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ELECTRONICALLY FILED - 2019 May 14 9:29 AM - ALLENDALE - COMMON PLEAS - CASE#2017CP0300244

STATE OF SOUTH CAROLINA)
 COUNTY OF ALLENDALE)
)
 J. Morgan Kears, Personal Representative)
 of the Estate of G.H. Kears,)
)
 Appellant,)
)
 v.)
)
 The Kears Family Education Trust,)
 William Gordon Kears, Elizabeth Kears)
 Gooding, Julia Kears Sharp, Rachael)
 Kears Best, Joseph Weber Kears, and)
 John Morgan Kears, of which all are)
 named individually and as Trustees of the)
 Kears Family Education Trust U/AID)
 Nov. 05, 1992,)
)
 Respondents.)

IN THE COURT OF COMMON PLEAS
 Case No. 2017-CP-03-00244

ORDER

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 MAY 29 2019
 SC Court of Appeals

This order follows a Form 4 entered April 8, 2019.

The case is before the Court pursuant to a motion to alter or amend. The Court heard the motion April 4, 2019 in Jasper. All parties consented to a hearing in Jasper rather than Allendale.

Attorney Matthew Myers appeared at the hearing for the Appellant. Attorney Daniel Speights appeared for Respondent Julia Sharp. Attorney Blake Hewitt appeared for Respondent Elizabeth Gooding.

Briefly, and as background, this is an appeal from probate court. The Court issued a formal order in December of 2018 dismissing the appeal.

The Respondents advocated for that disposition. They argued the Appellant cannot properly appeal this case as personal representative for his late father's estate because he is not the personal representative, having resigned that office in probate court. This Court agreed. The December 2018 order dismissing the appeal was based on that reasoning.

Appellant subsequently filed a motion asking the Court to alter or amend its order dismissing the appeal. He argues there are several reasons why he remains personal representative and has standing to litigate this appeal. Alternatively, he argues the appeal should proceed through ratification, joinder, or substituting the appropriate real party in interest.

Respondents oppose these arguments and gave reasons for their opposition at the hearing.

After considering the Appellant's written motion, the arguments at the hearing, and the previous filings, the Court adheres to its prior decision and respectfully denies the motion. The reasons for this decision are detailed below.

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Some parts of this case are contested, but the general background is not. G.H. Kearse had a large farm in Allendale County. In 1992 he transferred that farm to an irrevocable trust. (R.p.44, Article I).

When Mr. Kearse died in 2013 his will said he wanted a large house built on the farm and that the house was to be modeled after a historic colonial home in Virginia. (R.p.38, Item VI). The farm, however, was not a part of Mr. Kearse's estate. As noted above, it had already been transferred to an irrevocable trust. The Appellant and his siblings are the trustees. (R.pp.56-57).

Three years after Mr. Kearse died, Appellant filed this lawsuit. (R.p.30). He filed the suit in his capacity as personal representative. He named himself (in his individual capacity) and his siblings as defendants. He later amended the suit to name himself and his siblings in their individual capacities as well as in their capacities as trustees. (R.p.73).

The suit sought a court order directing the estate to build the house on the trust's land. (R.p.78). The suit asked the court to authorize the use of trust assets to help fund the construction, if necessary. (R.p.76, ¶18).

Respondents Sharp and Gooding opposed the suit. Their chief defense was that the estate had no right to build a house on land that was not a part of the estate. (R.p.80, ¶8 & p.85, ¶8).

Several motions were set to be heard in probate court in February of 2017. Shortly before the hearing, however, the parties reached an agreement resolving the case. (R.p.257) (letter from Appellant's counsel). The parties dispute whether that agreement is binding. The probate court enforced the agreement, but again, the parties dispute whether the agreement is enforceable.

The basics of the disputed agreement were that the Appellant would personally pay the Respondents' legal fees, that he would personally pay his own legal fees, and that he could ask the estate to reimburse some of those fees if a majority of his siblings agreed. (R.pp.198-199).

The Appellant initiated this appeal after the probate court enforced the disputed agreement.

The Court believes its decision to dismiss this appeal was correct. The Appellant claims to be taking this appeal in his capacity as personal representative. The Court dismissed this appeal because the Appellant is not the personal representative.

The record reflects the Appellant resigned that office in probate court. The Appellant did not attend the February 2017 hearing in probate court, but at that hearing, his lawyer told the probate court he was submitting his resignation "irrevocably." (R.p.173, lines 23-24). The Appellant's lawyer also said the Appellant "has no power to write checks. He has no power to file documents. He has no power to take action. He can do nothing but sit on the sidelines and wait for your honor to appoint a successor fiduciary[.]" (R.p.174, lines 4-9).

At that same hearing, the probate court specifically ruled that the court had no choice other than to accept Appellant's resignation. (R.p.187, line 2 - p.188, line 6). If Appellant disagreed with that decision, ordinary rules of error preservation would require him to immediately object. Nobody objected after the probate court announced its ruling. (R.pp.188-189).

The Appellant moved for reconsideration in probate court after the court accepted his resignation and enforced the settlement agreement. That motion for reconsideration did not argue that the probate court erred in accepting Appellant's resignation as personal representative. There, the arguments were that the alleged settlement agreement was not binding, that its terms were not properly before the probate court, and that Appellant wanted a new hearing. (R.pp.123-133).

The probate court conducted a hearing on the Appellant's motion for reconsideration. There as well, nobody argued that the probate court erred in accepting Appellant's resignation as personal representative. (R.pp.222-231) (the hearing transcript).

The probate court appointed Harley Ruff as successor personal representative in March of 2017. (R.p.13). This was five months before the hearing on the Appellant's motion for reconsideration. Nobody at that hearing argued the order appointing Harley Ruff was invalid.

Both of the Respondents specifically mentioned at that hearing that the Appellant was not the personal representative. (R.p.225) (transcript p.14, lines 13-17) and (R.p.228) (transcript p.24, lines 16-19). The probate court specifically noted nobody had objected to the order appointing Ruff and that the Appellant was not the personal representative. (R.pp.17 & 20). The court's prior order "terminated" the Appellant's authority as of February 2, 2017. (R.p.10, ¶4). Nobody challenged these things.

The Appellant's brief in this Court frames the issues as including whether he was validly removed as personal representative and whether the probate court erred in accepting his resignation. His brief also claims he remains personal representative and that the probate court's February 2017 order accepting his resignation is void. These arguments were never made to the probate court. Ordinary rules of error preservation provide that they cannot be made on appeal.

Nobody could reasonably deny the Appellant would have standing to appeal the probate court's order in his individual capacity. The alleged settlement directly affects him individually as it calls for him to personally pay everyone's legal fees. The estate is not affected unless the Appellant asks the estate to reimburse him for some of those fees. See (R.pp.10-11, ¶¶6-8).

Still, the documents in the record explain that the Appellant is not appealing in his individual capacity. His brief to this Court specified that he was appealing in his capacity as personal representative. (Brief of Appellant, p.20). His counsel only represents him in his capacity as personal representative; they do not represent him individually. (R.p.7 & p.171, lines 20-21). As noted above, the Appellant is not the personal representative. He resigned that office and did not argue to the probate court that the court erred in accepting his resignation.

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The Court expresses no opinion on new arguments raised in the Appellant's motion to alter or amend. Arguments that could have been raised before a judgment may not be raised for the first time in a motion to alter or amend. *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990). As to any other arguments not specifically addressed, the Court believes its decision is controlled by the Appellant's past insistence that he is appealing as the personal representative and by the fact that he is not the personal representative.

The motion for reconsideration is respectfully denied.

Judge R. Lawton McIntosh

_____, 2019
_____, South Carolina



Allendale Common Pleas

Case Caption: J Morgan Kears, Personal Representative Of The Estate G. H. Kears
VS William Gordon Kears , defendant, et al
Case Number: 2017CP0300244
Type: Order/Other

S/R. LAWTON McINTOSH

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