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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY COURT OF COMMON PLEAS
Court of Common Pleas
Jennifer B. McCoy, Circuit Judge
Irvin G. Condon, Probate Judge
Tamara C. Curry, Associate Probate Judge

Appellate Case No. 2021-001152
Court of Common Pleas Case No. 2020-CP-10-04036
Probate Court Case No. 2017-ES-10-01946

IN THE ESTATE OF ROY E. MEVERS, JR.,

SOUTH CAROLINA ATTORNEY GENERAL,
Respondent,

versus

MINNIE LEE NEWMAN-MEVERS,
Appellant,

versus

J. JAMES DUGGAN, as Special Administrator of the Estate of Roy E. Mevers, Jr.,
Respondent.

BRIEF OF APPELLANT

Daniel F. Blanchard, III
ROSEN HAGOOD, LLC
151 Meeting Street, Suite 400
Post Office Box 893
Charleston, SC 29402
(843) 577-6726

ATTORNEYS FOR APPELLANT

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II. Did the Probate Court err by reopening Decedent Roy E. Mevers, Jr.'s estate and granting Respondent's *ex parte* petition for appointment of a special administrator pursuant to S.C. CODE ANN. § 62-3-614 without affording Appellant notice of the petition or an opportunity to be heard on the merits when Appellant had been serving as Personal Representative of the Decedent's estate when the Probate Court previously closed his estate?

III. Did the Probate Court err by extending the *ex parte* TRO for a duration beyond the initial ten days permitted by S.C. R. CIV. PRO. 65(b) when Respondent served no motion on Appellant to extend the *ex parte* TRO and he made no motion for a temporary injunction, preliminary injunction, or any relief beyond a TRO?

IV. Did the Probate Court err by granting a temporary injunction or preliminary injunction and ordering Appellant to render an accounting when Respondent's motion merely requested an *ex parte* TRO "effective from the date and time of issuance and for a period of 10 days thereafter" and the *ex parte* TRO expired within ten days of its issuance in accordance with South Carolina law, and Respondent had not served any motion seeking an extension of the *ex parte* TRO or seeking a temporary injunction, preliminary injunction, or any relief beyond an *ex parte* TRO and Appellant had not been provided notice of any motion or hearing on any such matters?

V. Is the Probate Court's Order granting a temporary injunction or preliminary injunction and ordering Appellant to render an accounting void for lack of subject matter jurisdiction when a timely Notice of Removal and Motion to Remove Action to Circuit Court was filed and served pursuant to S.C. CODE ANN. § 62-1-302(d) before the Probate Court entered its Order?

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X. Did the Probate Court err by finding or holding that Respondent is likely to succeed on the merits of his claim when his action seeks to assert the rights or interests of Foundation as the alleged residuary beneficiary of the Decedent's estate, but the Foundation failed to satisfy the express conditions in the Decedent's Will and Codicils necessary for it to become the residuary beneficiary because at the time of the Decedent's death and/or when the estate was distributed (a) the Foundation could not qualify as a charitable organization within the meaning of Section 2055 of the IRC and (b) a gift or devise from the estate to the Foundation would not be permitted as a charitable deduction for federal estate tax purposes, both of which were necessary conditions to the Foundation's receipt of any benefits under the terms of the Decedent's Will and Codicils?

XI. Did the Circuit Court err by affirming the Probate Court's Orders?

INTRODUCTION

For several compelling reasons—procedural, jurisdictional, and substantive—this Court should reverse the Circuit Judge's Form 4 Order dated September 10, 2021 that affirmed without discussion (a) the Probate Court's *ex parte* Orders dated March 13, 2020, which granted Respondent South Carolina Attorney General's ("SCAG") motion for a temporary restraining order and appointed a Special Administrator (hereinafter "*ex parte* TRO"), and (b) the Probate Court's Order dated June 29, 2020, which granted a preliminary injunction and ordered Appellant Minnie Lee Newman-Mevers ("Appellant") to render an accounting (hereinafter "Preliminary Injunction").

First, the Circuit Judge erred by affirming the Probate Court's *ex parte* TRO dated March 13, 2020, which disregarded the mandates of S.C. R. CIV. PRO. 65(b) and failed to afford Appellant notice or an opportunity to be heard prior to its issuance when the SCAG knew of Appellant's whereabouts, Appellant's counsel had been actively engaged in dialogue and exchange of information with the SCAG involving these subject matters for several months before this action was filed, the SCAG made no attempt to contact Appellant or her counsel about a hearing before obtaining the *ex parte* TRO, and the SCAG did not present specific facts by affidavit or verified complaint showing an emergency or that "immediate and irreparable injury, loss, or damage will result" to him before notice could be served on Appellant and a hearing conducted.

Second, the Circuit Judge erred by affirming the Probate Court's June 29, 2020 Order granting a Preliminary Injunction and ordering Appellant to render an accounting when the SCAG's motion merely requested an *ex parte* TRO "effective from the date and time of issuance and for a period of 10 days thereafter," which expired ten days after its issuance in accordance with Rule 65(b), and the SCAG never filed or served any motion for an extension of the *ex parte* TRO or requesting a preliminary injunction, thus Appellant was not provided notice of any such motion. The

matter of a preliminary injunction was not before the Probate Court when it conducted a hearing on March 23, 2020. The Probate Court further erred by extending the *ex parte* TRO for a duration beyond that permitted by Rule 65(b)'s terms and by refusing Appellant's request for leave to file additional affidavits in response to matters which the SCAG raised for the first time at the hearing conducted on March 23, 2020.

Third, when the Probate Court entered its Preliminary Injunction on June 29, 2020 and required Appellant to render an accounting, that Court no longer possessed subject matter jurisdiction to grant such relief because a Notice of Removal and Motion to Remove Action to Circuit Court had previously been timely filed and served on May 12, 2020 in accordance with S.C. CODE ANN. § 62-1-302(d), thereby divesting the Probate Court of subject matter jurisdiction over the matter. Thus, the Preliminary Injunction is void for lack of subject matter jurisdiction.

Finally, the Circuit Judge erred by affirming the Probate Court's holding that the SCAG satisfied the prerequisites for the issuance of a preliminary injunction—(1) irreparable harm, (2) likelihood of success on the merits, and (3) inadequate remedy at law. As a matter of law, the SCAG failed to prove he would suffer irreparable harm if a preliminary injunction was not issued and that he lacked an adequate remedy at law because the injury he alleges in his Petition can be remedied by monetary relief after a trial on the merits. The Circuit Judge also erred by affirming the Probate Court's holding that the SCAG's derivative lawsuit seeking to assert claims on behalf of and belonging to The "Sonny Mevers" Foundation (hereinafter "Foundation") is likely to succeed on the merits when the Foundation was dissolved on January 24, 2018 before commencement of this action, its dissolution has not been revoked, the statutory period for the Foundation's dissolution to be revoked has long expired, and the Foundation no longer has the right to pursue any claims as a matter of law. Respondent lacks standing or capacity to assert claims on behalf of the Foundation

and is not a real party in interest because he cannot pursue claims that the Foundation itself—a dissolved corporation—can no longer pursue. Notably, the Foundation itself has not brought this action or sought to join in the SCAG's lawsuit.

The Circuit Judge further erred by affirming the Probate Court's holding that the SCAG is likely to succeed on the merits of his claim when the Foundation (whose interests the SCAG is attempting to pursue) was disqualified from taking under the late Roy E. Mevers, Jr.'s ("Decedent") Will and Codicils as the alleged residuary beneficiary of his estate. The Foundation failed to satisfy the express conditions in the Decedent's Will and Codicils necessary for it to have a vested interest as the residuary beneficiary of his estate because at the time of the Decedent's death and when the estate was distributed (1) the Foundation could not qualify as a charitable organization within the meaning of Section 2055 of the IRC and (2) a gift or devise from the estate to the Foundation would not be permitted as a charitable deduction for federal estate tax purposes, both of which were necessary conditions to the Foundation's receipt of any benefits under the terms of the Decedent's Will and Codicils.

STATEMENT OF THE CASE AND FACTS

This case originated in the Probate Court. Appellant is the Decedent's widow. (R. p.167 ¶5). Decedent died on November 3, 2017. Id. Appellant was appointed as Personal Representative of Decedent's estate on November 13, 2017. Id. ¶5.

On December 19, 2017, Jessica Wentworth, Esquire was substituted as Appellant's counsel in her role as Personal Representative for the estate. (R. p.167 ¶5; R. pp.57-60).[1] Ms. Wentworth is a local attorney whose practice focuses primarily on estate planning, probate administration, and real

[1] Ms. Wentworth replaced Irvin Slotchiver, Esquire, who initially served as counsel for Appellant in her role as Personal Representative. Mr. Slotchiver filed the initial application on November 13,

estate transactions. (R. p.166-67 ¶¶1-4). Appellant also hired H. Christopher Moss, who is both a Certified Public Accountant (CPA) and tax attorney with over 35 years of experience, to serve as advisor on tax and Internal Revenue Service (IRS) related matters. (R. p.167 ¶5; 155 ¶6; 158 ¶17).[2]

In 2004, many years before marrying Appellant, Decedent had formed the Foundation as a South Carolina non-profit organization. (R. pp.423-29). Via an IRS determination letter issued on July 21, 2005, the Foundation initially was granted tax-exempt status as a private, nonoperating foundation under § 501(c)(3) of the IRC. (R. p.106). However, effective on November 15, 2017, the IRS revoked the Foundation's federal tax-exempt status under IRC § 501(c)(3) for failure to file the required annual returns for three consecutive years. (R. p.433). The Foundation's tax-exempt status has never been reinstated.

On January 23, 2018, the Foundation was dissolved as an entity with the South Carolina Secretary of State with an effective date of January 24, 2018. (R. pp.119-21, 434). The Foundation filed Articles of Dissolution for a Nonprofit Corporation with the Secretary of State on January 24, 2018, and thereby forfeited its charter. Id. State statutory law provides that the Foundation could revoke its dissolution within 120 days of its effective date, which did not occur. See S.C. CODE ANN.

2017 opening the Estate and obtained Appellant's appointment as Personal Representative.

[2] The SCAG has erroneously suggested that Mr. Moss engaged in the unauthorized practice of law when he rendered advice to Appellant on tax and IRS matters while she was administering Decedent's estate in the Probate Court because he is not licensed as a lawyer in South Carolina. The Probate Court and Circuit Court made no such findings in their Orders.

Mr. Moss is licensed as a CPA in Virginia and South Carolina as well as the District of Columbia. He is also licensed as a lawyer in Virginia and the District of Columbia. He assisted Ms. Wentworth (a lawyer licensed in this state) with her representation of Appellant as is expressly permitted by our rules of professional conduct. See S.C. R. PROF. RESP. 5.5(c). Additionally, a CPA such as Mr. Moss does not engage in unauthorized practice of law in this state when he renders professional assistance within his professional expertise and qualifications. In re Unauthorized Practice of Law Rules Proposed by S.C. Bar, 309 S.C. 304, 422 S.E.2d 123 (1992).

§ 33-31-1404(a). The statutory period for the Foundation to revoke its dissolution expired on May 24, 2018. No such revocation of dissolution was applied for or occurred.

Decedent died testate while married to Appellant. His Last Will and Testament, as well as two Codicils amending his original Will, were prepared by Irvin Slotchiver, Esquire. (R. p.168 ¶6). Article XII of Decedent's original Will, which was made before he married Appellant, specifically provided for the disposition of his residuary estate:

> I give devise and bequeath my entire residuary estate, being all real and personal property, wherever situated, in which I may have any interest at the time of my death, not otherwise effectively disposed of, to THE "SONNY MEVERS" FOUNDATION, ***if it is in existence at the time of my death and on the condition that it is an organization that is charitable within the meaning of Section 2055 of the Internal Revenue Code, as amended, and on the further condition that this gift is permitted as a charitable deduction from my Estate for Federal Estate Tax purposes, absolutely and in fee simple, forever***.

(R. pp.50-51) (emphasis added).

After Decedent married Appellant on September 12, 2016, he later executed a Codicil to his Will amending Article XII so as to add the following sentence to the conclusion of that article:

> Otherwise, I give, devise and bequeath my said entire residuary estate to my Spouse, MINNIE LEE NEWMAN MEVERS, absolutely and in fee simple, forever, on the condition that she shall survive me.

(R. p.43).

Under the terms and provisions of Decedent's Will, the Foundation's status as the outright beneficiary of Decedent's residuary estate would vest ***provided*** the Foundation was in existence at the time of Decedent's death ***and*** it satisfied the other "conditions" set forth in Article XII. (R. p.169 ¶12; 157 ¶15; 708-09 ¶12). The Will sets forth specific conditions that the Foundation must satisfy to qualify for receipt of the gift or distribution of the residuary estate—that (a) it is an organization which is charitable within the meaning of Section 2055 of the Internal Revenue Code (IRC) and (b) that the gift is permitted as a charitable deduction from Decedent's estate for federal estate tax

purposes. If either of those conditions were not satisfied either at the time of Decedent's death or when the estate assets were to be distributed, then the devise or gift to the Foundation either did not vest or, if it vested, it lapsed or was cancelled and instead devolved to Appellant. (R. p.169-70 ¶13; 157-58 ¶16; 709 ¶13).

Decedent had created the Foundation in 2004, before he had even met Appellant. Because Ms. Wentworth is not a CPA or tax attorney, Appellant contacted Mr. Moss, who is both a CPA and a tax attorney, to serve as advisor on tax and IRS related matters, including the question of whether the Foundation satisfied the conditions in Article XII of the Will. (R. pp.167 ¶5, 170-71 ¶14; 158 ¶17). Mr. Moss investigated the matter and concluded that the Foundation was a sham and it had no real substance. (R. p.158-59 ¶¶18-19).

Among other things, Mr. Moss learned the Foundation had not filed the required tax information returns (Form 990-PF) for the years 2014, 2015, and 2016 and he could find no other reporting or other documentation to the IRS or another regulatory body concerning its operations during these periods. (R. pp.158-59 ¶18; 170-71 ¶14; 709-10 ¶15). He determined the Foundation had no real corporate records or documentation (outside its initial formation documents) that evidenced the Foundation had been, and was continuing, to be organized and operated exclusively for charitable purposes. Id. He learned that almost the entirety of the Foundation's Board members had conflicts of interest as they primarily comprised persons with whom Decedent transacted business raising a number of concerns regarding self-dealing under IRC § 4941. Id. There were no records of when and how long these individuals were serving as directors, whether they were in fact appointed, or had ever approved any transactions, the compensation arrangements, or any charitable activities, grants, or any other matters required of individuals acting as directors. Id. The Foundation had no bookkeeping or records, had not conducted periodic meetings or recorded minutes of

meetings as required in the bylaws, had no records of appointments of directors or officers, had no staff or employees, and had no office. Id. In short, Mr. Moss concluded the Foundation had no substance. Id. It had no documentation that could demonstrate it had been actually operated by a board of directors to further exclusively charitable purposes. Id.

Based on his considerable experience in the field of taxation and with tax audits by the IRS, Mr. Moss concluded the Foundation could not withstand an IRS audit, it could not qualify as a charitable organization within the meaning of IRC § 2055, and a devise from the Estate to the Foundation would not be permitted as a charitable deduction for federal estate tax purposes. (R. p.159 ¶19; 171-72 ¶15; 711 ¶18). Ms. Wentworth and Appellant were concerned it would be fraudulent or possibly even criminal to file papers taking the position that the Foundation was tax-exempt. (R. p.171-72 ¶15).

The IRS confirmed Mr. Moss's finding about the Foundation when it revoked its federal tax-exempt status under IRC § 501(c)(3) effective on November 15, 2017. (R. p.159 ¶21; 172 ¶16). As of that date, the Foundation was a taxable c-corporation. Id. This occurred a mere two days after Appellant had been appointed as Personal Representative.

On January 23, 2018, the Foundation was dissolved for the reasons pointed out by Mr. Moss. (R. p.159-60 ¶22). The Foundation filed Articles of Dissolution for a Nonprofit Corporation with the South Carolina Secretary of State on January 24, 2018, and the Foundation ceased to exist. Id.

Decedent's estate was administered based on the determinations the Foundation had not satisfied the conditions in the Will, the devise or gift to the Foundation had lapsed or was canceled, and Appellant was the residuary beneficiary under the Will. (R. p.172 ¶17; 160 ¶23). With Ms. Wentworth's assistance, Appellant filed a Proposal for Distribution (Form #410ES) with the Probate Court on November 21, 2018, along with a Final Accounting (Form #361ES), Application for

Settlement (Form #412ES), and Notice of Right to Demand Hearing (Form #416ES), which clearly disclosed that Appellant would receive the residuary estate as part of the proposed distribution of Decedent's estate. (R. pp.63-68; 172 ¶17). Because the Foundation was not a proper residuary beneficiary, these actions were completely proper and were mandated by the terms and provisions of Decedent's Will.

All of the 28 beneficiaries who received distributions from the estate signed a Receipt and Release with Waiver (Form #403ES) and none responded to the notice of right to demand a hearing, or filed any objection to the Proposal for Distribution or Application for Settlement. (R. p.172 ¶18; 160 ¶24). None of the directors or officers of the Foundation contested the probate process, its revocation of exempt status on November 15, 2017, or the subsequent dissolution of the Foundation. (R. p.173 ¶19; 160-61 ¶25).

The Probate Court issued an Order closing the estate on December 31, 2018. (R. p.1). The Probate Court expressly found that "[t]he asset(s) has/have been administered according to the laws of South Carolina." Id. The assets of the Estate were distributed in accordance with the terms of the Will and Codicil as shown on the Proposal for Distribution. (R. p.173 ¶20). Deeds of distribution involving the various real estate owned by Decedent were duly executed and recorded with the Registers of Deed for the appropriate counties. Id. The assets of the estate have already been distributed in accordance with the terms of Decedent's Will and Codicil. Id.

On March 13, 2020, notwithstanding the dissolution of the Foundation and the forfeiture of its charter, the SCAG filed the instant action in the Probate Court in his *parens patriae* capacity purportedly on behalf of the Foundation's beneficiaries, even though the Foundation no longer exists and lacks the right to sue. (R. pp.69-125). The SCAG's lawsuit alleges the Foundation was a qualifying devisee under the terms and provisions of Decedent's Will and it should have been

distributed all or a portion of the Decedent's residuary estate. The SCAG's action seeks to reopen Decedent's estate and formally probate his Will and Codicils, to have a special administrator appointed in place of Appellant, and to impose a constructive trust for the benefit of the Foundation over the assets that were previously distributed from the estate to Appellant.

On the very same day the SCAG filed the action, and without prior notice to Appellant or opportunity to be heard and despite the fact the SCAG had been engaged in active dialogue with Appellant's counsel for several months, the SCAG obtained an *ex parte* TRO from Associate Probate Judge Tamara Curry based solely on the SCAG's uncontested submissions to the Court. (R. pp.2-12; 126-30; 435).[3] In the same Order, Judge Curry reopened Decedent's estate and appointed a Special Administrator for the estate when a hearing on those matters was not previously noticed or conducted. (R. pp.2-12). Judge Curry set a hearing to take place on March 23, 2020, but did not specify the purpose of the hearing. (R. p.12). The hearing notice merely states the hearing is "Per Temporary Restraining Order Dated March 13, 2020." Id. Appellant and her counsel were served with the SCAG's Petition, *ex parte* TRO, and Notice of Hearing on March 17, 2020. (R. p.176-77).

Probate Judge Irvin G. Condon conducted a TRO hearing six days later on March 23, 2020. (R. pp.258-355). Appellant and her counsel appeared and opposed the continuation of the TRO. Judge Condon verbally indicated at the conclusion of the hearing his preliminary finding that he would continue the TRO in effect, but also stated he would issue a written Order setting forth his final findings and rulings on a future date to be determined.[4]

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[3] Prior to the SCAG's *ex parte* proceedings, Appellant's legal counsel had been actively communicating with the SCAG concerning these subject matters for several months, her counsel had repeatedly responded to the SCAG's numerous requests for information, and she had been cooperating with the SCAG's inquiries. (R. p.356-422).

[4] Under state law, until a written order is entered, a binding ruling has not been issued by the Court. Bayne v. Bass, 302 S.C. 208, 210, 394 S.E.2d 726, 727 (Ct. App. 1990); Bowman v. Richland Mem'l

On April 10, 2020, before Judge Condon issued a final ruling on the TRO, Appellant filed her Return to the SCAG's Petition along with Counterclaims, Cross-Claims, and Third-Party Claims. (R. pp.178-97). Appellant raised several defenses (including the SCAG's lack of standing, lack of capacity, is not a real party in interest, and failure to state a claim as a matter of law) and also asserted claims involving the construction of Decedent's Will and Codicils. In the same pleading, Appellant also petitioned for an elective share of Decedent's probate estate in accordance with S.C. CODE ANN. §§ 62-2-201 *et seq.* and requested attorneys' fees under § 62-1-111. Id.

By Reply dated May 4, 2020, the Special Administrator answered the Counterclaims, Cross-Claims, and Third-Party Claims. (R. pp.198-202). By Reply dated May 8, 2020, the SCAG answered the Counterclaims, Cross-Claims, and Third-Party Claims. (R. pp.203-10).

On May 12, 2020, fifty days after the TRO hearing, Appellant timely filed and served a Notice of Demand for Jury Trial. (R. pp.211-13). On that same day, in accordance with S.C. CODE ANN. § 62-1-302(d), Appellant timely filed and served a Notice of Removal and Motion to Remove Action to Circuit Court. (R. pp.214-19).

On June 29, 2020, notwithstanding the prior removal notice, Judge Condon entered a written Order granting a preliminary injunction and other relief. (R. pp.13-28). In addition to enjoining Appellant, the Order further requires her to render a "complete accounting" to the Special Administrator. Id.

On July 10, 2020, Appellant timely filed and served a Motion to Alter, Amend, and/or Vacate the June 29, 2020 Order pursuant to Rule 59(e). (R. pp.220-30). On August 28, 2020, Appellant also timely filed and served a Motion to Vacate Order pursuant to Rule 60(b). (R. pp.243-51). Appellant

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Hosp., 335 S.C. 88, 91, 515 S.E.2d 259, 260 (Ct. App. 1999). Judge Condon was free to change his mind or modify his rulings until he issued a written Order.

requested a hearing on her motions. (R. pp.436-37). However, on September 10, 2020, Judge Condon entered an Order denying Appellant's motions without a hearing. (R. pp.29-33).

On September 11, 2020, Appellant filed a timely Notice of Intent to Appeal to the Circuit Court involving all of the Probate Court's Orders. (R. pp.252-57, 440-45). Appellant's appeal was assigned Case No. 2020-CP-10-04036 in the Circuit Court.

On September 15, 2020, the Probate Court then filed a removal of the remainder of the action not subject to the prior appeal to the Circuit Court, which action is currently pending in the Circuit Court as Case No. 2020-CP-10-04089. (R. pp.29-33). Thus, there were two actions pending in the Circuit Court at that time.

On September 16, 2020, the SCAG filed a Motion for Continuance of the TRO issued by the Probate Court or, in the Alternative, Issuance of a Temporary Injunction in Case No. 2020-CP-10-04089. (R. pp.595-662). On September 22, 2020, following a hearing, Circuit Judge Bentley D. Price denied the SCAG's motion via a Form 4 Order. (R. pp.589-91).

On September 10, 2021, in the appeal from the Probate Court pending in the Circuit Court as Case No. 2020-CP-10-04036, Circuit Judge Jennifer B. McCoy entered a Form 4 Order affirming the Probate Court's Orders without discussion or analysis. (R. pp.572-74). On October 8, 2021, Appellant timely filed and served a Notice of Appeal to this Court. (R. pp.575-83).

ARGUMENTS

I. STANDARD OF REVIEW ON APPEAL.

Questions of law are reviewed *de novo* and the appellate court will reverse the lower court's decision when it is controlled by an error of law. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). "Whether a court has subject matter jurisdiction is a question of law [this Court] review[s] *de novo*." Deborah Dereede Living Tr. dated Dec. 18, 2013 v. Karp, 427 S.C. 336, 346, 831 S.E.2d 435, 441 (Ct. App. 2019).

An action to appoint a special administrator is equitable in nature. Cf. Fisher v. Huckabee, No. 2014-002020, 2016 WL 7495869, at *3 (S.C. Ct. App. Dec. 21, 2016), aff'd in part, rev'd in part, No. 2017-000743, 2018 WL 6528122 (S.C. Dec. 12, 2018) ("The underlying nature of the matter before the probate court was the appointment of a special fiduciary to manage the estate assets, which we find akin to the removal of a personal representative; thus, the action is in equity."); Blackmon v. Weaver, 366 S.C. 245, 248, 621 S.E.2d 42, 43 (Ct. App. 2005) ("An action to remove a personal representative is equitable in nature."). "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, 366 S.C. at 249, 621 S.E.2d at 44.

"The granting of temporary injunctive relief is within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion." MailSource, LLC v. M.A. Bailey & Assocs., 356 S.C. 363, 367, 588 S.E.2d 635, 637–38 (Ct. App. 2003) (citation omitted). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Id. (quoting County of Richland v. Simpkins, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002)).

II. THE PROBATE COURT ERRED BY GRANTING AN *EX PARTE* TRO, REOPENING THE ESTATE, AND APPOINTING A SPECIAL ADMINISTRATOR WITHOUT AFFORDING APPELLANT NOTICE OR AN OPPORTUNITY TO BE HEARD.

The Probate Court erroneously granted an *ex parte* TRO, reopened the estate, and appointed a special administrator on March 13, 2020, without requiring the SCAG to provide Appellant notice or an opportunity to be heard. The Circuit Court subsequently erred in affirming the Orders.[5]

South Carolina Rule of Civil Procedure 65(b) expressly provides in pertinent part as follows:

> No temporary restraining order shall be granted without notice of motion for the order to the adverse party ***unless it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon***. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; … shall be served … upon the adverse party in accordance with the provisions of Rule 4; ***shall define the injury and state why it is irreparable and why the order was granted without notice***; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period.

S.C. R. CIV. PRO. 65(b) (emphasis added).

"Because a temporary restraining order may be issued *ex parte*, the device is vulnerable to abuse; indeed, the propriety of a court issuing any order that would subject a person to injunctive restraint without the person's knowledge has been questioned." WRIGHT & MILLER, 11A FED. PRAC. & PROC. CIV. § 2952 (3d ed. 2020). "To ensure that the rights of all concerned are protected, Rule 65(b) prescribes certain safeguards for the issuance of temporary restraining orders that must be

[5] Although Judge Price later refused to continue the preliminary injunction after part of the proceedings were removed to the Circuit Court in the related matter, Case No. 2020-CP-10-04089, he did not alter the Probate Court's Order reopening the estate or appointing a special administrator, which rulings are still in place. In any event, the appeal from the Probate Court's *ex parte* TRO is ripe because it is an issue capable of repetition but evading review. Byrd v. Irmo High School, 321 S.C. 426, 468 S.E.2d 861, 864 (1996); Nelson v. Ozmint, 390 S.C. 432, 702 S.E.2d 369, 370 (2010).

scrupulously honored." Id. "In view of the fact that notice and a hearing usually can be arranged easily, there normally is no reason why the rule's requirements cannot be carried out promptly." Id.; see JAMES F. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE 534 (3rd ed. 2010) ("Ex parte [TROs] are disfavored in state practice. TROs are limited to those 'rare occasions when no adverse interest exists or when exigent circumstances dictate that action be taken prematurely.'").

In Spartanburg Buddhist Ctr. of S.C. v. Ork, 417 S.C. 601, 790 S.E.2d 430 (Ct. App. 2016), this Court reinforced that Rule 65(b)'s requirements are mandatory. The Court reversed the trial court due to its failure to adequately set forth the reasons why a TRO was granted without notice. "Rule 65(b) requires that a TRO issued without notice 'shall define the injury and state why it is irreparable and why the order was granted without notice.'" Id. at 609, 790 S.E.2d at 435. "Here, the [TRO] stated the Center would 'suffer irreparable harm if the injunction is not granted' but did not elaborate on the injury itself or why the order was granted without notice.'" Id. The same situation exists in the present case.

The normal circumstances in which a trial court would be justified in proceeding *ex parte* on a TRO motion is when it makes a specific finding that notice to the adverse party is impossible because the adverse party is unknown or cannot be found or when specific evidence is presented that the adverse party would likely take some action that would in turn cause irreparable harm to the movant if notice was given. Guilford v. California, No. 317CV00038RCJVPC, 2017 WL 376153, at *3 (D. Nev. Jan. 25, 2017); First Technology Safety Systems, Inc. v. Depinet, 11 F.3d 641 (6th Cir. 1993). However, when the adverse party's location is known and no showing is made by sworn affidavit or verified complaint that immediate and irreparable harm will result before notice can be given to the adverse party or his or her attorney, then an *ex parte* TRO is improper and must be

vacated. See, e.g., Rabbi Jacob Joseph School v. Province of Mendoza, 342 F. Supp. 2d 124 (E.D. N.Y. 2004); Reno Air Racing Ass'n., Inc. v. McCord, 452 F.3d 1126, 1131-32 (9th Cir. 2006).

A party's delay in seeking injunctive relief strongly militates against a finding that immediate and irreparable injury, loss, or damage will result to the party before notice can be served and a hearing conducted. Quince Orchard Valley Citizens Ass'n v. Hodel, 872 F.2d 75, 79-80 (4th Cir. 1989). In Wangson Biotechnology Grp., Inc. v. Tan Tan Trading Co., 2008 WL 4239155 (N.D. Cal. Sept. 11, 2008), for instance, the Court found that a party's delay for two months in requesting an *ex parte* TRO warranted its denial. The Court observed that "[p]arties spurred on by the threat of or actual immediate irreparable harm, file for TROs as quickly as possible to head or stave it off," but in the case before it the plaintiff was aware of the defendants' alleged counterfeiting activities since July 2008, but did not file suit until September 2008. Id. at *6.

The South Carolina Probate Code (SCPC) imposes similar notice requirements. An estate cannot be reopened except "upon application of any interested person and ***upon notice*** as [the Court] directs." S.C. CODE ANN. § 62-3-1008 (emphasis added). A special administrator may be appointed "in a formal proceeding by order of the court on the petition of any interested person and finding, ***after notice and hearing***, that appointment is necessary to preserve the estate or to secure its proper administration including its administration in circumstances where a general personal representative cannot or should not act." Id. § 62-3-614(2) (emphasis added). The requirement of notice and a hearing can be dispensed with only if "***an emergency exists***." Id. (emphasis added).

Courts applying similar statutes have held an "emergency" necessitates a showing of an immediate or imminent threat to the administration of the estate if notice is given. See, e.g., Matter of Est. of Runyan, 557 N.E.2d 1353, 1358 (Ind. Ct. App. 1990); In re Est. of Wilson, 594 N.W.2d 695, 701 (Neb. Ct. App. 1999); In re Est. of Cooper, 746 N.W.2d 663, 669 (Neb. 2008); Matter of

Est. of Mattila, 718 P.2d 343, 345 (Mont. 1986); see also May v. Sansberry, 86 N.E.2d 88, 90 (Ind. App. Ct. 1949) (Defining "emergency" as "[a]n unforeseen combination of circumstances which calls for immediate action" and holding the emergency "should be clear and imperative before a court should take such a drastic measure to remove an executor or administrator without [notice] so that the parties in interest may have their day in court.").

Appellant and her counsel were not served with the SCAG's Petition and Motion for TRO and request for appointment of a Special Administrator until March 17, 2020, which was three days after the *ex parte* TRO was granted. (R. pp.176-77). By then, the Probate Court had already reopened the estate, appointed a special administrator, and granted a TRO against Appellant.

The SCAG first contacted Appellant about the issues in this case on November 14, 2019. (R. p.356). He then waited for four months before seeking an *ex parte* TRO, which strongly militates against a finding that immediate and irreparable injury will result. The SCAG knew where Appellant was located and had written letters to Appellant and her legal counsel beginning on November 14, 2019, in which the SCAG requested information and records relating to the Foundation and Decedent's estate. For several months prior to the SCAG's filing of this lawsuit, Appellant's counsel had been actively engaged in dialogue and the exchange of information with the SCAG involving the very subject matters in this case. (R. pp.356-422).

Through her counsel, Appellant promptly responded to the SCAG's inquiries on each occasion and expressed her desire to cooperate with the SCAG's investigation. In fact, on February 11, 2020, Appellant's counsel sent a detailed letter to the SCAG and suggested that "[a]t this juncture, a phone call to discuss these matters further may be most effective." (R. pp.395-96). Appellant and her counsel had repeatedly responded to the SCAG's requests and Appellant was fully cooperating with the SCAG's inquiries. Despite this cooperation, the SCAG made no attempt to

contact Appellant or her counsel and notify them about a hearing before obtaining the *ex parte* TRO, reopening the estate, and the appointment of a special administrator.

The SCAG presented no specific facts by affidavit or verified complaint showing that an emergency existed or that immediate and irreparable injury, loss, or damage will result to the SCAG before notice could be served on Appellant or her counsel and a hearing conducted. The SCAG made no showing that estate assets were in immediate or imminent danger. To the contrary, this case involves an estate that had been fully administered and closed on December 31, 2018 (15 months before the SCAG filed this action) and the estate's assets (which predominantly comprised real estate) had already been distributed approximately 1½ years before this case was commenced. The SCAG made no showing whatsoever that Appellant was on the verge of disposing of any property or assets that she had received from Decedent's estate 1½ years earlier.

The most the SCAG could muster was the following weak claim: "Ms. Newman, through her counsel, declined the State's request for an assurance that she would refrain from dissipating Foundation assets pending resolution of this matter." (R. pp.127-28 ¶5). The SCAG had no evidence that Appellant was on the verge of disposing of or secreting any assets that she received from Decedent's estate in an effort to thwart the SCAG's action. Rather, the SCAG sought the extraordinary remedy of an *ex parte* TRO based on the thinnest of grounds—that Appellant would not affirmatively agree to refrain from disposing of properties she received as an estate beneficiary and which she still may hold. If such a meager showing were sufficient to satisfy the "immediate and irreparable injury, loss or damage" language of Rule 65(b), then the rule's protections are illusory. The issuance of *ex parte* TROs will become the norm, not the exception.

The Probate Court had no evidentiary grounds on which to grant an *ex parte* TRO, reopen the estate, or appoint a special administrator without first affording Appellant notice and an opportunity

to be heard. The Circuit Court likewise had no basis upon which to affirm the Probate Court's Order. This Court should reverse the Probate Court given its failure to provide Appellant with advance notice of the SCAG's motion or an opportunity to be heard prior to issuance of its Order.

III. THE PROBATE COURT ERRED BY EXTENDING THE TRO BEYOND TEN DAYS AND BY PRELIMINARY ENJOINING APPELLANT FOR AN INDEFINITE DURATION AND ORDERING HER TO ACCOUNT WHEN THE SCAG DID NOT MOVE FOR SUCH RELIEF.

The SCAG's motion simply requested an *ex parte* TRO pursuant to Rule 65(b) "effective from the date and time of issuance and for a period of 10 days thereafter." (R. p.128). The SCAG's motion nowhere asked the Probate Court to extend or enlarge the TRO beyond the time limitations imposed by Rule 65(b). The SCAG never filed any motion seeking a preliminary injunction or seeking to require Appellant to render an accounting. The SCAG's Petition also did not request or seek a preliminary injunction or other injunctive relief. (R. pp.69-84).

Rule 65(b) expressly provides that a TRO "shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period." See S.C. R. CIV. PRO. 65(b). As such, a TRO expires no later than ten days after it is issued. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 602, 553 S.E.2d 110, 121 (2001). The rule allows the Court to extend the time for another ten days for "good cause shown" absent the restrained party's consent. However, nothing in the rule allows the Court to extend a TRO beyond a maximum of twenty days.

In this case, the *ex parte* TRO issued on March 13, 2020 expired ten days after its issuance in accordance with Rule 65(b). When the Probate Court conducted a hearing on March 23, 2020, the maximum amount of time the Court could extend the TRO was by another ten days. However, the

Probate Court disregarded the clear limitations of Rule 65(b) and entered a Preliminary Injunction on June 29, 2020 for an indefinite duration as well as ordered Appellant to render an accounting. The Probate Court never gave notice of any hearing on a preliminary injunction request. The issues of a preliminary injunction and an accounting were not before the Probate Court when it conducted a hearing on March 23, 2020 because the SCAG had never moved for or requested such relief in its motion and the Probate Court had never noticed a hearing on such a motion or request.

The Probate Court erred by extending the *ex parte* TRO for a duration beyond that authorized by Rule 65(b) and by granting a preliminary injunction and ordering an accounting when such relief had not been requested in the SCAG's motion. The Probate Court compounded its error by refusing Appellant's request for leave to file additional affidavits in response to matters which the SCAG raised for the first time at the March 23, 2020 hearing. At the hearing, Appellant's counsel requested leave to file additional affidavits addressing certain issues which the SCAG had raised for the first time during the hearing. (R. pp.295, 345-53). Appellant had no notice of those matters prior to learning of them during the hearing. The Probate Court initially indicated at the hearing that it was inclined to accommodate Appellant's request and grant her time to submit additional affidavits. However, the Probate Court later changed its mind and denied Appellant's request for more time to submit additional affidavits. (R. p.26).

The Court must reverse the Probate Court's Order given its noncompliance with Rule 65(b).

IV. THE PROBATE COURT LACKED SUBJECT MATTER JURISDICTION TO GRANT A PRELIMINARY INJUNCTION OR TO REQUIRE APPELLANT TO ACCOUNT AFTER A NOTICE OF REMOVAL TO THE CIRCUIT COURT HAD BEEN FILED AND SERVED.

The Probate Court entered its June 29, 2020 Preliminary Injunction and ordered Appellant to render an accounting ***after*** Appellant had filed and served a Notice of Removal and Motion to

Remove Action to Circuit Court pursuant to S.C. CODE ANN. § 62-1-302(d) on May 12, 2020. The filing of the removal notice divested the Probate Court of jurisdiction over the matter and required it to remove the action to the Circuit Court without conducting further proceedings.

Pursuant to § 62-1-302(d), the action "***must be removed*** to the circuit court and in these cases ***the circuit court shall proceed upon the matter de novo***." S.C. CODE ANN. § 62-1-302(d) (emphasis added); see Thomas v. Gathings, 304 S.C. 308, 312, 403 S.E.2d 682, 684 (Ct. App. 1991) (statute requires removal when it is raised by motion of any party or by motion of the probate judge on his own). The statute is mandatory and not discretionary with the Probate Court. Once the notice of removal is filed, the Probate Court is divested of subject matter jurisdiction over the matter that was removed to the Circuit Court. Ex parte Cannon, 385 S.C. 643, 657, 685 S.E.2d 814, 822 (Ct. App. 2009); see S.C. CODE ANN. § 62-1-302(e) ("The removal to the circuit court of an action or proceeding within the exclusive jurisdiction of the probate court applies only to the particular action or proceeding removed, and the probate court otherwise retains continuing exclusive jurisdiction."). The Circuit Court determines the removed matter *de novo,* which means to begin again "as if no proceeding whatsoever had been had in the first instance." Nat'l Health Corp. v. DHEC, 298 S.C. 373, 378 n.1, 380 S.E.2d 841, 844 n.1 (Ct. App. 1989).

The SCAG does not claim Appellant improperly removed the matter to the Circuit Court. Despite § 62-1-302(d)'s mandate that the action "***must be removed*** to the circuit court" once the removal notice was filed, the SCAG argues the Probate Court properly delayed removal to grant a Preliminary Injunction after the removal notice. To follow the SCAG's logic means the Probate Court can disregard a proper notice of removal, refuse to enter or delay entry of an Order formally granting removal, and continue to issue rulings affecting the merits as if the case had not been removed to the Circuit Court. This result is inconsistent with § 62-1-302(d)'s mandate.

In Cotty v. Yartzeff, 309 S.C. 259, 422 S.E.2d 100 (1992), after a petition for testacy and appointment of a personal representative was filed in the probate court, the probate court began a hearing on Friday, April 27, 1990, and recessed the hearing until Monday, April 30, 1990. After the hearing had been started, the appellant filed an answer and a motion to remove the matter to the circuit court. The probate court went forward with the hearing and later denied the appellant's removal motion. On appeal from the probate court's order denying the removal motion and the circuit court's order affirming same, the respondent argued the appellant had waived her right to remove by participating in the hearing before filing her removal motion. However, the Supreme Court disagreed and held the probate court should have granted the appellant's motion for removal to the circuit court for a trial *de novo*. Id. at 262-63, 422 S.E.2d at 102.

The removal of an action from the Probate Court to the Circuit Court pursuant to § 62-1-302(d) is analogous to the removal of an action from state court to the federal court pursuant to 28 U.S.C. § 1446(d). Once a party in a state court action files a notice to remove the case to the federal court, the filing of the notice of removal immediately divests the state court of jurisdiction over the case. Yarnevic v. Brink's, Inc., 102 F.3d 753, 754 (4th Cir. 1996); Givens v. Isuzu Motors Am.,LLC, 2009 WL 10669837, at *1 (M.D. Fla. July 13, 2009). Unless and until the federal court enters an order remanding the case to the state court, "anything that has occurred in state court since the removal is void for want of jurisdiction." Givens, 2009 WL 10669837 at *1; see Rosenberg v. Lexington Ins. Co., 2009 WL 10677929, at *2 (D.S.C. Mar. 19, 2009); Barrett v. Southern Ry. Co., 68 F.R.D. 413, 422 (D.S.C. 1975).

A similar rule should be followed when a party removes an action from the Probate Court to the Circuit Court. Appellant filed and served a removal notice pursuant to § 62-1-302(d) on May 12, 2020. As such, the Probate Court no longer had subject matter jurisdiction over the matter. The

Probate Court erred in subsequently issuing a Preliminary Injunction and ordering Appellant to account after the notice of removal had been filed and served. The Probate Court's June 29, 2020 Order is void for lack of subject matter jurisdiction and must be reversed.

V. THE SCAG FAILED TO SATISFY THE NECESSARY REQUIREMENTS FOR A PRELIMINARY INJUNCTION.

Even disregarding the fact the SCAG failed to move for or give Appellant timely notice of the hearing on its request for a preliminary injunction and even ignoring the fact the Probate Court lacked subject matter jurisdiction to grant a preliminary injunction once the case had been removed to the Circuit Court, the Probate Court also erred on the merits in finding the SCAG satisfied the prerequisites for the issuance of a preliminary injunction.

Circuit Judge Bentley D. Price ruled against the SCAG on this exact issue in the related case pending in the Circuit Court as Case No. 2020-CP-10-04089. On September 16, 2020, the SCAG filed a Motion for Continuance of the TRO issued by the Probate Court or, in the Alternative, Issuance of a Temporary Injunction in that separate case. (R. pp.595-662). On September 22, 2020, Judge Price denied the requested TRO. (R. pp.589-91). As such, the Circuit Court has already determined the SCAG is not entitled to a TRO or preliminary injunction.

Under South Carolina law, a party seeking a preliminary injunction "must establish that (1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." Scratch Golf Co. v. Dunes W. Residential Golf Properties, Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004); Hook Point, LLC v. Branch Banking and Trust Co., 397 S.C. 507, 511, 725 S.E.2d 681, 683 (2012). The sole purpose of a temporary injunction is to preserve the *status quo* during litigation to prevent irreparable injury

to the requesting party and to preserve the ability of the court to render complete relief. County Council of Charleston v. Felkel, 244 S.C. 480, 484, 137 S.E.2d 577, 578 (1964).

A preliminary injunction is an "extraordinary remedy ... which is to be applied only in the limited circumstances which clearly demand it." Dao Travels, LLC v. Charleston Black Cab Co., 2015 WL 631137, *4 (D.S.C. Feb. 13, 2015); see Munaf v. Geren, 553 U.S. 674, 689-90 (2008) ("A preliminary injunction is an extraordinary and drastic remedy; it is never awarded as of right." (internal citation and quotation marks omitted)).

The Probate Court erred in finding the SCAG demonstrated irreparable harm if the injunction is not granted, he is likely to succeed on the merits of his claims, and there is an inadequate remedy at law. The Circuit Court also erred in affirming those rulings.

(1) The SCAG Did Not Show Irreparable Harm:

The SCAG failed to show he will suffer irreparable harm if a preliminary injunction is refused. The assets that Appellant received under Decedent's Will are primarily real estate. The SCAG made no showing that Appellant intended to dispose of the real estate she received as beneficiary of the estate and which she still held when the action was filed. One of the properties that Appellant received is 17 East Battery, which is situated in Charleston's historic district and overlooks the Cooper River. This house was the couple's marital home. It is where Appellant still resides. The house had been in Decedent's family for nearly 125 years. Selling that house would be the last thing Appellant would ever do.

The SCAG argues that Appellant declined his request for an assurance that she will refrain from dissipating the assets she received from Decedent's estate pending resolution of this case. Of course, this assertion assumes without proving that the Foundation will be entitled to recover those assets. Even if it is assumed for argument's sake the SCAG can assert the Foundation's rights in this

case and the Foundation was entitled to Decedent's residuary estate, the SCAG offered no evidence showing that Appellant was on the verge of disposing of the assets she received from Decedent's estate and which she still held.[6] Rather, the SCAG seeks the extraordinary remedy of a preliminary injunction based on the barest of claims—that Appellant would not affirmatively "assure" the SCAG that she will refrain from selling any assets she received as residual beneficiary. If such a meager showing were sufficient to establish "irreparable harm," then the "extraordinary remedy" of a preliminary injunction during the pendency of litigation becomes the rule and not the exception.

Further assuming for argument's sake the SCAG had shown that Appellant was on the verge of disposing of the assets she received from Decedent's estate, which would potentially cause a financial harm to the Foundation if the asset cannot later be returned should the Foundation (via the SCAG's lawsuit) obtain a judgment in its favor, "pure economic loss is not sufficient to satisfy the requirement of showing an irreparable harm where an adequate remedy is available at law." Professional Wiring Installers, Inc. v. Sims, 2008 WL 9840409, *3 (S.C. Ct. App. 2008).

A preliminary injunction is unwarranted when the purported harm to the SCAG can be remedied by monetary relief. See, e.g., MailSource, 356 S.C. at 369-70, 588 S.E.2d at 639. The United States Supreme Court has instructed that:

> The key word in this consideration is *irreparable.* Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief

[6] The SCAG ignores the fact that Appellant not only took under Decedent's Will pursuant to the *residuary clause*, but she also was a *specific devisee* under other provisions of the Will. (R. p.49 Art. IX.1) (devising $350,000 to Appellant); R. p.42 (devising all personal property to Appellant). Even if the SCAG is correct that the Foundation was the residuary beneficiary, it would not divest Appellant of her rights as a specific devisee under the Will and the SCAG has no right to restrain Appellant from using or disposing of those assets. The SCAG further ignores the fact that Appellant was Decedent's surviving spouse. As such, she is entitled to an elective share equal to one-third of Decedent's probate estate. See S.C. CODE ANN. §§ 62-2-201 et seq. The SCAG also has no right to restrain Appellant from using or disposing of those assets.

> will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Sampson v. Murray, 415 U.S. 61, 90 (1974) (emphasis in original).

This principle was illustrated in Schwartz v. Wellin, No. 2:13-CV-3595-DCN, 2014 WL 51212, at *1 (D.S.C. Jan. 7, 2014), which reversed a TRO granted by the probate court. In that case, which originated in the probate court but was removed to the federal court, three co-trustees ("the children") of a trust created by their father had liquidated and distributed over $95.6 million of the trust's assets to themselves personally. Id. at *1; McDevitt v. Wellin, No. 2:13-CV-3595-DCN, 2016 WL 199626 (D.S.C. Jan. 15, 2016). The children had used millions of dollars they took from the trust to pay their own attorneys, experts, and consultants. McDevitt, 2016 WL 199626 at *2. The trust protector and another co-trustee sued the three children to compel them to restore the trust's assets to the trusts and for temporary and permanent injunctive relief.

While the case was pending in the probate court, the probate judge issued an *ex parte* TRO enjoining the children from disposing of or using the trust assets. Schwartz, 2014 WL 51212 at *2. After the case was removed to the federal court, a motion was made to extend the TRO and for a preliminary injunction. Id. In denying the motion, the federal court pointed out the lawsuit primarily sought to force the children to return the $95.6 million in trust assets which they had distributed to themselves and, as such, it sought monetary relief. Id. at *4. Because "the harm at issue can be remedied by money damages," the "irreparable harm" element could not be satisfied. Id. (citing Bethesda Softworks, LLC v. Interplay Entm't Corp., 452 F. App'x 351, 353 (4th Cir. 2011)).

The same principles apply here. Even assuming *arguendo* the SCAG could show the Foundation will suffer some financial harm resulting from Appellant's disposition of any property she received from Decedent's estate as residual beneficiary during the pendency of this action and

further assuming the SCAG has authority to sue Appellant in such a circumstance, any such harm could be remedied by an award of damages at end of this case after a trial on the merits. The SCAG cannot satisfy the irreparable harm element.

(2) The SCAG Did Not Show Likelihood of Success on the Merits:

The SCAG also failed to show he is "likely" to succeed on the merits of the litigation. In fact, his claims fail because (i) he is improperly seeking to pursue the rights of the Foundation, which was a private foundation that was dissolved over 2½ years ago, no longer exists, and no longer has the right, power, or ability to pursue any claims; (ii) he lacks standing or capacity to sue on the Foundation's behalf to enforce any rights it may have to receive Decedent's residuary estate—any such claims belong to the Foundation, not to the SCAG; and (iii) the Foundation—even assuming *arguendo* the SCAG can sue to enforce its rights—did not have any right to receive any portion of Decedent's estate because the Foundation did not meet the express conditions or qualifications set forth in his Will and Codicils. Each of these issues is addressed below.

a. The Foundation Was Dissolved, Has Not Been Reinstated, and Lacks Capacity to Pursue Any Claims Against Appellant:

The Foundation was dissolved as an entity with the Secretary of State effective on January 24, 2018. (R. pp.119-24; 434). State law provides that "[a] corporation is dissolved upon the effective date of its articles of dissolution." S.C. CODE ANN. § 33-31-1404(b). The Foundation has been dissolved for over 3½ years and lacks capacity to sue in this matter.

Section 33-31-1405(a) provides that the Foundation could have revoked its dissolution within 120 days of its effective date, which did not occur. The statutory period for the Foundation to revoke its dissolution expired on May 24, 2018. See S.C. CODE ANN. § 33-31-1405(a) ("A corporation may

revoke its dissolution within one hundred twenty days of its effective date."). No such revocation of dissolution was applied for or granted.

The Georgia Supreme Court confronted this same scenario in Gas Pump, Inc. v. Gen. Cinema Beverages of N. Fla., Inc., 436 S.E.2d 207, 208 (Ga. 1993). In that case, a corporation was dissolved in 1988 due to its failure to comply with state filing and fee requirements. In 1991, the corporation later filed a lawsuit against several defendants alleging violations of the federal antitrust laws. The trial court dismissed the lawsuit on the grounds that the plaintiff corporation lacked standing to pursue the case as a matter of law because it had been dissolved and never reinstated.

The Georgia Supreme Court pointed out that Georgia's statutes give a dissolved corporation two years in which it may seek reinstatement. Because the corporation had not filed for reinstatement within this two-year period, the Court held it no longer existed and, as such, it lacked capacity to sue the defendants. Id. at 207. The Court explained:

> The expiration of the time for reinstatement puts a stamp of finality on the demise of the corporation—it can no longer be resuscitated. The unavoidable conclusion is that the corporation cannot, after the time its demise is deemed complete, initiate any activity. To permit a suit to be initiated in the name of the dissolved corporation after that time would be to sanction a form of legal necromancy, reanimation of the empty husk of a dead corporate entity.

Id. at 208.

Numerous other state courts have similarly held that a corporation which has been dissolved and which has not timely sought reinstatement following such dissolution cannot maintain an action. See, e.g., Pacesetter Real Estate, Inc. v. Fasules, 767 P.2d 961, 964-65 (Wash. 1989); Abrams v. Porter, 920 P.2d 386, 388-89 (Idaho 1996); Bio-Thrust, Inc. v. Div. of Corps., 80 P.3d 164, 166 (Utah 2003); Metered Appliances, Inc. v. 75 Owners Corp., 225 A.D.2d 338, 338 (N.Y. App. Div. 1996); see also Deere & Co. v. JPS Dev., Inc., 592 S.E.2d 175 (Ga. Ct. App. 2003) (dissolved

corporation could not file action to revive breach of warranty and negligent misrepresentation action against seller of tractors since two-year statutory period for bringing a renewal action had run and corporation had no legal existence).

At the time when the SCAG filed this lawsuit, and even to this day, the Foundation was dissolved. The 120-day statutory period for the Foundation to revoke its dissolution expired on May 24, 2018, which was over 1½ years before the SCAG filed this lawsuit. At that time, the Foundation no longer existed as an entity, had forfeited its charter, and could not sue or be sued. Because the SCAG is attempting to bring a lawsuit on the Foundation's behalf and seeks to enforce the Foundation's rights and claims against Appellant (albeit improperly as discussed below), the SCAG likewise lacks standing, capacity, or right to bring this lawsuit. The SCAG cannot sue to enforce rights on the Foundation's behalf when the Foundation itself cannot bring such an action.

b. The SCAG Lacks Standing or Capacity to Pursue any Rights the Foundation May Have to Decedent's Estate:

Even if it were assumed the Foundation had not been dissolved and was still a corporation in existence with the right and power to sue, the SCAG still cannot bring this lawsuit against Appellant because any claims belong ***to the Foundation***, not to the SCAG or to the Foundation's "unspecified charitable beneficiaries." The SCAG lacks standing or capacity to sue in this matter and is not the real party in interest.

"Standing to sue is a fundamental requirement in instituting any action." Joytime Distribs. & Amusement Co. v. State, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999). Standing is "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." S.C. Pub. Interest Found. v. S.C. Dep't of Transportation, 421 S.C. 110, 117, 804 S.E.2d 854, 858 (2017) (quoting BLACK'S LAW DICTIONARY 1625 (10th ed. 2014)). "To have standing, one must have a personal stake in the

subject matter of the lawsuit; i.e., one must be the 'real party in interest.'" Townsend v. Townsend, 323 S.C. 309, 474 S.E.2d 424, 427 (1996) (citation omitted).

A corollary to standing is that "[e]very action shall be prosecuted in the name of the real party in interest." S.C. R. CIV. PRO. 17(a). "A real party in interest is one who 'has a real, actual, material or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action.'" Townsend, 323 S.C. at 309, 474 S.E.2d at 427. "[T]he real party in interest is 'the party who, by the substantive law, has the right sought to be enforced.'" and "[i]t is ownership of the right sought to be enforced which qualifies one as a real party in interest." Fisher on behalf of estate of Shaw-Baker v. Huckabee, 422 S.C. 234, 238, 811 S.E.2d 739, 741 (2018) (quoting Bank of Am., N.A. v. Draper, 405 S.C. 214, 220, 746 S.E.2d 478, 481 (Ct. App. 2013)).

The SCAG argues he has a "statutory and common law duty to represent the interests of the unspecified charitable beneficiaries [of the Foundation] and the interests of the public at large." (R. pp.70-71 ¶1). It is crucial to appreciate that the SCAG's lawsuit attempts to enforce ***the Foundation's rights*** as a putative beneficiary of Decedent's Will. The SCAG is trying to enforce the distribution of the residuary estate to the Foundation as a charitable devise. However, the Foundation's "unspecified charitable beneficiaries" are not beneficiaries of Decedent's Will. Rather, ***the Foundation itself*** (not its potential beneficiaries) was named as the initial residuary beneficiary conditioned upon its satisfaction of requirements specified in Decedent's Will.

The Foundation is a corporation. South Carolina law is clear that any recovery on behalf of a corporation must be pursued by the corporation itself, not by its shareholders or owners individually. In Davis v. Hamm, 300 S.C. 284, 387 S.E.2d 676 (Ct. App. 1989), the Court observed it is well-established that the assets of a corporation belong to the corporation (and not the individual

stockholders) and that a loss caused to a corporation because of mismanagement is an asset of the corporation, thus any recovery on such a cause of action belongs solely to the corporation (not its shareholders). Id. at 287–88, 387 S.E.2d at 678; see also Babb v. Rothrock, 303 S.C. 462, 401 S.E.2d 418 (1991) (shareholders lacked standing to assert claim based on alleged misappropriation of corporate property); In re Greenwood Supply Co., 295 B.R. 787, 795 (Bankr. D.S.C. 2002) (holding that a cause of action for an accounting based upon a diversion of corporate assets is a claim that must be brought by the corporation, not its shareholders individually).

Even assuming *arguendo* the SCAG is correct that Appellant misappropriated assets rightfully belonging to the Foundation, which is denied, ***the Foundation's "unspecified charitable beneficiaries"*** have no cause of action against Appellant. Although the SCAG argues he represents the Foundation's "unspecified charitable beneficiaries" and not the Foundation, he points to nothing in Decedent's Will or Codicil devising any assets to those beneficiaries. Instead, the Foundation itself was named as the initial residuary beneficiary in the Will and Codicil conditioned upon its satisfaction of specified requirements. It is ***the Foundation itself***—not its shareholders or ultimate beneficiaries—that would have a potential cause of action against Appellant for any alleged misappropriation. The loss, if any, is to Foundation, thus any recovery belongs to it. It is the Foundation that must bring the claim, not the SCAG. Lefkowitz v. Lebensfeld, 408 N.Y.S.2d 216, 219 (N.Y. Sup. Ct. 1978) ("[N]ot-for-profit corporations … have the right to prosecute an action in their own names for the protection of their ultimate beneficiaries … and thus no need exists for the Attorney General to act in their behalf.").

The SCAG has not cited any law holding he has the right, power, or authority to step in place of the Foundation purportedly on behalf of its "unspecified" beneficiaries or to bring an action on the Foundation's behalf to enforce any rights the Foundation may have against Appellant. As the

purported basis for his authority to bring this action, the SCAG incorrectly relies on a statute which authorizes the SCAG ***to prosecute nonprofit corporations*** (not their officers or directors) to hold them accountable concerning their use of charitable assets and on common-law case law providing that under limited circumstances the SCAG can file or intervene in an action in his *parens patriae* capacity ***on behalf of the beneficiaries of a charitable trust***. Neither of these bases support the SCAG's claim of standing in this matter. Neither basis allows the SCAG to step in the shoes of a nonprofit corporation such as the Foundation and represent it in an action against a third party.

The SCAG cites to a statute authorizing him to sue nonprofit corporations to hold them accountable for their use of their charitable assets. See S.C. CODE ANN. § 1-7-130 ("The Attorney General shall enforce the due application of funds given or appropriated to public charities within the State, prevent breaches of trust in the administration thereof and, when necessary, prosecute corporations which fail to make to the General Assembly any report or return required by law."). However, this statute is inapplicable to the SCAG's claims in this case for a couple of reasons.

First, subsequent to § 1-7-130, the South Carolina General Assembly enacted the South Carolina Nonprofit Corporation Act, S.C. CODE ANN. §§ 33-31-101 to -31-1708. The Nonprofit Corporation Act establishes a comprehensive scheme governing the duties owed by directors and officers to private foundations such as the Foundation. Unlike § 1-7-130, the Nonprofit Corporation Act specifically addresses the enforcement actions that can be brought against the officers and directors of private foundations. While § 1-7-130 expresses the SCAG's general authority with respect to "public charities," §§ 33-31-101 to -31-1708 of the Nonprofit Corporation Act specifically govern enforcement actions involving private foundations and their officers and directors.

Settled law holds that "[w]here there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more

specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." Denman v. City of Columbia, 387 S.C. 131, 691 S.E.2d 465, 468–69 (2010) (citing Spectre, LLC v. S.C. Dept. of Health and Envtl. Control, 386 S.C. 357, 688 S.E.2d 844, 851 (2010)). As a result, the SCAG cannot circumvent the specific enforcement provisions of the Nonprofit Corporation Act by relying upon the general provisions of § 1-7-130. See Van de Kamp v. Gumbiner, 270 Cal. Rptr. 907, 921-22 (Ct. App. 1990) (provisions of California's comprehensive Nonprofit Corporation Law governing authority to enjoin or otherwise remedy breaches of the statute superseded the attorney general's common law authority as *parens patriae* to bring actions for breaches of charitable trusts); People ex rel. Spitzer v. Grasso, 893 N.E.2d 105, 110 (N.Y. 2008) (attorney general lacked standing under *parens patriae* doctrine to circumvent comprehensive legislative scheme of New York Not-For-Profit Corporation Law governing duties and liability of officers and directors of not-for-profit organizations by asserting non-statutory claims for constructive trust and unjust enrichment against chairman and chief executive officer of not-for-profit corporation seeking recovery of compensation payments made to executive).

The SCAG's authority to bring actions against the Foundation's officers and directors is governed by §§ 33-31-101 to -31-1708, not by § 1-7-130. The Nonprofit Corporation Act does not authorize the SCAG to file a damages action against the directors or officers of a private foundation to enforce any duties owed by them to the private foundation. See S.C. CODE ANN. § 33-31-304 rptr.'s cmt. ("This new nonprofit statute differs from the Business Corporation statute.... There was consideration of adopting language more similar to the South Carolina Business Corporation Act. However, ***the South Carolina Business Corporation Act, as noted, provides for damage actions against the board which was viewed as undesirable in the context of nonprofit corporations***.") (emphasis added). The Nonprofit Corporation Act simply authorizes the SCAG to bring actions to

remove directors or to dissolve the nonprofit corporation. See S.C. CODE ANN. § 33-31-810 (removal of directors); id. § 33-31-1430 (judicial dissolution); see also State ex rel. Butterworth v. Anclote Manor Hosp., Inc., 566 So. 2d 296, 298-99 (Fla. Dist. Ct. App. 1990) (statute allowing attorney general to institute proceedings to revoke a nonprofit corporation's charter or to prevent the corporation from being used for purposes inconsistent with its charter did not authorize the attorney general to sue the corporation's directors to recover profits the directors might have received from the sale of the corporation's assets).

Second, even assuming *arguendo* that § 1-7-130 governs enforcement actions involving private foundations notwithstanding the enactment of the Nonprofit Corporation Act, § 1-7-130 does not authorize the SCAT to bring actions against the Foundation's officers and directors. Section 1-7-130 authorizes the SCAG to sue ***the nonprofit corporation*** to hold it accountable. However, the SCAG's lawsuit in this case is not an action against the Foundation itself. The SCAG has not filed any action against the Foundation seeking to hold it accountable for its application or administration of its charitable assets.

To the contrary, the SCAG is attempting to bring an action on the Foundation's behalf to enforce alleged rights the Foundation may have against Appellant for alleged breaches of fiduciary duties owed by Appellant to the Foundation itself. Section 1-7-130 does not authorize the SCAG to prosecute any such derivative claims for or on behalf of the Foundation. The Foundation itself must bring any such claims. See Butterworth, 566 So. 2d at 298 (attorney general lacked standing to initiate a derivative action on behalf of nonprofit corporation); Lefkowitz, 408 N.Y.S.2d at 219 ("[N]ot-for-profit corporations ... have the right to prosecute an action in their own names for the protection of their ultimate beneficiaries ... and thus no need exists for the Attorney General to act in their behalf."); Lefkowitz v. Lebensfeld, 68 A.D.2d 488, 417 N.Y.S.2d 715 (1979), aff'd, 51 N.Y.2d

442, 415 N.E.2d 919 (1980) (attorney general lacked standing to step into the shoes of charitable organizations and bring what was in effect a shareholders' derivative action on behalf of the charitable organizations alleging breaches of fiduciary duties); James J. Fishman, Improving Charitable Accountability, 62 MD. L. REV. 218, 262 (2003) ("Despite the authority to supervise charities, the attorney general does not have the power to manage charities in their everyday affairs. Thus, courts have prohibited the attorney general from intervening in suits contesting wills involving charities, from ordering deviations from trust provisions, or from enforcing obligations owing to charities." (citing cases)).

In addition to § 1-7-130, the SCAG also attempts to invoke the *parens patriae* doctrine. (R. pp.70-71 ¶¶1-2). *Parens patriae* is a common-law standing doctrine that allows states to bring suit on behalf of their citizens in certain circumstances by asserting a "quasi-sovereign interest," such as the safety, health, or welfare of its citizens. Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 601, 607 (1982); Grasso, 893 N.E.2d at 107 n.4. To invoke the doctrine, the SCAG must prove a quasi-sovereign interest distinct from that of a particular party and injury to a substantial segment of the state's population. The doctrine of *parens patriae* derives from the common-law principle that a sovereign, as "parent of the country," may step in on behalf of its citizens to prevent "injury to those who cannot protect themselves." Snapp, 458 U.S. at 600 (citation and internal quotation marks omitted).

"[A] state's mere assertion of quasi-sovereign interests is not sufficient to grant *parens patriae* standing if the relief sought is limited to monetary damages for injuries suffered to individual parties; such an award will not compensate the state for any harm done to its quasi-sovereign interest." In re Racing Servs., Inc., 619 B.R. 681, 684-85 (B.A.P. 8th Cir. 2020). "A state that sues as *parens patriae* must seek to redress an injury to an interest that is separate from the interests of

particular individuals." People of State of N.Y. by Abrams v. Seneci, 817 F.2d 1015, 1017 (2nd Cir. 1987). "The state cannot merely litigate as a volunteer the personal claims of its competent citizens." Id. "Where the complaint only seeks to recover money damages for injuries suffered by individuals, the award of money damages will not compensate the state for any harm done to its quasi-sovereign interests." Id. "Thus, the state as *parens patriae* lacks standing to prosecute such a suit." Id.

"*Parens patriae* standing is rarely appropriate in 'the presence of a more appropriate party or parties capable of bringing suit,' and such suits 'cannot be brought to collect the damages claim of one legally entitled to sue in his own right.'" In re Tobacco/Governmental Health Care Costs Litig., 83 F. Supp. 2d 125, 134 (D.D.C. 1999) (internal citations omitted); Com. of Pa., by Shapp v. Kleppe, 533 F.2d 668, 675-76 (D.C. Cir. 1976) (In determining whether state has *parens patriae* standing to sue on basis of generalized economic injury to its citizens, an important factor to be considered is presence or absence of more appropriate party or parties capable of bringing suit.); Pfizer, Inc. v. Lord, 522 F.2d 612, 616 (8th Cir. 1975) ("A *Parens patriae* action cannot be brought to collect the damage claim of one legally entitled to sue in his own right.").

These principles negate the existence of *parens patriae* standing in this case. The Foundation itself was capable of filing suit against Appellant if it had wanted to do so. The SCAG's lawsuit seeks to recover the damages claim of the Foundation, which was a nonprofit corporation fully entitled to sue in its own right. The present lawsuit is nothing more than the SCAG's attempt to pursue claims against Appellant for money damages allegedly suffered by the Foundation. The award of money damages would not compensate the State for any harm done to its quasi-sovereign interests, but would compensate the Foundation itself.

The SCAG relies on Watson v. Wall, 229 S.C. 500, 93 S.E.2d 918 (1956) and Furman Univ. v. McLeod, 238 S.C. 475, 120 S.E.2d 865 (1961). Both of those cases involved the SCAG's

participation either as an intervenor or as a named defendant in ongoing lawsuits when a decedent's will or real estate deeds contained language creating public or charitable trusts, the litigation involved the determination of the trusts' rights under the will or deeds, and there was no trustee or representative in place who could represent the interests of the public or charitable trusts in the litigation. Neither of those cases involved a scenario, like the present case, in which the SCAG is attempting to sue in place of a nonprofit corporation fully capable of protecting its own rights and to supplant the corporation's own board, officers, and managers to prosecute the corporation's putative rights or claims even though the corporation itself did not initiate any such action.

Unlike Watson and Furman, this case does not involve a charitable trust unrepresented by a trustee. Here, there was a nonprofit corporation in place that was fully capable of asserting claims in Decedent's estate if it wanted to do so. But the Foundation chose not to bring such a claim. The *parens patriae* doctrine is inapplicable when there is "the presence of a more appropriate party or parties capable of bringing suit." Tobacco/Governmental Health, 83 F. Supp. 2d at 134; Kleppe, 533 F.2d at 675-76. The SCAG fails to cite a single case involving a scenario, like this case, where he was allowed to sue in place of a nonprofit corporation fully capable of protecting its own rights and to supplant the corporation's own board, officers, and managers to prosecute the corporation's rights even though the corporation itself did not initiate any such action.

In Blumenthal v. Barnes, 804 A.2d 152 (Conn. 2002), the Connecticut Supreme Court rejected a similar claim of authority by the Connecticut Attorney General. The attorney general asserted he had common-law authority to maintain an action against the president and treasurer of a not-for-profit organization for several alleged breaches of her fiduciary duties to the organization. The suit alleged the defendant had engaged in self-dealing and had enriched herself at the organization's expense. Id. at 153–54. The attorney general argued "he has common-law authority to

bring an action seeking to remedy breaches of fiduciary duties by those individuals entrusted with charitable funds, and that, pursuant to such authority, he may reach all of the misappropriated assets of the not-for-profit organization regardless of their source." Id. at 156. However, the Court rejected this argument and affirmed the dismissal of the attorney general's suit on the basis he lacked standing to pursue such claims against the defendant. Id. at 156.

Our state Supreme Court has not hesitated to curtail the SCAG's efforts to overreach his powers. In Wilson v. Dallas, 403 S.C. 411, 743 S.E.2d 746 (2013), the SCAG intervened in a will contest and attempted to usurp control of a charitable trust, ostensibly to protect the trust's unspecified beneficiaries. The Court rebuked the SCAG's actions and made pointed remarks that the SCAG is not a "super administrator of charities." Id. at 446, 743 S.E.2d at 765. The Court explained:

> the [SCAG] has no authority to become completely entrenched in an action that began here as one to set aside a will and for statutory shares, direct the settlement negotiations, and then fashion a settlement that discards [the decedent's] will and his 2000 Irrevocable Trust and replaces them with new trusts, only to give himself sole authority to select the managing trustee. By so doing, the [SCAG] has effectively obtained control over the bulk of [the decedent's] assets and has given his office unprecedented authority to oversee the affairs of the parties that has not heretofor been recognized in our jurisprudence.

Id. at 445-46, 743 S.E.2d at 765.

The SCAG has engaged in a similar overreach in this case. He wants to usurp the Foundation's own board, officers, and managers and force a lawsuit against Appellant which the Foundation itself does not want and has not sought. The Foundation is the real party in interest. It is the owner of the right sought to be enforced. However, the Foundation itself has not initiated any claim against Appellant.

Despite this fact, the SCAG has taken it upon himself to intervene and file an action for or on behalf the Foundation trying to reinterpret the terms of Decedent's Will and Codicils supposedly in

his role as protector of the Foundation's potential beneficiaries. The SCAG is attempting to initiate a suit on the Foundation's behalf by interjecting himself in a probate process that had already been closed to facilitate a forced distribution of assets to the Foundation when the Foundation itself has not sought such relief. His legal support for standing is a statute authorizing him to prosecute the Foundation for misuse of charitable assets and case law allowing him to intervene on behalf of the beneficiaries of a yet-to-be-funded charitable trust. Neither of those situations apply here.

c. The Foundation Did Not Satisfy the Conditions and Qualifications in Decedent's Will and Codicils:

The SCAG's lawsuit is based entirely on his faulty premise that the Foundation was a residuary beneficiary under Decedent's Will. He ignores the fact the Foundation was disqualified under the Will because at the time of Decedent's death and when his estate was distributed (a) it could not qualify as a charitable organization within the meaning of IRC § 2055 and (b) a devise from the estate to the Foundation would not be permitted as a charitable deduction for federal estate tax purposes, both of which were conditions to the Foundation's receipt of benefits under the Will.

The SCPC mandates that "[t]his Code shall be liberally construed and applied to promote its underlying purposes and policies" including "to discover and *make effective the intent of a decedent* in the distribution of his property." S.C. CODE ANN. § 62-1-102(b)(2) (emphasis added). Our state has long recognized that "[t]he power to dispose of property by will includes the right to attach to testamentary gifts such terms, conditions, or restrictions as the testator pleases, provided they are not contrary to public policy or forbidden by law." Brown v. Drake, 275 S.C. 299, 302, 270 S.E.2d 130, 131 (1980).

Decedent's Will sets forth conditions the Foundation must satisfy to qualify for receipt of the gift of his residuary estate. As the ensuing shows, the Foundation did not satisfy those conditions.

The SCAG does not claim the conditions violate public policy or are forbidden by law.

Article XII of Decedent's original Will, which was made before he married Appellant, specifically provided for the disposition of his residuary estate:

> I give devise and bequeath my entire residuary estate, being all real and personal property, wherever situated, in which I may have any interest at the time of my death, not otherwise effectively disposed of, to THE "SONNY MEVERS" FOUNDATION, ***if it is in existence at the time of my death and on the condition that it is an organization that is charitable within the meaning of Section 2055 of the Internal Revenue Code, as amended, and on the further condition that this gift is permitted as a charitable deduction from my Estate for Federal Estate Tax purposes, absolutely and in fee simple, forever***.

(R. pp.50-51 Art. XII) (emphasis added).

After Decedent married Appellant on September 12, 2016, he executed a Codicil to his Will amending Article XII to add the following sentence to the conclusion of that article:

> Otherwise, I give, devise and bequeath my said entire residuary estate to my Spouse, MINNIE LEE NEWMAN MEVERS, absolutely and in fee simple, forever, on the condition that she shall survive me.

(R. p.43).

Under the terms of Decedent's Will and Codicil, the Foundation's status as the beneficiary of his residuary estate would only vest ***provided*** the Foundation was in existence at the time of Decedent's death ***and*** it satisfied the other "conditions" set forth in Article XII—that (1) it is an organization which is charitable within the meaning of IRC § 2055 and (2) the gift is permitted as a charitable deduction from Decedent's estate for federal estate tax purposes. (R. p.169 ¶12; 157 ¶15; 708-09 ¶12).

If either of those conditions was not satisfied either at the time of Decedent's death or when the estate assets were to be distributed, then the devise to the Foundation either did not vest or, if it vested, it lapsed or was cancelled and instead devolved to Appellant. (R. pp.169-70 ¶13; 157-58 ¶15; 709 ¶13); Shuman v. Heldman, 63 S.C. 474, 41 S.E. 510, 515-16 (1902); see also Joanne R.

Sternliefb, Uses of Charitable Giving in Estate Planning, C118 ALI-ABA 69, 74 (ALI-ABA March 1, 1995) ("In order for an estate to receive an estate tax charitable deduction for a bequest to charity, the charity must be a Qualified Charity on the date of distribution. If the client wants to make sure she receives a charitable deduction, the will should say that the bequest will only be made if the organization is a Qualified Charity. For example, a bequest might take the following form: 'I give $10,000 to the Legal Aid Society, New York, New York, if it is a Qualified Charity.' Under this scenario, if the Legal Aid Society is not a Qualified Charity when the distribution is to be made, the bequest would lapse.").

Appellant retained well-qualified attorneys and advisors to assist her in the administration of Decedent's estate. She hired specialists in probate and tax matters to assist with the administration. Appellant not only retained Ms. Wentworth, a probate and estate planning attorney, but she also hired Mr. Moss, who is both a CPA and a tax attorney. Mr. Moss investigated whether the Foundation satisfied the conditions in Article XII of the Will. (R. pp.167-68 ¶¶5-6; 158 ¶17). He concluded the Foundation was a sham and it had no real substance. (R. pp.158-59 ¶¶18-19).

Among other things, the Foundation had not filed the legally required tax information returns (Form 990-PF) for the fiscal years 2014, 2015, and 2016 and had no other reporting or other documentation to the IRS or another regulatory body concerning its operations or activities during these periods. (R. pp. 158-59 ¶18; 170-71 ¶14; 709-10 ¶15). The Foundation had no real corporate records (outside its initial formation documents) that evidenced the Foundation had been, and was continuing, to be organized and operated exclusively for charitable purposes. Id. Almost the entirety of the Foundation's Board members had conflicts of interest as they primarily comprised persons with whom Decedent transacted business raising a number of concerns regarding self-dealing under IRC § 4941. Id. There were no records of when and how long these individuals were serving as

directors, whether they were in fact appointed, or had ever approved any transactions, the compensation arrangements, or any charitable activities, grants, or any other matters required of individuals acting as directors. Id. The Foundation had no bookkeeping or records, had not conducted periodic meetings or recorded minutes of meetings as required in the bylaws, had no records of appointments of directors or officers, had no staff or employees, and had no office. Id. In short, the Foundation had no substance and/or documentation that could demonstrate it had been actually operated by a board of directors to further charitable purposes. Id.

Based on his considerable experience in the field of taxation and with tax audits by the IRS, Mr. Moss concluded the Foundation could not withstand an IRS audit, it did not qualify as a charitable organization within the meaning of IRC § 2055, and a gift or devise from the estate to the Foundation would not be permitted as a charitable deduction for federal estate tax purposes. (R. pp. 159 ¶19; 171-72 ¶15; 711 ¶18). Mr. Moss's conclusion about the Foundation was confirmed by the IRS, which revoked the Foundation's federal tax-exempt status under IRC § 501(c)(3) effective on November 15, 2017. (R. pp. 159 ¶21; 172 ¶16). Therefore, the gift of Decedent's residual estate devolved to Appellant.

On January 23, 2018, the Foundation was dissolved for the reasons pointed out by Mr. Moss. (R. pp. 159-60 ¶22; 119-24; 434). The Foundation filed Articles of Dissolution for a Nonprofit Corporation with the South Carolina Secretary of State on January 24, 2018, and the Foundation ceased to exist. Id.

In straightforward terms, Appellant—not the Foundation—was the residuary beneficiary under Decedent's Will because the Foundation did not meet the conditions set forth in the Will. Decedent's estate was administered based on the determinations the Foundation had not satisfied the conditions in the Will, the devise or gift to the Foundation had lapsed or was canceled, and

Appellant was the residuary beneficiary under the Will. (R. pp. 172 ¶17; 160 ¶23). Because the Foundation was not a proper residuary beneficiary, these actions were completely proper and were mandated by the terms of Decedent's Will. Id.

The SCAG selectively quotes an excerpt from S.C. CODE ANN. § 62-3-101 to argue the bequest of Decedent's real estate immediately "devolved" to the Foundation upon Decedent's death and thus the Foundation purportedly became a "vested" beneficiary at that time. (R. p. 74 ¶17). However, the SCAG inexplicably omits the remainder of § 62-3-101, which clarifies that a bequest of real estate does not "devolve" to the beneficiary in cases involving the lapse of a gift or other circumstances affecting the devolution of testate estates. See S.C. CODE ANN. § 62-3-101 ("Upon the death of a person, his real property devolves to the persons to whom it is devised by his last will ***or to those indicated as substitutes for them in cases involving lapse, renunciation, or other circumstances affecting the devolution of testate estates*** ...." (emphasis added)).

Decedent's property would not devolve to the Foundation if the gift lapsed or was canceled under the terms of his Will, including the Foundation's failure to satisfy the conditions for it to receive the residuary estate—i.e., that it be an organization which is charitable within the meaning of IRC § 2055 and that the gift would be permitted as a charitable deduction from Decedent's estate for federal estate tax purposes. (R. pp. 173 ¶21; 161 ¶26). Because the Foundation did not satisfy the conditions in Article XII of Decedent's Will to qualify for the gift of the residuary estate either at the time of Decedent's death or when the distributions were made from the estate, the devise to the Foundation either did not vest or, if it vested, lapsed or was cancelled and instead devolved to Appellant. (R. pp. 173-74 ¶¶22-23; 161 ¶27).

To support its allegation that the Foundation was a tax-exempt organization on the date of Decedent's death and when the estate was distributed, the SCAG relies almost entirely on the IRS

determination letter issued ***on July 21, 2005***, which granted the Foundation tax-exempt status as a private, nonoperating foundation under IRC § 501(c)(3). (R. pp. 73 ¶10; 106). That letter was issued over 16 years ago and was revoked by the IRS effective on November 15, 2017. The SCAG did not submit any affidavit or other evidence of any kind demonstrating that Mr. Moss was incorrect that the Foundation did not satisfy the conditions in Article XII of the Will on the date of Decedent's death or when the estate was distributed. The SCAG also did not dispute that the Foundation's tax-exempt status was revoked by the IRS effective on November 15, 2017, which was only two days after Appellant had been appointed as Personal Representative.

To circumvent these deficiencies, the SCAG made the naked claim unsupported by any citation to any law whatsoever that Appellant had a "fiduciary duty" to secure retroactive reinstatement of the Foundation's tax-exempt status. (R. pp.76-77 ¶24). The SCAG further claimed in conclusory fashion that "the Foundation's tax exempt status was and remains eligible to be restored retroactively at all times relevant to this Petition." (R. p.76 ¶23). No affidavit or evidence was offered to support this allegation. The SCAG is simply wrong.

Mr. Moss, a CPA and tax attorney with over 35 years of experience who regularly prepares tax returns for clients and handles IRS matters, including tax audits and appeals within the IRS and U.S. Tax Court appeals, gave an affidavit addressing the SCAG's claim. He said the SCAG's assertion that "the Foundation's tax exempt status could be 'restored retroactively' is a gross over-simplification of the situation and a distortion of the facts." (R. pp.164 ¶36; 712-13 ¶23). He explained "it would not have been possible to retroactively restore the Foundation's tax exempt status" and that "[r]etroactively restoring a private foundation's tax exempt status is not an easy process and the IRS has no automatic or guaranteed procedure to have an organization's revoked tax-exempt status retroactively reinstated." Id. The SCAG submitted nothing to the contrary.

To obtain retroactive reinstatement of tax-exempt status, the Foundation would be required to submit a Form 1023 (Application for Recognition of Exemption Under Section 501(c)(3) of the IRC). (R. pp.164 ¶36; 712-13 ¶23). In Revenue Procedure 2014-11, the IRS set forth procedures for retroactively reinstating the tax-exempt status of an organization that had that status automatically revoked for failure to file the required annual returns for three consecutive years. See REV. PROC. 2014-11, 2014-3 I.R.B. 411 (2014). "Generally, to obtain retroactive reinstatement of the organization's tax-exempt status, it must apply not later than 15 months after the later of (1) the date of the revocation letter or (2) the date on which the IRS posted the organization's name on the Revocation List." Martin J. McMahon, Jr. et. al., Recent Developments in Federal Income Taxation: The Year 2014, 17 FLA. TAX REV. 97, 270 (2015). The decision to grant retroactive reinstatement is discretionary with the IRS. It is not automatic that any organization will obtain such reinstatement even if all of the qualifications for it are satisfied.

Under the procedures in Revenue Procedure 2014-11, the organization must still show that it was "eligible" to file reports as a tax-exempt organization for each of the three years that it failed to file them, which means it must satisfy the organizational and operational tests for all periods it seeks to be exempt. See REV. PROC. 2014-11 §§4-6. This is based on the submission of financial, corporate, and programmatic documentation to evidence, to the satisfaction of the IRS, that it was, and continues to be, organized and operated exclusively for charitable purposes in accordance with Section 501(c)(3) and applicable Treasury Regulations for the time periods it failed to file. It must also demonstrate that it had "reasonable cause" for its failure to file the annual information returns. Id. §§ 8.01-8.02. This "reasonable cause" showing involves a weighing of various "factors," including whether the organization's failure to file "was due to its reasonable, good faith reliance on erroneous written information from the IRS, stating that the organization was not required to file a

return or notice" or "arose from events beyond the organization's control ... that made it impossible for the organization to file a return or notice for the year." Id. § 8.05. In determining whether reasonable cause exists, the IRS will only consider a factor if the organization shows to the IRS's satisfaction evidence to substantiate the factor.

Critically, these representations by the organization must be made under penalty of perjury. The reasonable cause statement submitted by the organization must "include an original declaration, dated and signed ***under penalties of perjury*** by an officer, director, trustee, or other official who is authorized to sign for the organization." Id. § 8.06 (emphasis added). This sworn declaration must state: "I, (Name), (Title) declare, under penalties of perjury, that I am authorized to sign this request for retroactive reinstatement on behalf of [Name of Organization], and I further declare that I have examined this request for retroactive reinstatement, including the written explanation of all the facts of the claim for reasonable cause, and to the best of my knowledge and belief, this request is true, correct, and complete." Id.

Based on the information that Mr. Moss learned during his work and of which Appellant and Ms. Wentworth were made aware, Appellant knew that none of these assertions would be "true, correct, and complete." (R. pp.171-72 ¶15; 164 ¶36). Appellant knew the Foundation was ***not*** "eligible" to file reports as a tax-exempt organization for each of the three years that it failed to file them. She knew the Foundation did ***not*** satisfy the organizational and operational tests for all periods it would seek to qualify as tax-exempt. She also knew the Foundation did ***not*** have "reasonable cause" for its failure to file the annual information returns. The Foundation had not failed to file the returns based on any reasonable, good faith reliance on erroneous written information from the IRS or because of events beyond the Foundation's control that made it impossible for it to file the returns.

In sum, the SCAG is claiming that Appellant should have committed perjury and filed a false application with the IRS seeking retroactive restoration of the Foundation's tax-exempt status, which is absurd. The Probate Court erred in finding that the SCAG is "likely" to prevail in this action.

(3) The SCAG Did Not Show an Inadequate Remedy at Law:

In MailSource, this Court held that "[a]n injunction is an equitable remedy; as such, it is available only where no remedy at law exists or where the legal remedy would fail to make the party whole." 356 S.C. at 369-70, 588 S.E.2d at 639; see also Scratch Golf, 361 S.C. at 121, 603 S.E.2d at 907 (reversing preliminary injunction and finding that the plaintiff had adequate remedy at law). In MailSource, which involved an employer's action to enforce a non-compete agreement executed by the defendants, this Court pointed out that in addition to seeking an injunction, the plaintiff also should be able to prove money damages from any breach of the agreement by the defendants. 356 S.C. at 369, 588 S.E.2d at 639. As a result, this Court affirmed the trial court's denial of the plaintiff's motion for a preliminary injunction because of the availability of an adequate remedy at law—an award of monetary damages.

SCAG likewise failed to show an inadequate remedy at law. The SCAG's Petition alleges that Appellant "breached her fiduciary and legal duties to the estate and the Foundation and improperly took possession of assets which should have been transferred to the Foundation and used assets for her own personal benefit and enjoyment...." (R. p.78 ¶30). Appellant vehemently denies these claims. However, even assuming *arguendo* they were true, any harm to SCAJ can be remedied by an award of money damages. Because the SCAJ has an adequate remedy at law, the Probate Court erred in granting a preliminary injunction in the SCAG's favor.

CONCLUSION

For the reasons stated, this Court should reverse the Orders of the Probate Court and Circuit Court and remand the case for further proceedings accordingly.

Respectfully submitted,

ROSEN HAGOOD, LLC

By:*/s/ Daniel F. Blanchard, III*
Daniel F. Blanchard, III (SC Bar 65342)
151 Meeting Street, Suite 400
Charleston, SC 29401
(843) 577-6726 telephone
dblanchard@rosenhagood.com
ATTORNEYS FOR APPELLANT

April 7, 2022.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY COURT OF COMMON PLEAS
Court of Common Pleas
Jennifer B. McCoy, Circuit Judge
Irvin G. Condon, Probate Judge
Tamara C. Curry, Associate Probate Judge

Appellate Case No. 2021-001152
Court of Common Pleas Case No. 2020-CP-10-04036
Probate Court Case No. 2017-ES-10-01946

IN THE ESTATE OF ROY E. MEVERS, JR.,

SOUTH CAROLINA ATTORNEY GENERAL,
Respondent,

versus

MINNIE LEE NEWMAN-MEVERS,
Appellant,

versus

J. JAMES DUGGAN, as Special Administrator of the Estate of Roy E. Mevers, Jr.,
Respondent.

CERTIFICATE OF COUNSEL

I certify that the Brief of Appellant and Reply Brief of Appellant comply with Rule 211(b), SCACR, and the South Carolina Supreme Court's Order dated April 15, 2014.

ROSEN HAGOOD, LLC

By:*/s/ Daniel F. Blanchard, III*

Daniel F. Blanchard, III (SC Bar 65342)
151 Meeting Street, Suite 400
Charleston, SC 29401
(843) 577-6726
dblanchard@rosenhagood.com

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