

THE STATE OF SOUTH CAROLINA

In the Supreme Court

**RECEIVED**

ON PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS

MAR 28 2017

**S.C. SUPREME COURT**

Appeal from the Circuit Court  
J.C. Nicholson, Jr., Circuit Court Judge

Consolidated Appellate Case No. 2014-002020; 2014-002028; 2014-002034  
Circuit Case No. 2011-CP-10-7819; 2011-CP-10-7821; 2011-CP-10-8657

BETTY FISHER, LISA FISHER.....Petitioners

v.

BESSIE HUCKABEE.....Respondent

**PETITION FOR WRIT OF CERTIORARI  
REGARDING UNPUBLISHED OPINION NO. 2016-UP-528  
Heard October 3, 2016 – Filed December 21, 2016.**

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## CERTIFICATION BY COUNSEL

On December 21, 2016, the Court of Appeals issued its decision, Unpublished Opinion No. **2016-UP-528** (“Opinion”), affirming in part the lower court orders and remanding in part. (App. 790). The Court consolidated its Opinion for three separate appeals, Appellate case nos. 2014-002020, 2014-002028, and 2014-002034. Petitioners, Betty Fisher and Lisa Fisher (“Petitioners”), filed their Petition for Rehearing on January 3, 2017 (App. 805), which was denied by Order filed February 24, 2017. (App. 836)

## QUESTIONS PRESENTED FOR REVIEW

In the Consolidated Opinion, the Court of Appeals summarized Petitioners’ questions presented. The complex issues related to Alice Shaw Baker's estate are interconnected and mandate reversal by this Court.

Pursuant to the requirements set forth in Rule 242(d)(2), the questions presented will be deemed to include every subsidiary question fairly comprised therein. Petitioners do not waive any argument, and repeat and restate all questions originally presented in their briefing, and as set forth in their Petition for Rehearing. They respectfully request the court consider the importance of the issues:

- 1) Whether the Circuit Court's imposition of oral argument *prior* to consideration of the written legal briefs, and without ruling on Petitioners’ objections constituted a denial of Due Process and Equal Protection?
  
- 2) and 7) Whether the Probate Court erred in appointing a Special Fiduciary, *when* the court lacked jurisdiction to make any orders related to the assets of Alice Shaw Baker, due to her death and was a denial of Due Process and Equal Protection?

- 3) Whether the Court of Appeals erred in not finding that Respondent Bessie Huckabee had standing, when there is pending litigation regarding revocation of Alice Shaw Baker's will and related will contest?
- 4) Whether the Court of Appeals erred in requiring Rule 11 notice in this matter?
- 5) Whether the Court of Appeals' consideration of Petitioner Lisa Fisher's right to compensation led to the correct result of "remand" to preclude a takings by the Court, yet led to directions and factual assertions that give credibility to false accusations considering the valuation of Alice Shaw Baker's estate and any depletion of the estate, and are prejudicial? Also, Whether the Court of Appeals erred in remanding the issue of Petitioner Lisa Fisher's right to compensation to the Probate Court, when any order related to the approval of fees must be considered in the estate case (which was removed to the Circuit Court)? If so, Do these issues implicate Equal Protection, Due Process, and the Takings Clause?
- 6) Whether the Probate Court's 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?
- 8) Whether the Probate Court erred in failing to grant Lisa Fisher an extension, when there is pending litigation and appellate review?
- 9) Whether the failure to give Petitioner Betty Fisher constitutionally (and statutory) required notice related to the Motion for a Special Fiduciary was prejudicial and in violation of Due Process?

## INTRODUCTION

It has been said that “Justice is truth in action,”<sup>1</sup> but as evidenced in the case of Alice Shaw Baker, the analysis of legal principles toward the path to justice, and truth, has sometimes been ravaged by disquiet, error, and confusion.

It becomes easier to avoid the truth and justice, by escaping to a clear path, even if that path is not lawful. As here, Petitioners contend that this is a case where following the statutory authorities and ensuring Constitutional protections can result in only one conclusion, i.e. the Court of Appeals’ Opinion must be reversed.

The Opinion certainly impacts the Estate of Alice Shaw Baker and her family on a personal level, however the specter of the future and public policy precedents that will affect the citizens of South Carolina make it a good cause for review and consideration. The policies will undermine the statutory protections which mandate due process. For instance:

- 1) If a conservator is not permitted to protect the assets of a conservatee after her death, then the Court is effectively forcing an estate to incur unnecessary costs, and allowing decedents’ estates to be subject to control by strangers. This is contrary to long held principles mandating a conservator/fiduciary to protect the assets and distribute to the proper personal representative.
- 2) If the Probate Court is allowed unrestrained authority to impose injunctive relief without following statutory mandates under S.C. Code § 62-7-704(e), than parties in probate litigation are not provided with the same Due Process rights and Equal protection of the Law provided to civil litigants.
- 3) If the probate court is allowed to interfere with a circuit court’s jurisdiction over decedent’s estates, then parties will be subject to surprise and the legislative mandate for removal under 62-1-302 is meaningless and contrary to statutory provisions.

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<sup>1</sup> Benjamin Disraeli, speech February 11, 1851; see also Benjamin Franklin also said, “Justice will not be served until those who are unaffected are outraged as those who are.”

Additionally, these unavoidable public policies created by the Court of Appeals' Opinion will stand in sharp contrast to the traditional values guaranteeing protection of decedents' estates by conservators/fiduciaries/trustees after their respective wards die. If allowed to stand, the effect which the Opinion will have on future protection of decedents' estates will lead all South Carolina Fiduciaries down a path of destruction, as houses are left unprotected, taxes are not filed, and those who seek recovery of their loved ones' estates may end up in the spotlight rather than wrongdoers who seek to abscond with the Estate, based on an unbending rule that a conservator may not expend estate assets after the death of their ward.<sup>2</sup>

The Opinion establishes dangerous public policies that impair and compel a breach of fiduciary duty, and at the same time effectively morphs Petitioners' arguments into legal trivialities despite their wholesale effect on the life and death of Alice Shaw Baker, as it effectively replaces the important legal concept of "preservation of the status quo"<sup>3</sup> with unfettered authority of a Probate Court to appoint an unknown Special Fiduciary which will significantly dissipate the Estate of Alice Shaw Baker and diminish her wish that her estate

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<sup>2</sup> It is important to remember that Petitioner is not suggesting that a fiduciary not be required to file accountings, rather that they must maintain and protect the property pending final resolution. As set forth herein, it is contrary to the law related to temporary trustees and fiduciaries.

<sup>3</sup> The United States Supreme Court recognized that a preliminary injunction may be given before a decision on the merits to preserve the status quo and allow the court time to reach a decision. (See *Univ. Of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).)

At the same time, Courts have disfavored injunctions that disturb the status quo and...afford the movant substantially all the relief it may recover at the conclusion of a full trial on the merits. See *O Centra Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1011 (10<sup>th</sup> Cir. 2004). Here, an injunctions not required, because the duty of a fiduciary is to preserve the estate. If a Special Fiduciary were allowed to interfere with the estate and assets of Alice Shaw Baker, respondents would effectively be granted the relief that they are seeking to interfere with the estate belonging to animal charities.

benefit animal charities.

Reversal of the Court of Appeals' Opinion will be the first "action" necessary to demonstrate the truth in Petitioners' efforts to preserve the estate, and following the well-settled law governing fiduciaries as set forth herein.

Petitioners pray that this Court reverse the Court of Appeals' decision, Opinion No. 2016-UP-528, Heard October 3, 2016-Filed December 21, 2016, and the probate court orders, and the Circuit Court orders affirming said orders.

### **STANDARD OF REVIEW**

It is well settled that this court is free to decide questions of law with no particular deference to the lower court. *See* S.C. Const. art. V, §§ 5 and 9; S.C. Code Ann. §§ 14-3-320 and -330 (1976 & Supp.1999); S.C. Code Ann. § 14-8-200 (Supp.1999) (granting Supreme Court and Court of Appeals the jurisdiction to correct errors of law in both law and equity actions); *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000.)

Rule 242, SCACR specifically addresses the types of cases that this Supreme Court will generally consider:

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court."

This case meets this Court's requirement under Rule 242, SCACR for consideration.

Although the traditional view proposed by Petitioners concerning fiduciary duties is not

novel, its application by both the probate court and the Court of Appeals creates distinct and novel questions of law.

Where there is insufficient public policy on a subject, the Court has held that **it may be the function of the courts by their judgments to establish public policy where none on the subject exists...**" (*See Page v. Winter*, 240 S.C. 516, 126 S.E. 2d 570 (1962), emphasis added.)

Petitioners request that the Court grant certiorari, on any of these issues.

### STATEMENT OF THE CASE

On February 25, 2009, Alice Shaw Baker died. (Appendix,203)<sup>4</sup> Her great niece, Petitioner Lisa Fisher, Esquire, had helped her since involuntary commitment proceedings were initiated without notice to her family, including her niece, Petitioner Betty Fisher. (App. 70, 73, 76.) Though she was already conserved, the family rushed to her side from California. (App. 83). On October 29, 2008, Lisa Fisher was appointed her guardian and conservator. (App. 28). After her appointment, Lisa Fisher traveled regularly to South Carolina to visit her great aunt, and ensure her health and well being. (App. 249, 250)

Petitioner 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. (App. 321, 342)

After Ms. Shaw Baker's death, Petitioner initiated litigation on April 27, 2009 in the Charleston County Probate Court and removed it to the Charleston County Court of

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<sup>4</sup> Appendix is hereinafter referred as "App." Said Appendix is filed concurrently.

Common Pleas on May 13, 2009 (Case no. 2009-CP-10-3010). (App. 219, 220). 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. (Pursuant to SCACR 201(d), Request for Judicial Notice, Court of Appeals, Case no. 2014-001267).

Petitioner obtained extensions regarding Ms. Shaw Baker's property from the Probate Court pending resolution by the Appellate Court and proper trial of the Will Contest, and at all times maintained proper control of Ms. Shaw Baker's property.<sup>5</sup>

After nearly three years of preservation of the status quo by Petitioner's daughter Lisa Fisher, while these matters were before the Appellate Court, Respondent filed her *Motion for Special Fiduciary*. (App. 281). No affidavits were attached to the motion. Respondent knew that the appointment of a 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. (App. 321, p. 327)

Petitioner filed several pleadings objecting and opposing said motion. The court set the Motion for Appointment of a Special Fiduciary for hearing on August 17, 2011. ( App. 548). At the hearing the Court appointed a Special Fiduciary, J. Heyward Harvey, Esquire, without any information about his record, any potential conflicts of interest, and/or his relationship to the parties.

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<sup>5</sup> Petitioner has advanced all monies for the protection of Alice Shaw Baker's properties to ensure that no losses are incurred and that her desires that her monies benefit Animal Charities. (See Restatement (Third) of Trusts, § 34))

At the hearing, Petitioners' counsel objected to Respondent's counsel, Peter Kouten's<sup>6</sup> discussion of contested issues relating to Petitioner's accounting. (App. 551)

Over Petitioner's objection, the court allowed Respondent's Counsel to discuss the accounts (without allowing him to "go into specificity" but "just generalities"). ( App. 551).

During argument, the court denied Petitioner the authority to speak:

"THE COURT: No, this is a motion, and this is really between the attorneys, and I just want to know what your position is, legal position, as to what her legal authority is to still disburse moneys when in fact the conservatorship has -- when she has been discharged, and the only thing the Court has been looking for are the annual accountings." (App. 553, 575)

Without taking any evidence or allowing any testimony, or even taking judicial notice of any proceedings, Respondent's counsel made numerous statements and accusations, Petitioner's counsel stated:

"MR. COOPER: Your Honor, without going through all of them, there are a lot of things that Mr. Kouten said in terms of factual representations about the expenditure and so forth, we disagree with and certainly we think are beyond the scope of this hearing." (App. 558, App. 593, ll. 18-23)

The Court's failure to allow Petitioner to present admissible evidence, or to set her *Motions for Reconsideration* on calendar precluded her from responding to the court's concerns and violated *her* Due process rights. Respondent did not object to any of Petitioner's objections and papers. The record is silent as to whether the court considered said affidavits. The court appointed the Fiduciary on September 28, 2011. (App. 55)

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<sup>6</sup> Peter Kouten represented Huckabee while he was court appointed attorney, guardian and visitor for Alice Shaw Baker in the underlying conservatorship. Petitioners do not waive her objections to his continuing representation of Huckabee.

On or about October 24, 2011, the Probate Court served its *Order Denying Motions for Reconsideration, etc.* (App. 61-63).

Petitioners timely appealed. (App. 398) Prior to the change in rules governing probate appeals, Petitioners filed their Statement of Grounds on December 9, 2011. (App. 455). Respondent filed her Notice of Appearance on March 20, 2014. (App. 538) . Respondent failed to file any timely opposing briefing. The matter for hearing on July 16, 2014. (App. 560).

On or about August 18, 2014, the court issued its Form 4 judgment on Petitioner's appeal. Petitioner timely filed her *Notice of Appeal* on September 19, 2014.( App. 542).

From the beginning of these cases, they have been fraught with factual inaccuracies based on the lower Courts' reliance on Respondent's unsubstantiated reference to "facts". The record demonstrates that there was no evidence referenced by Respondent .

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 App. 281). Moreover, the court denied Petitioners' request to rebut the argument. ( See App. 551, App. 567, ll. 4-8, App. 548, App. 553, App. 575,ll. 7-14).

Therefore, the lower Court's orders are 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.

## ARGUMENT

### I.

#### **REVERSAL IS MANDATED: THE CIRCUIT COURT IN ITS APPELLATE ROLE FAILED TO CONSIDER THE APPEALS PRIOR TO ORAL ARGUMENT**

##### *A. Constitutional Protections Protecting the Rights of Petitioners*

The United States Supreme Court has held Due Process requires: (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 Petitioners as outlined herein.

South Carolina courts have also embraced the constitutional protections of Due Process, both in their reliance on the United States Constitution, Amends. V and XIX, § 1 and the South Carolina Constitution, Art. 13 and through their legal precedent. Due Process 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).

Equal protection is implicated under article I, section 3 of the South Carolina Constitution and the Fourteenth Amendment of the United States Constitution. The general rule is that the action of state courts and of judicial officers in their official capacities is to be regarded as action

of the State within the 14<sup>th</sup> Amendment. (See *Shelley v. Kraemer*, 334 U.S.1, 14 (1948).) Here, as will be shown, Petitioners were deprived of equal protection.

***B. Failure to Consider Briefing Prior to Oral Argument deprived Petitioners of Due Process and Equal Protection***

At the Circuit Court's 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.”

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

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 somewhat 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....?

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*) 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, Petitioners did not have

the benefit of this “difference”. Rather, the Court of Appeals 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. The Opinion argues that Petitioners felt trust law did not apply, these are the types of things that can be clarified at oral argument.

The Court of Appeals 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. In fact, Lisa Fisher's right to testify was expressly denied by the Probate Court. 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).<sup>7</sup>

At the same time, the Court of Appeals misapprehended 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. Petitioners 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 considered by the Circuit Court or even the Court of Appeals if "credibility" is in question. Petitioner 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 Petitioners' objections deprived Petitioners of Due Process, Equal Protection and a fair hearing.

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<sup>7</sup> 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 Petitioner'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 Petitioner pending this appeal.

Moreover, Petitioners 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)

## II.

**THE SOUTH CAROLINA COURT OF APPEALS ERRED IN APPOINTING A SPECIAL FIDUCIARY, *WHEN THE COURT LACKED JURISDICTION TO MAKE ANY ORDERS RELATED TO THE ASSETS OF ALICE SHAW BAKER, DUE TO HER DEATH. ALSO, PETITIONER WAS DENIED DUE PROCESS AND EQUAL PROTECTION DUE TO THE COURT'S CONSIDERATION OF IMPROPER EVIDENCE AND SUBJECTED TO SPECULATION AND PREJUDICIAL COMMENTS.***

There are 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 held a fiduciary may be appointed to "preserve the estate." Yet, this conclusion begs the Question:

Was Alice Shaw Baker's Estate ever in jeopardy, where the conservator Petitioner 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 to suggest otherwise?

The appointment of a Special Fiduciary mandates a vacancy in the office of Trustee, and as the facts demonstrate in this case, there was no vacancy. For the court to create a vacancy by Petitioner 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.

The Court's Opinion 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 of Appeals 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* Petitioner 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 Petitioner Lisa Fisher's knowledge that the will by which Bessie Huckabee was appointed was

revoked.<sup>8</sup>

- 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 Petitioner's 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 Petitioners are deprived of Due Process and Equal Protection.<sup>9</sup>

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<sup>8</sup> 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, sect. 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).)

<sup>9</sup> 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*

The Court of Appeals 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. § 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.

The Court of Appeal misapprehended the facts related to Respondent Huckabee's filing of the Motion, prior to resolution of the Appeal.<sup>10</sup> 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).) Close reading of the Opinion also leads Petitioners to believe that there is a misunderstanding by the Court of Appeals concerning the Will Contest, in that it states that "Fishers' cause of action challenging the Will remains pending in the probate court."

This case was removed to the Circuit Court pursuant to S.C. Code Ann § 62-1- 302(d). Therefore, the public policy governing Administration of a decedent's estate requires reversal of the Opinion, since the case was removed, the Probate Court has no authority to interfere with the Circuit Court's authority over the estate, and it had no jurisdiction to make any orders when the matter was still on appeal.

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*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.)

<sup>10</sup> The 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.

**III.**  
**THE SOUTH CAROLINA COURT OF APPEALS ERRED IN FINDING BESSIE  
HUCKABEE HAD 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 Huckabee's 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 Petitioner'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 first

Petitioners 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. Petitioner Lisa Fisher has 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. Reversal is mandated.

**IV.  
THE COURT OF APPEALS ERRED IN FAILING TO REQUIRE RULE 11 NOTICE.**

It is clear that Rule 11, SCRCP requires "[a]ll motions filed shall contain an affirmation that the movant's counsel prior to filing the motion has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter . . . unless the movant's counsel certifies that consultation would serve no useful purpose, or could not be timely held."

The penalty for noncompliance is to strike the motion unless the attorney promptly amends the document to comply with the rule.

In *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (S.C. 06/23/1997) , the court held that when the trial judge makes a finding on the record that it would be pointless to consult about the filing of the motion, that this is adequate to cure the deficiency under Rule 11.

Here, the Probate Court made no finding on the record, and just denied the motion in its entirety. (App.35, ll. 6) No procedural safeguards were honored in this case on behalf of Appellant. No testimony was allowed. The court made findings of fact where the record is devoid of evidence and testimony in violation of Appellant's due process rights. (See *Ellis v. Procter & Gamble Dist. Co.*, 315 S.C. 283, 285, 433 S.E.2d 856 (1993) [bias demonstrated when factual findings not supported by the records]).

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.<sup>11</sup>

The refusal by Respondent to honor this rule mandates reversal.

## V.

### **THE COURT OF APPEAL ERRED IN GIVING CREDIBILITY TO THE FALSE ACCUSATIONS AND SPECULATION CONSIDERING THE VALUATION OF ALICE SHAW BAKER'S ESTATE AND ANY DEPLETION OF THE ESTATE, AND SUCH CONCLUSIONS WILL PREJUDICE PETITIONER IN HER COMPENSATION**

The Court of Appeals' consideration of Petitioner 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 the Court of Appeals give credibility to false accusations considering the valuation of Alice Shaw Baker's estate and any depletion of the estate.<sup>12</sup>

Moreover, the Court of Appeals has remanded the issue to the Probate Court, however any order

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<sup>11</sup> "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).)

<sup>12</sup> It's important to remember that this was a voluntary conservatorship/guardianship. Alice Shaw Baker's trust in Petitioner 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 Petitioner 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."

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 Petitioner agrees remand is appropriate, to ensure a correct record and to 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.

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. The Court said: "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 the Court of Appeals. Moreover, by citing to and referencing disputed amounts in the pleadings, the court gives deference to alleged facts that are not supported by evidence. Petitioners 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 Petitioner 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 reversal to ensure that Due Process and Equal Protection principles are guaranteed to Petitioners.

## VI.

### **THE SOUTH CAROLINA COURT OF APPEALS ERRED IN FAILING TO FIND THAT THE PROBATE COURT'S 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**

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)).

The Court of Appeals 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 Petitioner.

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 Petitioner was deprived of a formal hearing, deprived of the ability to testify, and deprived of the ability to present evidence. Therefore, the Court of Appeals' 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 Petitioners' 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.

**VII.**  
**THE SOUTH CAROLINA COURT OF APPEALS ERRED IN FINDING THAT THE COURT HAD A RIGHT TO DENY AN EXTENSION, WHICH INTERFERED WITH THE STATUS *QUO*.**

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, § 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 Petitioner Lisa Fisher to take action to protect the estate. The rules for enlargement of time can not change Petitioner's duty to deliver pursuant to the statutory scheme. The court's discretion can not interfere with a statutory duty, and the need for an extension.

**VIII.**  
**THE SOUTH CAROLINA COURT OF APPEALS ERRED IN FAILING TO FIND THAT  
BETTY FISHER WAS NOT ENTITLED TO NOTICE**

The Court of Appeals 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 § 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 (3) written motions...shall be served upon each of the parties of record,”

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 Petitioners’ objections. The transcript and the record discloses that Petitioners 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).)

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

## CONCLUSION

The famous poet Ella Wheeler Wilcox once said: "To Sin by silence when they should protect, makes cowards of men."

Petitioners seek to protect Alice Shaw Baker's estate, not for their own benefit, but for that of Alice's intended beneficiaries, animal charities. While legal briefing and hearings could make petitioners' weary, they choose to honor Alice's wishes, and seek reversal of the Court of Appeals' decision.

Here, the Opinion is not based on the truth, as Petitioners again state that the probate court heard no testimony, no exhibits were introduced, no evidence was introduced at all-- other than Attorney Peter Kouten's unsubstantiated argument. It is well settled that an attorney's argument is not considered by the court as evidence. (See *Gilmore v. Ivey* 290 S.C. 53 (1986) [factual statements of counsel whether made during oral argument or in written briefs or memoranda ordinary may not be so considered]; see also *McManus v. Bank of Greenwood*, 171 S.C. 84, 89 (1933).) Further, certainly justice is avoided when the Opinion is based on rank speculation which illustrates the extremes where Due Process is denied, as here to Petitioners. The public policies established by the Opinion must be stopped to preserve the integrity of the law.

Alice Shaw Baker's estate has and continues to be protected, at a cost to Petitioner, nevertheless, by evaluating this case on the true facts, i.e. petitioner Lisa Fisher, the conservator of Alice Shaw Baker's estate, is bonded, has protected and secured the assets, and is duty bound to distribute the property to the rightful personal representative, reversal is mandated.

March 27, 2017

RESPECTFULLY SUBMITTED,  
JOHN HUGHES COOPER, P.C.

By:  \_\_\_\_\_

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THE STATE OF SOUTH CAROLINA

In the Supreme Court

ON PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS

Appeal from the Circuit Court  
J.C. Nicholson, Jr., Circuit Court Judge

Consolidated Appellate Case No. 2014-002020; 2014- 002028; 2014-002034

Circuit Case No. 2011-CP-10-7819; 2011-CP-10-7821; 2011-CP-10-8657

BETTY FISHER, LISA FISHER.....Appellants/Petitioners  
v.

BESSIE HUCKABEE .....Respondent

**PROOF OF SERVICE**

I certify that on March 27, 2017, I served a copy of **Petition for Writ of Certiorari** on  
the Respondent by depositing same in the United States Mail, postage prepaid, addressed as  
follows:

Peter A. Kouten, Esquire  
Kouten Law Firm, LLC  
P.O. Box 340a  
Johns Island, SC 29457  
(Attorney for Respondent)

**RECEIVED**

MAR 28 2017

**S.C. SUPREME COURT**

March 27, 2017

RESPECTFULLY SUBMITTED:

JOHN HUGHES COOPER, P.C.

  
\_\_\_\_\_  
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MAR 28 2017

**S.C. SUPREME COURT**