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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ALLENDALE COUNTY
Circuit Court

Lawton McIntosh, Circuit Court Judge

Case No. 2019-000905

J. Morgan Kearse, Personal Representative of the Estate of G.H. Kearse .....Appellant,

v.

The Kearse Family Education Trust, William Gordon Kearse, Elizabeth Kearse Gooding, Julia Kearse Sharp, Rachael Kearse Best, Joseph Weber Kearse, and John Morgan Kearse, of which all are named individually and as Trustees of the Kearse Family Education Trust U/A/D Nov. 05, 1992.....Respondents.

PETITION FOR REHEARING

For the reasons set forth below, Appellant respectfully submits this Petition for Rehearing pursuant to Rule 221(a), SCACR, in response to this Court's Order dated November 23, 2022, affirming the Circuit Court's dismissal of the Appeal.

STANDARD

"A petition for rehearing . . . shall state with particularity the points supposed to have been overlooked or misapprehended by the court." Rule 221(a), SCACR.

DISCUSSION

Appellants hereby submit that the following arguments raised by Appellant were overlooked or misapprehended by the Court, and respectfully ask this Court to reconsider their Order affirming the Circuit Court's ruling that the Appellant lacks standing to bring this Appeal:

1. **The Court misapprehended that Appellant has argued and appealed his resignation as personal representative.**

The Court's order states "Appellant did not argue either in his motion [to alter or amend] or at the hearing that the probate court erred in accepting his resignation as personal representative." However, the Probate Court's Order dated February 27, 2017 specifically states "IT IS ORDERED AS FOLLOWS::[sic] ... (4) The Court accepts the [Appellant's] resignation as the Personal Representative...." (R. p. 11). Appellant has timely appealed that Order in its entirety, as well as the Probate Court's Order dated September 18, 2017, which reaffirmed its prior Order dated February 27, 2017.

It is axiomatic that a terminated personal representative cannot be "reterminated" a second time unless they were reappointed in the interim. Here, however, the Probate Court did not reappoint Appellant as personal representative after is accepted his resignation as pursuant to the February 27, 2017 Order. Accordingly, the Probate Court's order dated February 27, 2017 is the one and only order that accepted Appellant's resignation and terminated him as personal representative, and Appellant has done everything that he needed to do in order to obtain a judicial review of that Order.

As discussed herein below, the Probate Court's correspondence dated March 20, 2017 was not a separate order. Yet, even if it could have been, it could not have "reterminated" Appellant as personal representative after the February 27, 2017 Order had already done so. Quite simply, Appellant has properly appealed his termination as personal representative.

2. **The Court misapprehended that the Probate Court appointed Harley Ruff as special administrator pursuant to its order dated February 27, 2017 rather than as successor personal representative by separate order dated March 20, 2017.**

Although Appellant's timely appeal of the Probate Court Order that removed him as personal representative should be sufficient for him to obtain judicial review, the Court also misapprehended that the Probate Court's correspondence dated March 20, 2017 was anything other than the Probate Court's appointment of a special administrator pursuant to the same February 27, 2017 Order that accepted Appellant's resignation as personal representative.

As the Court's Order notes, "[i]f the proceeding in the probate court is in the nature of an action at law, the circuit court may not disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them." Matter of Howard, 315 S.C. 356, 361, 434 S.E.2d 254, 257 (1993). Here, the record shows that the Probate Court appointed Harley Ruff as special administrator pursuant to its Order dated February 27, 2017, which Appellant timely appealed, and not as successor personal representative pursuant to a separate order.

On February 27, 2017, the Probate Court issued an Order that specifically adopted a proposed settlement labeled "Final Term Sheet" advanced by Elizabeth Gooding and Julia Sharp (hereinafter referred to as "Respondents"). The Final Term Sheet's very first provision was that Appellant "will immediately resign as Personal Representative" and that "A.G. Solomons shall be appointed as the Special Administrator of this Estate; if A.G. Solomons is unwilling to serve, then all parties consent that the Court shall appoint a neutral non-family member to serve as the Special Administrator." (R. p. 11, ¶¶ 1 & 2; p. 12, ¶ 9; p. 619, ¶ 1) (emphasis added). On March 16, 2017, Appellant timely served a Motion to Alter or Amend or, in the Alternate, for a New Hearing. (R. pp. 147-59). Appellant's motion objected to the February 27, 2017 Order in its entirety and the Probate Court's approval of the Final Term Sheet in its entirety, including but not limited to the resignation of Appellant as personal representative and the appointment of a special administrator.

On March 20, 2017, Probate Judge Odom wrote counsel for Julia Sharp with copy to other counsel and pro se parties to inform them "Mr. Harley Ruff of Ruff & Ruff, LLC Beaufort, S.C. has graciously accepted to serve as the Special Administrator in the above matter. This Court did reach out to both Mr. A.G. Solomons, Jr. and Mr. Kevin Brown who both respectfully declined to serve in the capacity of Special Administrator." (R. p. 15) (emphasis added). Further, "[t]this Court will notify the other counsel of record of this appointment, copy attached." Ibid (emphasis added).

Therefore, the Probate Court's correspondence dated March 20, 2017, in its very own words, was intended to serve as notice that Harley Ruff had "accepted to serve as the Special Administrator", which he could only have done pursuant to the Probate Court's standing Order dated February 27, 2017, and as "record of this appointment". In fact, Harley Ruff himself understood his appointment to be as special administrator, representing himself in that capacity a July 11, 2017 memorandum to the Estate beneficiaries. (R. p. 814).

Nevertheless, and although not argued below, Respondents on appeal have ignored the Probate Court's clear instruction alleging that Appellant's Statement of Resignation that was attached to the Probate Court's letter was a separate order appointing Harley Ruff as successor personal representative rather than as "Special Administrator." However, there is simply no reasonable basis to conclude that the Probate Court intended to issue, or did issue, a wholly separate order appointing Harley Ruff as successor personal representative in contravention of its prior Order appointing a special administrator. In addition to the facts stated above, relevant considerations include the following:

- Special administrator and successor personal representative are different appointments with differing authority pursuant to the South Carolina Probate Code. Cf. S.C. Code Ann. §§ 62-3-613, -616, & -617.

- The Statement of Resignation form was not file stamped, as any order must be, after the Probate Court entered Harley Ruff's name and included it, in the Probate Court's own words, as a "record of this appointment" as "Special Administrator". (R. pp. 14-16).
- The Statement of Resignation automatically became "ineffective as a termination of appointment" upon the passage of twenty days (prior to March 20, 2017) without any interested person filing an application or petition for the appointment of a successor personal representative. See S.C. Code Ann. § 62-3-610(b).[1] See also S.C. Code Ann. §§ 62-3-301 et seq. & 62-3-401 et seq. (providing the procedures for the application and petition procedures, respectively); S.C. Code Ann. § 62-3-301(a)(6) (specifically referencing "[a]n application for appointment of a personal representative to succeed a personal representative who has tendered a resignation as provided in Section 62-3-610....").
- The Probate Court itself and Appellant's counsel acknowledged at the February 2, 2017 hearing that Appellant's Statement of Resignation would not become effective without further procedures being followed. (R. p. 594, lns. 12-14; p. 609, lns. 7-13). Respondents did not object to either of these statements.
- Respondents have since acknowledged that "Fairness requires acknowledging a personal representative may not 'immediately' resign his position." (R. p. 230).
- The Statement of Resignation is not the proper probate form for appointing a successor personal representative. The proper form is the Application/Petition for Appointment of Successor Personal Representative (probate form 333ES) that, unlike the Statement of

[1] "A personal representative may resign his position by filing a written statement of resignation with the court and providing twenty days' written notice to the persons known to be interested in the estate. If no one applies or petitions for appointment of a successor representative within the time indicated in the notice, the filed statement of resignation is ineffective as a termination of appointment...."

Resignation, includes an "Order for Hearing" section, and "Order of Appointment" section, and an "Qualification and Statement of Acceptance" section to be signed by the appointed fiduciary. (R. pp. 579-81).

- To that end, the record includes absolutely no evidence that Harley Ruff accepted the purported appointment as successor personal representative. To the contrary, Harley Ruff's memorandum dated July 11, 2017 evidences his understanding that he was appointed as special administrator. (R. p. 814).
- Appellant's Motion to Alter or Amend the February 17, 2017 Order was heard on August 17, 2017, by which time the Probate Court had plenty of time to indicate Harley Ruff's appointment was not pursuant to the Final Term Sheet and February 27, 2017 Order. However, the Probate Court did not do so and, to the contrary, reaffirmed the February 27, 2017 Order in response to Appellant's Motion. (R. pp. 18-24).
- Respondent Gooding's brief in Opposition to Appellant's Motion to Alter or Amend also acknowledged that the Probate Court was authorized to appoint a "special administrator" pursuant to its February 27, 2017 Order. (R. p. 175). However, no mention was made of Harley Ruff as a successor personal representative. (R. pp. 174-82).
- Appellant references Harley Ruff as the "proposed Special Administrator" in the Proof of Delivery of the Notice of Hearing filed August 2, 2017. (R. pp. 167-68).
- At the hearing, Appellant continued to refer to Harley Ruff as the "proposed special administrator" (R. p. 643) without any objection by Respondents or the Probate Court. Further, neither the Probate Court nor Respondents referred to Harley Ruff as a successor personal representative. (R. pp. 643-661).

- All that was said by Respondents at the hearing regarding the issue is that Appellant "is not the personal representative" (R. p. 646) and "is no longer the personal representative" (R. p. 649), which is consistent with the appointment of Harley Ruff as special administrator pursuant to the Probate Court's Order dated February 27, 2017 Order and subsequent "record of this appointment" as "Special Administrator" dated March 20, 2017.
- Ultimately, the Court's September 18, 2017 Order denying Appellant's Motion to Alter or Amend upheld the Final Term Sheet as well as its February 27, 2017 Order, both of which provide for the appointment of a special administrator. (R. pp. 18-24). Had the Probate Court intended to alter its February 27, 2017 Order appointing a special administrator it would have made that clear.

In sum, there can be no reasonable argument that the Probate Court intended to appoint, or did appoint, Harley Ruff as successor personal representative in contradiction of its own February 27, 2017 Order, and its subsequent September 18, 2017 Order upholding the same. Rather, the Probate Court's March 20, 2017 "record of appointment" of Harley Ruff as "Special Administrator" merely puts into effect that component of its standing Order dated February 27, 2017 for the appointment of a special administrator, which Order the Appellant timely appealed.

3. The Court overlooked that the Probate Court lacked jurisdiction to issue a separate order, as dated March 20, 2017, removing or appointing the personal representative.

"Lack of subject matter jurisdiction may be raised at any time, and may be raised for the first time on appeal." Gantt v. Selph, 423 S.C. 333, 338, 814 S.E.2d 523, 525-26 (2018). "The probate court is a court of limited jurisdiction owing its present existence to creation by statute, rather than the Constitution, and as such, can exercise only such powers as are directly conferred upon it by legislative enactment and such as may be necessarily incident to the execution of the powers expressly granted." Greenfield v. Greenfield, 245 S.C. 604, 610, 141 S.E.2d 920, 923

(1965). See also Ex parte McLeod, 323 S.C. 461, 464, 476 S.E.2d 167, 168–69 (Ct. App. 1996) (holding that the probate court lacked subject matter jurisdiction to award attorney fees under a wrongful death settlement agreement absent a petition for approval of the settlement); Wellin v. Wellin, 427 S.C. 15, 24, 828 S.E.2d 767, 772 (Ct. App. 2019) (overturning a probate court order where a trust affected by the action was not made party to action, stating "even if the probate court had subject matter jurisdiction and authority to issue the disputed order, the order required action by the Trust, which had not been made party to the conservatorship action.").

Respondents argue for the first time on appeal that the Probate Court's filling in of Harley Ruff's name on Appellant's Statement of Resignation on March 20, 2017 constituted a separate order appointing Harley Ruff as successor personal representative, rather than as "Special Administrator" as the Probate Court's own cover letter stated. However, Appellant's Statement of Resignation had by that time automatically became "ineffective as a termination of appointment" upon the passage of twenty days (on February 22, 2017) without any interested person filing an application or petition for the appointment of a successor personal representative. Accordingly, the Probate Court lacked jurisdiction to terminate Appellant pursuant to the Statement of Resignation, and which the Probate Court had already done anyway in its February 27, 2017 Order on appeal.

Moreover, no interested person had invoked the Probate Court's jurisdiction to appoint a successor personal representative as provided by the South Carolina Probate Code. See S.C. Code Ann. §§ 62-3-301, -308 & -310 (requiring for informal appointment an application by the proposed successor, with notice to interested persons, and findings by the court as to the applicant's statutory qualifications, including the applicant's priority for appointment); S.C. Code Ann. §§ 62-3-402, -403, & -414 (requiring for formal appointment a summons and petition by the proposed successor, served on all interested persons, and a formal hearing by the court, after

notice of hearing sent to the interested parties, to confirm the applicant's qualifications, including the applicant's priority for appointment). See also S.C. Code Ann. § 62-3-610(b). S.C. Code Ann. § 62-3-301(a)(6) (specifically referencing "[a]n application for appointment of a personal representative to succeed a personal representative who has tendered a resignation as provided in Section 62-3-610....").

In summary, by March 20, 2017, the Probate Court lacked jurisdiction to appoint a successor personal representative pursuant to Appellant's Statement of Resignation or in any other manner, or to otherwise "re-terminate" Appellant as personal representative.

4. The Court overlooked that Appellant's alleged lack of standing was not raised below.

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. Moreover, an objection must be sufficiently specific to inform the trial court of the point being urged by the objector." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (citations omitted). "This Court has the inherent authority to consider justiciability. However, when a party belatedly attempts to raise the issue of standing, our courts have applied error preservation principles and held that the matter was not preserved for review where the trial court was not given an opportunity to first rule on the issue." James v. Anne's Inc., 390 S.C. 188, 193, 701 S.E.2d 730, 732–33 (2010) (citations by footnote omitted). See also Wilson v. Dallas, 403 S.C. 411, 422-23, 743 S.E.2d 746, 752-53 (2013) (rejecting argument that disposed personal representatives and trustees lacked standing to challenge order where standing had not been raised below).

At the August 17, 2017 hearing, neither Respondents nor the Probate Court stated that Appellant lacked standing or otherwise referred to the Probate Court's modification of the Statement of Resignation on March 20, 2017, nearly a half-year prior to the hearing. The closest statement was from counsel for Respondent Sharp, who stated (emphasis added):

> I will say at the outset that I don't understand how the motion is being made by Morgan as the Personal Representative because he is not the personal representative and has not been for some period of time as I will deal with in a minute. His lawyer told us at the last hearing [on February 2, 2017] that he was resigning effective immediately....Now I'm not sure what effect that has legally. I'll let my probate lawyer Mr. Slotchiver address that if it comes up, but I think it's important to note that this is the only party that is before Your Honor in support of the motion.

(R. p. 646, lns. 13-19). However, Mr. Slotchiver never addressed the standing issue either beyond simply claiming that Appellant "is no longer the Personal Representative." (R. p. 649, lns. 18-19). Accordingly, Respondents' statements simply reflect the fact that Appellant's status as personal representative was terminated under the February 27, 2017 Order, which is an issue now on appeal.

Only after the final Probate Court hearing did the Probate Court's September 18, 2017 Order even reference the Probate Court's modification of the Statement of Resignation on March 20, 2017, stating "Additionally, no party (including Petitioner), has objected to this Court's Order dated March 20, 2017 appointing Harley Ruff as Successor Personal Representative." (R. p. 20). However, this statement contradicted not only the statements of the parties and Probate Court to that point, but the actual holding of the Order, which was to uphold Appellant's termination as personal representative as part of the Final Term Sheet and February 27, 2017 Order.[2] Accordingly, the reference to the "Order dated March 20, 2017" is either in error or dicta and, in any event, is part of the September 18, 2017 Order now on appeal.

[2] As acknowledged at oral argument before the Circuit Court, the September 18, 2017 Order was drafted by counsel for Respondent Sharp. (R. p. 686, lns. 19-23).

Regardless, the September 18, 2017 Order did not state or even imply that Appellant was without standing in his capacity as personal representative to argue his Motion to Alter or Amend or otherwise appeal the same. (R. pp. 18-24). In summary, Respondents' argument that Appellant lacks standing as personal representative due to the March 20, 2017 alleged "order was not raised below, and is therefore not reserved for appellant review. See James v. Anne's Inc., 390 S.C. at 193, 701 S.E.2d at 732–33; Wilder Corp. v. Wilke, 330 S.C. at 76, 497 S.E.2d at 733; Wilson v. Dallas, 403 S.C. at 422-23, 743 S.E.2d at 752-53.

5. The Court overlooked that Appellant's alleged lack of standing was otherwise not raised in a timely manner and therefore waived.

"Unless a party promptly challenges the opposing party's status as a real party in interest, such a challenge is waived." Bryson v. Bryson, 378 S.C. 502, 509, 662 S.E.2d 611, 614 (Ct. App. 2008) (emphasis added) (holding waiver occurred when argument that personal representative was not the real party in interest was not presented until the end of trail); Bardoon Props., NV v. Eidolon Corp., 326 S.C. 166, 485 S.E.2d 371 (1997) (determining issue of a party's status as real party in interest did not involve a question of subject matter jurisdiction and, therefore, the issue was waived where it was not timely raised prior to entry of default).

Therefore, even if the standing issue could be considered implicitly raised in an Order drafted by Respondent Sharp's counsel after the final hearing, the standing argument was nevertheless waived because it was not timely raised. Moreover, Respondents cannot argue that they were not without an opportunity to develop the issue, since nearly a half-year passed between the hearing on August 17, 2017 and the Probate Court's March 20, 2017 "record of th[e] appointment" of Harley Ruff as "Special Administrator". (R. pp. 14 & 643).

6. **The Court overlooked that Appellant retained general standing to appeal as personal representative even if removed.**

"Standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right. Generally, to have standing, a litigant must have a personal stake in the subject matter of the litigation." Wilson v. Dallas, 403 S.C. 411, 423, 743 S.E.2d 746, 753 (2013) (holding that trustees removed by the court maintained standing to challenge a court-approved settlement affecting the trust at issue):

> [W]e conclude Appellants have standing. Appellants were properly made parties to the action and were allowed to set forth specific challenges to the proposed compromise agreement for the circuit court's consideration under S.C. Code Ann. § 62–3–1102 (2009). We agree with Appellants that they have standing based on the explicit terms of the trust agreement, which conferred upon the trustees the authority to handle claims for or against the trust estate (including the authority to mediate or compromise claims), and based on their official fiduciary capacities pursuant to state law.

Id. at 423-24, 743 S.E.2d at 753. Here too, Appellant in his capacity as personal representative was a party to the February 2, 2017 hearing in which the Probate Court approved the Final Term Sheet as a binding settlement and, Appellant in his capacity as personal representative, has general authority to compromise claims for the Estate pursuant to general law and Decedent's will.

Similarly, the South Carolina Supreme Court has conferred general standing where a claimant had (1) statutory duties regarding the subject of the litigation and (2) an economic interest in the same. See Henry v. Horry Cty., 334 S.C. 461, 463, 514 S.E.2d 122, 123 (1999) (holding a county sheriff had standing to challenge a law from 1959 divesting the sheriff of control over the county prison several decades earlier). Under those general principles as applied to this matter, Appellant has standing to challenge the alleged settlement as personal representative where the alleged settlement gives Appellant both (1) duties with respect to Appellant's status as personal representative (e.g., resign and turn over the Estate assets) and (2)

an economic interest with respect to Appellant's status as personal representative (fixing Appellant's fee as personal representative and requiring him to pay for his own legal expenses as personal representative). (R. pp. 619-20).

7. The Court overlooked that the Appellant's Statement of Resignation was not appealable and, therefore, not the law of the case.

"The doctrine of the law of the case applies to an order or ruling which finally determines a substantial right....Ordinarily an interlocutory order which merely decides some point or matter essential to the progress of the cause, collateral to the issues in the case, is not binding as the law of the case, and may be reconsidered and corrected by the court before entering a final order on the merits." Weil v. Weil, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989) (quoting 21 C.J.S. Courts Section 195 at 335 (1940)) (quoted with approval by Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013)).

To that end, appeals from probate court are governed by statute. "A person interested in a final order, sentence, or decree of a probate court may appeal to the circuit court ...." S.C. Code Ann. § 62-1-308(a) (emphasis added). "As a general rule, only final judgments are appealable. Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final." Ex parte Wilson, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005) (citations omitted). See also Rule 54(a), SCRCP ("'Judgment' as used in these rules includes any decree or order which dismisses the action as to any party or finally determines the rights of any party.").

Here, even if the Probate Court's appointment of Harley Ruff on March 20, 2017 could be considered an independent order, it was not a final order with regard to Appellant's status as personal representative because Appellant had already filed a Motion to Alter or Amend the same, and there remained further action by the Probate Court to determine the same. In fact, the

Probate Court took such further action by denying Appellant's Motion to Alter or Amend, which Appellant continued pursuing in his capacity as personal representative all the way through the Probate Court's September 18, 2017 Order, which then became its final order as to that issue. (R. pp. 18-24).

In addition, the South Carolina Supreme Court has specifically held that the probate court's addition of a new party is an interlocutory order for which there is no right of immediate appeal under S.C. Code Ann. § 62-1-308(h). Dorn v. Cohen, 421 S.C. 517, 520, 809 S.E.2d 53, 54 (2017). The addition of Harley Ruff as fiduciary is fundamentally no different that the addition of a party.

In summary, Appellant had no legal right to appeal the Probate Court's March 20, 2017 appointment, and it would have needlessly complicated the proceedings for Appellant to have attempted to do so. Appellant has taken the legally proper, and most efficient, actions to appeal the Probate Court's termination of his status as personal representative, and it is Respondents who have unnecessarily complicated these proceedings by asserting, for the first time on appeal, that Appellant is without standing due to an interlocutory "order" that is not even an actual order.

8. The Court overlooked that the purported appointment of new fiduciary must be disregarded for purposes of present appeal.

"When an appeal according to law is taken from any sentence or decree of the probate court, all proceedings in pursuance of the order, sentence, or decree appealed from shall cease until the judgment of the circuit court, court of appeals or Supreme Court is had." S.C. Code Ann. § 62-1-308(h). See also Rule 241(a), SCACR (providing an automatic stay of matters decided in the order being appealed).

Here, it was the February 27, 2017 Order that first terminated Appellant as personal representative and provided for the appointment of a special administrator, and the final

September 18, 2017 Order that confirmed the same. Accordingly, any intervening "order" of appointment for Appellant's replacement must necessarily be "in pursuance" of the appealed orders, and such intervening "order" is therefore ceased and stayed until this appeal is decided.

9. The Court overlooked that Appellant's only option was to appeal in his capacity as personal representative.

Rule 201(b), SCACR provides that "[o]nly a party aggrieved by an order, judgment, sentence or decision may appeal." Similarly, Rule 17(a), SCRCP requires that "[e]very action shall be prosecuted in the name of the real party in interest." "Under Rule 17(a), the definition of the proper party is the same as it has always been—the proper party is any real party in interest.... Where, as here, the named plaintiff has suffered an actionable loss at the hand of the defendant, he is a real party in interest and the requirement of Rule 17(a) is met." Patton v. Miller, 420 S.C. 471, 487, 804 S.E.2d 252, 260 (2017), reh'g denied (Sept. 27, 2017) (quotation and citation omitted).

Here, Appellant in his capacity as personal representative was the real party in interest and aggrieved by the Final Term Sheet and Probate Court orders upholding the same, because they (1) removed him as personal representative, (2) fixed his personal representative fee, (3) potentially made him pay his own legal fees as personal representative, and (4) made him pay at least one of the Respondents' legal fees resulting from the Petition for Instructions Appellant filed as personal representative. (R. pp. 619-20). Moreover, Appellant has not even appeared before the Probate Court in his individual capacity, and Appellant's undersigned counsel has only represented Appellant in his capacity as personal representative.

In summary, Appellant had no choice but to appeal the Final Term Sheet and Probate Court orders in his capacity as personal representative. In fact, had Appellant instead appealed in

his individual capacity, Respondents would most assuredly argue that Appellant had abandoned his right to contest all matters affecting his interest as personal representative.

10. The Court overlooked that the Probate Court itself declined to alter Appellant's status as personal representative.

"Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." Rule 21, SCRCP. "The decision whether to realign the parties lies within the sound discretion of the trial court and will not be disturbed on appeal absent a showing of an abuse of discretion and resulting prejudice." Branham v. Ford Motor Co., 390 S.C. 203, 243, 701 S.E.2d 5, 26 (2010). Consistent with the foregoing, the South Carolina Appellant Court Rules do not require any change in identification of the parties, and merely provide that "[t]he party appealing shall be known as the appellant and the adverse party as the respondent." Rule 202(a), SCACR.

Here, the Probate Court did not realign Appellant from his capacity as personal representative, even nearly a half-year after its appointment of Harley Ruff, and therefore Appellant quite logically filed this appeal in the same personal representative capacity. (R. pp. 18-24). Further, Respondents cannot show the Probate Court abused its discretion to allow Appellant to do so, since logic dictates that the special administrator has a conflict of interest in vacating the Order that resulted in his appointment and, for that matter, the Respondents did not object to Appellant's standing as personal representative before the Probate Court. (R. pp. 589-661). Finally, Respondents cannot show prejudice from Appellant's appeal as personal representative where the underlying Final Term Sheet is subject to collateral attack by the Trust and other parties that it purports to bind, and Appellant's appeal would be (but for Respondents' resistance) the most efficient way to resolve that issue.

Accordingly, the Circuit Court on appeal cannot divest Appellant of the same capacity in which the Probate Court allowed Appellant to litigate from the beginning of this matter to the final order. To do so now, on appeal, is contrary to precedent, fairness, and common sense. As the Court of Appeals' Order affirming the Circuit Court acknowledges, "[i]f the proceeding in the probate court is in the nature of an action at law, the circuit court may not disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them." Matter of Howard, 315 S.C. 356, 361, 434 S.E.2d 254, 257 (1993).

11. The Court overlooked that even terminated personal representatives may continue to act under the South Carolina Probate Code.

"If, through error, general letters are afterwards issued to another, the first appointed representative may recover any property of the estate in the hands of the representative subsequently appointed ...." S.C. Code Ann. § 62-3-702. Further, even a validly terminated personal representative, "at any time prior to distribution or until restrained or enjoined by court order, may perform acts necessary to protect the estate ...." S.C. Code Ann. § 62-3-608.

Here, quite simply, the appeal is necessary to protect the Estate because the alleged order would bind the Estate to various inequitable obligations if not challenged. For example, absent a contrary finding under S.C. Code Ann. § 62-1-111, Respondent Gooding's legal fees in this matter should be paid by herself and not potentially by the Estate. In addition, the Estate has not been distributed and Appellant has not been restrained or enjoined by court order from maintaining this appeal, and there is no evidence of the same. Therefore, under statute, Appellant may continue the appeal even if terminated as personal representative.

12. The Court overlooked that the Appeal may not be dismissed until a reasonable time is allowed for ratification, substitution, or joinder of the real party in interest.

"No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after objection, for ratification of

commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest." Rule 17(a), SCRCP. Furthermore, ratification, substitution, and joinder may be made on appeal, and it is no defense to substitution that the request was not made below. See Patton v. Miller, 420 S.C. 471, 489, 804 S.E.2d 252, 261 (2017), reh'g denied (Sept. 27, 2017) ("The defendants contend that any argument under Rule 17(a) is not preserved for our review because Patton never specifically mentioned Rule 17. We find this argument troubling. It was the defendants who first invoked the Rule 17(a) requirement that "Every action shall be prosecuted in the name of the real party in interest" by claiming Patton in her representative capacity was not the proper party to bring the claim for Alexia's medical expenses. In doing so, it was the defendants who first failed to mention Rule 17.").

"Formerly, the failure to bring suit in the name of the real party in interest was a jurisdictional failure requiring dismissal of the lawsuit. Under the Rules of Civil Procedure, however, it is improper to immediately dismiss a lawsuit simply because it was not brought in the name of the real party in interest." Id. at 487, 804 S.E.2d at 260. "The purpose of this provision is to avoid precisely what occurred here—the unnecessary procedural dismissal of a lawsuit the court should resolve on the merits. As the Reporter's Note to the rule indicates, this sentence is intended to prevent forfeiture in those cases in which the determination of the proper party to sue is difficult or when there has been an honest mistake." Id. at 488, 804 S.E.2d at 261 (quotation omitted).

In the present case, the Appellant's standing to litigate as personal representative has been questioned only before the Circuit Court on appeal, and it was Respondents who failed to raise

the need for a substitution of parties before the Probate Court, if in fact there is such a need. Moreover, because Appellant maintains many independent grounds why he remains the proper party for the appeal (see section III, parts A., B., and C., supra), then, at worst, the proper party for this appeal is difficult to determine or Appellant has otherwise made an honest mistake as to his interest as the proper party. Finally, though it is not a relevant inquiry under Rule 17(a), SCRCP, Respondents will not be prejudiced by the ratification, substitution, or joinder of a proper party since Respondents have been on notice from the first day they proffered the alleged settlement over Appellant's objection that it was not a valid settlement. (R. pp. 589-642). In fact, the sooner the settlement validity is addressed, the less of their own money Respondents will potentially spend attempting to enforce the same.

Ultimately, even if Appellant lacks standing to appeal this matter in his capacity as personal representative, then the appropriate response under Rule 17(a), SCRCP is not to dismiss the appeal, but to allow the ratification, joinder, or substitution of a real party in interest.

13. The Court overlooked that Appellant may act as personal representative until the court substitutes or joins the proper party upon motion for substitution or joinder.

"In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party." Rule 25(c), SCRCP (emphasis added). In addition, [s]ubstitution of parties under the provision of this rule may be made by the trial court either before or after judgement, or pending appeal, by the appellate court." Rule 25(e), SCRCP (emphasis added). See also S.C. Code Ann. § 62-3-613 ("After appointment and qualification, a successor personal representative may be substituted in all actions and proceedings to which the former personal representative was a party ....") (emphasis added).

Here, Respondents argue on appeal that the Probate Court has irrevocably transferred Appellant's interest as personal representative to Harley Ruff. Even if that were true, Rule 25(c), SCRCP expressly provides that Appellant may continue the appeal as personal representative until Harley Ruff is substituted or joined to the action, upon a motion for the same, which joinder or substitution may be made even on appeal pursuant to Rule 25(e), SCRCP. Similarly, S.C. Code Ann. § 62-3-613 allows, but does not require, the substitution of a successor personal representative in litigation involving the former personal representative as a party.

Since Respondents have failed to seek a substitution of Harley Ruff as the proper party, Appellant's appeal remains proper notwithstanding the alleged transfer of his interest as personal representative. However, Appellant submits that the better course of action is to adhere to Harley Ruff's own request to remain neutral in this matter, and to simply accept Mr. Ruff's ratification of Appellant's appeal under Rule 17(a), SCRCP. (R. p. 577, ¶ 4).

14. The Court overlooked the substantive issues on appeal and, therefore, general purposes of the South Carolina Rules of Procedure.

An overarching rule governing this appeal is that the South Carolina Rules of Civil Procedure "shall be construed to construe the just, speedy, and inexpensive determination of every action." Rule 1, SCRCP. "It is too late in the day and entirely contrary to the spirit of the ... Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The ... Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.'" Patton v. Miller, 420 S.C. 471, 493, 804 S.E.2d 252, 263 (2017), reh'g denied (Sept. 27, 2017) (quoting Foman v. Davis, 371 U.S. 178, 181–82 (1962)).

However, a dismissal of this appeal prior to any court determining the validity of the Final Term Sheet under the relevant law is not just, nor will it provide a speedy and inexpensive determination of that issue, as new litigation would have to be pursued by one or more Trustees of the Trust, which was not a party to the Final Term Sheet. As stated by Harley Ruff himself, "I believe that [Appellant's] above referenced appeal is necessary to resolve legal disputes that prevent the full administration of the Estate of G.H. Kearse, and anticipate that a dismissal of the appeal would not provide a final resolution of those issues. (R. p. 577, ¶ 2).

To the extent necessary for purposes of this Petition for Rehearing, Appellant incorporates by reference herein his substantive arguments appearing in Sections I and II of his Initial Brief of Appellant, along with the relevant facts from the Statement of the Case therein.

CONCLUSION

For the reasons stated above, Appellants respectfully submit this Petition for Rehearing asking the Court to overrule the Circuit Court's order dismissing the Appellant's Appeal for lack of standing and to overrule the Probate Court Orders dated February 17, 2017 and September 18, 2017 approving the Final Term Sheet including removal of Appellant as personal representative.

Respectfully submitted,

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Columbia, South Carolina
December 8, 2022

RECEIVED
DEC 08 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ALLENDALE COUNTY
Circuit Court

Lawton McIntosh, Circuit Court Judge

Case No. 2019-000905

J. Morgan Kearse, Personal Representative of the Estate of G.H. Kearse .....Appellant,

v.

The Kearse Family Education Trust, William Gordon Kearse, Elizabeth Kearse Gooding, Julia Kearse Sharp, Rachael Kearse Best, Joseph Weber Kearse, and John Morgan Kearse, of which all are named individually and as Trustees of the Kearse Family Education Trust U/A/D Nov. 05, 1992..... Respondents.

PROOF OF SERVICE

I certify that, on December 8, 2022, I have served a copy of the Appellant's Petition for Rehearing by e-mailing a copy of same to the attorneys of record as indicated below, with a copy of such e-mail included with this Proof of Service, as allowed by S.C. Supreme Court Order No. 2020-000447, as amended May 6, 2022, by mailing a copy of the same to the Pro Se parties as indicated below, and by mailing an additional copy to the Clerk of Court for the S.C. Court of Appeals for the Kearse Family Education Trust.

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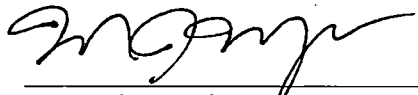

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From: Matthew J. Myers
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To: Dan Speights; Whitney Harrison; Kathleen Barnes; 'steve@slotchiverlaw.com'
Subject: Kearse appellant case number 2019-000905
Attachments: 20221208144903426.pdf

Please find Appellant's Petition for Rehearing and Proof of Delivery with cover letter attached.

Best regards,

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December 8, 2022

Reply to: Main Office

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VIA HAND-DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk of Court of the S.C. Court of Appeals
1220 Senate Street, Columbia, SC 29201

RE: J. Morgan Kearse, Personal Rep. v. The Kearse Family Education Trust, et al.
Case No.: 2019-000905
Our File: 5330-10329

Dear Ms. Kitchings:

Please find enclosed for filing in the above referenced matter an original and eight (8) copies of Appellant's Petition for Rehearing, including one copy for service upon Respondent Kearse Family Education Trust and one copy to return to Appellant after clocking the same.

Please also find enclosed an original and one copy of the Proof of Service, the $50 filing fee, and an envelope to return Appellant's clocked copies.

Thank you for your assistance, and please let me know if you need anything further at this time.

Yours truly,

SWEENY, WINGATE & BARROW, P.A.

Matthew J. Myers

Enclosures

cc: Kathleen Barnes, Esq. (via email)
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