

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEALS FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge
Tamara Curry, Probate Court Judge

Appellate Case No. 2014-002028
Circuit Case No. 2011-CP-10-7821

LISA FISHER.....Appellant

v.

BESSIE HUCKABEE.....Respondent

INITIAL BRIEF OF APPELLANT

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SC Court of Appeals

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I.
INTRODUCTION

Alice Shaw Baker's intention was that her monies were to be used for Animals and Animal Charities. Appellant and Proposed Personal Representative Betty Fisher filed an action to demonstrate that the Will offered by Respondent Bessie Huckabee was revoked, and to challenge it by way of a Will Contest. Appellant's commitment to ensuring that her beloved great aunt's wishes are honored are at the core of this litigation, and the related Will Contest and appeals herein.

This is one in three appeals related to the orders of the probate court in the *Conservatorship of Alice Shaw Baker*, Probate Case no. 2008-GC-10-088. These orders relate to the Conservator Lisa Fisher's Accountings and will decide the duties owed by a conservator to a conservatee's estate, after her death. These specifically involve orders dated September 28, 2011 appointing a Special Fiduciary, denying Lisa Fisher's Motion to Strike, denying Fisher's Motion for Reconsideration of the Court's Order of September 28, 2011, and ordering that Appellant have 30 days to turn over estate assets to the appointed Special Fiduciary, and ending the Circuit Case. (R. ___, Notice of Appeal)

While these appeals involve to the same tragic factual issues related to Alice Shaw Baker's conservatorship, pending litigation related to a Will contest and revocation of Ms. Shaw Baker's Will, and the safeguarding of her estate assets pending resolution of these matters, each case involves slightly different legal issues. The errors of the Probate Court were not rectified by the Circuit court, so Appellant filed this appeal for this Court's review.

Pursuant to motion by Appellant, this court consolidated the record on appeal, however all briefing will be separate.

Appellant prays that this Court reverse the following Issues on Appeal:

II.
STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court's Failure to Consider Appellant's Statement of Grounds prior to Oral Argument, and Failure to reverse the Probate Court's Order amount to an abuse of discretion and a deprivation of due process?
2. Did the Pending Appeal in the South Carolina Supreme Court Preclude the Probate Court from Appointing a Special Fiduciary?
3. Did the Pending Appeal in the South Carolina Supreme Court preclude the Probate Court's Order Appointing a Special Fiduciary, because it attempts to a Review another Judge's Order in Violation of Rule 60 and Decisional Law.
4. Once a Personal Representative is Appointed, Does the Probate Court have Jurisdiction to Appoint a Special Fiduciary under Probate Code § 62-7-704 (e)?
5. Was it an Abuse of Discretion for the Court to Consider Bessie Huckabee's Motion, when her Standing is on Appeal, and when it amounts to a Removal without Cause of Appellant?
6. Did The Probate Court's Proceedings as Protective Proceedings end at Alice Shaw Baker's Death, thereby Precluding the Court from considering the Appointment of a Special Fiduciary?
7. Did the Probate Court Abuse its Discretion in its Failure to Rule on Appellant's Objections to Respondent's Motion to Appoint Special Fiduciary and Made at the Hearing?
8. Was the Probate Court's Finding that Appellant did not have Authority to Pay Expenses on Behalf of the Estate Erroneous, and Demonstrate that there was no Emergent Need?
9. Does the Legal Principal Governing Laches Demonstrate that there is no "Emergent need" under S.C. Code Ann. § 62-7-704(e) and Preclude the Appointment of a Special Fiduciary?
10. Did the Probate Court Abuse its Discretion by Refusing to Strike Respondent's Motion to Appoint Special Fiduciary due to her failure to comply with Rule 11, SCRPC?
11. Did The Probate Court's Abuse its Discretion in Failing to Grant Appellant's Extension of Time to Deliver Proper?
12. Did the Probate Court Err in hearing the Motion to Appoint a Special Fiduciary when the record disclosed that interested parties, including the Attorney General of

South Carolina and Heir at Law Betty Fisher, had not received statutory notice of the Proceedings, under S.C. Code Ann. § 62-3-614 and the United States Constitution, Amends. V and XIX, § 1 and the South Carolina Constitution, Art. 13?

III. STATEMENT OF THE CASE

A. *Summary of Facts and Pleadings*

On February 25, 2009, Alice Shaw Baker died. (R._____, Death Certificate) Her great niece, Appellant Lisa Fisher, Esquire, had helped her since involuntary commitment proceedings were initiated without notice to her family, including her niece, Appellant Betty Fisher (“Appellant”). (R._____, Petitions for Incapacity, Emergency, and Conservatorships, etc.) Though she was already conserved, the family rushed to her side from California. (R._____, Petition for Appointment of Successor) After a hearing, on October 29, 2008, Lisa Fisher was appointed her guardian and conservator. (R._____, Order Appointing Lisa Fisher as Guardian and Conservator) After her appointment, Lisa Fisher traveled regularly to South Carolina to visit her great aunt, and ensure her health and well being. (R._____, Motion for Approval of Conservator fees)

Appellant also visited with Ms. Shaw Baker before her death, and knew that she had revoked her Will, and reaffirmed her desire that all of her property benefit these animal charities. (R._____, Motion for Reconsideration, p. 7)

After Ms. Shaw Baker’s death, Appellant initiated litigation on April 27, 2009 in the Charleston County Probate Court and removed it to the Charleston County Court of Common Pleas on May 13, 2009 (Case no. 2009-CP-10-3010). (R._____, Opposition to Petition for Discharge) These proceedings included Alice Shaw Baker’s family’s attack of the validity of the informal appointment of Respondent Bessie Huckabee (“Respondent”), the Will Contest, the

appointment of a Special Administrator, the effect of Attorney Peter Kouten's ex-parte communication in the lower court proceedings, and bond provisions. (Pursuant to SCACR 201(d), Request for Judicial Notice, Court of Appeals, Case no. 2009-CP-10-03010)

Appellant obtained extensions regarding Ms. Shaw Baker's property from the Probate Court pending resolution by the Supreme Court and proper trial of the Will Contest, and at all times maintained proper control of Ms. Shaw Baker's property.¹

After nearly three years of preservation of the status quo by Appellant's daughter Lisa Fisher, while these matters were before the Supreme Court, Respondent filed her *Motion for Special Fiduciary*. (R. ____, Respondent motion) No affidavits were attached to the motion. (The certificate of service stated that it was served on May 19, 2011, however the letter to counsel was dated May 20, 2011). Respondent knew that the appointment of a Third Party Special Fiduciary, would affect the Estate litigation and was contrary to Ms. Shaw Baker's desires that the monies be used solely for Animal Charities. (R. __)

Appellant filed several pleadings addressing the deficiencies and the impropriety of granting Respondent's motion, including affidavits. These included her *Motion to Strike and Memorandum in Opposition to Bessie Huckabee's Motion to Appoint Special Fiduciary* dated June 1, 2011. (R. ____, *Motion to Strike*). She also filed *Objections by Lisa Fisher to Proposed Order by Bessie Huckabee* dated September 21, 2011. (R. ____, *Objections*), *Objection to Court's Consideration of Huckabee's Motion to Appoint Special Fiduciary* dated August 12, 2011 (R. ____, *Objection to Court's Consideration*), *Objections by Lisa Fisher, Esq. To Second, Duplicate Proposed Order by Bessie Huckabee* dated September 29, 2011, and a *Motion of Reconsideration of Probate Court Order Dated September 28, 2011 Appointing Special*

¹ As will be evidenced in future proceedings, Appellant has advanced all monies for the protection of Alice Shaw Baker's properties to ensure that no losses are incurred and that her desires that her monies benefit Animal Charities. (See Restatement (Third) of Trusts, § 34))

Fiduciary and Lisa Fisher's Opposition to Motion to Appoint Special Fiduciary; Affidavit of Lisa Fisher; Affirmation of Consultation filed October 7, 2011. (R. ____, Motion for Reconsideration)

The court set the Motion for Appointment of a Special Fiduciary for hearing on August 17, 2011. (R. ____) At the hearing the Court appointed a Special Fiduciary, J. Heyward Harvey, Esquire, without any information about his record, any potential conflicts of interest, and/or his relationship to the parties.

B. Probate Court's Failure to Allow Testimony and Lack of Evidentiary Hearing

At the hearing, Appellant's counsel objected to Respondent's counsel, Peter Kouten,² discussion of contested issues relating to appellant's accounting. (R. ____, Reporters' Transcript, filed on December 4, 2011, "R.T." 6: 24-25 and 7: 1-12)

Over Appellant's objection, the court allowed Respondent's Counsel to discuss the accounts (without allowing him to "go into specificity" but "just generalities"). (R. ____, R.T.8:4-8)

During argument, Appellant's counsel requested authority to have Appellant speak, which the court denied as follows:

"THE COURT: No, this is a motion, and this is really between the attorneys, and I just want to know what your position is, legal position, as to what her legal authority is to still disburse moneys when in fact the conservatorship has -- when she has been discharged, and the only thing the Court has been looking for are the annual accountings."
(R. ____, R.T., 16: 7-14)

² Appellant does not waive her objections to the continuing representation of Peter Kouten as counsel to Huckabee, in light of his non-waiveable representation of Alice Shaw Baker in the underlying conservatorship case where he was court appointed counsel and a visitor.

Without taking any evidence or allowing any testimony, or even taking judicial notice of any proceedings, during further argument concerning the court's lack of jurisdiction, the court stated:

“THE COURT: I am just trying to determine procedurally where we are... I am interested in reference to what is happening with the conservatorship accounts.” (R.____, R.T., 24: 22-25 and 25: 1-14)

After Respondent's counsel made numerous statements and accusations, Appellant's counsel stated:

“MR. COOPER: Your Honor, without going through all of them, there are a lot of things that Mr. Kouten said in terms of factual representations about the expenditure and so forth, we disagree with and certainly we think are beyond the scope of this hearing.” (R.____, R.T., 34: 18-23)

Appellant contends that the court's failure to allow Appellant to testify, to require Respondent to present admissible evidence, or to set her *Motions for Reconsideration* on calendar precluded her from responding to the court's concerns and violated *her* Due process rights. Appellant filed an affidavit in her *Motion for Reconsideration*, and Respondent did not object nor did she oppose the Motion. However, the record is silent as to whether the court considered said affidavit. The Probate Court abused its discretion by Ordering the Appointment of a Special Fiduciary, and by denying her objections, the motion to strike, and the motion for reconsideration, and as such, the court's actions all mandate reversal.

C. Probate Orders

The probate court's order dated September 28, 2011 appointing Special Fiduciary made the following *Finding of Facts and Conclusions of Law* in pertinent part:

“This court has jurisdiction over this matter and venue is proper. Respondent Lisa fisher was discharged as Conservator by Order of this Court on May 11, 2009. Movant Bessie Huckabee has argued that requests for account of estate assets have been made on several occasions and these accountings had been denied. Lisa Fisher continues to object to the jurisdiction of this Court with regard to the Estate of Alice Shaw Baker, in part due to the fact that any ruling by this court would intrude on decisions properly to be made in the Supreme Court and/or the Circuit Court. Respondent filed a final accounting on May 26, 2009. Respondent has sought and been granted extensions of time to turn over the estate and has held these estate assets in trust. Respondent has, on June 1, 2011, filed with the Court annual accountings for the estate assets for the years 2009 or 2010.

[¶] In reviewing the 2009 and 2010 accountings, it is determined that there are real property assets in the estate of decedent Alice Shaw-Baker and there are continuing requirements for upkeep and repair on this property. Further, review of the filed accountings indicate that there are needs for authority to deal with third parties with regard to this estate. Bessie Huckabee, as personal representative of the estate of decedent Alice Shaw-Baker (2009-ES-10-0378) is currently respondent to pending probate actions including action to appoint a special administrator. The Court finds an emergent need for authority as to these estate assets.

[¶] Whether or not a vacancy exists as to administration of these assets held in trust, the Court has the authority to appoint a special fiduciary. (South Carolina Probate code 62-7-704(e))

[¶] THEREFORE, based on the foregoing, it is hereby

[¶] **ORDERED, ADJUDGED AND DECREED** that Respondent’s motion to strike and motion for extension to turn over estate assets be DENIED and that a special fiduciary be appointed, and it is further

[¶] **ORDERED, ADJUDGED AND DECREED** that Respondent’s motion to strike and motion for extension to turn over estate assets be DENIED and that a special fiduciary be appointed, and it is further

[¶] **ORDERED, ADJUDGED AND DECREED** that Heyward Harvey, Esquire, be appointed Special Fiduciary for the estate assets of Alice Shaw-Baker, and it is further

[¶] **ORDERED, ADJUDGED AND DECREED** that Heyward Harvey receive all assets held by Lisa Fisher within fifteen days of execution of this Order. That Mr. Harvey:

- a. marshal all assets, review accounts and 2009 and 2010 accountings with all the powers and discretions as authorized by law with regard to same.
- b. Seek formal approval of the final accounting and 2009 and 2010 accountings with authority to amend same, if necessary, and further, seek to close the conservatorship estate.
- c. review needs for maintenance, taxes and insurance on real property with authority as fiduciary over same.

- d. maintain authority and control over all estate assets.
- e. keep records of his time devoted to this file and seek approval of his fees through separate order of this Court, and it is further

[¶] **ORDERED, ADJUDGED AND DECREED** that Mr. Harvey's appointment shall terminate upon final determination of proper authority over administration of the estate of Alice Shaw-Baker." (R.____, Order Appointing Special Fiduciary)

On or about October 24, 2011, the Probate Court served its *Order Denying Motions for Reconsideration and Opposition of Probate Court Order Appointing Special Fiduciary, Motion to Strike, etc.* which states in pertinent part:

"... Petitioner asks the Court to reconsider the Court's Order, dated September 28, 2011. This motion is based on the Court's order concerning the Motion to Appoint a Special Fiduciary for Conservatorship Assets filed by Bessie Huckabee dated May 20, 2011 by and through her attorney, Peter A. Kouten, Esq. in response to Lisa Fischer [sic] 's Motion for Extension filed May 13, 2011, and her Motion to Strike file [sic] June 1, 2011 by and through her attorney, John Hughes Cooper, Esq. This Court's order denied the Respondents Motion to Strike and Motion for Extension to turn over assets and further ordered that a special fiduciary be appointed. The court further ordered that J. Heyward Harvey, Esq. be appointed Special Fiduciary for the estate assets of Alice Shaw Baker and that Lisa Fischer [sic] within fifteen days turn over these assets to Heyward Harvey, Esq.

[¶] At this time, having reviewed the Motions and the record, the Court hereby denies Respondents Motions. The probate court has jurisdiction of proceedings initiated by interested parties concerning the internal affairs over protective proceedings and guardianship proceedings (South Carolina Probate Code 62-5-102) This Court finds that Lisa Fischer's [sic] fiduciary role as Guardian and Conservator was terminated by this Court's Order dated May 11, 2009. Since Ms. Fischer's [sic] discharge she has held estate assets; has requested and been granted several extensions to perform the same, due to the ongoing litigation in the estate matter. The Court became aware at the August 17, 2011 hearing that Lisa Fischer [sic] has continued to expend funds since Alice Shaw-Baker's death from the Conservator accounts of Alice Shaw Baker.

[¶] The Court finds that Lisa Fischer [sic] has been terminated as Conservator and no longer has the authority to withdraw or pay expenses out of the estate which is being withdrawn without authorization from the Probate Court. The decedent's estate is seized with real property. On the court's own motion, to preserve the estate of Alice Shaw-Baker, this Court is freezing all money and assets in the name of Alice Shaw-Baker.

THEREFORE, IT IS ORDERED ADJUDGED AND DECREED THAT:

1. The Motion for Reconsideration of Probate Order Dated September 28, 2011 Appointing A Special Fiduciary, the Motion to Strike and Opposition to the Motion to Appoint A Special Fiduciary, the Renewed Motion for Approval of Fees and Expenses of Guardian and Conservator and the Motion to Set Aside Void Probate Court Order dated September 28, 2011 Appointing A Special Fiduciary is hereby Denied; it is further ordered
2. That Alice Shaw-Baker has funds currently in a number of banking institutions under the name of Alice Shaw-Baker Conservatorship and Lisa Fischer [sic] Conservatorship or individually. It is ordered that the assets in any and all accounts in the name of Alice Shaw Baker Conservatorship, or individually being held with any banking institution shall be frozen until J. Heyward Harvey, Jr., Esq. as Special Fiduciary takes control of said accounts.” (R. _____, Orders denying)

D. Timely Appeal by Appellant of Probate Orders to the Circuit Court

On October 25, 2011, Appellant filed her *Notice of Intention to file Appeal* pursuant to S.C. Code Ann. 62-1-308(a). (R. _____, *Notice of Intention*) The time for filing said *Notice of Intention to file Appeal* is 10 days after written entry of notice, here October 24, 2011 on the *Motion for Reconsideration*.

In light of the fact that Appellant filed her *Motion for Reconsideration*, said time was extended pursuant to SCRCP 59(f) and SCACR 203(b)(1) by Appellant's *Motion for Reconsideration*. (See also *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004) ("A timely post-trial motion, including a motion to alter or amend the judgment pursuant

to Rule 59(e), SCRCP, stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such motion."

Appellant filed her Statement of Grounds on December 9, 2011. (R. ____, Statement of Grounds) Respondent filed her Notice of Appearance on March 20, 2014. (R. ____, Notice) . She failed to file any timely briefing or opposition to the statement of grounds. Thereafter, the court set the matter for hearing on July 16, 2014.

E. Timely Appeal by Appellant of Circuit Court Orders

On or about August 18, 2014, the court issued its Form 4 judgment on Appellant's appeal.

The ruling was as follows:

"Statement of Judgement by the Court: Appellant Fisher's appeal, filed on October 25, 2011, came before this Court on July 16, 2014. Upon a review of the case, this Court affirms the probate court's order of September 28, 2011, appointing a Special Fiduciary and denying Lisa Fisher's Motion to Strike and Opposing the Motion Appointing Special Fiduciary, and affirms the probate court's order of October 14, 2011, denying Lisa Fisher's Motion for Reconsideration of the court's order of September 28, 2011. Appellant Fisher has thirty (30) days from the date of this Order to turn over estate assets to the appointed Special Fiduciary, Heyward Harvey."

Thereafter, Appellant timely filed her *Notice of Appeal* on September 19, 2014.(R. ____, Notice of Appeal) Thereafter, Appellant filed her *Motion to Consolidate the Record* for judicial economy and to determine appropriate briefing. This Court granted the *Motion to Consolidate*. The record on all three (3) appeals is the same, however due to the differing Legal issues, the briefing is separate. As set forth herein, Appellant contends these orders must be reversed.

IV.
ARGUMENT

A. Standard of Review

It is well settled that the standard of review for Appeals from the probate court are governed by the provisions of the Probate Code. (*Matter of Howard*, 315 S.C. 356, 360, 434 S.E.2d 254, 256 (1993).) The Probate Code provides that a final order or decree of the probate court may be appealed to the circuit court. (S.C. Code Ann. § 62-1-308 (2009).)

If the proceeding in the probate court is in the nature of an action at law, neither the circuit court nor the appellate court may "disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them." (*Neely v. Thomasson*, 365 S.C. 345, 349-50, 618 S.E.2d 884, 886 (2005).)

Also, an issue regarding statutory interpretation is a question of law. (*Univ. of S. Cal. v. Moran*, 365 S.C. 270, 274-75, 617 S.E.2d 135, 137 (Ct. App. 2005). A petition to remove personal representative is in equity. (See *Dean v. Kilgore*, 313 S.C. 257, 259 (Ct. App. 1993).)

If the proceeding in the probate court is in the nature of an action at law, neither the circuit court nor the appellate court may "disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them." (*Neely v. Thomasson*, 365 S.C. 345, 349-50, 618 S.E.2d 884, 886 (2005).) The Probate Court's refusal to allow Appellant to testify supports her position that this court must reverse the findings of fact, because "there is no evidence to support them." (*Id.*)

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Review of these orders discloses that there was no evidence to support the order, because the court did not allow testimony, Respondent failed to present any admissible evidence, objections were made to probate court's procedures. These due process failures, accompanied by the legal duty of a conservator to maintain the property pending final "receipt" by the proper Personal Representative (S.C. Code Ann. § 62-5-425(d)) all precluded the Probate court orders.

1) **The Circuit Court's Failure to Allow Oral Argument Interfered with its Ability to Reverse the Probate Court's Erroneous Orders and Deprived Appellant of Due Process**

At the Circuit Court's hearing on July 16, 2014, the Court stated:

“Yes, I've got the briefs. I have not looked at them but I have got them here. I will probably have to look at them before I make a decision. But go ahead...You don't have to reiterate everything that's in there, okay, because I will read them...Or my law clerk and -we both will probably read them.”

(R. _____, 7/16/14 R.T. p. 6-7)

The court concluded the argument without allowing counsel to complete the record, although the court did reassure the parties that he would review the memorandum. (R. _____, 7/16/14 R.T. p. 6-7) While it is true that the law provides:

“the right of oral argument as a matter of procedural due process **varies from case to case in accordance with differing circumstances**, as do other procedural regulations. Certainly the Constitution does not require oral argument in all cases where only insubstantial or frivolous questions of law, or indeed even substantial ones, are raised. Equally certainly, it has left wide discretion to Congress in creating the procedures to be followed in both administrative and judicial proceedings, as well as in their conjunction.” (See *FCC v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 272 (1949), emphasis added)

Here, the court stated that it had not read the briefs, therefore the threshold questions as to the need for oral argument and the circumstances that gave rise to the substantial questions of law,

raised here, could never be addressed, and mandated a different conclusion that oral argument was necessary. Appellant contends due process was implicated, and that she was deprived of these necessary protections.

Finally, the Circuit Court's deprivation of further argument on the records, prevented Appellant from curing any misunderstanding the court may have had about the complicated and important issues raised in this case. It also prevents Appellant from demonstrating that the court's ultimate judgment in this case was based on erroneous application of the law. In light of the fact that: "[b]eing an equity case, the circuit court, sitting as an appellate court, had jurisdiction to make findings in accordance with its own view of the preponderance of the evidence." (*Eagles v. S.C. Nat'l Bank*, 301 S.C. 402, 408 (Ct. App. 1990).) The court made no findings, and Appellant contends this coupled with the underlying failure of the probate court to make findings based on appropriate evidence is fatal to the orders, and reversal is mandated.

2. At the time of the Order. The Probate Court did Not have Jurisdiction to Appoint a Special Fiduciary.

Appellant contends that the Probate Court had no jurisdiction to hear this matter, because when a matter is on appeal the lower court loses jurisdiction pursuant to Rule 203, SCACR:

“Upon the service of the notice of appeal, **the appellate court shall have exclusive jurisdiction over the appeal**; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal. (Rule 205, SCACR, emphasis added.)

Further, pursuant to S.C. Code Ann. § 62-1-308 (c):

“When an appeal according to law is taken from any sentence or decree of the probate court, **all proceedings in pursuance of the order, sentence, or decree**

appealed from shall cease until the judgment of the circuit court, court of appeals, or Supreme Court is had. If the appellant, in writing, waives his appeal before the entry of the judgment, proceedings may be had in the probate court as if no appeal had been taken.” (Emphasis added)

At the time of the hearing, the issue of the proper appointment of the personal representative and the appointment of the special administrator was on appeal, thus the Probate Court had no jurisdiction to interfere with the Supreme Court’s jurisdiction and issuance of any orders was in excess of the Court’s jurisdiction.

It is well settled that: “When an appeal according to law is taken from any sentence or decree of the probate court, all proceedings in pursuance of the order, sentence, or decree appealed from shall cease until the judgment of the [appellate court] is had.” (See S.C. Code Ann. 62-1-308(c).) The circuit court acts solely as an appellate court in appeals from the probate court. *Id.* Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal.” (Rule 205, SCACR) Once the notice of appeal is served, the circuit court has exclusive jurisdiction except for matters not affected by the appeal.” (See *Bunkum v. Manor Props.*, 321 S.C. 95, 98-99)

Here, there was the appeal in the Supreme Court which precluded Lisa Fisher as Conservator from turning monies over to any fiduciary, pending final determination. The probate court thereafter raised questions about whether the conservator had no powers pending final transfer to the proper administrator, or if she had a continuing duty to protect the assets. As set forth below, if Appellant did not continue to act pending final resolution of this matter Alice Shaw Baker’s estate would have suffered losses, and her intention that the monies benefit animal charities would have been defeated (or at least severely compromised by the unnecessary costs to the estate.)

3. **Appellant's Appeal in the Supreme Court precluded the Probate Court's Order Appointing a Special Fiduciary, because it attempted to Review another Judge's Order in Violation of Rule 60 and Decisional Law.**

When the Probate Court entertained Huckabee's motion, it was interfering with the appellate jurisdiction, and ultimately the order of another judge.

Despite Respondent's desire to interfere with Appellant's proper protection of Ms. Shaw Baker's estate assets by the filing of her motion, it was error for the Probate Court to entertain the motion because it essentially countered the actions in the Appeal.

It is well settled law that a court can not interfere with another court's order which is subject to the pending litigation. (See Rule 60, SCACR; See also *Dukes & Dukes v. Hygrade Food Products*, 236 S.C. 69 (1960).)

Therefore, any and all orders issued in relationship to the Motion for Special Fiduciary must be reversed.

4. **Once a Personal Representative is Appointed, the Probate Court does not have Jurisdiction to Appoint a Special Fiduciary under Probate Code § 62-7-704 (e)**

Here, the law and record supports Appellant's position that S.C. Code Ann. § 62-7-704(e), upon which Respondent relies, is very specific:

“ Whether or not a vacancy in a trusteeship exists or is required to be filled, the court may appoint an additional trustee or special fiduciary whenever the court considers the appointment necessary for the administration of the trust. **The procedure for such appointment and the notice requirement shall be the same as set forth for special administrators under South Carolina Code Section 62-3-614.**” (Emphasis added).

While on the surface it appears that this Code provides the Probate Court unfettered discretion to appoint a Special Fiduciary, however as noted above, the procedure for appointment is governed by the code for appointment of Special administrator, § 62-3-614, which provides as follows:

“A special administrator may be appointed:

(1) informally by the court on the application of an interested person when necessary:

(a) to protect the estate of a decedent **prior to the appointment of a general personal representative** or if a prior appointment has been terminated as provided in Section 62-3-609; or

(b) for a creditor of the decedent's estate to institute any proceeding under Section 62-3-803 (c);

(2) in a formal proceeding by order of the court on the petition of any interested person and finding, after notice and hearing, that appointment is necessary to preserve the estate or to secure its proper administration including its administration in circumstances **where a general personal representative cannot or should not act**. If it appears to the court that an emergency exists, appointment may be ordered without notice.” (Emphasis added)

These codes make it clear that appointment of a Special Fiduciary is only appropriate in cases where there has been **no** appointment, or there is an adjudication that a Personal Representative can not act. These very issues are on appeal.

So statutory interpretation of the conflict between § 62-7-704(e) and § 62-3-614 mandates reversal. The cardinal rule of statutory construction explains that:

“[w]here there is one statute addressing an issue in general terms and another statute dealing with the **identical issue in a more specific and definite manner**, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect.” *Spectre, LLC v. S.C. Dept. of Health and Envtl. Control*, 386 S.C. 357 688 S.E.2d 844, 853 (2010).” (Emphasis added)

The specific language in § 62-3-614 overlaps the general terms regarding the appointment of a representative of the estate. It is "well settled that statutes dealing with the same subject matter are in pari materia and must be construed together, if possible, to produce a single, harmonious result." (*Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000).) Viewing the statutes together, it is clear that appointment of a Special Fiduciary is not proper, while the issues on Appeal were pending before the Supreme Court, nor are they proper until there is final judgment in the Will Contest. As conservator, Appellant must turn over the assets to the proper individual, and has a duty to protect it pending that appointment. (See S.C. Code Ann. § 62-5-425(d).) No orders may be made which will undermine the objectives concerning the rightful appointment of a personal representative, which is contested in this case.³

5. Respondent Huckabee' Standing was also on Appeal, so it was an Abuse of Discretion for the Court to Grant her Motion which Amounts to a Removal without Cause of Appellant.

The statutory definition for an "interested party" in a Probate matter is set forth in S.C. Code Ann. § 62-1-201(20).

"Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative and other fiduciaries representing interested persons. **The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding.**" (Emphasis added)

³ For clarity, S.C. Code Ann. § 62-5-425(d) provides an alternative method for delivery of estate property, allowing the conservator to file if there is no other person appointed or petition pending, but here, when there are competing petitions, Appellant contends trust law will dictate Appellant's acts as conservator and her continuing duty to safeguard the property.

Respondent Bessie Huckabee had no standing while Ms. Shaw Baker was alive to involve herself in the conservatorship (S.C. Code § 62-5-309), and Appellant contends that the statutory language and facts of this case preclude her from intervening and attempting to gain favor in the Probate Court by her forum shopping.

The language governing Trusts also makes clear that she did not have standing to bring the motion as a “representative” because it amounted to a removal of Appellant without good cause and/or authority. (See S.C. Code Ann. § 62-7-706 [“a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.”] Here, the court did not “remove” Appellant on its own initiative, and Appellant asserts that her reputation and character is attacked by the removal without cause. More importantly, her removal would cause unnecessary costs and harm to the estate.

Due to their lack of standing, both Respondent and Kay Passailague are merely interlopers attempting to sully Appellant's name and interfere with the proper administration of the estate. These individuals proved that they were not even friends to Alice Shaw Baker in the end, and as such allowing them to interfere with the administration is contrary to Alice Shaw Baker's stated wishes. (R._____, Motion for Reconsideration, p. 7)

The language of S.C. Code Ann. § 62-1-201(20) makes it clear that the role of an interested party may “vary from time to time” in litigation. Therefore, while the issue of the Representative was on Appeal, and the estate matter was removed to the Circuit Case, the Probate Court's jurisdiction is precluded and constitutes an improper interference with the Circuit Court's jurisdiction. (See S.C. Code Ann. § 62-1-302)

To allow Respondent to come in, seek the appointment of a third party, whose very appointment will squander away funds rightfully held for the protection of the animals, is inherently wrong and mandates equitable consideration.

Ms. Shaw Baker's life was about animals and their protection. Respondent Huckabee must not be allowed to undermine the jurisdiction of the Courts, by attempting to garner favor before the Probate court through innuendo and misrepresentation about Appellant's actions and role in Ms. Shaw Baker's life. (R._____, *Motion for Special Fiduciary*)

6. The Probate Court's Proceedings were Pursuant to Protective Proceedings, however the Probate Court's Jurisdiction Ended at Alice Shaw Baker's Death.

Appellant is duty bound to maintain the property pending final "receipt" by the proper Personal Representative (S.C. Code Ann. § 62-5-425(d)).

Here, Huckabee can not use innuendo to gain control, or interfere with the estate, while they are a party to a known appeal dealing with the same subject. Said action implicates Due Process considerations, and Equal protections under the United States and South Carolina Constitutions.

Although the Probate Code retains "exclusive jurisdiction" of certain matters not removed (S.C. Code Ann. § 62-1-302 (e)), any attempt to characterize this as litigation relating to its jurisdiction of protective proceedings under § 62-5-102 is misplaced. At Ms. Shaw Baker's death, the Probate court lost jurisdiction to deal with the Estate property. (See S.C. Code Ann. § 62-5-306 (1987) (terminating the authority of a guardian upon the death of the ward).

Since there is a dispute as to who is legally "entitled" to delivery of Ms. Shaw Baker's property and/or to appointment or to receive "delivery", the Probate Court in its capacity in the protective proceedings can not interfere with the Probate Court's jurisdiction of Estate administration under S.C. Code Ann. § 62-3-105.

Respondent Huckabee attempted to forum shop by filing the Motion in Probate. She knew that the matter had been removed and was subject to "estate administration." No longer was it an affair for the Probate Court in its protective proceedings capacity. Therefore, it was improper for the Probate Court to interfere with the litigation pending the Appeal in the Supreme Court.

7. The Probate Court Erred in its Failure to Rule on Appellant's Objections to Respondent's Motion to Appoint Special Fiduciary and Made at the Hearing.

The transcript and the record discloses that Appellant objected to 1) the procedure, 2) the accusations and purported averments by Respondent's counsel, and 3) the conclusions of the court (both at the hearing and in its orders), and the Probate Court's rulings are not supported by the record. (R.____, R.T._____ and Objections)

It is well settled that an attorney does not have to use the word "objection" to Contest the court's consideration of evidence at a contested hearing. Recently, the South Carolina Supreme Court explained in *State v. Najjar De'breece Byers*, 710S.E. 2d 55 (2011), that a defense counsel's purpose would not have been made clearer had he used the word "objection" before making a motion to strike.

The court also said that for an admissibility error to be preserved, the objection must include a specific ground "if the specific ground was not apparent from the context." Rule 103(a)(1), SCRE. When supported by context, "[a] party need not use the exact name of a legal doctrine . . . , but it must be clear the argument has been presented on that ground." (*State v. Stahlnecker*, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010).)

In this case, under the Rules of Evidence, Appellant clearly preserved the issue of admissibility by moving to strike the pleadings of Respondent, and by objecting to the statements

made at the hearing, and for the improper findings of fact in the orders. (See R._____, Motion to Strike, transcript, and Objections to Orders filed herein.)

This court is authorized to judicially notice the files and proceedings in this case. It is well settled that a court can take judicial notice of its own records, files, and proceedings for all proper purposes including facts established in its records. (See *Wise v. Wise*, 394 S.C. 591, 716 S.E.2d 117 (Ct. App. 2011); *Freeman v. McBee*, 280 S.C. 490, 313 S.E.2d 325 (Ct.App.1984); see also *In re Estate of Pallister*, 363 S.C. 437, 250, 256 (2005) (orders of the probate court subject to reversal if there is no evidence to support them.)

The motion filed by Respondent contained no affidavits, was filled with speculation and innuendo, and as evidenced by the counter affidavit filed by Appellant (in her Motion for Reconsideration), was false. (R.____, Motion for Reconsideration) The allegations were an improper attempt to impugn Appellant Lisa Fisher's character. (See *Toyota v. Florence Inv. V. Lynch* (1994) 314 S.C. 257 [vicious, inflammatory argument resulting in clear prejudice support new trials]; see also South Carolina Rules of Professional Conduct, Rules 3.3, 4.1, 8.4(a), 8.4(d), and 8.4(e) provide that an attorney cannot provide a false statement of material fact to the court.)

Here, Respondents can not make any case of wrongdoing by Appellant, who has safeguarded the property throughout her tenure. Therefore, reversal is mandated.

8. The Probate Court's Finding that Appellant did not have Authority to Pay Expenses on Behalf of the Estate was Erroneous, and Demonstrates that there was no Emergent Need for Appointment of a Special Fiduciary.

Respondent relied on Trust law for her position that the Probate court had authority to appoint a Special Fiduciary under S. C. Code Ann. § 62-7-704, claiming Appellant no longer had authority to protect the Estate.

However, fleshing out the purpose and intent of trust law demonstrates that Appellant had not only a duty to protect the estate during Alice Shaw Baker's life but after her death, under S.C.

Code Ann. § 62-5-417 which provides: "...a conservator is to act as a fiduciary and shall observe the standards of care applicable to trustees as described by Section 62-7-933."

Therefore, under Trust law, there are numerous statutory obligations and safeguards that mandated Appellant's proper protection of the Estate and demonstrated that she has behaved in an appropriate manner, under relevant trust law.

The law is explicit as governed by South Carolina Probate Code § 62-7-303(a)(4), "a trustee may represent and bind the beneficiaries of the trust with respect to questions or disputes involving the trust."

Under § 62-7-404 provides "A trust may be created only to the extent its purposes are lawful and possible to achieve." Here, both the extension and the statutory mandate that Appellant delivers property to the personal representative demonstrates it is for a "lawful purpose."

A trust and its terms must be for the "benefit of its beneficiaries." Alice Shaw Baker's intentions made known, and evidenced in writing, did not require a formal trust document. (See § 62-7-407 ["...a trust need not be evidence by a trust instrument."]) Alice Shaw Baker's estate belongs to Animal Charities. (R.____, Motion for Reconsideration)

Moreover, § 62-7-418(a) provides in pertinent part: "When any person shall be seized of any lands...the person or body politic that shall have such use, confidence, or trust...shall be deemed and adjudged in **lawful** seizing...to all intents, constructions, and purposes in law of and in such like estates as they shall have in **use, trust, or confidence of or in them.**" (Emphasis added).

It is clear that South Carolina protects estates under both formal and informal trusts. Appellant is protecting the assets pending proper transfer. Huckabee relies on trust law for this improper order, however § 62-7-701 (A)(2) provides that: "...if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, **by**

accepting delivery of the trust property, exercising powers or Performing duties as trustee, or otherwise indicating acceptance of the trusteeship.” (Emphasis added)

So even under Huckabee’s argument, Respondent had an obligation to protect the assets. Huckabee’s counsel cites that this court has authority to appoint a special fiduciary under § 62-7-704(e). However, the purpose of the code is to provide the means for appointment of a special fiduciary when there is a **“Vacancy in trusteeship.”** There is no vacancy in the trusteeship. Subsection (e)’s provision for appointment “whether or not a vacancy exists” still is not unlimited due to the limiting language controlling procedures related to a Special Administration, if it were, than any person without standing could act as an interloper and interfere with Estate administration. Here, assuming that the Will Contest is successful, Huckabee has no standing to interfere with this case.

There are no grounds for the Motion for Appointment of Special Fiduciary, except conjecture and speculation, and allowing such argument is adverse to the interests of justice. Moreover, this court’s appointment of a stranger to the Estate compromises the purpose of the “trust” to benefit animal charities and allows dissipation of the trust at the whims of a stranger to the estate, and the court’s conclusion that Appellant did not have authority to continue to act on behalf of the Estate is contrary to Trust law, and common sense. Had Appellant not acted, the Estate would have been subject to waste.

A trustee has a duty under S.C. Code Ann. § 62-7-707 to:

“ Unless a cotrustee remains in office or the court otherwise orders, and until the trust property is delivered to a successor trustee or other person entitled to it, **a trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect the trust property.**” (Emphasis added).

This emphasizes the statutory scheme which provides for a continuing duty of a fiduciary/conservator to hold property until it can be delivered to the proper person. Here, Appellant was never removed, there was never any action filed regarding the accounting, the court rejected allowing Appellant to testify, there was no formal hearing on the Accounting— but it all comes down to the fact that she has at all times acted appropriately, and in furtherance of the statutory scheme to protect the property of Ms. Shaw Baker, and continues to do so.

Finally, under a "trust", Appellant would be required to "...administer the trust solely in the interests of the beneficiaries." (§ 62-7-802) The beneficiaries of the trust are animal charities, and pending final determination of the litigation on their behalf, Appellant is required to take all action to protect the trust properties. Therefore, Appellant acts are in the best interests of the estate, and the court's orders were without authority.

9. The Legal Principal Governing Laches Demonstrates that there is no "Emergent need" under S.C. Code Ann. § 62-7-704(e) for the Appointment of a Special Fiduciary.

Respondent Bessie Huckabee knew that Appellant was safeguarding the property for Ms. Shaw Baker. She failed to object to all of the previously requested extensions filed by Appellant. She took no action whatsoever. Only Appellant's action has protected the Estate of Ms. Shaw Baker. Had appellant not taken this action, the Estate would have sustained serious injuries.

Under *Hallums v. Hallums*, 296 S.C. 195, 198-199, 371 S.E. 2d 525, 527 (1988), the doctrine of Laches is defined as "**neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence to do what in law should have done.**" (Emphasis added).

Respondent Huckabee is barred from arguing for the appointment of a Special Fiduciary, these years after Alice Shaw Baker's death.

10. The Probate Court Abused its Discretion by Refusing to Strike Respondent's Motion to Appoint Special Fiduciary due to her failure to comply with Rule 11, SCRPC

It is clear that Rule 11 requires "[a]ll motions filed shall contain an affirmation that the movant's counsel prior to filing the motion has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter . . . unless the movant's counsel certifies that consultation would serve no useful purpose, or could not be timely held."

The penalty for noncompliance is to strike the motion unless the attorney promptly amends the document to comply with the rule.

In *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (S.C. 06/23/1997), the court held that when the trial judge makes a finding on the record that it would be pointless to consult about the filing of the motion, that this is adequate to cure the deficiency under Rule 11.

Here, the Probate Court made no finding on the record, and just denied the motion in its entirety. (R.T. p. 35, ll. 6) No procedural safeguards were honored in this case on behalf of Appellant. No testimony was allowed. The court made findings of fact where the record is devoided of evidence and testimony in violation of Appellant's due process rights. (See *Ellis v. Procter & Gamble Dist. Co.*, 315 S.C. 283, 285, 433 S.E.2d 856 (1993) [bias demonstrated when factual findings not supported by the records]).

11. The Probate Court's Erred in Failing to Grant Appellant's Extension of Time to Deliver Proper.

Appellant sought lawful court orders to hold property during the determination by the Supreme Court. (R._____, Motions for Extensions) The Probate Court's conclusion that "Ms.

Fisher did not have the duty to act in a conservator capacity once she had been discharged” (R. T, p. 35, ll. 17-18) wasn’t reasonable.

Just as a trustee must “protect the trust property” until delivery of the property (S.C. Code § 62-7-707), Appellant would have subjected herself to sanctions and/or possible litigation had she not protected the property.

The extensions granted gave Appellant the right, and duty, to act as a fiduciary until the Will Contest was heard.

12. The Probate Court Erred in hearing the Motion to Appoint a Special Fiduciary when the record disclosed that interested parties, including the Attorney General of South Carolina and Heir at law Betty Fisher, had not received statutory notice of the Proceedings, under S.C. Code Ann. § 62-3-614 and the United States Constitution, Amends. V and XIX, § 1 and the South Carolina Constitution, Art. 13.

A void judgment is one that from its inception is a complete nullity and without legal effect. (*Thomas v. Howard Co. & T.W. Graham and Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995).)

The requirements of due process include notice and an opportunity to be heard. (*S.C. Dep’t of Soc. Serv. v. Holden*, 319 S.C. 72, 78, 459 S.E.2d 846, 849 (1995).)

It is fundamental that no judgment or order affecting the rights of a party to the cause shall be made or rendered without notice to the party whose rights are to be affected. (*Tyron Fed. Sav. & Loan Ass’n v. Phelps*, 307 S.C. 361, 362, 415 S.E.2d 397, 398 (1992).)

In proceedings in the probate court where notice is required, an order is binding only as to persons given notice of the proceedings. (*See S.C. Code Ann. § 62-3-106*).

Interested Person, Betty Fisher, the niece of Alice Shaw Baker and litigant in the Will Contest, etc. action, did not receive individual notice. The Attorney General, on behalf of animal charities, did not receive notice. This failure and refusal to give notice to persons entitled to notice deprived them from objecting to the appointment of a Special Fiduciary. It also deprived them from inquiry into the cost, conflict of interest, and role of a Special Fiduciary. This court's unilateral choice of an "unknown" fiduciary, without opportunity to review his record and/or object is improper and mandates reversal in this case.

**V.
CONCLUSION**

Aside from the familial relationship to Ms. Shaw Baker, as former conservator, Appellant understands that in "equity and good conscience" she is bound to act in good faith and with due regard to the interests" of Ms. Shaw Baker (See *O'Shea v. Lesser*, 308 S.C. 10, 15) . By appealing the Probate Court's orders, Appellant is continuing to observe the trust reposed in her by Ms. Shaw Baker--to protect her estate, prevent the depletion of the principle and ensure that animal charities benefit.

This duty coupled with the statutory duty under S.C. Code Ann. § 62-5-425 to deliver the estate "to a duly appointed personal representative or other persons entitled thereto" mandate reversal.

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The main issue of who was the "duly appointed personal representative" will be resolved upon the trial of the Will Contest.

Appellant respectfully requests that this Honorable Court reverse the Orders in this matter.

April 9, 2015

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By: 

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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2014-002028

Circuit Case No. 2011-CP-10-7821

LISA FISHERAppellant

v.

BESSIE HUCKABEE.....Respondent

PROOF OF SERVICE

I certify that I have served the **Initial Brief of Appellant and Consolidated Designation of Matter to be Included in the Record of Appellants** upon Respondent Bessie Huckabee by depositing a copy of it in the United States Mail, postage prepaid, on April 9, 2015, addressed to her attorney of record Peter A. Kouten, Esquire, P.O. Box 340, Johns Island, SC 29457.

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SC Court of Appeals

April 9, 2015

RESPECTFULLY SUBMITTED,

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Federal Court ID 298

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April 9, 2015

South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211
Attn: Ms. Ella Calvert

Re: LISA FISHER, Appellant v. BESSIE HUCKABEE, Respondent
Appellate Case No. 2014-002028

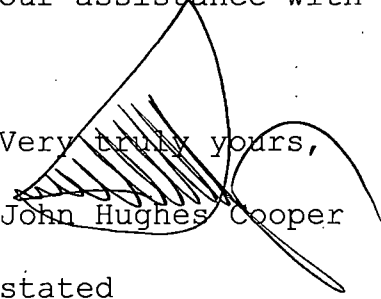
Dear Ella:

Enclosed for filing please find originals of Initial Brief of Appellant, Consolidated Designation of Matter to be Included in the Record of Appellants, and Proof of Service.

Also enclosed please find a copy of our filing for date stamping and return to us in the enclosed envelope.

Thank you for your assistance with this matter.

Best regards.

Very truly yours,

John Hughes Cooper

Enclosures: as stated

Cc: Peter A. Kouten, Esquire

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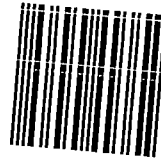


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Attn: Ms. Ella Calvert

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