

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Berkeley County
Court of Common Pleas

The Honorable Kristi L. Harrington

Case No. 2011-CP-08-2315

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SC Court of Appeals

Nancy Schaffer Turner, as Personal Representative
of the Estate of Martha L. Schaffer.....Appellant,

v.

Susan Linda Schaffer Sawadske.....Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

THE CIRCUIT COURT DID NOT ERR IN AFFIRMING THE PROBATE COURT AS TO ALL MATTERS RAISED ON APPEAL, AND THE APPEAL SHOULD OTHERWISE BE DISMISSED FOR LACK OF APPELLATE JURISDICTION, LACK OF SUBJECT MATTER JURISDICTION, AND FOR FAILURE OF THE APPELLANT TO PRESERVE ISSUES FOR APPEAL.

STATEMENT OF THE CASE

On November 7, 2001, Mark David Schaffer was appointed Personal Representative of the Estate of Martha Leonora Edgar Schaffer (“Decedent”) by Order of the Berkeley County Probate Court. Decedent died testate on July 28, 2001. The Estate was closed and the Personal Representative discharged upon satisfactory completion of assigned duties on January 31, 2003. R. _____. (January 31, 2003 Termination of Appointment).

On January 7, 2011, Appellant filed a Summons and Petition with the Berkeley County Probate Court alleging claims solely against the Respondent of undue influence and/or fraud and incapacity towards the Decedent, and generally seeking to set aside a 1997 deed of conveyance from the Decedent to the Respondent, the return of certain personal property, and the recovery of funds. R. _____. (Summons and Petition). Service on the Respondent was by publication. The Berkeley County Probate Court heard the matter on June 29, 2011 together with Appellant’s Petition for Appointment of Successor Personal Representative. Following hearing, the Berkeley County Probate Court appointed Appellant as Successor Personal Representative and entered an Order dated July 13, 2013 awarding the Appellant personal property from Decedent’s home if the same could be located, appointing Appellant Successor Personal Representative to afford her to opportunity to search for and locate assets to which she claimed were not distributed, and denied Appellant’s action to set aside the 1997 deed from the Decedent

to Respondent as time barred. R. _____. (Order of the Honorable Keith W. Kornahrens, filed July 13, 2011).

Appellant filed no motions to alter or amend the trial court Order. Appellant Nancy Turner served her Notice of Appeal from the Probate Court on Respondent Susan Sawadske on July 18, 2011, which Notice was filed in the Probate Court on July 20, 2011. R. _____ (Proof of Service, dated July 18, 2011). The Notice of Appeal from the Probate Court was dated July 18, 2011 and stated that Appellant received written notice of the entry of the Probate Order on July 16, 2011. R. _____. (Notice of Appeal from the Probate Court, dated July 18, 2011). On August 24, 2011, Appellant further filed her Notice of Appeal from the Probate Court in the Berkeley County Court of Common Pleas, which Notice was dated August 11, 2011. R. _____. (Notice of Appeal from Probate Court dated August 11, 2011). On August 24, 2011, Appellant also filed a Proof of Service in the Court of Common Pleas dated August 11, 2011, together with her filing fee of \$150.00 in the form of a money order. R. _____. (Proof of Service, dated August 11, 2011); (Receipt of the Honorable Mary P. Brown, dated August 24, 2011). August 24, 2011 is also the same date the Probate Court filed its Return to the Notice of Appeal in the Court of Common Pleas. Following hearing, the Honorable Kristi Lee Harrington affirmed the Probate Court on all matters raised on appeal by the Appellant, entering the decision February 1, 2013. R. _____. (Form 4 Order Affirming the Probate Court). Appellant appealed to the Court of Appeals.

STATEMENT OF FACTS

Decedent died testate on July 28, 2001 survived by her three children: Susan Sawadske, Mark Schaeffer, and Nancy Turner. Prior to her death, Decedent conveyed a home at Folly Beach, South Carolina, to her daughter, Susan Sawadske (“Respondent”)

by deed dated March 13, 1997. R. _____. Due to declining health, Decedent resided with Respondent for a period of years prior to her death. Following the Decedent's death, her son Mark Schaeffer was appointed Personal Representative of Decedent's Estate. Following administration, the Estate was closed January 23, 2003. Appellant, despite notice of her right to demand hearing regarding the administration of the Estate prior to closure, did not demand a hearing. The Personal Representative made no claim against the Respondent for any property or with regard to any issues now complained of by the Appellant some ten years later.

ARGUMENT

1. **The Appellant Failed to Timely Serve and File Her Notice of Appeal from the Probate Court to the Circuit Court Pursuant to South Carolina Code Ann. § 62-1-308, and the Appeal Should be Dismissed for Lack of Appellate Jurisdiction.**

The Appellant failed to timely serve and file her appeal from the Probate Court in accordance with statute and, therefore, there is no appellate jurisdiction over this matter. The procedure for initiating an appeal from the Probate Court to the Circuit Court is governed by S.C. Code Ann. § 62-1-308. When appealing to the Circuit Court, "the notice of intention to appeal to the Circuit Court must be filed in the office of the Circuit Court and in the office of the Probate Court and a copy served on all parties within ten days after receipt of written notice of the appealed from order . . . of the Probate Court. *Id.* (emphasis added). By its plain language, § 62-1-308 requires both the service of the notice of intention to appeal and the dual filing in the office of the Probate Court and the Circuit Court within ten days of the entry of a final order. The requirement of dual filing can also be found in Rule 74, SCRCP, but the timeframe for such filing is governed by statute.

This matter arises from the initial appeal of the July 13, 2011 Order of the Berkeley County Probate Court. R. _____. (Order of the Honorable Keith W. Kornahrens, filed July 13, 2011). Appellant's own Statement of the Case reveals that her appeal was untimely served and filed pursuant to the strict requirements of the statute. While Appellant made an initial attempt to serve and file a Notice of Appeal in the Probate Court within time limits, the Record indicates Appellant received written notice of the entry of the Probate Court Order on July 16, 2011 and subsequently served a Notice of Appeal from the Probate Court upon the Respondent Susan Sawadske on August 11, 2011. R. _____. (Notice of Appeal from Probate Court dated August 11, 2011). The Notice of Appeal and Proof of Service were not filed in the Court of Common Pleas until August 24, 2011, together with the requisite filing fee. R. _____. (Proof of Service, dated August 11, 2011); (Receipt of the Honorable Mary P. Brown, dated August 24, 2011). Pursuant to the mandatory language of the applicable statute, the deadline for filing and serving the notice of intention to appeal in both the Probate Court and Circuit Court was July 27, 2011. Appellant's service and filing occurred twenty-eight days after the ten-day period mandated by statute. Even the timeframe between service of the Notice of Appeal and its actual filing with the Circuit Court exceeds the ten day statutory period.

Because the appeal was not perfected through timely filing of the Notice in both courts as required by statute, the Circuit Court never acquired appellate jurisdiction. *State v. Brown*, 358 S.C. 382, 596 S.E.2d 39 (2004) (holding the failure to comply with procedural requirements for an appeal divests a court of appellate jurisdiction). Because the Circuit Court never acquired appellate jurisdiction, the appeal should have been dismissed from its outset in both the Circuit Court and the Court of Appeals, and the

findings of the trial court must remain the law of the case as if the same were never appealed. See *Allison v. W.L. Gore & Associates*, 394 S.C. 185, 714 S.E.2d 514 (2011); *ML-Lee Acquisition Fund, L.P. v. DeLoitte & Touche*, 327 S.C. 238, 489 S.E.2d 470 (1997) (stating that an unappealed ruling is the law of the case). “It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling. Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. The unchallenged ruling, right or wrong, is the law of the case and requires affirmance.” *First Union Nat. Bank of SC v. Soden*, 333 S.C. 554, 511 SE 2d 372 (Ct. App. 1998) (citing *Lindsay v. Lindsay*, 328 S.C. 329, 491 S.E.2d 583 (Ct. App. 1997), *cert. denied* (June 18, 1998) (internal citations omitted)). Upon the Appellant failing to timely file her Notice of Appeal in the Circuit Court, the Order of the trial court became incapable of challenge and is now the law of the case—right or wrong—and this matter must be dismissed for the lack of appellate jurisdiction.

2. The Appeal Must be Dismissed As to Appellant’s Action to Set Aside a Deed and for Disgorgement of Sales Proceeds Because the Probate Court Lacked Subject Matter Jurisdiction On the Claims.

The Probate Court lacked subject matter jurisdiction with regard to Appellant’s action to set aside a deed and to disgorge sales proceeds, and therefore the Appellate Court cannot acquire jurisdiction. The Probate Court has exclusive original jurisdiction over all subject matter related to estates of decedents, including the contest of wills, construction of wills, and determinations of heirs and successors of decedents and estates of protected persons. S.C. Code Ann. § 62-1-302(a)(1). Appellant’s action seeks to set aside a deed involving an *inter vivos* transfer of real property from the Decedent to the Respondent in 1997 on the basis of undue influence and incapacity as well as the

disgorgement of sales proceeds from the sale of certain real property. R. _____ (Summons and Petition). However, Appellant's case on these matters was not brought by the Estate of Martha L. Schaffer or the Appellant as its Personal Representative, but by the Appellant in her individual capacity against the Respondent, individually. The Appellant's suit was filed approximately eight years following the close of the Decedent's Estate and the discharge of its Personal Representative, Mark David Schaffer. R. _____. (January 31, 2003 Termination of Appointment). While Appellant's action ostensibly seeks to set aside a deed and recover funds such that the real property and funds would ultimately devolve through the Decedent's Estate and inure to Appellant's benefit as a devisee, the issues are not jurisdictionally proper for the Probate Court under the case as pled.

In *Brown v. Butler*, 347 S.C. 259, 554 S.E.2d 431 (Ct. App. 2001), the widow of a decedent brought an action in the Court of Common Pleas to set aside the deed made by her estranged husband to his sister (Butler) in violation of the Statute of Elizabeth. The Master-in-Equity set aside the deed and Butler appealed, arguing *inter alia* that the Master's Order was void on the basis the Probate Court had exclusive jurisdiction to determine whether the property constituted an asset of the decedent's estate. The Court of Appeals noted the action (1) was not against the decedent but was against the decedent's sister, (2) was not to contest or construe a will, (3) was not to determine heirs or successors, and (4) was not to determine the estate of a protected person. *Id.*, 347 S.C. at 262. Rather, the action was "one to set aside a deed, and it is brought against one who is very much alive and litigating," and thus rejected Butler's argument that jurisdiction over such an issue belonged to the Probate Court. *Id.*, 347 S.C. at 263. The Court further held that the authority relied upon by Butler involved a case in which the property in

question actually formed a part of a decedent's estate, stating, "The case relied on by Butler . . . does not aid her. There, the property in question formed part of the decedent's estate. Here, Butler received legal title to the property as a result of an *inter vivos* conveyance and held title for several months before the transferor's death." *Id.* (internal citations omitted). *Howard v. Mutz*, 434 S.E.2d 254 (S.C. 1993) (holding because the estate asserted no interest in item of personal property, the issue of title to the item of personal property is not subject matter related to the estate of the decedent).

In the case at bar, the conveyance of real property to the Respondent occurred in 1997, nearly four years prior to the Decedent's death. In other words, as occurred in *Brown*, Respondent received title to the property as a result of an *inter vivos* conveyance and held title for a period of time before the transferor's death. The property in question in this case did not form a part of the Decedent's Estate at her death because the Decedent had parted with all interest in the property prior to death. *Howard v. Mutz*, 434 S.E.2d 254 (S.C. 1993) (holding because the estate asserted no interest in personal property, the issue of title to the personal property is not subject matter related to the estate of the decedent); *See Powell v. Green*, 281 S.C. 358, 315 S.E.2d 183 (Ct. App. 1984) (holding the grantor in an allegedly fraudulent conveyance is not a necessary party in an action to set aside the transfer because she was deemed to have parted with all interest in the subject property). The conclusion derived from *Howard*, *Powell*, and applicable rules procedure is that equitable causes of action in the Probate Court to set aside a deed and to recover funds would require such claims to be asserted on behalf of the grantor-Decedent/injured-Estate as the party to whom the claim for recovery belongs—by the Personal Representative—in order for the Decedent (i.e. her Estate) to become a necessary party to which Probate Court jurisdiction applies. S.C. Code Ann. §

62-3-703 (“Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in this State at his death has the same standing to sue and be sued in the courts of this State and the courts of any other jurisdiction as his decedent had immediately prior to death”). *See* Rule 17(a), SCRCP.

Appellant’s action is one at equity and involves a claim that if successful would result in the obvious necessity for the property to pass through the Decedent’s Estate. However, as pled by the Appellant and for the foregoing reasons, the action to set aside the deed and to recover funds simply does not fall within the statutory grant of subject matter jurisdiction for the Probate Court. *Cf. Shelley v. South Carolina Dep’t of Mental Health*, 283 S.C. 344, 322 S.E.2d 687 (Ct. App. 1984) (holding that, under the former probate code, the statutory grant of jurisdiction “in all matters testamentary and of administration” to probate courts does not embrace jurisdiction in an equitable action to dissolve a lien of a health-care provider for care given to a deceased). The appellate court cannot acquire jurisdiction of a cause if the court from which the appeal was taken lacked jurisdiction. *Howard*, 434 S.E.2d at 259 (citing *In re Estate of Krueger*, 235 Neb. 518, 455 N.W.2d 809 (1990)). Appellant’s appeal of these issues should be dismissed.

3. The Issue of a Default Judgment in Favor of Appellant is Not Preserved for Appellate Review.

Appellant raises the issue of whether the Probate Court erred by not granting Appellant a default judgment against the Respondent. Appellant failed to preserve the issue through appropriate post trial motions and did not raise the issue in her appeal to the Circuit Court. *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 311, 698 S.E.2d 773, 779 (2010) (holding, in order for an issue to be properly preserved for appeal, it must have been both raised to and ruled on by the trial court, and where the trial court's

order did not address appellant's argument and appellant did not bring the absence of this issue to the trial court's attention in a motion to alter or amend, the issue was not preserved). The Record is furthermore absent of any request or motion for the entrance of a default judgment as to any matter. The issue is not preserved for review and the appeal as to the issue should be denied.

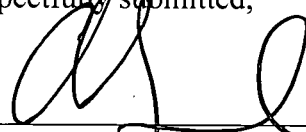
4. The Issue of an Award for Damages in Favor of Appellant is Not Preserved for Appellate Review.

Appellant raises the issue as to whether the Probate Court should have awarded damages to the Appellant for the value of personal property she alleges she did not receive from the Estate. Appellant failed to preserve the issue through appropriate post trial motions. *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 311, 698 S.E.2d 773, 779 (2010) (holding, in order for an issue to be properly preserved for appeal, it must have been both raised to and ruled on by the trial court, and where the trial court's order did not address appellant's argument and appellant did not bring the absence of this issue to the trial court's attention in a motion to alter or amend, the issue was not preserved). The trial court did not address the issue of damages and Appellant failed to bring the absence of the issue to the trial court's attention. The appeal as to an award of damages should be denied.

CONCLUSION

The Order of the Probate Court and the decision of the Circuit Court should be affirmed and the matter dismissed for the reasons set forth herein.

Respectfully submitted,



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November 14, 2013.

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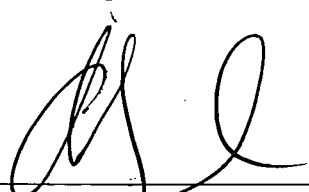
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of the Estate of Martha L. Schaffer.....Appellant,

v.

Susan Linda Schaffer Sawadske.....Respondent.

CERTIFICATE OF SERVICE

I certify that I served the Respondent's Initial Brief, on the Appellant, by depositing a copy in the United States Mail, postage prepaid, on November 14, 2013, addressed to Pro Se Appellant, Nancy Schaffer Turner, 311 Claude Phillips Road, Bennett, NC 27208.



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