

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEALS FROM CHARLESTON COUNTY
Court of Common Pleas

RECEIVED

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

DEC 11 2015

SC Court of Appeals

Appellate Case No. 2014-002020
Circuit Case No. 2011-CP-10-7819

BETTY FISHER.....Appellant

v.

BESSIE HUCKABEE.....Respondent

FINAL REPLY BRIEF OF APPELLANT

JOHN HUGHES COOPER, ESQUIRE
1476 Ben Sawyer Blvd. Ste. 7
Mount Pleasant, SC 29464
shiplaw@jhcooper.com
843-883-9099; fax 843-883-9335
(Attorney for Appellant)

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INTRODUCTION

Appellant Betty Fisher ("Appellant") is Alice Shaw Baker's niece, and in replying to Respondent Bessie Huckabee's ("Respondent") brief, she is challenged with overcoming mischaracterizations by Respondent's attorney, vindicating her Statutory and Due Process rights to Notice to object, and finally, bringing a voice to the longheld wishes of Alice Shaw Baker¹—by continuing to fight for the protection of her estate for the benefit of animal charities.

In so doing, Appellant outlines Respondent's false statements and legal flaws—flaws that support reversal of the order appointing a Special Fiduciary.

ARGUMENT

I. The Circuit Court Abused its Discretion and Deprived Appellant of Due Process by Failing to Review the Statement of Grounds Prior to the Hearing

Respondent's claim that Appellant does not have standing hinges entirely upon his unsupported claim that she is not an interested person under S.C. Code Ann. § 62-1-201(2). However, there is no dispute that Appellant filed a Will contest, seeking relief against Bessie Huckabee and third parties Kay Passailaigue Slade and Sandra Byrd, and that Appellant contends evidence exists that the will of Alice Shaw Baker was revoked once she learned that Kay Passailaigue Slade lied to her and did **not** operate animal charities. (R. 327, 363) As such, Appellant would be beneficiary. The Will Contest also includes causes of action which would provide the monies to animal charities, as Appellant contends they belong. Therefore, Appellant has standing, and her appeal should **not** be dismissed.

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¹ Hereinafter referred to as "Alice Shaw Baker" or "Alice." Reference to her first name is meant merely for convenience, and not to disrespect Ms. Shaw Baker.

It is almost laughable that Respondent would claim Appellant seek to bring an action against the “discharged conservator”, Lisa Fisher in this case. She has taken all action to protect the estate, both during Alice’s life and after her death. However, Respondent is a fiduciary, and based on Respondent’s own argument, a contingent remainderman has standing to pursue actions involving “misconduct of a fiduciary...”, that being Respondent. Appointing a Special Fiduciary without proper notice allows strangers to be involved the estate and increase costs in contravention of Alice Shaw Baker’s desires to have her monies used for animal charities. Here, Appellant contends that the Probate Court has no jurisdiction to order funds transferred to a Special Fiduciary.

Due to the contested title of personal representative, Respondent’s attempt to gain an advantage by filing this in the probate court, rather than the circuit court, demonstrates her interests that are adverse to the real beneficiaries of the estate—either Appellant or animal charities, as Appellant contends. This is standing. The law is clear that it will not permit her to use her fiduciary position to promote her selfish interest over the best interest of a beneficiary. (See *First Union National Bank of South Carolina v. Cisa*, 293 S.C. 456, 361 S.E.2d 615 (1987).) This has been a continuing argument by Appellant that Respondent seeks to continue in her role as “alleged” personal representative, when she is adverse to Alice’s true intentions.

Respondent relies heavily on the argument that the order involved in this case is interlocutory and not immediately appealable. However, courts have found that :“An order that is not directly appealable will nonetheless be considered if there is an appealable issue before the [c]ourt and a ruling on appeal will avoid unnecessary litigation.” (See *Hite v. Thomas & Howard Co.*, 305 S.C. 358, 360, 409 S.E. 2d 340, 341 (1991).

Further, Appellant contends that since the “order freezing accounts” is tantamount to an injunction, and it is well settled that an order freezing the accounts is in the nature of an injunction.

(See *Grosshuesch v. Cramer*, 367 S.C. at 5, 623 S.E.2d 833, 835 (2005) (interpreting order freezing assets as an injunction). Also, under the South Carolina Code, injunctions are immediately appealable. S.C. Code Ann. § 14-3-330(4). Thus, the lack of jurisdiction of the probate court sitting in its capacity regarding the conservatorship estate coupled with the improper freezing order mandates direct appeal.

Respondent's counsel implies that Appellant misled the court by her cite to *Eagles v. S.C. National Bank*, 301 S.C. 402 (1990). Indeed, he directly claims that: "Appellant fails to mention that Eagles further states that, although the appeals court may make finding [sic] with its own view, the standard of review followed was whether there is any evidence which 'reasonably supports' the circuit court's findings." (See Respondent's brief, p. 8) Review of the case, does not reveal that the *Eagles* court makes that statement, although the case in *Dean v. Kilgore*, 437 S.E. 2d 154 (1993) does stand for that proposition. With that said, it does not change the facts in this case.

Despite Respondent's conclusions, "Emergent need" can not be a finding, when there was no notice, no evidence, no affidavit, no verification, nor any testimony. Respondent concludes that the Court Order of September 28, 2011 constitutes sufficient findings of fact, and thatt the order was somehow proper. Respondent argues that the probate court can do virtually *anything*. However, it is well settled that "The probate court is a court of limited jurisdiction owing its present existence to creation by statute rather than the Constitution, and as such, can exercise only such powers as are directly conferred upon it by legislative enactment..." (See *Greenfield v. Greenfield*, 245 S.C. 604, 610, 141 S.E. 2d 920, 923 (1965).) The court does NOT have a right nor get to change said.

In this case, the probate court lacked jurisdction to make any orders related to the appointment of a fiduciary, when Appellant sought removal of the Estate case to the Circuit Court.

Thus, the probate court did not have power to order Lisa Fisher to turn the conservatorship assets over to a Special Fiduciary. The law is clear that Lisa Fisher was required to hold the monies for the proper personal representative. (See S.C. Code Ann. § 62-5-425)

II. At the time of the hearing, All Actions were Stayed in the Circuit Court because of the Appeal in the South Carolina Supreme Court, therefore the Probate Court was without Power to Grant the Motion for Special Fiduciary.

Respondent rehashes the same legal theories throughout this appeal—standing, interlocutory, and dismissal. These sections fail to address appellant’s arguments, and as such should have been treated as a failure to respond to the issues raised, as a confession that appellant’s position is correct. (See *First Union National Bank v. FCVS Communications*, 321 S.C. 496, 469 S.E. 2d 613 (1996).) Respondent’s counsel did not present any admissible evidence to the probate court, did not brief the appeal to the Circuit court, and now seeks to reference records in violation of the Rules of this court (i.e. records from the estate action).²

The issue raised in this section, that when there was a pending appeal, no party that authority under Rule 203, SCACR and S.C. Code Ann. § 62-1-308 (c) precluded bringing any motion while the matter was on appeal.

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² Filed concurrently is Appellant’s Motion to Strike. Respondent seeks to reference records not presented to the probate or Circuit Court. Georgia courts have discussed the problems with allowing facts outside the record even in argument. The court in *McConnell v. Akins*, 586 S.E.2d 688 (2003) stating: “The law forbids introduction into case, by way of argument, facts which are not in the record and are calculated to prejudice party and render trial unfair.” It is well established by the rules of the court, Rules 208 and 212, SCACR, that this court is not to consider any alleged fact not cited in the record. Here, there is nothing in the record to allow the court to jump to this conclusion, and Appellant respectfully requests that the court ignore these improper conclusions. (See Concurrently Filed Motion to Strike)

III. Reversal is Mandated Due to Respondent's Failure to Give Appellant Betty Fisher Notice

Respondent again argues that Appellant is not an interested person, and does not have standing, however as set forth above, either Appellant or Animal Charities are the true beneficiaries, and dismissal is improper. "Standing is...that concept of justiciability that is concerned with whether a particular person may raise legal arguments or claims." (See *Bank of Am., N.A. v. Draper*, 405 S.C. 214,219, 746 S.E. 2d 478, 480 (2013).) It concerns an individual's sufficient interest in the outcome of the litigation to warrant consideration of [the person's position by a court." (*Id.* At 219, 20, 746 S.E. 2d at 480.) There are three requirements for standing:

"First, the plaintiff must have suffered an 'injury in fact'— an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly...traceable] to the challenged action of the defendant, and not...the result of the independent action of some third party not before the court. Third, it must be 'likely,' as opposed to merely 'speculative' that the injury will be 'redressed by a favorable decision." (*Id.* [quoting *Smiley v. South Carolina Dept. Of Health &Env'tl Control*, 374 S.C. 326, 329, 649 S.E. 2d 31, 32-33 (2007)]).

The Probate Court's order requiring the transfer of monies to the Special Fiduciary constitutes "Injury in fact" to the beneficial interest in the estate to Appellant, based on the Will Contest and relationship to Alice Shaw Baker. If a Third party Fiduciary is involved, both attorney fees and fiduciary fees, will substantially reduced with no corresponding benefit to the estate, and substantial losses to Appellant (and/or the intended beneficiaries—animal charities). Second, this interest is the direct result of the Probate court's attempt to exercise jurisdiction over estate assets, outside the control of the Circuit Court. Finally, a decision that the Probate court lacked jurisdiction would cause harm to the beneficial interest of Appellant (and/or the intended beneficiaries, animal charities.). Accordingly, Appellant has standing to object to the rulings affecting the Estate assets, and has brought this at the earliest opportunity after Respondent's

Motion for Appointment of Special Fiduciary. Therefore, Appellant did not waive the objection on jurisdictional grounds. (See 12, SCRCF.)

The conservatorship action is now moot, because Alice Shaw Baker died, and in connection with a separate action removed to the Circuit Court, Appellant seeks a formal probate of Alice Shaw Baker's estate. Appellant awaits determination of the appropriate person as Administrator. Respondent's informal appointment is challenged. Lisa Fisher continues to protect the property, pursuant to her fiduciary duties, and in fulfillment of the her mandatory duty to transfer to the appropriate personal representative.

Respondent also contends that the case is interlocutory, and not immediately appealable. As authority for her position, Respondent cites *Watson v. Undercook*, 407 S.C. 443 (2014), however this case does not support his position. Instead, it supports Appellant's position, and contains language directly instructive:

“An order that is not directly appealable will nonetheless be considered if there is an appealable issue before the [c]ourt and a ruling on appeal will avoid unnecessary litigation.” (See *Hite v. Thomas & Howard Co.*, 305 S.C. 358, 360, 409 S.E. 2d 340, 341 (1991).)

It is important in the scheme of Respondent's argument to recall, that she filed a Motion for Special Fiduciary, without reference to evidence, without affidavit, and without notice. Respondent also knew that there was a pending appeal, and that authority under Rule 203, SCACR and S.C. Code Ann. § 62-1-308 (c) precluded bringing any motion.

On appeal to the Circuit Court, Respondent's counsel merely attended oral argument, he did not file any briefing.³ Appellant contends that based on authority from *First Union National*

³ Filed concurrently is Appellant's Motion to Strike. Respondent seeks to reference records not presented to the probate or Circuit Court. Georgia courts have discussed the problems with allowing facts outside the record even in argument. *McConnell v. Akins*, 586 S.E.2d 688 (2003) stating: “The law forbids introduction into case, by way of argument, facts which are not in the record and are calculated to prejudice party and render trial unfair.” On p.

Bank, supra., 321 S.C. 496, 469 S.E. 2d 613 (1996), respondent's failure to respond to issues in Appellant's brief, in the Circuit Court on appeal, should have been treated as a failure to respond as a confession that appellant's position is correct.

Thus, the Probate Court did **NOT** have jurisdiction to enter the order appointing a Special Fiduciary. The nexus between the appointment of a special fiduciary and estate assets is which court had authority to enter any orders., in light of the Probate Court's jurisdiction over the decedent's estate.

Therefore, the Appointment of a Special Fiduciary is not interlocutory when there has been no notice of the order and the order is against the law. Here, Lisa Fisher is required to deliver the property to the proper personal representative pursuant to Probate Code § 62-5-425. The court in *First Union National Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) emphasizes that: "Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. The unchallenged ruling, right or wrong, is the law of the case and requires affirmance." In probate matters, which necessarily affect all of the decedent's estate, here Alice Shaw Baker's estate, no notice to family and beneficiaries mandates immediate review. Appellant and Lisa Fisher both objected to the Probate Court's exercise of jurisdiction over the Estate action which was removed to the Circuit Court. The Probate Court did not have jurisdiction to hear the motion for Special Fiduciary, and as such the order must be reversed.⁴

11 of Respondent's brief, there is a paragraph purporting to extol all of the events that took place in the probate court. The accuracy which is disputed by Appellant. It is well established by the rules of the court, Rules 208 and 212, SCACR, that this court is not to consider any alleged fact not cited in the record. Here, there is nothing in the record to allow the court to accept Respondent's narrative, and Appellant respectfully requests that the court ignore these improper references. (See Concurrently Filed Motion to Strike)

⁴ See *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183, 561 S.E. 2d 659, 661 (2002) [noting that a judgment is void if rendered by a court "which lacked subject matter jurisdiction or personal jurisdiction"] Moreover, even when a probate court has subject matter jurisdiction over the dispute, its jurisdiction can be divested. (See *Limehouse v. Hulsey*, 404 S.C.

And even if there was authority for a Motion, under constitutional and statutory notice provisions Respondent was required to give Appellant notice. (See §62-7-704(e) and § 62-3-614; § 62-1-401 [requires 20 days notice and a hearing].)⁵

Finally, Respondent argues that the courts have inherent power to do all things reasonably necessary to insure just results. (Respondent's brief, p. 11) Here, Respondent ignores the statutory and Constitutional Provisions, and basic principles that a court must make "appropriate order" (e.g. S.C. Code Ann. § 62-5-416(C).) Once the estate action was removed from the Circuit court, the probate court had no authority to act to appoint any fiduciary.

Therefore, the orders must be reversed.

IV. The Order Appointing Special Fiduciary is Void, because Alice Shaw Baker revoked the Will Naming her Personal Representative.

Respondent mischaracterizes Appellant's action in the Circuit Court, claiming that she "has yet to seek hearing or determination" that the last will is valid or invalid. This issue is not before this court, and requires reference to material outside the record in violation of Rule 208, 212, SCACR.

Respondent rehashes the same issues related to standing, interlocutory, and preservation of issues. Appellant contends the law and facts set forth above demonstrate that Appellant has standing and that this matter is not interlocutory.

Appellant brought these issues up in her objections and motions to alter. Therefore the Issues are preserved.

93, 105, 744 S.E.2d 566, 573 (2013). All of these issues together mandate compliance with the statute.

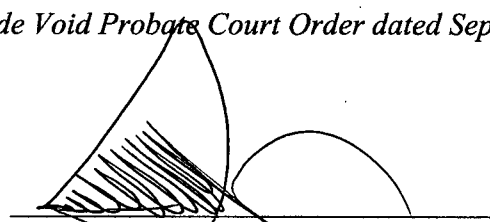
⁵ A fundamental requirement of procedural due process is the opportunity to be heard at a meaningful time and in a meaningful manner. (See *Blanton v. Stathos*, 351 S.C. 534 542, 570 S.E. 2d 565, 569 (2002).)

It is questionable why Respondent's counsel went to the Conservator court , he knew that jurisdiction for the estate property was in the Circuit Court. He further knew that after the death of Alice Shaw-Baker, the assets were estate property and by statute, Appellant was duty bound to protect the assets pending proper appointment. (See South Carolina Probate Code Section 62-5-425 (d).) This is a classic case of forum shopping--wherein Respondent's counsel attempts to undermine the statutory protections obtained by Betty Fisher in seeking removal of the Estate case to the Circuit Court . The issue of revocation and Bessie Huckabee's standing to bring the motion must be considered, and the bringing of the motion viewed with suspicion and

CONCLUSION

Appellant respectfully prays that this Honorable Court reverse the judgments of the Probate Court and the Order of the Circuit Court affirming the Probate Court Order Appointing Special Fiduciary and Denying Appellant *Motion to Set Aside Void Probate Court Order dated September 28, 2011.*

December 8, 2015



John Hughes Cooper, Esquire
1476 Ben Sawyer Blvd. Ste. 7
Mount Pleasant, SC 29464
shiplaw@jhcooper.com
(843) 883-9099
Attorney for Appellant

Other Counsel of Record:

Peter A. Kouten, Esquire
Kouten Law Firm, LLC
P.O. Box 340
John's Island, SC 29457

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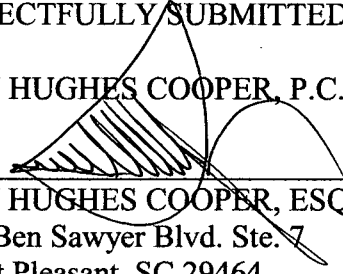
CERTIFICATE OF COUNSEL

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

December 8, 2015

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By: 

JOHN HUGHES COOPER, ESQUIRE

1476 Ben Sawyer Blvd. Ste. 7

Mount Pleasant, SC 29464

shiplaw@jhcooper.com

843-883-9099; fax 843-883-9335

843-883-9099; fax 843-883-9335

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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

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By: 

JOHN HUGHES COOPER, ESQUIRE

Federal Court ID 298

South Carolina Bar 1387

State Bar of Georgia 185986

1476 Ben Sawyer Blvd. Ste. 7

Mount Pleasant, SC 29464

shiplaw@jhcooper.com

843-883-9099; fax 843-883-9335

ATTORNEYS FOR APPELLANT