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SC Court of Appeals

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. 2014-002034
Circuit Case No. 2011-CP-10-8657

LISA FISHER.....Appellant

v.

BESSIE HUCKABEE.....Respondent

FINAL BRIEF OF APPELLANT

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I.
INTRODUCTION

Appellant Lisa Fisher (“Appellant”) was devoted to Alice Shaw Baker, and acted at all times to help her maintain her independence when guardianship and conservatorship proceedings in Charleston threatened to remove Ms. Shaw Baker from her. For the rest of her life, Alice Shaw Baker was cared for and protected by Appellant, only to die an untimely death the day before she was going to California.

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 Appellant’s *Motion for Approval of Fees*, and the probate court’s sua sponte order freezing Alice Shaw Baker’s conservatorship accounts.¹ All other individuals involved in initiating the conservatorship, including court appointed conservators, guardians, attorneys, visitors, doctors, and even Appellant’s counsel’s were granted fees in this matter. Despite Appellant advancing her own monies to ensure that Ms. Shaw Baker was not placed in an assisted living and that she was able to remain in her home, Appellant was denied her guardian and conservator fees. (R. 61 and 64, Order of 10/14/11 and Denial of Motion to Alter 11/9/11).

While the three 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.

¹ The order also referenced Lisa Fisher’s individual account, however no individual accounts were actually frozen.

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 Probate Court Abuse its Discretion in Depriving Appellant of her right to "reasonable compensation" and reimbursement of fees by denying her Motion for Approval of Fees and Expenses under S.C. Code Ann. § § 62-5-312(b) and well established legal precedent?
3. Did services by Appellant to her great-aunt, Alice Shaw Baker, constitute "property" interests entitling her to "just compensation" under the Takings Clause in the U.S. Const. Amend. V; S.C. Const. Art. I, § 13(a) and well established legal precedent?
4. Was the Probate Court's denial of Appellant's Request for Approval of Fees and Expenses in violation of the Equal Protection Clause of the United States Constitution in the U.S. Const. Amend. XIV; S.C. Const. Art. I, § and well established legal precedent?
5. Did the Probate Court Abuse its Discretion by issuance of an Order intending to Freeze not only the decedent, Alice Shaw-Baker's assets, but Appellant's personal Assets?
6. Were the Probate Court's Orders Freezing Accounts in violation of the Due Process Clause, Equal Protection Clause, and Takings Clause of the United States Constitution and well established legal precedent?

Additionally, this Appeal is related to the Appeals filed by Appellant and Appellant

Betty Fisher in Case nos. 2014-002020 and 2014-002028.

Appellant joins and restates these grounds as support for her appeal herein.

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III. STATEMENT OF THE CASE

A. *Statement of Facts*

On February 25, 2009, Alice Shaw Baker died. (R. 203, Death certificate) Her great niece, Lisa Fisher, Esquire, had helped her since involuntary commitment proceedings were initiated without notice to her family, including her niece, Betty Fisher. (R. 70, 73, 76, Petitions for Incapacity, Emergency, and Conservatorships, etc.) Though she was already conserved, the family rushed to her side from California. (R. 83, Petition for Appointment of Successor) After a hearing, on October 29, 2008, Lisa Fisher was appointed her guardian and conservator. (R. 28, Order Appointing Lisa Fisher as Guardian and Conservator) After learning of the filing of the conservatorship/guardianship, Lisa Fisher travelled regularly to South Carolina to visit her great aunt, and ensure her health and well being. (R. 249, p. 250, 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. 321, p. 342, Motion for Reconsideration.)

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. 219, p. 220, 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. (Request for Judicial Notice, Court of Appeals, Case no. 2009-CP-10-03010)

At the time, there was an Appeal before the Supreme Court relating the improper appointment of the personal representative, on August 17, 2011, the Probate Court heard Respondent's *Motion for Appointment of Special Fiduciary*. (R.281, Motion for Special Fiduciary) Respondent presented no evidence, testimony, or request for judicial notice. The Probate Court refused to allow Appellant to testify. (R. 548, p. 553, reference to p. 16, ll. 7-14, R.T. of 8/17/2011) Thereafter, the court appointed J. Heyward Harvey, Esquire as Special Fiduciary without notice to all parties.

Respondent knew of Objector Betty Fisher's existence, and 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. 321, p. 327, Motion for Reconsideration dated October 7, 2011)

Appellant vigorously opposed the motion based on her legal duty to maintain the property pending final "receipt" by the proper Personal Representative (S.C. Code Ann. § 62-5-425(d)). (R. 285, 310, 313, and 321, objections, opposition, motion to strike, etc.) The court granted the motion for Special Fiduciary. By her related appeal, Case no. 2014-002028, Appellant attacks the Probate Court's orders of September 29, 2011 and October 14, 2011 appointing J. Heyward Harvey, Esquire as Special Fiduciary and denying Appellant's Motion to Void Orders.

B. Probate Orders

1. Orders Denying Renewed Motion for Approval of Fees and Expenses of Guardian and Conservator

The order of October 14, 2011 was a cumulative order regarding all of the Motions, i.e. "Motions for Reconsideration and Opposition of Probate Court Order Appointing Special Fiduciary, Motion to Strike, and Renewed Motion for Approval of Expenses of Guardian and Conservator."

In said order, the Probate Court made no findings regarding the Motion, and denied it in its entirety.

2. Orders after Rule 59 Motion on Fees Petition

The Probate Court's order dated November 9, 2011, "*Denial of Motion to Alter or Amend Denial of Renewed Motion for Approval of Fees and Expenses of Guardian and Conservator*" made the following *Finding of Facts and Conclusions of Law* in pertinent part:

"This matter comes before the Court on a motion to Alter or Amend Denial of Renewed Motion for Approval of Fees and Expenses of Guardian and Conservator dated October 20, 2011 by Lisa Fischer [sic], by and through her attorney, John Hughes Cooper, Esq. Lisa Fischer [sic] moves this Court to Alter or Amend its October 14, 2011 denial of her Renewed Motion for Approval of Fees and Expenses of Guardian and Conservator.

At this time, having reviewed the Motion and the record, the Court hereby denies Lisa Fischer's [sic] Motion to Alter or Amend Denial of Renewed Motion for Approval of Fees and Expenses of Guardian and Conservator dated October 20, 2011. The Court's position remains that Lisa Fisher's fiduciary role as Guardian and Conservator was terminated by this Court's Order dated May 11, 2009, and that Ms. Fischer withdrew monies from the Conservatorship account without having the legal fiduciary authority to do so. There is ongoing litigation in the Estate of Alice Shaw-Baker and the court has appointed J. Heyward Harvey, Esq. As Special Fiduciary during the pendency of the litigation to take control of all accounts in the name of Alice Shaw-Baker, and until Attorney Harvey takes control of the said accounts, no further transactions are authorized.

THEREFORE, IT IS ORDERED ADJUDGED AND DECREED THAT:

The Motion to Alter or Amend Denial of Renewed Motion for Approval of Fees and Expenses of Guardian and Conservator dated October 20, 2011 is hereby denied." (Emphasis added)

(R. 65)

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3. *Orders after Rule 59 Motion re: Orders Freezing Assets*

The Probate Court order dated November 9, 2011, entitled *Denial of Motion to Alter or Amend the Orders Freezing Assets Dated October 14, 2011*:

..At this time, having reviewed the Motion and the record, the Court hereby denies Lisa Fischer's [sic] Motion to alter or Amend Orders Freezing Assets dated October 20, 2011. The Court's position remains that Lisa Fisher's fiduciary role as Guardian and Conservator was terminated by this court's Order dated May 11, 2009, and that Ms. Fischer [sic] withdrew monies from the Conservatorship account without having the legal fiduciary authority to do so.

THEREFORE, IT IS ORDERED ADJUDGE AND DECREED THAT:

1. The Motion to Alter or Amend the Orders Freezing Assets dated 10/20/11 is hereby denied;
2. That any assets in the name of the Alice Shaw-Baker Conservatorship and Lisa Fischer conservatorship or **individually** remains frozen;
3. That J. Heyward Harvey retains control of the assets in the name of the Alice Shaw Baker Conservatorship and Lisa Fischer [sic] conservatorship." ®. 64, Emphasis added)

C. *Timely Appeal Procedures*

Appellant timely filed her *Notice of Intent to Appeal* on November 21, 2011.

(R. 400)²

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² The time for filing said *Notice of Intention to file Appeal* is 10 days after written entry of notice, here November 21, 2011, on the *Rule 59 motion*.

Therefore, 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."))

Thereafter, Appellant filed her Statement of Grounds on December 9, 2011. (R. 502.) Respondent failed to file any opposition or response to the grounds, however by counsel, she filed a *Notice of Appearance* on March 11, 2014. (R. 539). The court set oral argument, and the matter was heard on July 16, 2014. (R. 560, R.T. 7/16/14)

The court denied the appeal, ruling:

“Statement of Judgment by the Court: Appellant Fisher’s appeal, filed on November 21, 2011, came before this Court on July 16, 2014. Upon a review of the case, this Court affirms the probate court’s order of November 9, 2011, denying Appellant’s motion to amend the probate court’s order freezing the estate assets , and affirms the probate court’s order of November 9, 2011, denying the Appellant’s motion to amend the court’s order denying the approval of fees and expenses of guardian and conservator.” (R. 69, Form 4, Judgment in a Civil Claim, dated 8/14/14)

Appellant filed her *Notice of Appeal* on September 19, 2014. (R.544) The court heard oral argument on July 16, 2014. She seeks reversal of both the Probate Court orders and the Circuit Court’s Order affirming the Probate Court Orders. Also, she contends that the denial of oral argument as to the issues briefed but not known to the Circuit Court at oral argument, when it admitted it had not reviewed the briefing.³

The Denial of Appellant’s Motion for conservator/guardian fees must be reversed. The orders freezing Alice Shaw Baker’s accounts, and to the extent that it orders Lisa Fisher’s accounts frozen, must be reversed as set forth herein.

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³ See R. 560, p. 565-566, ll. 24-25 and ll. 1-2, respectively, R.T. 7/16/14 p. 6-7.

ARGUMENT

IV.

SUMMARY OF ISSUES FOR COURT'S CONSIDERATION:

- A. **REVERSAL OF PROBATE ORDER MANDATED, WHEN APPELLANT IS THE ONLY PERSON INVOLVED IN THIS CASE WHO WAS DEPRIVED OF PAYMENT OF COMPENSATION FOR SERVICES RENDERED TO A "PROTECTED PERSON", and**
- B. **REVERSAL IS MANDATED WHEN THE PROBATE COURT SUA SPONTE ISSUES ORDERS RELATING TO THE FREEZING OF ESTATE ASSETS WITHOUT NOTICE, HEARING, OPPORTUNITY TO BE HEARD, AND/OR JURISDICTION TO ISSUE SAID ORDERS**

Appellant briefly summarizes the important legal issues raised by the Probate Court's orders denying Appellant her guardian/conservator fees and freezing monies held by Appellant and on behalf of Ms. Shaw Baker's estate.

The issue of compensation for an individual appointed by the court was discussed in the decision *Ex Parte Brown*, 393 S.C. 214, 711 S.E.2d 899 (2011). The court held that: "...the Fifth Amendment Takings Clause is implicated when an attorney is appointed to represent an indigent litigant. In such circumstances, the attorney's services constitute property entitling the attorney to just compensation."

The court limited its holding to cases involving "...an attorney's constitutional entitlement to compensation in appointed cases." However, in its analysis of the issue, the South Carolina Supreme Court reviewed precedent which demonstrates application in areas not limited to court appointed attorneys.

The United Supreme Court found in, *Armstrong v. United States* 364 U.S. 40, 49 (1960), that the Takings Clause was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

The inclusion of this “public service” rationale, coupled with the public policy of “protection of persons under disability and their property” set forth in S.C. Ann. Code § 62-5-101 et seq., supports an expansive view of the decision in *Brown* which focuses on the professionalism and public service duties of an attorney. Therefore, if these “duties” implicate the venerable principle enunciated in the United States Constitution, Fifth Amendment, *Takings Clause*, Appellant contends the “duties” imposed on a Guardian and Conservator, and the services thereafter provided, also implicate “property interests” under the *Takings Clause*.

Here, the court appointed Guardian and Conservator of Alice Shaw Baker’s great niece, Appellant Lisa Fisher, who spent in excess of 450 hours to help Ms. Shaw Baker, spent in excess of \$14,000.00 to travel and assist Ms. Shaw Baker, and placed her own life and law practice on hold to help Ms. Shaw Baker maintain her independence and avoid institutionalization.⁴ (R. 90 and R. 249)

The Probate Court’s orders not only ignore this significant sacrifice, they go a step further by making sua sponte orders which were intended to freeze not only Ms. Shaw Baker’s monies but Appellant’s.⁵ These “Freeze” orders were also executed without any testimony or affidavits presented by Respondent Bessie Huckabee⁶ without any

⁴ Appellant Lisa Fisher is a California Attorney in Good Standing who traveled to South Carolina repeatedly to assist Ms. Shaw Baker and to ensure compliance with the probate courts orders. (R. 249, p. 250, Motion for Approval of Fees and Expenses of Guardian and Conservator)

⁵ These orders of November 9, 2011 also retell the earlier order that J. Heyward Harvey control assets in the name of Appellant and the conservatorship estate. Appellant contends that these orders and issues have been properly raised in the Appeals filed by Appellant and Betty Fisher. To avoid duplication, Appellant is not repeating the arguments relating to the Appointment and initial freeze orders, but she does not waive the underlying orders that precipitated these “freeze” orders.

⁶ Appellant does not waive her contention that Respondent does not have standing. She is not a beneficiary of the estate, and there is a pending action for her removal as informally

witnesses, and most significantly, without any evidence to support the findings of the probate court. (See *Neely v. Thomasson*, 365 S.C. 345, 349-50, 618 S.E.2d 884, 886 (2005) [probate court's findings of facts may not be disturbed unless a review of the record discloses there is no evidence to support them].)

As such, the record shows the Orders violate the principles set forth in Rule 65, SCRCP, and under Constitutional Principles enunciated in the Due Process and Equal Protection clauses.

Appellant respectfully contends that these principles mandate reversal under the proper standard of review.

1. 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).)

Moreover, 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).)

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, supra*, at 349-50).

appointed administrator. (See S.C. Code Ann. § 62-1-201(20) ["interested party" definition]; S.C. Code § 62-5-309; S.C. Code Ann. § 62-7-706 [beneficiary may seek removal].)

Additionally, where a case raises a novel question of law, The court is free to decide the question with no particular deference to the lower court. (*I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 718-19 (2000).)

As will be set forth herein, the court failed to set the matter for hearing and there was no objection to the request for fees, therefore “there is no evidence to support” the court’s decision to deny Appellants’s fees.(*Patel v. Patel*, 359 S.C. 515, 529, 599 S.E.2d 114, 121 (2004) [An abuse of discretion occurs when the ruling lacks evidentiary support or is controlled by an error of law.]) And certainly no evidence to justify the deprivation of compensation for services rendered by Appellant, nor for an order intended to freeze her assets.

As in *Browne*, these interests are property for purposes of the Takings Clause, therefore Appellant contends deprivation of fees and expenses incurred on behalf of Ms. Shaw Baker and the subsequent Order freezing Assets must be reversed.

2. 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 appeals 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. 560, pp. 565-566 , ll. 24-25 and 1-13, respectively)

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. 560, pp. 565-566 , ll. 24-25 and 1-13, respectively) 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.

3. *The Probate Court Abused its Discretion by Depriving Appellant of her Right to Reasonable Compensation and Reimbursement of Fees by Denying her Request for Fees*

A. Legal Authority

The South Carolina Probate Code provides for reasonable compensation to Guardians and Conservators appointed in protective proceedings.

With regard to Conservators, S.C. Code Ann. § 62-5-414 provides, "If not otherwise compensated for services rendered, any visitor, lawyer, physician, **conservator**, or special conservator **appointed in a protective proceeding is entitled to reasonable compensation from the estate**, as determined by the court (emphasis added)."

S.C. Code Ann. § 62-5-312(b) provides as to Guardians, in pertinent part, "Any **guardian** of one for whom a conservator also has been appointed shall control the custody and care of the ward and **is entitled to receive reasonable sums for his services** and for room and board furnished to the ward as agreed upon between him and the conservator, **provided the amounts agreed upon are reasonable under the circumstances** (emphasis added)."

In *Dowaliby v. Chambliss*, 344 S.C. 558, 544 S.E.2d 646 (Ct. App. 2001), the court stated that, "an appointed guardian may be able to recover expenses prior to the formal appointment if such expenditures benefitted the ward."

In the instant case, Appellant was appointed Guardian and Conservator and served Ms. Shaw-Baker in both capacities. Ms. Fisher assisted Ms. Shaw-Baker to remain in her home, and to avoid placement in an institution. This was a great benefit to Ms. Shaw-Baker, who often expressed that remaining in her home was her primary goal.

As set forth above, Appellant spent in excess of 25 hours a week to help Ms. Shaw Baker remain in her home, traveled from California, and ensured that the Probate Court's orders for expert examinations and 24 hour care were followed. (R. 249, pp. 254-265,

Motion for Approval of Fees) To deprive Appellant of these fees is contrary to the public policy and purpose to protect and assist “protected persons.” (S.C. Code Ann. § 62-5-101)

B. The Services Provided to Alice Shaw Baker constituted “Property interests” protected under the Takings Clause.

The services provided pursuant to the appointment of Guardians and Conservators to protect and assist the Elderly, i.e. protected person under S.C. Code § 62-5-101, implicates the Takings Clause of the Fifth Amendment to the United States Constitution. (See U.S. Const. amend. V [“[N]or shall private property be taken for public use without just compensation”] and South Carolina Constitution, Article 1, § 13.)

Appellant’s services to Ms. Shaw Baker constituted a “property interest” entitling her to just compensation. As referenced above, the court in *Brown, supra*, implicates the *Takings Clause* mandating reversal, in light of Appellant’s statutory entitlement to compensation for serving as Guardian and Conservator.

As the *Brown* court explained in relation to attorneys, a Conservator and/or Guardian are “conscripted” for the public good, and as the Probate Court’s Order in effect requires Appellant to “donate funds out-of-pocket” to help a protected person (even if willingly for the benefit of a relative, as here), Appellant is deprived of property in the form of money.

Appellant respectfully argues that this implicates Fifth Amendment protection in conservatorship and guardianship proceedings. (See for example, *State v. Smith*, 747 P.2d 816, 842 (Kan. 1987); see also *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (noting that the Takings Clause was “designed to bar Government from forcing some people alone

to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"). Therefore, the order must be reversed.

C. **The Probate Court's denial of Appellant's Request for Approval of Fees and Expenses is in Violation of the Equal Protection Clause**

Appellant contends that denial of fees and expenses to Appellant treats her differently from other similarly situated citizens who have served as Guardians and Conservators and thereby violates the Equal Protection Clauses of the United States and South Carolina Constitutions. (U.S. Const. Amend. 14; S.C. Const., Art. I, § 3.)

Moreover, in this case, Appellant is the only person being deprived compensation for her services and reimbursement for funds expended on behalf of Ms. Shaw Baker. All other previously appointed individuals received compensation from Ms. Shaw Baker's monies. The Probate Court approved Guardianship fees for Walter Kaufman, who served as Co-Guardian for Ms. Shaw-Baker in the early stages of this case, at a rate of \$120 per hour, in excess of \$4300.00. (R. 20, Order Awarding Fees to Temporary Co-Guardians for period from July 31, 2008 and August 27, 2008 dated November 10, 2008) All other individuals involved with the guardianship/conservatorship received payment for this pre-death services, including Jane Orenstein, Mac Gibson, Esquire, the in-home caregivers, and Court appointed counsel, Peter Kouten (now, Bessie Huckabee's counsel). (R. 22, 24, 27, 42, 38, 44, 46, 48, 50, 51, orders approving compensation) Appellant continues to object to Mr. Kouten's representation, due to the non-waiveable conflict of interest.⁷

⁷ Review of the final fee awards to Peter Kouten further demonstrate that they were not even served on Appellant, and again demonstrate Ex parte communications with the court. (R. 46 and 46, respectively, Order Approving Attorney Fees dated February 27, 2009 and Order Granting Fees by Court Appointed Guardian Ad Litem for Alice Shaw Baker for services from January 1, 2009 through February 25, 2009 and Final Discharge of GAL dated February 27,

(Even Appellant's counsel received payment of their attorney fees after noticed hearing.)

Many of these fees were paid without any formal petition and/or service of request on Appellant.

It is well settled that "A judge's impartiality might reasonably be questioned when his [or her] factual findings are not supported by the record." (*Simpson v. Simpson*, 377 S.C. 519, 660 S.E.2d 274, (S.C.App. 02/08/2008).)

In this instance, this court did not make any factual findings regarding the denial of Appellant's motion. Appellant was the person who came to her great-aunt's aid, when her power of attorney (Bessie Huckabee) renounced her duties, turned Ms. Shaw Baker into Adult Protective Services, and abandoned her.

Appellant showed her love and respect for Ms. Shaw Baker by traveling repeatedly to see her, help her, and attend to her needs. Appellant did not charge for all of the time expended to help her aunt, nor did she request fees for the travel fees for her mother, so that Ms. Shaw Baker had family present for Christmas. However, the failure to seek fees for the extra time and effort she expended did not mean that Appellant was waiving her fees.

Furthermore, **only** Appellant's counsel fees were approved by a noticed hearing, all other individuals involved (e.g. Walter Kaufman, Jane Orenstein, Peter Kouten)

2009) This type of communication is prohibited. Submission of a proposed order without sending a copy to opposing counsel is an *ex parte* communication after the effective date of Rule 5(b)(3), SCRCP. (See also *First Financial Ins. Co. v. Sea Island Sport 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).

received approval of their fees without hearing, and without any opportunity to object. (R. 22, 24, 27, 42, 38, 44, 46, 48, 50, 51) Here, Appellant filed a proper motion for approval of her fees, which this court now denies without explanation. This mandates reversal.

D. The Probate Court Abused its Discretion by issuance of an Order intending to Freeze not only the decedent, Alice Shaw-Baker's Assets, but Appellant's, Without Notice and Hearing

1. *Legal Authority Governing Freezing of Bank Accounts*

Rule 65 (a) provides that “No temporary injunction shall be issued **without notice** to the adverse party.” (Emphasis added)

Subsection (b)also provides: “No temporary restraining order shall be granted without notice of motion for the order to the adverse party unless it clearly appears from specific facts shown by affidavit or by a verified complaint that **immediate and irreparable** injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon.” (Emphasis added).

It is well settled that an order freezing the accounts is in the nature of an injunction. (See *Grosshuesch v. Cramer*, 367 S.C. 1, 5, 623 S.E.2d 833, 835 (2005) [interpreting order freezing assets as an injunction].)

Under the South Carolina Code, injunctions are immediately appealable. To obtain an injunction, a party must demonstrate irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law. (See *County of Richland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002).)

In this case, no party requested these orders freezing the assets, there was no chance for irreparable harm (i.e. Appellant is bonded), and certainly the issues of likelihood of

success and absence of an adequate remedy are not even considered in the orders or in the originating Motion for Appointment of Special Fiduciary.

Therefore, the law governing injunctions precludes any sua sponte injunctions, especially when there are no specific facts justifying it and no hearing on the matter. In this case, the broad language of the order also intends to implicate Appellant's personal accounts, which Appellant could not have foreseen. Appellant has been deprived of a proper hearing on the matter, and as such the order should be reversed.

2. *Appellant was Required to Retain Estate Property for the "Duly Appointed" Personal Representative for the Benefit of Alice Shaw Baker's Estate.*

Contrary to the Probate Court's conclusion that Lisa Fisher lacked "legal fiduciary authority" to protect and preserve Alice Shaw Baker's assets, the South Carolina Probate Code Section 62-5-425 (d) provides:

“(d) If a protected person dies, the conservator shall ... **retain the estate for delivery to a duly appointed personal representative of the decedent or other persons entitled thereto...**” (Emphasis added)

Also, the South Carolina Probate Code section 62-7-707 provides that: “(a) Unless a co-trustee 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.

The well settled legal authority governing Statutory interpretation is:

“Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers.” *Collins Music Co., Inc. v. IGT*, 365 S.C. 544, 550, 619 S.E.2d 1, 3 (Ct. App. 2005) (quoting *TNS Mills, Inc. v. South Carolina Dep't of Revenue*, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998)). **Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention.** *Jones*, 364 S.C. at 230, 612 S.E.2d at 723 (citing *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000)).” (Emphasis added)

Here, in light of the orders extending the time to turn over the assets of the Conservatorship, Appellant has at all times acted appropriately, and in furtherance of the statutory scheme to protect the property of Ms. Shaw Baker. The Probate Court’s failure to acknowledge the continuing duty to protect the assets is contrary to the accepted duty of all fiduciaries, and is at the core of a “fiduciaries” standard. This too requires reversal.

3. The Doctrine of Laches Supports Appellant’s Continued Protection of the Estate

Bessie Huckabee cannot now object that the Estate is not protected. All of the years that have passed since Ms. Shaw Baker’s death were met without objection by Huckabee. Had Appellant not acted pursuant to the statutory duties outlined in 62-5-425 (d), and protected the Estate, it would have sustained losses and been contrary to Ms. Shaw Baker’s intent.

Under *Hallums v. Hallums*, 296 S.C. 195, 198-99, 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 been done.**” (Emphasis added)

Here, Respondent knew that Ms. A

Shaw Baker owned real property, required insurance, and was in fact, the named Agent under both the Power of attorney for finances and healthcare. (R. 390, prg. 8) Respondent abandoned Ms. Shaw Baker in her time of need, so Appellant helped her great aunt during her life—and made sure that at her death and pending the proper determination of her Wishes, these assets were not lost.

Therefore, Respondent not only waived the argument that the property was not being properly taken care of, but consented to Appellant’s continued protection of the estate pending final determination on Appeal by the doctrine of laches.

The disingenuous argument that Appellant was required to merely hold the assets pending transfer ignores the potential problems that would have resulted:

- A. No taxes would have been paid on the property leaving it vulnerable to a Tax sale;
- B. Insurance would have lapsed;
- C. No Estate tax returns would have been filed subjecting the Estate to fines and penalties;
- D. And the value of the real property would have been dissipated.

Due to Appellant's actions in protecting the assets pending resolution of the litigation, and continuing to this date, the Estate has maintained its value and increased in value.

4. *The Probate Court Lacked Jurisdiction to Hear this matter, in light of the fact that the Circuit Court had Control over the Estate Matter and at the time of the Orders, there was an Appeal before the Supreme Court.*

Since this Probate matter was removed to the Circuit Court, once the conservatorship was terminated, **any recourse regarding the assets would be in the Circuit Court.** (Emphasis added)

However, Respondent forced this action back to this Probate Court and avoid the very protections that Alice Shaw Baker's heir at law, Betty Fisher, sought by Removal of the Will Contest/Appointment of Administrator to the Circuit Court.

This court's jurisdiction under South Carolina Probate Code 62-5-102 ended upon the death of Ms. Shaw Baker, and now authority is conferred in the Circuit Court as it administers the decedent's estate. Therefore, all orders must be reversed.

E. Due Process, Equal Protection, and the Takings Clauses Under the Constitution Prohibit the Imposition of the Order Freezing Assets

The initial orders of October 14, 2011, and thereafter on November 9, 2011, improperly seek to freeze Appellant's bank accounts, even those not held on behalf of the conservatorship. (R. 59) These orders violated Rule 65 standards for injunctive relief.

They were made without notice, include factual findings where no evidence was produced

at the hearing and seek to invade Lisa Fisher's financial privacy and interfere with her ability to maintain her expenses by their very orders.

The orders are in violation of Due Process laws. The requirements of due process include notice and an opportunity to be heard. (*S.C. Dept of Soc. Serv. v. Holden*, 319 S.C. 72, 78, 459 S.E.2d 846, 849 (1995).)

Ordering the freezing of these accounts without a hearing or evidence also denies Appellant's equal protection, and treats her differently from other similarly situated citizens who have served as Guardians and Fiduciaries thereby violates the Equal Protection Clauses of the United States and South Carolina Constitutions. (U.S. Const. Amend. 14; S.C. Const., Art. I, § 3.) This was demonstrated with the very uneven treatment of all other fiduciaries, visitors, examiners, and counsel in this case who received their compensation without a hearing. (R. 22, 24, 27, 42, 38, 44, 46, 48, 50, 51)

Freezing Appellant's personal and trust fund accounts also constitute a taking under both the South Carolina and United States Constitutions. (See U.S. Const. Amend. V; S.C. Const. Art. I, § 13(A); See *Ex Parte Brown*, 393 S.C. 214, 711 S.E.2d 899 (2011) (holding that a court-appointed attorney's service is property for purposes of the Takings Clause).

For all the reasons stated in this Appeal, Appellant seeks reversal of the probate court, and thereafter the Circuit Court, for their failure to reverse the orders based on the statutory and constitutional principals which govern this case.

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V. CONCLUSION

V.
CONCLUSION

Love and Affection was the basis for Appellant's desire to help Alice Shaw Baker. Even without the fiduciary obligation, Appellant's desire is to protect the life works of Alice Shaw Baker.

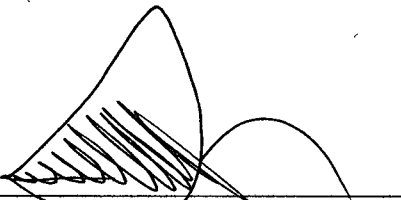
In this case, no party requested any orders freezing Ms. Shaw Baker's assets, and pending final resolution of this matter, the Orders place Ms. Shaw Baker's property in jeopardy.

Appellant has maintained the property, and ensured that it is safe and secure. Allowing the property to sit, without being maintained, while strangers to the Estate, here-- Bessie Huckabee, fight over property that rightfully belongs to Alice Shaw Baker's intended beneficiaries, Animal Charities, would be harmful.

While this fight takes priority for Appellant, the Probate Court's second order denying her fees and costs has its own harmful effects, as years go by, as Appellant overcomes the lost of monies incurred in helping Alice live in her home and seek injunctions to prevent premature institutionalization. (R. 61)

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

December 8, 2015



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THE STATE OF SOUTH CAROLINA

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In the Court of Appeals

DEC 11 2015

APPEALS FROM CHARLESTON COUNTY SC Court of Appeals
Court of Common Pleas

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

Appellate Case No. 2014-002034
Circuit Case No. 2011-CP-10-8657

LISA FISHER.....Appellant

v.

BESSIE HUCKABEE.....Respondent

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

December 8, 2015

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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
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SC Court of Appeals

LISA FISHERAppellant

v.

BESSIE HUCKABEE.....Respondent

PROOF OF SERVICE

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

December 9, 2015

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