

THE STATE OF SOUTH CAROLINA  
In the Circuit Court  
C.A. No.: 2019-CP-22-01226  
C.A. No.: 2019-CP-22-01239  
C.A. No.: 2019-CP-22-01245

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**SC Court of Appeals**

APPEAL FROM THE GEORGETOWN COUNTY PROBATE COURT  
Leigh Powers Boan, Probate Judge

C.A. No.: 2016-ES-22-00579

IN THE MATTER OF THE ESTATE OF JASON F. GARDNER, DECEASED

Michelle N. Gardner .....Appellant/ Respondent

v.

Ernest J. Gardner, Jr., individually and as Personal  
Representative of the Estate of Jason F. Gardner .....Respondent/ Appellant

**DECISION OF THE COURT**

This cross-appeal from the Probate Court is before the Court by operation of S.C. Code Ann. § 62-1-308. The appeals were consolidated by order dated January 27, 2020. The Court heard arguments on October 30, 2020 and, after consideration of the briefs, record, and arguments of counsel issues the following order affirming in part, reversing in part, and remanding this matter to the Probate Court.

**ISSUES PRESENTED**

**I. Appeal of Michelle N. Gardner**

- Did the Probate Court err in ruling that Ernest J. Gardner, Jr. made a timely claim against the estate of Jason F. Gardner?

**II. Appeals of Ernest J. Gardner, Jr., individually and as Personal Representative of the Estate of Jason F. Gardner<sup>1</sup>**

- Did Respondent's express waiver of "any and all right, title, interest or claim she has, had, or may have" in decedent Jason F. Gardner's retirement accounts pursuant to their divorce settlement preclude Respondent from recovering the proceeds of such accounts to the extent Jason F. Gardner did not name a beneficiary and the accounts are payable to his estate?
- Did the probate court err in granting Respondent's motion for partial summary judgment and ruling that Respondent's divorce agreement waiver did not preclude her from reaching the proceeds of decedent Jason F. Gardner's retirement accounts?

**FACTS**

The facts pertinent to this cross-appeal are not in dispute and are consistent with the findings made by the Probate Court. For that reason, the Court incorporates by reference the Findings of Fact contained in the Probate Court's order.

Very briefly, this cross-appeal stems from the claims of competing creditors of the Estate of Jason F. Gardner (the "Decedent"). The Appellant/Respondent ("Ms. Gardner") is the former wife of the Decedent, and the Respondent/Appellant is the Decedent's father, Ernest J. Gardner, Jr. ("Dr. Gardner"). Each of these parties has made a claim against the Estate.

The Decedent and Ms. Gardner were divorced by order dated December 6, 2011. The Decedent died testate on October 17, 2016; and Dr. Gardner was appointed as Personal Representative on November 2, 2016. The standard form of creditors' notice was run in the Georgetown Times newspaper once per week for three consecutive weeks, containing warning of the potential bar should a claim not be filed within eight months following the first run on November 11, 2016. The eight-month notice period ran on July 11, 2017.

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<sup>1</sup> Or, as counterstated by Michelle Gardner, "[d]id the Probate Court correctly determine that Michelle N. Gardner, as an allowed creditor of the Estate of Jason F. Gardner, was entitled to have her claim paid from the Estate's assets as a matter of law at the summary judgment stage?"

Ms. Gardner filed a creditor claim on July 10, 2017, seeking to recover lump sum alimony payments that were a term of her divorce agreement (“Divorce Agreement”) with the Decedent.<sup>2</sup> Her claim of \$328,000 was allowed by Order of the Probate Court dated March 8, 2019 (“March 8 order”). The allowed claim was to be payable by the Estate in forty-one monthly installments of \$8,000.<sup>3</sup> No payments have been made.

Dr. Gardner filed a claim on August 7, 2017 for \$228,662.27 plus interest. He claims this amount was owed to him on an unsecured promissory note from the Decedent.

The order on appeal stemmed from the parties’ cross-motions for summary judgment raising the issues of whether Dr. Gardner’s claim was timely and whether Ms. Gardner’s allowed claim could be paid from the proceeds of retirement accounts that were part of the Estate’s assets. By order dated December 10, 2019, the Probate Court ruled that since Dr. Gardner was “a known creditor with actual notice,” the eight-month publications deadline did not apply to him and his claim was therefore timely because it was filed within one year of the Decedent’s death. The Probate Court also ruled that the waiver signed by Ms. Gardner as a part of her

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<sup>2</sup> The Divorce Agreement also included a provision by which Ms. Gardner waived any right to the Decedent’s retirement accounts.

<sup>3</sup> In reaching that result, the Probate Court made the following rulings that are pertinent to this Appeal:

1. The Probate Court had jurisdiction over the matter.
2. The Divorce Agreement did not require that the lump sum alimony be drawn from a particular account.
3. Any life insurance policy held by Ms. Gardner on the Decedent was not intended to offset the lump sum alimony obligation.
4. The lump sum alimony obligation did not end with the Decedent’s death.

No party has appealed the March 8 order, and it is the law of the case. *See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding unappealed ruling is law of the case). The Probate Court did not make any rulings at that time about which assets were available to pay Ms. Gardner’s claim.

divorce settlement with the Decedent did not bar her from recovering against the Estate's assets on her allowed claim.

### STANDARD OF REVIEW

A motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCF.

Here, the facts are not in dispute with respect to the issues on appeal. Instead, the Court is called to construe portions of the Probate Code (Ms. Gardner's appeal) and to interpret an unambiguous contract in light of the provisions of the Probate Code relating to creditor's claims (Dr. Gardner's appeal). Both of these determinations are matters of law for the Court and may be reviewed de novo by this Court on appeal. *See McDuffie v. McDuffie*, 313 S.C. 397, 399, 438 S.E.2d 239, 241 (1993) (holding family court agreements should be construed as a matter of contract law); *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) ("Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo.").

### DISCUSSION

#### **I. Appeal of Michelle N. Gardner.**

Ms. Gardner's appeal involves the construction of the South Carolina nonclaim statute, S.C. Code Ann. § 62-3-803. There is no dispute that if a creditor "fails to timely present a claim in compliance with the nonclaim statute, the creditor's right of action against the estate is barred." *In re Estate of Hover*, 407 S.C. 194, 205, 754 S.E.2d 875, 881 (2014). The issue here is whether Dr. Gardner's August 7, 2017 claim was timely.

This section provides in pertinent part as follows:

(a) All claims against a decedent's estate which arose before the death of the decedent, . . . , whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by another statute of limitations or nonclaim statute; are barred against the estate, the personal representative, the decedent's heirs and devisees, and nonprobate transferees of the decedent; **unless presented within the earlier of the following:**

- (1) one year after the decedent's death; or
- (2) the time provided by Section 62-3-801(b) for creditors who are given actual notice, and within the time provided in Section 62-3-801(a) for all creditors barred by publication. . . .

(emphasis added). S.C. Code Ann. § 62-3-801 states in pertinent part:

(a) **Unless notice has already been given under this section,** a personal representative upon his appointment must publish a notice to creditors once a week for three successive weeks in a newspaper of general circulation in the county announcing his appointment and address and notifying creditors of the estate to present their claims within eight months after the date of the first publication of the notice or be forever barred.

(b) A personal representative may give written notice by mail or other delivery to any creditor, notifying the creditor to present his claim within one year of the decedent's death, or within sixty days from the mailing or other delivery of such notice, whichever is earlier, or be forever barred. Written notice is the notice described in (a) above or a similar notice.

(emphasis added).

These code sections must be construed in light of the directives of S.C. Code Ann. § 62-1-102 and its mandate that the Probate Code "shall be liberally construed and applied to promote its underlying purposes and policies[.]" which include "(3) to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors[.]" In addition, South Carolina courts "will not construe a statute in a way which leads to an absurd result or renders it meaningless." *Florence Cnty. Democratic Party v. Florence Cnty. Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012).

In this case, Dr. Gardner was in the single best position of any potential creditor to make a prompt claim; however, the Probate Court's ruling excuses his failure to make a claim until August 2017. The effect of the Probate Court's ruling is that a creditor known to the Personal Representative with actual notice cannot be barred by publication, no matter how intimately or actually aware the creditor is of the published claims-barring notice. The Probate Court found "[t]he fact that a known creditor who is given actual notice [of the Estate's proceedings] is also given written notice which includes an eight month publications deadline does not convert that creditor into one barred by publication. ..."

This Court disagrees. The nonclaim statute must be construed consistent with S.C. Code Ann. § 62-3-801 and the rest of the Probate Code. "Statutes in pari materia . . . have to be construed together and reconciled, if possible, so as to render both operative." *Lewis v. Gaddy*, 254 S.C. 66, 70, 173 S.E.2d 376, 378 (1970). When these statutes are viewed together, it becomes apparent that if notice has been given by publication pursuant to S.C. Code Ann. § 62-3-801(a), the eight month bar will apply "unless notice has already been given under this section" as of the date of publication.

The Probate Court's ruling rested on the use of the term "actual notice" in § 62-3-803(a)(2), finding that § 62-3-801(b) would apply in any case where a creditor had some notice of estate proceedings and that a creditor with any notice could not be barred by publication. The Court finds the better construction is that the "actual notice" referenced in § 62-3-803(a)(2) is the specific sixty day notice of § 62-3-801(b).

The intent of the statute is that the publication of notice applies to all creditors as reflected on the approved probate court form for "Notice to Creditors." Form 370ES, SCRPC ("All persons having claims against the following estate **MUST** file their claims . . . within eight

(8) months after the date of publication of this Notice to Creditors or within one (1) year from date of death, whichever is earlier . . .”). This language mirrors S.C. Code Ann. § 62-3-801, which does not limit its application to unknown creditors or creditors without actual notice, but rather applies to all creditors unless “notice has already been given.” This construction provides clear guidance to creditors: all are bound by the published eight month notice unless the specific, alternative sixty day notice described in S.C. Code Ann. § 62-3-801(b) has been given.

In contrast to the clear deadlines applicable under this construction of the nonclaim statute, the Probate Court found that there are different filing periods depending upon whether the creditor’s identity is known to the personal representative and the creditor had some notice an estate had been opened (in which case the creditor supposedly has one year to file) or whether the creditor was unknown or did not have notice an estate had been opened (in which case the creditor supposedly has eight months following publication to file). In effect, the Probate Court’s ruling renders the publication notice a nullity for any known creditor with notice of an estate. This ruling leads to the bizarre result that the people with the most knowledge of the estate proceedings get the longest filing period unless they have been provided the shorter sixty-day notice. This case presents the most extreme example of why this construction makes no sense—Dr. Gardner, as Personal Representative and publisher of the claims notice, is not bound by his own publication deadline and would get more time to file his own claim than creditors who are completely unaware of the Estate proceedings. That cannot have been the intent of the General Assembly.

The Probate Court’s ruling was based solely on its construction of the nonclaim statute. The Probate Court expressly ruled that there were not any due process concerns because “Ernest Gardner was not only a known creditor with actual notice, he was also a creditor who received

written notice when he was provided a copy of the Notice to Creditors published pursuant to S.C. Code Ann. § 62-3-801(a).” The Probate Court further found that S.C. Code Ann. § 62-3-803(c) and (d) did not provide an additional basis for allowing Dr. Gardner’s claim as a matter of law.<sup>4</sup>

Dr. Gardner was aware of the existence of his claim and of the requirement that it be filed within eight months following the first run of the notice. He simply failed to file a timely claim. This Court finds his claim should be held to the same standard he advertised to others. As a result, Dr. Gardner’s claim was not filed timely and is barred. Therefore, this Court reverses the findings of the Probate Court as to the timeliness of Dr. Gardner’s claim and remands this matter to the Probate Court for further proceedings.

**II. Appeals of Ernest J. Gardner, Jr., individually and as Personal Representative of the Estate of Jason F. Gardner.**

This Court finds that the Probate Court correctly ruled as a matter of law at the summary judgment stage that Ms. Gardner is entitled to have her claim paid from the Estate’s assets, including any retirement account payable to the Estate. Ms. Gardner has not made any claim on any retirement account held by the Decedent. Instead, she has made a claim against the Estate seeking the benefit of her bargain as to lump sum alimony. The Probate Court confirmed that she had a right to make that claim in the March 8 order, which is not on appeal and is the law of the case.

Ms. Gardner does not disagree with the general statements of contract law presented by Dr. Gardner. The result would be very different if she had made a claim on a retirement account—she did waive any rights to make a claim on those accounts in the Divorce Agreement

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<sup>4</sup> On subsection (d), the Probate Court found that the facts were in dispute and summary judgment would not be appropriate.

and, indeed, she has not made any claim against the Decedent's other retirement accounts which have designated beneficiaries.

Per the South Carolina Probate Code, "[e]state" includes the property of the decedent, trust, or other person whose affairs are subject to this Code as originally constituted and as it exists from time to time during administration." S.C. Code Ann. § 62-1-201. With respect to an allowed claim, such as Ms. Gardner's, payment shall be made from the Estate "in the order of priority prescribed, and after making provision for the homestead, for exempt property under Section 62-2-401, for claims already presented which have not been allowed or whose disallowance is the subject of a legal proceeding, or the time to file such a proceeding has not expired, and for unbarred claims which may yet be presented, including costs and expenses of administration." S.C. Code Ann. § 62-3-807(a). Priority is set forth in S.C. Code Ann. § 62-3-805. It is under these provisions that Ms. Gardner seeks payment. The fact that the proceeds of a retirement account may be included among the Estate's assets does not change her claim against the Estate or her right to payment under these statutes.

Dr. Gardner admits there is not a South Carolina case on point and has cited *Stribling vs. Stribling*, 369 S.C. 400, 632 S.E.2d 291 (Ct. App. 2006) by way of analogy. That case was based on very different facts. There, the ex-wife sought benefits under a retirement account on which she remained the designated beneficiary after she waived rights to the account in the parties' divorce decree. The Court of Appeals found that the waiver prevented ex-wife from receiving the retirement plan. Ms. Gardner has not made any claim as a beneficiary of any retirement account. Instead, her claim is as an Estate creditor: it is independent of the

Decedent's retirement-benefit designation and made solely against the Estate's probate property, whatever it may be. *Stribling* is therefore not applicable.<sup>5</sup>

Here, Ms. Gardner and the Decedent executed the Divorce Agreement to settle and dispose of any rights either had in the other's property. In exchange, the parties agreed to the rights and obligations provided in the Divorce Agreement, including the lump sum alimony. Ms. Gardner's claim for the lump sum alimony payments has been allowed. With respect to the allowed claim, the Probate Code governs what is in the Estate, what must be paid, and the priority for payment. Therefore, the Probate Court correctly determined at the summary judgment phase that the waivers signed by Ms. Gardner do not bar "her recovery from this [E]state or the retirement account which is presently an asset of the Estate." Therefore, this Court affirms the ruling of the Probate Court as to Dr. Gardner's appeal.

### CONCLUSION

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<sup>5</sup> This case more closely resembles *Hawkins v. McLaughlin*, 16 Cal. Rptr. 572 (Cal. Ct. App. 1961). In *Hawkins*, ex-wife filed a creditor's claim against her former husband's estate for monthly alimony payments due under their property settlement agreement. The court first concluded that pursuant to the parties' agreement, the ex-husband's estate was obligated to continue the payments. Ex-husband's estate then argued that the broadly worded waiver language of the parties' property settlement agreement was a bar to ex-wife's ability to file a creditor's claim for the monthly payments. Characterizing such a construction as "self-stultifying," the court rejected this argument. Quoting *Anderson vs. Mart*, 303 P.2d 543 (Cal. 1956), with regard to the inapplicability of the waiver contained in a property settlement agreement to the ability of a divorced spouse to file a creditor's claim for unpaid monthly alimony payments against the estate, the court held as follows:

Taken together these provisions make [it] clear that neither party should have any rights in the property or the estate of the other growing out of the marital relationship. The agreement was executed to settle and dispose of those rights in exchange for those provided in the agreement, and manifestly the agreement would be self-stultifying if the mutual relinquishment of marital rights was so broad as to prevent the enforcement of the contractual obligations given in consideration therefor....

Id. at 576 (emphasis added).

For the above reasons, the Court reverses the Probate Court's finding that Dr. Gardner's claim was filed timely and finds that his claim was not timely and is barred as a matter of law. The Court affirms the Probate Court's ruling that Ms. Gardner's ability to recover on her allowed claim "from this [E]state or the retirement account which is presently an asset of the Estate" is not barred as a matter of law by operation of the waivers found in the Divorce Agreement. The Court remands this matter to the Probate Court for further proceedings consistent with this Order.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

**IT IS SO ORDERED.**



Georgetown Common Pleas

**Case Caption:** Michelle N Gardner VS Ernest J Gardner Jr , defendant, et al  
**Case Number:** 2019CP2201226  
**Type:** Order/Other

So Ordered

s/Brian M. Gibbons #2168 Circuit Judge

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