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Feb 22 2022

SC Court of Appeals

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,

FINAL REPLY BRIEF OF APPELLANT

Russell A. Blanchard IV, SC Bar No. 76369
Williams & Williams
P.O. Box 1084
Orangeburg, SC 29116
803.534.5218
blanchardra@williamsattys.com
Attorneys for Appellant

Robert F. McCurry, Jr., SC Bar No. 3762
Horer Barnwell and McCurry, LLP
P.O. Box 329
Orangeburg, SC 29116
803.531.3000
bobmccurry@hbmlp.com
Attorneys for Respondent

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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 DISTRIBUTION 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 and FACTS

The Statement of the Case and the Facts as stated in Appellant's Final Brief are incorporated herein by reference.

ARGUMENT

Standard of Review

This case presents issues of both equity and law, so the Court must review each issue under the applicable rule of law. *Mason v. Mason*, 412 S.C. 28, 770 S.E.2d 405 (Ct. App. 2015). For equitable issues, this Court has jurisdiction to find facts in accordance with the preponderance of the evidence. *Park Regency, LLC v. R&D Dev. of the Carolinas, LLC*, 402 S.C. 401, 741 S.E. 2d 528 (Ct. App. 2012). Where legal issues are raised, the standard of review requires that the findings of the lower court are not to be overturned unless there is no evidence which reasonably supports the lower court's findings. *Townes Associates, Ltd. V. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976).

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.

Appellant has adequately argued this issue in his Final Brief and maintains that the language in the Deed of Distribution should control. As discussed in Section III of this Reply Brief, the language of the Will leads to the same result as the language of the Deed of Distribution. The Deed of Distribution is correct, and the language of the will does not set up a situation where Martha's life estate can ripen automatically into fee simple as argued by Respondent.

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

Appellant has adequately argued this issue in his Final Brief. If the Deed of Distribution was incorrect, which Appellant disputes, the Probate Court would only have subject matter jurisdiction to require a corrective Deed of Distribution if an interested party reopened

Catharine's Estate. The Probate Court would only have subject matter jurisdiction to act on assets of Catharine or modify Catharine's Deed of Distribution while her Estate is open.

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.

In her Brief, Respondent focuses on the interpretation of the language in Catharine's Last Will and Testament. The Personal Representative of Catharine's Estate had the difficult task of drafting a Deed of Distribution that conformed with Catharine's desire as expressed in her Will. In this case, the interest that Martha held at her death was either 1) a life estate that could have become a fee simple interest if Martha had taken appropriate action or 2) a life estate with remainder to Mark if he survived and if he did not survive, remainder to the residuary devisees. The first option is discussed in Appellant's Brief, so the second option will be explored here.

The construction or interpretation of a provision in a will is a legal not equitable issue. *Holcome-Burdette v. Bank of America* 371 S.C. 648, 654, 640 S.E.2d 480, 483 (Ct. App. 2006). In this case, the lower Courts did not employ the proper legal principles for interpreting will provisions. "The paramount rule of will construction is to determine and give effect to the testator's intent." *Id.* at 655. It is clear from the wording of the devise at issue that Catharine did not want Henry L. Gillespie, the spouse of Martha Ann Fairey Gillespie, or any non-blood relative to inherit the 9.7 acre tract. The mechanism that Catharine uses to ensure that the real property remains in the family is a life estate. Her will states "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." (R. p. 113-114, emphasis added). The Will then goes on to list out the conditions. This initial sentence in the devise clearly creates a life estate in Martha with the purpose of the life estate being later revealed in the conditions and other

language in the Will. If Martha or Mark were to receive the real property and attempt to sell it, Catharine specifically granted a first right of refusal to Lyle. (R. p. 114). Catharine also states her “desire that the subject property be sold or be offered at the time of any sale to a member of the Fairey Family under the same terms as offered to a third party for sale.” (R. p. 114). Clearly Catharine desired that this real property remain in the family, which would include Appellant, Martha, and Mark. Almost a whole page of her Will is devoted to setting out mechanisms to keep the real property in the family.

In this case, when Catharine died, Martha was married, and Mark was alive. At Catharine’s death, Martha could only inherit a life estate in the real property at issue because that is what Catharine’s Will specifically devised her. On July 31, 2003, when Catharine died, and on January 21, 2005, when the Deed of Distribution is signed (R. p. 112), the same conditions existed, and no one could know what order Mark and Martha would die in. Additionally, no one could know if Martha would be married or single when she died. While the Will conditions specifically mention Martha’s husband Henry, it is clear from the other language in the same devise that Catharine would not want any husband of Martha to inherit the land.

“In assigning meaning to the words used in the will and ascertaining the intent of the testator, the court must view the will as a whole.” *Holcombe-Burdette* 371 S.C. at 657. “A court may not consider the will piecemeal, but must give due weight to all its language and provisions, giving effect to every part when, under a reasonable interpretation, all the provisions may be harmonized with each other and the will as a whole.” *Epworth Children’s Home v. Beasley*, 365 S.C. 157, 166, 616 S.E.2d 710, 715 (2005). To interpret the meaning of this complicated devise, all the language of the devise and the rest of the Will must be considered. The overarching purpose of Catharine’s Will is to devise her assets to her children, Martha and Lyle, or her

grandson Mark. The only devisees listed in Catharine's Will are her two children, Martha and Lyle, and her grandchild, Mark. The "rest and residue" of her property is left to Marth and Lyle. (R. p. 117). Catharine clearly wants the real property at issue to go to either Martha, Mark, or Lyle, because they are her blood relatives. It is also clear that Catharine wants the property to go to either Mark or Lyle after Martha dies. Catharine believed that if Martha died unmarried, Mark would be the one to get the real property. When the condition "If during my daughter's lifetime she shall become a widow of Henry L. Gillespie, then I direct that this gift of real estate to my said daughter shall be in fee simple" (R. p 114) is read in conjunction with the other provisions of the will, it is clear that Catharine still meant for Martha's interest to be a life estate with remainder to Mark. Catharine would not have desired for Martha to have the opportunity to remarry and leave the property to her husband instead of her son Mark.

In the first sentence of the devise, Martha gets a life estate with remainder to Mark (if he survives). In the first condition, Mark gets the real property if he survives Martha and Martha is still married. Catharine clearly intended the property to go to Mark if he was alive at Martha's death, so Mark's survivorship should be implied under the second condition. It is also clear that if Mark was not going to inherit from Martha because he was deceased or she was married, Catharine wanted the property to go to Lyle. "An interpretation that fits into the whole scheme or plan of the will is most likely to be the correct interpretation of the intent of the testator." *Epworth Children's Home*, 365 S.C. at 166, 616 S.E.2d at 715.

When the appropriate legal standards are applied to the interpretation of Catharine's Will, the Court should reach the conclusion that the real property was not part of Martha's Estate.

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.

February 18, 2022

Respectfully Submitted,

s/Russell A. Blanchard IV
Russell A. Blanchard IV, SC Bar No. 76369
WILLIAMS & WILLIAMS
Post Office Box 1084
Orangeburg, S. C. 29116-1084
(803) 534-5218
blanchardra@williamsattys.com
Attorneys for Appellant