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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Appellate Case No. 2014-001267
Circuit Case No.2009-CP-10-3010

In the matter of the Estate of Alice Shaw Baker.

Betty Fisher and Lisa Fisher, ...Appellants

v.

Bessie Huckabee, Kay Passailague Slade,
Sandra Byrd, and Henry McMaster, in his Capacity as Attorney General, Defendants,

Of whom Bessie Huckabee, Kay Passailague Slade, and Sandra Byrd,
.....Respondents

APPELLANTS' PETITION FOR REHEARING REGARDING OPINION NO. 2015-UP-359 FILED JULY 15, 2015

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INTRODUCTION

Pursuant to Rule 221(a), SCACR,[1] Appellants Betty Fisher and Lisa Fisher ("Appellants") respectfully petition this Court for rehearing of Opinion No. **2015-UP-359** ("Opinion") filed on July 15, 2015 dismissing Appellants' appeal.[2] Appellants contend that the court 1) overlooked or misapprehended the law regarding availability of immediate appeal for cases involving disqualification of court appointed counsel in conflict cases; 2) overlooked or misapprehended the law regarding the impact of a policy which allows court appointed counsel to generate fees and business from the death of its ward; and 3) overlooked or misapprehended the law regarding substitutions of counsel in violation of notice, ex parte communications with the court, and improper association of counsel.

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[1] Rule 221(a) states in pertinent part:

> "Petitions for rehearing must be actually received by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court. A petition for rehearing shall be in accordance with Rule 240, **and shall state with particularity the points supposed to have been overlooked or misapprehended by the court.'**

[2] The court's decision of July 15, 2015 did not elaborate on their decision to dismiss Appellants' appeal. The brief opinion states as follows:

> "PER CURIAM: Betty and Lisa Fisher appeal circuit court orders denying their motion to disqualify Peter Kouten and a consent order substituting counsel. Because the orders are not immediately appealable, we dismiss this appeal. *See EnerSys Delaware, Inc. v. Hopkins,* 401 S.C. 615, 619, 738 S.E. 2d 478, 480 (2013) holding an order denying a motion to disqualify an attorney is not immediately appealable.).
> DISMISSED.
> SHORT, LOCKEMY, AND McDONALD, JJ., concur." (Opinion dated July 15, 2015.

As set forth herein, the principles in *EnerSys Delaware Inc, supra,* are not controlling in this case.

By failing to scrutinize the inexplicable conflict generated by the differing analysis between *EnerSys Delaware, Inc. v. Hopkins,* 401 S.C. 615, 619, 738 S.E. 2d 478, 480 (2013) and *Townsend v. Townsend,* 323 S.C. 309, 474 S.Ed. 2d 424 (1996), the most vulnerable populations– the elderly and disabled– will be deprived of important policy and legal analysis in *Townsend, supra.*[3] The *Townsend* case becomes a nullity and court appointed attorneys gain a free pass as they are enabled to use the probate court as a network for business, while undermining the solemn duty owed to the disadvantaged involved in these very protective proceedings, wherein guardians ad litem are appointed. Therefore, as this petition for rehearing represents, dismissal of Appellants' case necessarily impairs *Townsend, supra,* in favor of the holding of *EnerSys Delaware, supra,* without analysis of the harmful effects on this vulnerable population, and more specifically upon Alice Shaw Baker.

It is well settled that a rehearing is warranted when the Court has overlooked or misapprehended an argument. (See *Kennedy v. S.C. Retirement System,* 349 S.C. 531, 564, S.E. 2d 322 (2001).) Also, if the Court fails to address some of the arguments raised in the appeal, "a ***prima facie* case for rehearing has been made**." (*Covar v. Sallat,* 22 S.C. 265, 272 (1885), emphasis added.) The principles behind the concept of rehearing were discussed in the broad constitutional context in the United States Supreme Court decision, in *Flynn v. United States,* 348 U.S. 956, 99 L.Ed. 1298, 1299 (1955) which provides: " The right to [a petition for rehearing] is not to be deemed an empty formality..." By dismissal without comment and analysis, Appellants contend they have made their "prima facie" case mandating rehearing.

Due to the exceptional importance of the issues raised herein, Appellants respectfully pray that the court grant this request for rehearing:

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[3] It is often the function of the courts by their judgments to establish public policy where none on the subject exists..." (*See* Page v. Winter, 240 S.C. 516, 126 S.E. 2d 570 (1962).

ARGUMENT

I. THE OPINION OVERLOOKS AND MISAPPREHENDS APPELLANTS' ARGUMENTS REGARDING THE EXCEPTIONS FOR REVIEW OF INTERLOCUTORY ORDERS

Although this court's brief opinion did not outline the underlying theory behind dismissing Appellants' case, review of the language and holding of *EnerSys Delaware, supra.* supports the conclusion that the court accepted at face value, that an order denying a motion for disqualification is never immediately appealable. In so doing, the factual distinction and important policy issues related to Alice Shaw Baker were not fully considered, nor the appropriate exception permitting immediate review by this Honorable Court.

There are, of course, exceptions to the principles governing immediate appeal of interlocutory orders. An interlocutory order which affects a substantial right, and either in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues an action, is immediately appealable under § 14-3-330(2)(a). Cases have found that the right of the plaintiff to choose her defendant is a substantial right within the meaning of this subsection. (Cf. *Chester v. South Carolina Dep't of Pub. Safety*, 388 S.C. 343, 698 S.E.2d 559 (2010) [on appeal from order requiring plaintiff to join parties as defendants, Court recognized common law right of tort plaintiff to choose her defendant]); see also *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005) [order disqualifying party's chosen attorney is immediately appealable under § 14-3-330(2)]).

In this case, immediate appeal is needed to prevent an unintended estoppel in the future and gross prejudice to Appellants now. It is insufficient for a court to say that any "ostensible danger [to a fair trial] can be redressed equally after trial as through an immediate appeal", as in *Hagood, supra.* Here, Appellants are forced to expend funds to seek disqualification of an attorney (in guardian ad litem capacity) who represented his ward and now has access to confidential

information. By denying the motion for disqualification, the policy protections of the elderly and disabled are thwarted, as a court appointed attorney is allowed to use the probate court as "rain maker" for his own future business prospects.

Without a careful consideration of this appeal, questions are raised whether this court would find that appellants waived or are estopped from any objection they may make at trial. Appellants contend based on the rationale in *EnerSys Delaware, supra,* it would– as public policy issues are lost in the success or failure outlined by any jury decision. The rationale behind the policy of *Hagood, supra,* applies to this case, but with a reverse outcome–disqualification must be mandated.

Hagood found disqualification improper because:

> "(1) the importance of the party's right to counsel of his choice in an adversarial system;
> (2) the importance of the attorney-client relationship, which demands a confidential, trusting relationship that often develops over time;
> (3) the unfairness in requiring a party to pay another attorney to become familiar with a case and repeat preparatory actions already completed by the preferred attorney; and
> (4) an appeal after final judgment would not adequately protect a party's interests because it would be difficult or impossible for a litigant or an appellate court to ascertain whether prejudice resulted from the lack of a preferred attorney."
> (*Id* at 197, 607 S.E.2d at 710)

A rehearing will allow the court to analyze these *Hagood* factors in Ms. Shaw Baker's case which demonstrate: 1) the importance of a ward's right to ensure that a court appointed counsel will not be able to use private information in an adverse manner–and contrary to the policy considerations for a court appointed counsel; 2) the importance of a fair trial and ensuring the underlying relationship of Attorney Kouten with Alice Shaw Baker was not compromised as set forth in *Townsend, supra*; 3) the unfairness of requiring Appellants to pay for an attorney to become familiar with the case, ensure no issues of estoppel or waiver occur, and that Attorney Kouten doesn't obtain a windfall due to his confidential relationship with Alice Shaw Baker; 4) and

the knowledge that an appeal after judgment would not adequately protect Appellant's interest, because it would be difficult or impossible to ascertain whether prejudice resulted from the involvement of the court appointed attorney–in his dual capacity representing Respondents and Alice Shaw Baker. Therefore, under the principles set forth in *Hagood, supra*, immediate appeal is proper.

Also, Appellants contend that in its short opinion, the court failed to consider the real impact of the motion to disqualify Attorney Kouten. As outlined below regarding *Townsend, supra,* the policy reasons demand an order restraining counsel from acting against the interests of his former client, here Alice Shaw Baker. It also seeks to restrain counsel from waiving the attorney client privilege/attorney work product, etc. This is tantamount to a request for an injunction against Attorney Kouten, which is well established as subject to immediate appeal. (See S. C. Code Ann. § 14-3-330(4), [immediate appeals when refusing injunction]; see also *Williams v. Northwestern Sec. Life Inc. Co.*, 307 S.C. 462 (1992), emphasis added.)

Under either scenario, the failure of the court to grant the motion for disqualification against Attorney Kouten creates separate tiers of justice for those most vulnerable, the elderly and disabled, who do not obtain the same protection of their interests, even though under *Townsend, supra,* the court itself has a duty to sua sponte disqualify an attorney who was a guardian ad litem.

For these reasons, Appellants respectfully request that the court grant this rehearing to consider these implications, and the need for immediate appeal.

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II. THE OPINION OVERLOOKS AND MISAPPREHENDS APPELLANTS' ARGUMENT RELATING TO THE COURT'S DECISION IN *TOWNSEND V. TOWNSEND*, 323 S.C. 309, 474 S.E.2d 424 (1996) IN WHICH THE COURT RECOGNIZED THE "SUBSTANTIALLY RELATED ISSUES" PERTINENT TO A WARD (AND HEREIN HER ESTATE) AND WHICH ESTABLISHED NON-WAIVEABLE CONFLICT WARRANTING A LOWER COURT'S DUTY TO REMOVE COUNSEL

Both *EnerSys Delaware Inc, supra.* and *Townsend, supra.* are Supreme Court cases, which on their face might not interact. However, in real life, these legal principles are seriously impacting each other. Alice Shaw Baker's case demonstrates the far reaching consequences parties will suffer when the "exceptions" for the court to hear interlocutory matters are seriously impaired. Both the fairness of trial and the public policy considerations of the elderly and disabled become victims of conflicting legal rationales.

The inevitable results are that Appellants' appeal was dismissed, based on the rationale in *EnerSys Delaware, Inc. v. Hopkins, supra.* However, *EnerSys* can not be controlling with the facts of this case. While it is understandable that the plain language from the Supreme Court in *EnerSys Delaware, supra,* would lead to the conclusion that dismissal is appropriate, the conflicting and inconsistent issues presented by the court in *Townsend, supra,* mandate a closer reading of the cases.

The Supreme Court in *Townsend, supra,* held that the family law judge had a "duty" to discharge a guardian ad litem who chose to represent the father of his ward in a related case. Basic ethical standards make it clear that an attorney should not represent clients with a potential or actual conflict,[4] but here, the duty is greater. These clients are not involved in arms length transactions. They are not retaining an attorney for help. They are generally in the most vulnerable position of

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[4] See S.C. Rules Prof. Conduct, Rule 1.9; Rule 407, SCACR; *In re Johnson,* 386 W.C. 550, 689 S.E. 2d 623, (2010)[duty of loyalty to former clients]; S.C. Ethical Opinion, 94 - 14 (1994); S.C. Ethical Opinion, Opinion 12-10 [lawyer must get order to release confidential information regarding deceased client].

their lives, where their very liberty is at stake. The guardian ad litem is not merely an attorney, he stands in the stead of that client, enabled with the power to take adverse action against that client. These are serious considerations which mandate professional decorum and strict court oversight.

If the court simply allows the principles in *EnerSys Delaware, supra,* to stand, the principles which are eloquently set forth in *Townsend, supra,* become of no effect. Judges do not have to consider the implications, and no longer have a "duty" to sua sponte remove an attorney, because the other side's choice of counsel is somehow more important than the strict dictates prohibiting an attorney from impairing his previous client's rights by new representation of adverse clients.

Similarly, as in *Townsend, supra,* Attorney Kouten reasonably could have, and Appellants contend the evidence shows, gained information in the conservatorship matter as with the Estate matter, where he , as the evidence will show, now represents those who lied and tricked Ms. Shaw Baker. The *Townsend* court found that this type of recognition of conflict furthered the policy of encouraging candid disclosure to the guardian ad litem by all parties to a custody dispute. The *Townsend* court went so far as to put an affirmative duty on the Lawyer to "have recognized the risk that information he gained during the custody matter in which he was Daughter's guardian ad litem might prove relevant to the child support claim and particularly to the college support claim in the action in which he represented the Father."

While Appellants agree with the same type of policy for the elderly and other representations, they further argue that the policy is more complex than mere represenation. It creates other policy considerations which go to the foundation of cases involving the vulnerable elderly. E.g. If as here, a guardian ad litem is appointed for a client purportedly with a will, and that guardian knows or should know that the conservatee wants to change the will, what incentive is there to bring this to the court's attention and assist the ward, if there is a promise of future

employment with those as here, Bessie Huckabee, Kay Passailague Slade, and Sandra Byrd? Moreover, if the guardian ad litem has facts that show that the conservatee was being given false information about the management and use of her estate at death, does he have a duty to disclose that information to the court and take affirmative steps to assist the conservatee? Therefore, the need to evaluate policy issues in determining a motion for disqualification when as here, it involves the elderly, disabled, and vulnerable subjected to the whims of a court appointed guardian ad litem/lawyer.

The argument before the court in *EnerSys Delaware, supra,* is simple in its analysis of the issue of disqualification, The court found that an order denying disqualification of an attorney does not affect a substantial right such that the order is immediately appealable. The court distinguished the issue of a "substantial right" when granting a motion for disqualification of an attorney, as opposed to denying the motion. (See *Hagood, supra,* [an order granting a motion to disqualify counsel in a civil trial was immediately appealable in that it affected the substantial right of the party to have an attorney of one's choosing]).

The rationale of *Hagood, supra,* can't overcome the problems associated with not finding a "substantial right" pursuant to section 14-3-330(2) for the elderly and vulnerable population, even upon their death, because it taints the essence of the attorney client relationship and the entirety of the guardianship/conservatorship process if a court appointed attorney is able to transform his appointments into future retainers. It can't pass the "smell" test–its rotten from the core. It is incestuous as it creates a culture of questionable representation, with none of the safeguards owed to the ward, as guardian ad litem versus attorney-client relationship, but with all of the opportunities for future employment without the incumbent court supervision.

While the court considers in *EnerSys* that there is unfairness in forcing a litigant to pay another attorney to or to have an attorney of his choice, the same unfairness that can be seen in this

case. Unfortunately, dismissal fails to weigh the problems facing Appellants in this case. Appellants are forced to incur attorney fees and costs associated with a case meant to safeguard Alice Shaw Baker, and in so doing they have to wait until after trial to see if the prior information obtained from a court appointed attorney implicates his immediate withdrawal.

Further, what does it say that in *Townsend, supra*, the court found a duty of the court to disqualify the attorney sua sponte. Such an inconsistent policy undermines the stated duties of the court, while undoing the benefits for the wards, elderly, and disabled. To have a policy that litigants will have to wait for relief until after trial will have devastating implications on this vulnerable population. If allowed to stand, this Court's opinion will manifest an inherent and fundamental prejudice for vulnerable populations.[5]

III. THE OPINION OVERLOOKS AND MISAPPREHENDS APPELLANTS' ARGUMENTS REGARDING THE IMPROPER SUBSTITUTION OF ATTORNEY, INCLUDING PROPER NOTICE, EX PARTE COMMUNICATION WITH THE COURT , AND THE IMPROPER ASSOCIATION OF COUNSEL

Appellants request rehearing on the issues relating to the improper consent order substituting W. Westbrook Wills as counsel for some of the respondents, while allowing Kouten to remain counsel for respondents Bessie Huckabee.

The briefing by Appellants set forth the law related to the improper submission of a proposed order without sending a copy to opposing counsel as *ex parte* communication after the effective date of Rule 5(b)(3), SCRCP. (See also *First Financial Ins. Co. v. Sea Island Sport*

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[5] Equal Protection requires "all persons to be treated alike under like circumstances and conditions, both in privileges conferred and liabilities imposed. (See *GTE Sprint Commcn's Corp v. Pub. Serv. Comm'n of South Carolina,* 288 S.C. 174, 181, 341 S.ED. 2d 126, 129 (1986) U.S. Const. Amend. XIV, § 1, S.C. Const. Art. I, § 3.)

Fishing Society, Inc., 327 S.C. 12, 490 S.E. 2d 257 (1997) (finding that submission of a proposed order without copying opposing counsel was not *ex parte* communication prior to the effective date of Rule 5(b)(3) where opposing counsel had opportunity to be heard on issues raised in it prior to the Court's ruling).

In rehearing the matter, including the above policy issues, the relationship of Attorneys Kouten and Wills, and the ex parte communication deserves a second look by this court.

CONCLUSION

One scholar wrote, "The decision to rehear a case is an equitable decision with the goal of attaining justice for the particular litigants involved, which is precisely what a legal system is supposed to do." (Wasserstrom, *Equity: The Case of an Equitable Decision Procedure* in Readings in Philosophy of Law 118 (1984).)

Alice Shaw Baker deserves justice. Respondents knew or should have known that their involvement and dual represenation during Alice Shaw Baker's life was wrong and created a non-waiveable conflict of interest. The principles in *Townsend* support the similar facts in this case, and the duty owed by the judge to sua sponte remove an errant attorney.

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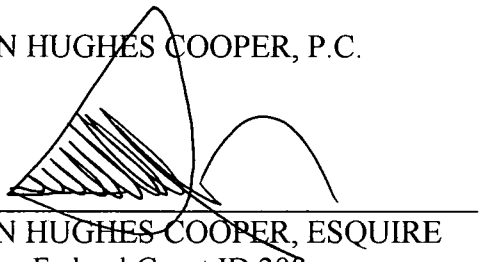
WHEREFORE, Appellants respectfully seek an Order granting rehearing and concluding that the Attorney Kouten must be disqualified, and that the Consent order for Substitution of Counsel dated October 10, 2013 and filed October 14, 2013 is void for lack of notice and ex parte communication with the court; and precluding W. Westbrook Wills from proceeding in light of the association with Attorney Kouten.

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.



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