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DEC 17 2018

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appellate Case No.: 2018-002112

APPEAL FROM LEXINGTON COUNTY COURT OF COMMON PLEAS
Civil Action No. 2018-CP-32-00315
The Honorable Walton J. McCleod, IV, Circuit Court Judge

In Re: The Estate of Leroy Fulmer

Mattie Lou FulmerRespondent,

v.

Elizabeth S. Gainey, as Personal Representative;
Elizabeth S. Gainey, individually; and Dennis C. Gainey Defendants.

Of whom, Elizabeth S. Gainey as Personal Representative is the Appellant.

**RESPONDENT’S REPLY TO APPELLANT’S RETURN TO THE MOTION TO
DISMISS THE APPEAL**

Respondent Mattie Lou Fulmer (“Respondent”), by and through her undersigned counsel, replies to the Return to the Motion to Dismiss the Appeal filed by Elizabeth S. Gainey, as Personal Representative of the Estate of Leroy Fulmer filed on December 14, 2018. Ms. Gainey appeals the Circuit Court’s removal of Ms. Gainey as personal representative of the Estate of Leroy Fulmer.¹ Respondent filed a Motion to Dismiss Ms. Gainey’s appeal as untimely due to order’s temporary, interlocutory status. Ms. Gainey responded arguing that her removal as personal representative is not temporary. Ms.

¹ Ms. Gainey, in her Response, made it clear that she does not appeal the appointment of Carlos Gibbons as Special Administrator.

Gainey also, in her Return, made it clear that she does not appeal the appointment of Carlos Gibbons as Special Administrator.

The Order is Not an Immediately Appealable Interlocutory Order.

The Order is a temporary order rather than a final order, and for this reason the appeal should be dismissed. In order to determine whether an order is a final order, the Supreme Court has found that if there is some further act that must be done by the court prior to a determination of the rights of the parties, then the order is not immediately appealable. *Mid-State Distrib., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777 (1993). Ms. Gainey's position ignores the fact that a special administrator was appointed rather than a replacement personal representative. Had another person been appointed as personal representative to replace Ms. Gainey, her argument that this is a final order might have more merit. Rather, nothing in the Order bars Ms. Gainey from serving as personal representative at some future date in the probate of Mr. Fulmer's Estate, although there are some questions raised regarding Ms. Gainey's behavior as personal representative. Rather, the Order appoints Carlos Gibbons, a well-respected probate and estate attorney, to serve as special administrator "at this time" and "during the pendency of the litigation."

The underlying case involves a dispute as to whether Mr. Fulmer's 2015 Will, which names Respondent as the personal representative, or his November 2016 Will, which names Ms. Gainey as the personal representative, should be probated.² In fact, there were very little assets remaining in Mr. Fulmer's Estate at the time of his death because Ms. Gainey had received almost all of Mr. Fulmer's assets during the last year of

² The litigation also raises concerns as to the legitimacy of pre-death distributions by Mr. Fulmer to his granddaughter Ms. Gainey of essentially all of his assets in the year prior to his death while he was under Hospice care.

his life. However, one very important asset to his widow was the family burial plots that gave her the ability to be buried next to her husband of 58 years. When Respondent learned that Ms. Gainey had sold the burial plots to Mr. Gainey without even notifying Respondent despite both Wills leaving the same to Respondent, she filed a Motion asking that Carlos Gibbons be appointed special administrator of Mr. Fulmer's Estate.

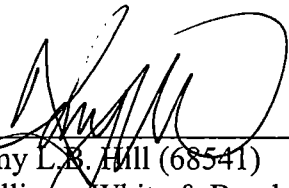
The Court of Appeals in *Estate of Boyce v. Work*, 305 S.C. 43, 44, 406 S.E.2d 184, 185 (Ct.App. 1991) upheld the appointment of a special administrator to an estate on a temporary basis until a personal representative could be formally appointed as a temporary order that could not be appealed until the conclusion of the formal proceedings challenging the will. *Id.* Similarly, Mr. Gibbons has been appointed as special administrator during the pendency of the underlying formal proceedings to determine the proper will for Mr. Fulmer and the legitimacy of certain transfers made prior to Mr. Fulmer's death. The appointment of Mr. Gibbons to oversee the limited remaining assets, which are very sensitive in nature, including the proceeds of the sale of the burial plots immediately adjacent to Respondent's husband of 58 years, is appropriate during the pendency of the formal proceedings, which is a temporary time period. The removal of Ms. Gainey as Personal Representative in order for Mr. Gibbons to be appointed and serve as special administrator is not immediately appealable.

Ms. Gainey's Appeal is Moot.

In her Response, Ms. Gainey specifically acknowledges that she is not appealing the appointment of Mr. Gibbons, which raises the question: why is there even an appeal? If Ms. Gainey is not appealing the appointment of the special administrator, then the remainder of her appeal is moot because the appointment of the special administrator

necessarily negates her service as personal representative while the special administrator serves in that capacity. Put another way, there cannot be a special administrator as well as a personal representative carrying out the exact same duties. Thus, Ms. Gainey's appeal fails as moot if the appeal is timely and she has failed to appeal the appointment of a special administrator.

For these reasons, the removal of Ms. Gainey as personal representative should be dismissed because it is not immediately appealable and even if it were, the issues raised in the appeal are moot because Ms. Gainey failed to appeal the appointment of the Special Administrator.



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Columbia, South Carolina
December 17, 2018

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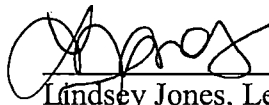
I certify that on December 17, 2018, I served copies of Respondent’s Motion to Dismiss
by *hand delivery* addressed to:

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Attorney for The Estate of Leroy Fulmer



Lindsey Jones, Legal Assistant
Gallivan White & Boyd, PA

December 17, 2018

SENT BY HAND DELIVERY

Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

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Re: Mattie Lou Fulmer v. Elizabeth S. Gainey, as Personal Representative; Elizabeth S. Gainey, individually; and Dennis C. Gainey
Appellate Case No.: 2018-002112
Our File No.: 9731-1

Dear Ms. Kitchings:

Enclosed please find the original and one (1) copy of Respondent Mattie Lou Fulmer's Reply to Appellant's Return to the Motion to Dismiss the Appeal in the above-referenced matter.

We would appreciate you filing the original and returning the clocked-in copy to our office with our courier.

Should you have any questions or concerns, please do not hesitate to contact me.

Yours very truly,

GALLIVAN, WHITE & BOYD, P.A.



Lindsey J. Jones
Legal Assistant to Amy L.B. Hill

ABH/ljj
Enclosures

cc: Robert P. Wood, Esquire
Carrie Ann Warner, Esquire