

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

) IN THE COURT OF COMMON PLEAS
) FOR THE THIRD JUDICIAL CIRCUIT
) APPEAL FROM PROBATE COURT
) CASE NO.: 2012-CP-14-0485
) 2012-ES-14-0025

Ronald Anson Berry

Appellant,

vs.

Philip Michael Berry, Sr. as Personal
Representative of the Estate of Allen Lester
Berry, Jr., and Philip Michael Berry, Sr.,

Respondents.

ORDER

2013 FEB - 7 AM 11:59
CLERK OF COURT
CLARENDON COUNTY, SC

This matter came before me in Manning, South Carolina on February 6, 2013 pursuant to a Notice of Intent to Appeal filed by the Appellant, Ronald Anson Berry (Ron Berry) dated October 18, 2012, wherein he appeals the Order of the Probate Court Judge Kathy L. Geddings appointing Philip Michael Berry, Sr. (Philip Berry) as the Personal Representative of the Estate of Allen Lester Berry, Jr. (Lester Berry).

The Appellant was represented by Allen Jackson Barnes, Esquire. The Respondent, Philip Michael Berry, Sr. individually and as personal representative of the Estate of Allen Lester Berry, Jr. was represented by Marvin E. McMillan, Jr., Esquire of the Sumter County Law Firm of Player & McMillan, LLC.

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SC Court of Appeals

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DATE

4/2/13

Beulah D. Roberts

CLERK OF COURT
CLARENDON COUNTY, SC

The Court has reviewed the Notice of Intent to Appeal, Grounds for Appeal, the pleadings, all briefs submitted, the transcript of record with exhibits from the Probate Court hearing held on September 18, 2012 and I have considered the arguments of council and I make the following findings of fact and conclusions of law:

1. That this Court has jurisdiction over the parties hereto and the subject matter herein.
2. That Lester Berry died testate on October 30, 2011 and was a resident of Clarendon County at the time of his death.
3. The Last Will and Testament of Lester Berry dated May 11, 2005 specifically designates Philip Berry as his Personal Representative and referred to Philip Berry as his beloved brother.
4. That the Last Will and Testament of Lester Berry was prepared by William C. Coffey, Jr., a duly licensed attorney in the state of South Carolina. Mr. Coffey practices law in Manning, South Carolina who testified that it was the intention of Lester Berry to appoint Philip Berry as his Personal Representative.
5. That the competency of Lester Berry at the time of executing his Last Will and Testament does not appear to be in question and is not being challenged by any party in this action.
6. That a hearing was held in Probate Court September 18, 2012 pursuant to a Notice of Hearing to determine the designation and appointment of the Personal Representative of the estate of Lester Berry. It appears that two (2) Petitions for Formal Appointment were filed with the Probate Court. Specifically, Philip Berry petitioned the Court for formal proceedings

and included in his Petition the fact that his appointment should be based on priority as being named as the primary Personal Representative in the Will of Lester Berry.

7. That Ron Berry, brother of Lester Berry, also filed a Petition for Formal Proceedings seeking to be appointed as Personal Representative based upon the fact that he claims to be a creditor and brother of Lester Berry. It appears that Ron Berry was not named or referenced as a Personal Representative of Lester Berry and was not named as a beneficiary in the Will of Lester Berry. The Court also notes that Ron Berry is not an heir at law under the estate of Lester Berry as acknowledged in the verified petition of Ron Berry. It appears that a lengthy hearing was held before Probate Court Judge Kathy L. Geddings in regard to this matter. In reviewing the transcript in this matter the Court has reviewed and considered the testimony of William C. Coffey, Jr., Philip M. Berry, Sr., Ronald A. Berry and Barbara Berry, the ex-wife of Lester Berry.

8. The Court further notes that Lester Berry not only designated Philip Berry as his Personal Representative, but also named Philip Berry as the beneficiary of the majority of his estate assets.

9. An action to remove a Personal Representative is equitable in nature and this Court may make findings in accordance with its own view of the preponderance of the evidence. See In re Estate of Weeks 329 S.C. 251, 495 S.E.2d 454 (S.C. App 1997).

10. The Court specifically finds that Philip Berry must given priority due to the fact that he was named in the Will of Lester Berry. The Court further finds that the appointment is mandatory based on the priority if the applicant is qualified and willing to serve. See In re

McClam's Estate 245 S.C. 315, 140 S.E.2d 478 (Sup. Ct. 1965) See also SC Code Ann §62-3-203(2009).

11. The Court is not required to evaluate all applications and petitions for Personal Representative and determine the best applicant but rather the Court is required to determine if the person with priority is unsuitable to serve as Personal Representative.

12. The Court finds that Philip Berry is not unsuitable and is not disqualified from serving as Personal Representative of the Estate of Lester Berry. In considering the evidence as a whole, the Court finds no evidence to satisfy the Court that Philip Berry is not qualified for the appointment as assigned to him by the wishes and instructions of his brother and by the priority established by law.


13. The Court concludes that Philip Michael Berry, Sr. should be appointed as Personal Representative of the Estate of Allen Lester Berry, Jr. and therefore the Order of Probate Court Judge Kathy L. Geddings dated October 4, 2012 is affirmed.

14. In making this decision, the Court is guided by the fact that there is a strong deference shown to the personal representative chosen by the testator. In Blackman v Weaver 366 S.C. 245, 621 S.E.2d 42 (S.C. App. 2005) the Court of Appeals held that "the Courts have been reluctant to take the management of an estate from those to whom it was confided by the Testator, for to that extend the intention expressed in his Will would be defeated." Smith v Heyward, 115 S.C. 145, 164, 105 S.E. 275, 282 (1920). The power to remove a Personal Representative "should be executed with great caution, and not at all, unless it appears to be necessary for the protection of the estate to prevent loss or injury to it from misappropriation, maladministration or fraud." *Id.* At 164-65, 105 S.E. at 202.

Now, THEREFORE, based upon the foregoing, it is

ORDERED, that the Order of Probate Court Judge Kathy L. Geddings dated October 4, 2012 be, and hereby is, affirmed and that Philip M. Berry, Sr. be, and hereby is, appointed and designated as the Personal Representative of the Estate of Allen Lester Berry, Jr.

IT IS SO ORDERED!


R. FERRELL COTHRAN, JR.
Circuit Court Judge

Manning, South Carolina

March 28, 2013