

STATE OF SOUTH CAROLINA
In The Court of Common Pleas

APPEAL FROM CHARLESTON COUNTY
Probate Court

The Honorable Tamara C. Curry, Associate Probate Court Judge
Case Number: 2016-ES-10-544
(Appellate Case Number: 2018-CP-10-3889)

IN RE: THE ESTATE OF HAZEL NORTH

GRADY NORTH AND JEAN CORBETT.....APPELLANTS-PETITIONERS,

vs.

LINDA NORTH AND JAMES NORTH, Individually and as Personal
Representative of the Estate of Hazel North....RESPONDENTS

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**ORDER OF REVERSAL AND REMAND TO
CHARLESTON COUNTY PROBATE COURT
TO INFORMALLY PROBATE 2008 WILL**

SC Court of Appeals

THIS MATTER came before the Court on Thursday, March 14, 2019, on Petitioners' Appeal of the Probate Court Order issued by the Honorable Tamara C. Curry on July 27, 2018, **denying** Appellant's Rule 60(b)4 SCRCF Motion to Vacate the March 30, 2016 Orders of the Court. (Order, R. p. 9-16).

The subject of Petitioners underlying Rule 60(b)4, SCRCF motion (R.p 29-33), was the March 30, 2016, Order of Informal Probate of a Will dated 12/19/14 (R.p. 39; 2014 Last Will And Testament of Hazel North (R.p. 108-111), and the Order Terminating Appointment of Grady North as Personal Representative, which provided:

X A Last Will and Testament dated December 19, 2014 was filed with this Court which names James Allen North as the Personal Representative of the estate. (R.p.1)

PETITIONER’S RULE 60(b)4 SCRCP MOTION

In the Motion before the Probate Court, Petitioner maintained as follows:

1. That the March 30, 2016 Orders of the Probate Court were void *ab initio*.
2. That in the informal proceeding (R.p. 17-22) to probate decedent’s 2008 Will, (R. p. 101-107), the Probate Court was without subject matter jurisdiction to terminate him as Personal Representative and set aside the informal probate of the 2008 Will; without the **commencement** of a formal proceeding, and without notice and a hearing in contravention of the South Carolina Probate Code, S.C. Code §§ 62-3-401, 62-3-402, 62-3-108, and 62-3-203(b).
3. Finally, that the Court’s Orders violated Petitioner’s rights to substantive due process mandated by the Probate Code, Article 1, § 3 of the South Carolina Constitution and the 14th Amendment to the United States Constitution. (Petitioner’s Rule 60(b)4 SCRCP (Petitioner’s Motion, R. pp. 29-50)

RESPONDENT JAMES NORTH’S MEMORANDUM IN OPPOSITION

Respondent James North filed a Memorandum in Opposition to the SCRCP 60(b)4 Motion (R.pp. 59-63), maintaining that the Probate Court’s jurisdiction was purely statutory, and that per S.C. Code § 62-1-302(a) to the full extent permitted by the Constitution, and except as otherwise specifically provided, the probate court has exclusive original jurisdiction over all subject matter related to:

- (1) estates of decedents, including the **contest** of wills...

(R.p.59, emphasis added).

Respondents argued, “Now the concept that my client, who had a subsequent will, was required under ... Section (6)2-3-401 to come in and file a formal complaint was patent error. “ (R.p. 80). His position was that James North’s filing of the 2014 will for informal

probate was not a will contest. Respondent then cited SC Code § 62-3-304 which provides that,

Applications for informal probate which relate to one or more of a known series of Wills, the latest of which does not expressly revoke the earlier shall be declined. (*Id.*, emphasis added).

In his memorandum Respondent argued that, “Petitioner fails to appreciate the nuances and applications of informal probate. James North was not required to initiate a formal contest of the earlier will.” He then argued that the burden was on Petitioner to challenge the 2014 will by commencing a formal proceeding, and he is now time barred from doing so, which is why the court is being faced with such, “creative motions such as this.” (R.p. 60-61).

Respondent maintained *Arguendo*, if there was an error of law for the Court not following § 62-3-401, the failure would not be jurisdictional. That Petitioner had the right to appeal or challenge the subject orders, and that now he is time barred from challenging, and he cannot appeal because the appeal is untimely. (*Id.*).

Respondent maintained that the Orders of the Court were not void for want of due process. That Petitioner was given notice that he was terminated as Personal Representative, the 2008 will was not being probated, and that he had notice that James North’s submission to informal probate was accepted. “Accordingly he had notice of the issue.” (R.p.62).

Respondent requested the Rule 60(B) motion be denied. Respondent requested attorney fees and costs be determined, “at the end of the case after the Respondent has had the opportunity to demonstrate to the Court that all of the Petitioners’ pleadings and motions are nothing more than a spurious attempt to salvage a case that is legitimately time barred.” (R.p.63).

Petitioner’s Rule 60(b)4 Motion was heard before Charleston County Associate Probate

Judge Curry on July 2, 2018. The transcript of the hearing is set forth in R.pp. 64-99.

THE APPEAL TO CIRCUIT COURT

The parties filed briefs with this Court. A Record on Appeal was prepared and submitted for this Court's consideration, which is referenced extensively herein. The hearing on the Appeal was held before this Court on March 14, 2019, with counsel for Petitioner and Respondent appearing and ably arguing the respective positions of their clients.

RESPONDENT'S MOTION TO DISMISS

During the pendency of the appeal, Respondent filed a Motion to Dismiss arguing the Petitioner had not timely filed his initial brief and not timely designated matters to be included in the record on appeal. The parties agreed that this Motion would be heard during the hearing of the Appeal.

After careful consideration of the record and arguments of counsel, for the reasons set forth below and upon a good faith showing by Petitioner, Respondent's Motion to Dismiss the Appeal is Denied.

Petitioner maintained that the time for filing the initial brief and designating matters to be included in the record on appeal was extended due to The Order of the Supreme Court (2018-09-17-01), as a result of disruption to South Carolina's legal system caused by the impact of Hurricane Florence, and that the appeal had been mistakenly dismissed by the Court of Common Pleas when no one appeared at a roster meeting to set the hearing date at a time when the appeal was not perfected. Upon the matter being called to the attention of the Clerk, the appeal was subsequently reinstated.

Petitioner's counsel argued that he further relied on information from the clerk's office as to the due date of the filings, and promptly filed Petitioner's Initial Brief and Designated

Matters to be included in the Record on Appeal.

Respondent-movant argued as set forth in his Motion which was carefully considered by this Court. The Court appreciates that neither side required the Motion to Dismiss be heard prior to perfecting the appeal which would have delayed the determination of the appeal in this case.

Based upon a careful review of the Motion as well as arguments of counsel the Court **Denies** the Motion to Dismiss, in the interest of justice and upon good cause shown by the Petitioner.

DECISION ON THE MERITS OF THE APPEAL

After careful consideration of all matters of record and arguments of counsel,

1. I find and conclude that by the Orders of March 29, 2016, the Charleston County Probate Court accepted for informal probate the 2008 Will of Decedent Hazel North, and appointed Grady North as Personal Representative of the Estate. (R.p.21).

2. I find and conclude the trial court erred in denying Petitioner's Rule 60(b)4 Motion to vacate or void *ab initio* the March 30, 2016, Orders of the Court (7-27-2018, Order of Associate Probate Judge Tamara Curry (R.pp: 9-16)), which set aside the informal probate of the 2008 Will and Terminated the Appointment of Grady North as Personal Representative of the Estate of Hazel North (R.p.1).

3. I find and conclude that the Trial Court erred in finding that "The Court has an absolute right to act administratively upon the applications it receives." And that, "It was proper for the court to make administrative corrections in the absence of a filing for formal testacy." (R. p. 11, last paragraph). This finding is contrary to the mandates of the

Probate Code to commence a formal proceeding to set aside the informal probate of the 2008 Will.

In the case at bar where the Probate Court had previously granted application for probate of the 2008 Will, Respondent-Defendant James North's submission of the 2014 Will for informal proceedings should have been **declined**. S.C. Code § 62-3-401, provides:

A formal testacy proceeding must be commenced by an interested person filing and serving a summons and petition, ...in which he requests the Court, after notice and a hearing enter an Order probating a Will or a petition to set aside an informal probate of a will or to prevent informal probate of a will which is the subject of a pending application.

4. I find and conclude that Respondent James North did not commence an action for formal probate within the Court's general subject matter jurisdiction to contest the 2008 Will by filing and serving a summons and petition as mandated by S.C.Code § 62-3-401.

5. I find and conclude that Court did not have subject matter jurisdiction to set aside the 2008 Will and grant application of informal probate of the 2014 Will as an action for formal probate was never commenced by Defendants.

Subject matter jurisdiction refers to a Court's constitutional or statutory power to adjudicate a case. *Earthscapes Unlimited, Inc., v. Ulbrich*, 390 S.C. 609, 614, 703 S.E.2d 499, 503 (2010); (*emphasis added*). Subject matter jurisdiction is defined as the power of a court to hear and determine cases of the general class to which the proceedings generally belong. *McCullar v. Estate of Campbell*, 381 S.C. 205, 206, 672 S.E.2d 784 (2009). (*emphasis added*).

Claims as to lack of subject matter jurisdiction can be raised at any time, subject matter jurisdiction may not be waived by filing responsive pleadings or otherwise consenting to the jurisdiction of a particular court. *Eldridge v. City of Greenwood*, 331 S.C. 398, 503 S.E.2d 191, 196 (Ct.App. 1998).

A judgment is void if made by the Court without subject matter jurisdiction, that is, a court without power to adjudicate the matters before it or without personal jurisdiction over the parties. *Griffin v. Capital Cash*, 310 S.C. 288, 423 S.E.2d 143 (1992), cited in Flanagan, South Carolina Civil Procedure, Second Edition, p. 487.

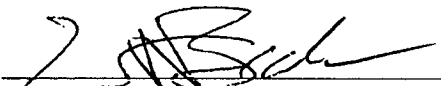
Relief under Rule 60(b)4 SCRPC is a matter of right if the adverse party failed to comply with the requirements of the law. *Richardson Constr. Co., v. Meek Eng'g & Constr. Co.*, 274 S.C. 307, 262 S.E.2d 913 (1980), *Id.*

6. I find and conclude that Petitioner was not afforded the substantive due process of notice and a hearing before he was terminated as Personal Representative of the Estate of Hazel North as mandated by the S.C. Probate Code as set forth above, and guaranteed by Article 1, § 3 of the South Carolina Constitution and the 14th Amendment to United States Constitution.

NOW THEREFORE IT IS HEREBY ORDERED as follows:

1. Respondent's Motion to Dismiss is **DENIED**.
2. The July 27, 2018, Order of the Charleston County Probate Court is hereby **REVERSED**.
3. This case is **REMANDED** back to the Charleston County Probate Court for informal probate of the 2008 Will of decedent Hazel North.

AND IT IS SO ORDERED!


The Honorable William H. Seals, Jr.
Presiding Judge

Dated: April 25, 2019

Marion, South Carolina