

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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MAR 30 2016
SC Court of Appeals

APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS
Ellis B. Drew, Master in Equity

Case No. 2014-CP-37-00143
Appellate Case No.: 2015-001860

Polly Thompson, Respondent,
v.
Cathy Swicegood, Appellant.

REPLY

J. Falkner Wilkes (SC Bar #12893)
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292
(864) 271-6035 (facsimile)
Counsel for Appellant

March 23, 2016.

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Statutes and Rules

S.C. Code 20-7-420	
S.C. Code Section 63-3-530(A)(2)	
Rule 3, SCRCP	

Other Authority

James F. Flanagan, South Carolina Civil Procedure 7 (2d ed.1996))	
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STATEMENT OF ISSUES ON REPLY

1. Did family court exclusive jurisdiction vest prior to circuit court jurisdiction?
2. Can circuit court jurisdiction attach prior to the commencement of the action pursuant to Rule 3, SCRCP?
3. Can the circuit court obtain concurrent jurisdiction once the family court action has been filed and served?
4. Is the circuit court order void for lack of jurisdiction?
5. Is Respondent's Issue III property preserved for review or is it either unpreserved or the law of the case?

STATEMENT OF FACTS IN REPLY

On March 11, 2016 the Respondent filed a petition to partition the property at issue in the circuit court. (R. p. ____). On March 13, 2016, the Appellant filed a summons and complaint in the family court alleging a common law marriage and seeking, among other things, separate support and maintenance and equitable division of marital property. (R. p. ____). On March 17, 2016 the Appellant's family court summons and complaint was served on the Respondent. (R. p. ____). On or after March 19, 2016, the Respondent's circuit court petition for partition was served on the Appellant. (R. p. ____).

ARGUMENT IN REPLY

I. THE FAMILY COURT WAS FIRST TO VEST WITH JURISDICTION AND THEREFORE HAD EXCLUSIVE JURISDICTION OVER THE PROPERTY AT ISSUE.

Standard of Review

The question of subject matter jurisdiction is a question of law for the court. Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009). This Court is free to decide questions of law with no deference to the trial court. Hammer v. Hammer, 399 S.C. 100, 730 S.E.2d 874 (S.C. App., 2012). "[I]ssues relating to subject matter jurisdiction may be raised at any time ... and should be taken notice of by this court on our own motion." Bunkum v. Manor Properties, 321 S.C. 95, 99-100, 467 S.E.2d 758, 761 (Ct.App.1996).

Discussion of the Issue

The family court obtained jurisdiction on March 17, 2016. Although the Respondent filed her partition action in the circuit court on March 11, 2016, she did not serve the petition until after the family court action had been both *filed and served*. To vest jurisdiction in the circuit court, to the exclusion of the family court, the circuit court jurisdiction must precede that of the family court. If the family court's jurisdiction attaches first, then the family court has exclusive

jurisdiction. *See* S.C. Code 63-3-530 (A)(2).

The circuit court does not obtain jurisdiction until proper service of the initial pleadings. "Under Rule 3(a), SCRCP, a civil action is commenced by the filing and service of a summons and complaint." *Louden v. Moragne*, 327 S.C. 465, 468, 486 S.E.2d 525, 526 (Ct.App.1997). "Service of the summons brings the defendant within the court's jurisdiction and gives the court the power to render a personal judgment against the person served." *Id.* (*citing James F. Flanagan, South Carolina Civil Procedure 7* (2d ed.1996)). The circuit court jurisdiction therefore could not attach prior to service of the petition for partition, which occurred on March 17, 2016. By that time, the family court's jurisdiction had already attached by way of both filing and service of the Appellant's summons and complaint seeking separate maintenance and equitable division. Once jurisdiction attaches, the family court's jurisdiction is exclusive. *See* S.C. Code Section 63-3-530 (A)(2).

The Respondent focuses only on the date of filing of the two actions. Filing alone does not commence an action under Rule 3, SCRCP. Respondent's argument overlooks the fact that service of the circuit court petition occurred after *filing and service* of the family court action. As a result, Gilley does not apply to bar the family court jurisdiction in this case. Respondent's reliance on Gilley is

therefore misplaced. Gilley provides that: "If jurisdiction once attaches *to the person and the subject matter* of the litigation the subsequent happening of events will not ordinarily operate to oust the jurisdiction already attached." Gilley quoting Gardner, *emphasis added*. In Gilley, the circuit court obtained jurisdiction before the family court. In the present case it did not. As the family court obtained jurisdiction first, the property in question became subject to equitable division by the family court. Under Gilley, the subsequent service of the circuit court petition would not oust the family court's jurisdiction. Since the family court's jurisdiction is exclusive, the circuit court could not thereafter obtain jurisdiction, as the subsequent exercise of concurrent jurisdiction would directly conflict with the family court's specific grant of exclusive jurisdiction under S.C. Code 20-7-420.

Because the circuit court lacked subject matter jurisdiction it is void *ab initio*. See DeWitt v. S.C. Dept. of Highways & Public Transp., 274 S.C. 184, 262 S.E.2d 28 (1980) (all proceedings of a court lacking subject matter jurisdiction are a nullity, and its judgment has no effect). Lack of subject matter jurisdiction may not be waived, even by consent of the parties. Anderson v. Anderson, 299 S.C. 110, 382 S.E.2d 897 (1989). [S]ubject matter jurisdiction may not be waived and the issue may be raised at any stage of the proceeding. Eaddy v. Eaddy, 324

S.E.2d 70, 283 S.C. 582 (S.C., 1984). "[I]ssues relating to subject matter jurisdiction may be raised at any time ... and should be taken notice of by this court on our own motion." Bunkum v. Manor Properties, 321 S.C. 95, 99-100, 467 S.E.2d 758, 761 (Ct.App.1996). Brown v. Greenwood School Dist. 50 Bd., 344 S.C. 522, 544 S.E.2d 642 (S.C. App., 2001). Regardless of the outcome of the family court action on the ultimate issue of the existence of a marriage, the circuit court did not have jurisdiction to enter an order in this case. The order of partition by the circuit court should therefore be declared null and void.

II. THE RESPONDENT'S ISSUE III AS TO A RULE 1006 OBJECTION IS NOT PROPERLY BEFORE THIS COURT.

The Respondent did not appeal from the decision of the lower court in allowing certain evidence relating to the Appellant's work performed at the subject properties. That issue is therefore not preserved for review. Furthermore, a family court's ruling on the admission or exclusion of evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law.

Judy v. Judy, 384 S.C. 634, 641, 682 S.E.2d 836, 839 (Ct.App.2009).

III. THE RESPONDENT HAS FAILED TO ESTABLISH OUSTER AS AN ADDITIONAL SUSTAINING GROUND TO AFFIRM.

The Master made no findings supporting a cause of action for ouster, nor did he award any damages for ouster. "The acts relied upon to establish an ouster

must be of an unequivocal nature, and so distinctly hostile to the rights of the other cotenants that the intention to disseize is clear and unmistakable. Freeman v. Freeman, 323 S.C. 95, 44 S.E.2d 467 (Ct. App. 1996). The Respondent admits that when the parties ended their relationship they agreed that the Appellant could stay at the Lake Hartwell home. (Resp. Br. p. 13). The Respondent does not allege in her brief, nor does the record show, that the agreement that the Appellant could stay at the Lake Hartwell home came with the condition that the Respondent would have access to enter the home without the Appellant's consent while the Appellant was living there. In light of the party's agreement that the Appellant could reside there, the record fails to establish ouster, or damages relating to ouster.

CONCLUSION

The decision of the circuit court should be voided, or in the alternative, reversed and remanded for further findings as to the Appellant's direct and indirect contributions to the value of the property at issue.

Respectfully submitted,



J. Falkner Wilkes, 12893
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292
Counsel for Appellant

March 27, 2016.

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Polly Thompson, Respondent,

v.


Cathy Swicegood, Appellant.

CERTIFICATE OF SERVICE

I certify that on March 27, 2016, I served the Appellant's Initial Reply Brief and Amended Designation of Matter on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, addressed to counsel of record and others as indicated below:

Ms. Margaret A. Chamberlain
Chamberlain Law Firm, LLC
600 Pettigru Street
Greenville, SC 29601
Attorney for Respondent

Respectfully submitted,


J. Falkner Wilkes (SC Bar #12893)
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292
Counsel for Appellant

March 27, 2016.

J. FALKNER WILKES

Attorney at Law

114 Whitsett Street
Greenville, South Carolina 29601

Telephone: (864) 282-1292
Facsimile: (864) 271-6035

March 27, 2016

Jenny Abbott Kitchings
Clerk of the Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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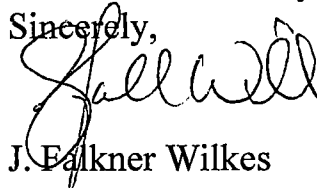
Re: Polly Thompson v. Cathy Swicegood, 2014-CP-37-00143
Appellate Case No. 2015-001860

Dear Ms. Kitchings,

Enclosed please find the Appellant's Initial Reply Brief and Amended Designation of Matter. Also, I have previously filed a Motion to Stay the Appeal. That motion is still pending. It is my understanding that the time remains stayed in the case as a result of that motion despite the Respondent's filing of her initial brief or my filing of an initial reply. I confirmed this with your office last week. My filing of an initial reply brief is not intended to waive or withdraw my motion to stay. The initial reply brief will address issues in the motion to stay as well as the corresponding issues in the Respondent's Memorandum.

The Appellant's motion to stay was based on the existence of another appeal involving the same parties. The two appeals are somewhat intertwined. This Court remanded the other case back to the family court (Appellate Case No.: 2014-001109). My motion to stay was made in anticipation of such an event. It is my understanding that the attorney general has or will petition from that ruling. The other appeal therefore appears to remain in the appellate process. As a result, I believe that the Court will still need to address the motion to stay.

Sincerely,



J. Falkner Wilkes

c:

Ms. Margaret A. Chamberlain
Chamberlain Law Firm, LLC
Chamberlain Law Firm, LLC
600 Pettigru Street
Greenville, SC 29601
Attorney for Respondent

