

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM CHARLESTON COUNTY
Probate Court

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JUN 15 2015

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

SC Court of Appeals

Appellate Case No. 2014-002020
Ct. Court Case No. 2011-CP-10-7819

BETTY FISHER,

Appellant,

v.

BESSIE HUCKABEE,

Respondent.

INITIAL BRIEF OF RESPONDENT

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Table of Contents

Table of Contents	2
Cases	3
Statement of the Case.....	4
Argument.....	7
Conclusion.....	13

Cases

Dean v. Kilgore 437 S.E.2d 154 (Ct. App. 1993) 8

Eagles v. S.C. National Bank 301 S.C. 402, 408 (Ct. App. 1990) 8

Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24 (2004) 8

Ex Parte Dibble 279 S.C. 592 (1983) 11

Mayer v. MS Bailey & Son, 347 S.C. 353 (Ct. App. 2001) 7,9,10,12

Pye v. Estate of Fox, 369 S.C. 555, 565 (2006) 13

Watson v. Underwood 407 S.C. 443 (2014) 7,9,11,13

Statutes, Rules and Reference

Conservatorship of Alice Shaw-Baker, Probate Court Order 9/28/2011 p.2, last line).... 8

Estate of Alice Shaw-Baker, Probate Court Order 6/9/2009 p.3, lines 8-9..... 13

South Carolina Probate Code §62-5-402(1)..... 12

S.C.Code Ann. § 62-1-201(20) 7,9,10,12

S.C.Code Ann. § 62-1-201(2) 7,9,10,12

STATEMENT OF THE CASE

Alice Shaw-Baker (hereinafter Alice), died testate on February 25, 2009. Prior to her death, there were hearings to appoint guardian and conservator for Alice. Lisa Fisher, Esquire is a relative to Alice and sought appointment and was appointed guardian and conservator for Alice. The conservator and Betty Fisher, mother of conservator, both live in California. Upon Alice's death, Respondent Bessie Huckabee was appointed personal representative after Alice's last will, which nominated Bessie Huckabee, was presented to the probate court by John Hughes Cooper, Esquire, local counsel for the conservator, Lisa Fisher individually and Betty Fisher. Attorney Cooper is sponsor for Lisa Fisher's pro hac vice appointment for this action and others pending in circuit court, to include a will contest.¹ Appellant sought by petition to void appointment of the personal representative, contest the will, appoint an intestate heir as personal representative, and contest the beneficiary designations of additional non-probate assets. Appellant removed these actions to Charleston County Court of Common Pleas by statutory right. The actions were filed in 2008 and have yet to be heard.

The conservator was discharged by the Charleston County Probate Court on May 11, 2009 after filing her Final Conservatorship Accounting. The conservator sought to maintain control over the estate assets by filing motions for extensions to turn over estate assets. Her sole basis to hold assets on each of her six motions for extension was so that they can be turned over to the proper party. Until the probate court deems otherwise, the personal representative is the proper party to receive estate assets as she is authorized to marshal assets of the estate. Respondent reviewed the conservatorship file periodically and noted that

¹ The petition contesting last will has not been heard. The petition to remove personal representative has not been heard. They were filed in 2009.

the court had written to Lisa Fisher seeking an annual accounting after her discharge based on the fact that she was holding the funds. Lisa Fisher did not respond to the request in a timely matter. The Respondent corresponded with counsel for the Appellant seeking the requested accounting from Lisa Fisher and no response was had. Lisa Fisher sought additional extension when the previous extension expired and Respondent objected to the extension based on lack of accounting. The Respondent sought to appoint a special fiduciary. Prior to the hearing from which this appeal comes, Appellant and Lisa Fisher sought motion to strike Respondent's motion based on S.C. Rules of Civil Procedure notice requirement. Proper notice was given to the conservator. Appellant is not a party to whom notice was required. Prior to hearing on Motion for Appointment of Special Fiduciary, Lisa Fisher filed an amended final accounting three years after she was discharged as conservator and an accounting for the following calendar year, 2010. Lisa Fisher, who is a lawyer in California and who alleges to practice in the area of conservatorships in her home state, clearly represented in her account filings to the probate court that she continued to act in matters affecting the estate. She expended funds after she was discharged as conservator. "The court discharged her" (R. _____ Transcript Page 13, Line 11), and Lisa Fisher "can no longer act as conservator." (R. _____ Transcript Page 14, Lines 2 and 3) Further, counsel for Appellant at the motion hearing indicated that "we just think this is a better way to do it" (R. _____ Transcript Page 27, Lines 8 and 9) The Appellant continues to expend estate assets without court authority and is unapologetic. The court asked whether the discharged conservator might have sought permission from the court to act in certain matters. (R. _____ Transcript Page 26, Lines 13 and 14) Lisa Fisher did not nor has she since. The lower court granted the motion appointing a special fiduciary. The lower

court found that Lisa Fisher, “did not have the duty to act in a conservator capacity.”
(R. _____ Transcript Page 35, Lines 17 and 18) Appellant appealed to the circuit
court and was denied. The appellant filed the appeal at bar.

ARGUMENTS

I. Did the circuit court's failure to consider Appellant's statement of grounds prior to oral arguments and failure to reverse the probate court's order amount to an abuse of discretion and a deprivation of due process?

South Carolina Probate Code defines an "interested person" to include an heir, devisee, child, spouse, creditor, beneficiary, and any others having a property right in or claim against a trust estate...." S.C.Code Ann. § 62-1-201(20) A "beneficiary" of a trust is defined as including a person who has any present or future interest, vested or contingent ..."
S.C.Code Ann. § 62-1-201(2) (See also Mayer v. MS Bailey & Son, 347 S.C. 353 (Ct. App. 2001)) Here, Betty Fisher has filed a petition with the Charleston County Probate Court and has yet to seek hearing or determination that the last will of Alice Shaw-Baker is valid or invalid. The last will, the original of which has been accepted for probate, does not name the Appellant as a beneficiary and she has not perfected her claim that she is an heir. Therefore, she lacks standing and her appeal should be dismissed.

Further, under the probate code, a contingent remainderman has standing to pursue actions involving "alleged misconduct of a fiduciary....," Id. The Appellant has not been found to be a contingent remainderman. As such, she could not bring an action against the discharged conservator. Therefore, her appeal on this issue should be dismissed.

An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties' rights. Watson v. Underwood 407 S.C. 443 (2014) The lower court's order appointing a special fiduciary is not a final order. In fact, the order appointing a special fiduciary is a safeguard protecting estate assets for future distribution of those to whom the

estate will be distributed. For this reason, the order appointing special fiduciary is interlocutory and, therefore, Appellants issues on appeal should be dismissed.

The circuit court, as appeals court in this matter, did not abuse its discretion nor did it deprive the Appellant due process. Here, the Appellant comes to the conclusion that the trier of fact did not consider the statement of grounds. There is no indication by the appellate court that it did not consider the statement of grounds. The trier of fact indicated, in the transcript, that it had not read Appellant's Brief prior to hearing and further indicated that he would do so prior to ruling. Further, Appellant argues that because the appeals court upheld the lower court's ruling, it abused its discretion and somehow deprived the Appellant due process.

Appellant cites Eagles v. S.C. National Bank by stating that the circuit court, sitting as an appellate court, has jurisdiction to make findings in accordance with its own view of the preponderance of the evidence. 301 S.C. 402, 408 (Ct. App. 1990) Appellant fails to mention that Eagles further states that, although the appeals court may make finding with its own view, the standard of review followed was whether there is any evidence which "reasonably supports" the circuit court's findings. Id. (See also Dean v. Kilgore 437 S.E.2d 154 (Ct. App. 1993))

Finally, Appellant argues that the probate court made no findings of fact. The lower in the order on appeal found an "emergent need for authority as to these estate assets." (Conservatorship of Alice Shaw-Baker, Probate Court Order 9/28/2011 p.2, last line)

Therefore, the Court should uphold the ruling of the lower court based on findings of fact which reasonably support the lower court's ruling and Appellant's appeal on this issue should be denied.

II. Did the probate court have jurisdiction to appoint a special fiduciary in light of the appeal in the South Carolina Supreme Court.

South Carolina Probate Code defines an "interested person" to include an heir, devisee, child, spouse, creditor, beneficiary, and any others having a property right in or claim against a trust estate...." S.C.Code Ann. § 62-1-201(20) (1987) A "beneficiary" of a trust is defined as including a person who has any present or future interest, vested or contingent ..." S.C.Code Ann. § 62-1-201(2) (1987) (See also Mayer v. MS Bailey & Son, 347 S.C. 353 (Ct. App. 2001)) Here, Betty Fisher has filed a petition with the Charleston County Probate Court and has yet to seek hearing or determination that the last will of Alice Shaw-Baker is valid or invalid. The last will, the original of which has been accepted for probate, does not name the Appellant as a beneficiary and she has not perfected her claim that she is an heir. Therefore, she lacks standing and her appeal should be dismissed.

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Appellant's other issues on other pending appeal(s) have no relationship to the case at bar. The Appellant has filed a separate appeal with the Supreme Court and said appeal has nothing to do with the assets of the estate of Alice Shaw-Baker and the appointment of a special fiduciary has no effect on the outcome of Appellant's Supreme Court appeal. As there is no nexus between the appointment of special fiduciary or estate assets and Appellant's other appeal, the Court should uphold the lower court's ruling and Appellant's appeal on this issue should be denied.

III. Is the order appointing a special fiduciary void because Huckabee failed to provide Betty Fischer with the statutorily and constitutionally required notice of her intent to seek appointment of the appointment of special fiduciary.

South Carolina Probate Code defines an "interested person" to include an heir, devisee, child, spouse, creditor, beneficiary, and any others having a property right in or claim against a trust estate...." S.C.Code Ann. § 62-1-201(20) (1987) A "beneficiary" of a trust is defined as including a person who has any present or future interest, vested or contingent ..." S.C.Code Ann. § 62-1-201(2) (1987) (See also Mayer v. MS Bailey & Son, 347 S.C. 353 (Ct. App. 2001)) Here, Betty Fisher has filed a petition with the Charleston County Probate Court and has yet to seek hearing or determination that the last will of Alice Shaw-Baker is valid or invalid. The last will, the original of which has been accepted for probate, does not name the Appellant as a beneficiary and she has not perfected her claim that she is an heir. Therefore, she lacks standing and her appeal should be dismissed.

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In response to this issue, the order appointing special fiduciary is not void. Counsel on several occasions discussed the matters of appointment of special administrator or financial intermediary appointment prior to the filing of the motion to appoint special fiduciary. The Appellant failed to appreciate that the motion for special fiduciary was a responsive pleading to the discharged conservator's motion for extension to hold estate assets. Each of the Conservator's motions for extension did not contain the required Rule 11 affirmation and the personal representative was never delivered a copy of the motion prior to the court's approval. Further, the lower court, based on the accountings and arguments of Appellant's counsel found that the appointment of a special fiduciary was emergent. Finally, the Appellant is not an interested party to the estate and therefore, is not interested in the assets of the conservatorship.

Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible. Ex Parte Dibble 279 S.C. 592 (1983) The probate court has exclusive jurisdiction to determine the need for a conservator or other

protective order until the proceeding is terminated. South Carolina Probate Code §62-5-402(1) Here, the lower court recognized conflicts in the final accounting and the amended final accounting and realized that the discharged conservator was continuing to expend funds. Under the circumstances, the court, in furtherance of protecting the assets of the estate, placed emergent authority in a special fiduciary. For the above reasons, the lower court's order should be upheld.

IV. Is the order appointing a special fiduciary void because Huckabee had no standing to bring said motion when Alice Shaw-Baker revoked the will naming her personal representative.

South Carolina Probate Code defines an "interested person" to include an heir, devisee, child, spouse, creditor, beneficiary, and any others having a property right in or claim against a trust estate...." S.C.Code Ann. § 62-1-201(20) (1987) A "beneficiary" of a trust is defined as including a person who has any present or future interest, vested or contingent ..." S.C.Code Ann. § 62-1-201(2) (1987) (See also Mayer v. MS Bailey & Son, 347 S.C. 353 (Ct. App. 2001)) Here, Betty Fisher has filed a petition with the Charleston County Probate Court and has yet to seek hearing or determination that the last will of Alice Shaw-Baker is valid or invalid. The last will, the original of which has been accepted for probate, does not name the Appellant as a beneficiary and she has not perfected her claim that she is an heir. Therefore, she lacks standing and her appeal should be dismissed.

Further, under the probate code, a contingent remainderman has standing to pursue actions involving "alleged misconduct of a fiduciary....," Id. The Appellant has not been found to be a contingent remaindermen. As such, she could not bring an action against the discharged conservator. Therefore, her appeal on this issue should be dismissed.

"Generally, an issue must be raised to and ruled upon by the circuit court to be preserved." Pye v. Estate of Fox, 369 S.C. 555, 565 (2006) (citing Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24 (2004)) Here, Appellant raises the issue of a conservatorship matter with asset protection and an estate matter regarding personal representative removal and seeks to create a nexus between the two. This issue was never raised at the lower court and has not been preserved. For this reason, the issue at bar on appeal should be dismissed.

An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties' rights. Watson v. Underwood 407 S.C. 443 (2014) The lower court's order appointing a special fiduciary is not a final order. In fact, the order appointing a special fiduciary is a safeguard protecting estate assets for future distribution of those to whom the estate will be distributed. For this reason, Appellants issues on appeal should be dismissed.

Appellant's argument that Respondent has no standing is misplaced. Bessie Huckabee is the court-appointed personal representative. The Appellant filed a will contest in 2009 and has yet to seek final hearing on the validity of Alice's last will. Until the probate court deems otherwise, Bessie Huckabee is the personal representative who, by court order, "may continue to administer and preserve the estate...." Estate of Alice Shaw-Baker, Probate Court Order 6/9/2009 p.3, lines 8-9

For the above reasons, Appellants issue regarding standing of personal representative should be dismissed and the lower court's order appointing special fiduciary should be upheld.

CONCLUSION

For the reasons stated, this Court should uphold the judgment of the lower court and dismiss Appellant's appeal or deny Appellant's appeal.

Respectfully submitted,

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June __, 2015

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BETTY FISHER,

Appellant,

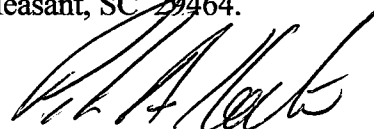
v.

BESSIE HUCKABEE,

Respondent.

PROOF OF SERVICE

I certify that I have served Respondent's Initial Brief and Consolidated Designation of Matter to be included in the Record on Appeal upon counsel for Appellant by U.S. Mail, on June 11, 2015, at 1476 Ben Sawyer Blvd., Mt. Pleasant, SC 29464.


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June 11, 2014

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SC Court of Appeals

The South Carolina Court of Appeals
ATTN: Ella Calvert, Clerk
P.O. Box 11629
Columbia, South Carolina 29211

Re: Betty Fisher v. Bessie Huckabee
Appellate Case #2014-002020

Dear Ms. Calvert:

Please find enclosed Respondent's Initial Brief, Designation of Matter for Record and Proof of Service in the above referenced matter.

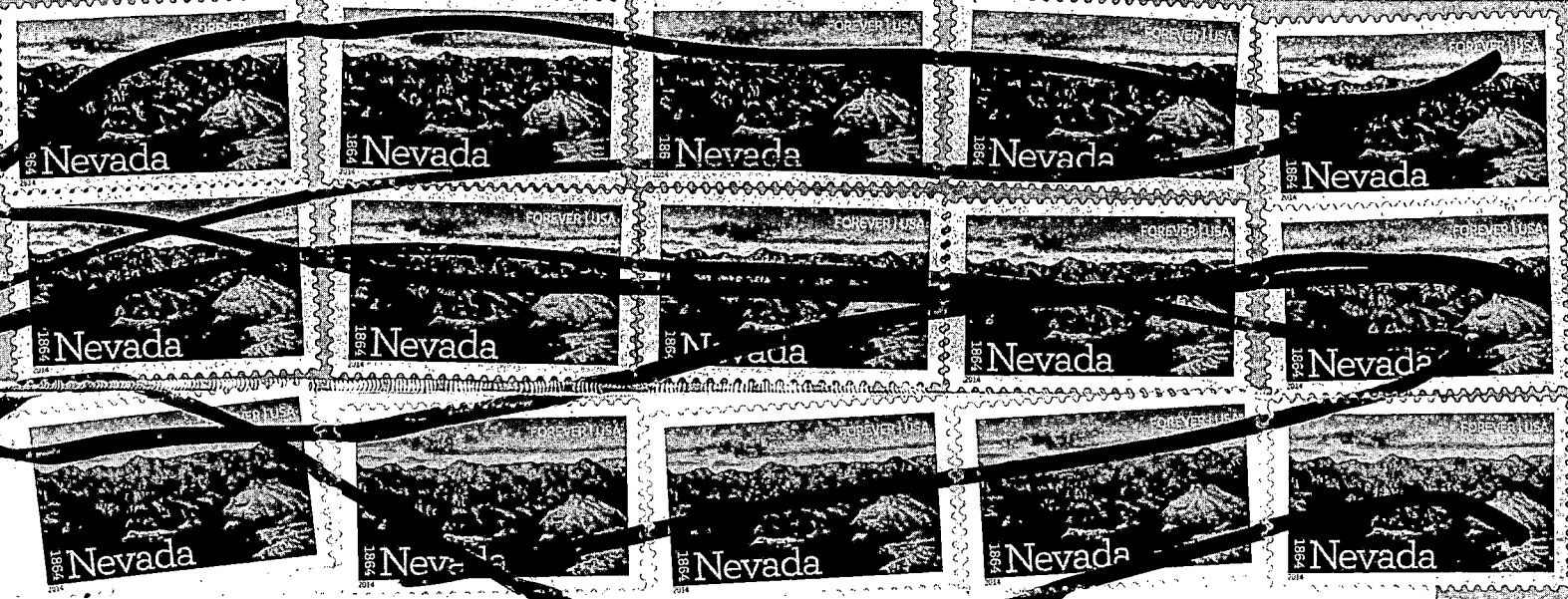
I have also enclosed additional copy to be clocked and returned in the envelope provided for my records. Please contact me if you have any questions regarding this filing.

Sincerely,



Peter A. Kouten

CC: John Hughes Cooper, Esq.



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