

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2012-213564

IN THE MATTER OF: Estate of Robert Ross Dinkins

Mae Lee Dinkins,..... Appellant,

v.

Synovus Trust Company, N.A., Respondent,

William C. Cantey, Jr, Intervenor.

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. DID THE CIRCUIT COURT ERR IN FINDING CERTAIN ISSUES WERE NOT PRESERVED FOR APPELLATE REVIEW?
2. DID THE CIRCUIT COURT ERR IN AFFIRMING THE PROBATE COURT'S GRANTING COMPENSATION TO SYNOVUS TRUST FROM THE ESTATE?

STATEMENT OF THE CASE

This is an appeal from a Circuit Court order dated September 28, 2012, which affirmed the Sumter County Probate Court's order dated January 3, 2012.

On July 30, 1982, Robert Ross Dinkins executed his Last Will and Testament. Item VII of the Will named his wife, Mae Lee Dinkins and the National Bank of South Carolina (hereinafter referred to as "NBSC") as co-personal representatives of his estate. Mr. Dinkins died on April 11, 2008. At that time, NBSC had been purchased by Synovus Financial. Another subsidiary of Synovus Financial, Synovus Trust Company, N.A. (hereinafter referred to as "Synovus Trust"), and Mrs. Dinkins were appointed co-personal representatives on May 2, 2008.

Synovus Trust filed a Conditional Statement of Resignation on February 23, 2011, in the Sumter County Probate Court. It agreed to resign only after being awarded its fees. Thereafter, Mrs. Dinkins filed a Petition for Removal of Personal Representative on March 2, 2011. Mrs. Dinkins' Petition requested that the Court remove Synovus Trust because Synovus Trust refused to resign unless Mrs. Dinkins approved its fees or the Probate Court did so. The Honorable Dale Atkinson held a hearing on July 7, 2011, on both Mrs. Dinkins' Petition for Removal of Personal Representative and Synovus Trust's Request for Compensation.

On January 3, 2012, Judge Atkinson entered his Order Denying Petition for Removal of Personal Representative, Granting Request for Compensation, Accepting Resignation of Co-Personal Representative and Appointing Successor Co-Personal Representative and Trustee. In the Order, Judge Atkinson found no evidence or testimony had been presented supporting the removal of Synovus Trust as co-personal representative for cause, awarded Synovus Trust compensation of \$294,317.66, accepted Synovus Trust's resignation as co-personal representative, and appointed William C. Cantey, Jr. as successor co-personal representative of the Estate and sole trustee of all trusts established under the Last Will. The Probate Court also ordered the co-personal representatives to execute a note and give Synovus Trust a mortgage on property located at 601 Hazard Street, Pawley's Island, South Carolina, to secure payment of Synovus Trust's fees. According to the Order, the Pawley's Island Property was "the only Estate asset with sufficient equity to secure the compensation due Synovus Trust." (Probate Order, ¶ 30; R. ____).

On January 11, 2012, Mrs. Dinkins filed a Motion for Reconsideration and/or Motion to Amend Judgment pursuant to Rule 59(e), SCRCPP. Mrs. Dinkins had timely appealed the Order to the Circuit Court on January 9, 2012, to appeal the Probate Court's decision to award compensation to Synovus Trust. (Notice of Appeal, Grounds for Appeal). *Compensation* includes both the fee amount payable to Synovus Trust and the security interest, a mortgage, ordered to secure such fee. Thereafter, William C. Cantey, Jr., as successor co-personal representative of the Estate, filed a Notice of Motion and Motion to Intervene in this matter as a matter of right.

At the Circuit Court hearing on June 26, 2012, counsel for Mrs. Dinkins, Synovus Trust Company, N.A., and William C. Cantey, Jr., made legal arguments and submitted briefs. Circuit Court Judge R. Ferrell Cothran, Jr., granted Mr. Cantey's Motion to Intervene, denied Mrs. Dinkins' appeal and affirmed the Probate Order. (Circuit Court Order on Appeal).

On October 10, 2012, Mrs. Dinkins filed a Motion for Reconsideration and/or Motion to Amend Judgment pursuant to Rule 59(e), SCRCF. Judge Cothran denied this motion on November 29, 2012. Mrs. Dinkins filed a Notice of Appeal on December 10, 2012. This appeal followed.

STATEMENT OF FACTS

Robert Ross Dinkins was in the business of real estate development and management. (Prob. Hr'g Tr., p.15, l.24 – p.16, l.1; R. ____). The Decedent and his family's livelihood depended on income from the properties that he owned and managed. (Prob. Hr'g Tr., p.17, ll. 4-7; R. ____). He executed his Last Will and Testament on July 30, 1982. (Probate Order, ¶1; R. ____). Item VII of the Will named the National Bank of South Carolina ("NBSC") and his wife Mae Lee Dinkins as co-personal representatives of his estate. (Probate Order, ¶2; R. ____).

Mr. Dinkins died on April 11, 2008. (Probate Order, ¶4; R. ____). At that time, NBSC had been purchased by Synovus Financial. (Prob. Hr'g Tr., p.78, ll. 11-12; R. ____). Another subsidiary of Synovus Financial, Synovus Trust Company, N.A. (hereinafter referred to as "Synovus Trust"), and Mrs. Dinkins were appointed co-personal representatives on May 2, 2008. (Probate Order, ¶5; R. ____). Synovus Trust's employee Kristi Curtis filed the application for appointment which stated that NBSC is

also known as Synovus Trust. (Prob. Hr’g Exh. 3; Prob. Hr’g Tr., p.79, ll. 16-20; R. ____). According to Ms. Curtis, Synovus Trust is not the corporate successor to NBSC. (Prob. Hr’g Tr., p.77, l.14 – p.78, l.10; R. ____). Instead, it purchased the trust business from NBSC. *Id.* The Decedent had an approximately one million dollar debt with NBSC prior to his death. (Prob. Hr’g Tr., p.68, ll. 8-14). However, Synovus Trust also did not disclose in its application for appointment that it is the Decedent’s Estate’s largest creditor. (Prob. Hr’g Tr., p.86 – p.87; R. ____).

Item X of the Will directed that NBSC receive compensation for its services as co-personal representative according to “its Standard Fee Schedule in effect and applicable at the time of the performance of such services.” (Probate Order, ¶12; R. ____). The April 2008 Fee Schedule in effect when Mr. Dinkins died indicates that compensation shall be “computed using [its] published fee schedule in effect at the time [it] begins those duties.” (Prob. Hr’g Tr., p.90, l.24 – p.91, l.2; R. ____).

In August 2008, Synovus Trust revised its Co-Executor Compensation Schedule. (Probate Order ¶14; R. ____). In January 2009, Synovus Trust had Mrs. Dinkins sign the August 2008 Fee Schedule as co-personal representative. (Prob. Hr’g Exh. 1; Probate Order, ¶14; R. ____). The signing was done without the presence or advice of Mrs. Dinkins’ attorney. The new schedule increased the fees by \$50,000. (Prob. Hr’g Tr., p.70, ll.16-19; R. ____). However, Mrs. Dinkins was not informed of this at the time of signing. (Prob. Hr’g Tr., p.70, ll.16-25; p.71, l.20 – p.72, l.22; p.73, l.23 – p.75, l.11; R. ____). In August 2010, Synovus Trust again revised its Co-Executor Compensation Schedule (hereinafter referred to as the “August 2010 Fee Schedule”). (Probate Order, ¶15; R. ____).

Mrs. Dinkins was not happy with the way Synovus Trust managed the Estate. (Prob. Hr'g Tr., p.17, ll. 14-18; p.28, ll. 9-23; R. ____). The Estate consists primarily of real property. A substantial portion of the real property was not properly maintained and laid empty under Synovus Trust's management. (Prob. Hr'g Tr., p.21, ll. 22-25; p.22, ll. 1-24; R. ____). The Dinkins family lived off the income from such property. (Prob. Hr'g Tr., p.17, ll. 4-7; R. ____). Yet, when Synovus Trust began managing the property, the Estate began losing money instead of making money as it did prior to Synovus Trust's management. (Prob. Hr'g Tr., p.20, ll. 3-6; R. ____).

Neither Synovus Trust nor any of its employees had a license to manage real estate, and Synovus Trust never hired a licensed real estate manager to manage the property. (Prob. Hr'g Tr., p.21, ll. 16-18; R. ____). Additionally, the value in the property plummeted. The initial value of the Estate in April 2008 was \$7,567,376. (Prob. Hr'g Tr., p.117, ll. 13-15; R. ____). However, by April 2011, the Estate was valued at \$5,312,606. (Prob. Hr'g Tr., p.118, l.7 – p.119, l.1; R. ____).

In early 2011, after the Estate had been under the management of Synovus Trust for over three years, Mrs. Dinkins repeatedly asked Synovus Trust to resign so that another person or entity could be appointed to properly manage the estate. (Prob. Hr'g Tr., p.21 - p.22; R. ____). After repeated requests by Mrs. Dinkins, Synovus Trust filed a Conditional Statement of Resignation in the Probate Court of Sumter County, South Carolina on February 23, 2011. Synovus Trust agreed to resign only after being awarded its fees. Mrs. Dinkins believed Synovus Trust was asking for excessive compensation for a poor job of managing an estate. Subsequently, she filed a petition to have Synovus Trust removed as co-personal representative on March 2, 2011.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN RULING THE ISSUE OF WHETHER THE PROBATE COURT HAS THE LEGAL AUTHORITY TO ORDER A PARTY TO LITIGATION TO EXECUTE A PROMISSORY NOTE OR MORTGAGE WAS NOT PRESERVED.

A. The Circuit Court erred in ruling the issue of whether the Probate Court has the legal authority to order a party to litigation to execute a promissory note or mortgage was not preserved for appellate review because such issue was raised and ruled upon by the Probate Court and was preserved by the Appellant's Rule 59(e) motion.

The Circuit Court failed to recognize that the Probate Court does not have the legal authority to force a party to litigation to execute a promissory note or mortgage. The Order states this issue was “never raised to or ruled upon by the Probate Court.” (Circuit Order, p.6; R. ____). “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 trial judge to be preserved for appellate review.” Nicholson v. Nicholson, 378 S.C. 523, 537, 663 S.E.2d 74, 81 (Ct. App. 2008) (citations and quotations omitted). “If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review.” I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). The South Carolina Court of Appeals identified “a ruling by the trial court or a post-trial motion as the two ways to preserve an issue for appeal.” Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505 (2006).

The prayer for relief in the Respondent's “Request for Compensation” clearly raised this issue before the Probate Court. Petitioner also argued the Court did not have the authority to force such relief during the closing of the hearing in the Probate Court.

(Prob. Hr'g Tr., p.290, ll. 10-25; R. ____). By the Probate Court granting such relief, the Probate Court clearly ruled upon this issue.

Furthermore, a proper Rule 59(e) motion was filed and recorded in the Sumter County Probate Court on January 11, 2012. The issue of the Probate Court's authority to execute a promissory note and mortgage falls within the grounds of "unreasonable compensation" which was raised on page 3, paragraph 7 of the motion. Black's Law Dictionary defines "compensation" as "[r]emuneration and other benefits received in return for services rendered."¹ The security interest clearly falls under "other benefits" as that term is used in the prior Motion for Reconsideration filed by the Appellant.

Judge Atkinson never ruled upon the 59(e) motion. However, South Carolina courts have found that an issue properly raised in a 59(e) motion is preserved for appellate review even though the lower court never ruled on the issue. "[L]awyers cannot force trial courts to address an issue, and a proper Rule 59 request is sufficient without a specific judicial decision on the issue." Sierra Club v. S. Carolina Dept. of Health & Envtl. Control, 387 S.C. 424, 434, 693 S.E.2d 13, 18 (Ct. App. 2010) (quoting Pye at 566, 633 S.E.2d at 511).² Therefore, because the Appellant also properly filed a Rule 59(e) motion with the Probate Court, the issue of whether the Probate Court had the authority to order the note and mortgage was preserved for appellate review even though the Probate Court did not specifically rule on such issue.

¹ Black's Law Dictionary (9th ed. 2009), available at Westlaw BLACKS.

² *See*. "Once the issue has been properly raised by a Rule 59(e) motion, it appears that it is preserved and a second motion is not required if the trial court does not specifically rule on the issue so raised." Coward Hund Const. Co., Inc. v. Ball Corp., 336 S.C. 1, 4, 518 S.E.2d 56, 58 (Ct.App.1999) (quoting *James F. Flanagan South Carolina Civil Procedure* 475 (2d ed.1996)).

Because the matter of the Probate Court's lack of authority to order the note and mortgage was raised to the Probate Court and the Rule 59(e) motion further preserved the issue for appeal, the issue regarding the note and mortgage was properly before the Circuit Court, and the Court should have ruled upon it.

- B. On the merits, the Probate Court erred by ordering compensation to Synovus Trust from the estate as there is no legal basis for supporting the order of a security interest and such order is contrary to the language of South Carolina Code Section 62-3-805.

The Probate Court erred by ordering compensation to Synovus Trust and violated the clear, unambiguous and plain language of South Carolina Code Section 62-3-805 by rewriting the statute to change the order of priority of payment of creditors' claims and administration expenses. There is no legal basis for ordering the co-personal representatives to execute a note and grant a mortgage in Estate property. By granting this relief the Probate Court completely disregarded the express terms of Code Section 62-3-805 which governs the order of priority of payment of claims and expenses. The Probate Court's order overrides the application of this provision and should therefore be reversed.

This is a question of statutory interpretation, and this Court need not give any deference to the lower court's ruling. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Id. "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." Miller v. Aiken, 364 S.C. 303,

613 S.E.2d 364 (2005). “Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature’s language.” City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997).

The order of payment of creditors’ claims and administration expenses of an estate is governed by South Carolina Code Section 62-3-805. By its Order for compensation, the Probate Court changed the statute by changing the order of payment of administration expenses and creditors’ claims and favored one creditor over all others. The Order makes Synovus Trust a secured creditor that has priority over all other creditors’ claims and administration expenses. See S.C. Attorney General’s Opinion which provides that “[c]reditor holding security interest would have priority over, or at least be accorded more preferential treatment than, persons or entities who would be paid pursuant to classification scheme established in Section 62-3-805(a)(1), (2), and (3).” 1990 S.C. Op. Att’y Gen. 169 (1990).

In light of the above, the Probate Court violated the language of the statute and intent of the legislature by rewriting the statute and changing the order of priority for payment of creditors’ claims and administration expenses. Therefore, the Probate Court’s order should be reversed as the probate judge does not have the authority to require the personal representative to execute a mortgage to guarantee the payment of Synovus Trust’s fees.

II. THE CIRCUIT COURT ERRED IN FINDING THE ISSUE OF WHETHER SYNOVUS TRUST'S FEES ACCRUED FOR LONGER THAN THEY SHOULD WAS NOT PRESERVED.

- A. The issue of whether Synovus Trust's fees accrued for longer than they should was preserved because such issue was raised and ruled upon by the Probate Court and was preserved by the Appellant's Rule 59(e) motion.

The Court failed to recognize that Synovus Trust charged fees for nearly a year and one-half beyond what it was entitled under its own fee schedule. The Order states this issue was "never raised to or ruled upon by the Probate Court." (Circuit Order, p.11; R. ____). However, a motion for reconsideration and/or motion to amend judgment was filed and this issue falls within the grounds of "unreasonable compensation" which was raised on page 3, paragraph 7 of the motion. Furthermore, the issue with the fee schedule was raised in the Probate Court on multiple occasions. (Prob. Hr'g Tr., p.93, ll. 8-20; p.133, l.16 – p.134, l.20; R. ____). Therefore, since the issue was raised and ruled upon in the Probate Court and a motion for reconsideration was filed, this issue was preserved for appeal and is properly before this Court.

- B. On the merits, the Probate Court erred in awarding Synovus Trust compensation because Synovus Trust charged fees for nearly a year and one-half beyond what it was entitled under its own fee schedule.

Pursuant to the April 2008 Fee Schedule, "[t]he account will be charged at these annual rates until the *earlier* of receipt of the Estate Tax Closing Letter or when the estate's administration is substantially completed" (emphasis added). (Brief on Appeal, Exh. 4; R. ____). This was the fee schedule in place at the time Synovus Trust was appointed. On October 28, 2009, the Internal Revenue Service sent the Estate Tax Closing Letter. (Brief on Appeal, Exh. 4; R. ____). Thus, Synovus Trust is not entitled to collect fees past October 28, 2009. Despite the Fee Schedule, Synovus Trust continued

to charge fees past this date, at a rate of approximately \$4,600 per month for the following 17 months totaling nearly \$83,000 in excessive fees. These charges were not permitted by the terms of the Synovus Trust Fee Schedule.

In addition to charging fees not allowed in its own fee schedule, Synovus Trust violated the South Carolina Probate Code by failing to close the estate in a timely manner. Pursuant to Code Section 62-3-1001, an estate must be closed “within one year after the date of the first publication of notice to creditors, or within ninety days after the receipt of a state or federal estate tax closing letter, which ever is later.” S.C. Code Ann. § 62-3-1001 (2012). Under this statute, Synovus Trust had a duty to close the estate within one year or within ninety days after receipt of the federal estate tax closing letter.

By October 28, 2009, the Estate of Robert Ross Dinkins had been open for nearly a year and a half. On this date, Synovus Trust received the estate tax closing letter from the IRS. In the nearly three years since Synovus Trust received the closing letter from the IRS, Synovus Trust had not closed the estate. All the while, Synovus Trust has unilaterally increased its own fees and stuck the estate with the bill. The purpose of South Carolina Code Section 62-3-1001 is to protect estates from excessive fees charged by personal representatives based on a failure to expeditiously close an estate. Here, Synovus Trust failed to close the estate as required by statute and continued to charge fees well beyond the statutorily imposed date. This Court should reverse the Probate Court’s award of compensation because it awards fees far beyond what Synovus Trust is entitled to.

III. THE CIRCUIT COURT ERRED IN AFFIRMING THE PROBATE COURT'S AWARD OF COMPENSATION TO SYNOVUS TRUST BECAUSE THE COMPENSATION IS UNREASONABLE AND UNSUPPORTED BY EVIDENCE.

Appeals from the Probate Court are governed by South Carolina Code Section 62-1-308. Subsection (d) of that statute provides that the Circuit Court "shall hear and determine the appeal according to the rules of law." S.C. Code Ann. § 62-1-308(d) (2012). "As used in this statute, the phrase 'according to the rules of law' means according to the rules governing appeals." In re Howard, 315 S.C. 356, 360, 434 S.E.2d 254, 257 (1993). Thus, in the absence of a statute or rule prescribing a different standard of review, "the circuit court must apply the same standard that the appellate court would apply were the appeal taken directly to either the Supreme Court or Court of Appeals." Univ. of S. Cal. v. Moran, 365 S.C. 270, 274, 617 S.E.2d 135, 137 (Ct. App. 2005) (citations and quotations omitted).

"The standard of review applicable to cases originating in the probate court depends upon whether the underlying cause of action is at law or in equity." Id. In this case, the Appellant appealed the Probate Court's award of compensation to Synovus Trust. See Notice of Appeal ("The Appellant will seek a trial appealing the Probate Court's decision to award compensation to Synovus Trust Company, N.A.") and Grounds for Appeal ("Mae Lee Dinkins hereby sets forth the following grounds for her appeal from the Order granting Respondent's Request for Compensation as Co-Personal Representative and Trustee of the subject estate"). The award of compensation has two components: (a) the amount of the fee and (b) security for payment of the fee.

A dispute over the appropriate amount of money to be paid by one party to another is a legal dispute. "On appeal from an action at law that was tried without a jury,

the appellate court can correct errors of law, but the findings of fact will not be disturbed unless found to be without evidence which reasonably supports the judge's findings.” Townes Assoc. Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

The Probate Court concluded in its Order that “Synovus [Trust] is entitled to reasonable compensation for its services as Co-Personal Representative.” (Probate Order, ¶36; R. ____). It found that Synovus Trust “did not . . . mismanage the Estate. . .or fail to perform any duty pertaining to its office” and that it “performed all the duties of its office in a capable and competent manner. . .[and] provided extraordinary services above and beyond those typically required for an estate the size of the Estate.” (Probate Order, ¶¶ 10-11; R. ____).

However, the Probate Court erred in its decision to award compensation to Synovus Trust as the record does not provide any evidence that supports these findings. The evidence is contrary to the findings. Under Synovus Trust’s management, the property plummeted in value and went to waste. (Prob. Hr’g Tr., p.21, l.22 – p.22, l.24; p.117, l.13 – p.119, l.1; R. ____). Synovus Trust submitted no written evidence to show time working on the estate. (Prob. Hr’g Tr., p.254, ll. 8-13; p.256, ll. 5-20; R. ____). It charged excessive fees for its services and continually increased its fees.

A. Synovus Trust did not properly manage the estate.

As discussed above, the Probate Court found “Synovus [Trust] has performed all the duties of its office in a capable and competent manner. Indeed, Synovus [Trust] has provided extraordinary services above and beyond those typically required for an estate the size of the Estate.” (Probate Order, ¶10; R. ____). The record clearly indicates that there is no evidence supporting this factual finding. The evidence is actually contrary to

the factual finding that Synovus Trust properly managed the estate. Synovus Trust systematically mismanaged the Estate. Synovus Trust is not entitled to fees incurred in violation of mismanagement of the Estate, and the compensation should be reversed.

Synovus Trust argued about the extensive work that had to be done to file tax returns for the estate. However, it did not file the tax returns. (Prob. Hr'g Tr., p.260, ll. 1-7; R. ____). Synovus Trust hired an accountant to file the tax returns and the estate paid the accountant. (Prob. Hr'g Tr., p.259, l.22 – p.260, l.13; R. ____). Synovus Trust hired someone else to do its work, which it is entitled to do. However, this is not evidence to support its contention the estate was properly managed. It is also not support for the fees Synovus Trust charged since Synovus Trust hired and paid someone else to do the work.

Synovus Trust took on management of all real property included in the estate. The value of the real property held by the estate decreased significantly since Synovus Trust assumed its role as co-personal representative. (Prob. Hr'g Tr., p.117, l.13 – p.119, l.19; R. ____). Synovus Trust did not maintain the property as needed, and now significant investment is required to restore the property to generate income. Synovus Trust did not rent the residential and community property. (Prob. Hr'g Tr., p.187, l.18 – p.188, l.1; R. ____).

Neither Synovus Trust nor its employees are licensed or trained as property managers in any way. (Prob. Hr'g Tr., p.169, ll. 3-10; R. ____). Synovus Trust did not list property for sale or properly market the property. In addition, Synovus Trust did not properly lease out rental property or maintain it. (Prob. Hr'g Tr., p.180, l.17 – p.182, l.21; R. ____). When the leases expired, Synovus Trust did not renew the leases or seek new tenants and allowed many of the properties to remain dormant without renters.

(Prob. Hr'g Tr., p.187, l.11 – p.188, l.1; R. ____). Synovus Trust did not keep proper records acceptable in the real estate management industry for the management of real estate.

Additionally, the estate was open for over three and a half years. Synovus Trust did not take the necessary steps to manage the Estate or close the Estate. Instead it continued to charge and attempt to collect fees for the continuation of the Estate and its management. (Prob. Hr'g Tr., p.106, ll. 8-22; R. ____). Much work remains to close the estate such as selling property, paying appropriate debts and renting property.

B. Synovus Trust unilaterally increased fees in violation of the initial fee schedule.

Synovus Trust increased its own compensation in violation of its agreed upon fee schedule. Synovus Trust is not entitled to fees incurred in violation of its agreement with the Estate, and the compensation should be reversed.

During the hearing, Synovus Trust employee Kristi Curtis testified that the April 2008 Fee Schedule was the fee schedule in place when Mr. Dinkins died and Synovus Trust was appointed personal representative. (Prob. Hr'g Tr., p.69, ll. 7-10; R. ____). The April 2008 Fee Schedule states that Synovus Trust's fee will be computed using its published fee schedule in effect at the time it begins its duties. (Brief on Appeal, Exh. 3; R. ____). Synovus Trust began its duties when it was appointed on May 2, 2008. However, Synovus Trust has increased the fee since 2008 and added additional fees. Ms. Curtis admitted that Synovus Trust increased its fees without full disclosure or negotiation with Mrs. Dinkins. (Prob. Hr'g Tr., p.71, l.11 – p.72, l.22; R. ____).

Synovus Trust promised to charge a certain fee when the initial fee schedule was executed. It later increased the fees by \$50,000 and Synovus Trust did not inform Mrs.

Dinkins, the primary beneficiary of the estate. (Prob. Hr'g Tr., p.70, ll.16-19; R. ____). This conduct is inequitable. This inequitable conduct should bar Synovus Trust from recovery of the fees it seeks.

C. Synovus Trust improperly calculated its annual fee.

Synovus Trust calculated the First Annual Fee at \$120,827.54. This fee was calculated according to the April 2008 PR Fee Schedule and was for the first twelve months of estate administration. This fee was to be calculated "on the asset values as reported on [IRS Form 706 – United States Estate (and Generation-Skipping Transfer) Tax Return] at [the] applicable rate" of 1.6 percent per year. Synovus Trust used the gross estate value of \$7,567,376 to calculate its fee. It took a fee based on 1.6% of \$7,567,376, although that was not the net value of the estate.

To determine the true value of the assets, the mortgage values owed on the assets should be considered. Synovus Trust included the higher gross estate value and not the net estate value. (Prob. Hr'g Tr., p.98, ll. 11-14; R. ____). Thus, the fee was overstated because Synovus Trust did not recognize the estate's true value. Synovus Trust admits that the term "gross estate value" is not on the fee schedule and that gross estate is different than net estate. (Prob. Hr'g Tr., p.97, ll. 5-18; R. ____). Curtis testified that Synovus Trust got the authority to use the gross estate value rather than the net value from the August 2008 Schedule. (Prob. Hr'g Tr., p.100, ll. 2-6; R. ____). However, the April 2008 Schedule in effect at the time of Mr. Dinkins' death does not say "gross value." (Prob. Hr'g Tr., p.100, ll. 2-25; R. ____).

Synovus Trust is attempting to increase its fees by back charging at a higher rate. This conduct is inequitable. For this reason, Synovus Trust should not receive the fees it charged.

D. Synovus Trust double charged real estate management fees.

The Probate Court awarded Synovus Trust real estate management fees for the second and third years of estate administration in the amount of \$27,106.09. (Probate Order, ¶27). The fee agreement in effect when Synovus Trust began its duties as personal representative did not provide for extra charges for real estate management services. (Prob. Hr'g Tr., p.111, ll. 4-17; R. ____). Synovus Trust bases its demand for these fees on the August 2008 and August 2010 Fee Schedules. However, Synovus Trust never told Mrs. Dinkins it was adding a real estate management fee to the estate. (Prob. Hr'g Tr., p.76, ll. 1-5; R. ____).

Additionally, the real estate management fees include fees for managing a beach house. However, Synovus Trust hired another company – Pawley's Island Realty – to manage the beach house, which also charged a fee. (Prob. Hr'g Tr., p.106, l.23 – p.107, l.21; R. ____). Thus, Synovus Trust is charging a management fee for a beach house managed by another company. As a result, Synovus Trust charged the estate management fees for management done by another company.

Synovus Trust committed inequitable conduct by charging fees it did not have a right to charge. Therefore, it is not entitled to receive the compensation it seeks.

IV. THE CIRCUIT COURT ERRED IN AFFIRMING THE PROBATE COURT'S AWARD OF COMPENSATION TO SYNOVUS TRUST BECAUSE SYNOVUS TRUST VIOLATED ITS FIDUCIARY DUTY TO THE ESTATE.

The Probate Court found that “Synovus [Trust] did not . . . fail to perform any duty pertaining to its office.” (Probate Order, ¶9). However, as a fiduciary, Synovus Trust violated its duties to the Estate by pursuing its own interests at the expense of the estate. As a personal representative, Synovus Trust owed the highest duty to the Estate - a fiduciary duty. The South Carolina Probate Code provides that “a personal representative is a fiduciary who shall observe the standards of care applicable to trustees as described by Section 62-7-804.” S.C. Code Ann. § 62-3-703 (2012). Pursuant to Section 62-7-804, the fundamental duty of a fiduciary is to “administer the [estate] as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the [estate].” S.C. Code Ann. § 62-7-804 (2012). This Section further provides that in satisfying the above standard, “the [personal representative] shall exercise reasonable care, skill, and caution.” *Id.*

The Circuit Court stated in its Order “[t]hus I find there is evidence in the record to support the Probate’s Order finding that Synovus Trust did not violate its fiduciary duty to the Estate and that Mrs. Dinkins has not met her burden of establishing that there is no evidence in the record supporting that finding.” (Circuit Court Order, p.13; R. ____). However, the Circuit Court did not name the evidence supporting this finding because there is no evidence supporting Synovus Trust’s proper discharge of its fiduciary duties. There is only evidence to the contrary.

- A. Synovus Trust refused to resign as personal representative until it was paid monies it claimed were owed.

Synovus Trust breached its fiduciary duty to the estate when it refused to resign as co-personal representative until it was paid monies it claims were owed. Synovus Trust wrongfully placed its own interests in getting paid above the interests of the Estate. The fiduciary duties of a personal representative are not conditioned upon payment.³

Over the protests of the Estate's beneficiaries, Synovus Trust clung to control over the Estate until the Estate paid Synovus Trust's fee. Over the objections of the beneficiaries, Synovus Trust also refused to close the Estate until it got its money. In sworn testimony, Synovus Trust employee Donna Nesbitt admitted that the sole reason Synovus Trust refused to resign as personal representative was that it had not been paid monies it claims were owed. (Prob. Hr'g Tr., p.249, l.14 – p.250, l.17; R. ____).

Therefore, Synovus Trust breached its fiduciary duty to the Estate by placing its own financial interest ahead of the Estate's interests in a fair and complete administration contrary to the South Carolina Code of Laws.

- B. Synovus Trust's sister company, NBSC, is the largest creditor of the estate.

There has been a great deal of confusion surrounding the legal relationship between Synovus Financial, Synovus Trust, and NBSC. Synovus Financial owns Synovus Trust, the former co-personal representative of the Estate. (Prob. Hr'g Tr., p.78, ll. 13-15; R. ____). Synovus Financial also owns NBSC, the primary creditor of the Estate. (Prob. Hr'g Tr., p.78, ll. 11-12; R. ____). Synovus Trust claims it is not a creditor

³ S.C. Code § 62-7-804, cmt. ("This [fiduciary] duty does not depend on whether the [personal representative] receives compensation").

of the Estate despite its common ownership with NBSC. (Prob. Hr'g Tr., p.77, ll. 7-13; R. ____). In the application to become co-personal representative, Synovus Trust knew of its relationship to the Estate as a creditor and by its omission misrepresented to the court that this relationship did not exist. This is a conflict of interest and a violation of South Carolina law.

When Synovus Trust applied to be co-personal representative, it knew that its sister company NBSC was the largest creditor of the estate and misrepresented material facts to the Probate Court by not disclosing NBSC as a creditor to the Estate. It failed to disclose in its co-personal representative application to the Probate Court that NBSC was a creditor of the estate. (Prob. Hr'g Tr., p.82, l.5 – p.83, l.25; R. ____). Synovus Trust through its subsidiary relationship with Synovus Financial essentially acted simultaneously as both a creditor and co-personal representative. However, Synovus Trust never disclosed this to the Estate or to Mrs. Dinkins. (Prob. Hr'g Tr., p.19, ll. 3-8; R. ____).

The Circuit Court Order cited a North Carolina Court of Appeals opinion which states “[n]o conflict of interest is created by the *mere* fact that the executor of the estate also occupied the status of creditor.” Cf. Tyson v. N.C. Nat'l Bank, 280 S.E.2d 478, 481 (N.C. Ct. App. 1981) modified on other grounds, 286 S.E.2d 561 (N.C. 1982) (citing North Carolina's priority statute) (emphasis added). The Appellant agrees that the mere fact that the co-personal representative is also a creditor does not in itself create a conflict. However, a conflict of interest and a breach of fiduciary duty do occur when a co-personal representative of the estate who is owned by the same company as a creditor

puts its interests above the interests of the estate. Furthermore, the co-personal representative has a duty to disclose all its interests in the estate.

Additionally, Synovus Trust breached its fiduciary duty to the Estate by requesting a note and mortgage on the Pawley's Island Property to secure payment of the fees awarded in the Probate Order. According to the Order, the Pawley's Island Property was "the only Estate asset with sufficient equity to secure the compensation due Synovus Trust." (Probate Order, ¶30). By requesting the note and mortgage, Synovus Trust put its interest ahead of the Estate and the creditors of the Estate. The Probate Court and the Circuit Court failed to recognize this breach of fiduciary duty by Synovus Trust.

Synovus Trust continually breached its fiduciary duty to the Estate by placing its own financial interests ahead of the Estate's interests in a fair and complete administration. This breach of fiduciary duty was in violation of the law in South Carolina, and this Court should reverse the Probate Court's order granting Synovus Trust compensation.

V. THE CIRCUIT COURT ERRED IN AFFIRMING THE PROBATE COURT'S AWARDING OF COMPENSATION TO SYNOVUS TRUST BECAUSE SYNOVUS TRUST DID NOT HAVE THE PROPER LICENSES AND REGISTRATIONS TO MANAGE PROPERTY OR ACT AS A PERSONAL REPRESENTATIVE IN SOUTH CAROLINA AND IS NOT ENTITLED TO FEES FOR WHICH IT IS NOT LICENSED.

A. The Probate Court erred in awarding compensation to Synovus Trust because it misconstrued South Carolina Code Sections 40-57-240(1) and 62-3-711.

The Probate Court made an error of law by misconstruing and misapplying South Carolina Code Sections 40-57-240(1) and 62-3-711 and affirming the Probate Court's finding that Synovus Trust was entitled to additional compensation for real estate property management.

The charging of fees for managing real estate for another is governed by Code Sections 40-57-20, 40-57-30 and 40-57-220. These sections provide that only licensed property managers may charge a fee for the management of property. *Id.* South Carolina Code Section 40-57-240(1) provides an exception to these statutes stating “real estate licensure statutes do not apply to ‘the sale, lease, or rental of real estate by an unlicensed *owner* of real estate who *owns* any interest in the real estate if the interest being sold, leased, or rented is identical to the owner’s legal interest.” (emphasis added). S.C. Code Ann. § 40-57-240(1) (2012).

Neither Synovus Trust nor any of the employees who worked on the estate administration are licensed to manage real estate. (Prob. Hr’g Tr., p.102 – p.103). Nonetheless, in addition to personal representative fees, Synovus Trust charged \$27,106.09 in real estate management fees. (Probate Order, ¶27; R. ____). The Probate Court awarded this fee in addition to the personal representative fee. The Probate Court misconstrued and misapplied South Carolina Code Section 62-3-711(a) to come to this conclusion. South Carolina Code Section 62-3-711(a) provides that “a personal representative has the same power over the title to property of the estate that an absolute owner would have[.]”⁴ S.C. Code Ann. § 62-3-711(a) (2012). However, Section 62-3-101 of the South Carolina Code states that “[u]pon the death of a person, his real property devolves to the persons to whom it is devised by his last will....” S.C. Code Ann. § 62-3-101 (2012).

⁴ The last portion of § 40-57-240(1) was left out of the Circuit Court’s Order. The full statute provides “a personal representative has the same power over the title to property of the estate that an absolute owner would have, in trust however, *for the benefit of the creditors and others interested in the estate*” (emphasis added).

While Synovus Trust, as co-personal representative, had the power to manage and sell the property, it did not have the right to charge an additional fee for doing so. It had the same *power* as an absolute owner but did not own any interest in the estate's real estate. Thus, South Carolina Code Section 40-57-240(1) does not apply, and Synovus Trust did not have a right to charge the extra real estate management fees, and the Probate Court erred when it awarded these fees to Synovus Trust.

Synovus Trust, acting as co-personal representative, did not need a license to manage or sell property. In fact, it had a duty to do so. However, Synovus Trust cannot double charge the estate an additional fee to manage the real estate, especially when it is not licensed to do so. The Probate Court made an error in law when it construed these statutes to find that Synovus Trust was entitled to charge fees to the estate for property management and selling and leasing real estate when Synovus Trust was not licensed to do so.

B. Synovus Trust was not licensed to conduct business in South Carolina when it acted as personal representative.

South Carolina Code Section 62-3-203 sets forth the requirements to serve as personal representative. Subsection (e)(3) of that statute indicates that “a corporation created by another state of the United States or ... a corporation created under the laws of the United States and not having a business in this State...” is not qualified to serve as personal representative. S.C. Code Ann. § 62-3-203(e)(3) (2012).

In addition, South Carolina Code Section 33-15-101(a) requires that “[a] foreign corporation may not transact business in this State until it obtains a certificate of authority from the Secretary of State.” Synovus Trust is a federally chartered association, and throughout its administration of the estate, it did not have a business in South Carolina.

S.C. Code Ann. § 33-15-101(a) (2012). In fact, it did not register to do business in South Carolina until July 7, 2011 – the day of the Sumter County Probate Court hearing on the matter. (Prob. Hr’g Tr., p.167, ll. 4-12; R. ____).

In addition, South Carolina Code Section 34-21-10 requires that any corporation must apply to the State Board of Bank Control before conducting a trust business. That section requires that “[n]o corporation, partnership or other person shall conduct a trust business in this State without first making a written application to the State Board of Bank Control and receiving written approval from the Board....” S.C. Code Ann. § 34-21-10 (2012).

A three judge panel of the Federal District Court for the District of South Carolina has found these statutes constitutional against challenge in American Trust Company v. South Carolina Board of Bank Control, 381 F.Supp. 313 (D.S.C. 1974). In this case, NCNB Corporation was organized under the laws of North Carolina. Id. at 318. It then formed a South Carolina corporation, American Trust Company, to transact trust business in South Carolina. Id. NCNB could not provide trust services in South Carolina through American Trust until it obtained approval of the Board of Governors of the Federal Reserve System. Id. The Board could not give its approval because American Trust was prohibited by South Carolina laws from serving as a fiduciary. Id. at 319. Litigation was then instituted to test the constitutionality of the South Carolina statutes. Id. The court found that South Carolina could exclude a foreign corporation from doing business in the state without violating the fourteenth amendment. Id. at 322. The court also found that the statute requiring approval from the South Carolina Board of Bank Control before a corporation can engage in trust business “resembles, in many respects, federal law and

regulations that pertain to applications from national banks seeking permission to exercise fiduciary powers . . . [and] does not violate the due process clause.” Id. at 323.

During its time as co-personal representative, Synovus Trust did not have approval of the State Board of Bank Control. In fact, it did not even apply for authorization until July 7, 2011 – the day of the hearing to remove it as personal representative. (Prob. Hr’g Tr., p.168, l.14 – p.170, l.10; R. ____).

Thus, Synovus Trust was not qualified to serve as personal representative under Code Section 62-3-203(e)(3) because it was not licensed to do business in South Carolina. In addition, it was not qualified to act as a personal representative under Code Section 34-21-10 because it did not have approval from the State Board of Bank Control.

Since it did not qualify as personal representative, Synovus Trust is not entitled to a fee. In Franklin v. Chavis, 371 S.C. 527, 640 S.E.2d 873 (2007), the South Carolina Supreme Court found a similar situation and ruled that a personal representative was not entitled to a fee. In that case, Ernest Chavis drafted a will for Ms. Weiss. He was not a lawyer. The will named him as personal representative. The Supreme Court held that Mr. Chavis practiced law without a license when he drafted a will for Ms. Weiss. The Court then held that he was not entitled to a fee for acting as personal representative as follows:

Respondent’s entitlement to a fee as personal representative flows directly from his unauthorized practice of law in drafting a will naming himself as personal representative. Accordingly, Respondent shall not receive any fee as personal representative of the Weiss estate and shall disgorge any fee received thus far.

Id. at 877. Likewise, Synovus Trust was not qualified to serve as personal representative under Code Section 62-3-203(e)(3) because it was not licensed to do business in South

Carolina. It also did not have the approval of the State Board of Bank Control as required by Code Sections 34-21-10. As a result, it is not entitled to the fees it seeks.

In addition, by petitioning to act as a fiduciary and personal representative, Synovus Trust represented that it had the necessary licenses and was acting in accordance with South Carolina law, even though it was not. This conduct is inequitable and should bar Synovus Trust from receiving its fees.

CONCLUSION

Mrs. Dinkins respectfully asks this court to reverse the Probate Court's Order which granted Synovus Trust's request for compensation and required the current personal representative to execute a promissory note and mortgage in favor of Synovus Trust.

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April 24, 2013

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2012-213564

IN THE MATTER OF: Estate of Robert Ross Dinkins

Mae Lee Dinkins,..... Appellant,

v.

Synovus Trust Company, N.A., Respondent,

William C. Cantey, Jr, Intervenor.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant Mae Lee Dinkins on the parties to the appeal by depositing a copy of it in the United States Mail, postage prepaid, on April 24, 2013, addressed to attorneys of record as follows:

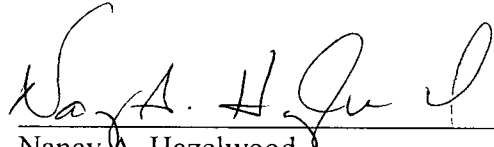
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