THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Thomas A. Russo, Judge of the Circuit Court
The Honorable Tamara C. Curry, Judge of the Probate Court

Supreme Court Appellate Case Np. 2020-00901
Unpublished Opinion No. 2019-UP-412
Appellate Case No. 2017-001196
Circuit Court Case No. 2015-CP-10-05056
Probate Court Case No. 2007-ES-10-1437

Jacquelin S. Bennett and Kathleen S. Turner
as Personal Representatives of the Estate of
Jacquelin K. Stevenson ..... Appellants

v.

Estate of James Kelly King and Genevieve S. Felder ..... Respondents

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BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Jacquelin K. Stevenson died testate on September 17, 2007 survived by three daughters, Kathleen S. Turner, Jacquelin S. Bennett (Appellants), and Genevieve S. Felder (Respondent). She was also survived by two sons, Thomas C. Stevenson, III, Daniel R. Stevenson, and a step son, James Kelly King. Each of these are devisees under her will. The will originally designated Kathleen S. Turner and Thomas C. Stevenson as Co-Personal Representatives.

The will was admitted to probate in the Charleston County Probate Court in October of 2007. The six individuals named above were the devisees under the will. Among the various assets of the estate are four real properties:

> Lot 19 Dupree Creek Lane, Mt. Pleasant, SC
> ("Paradise Island")
>
> Glascow Island Lane, Edisto Island, SC
> ("Bailey's Island")
>
> Lots 34, 35, 36, and 37, Lake Front Drive,
> Hendersonville, NC ("Lake Summit")
>
> 2414 Rockland Avenue, Rockville, SC
> ("Rockville")

Rockville is a waterfront lot with an upscale vacation and rental home, and a deepwater dock. The Lake Summit property is a long-time family vacation home, also waterfront, comprised of a home on one lot, and 4 adjacent undeveloped waterfront lots. The property earns significant rental income, which covers all of its expenses. (R., p. 35, ll. 11 – 25, p. 36, ll. 1 – 10, p.), still affording time for the enjoyment of its owners. (R., p. 145, l. 25, p. 146, ll. 1 – 3). Bailey's Island and Paradise Island are vacant lots with significant carrying costs, exceeding $25,000.00 annually. (R., p. 33, 34). It is the

proposed distribution of these properties that is the basis of this dispute.

Pursuant to the terms of the will, Kathleen S. Turner and Jacquelin S. Bennett were devised the Rockville property. Lake Summit was devised to Daniel R. Stevenson and Thomas C. Stevenson, III. Genevieve S. Felder and James Kelley King received monetary bequests roughly equal in value to these real estate shares. Thomas C. Stevenson, III was subsequently removed as Personal Representative due to malfeasance, and both he and Daniel R. Stevenson lost their inheritance rights by order of the Probate Court dated February 11, 2011, for the same reason. Jacquelin S. Bennett was appointed co-Personal Representative in place of Thomas C. Stevenson, Jr. By Private Agreement executed in March of 2015, the claims of the Estate of James Kelly King, who died during the administration of the estate, were resolved by monetary payment pursuant to a Private Agreement (R., 219), Appellants now find themselves as co-Personal Representatives, with Respondent as the only other beneficiary, and the only beneficiary who is not also a Personal Representative. The disposition of the real properties, with the exception of Rockville, which was originally devised to respondents, is now governed by the residuary clause, which states:

> All the rest, residue, and remainder of my property and estate real and personal, of whatsoever nature, and wheresoever situate, including any property before mentioned but not effectively disposed of, . . .
> I give, devise, and bequeath to Kathleen S. Turner, Jacquelin S. Bennett, Thomas S. Stevenson, III, Daniel R. Stevenson, James Kelly King, and Genevieve S. Felder, in equal shares, per stirpes, and not per capita . . .
>
> R., p. 228

Pursuant to the terms of the Private Settlement Agreement, the allocation of the residuary assets would, at a later time either be resolved by agreement of the parties, or

would be determined by the probate court. (R., p. 220),

On September 14, 2011, Respondent filed a Demand for Hearing. The requested hearing was held on June 16, 2015. The interested parties were Jacquelin S. Bennett, Kathleen S. Turner. the co-Personal Representatives, and Genevieve S. Felder. The proposal of the co-Personal Representatives was that Lake Summit be equally divided between themselves. Paradise Island would be divided equally among the three. Genevieve S. Felder would receive the large majority of Bailey's Island, with the remaining, minor share divided equally between the co-Personal Representatives. (R., p. 5, p. 90, l. 15 – p. 92, l.13, p. 207 – p. 218).

At the hearing, Appellant's sole argument was that the will gave the Co-Personal Representatives unfettered authority to distribute in kind, their only consideration being that the distribution "come out equal" based on appraised monetary value, with no other factors being relevant. (R., p. 138, l. 78 – p.141, l. 15). Respondent argued that while the language in the will clearly grants Personal Representatives broad authority to distribute in kind, such authority is not absolute, and is constrained by fiduciary principals and the duty to treat all beneficiaries equitably and fairly. (R. p. 97). Respondent further argued that the determination as to what was fair and equitable should, in proper circumstances, include non-economic considerations such as sentimental value, utility, the burden of significant annual expenses, and other factors. The position of the Respondent is that in the particular circumstances of this case, only a pro-rata distribution of the remaining, residuary properties could be fair and equitable. (R., p. 17, p. 93, l. 13 – p. 97, l. 17)

In its Order Regarding the Division of Real Property dated July 30, 2015, the Probate Judge, Tamara C. Curry, referencing the terms of the Family Settlement Agreement, noted that in the event the parties could not agree upon the disposition of the residuary properties, the Probate Court would decide the allocation. In its order, The Court stated:

> Since no subsequent agreement has been presented, the Charleston County Probate Court will make a determination on the residuary assets in light of the duties imposed upon a Fiduciary.
>
> (R., p. 18)

and then ruled:

> Petitioners . . . acting as Co-Personal Representatives of the Estate of Jacquelin Stevenson, are to divide said properties located on Lots 34, 35, 36, and 37, Lakefront Drive . . . , Lot 19 Dupree Creek Lane . . . , and Glascow Island Lane . . . in equity and in good faith among the devisees so that each receives an equal ownership interest in each piece of real estate that is before the Court.
>
> (R., p. 19).

Appellant filed a Motion to Alter or Amend on August 12, 2015, which was denied by order dated September 10, 2015. Appellants appealed the decision of the Probate Court to the Court of Common Pleas by Notice filed September 15, 2015. That appeal was heard by the Honorable Thomas Anthony Russo on June 3, 2016. Judge Russo issued his order affirming the Probate Court on March 18, 2017. Notice of Appeal to the Court of Appeals was filed May 19, 2017. That appeal was considered on the record and briefs without oral argument. The Circuit Court was affirmed by unpublished opinion filed December 31, 2019. Appellant's Petition for Rehearing was filed on January 14, 2020, and denied. The Court granted Certiorari by order dated December 1, 2020.

ARGUMENTS

I. The Court of Appeals erred in affirming the Probate Court's holding that all real property passing through the Residuary Estate should be distributed to the devisees in equal shares.

a. The Probate Court erred as a matter of law in disregarding the testamentary intent of the Testatrix.

Respondent's are correct in stating that "'no will has a brother, and as a result, a court may find little guidance in prior decisions interpreting wills due to the different intent and circumstances of each testator." That principle is starkly illustrated in the current case. Here, the Testatrix believed that she had six children, three girls and three boys (one of whom was actually a step-child) to accommodate in her will. Her dispositions show that she regarded each as equally deserving, as her bequests were clearly designed to approximate equal values. (R., p. 193, l. 18). Little could she have anticipated that, before her estate could be settled, one of the boys (the step-son) would be dead, and her two blood sons would have been excluded from inheritance by court order for, essentially, looting the estate of much of its cash value. And she could have hardly imagined that ultimately, two of her daughters would become Personal Representatives in charge of an estate in which the total number of beneficiaries would be three.

Appellant's view of the Testatrix's intent is unconvincing. They make the point that the will shows no intent that the real property be divided equally. It is equally true that the will indicates no intent that Respondent receive *any* real property, or that Respondents receive *any* interest in Lake Summit, let alone end up with *both* resort properties. But in the current posture of the estate, there is *only* real property to be distributed, and Appellants have no choice but to distribute the real properties among all three beneficiaries. The Probate Court simply decided that, under the present posture of the estate, applying the equitable principles demanded of a fiduciary required an equal pro-rata distribution "in equity and in good faith". (R., p. 18, 19)

Appellants assert, on page 10 of their current brief, that the Probate Court committed clear error in refusing to consider Testatrix's intent, as evidenced by the language "regardless of whether (Appellant's') interpretation was actually testator's intent . . . .". This language is not found in either order of the Probate Court. Rather, this language is from the Order of the Court of Common Pleas. (R., p. 7). It refers to Appellant's intent relative to whether broad discretion applies to the residuary clause, not to any specific intent with respect to the division of any specific property. The Court of Common Pleas is not expressing a disregard for what the Testatrix's intent might have been. It is stating that, *even accepting* Appellant's assertion that Testatrix intended for the Personal Representatives to have broad discretion the distribution of the residuary assets, such discretion is not absolute, is subject to fiduciary considerations, and accordingly:

> ". . . I find the lower court's ruling – that here, the fiduciary duty in fact requires a pro-rata distribution.
>
> (R., p. 7)

b. The holding of the Probate Court was unsupported by any evidence, and the terms of the will expressed a contrary intent.

Appellants argue that the inclusion of the set-off provision in the residuary clause creates unequal interests in the residuary, and that, somehow, this should be interpreted as an intent on the part of the Testatrix that the residuary estate not necessarily be distributed equally. This conclusion is unwarranted. The set-off provision simply indicates an intent to assure that all beneficiaries are ultimately treated *equally,* taking *inter vivos* transfers into consideration. (see Order of the Probate Court in its Order Denying Reconsideration. R., p. 12). The beneficiaries to whom the set-off provision apply are no longer involved, so, while Respondents might persist in arguing over Testatrix's intent, there is no argument to be made that a pro-rata division of the

residuary estate would be contrary to Testatrix's clear intent that these three beneficiaries receive residuary distributions of equal value, or is not consistent with the residuary clause as well as the set-off provision. It is equally indisputable that the Probate Court's requirement of a pro-rata distribution is fair and equitable in all respects.

Appellant's assert that "no court, to date, has cited any verbiage in the four corners of the document which suggests that Testatrix ever intended for the children to share all property in equal ownership shares". This has never been argued by Respondent, or found by any court in this process. In fact, the children have not received equal shares in all estate property. Jim Kelly received a strictly monetary distribution. Appellants have already received the Rockville property in its entirety. As stated, the will also shows that Testatrix did not intend for any beneficiary to receive an interest in *both* resort properties, or that Appellants themselves should receive *any* interest in the Lake Summit property. The inescapable fact is, at this juncture, a division of the residual real properties must be made. It is axiomatic that the division must be made in a fair and equitable manner, and the Probate Court found after a full evidentiary hearing, that the only way to do so was through a pro-rata distribution.

Before the Probate Court was abundant evidence that the character of the various real estate assets to be distributed was fundamentally different. Lake Summit is a desirable resort property that its owners are able to personally enjoy, even while recouping all of its costs through rentals. (R., p. 118, ll. 12 – 25, p. 119, ll. 1 – 12, p. 131, ll. 9 – 14) The other properties, (a mishmash of interests in which the majority are consigned to Respondent by Appellants in order to offset the value of Lake Summit) are investment properties with no improvements, onerous carrying costs (R., p. 117, ll 1-25, p. 118, ll1-3), and, having never been used by the family, devoid of sentimental attachment. (R., p. 115, ll. 10 – 18) Considering the

unforeseeable, drastically altered complexion of the estate and the set of beneficiaries, coupled with the competing characteristics of the assets to be distributed, the Probate Court's decision, affirmed by the circuit court and the Court of Appeals, that fiduciary principles here required an equal, pro-rata division was clearly not without evidence.

II. The Court of Appeals erred in holding that the Testatrix's grant of broad discretionary authority to the Personal Representatives with respect to distributions did not apply to Residuary Estate Assets.

a. The laws of this State grant Personal Representatives broad discretionary authority in distribution of estate assets.

b. A plain reading of the terms of Testatrix's will evidences a testamentary intent to confer these broad powers upon the Personal Representatives.

These assertions are not in dispute. What is in dispute is Appellant's view that such discretion is unbridled, absolute, "raw discretion" (R. p. 190, ll. 11 – 13), unconstrained by any obligation to other beneficiaries save that of making the numbers "come out equal". The Court of Appeals found that:

> There is evidence in the record to support the circuit court's finding that a plain reading of the Will and the duties imposed upon a fiduciary require the Disputed Properties to be divided into equal ownership interests. (Decision of the Court of Appeals, p. 1)
>
> Although the Will did not clearly provide for whether the shares should consist of equal ownership interests or shares of equal monetary value, South Carolina law requires a personal representative to distribute the estate for the best interests of the estate, not for his or her own personal interests. (Decision of the Court of Appeals, p. 2)

This principal is hardly up for debate. No court is required to scour the language of a will to determine whether a testamentary grant of "broad discretionary authority" to a personal representative includes the power to disregard the fiduciary principals and the duty to act in the best interests of the estate and the other beneficiaries. The findings of the lower courts, including

the Court of Appeals, is that fiduciary considerations control, even in the exercise of broad discretion. There is substantial evidence in the record to support the conclusion of the lower courts that that appellant's proposed distribution is unreasonable. The Court of Appeals specifically cites the lack of an apparent reasonable purpose for the proposed distribution (the gerrymandered division of the other properties in order to preserve for the personal representatives the entirety of the Lake Summit property.)

III. The Court of Appeals erred in holding that the Personal Representative's proposed distribution was a violation of their fiduciary duty where there was no evidence to support such a finding.

a. There is no evidence which supports any violation of the Personal Representative's fiduciary duties to the estate where the proposed distribution results in each beneficiary receiving equal monetary shares.

> "Appellants contend this (fiduciary) duty requires **only** that each beneficiary receive a distribution of **equal** (pecuniary) value"
>
> (Brief of Appellants, p. 15) (bold letters in original)

Appellants propose a legal principal which would forbid the courts of South Carolina from scrutinizing, in any case, a proposal for distribution so long as the monetary values can be shoe-horned into an equalized balance sheet. Appellants cite no authority for such a rule. The ways to divide estates into equal, though non-pro-rata shares are limited only by the imagination. Obviously, some could be deemed unreasonable and self-serving. There is no reason that the courts should be prohibited from considering the fairness and reasonableness of distributions when called upon to do so just because the personal representatives have managed an accounting that equalizes values. That those who find themselves in the position of personal representative should be allowed to cherry-pick among the estate assets with no possibility of judicial review would be a license for abuse, and a poor legal principal indeed.

Further, the Probate Court did not articulate or suggest that it was applying some blanket

rule that the only appropriate method of distribution which can satisfy the fiduciary duty . . . is in equal ownership shares. Appellants argue "no party or court to date has provided **any** case law or statutory authority which stands for the proposition that the **only** way to satisfy (the fiduciary) duty is to distribute real property in the residuary estate in equal ownership shares." No authority has been cited for such a rule precisely because no such rule has been posited. Rather, after an evidentiary hearing, the probate court, in accordance with its charge under the Private Family Settlement Agreement (R., p. 220), decided that, after hearing the evidence and arguments of counsel, that it would "make a determination on the residuary assets in light of the duties imposed upon a fiduciary" (R., p. 18) "in equity and in good faith" (R., p. 19.). The evidence before the court included the gerrymandered division of the properties other than Lake Summit, allowing the Personal Representative's ability to assign that property to themselves, the fact that the Personal Representatives had already inherited the other desirable resort property, and the consignment to Respondent of the lion's share of the financial burden associated with the assets to be distributed. The court heard substantial testimony regarding the sentimental value of Lake Summit to the family.

Appellants attempt to characterize the agreement of the parties concerning the appraised value of the properties as if that agreement was dispositive. The purpose of the agreement was to avoid a contest over the accuracy of the appraisals. This characterization of the agreement is apparent from discussions with the probate court. (R.. 127, ll. 5 – 21) Even if such a contest had occurred, and the various values been adjusted by the court, the Personal Representatives may well have simply adjusted their calculations, affording Respondent a larger or smaller share in the other assets, while still retaining Lake Summit. Had Respondent intended to agree to the values as an all-encompassing, comprehensive statement of intrinsic worth, as opposed to simply

the results of the appraisals, this dispute would never have arisen and no hearing would have been held in the Probate Court. Respondent's position is that considerations of unqualifiable, but nevertheless intrinsic values are properly considered by the courts in certain circumstances, and in some cases, can be compelling. The accuracy of the appraisals is not the point of this dispute. The point is, taking the appraised values, whatever they may have been, are the personal representatives free to make any division of assets divisions based on those values free from scrutiny as to whether those divisions are consistent with fiduciary considerations? Appellants argues a standard that would prohibit courts from ever scrutinizing such things.

b. A ruling that requires Personal Representatives to consider other non-pecuniary factors is incompatible with the laws of this state.

Appellants argue here that Respondent is advocating a position that would require a personal representative to take into account unqualifiable non-economic factors of assets when distributing estates. Citing *Zimmerman v. Marsh,* 618 S.E.2d 898 (S. Ct. 2005), they concede that personal representatives may consider such things, but assert that they are under no obligation to do so. Appellant makes the contrary argument that such considerations may, at times, be relevant and required. As an example, if one beneficiary has worked his entire life in his father's business, protecting and increasing its value in his father's decline, and rising to the position of president by the time of his father's death, should the courts be forbidden from scrutinizing a distribution in which the personal representative decides to takes that business for himself, distributing to the involved son a work of art of equal appraised value?

Respondent's analysis of *Zimmerman* is erroneous to the extent that they assert it stands for the proposition that while consideration of non-economic value may be considered, the language stating "pecuniary interests . . . is the determining factor" trumps and overrides any

such consideration. It goes without saying that the pecuniary interests must be equal. But such an interpretation would nullify the remainder of the opinion, i.e,, that non-economic factors may be considered and acted upon where the evidence requires. The *Zimmerman* court could simply have stated that no non-economic factors were relevant, so long as the pecuniary interests were equal. It did not. Rather, it left open the possibility that, after examining the pure pecuniary interests as well as non-pecuniary factors, in appropriate circumstances, a court might exercise either option, sale or allotment. (see also *Ark Land Company v. Harper*, 215 W.Va. 331, 599 S.E.2d 754, cited by the Supreme Court in *Zimmerman)*. Respondent's conclusion that . . . "ultimately the case law of this state requires only that Appellants ensure all parties receive equal monetary distributions" does not accurately represent the holding in *Zimmerman,* nor is it found elsewhere in the case law of this state.

Appellant's discussion regarding honoring the intent of the Testatrix is unconvincing. As previously discussed, Testatrix's intent regarding the real properties of the estate has been frustrated to the extent that it is unrecognizable. She originally had six children to consider. We are left with three. Her intent was clearly that no set of beneficiaries receive both resort properties. Her intent was that Appellants receive no interest in Lake Summit. She originally intended Respondent to receive none of the real properties. None of this is now possible. Appellants must divide the real properties among the remaining beneficiaries. Inarguably, this must be done in accordance with fiduciary principles.

When a fiduciary is self-dealing, the standard of scrutiny is enhanced. "The transactions are subject to the closest scrutiny, under the most searching light of truth, and must be characterized by absolute good faith". *Gilbert v. McLeod Infirmary*, 219 S.C. 174, 64 S.E.2d 60 (S.Ct. 1951). Respondent would argue that this standard is acutely relevant where, through

happenstance, the personal representatives outnumber the beneficiary two to one, and are acting in concert.

> It is a well settled equitable rule that anyone acting in a fiduciary relationship will not be permitted to make use of that relationship to benefit his own interests. It is a doctrine repeatedly announced by the courts of this nation that the courts of equity will scrutinize with the most zealous vigilance transactions between parties occupying confidential relations toward each other and particularly any transaction between parties by which the dominant party secures any profit *or advantage* at the expense of the person under his influence. (italics supplied)
>
> *Island Car Wash v. George F. Norris, III, et. al*
> 358 S.E.2d 150, 292 S.C. 595 (Ct. App. 1986)

These principles, articulated in *Gilbert* and *Island Car Wash* are completely at odds with Appellant's position that they enjoy raw and absolute discretion in making distributions, immune from court scrutiny, so long as they are able to balance the numerical value of the interests based solely on appraised values. It is worth noting that the court in *Island Car Wash* employs the words "profit or advantage", strongly implying that a fiduciary's responsibility is not limited solely to raw pecuniary considerations.

IV. The Court of Appeals erred in holding that title to property had already passed to the Respondent.

While Appellants is correct in asserting that the general vesting of real property in devisees is subject to the purposes of administration, it does not follow that the Personal Representative's power over such matters extends to acting in an arbitrary manner contrary to their fiduciary duty. Representative's authority is, as always, constrained by statute, principles of probate administration, and the obligations of a fiduciary. It does not extend, as claimed by Appellants, to "raw discretion". Language in a will, or statute granting broad authority to personal representatives is intended to provide reasonable flexibility where needed in estate

administration, not as a shield from scrutiny.

V. The Court of Appeals erred in holding that the Private Family Agreement divested the Personal Representatives of their discretionary powers and their ability to challenge the Probate Court's plan of Distribution.

The language of the Private Agreement was drafted by Appellant's attorneys (Record, p. 220, item 7). It is clear and unambiguous. This plain language states simply and directly, ". . . the only exception being the allocation of the residuary assets between Kathleen S. Turner, Jacquelin S. Bennett, and Genevieve S. Felder (which will either be resolved by subsequent agreement or will be determined by the Charleston County Probate Court)". In its Order Regarding the Division of Real Property, the probate court said "Since no subsequent agreement has been presented, the Charleston County Probate Court will make a determination on the residuary assets *in light of the duties imposed upon a fiduciary*". (Record, p. 18, item 11)

As Appellants observe, the idea that the parties relinquished any say in the process moving forward is incompatible with the probate court's decision to conduct a hearing, wherein the parties were fully heard. As previously discussed, however, its findings did not "disregard the plainly stated intent of the testatrix in contravention to established case law and to apply new, never before applied standards in determining how the property ought to be divided. The intent of the Testatrix with regards to the Lake Summit property, given that its intended devisees have been disqualified, is hardly plainly stated, and the probate court's making its decision in light of fiduciary principals is hardly novel or contrary to established case law.

A court makes no statement regarding its ultimate findings, nor does it limit itself, by affording the parties the opportunity to be heard. The Probate Court expressly made its decision in light of fiduciary principals, the plain language of the Private Agreement, and of the residuary clause. That a court employed fiduciary principals in making its decision was no more than what

it (and Appellants), was required to do. The decision of the probate court is undeniably equitable. It is undeniably consistent with the residuary clause. This cannot be said about Appellant's proposed distribution.

CONCLUSION

For the reasons stated, the Court should affirm the decision of the Probate Court, previously affirmed by the Court of Common Pleas and the Court of Appeals.

Respectfully submitted this 26th day of May, 2021

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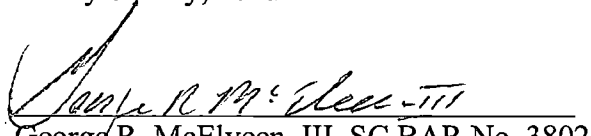
CERTIFICATE OF SERVICE

The undersigned hereby certify that this Brief of Respondent been served on Appellants by e-mail, and by depositing the same in the regular US Mail, with proper postage attached, addressed to Andrew J. McCumber, Esq., Daniel S. Slotchiver, Esq., and Stephen M. Slotchiver, Esq., 751 Johnnie Dodds Blvd., Suite 100, Mount Pleasant, South Carolina, 29464, this 26th day of May, 2021.

Respectfully submitted this 26th day of May, 2021



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