THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

JENNIFER B. McCOY, Circuit Court Judge

Case No.: 2019-CP-10-01932

Appellate Case No. 2019-002124

IN RE: ESTATE OF STEPHEN DAY WARD, JR.

MARY K. WARD A/K/A MARY KIMBERLY WARD . . . . . Respondent,

v.

STEPHANIE WARD CIBINIC, DAVID D. WARD, And BRIAN C. WARD, Personal Representatives . . . . . Appellants.

INITIAL BRIEF OF RESPONDENT

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Statement of Issues on Appeal

1. Did the Circuit Court properly find that Appellants' appeal of the Probate Court's Order of April 2, 2019, denying Appellants' Motion for Reconsideration was without merit, and further, was abandoned by Appellants as the Issues in their written Brief do not argue the April 2, 2019 Order?

2. Alternatively, did the Probate Court properly find that Respondent Mary K. Ward, as the surviving spouse of decedent Stephen D. Ward, was omitted from his 2005 Last Will and Testament, admitted to probate, and such omission of Mary K. Ward, specifically, was not intended by the language of the 2005 Will?

3. Did the Probate Court properly find that Mary K. Ward, as surviving spouse of decedent Stephen D. Ward, was not provided for by decedent outside his 2005 Last Will, intended in lieu of testamentary provision, and that Mary K. Ward is entitled to her statutory omitted spouse share?

STATEMENT OF THE CASE

Respondent/Petitioner Mary K. Ward ("Respondent") is the surviving spouse of Stephen Day Ward, Jr. ("Decedent"), who died in Charleston County, S.C. on September 16, 2016. Appellants/Respondents ("Appellants") are adult children of the Decedent, who filed an Application for Informal Probate of Will in the Charleston County Probate Court on September 20, 2016, offering for probate a Last Will and Testament of Decedent dated April 21, 2005. Appellants were subsequently appointed as Co-Personal Representatives of Decedent's estate by Order of the Probate Court dated September 30, 2016. In their Application for Informal Probate. Appellants acknowledged, in question 1.5., that Decedent had had a "change in marital status . . . after execution of this Will." Applicants specified that Decedent's wife in April 2005, i.e. Nancy Ward, predeceased Stephen Day Ward, Jr., and Decedent subsequently married Mary K. Ward, the Respondent herein, who survived her husband.

By Order of the Charleston County Probate Court dated December 13, 2016, a Conservator was appointed for Mary K. Ward. Said Conservator filed a Petition, on behalf of Mary K. Ward, for Omitted Spouse Share on January 18, 2017, stating that the 2005 Last Will and Testament of Stephen Day Ward, Jr. makes no mention of, or provision for, Mary K. Ward, his surviving spouse. Appellants responded, by Response dated April 7, 2017, admitting that Decedent married Respondent on September 7, 2013, that Respondent was the surviving spouse of Decedent, and that the April 2005 Will makes no provision for Respondent. Appellants argued, however, that such omission by Decedent was intentional and/or that Decedent provided for Respondent outside of the 2005 Will, in lieu of testamentary provision.

Following a period of discovery, Appellants filed a Motion for Summary Judgement on June 30, 2017. Appellants argued in their Motion that an "Agreement for Mutual Wills and

Trusts", also signed by Decedent on April 21, 2005, referenced his 2005 Last Will and Testament, executed on the same date, and was thereby incorporated into said 2005 Last Will. Further, Appellants argued that language within the 2005 "Agreement", made jointly between Decedent and his then-wife, Nancy L. Ward, reflected the "intentional omission of any subsequent spouse, including Petitioner [i.e. Mary K. Ward] from the Will." (Motion for Summary Judgement. pg. 5). A rescheduled hearing was held in the Probate Court on October 25, 2017. By Order dated November 10, 2017, Appellants' Motion for Summary Judgement was denied by the Probate Court. Appellants moved for Reconsideration of the Denial for Summary Judgement on November 27, 2017, which Motion was denied by the Probate Court by Order dated February 9, 2018.

A rescheduled merits hearing on Respondent's Petition for Omitted Spouse Share was held on April 18, 2018, at which both parties presented evidence and testimony of witnesses.

By Order dated August 9, 2018, the Probate Court found that Respondent Mary K. Ward had properly filed her Petition for Omitted Spouse Share under S.C. statutory law, that she was the surviving spouse of Decedent, having married him on September 7, 2013, but was not mentioned, or provided for, in his 2005 Last Will and Testament, admitted to probate. The Court further found that Appellants had failed to present any statements or documents of Decedent evidencing any intent to provide for his wife, Mary K. Ward, outside his 2005 Will and in lieu of testamentary provision. The Court also found no evidence of any transfer of assets by Decedent, either during his marriage or intended to take effect after his death, to Respondent that would bear any reasonable relation to an intestate spousal share, relative to the size of Decedent's estate. The Court also found that Appellants' argument that the 2005 "Agreement" establishes an intent by Decedent to specifically exclude Respondent, to whom he was married only in

September 2013, was without merit or within any reasonable bounds of construction, in that Mary K. Ward is nowhere specifically mentioned in the 2005 Will, there was no evidence presented that Decedent and Respondent had any personal relationship in 2005, and, presumably, did not even know one another until many years later.

Further, Appellants' own reliance on the 2005 "Agreement" was found to be contradictory to their expressed arguments regarding Decedent's intent. Included within the 2005 "Agreement" are provisions which acknowledge and confirm the responsibility of Decedent to expressly ratify provisions of the "Agreement", in the same form and manner as the "Agreement" itself, including written waivers from any future spouse, should his then-spouse, Nancy K. Ward, predecease him and he decide to subsequently remarry. The Court found, as a matter of fact, that no such written ratification by Decedent, nor any waiver of any spousal inheritance by Respondent Mary K. Ward, was ever executed.

Appellant filed a Motion for Reconsideration of the merits Order on August 20, 2018, to which Respondent filed a Reply on October 22, 2018.

By Order to Alter or Amend Judgement, dated January 18, 2019, and without further hearing the Probate Court confirmed its award to Respondent of her omitted spouse share of Decedent's estate.

Appellants thereafter filed a Motion for Reconsideration of the January 18, 2019 Order on January 28, 2019, to which Respondent filed a Reply on February 21, 2019. By Order dated April 2, 2019, without further hearing, the Probate Court found that Appellants' 59(e) Motion for Reconsideration "raises no new argument and presents no new evidence", and denied said Motion.

Appellants filed their Notice of Intent to Appeal "the Order Denying Respondents Motion for Reconsideration of January 18, 2019 Order in the Probate Court, dated April 2, 2019" in the Circuit Court on April 15, 2019.

Following a hearing before Hon. Jennifer B. McCoy on November 15, 2019, the Circuit Court affirmed the decision of the Probate Court by Order dated December 19, 2019, and filed December 20, 2019. Appellants thereafter filed a Notice of Appeal dated December 30, 2019 in the South Carolina Court of Appeals.

STANDARD OF REVIEW

An action concerning the application of the omitted spouse statute is an action at law. *Williams v. Williams*, 329 S.C. 569, 496 S.E.2d 23 (Ct. App. 1998), *In re Timmerman*, 331 S.C. 455, 502 S.E.2d 920 (S.C. App. 1998).

In an action at law, the appellate court(s) may not disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them. *In re Howard*, 315 S.C. 356, 434 S.E.2d 254 (1993).

ARGUMENT

1. Because Appellants' Notice of Appeal to the Circuit Court dated April 12, 2019 states they are appealing the Order of the Charleston County Probate Court dated April 2, 2019 of the Probate Court, but, thereafter, no Issue on Appeal or Argument referencing said April 2, 2019 order is contained in Appellants' written brief, said appeal was abandoned and properly denied by the Circuit Court.

Appellants' Notice of Intent to Appeal, dated April 12, 2019 and filed in the Circuit Court on April 15, 2019, states they are appealing "the Order Denying Respondents' Motion for Reconsideration of January 18, 2019 Order in the Probate Court, dated April 2, 2019 and received by the undersigned on April 9, 2019, a copy of which is attached." No copy of Order was served on Respondent, and no copy of said order attach could be located in the Circuit Court file.

The noticed Order of the Probate Court of April 2, 2019 found that "after a review of the relevant pleadings, memoranda, and hearing notes, the Court finds that the Motion filed raises no new argument and presents no new evidence," and denied Appellants' Motion for Reconsideration. April 2, 2019 Order.

Nowhere in the Appellants' filings, subsequent to their Notice of Intent to Appeal, do they state any Issues on Appeal or Arguments citing any alleged errors in the Court's April 2, 2019 Order. By failing to state any alleged errors of law or fact contained in the said Order, Appellants have effectively abandoned any appeal of the April 2, 2019 Order. SCACR 208(b)(1)(b) states "ordinarily, no point will be considered which is not set forth in the Statement of the Issue on Appeal."

Pursuant to SCACR 220(c), Respondent additionally argues that the Court's April 2, 2019 Order should be affirmed in that every ground for requested relief stated in Appellants' January 28, 2019 59(e) Motion had previously been filed and/or argued by

Appellants. Paragraph 1 of said Motion incorporates by reference all Appellants' arguments presented at the Summary Judgement and Merit hearings in Probate Court, as well as previously filed Motions for Reconsideration and supporting Memoranda.

2. Because Respondent Mary K. Ward was acknowledged by Appellants to be the surviving spouse of Stephen D. Ward, deceased, and said Mary K. Ward is nowhere mentioned in the decedent's 2005 Last Will and Testament, admitted to probate, and Respondent has complied with all statutory filing requirement to assert her claim, she is entitled to her statutory omitted spouse share of decedent's estate.

The Probate Court correctly construed applicable statutory law, i.e. S.C. Code Ann. Sect. 62-2-301 ("Omitted Spouse Statute") in granting Respondent's claim for omitted spouse share. Such statute clearly directs that "If a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse, upon compliance with the provisions of subsection (c), shall receive the same share of the estate he would have received if the decedent left no will. . . " (Sect. 62-2-301(a)) (emphasis added). Subsection (c) further prescribes the requirements of filing a summons and petition within one of these specific, limited time periods and giving notice of hearing to interested parties. (Sect. 62-2-301(c)).

It is undisputed that Respondent complied with the filing requirements of subsection (c), filing the required S.C. Probate Court form #382ES, together with a certified copy of her marriage license to the decedent, Stephen Day Ward, Jr. (Petition dated 1/12/17). It is also undisputed that the decedent's 2005 Will, admitted to probate, makes no mention of Respondent, whom he married on September 7, 2013. (Last Will and Testament of Stephen D. Ward filed 9/29/16).

Appellants argue that Respondent should be denied her omitted spouse share under Sect. 62-2-301 because one or both of the two statutory exceptions to granting such a spousal share exist.

In a 1999 S.C. Law Review article, the author gives a comprehensive study of the background purposes and application of the S.C. Omitted Spouse statute. "South Carolina Probate Code's Omitted Spouse Statute and In Re Estate of Timmerman," D.E. Wagner, 50 S.C. L. Rev. 979, (Summer, 1999). The current statute has evolved as a refinement from an earlier common law concept that marriage operated to revoke a premarital Will. As in many other states, South Carolina's current omitted spouse statute is intended to balance two important legal principles of the testamentary process and societal public policy, that is, to attempt to carry out the testator's intent as evidenced in their written will, and to protect a surviving spouse and prevent them from becoming a public charge for support. Berkebile v. Outen, 311 S.C. 50, 56, 426 S.E.2d 760 (S.C. 1993), Williams v. Williams 335 S.C. 386, 517 S.E.2d 689, 691 (Ct. App. 1999).

In describing how Sect. 62-2-301 of the South Carolina Probate Code seeks to achieve this balance, the author sets out four conditions which may be involved in proper application of the Omitted Spouse Statute. The first two, that the surviving spouse married the testator after the execution of the probated Will, and that the said Will does not provide for the surviving spouse, are said to be qualifying conditions. In the instant case, Respondent has met both conditions, without any opposition argument by Appellants, and such was found as a matter of fact by the Probate Court. (Order dated 8/9/18 , Order dated 1/18/19).

The remaining two conditions, stated in the statute in Sect. 62-2-301(a)(1) and Sect. 62-2-301(a)(2), are described as exclusions. These are, it must not appear "from the Will that the

omission was intentional," and that the testator did not provide for the spouse outside the Will, as intended to "be in lieu of a testamentary provision." South Carolina, like a majority of the states with similar statutes, has looked to the surviving spouse to satisfy the first two statutory, or qualifying, conditions, while looking to the proponents of a premarital Will to prove either, or both, of the latter two exclusionary, or disqualifying, conditions.

As confirmed in the above article, in the many South Carolina cases where the "Will simply does not mention the surviving spouse," the Courts have found the exclusion does not apply, and the omission, by name, of the particular and individual surviving spouse, satisfies the condition of not being provided for by the Will. (Wagner, p. 983).

Even in those cases where the Will specifically includes as beneficiary the named individual, who later becomes the spouse of testator, the Courts have held that unless the request was made "in contemplation of marriage," the beneficiary has not been "provided for" in their capacity as a spouse." (emphasis added) To constitute an exception to the omitted spouse statutory share, the decedent must have "considered the surviving spouse in the capacity at the time the Will was executed" (emphasis added). *Miles v. Miles*, 312 S.C. 408, 440 S.E.2d 882, 883 (S.C., 1994).

Conversely, where the testator makes provision for a specific beneficiary, although not yet married, in her capacity as "wife" or "prospective wife", as well as provided for her outside the will, as a contingent beneficiary of a trust should they subsequently marry, S.C. Court has found that she was not an "omitted spouse," even though only legally married after execution of the Will. The Court found that both parties clearly anticipated marriage, participated in estate planning with attorneys, and that the surviving spouse was provided for,

both within and outside the Will. (emphasis added) *Green ex rel. Estate of Cottrell v. Cottrell ex rel. Estate of Cottrell*, 346 S.C. 53, 550 S.E.2d 324 (Ct. App. 2001).

The current "omitted spouse statute" replaces an earlier statutory presumption that a Will, executed prior to a marriage, was revoked by subsequent marriage (see former S.C. Code Sect. 21-7-220, S.C. Code 1962 Sect. 19-222). The current statutory provisions, as amended, provide two specific and limited exceptions to the presumption of providing a full intestate estate share to a surviving spouse who is omitted from a decedent's will, which was executed prior to their marriage.

Appellants argue that Respondent's claim should be denied because the first exception is met through their testimony and exhibits, i.e. "it appears from the will that the omission was intentional" (Sect. 62-2-301(a)(1)).

Appellants presented at the Probate hearing extensive estate planning documents, in addition to the April 21, 2005 Last Will and Testament of decedent. Such documents were executed by decedent and his then-wife, Nancy L Ward, on the same date as his Last Will, and, as argued by Appellants, should be incorporated into any review of the 2005 Will.

However, nowhere in any of the several 2005 estate documents is there any mention or reference to Mary K. Ward. Indeed, testimony of the decedent and Respondent's children indicate that Stephen Ward and Mary Ward did not even know each other in 2005. (Transcript p. _____) Further, decedent's 2005 Will was not written "in anticipation of marriage" to Mary K. Ward, as some S.C. cases have required for application of the statutory exception, as Stephen Ward was clearly married to Nancy L. Ward in 2005, and remained so until her death in 2011.

However, Appellants argue that general language in the 2005 Estate Planning documents, specifically the "Agreement for Mutual Wills and Trusts", regarding revocability, or lack thereof, after the death of either Nancy Ward or Stephen Ward, acts as a bar to the statutory rights of a subsequent surviving spouse, such as Mary K. Ward. Such interpretation would be directly contrary to long-standing S.C. public policy, as described in successive statutory procedures to provide for surviving spouses in decedents' estates, and cannot be held to be a lawful interpretation of the contract document. *Weeks v. New York Life Ins. Co.*, 122 S.E. 586, (S.C. 1924).

Even more specifically, the 2005 Agreement for Mutual Wills and Trusts, cited by Appellants as an essential component to interpretation of decedent's 2005 Will, clearly states that all provisions of the relevant estate planning documents were to be governed by, and construed in accordance with, the laws of the State of S.C. ("2005 Agreements for Mutual Will and Trusts"- Article VII). S.C. Public policy, as codified in Sect. 62-2-301, in effect in 2005, to "set aside an intestate share for any surviving spouse married to testator after the execution of a will which omits provision for the spouse," clearly governs interpretation and application of any provision of the documents.

Wagner's 1999 Law Review article also discusses the role and responsibility of the drafting attorney in guarding against confusion and protracted litigation surrounding the omitted spouse statute. He advises the estate planning attorney to not only discuss with his married client the consequences of remarriage in his testamentary plan, but also "the need to execute a new will or re-execute the old will after the subsequent marriage."

In his testimony at the Probate merits hearing, decedent's estate-planning attorney assured the Court that he had thoroughly discussed, in April 2005, all aspects of the

testamentary documents with his client, Stephen D. Ward, including that, in all aspects, existing South Carolina statutory and case law would apply to their provisions.(Transcript p. _____.) Whether or not we know if Attorney Bluestein was familiar with the drafting suggestions of the 1999 Law Review article, the documents confirm that such advice was heeded. (Agreement, Article VII)

An even more specific acknowledgement, however, of existing S.C. statutory and case law are several provisions in the "2005 Agreement." Article 4.1. of the "2005 Agreement" requires the survivor of Stephen L. Ward, Jr. and Nancy L. Ward to take all "necessary" or "required" measures to "maintain his or her Will and Trust in full force until his or her death." (Agreement, Art. 4.1)

The actions necessary to comply with that statutory rule, in the case of a subsequent marriage by the surviving spouse of Stephen and Nancy, were specified in Article 4.2.1 and 4.2.2 of the "2005 Agreement." Stephen, as survivor of the 2005 marital unit, upon his remarriage (i.e. to Mary K. Ward in 2013) needed to "ratify his. . . Will and Trust in the form and with the provisions contained in his . . . Will and Trust annexed hereto" (emphasis added). Acknowledging additional governing S.C. law, the 2005 Agreement also states that the surviving spouse would "as a condition of such remarriage, require any person he or she remarries to legally and unconditionally waive his or her right to an elective share . . ." (2005 Agreement, Article 4.2.2).

Stephen Ward's own "Agreement" required him to ratify his will "in the form and with the provisions contained . . ." in his 2005 Will, in order to maintain its full force upon his remarriage to Mary Ward. At the least, this ratification would need to be in writing, signed by him, witnessed, and incorporate relevant provisions of the 2005 Will and other estate

documents. It is undisputed that no subsequent written estate document was written or signed by Stephen Ward after 2005, and no written waiver or release of inheritance rights was executed by his subsequent wife, Mary K. Ward.

Appellants also attempted to testify as to decedent's statements to them regarding the 2005 Will, but was objected to by Respondent as prohibited by the Dead Man's statute. The Probate Court sustained the objections.

The legal concept of ratification as defined in Corpus Juris, Vol. 52, p. 1144, and applied by South Carolina Courts, necessarily includes an adoption by one, as binding upon himself, of a previous action or agreement done "under such circumstances that he would not have been bound but for his subsequent assent." *Brazell Bros. Contractors v. Hill*, 245 S.C. 69, 74, 138 S.E.2d 835 (S.C. 1964), *First Carolinas Joint Stock Land Bank v. Stuyvesant Ins. Co.*, 168 S.C. 37, 166 S.E. 883 (S.C. 1932).

Stephen Ward's 2005 "Agreements," as ably drafted by his estate-planning attorney, requires Ward to "ratify" the agreement should he survive Nancy Ward and subsequently remarry. He did not do so upon his marriage to Mary Ward in 2013. Both by S.C. statute, reflecting a long-standing public policy of protecting surviving spouses, and by the specific terms of his own 2005 Agreement, no terms of that Agreement or the Will they may be annexed to, can be interpreted to deny provision and protection for his surviving spouse Mary K. Ward.

3. Because the 2005 Will of Stephen D. Ward makes no specific mention of her, and said decedent did not provide for Mary K. Ward, his wife, outside his Last Will, by any means intended to be in lieu of testamentary provision, Respondent is entitled to her omitted spouse share of decedent's estate.

Appellants further argue that the second statutory exception to an omitted spousal share, i.e. provision for a surviving spouse "by transfer outside the Will and the intent . . . be in lieu

of a testamentary provision . . ." should be applied. The facts do not support this argument. Appellants can only point to, as possible assets, the remains of a joint bank account used during the marriage for joint marital support and expenses (estimated at $4,000.00), a time share of unknown value, an automobile lease, (which, as a contract for payments is more of a liability than an asset), and a contingent residuary refund from the Seabrook Island Owners Association. The latter account designation was not shown to be precipitated by any intentional act of decedent, but, rather operates, if at all, accorded to the Owners Association by-laws. Other amounts Appellants allege, such as medical expense for Respondent, and household expenses for the marriage, are clearly incidents of marital support during decedent's life. They can point to no statement or action by decedent that indicates any intention for a non-probate transfer "in lieu of testamentary provisions."

Moreover, even if any of the amounts noted above could be considered an "in lieu of" transfer, the Courts have routinely examined the amount of any such transfers and its relation to the overall estate assets of the decedent. (In Re Timmerman) Indicative of a lack of any intent to "make transfers . . . in lieu of testamentary provision" is the substantial disparity in decedent's and Respondent's income and assets. Decedent, who was some 20 years younger than his last wife, had reported income estimated four times that of his wife. (Transcript p. _____.) As per the Estate Inventory, as amended by testimony of one of the Co-Personal Representatives, decedent's net assets at his death were valued at more than $990,000.00 (Transcript, p. _____, Estate Inventory).

CONCLUSION

For the reasons stated above, the Court should affirm the judgement of the Circuit Court, which affirmed the judgement of the Probate Court.

Respectfully submitted,

8th day of October, 2020

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In Re: _Estate of Stephen D. Ward, Jr. et al_

Case no. 2019-0021214

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*Comments:
Dear Ms. Kitchings:
Please find enclosed Respondent's Initial Brief, in the above-referenced Appeal matter. Thank you for filing this with the Court.

Sincerely,
Jane A. McFaddin
Attorney and Counselor at Law

*If you do not receive total number of pages, please call (843)556-3333.