RECEIVED
Jun 24 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Alex Kinlaw, Jr. Circuit Court Judge

Common Pleas Case No. 2019-CP-23-02032

Appellate Case No. 2022-000731

John R. Mensch and Shauna M. Waddell
Individually and as Personal Representative
Of the Estate of Florence Petrak Mensch and
John R. Mensch

Respondent,

v.

Sterling Raymond Mensch, III, Individually
As Personal Representative of the Estate
of Florence Petrak Mensch and in the
former Capacity as Agent under a Power
of Attorney for Florence Petrak Mensch

Appellant.

Memorandum in Support of
Motion for Leave to File R. 60(b), SCRCP, Motion in the Probate Court

---

TRULUCK THOMASON, LLC

s/John-Paul Baum
John-Paul Baum
SC Bar No.: 104938
s/Devon M/ Puriefoy
Devon M. Puriefoy
SC Bar No.: 102097
3 Boyce Avenue
Greenville, SC 29601
johnpaul@truluckthomason.com
devon@truluckthomason.com
P: 864-331-1751

Table of Contents

Appendix

Proof of Service

Table of Authorities

CASES

STATUTES

RULES

CONSTITUTIONAL PROVISIONS

Comes now the Appellant Sterling Raymond Mensch, III, Individually As Personal Representative of the Estate of Florence Petrak Mensch and in the former Capacity as Agent under a Power of Attorney for Florence Petrak Mensch ("Appellant") respectfully submits this Memorandum of Law in Support of his Motion for Leave to File a R. 60(b), SCRCP, Motion in the Probate Court. In support of the Motion, the Appellant would respectfully show the following to the Court:

Background

On January 26, 2022 the Probate Court entered judgment against the Appellant in the amount of $ 984,763.00. [App. 001]. The overwhelming majority of the damages awarded were for common-law conversion and statutory violations committed prior to the decedent's passing. [App. 001]. The damages awarded against the Appellant are for monetary damages resulting from the Appellant misappropriating assets, failing to itemize tax returns, incurring tax penalties, pension overpayment, repair costs to an estate asset, and attorney's fees. [App. 001]. The Probate Court imposed a constructive trust over the Appellant's assets. [App. 001].

On February 2, 2022, Appellant filed a R. 59, SCRCP Motion to Alter or Amend. [App. 015]. Subsequently, on February 17, 2022, the Probate Court issued an Order stating that Appellant failed to comply with R. 7(b)(1) SCRCP and dismissed his motion. [App. 017].

Appellant then filed an appeal with the Court of Common Pleas on February 23, 2022. [App. 018]. Appellant filed a brief on appeal, which included a subject-matter

jurisdiction challenge to the Probate Court's judgment and a suggestion that appellate jurisdiction was lacking because no final order had been entered within the meaning of S.C. Code 62-1-308 [App. 034]. The Circuit Court never, however, reached Appellant Mensch's challenges, jurisdictional or merits. Instead, it granted Respondents' motion to dismiss on the grounds that the Rule 59 motion filed in the Probate Court did not toll the time for appeal, thus depriving the Circuit Court of appellate jurisdiction.

Appellant Mensch filed a timely notice of appeal to this Court. The transcript of the hearing in the Circuit Court has been ordered but not yet filed.

Argument

Lack of subject-matter jurisdiction can be raised "at any stage of the proceeding," *Eaddy v. Eaddy*, 283 S.C. 582, 584 (1984), whether on direct appeal or via a post-judgment motion under R. 60(b)(4), SCRCP, because the judgment is void. *Gatling v. Beach Palace, Inc.*, 294 S.C. 464, 464, 365 S.E.2d 736 (Ct. App. 1988) ("because a void judgment is a nullity, it may be attacked at any time.")

But where, as here, an appeal is pending, "leave to make the motion must be obtained from the appellate court." R. 60(b), SCRCP. See also *Hudson v. S.C. Dep't of Highways & Pub. Transp.*, 324 S.C. 245, 246, 478 S.E.2d 839, 840 (1996) ("Since respondent did not obtain leave from the appellate court to make the Rule 60(b)(1) motion, the trial court lacked subject matter jurisdiction."). This Court should grant Appellant Mensch leave to file a R. 60(b) motion in the Probate Court challenging the Probate Court's subject-matter jurisdiction.

I. A Significant Question Exists as to Whether the Probate Court Had Subject-Matter Jurisdiction.

Under our constitution, the Circuit Court is this state's general trial court with original jurisdiction in all civil cases except those cases in which exclusive jurisdiction lies in an inferior court. S.C. Const. art. V, § 11. Because the Probate Court is not a constitutional court, its subject-matter jurisdiction is limited to those classes of cases that the General Assembly has authorized by statute. *Judy v. Judy*, 393 S.C. 160, 169 (2011); *Kosciusko v. Parham*, 428 S.C. 481, 492 (Ct. App. 2019). Insofar as the Probate Court adjudicated claims that pre-dated the decedent's passing, a significant question exists as to whether the Probate Court exceeded its subject-matter jurisdiction.

1. S.C. Code § 62-3-302(a)'s General Grant of Jurisdiction of "Estates" Likely Does Not Include Pre-Death Claims.

The Probate Court's general jurisdictional grant extends, as relevant here, to "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, and determination of heirs and successors of decedents and estates of protected persons...." S.C. Code § 62-3-302(a)(1).

Litigating claims that pre-date a decedent' passing is not likely part of administering an "estate" within the meaning of the Probate Code. Indeed, the "claims[] that Probate Court can administer are those "which arise at or after the death of the decedent." S.C. Code § 62-2-201(4). Thus, while an estate can use the Probate Court to authorize the recovery for damages to or theft of property after a person has died, that authority does not extend to adjudicating pre-death damage or theft. See generally *Greenfield v. Greenfield*,

245 S.C. 604 (1965) (recognizing that a person who takes or injures a decedent's property after the decedent's death can be liable in the Probate Court as an executor de son tort).

Indeed, if S.C. Code § 62-3-302(a) already conferred jurisdiction over pre-death claims, then the (limited) grant of jurisdiction conferred under S.C. Code § 62-3-302(b) for pre-death claims, discussed below, would be superfluous. But statutes must not be read to render any portion of them meaningless. *Florence Cty. Democratic Party v. Florence Cty. Republican Party*, 398 S.C. 124, 128 (2012).

Appellant Mensch respectfully submits that S.C. § Code 62-1-302(a) did not confer subject-matter jurisdiction for the Probate Court to award damages for pre-death conversion of property ($546,921 after the 1/3 credit against the $820,382), for failure to have itemized the Decedent's tax returns ($24,559), tax penalties ($13,820), avoidable income tax ($163,420), and annual gift-tax exclusion during the Decedent's lifetime ($28,000). Those claims, totaling $776,720, likely could and should have been litigated in the Court of Common Pleas. If permitted to do so, Appellant Mensch will request that the Probate Court so hold via a motion under R. 60(b), SCRCP.

2. *S.C. Code § 62-3-302(b) Likely Specifically Strips Jurisdiction from the Probate Court Over Pre-Death Claims.*

The General Assembly has granted the Probate Court very limited jurisdiction over actions under the survival statute. The Probate Court's "jurisdiction over matters involving...actions under the survival statute is concurrent with that of the circuit court and extends only to the approval of settlements... and to the allocation of settlement proceeds among the parties involved in the estate." S.C. Code § 62-1-302(b) (emphasis added).

South Carolina's survival statute provides, in relevant part, that "[c]auses of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property shall survive both to and against the personal... representative... of a deceased person...." S.C. Code § 15-5-90. The General Assembly passed that statute to overturn "the common-law rule that a personal right of action dies with the person." *Page v. Lewis*, 203 S.C. 190, 193 (1943). Abatement at common law extended to all tort claims. See Mattison v. Palmetto State Life Ins. Co., 197 S.C. 256, 261 (1941) ("Under the common law there was no survival of actions in tort."). Likewise, statutory claims abated upon death, *Claussen v. Brothers*, 148 S.C. 1, 4 (1928) (citation omitted), until the passage of the survival statute.

Here, almost all the damages awarded against the Appellant Mensch were for alleged wrongful acts that occurred prior to the death of the Decedent in 2018, [App. 001]. The damages were for torts and statutory actions that, but for the survival statute, would have been extinguished upon the Decedent's passing. The Probate Court's jurisdiction over those actions was thus limited to settlement approval and proceeds distribution, which were not at issue.

Accordingly, to whatever extent jurisdiction may have somehow otherwise existed under the general grant of jurisdiction under S.C. Code § 62-1-302(a) to adjudicate pre-death claims, that jurisdiction was likely stripped under S.C. § Code 62-1-302(b). Thus, the award of damages for pre-death conversion of property ($546,921 after the 1/3 credit against the $820,382), for failure to have itemized the Decedent's tax returns ($24,559), tax penalties ($13,820), avoidable income tax ($163,420), and annual gift-tax exclusion

during the Decedent's lifetime ($28,000) would have been improper, as only the Circuit Court could have entered such relief. If permitted to do so, Appellant Mensch will request that the Probate Court so hold via a motion under R. 60(b), SCRCP.

II. Judicial Economy Would Be Advanced If the Probate Court Considers that Challenge During the Pendency of This Appeal.

Appellant Mensch respectfully submits that the instant motion advances judicial economy. As the Court is aware, civil appeals commonly take between 24-36 months to resolve. There would thus be ample time for the Probate Court to hear the subject-matter challenge, the dissatisfied party to obtain review from the Circuit Court, and then consolidate the oral argument of any appeal from that jurisdictional decision with the instant appeal. That way, a panel of this Court would only have to consider the underlying judgment one time.

Furthermore, while subject-matter jurisdiction can be raised at any time, Appellant Mensch respectfully submits that this Court may benefit from having opinions from the lower courts on the jurisdictional issue.

Conclusion

Accordingly, Appellant Mensch respectfully requests that the Court grant him leave to file a motion under R. 60(b), SCRCP, in the Probate Court during the pendency of this appeal.

Dated this 24 day of June, 2022

TRULUCK THOMASON, LLC

s/John-Paul Baum
John-Paul Baum
SC Bar No.: 104938
s/Devon M/ Puriefoy
Devon M. Puriefoy
SC Bar No.: 102097
3 Boyce Avenue
Greenville, SC 29601
johnpaul@truluckthomason.com
devon@truluckthomason.com
P: 864-331-1751

APPRENDIX

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE PROBATE COURT

CASE NO.2018ES2302854

IN THE MATTER OF:
Estate of Florence Petrak Mensch

Shauna M. Waddell, individually and as Personal Representative of the Estate of Florence Petrak Mensch and John R. Mensch,
Petitioners,

vs.

Sterling Raymond Mensch III, individually, as former Personal Representative of the Estate of Florence Petrak Mensch and in his former capacity as Agent under Power of Attorney for Florence Petrak Mensch,
Respondents.

ORDER

FILED

JAN 2 6 2022

GREENVILLE COUNTY
PROBATE COURT

Date of Hearing: September 16, 17, 2021
Presiding Judge: Debora A. Faulkner, Probate Judge
Attorney for Petitioners: Tyler E. McLeod
Attorneys for Respondent: Devon M. Puriefoy, Kimberly Thomason
Court Reporter: Rachel Wood

This matter came before the court for trial to determine the amount of damages owed the Estate of Florence Mensch by Respondent, Sterling Raymond Mensch (SRM) admits he misappropriated funds belonging to Florence Mensch and her estate. However, the amount of damages due the estate is the central issue in the litigation. The relevant time period for the misappropriations is from May 17, 2010, the date Mrs. Mensch's executed her Durable Power of Attorney (DPOA) naming SRM as her Attorney in Fact, (AIF) and April 26, 2018, the date of Ms. Mensch's death.

Present at the hearing was Petitioner Shauna M. Waddell (SW) represented by Tyler McLeod. Petitioner John Mensch (JM) was present for days one and two of the hearing. SRM appeared for each day of trial with his attorneys, Devin Puriefoy and Kimberly Thomason. Witnesses in the case were Petitioner, SW, Petitioners' expert, John Markel, and Respondent's expert, Mark Chastain.

Prior to taking testimony the Court denied the Petitioner's *Motion in Limine*.

STIPULATIONS

1. SRM made a number of withdrawals from Mrs. Mensch's bank account totaling $820,382.

2. SRM deposited the funds from these withdrawals into his single owner checking account.

3. Both expert witnesses are qualified to give their opinions

PROCEDURAL HISTORY

1. On December 14, 2018, SRM filed the Will and Codicil with the Court but took no action to have the documents admitted as the valid testamentary documents of his mother. Neither did he apply for appointment as Personal Representative (PR) which would have granted him legal authority over her assets for the benefit of the devisees named in her Will and any estate creditors.

2. On January 23, 2019, SRM filed his application for admission of the Will and Codicil to Probate and for his appointment as PR. He was appointed PR on January 23, 2019.

3. On May 15, 2019, this action was filed by Petitioners.

4. On August 28, 2019, the Hon. Clayton L. Jennings issued an Order in response to Petitioners' Motion to Compel which, among other rulings, ordered SRM to provide discovery to Petitioners within ten days of the entry of the Order. The Order attached hereto is incorporated herewith as if fully set out.

5. On December 4, 2019, the Hon. Clayton L. Jennings issued his Order in the Petitioner's first Rule to Show Cause proceeding finding SRM in willful contempt of the August 28, 2019 Order. Accordingly, the Court removed SRM as PR and appointed Shauna Waddell to serve as Successor PR. The Court imposed further financial sanctions against SRM. The Order is attached hereto and incorporated herewith as if fully set out.

6. On May 13, 2020, an Amended Petition was filed as permitted by Judge Jennings' Court Order.

7. On September 2, 2020, the Hon. Clayton L. Jennings issued an Order as a result of the Petitioners' filing a second Rule to Show Cause against SRM. The Court found SRM to be in willful contempt of the Court's prior Orders. This Order attached hereto is incorporated herewith as if fully set out.

8. On January 13, 2021, the Hon. Clayton L. Jennings issued an Order as a result of Petitioners third Rule to Show Cause alleging SRM willfully failed to comply with the September 2, 2020 Order. He was found to be in willful contempt, ordered to pay attorneys' fees to Petitioners and cautioned that he would be subject to incarceration should he violate this Order. This Order attached hereto is incorporated herewith as if fully set out.

9. On July 29, 2021, the Court entered an Order granting the Petitioners Summary Judgment on the following causes of action: 1) Breach of Fiduciary Duty as Attorney in Fact (AIF), 2) Violation of the S.C. Uniform Power of Attorney Act, and 3) Conversion. The Court denied Petitioners' Motion for Summary Judgment on the remaining causes of action: Negligence, Unjust Enrichment/Money Had and Received, and Constructive Trust.

10. Trial in this case was heard on September 16-17, '21. By agreement of counsel, Petitioner, John Mensch, participated by telephone on September 17, 2021.

11. A proposed Order was transmitted to the Court on 10/15/21. An extension was granted to SRM's counsel to Dec. 16, 2021 to lodge objections to the proposed Order.

FINDINGS OF FACT

By the preponderance of the evidence, I make the following findings of fact:

1. Mrs. Mensch and her husband moved to Greenville from New York. From their marriage, they had three children, John, Sterling and Shauna.

2. Mr. Mensch died in or around 1995.

3. The record contains no evidence that Ms. Mensch had anything other than a loving relationship with all three of her children.

4. In 1998, Ms. Mensch executed a Will leaving her estate equally to each of her three children. She named all three children to serve as Co-Personal Representatives. Similarly, she named each of her 3 three children to share equally in her non-probate accounts which includes a retirement account. Based on the foregoing, I find that Ms. Mensch intended to leave her estate both probate and non-probate to each of her three children in equal shares.

5. In 2007, Mrs. Mensch executed a DPOA naming the Petitioner, SW, as her attorney in fact but it was later revoked in favor of SRM in 2010.

6. After her husband's death, Ms. Mensch lived in her own home at 207 West Beverly Street in Greer, S.C.

7. On May 17, 2010, Ms. Mensch, with the assistance of an attorney, executed another DPOA naming SRM as her AIF. This DPOA contained no provisions allowing SRM to make gifts to himself.

8. She also executed a Codicil to her 1998 Will naming SRM as her sole Personal Representative. She republished her 1998 Will in all other respects, i.e. her estate plan remained unchanged.

9. SW testified that around 2009 she began to take notice of her mother's dementia symptoms.

10. In or around 2012, she purchased an apartment at Rolling Green. She moved into the Rolling Green apartment and sold her home in Greer.

11. In or around 2013 or 2014, as a result of her diagnosis of dementia, Alzheimer's type, SW arranged for FM to be moved to the memory care unit at Oakleaf Village. No evidence was presented that this decision was contested. She died at Oakleaf Village on April 26, 2018.

12. At Ms. Mensch's funeral, SRM advised his brother John to return to Oregon, because he would be starting the estate administration immediately. After hearing nothing from SRM, SW called him about the estate administration. SRM told her he was waiting on tax information.[1] She called again and he said the taxes were done and that he would be dropping off the estate information to attorney, David Massey's office. After hearing nothing further, SW called the attorney's office and the attorney's office didn't have any estate information. SRM told SW that their secretary probably lost it. The firm was never hired by SRM. SW's communication with SRM became increasingly difficult.

13. On December 14, 2018, SRM filed FM's Will and Codicil in the Probate Court without opening an estate. On January 23, 2019, nine months after Ms. Mensch's death, SRM filed his application to admit the Will and be appointed as the PR. He was appointed PR on January 23, 2019. He filed this without the assistance of counsel.

14. On April 30, 2018, SRM signed and filed a sworn *Inventory and Appraisement* with the Court. The Inventory and Appraisement is part of the Court's record. On that Inventory, he swore that the balance in the UBS account on 4/30/2018 was $409,652. Petitioner's Exhibit 21, the UBS statement from April, 2018 shows that SRM had withdrawn $259,000.00 on April 23, 2018 with a resulting balance of $154,069. He also stated on the *Inventory*, under oath, that the Tarleton Way home had an existing mortgage of $238,170.00 Two months earlier on February

[1] The records would later show that upon her appointment as Successor PR, SW learned that the 2018 tax return had never been filed. Petitioner's #19 is an IRS Letter stating that on 12/31/18, the estate owed $91,367.

8, 2019, he paid the sum of $232,047 in full satisfaction of the mortgage. So, after being sworn, he voluntarily and willfully filed perjured information to the Court. [2]

15. After his mother's death, rather than filing the Will immediately and becoming the PR of her estate, he was continuing to make post-death withdrawals from Ms. Mensch's x7059 account. He was also allowing her GE pension auto deposits to continue despite her death. He made his last withdrawals from FM's account in or around February, 2019 leaving approximately $1500 in x7059 and $65 in x2007. SRM withdrew a total of $170,000 from Ms. Mensch's bank accounts after her death. This proceeding was commenced three months later on May 15, 2019

TARLETON WAY HOUSE AND LOT

16. On April 18, 2007, Ms. Mensch purchased property in a subdivision in Greer. As such, she signed the mortgage obligating herself to pay $330,000.00 for the property in monthly installments. Further, she signed a "Rider" stating that this would be her second home and keep the home only for her exclusive use.

When she purchased the property, she was still living at her West Beverly Street property. Her intent was never to live at this Tarleton Way property. The intent was that the house would actually be purchased by SRM as a home for him and his daughter. SRM orchestrated this arrangement since he was a party in a divorce proceeding. He wanted to protect the property from being included as marital property subject to equitable division. SW testified that it wasn't until after FM's death that she and her brother discovered that the house was not actually owned by SRM.

SRM's expert witness, Mr. Chastain, listed that SRM should be given credit for $39,000.00 that he paid as a down payment from his own funds when the home was purchased. Upon further examination of the witness, it appeared this was untrue in that the amount was folded into the mortgage.

SRM paid nothing to FM for the 12 years he lived there. It was home with landscaping, pool, theatre room, and nice finishes. SRM alleges he made a total of $240,631.00 in payments from his personal funds to service the principal and interest on the Tarleton mortgage and that he should be credited with those payments as being beneficial to FM.

SRM's employment status and income were never presented in evidence. In order to weigh the veracity of this assertion, the ability of SRM to pay this would need to be known. It is unknown whether or not he was employed; or, if so, the dates of his employment and the amount of his income. Petitioner's expert witness, Mr. Markel, attempted to trace these alleged mortgage payments using bank documents. He found that many of the alleged payments were untraceable and were inconsistent with the dollar amounts alleged. Countless online cash withdrawals from x7059 to SRM's account were in amounts similar to the amount of the mortgage payments. Bank statements prior to 2012 were not available to the parties.

SRM also alleges that he used some of the cash from FM's accounts to make improvements and repairs to the home which were beneficial to FM. He alleges these expenditures amount to $69,957.00.[3] Despite repeated directions from the Court, SRM never produced receipts or other documents to prove this amount. He failed to testify at this hearing regarding how he arrived at this total. He failed to produce witnesses to confirm payments made for improvements. He failed to issue any subpoenas for merchants or repair companies to produce records.

---

[2] The estate record contains a claim filed on 2/11/2019 by Traci Malone of South State Bank. On the same day, February 11, a *Loan Payoff Statement* was filed. SRM satisfied the mortgage in full on 2/8/19. SW's *Settlement Statement* (Exh. #25) when TW was sold shows a mortgage payoff of 218,579 to South State Bank on 12/3/2020

[3] SW testified in detail regarding the condition of the home after SRM moved resulting in an expense to the estate of $10,000.00 on extensive cleaning and repairs in order to make it fit for sale.

When SRM moved from the home in September, 2020, the estate has to spend $10,000 for cleaning and repairs to make the property presentable for potential buyers.

As a minor point; but one that shows how no opportunity was missed by SRM, SRM collected $22,434.00 in insurance proceeds for hail damage to FM's home. The amount of the damage was not placed in the record. Again, these are proceeds from an insurance policy that FM pays for each month in mortgage payments for a house she doesn't need; and, that is being used as a residence for her able bodied son. SRM's expert witness testified that the damage estimate was less than the amount collected and that SRM appeared to have kept the balance not used. This was not contradicted by SRM.

FLORENCE MENSCH'S ASSETS

17. A listing of FM's assets and their values on the date SRM became FM's AIF in 2010 is not in evidence. Bank records were not available prior to 2012. However, from the evidence presented, it appeared that her assets, residential expenses were as follows on the dates indicated:

Asset	Value	Date of Value	Residential Expense
[4]Home on Tarleton Way	420,000.00	Sold 12/3/20	Moved to Rolling Green In 2012 Oakleaf in 2015
x7059 BOA Checking account	various		
x2007 BOA Savings account	various		
Elfin Trusts + GE stock IRA[5]	$1,321,717.00	1/1/2015	
UBS Retirement Acct	$913,511.00	12/30/16	

Annual Income

2012	$16,000.00 SSA 2580 x 12/ 31K $17,800.00 Pension $49,240.00 IRA Distribution $83,090.00
2013	$16,000.00 SSA 2580 x 12/ 31K $17,800.00 Pension $70,000.00 IRA Distribution $104,125.00
2014	$16,000.00 SSA 2580 x 12/ 31K $17,800.00 Pension $90,594.00 IRA Distribution $124,964.00
2015	$16,000.00 SSA 4550x12/55K $17,800.00 Pension

[4] Purchased 2007 for $330,000.00 includes $39,700.00 down payment, additional $65,000.00 for pool, home theater, fencing, landscaping, etc. SRM claims he paid this via his allegations in an affidavit.

[5] Elfin later managed by State Street Global.

$213,945.00 IRA Distribution
$248,590.00

2016 $16,000.00 SSA 4550x12/55K
$17,800.00 Pension
$208,727.00 IRA Distribution
$243,379.00

MANAGEMENT OF ASSETS BY SRM

18. FM's Bank of America (BOA) accounts are her checking account, x7059 and a savings account x2007. The fund balance in x7059 was the result of FM's monthly income deposits plus any online transfers directed by SRM-AIF from her investment accounts. Payments for her residence at the facilities were automatically drafted from x7059.[6]

19. In 2013, SRM, using the authority granted to him by FM in the DPOA, decided to add his name as a joint account owner to x7059. No evidence was presented on why SRM chose to do this, especially since this change would affect FM's estate plan. Instead of the balance being a part of her estate to be shared by all 3 of her children, this change would result in SRM being able to claim all funds remaining on deposit for himself.

20. SRM's personal BOA account is x3259. From 2013 until FM's death in April, 2018, SRM engaged in over 239 online transfers, cash transactions, withdrawals, from FM's BOA accounts. He directed these transfers to his personal BOA account x3259 which was a POD account, providing that his daughter would be paid the balance in the account upon his death. The parties stipulate that the total for all these transfers comes to $820,382.00[7] Once deposited into his account, SRM spent the funds on a variety of personal pleasures including nice restaurants, men's clothing stores, jewelry, home improvement stores, grocery stores, travel, alcohol, etc. He made several large cash withdrawals and made online payments to his personal credit card company from FM's account. The piece de resistance $8000.00 to Greenville Matchmakers.

21. From 2015 through 2018, SRM withdrew funds from Elfin Trust, taking smaller amounts from FM's GM stock. On 12/31/2015, the Elfin fund's market value was $279,819.00; on the same date, the GM market value was $1,321,717.00.

22. SRM facilitated IRA distributions to FM in excess of the amount mandated for *required minimum distributions* (RMD).[8] In years 2011, 2012, 2015, 2016, and 2018, SRM unnecessarily caused FM's IRA distributions to exceed allowable RMD for each year. From the above chart, SSA and pension income were largely sufficient to cover her monthly living expense at Rolling Green and less so at Oak Leaf. However, no evidence is presented to show that the allowable RMD for each year plus her income would have been insufficient to comfortably pay for her care. The amount of income taxes incurred due to these excessive withdrawals was $163,420.00.

23. On March 20, 2018, SRM sold the GE stock for $406,255.80.

24. Petitioners allege that SRM failed to properly diversify FM's portfolio resulting in a reduction of approximately $400,000.00 in value. Court finds that this was speculative and not supported by the preponderance of the evidence.

---

[6] Occasionally, SRM would use the x2007 to receive online transfers.
[7] No bank records were available prior to 2012.
[8] Under Treasury Regulations, taxpayers over 70.5, like FM must take the required minimum distributions.

Pa Coof 4 YKEH

25. On April 23, 2019, three days prior to FM's death, SRM transferred $259,000.00 of the $409,652.00 held in FM's UBS retirement account to FM's 7059 account.

26. SRM failed to notify BOA and failed to notify GE Pension of FM's death. The pension payments continued unabated and SRM continued to make withdrawals from the BOA accounts. From the time of FM's death on April 26, 2018 until February 18, 2019, SRM directed $170,000 of FM's, i.e. the Estate's, post-death funds to his x3259 personal account. These were funds earmarked to be divided equally among her 3 children. SRM withdrew these post-death pension payments from FM's account for his personal use. To reimburse GE for these overpayments. As a result, the estate was charged with an overpayment of $30,157.00.

SW, as PR, agreed to forfeit the $10,000 of GE life insurance that FM intended to be shared equally by her children. SW assigned $3333.33 of the 10,000 for each beneficiary. This left a balance due to GE of $20,157.81 from the estate. SRM should be liable to the estate for the total amount of overpayment in the amount of $30,157.00.

27. At the time SW was appointed PR, there was only $15,000 in FM's x7059 account.

TAX LIABILITIES

28. Between 2012 and 2016, SRM's failed to timely file tax returns and failed to timely pay taxes due resulting in penalties for failure to file and penalties and interest for failure to pay the IRS and SCDOR. The amount admitted by SRM's attorneys is $13,820.17.

29. SRM failed to file tax return for FM for 2017.

30. SRM made gifts from FM to himself, SW and Steve, John and Shea, Sterling and Holly in the years 2014, 2015, and 2016 for the purpose of meeting the annual exclusion allowed by the IRS. This was permitted by FM's DPOA.

31. SRM failed to take action necessary to avoid $40,314.00 penalties and interest connected to FM's 2018 taxes. This amount is currently on appeal.

32. From 2011 through 2016, SRM failed to itemize deductions for property tax and mortgage interest on the Tarlton Way on FM's returns. FM as owner of the property was clearly entitled to claim those itemized deductions, and thereby proportionately reduce her tax liability for each respective year. This failure amounts to $24,559 in excessive tax.

33. From 2011 through 2018, SRM caused FM and, later, her estate to incur unnecessary tax liabilities of $163,420 as set forth in Petitioner's Exhibit #1 [9] due to SRM's withdrawals in excess of the RMD for each year.

34. In 2015 and 2016, SRM wrote checks to his siblings, their spouses, to himself and his daughter in accordance with IRS rules that permit gifting a certain amount each year. Each year he wrote himself a check equal to the others, despite his siphoning of funds from his mother to subsidize his lifestyle. He has made no good faith effort whatsoever during this litigation to pay any amount that he admits he owes. The only amounts he has paid to the estate to date for his wrongdoing were attorneys' fees ordered by Judge Jennings short of incarceration. As a matter of equity, SRM should not be able to sit at the table with his siblings and collect a gift in an amount equal to theirs given his actions. Specifically, the record indicates he paid himself $14,000.00 for 2015 and 2016 for a total of $28,000.00.

[9] Pet. Exhib. 21, USB states RMD for 2018 is 33,358. SRM withdrew $259,000 or $ 225,642 in excess of IRS limits

CONCLUSIONS OF LAW

Applying the facts to applicable law, I make the following conclusions of law:

BREACH OF FIDUCIARY DUTY

1. "A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience is bound to act in good faith and with due regard to the interests of the one imposing the confidence." *Davis v. Greenwood Sch. Dist. SO*, 365 S.C. 629, 635, 620 S.E.2d 65, 68 (2005). To establish a claim for breach of fiduciary duty, the plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty owed to the plaintiff by the defendant, and (3) damages proximately resulting from the wrongful conduct of the defendant. See generally, Moore v. Moore, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004) (discussing the elements comprising a breach of fiduciary duty claim); *RFT Mgmt. Co. v. Tinsley & Adams*, 399 S.C. 322, 732 S.E.2d 166 (2012).

2. A fiduciary relationship existed between FM and SRM as expressed in the DPOA signed by FM in May, 2010. FM reposed special confidence in SRM; confidence that he would act in good faith placing her As such, SRM has all the duties and obligations set forth in the document plus he is duty bound to act at all times with due regard to the interests of FM. Moore v. Benson, 390 SC 153 (2010). Being in the firm grasp of Alzheimer's disease, she was squarely at the mercy of SRM to act in her best interests. Instead, SRM exploited the trust his mother bestowed on him at every turn.

3. The clear weight of the evidence shows SRM used the DPOA as a license to access as much of his mother's property as possible, leaving enough for her basic requirements, such as the payments to her facility. The chart above shows that her income and RMD distributions were substantially exceeded the amount of her monthly facility fees. The excess was taken as a part of the obvious scheme concocted by SRM to maximize his grift. At every opportunity, he placed his desire to take as much of her property as possible ahead of his mother's welfare. To further nail down his continued free use of his mother's money, to the detriment of his siblings, he added his name as a joint owner to her BOA accounts. By doing this, he was depriving his siblings of their right to inherit a share of the balance as their mother so intended. To further thwart his mother's estate plan, he designated his personal checking account as a POD account. With this change, all the ill-gotten funds in this account would become the property of his daughter to the detriment of his mother's estate, i.e. his siblings.

4. He breached his fiduciary duty by using the authority reposed in him by FM to delay or fail to file taxes, resulting in unnecessary fines and penalties, thus reducing FM's estate. He made withdrawals exceeding her RMDs, he liquidated her IRA, and also resulting is unnecessary taxes and penalties. These accounts were all created by FM to be divided equally at her death. FM's estate, both non-probate and probate, would have been substantially greater but for the shenanigans employed by SRM while his mother suffered with Alzheimer's disease, helpless to intervene.

5. The DPOA contained no express authority for SRM to gift himself any of his mother's property. The Decedent's DPOA contains the following provision on page 5, third paragraph:

Notwithstanding any provisions herein to the contrary, my attorney in fact shall not satisfy the legal obligations to the attorney in fact, out of any property subject to this power of attorney. Except to the extent this power of attorney specifically authorizes gifts to my attorney in fact, my attorney in fact may not exercise this power in favor to the attorney, the attorney's estate, the attorney's creditors, or the creditors of attorney's estate.

An agent acting for a principal pursuant to a power of attorney may not make a substantially gratuitous conveyance of the property of the principal to himself unless the power to do so is expressly granted by the instrument itself. Fender v. Fender, 329 SE2d 430 (1985).

6. Florence Mensch died on April 26, 2018. S.C. law requires anyone in possession of a decedent's Will to file the Will within 30 days of the date of death. 62-2-901 (Supp. 2014). SRM waited until December, 2018 to file the Will and Codicil. He waited until January of 2019 to open his mother's estate. He continued to collect her pension and spend money belonging to the estate from April 26, 2018 until February, 2019. Since her death, he continued to convert her property to his own use, said amount totaling approximately $170,000.00 and causing the estate to be indebted to GE for the overpayment of monthly pensions.

SRM's actions equate him to executor de son tort. Because he continued to receive and spend estate property, he is chargeable as the executor of his own wrong. The value of the property is charged to the *executor de son tort*. 62-3-619 S.C. *Code Annot.* (Supp. 2014)

I find SRM, who was named as the PR in the Will of his mother, did intentionally and with bad faith convert and waste estate property by means of the concealment of the fact of his mother's death to her bank and to her pension company.

7. While serving as PR, SRM failed to repay or make any effort to repay to the Estate the property he converted to his own use. Further, he failed to comply with the Orders of this Court, failed to cooperate with his first attorney so the attorney could assist in the estate administration. All these acts together constitute a violation of his fiduciary duty as Personal Representative to the Estate causing unnecessary time and expense in the administration of what could have been a very straight forward estate administration.

8. While serving as PR, SRM failed to properly file his mother's 2018 tax returns resulting in taxes, penalties and interest assessed against her estate in excess of $40,000.00.

VIOLATION OF THE UNIFORM POWER OF ATTORNEY ACT

9. As a matter of law, it is undisputed SRM owed a fiduciary duty to the Decedent as her AIF. Loftis v. Eck, 341 SE 2d 641(1986). Instead of preserving her funds for the future use of the Decedent, Sterling Mensch transferred funds from the Decedent's accounts to his personal account while acting under the authority given to him by her in her DPOA. It is undisputed that Sterling Mensch used funds from these transfers for his own personal use, resulting in the diminishment of available funds for the Decedent's estate to distribute. Therefore, Sterling Mensch failed to maintain Decedent's estate plan as is required by the South Carolina Power of Attorney Act.

This Court has previously ruled as a matter of law that no genuine issue of material fact exists as to this cause of action and Petitioners are entitled to judgment against Respondent.

The Decedent's DPOA contains the following provision on page 5, third paragraph:

Notwithstanding any provisions herein to the contrary, my attorney in fact shall not satisfy the legal obligations of the attorney in fact, out of any property subject to this power of attorney. Except to the extent this power of attorney specifically authorizes gifts to my attorney in fact, my attorney in fact may not exercise this power in favor to the attorney, the attorney's estate, the attorney's creditors, or the creditors of attorney's estate.

While serving as Decedent's AIF, Sterling Mensch transferred funds from the Decedent's accounts to his personal account. Sterling Mensch admitted that he made the unauthorized transfers as described. However, he claims that he used a substantial part of the transfers for the benefit of Florence Mensch. In Moore v. Benson (supra), the Court of Appeals upheld the Master in Equity's refusal to allow credit for alleged tax payments without documentary evidence to support the claim. As to these claims, the Court finds that Sterling Mensch was unable to demonstrate that the above-referenced transactions were for Florence Mensch's benefit. He produced no receipts, documents, witnesses and he failed to testify. In addition to failure to provide proof, as a matter of equity, He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequitableness or bad faith relative to the matter in

which he seeks relief, Emery v. Smith, 361 S.C. 207,220, 603 SE2d 598, 605 (Ct. App. 2004). He who seeks equity must do equity. Norton v. Matthews, 249 S.C. 71, 152 SE2d 680 (1987).

As a result of Mr. Mensch's failure to keep complete and accurate records, the Court finds he has violated the following provisions of the Uniform Power of Attorney Act, S.C. Code Ann. 62-8-114 (Supp. 2017): failed to act in good faith; failed to act within the scope of authority granted in the DPOA; failed to act with care, competence and diligence; failed to keep records or all receipts, disbursements and transactions; failed to preserve the Decedent's estate plan by liquidating retirement accounts; failed to preserve the Decedent's estate plan by using her funds for his personal use resulting in less assets to be distributed to all three of her children from her estate; failed to timely file taxes resulting in penalties and interest; failed to minimize taxes and incurring penalties by liquidating retirement accounts; acted with reckless indifference to the purpose of the power of attorney; and his conduct was reckless and willful in complete disregard of duties imposed upon him as a fiduciary.

The Court finds that Sterling Mensch is liable to the Decedent's successors in interest for the amount required to restore the value of the Decedent's property to what it would have been had the violations not occurred. S.C. Code Annot. 62-8-117 (Supp. 2017).

As to the amount, See Section VII.

CONVERSION

10. The evidence is clear and convincing that SRM converted funds belonging to his mother, and later, the estate to his own use and control. To recover in an action for conversion, Petitioners must:

(1) Have an interest in the thing converted;

(2) Respondent must have converted the property to his own use;

(3) The use was without Petitioners' permission.

Moseley vs. Oswald, 656 SE 2d 380 (2008). The Personal Representative has an interest in and a duty to recover all property due the Estate of Florence Mensch. John Mensch as a devisee in her Will has joined the Personal Representative in order to secure the inheritance intended for him by his mother. SRM has admitted taking over $800,000.00. These funds were used without the permission of Florence Mensch, her Estate, or John Mensch.

By exploiting his status as AIF he wrongfully and willfully took without legal authority property belonging to FM and ultimately to FM's Estate. The wrongful detention of another's property may give rise to action for conversion; in such cases, conversion occurs when, without justification or excuse, one refuses to surrender the possession of goods after demand for possession by one entitled thereto. Conversion is a wrongful act and has been defined as the unauthorized assumption in the exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner's rights. Owens v. Andrews Bank & Trust Co., 265 SC 490, 220 S.E. 2d 116 (1975). Conversion is a wrongful act which emanates from either a wrongful taking or wrongful detention. Kirby v. Horne Motor Co., 295 S.C. 7, 11, 366 S.E.2d 259, 261 (Ct. App. 1988).

This Court previously ruled as a matter of law that no genuine issue of material fact exists as to this cause of action and Petitioners are entitled to judgment against Respondent.

Rent, Pre-Judgment Interest, Causes of Action for Negligence, Fraudulent and Negligent Misrepresentation and Concealment, Unjust Enrichment/Money Had and Received and Eviction/Ejectment.

11. Petitioner has requested pre-judgment interest as a part of its relief. However, in order to recover pre-judgment interest, such must be specifically pled. Tilley v. Pacesetter Corp., 355 S.C. 361, 585 S.E.2d 292 (2003). The Court finds that Petitioners statement of "including any interest and appreciation that should have accrued from the time of the violations," contained in line 70 of Petitioner's Petition does not constitute a specific pleading of pre-judgement interest. Therefore, the Court has determined that pre-judgment interest will not be awarded because it was not specifically pled.

12. Petitioner requested rent be charged against Respondent as damages related to Respondent's occupation of 512 New Tarleton Way. Special damages, however, must be particularly alleged and proved. *Kline Iron & Steel Co. v. Superior Trucking Co.*, 261 S.C. 542, 547, 201 S.E.2d 388, 390 (1973) (emphasis added) (failure to plead and prove special damages will prevent recovery). Thus, special damages must be specifically stated to avoid surprise to the other party. *Benedict College v. Nat'l. Credit Sys.* 400 S.C. 538, 548, 735 S.E.2d 518 523 (Ct. App. 2012). The reasoning for such a pleading requirement is to give a party due notice of the amounts sought. *Norwest Properties, LLC v. Strebler*, 424 S.C. 617, 624, 819 S.E.2d 154, 158 (Ct. App. 2018). The Court finds that rent will not be awarded from Respondent as such is special damages which must be specifically pled.

Additionally, Petitioners asserted causes of action for negligence, fraudulent and negligent misrepresentation and concealment, unjust enrichment/money had and received as well as a motion for eviction/ejectment. The Court dismisses the foregoing actions asserted by Petitioner as cumulative given the relief granted by the Court herein.

PUNITIVE DAMAGES

13. The Probate Court can only exercise the jurisdiction provided by statute as enacted by the S.C. General Assembly. As such, the Probate Court lacks subject matter jurisdiction to award punitive damages.

DAMAGES

14. The Court received a number of exhibits during the trial as well as testimony from SW, the estate's PR, and lengthy testimony from both expert witnesses. Mr. Chastain, Respondent's expert, offered testimony regarding his opinions based upon a review of banking and other transactional documents as to the amounts of money transferred from the account of Florence Mensch as compared to the opinion and report of Petitioner's expert John Markel whose testimony was also received. Based upon the testimony of Mr. Chastain in conjunction with the evidence submitted by Mr. Markel, Petitioners' expert, as well as the party's stipulation as to the amount, it is the finding of this court that $820,382.00 was transferred from Decedent's accounts by Sterling Mensch to his own account for his own personal use.

It is the further finding of this court based upon the evidence that Sterling Mensch is not due any offsets or credits regarding the aforementioned amounts transferred from Decedent's account. Under the settled law of this State, an essential preliminary to the allowance of an offset is that the offset claimed must be pleaded, and there must be some evidence tending to establish such plea. *Hurst v. Sumter County*, 189 S.C. 376, 1 S.E.2d 238 (1939). Likewise, Respondent was required to plead offset. Furthermore, based on the testimony and evidence presented at trial by Respondent, this Court finds that Sterling Mensch has failed to meet his burden of showing that any transfers of funds were made directly for the benefit of Florence Mensch.

PA 11 of 14 MEH

It is a further finding of this court that Petitioners shall not recover any amount for Sterling Mensch's failure to diversify Florence Mensch's assets, as such amount is too speculative for this Court to determine.

With regard to the $820,382.00 transferred from the Decedent's account by Sterling Mensch, the court subtracts from such amount $273,461.00 as a credit for Respondent's one-third (1/3rd) inheritance, leaving $546,921.00 due from Respondent to the estate to compensate the Petitioners loss of inheritance. Added to this amount is $24,559.00 for avoidable taxes due to failure to itemize for the years 2011 through 2016, as well as 2018 penalties and interest, currently on appeal to the IRS, in the amount of $40,314.00. The Estate had to spend $10,000.00 to clean and repair Tarleton Way when SRM moved in order to market the property. Because SRM concealed the death of his mother resulting in an overpayment in pension funds, he owes the estate $ 30,000.00.

Sterling Mensch admitted he owed penalties and interest in the amount of $13,820.00.00 thus, the total owed from Respondent to John Mensch and Shauna Waddell as damages is $625,614.00. This amount will be reduced by the 2018 penalties and interest if the appeal of those penalties and interest is successful. Petitioner's expert calculated that $163,420 in taxes were levied to excessive RMD distribution. Further, he should not receive the benefit of a gift from his mother at a time he was converting her funds almost on a daily basis in violation of his fiduciary duty to her when she needed him most.

These are just the damages that Petitioners have been able to discover from SRM who has lied to the Court, lied to his siblings, lied by omission to GE Pension and BOA, failed to cooperate with his first attorney, refused to obey Court Orders, failed to produce cooperate in discovery, and failed to produce documentary evidence or witnesses to support his written allegations.,

By preponderance of the evidence and to confirm the foregoing, the Court finds in favor of Petitioners on causes of action for Breach of Fiduciary Duty both as AIF and Personal Representative, Violation of the SC Power of Attorney Act, and Conversion.

In addition to the damages referenced above, the court finds that Petitioners are entitled to recover from Respondent attorney's fees and costs in the total amount of $127,572.00 as provided by 62-1-111 SC Code Annot. (Supp. 2014). This is a reduction of $6380 related to time spent on engagement letters, subpoenas, time spent on Affidavit of Fees. I will further note that this amount includes the fees for Petitioners' expert witness. With regard to such fees, the court considered all the elements required under the case of Glasscock v. Glasscock, 304 S.C. 158, 403 S.E. 2d 313 (1991) and finds such fees to be reasonable. Specifically, the Court assessed (1) the nature, extent and difficulty of the case, (2) the time necessarily devoted to the case, (3) the professional standing of counsel, (4) the contingent nature of the compensation, if any, (5) the beneficial results obtained, and (6) customary legal fees for similar services. Applying the foregoing factors, as noted above, and after review of the Affidavit of Attorney's Fees and Costs submitted by Petitioners' Counsel, the Court finds $127,572.00 to be reasonable attorney's fees and costs.

Petitioners request the Court award the estate 1,462,495.00 not including pre-judgment interest. Respondent requests that Court award $513,336.00. To date, SRM has paid nothing toward even the amount he admits he owes.

The relief requested by John Mensch, as a 1/3 devisee of the estate, is addressed by payment to Shauna Waddell as Personal Representative of the Estate. Any claim he has against the Respondent is derivative to the Estate's claims.

In view of the foregoing, this Court awards the Estate of Florence Mensch a judgment in the amount of $821,343.00 calculated as follows:

$ 546,921.00 Misappropriations from FM's BOA accounts less SRM's 1/3 share in FM's Will

24,559.00 Failure to itemize FM's tax returns

[10] 40,314.00 2018, taxes, penalties and interest

13,820.00 Tax penalties and interest

163,420 .00 Avoidable Income tax due SRM taking more than the RMD from 2011-2018

30,157.00 GE pension overpayment

10,000.00 Cost to estate to clean and repair Tarleton Way

28,000.00 Annual exclusion gift to himself in 2015, 2016

127,572.00 Attorneys fees, costs

$ 984,763 Total Damages

PAYMENT OF DAMAGES

15. A constructive trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by the one holding the legal title. *Lollis v. Lollis*, 354 SE2d 559, 561 (1987). A constructive trust arises entirely by operation of law without reference to any actual or supposed intentions of creating a trust. It is resorted to by equity to vindicate right and justice or frustrate fraud. *McNair v. Ramsford*, 499 SE2d 488, 501 (Ct. App 1988). The Court finds by clear and convincing evidence that a constructive trust should be imposed upon SRM's non-exempt property of whatever type, wherever located, and however titled. This remedy is appropriate as a result of his deceitful, devious, willful, wanton, and careless actions set forth above. He engaged in repeated action of civil theft for 8 years, depleting his mother's property without any regard to what her future needs might be, without regard to her estate plan, without regard to his siblings, without regard to tax law, probate law, prudent investment principles, etc.

16. If execution on this judgment is commenced by Petitioners, the specific property subject to this constructive trust will be identified in accordance with 14-23-360-420, *S. C. Code Annot.* (1976 as Amended) and any other applicable law. Any discovery regarding the ability of SRM to pay the judgment will be incident to these supplemental proceedings after they have commenced.

[10] This amount is on appeal with the IRS. SRM is allowed to reduce the total judgment should this amount change as a result of the appeal

PA 13 OF 14 PAGES

ORDER

1. STERLING RAYMOND MENSCH, III shall pay $984,763.00 in damages to Shauna Waddell, Personal Representative of the Estate of Florence Mensch. Payment shall be made immediately.

2. Shauna Waddell, Personal Representative of the Estate of Florence Mensch, is hereby awarded judgment against STERLING RAYMOND MENSCH, III in the amount of $984,763.00.

3. Post-judgment interest shall begin to accrue at the legal rate of interest 7.25% or the current rate approved by the S.C. Supreme Court when this Judgment is transcribed and enrolled in the Offices of the Clerk of Court of Greenville County.

4. Should this Order be appealed, interest on the judgement will be governed by 14-23-380 S.C. Code Annot. (1976 as Amended) and other applicable law.

IT IS SO ORDERED.

Debora A. Faulkner
Greenville County Probate Judge

Greenville, South Carolina
Dated this 26 day of Jan, 2022

I ATTEST A TRUE COPY
Clerk, Probate Court
Greenville County, SC
Dated: 1/28/22

PAGE 14 OF 14

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE PROBATE COURT

C.A. No.: 2018-ES-02854

Estate of Florence Petrak Mensch,

John R. Mench and Shauna M. Waddell Individually and as Personal Representative Of the Estate Florence Petrak Mensch And John R. Mensch

Petitioner,

v.

Sterling Raymond Mensch, III, Individually As Personal Representative of the Estate of Florence Petrak Mensch and in the former Capacity as Agent under a Power of Attorney for Florence Petrack Mensch

Respondent.

FILED
FEB 02 2022
GREENVILLE COUNTY
PROBATE COURT

MOTION TO ALTER OR AMEND

Respondent, Sterling Raymond Mensch, III, Individually as Personal Representative of the Estate of Florence Petrak Mensch and in the former Capacity as Agent under a Power of Attorney for Florence Petrack Mensch ("Respondent"), through his undersigned counsel, move pursuant to Rule 59 of the South Carolina Rules of Civil Procedure to alter or amend the Order granting Petitioner damages.

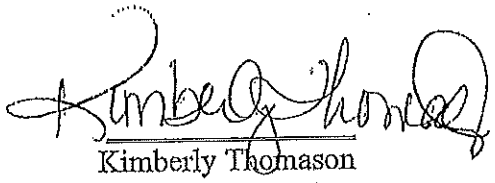
WHEREFORE, Respondent respectfully requests this Court to alter or amend its January 26, 2022, Order.

[signature page to follow]

COPY

Respectfully Submitted this
2nd day of February, 2022

TRULUCK THOMASON, LLC



Kimberly Thomason
Bar No.:79179
Truluck Thomason, LLC
3 Boyce Avenue
Greenville, SC 29601
Phone: (864) 331-1751
Fax: (864) 243-8115
kim@truluckthomason.com

Attorney for Respondent

FILED

FEB 17 2022

GREENVILLE COUNTY
PROBATE COURT

STATE OF SOUTH CAROLINA) IN THE PROBATE COURT

COUNTY OF GREENVILLE) C. A. No.: 2018-ES-23-02854

Estate of Florence Petrak Mensch)	
Shauna M. Waddell, individually and)	
As Personal Representative of the Estate of)	ORDER
Florence Petrak Mensch and John R.)	
Mensch)	
Petitioner,	
v.)	
Sterling Raymond Mensch, III, individually,)	
As former Personal Representative of the)	
Estate of Florence Petrak Mensch and in)	
His former capacity as Agent under Power)	
Of Attorney for Florence Petrak Mensch.)	
)	
Respondent.)	

This matter is before me to address Respondent's *MOTION TO ALTER OR AMEND* filed with the Court on February 2, 2022. Evidence of service by mail upon Petitioners' counsel on February 2, 2022 was filed with the Court. As of the date of this Order, no *RETURN* has been filed by the Petitioners' counsel.

S. C. Supreme Court Order of February 4, 2022 regarding the operation of trial courts during the Coronavirus Emergency, directs that hearings on Motions should be minimized. The Order directs trial judges to dispose of Motions without merit without waiting on a Return or other response from opposing counsel. [1]

The Court finds that the Motions fails to comply with Rule 7 (b) (1) in that it fails to state any grounds that would entitle the Respondent to relief. As such, the bare request to the Court to amend the Order under Rule 59 fails to give notice to the Court and opposing counsel of the relief being requested of the Court.

After careful review of the final Order in its entirety, I find no basis to give Respondent relief under SCRCP 59.

If view of the foregoing, Respondent's Motion is denied.

Debora A. Faulkner, Probate Judge

February 17, 2022
Greenville, S.C.

[1] See https://sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2655

ELECTRONICALLY FILED - 2022 Feb 23 4:12 PM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE IN THE MATTER OF: Estate of Florence Petrak Mensch John R. Mensch and Shauna M. Waddell Individually and as Personal Representative Of the Estate of Florence Petrak Mensch and John R. Mensch, Respondent, v. Sterling Raymond Mensch, III, Individually As Personal Representative of the Estate of Florence Petrak Mensch and in the former Capacity as Agent under a Power of Attorney for Florence Petrak Mensch, Appellant.	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT C.A. No.: 2022-CP-23- **NOTICE OF APPEAL**

Sterling Raymond Mensch, appeals the Orders in this matter filed on January 26, 2022 and February 17, 2022. Copy of written Orders are attached to this Notice as Exhibit "A", and Exhibit "B".

Date this 23rd day of February, 2022.

TRULUCK THOMASON, LLC

s/Devon M. Puriefoy
Devon M. Puriefoy
SC Bar No.: 102097
Kimberly T. Thomason
SC Bar No.: 70179
3 Boyce Avenue
Greenville, SC 29601
devon@truluckthomason.com
kim@truluckthomason.com
T: 864-331-1751

ELECTRONICALLY FILED - 2022 Feb 23 4:12 PM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE PROBATE COURT

CASE NO.2018ES2302854

IN THE MATTER OF:
Estate of Florence Petrak Mensch

Shauna M. Waddell, individually and as Personal Representative of the Estate of Florence Petrak Mensch and John R. Mensch,
Petitioners,

vs.

Sterling Raymond Mensch III, individually, as former Personal Representative of the Estate of Florence Petrak Mensch and in his former capacity as Agent under Power of Attorney for Florence Petrak Mensch,
Respondents.

ORDER

FILED
JAN 26 2022
GREENVILLE COUNTY
PROBATE COURT

Date of Hearing: September 16, 17, 2021
Presiding Judge: Debora A. Faulkner, Probate Judge
Attorney for Petitioners: Tyler E. McLeod.
Attorneys for Respondent: Devon M. Puriefoy, Kimberly Thomason
Court Reporter: Rachel Wood

This matter came before the court for trial to determine the amount of damages owed the Estate of Florence Mensch by Respondent, Sterling Raymond Mensch (SRM) admits he misappropriated funds belonging to Florence Mensch and her estate. However, the amount of damages due the estate is the central issue in the litigation. The relevant time period for the misappropriations is from May 17, 2010, the date Mrs. Mensch's executed her Durable Power of Attorney (DPOA) naming SRM as her Attorney in Fact, (AIF) and April 26, 2018, the date of Ms. Mensch's death.

Present at the hearing was Petitioner Shauna M. Waddell (SW) represented by Tyler McLeod. Petitioner John Mensch (JM) was present for days one and two of the hearing. SRM appeared for each day of trial with his attorneys, Devin Puriefoy and Kimberly Thomason. Witnesses in the case were Petitioner, SW, Petitioners' expert, John Markel, and Respondent's expert, Mark Chastain.

Prior to taking testimony the Court denied the Petitioner's *Motion in Limine*.

STIPULATIONS

1. SRM made a number of withdrawals from Mrs. Mensch's bank account totaling $820,382.

Pg 1 of 14

ELECTRONICALLY FILED - 2022 Feb 23 4:12 PM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

2. SRM deposited the funds from these withdrawals into his single owner checking account.

3. Both expert witnesses are qualified to give their opinions

PROCEDURAL HISTORY

1. On December 14, 2018, SRM filed the Will and Codicil with the Court but took no action to have the documents admitted as the valid testamentary documents of his mother. Neither did he apply for appointment as Personal Representative (PR) which would have granted him legal authority over her assets for the benefit of the devisees named in her Will and any estate creditors.

2. On January 23, 2019, SRM filed his application for admission of the Will and Codicil to Probate and for his appointment as PR. He was appointed PR on January 23, 2019.

3. On May 15, 2019, this action was filed by Petitioners.

4. On August 28, 2019, the Hon. Clayton L. Jennings issued an Order in response to Petitioners' Motion to Compel which, among other rulings, ordered SRM to provide discovery to Petitioners within ten days of the entry of the Order. The Order attached hereto is incorporated herewith as if fully set out.

5. On December 4, 2019, the Hon. Clayton L. Jennings issued his Order in the Petitioner's first Rule to Show Cause proceeding finding SRM in willful contempt of the August 28, 2019 Order. Accordingly, the Court removed SRM as PR and appointed Shauna Waddell to serve as Successor PR. The Court imposed further financial sanctions against SRM. The Order is attached hereto and incorporated herewith as if fully set out.

6. On May 13, 2020, an Amended Petition was filed as permitted by Judge Jennings' Court Order.

7. On September 2, 2020, the Hon. Clayton L. Jennings issued an Order as a result of the Petitioners' filing a second Rule to Show Cause against SRM. The Court found SRM to be in willful contempt of the Court's prior Orders. This Order attached hereto is incorporated herewith as if fully set out.

8. On January 13, 2021, the Hon. Clayton L. Jennings issued an Order as a result of Petitioners third Rule to Show Cause alleging SRM willfully failed to comply with the September 2, 2020 Order. He was found to be in willful contempt, ordered to pay attorneys' fees to Petitioners and cautioned that he would be subject to incarceration should he violate this Order. This Order attached hereto is incorporated herewith as if fully set out.

9. On July 29, 2021, the Court entered an Order granting the Petitioners Summary Judgment on the following causes of action: 1) Breach of Fiduciary Duty as Attorney in Fact (AIF), 2) Violation of the S.C. Uniform Power of Attorney Act, and 3) Conversion. The Court denied Petitioners' Motion for Summary Judgment on the remaining causes of action: Negligence, Unjust Enrichment/Money Had and Received, and Constructive Trust.

10. Trial in this case was heard on September 16-17, '21. By agreement of counsel, Petitioner, John Mensch, participated by telephone on September 17, 2021.

11. A proposed Order was transmitted to the Court on 10/15/21. An extension was granted to SRM's counsel to Dec. 16, 2021 to lodge objections to the proposed Order.

FINDINGS OF FACT

By the preponderance of the evidence, I make the following findings of fact:

Pg 2 of 14

ELECTRONICALLY FILED - 2022 Feb 23 4:12 PM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

1. Mrs. Mensch and her husband moved to Greenville from New York. From their marriage, they had three children, John, Sterling and Shauna.

2. Mr. Mensch died in or around 1995.

3. The record contains no evidence that Ms. Mensch had anything other than a loving relationship with all three of her children.

4. In 1998, Ms. Mensch executed a Will leaving her estate equally to each of her three children. She named all three children to serve as Co-Personal Representatives. Similarly, she named each of her 3 three children to share equally in her non-probate accounts which includes a retirement account. Based on the foregoing, I find that Ms. Mensch intended to leave her estate both probate and non-probate to each of her three children in equal shares.

5. In 2007, Mrs. Mensch executed a DPOA naming the Petitioner, SW, as her attorney in fact but it was later revoked in favor of SRM in 2010.

6. After her husband's death, Ms. Mensch lived in her own home at 207 West Beverly Street in Greer, S.C.

7. On May 17, 2010, Ms. Mensch, with the assistance of an attorney, executed another DPOA naming SRM as her AIF. This DPOA contained no provisions allowing SRM to make gifts to himself.

8. She also executed a Codicil to her 1998 Will naming SRM as her sole Personal Representative. She republished her 1998 Will in all other respects, i.e. her estate plan remained unchanged.

9. SW testified that around 2009 she began to take notice of her mother's dementia symptoms.

10. In or around 2012, she purchased an apartment at Rolling Green. She moved into the Rolling Green apartment and sold her home in Greer.

11. In or around 2013 or 2014, as a result of her diagnosis of dementia, Alzheimer's type, SW arranged for FM to be moved to the memory care unit at Oakleaf Village. No evidence was presented that this decision was contested. She died at Oakleaf Village on April 26, 2018.

12. At Ms. Mensch's funeral, SRM advised his brother John to return to Oregon, because he would be starting the estate administration immediately. After hearing nothing from SRM, SW called him about the estate administration. SRM told her he was waiting on tax information.[1] She called again and he said the taxes were done and that he would be dropping off the estate information to attorney, David Massey's office. After hearing nothing further, SW called the attorney's office and the attorney's office didn't have any estate information. SRM told SW that their secretary probably lost it. The firm was never hired by SRM. SW's communication with SRM became increasingly difficult.

13. On December 14, 2018, SRM filed FM's Will and Codicil in the Probate Court without opening an estate. On January 23, 2019, nine months after Ms. Mensch's death, SRM filed his application to admit the Will and be appointed as the PR. He was appointed PR on January 23, 2019. He filed this without the assistance of counsel.

14. On April 30, 2018, SRM signed and filed a sworn *Inventory and Appraisement* with the Court. The Inventory and Appraisement is part of the Court's record. On that Inventory, he swore that the balance in the UBS account on 4/30/2018 was $409,652. Petitioner's Exhibit 21, the UBS statement from April, 2018 shows that SRM had withdrawn $259,000.00 on April 23, 2018 with a resulting balance of $154,069. He also stated on the *Inventory*, under oath, that the Tarleton Way home had an existing mortgage of $238,170.00 Two months earlier on February

[1] The records would later show that upon her appointment as Successor PR, SW learned that the 2018 tax return had never been filed. Petitioner's #19 is an IRS Letter stating that on 12/31/18, the estate owed $91,367.

Pg 3 of 14

ELECTRONICALLY FILED - 2022 Feb 23 4:12 PM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

8, 2019, he paid the sum of $232,047 in full satisfaction of the mortgage. So, after being sworn, he voluntarily and willfully filed perjured information to the Court. [2]

15. After his mother's death, rather than filing the Will immediately and becoming the PR of her estate, he was continuing to make post-death withdrawals from Ms. Mensch's x7059 account. He was also allowing her GE pension auto deposits to continue despite her death. He made his last withdrawals from FM's account in or around February, 2019 leaving approximately $1500 in x7059 and $65 in x2007. SRM withdrew a total of $170,000 from Ms. Mensch's bank accounts after her death. This proceeding was commenced three months later on May 15, 2019

TARLETON WAY HOUSE AND LOT

16. On April 18, 2007, Ms. Mensch purchased property in a subdivision in Greer. As such, she signed the mortgage obligating herself to pay $330,000.00 for the property in monthly installments. Further, she signed a "Rider" stating that this would be her second home and keep the home only for her exclusive use.

When she purchased the property, she was still living at her West Beverly Street property. Her intent was never to live at this Tarleton Way property. The intent was that the house would actually be purchased by SRM as a home for him and his daughter. SRM orchestrated this arrangement since he was a party in a divorce proceeding. He wanted to protect the property from being included as marital property subject to equitable division. SW testified that it wasn't until after FM's death that she and her brother discovered that the house was not actually owned by SRM.

SRM's expert witness, Mr. Chastain, listed that SRM should be given credit for $39,000.00 that he paid as a down payment from his own funds when the home was purchased. Upon further examination of the witness, it appeared this was untrue in that the amount was folded into the mortgage.

SRM paid nothing to FM for the 12 years he lived there. It was home with landscaping, pool, theatre room, and nice finishes. SRM alleges he made a total of $240,631.00 in payments from his personal funds to service the principal and interest on the Tarleton mortgage and that he should be credited with those payments as being beneficial to FM.

SRM's employment status and income were never presented in evidence. In order to weigh the veracity of this assertion, the ability of SRM to pay this would need to be known. It is unknown whether or not he was employed; or, if so, the dates of his employment and the amount of his income. Petitioner's expert witness, Mr. Markel, attempted to trace these alleged mortgage payments using bank documents. He found that many of the alleged payments were untraceable and were inconsistent with the dollar amounts alleged. Countless online cash withdrawals from x7059 to SRM's account were in amounts similar to the amount of the mortgage payments. Bank statements prior to 2012 were not available to the parties.

SRM also alleges that he used some of the cash from FM's accounts to make improvements and repairs to the home which were beneficial to FM. He alleges these expenditures amount to $69,957.00.[3] Despite repeated directions from the Court, SRM never produced receipts or other documents to prove this amount. He failed to testify at this hearing regarding how he arrived at this total. He failed to produce witnesses to confirm payments made for improvements. He failed to issue any subpoenas for merchants or repair companies to produce records.

[2] The estate record contains a claim filed on 2/11/2019 by Traci Malone of South State Bank. On the same day, February 11, a *Loan Payoff Statement* was filed. SRM satisfied the mortgage in full on 2/8/19. SW's *Settlement Statement* (Exh. #25) when TW was sold shows a mortgage payoff of 218,579 to South State Bank on 12/3/2020

[3] SW testified in detail regarding the condition of the home after SRM moved resulting in an expense to the estate of $10,000.00 on extensive cleaning and repairs in order to make it fit for sale.

Pg 4 of 14

When SRM moved from the home in September, 2020, the estate has to spend $10,000 for cleaning and repairs to make the property presentable for potential buyers.

As a minor point; but one that shows how no opportunity was missed by SRM, SRM collected $22,434.00 in insurance proceeds for hail damage to FM's home. The amount of the damage was not placed in the record. Again, these are proceeds from an insurance policy that FM pays for each month in mortgage payments for a house she doesn't need; and, that is being used as a residence for her able bodied son. SRM's expert witness testified that the damage estimate was less than the amount collected and that SRM appeared to have kept the balance not used. This was not contradicted by SRM.

FLORENCE MENSCH'S ASSETS

17. A listing of FM's assets and their values on the date SRM became FM's AIF in 2010 is not in evidence. Bank records were not available prior to 2012. However, from the evidence presented, it appeared that her assets, residential expenses were as follows on the dates indicated:

Asset	Value	Date of Value	Residential Expense
[4]Home on Tarleton Way	420,000.00	Sold 12/3/20	Moved to Rolling Green In 2012 Oakleaf in 2015
x7059 BOA Checking account	various		
x2007 BOA Savings account	various		
Elfin Trusts + GE stock IRA[5]	$1,321,717.00	1/1/2015	
UBS Retirement Acct	$913,511.00	12/30/16	

Annual Income	
2012	$16,000.00 SSA 2580 x 12/ 31K $17,800.00 Pension $49,240.00 IRA Distribution $83,090.00
2013	$16,000.00 SSA 2580 x 12/ 31K $17,800.00 Pension $70,000.00 IRA Distribution $104,125.00
2014	$16,000.00 SSA 2580 x 12/ 31K $17,800.00 Pension $90,594.00 IRA Distribution $124,964.00
2015	$16,000.00 SSA 4550x12/55K $17,800.00 Pension

[4] Purchased 2007 for $330,000.00 includes $39,700.00 down payment, additional $65,000.00 for pool, home theater, fencing, landscaping, etc. SRM claims he paid this via his allegations in an affidavit.
[5] Elfin later managed by State Street Global.

ELECTRONICALLY FILED - 2022 Feb 23 4:12 PM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

ELECTRONICALLY FILED - 2022 Feb 23 4:12 PM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

$213,945.00 IRA Distribution
$248,590.00

2016 $16,000.00 SSA 4550x12/55K
$17,800.00 Pension
$208,727.00 IRA Distribution
$243,379.00

MANAGEMENT OF ASSETS BY SRM

18. FM's Bank of America (BOA) accounts are her checking account, x7059 and a savings account x2007. The fund balance in x7059 was the result of FM's monthly income deposits plus any online transfers directed by SRM-AIF from her investment accounts. Payments for her residence at the facilities were automatically drafted from x7059.[6]

19. In 2013, SRM, using the authority granted to him by FM in the DPOA, decided to add his name as a joint account owner to x7059. No evidence was presented on why SRM chose to do this, especially since this change would affect FM's estate plan. Instead of the balance being a part of her estate to be shared by all 3 of her children, this change would result in SRM being able to claim all funds remaining on deposit for himself.

20. SRM's personal BOA account is x3259. From 2013 until FM's death in April, 2018, SRM engaged in over 239 online transfers, cash transactions, withdrawals, from FM's BOA accounts. He directed these transfers to his personal BOA account x3259 which was a POD account, providing that his daughter would be paid the balance in the account upon his death. The parties stipulate that the total for all these transfers comes to $820,382.00[7] Once deposited into his account, SRM spent the funds on a variety of personal pleasures including nice restaurants, men's clothing stores, jewelry, home improvement stores, grocery stores, travel, alcohol, etc. He made several large cash withdrawals and made online payments to his personal credit card company from FM's account. The piece de resistance $8000.00 to Greenville Matchmakers.

21. From 2015 through 2018, SRM withdrew funds from Elfin Trust, taking smaller amounts from FM's GM stock. On 12/31/2015, the Elfin fund's market value was $279,819.00; on the same date, the GM market value was $1,321,717.00.

22. SRM facilitated IRA distributions to FM in excess of the amount mandated for *required minimum distributions* (RMD).[8] In years 2011, 2012, 2015, 2016, and 2018, SRM unnecessarily caused FM's IRA distributions to exceed allowable RMD for each year. From the above chart, SSA and pension income were largely sufficient to cover her monthly living expense at Rolling Green and less so at Oak Leaf. However, no evidence is presented to show that the allowable RMD for each year plus her income would have been insufficient to comfortably pay for her care. The amount of income taxes incurred due to these excessive withdrawals was $163,420.00.

23. On March 20, 2018, SRM sold the GE stock for $406,255.80.

24. Petitioners allege that SRM failed to properly diversify FM's portfolio resulting in a reduction of approximately $400,000.00 in value. Court finds that this was speculative and not supported by the preponderance of the evidence.

---

[6] Occasionally, SRM would use the x2007 to receive online transfers.
[7] No bank records were available prior to 2012.
[8] Under Treasury Regulations, taxpayers over 70.5, like FM must take the required minimum distributions.

ELECTRONICALLY FILED - 2022 Feb 23 4:12 PM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

25. On April 23, 2019, three days prior to FM's death, SRM transferred $259,000.00 of the $409,652.00 held in FM's UBS retirement account to FM's 7059 account.

26. SRM failed to notify BOA and failed to notify GE Pension of FM's death. The pension payments continued unabated and SRM continued to make withdrawals from the BOA accounts. From the time of FM's death on April 26, 2018 until February 18, 2019, SRM directed $170,000 of FM's, i.e. the Estate's, post-death funds to his x3259 personal account. These were funds earmarked to be divided equally among her 3 children. SRM withdrew these post-death pension payments from FM's account for his personal use. To reimburse GE for these overpayments. As a result, the estate was charged with an overpayment of $30,157.00.

SW, as PR, agreed to forfeit the $10,000 of GE life insurance that FM intended to be shared equally by her children. SW assigned $3333.33 of the 10,000 for each beneficiary. This left a balance due to GE of $20,157.81 from the estate. SRM should be liable to the estate for the total amount of overpayment in the amount of $30,157.00.

27. At the time SW was appointed PR, there was only $15,000 in FM's x7059 account.

TAX LIABILITIES

28. Between 2012 and 2016, SRM's failed to timely file tax returns and failed to timely pay taxes due resulting in penalties for failure to file and penalties and interest for failure to pay the IRS and SCDOR. The amount admitted by SRM's attorneys is $13,820.17.

29. SRM failed to file tax return for FM for 2017.

30. SRM made gifts from FM to himself, SW and Steve, John and Shea, Sterling and Holly in the years 2014, 2015, and 2016 for the purpose of meeting the annual exclusion allowed by the IRS. This was permitted by FM's DPOA.

31. SRM failed to take action necessary to avoid $40,314.00 penalties and interest connected to FM's 2018 taxes. This amount is currently on appeal.

32. From 2011 through 2016, SRM failed to itemize deductions for property tax and mortgage interest on the Tarlton Way on FM's returns. FM as owner of the property was clearly entitled to claim those itemized deductions, and thereby proportionately reduce her tax liability for each respective year. This failure amounts to $24,559 in excessive tax.

33. From 2011 through 2018, SRM caused FM and, later, her estate to incur unnecessary tax liabilities of $163,420 as set forth in Petitioner's Exhibit #1 [9] due to SRM's withdrawals in excess of the RMD for each year.

34. In 2015 and 2016, SRM wrote checks to his siblings, their spouses, to himself and his daughter in accordance with IRS rules that permit gifting a certain amount each year. Each year he wrote himself a check equal to the others, despite his siphoning of funds from his mother to subsidize his lifestyle. He has made no good faith effort whatsoever during this litigation to pay any amount that he admits he owes. The only amounts he has paid to the estate to date for his wrongdoing were attorneys' fees ordered by Judge Jennings short of incarceration. As a matter of equity, SRM should not be able to sit at the table with his siblings and collect a gift in an amount equal to theirs given his actions. Specifically, the record indicates he paid himself $14,000.00 for 2015 and 2016 for a total of $28,000.00.

[9] Pet. Exhib. 21, USB states RMD for 2018 is 33,358. SRM withdrew $259,000 or $ 225,642 in excess of IRS limits

ELECTRONICALLY FILED - 2022 Feb 23 4:12 PM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

CONCLUSIONS OF LAW

Applying the facts to applicable law, I make the following conclusions of law:

BREACH OF FIDUCIARY DUTY

1. "A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience is bound to act in good faith and with due regard to the interests of the one imposing the confidence." *Davis v. Greenwood Sch. Dist. 50*, 365 S.C. 629, 635, 620 S.E.2d 65, 68 (2005). To establish a claim for breach of fiduciary duty, the plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty owed to the plaintiff by the defendant, and (3) damages proximately resulting from the wrongful conduct of the defendant. See generally, Moore v. Moore, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004) (discussing the elements comprising a breach of fiduciary duty claim); *RFT Mgmt. Co. v. Tinsley & Adams*, 399 S.C. 322, 732 S.E.2d 166 (2012).

2. A fiduciary relationship existed between FM and SRM as expressed in the DPOA signed by FM in May, 2010. FM reposed special confidence in SRM; confidence that he would act in good faith placing her As such, SRM has all the duties and obligations set forth in the document plus he is duty bound to act at all times with due regard to the interests of FM. Moore v. Benson, 390 SC 153 (2010). Being in the firm grasp of Alzheimer's disease, she was squarely at the mercy of SRM to act in her best interests. Instead, SRM exploited the trust his mother bestowed on him at every turn.

3. The clear weight of the evidence shows SRM used the DPOA as a license to access as much of his mother's property as possible, leaving enough for her basic requirements, such as the payments to her facility. The chart above shows that her income and RMD distributions were substantially exceeded the amount of her monthly facility fees. The excess was taken as a part of the obvious scheme concocted by SRM to maximize his grift. At every opportunity, he placed his desire to take as much of her property as possible ahead of his mother's welfare. To further nail down his continued free use of his mother's money, to the detriment of his siblings, he added his name as a joint owner to her BOA accounts. By doing this, he was depriving his siblings of their right to inherit a share of the balance as their mother so intended. To further thwart his mother's estate plan, he designated his personal checking account as a POD account. With this change, all the ill-gotten funds in this account would become the property of his daughter to the detriment of his mother's estate, i.e. his siblings.

4. He breached his fiduciary duty by using the authority reposed in him by FM to delay or fail to file taxes, resulting in unnecessary fines and penalties, thus reducing FM's estate. He made withdrawals exceeding her RMDs, he liquidated her IRA, and also resulting is unnecessary taxes and penalties. These accounts were all created by FM to be divided equally at her death. FM's estate, both non-probate and probate, would have been substantially greater but for the shenanigans employed by SRM while his mother suffered with Alzheimer's disease, helpless to intervene.

5. The DPOA contained no express authority for SRM to gift himself any of his mother's property. The Decedent's DPOA contains the following provision on page 5, third paragraph:

Notwithstanding any provisions herein to the contrary, my attorney in fact shall not satisfy the legal obligations to the attorney in fact, out of any property subject to this power of attorney. Except to the extent this power of attorney specifically authorizes gifts to my attorney in fact, my attorney in fact may not exercise this power in favor to the attorney, the attorney's estate, the attorney's creditors, or the creditors of attorney's estate.

An agent acting for a principal pursuant to a power of attorney may not make a substantially gratuitous conveyance of the property of the principal to himself unless the power to do so is expressly granted by the instrument itself. Fender v. Fender, 329 SE2d 430 (1985).

Pg 8 of 14

ELECTRONICALLY FILED - 2022 Feb 23 4:12 PM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

6. Florence Mensch died on April 26, 2018. S.C. law requires anyone in possession of a decedent's Will to file the Will within 30 days of the date of death. 62-2-901 (Supp. 2014). SRM waited until December, 2018 to file the Will and Codicil. He waited until January of 2019 to open his mother's estate. He continued to collect her pension and spend money belonging to the estate from April 26, 2018 until February, 2019. Since her death, he continued to convert her property to his own use, said amount totaling approximately $170,000.00 and causing the estate to be indebted to GE for the overpayment of monthly pensions.

SRM's actions equate him to executor de son tort. Because he continued to receive and spend estate property, he is chargeable as the executor of his own wrong. The value of the property is charged to the *executor de son tort* . 62-3-619 S.C. *Code Annot.* (Supp. 2014)

I find SRM, who was named as the PR in the Will of his mother, did intentionally and with bad faith convert and waste estate property by means of the concealment of the fact of his mother's death to her bank and to her pension company.

7. While serving as PR, SRM failed to repay or make any effort to repay to the Estate the property he converted to his own use. Further, he failed to comply with the Orders of this Court, failed to cooperate with his first attorney so the attorney could assist in the estate administration. All these acts together constitute a violation of his fiduciary duty as Personal Representative to the Estate causing unnecessary time and expense in the administration of what could have been a very straight forward estate administration.

8. While serving as PR, SRM failed to properly file his mother's 2018 tax returns resulting in taxes, penalties and interest assessed against her estate in excess of $40,000.00.

VIOLATION OF THE UNIFORM POWER OF ATTORNEY ACT

9. As a matter of law, it is undisputed SRM owed a fiduciary duty to the Decedent as her AIF. Loftis v. Eck, 341 SE 2d 641(1986). Instead of preserving her funds for the future use of the Decedent, Sterling Mensch transferred funds from the Decedent's accounts to his personal account while acting under the authority given to him by her in her DPOA. It is undisputed that Sterling Mensch used funds from these transfers for his own personal use, resulting in the diminishment of available funds for the Decedent's estate to distribute. Therefore, Sterling Mensch failed to maintain Decedent's estate plan as is required by the South Carolina Power of Attorney Act.

This Court has previously ruled as a matter of law that no genuine issue of material fact exists as to this cause of action and Petitioners are entitled to judgment against Respondent.

The Decedent's DPOA contains the following provision on page 5, third paragraph:

Notwithstanding any provisions herein to the contrary, my attorney in fact shall not satisfy the legal obligations of the attorney in fact, out of any property subject to this power of attorney. Except to the extent this power of attorney specifically authorizes gifts to my attorney in fact, my attorney in fact may not exercise this power in favor to the attorney, the attorney's estate, the attorney's creditors, or the creditors of attorney's estate.

While serving as Decedent's AIF, Sterling Mensch transferred funds from the Decedent's accounts to his personal account. Sterling Mensch admitted that he made the unauthorized transfers as described. However, he claims that he used a substantial part of the transfers for the benefit of Florence Mensch. In Moore v. Benson (supra), the Court of Appeals upheld the Master in Equity's refusal to allow credit for alleged tax payments without documentary evidence to support the claim. As to these claims, the Court finds that Sterling Mensch was unable to demonstrate that the above-referenced transactions were for Florence Mensch's benefit. He produced no receipts, documents, witnesses and he failed to testify. In addition to failure to provide proof, as a matter of equity, He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequitableness or bad faith relative to the matter in

ELECTRONICALLY FILED - 2022 Feb 23 4:12 PM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

which he seeks relief, Emery v. Smith, 361 S.C. 207,220, 603 SE2d 598, 605 (Ct. App. 2004). He who seeks equity must do equity. Norton v. Matthews, 249 S.C. 71, 152 SE2d 680 (1987).

As a result of Mr. Mensch's failure to keep complete and accurate records, the Court finds he has violated the following provisions of the Uniform Power of Attorney Act, S.C. Code Ann. 62-8-114 (Supp. 2017): failed to act in good faith; failed to act within the scope of authority granted in the DPOA; failed to act with care, competence and diligence; failed to keep records or all receipts, disbursements and transactions; failed to preserve the Decedent's estate plan by liquidating retirement accounts; failed to preserve the Decedent's estate plan by using her funds for his personal use resulting in less assets to be distributed to all three of her children from her estate; failed to timely file taxes resulting in penalties and interest; failed to minimize taxes and incurring penalties by liquidating retirement accounts; acted with reckless indifference to the purpose of the power of attorney; and his conduct was reckless and willful in complete disregard of duties imposed upon him as a fiduciary.

The Court finds that Sterling Mensch is liable to the Decedent's successors in interest for the amount required to restore the value of the Decedent's property to what it would have been had the violations not occurred. S.C. Code Annot. 62-8-117 (Supp. 2017).

As to the amount, See Section VII.

CONVERSION

10. The evidence is clear and convincing that SRM converted funds belonging to his mother, and later, the estate to his own use and control. To recover in an action for conversion, Petitioners must:

(1) Have an interest in the thing converted;

(2) Respondent must have converted the property to his own use;

(3) The use was without Petitioners' permission.

Moseley vs. Oswald, 656 SE 2d 380 (2008). The Personal Representative has an interest in and a duty to recover all property due the Estate of Florence Mensch. John Mensch as a devisee in her Will has joined the Personal Representative in order to secure the inheritance intended for him by his mother. SRM has admitted taking over $800,000.00. These funds were used without the permission of Florence Mensch, her Estate, or John Mensch.

By exploiting his status as AIF he wrongfully and willfully took without legal authority property belonging to FM and ultimately to FM's Estate. The wrongful detention of another's property may give rise to action for conversion; in such cases, conversion occurs when, without justification or excuse, one refuses to surrender the possession of goods after demand for possession by one entitled thereto. Conversion is a wrongful act and has been defined as the unauthorized assumption in the exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner's rights. Owens v. Andrews Bank & Trust Co., 265 SC 490, 220 S.E. 2d 116 (1975). Conversion is a wrongful act which emanates from either a wrongful taking or wrongful detention. Kirby v. Horne Motor Co., 295 S.C. 7, 11, 366 S.E.2d 259, 261 (Ct. App. 1988).

This Court previously ruled as a matter of law that no genuine issue of material fact exists as to this cause of action and Petitioners are entitled to judgment against Respondent.

Pg 10 of 14

ELECTRONICALLY FILED - 2022 Feb 23 4:12 PM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

Rent, Pre-Judgment Interest, Causes of Action for Negligence, Fraudulent and Negligent Misrepresentation and Concealment, Unjust Enrichment/Money Had and Received and Eviction/Ejectment.

11. Petitioner has requested pre-judgment interest as a part of its relief. However, in order to recover pre-judgment interest, such must be specifically pled. Tilley v. Pacesetter Corp., 355 S.C. 361, 585 S.E.2d 292 (2003). The Court finds that Petitioners statement of "including any interest and appreciation that should have accrued from the time of the violations," contained in line 70 of Petitioner's Petition does not constitute a specific pleading of pre-judgement interest. Therefore, the Court has determined that pre-judgment interest will not be awarded because it was not specifically pled.

12. Petitioner requested rent be charged against Respondent as damages related to Respondent's occupation of 512 New Tarleton Way. Special damages, however, must be particularly alleged and proved. *Kline Iron & Steel Co. v. Superior Trucking Co.*, 261 S.C. 542, 547, 201 S.E.2d 388, 390 (1973) (emphasis added) (failure to plead and prove special damages will prevent recovery). Thus, special damages must be specifically stated to avoid surprise to the other party. *Benedict College v. Nat'l. Credit Sys.* 400 S.C. 538, 548, 735 S.E.2d 518 523 (Ct. App. 2012). The reasoning for such a pleading requirement is to give a party due notice of the amounts sought. *Norwest Properties, LLC v. Strebler*, 424 S.C. 617, 624, 819 S.E.2d 154, 158 (Ct. App. 2018). The Court finds that rent will not be awarded from Respondent as such is special damages which must be specifically pled.

Additionally, Petitioners asserted causes of action for negligence, fraudulent and negligent misrepresentation and concealment, unjust enrichment/money had and received as well as a motion for eviction/ejectment. The Court dismisses the foregoing actions asserted by Petitioner as cumulative given the relief granted by the Court herein.

PUNITIVE DAMAGES

13. The Probate Court can only exercise the jurisdiction provided by statute as enacted by the S.C. General Assembly. As such, the Probate Court lacks subject matter jurisdiction to award punitive damages.

DAMAGES

14. The Court received a number of exhibits during the trial as well as testimony from SW, the estate's PR, and lengthy testimony from both expert witnesses. Mr. Chastain, Respondent's expert, offered testimony regarding his opinions based upon a review of banking and other transactional documents as to the amounts of money transferred from the account of Florence Mensch as compared to the opinion and report of Petitioner's expert John Markel whose testimony was also received. Based upon the testimony of Mr. Chastain in conjunction with the evidence submitted by Mr. Markel, Petitioners' expert, as well as the party's stipulation as to the amount, it is the finding of this court that $820,382.00 was transferred from Decedent's accounts by Sterling Mensch to his own account for his own personal use.

It is the further finding of this court based upon the evidence that Sterling Mensch is not due any offsets or credits regarding the aforementioned amounts transferred from Decedent's account. Under the settled law of this State, an essential preliminary to the allowance of an offset is that the offset claimed must be pleaded, and there must be some evidence tending to establish such plea. *Hurst v. Sumter County*, 189 S.C. 376, 1 S.E.2d 238 (1939). Likewise, Respondent was required to plead offset. Furthermore, based on the testimony and evidence presented at trial by Respondent, this Court finds that Sterling Mensch has failed to meet his burden of showing that any transfers of funds were made directly for the benefit of Florence Mensch.

PA 11 of 14 SMSH

ELECTRONICALLY FILED - 2022 Feb 23 4:12 PM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

It is a further finding of this court that Petitioners shall not recover any amount for Sterling Mensch's failure to diversify Florence Mensch's assets, as such amount is too speculative for this Court to determine.

With regard to the $820,382.00 transferred from the Decedent's account by Sterling Mensch, the court subtracts from such amount $273,461.00 as a credit for Respondent's one-third (1/3rd) inheritance, leaving $546,921.00 due from Respondent to the estate to compensate the Petitioners loss of inheritance. Added to this amount is $24,559.00 for avoidable taxes due to failure to itemize for the years 2011 through 2016, as well as 2018 penalties and interest, currently on appeal to the IRS, in the amount of $40,314.00. The Estate had to spend $10,000.00 to clean and repair Tarleton Way when SRM moved in order to market the property. Because SRM concealed the death of his mother resulting in an overpayment in pension funds, he owes the estate $ 30,000.00.

Sterling Mensch admitted he owed penalties and interest in the amount of $13,820.00.00 thus, the total owed from Respondent to John Mensch and Shauna Waddell as damages is $625,614.00. This amount will be reduced by the 2018 penalties and interest if the appeal of those penalties and interest is successful. Petitioner's expert calculated that $163,420 in taxes were levied to excessive RMD distribution. Further, he should not receive the benefit of a gift from his mother at a time he was converting her funds almost on a daily basis in violation of his fiduciary duty to her when she needed him most.

These are just the damages that Petitioners have been able to discover from SRM who has lied to the Court, lied to his siblings, lied by omission to GE Pension and BOA, failed to cooperate with his first attorney, refused to obey Court Orders, failed to produce cooperate in discovery, and failed to produce documentary evidence or witnesses to support his written allegations.,

By preponderance of the evidence and to confirm the foregoing, the Court finds in favor of Petitioners on causes of action for Breach of Fiduciary Duty both as AIF and Personal Representative, Violation of the SC Power of Attorney Act, and Conversion.

In addition to the damages referenced above, the court finds that Petitioners are entitled to recover from Respondent attorney's fees and costs in the total amount of $127,572.00 as provided by 62-1-111 SC Code Annot. (Supp. 2014). This is a reduction of $6380 related to time spent on engagement letters, subpoenas, time spent on Affidavit of Fees. I will further note that this amount includes the fees for Petitioners' expert witness. With regard to such fees, the court considered all the elements required under the case of Glasscock v. Glasscock, 304 S.C. 158, 403 S.E. 2d 313 (1991) and finds such fees to be reasonable. Specifically, the Court assessed (1) the nature, extent and difficulty of the case, (2) the time necessarily devoted to the case, (3) the professional standing of counsel, (4) the contingent nature of the compensation, if any, (5) the beneficial results obtained, and (6) customary legal fees for similar services. Applying the foregoing factors, as noted above, and after review of the Affidavit of Attorney's Fees and Costs submitted by Petitioners' Counsel, the Court finds $127,572.00 to be reasonable attorney's fees and costs.

Petitioners request the Court award the estate 1,462,495.00 not including pre-judgment interest. Respondent requests that Court award $513,336.00. To date, SRM has paid nothing toward even the amount he admits he owes.

The relief requested by John Mensch, as a 1/3 devisee of the estate, is addressed by payment to Shauna Waddell as Personal Representative of the Estate. Any claim he has against the Respondent is derivative to the Estate's claims.

In view of the foregoing, this Court awards the Estate of Florence Mensch a judgment in the amount of $821,343.00 calculated as follows:

ELECTRONICALLY FILED - 2022 Feb 23 4:12 PM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

$ 546,921.00	Misappropriations from FM's BOA accounts less SRM's 1/3 share in FM's Will
24,559.00	Failure to itemize FM's tax returns
[10] 40,314.00	2018, taxes, penalties and interest
13,820.00	Tax penalties and interest
163,420.00	Avoidable Income tax due SRM taking more than the RMD from 2011-2018
30,157.00	GE pension overpayment
10,000.00	Cost to estate to clean and repair Tarleton Way
28,000.00	Annual exclusion gift to himself in 2015, 2016
127,572.00	Attorneys fees, costs
$ 984,763	Total Damages

PAYMENT OF DAMAGES

15. A constructive trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by the one holding the legal title. *Lollis v. Lollis*, 354 SE2d 559, 561 (1987). A constructive trust arises entirely by operation of law without reference to any actual or supposed intentions of creating a trust. It is resorted to by equity to vindicate right and justice or frustrate fraud. *McNair v. Ralnsford*, 499 SE2d 488, 501 (Ct. App 1988). The Court finds by clear and convincing evidence that a constructive trust should be imposed upon SRM's non-exempt property of whatever type, wherever located, and however titled. This remedy is appropriate as a result of his deceitful, devious, willful, wanton, and careless actions set forth above. He engaged in repeated action of civil theft for 8 years, depleting his mother's property without any regard to what her future needs might be, without regard to her estate plan, without regard to his siblings, without regard to tax law, probate law, prudent investment principles, etc.

16. If execution on this judgment is commenced by Petitioners, the specific property subject to this constructive trust will be identified in accordance with 14-23-360-420, *S. C. Code Annot.* (1976 as Amended) and any other applicable law. Any discovery regarding the ability of SRM to pay the judgment will be incident to these supplemental proceedings after they have commenced.

[10] This amount is on appeal with the IRS. SRM is allowed to reduce the total judgment should this amount change as a result of the appeal

ELECTRONICALLY FILED - 2022 Feb 23 4:12 PM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

ORDER

1. STERLING RAYMOND MENSCH, III shall pay $984,763.00 in damages to Shauna Waddell, Personal Representative of the Estate of Florence Mensch. Payment shall be made immediately.

2. Shauna Waddell, Personal Representative of the Estate of Florence Mensch, is hereby awarded judgment against STERLING RAYMOND MENSCH, III in the amount of $984,763.00.

3. Post-judgment interest shall begin to accrue at the legal rate of interest 7.25% or the current rate approved by the S.C. Supreme Court when this Judgment is transcribed and enrolled in the Offices of the Clerk of Court of Greenville County.

4. Should this Order be appealed, interest on the judgement will be governed by 14-23-380 S.C. Code Annot. (1976 as Amended) and other applicable law.

IT IS SO ORDERED.

Debora A. Faulkner
Greenville County Probate Judge

Greenville, South Carolina
Dated this 26 day of Jan, 2022

I ATTEST A TRUE COPY
Clerk, Probate Court
Greenville County, SC
Dated: 1/28/22

FILED
FEB 17 2022
GREENVILLE COUNTY
PROBATE COURT

STATE OF SOUTH CAROLINA) IN THE PROBATE COURT

COUNTY OF GREENVILLE) C. A. No.: 2018-ES-23-02854

Estate of Florence Petrak Mensch)

Shauna M. Waddell, individually and)
As Personal Representative of the Estate of) ORDER
Florence Petrak Mensch and John R.)
Mensch)

Petitioner,

v.)

Sterling Raymond Mensch, III, individually,)
As former Personal Representative of the)
Estate of Florence Petrak Mensch and in)
His former capacity as Agent under Power)
Of Attorney for Florence Petrak Mensch.)

Respondent.)

This matter is before me to address Respondent's *MOTION TO ALTER OR AMEND* filed with the Court on February 2, 2022. Evidence of service by mail upon Petitioners' counsel on February 2, 2022 was filed with the Court. As of the date of this Order, no *RETURN* has been filed by the Petitioners' counsel.

S. C. Supreme Court Order of February 4, 2022 regarding the operation of trial courts during the Corohavirus Emergency, directs that hearings on Motions should be minimized. The Order directs trial judges to dispose of Motions without merit without waiting on a Return or other response from opposing counsel.[1]

The Court finds that the Motions fails to comply with Rule 7 (b) (1) in that it fails to state any grounds that would entitle the Respondent to relief. As such, the bare request to the Court to amend the Order under Rule 59 fails to give notice to the Court and opposing counsel of the relief being requested of the Court.

After careful review of the final Order in its entirety, I find no basis to give Respondent relief under SCRCP 59.

If view of the foregoing, Respondent's Motion is denied.

Debora A. Faulkner, Probate Judge

February 17, 2022
Greenville, S.C.

[1] See https://sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2655

ELECTRONICALLY FILED - 2022 Feb 23 4:12 PM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

ELECTRONICALLY FILED - 2022 Apr 25 9:31 AM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE MATTER OF:
Estate of Florence Petrak Mensch

Sterling Raymond Mensch, III, Individually As Personal Representative of the Estate of Florence Petrak Mensch and in the former Capacity as Agent under a Power of Attorney for Florence Petrak Mensch,

Appellant,

v.
John R. Mensch and Shauna M. Waddell Individually and as Personal Representative Of the Estate of Florence Petrak Mensch and John R. Mensch,

Respondent.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2022-CP-23-01064

MEMORANDUM IN OPPOSITION OF MOTION TO DISMISS

TO: THE ABOVE PARTIES AND THEIR ATTORNEY OF RECORD:

Sterling Raymond Mensch, III, Individually as Personal Representative of the Estate of Florence Petrak Mensch and in the former Capacity as Agent under a Power of Attorney for Florence Petrak Mensch, (hereinafter "Appellant"), by and through his undersigned counsel, respectfully requests that Respondent's Motion to Dismiss be denied. Appellant admits that the appeal seems to be premature as the order from the lower court in not a final order. However, due to Respondent's Motion to Dismiss, Appellant seeks an order from this Court stating that the lower court's order is not a final order and having the appeal held in abeyance until a final order is issued. In the alternative, if this Court finds the lower court's order to be a final order, than the appeal was timely made.

ELECTRONICALLY FILED - 2022 Apr 25 9:31 AM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

PROCEDURAL POSTURE

On May 15, 2019, the Respondents filed a Petition with the Probate Court for numerous causes of actions against the Appellant. [01/26/2022 Order]. Over two years later on July 29, 2021, the Probate Court entered an Order granting the Respondent's Motion for Summary Judgment on Breach of Fiduciary Duty, Violation of the S.C. Uniform Power of Attorney Act, and Conversion. *Id.* A damages hearing was held on September 16 and 17 of 2021. *Id.* On January 26, 2022, The Court found in favor of Respondents and awarded Nine Hundred Eighty-Forty Thousand Seven Hundred and Sixty-Three Dollars ($ 987,763.00) to the Personal Representative. *Id.* Of the total Judgment, Forty Thousand Three Hundred and Fourteen Dollars ($ 40,314.00) were to be awarded from tax implications. *Id.* However, the footnote associated with the payment of taxes specifically stated, "This amount is on appeal with the IRS. ***SRM is allowed to reduce the total judgment should this amount change as a result of the appeal.***" *Id.* (emphasis added).

On February 2, 2022, only Seven (7) days after Judgement, Appellant filed a timely SCRCP 59 Motion to Alter or Amend with the Court. The Motion in its entirety stated,

> "Respondent, Sterling Raymond Mensch, III, Individually as Personal Representative of the Estate of Florence Petrak Mensch and in the former Capacity as Agent under a Power of Attorney for Florence Petrack Mensch ("Respondent"), through his undersigned counsel, move pursuant to Rule 59 of the South Carolina Rules of Civil Procedure to alter or amend the Order granting Petitioner damages.
>
> WHEREFORE, Respondent respectfully requests this Court to alter or amend its January 26, 2022, Order."

ELECTRONICALLY FILED - 2022 Apr 25 9:31 AM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

On February 17, 2022, the Probate Court filed an Order stating that Appellant failed to comply with SCRCP 7(b)(1) because the motion failed to state any ground that would entitle the Respondent to relief. [02/17/2022 Order]. Respondent filed its appeal on February 23, 2022. Respondent file a Notice of Motion and Motion to Dismiss the Appeal on February 25, 2022.

ANALYSIS

The Order by the Probate Court is not a full and final order pursuant to S.C. Code Ann § 62-1-308 and therefore, is not immediately appealable. Alternately, if this Court finds the Order to be a final order of the court, then it must deny Respondent's Motion to Dismiss as the appeal is timely.

I. The Probate Court's Order is not a final order and Appellant admits that the appeal is premature.

Appeals from the Probate Court are governed under S.C. Code Ann § 62-1-308. It states in part, "A person interested in a final order, sentence, or decree of a probate court may appeal to the circuit court in the same county. *Id.* Our Supreme Court has defined what a final order is in the case of *Fulmer v. Cain*, 380 S.C. 466, 670 S.E.2d 652 (2008). In *Fulmer v. Cain*, the Court of Appeals held that an order denying a motion to remove was immediately appealable. Our Supreme Court reversed this holding stating that because the order did not resolve all issues, the order can not be considered a final order under S.C. Code Ann § 62-1-308.

Furthermore, the case law in the state is well settled that only a final order from the probate court is appealable. *See Dorn v. Cohen*, 421 S.C. 517, 520, 809 S.E.2d 53, 54 (2017) (Because the probate court's order adding a party to the action was not a final order, the order was not immediately appealable pursuant to section 62-1-308); *Breland v. Love Chevrolet*, 339 S.C. 89, 529 S.E.2d 11 (2000) (order denying a motion to change venue is not immediately

ELECTRONICALLY FILED - 2022 Apr 25 9:31 AM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

appealable); *Ballenger v. Bowen*, 313 S.C. 476, 477–78, 443 S.E.2d. 379, 380 (1994) (order denying a motion for summary judgment is not immediately appealable).

To determine whether the order is a full and final order, the court must look to see if there is some further act, which must be done by the court prior to a determination of the rights of the parties. *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 267 (2010). A judgment which determines the law but leaves open a question of fact is not a final judgment. *Id.* A final judgment is one that disposes of the whole matter or terminates the proceeding "leaving nothing to be done but to enforce by execution what has been determined." *Id.*

In this instance, Forty Thousand Three Hundred and Fourteen Dollars ($ 40,314.00) were to be awarded to the Respondents. However, the footnote associated with the payment of taxes explicitly stated, "This amount is on appeal with the IRS. ***SRM is allowed to reduce the total judgment should this amount change as a result of the appeal.***" [01/26/2022 Order]. (emphasis added). Thus, under a *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control* analysis, the Order issued by the Probate Court is not immediately appealable as the parties are waiting on a further act by the IRS. The IRS could determine that more taxes are owed or that less taxes are owed. The IRS could even find that the same amount of taxes are due. However, the parties are still waiting on the IRS to determine the final amount owed. Once the IRS determines the amount of taxes owed, the probate court's order will be changed to reflect such amount. The law in this state is well settled, only full and final orders are immediately appealable under S.C. Code Ann § 62-1-308. Therefore, this Court should remand this action to the Probate Court pending the outcome of the IRS issue.

ELECTRONICALLY FILED - 2022 Apr 25 9:31 AM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

II. Alternatively, if the Court finds that the Probate Court's Order is a full and final order, Appellant has timely appealed.

Our Supreme Court has already ruled on the issue of whether a motion to reconsider denied pursuant to SCRCP 7(b)(1) tolls the time to file an appeal. In *Camp v. Camp*, 386 S.C. 571, 576, 689 S.E.2d 634, 637 (2010), judgement was entered and a motion to reconsider (motion to alter or amend) was filed with the court. In its entirety it stated:

> "PLEASE be advised that the Defendant through his undersigned attorney, will move before the Honorable David Sawyer, Jr., to reconsider the ruling in his Order dated July 26, 2006, in awarding Plaintiff, William James Camp's college expenses and costs. This motion hearing is set to be heard on the 18th day of October, 2006, at 3:45 o'clock, p.m. Please be present to defend if so minded."
>
> *Id.*

There was no accompanying brief in support of the motion and the motion was denied by the court. *Id.* The party who filed the motion to reconsider filed an appeal well after the deadline of the judgment, but within the time frame required after an order was issued from the motion. *Id.* The Court of Appeals found the appeal untimely. *Id.* Our Supreme Court then reserved the Court of Appeals and held that applying an overly technical reading of the rules does not serve the purpose of SCRCP 7(b)(1) and tolled the time for filing a notice of appeal. *Id.*

Furthermore, it is well settled that a timely motion to alter or amend tolls the time to appeal. *Elam v. South Carolina Dep't of Transp.*, 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004) (holding a timely post-trial motion, including a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such motion); *Nexstar Media Grp., Inc. v. Davis Roofing Grp., LLC,*

ELECTRONICALLY FILED - 2022 Apr 25 9:31 AM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

431 S.C. 593, 599, 848 S.E.2d 597, 600–01 (Ct. App. 2020) (holding a motion for reconsideration tolled the time to file its appeal).

On January 26, 2022, the lower court entered a judgment against the Appellant. On February 2, 2022 Appellant filed a motion to alter or amend the Order due to the court awarding the Petitioner damages. On February 17, 2022, the Probate Court filed an Order stating that Appellant failed to comply with SCRCP 7(b)(1) stating that the motion to alter or amend failed to state any ground that would entitle the Respondent to relief. Appellant then filed its appeal after ten days of the original order, but within ten days of the order denying Appellant's Motion to Alter or Amend. Under the *Camp v. Camp* analysis, because Appellant filed its appeal within the ten-day time frame pursuant to S.C. Code Ann § 62-1-308, the Appeal is timely. Furthermore, the appeal was plead with specify as required by SCRCP 7(b)(1) as Appellant asked the court to amend its order due to damages. Therefore, based on Our Supreme Court holding in *Camp v. Camp* the motion to alter or amend tolled the time to file an appeal.

CONCLUSION

Based on the foregoing, Appellant admits that the appeal is most likely premature and apologizes for the use of judicial resources to hear this motion. Due to Respondent's Motion to Dismiss, Appellant seeks an order of this Court stating that the Appeal is not a final order and hold the appeal in abeyance until the tax issue is resolved. In the alternative, if this Court finds the lower court's order is a final order, then Appellant's Motion to Alter or Amend tolled the time to appeal.

[signature page to follow]

Respectfully Submitted this
25th day of April, 2022

TRULUCK THOMASON, LLC

s/John-Paul Baum
John-Paul Baum
SC Bar No.: 104938
johnpaul@truluckthomason.com
3 Boyce Avenue
Greenville, SC 29601
T: (864) 331-1751
Attorneys for Appellant

ELECTRONICALLY FILED - 2022 Apr 25 9:31 AM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

RECEIVED
Jun 24 2022
SC Court of Appeals

CERTIFICATE OF SERVICE

I, the undersigned, served a copy of this Motion for Leave and Memorandum in Support of Motion for Leave on the following counsel of record this 24th day of June 2022, by email and U.S. mail to the following addresses of record:

Tyler McLeod
BROWN, MASSEY, EVANS, MCLEOD, & HAYNSWORTH, LLC
P.O. Box 2464
Greenville, SC 28602
tmcleod@bmemhlaw.com

s/Devon M. Puriefoy
Devon M. Puriefoy
SC Bar No.: 102097
John-Paul Baum
SC Bar N.: 104938
3 Boyce Avenue
Greenville, SC 29601
T: 864-331-1751
devon@truluckthomason.com
johnpaul@truluckthomason.com

Counsel for Appellant