

The State of South Carolina
In The Court of Appeals

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Jul 19 2021

SC Court of Appeals

Appeal from Charleston County
Hon. J. Derham Cole, Circuit Court Judge

Case No. 2019-CP-10-1887
Probate Case No. 2016-ES-10-02054
Appeal Case 2020-000853

In the Matter of re Estate of Annie Mae Crosby:

Jessie Fred Crosby and Robert Edward Crosby, Jr., Respondents

v.

Rose Mae Crosby Walsh, individually and as personal representative of the Estate of Annie Mae Crosby, and Kelvin Wayne Crosby, Respondents,

Of Whom Rose Mae Crosby Walsh, individually and as personal representative of the Estate of Annie Mae Crosby is the Appellant.

Proof of Service

I hereby affirm that I have served upon counsel for the defendant/respondent a copy of

Appellant's Initial Brief

By transmitting a copy of the documents via email a second time (the first time having been May 17, 2021) to counsel of record for the Respondents, Tom Lydon, sent to: tlydon@mgclaw.com to reach him at:

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And by placing a copy of the document in the United States mail, first-class postage pre-paid, addressed to:

Kelvin Crosby
181 Azaelea Drive

Waynesville NC 28786

Done July 18, 2021

s/ Gregg Meyers

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Appellant

Appellants' Initial Brief

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STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court err in concluding the order governing the sale of 3283 Von Oshen Road was not a Consent Order?
2. Did the Circuit Court err in removing the personal representative for violating her fiduciary duties to the estate because she complied with the Consent order?

STANDARD OF REVIEW

The order that removed Rose as personal representative and the ordered her to deed back to the estate the property at 3283 Von Oshen Road are each equitable in nature. *See Dean v. Kilgore*, 437 S.E.2d 154, 155 (S.C. App. 1993) (action to remove a personal representative appointed pursuant to the terms of a will is equitable in nature); *Wheeler v. Estate of Green*, 381 S.C. at 554, 673 S.E.2d 836, 839 (S.C. App. 2009) (a "breach of fiduciary duty [claim] may sound in equity if the relief sought is equitable.") (citation omitted). The appellate court may, therefore, make factual findings according to its own view of the preponderance of the evidence with regard to the removal of Rose as personal representative and the sale of 3283 Von Oshen Road. *Id.*, 673 S.E.2d at 839.

STATEMENT OF THE CASE

This appeal concerns a consent order from the Charleston County Probate Court and parties who objected to the outcome to which they had previously consented.

Anne Mae Crosby (the "Decedent") died on November 29, 2016, survived by four adult children, three of whom are involved in this appeal: Respondents Jessie Fred Crosby ("Jessie"), Robert Edward Crosby, Jr. ("Bobby"), Kelvin Wayne Crosby ("Kelvin"), and Appellant Rose Mae Crosby Walsh ("Rose").¹ (Order, April 2, 2019, p. 2). Ms. Crosby's estate was administered in accordance with her Will, dated April 15, 2009 (the "Will", which is Ex. A to Mem. in Opp'n). The Will named Rose as personal representative and the probate court appointed her by order of January 26, 2017 (Ex. D to Mem. In Opp'n, Consent Order p. 2)..

Pertinent to this appeal, Ms. Crosby's Will bequeathed "[t]he vacant land on Mill Street bearing tax number 385-10-00-018 to my son, Jessie Fred Crosby." (*Id.* at p. 2).

At her death, Ms. Crosby owned a 100% interest in 3283 Von Ohsen Road in Summerville, South Carolina, which was her primary residence until a few years before her death. (*Id.*) Disinterested qualified appraisers assessed the date of death value of 3283 Von Ohsen Road as being \$145,000.00, and the value as of March 28, 2018 as being \$190,000.00. (Ex. B to Mem. in Opp'n, *Appraisals*). As it is adjacent to her own property, Rose filed an Amended Petition for Approval of Sale of Real Estate on April 12, 2018, seeking approval from the court to sell 3283 Von Ohsen Road to herself. (Ex. C to Mem. in Opp'n, *Amended Petition*).

Prior to the hearing on Rose's Amended Petition, Jessie also expressed interest in

¹ Kelvin Wayne Crosby ("Kelvin") is a party to the proceedings below but is not a party to this appeal.

purchasing 3283 Von Ohsen Road from the estate. At the April 23, 2018 hearing for the Amended Petition, all parties agreed to a process and parameters for Rose and Jessie to use for bidding on 3283 Von Ohsen Road, which the court approved. (Ex. D to Mem. in Opp'n, *Consent Order*). That agreement and the bid parameters were memorialized by a Consent Order dated May 16, 2018 (the "Consent Order"). (*Id.*)

To keep the bidding honest, the Consent Order included both a requirement that a winning bid be perfected in ten days by a specified partial payment as well as a fallback provision in case the high bidder could not perfect his or her bid. The Consent Order provided, in pertinent part:

(e) The person submitting the highest bid to purchase 3283 Von Ohsen Road must pay to the Personal Representative of the Decedent's Estate a sum equal to seventy-five percent (75%) of the highest bid within ten (10) days of making the final bid. The highest bidder may only assign up to \$75,000 of his or her expected share of the estate to the purchase.

(f) If the highest bidder cannot make such payment within ten (10) days of making the final bid, then the other party may submit a bid equal to One Hundred Seventy One Thousand Dollars (\$171,000.00) and shall be the highest bidder.

(*Id.* at p. 5).² Rose engaged separate counsel to represent her individual interest in the bid process.

On April 25, 2018, two days after the terms of the consent order had been agreed to before the probate court, and for the first time, counsel for Jessie and Bobby requested that Rose as personal representative immediately deed the Mill Street property to Jessie. (Ex. E to Mem. in Opp'n, *April 25-May 21, 2018 E-mails*). On May 15, 2018, counsel for Jessie and Bobby sent a subsequent e-mail requesting that the Mill Street property be deeded to Jessie. (*Id.*)

² This \$171,000 figure was derived from the March 2018 value of the property minus the fees and closing costs the estate would not incur in selling the property by the bid process to beneficiaries. A regular commercial sale would incur fees and costs that would net the estate the same sum.

Counsel for Rose as personal representative responded on May 18, 2018, and stated that Rose "cannot make a distribution to only Jessie at this time. We would prefer that the remaining outstanding issues of the estate be resolved before further distributions are made from the estate." (*Id.*) Counsel for Jessie and Bobby responded on May 21, 2018, and stated that he would file a motion to compel if counsel for Rose did not deed the Mill Street property. (*Id.*) Counsel for Rose replied on the same day and stated that Rose was in the process of selling various properties owned by the estate and making copies of family photographs, all pursuant to the Consent Order, and that she would make final distribution of estate assets after those matters were handled. (*Id.*)

The bidding for 3283 Von Ohlsen Road began on May 21, 2018. (Ex. F to Mem. in Opp'n, *May 21-31, 2018 Bidding E-mails*). Jessie participated and at no point requested that the bidding be stayed so that the Court could address the Mill Street property. (*Id.*)

The bidding concluded on May 31, 2018, with Jesse's winning bid of \$312,000.00 (*Id.*) for the property valued at \$190,000. Counsel for Jesse circulated an email setting forth that the terms of the Consent Order required Jessie, by June 11, 2018, to perfect his winning bid by paying to Rose as personal representative the sum of \$159,000.00. (Ex. D to Mem. in Opp'n, *Consent Order*). There was no disagreement about the sum due. (*Id.*)

Jesse failed to make the payment that all parties agreed was required by the Consent order. He had his own idea of what should be owed, so instead of paying the \$159,000 that all parties had agreed was required, on June 11, 2018 Rose received from Jessie and Bobby payments and credits which totaled only \$156,000, assembled from the following parts:

- (1) a check from Jessie in the amount of \$3,000;
- (2) a note from Bobby assigning \$75,000 of his expected share of the estate

to the purchase;

- (3) a check from Bobby in the amount of \$3,000; and
- (4) a check from Bobby in the amount of \$75,000.

(Ex. G to Mem. in Opp'n, *June 11, 2018 E-mail*).

Complying with the terms of the Consent Order, after receiving the above from Jessie, Rose informed him that he had not complied with the terms required by the Consent Order for two reasons: (1) the Consent Order authorized Rose to accept payments and credits from only Jessie, not Bobby, towards the purchase of 3283 Von Ohsen Road; and (2) even if Rose was authorized to accept payments and credits from Bobby, she had only received a total of \$156,000, which was \$3,000 short of the agreed-upon sum required of \$159,000. (*Id.*)

Following the fallback provisions of the Consent Order, Rose in her own capacity then submitted payment to the estate for \$171,000, and prepared to purchase from the estate 3283 Von Oshen Road. (*Id.*)

On May 23, 2018, Jessie and Bobby filed a Motion to Compel and For Removal of the Personal Representative (the "Motion to Compel") seeking an order: (1) requiring Rose to deed the Mill Street property to Jessie; and (2) removing Rose as personal representative. (Mot. to Compel).

The Court held a hearing on the Motion to Compel on July 11, 2018, during which the parties agreed that the Motion to Compel would be continued to a later date. (Ex. A to Mot. to Quash, *July 28 Order*). The parties also agreed that:

13. the specific devises will be made, as directed by the Will, as soon as possible,
14. Personal Representative shall provide a list and inventory of non-probate property owned by the Decedent within two weeks of July 11, 2018, giving deference to the fact that some documents may need to be requested From third parties. The information provided shall include where the Personal Representative was added or named as beneficiary.

(Id.) In accordance with this agreement, Rose deeded the Mill Street property to Jessie on July 19, 2018. (Ex. H to Mem. in Opp'n, *Deed of Distribution*).

On June 20, 2018, Jessie and Bobby filed a Petition to Enforce Sale and Petition to Remove the Personal Representative (the "Petition"). (Petition). The Petition requested removal of Rose as personal representative because she: (1) "began the bidding process for 3283 Von Ohsen Road knowing that Jessie would be at a financial disadvantage because of her failure to deed the Mill Street Property"; and (2) "denied [Bobby's] request to pledge his \$75,000.00 in credit towards [Jessie's] purchase of said property." (*Id.* at ¶¶ 21-22).

At no point prior to or during the bidding had Jessie articulated that he could not engage in bidding without the Mill Street Property. At no point had he asked the bidding be stayed. At no point had he articulated that he was at a disadvantage in bidding. He engaged in the bidding and when it was concluded his counsel confirmed the price required under the Consent Order to perfect his winning bid. Nor had Rose as personal representative "denied" Bobby's request to pledge. She merely observed that the Consent Order did not provide for Bobby to make such a pledge, a limitation which (a) Bobby or Jessie could have raised prior to agreeing to the Consent Order but did not, and (b) which never ripened to a dispute because the proper sum was not paid to perfect the bid.

On July 26, 2018, Rose provided Jessie and Bobby with a document titled Non-probate Inventory and Appraisal. (Ex. B to Mot. to Quash, *Non-probate Inventory*). Pursuant to the parties' agreement at the July 11, 2018, status conference, this document identified a list and inventory of non-probate property owned by the Decedent. (*Id.*) Later in the day on July 26, 2018, counsel for Jessie and Bobby sent counsel for Rose an e-mail acknowledging that he had received the list and inventory of non-probate property. (Ex. C to Mot. to Quash, *July 26, 2018, E-mails*). Contrary to the parties' agreement at the July 11, 2018, status conference and the

court's July 28, 2018, order, however, counsel for Jessie and Bobby then stated in his e-mail a new demand for "the amount of the account on the date [Rose] was added and the date of Mrs. Crosby's passing." (*Id.*)

Although the new information demand by Jessie and Bobby, after Rose had complied with a supposed agreement, created a new issue for the court to address involving a subpoena and a motion to quash, the document production portion of the circuit court's order is not part of this appeal.

On December 5, 2018, the probate court held a hearing on (1) Jessie and Bobby's Motion to Compel and for Removal of the Personal Representative; and (2) Jessie and Bobby's Petition to Enforce Sale and Petition to Remove the Personal Representative.³ (Order, April 2, 2019).

On April 2, 2019, pertinent to this appeal, the probate court ordered (1) that Rose be removed as personal representative of the estate; (2) appointing Tiffany N. Provence, Esquire, as successor personal representative of the estate; (3) requiring Ms. Provence, to accept Jessie and Bobby's bid of \$312,000.00 for 3283 Von Ohsen Road; (4) requiring Rose to deed 3283 Von Ohsen Road back to the estate; (5) ordering that Jessie and Bobby's notes and cashiers' checks be accepted by the estate to go towards the purchase of 3283 Von Ohsen Road; (6) requiring Ms. Provence to deed 3283 Von Ohsen Road to Jessie and Bobby; and (7) requiring that Ms. Provence deed the Mill Street property to Jessie as soon as practicable.

Rose appealed the court's order to the circuit court, which upheld the probate court. Order of May 7, 2020. Although it had not been disputed, the circuit court ruled (order at p. 12 n. 1) that the bid process had not been performed pursuant to a consent order by which all estate beneficiaries had consented to the bid process and the fallback provision. The court also

³ The probate court also heard and ruled on Rose's Motion to Quash Subpoena and for Protective Order, as did the circuit court, but those issues are not part of this appeal.

concluded that a dispute had existed as to the sum needed to perfect the bid (order at p. 8), making no mention that all parties agreed with the calculation by counsel for Jessie and Bobby that the sum required to perfect the bid was \$159,000. The court chose to label that number as “Rose’s calculation” (order at 11) when it had undisputedly been articulated by counsel for Jessie and Bobby. The court deemed “Rose’s calculation” to be “incorrect” (order at p. 11), agreed she had followed the terms of the court order, but determined that by doing so she had violated her fiduciary duty to the estate and should be removed as personal representative.

A motion to alter or amend timely provided documents reflecting that the court order governing the bid process had indeed been a Consent Order among all beneficiaries (Motion of May 20, 2020), but the court denied that motion. Order of October 9, 2020.

This appeal followed.

ARGUMENT

I. The Circuit Court erred in concluding the order governing the sale of 3283 Von Oshen Road was not a Consent Order.

Parties to a consent order be “aggrieved” when the consent order is faithfully executed.

Although it was undisputed that the order governing the bid process for the property at 3283 Von Oshen Road, including the fallback provision, was a Consent Order, the circuit court concluded “that order was not a consent order.” Order at p. 12 n. 1. As the transcript of proceedings and other correspondence filed with the motion to alter or amend shows, the probate court order which governed the property sale process, and which it is undisputed Rose followed, was in fact a consent order to which all estate beneficiaries had consented. The circuit court erred in concluding otherwise.

The circuit court also erred in concluding there had been a factual dispute about the \$159,000 payment required by the Consent Order and that what the Circuit Court referred to as “Rose’s calculation” (order at 11) was “incorrect.” Id. There was no dispute.

As reflected by the emails in the record, all counsel agreed that the bid of \$312,000 required a payment of \$159,000 to perfect the \$312,000 winning bid. In the Record at p. 771 is the email from counsel for Jessie and Bobby confirming “the breakdown of what he needs to pay within the next 10 days” of \$159,000). There was no dispute about the sum due.

The terms of the May 15, 2018 consent order bind all beneficiaries, including Jessie and Robert Crosby. Each of the probate court and the Circuit Court erred as a matter of law in permitting them to unilaterally modify the May 15, 2018 consent order and to dispute the sum due, dispute the fallback provision, and argue that the personal representative violated her fiduciary duty to the estate by following the Consent Order.

[A] consent order is an agreement of the parties, under the sanction of the court, and is to be interpreted as an agreement. It can be rescinded by mutual consent in a subsequent court action. It cannot, however, be set aside in part so that one party is absolved from the duty imposed by it, while the same party retains the benefits it confers.

Johnson v. Johnson, 425 S.E.2d 46, 46 - 47 (S.C. App. 1992) (citations omitted). The Circuit Court erred in penalizing Rose Walsh for complying with the May 15, 2018 Consent Order, and in modifying it for the benefit of Jessie and Robert Crosby, exactly as *Johnson* prohibits. The purpose of a Consent Order should not be defeated by parties who reach agreement then challenge the agreements they reached. Rose was careful to work by consent order and it is undisputed that she complied with the consent order.

The bidding outcome was exactly the relief that all beneficiaries had explicitly contemplated and agreed to. The estate received what all beneficiaries agreed was a fair market compensation to the estate when the fallback provision had to be implemented because the high bidder was unable to perfect the bid as required by the Consent Order.

II. The circuit court erred in upholding the probate court ruling to remove the personal representative for violating her fiduciary duties to the estate because she complied with the Consent Order.

The probate court found (Order of April 2, 2019, p. 7) that Rose "complied with the terms of the May 15, 2018 Order," referring to the Consent Order). The Circuit Court affirmed her removal as personal representative for having complied with that court order.

S.C. Code § 62-3-703(a) provides that:

A personal representative is a fiduciary who shall observe the standards of care described by Section 62-7-804. A personal representative has a duty to settle and distribute the estate of the decedent in accordance with the terms of a probated and effective will and this code, and as expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the authority conferred upon him by this code, the terms of the will, and any order in proceedings to which he is party for the best interests of successors to the estate.

S.C. Code § 62-3-703. Furthermore, S.C. Code § 62-7-804 states "[a] trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution." Ultimately, and as stated in the Order, "a personal representative is held to the same prudent person standard of that of a trustee." (Order, April 2, 2019, p. 7).

A trustee "may be removed ... for refusal to obey orders of a court directed to the trustee in his role as trustee." *Floyd v. Floyd*, 615 S.E.2d 465, 487 (S.C. App. 2005); *Crayton v. Fowler*, 139 S.E. 161, 162 (S.C. 1927) (trustee would be removed if he failed to comply with the court's order). S.C. Code § 62-3-611(b) provides "[c]ause for removal [of a personal representative] exists when . . . the personal representative has disregarded an order of the court "

Contrary to *Floyd*, *Crayton*, and S.C. Code § 62-3-611(b), the Circuit Court affirmed the probate court in vacating the sale of 3283 Von Ohsen and removed Rose for *complying* with the terms of the Consent Order.

The terms of the Consent Order did not exist in a vacuum. All beneficiaries had agreed to its process and its potential outcomes. The fallback provision of that order was implemented only because the high bidder had failed to perfect his bid in the manner as had been agreed was required. The fallback sale was executed as all beneficiaries had agreed would occur in the event of a high bid not properly perfected. As counsel for the high bidder set forth in his confirming

email, \$159,000 was reached by taking seventy-five percent (75%) of \$312,000, which is \$234,000, then reducing that by \$75,000 (the maximum amount of Jessie's share of the estate that the Consent Order allowed him to apply to the purchase). (Record at p; 771, confirming email from Jessie Crobsy's counsel).

CONCLUSION

The Court should reinstate Rose as personal representative and require that 3283 Von Ohsen Road, Summerville, South Carolina 29485 be deeded to her under the fallback provision of the Consent Order, in exchange for her payment to the estate of \$171,000.00.

Respectfully submitted,

s/ Gregg Meyers

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