

**RECEIVED**

**Mar 07 2023**

**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM ALLENDALE COUNTY  
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2023-000159

J. Morgan Kears,..... Petitioner,

v.

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

RESPONDENT ELIZABETH KEARSE GOODING’S RETURN TO  
PETITION FOR A WRIT OF CERTIORARI

Kathleen C. Barnes, SC Bar No. 78854  
BARNES LAW FIRM, LLC  
P.O. Box 897  
Hampton, SC 29924  
803-943-4529

Stephen M. Slotchiver  
SLOTCHIVER & SLOTCHIVER, LLP  
751 Johnnie Dodds Blvd, Ste. 100  
Mount Pleasant, SC 29464

*Attorneys for Respondent Elizabeth  
Kears Gooding*

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

INTRODUCTION ..... 1

COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW..... 1

COUNTER STATEMENT OF THE CASE..... 2

    I. Mr. Kearsse’s will provision to build a home on land he did not own ..... 2

    II. The Probate Court accepted Morgan’s resignation as PR, ordered Morgan individually to pay attorney’s fees, and appointed a successor PR ..... 2

    III. The Circuit Court dismissed the appeal because Morgan is not the PR and cannot take any action on behalf of the Estate ..... 7

    IV. Court of Appeals’ opinion affirming in favor of Respondents ..... 10

ARGUMENT ..... 10

    I. The Court of Appeals correctly held Morgan does not have standing to appeal as PR..... 11

        A. Morgan’s lack of standing was raised below, raised in a timely manner, and is not waived. .... 12

        B. The Court of Appeals Correctly held Morgan failed to appeal his resignation as PR.... 13

        C. The Court of Appeals correctly found that the probate court appointed Mr. Ruff as successor PR and not a special administrator. .... 14

        D. The probate court had jurisdiction to enter the March 20, 2017 order. .... 16

        E. The March 20, 2017 Order is appealable and is the law of the case..... 17

        F. Morgan does not have general standing to appeal as PR..... 17

        G. Morgan is without legal authority as PR and cannot continue to act as PR. .... 18

        H. There is no real party in interest issue; substitution, ratification, and joinder are untimely and improper under these circumstances. .... 19

        I. Morgan had no authority to act as PR until an alleged substitution or joinder..... 20

    II. Morgan did not preserve the issue of the Probate Court’s authority to enforce the parties settlement, and the Probate Court correctly acted within its authority..... 21

        A. The Probate Court had authority to enforce the settlement agreement..... 21

        B. S.C. Code Ann. § 62-3-912 does not apply to the Settlement Order..... 22

        C. S.C. Code Ann. § 62-3-1102 does not apply to the Settlement Order..... 22

        D. The Settlement Order satisfies Rule 43(k), SCRCF. .... 23

    III. The Court may deny the petition based on additional sustaining grounds. .... 24

CONCLUSION..... 25

**TABLE OF AUTHORITIES**

**Cases**

*Bone v. United States Food Serv.*, 399 S.C. 566, 733 S.E.2d 200 (2012) ..... 24

*Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629 (2004)..... 15, 22

*Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 737 S.E.2d 601  
(2013)..... 15, 21

*Erickson v. Jones St. Publr.s., LLC*, 368 S.C. 444, 629 S.E.2d 653 (2006) ..... 19

*Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 627 S.E.2d 724 (2006).. 23

*Fisher v. Huckabee*, 422 S.C. 234, 811 S.E.2d 739 (2018) ..... 6, 20

*Ford v. State Ethics Comm’n*, 344 S.C. 642, 545 S.E.2d 821 (2001)..... 15

*Holy Loch Distribs. v. Hitchcock*, 340 S.C. 20, 531 S.E.2d 282 (2000)..... 13

*I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000). .... 12

*In re Estate of Brown*, 427 S.C. 138, 828 S.E.2d 789 (Ct. App. 2019) ..... 22, 23

*Judy v. Martin*, 381 S.C. 455, 674 S.E.2d 151 (2009)..... 24

*Kearse v. Kearse Family Educ. Trust*, 2022-UP-415 (S.C. Ct. App. Nov. 23, 2022) ..... 1, 10

*Norwest Props., LLC v. Strebler*, 424 S.C. 617, 819 S.E.2d 154 (Ct. App. 2018)..... 12

*Sanford v. S.C. State Ethics Comm’n*, 385 S.C. 483, 685 S.E.2d 600 (2009) ..... 12, 16

*Sea Pines Ass’n for the Prot. of Wildlife, Inc. v. S.C. Dep’t of Natural Res.*, 345 S.C. 594, 550  
S.E.2d 287 (2001) ..... 18

*Shirley’s Iron Works, Inc. v. City of Union*, 403 S.C. 560, 743 S.E.2d 778 (2013) ..... 15, 17

*Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998) ..... 14

*Youngblood v. S.C. Dep’t of Soc. Servs.*, 402 S.C. 311, 741 S.E.2d 515 (2013)..... 18

**Statutes**

S.C. Code Ann. § 26-6-70..... 24

S.C. Code Ann. § 62-1-111..... 25

S.C. Code Ann. § 62-1-308..... 17

S.C. Code Ann. § 62-3-1102.....	23
S.C. Code Ann. § 62-3-608.....	18
S.C. Code Ann. § 62-3-610.....	6, 16
S.C. Code Ann. § 62-3-611.....	3
S.C. Code Ann. § 62-3-613.....	21
S.C. Code Ann. § 62-3-702.....	18
S.C. Code Ann. § 62-3-720.....	25
S.C. Code Ann. § 62-3-912.....	22
S.C. Code Ann. § 62-7-816.....	19

**Rules**

Rule 17, SCRCP.....	20
Rule 201, SCACR.....	14
Rule 208, SCACR.....	12
Rule 220, SCACR.....	25
Rule 221, SCACR.....	11, 21
Rule 25, SCRCP.....	20
Rule 43, SCRCP.....	23, 24

## INTRODUCTION

This is an appeal brought by someone as personal representative (“PR”) of an estate when that person is not the PR. Six siblings are the beneficiaries of an estate, and one sibling, Appellant John Morgan Kearse (“Morgan”), served as the prior PR. While PR, he filed a petition to force the estate to build a home that it had no money to build. Two siblings, Respondents Elizabeth Kearse Gooding (“Elizabeth”) and Julia Kearse Sharp (“Julia”), opposed the petition. The probate court ultimately entered a settlement agreement among the siblings that ordered Morgan *individually* to pay the estate, Elizabeth, and Julia’s legal fees. At the same time, the court accepted Morgan’s irrevocable resignation as PR. The court appointed a new PR.

Morgan began a long, unsuccessful appellate attempt to avoid his individual obligation to pay legal fees but did so as PR—a capacity he no longer legally held. Even though Respondents raised that problem, Morgan never timely attempted to correct it but, instead, doubled down on his chosen legal strategy. The circuit court dismissed Morgan’s appeal because he was not the PR, could not appeal as the PR, and had not appealed the order appointing a new PR.

Morgan appealed the circuit court’s dismissal to the Court of Appeals. On November 23, 2022, in a unanimous unpublished opinion, the Court of Appeals affirmed the circuit court’s decision that Morgan did not have standing to appeal as PR. *Kearse v. Kearse Family Educ. Trust*, 2022-UP-415 (S.C. Ct. App. Nov. 23, 2022). The law and record fully support the Court of Appeals’ Opinion, and this Court should deny the petition for writ of certiorari.

## COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

- I. Whether the Court of Appeals correctly held Morgan did not have standing to appeal as PR when he was no longer PR, did not appeal the order appointing a new PR, and when Respondents timely raised the issue and are not responsible for issue preservation?
- II. Whether Morgan preserved the issue of the probate court’s authority to enforce the parties settlement and, if so, whether the probate court correctly acted within its authority by entering the settlement that Morgan asked for?

III. Whether the Court may affirm on additional sustaining grounds?

### COUNTER STATEMENT OF THE CASE

G.H. Kearsse (“Mr. Kearsse”) died in 2013, with six living children. (R. p. 30). All are parties to the underlying action, and three are parties to this appeal. A provision in Mr. Kearsse’s will led to the underlying action, an explanation of which shows how the parties arrived here.

#### **I. Mr. Kearsse’s will provision to build a home on land he did not own**

In 1992, Mr. Kearsse created The Kearsse Family Education Trust (“the Trust”), an irrevocable trust that named his six children as Trustees. (R. pp. 295, 309-26). He transferred a farm and other real property to the Trust to use money generated by the land to pay for his grandchildren’s education. (R. pp. 309, 325-26, 376-77, 381-82).

In May 2011, almost twenty years later, Mr. Kearsse wrote a will with a provision telling his children to build a house on the farm. (R. p. 303). After his death, the siblings disagreed about whether they could or should build the house because the Trust, not Mr. Kearsse, owned the property and Mr. Kearsse did not provide money to pay for a house. (R. pp. 296, 327-28).

Mr. Kearsse named his six children as co-PRs of his estate. (R. pp. 295, 304). They are W. Gordon Kearsse (“Gordon”), Respondent Elizabeth, Respondent Julia, Rachael Kearsse Best (“Rachael”), Appellant Morgan, and Joseph W. Kearsse (“Joseph”).<sup>1</sup> In October 2013, five siblings renounced their rights as PR, and the probate court appointed Morgan as PR. (R. p. 295).

#### **II. The Probate Court accepted Morgan’s resignation as PR, ordered Morgan individually to pay attorney’s fees, and appointed a successor PR**

On April 8, 2016, Morgan, acting as then-PR of Mr. Kearsse’s estate, filed a Petition for Instructions in the probate court to resolve the siblings’ disagreement about the house. (R. 295).

---

<sup>1</sup> First names are used for clarity.

It is captioned “J. Morgan Kearse, Personal Representative of the Estate of G.H. Kearse” versus the individual siblings. (R. p. 295). He asked the court to order the PR to build the house and use money from the Estate *and* Trust to pay for it. (R. pp. 297-98, 300). Four siblings—Respondents Elizabeth and Julia, and Joseph and Gordon—submitted filings in response.<sup>2</sup> (R. pp. 327-33). Elizabeth asked the court to find it cannot order the Estate to build a house on property the Estate does not own and to award her costs and attorneys’ fees in opposing the petition. (R. p. 330).

In June 2016, Morgan filed an Amended Petition naming the siblings individually and as trustees. (R. p. 338). At this point, Morgan as PR was suing himself individually and as trustee. (R. pp. 338, 344). Respondents Elizabeth and Julia filed answers to the Amended Petition, asking the probate court to deny it and award them attorneys’ fees and costs. (R. pp. 344-53).

During Morgan’s deposition, he admitted that he knew before filing the petition that the Trust owned the property and that an attorney provided him an opinion that Mr. Kearse could not direct the construction of a house on land he did not own. (R. pp. 381-82).

On December 7, 2016, Elizabeth filed a petition to remove Morgan as PR and a motion for summary judgment as to the petition. (R. pp. 356, 364). Elizabeth stated Morgan’s deficiencies and mismanagement as PR, and asked the Court to remove him as PR and order him to pay the Estate’s and her legal fees. (R. pp. 357-63). After service of the removal petition, Morgan had very little authority as PR. *See* S.C. Code Ann. § 62-3-611(a). In response to it, Morgan as PR filed a motion to voluntarily dismiss his petition and close the Estate. (R. pp. 367-68). The probate court scheduled a hearing for February 2, 2017, to hear all outstanding motions.

---

<sup>2</sup> Joseph is *pro se* and submitted a letter saying he supported building a house if financially possible and he wanted the Estate closed as soon as possible. (R. p. 335). Gordon is *pro se* and submitted a letter saying he opposed building a house and wanted the Estate closed as soon as possible. (R. p. 520). Neither one submitted any further filing.

Before the hearing, the parties entered a settlement. The attorneys for Elizabeth, Julia, and Morgan circulated a settlement term sheet and stated that each of their clients agreed to it. (R. pp. 466-68, 470, 473). Morgan's attorney, Mr. Wingate, notified the court "that we have reached a settlement" and asked permission to not attend the hearing. (R. p. 477). Mr. Wingate emailed a letter to the probate judge stating the hearing "will not be necessary" because the "parties have reached a global settlement in this matter, including the siblings who are pro se parties", and said Julia's attorney, Mr. Speights, will "read the agreement into the record." (R. p. 522). The agreement contains six paragraphs, including these relevant provisions:

Morgan shall immediately pay Julie's legal fees and expenses incurred in connection with the defense of Morgan's Petition for Instructions. Julie does not want the Estate to pay any of these fees or expenses.

Morgan shall be responsible for the payment of your [Mr. Wingate's] legal fees and [Eliza]beth's legal fees. Morgan may seek to have the Estate pay all or some portion of these legal fees. In such event, if the majority of the other siblings (Gordon, [Eliza]beth, Rachael, Joseph, and Julie) do not object to the Estate paying such fees, Julie will honor the decision of the majority.

(R. pp. 481-81, 444 lns. 14-15). The other paragraphs required Morgan to resign as PR, allowed him to keep a \$25,000.00 PR commission, agreed for the Trust to purchase their mother's home, and allowed Morgan to use Mr. Kearse's old law office rent free without objection from Julia because the Estate does not own the office. (R. pp. 480-81, 358-59).

On February 2, 2017, Mr. Wingate, Mr. Speights, Julia, Elizabeth, and Mr. Slotchiver (Elizabeth's counsel) attended the hearing. (R. p. 273). Morgan, Rachael, and Joseph chose not to attend despite proper notice and knowledge that a settlement agreement would be presented to the court. (R. pp. 287-91). At the hearing, Morgan tried to renege on the settlement.

Mr. Wingate began by explaining "I represent Morgan Kearse in his capacity as Personal Representative of the Estate." (R. p. 436 lns. 20-21). He told the court that he did not have Joseph and Rachael's signatures on the settlement and Morgan "does not consent to the settlement." (R.

pp. 437, 439). Importantly, he stated Morgan “would like to take a unilateral step and submit . . . a pleading announcing his *resignation* as Personal Representative.” (R. pp. 437-38) (emphasis).

He described the resignation as submitted “*irrevocably*” and stated

that *all* of [Morgan]’s authority is terminated or is frozen. He has no power to write checks. He has no power to file documents. *He has no power to take action*. He can do nothing but sit on the sidelines and wait for Your Honor to appoint a successor fiduciary or fiduciaries, whatever you decide to do, for this estate.

(R. pp. 438-39) (emphasis added).

Julia and Elizabeth asked the court to enforce the settlement and submitted copies of the attorneys’ emails and the settlement signed by Julia, Elizabeth, and Gordon. (R. pp. 443, 463-85).

On February 27, 2017, the probate court filed an order entering the settlement. (R. pp. 272-76). It found “Rachael and Joseph advised the Petitioner that they agreed to the settlement before Mr. Wingate represented to the Court that a settlement had been reached, but they chose not to attend the hearing to dispute the settlement.” (R. p. 275). The order required “Morgan”<sup>3</sup> to pay Julia, Elizabeth, and Mr. Wingate’s legal fees and expenses within 7 days of the date of the order. (R. pp. 275-76). He could then “seek to have the Estate reimburse him for all or some portion of these legal fees and expenses” paid to Elizabeth and Mr. Wingate. *Id.* The court accepted Morgan’s resignation as PR. “Effective February 2, 2017, Petitioner’s authority is *terminated*. The Petitioner has *no power* to take any action.” (R. p. 275) (emphasis added).

On March 20, 2017, the probate court appointed Harley Ruff as the successor PR. (R. p. 278). The order states the “appointment” of Mr. Ruff “as Successor Personal Representative” and that Morgan’s appointment “shall be *terminated*.” (R. p. 278) (emphasis added).

---

<sup>3</sup> The probate court used “Petitioner” when referring to Morgan as PR and “Morgan” when referring to him as an individual. (R. pp. 275-76).

Morgan complied with his termination and Mr. Ruff's appointment, and Mr. Ruff began to take action as PR. "In late March" Morgan mailed Mr. Ruff the estate checking account. (R. p. 814). In June 2017, Morgan delivered the remaining estate assets to Mr. Ruff's office. *Id.* On July 11, 2017, Mr. Ruff sent the beneficiaries a memorandum on the consolidation of estate assets. *Id.* In November 2017 and October 2018, Mr. Ruff executed and filed deeds of distribution for various real properties owned by the Estate. (R. pp. 816-28).

On March 20, 2017, Morgan filed a motion to alter or amend the February 27, 2017 order. (R. p. 388). He filed it "in his capacity as Personal Representative of the Estate of G.H. Kearse", even though he was no longer PR. (R. pp. 388, 814). It was Morgan's burden to ensure the proper legal capacity and status of his filings. *Fisher v. Huckabee*, 422 S.C. 234, 241, 811 S.E.2d 739, 742 (2018). Further, after Morgan's resignation, his attorney's authority to file on behalf of the Estate terminated. S.C. Code Ann. § 62-3-610(b).

Morgan's motion to alter or amend did not contest the probate court's removal of him as PR. (R. p. 275). To the contrary, it states he "would ***not contest*** any order that accepted his resignation" as PR even if it was not properly before the court or did not follow statutory procedure. (R. p. 297) (emphasis added).

Morgan filed a new affidavit stating that he tried to get Joseph, Rachael, and Gordon to sign a second agreement (unbeknownst to Julia and Elizabeth) in which they agreed to allow the Estate to pay for Elizabeth and Mr. Wingate's attorney's fees. (R. pp. 396, 399-400). When Gordon refused to sign it, Morgan no longer wanted to agree to the settlement. (R. pp. 396, 399).

In July 2017, while Morgan's motion to alter or amend was pending, he filed another motion, purportedly "in his capacity as" PR, asking the probate court to dismiss his original petition for instruction, confirm his resignation as PR and Mr. Ruff's appointment, and order the

Estate to pay his legal fees. (R. pp. 401-06). The probate court had already decided those matters in the February 27, 2017 and March 20, 2017 orders. (R. pp. 275, 278).

On August 15, 2017, Elizabeth filed memoranda in opposition to the motions. (R. pp. 408-21). She argued, *inter alia*, that “No party appealed this [March 20, 2017] Order [appointing Mr. Ruff as PR] and it is the law of the case and unappealable.” (R. p. 410). On August 17, 2017, the probate court held a hearing on the motions. (R. pp. 495-96). Elizabeth argued that Morgan (purportedly acting as PR) is the only party who filed a motion to alter or amend and he “is no longer the personal representative.” (R. pp. 490, 493). These arguments directly raised the issue that Morgan was no longer PR and could not take any action as PR. In response, Morgan did nothing to substitute a party or challenge the probate court’s orders in a proper capacity.

On September 18, 2017, the probate court filed an order denying the motions. (R. pp. 280-86). It noted that no respondent, including Morgan individually, joined in the motions and no party objected to Mr. Ruff’s appointment as PR. (R. pp. 281-82). The court held Morgan (1) is not the PR; (2) did not object to the presentation of the settlement at the February 2, 2017 hearing and did not ask for a continuance to present any counter-evidence; and (3) did not provide any testimony or evidence at the February 2 hearing and neither a *pro se* party nor Morgan individually filed an objection to the court’s prior decision. (R. pp. 284-85).

### **III. The Circuit Court dismissed the appeal because Morgan is not the PR and cannot take any action on behalf of the Estate**

On September 27, 2017, Morgan, still purportedly acting as PR, filed an appeal to the circuit court. He listed the probate court’s February 27, 2017 and September 15, 2017 orders as those on appeal. (R. p. 426). He did not list the order appointing Mr. Ruff as the successor PR in the notice of appeal. *Id.* Elizabeth and Julia filed a joint Respondents’ brief arguing, *inter alia*, that Morgan is not the PR and cannot appeal or take any action as PR. (R. pp. 228-37).

The Honorable R. Lawton McIntosh held oral argument on October 8, 2018. Respondents argued that the Court should dismiss the appeal because Morgan is not the PR and did not have standing to take any action on the Estate's behalf, and did not appeal the order appointing Mr. Ruff as PR. (R. pp. 673-74). Respondents also argued that Morgan did not preserve many of his arguments, including the arguments that the settlement did not comply with alleged statutory requirements, case law, and Rule 43(k), SCRCF. *Id.*

On October 29, 2018, the circuit court issued a Form 4 Order dismissing the appeal "based on Mr. Kearse's resignation as personal representative as evidenced by probate court order filed March 23, 2017. Personal representative did not appeal that order and is not subject for a motion for reconsideration. Probate court judgment is affirmed. Mr. Hewitt [counsel for Elizabeth] to prepare formal order." (R. p. 29).

On November 8, 2018, before the entry of a formal order, Morgan filed a motion to reconsider or for ratification, joinder, or substitution of a real party in interest. (R. p. 527). The motion raised dozens of arguments for the first time and asked for the first time to substitute as the appellant either Morgan individually or as co-trustee or Mr. Ruff as PR, even though Respondents raised Morgan's lack of capacity over a year prior in an August 15, 2017 memorandum and at the August 17, 2017 hearing. (R. pp. 410, 490-93).

Morgan's motion also falsely stated that Mr. Ruff did not accept the appointment as PR and Morgan did not deliver the Estate assets to him. (R. pp. 542-44). On November 28, 2018, Elizabeth submitted an affidavit and attachments to the circuit court showing that Morgan began transferring Estate assets to Mr. Ruff in late March 2017 and knew that Mr. Ruff accepted the PR appointment and was administering the Estate. (R. pp. 812-28).

On December 13, 2018, the circuit court filed a formal order dismissing the appeal as a nullity “because Morgan is not the personal representative and can therefore not purport to appeal the probate court’s decision as personal representative.” (R. p. 34). “[T]he March 20, 2017 order appointing Harley Ruff as personal representative” is “the law of the case” because the “motion to reconsider did not mention Morgan’s resignation—a resignation his lawyer said was irrevocable” and the order appointing Mr. Ruff is not mentioned in the notice of appeal. *Id.* The circuit court “expresse[d] no opinion” on any other issue. (R. p. 35).

On December 27, 2018, Morgan filed another motion to reconsider or for ratification, joinder, or substitution of a real party in interest. (R. p. 551). On April 4, 2019, Judge McIntosh held a hearing on the motion. Respondents explained that the probate court’s order requires Morgan *individually* to pay the legal fees and only affects the Estate if a majority of the siblings agree the Estate will pay the fees for Elizabeth and Morgan’s counsel. (R. pp. 708, 715). But, Morgan did not individually appear or appeal. *Id.*

On May 14, 2019, the court filed a formal order denying the motion. It held Morgan did not preserve the arguments that the probate court did not validly remove him as PR and erred in accepting his resignation. (R. p. 43). It held Morgan could have, but did not, dispute his resignation and the order appointing Mr. Ruff as PR at least four times—(1) the February 2, 2017 hearing when the probate court accepted his resignation, (2) the motion for reconsideration in the probate court, (3) after the order appointing Mr. Ruff as PR, and (4) the hearing on the motion to reconsider in probate court when Respondents’ counsel stated Morgan was not PR. (R. pp. 42-43). The court held that Morgan is not the PR, the time passed to challenge his resignation or removal, and he cannot appeal as PR. (R. pp. 43-44). On May 29, 2019, Morgan filed this appeal.

#### **IV. Court of Appeals’ opinion affirming in favor of Respondents**

In the Court of Appeals, Morgan argued the probate court erred in accepting and enforcing the settlement agreement and the circuit court erred in dismissing his appeal on procedural grounds. *Kearse v. Kearse Family Educ. Trust*, 2022-UP-415 (S.C. Ct. App. Nov. 23, 2022). The Court affirmed the circuit court because “the evidence supports the probate and circuit courts’ findings of fact as to [Morgan]’s lack of standing.” *Id.* at \*3-4. The Court found that Morgan appealed “in his capacity as the personal representative” but “the circuit court found the order appointing someone other than [Morgan] as the personal representative was not appealed; thus, [Morgan]’s attempt to appeal as the personal representative was a nullity.” *Id.* at \*3.

Morgan filed a petition for rehearing generally restating the arguments in his brief about his standing as PR. (Pet.). The Court of Appeals denied the petition, and Morgan now seeks a writ of certiorari. The Court should deny the petition in its entirety.

#### **ARGUMENT**

The record shows that Morgan “irrevocably” resigned as PR in a court hearing, signed and filed a statement of resignation as PR, knew the probate court appointed a “Successor Personal Representative” and “terminated” Morgan’s appointment, and acted in compliance with that order by transferring estate assets and bank account information to the new PR. (R. pp. 278, 438-39, 814, 816-28). Morgan did not appeal the order appointing a successor PR but, instead, appealed other orders and appealed them as PR when he was not the PR. The Court of Appeals correctly held Morgan did not have standing, and this Court should deny the petition for writ of certiorari.

Morgan listed fourteen issues in his petition for rehearing in the Court of Appeals. (Pet. for Rehearing). Three of those issues (numbered 8, 9, and 10) are not raised in this Court and are now abandoned. *Compare* Pet. for Rehearing pp. 14-16 *with* Pet. for Cert. Morgan now lists thirteen issues for this Court’s consideration. The four issues under his argument heading II are not

preserved. Those issues relate to the probate court's authority to enforce the settlement agreement. Morgan did not raise "with particularity" in his petition for rehearing any substantive argument about those issues. Rule 221, SCACR (stating a petition for rehearing "shall state *with particularity* the points supposed to have been overlooked or misapprehended by the court" (emphasis added)). Morgan incorporated "by reference" his Brief argument sections I and II, but that is insufficient to satisfy Rule 221. (Pet. p. 21). Therefore, the only issues the Court may consider are those under Morgan's argument heading I, although many of those issues are unpreserved and all of them are meritless.

**I. The Court of Appeals correctly held Morgan does not have standing to appeal as PR.**

Morgan does not have standing as PR of the Estate because he is not the PR. Even if he somehow remained PR, the order he challenges affects him as an individual and does not affect the Estate. Morgan chose to sue himself as an individual and trustee. He then agreed as an individual to pay Respondents' and the Estate's legal fees. When the probate court entered that agreement, Morgan challenged it as PR rather than as an individual. Those legal errors are the law of the case, and the Court of Appeals correctly found the evidence supports dismissing his appeal as brought without standing and for failure to challenge the order appointing Mr. Ruff as PR.

In his petition for certiorari, Morgan is now principally arguing that Respondents did not raise his lack of standing. (Pet. pp. 10-12). This is factually false and legally misguided, as explained below. Morgan now also argues that "no argument" was made below about his standing or status as PR and that "there was no reference" made to the fact that the February 17, 2017 and March 20, 2017 orders are separate orders. (Pet. p. 6). This is false. Elizabeth argued in her August 15, 2017 memorandum and at the August 17, 2017 hearing that Morgan was not PR and did not appeal Mr. Ruff's appointment. (R. pp. 410, 490, 493). Further, that Morgan argues he "did not view" the orders as separate is irrelevant. (Pet. p. 7). His assertions and arguments on these points

are disingenuous to the record and blatantly ignore two undisputed facts—(1) his counsel stood before the court in a hearing on the record and stated Morgan’s resigned as PR immediately and irrevocably (R. pp. 437-39), and (2) Morgan stated in the March 20, 2017 motion to alter or amend that he “would **not contest** any order that accepted his resignation” as PR even if it was not properly before the court or did not follow statutory procedure (R. p. 297) (emphasis added).

**A. Morgan’s lack of standing was raised below, raised in a timely manner, and is not waived.**

Morgan begins by accusing the Court of Appeals of not addressing his argument that Respondents did not raise his lack of standing. (Pet. p. 10). He cites to no law for this argument. *See* Rule 208(b)(1)(D), SCACR (stating an argument must be “followed by discussion and citations of authority”). In fact, the law is to the contrary. Morgan raised that argument to the Court of Appeals, and the Court ruled on it by rejecting that argument and holding that he did not have standing. *See Norwest Props., LLC v. Strebler*, 424 S.C. 617, 623, 819 S.E.2d 154, 157 (Ct. App. 2018) (finding the court necessarily ruled on an argument when it implicitly rejected it by ruling to the contrary). Knowing that Morgan challenged issue preservation, the Court ruled on the issue. It necessarily found the issue is preserved.

As to the merits of issue preservation, Morgan’s arguments are legally and factually incorrect. He argues that Respondent failed to preserve the issue of standing and that the issue is waived.<sup>4</sup> (Pet. pp. 9-11). A Respondent is not responsible for issue preservation because the Court may affirm for any reason appearing in the record. *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420-21, 526 S.E.2d 716, 723-24 (2000). Regardless, the issue of standing is properly

---

<sup>4</sup> Waiver and issue preservation are distinct legal concepts. Morgan’s waiver argument is really another way of arguing issue preservation because his sole argument on waiver is timeliness. Proof of waiver requires much more than a timeliness argument. *See Sanford v. S.C. State Ethics Comm’n*, 385 S.C. 483, 496, 685 S.E.2d 600, 607 (2009) (“A waiver is a voluntary and intentional abandonment or relinquishment of a known right.”).

preserved and not waived. “[T]o preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court.” *Holy Loch Distribs. v. Hitchcock*, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000). The probate court appointed Mr. Ruff as successor PR on March 20, 2017. (R. p. 278). On August 15, 2017, in a memorandum in opposition to Morgan’s motion to dismiss and confirm his resignation, Elizabeth promptly argued that “No party appealed this [March 20, 2017] Order and it is the law of the case and unappealable.” (R. p. 410). Respondents argued at the hearing on the motion to reconsider that Morgan is not the PR, and the probate court ruled that Morgan is not the PR. (R. pp. 490, 493, 285). Elizabeth argued standing in her brief to the circuit court, which ruled that Morgan is not the PR and does not have standing to appeal as PR. (R. pp. 229-31, 29, 32, 34, 43-44). The issue was timely raised to and ruled on by the probate, circuit court, and Court of Appeals.

Finally, although Morgan’s waiver argument is not legally applicable, *see* fn. 5, it is notable that, if anyone waived an argument related to standing, it is Morgan. Morgan filed “irrevocably” a resignation as PR and, in his March 20, 2017 motion to alter or amend, Morgan stated he “would *not contest* any order that accepted his resignation” as PR even if it was not properly before the court or did not follow statutory procedure. (R. pp. 438-39, 297) (emphasis added). It is plain that Morgan is not the PR and has no standing or authority to act on behalf of the Estate.

The issue of standing is properly preserved, and the Court of Appeals correctly ruled on it.

**B. The Court of Appeals correctly held Morgan failed to appeal his resignation as PR.**

Morgan argues that he appealed his resignation as PR by appealing the February 27, 2017 order. (Pet. p. 2). This is incorrect. He filed a motion to reconsider the February 27, 2017 order (R. p. 388) but did not ask the probate court to reconsider its acceptance of his “irrevocably” submitted resignation (R. p. 438-39). To the contrary, the motion states that Morgan “would *not*

*contest* any order that accepted his resignation” even if not properly before the court or not using proper statutory procedure. (R. p. 397) (emphasis added). Therefore, not only did Morgan not raise the issue in the motion, he expressly waived it. Further, while his motion to reconsider was pending, Morgan complied with the order appointing Mr. Ruff as PR by transferring the Estate assets to him. (R. pp. 812-28). It was only when he lost the motion to reconsider in the September 18, 2017 order that Morgan contested his status as PR. This is simply too late and, he should not be permitted to take contrary legal positions when it suits him. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“[A]n 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.”).

Morgan got what he asked for—resignation as PR—and cannot complain on appeal when he is not an aggrieved party as to that ruling. Rule 201(b), SCACR. The facts and law support the Court’s finding that he “did not argue either in his motion or at the hearing that the probate court erred in accepting his resignation.” (Op. p. 2). The Court should also reject this argument because it is undisputed that Morgan did not appeal the March 20, 2017 order that appointed Mr. Ruff as successor PR and stated Morgan’s resignation immediately effective. (R. p. 278).

**C. The Court of Appeals correctly found that the probate court appointed Mr. Ruff as successor PR and not a special administrator.**

To avoid his failure to appeal the probate court’s order appointing Mr. Ruff as successor PR, Morgan argues that the probate court really appointed Mr. Ruff as a special administrator. (Pet. pp. 3-7). This is incorrect. The March 20, 2017 order is at the bottom of a form on which Morgan resigned as “Personal Representative.” (R. p. 14). The order states that the probate court appoints Harley Ruff “as Successor **Personal Representative** in this Estate” and terminates Morgan as PR. (R. p. 14) (emphasis added). The plain language of the order is enough to reject Morgan’s argument. Further, Morgan did not appeal that order, and it is the law of the case.

*Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) (“An unappealed ruling is the law of the case and requires affirmance.”).

Morgan cites to communication from the probate court using the term “special administrator.” (Pet pp. 13-14). The court’s final written order, not a prior communication, is the actual ruling. *Ford v. State Ethics Comm’n*, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001) (“The written order is the trial judge’s final order and as such constitutes the final judgment of the court. The final written order contains the binding instructions which are to be followed by the parties.”).

Morgan fails to recognize that, even if Mr. Ruff was appointed as special administrator and not PR, Morgan is still not the PR because his resignation was voluntary, irrevocable, uncontested, and unappealed. (R. p. 397). Morgan is improperly taking contrary positions in the lower court and on appeal. *See Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 302 n.11, 737 S.E.2d 601, 612 n.11 (2013) (“Appellant may not argue a different position on appeal.”); *and Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004) (“Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding.”). Morgan cannot represent to the probate court that he irrevocably resigns and will not contest his removal as PR but then, on appeal, argue that the court erred in accepting his resignation.

Finally, all of Morgan’s arguments<sup>5</sup> are untimely and ineffective to challenge an order that he did not appeal.

---

<sup>5</sup> Morgan includes a long list of “relevant considerations.” (Pet. pp. 14-16). Many are factually inaccurate and, regardless, none of them change the legal fact that the probate court appointed Mr. Ruff as a successor PR, Morgan failed to appeal that order, and Morgan waived any challenge to the order by complying with it. *See also* Br. of Resp’t Gooding p. 21.

**D. The probate court had jurisdiction to enter the March 20, 2017 order.**

Morgan argues that the probate court lacked jurisdiction to appoint Mr. Ruff as successor PR because more than twenty days passed between Morgan's resignation and Mr. Ruff's appointment. (Pet. pp. 16-17). Morgan represented to the probate court that he would not contest appointment of a new PR "even if" the court "did not follow the procedure of S.C. Code Ann. § 62-3-610(b)." (R. p. 397). Therefore, he plainly and unequivocally waived the ability to contest Mr. Ruff's appointment. *Sanford v. S.C. State Ethics Comm'n*, 385 S.C. 483, 496, 685 S.E.2d 600, 607 (2009) ("A waiver is a voluntary and intentional abandonment or relinquishment of a known right."). Regardless, his argument fails on the merits.

Jurisdiction and the effectiveness of a statement of resignation are different matters. Under S.C. Code Ann. § 62-3-610(b), "[1] If no one applies or petitions for appointment of a successor representative within the time indicated in the notice, the filed statement of resignation is ineffective as a termination of appointment and [2] in any event is effective only upon the appointment and qualification of a successor representative and delivery of the assets to him." As to the first clause regarding an application or petition for appointment, it says only that, after twenty days, the resignation is ineffective "as a termination of appointment", *i.e.*, it does not independently terminate the appointment. As to the second clause, "in any event" the court appointed a successor without objection or appeal, and Morgan complied with the appointment by delivering the Estate assets to Mr. Ruff. The probate court always retains jurisdiction to appoint a PR, and it correctly exercised that jurisdiction in this case.

The circuit court correctly held the order appointing Mr. Ruff is the law of the case and the Court may affirm for this reason alone.

**E. The March 20, 2017 Order is appealable and is the law of the case.**

Morgan argues that the March 20, 2017 order is not appealable and cannot be the law of the case. (Pet. pp. 17-18). He is incorrect. The March 20, 2017 order finally terminated Morgan’s rights as PR and conferred all authority to Mr. Ruff. (R. p. 278). If he wanted to continue as PR, he needed to appeal Mr. Ruff’s appointment. (Br. of App. pp. 36-37); S.C. Code Ann. § 62-1-308(a) (“A person interested in a final order, sentence, or decree of a probate court may appeal to the circuit court . . .”). Instead, he accepted it by failing to appeal and complying with the appointment when he delivered the Estate assets to Mr. Ruff.

Mr. Ruff’s appointment is labeled as “ORDER”, appoints him as successor PR, makes Morgan’s resignation effective, and terminates Morgan’s appointment. (R. p. 278). This is an appealable order. Because Morgan failed to appeal it, it is the law of the case. *Shirley’s Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) (“An unappealed ruling is the law of the case and requires affirmance.”).

Morgan’s argument that filing a motion to reconsider affected the finality of the March 20 order is factually disingenuous because his motion did not challenge Mr. Ruff’s appointment. (R. pp 388-98). His motion states the exact opposite—that he “would *not contest* any order that accepted his resignation.” (R. p. 397) (emphasis added). Finally, he incorrectly characterizes the order as adding Mr. Ruff as a party. (Br. of App. p. 37). The order does not add Mr. Ruff as a party to any action. It appoints him as the PR of an Estate.

**F. Morgan does not have general standing to appeal as PR.**

Morgan argued for the first time on appeal that he had “general standing.” (Br. of App. pp. 40-41); (Pet. pp. 18-19). The argument is unpreserved and meritless. It is not legally possible to have general standing as a PR when the court ruled that he did not have standing as an actual PR. Even if legally possible, Morgan fails to meet the requirements for general standing. “When no

statute confers standing, the elements of constitutional standing must be met.” *Youngblood v. S.C. Dep’t of Soc. Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013). The elements of constitutional standing are (1) injury in fact, (2) a causal connection between the injury and the conduct complained of, and (3) it is likely as opposed to merely speculative that the injury will be redressed by a favorable decision. *Sea Pines Ass’n for the Prot. of Wildlife, Inc. v. S.C. Dep’t of Natural Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (internal quotation marks omitted). Morgan suffered no injury as PR. To the contrary, he got the relief he sought—termination of his PR appointment. (R. pp. 275-76). Neither the Estate nor Morgan as PR suffered an injury in fact from the order. It follows that with no injury, there is also no causal connection and nothing a favorable decision may redress. Morgan does not have general standing as PR.

**G. Morgan is without legal authority as PR and cannot continue to act as PR.**

Morgan argues that he can continue to act as PR even though the probate court terminated his appointment.<sup>6</sup> (Pet. p. 19). He does not retain statutory authority to appeal, and this argument is unpreserved. S.C. Code Ann. § 62-3-608 says that termination ends a PR’s power “except that” a PR “until restrained or enjoined by court order, may perform acts necessary to protect the estate.” Morgan’s power terminated, restrained, and enjoined at the latest on March 20, 2017. At that time, he could not take any acts as PR, including an appeal. The appeal is not necessary to protect the Estate because the probate court’s order does not direct the Estate to pay any money. It says Morgan *individually* may ask the Estate to reimburse him. (R. p. 276). Morgan appealed to get the Estate to pay the legal fees. His brief to the circuit court states “it is important for the record to accurately reflect that Morgan Kearsse is pursuing this appeal as Personal Representative so that

---

<sup>6</sup> Morgan’s petition for rehearing in the Court of Appeals on this issue also included citation to S.C. Code Ann. § 62-3-702. He no longer cites to it, and that argument is abandoned.

he has a firmer basis for recovering his legal fees and costs for the same.” (R. p. 213). Continuing an action purportedly as PR to strengthen the chances of recovering *as an individual* legal fees from the Estate does not protect the Estate.

**H. There is no real party in interest issue; substitution, ratification, and joinder are untimely and improper under these circumstances.**

Morgan argues that, even if he lacks standing as PR, the Court should not dismiss the appeal but should allow for ratification, joinder, or substitution of a real party in interest. (Pet. pp. 19-20). On the contrary, all of the real parties in interest were a part of the proceedings below.<sup>7</sup> Morgan brought an action as PR and chose to name himself individually and as Trustee as an opposing party. His own conflict of interest and continued attempts to exercise authority he does not have caused the standing problem.

For the first time in this Court, Morgan suggests a person for substitution—“the person [the Court of Appeals] believed had succeeded” him as PR. (Pet. p. 20). Mr. Ruff is the PR but does not agree to substitution on behalf of the Estate. (R. p. 577 Aff. ¶ 4). Morgan’s choice to pursue this as the Estate (to recover his legal fees from the Estate) rather than as an individual caused the standing problem, and it is not remedied by substitution. (R. p. 213).

Even if a person for substitution did exist, Morgan failed to seek substitution within a reasonable time. “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 or commencement of the action by, or joinder or substitution of, the real party in interest.” Rule

---

<sup>7</sup> Morgan named all six siblings individually and as Trustees. The Trust was properly represented, and the co-trustees properly acted on its behalf. *See, e.g.*, S.C. Code Ann. §§ 62-7-816(2), -816(14), -816(24). Regardless, Morgan filed the pleadings. He never raised the Trust’s representation below and cannot complain about it on appeal. *Erickson v. Jones St. Publr., LLC*, 368 S.C. 444, 476, 629 S.E.2d 653, 670 (2006) (“[A] party may not complain on appeal of error or object to a trial procedure which his own conduct has induced.”).

17(a), SCRCP; *Fisher v. Huckabee*, 422 S.C. 234, 241, 811 S.E.2d 739, 742 (2018) (ordering dismissal where the defendant’s challenged the plaintiff’s status but “she responded by continuing to maintain her legally flawed position. In other words, Fisher insisted that the validity of her claimed status be litigated, and she never contemplated changing her status to comply with Rule 17(a)”). Instead of timely seeking substitution (if even applicable), Morgan insisted that the validity of his status as PR be litigated and belatedly asked for substitution, ratification, or joinder after losing this argument. (R. pp. 212-13, 244-51). Morgan cannot choose to litigate his capacity to bring the claim and then, after losing the argument, ask for substitution. This is not a proper situation for substitution under Rule 17(a), SCRCP, and the Court should deny the belated request.

Further, Respondents would suffer prejudice from a belated substitution. Respondents directly and timely raised Morgan’s authority and capacity in the probate court and then asked the circuit court to dismiss the case on that basis. Morgan continued to maintain the validity of his status to litigate. Respondents incurred legal fees and costs in challenging him.

**I. Morgan had no authority to act as PR until an alleged substitution or joinder.**

Morgan argues that, under Rule 25(c), SCRCP, he may continue as PR until Mr. Ruff is substituted or joined to this action. (Pet. pp. 19-20). Rule 25(c) does not apply to the facts of this case. (Pet. p. 19). No “transfer of interest” occurred to invoke Rule 25(c). This case involves termination of authority.

In his petition for rehearing in the Court of Appeals, Morgan asked the Court to “accept Mr. Ruff’s ratification” of his appeal under Rule 17(a), SCRCP. (Pet. for Rehearing p. 20). He abandons that argument in this Court by failing to make it.

Morgan cites to S.C. Code Ann. § 62-3-613, but it does not help him. “[A] successor personal representative *may* be substituted in all actions and proceedings to which the former personal representative was a party”, but Mr. Ruff has not sought to do so and there is no statute

providing that a former PR and his attorney may continue acting on behalf of the Estate. S.C. Code Ann. § 62-3-613 (emphasis added). That Mr. Ruff supports the resolution of the dispute does not give Morgan authority to act and take positions on behalf of the Estate, especially when he has a personal monetary stake in the outcome.

**II. Morgan did not preserve the issue of the Probate Court’s authority to enforce the parties settlement, and the Probate Court correctly acted within its authority.**

Morgan’s arguments on this issue are unpreserved because he failed to raise them in the Court of Appeals, as explained above on pages 10-11. Morgan did not raise “with particularity” in his petition for rehearing any substantive argument about the probate court’s authority to enforce the settlement agreement. Rule 221, SCACR. Regardless, the probate court did have authority to enforce the settlement agreement that Morgan asked it to enter.

**A. The Probate Court had authority to enforce the settlement agreement.**

Morgan argues the probate court lacked “jurisdiction” to enforce the settlement agreement because no motion raised the terms of it. (Pet. p. 22). He confuses authority with jurisdiction. The probate court absolutely had subject matter jurisdiction to rule on Estate and PR matters.

On the merits, the settlement terms were before the court for a ruling. Elizabeth filed an opposition to Morgan’s petition asking the court to award her costs and attorney’s fees, and then filed a petition to remove Morgan as PR and order him to pay the Estate’s and her legal fees. (R. pp. 330, 356, 362, 364). Morgan’s counsel wrote a letter to *the court* that stated the motions hearing is “not [] necessary” because the “parties reached a global settlement”; “all matters have been resolved”; and included as a settled matter that Morgan “will resign as” PR. (R. p. 522). Having asked the probate court to enter the settlement agreement, Morgan cannot now take a contrary position on appeal that the court had no authority to do so. *See Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 302 n.11, 737 S.E.2d 601, 612 n.11 (2013) (“Appellant

may not argue a different position on appeal.”); and *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004) (“Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding.”). The probate court had authority to enter a settlement agreement that resolved the motions and Estate pending before it.

**B. S.C. Code Ann. § 62-3-912 does not apply to the Settlement Order.**

Section 62-3-912 of the South Carolina Code does not apply to this case. It applies when “successors . . . agree among themselves to alter the interests, shares, or amounts to which they are entitled under the will of the decedent.” S.C. Code Ann. § 62-3-912. The settlement order in this case does not alter any successor’s interest under Mr. Kears’s will. See *In re Estate of Brown*, 427 S.C. 138, 142, 828 S.E.2d 789, 791 (Ct. App. 2019) (“We hold the settlements here are not governed by § 62-3-912 because they do not alter the interests, shares or amounts to which the successors are entitled under Brown’s Will.”). Morgan does not even argue to this Court that the settlement alters someone’s shares.

**C. S.C. Code Ann. § 62-3-1102 does not apply to the Settlement Order.**

Section 62-3-1102 of the South Carolina Code also does not apply to the settlement. (Br. of App. 99 18-20). It states the “procedure for securing court approval of a compromise” and “is designed to require court approval of the settlement of estate controversies when the settlement (1) will impact persons holding beneficial interests in the estate and (2) is sought to be binding on non-parties.” *In re Estate of Brown*, 427 S.C. at 143, 828 S.E.2d at 791. To “trigger § 62-3-1102”, a “successor” must have a “beneficial interest” that is “affected by the compromise.” *Id.* at 143, 828 S.E.2d at 791. The relevant terms of Mr. Kears’s will (1) allow Morgan to use his old law office for the “duration of his practice” and then, to any other lawyer family member or to the

Trust, and (2) all other property to the Trust. (R. pp. 301-05). The settlement Order does not fall within § 62-3-1102 because it does not impact a person holding a beneficial interest and is not binding on a non-party. The Order binds only the parties to the petition and does not impact anyone's beneficial interest because it only allows Morgan to keep using the law office (which the Estate did not own) and requires him *personally* to pay legal fees. (R. pp. 358-59). As in *In re Estate of Brown*, the agreement "does not affect [a] beneficial interest: he will receive precisely the same thing under the Will and Trust that he would have received had" the parties not entered into the settlement. *Id.* at 143, 828 S.E.2d at 791.

**D. The Settlement Order satisfies Rule 43(k), SCRCP.**

The Settlement Order satisfies Rule 43(k), SCRCP, which states:

No agreement between counsel affecting the proceedings in an action shall be binding unless [1] *reduced to the form of a consent order or written stipulation signed by counsel and entered in the record*, or [2] unless made in open court and noted upon the record, or [3] reduced to writing and signed by the parties and their counsel.

Rule 43(k), SCRCP (emphasis added). The agreement satisfies the first condition. It was reduced to a written stipulation when Morgan's counsel sent the probate court a letter stating the "parties have reached a global settlement in this matter" and describing the terms. (R. p. 522). This is an agreement reduced to the form of a written stipulation signed by Morgan's counsel and entered into the Court record. *See also* S.C. Code Ann. § 26-6-70. Rule 43(k) references "entered into the record" and "made in open court." These are different methods of satisfying Rule 43(k). Once Morgan's counsel sent the probate court a letter acknowledging and communicating the settlement, it became part of the court's record and Morgan could no longer withdraw his assent. *Cf. Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 627 S.E.2d 724 (2006) (allowing a party to withdraw his assent to a settlement before the parties communicated it to the court). The probate court correctly enforced the settlement.

Finally, Morgan threatens that the settlement Order is “subject to collateral attack by the parties” who allegedly did not agree to it. (Pet. for Cert. p. 25). If the Court affirms the dismissal of this appeal, the probate court’s order is the law of the case and cannot be challenged by any of the siblings. *See Bone v. United States Food Serv.*, 399 S.C. 566, 576, 733 S.E.2d 200, 205 (2012) (“The law of the case doctrine applies where a party does not challenge an issue on appeal when there has been an opportunity to do so.”). Any party could have challenged the probate court’s order but they all chose not to do so despite receiving notice at every juncture. A future failure to comply with it is contempt of court.<sup>8</sup>

### **III. The Court may deny the petition based on additional sustaining grounds.**

The Court should deny the petition based on two additional sustaining grounds. Rule 220(c), SCACR. First, Morgan abandons his argument—made in the Court of Appeals but not before this Court—that there was no meeting of the minds as to the settlement agreement. *Compare* Br. of App. p. 16 *with* Pet. for Cert. pp. 21-22. Second, because Morgan did not bring the petition for instructions in good faith, the Court should affirm the order requiring him to pay his, Elizabeth, and Julia’s legal fees. S.C. Code Ann. § 62-1-111. Elizabeth presented evidence that, *before* filing the petition, Morgan (1) had an attorney’s opinion that Mr. Kearsse could not order a house built on land he did not own, (2) knew the Trust owned the land, and (3) did not know the size of the house or cost of building. (R. pp. 376-87, 234-37). Morgan’s explanation that he filed the petition because a sibling threatened litigation does not change that there was no legal basis for the action.

---

<sup>8</sup> Morgan threatens that, if the Court dismisses the appeal for lack of standing, either he or a *pro se* party will choose not to comply with the settlement order as a way to challenge it. (Br. of App. p. 45; R. pp. 558, 251, 717-18). “Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court.” *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). Noncompliance is contempt of court and threatening it is improper.

The Court may deny payment by the estate of a PR's legal fees when a proceeding is not brought in good faith. S.C. Code Ann. § 62-3-720. The petition was not brought in good faith because it lacked any legal basis, and the appeals are not pursued in good faith where Morgan is not the PR and they are unnecessary to preserve the estate. S.C. Code Ann. § 62-3-611(a). The Court should affirm the order that Morgan pay his own legal fees and costs in bringing the Petition and pursuing appeals.

### CONCLUSION

The Court should deny Morgan's petition for writ of certiorari in its entirety.

March 7, 2023

Respectfully submitted,

s/Kathleen C. Barnes

Kathleen Chewing Barnes, SC Bar No. 78854

Barnes Law Firm, LLC

P.O. Box 897

Hampton, SC 29924

803-943-4529

Stephen M. Slotchiver

SLOTCHIVER & SLOTCHIVER, LLP

751 Johnnie Dodds Blvd, Ste. 100

Mount Pleasant, SC 29464

*Attorneys for Respondent Elizabeth Kearse  
Gooding*