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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
Court of Common Pleas

APPEAL FROM GREENVILLE COUNTY
Probate Court

Debra A. Faulkner, Probate Judge
Probate Case No. 2018-ES-23-02854

Appellate Case No. 2022-CP-23-01064

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,

v.

Shauna M. Waddell, individually and as Personal Representative of the Estate of Florence Petrak Mensch and John R. Mensch

Respondents.

ORDER AFFIRMING THE PROBATE COURT

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This matter came before the Court for a hearing on Thursday, October 16, 2025 pursuant to Appellant's appeal from the Probate Court's Order following trial in September of 2021. After the Circuit Court and South Carolina Court of Appeals affirmed the Probate Court's Order, Appellant petitioned the Supreme Court for a writ of certiorari, which they granted "only as to whether the appeal to circuit court was timely…." *Mensch v. Waddell*, Op. No. 2025-MO-037 (S.C.Sup.Ct. filed July 2, 2025). Based on the newly decided case *Swing v. Swing,* the Supreme Court ruled that even though Appellant's Rule 59(e) motion was defective under Rule 7(b)(1), it tolled the time to appeal and therefore Appellant's appeal was timely. *Swing v. Swing*, 445 S.C. 340, 351, 914 S.E.2d 158, 164 (2025). The case was then remanded to this court for consideration of the merits of the appeal. After hearing arguments from Counsel for both parties and a complete review of the file, the Order of the Probate Court is affirmed.

STANDARD OF REVIEW

In a probate appeal, the circuit court, court of appeals, or supreme court shall hear and determine the appeal according to the rules of law. S.C. Code Ann. § 62-1-308(i) (Supp. 2018). "[I]f the action is at law, the circuit court should uphold the findings of the probate court if there is any evidence to support them." *In re Estate of Weeks*, 329 S.C. 251, 260, 495 S.E.2d 454, 459 (Ct. App. 1997).

An action to declare a constructive trust is in equity, and a court may find facts in accordance with its own view of the evidence. *Carolina Park Assocs., LLC v. Marino*, 400 S.C. 1, 732 S.E.2d 876 (2012) (citing *Lollis v. Lollis*, 291 S.C. 525, 530, 354 S.E.2d 559, 561 (1987)).

"An award of attorneys' fees and costs is a discretionary matter not to be overturned absent abuse by the trial court." *Donahue v. Donahue*, 299 S.C. 353, 365, 384 S.E.2d 741, 748 (1989). "Similarly, the specific amount of attorneys' fees awarded pursuant to statute authorizing

reasonable attorneys' fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." *Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008).

I. The Probate Court's Order constituted a final order.

The Order of the Probate Court adequately addressed this issue and this Court adopts the findings of the Court of Appeals on this issue. The Court of Appeals held that:

> While the order allowed for adjustment of the amount of taxes Sterling owed based on a pending appeal to the Internal Revenue Service, it adjudicated and completely fixed the rights of the parties leaving nothing further for the probate court to do. *See Olson v. Fac. House of Carolina, Inc.*, 344 S.C. 194, 213, 544 S.E.2d 38, 48 (Ct. App. 2001) ("Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory; *but if it so completely fixes the rights of the parties that the court has nothing further to do in the action, then it is final.*" (quoting *Adickes v. Allison & Bratton,* 21 S.C. 245, 259 (1883) (emphasis added); *Watson v. Underwood*, 407 S.C. 443, 458-59, 756 S.E.2d 155, 163 (Ct. App. 2014) ("[A] decree or judgment that leaves in doubt whether the plaintiff will prevail is not final."); *Good v. Hartford Acc. & Indem. Co.*, 201 S.C. 32, 21 S.E.2d 209, 212 (1942) ("[I]t has been laid down that in substance the decision must show intrinsically and distinctly, and not inferentially, that the matters in the record have been determined in favor of one of the litigants, or that the rights of the parties in litigation have been adjudicated." (quoting 2 R.C.L. 32, Appeal and Error § 10)).

Mensch v. Waddell, Op. No. 2024-UP-384 (S.C.Ct.App. filed Nov. 13, 2024) (Howard Adv.Sh. No. 44).

The order of the probate court was final. Nothing further needs to be done by the probate court, and there is nothing the probate court could do that would change in any way what the IRS decides. The amount of damages owed by Appellant was fixed and determined, and any decision by the IRS may simply modify that figure.

Appellant could not have filed an appeal of an order that was not "final." Section 62-1-308 of the Probate Code states in pertinent part: "Except as provided in subsection (g), appeal from

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the probate court must be to the circuit court and are governed by the following rules: (a): A person interested in a **final order, sentence or decree of a probate court** and considering himself injured by it may appeal to the circuit court in the same county." S.C. Code Ann. §62-1-308 (emphasis added). The Supreme Court of South Carolina confirms that Section 62-1-308 codifies the final judgment rule in the case of *Fulmer v. Cain*. 380 S.C. 466, 469, 670 S.E.2d 652, 654 (2008). A final judgment is required before Appellant can appeal.

II. The Probate Court had subject matter jurisdiction to hear the causes of action in the case related to pre-death damages.

The Order of the Probate Court adequately addressed this issue and this Court adopts the findings of the Court of Appeals on this issue. The Court of Appeals held that:

> Finally, as to Sterling's argument the probate court lacked subject matter jurisdiction to hear the causes of action in the case related to pre-death damages, we affirm. Claims against an agent to whom authority is designated through a power of attorney are within the probate court's subject matter jurisdiction. *See* S.C. Code Ann. § 62-8-401 (Supp. 2018) ("The probate court has concurrent jurisdiction with the circuit courts of this State over all subject matter related to the creation, exercise, construction, and termination of powers of attorney governed by the provisions of this article."); S.C. Code Ann. § 62-8-116(a)(4)(5)(6) (2022) ("The following persons may petition a court to construe a power of attorney or review the agent's conduct, and grant appropriate relief: . . . (4) the principal's spouse, parent, or adult descendant; (5) an individual who would qualify as a presumptive heir of the principal; [and] (6) a person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death . . . ."); S.C. Code Ann. § 62-8-117 (2022) ("An agent that violates this article is liable to the principal or the principal's successors in interest for the amount required to: (1) restore the value of the principal's property to what it would have been had the violation not occurred; and (2) reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid on the agent's behalf.").

Mensch v. Waddell, Op. No. 2024-UP-384 (S.C.Ct.App. filed Nov. 13, 2024) (Howard Adv.Sh. No. 44).

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After Mr. Mensch appealed the final order, he then took the position that the circuit court had no appellate jurisdiction because there was no "final order" from the probate court. Nowhere at the trial court level did Mr. Mensch ever challenge the jurisdiction of the probate court prior to the issuance of the final order dated January 26, 2022. While it is true that subject matter jurisdiction may be raised at any time, even on appeal, it is also true that a party may not invoke the provisions of Rule 60(b) where it is clear the issue could have been litigated at trial. Appellant may not make an argument for lack of subject matter jurisdiction for the first time to the circuit court because he failed to make that argument to the probate court. "It is axiomatic that an issue cannot be raised for the first time on appeal." *State v. Haygood*, 409 S.C. 420, 762 S.E.2d 69, 74 (Ct. App. 2014) (quoting *State v. Cope*, 405 S.C. 317, 338-339, 748 S.E.2d 194, 205 (2013)). "For an issue to be properly preserved it has to be raised and ruled on by the trial court." *State v. Jennings*, 394 S.C. 473, 481, 716 S.E.2d 91, 95 (2011). "An argument advanced on appeal but not raised and ruled on below is not preserved." *State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005).

III. The Probate Court properly imposed a constructive trust in this case.

Appellant raises the issue of constructive trust for the first time in his Initial Brief. (App. Brief p. 11). Appellant could have made an argument regarding the impropriety of a constructive trust at trial or in his written motion to reconsider, but he failed to do so, and therefore that argument has been waived. *See Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481 (Ct. App. 1990). "It is axiomatic that an issue cannot be raised for the first time on appeal." *State v. Haygood*, 409 S.C. 420, 762 S.E.2d 69, 74 (Ct. App. 2014) (quoting *State v. Cope*, 405 S.C. 317, 338-339, 748 S.E.2d 194, 205 (2013)). "For an issue to be properly preserved it has to be raised and ruled on by the trial court." *State v. Jennings*, 394 S.C. 473, 481, 716 S.E.2d 91, 95 (2011). "An

argument advanced on appeal but not raised and ruled on below is not preserved." *State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005).

Even if Appellant had properly preserved the issue of constructive trust, the imposition of the constructive trust was proper and the Probate Court appropriately applied the law.

After the first two days of trial, Counsel for Respondents sent out updated subpoenas for bank records of Appellant[1]. Respondents discovered that Appellant had liquidated his T. Rowe Price account of $267,105.00 between April 1, 2021 and June 30, 2021. After counsel for Respondents filed a motion for preliminary injunction, Counsel for Appellant disclosed that the funds were in their IOLTA account. With the knowledge that Appellant's funds were in the IOLTA account of Truluck Thomason, Judge Faulkner issued the January 26, 2022 final order imposing a constructive trust over all of Appellant's non-exempt property "of whatever type, **wherever located, and however titled.** This remedy is appropriate as a result of his deceitful, devious, willful, wanton and careless actions set forth above." (R. p. 17 (emphasis added)).

As far as the propriety of a constructive trust, this is exactly the scenario for which constructive trusts were created. "A constructive trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by the one holding legal title." *Lollis v. Lollis*, 291 S.C. 525, 529, 354 S.E.2d 559, 561 (1987) (internal citations omitted). (R. p. 17). "As was held in the case of *All v. Prillaman*, 200 S.C. 279, 20 S.E.2d 741, a constructive trust …. is resorted to by equity to vindicate right and justice or frustrate fraud." *Dominick v. Rhodes*, 202 S.C. 139, 148, 24 S.E.2d 168, 172 (1943) (internal citations omitted). "A constructive trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by him who holds the legal title, as against another, provided some

[1] Appellant's records through December 2020 were already obtained in the case, and the subpoena was to update the records from January 2021 through present.

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confidential relation exists between the two, and provided the raising of a trust is necessary to prevent a failure of justice. So, as has been said, the form and varieties of constructive trusts are practically without limit, such trusts being raised, broadly speaking, whenever necessary to prevent injustice." *Id*. at 149, 172-173 (internal citations omitted).

In this case, Appellant was power of attorney for Florence Mensch and then personal representative for the Estate of Florence Mensch and abused the fiduciary relationship to completely drain her assets. (R. p. 17). "He engaged in repeated action of civil theft for 8 years, depleting his mother's property without any regard to what her future needs might be, without regard to her estate plan, without regard to his siblings, without regard to tax law, probate law, prudent investment principles, etc." *Id*. The constructive trust was necessary "as a result of his deceitful, devious, willful, wanton, and careless actions.." *Id*. A constructive trust arises when fraud, bad faith, abuse of confidence or violation of a fiduciary duty occurs which gives rise to an obligation in equity to make restitution. In this case, Appellant acted fraudulently, in bad faith, in abuse of confidence and in violation of the fiduciary duty imposed on him as power of attorney and therefore must, in equity, make restitution to his mother's estate.

"A constructive trust …can arise from a breach of a fiduciary duty giving rise to the obligation in equity to make *restitution*." *See Verenes v. Alvanos*, 387 S.C. 11, 17 n.7, 690 S.E.2d 771, 774 n.7 (2010) (emphasis added). Appellant makes an unsupported argument that the constructive trust must be traceable to misappropriated property. Appellant attempts to differentiate his case by claiming that the money he stole from his mother and then spent, cannot now be subject to a constructive trust because he spent it. "It is an attempt at a technical avoidance which rests upon an asserted public policy or illegality of some kind. The courts have refused to accept this ruse because to do so would be to compound the defendant's wrong. In those instances,

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as here, the defendant is really attempting to assert, not a public policy but a "private policy" to insulate the defendant from his own wrong. Equity does not permit a defendant to defeat justice by such a ploy." *Chapman v. Citizens and Souther Nat'l. Bank of South Carolina*, 302 S.C. 469, 395 S.E.2d 446 (Ct. App. 1990).

As an appellate court, this Court defers to the trial court's award. "…[T]he discretion that must be accorded to the [special referee] compels us to affirm the award as appropriate recompense for misconduct necessitating the imposition of a constructive trust." *Hale v. Finn*, 388 S.C. 79, 694 S.E.2d 51 (Ct. App. 2010).

IV. The Probate Court's award of attorneys' fees was proper.

Appellant raises the issue of attorney's fees for the first time in his Appellant Brief. (Appellant's Brief p. 12). Appellant could have made an argument regarding the attorney's fees award at trial or in his written motion to reconsider, but he failed to do so, and therefore that argument has been waived. *See Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481 (Ct. App. 1990). "It is axiomatic that an issue cannot be raised for the first time on appeal." *State v. Haygood*, 409 S.C. 420, 762 S.E.2d 69, 74 (Ct. App. 2014) (quoting *State v. Cope*, 405 S.C. 317, 338-339, 748 S.E.2d 194, 205 (2013)). "For an issue to be properly preserved it has to be raised and ruled on by the trial court." *State v. Jennings*, 394 S.C. 473, 481, 716 S.E.2d 91, 95 (2011). "An argument advanced on appeal but not raised and ruled on below is not preserved." *State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005).

Even if Appellant had properly preserved the issue of the award of attorneys fees, the award of attorneys' fees was proper and the Probate Court appropriately applied the law.

"The decision to award or deny attorneys' fees under a state statute will not be disturbed on appeal absent an abuse of discretion….Similarly, the specific amount of attorneys' fees awarded

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pursuant to a statute authorizing reasonable attorneys' fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." *Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008).

Respondents were awarded attorney's fees and costs in the total amount of $127,572.00 pursuant to § 62-1-111 of the South Carolina Probate Code which states, "in a formal proceeding, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the estate that is the subject of the controversy." (R. p. 16). Judge Faulkner reduced the requested fees by $6,380.00 for time spent on engagement letters, subpoenas and the Affidavit of Fees. *Id*. Judge Faulkner's order specifically states that she reviewed all elements under the case of *Glasscock v. Glasscock*, and finds such fees to be reasonable. *Id*. Judge Faulkner listed the factors, specifically stated that she considered them, and even reduced the fees to the amount she considered reasonable. *Id.*

Appellant cites no legal authority for his contention that "[e]vidence for each of the factors must be specific." "South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." *Id*. (quoting *Glasscock, Inc. v. U.S. Fid. & Guar. Co.,* 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001)). Rather than citing applicable legal authority, Appellant refers to a case where only a conclusory affidavit of attorney's fees was not upheld on appeal. The Amended Affidavit of Attorney's Fees and Costs filed by Counsel for Respondents was in no way conclusory as Appellant alleges. The Amended Affidavit was seven pages long. (R. p. 116-122). In addition to the affidavit, Counsel for Respondents included all of their billing entries, expense entries, and subtracted amounts previously awarded by the Probate Court. *Id*. The affidavit was not conclusory

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like the cases cited by Appellant. Additionally, Judge Faulkner made thirty-four (34) findings of fact in her order spanning five (5) of the twelve (12) pages. (R. pp. 6-11).

As to the factor of contingency of compensation, Judge Faulkner specifically listed it as a factor that was considered in her Order. (R. p. 16). In 2021, the Court of Appeals decided the case of *Jordan v. Postell* and considered the "contingency of compensation" factor by stating "neither party had entered into contingency fee arrangements with their respective counsel." 434 S.C. 510, 529, 864 S.E.2d 558, 568 (Ct. App. 2021)

Judge Faulkner was familiar with the nature, extent, and difficulty of the case as the presiding trial judge. Judge Faulkner considered all of the factors including the time devoted to the case, the professional standing of counsel, and the beneficial results obtained and awarded attorneys fees to Respondents. (R. p. 16). The Probate Court's Order is affirmed.

IT IS SO ORDERED.

[Electronic Signature of Judge Gravely to follow]

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Greenville Common Pleas

Case Caption: Sterling Raymond Mensch VS Shauna M Waddell , defendant, et al

Case Number: 2022CP2301064

Type: Order/Dismissal

So Ordered

s/ Honorable Perry H. Gravely, #2755