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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas

Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2023-000159

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

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 A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled upon by order of the Court of Appeals on January 4, 2023.

QUESTIONS PRESENTED

I. Did the Circuit Court err in dismissing this appeal based on Petitioner's alleged lack of standing as Personal Representative, which argument was raised for the first time on appeal?

II. Did the Probate Court err in enforcing an alleged settlement in which several of the parties affected thereby did not agree to the settlement?

STATEMENT OF THE CASE

Petitioner asks this Honorable Court to review an order of former Probate Judge Sheila Odom enforcing an alleged settlement that was not agreed to by the parties affected thereby, and to overrule the denial of Petitioner's right to judicial review by the Circuit Court and Court of Appeals based on Petitioner's alleged lack of standing, as raised for the first time on appeal.

This matter begins with the death of longtime South Carolina attorney G.H. Kearse ("Decedent") on June 10, 2013, survived by his wife and six children. Decedent's last will and testament named all six children as co-personal representatives and left his residuary to the separately created Kearse Family Educational Trust U/A/D November 5, 1992 (the "Trust"), which Decedent established to preserve the family farm and pay educational expenses of Decedent's descendants (R. pp. 307-325; 730-35).

All six children agreed that brother Morgan Kearse ("Petitioner"), himself a South Carolina attorney in good standing since 2002, would serve as sole Personal Representative, and the Allendale County Probate Court (the "Probate Court") appointed him as such. (R. p. 737). All six of Decedent's children have served as Co-Trustees of the Trust since its inception. (R. pp. 322-24).

While administering Decedent's estate, Petitioner encountered an interpretational problem concerning Decedent's will as to which all six siblings were not in agreement. Upon the advice of Petitioner's counsel, Kenneth Wingate, himself a South Carolina Certified Specialist in Estate Planning and Probate Law for many years prior through the present, Petitioner filed a Petition for Instruction for the Probate Court to direct Petitioner regarding the proper interpretation of Decedent's will.[1] (R. p. 157, ¶ 4).

Respondent Gooding filed an Answer to the Petition for Instruction and Motion for Summary Judgment, and Respondent Sharp filed a Motion to Dismiss. (R. pp. 84-86; 116-18). Petitioner subsequently determined that his siblings opposed to Respondent Gooding and Respondent Sharp's interpretation of Decedent's will had relented, and so Petitioner filed a Motion to Dismiss his own Petition for Instruction. (R. pp. 121-23; 157, ¶ 5).

The Probate Court scheduled a hearing for Petitioner's Motion to Dismiss the Petition for Instruction and Respondent Gooding's Motion for Summary Judgment on February 2, 2017. (R. p. 124). By appointment of the South Carolina Supreme Court, the Honorable Sheila B. Odom presided as Special Probate Judge for all litigation involving the Estate. (R. p. 7).

At 9:00 p.m. on January 31, 2017, just one business day prior to the hearing, counsel for Respondent Sharp emailed a document entitled "Final Term Sheet" to counsel for Petitioner and counsel for Respondent Gooding. (R. pp. 622-24). The terms of the Final Term Sheet may be fairly summarized as follows:

- Item 1: Petitioner shall immediately resign as Personal Representative and A.G. Solomons, or another neutral non-family member appointed by the Probate Court, would become Special Administrator.

[1] See S.C. Code Ann. § 62-3-105 (allowing interested persons to petition the probate court for orders within the court's jurisdiction); S.C. Code Ann. § 62-7-201(a)(1) (giving the probate court broad jurisdiction over trustees, including an action to "instruct trustees").

- Item 2: Petitioner's Personal Representative fee fixed at $25,000.
- Item 3: Petitioner to pay Respondent Sharp's legal fee in defense of the Petition for Instruction.
- Item 4: Petitioner responsible for legal fees of Respondent Gooding and his own legal fees as Personal Representative; provided, however, that if three of the five other siblings besides Petitioner did not object, Petitioner may ask the Estate to pay these.
- Item 5: Respondent Sharp does not object to Petitioner's use of Decedent's office rent free while Petitioner practices law therein, maintains the property, and carries sufficient hazard insurance.
- Item 6: The Trust to purchase home of Decedent's surviving spouse for $89,000.

Although there was no justification for imposing these legal fees on Petitioner,[2] Petitioner was willing to absorb Respondent Sharp's legal fees for the good of the family and the Estate if, and only if, a majority of siblings agreed to let the Estate pay the legal fees of Petitioner and Respondent Gooding, pursuant to Item 4 of the Final Term Sheet. (R. pp. 157-58, ¶¶ 6-15). Accordingly, Petitioner prepared and circulated a supplemental agreement among Respondents Best, Joseph Kearse, and Gordon Kearse (referred to collectively as the "Pro Se Respondents") that would have confirmed a majority of Petitioner's siblings did not oppose the Estate's payment of the legal fees of Petitioner and Respondent Gooding. Id. Petitioner discussed this supplemental agreement with the Pro Se Respondents and understood that each agreed to the same. Id.

Ultimately, however, Petitioner learned the evening of February 1, 2017 that Respondent Gordon refused to sign Petitioner's supplemental agreement, and Petitioner informed his informed his counsel that there was no agreement regarding the Final Term Sheet. (R. p. 158, ¶¶ 12 & 14). In turn, Petitioner's counsel informed the Court of this non-agreement at the February 2, 2017 hearing, stating unequivocally: "his position will be that he does not consent to the settlement." (R. p. 595, lns. 14-16). "His position, however, is what I have said….he does not consent." (R. p. 595, lns. 23-

[2] See S.C. Code Ann. § 62-3-720 (requiring payment by the estate of a personal representative's fees and expenses for defending or prosecuting a matter in good faith).

25). As explained by Petitioner's counsel, "I'm afraid to announce to the Court that two things have changed. Number one, I have not been provided copies of any document from the pro se litigants consenting to the settlement, so whereas I was told that I would be able to present that to you, I do not have that and cannot present it to you." (R. p. 593, lns. 14-20).

In response, Respondent Sharp put the Final Term Sheet on the record, including evidence that it was signed by Respondents Gooding, Sharp, and Gordon Kearse, as well as the email communications prior to the hearing between counsel for Petitioner and Respondents Gooding and Sharp. Ultimately, however, the Final Term Sheet was signed by only three of the six siblings – Respondents Gooding, Sharp, and Gordon Kearse – and no other persons. (R. pp. 636-41). Furthermore, Petitioner, Respondent Best, and Respondent Joseph Kearse did not attend the hearing nor otherwise expressed assent to the Final Term Sheet. (R. p. 9). Consequently, the Final Term Sheet was also not approved by a majority of the Trustees of the Trust directly impacted by the Final Term Sheet and, regardless, at no point did any person purport to approve the Final Term Sheet on behalf of the Trust. (R. pp. 8-13; 589-642).

Nevertheless, the Probate Court decided to enforce the Final Term Sheet anyway, stating "the Court is going to enter into the record that this Final Term Sheet of agreement be filed as a family agreement and that the record will reflect that the order provided to this court on behalf of either [Respondents Gooding or Sharp] to state that this order will be entered into the record and accepted on the terms as it is on the face of the agreement itself." (R. p. 609, lns. 14-22). As a result, Respondent Sharp offered a proposed order specifically adopting the Final Term Sheet as a binding settlement, stating "the Court entered into the record the Final Term Sheet of Agreement as a family agreement and stated that an Order would be entered into the record and accepted on the terms as it is on the face of the agreement itself." (R. pp. 11; 794-800). The Probate Court executed

the Order on February 27, 2017, served it on March 3, 2017, and Petitioner received it on March 6, 2017. (R. pp. 12-13).

Although Petitioner had also submitted a Statement of Resignation at the February 2, 2017 hearing indicating his intent to resign as Personal Representative (R. p. 145), it had by that time become automatically ineffective upon the passage of 20 days without application or petition of a successor. See S.C. Code Ann. § 62-3-610(b). As Petitioner's counsel stated on the record "[n]ow, as the Code indicates and as Your Honor is aware, a Personal Representative cannot automatically resign …." (R. p. 595, lns. 12-14). The Probate Court subsequently acknowledged as much, stating, "Mr. Wingate, as his attorney, you did read this statute per se without reading it verbally that there are requirements of [Petitioner] to give notice of his resignation and formal process and to obtain the acceptance of Mr. Solomons, and we need to reconvene on a hearing on that matter. I expect that you will so file those documents as necessary." (R. p. 609, lns. 7-13). However, no party filed any additional documents related to the Statement of Resignation, nor did the Probate Court hold an additional hearing on that matter. Accordingly, the Probate Court based Petitioner's termination as Personal Representative solely on the Final Term Sheet as approved by the Probate Court's Order dated February 27, 2017.

On March 16, 2017, Petitioner served a Motion to Alter or Amend or, in the Alternate, for a New Hearing. (R. pp. 147-59). Petitioner's motion objected to the February 27, 2017 Order in its entirety and the approval of the Final Term Sheet in its entirety, including its termination of Petitioner as Personal Representative and the appointment of a Special Administrator.

Soon thereafter, on March 20, 2017, Judge Odom wrote counsel for Respondent 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). Further, "[t]this Court will notify the other counsel of record of this appointment, copy attached." Id. Attached to the letter was the Statement of Resignation that Petitioner had previously signed and submitted to the Probate Court on February 2, 2017. (R. p. 14).

This notice from the Court had been anticipated based on the Court's recent February 27, 2017 Order, which specifically indicated that the Probate Court would contact A.G. Solomons to see if he would serve as special administrator and, if not, to appoint a different neutral non-family member. (R. pp. 11-12). Further, no separate procedure had been conducted for the appointment of a special administrator independently of the February 27, 2017 Order, as required by S.C. Code Ann. § 62-3-614. Further still, the Statement of Resignation, as modified by the Probate Court with Mr. Ruff's name on March 20, 2017, was not file stamped with the Court as a separate document. (R. p. 14). Accordingly, Petitioner had no reasonable basis to conclude anything except that Mr. Ruff's appointment was simply part of the Probate Court's February 2, 2017 Order.

After some delay, a hearing was scheduled for August 17, 2017 to hear Petitioner's Motion to Alter or Amend, which Petitioner pursued in his capacity as Personal Representative. (R. p. 167). At the hearing, Petitioner continued to refer to Harley Ruff as the "proposed special administrator" (R. p. 643), and there was **no** argument made that the Probate Court's purported appointment of Harley Ruff on March 20, 2017, nearly a half-year earlier, deprived Petitioner of standing to argue that the Final Term Sheet was void or that his status as Personal Representative had not been validly terminated. (R. pp. 643-661). In fact, there was no reference made to the purported March 20, 2017 appointment as being distinguishable from the Probate Court's underlying Order dated February 27, 2017 at all. Id. Further still, Respondent Sharp offered that if "they want to appeal to Judge

Buckner and say [the Probate Court] should've done something differently, then they can file that appeal anytime after this hearing in the designated time." (R. p. 648).

Once again, Respondent Sharp provided the Probate Court with a proposed order, which the Probate Court executed and filed on September 18, 2017, and which was received by Petitioner on September 19, 2017. (R. pp. 18-24; 801-08). The new Order denied Petitioner's Motion to Alter or Amend, and specifically upheld the Final Term Sheet and the Probate Court's prior Order dated February 27, 2017. (R. pp. 19 & 24).

On September 27, 2017, Petitioner filed his Notice of Intention to Appeal both the Order dated February 27, 2017 and the Order filed September 18, 2017. (R. p. 187-90). Petitioner did not include the Probate Court's purported March 20, 2017 appointment of Harley Ruff as an "order" for appeal because the February 27, 2017 Order terminated Petitioner's status as Personal Representative and provided for appointment of a Special Administrator, and the September 18, 2017 Order confirmed those rulings. As such, Petitioner did not view the March 20, 2017 "record of appointment" as described by the Probate Court as an independent order subject to appeal. (R. p. 15). Petitioner's initial Brief of Petitioner to the Circuit Court also addressed the legal reasons why Petitioner remained Personal Representative. (R. pp. 194-215).

Before filing their responsive Petitioner brief, Respondents Gooding and Sharp filed a joint Motion to Mediate on January 19, 2018 (R. pp. 217-18), which the Circuit Court granted on February 7, 2018, stating "the Court encourages all named parties to the underlying dispute to attend and actively participate in the mediation in an effort to resolve any and all issues arising out of this Estate." (R. p. 27, emphasis added). Accordingly, even on appeal, the Circuit Court issued a preliminary order that was directed to, and meant to be binding on, Petitioner in his capacity as Personal Representative as one of the "named parties." (R. pp. 25-28). Further, by requesting and

participating in a mediation involving Petitioner in his capacity as Personal Representative without objection regarding his status as such, Respondents Gooding and Sharp implicitly acknowledged and consented to Petitioner's continued standing to act as Personal Representative. (R. pp. 216-21).

It was not until after this failed mediation, on appeal, that Respondents Gooding and Sharp for the very first time argued that Petitioner's "appeal is a nullity. He lacks authority to take this action on the estate's behalf." (R. p. 229). Respondents Gooding and Sharp based this, also for the first time on appeal, on the argument that "[t]he Probate Court's March 20, 2017 order appoints Harley Ruff as 'successor personal representative' for this estate and indicates [Petitioner]'s resignation 'is hereby effective.'" Id. "That order was not appealed and compels the conclusion that [Petitioner] is not the personal representative." Id.

Despite having a mere 10 days to respond to these new arguments under S.C. Code Ann. § 62-1-308(e), which arguments Respondents Gooding and Sharp first raised 16 months after the Probate Court's purported March 20, 2017 appointment, Petitioner's Reply Brief offered numerous rebuttals to the argument that Petitioner's appeal was a nullity, and further argued that the appeal was proper even if Petitioner lacked authority as Personal Representative. Petitioner also made these arguments at oral argument. (R. p. 684, 1ns. 14-25; p. 685, lns. 1-21).

For its part at the oral argument, the Circuit Court succinctly stated its erroneous belief that Petitioner had no judicial right to review of an order removing him as Personal Representative. "Either he is the PR or he is not the PR. And if he is appealing in that capacity, he has to be acting in that capacity." (R. pp. 684-85). Under such a formulation, it would be impossible for a personal representative to contest their removal from office.

Ultimately, the Circuit Court's December 13, 2018 Order accepted the argument of Respondents Gooding and Sharp made for the first time on appeal, ruling that that the Petitioner

lacked standing due to the Probate Court's purported appointment of a new personal representative on March 20, 2017. Notably, Respondents Gooding and Sharp did not even specifically question Petitioner's "standing" per se until their oral argument after all briefing was concluded (R. p. 674, l. 9-13), which Petitioner also argued against at oral argument (R. p. 685, lns. 10-21).

Consequently, Petitioner responded his alleged lack of standing as soon as he was able by filing a Motion to Alter or Amend and, if Necessary, For Ratification, Joinder or Substitution of a Real Party in Interest. (R. pp. 551-584). To that end, Petitioner's motion also included an affidavit of Harley Ruff, the purported Special Administrator (according to him and the Probate Court) or Personal Representative (according to Respondents Gooding and Sharp on appeal and Circuit Court), who stated that Petitioner's appeal was necessary to administer Decedent's estate, and that Harley Ruff was willing to ratify, be joined with, or substituted into the appeal. (R. p. 577-78). NO party filed a memorandum in opposition to this motion.

After additional oral argument regarding the Respondent Gooding and Sharp's new arguments on appeal and Petitioner's request for ratification, joinder, or substitution of a real party in interest, the Circuit Court upheld its prior Order under Order dated May 14, 2019. (R. pp. 37-45). Petitioner subsequently timely appealed the Circuit Court's Orders dated December 13, 2018 and April 4, 2019, and the Probate Court's Orders dated February 27, 2017 and September 18, 2017.

STANDARD OF REVIEW

The Court has the power to grant a writ of certiorari for any special or important reasons, including but not limited to where the decision of the Court of Appeals and Circuit Court conflicts with prior decisions of the Court regarding Petitioner's right to judicial review, and where such right of review directly implicates substantial constitutional issues.

LEGAL ARGUMENT

I. This Appeal Should Not Be Dismissed For Petitioner's Alleged Lack of Standing

A. Petitioner's alleged lack of standing was not raised below.

Neither the Circuit Court nor Court of Appeals have addressed Petitioner's argument that his alleged lack of standing was not raised below. Yet, at the same time, the argument against Petitioner's standing is itself based on Petitioner having failed to appeal an alleged separate order of the Probate Court. Therefore, the Circuit Court and Court of Appeals have applied issue preservation inconsistently in this matter to deny Petitioner's right to judicial review.

"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 PRs 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 Petitioner 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. 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 Petitioner's termination as personal representative as part of the Final Term Sheet and February 27, 2017 Order.[3] 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.

Regardless, the September 18, 2017 Order did not state or even imply that Petitioner 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, Respondent Gooding and Sharp's argument that Petitioner lacks standing as personal representative due to the March 20, 2017 alleged order was not raised below, and is therefore not reserved for Petitioner 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.

Finally, 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. "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 trial); 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

[3] 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).

question of subject matter jurisdiction and, therefore, the issue was waived where it was not timely raised prior to entry of default). 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).

B. Petitioner argued and appealed his resignation as personal representative.

The Court of Appeals affirming the Circuit Court states "Petitioner 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 [Petitioner's] resignation as the Personal Representative…." (R. p. 11). Petitioner 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 Petitioner as personal representative after it 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 Petitioner's resignation and terminated him as personal representative, and Petitioner has done everything that he needed to do in order to obtain a judicial review of that Order.

As discussed 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" Petitioner as personal representative after the February 27, 2017 Order had already done so. Quite simply, Petitioner has properly appealed his termination as personal representative.

C. The Probate Court did not appoint a successor personal representative by separate order dated March 20, 2017.

Although Petitioner'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 of Appeals and Circuit 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 Petitioner's resignation as personal representative.

As the Court of Appeals'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 Petitioner 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 Respondents Gooding and Sharp. The Final Term Sheet's very first provision was that Petitioner "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, Petitioner timely served a Motion to Alter or Amend or, in the Alternate, for a New Hearing. (R. pp. 147-59). Petitioner'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 Petitioner 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 in a July 11, 2017 memorandum to the Estate beneficiaries. (R. p. 814).

Nevertheless, and although not argued below, Respondents Gooding and Sharp on appeal have ignored the Probate Court's clear instruction alleging that Petitioner's Statement of Resignation 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 foregoing, relevant considerations include the following:

- Special administrator and successor personal representative are different offices under 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). 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 Petitioner's counsel acknowledged at the February 2, 2017 hearing that Petitioner'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 Gooding and Sharp have 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) which includes an "Order for Hearing" section, and "Order of Appointment" section, and a "Qualification and Statement of Acceptance" section to be signed by the appointed fiduciary. (R. pp. 579-81).

- The record includes no evidence that Harley Ruff accepted the purported appointment as successor personal representative. To the contrary, his memorandum dated July 11, 2017 evidences his understanding that he was appointed as special administrator. (R. p. 814).

- Respondent Gooding's brief in Opposition to Petitioner's Motion to Alter or Amend stated the Probate Court was authorized to appoint a "special administrator" pursuant to its February 27, 2017 Order. (R. p. 175), and made no mention of Harley Ruff as a successor personal representative or the alleged order dated March 20, 2017. (R. pp. 174-82).

- Petitioner 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, Petitioner continued to refer to Harley Ruff as the "proposed special administrator" (R. p. 643) without any objection or reference to Harley Ruff as a successor personal representative by Respondents or the Probate Court. (R. pp. 643-661).

- All that was said by Respondents Gooding and Sharp at the hearing regarding the issue is that Petitioner "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 and subsequent "record of this appointment" as "Special Administrator" dated March 20, 2017.

- Ultimately, the Court's September 18, 2017 Order denying Petitioner'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 otherwise it could have amended its February 27, 2017 Order.

In summary, 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 orders, dated February 27, 2017 and September 18, 2017, by which the Probate Court enforced the Final Term Sheet's appointment of a special administrator, which the Probate Court implemented through its March 20, 2017 "record of appointment" of the "Special Administrator".

D. The Probate Court lacked jurisdiction to issue a separate order on March 20, 2017.

"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 a party to the 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 Gooding and Sharp argue for the first time on appeal that the Probate Court's filling in of Harley Ruff's name on Petitioner'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, Petitioner's Statement of Resignation had by that time automatically become "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. See S.C. Code Ann. § 62-3-610(b). 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, -306(a)(6), -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); 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).

Accordingly, by March 20, 2017, the Probate Court lacked jurisdiction to take any action pursuant to the Statement of Resignation, whether to appoint a successor personal representative in contrast to its February 27, 2017 Order requiring a special administrator or to otherwise "reterminate" Petitioner after having already done so in its February 27, 2017 Order.

E. The appointment of a successor fiduciary is not appealable and 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."); Dorn v. Cohen, 421 S.C. 517, 520, 809 S.E.2d 53, 54 (2017) (holding 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)).

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 Petitioner's status as personal representative because Petitioner had already filed a Motion to Alter or Amend the same, and there remained further action by the Probate Court to determine the same. The Probate Court took such further action by denying Petitioner's Motion to Alter or Amend by order dated September 18, 2017, which then became its final order as to Petitioner's status as Personal Representative. (R. pp. 18-24). Petitioner then appealed the Probate Court's as required by law. See S.C. Code Ann. § 62-1-308(a); Ex parte Wilson, 367 S.C. at 12, 625 S.E.2d at 208.

In summary, Petitioner had no legal right to appeal the Probate Court's March 20, 2017 appointment. Petitioner has taken the legally proper, and most efficient, actions to appeal the Probate Court's termination of his status as personal representative.

F. Petitioner retained 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). Here too, Petitioner was made a party to an alleged settlement approved by the Probate Court which affected his personal interest as Personal Representative as well as the Estate he represented. He therefore has standing to challenge the alleged settlement notwithstanding his removal as Personal Representative.

G. A terminated personal representative retains statutory authority to appeal.

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 by the Estate. In addition, the Estate has not been distributed and Petitioner has not been restrained or enjoined by court order from maintaining this appeal, and there is no evidence of the same. Therefore, under statute, Petitioner may continue the appeal even if terminated as personal representative.

H. 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).

"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, Respondents Gooding and Sharp questioned Petitioner's standing for the first time on appeal. In response, Petitioner not only argued that he did have standing, but also filed a Motion to Alter or Amend and, if Necessary, For Ratification, Joinder or Substitution of a Real Party in Interest. (R. pp. 551-584). Accordingly, the Circuit's Court erred dismissing Petitioner's appeal, and should have ratification, substitution, or joinder of the person it believed had succeeded Petitioner as Personal Representative.

I. Petitioner 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 judgment, 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 Gooding and Sharp argue on appeal that the Probate Court has irrevocably transferred Petitioner's interest as personal representative to Harley Ruff. Even if that were true, Rule 25(c), SCRCP expressly provides that Petitioner 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. In this case, however, no party has sought to substitute Harley Ruff as the proper party, and no court has otherwise done so on its own initiative. Accordingly, Petitioner's appeal remains proper notwithstanding the alleged transfer of his interest as personal representative.

II. The Probate Court Lacked Authority to Enforce a Settlement Agreement.

"The law looks with favor upon an agreement among members of a family and others which avoids a will contest or promotes the settlement and distribution of an estate." Duncan v. Alewine, 273 S.C. 275, 282, 255 S.E.2d 841, 845 (1979). However, "[o]nly those parties participating in the agreement are bound thereby." Id. Further, "[a] compromise agreement is void unless executed in compliance with the governing statute." Wilson v. Dallas, 403 S.C. 411, 426, 743 S.E.2d 746, 754 (2013) (quoting In re Estate of Riley, 266 P.3d 1078, 1080 Ariz. Ct. App. 2011)). Finally, the proponent of a settlement has the burden of proving the existence thereof. Kinghorn as Tr. for the Mildred Ann Kinghorn Tr. dated 28 Apr. 2004 v. Sakakini, 426 S.C. 147, 152-53, 825 S.E.2d 748, 750-51 (Ct. App. 2019) (determining whether proponent of settlement met his burden of proving the

existence of the same). To date, no court has considered whether the Probate Court had authority to enforce the Final Term Sheet, or the terms thereof, as a settlement. It did not for the reasons stated below.

A. The Probate Court lacked jurisdiction to enforce a settlement.

As stated in Section I.E., supra, the probate court is a court of limited jurisdiction. See Greenfield v. Greenfield, 245 S.C. 604, 610, 141 S.E.2d 920, 923 (1965). Further, the court's lack of subject matter jurisdiction may be raised for the first time on appeal. See Gantt v. Selph, 423 S.C. 333, 338, 814 S.E.2d 523, 525-26 (2018).

To that end, the only matters properly before the Probate Court, pursuant to the Amended Notice of Hearing, were Appellant's Motion to Dismiss the Petition for Instruction and Respondent Gooding's Motion for Summary Judgement. (R. p. 124). Therefore, at most, the Court could have (1) ruled that the Decedent's directive to build a house on Trust property could not be honored without the Trust's consent and (2) dismissed the Petition for Instruction. In contrast, not before the Probate Court in any form that could be ruled on were any of the terms of the Final Term Sheet: Appellant's resignation as Personal Representative and the appointment of a Special Administrator (Item 1), Appellant's personal representative fee (Item 2), the allocation of legal fees and costs in this matter (Item 3 and 4), Appellant's use of Decedent's office (Item 5), and the Trust's purchase of Decedent's surviving spouse's house (Item 6). (R. pp. 124; 619-20).

B. The Final Term Sheet did not satisfy S.C. Code Ann. § 62-3-912.

"Section 62-3-912 provides in pertinent part that 'successors may agree among themselves to alter the interests, shares, or amounts to which they are entitled under the will ... in any way that they provide in a written contract executed by all who are affected by its provisions.'" In Re Estate of Brown, 427 S.C. 138, 141, 828 S.E.2d 789, 790 (Ct. App. 2019). Meanwhile, "successors" are

"persons, other than creditors, who are entitled to property of a decedent under his will." S.C. Code Ann. § 62-1-201(47).

Here, the Final Term Sheet was not executed by multiple parties affected thereby including Petitioner, both as Personal Representative and in his individual capacity, and the Trust acting through a majority of its Trustees. For that matter, the Trust has been unrepresented throughout these proceedings. See, e.g., Real Estate Unlimited, LLC v. Rainbow Living Trust, No. 2004-UP-019, 2004 WL 6248341, at *2 (S.C. Ct. App. Jan. 15, 2004) (holding non-attorney trustee may not appear in court on behalf of a trust).

C. The Final Term Sheet did not satisfy S.C. Code Ann. § 62-3-1102.

"[T]he requirements to seek court approval of an agreement under section 62–3–1102 are … the agreement must be in writing and executed by all parties with beneficial interests in the estate, it must be submitted to the court by an interested party, notice must be given to all interested parties, and there must be an opportunity to be heard." Wilson v. Dallas, 403 S.C. 411, 432, 743 S.E.2d 746, 757–58 (2013). If the requirements for seeking approval are met, then it becomes the court's duty "to review the compromise to determine if it satisfied the two statutory factors (a good faith controversy, a fair and just effect), and [] set forth its findings in this regard." Id. at 431–32, 743 S.E.2d at 757.

Here, once again, the Final Term Sheet was not executed by multiple parties with a beneficial interest in the estate "or having claims which will or may be affected by the compromise." S.C. Code Ann. § 62-3-1102(1). In addition, no notice of hearing for approval of a settlement was provided to the interested parties, nor did the Probate Court attempt to determine, or set forth its findings, that the Final Term Sheet was a fair and just resolution of a good faith controversy. (R. pp. 8-13; 589-642). S.C. Code Ann. § 62-3-1102(3). See also S.C. Code Ann. §

62-1-401 (requiring 20 days' notice, unless the probate court determines a different period for good cause shown, along with filed proof that the notice was so given).

D. The Final Term Sheet did not satisfy Rule 43(k), SCRCP

The only argument proffered by Respondents Gooding and Sharp for the validity of the Final Term Sheet is under Rule 43(k), SCRCP (R. pp. 222-39; 673-77), which does not even apply to estate settlements on account of the specific requirements under Sections 62-3-912 or Section 62-3-1102. Nevertheless, the Final Term Sheet also fails to satisfy the requirements for reaching a binding settlement of general civil litigation under Rule 43(k), SCRCP, which provides as follows (emphasis added):

> No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel. Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP.

Here, not a single attorney signed the Final Term Sheet, thus eliminating the first and last options under Rule 43(k), SCRCP. See S.C. Hum. Affs. Comm'n v. Zeyi Chen, 430 S.C. 509, 519, 846 S.E.2d 861, 866 (2020) (rejecting argument that strict compliance with Rule 43(k) was not required because the parties admitted the agreement was signed by them in the presence of counsel).

In addition, the second is eliminated because Petitioner's counsel clearly disavowed the Final Term Sheet in open court. (R. p. 595, lns. 14-16 and 23-25; p. 593, lns. 14-20). Note that being "made" in open court requires more than merely stating the terms on the record; the terms must also be affirmed by the parties to be bound thereby. See Buckley v. Shealy, 370 S.C. 317, 322, 635 S.E.2d 76, 78 (2006) (emphasis added) ("Because the purported agreement the parties reached following mediation was neither entered into the court's record nor acknowledged in open court and placed upon the record, Rule 43(k), SCRCP, plainly provides that the agreement is unenforceable."). As defined in Black's Law Dictionary (10th ed. 2014), "acknowledge" means:

> 1. To recognize (something) as being factual or valid <acknowledge the federal court's jurisdiction>. 2. To show that one accepts responsibility for <acknowledge paternity of the child>. 3. To make known the receipt of <acknowledged the plaintiff's letter>. 4. To confirm as genuine before an authorized officer <acknowledged before a notary public>. 5. (Of a notary public or other officer) to certify as genuine <the notary acknowledged the signature as genuine>.

In the present case, the Final Term Sheet was neither "acknowledged" nor "made" in open court. To the contrary, Petitioner's counsel unequivocally disavowed the settlement in open court. (R. p. 595, lns. 23-25). In summary, the Probate Court lacked authority to enforce the Final Term Sheet, or the terms thereof, as a binding settlement. Their decision must be reversed, if not for the sake of Petitioner's due process rights and for the uniform enforcement of South Carolina Supreme Court precedent, then for the sake of judicial efficiency as the Final Term Sheet remains subject to collateral attack by the parties affected thereby who did not ascent to the same.

CONCLUSION

For the reasons stated above, Petitioner respectfully submits this Petition for a Writ of Certiorari asking the Court to overrule the orders of the Court of Appeals and Circuit Court dismissing the Petitioner's Appeal for lack of standing and to overrule the Probate Court Orders approving the Final Term Sheet as a binding settlement.

Respectfully submitted,

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Columbia, South Carolina
February 16, 2023

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas

Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2023-000159

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

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

The undersigned counsel for Petitioner certifies that he has served a copy of the Petition for a Writ of Certiorari on all Respondents on the date shown below, by emailing a copy of the same to their counsel or mailing a copy of the same to those without counsel, addressed as follows:

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VIA EMAIL ONLY TO

Hon. Patricia A. Howard Clerk of Court
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V. Claire Allen, Chief Deputy Clerk
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RE: Estate of G. H. Kearse
Appellate Case No. 2023-000159
Our File: 5330-10329

Dear Ms. Howard and Ms. Allen:

Enclosed for filing please find Petitioner's Petition for a Writ of Certiorari and a Proof of Service. I will follow with delivery of the $250.00 filing fee to the South Carolina Supreme Court.

Thank you greatly for your assistance, and please let me know if either of you need anything further regarding the Petition at this time. With warm regards, I am,

Yours truly,

SWEENY, WINGATE & BARROW, P.A.

s/Matthew J. Myers

Enclosures

cc: Kathleen Barnes, Esq. (via email)
Whitney B. Harrison, Esq. (via email)
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