

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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

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

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RECEIVED  
AUG 30 2017  
SC Court of Appeals

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

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REPLY

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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. 207-214). 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. 135 ). On March 17, 2016 the Appellant's family court summons and complaint was served on the Respondent. (R. p. 551). 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), SCRCF, 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, SCRCF. 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,



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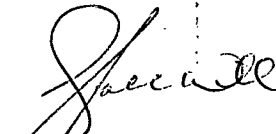
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CERTIFICATE

I certify that the Brief of the Appellant and the Appellant's Reply are in compliance with Rule 211(b).

Respectfully submitted,



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August 28, 2017.