

STATE OF SOUTH CAROLINA
In the Supreme Court

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JUN 10 2019

APPEAL FROM RICHLAND COUNTY
Probate Court

S.C. SUPREME COURT

Amy W. McCulloch, Probate Court Judge

Richland County Probate Case No. 2017-ES-40-01330

Appellate Case No. 2019-000169 (S.C. Ct. App. Order filed April 5, 2019)

Terri Ann Thompson, Wendy K. Thompson, and Robert
M. Thompson, Jr., as Co-Personal Representatives of the
Estate of Robert M. Thompson, Sr.....Respondents,

v.

Marilyn M. White as Personal Representative of the
Estate of Bertha Maust-Thompson.....Petitioner.

**RETURN IN OPPOSITION TO MOTION TO DISMISS
PETITION FOR WRIT OF CERTIORARI**

Petitioner Marilyn M. White, as Personal Representative of the Estate of Bertha Maust-Thompson (“Petitioner”) submits this return in opposition to the Motion to Dismiss Petition for Writ of Certiorari by Respondents Terri Ann Thompson, Wendy K. Thompson, and Robert M. Thompson, Jr., as Co-Personal Representatives of the Estate of Robert M. Thompson, Sr. (“Respondents”).

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner craves reference to the Statement of the Case section included in the Petition for a Writ of Certiorari, incorporated herein by reference. In addition, while Petitioner does not dispute the facts and procedural posture as stated by Respondents in their motion to dismiss,

important details, set out below, were omitted.

In an attempt to reconcile the apparent conflict between Rule 203(d), SCACR (absent specific exceptions, notice of appeal from circuit court, family court, and probate court orders “shall be filed with the . . . Clerk of the Court of Appeals.”), and S.C. Code Ann. § 62-1-308(l) (permitting direct appeal to the South Carolina Supreme Court), Appellant filed her Notice of Appeal in the South Carolina Court of Appeals. Noting that Petitioner’s notice of appeal should have been filed in this Court, Respondents made known their intention to seek transfer of the appeal to this Court. (*See Ex. A to Resps.’ Mot. to Dismiss*). Thereafter, both parties requested that the South Carolina Court of Appeals transfer to this Court pursuant to the mandatory transfer provision of Rule 204(a), SCACR, which provides: “In the event that the notice of appeal is filed in the wrong appellate court, the appellate court in which the matter is filed **shall issue** an order transferring the case to the appropriate appellate court.” (Emphasis added). (Appx. pp. 20 and 22).

Rather than transfer the case pursuant to the mandatory transfer provision of Rule 204(a), SCACR, the Court of Appeals instead issued its February 15, 2019 Order dismissing the appeal as interlocutory. *But see In re November 4, 2008 Bluffton Town Council Election*, 385 S.C. 632, 641, 686 S.E.2d 683, 688 (2009) (“In invoking Rule 204(a), we are guided by the principle that courts should not interpret procedural rules to create a trap for unwary lawyers.”). Here, both parties consented to and requested transfer of a timely filed notice of appeal to this Court. Rather than honor that consent request and the mandatory provisions of Rule 204(a), the Court of Appeals erroneously dismissed the appeal as interlocutory. (Appx. p. 25).

Appellant timely moved for reconsideration of the February 15, 2019 Order dismissing her appeal (Appx. p. 27), and that motion was fully briefed to the Court of Appeals. (Appx. pp. 32 and 36). Appellant also filed a Motion for Expedited Reinstatement of Appeal and Transfer to the Supreme Court on March 22, 2019. (Appx. p. 43) In response to that motion, Respondents agreed this Court is the correct venue and noted that the Court of Appeals lacked jurisdiction over the matter. (Appx. pp. 34 and 50). The Court of Appeals denied reinstatement via Order dated April 5, 2019, and declined to rule on the motion to transfer. (Appx. p. 52). Petitioner's Petition for Writ of Certiorari followed.

ARGUMENT

The sole issue in this appeal is whether a state probate court may force a personal representative to make a federal tax election to provide significant tax savings to a surviving spouse's beneficiaries. The probate court in this case determined that it could, and thereby disposed of the only issue before it. Disregarding the finality of that order and the lack of anything remaining to be accomplished on remand, the South Carolina Court of Appeals dismissed the appeal as interlocutory, and Petitioner has filed her Petition for Writ of Certiorari in this Court. Because the appealed order before this Court is a final order, and because filing of the estate return electing portability did not render the controversy moot, the Court should deny Respondents' Motion to Dismiss.

I. The Order Of The Probate Court Constitutes A Final Order That Is Subject To Immediate Appellate Review In This Court.

Final orders of the probate courts are subject to immediate appellate review pursuant to S.C. Code Ann. § 62-1-308(a). *Dorn v. Cohen*, 421 S.C. 517, 520, 809 S.E.2d 53, 54 (2017), citing *Fulmer v. Cain*, 380 S.C. 466, 670 S.E.2d 652 (2008) (holding only final orders from the probate court are appealable under section 62-1-308). The term "final order" is not defined by

the probate code; reviewing courts must hear and determine the appeal pursuant to “the rules governing appeals.” *In re Estate of Weeks*, 329 S.C. 251, 260-261, 495 S.E.2d 454, 459 (Ct. App. 1997), quoting *Ex parte White*, 33 S.C. 442, 12 S.E. 5 (1890). An order or judgment is final where “no further action” is required by the court and the “litigant has reached the end of the road.” *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 7, 630 S.E.2d 464, 467-468 (2006) (citations omitted).

The *only* dispute between the parties is whether Bertha Maust-Thompson’s Personal Representative should be required to make the federal tax election for portability of the unused exclusion amount (the “DSUE”), pursuant to 26 U.S.C.A § 2010(c)(4), for the benefit of her surviving spouse, Robert M. Thompson, Sr. That question was tried before the probate court November 7-8, 2018, and the probate court thereafter issued an order granting full relief to Respondents. (Appx. p. 16). In furtherance of the relief ordered by the probate court, the order compelled Appellant to file an estate tax return and to make the DSUE election in favor of the surviving spouse. (*Id.*). The probate court thereby fully and finally determined the rights of the parties and left nothing further to be done. In other words, the order advanced Appellant to the “end of the road” with no other option but to seek appellate relief. Indeed, Respondents themselves believed the probate court’s order was a “final order” as evidenced by their consent to a direct appeal to the South Carolina Court of Appeals and, thereafter, by seeking transfer of the appeal to this Court.

In summary, and for the additional reasons stated in Petitioner’s Petition for Writ of Certiorari, the probate court order is a final order and subject to appellate review because it granted complete relief on the sole issue before it, finally and fully determining the rights of the parties and leaving nothing to be determined in later proceedings.

II. Filing Of The Notice Of Appeal Divested The Probate Court Of Jurisdiction, And The Appeal Is Not Moot.

In support of their motion to dismiss, Respondents argue this appeal is moot inasmuch as the election, once made, became irrevocable. (Resps.' Mot. p. 2) (citing 26 U.S.C.A. § 2010(c)(5)(A)) Respondents overlook two critical points that militate against their motion. First, the filing of Appellant's notice of appeal triggered the automatic stay provision pursuant to both S.C. Code Ann. § 62-1-308(h) and Rule 205, SCACR. Second, because the probate court's additional orders issued subsequent to the January 26 order violated the automatic stay, they are void and unenforceable. For these reasons, explained more fully below, the issues presented on appeal are not moot, and this appeal presents an active case and controversy that should be decided on its merits in this Court. Respondents' motion must be denied.

As noted in the preceding section of this return, the January 26 probate court order constituted a final order because it fully resolved the exclusive controversy before the tribunal; to wit, whether Petitioner should be compelled to file an estate return electing portability of the DSUE in favor of the surviving spouse. As such, filing of the notice of appeal immediately stayed any further proceedings touching on issues related to appeal and divested the probate court of jurisdiction over the matters addressed in the appealed January 26 Order.

South Carolina Code § 62-1-308(h) specifically provides:

When an appeal according to law is taken from any sentence or decree of the probate court, all proceedings in pursuance of the order, sentence, or decree appealed from shall cease until the judgment of the circuit court, court of appeals or Supreme Court is had.

Construing this provision as it existed in a prior version of the probate code¹, this Court observed that "[t]he only proceedings required to cease are those proceedings addressed in the orders from

¹ See 2013 Act No. 100, § 1, eff. January 1, 2014 (amending § 62-1-308 to clarify appellate procedures and renumbering sections).

which an appeal was taken.” *Ulmer v. Ulmer*, 369 S.C. 486, 492, 632 S.E.2d 858, 861 (2006).

Similarly, Rule 205, SCACR, provides that service of a notice of appeal vests “exclusive jurisdiction” over the appeal with the appellate court. As former Chief Judge Few explained:

Under Rule 205, the lower court is deprived of the power to proceed with matters that are affected by the appeal. . . . [T]he lower court’s power to proceed is determined by whether the issue sought to be litigated in the lower court during the appeal is a ‘matter [] affected by the appeal’ under Rules 205 and 241(a).

Tillman v. Oakes, 398 S.C. 245, 255-56, 728 S.E.2d 45, 51 (Ct. App. 2012) (citing *Arnal v. Fraser*, 371 S.C. 512, 518-519, 641 S.E.2d 419, 422 (2007) (per curiam) (explaining that Rules 205 and 241(a) permit the family court’s action on matters not affected by the appeal and prohibit action on matters that are affected by the appeal)). It is well-established in South Carolina jurisprudence that an order entered without jurisdiction is void *ab initio* and of no legal effect. *See, e.g., Webster v. Clanton*, 259 S.C. 387, 391, 192 S.E.2d 214, 216 (1972) (“A judgment by a court without jurisdiction of both the parties and the subject matter is a nullity and must be so treated by the courts whenever and for whatever purpose it is presented and relied upon.”).

Here, the probate court issued its dispositive January 26, 2019 Order requiring, among other things: (1) preparation of a federal estate tax return electing portability of the DSUE; (2) presentation of a draft estate tax return and supporting materials to Respondents and their counsel within 45 days; and (3) filing of the return and election of portability with the IRS. Petitioner challenged that order, in all respects, with the timely filing of her notice of appeal.

Disregarding the automatic stay² that took effect upon filing of Petitioner's notice of appeal, the probate court nevertheless issued subsequent orders in furtherance of the acts it sought to compel in the challenged January 26 Order. For example, the probate court entered a March 15, 2019 Order appointing a special administrator to prepare an estate tax return as directed in the order challenged on appeal. The probate court thereafter entered another order dated April 15, 2019, directing the parties to submit any changes to a draft estate tax return and authorizing the special administrator to file said return on May 27, 2019, "unless stayed by an order of an appellate court of South Carolina." The special administrator filed an estate return electing portability on May 24, 2019.

Try as they may to argue that filing of the federal estate tax return renders this controversy moot and subject to dismissal, Respondents cannot change the fact that the March 15 and April 15 Orders were issued in violation of the automatic stay. Accordingly, those orders appointing the special administrator and directing him to filing of the estate return constitute a nullity, are unenforceable, and have no legal effect. *Arnal v. Fraser*, 371 S.C. 512, 641 S.E.2d 419 (2007) (per curiam).

This conclusion applies with equal force to defeat Respondents' argument that irrevocability of election of the DSUE renders this appeal moot. The orders appointing the special administrator and directing filing of the estate return are invalid and unenforceable; therefore, the special administrator was not a "duly qualified executor or administrator" authorized to file the return. *See* 26 C.F.R. § 20.6018-2 ("It is required that the duly qualified

² In addition to being deprived of jurisdiction by the filing of the notice of appeal, the probate court also disregarded the fact that, although the court of appeals issued its order dismissing the appeal on February 15, 2019, that court has yet to issue the remittitur. Until such time as the remittitur is issued and the matter remanded to the probate court, the appellate court retains jurisdiction, and the probate court lacks jurisdiction over matters affected by the appeal. *Lancaster v. Georgia-Pacific Corp.*, 403 S.C. 136, 742 S.E.2d 867 (2013).

executor or administrator shall file the return.”). Further, because the special administrator was not duly appointed and therefore not authorized to sign the return, that return is invalid, and “acceptance [by the IRS] cannot cure an invalid return.” *Olpin v. C.I.R.*, 270 F.3d 1297, 1301 (10th Cir. 2001) (quoting *Angelus Milling Co. v. Comm’r*, 325 U.S. 293, 295 (1945) (“explicit statutory requirements [] must be observed and are beyond the dispensing power of Treasury officials.”)).

The fact that May 28 has come and gone also does not render the appeal moot. Revenue Procedure 2017-34, which grants an automatic extension of two years from date of death to make the portability election, also recognizes that some taxpayers may miss this deadline. It allows “a taxpayer seeking relief to elect portability after the second anniversary of a decedent’s death [to] do so by requesting a letter ruling in accordance with the requirements of § 301.9100-3 and Rev. Proc. 2017-1, 2017-1 I.R.B. 1 (or any successor revenue procedure).” Rev. Proc. 2017-34, I.R.B. 2017-26. Thus if this Court grants the Petition for a Writ of Certiorari, Appellant can request additional time from the Internal Revenue Service.³

It is axiomatic that South Carolina’s appellate courts favor resolution of controversies on their merits after the parties have been afforded a full and fair opportunity to be heard. The probate court’s order was final, dispositive, and subject to immediate appellate review, and the filing of Petitioner’s notice of appeal triggered an automatic stay of proceedings relating to the matters addressed in the January 26 Order. The probate court’s subsequent orders issued in furtherance of the January 26 Order are void inasmuch as the probate court lost jurisdiction over this matter when Petitioner filed her notice of appeal. Accordingly, the special administrator was

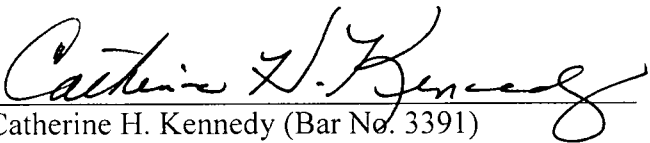
³ Prior to May 28, Petitioner was in contact with the Internal Revenue Service which indicated it would be inclined to grant an extension under these circumstances but would not do so unless the two-year deadline passed and no valid estate tax return was filed.

not duly appointed, thus the estate return was invalid. Petitioner is allowed to seek additional time from the Internal Revenue Service, and this controversy is not moot. For all of these reasons, the Court should deny Respondents' motion to dismiss.

CONCLUSION

The January 26 Order of the probate court is immediately appealable, and this case is not moot. Accordingly, the Court should deny Respondents' Motion to Dismiss Petition for Writ of Certiorari and permit this appeal to proceed to a determination on the merits.

June 10, 2019

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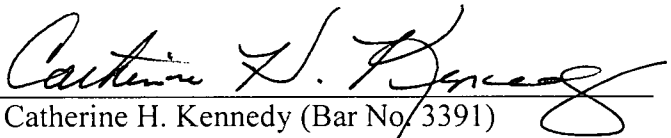
PROOF OF SERVICE

I certify this 10th day of June 2019 that I have served a copy of the RETURN IN
OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI upon
other counsel of record, by mailing same, postage prepaid in the United States mail, addressed to
the following:

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(Signature page to follow.)

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