THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Case No. 2010-CP-12-0201

Mell Woods . . . . Appellant,

v.

Robert H. Breakfield, Esquire, as Personal Representative
of the Estate of Reba Hinson . . . . Respondent.

RESPONDENT'S BRIEF

B. Michael Brackett
Moses & Brackett, PC
P. O. Box 100261
Columbia, SC 29202
803.461.2312
Attorney for Respondent

Table of Contents

Table of Authorities iii

Statement of Issues on Appeal 1

Statement of the Case 2

Arguments 6

As To Issue on Appeal No. 1

1. Appellant's Issue on Appeal No. 1, "Is it lawful for an applicant to be a personal representative to lie under oath in order to obtain appointment as a representative of an estate in South Carolina," was not preserved for appellate review. 6

2. As to Appellant's Issue on Appeal No. 1, the underlying Probate Court Order, dated April 19, 2010, and the Circuit Court Order dated July 17, 2011 Affirming the Probate Court Order, correctly concluded that Appellant had no standing to object to or to contest the appointment proceedings for the personal representative in the Estate of Reba Hinson. 7

3. Appellant's Brief improperly includes argument about Appellant's belief that the wrong will is being probated under the guise of presenting argument on Issue on Appeal no. 1, when this subject was not preserved for appellate review. 10

4. Appellant's Brief improperly includes argument about Appellant's complaint that he was not given notice of the February 18, 2009 probate court hearing at which Respondent was appointed to serve as personal representative and at which the June 23, 1998 last will was ordered admitted to probate, under the guise of presenting argument on Issue on Appeal no. 1, when this subject was not preserved for appellate review. 12

As to Issue on Appeal No. 2

5. Appellant's Issue on Appeal No. 2, "May a probate judge interfere with the ministerial duty of his staff in issuing subpoenas," was not preserved for appellate review. 12

As to Issue on Appeal No. 3

6. The Circuit Court correctly ruled that the Probate Court's Return to the Circuit Court with respect to Appellant's appeal from the Probate Court's Order dated April 19, 2010, complied with the requirements of S. C. Code Ann. §62-1-308. 14

7. The Circuit Court correctly held that S. C. Code Ann. §62-1-308 requires only the content of the Probate Court file that is relevant to the particular proceedings or order from which the appeal is taken be included in the Return. 15

Conclusion 16

Table of Authorities

Cases

Baker v. Henderson, 69 S.E.2d 278 (Ga. 1952) 10

Estate of Keener, 521 N.E.2d 232 (Ill. App. 1988) 10

Evins v. Richland County Historic Preservation Comm., 341 S.C. 15,
532 S.E.2d 876 (2000) 7

Hubbard v. Rowe, 192 S. C. 12, 5 S.E.2d 187 (1939) 6

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S. C. 406, 526 S.E.2d 716 (2000) 6

Matter of Wharton, 453 N.Y.S.2d 308 (1982) 10

Sloan v. Friends of the Hunley, Inc., 369 S.C. 20, 630 S.E.2d 474 (2006) 7

Statutes

S. C. Code Ann. §62-1-201(43) 8, 9

S. C. Code Ann. §62-1-308. 1,2,14,15

S. C. Code Ann §62-1-308(b) 4,14,15

S. C. Code Ann. §62-3-105. 8

S. C. Code Ann. §62-3-107. 16

S. C. Code Ann. §62-3-401 8

S. C. Code Ann. §62-3-805 9

S. C. Code Ann. §62-3-902. 9

Other

3 Bowe-Parker: Page on Wills §26.52 10

3 Bowe-Parker: Page on Wills §26.60 8

Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 55 (2d ed.2002) 6

Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 80 (2d ed.2002) 15

Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 209 (2d ed.2002) 15

Rule 59, SCRCP 4,6,13

Rule 60(b), SCRCP 4, 11

Statement of Issues on Appeal

(in response to Appellant's Amended Initial Brief dated March 20, 2012 and accepted by the Court for filing pursuant to letter dated April 17, 2012)

As To Issue on Appeal No. 1

1. Appellant's Issue on Appeal No. 1, "Is it lawful for an applicant to be a personal representative to lie under oath in order to obtain appointment as a representative of an estate in South Carolina," was not preserved for appellate review.

2. As to Appellant's Issue on Appeal No. 1, the underlying Probate Court Order, dated April 19, 2010, and the Circuit Court Order dated July 17, 2011 Affirming the Probate Court Order, correctly concluded that Appellant had no standing to object to or to contest the appointment proceedings for the personal representative in the Estate of Reba Hinson.

3. Appellant's Brief improperly includes argument about Appellant's belief that the wrong will is being probated under the guise of presenting argument on Issue on Appeal no. 1, when this subject was not preserved for appellate review.

4. Appellant's Brief improperly includes argument about Appellant's complaint that he was not given notice of the February 18, 2009 probate court hearing at which Respondent was appointed to serve as personal representative and at which the June 23, 1998 last will was ordered admitted to probate, under the guise of presenting argument on Issue on Appeal no. 1, when this subject was not preserved for appellate review.

As to Issue on Appeal No. 2

5. Appellant's Issue on Appeal No. 2, "May a probate judge interfere with the ministerial duty of his staff in issuing subpoenas," was not preserved for appellate review.

As to Issue on Appeal No. 3

6. The Circuit Court correctly ruled that the Probate Court's Return to the Circuit Court with respect to Appellant's appeal from the Probate Court's Order dated April 19, 2010, complied with the requirements of S. C. Code Ann. §62-1-308.

7. The Circuit Court correctly held that S. C. Code Ann. §62-1-308 requires only the content of the Probate Court file that is relevant to the particular proceedings or order from which the appeal is taken be included in the Return.

Statement of the Case

The action involved in this appeal was commenced by the Appellant's Petition in probate court for Removal of Personal Representative dated January 22, 2010. (R. p. 147-149.) Attached to the Petition was a document titled "Motion for Removal of Personal Representative." The Petition identified the grounds for removal as "Misadministration [sic] of estate by failing to post bond, and by probating the wrong will." The Motion for Removal identified the grounds as failure to give bond after a demand for bond was made, and other "mis-management items," not identified in the motion with any particularity.

Appellant thereafter filed his "Verified Petition to Vacate the Chester County Probate Court Order Entered in the Above-Styled Case on February 18, 2009; [and] Motion For Removal to Circuit Court." (R. p. 150-155.) This pleading was dated February 17, 2010. [1]

The Personal Representative filed and served an Answer to the Petition for Removal of Personal Representative. (R. p. 157-163.) The Personal Representative also filed and served a consolidated Motion to Dismiss the Petition to Vacate Order and a Return to the Motion to Remove the Petition to Vacate to Circuit Court. (R. p. 141-146.)

---

[1]Although the Probate Court denied the relief sought in the Petition to Vacate Order and the Motion to Remove the proceeding to the Circuit Court, as explained hereinbelow, the Appellant did not appeal those rulings.

The hearing on the Appellant's two Petitions and related motions was held in the Probate Court on April 12, 2010.[2] Following the hearing Probate Judge John P. Gettys issued his Order dated April 19, 2010. (R. p. 2-6.) The Order contained three rulings: (1) it denied the Appellant's Petition for Removal of the Personal Representative for cause; (2) it denied the motion to remove to Circuit Court the Petition to Vacate; and (3) it denied Appellant's Petition to Vacate the Probate Court's February 18, 2009 Order of Formal Testacy.[3]

Appellant appealed the April 19, 2010 Probate Court Order to Circuit Court. In his Notice of Appeal filed on April 30, 2010, Appellant identified two subjects as "partial grounds" for the appeal: (1) the Probate Judge did not recuse himself from the matter when he had knowledge that a family member had some past involvement in the matter, and (2) that the Probate Judge refused to issue subpoenas for witnesses that the Appellant wanted to subpoena to the hearing. (R. p. 170-171.)

---

[2] The hearing was held in York County because the Chester County Probate Judge recused herself from the proceeding and the York County Probate Judge was appointed to serve as Special Probate Judge for Chester County in matters related to this estate.

[3] As indicated in footnote 1 above, rulings 2 and 3 were not appealed.

On June 4, 2010 the Appellant filed two "additional grounds" for his appeal: (3) that the probate court erred in not removing the Personal Representative for his failure to provide bond, and (4) that the probate court erred in failing to rule that the wrong will is being probated.[4] (R. p. 173-174.)

The first hearing on Appellant's grounds of appeal was held on September 8, 2010, Judge Clifton Newman presiding. At the hearing the Appellant objected to going forward with the hearing because the Probate Court had not made its Return to the Circuit Court pursuant to §62-1-308(b). Judge Newman ordered that the probate court deliver its entire Reba Hinson estate file to the circuit court courtroom for use during the hearing. The file was delivered for the use of the parties, attorneys and the circuit court.

By Order dated September 30, 2010 the Circuit Court affirmed the Probate Court's April 19, 2010 Order and dismissed the appeal. (R. p. 18-22.) Appellant filed and served a Rule 59(e) motion for reconsideration raising, among other arguments, that the appeal had been "heard without benefit of a certified record from the Probate court." (R. p. 187-196.) By Order dated January 27, 2011, Appellant's motion for reconsideration was granted on the ground that "a proper return was not made by the Probate Court." (R. p. 25). The undersigned as attorney for Respondent took the initiative to have the Probate Court's Return

[4] The Appellant's issue on appeal no. 4 to the circuit court is actually misstated. The Probate Court Order that admitted the particular Last Will to probate (the Last Will that Appellant labels the "wrong will") was the Probate Court's Order dated February 18, 2009. Appellant tried to vacate that Order, but in the April 19, 2010 Order, the Probate Court denied such relief because Appellant had no standing to seek the vacate the Order and, alternatively, he made an insufficient showing for Rule 60 (b) relief. Appellant has not appealed that portion of the April 19, 2010 Order. In the appeal now pending, the Appellant is really appealing the Probate Court's refusal to remove the Respondent as PR because he is probating the wrong will.

delivered to the Circuit Court. (R. p. 200-201.) The Probate Court confirmed that the Return was delivered. (R. p. 199.) By Order dated May 18, 2011, Judge Newman amended his January 27, 2011 Order to not only grant the Motion for Reconsideration but to also vacate the September 30, 2010 Order and to return the appeal to the circuit court roster for a new hearing. (R. p. 28.)

The second hearing on Appellant's appeal from Probate Court was held on July 8, 2011. By Order dated July 17, 2011 the circuit court affirmed the Probate Court's April 19, 2010 Order. (R. p. 8-13.)

Appellant served his Notice of Appeal on October 1, 2011. Upon service of Appellant's Initial Brief and Designation of Matter for the Record on Appeal, Respondent, on January 25, 2012, served a Motion to Dismiss Appeal. By Order dated February 29, 2012 the motion was denied. A second Motion to Dismiss Appeal was served on March 2, 2012. By Order dated April 6, 2012, the motion was denied, but Appellant was ordered to amend his initial brief to comply with the appellate court rules.

While the second Motion to Dismiss Appeal was pending, the Appellant filed and served an Amended Initial Brief which the Court accepted as the Appellant's operative initial brief. By letter to the undersigned dated April 17, 2012, the court notified Respondent of the Court's acceptance of the amended initial brief.

Arguments

As To Issue on Appeal No. 1

1. Appellant's Issue on Appeal No. 1, "Is it lawful for an applicant to be a personal representative to lie under oath in order to obtain appointment as a representative of an estate in South Carolina," was not preserved for appellate review.

To preserve an issue for appellate review, the issue must be raised to and ruled upon by the lower court. Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 55 (2d ed.2002) and cases cited therein, including Hubbard v. Rowe, 192 S. C. 12, 5 S.E.2d 187 (1939) (questions presented for appellate review must first have been fairly and properly raised in the lower court and passed upon by that court); and I'On, L.L.C. v. Town of Mt. Pleasant, 338 S. C. 406, 526 S.E.2d 716 (2000) (if the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a Rule 59 motion to alter or amend the judgment in order to preserve the issue for appellate review).

Appellant's pleadings in the Probate Court did not raise the issue of the personal representative having lied to obtain his appointment. (R. p. 147-149 and p. 150-155.) By his pleadings, the Appellant was seeking the removal of the personal representative on two grounds: because he had failed to post bond and he was probating what the Appellant alleged was "the wrong will." (R. p. 147-149.) With respect to ground one, the Probate Court held that the court had never required the personal representative to post bond. (R. p. 3, l. 2-8.) On ground two, the Probate Court held that the Appellant was a stranger to the

estate and did not have standing to object to or contest the appointment proceedings. (R. p. 3, l. 9 to p. 4, l. 8.)

Not surprisingly, the Probate Court Order dated April 19, 2010 did not address or rule on the question of whether the personal representative lied to the court get his appointment, and no motion for reconsideration was filed to bring this subject to the Probate Court for a ruling.

In his appeal to the Circuit Court, Appellant did not identify the issue of the alleged "lie" as a ground of appeal. (R. 170-171 and 173-174.)

In its Order Affirming Probate Court dated July 17, 2011, the Circuit Court did not address or rule on the issue of the alleged "lie." (R. p. 8-13.) No motion for reconsideration was filed to bring this subject to the Circuit Court for a ruling.

Many times over, Appellant has failed to preserve Issue No. 1 for appellate review.

2. As to Appellant's Issue on Appeal No. 1, the underlying Probate Court Order, dated April 19, 2010, and the Circuit Court Order dated July 17, 2011 Affirming the Probate Court Order, correctly concluded that Appellant had no standing to object to or to contest the appointment proceedings for the personal representative in the Estate of Reba Hinson.

To have standing, one must generally have a personal stake in the subject of the lawsuit, i.e., one must be a real party in interest. Evins v. Richland County Historic Preservation Comm., 341 S.C. 15, 532 S.E.2d 876 (2000). A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action. Sloan v. Friends of the Hunley, Inc., 369 S.C. 20, 630 S.E.2d 474 (2006). Being only someone who has filed a

claim against the estate, Plaintiff has no standing to be involved in estate administration matters. A creditor of the decedent cannot contest her will. 3 Bowe-Parker: Page on Wills §26.60. "Interested persons" may apply to the probate court for determination of issues arising under Title 62, Article 3. S. C. Code Ann. §62-3-105. A formal testacy proceeding (litigation to determine whether a decedent left a valid last will), S. C. Code Ann. §62-1-201(43) and §62-3-401, may be commenced by an interested person. Id.

Interested person is defined in the probate code as follows:

> (20) "Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others **having a property right** in or claim against a trust estate or the estate of a decedent, ward, or protected person **which may be affected by the proceeding**. It also includes persons having priority for appointment as personal representative and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding.

S. C. Code Ann. §62-1-201(43) (emphasis added).

Mr. Woods' pleadings demonstrate the absence of a property right that may be affected by the issue of which of decedent's last wills is entitled to probate.

a. Two last wills have been filed with the probate court: June 23, 1998 Last Will and Testament of Reba Pettit Hinson, and a document headed "Private Last Will" bearing the typed date April 5, 2003 but purportedly signed on April 24, 2003. (R. p. 389-390.) There are signed and unsigned copies of the April 2003 Last Will. (R. p. 99-101 and p. 159-160.) The court's February 18, 2009 Order admitted the June 23, 1998 Last Will to probate by agreement of the heirs and devisees. (R. p. 108 -Order of Formal Testacy; p. 107 - narrative explanation; and p. 473-481.)

b. Mell Woods is not a devisee under either Last Will. His name does not appear in either Last Will. He is a stranger to each of the Last Wills. (R. p. 389-390 and p. 159-160.)

c. Mr. Woods has filed a claim against the estate (R. p. 82-88), including Amendment of Claim, dated February 1, 2010 (R. p. 77-80). After filing his claim in November 2009, Mr. Woods was a claimant and was not, and still is not, a creditor whose claim has been allowed by either the personal representative or the court. It is in the capacity of a mere unproven or unallowed claimant that Mr. Woods now seeks to sue Ned Gregory on estate related allegations, by law a decision left solely to the personal representative.

Under these facts, Mr. Woods has no property interest that can be affected by the resolution of which last will to probate. Assuming, without admitting, that Mr. Woods can eventually prove a claim against the estate, the issue of which Last Will governs the estate does not affect Mr. Woods' property interests. The two wills name the same four devisees, the decedent's children, and the difference between the two wills is how the estate assets are divided among the four children. The size of the estate is not affected by which Last Will is probated, and the sequence of or relative priority for payments from the estate (the payment of allowed claims prior to distributions to devisees) remains the same. Mr. Woods' claim, if allowed, would be entitled to payment before distributions to the devisees could be made. S. C. Code Ann. §62-3-805 and §62-3-902. Whatever property interest Mr. Woods might have, if any, is unaffected by which Last Will is probated.

Other authorities supporting this principle of law in analogous situations include: 3 Bowe-Parker: Page on Wills §26.52 (one who would not take more if the will in question were held to be invalid than he would take if it were held to be valid cannot, by the weight of authority, contest the will in question); Baker v. Henderson, 69 S.E.2d 278 (Ga. 1952) (if petitioners will not be injured or benefitted by the establishment and probate of the alleged copy will, they are strangers to it and are not proper parties to the litigation); Estate of Keener, 521 N.E.2d 232 (Ill. App. 1988) (even if the latest will was invalid, earlier wills failed to name the contestant, so he was not entitled to contest); Matter of Wharton, 453 N.Y.S.2d 308 (1982) (generally a person who is not a distributee of the decedent and who will receive no part of a decedent's estate if a will is denied probate, will not be permitted to file objections to probate. The exception is when a person is named in a prior will and his interest under the prior will is greater than under the propounded will).

3. Appellant's Brief improperly includes argument about Appellant's belief that the wrong will is being probated under the guise of presenting argument on Issue on Appeal no. 1, when this subject was not preserved for appellate review.

Although the Circuit Court's July 17, 2011 Order Affirming Probate Court mentions the issue of the alleged "wrong will," it is mentioned only as it relates to Appellant's effort to remove the Respondent as personal representative for cause; it was not mentioned in the Circuit Court Order with regard to allegations that the Respondent lied to the court.

Appellant argues that the wrong last will has been admitted to probate and that the Respondent Personal Representative and an attorney who is not a party to this case lied to the court to have the wrong will admitted. The subject of "wrong will" is not identified as

an Issue on Appeal. The transcript of the April 12, 2010 probate court hearing shows that the Respondent was sworn and testified that the estate heirs had disagreed for a substantial time about matters of estate administration and the heirs' lawyers asked the Respondent if he would serve as personal representative. The heirs consented for Respondent to be appointed, and by agreement consented to admit the decedent's 1998 last will for probate. (R. p. 341, l. 14 to p. 343, l. 4 and p. 356, l. 5 to p. 357, l. 8 and p. 473-481). The Probate Court Order on page 5 of the Form 300 Petition for Formal Testacy and Appointment in the Reba Hinson estate confirms that the Probate Judge ordered that the Respondent be appointed and ordered that the decedent's June 23, 1998 last will be admitted formally to probate. (R. 108.) Page 3 of the Form 300 discloses that there were multiple last wills and explains how the June 23, 1998 last will was decided to be the operative last will. (R. p. 107.)

The Circuit Court rightly recognized that the Order that appointed the Respondent as personal representative and ordered the particular will to be admitted to probate was the Probate Court Order dated February 18, 2009, found on page 5 of the Form 300. (R. p. 108.) The Circuit Court in footnote 4 wrote:

> The Appellant's issue on appeal no. 4 is actually misstated. The Probate Court Order that admitted the particular Last Will to probate (the Last Will that Appellant labels the "wrong will") was the Probate Court's Order dated February 18, 2009. Appellant tried to vacate that Order, but in the April 19, 2010 Order, the Probate Court denied such relief because Appellant had no standing to seek to vacate the Order and, alternatively, he made an insufficient showing for Rule 60 (b) relief. Appellant has not appealed that portion of the April 19, 2010 Order. In the appeal now pending, the Appellant is really appealing the Probate Court's refusal to remove the Respondent as PR because he is probating the wrong will.

Appellant's argument about the wrong will in this appeal is improper and was by all appearances included in bad faith because Appellant is charged with knowledge that he has not preserved that issue for review.

4. Appellant's Brief improperly includes argument about Appellant's complaint that he was not given notice of the February 18, 2009 probate court hearing at which Respondent was appointed to serve as personal representative and at which the June 23, 1998 last will was ordered admitted to probate, under the guise of presenting argument on Issue on Appeal no. 1, when this subject was not preserved for appellate review.

This subject was not presented to the Probate Court (R. p. 2-6) or the Circuit Court (R. p. 8-13) for consideration, and obviously, has never been ruled on by a lower court. It is not preserved for appellate review. Additionally, it is not identified in Appellant's Brief as an Issue on Appeal. Appellant's argument about lack of notice is improper and was by all appearances included in bad faith because Appellant is charged with knowledge that he has not preserved that issue for review.

Issue on Appeal No. 2

5. Appellant's Issue on Appeal No. 2, "May a probate judge interfere with the ministerial duty of his staff in issuing subpoenas," was not preserved for appellate review.

This issue is not preserved for further review for two separate reasons, either one alone being sufficient as a ground for dismissal. First, on the issue of the probate judge not issuing subpoenas for Appellant's use, no objection or motion on the subject was raised at the probate court hearing (R. p. 326-361); the issue was not raised to and ruled upon by the

trial court (R. p. 2-6) and was first raised in the Appellant's partial grounds of appeal to the Circuit Court (R. p. 170-171 and p. 173-174). Having not been addressed and ruled on in the Probate Court's April 19, 2010 Order, Appellant did not raise the subject in a Rule 59 motion. Additionally, the record of the April 12, 2010 hearing reveals that the Appellant did not move for a continuance so that he could subpoena witnesses for attendance at the hearing, he did not identify who he would have subpoenaed, nor did he make a proffer of what the witness(es) were expected to offer in the way of relevant and admissible evidence. (R. p. 326-361). Consequently, based on the authorities cited above, this ground of appeal was not preserved for appellate review in the circuit court. [5]

Second, the Circuit Court addressed the issue of the probate judge having refused to issue subpoenas only to the extent of ruling that the issue was not preserved for appellate review in the Circuit Court because the issue had not been presented to and ruled upon by the Probate Court in its April 19, 2010 Order or in a motion for reconsideration. (R. p. 11, l. 8-18). The Circuit Court did not rule on the merits of the subject of the Probate Judge having properly or improperly issued or refused to issue subpoenas. There was no motion for reconsideration. Having not been preserved for Circuit Court review in phase one of the

[5] The transcript of the April 12, 2010 probate court hearing reveals that the subject of subpoenas was discussed twice: first, the judge disclosed that Appellant visited the probate court requesting that subpoenas be issued in blank and that the Judge refused. (R. p. 329, l. 7-13). Appellant did not object to the disclosure or make a motion for relief. Near the conclusion of the hearing, the Judge referred to the Private Agreement entered into by the heirs, and Appellant said "That's what I needed the subpoenas for. They do not understand the agreement." (R., p. 353, l. 3 to p. 354, l. 22). The eventual Order dated April 19, 2010 did not address or rule on a question with respect to issuance of subpoenas.

appeal process, the specific issue cannot be revived in subsequent phases of the appeal process.

Consequently, based on the authorities cited above, this ground of appeal was not preserved for appellate review in the Circuit Court, and the Circuit Court's Order dated July 17, 2011 properly decided the issue. (R. p. 8-13).

Issue on Appeal No. 3

6. **The Circuit Court correctly ruled that the Probate Court's Return to the Circuit Court with respect to Appellant's appeal from the Probate Court's Order dated April 19, 2010, complied with the requirements of S. C. Code Ann. §62-1-308.**

The issue on appeal as framed by the Appellant is whether the Circuit Court can proceed to hear an appeal from probate court "without the probate record as required by South Carolina Statute §62-1-308(b). . ." (Appellant's Amended Brief - Issue Presented no. 3). The obvious answer is no. **But, that was not the issue presented to and ruled upon by the Circuit Court**. By the time of the July 8, 2011 appeal hearing in the Circuit Court, the Probate court had made its Return. (R. p. 199.) The Appellant objected on the basis of his belief that §62-1-308(b) requires the Probate Court to certify and deliver its entire file. (R., p. 8. l. 3-7). The Circuit Court did not address the general requirement for a Return from the Probate Court, rather, the issue decided by the Circuit Court was more specifically directed to the content of the Return. (R., p. 8, l. 3-12). The Appellant has not appealed the Circuit Court's ruling that all that is required by §62-1-308(b) to be included in the Return is the portion of the Probate Court's record that is relevant to the particular proceeding from

which the appeal arises, not the entire probate court file[6]. (R., p. 1, lines 7-12.) Having not appealed the Circuit Court's ruling that "only those contents of the Probate Court file that are relevant to the particular proceeding or order in the Probate Court from which the appeal is taken must be included in the Return," that ruling is now the law of the case. Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 80 (2d ed.2002) and cases cited therein.

Accordingly, the issue presented in Appellant's Issue on Appeal no. 3 has not been ruled on by the lower court. Statements of Issues on Appeal must be "concise," and no point will be considered on appeal which is not set forth in a statement of issues on appeal. Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 209 (2d ed.2002) and cases cited therein. The need for a Return is not synonymous with the content of the Return.

7. The Circuit Court correctly held that S. C. Code Ann. §62-1-308 requires only the content of the Probate Court file that is relevant to the particular proceedings or order from which the appeal is taken be included in the Return.

At the July 8, 2011 appeal hearing the Appellant argued that S. C. Code Ann. §62-1-308(b) requires the Probate Court to certify and deliver its "whole record" in the Return. (R., p. 281, l. 1-17). The statute actually requires that the Probate Court make a return of "the testimony, proceedings, and judgment and file it in the appellate court." It does not say "whole record." No doubt this is because the Probate Code provides, with the exception of

---

[6] Section 62-1-308(b) identifies the content of the Return to be "testimony, proceedings, and judgment."

the highly supervised Part 5 administration, "each proceeding before the court [probate court] is independent of any other proceeding involving the same estate. . ." S. C. Code Ann. §62-3-107. Consequently, the Probate Court's file in a particular estate may contain records from several separate and independent proceedings, and the estate file records pertaining to one proceeding may have no relevance to the issues in another proceeding. Appellant is wrong; the Circuit Court got it right.

Additionally, the Appellant was given the opportunity to request that records other than what Respondent suggested be included in the Return, and Appellant did not do so. (R. p. 200-201, 2d from last paragraph; and p. 276, l. 19 to p. 278, l. 16).

Additionally, the Circuit Court gave the Appellant the opportunity to identify what should have been included in the Probate Court's Return but that was not included. He did not identify a single missing record. (R., p. 281, l. 1- 17).

Conclusion

For the reasons set out above, the Circuit Court's Order Affirming Probate Court dated July 17, 2011 should be affirmed.

B. Michael Brackett
Moses & Brackett, PC
P. O. Box 100261
Columbia, SC 29202
803.461.2312
Attorney for Respondent

June 29, 2012

RECEIVED
JUN 29 2012
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Case No. 2010-CP-12-0201

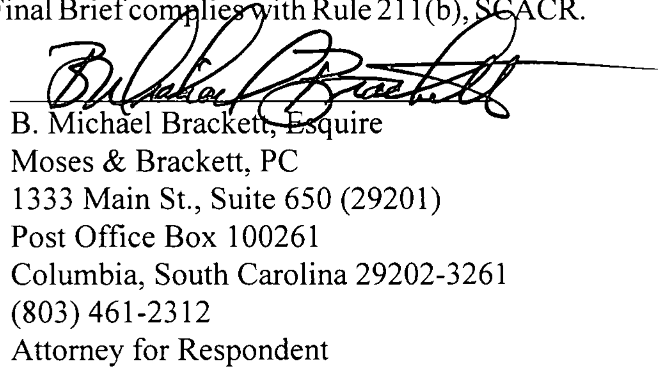
Mell Woods . . . . Appellant,

v.

Robert H. Breakfield, Esquire, as Personal Representative
of the Estate of Reba Hinson . . . . Respondent.

RULE 211(a) CERTIFICATE OF COUNSEL

The undersigned certifies that Respondent's Final Brief complies with Rule 211(b), SCACR.



B. Michael Brackett, Esquire
Moses & Brackett, PC
1333 Main St., Suite 650 (29201)
Post Office Box 100261
Columbia, South Carolina 29202-3261
(803) 461-2312
Attorney for Respondent

Columbia, South Carolina

June 29, 2012

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

RECEIVED
JUN 29 2012
SC Court of Appeals

Case No. 2010-CP-12-0201

Mell Woods .... Appellant,

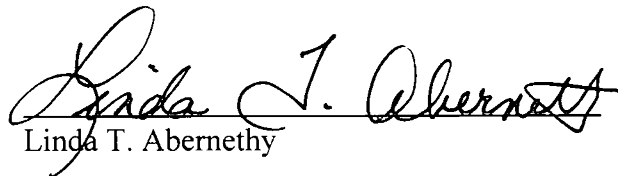
v.

Robert H. Breakfield, Esquire, as Personal Representative
of the Estate of Reba Hinson .... Respondent.

CERTIFICATE OF SERVICE

I, Linda T. Abernethy, Legal Assistant to B. Michael Brackett, Esquire, attorney for the Respondent in the above-captioned matter, do hereby certify that I have served the Appellant, Mell Woods, with a copy of **Respondent's Final Brief and Certificate of Counsel,** postage prepaid and return address clearly indicated on said envelope, on this 29th day of June, 2012 at the following address:

Mell Woods
P. O. Box 2603
Lancaster, SC 29721
Plaintiff, pro se



Linda T. Abernethy

MOSES & BRACKETT, PC

ATTORNEYS AND COUNSELORS AT LAW

1333 Main Street, Suite 650 (29201)
Post Office Box 100261
Columbia, South Carolina 29202-3261

Telephone (803) 461-2300
Facsimile (803) 461-2309

B. Michael Brackett
Direct Dial: (803) 461-2312
Email: mbrackett@mkb-law.com

June 29, 2012

VIA HAND DELIVERY

The Honorable Tanya A. Gee
Clerk of Court
S.C. Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RE: Woods v. Breakfield, as Personal Representative
2010-CP-12-0201
Tracking No. 2011201066
Our File Number - 12085.1

RECEIVED
JUN 29 2012
SC Court of Appeals

Dear Ms. Gee:

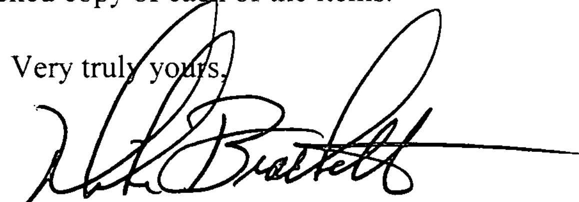
Enclosed for filing please find the following:

1) Original Respondent's Final Brief (unbound);
2) Fifteen copies of Respondent's Final Brief (bound);
3) Proof of Service of Final Brief; and
4) Certificate of Counsel.

By copy of this letter, copies of each of the enclosures are being served upon the pro se Appellant.

Please allow our courier to return with a clocked copy of each of the items.

Very truly yours,



B. Michael Brackett

BMB/lta
Enclosures

cc: Robert H. Breakfield, Esquire
Mell Woods, pro se