THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas

The Honorable Lawton McIntosh

Appellate 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.

RESPONDENT ELIZABETH KEARSE GOODING'S RETURN TO PETITION FOR REHEARING

Pursuant to Rules 220 and 240(e), SCACR, and the Court's December 9, 2022 letter requesting a return to Appellant's petition for rehearing, Respondent Elizabeth Kearse Gooding, individually and as Trustee, submits this return.

On November 23, 2022, the Court issued unanimous Opinion No. 2022-UP-415 affirming the decision of the lower court in favor of Respondents. The law and record support the Court's Opinion, and Appellant fails to show any point overlooked or misapprehended by the Court. Therefore, the Court should deny the petition for rehearing. For brevity, Respondent Gooding incorporates her Final Brief into this Return.

ARGUMENT

The Court correctly affirmed on the basis that Appellant did not have standing to pursue this action because he is not the personal representative of the Estate. Appellant raises fourteen issues in the petition for rehearing. In deciding to affirm, the Court did not overlook or misapprehend any of these issues, and the Court should deny the petition in its entirety.

I. The Court correctly held Appellant failed to appeal his resignation as PR.

Appellant argues that, because he appealed the February 27, 2017 order, he appealed his resignation as PR. (Pet. p. 2). This is factually and legally baseless. He filed a motion to reconsider the February 27, 2017 order (R. p. 388) but did not ask the probate court to reconsider its acceptance of his "irrevocably" submitted resignation (R. p. 438-39). To the contrary, the motion states that Morgan "would not contest any order that accepted his resignation" even if not properly before the court or not using proper statutory procedure. (R. p. 397). Therefore, not only did Morgan not raise the issue in the motion to reconsider, he expressly chose not to oppose it. Further, during the pendency of his motion to reconsider, Morgan acted in accordance with the order appointing Mr. Ruff as PR by transferring the Estate assets to him. (R. pp. 812-28). It was only when he lost the motion to reconsider in the September 18, 2017 order that Morgan contested his status as PR. This is simply too late and, he should not be permitted to take contrary legal positions when it suits him. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("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."). Morgan got what he asked for—resignation as PR—and cannot complain on appeal when he is not an aggrieved party as to that ruling. Rule 201(b), SCACR. The facts and law support the Court's finding that he "did not argue either in his motion or at the hearing that the probate court erred in accepting his

resignation." (Op. p. 2). The Court should also reject this argument because it is undisputed that Appellant did not appeal the March 20, 2017 order that appointed Mr. Ruff as successor PR and stated Morgan's resignation immediately effective. (R. p. 278).

II. The Court correctly found that the probate court appointed Mr. Ruff as Successor PR and not a special administrator.

To avoid his failure to appeal the probate court's order appointing Mr. Ruff as successor PR, Appellant argues that the probate court really appointed Mr. Ruff as a special administrator. (Pet. pp. 3-7). This is factually and legally incorrect. The March 20, 2017 order is at the bottom of a form in which Appellant resigned as "Personal Representative." (R. p. 14). The order states that the probate court appoints Harley Ruff "as Successor **Personal Representative** in this Estate" and terminates Appellant as PR. (R. p. 14) (emphasis added). The plain language of the order is alone enough to reject Appellant's argument.

Appellant cites to communication from the probate court using the term "special administrator." (Pet pp. 4-5). The court's final written order, and not any prior communications, is what constitutes the binding ruling. *Ford v. State Ethics Comm'n*, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001) ("The written order is the trial judge's final order and as such constitutes the final judgment of the court. The final written order contains the binding instructions which are to be followed by the parties.").

Further, Appellant fails to recognize that, even if Mr. Ruff was appointed as special administrator and not PR, Appellant is still not the PR because his resignation was voluntary, irrevocable, uncontested even without proper court procedure (R. p. 397), and unappealed. Appellant is improperly taking contrary positions in the lower court and on appeal. *See Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 302 n.11, 737 S.E.2d 601, 612 n.11 (2013) ("Appellant may not argue a different position on appeal."); *and Cothran v. Brown*, 357

S.C. 210, 215, 592 S.E.2d 629, 631 (2004) ("Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding."). Appellant cannot represent to the probate court that he irrevocably resigns and will not contest his removal as PR but then, on appeal, argue that the court erred in accepting his resignation.

Finally, all of Appellant's arguments are untimely and ineffective to challenge an order that he did not appeal.

III. The probate court had jurisdiction to enter the March 20, 2017 order.

Appellant argues that the probate court lacked jurisdiction to appoint Mr. Ruff as successor PR because more than twenty days passed between Morgan's resignation and Mr. Ruff's appointment. (Pet. p. 8). As an initial matter, Appellant represented to the probate court that he would not contest appointment of a new PR "even if" the court "did not follow the procedure of S.C. Code Ann. § 62-3-610(b)." (R. p. 397). Therefore, he plainly and unequivocally waived the ability to contest Mr. Ruff's appointment. *Sanford v. S.C. State Ethics Comm'n*, 385 S.C. 483, 496, 685 S.E.2d 600, 607 (2009) ("A waiver is a voluntary and intentional abandonment or relinquishment of a known right."). Regardless, his argument fails on the merits. Jurisdiction and the effectiveness of a statement of resignation are different matters. Under S.C. Code Ann. § 62-3-610(b), "[1] 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 and [2] in any event is effective only upon the appointment and qualification of a successor representative and delivery of the assets to him." S.C. Code Ann. § 62-3-610(b). As to the first clause regarding an application or petition for appointment, it states only that after twenty days the resignation is ineffective "as a termination of appointment", *i.e.*, it does not independently

terminate the appointment. As to the second clause, "in any event" the court appointed a successor without objection or appeal, and Morgan delivered the Estate assets to him in compliance with the appointment as PR. The probate court always retains jurisdiction to appoint a PR, and it correctly exercised that jurisdiction in this case.

IV. Appellant's lack of standing was raised below, raised in a timely manner, and is not waived.

Appellant's arguments numbered 4. and 5. assert that Respondent failed to preserve the issue of his standing and that the issue is waived.[1] (Pet. pp. 9-11). As an initial matter, a Respondent is not responsible for issue preservation because the Court may affirm for any reason appearing in the record. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420-21, 526 S.E.2d 716, 723-24 (2000). Regardless, the issue of standing is properly preserved and not waived. "[T]o preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court." *Holy Loch Distribs. v. Hitchcock*, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000). The probate court appointed Mr. Ruff as successor PR on March 20, 2017. (R. p. 278). On August 15, 2017, in a memorandum in opposition to Morgan's motion to dismiss and confirm his resignation, Elizabeth promptly argued that "No party appealed this [March 20, 2017] Order and it is the law of the case and unappealable." (R. p. 410). Respondents argued at the hearing on the motion to reconsider that Morgan is not the PR, and the probate court ruled that Morgan is not the PR. (R. pp. 490, 493, 285). Appellant argues without reference to legal authority that this is not enough to raise the issue of standing. (Pet. p. 10). It is self-evident that one who is not PR cannot act as PR. Elizabeth argued standing in her brief to the circuit court, which ruled that Morgan is not the PR

[1] Waiver and issue preservation are distinct legal concepts. Appellant's waiver argument is really another way of arguing issue preservation because his sole argument on waiver is timeliness. Proof of waiver requires much more than a timeliness argument. *See Sanford v. S.C. State Ethics Comm'n*, 385 S.C. 483, 496, 685 S.E.2d 600, 607 (2009) ("A waiver is a voluntary and intentional abandonment or relinquishment of a known right.").

and does not have standing to appeal as PR. (R. pp. 229-31, 29, 32, 34, 43-44). The issue was timely raised to and ruled on by the probate and circuit courts.

V. Appellant does not have general standing to appeal as personal representative.

Appellant argued for the first time on appeal that he had "general standing." (Br. of App. pp. 40-41); (Pet. pp. 12-13). The argument is unpreserved and legally meritless. It is not legally possible to have general standing as a personal representative when the court ruled that he did not have standing as an actual personal representative. Even if legally possible, Morgan fails to meet the requirements for general standing. "When no statute confers standing, the elements of constitutional standing must be met." *Youngblood v. S.C. Dep't of Soc. Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013). The elements of constitutional standing are (1) injury in fact, (2) a causal connection between the injury and the conduct complained of, and (3) it is likely as opposed to merely speculative that the injury will be redressed by a favorable decision. *Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (internal quotation marks omitted). Morgan suffered no injury as PR. To the contrary, he got the relief he sought—termination of his PR appointment. (R. pp. 275-76). Neither the Estate nor Morgan as PR suffered an injury in fact from the order. It follows that with no injury, there is also no causal connection and nothing a favorable decision may redress. Morgan does not have general standing as PR to appeal.

VI. The March 20, 2017 Order is appealable and is the law of the case.

Appellant argues that the March 20, 2017 order is not appealable and, therefore, cannot be the law of the case. (Pet. pp. 13-14). This is legally and factually incorrect. The March 20, 2017 order finally terminated Morgan's rights as PR and conferred all authority to Mr. Ruff. *See* S.C. Code Ann. § 62-1-308(a) ("A person interested in a final order, sentence, or decree of a probate

court may appeal to the circuit court . . . ."). The order finally determined Morgan's rights as PR. (R. p. 278). If he wanted to continue as PR, he needed to appeal Mr. Ruff's appointment. (Br. of App. pp. 36-37). Instead, he accepted it by failing to appeal and by complying with it when he delivered the Estate assets to Mr. Ruff.

Appellant's argument that his filing of the motion to reconsider affected the finality of the March 20 order is factually disingenuous. His motion to reconsider did not challenge Mr. Ruff's appointment. (R. pp 388-98). In fact, his motion states he "remains willing to resign as personal representative, and would ***not contest*** any order that accepted his resignation." (R. p. 397) (emphasis added). Finally, he incorrectly characterizes the order as adding Mr. Ruff as a party. (Br. of App. p. 37). The order does not add Mr. Ruff as a party to any action. It appoints him as the PR of an Estate.

VII. Mr. Ruff's appointment as successor PR is not disregarded on appeal.

Appellant asks the Court to disregard his appointment because the case is on appeal. (Pet. pp. 14-15). His cited authority, S.C. Code Ann. § 62-1-308(h), does not apply to the order appointing Mr. Ruff as Successor PR because the order was entered on March 20, 2017, ***prior*** to Morgan's notice of appeal filed on September 27, 2017. (R. pp. 278, 426). The argument is also made for the first time in this appeal and is, therefore, unpreserved.

VIII. Appellant could have appealed in an individual capacity.

Appellant argues his "only option" was to appeal in his capacity as personal representative. (Pet. pp. 15-16). The Court should reject this argument. He could have appealed as an individual. The underlying dispute is about an order that Morgan ***individually*** pay attorney's fees. His motion to reconsider in probate court stated he took no issue with the order except for the legal fees. (R. pp. 395, 397). The proceedings below included all of the real parties in interest. Morgan brought

an action as PR and then named himself individually and as trustee as an opposing party. The issue is the capacity in which he appealed. He appealed as PR rather than as an individual when the challenged order requires him individually to pay legal fees. *See, e.g.*, Rule 201(b), SCACR ("Only a party aggrieved by an order, judgment, sentence or decision may appeal.").

IX. The probate court did not decline to alter Appellant's status as PR, it terminated that status.

Appellant argues without any factual basis that the probate court did not "realign" him "from his capacity" as PR. To the contrary, the court terminated that capacity. Further, the probate court had no independent obligation to realign parties in an action it dismissed. Appellant never asked the probate court to realign the parties. "[T]he burden of compliance with Rule 17(a) and its real party in interest requirement falls to the plaintiff." *Fisher v. Huckabee*, 422 S.C. 234, 241, 811 S.E.2d 739, 742 (2018). The absence of realignment does not allow Appellant to appeal as PR when the court terminated that authority. Elizabeth suffered and continues to suffer prejudice by incurring legal fees to oppose Morgan's appeal of an action as PR of her father's Estate when that authority lies solely with Mr. Ruff.

X. Appellant is without legal authority as PR and cannot continue to act as PR.

Appellant argues that he can continue to act as PR even though the probate court terminated his appointment. (Pet. p. 17). To the contrary, he does not retain statutory authority to appeal, and this argument is unpreserved. S.C. Code Ann. § 62-3-702 does not address the continuation of someone to act as PR. It provides a PR with "general letters" authority until his appointment is terminated. If "general letters" are incorrectly issued to someone else, the prior PR can recover estate property from the second PR. The statute says nothing about continuing to act as PR after termination and appointment of a successor PR, and does not confer standing to Morgan. He is also not saved by S.C. Code Ann. § 62-3-608, which says termination ends a PR's power "except

that" a PR "until restrained or enjoined by court order, may perform acts necessary to protect the estate." His power terminated, restrained, and enjoined at the latest on March 20, 2017. At that time, he could not take any acts as PR, including an appeal. The appeal is not necessary to protect the Estate because the probate court's order does not direct the Estate to pay any money. It simply says Morgan ***individually*** may ask the Estate to reimburse him. (R. p. 276). Morgan also stated his reason for appealing, and it is not to benefit the Estate but to ensure the Estate pays the legal fees he incurred in pursuing this matter. His brief to the circuit court states "it is important for the record to accurately reflect that Morgan Kearse is pursuing this appeal as Personal Representative so that he has a firmer basis for recovering his legal fees and costs for the same." (R. p. 213). Continuing an action purportedly as PR to strengthen the chances of recovering *as an individual* legal fees from the Estate is not necessary to protect the Estate.

XI. There is No Real Party in Interest Issue; Substitution, Ratification, and Joinder are Untimely and Improper Under These Circumstances.

Appellant argues that, even if he lacks standing as PR, the Court should not dismiss the appeal but should allow for ratification, joinder, or substitution of a real party in interest. (Pet. pp. 18-19). On the contrary, all of the real parties in interest were a part of the proceedings below.[2] Morgan brought an action as PR and chose to name himself individually and as Trustee as an opposing party. His own conflict of interest and continued attempts to exercise authority he does not have caused the standing problem. The issue is the capacity in which Morgan appealed as PR instead of as an individual when the settlement agreement affects him individually.

[2] Morgan named all six siblings individually and as Trustees. The Trust was properly represented, and the co-trustees properly acted on its behalf. *See, e.g.*, S.C. Code Ann. §§ 62-7-816(2), -816(14), -816(24). Regardless, Morgan filed the pleadings. He never raised the Trust's representation below and cannot complain about it on appeal. *Erickson v. Jones St. Publrs., LLC*, 368 S.C. 444, 476, 629 S.E.2d 653, 670 (2006) ("[A] party may not complain on appeal of error or object to a trial procedure which his own conduct has induced.").

Notably, Appellant does not ask the Court to substitute a particular person because there is no one proper to substitute. Mr. Ruff is the PR but does not agree to substitution on behalf of the Estate. (R. p. 577 Aff. ¶ 4). Morgan's choice to pursue this as the Estate (to recover his legal fees from the Estate) rather than as an individual caused the standing problem, and it is not remedied by substitution. (R. p. 213).

Even if a person for substitution did exist, Morgan failed to seek substitution within a reasonable time. "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 or commencement of the action by, or joinder or substitution of, the real party in interest." Rule 17(a), SCRCP; *Fisher v. Huckabee*, 422 S.C. 234, 241, 811 S.E.2d 739, 742 (2018) (ordering dismissal where the defendant's challenged the plaintiff's status but she responded by continuing to maintain her legally flawed position. In other words, Fisher insisted that the validity of her claimed status be litigated, and she never contemplated changing her status to comply with Rule 17(a)). Instead of timely seeking substitution (if even applicable), Appellant insisted that the validity of his status as PR be litigated and belatedly asked for substitution, ratification, or joinder after losing this argument. (R. pp. 212-13, 244-51). Appellant cannot choose to litigate his capacity to bring the claim and then, after losing the argument, ask for substitution. This is not a proper situation for substitution under Rule 17(a), SCRCP, and the Court should deny the belated request for it.

Further, Respondents would suffer prejudice from a belated substitution. Respondents directly raised Morgan's authority and capacity in the probate court and asked the circuit court to dismiss the case on that basis. Appellant continued to maintain the validity of his status to litigate. Respondents incurred legal fees and costs in challenging him.

XII. Appellant did not have legal authority to act as PR until an alleged substitution or joinder.

Appellant argues that, under Rule 25, SCRCP, he may continue as PR until Mr. Ruff is substituted or joined to this action. (Pet. pp. 19-20). There is no merit to this argument.

Rule 25(c), SCRCP, does not apply to the facts of this case. (Pet. p. 19). No "transfer of interest" occurred to invoke Rule 25(c). This case involves termination of authority.

Appellant's request that the Court "accept Mr. Ruff's ratification of Appellant's appeal under Rule 17(a), SCRCP" (Pet. p. 20; Br. of App. p. 44) is unpreserved because Morgan did not raise it until the second motion to reconsider in the circuit court. (R. p. 554). The argument and Mr. Ruff's affidavit also do not provide a basis for ratification. Mr. Ruff stated only that he ratified the "pursuit of the above referenced appeal so that it may be resolved on the merits." (R. p. 577 ¶ 3). He does "not take any position, and I remain neutral, regarding the substance of such appeal." *Id.* That is not ratification. This litigation is not neutral and Morgan takes numerous positions on disputed matters between the parties. "[A] successor personal representative ***may*** be substituted in all actions and proceedings to which the former personal representative was a party", but Mr. Ruff has not sought to do so and there is no statute providing that a former PR and his attorney may continue acting on behalf of the Estate. S.C. Code Ann. § 62-3-613 (emphasis added). That Mr. Ruff supports the resolution of these issues does not give Morgan authority to act on behalf of the Estate and take positions as to the issues.

XIII. The Court did not overlook the substantive issues on appeal.

Finally, Appellant argues that the Court's decision to affirm is improper because a dismissal may result in a challenge by a party who "was not a party to the Final Term Sheet." (Pet. p. 21). That a party may challenge the court's decision is not a basis to allow Appellant to appeal without standing and in an unauthorized capacity. (Br. of App. p. 45). The proper way to get a

ruling on the merits of the order was to appeal in the proper capacity in a timely manner. If the Court affirms the dismissal of this appeal, the probate court's order is the law of the case and cannot be challenged by any of the siblings who voluntarily and knowingly chose not to pursue any challenges to the rulings in this case. *See Bone v. United States Food Serv.*, 399 S.C. 566, 576, 733 S.E.2d 200, 205 (2012) ("The law of the case doctrine applies where a party does not challenge an issue on appeal when there has been an opportunity to do so."). Any party could have challenged the probate court's order but they all chose not to do so. A future failure to comply with it is contempt of court.

CONCLUSION

For these reasons and those stated in the Court's opinion and the Final Brief of Respondent Gooding, the Court should deny the petition for rehearing and remit this case to the probate court.

Respectfully submitted,

December 20, 2022

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas

The Honorable Lawton McIntosh

Appellate Case No. 2019-000905

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v.

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PROOF OF SERVICE

The undersigned certifies that on December 20, 2022 a copy of *Respondent Elizabeth Kearse Gooding's Return to Petition for Rehearing* has been served upon the counsel listed below by emailing a copy to the attorneys of record listed below. All *pro se* parties listed below are served by mailing a copy of the same, postage prepaid, in the United States Mail, addressed as shown below. All service is made to the parties in their individual capacities and as Trustees.

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December 20, 2022

Via E-Mail and U.S. Mail (to pro se parties only)

The Honorable Jenny Abbott Kitchings
Clerk of Court for the Court of Appeals
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Re: *J. Morgan Kearse, Personal Representative of the Estate of G.H. Kearse v. The Kearse Family Education Trust, et al.*,
Appellate Case No. 2019-000905

Dear Ms. Allen:

Attached for electronic filing and service is *Respondent Elizabeth Kearse Gooding, Individually and as Trustee of the Kearse Family Education Trust U/A/D Nov. 05, 1992*, *Return to Petition for Rehearing* and *Proof of Service*. By copy of this letter, I am serving all counsel of record and pro se parties as stated below.

With kind regards, I am,

s/Kathleen Barnes

cc: Kenneth B. Wingate (via email only)
Matthew J. Myers (via email only)
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