

South Carolina Law Review

Volume 43
Issue 1 *ANNUAL SURVEY OF SOUTH CAROLINA
LAW*

Article 16

Fall 1991

Probate Law

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Recommended Citation

(1991) "Probate Law," *South Carolina Law Review*. Vol. 43 : Iss. 1 , Article 16.
Available at: <https://scholarcommons.sc.edu/sclr/vol43/iss1/16>

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PROBATE LAW

I. COURT REQUIRES CLAIMANTS TO KNOWINGLY WAIVE ELECTIVE SHARE RIGHTS AND UPHOLDS THE CONSTITUTIONALITY OF THE ELECTIVE SHARE PROVISION

In *In re Patrick*¹ the South Carolina Supreme Court held that under section 62-2-204 of the South Carolina Code² claimants must knowingly waive their rights to an elective share.³ The supreme court also upheld the constitutionality of section 62-2-201's elective share provision⁴ and held that article XVII, section 9 of the South Carolina Constitution,⁵ as applied, violates the Fourteenth Amendment's Equal Protection Clause.⁶

Murray Patrick's wife, from whom he was separated when she executed her will, died testate. Mrs. Patrick devised one dollar to her husband and the remainder of her estate to her children. Thereafter, Murray claimed and was awarded his elective share. On appeal Mrs. Patrick's children argued that Murray waived his right to elective share when he conveyed his one-half interest in the home to his wife and sent her a letter which indicated that he would convey his interest to her if she would reconcile. The children also argued that the elective share provision violates the Fourteenth Amendment's Equal Protection Clause.⁷ The court rejected both of these contentions.

The court based its holding that Murray did not waive his right to elective share on three grounds: no evidence in the record indicated that Murray knowingly waived his right to elective share, the legislature did not enact the elective share provision until after Murray wrote the letter, and Murray and his wife reconciled after Murray wrote the

1. 402 S.E.2d 664 (S.C. 1991).

2. S.C. CODE ANN. § 62-2-204 (Law. Co-op. 1987).

3. *Patrick*, 402 S.E.2d at 665.

4. S.C. CODE ANN. § 62-2-201 (Law. Co-op. 1987 & Supp. 1990).

5. S.C. CONST. art. XVII, § 9. The section provides:

The real and personal property of a woman held at the time of her marriage, or that which she may thereafter acquire, either by gift, grant, inheritance, devise or otherwise, shall be her separate property, and she shall have all the rights incident to the same to which an unmarried woman or a man is entitled. She shall have the power to contract and be contracted with in the same manner as if she were unmarried.

Id.

6. *Patrick*, 402 S.E.2d at 666.

7. *Id.* at 665.

letter.⁸ However, the first ground on which the court relied may be erroneous because the plain meaning of section 62-2-204 does not require that claimants knowingly waive their rights to an elective share.

Section 62-2-204 provides:

The right of election . . . may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the party waiving after fair disclosure. Unless it provides to the contrary, a waiver of all rights in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights to elective share⁹

If Murray's letter or conveyance of his one-half interest in the home was either a waiver of all rights in his wife's property or a complete property settlement, the requirements of section 62-2-204 would be met. Any reasonable application of the statute's plain meaning therefore would require a court to hold that Murray waived his right to elective share.

Moreover, when the Colorado Court of Appeals applied a statute almost identical to section 62-2-204, it held that "[b]y virtue of the statute, the waiver is now deemed to arise from a property settlement which completely disposes of the spouses' property and fails specifically to provide that it does not constitute waiver of all rights to elective share."¹⁰ Thus, the *Patrick* court's holding also is inconsistent with authority from other jurisdictions.

The real issue is whether Murray's conveyance or letter constituted either a waiver of all rights in the property or a complete property settlement. Other courts have held that a property settlement agreement waives the right to elective share only if it purports to conclude all marital rights and effect a full settlement of every item of property owned by the parties.¹¹ Therefore, because the home was not the only property of the estate, Murray's conveyance of his interest in the home was neither a waiver of all rights in the property of the estate nor a complete property settlement. Although Murray promised to sign all the property over to his wife, it also is questionable whether a mere promise in a signed letter was the complete agreement between the parties or a waiver of all rights in the property. Furthermore, Murray wrote the letter in anticipation of reconciliation and not "in anticipa-

8. *Id.*

9. S.C. CODE ANN. § 62-2-204 (Law. Co-op. 1987).

10. *In re Estate of Morrell*, 687 P.2d 1319, 1322 (Colo. Ct. App. 1984); *accord In re Estate of Messer*, 118 Ariz. 291, 293-94, 576 P.2d 150, 152-53 (Ct. App. 1978).

11. *Morrell*, 687 P.2d at 1323; *In re Estate of Montesi*, 682 S.W.2d 906, 911 (Tenn. 1984).

tion of separation or divorce."¹²

Section 62-2-204 does allow a waiver of the right to elective share without a waiver of all rights in the property of the estate or a complete property settlement agreement. However, under almost identical statutes, courts from other jurisdictions require the following: The waiver is a written contract or agreement, the party waiving the elective share signs the waiver, and there is fair disclosure of the party's interest in the estate.¹³ Therefore, the *Patrick* court should not have held that there was no waiver because nothing in the record indicated that Murray knew he was waiving his right to elective share. Instead, the court should have held that Murray did not waive his right to elective share because neither his letter nor his conveyance constituted a complete settlement of all property, a waiver of all of his rights in the property, or a written contract waiving his right to elective share.

Because "Article XVII, Section 9 provides married women with the same rights as unmarried women over the disposition of their property and the elective share provision restricts the rights of married women,"¹⁴ the court had to address the constitutionality of the elective share provision. In holding that article XVII, section 9 violated the Equal Protection Clause of the United States Constitution,¹⁵ the court did not analyze or cite any federal authority; nonetheless, the decision is consistent with South Carolina precedent¹⁶ that is based on the United States Supreme Court's holding in *Orr v. Orr*.¹⁷

In *Orr* the Court held that a state statute which required husbands but not wives to pay alimony upon divorce violated the Equal Protection Clause of the United States Constitution.¹⁸ The Court reaffirmed that "[t]o withstand scrutiny' under the Equal Protection Clause, 'classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.'"¹⁹ The Court reaffirmed that the "[r]eduction of the disparity in economic condition between men and women caused by the long history of discrimination against women [is] an important govern-

12. S.C. CODE ANN. § 62-2-204 (Law. Co-op. 1987).

13. *Ruzic v. Ruzic*, 549 So. 2d 72, 74 (Ala. 1989); *In re Estate of Tapper*, 432 So. 2d 135, 136 (Fla. Dist. Ct. App. 1983). The *Tapper* court also required that under this standard the claimant must knowingly agree to waive the right to elective share. 432 So. 2d at 136.

14. *In re Patrick*, 402 S.E.2d 664, 666 (S.C. 1991).

15. U.S. CONST. amend. XIV, § 1.

16. *Boan v. Watson*, 281 S.C. 516, 316 S.E.2d 401 (1984).

17. 440 U.S. 268 (1979).

18. *Id.* at 278-83.

19. *Id.* at 279 (quoting *Califano v. Webster*, 430 U.S. 313, 316-17 (1977) (per curiam)).

mental objective.’ ”²⁰ However, the Court held that the statute’s classification by gender was not substantially related to the objective of reducing the economic disparity between women and men because the statute in question already provided for individualized hearings to determine need.²¹ Therefore, the *Patrick* court’s blanket statement that “[t]he Equal Protection Clause of the Fourteenth Amendment prohibits its discrimination based upon gender”²² is misleading,²³ and in certain circumstances a statute may discriminate on the basis of gender.²⁴

Although the supreme court probably reached the correct result on both issues, it misapplied both the plain meaning of the elective share provision and United States Supreme Court decisions regarding gender-based discrimination. More importantly, this decision erroneously provides the basis for granting a claimant a right to elective share solely because the claimant did not knowingly waive the right.

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II. CONSTRUCTIVE TRUST IMPOSED ON PROPERTY APPOINTED BY WIFE IN VIOLATION OF PROMISE TO HUSBAND

In *Chapman v. Citizens & Southern National Bank*²⁵ the South Carolina Court of Appeals held that a confidential relationship existed between spouses and imposed a constructive trust on property that a husband had devised to his wife because the wife’s exercise of her

20. *Id.* at 280 (first alteration by Court) (quoting *Califano*, 430 U.S. at 317).

21. *Id.* at 281-82.

22. *In re Patrick*, 402 S.E.2d 664, 666 (S.C. 1991).

23. The *Patrick* case is not the first decision in which the South Carolina Supreme Court held that the Equal Protection Clause of the United States Constitution mandates the elimination of gender-based discrimination. This notion results from the court’s interpretation of *Orr* in *Boan v. Watson*, 281 S.C. 516, 316 S.E.2d 401 (1984). In *Boan* the court held that the *Orr* “principle is equally applicable to the property rights of husbands and wives on the termination of a marriage by death.” *Id.* at 519, 316 S.E.2d at 402-03. The court did not apply the gender-based test articulated in *Orr* and held that the common-law right of dower in South Carolina violated the Equal Protection Clause. *Id.* As a result, it implied that *Orr* requires the elimination of gender-based discrimination.

24. For example, in *Califano v. Webster*, 430 U.S. 313 (1977) (per curiam), the Court upheld a section of the Social Security Act that allowed a female to exclude three more low earning years than a male when calculating an average monthly wage. As a result, a female received greater social security benefits in comparison to a similarly situated male. The Court noted that the statute was specifically enacted to remedy wage and job discrimination against women, *id.* at 318-20, and that Congress intended “to compensate for past employment discrimination against women,” *id.* at 318.

25. 395 S.E.2d 446 (S.C. Ct. App. 1990).

power of appointment over the property violated a promise she had made to her husband.²⁶

In 1948 Mr. and Mrs. Chapman married. Both were individually wealthy with children from previous marriages. In 1958 Mr. Chapman created a marital trust²⁷ that contained the couple's home and furniture.

The testamentary trust gave Mrs. Chapman a life estate in the property with a power of appointment exercisable upon her death. If she failed to exercise the power of appointment, the property would pass to Mr. Chapman's children. Letters of record revealed that the Chapman's intentions concerning the trust property were not fully expressed in Mr. Chapman's will. Specifically, Mr. and Mrs. Chapman agreed that Mrs. Chapman was to either make gifts of the property to Mr. Chapman's children during her lifetime or allow the property to pass to his children upon her death by declining to exercise her power of appointment.²⁸

Mr. Chapman died in 1975 after a prolonged illness. Until her husband's death Mrs. Chapman continually expressed "her hope and intent to give as much of the marital trust as conditions would allow directly to Mr. Chapman's issue."²⁹ Nevertheless, two years after Mr. Chapman's death, she exercised her power of appointment in favor of her own children. After Mrs. Chapman's death in 1986 Mr. Chapman's children sought to have a constructive trust imposed for their benefit upon the marital trust property Mrs. Chapman appointed to her own children.

The court of appeals reversed the trial court and imposed a constructive trust on the property for the benefit of Mr. Chapman's children. The court of appeals ruled that Mrs. Chapman breached her confidential relationship with her husband by exercising her power of appointment in favor of her own children.³⁰

A constructive trust is an equitable remedy designed to prevent

26. *Id.* at 450-52.

27.

[A] device in the form of a trust utilized to gain the maximum benefit of the marital deduction by dividing the property in half. Commonly, one half of the property is transferred to the marital deduction trust and the other half is disposed of in a trust or like arrangement with a view towards having it escape taxation in the estate of the surviving spouse.

BLACK'S LAW DICTIONARY 968 (6th ed. 1990). As a result of a change in the law with respect to the estate of decedents dying after 1981, the marital deduction trust is generally not used. See *Chapman*, 395 S.E.2d at 450 n.2.

28. *Chapman*, 395 S.E.2d at 449-50.

29. *Id.* at 450.

30. *Id.* at 452.

unjust enrichment.³¹ Generally, courts impose constructive trusts in contravention of express agreements because of a constructive or actual fraudulent breach of a confidential relationship that renders possession of the property by one party unconscionable.³² A party that petitions a court to impose a constructive trust may use parol evidence “‘despite the statute of frauds upon the high and long established ground that the statute will not be permitted to shield a fraud.’”³³ Nevertheless, the evidentiary standard is high. The party must present clear and convincing evidence of wrongdoing before the court will impose a constructive trust.³⁴

The disagreement between the court of appeals and the trial court in *Chapman* stemmed from their differing interpretations of *All v. Prillaman*.³⁵ In *All* the South Carolina Supreme Court refused to impose a constructive trust on property that a mother devised to her son because no proof existed that the son fraudulently made a promise to induce his mother to convey the property to him, that the son in any manner overreached his mother, or that the son abused any confidential relationship which may have existed between them.³⁶

The trial court reasoned that *All* controlled because Mr. Chapman's children had not shown that Mrs. Chapman acted with fraudulent intent when Mr. Chapman created the marital trust.³⁷ On the other hand, the court of appeals found *All* inapplicable because the Chapmans, unlike the mother and son in *All*, had a confidential relationship.³⁸

As the *Chapman* court noted, a person ordinarily has a confidential relationship with a family member.³⁹ Before a court will hold that a confidential relationship exists, however, “‘the one in whom the trust or confidence is reposed must possess the power to abuse the trust of the confiding party . . . to the detriment of the confiding party.’”⁴⁰ Addressing the case at hand, the court of appeals stated:

31. 76 AM. JUR. 2D *Trusts* § 222 (1975); *Faulkner v. Faulkner*, 257 S.C. 172, 175-76, 184 S.E.2d 718, 720 (1971). Constructive trusts are not new to South Carolina law. For an early example see *McDonald v. Executors of May*, 18 S.C. Eq. (1 Rich. Eq.) 91 (1844).

32. 76 AM. JUR. 2D *Trusts* § 221 (1975).

33. *Briggs v. Richardson*, 273 S.C. 376, 379, 256 S.E.2d 544, 545 (1979) (quoting *Wolfe v. Wolfe*, 215 S.C. 530, 536, 56 S.E.2d 343, 346 (1949) (per curiam)).

34. *SSI Medical Servs., Inc. v. Cox*, 301 S.C. 493, 500, 392 S.E.2d 789, 794 (1990) (citing *Briggs v. Richardson*, 288 S.C. 537, 343 S.E.2d 653 (Ct. App. 1986)).

35. 200 S.C. 279, 20 S.E.2d 741 (1942).

36. *Id.* at 305, 20 S.E.2d at 752.

37. *Chapman v. Citizens & S. Nat'l Bank*, 395 S.E.2d 446, 449 (S.C. Ct. App. 1990).

38. *Id.* at 453.

39. *Id.* at 451 (citing *All*, 200 S.C. at 299, 20 S.E.2d at 750).

40. *Id.* Thus, the finding of a confidential relationship depends more upon the reliance of the confiding party than simply the propinquity of the parties.

[W]hen a husband or wife reposes in the other a trust to do or not do an act relating to the corpus of his estate after his or her death a confidential relationship shall be deemed to have existed if the one in whom the confidence is reposed has the power to abuse the confidence to his or her own advantage.⁴¹

Mrs. Chapman's "absolute dominance" over the marital trust after Mr. Chapman died created a confidential relationship between her and her husband and, accordingly, precluded her from disposing of the trust property in a manner contrary to her agreement with her husband.⁴²

The issue of whether a confidential relationship existed between a testator and family members has long been a dilemma for South Carolina courts.⁴³ *Chapman* illuminates the circumstances under which confidential relationships exist between family members. Nevertheless, as long as heirs are dissatisfied with provisions of a will and believe a confidential or fiduciary relationship existed between the testator and the devisee, litigation that attempts to impose constructive trusts on devised property will continue.

Bob Deeb

41. *Id.*

42. *Id.*

43. *See, e.g.,* *Faulkner v. Faulkner*, 257 S.C. 172, 184 S.E.2d 718 (1971); *Scott v. Scott*, 216 S.C. 280, 57 S.E.2d 470 (1950) (per curiam); *All v. Prillaman*, 200 S.C. 279, 20 S.E.2d 741 (1942).