

THE STATE OF SOUTH CAROLINA

In the Supreme Court

PETITION FOR WRIT OF CERTIORARI

Appellate Case No. 2017-000743

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S.C. SUPREME COURT

Betty Fisher, Petitioner v. Bessie Huckabee, Respondent

AND

Lisa Fisher, Petitioner v. Bessie Huckabee, Respondent

RESPONDENT'S RETURN

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STATEMENT OF THE CASE

Alice Shaw-Baker (hereinafter Alice), died testate on February 25, 2009. Prior to her death, there were hearings to appoint guardian and conservator for Alice. Lisa Fisher, Esquire is a relative to Alice and sought appointment and was appointed guardian and conservator for Alice. The conservator and Betty Fisher, mother of conservator, both live in California. Upon Alice's death, Respondent Bessie Huckabee was appointed personal representative after Alice's last will, which nominated Bessie Huckabee, was presented to the probate court by John Hughes Cooper, Esquire, local counsel for the conservator, Lisa Fisher individually and Betty Fisher. Attorney Cooper is sponsor for Lisa Fisher's pro hac vice appointment for this action and others pending in circuit court, to include a will contest.¹ Appellant sought by petition to void appointment of the personal representative, contest the will, appoint an intestate heir as personal representative, and contest the beneficiary designations of additional non-probate assets. Appellant removed these actions to Charleston County Court of Common Pleas by statutory right. The actions were filed in 2008 and have yet to be heard.

The conservator was discharged by the Charleston County Probate Court on May 11, 2009 after filing her Final Conservatorship Accounting. The conservator sought to maintain control over the estate assets by filing motions for extensions to turn over estate assets. Her sole basis to hold assets on each of her six motions for extension was so that they can be turned over to the proper party. Until the probate court deems otherwise, the personal representative is the proper party to receive estate assets as she is authorized to marshal assets of the estate. Respondent reviewed the conservatorship file periodically and noted that the court had written to Lisa Fisher seeking an annual accounting after her discharge based on the fact that she was

¹ The petition contesting last will has not been heard. The petition to remove personal representative has not been heard. They were filed in 2009.

holding the funds. Lisa Fisher did not respond to the request in a timely matter. The Respondent corresponded with counsel for the Appellant seeking the requested accounting from Lisa Fisher and no response was had. Lisa Fisher sought additional extension when the previous extension expired and Respondent objected to the extension based on lack of accounting. The Respondent sought to appoint a special fiduciary. Prior to the hearing from which the appeal arose, Appellant sought motion to strike Respondent's motion based on S.C. Rules of Civil Procedure notice requirement. Proper notice was given to the conservator. Appellant Betty Fisher is not a party to whom notice was required. Before walking into the courtroom prior to hearing on Motion for Appointment of Special Fiduciary, Lisa Fisher filed an amended final accounting with the probate court. This amended accounting was filed three years after she was discharged as conservator. She also filed an accounting for the following calendar year, 2010. Lisa Fisher, who is a lawyer in California and who alleges to practice in the area of conservatorships in her home state, clearly represented in her account filings to the probate court that she continued to act in matters affecting the estate without authority. She expended funds after she was discharged as conservator. Although the transcript of the hearing was received, Appellants refused to include the entire transcript as exhibit to her appeal. The transcript reads, in pertinent part, "The court discharged her" (Transcript Page 13, Line 11), and Lisa Fisher "can no longer act as conservator." (Transcript Page 14, Lines 2 and 3) Further, counsel for Appellant at the motion hearing indicated that "we just think this is a better way to do it" (Transcript Page 27, Lines 8 and 9) The Appellant continues to expend estate assets without court authority and is unapologetic. The court asked whether the discharged conservator might have sought permission from the court to act in certain matters. (Transcript Page 26, Lines 13 and 14) Lisa Fisher did not nor has she since. The lower court granted the

motion appointing a special fiduciary. The lower court found that Lisa Fisher, “did not have the duty to act in a conservator capacity.” (Transcript Page 35, Lines 17 and 18) After appointment of the Special Fiduciary by the lower court, Appellant sought reconsideration and was denied. The lower court froze accounts in the name of the Appellant and the decedent and further denied Appellant’s request for fees. In the consolidated appeal, the Court of Appeals upheld the appointment of Special Administrator and the orders freezing assets. The issue of attorney’s fees was remanded. Appellant sought re-hearing and the Court of Appeals denied Appellant’s request.

Questions Presented

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. 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?

ARGUMENTS

1. Did 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?

The circuit court, as appeals court in this matter, did not abuse its discretion nor did it deprive the Appellant due process.

The findings of fact of the trial judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81 (1976) Here, the Appellant comes to the conclusion that the trier of fact did not consider the statement of grounds. There is no indication by the appellate court that it did not consider the statement of grounds. The trier of fact indicated, in the transcript, that it had not read Appellant's brief prior to hearing and further indicated that he would do so prior to ruling. In review of the evidence presented, the lower court upheld the order of the probate court and the Court of Appeals upheld the Order on this issue stating that "[t]he accounting provided by Lisa Fisher established unauthorized depletion of the estate assets after Fisher was discharged as conservator of the estate by order filed May 11, 2009." It is clear that the circuit court judge read all briefings. Appellant argues, with no evidence for the conclusion, that because the appeals court upheld the lower court's ruling, it somehow

deprived the Appellant due process and equal protection. For the above reasons, Certiorari should not be granted on this issue in this case.

2. Did the Probate Court err in appointing a Special Fiduciary and did the court lack jurisdiction to make any orders related to the assets of Alice Shaw Baker, due to her death and was there a denial of Due Process and Equal Protection?

The Probate Court did not err in appointing a Special Fiduciary as the Probate Court has jurisdiction to make any orders related to the assets of Alice Shaw Baker, even after her death and therefore, there was no denial of Appellant's Due Process and Equal Protection.

When an appeal according to law is taken from any sentence or decree of the probate court, all proceedings in pursuance of the order, sentence, or decree appealed from shall cease until the judgment of the circuit court, court of appeals or Supreme Court is had. South Carolina Probate Code Section 62-1308(h) See also Ulmer v. Ulmer 369 S.C. 486, 491-92, 632 S.E.2d 858, 861 (2006) (The only proceedings required to cease are those proceedings addressed in the orders from which an appeal was taken.) Here, at the time of the hearing to appoint special fiduciary, the only issues on appeal were issues on estate matters: the appointment of personal representative and validity of last will. The Court of Appeals held that the estate issues were not related to the appointment of a special fiduciary and that "the probate court had jurisdiction to appoint a special fiduciary under sections 62-1-302(a) and 62-3-614." For the above reasons, Certiorari should not be granted on this issue in this case.

3. Did the Court of Appeals err 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?

To have standing, one must be a real party in interest, *i.e.*, a party who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action." Ex Parte Morris, 367 S.C. 56, 624 S.E.2d

649, 652 (2006) An interested party can be an heir, devisee, child, spouse, creditor, beneficiary, and any others having a property right or claim South Carolina Probate Code Section 62-1-308(c). Here, Respondent Huckabee is a devisee in the last will and she is the personal representative, either of which includes her as an interested party with standing. As personal representative, Respondent has the duty to marshal assets of the estate and this duty does not cease while an appeal is pending in a separate estate matter. For the above reasons, Certiorari should not be granted on this issue in this case.

4. Did the Court of Appeals err regarding Rule 11 notice in this matter?

The Court of Appeals in affirming the lower court's order stated that "Rule 11 of the South Carolina Rules of Civil Procedure provides that "[a]ll motions filed shall contain an affirmation that the movant's counsel . . . has communicated . . . 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" Further, it cited Jackson v. Speed, "our supreme court affirmed the trial judge's refusal to strike a motion based on a similar Rule 11(a) violation, finding the trial judge did not abuse his discretion in refusing to strike the motion because an attempt to consult with opposing counsel about the matter would have been pointless." 326 S.C. 289, 31011, 486 S.E.2d 750, 761 (1997). Here, there were prior discussions regarding appointment of a special administrator on several occasions which led to an impasse. Respondent's request for accountings went unanswered by Appellant Lisa Fisher. Fisher, through her counsel, indicated that Respondent was not entitled to an accounting. Respondent had every reason to believe consultation with opposing counsel would have been pointless. The probate court ruled at the hearing that Huckabee had "a right to file that motion

with the Court." For the above reasons, Certiorari should not be granted on this issue in this case.

5. Did 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, Did 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?

Appellant inaccurately states that the Court of Appeals' remand of the issue of conservator compensation is an indication that Appellant has a *right to compensation*. Further, Appellant is incorrect in stating that the value of the estate has anything to do with her request for fees. It is also an inaccurate statement that the approval of conservator fees must be addressed in the estate. The approval of the conservator fees is an issue that is rightfully taken up by the probate judge presiding over the conservatorship. If the conservator fees are approved, the order for fees becomes a claim on the estate payable in order of claimant priority as determined by the probate code. The circuit court does not gain authority over the estate claims process merely because certain issues have been removed to the circuit court. There is no violation of equal protection or due process nor is there a taking on this issue. The Court of Appeals remanded the issue of fee consideration properly to the probate court. Fees are not an entitlement and a determination approving fees or disallowing fees are based on facts which include not only time spent associated with the care of the conserved individual but also the actions taken by the discharged conservator such as "unauthorized depletion of the estate assets after Fisher was discharged as conservator..." For the above reasons, Certiorari should not be granted on this issue in this case.

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?

Appellant comes to an inaccurate conclusion that the estate funds and assets are under the jurisdiction of the circuit court. The issue removed to the circuit court is the issue of validity of decedent's last will. Once that issue is decided, the remainder of the estate probate can be fulfilled in the probate court. Appellant surely realizes that by hearing the will contest and having a ruling on the will's validity either relieves Betty Fisher's standing or makes her sole heir. Appellant has not sought hearing on the validity of the will. The probate court, having received an amended final accounting from the Appellant after being discharged as conservator, noted that Lisa Fisher was spending money from the estate with no authority. Appellant's counsel argued that although she was discharged and the statutes are clear that she should not act, Lisa Fisher felt it was a better way to do things. The probate court froze assets because the Appellant provided evidence she was not simply holding the funds, but was spending the funds. The Court of Appeals, in upholding the lower court's decision, stated the Probate Code has jurisdiction over all subject matter related to estates of decedents. S.C. Code Ann. § 62-1-302(a)(1) (Supp. 2015). It further stated that the probate court has the authority to issue injunctions citing Greenfield v. Greenfield, wherein the court held it had the authority to issue an order requiring relatives of a decedent to surrender the records of the decedent. 245 S.C. 604, 611, 141 S.E.2d 920, 924 (1965) This authority covers all matters of estate administration. The probate court has authority to freeze estate accounts when there is clear evidence, as there is here, that funds are being expended by a discharged conservator without authority. With regard to the amount of funds expended and the actual value of the estate, it is

of no consequence to this issue, although repayment may be necessary for inappropriately expended funds. The freezing of Appellant's personal accounts had no prejudice as noted by the Court of Appeals. Therefore, Certiorari should not be granted on this issue because the probate court had the authority to freeze assets to protect the estate.

8. Whether the Probate Court erred in failing to grant Lisa Fisher an extension, when there is pending litigation and appellate review?

Alice Shaw-Baker died while under conservatorship. Appellant Lisa Fisher, after the appointment of personal representative for the estate of Alice Shaw-Baker, sought to hold the estate funds until a proper authority could be appointed. The Charleston County Probate Court recognized the authority of the personal representative, but, for some reason, granted Appellant's request to hold the funds. This grant was extended numerous times after the discharge of the conservator. The conservator, a California attorney who alleges to practice in the area of probate, did not merely hold the funds, she spent the funds. Further, she refused to file annual accountings for the funds even after accountings were requested by the probate court. When Appellant filed her subsequent motion for extension, Respondent, as personal representative, objected seeking evidence that the funds were still protected. When the accountings were refused, Respondent, as personal representative, filed motion to appoint a special fiduciary. Appellant argues that she should have the authority to spend money from estate accounts even after her authority has been discharged because there is pending litigation and an appeal pending. The order granting authority to the Court of Appeals cites Section 62-1-304 of the South Carolina Probate Code wherein it is stated the rules of civil procedure shall be applied in formal proceedings in the probate court. Further, the Court of Appeals found the probate court's denial on Fisher's motion for an extension to turn over the estate assets was

within the sound discretion of the probate court. Finally, the Court of Appeals noted that the probate court made a statement during the hearing that Lisa Fisher “did not have the duty to act once she had been discharged” and Respondent submits here that Lisa Fisher did not have the authority to act and knew or should have known she did not have the duty or authority to act after being discharged as conservator. Therefore, Certiorari should not be granted on this issue.

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?

Betty Fisher was not entitled to notice in the matter of the conservatorship including the appointment of special fiduciary. Betty Fisher is not a beneficiary of the estate of Alice Shaw-Baker and, until such time as she prevails as heir, she has no interest in the protection of the assets. The Court of Appeals stated “Neither Betty Fisher nor the animal charities are named in the last will.” Betty Fisher was not entitled to notice. Therefore, Certiorari should not be granted on this issue.

CONCLUSION

For the reasons stated, this Court should uphold the judgment of the lower court and deny Appellant’s Petition.

Respectfully submitted,



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April 29th, 2017

THE STATE OF SOUTH CAROLINA

In the Supreme Court

RECEIVED

MAY 02 2017

PETITION FOR WRIT OF CERTIORARI

S.C. SUPREME COURT

Appellate Case No. 2017-000743

Betty Fisher, Petitioner v. Bessie Huckabee, Respondent

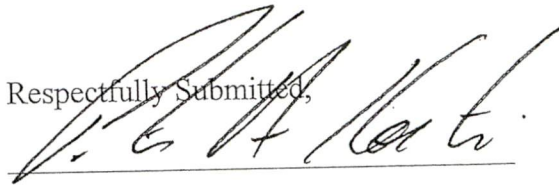
AND

Lisa Fisher, Petitioner v. Bessie Huckabee, Respondent

PROOF OF SERVICE

I certify that I have served the foregoing Respondent Return upon counsel for Petitioner by depositing a copy of same in the United States Mail, postage prepaid, on April 29th, 2017, addressed as noted below.

Respectfully Submitted,



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