THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Brian M. Gibbons

C.A. No.: 2019-CP-22-01226
C.A. No.: 2019-CP-22-01239
C.A. No.: 2019-CP-22-01245

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 RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court correctly find that that Ernest J. Gardner, Jr. did not make a timely claim against the estate of Jason F. Gardner?

2. Did the Circuit Court correctly determine that Michelle N. Gardner, as an allowed creditor of the Estate of Jason F. Gardner, was entitled to have her claim paid from the Estate's assets as a matter of law?

STATEMENT OF THE CASE AND FACTS[1]

This appeal stems from the claims of competing creditors of the Estate of Jason F. Gardner (the "Decedent"). Michelle N. Gardner ("Ms. Gardner") is the former wife of the Decedent, and the Appellant is the Decedent's father, Ernest J. Gardner, Jr. ("Dr. Gardner"). Each of these parties made a claim against the Estate. (R. at 93 ¶¶ 3, 5, 121, 123).

The Decedent and Ms. Gardner were divorced by order dated December 6, 2011. (R. at 93 ¶ 6, 6-45). The Decedent died testate on October 17, 2016; and Dr. Gardner was appointed Personal Representative. (R. at 93 ¶¶1,2, 286-91). The standard form of creditors' notice was run in the Georgetown Times newspaper once per week for three consecutive weeks, containing warning of the potential bar should a claim not be filed within eight months following the first run on November 11, 2016. (R. at 292). On December 15, 2016, counsel for Dr. Gardner mailed to counsel for Ms. Gardner a copy of the Affidavit of Publication of Notice to Creditors, with a notation that a copy was emailed to Dr. Gardner. (R. at 284-92). The creditors' claims period contemplated by S.C. Code Ann. § 62-3-801(a) ran on July 11, 2017.

Ms. Gardner filed a claim on July 10, 2017, seeking to recover lump sum alimony payments that were a term of her divorce agreement ("Divorce Agreement") with the Decedent.[2] (R. at 121). Her claim of $328,000 was allowed by Order of the Probate Court dated March 8, 2019 ("March 8 order"). (R. at 78-91). The allowed claim was to be payable by the Estate in forty-one monthly installments of $8,000.[3] No payments have been made.

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[1] As agreed by the parties and the Circuit Court, the facts are not in dispute and are consistent with the Findings of Fact as stated in the Probate Court's Order of December 10, 2019.

[2] The Divorce Agreement also included a provision by which Ms. Gardner waived any right to the Decedent's retirement accounts.

[3] In reaching that result, the Probate Court made the following rulings that are pertinent to this Appeal:

Dr. Gardner filed a claim on August 7, 2017 for $228,662.27 plus interest. (R. at 123). He claims this amount was owed to him on an unsecured promissory note from the Decedent.

Ms. Gardner filed a motion for summary judgment with the Probate Court seeking a determination as to whether Dr. Gardner's claim was time-barred and a determination that Ms. Gardner's claim against the Estate could be paid using retirement fund assets.[4] (R. at 214-15). Additionally, Dr. Gardner filed a motion for partial summary judgment on the timeliness issue. (R. at 217-18). The motions were heard by the Probate Court on August 22, 2019.

By order dated December 10, 2019, the Probate Court ruled that since Dr. Gardner was "a known creditor with actual notice," the eight-month publication deadline did not apply to him and his claim was therefore timely because it was filed within one year of the Decedent's death. The Probate Court's ruling was based solely on its construction of the nonclaim statute. (R. at 92-101). The Probate Court expressly ruled that there were not any due process concerns because "Ernest Gardner was not only a known creditor with actual notice, he was also a creditor who received written notice when he was provided a copy of the Notice to Creditors published

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1. The Probate Court had jurisdiction over the matter.

2. The Divorce Agreement did not require that the lump sum alimony be drawn from a particular account.

3. Any life insurance policy held by Ms. Gardner on the Decedent was not intended to offset the lump sum alimony obligation.

4. The lump sum alimony obligation did not end with the Decedent's death.

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

[4] Of note for purposes of this appeal, there is a retirement account listed on the Estate's original Inventory and Appraisement form filed as a part of the Estate's administration as having no designated beneficiary and being thus payable to the Decedent's Estate. (R. at 294-98).

pursuant to S.C. Code Ann. § 62-3-801(a)." *(Id.)* The Probate Court further found that S.C. Code Ann. § 62-3-803(c) and (d) did not provide an additional basis for allowing the claim.[5]

With respect to the issue of retirement fund assets, the Probate Court ruled that the waiver signed by Ms. Gardner as a part of her divorce settlement with the Decedent did not bar her from recovering against the Estate's assets on her allowed claim, ruling that the Decedent's Estate "is required to respond to her, like any other creditor, with any assets available to it." (R. at 100).

The parties cross-appealed to the Circuit Court pursuant to S.C. Code Ann. § 62-1-308. (R. at 328-353). The issues presented were as follows:

Appeal of Michelle N. Gardner

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

Appeals of Ernest J. Gardner, Jr., individually and as Personal Representative of the Estate of Jason F. Gardner[6]

- Did Respondent's express waiver of "any and all right, title, interest or claim she has, had, or may have" in decedent Jason F. Gardner's retirement accounts pursuant to their divorce settlement preclude Respondent from recovering the proceeds of such accounts to the extent Jason F. Gardner did not name a beneficiary and the accounts are payable to his estate?

- Did the probate court err in granting Respondent's motion for partial summary judgment and ruling that Respondent's divorce agreement waiver did not preclude her from reaching the proceeds of decedent Jason F. Gardner's retirement accounts?

(R. at 362, 377).

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[5] On subsection (d), the Probate Court found that the facts were in dispute and summary judgment would not be appropriate. (R. at 99).

[6] Or, as counterstated by Ms. Gardner, "[d]id the Probate Court correctly determine that Michelle N. Gardner, as an allowed creditor of the Estate of Jason F. Gardner, was entitled to have her claim paid from the Estate's assets as a matter of law at the summary judgment stage?" (R. at 405).

The appeals were consolidated by order dated January 27, 2020. (R. at 102-08). The Circuit Court heard arguments on October 30, 2020 and issued an order on November 23, 2020 affirming in part, reversing in part, and remanding this matter to the Probate Court. (R. at 109-20). The Circuit Court ruled in Ms. Gardner's favor on all issues, finding that Dr. Gardner's claim was not timely filed and that Ms. Gardner's claim was recoverable against the assets of the Estate regardless of the source of those assets.[7] Dr. Gardner appealed.

STANDARD OF REVIEW

A motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. "Where cross motions for summary judgment are filed, the parties concede the issue . . . should be decided as a matter of law." *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011); *see also Quicken Loans, Inc. v. Wilson*, 425 S.C. 574, 579, 823 S.E.2d 697, 700 (Ct. App. 2019).

Here, the facts are not in dispute. Instead, the Court is called to construe portions of the probate code and to interpret unambiguous language in the Divorce Agreement. Both of these determinations are matters of law for the court. *See McDuffie v. McDuffie*, 313 S.C. 397, 399, 438 S.E.2d 239, 241 (1993) (holding family court agreements should be construed as a matter of contract law); *Pearson v. Church of God*, 325 S.C. 45, 54, 478 S.E.2d 849, 853 (1996) (finding construction of an unambiguous contract is a matter of law for the Court); *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) ("Determining the proper

[7] With respect to Argument II in Dr. Gardner's brief, Ms. Gardner does not read the Circuit Court's order to make any finding as to which assets are part of the Estate, but rather to say that Ms. Gardner's should be paid from those assets regardless of their source.

interpretation of a statute is a question of law, and this Court reviews questions of law de novo.").

ARGUMENT

I. Dr. Gardner's claim is time barred.

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

Dr. Gardner, as the Personal Representative, was in the single best position of any potential creditor to make a prompt claim. Without question, he had actual notice. (R. at 97).[8]

The Probate Court's ruling excused his failure to make a claim until August 2017, reasoning that the nonclaim statute gives any creditor whose identity is known to the personal representative one year following the decedent's death to file a claim. (R. at 95-99). In effect, the Probate Court ruled that a creditor known to the Personal Representative cannot be barred by publication, no matter how intimately or actually aware the creditor is of the published claims-barring notice. The Probate Court ruled as follows, "[t]he fact that a known creditor who is given actual notice [of the Estate's proceedings] is also given written notice which includes an eight month publications deadline does not convert that creditor into one barred by publication.

[8] Therefore, there are no due process concerns in this case. Dr. Gardner makes much of *Tulsa Prof'l Collections Servs. v. Pope*, 485 U.S. 478 (1988) in his brief. Nothing about *Tulsa* directly implicates the construction of the South Carolina nonclaim statute. Instead, the rule from *Tulsa* is very simply that if appellant's identity as a creditor was known or "reasonably ascertainable," then the Due Process Clause requires that appellant be given "[n]otice by mail or other means as certain to ensure actual notice." *Id.* at 491.

..." (R. at 98). The Circuit Court disagreed and reversed this ruling, finding that Dr. Gardner's claim was barred for failure to file a timely claim. (R. at 112-16).

The nonclaim statute provides in part as follows:

> a) All claims against a decedent's estate which arose before the death of the decedent, . . ., whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by another statute of limitations or nonclaim statute; are barred against the estate, the personal representative, the decedent's heirs and devisees, and nonprobate transferees of the decedent; **unless presented within the earlier of the following**:
>
> > (1) one year after the decedent's death; or
> > (2) the time provided by Section 62-3-801(b) for creditors who are given actual notice, and within the time provided in Section 62-3-801(a) for all creditors barred by publication. . ..

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

> (a) **Unless notice has already been given under this section**, a personal representative upon his appointment must publish a notice to creditors once a week for three successive weeks in a newspaper of general circulation in the county announcing his appointment and address and notifying creditors of the estate to present their claims within eight months after the date of the first publication of the notice or be forever barred.
>
> (b) A personal representative may give written notice by mail or other delivery to any creditor, notifying the creditor to present his claim within one year of the decedent's death, or within sixty days from the mailing or other delivery of such notice, whichever is earlier, or be forever barred. Written notice is the notice described in (a) above or a similar notice.

(emphasis added).

These provisions must be construed in light of the directives of S.C. Code Ann. § 62-1-102 and its mandate that the Probate Code "shall be liberally construed and applied to promote its underlying purposes and policies[,]" which include "(3) to promote a **speedy and efficient system** for liquidating the estate of the decedent and making distribution to his successors[.]" (emphasis added). These statutes all suggest closing the claims period earlier, rather than later.

Generally,

> Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below. The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature. 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. In interpreting a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Further, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect.

In re Estate of Hover, 407 S.C. at 203-04, 754 S.E.2d at 879 (citations and quotations omitted). South Carolina courts "will not construe a statute in a way which leads to an absurd result or renders it meaningless." *Florence Cty. Democratic Party v. Florence Cty. Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012). In addition, the nonclaim statute must be construed consistent with S.C. Code Ann. § 62-3-801 and the rest of the Probate Code. "Statutes in pari materia . . . have to be construed together and reconciled, if possible, so as to render both operative." *Lewis v. Gaddy,* 254 S.C. 66, 70, 173 S.E.2d 376, 378 (1970).

When these statutes are viewed together, it becomes apparent that if notice has been given by publication pursuant to S.C. Code Ann. § 62-3-801(a), the eight month bar will apply "unless notice has already been given under this section" as of the date of publication. The quoted language refers to the alternate notice provision, not relevant to this appeal, pursuant to which the personal representative may serve a creditor with written notice to file its claim within sixty days, or prior to the first anniversary of the decedent's death, whichever is earlier. This language only has meaning if it references notice previously given under some other subsection of § 62-3-801, such as § 62-3-801(b). If notice has already been given under § 62-3-801(b), the provisions of that section will apply, and the deadline is "one year of the decedent's death, or within sixty days from the mailing or other delivery of such notice, *whichever is earlier.*"

(Emphasis added). Otherwise, the claims "will be barred within the time provided in Section 62-3-801(a) for all creditors barred by publication." As found by the Circuit Court,

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

(R. at 114).

This interpretation is consistent with the Reporter's Comments to the nonclaim statute, which state, "[c]laims arising before death, unless barred by other statutes of limitation, are barred unless presented as follows: (1) for those creditors not barred by publication within the earlier of one year following date of death or sixty days from any actual notice; and (2) for those creditors barred by publication within the earlier of one year from date of death or eight months from any publication." S.C. Code Ann. § 62-3-803 (Reporter's Comment).

The intent of the statute is that the publication of notice applies to all creditors as reflected on the approved probate court form for "Notice to Creditors." Form 370ES, SCRPC ("All persons having claims against the following estate **MUST** file their claims . . . within eight (8) months after the date of publication of this Notice to Creditors or within one (1) year from date of death, whichever is earlier . . ."). This language mirrors S.C. Code Ann. § 62-3-801, which does not limit its application to unknown creditors, but rather applies to all creditors unless "notice has already been given." This construction provides clear guidance to creditors: all are bound by the published eight month notice unless the specific, alternative sixty day notice described in S.C. Code Ann. § 62-3-801(b) has been given.

Dr. Gardner wants to completely separate S.C. Code Ann. § 62-3-801(a) from § 62-3-801(b). In doing so, he ignores the plain language of the statute as emphasized above. Section

62-3-801(a) expressly contemplates that § 62-3-801(a) applies unless notice has already been given under § 62-3-801. Moreover, § 62-3-801(b) provides that the notice can be in the form provided in § 62-3-801(a). Thus, nothing in S.C. Code Ann. § 62-3-801 prevents a known creditor with actual notice from being barred by publication for purposes of S.C. Code Ann. § 62-3-803.

The statutes speak for themselves. Dr. Gardner's argument relating to the amendment history of § 62-3-801 is unavailing because the legislature could have easily amended § 62-3-801(a) to clarify that it only referred to notice under that subsection at the same time § 62-3-801(b) was added. The legislature did not do so. Therefore, the plain language must be followed, such that § 62-3-801(a) applies unless notice has already been given through some other means under § 62-3-801.

The problem with the construction urged by Dr. Gardner and adopted by the Probate Court is highlighted in the following discussion from the Circuit Court:

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

(R. at 115).

Dr. Gardner was aware of the existence of his claim and of the requirement that it be filed within eight months following the first run of the notice. He simply failed to file a timely claim. This Circuit Court found that Dr. Gardner's claim should be held to the same standard he advertised to others. As a result, the Circuit Court correctly found that Dr. Gardner's claim was not filed timely and is barred.

II. Ms. Gardner's allowed claim should be paid from the Estate's assets, regardless of the source of those assets.

The Decedent and Ms. Gardner were divorced by order dated December 6, 2011. (R. at 93). The agreements executed in conjunction with their divorce speak for themselves (collectively, the "Divorce Agreement"). With respect to lump sum alimony, the Divorce Agreement provided:

> In lieu of the alimony set forth in Paragraph 1.B. of the Custody, Property and Support Settlement Agreement filed December 6, 2011, Husband agrees to pay Wife lump sum alimony as set forth herein. Husband shall pay directly to Wife the sum of Eight Thousand Dollars ($8,000.00) per month, as and for non-refundable lump sum alimony, commencing on November 1, 2013, and payable on the first of each month thereafter for a period of seventy-eight (78) months. These payments shall be paid by automatic bank draft by Husband into Wife's account of her choosing, and Wife shall provide Husband with all necessary bank account information to effect this monthly transfer. These payments are non-modifiable and will not terminate upon the remarriage of Wife or Wife's cohabitation as set forth under South Carolina law. These payments shall be taxable to wife and deductible to Husband.

(R. at 80 ¶ 4, 61-77).

Ms. Gardner's claim here is as an allowed creditor with respect to the Decedent's lump sum alimony obligation. (R. at 78-91). Ms. Gardner has not made any claim on any retirement account held by the Decedent. Instead, she has made a claim against the Estate seeking the benefit of her bargain as to lump sum alimony. The Probate Court confirmed that she had a right to make that claim in the March 8 order, which is not on appeal and is the law of the case.

Dr. Gardner's appeal to the Circuit Court was limited to whether Ms. Gardner had waived her right to recover from Decedent's retirement account payable to Decedent's Estate. (R. at 366). He raised general waiver and summary judgment principles. (R. at 366-72). To the extent that Dr. Gardner seeks to add additional arguments in his appeal to this Court, those arguments are not preserved for review as they were neither raised to nor ruled on by either the Probate Court or the Circuit Court. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 734 (1998) (holding that to be preserved for appellate review, an argument must have been raised to and ruled on by the trial court).[9]

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

Dr. Gardner fails to acknowledge, however, that the Divorce Agreement also includes an agreement for lump sum alimony and that Ms. Gardner has to the right to enforce her benefit of that bargain through a claim against the Estate. Ms. Gardner does not care what those assets are as long as her claim is paid.

Per the South Carolina Probate Code, "[e]state" includes the property of the decedent, trust, or other person whose affairs are subject to this Code as originally constituted and as it exists from time to time during administration." S.C. Code Ann. § 62-1-201. With respect to an allowed claim, such as Ms. Gardner's, payment shall be made from the Estate "in the order of

[9] By way of example, Argument III of Dr. Gardner's brief includes new analogy to creditor/ debtor rights, a new argument relating to whether Ms. Gardner waived her "expectancy interest" in any retirement account, and a new theory of promissory estoppel. None of these arguments, however, change the analysis under the Probate Code as to the payment of Ms. Gardner's allowed claim.

priority prescribed, and after making provision for the homestead, for exempt property under Section 62-2-401, for claims already presented which have not been allowed or whose disallowance is the subject of a legal proceeding, or the time to file such a proceeding has not expired, and for unbarred claims which may yet be presented, including costs and expenses of administration." S.C. Code Ann. § 62-3-807(a). Priority is set forth in S.C. Code Ann. § 62-3-805. It is under these provisions that Ms. Gardner seeks payment. The fact that the proceeds of a retirement account may be included among the Estate's assets does not change her claim against the Estate or her right to payment under these statutes.

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

Ms. Gardner makes no such claim in this case. She makes no claim as a beneficiary, with regard to the Decedent's retirement benefits or otherwise. Instead, her claim is as an Estate creditor. It is independent of the Decedent's retirement-benefit designation and made solely against the Estate's probate property, whatever it may be. *Stribling* is therefore not applicable.

This case is similar, instead, to that of *Hawkins v. McLaughlin*, 16 Cal. Rptr. 572 (Cal. Ct. App. 1961). In *Hawkins*, ex-wife filed a creditor's claim against the estate of her deceased former husband for funds due under their property settlement agreement, which called for payments of $50 per month to be made to her by him. The Hawkins court first concluded that pursuant to the parties' agreement, the ex-husband's estate was obligated to continue such

monthly payments notwithstanding the ex-husband's death. This ruling is consistent with the Probate Court's unappealed March 8 order allowing Ms. Gardner's claim.

In *Hawkins*, ex-husband's estate then argued that the broadly worded waiver language of the parties' property settlement agreement was a bar to ex-wife's ability to file a creditor's claim for the monthly payments. Characterizing such a construction as "self-stultifying," the court rejected this argument. The waiver language in *Hawkins* read:

> That said parties hereto hereby waive any and all rights to the estate of the other left at his or her death, and quit claim any and all right to share in the estate of the other, by the laws of succession, and said parties hereby release one to the other all right to be administrator or administratrix, or executor or [executrix] of the estate of the other, and hereby release and waive all rights to inherit under any will of the other and each of said parties hereby waive any and all right of homestead in the real property now owned or hereafter acquired by either of said parties, and said parties hereby waive any and all right to the estate or any interest in the estate of the other for family allowance by way of inheritance, and each party herein shall have all the rights of a single person.

Id. at n. 2. Quoting with approval *Anderson vs. Mart*, 303 P.2d 543 (Cal. 1956), with regard to the inapplicability of the waiver contained in a property settlement agreement to the ability of a divorced spouse to file a creditor's claim for unpaid monthly installments of alimony against her husband's estate, the Court held as follows:

> It is obvious that the fourth paragraph refers only to any rights to share in the estate not otherwise provided for in the agreement. It is similar in its broad language to the provisions of the second and third paragraphs in which each of the parties waived all rights in any of the property assigned to the other and any property to be thereafter acquired by the other. **Taken together these provisions make [it] clear that neither party should have any rights in the property or the estate of the other growing out of the marital relationship. The agreement was executed to settle and dispose of those rights in exchange for those provided in the agreement, and manifestly the agreement would be self-stultifying if the mutual relinquishment of marital rights was so broad as to prevent the enforcement of the contractual obligations given in consideration** therefor....

Id. at 576 (emphasis added).

As in *Hawkins*, Ms. Gardner and the Decedent executed the Divorce Agreement to settle and dispose of any rights either had in the other's property. In exchange, the parties agreed to the rights and obligations provided in the Divorce Agreement, including the lump sum alimony. Rather than advancing this goal, Dr. Gardner seeks to deprive Ms. Gardner of the benefit of her bargain by redefining what is available in the Estate to satisfy her creditor's claim. The position that Dr. Gardner would have this Court adopt would indeed be "self-stultifying" if Ms. Gardner's and the Decedent's mutual relinquishment of marital rights were construed so broadly as to prevent the enforcement of the contractual obligations received in exchange, *i.e.*, the lump sum alimony and the ability to collect in the event of a breach.

With respect to the allowed claim, the South Carolina Probate Code governs what is in the Estate, what must be paid, and the priority for payment. Under this plain language, the Probate Court and the Circuit Court both correctly found that any Estate asset may be used to satisfy Ms. Gardner's allowed claim.

CONCLUSION

The Circuit Court correctly applied the law to the facts of this case as found by the Probate Court. As such, that order should be affirmed and this case remanded for final disposition by the Probate Court.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that the final brief of respondent in this matter complies with Rule 211(b), SCACR and the April 15, 2014 Order of the South Carolina Supreme Court relating to personal data identifiers with one exception. In preparing the final brief, I discovered an error in the Statement of the Case and Facts. With the written consent of opposing counsel, I have changed a paragraph in the initial brief (the included footnote is unchanged). The paragraph in question appeared on page 3 of the initial brief:

> Ms. Gardner filed a motion for summary judgment with the Probate Court seeking a determination as to whether Dr. Gardner's claim was time-barred. (Motion, R. at ____). Additionally, Dr. Gardner filed a motion for partial summary judgment, seeking an order directing that Ms. Gardner's claim against the Estate could not

be paid using retirement fund assets. (Motion, R. at ____). Ms. Gardner filed a cross-motion on July 22, 2019. (Motion, R. at ____). The motions were heard by the Probate Court on August 22, 2019.

The revised paragraph in the final brief reads:

> Ms. Gardner filed a motion for summary judgment with the Probate Court seeking a determination as to whether Dr. Gardner's claim was time-barred and a determination that Ms. Gardner's claim against the Estate could be paid using retirement fund assets. (R. at 214-15). Additionally, Dr. Gardner filed a motion for partial summary judgment on the timeliness issue. (R. at 217-18). The motions were heard by the Probate Court on August 22, 2019.

Respectfully submitted,

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June 24, 2021