

STATE OF SOUTH CAROLINA
In the Court of Common Pleas

APPEAL FROM CHARLESTON COUNTY PROBATE COURT

Peter A. Kouten, Associate Judge of Probate

Case No. 2020-CP-10-2604

Kenneth Smalls.....Appellant

Lyric Brown, by and through her next friend and general guardian, Latoya
Ekpunobi.....Respondent

ORDER AFFIRMING PROBATE COURT AND REMANDING CASE

This matter came before the Court via WebEx Virtual Courtroom for hearing on Friday, March 19, 2021, regarding Appellant Kenneth Smalls' appeal of a May 28, 2020, Order Denying Motion for Reconsideration, entered by The Honorable Peter A. Kouten, Associate Judge of the Probate Court of Charleston County. At the hearing Appellant was represented by Michael H. Ellis, Esquire. Respondent, Lyric Brown, by and through her custodial parent, next friend and general guardian, Latoya Ekpunobi, was represented by James Taylor Anderson, III, Esquire.

Appellant's Statement of Issues on Appeal, states that the following issues are being appealed:

I. Whether the Probate Court erred by concluding S.C. Code Ann. § 62-3-203(c) allows Latoya Ekpunobi to be appointed personal representative.

II. Whether the Probate Court erred by concluding that Kenneth Smalls is not an heir of Brian Smalls.

III. Whether the Probate Court erred by concluding that Monteshia Smith-Smalls failed to submit to DNA testing.

STANDARD OF REVIEW

This appeal is an action at law. Therefore, this Court must affirm the Probate Court's factual findings unless no evidence supports them. Questions of law are subject to de novo review. *See In re Fields*, 424 S.C. 627, 631, 819 S.E. 2d 160, 163 (S.C. App. 2018).

FINDINGS OF FACT BY THE PROBATE COURT

This Court adopts the factual findings of the Probate Court's May 28, 2020, Amended Order Appointing Personal Representative. The Probate Court's findings of fact are set forth verbatim:

1. The Decedent, Brian Jerome Smalls, died intestate on October 16, 2018, a resident of Charleston County, South Carolina.
2. At the time of his death, the Decedent was not married and was survived by two potential children, Respondent Lyric Brown and Monteshia Smith-Small.
3. Prior to the death of the Decedent, Respondent Lyric Brown was judicially determined to be the daughter of the Decedent by the Ninth Circuit Family Court for the State of South Carolina
4. On October 30, 2018, Monteshia Smith-Small filed a Summons and Petition for Formal Appointment of Personal Representative for the Estate of Brian Jerome Smalls.
5. On November 27, 2018, Respondent Lyric Brown, by and through her Guardian Latoy Ekpunobi, filed an Answer to Petition and Objection to Appointment of Monteshia Smith-Small. In her Answer, Respondent argues that the Petitioner is not the child of the Decedent.
6. On March 8, 2019, Respondent Lyric Brown, by and through her Guardian Latoya-Ekpunobi, filed a Summons and Petition for Formal Appointment of Personal Representative.
7. On April 22, 2019, Monteshia Smith-Small filed a Notice of Motion and Motion

for Determination of Paternity.

8. On May 13, 2019, Respondent filed a Response to the Notice of Motion and Motion for Determination of Paternity. In her Response, Respondent argues that Monteshia Smith-Small's should submit to DNA testing in order to determine paternity. Respondent also filed a Notice of Motion and Motion for Paternity Test on May 13, 2019.

9. A hearing on the Motion for Determination of Paternity was held by this Court on May 22, 2019. An Order was issued by this Court on June 6, 2019, in which the Court ordered that Monteshia Smith-Small's shall submit to DNA testing.

10. On June 18, 2019, a Motion for Reconsideration was filed with this Court by Monteshia Smith-Small's. This Court denied Monteshia Smith-Small's' Motion for Reconsideration by Order of this Court dated June 28, 2019. On July 25, 2019, Monteshia Smith-Small's filed with this Court a Notice of Intent to Appeal.

11. On August 7, 2019, Petitioner Kenneth Small's, father of the Decedent, filed a Summons and Petition for Formal Appointment of Personal Representative.

12. Monteshia Smith-Small's filed a withdrawal other Appeal with the Ninth Judicial Circuit Court for the State of South Carolina on October 16, 2019. By Order of the Ninth Judicial Circuit Court dated October 18, 2019, the matter was remanded to this Court.

13. On November 12, 2019, Respondent Latoya Ekpunobi, as Guardian of Lyric Brown, filed a Motion for Appointment of Personal Representative. In her Motion, the Respondent argues that, as the Guardian of Lyric Brown, she can exercise the same right to be appointed as Personal Representative of the Estate of Brian Jerome Small's as Lyric Brown, pursuant to S.C. Code Ann. § 62-3-203(c).

14. At the hearing, counsel for the Petitioner and Monteshia Smith-Small's stated that

Monteshia Smith-Small was no longer pursuing her Petition for Formal Appointment of Personal Representative. Counsel for Monteshia Smith-Small further stated that she has not submitted to DNA testing as required by this Court's Order dated June 6, 2019.

CONCLUSIONS OF LAW

This Court makes the following conclusions of law:

Appellant's Issue Number I. "Whether the Probate Court erred by concluding S.C. Code Ann. § 62-3-203(c) allows Latoya Ekpunobi to be appointed personal representative."

At this point in the proceeding, the only beneficiary of Decedent's estate is Lyric Brown. It is undisputed that Latoya Ekpunobi is the custodial parent of Lyric Brown. This Court finds that the Probate Court was correct in appointing Lyric Brown's custodial parent, Latoya Ekpunobi, as personal representative of Decedent's Estate.

First, South Carolina Code Ann. Section 62-3-203(c) expressly provides as follows:

Conservators of the estates of protected persons or, if there is no conservator, any guardian for the protected person or **the custodial parent of a minor**, except a court-appointed guardian ad litem of a minor or incapacitated person may exercise the same right to be appointed as personal representative, to object to another's appointment, or to participate in determining the preference of a majority in interest of the heirs and devisees that the protected person or ward would have if qualified for appointment.

S.C. Code Ann. § 62-3-203(c).

The plain language of S.C. Code Ann. § 62-3-203(c) provides that it applies to "the custodial parent of a minor." **"A person serving as guardian or conservator of a person or the custodial parent of a minor with a priority has the same priority to be appointed as the minor or protected person or incapacitated person."** Albert Lawrence Moses & William Bert Brannon, THE SOUTH CAROLINA PROBATE PRACTICE MANUAL, Fifth Edition (2017), P. 28.

Appellant argues that the last portion of S.C. Code Ann. § 62-3-203(c), which reads “that the protected person or ward would have if qualified for appointment,” somehow limits the application of the S.C. Code Ann. § 62-3-203(c), and prohibits the custodial parent of a minor from exercising “the same right to be appointed personal representative” as the minor would have had if the minor were an adult. Appellant’s argument is based on the premise that “protected person” and “ward” are defined terms and that the definition does not include minor children.¹ Appellant’s reading of S.C. Code Ann. § 62-3-203(c) would render ineffectual the portion of the statute that explicitly says that it applies to the custodial parents of a minor. The statute applies to three different types of people: (1) Conservators of the estates of protected persons, (2) if there is no conservator, any guardian for the protected person and (3) the custodial parent of a minor. If South Carolina Code Ann. § 62-3-203(c), were only applicable to “wards” and “protected persons” there would be no reason to include the third category of people, “custodial parents of a minor.” The statute unambiguously provides that the custodial parent of a minor may exercise the minor’s right to be appointed personal representative.

Appellant’s suggested reading of the statute would render the words “custodial parent of a minor” mere surplusage. “A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous....” *Matter of Decker*, 471 S.E.2d 462, 322 S.C. 215, 219 (1995). The legislature would not have included “custodial parents of a minor” if the intent were to limit the statute’s application to “wards” and “protected persons” as

¹ Appellant bases his argument on the definitions section of the Probate Code. Specifically, Appellant focuses on the definition of “Protected Person” and “Ward.” South Carolina Code Ann. § 62-1-201(38) defines “protected person” by reference to S.C. Code Ann. § 62-5-101. South Carolina Code Ann. § 62-5-101(18), defines “Protected Person” as “unless otherwise apparent from this article . . . ‘Protected person’ means an individual for whom a conservator has been appointed or other protective order has been issued.” Likewise, South Carolina Code Ann. § 62-1-201(52) defines “Ward” by reference to South Carolina Code Ann. § 62-5-101. South Carolina Code Ann. § 62-5-101(24) states “‘Ward’ means an adult for whom a guardian has been appointed.”

strictly defined by the Probate Code. *See* Albert Lawrence Moses & William Bert Brannon, THE SOUTH CAROLINA PROBATE PRACTICE MANUAL, Fifth Edition (2017), P. 28. (“**A person serving as guardian or conservator of a person or the custodial parent of a minor with a priority has the same priority to be appointed as the minor or protected person or incapacitated person.**”)(citing S.C. Code Ann. § 62-3-203(c)).²

Perhaps even more fundamentally, in the event of an objection made in a formal proceeding, and no agreement among the heirs or devisees, the Probate Court can appoint “**any suitable person**” to serve as personal representative.

(b) An objection to an appointment can be made only in formal proceedings. In case of objection the priorities stated in (a) apply except that:

(2) **in case of objection to appointment of a person other than one whose priority is determined by will** by an heir or devisee appearing to have a substantial interest in the estate, the court may appoint a person who is acceptable to heirs and devisees whose interests in the estate appear to be worth in total more than half of the probable distributable value or, in default of this accord, **any suitable person**.

S.C. Code Ann § 62-3-203(b)(2).

Given that, at this point, Lyric Brown is the only person entitled to assets of the estate, the Probate Court is well within its discretion to appoint her mother, Latoya Ekpunobi, personal representative of the Decedent’s estate. *See In re Brown’s Estate*, 96 S.C. 34, 79 S.E.2d 791, 792

² Even under Appellant’s restricted view of S.C. Code Ann. § 62-3-203(c), at this point, Lyric Brown is a “protected person” for whom a “protective order has been issued.” The Probate Code defines “Protected Person” as “an individual for whom a conservator has been appointed or other protective order has been issued.” S.C. Code Ann. § 62-5-101(18). “Protective Order” is, in turn, defined by S.C. Code Ann. § 62-5-101(19), which defines “Protective Order” as “an order appointing a conservator or relating to the management of the property of: . . . (b) a minor.” At this point in the litigation, the Amended Order Appointing Personal Representative is an order “relating to the management of the property of” Lyric Brown, a minor, and Lyric Brown is a “protected person.”

(1913) (holding that the legal guardian of decedent's minor children was properly appointed administrator of the decedent's estate over decedent's brother). Clearly, the Probate Court should not appoint Kenneth Smalls, who is arguing that Lyric Brown is not the sole heir of Decedent's estate, as personal representative responsible for the management of Lyric Brown's inheritance.

Appellant's Issue Number II. "Whether the Probate Court erred by concluding that Kenneth Smalls is not an heir of Brian Smalls."

South Carolina law clearly establishes what constitutes an "heir" in the eyes of the law. If an individual dies, without a surviving spouse, and with a child, the child takes the entire estate. *See S.C. Code Ann. § 62-2-103(1) (to the issue of the decedent: if they are all of the same degree of kinship to the decedent they take equally, but if of unequal degree, then those of more remote degree take by representation.)*. Parents only inherit property from the estate if there are no surviving children. *See S.C. Code Ann. § 62-2-103(2) (if there is no surviving issue, to his parent or parents equally)* (emphasis added).

The term "heir" is defined by the Probate Code.

"Heirs" means those persons, including the surviving spouse, who are entitled under the statute of intestate succession to the property of a decedent."

SC Code § 62-1-201(20).

It is beyond reasonable dispute that an "heir" is someone who will inherit some portion of a deceased person's property. *See BLACKS LAW DICTIONARY*, Seventh Edition (1999) ("heir (air). 1. A person who, under the laws of intestacy, is entitled to receive an intestate decedent's property, esp. real property . . ."). Appellant's argument that he is an "heir" who will inherit "zero percent" of Decedent's Estate is meritless.

Appellant's Issue Number III. "Whether the Probate Court erred by concluding that Monteshia Smith-Small failed to submit to DNA testing."

Monteshia Smith-Small did not appeal from the Probate Court's order. On appeal,

Kenneth Smalls lacks standing to litigate issues related to Monteshia Smith-Small's failure to take a court ordered paternity test.

Only a person aggrieved by a ruling may appeal. *See* S.C. Code Ann. § 18-1-30 ("Any party aggrieved may appeal in the cases prescribed in this Title."); *See also* S.C. App. C.R. 201(b) ("Only a party aggrieved by an order, judgment, or sentence may appeal."). "A party is aggrieved by a judgment or decree when it operates on his or her rights of property or bears directly on his or her interest." *Beaufort Realty Co. v. Beaufort Cty.*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001). "A party . . . cannot appeal from a decision which does not affect his interest, however erroneous and prejudicial it may be to the rights and interests of some other person." *Bivens v. Knight*, 254 S.C. 10, 13, 173 S.E.2d 150, 152 (1970).

[A]n aggrieved party is one who is injured in a legal sense; one who has suffered an injury to person or property. A good definition of an aggrieved party is contained in the case of *Bowles v. Dannin*, 62 R.I. 36, 2 A.2d 892. It is there stated that an aggrieved party within statute relating to appeals is a person who is aggrieved by the judgment or **decree when it operates on his rights of property or bears directly upon his interest**, the word aggrieved referring to a substantial grievance, **a denial of some personal or property right or the imposition on a party of a burden or obligation**.

Bivens v. Knight, 254 S.C. 10, 12-13, 173 S.E.2d 150, 152 (1970)(emphasis added).

The Probate Court's rulings regarding Monteshia Smith-Small's do not affect Kenneth Smalls. The rulings relating to Monteshia Smith-Small's are not a "denial of some personal or property right" of Kenneth Smalls, nor does any ruling regarding Monteshia Smith-Small's failure to take a court ordered paternity test constitute "the imposition . . . of a burden or obligation" on Kenneth Smalls. *See Bivens v. Knight*, 254 S.C. 10, 12-13, 173 S.E.2d 150, 152 (1970). Kenneth Smalls lacks standing to appeal the Probate Court's findings regarding Monteshia Smith-Small's court ordered paternity test.

CONCLUSION

The Probate Court is AFFIRMED and this matter is hereby REMANDED to the Charleston County Probate Court.

Debra R. McCaslin
Presiding Circuit Court Judge

March 26, 2021
Lexington, SC



Charleston Common Pleas

Case Caption: Kenneth Smalls , plaintiff, et al VS Lyric Brown , defendant, et al

Case Number: 2020CP1002604

Type: Order/Other

So Ordered

Debra R. McCaslin