STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS
IN THE MATTER OF: Estate of James D. Rucker, Jr.,	)	Case No. 2013-CP-46-01569
IN RE: James D. Rucker, Jr. Trust, Marian Shamu, James D. Rucker, Sr. Endowed Scholarship Fund, Howard University School of Dentistry, Mt. Prospect Baptist Church, Frances Julie Buchanan, and Benedict College, Respondents, Tanzella Gaither, Petitioner.	)	**ORDER AFFIRMING PROBATE COURT**

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YORK COUNTY, SC

This matter came before me on October 17, 2013, upon an appeal of two orders entered in the above-captioned proceeding in the York County Probate Court. Representing the Petitioner was Dwight C. Moore, and representing Respondent Marian Shamu ("Respondent") was Thomas E. Lydon.

This appeal arises out of a will contest filed by Petitioner in connection with the Estate of James D. Rucker, Jr. ("Dr. Rucker"). The initial will that was presented for probate was dated October 16, 2009 ("2009 Will"), and was filed for probate on November 11, 2011. Thereafter, on June 13, 2012, Petitioner filed in the Probate Court a Petition to Nullify Will, seeking to have a second will dated June 20, 2011 ("2011 Will") probated. Petitioner is a named beneficiary in the 2011 Will, but is not a beneficiary under the 2009 Will.

In response to the Petition, Respondent filed an Amended Answer, Counterclaim, and Crossclaim, asserting that neither the 2009 Will, nor the 2011 Will, was properly signed, witnessed, and notarized. Respondent is the sister of Dr. Rucker, and is named as a beneficiary in both wills. It is undisputed that Respondent is the only intestate heir of Dr. Rucker. None of the other beneficiaries under the Wills filed a response to the Petition.

This entire matter came before the Probate Court for a hearing on the merits. The initial hearing was held on October 15, 2012, and continued to January 23, 2013. It was bifurcated due to the length of time taken for the testimony of the lay witnesses at the October hearing. The

proceedings were continued to January, 2013, and resumed for the testimony of experts.

The central issue before the Probate Court was the genuineness of the signatures of Dr. Rucker on both wills. On February 26, 2013, the Probate Judge filed an Order ("February Order"), finding that the purported signatures of Dr. Rucker on both wills were not his. Thereafter, on March 11, 2013, Petitioner filed a motion to alter or amend. After a hearing on the motion, the Probate Judge filed an Amended Order on May 3, 2013 ("May Order"), which denied the motion to alter or amend, but clarified and expanded on the February Order.

SCOPE OF REVIEW

When an appeal is made to the circuit court from an order of the probate court, the circuit court must determine ". . . the appeal according to the rules of law. The hearing must be strictly on appeal and no new evidence shall be presented." *See* S.C. Code Ann. § 62-1-308(d) (1976, as amended). The term "according to the rules of law," as used in § 62-1-308(d), is interpreted to mean 'according to the rules regulating appeals.' *Eagles v. South Carolina Nat. Bank*, 392 S.E.2d 187, 301 S.C. 402 (Ct. App. 1990).

An action to contest a will is an action at law. *In re Estate of Cumbee*, 333 S.C. 664, 511 S.E.2d 390 (Ct. App.1999). In a law case tried without a jury, questions regarding the credibility and the weight of evidence are exclusively for the trial judge, and 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. *Golini v. Bolton*, 326 S.C. 333, 482 S.E.2d 784 (Ct. App.1997).

ISSUES ON APPEAL

Petitioner's Grounds of Appeal, and the arguments made by Petitioner at the hearing on the appeal, present four grounds for appeal:

1. The Probate Court erred in finding that Petitioner failed to establish a prima facie case of due execution of the 2011 Will;

2. The Probate Court erred in applying the burden of proof;

3. The Probate Court erred in rejecting the testimony of Petitioner's fact witnesses in favor of Respondent's expert; and,

4. The Probate Court erred in its ruling, because the 2011 Will would be valid if it was signed by someone other than Dr. Rucker in his presence and at his direction.

DISCUSSION

I. Failure to Establish a *Prima Facie* Case.

Petitioner argues that the Orders of the Probate Court should be reversed because the

Court erroneously ruled that Petitioner had failed to present a *prima facie* case of due execution of the will." However, the Court made no such ruling. The orders, and the record of the proceedings in the Probate Court, establish that the decision was based on a review and evaluation of all of the testimony presented at both hearings. The May Order specifically states that the decision was based on ". . . the testimony of the Petitioner's lay witnesses and both parties' expert witnesses . . . ."

The proceedings in the Probate Court also establish that the Court did not conclude that Petitioner failed to make out a *prima facie* case. If there was such a determination, the Petition would have been dismissed, and Respondent would not have been required to present evidence to rebut the due execution of the will.

In summary, Petitioner's argument that the Probate Court erred in finding that Petitioner did not establish a *prima facie* case is without merit.

II. **Burden of Proof.**

Petitioner contends that the Probate Court erred by placing the burden of proof as to both wills upon Petitioner. In this regard, Petitioner contends that the 2011 Will was a self-proving will, and that she should not have been required to present any additional evidence to prove due execution of the 2011 Will.

Clearly, the 2011 Will meets the requirements of § 62-2-503 to be a self-proving will. Thus, Petitioner was not required to present any additional evidence to establish due execution of the 2011 Will. Petitioner could have required Respondent to present rebuttal evidence prior to Petitioner presenting any evidence. Instead, without objection, Petitioner presented the testimony of her fact witnesses concerning execution of the 2011 Will before Respondent presented any evidence. The record establishes that after Petitioner presented her fact witnesses, Respondent testified and also presented the testimony of her expert at the January hearing. After Respondent's expert's testimony, Petitioner then presented the testimony of her expert witness.

Issues regarding the mode of trial must be raised in the trial court at the first opportunity, and the order of the trial judge is immediately appealable. *Pelfrey v. Bank of Greer*, 270 S.C. 691, 244 S.E.2d 315 (1978). The failure to raise timely objections to the mode of trial affects a waiver of the right to appeal this issue. *Foggie v. CSX Transportation, Inc.*, 313 S.C. 98, 431 S.E.2d 587 (1993). Because Petitioner did not object to presenting her evidence prior to Respondent's rebuttal evidence, this issue is not preserved for appeal. In any event, from a full review of the record in the Probate Court, it is clear that Petitioner would have had to present her

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evidence anyway. Respondent's evidence was sufficient to defeat the rebuttable presumption created by the statute, and require presentation of evidence by Petitioner.

The record establishes that both parties were given ample opportunity to present all of their evidence in the Probate Court proceedings, and that all of the evidence presented was considered by the Court in making its decision. Thus, Petitioner was not prejudiced by the order in which evidence was presented. Any error in that regard is harmless, and is not a basis for reversal the Probate Court. *See Judy v. Judy,* 384 S.C. 634, 682 S.E.2d 634 (Ct.App. 2009) ("Error is harmless where it could not reasonably have affected the result of the trial").

Petitioner also argues that the Probate Court erred in applying the burden of proof in its Orders. The basis for this argument is that the February Order stated that "I find there is clear and convincing evidence that the purported signatures of Dr. Rucker on both the 2009 Will and the 2011 Will are not genuine." Thereafter, the May Order stated that Petitioner had failed to carry the burden of proof "by a preponderance of the evidence."

The burden of proof in a will contest is the preponderance of the evidence. *Golini v. Bolton*, 326 S.C. 333, 482 S.E.2d 784 (Ct. App. 1997). Although the Probate Judge in the February Order stated that there was clear and convincing evidence that the signatures of Dr. Rucker on both wills were not genuine, any error regarding the burden of proof was corrected in the May Order in which the Probate Judge correctly applied the preponderance of the evidence standard. Thus, there is no basis for reversal of the Probate Court on this ground.

III. <u>Reliance on Testimony of Respondent's Expert Witness.</u>

Petitioner asserts that the Probate Court erred by rejecting the testimony of the six lay witnesses presented by Petitioner in favor of Respondent's single expert witness. However, it is the general rule in this state that the finder of fact

> . . . may believe one witness as against several witnesses or several witnesses as against one witness. [It] may believe a part of the testimony of a witness and reject the remaining part of the testimony of that same witness. [It] may believe the testimony of a witness in its entirety or . . . may reject the testimony of a witness in its entirety. *State v. Rayfield*, 369 S.C. 106, 116-117, 631 S.E.2d 244, 250 (2006); *see also, State v. Bamberg*, 270 S.C. 77, 240 S.E.2d 639 (1977).

The Probate Court gave ample explanation for acceptance of Respondent's expert's testimony over that of Petitioner's witnesses. The May Order details significant discrepancies and inconsistencies between the testimony of the subscribing witnesses. Further, the record contains other testimony by Petitioner's fact witnesses that is inconsistent and contradictory. Given the discrepancies between the subscribing witnesses, Petitioner's assertion that their

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testimony was not impeached is not supported by the record.

In a law case tried by a probate judge, questions regarding the credibility and the weight of the evidence are exclusively for the trial judge. *Golini, supra.* Therefore, the argument that the trial judge erred in deciding the case based solely on the testimony of a handwriting expert is not supported by the record, or by the applicable law.

IV. Will Valid if Signed in Presence of Testator and at his Direction.

Petitioner's final argument springs from the Probate Court's determination that Dr. Rucker did not sign the 2011 Will. Petitioner asserts that even if Dr. Rucker did not sign the 2011 Will, someone else could have signed the will for him. Petitioner is correct that a testator can authorize and direct some other person to sign his name. S.C. Code Ann. § 62-2-502 (1976, as amended). However, there is no evidence in the record to indicate that the process dictated by § 62-2-502 was either intended, or followed. Petitioner's entire case is premised on the claim that Dr. Rucker, not an authorized surrogate, actually signed the 2011 Will.

There is no evidence in the record that either of the wills was signed by someone other than Dr. Rucker in his presence and at his direction, and this issue was not addressed in the February Order. Nor was it raised in Petitioner's motion to alter or amend, or addressed in the May Order. Since the Probate Court never addressed this issue, and Petitioner did not file a Rule 59(e) motion, this issue is not preserved for review. *See Duncan v. CRS Sirrine Eng'rs, Inc.*, 337 S.C. 537, 524 S.E.2d 115 (Ct.App.1999). An issue cannot be raised for the first time on appeal. *Butler v. Town of Edgefield*, 328 S.C. 238, 493 S.E.2d 838 (1997) (issue not raised to the Election Commission cannot be raised for the first time to the circuit court for review); *Rodney v. Michelin Tire Corp.*, 320 S.C. 515, 466 S.E.2d 357 (1996) (arguments not raised to Workers' Compensation Commission are not preserved for appeal).

CONCLUSION

Based on the foregoing discussion, and having considered the entire record, the briefs of the parties, and the arguments of counsel, I find and conclude that the orders of the Probate Court must be affirmed.

AND IT IS SO ORDERED.

October 28, 2013

S. Jackson Kimball
Special Circuit Court Judge
York County

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