RECEIVED
Nov 25 2020
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

THE HONORABLE 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,

vs.

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

FINAL REPLY BRIEF OF APPELLANTS

BURR & FORMAN LLP
Amanda A. Bailey SC Bar #71085
George Morrison, SC Bar#71622
Post Office Box 336
2411 Oak Street, Suite 206
Myrtle Beach, SC 29578
(843) 444-1107
Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

RULES

OTHER AUTHORITIES

STATEMENT OF ISSUES IN REPLY

I. WHETHER APPELLANT'S NOTICE OF APPEAL AND STATEMENT OF ISSUES ON APPEAL PRESERVED ISSUES FOR APPEAL

II. WHETHER RESPONDENT WAS ENTITLED TO RECEIVE AN OMITTED SPOUSAL SHARE WHEN SHE WAS INTENTIONALLY OMITTED FROM THE WILL

III. WHETHER THE CIRCUMSTANCES OF DECEDENT'S AND RESPONDENT'S MARRIAGE, INCLUDING THEIR LATE IN LIFE NUPTIALS, THEIR ADULT CHILDREN FROM PRIOR MARRIAGES, THEIR SIGNIFICANT NON-MARITAL ASSETS, AND THE NON-TESTAMENTARY TRANSFERS FROM DECEDENT TO RESPONDENT PROVIDE FURTHER EVIDENCE OF RESPONDENT'S INTENTIONAL OMISSION FROM DECEDENT'S WILL.

REPLY ARGUMENT

I. APPELLANT'S NOTICE OF APPEAL AND STATEMENT OF ISSUES ON APPEAL PRESERVED ISSUES FOR APPEAL.

Section 62-1-308 of the South Carolina Code governs appeals from probate court. The Probate Code provides that a person interested in a final order of the probate court must file a notice of intention to appeal to the circuit court in the office of the circuit court and in the office of the probate court, and a copy served on all parties not in default within ten days after receipt of written notice of the appealed from order. S.C. Code Ann. §62-1-308(a).

Appellants timely filed and served a notice of intention to appeal on April 15, 2019. An appeal from probate court is pursuant to Section 62-1-308 of the South Carolina Code, and specifies that "except as provided for in this section, no party is required to comply with any other requirements of the South Carolina Appellate Court Rules. S.C. Code Ann. §62-1-308(g).

The notice of intention to appeal appealed from and specifically identified the final order issued by the Probate Court, i.e. the order denying motion for reconsideration, as required by Section 62-1-308. An order denying a motion for reconsideration is a final order and is not interlocutory. All other orders in this case were interlocutory and not final orders of the Probate Court. Pursuant to S.C. Code Ann. §14-3-330 (1976), only final judgments and limited interlocutory orders are appealable. State v. Cooper, 342 S.C. 389, 397, 536 S.E.2d 870, 875 (2000).

South Carolina Code Section 62-1-308(b) requires that within forty-five days after receipt of written notice of the order, sentence, or decree of the probate court, the appellant must file with the clerk of the circuit court a Statement of Issues on Appeal (in a format described in Rule 208(b)(1)(B), SCACR) with proof of service and a copy served on all parties. Respondents timely filed and served the Statement of Issues on Appeal setting forth four issues for appeal arising out

of the rulings of the Probate Court. **(R. pp. 46-50).** Thereafter, Appellants timely briefed those arguments set forth in the Statement of Issues on Appeal and further complied with Section 62-1-308. **(R. pp. 368-394).**

Whether the notice of intention to appeal did or did not include a copy of the referenced final order, the April 2, 2019 Order Denying Respondents' Motion for Reconsideration of the January 18, 2019 Order in the Probate Court, does not render the appeal abandoned for three reasons.

First, Section 62-1-308(a) does not require a copy of the order appealed from to be attached to the notice of intention to appeal. Only direct appeals from the probate court to the South Carolina Supreme Court require service of the notice of intention to appeal in the same manner as provided for by SCACR Rule 203. See SCACR Rule 203 and S.C. Code Ann. §62-1-308(g) and (l). In this case, Appellant appealed from the probate court to the circuit court.

Second, even if Rule 203(B) required a copy of the order to be attached to a notice of intention to appeal from probate court to circuit court, clerical errors in a notice of appeal do not destroy the appeal. See e.g., Charleston Lumber Co. v. Miller Housing Corp., 318 S.C. 471, 458 S.E. 2d 431 (Ct. App. 1995); Weatherford v. Price, 340 S.C. 572, 532 S.E.2d 310 (Ct. App. 2000); Pertuis v. Front Roe Restaurants, Inc., 423 S.C. 640, 649 n.3, 817 S.E.2d 273, 277 n.3 (2018), reh'g denied (Aug. 16, 2018) (citations omitted).

Third, Appellants' notice of intention to appeal identifies the final order appealed from and their Statement of Issues on Appeal clearly set forth the issues argued on appeal to the circuit court and to this court on why the Probate Court erred. Respondents have set forth no prejudice as a result of any omission.

As such, Appellants have not waived any argument on appeal and the order of the Probate Court should be reversed.

II. RESPONDENT WAS NOT ENTITLED TO AN OMITTED SPOUSAL SHARE BECAUSE SHE WAS INTENTIONALLY OMITTED FROM THE WILL.

a. South Carolina requires a surviving spouse demonstrate that their omission from the will was unintentional.

South Carolina does not require the "proponents of a premarital Will to prove exceptions" to the omitted spouse statute as argued by the Respondents. In support of this erroneous position, Respondent cites to the 1999 law review article discussing the possible effects of In re: Timmerman, 331 S.C. 455, 502 S.E. 2d 920 (Ct. App. 1998). David E. Wagner, The South Carolina Probate Code's Omitted Spouse Statute and in Re Estate of Timmerman, 50 S.C. L. Rev. 979 (1999). Notably, the 1999 law review article recognized that Timmerman did not decide the burden of proof, and discussed possible alternatives that South Carolina courts could adopt as the burden of proof under the omitted spouse statute. The 1999 law review article, however, did not establish the burden of proof. Thereafter, in 2001, the South Carolina Court of Appeals set forth the burden of proof in the case of Green ex rel. Estate of Cottrell v. Cottrell ex rel. Estate of Cottrell, 346 S.C. 53, 62, 550 S.E.2d 324, 329 (Ct. App. 2001).

The Green case provides: A surviving spouse who wishes to qualify as an "omitted spouse" must demonstrate:

(1) the Decedent spouse executed the Will in question prior to the marriage;

(2) the Will does not provide for her as the surviving spouse;

(3) the omission was unintentional; and

(4) the Decedent did not provide for the spouse with transfers outside of the Will.

The Green court upheld summary judgment after finding that the surviving spouse's personal representative "failed to demonstrate that Marilyn was ***unintentionally*** omitted from Martin's will". Green ex rel. Estate of Cottrell, 346 S.C. at 64, 550 S.E.2d at 330. This finding in Green reiterates the burden of proving an unintentional an omission from a will falls on the surviving spouse. Id. See also S.C. Code Ann. §62-2-301.

The Probate Court erred in finding Respondent met her burden of proof and in finding the Respondent entitled to the omitted spousal share. This court should reverse.

b. An intentional omission from a Will does not require proof that the Decedent contemplated the omitted spouse in their capacity as a future spouse at the time the Will was executed.

Contrary to the assertion by Petitioner, South Carolina does not require omission by name of the subsequent spouse or that the Decedent consider the omitted spouse in that capacity at the time of the Will to prove intentional omission. In support of this proposition, Respondent cites to Miles v. Miles, 312 S.C. 408, 440 S.E.2d 882 (1994), where the issue before the court was whether the Decedent provided for the surviving spouse in the Will. In Miles, the decedent bequeathed to the surviving spouse in her capacity as the Decedent's "friend" prior to marriage, and not in her capacity as subsequent spouse. The Miles case is distinguishable from the facts at issue here because there is not issues as to whether the Decedent provided for Respondent in the Will. It is undisputed in this case that the Decedent was not provided for in the Decedent's Will and was "omitted." Rather, the issue before this court is whether Decedent *intentionally* omitted Respondent where the plain and ordinary language of the Will and 2005 Estate Planning Documents contemplate subsequent marriage and intentionally omits subsequent spouses from the Will.

It is not the public policy of this state to ignore the clear intent of a Will to omit a subsequent spouse in favor of providing for a surviving spouse under the omitted spousal statute. "The paramount rule of Will construction is to determine and give effect to the testator's intent. In construing the provisions of a Will, every effort must be made to determine and carry out the intentions of the testator. A Will must be read in the ordinary and grammatical sense of the words employed, unless some obvious absurdity, repugnancy, or inconsistency with the declared intention of the testator, as abstracted from the whole Will, would follow from such construction. The rules of construction are subservient to the primary consideration of ascertaining what the testator meant by the terms used in the written instrument itself, and each item of a Will must be considered in relation to other portions." Estate of Gill ex rel. Grant v. Clemson Univ. Found., 397 S.C. 419, 426, 725 S.E.2d 516, 520 (Ct. App. 2012), See also S.C. Code Ann. § 62–1–102(b)(2) (2009) ("The underlying purposes and policies of this Code are ... (2) to discover and make effective the intent of a decedent in the distribution of his property.").

Here, the clear and unambiguous intent of the Will, and the 2005 Estate Planning Documents incorporated in the Will by reference, was to exclude subsequent spouses from the Wills of both the Decedent and his then wife, Nancy Ward, in favor of mutual irrevocable wills. This intent was reiterated by the testimony of the attorney drafting the mutual wills, by testimony regarding statements of the Decedent, and by the Decedent and Mary Ward's actions prior to marriage, in contemplation of marriage, and following marriage.

The Probate Court erred in finding the Respondent entitled to the omitted spousal share because she was intentionally omitted from the Will. This court should reverse.

c. The Respondent erroneously sets forth the law regarding evidence of the intent of the Decedent.

The 2005 Estate Planning documents provide ample evidence of Decedent's intent to omit a subsequent spouse from his Will.

The law requires analysis of whether it was clear that Decedent intended to omit a subsequent spouse from the *Will*. The law does not require that a Decedent's intentional omission of a subsequent spouse be from his entire estate or from the elective share as Respondent asserts. Rather, Section 62-2-301 of the Probate Code precludes recovery as a surviving spouse if the omission from the *will* is intentional. Respondent does not claim the elective share and this court is not asked to determine whether Respondent should be entitled to the elective share.

As a result, the Probate Court erred in granting Respondent the omitted spousal share and this court should reverse.

d. The Decedent ratified the Will.

The Decedent ratified the Will upon remarriage to Mary Ward and the Will is the final last Will of Decedent. If the 2005 Will had not been ratified, this court would not be asked to interpret its terms. There is no dispute that Ward maintained this 2005 Will in full force until his death. It is an undisputed and unappealed fact. **(R. p. 33, ¶13)**

Respondent asserts that the Decedent did not ratify his will and thus, the Probate Court did not err in granting her the omitted spousal share. Respondent's argument is factually incorrect based on the unappealed findings of the probate court.

As a result, this court should reverse.

III. THE CIRCUMSTANCES OF DECEDENT'S AND RESPONDENT'S MARRIAGE, INCLUDING THEIR LATE IN LIFE NUPTIALS, THEIR ADULT CHILDREN FROM PRIOR MARRIAGES, THEIR SIGNIFICANT NON-MARITAL ASSETS, AND THE NON-TESTAMENTARY TRANSFERS FROM DECEDENT TO RESPONDENT ARE EVIDENCE OF RESPONDENT'S INTENTIONAL OMISSION.

Even if the evidence of non-testamentary transfers and non-marital assets of the Decedent and Respondent are insufficient to reflect that Mary Ward was provided for outside of the will in lieu of testamentary provisions under Section 62-2-301(a)(2), the means by which the Decedent and Respondent maintained their finances during their lifetime was further evidence that Decedent intentionally omitted Responded from the Will pursuant to Section 62-2-301(a)(1).

The Decedent and Respondent were married late in life, with each spouse having adult children from subsequent marriages. **(R. pp. 406-407; 468; 489).** Decedent's Will and 2005 Estate Planning Documents made clear that he intended to provide for his and Nancy Ward's adult children from previous marriages in his Will, to the exclusion of any subsequent spouse, and that his Will became irrevocable upon the death of Nancy Ward. **(R. pp. 598-785).**

Further, Decedent made clear in verbal statements prior to his marriage to Respondent that his Will and 2005 Estate Planning Documents would be unchanged by the marriage. **(R. pp. 415-568).** In fact, neither the Decedent nor Respondent changed their estate planning documents as a result of their marriage. **(Id.)** In addition, both Decedent and Respondent maintained significant non-marital estates, including Respondent's separate home and residence on Seabrook Island, which was owned and maintained by Respondent individually and not as a marital asset. **(Id.)**

While it is clear that the Decedent intended to omit any subsequent spouse from his Will based on the plain and ordinary language of the Will, and the 2005 Estate Planning Documents incorporated therein by reference, this intent was reiterated by the Decedent and Mary Ward's actions prior to marriage, in contemplation of marriage, and following marriage.

As a result, the Probate Court erred in granting the Responded an omitted spousal share because it was the Decedent's clear intent to omit her as a subsequent spouse from the Will. This court should reverse.

CONCLUSION

For the reasons set forth herein, the Probate Court erred in granting Respondent the omitted spousal share. Respondent should be denied her claim for the omitted spousal share and this court should reverse.

BURR & FORMAN LLP

Dated: November 25, 2020

s/Amanda A. Bailey

Amanda A. Bailey SC Bar #71085
George Morrison, SC Bar #71622
Post Office Box 336
2411 Oak Street, Suite 206
Myrtle Beach, SC 29578
E-mail:abailey@burr.com
George Morrison
E-mail:gmorrison@burr.com
(843) 444-1107
Attorneys for Appellants
Stephanie Ward Cibinic, David D. Ward, and Brian C. Ward

RECEIVED
Nov 25 2020
SC Court of Appeals

CERTIFICATION

We hereby certify that Appellants' Final Reply Brief complies with Rule 211(b).

Respectfully submitted,

BURR & FORMAN LLP

Dated: November 25, 2020

s/Amanda A. Bailey
Amanda A. Bailey, SC Bar No. 71085
George Morrison, SC Bar No. 71622
E-mail:abailey@burr.com
George Morrison
E-mail:gmorrison@burr.com
100 Calhoun Street, Suite 400
Post Office Box 1431
Charleston, SC 29402
Telephone: 843.723.7831
Fax: 843.722.3227
Attorneys for the Respondents
Stephanie Ward Cibinic, David D. Ward, and
Brian C. Ward

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
Nov 25 2020
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
THE HONORABLE 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

vs.

Stephanie Ward Cibinic, David D. Ward, and Brian C. Ward, Personal Representatives ..... Appellants,

---

PROOF OF SERVICE

I, Christine Badami, an employee of Burr & Forman LLP, attorneys for Appellants in the above-entitled action, certify that I have served **Appellants' Final Reply Brief** and **Proof of Service** on Counsel of Record by electronic mail by using the AIS Email address of counsel of record to this matter pursuant Order of the Supreme Court of South Carolina, Appellate Case No. 2020-000447, Section (g)(3), on the 25th day of November, 2020 as follows:

Jane A. McFaddin, Esq.
665 St. Andrews Boulevard
Charleston, SC 29407
Attorney for Respondent
Fax: 843-556-4429
Email: jamcfaddin@bellsouth.net

Christine Badami

Myrtle Beach, South Carolina