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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Alex Kinlaw, Jr. Circuit Court Judge
Common Pleas Case No. 2022-CP-23-01064

(Court of Appeals Appellate Case No. 2022-000731)

Supreme Court Appellate Case No. 2025-000386

IN THE MATTER OF:
Estate of Florence Petrak Mensch,

STERLING RAYMOND MENSCH, III, individually
as former Personal Representative of the Estate
of Florence Petrak Mensch and in his former
capacity as Agent under a Power of Attorney
for Florence Petrak Mensch,

Appellant,

SHAUNA M. WADDELL, individually and as Per- v.
sonal Representative of the Estate of Florence
Petrak Mensch and JOHN R. MENSCH,

Respondents.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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Appellant Sterling Raymond Mensch, III, respectfully offers this reply to the Return to Petition for Writ of Certiorari.

ARGUMENT

I. Appellate Jurisdiction Does Not Exist Where the Probate Court Has Not Yet Entered a Final, Appealable Order.

A. The Appeal of the Probate Court's Order Was Premature.¹

Mr. Mensch filed the notice of appeal to the Circuit Court out of an abundance of caution, lest he await conclusion of the tax proceedings before the Internal Revenue Service and then have Respondent say that he waited too long to appeal. The bar would benefit from published precedent as to finality, to avoid uncertainty as to when an appeal must be filed.

To the extent, if any, that the Respondent is attempting to argue that Mr. Mensch was somehow required to ask the Circuit Court to reconsider its ruling on finality as a prerequisite to appeal, *see* [Return at 4], that claim is wrong. The Circuit Court ruled upon the issue that Mr. Mensch raised, determining that the Probate Order was final. [ROA 31 (“The Court finds that Judge Faulkner’s January 26, 2022, Order was a final order, and therefore Appellant’s request that the case be remanded to probate court is DENIED.”)]. A motion to reconsider is not a prerequisite to appeal preserved issues. *See, e.g., Wilder Corp. v. Wilke*, 330 S.C. 71, 77 (1998) (“Post-trial motions are not necessary to preserve issues that have been ruled upon at trial...” (citation omitted)).

¹ Respondent’s Return reordered the questions presented from the original order in the Petition, which has been maintained here. The discussion above corresponds to Point III in the Return.

B. If the Probate Court’s Order Was Final and an Appeal to the Circuit Court Was Timely, this Court Can Reach the Jurisdictional Problems in the Probate Court’s Order.²

The Respondent claims that the issue of the Probate Court exceeding its jurisdiction was not preserved because it was not ruled upon in the Probate Court. *See* [Return at 3-5]. If that argument were correct—and it is not, as shown below—that would mean that *the Court of Appeals* here was wrong to have considered the issue at all. *Compare* [Slip Op. at 3 (“Finally, as to Sterling’s argument the probate court lacked subject matter jurisdiction to the hear the causes of action in the case related to pre-death damages, we affirm.”)], *with Mercer v. Phillips*, 318 S.C. 453, 455 (1995) (“[I]t is well settled that, but for a very few exceptional situations not present here, an appellate court cannot address an issue unless it was raised to, and ruled upon by, the trial court.” (footnote omitted)). Thus—under both sides’ views—this Court’s review is appropriate.

Ultimately, however, the Probate Court’s jurisdiction was properly reachable on appeal. As Respondent correctly concedes, “subject matter jurisdiction may be raised at any time. . . .” [Reply at 3]. Accordingly, Mr. Mensch was not required to obtain a ruling from the Probate Court on his jurisdictional challenges before raising them on appeal. *See, e.g., Bunkum v. Manor Props.*, 321 S.C. 95, 99 (Ct. App. 1996) (“[I]ssues relating to subject matter jurisdiction may be raised at any time, cannot be waived even by consent, and should be taken notice of by this court on our own motion.” (citations omitted)).

To the extent, if any, that the Respondent is attempting to argue through its citations to *Dunlap & Dunlap v. Zimmerman*, 188 S.C. 322 (1938), and *De Treville v. Groover*, 219 S.C. 313 (1951),

² The discussion above corresponds to Point I of the Return.

that a motion to alter or amend was required in the Circuit Court, to ask it to issue a ruling as to the Probate Court's jurisdiction, that claim fails. The Circuit Court believed that it lacked all appellate jurisdiction over the Probate Court's order due to the timing of the filing of the notice of appeal and thus dismissed the appeal as untimely. [ROA 29-30].³ See also *Mears v. Mears*, 287 S.C. 168, 169 (1985) (“[T]he timely service of the notice of intent to appeal will remain a jurisdictional requirement”). If so, the Probate Court's damages order was not properly before the Circuit Court for appellate revision. As such, any attempt to have the Circuit Court decide the Probate Court's jurisdiction to enter the order would have itself been a nullity. See, e.g., *Wagener v. Booker*, 31 S.C. 375, 377 (1889) (noting that “acts, done without jurisdiction..., being ultra vires, are absolutely void”). Because the Circuit Court could only decide the issue of the Probate Court's jurisdiction if the Circuit Court had appellate jurisdiction over the order, any motion to alter or amend to obtain a (potentially advisory) ruling on Mr. Mensch's jurisdictional challenge would have been entirely futile. This Court “does not require parties to engage in futile actions in order to preserve issues for appellate review.” *Staubes v. City of Folly Beach*, 339 S.C. 406, 415 (2000) (collecting cases).

II. If the Probate Court Entered a Final Order, Mr. Mensch Timely Appealed Because His Motion to Alter or Amend Tolled the Time to Appeal.⁴

Since the filing of this Petition, this Court decided *Swing v. Swing*, __ S.C. __, 2025 S.C. LEXIS 34 (March 12, 2025). That case establishes why the Court of Appeals erred below in

³ A challenge to the subject-matter jurisdiction of the Probate Court was one of the issues identified in the Statement of Issues on Appeal. [ROA 9268]. But the Circuit Court's resolution of the finality issue precluded it from having power to reach the other issues.

⁴ The discussion above relates to Point IV in the Return.

holding that the skeletal post-trial motion did not stay the time to appeal. There, this Court held that a post-trial motion that otherwise “runs afoul of a rule of procedure” will stay the time to appeal so long as the motion was timely. *Id.* at *15. In that regard, “‘timely’ means only that the Rule 59(e) motion was served on the opposing parties not later than ten days from the date of receipt of written notice of the entry of the order the merits of which the motion purports to address.” *Id.* In adopting the rule, this Court sought to protect the bar from being “stuck between the rock of wondering whether you should promptly serve a notice of appeal to meet the drop-dead deadline to appeal and the hard place of filing of a Rule 59(e) motion to ensure you’ve met the drop-dead requirement of preserving an issue for appellate review.” *Id.* at *6 (quotation omitted).

Accordingly, while the post-trial motion may have been procedurally improper for want of particularity, no one disputes that it was “timely” under R. 203(b)(1), SCAR. Accordingly, it stayed the deadline for the notice of appeal.⁵ Had the Court of Appeals had the benefit of that ruling, it would have found the appeal timely.

To whatever extent that *Swing* does not control the timeliness question, the Court of Appeals should have found that *Camp v. Camp*, 386 S.C. 571 (2010) still rendered the appeal timely. The Probate Court acted fairly, invoking its right to deny the motion without a hearing. Respondent was not prejudiced—not only did Respondent “win” the motion, but Respondent did not even have to draft a return, much less attend a hearing. Nothing more was required under *Camp*.

⁵ The world is round. Respondent’s complaints that the post-trial motion was procedurally improper seem a bit ironic given that Respondent—without requesting or receiving leave of Court—filed its Return more than 30 days after the Petition.

Contrary to the holding below, the post-trial motion was sufficient to toll the time to appeal from any final order, and Mr. Mensch should be allowed to have the merits of his appeal heard.

III. The Probate Court Lacked Subject-Matter Jurisdiction to Award Damages for any Misconduct Prior to Florence Petrak Mensch’s Death.⁶

Contrary to the Respondent’s arguments, jurisdiction for predeath claims did not exist in the Probate Court.

First, the Reply does not dispute that a *chose in action* for predeath injury does not expressly appear within the statutorily defined grant of jurisdiction set forth in S.C. Code § 62-1-302(a).

Second, to whatever extent that predeath *choses in action* do fall under S.C. Code § 62-1-302(a), the parties here agree that Estate’s claims for predeath actions were for common-law torts and for statutory claims, which are claims at law. *Compare* [Cert. Pet. at 12-13], *with* [Return at 2 (stating the action below was an action “at law”)]. The Petition established that *all* claims at law abate upon death—except those saved by the survival statute. [Cert. Pet. at 12-13]. The Return does not claim otherwise. Nor does it dispute that S.C. Code § 62-1-302(b) explicitly strips the Probate Court of jurisdiction over actions involving the survival statute except for “the approval of settlements as provided in Sections 15-51-41 and 15-51-42 and to the allocation of settlement proceeds among the parties involved in the estate,” *id.* Respondent, understandably, cannot contend that the General Assembly did not mean what the General Assembly said.

Insofar the Respondent seeks to invoke *Vaughn v. Bernhardt*, 339 S.C. 125 (Ct. App. 2000), the case cannot resolve the jurisdictional challenge presented here. For one thing, the case did not explicitly consider whether jurisdiction existed and does not therefore establish that it did.

⁶ The discussion above relates to Point II of the Reply.

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 119 (1984) (“When questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us. We therefore view the question as an open one.” (quotation and footnote omitted)). Besides, that case involved money from a joint account that was withdrawn and then placed into an account solely titled in the defendant’s name; the estate was seeking to recover the exact dollars that the decedent had owned, which became the estate’s property upon her passing. *See Vaughn*, 339 S.C. at 128. Here, by contrast, the Probate Court purported to award damages for dollars that had already been spent. Certainly, a personal representative may use the Probate Court to obtain the recovery of Estate property that is still in the hands of a third party. S.C. Code § 62-3-619 (rendering one an executor de son tort who illegally obtained control over the decedent’s property); S.C. Code § 62-3-620 (“Acting sua sponte or upon the petition of any interested person, the probate judge of the county in which a deceased person was domiciled at the time of his death may order the executor de son tort to account for the property *in his possession*.” (emphasis added)). But when the property is no longer in the (alleged) wrongdoer’s hands, the personal representative must use the Circuit Court (or Magistrate’s Court) to obtain damages for the property that is no longer in the (alleged) wrongdoer’s hands.⁷

Next, the Respondent’s citation to S.C. Code § 62-8-117, [Return at 7], is not any help, either. That statute allows a cause of action against an agent who has abused a power of attorney. But the

⁷ A ruling that a lawsuit for predeath actions must be filed in Probate Court would render as nullities every lawsuit for wrongful death filed in Common Pleas—where, of course, such actions are (properly) filed. *See, e.g., Singletary v. Shuler*, 433 S.C. 600 (Ct. App. 2021) (wrongful death action filed in Common Pleas). Wrongful death claims must be filed in Common Pleas because they fall within the survivorship statute, as to the predeath claims here.

statute is silent as to *where* that cause of action must be brought. Where, as here, a principal has died before the action has begun, the survival statute allows the Personal Representative to maintain the action despite the principal's death, but S.C. Code § 62-1-302(b) prohibits the action from being filed in Probate Court. An agent can only be "liable to ... the principal's successors" in Circuit Court, S.C. Code § 62-8-117.

Finally, insofar as the Respondent claims that requiring a Personal Representative to file an action in Circuit Court would prevent a final accounting, [Return at 8], the claim is simply incorrect. Just as with wrongful death claims, the final accounting in an estate asserting a claim for predeath misconduct is simply delayed until that unliquidated *chose in action* is resolved. Filing an action in the Probate Court in the first instance would not alter that fact. Indeed, because the claims are at law (as Respondent agrees), defendants could—even under the Respondent's view—simply remove the action to the Circuit Court. S.C. Code § 62-1-302(d) (allowing removal, among other times, where action seeks to try title to property and where a right to trial by jury exists with respect to an amount in controversy over \$5,000).

Respondent has pointed to no published authority from this Court or the Court of Appeals specifically conducting a jurisdictional analysis of claims for predeath misconduct under the Power of Attorney Act. The bench and bar deserve definitive guidance on that point, especially given that jurisdiction is nonwaivable.

IV. Judicial Estoppel Does Not Apply.⁸

For good reason, Respondent has been unable to cite a single case holding that a party, whether through judicial estoppel or otherwise, can ever confer jurisdiction beyond that which would otherwise exist. Caselaw in this State is squarely to the contrary: “[T]he parties cannot, by their actions or agreements, confer subject matter jurisdiction upon the trial court....” *State v. Richburg*, 304 S.C. 162, 165 (1991). Only the General Assembly, in its discretion, can authorize jurisdiction for a non-constitutional court like the Probate Court. *See generally Peterson v. Peterson*, 333 S.C. 538, 548 (Ct. App. 1998) (“The jurisdiction of a court is determined *by the sovereign* creating it....” (quotation omitted) (emphasis added)). Furthermore, while the Respondent notes that *Hayne Federal Credit Union v. Bailey*, 327 S.C. 242 (1997), adopted the doctrine of judicial estoppel in this State, this Court did so only “as [judicial estoppel] relates to matters of *fact* (not law).” *Id.* at 251 (original emphasis). But “[t]he question of subject matter jurisdiction is a question of law.” *Porter v. Labor Depot*, 372 S.C. 560, 567 (Ct. App. 2007) (citations omitted). Judicial estoppel has no legal relevance to the jurisdictional question raised here.

Even if it could theoretically extend jurisdiction beyond the statutory limits that the General Assembly has set, the doctrine is not properly invoked on this record. Judicial estoppel requires multiple factual findings, including that “the party taking the position [was] successful in maintaining that position and have received some benefit; ... [that] the inconsistency must be part of an intentional effort to mislead the court; and ... [that] the two positions [are] totally inconsistent.” *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 598 (2013) (citation omitted). Here, however, Mr. Mensch did not successfully convince the Probate Court to rule in a way that benefited him; the

⁸ The discussion above relates to Point V of the Reply.

Probate Court’s *ultra vires* rulings were against him. Nor did Mr. Mensch intentionally seek to mislead that court into exercising more jurisdiction than it had. Had Mr. Mensch been able to have been heard on his post-trial motion, he could have presented the jurisdictional problems that he discovered—but he was not allowed to be heard on his motion. Finally, the position taken here is not “totally inconsistent,” *id.*, with that raised in the Answer. Mr. Mensch agrees that the Probate Court had jurisdiction as to \$208,043 of the damages, fees, and costs awarded. It thus possessed at least some jurisdiction. It simply lacked jurisdiction as to the remaining \$776,720, which concerned pre-death conduct.

Because judicial estoppel is not appropriate as a matter of law or fact, it is irrelevant to the jurisdictional inquiry here.

CONCLUSION

This Court should grant this Petition and reverse the judgment of the Court of Appeals.

Dated this 18th day of April, 2025

Respectfully submitted,

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