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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Orangeburg County
Judge James B. Jackson, Jr., Master in Equity

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Appellate Case No. 2021-000787

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Lyle Wilson Fairey, Jr., Appellant.

v.

Joy A. Gillespie, as Personal Representative of the Estate of Martha Ann Fairey Gillespie, Respondent,

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# INITIAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUES ON APPEAL

1. DID THE LOWER COURTS INCORRECTLY RELY ON THE LANGUAGE IN THE WILL INSTEAD OF THE LANGUAGE IN THE DEED OF DISTRIBUTION WHEN DETERMINING WHAT INTEREST MARTHA A. F. GILLESPIE HAD IN THE 9.7 ACRES?

2. DID THE PROBATE COURT HAVE SUBJECT MATTER JURISDICTION TO MODIFY THE DEED OF DISTRBUTION FILED ON FEBRUARY 4, 2005?

3. DID THE LOWER COURTS ERR IN DETERMINING THAT MARTHA GILLESPIE OWNED A FEE SIMPLE INTEREST IN THE 9.7 ACRES AT ISSUE IN THIS MATTER AT HER DEATH?

## STATEMENT OF THE CASE

This appeal follows from a case that was originally filed with the Orangeburg County Probate Court. Catharine Inabinet Fairey died testate on July 31, 2003, and her Estate was filed in the Orangeburg County Probate Court in Case No. 2003-ES-38-00416. At her death, Catharine I. Fairey held fee simple title to a 9.7 acre tract of land in Orangeburg County. A Deed of Distribution was signed on January 21, 2005, and filed on February 4, 2005, in the Orangeburg County office of the Register of Deeds in Deed Book 1078 at page 315. This Deed of Distribution transferred title to the 9.7 acre tract of land to "Martha Ann Fairey Gillespie, for her lifetime; remainder unto Mark Allen Gillespie, if he survives; contingent remainder unto L. Wilson Fairey, Jr."

Martha Ann Fairey Gillespie, hereinafter Martha, died on January 13, 2015, and her Estate was filed in the Orangeburg County Probate Court in Case No. 2015-ES-38-00105. Her son, Mark Gillespie, died on December 20, 2014. The Inventory and Appraisement for the Estate of Martha was filed on May 18, 2015, and listed the 9.7 acres as an asset of Martha's Estate. This property is listed as Item 2 in Schedule A and titled "1014 Till Rd; TMS#0214-00-04-001.000; House/Acreage." Appellant filed a Petition for Removal of Personal Representative in Martha's Estate on August 13, 2015. A hearing on that Petition was held on February 4, 2016, and the Probate Court issued its decision by Order dated February 26, 2016. Appellant filed a Motion to Reconsider on March 7, 2016, and the Probate Court denied this Motion by Order dated April 11, 2016. Appellant subsequently filed his Notice of Appeal to the Circuit Court on April 21, 2016.

Appellant filed his Brief and Designation of Matter on Appeal with the Circuit Court on December 29, 2018. The matter was heard by Judge James B. Jackson, Jr., as Special Circuit

Court Judge for Orangeburg County, on July 31, 2019. An Order Denying Appeal was issued on February 19, 2020. Appellant filed a Motion to Reconsider on March 2, 2020, and Appellant's Motion was denied June 28, 2021. This Appeal followed.

## FACTS

Catharine Inabinet Fairey died testate on July 31, 2003, and at her death she held fee simple title to the real property described as follows:

> All that certain piece, parcel, or tract of land, with any improvements thereon, containing 9.73 Acres, situate, lying, and being in Orange Township, Orangeburg County, South Carolina, being more specifically shown and delineated as Tract B on a Plat surveyed for Lyle W. Fairey, made by Edisto Surveyors & Associates, dated February 22, 1982, and recorded in the Office of the Clerk of Court for Orangeburg County in Plat Book 52, at page 124.

Catharine I. Fairey's Estate was probated in the Orangeburg county Probate Court in Case No. 2003-ES-38-00416. A Last Will and Testament dated March 31, 1992, was admitted to Probate, and Appellant Lyle Wilson Fairey, Jr., was appointed as the Personal Representative pursuant to the Will. In her Last Will and Testament dated March 31, 1992, Catharine I. Fairey devises her interest in the 9.7 acre tract in Item Three as follows:

> I give and devise unto my daughter, Martha Ann Fairey Gillespie, subject to the following conditions, for and during the term of her natural life and after her death to my grandson, Mark Allen Gillespie, if he shall survive her, the real estate described below. If my said daughter shall die and at the time of her death be married to Henry L. Gillespie and not survived by Mark Allen Gillespie, I give and devise said real estate unto my son, Lyle Wilson Fairey, Jr. If during my daughter's lifetime she shall become the widow of Henry L. Gillespie, then I direct that this gift of real estate to my said daughter shall be in fee simple.

The Last Will and Testament then goes on to grant Appellant a First right of Refusal and specifically describe the 9.73 acres at issue along with a 42.7 acre tract of land. The 42.7 acre tract was transferred by Catharine prior to her death. A Deed of Distribution was filed on February 4, 2005, conveying Catharine I Fairey's interest in the 9.7 acres to "Martha Ann Fairey Gillespie, for her lifetime; remainder unto Mark Allen Gillespie, if he survives; contingent remainder unto L. Wilson Fairey, Jr." The Deed of Distribution was filed with the Orangeburg County Register of Deeds in Deed Book 1078 at page 315. The Deed was prepared by the Dooley Law Firm.

Martha took possession of the property as the life tenant and maintained possession until her death on January 13, 2015. Martha was predeceased by her husband Henry in 2012, and her son Mark in 2014. No action was taken by Martha during her lifetime to modify the Deed of Distribution.

On February 19, 2015, Joy A. Gillespie was appointed as the Personal Representative of the Estate of Martha A. F. Gillespie. The Inventory and Appraisement filed by the Personal Representative shows the 9.7 Acre tract of land as an asset of the Estate of Martha and shows that Martha had a 100% ownership interest in the real property. At the time the Inventory and Appraisement was prepared and filed, Respondent was not represented by an attorney. Appellant filed his Petition for Removal of Personal Representative in part to challenge the inclusion of the 9.7 acre tract in the Estate of Martha. When Appellant filed the Petition for Removal, he was unrepresented, but he subsequently retained Martin R. Banks to represent him.

The Appellant and Respondent appeared with their attorneys for a hearing on February 4, 2016, at the Orangeburg County Probate Court. At the hearing, both attorneys made arguments regarding the status of Martha A. F. Gillespie's ownership of the 9.7 acres of land at her death.

After hearing the parties' agreements and reviewing the language in the Last Will and Testament, the Probate Court determined that the 9.7 acre tract of land "was owned in fee simple by Martha Ann Fairey Gillespie at the time of her death" and therefore was an asset to be included in her Estate.

Appellant filed a Motion to Reconsider on March 7, 2016. The Probate Court denied the relief requested in the Motion without a hearing as stated in the Order Denying Motion to Reconsider dated April 11, 2016. In this Order, the Court indicates that it relied on the language of the Will in making its decision regarding the ownership of the 9.7 acre tract of land.

Appellant filed his Brief and Designation of Matter on Appeal with the Circuit Court on December 29, 2018. The matter was heard by Judge James B. Jackson, Jr., as Special Circuit Court Judge for Orangeburg County, on July 31, 2019. An Order Denying Appeal was issued on February 19, 2020. Appellant filed a Motion to Reconsider on March 2, 2020, and Appellant's Motion was denied June 28, 2021. This Appeal followed.

## ARGUMENT

### *Standard of Review*

When a case originates in the Probate Court, the standard of review to be used on appeal "depends upon whether the underlying cause of action is at law or in equity." *In re Estate of Hyman*. 362 S.C. 20, 25, 606 S.E.2d 205, 207 (Ct. App. 2004). "If the proceeding in the probate court is in the nature of an action at law, the [higher] 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." *In re Estate of Cumbee*, 333 S.C. 664, 670, 511 S.E.2d 390, 393 (Ct. App. 1999). "In a law case tried without a jury, questions regarding the credibility and the weight of evidence are exclusively for the trial [court]." *Golini v. Bolton*, 326 S.C. 333, 342, 482 S.E.2d 784, 789 (Ct. App. 1997). If probate proceedings are equitable in nature, then the higher court on appeal may make factual findings according to its own view of the preponderance of the evidence. *Howard*, 315 S.C. at 361-62, 434 S.E.2d 254, 257-58.

### I. THE LOWER COURTS INCORRECTLY RELIED ON THE LANGUAGE IN THE WILL INSTEAD OF THE LANGUAGE IN THE DEED OF DISTRIBUTION WHEN DETERMINING WHAT INTEREST MARTHA A. F. GILLESPIE HAD IN THE 9.7 ACRES.

In reaching its decision on the ownership of the 9.7 acres at issue in this matter, the Lower Courts incorrectly looked to the language of the Last Will and Testament of Catharine instead of focusing solely on the language contained in the Deed of Distribution. Because the Deed of Distribution was filed and the Estate of Catharine was closed, the Deed of Distribution operates as proof of ownership to "the distributee, and his purchasers or encumbrancers." S.C. Code Ann. §62-3-907; see also §62-3-908. There is no requirement that a future purchaser for value review the decedent's Last Will and Testament to verify that the language in the Deed of Distribution complies with the Last Will and Testament.

The language in the granting clause and habendum clause of the Deed of Distribution is clear and unambiguous, and a court interpreting the deed would be restricted to the language contained solely in the deed itself. "When a deed is unambiguous, any attempt to determine the grantor's intent . . . must be limited to the deed itself and using extrinsic evidence to contradict the plain language of the deed is improper." *Bluestein v. Town of Sullivan's Island*, 424 S.C. 362, 371, 818 S.E.2d 239, 243 (Ct. App. 2018). "The language in a deed is ambiguous if it is reasonably susceptible to more than one interpretation." *Id*. at 370. The language in the granting clause and habendum clause clearly grant a life estate to Martha with remainder to Mark, if he survives, and contingent remainder to Wilson. There is nothing ambiguous in the deed. Additionally, "in ascertaining [the grantor's] intention, the deed must be construed as a whole and affect given to every part thereof, is such can be done consistently with law." *Id.* at 371.

"The determination of whether language in a deed is ambiguous is a question of law." *Id*. at 370. In this case there is no evidence in the deed itself to support a finding by the Lower Courts that the deed is ambiguous. The Lower Courts therefore committed an error of law when they used the language in the Last Will and Testament of Catharine to modify the Deed of Distribution.

## II. THE PROBATE COURT DID NOT HAVE SUBJECT MATTER JURISDICTION TO MODIFY THE DEED OF DISTRIBUTION FILED ON FEBRUARY 4, 2005.

"Subject matter jurisdiction is 'the power to hear and determine cases of the general class to which the proceedings in question belong.'" *Gantt v. Selph, et al.* 423 S.C. 333, 337, 814 S.E.2d 523, 525 (2018). The issue of subject matter jurisdiction can be raised for the first time on appeal. *Id.* at 338. Additionally, the existence of subject matter jurisdiction is a question of law, and an appellate court can decide questions of law without giving deference to the trial

court. *Id.* In this case, the issue of subject matter jurisdiction was not raised or ruled on by the Probate Court.

The Probate Court is not a constitutional court and only has jurisdiction as defined by the legislature. *Judy v. Judy,* 393 SC. 160, 169, 712 S.E.2d 408, 412 (2011). The subject matter jurisdiction of the Probate Court is set out in §62-1-302. Subsection (a)(1) allows the Probate Court to determine whether a particular piece of property is or is not part of a decedent's Estate. To make that determination, the Probate Court in this case would read the granting clause and habendum clause from the Deed of Distribution filed in the Estate of Catharine Inabinet Fairey which both provide that the property goes to Martha for life with the remainder to Mark Allen Gillespie if he survives and the contingent remainder to L. Wilson Fairey, Jr. Under a clear reading of this language, if Mark Allen Gillespie is alive when Martha dies, he takes title to the property, but if Mark predeceases Martha, L. Wilson Fairey, Jr., gets the remainder interest. There is no ambiguity in this language. The only fact needed for the Probate Court to make its determination is whether Mark survived Martha.

Instead of interpreting the language in the Deed of Distribution, the Probate Court took the additional step of modifying the language to reach the conclusion in the Order of February 26, 2016. The power to modify a deed is not granted to the Probate Court by S.C. Code §62-1-302. Additionally, the Estate of Catharine was closed on March 3, 2016, and has not been reopened.

Because the Probate Court lacked subject matter jurisdiction to modify the Deed of Distribution filed at Deed Book 1078 at page 315 with the Orangeburg County Register of Deeds, this Court should issue an Order reversing the decision of the Probate Court.

## III. THE LOWER COURTS ERRED IN DETERMINING THAT MARTHA GILLESPIE OWNED A FEE SIMPLE INTEREST IN THE 9.7 ACRES AT ISSUE IN THIS MATTER AT HER DEATH.

"The interpretation of a deed is an equitable matter." *Bluestien* at page 370. On appeal, the Appellate Court may therefore make factual findings according to its own view of the preponderance of the evidence. *In re Howard*, 315 S.C. at 361-62, 434 S.E.2d 254, 257-58. Here the preponderance of the evidence supports a finding that Martha owned merely a life estate in the 9.7 acres with the remainder to Wilson.

As previously argued, the language in the Deed of Distribution is clear and unambiguous, so the Court should make no further inquiry to determine what ownership interest Martha had in the 9.7 acres. However, even if the Court looks to extrinsic evidence to determine the grantor's intent, the conclusion reached should be the same. The language in Catharine's Last Will and Testament shows Catharine's intention is that Martha could be given the property in fee simple in Martha's lifetime if she became a widow. Martha held a life estate subject to a condition subsequent. The legal right created was a right of entry which accompanied a condition subsequent. Normally conditions subsequent are used to defeat estates, so they are strictly construed against the grantor. *McManaway v. Clapp*, 150S.C. 249, 148 S.E. 18, 19 (1929). Conditions subsequent do not enforce themselves automatically but require action to be taken by the party benefiting from the condition, if they so choose. In this case, the condition subsequent provided for a right of entry that would allow Martha during her life time to end her life estate and take a fee simple interest if she became a widow. At the time of Catharine's death, Martha's husband was still alive. When the Deed of Distribution was drafted and filed in 2005, Martha's husband was still alive. Martha's husband died in 2012, but she took no action to alter or amend the Deed of Distribution.

Martha had the right during her lifetime take action to obtain a fee simple interest in the 9.7 acres, but she did not exercise that right.

## CONCLUSION

For the foregoing reasons, this Court should reverse the ruling of the Lower Courts and determine that the Probate Court lacked subject matter jurisdiction to modify the Deed of Distribution in this matter or alternatively find that Appellant owns the real property at issue in fee simple.

October 8, 2021

Respectfully Submitted,

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PROOF OF SERVICE

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I certify that I have served Appellant's Initial Brief and Designation of Matters to be Included in Record on Appeal on Joy A. Gillespie, as Personal Representative of the Estate of Martha Ann Fairey Gillespie, Respondent, by emailing her attorney of record, Robert F. McCurry, Jr., of Horger Barnwell & Reid, LLP, at his AIS email address (rfmccurry@hbrllp.com) in compliance with The Supreme Court of South Carolina's Amended Order 2020-05-29-02 RE: Operation of the Appellate Courts during the Coronavirus Emergency (As Amended May 29, 2020).

October 8, 2021

Orangeburg, SC

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