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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Order of Dismissal Dated 28 June 2019
No Hearing on Matter – Order Filed 28 June 2019
Petition for Rehearing Denied 27 September 2019
Appellate Case No. 2019-~~001808~~

In Re: The Estate of Hazel North

Grady North and Jean Corbett.....Respondents,

v.

Linda North and James North,Petitioners.

PETITION FOR A WRIT OF CERTIORARI

M. Richardson Hyman, Jr. (S.C. Bar # 64867)
Peter G. McGrath (S.C. Bar # 101611)
P.O. Box 127
Charleston, South Carolina 29402
(843) 416-1047

Attorneys for Petitioner

Other Counsel of Record:

Michael W Sautter, Esquire
Queery Sautter and Associates
147 Wappoo Creek Dr. Ste. 202
Charleston, South Carolina 29412
(843) 795-9500

Attorneys for Respondents

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CERTIFICATE OF COUNSEL

Pursuant to Rule 242(d)(1) of the South Carolina Appellate Court Rules, the undersigned counsel for Petitioner certifies that a Motion for Rehearing / Reinstatement was made and ruled upon by the South Carolina Court of Appeals. (App. P. 00.)

QUESTION FOR REVIEW

Did the South Carolina Court of Appeals err in dismissing the matter based upon a lack of appealability predicated upon the order being appealed not being final?

STATEMENT OF THE CASE

This case stems from a series of informal petitions for appointment and probate submitted to the Charleston County Probate. Initially, the Respondent, Grady North informally applied for appointment and probate of a will (hereinafter “will 1”). (App. p. 56) The Charleston County Probate Court granted the application and issued an order submitting the will to probate and appointing Grady North as personal representative. (App. p. 60) Petitioner, James North, was in possession of a subsequently executed will (hereinafter “will 2”). Subsequent to the probate of will 1, James informally applied to the Charleston County Probate Court for probate of will 2. (App. p. 50) As will 2 named him as the primary personal representative, he applied for informal appointment also. (*Id.*)

Insomuch as the Probate Code requires the probate of the last of a series of wills, the Charleston County Probate Court issued two orders, the first of which terminated Grady North’s position as Personal Representative (App. p. 48); and the second which admitted will 2 to probate and appointed James North as Personal Representative. (App. p. 54 & p. 49)

The Respondent, Grady North claims that he did not receive prior notice of the Court’s intent to remove him as PR or will 1 from probate. However, he concedes that he received a copy

of the order removing him as PR and removal of the will from probate post-execution. He did not appeal that order. Likewise, He received an information to heirs and devisees on the probate of will 2 and the appointment of James North. Respondents did not appeal the orders appointing James North as PR or admitting will 2 to probate. Moreover, while litigation ensued within the year following between the parties, which recognized the appointment of James North as PR, the appointment and probate was never challenged. Respondents also never filed a formal testacy or appointment proceeding to challenge James North within the one-year statute of repose contained in the Probate Code.

Well after one year of the issuance and service of the orders (1) removing Grady North as PR and (2) removing will 1 from Probate and admitting will 2 to probate and appointing James North, the Respondents filed a SCRCP Rule 60(b)(4) motion with the Probate Court asking for relief from the above orders. (App. p. 44.) Specifically, the motion asked to set aside the appointment of James North and will 2 and reinstate will 1 and reappoint Grady North as PR. (*Id.*) The basis for the motion was that the orders were void insomuch as the Probate Court lacked subject matter jurisdiction to issue the appointments and admit the wills to probate and that there was a lack of due process. The Probate Court denied the motion. (App. p. 36) The Respondents appealed to the Circuit Court.

On appeal, the Circuit Court held that the Probate Court did not “have subject matter to set aside the 2008 will and grant application of the 2014 will... .” (App. p. 32, para 5.) The Circuit Court also found that the “Petitioner was not afforded substantive due process [presumably the Court meant procedural due process] of notice and a hearing before he was terminated as personal representative” (*Id.*, p.33, para 6, emphasis in the original) In conclusion, the Circuit Court reversed the Probate Court’s denial of the SCRCP 60(b)(4) motion, (“The July 27, 2018 order of

the Charleston County Probate Court is hereby reversed.” (App. p. 33 para 2.) which in both effect and fact voided the Order removing Grady North as PR and voided the Order admitting will 2 to probate and appointing James North as PR. (*Id.*) Consequently, the Order from the Circuit Court fully adjudicated the whole case.

The Petitioners appealed this Order to the Court of Appeals. Prior to the time in which initial briefs were due to be filed, the Court of Appeals issued a request for a brief on the question of appealability. (App. p. 26.) Without hearing on the matter, the Court of Appeals dismissed the action *ex meru motu* by order of 28 June 2019 “[b]ecause the order on appeal is not a final order.” (App. p. 18.) Petitioner filed a timely Petition for Rehearing / Reinstatement, which was denied on 27 September 2019. (App. p. 00.)

ARGUMENT

Did the Court of Appeals Err in Determining the Order in Question to be Not Final?

The merits of the Rule 60(b)(4) motion is not at hand. The sole question upon which the Petitioner seek a writ of certiorari is whether the order of the Curcuit Court was a final order. It is axiomatic that appeals of orders in South Carolina must be from final orders unless such orders fall within a limited line of exceptions. Rule 201 SCACR. Moreover, in actions under the Probate Code, parties are granted the statutory right to appeal final orders. See South Carolina Code Annotated § 62-1-308(a). The Petitioners most respectfully assert that the Order in question is a final order. The question of the finality of an order directing the probate of a will and the appointment of a personal representative has significant implications both within the estate at hand, and within South Carolina estate practice in general. While prior law, cited below, indicates that a ruling on appointment is a final ruling, this question has never been directly addressed under the South Carolina Probate Code. Thus, the finality of orders of probate and appointment under the

Probate Code and for purposes of South Carolina Code Annotated § 62-1-308(a) is a novel question before the Court.

The petitions which ultimately drove the Order being appealed were for the probate of wills and the appointment of personal representatives. While the Probate Code does specify that appeals may only be taken from final orders, the Code does not define what is a final order on a petition for appointment, and what is a final order on a petition for probate of a will. The Court of Appeals did not explain its rationale for concluding that the Order of the Circuit Court sitting in its appellate capacity was not a final order. Presumably, the Court found the matter not final because the estate has yet to have been administered. Regardless of the rationale, the conclusion that the Circuit Court's order did not finally dispose of all matters involving the outstanding petitions for probate and appointment in the estate at hand is a significant departure from prior South Carolina practice; and potentially impacts every question arising on appeal from an order dealing with appointment or probate. No one contests the fact that there would be a time for review of the Order in question. However, in probate practice, a clear rule should be established as to the finality and appealability of orders directing the appointment of personal representatives and the probate of wills pursuant to the Probate Code. Also, as discussed *infra*, within the confines of the case at hand, the matter raises significant issues of procedural due process of law.

Estate litigation is different from almost all other aspects of jurisprudence in this state. On the informal side it is more administrative and ministerial. South Carolina Code Annotated § 62-1-201(22). On the formal side, it is fundamentally judicial in nature. South Carolina Code Annotated § 62-1-201(17). Unless the administration of an estate is pursuant to Part 5 (of Article 3 of the South Carolina Probate Code), the estate is not a "single *in rem* proceeding." (This estate is not a Part 5 estate.) On the contrary, administration under the Probate Code is a series of

independent proceedings which may be informal and ministerial, or formal and judicial, or a combination of both. There are informal and formal actions for appointment as personal representatives which may or may not be combined with informal or formal actions for probate. Independent of this, there may be independent actions not contesting probate but seeking to construe a will, while at the same time creditors outside of the probate action may file separate actions to press their claims against the estate. These various actions can and often do happen concurrent with one another though they are independent and heard independently. While each of these actions occurs under one case number, each of these actions require a separate petition or application.¹ This is evidenced by the vast list of South Carolina standard form petitions, including, but certainly not limited to: Form 300ES Petition for Appointment or for Probate; Form 332ES, Petition for Appointment of Special Administrator, FORM 334 Petition for Subsequent Administration; Form 373ES, Petition for the Allowance of a Claim; Form 390ES, Petition for Administration under Part 5; and, Form 404ES, Petition for Elective Share. Of course, this list is not even close to being exhaustive, but does demonstrate that each of these individual actions are separate from others arising under the Code. Each has its own petition, its own summons, its own filing fee, and unless Part 5 administration has been ordered, which it is has not in this case, its own order resolving the matters prayed for in the petition.

It is not clear from the Order dismissing the appeal why the Court of Appeals believes that the Order of the Circuit Court sitting in appeal is not a final order. However, this Honorable Court has explained that “[a] final judgment disposes of the whole subject matter of the action or

¹ Applications for informal appointment or for informal probate are commenced by separate application which may be combined with one another. South Carolina Code Annotated § 62-3-301. Formal proceedings must be commenced with a formal petition, akin to a complaint, and accompanied by a summons. See South Carolina Code Annotated § 62-1-201(17). See also South Carolina Code Annotated § 62-3-401 (formal testacy proceedings) & South Carolina Code Annotated § 62-3-414 (formal appointment proceedings). Creditors claims are enforced by separate petitions. See South Carolina Code Annotated § 804(3).

terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010).

Accordingly, we must examine what has been addressed commencing with "the subject matter of the action." Grady North had a Petition for Appointment and Probate. James North had a Petition for Appointment and Probate. Both were competing. The Respondent's SCRC 60(b)(4) motion denied by the Probate Court and granted by the Circuit Court in appeal "disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." It addresses the separate questions of appointment and probate and it addresses it for both James North and Grady North. "The July 27, 2018 Order of the Charleston County Probate Court is hereby **REVERSED**." App. p. 33 para 2, emphasis in the original.) It means that Grady North is now personal representative and James North is no longer personal representative. Accordingly, the question of appointment as outlined in both petitions for appointment has been fully and finally decided.

In regard to the competing petitions for probate, the order outlines it unambiguously in black and white. "The case is **REMANDED** back to the Charleston County Probate Court for informal probate of the 2008 will of Hazel North [will 1]." (*Id.*, at para. 3.) Therefore, the question of probate has also been conclusively determined by the Appellate Court. This Order fully adjudicates, James North's petition to have the latter will probated. It closes all outstanding petitions on probate. The decision is final. There is nothing left to do at all save "to enforce by execution what has been determined.... ." which in this case is the probate of will 1. Under Probate Code law, an order such as in this case "decreeing that the letters of administration should be granted ...[is] really the final order adjudicating the rights of the parties, and was therefore

appealable.” *Ex parte Small*, 69 S.C. 43, 46, 48 S.E. 40, 41 (1904). It is difficult to see why such rationale should not be applied to orders of appointment under Article 3 of the Probate Code today.

While this Petition is not on the merits of the appeal but rather on the question of appealability, one must note that the circuit court based its holding on a finding that the Probate Court lacked the subject matter jurisdiction to appoint James North. “I find and conclude that the Court did not have subject matter jurisdiction to set aside the 2008 will and grant [sic] application of the 2014 will” which was the will that appointed James North. (App. p. 32, para 5.) While it is true that the denial of a motion to dismiss for lack of subject matter jurisdiction is not immediately appealable,² the same is not true when there is a grant of a motion declaring the court at hand to be without subject matter jurisdiction. In this case, the Circuit Court’s reversal of James North’s will 2 from probate and his appointment was based upon a lack of subject matter jurisdiction as is specifically stated in the Order. (*Id.*) An order reversed based upon a lack of subject matter jurisdiction is assuredly as final as order gets as it effectively precludes further on the matter from the court deemed to be without jurisdiction. *Martin v. Paradise Cove Marina, Inc.*, 348 S.C. 379, 385, 559 S.E.2d 348, 351-52 (Ct. App. 2001). Again, the manifest error of circuit court’s conclusion that the probate court lacked subject matter jurisdiction to admit wills to probate and name personal representatives, cries out for redress.³ However, such is not the subject of this Petition – finality of the order is. In summary, at this point, it is clear that the Order of the Circuit Court on appeal selected and directed the appointment of a personal representative, and it selected one and only one will to be admitted to probate. There is nothing prayed for in the original

² See *Woodard v. Westvaco Corp.*, 319 S.C. 240, 242–43, 243 n.2, 460 S.E.2d 392, 393–94, 394 n.2 (1995).

³ See South Carolina Code Annotated § 62-1-302(a)(1) which states in relevant part:

(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...

petitions (App. p. 50 & 56) which is not decided, decreed and directed by the Circuit Court's Order. The only thing left is for Grady North to administer the estate in accordance with will 1. James North has been removed from involvement and has been disinherited. There is conclusive finality as to the petitions for appointment and probate.

This case raises an important issue of due process as to the parties in question. The elements of due process are simple and include: (1) notice and (2) the right to be heard, and (3) judicial review. *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 58 L.Ed. 1363 (1914). This right of judicial review is codified in the Appellate Court Rules at SCACR 201. There is no question that the Petitioners had notice and the right to be heard, but the question of judicial review is seriously in jeopardy. Because this is a final order, failure to appeal at this time would constitute a waiver. If the Petitioners were to wait until the end of administration and an order from the Court dismissing the personal representative, it would be too late to appeal, and the Respondents would rightfully oppose them on this issue.

As stated above, the reversal by the Circuit Court has disinherited Linda and James North. It is denied James North the fundamental right to serve as personal representative. Assuredly the law must contemplate judicial review of such a draconian result. Because the Respondents waited to challenge the validity of the Probate Court's actions until well over a year after the orders in question (and death of the decedent) the Petitioners are now barred from filing a challenge to will 1 as the Probate Code contains a blanket statute of repose. See South Carolina Code Annotated § 62-3-108(A)(2)(c). If a remedy is to be had, it must be on the merits on appeal.

The right to judicial review is constitutionally fundamental. This is particularly so in a case in which the errors are manifest on the face of the order, such as the conclusion that the

Probate Court was without subject matter to appoint a personal representative or admit a will to probate.

In summary, the question of finality as to orders directing probate of a will and appointment of a personal representative, whether made by a trial court or the circuit court on appeal, are final orders is a matter of critical importance for interested parties in the estates of decedents. When the order disposes of the ultimate prayer of the petition, which in this case is appointment and probate, the matter should be considered final, and litigants should have a clear-cut appreciation of the time in which an appeal must be taken or waived. The Order of the Court of Appeals establishes a rule which is contrary to pre-Code practice as outlined *supra* in *Ex parte Small*, 69 S.C. at 46, 48 S.E. at 41. The Court of Appeals gives no guidance as to when it will consider an order directing probate and appointment to be final. Is it at the end of administration, or it is some other time? The commonality of orders of this nature calls for a clearly-defined and unified approach. Litigants should not be required to muddle through questions involving finality based on Hamlet's conundrum "[i]f it be now, 'tis not to come. If it be not to come, it will be now. If it be not now, yet it will come... ." *Hamlet*, Act 5, Scene 2. The determination of this matter, at this time, by this Court can and will establish such an obviously-needed clearly-defined rule that can govern all appeals arising under South Carolina Probate Code, if not certainly the most common appeals which involve probate and / or appointment.

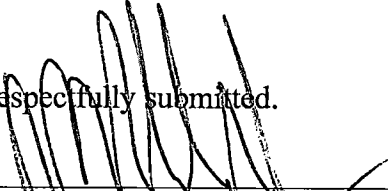
As to the parties in the case at hand, the Circuit Court unambiguously directed probate of one will and selected the personal representative. It is final. It "disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." *Charlotte-Mecklenburg Hosp. Auth. v.*

S.C. Dep't of Health & Envtl. Control, 387 S.C. at 267, 692 S.E.2d at 895. If judicial review of the order is to be had, and due process afforded, it must be now.

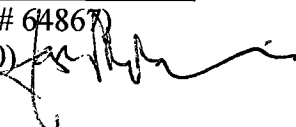
CONCLUSION

Based on the foregoing arguments and citation to authority, the Supreme Court should extend *certiorari* and reverse the Court of Appeals dismissal for lack of a final order. The Petitioners therefore file this Petition.

Respectfully submitted.



M. Richardson Hyman, Jr. (S.C. Bar # 64867)

Peter G. McGrath (S.C. Bar # 101480) 

P.O. Box 127

Charleston, South Carolina 29402

(843) 416-1047

Attorneys for Petitioner

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