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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Consolidated Appellate Case No. 2014-002020¹
Circuit Case No. 2011-CP-10-7819

Betty Fisher and Lisa FisherAppellants

v.

Bessie Huckabee.....Respondent

**APPELLANTS' PETITION FOR REHEARING
REGARDING OPINION NO. 2016-UP-528 FILED DECEMBER 21, 2016**

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¹ Correspondence from the South Carolina Court of Appeals dated December 21, 2016 noted that the three appeals, case numbers 2014-002020, 2014-002028, and 2014-2034 are now consolidated under case number 2014-002020.

I. INTRODUCTION

Pursuant to Rule 221(a) and 240 of the South Carolina Appellate Court Rules ("SCACR"), Appellants Betty Fisher and Lisa Fisher ("Appellants") respectfully petition this Court for rehearing. The Court issued its decision, Unpublished Opinion No. **2016-UP-528** ("Opinion"), on December 21, 2016, affirming in part the lower court orders and remanding in part.

This petition is timely under Rule 221(a), SCACR.²

Appellants' decision to file this petition for rehearing is supported by the goals enunciated below:

"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), emphasis added)

Appellants rely on the idea of what the "legal system" is supposed to do—render justice. By seeking rehearing on the specific issues raised in this petition and on the original arguments set forth in Appellants' briefs, they ask this Court to consider the intricate relationship of the issues--a relationship which demands consideration of the

² 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.**" (Emphasis added)

Constitutional protections mandated and the practical necessity of employing straightforward procedures to protect a decedent's assets in these court proceedings.

This protection must embrace both economical considerations and the intention of the decedent, which Appellants assert is to provide estate funds to benefit Animal Charities. Appellants are confident that if both of these factors are considered, Justice will be attained and reversal of the entirety of the Opinion will be necessitated.

The complex issues related to Alice Shaw Baker's estate were raised in the briefs and admittedly addressed in at least 22 distinct legal issues which this court consolidated³ and reduced to a mere 9 issues. These 9 issues all have an interconnection which mandate reconsideration by this court: Due Process, Equal Protection, Jurisdiction, Appellate Stays, Statutory Requirements, and preservation of estate assets to benefit a decedent's trust beneficiaries.

Therefore, Appellants resubmit the arguments from their briefs on the issues raised in this appeal as if stated verbatim herein, which arguments were not addressed in the Court's unpublished opinion, and additionally submits the following issues that the Court has overlooked and/or misapprehended in reaching its decision.

II.

STANDARD FOR GRANT OF REHEARING

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,

³ Appellants contend that this numeric valuation is set forth in the Opinion, however based on subsections in the briefing, the legal issues are not necessarily limited to 22 issues. The number is used for emphasis, and Appellants reassert and revisit these issues to preserve them in these proceedings.

564, S.E. 2d 322 (2001), emphasis added.) 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.) As set forth herein, rehearing must be granted on this principal alone.

The principles behind the concept of rehearing were discussed in the broad constitutional context in the United States Supreme Court decision, *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...”

Thus, consideration of the following issues are to ensure a just result for the parties, and to embrace the underlying policy principles mandating protection of estates and honoring the decedent's intentions *based on evidence* are the foundation for this petition.

III. ARGUMENT

A. THE OPINION OVERLOOKS AND MISAPPREHENDS THE PERVASIVE DUE PROCESS VIOLATIONS THAT INTERFERED WITH THE CONSTITUTIONAL RIGHTS OF BOTH APPELLANTS.

From the beginning of these cases, they have been fraught with factual inaccuracies based on this Court's reliance on Respondent's unsubstantiated reference to "facts". The record submitted by Appellants' demonstrates that there was no record referenced by Respondent to support any of the rulings from the probate court.

The motion for appointment of special fiduciary was not supported by affidavits, the court heard no testimony, no exhibits were introduced, no evidence was introduced at all-- other than Attorney Peter Kouten's unsubstantiated argument. (See R.281, Motion for Special Fiduciary) Moreover, when Appellant requested an opportunity to rebut the claims

of Attorney Kouten, the court denied her request. (See R. 551, R.T.8:4-8, R. 548, p. 553, reference to p. 16, ll. 7-14, R.T. of 8/17/2011)

Therefore, this Court's Opinion is an opinion based on Nothing—an invisible record claimed by Respondents but not supported by the evidence. Respondent made no effort to properly oppose the appeal in the circuit court and failed to reference the record in the Respondent's brief. Despite Due Process considerations, there is another reason this Court requires reference to the record, and that is to prevent prejudice to parties based on manipulated facts. The Opinion demonstrates the error that occurs when this legal foundation is built on careless assertions, rather than strong references to evidence.

1. Summary

The United States Supreme Court has held that at a minimum certain elements must be present to adequately provide appropriate Due Process.

These include (1) adequate notice, *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729, 42 L.Ed. (2d) 725 (1975); (2) adequate opportunity for a hearing, *Armstrong v. Manzo*, 380 U.S. 545, 85 S. Ct. 1187, 14 L.Ed. (2d) 62 (1965); (3) the right to introduce evidence, *Baltimore & Ohio Railroad Co. v. United States*, 298 U.S. 349, 56 S. Ct. 797, 80 L. Ed. 1209 (1936); and (4) the right to confront and cross-examine witnesses, see *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L.Ed. (2d) 935 (1974). All of these factors were in some way denied Appellants as outlined herein.

South Carolina courts have also embraced the constitutional protections of Due Process, both in its reliance on the United States Constitution, Amends. V and XIX, § 1 and the South Carolina Constitution, Art. 13 and through its legal precedent. It also contemplates notice, a reasonable opportunity to be heard, and a *fair hearing* before a

legally constituted impartial tribunal. (See *Blanton v. Stathos*, 351 S.C. 534, 542, 570 S.E. 2d 565, 569 (Ct. App.2002), emphasis added).

The rationale set forth by the Court embraces the principles of notice, but sets Appellants apart as notice is deemed unnecessary to Appellant Betty Fisher because of a Will, without consideration of the factual assertion of revocation of the claimed will and the Contested nature of the case.

As will be shown, Rehearing is required, because the Court misapprehended and overlooked the actions of Respondent and those of the lower court which caused Appellants to be prejudiced by the numerous violations of Constitutional principles and denial of a fair trial:

- a) The Circuit Court's imposition of oral argument *prior* to consideration of the written legal briefs, and without ruling on Appellant's objections was a denial of Due Process and Equal Protection;
- b) Also, the hearing on the Motion for a Special Fiduciary in the probate court, *when* the court lacked jurisdiction to make any orders related to the assets of Alice Shaw Baker, due to her death was a denial of Due Process and Equal Protection;
- c) The failure to give Appellant Betty Fisher constitutionally (and statutory) required notice related to the Motion for a Special Fiduciary also was prejudicial and in violation of Due Process;

- d) The imposition of an injunction on funds held in California without following any formalities, when the assets were under the jurisdiction of the Circuit Court, and when none of the standards for “Emergent need” under S.C. Code Ann. § 62-7-704(e) were met created a Due Process and Equal Protection Violation;

- e) Further, this Court's consideration of Appellant Lisa Fisher's right to compensation led to the correct result of "remand" to preclude a takings by the Court, however the directions and factual assertions set forth by this Court give credibility to false accusations considering the valuation of Alice Shaw Baker's estate and any depletion of the estate. Moreover, the Court has remanded the issue to the probate court, however any order related to the approval of fees must be considered in the estate case (which was removed to the Circuit Court). These issues implicate Equal Protection, Due Process, and the Takings Clause.

Therefore, rehearing on all of these issues should be granted.

- a) **This Court Has Overlooked and Misapprehended the Law Related to Appellants’ Due Process and Equal Protection with Regard to Oral Argument.**

Some Courts have ruled that procedures relating to oral argument in Appellate proceedings may implicate the Constitution. Fundamental fairness requires that Appellants have a right to argue meaningfully to the Court concerning the issues related to the case, and sometimes this requires oral argument.

The issue is not settled in the law. The United States Supreme Court has ruled that "...the right to oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances, as do other procedural regulations." (*FCC v. WJR, The Goodwill Station, Inc.*, 337 US 265 (1949).)

The *FCC* case also references the very early case of *Londoner v. Denver*, 210 US 373 (1908) which stands for the proposition that oral argument is necessary in cases, however brief. Here, the question is not merely whether there is a due process right to oral argument, rather when oral argument is permitted, do procedures mandate that the court be familiar with the issues on appeal prior to allowing oral argument? Isn't it merely a meaningless act to argue, if the court can not clarify the issues at hand? Would we allow a jury to consider a case, prior to hearing testimony or the law or consider the impact of evidence or....? This Court misapprehends and overlooks Appellant's legal theory related to oral argument.

Other Courts have discussed the implications of procedure in oral argument. A California case, *People v. Pena*, 32 Cal.4th 389 (Cal.2004), dealt with tentative decisions and oral argument. The court explained why the procedure surrounding oral argument could itself be the problem. In *Pena*, the Court of Appeals outlined a procedure where a tentative decision became final unless oral argument was requested. Part of the notice included language that "oral argument will not aide the decision making process" and included a threat of sanctions.

Clearly, the question of a fair hearing and right to oral argument in *Pena* seems tenuous and the court reversed the decision and declined to use the notice in the future. But what about here, a more subtle case. Argument is allowed, without reference to the issues, without knowledge of the law, and without an opportunity to inquire about the

distinctions in the case. Similar to the results in the *Pena* case, consideration of the appellate issues without all of the preliminary steps could cause counsel to doubt whether oral argument would, in fact be meaningful, and that it had the potential to discourage improperly the exercise the right to present oral argument on appeal. (*Id. at 400-402*) Appellant contends that allowing oral argument as a precursor to reading the briefing prevented meaningful oral argument and improperly, if not discouraged, interfered with the presentation of oral argument.

There have been several articles on the importance of oral argument. In Bright & Arnold, *Oral Argument? It May be Crucial*, 70 A.B.A.J 68, 70 (Sept. 1984) it was noted that two Eighth Circuit judges changed their mind in 17% and 31 % of the cases in which oral argument was held; see also Wald, *19 Tips from 19 Years on the Appellate Bench*, 1 J.App. Prac. & Process 7, 17 (2001) which explained that "Oral argument seldom brings you 180 degrees around, but if your tilt is, say 50-49%, It can make a difference." Due to the procedure, Appellants did not have the benefit of this "difference" in a case where the facts that led to the filing of the Appeal demonstrated substantial prejudice.

Rather, this Court concluded that there was "no error by the circuit court" in failing to consider the statement of grounds or permit oral argument. (Section V, 1) In its analysis it concludes that the court was allowed to provide "deference to the probate court's finding ...in circumstances where it is apparent from the record that the credibility of the witnesses was a consideration." However, this rationale fails, because there were no witnesses in the probate court.

This Court cites to *Macaulay v. Wachovia Bank of S.C.*, 351 S.C. 287, 293-94, 569 S.E. 2d 371 (2002) for the position that the probate court "was in the best position to judge credibility." The court noted that this deference to the probate court's findings is

appropriate in circumstances where it is *apparent* from the record the credibility of the witnesses was a key consideration in weighing the evidence.

This Court's conclusion ignores the facts that no one testified, therefore Lisa Fisher's "credibility" was not *apparent* from the record and Respondents presented no evidence for the probate court to weigh. It also accepts as truth the conclusion that there was an "unauthorized depletion", when the record shows that there was no evidence presented by Respondents, no sworn affidavits, no objections--nothing more than unsubstantiated argument by Respondent's counsel. If Lisa Fisher had been provided with an opportunity to rebut the "argument" of Respondent's counsel, this Court would have had an opportunity to examine the duty owed by a fiduciary (here, conservator Lisa Fisher) to protect the assets and the duty to deliver Ms. Shaw Baker's property to the proper person. (See S.C. Code Ann. §§ 62-5-425(d) and See § 62-3-614).⁴

At the same time this Court misapprehends the concepts related to oral argument, it also fails to consider 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 under both statutory and trust law. Appellants cited in their brief the complex duty associated with the conservator and duty as a trustee. The Court contended that the circuit court heard the arguments at the hearing. However, "Fisher's arguments" could not have been

⁴ The protection of assets would encompass payment of taxes, payment of insurance, maintenance of the real property, filing of tax returns and the attendant costs related to these duties. Any inference of unauthorized depletion of funds creates a misconception related to Appellant Lisa Fisher's handling of her duties, and ignores the fact that since the filing of the Appeal, no monies of Alice Shaw Baker's were used to protect the properties. Therefore, all of the above were paid by Appellant pending this appeal. Moreover, Appellants question why the Court would accept the assertions of fact by Respondent, in light of his failure to reference the record on all issues and inaccurately portrayed the facts. (E.g. Case no. 2014-002020, Respondents' brief, pp. 4-5)

considered by the circuit court or even this Court if "credibility" is in question. Appellant Lisa Fisher could not and should not be forced to guess at the questions the appellate court in oral argument might have had about her credibility when she was denied a formal hearing to rebut the false accusations asserted in this matter.

The circuit court's imposition of oral argument *prior* to consideration of the written legal briefs, and without ruling on Appellants' objections deprived Appellants of Due Process, Equal Protection and a fair hearing. Therefore, Appellants respectfully request that the Court grant rehearing.

b) This Court Has Overlooked and Misapprehended the Law Related to Appointment of a Special Fiduciary

The Opinion continues to overlook the strict and clear statutory mandates preventing appointment of a Special Fiduciary, when there is no vacancy in the office of the trustee.

The Court determined that the issue of a Special Fiduciary was not an interlocutory order, pursuant to *Ex parte Small*, 69 S.C. 43, 46, 48 S.E. 40, 41 (1904), however citing to S.C. Code Ann § 62-3-614, the court concluded that the court may order appointment to "preserve the estate." Yet, this conclusion begs the Question:

Was Alice Shaw Baker's Estate ever in jeopardy, where the conservator Appellant Lisa Fisher is an officer of the Court, has a bond, was maintaining the property, and no admissible evidence or testimony existed in the courts below?

The Opinion misapprehends the problems associated with the appointment of a Special Fiduciary. The appointment mandates a vacancy in the office of Trustee, and as the facts demonstrate in this case, there was no vacancy. Moreover, for the court to create a vacancy by Appellant Lisa Fisher it had to take action to remove her. It makes no difference that the probate court did not use the language of "removal", the actions of Appointment when there was no vacancy created a constructive removal. For a lawful removal, notice was required, an appropriate hearing, an opportunity to produce evidence, and the ability to confront witnesses. (See S.C. Code § 62-5-415.) As cited above, this is essential to Due Process.

The conservator, here Lisa Fisher, had a bond, and was duty bound to "deliver" the funds to the proper person. (See S.C. Code § 62-5-425 (d) and § 62-7-707) If the probate court can come in and disturb an original order of appointment of personal representative, here rightly contested and subject to real issues of revocation of the will, then the probate court can interfere with the removal to the circuit court and actions in the Court of Appeals. Further, it can interfere with a testator's wishes by blocking the proper revocation of the Will by appointing an unknown special representative of the court without testimony or factual record--without any ability to determine a conflict of interest and more importantly in this case, remove a conservator/trustee who is duty bound to protect the decedent's estate of monies meant for Animal Charities because she questions the propriety of court orders.

The Court relies on *Ulmer v. Ulmer*, 369 S.C. 486, 491-92, 632 S.E. 2d 858, 861 (2006). The *Ulmer* facts dealt with a visitation order that was not appealed. The *Ulmer* appellant contended that the court erred in issuing orders related to a change in visitation, because it was not preserved on appeal. *Ulmer* is not dispositive in this case, the general

rule discussing the scope of S.C.Code Ann. §62-1-308 is that "the only proceedings required to cease are those proceedings addressed in the orders from which an appeal is taken." However, implicit in these appeals is the related question: To whom is the conservator legally responsible to deliver the property? Under no authority can a Special Fiduciary be contemplated without the unlawful and improper removal of the conservator trustee when there is no vacancy. The legal implications in this case are ambiguous at best:

- 1) On one hand, Bessie Huckabee is the named personal representative, however she never filed a bond, so delivery to her would be irresponsible and subject the conservator/trustee to surcharge, especially in light of Appellant Lisa Fisher's knowledge that the will by which Bessie Huckabee was appointed was revoked.⁵

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⁵ (See S.C. Code Ann. § 62-5-417 [conservator is to act as a fiduciary and shall observe the standards of care applicable to trustees as described by Section 62-7-933.]; See also S.C. Code Ann. § 62-7-303(a)(4) ["a trustee may represent and bind the beneficiaries of the trust with respect to questions or disputes involving the trust]; S.C. Code Ann § 62-7-404 ["A trust may be created only to the extent its purposes are lawful and possible to achieve]; S.C. Code Ann. § 62-7-407 ["...a trust need not be evidenced by a trust instrument."])
As applied, this Court has created an exception to the Statutory rule which conflicts with the scheme for protection of estate assets. It is well settled that where statutory law conflicts with the Rules of procedure, statutory law controls. (S.C. Const. Art. V, sct. 4 (Subject to the statutory law, the Supreme Court shall make rules governing the practice and procedure in all such courts; see *Hendrics v. State*, 387 S.C. 221, 692 S.E. 892 (2010).)

- 2) On the other hand, delivery to a Special Fiduciary, when there was already a grant of an order of appointment of personal representative was effectively subjecting the conservator to future surcharge, because the order directly conflicts with the statute and after trial in the contested case could lead to the beneficiaries of Alice Shaw Baker's estate to seek surcharge for failing to abide by the statute.

South Carolina has adopted the Uniform Probate Code. The comment in the Uniform Probate Code Section 5-428 provides that "the particular problems that can arise if the estate beneficiaries fail to take action to appoint a personal representative for the protected person's estate. **The conservator will then be unable to close the conservatorship because there is no 'successor' to whom to deliver the protected person's assets.**" (Emphasis added)

This analysis supports Appellants' position that she must wait for a proper determination of the contest/trial on the revocation. If this Court makes an exception to the rule that a Special Fiduciary may not be appointed if there is no vacancy, that the Court handling the Estate has exclusive jurisdiction, and that a conservator may not be removed without evidence and a hearing, than Appellants are deprived of Due Process and Equal Protection.⁶

⁶ 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.)

This Court also relies on trust law as support for the appointment of a special fiduciary as "whenever the court considers the appointment necessary for the administration of a trust." (S.C. Code Ann. sct. 62-7-704(e).) This interpretation does violence to the statutory scheme and the relationship with the jurisdiction of the circuit court after removal of the Estate matter to the circuit court. This court misapprehends the facts related to Respondent Huckabee's filing of the Motion, prior to resolution of the Appeal.⁷ The effect is to interfere with another court's order which is subject to the pending litigation. (See Rule 60, SCACR; See also *Dukes & Dukes v. Hygrade Food Products*, 236 S.C. 69 (1960).)

c) This Court Has Overlooked and Misapprehended the Law Related to Appellant Betty Fisher's Right to Notice and Objection with Regard to the Motion for Special Fiduciary.

This Court determined that Betty Fisher was not entitled to notice of the hearing on the appointment of a special fiduciary. The court based this on Probate Code sct. 62-3-614 (2015) and that neither Betty Fisher, nor the Animal Charities are named in the last will. However, this case involves the contested issues of the Will Contest, the revocation of the Will, etc. The Opinion seems to accept the claim that the Will is proper, yet this is a contested issue. Therefore, under Rule 5, service of motions are on all parties:

"Rule 5 (a)Service: When Required. Unless otherwise ordered by the court because of numerous defendants or other reasons, all (1) written orders; (2) pleadings subsequent to the original summons and complaint, which includes answers, counterclaims, cross claims,

⁷ The court's conclusion that Huckabee's appointment as the personal representative was not affirmed by this court until April 2011 is not correct. The Motion was filed in May, 2011 while the matter was still on appeal. The substituted opinion of June 2, 2011, Case no. 2011-UP-173 did not affirm Huckabee's appointment, rather it indicated it was an interlocutory order. Huckabee never complied with the order, and did not obtain any type of bond. Thus, the order was not in effect.

replies and amended complaints; (3) written motions, other than ones which may be heard ex parte; (4) written notices; (5) discovery requests and responses; (6) appearances; (7) demands; (8) offers of judgment; (9) designations of record or case; (10) grounds or exceptions on appeal; and (11) other similar papers shall be served upon each of the parties of record. No service need be made on parties in default for failure to appear, except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for serving of summons in Rule 4, and notice of any trial or hearing on unliquidated damages shall also be given to parties in default.”

This rule coupled with the Constitutional provisions of Due process support the conclusion that Betty Fisher was entitled to notice, and the Opinion overlooked the real status of the case.

Also, the Court overlooked the issue of the probate court proceeding with the motion, without ruling on Appellants’ objections. The transcript and the record discloses that Appellants objected to 1) the procedure, 2) the accusations and purported averments by Respondent’s counsel, and 3) the conclusions of the court (both at the hearing and in its orders), and the Probate Court’s rulings. (R. 285, 310, 313, 318, 321 and R.T. 548) (See *State v. Najjar De'breece Byers*, 392 S.C. 438, 710 S.E. 2d 55 (2011).)

Therefore, Appellants respectfully request that the court grant rehearing on this issue.

- d) **This Court Has Overlooked and Misapprehended the Law Regarding Freezing of Alice Shaw Baker’s Monies, and the Failure of the Probate Court to follow any Due Process Procedures.**

The imposition of an injunction on funds held in California without following any formalities, when the assets were under the jurisdiction of the Circuit Court, and when

none of the standards for “Emergent need” under S.C. Code Ann. § 62-7-704(e) were met, created a Due Process and Equal Protection Violation. (See also Rule 65 (a) and (b).)

This Court misapprehended and overlooked the prejudicial effect of the freezing orders. (See *Grosshuesch v. Cramer*, 367 S.C. 1, 5, 623 S.E.2d 833, 835 (2005) (interpreting order freezing assets as an injunction).)

Greenfield v. Greenfield, 245 S.C. 604 (1965) is advanced for the proposition that the court had authority to freeze the funds, however the only authority allowed was to compel property of a decedent to be transferred to the Appellant.

This court relying on *Holcombe v. Hardee*, 304 S.C. 522, 524, 405 S.E.2d 821, 822 (1991) indicates that it may make its own findings of fact if the record is sufficient. The record in this case is not sufficient, because Appellant was deprived of a formal hearing, deprived of the ability to testify, and deprived of the ability to present evidence. Therefore, this court’s determination that the record was sufficient is further deprivation of Due Process, and evidence of a disregard for standards of law and justice and the impression of fair legal process—all to Appellants’ prejudice.

Under the South Carolina Code, in order 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. *County of Richland v. Simpkins* 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002). In this case, no one requested these orders freezing the assets, and certainly no evidence was produced to support any finding of irreparable harm. Moreover, the probate court refused to allow testimony to rebut any accusations. This again raises the issue of Due Process and Equal Protection.

A Rehearing on these issues must be granted.

- e) **Despite Remand, This Court's Conclusions related to Appellant Lisa Fisher's Right to Compensation has Directions and Conclusions which will follow the Case and Prejudice Appellants.**

This Court's consideration of Appellant Lisa Fisher's right to compensation led to the correct result of "remand" to preclude a takings by the Court, however the directions and factual assertions set forth by this Court give credibility to false accusations considering the valuation of Alice Shaw Baker's estate and any depletion of the estate.⁸ Moreover, the Court has remanded the issue to the probate court, however any order related to the approval of fees must be considered in the estate case (which was removed to the Circuit Court). These issues implicate Equal Protection, Due Process, and the Takings Clause.

While Appellant agrees remand is appropriate, to ensure a correct record and maintain the integrity of the basis for this Opinion on these issues it is important to note that Huckabee's appointment is contested and the alleged will is alleged to be revoked. Moreover, the valuation of the estate does not include the monies that are interplead in the court, so the valuation is not accurate. It was and is a preliminary valuation which further supports the need for an evidentiary hearing which was denied by the court below.

⁸ It's important to remember that this was a consensual conservatorship/guardianship. Alice Shaw Baker's trust in Appellant Lisa Fisher must be honored, and in honoring this trust, Alice Shaw Baker's estate would not incur unnecessary costs.(See S.C. § 62-5-410 which discusses priority of appointment and that the conservator act as "trustee"). Therefore, as set forth by Appellant Lisa Fisher, as fiduciary/conservator/trustee, she had a duty to deliver the monies to the proper personal representative. Anything less would subject her to surcharge. (See *Greenfield v. Greenfield*, 245 S.C. 604 (1965), which cites to *In re Pringle's Estate*, 51 Wyo.352, 67 P.2d 204, 208, 110 A.L.R. 987, stating that "until one has paid (money) or delivered over property to those legally entitled thereto he has not "accounted" therefor."

Also, the allegations that the fees were depleted in any amount between \$80,000 and \$250,000 is error and further supports an appropriate hearing. There were no losses to the estate, there were merely payments of court ordered attorney fees, conservator fees, caregiver fees, and maintenance and support fees. Thus, the Court's statement in footnote 16 is incomplete. It states: "We make no determination of the entitlement to, or the reasonableness of, the fees claimed. "

If the court makes a determination that Fisher is "entitled" to fees then the circuit court can ignore the rationale of this court. Moreover, by citing to and referencing disputed amounts in the pleadings, the court gives deference to alleged facts that are not supported by evidence. Appellants bring these inaccuracies to the Court's attention to preclude any purported finding by this Court related to valuation and/or determination of fees. Fundamental fairness requires that Appellant Lisa Fisher's right to compensation is not burdened by factual inaccuracies. (See *Lambries v. Saluda County Council*, 760 S.E. 2d 785, 409 S.C.1, 6 (S.C. 06/18/2014) [abuse of discretion when a decision based upon an error of law or without evidentiary support]).

This too requires rehearing to ensure that Due Process and Equal Protection principles are guaranteed to Appellants.

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B. DUE TO THE FACTUAL ERRORS, THE OPINION OVERLOOKS AND MISAPPREHENDS ISSUES RELATED TO SOUTH CAROLINA PROCEDURE

1. *Huckabee Standing*

The Opinion again gives credence to the viability of the Will, when this issue is not before the court. The court affirms that Huckabee has standing based on its conclusion in part 2 of the opinion which recognized that the court had the ability to appoint a special fiduciary, however at the time of the appeal and the appointment of the special fiduciary, Huckabee's appointment was contested and on appeal, so to provide her with standing after the fact undoes the principles behind standing. None of the heirs appealed, therefore Respondent Huckabee's appointment continued to be a contested issue, especially in light of her failure to post a bond. Her failure to comply with this court order prevents her from acting in any way for the estate.

The court cites to *Davis v. Davis*, 214 S.C. 247, 258, 52 S.E. 2d 192, 197 (1949) for the proposition that Bessie Huckabee has standing. However to the contrary, *Davis* supports Appellant's position in that it cites law relating to the intent of a person to revoke a will. It further sets forth that the issue of the "will or no will" is to be determined in the first instance. The *Davis* court explicitly supports the idea that the determination of the status of the Will must be made.

Appellants contend that this is the essence of the issue in this case. Who is the conservator to deliver assets to, when the determination of status is not made? Moreover, if the probate court is permitted to order the assets to be handled by a third person, either in violation of the testator's intent or in violation of the conservator's duty to deliver monies to the appropriately appointed personal representative, then the conservator is deprived of

due process in that there is an implicit finding of wrongdoing. Appellant Lisa Fisher as a bond, no one else has a bond--the court has appointed not merely a stranger but a stranger with connections to the court. This creates its own conflict, and demands reversals to ensure transparency and proper notice.

For these reasons, a rehearing is necessary.

2. ***Rule 11***

The court's blind acceptance of Huckabee's contentions that there had been discussions of a special administrator and motions for extensions is worrisome in light of Huckabee's failure to reference the record. The "conclusions" by Huckabee are distortions and manipulations of the facts. If parties' opposition to each other's legal arguments and/or contentions is sufficient for a finding that consultation is "pointless", then it is *always* pointless. Parties' efforts to consult is necessary to prevent the need for appeals as in this case.⁹

The refusal by Respondent to honor this rule mandates rehearing.

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⁹ "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).)

3. *Denial of Lisa Fisher's Request for Extension*

As previously explained, the Court's reliance on the South Carolina Rules of Probate Court conflicts with the scheme for protection of estate assets. When statutory law conflicts with the Rules of procedure, statutory law controls. (S.C. Const. Art. V, sct. 4 (Subject to the statutory law, the Supreme Court shall make rules governing the practice and procedure in all such courts; see *Hendrics v. State*, 387 S.C. 221, 692 S.E. 892 (2010).)

Therefore, as cited herein, there was a procedure and duty set forth for a conservator/trustee. These rules required Appellant Lisa Fisher to take action to protect the estate. The rules for enlargement of time can not change Appellant's duty to deliver pursuant to the statutory scheme. The court's discretion can not interfere with a statutory duty.

Lastly, requiring rule 11 compliance when the basis of the extensions was Rule 203, SCACR is unnecessary, and is distinctly different than seeking a special fiduciary.

Rehearing is warranted.

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CONCLUSION

WHEREFORE, Appellants respectfully requests that this Court grant the petition for rehearing on all issues—this will allow Appellants to continue their work toward attaining justice for Alice Shaw Baker and it will honor the poetic essence of Due Process, that “In case of dissension, never dare to judge till you’ve heard the other side.” (Euripides, *The Children of Herakles*; *Prov. 18:17*; *Deut. 1:17*) Here, Appellants were prejudiced as their side was never heard, because it was obscured by Respondent’s invisible record.

RESPECTFULLY SUBMITTED,
JOHN HUGHES COOPER, P.C.

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ATTORNEYS FOR APPELLANTS

January 3, 2017

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. 2014-002020

Circuit Case No. 2011-CP-10-7819

RECEIVED

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SC Court of Appeals

BETTY FISHER and LISA FISHER.....Appellants

v.

BESSIE HUCKABEE.....Respondent

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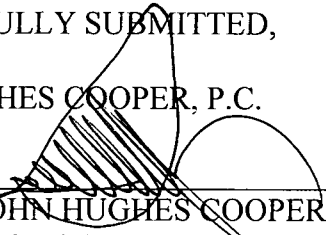
I hereby certify that I have served **Appellants' Petition for Rehearing** upon Respondent Bessie Huckabee by depositing a copy of it in the United States Mail, postage prepaid, on January 3, 2017, addressed to her attorney of record Peter A. Kouten, Esquire, P.O. Box 340, Johns Island, SC 29457.

January 3, 2017

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