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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

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**Terry Weems, as the personal representative of the Estate of
Terry Wallace Sutherland, deceased**

v.

Angela Long and Gary Sutherland

**Appeal from Winston Probate Court
(No. 4336)**

SHAW, Justice.

Terry Weems, as the personal representative of the estate of Terry Wallace Sutherland ("Terry"), deceased, the proponent of what is

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purported to be the will of Terry's mother, Gladys Elizabeth Stidham Sutherland ("Elizabeth"), appeals a judgment entered by the Winston Probate Court in favor of Terry's siblings, Angela Long and Gary Sutherland, who contested that purported will. For the reasons addressed below, we dismiss the appeal.

Facts and Procedural History

In March 2016, Elizabeth died. A month after her death, Angela filed a petition in the Winston Probate Court to admit to probate a will that her mother had executed in 2002 ("the 2002 will"). That will divided Elizabeth's estate equally among her three children -- Angela, Terry, and Gary -- and also named Angela as the executor of her estate.

Shortly thereafter, Terry petitioned the probate court to enter an order admitting a different will to probate that, he said, Elizabeth had executed in 2013 ("the 2013 will"); he also requested that the probate court issue letters testamentary to him as the executor of Elizabeth's estate. That will revoked "all prior wills and codicils" and named Terry as the executor of Elizabeth's estate. According to Terry, because the 2013 will expressly revoked "all prior wills and codicils," including the 2002

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will, the 2013 will was the only valid will that could be admitted to probate.

In August 2016, Angela petitioned the Winston Circuit Court, pursuant to § 12-11-41, Ala. Code 1975, to remove the "administration" of Elizabeth's estate from the probate court. That same day, the circuit court issued an order granting the removal. In October 2017, after determining that its jurisdiction had not been properly invoked, the circuit court issued an order remanding the proceedings relating to Elizabeth's estate back to the probate court. Five days later, the probate court entered an order acknowledging receipt of the proceedings from the circuit court.

Shortly thereafter, in November 2017, Angela filed a document in the probate court labeled: "Contest of the Purported Will Offered for Probate by Terry Sutherland and Motion to Transfer to Circuit Court." Angela averred that the 2013 will was procured and executed as a result of undue influence by Terry. She also requested that the probate court transfer her will contest to the circuit court and add both Terry and Gary as "proper parties to this cause." Despite Angela's clear transfer request, the probate court never entered an order transferring Angela's contest of

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the 2013 will to the circuit court. It did, however, continue to take action in the proceedings relating to Elizabeth's estate.

In September 2018, Terry died and Terry Weems was appointed to be the personal representative of his estate. At the time of Terry's death, neither the 2002 will nor the 2013 will had been admitted to probate and letters testamentary had not been issued.

Following several months of additional filings, in April 2019, Angela withdrew her transfer request. Two hearings were held in the probate court in July and October 2019; after receiving testimony and evidence from the parties, the probate court issued an order in which it found that the procurement and execution of the 2013 will was unduly influenced by Terry. It also admitted the 2002 will to probate and issued letters testamentary to Angela. Thereafter, Weems appealed to this Court.

Discussion

Although no party to the appeal challenges the probate court's jurisdiction to render the judgment in the present case, "the absence of subject-matter jurisdiction cannot be waived, and it is the duty of an appellate court to notice the absence of subject-matter jurisdiction ex mero

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motu." McElroy v. McElroy, 254 So. 3d 872, 875 (Ala. 2017). Under Alabama law, the probate court has general and original jurisdiction over matters involving the administration of estates and the probating of wills. See Ala. Const. 1901 (Off. Recomp.), art. VI, § 144; and § 12-13-1, Ala. Code 1975. When a party files a will contest, that contest either may be initiated in the probate court pursuant to § 43-8-190, Ala. Code 1975, if the will has not yet been admitted to probate, or may be initiated in the circuit court pursuant to § 43-8-199, Ala. Code 1975, within six months after the will has been admitted to probate.

Section 43-8-190 which is applicable in this case because Angela's contest of the 2013 will was filed before any will had been admitted to probate, provides as follows:

"A will, before the probate thereof, may be contested by any person interested therein, or by any person, who, if the testator had died intestate, would have been an heir or distributee of his estate, by filing in the court where it is offered for probate allegations in writing that the will was not duly executed, or of the unsoundness of mind of the testator, or of any other valid objections thereto; and thereupon an issue must be made up, under the direction of the court, between the person making the application, as plaintiff, and the person contesting the validity of the will, as defendant; and such issue must, on application of either party, be tried by a jury."

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There is no dispute that Angela is a "person interested" in the 2013 will for purposes of invoking § 43-8-190 or that the contest did not otherwise comply with that Code section. Thus, the filing of her contest in the probate court was proper pursuant to that Code section. Angela simultaneously filed with her will contest a request to have the contest transferred to the circuit court. Section 43-8-198, Ala. Code 1975, allows a party to seek a transfer of a will contest from the probate court to the circuit court and provides, in pertinent part:

"Upon the demand of any party to the contest, made in writing at the time of filing the initial pleading, the probate court, or the judge thereof, must enter an order transferring the contest to the circuit court of the county in which the contest is made, and must certify all papers and documents pertaining to the contest to the clerk of the circuit court, and the case shall be docketed by the clerk of the circuit court and a special session of said court may be called for the trial of said contest or, said contest may be tried by said circuit court at any special or regular session of said court."

(Emphasis added.) For purposes of § 43-8-198, Angela, as the contestant, was a "party to the contest," and her request to transfer was "made in writing at the time of filing the initial pleading," that is, in a pleading contesting the 2013 will. See Kaller ex rel. Conway v. Rigdon, 480 So. 2d

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536, 539 (Ala. 1985) ("The 'initial pleading' for the contestant in a will contest is the filing of the contest itself in the probate court.").

Alabama caselaw states:

"[O]nce a will contestant seeking to remove the contest pursuant to § 43-8-198 makes a prima facie showing that he or she is a person described in § 43-8-190[, Ala. Code 1975, which pertains to who may contest a will] as one "interested therein," the probate court "must enter an order transferring the contest to the circuit court." ' [Ex parte McLendon,] 824 So. 2d [700] at 705 [(Ala. 2001)] (quoting § 43-8-198; emphasis added in McLendon). Just as a court lacking subject-matter jurisdiction has no authority to do anything other than enter a judgment of dismissal, see Cadle Co. v. Shabani, 4 So. 3d 460, 463 (Ala. 2008), a probate court confronted with a proper and timely transfer demand accompanying a will contest can do nothing but comply with the mandate of the legislature and refer the contest to the appropriate circuit court. See Summerhill v. Craft, 425 So. 2d 1055, 1056 [(Ala. 1982)] (construing Ala. Code 1975, § 43-1-78, which was repealed and was replaced by § 43-8-198). Therefore ... the filing of the [request to transfer] triggered a mandatory duty on the part of the probate court to transfer the contest to the circuit court forthwith, and without further action touching on the validity of the will submitted by the proponent"

Hodges v. Hodges, 72 So. 3d 687, 691 (Ala. Civ. App. 2011). Thus, once a party files a proper demand for transfer of a will contest to the circuit court, the probate court is required to enter a written order transferring the will contest, see § 43-8-198, and the probate court has no authority to

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do anything other than timely refer the contest to the appropriate circuit court.

After receiving Angela's proper and timely transfer demand with her will contest, the probate court issued no order of transfer and continued to take action in the case, including holding a hearing and issuing an order concluding that the 2013 will was the product of undue influence. Because the probate court was required to transfer the contest after the demand to transfer was made, it had no jurisdiction to hold a hearing or to issue its order. See Summerhill v. Craft, 425 So. 2d 1055 (Ala. 1982) (holding that, because the probate court was required to transfer a will contest to the circuit court after a demand to transfer was made, the probate court had no jurisdiction to hold a hearing to probate the will or to issue its order that the will was duly proved and, thus, that the order was void). "Because the probate court lacked jurisdiction in this case, its judgment is void. A void judgment will not support an appeal. It is this Court's obligation to vacate such a judgment and dismiss the appeal." Russell v. Fuqua, 176 So. 3d 1224, 1229 (Ala. 2015) (internal citations and footnote omitted).

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JUDGMENT VACATED; APPEAL DISMISSED.

Parker, C.J., and Bryan, Mendheim, and Mitchell, JJ., concur.