THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate Case No. 2021-000787

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 RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE LOWER COURT CORRECTLY RELY ON THE LANGUAGE IN THE LAST WILL AND TESTAMENT OF CATHARINE FAIREY INSTEAD OF THE LANGUAGE IN HER DEED OF DISTRIBUTION WHICH DID NOT CONFORM TO CATHARINE'S LAST WILL AND TESTAMENT WHEN DETERMINING MARTHA ANN FAIREY GILLESPIE'S INTEREST IN THE 9.7 ACRES?

2. DID THE PROBATE COURT HAVE EXCLUSIVE ORIGINAL JURISDICTION OVER SUBJECT MATTER RELATED TO THE DETERMINATION OF PROPERTY IN WHICH THE ESTATE OF MARTHA GILLESPIE HAD AN INTEREST?

3. DID THE LOWER COURT PROPERLY DETERMINE THAT MARTHA ANN FAIREY GILLESPIE OWNED A FEE SIMPLE INTEREST IN THE 9.7 ACRES 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. In ITEM III of her Last Will and Testament, Catherine devised the subject property using the following language:

> THIRD: 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 her 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 m y said daughter shall be in fee simple.

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. In this Deed of Distribution, the Personal Representative released from his control the subject tract to Martha with the following language: 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. At the time she executed her Last Will and Testament on March 31, 1992, she owned four tracts of land which had been surveyed and platted. Catharine devised two tracts in fee simple to her son, the Appellant, and two tracts were devised to her daughter, Martha Ann Fairey Gillespie, with certain conditions. One of those two tracts was later conveyed to Martha during the life of Catharine. The 9.7 acre "home" tract remained in Catharine's name until her death.

Item Third of the Last Will and Testament of Catharine is that item that speaks to the 9.7 acre tract, and it states as follows:

> THIRD: 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 her 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 m y said daughter shall be in fee simple.

Catharine's Estate was probated in the Orangeburg County Probate Court in Case No. 2003-ES-38-00416. Appellant Lyle Wilson Fairey, Jr., was appointed as the Personal Representative pursuant to the Will. Appellant retained the Dooley Law Firm to assist in the probate. A Deed of Distribution was filed on February 4, 2005, distributing Catharine I Fairey's interest in the 9.7 acres as follows:

> " …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 language in the deed of distribution clearly differs from the Last Will and Testament.

Martha went into possession of the property after Catharine's death. Henry Gillespie, Martha's husband, died on July 21, 2012. Martha's son, Mark Gillespie, died December 20, 2014. Martha, in failing health, died twenty-four days later on January 13, 2015.

Respondent Joy A. Gillespie was appointed as the Personal Representative of the Estate of Martha A. F. Gillespie in February of 2015. 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. Appellant filed his Petition for Removal of Personal Representative in part to challenge the inclusion of the 9.7 acre tract in Martha's estate.

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's ownership of the 9.7 acres of land at her death. After hearing the

parties' positions and comparing the Last Will and Testament of Catharine Fairey and the Deed of Distribution from Catharine's estate, 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 Motion to Reconsider by its Order 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 appealed the Order of the Probate Court to 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 the 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).

I. THE LOWER COURT PROPERLY RELIED ON THE LANGUAGE IN THE LAST WILL AND TESTAMENT INSTEAD OF THE INCORRECTLY WORDED LANGUAGE IN THE DEED OF DISTRIBUTION WHEN DETERMINING THE INTEREST OF MARTHA GILLESPIE IN THE 9.7 ACRE HOME TRACT.

Catharine Inabinet Fairey died on July 31, 2003. Her Last Will and Testament allocated property between her two children: her son, Appellant, Lyle Wilson Fairey, Jr, and her daughter, Martha Ann Fairey Gillespie. Catharine devised to Appellant fee simple title in a 61.12 acre tract and 8.94 acre tract in the Second Item of her Last Will and Testament.

In the Third Item, Catharine devised to Martha a life estate in the 9.7 acre home tract subject to various conditions which provided for the possibility to ripen into fee simple absolute. The determinative language is three sentences. If one counts proper names as one word, these three sentences contain 104 words, ending with "If during my daughter's lifetime she shall become the widow of Henry L. Gillespie, then I direct that this said real estate to my daughter shall be in fee simple."

Upon Catharine's death, the Appellant, named as personal representative, probated the estate, and retainer counsel to assist. Counsel for the estate also prepared a Deed of Distribution which distributed to Martha the subject home tract. Inexplicably, instead of quoting the language of the Last Will and Testament verbatim, counsel for the Personal Representative instead attempted to interpret the language, and truncated and excised the subject in the granting clause from 104 words to 14 words, again counting personal names as one word.

It must be said that §62-3-907(b) states that the deed of distribution only constitutes a release of the Personal Representative's power over the real estate during the administration of the probate estate. It is not a conveyance of title. Title is conveyed by the language of the Testator in the Last Will and Testament. Therefore, reliance on a deed of distribution to convey title is suspect and the cases may turn on this issue alone.

An improperly worded deed of distribution is doubly problematic for Appellant. However, if one disregards the reading of this code section, even a quick perusal of the language in the Deed of Distribution versus the language of the controlling Last Will and Testament reveals that the Deed of Distribution is patentably erroneous. The Deed of Distribution simply is wrong, and the lower court determined correctly that the Deed of Distribution was improper, "inconsistent with the provisions of the Last Will and Testament… as set forth in S.C. Code §62-3-908. The Judge of Probate and the Circuit Court Judge, realizing that the issue presented at the initial hearing was to determine if the subject property was owned in fee simple by Martha Gillespie at the time of her death, each properly looked to the Last Will and Testament for guidance when it was realized that the deed of distribution had non-conforming language. Examples exist where a scrivener prepares a deed of distribution stating that 100% of a parcel is conveyed to a devisee, when in fact, the decedent only had a fractional undivided interest in the property. Sometimes, a Deed of Distribution reflects that an intestate decedent has his ownership interest divided equally between spouse and

multiple children, when our laws of descent and distribution indicate that decedent's spouse takes one-half and decedent's issue receive the remaining one-half undivided interest. In such instances, the Deed of Distribution is patently erroneous. A competent real estate attorney realizes this and properly handles the distribution of proceeds at sale of the property.

In the instant case, the abbreviated language used in the Deed of Distribution did not conform to that of ITEM III of the Last Will and Testament of Mrs. Fairey. Therefore, the Deed of Distribution could not be determinative of title because the Deed of Distribution was improper**.**

II. THE PROBATE COURT HAD EXCLUSIVE ORIGINAL JURISDICTION OVER SUBJECT MATTER RELATED TO THE DETERMINATION OF PROPERTY IN WHICH THE ESTATE OF MARTHA GILLESPIE HAD AN INTEREST.

Section §62-1-302 "Subject matter jurisdiction" of the Probate Code states… (a) the probate court has exclusive original jurisdiction over all subject matter related to: (1) estates of decedents, including the contest of wills, construction of wills, determination of property in which the estate of a decedent or a protected person has an interest... " (Emphasis added)

When the Inventory and Appraisement was filed by Respondent as Personal Representative of the Estate of Martha Gillespie, Respondent indicated that Martha Gillespie owned the subject real estate. The Appellant filed suit to dispute this. After a hearing before the Probate Court, the Probate Court issued its Order dated February 26, 2016, ruling that the subject property was an estate asset. The fact that the Probate Court had subject matter jurisdiction to determine if the 9.7 acre home tract was a part of Martha's estate can be no clearer than is set forth in Section §62-1-203(a)(1).

The Appellant filed a Motion to Reconsider, which was denied by the Probate Court. The Probate Court's Order was appealed to the Circuit Court and Judge Jackson in his Order dated

February 20, 2020 agreed that the subject 9.7 acre tract property was owned by Martha in fee simple absolute. Again, the Appellant moved to reconsider and argued the issue of subject matter jurisdiction at the hearing and argued that the issue was first raised at the hearing on appeal. Nonetheless, the Circuit Court again denied the motion and ruled that the property was owned by Martha in fee simple.

Both of the lower courts were presented the Deed of Distribution as proof of the position of Appellant. But when shown the language of the Last Will and Testament, the courts acknowledged the error in the Deed of Distribution. It is patently erroneous because it does not conform to the language in the Last Will and Testament of Catherine Fairey. Because of the patent difference, both courts correctly determined the fact that the Last Will and Testament is the controlling document setting forth the wishes of the Testator. Therefore, contrary to Appellant's contention, there was no modification by any court of the Deed of Distribution because the Deed of Distribution was determined by both courts to be in error, and each ruled as to Martha's ownership of the subject property based upon the language of Catharine's Will.

It should also be noted that Appellant's position would require the court to rely on an improperly drafted Deed of Distribution that was drafted by Appellant's attorney that Appellant hired for Catherine's estate. A ruling in Appellant's favor would allow Appellant to reap the benefit from improper drafting by his attorney, all to the benefit of Appellant and to the great detriment of his sister Martha. Such improper drafting cannot result in a reward to the Appellant at the expense of his sister. Without question. it should also be noted that if the Deed of Distribution had properly mirrored the language of the Last Will and Testament, this Appeal would not be before this Honorable Court in this proceeding.

III. THE LOWER COURT PROPERLY DETERMINED THAT MARTHA GILLESPIE OWNED A FEE SIMPLE INTEREST IN THE 9.7 ACRE TRACT AT THE TIME OF HER DEATH.

As stated above §62-3-907(b) may quickly render the deed of distribution analysis moot, but if not, the Deed of Distribution for the Estate of Catharine Inabinet Fairey prepared by Appellant's attorney was patently erroneous and both lower courts did not rely on it to determine the status of the ownership of the subject property. Item III in the Last Will and Testament of Catharine Inabinet Fairey controls.

The 104 words in the determinative three sentences indicated Catharine's intention that the subject property – the family home – could be devised to her daughter Martha in fee simple in Martha's lifetime, if Martha became a widow. The Appellant also agrees with this and states so in Appellant's Initial Brief. Catharine's critical desire was also to ensure that Henry or "Buddy" Gillespie, Martha's husband, would not ever take any of the Fairey family property. Catharine was not in favor of Henry or in favor of Martha's marriage to Henry, because Henry was ten years older than Martha, had been married twice before and had four children from these prior relationships. We see that the language used by the drafter of Catharine's Last Will and Testament, Charlton B. Horger, armed with the knowledge of Catharine's intentions, ultimately allowed Catharine's desires to be realized.

The three sentences indicate that Martha obtains a life estate, and there are three conditions which determine the remaining balance of the ownership:

(1) If Martha's son Mark survived Martha – "if he shall survive her," – then Mark would be the remainderman. This condition did not occur because Mark predeceased Martha. Condition Number 1 fails.

(2) If Martha – "shall die and at the time of her death be married to Henry L. Gillespie and not survived by Mark," then the remainder interest goes to Appellant. This also did not occur because Henry died in 2012, three years prior to Martha's death in 2015. Therefore, Martha was not married to Henry at her death – she was already a widow. Condition Number 2 fails.

(3) If during Martha's lifetime she "shall become the widow of Henry, then I direct that this gift of real estate to my daughter shall be in fee simple." This is exactly what happened. Henry died during Martha's life, and the property became Martha's in fee simple absolute. Condition Number 3 prevails. Catherine's wishes were realized – Henry did not inherit any of the Fairey land.

Nonetheless, Appellant argues that Martha had some duty to file documentation, "modify" the deed of distribution, or take some action to assert her fee simple ownership. This was not necessary for the grant to become fees simple absolute – Henry's death occurred prior to Martha's death as set forth in Condition Number 3. That is all that was required for Martha to take in fee simple as set forth in Catharine's Third Item in her Last Will and Testament. Henry's death before Martha was determinative. Catharine did not place any further restriction on the devise.

Upon Martha's death in 2015, Martha's Last Will and Testament provided for her property to pass to the issue of Mark, because Mark predeceased her by twenty-four (24) days. As a result, Mark's son Preston is the equitable owner of the 9.7 acres in question, legal title being held by his mother, the Respondent, as Trustee, until Preston becomes 21 years old. It must be said that Catharine's wishes were met because the subject property was devised in fee simple to Martha, did not go to Henry and did not even go to Mark's wife, the Respondent, but is now owned by Preston, her great-grandson, staying in the Fairey bloodline.

CONCLUSION

As stated in §62-1-302(a)(1), the Probate Court has exclusive subject matter jurisdiction to determine whether the 9.7 acre home tract was owned by Martha in fee simple absolute at the time of her death. §62-3-907(b) indicates that a deed of distribution evidences a release of the real estate from the power of the personal representative during the administration of the estate. Therefore, the Last Will and Testament conveys title pursuant to the language of the Testator, and Catharine's Will provided conditions by which Martha took fee simple title to the subject property. The lower court did review the documentation presented however, and when the court was shown that the deed of distribution did not conform to the language of Catharine I. Fairey's Last Will and Testament, the Court properly relied on the controlling language in Testator's Last Will and Testament.

Catherine Inabinet Fairey crafted her Will in such a way to ensure that her son-in-law, Henry Gillespie, would never take an interest in the family home. Conditions which were set out to accomplish this desire. Henry died while Martha was still living. Henry's death, as set out in the third condition, was the decisive event that determined with finality the status of ownership because Martha became a widow and thereby the owner of the home tract in fee simple.

At that point in 2012, Martha's fee simple interest was determined: no further action whatsoever was required from Martha or any person to indicate that Martha was the fee simple owner of the home tract. Henry's death accomplished everything.

As a result, Catherine's wishes were fulfilled. Henry never had an opportunity to have any ownership interest in the Fairey family home and the Fairey family home is now owned by the great grandson of Catherine. To think that Catharine would have preferred to reward her Appellant son at the expense of her daughter Martha is not evidenced in any document or testimony.

For the foregoing reasons, this Court should affirm the decision of the lower court which

ruled that the 9.7 acre home tract was owned by Martha Gillespie in fee simple at the time of her death.

December 8, 2021

Respectfully Submitted,

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