

90248

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas Acting as Appellate Court to the Probate Court

The Honorable William H. Seals, Jr., Circuit Court Judge

2019-000758

In Re The Estate of Hazel North
Grady North and Jean Corbett,

Respondents,

v.

Linda North and James North
Individually and as Personal
Representative of the Estate of Hazel
North,

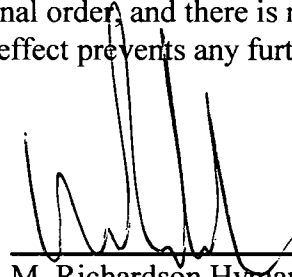
Appellants.

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SC Court of Appeals

MOTION TO REINSTATE

COMES NOW YOUR APPELLANTS by and through their undersigned counsel of record, and in accordance with the provisions of SCACR 260, and does respectfully pray that this Honorable Court reinstate the case to the appellate roster insomuch as the order of the circuit court which is being appealed is, in fact, a final order, and there is not only no further action to be taken on the trial level, but that the order in effect prevents any further action from being taken on the trial level.

10 July 2019



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MOTION TO REINSTATE APPEAL

The Appeal was dismissed by Order of this Court based upon a lack of appealability as the order being appealed is not a final order. COMES NOW YOUR APPELLANTS by and through their undersigned counsel of record, and in accordance with the provisions of SCACR 260, and does respectfully pray that this Honorable Court reinstate the case to the appellate roster insomuch as the order of the circuit court which is being appealed is, in fact, a final order, and there is not only no further action to be taken on the trial level, but that the order in effect prevents any further action from being taken on the trial level.

RELEVANT FACTS

1. Grady North (Respondent) filed a petition for informal probate of a will in Charleston, South Carolina along with a petition for informal appointment. (First Petition)
2. The will was admitted to informal probate and Grady North was informally appointed as Personal Representative. (First Order)
3. After the appointment and admission to probate, James North filed a separate petition for informal probate of a second will along with a petition for informal appointment in the same estate. (Second Petition)
4. The probate court granted James North's petition for probate of the latter will and appointed him as personal representative. (Second Order)
5. The probate court then terminated the appointment of Grady North and removed the prior will from probate by order of 27 March 2016. (Third Order)
6. Grady North did not appeal the order terminating his appointment. (Third Order)
7. Grady North did not appeal the withdrawal of his will from probate. (Third Order)

8. Grady North did not appeal the order admitting the latter will (James North will) to probate. (Second Order)

9. Grady North did not appeal the appointment of James North as personal representative. (Second Order)

10. Well over a year after all of the orders in question, Grady North moved the court for relief from those orders based upon SCRCP 60(b)(4).

11. The basis for the motion was that there was a lack of due process on the because he had no prior notification of the Second and Third Orders.

12. The motion was denied.

13. Grady North appealed to the circuit court which granted the appeal.

14. The circuit court ordered:

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 the decedent Hazel North. (Order p. 7)

15. The rationale was that the court found and concluded

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 [sic] the United States Constitution. (Order p. 6. Para 6).

16. That at the time of the filing of the SCRCP 60(b)(4) motion, over one year had elapsed since:

A. The death of the Decedent.

B. Grady North's initial appointment.

C. James North's subsequent appointment.

DISCUSSION

The order of the circuit court sitting in appeals is both a *de facto* and a *de jure* final order. If this matter is not heard here and now, it will never be heard at all. The circuit court voided the second order which both accepted the second will to probate and appointed James North as personal representative. It also voided the order removing Grady North as personal representative and removing the original will for probate. By voiding those orders, Grady North is appointed as personal representative and the original will is reinstated for probate. There is nothing more to be done on any of the petitions for appointment or probate. The circuit court did not remand for further proceedings. It decided the case, fully, finally and completely. The only thing left to do on the probate level is to administer the estate per the terms of the appointment and per the terms of the admission to probate. However, administration is a ministerial and not judicial action and not a part of the petitions for appointment and probate, nor a part of any order which the probate court or appellate court issued on those petitions. In short, the relief of the parties was fully and completely adjudicated by the probate court and fully and completely reversed by the circuit court in its appellate capacity. Based upon that ruling, there is nothing left to be done on the trial level. Moreover, because of a statute of repose in the probate code, Appellants are now time barred from making a contest on the probate level as a result of a year having passed since the testator's death even though they acted timely on the probate level.

In South Carolina, the laws regarding estates of decedents are generally found within the South Carolina Probate Code as codified in Title 62 of the South Carolina Code of Laws. While each decedent is given one case number in the Probate Court for all actions regarding that decedent's estate, it does not follow that all aspects of the administration of a decedent's estate are one single action. In fact, the contrary is true. "Unless administration under Part 5 [Sections

62-3-501 et seq.] is involved, (1) each proceeding before the court is **independent of any other proceeding involving the same estate...**” South Carolina Code Annotated § 62-3-107(1)(Emphasis added). While petitions for informal or formal appointment may be combined, South Carolina Code Annotated § 62-3-107(1), other matters are independent and require independent petitions. Therefore, whether this is a final decision depends upon whether it dispositively and fully adjudicates the underlying petitions for relief, to wit: appointment and probate. In this case, it does. The appellate court ordered the probate of the original will and declared the order for probate of the second will, and the order appointing James North, and the Order removing Grady North as personal representative as being void – not voidable, but void. By declaring the latter void, Grady North was never removed as personal representative and remains the same by the holding of the circuit court. Thus, the petitions for appointment and probate have been fully and completely adjudicated as there is an order for probate and an “unterminated” appointment of Grady North.

An example of how each aspect of estate administration is separate from another within the same estate is as follows. There may be a Petition for informal probate and administration and also a formal Petition for appointment and a prayer for a finding of no will. Within that same estate there may be another petition to sell real property, and a petition by a creditor to enforce a creditor’s claim. Each is a separate action brought under the same caption but with by a separate petition and a separate filing fee. The finality of an order based upon the Petition to sell property is not delayed because the court has not ruled upon a separate petition by a creditor to enforce a creditor’s claim. This is critical to in terms of understanding the finality of the lower court orders in this matter.

In recap, there have been several orders in this case. The first order in question was based upon a Petition by Grady North for the informal probate of a will and the informal appointment of himself as personal representative. The Court granted informal probate and appointment as prayed for in the Petition. This was the first proceeding before the court which was and is independent of any others in the same case per the express provisions of South Carolina Code Annotated § 62-3-107(1).

Subsequently, under the same caption and number as is proper practice in the Probate Courts, **a second petition** was filed for the informal probate of a later will by James North. This petition requested that the court also informally appoint James North as personal representative. The Court granted informal probate and appointment as prayed for in the Petition. This was the second proceeding before the court which was and is independent of any others in the same case per the express provisions of South Carolina Code Annotated § 62-3-107(1).

Simultaneously to granting James North's prayer in the second action in the *Estate of Hazel North*, the Court issued a third order which revoked the first will from informal probate and also dismissed Grady North as Personal Representative. This was not a third proceeding. It was a modification within the first proceeding initiated by the Petition of Grady North for informal appointment and probate.

Grady North did not appeal the order removing the first will from probate and dismissing him as personal representative. Likewise, Grady North did not appeal the order appointing James North as personal representative and admitting the second will to probate. After having fallen well over a year past the time for appeal, Grady North filed a motion for relief from the orders removing the first will from probate and dismissing him as personal representative and the order appointing James North as personal representative and admitting the second will to

probate. This motion was denied by an order of the Probate Court. He appealed to the circuit court which reversed the decision in its appellate capacity.

When examining the appealability of the circuit court's ruling as an appellate court, we must examine what it says and what it does. The circuit court in appeals stated that:

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 the decedent Hazel North. (Order of the Circuit Court, emphasis in the original.)

The order being reversed was the probate court's denial of the motion for relief from the judgments which removed the first will from probate and dismissed Grady North as personal representative and appointed James North as personal representative and admitted the second will to probate.

Appealability

What has happened in this case is that the appellate court reversed two final orders of the probate court. These were the orders (1) removing the Grady North will from probate and dismissing Grady North as personal representative; and (2) admitting the James North will to probate and appointing James North as personal representative.

The appealability of an order from the Probate Court is generally governed by § 62-1-308(a) which fundamentally mirrors other South Carolina law regarding appealability. This states in relevant part "a person interested in a final order, sentence, or decree of a probate court may appeal" Therefore, for an order from the Probate Code to be appealable it must be made by an interested party and it must be a final order.

There is but no question that the appellants were and are interested persons for purposes of appealability under South Carolina Code Annotated § 62-1-308(a). The term “interested person” as used in the Probate Code is specifically defined by the Probate Code.

“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. South Carolina Code Annotated § 62-1-201(23).

Appellant James North is an heir of the decedent, a child of the decedent, a devisee of the subsequent will and a person “having priority for appointment as personal representative” under the subsequent will which the appellate court removed from probate. He is unquestionably an interested person as defined by the Probate Code. Likewise, Linda North is a heir, devisee and child of the decedent. By definition, she too is an interested person.

As to the finality of the orders in question, one must examine the Probate Code. The circuit court has made a formal ruling upon the both of the Petitions for probate. It ruled that “This case is **REMANDED** back to the Charleston County Probate Court for informal probate of the 2008 will of the decedent Hazel North.” (Order p. 7). It did not remand for proceedings “consistent with the order.” It **ordered the probate** of the Grady North will pure and simple. It is an adjudication of both informal petitions for probate. It denied James North’s petition and it granted Grady North’s petition. There is nothing more to do in regard to either. Because, actions under the Probate Code are a series of *in rem* actions, and because the circuit court ruled on the question of probate, the *in rem* action in regard to probate is final.

Again, the order being appealed is the order of the circuit court which was sitting in an appellate capacity, and again, that order reversed the Probate Court's order for relief from the judgments (1) dismissing Grady North and appointing James North and (2) removing the Grady North will from probate and admitting the James North will to probate. This adjudication left Grady North as personal representative, and thus, fully and completely determined the independent issue of appointment in the *Estate of Hazel North*. Moreover, it ordered the probate court to probate the Grady North will, which fully and completely determined the independent issue of probate in the *Estate of Hazel North*.

As to James North's petitions, the appellate court reversed the trial court on the grounds of subject matter jurisdiction. "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 mandate by S.C Code § 62-3-401. (Order page 6. para. 4). The circuit court went on to rule that James North's "should have been **declined**." (Order page 6. para. 3, emphasis in the original). There is but no question that the appellate court finalized the matter in regard to the James North petition for probate and appointment. The appellate court ruled that the probate court should not have even accepted the application and that the matter was not even within the subject matter jurisdiction of the court to hear. It does not get more final than that. On remand, the probate court cannot do anything with the James North Petition as it has no subject matter jurisdiction to do so according to the appellate court. It is over in regard to that petition. The only relief that can be had is on appeal of the circuit court's ruling that James North's application should not have been accepted because of a lack of subject matter jurisdiction. While a denial of a motion to dismiss based upon a lack of subject matter jurisdiction is not immediately appealable in South Carolina is not

final, a finding of a lack of subject matter jurisdiction which terminates the rights of one or more of the parties, in this case Appellants, is final.

This is not akin to an order which denies an amendment or denies a motion for file a late answer or to file a third party complaint. As our courts have held, these types of orders are not immediately appealable “primarily because they may be appealed after the case has ended and final judgment entered.” *Tillman v. Tillman*, 420 S.C. 246, 249, 801 S.E.2d 757, 759 (Ct. App., 2017). The circuit court order in this case finally adjudicated the two petitions for probate and appointment in both fact and in effect. It finally adjudicated it in fact because it imposed a duty on the probate court “for informal probate of the 2008 will of the decedent Hazel North.” (Order p. 7).

Even if the order were not a final adjudication, it effectively amount to the same as it operates to immediately to terminate all of Appellants’ rights in the estate altogether. The Appellants are now time barred from either filing an informal or formal action for probate of the latter will.

Under the Probate Code,

a proceeding to contest an informally probated will and to secure appointment of the person with legal priority for appointment in the event the contest is successful may be commenced within eight months from informal probate or one year from the decedent’s death, whichever is later. South Carolina Code Annotated s 62-1-108(c).

This is not a statute of limitation. It is an absolute statute of repose.¹ Because it has been more than a year since the decedent died, and because it has been more than eight months since the

¹ This provision has been referred to as a statute of limitations in certain cases. See e.g., *Truluck v. Snyder*, 362 S.C. 108, 606 S.E.2d 792 (Ct. App., 2004). See also *Theisen v. Theisen*, 382 S.C. 213, 676 S.E.2d 133 (2009). However, it is in effect more of a statute of repose than it is a statute of limitations. In South Carolina, “[a] statute of limitations is a procedural device that operates as a defense to limit the remedy available from an existing cause of action. *Langley v. Pierce*, 313 S.C. 401, 403-04, 438 S.E.2d 242, 243 (1993), referencing the holding in *Goad v. Celotex Corp.*, 831 F.2d 508, 511 (4th Cir.1987), cert. denied, 487 U.S. 1218, 108 S.Ct. 2871, 101 L.Ed.2d 906 (1988). On the other hand, a statute of repose is “typically an absolute time limit beyond which liability no longer exists...”

appointment of a personal representative (regardless of whether one applies the appointment of Grady or James North) the Appellants are time barred from contesting Grady North's will or applying for formal probate of their own. There is no recourse on the trial (probate level) for Appellants as a proximate cause of the circuit court ruling. Even if the probate court wanted to grant them relief, it cannot because the time to contest has passed. The same statute bars a contest for appointment based upon the same reasons.

As this Court has noted, "[t]o determine whether an order is immediately appealable, we look to the [] court's order's effect on the proceedings" *Dorn v. Cohen*, 418 S.C. 126, 138, 791 S.E.2d 313, 319 (Ct. App., 2016) citing in turn *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011). It does not get more final in effect and in name than it does in this case.

In recap, Grady North sat on his rights and did not appeal any of these orders. He waited until the time to contest had elapsed. Then he claimed that there was no subject matter jurisdiction for the orders, and that he had no due process in the matter. As a result of the order of the circuit court, the Appellants who have been diligent in the probate case are now disinherited and cannot challenge whether or not due process was or was not had, and the obscenely ridiculous question of whether or not the probate court had the subject matter jurisdiction to hear questions involving testacy and appointment. That is unless those questions can be heard now.

Id. In the case of the Probate Code limitation, it would appear to be a limit beyond which appointment or probate simply cannot be had. The distinction is important. "A statute of repose constitutes a substantive definition of rights rather than a procedural limitation provided by a statute of limitation." 313 S.C. at 404, 438 S.E.2d at 243. As a consequence, statutes of repose are not tolled for any reason. *Id.* Section 62-3-108 appears to be a statute which cannot be tolled if it is applicable.

As it has been demonstrated that the order is final in regard to the question of probate, it is equally clear that the order is final in regard to both James North's and Grady North's petitions for appointment. Again, the order of the circuit court does not remand the question to the probate court for action. The order of the circuit court voids the order appointing James North as personal representative. It is nothing less than a final ruling on the Petition in that matter. Furthermore, by voiding the order appointing James North, and the order terminating Grady North, the court has effectively ruled that Grady North is the personal representative of the estate, as those were the orders which terminated his appointment. If those orders are void, then his appointment was never terminated. So again, the circuit court ruled that the orders are void and that the probate court had no subject matter jurisdiction to even entertain them. The question of appointment has been dispositively decided by the appellate court.

Per the Probate Code "a proceeding for appointment of a personal representative is **concluded** by an order making or declining the appointment." South Carolina Code Annotated § 62-3-107(4). (Emphasis added) That is what the circuit court did in this case. Because each action under the Probate Code is a separate proceeding within the same case file, an order granting or denying a petition for appointment is a *de facto* and *de jure* full and final adjudication of that proceeding.

Again, the ramifications may not seem as far reaching upon first glance as they actually are. Again, under the Probate Code,

a proceeding to contest an informally probated will **and to secure appointment of the person with legal priority for appointment in the event the contest is successful** may be commenced within eight months from informal probate or one year from the decedent's death, whichever is later. South Carolina Code Annotated s 62-1-108(c)(emphasis added).

This is not a statute of limitation. It is an absolute statute of repose, and it creates a double conundrum for Appellants. (1). The informal petitions have been ruled on so there is no further action to be had in these cases. (2) Because it has been more than a year since the decedent died, and because it has been more than eight months since the appointment of a personal representative (regardless of whether one applies the appointment of Grady or James North) the Appellants are time barred from seeking appointment as persons with priority. (3) Lastly, because the circuit court ordered the probate of the original will, they have lost their priority for appointment even if they were not time barred on the matter.

CONCLUSION

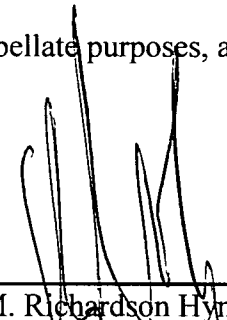
The order of the circuit court in appeals is *de jure* and *de facto* final. There were two petitions for the probate of two wills. The ruling in this case fully and finally answers the question of which will shall be probated. It is a grant of one petition and a denial of the other. Those petitions are closed and there is no further action to be taken on the trial level. The matter is over unless it will be heard on appeal.

The ruling in this case fully and finally answers the question of appointment. Because the judge voided the Order of Appointment of James North as well as the Order terminating Grady North, there is nothing left to do in regard to the question of appointment. According to the order Grady North is now, and has always been, the personal representative per the original appointment. Further, the appellate court determined that the probate court did not even have subject matter jurisdiction to accept James Norths' petition for appointment and was wrong to do so.

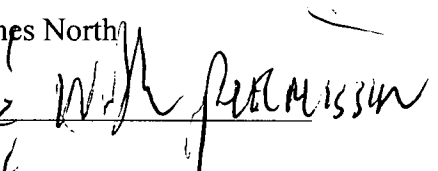
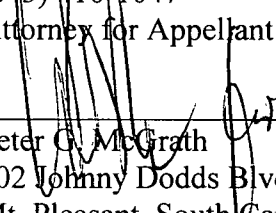
There is nothing more to do on the trial level on any of the petitions for appointment or probate. There will be no further available proceedings upon the remand. Consequently, the

order of the circuit court is a final order for appellate purposes, and the appeal should be reinstated.

10 July 2019



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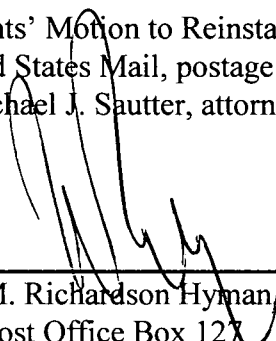
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I certify that I have served the Appellants' Motion to Reinstate Grady North and Jean Corbett by depositing a copy of it in the United States Mail, postage prepaid, on 10 July 2019, 2019, addressed to their attorney of record Michael J. Sautter, attorney of record, 147 Wappoo Creek Drive, Ste 202, Charleston, SC 29412.

10 July 2019


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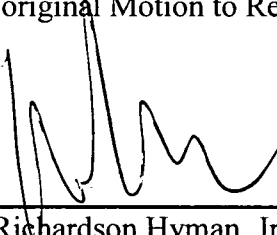
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The Honorable Jenny Abbott Kitchings
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RE: In Re: The Estate of Hazel North, Grady North and Jean Corbett Respondents v. Linda North and James North, Individually and as Personal Representative of the Estate of Hazel North, Case No. 2019-000758

Dear Ms. Kitchings:

Please find enclosed for filing the original Motion to Reinstate as well as proof of service as well as the filing fee of \$50.00.



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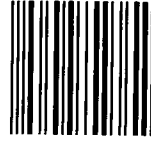
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