State of South Carolina	)	In the Circuit Court
	)	Fifteenth Judicial Circuit
County of Georgetown	)	Civil Action Number 2013-CP-22-001231

Melanie J. Newman, Melissa J. Arce,
Winona M. Newman, and Christopher J. Newman,

Petitioners,

vs.

Virginia K. Newman, individually, and
Virginia K. Newman, as Personal Representative
of the Estate of John Percy Newman,

Respondents-Appellant.

In Re: Estate of John Percy Newman

Appeal from Order Granting Enforcement of Court Order

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Virginia K. Newman, individually, and
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of the Estate of John Percy Newman,

Petitioners-Appellant,

vs.

Melanie J. Newman, Melissa J. Arce,
Winona M. Newman, and Christopher J. Newman,

Respondents.

In Re: Estate of John Percy Newman

Appeal from Order Denying Petition for Sale and/or Mortgage of Real Property in Aid of Assets

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ORDER REVERSING
ORDER GRANTING ENFORCMENT OF PRIOR COURT ORDER,
AND
ORDER DENYING PETITION TO SELL AND MORTGAGE REAL PROPERTY

Date of Hearing:	August 7, 2014
Trial Judge:	The Honorable Larry B. Hyman, Jr.
Attorneys for Appellants:	Charles Owen Nation, II, Esquire Eric G. Armstrong, Esquire
Attorney for Respondents:	Brana J. Williams, Esquire

These consolidated appeals came before me on the date reflected above. The attorneys for Appellant and the attorney for Respondents were present at the hearing. The appeals relate to two (2) orders issued on two separate petitions which were sequentially tried before the Honorable Waldo A. Maring, Probate Judge for Georgetown County, on two (2) consecutive days, May 15th and May 16th, 2013. The first trial centered on a Petition [to Enforce Court Order] and the second trial centered on a Petition to Sell Personal and Real Property In Aid Of Assets.

Virginia K. Newman, individually, sometimes hereinafter referred to as "Virginia K. Newman," and Virginia K. Newman, the duly appointed Personal Representative for the Estate of John Percy Newman, sometimes hereinafter referred to as "Personal Representative," with Virginia K. Newman and the Personal Representative being sometimes collectively referred to herein as "Appellant," by and through the undersigned attorneys, have appealed from two (2) orders.

The first order appealed from is styled "ORDER ENFORCING PRIOR COURT ORDER," and was executed by the Honorable Waldo A. Maring and filed in the Office of the Probate Court on July 11, 2013. A MOTION TO RECONSIDER AND AMEND ORDER REQUIRING SPECIFIC PERFORMANCE was filed in the Office of the Probate Court on July 22, 2013; an ORDER DENYING MOTION TO RECONSIDER AND AMEND ORDER REQUIRING SPECIFIC PERFORMANCE was executed by the Honorable Waldo A. Maring and filed in the Office of the Probate Court on August 6, 2013The second order appealed from is

styled "ORDER GRANTING PETITION TO SELL PERSONAL PROPERTY AND ORDER DENYING PETITION TO SELL AND MORTGAGE REAL PROPERTY," and was executed by the Honorable Waldo A. Maring on October 30, 2013, and filed in the Office of the Probate Court on October 30, 2013. A Motion to Reconsider and Amend Order was filed on November 15, 2013, and was thereafter denied as reflected by an Order styled "MOTION TO RECONSIDER AMEND ORDER DENIED," executed by the Honorable Waldo A. Maring on December 2, 2013, and filed in the Office of the Probate Court on December 2, 2013.

For the reasons expressed herein, I conclude (a) both orders should-be-reversed, (b) the underlying agreements sought to be enforced are void and of no effect, (c) Appellant shall be authorized to sell the real property and/or mortgage the real property in aid of assets, and (d) the actions should be remanded to the Probate Court for the County of Georgetown for actions consistent with this Order.

STANDARD OF REVIEW

"The standard of review applicable to cases originating in the Probate Court depends upon whether the underlying cause of action is at law or in equity." University of Southern California v. Moran, 365 S.C. 270, 274, 617 S.E.2d 135, 137 (Ct. App. 2005). To make this determination, the appellate court must look to the essential character of the cause of action alleged by the petitioners below. Dean v. Kilgore, 313 S.C. 257, 258, 437 S.E.2d 154, 155 (Ct. App. 1993). The appellate court is free to decide questions of law with no particular deference to the lower court. Moriaty v. Garden Sanctuary Church of God, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000). Furthermore, the interpretation of a statute is a question of law, which is reviewed de novo. Layman v. State, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008).

After fully considering the testimony reflected in the Transcripts of the two (2) Hearings, the pleadings, the exhibits, and the applicable law, I render the following findings of fact and conclusions of law. All factual findings are based on my view of the preponderance of the evidence and my determination of the discretionary weight to be given to the evidence presented. In the event a finding of fact is included under the heading of conclusions of law, or vice versa, the headings shall not control whether a particular determination is a finding of fact or a conclusion of law.

FINDINGS OF FACT

I. Finding of Facts in Relation to Order Granting Enforcement of Prior Court Order

1. There were two trials, one on each of the two petitions; the hearing on the first petition occurred on May 15, 2013, and the hearing on the second petition occurred on May 16, 2013. The references to the transcript of the first hearing before the Honorable Waldo A. Maring, Probate Judge for Georgetown County, on May 15, 2013, are referred to herein as "Transcript of Record One." The references to the transcript of the second hearing on May 16, 2013, are referred to herein as "Transcript of Record Two."

2. John Percy Newman, hereinafter "Mr. Newman," had four (4) children, Respondents, with his first wife. Transcript of Record One at Page 209, Lines 12 – 14.

3. The relationship which led to the marriage of Mr. Newman and Mrs. Newman developed over a period of years. As they agreed, Appellant came to live with Mr. Newman in late December of 2008 or early January of 2009.

4. Mr. Newman and Virginia K. Newman procured their marriage license on June 23, 2009, Transcript of Record One, Page 197, Lines 3-7, and planned a simple wedding at their home on July 2, 2009, well before the date of their marriage. Transcript of Record One at Page 194, Lines 14-16.

5. Prior to his marriage, Mr. Newman, one of his daughters, Respondent Melissa J. Arce, and Virginia K. Newman met with Katherine DeAngelo, an estate attorney recommended by Respondent Melanie J. Newman, another daughter of Mr. Newman, to obtain an objective opinion as to whether or not Mr. Newman was of sound mind. On July 2, 2009, Katherine DeAngelo concluded Mr. Newman was of a mind sufficiently sound to make a Last Will and Testament.

6. On July 2, 2009, Mr. and Mrs. Newman were quietly married in a simple ceremony at their cabin in Carver's Bay immediately following this meeting. The children of Mr.

Newman did not learn of the marriage until two weeks after and immediately sought legal counsel.

7. On July 16, 2009, Winona M. Newman and Melissa J. Arce, two (2) of the children of Mr. Newman and Respondents, filed a petition to have themselves appointed as their father's guardians, indexed under Case No. 2009-GC-22-0008, and filed a petition to have themselves appointed as their father's conservators, indexed under Case No. 2009-GC-22-0009. These protective proceedings are sometimes hereinafter independently referred to as "the guardianship action" and "the conservatorship action."

8. Melissa J. Arce and Winona Mae Newman signed the PETITION FOR FINDING INCAPACITY AND FOR THE APPOINTMENT OF GUARDIAN on July 15, 2009. The VERIFICATION to these pleadings reflects they were first duly sworn and while under oath they certified to the Probate Court "the facts set forth in the foregoing statement are true to the best of the undersigned knowledge, information and belief." See Petition filed in the guardianship action on July 16, 2009, Probate Court Case Number 2009-GC-22-00008. In this Petition, they alleged their father was "unable to make rational decisions about his daily needs as well as his medical needs." Id. In this Petition, they both requested the Probate Court to determine their father "is incapacitated." Id.

9. Melissa J. Arce and Winona Mae Newman also signed the PETITION FOR APPOINTMENT OF CONSERVATOR on July 15, 2009. The VERIFICATION to these pleadings reflects they were first duly sworn and while under oath certified to the Probate Court "the facts set forth in the foregoing statement are true to the best of the undersigned knowledge, information and belief." See Petition filed in the conservatorship action on July 16, 2009, Probate Court Case Number 2009-GC-22-00009. In this Petition, they alleged their appointment as conservators for their father was necessary because he was suffering from "late onset of Alzheimer's, depression, and alcohol dependency." Id. In this Petition, they requested the Probate Court to determine their father "is a person for whom appointment of a conservator is proper...." Id.

10. Additionally, Melissa J. Arce and Winona Mae Newman signed a QUALIFICATION AND STATEMENT OF ACCEPTANCE which reflects, after they were first duly sworn, they agreed to "accept his appointment and agree to perform the duties and discharge the trust of the office of Conservator of the conservatorship ...." As of July 15, 2009, these two Petitioners owed their father the duties owed by a conservator to an alleged ward.

11. On July 15, 2009, two daughters of Mr. Newman submitted sworn statements to the Probate Court to the effect their father was incapacitated; on May 15, 2013, they admitted their sworn statements were false at the time and were presented to the Probate Court, and were submitted on the advice of their attorney. Transcript of Record One at Page 131, Lines 11 – 13 and at Page 88, Line 10, and at Page 47, Line 4; Answers to Request for Admissions.

12. As a result of the filing of the guardianship action and the conservatorship action, Mr. Newman was examined on August 20, 2009, by Dr. Romeo Nillas, M.D., an internist, who opined Mr. Newman was an incapacitated person based on a mental deficiency, his reduced mental capacity to decide in reference to medical health. See Probate Court Case Numbers 2009-GC-22-00008 and 00009. On October 3, 2009, Mr. Newman was examined by Kathleen A. O'Leary, who opined Mr. Newman was an incapacitated person in need of a guardian and/or conservator based on mental illness - dementia. See Probate Court Case Numbers 2009-GC-22-00008 and 00009. On November 18, 2009, Mr. Newman was examined by William A. Van Horn, M.D., Medical Director of Coastal Neuropsychiatry, who opined Mr. Newman was "competent to make legal decisions and recommended formal neuropsychological testing to better clarify his cognitive capacity." See Probate Court Case Numbers 2009-GC-22-00008 and 00009.

13. The guardianship and conservatorship proceedings were filed even though Melissa J. Arce testified she was aware her father was competent at the time of filing; at the time of trial, they all claim the protective proceedings were filed on the advice of counsel. Transcript of Record One at Page 84, Lines 16 and at Page 88, Line 10.

14. It is clear both siblings, with the full knowledge and acquiescence of their two (2) absent siblings, believed the assets of their father needed to be protected. Transcript of Record One, Page 43, Lines 16-21. Winona Mae Newman believed her father was spending money in a fashion which was "very un-natural to him." Transcript of Record One at Page 43, Line 11 and at Page 44, Line 23. His unnatural acts include the purchase of two (2) dogs as gifts, the purchase of an automobile for his future wife, with the aid of an auto trade-in owned by her, and additions made to his cabin, additions which all parties recognize were much needed. Transcript of Record One at Page 44, Line 5 and at Page 45, Line 18.

15. The testimony of Melanie J. Wyndham reveals the real purpose for commencing the actions to declare her father's incompetence:

> My dad still was a bit fuzzy, and so I think what we did was did kind of question the action of this marriage simply because of it was kind of out of character for him to do that, and like we said, *the conservatorship was done to hopefully protect my father and his assets, so that all was done in a realm of trying to protect the estate and to keep it as it is.* So I wasn't involved in this. (emphasis added)

Transcript of Record One at Page 120 and 121, Lines 23- 6.

16. The three (3) daughters of Mr. Newman have, at a hearing after their filings, with knowledge before their filings, admitted their father was not mentally incompetent at the time they petitioned the probate court for their appointment as his guardians and conservator. Transcript of Record One at Page 47, Line 4 and at Page 48, Line 17.

17. All the children of Mr. Newman have admitted the conservatorship action was commenced in an attempt to annul his marriage to protect his assets. Answers to Requests for Admission.

18. A very brief mediation conference occurred on December 30, 2009. On January 4, 2010, a Mediation Results Report was executed by the Mediator, G. Michael Smith, and thereafter filed on January 8, 2010. The Mediation Results Report reflects the guardianship action and the conservatorship action were "fully settled" and a Consent Judgment would be filed by Virginia K. Newman. At trial, Winona Mae Newman and her three (3) siblings, two of which were not parties to the actions, assert the agreements within the Consent Order were the product of this mediation. Transcript of Record One at Page 12, Lines 21-25.

19. At trial, Melissa J. Arce admits the document generated at the mediation was handwritten and signed by only five (5) of the seven (7) people in attendance. Transcript of Record One at Page 75, Lines 15-17. The evidence reflects this partially signed document was used to pressure Mr. Newman, an alleged incompetent, into signing agreements which were neither made nor agreed to at mediation, and are not the product of mediation.

20. No judicial finding was made by the Probate Court concerning the mental capacity of Mr. Newman, and neither a Guardian nor a Conservator was appointed in the proceedings commenced by his two daughters.

21. While a proposed consent order without any handwritten amendments was prepared following the mediation conference, and while it apparently reflected the terms which the person or persons preparing the document believed were discussed at mediation on December 30, 2009, this document remained unsigned by the parties for a very long period of time. In April of 2010, four (4) months after the mediation conference, the Honorable Waldo A. Maring, Probate Court Judge, informed the parties to the guardianship action and the conservatorship action he intended to schedule a hearing in the event Mr. Newman did not execute and return the proposed consent order before May 17, 2010. On June 8, 2010, Mr. Newman still had not signed the proposed consent order. A hearing was scheduled in the guardianship action and the conservatorship action to occur on July 16, 2010. On June 15, 2010, this hearing was continued until August 3, 2010. No reasons appear within the record for the need for this continuance. Then, on three (3) different dates, on June 20, 2010, and on June 21, 2010, and on June 22, 2010, a proposed consent order was initialed and signed. This document was then submitted to the Probate Court Judge for his execution and filing.

22. The Probate Court made no independent judicial determination in either the guardianship action or in the conservatorship action as to whether Mr. Newman was incompetent and in need of a guardian and/or in need of a conservator. The Consent Order was filed on August 9, 2010, but does not appoint either a Guardian or a Conservator. No hearing occurred before the Honorable Waldo A. Maring as a result of the filing of the guardianship action and the conservatorship action. No witnesses were presented. No evidence was presented. While a hearing was scheduled to occur on August 3, 2012, no

party to the Consent Order appeared before the Probate Court to be questioned concerning his or her full understanding of the terms of, the additions to, the deletions from, the amendments to, and the initials on the Consent Order. Likewise, no inquiry was made into the possible coercion or duress which may have been and was placed on Mr. Newman, a person whose mental capacity could very well have been diminished and/or impaired to such a point as to make the self-serving agreements signed by him unenforceable as a matter of law.

23. On June 20, 2010, without the benefit of any communication with, or advice from, or representation from his appointed guardian, and with pressure being applied by the Probate Court (as outlined above), and with pressure being applied by most if not all his children, amendments were made to the agreement reached at mediation and were presented for Mr. Newman's signature. Winona Mae Newman testified:

> My father wasn't very pleased with - the idea of his money being removed from his account to be held in trust for his long term health care and burial, as this document said. Both myself, my father, my sister, Virginia Arce, we agreed – correction, Melissa Arce, we agreed, It's Dad's money, he can do what he wants to do with the money.

Transcript of Record One at Page 16, Lines 6-13.

24. It is undisputed the guardian appointed for Mr. Newman, Sam Scoville, Esquire, was not present on June 20, 2010, and had no involvement with Mr. Newman after December 30, 2009. Transcript of Record One at Page 18, Lines 2-4.

25. No one, not even Melissa J. Arce, can reconcile or explain why, on July 15, 2009, the children of Mr. Newman certified they believed their father was incompetent, this being the date the petitions in the conservatorship and guardianship actions were filed, but yet fully competent on June 20, 2010, the date he signed the Consent Order which reflects the agreements in question. Transcript of Record One at Page 90, Line 25–Page 91, Line 7; Transcript of Record One at Page 93, Line 18; Page 94, Line 24.

26. The Consent Order was filed of record on August 9, 2010; Mr. Newman was diagnosed with pancreatic cancer in May of 2011. Transcript of Record One at Page 207, Lines 1-5. Mr. and Mrs. Newman were married for two (2) years and two (2) months before he succumbed to the disease. Subsequently, an action was brought to enforce the Consent Order on February 27, 2012.

27. After the filing of the Consent Order and prior to Mr. Newman's death, Winona Mae Newman admitted she had a draft of a last will and testament prepared by an attorney of her choice for presentation to her father but he never executed the document. Transcript of Record One at Page 40, Line 23– Page 41, Line 18. Melissa J. Arce also admits she instructed an attorney to prepare a draft of a last will and testament for her father's signature, the purpose of which was to disinherit Mrs. Newman and to leave everything to his four (4) children. Transcript of Record One at Page 88, Line 22–Page 89, Line 5.

28. Mr. Newman never signed the last will and testament presented by his children for his signature, the express purposes of which was to disinherit his wife. One of the agreements within the Consent Order includes a waiver of Mrs. Newman's "spousal share election" which, but for Mr. Newman's refusal to sign the prepared will, would have made her disinheritance complete.

29. Melanie J. Wyndham testified her father did not believe he was going to die, and "refused" to sign the last will and testament which, if signed, would have disinherited Mrs. Newman. Transcript of Record One at Page 126, Lines 1-4. She testified as follows:

> We all were trying to – Dad knew that he needed to have a Will made. He went willingly [on July 2, 2009,] to have that consultation done, so that he could hear what he needed to do in order to make a Will so that he could leave his property equally divided between his four children.

Transcript One, Page 125, Lines 7-24.

30. The agreements reached within the Consent Order were ignored by the parties. Id. Mr. Newman paid for his routine health care expenses, and administered his person and estate with his own funds which were never transferred from his bank accounts to his children. Mr. Newman, under his own steam, made his own decisions concerning his long term health care and his burial. He transferred the sum of $8,000.00 to his wife trusting she would take care of his burial expenses, as she did.

31. The Appellants took no actions to seek compliance with or to enforce the agreements while their father was alive. Transcript of Record One at Page 95, Line 3--Page 96, Line 2. It is clear the children of Mr. Newman never presented a deed to their father for his signature. Transcript of Record One at Page 18, Lines 19-21 and at Page 19, Lines 9-13.

32. The agreements within the Consent Order do not require Mr. Newman to make a will; instead, the agreements anticipate Mr. Newman gifting his property for no consideration by deed while he was alive.

II. Facts in Relation to Order Denying Petition for Sale and/or Mortgage of Real Property in Aid of Assets

33. Virginia K. Newman was appointed as the personal representative of her late husband's estate on October 28, 2011, and has since defended against the following petitions: (1) Petition to Remove Personal Representative filed February 24, 2012; (2) Petition to Enforce Agreement filed February 27, 2012; (3) Petition for Ex Parte Temporary Restraining Order filed October 16, 2012; and (4) Petition for Appointment of Special Administrator filed April 30, 2013. Additionally, within each petition there have been numerous motions.

34. Virginia K. Newman, as the personal representative, has continually asserted she has attempted to minimize the legal administrative expenses, but has been required, time and time again, to defend the Estate against the offensive positions adopted and relentlessly pursued by Mr. Newman's children. She believes she has acted in good faith as a fiduciary and all the reasons for her actions will, in the final analysis, be memorialized in an Order which supports her proposal for distribution.

35. The administrative expenses related to and incurred by the Estate have depleted the liquid assets of the Estate, there are outstanding unpaid administrative expenses, additional administrative expenses are anticipated, and the need to fund the administrative expenses of the Estate required the Personal Representative to seek the requisite authority to sell certain assets of the Estate; therefore, Mrs. Newman requested the Probate Court to grant her the authority to sell real property and to mortgage real property to allow her to pay the administrative expenses related to the Estate. Transcript of Record Two at Page 57, Lines 16-23.

36. Appellant ordered, received and reviewed, and then shared appraisals for the real property owned wholly and partially by her husband, and has established the fair market value of the real property as of her husband's date of death. She has insured the assets of the Estate which prior to her appointment were uninsured, and has since maintained the insurance and taxes on the property once owned by her husband. Appellant consulted with bank representatives, appraisers, and surveyors, caused an Inventory and Appraisement to be filed as required by the Probate Court, and has attempted to marshal and preserve the assets of the Estate.

37. Nation Law Firm, P.C. was retained by Virginia K. Newman to represent her as the personal representative following an independent investigation of local attorneys, a referral, and a conference. Virginia K. Newman requested and received a ten percent (10%) reduction in the regular hourly rate for Charles Owen Nation, II, Esquire, and believes the hourly rate for the services provided is reasonable given the experience, reputation, and her perception of the work performed by the attorneys.

38. Appellant understands the hourly rate, the legal fees, and the administrative expenses related to the Estate which have been and are being charged by and paid to Nation Law Firm, P.C. under invoices which she reviewed, approved and paid as a fiduciary. Virginia K. Newman believes the payment of legal administrative fees were made in good faith, were necessary, and reasonably support her positions and actions as a fiduciary. See Affidavit styled "Affidavit in Defense of Administrative Costs" dated October 25, 2012, and executed by the attorneys for the personal representative, and Affidavit executed by Virginia K. Newman styled "Affidavit in Support of Motion for Summary Judgment on Petition for Enforcement of Agreement" filed in support of Order Granting Motion for Summary Judgment and Dismissing Petition for Removal of Personal Representative filed February 8, 2013.

39. The Probate Court has twice concluded Appellant has not incurred and paid unreasonable and excessive legal expenses, and has not mismanaged and wasted the assets of the

Estate. Order Granting Motion for Summary Judgment and Dismissing Petition for Removal of Personal Representative filed February 8, 2013; ORDER DENYING APPOINTMENT OF A SPECIAL ADMINISTRATOR filed October 30, 2013.

40. John Percy Newman, at the time of his death, owned an undivided interest in and to four (4) tracts of land located in the County of Georgetown, along with his siblings and/or family members. Mr. Newman owned 6.5 acres, more or less, located off North Frasier Street, Highway 701, taxed under TMS Number 03-0450-026-00-00, with a total appraised value of $30,000.00, and 14.0 acres, more or less, located off North Frasier Street, Highway 701, taxed under TMS Number 03-0450-028-00-00, with a total appraised value of $72,000.00, and 16 acres, more or less, located in Hemingway, taxed under TMS Number 03-0430-039-00-00, with a total appraised value of $35,000.00, and 16 acres, more or less, located in Hemingway, taxed under TMS Number 03-0430-045-00-00, with a total appraised value of $35,000.00. See Inventory and Appraisal filed in Estate.

41. Mrs. Newman confirmed her husband's ownership of one parcel, and an undivided interest in four (4) parcels of real property. Mr. Newman owned the homestead containing eighty (80) acres more or less, outright, and owned an undivided interest in two (2) tracts, each containing sixteen (16) acres, and the two (2) tracts which are the subject of the Offer to Purchase. Transcript of Record Two at Page 57, Lines 2-16.

42. Mrs. Newman procured a ready, willing and able purchaser for some of the real property. A written offer to purchase the undivided twenty five percent (25%) interest owned by Mr. Newman in two (2) tracts, "as is" and "where is" without a contingency for financing, was presented from a co-tenant and a person related by blood to the other family members, hereinafter "the Offer to Purchase." Transcript Two, Page 54, Lines 11-24. The Offer to Purchase was introduced into evidence at the second hearing. See Plaintiff's Exhibit No. 2. Transcript of Record Two at Page 54, Lines 17-24.

43. The Personal Representative requested the Probate Court to grant her the authority to execute the Offer to Purchase, and to sell this interest to the potential Purchaser, a member of the Newman family and a co-tenant of the property. Transcript of Record Two at Page 55, Lines 5-17.

44. The sale of the property interest identified within the Offer to Purchase would yield funds in an amount equal to two-thirds of the appraised value for the property, less closing costs as allocated therein, and would not require the payment of a real estate commission. Transcript of Record Two at Page 55, Line 5–Page 57, Line 1.

45. A sale, if made following the acceptance of the Offer to Purchase, would avoid the legal expenses and costs associated with a partition. Transcript of Record Two at Page 56, Lines 12-13. The Personal Representative believes the Offer to Purchase is fair and reasonable, and has requested the authority to accept the Offer to Purchase, and to sell the property interest on the terms expressed within the Offer to Purchase. Transcript of Record Two at Page 56, Line Page 19–Page 57, Line 1.

46. While the family member, co-tenant, and potential purchaser who submitted the Offer to Purchase has offered to lend funds to the Estate, and to purchase the property in accordance with the terms of the Offer to Purchase, Transcript of Record Two at Page 107, Lines 9-23, all of the children of Mr. Newman are opposed to the sale of any property owned by the Estate. Transcript of Record Two at Page 96, Lines 6-11; Page 103, Lines 2-9; and Page 111, Lines 4-23. The children of Mr. Newman were unable to articulate any reasonable basis for their opposition, and all declined the opportunity to place their evidence on record, except to stipulate to their general opposition.

47. At the hearing, the parties stipulated the children of Mr. Newman, either independently or collectively, would have the right of first refusal to purchase the undivided interest owned by Mr. Newman in and to the two (2) tracts identified within the Offer to Purchase, on terms identical to those reflected within the Offer to Purchase. Transcript of Record Two at Page 10, Line 6–Page 11, Line 12.

CONCLUSIONS OF LAW

Mr. Newman died intestate on August 28, 2011, and Appellant, without opposition, was appointed as the personal representative for his Estate. Less than six (6) months later, on February 27, 2012, the children of Mr. Newman filed a Petition [to Enforce Court Order] which alleges four (4) causes of action.

The first cause of action is for the enforcement of the agreements within the Consent Order, and is founded exclusively on Section 63-3-912, South Carolina Probate Code. The children of Mr. Newman seek to make the agreements within the Consent Order the "will of Decedent." Paragraph Number 10, Petition filed February 27, 2012. The relief granted within the Orders on appeal is founded on the theory of estoppel as alleged in the third cause of action, an action styled "Equitable Estoppel - Unjust Enrichment." As alleged, Mrs. Newman "participated in and fully negotiated the agreement between the parties." See Paragraph Number 17, Petition filed February 27, 2012. As alleged, Appellant "represented to the parties that it was her intention to fulfill the obligations under the agreement and be bound by the provision of the same." Id. As alleged, Appellant "does not intend to abide by the obligations of the agreement

but seek[s] to recover properties in excess of those to which she would receive pursuant to the agreement." See Paragraph Number 18, Petition filed February 27, 2012. Therefore, as alleged, Appellant would be unjustly enriched if the value of her intestate inheritance exceeded the value of the property she would have received had her husband gifted all his real property to his children while he was alive; Appellant, Respondents allege, should therefore be equitably estopped from claiming any such excess. See Paragraph Number 19, Petition filed February 27, 2012. The prayer in the Petition [to Enforce Court Order] requests the Probate Court to determine the heirs, to determine the assets, to make a "judicial determination as to the inheritance due [to] the individual heirs of the estate," and to require the personal representative "to fulfill the decedents' duties and obligations under the Agreement and transfer all real estate property to his four (4) children subject to the condition of the Agreement ...". See Prayer, Petition filed February 27, 2012.

Appellant filed a Return, Affirmative Defenses and Counterclaims to this Petition on March 30, 2013. Appellant alleged eight (8) affirmative defenses and/or counterclaims. These are, in order, (a) the agreements were unenforceable for numerous reasons, (b) unclean hands of the children of Mr. Newman, (c) betterments, (d) unjust enrichment in the event of disinheritance, (e) waiver by non-enforcement between August 9, 2010, and August 28, 2011, (f) laches, (g) failure to mitigate damages, (h) breach of obligation of good faith, (i) the sole negligence of others, (j) comparative negligence, and (k) civil conspiracy. These defenses were neither considered nor addressed in the Orders under appeal.

The appeals from two (2) orders have been consolidated and appellant raises seventy-three (73) grounds on appeal. Appellant argues the two (2) orders on appeal were controlled by errors of law, and the Honorable Waldo A. Maring erred in ordering specific

performance of a putative agreement to gift real property contained within a Consent Order based on procedural, substantive, and jurisdictional defects. Appellant also argues specific performance of an agreement to gift real property contained within a Consent Order in a guardianship and conservatorship action, based on material misrepresentations to and fraud upon the Probate Court, should not be ordered. First, I conclude the agreements reflect a breach of the fiduciary duties owed by the Respondents to their father, and reflect their egregious failure to protect their father from themselves, as an alleged incompetent person. Second, I conclude the agreements within the Consent Order exceed the relief the Probate Court is authorized to grant in a conservatorship action, and represents an impermissible property settlement agreement. Third, I conclude the Orders are wholly founded upon unjust enrichment even though no legal or equitable grounds exist for enforcing the agreement in the absence of a controlling statute, especially given the impermissibility of the Consent Order. Fourth, I conclude the agreements within the Consent Order are not specifically enforceable prior to or following the death of Mr. Newman for want of consideration, and are void for being contrary to public policy.

Appellant also argues both orders should be reversed, and the fiduciary should be authorized to sell and/or mortgage real property under the control of the personal representative in aid of assets. Mrs. Newman further contends the agreements within the Consent Order are unenforceable based on the procedural and substantive irregularities, and jurisdictional flaws related to the proceedings. Transcript One, Page 277, Line 21 – Transcript One, Page 282, Line 9. In reply to this, the Respondents suggest the agreements within the Consent Order are not contracts but instead carry the imprimatur of an order of the Court, and are therefore retroactively binding so as to require Mrs. Newman to transfer the real property as if Mr.

Newman had signed the gift deeds prior to his death. Transcript of Record One at Page 262, Lines 16-17.

I conclude the orders on appeal were controlled by errors of law, and the Probate Court erred in ordering specific performance of an agreement to gift real property, for no consideration and with no mutual meeting of the minds, contained within the Consent Order, which is the product of a sham proceeding and well beyond the scope of petitions seeking a guardianship and conservatorship. For ease of reference, I have bifurcated my Conclusions of Law into (I) Conclusions of Law in Relation to Order Granting Enforcement of Prior Court Order; and (II) Conclusions of Law in Relation to Order Denying Petition for Sale and/or Mortgage of Real Property in aid of Assets.

I. Conclusions of Law in Relation to Order Granting Enforcement of Prior Court Order

It has long been the policy of the court to encourage settlement in lieu of litigation, and courts have usually enforced settlement agreements. There can be no doubt the trial court retains inherent jurisdiction and power to enforce agreements entered into in settlement of litigation before that court. Ozyagcilar v. Davis, 701 F.2d 306 (1983). But even as the court may enforce settlements, it has the inherent power to refuse to enforce settlements. Rock Smith Chevrolet, Inc. v. Smith, 309 S.C. 91 (1992).

Questions of statutory interpretation are questions of law, which I am free to decide without any deference to the court below.' " Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012) (quoting CFRE, L.L.C. v. Greenville County Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)). "The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). "When a statute's terms are clear and unambiguous on their face, there

is no room for statutory construction and a court must apply the statute according to its literal meaning." Id. In interpreting a statute, "[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." Id. at 499, 640 S.E.2d at 459. Further, "the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect." S.C. State Ports Auth. v. Jasper County, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006).

The case at bar involves statutory interpretation as it relates to the enforcement of putative agreements framed within a consent order. I conclude the Consent Order and the putative agreements contained therein cannot pass muster for the following reasons: (A) The Consent Order is unenforceable based on procedural and substantive errors of law; and (B) The putative agreements which populate the Consent Order are not specifically enforceable; and (C) Assuming arguendo the putative agreements were specifically enforceable, the agreements fail based on the unclean hands of the Appellants, laches, a lack of consideration for the agreements, a lack of an actual meeting of the minds, and for policy concerns with regard to devolution of property and intestacy.

A. The Consent Order is unenforceable based on procedural and substantive errors of law.

i. The Consent Order is not a "permissible court order" as defined by SC St. § 62-5-408.

Section 62-5-408, South Carolina Probate Code, entitled "Permissible court orders," states the court has the following powers which may be exercised directly or through a conservator in respect to the estate and affairs of protected persons:

> (3)(a) *After hearing and upon determining that a basis for an appointment or other protective order exists* with respect to a person for reasons other than minority, the court has, for the benefit of the person and of his estate and fulfillment of his legal obligations of support of dependents, all the powers over his estate and affairs which he could exercise if present and not under disability,

> *except the power to make a will.* These powers include, but are not limited to, the power to (i) make gifts as the court, in its discretion, believes would be made by the person if he were competent; ***and (iv) enter into contracts; ***and (x) renounce any interest by testate or intestate succession or by inter vivos transfer.
>
> (b) *In order to exercise, or direct the exercise of the court's authority in any powers set forth in item (a), the court must entertain a petition in which the specific relief sought is set forth, the incapacitated person, his known heirs, devisees, donees, and beneficiaries are made parties to the action, and which contains a statement that the person either is incapable of consenting or has consented to the proposed exercise of power.*
>
> (c) *In exercising the powers set forth in item (b), the court also must inquire* into and consider any known lifetime gifts or the estate plan of the person, the terms of any revocable trust of which he is grantor, and any contract, transfer, or joint ownership arrangements with provisions for payment or transfer of benefits or interests at his death to another which he may have originated. *In exercising the court's authority set forth in item (b), the court must set forth in the record specific findings upon which it has based its ruling.* The Personal Representative had the parcels appraised, Transcript of Record Two at Page 12, Lines 16-21, and testified there is a need for liquid assets to complete the administration of the Estate. Transcript of Record Two at Page 43, Line 10–Page 46, Line 21. (*emphasis added*)

All the heirs at law of Mr. Newman are required to be named in the proceeding. Section 62-5-408(3), South Carolina Probate Code. This is one condition to the exercise of the powers authorized under § 62-5-408(3)(a), South Carolina Probate Code. Mr. Newman was neither named as a plaintiff nor as a defendant, and two (2) of his five (5) heirs at law are not parties. Instead, the action is directed at Mr. Newman's wife, Appellant, which further comports with the Respondent's stated purpose of filing the action as an attempt to annul the marriage. The absence of the two (2) necessary parties - Melanie J. Newman and Christopher J. Newman - children and heirs at law of Mr. Newman violates the express requirements within the statutes relating to the appointment of a guardian and of a conservator. Their absence opens the door to allow these missing parties to thereafter take inconsistent positions. Melanie J. Newman and Christopher J. Newman, persons not parties, are therefore not bound by the terms of the Consent

Order and are not third party beneficiaries with rights to enforce the Consent Order. In this case, all the "necessary parties" were known but not named.

Further, with regard to the specific use of the power of a conservator, the Probate Court is required to first "entertain a petition in which the specific relief sought is set forth . . . which contains a statement that the person either is incapable of consenting or has consented to the proposed exercise of power." The Petitions filed within the guardianship and conservatorship actions give no notice of the type of self-serving, comprehensive relief outlined in the agreements within the Consent Order, and the Petitions are therefore substantively and statutorily deficient and outside the scope of the pleadings and orders which are permissible under the applicable statutes. The children of Mr. Newman cannot, under these facts, convert the agreements into an enforceable postnuptial property settlement agreement, or into an enforceable compromise agreement, because the Consent Order fails to pass muster under Section 62-5-408 3(b), South Carolina Probate Code.

As required by Section 62-5-408(3)(c), South Carolina Probate Code, in exercising the powers set forth in §62-5-408(3)(b), South Carolina Probate Code, "the Probate Court also must inquire into and consider any known lifetime gifts or the Estate plan of the person . . . and any contract, transfer, or joint ownership arrangements with provisions for payment or transfer of benefits or interests at his death to another which he may have originated." No such inquiry was made. Further, as required in Section 62-5-408(3)(c), South Carolina Probate Code, in exercising the powers set forth in §62-5-408(3)(b), South Carolina Probate Code, "the Probate Court must set forth in the record specific findings upon which it has based its ruling." No such findings are reflected within the agreements within the Consent Order and the Probate Court made no such inquiry, as no hearing was held.

In the absence of a hearing, the Probate Court could not have independently and properly concluded whether or not (a) Mr. Newman fully understood the agreements within Consent Order, (b) the agreements were fundamentally fair to him, an alleged incompetent person, or (c) the agreements within the Consent Order served his best interest. Neither Mr. Newman nor his Guardian nor any other party was presented to be questioned before the Probate Court concerning his or her full understanding of the terms of, the additions to, the deletions from, the amendments to, and the initials on the Consent Order.

Tangentially, in the exercise of their powers, conservators are to act as a fiduciary and shall observe the standards of care applicable to trustees as described by Section 62-5-417, Probate Code of South Carolina, 1976 as amended. Under Section 62-5-425 (a)(2), Probate Code of South Carolina, the daughters of Mr. Newman, acting as potential conservators, were required to take into account (i) the size of their father's estate, the probable duration of their conservatorship and the likelihood their father, at some future time, may be fully able to manage his affairs and the estate which had been conserved for him; (ii) the accustomed standard of living of their father and members of his household; (iii) other funds or sources used for the support of the protected person.

A mere glance at the putative agreements within the Consent Order, when judged by these standards, reflects they are patently contrary to the best interests of Mr. Newman and violate the obligations of the two (2) fiduciaries who claimed their intentions were to protect their father. A hearing on the merits would have revealed this, but no hearing occurred. All the procedural safeguards designed to protect Mr. Newman, an alleged incompetent person, were manipulated and controlled by the children of Mr. Newman, and disregarded by the Court.

A proposed consent order (without any handwritten amendments) remained unsigned for six (6) months following the mediation conference. Mr. Newman still had not signed the proposed consent order on June 8, 2010. The Probate Court scheduled a hearing to occur on July 16, 2010; for reasons unknown, this hearing was continued on June 15, 2010 and re-scheduled for August 3, 2010, and the Consent Order (with handwritten changes) was thereafter filed without a hearing. The hearing scheduled to occur on August 3, 2010, never occurred. No testimony of any party or any evidence was presented. Mr. Newman, a party not named, the alleged incompetent person, did not testify. The Guardian appointed to represent Mr. Newman had absolutely no involvement with the action for over seven (7) months following the mediation and did not testify.

The continuances of a hearing scheduled to decide whether or not a guardian and conservator would be appointed for Mr. Newman also undermines the foundation for the relief ordered. Mr. Newman, the person alleged to be incompetent, refused to sign the "settlement agreement" circulated at the time of mediation. Thereafter, the guardian appointed to represent Mr. Newman, became completely disengaged after December 30, 2009. Four (4) months after the mediation conference, the Probate Court Judge informed Mr. Newman, not his Guardian, a hearing on the guardianship action and the conservatorship action would be scheduled in the event he did not execute and return the proposed consent order prior to May 17, 2010.

Neither the Probate Court nor a properly appointed conservator has the judicial power to make a Last Will and Testament, even after a hearing and upon determining that a basis for an appointment or other protective order exists. SC St. § 62-5-408. In this case, the Orders on appeal improperly and collectively operate to elevate one agreement within the Consent Order to the functional equivalent of the Last Will and Testament of Mr. Newman which Mr. Newman

refused to sign. Unquestionably, no hearing occurred, no basis was judicially found to exist following the presentation of evidence for the appointment of a conservator, and the Probate Court entered an impermissible order. Further, even if the agreements are enforceable, they cannot be enforced after the death of Mr. Newman as a way to avoid the proper claims filed within and the administrative expenses related to the Estate. I therefore conclude the agreements within the Consent Order are void ab initio because their scope and breadth exceed the types of orders which are permitted under a conservatorship proceeding as limited and as outlined within Section 62-5-408(3), South Carolina Probate Code. The two daughters violated the statutory duties owed by them to their father in proposing the agreements, and the Probate Court is without the authority to enforce the agreements because the agreements sought to be enforced go well beyond the statutory authority granted to the Probate Court, and the Consent Order is an impermissible order which violates §62-5-408.

Moreover, agreements otherwise enforceable contained within an order determined to be impermissible at the time of issuance based on § 62-5-408 is jurisdictionally flawed and incapable of enforcement. "The word 'jurisdiction' does not in every context connote subject matter jurisdiction, but rather, is 'a word of many, too many, meanings.'" Limehouse v. Hulsey, 404 S.C. 93, 104, 744 S.E.2d 566, 572 (2013) (quoting Rockwell Int'l Corp. v. U.S., 549 U.S. 457, 467, 127 S.Ct. 1397, 167 L.Ed.2d 190 (2007)). Rather, "[j]urisdiction is generally defined as 'the authority to decide a given case one way or the other. Without jurisdiction, a court cannot proceed at all in any cause; jurisdiction is the power to declare law, and when it ceases to exist, the only function remaining to a court is that of announcing the fact and dismissing the cause.'" Id. at 104, 744 S.E.2d at 572 (quoting 32A Am.Jur.2d Federal Courts § 581 (2007) (footnotes omitted)). "Specifically, '[j]urisdiction is composed of three elements: (1)

personal jurisdiction; (2) subject matter jurisdiction; and (3) the court's power to render the particular judgment requested.' " Id. (quoting Indep. Sch. Dist. No. 1 of Okla. County v. Scott, 15 P.3d 1244, 1248 (Okla.Civ.App.Div.2000)).

The failure of the attorney for two of the potential heirs at law to comply with the statutes which address the requirements for a conservatorship does not divest either the probate court or the circuit court of subject matter jurisdiction with respect to issues arising out of the probate of an estate. S.C.Code Ann. § 62–1–302(a) (1) (2009 & Supp.2012) (recognizing probate court's exclusive original jurisdiction over all subject matter related to the estates of decedents). However, because the Consent Order is an impermissible order, as defined by SC St. § 62-5-408, the Court lacks the jurisdictional authority to enforce it. Even assuming the Consent Order was enforceable, logically, any agreement within the Consent Order is unenforceable against Melanie J. Newman and Christopher J. Newman because they were not parties to the guardianship and conservatorship actions and they are not bound by the terms of the Consent Order; likewise, they are not third party beneficiaries with rights to enforce the Consent Order. See, E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002) (holding, a contract cannot bind a nonparty).[1]

ii. The relief granted cannot be founded on SC St. § 62-3-912 because the putative agreements within the Consent Order were not made by successors, as defined by SC St. § 62-1-2019(47), to a decedent.

The Petition to enforce the agreements within the Consent Order is founded on Section 62-3-912, South Carolina Probate Code, entitled, "Private agreements among successors to decedent binding on personal representative," the Petition was not amended, and the specific

[1] Additionally. the agreements within the Consent Order do not bind the property interest of Melissa J. Arce and Winona M. Newman, or any of the heirs, because the flaws within the agreements within the Consent Order are not, by their terms, expressly made binding on the heirs at law of Mr. Newman following his death.

performance of the agreements within the Consent Order, as required by the Order, as a matter of law, cannot be based on the putative agreements constituting a compromise agreement. The putative agreements within the Consent Order cannot be construed as a compromise agreement because John Percy Newman signed the Consent Order while he was alive, and the Respondents did not sing the Consent Order in their capacities as "successors" for this same reason.

Section 62-3-912, South Carolina Probate Code, states as follows:

> Subject to the rights of creditors and taxing authorities, competent *successors* may agree among themselves to alter the interests, shares, or amounts to which they are entitled under the will of the *decedent*, or under the laws of intestacy, in any way that they provide in a written contract executed by all who are affected by its provisions. The personal representative shall abide by the terms of the agreement subject to his obligation to administer the estate for the benefit of creditors, to pay all taxes and costs of administration, and to carry out the responsibilities of his office for the benefit of any successors of the decedent who are not parties. Personal representatives of decedents' estates are not required to see to the performance of trusts if the trustee thereof is another person who is willing to accept the trust. Accordingly, trustees of a testamentary trust are successors for the purposes of this section. Nothing herein relieves trustees of any duties owed to beneficiaries of trusts. (emphasis added)

Section § 62-1-2019(47), South Carolina Probate Code, defines successors as "those persons, other than creditors, who are entitled to property of a decedent under his will or this Code". Accordingly, one cannot be a "successor" until there is a "decedent", and John Percy Newman did not pass away until August 28, 2011, and the Consent Order was signed on June 20, 2010. I conclude the underlying Order must be reversed because the putative agreements within the Consent Order are not compromise agreements as contemplated within SC St. § 62-3-912.

B. Putative agreements found within the Consent Order are not specifically enforceable.

An action for specific performance of a contract to make a will is an action in equity. Wright v. Patrick, 262 S.C. 434, 205 S.E.2d 175 (1974); Kerr v. Kennedy, 105 S.C. 496, 90 S.E. 177 (1916). While this case is not an action on contract to make a will, the elements are

the same. The essential elements of any contract are a contractual intent, an actual meeting of the minds of the parties, and valid mutual consideration. Caulder v. Knox, 251 S.C. 337, 344, 162 S.E.2d 262, 266 (1968). Courts only have the authority to specifically enforce contracts that the parties themselves have made; they do not have the authority to alter contracts or to make new contracts for the parties. Amick v. Hagler, 286 S.C. 481, 485, 334 S.E.2d 525, 527 (Ct.App.1985) (holding the trial judge properly granted specific performance, but did not have the authority to give one party the option of requiring the other party to provide owner financing because this was not part of the parties' contract). A court has no authority to rewrite a contract and impose unwanted obligations and terms under the guise of specific performance or judicial construction. See, e.g., Lewis v. Premium Inv. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002) ("It is not the function of the court to rewrite contracts for parties."); E. Bus. Forms, Inc. v. Kistler, 258 S.C. 429, 189 S.E.2d 22 (1972) (finding the court may not make a new agreement for the parties into which they did not voluntarily enter).

The children of Mr. Newman have selectively focused on the specific performance of three (3) three operative paragraphs within the Consent Order, and assert they work separately or together to bar Virginia K. Newman from inheriting fifty percent (50%) of her deceased husband's probate estate. I conclude the terms of the agreements are unambiguous, the agreements reflect the "entire understanding" of the parties, the agreements are not expressly made binding on the heirs or assigns of Mr. Newman, there are no provisions for the breach of the agreement, and the agreement calls for acts while Mr. Newman was alive and do not contemplate his owning any property at the time of his death.

By ordering the conveyance of the real property based on the theory of estoppel, the Probate Court, in effect, granted the Petitioners' request for specific performance. "In order

to compel specific performance, a court of equity must find: (1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract." Campbell v. Carr, 361 S.C. 258, 262, 603 S.E.2d 625, 628 (Ct.App.2004).

The agreements collectively anticipate the conveyance of all his personal and real property to the children of Mr. Newman for no consideration while he was alive. Further, to the extent there is an alleged default, there are no remedies outlined within the agreements reflected within the Consent Order in the event one or more of the agreements is breached in any way. With full knowledge of these flaws, and others, the children of Mr. Newman failed, refused or purposefully decided not to obtain the required deeds or to commence a civil action which requested the enforcement of any term of the agreements within the Consent Order against their father while Mr. Newman was alive.

The first element of specific performance, a valid contract, fails for lack of consideration and an absence of a meeting of the minds. The children of Mr. Newman essentially gave nothing while expecting everything from their father, while the threat of the guardianship and conservatorship loomed overhead - an action that was admittedly for the purposes of annulling a marriage and protecting assets which did not belong to the two petitioners. "The discretionary power of an equity court to decree specific performance can never come into question or be exercised until and unless it first be factually established that there was a contract and that the promisee performed." Wright v. Patrick, 262 S.C. 434, 441, 205 S.E. 2d 175 (1974).

The agreements sought to be enforced are also unenforceable for want of a meeting of the minds. South Carolina common law requires that, in order to have a valid and

enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. Hughes v. Edwards, 265 S.C. 529, 220 S.E.2d 231 (1975). The "meeting of minds" required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known. McClintock v. Skelly Oil Co., 232 Mo.App. 1204, 114 S.W.2d 181 (Mo.App.1938). The record before us evinces no meeting of the minds, as there was no judicial determination as to Mr. Newman's competency during the conservatorship and guardianship proceedings- in which he was alleged incompetent, Mr. Newman was not represented by his appointed Guardian Ad Litem at the time changes were made to the Consent Order, the changes made to the Consent Order were made at different times by different parties so there could be no comprehensive global understanding, and the self-serving putative agreements within the Consent Order effectively disinherits his wife and this conclusion was refuted when Mr. Newman refused to sign a Last Will and Testament, prepared as instructed by Respondents, which requested same.

As to the second and third requirements of specific performance, partial performance and the ability to actually perform the contract, these two fail as the Respondents admittedly made no attempts to have their father conform to the Consent Order while he was alive by presenting a deed or instituting an action. Transcript of Record One at Page 97, Lines 7-16. In fact, the Respondents characterized the Consent Order as the Last Will and Testament of their father, believing the contract somehow rose to that level and was somehow binding on the heirs following the death of their father, when their father never contracted for a will and the

Consent Order was not made expressly binding on the heirs. I conclude the putative agreements framed within the consent order are not specifically enforceable.

C. Assuming arguendo the putative agreements are specifically enforceable, the agreements fail based on the unclean hands of the Appellants, laches, and for policy concerns.

i. Unclean hands based on Respondents' fraud perpetrated on the Probate Court

A defendant seeking the protection of the doctrine of unclean hands must demonstrate that the plaintiff "acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." Wilson v. Landstrom, 281 S.C. 260, 266, 315 S.E.2d 130, 134 (Ct.App.1984) (citing Arnold v. City of Spartanburg, 201 S.C. 523, 23 S.E.2d 735 (1943)). The children of Mr. Newman cannot show any act of unfairness of Mrs. Newman. Instead, the children of Mr. Newman have, from the outset, misrepresented facts to the Probate Court and perpetrated a fraud upon the Probate Court by filing the guardianship action and the conservatorship action. The children of Mr. Newman have admitted they commenced the conservatorship action and the guardianship action with the knowledge their father was neither incapacitated nor mentally incompetent, and solely as an attempt to annul Mr. Newman's marriage to Virginia K. Newman, and to "protect their father's assets" as they deemed he would have wanted. This sentiment is evident throughout the self-serving Consent Order which is sought to be enforced, and the testimony at trial.

The children of Mr. Newman did not commence an action to annul the marriage of their father in the Family Court, and their actions which ended with the putative agreements were intended to provide them with the instrument with which to manipulate Mr. Newman with the stated purpose of controlling the disposition of his assets to the exclusion of Virginia K. Newman, his wife. The children of Mr. Newman commenced the actions leading to the Consent

Order with an expectancy of obtaining ownership of all his personal property, and all of his real property by gift deed, events which did not occur, or by way of a Last Will and Testament which disinherited Mrs. Newman, which also did not occur, secure in their knowledge she had waived her "spousal share election." See Paragraph Number 5, Consent Order filed August 9, 2010. The Orders on appeal allow the children of Mr. Newman to bootstrap the fraud perpetrated by them on the judiciary to disinherit Virginia K. Newman and for these reasons they should be reversed.

The children of Mr. Newman will not be allowed to manipulate the outcome of their father's estate with extrinsic fraud. The children of Mr. Newman, at the inception of the case, perpetrated a fraud on the Probate Court by founding their actions on non-existent grounds in an admitted attempt to nullify a marriage based on their desire to control the disposition of their father's future estate.

Respondents fraudulent tactics are further recognized in Respondents pursuit of a line of questioning while cross examining the Appellant based on the their names being omitted from one of two of the decedent's obituaries. The three daughters of John Percy Newman sought to discredit Appellant with knowledge they had, in writing to the funeral director, asked to be removed from the obituary, thus again committing a fraud on the court. The use of this newspaper article in an attempt to improperly color the character of the Personal Representative reflects the levels to which the children of Mr. Newman will descend in an attempt to orchestrate evidence and manipulate the judiciary.

The marriage of Mr. and Mrs. Newman led to resentment, hostility and animosity on the part of the children of Mr. Newman toward his second wife, and provided the catalyst they needed to attempt to bend the truth to their own selfish ends. Transcript Two, Page 77, Line

9 – Page 78, Line 24, and Transcript Two, Page 81, Line 21 – Page 86, Line 15. This is evident in the fraud perpetrated on the Probate Court, two weeks after the marriage, by representing mental incompetence when none existed, and their actions in attempting to mislead the Probate Court at the end of the second hearing by suggesting Mrs. Newman purposefully excluded the children from one of two (2) obituaries published following his death. Transcript Two, Page 66, Line 2 – Page 67, Line 5.

ii. The Doctrine of Laches is a bar to the enforcement of the putative agreements.

The Respondents failed to enforce the putative agreement when they had ample opportunity to attempt to do so. A party seeking the protection of the doctrine of laches must prove the proponent of an action unreasonably delayed instituting the action and that such a delay is unexplainable and negligent in light of what should have been done. Lindler v. Adcock, 250 S.C. 383, 158 S.E.2d 192 (1967). As applied here, the putative agreements within the Consent Order are unambiguous and require a deed, which was never prepared, presented, or even contemplated. Moreover, the parol evidence rule cannot be used to obviate the necessity of this requirement according to the Consent Order. When questioned why a deed was never presented, Winona Mae Newman testified: "I thought the Consent Order was a binding consent of the, of the court. It doesn't say that it had to be done within a certain time period. There is not an expiration date on the time that this had to be executed. I felt no urgency in doing this, then my father got sick, and life becomes very complicated when you're dealing with a parent who's sick." Transcript of Record One at Page 20, Lines 8-15.

"The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary or explain the written

instrument." Gilliland v. Elmwood Properties, 301 S.C. 295, 302, 391 S.E.2d 577, 581 (1990). Where a written instrument is unambiguous, parol evidence is inadmissible to ascertain the true intent and meaning of the parties. Penton v. J.F. Cleckley & Co., 326 S.C. 275, 486 S.E.2d 742 (1997). The parol evidence rule is a rule of substantive law, not a rule of evidence. Accordingly, admission of evidence violating the parol evidence rule is legally incompetent and should not be considered even if no objection is made at trial. Penton v. J.F. Cleckley & Co., supra; Muckelvaney v. Liberty Life Ins. Co., 261 S.C. 63, 198 S.E.2d 278 (1973). I have therefore not considered any evidence which attempts to contradict or explain the clear terms of the Consent Order. Assuming arguendo enforceable agreements within the Consent Order were reached, I find Respondents had ample time to enforce said agreements and negligently and unexplainably failed in doing so while their father, Mr. Newman, was alive.

iii. Policy concerns with regard to devolution of property and inheritance bar enforcement of the putative agreements.

The putative agreements within the Consent Order, taken together, are not a binding marital agreement, prenuptial or postnuptial, which can be specifically enforceable after the death of Mr. Newman. Under South Carolina Code Ann. §20-7-473(4), prenuptial agreements are "presumptively fair and equitable so long as it was voluntarily executed, with both parties separately represented by counsel, and pursuant to the full financial disclosure to each other that is mandated by the rules of the family court as to income, debt and assets." Postnuptial agreements are allowed by Section 20-7-420, Code of Laws of South Carolina, 1976, as amended, which outlines the jurisdiction of family courts in domestic matters. In order to be enforceable, however, such an agreement must be approved and made a part of a family court order following the general litany of questions asked and answered to ensure all parties fully

understand the agreement and desire the agreement to be incorporated as the order of the Probate Court. This never occurred.

Under the South Carolina Probate Code, postnuptial agreements are contemplated in Section 62-2-507, South Carolina Probate Code, which defines who is considered a surviving spouse for intestate succession, and in Section 62-2-802, South Carolina Probate Code, which defines the effect of a divorce or property settlement agreement on the terms of a will. There is one sole exception to the requirement for a court order: the spousal elective share statute provides a statutory means for a spouse to waive her spousal elective share. In the event there was a will and the other conditions framed above are satisfied, it is possible for the right of election to be waived as provided in Section 62-2-203, South Carolina Probate Code. Mr. Newman died intestate and this analysis is therefore unnecessary except to show bad faith on the part of, and the fraud perpetrated by, the children of Mr. Newman to "set up" their father as well as the Appellant. The absence of a valid will which disinherits Appellant has defeated the well-laid plan of the children of Mr. Newman, a document they caused to be created but could not get Mr. Newman to sign. I conclude the orders appealed from should therefore be reversed for these reasons.

The children of Mr. Newman carry the burden of proof on the issue of the selective specific enforcement of one agreement which is unenforceable in law and in equity; the children of Mr. Newman could have but did not convene a hearing before the Probate Court to formally approve the terms of the agreement within the Consent Order on either July 16, 2012, or on August 3, 2012, and the understanding of the parties of the agreements within the Consent Order at that time can now never be known.

The guardianship action and the conservatorship action were ended on August 9, 2010, when a Consent Order was filed without a hearing. Two (2) of the children of Mr. Newman alleged a conviction firm enough to believe Mr. Newman suffered from late onset Alzheimer's disease more than a year before his death, and may therefore have been without the requisite capacity at the time of filing to execute either a deed or a will. Under these facts, the children of Mr. Newman cannot now take advantage of a group of related agreements with so many impediments and selectively torture their reasonable interpretation to bar the rights of Virginia K. Newman as an intestate heir.

A personal representative, under Section 62-3-715, South Carolina Probate Code, entitled "Transactions authorized for personal representatives; exceptions," acting reasonably for the benefit of the interested persons, may, properly (1) retain assets owned by the decedent pending distribution or liquidation including those in which the representative is personally interested, ... and (3) perform, compromise, or refuse performance of the decedent's contracts that continue ... as obligations of the estate, as he may determine under the circumstances. In performing enforceable contracts by the decedent to convey or lease land, the personal representative, among other possible courses of action, may: (i) execute and deliver a deed of conveyance for cash payment of all sums remaining due or the purchaser's note for the sum remaining due secured by a mortgage or deed of trust on the land; or (ii) deliver a deed in escrow with directions that the proceeds, when paid in accordance with the escrow agreement, be paid to the successors of the decedent, as designated in the escrow agreement. There are no payments owed on the contracts which are sought to be enforced, and the agreements are not "enforceable contracts" within the meaning of this statute. A contract which contravenes public policy is void, and an action cannot be maintained for either its breach or for inducing its breach. Jackson v. Bi-

Lo Stores, Inc., 313 S.C. 272, 437 S.E.2d 168 (Ct. App. 1993). Court will not hold a party for breach when the contract was void at the time of the alleged breach. Stonhard, Inc. v. Carolina Flooring Specialists, Inc., 366 S.C. 156, 621 S.E.2d 352 (2005), reh'g denied, (Nov. 17, 2005).

Mr. Newman did not gift his property to his children while he was alive, and died owning real and personal property; therefore, as a matter of law and at and upon the death of her husband, Virginia K. Newman inherited an undivided one-half interest in all real and personal property owned by Mr. Newman. Mrs. Newman did not waive her rights as an intestate heir, and is otherwise not barred from her inheritance under the terms of the agreements contained within the Consent Order.

A gift, in its most general meaning, is a voluntary transfer of property to another without consideration. A gift differs from a testamentary disposition, which involves an intent that nothing vest until the donor's death. A conservator does not have the authority to gift property absent court approval. Section 62-5-424, South Carolina Probate Code. The agreements embedded in the Consent Order, because they are agreements to gift property for which no consideration was given, would not have been enforceable during the life of Mr. Newman, and should not be enforced following his death.

Mr. Newman died on August 28, 2011, and the Consent Order was not executed with the requisite formalities of a Last Will and Testament. Mr. Newman died without leaving a valid Last Will and Testament, died intestate, and his property was instantly inherited by his wife and four (4) children subject, nonetheless, to the claims against and administrative expenses of his Estate. Mr. Newman did not gift his real property to any person at any time; further, he refused to sign the Last Will and Testament prepared by others for his execution. It is clear Respondents, for their benefit, had their attorney prepare a Last Will and Testament; it is equally

clear Mr. Newman refused to sign the Last Will and Testament, prepared as instructed by Respondents, and also refused to gift his real property by deed before his death. While Virginia K. Newman agreed to forever waive her "spousal share election," she did not disclaim her intestate inheritance, and her waiver is inoperative as a matter of law because her husband died intestate.

There is no provision within the Consent Order which addresses a waiver of her rights to as an "intestate" heir, and the word "intestate" is markedly absent from the entire record of the guardianship action and the conservatorship action. The agreements within the Consent Order do not bar Virginia K. Newman from serving as Personal Representative or from inheriting should her husband die intestate; instead, the agreements contemplate the existence of a valid Last Will and Testament which disinherited Mrs. Newman as a failsafe in the event the real property was not gifted by Mr. Newman. Both crucial documents are missing; hence, the gift of all Mr. Newman's real property never occurred as planned by his children, and the waiver of Mrs. Newman's spousal elective share contained within the Consent Order was inoperative because Mr. Newman died intestate. Equity should not now bar Virginia K. Newman from receiving her inheritance based on the facts of this case; and the Orders appealed from should therefore be reversed.

The Orders on appeal effectively serve to bar Virginia K. Newman from inheriting fifty percent (50%) of her deceased husband's probate estate, require her to specifically perform an unenforceable agreement, and divests both her and the creditors of the Estate of vested property rights without compensation. The Personal Representative is an heir at law of Mr. Newman and did not waive her rights of inheritance; therefore, the agreement to gift property does not bind Mrs. Newman following the death of her husband, and she should not be

required to gift her interest in property inherited by her to the children of Mr. Newman. Further, the Orders on appeal improperly insulates the probate estate from being used to satisfy the claims against the Estate, and the administrative fees and expenses generated in good faith by the Personal Representative.

II. Conclusions of Law in Relation to Order Denying Petition for Sale and/or Mortgage of Real Property in Aid of Assets

The Order Denying Petition for Sale and/or Mortgage of Real Property in Aid of Assets, the second order on appeal, requires the Estate's real property to be conveyed to the children of the Decedent without first addressing whether or not the real property, as assets of the Estate, should be sold given the need to satisfy the past, current and future administrative expenses of the Estate, and the claims against the Estate. A claim has been filed within the Estate, and it is clear administrative expenses are owed; at the same time, it is equally clear the Estate is without sufficient liquid assets to pay these expenses unless personal property, which was authorized to be sold, and real property as well, are sold. The real property owned by the decedent is inherited by his heirs at law subject, nevertheless to the debts of the decedent, including claims and administrative fees and expenses generated in good faith by the Personal Representative.

The second Order on appeal recognizes the need to sell personal assets and then erroneously denies the authority to the personal representative to sell the real property to satisfy the claim and current past due and future administrative expenses of the Estate, all because of the alleged right of specific performance which was erroneously granted for the reasons expressed above. The Estate needs to sell real property in aid of generating assets to pay administrative expenses, and the reversal of first Order on appeal dictates the reversal of the second.

An agreement to gift real property, under the facts of this case, is not specifically enforceable prior to or following the death of Mr. Newman. Specific performance of the agreement, while insulating the property from claims and expenses, would be prejudicial to claimants, creditors and those persons acting in good faith on the reliance of contracts with the Personal Representative, all of which are backed by the value and credit of the probate estate. The Orders on appeal deny the use of these assets to pay administrative expenses, including a claim filed by one of the children of Mr. Newman; the transfer of the real property as ordered would, unless reversed, compromise and thwart the ability of the Personal Representative to discharge her duties as a fiduciary. I conclude the real property owned by Mr. Newman stands for the payment of the debts of the decedent and the lawful administrative expenses of the Estate, and is subject to sale.

The children of Mr. Newman are not secured creditors and they enjoy no priority over any other person to be paid or receive the assets of the Estate under the classification scheme established in Section 62–3–805 of the Probate Code which controls the payment of claims. The personal property, under the authority of the Probate Court which recognizes the need for liquidity, was ordered to be sold; given the need for sales in aid of assets, the real property, under the control of the Personal Representative, should also be subject to sale in aid of assets. The transfer of the real property without first satisfying claims and administrative expenses is an impermissible dilution of the security for the payment of all claims and administrative expenses, places an inequitable burden on the Personal Representative, prevents her from discharging her duties, and unfairly prejudices claimants and creditors of the Estate. Unless reversed for the reasons expressed, the Orders on appeal will give an unlawful preference

to the children of Mr. Newman over his widow, and over the claimants and creditors of the Estate. For these reasons, the second Order appealed from should also be reversed.

I conclude the agreements in question cannot be characterized as "claims." The children of Mr. Newman have not commenced a proceeding to enforce a mortgage, have not commenced a proceeding to enforce a pledge, and have not commenced a proceeding to enforce a lien or a security interest upon real property of the Estate. The children of Mr. Newman have no right to sue for money because they have no monetary claim; instead, they seek the assistance of the Probate Court to specifically enforce an agreement within an impermissible order. Under these facts, I conclude the agreement to gift real property within the Consent Order is not an enforceable contract, because it anticipates a gift and not a sale of the assets, and the real property shall be subject to the claims and administrative expenses of the Estate.

S.C. Code Ann. Section 62-3-711(b), entitled "Powers of Personal Representatives; In General," states a personal representative may not sell real property of the estate except as authorized pursuant to the procedure described in Section 62-3-1301 et. seq. Section 62-3-1302 authorizes the Probate Court to grant to the Personal Representative the authority to sell the real estate of John Percy Newman in the event the personal estate available to pay the debts of the Estate is insufficient to pay the outstanding administrative expenses. The Probate Court Judge recognized this to be the case when he granted a portion of the petition to sell property in aid of asserts, and authorized the sale of the personal but not real property.

A review of the file and the record reflects the parties are unable to agree on any proposed course of conduct. The actions of the children of Mr. Newman and the results of these actions are memorialized in a variety of orders documenting the conflict between these parties. These orders include but are not limited to an Order Granting Motion to Compel Production of

Documents and Things filed November 7, 2012; a Temporary Restraining Order filed October 16, 2012, and an Order Dissolving Ex Parte Temporary Restraining Order filed November 7, 2012. The polarization and conflict are evident, have slowed and delayed the administrative process, and have increased the legal administrative costs. The size of the administrative expenses, and the payment of these expenses, formed the main foundation of two (2) failed attempts by Mr. Newman's children to remove Appellant as the personal representative, for cause. See Order Granting Motion for Summary Judgment and Dismissing Petition for Removal of Personal Representative filed February 8, 2013. See ORDER DENYING APPOINTMENT OF A SPECIAL ADMINISTRATOR filed October 30, 2013.

The Probate Court granted a Motion for Summary Judgment in favor of Appellant on the first attempt to have her removed as a fiduciary; Mr. Newman's children have not appealed from the issuance of that order. The Order Granting Motion for Summary Judgment and Dismissing Petition for Removal of Personal Representative, in part states:

> Admittedly, an increase in the administrative costs depletes the assets of the Estate, and diminishes the assets available for eventual distribution, but this depletion affects all persons otherwise entitled to these assets, Virginia K. Newman included. The depletion of assets is an unfortunate but predictable result of conflict, and the acts of the Petitioners have contributed to the size of the legal administrative fees. Waste is a two-edged sword and the legal administrative expenses paid by Virginia K. Newman, as the personal representative, would no doubt have been considerably less but for the various petitions, motions, discovery, and legal positions asserted by the Petitioners, and the consequent need for the fiduciary to defend against those positions. The size of the legal administrative expenses incurred by the Estate are directly related to the cost of the conflict exacerbated by the Petitioners, and the need to pay and the payment of these expenses also serves to diminish whatever distribution Virginia K. Newman would otherwise be entitled to, even if the Petitioners prevail in their attempts to specifically enforce the agreements within the Consent Order as outlined in their most recent Affidavits.
>
> At this juncture, the Petitioners cannot be heard to complain of the size of the legal administrative expenses, or use their existence under these circumstances as a foundation for the cause necessary to remove Virginia K.

> Newman as a fiduciary. Against this backdrop, I conclude the legal administrative expenses were paid by the fiduciary for acts of the fiduciary to account and to preserve the estate, are a direct result of her good faith attempts to administer the Estate and to take appropriate defensive positions to the assertions advanced by Petitioners, appear to be reasonable, and are related to the need of the appointed fiduciary to discharge her general duties of a personal representative.

Order Granting Motion for Summary Judgment and Dismissing Petition for Removal of Personal Representative filed February 8, 2013, Pages 11 – 12.

The children of Mr. Newman fundamentally believe Virginia K. Newman, as a fiduciary with duties to the Estate as a whole, has presented positions and taken actions which only benefit her as an heir of the Estate, and do not benefit the Estate as a whole, and has used assets of the estate to fund legal fees generated to advance positions which she cannot in good faith defend, all to the detriment of the children of Mr. Newman. This belief fueled a second attempt to remove Mrs. Newman as a fiduciary; the Probate Court reviewed the Petition for Appointment of Special Administrator and denied the second attempt to remove Appellant as the fiduciary.

Appellant, for good cause, has been forced to defend against the actions of Mr. Newman's children and their preferred interpretation of agreements now determined to be void and unenforceable. The payment of legal fees by the personal representative is allowed under Section 62-3-720 of the South Carolina Probate Code, which states a personal representative who "defends or prosecutes any proceeding in good faith, whether successful or not, is entitled to receive from the estate the necessary expenses and disbursements including reasonable attorneys' fees incurred."

I conclude the rights of the potential purchaser who tendered the Offer to Purchase shall be subject to the rights of the children of Mr. Newman to purchase on terms

identical to the terms offered for a period of thirty (30) days following the date of recordation of this Order, exclusive of the date of filing, with performance being required in accordance with the terms of the Offer to Purchase. Time shall be of the essence, and the children of Mr. Newman shall have the right to elect in writing to exercise a right of first refusal to purchase for thirty (30) days following the recordation of this Final Order, exclusive of the date of the sale, and the failure to so elect shall be deemed an abandonment of this right. In the event the right of first refusal to purchase is timely exercised, then the earnest money deposit paid by the purchaser who tendered the Offer to Purchase shall be returned. In the event the right of first refusal to purchase is not timely exercised, then the potential purchaser identified in the Offer to Purchase shall be free to complete the transaction in accordance with the terms of the Offer to Purchase.

I also conclude the Personal Representative, on terms acceptable to her, shall have the authority to sell the balance of the real property within the probate estate in aid of assets to satisfy administrative expenses and legitimate claims, to complete the administration of the Estate. The authority of the Personal Representative to sell real property includes the authority to sell all the remaining property following the sale of the pieces subject to the Offer to Purchase.

HAVING STATED MY FINDINGS AND CONCLUSIONS ABOVE, I direct the entry of judgment in this action without further order of court as follows and impose the following orders:

a. The ORDER ENFORCING PRIOR COURT ORDER executed by the Honorable Waldo A. Maring and filed in the Office of the Probate Court on July 11, 2013, and the ORDER GRANTING PETITION TO SELL PERSONAL PROPERTY AND ORDER DENYING PETITION TO SELL AND MORTGAGE REAL PROPERTY, executed by the Honorable Waldo A. Maring and filed in the Office of the Probate Court on October 30, 2013, from which appeals have been taken, be and hereby are reversed for proceedings consistent herewith; and

b. The agreements sought to be enforced by Melanie J. Newman, Melissa J. Arce, Winona M. Newman, and Christopher J. Newman, as are contained within the

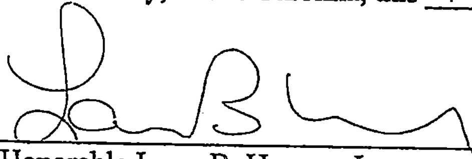
Consent Order which is the subject of their Petition, be and hereby are declared to be void and of no effect and unenforceable as a matter of law and equity for the reasons expressed herein; and

c. The Personal Representative of the Estate of John Percy Newman be and hereby is fully authorized and empowered to sell the real property subject to the Offer to Purchase; provided, however, the Personal Representative shall first allow Melanie J. Newman, Melissa J. Arce, Winona M. Newman, and Christopher J. Newman a period of thirty (30) days, as measured from the date of filing of this Final Order, exclusive of the date of filing, to fully perform under the terms of the Offer to Purchase, with time being of the essence; therefore, Melanie J. Newman, Melissa J. Arce, Winona M. Newman, and Christopher J. Newman, the children of John Percy Newman, shall have the right of first refusal to purchase the property subject to the Offer to Purchase for thirty (30) days following the recordation of this Final Order, exclusive of the date of the sale, and their failure to fully perform under the terms of the Offer to Purchase shall be deemed an abandonment of this right. In the event the right of first refusal to purchase is timely exercised and the covenants therein are fully performed, then the earnest money deposit paid by the potential purchaser who tendered the Offer to Purchase shall be returned following full performance. In the event the right of first refusal to purchase granted herein is not timely exercised and is abandoned, then the potential purchaser identified in the Offer to Purchase shall be free to complete the transactions in accordance with the terms of the Offer to Purchase; and

d. The Personal Representative, on terms acceptable to her and without the necessity of obtaining permission from the Probate Court, but subject to the duty to account to the Probate Court, shall have the authority to sell the balance of the real property at one time owned by John Percy Newman, in aid of assets to satisfy administrative expenses of and legitimate claims against the Estate, to allow the personal representative to complete the administration of the Estate.

AND IT IS SO ORDERED.

Dated at Conway, South Carolina, this 12 day of November, 2014.



_______________________________ (L.S.)
The Honorable Larry B. Hyman, Jr.
Presiding Judge for the Fifteenth Circuit

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2013 CP-22-001231

Melanie J. Newman, Melissa J. Arce, Winona M. Newman, and Christopher J. Newman

Virginia K. Newman, Individually, and Virginia K. Newman, as Personal Representative of the Estate of John Percy Newman

Virginia K Newman, Individually, and Virginia K. Newman, as Personal Representative of the Estate of John Percy Newman
PLAINTIFF(S)

Melanie J. Newman, Melissa J. Arce, Winona M. Newman, and Christopher J. Newmam
DEFENDANT(S)

Submitted by: CHARLES OWEN NATION, II, ESQUIRE	Attorney for: ☒ Plaintiff ☒ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk:

INFORMATION FOR THE JUDGMENT INDEX
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Virginia K. Newman, Individually, and Virginia K. Newman, as Personal Representative of the Estate of John Percy Newman	Melanie J. Newman, Melissa J. Arce, Winona M. Newman, and Christopher J. Newman	$N/A
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

of additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge | 2152 Judge Code | 3-4-15 Date

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 _to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Jodi C Bailey Deputy
CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

State of South Carolina)
)
County of Georgetown)

In the Circuit Court
Fifteenth Judicial Circuit
Civil Action Number 2013-CP-22-001231

Melanie J. Newman, Melissa J. Arce,
Winona M. Newman, and Christopher J. Newman,

Petitioners,

vs.

Virginia K. Newman, individually, and
Virginia K. Newman, as Personal Representative
of the Estate of John Percy Newman,

Respondents-Appellant.

In Re: Estate of John Percy Newman

Virginia K. Newman, individually, and
Virginia K. Newman, as Personal Representative
of the Estate of John Percy Newman,

Petitioners-Appellant,

vs.

Melanie J. Newman, Melissa J. Arce,
Winona M. Newman, and Christopher J. Newman,

Respondents.

In Re: Estate of John Percy Newman

FILED
2015 MAR 10 PM 1:38
CLERK OF COURT

<u>ORDER DENYING MOTION TO RECONSIDER/ALTER OR AMEND THE FINDINGS OF THE COURT AND THE ORDER REVERSING ORDER GRANING ENFORCEMENT OF PRIOR COURT ORDER AND ORDER DENYING PETITION TO SELL AND MORTGAGE REAL PROPERTY</u>

Date of Hearing:	February 12, 2015
Trial Judge:	The Honorable Larry B. Hyman, Jr.
Attorney for Melanie J. Newman, Melissa J. Arce, Winona M. Newman, And Christopher J. Newman:	Brana J. Williams, Esquire
Attorneys for Virginia K. Newman:	Charles Owen Nation, II, Esquire Eric G. Armstrong, Esquire

By consent of the parties, I heard arguments in Conway, South Carolina, on a Motion styled "MOTION TO RECONSIDER/ALTER OR AMEND THE FINDINGS OF THE COURT AND THE ORDER REVERSING ORDER GRANTING ENFORCEMENT OF PRIOR COURT ORDER AND ORDER DENYING PETITION TO SELL AND MORTGAGE REAL PROPERTY," filed by the attorney for Melanie J. Newman, Melissa J. Arce, Winona M. Newman, and Christopher J. Newman, on December 1, 2014, hereinafter "the Motion to Alter or Amend," in Conway, South Carolina. The Motion to Alter or Amend centers on the findings of fact and conclusion of law reflected within an order styled "ORDER REVERSING ORDER GRANTING ENFORCMENT OF PRIOR COURT ORDER, AND ORDER DENYING PETITION TO SELL AND MORTGAGE REAL PROPERTY," executed by me on November 12, 2014, and filed of record November 12, 2014, hereinafter "the Order under Consideration."

The attorneys for the parties were present at the hearing. At the commencement of the hearing, Melanie J. Newman, Melissa J. Arce, Winona M. Newman, and Christopher J. Newman, hereinafter for ease of reference "Decedent's Children," by and through their attorney, presented a Brief which by its terms expressly states it omits a full recitation of the facts and outlines only those facts which are contested in the case on appeal. Reference is made to the Order under Consideration for a full recitation of the facts to supplement the findings and conclusions reflected herein. The arguments presented within the Motion to Alter or Amend are

sequentially addressed below. I conclude the Motion to Alter or Amend should be denied for the reasons expressed herein.

If a party is unsure whether he properly raised all issues and obtained a ruling, he must file a Rule 59(e) motion or an appellate court may later determine the issue or argument is not preserved for review. But in filing the motion, he may unwittingly forfeit the right to an appeal if an appellate court later determines the Rule 59(e) motion was unnecessary because he already had raised the issue and obtained a ruling. In South Carolina, "[a] party **may** wish to file such a motion [to alter or amend] when [the party] believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party **must** file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Elam v. S. Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphases in original). Decedent's Children are not confident their issues and arguments were sufficiently raised to and ruled upon by me. As the losing party and by and through their attorney, Decedent's Children must first try to convince me the Court has ruled wrongly and then, in the event that effort fails, thereafter convince the appellate court the undersigned erred twice. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments. If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review. Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. The requirement also serves as a keen incentive for a party to prepare a case

thoroughly. It prevents a party from keeping an ace card up his sleeve intentionally or by chance in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

Turning to the present case, Decedent's Children first argue, inter alia, the undersigned misapplied the appropriate standard of review within the Order under Consideration. On review, I confirm the standard of review is correct because the causes of action presented to the Probate Court were actions in equity, not actions at law. John Percy Newman married Virginia K. Newman on July 2, 2009; on July 16, 2009, two (2) of Decedent's Children filed a petition to have themselves appointed as their father's guardians, a case indexed under Case No. 2009-GC-22-0008, and filed a petition to have themselves appointed as their father's conservators, a case indexed under Case No. 2009-GC-22-0009. These protective proceedings are sometimes hereinafter independently referred to as "the guardianship action," and "the conservatorship action." John Percy Newman died intestate on August 28, 2011, and Virginia K. Newman, without opposition, was appointed as the personal representative for his Estate. On February 27, 2012, six (6) months following the death of their father to the day, more or less, Decedent's Children filed a Petition which alleges four (4) causes of action. The first cause of action for the enforcement of the agreements within the Consent Order is founded exclusively on Section 63-3-912, South Carolina Probate Code. Enforcement of the agreements within the Consent Order as the "will" of the decedent cannot be based on this statute for the reasons expressed in the Order under Consideration. It is abundantly clear the relief granted within the Orders issued by the Probate Court, relief reversed by the Order under Consideration, has to be and is wholly founded on the third cause of action styled "Equitable Estoppel - Unjust

Enrichment." The prayer in the Petition requests the Probate Court to determine the heirs, to determine the assets, to make a "judicial determination as to the inheritance due [to] the individual heirs of the estate," and to require the personal representative "to fulfill the decedents' duties and obligations under the Agreement and transfer all real estate property to his four (4) children subject to the condition of the Agreement ...". See Prayer, Petition filed February 27, 2012. The dispositive causes of action alleged by Decedent's Children are equitable causes of action.

Virginia K. Newman filed a Return, Affirmative Defenses and Counterclaims to this Petition on March 30, 2013, and alleged eight (8) affirmative defenses and/or counterclaims. These are, in order, (a) the agreements were unenforceable for numerous reasons, (b) unclean hands of the children of Mr. Newman, (c) betterments, (d) unjust enrichment in the event of disinheritance, (e) waiver by non-enforcement between August 9, 2010, and August 28, 2011, (f) laches, (g) failure to mitigate damages, (h) breach of obligation of good faith, (i) the sole negligence of others, (j) comparative negligence, and (k) civil conspiracy. These defenses were neither considered nor addressed in the two (2) Probate Court orders under appeal, even after motions to alter and amend the orders were made and passed over.

With regard to the standard on review, the cases cited in the Brief as presented by the attorney for Decedent's Children are all distinguishable. Decedent's Children have not alleged ambiguity, and their causes of action are to enforce the agreements within the Consent Order, and are not actions to construe a contract. Silver v. Abstract Pools & Spas, Inc., 376 S.C. 585, 590, 658 S.E.2d 539, 541 (Ct. App. 2008). Decedent's Children are bound by their pleadings under which they attempted to enforce, not construe, the agreements within the Consent Order. Decedent's Children did not allege a claim for money due, did not attempt to

advance a will contest, did not allege an action to construe a will, and did not allege an action on a husband's claim to include joint accounts in an elective share claim. For these reasons, and others, it is clear the case of Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001), which finds enforcement of the terms of a settlement agreement is a matter of contract law, is not dispositive to amend the standard of review applied.

"The standard of review applicable to cases originating in the Probate Court depends upon whether the underlying cause of action is at law or in equity." University of Southern California v. Moran, 365 S.C. 270, 274, 617 S.E.2d 135, 137 (Ct. App. 2005). To make this determination, the appellate court must look to the essential character of the cause of action alleged by the petitioners below. Dean v. Kilgore, 313 S.C. 257, 258, 437 S.E.2d 154, 155 (Ct. App. 1993). The appellate court is free to decide questions of law with no particular deference to the lower court. Moriaty v. Garden Sanctuary Church of God, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000). Furthermore, the interpretation of a statute is a question of law, which is reviewed de novo. Layman v. State, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008). The underlying causes of action under consideration all sound and are in equity; the standard of review as outlined in the Order under Consideration is the correct standard.

Second, Decedent's Children suggest Subsection 5 of the Findings of Fact within the Order under Consideration are erroneous. There was ample evidence in the record to support the conclusion of Katherine DeAngelo to the effect Mr. Newman was of a mind sufficiently sound to make a Last Will and Testament on July 2, 2009.

Next, Decedent's Children suggest Subsections 7, 8, 9, and 10 of the Findings of Fact within the Order under Consideration are erroneous insofar as they suggest the act of filing the Petitions in the conservatorship action and the guardianship action, documents which include

sworn Verifications, and sworn Qualifications and Statements of Acceptance, does not create a duty owed by them to their father which commences as of the time and date of filing; instead, Decedent's Children posit a fiduciary duty is only owed to their father, their potential future ward, after the Probate Court issues an order which concluded (a) their father had assets requiring protection, (b) their father was found to be a protected person for whom appointment of a conservator was proper, (c) they were appointed as the conservators of their father's estate and affairs, (d) Letters of Conservatorship should be issued to them, (e) they as conservators were judicially required to thereafter file a complete an accurate Inventory and Appraisement of their father's assets, and prepare and file regular annual accountings, with or without a bond. This suggestion, especially when viewed against the fabric of the distasteful relief sought, is without merit and runs contrary to the spirit and intentions of a guardianship and conservatorship.

Next, Decedent's Children suggest Subsection 11 of the Findings of Fact within the Order under Consideration are erroneous, because Decedent's Children did not admit their sworn statements were false at the time of any filings. This suggestion is without merit based on a review of the Transcripts, the record in the Probate Court, the Order under Consideration, and the written Answers to Requests for Admission of Decedent's Children.

Next, Decedent's Children suggest Subsection 13 of the Findings of Fact within the Order under Consideration are erroneous, because Melissa J. Arce was not aware her father was competent at the time of filing of the protective proceedings. This suggestion is without merit based on a review of the Transcripts, the record in the Probate Court, the Order under Consideration, and the written Answers to Requests for Admission of Decedent's Children.

Next, Decedent's Children suggest Subsection 16 of the Findings of Fact within the Order under Consideration are erroneous, because the three (3) daughters of John Percy

Newman, "after their filings, with knowledge before their filings, admitted their father was not mentally incompetent at the time they petitioned the probate court for their appointment." This suggestion is without merit based on a review of the Transcripts, the record in the Probate Court, the Order under Consideration, and the written Answers to Requests for Admission of Decedent's Children.

<u>Next</u>, Decedent's Children suggest Subsection 17 of the Findings of Fact within the Order under Consideration are erroneous, because the children of John Percy Newman did not admit the conservatorship proceedings were commenced to annul his marriage to Virginian K. Newman. This suggestion is without merit based on a review of the Transcripts, the record in the Probate Court, the Order under Consideration, and the written Answers to Requests for Admission of Decedent's Children.

<u>Next</u>, Decedent's Children suggest Subsection 19 of the Findings of Fact within the Order under Consideration are erroneous, because the mediation agreement was not used to "pressure Mr. Newman, an alleged incompetent, into signing agreements which were neither made nor agreed to at mediation and are not the product of mediation." John Percy Newman did not sign the agreement circulated at the mediation conference. A proposed consent order (without any handwritten amendments) remained unsigned for six (6) months following the mediation conference. John Percy Newman still had not signed the proposed consent order on June 8, 2010. The Probate Court scheduled a hearing to occur on July 16, 2010; for reasons unknown, this hearing was continued on June 15, 2010 and re-scheduled for August 3, 2010, and the Consent Order (with handwritten changes) was thereafter filed without a hearing. The hearing scheduled to occur on August 3, 2010, never occurred, and no testimony of any party or any evidence was presented. It is clear John Percy Newman, the person alleged to be

incompetent, refused to sign the "settlement agreement" circulated at the time of mediation. Thereafter, the guardian appointed to represent Mr. Newman, became completely disengaged after December 30, 2009, the date on which the mediation occurred. Four (4) months after the mediation conference, the Probate Court Judge informed Mr. Newman, not his Guardian, a hearing on the guardianship action and the conservatorship action would be scheduled in the event he did not execute and return the proposed consent order prior to May 17, 2010. While the exact degree of pressure brought to bear on John Percy Newman will never be known absent the hearing which can now never be held, the identity of the persons responsible for the pressure which was certainly brought to bear and produced the "amendments" to the agreements within the Consent Order is clear from the record. This suggestion is without merit based on a review of the Transcripts, the record in the Probate Court, and the Order under Consideration.

Next, Decedent's Children suggest Subsection 22 of the Findings of Fact within the Order under Consideration are erroneous, because a hearing in the Probate Court was not required to approve the agreements within the Consent Order. Decedent's Children seek the enforcement of agreements which are, by their pleadings, akin to the "will" of Decedent, in proceedings under which, if properly brought to their intended conclusion, expressly exclude the power to make a will. Decedent's Children seek to have a property settlement agreement filed within a Consent Order within a conservatorship action enforced after the death of their father. This result is prohibited under Section 62-5-408(3)(a), South Carolina Probate Code, a statute which states the Probate Court may directly exercise the power "in respect to the estate and affairs of protected persons" but only after (a) a hearing and (b) upon determining a basis for an appointment or other protective order exists, and (c) then only for the benefit of the person and of

his estate. This suggestion is without merit based on a review of the Transcripts, the record in the Probate Court, and the Order under Consideration.

Decedent's Children suggest the proceedings involving John Percy Newman never reached the point where a conservator was appointed, and therefore Section 62-5-408 is inapplicable. This ground is without merit and attempts to side step all the reasons which combine to reflect the distasteful nature of the proceedings commenced by some of Decedent's Children.

Next, Decedent's Children suggest Subsection 23 of the Findings of Fact within the Order under Consideration are erroneous, because John Percy Newman did enter into the agreements in question with advice or representation. This argument is based on the presumption of lucidity John Percy Newman enjoyed as a matter of law based on the failure of the Probate Court to appoint a Conservator. While this may be the case, there is no evidence of John Percy Newman having any contact with his appointed guardian between the date of the mediation conference and the date the conservatorship action and the guardianship action were dismissed. This suggestion is without merit based on a review of the Transcripts, the record in the Probate Court, and the Order under Consideration.

Next, Decedent's Children suggest Subsection 24 of the Findings of Fact within the Order under Consideration are erroneous, because Sam Scoville, Esquire, the guardian ad litem appointed for John Percy Newman, had involvement with Mr. Newman after December 30, 2009. This suggestion is without merit based on a review of the Transcripts, the record in the Probate Court, and the Order under Consideration.

Next, Decedent's Children suggest Subsections 27 and 28 of the Findings of Fact within the Order under Consideration are erroneous, because Ms. Arce's actions in having a Last

Will and Testament prepared for her father were not done with the purpose of disinheriting Mrs. Newman. In this case, a simple review of one document admitted into evidence bears testament to the accuracy of this finding. It is clear Virginia K. Newman is an excluded spouse by her omission within the terms of the Last Will and Testament prepared as instructed by Decedent's Children for their father's signature, a document which was never signed by John Percy Newman. This suggestion is without merit based on a review of the Transcripts, the record in the Probate Court, and the Order under Consideration.

Next, Decedent's Children suggest Subsection 30 of the Findings of Fact within the Order under Consideration are erroneous, because the agreements reached within the Consent Order were not ignored by the parties. This suggestion is without merit based on a review of the Transcripts, the record in the Probate Court, and the Order under Consideration.

Next, Decedent's Children suggest Subsection 32 of the Findings of Fact within the Order under Consideration are erroneous, because the agreements reached within the Consent Order do require John Percy Newman to make a Last Will and Testament. This suggestion is without merit based on a review of the Transcripts, the record in the Probate Court, and the Order under Consideration.

Next, Decedent's Children suggest Subsection 34, 35, and 38 of the Findings of Fact within the Order under Consideration are erroneous, because Virginia K. Newman has not attempted to minimize the legal administrative expenses, and has not acted in good faith, the administrative expenses and costs have not been reasonable and ordinary, and the payment of legal administrative fees were not made in good faith, were not necessary, and do not reasonably support the positions and actions as a fiduciary.

A review of the file and the record reflects the parties were and most probably will remain unable to agree on any proposed course of conduct. The actions of Decedent's Children and the results of these actions are memorialized in a variety of orders documenting the conflict between these parties. These orders include but are not limited to an Order Granting Motion to Compel Production of Documents and Things filed November 7, 2012; a Temporary Restraining Order filed October 16, 2012, and an Order Dissolving Ex Parte Temporary Restraining Order filed November 7, 2012. The polarization and conflict between the children and the second spouse of John Percy Newman are evident, have slowed and delayed the administrative process, and have increased the legal administrative costs. The size of the administrative expenses, and the payment of these expenses, formed the main foundation of two (2) failed attempts by Decedent's Children to remove Virginia K. Newman as the personal representative, for cause. See Order Granting Motion for Summary Judgment and Dismissing Petition for Removal of Personal Representative filed February 8, 2013. See ORDER DENYING APPOINTMENT OF A SPECIAL ADMINISTRATOR filed October 30, 2013.

The Probate Court granted a Motion for Summary Judgment in favor of Virginia K. Newman on the first attempt to have her removed as a fiduciary, wich Defendants have not therefrom appealed. The Order Granting Motion for Summary Judgment and Dismissing Petition for Removal of Personal Representative, with emphasis added, in part states:

> Admittedly, an increase in the administrative costs depletes the assets of the Estate, and diminishes the assets available for eventual distribution, but this depletion affects all persons otherwise entitled to these assets, Virginia K. Newman included. The depletion of assets is an unfortunate but predictable result of conflict, and **the acts of the Petitioners have contributed to the size of the legal administrative fees**. Waste is a two-edged sword and **the legal administrative expenses paid by Virginia K. Newman, as the personal representative, would no doubt have been considerably less but for the various petitions, motions, discovery, and legal positions asserted by the Petitioners, and the consequent need for the fiduciary to defend against those**

> **positions**. The size of the legal administrative expenses incurred by the Estate are directly related to the cost of the **conflict exacerbated by the Petitioners**, and the need to pay and the payment of these expenses also serves to diminish whatever distribution Virginia K. Newman would otherwise be entitled to, even if the Petitioners prevail in their **attempts to specifically enforce the agreements within the Consent Order as outlined in their most recent Affidavits.**
>
> At this juncture, the Petitioners cannot be heard to complain of the size of the legal administrative expenses, or use their existence under these circumstances as a foundation for the cause necessary to remove Virginia K. Newman as a fiduciary. Against this backdrop, **I conclude the legal administrative expenses were paid by the fiduciary for acts of the fiduciary to account and to preserve the estate, are a direct result of her good faith attempts to administer the Estate and to take appropriate defensive positions to the assertions advanced by Petitioners, appear to be reasonable, and are related to the need of the appointed fiduciary to discharge her general duties of a personal representative**. Order Granting Motion for Summary Judgment and Dismissing Petition for Removal of Personal Representative filed February 8, 2013, Pages 11 – 12.

The issue of administrative legal fees and costs through the date of the ORDER DENYING APPOINTMENT OF A SPECIAL ADMINISTRATOR filed October 30, 2013, has been previously litigated to finality between the same parties and ended with a grant of summary judgment from which no appeal has been taken. This suggestion is without merit based on a review of the Transcripts, the record in the Probate Court, and the Order under Consideration.

Next, Decedent's Children suggest Subsection 46 of the Findings of Fact within the Order under Consideration are erroneous, because "[t]he children of Mr. Newman were unable to articulate any reasonable basis for their opposition, and all declined the opportunity to place their evidence on record, except to stipulate to their general opposition." The finding of fact as issue states as follows:

> While the family member, co-tenant, and potential purchaser who submitted the Offer to Purchase has offered to lend funds to the Estate, and to purchase the property in accordance with the terms of the Offer to Purchase, Transcript of Record Two at Page 107, Lines 9-23, all of the children of Mr. Newman are opposed to the sale of any property owned by the Estate. Transcript of Record Two at Page 96, Lines 6-11; Page 103, Lines 2-9; and Page 111, Lines 4-23. The

> children of Mr. Newman were unable to articulate any reasonable basis for their opposition, and all declined the opportunity to place their evidence on record, except to stipulate to their general opposition.

The stipulation as issue was made by the attorney for Decedent's Children. A review of the Transcript of the second hearing reflects this suggestion is devoid of merit.

Third, Decedent's Children suggest the undersigned erred as a matter of law because they believe the outcome in the case turns on their breach of a fiduciary duty owed by them to their father created as of the date of commencement of the conservatorship action and the guardianship action. The error of law, supposedly, lies in the conclusion the substance of the terms of agreements within the Consent Order reflect a breach of the fiduciary duties which they contend are not owed by them to their father for want of and until a judicial finding of mental incapacity. Further, Decedent's Children suggest the error lies in the conclusion the terms within the agreements within the Consent Order reflect the egregious failure of Decedent's Children, after alleging his mental incompetence, to protect their father from themselves.

Decedent's Children are mistaken by believing the outcome of this case turns on whether or not the act of filing the pleadings in the conservatorship action and the guardianship action, accompanied by sworn Verifications and Qualifications and Statements of Acceptance, creates a fiduciary duty owed by them to their father as of the time and date of filing. Decedent's Children attempt to change the focus from the underlying causes of action in equity to a focus whether or not they owed their father a fiduciary duty, and if so, the date of its creation, must fail. Decedent's Children hope to elevate one of many findings to alter the standard of review by suggesting the existence of a fiduciary duty is a question of law for the court based on Vortex Sports & Entm't, Inc. v. Ware, 378 S.C. 197, 207, 662 S.E.2d 444, 450 (Ct. App. 2008), and to then suggest a claim of a breach of fiduciary duty is an action at law, must fail. The standard of

review is proper as outlined above. This suggestion is without merit based on a review of the Transcripts, the record in the Probate Court, and the Order under Consideration.

Fourth, Decedent's Children suggest the undersigned erred as a matter of law in concluding the terms of the Consent Order is an impermissible property settlement agreement which exceeded the relief the Probate Court is authorized to grant. Decedent's Children seek to enforce the terms of a property settlement agreement filed within a Consent Order filed within a conservatorship action after the death of their father. This result cannot be supported under the pleadings filed or the governing statutes of South Carolina. Such a result is prohibited under Section 62-5-408(3)(a), South Carolina Probate Code, a statute which expressly states the Probate Court may only directly exercise the power in respect to the estate and affairs of "protected persons" but then only after a hearing and upon determining a basis for an appointment or other protective order exists, and then only for the benefit of the person and of his estate. John Percy Newman was not a protected person; a hearing in the case was never held; the terms of the agreement within the Consent Order are not for the benefit of John Percy Newman except to stop the conservatorship action and to stop the guardianship action. The scope and breadth of the agreements within the Consent Order exceed the types of orders which are permitted under a conservatorship proceeding as limited and as outlined within Section 62-5-408(3), South Carolina Probate Code. This suggestion is without merit based on a review of the Transcripts, the record in the Probate Court, and the Order under Consideration.

Fifth, Decedent's Children suggest the undersigned erred as a matter of law insofar as Order appealed from was wholly founded upon unjust enrichment. The prayer in the Petition filed by Decedent's Children requests the Probate Court to require the personal representative to transfer all real estate property to his four (4) children based on the agreements

within the Consent Order, an equitable cause of action; the refusal of this relief, Decedent's Children argue, would result in Virginia K. Newman being unjustly enriched. The relief ordered in the Probate Court must be based on unjust enrichment because specific performance could not be ordered under the terms of the statute alleged, one applicable to compromise agreements between fiduciaries following death. The Order under Consideration, among other conclusions, makes it clear the agreements within the Consent Order were unenforceable for numerous reasons. This suggestion is without merit based on a review of the orders issued and specifically referenced in the Order under Consideration.

Sixth, Decedent's Children suggest the undersigned erred as a matter of law because the agreements within the Consent Order are not specifically enforceable prior to or following the death for want of consideration, and the agreements within the Consent Order are otherwise void for being contrary to public policy. Decedent's Children's theory of want of consideration is rooted in the concept of forbearance. Decedent's Children argue the Consent Order reflects the agreement of the parties to withdraw their claims and to end all litigation, and suggest their forbearance to exercise their legal right to continue the litigation under the conservatorship action and the guardianship action constitutes valuable consideration. This argument is both distasteful and circuitous, and ignores the purposes for which guardianship and conservatorship proceedings are commenced. A mere glance at the putative agreements within the Consent Order reflects they are patently contrary to the best interests of Mr. Newman and violate the obligations of the two (2) fiduciaries who claimed their intentions were to protect their father. Many if not all the procedural safeguards designed to protect John Percy Newman, an alleged incompetent person, were manipulated and controlled by at least two (2) of the children of John Percy Newman. A full hearing on the merits of the agreements within the

Consent Order would have revealed this but did not occur. The agreements within the Consent Order reflect John Percy Newman received far less than he gave – the cessation of litigation in exchange for the conveyance of all his property to his children.

Seventh, Decedent's Children suggest the undersigned erred as a matter of law because the agreements within the Consent Order are not unenforceable based on procedural and substantive errors of law. This catch all suggestion is without merit based on a review of the orders issued and specifically referenced in the Order under Consideration.

Eighth, Decedent's Children suggest the undersigned erred as a matter of fact and law because the agreements within the Consent Order are enforceable due to the unclean hands of Virginia K. Newman, and for policy concerns. There is no evidence of any unclean hands on the part of Virginia K. Newman. Further, Decedent's Children cannot first plead the doctrine of unclean hands in support of the foundation of the equitable relief granted to them in the Probate Court, only to then simultaneously suggest error because the equitable doctrine has no application to what is mischaracterized by them as an action at law. This suggestion is without merit based on a review of the orders issued and specifically referenced in the Order under Consideration.

Ninth, Decedent's Children suggest the undersigned erred as a matter of fact and law because the Order under Consideration permits the Personal Representative to sell the real property of the Estate. The Order Denying Petition for Sale and/or Mortgage of Real Property in Aid of Assets, the second order which is reversed by the Order under Consideration, requires the real property owned by John Percy Newman to be conveyed to Decedent's Children without first addressing whether or not the real property, as assets of the Estate, should be sold given the need to satisfy the past, current and future administrative expenses of the Estate, and the claims

against the Estate. The record clearly reflects the personal representative is without sufficient liquid assets to pay these expenses unless personal property, which was authorized to be sold, and real property as well, are sold.

The real property owned by the decedent is inherited by his heirs at law subject, nevertheless to the debts of the decedent, including claims and administrative fees and expenses generated in good faith by the Personal Representative. The Personal Representative of the Estate needs to sell real property in aid of generating assets to pay administrative expenses, because the real property owned by Mr. Newman stands for the payment of the debts of the decedent and the lawful administrative expenses of the Estate, and is subject to sale. S.C. Code Ann. Section 62-3-711(b), states a personal representative may not sell real property of the estate except as authorized pursuant to the procedure described in Section 62-3-1301 et. seq. S.C. Code Ann. Section 62-3-1302 authorizes the Probate Court to grant to the Personal Representative the authority to sell the real estate of John Percy Newman in the event the personal estate available to pay the debts of the Estate is insufficient to pay the outstanding administrative expenses. This is the case here, and this suggestion is without merit based on a review of the Transcripts, the record in the Probate Court, and the Order under Consideration.

Tenth, Decedent's Children raise the law of the case as a ground to alter or amend the Order under Consideration. Virginia K. Newman, they argue, did not challenge the validity of the Consent Order entered to end the conservatorship action and the guardianship action, and did not file a Motion for Reconsideration, and did not file an appeal in either one or both actions; therefore, they argue, she is bound by the terms of the unchallenged Consent Order which has become "the law of the case." See ML-Lee Acquisition Fund L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997) (un-appealed ruling is law of the case); Buckner v.

Preferred Mut. Ins. Co., 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970) (unchallenged ruling, "right or wrong, is the law of this case and requires affirmance.")

Decedent's Children suggest the issue of their father's mental capacity was actually litigated, then directly determined in the Consent Order, and he was judicially declared to be mentally competent by reason of the dismissal of the two (2) actions which allege otherwise. For these reasons, Decedent's Children suggest, the Order under Consideration should be reconsidered based on the doctrine of Res Judicata. In the case at bar, Decedent's Children admit the alleged mental incapacity of their father was raised, recognize a full hearing on the merits of the terms contained within the Consent Order never occurred, argue a judicial finding on the mental condition of John Percy Newman nevertheless occurred based on the absence of the issuance of Letters of Conservatorship, and then recognize the parties at some point after the mediation conference agreed John Percy Newman was not mentally incompetent for all purposes; on this foundation, Decedent's Children contend the issue of whether or not John Percy Newman was mentally incapacitated was actually litigated. Decedent's Children then suggest Virginia K. Newman participated as a necessary party in the guardianship action and in the conservatorship action, and her entry into the agreements within the Consent Order now bar her from raising any defense to the enforcement of the terms of the agreements within the Consent Order after the death of her husband. The law of the case cannot, under the facts of this case, be bootstrapped to support enforcement of the agreements within the Consent Order appealed from the Probate Court for all the reasons expressed in the Order under Consideration, and herein.

The doctrine of Res Judicata provides that final judgment on the merits of an action precludes the parties or their privies from litigating claims that were or could have been

raised in that action. Venture Engineering, Inc. v. Tishman Const. Corp. of South Carolina, 360 S.C. 156, 600 S.E.2d 547 (Ct. App. 2004), reh'g denied, (Aug. 24, 2004). Res Judicata bars not only the claims that were actually raised in a prior action, but also those issues which might have been raised in the former suit. RIM Associates v. Blackwell, 597 S.E.2d 152 (S.C. Ct. App. 2004). Res Judicata requires: "(1) identical parties or their privies; (2) identity of subject matter; and (3) adjudication of the issue in the former suit." Ford v. Watson, 282 S. C. 66, 316 S. E. 2d 429 (Ct. App. 1987).

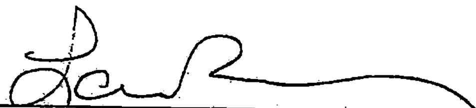
Collateral Estoppel occurs when a final judgment has been reached on the merits in a prior suit. If, in that prior suit, a party had a full and fair chance to litigate an issue, and it has been necessarily and finally determined against him, he will be estopped to relitigate the issue even against a stranger to the action. C. B. Marchant Co. v. Eastern Foods, Inc., 756 F. 2d 317 (4th Cir. 1985); Graham v. State Farm Fire and Cas. Ins. Co., 277 S. C. 389, 287 S. E. 2d 495 (1982). A review of the history leading up to the Order under Consideration, and the elements of Res Judicata and Collateral Estoppel, reflect this suggestion is without merit.

The Motion to Alter or Amend, and the Brief submitted, and the arguments of the attorneys for the parties, following deliberation, do not raise any issue the undersigned misunderstood, failed to fully consider, or failed to rule on. Having duly considered the Motion to Alter or Amend, I determine the ORDER REVERSING ORDER GRANTING ENFORCMENT OF PRIOR COURT ORDER, AND ORDER DENYING PETITION TO SELL AND MORTGAGE REAL PROPERTY filed of record November 12, 2014, is fully supported by the law and the evidence and is hereby ratified and reconfirmed. For these reasons, the MOTION TO RECONSIDER/ALTER OR AMEND THE FINDINGS OF THE COURT AND THE ORDER REVERSING ORDER GRANING ENFORCEMENT OF PRIOR COURT

ORDER AND ORDER DENYING PETITION TO SELL AND MORTGAGE REAL PROPERTY, filed December 1, 2014, be and hereby is denied.

AND IT IS SO ORDERED.

Dated at Conway, South Carolina, this 3 day of March, 2015.



_______________________________ (L.S.)
The Honorable Larry B. Hyman, Jr.
Presiding Judge for the Fifteenth Circuit