

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
Edgar W. Dickson, Circuit Judge

Appellate Case No. 2017-000095
Court of Common Pleas Case No. 2016-CP-18-1849

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SC Court of Appeals

IN RE: TRUST EIP CREATED UNDER THE LAST WILL AND TESTAMENT OF
EUNICE I. PAGE DATED OCTOBER 14, 1992,

RICHARD S. HENSON AND VANN KENNETH HENSON,
Petitioners,

v.

ALBERT T. HENSON, JR. AND JULIAN REID HENSON,
Respondents.

Of whom

ALBERT T. HENSON, JR. is the Appellant.

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal1

Introduction.....2

Statement of the Case.....4

Arguments.....10

I. STANDARD OF REVIEW10

II. THE CIRCUIT COURT ERRED AS A MATTER OF LAW BY DISMISSING APPELLANT’S APPEAL OF THE PROBATE COURT’S ORDER APPOINTING A SPECIAL FIDUCIARY AS INTERIM TRUSTEE ON THE GROUNDS THAT THE ORDER IS NOT IMMEDIATELY APPEALABLE.10

A. The Probate Court’s Order is Immediately Appealable as a Final Order Affecting a Substantial Right Made in a Special Proceeding under S.C. CODE ANN. § 14–3–330(3)11

1. *Distinction Between “Actions” and “Special Proceedings.”*11

2. *Impact of S.C. CODE ANN. § 62-3-107.*.....16

3. *The Opinion in Estate of Boyce is not Controlling.*25

B. The Probate Court’s Order is Immediately Appealable as an Order that Grants, Continues, or Refuses an Injunction under S.C. CODE ANN. § 14–3–330(4)26

Conclusion29

TABLE OF AUTHORITIES

Cases

<u>Agricultural Labor Bd. v. Superior Court</u> , 196 Cal. Rptr. 920, 923 (Cal. Ct. App. 1983)	12
<u>Airline Ground Serv. Inc. v. Checker Cab Co.</u> , 39 N.W.2d 809, 811 (Neb. 1949)	20
<u>Allen v. Partlow</u> , 3 S.C. 417, 1872 WL 5562 (1872)	12
<u>Appeal of Paslay</u> , 230 S.C. 55, 94 S.E.2d 57 (1956)	26
<u>Babb v. Scott</u> , 2005 WL 7084291 (S.C. Ct. App. 2005)	26
<u>Barnes v. Kochhar</u> , 633 S.E.2d 474 (N.C. Ct. App. 2006)	16
<u>Boyce-Abel In re Estate of Boyce v. Work</u> , 308 S.C. 234, 417 S.E.2d 597 (1992)	25
<u>Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control</u> , 387 S.C. 265, 692 S.E.2d 894 (2010)	11
<u>Cotty v. Yartzeff</u> , 309 S.C. 259, 422 S.E.2d 100 (1992)	17
<u>Dorn v. Cohen</u> , 418 S.C. 126, 791 S.E.2d 313 (Ct. App. 2016)	10
<u>Edwards v. SunCom</u> , 369 S.C. 91, 631 S.E.2d 529 (2006)	10-11
<u>Estate of Boyce v. Work</u> , 305 S.C. 43, 406 S.E.2d 184 (Ct. App. 1991)	25
<u>Estate of Marsh</u> , 2016 WL 6581173 (Cal. Ct. App. Nov. 7, 2016)	18
<u>Ex parte Capital U-Drive-It, Inc.</u> , 369 S.C. 1, 630 S.E.2d 464 (2006)	10-11, 24

<u>Ex parte McFarlin</u> , 2007 WL 8326605 (S.C. Ct. App. Feb. 12, 2007)	11
<u>Ex parte TLC Laser Eye Centers (Piedmont/Atlanta), LLC</u> , 404 S.C. 385, 745 S.E.2d 105 (2013)	10
<u>Freeman v. McBee</u> , 280 S.C. 490, 313 S.E.2d 325 (Ct. App. 1984)	23
<u>Gibbes v. Elliott</u> , 8 S.C. 50, 1876 WL 6768 (1876)	12
<u>Gomes v. Kauwe's Heirs</u> , 472 P.2d 119 (Haw. 1970)	20
<u>Historic Charleston Holdings, LLC v. Mallon</u> , 381 S.C. 417, 673 S.E.2d 448 (2009)	27
<u>Hoover v. Hoover</u> , 271 S.C. 177, 246 S.E.2d 179 (1978)	17
<u>Howell v. Reimann</u> , 288 P.2d 649 (Idaho 1955)	20
<u>In re Estate of Adams</u> , 2013 WL 84925 (Tex. Ct. App. Jan. 8, 2013)	21
<u>In re Estate of Geier</u> , 809 N.W.2d 355 (S.D. 2012)	17
<u>In re Estate of Janecek</u> , 610 N.W.2d 638 (Minn. 2000)	14
<u>In re Estate of Janet N. Price</u> , 1995 WL 628344 (Ohio Ct. App. Oct. 26, 1995)	15
<u>In re Estate of Ketterling</u> , 885 N.W.2d 85 (N.D. 2016)	19
<u>In re Estate of Kotowski</u> , 704 N.W.2d 522 (Minn. Ct. App. 2005)	18
<u>In re Estate of McKillip</u> , 820 N.W.2d 868 (Neb. 2012)	19

<u>In re Estate of Muncillo,</u> 789 N.W.2d 37 (Neb. 2010)	16, 24
<u>In re the Estate of Paul J. Gadash,</u> 2017 WL 1404237 (Colo. Ct. App. 2017)	20
<u>In re Estate of Sanders,</u> 750 N.W.2d 806 (Wis. 2008)	18
<u>In re Estate of Sims,</u> 540 S.E.2d 650 (Ga. Ct. App. 2000)	20
<u>In re Estate of Williams,</u> 2011 WL 345848 (Tex. App. Feb. 3, 2011)	21
<u>In re Estate of Zimmerman,</u> 633 N.W.2d 594 (N.D. 2001)	17
<u>In re GlaxoSmithKline PLC,</u> 699 N.W.2d 749 (Minn. 2005)	14, 16
<u>In re Guardianship of Forster,</u> 856 N.W.2d 134 (Neb. Ct. App. 2014)	15, 20
<u>In re Guardianship of Glasser,</u> 297 S.W.3d 369 (Tex. App. 2009)	19
<u>In re Merlino's Estate,</u> 294 P.2d 941 (Wash. 1956)	21
<u>In re Putka,</u> 2001 WL 210027 (Ohio Ct. App. Mar. 1, 2001)	16
<u>In re Swanson's Estate,</u> 397 So.2d 465 (Fla. Ct. App. 1981)	18
<u>In re Trust of Rosenberg,</u> 693 N.W.2d 500 (Neb. 2005)	15
<u>Jones-El v. Berge,</u> 374 F.3d 541 (7 th Cir. 2004)	27
<u>Jordan v. Officer,</u> 508 N.E.2d 1077 (Ill. App. Ct. 1987)	26

<u>Kelley v. Barnhill</u> , 188 S.W.2d 385 (Tex. 1945)	19
<u>Levi v. N. Anderson Cnty. EMS</u> , 409 S.C. 374, 762 S.E.2d 44 (Ct. App. 2014)	11
<u>Matter of Estate of Newalla</u> , 837 P.2d 1373 (N.M. 1992)	18
<u>Matter of Estate of Olson</u> , 440 N.W.2d 792, 793 (Wis. Ct. App. 1989)	19
<u>Matter of Estate of O'Neill</u> , 519 N.W.2d 750 (Wis. Ct. App. 1994)	15
<u>Matter of Howard</u> , 315 S.C. 356, 434 S.E.2d 254 (1993)	10
<u>McDevitt v. Wellin</u> , 2016 WL 199626 (D.S.C. 2016)	27
<u>MIA Funding, LLC v. Sizer</u> , No. 2010-UP-443, 2010 WL 10085566 (S.C. Ct. App. Oct. 14, 2010)	23
<u>Morton v. Beery</u> , 1933 WL 2222 (Ohio Ct. App. 1933)	13
<u>Peninsula Prop. Co. v. Santa Cruz County</u> , 235 P.2d 635 (Cal. Dist. Ct. App. 1951)	21
<u>Pfeil v. State</u> , 727 N.W.2d 214 (Neb. 2007)	15
<u>Phil Mechanic Const. Co., Inc. v. Haywood</u> , 325 S.E.2d 1 (N.C. Ct. App. 1985)	12
<u>Pocisk v. Sea Coast Const. of Beaufort</u> , 380 S.C. 584, 671 S.E.2d 98 (Ct. App. 2008)	16
<u>Rentz v. Rentz</u> , 2016 WL 6270439 (Ga. Ct. App. Oct. 26, 2016)	21
<u>Richland County v. Kaiser</u> , 351 S.C. 89, 567 S.E.2d 260 (Ct. App. 2002)	27

<u>Sanford v. South Carolina State Ethics Com'n,</u> 385 S.C. 483, 685 S.E.2d 600 (2009)	27
<u>Savig v. First Nat. Bank of Omaha,</u> 781 N.W.2d 335 (Minn. 2010)	18
<u>S.C. Dep't of Soc. Servs. v. Janice C.,</u> 383 S.C. 221, 678 S.E.2d 463 (Ct. App. 2009)	23
<u>Schmidt v. Schmidt,</u> 540 N.W.2d 605 (N.D. 1995)	19
<u>Schuster v. Schuster,</u> 87 N.W. 1014 (Minn. 1901)	14
<u>Sellner v. State,</u> 416 S.C. 606, 787 S.E.2d 525 (2016)	10
<u>Shapemasters Golf Course Builders, Inc. v. Shapemasters, Inc.,</u> 360 S.C. 473, 602 S.E.2d 83 (Ct. App. 2004)	26
<u>Sheets v. Antes,</u> 470 N.E.2d 931 (Ohio Ct. App. 1984)	15
<u>State v. Austin,</u> 306 S.C. 9, 409 S.E.2d 811 (Ct. App. 1991)	26
<u>State ex rel. Reid v. District Court of Fifth Judicial Dist. in and for Madison County,</u> 256 P.2d 546 (Mont. 1953)	13, 15
<u>Sullivan v. Storz,</u> 55 N.W.2d 499 (Neb. 1952)	13, 16, 20
<u>Tatnall v. Gardner,</u> 350 S.C. 135, 564 S.E.2d 377 (Ct. App. 2002)	11
<u>Teague v. Estate of Hoskins,</u> 709 So.2d 1373 (Fla. 1998)	18
<u>Univ. of S. California v. Moran,</u> 365 S.C. 270, 617 S.E.2d 135 (Ct. App. 2005)	10
<u>Wead v. Lutz,</u> 831 N.E.2d 482 (Ohio Ct. App. 2005)	15

<u>West Branch Pants Co. v. Gordon,</u> 200 N.W. 908, 909 (N.D. 1924)	13
<u>White v. Pope,</u> 664 S.W.2d 105 (Tex. Ct. App. 1983)	19
<u>Williams v. Baird,</u> 735 N.W.2d 383 (Neb. 2007)	13, 15
<u>Wise v. Wise,</u> 394 S.C. 591, 716 S.E.2d 117 (Ct. App. 2011)	23
<u>Wittner v. Scanlan,</u> 959 S.W.2d 640 (Tex. Ct. App. 1995)	19

Statutes, Rules & Other Authorities

S.C. CODE ANN. § 14-3-330	11
S.C. CODE ANN. § 14-3-330(3)	2-3, 9, 25-26
S.C. CODE ANN. § 14-3-330(4)	2, 4, 9, 25-26
S.C. CODE ANN. § 62-1-102	3, 17
S.C. CODE ANN. § 62-1-308	2, 9-10
S.C. CODE ANN. § 62-1-308(a)	10
S.C. CODE ANN. § 62-1-308(b)	9
S.C. CODE ANN. § 62-1-308(i)	10
S.C. CODE ANN. § 62-3-107	2, 16-17, 25-26
S.C. CODE ANN. § 62-7-704(e)	2, 6-7, 22
S.C. R. CIV. PRO. 65(c)	7
UNIF. PROBATE CODE § 3-107	2, 17, 25
UNIF. PROBATE CODE § 3-107 cmt.	17
1 AM. JUR. 2D <u>Actions</u> § 3 (2016)	14-15

4 AM. JUR. 2D Appellate Review § 116 (2016)13, 15
BLACK'S LAW DICTIONARY 1349 (8th ed. 2004)16

STATEMENT OF ISSUES ON APPEAL

- I. Did the Circuit Court err as a matter of law by holding that the Probate Court's order appointing a special fiduciary as interim trustee for a trust pursuant to S.C. CODE ANN. § 62-7-704(e) is not immediately appealable when the order is a final order affecting a substantial right made in a special proceeding under S.C. CODE ANN. § 14-3-330(3)?

- II. Did the Circuit Court err as a matter of law by holding that the Probate Court's order appointing a special fiduciary as interim trustee for a trust pursuant to S.C. CODE ANN. § 62-7-704(e) is not immediately appealable when the order grants, continues, or refuses an injunction under S.C. CODE ANN. § 14-3-330(4)?

INTRODUCTION

This case involves the issue of whether a party may immediately appeal from an order of the Probate Court appointing a Special Fiduciary as Interim Trustee for a Trust pursuant to S.C. CODE ANN. § 62-7-704(e) or whether the party must await the Probate Court's resolution of other petitions involving the Trust before an appeal can be pursued. After Appellant Albert T. Henson, Jr. (hereinafter "Appellant") timely filed an appeal from the Probate Court's order to the Circuit Court in accordance with S.C. CODE ANN. § 62-1-308, upon the motion of Respondents Richard S. Henson and Vann K. Henson (hereinafter "Respondents"), the Circuit Court dismissed Appellant's appeal based on its conclusion that the Probate Court's order grants "only temporary relief" and "is not a final order subject to appeal" because it did not resolve all the petitions pending before the Probate Court. However, Appellant's appeal involves (a) a final order affecting a substantial right made in a special proceeding under S.C. CODE ANN. § 14-3-330(3) and/or (b) an order that grants, continues, or refuses an injunction under § 14-3-330(4). As such, the order is immediately appealable. The Circuit Court erred as a matter of law by dismissing Appellant's appeal.

As discussed below, South Carolina is among the considerable number of jurisdictions that have adopted Section 3-107 of the Uniform Probate Code (UPC). Under this section, unless supervised administration of an estate is involved, which is inapplicable here, "each proceeding before the [Probate Court] is independent of any other proceeding involving the same estate." S.C. CODE ANN. § 62-3-107. Thus far our state appellate courts have not yet addressed the significance of this particular section on the appealability of Probate Court orders rendered in our state. However, the South Carolina Probate Code mandates that our courts must liberally construe and apply this provision to effectuate its underlying purpose to make uniform the law of those states which have

enacted it. See S.C. CODE ANN. § 62-1-102. As a result, decisions from other states that have adopted this provision of the uniform act are especially persuasive.

Decisions from other jurisdictions that have adopted the uniform act make clear that each petition in a probate file ordinarily is considered as initiating an independent proceeding, so that an order disposing of the matters raised in the petition is considered a final, appealable order even though it does not resolve the entire estate. The administration of a decedent's estate can involve several special proceedings, and the final orders entered in each such proceeding are independently appealable. In other words, multiple judgments final for purposes of appeal can be rendered on discrete issues in a single probate matter. Because each proceeding before the Probate Court is independent, there needs to be finality, for purposes of appealability, only for the proceeding being appealed. In order to authorize an appeal in a probate matter, it is not necessary that the order on appeal be one which fully and finally disposes of the entire probate proceeding. All that is required for a probate order to be appealable is that the order must finally dispose or be conclusive of the issue or controverted question for which the particular part of the proceeding was brought. In the present case, because the Probate Court has entered a final order in a special proceeding affecting a substantial right and has concluded or disposed of the particular issue raised in the Respondents' motion or petition, the Probate Court's order is appealable under S.C. CODE ANN. § 14-3-330(3).

Additionally, the Probate Court's order in this case has the effect of granting or refusing an injunction. Orders granting or refusing an injunction are immediately appealable under state law. Although not styled as seeking an injunction, the substance of Respondents' motion in the Probate Court sought a mandatory injunction against Appellant. The motion requested the Probate Court to alter the *status quo* by appointing a special fiduciary and to require Appellant to immediately turn

over and relinquish possession, use, control, and ownership of certain property to the special fiduciary, even though ownership of the property is in dispute. Although the Probate Court's order did not grant all of the relief requested by Respondents, the order nevertheless alters the parties' legal relationship. The order appoints a special fiduciary with powers over the Trust for an indefinite period of time. The order expressly permits the special fiduciary to negotiate an extension of a loan and mortgage involving the real property in controversy and to take "other appropriate action . . . in her sole discretion," including placing a mortgage on the subject property. The practical effect of the Probate Court's order is to grant injunctive relief because it effectively restrains Appellant from exercising complete and full ownership over his property. The order also mandates that Appellant must turn over records to the special fiduciary regarding his ownership of the property and any leases of the property. The order also necessarily denied or refused Appellant's request to be appointed as the special fiduciary for the Trust, which relief he requested in the alternative should such an appointment be deemed necessary. In short, because the Probate Court's order has the effect of granting or refusing an injunction, it is appealable under S.C. CODE ANN. § 14-3-330(4).

STATEMENT OF THE CASE

This litigation arises from a dispute among three brothers over the ownership of valuable commercial property located at 605 North Main Street, Summerville, South Carolina. Appellant and Respondents are brothers and are the grandchildren of Eunice I. Page, who died on October 6, 1993. See A. Henson Aff. ¶¶ 2-3. Appellant asserts that he is the owner of the 605 North Main property based on an agreement that he entered into with Mrs. Page in 1988. Id. ¶¶ 4-9 & Exh. A; J. Wright Aff. ¶¶ 3-6; Burbage Aff. ¶¶ 4-5; Agnew Aff. ¶ 2; K. Wright Aff. ¶ 3. Pursuant to that agreement, Appellant has been in exclusive possession of the property since 1988; has continuously possessed

and used the property since 1988; has paid the taxes, insurance, and expenses for the property since 1988; has kept his personal property, equipment, and tools on the property since 1988; has made permanent improvements to the property; has leased portions of the property to tenants for many years; and earns his livelihood from the business that he conducts on the property. See A. Henson Aff. ¶¶ 10-13, 19; J. Wright Aff. ¶ 3; K. Wright Aff. ¶ 3. The property is Appellant's sole source of income. See A. Henson Aff. ¶ 11.

On January 26, 2015, Appellant's brothers (the Respondents) filed a petition in the Probate Court entitled "Petition to Appoint a Successor Trustee," in which they seek to divest Appellant of ownership of the 605 North Main property. See Petition filed 1.26.15. Respondents allege in their petition that the property is owned by a Trust EIP created under the Last Will and Testament of Eunice I. Page dated October 14, 1992 ("the EIP Trust"). Id. The EIP Trust named Ann P. Pittillo as Trustee. Mrs. Pittillo is the mother of Appellant and Respondents and is Mrs. Page's daughter. Mrs. Pittillo died on April 20, 2014. Respondents allege that they along with Appellant and Julian R. Henson (Respondent Richard Henson's daughter) are the "sole remaining qualified beneficiaries of the" EIP Trust. According to Respondents' petition, "[Respondents] desire for the Court to appoint themselves as the successor co-trustees of the Trust for the sole purpose of dissolving the Trust and distributing the [605 North Main property] to its designated beneficiaries." Id. p.2. Respondents ask the Court to deem the Trust to be the owner of the property, to immediately dissolve the Trust, and to disburse the property (i.e., proceeds from its sale) to themselves and Appellant. Id.

On April 2, 2015, Appellant filed an Answer to Respondents' petition and denied that the 605 North Main property is owned by the EIP Trust. See Answer filed 4.2.15. On May 4, 2015, Appellant filed an Amended Answer, Counterclaims, and Cross-Claim seeking, *inter alia*, a

declaratory judgment declaring that Appellant is the rightful owner of the property. See Amended Answer filed 5.4.15.

On October 12, 2015, before a trial or evidentiary hearing was conducted or any action was taken on Respondents' Petition to Appoint a Successor Trustee or involving Appellant's Counterclaims or Cross-Claim, Respondents then filed a separate "Motion for Appointment of Special Fiduciary as Interim Trustee" under S.C. CODE ANN. § 62-7-704(e). See Motion filed 10.12.15. Section 62-7-704(e) of Probate Code states that "[w]hether or not a vacancy in a trusteeship exists or is required to be filled, the court may appoint an additional trustee or special fiduciary whenever the court considers the appointment necessary for the administration of the trust." Id. § 62-7-704(e). On December 9, 2015, Respondents also moved for an expedited hearing on their Motion for Appointment of Special Fiduciary as Interim Trustee. See Motion filed 12.9.15.

Respondents' Motion for Appointment of Special Fiduciary as Interim Trustee and their Motion for Expedited Hearing requested that a special fiduciary be appointed with the authorization to immediately have "access to all records concerning the assets of the Trust," "authority over Trust assets," and payment of "reasonable compensation." See Motion filed 10.12.15 p. 3. Their motions also asked the Probate Court to alter the *status quo* by authorizing the special fiduciary to have immediate possession, control, and authority over the 605 North Main property, including "management" of the property, "collection of rents and other income generated by" the property, and potentially selling the property. See Motion filed 12.9.15 p. 2. The motions effectively requested the Probate Court to order Appellant to vacate the property and to relinquish ownership and possession of the property to the special fiduciary. The motions also argued that it was imperative that the Probate Court appoint a special fiduciary because Mrs. Pittillo had previously executed a Promissory

Note and Mortgage using the 605 North Main property as collateral that was scheduled to become due on December 3, 2016. Respondents did not file any affidavit or evidence to support either of their motions. Instead, they simply relied on the statement in their motions that “[t]he possibility of the Mortgage being foreclosed for non-payment of the Note is a real threat to the Trust’s main asset, and immediate measures need to be taken to protect this asset, including the possible sale of the property.” Id.

On June 29, 2016, Appellant filed an opposition to the Motion for Appointment of Special Fiduciary. See Memo. Opp. Motion for Special Fiduciary filed 6.29.16. Appellant simultaneously filed sworn affidavits of Appellant and several witnesses, including Jim Wright, Lee Agnew, Sharon Burbage, and Kane Wright. See A. Henson Aff.; J. Wright Aff.; Burbage Aff.; Agnew Aff.; K. Wright Aff. In his opposition to Respondents’ motions, Appellant argued that the substance of the motions sought a mandatory injunction against Appellant, that Respondents failed to show that injunctive relief is necessary to preserve the *status quo*, and that the motions improperly sought to alter the *status quo* by appointing a special fiduciary and to require Appellant to immediately turn over and relinquish possession, use, control, and ownership of the 605 North Main property to the special fiduciary, even though the property’s ownership is in dispute. Appellant also argued that the Probate Court could not grant the relief requested by Respondents without requiring them to post a bond under S.C. R. CIV. PRO. 65(c), which Respondents had not shown they were capable of providing. Finally, as an alternative position, Appellant requested that the Probate Court appoint him as the special fiduciary should the Court determine that it is necessary and appropriate to appoint such a person under § 62-7-704(e).

On June 29, 2016, Associate Probate Judge Molly D. Edwards conducted a hearing on

Respondents' motions. See Hearing Transcript 6.29.16. No testimony was proffered at the hearing. On August 31, 2016, Judge Edwards issued an order appointing Ashley Andrews, Esquire "as the special fiduciary to serve as the Interim Trustee." See Order filed 8.31.16 p. 6. In delineating the special fiduciary's "duties and responsibilities," the order states that "it is important that the Court treads lightly in regards to the duties and responsibilities assigned to a special fiduciary in order to ensure that the *status quo* is maintained in this matter to the greatest extent possible." Id. p. 7. The order also finds that "[w]hile on the face of the Motion, [Respondents] did not request an injunction, it appears that some of their requested relief would have the consequence of altering the *status quo*" and that "[w]hile injunctive relief was not plead by [Respondents], that would be the effect." Id. However, Judge Edwards concluded that the outstanding mortgage taken out on the 605 North Main property by Mrs. Pittillo "poses a major risk to the ownership of this property," thus she ruled that the "appointment of a Special Fiduciary is necessary in order to preserve 605 N. Main Street for all parties and to negotiate an extension of the current loan or other appropriate action to pay the mortgage in her sole discretion." Id. p. 8. The order authorizes the special fiduciary "[i]n her sole discretion, [to] negotiate with the lender and/or parties to extend the due date on the current mortgage in order for litigation to be finalized or [to] have the mortgage paid off prior to the December 3, 2016 due date." Id. p. 10. By appointing Ms. Andrews as the special fiduciary, Judge Edwards necessarily denied Appellant's competing request that he be the person appointed to that position. The order also affirmatively requires that Appellant turn over certain records to the special fiduciary regarding the 605 North Main property. Id. pp. 8, 10. The order further states that the special fiduciary "shall be compensated at \$200/hour." Id. p. 9.

Appellant's counsel received written notice of the entry of the order via regular mail on

September 6, 2016. On September 16, 2016, Appellant timely filed and served his Notice of Intent to Appeal to the Circuit Court in accordance with S.C. CODE ANN. § 62-1-308. See Notice of Intent to Appeal filed 9.16.16. On October 21, 2016, Appellant timely served his Statement of Issues on Appeal in the Circuit Court pursuant to S.C. CODE ANN. § 62-1-308(b). See Statement of Issues on Appeal filed 10.24.16.

On October 26, 2016, Petitioners filed a Motion to Dismiss Appeal arguing that the Probate Court's order grants "only temporary relief" and "is not a final order subject to appeal" until there is "a final hearing on the merits" and a resolution of Respondents' separate Petition to Appoint a Successor Trustee and Appellant's Counterclaims and Cross-Claim. See Motion to Dismiss Appeal filed 10.26.16 pp. 3-4. Respondent filed his opposition to the motion on November 21, 2016, and asserted that the Probate Court's order is appealable because it involves (a) a final order affecting a substantial right made in a special proceeding under S.C. CODE ANN. § 14-3-330(3) and/or (b) an order that grants, continues, or refuses an injunction under § 14-3-330(4). See Memo. Opp. Motion to Dismiss Appeal filed 11.21.16. Circuit Judge Edgar W. Dickson conducted a hearing on the Petitioners' motion on November 21, 2016. See Hearing Transcript 11.21.16.

On December 12, 2016, Judge Dickson entered an Order granting the Respondents' motion to dismiss Appellant's appeal. See Order filed 12.12.16. Appellant's counsel received written notice of entry of the Order on December 15, 2016. On January 12, 2017, Appellant timely served his Notice of Appeal to this Court. See Notice of Appeal.

ARGUMENTS

I. STANDARD OF REVIEW.

Questions of law are reviewed *de novo* and the appellate court will reverse the lower court's decision when it is controlled by an error of law. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); see also Ex parte TLC Laser Eye Centers (Piedmont/Atlanta), LLC, 404 S.C. 385, 392, 745 S.E.2d 105, 109 (2013) (“Questions of law are reviewed *de novo*.”).

II. THE CIRCUIT COURT ERRED AS A MATTER OF LAW BY DISMISSING APPELLANT'S APPEAL OF THE PROBATE COURT'S ORDER APPOINTING A SPECIAL FIDUCIARY AS INTERIM TRUSTEE ON THE GROUNDS THAT THE ORDER IS NOT IMMEDIATELY APPEALABLE.

Appeals from the Probate Court to the Circuit Court are governed by S.C. CODE ANN. § 62-1-308. Section 62-1-308 provides that “[a] person interested in a final order, sentence, or decree of a probate court may appeal to the circuit court in the same county” Id. § 62-1-308(a). It further states that “[t]he circuit court . . . shall hear and determine the appeal according to the rules of law.” Id. § 62-1-308(i). “As used in this statute, the phrase ‘according to the rules of law’ means according to the rules governing appeals.” Univ. of S. California v. Moran, 365 S.C. 270, 274, 617 S.E.2d 135, 137 (Ct. App. 2005) (citation omitted); Matter of Howard, 315 S.C. 356, 434 S.E.2d 254, 257 (1993).

“[T]he question of whether an order is immediately appealable is determined on a case-by-case basis.” Dorn v. Cohen, 418 S.C. 126, 138, 791 S.E.2d 313, 319 (Ct. App. 2016) (citation omitted). “The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by S.C. CODE ANN. § 14-3-330.” Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 6-7, 630 S.E.2d 464, 467 (2006); see also Edwards v. SunCom, 369 S.C. 91, 93, 631

S.E.2d 529, 530 (2006) (“Absent some specialized statute, the immediate appealability of an interlocutory or intermediate order depends on whether the order falls within S.C. CODE ANN. § 14-3-330.”); Levi v. N. Anderson Cnty. EMS, 409 S.C. 374, 379-80, 762 S.E.2d 44, 47 (Ct. App. 2014); Tatnall v. Gardner, 350 S.C. 135, 137, 564 S.E.2d 377, 378 (Ct. App. 2002).

The types of orders that are appealable pursuant to § 14-3-330 include *inter alia*:

(3) **A final order affecting a substantial right made in any special proceeding** or upon a summary application in any action after judgment; and

(4) **An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction** or granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. CODE ANN. § 14-3-330 (emphasis added); see also Edwards, 369 S.C. at 93-94, 631 S.E.2d at 530. Although § 14-3-330(4) does not explicitly refer to “probate court” orders involving injunctions, our appellate courts have applied this provision to such orders. See, e.g., Ex parte McFarlin, 2007 WL 8326605, at *2 (S.C. Ct. App. Feb. 12, 2007).

Where a specialized statute exists, it controls over § 14-3-330. Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep’t of Health & Envtl. Control, 387 S.C. 265, 266, 692 S.E.2d 894 (2010); see also Ex parte Capital U-Drive-It, Inc., 369 S.C. at 6, 630 S.E.2d at 467.

A. The Probate Court’s Order is Immediately Appealable as a Final Order Affecting a Substantial Right Made in a Special Proceeding under S.C. CODE ANN. § 14-3-330(3).

The Probate Court’s order constitutes a final order affecting a substantial right made in a special proceeding within the meaning of § 14-3-330(3).

1. Distinction Between “Actions” and “Special Proceedings.”

Despite the fact that § 14-3-330(3) and its predecessor versions have been around for over a

century and a half, South Carolina has few reported decisions addressing this subsection. Our state law has historically divided the remedies in the courts of justice into (1) “actions” and (2) “special proceedings.” Actions are distinguished from special proceedings according to the remedy sought. The two terms are used in contradistinction to each other. An “action” is an “ordinary proceeding in a Court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence.” Allen v. Partlow, 3 S.C. 417, 418, 1872 WL 5562, *1-2 (1872). In contrast, a “special proceeding” is any other remedy—“such proceedings being in their nature independent remedies, that cannot be taken by an action.” Id.; see also Gibbes v. Elliott, 8 S.C. 50, 62, 1876 WL 6768, *8 (1876) (noting that “special proceedings” are defined “as being every remedy other than the ordinary proceeding in a Court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense”).

Our state law is consistent with the law in a substantial majority of our sister states. See, e.g., Agricultural Labor Bd. v. Superior Court, 196 Cal. Rptr. 920, 923 (Cal. Ct. App. 1983) (“[A]ctions’ are distinguished from ‘special proceedings’ according to the remedy sought. Thus, ‘[a]n action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.’ A ‘special proceeding’ is ‘[e]very other remedy’” (citations omitted)); Phil Mechanic Const. Co., Inc. v. Haywood, 325 S.E.2d 1, 2 (N.C. Ct. App. 1985) (North Carolina statutory law “provides that ‘[r]emedies in the courts of justice are divided into (1) Actions’ and ‘(2) Special Proceedings.’ . . . ‘An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a

wrong, or the punishment or prevention of a public offense,” while . . . “[e]very other remedy is a special proceeding.” (citations omitted); Morton v. Beery, 1933 WL 2222, *3 (Ohio Ct. App. 1933) (“The codes do not in express terms define a special proceeding, but merely divide remedies into actions and special proceedings, defining an action, and then providing that every other remedy is a special proceeding. The phrase ‘special proceeding’ is therefore a generic term for all civil remedies in courts of justice which are not ordinary actions.” (citations omitted)); State ex rel. Reid v. District Court of Fifth Judicial Dist. in and for Madison County, 256 P.2d 546, 549 (Mont. 1953) (“[J]udicial remedies administered by the courts of justice or by judicial officers are divided into two classes, namely, (1) actions, and (2) special proceedings. ‘An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.’ ‘Every other remedy is a special proceeding.’ (citations omitted)); West Branch Pants Co. v. Gordon, 200 N.W. 908, 909 (N.D. 1924) (“Our statute divides all remedies into (1) actions, and (2) special proceedings. An action is distinguished from a special proceeding, and vice versa. The term ‘special proceedings’ includes only remedies not furnished by actions. . . . [T]he two terms, ‘action’ and ‘special proceeding,’ are used in the Code in contradistinction to each other.” (citations omitted)).

In applying statutes identical to § 14-3-330(3), other states have held that “[a] special proceeding includes every special statutory remedy which is not in itself an action.” Williams v. Baird, 735 N.W.2d 383, 389 (Neb. 2007); Sullivan v. Storz, 55 N.W.2d 499, 502 (Neb. 1952) (“A special proceeding may be said to include every special statutory remedy which is not in itself an action.”); 4 AM. JUR. 2D Appellate Review § 116 (2016) (citing cases). “A special proceeding is defined as usually meaning such a proceeding as may be commenced independently of a pending

action by petition or motion, upon notice, in order to obtain special relief.” In re GlaxoSmithKline PLC, 699 N.W.2d 749, 756 (Minn. 2005). “Its existence is not dependent upon the existence of any other action and it therefore is not an integral part of the original action but is separate and apart” and “[i]t adjudicates by final order a substantial right distinct from any judgment entered upon the merits of the original action.” Id.; see also In re Estate of Janecek, 610 N.W.2d 638, 642 (Minn. 2000) (stating that a special proceeding is a “generic term for a remedy that is not part of the underlying action and that is brought by motion or petition, upon notice, for action by the court independent of the merits of the underlying action”); Schuster v. Schuster, 87 N.W. 1014, 1015 (Minn. 1901) (“The phrase ‘special proceeding,’ within its proper definition, is a generic term for all civil remedies in courts of justice which are not ordinary actions. Where the law confers a right, and authorizes a special application to a court to enforce it, the proceeding is special, within the ordinary meaning of the term ‘special proceeding.’”).

AMERICAN JURISPRUDENCE (SECOND) explains the difference between an “action” and a “special proceeding” as follows:

The word “action” refers to an entire proceeding, not to one or more parts within a proceeding. Specifically, an action not only encompasses the complaint but also refers to the entire judicial proceeding at least through judgment. An “action” is an ordinary proceeding.

The phrase “special proceeding” has no reference to provisional remedies in actions at law or in equity, and it has reference only to such proceedings as may be commenced independently of a pending action by petition or motion upon notice in order to obtain special relief. Special proceedings include civil statutory remedies not encompassed in the civil procedure statutes. As a general rule, a special proceeding is confined to the type of case which was not, under the common law or equity practice, either an action at law or a suit in equity. A special proceeding instead arises from a right conferred by a statute which authorizes a special application to the courts to enforce the right. Special proceedings have been distinguished from actions by characterizing the latter as

ordinary proceedings in court by which one party prosecutes another for a declaration, enforcement, or protection of a right; or the redress or prevention of a wrong, with all other remedies being deemed special proceedings. Special proceedings have also been distinguished from actions by characterizing actions as ordinary proceedings for the punishment of a public offense. Additionally, special proceedings may be distinguished from other civil actions by the manner of pleading, practice, and procedure prescribed by the law.

1 AM. JUR. 2D Actions § 3 (2016) (footnotes omitted).

Importantly, proceedings in the Probate Court are examples of a “special proceeding.” See Matter of Estate of O’Neill, 519 N.W.2d 750, 752 (Wis. Ct. App. 1994) (“Probate is a series of special proceedings.”); Reid, 256 P.2d at 549 (“The administration of an estate of a deceased person is neither an action at law nor a suit in equity but it is a special proceeding.”); Pfeil v. State, 727 N.W.2d 214, 218 (Neb. 2007) (“[A] special proceeding includes every special statutory remedy which is not in itself an action. . . . Examples of special proceedings include . . . probate actions”); Williams, 735 N.W.2d at 389 (“Examples of special proceedings include juvenile court proceedings, probate actions, and workers’ compensation cases.”); see also 4 AM. JUR. 2D Appellate Review § 116 (citing cases); In re Guardianship of Forster, 856 N.W.2d 134, 146 (Neb. Ct. App. 2014) (proceedings under the Nebraska Probate Code are “special proceedings”); In re Trust of Rosenberg, 693 N.W.2d 500, 504 (Neb. 2005) (proceeding in county probate court to remove trustee was “special proceeding”); Wead v. Lutz, 831 N.E.2d 482, 485 (Ohio Ct. App. 2005) (“Generally, matters related to estate administration are treated as special proceedings.”); In re Estate of Janet N. Price, 1995 WL 628344 (Ohio Ct. App. Oct. 26, 1995) (appeal from probate court’s order denying an application to administer an estate was a final, appealable order because it affected a substantial right and was made in a special proceeding); Sheets v. Antes, 470 N.E.2d 931, 934 (Ohio Ct. App. 1984) (observing that probate court orders “such as an order authorizing a claimant to present a claim

against the estate after the expiration of the time allowed for presentation and an order making an election for an incompetent surviving spouse [were] orders made in special proceedings”); In re Putka, 2001 WL 210027, at *1 n.1 (Ohio Ct. App. Mar. 1, 2001) (appeal from probate court’s denial of an application for appointment as executor of the decedent’s estate was final order made in a special proceeding and affected a substantial right).

In applying statutes identical to § 14-3-330(3), courts have held that “[a] substantial right is an essential legal right as distinguished from a mere technical one.” Sullivan, 55 N.W.2d at 502; In re Estate of Muncillo, 789 N.W.2d 37, 42 (Neb. 2010) (“A substantial right is an essential legal right, not a mere technical right.”). “A ‘substantial right’ is ‘a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a man is entitled to have preserved and protected by law: a material right.” Barnes v. Kochhar, 633 S.E.2d 474, 479 (N.C. Ct. App. 2006) (citation omitted);¹ see also In re GlaxoSmithKline PLC, 699 N.W.2d at 754 (substantial right defined as “[a]n essential right that potentially affects the outcome of a lawsuit and is capable of legal enforcement and protection, as distinguished from a mere technical or procedural right” (quoting BLACK’S LAW DICTIONARY 1349 (8th ed. 2004))).

2. *Impact of S.C. CODE ANN. § 62-3-107.*

The fact that South Carolina is among the jurisdictions that have adopted Section 3-107 of the UPC is vitally important to the resolution of the instant appeal. Under this section, unless supervised administration of an estate is involved, which is not applicable here, “each proceeding

¹ In Pocisk v. Sea Coast Const. of Beaufort, 380 S.C. 584, 589, 671 S.E.2d 98, 101 (Ct. App. 2008), our Court of Appeals pointed out the similarity of our statute to North Carolina’s statute involving appealability of orders affecting a “substantial right.”

before the [Probate Court] is independent of any other proceeding involving the same estate.” S.C. CODE ANN. § 62-3-107; see also UPC § 3-107; Cotty v. Yartzeff, 309 S.C. 259, 422 S.E.2d 100, 102 (1992) (quoting § 62-3-107). The comment to UPC § 3–107 provides in part: “When resort to the judge is necessary or desirable to resolve a dispute or to gain protection, the scope of the proceeding if not otherwise prescribed by the Code is framed by the petition.” UPC § 3–107 cmt.

Thus far our appellate courts have not yet addressed the significance of § 62-3-107 on the appealability of Probate Court orders in our state. However, the South Carolina Probate Code statutorily mandates that our courts must liberally construe and apply this provision to effectuate its underlying purpose to make uniform the law of those states which have enacted it. See S.C. CODE ANN. § 62-1-102 (mandating that “[t]his Code shall be liberally construed and applied to promote its underlying purposes and policies” and that “[t]he underlying purposes and policies of this Code are . . . to make uniform the law among the various jurisdictions”). As a result, decisions from other states that have adopted this provision of the uniform act are particularly persuasive. See Hoover v. Hoover, 271 S.C. 177, 182, 246 S.E.2d 179, 181 (1978) (“In accord with the directive [in the Uniform Reciprocal Enforcement of Support Act that it] ‘be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it,’” our state supreme court “follow[ed] the courts of our sister states” in interpreting the statute (citations omitted)); see also In re Estate of Geier, 809 N.W.2d 355, 359 (S.D. 2012) (“[W]e are statutorily mandated to interpret uniform laws such as the UPC ‘to effectuate its general purpose to make uniform the law of those states which enact it.’” (citations omitted)); In re Estate of Zimmerman, 633 N.W.2d 594, 599 (N.D. 2001) (“We interpret uniform laws in a uniform manner, and we may seek guidance from decisions in other states which have interpreted similar provisions in a uniform law.

We also may look to the Editorial Board Comments of the Uniform Probate Code to interpret its provisions.” (citations omitted)); Savig v. First Nat. Bank of Omaha, 781 N.W.2d 335, 346 (Minn. 2010) (“If possible, we should construe the Minnesota [statute] consistently with courts from other jurisdictions that have faced the same issue under the Uniform Probate Code. . . . ‘[W]e give great weight to other states’ interpretations of a uniform law.’” (citation omitted)); In re Estate of Kotowski, 704 N.W.2d 522, 526 (Minn. Ct. App. 2005) (“Because uniform laws are intended to encourage common interpretation among jurisdictions, caselaw from other UPC jurisdictions has substantial persuasive value here.”); In re Swanson's Estate, 397 So.2d 465, 466 (Fla. Ct. App. 1981) (“When a statute has its origins in a uniform law, it should receive a uniform interpretation in all adopting states if the beneficial purpose of uniformity is to be served.”); Teague v. Estate of Hoskins, 709 So.2d 1373, 1374 (Fla. 1998) (“In construing a statute modeled after a uniform law, ‘it is pertinent to resort to the holdings in other jurisdictions where the act is in force.’” (citation omitted)).

Case law from other jurisdictions applying their versions of UPC § 3–107 have held that “as a practical matter each petition in a probate file should ordinarily be considered as initiating an independent proceeding, so that an order disposing of the matters raised in the petition should be considered a final, appealable order.” Matter of Estate of Newalla, 837 P.2d 1373, 1377 (N.M. 1992); In re Estate of Sanders, 750 N.W.2d 806, 813 (Wis. 2008) (“Because the probate of an estate may consist of a series of special proceedings, unlike other forms of litigation, probate can result in a series of potentially final orders.”); Estate of Marsh, 2016 WL 6581173, at *5 (Cal. Ct. App. Nov. 7, 2016) (“The administration of a decedent’s estate can involve several ‘independent collateral proceedings,’ and the ‘final orders’ entered in each such proceeding are independently appealable and can be the basis for a res judicata defense.” (citations omitted)).

“Because each proceeding [before the Probate Court] is independent, there needs to be finality, for purposes of appealability, only for the proceeding being appealed.” In re Estate of Ketterling, 885 N.W.2d 85, 87 (N.D. 2016); see Schmidt v. Schmidt, 540 N.W.2d 605, 607 (N.D. 1995) (“Because each proceeding in an unsupervised probate is considered independent of other proceedings involving the same estate, there need be finality only as to that proceeding, not the entire estate.”). “[M]ultiple judgments final for purposes of appeal can be rendered on certain discrete issues” in a single probate matter. In re Guardianship of Glasser, 297 S.W.3d 369, 372 (Tex. App. 2009) (citation omitted). “[I]n order to authorize an appeal in a probate matter, it is not necessary that the decision, order, decree, or judgment referred to therein be one which fully and finally disposes of the entire probate proceeding.” Kelley v. Barnhill, 188 S.W.2d 385, 386 (Tex. 1945); White v. Pope, 664 S.W.2d 105, 107 (Tex. Ct. App. 1983) (“An order may be final and appealable even though the decision does not fully and finally dispose of the entire probate proceeding.”).

All that is required for a probate order to be appealable is that “[t]he order must finally dispose or be conclusive of the issue or controverted question for which the particular part of the proceeding was brought.” Wittner v. Scanlan, 959 S.W.2d 640, 641 (Tex. Ct. App. 1995); see also Kelley, 188 S.W.2d at 386 (“[I]t must be one which finally disposes of and is conclusive of the issue or controverted question for which that particular part of the proceeding was brought.”); In re Estate of McKillip, 820 N.W.2d 868, 875–76 (Neb. 2012) (“In the context of multifaceted special proceedings that are designed to administer the affairs of a person, the word ‘case’ means a discrete phase of the proceedings” and “[a]n order that ends a discrete phase of the proceedings affects a substantial right because it finally resolves the issues raised in that phase.”); Matter of Estate of Olson, 440 N.W.2d 792, 793 (Wis. Ct. App. 1989) (“Mozelle’s effort to have the premarital

agreement declared void began with a petition; the resulting judgment disposed of the matters raised in the petition. We are persuaded that this special proceeding, although occurring within the confines of the larger probate proceeding, nevertheless satisfies the statutory requirement of disposing of the ‘entire matter in litigation as to one or more of the parties’”).

“An order affecting a substantial right, when made in a special proceeding is a final order and is appealable, even though it does not terminate the action, nor constitute a final disposition of the case.” Sullivan, 55 N.W.2d at 502; Forster, 856 N.W.2d at 146 (“If a substantial right is affected, an order is directly appealable as a final order even though it does not terminate the action or constitute a final disposition of the case.”). “In other words, ‘an order is appealable if it finally adjudicates some substantial right, whereas if it merely leads to further hearings on the issue, it is interlocutory.’” White, 664 S.W.2d at 107 (citation omitted); see also In re the Estate of Paul J. Gadash, 2017 WL 1404237, *4 (Colo. Ct. App. 2017) (holding that wife’s petition for spouse’s elective share and wife’s creditor’s claim initiated independent proceedings, thus the probate court’s order disposing of the wife’s creditor’s claim was a “final order” for appellate purposes even though the probate court had not ruled on the wife’s elective share claim).

Importantly, “it is substance and not mere nomenclature which determines the nature and finality of the order.” In re Estate of Sims, 540 S.E.2d 650, 651 (Ga. Ct. App. 2000); see also Gomes v. Kauwe's Heirs, 472 P.2d 119, 119-120 (Haw. 1970) (“The nature of an order as final or interlocutory is determined by its substance and not on the basis of the designation given to by the court.”); Howell v. Reimann, 288 P.2d 649, 651 (Idaho 1955) (“Whether an instrument is an appealable order or judgment must be determined by its content and substance, and not by its title.”); Airline Ground Serv. Inc. v. Checker Cab Co., 39 N.W.2d 809, 811 (Neb. 1949) (“It is fundamental

of course that the form of an order or the label placed upon it does not determine its character. It is the substance of the order which is controlling in determining its nature.”); Peninsula Prop. Co. v. Santa Cruz County, 235 P.2d 635, 640 (Cal. Dist. Ct. App.1951) (“The label placed upon the order or judgment by the trial court is not conclusive. . . . [A]n appellate court must determine from the substance and effect of the order or judgment whether it is final or interlocutory.”).

The fact that a probate order is designated as “interim” does not negate the conclusion that it is appealable as a “final” order under § 14-3-330(3). See, e.g., Rentz v. Rentz, 2016 WL 6270439, at *3 (Ga. Ct. App. Oct. 26, 2016) (“The probate court’s caption as an ‘interim’ order does not require us to conclude that the order was not final. Rather, we look to the substance of the order to determine whether it was final. In this case, the probate court’s order resolved the issue pending before it—the sale of the estate property. Accordingly, the probate court’s order was final for purposes of the superior court’s jurisdiction.” (citations omitted)); In re Estate of Adams, 2013 WL 84925, *2 (Tex. Ct. App. Jan. 8, 2013) (“A probate proceeding consists of a continuing series of events, in which the probate court may make decisions at various points in the administration of the estate on which later decisions will be based. In probate cases, it is possible to have more than one final, appealable order. *There may be appeals of interim orders rendered on discrete issues before the entire probate proceeding is concluded. . . .*” (emphasis added)); In re Merlino's Estate, 294 P.2d 941, 943 (Wash. 1956) (holding that an “interim order made during the course of probate” was “final in its nature” and immediately appealable); In re Estate of Williams, 2011 WL 345848, at *5 (Tex. App. Feb. 3, 2011) (“[P]robate proceedings give rise to a recognized exception to the general rule that only final judgments are appealable. *This exception accommodates appeals of interim orders rendered on discrete issues before the entire probate proceeding is concluded.*” (emphasis added)).

In the case at bar, Respondents' motion seeking the appointment of a special fiduciary pursuant to § 62-7-704(e) of the South Carolina Probate Code is a "special proceeding." The motion is not in itself an action, but requests special relief (appointment of a special fiduciary on an interim basis) that is not dependent upon the existence of any other action or the outcome of Respondents' original petition seeking the appointment of a successor trustee. The motion for appointment of a special fiduciary is not essential to Respondents' original petition and is discrete from that petition. The original petition did not seek appointment of an interim special fiduciary. It is unnecessary for the Probate Court to appoint a special fiduciary on an interim basis in order to adjudicate Respondents' original petition, which seeks the appointment of a successor trustee to administer and dissolve the Trust after a final hearing on the merits. The appointment of a special fiduciary on an interim basis is not an integral part of the original petition, but is separate and apart from that petition. It is merely collateral to it; a special and independent step.

The Probate Court's order also fully and finally adjudicates the parties' rights involving Respondents' request for the appointment of a special fiduciary. The order is "final" because no further action is required in the Probate Court to determine the parties' rights with respect to the discrete issue involving the appointment of a special fiduciary. The order does not advise that any further hearings or proceedings will occur on whether to appoint a special fiduciary. There is nothing left for the Probate Court to do involving Respondents' request for appointment of a special fiduciary. Instead, the Probate Court has already decided that discrete issue. In fact, the special fiduciary has already been—and is currently—acting pursuant to the authorization granted to her in the Probate Court's order.

Finally, the Probate Court's appointment of a special fiduciary involves a substantial right,

not merely a technical or procedural matter. The Probate Court's order specifically authorizes the special fiduciary "to negotiate an extension of the current loan or other appropriate action to pay the mortgage in her sole discretion." See Order p. 8. The order expressly authorizes the special fiduciary "[i]n her sole discretion, [to] negotiate with the lender and/or parties to extend the due date on the current mortgage in order for litigation to be finalized or [to] have the mortgage paid off prior to the December 3, 2016 due date." Id. p. 10. For example, pursuant to the powers granted to the special fiduciary in the Probate Court's order, the special fiduciary could borrow money or obtain a loan from a lender to pay off the existing loan and place a mortgage or other lien on the 605 North Main property, which Appellant maintains that he alone owns. Indeed, the special fiduciary already has extended the original loan that became due on December 3, 2016 by increasing the amount due from \$190,000.00 to \$247,000.00 and by executing a corresponding mortgage using the 605 North Main property as security for the extension. See Mortgage Modification dated 12.6.16.² The Probate Court also denied Appellant's request to be appointed to the position of special fiduciary, thus depriving him of this right. The order affirmatively requires that Appellant turn over records to the special fiduciary regarding his ownership of the 605 North Main property and any leases of the property. See Order pp. 8, 10. The order further states that the special fiduciary "shall be compensated at

² Because the modification document did not exist until December 6, 2016, which was after Judge Edwards issued her August 31, 2016 order appointing a special fiduciary, the document was not presented to Judge Edwards. However, this Court can take judicial notice of the document because it is a matter of public record (it is recorded with the Dorchester County Register of Deeds) and is undisputed. See Wise v. Wise, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011); MIA Funding, LLC v. Sizer, No. 2010-UP-443, 2010 WL 10085566, at *2 n.5 (S.C. Ct. App. Oct. 14, 2010); Freeman v. McBee, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984); S.C. Dep't of Soc. Servs. v. Janice C., 383 S.C. 221, 227, 678 S.E.2d 463, 467 (Ct. App. 2009).

\$200/hour.” Id. p. 9. In short, the order undoubtedly involves substantial rights.

Notably, even if the Circuit Court or this Court should later determine that the Probate Court erred in appointing a special fiduciary and in allowing transactions involving the 605 North Main property to proceed, it will be impossible to undo the particular transactions that have already taken place under the Probate Court’s order before the appellate court has ruled on the validity of that order. The transactions will have already occurred and there is nothing this Court could do to rectify the Probate Court’s improper rulings. If the special fiduciary is allowed to undertake transactions involving the 605 North Main property, this Court will not be able to provide an effective remedy to Appellant if he has to wait until the entire controversy is disposed of before he can appeal the order.³ See Ex parte Capital U-Drive-It, Inc., 369 S.C. at 8, 630 S.E.2d at 468 (agreeing that order unsealing family court records was immediately appealable because no appellate remedy is likely to repair any damage done by an improper disclosure); Muncillo, 789 N.W.2d at 41-42 (Court held that probate court order denying application for appointment of a special administrator was a “special proceeding” and “affects an essential legal right” which “cannot be vindicated upon appeal from entry of the later final judgment” because “[i]t is not uncommon for the probate of an estate to remain open for years, and a special administrator cannot go back in time and preserve or administer the estate long after the application to appoint has been denied.” Accordingly, Court held “the probate court’s ruling in this case affected a substantial right of the appellant in a special proceeding, and is therefore a final, appealable order . . .”).

³ The Probate Court’s order rejected Appellant’s request that Respondents be required to give a bond or otherwise indemnify Appellant for any loss he may sustain if it should finally be determined the Probate Court’s order was improperly entered. The Probate Court’s order does not require either Respondents or the special fiduciary to post a bond of any sort.

In summary, because the Probate Court has entered a final order in a special proceeding affecting a substantial right, the Probate Court's order is appealable.

3. *The Opinion in Estate of Boyce is not Controlling.*

Respondents and the Circuit Court placed considerable reliance on this Court's decision in Estate of Boyce v. Work, 305 S.C. 43, 406 S.E.2d 184 (Ct. App. 1991).⁴ However, that reliance is misplaced because this Court was never asked to—and did not—address the appealability of a Probate Court's order under either § 14–3–330(3) or § 14–3–330(4) in that case. The Court in Estate of Boyce also did not address the impact of S.C. CODE ANN. § 62-3-107, which adopted UPC § 3-107 and significantly affects the appealability of Probate Court orders that rule on independent proceedings involving the same estate.

In Estate of Boyce, this Court held that a Probate Court order appointing two sisters as “special administrators” for an estate was “clearly temporary” because it stated the sisters are appointed “until such time as a Personal Representative(s) shall be formally appointed.”⁵ The order also forbade the sisters from distributing any estate assets and required them to post a substantial bond. On appeal to the Circuit Court, the Circuit Court disqualified one of the sisters from serving as special administrator. The sisters then appealed to this Court, which vacated the Circuit Court's order based on its conclusion that the Probate Court's “temporary order” was not final.

⁴ This Court's opinion in Estate of Boyce was appealed to our state supreme court. However, the parties settled before the supreme court decided the merits of the matter. Boyce-Abel In re Estate of Boyce v. Work, 308 S.C. 234, 417 S.E.2d 597 (1992).

⁵ The order at issue in this case is noticeably different from the order in Estate of Boyce. Although the Probate Court's order in this case states the “special fiduciary [is] to serve as the Interim Trustee,” it nowhere states when the special fiduciary's appointment will terminate. See Order p. 6. Instead, the special fiduciary is appointed for an indefinite period.

However, nothing in the Court’s opinion indicates that it was presented with any argument that the order was a final order affecting a substantial right made in a special proceeding under § 14–3–330(3) or an order that grants, continues, or refuses an injunction under § 14–3–330(4). The Court also did not address the impact of § 62-3-107. As former Chief Judge Alex Sanders so aptly stated, “appellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.” State v. Austin, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991). This Court in Estate of Boyce did not decide the issues presented in this case and that decision is not controlling of the issues raised in Appellant’s appeal.

B. The Probate Court’s Order is Immediately Appealable as an Order that Grants, Continues, or Refuses an Injunction under S.C. CODE ANN. § 14–3–330(4).

The Probate Court’s order also has the effect of granting or refusing an injunction within the meaning of § 14-3-330(4).

Orders granting or refusing an injunction are immediately appealable. Babb v. Scott, 2005 WL 7084291, *1 (S.C. Ct. App. 2005) (“A grant of an injunction is immediately appealable.”); Shapemasters Golf Course Builders, Inc. v. Shapemasters, Inc., 360 S.C. 473, 602 S.E.2d 83, 86 (Ct. App. 2004) (“Appellants correctly argue that the refusal to grant a restraining order is immediately appealable.”); Appeal of Paslay, 230 S.C. 55, 94 S.E.2d 57, 61 (1956) (appeal lay from the restraining order or temporary injunction); S.C. CODE ANN. § 14–3–330(4).

“In determining what constitutes an injunction subject to interlocutory review the court should look to the substance of the order rather than its form.” Jordan v. Officer, 508 N.E.2d 1077, 1079 (Ill. App. Ct. 1987). “An order—including a postjudgment order—is properly characterized as an ‘injunction’ when it substantially and obviously alters the parties’ pre-existing legal relationship.”

Jones-El v. Berge, 374 F.3d 541, 544 (7th Cir. 2004).

Our state supreme court has recognized that labels are not determinative; instead, it is the substance of the requested relief that matters. Sanford v. South Carolina State Ethics Com'n, 385 S.C. 483, 495-96, 685 S.E.2d 600, 607 (2009) (“Because it is ‘the substance of the requested relief that matters’ and not the form in which the petition for relief is framed, we may construe the Governor’s request as one for injunctive relief if that is substantively what he is requesting.”); Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 437, 673 S.E.2d 448, 458 (2009); see also McDevitt v. Wellin, 2016 WL 199626, *3 (D.S.C. 2016) (“The trust plaintiffs’ motion also seeks to compel the Wellin children to make certain payments and take certain actions with respect to the Trust assets going forward. Thus, it falls within the definition of injunctive relief outlined above.”); Richland County v. Kaiser, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002) (“Although the petition in this case was styled as a request for a writ of mandamus, we find that based on the relief sought, the County’s pleading is more properly characterized as a request for an injunction. It is the substance of the requested relief that matters ‘regardless of the form in which the request for relief was framed.’”).

Although Respondents’ motions did not expressly ask for or analyze the requirements for injunctive relief, the substance of their motions sought a mandatory injunction against Appellant. Respondents’ motions requested the Probate Court to alter the *status quo* by appointing a special fiduciary and to require Appellant to immediately turn over and relinquish possession, use, control, and ownership of the 605 North Main property to the special fiduciary, even though ownership of the property is in dispute. Despite the fact that Appellant possesses and uses the property and claims ownership of the property, Respondents nevertheless asked the Court to authorize the special

fiduciary to have immediate possession, control, and authority over the property, including “management” of the property, “collection” of the rents and income generated thereby, and potentially selling the property.

In the Probate Court’s order appointing a special fiduciary, it specifically acknowledged that “it is important that the Court treads lightly in regards to the duties and responsibilities assigned to a special fiduciary in order to ensure that the *status quo* is maintained in this matter to the greatest extent possible.” See Order p. 7. The order also expressly found that “[w]hile on the face of the Motion, Petitioners did not request an injunction, it appears that some of their requested relief would have the consequence of altering the *status quo*” and that “[w]hile injunctive relief was not plead by Petitioners, that would be the effect.” Id. By appointing Ms. Andrews as special fiduciary, the order also necessarily denied Appellant’s alternative request that he be the person appointed to that position if an appointment was deemed necessary.

The Probate Court’s order alters the parties’ legal relationship. The order appoints a special fiduciary with powers over the Trust for an indefinite period of time. Even though ownership of the 605 North Main property is in dispute, the order expressly permits the special fiduciary “to negotiate an extension of the current loan or other appropriate action to pay the mortgage in her sole discretion.” See Order p. 8. “In her sole discretion, [the special fiduciary may] negotiate with the lender and/or parties to extend the due date on the current mortgage in order for litigation to be finalized or [to] have the mortgage paid off prior to the December 3, 2016 due date.” Id. p. 10. Pursuant to the powers granted to her in the order, the special fiduciary already has extended the original loan that became due on December 3, 2016 by increasing the amount due from \$190,000.00 to \$247,000.00 and by executing a corresponding mortgage using the 605 North Main property as

security for the extension. See Mortgage Modification dated 12.6.16. The order also mandates that Appellant must turn over records to the special fiduciary regarding his ownership of the 605 North Main property and any leases of the property. Id. pp. 8, 10. The order further states that the special fiduciary “shall be compensated at \$200/hour.” Id. p. 9.

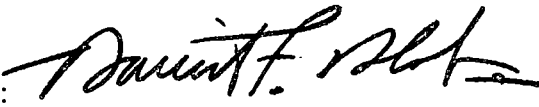
The practical effect of the Probate Court’s order is to grant injunctive relief because it effectively restrains Appellant from exercising complete and full ownership over his property. By granting the special fiduciary the power to negotiate and obtain an extension of the existing note and mortgage involving the property and to take steps to obtain a new loan and place a new mortgage on the property, it necessarily alters the parties existing legal relationship. The order also denied or refused Appellant’s request to be appointed as special fiduciary.

CONCLUSION

For the reasons stated, this Court should reverse the Circuit Court’s Order dismissing Appellant’s appeal from the Probate Court’s order and remand the case to the Circuit Court to determine the merits of Appellant’s appeal.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT

May 1, 2017.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
Edgar W. Dickson, Circuit Judge

Appellate Case No. 2017-000095
Court of Common Pleas Case No. 2016-CP-18-1849

IN RE: TRUST EIP CREATED UNDER THE LAST WILL AND TESTAMENT OF
EUNICE I. PAGE DATED OCTOBER 14, 1992,

RICHARD S. HENSON AND VANN KENNETH HENSON,
Petitioners,

v.

ALBERT T. HENSON, JR. AND JULIAN REID HENSON,
Respondents.

Of whom

ALBERT T. HENSON, JR. is the Appellant.


PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant and the Appellant's Designation of Matter to be Included in Record on Appeal on the Respondents by mailing copies to their attorneys of record on May 1, 2017 via first-class mail, postage prepaid, and addressed as follows:

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May 1, 2017

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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SC Court of Appeals

Re: *In re: Trust EIP Created Under the Last Will and Testament of Eunice I. Page dated October 14, 1992*
Richard S. Henson and Vann Kenneth Henson v. Albert T. Henson, Jr. and Julian Reid Henson,
Court of Common Pleas Case No. 2016-CP-18-1849
Appellate Case No. 2017-000095

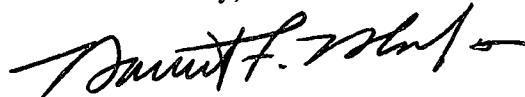
Dear Ms. Kitchings:

We received the hearing transcript from Hilda M. Jordan on April 8, 2017. Accordingly, enclosed for filing in the above-referenced case are the following:

- [1] The original and one copy of the Initial Brief of Appellant,
- [2] The original and one copy of the Appellant's Designation of Matter to be Included in Record on Appeal, and
- [3] The original and one copy of the Proof of Service.

We would greatly appreciate your filing these and returning the date-stamped copies in the self-addressed return envelope enclosed herewith. Thank you for your assistance with this matter. With best regards, I am

Sincerely,



Daniel F. Blanchard, III

DFB/db

Encls.

Cc: Barry I. Baker, Esquire (w/ encl.)
Kyle Varner, Esquire (w/ encl.)
Trudy H. Robertson, Esquire (w/ encl.)
Paul Lynch, Esquire (w/ encl.)
Mr. Albert T. Henson, Jr. (w/ encl.)



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SC Court of Appeals

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