THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ALLENDALE COUNTY
Circuit Court

Lawton McIntosh, Circuit Court Judge

Case No. 2019-000905

J. Morgan Kearse, Personal Representative of the Estate of G.H. Kearse ..... Appellant,

v.

The Kearse Family Education Trust, William Gordon Kearse, Elizabeth Kearse Gooding, Julia Kearse Sharp, Rachael Kearse Best, Joseph Weber Kearse, and John Morgan Kearse, of which all are named individually and as Trustees of the Kearse Family Education Trust U/A/D Nov. 05, 1992 ..... Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This appeal concerns two basic injustices perpetrated against Appellant, the estate he represents, and a trust that has had no representation. The first injustice is the imposition of a settlement agreement upon the Appellant, the estate, and trust, none of whom agreed to the settlement in accordance with South Carolina law, and which would require Appellant and, possibly also the estate, to pay undetermined amounts of money in legal fees, and also affect the rights and obligations of the trust. The second injustice is the denial of Appellant's right to challenge the order imposing the settlement on the basis that Appellant supposedly lacks standing to do so. Each issue is addressed in turn following a summary of the relevant procedural and factual history.

This matter begins with the death of G.H. Kearse ("Decedent") on June 10, 2013, who was survived by his wife and six children. Decedent's duly probated last will and testament named all six children as co-personal representatives and left his residuary to the separately created Kearse Educational Trust U/A/D November 5, 1992 (the "Trust"). (R. pp. 307-325; 730-35). Rather than all six children serving as co-personal representatives, the children agreed that brother Morgan Kearse ("Appellant") would serve as sole Personal Representative, and the Allendale County Probate Court (the "Probate Court") appointed him as such. (R. p. 737). For its part, the Trust was established to preserve the family farm and use other available Trust property for payment of

educational expenses of Decedent's descendants. (R. pp. 309). All six of Decedent's children have served as Co-Trustees from the Trust's inception through the present day. (R. pp. 322-24).

Early on in his duties as Personal Representative, Appellant encountered an interpretational problem with regard to Decedent's will. Item VI of the will purported to give "all my monies" to build a house modeled after Gunston Hall in Lorton, Virginia, unless otherwise needed to pay ad valorum taxes for the Trust property. (R. p. 303). Item VI did not name a recipient, but stated "I direct that my six (6) children build the house." Id. In possible conflict, Item VIII of the will specifically gave "any monies in any banks, bonds, or any cash in my possession" to the Trust. Furthermore, the location of the house specified in Item VI was on property that was held by the Trust as of Decedent's death.[1] (R. p. 304).

Accordingly, there was and remains an interpretational dilemma as to whether Decedent's probate "monies" should be paid to the Trust or to the six children individually and, in either case, whether Decedent's directive to build the house was merely precatory or could be construed as an amendment to the Trust. With regard to the latter point, Appellant and two of his siblings thought the directive should be followed and three did not, with at least one of Appellant's siblings on each side threatening to litigate regardless of what was done. (R. p. 157, ¶¶ 2-3).[2] Finding himself in an impossible situation and having a fiduciary duty to carry out the terms of Decedent's will, Appellant therefore relied on the advice of his legal counsel Kenneth Wingate, who has been a Certified Specialist in Estate Planning and Probate Law for many years, to file a Petition For Instructions so

[1] The only other specific bequest in Decedent's will, which is not at issue here, was to allow Appellant to use Decedent's office contents for as long as Appellant continued practicing law, and then to other heirs who do the same. (R. p. 302).

[2] Appellant's Affidavit and its Exhibit were properly to the Probate Court pursuant to Rule 6(d), SCRCP, as part of Appellant's Motion to Alter or Amend or, in the Alternate, for a New Hearing.

that the Probate Court could direct Appellant as to the proper interpretation of Decedent's will.[3] (R. p. 157, ¶ 4).

In response to the Petition, siblings Elizabeth Gooding and Julia Sharp (referred to herein as "Respondents") asked the Probate Court to rule that the house may not be built, with Respondent Gooding filing an Answer to the Petition for Instruction and Motion for Summary Judgement, and Respondent Sharp filing a Motion to Dismiss. (R. pp. 84-86; 116-18). As a result of their stern resistance, the siblings who were in favor of honoring their father's wishes relented, and so Appellant filed a Motion to Dismiss his own Petition for Instruction, which he could not do unilaterally under Rule 41(a)(1), SCRCP after the Respondents' filings. (R. pp. 121-23; 157, ¶ 5)..

The Probate Court scheduled a hearing for Appellant' Motion to Dismiss the Petition for Instruction and Respondent Gooding's Motion for Summary Judgement on February 2, 2017. (R. p. 124). By appointment of the South Carolina Supreme Court, the Honorable Judge Sheila B. Odom presided as Special Probate Judge for all litigation involving the Estate. (R. p. 7).

At 9pm on January 31, 2017, just one business day prior to the hearing, counsel for Respondent Sharp emailed a document entitled "Final Term Sheet" to counsel for Appellant and counsel for Respondent Gooding. (R. pp. 622-24). The terms of the Final Term Sheet may be fairly summarized as follows:

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[3] See S.C. Code Ann. § 15-53-20 ("Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed."); S.C. Code Ann. § 62-1-301(a)(1) (giving the probate court broad jurisdiction over estate matters); S.C. Code Ann. § 62-3-105 (allowing interested persons to petition the probate court for orders within the court's jurisdiction); S.C. Code Ann. § 62-7-201(a)(1) (giving the probate court broad jurisdiction over trustees, including an action to "instruct trustees").

- Item 1: Appellant would immediately resign as Personal Representative and A.G. Solomons, or another neutral non-family member appointed by the Probate Court, would become Special Administrator.
- Item 2: set Appellant's Personal Representative fee at $25,000.
- Item 3: Appellant to pay Respondent Sharp's legal fee in defense of the Petition for Instructions.
- Item 4: Appellant responsible for legal fees of Respondent Gooding and his own legal fees as Personal Representative; provided, however, that if three of the five other siblings besides Appellant did not object, Appellant may ask the Estate to pay these.
- Item 5: Respondent Sharp does not object to Appellant using Decedent's office rent free as long as Appellant practices law therein, maintains the property, and carries sufficient hazard insurance.
- Item 6: the Trust to purchase home of Decedent's surviving spouse for $89,000.

Although there was no legal or factual justification for imposing these legal fees on Appellant,[4] Appellant was willing to absorb Respondent Sharp's legal fees for the good of the family and the Estate if, and only if, three of the other siblings would agree to let the Estate pay the legal fees for Appellant and Respondent Gooding, pursuant to Item 4 of the Final Term Sheet. (R. pp. 157-58, ¶¶ 6-15). Accordingly, Appellant sought and received oral affirmation from siblings Rachael Best, Gordon Kearse, and Joseph Kearse (referred to herein as the "Pro Se Respondents"). Id. Appellant then prepared a simple written supplemental agreement that would have (1) confirmed approval of the Final Term Sheet by the Pro Se Respondents and (2) confirmed that a majority of his siblings did not oppose the Estate's payment of the legal fees of Appellant and

[4] See S.C. Code Ann. § 62-3-720 (requiring payment by the estate of a personal representative's fees and expenses for defending or prosecuting a matter in good faith).

Respondent Gooding. Id. Appellant also discussed this supplemental agreement with the Pro Se Respondents and understood that each agreed to the same. Id.

With this understanding, Appellant's counsel emailed Respondents' counsel on February 2, 2017 to indicate that Appellant was agreeable to having the Final Term Sheet entered on the record at the hearing and would notify the Probate Court. (R. pp. 633-34). Respondent Sharp's counsel then responded to ask that Appellant's counsel please notify the Probate Court that "all the other siblings have agreed to the settlement. I can only speak for [Respondent Sharp] and Steve can only speak for [Respondent Gooding]." (R. p. 633). In addition, Respondent Gooding's counsel emailed to say "[c]andidly, I would prefer that all interested parties, including [Appellant] and each of his siblings be present to place on the record their consent to this Agreement ...." (R. p. 632). Appellant's counsel responded that "I'm in the process of obtaining signatures from [the Pro Se Respondents] to indicate their consent. I'll confirm to you when we have them in hand." (R. p. 631). Near the end of the day, Appellant's counsel sent a final email stating his understanding that the Pro Se Parties "are each signing the agreement this afternoon, and I'll have copies of their signatures with me at the hearing." Id.

In addition, Appellant emailed a letter to the Probate Court indicating his belief that all parties had reached a settlement. (R. p. 793). However, this letter was never introduced as evidence at the February 2, 2017 hearing. [5] (R. pp. 589-642). Further, the letter did not specifically incorporate the Final Term Sheet or discuss the terms thereof except that Appellant would resign as Personal Representative, that an "agreed-upon" special administrator would be appointed (which was not technically in accord with the Final Term Sheet), and that pending pleadings would be withdrawn (which was not in the Final Term Sheet at all). (R. p. 793). Finally, at no time did

[5] Respondents' counsel discussed the letter at the hearing, but they were not testifying and, if they had been, such statement would be hearsay. (R. pp. 601-02).

Appellant or his counsel represent to anyone that either could speak on behalf of the Pro Se Parties, or the Trust for which all of the siblings were and are Trustees, or that the Final Term Sheet could otherwise be official and binding without adequately confirming everyone's consent pursuant to South Carolina law. In fact, it was Respondents' counsel themselves that raised that concern. (R. pp. 632-33).

Unfortunately, however, Appellant learned after close of business on February 1, 2017 that one of the Pro Se Respondents now refused to sign Appellant's supplemental agreement, which was a necessary condition of Appellant's agreement with the Final Term Sheet, and so Appellant informed his counsel that there was in fact no agreement regarding the Final Term Sheet. (R. p. 158, ¶¶ 12 & 14). Due to the last minute nature of these developments, Appellant's counsel first informed the Court of this non-agreement at the February 2, 2017 hearing. (R. p. 158 ¶ 14). In addition, because there was no longer an agreement providing for Appellant's resignation, Appellant signed a separate Statement of Resignation indicating his intent to resign pursuant to South Carolina law.[6] (R. p. 145).

As to the Statement of Resignation, Appellant's counsel noted "[n]ow, as the Code indicates and as Your Honor is aware, a Personal Representative cannot automatically resign ...." (R. p. 595, lns. 12-14). The Probate Court subsequently acknowledged as much, stating, "Mr. Wingate, as his attorney, you did read this statute per se without reading it verbally that there are requirements of [Appellant] to give notice of his resignation and formal process and to obtain the acceptance of Mr. Solomons, and we need to reconvene on a hearing on that matter. I expect that you will so file those documents as necessary." (R. p. 609, lns. 7-13). Although Appellant's counsel described Appellant's resignation as being "irrevocable," this statement was meant within the stated context

[6] See S.C. Code Ann. § 62-3-610(b) (providing by which a personal representative may resign).

that there is a statutory process that must be followed to remove Appellant as Personal Representative, and that Appellant did not have the unilateral authority to resign without such process being completed.

As for the Final Term Sheet, Appellant's counsel's declaration of the non-agreement was unequivocal: "As we stand here this morning, I'm afraid to announce to the Court that two things have changed. Number one, I have not been provided copies of any document from the pro se litigants consenting to the settlement, so whereas I was told that I would be able to present that to you, I do not have that and cannot present it to you." (R. p. 593, lns. 14-20). And specifically as to Appellant, "his position will be that he does not consent to the settlement." (R. p. 595, lns. 14-16). "His position, however, is what I have said....he does not consent." (R. p. 595, lns. 23-25).[7]

In response, Respondents put the Final Term Sheet on the record, including evidence that it was signed by Respondents and Gordon Kearse, as well as the email communications prior to the hearing between counsel for Appellant and Respondents. Ultimately, however, the Final Term Sheet was signed by only three of the six siblings – Respondents and Gordon Kearse – and no other persons. (R. pp. 636-41). Furthermore, neither Appellant nor Rachael Best or Joseph Kearse attended the hearing to otherwise express assent to the Final Term Sheet. (R. p. 9). Consequently, the Final Term Sheet was also not approved by a majority of the Trustees of the Trust directly impacted by the Final Term Sheet and, regardless, at no point did any person purport to approve the Final Term Sheet on behalf of the Trust. (R. pp. 8-13; 589-642).

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[7] Respondents have argued that Appellant acquiesced to the Final Term Sheet as a binding settlement by stating that "I am certain Your Honor will hear arguments today that once I have represented to the Court yesterday that we had a settlement that ... my client would be bound to that. That very well may be what you decide." (R. p. 595, lns. 18-22). However, this is nothing more than an acknowledgement that the Probate Court may or may not make such ruling; not that Appellant would agree with the Probate Court. This is particularly evident given that the statement was directly preceded and followed by Appellant's clear denial of a settlement.

For its part, the Probate Court acknowledged that the siblings were no longer in agreement with the proposed settlement and stated it was going to accept the Final Term Sheet on the record and accept Appellant's statement of resignation:

> Being the – what I would refer to as the 11th hour that this is not an agreed upon by all parties exclusively agreement any longer, the Court is left in a conundrum because I have nothing further from [Appellant] what all of a sudden he doesn't agree to specifically in the agreement, and having found – this particular time with nothing further on that except that he just is going to resign and doesn't agree and all the parties having been present this morning to present this agreement, [8] the Court finds no other way at this point to move forward other than to, A, accept the agreement into the record, and, B, accept the appointment of resignation of [Appellant].

(R. p. 608, lns. 18-25; p. 610, lns. 1-6). Nevertheless, although not understood by Appellant's counsel at the time, the Probate Court intended that the Final Term Sheet be accepted as a binding settlement when it stated "the Court is going to enter into the record that this Final Term Sheet of agreement be filed as a family agreement and that the record will reflect that the order provided to this court on behalf of either [Respondents] to state that this order will be entered into the record and accepted on the terms as it is on the face of the agreement itself." (R. p. 609, lns. 14-22).

Ultimately, Respondent Sharp did submit a proposed order that specifically adopted the Final Term Sheet as a binding settlement, stating "the Court entered into the record the Final Term Sheet of Agreement as a family agreement and stated that an Order would be entered into the record and accepted on the terms as it is on the face of the agreement itself." (R. pp. 11; 794-800). The Order was executed by the Probate Court on February 27, 2017, served by letter dated March 3, 2017, and received by Appellant on March 6, 2017. (R. pp. 12-13).

On March 16, 2017, Appellant served a Motion to Alter or Amend or, in the Alternate, for a New Hearing. (R. pp. 147-59). Appellant's motion objected to the February 27, 2017 Order in its

[8] Appellant believes the Probate Court intended to say "all the parties [not] having been present," as the record shows only Respondents were personally in attendance.

entirety and the Probate Court's approval of the Final Term Sheet in its entirety, including but not limited to its termination of Appellant as Personal Representative and the appointment of a Special Administrator. Appellant also noted that he remained willing to resign and have a Special Administrator appointed if the remaining portions of the Final Term Sheet were stricken. (R. p. 155). However, the Probate Court did not strike any portion of the Final Term Sheet and, therefore, Appellant's objection to February 27, 2017 Order and Final Term Sheet in their entirety remain pending. (R. pp. 8-13).

Soon thereafter, on March 20, 2017, Judge Odom wrote counsel for Respondent Sharp with copy to other counsel and pro se parties to inform them "Mr. Harley Ruff of Ruff & Ruff, LLC Beaufort, S.C. has graciously accepted to serve as the Special Administrator in the above matter. This Court did reach out to both Mr. A.G. Solomons, Jr. and Mr. Kevin Brown who both respectfully declined to serve in the capacity of Special Administrator." (R. p. 15). Further, "[t]this Court will notify the other counsel of record of this appointment, copy attached." Id. Attached to the letter was the Statement of Resignation that Appellant had previously signed and submitted to the Probate Court on February 2, 2017. (R. p. 14).

This notice from the Court had been anticipated based on the Court's recent February 27, 2017 Order, which specifically indicated that the Probate Court would contact A.G. Solomons to see if he would serve as special administrator and, if not, to appoint a different neutral non-family member. (R. pp. 11-12). Further, no separate procedure had been conducted for the appointment of a special administrator independently of the February 27, 2017 Order.[9] Further still, the Statement of Resignation, as modified by the Probate Court with Mr. Ruff's name on March 20, 2017, was not file stamped with the Court as a separate document. (R. p. 14). Accordingly, Appellant had no

[9] See S.C. Code Ann. § 62-3-614.

reasonable basis to conclude anything except that Mr. Ruff's appointment was simply part of the Probate Court's February 2, 2017 Order.

After some delay, a hearing was scheduled for August 17, 2017 to hear Appellant's Motion to Alter or Amend or, in the Alternate, for a New Hearing, which Appellant pursued in his capacity as Personal Representative. (R. p. 167). Prior to the hearing, on July 27, 2017, Appellant served an additional motion that was intended to resolve the various issues that would remain if the February 27, 2017 Order was vacated. (R. pp. 160-66). This was titled as a Motion to Dismiss Petition for Instruction, Confirm Resignation of Personal Representative and Appointment of Special Administrator, and Direct Payment of Legal Fees and Cost. On August 16, 2017, Respondent Gooding served a Memorandum in Opposition to Appellant's Motion to Alter or Amend and, on August 15, 2017, served a Memorandum in Opposition to Appellant's additional motion dated July 27, 2017. (R. pp. 169-182).

At the hearing, the Probate Court declined to entertain Appellant's additional motion dated July 27, 2017 upon Respondent's objection. (R. pp. 19 & 645). Therefore, the only matter before the Probate Court was Appellant's motion to overturn the Final Term Sheet and February 27, 2017 Order in full. Further, Appellant continued to refer to Harley Ruff as the "proposed special administrator" (R. p. 643), and there was no argument made that the Probate Court's purported appointment of Harley Ruff on March 20, 2017, nearly a half-year earlier, deprived Appellant of standing to argue that the Final Term Sheet was void or that his status as Personal Representative had not been validly terminated. (R. pp. 643-661). In fact, there was no reference made to the purported March 20, 2017 appointment as being distinguishable from the Probate Court's underlying Order dated February 27, 2017 at all. Id. The most that Respondent Sharp offered on the matter was:

> I will say at the outset that I don't understand how the motion is being made by [Appellant] as the Personal Representative because he is not the personal representative and has not been for some period of time as I will deal with in a minute. His lawyer told us at the last hearing [on February 2, 2017] that he was resigning effective immediately....Now I'm not sure what effect that has legally. I'll let my probate lawyer Mr. Slotchiver address that if it comes up, but I think it's important to note that this is the only party that is before Your Honor in support of the motion.

(R. p. 646, emphasis added). However, Mr. Slotchiver never addressed the standing issue either beyond simply claiming that Appellant "is no longer the Personal Representative." (R. p. 649).

Accordingly, Appellant's status as Personal Representative was raised as an issue before the Probate Court only insofar as Appellant's termination was part of the Final Term Sheet and February 27, 2017 Order that remains on appeal, but not as an attack on Appellant's standing, nor as based on the Probate Court's purported March 20, 2017 appointment as a supposedly independent order. In fact, Respondent Sharp offered that if "they want to appeal to Judge Buckner and say [the Probate Court] should've done something differently, then they can file that appeal anytime after this hearing in the designated time." (R. p. 648).

Once again, Respondent Sharp provided the Probate Court with a proposed order, which the Probate Court executed and filed on September 18, 2017, and which was received by Appellant on September 19, 2017. (R. pp. 18-24; 801-08). The new Order denied Appellant's Motion to Alter or Amend, and specifically upheld the Final Term Sheet and the Probate Court's prior Order dated February 27, 2017. (R. pp. 19 & 24).

On September 27, 2017, Appellant filed his Notice of Intention to Appeal both the Order dated February 27, 2017 and Order filed September 18, 2017. (R. p. 187-90). Appellant did not include the Probate Court's purported March 20, 2017 appointment of Harley Ruff as an "order" for appeal for the very simple reason that it was the February 27, 2017 Order in which the Probate Court first terminated Appellant's status as Personal Representative and provided for appointment

of a Special Administrator, and the September 18, 2017 Order that confirmed those rulings. As such, Appellant did not view the March 20, 2017 "record of appointment" as described by the Probate Court as an independent order subject to appeal. (R. p. 15). Appellant's initial Brief of Appellant to the Circuit Court also addressed the legal reasons why Appellant remained Personal Representative. (R. pp. 194-215).

Before filing their responsive appellant brief, Respondents filed a joint Motion to Mediate on January 19, 2018, stating that "in the event that the parties are not able to resolve all matters in this mediation, Respondents Gooding and Sharp may have until thirty days after the mediator declares an impasse to file their responsive briefs." (R. pp. 217-18) (emphasis added). Respondents' motion was granted by consent on February 7, 2018,[10] with the Circuit Court stating "the Court encourages all named parties to the underlying dispute to attend and actively participate in the mediation in an effort to resolve any and all issues arising out of this Estate." (R. p. 27, emphasis added). Thereafter, Appellant in his capacity as Personal Representative continued to spend extensive amounts of time in the attempted mediation, which was held open for over three months beyond the initial day of mediation on February 26, 2018. (R. pp. 809-10). Accordingly, even on appeal, the Circuit Court issued a preliminary order that was directed to, and meant to be binding on, Appellant in his capacity as Personal Representative as one of the "named parties." (R. pp. 25-28). Further, by requesting and participating in a mediation involving Appellant in his capacity as Personal Representative without objection regarding Appellant's status as such, Respondents implicitly acknowledged and consented to Appellant's continued standing to act as Personal Representative. (R. pp. 216-21).

[10] Except for the Appellant's request for the Court to choose a mediator with experience in probate matters, which the Circuit Court rejected.

It was not until after this failed mediation, on appeal, that Respondents for the very first time argued that Appellant's "appeal is a nullity. He lacks authority to take this action on the estate's behalf." (R. p. 229). Respondents based this, also for the first time on appeal, on the argument that "[t]he Probate Court's March 20, 2017 order appoints Harley Ruff as 'successor personal representative' for this estate and indicates [Appellant]'s resignation 'is hereby effective.'" Id. "That order was not appealed and compels the conclusion that [Appellant] is not the personal representative." Id.[11]

Despite having a mere 10 days to respond to these new arguments,[12] which Respondents first raised 16 months after the Probate Court's purported March 20, 2017 appointment, Appellant's Reply Brief offered numerous rebuttals to the argument that Appellant's appeal was a nullity, and further argued that the appeal was proper even if Appellant lacked authority as Personal Representative. Appellant also made these arguments at oral argument. (R. p. 684, lns. 14-25; p. 685, lns. 1-21).

Ultimately, the Circuit Court's December 13, 2018 Order accepted Respondents' argument and dismissed the appeal. "An unappeased order appoints someone other than Appellant to the office of Personal Representative. For that reason, Appellant's attempt to take this appeal 'as Personal Representative' is a nullity." (R. p. 32). The Circuit Court further stated "[a]s this order explains, the appeal is dismissed because an unappealed order recognizes the Appellant is not the personal representative. He therefore lacks standing to initiate this appeal as personal representative." (R. p. 35).

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[11] Notably, however, the Joint Respondent's Brief did not address Appellant's argument that the Final Term Sheet did not meet the requirements of S.C. Code Ann. §§ 62-3-912 or -1102, and Respondents' counsel did not address the substance of Appellant's arguments regarding the invalidity of the Final Term Sheet at oral argument. (R. pp. 222-39; 673-77.

[12] See S.C. Code Ann. § 62-1-308(e).

Notably, the Circuit Court's rejection of Appellant's "standing" per se had not even been specifically raised by Respondents until their oral argument after all briefing was concluded. (R. p. 674, l. 9-13). Consequently, Appellant once again responded to a new legal issue as soon as he was able to do so by filing a Motion to Alter or Amend and, if Necessary, For Ratification, Joinder or Substitution of a Real Party in Interest. (R. pp. 551-584). To that end, Appellant's motion also included an affidavit[13] of Harley Ruff, the purported Special Administrator (according to the Probate Court) or Personal Representative (according to Respondents on appeal), who stated that Appellant's appeal was necessary to administer Decedent's estate, and that Harley Ruff was willing to ratify, be joined with, or substituted into the appeal. (R. p. 577-78).

Respondents did not file a memorandum in opposition to Appellant's Motion to Alter or Amend and, if Necessary, For Ratification, Joinder or Substitution of a Real Party in Interest. After additional oral arguments regarding the Respondents' new arguments on appeal and Appellant's numerous objections to the same and request for ratification, joinder, or substitution of a real party in interest, the Circuit Court upheld its prior Order under new Order dated May 14, 2019. (R. pp. 37-45). Appellant's appeal of the Circuit Court's Orders dated December 13, 2018 and April 4, 2019, and the Probate Court's Orders dated February 27, 2017 and September 18, 2017, which encompass the Probate Court's purported appointment of Harley Ruff as Special Administrator, follows.

STANDARD OF REVIEW

A proceeding before the probate court may sound in equity or at law. Matter of Estate of Kay, 423 S.C. 476, 480, 816 S.E.2d 542, 544 (2018), reh'g denied (Aug. 2, 2018). "The issues Appellant raises require interpretation of several sections of the Probate Code, which are

[13] Submitted in accordance with Rule 6(d), SCRCP.

questions of law that we review de novo." In Re Estate of Brown, 427 S.C. 138, 828 S.E.2d 789 (Ct. App. 2019). "Although the existence of a contract is ordinarily a question of fact for the jury, where the undisputed facts do not establish a contract, the question becomes one of law." Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 568, 762 S.E.2d 696 (2014). An action to construe a will is an action at law. NationsBank of S.C. v. Greenwood, 321 S.C. 386, 392, 468 S.E.2d 658, 662 (Ct. App. 1996). However, the jurisdiction of court to construe a trust created in will is in equity. Waddell v. Kahdy, 309 S.C. 1, 5, 419 S.E.2d 783, 786 (1992). An action to remove a personal representative is equitable in nature. Dean v. Kilgore, 313 S.C. 257, 259, 437 S.E.2d 154, 155 (Ct. App. 1993); abrogated on other grounds by Matter of Estate of Kay, 423 S.C. 476, 816 S.E.2d 542 (2018).

> When legal and equitable causes of action are maintained in one suit, the court is presented with a divided scope of review. On appeal from an action at law that was tried without a jury, the appellate court can correct errors of law, but the findings of fact will not be disturbed unless found to be without evidence which reasonably supports the judge's findings. In an equitable action tried without a jury, the appellate court can correct errors of law and may find facts in accordance with its own view of the preponderance of the evidence.

Blackmon v. Weaver, 366 S.C. 245, 248-49, 621 S.E.2d 42, 43-44 (Ct. App. 2005) (citation omitted).

This matter involves interpretation of the South Carolina Probate Code, the existence of an alleged settlement, the removal of a personal representative and appointment of a special administrator and, as a background for these same issues, the interpretation of a decedent's will and separate trust that is the primary beneficiary under the will. Accordingly, the Court of Appeals has a divided scope of review. Ultimately, however, this appeal presents clear errors of law for which the Court need not give any deference to the Probate Court, and should not need to disturb any findings of fact, regardless of whether the underlying matter is legal or equitable in nature.

LEGAL ARGUMENT

I. The Parties To This Matter Did Not Reach A Binding Settlement.

"The law looks with favor upon an agreement among members of a family and others which avoids a will contest or promotes the settlement and distribution of an estate." Duncan v. Alewine, 273 S.C. 275, 282, 255 S.E.2d 841, 845 (1979). However, "[o]nly those parties participating in the agreement are bound thereby." Id. Further, "[a] compromise agreement is void unless executed in compliance with the governing statute." Wilson v. Dallas, 403 S.C. 411, 426, 743 S.E.2d 746, 754 (2013) (quoting In re Estate of Riley, 266 P.3d 1078, 1080 Ariz. Ct. App. 2011)). Finally, the proponent of a settlement has the burden of proving the existence thereof. Kinghorn as Tr. for the Mildred Ann Kinghorn Tr. dated 28 Apr. 2004 v. Sakakini, 426 S.C. 147, 152-53, 825 S.E.2d 748, 750-51 (Ct. App. 2019) (determining whether proponent of settlement met his burden of proving the existence of the same).

As a threshold matter, there was never a meeting of the minds with regard to the Final Term Sheet, which purported to be binding on all six siblings in their individual capacities and as Trustees of the Trust, along with Appellant in his capacity as Personal Representative. Only three siblings ever assented to the Final Term Sheet in their individual capacities: Respondents and Gordon Kearse. (R. pp. 636-41). Furthermore, there is no evidence they consented in their capacities as Trustees and, even if they had, they would not constitute a majority of the Trustees. Id. The Trust is a necessary party because every term of the Final Term Sheet, except the use of Decedent's office (Item 5), affects how much money the Trust will ultimately receive from the Estate. Id.

Even if there had been a meeting of the minds, for the Final Term Sheet to become a binding settlement in this matter, it must satisfy the terms of either S.C. Code Ann. § 62-3-912, relating to private agreements among successors to decedent binding on personal representative, or S.C. Code

Ann. § 62-3-1102, relating to the procedure for securing court approval of compromise. However, the Final Term Sheet satisfied neither such statute.

"Section 62-3-912 provides in pertinent part that 'successors may agree among themselves to alter the interests, shares, or amounts to which they are entitled under the will ... in any way that they provide in a written contract executed by all who are affected by its provisions.'" In Re Estate of Brown, 427 S.C. 138, 141, 828 S.E.2d 789, 790 (Ct. App. 2019). Meanwhile, "successors," are "persons, other than creditors, who are entitled to property of a decedent under his will." S.C. Code Ann. § 62-1-201(47). In this case, the successors to Decedent's will are the Trust which is entitled to Decedent's residuary, Appellant who is entitled to the use of Decedent's office and contents, and all of Decedent's children who are entitled to Decedent's "monies," either individually under Item VI or as Trustees under Item VIII. (R. pp. 730-735).

For its part, the Final Term Sheet alters Appellant's interest by placing additional conditions upon his use of Decedent's office, setting his Personal Representative fee, requiring him to pay Respondent Sharp's legal fees, and possibly paying Respondent Gooding's legal fees and individually paying his own legal fees as Personal Representative. (R. p. 619-20). The Final Term Sheet also altered the Trust's interest by requiring it to buy the house of Decedent's surviving spouse, by setting the Personal Representative's fee owed by the Estate, providing the Estate's possible payment of legal fees of Respondent Gooding as a third-party, and requiring the Estate to pay a Special Administrator. Id. Furthermore, the February 27, 2017 Order adopting the Final Term Sheet also dismissed the Petition for Instructions with prejudice, even though such dismissal was not part of the Final Term Sheet, thus altering the amount that the Trust must arguably spend to build a house as directed by Decedent. (R. p. 11). Finally, to the extent Decedent's children receive Decedent's "monies" in their individual capacities under Item VI of the will, the Final Term Sheet

alters their interests for the same reasons as the Trust, with the exception of the Trust having to buy the house of Decedent's surviving spouse. (R. p. 732).

Accordingly, Section 62-3-912 was not satisfied because the Final Term Sheet was not "executed by all who are affected by its provisions," including Appellant, whether in his capacity as individual or Personal Representative, the Trust or even a majority of the Trustees individually, or all of Decedent's children to the extent they are successors. In fact, to date, no one has purported to speak, much less sign, on behalf of the Trust. See, e.g., Real Estate Unlimited, LLC v. Rainbow Living Trust, No. 2004-UP-019, 2004 WL 6248341, at *2 (S.C. Ct. App. Jan. 15, 2004) (holding non-attorney trustee may not appear in court on behalf of a trust).

As an alternative to Section 62-3-912, Respondents could have sought Probate Court approval of the Final Term Sheet as a binding settlement pursuant to S.C. Code Ann. § 62-3-1102. In fact, Respondents actually did seek, and received, Probate Court approval of the Final Term Sheet, though several of the statutory requirements necessary to receive such approval were not met. (R. pp. 11, ¶ 1; 602, lns. 20-22; 604, lns. 21-23).

"[T]he requirements to seek court approval of an agreement under section 62–3–1102 are … the agreement must be in writing and executed by all parties with beneficial interests in the estate, it must be submitted to the court by an interested party, notice must be given to all interested parties, and there must be an opportunity to be heard." Wilson v. Dallas, 403 S.C. 411, 432, 743 S.E.2d 746, 757–58 (2013). If the requirements for seeking approval are met, then it becomes the court's duty "to review the compromise to determine if it satisfied the two statutory factors (a good faith controversy, a fair and just effect), and [] set forth its findings in this regard." Id. at 431–32, 743 S.E.2d at 757.

As a starting point, the South Carolina Probate Code provides a very broad definition of "interested person" under S.C. Code Ann. § 62-1-201(23):

> "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.

Based on the foregoing, Respondents as children of Decedent could clearly submit an agreement for approval to the Probate Court. However, the statute also requires that notice and an opportunity to be heard "must be given to all interested parties," Wilson v. Dallas, 403 S.C. at 432, 743 S.E.2d at 757–58, which in this case includes Decedent's remaining children, Appellant in his capacity as Personal Representative, the Trustees of the Trust, and even Decedent's spouse.

To that end, unless "[t]he court for good cause shown" provides differently, notice requires at least 20 day's notice before the hearing and a filed proof that the notice was so given. S.C. Code Ann. § 62-1-401. In this case, there was no such notice or proof of delivery and, therefore, there was also effectively no opportunity to be heard by any of the interested parties. Only Appellant through his counsel in his capacity as Personal Representative was present to oppose Respondents, though without notice of an action seeking court approval of a compromise. (R. p. 124).

Furthermore, the statute requires the proposed agreement to be "in writing and executed by all parties with beneficial interests in the estate." Wilson v. Dallas, 403 S.C. at 432, 743 S.E.2d at 757–58. "In the context of section 62–3–1102, 'competent persons ... having beneficial interests' refers to a beneficial interest in the decedent's estate. Therefore, the central question here is not who holds the beneficial interest in the [trust which is a beneficiary of decedent's estate], but who has the beneficial interest in [the decedent's] estate." Univ. of S. California v. Moran, 365 S.C. 270, 280,

617 S.E.2d 135, 140 (Ct. App. 2005) (holding that the trustee of a separate trust receiving property from an estate holds the beneficial interest, and not the trust beneficiaries).

Here, the persons with beneficial interests affected by the proposed Final Term Sheet are the same as under the Section 62-3-912 analysis: Appellant who would become subject to restrictions on the use of Decedent's office as well as liable for one or more third-parties' legal fees in addition to his own as Personal Representative, as well as the Trustees of the Trust that would have to buy a house and have the amount going to the Trust altered due to the Estate hiring a Special Administrator, setting the Appellant's Personal Representative fee, and making the Estate potentially liable for a third-party's legal fees. (R. pp. 636-41). These are the persons who must execute the Final Term Sheet in writing to satisfy S.C. Code Ann. § 62-3-1102. They did not do so. Id.

Finally, even if the Final Term Sheet were executed by persons with beneficial interests and there was notice of a hearing and opportunity to be heard by interested persons, the Probate Court must still "determine if it satisfied the two statutory factors (a good faith controversy, a fair and just effect), and [then] set forth its findings in this regard." Wilson v. Dallas, 403 S.C. at 431–32, 743 S.E.2d at 757. However, the Probate Court did neither. (R. pp. 8-13; 589-642). Even if it had, such finding may also be subject to reversal, as the South Carolina Supreme Court famously did with regard to the Circuit Court's approval of a settlement regarding James Brown's estate. "A settlement agreement must defer to the testator's intent unless departing from his intent is reasonably necessary to protect the beneficiaries' interests." Wilson v. Dallas, 403 S.C. at 445, 743 S.E.2d at 765 (quoting In re Estate of Sullivan, 724 N.W.2d 532, 535 (Minn. Ct. App. 2006)).

In summary, the Probate Court was without authority to approve the Final Term Sheet as a valid settlement in this matter for numerous independent reasons, not the least of which is that the parties with beneficial interests never executed it. See S.C. Code Ann. § 62-3-1102.

Although the analysis of the Final Term Sheet as a binding settlement may end here, the Final Term Sheet also fails to satisfy the requirements for reaching a binding settlement of general civil litigation under Rule 43(k), SCRCP, which provides as follows (emphasis added):

> No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel. Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP.

Thus, there are three ways for an agreement affecting legal proceedings not subject to Sections 62-3-912 or 62-3-1102 to be binding. However, none of those occurred here.

Taking the last method first, the Final Term Sheet was not "signed by the parties and their counsel." Rule 43(k), SCRCP. In fact, not a single attorney signed it, Appellant did not sign in his capacity as Personal Representative, only three of the six siblings signed in their individual capacities, and none of those purported to sign for the Trust. (R. pp. 636-41). As such, the Final Term Sheet also was not "signed by counsel and entered in the record." Rule 43(k), SCRCP. Id. Finally, the Final Term Sheet was not "made in open court and noted upon the record." Rule 43(k), SCRCP. Only this option from Rule 43(k) may require some clarification.

Here, though the Final Term Sheet may have been "noted upon the record" in a purely mechanical sense, it was not "made in open court" as intended by Rule 43(k), SCRCP. In other words, having an agreement "made" for purposes of Rule 43(k), SCRCP is more than merely stating the words of a purported agreement on the record; it is an affirmative acknowledgment to be bound by the agreement "in open court." See Buckley v. Shealy, 370 S.C. 317, 322, 635 S.E.2d 76, 78

(2006) (emphasis added) ("Because the purported agreement the parties reached following mediation was neither entered into the court's record nor acknowledged in open court and placed upon the record, Rule 43(k), SCRCP, plainly provides that the agreement is unenforceable."). As defined in Black's Law Dictionary (10th ed. 2014), "acknowledge" means:

> 1. To recognize (something) as being factual or valid <acknowledge the federal court's jurisdiction>. 2. To show that one accepts responsibility for <acknowledge paternity of the child>. 3. To make known the receipt of <acknowledged the plaintiff's letter>. 4. To confirm as genuine before an authorized officer <acknowledged before a notary public>. 5. (Of a notary public or other officer) to certify as genuine <the notary acknowledged the signature as genuine>.

In the present case, the Final Term Sheet was neither "acknowledged" nor "made" in open court. To the contrary, Appellant's counsel unequivocally disavowed the settlement in open court. (R. p. 595, lns. 23-25). Further, it is of no avail to Respondents that Appellants' counsel, prior to and outside of the February 2, 2017 hearing, may have indicated his understanding that the parties all had signed the Final Term Sheet. As established by our State's Supreme Court, "[u]ntil a party is bound, [he] is entitled to withdraw [his] assent." Farnsworth v. Davis Heating & Air Conditioning, Inc., 367 S.C. 634, 637, 627 S.E.2d 724, 725 (2006) (holding that a settlement offer signed by each party's legal counsel with client authorization could be rescinded prior to trial).

In summary, whether one analyzes the Final Term Sheet under Section 62-3-912, Section 62-3-1102, or Rule 43(k), SCRCP, there is only one conclusion that can be drawn; the proposed settlement agreement is not legally binding under South Carolina law. In fact, neither the Probate Court nor the Circuit Court has even attempted to analyze whether the Final Term Sheet complies with any of the foregoing three standards or otherwise cited to any other recognized standards for reaching binding settlement. (R. pp. 8-13; 18-24; 32-36; 40-45; 589-726). Further, the only standard by which the Respondents have attempted to analyze the Final Term Sheet is Rule 43(k),

SCRCP, which does not even apply in this matter, but which nevertheless provides the same result as S.C. Code Ann. §§ 62-3-912 & -1102.

II. The Probate Court Lacked Authority To Enforce The Terms Of The Final Term Sheet

Since the parties to this matter failed to execute a binding settlement under South Carolina law, the next question is whether the Probate Court could have otherwise entered an order that incorporated the Final Term Sheet without a binding settlement. The answer again must be no.

"The probate court is a court of limited jurisdiction owing its present existence to creation by statute, rather than the Constitution, and as such, can exercise only such powers as are directly conferred upon it by legislative enactment and such as may be necessarily incident to the execution of the powers expressly granted." Greenfield v. Greenfield, 245 S.C. 604, 610, 141 S.E.2d 920, 923 (1965). See also Ex parte McLeod, 323 S.C. 461, 464, 476 S.E.2d 167, 168–69 (Ct. App. 1996) (holding that the probate court lacked subject matter jurisdiction to award attorney fees under a wrongful death settlement agreement absent a petition for approval of the settlement); Wellin v. Wellin, 427 S.C. 15, 24, 828 S.E.2d 767, 772 (Ct. App. 2019) (overturning a probate court order where a trust affected by the action was not made party to action, stating "even if the probate court had subject matter jurisdiction and authority to issue the disputed order, the order required action by the Trust, which had not been made party to the conservatorship action."). Furthermore, as to settlement agreements, regardless of which court is presiding:

> It is well settled that a district court retains inherent jurisdiction and equitable power to enforce agreements entered into in settlement of litigation before that court. However, it is clear that the district court only retains the power to enforce complete settlement agreements; it does not have the power to impose, in the role of a final arbiter, a settlement agreement where there was never a meeting of the parties' minds.

Ozyagcilar v. Davis, 701 F.2d 306, 308 (4th Cir. 1983) (citations omitted) (cited with approval by Rock Smith Chevrolet, Inc. v. Smith, 309 S.C. 91, 93, 419 S.E.2d 841, 842 (Ct. App. 1992)).

"Lack of subject matter jurisdiction may be raised at any time, and may be raised for the first time on appeal." Gantt v. Selph, 423 S.C. 333, 338, 814 S.E.2d 523, 525-26 (2018).[14]

To that end, the only matters properly before the Probate Court, pursuant to the Amended Notice of Hearing, were Appellant's Motion to Dismiss the Petition for Instruction and Respondent Gooding's Motion for Summary Judgement. (R. p. 124). Therefore, at most, the Court could have (1) ruled that the Decedent's directive to build a house on Trust property could not be honored without the Trust's consent and (2) dismissed the Petition for Instruction.

In contrast, not before the Probate Court in any form that could be ruled on were any of the terms of the Final Term Sheet: Appellant's resignation as Personal Representative and the appointment of a Special Administrator (Item 1), Appellant's personal representative fee (Item 2), the allocation of legal fees and costs in this matter (Item 3 and 4), Appellant's use of Decedent's office (Item 5), and the Trust's purchase of Decedent's surviving spouse's house (Item 6). (R. pp. 124; 619-20). In addition, no evidence was introduced regarding these issues aside from the Statement of Resignation that initiated an independent procedure under S.C. Code Ann. § 62-3-610(b) but which was never followed. (R. p. 145). Moreover, the allocation of legal fees and probate fee pursuant to the Final Term Sheet also conflicts with various default provisions of the South Carolina Probate Code. See S.C. Code Ann. § 62-3-720 (the estate pays the personal representative's legal fees and costs); S.C. Code Ann. § 62-1-111 (the beneficiaries pay their own legal fees and costs); and S.C. Code Ann. § 62-3-719 (the personal representative receiving a fee equal to 5% of all personal probate property, real estate sales proceeds, and income).

[14] Alternately, any alleged party to the Final Term Sheet that did not assent thereto, including Appellant in his individual capacity, several pro se parties, and the Trust may collaterally attack the Final Term Sheet at any time. However, insofar as this appeal is concerned, Appellant had no choice but to appeal the Orders approving the Final Term Sheet in the same capacity that he had appeared before the Probate Court or risk being declared bound thereby.

In summary, the particulars of the Final Term Sheet were not properly before the Probate Court for consideration and, despite no evidence being taken thereon, were accepted by the Probate Court in contradiction of various default rules of the South Carolina Probate Code. Accordingly, the Probate Court had no basis to order any of the terms within the Final Term Sheet.

III. This Appeal Should Not Be Dismissed On Procedural Grounds

The basis upon which the Circuit Court dismissed this appeal, which was advanced by Respondents for the first time on appeal, is that the Probate Court appointed Harley Ruff as Successor Personal Representative on March 20, 2017, and that this appointment constituted an independent "order" that became the law of the case because Appellant did not separately appeal the same, which in turn renders this appeal a "nullity" because Appellant is allegedly without authority or standing to bring the same. However, this ruling and reasoning that denies Appellant's right to judicial review is flawed for numerous independent reasons.

A. There is no independent, unappealed order in this matter

Most fundamentally, the Probate Court's March 20, 2017 appointment was merely the Court's attempt to appoint Harley Ruff as Special Administrator pursuant to its own February 27, 2017 Order, which Appellant timely appealed, and not an independent "order" appointing Harley Ruff as Successor Personal Representative in contravention of its prior Order. Though discussed in more detail in the Statement of the Case, the February 27, 2017 Order specifically adopted the Final Term Sheet as a binding settlement, including the Final Term Sheet's very first provision that Appellant "will immediately resign as Personal Representative" and that "A.G. Solomons shall be appointed as the Special Administrator of this Estate; if A.G. Solomons is unwilling to serve, then all parties consent that the Court shall appoint a neutral non-family member to serve as the Special Administrator." (R. p. 11, ¶¶ 1 & 2; p. 12, ¶ 9; p. 619, ¶ 1).

Accordingly, it was not unexpected when the Probate Court, on March 20, 2017, wrote counsel for Respondent Sharp with copy to other counsel and pro se parties to inform them "Mr. Harley Ruff of Ruff & Ruff, LLC Beaufort, S.C. has graciously accepted to serve as the Special Administrator in the above matter. This Court did reach out to both Mr. A.G. Solomons, Jr. and Mr. Kevin Brown who both respectfully declined to serve in the capacity of Special Administrator." (R. p. 15). Further, "[t]this Court will notify the other counsel of record of this appointment, copy attached." Id.

As indicated in the letter, attached as a "record of this appointment" was the Statement of Resignation that Appellant had previously signed and submitted to the Probate Court on February 2, 2017, though with the bottom portion now filled in with Harley Ruff's name, and signed by Judge Odom with the date of March 20, 2017. (R. p. 14). However, there is no reasonable basis to conclude anything except that this "record of appointment" was simply, as the Probate Court indicated, a ministerial component of the Probate Court's own Order dated February 2, 2017 for which Appellant had already filed a valid Motion to Alter or Amend. The relevant consideration include the following:

- The February 27, 2017 Order and Paragraph 1 of the Final Term Sheet incorporated therein specifically provide for the appointment of a Special Administrator, including by way of first contacting A.G. Solomons. (R. pp. 12, ¶ 9; 619, ¶ 1).
- The Probate Court's May 20, 2017 cover letter indicated it was appointing a Special Administrator (consistent with the February 27, 2017 Order) and not a Successor Personal Representative as Harley Ruff is referred to on the Statement of Resignation (and inconsistent with the Order). (R. pp. 14-15).

- The Probate Court's May 20, 2017 "record of appointment" and cover letter were less than a month after the February 27, 2017 Order, and there had been no independent procedure initiated for the appointment of a Special Administrator outside of the February 27, 2017 Order. See S.C. Code Ann. § 62-3-614.
- Although Appellant's filed Statement of Resignation could have initiated an independent procedure for appointing a Successor Personal Representative pursuant to S.C. Code Ann. § 62-3-610(b), such procedure was not followed through with and so Appellant's Statement of Resignation automatically became ineffective as an independent means for appointing a Successor Personal Representative by operation of law.
- Moreover, both the Probate Court itself and Appellant's counsel acknowledged at the February 2, 2017 hearing that the Statement of Resignation would not become effective without further procedures being followed. (R. p. 594, lns. 12-14; p. 609, lns. 7-13). Respondents did not object to either of these statements in that regard and have since acknowledged that "Fairness requires acknowledging a personal representative may not 'immediately' resign his position." (R. p. 230).
- The Statement of Resignation is not the proper probate form for appointing a Special Administrator. The proper form is the Application/Petition for Appointment of Special Administrator (probate form 332ES) that, unlike the Statement of Resignation, includes an "Order for Hearing" section, an "Order of Appointment" section, and a "Qualification and Statement of Acceptance" section to be signed by the appointed fiduciary. (R. pp. 582-84).
- Similarly, the Statement of Resignation is also not the proper probate form for appointing a Successor Personal Representative. The proper form is the Application/Petition for Appointment of Successor Personal Representative (probate form 333ES) that, unlike the

Statement of Resignation, includes an "Order for Hearing" section, and "Order of Appointment" section, and an "Qualification and Statement of Acceptance" section to be signed by the appointed fiduciary. (R. pp. 579-81).

- The Statement of Resignation form, which the Probate Court referred to merely as a "record of appointment," was not file stamped as it would be if intended to be an independent order.[15] (R. p. 14).

In addition, subsequent proceedings before the Probate Court indicate that it had simply intended its "record of appointment" to fall within the scope of the February 27, 2017 Order:

- Appellant's Motion to Alter or Amend objected to the Final Term Sheet and February 27, 2017 in total, including the appointment of a Special Administrator pursuant thereto. Eventually, Appellant's motion was heard August 17, 2017, by which time the Probate Court had plenty of time to indicate the appointment was not pursuant to the Final Term Sheet and February 27, 2017 Order. However, the Probate Court did not do so and, to the contrary, reaffirmed the February 27, 2017 Order. (R. pp. 18-24).
- Respondent Gooding's brief in Opposition to Appellant's Motion to Alter or Amend also acknowledged that the Probate Court was authorized to appoint a "special administrator" pursuant to its February 27, 2017 Order. (R. p. 175). However, no mention was made of a Successor Personal Representative as Harley Ruff is referenced in the Statement of Resignation. (R. pp. 174-82).
- At the hearing, Appellant continued to refer to Harley Ruff as the "proposed special administrator" (R. p. 643) without any objection by Respondents or the Probate Court.

[15] Note, however, that the opposite is not necessarily true; many things are file stamped that are not intended to be orders.

Further, neither the Probate Court nor Respondents referred to Harley Ruff as a Successor Personal Representative as does the Statement of Resignation. (R. pp. 643-661).

- All that was said by Respondents at the hearing regarding the issue is that Appellant "is not the personal representative" (R. p. 646) and "is no longer the personal representative" (R. p. 649) which is of course a primary component of the Final Term Sheet and the February 27, 2017 Order for which Appellant filed a timely Motion to Alter or Amend.
- Ultimately, the Court's September 18, 2017 Order denying Appellant's Motion to Alter or Amend upheld the Final Term Sheet as well as its February 27, 2017 Order, both of which provide for the appointment of a Special Administrator.[16] (R. pp. 18-24).

In sum, there can be no reasonable argument that the Probate Court's March 20, 2017 action was intended by the Probate Court to independently appoint Harley Ruff as Successor Personal Representative in contradiction of its own February 27, 2017 Order, and its subsequent September 18, 2017 Order upholding the same. Rather, the Probate Court intended its "record of appointment" merely to reflect the underlying February 27, 2017 Order, which was the Order that terminates Appellant as Personal Representative and appoints a Special Administrator in his stead, and which Appellant has validly appealed.

B. The alleged order is not effective even as an independent order

This brief has already addressed the Probate Court's lack of jurisdiction to affirm the Final Term Sheet in Section II, supra. Similarly, the Probate Court also lacked jurisdiction to appoint a Successor Personal Representative or Special Administrator as part of an independent process.

[16] The September 18, 2017 Order does state that "no party (including Petitioner), has objected to this Court's Order dated March 20, 2017 appointing Harley Ruff as Successor Personal Representative)." September 18, 2017 Order, (R. p. 20). However, this aspect of the Order, all of which was drafted by one of the Respondents, contradicted the Probate Court's actual ruling and is therefore in error or is dicta and, in any event, is a component of the September 18, 2017 Order now on appeal. (R. pp. 801-08).

First, there was no independent process initiated for a Special Administrator. See S.C. Code Ann. § 62-3-614 (requiring either an informal application or a formal petition by an interested person along with additional findings by the court). Thus, the Probate Court's jurisdiction for appointment of a Special Administrator outside of the Final Term Sheet was never invoked.

In addition, there was no independent process completed for a Successor Personal Representative. Although Appellant invoked the Probate Court's jurisdiction for a Successor Personal Representative by filing a Statement of Resignation on February 2, 2017, the Probate Court's jurisdiction for that action terminated on February 22, 2017 because no interested party followed with an application or petition for a successor personal representative by that time. See S.C. Code Ann. § 62-3-610(b). See also S.C. Code Ann. §§ 62-3-301, -308 & -310 (requiring for informal appointment an application by the proposed successor, with notice to interested persons, and findings by the court as to the applicant's statutory qualifications, including the applicant's priority for appointment); S.C. Code Ann. §§ 62-3-402, -403, & -414 (requiring for formal appointment a summons and petition by the proposed successor, served on all interested persons, and a formal hearing by the court, after notice of hearing sent to the interested parties, to confirm the applicant's qualifications, including the applicant's priority for appointment). Thus, by March 20, 2017, the Probate Court lacked jurisdiction to appoint a successor personal representative pursuant to Appellant's Statement of Resignation or in any other manner.

Even if the Probate Court had jurisdiction to appoint a special administrator or successor personal representative on March 20, 2017, separately from its February 27, 2017 Order, the Probate Court's execution of the Statement of Resignation would fail as such an appointment for multiple reasons:

- A March 20, 2017 "order" appointing Harley Ruff as Successor Personal Representative directly contradicts the Probate Court's Order dated February 27, 2017, less than a month earlier, because a Special Administrator and Successor Personal Representative are different statutory roles with differing authority. Cf. S.C. Code Ann. §§ 62-3-613, -616, & -617. As such, the contradictory subsequent March 20, 2017 "order" would be void ab initio.
- Alternately, if the March 20, 2017 "order" was not automatically void, then it would have necessarily either negated the Final Term Sheet in its entirety or, at a minimum, modified and therefore become a party of the Final Term Sheet that remains validly on appeal.
- Moreover, if the March 20, 2017 "order" could supersede the February 27, 2017 Order, then the March 20, 2017 "order" was itself superseded by the Probate Court's September 18, 2017 Order that reaffirmed the Final Term Sheet and the original February 27, 2017 Order. Ironically then, if Respondents want the March 20, 2017 alleged contradictory "order" to spring back to life, they would need to join Appellant in overturning the Probate Court's Orders dated February 27, 2017 and September 18, 2017.
- The Statement of Resignation is not an Order of Appointment of either a Special Administrator or Successor Personal Representative. Those are, respectively, the Application/Petition for Appointment of Special Administrator (probate form 332ES) and the Application/Petition for Appointment of Successor Personal Representative (probate form 333ES), each of which, in keeping with procedural requirements, includes an "Order for Hearing" section, and "Order of Appointment" section, and an "Qualification and Statement of Acceptance" section to be signed by the appointed fiduciary. (R. pp. 579-84).

- The Statement of Resignation itself provides that it is only effective "[u]pon accounting to the Court for the assets and the delivery of the assets of the Decedent to the Successor Personal Representative ...." which conditions have not been fulfilled and for which there is no record of having been fulfilled. (R. p. 14).
- The Statement of Resignation also specifically states that Appellant's resignation is effective only "[w]ith the appointment of Harley Ruff, Ruff & Ruff, LLC as Successor Personal Representative in this Estate." Id. In other words, not until such appointment has separately occurred. Similarly, the Statement of Resignation specifically states that Appellant "realize[s] that this resignation is effective only upon the appointment and qualification of a Successor Personal Representative and the delivery of the assets to that person." Id. However, the mandatory procedure for appointing a Successor Personal Representative has not been followed and, therefore, there is no valid appointment to make the Statement of Resignation effective upon its own terms.
- Finally, because Respondents seek to deny Appellant's right to appeal based on alleged procedural technicalities, there is one that undercuts their reliance on the Statement of Resignation: the record includes absolutely no evidence that Harley Ruff actually accepted the purported appointment as Successor Personal Representative or Special Administrator. At most, the Statement of Resignation merely purports to appoint Harley Ruff. (R. p. 14). However, his acceptance of such alleged appointment cannot be assumed, especially given that there is no "Qualification and Statement of Acceptance" as is found on the forms actually intended to be used for appointment of a fiduciary. See

Probate Forms 332ES and 333ES.[17] In fact, Appellant references Harley Ruff as the "proposed Special Administrator," both in the Notice of Hearing filed August 2, 2017 and in the August 17, 2017 Hearing Transcript (R. p. 643), neither reference of which was refuted by Respondents or the Probate Court. (R. pp. 643-61).

C. Appellant retains standing even if the alleged order is effective

Even if the Probate Court's May 20, 2017 "record of appointment" could be construed as an independent order appointing Harley Ruff as Successor Personal Representative, there are numerous reasons why Appellant maintains standing to pursue this appeal.

1. Lack of standing cannot be raised for the first time on appeal.

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. Moreover, an objection must be sufficiently specific to inform the trial court of the point being urged by the objector." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (citations omitted). "This Court has the inherent authority to consider justiciability. However, when a party belatedly attempts to raise the issue of standing, our courts have applied error preservation principles and held that the matter was not preserved for review where the trial court was not given an opportunity to first rule on the issue." James v. Anne's Inc., 390 S.C. 188, 193, 701 S.E.2d 730, 732–33 (2010) (citations by footnote omitted). See also Wilson v. Dallas, 403 S.C. 411, 422-23, 743 S.E.2d 746, 752-53 (2013) (rejecting argument that disposed personal representatives and trustees lacked standing to challenge order where standing had not been raised below).

[17] In an implicit acknowledgment of this fact, Respondents submitted an affidavit to the Circuit Court proffering evidence of Harley Ruff's acceptance of fiduciary responsibilities at least in a de facto capacity. (R. p. 811-29). If this affidavit is accepted then so to should be the affidavit Harley Ruff himself submitted indicating his desire to ratify Appellant's appeal so that the underlying substantive issue may be determined for purposes of administering the Estate.

At the August 17, 2017 hearing, neither Respondents nor the Probate Court stated that Appellant lacked standing or otherwise referred to the Probate Court's modification of the Statement of Resignation on March 20, 2017, nearly a half-year prior to the hearing. The closest statement was from counsel for Respondent Sharp, who stated (emphasis added):

> I will say at the outset that I don't understand how the motion is being made by Morgan as the Personal Representative because he is not the personal representative and has not been for some period of time as I will deal with in a minute. His lawyer told us at the last hearing [on February 2, 2017] that he was resigning effective immediately....Now I'm not sure what effect that has legally. I'll let my probate lawyer Mr. Slotchiver address that if it comes up, but I think it's important to note that this is the only party that is before Your Honor in support of the motion.

(R. p. 646, lns. 13-19). However, Mr. Slotchiver never addressed the standing issue either beyond simply claiming that Appellant "is no longer the Personal Representative." (R. p. 649, lns. 18-19). Accordingly, Respondents' statements simply reflect the fact that Appellant's status as Personal Representative was terminated under the February 27, 2017 Order, which is an issue now on appeal.

Only after the final Probate Court hearing did the Probate Court's September 18, 2017 Order even reference the Probate Court's modification of the Statement of Resignation on March 20, 2017, stating "Additionally, no party (including Petitioner), has objected to this Court's Order dated March 20, 2017 appointing Harley Ruff as Successor Personal Representative." (R. p. 20). However, this statement contradicted not only the statements of the parties and Probate Court to that point, but the actual holding of the Order, which was to uphold Appellant's termination as Personal Representative as part of the Final Term Sheet and February 27, 2017

Order.[18] Accordingly, the reference to the "Order dated March 20, 2017" is either in error or dicta and, in any event, is part of the September 18, 2017 Order now on appeal.

Regardless, the September 18, 2017 Order did not state or even imply that Appellant was without standing in his capacity as Personal Representative to argue his Motion to Alter or Amend or otherwise appeal the same. (R. pp. 18-24). In summary, Respondents' argument that Appellant lacks standing as Personal Representative due to the March 20, 2017 alleged "order was not raised below, and is therefore not reserved for appellant review. See James v. Anne's Inc., 390 S.C. at 193, 701 S.E.2d at 732–33; Wilder Corp. v. Wilke, 330 S.C. at 76, 497 S.E.2d at 733; Wilson v. Dallas, 403 S.C. at 422-23, 743 S.E.2d at 752-53.

2. Lack of standing must also be raised promptly in the matter below.

"Unless a party promptly challenges the opposing party's status as a real party in interest, such a challenge is waived." Bryson v. Bryson, 378 S.C. 502, 509, 662 S.E.2d 611, 614 (Ct. App. 2008) (emphasis added) (holding waiver occurred when argument that personal representative was not the real party in interest was not presented until the end of trail); Bardoon Props., NV v. Eidolon Corp., 326 S.C. 166, 485 S.E.2d 371 (1997) (determining issue of a party's status as real party in interest did not involve a question of subject matter jurisdiction and, therefore, the issue was waived where it was not timely raised prior to entry of default).

Therefore, even if the standing issue could be considered implicitly raised in an Order drafted by Respondent Sharp's counsel after the final hearing, the standing argument was nevertheless waived because it was not timely raised. Moreover, Respondents cannot argue that they were not without an opportunity to develop the issue, since nearly a half-year passed

[18] As acknowledged at oral argument before the Circuit Court, the September 18, 2017 Order was drafted by counsel for Respondent Sharp. (R. p. 686, lns. 19-23).

between the hearing on August 17, 2017 and the March 20, 2017 alleged "order." (R. pp. 14 & 643).

3. The Statement of Resignation was not appealable and, therefore, not the law of the case.

"The doctrine of the law of the case applies to an order or ruling which finally determines a substantial right....Ordinarily an interlocutory order which merely decides some point or matter essential to the progress of the cause, collateral to the issues in the case, is not binding as the law of the case, and may be reconsidered and corrected by the court before entering a final order on the merits." Weil v. Weil, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989) (quoting 21 C.J.S. Courts Section 195 at 335 (1940)) (quoted with approval by Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013)).

To that end, appeals from probate court are governed by statute. "A person interested in a final order, sentence, or decree of a probate court may appeal to the circuit court ...." S.C. Code Ann. § 62-1-308(a) (emphasis added). "As a general rule, only final judgments are appealable. Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final." Ex parte Wilson, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005) (citations omitted). See also Rule 54(a), SCRCP ("'Judgment' as used in these rules includes any decree or order which dismisses the action as to any party or finally determines the rights of any party.").

Here, even if the Probate Court's appointment of Harley Ruff on March 20, 2017 could be considered an independent order, it was not a final order with regard to Appellant's status as Personal Representative because Appellant had already filed a Motion to Alter or Amend the same, and there remained further action by the Probate Court to determine the same. In fact, the Probate Court took such further action by denying Appellant's Motion to Alter or Amend, which

Appellant continued pursuing in his capacity as Personal Representative all the way through the Probate Court's September 18, 2017 Order, which then became its final order as to that issue. (R. pp. 18-24).

In addition, the South Carolina Supreme Court has specifically held that the probate court's addition of a new party is an interlocutory order for which there is no right of immediate appeal under S.C. Code Ann. § 62-1-308(h). Dorn v. Cohen, 421 S.C. 517, 520, 809 S.E.2d 53, 54 (2017). The addition of Harley Ruff as fiduciary is fundamentally no different that the addition of a party.

In summary, Appellant had no legal right to appeal the Probate Court's March 20, 2017 appointment, and it would have needlessly complicated the proceedings for Appellant to have attempted to do so. Appellant has taken the legally proper, and most efficient, actions to appeal the Probate Court's termination of his status as Personal Representative, and it is Respondents who have unnecessarily complicated these proceedings by asserting, for the first time on appeal, that Appellant is without standing due to an interlocutory "order" that is not even an actual order.

4. Appointment of new fiduciary disregarded for purposes of present appeal.

"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." S.C. Code Ann. § 62-1-308(h). See also Rule 241(a), SCACR (providing an automatic stay of matters decided in the order being appealed).

Here, it was the February 27, 2017 Order that first terminated Appellant as Personal Representative and provided for the appointment of a Special Administrator, and the final September 18, 2017 Order that confirmed the same. Accordingly, any intervening "order" of

appointment for Appellant's replacement must necessarily be "in pursuance" of the appealed orders, and such intervening "order" is therefore ceased and stayed until this appeal is decided.

5. Appellant can only appeal in his capacity as Personal Representative.

Rule 201(b), SCACR provides that "[o]nly a party aggrieved by an order, judgment, sentence or decision may appeal." Similarly, Rule 17(a), SCRCP requires that "[e]very action shall be prosecuted in the name of the real party in interest." "Under Rule 17(a), the definition of the proper party is the same as it has always been—the proper party is any real party in interest.... Where, as here, the named plaintiff has suffered an actionable loss at the hand of the defendant, he is a real party in interest and the requirement of Rule 17(a) is met." Patton v. Miller, 420 S.C. 471, 487, 804 S.E.2d 252, 260 (2017), reh'g denied (Sept. 27, 2017) (quotation and citation omitted).

Here, Appellant in his capacity as Personal Representative was the real party in interest and aggrieved by the Final Term Sheet and Probate Court orders upholding the same, because they (1) removed him as Personal Representative, (2) fixed his Personal Representative fee, (3) potentially made him pay his own legal fees as Personal Representative, and (4) made him pay at least one of the Respondents' legal fees resulting from the Petition for Instructions Appellant filed as Personal Representative. (R. pp. 619-20). Moreover, Appellant has not even appeared before the Probate Court in his individual capacity, and Appellant's undersigned counsel has only represented Appellant in his capacity as Personal Representative.

In summary, Appellant had no choice but to appeal the Final Term Sheet and Probate Court orders in his capacity as Personal Representative. In fact, had Appellant instead appealed in his individual capacity, Respondents would most assuredly argue that Appellant had no

standing as such and that he otherwise abandoned his right to contest all matters affecting his interest as Personal Representative.

6. The Probate Court itself declined to alter Appellant's status as Personal Representative.

"Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." Rule 21, SCRCP. "The decision whether to realign the parties lies within the sound discretion of the trial court and will not be disturbed on appeal absent a showing of an abuse of discretion and resulting prejudice." Branham v. Ford Motor Co., 390 S.C. 203, 243, 701 S.E.2d 5, 26 (2010). Consistent with the foregoing, the South Carolina Appellant Court Rules do not require any change in identification of the parties, and merely provide that "[t]he party appealing shall be known as the appellant and the adverse party as the respondent." Rule 202(a), SCACR.

Here, the Probate Court did not realign Appellant from his capacity as Personal Representative, even nearly a half-year after its appointment of Harley Ruff, and therefore Appellant quite logically filed this appeal in the same Personal Representative capacity. (R. pp. 18-24). Further, Respondents cannot show the Probate Court abused its discretion to allow Appellant to do so, since logic dictates that the Special Administrator has a conflict of interest in vacating the Order that resulted in his appointment and, for that matter, the Respondents did not object to Appellant's standing as Personal Representative before the Probate Court. (R. pp. 589-661). Finally, Respondents cannot show prejudice from Appellant's appeal as Personal Representative where the underlying Final Term Sheet is subject to collateral attack by the Trust and other parties that it purports to bind, and Appellant's appeal would be (but for Respondents' resistance) the most efficient way to resolve that issue.

Accordingly, the Circuit Court on appeal cannot divest Appellant of the same capacity in which the Probate Court allowed Appellant to litigate from the beginning of this matter to the final order. To do so now, on appeal, is contrary to precedent, fairness, and common sense.

7. Appellant retains statutory standing to appeal as Personal Representative.

Appellant may continue to act as Personal Representative if any contrary appointment was in error. "A person to whom general letters are issued first has exclusive authority under the letters until his appointment is terminated or modified. If, through error, general letters are afterwards issued to another, the first appointed representative may recover any property of the estate in the hands of the representative subsequently appointed ...." S.C. Code Ann. § 62-3-702 (titled "Priority Among Different Letters"). As discussed throughout this brief, any purported appointment of Harley Ruff as Successor Personal Representative or Special Administrator is in plain error as a matter of law. Therefore, Appellant may continue to act as Personal Representative in order to confirm his rightful status as Personal Representative and recover any Estate property in the hands of one who has been wrongfully appointed.

In addition, even a validly terminated personal representative, "at any time prior to distribution or until restrained or enjoined by court order, may perform acts necessary to protect the estate ...." S.C. Code Ann. § 62-3-608. Here, quite simply, the appeal is necessary to protect the Estate because the alleged order would bind the Estate to various inequitable obligations if not challenged. For example, absent a contrary finding under S.C. Code Ann. § 62-1-111, Respondent Gooding's legal fees in this matter should be paid by herself and not potentially by the Estate. In addition, the Estate has not been distributed and Appellant has not been restrained or enjoined by court order from maintaining this appeal, and there is no evidence of the same.

Therefore, under statute, Appellant may continue the appeal even if terminated as Personal Representative.

8. Appellant retains general standing to appeal as Personal Representative.

"Standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right. Generally, to have standing, a litigant must have a personal stake in the subject matter of the litigation." Wilson v. Dallas, 403 S.C. 411, 423, 743 S.E.2d 746, 753 (2013) (holding that trustees removed by the court maintained standing to challenge a court-approved settlement affecting the trust at issue):

> [W]e conclude Appellants have standing. Appellants were properly made parties to the action and were allowed to set forth specific challenges to the proposed compromise agreement for the circuit court's consideration under S.C. Code Ann. § 62–3–1102 (2009). We agree with Appellants that they have standing based on the explicit terms of the trust agreement, which conferred upon the trustees the authority to handle claims for or against the trust estate (including the authority to mediate or compromise claims), and based on their official fiduciary capacities pursuant to state law.

Id. at 423-24, 743 S.E.2d at 753. Here too, Appellant in his capacity as Personal Representative was a party to the February 2, 2017 hearing in which the Probate Court approved the Final Term Sheet as a binding settlement and, Appellant in his capacity as Personal Representative, has general authority to compromise claims for the Estate pursuant to general law and Decedent's will.

Similarly, the South Carolina Supreme Court has conferred general standing where a claimant had (1) statutory duties regarding the subject of the litigation and (2) an economic interest in the same. See Henry v. Horry Cty., 334 S.C. 461, 463, 514 S.E.2d 122, 123 (1999) (holding a county sheriff had standing to challenge a law from 1959 divesting the sheriff of control over the county prison several decades earlier). Under those general principles as applied to this matter, Appellant has standing to challenge the alleged settlement as Personal

Representative where the alleged settlement gives Appellant both (1) duties with respect to Appellant's status as Personal Representative (e.g., resign and turn over the Estate assets) and (2) an economic interest with respect to Appellant's status as Personal Representative (fixing Appellant's fee as Personal Representative and requiring him to pay for his own legal expenses as Personal Representative). (R. pp. 619-20).

D. The appeal should not be dismissed even if Appellant lacks standing

Even if Appellant currently lacks standing to appeal, the Circuit Court should not have dismissed the appeal, but rather allowed the appeal to continue by way of ratification, joinder, or substitution of a party at the Circuit Court deemed proper. On this point in particular, it should be noted that the South Carolina Rules of Civil Procedure continued to apply to this appeal before the Circuit Court, pursuant to Rule 74, SCRCP. See. e.g., State v. Oxner, 391 S.C. 132, 134, 705 S.E.2d 51, 51–52 (2011) (applying SCRCP to a criminal appeal to the circuit court).

1. Lack of prosecution by a real party in interest is not grounds for dismissal until a reasonable time is allowed for ratification, substitution, or joinder.

"No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after objection, for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest." Rule 17(a), SCRCP. Furthermore, ratification, substitution, and joinder may be made on appeal, and it is no defense to substitution that the request was not made below. See Patton v. Miller, 420 S.C. 471, 489, 804 S.E.2d 252, 261 (2017), reh'g denied (Sept. 27, 2017) ("The defendants contend that any argument under Rule 17(a) is not preserved for our review because Patton never specifically mentioned Rule 17. We find this argument troubling. It was the defendants who first invoked the Rule 17(a)

requirement that "Every action shall be prosecuted in the name of the real party in interest" by claiming Patton in her representative capacity was not the proper party to bring the claim for Alexia's medical expenses. In doing so, it was the defendants who first failed to mention Rule 17.").

"Formerly, the failure to bring suit in the name of the real party in interest was a jurisdictional failure requiring dismissal of the lawsuit. Under the Rules of Civil Procedure, however, it is improper to immediately dismiss a lawsuit simply because it was not brought in the name of the real party in interest." Id. at 487, 804 S.E.2d at 260. "The purpose of this provision is to avoid precisely what occurred here—the unnecessary procedural dismissal of a lawsuit the court should resolve on the merits. As the Reporter's Note to the rule indicates, this sentence is intended to prevent forfeiture in those cases in which the determination of the proper party to sue is difficult or when there has been an honest mistake." Id. at 488, 804 S.E.2d at 261 (quotation omitted).

In the present case, the Appellant's standing to litigate as Personal Representative has been questioned only before the Circuit Court on appeal, and it was Respondents who failed to raise the need for a substitution of parties before the Probate Court, if in fact there is such a need. Moreover, because Appellant maintains many independent grounds why he remains the proper party for the appeal (see section III, parts A., B., and C., supra), then, at worst, the proper party for this appeal is difficult to determine or Appellant has otherwise made an honest mistake as to his interest as the proper party. Finally, though it is not a relevant inquiry under Rule 17(a), SCRCP, Respondents will not be prejudiced by the ratification, substitution, or joinder of a proper party since Respondents have been on notice from the first day they proffered the alleged settlement over Appellant's objection that it was not a valid settlement. (R. pp. 589-642). In fact,

the sooner the settlement validity is addressed, the less of their own money Respondents will potentially spend attempting to enforce the same.

Ultimately, even if Appellant lacks standing to appeal this matter in his capacity as Personal Representative, then the appropriate response under Rule 17(a), SCRCP is not to dismiss the appeal, but to allow the ratification, joinder, or substitution of a real party in interest.

2. Appellant has the power to act as Personal Representative until the court substitutes or joins the proper party upon motion for substitution or joinder.

"In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party." Rule 25(c), SCRCP (emphasis added). In addition, [s]ubstitution of parties under the provision of this rule may be made by the trial court either before or after judgement, or pending appeal, by the appellate court." Rule 25(e), SCRCP (emphasis added). See also S.C. Code Ann. § 62-3-613 ("After appointment and qualification, a successor personal representative may be substituted in all actions and proceedings to which the former personal representative was a party ....") (emphasis added).

Here, Respondents argue on appeal that the Probate Court has irrevocably transferred Appellant's interest as Personal Representative to Harley Ruff. Even if that were true, Rule 25(c), SCRCP expressly provides that Appellant may continue the appeal as Personal Representative until Harley Ruff is substituted or joined to the action, upon a motion for the same, which joinder or substitution may be made even on appeal pursuant to Rule 25(e), SCRCP. Similarly, S.C. Code Ann. § 62-3-613 allows, but does not require, the substitution of a successor personal representative in litigation involving the former personal representative as a party.

Since Respondents have failed to seek a substitution of Harley Ruff as the proper party, Appellant's appeal remains proper notwithstanding the alleged transfer of his interest as Personal

Representative. However, Appellant submits that the better course of action is to adhere to Harley Ruff's own request to remain neutral in this matter, and to simply accept Mr. Ruff's ratification of Appellant's appeal under Rule 17(a), SCRCP. (R. p. 577, ¶ 4).

3. The substantive merits of the appeal must be addressed before the full administration of the Estate and Trust can be had.

An overarching rule governing this appeal is that the South Carolina Rules of Civil Procedure "shall be construed to construe the just, speedy, and inexpensive determination of every action." Rule 1, SCRCP. "It is too late in the day and entirely contrary to the spirit of the ... Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The ... Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.'" Patton v. Miller, 420 S.C. 471, 493, 804 S.E.2d 252, 263 (2017), reh'g denied (Sept. 27, 2017) (quoting Foman v. Davis, 371 U.S. 178, 181–82 (1962)).

However, a dismissal of this appeal prior to any court determining the validity of the Final Term Sheet under the relevant law is not just, nor will it provide a speedy and inexpensive determination of that issue, as new litigation would have to be pursued by one or more Trustees of the Trust, which was not a party to the Final Term Sheet. As stated by Harley Ruff himself, "I believe that [Appellant's] above referenced appeal is necessary to resolve legal disputes that prevent the full administration of the Estate of G.H. Kearse, and anticipate that a dismissal of the appeal would not provide a final resolution of those issues. (R. p. 577, ¶ 2).

Therefore, the Court of Appeals should reach the merits of this dispute so that the proper result may be sooner reached, for the benefit of all interested parties including Respondents themselves.

CONCLUSION

Based on the foregoing, Appellant respectfully requests the Court of Appels to rule as follows:

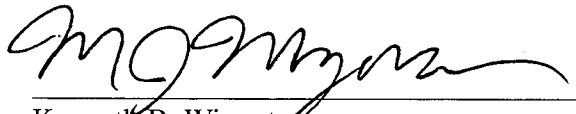
A. Vacating the Orders of the Probate Court in this matter filed February 27, 2017 and September 18, 2017.

B. Vacating the Orders of the Circuit Court in this matter dated December 13, 2018 and May 14, 2019.

C. Ordering that the Final Term Sheet is not a binding settlement.

D. Ordering that Appellant remains Personal Representative until validly terminated in accordance with law.

Respectfully submitted,



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June 15, 2020

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellant's Final Initial Brief and Final Reply Brief comply with Rule 211(b), SCACR.

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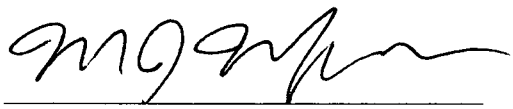

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