Motion to Alter or Amend on August 12, 2015, which was denied by order dated September 10, 2015. Appellants appealed the decision of the Probate Court to the Court of Common Pleas by Notice filed September 15, 2015. That appeal was heard by the Honorable Thomas Anthony Russo on June 3, 2016, and denied by order dated April 18, 2017, also finding that the language of the residuary clause, and fiduciary principals requires an equal, pro-rata distribution. Notice of Appeal to the Court of Appeals was filed May 19, 2017. That appeal was considered on the record and briefs without oral argument. The Circuit Court was affirmed by unpublished opinion filed December 31, 2019. Appellant's Petition for Rehearing was filed on January 14, 2020, and denied. This Petition for Certiorari followed.

## ARGUMENTS

- 1. Whether the Court of Appeals erred in affirming the Probate Court's finding that Testatrix intended all real property passing through the residuary estate to pass to each devisee in equal ownership shares when such an interpretation runs contrary to the existing decisions of this court?**

Appellant's interpretation of the initial order of the Probate Court is incorrect. That court simply observed that the residuary clause required an equal distribution (R. p. 17), which is not in dispute. The Probate court then proceeded to note that the Private Family Settlement Agreement provides that in the absence of an agreement, the court would resolve the dispute. (R. p. 18). That the Court would do so in a manner consistent with fiduciary principles should not be a matter for controversy. The remainder of the order discusses in detail the unchallengeable principle that personal representatives are subject to those duties. The Court ends by stating that based upon these considerations, equity and good faith require that the real properties be equally divided. (R. p. 19). Accordingly, the Probate Court did exactly what the Private Agreement required it to do, and what all parties agreed that it should do: make a determination on the division of the residuary assets. Applying fiduciary principles in making its decision was entirely proper.

In its Order Denying Reconsideration, the Probate Court noted the language of the residuary clause, observing that property not effectively disposed of by specific devise would be distributed in equal shares, and unless that provision created some incongruous result, should be applied in accordance with its plain meaning. (R. p. 12). It should be reiterated that the complexion of this estate at the time of this litigation is drastically different than that which was contemplated by the Testatrix at the time the will was drafted. Two of Testrix's children have been barred from inheritance by court order, and another has died, leaving only the three daughters. Any attempt to devine Testatrix's intent had she anticipated this turn of events is rank speculation. The Probate Court's determination that an equal, pro-rata division of the real properties is the only proper application of the Personal Representative's fiduciary responsibilities is the only result that avoids an obvious repugnancy. That Appellants should manage to acquire for themselves through the happenstance of a drastically altered set of

circumstances, and a gerrymandered and contrived division of the remaining real properties, the prized asset, Lake Summit, having already been devised the Rockville house, is a repugnant result.

Appellants have repeatedly asserted that their only consideration throughout has been to honor Testatrix's intent. Yet their own interpretation of that intent has evolved over the course of this litigation. They have variously stated that her intent was:

- a. For certain real properties to go only to certain beneficiaries (Appellant's brief in the Court Appeals, p. 13).
- b. The will "evidenced a clear intent to bequeath real property only to children from her first marriage". (Appellant's Petition for rehearing in the Court of Appeals, p. 3)
- c. Testatrix sought to devise (to the children resulting from her marriage to Thomas Stevenson) the properties they had acquired as a family. (Appellant's Petition for Certiorari. P. 15).

The first, (a), fails because, even though true in itself, it does not follow that her intent would have been that, in the present situation, Appellants should receive a 100% interest in *both* resort properties, and can just as easily be interpreted to indicate that she did not intend for any set of beneficiaries to receive both. It can also be inferred that she did not intend Appellants to receive Lake Summit in any event.

As to (b), whether this is correct or not, fulfilling that intent is impossible, as only real property remains to be distributed. So, in making that distribution, Appellants are bound by fiduciary principals. They do not receive, by virtue of this interpretation of intent, license to pick and choose among the remaining real property assets, leaving Respondent with varied interests in the investment properties gerrymandered to create an equalized balance sheet.

(c) makes its appearance for the first time in Appellants Petition for Certiorari. This interpretation is clearly speculation. Nowhere is there any language or evidence to support this

assertion, and if the will makes any manifestation of intent clear, it is that Testatrix intended to treat all of her children equally.

Appellants' own difficulties in settling on Testrix's actual intent in the current posture of this estate underscores the Probate Court's proper approach in applying the residuary clause.

**2. Whether the Court of Appeals erred in affirming the Probate Court's finding that the will does not grant Appellants broad discretionary authority with respect to distribution of the residuary estate when such a position is contrary to both previous decisions of this court and the laws of this state?**

Neither the Probate Court, nor Circuit Court, nor the Court of Appeals has ruled that the Personal Representatives under this will have not been granted broad discretionary powers. Rather, the Probate Court ruled that applying fiduciary principals to the matter at hand, a pro-rata, equal division of the real properties was required, and the only way to reach a fair and equitable result. In denying Appellant's Request for Rehearing, the court went further and distinguished between specific and property "not effectively disposed of", stating that such property should be equally divided under the residuary clause.

Even granting Appellant's claim that such broad discretion follows the residuary estate and allows them to distribute the residuary properties in "any reasonable manner", they have not even attempted to address why it is reasonable and consistent with fiduciary principles to juggle the values to the extent that they have in order to arrange to obtain the Lake Summit property to the exclusion of Respondent, beyond speculative and inconsistent assertions of honoring the Testatrix's intent.

**3. Whether the Court of Appeals erred in holding that the Personal Representative's proposed distribution was a violation of their fiduciary duty of good faith when such a holding runs contrary to previous decisions of this court?**

A case involving the construction of a will is an action at law. *Epting v. Mayer*, 283 S.C. 517, 323 S.E.2d 797 (Ct. App. 797). If the essential nature of the case is legal, the action to be

taken (on appeal) is controlled by the determination of whether there is any evidence to support the factual findings below. *Dean v. Kilgore*, 313 S.C. 257, 437 S.E.2d 154 (Ct. App 1993).

Appellants argue that the Probate Court was without evidence in finding that “the only appropriate method of distribution which could satisfy the fiduciary responsibility of Appellants was an equal, pro-rata distribution of the real properties. The Court had before it Appellant’s proposed distribution, which is:

Lake Summit	\$1,100,000.00
Jacqueline Bennett (PR)	\$550,000.00
Kathleen Turner (PR)	\$550,000.00
Bailey’s Island	\$725,000.00
Genevieve Felder	\$584,500.00
Jacqueline Bennett	\$35,000.00
Kathleen Turner	\$35,000.00
James Kelly King	\$106,000.00
Paradise Island	\$390,000.00
Genevieve Felder	\$83,333.33
Jacqueline Bennett	\$83,333.33
Kathleen Turner	\$83,333.33
James Kelly King	\$140,00.00

(Jacqueline Bennett, Kathleen Turner, and Genevieve Felder agreed to buy out James Kelley King’s interests. The PR’s proposal contemplates distributing those interests pro-rata to the remaining three beneficiaries in accordance with the above schedule). (Tr., p. 91, l. 23 – p. 9, l. 13). The court also heard the testimony of the parties concerning rental income, carrying costs, personal vacation time, and sentimental value. At the hearing, Appellants offered no testimony or argument concerning any of their various interpretations of Testatrix’s intent regarding the real properties, that they now claim to be intent on honoring. The only discussion of intent related to whether she intended the general “broad discretionary power” of the Personal Representatives under the residuary clause, that they seek to transition into the authority to make

any distribution whatsoever, so long as they can make the values come out equal.

The Probate Court, confirmed by both the Circuit Court and the Court of Appeals, found The proposed division manifestly unreasonable. Appellants have put forth no evidence whatsoever to support the reasonableness of this proposal, beyond the above-mentioned attempts to devine Testrix's intent (absent fulfilling Testatrix's alleged intent, the proposed distribution serves no apparent purpose beyond consolidating Appellant's ownership of the most desirable properties in the estate). The Probate Court did not find, as Appellants suggest, that, as a general proposition of law, the only way to distribute a residuary estate is on an equal, pro-rata basis in every case. Rather, the Court, after interpreting the Settlement Agreement, considering the proposed distribution, and the testimony of the parties, concluded that the only fair method of distribution in this case was a pro-rata basis.

Appellants mis-characterize the holding in *Zimmerman v. Marsh*, 618 S.E2d 898, No. 26029 (S.Ct. 2004). The cited language stating that "while equitable considerations . . . may be considered, pecuniary interests are the determining factor" does not mean that if the raw numbers can equalized, all other factors are trumped. It is axiomatic that in an equal distribution, all values should be, in fact, equal. It does not follow however, that in distributing shares of equal value, there are not times when equitable factors should not be relevant, or even compelling\* Such a holding would be non-sensical, rendering the language concerning non-pecuniary considerations meaningless and superfluous. This language should be interpreted

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\* It is easy to imagine factual scenarios in which non-economic considerations would be compelling, such as in the case of a child being part-owner of an ongoing business with the deceased.

simply as “yes, the distributions should be monetarily equal, but in appropriate circumstances, other considerations can come into play when making distributions”. (See also *Ark Land Company v. Harper*, 599 S.E.2d, 215 W.Va 331 (2004) .

Appellants also mis-characterize the parties’ agreement concerning value. That stipulation was never intended to be a comprehensive, all-encompassing acceptance of intrinsic value. If that were the case, there would be no dispute, and Respondent would not have requested a hearing in the first place. The Appellant’s witness himself acknowledges that he has no idea what factors went into the appraisals, or what approach they used in determining value. (R., p. 135, l. 8 – p. 137, l. 10.

This entire dispute is not about monetary value. It is about the Personal Representative’s use of their authority to cherry pick among the assets to be distributed. Had there been no stipulation, a significant portion of the original hearing might have been devoted to cross-examination of the appraiser, and presenting other evidence of value, including expert testimony. Ultimately, the Court would have ruled on the values, leaving Appellants free to make the same or similar allocation of percentages that are now objected to, and leaving the dispute intact.

Next, Appellants suggest that the Courts below have ruled that Personal Representatives “have a duty” to consider, (and, apparently act upon), intangible, non-economic factors. No court in this case has made such a sweeping pronouncement. The case law states, and it has only been said in this case, that such considerations are appropriate in certain situations. (*Zimmerman, Ark Land Company, supra*). After repeating their insistence that their proposed distribution solely reflects their desire to see Testatrix’s intent carried out, Appellants revert to their original position (R., p. 17), that so long as the numbers can be shoe-horned into an equalized balance sheet, they have no further fiduciary responsibility, and their actions are beyond scrutiny.

(Appellant's Petition for Certiorari, p. 14). The three courts below have rejected this proposition. Far from hamstringing future Personal Representatives, such an approach ensures that the needs and desires of non-PR beneficiaries at least receive proper consideration, that they are not completely at the mercy of the whims of Personal Representatives, and that Personal Representatives fully comply with their fiduciary responsibilities.

**4. The Court of Appeals erred in holding that title to property had already passes to the Respondent.**

Appellants are correct in asserting that the general vesting of real property in heirs or devisees is subject to the purposes of administration. However, it does not follow that the Personal Representative's power over such matters extends to divesting title for any reason. The Personal Representative's authority is, as always, constrained by statute, principles of probate administration, and the obligations of a fiduciary. It does not extend, as claimed by Appellants, to "raw" unbridled discretion. Language in a will, or statute granting broad authority to Personal Representatives is intended to provide reasonable flexibility where needed in estate administration, not as a shield from scrutiny.

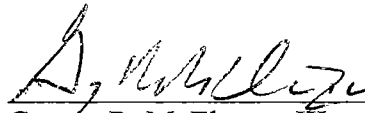
**5. The Court of Appeals erred in holding that the Private Family Settlement Agreement divested the Personal Representative of their discretionary powers, and precludes a challenge to the Probate Court's plan of distribution.**

In its Order Regarding the Division of Real Property, the Probate Court notes that in assuming the duty imposed by the Private Family Agreement, it will "make its determination in light of the duties imposed upon a fiduciary". It proceeded to do exactly that. In doing so, it did not, as Appellants state, "disregard the plainly stated intent of the Testatrix". Rather it ruled that, applying fiduciary principals, a pro-rata distribution was required. The Court was not required to give deference to a proposal that is, on its face, plainly inconsistent with the Personal Representative's fiduciary obligations.

**CONCLUSION**

For the foregoing reasons, the Court should deny Appellant's Petition for Certiorari.

Respectfully submitted this 5th day of August, 2020



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