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S.C. SUPREME COURT

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

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

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

Unpublished Opinion No. 2019-UP-412
Submitted June 3, 2019 – Filed December 31, 2019
Petition for Rehearing Denied May 22, 2020
Appellate Case No. 2020-000901

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' REPLY TO RETURN

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ARGUMENTS IN REPLY

Respondent's Return is fraught with a number of assertions and arguments that lack much, if any, legal authority. Appellants will first address a few factual inaccuracies contained in the Return and then briefly highlight the deficiencies contained with the same.

As to the factual issues, Respondent once again refers to the parties to this dispute as the "three daughters" of the Testatrix, and refers to James King as the "step-son" of the Testatrix. *See, Return to Petition for Writ* at 2. This is factually inaccurate. Appellants are the daughters of the Testatrix, and Respondent is the stepdaughter of Testatrix. Conversely, James Kelly King is not a stepchild, but is the Testatrix's son from her first marriage. This distinction is relevant inasmuch as the misstatement of same blurs the familial lines which governed the Testatrix's testamentary plan.

As was discussed extensively in the previous briefs and the subject Petition for Writ, the Testatrix's unequivocal intent was to provide cash bequests to the children of her and her late husband's first marriages, and to bequeath the real property of their marriage together to their four children. Testatrix made a specific pecuniary bequest in the amount of Four Hundred Thousand (\$400,000.00) Dollars to the son of her first marriage, Respondent James Kelly King. R. 227. Likewise, the Testatrix made a specific pecuniary bequest also in the amount of Four Hundred Thousand (\$400,000.00) Dollars to the daughter of Thomas C. Stevenson, Jr.'s first marriage, Respondent Genevieve Felder. R. 228. To the children of her marriage to Thomas C. Stevenson, Jr., the Testatrix devised the vacation homes acquired during the course of the marriage, including the Wadmalaw property and the Henderson Property. Testatrix devised these properties to the Appellants and the Stevenson brothers, respectively. R. 227-228.

As to the description of Lake Summit (or Henderson County Property), Respondent is incorrect in their description of the Lake Summit property in that it contains four lots in total, not

five. *See, Return* at 2; *cf.* R. 16. Further, describing the Lake Summit property as containing a house and several “undeveloped” lots is somewhat misleading in that the four lots operate essentially as one “package.” There is a house and a dock/water access located on two of the lots, while the remaining two lots are across the street from the house and act as a privacy buffer between the house and other homes. There are no undeveloped lake front lots. To the extent Respondent is implying there is additional undeveloped waterfront property, presumably to make the property appear more “desirable / valuable” the same would be a gross mischaracterization of fact.

Finally, Respondent asserts that the Lake Summit property covers “all of its expenses.” *Id.* While the Record before this Court does not contain any reports of profits over the past half a decade, even the years cited in the Record show that not every year is profitable. R. 118. Further, it is reasonable to assume that the modest profits derived from the rental income from same certainly would not offset future major costs of upkeep at the home. However, despite these mischaracterizations, the real issue is that the appraised value proffered by Herb McGuire was consented to by all parties. Accordingly, Respondent’s only motive in drawing attention to these details is an attempt to portray one property as more or less valuable than the appraised value previously consented to by the Respondent.

Turning next to the substantive legal arguments, in Response to Appellants’ first argument, Respondent asserts that Appellants are engaging in “rank speculation.” *See, Return* at 6. Respondent is correct that Testatrix, nor any of the parties to this action, could have predicted the intervening events which occurred in this case. However, Respondent is willfully ignoring the plainly stated intent to devise the real properties of her marriage to Thomas C. Stevenson, Jr. to the children of that marriage. Accordingly, even in the context of the residuary clause, it is possible to distribute those assets while still honoring the Testatrix’s intent. Certainly, there could be times where such a distribution would be impossible, if for example, all four children from that marriage had been disinherited. However,

given that two heirs of that marriage stand to receive assets from the Residuary Clause, and given that an equal monetary distribution of the same can be achieved while simultaneously honoring the intent of the Testatrix, that ought to be the preferred method of distribution.

The Probate Court instead erroneously substituted their own interpretation for the Testator's intent—thus abandoning the “cardinal rule of will construction... to determine and give effect to the [Testatrix's] intent.” *Matter of Clark*, 308 S.C. 328, 330, 417 S.E.2d 856, 857 (1992); *May v. Riley*, 279 S.C. 248, 250, 305 S.E.2d 77, 78 (1983); *Albergotti v. Summers*, 205 S.C. 179, 182, 31 S.E.2d 129, 130 (1944). The Probate Court held 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. Such a decision is controlled by a clear error of law when the Court is explicitly stating that their interpretation shall control **without any regard to the testator's intent**. This is an outright dereliction of the principal duty of the Court to determine the testator's intent in an action to determine the construction of a will.

The Respondent attempts to claim that Appellants have changed their interpretation of Testatrix's intent has changed throughout the course of this litigation—such a position is patently false as evidenced by the very excerpts cited by the Respondent.

- a. For certain **real properties** to go only to **certain beneficiaries**
- b. The will evidenced a clear intent to bequeath the **real property** only to **children from her [second]¹ marriage**
- c. Testatrix sought to devise **(to the children resulting from her [1]¹ marriage to Thomas Stevenson) the properties** they had acquired as a family.

See, Return at 7. Each of these three sentences say exactly the same thing: The Testatrix's intent, as is plainly and unequivocally stated in the will, was to make **cash bequests** to her son from her first

¹ The Respondent's return appears to quote Appellant's previous filings, which erroneously described Testatrix's marriage to Thomas C. Stevenson as her “first marriage”. This scrivener's error is clearly inconsistent with the evidence in the Record, and further was addressed by way of a letter to the Court of Appeals on February 14, 2020 advising them of the error and correcting the same.

marriage, and her step-daughter from her husband's first marriage, and to bequeath the real properties to the four children of her marriage. The language used in the Appellate filings may have changed in style, but the substance remains identical, and inviolable.

In response to Appellants' second argument, Respondent fails to offer any legal support for same. As extensively discussed in the Petition, the Appellants had "a duty to settle and distribute the estate of the Testatrix in accordance with the terms of a probated and effective will and this code..." S.C. CODE ANN. § 62-3-703. It is without question that the Testatrix's declared intent, by the terms of her will, was to "give broad discretion and flexibility to [her] Personal Representatives." R. 234. Testatrix specifically incorporates the statutory authority for same granted by the S.C. Probate Code by reference and states the powers of her Personal Representatives shall include those enumerated in S.C. CODE ANN. § 62-3-712. *Id.*

Appellants were given this broad discretionary authority. Despite Respondent's unsupported assertions to the contrary, the Probate Court's ruling created an arbitrary mandate in contravention to the Testatrix's plainly stated intent. Appellants proposed distribution would therefore be the preferred method of distribution as the Will's plainly stated intent was to provide this authority and discretion in drafting the same to the Appellants. The authority to make distributions without Respondent's consent is plainly stated by the terms of the Will and by the statutory authority conferred in S.C. CODE ANN. § 62-3-715(23). Conversely, there is **no evidence**, nor **any authority** which Appellants can find which supports the proposition that the powers granted to a Personal Representative by the South Carolina Probate Code operate in a vacuum, and may not be applied to a Residuary Estate.

² Further, the specific powers enumerated in Section 10 of the Will track the language of § 62-3-715 nearly verbatim. R. 234-236; *cf.* S.C. CODE ANN. § 62-3-715.

Turning next to the third argument proffered by the Appellants, Respondent claims that Appellants proposed distribution scheme somehow constitutes a violation of their fiduciary duties—without **any** evidentiary or legal support of such a proposition.

As has been previously noted, “[the Court] 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.” *Estate of Jacquelin K. Stevenson v. Genevieve Felder*, 2019-UP-412 at p. 2 (December 31, 2019) (*citing Blackmon v. Weaver*, 366 S.C. 245, 249, 621 S.E.2d 42, 44 (Ct. App. 2005)). In the present case, there simply is **no** evidence properly before the Court which would reasonably support their holding.

The Probate Court erroneously held the **only** appropriate method of distribution which could satisfy this fiduciary duty was a “pro-rata” division. R. 9. Respondent cites to cases which state that the Personal Representatives owe a duty of good faith. Yet once again, has failed to provide **any** case law or statutory authority which stands for the proposition that the **only** way to satisfy this duty is to distribute real property in the Residuary Estate in equal ownership shares.

Appellants agree that they most certainly have a duty as a fiduciary and must “act in good faith and with due regard” to the other beneficiaries, but Appellants contend this duty requires **only** that each beneficiary receive a distribution of **equal value**. This position is the only one consistent with previous decisions of this Court. *See, Zimmerman v. Marsh*, 618 S.E.2d 898 (S.C. 2005) (“While we find that equitable considerations such as ... sentimental attachment to the property may be considered, **the pecuniary interests of all the parties is the determining factor.**”) (**emphasis added**); *Wilson*, 320 S.C. 137, 463 S.E. 2d 614 (Ct. App 1995) (The allocation of a preselected tract to one heir was not prejudicial to other heirs unless evidence was presented to demonstrate a tract was **more valuable** than other tracts) (**emphasis added**). Respondent’s Return exhibits once again a flagrant disregard for the Testatrix’s intent. They accuse Appellant’s of “cherry picking properties” when in reality, they

simply seek to honor the plainly stated wishes of their late mother—a proposition in which Respondent clearly has no interest.

Respondent once again is attempting to proffer the argument that there is somehow an unequal value amongst the properties. Appellants vociferously object to any such line of argument given that the values assigned to the properties were consented to by Respondent. R. 42. Respondent chose to stipulate on the record that the valuation of the properties was correct for purposes of distribution. Appellants provided the accounting report of Herbert McGuire, CPA, who was hired to assist in formulating the proposed distribution scheme. R. 138.

Moreover, Respondent appears to make a misrepresentation of fact to this Court, claiming that “Appellant’s witness has no...idea what factors went into the appraisals.” See, Return at 11. The Record clearly indicates that Appellant’s witness, while on the stand, was unable to recall the exact methodology employed, but testified the same could easily be gleaned from looking at the report. R. 137. Respondent had every opportunity to refresh the witness’s recollection by providing them with a copy of same and to inquire into further on cross examination, but yet failed to do so. The Respondent’s failure to effectively cross examine a witness reveals nothing about the methodology employed by the appraiser. Further, none of this negates the fact that the value assigned to the properties for purposes of distribution were consented to by the Respondent. They are attempting to have their cake and eat it too. They are consenting to the value, but yet simultaneously retaining the right to challenge the assigned value if they do not agree with the proposed distribution scheme.

Once again, Respondent champions the view Personal Representatives now apparently have a **fiduciary duty** to take into account **intangible non-economic factors**, including considerations of **“sentimental value”** and subjective **“desirability”** of assets when dividing and distributing estates. As is fully briefed in the Petition, such a position is incongruent with South Carolina law.

Turning to the fourth argument proffered by the Appellants, Respondent appears to miss the

thrust of the same. Appellants have argued that the Court of Appeals clearly erred in holding that Appellants are attempting to “divest” Respondent of title to property. Appellants contention rests upon the fact that title has **not yet vested** and accordingly, no divestment has occurred. Appellants once again note that during the pendency of administration, title vests at distribution. Prior to same, no vesting can occur as the title is “subject to ... administration” *See*, S.C. CODE ANN. § 62-3-101.

Further, the South Carolina Probate Code is 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 62-3-907. Just as the Appellants (individually) do not have title to any of the properties, Respondent likewise does not have yet have any title to the property sufficient to claim that Appellants are divesting her of an interest in same. The Estate retains title to the real property for purposes of administration, and once a distribution is made, only then could there be a divestment. Accordingly, the Court of Appeal’s improper application of the applicable law ought to require this Court to grant

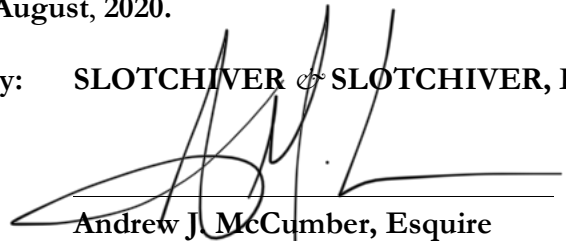
Finally, as to the fifth and final argument proffered by the Appellants, Respondent once again offers a cursory denial of same, and resorts once again to relying on the imagined specter of a violation of fiduciary duty. Appellants main contention is that they have standing to challenge the Probate Court’s decision. The Court of Appeals appears to take the position that Appellant’s were without recourse in the event that they disagreed with the trial court’s opinion. Appellant’s extensively briefed in their Petition the reasons they assert such a holding is erroneous. Nothing in Respondent’s counterarguments dispute this standing argument, rather they appear to only once again repeat why they believe the Probate Court’s holding was correct.

CONCLUSION

A thorough review of the arguments and legal authority as set forth by the Appellants in their Petition and in this Reply leads to only one proper conclusion: The Appellate Court's decision was erroneous in affirming the Probate Court's holdings and ought to be reviewed. Accordingly, Appellants respectfully request this honorable Court to GRANT their Petition for Writ of Certiorari.

Respectfully submitted this **25th** day of **August, 2020**.

By: **SLOTCHIVER & SLOTCHIVER, LLP**



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