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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

Appeal from the Charleston Circuit Court

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

Consolidated Appellate Case No. 2017-000743

Betty Fisher and Lisa FisherPetitioners

v.

Bessie Huckabee.....Respondent

**PETITIONERS BETTY FISHER AND LISA FISHER’S REPLY TO RETURN OF
RESPONDENT BESSIE HUCKABEE
REGARDING OPINION NO. 2016-UP-528
Heard October 3, 2016-filed December 21, 2016**

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I.
PETITIONERS' ARGUMENT IN REPLY
TO RESPONDENT BESSIE HUCKABEE'S RETURN

Alice Shaw Baker would have loved the quote by Oliver Wendell Holmes, and its meaning has a purpose in this reply:

"Even a dog distinguishes between being stumbled over and being kicked."

(See Holmes, Oliver Wendell, "Early Forms of Liability,"
Lecture I from The Common Law. (1909).)

The case of Alice Shaw Baker's estate, and the orders to enjoin and interfere with petitioner Lisa Fisher's role as conservator/trustee, demand intervention by this Supreme Court to undo and rectify the violations of Due Process, Equal protection and statutory law. Whether the claimed injustice is by a stumble or a kick, the grant of Certiorari can give dignity to the principles of protecting decedents' estates. It has far reaching benefits for future estate representatives, former conservators/trustees safeguarding estate property, and even the lower courts in ensuring that there is no overreaching, bias, or unauthorized interference with removed Will contest cases.

The factual questions that support this Court's grant of certiorari can be briefly summarized as:

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- 1) Can a Probate Court issue an injunction without an evidentiary hearing?
- 2) Can a Probate Court appoint a Special Fiduciary without proper notice and without an evidentiary hearing, and when initiated by a personal representative who failed to file a bond?
- 3) Once an estate matter is removed to the Circuit Court, can the Probate Court interfere with the estate by appointing a new fiduciary without notice to all parties?

Although convenient for Respondent Bessie Huckabee's ("Respondent") goals, the appointment of a Special Fiduciary and the enjoining of Alice Shaw Baker's assets, which are protected by Petitioner Lisa Fisher's bond, does nothing to aid in resolution of this case, or the underlying hearing on the revocation and will contest. It ultimately acts only to dissipate the funds of a wonderful woman, after her service in the Navy, Alice Shaw Baker (the decedent), who worked the majority of her adult life, in South Carolina, with the important goal of benefitting animal charities. The evidence will show there is no emergency, exigency or harm caused by Petitioner Lisa Fisher. If no emergency exists, then the effect is a power grab to punish Petitioner Lisa Fisher for taking action to preserve both the intent of Alice Shaw Baker and her actual estate.

Attempting to stave off this Court's review, Respondent Bessie Huckabee's return tries to obfuscate and ignore Petitioners Betty Fisher and Lisa Fisher's ("Petitioners") salient points in

the *Petition for Writ of Certiorari* by:

- 1) Her incomplete analysis of the law, including the law relating to the appointment of a Special Fiduciary, the constitutional implications of notice, the statutory mandates for imposition of an injunction, and more;
- 2) her efforts to distort the factual and procedural background of the case in the brief submitted by Respondent Bessie Huckabee,¹ and
- 3) her efforts to downplay the importance of these issues for future conservators/trustees dealing with a decedent's estate assets.

As set forth in this brief reply to Respondent's return, Petitioner contends that this Court's guidance is sorely needed to ensure conformity with statutory law and support constitutional protections in this area of probate estates.

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¹ Petitioners ask this Court to disregard Respondent's purported facts that do not reference the record, including allegations that Petitioners did not respond in a timely manner, the filing of amended accounting before walking into courtroom and characterization that Petitioner was "unapologetic", etc. (Return, pp. 3, 4, 5 and 7)

The court in *Henning v. Kaye*, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992), provides: "Except as provided by Rule 212 and Rule 208(b)(1) (c) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal." Rule 210(h), SCACR. requires appropriate "reference to the record" so that the party and this Court can accurately determine where the alleged facts are located. (See Rule 210(h), SCACR); see also *McConnell v. Akins*, 586 S.E.2d 688 (2003).)

II.
PETITIONERS' REPLY SUPPORTS THE GRANT OF THIS WRIT OF CERTIORARI TO ENCOURAGE PROPER RESOLUTION OF CASES INVOLVING SPECIAL FIDUCIARIES, TO DEFINE PROBATE INJUNCTIONS, AND TO PROVIDE CLARITY FOR TRUSTEES/CONSERVATORS BOUND TO DELIVER PROPERTY TO THE PROPER REPRESENTATIVE AND ALL OF THE ISSUES RAISED BY PETITIONERS.

There is no dispute that Respondent Bessie Huckabee was appointed Personal Representative pursuant to an *informal* appointment without notice, with conflicted court appointed counsel and guardian ad litem, Peter Kouten. Attorney Kouten had a duty and obligation to avoid an actual conflict, as to Alice Shaw Baker. His refusal to recuse himself continues to plague this case and supports judicial concern about the integrity of all orders addressed in this writ.

Respondent's return continues on this path of improper representation, and the Return filed by Respondent does nothing to support their position as set forth herein.

1. Respondent's Return ignores Petitioner's argument that the Denial of Oral Argument is an Important Issue that Should be considered by this Court.

This petition for writ of certiorari promotes the well settled position that oral argument on appeal varies from case to case. Nevertheless, Petitioners' extensive review of the law governing oral argument suggests that this is a case where oral argument is mandated. (see also *FCC v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 272 (1949).)

However, Respondent chose not to address this issue in her return. It is well settled that a failure to respond to the issues raised in briefing, should be deemed as a confession that appellant's position is correct. (See *First Union National Bank v. FCVS Communications*, 321 S.C. 496, 469 S.E. 2d 613 (1996).)

Petitioners have fully addressed the constitutional and statutory problems created by the Circuit Court acting in its appellate capacity to consider the Petitioners' briefings prior to oral argument. These are significant and important issues that if not corrected will plague parties and undermine the Appellate process. As an example, this Court's consideration of these briefings occurs prior to hearing oral argument, considering the law, or considering the factual impact of the case.

This is even more significant in light of the fact that Attorney Peter Kouten did not brief or file documents until the hearing before the Circuit Court. Petitioners' ability to properly prosecute and address Kouten's briefs were compromised and created violations of Due Process and Equal Protection.

Petitioners respectfully request that this Court grant the writ of certiorari on this issue of Oral Argument on appeal.

2. & 7. Respondent's Return Fails in its Efforts, as Any Request to Appoint a Special Fiduciary compromises the Proper Use of Alice Shaw Baker's assets and is not supported by the Statutory Scheme and Constitutional Protections.

Respondent's return merely accepts the Court of Appeals's decision with regard to the Motion for Special Fiduciary.² However, as outlined here, the Court of Appeals erred in affirming the Probate Court's decision to appoint a Special Fiduciary. Petitioners believe that the Court of Appeals opinion reached beyond the question of whether the conflicting provisions, §62-7-704(e) and § 62-3-614, require notice and an opportunity to be heard. This along with

² Petitioners use the same numbering as Respondents to ensure quick access on this Court's review

specific preclusion of the code to allow for appointment when a personal representative has been appointed mandates reversal.

These codes make it clear that appointment of a Special Fiduciary is only appropriate in cases where there has been **no** appointment, or there is an adjudication that a Personal Representative can not act.

By application the Probate Court's attempt to give unfettered discretion to appoint a Special Fiduciary cannot occur if the court relies on and follows the statutory scheme. (See S.C. Code Ann. § 62-3-614).

As conservator/trustee, Petitioner Lisa Fisher must turn over the assets to the proper individual, and has a duty to protect Alice Shaw Baker's assets pending the resolution of the Will Contest/revocation of the Will. (See S.C. Code Ann. § 62-5-425(d)).

No orders may be made which will undermine the objectives concerning the rightful appointment of a personal representative, which is contested in this case.

This duty coupled with the statutory duty under S.C. Code Ann. § 62-5-425 to deliver the estate "to a duly appointed personal representative or other persons entitled thereto" mandate reversal. Even Respondent Huckabee admits as such in her brief, she contends that she "is the proper party to receive estate assets" (Respondent's Return, p. 3) , so Respondent can not complain that Petitioner has a duty to protect the assets and question the improper procedure followed by the Probate Court.

So here the result was not merely an attack on petitioner Lisa Fisher's duties, as there were no evidentiary grounds for such an attack, but it also resulted in Bessie Huckabee's removal

as personal representative.³ Therefore, Petitioner has the right and obligation to assure that the procedure followed was correct prior to delivery and only upon proper court order. Moreover, Petitioner Lisa Fisher had a statutory duty to maintain the property under S.C. Code Ann. § 62-7-707, which provides in pertinent part that: "...a trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect the trust property."

Respondent did not address the standard for appointment of Special Fiduciary, other than cite the code. Allowing a court to remove a Fiduciary without notice undermines the important policy issues designed to protect a decedent's estate and prevent financial overreaching by the court. It is important to note that this type of interference with the duties of a trustee and appointment of a special fiduciary are subject to repetition if the lower Courts do not interpret the statutes per the Probate code.

Finally, the jurisdiction of the court is concurrent, however the Probate Court can not make decisions that impact and impair the Will contest in the Circuit Court. Petitioners respectfully request the Court grant this request and issue certiorari.

3. Respondent Huckabee' Standing is Dependant on the Revoked Will, and Petitioners contend that her ability to Object to Petitioner Lisa Fisher's Position as Trustee must be Stayed pending the Trial on the matter.

The Court of Appeals' decision affirming Respondent's standing ignores the problems associated with giving her standing prior to determining the Probate litigation. Petitioners contend that until final resolution, Respondent can not have standing to interfere with Petitioner Lisa Fisher's role as conservator/trustee.

³ Petitioners do not concede that Respondent Huckabee is properly appointed, instead they note the reasons that following the statutory scheme is mandated to grant certiorari.

Respondent was able to interfere with the status quo pending the trial on the will contest, and did so even though when the revocation of the Will is affirmed, she would be denied the right to object. Therefore, she also was able to accomplish this feat with the assistance of the Probate Code, without satisfying the orders of the *Circuit Court* to file a bond.⁴

Petitioners again contend, her failure to get this bond precluded her from even filing the Motion for Special Fiduciary, and certiorari should be granted to resolve this matter.

4. Respondent's contentions that the Parties engaged in Meet and Confer under Rule 11 is not supported by the Record, and the Court of Appeal's Declaration that Consultation would be pointless is Error.

Here, Respondent claims that there were prior discussions which "led to an impasse" and were "unanswered by" Petitioner Lisa Fisher, however this is not true and is not evidenced in the record.

It is clear that Rule 11 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 Court of Appeal ruled that " Although a specific ruling excusing the Rule 11 violation is preferable, we affirm, finding the Probate Court's ruling implicitly found consultation with opposing counsel would have been pointless. (See *Runyon v. Wright*, 322 S.C. 15, 19, 471

⁴ It is important to remember that the Probate Court did not give any opportunity to look at the qualifications of the Special Fiduciary, object to potential/actual conflicts, analyze costs, etc. or address Respondent's failure to obtain a bond, prior to the appointment of the Special Fiduciary.

S.E.2d 160, 162 (1996) (stating the imposition of sanctions under Rule 11 is subject to an abuse of discretion standard of review).)

If no evidence is sufficient to find that consultation would be pointless, then Petitioners contend that opposing counsel can always falsely claim they satisfied the mandate of proper consultation. Here, proper consultation would have shown that under any scenario, Petitioner Lisa Fisher's continued control of the estate assets was correct under the law and was the most reasonable method of protecting the estate.

The Court of Appeals acceptance of these allegations is disturbing in light of the fact that there was no evidentiary hearing, and as such, supports this Court's grant of Certiorari.

5. Respondent's Return does not Address the Law Governing Fees for Petitioner, and the Court of Appeals' Remand to the Probate Court Demonstrates a Fundamental Flaw in Application of the Law governing Statutory Removal.

Petitioners contend that the issue of fees was not properly addressed by Respondent. Instead, she focuses on whether the Circuit Court has authority over the estate. She does take the position that Petitioner Lisa Fisher is not "entitled" to fees, however Petitioners contend that failing to pay her is a violation of the takings clause. (See US Const., Art. 1, § 13A, also *Ex Parte Brown*, 393 S.C. 214, 711 S.E. 2d 899 (2011).)

Therefore, Petitioner reminds the court that statutory removal from the Probate Court to the Circuit Court is governed by S.C. § 62-1-302(d)(1), and includes proceedings related to the probate of wills and for the appointment of general personal representatives and (4) and matters involving the internal or external affairs of trusts.

In essence, Petitioner Lisa Fisher acts as trustee for the estate of Alice Shaw Baker, so the relevant issues related to who has the authority to seek delivery of the assets. The matter must be decided in the Circuit Court, considering the statutory language governing distribution.

By ruling that there was "unauthorized depletion of the estate assets after Fisher was discharged as conservator", the Court of Appeals presumed that Petitioner Lisa Fisher erred in using Alice Shaw Baker's funds to protect the house, pay taxes, obtain insurance, and maintain her property. This is not the law in South Carolina. Every trustee has a duty under South Carolina Probate Code Section 62-5-425 (d) which provides:

“(d) If a protected person dies, the conservator shall ... **retain the estate for delivery to a duly appointed personal representative of the decedent or other persons entitled thereto...**” (Emphasis added)

Also, the South Carolina Probate Code section 62-7-707 provides that: “(a) Unless a co-trustee remains in office or the court otherwise orders, and until the trust property is delivered to a successor trustee or other person entitled to it, **a trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect the trust property.** “ (Emphasis added)

So the Circuit Court’s remand was correct, however determination whether remand should be to the Circuit Court or the Probate Court must be addressed. The Court of Appeals’ remand to the Probate Court is error. It is important to note that this type of interference with the duties of a

trustee and appointment of a special fiduciary are subject to repetition.⁵ Therefore, petitioners request that the Court grant certiorari.

6. Contrary to Respondent's Return, A Probate Injunction Require Compliance with Constitutional and Legal Protections.

Respondent argues that the Probate Court may interfere with the parties and estate assets, even when there is litigation in the Circuit Court. Petitioners contend that there were at least 3 reasons that the Probate Court could not issue an injunction: 1) There was no notice; 2) There was no exigency; and 3) due to statutory removal, the Probate Court lacks jurisdiction.

Respondent's argue that Petitioners have "an inaccurate conclusion that the estate funds and assets are under the jurisdiction of the Circuit Court." (Respondent's return, p. 11, prg. 6) Again, Respondent cites no authority for her conclusion that the Circuit Court does not have authority to control the issues when there is a Will contest. This case ably illustrates that allowing the Probate Court make orders about the administration of the estate will interfere with the litigation, and increase costs. There is a reason that the legislature provided the statutory

⁵ Attached hereto as Exhibit A is a true and correct copy of an order relating to the same Judge, Tamara C. Curry, wherein a special fiduciary was appointed and a representative was summarily removed. (See *Brubaker v. Brubaker*, Case no. 2005-ES10-01711, Order of Denial of Motion for Contempt of Court, Temporary Removal of Trustee and Temporary Appointment of Trustee, dated March 12, 2013)

Of interest, is the fact that Peter Kouten was appointed as the Special Fiduciary in this case, a similarly contested case. Nevertheless, in the Brubaker case, the parties *had* an evidentiary hearing as noted by the Court's statement that by the Clients, because the grounds for the appointment were that "...due to the voluminous nature of the financial records it is too difficult to determine what bills or debts were paid." (Ex. A, p. 3) Here, petitioners were provided no such protections, and were specifically denied the right to an evidentiary hearing.

Due process and Equal Protection mandate that Judge Curry could not interfere with Alice Shaw Baker's estate without following certain procedures, which were specifically denied to Petitioners. (See U.S. Const. Amends. IV and XIV, § 1 and S.C. Const. Art. I, § 3.)

right of removal to the Circuit Court. Additionally, there is concurrent jurisdiction. (See S.C. Ann. Code § 62-1-304 --concurrent jurisdiction).

Respondent claims that "Appellant has not sought hearing on the validity of the will" [sic] (Respondent's return, p. 11), however this is an characterization meant to prejudice Petitioners. To obtain a hearing on the will would necessitate waiver of the important issues raised in this *Petition for Writ of Certiorari*, and Petitioners can not be castigated for seeking review of orders they believe to be wrong.⁶

In her Brief, Respondent inaccurately claims that the statutes are clear that "Lisa Fisher should not act" and protect the estate.⁷ Contrary to Respondent's contentions, petitioners' cite authority for the proposition that she has a duty to deliver the property to the proper person. (See S.C. Code Ann. § 62-7-707; also Section 62-5-425 (d).)

Respondent merely latches on the Court of Appeals' general statement that the Probate Court has the authority to issue injunctions under *Greenfield v. Greenfield*, 245 S.C. 604, 611, 141, 141 S.E. 2d 920, 924 (1965) . However, a close reading of *Greenfield* supports Petitioners' position that they were entitled to an evidentiary hearing. The court outlined the facts in

⁶ The conclusion that hearing on the will contest "either relieves Betty Fisher's standing or makes her sole heir" is incorrect. The litigation is to honor Alice Shaw Baker and have her monies go to animal charities. Certainly Petitioners' success will **completely** decide Bessie Huckabee's standing.

⁷ The *Greenfield* court explained that: "The object of administration is to pay the debts of the deceased, and distribute his personal estate among those entitled to it, and any act that may properly be performed by an administrator looking to this end is a matter of administration. To accomplish this end the administrator is clothed with authority to collect the personal estate and to convert it into a form suitable for the purpose." (*Id.* at 611) Therefore, pending resolution in her capacity as trustee, respondent can not argue that Petitioner Lisa Fisher did not have authority to protect the assets, as she continues to protect the property to this day and seeks restoration of her power to perform that authority through this Court.

Greenfield where the court noted "On the hearing appellant testified at length and was cross examined" (*Id.* at 609) To be accurate, *Greenfield* is not about an injunction at all, merely it provides authority to issue orders. The question is are they required to follow procedures.

It is well settled that an order freezing the accounts is in the nature of an injunction. (See *Grosshuesch v. Cramer*, 367 S.C. 1, at 5, 623 S.E.2d 833, 835 (2005) (interpreting order freezing assets as an injunction). "To obtain an injunction, the plaintiff must allege facts sufficient to constitute a cause of action for injunction and demonstrate the injunction is reasonably necessary to protect the legal rights pending in the litigation. (See *Levine v. Spartanburg Regional Services District, Inc.*, 367 S.C. 458, 464 (2005).) In *Grosshuesch*, the conservator filed civil actions to recover estate property. The statutes governing injunctions support notice and hearings. The standard for an injunction is that a party must demonstrate "irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law." (*Id.*) *Grosshuesch* also supports the issuance of a bond which Petitioner already possesses, and which Bessie Huckabee has failed to obtain in this case. (See S.C. Code Ann. § 14-3-330(4)[injunctions are immediately appealable.])

Petitioners have the right and obligation to assure that the procedure followed was correct, and that delivery of the property complies with S.C. Code Ann. § 62-7-707 (See South Carolina Code Ann. § 62-5-425 (d) [duty to protect assets].). Failure to comply with the statute on delivery places the entire estate of Alice Shaw Baker at risk and required that Petitioner Lisa Fisher either run the risk of surcharge or pay the costs of protecting the estate pending this appeal. Petitioner Lisa Fisher chose the latter at great financial risk, in an effort to avoid a failure to comply with her statutory and familial duties while pursuing review by the Court of Appeals

and this Court.

This is a classic case of forum shopping—wherein Respondent’s counsel attempts to undermine the statutory protections obtained by Betty Fisher in seeking removal of the Estate case to the Circuit Court. Respondent was to get a bond which she failed to get, therefore the law is clear that had evidence been submitted to the Probate Court, the Court would have been required to “balance the equities of the opposing parties on the particular facts of the case to determine which side is more entitled to relief (See *Levine v. Spartanburg Regional Services District, Inc., supra.*) after notice and compliance with the statutes. The conclusion that the court had authority, even to freeze Alice Shaw Baker’s accounts, are untenable.

In this case, no one asked for an injunction, and the Court specifically denied Petitioners the right to produce evidence and testify. This again is a violation of due process and equal protection mandating that Certiorari be granted.

8. Petitioner Lisa Fisher’s argument re: extensions is supported by her argument that Trust law and statutory law mandates her Protection of the Estate Assets pending Final Resolution.

Contrary to Respondent’s Return, there was a continuing duty to extend the time for delivery of the property due to the pending litigation and statutory requirement that Petitioner Lisa Fisher deliver the property to the proper person and preservation of the status quo.

Petitioners repeat their request that the this Court grant certiorari to decide this important issue.

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9. As a party, Petitioner Betty Fisher was entitled to Notice with regard to the Motion for Appointment of Special Fiduciary

Petitioners repeat their argument with regard to Betty Fisher's entitlement to notice.

Rule 5 provides for notice to parties, so allowing Respondent to obtain orders which directly affect the pending litigation is 1) forum shopping; 2) ex parte communications with the Probate Court, after the case was removed to the Circuit Court, and finally, 3) a clear violation of Betty Fisher's rights and protections to Due Process and Equal Protection under South Carolina's Constitution and the United States Constitution. (See U.S. Const. Amends. IV and XIV, § 1 and S.C. Const. Art. I, § 3.)

**III.
REMEDY SOUGHT**

The South Carolina Court of Appeals' decision in this case directly implicates unsettled questions of law involving 1) Probate injunctions, 2) Special fiduciaries, and 3) the authority of the Probate Court once a matter has been removed. These issues, and all other stated issues, are areas of law devoid of meaningful precedent as applied in the Probate Courts. Failure to consider these "novel questions of law or deal with the substantial constitutional issues" also deepens the harm that will continue to plague the Probate Courts without guidance from this Court.

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This Court's ability to rectify these challenging questions will not only help resolve Petitioners' case, but the legal issues fall squarely into the types of cases that this Court can consider on Certiorari.

May 30, 2017

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

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STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 BETTE JEAN BRUBAKER)
 TRUSTEE)
 Petitioner.)
)
 v.)
)
 SAMUEL C. BRUBAKER, JR.,)
)
 Respondent.)
)
 IN THE MATTER OF:)
 Estate of Samuel C. Brubaker)
 _____)

IN THE PROBATE COURT

CASE NO.: 2005-ES10-01711

DENIAL OF MOTION FOR
 CONTEMPT OF COURT

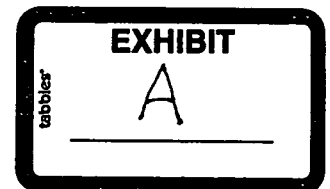
TEMPORARY REMOVAL OF
 TRUSTEE AND TEMPORARY
 APPOINTMENT OF TRUSTEE

Judge: Tamara C. Curry
 Petitioner: Bette Jean Brubaker
 Petitioner's Attorney: Dennis J. Christensen
 Respondents: Samuel C. Brubaker, Jr. (Pro Se)
 Sheryl Ging
 Respondent's Attorney: Nathan Senn, Esq.

JCC
1986
3/12/13

This matter comes before the Court on a Motion for Contempt of Court, which Respondent, Samuel C. Brubaker, Jr., filed on January 8, 2013. Respondent asks the Court to hold Trustee, Bette Jean Brubaker, and her attorney, Dennis J. Christensen, in Contempt of Court for failing to comply with this Court's Order dated July 31, 2012, requiring a Compilation Review to be conducted in regards to the estate's assets and accounting within sixty (60) days.

Respondent, Samuel C. Brubaker, Jr., contends that his motion is based on Trustee, Bette Jean Brubaker, failure to perform duties following the death of decedent in providing inspection and review of all documents. Respondent further alleges that the trustee and her attorney, Dennis J. Christensen, have failed to comply with several Court Orders to complete an audit. Respondent asserts that Bette Jean Brubaker and Dennis J. Christensen are both intentionally delaying and willfully with gross negligence causing great financial harm to him.



BACKGROUND

Samuel C. Brubaker Sr. (the "Decedent") died, *testate*, November 19, 2005. He was survived by his wife, Bette Jean Brubaker, and his two children: Samuel C. Brubaker, Jr., and Sheryl Ging. The Decedent's Last Will was probated in Charleston County, South Carolina.

The Decedent's Will established the Samuel C. Brubaker Living Trust naming his children, Samuel C. Brubaker, Jr. and Sheryl Ging, as beneficiaries. The Samuel C. Brubaker Living Trust dated 12/17/2003, as amended and restated on 03/17/2005 (hereafter referred to as the "Trust") named Bette Jean Brubaker, wife of Decedent, as the Trustee.

The Probate Court records reflect that several assets existed at the time of Decedent's death. There were three corporations, Basbie Ventures Inc., Blinds Plus, and Blinds Plus Net Inc., two condominiums, located in Mount Pleasant, SC, and Columbia, S.C., and a life insurance policy. Respondent, Samuel C. Brubaker, Jr., son of the decedent, now comes before the Court to Motion for Contempt of Court and to request the Court perform an independent Accounting/Audit of the Trust.

Respondent alleges that Bette Jean Brubaker, serving as Trustee, and her attorney, Dennis Christensen, have failed in their fiduciary duty to promptly supply him with the financial records he has requested. Specifically; Medical Records of Samuel Brubaker, a copy of his Life Insurance Policies, monthly statements from his bank accounts (checking and savings) both business and personal from March 2003 until present, a listing of the accounts payable with supporting documentation i.e. invoices since March 2005 until now, his social security card and all statements from the department of social security, New Jersey workers compensation paperwork, copy of UPS receipts for shipment of military boots and antique train set, copy of his

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marriage certificate to Bette Jean Brubaker, formerly Bette Jean Shuler, monthly statements of all credit card accounts both business and personal from March 2003 until present.

The focal issue of this case revolves around the role and duties of the Trustee. While serving in her role as Trustee, Bette Jean Brubaker authorized the sale of company property and dissolved the three corporations. The net proceeds of which were then, allegedly, added to the Trust. As Trustee she also oversaw the management and collection of rents pertaining to the condominiums/rental properties.

FINDINGS OF FACT

The Court finds that, pursuant to the South Carolina Trust Code, that the Trustee has a duty to include in an annual report/accounting “the trust property, liabilities, receipts, and disbursements, including the source and amount of the Trustee’s compensation, a listing of the Trust assets and, if feasible, their respective market values.” S.C. Code Ann. § 62-7-813; Unif. Trust Code § 813(c). “Thus, it may be sufficient to provide the beneficiaries with copies of the Trust’s tax returns *and* account statements, if those documents include the required information and are clear and complete.” Robert Whitman & David M. English, Fiduciary Accounting and Trust Administration Guide 250, n. 22 (2002)(emphasis added).

The Court finds, based on testimony, that there are copious amounts of reports, ledgers, tax returns, “QuickBooks” statements, and bank statements to which this Court has the burden to investigate and analyze in order to track every deposit and withdrawal with regards to the Samuel C. Brubaker Living Trust.

The Court finds that due to the voluminous nature of the financial records it is too difficult to determine what bills or debts were paid, amounts deposited into the Trust account, and expenditures paid, given documentation supplied by the Trustee. There exist over twelve

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(12) different bank accounts connected with this Trust and this Court has received numerous tax returns and multiple deposit and withdrawal statements from many of these accounts.

CONCLUSIONS OF LAW

Upon considering the arguments of Respondent, the Court concludes that Respondent's Motion for Contempt of Court is hereby DENIED.

On October 8, 2012, the Court received Notice that Henry Wilson, per the Court's Order, could not complete the Compilation Review for five thousand dollars (\$5,000.00). The Court has attempted to have an audit completed. Also, the Court has been unable to find a CPA who can accomplish the Compilation Review for five thousand dollars (\$5,000.00).

Therefore, the Court will temporarily remove Bette Jean Brubaker as Trustee because throughout the pendency of this action and pursuant to the S.C. Code Ann. §62-7-1005, Bette Jean Brubaker has not provided and disclosed adequate, yearly reports that neither the Court nor the Beneficiaries can review. The Court will appoint a temporary Trustee, who will make a finding to the Court, in the interim.

Pursuant to S.C. Code Ann. §62-7-704(e), the Court may appoint a special fiduciary whenever it considers the appointment to be necessary for the administration of the trust. Subsection (e) makes clear that the Court can appoint a special fiduciary regardless of whether the trusteeship is vacant. Under S.C. Code Ann. §62-7-704(e), the procedure for such an appointment and the notice requirement shall be the same as set forth for Special Administrators under S.C. Code Ann. §62-3-614. At this time, the Court shall appoint Peter Kouten, Esquire as Temporary Special Administrator and Temporary Successor Trustee.

Any proper person may be appointed Successor Trustee. S.C. Code Ann. §62-7-812. A Successor Trustee appointed formally has the powers of a General Trustee except limited or

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specifically prescribed by the Court. S.C. Code Ann. §62-7-816. Since Bette Jean Brubaker is temporarily removed as Trustee, she must expeditiously deliver the trust property within her possession and all the trust documentation to the Special Administrator. S.C. Code Ann. §62-7-707. Bette Jean Brubaker is bound by the duties of a trustee until she delivers the trust property and documentation to Peter Kouten, as Special Administrator. S.C. Code Ann. §62-7-707.

IT IS HEREBY ORDERED that Respondent's Motion for Contempt of Court is denied.

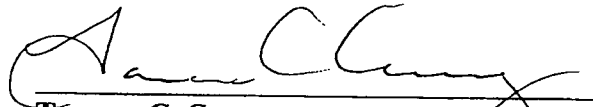
IT IS FURTHER ORDERED that Bette Jean Brubaker is temporarily removed as Trustee of the Samuel C. Brubaker Living Trust under the Will of Samuel C. Brubaker, Sr. The Trustee shall take no further action regarding the management of this trust other than to turn over all documents, records, and property of the trust to the trustee to be appointed by the Court.

IT IS FURTHER ORDERED that Peter Kouten, Esquire shall be appointed Temporary Successor Trustee and Temporary Special Administrator. The appointment shall terminate after further order of this Court. Furthermore, the Temporary Successor Trustee shall proceed with the administration of this Trust as determined by the South Carolina Probate Code. The Temporary Successor Trustee shall review all previously filed financial reports and exhibits to determine if Bette Jean Brubaker is not personally liable for claims filed against the Decedent or the expenses incurred by the Decedent before or after his death. However, the Temporary Successor Trustee shall proceed with the administration of the Estate and apply any and all assets to properly filed claims or judgments against the Estate, as determined by the South Carolina Probate Code, and distribute the remaining assets among the devisees of the Estate pursuant to the Decedent's Last Will and Testament. The Temporary Successor Trustee shall keep the beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for the beneficiaries to protect their interests. The Temporary Successor

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Trustee shall also keep adequate records of the administration of the trust and shall keep trust property separate from his own property. In addition, the Special Administrator shall keep records of all his time devoted to this file and submit a bill for his fees at the conclusion of the Estate. These fees shall be paid from the Estate, upon Court approval, pursuant to the South Carolina Probate Code.

AND IT IS SO ORDERED.



Tamara C. Curry
Associate Probate Judge

This 12th day of March, 2013.
Charleston, South Carolina.

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