THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2020-001678

Michelle N. Gardner .....Respondent,

v.

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

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court err in reversing the Probate Court and ruling that Appellant Ernest J. Gardner, Jr., individually, failed to make a timely creditor's claim against the Estate of Jason F. Gardner?

II. Did the Probate Court err in purporting to grant Respondent Michelle N. Gardner's motion for partial summary judgment with regard to Jason F. Gardner's retirement accounts, and did the Circuit Court err in affirming the Probate Court?

III. Did Respondent Michelle N. Gardner'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 if payable to his estate?

STATEMENT OF THE CASE

This Appeal originates with the filing of a creditor's claim for unpaid alimony by Respondent Michelle N. Gardner (the "Respondent") against the Estate of Jason F. Gardner, Respondent's former husband (the "Decedent"). (R. p.__). Shortly thereafter, Appellant Ernest J. Gardner, Jr. (the "Appellant"), in his individual capacity, filed a creditor's claim against Decedent's Estate for the outstanding balance of an unpaid loan due to him. (R. p.__). Respondent's claim was denied by the Decedent's Estate (R. p.__); however, pursuant to the order of the Probate Court dated March 8, 2019, Respondent's claim was determined to be valid. (R. p.__). Respondent filed a subsequent action in Probate Court primarily seeking payment of her claim. (R. p.__). After the filing of responsive pleadings, Respondent and Appellant filed competing motions for partial summary judgment. (R. pp.____). A hearing on the motions was held by the Probate Court on August 22, 2019. On December 10, 2019, the Probate Court issued

its order which ruled that (i) Appellant's creditor claim was timely filed and (ii) the waivers signed by Respondent in her divorce agreement with Decedent were not a bar to her recovery from Decedent's Estate or the retirement account payable to his Estate. (R. p.__).

Respondent appealed the Probate Court's ruling that Appellant's creditor's claim was timely (R. p.__), and Appellant appealed the Probate Court's rulings regarding Respondent's waiver of rights to Decedent's retirement account. (R. p.__). The cross-appeals were consolidated by order dated January 27, 2020 (R. p.__), and the Circuit Court heard arguments on October 30, 2020. The Circuit Court issued its order dated November 23, 2020 in which it (i) overturned the Probate Court's ruling concerning Appellant's creditor's claim, finding Appellant's claim to be untimely; and (ii) upheld the Probate Court's ruling that Respondent did not waive her right to pursue collection of her creditor's claim against Decedent's retirement plan benefits payable to his estate. (R. p.__).

On December 21, 2020, Appellant, individually and as Personal Representative of Decedent's Estate, filed a Notice of Appeal in the Court of Appeals. (R. p.__). Appellant seeks a reversal of that portion of the Circuit Court's order, dated November 23, 2020, which overturned the Probate Court's ruling that Appellant, individually, timely filed his creditor's claim against Decedent's Estate. Appellant also seeks reversal of those portions of the Circuit Court's order, dated November 23, 2020, and the Probate Court's order, dated December 10, 2019, purporting to grant Respondent partial summary judgment with regard Decedent's retirement accounts, and finding that Respondent's waiver of future claims against Decedent's retirement accounts does not bar her from collecting the same from Decedent's Estate as a matter of law.

STATEMENT OF FACTS

The facts in this appeal are not in dispute and are consistent with the findings made by the probate court in its order dated December 10, 2019, which are repeated verbatim except for providing additional footnotes for further context, and the use of the terms Decedent, Appellant, and Respondent in lieu of actual names:

1. The Decedent died testate on October 17, 2016.
2. Appellant is
    a. Decedent's father;
    b. the duly appointed, qualified and acting Personal Representative of the Estate;
    c. the sole devisee of the Estate.
3. Appellant filed a claim on August 7, 2017 for funds allegedly owed to him by the Decedent.[1]
4. Respondent is the former wife of the Decedent.
5. Respondent filed a claim on July 10, 2017.[2]
6. Respondent and the Decedent divorced on December 6, 2011.
7. The divorce decree approved and incorporated a Custody, Property and Support Settlement Agreement dated December 2, 2011 (hereinafter "the Divorce Agreement").

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[1] Appellant Ernest J. Gardner, individually, filed his Statement of Creditor's Claim on August 7, 2017, in the amount of $228,662.27 plus interest for the outstanding balance of the loan made to Decedent (R. p. ___).

[2] By Order of the Probate Court dated March 8, 2019, Respondent Michelle N. Gardner's claim for lump sum alimony was allowed. Respondent's Statement of Creditor's Claim was in the amount of $336,000; however, the Probate Court allowed the claim in the amount of $328,000, payable by the Estate at a monthly rate of $8,000 for forty-one months (Order dated March 8, 2019, p. 10). The Probate Court specifically withheld its ruling on the "sufficiency, availability or applicability of funds to pay this Claim." (Order dated March 8, 2019, p. 10).

8. Respondent and the Decedent entered into three (3) modifications to the Divorce Agreement.
9. The last modification to the divorce agreement was adopted and incorporated into a Court Order on November 15, 2013 (hereinafter the "November 2013 Decree").[3]
10. The November 2013 Decree directed that all provisions of the divorce agreement not specifically modified would remain in full force and effect.
11. The divorce agreement contained two waivers which were neither modified nor replaced in any subsequent modification, as follows[4]:
    a. [Respondent] waives and releases any and all right, title, interest or claim she has, had or may have to [Decedent's] retirement accounts[5]. (Article III B. 5.)
    b. "Each party expressly releases all right to share in the estate of the other party, whether by will, intestacy, or statutory elective share…" (Article VII).

[3] For purposes of this matter, the only relevant modifications to the Divorce Agreement are set forth in the final modification.

[4] The Divorce Agreement included numerous additional waivers which, as discussed in Section III, *infra*, are not directly dispositive to this matter but which aid in construing the retirement account waiver.

[5] Decedent's specific retirement accounts are enumerated in the waiver. The 2011 Decree lists Decedent's retirement accounts, including a Merrill Lynch/Sorin 401(k). The administrator for the Merrill Lynch/Sorin 401(k) was transferred from Merrill Lynch to Fidelity Investments on or about March 19, 2012. On December 30, 2016, Decedent's 401(k) was transferred to LivaNova US Employee Retirement Savings Plan which is still managed by Fidelity Investments. This account is currently listed as "LivaNova Fidelity 401(k)" on the Estate's Amended Inventory & Appraisement dated and filed on August 31, 2018. Since Decedent's death, no funds have been withdrawn from the LivaNova Fidelity 401(k). Appellant has filed a separate action seeking a declaratory judgment that Decedent substantially complied with the change of beneficiary provisions under ERISA naming Appellant as the direct beneficiary of the LivaNova Fidelity 401(k).

12. The standard "Notice to Creditors" was published in the Georgetown Times newspaper once per week for three consecutive weeks.
13. The Notice to Creditors contained the warning of the potential bar should a claim not be filed within eight (8) months following the first publication.
14. The Notice to Creditors was first published on November 11, 2016.
15. The Probate Court coordinated the Notice to Creditors publication as is typical in Georgetown County.
16. The Creditor's Claims period contemplated by S.C. Code Ann. § 62-3-801(a) expired on July 11, 2017.
17. Appellant shares the roles of Personal Representative, sole devisee and creditor.
18. Appellant is a known creditor with actual notice.
19. Appellant, as Personal Representative, was paying the debt owed him by the Estate before Respondent filed her Creditor's Claim (filed on July 10, 2017) and before Appellant filed his Creditor's Claim (filed on August 7, 2017).[6]
20. On December 15, 2016, then counsel for Appellant mailed counsel for Respondent a copy of the Georgetown Times' Affidavit of Publication of Notice to Creditors and copied Appellant via e-mail.

[6] The Probate Court did not rule on the appropriateness of these payments as there was a need for additional evidence before such determination could be made. (Order dated December 10, 2019, p. 4, footnote 3).

STANDARD OF REVIEW

"Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below." In re Estate of Gurnham, 407 S.C. 194, 754 S.E.2d 875 (2014) (quotation omitted). "An issue regarding statutory interpretation is a question of law." Univ. of S. Cal. v. Moran, 365 S.C. 270, 274, 617 S.E.2d 135, 137 (Ct. App. 2005). "The cardinal rule for statutory interpretation is to ascertain and effectuate the intention of the legislature." Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." Id. Further, "the statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect." S.C. Ports Auth. v. Jasper County, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006).

The construction of a separation agreement is a matter of contract law. McDuffie v. McDuffie, 313 S.C. 397, 438 S.E.2d 239 (1993). "[W]hen a contract is clear and unambiguous, the construction thereof is a question of law for the court." Bowen v. Bowen, 345 S.C. 243, 249, 547 S.E.2d 877, 880 (Ct. App. 2001), aff'd, 352 S.C. 494, 575 S.E.2d 553 (2003). "A court will look to extrinsic evidence only if an ambiguity exists in the agreement's terms. Whether the language of a contract is ambiguous is a question of law to be determined by the court." Gaffney v. Gaffney, 401 S.C. 216, 222, 736 S.E.2d 683, 687 (Ct. App. 2012) (citations omitted). "While a trial court's findings of fact in a nonjury action at law should not be disturbed on appeal unless they are without evidentiary support, a reviewing court is free to decide questions of law with no particular deference to the trial court." Hunt v. S.C. Forestry Comm'n, 358 S.C. 564, 569, 595 S.E.2d 846, 848-49 (Ct. App. 2004).

Summary judgment is appropriate only when it is clear there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed. Garvin v. Bi-Lo, Inc., 343 S.C. 625, 628, 541 S.E.2d 831, 833 (2001). Summary judgment is inappropriate, however, where further inquiry into the facts of the case is desirable to clarify the application of law. Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing & Regulation, 337 S.C. 476, 484, 523 S.E.2d 795, 799 (Ct. App. 1999). In determining whether any triable issue of fact exists so as to preclude summary judgment, the evidence and all inferences reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998). "Because summary judgment is a drastic remedy, it should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial." Pallares v. Seinar, 407 S.C. 359, 365, 756 S.E.2d 128, 131 (2014).

LEGAL ARGUMENT

I. Appellant Ernest J. Gardner, Jr., individually, timely filed his creditor's claim against the Estate of Jason F. Gardner.

A. History of South Carolina Code Section 62-3-801 and 62-3-803. Title 62 of the South Carolina Code of Laws, also known as the South Carolina Probate Code, became effective July 1, 1987. Upon its adoption, Section 62-3-801, Notice to Creditors, provided for notice to creditors by publication only, and the creditor's claims period for claims arising before death ended four months after the date of first publication. Section 62-3-803, Limitations on the Presentation of Claims, was also quite different in its original form, and it provided (i) a one year claims period for claims founded in tort (if notice to creditors was published), (ii) a four month period for claims founded on contract or other legal basis (if notice to creditors was published),

and (iii) a three year claims period for claims founded in contract, tort, or other legal basis if notice to creditors has not been published. 1986 Act No. 539, § 1.

In 1987, S.C. Code Ann. § 62-3-801 was amended to increase the claims period for claims arising before death from "four" months to "eight" months. 1987 Act No. 171, § 31. Section 62-3-803 was also amended to decrease the one year claims period for torts to "eight" months, deleted sub-paragraph (a)(2) and reworded and renumbered the remaining paragraphs (a)(3). 1987 S.C. Act No. 171, § 33.

In 1988, the U.S. Supreme Court issued its opinion in Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988). The Supreme Court considered an Oklahoma nonclaims statute similar to S.C. Code Ann. § 62-3-803(a)(2) and the publication requirements of S.C. Code Ann. § 62-3-801(a). Like S.C. Code Ann. § 62-3-803(a)(2), the Oklahoma nonclaim statute only required notice by publication. The Supreme Court found that the probate court's "intimate involvement" through the probate process – specifically the activation of the nonclaims period by the appointment of the personal representative – constituted state action triggering the Fourteenth Amendment's Due Process Clause. As a result, the Court held that if a creditor's identity was known or "reasonably ascertainable," due process requires that the creditor be given actual notice, by mail or other means, before terminating the creditor's property rights. Id. at 491.

The decision in Tulsa had "significant impact on probate procedures throughout the country." Nicole Losacco, *Probate: Notice to Estate Creditors: The Effect of Tulsa Professional Collection Services v. Pope*, 42 Okla. L. Rev. 325 (1989). The South Carolina legislature, like the legislatures of many states, reviewed and modified its creditor claims statutes in response to the U.S. Supreme Court's ruling. See 1990 Act No. 521, §§ 51 and 53.

In 1990, S.C. Code Ann. § 62-3-801 was amended to allow a personal representative to give written notice to any creditor to present his or her claim within eight months from the published notice or sixty days from the mailing or delivery of such notice, whichever was later. 1990 Act No. 521, § 51. Section 62-3-803 was also amended to clarify and distinguish the applicable claims periods for "creditors who are given actual notice" as compared to "creditors barred by publication." 1990 Act No. 521, § 53. After the 1990 amendments, a "creditor given actual notice" had 60 days from mailing or delivery of said notice, or until the end of the eight-month published notice period, whichever was later, to file his or her creditor's claim.

Finally, in 2014, S.C. Code Ann. § 62-3-801(b) was amended to extend the claims period for creditors who are given written notice from "eight months from published notice" to "one year of decedent's death" and substituting "whichever is earlier" for "whichever is later." 2013 S.C. Act No. 100 § 1.

Since the 2014 amendments, Section 62-3-803(a) reads, in relevant part, as follows (emphasis added):

> (a) All claims against a decedent's estate, which arose before the decedent's death, …, if not barred by another statute of limitations or nonclaim statute, are barred against the estate,…; unless presented within the earlier of the following:
>
> (1) one year after 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 by Section 62-3-801(a) for all creditors barred by publication.

In addition, since the 2014 amendments, Section 62-3-801(b) reads, in relevant part, as follows (emphasis added):

> (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.

Section 62-3-803(a)(1) is self-executing and begins running upon the death of the decedent. (Order dated December 10, 2019, p. 5). It does not require any action by the state, and it does not require notice or publication to or for the benefit of any creditor. (Id. at p. 5). Therefore, such a statute does not implicate due process concerns.

Section 62-3-803(a)(2), on the other hand, requires state involvement in order to commence the nonclaims period, *i.e.*, as the Probate Court succinctly put it, "the court has appointed a Personal Representative who has published a Notice to Creditors or has provided actual notice to a known creditor." (Order dated December 10, 2019, p. 5).

In addition to the changes discussed above, the 2014 amendments to the South Carolina Probate Code also modified S.C. Code Ann. § 62-3-806, providing the personal representative with the later of 60 days from presentment of a claim or fourteen months from the decedent's death to allow or disallow a creditor's claim. Clearly, the South Carolina legislature, by enacting this provision, could envision estates being open and under administration well beyond the claims periods set forth in S.C. Code Ann. §§ 62-3-801 and 803. Furthermore, S.C. Code Ann. §§ 62-3-1001, 1002 and 1003, along with Probate Form #412ES – Application for Settlement – require the personal representative to have filed all tax returns (income, fiduciary income, and estate) prior to closing the decedent's estate. Consequently, it is difficult to imagine that the legislature, in providing additional time for known creditors to file claims, would see this as a significant burden on an estate in light of the multiple other issues to be resolved prior to closing.

Unlike other states, to address due process concerns, South Carolina did not mandate the mailing of notice to known or "reasonably ascertainable" creditors. In balancing the due process rights of creditors and the desire for speedy and efficient administration of estates, the South Carolina Legislature decided to provide a choice for personal representatives dealing with known

or "reasonably ascertainable" creditors: the personal representative may (i) provide written notice to the creditor pursuant to S.C. Code Ann. § 62-3-801(b) (reducing the claims period to 60 days) or (ii) allow the time provided under South Carolina's self-executing statute, *i.e.*, S.C. Code Ann. § 62-3-803(a)(1), to expire (*i.e.*, one year from decedent's death). Either choice satisfies the due process concerns raised by *Tulsa* and bars the creditor's right to bring a claim after the expiration of the applicable time period.

It is important to note that not all creditors are required to be treated the same. For example, a personal representative may decide to provide written notice pursuant to S.C. Code Ann. § 62-3-801(b) to one known creditor, but not another. Furthermore, if a personal representative gives written notice to a known creditor early in the estate administration, that particular creditor will have a substantially shorter claims period than (i) an unknown creditor (*i.e.*, 60 days vs. eight months from date of publication) or (ii) a known creditor without written notice (*i.e.*, 60 days vs. one year from date of death). As a result, the South Carolina legislature did not focus on the "fairness" of the length of the claims period applicable to each creditor, but rather on a discretionary system, managed by the personal representative, to balance the due process rights of creditors and the efficient administration of the estate.

B. Appellant was a known creditor given actual notice pursuant to S.C. Code § 62-3-803(a)(2) and entitled to the claims period provided under S.C. Code § 62-3-801(b).

The Probate Court found that Appellant was a known creditor with actual notice as a result of his dual role of Personal Representative and creditor. (Order dated December 10, 2019, p. 6). Furthermore, the Probate Court found Appellant to be a creditor who received written notice as a result of receiving a copy of the Affidavit of Publication of Notice to Creditors. (Order

dated December 10, 2019, p. 6).[7] Therefore, the clear, unambiguous reading of S.C. Code Ann. § 62-3-803(a)(2) subjects Appellant's claim to the time periods provided under S.C. Code Ann. § 62-3-801(b).

To that end, the notice provided to Appellant did not "accurately reflect the time frames specifically set forth for creditors in S.C. Code § 62-3-801(b)." (Order dated December 10, 2019, p. 7). However, as properly stated by the Probate Court, S.C. Code Ann. § 62-3-803(a)(2) does not require Appellant to have received written notice in order to be subject to the time frames established under S.C. Code Ann. § 62-3-801(b). (Order dated December 10, 2019, p. 7). As a known creditor, with actual notice (although not written notice as contemplated in S.C. Code Ann. § 62-3-801(b)), Appellant was entitled to file a claim within one year from Decedent's death since he was not properly notified of the earlier time bar. Order dated December 10, 2019, p. 7. See In re Estate of Emery, 258 Neb. 789, 606 N.W.2d 750 (Neb. 2000) (actual notice does not constitute written notice required by state statute), see also In Re Estate of Kotowski, 704 N.W.2d 522 (Minn. App. 2005). Sections 62-3-801(b) and -803(a)(2), as construed together, simply required Appellant to file his claim within one year of Decedent's death (*i.e.*, October 17, 2017). Appellant filed his creditor's claim on August 7, 2017, more than two months before the expiration of the applicable claims period.

The Circuit Court, in its review of the applicable code sections, fails to give any meaning to the specific language, and nuances, of S.C. Code Ann. § 62-3-803(a)(2) and S.C. Code § 62-3-801(b). In the most recent amendments to these sections, the South Carolina Legislature chose to subject the claims of "creditors with actual notice" to the time frames set forth in S.C. Code § 62-3-

[7] No party has appealed these findings, 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).

801(b), rather than the time frame set forth in S.C. Code § 62-3-801(a). The Circuit Court's order states that the Probate Court's "ruling leads to a bizarre result that the people with the most knowledge of the estate proceedings have the longest period…" (Order dated November 23, 2020, p. 7). In some cases, it may work that way, but not in others. Each estate, the personal representative for each estate, and the creditors of each estate are all different. The South Carolina Legislature has empowered the personal representative to deal with the estate's creditor's, and these situations, differently. Even as it relates to the Decedent's Estate, a variety of results could have occurred. For example, Respondent could have received the 60 day creditor notice provided under S.C. Code Ann. § 62-3-801(b) when she received a copy of the Affidavit of Publication Notice to Creditors on or around December 15, 2016. If that had occurred, Respondent's claim period would have been significantly shorter (*i.e.*, February 15, 2017 rather than July 11, 2017), and other creditors, including the Appellant, could have longer claims periods (even if subject to the publication notice period). Ultimately, the South Carolina Legislature did not require that all estate creditors be treated the same, but it did enact legislation to allow for the balancing of due process rights with the efficient administration of estates.

II. The Probate Court erred in purporting to grant summary judgment on Respondent's request to make Decedent's retirement accounts subject to her creditor claims, and the Circuit Court erred in affirming, and purportedly extending, the Probate Court's order.

The final conclusion of the Probate Court's Order dated December 10, 2019 purports to grant Respondent's Motion for Partial Summary Judgment with regard to Decedent's retirement accounts. Order, p. 10. However, the specific language of the order indicates that the Probate Court did not grant Respondent's request for affirmative relief, but merely denied, as a matter of law, Appellant's defense to Respondent's request, which defense is discussed in Section III, infra). Id. As such, the Probate Court actually denied Respondent's Motion for Partial Summary Judgment on both questions presented by Respondent.

To begin with, Respondent's Partial Motion for Summary Judgment requested an affirmative determination that Respondent may collect against funds payable from Decedent's retirement accounts to the Estate. In Respondent's own words, she requested "[t]hat the Decedent's retirement benefits listed on the Estate's Supplemental #1 Inventory and Appraisement form at Schedule I, Item 1 as payable to the Decedent's Estate, be determined susceptible to payment of the [Respondent's] allowed claim, plus interest and attorneys[' fees] as asserted in the [Respondent's] April 4, 2019 Summons and Petition." Partial Motion for Summary Judgment, p. 1.

However, the Probate Court did not grant Respondent's affirmative request. In the Probate Court's own words, "[t]he factual disputes which remain with regard to any equitable liens, ERISA claims, unjust enrichment, promissory estoppel, and other claims limit this Court's ruling at this time. Specifically, this Court's ruling is limited to a finding that the waivers contained in the [Divorce] Agreement are not as a matter of law a bar to [Respondent's] recovery from this estate or the retirement account which is presently an asset of the Estate." Order, p. 10.

Therefore, in actuality, the Probate Court denied, as a matter of law, both the Respondent's affirmative request to deem Decedent's retirement account funds if paid to the Estate available for collection of Respondent's creditor claims, as well as Appellant's defense that Respondent's Divorce Agreement operated as a bar to her attempted collection of the same.

To confuse matters further, the Circuit Court on appeal simultaneously stated its affirmation of the Probate Court's limited ruling (Order pp. 10-11), yet elsewhere purported to expand the scope of the Probate Court's ruling by stating "[t]his Court finds that the Probate Court correctly ruled as a matter of law at the summary judgment stage that [Respondent] is entitled to have her claim paid from the Estate's assets, including any retirement account payable

to the Estate." Order p. 8.[8] As explained previously, however, the Probate Court did not specifically grant Respondent's request to deem Decedent's retirement accounts paid into the Estate subject to Respondent's claims, and instead limited its holding to the denial of Appellant's defense as a matter of law due to "factual disputes which remain." Order p. 10. Among these factual disputes is Appellant's separate action to deem Appellant the direct beneficiary of Decedent's retirement accounts, which if successful will necessarily render Respondent's Estate claims moot with respect to the retirement accounts because they will not be part of the Estate.

In summary, the Court of Appeals should at a minimum reverse the Probate Court and Circuit Court orders to the extent that each purports to grant Respondent's Partial Motion for Summary Judgment with respect to Decedent's retirement accounts. In addition, for the reasons stated in Section III, infra, the Circuit Court should rule as a matter of law that Respondent may not collect against Decedent's retirement account funds even if those funds are paid into Decedent's Estate.

III. Respondent Michelle N. Gardner waived her right to recover from Decedent's retirement accounts payable to Decedent's Estate as a matter of law.

"Waiver is a voluntary and intentional abandonment or relinquishment of a known right." Parker v. Parker, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). It is generally recognized that a beneficiary may contract away rights through a separation or property settlement agreement. See Moseley v. Mosier, 279 S.C. 348, 353, 306 S.E.2d 624, 627 (1983) ("The parties may agree to any terms they wish as long as the court deems the contract to have been entered fairly, voluntarily and reasonably"). "Where an agreement is clear and capable of legal construction, the court's only function is to interpret its lawful meaning and the intention of the parties as

[8] Respondent's counsel drafted the proposed order, and the Circuit Court may have adopted the incorrect statement inadvertently.

found within the agreement and give effect to it." Ebert v. Ebert, 320 S.C. 331, 465 S.E. 2d 121 (Ct. App. 1995). "Unambiguous marital agreements will be enforced according to their terms ..., regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully." Davis v. Davis, 372 S.C. 64, 75, 641 S.E.2d 446, 451-52 (Ct. App. 2006).

In the present matter, Respondent and Decedent entered into a series of property settlement agreements, the last of which was approved by the Family Court on November 18, 2013, and which incorporated all terms of the prior agreements not specifically modified by the final agreement. Agreement filed Nov. 18, 2013, p. 7. As relevant to Appellant's defense of Respondent's creditor claim, Section III.B.5 of the initial settlement agreement remained unmodified and provided in relevant part as follows:

> **5. Retirement funds:** Husband shall be the sole owner of the funds in his Vanguard/Medtronic Investment Plan #1560 (with balance of $197,229.00 as of March 31, 2011), Maquet USA Retirement Savings Plan/NY Life (with a balance of $193,888.00 as of December 31, 2010), and his Merrill Lynch/Sorin 401(k) plan (with balance of $14,765.00 as of January 13, 2011). Wife waves and releases any and all right, title, interest or claim she has, had, or may have to Husband's retirement accounts."

Order dated Dec. 2, 2011, p. 10 (emphasis added). Likewise, with regard to Respondent's IRA, Decedent waived and released "any and all right, title, interest or claim he has, had, or may have to this account." Order dated Dec. 2, 2011, p. 8. The retirement account waivers did not contain any contingency for the death of the other party, nor has Respondent attempted to provide any evidence of an intent to limit the retirement account waivers with respect to death.

Generally, the parties also affirmed that each had independent legal counsel, had participated in the drafting of the agreement language, agreed to the same "freely and voluntarily" and "fully informed of his or her legal rights." Agreement filed Nov. 18, 2013, p. 10, 11; Agreement dated Dec. 2, 2011, p. 30, 31. Furthermore, parties promised "at any time hereafter … make, execute and deliver any and all further and other instruments or papers or

things as may be reasonably required or desirable for purpose of giving full effect to this Agreement," Agreement dated Dec. 2, 2011, p. 31, and also remain subject to the implied covenant of good faith and fair dealing that exists in every contract. See Commercial Credit Corp. v. Nelson Motors, Inc., 247 S.C. 360, 366-67, 147 S.E.2d 481, 484 (1966).

Critically, the Respondent and Decedent's mutual waivers against each other's retirement accounts are the only provisions in the Divorce Agreement that included the broad language of specifically waiving "any and all right, title, interest or claim" that each "has, had, or may have" in the future. In contrast, the other waivers as provided in the initial divorce agreement did not specifically include a waiver of "claims" that either may have in the future:

- Respondent's residence (Section III.A.1.)
- Both parties' vehicles (Sections III.A.2. and III.B.1.)
- Decedent's boat and trailer (Section III.B.2.)
- Both parties' bank accounts (Sections III.A.3. and III.B.3.)
- Both parties' investment accounts (Sections III.A.4 and III.B.4.)
- Both parties' Marriott and Delta rewards points (Sections III.A.6. and III.B.6.)
- Both parties' miscellaneous tangible personal property (Sections III.A.7. and III.B.7)
- Both parties' other miscellaneous property (Sections III.A.8. and III.B.8)
- Respondent's 529 plans for benefit of the children (Section III.A.9.)

A comparison of the full range of property waivers shows that Respondent and Decedent specifically intended to effect a more expansive waiver of their retirement accounts. In fact, the drafters of the retirement account waivers would have been hard pressed to come up with a more expansive waiver of future claims without advance knowledge of the peculiar and unforeseeable series of circumstances resulting in the present litigation. The only reasonable conclusion is that Respondent and Decedent intended to irrevocably waive any expectancy interest that each could possibly have in the other's retirement accounts, and to rule otherwise renders their waiver of "claims" that either "may have" meaningless.

In fact, Respondent concedes that if Decedent simply named Appellant as direct beneficiary of Decedent's retirement accounts, then Respondent would have no claim against the retirement funds. Transcript of August 22, 2019 Hearing, p. 86, l. 7-12; p. 70, l. 18 through p. 71, l. 7. Nevertheless, Respondent contends that if those same funds are instead paid to Appellant through Decedent's Estate in which Appellant is sole beneficiary, even if by Decedent's mistake, then Respondent as a creditor of the Estate may ignore the fact that irrevocably forever waived all claims "she has, had, or may have" to Decedent's retirement accounts.

Respondent's argument only works in an over-simplified mechanical approach to a limited portion of the South Carolina Probate Code. Namely, Respondent is a creditor of Decedent's Estate, and funds in the Estate are generally subject to the claims of creditors. However, principals of equity supplement the entire Probate Code unless specifically displaced, S.C. Code Ann. § 62-1-103, and the Probate Code must also be liberally construed and applied to promote its underling purposes, including "to discover and make effective the intent of a decedent in the distribution of his property", S.C. Code Ann. § 62-1-102(b)(2). In this case, no one disputes Decedent's intent for Appellant to receive his retirement accounts, and equity dictates that Decedent should receive the benefit of the retirement waiver that he bargained for in order to repay Appellant for money already paid to Respondent.

To illustrate the broader context in which Respondent's waiver of retirement accounts must be considered, the Court of Appeals (in a decision written by now Chief Justice Beatty) has previously rejected the argument that a spousal waiver of a retirement account in a divorce settlement may be ignored simply based on how the funds are transferred pursuant to the terms of the retirement account. See Stribling v. Stribling, 369 S.C. 400, 632 S.E.2d 291 (Ct. App. 2006). In Stribling, a husband and wife entered a divorce settlement agreement whereby the

wife agreed to waive her interest in the husband's retirement accounts. However, after entry of the divorce and settlement, the ex-husband failed to remove the ex-wife as beneficiary of his retirement account before his subsequent death. Like Respondent in the present matter, the ex-wife argued that the mechanical application of the retirement account beneficiary designation entitled her to the retirement account funds, notwithstanding the fact that she had previously waived her rights to the retirement accounts.[9]

In rejecting the ex-wife's form-over-substance argument, the Court of Appeals found as a threshold matter that "the language of the Decree unambiguously provides Wife waived any interest in all of Husband's retirement accounts."[10] Id., 369 S.C at 404, 632 S.E.2d at 293. From that factual determination, the Court of Appeals ruled that a spousal waiver of a retirement account in a divorce settlement was not limited to the retirement funds while the account owner was living, but also included the waiving spouse's general "expectancy interest" in the retirement accounts funds after death. Id., 369 S.C at 405-07, 632 S.E.2d at 294-95.

Respondent seeks to distinguish Stribling because the ex-wife in that case was the direct beneficiary of the account and not a creditor of the ex-husband's estate. However, the principal behind the Court of Appeal's ruling may not be so limited. The fundamental issue before the Court of Appeals was whether the waiver of a retirement account interest remained in effect after

[9] The South Carolina Legislature subsequently provided by statute that divorce or annulment automatically severed certain spousal interests, including retirement account beneficiary designations. See S.C. Code Ann. § 62-2-507 (effective as of January 1, 2014). However, that statute does not supplant the general ruling of Stribling, but rather affirms it, nor did the Legislature attempt to address the novel question of retirement accounts payable to an estate.

[10] The sentence relied on by the Court of Appeals stated simply "[t]he parties further acknowledge they are waving any interest they may have in the other party's retirement." Id., 369 S.C at 402, 632 S.E.2d at 292. This waiver is noticeably less robust than the Respondent's waiver of "any and all right, title, interest or claim she has, had, or may have to [Decedent's] retirement accounts." Agreement dated Dec. 2, 2011, p. 10.

the account owner's death (the "expectancy interest"), not the mechanics of whether that interest may have passed directly to a beneficiary or indirectly. If anything, the ex-wife in the Stribling matter had a superior claim to the funds in that she remained her ex-husband's direct beneficiary until death, which the ex-husband could have changed at any time before death, whereas here the record shows that Decedent attempted to name Appellant as beneficiary of his retirement accounts, and did name Appellant as sole beneficiary of his Estate.

Similarly, Respondent argues "[w]e are not seeking a claim against an IRA asset. We are seeking to be paid out of estate assets in general of which the proceeds of this IRA is one." Transcript of August 22, 2019 Hearing, p. 86. However, this is a distinction without a difference under the Stribling decision, which upheld the ex-wife's waiver not merely against the ex-husband's actual retirement accounts, but also the funds which flowed to the ex-wife pursuant to the beneficiary designation. Necessarily then, the "expectancy interest" protected under Stribling applies to the retirement funds themselves even when paid from the retirement accounts. Otherwise, the Court of Appeal's Stribling decision is rendered meaningless.

Realizing that the application of Stribling to this matter is fatal to her claim, Respondent also attempts to offer an alternative guiding decision, looking across the country and backwards 60 years to the California decision of Hawkins v. McLaughlin, 16 Cal. Rptr. 572, 196 Cal. App. 2d 318 (1961). In Hawkins, divorcing spouses executed a settlement agreement that waived their right to inherit from each other's estate. Accordingly, the Hawkins court allowed the surviving spouse to recover against the deceased spouse's estate as a creditor for unpaid alimony payments since the surviving spouse was not attempting to inherit from the estate. In comparison with the present matter, Hawkins might have been analogous to Respondent's claim if, and only if, Appellant was attempting to use Respondent's general release of estate rights as a

defense to Respondent's claims.[11] However, Appellant does not offer Respondent's general waiver of estate rights as a defense, but rather her specific waiver of future claims as to Decedent's retirement accounts. In that regard, Hawkins simply has nothing to say about a specific waiver of future "claims" (not merely inheritance) with regard to a specific asset. The only case that does so is Stribling, and it provides that an unequivocal waiver of claims against a retirement account serves as a waiver of all "expectancy interest" in that account.

The rationale for protecting the "expectancy interest" from retirement accounts even if paid to a third-party may also be analogized to the universally-accepted principals of asset tracing as a means of enforcing legal rights and otherwise restoring equity. For example, if person "A" held property for person "B", but instead transferred that same property to person "C" without consideration, person A would still be entitled to recover the property notwithstanding the fact that person C possessed legal title of the property and had no privity with person A. Further, this tracing principal need not be limited to the affirmative pursuit of property, but also applies to negative covenants and restrictions that attach to property regardless of who the record owner is.

Similarly, just as a creditor and debtor may privately agree to a priority interest in specific assets (*e.g.*, a mortgage or UCC lien), so too can a creditor and debtor privately agree that certain assets are off limits (e.g., Decedent's retirement account). There is no public policy against doing so and, in fact, two fundamental policies are to promote freedom contract and settlements of disputes such as divorces. In fact, the South Carolina Legislature has found it appropriate to

[11] Pursuant to Section VII of the initial divorce settlement agreement, "[e]ach party expressly releases all right to share in the estate of the other party, whether by will, intestacy, or statutory elective share, or to serve as executor, personal representative, or administrator of the estate of the other party, except only as provided by will or codicil executed after the date of this Agreement." Agreement dated Dec. 2, 2011, p. 13.

exempt some assets from creditor claims even in the absence of such an agreement, see S.C. Code § 15-41-30, and several of these exemptions also survive the death of the debtor, see Scholtec v. Estate of Reeves, 327 S.C. 551, 490 S.E.2d 603 (Ct. App. 1997). Therefore, if the State Legislature can provide for creditor asset exemptions that survive death in the absence of such an agreement by the creditor, then certainly Respondent and Decedent have the freedom to contractually set Decedent's retirement accounts off limits from all claims Respondent "may have" in the future, including after Decedent's death.

In sum, Appellant merely asks the Court of Appeals to apply its precedent established in Stribling to the slightly different circumstances in this matter; that is, to affirm that Respondent's waiver of Decedent's retirement account funds eliminated her "expectancy interest" in the same, regardless of where those funds may ultimately be paid. Although the Probate Court and Circuit Court did not reach the factual question of whether Decedent and Respondent waived their expectancy interest in each other's retirement accounts, "when a contract is clear and unambiguous, the construction thereof is a question of law for the court." Bowen v. Bowen, 345 S.C. 243, 249, 547 S.E.2d 877, 880 (Ct. App. 2001), aff'd, 352 S.C. 494, 575 S.E.2d 553 (2003). Further, "[u]nambiguous marital agreements will be enforced according to their terms ..., regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully." Davis v. Davis, 372 S.C. 64, 75, 641 S.E.2d 446, 451-52 (Ct. App. 2006). Here, Respondent's waiver of "any and all right, title, interest or claim she has, had, or may have to [Decedent's] retirement accounts," Agreement dated Dec. 2, 2011, p. 10, is more complete even that the waiver in Stribling: "The parties further acknowledge they are waving any interest they may have in the other party's retirement." Id., 369 S.C at 402, 632 S.E.2d at 292.

In addition to being the correct framework for analyzing Respondent's retirement account waiver, the application of Stribling to this matter will provide Decedent with the benefit the settlement he reached with Respondent and for which he paid dearly. It may be noted, as relevant to the equitable enforcement of the Divorce Agreement, that Appellant loaned Decedent $400,000 in order to fund a lump sum payment to Respondent in the final Divorce Agreement, most of which remained unpaid at Decedent's death, and that Decedent had stated he would repay the balance through his retirement funds if not fully satisfied during Decedent's life. Accordingly, not only has Respondent already benefited from the funds provided Appellant to fund the Divorce Agreement, but she now seeks to benefit a second time by preventing Appellant from receiving the only category of assets (retirement funds) that she and Decedent had specifically agreed to waive all possible future claims to.

Further, to the extent Respondent would argue that she should get the benefit of the alimony provided in the Divorce Agreement, it should also be noted that the Divorce Agreement allowed Respondent to keep life insurance that on Decedent that ultimately paid Respondent an amount that is several multiples of the alimony that remained at the time of Decedent's death. In addition, Respondent had the opportunity to negotiate for security for the payment of the alimony, or to otherwise limit the waiver of future claims against Decedent's retirement accounts, but she did neither. Instead, she agreed to an unsecured promise to pay while simultaneously agreement that she could not recover Decedent's retirement account benefits.[12] Accordingly, Respondent still receives the benefit of seeking all available funds that she did not

[12] In fact, the Divorce Agreement specifically provided that the alimony "shall be paid by automatic bank draft by Husband into Wife's account of her choosing …." Therefore, the alimony arguably should have terminated automatically when Decedent's bank account dried up after his death. However, the Probate Court rejected this mechanical argument as violating the spirit of the Divorce Agreement (which Appellant did not appeal), and should have similarly rejected the mechanical argument that Respondent's waiver to Decedent's retirement accounts is lost if those accounts are paid through Decedent's Estate. .

permanently waive the right to recover against, a benefit which remains intact even with the application of Stribling to protect the permanent waiver of claims that Decedent and Respondent agreed to with respect to their retirement accounts.

In addition to the Stribling analysis, as a contractual matter, Respondent's effort to collect retirement funds that she previously waived also breaches her promise to "at any time hereafter … make, execute and deliver any and all further and other instruments or papers or things as may be reasonably required or desirable for purpose of giving full effect to this Agreement …." Agreement dated Dec. 2, 2011, p. 31. The Divorce Agreement plainly shows Respondent and Decedent intended to protect Decedent's retirement accounts from Respondent's future claims, and the only justification Respondent has offered for thwarting that intent is that Decedent either failed to name Appellant as direct beneficiary or otherwise did not apprehend that Respondent could claim those funds if they were paid to Appellant through the Estate. However, Respondent's contractual obligation to give effect to the Divorce Agreement, including her waiver of claims against retirement account funds, also prevents her from seeking those same funds if they become part of Decedent's Estate.

Similarly, promissory estoppel should also bar Respondent as a matter of law from collecting against Decedent's retirement account funds if payable to his Estate. The elements of promissory estoppel are: (1) the presence of a promise unambiguous in its terms; (2) reasonable reliance upon the promise by the party to whom the promise is made; (3) the reliance is expected and foreseeable by the party who makes the promise; and (4) the party to whom the promise is made must sustain injury in reliance on the promise. The applicability of the doctrine depends on whether the refusal to apply it would be virtually to sanction the perpetration of a fraud or would

result in other injustice. Satcher v. Satcher, 351 S.C. 477, 483–84, 570 S.E.2d 535, 538 (Ct. App. 2002).

In the present matter, Petitioner unambiguously promised to waive any future claim to Decedent's retirement accounts, which promise Decedent relied on by naming Appellant as sole beneficiary of the Estate, and which reliance was foreseeable by Petitioner in making the promise, and which reliance will cause harm to Decedent by thwarting Decedent's intent to repay Appellant for funding Decedent's divorce from Respondent. Failure to repay this loan will also cause injustice in that Respondent previously benefited the loan, and Decedent's retirement accounts would be greatly reduced but for Appellant's loan to Decedent.

CONCLUSION

Based on the foregoing, the Appellant Ernest J. Gardner, Jr., individually and as Personal Representative of the Estate of Jason F. Gardner, respectfully requests that the Court of Appeals (i) reverse the Circuit Court and uphold the Probate Court's ruling that Appellant's creditor's claim was timely, (ii) reverse or clarify the Circuit Court and Probate Court's purported granting of summary judgment to Respondent Michelle N. Gardner's Partial Motion for Summary Judgment with respect to Jason F. Gardner's retirement, and (iii) rule that Respondent Michelle N. Gardner is barred from recovering from Decedent's retirement accounts payable to the Estate of Jason F. Gardner, if any, as a result of her express waiver of "any and all right, title, interest or claim she has, had, or may have" in Jason F. Gardner's retirement accounts.

Signature Page To Follow

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Columbia, South Carolina
March 5, 2021

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2020-001678

Michelle N. Gardner .....Respondent,

v.

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

PROOF OF SERVICE

I certify that I have served a copy of the Appellant's Initial Brief in the above referenced matter by e-mailing a copy of same to the attorneys of record, on March 5, 2021, as allowed by section (g)(3) of South Carolina Supreme Court Order No. 2020-000447, with a copy of such e-mail included with this Proof of Service.

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Subject: Gardner Initial Brief of Appellant
Attachments: Gardner brief.pdf

John & Sarah, I hope you are doing well.

Attached please find the Appellant's initial brief and proof of service for service upon you by e-mail.

Thank you,

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