

**RECEIVED**

**Mar 17 2021**

**SC Court of Appeals**

APPEAL FROM CHARLESTON COUNTY

Bentley D. Price, Circuit Court Judge for Charleston County

---

Appellate Case No. 2020-000594

---

Melissa Combs a/k/a Melissa Cleary.....Appellant,

v.

Carlie Elvin Cleary, Individually and as Personal Representative of the  
Estate of Scott B. Cleary & Ditech Financial, LLC

Of whom Carlie Elvin Cleary, Individually and as Personal Representative  
of the Estate of Scott B. Cleary .....Respondent,

---

***APPELLANT'S FINAL BRIEF***

---

Kerry W. Koon, Esq.  
147 Wappoo Creek Drive, Ste. 203  
Charleston, South Carolina 29412  
843.795.7000  
Attorney for Appellant

**TABLE OF CONTENTS**

Table of Authorities.....	ii
Statement of the Case.....	1
Standard of Review.....	2
<b>Argument</b>	
I. DID THE LOWER COURT ERR IN REMANDING THE CASE TO THE PROBATE COURT AND DETERMINING THAT THE PROBATE COURT HAD EXCLUSIVE JURISDICTION OF THE MATTERS RAISED IN THE COMPLAINT?.....	2
Conclusion.....	6

**TABLE OF AUTHORITIES**

**CASES**

<u>Catawba Indian Tribe v. State</u> , 372 S.C. 519, 642 S.E. 2 <sup>nd</sup> 751, 753 (2007).....	2
<u>Hodges v. Rainey</u> , 341 S.C. 79, 533 S.E. 2 <sup>nd</sup> 578, 85 (2000).....	5
<u>Richland Memorial Hospital v. English</u> , 295 S.C. 511, 513, 369 S.E. 2 <sup>nd</sup> 395, 396 (Ct. App. 1988) .....	6
<u>Stone v. Thompson</u> , 428 S.C. 79, 833 S.E. 2 <sup>nd</sup> 266 (2019).....	2

**RULES & STATUTES**

Section 62-1-302, Code of Laws of South Carolina, Annotated (1976).....	2, 4, 5, 6
---	------------

## *STATEMENT OF THE CASE*

This matter was commenced by Appellant's filing of a Summons, Complaint and Lis Pendens in the Charleston County Probate Court on April 4, 2019.

The Complaint consists of four (4) causes of action;

1. determination of heirs (Complaint, R. p. 14);
2. quiet title (Complaint, R. pp. 14-15);
3. set aside deed of distribution (Complaint, R. p. 15); and
4. removal of personal representative (Complaint, R. p. 15).

Respondent filed its Answer & Counterclaim in the probate court on May 1, 2019 (Answer & Counterclaim, R. pp. 19-22). Appellant filed its Answer to Counterclaim in the probate court on May 9, 2019 (Answer to Counterclaim, R. p. 23).

Appellant filed a Motion for Removal to the circuit court on May 9, 2019 (Motion for Removal, R. p. 8).

By Order dated May 13, 2019, the probate court granted the Motion for Removal (Order for Removal, R. p. 8).

On June 10, 2019, the clerk of the probate court filed its Return forwarding to the circuit court the pertinent documents relative to the action.

On August 16, 2019, the Respondent filed a notice of motion and Motion to Dismiss in the circuit court (Motion to Dismiss, R. pp. 24-25).

On January 6, 2020, Appellant filed a Memorandum in Opposition to Motion to Dismiss supported by five (5) affidavits (Memorandum in Opposition and supporting affidavits, R. pp. 27-48).

The motion was heard before the Honorable Bentley D. Price on January 9, 2020.

On January 30, 2020, Judge Price issued an Order Granting the Motion to Dismiss and remanding the case back to the probate court (Order of January 30, 2019, R. pp. 1-3).

On February 7, 2020, Appellant filed a Motion to Alter or Amend (Motion to Alter or Amend, R. pp. 49-50).

By order dated March 3, 2020, Judge Price denied the motion to alter or amend (Order of March 3, 2020, R. pp. 4-5), and this appeal followed.

### *STANDARD OF REVIEW*

The sole issue in this case involves the interpretation of Section 62-1-302 of the probate code. “The issue of interpretation of the statute is a question of law for the court.” *Catawba Indian Tribe v. State*, 372 S.C. 519, 642 S.E. 2<sup>nd</sup> 751, 753 (2007). The court is free to decide a question of law with no particular deference to the circuit court. *Id.* at 642 S.E. 2<sup>nd</sup> 753.

### *ARGUMENT*

- I. DID THE LOWER COURT ERR IN REMANDING THE CASE TO THE PROBATE COURT AND DETERMINING THAT THE PROBATE COURT HAD EXCLUSIVE JURISDICTION OF THE MATTERS RAISED IN THE COMPLAINT?

This action alleges a common law marriage between the decedent, Scott B. Cleary and Appellant, Melissa Combs-Cleary (Complaint, R. p. 14). The Appellant alleges the common law marriage pre-existed the Supreme Court’s decision in *Stone v. Thompson*, 428 S.C. 79, 833 S.E. 2<sup>nd</sup> 266 (2019) by which the Court prospectively abolished common law marriage but declined to make its holding retroactive to marriages established prior to the date of the opinion. *Id.* at 428 S.C. 87.

Scott B. Cleary died intestate on November 22, 2018. His father Carlie Elvin Cleary was appointed personal representative of his estate. Carlie Elvin Cleary died February 25, 2020, and by consent, the probate court appointed his wife Betty P. Cleary as special administrator of the Estate of Scott B. Cleary without prejudice to the claims of Appellant.

The decedent had no children. Depending on the outcome of this action, decedent’s sole heir would be his deceased father’s estate or the Appellant. The estate consists of at least three (3) pieces of real property, two in South Carolina as described in the Complaint and *Lis Pendens* and one in North Carolina, and other assets.

In support of her memorandum in opposition to Respondent's motion to dismiss, Appellant submitted her affidavit, stating that the decedent invited her to Folly Beach on or about Valentine's Day in 2016 where they exchanged vows agreeing to become husband and wife (Appellant's affidavit, R., p. 29), that they thereafter periodically exchanged greeting cards referring to each other as husband and wife (Appellant's affidavit and Exhibit "C", R. pp. 29-30, 36-41), that they brought vacation time share interests as husband and wife (Appellant's affidavit and Exhibit "B", R. pp. 29, 32-35), that they introduced themselves to friends and acquaintances as husband and wife, and that decedent changed his profile with the North Carolina State University Alumni Association, to "Married" identifying Appellant as his wife (Appellant's affidavit and Exhibit "D", R. pp. 30, 42-43), and that they otherwise lived together as husband and wife (Appellant's affidavit, R. p. 31). Appellant also filed affidavits of four (4) friends or acquaintances of decedent supporting the couple's reputation as husband and wife (Affidavits of Carol Meyer (R. p. 46), Robert L. Myer, Jr. (R. p. 45), Peggy Harris (R. p. 47), and Ian McClure (R. p. 48)).

The dispositive issue as to each of Appellant's causes of action is the determination of the Appellant and decedent's status as husband and wife.

At the hearing before Judge Price on January 9, 2020, Respondent moved for remand to the probate court arguing that the probate court has exclusive jurisdiction to try actions concerning common law marriage, with the only exception being the concurrent jurisdiction of the family court when the alleged common law spouses are "alive and well." (Transcript of January 9, 2020 hearing, R. pp. 53, line 18 – p.. 54, line 23). Judge Price granted the motion on January 30, 2020, by a "Form 4" order without findings of fact or conclusions of law (Order of

January 30, 2020, R. pp. 1-3). He denied Appellant's Motion to Alter or Amend on March 3, 2020, also by a "Form 4" order (Order of March 3, 2020, R. pp. 4-5).

Section 62-1-302 establishes jurisdiction of the probate court. In Section 62-1-302 (a) the probate court is given exclusive jurisdiction of all matter related to:

"(1) the estates of decedents, including the contest of wills, construction of wills, determination of property in which the estate of a decedent or a protected person has an interest, and determination of heirs and successors of decedents and estates of protected persons, except that the circuit court also has jurisdiction to determine heirs and successors as necessary to resolve real estate matters, including partition, quiet title, and other actions pending in the circuit court."

Subparagraph (c) provides that the probate court has jurisdiction of the issues relating to "...paternity, common law marriage, and interpretation of marital agreements in connection with estate, trust, guardianship and conservatorship actions pending before it, concurrent with the family court pursuant to Section 63-3-530."

The critical statutory language to be interpreted here is contained in Section 62-1-302 (d) which provides:

"(d) Notwithstanding the exclusive jurisdiction of the probate court over the foregoing matters, any action or proceeding filed in the probate court and relating to the following subject matters, on motion of a party, or by the court on its own motion, made not later than ten days following the date on which all responsive pleadings must be filed, must be removed to the circuit court and in these cases the circuit court shall proceed upon the matter de novo:

- (1) formal proceedings for the probate of wills and for the appointment of general personal representatives;
- (2) construction of wills;
- (3) actions to try title concerning property in which the estate of a decedent or protected person has an interest;
- (4) matters involving the internal or external affairs of trusts as provided in Section 62-7-201, excluding

- matters involving the establishment of a ‘special needs trust’ as described in Article 7;
- (5) actions in which a party has a right to trial by jury and which involve an amount in controversy of at least \$5,000.00 in value; and
  - (6) actions concerning gifts made pursuant to the South Carolina Uniform Gifts to Minors’ Act, Article 5, Chapter 5, Title 63.”

It is worthy to note that subsection (d) of Section 62-1-302 provides that, upon a properly filed motion, the action “...must be removed to the circuit court...” if the action involves one of the enumerated causes of action. Removal is not discretionary with the probate court, but mandatory.

The first phrase in subsection (d), “Notwithstanding the exclusive jurisdiction of the probate court over the foregoing matters...” makes clear that all actions described in Section 62-1-302, subparagraph (a) through subparagraph (c) are subject to mandatory removal, so long as at least one of the cause of actions enumerated in subsection (d)(1) through (6) is pled.

This action contains causes of action to determine heirs (Complaint, R. p. 14), to quiet title (Complaint, R. pp. 14-15), to set aside the deed of distribution (Complaint, R. p. 15) and removal of personal representative (Complaint, R. p. 15).

The causes of action to quiet title and setting aside the deed of distribution, each plainly trigger the mandatory removal provisions of subparagraph (d), as both qualify as a causes of action to try title.

A common law marriage between the Appellant and decedent as alleged in the first cause of action, would establish the factual predicate for the causes of action to quiet title and setting aside the deed of distribution.

Where, as here, statutory language is plain and unambiguous and conveys a clear and definite meaning, the court has no right to impose another meaning. Stated alternatively, “What a

legislature says in the text of a statute is considered the best evidence of the legislative intent or will.” *Hodges v. Rainey*, 341 S.C. 79, 533 S.E. 2<sup>nd</sup> 578, 85 (2000).

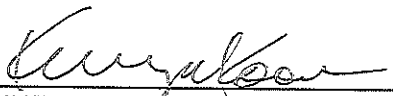
Here, the statute is plain and unambiguous that actions to try title are subject to mandatory removal upon a timely filed motion.

Further, an action to determine a common law marriage is a case at law for which the parties are entitled to a jury trial which is an additional ground for mandatory removal under Section 62-1-302 (d)(5). *Richland Memorial Hospital v. English*, 295 S.C. 511, 513, 369 S.E. 2<sup>nd</sup> 395, 396 (Ct. App. 1988).

### *CONCLUSION*

Appellant respectfully submits that the trial judge’s order be reversed and this action be remanded with instruction to restore to the active circuit court roster.

March 16, 2021

---

**KERRY W. KOON**  
147 Wappoo Creek Drive, Ste. 203  
Charleston, SC 29412  
(843) 795-7000  
Attorney for Appellant

APPEAL FROM CHARLESTON COUNTY

Bentley D. Price, Circuit Court Judge for Charleston County

---

Appellate Case No. 2020-000594

---

Melissa Combs a/k/a Melissa Cleary.....Appellant,

v.

Carlie Elvin Cleary, Individually and as Personal Representative of the  
Estate of Scott B. Cleary & Ditech Financial, LLC

Of whom Carlie Elvin Cleary, Individually and as Personal Representative  
of the Estate of Scott B. Cleary .....Respondent,

---

***CERTIFICATE OF COUNSEL***

---

The undersigned hereby certifies that the Final Brief complies with Rule 211 (b)  
S.C.A.C.R.

March 16, 2021



---

Kerry W. Koon  
147 Wappoo Creek Drive, Ste. 203  
Charleston, SC 29412  
(843) 795-7000  
Attorney for Appellant

Telephone: Bus: (843) 795-7000  
Fax: (843) 762-5276

**RECEIVED**

**Mar 17 2021**

**SC Court of Appeals**

**KERRY W. KOON**  
*Attorney at Law*  
147 Wappoo Creek Drive  
Wappoo Centre, Suite 203  
Charleston, South Carolina 29412

March 17, 2021

**VIA EMAIL**[ctappfilings@sccourts.org](mailto:ctappfilings@sccourts.org) **& U.S. MAIL**

Jenny Kitchings, Clerk of Court  
South Carolina Court of Appeals  
1220 Senate Street  
PO Box 11629 (29211)  
Columbia, SC 29201

**RE: *Melissa Combs a/k/a Melissa Cleary v. Carlie Elvin Cleary, Individually & as Personal Representative of the Estate of Scott B. Cleary & Ditech Financial, LLC***  
**Appellate case #: 2020-000594**

Dear Madam Clerk,

Please find herewith the Appellant's Final Brief and Appellant's Final Reply Brief together with a Proof of Service of the same for filing in the above referenced matter. By copy of this letter, one bound copy of each brief is sent for filing with the court.

With kindest personal regards, I am

Very truly yours,



Kerry W. Koon

KWK:mmm  
Enclosures

cc: John Dodds, Esq. (*Via email [john@cisadodds.com](mailto:john@cisadodds.com) and U.S. Mail*)

RECEIVED

Mar 17 2021

SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Bentley D. Price, Circuit Court Judge for Charleston County

Appellate Case No. 2020-000594

Melissa Combs a/k/a Melissa Cleary.....Appellant,

v.

Carlie Elvin Cleary, Individually and as Personal Representative of the Estate of Scott B. Cleary & Ditech Financial, LLC.

Of whom Carlie Elvin Cleary, Individually and as Personal Representative of the Estate of Scott B. Cleary .....Respondent,

PROOF OF SERVICE

I certify that I have served a copy of the Appellant’s Final Brief and Appellant’s Final Reply Brief, on John Dodds, Attorney for Respondent Carlie Elvin Cleary, Individually & as Personal Representative of the Estate of Scott B. Cleary, via electronic mail to john@cisadodds.com and by depositing a copy of the same in the United States Mail, postage prepaid, on March 17, 2021, addressed to Cisa & Dodds, LLP, 858 Lowcountry Blvd., Ste. 101, Mt. Pleasant, SC 29464.

March 17, 2021



Kerry W. Koon, Esq.  
147 Wappoo Creek Drive, Ste. 203  
Charleston, South Carolina 29412  
843.795.7000  
kerrykoon@hotmail.com  
Attorney for Appellant