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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
J. Derham Cole, Circuit Court Judge

Appellate Case No. 2020-000853
Circuit Court Case No. 2019-CP-10-1887
Probate Case No. 2016-ES-10-02054

In the Matter of: 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,

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

**INITIAL BRIEF OF RESPONDENTS JESSIE FRED CROSBY
AND ROBERT EDWARD CROSBY, JR.**

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STATEMENT OF ISSUES ON APPEAL

1. Is the Circuit Court's Statement in a Footnote that the May 16, 2018 Order was not a Consent Order Grounds for Reversing the Order Affirming Probate Court?
2. Did the Circuit Court Err in Affirming the Order of the Probate Court that Appellant Should be Removed as Personal Representative of the Estate?

STATEMENT OF THE CASE

On April 2, 2019, the Charleston County Probate Court issued an Order that that required Appellant Rose Mae Crosby Walsh to take certain actions and removed her from her position as personal representative of the Estate of Annie Mae Crosby. Appellant Rose Walsh thereafter filed an appeal of the Probate Court's Order to the Circuit Court for Charleston County on April 12, 2019. The issues raised by Appellant in her Statement of Issues on Appeal were briefed, and the hearing on the appeal was held on January 30, 2020, before the Honorable J. Derham Cole. On May 7, 2020, Judge Cole issued an Order affirming the Probate Court. Appellant Rose Walsh then timely filed a Motion to Alter or Amend. On October 9, 2020, Judge Cole issued a Form 4 Order denying the Motion to Alter or Amend. Appellant Rose Walsh then appealed Judge Cole's Order Affirming Probate Court to the South Carolina Court of Appeals.

STANDARD OF REVIEW

The South Carolina Probate Code provides that the "circuit court, court of appeals, or Supreme Court shall hear and determine the appeal according to the rules of law." S.C. Code Ann. §62-1-308(i). "On appeal from the final order of the probate court, the circuit court must apply the same rules of law as an appellate court would apply on appeal." *Wheeler v. Estate of Green*, 381 S.C. 548, 553, 673 S.E.2d 836, 839 (Ct. App. 2009). As

such, "if the proceeding in the probate court is in the nature of an action at law, the circuit court and the appellate court may not disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them." *Id.* "On the other hand, if the probate proceeding is equitable in nature, [an appellate court] may make factual findings according to its own view of the preponderance of the evidence." *Id.* However, the equitable standard of review does not require the appellate court to ignore the findings of the trial judge who heard the witnesses. The veracity and credibility of witnesses can best be made by the judge who heard the witnesses and observed their demeanor. *Church v. McGee*, 391 S.C. 334, 705 S.E.2d 481 (Ct. App. 2011).

The April 2, 2019 Order removed Rose Walsh as personal representative, a proceeding that is equitable in nature. *See Dean v. Kilgore*, 313 S.C. 257, 259, 437 S.E.2d 154, 155 (Ct. App. 1993) (action to remove a personal representative appointed pursuant to the terms of a will is equitable in nature). The April 2, 2019 Order also ordered the equitable relief of requiring Rose Walsh to deed 3283 Von Ohsen Road back to the Estate as a result of her breach of fiduciary duty. *See Wheeler*, 381 S.C. at 554, 673 S.E.2d at 839 (a "breach of fiduciary duty [claim] may sound in equity if the relief sought is equitable."). The appellate court may, therefore, make factual 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 Ohsen Road. *See Sullivan v. Brown*, 423 S.C. 476, 481, 816 S.E.2d 542, 545 (2018). However, the equitable standard of review does not require the appellate court to ignore the findings of the trial judge. *Church v. McGee, supra.*

FACTS

Annie Mae Crosby ("Decedent") died on November 29, 2016, survived by four adult children: Respondents Jessie Fred Crosby ("Jessie"), Robert Edward Crosby, Jr. ("Bobby"), and Kelvin Wayne Crosby ("Kelvin"); and Appellant Rose Mae Crosby Walsh ("Rose"). (Order, April 2, 2019, p. 2; R. App. 13). The Decedent's estate is being administered by the Charleston County Probate Court in accordance with the Decedent's Last Will and Testament, dated April 15, 2009 (the "Will"). (Ex. A to Mem. in Opp'n, *Will*; R. App. 627-631). The Will named Rose as Personal Representative and Tiffany N. Provence, Esquire as Successor Personal Representative. Pursuant to the Will, the Decedent's real property located at 3329 Von Oshen Road bearing tax number 388-00-00-107 was devised to Rose; a vacant lot on Mill Street bearing tax number 385-10-00-018 was devised to Jessie; and all other property was to be shared equally between Rose, Jessie, Bobby, and Kelvin. (Will, Item II; R. App. 629).

Decedent owned a 100% interest in property located at 3283 Von Ohsen Road in Summerville, South Carolina, which she used as her primary residence until a few years before her death. According to appraisals obtained by Rose, the date of death value of 3283 Von Ohsen Road was \$145,000.00, and the value as of March 28, 2018 was \$190,000.00. (Ex. B to Mem. in Opp'n, *Appraisals*; R. App. 632-733). On April 12, 2018, Rose filed an Amended Petition for Approval of Sale of Real Estate, seeking approval from the Probate Court to sell 3283 Von Ohsen Road to herself for \$171,000.00 (Ex. C to Mem. in Opp'n, *Amended Petition*; R. App. 735).

Prior to the hearing on the Amended Petition for Approval of Sale of Real Estate, Jessie sought to purchase 3283 Von Ohsen Road from the Estate. By Order dated May 16,

2018¹ (the “May 16 Order”), the Probate Court approved the sale of various pieces of real property of the Decedent, including 3283 Von Ohlsen Road. Pursuant to the May 16 Order, a bidding process was established for 3283 Von Ohlsen Road. At the conclusion of the bidding, the highest bidder was to remit 75% of the bid amount to the attorney for the Estate within ten days. (Order dated May 16, 2018, p. 5; R. App. 5).

The requirement to pay only 75% of the purchase price was based on the fact that each beneficiary owned a 25% interest in the property, so the successful bidder was purchasing the interests of the other beneficiaries. However, if the highest bidder did not make the payment to the attorney for the Estate, then the other bidder would be able to purchase 3283 Von Ohlsen for \$171,000.00. The bidding process also allowed the highest bidder to assign \$75,000.00 of his expected share of the Estate of Annie Mae Crosby toward the purchase of the property. (Order dated May 16, 2018, p. 5; R. App. 5).

The bidding process for 3283 Von Ohlsen began on May 21, 2018, and concluded on May 31, 2018. At the beginning of the bidding process, Jessie’s attorney, David Michel, informed the attorneys for Rose that Jessie would be purchasing the property with Bobby. In response to this information, one of Rose’s attorneys, Gregg Myers, sent the following e-mail to Mr. Michel:

We can take this issue up only if we need to once the bidding is over, but it seems to me that the order states that the bidding is between Rose and Jessie, and, from page 5, that either of them can assign “up to \$75,000 of her or her expected share of the estate to the purchase.” So I am not sure that Judge Condon would agree that it complies with the order for Jessie to try to make payment by assigning Bobby’s expected share rather than his own, or in addition to his own. Should Jessie purchase it, he is of course free to arrange the ownership interest any way he chooses between he and Bobby or anyone else, I think the issue I am talking about comes into play only if Jessie wins the bid and attempts to achieve the payment by that method of assignment.

¹ This Order was signed and dated by Judge Condon on May 16, 2018. (R. App. 6). However, in his Order dated April 2, 2019, Judge Condon refers to this Order as the “May 15, 2018 Order”, and Appellant’s Initial Brief also refers to it as the “May 15, 2018 Order.” In this Brief, Respondents will refer to the Order as the “May 16 Order.”

This is just to let you know that we read the order differently in that regard. But we don't need to join that issue until it becomes ripe for adjudication, if and when it does. This is merely notice of a different read.

(Memo in Opposition, Exhibit F, *e-mail from Gregg Myers dated May 23, 2018*; R. App. 760-761).

On May 30, 2018, Jessie and Bobby submitted the highest bid in the amount of \$312,000.00. At the conclusion of the bidding process, there were disputes between the parties as to the amount of money that should be deposited with the Personal Representative. Jessie and Bobby timely delivered \$81,000.00 in cashier's checks to Shelly K. All, Esquire, attorney for the Estate. The \$81,000 payment was calculated as follows:

Amount bid by Jessie and Bobby	\$312,000.00
Less: 50% interest owned by Jessie and Bobby	<u>(\$156,000.00)</u>
BALANCE DUE TO ESTATE	\$156,000.00
Less: \$75,000 credit per Consent Order	<u>(\$75,000.00)</u>
NET BALANCE DUE TO ESTATE	\$81,000.00

Upon receipt of the cashier's checks, Rose, acting in her capacity as Personal Representative, determined that Jessie and Bobby had not complied with the May 16 Order, but did not seek guidance or approval by the Probate Court in making this determination. Instead, she decided to exercise the right to purchase the property for the sum of \$171,000.00 from the Estate pursuant to her reading of the May 16 Order. (R. App. 14).

While the bidding process was ongoing, on May 23, 2018, Jessie and Bobby filed a Motion to Compel and for Removal of Personal Representative. In their Motion, Jessie and Bobby argued that Rose Mae Crosby Walsh, in her capacity as Personal Representative, should be compelled to deed the property located on Mill Street to Jessie, pursuant to the terms of the Decedent's Last Will and Testament. They also argued that Rose should be removed as

Personal Representative for failing to distribute the assets of the Estate. (Motion to Compel filed May 23, 2018; R. App. 293-295).

On June 20, 2018, after learning that Rose had decided to sell 3283 Von Ohsen Road to herself for \$171,000.00, Jessie and Bobby filed a Petition to Enforce Sale and Petition to Remove Personal Representative. (R. App. 308-330). In their Petition, they asked the Probate Court to enforce the sale of 3283 Von Ohsen Road to them for \$312,000.00 and to remove Rose as Personal Representative. On June 25, 2018, Rose filed a Return to Petition to Enforce Sale and Petition to Remove Personal Representative, Counterclaim, and Motions for Judgment on the Pleadings and Summary Judgment. (R. App 331-564). In her Return, Rose asserted that she had complied with the bidding process for 3283 Von Ohsen Road and had acted in good faith in the purchase of the property. On July 12, 2018, Jessie and Bobby filed an Answer to Rose's Counterclaim to Petition to Enforce Sale and Petition to Remove the Personal Representative (R. App. 567-568).

On December 5, 2018, the Probate Court held a hearing on the following matters: (1) Jessie and Bobby's Motion to Compel and for Removal of the Personal Representative; (2) Jessie and Bobby's Petition to Enforce Sale and Petition to Remove the Personal Representative; and (3) Rose's Motion to Quash Subpoena and for Protective Order. (Order, April 2, 2019; R. App. 12-13). On April 2, 2019, the Probate Court issued an order that contained the following relief: (1) removing Rose as personal representative of the Estate; (2) appointing Tiffany N. Provence as successor personal representative of the Estate; (3) requiring Tiffany N. 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 toward the purchase of 3283 Von Ohsen Road; (6) requiring Tiffany N. Provence to deed 3283 Von Ohsen Road to Jessie and

Bobby; (7) requiring Tiffany N. Provence to deed the Mill Street property to Jessie as soon as practicable; and (8) requiring Rose to provide the attorney for Jessie and Bobby with information regarding Decedent's right of survivorship accounts. (R. App. 12-21).

ARGUMENTS

1. The Circuit Court correctly stated that the May 16 Order was not a consent order, but even if it was a consent order, the legal analysis and conclusion of the Circuit Court would be the same.

The first issue raised by Rose in this appeal is that the Circuit Court erred in a footnote contained in the Order Affirming the Probate Court by stating that the May 16 Order was not a consent order. However, this argument fails for three reasons. First, this issue was not raised in the initial appeal to from the Probate Court. Second, under the applicable rule of civil procedure, the May 16 Order was not a consent order. Third, under South Carolina law, a consent order is not given any sort of elevated status over other court orders, so the issue of whether or not the May 16 Order was a consent order does not affect the legal analysis in either the Probate Court's Order or Judge Cole's Order Affirming Probate Court.

In the Probate Court's Order filed April 2, 2019 ("April 2 Order"), which was the subject of the initial appeal to the circuit court, Judge Condon summarizes the terms of the May 16 Order, but does not refer to it as a consent order or otherwise indicate that it was the product of an agreement that was made in open court and noted on the record. (R. App. 13). Nowhere in the ten pages of the April 2 Order does he refer to the May 16 Order as a consent order. (R. App. 12-21).

Despite the fact that the April 2 Order did not refer to the May 16 Order as a "consent order", in her appeal to the Circuit Court, Rose never raised the issue that Judge Condon's rulings in the April 2 Order were incorrect because the May 16 Order was a consent order.

Specifically, in her Statement of Issues on Appeal filed May 17, 2019 in the Circuit Court, Rose details the four issues that she was appealing from the Probate Court, but does not assert that the Probate Court erred in its analysis because the May 16 Order was a consent order. (Statement of Issues on Appeal, 5/17/2019).

Although Rose's brief to the Circuit Court refers to the May 16 Order as a consent order, in that brief she never argues that Judge Condon's conclusions in the April 2 Order were erroneous because he did not analyze the May 16 Order as a consent order. Likewise, nothing in Rose's brief to the Circuit Court suggests that the appellate review of the April 2 Order should have been different because the May 16 Order was a consent order. In fact, the assertion that the May 16 Order is subject to a different legal analysis because it was a consent order is raised for the first time in this appeal.

Because Rose did not raise this issue either to the probate court or to the circuit court, it is unpreserved for review on appeal. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review." Thus, the issue of whether the May 16 Order was a consent order is not properly before this Court.

The second reason that the consent order argument fails is that the May 16 Order does not meet the requirements of a consent order set forth in the South Carolina Rules of Civil Procedure. Section 62-1-304 of the Probate Code states that the South Carolina Rules of Civil Procedure "adopted for the circuit court and other rules of procedure" govern proceedings under the South Carolina Probate Code. S.C. Code §62-1-304. As stated in the South Carolina Rules of Civil Procedure, a consent order is an order that is "signed by counsel and entered in the record...or made in open court and noted on the record..." Rule 43(k), SCRPC. In this

case, the May 16 Order was signed only by Judge Condon and not by any of the attorneys or parties. Further, nothing in the May 16 Order indicates that the bidding process was established by an agreement of the parties that was made in open court and noted on the record. Therefore, the May 16 Order was not a consent order, either according to its terms or as defined by the South Carolina Rules of Civil Procedure.

Finally, neither the South Carolina Rules of Civil Procedure nor South Carolina law makes a distinction between a consent order and a court order that was entered without consent. Likewise, the standard of review and the analysis on appeal do not differ based on whether the order was entered by consent or otherwise. Therefore, Judge Cole's statement in a footnote that the May 16 Order was not a consent order did not affect the legal analysis contained in the Order Affirming Probate Court. As such, even if the May 16 Order was a consent order, that is not a basis for reversing either the Probate Court or the Circuit Court decisions.

2. The Circuit Court was correct in concluding that the Probate Court acted properly in determining that Rose Walsh should be removed as Personal Representative of the Estate.

The next issue raised in Rose's brief is that she should not have been removed as personal representative of the Estate by the Probate Court and, therefore, the Circuit Court erred in affirming her removal. More specifically, Rose asserts that she was removed as personal representative for complying with the May 16 Order. In support of this position, Rose relies on the first half of one sentence in the May 16 Order and ignores multiple findings of improper conduct by the Probate Court, as well as other applicable grounds for removal.

Section 62-3-611(b) of the South Carolina Probate Code provides that the probate court can remove the personal representative upon finding that it would serve in the best

interest of the estate. In deciding whether it would serve in the best interest of the estate to remove the personal representative, the court is to consider whether the personal representative has fulfilled her fiduciary duty for the benefit of the beneficiaries. “A personal representative is a fiduciary who shall observe the standards of care described in Section 62-7-804.” S.C. Code §62-3-703(a). As a result, “[the personal representative] is to administer the [estate] as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust.” S.C. Code §62-7-804. Further, a personal representative has the “duty to settle and distribute the estate ... as expeditiously and efficiently as is consistent with the best interests of the estate.” S.C. Code §62-3-703(a); *see also, Turpin v. Lowther*, 404 S.C. 581, 591, 745 S.E.2d 397, 401 (Ct. App. 2013).

With regard to Rose’s argument that she was removed as personal representative for complying with the May 16 Order, the sentence that Rose is referring to reads in its entirety as follows: “In this case, Rose Mae Crosby Walsh, as Personal Representative of the Estate of Annie Mae Crosby, complied with the terms of the May 15, 2018 Order, however, Respondent Walsh failed to exercise reasonable care, skill, and caution in not allowing the Petitioners to purchase the property jointly for \$312,000.” (R. App. 18). Moreover, the Order goes on to state that “Respondent Walsh violated the prudent person standard,” a reference to her failure to meet the standard set forth in Section 62-7-804 of the Probate Code. The May 16 Order further states that Rose “failed to act in the best interest of the Estate by selling property to herself for a significant lower price than that which was offered by the Petitioners, thus this transaction causes significant harm to the Estate of Annie Mae Crosby and to Kelvin Crosby, as a beneficiary who was not involved in the bidding process.” (R. App. 18).

S.C. Code Ann. § 62-3-703 sets forth the general duties of a personal representative to an estate. Under S.C. Code § 62-3-703(a):

[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 Ann. Section 62-3-703(a).

Pursuant to S.C. Code Ann. Section 62-7-804, "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." S.C. Code Ann. § 62-7-804. Therefore, a personal representative is held to the same prudent person standard as that of a trustee. Under S.C. Code Ann. Section 62-3-712, "if the exercise of power concerning the estate is improper, the personal representative is liable to interested persons for damage or loss resulting from breach of his fiduciary duty to the same extent as a trustee of an express trust." S.C. Code Ann. § 62-3-712.

In this case, Rose failed to exercise reasonable care, skill, and caution by not allowing Bobby and Jessie to purchase the Property for \$312,000.00. Under S.C. Code Section 62-3-703(a), Rose has the duty to settle and distribute the Estate in the manner that is in the best interests of the Estate and its beneficiaries. The record in this matter shows that Rose exercised the right to purchase 3283 Von Ohsen Road for \$171,000.00 on June 11, 2018, twelve days after the conclusion of the bidding process. She did not give Bobby and Jessie notice and an opportunity to cure what she believed was a shortfall in their compliance with their bid. By failing to give Bobby and Jessie such notice and opportunity, and by subsequently deeding the Property to herself for \$141,000.00 less than the amount Bobby and Jessie agreed to pay, Rose violated the prudent person standard. Furthermore, Rose failed to act in the best interests of the Estate by selling the property to herself for a significantly lower price

than that which was offered by Jessie and Bobby. Thus, this transaction caused significant harm both to the Estate of Annie Mae Crosby and to Kelvin, a beneficiary who was not involved in the bidding process.

In her brief, Rose also ignores the factual findings in the May 16 Order regarding the harm caused to Kelvin Crosby. The Probate Court found that Rose's conduct in the administration of the Estate had "caused emotional distress and financial harm to Kelvin Crosby" and that there have been "significant delays in the administration of this Estate." (R. App. 19). As cited above, Section 62-3-611(b) of the South Carolina Probate Code allows the probate judge to remove a personal representative upon finding that it would serve in the best interest of the estate, and the judge should consider whether the personal representative has fulfilled her fiduciary duty for the benefit of the beneficiaries. Based on the findings of the Probate Court and the undisputed fact that Rose's attempt to sell 3283 Van Ohlsen Road to herself for \$171,000 would result in direct financial harm of approximately \$30,000 to Kelvin, the Probate Court was correct in removing Rose as personal representative, and the Circuit Court acted properly in affirming the Probate Court.

CONCLUSION

The Order Affirming Probate Court entered by the Circuit Court on May 7, 2020 should be affirmed. For the reasons stated above, the May 16 Order was not a consent order. Even if it was a consent order, that does not change the analysis of whether the April 2 Order of the Probate Court should be affirmed. Additionally, the actions of Rose in administering this Estate warranted her removal as Personal Representative. For these reasons, the Order Affirming Probate Court should be affirmed.

s/Thomas E. Lydon

Thomas E. Lydon

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personal representative of the Estate of Annie Mae Crosby,
and Kelvin Wayne Crosby,

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 certify that I have this 6th day of August, 2021, served the Initial Brief and Designation of Matter of Respondents Jessie Fred Crosby and Robert Edward Crosby, Jr. on the following:

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August 6, 2021

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Via Electronic Mail

Hon. Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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Columbia, SC 29211

**Re: Estate of Annie May Crosby
Appellate Case No. 2020-000853**

Dear Ms. Kitchings:

Enclosed please find:

1. Initial Brief of Respondents Jessie Fred Crosby and Robert Edward Crosby, Jr.;
2. Respondents' Designation of Matter to be Included in the Record on Appeal;
3. Proof of Service for the Initial Brief and Designation.

By copy of this letter, and as indicated in the Proof of Service, copies of Respondents' Initial Brief and Designation are being served on Appellant's counsel via electronic mail and on Kelvin W. Crosby via United States mail.

Sincerely,

Thomas E. Lydon

Thomas E. Lydon

Encl.

cc: Gregg Meyers, Esquire
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