

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Gail Turner,
Plaintiff/Appellant,

v.

Henry McMaster, Governor of
South Carolina,
Defendant/Respondent.

AND

In the matter of the Estate of James
Najee Karim,

Gail Turner,
Pctitioner/Appellant,

v.

Harmonica Hart, Sandra Jones, Carinne
Byrd, Cornelius Hart, Joann Wall,
Respondents.

IN THE COURT OF COMMON PLEAS
FIFITH JUDICIAL CIRCUIT

C/A No.: 2018-CP-40-01772

RECEIVED
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SC Court of Appeals

APPEAL FROM THE RICHLAND COUNTY PROBATE COURT
The Honorable Amy W. McCulloch, Probate Judge

This appeal by Gail Turner concerns two orders of the Richland County Probate Court. The first concerns an order of the Honorable Amy W. McCulloch, Probate Judge, dismissing the Governor from these proceedings as an improper party. The second was an order refusing a will

to probate and confirming Harmonica Hart as Personal Representative of the Estate of James Najee Karim. The Court finds that for the following reasons the Probate Court is affirmed.

FACTUAL BACKGROUND

Appellant has failed to file and serve the record on appeal as mandated by S.C. Code Ann. § 62-1-308. Therefore, much of the Court's facts must necessarily derive from the two orders of the Probate Court which have been filed with the Court. The following facts are drawn from Judge McCulloch's order dated March 20, 2018.

James Najee Karim (hereinafter Decedent) died on August 27, 2017 and was unmarried. Decedent was predeceased by his mother, Willie Mae Hart, and his son Darrick Hart. Darrick Hart was unmarried and was not survived by any children. The Decedent was survived by his daughter, Harmonica Hart; his father, James C. Hart, Sr.; and his siblings, Gail Turner, Sandra Jones, Carinne Byrd, Cornelius Hart, and JoAnn Wall. Under the intestacy statute, S.C. Code Ann. § 62-2-103, Harmonica Hart is the only surviving heir of Decedent.

On September 8, 2017, Harmonica Hart filed an Application for Informal Appointment requesting the Richland County Probate Court to appoint her as Personal Representative of the Estate of James Najee Karim ("Estate"). The Probate Court appointed Ms. Hart as Personal Representative on September 28, 2017. Prior to Ms. Hart's appointment Appellant, Gail Turner, and Sandra Jones¹ filed an incomplete Summons and Petition for Formal Testacy in which they alleged that the Decedent had executed a living trust which left all his assets to his siblings. The living trust was not included with their filings. Sandra Jones subsequently filed a "Proof of Service" on September 28, 2017, in which she stated that she mailed the Summons and Petition

¹ Ms. Jones is not a party to this appeal.

to Harmonica Hart by first class mail; however the date she mailed was left blank. The Probate Court found that the purported service was insufficient under Rule 4(d), SCRCP.

On September 28, 2017, Ms. Turner and Ms. Jones further filed an "Objection to the Petitioner's Application for Executorship" where they alleged that the Probate Court lacked subject matter jurisdiction because Decedent "did not execute a will or a bequest" and that the Decedent "did not have nor hold an estate nor any real or personal property for this Court to probate in any way." Along with this document Ms. Turner and Ms. Jones filed several affidavits averring that Decedent and Ms. Harmonica Hart were estranged and because of this reason she should not inherit from the Estate.² Furthermore, Ms. Turner and Ms. Jones filed a copy of a trust document entitled "Najee61372 Trust" dated January 23, 2017. The purported trust document indicates that it was amending a trust document created on July 25, 2015. There is no indication that the 2015 trust document was ever filed with the Probate Court. The purported 2017 trust document provided that Harmonica Hart was to receive one (1) acre of land at the "rear end of the lot" on real property known as 1328 Winterwood Road, Columbia, South Carolina, 29203; James C. Hart, Sr. and Willie Mae Hart were to receive the house located at 1334 Winterwood Road, Columbia, South Carolina, 29203; Catherine Byrd was to receive a one-fourth (1/4) parcel adjoining real property she already owns; JoAnn Wall was to receive one (1) "acre to be held in trust by trustee;" Gail Turner was to receive one (1) acre located at 160161 Highway So. (sic) Winnsboro, South Carolina, 29180; Sandra Jones was to receive two (2) acres located at 1328 Winterwood Road, Columbia, South Carolina, 29203; and Cornelius Hart was to receive the "Estate House plus 2 acres remaining."³ The document was allegedly signed by the Decedent as

² All of these affidavits were notarized by Gail Turner. Generally, a notary may not notarize any document to which they are a party to or beneficiary of. *See* S.C. Code Ann. § 26-1-90(C)(3).

³ Again the Court must draw these facts off of the Probate Court's order as none of the documents presented to the Probate Court were presented to this Court for appellate review.

trustee and Sandra Jones as successor trustee. The trust was notarized by Gail Turner and witnessed by Carinne Byrd and James C. Hart, Sr. The Probate Court informed Ms. Turner and Ms. Jones on September 28, 2017, of the deficiencies in their filings and what was required to correct such deficiencies.

On October 19, 2017, Gail Turner filed the purported Last Will and Testament of the Decedent dated June 23, 2012. The Will bequeathed \$1,000.00 to Harmonica Hart and devised the real properties, along with the remainder of the Estate, to the "Najee 6-13-72 Living Trust." The Will was allegedly signed by the Decedent and witnessed by the Decedent's parents, James C. Hart, Sr. and Willie Mac Hart, and by the Decedent's nephew, Corey Byrd, who is the son of Carinne Byrd. Along with the Will, Ms. Turner filed a purported trust document entitled the "Najee 6-13-72 Living Trust" dated June 23, 2012. The purported trust named Gail Turner as trustee and was allegedly signed by the Decedent and Gail Turner as trustee. It was witnessed by Willie Mac Hart, James C. Hart, Sr., and Corey Byrd. The Will was not self-proving under S.C. Code Ann. § 62-2-503.

Again the Probate Court found that Appellant's filings were littered with procedural errors. The Probate Court found that the appropriate and complete Summons and Petition for Formal Testacy was never filed, nor was any such Summons and Petition properly served. However, in the interest of judicial economy, the Probate Court convened a hearing on the issues raised on February 6, 2018. After the hearing the Probate Court made its findings of fact and conclusions of law. The Probate Court found that as none of the assets listed were ever titled in the name of the trust that the trust document was invalid unless the Will successfully devised real

property or bequeathed personal property to the trust.⁴ The Probate Court further found that the Will appeared to be properly executed by the Decedent according to the formalities. However, the Court found that the Will was witnessed by two interested witnesses, James C. Hart, Sr. and Willie Mae Hart. The Probate Court thus excluded the signatures of these two witnesses. The Probate Court found that as there was only one witness to the Will, after excluding the two interested witnesses, and on that ground refused the Will to probate. As the Will was denied to probate the Court found that the Estate should pass according to the intestacy statute. Furthermore, the Court determined that Harmonica Hart should continue to serve as Personal Representative of the Estate.

Before the hearing on February 6 Appellant, Gail Turner, filed a document styled a Complaint and a "Petition in the Nature of a Motion for a Declaratory Judgment" which named Governor Henry McMaster as the sole defendant. On February 12, 2018, the Probate Court dismissed the Governor from the litigation finding that he was not a proper party to the litigation and that Appellant had not asserted any claims against him. Appellant appealed to the Circuit Court from both of these orders pursuant to S.C. Code Ann. § 62-1-308(a) by filing a Notice of Appeal on March 29, 2018. A hearing was conducted on the appeal before the Honorable DeAndrea G. Benjamin, Circuit Judge, on June 15, 2018. As the Personal Representative and her attorney were not given proper notice of the hearing Judge Benjamin continued the hearing as to the March 20, 2018 order. However, the Circuit Court proceeded as to the February 12, 2018, order dismissing Governor McMaster. Judge Benjamin issued her ruling on June 25, 2018, affirming the Governor's dismissal by the Probate Court and dismissing the Governor from this

⁴ In effect the Probate Court found that the trusts failed for lack of a *res*. See *Foster v. Foster*, 384 S.C. 380, 384, 682 S.E.2d 312, 314 (Ct. App. 2009) (To prove the existence of a trust a party must prove the existence of a trust *res*.)

appeal. The undersigned convened a hearing on Appellant's remaining case on June 28, 2019. Present were Appellant, counsel for Governor McMaster, and the Personal Representative and her attorney.

ANALYSIS

A. Judge Benjamin's June 25, 2018 Order

As a first matter Appellant attempted to reargue Judge Benjamin's order dated June 25, 2018, releasing Governor McMaster from this case. This is clearly without merit. It is black letter law in this state that one circuit court judge may not overrule the substantive decision of another. *Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986). Appellant may not argue against Judge Benjamin's order before the undersigned, her only avenue is to appeal the ruling.

B. Subject Matter Jurisdiction

Appellant argued below that the Probate Court was without subject matter jurisdiction. Appellant argued that as Decedent, in her view, had died without any property there was no estate to probate and the Probate Court was thus without subject matter jurisdiction. Appellant failed to raise this argument in her statement of issues on appeal and the issue was not addressed by the Probate Court. However, "[t]he lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised *sua sponte* by the court." *Town of Hilton Head v. Godwin*, 370 S.C. 221, 223, 634 S.E.2d 59, 60-61 (Ct. App. 2006). "Subject matter jurisdiction is defined as 'the power [of a court] to hear and determine cases of the general class to which the proceedings in question belong.'" *In re November 4, 2008 Bluffton Town Council Election*, 385 S.C. 632, 637, 686 S.E.2d 683, 685-86 (2009). Furthermore, subject

matter jurisdiction may not be waived even by consent of the parties and courts are obliged to take notice of the lack of subject matter jurisdiction. *Id.*

It is clear in this case that the Probate Court had subject matter jurisdiction. The Probate Court has exclusive original jurisdiction over the estates of decedents including will contests and the determination of intestate heirs. S.C. Code Ann. § 62-1-302(a)(1). Furthermore, the Probate Court has exclusive original jurisdiction over trusts, *inter vivos* or testamentary. § 302(a)(3). Appellant's subject matter jurisdiction challenge was plainly without merit.

C. Failure of Appellant to Serve Record on Appeal

Appellant in this case has completely failed to comply with the procedural requirements of S.C. Code Ann. § 62-1-308. Appellant was required to file and serve a Statement of Issues on Appeal. § 308(b). Arguably Appellant has complied with this requirement as her Notice of Appeal states that Appellant objects to the Probate Court's March 20, 2018, order on the grounds that it had an incorrect caption. Furthermore, Appellant made a vague objection in regards to the Probate Court's February 12, 2018, order dismissing Governor McMaster. However, it is clear that Appellant has failed to (a) furnish a copy of the transcript in this matter; (b) a Designation of Matter to be Included in the Record on Appeal in a format described by Rule 209, SCACR; (c) a copy of Appellant's brief on appeal in format described by Rule 208(b)(1), SCACR; (d) furnish a copy of the Record on Appeal. *See* § 308(c)-(f).

As a first matter Appellant was required to comply with Rule 208(b)(1)(B) in filing her Statement of Issues on Appeal. This Court is not free to consider any issue outside those which were raised in the Statement. "No point will be considered which is not set forth in the statement of issues on appeal." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (*citing* Rule 208(b)(1)(B), SCACR). Furthermore, by failing to include the Designation of Matter to be

Included in the Record on Appeal Appellant has forfeited any review of the Probate Court's findings as to the Will or the trust documents. *See State v. Hawes*, 423 S.C. 118, 128, 813 S.E.2d 513, 518 (Ct. App. 2018) (Appellate court will not consider any matter not included on the record on appeal). Furthermore, by failing to provide the Circuit Court with a copy of the transcript, or the Record on Appeal, the Court is unable to determine what, if any, issues were raised to or ruled upon by the Probate Court. All the Court has is the Probate Court's orders. "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). Without a copy of the transcript the Court is unable to tell what exactly has been raised to the Probate Court. Appellant has the burden of providing the Court with a sufficient record with which to make a decision. *Medlock v. One 1985 Jeep Cherokee*, 322 S.C. 127, 132, 470 S.E.2d 373, 376-77 (1996). Without the Record on Appeal in this case the Court is completely unable to make a decision as to the correctness of the Probate Court's decision.

D. Issues Raised

Even assuming the Court had a sufficient record, which it does not. Appellant only presents two issues on appeal. First, Appellant argues that this case was incorrectly captioned. Secondly, the Appellant raises an extremely vague objection to the order of the Probate Court dismissing Governor McMaster. As the Court has explained above the second issue may not be considered as it has already been decided by Judge Benjamin. As to the first issue the Court finds no error in how the Probate Court captioned the case and in any event the Court cannot say that Appellant has been prejudiced. Again Appellant's failure to provide a Record on Appeal hamstring the Court from considering prejudice. It may very well be the case that the Probate Court's order

was erroneous in some way. However, Appellant has failed to show either what those errors may be and to provide the Court with the record required to review such an error. “[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.” *State v. Austin*, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991). “For this court to evaluate the merits of a disputed issue, the appellant must provide the court with a sufficient record pertaining to that issue; otherwise, there is nothing for this court to review.” *Schultze v. Schultze*, 403 S.C. 1, 8, 741 S.E.2d 593, 597 (Ct. App. 2013).

CONCLUSION

The Court finds that Appellant’s attempt to reargue the order of Judge Benjamin is incorrect as the undersigned may not disturb the substantive ruling of another Circuit Judge. Furthermore, Appellant bears the burden of providing this Court with a sufficient Record on Appeal on which to review the order of the Probate Court. Appellant has failed to do so in this case. As the Court is unable to give any meaningful review of the Probate Court’s order such order must be

AFFIRMED.

AND IT IS SO ORDERED.

July __, 2019
Florence, South Carolina

/s/ Michael G. Nettles
Presiding Judge, Fifth Circuit



Richland Common Pleas

Case Caption: Gail Turner , plaintiff, et al VS Henry McMaster , defendant, et al

Case Number: 2018CP4001772

Type: Order/Other

So Ordered

s/ The Honorable Michael G. Nettles #2140

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