

THE STATE OF SOUTH CAROLINA

In the Supreme Court

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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

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

RECEIVED

MAR 28 2017

S.C. SUPREME COURT

BETTY FISHER, LISA FISHER,.....Petitioner,

v.

BESSIE HUCKABEE,.....Respondent.

**APPENDIX
VOLUME II**

JOHN HUGHES COOPER, ESQUIRE
LISA FISHER, ESQUIRE - *Pro Hac Vice*
1476 Ben Sawyer Blvd, Ste 11
Mount Pleasant, SC 29464
shiplaw@jhcooper.com
843-883-9099; fax 843-883-9335
(Attorneys for Petitioners Betty Fisher and
Lisa Fisher)

Other Counsel of Record:
PETER A. KOUTEN, ESQUIRE
P.O. Box 340
Johns Island, SC 29457
843-789-9614; fax 843-559-3162
pkiuten@gmail.com
(Attorney for Respondent)

INDEX

Record on Appeal	1
Final Brief of Appellant on Case no. 2014-002020.....	608
Final Brief of Appellant on Case no. 2014-002028.....	625
Final Brief of Appellant on Case no. 2014-002034.....	660
Final Brief of Respondent on Case no. 2014-002020.....	691
Final Brief of Respondent on Case no. 2014-002028.....	705
Final Brief of Respondent on Case no. 2014-002034.....	724
Final Reply Brief of Appellant on Case no. 2014-002020.....	735
Final Reply Brief of Appellant on Case no. 2014-002028	748
Final Reply Brief of Appellant on Case no. 2014-002034	767
Appellant's Motion for Admission of Lisa Fisher, Esquire as Pro Hac Vice and Associated Counsel for Purposes of Scheduled Consolidated Oral Argument On October 3, 2016 at 10:40 a.m in Courtroom 1.....	782
Order on Motion for Admission of Lisa Fisher.....	789
South Carolina Court of Appeals Opinion no. 2016-UP-528	790
Appellants' Petition for Rehearing.....	805
Respondent's Return to Appellant's Petition for Rehearing	828
Appellants' Reply to Respondent's Return to Appellants' Petition for Rehearing.....	834
Order Denying Rehearing filed February 24, 2017.....	836

FILED PROBATE CT CHRSN CO

THE STATE OF SOUTH CAROLINA
In the Court of Court of Common Pleas

APPEAL FROM CHARLESTON COUNTY
Probate Court

Tamara C. Curry, Associate Judge of Probate.

Case No. 2011-CP-10-7821

Lisa Fisher.....Appellants

v.

Bessie Huckabee.....Respondent

STATEMENT OF GROUNDS BY APPELLANT LISA FISHER
SUPPORTING HER APPEAL FILED ON OCTOBER 25, 2011
SEEKING TO VOID PROBATE ORDERS IN CASE 2008-GC-088
and MEMORANDUM OF POINTS AND AUTHORITIES

John Hughes Cooper
John Townsend Cooper
John Hughes Cooper, P.C.
P.O. Box 395
Sullivan's Island, S.C. 29482
(843) 883-9099

Cain Denny
Cain Denny, P.A.
P.O. Box 1205
Charleston, S.C. 29402

(843) 965-5400

Lisa Fisher files this Statement of Grounds supporting her Appeal filed on October 25, 2011 seeking review of the Probate Orders of the Honorable Tamara C. Curry dated September 28, 2011 appointing Special Fiduciary and Denying Lisa Fisher's Motion to Strike and Opposing the Motion Appointing Special Fiduciary and October 14, 2011 denying Ms. Fisher's Motion for Reconsideration of the September 28, 2011 order.

Appellant Lisa Fisher timely filed her Notice of Intent to Appeal on October 25, 2011.

STATEMENT OF GROUNDS ON APPEAL
PURSUANT TO S.C. CODE ANN. § 62-1-308 (a)

1. Did the Pending Appeal in the South Carolina Supreme Court Preclude the Probate Court from Appointing a Special Fiduciary?
2. Did the Pending Appeal in the South Carolina Supreme Court preclude the Probate Court's Order Appointing a Special Fiduciary, because it attempts to a Review another Judge's Order in Violation of Rule 60 and Decisional Law.
3. Once a Personal Representative is Appointed, Does the Probate Court have Jurisdiction to Appoint a Special Fiduciary under Probate Code § 62-7-704 (e)?
4. Was it an Abuse of Discretion for the Court to Consider Bessie Huckabee's Motion, when her Standing is on Appeal, and when it amounts to a Removal without Cause

of Appellant?

//

//

5. Did The Probate Court's Proceedings as Protective Proceedings end at Alice Shaw Baker's Death, thereby Precluding the Court from considering the Appointment of a Special Fiduciary?
6. Did the Probate Court Abuse its Discretion in its Failure to Rule on Appellant's Objections to Respondent's Motion to Appoint Special Fiduciary and Made at the Hearing?
7. Was the Probate Court's Finding that Appellant did not have Authority to Pay Expenses on Behalf of the Estate Erroneous, and Demonstrate that there was no Emergent Need?
8. Does the Legal Principal Governing Laches Demonstrate that there is no "Emergent need" under S.C. Code Ann. § 62-7-704(e) and Preclude the Appointment of a Special Fiduciary?
9. Did the Probate Court Abuse its Discretion by Refusing to Strike Respondent's Motion to Appoint Special Fiduciary due to her failure to comply with Rule 11, SCRCF?
10. Did The Probate Court's Abuse its Discretion in Failing to Grant Appellant's Extension of Time to Deliver Proper?
11. Did the Probate Court Err in hearing the Motion to Appoint a Special Fiduciary when the record disclosed that interested parties, including the Attorney General of South Carolina and Heir at Law Betty Fisher, had not received statutory notice of the Proceedings, under S.C. Code Ann. § 62-3-614 and the United States Constitution, Amends. V and XIX, § 1 and the South

Carolina Constitution, Art. 13?

//

//

//

Additionally, Appellant Lisa Fisher joins in the
concurrently

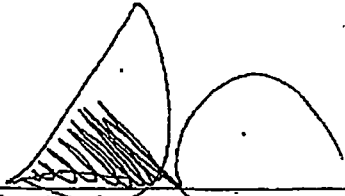
filed Statement of Grounds by Appellant Betty Fisher.¹

December 8, 2011

¹ Filed concurrently with Appellant's Statement of Grounds are Appellant Betty Fisher's Statement of Grounds. These appeals are related in that they both object to the Appointment of J. Heyward Harvey, Esq. As Special Fiduciary. However, Betty Fisher, as heir at law for Alice Shaw Baker, objects to the failure to provide statutory and constitutional notice, sua sponte appointment of Mr. Harvey without an opportunity to object, and lack of standing by Bessie Huckabee to bring said motion. Appellant Lisa Fisher joins in Betty Fisher's Statement of Grounds, and requests that the court consider these issues in her appeal.

Additionally, Appellant has filed a separate *Notice of Intent to Appeal* based on the trial court's sua sponte grant of freezing orders on October 14, 2011, and failure to grant Appellant's request for fees and costs. Due to the need to file a Motion for Reconsideration, these issues are separately addressed in Case no. 2011-CP-10-8657. Appellant does not waive the issues relating to these orders to Freeze Accounts, including Appellant's personal accounts.

It is well settled that An order freezing the accounts is in the nature of an injunction. *Grosshuesch v. Cramer*, 367 S.C. 1, 5, 623 S.E.2d 833, 835 (2005) (interpreting order freezing assets as an injunction). Under the South Carolina Code, injunctions are immediately appealable. To obtain an injunction, a party must demonstrate irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law. *County of Richland v. Simpkins* 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002). In this case, no party requested these orders freezing the assets.



John Hughes Cooper, Esquire
P.O. Box 395
Sullivan's Island, SC 29482
(843) 883-9099
Attorney for Appellant

Cain Denny, Esquire
Cain Denny, P.A.
P.O. Box 1205
Charleston, SC 29402
(843) 478-0692

Other Counsel of Record:

Hon. Mary Frances Jowers
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

Peter A. Kouten, Esquire
Kouten Law Firm, LLC
P.O. Box 340
John's Island, SC 29457

John Edward Robinson, Esquire
McDowell Law Offices
36 Broad Street
Charleston SC 29401-3045

J. Heyward Harvey Jr., Esquire
13 State Street
Charleston, SC 29401

TABLE OF CONTENTS AND AUTHORITIES

STATEMENT OF GROUNDS ON APPEAL PURSUANT TO S.C. CODE ANN. § 62-1-308 (a).....	2
TABLE OF CONTENTS AND AUTHORITIES	6
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPELLANT'S STATEMENT OF GROUNDS.....	11
I. INTRODUCTION.....	11
II. STATEMENT OF THE CASE.....	13
A. <i>Brief Statement of Facts</i>	13
B. <i>Pertinent Pleadings</i>	14
C. <i>Probate Court's Failure to Allow Testimony and Lack of Evidentiary Hearing</i>	15
D. <i>Probate Orders</i>	17
E. <i>Timely Appeal by Appellant</i>	21
III. ARGUMENT.....	22
A. <i>Standard of Review</i>	22
1. <u>The Pending Appeal in the South Carolina Supreme Court Precluded the Probate Court from Appointing a Special Fiduciary</u>	23
2. <u>Appellant's Appeal in the Supreme Court Precluded the Probate Court's Order Appointing a Special Fiduciary, because it attempts to a Review another Judge's Order in Violation of Rule 60 and Decisional Law</u>	24
3. <u>Once a Personal Representative is Appointed, the Probate Court does not have Jurisdiction to Appoint a Spécial Fiduciary under Probate Code §62-7-704 (e)</u>	25

4.	<u>Respondent Huckabee's Standing is also on Appeal, so it was an Abuse of Discretion for the Court to Grant her Motion which Amounts to a Removal without Cause of Appellant.....</u>	27
5.	<u>The Probate Court's Proceedings were Pursuant to Protective Proceedings, however this Court's Jurisdiction Ended at Alice Shaw Baker's Death.....</u>	29
6.	<u>The Probate Court Erred in its Failure to Rule on Appellant's Objections to Respondent's Motion to Appoint Special Fiduciary and Made at the Hearing.....</u>	31
7.	<u>The Probate Court's Finding that Appellant did not have Authority to Pay Expenses on Behalf of the Estate was Erroneous, and Demonstrates that there was not Emergent Need.....</u>	35
8.	<u>The Legal Principal Governing Laches Demonstrates that there is no "Emergent need" under S.C. Code Ann. § 62-7-704(e).....</u>	37
9.	<u>The Probate Court Abused its Discretion by Refusing to Strike Respondent's Motion to Appoint Special Fiduciary due to her Failure to Comply with Rule 11, SCRCP.....</u>	37
10.	<u>The Probate Court's Erred in Failing to Grant Appellant's Extension of Time to Deliver Alice Shaw Baker's Property.....</u>	39
11.	<u>The Probate Court Erred in hearing the Motion to Appoint a Special Fiduciary when the record disclosed that interested parties, including the Attorney General of South Carolina, had not received statutory notice of the Proceedings, under S.C. Code Ann. § 62-3-614 and the United States Constitution, Amends. V and XIX, § 1 and the South Carolina Constitution, Art. 13.....</u>	39
IV.	CONCLUSION.....	40

TABLE OF AUTHORITIES

Decisional Law:

<i>County of Richland v. Simpkins</i> , 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002).....	4
<i>Dukes & Dukes v. Hygrade Food Products</i> , 236 S.C. 69 (1960).....	24, 25
<i>Elam v. South Carolina Dept. of Transp.</i> , 361 S.C. 9, 602 S.E.2d 772 (2004)	21, 22
<i>Ellis v. Procter & Gamble Dist. Co.</i> , 315 S.C. 283, 285, 433 S.E. 2d 856 (1993).....	38
<i>Freeman v. McBee</i> , 280 S.C. 490, 313 S.E.2d 325 (1984).....	32
<i>Hallums v. Hallums</i> , 296 S.C. 195, 198-199, 371 S.E. 2d 525.....	37
<i>Grosshuesch v. Cramer</i> , 367 S.C. 1, 5, 623 S.E.2d 833, 835 (2005).....	4
<i>In re Estate of Pallister</i> , 363 S.C. 437, ___, 256 (2005).....	32
<i>Jackson v. Speed</i> , 326 S.C. 289, 486 S.E. 2d 750 (1997).....	39
<i>Joiner ex rel. Rivas v. Rivas</i> , 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000).....	27
<i>Matter of Howard</i> , 315 S.C. 356, 360, 434 S.E.2d 254, 256 (1993).....	21
<i>Neely v. Thomasson</i> , 365 S.C. 345 (2005).....	22, 23
<i>O'Shea v. Lesser</i> , 308 S.C. 10, 15.....	41
<i>S.C. Dep't of Soc. Serv. V. Holden</i> , 319 S.C. 72, 78, 459 S.E. 2d 846, 849 (1995).....	39
<i>Spectre, LLC v. S.C. Dept. of Health and Env'tl. Control</i> , ___ S.C. ___, 688 S.E.2d 844, 853 (2010).....	28

<i>State v. Najjar De'breece Byers</i> , No. 26976 (S.C. 05/23/2011) ..	31
<i>State v. Stahlnecker</i> , 386 S.C. 609, 617 (2010)	31
<i>Thomas v. Howard Co. & T.W. Graham and Co</i> , 318 S.C. 286, 291, 457 S.E. 2d 340, 343 (1995)	39
<i>Toyota v. Florence Inv. V. Lynch</i> (1994) 314 S.C. 257	32
<i>Tyron Fed. Sav. & Loan Ass'n v. Phelps</i> , 307 S.C. 361, 362, 415 S.E.2d 397, 398 (1992)	40
<i>Univ. of S. Cal. v. Moran</i> , 365 S.C. 270, 274-75, 617 S.E.2d 135, 137 (Ct. App. 2005)	22
<i>Wise v. Wise</i> , 394 S.C. 591, 716 S.E.2d 117 (Ct. App. 2011)	32
 South Carolina Statutes:	
S.C. Code Ann. § 62-1-201(20)	27, 28, 29
S.C. Code Ann. § 62-1-302	30
S.C. Code Ann. § 62-1-308 /(a)	2, 11, 23, 24
S.C. Code Ann. § 62-3-105	30
S.C. Code Ann. § 62-3-105	40
S.C. Code Ann. § 62-3-609	26
S.C. Code Ann. § 62-3-614	25, 26, 27, 28
S.C. Code Ann. § 62-3-803	26
S.C. Code Ann. § 62-5-102	20, 29
S.C. Code Ann. § 62-5-306	30
S.C. Code Ann. § 62-5-309	28
S.C. Code Ann. § 62-5-417	33

S.C. Code Ann. § 62-5-418.....	35
S.C. Code Ann. § 62-5-425.....	29, 41
S.C. Code Ann. §62-7-303(a)(4).....	34
S.C. Code Ann. § 62-7-404.....	33
S.C. Code Ann. § 62-7-407.....	34
S.C. Code Ann. § 62-7-418.....	34
S.C. Code Ann. § 62-7-701.....	34
S.C. Code Ann. § 62-7-704(e))...2, 3, 18, 25, 25, 26, 33, 35, 37	
S.C. Code Ann. §§ 62-7-706.....	28
S.C. Code Ann. § 62-7-707.....	35, 36, 39
S.C. Code Ann. § 62-7-802.....	36
S.C. Code Ann. § 62-7-933.....	33

South Carolina Rules:

Rule 11, SCRCP.....	3, 37
Rule 59, SCRCP.....	14, 21
Rule 60, SCRCP	2, 14, 24
Rule 103(a)(1), SCRCP.....	31
Rule 203(b)(1), SCRCP.....	23
Rule 205, SCRCP.....	23
Rule 241, SCRCP.....	23

Miscellaneous:

Restatement (Third) of Trusts, § 34.....	12
South Carolina Rules of Professional Conduct, Rule 3.3.....	32
South Carolina Rules of Professional Conduct, Rule 4.1.....	32
South Carolina Rules of Professional Conduct, Rule 8.4.....	32
United States Constitution, Amends. V and XIX, § 1.....	3, 30
South Carolina Constitution, Art. 13.....	3, 30

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPELLANT'S
STATEMENT OF GROUNDS

Appellant Lisa Fisher submits these points and authorities in support of her *Statement of Grounds* filed pursuant to S.C. Code Ann. § 62-1-308 (a).

Due to the fact that the procedural requirements for a circuit court appeal are vague (i.e. no briefing schedule under S.C. Code Ann. § 62-1-308 (d)), Appellant is unable to refer to the record.

For the court's convenience, Appellant has summarized the pertinent pleadings below:

I.
INTRODUCTION

On February 25, 2009, Alice Shaw Baker died. Her great niece, Appellant Lisa Fisher, Esquire ("Appellant"), had helped her since involuntary commitment proceedings were initiated without notice to her family. Though she was already conserved, Appellant rushed to her side. After a hearing, on October 29, 2008, Appellant was appointed her guardian and conservator.

Ms. Shaw Baker had worked hard her entire life. She demonstrated a life long commitment to charitable activities, especially animal charities. Prior to her death, she revoked her

will and reaffirmed her desire that all of her property benefit these animal charities.

She was greatly loved by her family, evidenced by Appellant's repeated travels from California to help Ms. Shaw Baker maintain her independence and avoid institutionalization. Since Ms. Shaw Baker's death, Appellant has executed her duties to protect and preserve Ms. Shaw Baker's estate pending final determination of the proper appointment of the personal representative (or special administrator) by the South Carolina Supreme Court.

The Probate Court's orders of September 29, 2011 and October 14, 2011, were obtained without testimony, in violation of Appellant's Due Process rights. If allowed to stand, these orders will have the effect of dissipating Ms. Shaw Baker's estate, aiding third parties in their alleged plundering and pilfering of her Estate, and most importantly, it will ignore the "objectives" and "probable intention" of Ms. Shaw Baker to benefit animal charities, and defeat the "proper administration" of her Estate. (See Restatement (Third) of Trusts, § 34)

Appellant contends that South Carolina statutory, decisional, and Constitutional law does not support such a result, and reversal is mandated.

//

//

II.
STATEMENT OF THE CASE

A. *Brief Statement of Facts*

Appellant was appointed guardian and conservator of Alice Shaw Baker on October 25, 2009. During Appellant's tenure as Ms. Shaw Baker's conservator, she protected her assets and continues to this date.

Moments after her death, while Appellant was in the room with Ms. Shaw Baker's body, Respondent Bessie Huckabee obtained the keys to Ms. Shaw Baker's house without Appellant's knowledge. Appellant believes property was taken from the house.

Thereafter, Appellant and Ms. Shaw's Baker's niece, Betty Fisher, initiated litigation on April 27, 2009 in the Charleston County Probate Court and removed it to the Charleston County Court of Common Pleas on May 13, 2009. These Proceedings included Alice Shaw Baker's family's attack of the validity of the informal appointment of Bessie Huckabee, the Will Contest, the appointment of a Special Administrator, the effect of Attorney Peter Kouten's ex-parte communication in the lower court proceedings, and bond provisions. These issues are currently on

Appeal before the Supreme Court.

Appellant obtained extensions regarding Ms. Shaw Baker's property from the Probate Court pending final resolution by the Supreme Court, and at all times maintained proper control of Ms. Shaw Baker's property.

B. Pertinent Pleadings

On or about May 20, 2011, Respondent Bessie Huckabee ("Respondent") served her *Motion to Appoint Special Fiduciary* on Appellant's counsel. No affidavits were attached to the motion. (The certificate of service stated that it was served on May 19, 2011, however the letter to counsel was dated May 20, 2011).

On or about June 1, 2011, Appellant filed her *Motion to Strike and Memorandum in Opposition to Bessie Huckabee's Motion to Appoint Special Fiduciary*. In part, the basis for the *Motion to Strike* was Respondent's failure to comply with Rule 11.

Appellant again filed an *Objection* to the Court's consideration of the *Motion* on August 12, 2011.

The court set the motion for hearing on August 17, 2011. At the hearing the Court appointed a Special Fiduciary, J. Heyward Harvey, Esquire, without any information about his record, any potential conflicts of interest, and/or his relationship to the parties.

The parties submitted their drafts of the order. Appellant objected to Respondent's orders, due in part to the inclusion of findings of fact not supported in the record and relief that was not sought in the original motion. The court signed Respondent's order on September 28, 2011. Said order was served on Appellant on September 29, 2011.

Appellant filed her *Motion for Reconsideration* of the Order pursuant to Rule 59 and Rule 60 on or about October 7, 2011. Said motion included an affidavit by Appellant. The court did not set the matter for hearing. Respondent failed to oppose said motion.

On or about October 14, 2011, the Court signed its *Order Denying the Motion for Reconsideration* (which was not served until October 24, 2011). On October 14, 2011, the court also sua sponte issued freeze orders regarding both Ms. Shaw Baker's accounts and Appellant's individual accounts. These freeze orders were served prior to certification by the court and without notice to Appellant. (These orders are also on appeal filed on or about November Case no. 2011-10-CP-8657).

C. Probate Court's Failure to Allow Testimony and Lack of Evidentiary Hearing

At the hearing, Appellant's counsel objected to Respondent's

counsel, Peter Kouten,¹¹ discussion of contested issues relating to appellant's accounting. (Reporters' Transcript, filed on December 4, 2011, "R.T." 6: 24-25 and 7: 1-12)

Over Appellant's objection, the court allowed Respondent's Counsel to discuss the accounts (without allowing him to "go into specificity" but "just generalities"). (R.T.8:4-8)

During argument, Appellant's counsel requested authority to have Appellant speak, which the court denied as follows:

"THE COURT: No, this is a motion, and this is really between the attorneys, and I just want to know what your position is, legal position, as to what her legal authority is to still disburse moneys when in fact the conservatorship has -- when she has been discharged, and the only thing the Court has been looking for are the annual accountings." (R.T., 16: 7-14)

Without taking any evidence or allowing any testimony, or even taking judicial notice of any proceedings, during further argument concerning the court's lack of jurisdiction, the court stated:

¹¹ Appellant does not waive her objections to the continuing representation of Peter Kouten as counsel to Huckabee, in light of his non-waiveable representation of Alice Shaw Baker in the underlying conservatorship case where he was court appointed counsel and a visitor.

"THE COURT: I am just trying to determine procedurally where we are... I am interested in reference to what is happening with the conservatorship accounts." (R.T., 24: 22-25 and 25: 1-14)

After Respondent's counsel made numerous statements and accusations, Appellant's counsel stated:

"MR. COOPER: Your Honor, without going through all of them, there are a lot of things that Mr. Kouten said in terms of factual representations about the expenditure and so forth, we disagree with and certainly we think are beyond the scope of this hearing." (R.T., 34: 18-23)

Appellant contends that the court's failure to set her *Motions for Reconsideration* on calendar precluded her from responding to the court's concerns and violated her Due process rights. Appellant did file an affidavit in her *Motion for Reconsideration*, and Respondent did not object nor did she oppose the Motion. However, the record is silent as to whether the

court considered said affidavit. The Probate Court abused its discretion by Ordering the Appointment of a Special Fiduciary, and by denying her objections, the motion to strike, and the motion for reconsideration, and as such, the court's actions all mandate reversal.

D. Probate Orders

The probate court's order dated September 28, 2011 appointing Special Fiduciary made the following *Finding of Facts* and *Conclusions of Law* in pertinent part:

"This court has jurisdiction over this matter and venue is proper. Respondent Lisa fisher was discharged as Conservator by Order of this Court on May 11, 2009. Movant Bessie Huckabee has argued that requests for account of estate assets have been made on several occasions and these accountings had been denied. Lisa Fisher continues to object to the jurisdiction of this Court with regard to the Estate of Alice Shaw Baker, in part due to the fact that any ruling by this court would intrude on decisions properly to be made in the Supreme Court and/or the Circuit Court. Respondent filed a final accounting on May 26, 2009. Respondent has sought and been granted extensions of time to turn over the estate and has held these estate assets in trust. Respondent has, on June 1, 2011, filed with the Court annual accountings for the estate assets for the years 2009 or 2010.

In reviewing the 2009 and 2010 accountings, it is determined that there are real property assets in the estate of decedent Alice Shaw-Baker and there are continuing requirements for upkeep and repair on this property. Further, review of the filed accountings

indicate that there are needs for authority to deal with third parties with regard to this estate. Bessie Huckabee, as personal representative of the estate of decedent Alice Shaw-Baker (2009-ES-10-0378) is currently respondent to pending probate actions including action to appoint a special administrator. The Court finds an emergent need for authority as to these estate assets.

Whether or not a vacancy exists as to administration of these assets held in trust, the Court has the authority to appoint a special fiduciary. (South Carolina Probate code 62-7-704(e))

THEREFORE, based on the foregoing, it is hereby ORDERED, ADJUDGED AND DECREED that Respondent's motion to strike and motion for extension to turn over estate assets be DENIED and that a special fiduciary be appointed, and it is further

ORDERED, ADJUDGED AND DECREED that Respondent's motion to strike and motion for extension to turn over estate assets be DENIED and that a special fiduciary be appointed, and it is further

ORDERED, ADJUDGED AND DECREED that Heyward Harvey, Esquire, be appointed Special Fiduciary for the estate assets of Alice Shaw-Baker, and it is further

ORDERED, ADJUDGED AND DECREED that Heyward Harvey receive all assets held by Lisa Fisher within fifteen days of execution of this Order. That Mr. Harvey:

- a. marshal all assets, review accounts and 2009 and 2010 accountings with all the powers and discretions as authorized by law with regard to same.
- b. Seek formal approval of the final accounting and 2009 and 2010 accountings with authority to amend same, if necessary, and further, seek to close the conservatorship estate.
- c. review needs for maintenance, taxes and insurance on real property with authority as fiduciary over same.
- d. maintain authority and control over all estate assets.
- e. keep records of his time devoted to this file and seek approval of his fees through separate order of this Court, and it is further

ORDERED, ADJUDGED AND DECREED that Mr. Harvey's appointment shall terminate upon final determination of proper authority over administration of the estate of Alice Shaw-Baker."

On or about October 24, 2011, the Probate Court served its Order Denying Motions for Reconsideration and Opposition of Probate Court Order Appointing Special Fiduciary, Motion to Strike, etc. which states in pertinent part:

"...Petitioner asks the Court to reconsider the Court's Order, dated September 28, 2011. This motion is based on the Court's order concerning the Motion to Appoint a Special Fiduciary for Conservatorship Assets filed by Bessie Huckabee dated May 20, 2011 by and through her attorney, Peter A. Kouten, Esq. in response to Lisa Fischer [sic] 's Motion for Extension filed May 13, 2011, and her Motion to Strike file [sic] June 1, 2011 by and through her attorney, John Hughes Cooper, Esq. This Court's order denied the Respondents Motion to Strike and Motion for Extension to turn over assets and further ordered that a special fiduciary be appointed. The court further ordered that J. Heyward Harvey, Esq. be appointed Special Fiduciary for the estate assets of Alice Shaw Baker and that Lisa Fischer [sic] within fifteen days turn over these assets to Heyward Harvey, Esq.

At this time, having reviewed the Motions and the record, the Court hereby denies Respondents Motions. The probate court has

jurisdiction of proceedings initiated by interested parties concerning the internal affairs over protective proceedings and guardianship proceedings (South Carolina Probate Code 62-5-102) This Court finds that Lisa Fischer's [sic] fiduciary role as Guardian and Conservator was terminated by this Court's Order dated May 11, 2009. Since Ms. Fischer's [sic] discharge she has held estate assets; has requested and been granted several extensions to perform the same, due to the ongoing litigation in the estate matter. The Court became aware at the August 17, 2011 hearing that Lisa Fischer [sic] has continued to expend funds since Alice Shaw-Baker's death from the Conservator accounts of Alice Shaw Baker.

The Court finds that Lisa Fischer [sic] has been terminated as Conservator and no longer has the authority to withdraw or pay expenses out of the estate which is being withdrawn without authorization from the Probate Court. The decedent's estate is seized with real property. On the court's own motion, to preserve the estate of Alice Shaw-Baker, this Court is freezing all money and assets in the name of Alice Shaw-Baker.

THEREFORE, IT IS ORDERED ADJUDGED AND DECREED THAT:

1. The Motion for Reconsideration of Probate Order Dated September 28, 2011 Appointing A Special Fiduciary, the Motion to Strike and Opposition to the Motion to Appoint A Special Fiduciary, the Renewed Motion for Approval of Fees and Expenses of Guardian and Conservator and the Motion to Set Aside Void Probate Court Order dated September 28, 2011 Appointing A Special Fiduciary is hereby Denied; it is further ordered

2. That Alice Shaw-Baker has funds currently in a number of banking institutions under the name of Alice Shaw-Baker Conservatorship and Lisa Fischer [sic] Conservatorship or individually. It is ordered that the assets in any and all accounts in the name of Alice Shaw Baker Conservatorship, or individually being held with any banking institution shall be frozen until J.. Heyward Harvey, Jr., Esq. as Special Fiduciary takes control of said accounts."

E. Timely Appeal by Appellant

On October 25, 2011, Appellant filed her Notice of Intention to file Appeal pursuant to S.C. Code Ann. 62-1-308(a). The time for filing said Notice of Intention to file Appeal is 10 days after written entry of notice, here October 24, 2011 on the Motion for Reconsideration.

In light of the fact that Appellant filed her Motion for Reconsideration, said time was extended pursuant to SCRCP 59(f) and SCACR 203(b)(1) by Appellant's Motion for Reconsideration. (See also *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004) ("A timely post-trial motion, including a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such motion."

III.

ARGUMENT

A. Standard of Review

It is well settled that the standard of review for Appeals from the probate court are governed by the provisions of the Probate Code. (*Matter of Howard*, 315 S.C. 356, 360, 434 S.E.2d 254, 256 (1993).) The Probate Code provides that a final order or decree of the probate court may be appealed to the circuit court. (S.C. Code Ann. § 62-1-308 (2009).)

Moreover, an issue regarding statutory interpretation is a question of law. (*Univ. of S. Cal. v. Moran*, 365 S.C. 270, 274-75, 617 S.E.2d 135, 137 (Ct. App. 2005).

If the proceeding in the probate court is in the nature of an action at law, neither the circuit court nor the appellate court may "disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them." (*Neely v. Thomasson*, 365 S.C. 345, 349-50, 618 S.E.2d 884, 886 (2005).)

As will be set forth herein, the Probate Court's refusal to allow Appellant to testify supports her position that this court

must reverse the findings of fact, because "there is no evidence to support them." (Id.)

1. The Pending Appeal in the South Carolina Supreme Court Precluded the Probate Court from Appointing a Special Fiduciary.

Appellant contends that the Probate Court had no jurisdiction to hear this matter, because when a matter is on appeal the lower court loses jurisdiction pursuant to Rule 203, SCACR:

"Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal. (Rule 205, SCACR, emphasis added.)

Further, pursuant to S.C. Code Ann. § 62-1-308 (c):

" When an appeal according to law is taken from any sentence or decree of the probate court, all proceedings in pursuance of the order, sentence, or decree appealed from shall cease until the judgment of the circuit court, court of appeals, or Supreme Court is

had. If the appellant, in writing, waives his appeal before the entry of the judgment, proceedings may be had in the probate court as if no appeal had been taken." (Emphasis added)

There is currently on appeal the issue of the proper appointment of the personal representative and the appointment of the special administrator, thus the Probate Court had no jurisdiction to interfere with the Supreme Court's jurisdiction.

2. Appellant's Appeal in the Supreme Court precluded the Probate Court's Order Appointing a Special Fiduciary, because it attempts to a Review another Judge's Order in Violation of Rule 60 and Decisional Law.

When the Probate Court entertained Huckabee's motion, it was interfering with the appellate jurisdiction, and ultimately the order of another judge.

Despite Respondent's desire to interfere with Appellant's proper protection of Ms. Shaw Baker's estate assets by the filing of her motion, it was error for the Probate Court to entertain the motion because it essentially counters the actions in the pending Appeal.

It is well settled law that a court can not interfere with another court's order which is subject to the pending litigation.

{See Rule 60, SCACR; See also *Dukes & Dukes v. Hygrade Food Products*, 236 S.C. 69 (1960).}

Therefore, any and all orders issued in relationship to the Motion for Special Fiduciary must be reversed.

3. Once a Personal Representative is Appointed, the Probate Court does not have Jurisdiction to Appoint a Special Fiduciary under Probate Code § 62-7-704 (e)

Here, Appellant contends that S.C. Code Ann. § 62-7-704(e) upon which Respondent relies is very specific:

" Whether 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. The procedure for such appointment and the notice requirement shall be the same as set forth for special administrators under South Carolina Code Section 62-3-614." (Emphasis added).

While on the surface it appears that this Code provides the Probate Court unfettered discretion to appoint a Special Fiduciary, however as noted above the procedure for appointment is governed by the code for appointment of Special administrator, § 62-3-614, which provides as follows:

"A special administrator may be appointed:

(1) informally by the court on the application of an interested person when necessary:

(a) to protect the estate of a decedent prior to the appointment of a general personal representative or if a prior appointment has been terminated as provided in Section 62-3-609; or

(b) for a creditor of the decedent's estate to institute any proceeding under Section 62-3-803
(c);

(2) in a formal proceeding by order of the court on the petition of any interested person and finding, after notice and hearing, that appointment is necessary to preserve the estate or to secure its proper administration including its administration in circumstances where a general personal representative cannot or should not act. If it appears to the court that an emergency exists, appointment may be ordered without notice." (Emphasis added)

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. These very issues are on appeal.

So statutory interpretation of the conflict between § 62-7-704(e) and § 62-3-614 mandates reversal. The cardinal rule of statutory construction explains that:

"[w]here there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." *Spectre, LLC v. S.C. Dept. of Health and Env'tl. Control*, ___ S.C. ___, 688 S.E.2d 844, 853 (2010)." (Emphasis added)

The specific language in § 62-3-614 overlaps the general terms regarding the appointment of a representative of the estate. It is "well settled that statutes dealing with the same subject matter are in *pari materia* and must be construed together, if possible, to produce a single, harmonious result." (*Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000).) Viewing the statutes together, it is clear that appointment of a Special Fiduciary is not proper, while the issues on Appeal before the Supreme Court are pending. No orders may be made which will undermine the objectives concerning the rightful appointment of a personal representative.

4. Respondent Huckabee' Standing is also on Appeal, so it was an Abuse of Discretion for the Court to Grant her Motion which Amounts to a Removal without Cause of Appellant.

The statutory definition for an "interested party" in a Probate matter is set forth in S.C. Code Ann. § 62-1-201(20).

"Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding." (Emphasis added)

Bessie Huckabee had no standing while Ms. Shaw Baker was alive to involve herself in the conservatorship (S.C. Code § 62-5-309), and Appellant contends that the statutory language and facts of this case preclude her from intervening and attempting to gain favor in the Probate Court by their forum shopping.

The language governing Trusts also makes clear that she did not have standing to bring the motion as a "representative" because it amounted to a removal. (See S.C. Code Ann. § 62-7-706 ["a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative."]) Here, the court did not "remove" Appellant on its own initiative, and Appellant asserts that her reputation and character is attacked by the removal without cause.

Due to their lack of standing, both Respondent and Kay

Passailague are merely interlopers attempting to sully Appellant's name and interfere with the proper administration of the estate. These individuals proved that they were not even friends to Alice Shaw Baker in the end, and as such allowing them to interfere with the administration is contrary to Alice Shaw Baker's stated wishes.

The language of S.C. Code Ann. § 62-1-201(20) makes it clear that the role of an interested party may "vary from time to time" in litigation. Therefore, while it is on Appeal and the subject of the Circuit Case Removal, the Probate Court's jurisdiction is precluded and constitutes an improper interference with the Circuit Court's jurisdiction. (See S.C. Code Ann. § 62-1-302)

To allow Respondent to come in, seek the appointment of a third party, whose very appointment will squander away funds rightfully held for the protection of the animals, is inherently wrong.

Ms. Shaw Baker's life was about animals and their protection. Respondent Huckabee must not be allowed to undermine the Supreme Court's jurisdiction, by attempting to garner favor before the Probate court through innuendo and misrepresentation about Appellant's actions and role in Ms. Shaw Baker's life.

5. The Probate Court's Proceedings were Pursuant to Protective Proceedings, however this Court's Jurisdiction Ended at Alice Shaw Baker's Death.

Appellant is duty bound to maintain the property pending final "receipt" by the proper Personal Representative (S.C. Code Ann. § 62-5-425(d)).

Here, Huckabee can not use innuendo to gain control, or interfere with the estate, while they are a party to a known appeal dealing with the same subject. Said action implicates Due Process considerations, and Equal protections under the United States and South Carolina Constitutions.

Although the Probate Code retains "exclusive jurisdiction" of certain matters not removed (S.C. Code Ann. § 62-1-302 (e)), the Probate Court's attempt to characterize this as litigation relating to its jurisdiction of protective proceedings under § 62-5-102 is misplaced. At Ms. Shaw Baker's death, the Probate court lost jurisdiction to deal with the Estate property. (See S.C. Code Ann. § 62-5-306 (1987) (terminating the authority of a guardian upon the death of the ward)).

Since there is a dispute as to who is legally "entitled" to delivery of Ms. Shaw Baker's property and/or to appointment or to receive "delivery". The Probate Court in its capacity in the

protective proceedings can not interfere with the Probate Court's jurisdiction of Estate administration under S.C. Code Ann. § 62-3-105.

Respondent Huckabee attempted to forum shop by filing the Motion in Probate. She knew that the matter had been removed and was subject to "estate administration." No longer was it an affair for the Probate Court in its protective proceedings capacity. Therefore, it was improper for the Probate Court to interfere with the litigation pending the Appeal in the Supreme Court.

6. The Probate Court Erred in its Failure to Rule on Appellant's Objections to Respondent's Motion to Appoint Special Fiduciary and Made at the Hearing.

The transcript and the record discloses that Appellant objected to 1) the procedure, 2) the accusations and purported averments by Respondent's counsel, and 3) the conclusions of the court (both at the hearing and in its orders), and the Probate Court's rulings are not supported by the record.

It is well settled that an attorney does not have to use the word "objection" to Contest the court's consideration of evidence at a contested hearing. Recently, the South Carolina Supreme Court explained in *State v. Najjar De'breece Byers*, No. 26976

{S.C. 05/23/2011} that a defense counsel's purpose would not have been made clearer had he used the word "objection" before making a motion to strike.

The court also said that for an admissibility error to be preserved, the objection must include a specific ground "if the specific ground was not apparent from the context." Rule 103(a)(1), SCRE. When supported by context, "[a] party need not use the exact name of a legal doctrine . . . , but it must be clear the argument has been presented on that ground." (*State v. Stahlnecker*, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010).)

In this case, under the Rules of Evidence, Appellant clearly preserved the issue of admissibility by moving to strike the pleadings of Respondent, and by objecting to the statements made at the hearing, and for the improper findings of fact in the orders. (See Motion to Strike, transcript, and Objections to Orders filed herein.)

This court is authorized to judicially notice the files and proceedings in this case. It is well settled that a court can take judicial notice of its own records, files, and proceedings for all proper purposes including facts established in its records. (See *Wise v. Wise*, 394 S.C. 591, 716 S.E.2d 117 (Ct. App. 2011); *Freeman v. McBee*, 280 S.C. 490, 313 S.E.2d 325

(Ct.App.1984); see also *In re Estate of Pallister*, 363 S.C. 437, ___, 256 (2005) (orders of the probate court reversible if there is no evidence to support them.))

The motion filed by Respondent contained no affidavits, was filled with speculation and innuendo, and as evidenced by the counter affidavit filed by Appellant (in her Motion for Reconsideration), was false. The allegations were an improper attempt to impugn Appellant Lisa Fisher's character. (See *Toyota v. Florence Inv. V. Lynch* (1994) 314 S.C. 257 [vicious, inflammatory argument resulting in clear prejudice support new trials]; see also South Carolina Rules of Professional Conduct, Rules 3.3, 4.1, 8.4(a), 8.4(d), and 8.4(e) provide that an attorney cannot provide a false statement of material fact to the court.)

Therefore, reversal is mandated.

7. The Probate Court's Finding that Appellant did not have Authority to Pay Expenses on Behalf of the Estate was Erroneous, and Demonstrates that there was no Emergent Need.

Respondent relied on Trust law for support that the Probate court had authority to appoint a Special Fiduciary under S. C. Code Ann. § 62-7-704, claiming Appellant no longer had authority to protect the Estate.

However, under S.C. Code Ann. § 62-5-417, "...a conservator is to act as a fiduciary and shall observe the standards of care applicable to trustees as described by Section 62-7-933:"

Therefore, under Trust law, there are numerous statutory obligations and safeguards that mandated Appellant's proper protection of the Estate and demonstrated that she has behaved in an appropriate manner, under relevant trust law.

The law is explicit as governed by South Carolina Probate Code § 62-7-303(a)(4), "a trustee may represent and bind the beneficiaries of the trust with respect to questions or disputes involving the trust."

Under § 62-7-404 provides "A trust may be created only to the extent its purposes are lawful and possible to achieve." Here, both the extension and the statutory mandate that Appellant delivers property to the personal representative demonstrates it is for a "lawful purpose."

A trust and its terms must be for the "benefit of its beneficiaries." Alice Shaw Baker's intentions made known, and evidenced in writing, did not require a formal trust document. (See § 62-7-407 ["...a trust need not be evidence by a trust instrument."]) Alice Shaw Baker's estate belongs to Animal Charities.

Moreover, § 62-7-418(a) provides in pertinent part: "When any person shall be seized of any lands...the person or body politic that shall have such use, confidence, or trust...shall be deemed and adjudged in lawful seizing...to all intents, constructions, and purposes in law of and in such like estates as they shall have in use, trust, or confidence of or in them."

(Emphasis added).

It is clear that South Carolina protects estates under both formal and informal trusts. Appellant is protecting the assets pending proper transfer. Huckabee relies on trust law for this improper order, however § 62-7-701 (A)(2) provides that: "...if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by accepting delivery of the trust property, exercising powers or Performing duties as trustee, or otherwise indicating acceptance of the trusteeship." (Emphasis added)

So even under Huckabee's argument, Respondent had an obligation to protect the assets. Huckabee's counsel cites that this court has authority to appoint a special fiduciary under § 62-7-704(e). However, the purpose of the code is to provide the means for appointment of a special fiduciary when there is a "Vacancy in trusteeship." There is no vacancy in the

trusteeship. Subsection (e)'s provision for appointment "whether or not a vacancy exists" still is not unlimited due to the limiting language controlling Special Administration, if it were, than any person without standing could act as an interloper and interfere. Here, assuming that the Will Contest is successful, Huckabee has no standing to interfere with this case.

There are no grounds for the motion except conjecture and speculation, and allowing such argument is adverse to the interests of justice. Moreover, this court's appointment of a stranger to the Estate compromises the purpose of the "trust" to benefit animal charities and allows dissipation of the trust at the whims of a stranger to the estate, and the court's conclusion that Appellant did not have authority to continue to act on behalf of the Estate is contrary to Trust law, and common sense. Had Appellant not acted, the Estate would have been subject to waste.

Finally, a trustee has a duty under S.C. Code Ann. § 62-7-707 to:

" Unless a cotrustee 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).

This emphasizes the statutory scheme which provides for a continuing duty of a fiduciary/conservator to hold property until it can be delivered to the proper person. . Here, Appellant was never removed, there was never any action filed regarding the accounting, and she has at all times acted appropriately, and in furtherance of the statutory scheme to protect the property of Ms. Shaw Baker.

Finally, under a "trust", Appellant would be required to "...administer the trust solely in the interests of the beneficiaries." (§ 62-7-802) The beneficiaries of the trust are animal charities, and pending final determination of the litigation on their behalf, Appellant is required to take all action to protect the trust properties. Therefore, Appellants acts are in the best interests of the estate, and the court's orders were without authority.

8. The Legal Principal Governing Laches
Demonstrates that there is no "Emergent need" under S.C.
Code Ann. § 62-7-704 (e).

Here Bessie Huckabee knew that Appellant was safeguarding the property for Ms. Shaw Baker. She failed to object to all of the previously requested extensions filed by Appellant. She took no action whatsoever. Only Appellant's action has protected the Estate of Ms. Shaw Baker. Had appellant not taken this action, the Estate would have sustained serious injuries.

Under *Hallums v. Hallums*, 296 S.C. 195, 198-199, 371 S.E. 2d 525, 527 (1988), the doctrine of Laches is defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence to do what in law should have done." (Emphasis added).

Respondent Huckabee is barred from arguing for the appointment of a Special Fiduciary, nearly three years after Alice Shaw Baker's death.

9. The Probate Court Abused its Discretion by Refusing to Strike Respondent's Motion to Appoint Special Fiduciary due to her failure to comply with Rule 11, SCRPC.

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

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

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

10. The Probate Court's Erred in Failing to Grant Appellant's Extension of Time to Deliver Proper.

Appellant sought lawful court orders to hold property pending final determination by the Supreme Court. The Probate Court's conclusion that "Ms. Fisher did not have the duty to act in a conservator capacity once she had been discharged" (R.T, p. 35,11. 17-18) wasn't reasonable.

Just as a trustee must "protect the trust property" until delivery of the property (S.C. Code § 62-7-707), Appellant would have subjected herself to sanctions and/or possible litigation had she not protected the property.

The extensions granted for 2 ½ years gave Appellant the right, and duty, to act as a fiduciary until the Will Contest was heard.

11. The Probate Court Erred in hearing the Motion to Appoint a Special Fiduciary when the record disclosed that interested parties, including the Attorney General of South Carolina and Heir at law Betty Fisher, had not received statutory notice of the Proceedings, under S.C. Code Ann. § 62-3-614 and the United States Constitution, Amends. V and VIX, § 1 and the South Carolina Constitution, Art. 13.

A void judgment is one that from its inception is a complete

nullity and without legal effect. (*Thomas v. Howard Co. & T.W. Graham and Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995).)

The requirements of due process include notice and an opportunity to be heard. (*S.C. Dep't of Soc. Serv. v. Holden*, 319 S.C. 72, 78, 459 S.E.2d 846, 849 (1995).)

It is fundamental that no judgment or order affecting the rights of a party to the cause shall be made or rendered without notice to the party whose rights are to be affected. (*Tyron Fed. Sav. & Loan Ass'n v. Phelps*, 307 S.C. 361, 362, 415 S.E.2d 397, 398 (1992).)

In proceedings in the probate court where notice is required, an order is binding only as to persons given notice of the proceedings. (See S.C. Code Ann. § 62-3-106).

Interested Person, Betty Fisher, the niece of Alice Shaw Baker and litigant in the Will Contest, etc. action did not receive individual notice. The Attorney General, on behalf of animal charities, did not receive notice. This failure and refusal to give notice to persons entitled to notice deprived them from objecting to the appointment of a Special Fiduciary. It also deprived them from inquiry into the cost, conflict of interest, and role of a Special Fiduciary. This court's unilateral choice of an "unknown" fiduciary, without opportunity

to review his record and/or object is improper and mandates reversal in this case.

IV. CONCLUSION

Aside from the familial relationship to Ms. Shaw Baker, as former conservator, Appellant understands that in "equity and good conscience" she is bound to act in good faith and with due regard to the interests" of Ms. Shaw Baker (See *O'Shea v. Lesser*, 308 S.C. 10, 15) . By appealing the Probate Court's orders, Appellant is continuing to observe the trust reposed in her by Ms. Shaw Baker--to protect her estate, prevent the depletion of the principle and ensure that animal charities benefit.

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.

The main issue of who was the "duly appointed personal representative" is currently on appeal before the Supreme Court thereby precluding the Probate Court's interference in this

matter.

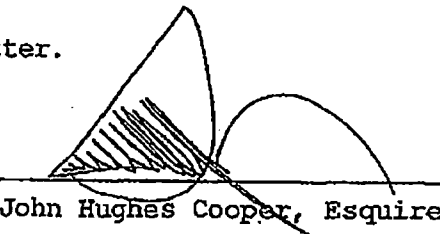
//

//

//

Appellant respectfully requests that this Honorable Court
reverse the Orders in this matter.

December 8, 2011



John Hughes Cooper, Esquire
P.O. Box 395
Sullivan's Island, SC 29482
(843) 883-9099
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2011 we served a copy
of the STATEMENT OF GROUNDS BY APPELLANT LISA FISHER SUPPORTING
HER APPEAL FILED ON OCTOBER 25, 2011 SEEKING TO VOID PROBATE
ORDERS IN CASE 2008-GC-088 and MEMORANDUM OF POINTS AND

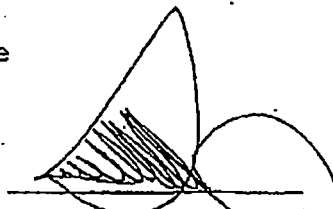
AUTHORITIES upon all counsel of record by email and by first class mail as follows:

Hon. Mary Frances Jowers
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

Peter A. Kouten, Esquire
Kouten Law Firm, LLC
P.O. Box 340
John's Island, SC 29457

John Edward Robinson, Esquire
McDowell Law Offices
36 Broad Street
Charleston SC 29401-3045

J. Heyward Harvey Jr., Esquire
13 State Street
Charleston, SC 29401



John Hughes Cooper

THE STATE OF SOUTH CAROLINA
In the Court of Court of Common Pleas

TDD
PROBATE COURT

12 JAN -5 AM 11:11

APPEAL FROM CHARLESTON COUNTY
Probate Court

Tamara C. Curry, Associate Judge of Probate

Case No. 2011-CP-10-8657

Lisa Fisher.....Appellants

v.

Bessie Huckabee.....Respondent

STATEMENT OF GROUNDS BY APPELLANT LISA FISHER
SUPPORTING HER APPEAL FILED ON NOVEMBER 21, 2011
SEEKING TO REVERSE PROBATE ORDERS IN CASE 2008-GC-10-088
and MEMORANDUM OF POINTS AND AUTHORITIES

John Hughes Cooper
John Townsend Cooper
John Hughes Cooper, P.C.
P.O. Box 395
Sullivan's Island, S.C. 29482
(843) 883-9099

Cain Denny
Cain Denny, P.A.
P.O. Box 1205
Charleston, S.C. 29402
(843) 965-5400

Lisa Fisher files this Statement of Grounds supporting her Appeal filed on November 21, 2011 seeking review of the Probate Orders of November 9, 2011 by the Honorable Tamara C. Curry entitled:

- 1) "Denial of Motion to Alter or Amend the Orders Freezing Assets Dated October 14, 2011," including but not limited to the sua sponte orders of the court and the orders that gave J. Heyward Harvey control of the assets in the name of Alice Shaw-Baker¹ Conservator and Lisa Fischer [sic] Conservatorship.

And

- 2) "Denial of Motion to Alter or Amend Denial of Renewed Motion for Approval of Fees and Expenses of Guardian and Conservator."

Appellant Lisa Fisher timely filed her Notice of Intent to Appeal on November 21, 2011. Her counsel received notice of entry of these orders on November 21, 2011.

¹ Alice Shaw Baker died on February 25, 2009. There is currently pending a Will contest initiated by Betty Fisher and Appellant regarding her intentions concerning her estate, and her desire that said monies benefit Animal Charities. The matter is on Appeal before the South Carolina Supreme Court. (Cir. Ct. Case no. 2009-CP-3010).

STATEMENT OF GROUNDS ON APPEAL
PURSUANT TO S.C. CODE ANN. § 62-1-308 (a)

1. Did the Probate Court Abuse its Discretion in Depriving Appellant of her right to "reasonable compensation" and reimbursement of fees by denying her Motion for Approval of Fees and Expenses under S.C. Code Ann. §§ 62-5-312(b) and 62-5-312 and well established legal precedent?
2. Did services by Appellant to her great-aunt, Alice Shaw Baker, constitute "property" interests entitling her to "just compensation" under the Takings Clause in the U.S. Const. Amend. V; S.C. Const. Art. I, § 13(a) and well established legal precedent?
3. Was the Probate Court's denial of Appellant's Request for Approval of Fees and Expenses in violation of the Equal Protection Clause of the United States Constitution in the U.S. Const. Amend. XIV; S.C. Const. Art. I, § and well established legal precedent?
4. Did the Probate Court Abuse its Discretion by issuance of an Order intending to Freeze not only the decedent, Alice Shaw-Baker's assets, but Appellant's personal

Assets?

5. Were the Probate Court's Orders Freezing Accounts in violation of the Due Process Clause, Equal Protection Clause, and Takings Clause of the United States Constitution and well established legal precedent?

Additionally, this Appeal is Related to the Appeals filed by Appellant Lisa Fisher (Case no. 2011-CP-10-7821) and Appellant Betty Fisher (Case no. 2011-CP-10-7819) on October 25, 2011, Statement of Grounds on both cases filed on December 9, 2011. Appellant joins and restates these grounds as support for her appeal herein.

January 5, 2012



John Hughes Cooper, Esquire
P.O. Box 395
Sullivan's Island, SC 29482
(843) 883-9099
Attorney for Appellant

Cain Denny, Esquire
Cain Denny, P.A.
P.O. Box 1205
Charleston, SC 29402
(843) 478-0692

Other Counsel of Record:

Hon. Mary Frances Jowers
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

Peter A. Kouten, Esquire
Kouten Law Firm, LLC
P.O. Box 340
John's Island, SC 29457

John Edward Robinson, Esquire
McDowell Law Offices
36 Broad Street
Charleston SC 29401-3045

J. Heyward Harvey Jr., Esquire
13 State Street
Charleston, SC 29401

TABLE OF CONTENTS AND AUTHORITIES

STATEMENT OF GROUNDS ON APPEAL PURSUANT TO S.C. CODE ANN. § 62-1-308 (a).....	3
TABLE OF CONTENTS AND AUTHORITIES	6
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPELLANT'S STATEMENT OF GROUNDS.....	11
I. THIS BRIEF SUMMARY DEMONSTRATES "NOVEL" ISSUES OF LAW WHICH DO NOT WARRANT DEFERENCE TO THE PROBATE COURT'S ORDERS:.....	11
A. RELATING TO THE PAYMENT OF COMPENSATION FOR SERVICES RENDERED TO A "PROTECTED PERSON", and	
B. RELATING TO THE ORDERS FREEZING ASSETS WITHOUT NOTICE, HEARING, OPPORTUNITY TO BE HEARD, AND/OR JURISDICTION.....	11
II. STATEMENT OF FACTS.....	14
III. PROBATE ORDERS.....	17
1. <i>Orders Denying Renewed Motion for Approval of Fees and Expenses of Guardian and Conservator.....</i>	17
2. <i>Orders after Rule 59 Motion on Fees Petition.....</i>	17
3. <i>Orders after Rule 59 Motion re: Orders Freezing Assets.....</i>	18
IV. ARGUMENT.....	19
A. <i>Standard of Review.....</i>	19
B. <i>The Probate Court Abused its Discretion by Depriving Appellant of her Right to Reasonable Compensation and Reimbursement of Fees by Denying her Request for Fees.....</i>	21

1.	<u>Legal Authority</u>	21
2.	<u>The Services Provided to Alice Shaw Baker constituted "Property interests" protected under the Takings Clause.</u>	23
C.	<u>The Probate Court's denial of Appellant's Request for Approval of Fees and Expenses is in violation of the Equal Protection Clause.</u>	24
D.	<u>The Probate Court Abused its Discretion by issuance of an Order intending to Freeze not only the decedent, Alice Shaw-Baker's Assets, but Appellant's.</u>	27
1.	<u>Legal Authority Governing Freezing of Bank Accounts.</u>	27
2.	<u>Appellant was Required to Retain Estate Property to a "Duly Appointed" Personal Representative.</u>	28
3.	<u>The Doctrine of Laches Supports Appellant's Continued Protection of the Estate.</u>	30
4.	<u>This Probate Court Lacks Jurisdiction to Hear this matter, in light of the fact that the Circuit Court has Control over the Estate Matter and the Appeal is currently before the Supreme Court.</u>	32
E.	<u>Due Process, Equal Protection, and the Takings Clauses Under the Constitution Prohibit the Imposition of the Order Freezing Assets.</u>	33
V.	<u>CONCLUSION.</u>	34

TABLE OF AUTHORITIES

South Carolina Decisional Law:

<i>Collins Music Co., Inc. v. IGT</i> , 365 S.C. 544, 550 (2005)	29
<i>County of Richland v. Simpkins</i> , 348 S.C. 664, (2002)	28
<i>Dowaliby v. Chambless</i> , 344 S.C. 558, (2001)	22
<i>Elam v. South Carolina Dept. of Transp.</i> , 361 S.C. 9 (2004) ...	16
<i>Ex Parte Brown</i> , 393 S.C. 214 (2011)	12, 20, 23, 34
<i>Hallums v. Hallums</i> , 296 S.C. 195 (1988)	30
<i>Grosshuesch v. Cramer</i> , 367 S.C. 1, (2005)	27
<i>I'On, LLC v. Town of Mt. Pleasant</i> , 338 S.C. 406, 411, 526 S.E. 2d 716 (2000)	20
<i>Matter of Howard</i> , 315 S.C. 356, 434 S.E. 2d 254 (1993)	19
<i>Neely v. Thomasson</i> , 365 S.C. 345 (2005)	13, 19
<i>Patel v. Patel</i> , 359 S.C. 515 (2004)	20
<i>S.C. Dept. Of Soc. Serv. V. Holden</i> , 319 S.C. 72, 78, 459 S.E. 2d 846, 849 (1995)	33
<i>Simpson v. Simpson</i> , 377 S.C. 519 (Ct.App. 2008)	25
<i>TNS Mills, Inc. v. South Carolina Dep't of Revenue</i> , 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998)	29
<i>Unisun Ins. Co. v. Schmidt</i> , 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000)	29
<i>Univ. of S. Cal. v. Moran</i> , 365 S.C. 270, 274-75, 617 S.E.2d 135, 137 (Ct. App. 2005)	19

Miscellaneous Court Decisions:

<i>Armstrong v. United States</i> , 364 U.S. 40 (1960)	12, 24
<i>State v. Smith</i> , 747 P.2d 816, 842 (Kan. 1987)	24

South Carolina Statutes:

S.C. Code Ann. § 62-1-201(20)	13
S.C. Code Ann. § 62-1-302	30
S.C. Code Ann. § 62-1-308 (a)	3, 11, 19
S.C. Code Ann. § 62-5-101	12, 22, 23
S.C. Code Ann. § 62-5-102	32
S.C. Code Ann. § 62-5-309	13
S.C. Code Ann. § 62-5-312	3
S.C. Code Ann. § 62-5-414	21, 28, 29
S.C. Code Ann. § 62-5-425	30
S.C. Code Ann. § 62-7-706	13
S.C. Code Ann. § 62-7-707	29

South Carolina Rules:

Rule 59, SCRCF	16, 17, 18
Rule 65, SCRCF	14, 27
Rule 203(b) (1), SCRCF	16

Miscellaneous:

United States Constitution, Amends. V and XIV.....3, 12, 14,
20, 23, 24, 33, 34

South Carolina Constitution, Art. 13.....3, 23, 34

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPELLANT'S
STATEMENT OF GROUNDS**

Appellant Lisa Fisher ("Appellant") submits these points and authorities in support of her Statement of Grounds filed pursuant to S.C. Code Ann. § 62-1-308 (a).

Due to the fact that the procedural requirements for a circuit court appeal are vague (i.e. no briefing schedule under S.C. Code Ann. § 62-1-308 (d)), Appellant is unable to refer to the record.

I.

THIS BRIEF SUMMARY DEMONSTRATES "NOVEL" ISSUES OF LAW WHICH DO NOT WARRANT DEFERENCE TO THE PROBATE COURT'S ORDERS:

- A. RELATING TO THE PAYMENT OF COMPENSATION FOR SERVICES RENDERED TO A "PROTECTED PERSON", and**
- B. RELATING TO THE ORDERS FREEZING ASSETS WITHOUT NOTICE, HEARING, OPPORTUNITY TO BE HEARD, AND/OR JURISDICTION**

Appellant briefly summarizes the important legal issues raised by the Probate Court's orders denying Appellant her fees and freezing monies held by Appellant and on behalf of Ms. Shaw Baker's estate.

Recently, the court in Ex Parte Brown, 393 S.C. 214, 711 S.E.2d 899 (2011) held that "...the Fifth Amendment Takings Clause is implicated when an attorney is appointed to represent an indigent litigant. In such circumstances, the attorney's services constitute property entitling the attorney to just compensation." The court limited its holding to cases involving

"...an attorney's constitutional entitlement to compensation in appointed cases." However, in its analysis of the issue, the South Carolina Supreme Court reviewed precedent which demonstrates application in areas not limited to court appointed attorneys.

The United Supreme Court found in, Armstrong v. United States 364 U.S. 40, 49 (1960), that the Takings Clause was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

The inclusion of this "public service" rationale, coupled with the public policy of "protection of persons under disability and their property" set forth in S.C. Ann. Code § 62-5-101 et seq., supports an expansive view of the decision in *Brown* which on the professionalism and public service duties of an attorney. Therefore, if these "duties" implicate the venerable principle enunciated in the United States Constitution, Fifth Amendment, Takings Clause, Appellant contends the "duties" imposed on a Guardian and conservator, and the services thereafter provided, also implicate "property interests" under the Takings Clause.

Here, the court appointed Guardian and Conservator of Alice Shaw Baker's great niece, Appellant Lisa Fisher,² spent in excess

² Appellant Lisa Fisher is a California Attorney in Good Standing who traveled to South Carolina repeatedly to assist Ms. Shaw Baker and to ensure compliance with the probate courts

of 450 hours to help Ms. Shaw Baker, spent in excess of \$14,000.00 to travel and assist Ms. Shaw Baker, and placed her own life and law practice on hold to help Ms. Shaw Baker maintain her independence and avoid institutionalization.

The Probate-Court's orders not only ignore this significant sacrifice, they go a step farther by making sua sponte orders which were intended to freeze not only Ms. Shaw Baker's monies but Appellant's.³ These "Freeze" orders were also executed without any testimony or affidavits presented by Respondent Bessie Huckabee⁴ without any witnesses, and most significantly, without any evidence to support the findings of the probate court. (See *Neely v. Thomasson*, 365 S.C. 345, 349-50, 618 S.E.2d 884, 886 (2005) [probate court's findings of facts may not be disturbed unless a review of the record discloses there is no

orders.

³ These orders of November 9, 2011 also retell the earlier order that J. Heyward Harvey control assets in the name of Appellant and the conservatorship estate. Appellant contends that these orders and issues have been properly raised in the Appeals filed by Appellant and Betty Fisher. To avoid duplication, Appellant is not repeating the arguments relating to the Appointment and initial freeze orders, but she does not waive the underlying orders that precipitated these "freeze" orders.

⁴ Hereinafter referred as "Respondent" or "Bessie Huckabee". Appellant does not waive her contention that Respondent does not have standing. She is not a beneficiary of the estate, and there is a pending action for her removal as informally appointed administrator. (See S.C. Code Ann. § 62-1-201(20) ["interested party" definition]; S.C. Code § 62-5-309; S.C. Code Ann. § 62-7-706 [beneficiary may seek removal].)

evidence to support them].)

As such, the record shows the Orders violate the principles set forth in Rule 65 and under Constitutional Principles enunciated in the Due Process and Equal Protection clauses.

Appellant respectfully contends that these principles mandate reversal of both Orders.

II.

STATEMENT OF FACTS

On February 25, 2009, Alice Shaw Baker died. Her great niece, Appellant, had helped her since involuntary commitment proceedings were initiated without notice to her family. When it was discovered they conserved her, Appellant rushed to her side. After a hearing, on October 25, 2008, Appellant was appointed her guardian and conservator.

Ms. Shaw Baker had worked hard her entire life. She demonstrated a life long commitment to charitable activities, especially animal charities. Prior to her death, she revoked her will and reaffirmed her desire that all of her property benefit these animal charities.

She was greatly loved by her family, evidenced by Appellant's repeated travels from California to help Ms. Shaw Baker maintain her independence and avoid institutionalization. Since Ms. Shaw Baker's death, Appellant has executed her duties

to protect and preserve Ms. Shaw Baker's estate pending final determination of the proper appointment of the personal representative (or special administrator) by the South Carolina Supreme Court.

On July 17, 2009, Appellant filed a Motion for Approval of Fees and Expenses as Guardian and Conservator. No objection was filed. The Probate Court never ruled on the motion.

Despite the pending Appeal before the Supreme Court, on August 17, 2011, the Probate Court heard Respondent's Motion for Appointment of Special Fiduciary. Respondent presented no evidence, testimony, or request for judicial notice. The Probate Court refused to allow Appellant to testify. Thereafter, the court appointed J. Heyward Harvey, Esquire as Special Fiduciary without notice to all parties. This matter is currently on appeal. (See case nos. 2011-CP-10-7819 and 2011-CP-10-7821)

On October 7, 2011, Appellant filed a "Renewed Motion for Approval of Fees and Expenses as Guardian and Conservator" ("Renewed Motion").

Attached to her Renewed Motion, Appellant re-submitted an itemization of 465.85 hours she spent assisting Ms. Alice Shaw-Baker prior to and during Appellant's formal appointment as Guardian and Conservator. She also itemized expenses she incurred. Again, no objections were filed by any party. Nevertheless and again, the court did not grant a hearing on the matter.

On October 14, 2011, this Court issued the formal Order denying Appellant's Renewed Motion, and issuing sua sponte orders freezing Appellant's Bank accounts and the denying certain of Ms. Fisher's other Motions.

On October 20, 2011, Appellant filed two motions seeking to alter or amend the Orders pursuant to Rule 59. These motions were decided without a hearing.

On November 9, 2011, the Probate Court signed two separate orders denying Appellant's rule 59 motions. Appellant's counsel received written notice of the orders on November 21, 2011.

On November 21, 2011, Appellant timely filed her "Notice of Intent to Appeal."⁵

The time for filing said *Notice of Intention to file Appeal* is 10 days after written entry of notice, here November 21, 2011, on the Rule 59 motion.

Therefore, said time was extended pursuant to SCRCP 59(f) and SCACR 203(b)(1) by Appellant's Motion for Reconsideration. (See also Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004) ("A timely post-trial motion, including a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such motion."))

III.

PROBATE ORDERS

1. *Orders Denying Renewed Motion for Approval of Fees and Expenses of Guardian and Conservator.*

The order of October 14, 2011 was a cumulative order regarding all of the Motions, i.e. "Motions for Reconsideration and Opposition of Probate Court Order Appointing Special Fiduciary, Motion to Strike, and Renewed Motion for Approval of Expenses of Guardian and Conservator."

In said order, the Probate Court made no findings regarding the Motion, and denied it in its entirety.

2. *Orders after Rule 59 Motion on Fees Petition*

The Probate Court's order dated November 9, 2011, "Denial of Motion to Alter or Amend Denial of Renewed Motion for Approval of Fees and Expenses of Guardian and Conservator" made the following Finding of Facts and Conclusions of Law in pertinent part:

"This matter comes before the Court on a motion to Alter or Amend Denial of Renewed Motion for Approval of Fees and Expenses of Guardian and Conservator dated October 20, 2011 by Lisa Fischer [sic], by and through her attorney, John Hughes Cooper, Esq. Lisa Fischer [sic] moves this Court to Alter or Amend its October 14, 2011 denial of her Renewed Motion for Approval of Fees and Expenses of Guardian and Conservator.

At this time, having reviewed the Motion and the record, the Court hereby denies Lisa Fischer's [sic] Motion to Alter or Amend Denial of Renewed Motion for Approval of Fees and Expenses of Guardian and Conservator

dated October 20, 2011. The Court's position remains that Lisa Fisher's fiduciary role as Guardian and Conservator was terminated by this Court's Order dated May 11, 2009, and that Ms. Fischer withdrew monies from the Conservatorship account without having the legal fiduciary authority to do so. There is ongoing litigation in the Estate of Alice Shaw-Baker and the court has appointed J. Heyward Harvey, Esq. As Special Fiduciary during the pendency of the litigation to take control of all accounts in the name of Alice Shaw-Baker, and until Attorney Harvey takes control of the said accounts, no further transactions are authorized. THEREFORE, IT IS ORDERED ADJUDGED AND DECREED THAT: The Motion to Alter or Amend Denial of Renewed Motion for Approval of Fees and Expenses of Guardian and Conservator dated October 20, 2011 is hereby denied." (Emphasis added)

3. Orders after Rule 59 Motion re: Orders Freezing Assets

The Probate Court order dated November 9, 2011, entitled "Denial of Motion to Alter or Amend the Orders Freezing Assets Dated October 14, 2011:

"..At this time, having reviewed the Motion and the record, the Court hereby denies Lisa Fischer's [sic] Motion to alter or Amend Orders Freezing Assets dated October 20, 2011. The Court's position remains that Lisa Fisher's fiduciary role as Guardian and Conservator was terminated by this court's Order dated May 11, 2009, and that Ms. Fischer [sic] withdrew monies from the Conservatorship account without having the legal fiduciary authority to do so.

THEREFORE, IT IS ORDERED ADJUDGE AND DECREED THAT:

1. The Motion to Alter or Amend the Orders Freezing Assets dated 10/20/11 is hereby denied;
2. That any assets in the name of the Alice Shaw-Baker Conservatorship and Lisa Fischer conservatorship or individually remains frozen;

3. That J. Heyward Harvey retains control of the assets in the name of the Alice Shaw Baker Conservatorship and Lisa Fischer [sic] conservatorship." (Emphasis added

IV. ARGUMENT

A. Standard of Review

It is well settled that the standard of review for Appeals from the probate court are governed by the provisions of the Probate Code. (Matter of Howard, 315 S.C. 356, 360, 434 S.E.2d 254, 256 (1993).) The Probate Code provides that a final order or decree of the probate court may be appealed to the circuit court. (S.C. Code Ann. § 62-1-308 (2009).)

Moreover, an issue regarding statutory interpretation is a question of law. (Univ. of S. Cal. v. Moran, 365 S.C. 270, 274-75, 617 S.E.2d 135, 137 (Ct. App. 2005)

If the proceeding in the Probate Court is in the nature of an action at law, neither the circuit court nor the appellate court may "disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them." (Neely, *supra*, at 349-50).

Additionally, where a case raises a novel question of law, The court is free to decide the

question with no particular deference to the lower court. (I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 718-19 (2000).)

As will be set forth herein, the court failed to set the matter for hearing and there was no objection to the request for fees, therefore "there is no evidence to support" the court's decision to deny Appellants's fees. (Patel v. Patel, 359 S.C. 515, 529, 599 S.E.2d 114, 121 (2004) [An abuse of discretion occurs when the ruling lacks evidentiary support or is controlled by an error of law.]) And certainly no evidence to justify the deprivation of compensation for services rendered by Appellant, nor for an order intended to freeze her assets.

As in Browne, these interests are property for purposes of the Takings Clause, therefore Appellant contends deprivation of fees and expenses incurred on behalf of Ms. Shaw Baker and the subsequent Order freezing Assets must be reversed.

//

//

//

//

B. *The Probate Court Abused its Discretion by Depriving Appellant of her Right to Reasonable Compensation and Reimbursement of Fees by Denying her Request for Fees*

1. Legal Authority

The South Carolina Probate Code provides for reasonable compensation to Guardians and Conservators appointed in protective proceedings.

With regard to Conservators, S.C. Code Ann. § 62-5-414 provides, "If not otherwise compensated for services rendered, any visitor, lawyer, physician, conservator, or special conservator appointed in a protective proceeding is entitled to reasonable compensation from the estate, as determined by the court (emphasis added)."

With regard to Guardians, S.C. Code Ann. § 62-5-312(b) provides in pertinent part, "Any guardian of one for whom a conservator also has been appointed shall control the custody and care of the ward and is entitled to receive reasonable sums for his services and for room and board furnished to the ward as agreed upon between him and the conservator, provided the amounts agreed upon are reasonable under the circumstances (emphasis added)."

In Dowaliby v. Chambless, 344 S.C. 558, 544 S.E.2d 646 (Et. App. 2001), the court stated that, "an appointed guardian may be able to recover expenses prior to the formal appointment if such expenditures benefitted the ward."

In the instant case, Appellant was appointed Guardian and Conservator and served Ms. Shaw-Baker in both capacities. Ms. Fisher assisted Ms. Shaw-Baker to remain in her home, and to avoid placement in an institution. This was a great benefit to Ms. Shaw-Baker, who often expressed that remaining in her home was her primary goal.

As set forth above, Appellant spent in excess of 25 hours a week to help Ms. Shaw Baker remain in her home, traveled from California, and ensured that the Probate Court's orders for expert examinations and 24 hour care were followed. To deprive Appellant of these fees is contrary to the public policy and purpose to protect and assist "protected persons." (S.C. Code Ann. § 62-5-101)

//

//

2. The Services Provided to Alice Shaw Baker constituted "Property interests" protected under the Takings Clause.

Appellant contends that the services provided pursuant to the appointment of Guardians and Conservators to protect and assist the Elderly, i.e. protected person under S.C. Code § 62-5-101, implicates the Takings Clause of the Fifth Amendment to the United States Constitution. (See U.S. Const. amend. V ["[N]or shall private property be taken for public use without just compensation"] and South Carolina Constitution, Article 1, § 13.)

Appellant's services to Ms. Shaw Baker constituted a "property interest" entitling her to just compensation. As referenced above, the court in Brown, supra, implicates the Takings Clause mandating reversal, in light of Appellant's statutory entitlement to compensation for serving as Guardian and Conservator.

As the Brown court explained in relation to attorneys, a Conservator and/or Guardian are "conscripted" for the public good, and as the Probate Court's Order in effect requires Appellant to "donate funds out-of-pocket" to help a protected person (even if willingly for the benefit of a relative, as here),

Appellant is deprived of property in the form of money. Appellant respectfully argues that this implicates Fifth Amendment protection in conservatorship and guardianship proceedings. (See for example, State v. Smith, 747 P.2d 816, 842 (Kan. 1987); see also Armstrong v. United States, 364 U.S. 40, 49 (1960) (noting that the Takings Clause was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole").

C. The Probate Court's denial of Appellant's Request for Approval of Fees and Expenses is in Violation of the Equal Protection Clause

Appellant contends that denial of fees and expenses to Appellant treats her differently from other similarly situated citizens who have served as Guardians and Conservators and thereby violates the Equal Protection Clauses of the United States and South Carolina Constitutions. U.S. Const. Amend. 14; S.C. Const., Art. I, § 3.

Moreover, in this case, Appellant is the only person being deprived compensation for her services and reimbursement for funds expended on behalf of Ms. Shaw Baker. All other previously appointed individuals

received compensation from Ms. Shaw Baker's monies. The Probate Court approved Guardianship fees for Walter Kaufman, who served as Co-Guardian for Ms. Shaw-Baker in the early stages of this case, at a rate of \$120 per hour, in excess of \$4300.00. All other individuals involved with the guardianship/conservatorship received payment for this pre-death services, including Jane Orenstein, Mac Gibson, Esquire, the in-home caregivers, and Court appointed counsel, Peter Kouten (now, Bessie Huckabee's counsel). Appellant continues to object to Mr. Kouten's representation, due to the non-waivable conflict of interest.

(Even Appellant's counsel received payment of their attorney fees after noticed hearing.)

Most of these fees were paid without any formal petition and/or service of Request on Appellant.

It is well settled that "A judge's impartiality might reasonably be questioned when his [or her] factual findings are not supported by the record." (Simpson v. Simpson, 377 S.C. 519, 560 S.E.2d 274, (S.C.App. 02/08/2008).)

In this instance, this court did not make any factual findings regarding the denial of Appellant's motion. Appellant was the person who came to her

great-aunt's aid, when her power of attorney (Bessie Huckabee) renounced her duties, turned Ms. Shaw Baker into Adult Protective Services, and abandoned her.

Appellant showed her love and respect for Ms. Shaw Baker by traveling repeatedly to see her, help her, and attend to her needs. Appellant did not charge for all of the time expended to help her aunt, nor did she request fees for the travel fees for her mother, so that Ms. Shaw Baker had family present for Christmas. However, the failure to seek fees for the extra time and effort she expended did not mean that Appellant was waiving her fees.

Furthermore, only Appellant's counsel fees were approved by a noticed hearing, all other individuals involved (e.g. Walter Kaufman, Jane Orenstein, Peter Kouten) received approval of their fees without hearing, and without any opportunity to object. Here, Appellant filed a proper motion for approval of her fees, which this court did not rule on, and now denies said motion without explanation. This mandates reversal.

//

//

//

D. *The Probate Court Abused its Discretion by issuance of an Order intending to Freeze not only the decedent, Alice Shaw-Baker's, assets, but Appellant's*

1. Legal Authority Governing Freezing of Bank Accounts

Rule 65 (a) provides that "No temporary injunction shall be issued without notice to the adverse party."

(Emphasis added)

Subsection (b) also provides: "No temporary restraining order shall be granted without notice of motion for the order to the adverse party unless it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon." (Emphasis added).

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, 5, 623 S.E.2d 833, 835 (2005) [interpreting order freezing assets as an injunction].)

Under the South Carolina Code, injunctions are immediately appealable. To obtain an injunction, a party must demonstrate irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law.

(See County of Richland v. Simpkins, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002).)

In this case, no party requested these orders freezing the assets, there was no chance for irreparable harm (i.e. Appellant is bonded), and certainly the issues of likelihood of success and absence of an adequate remedy are not even considered in the orders or in the originating Motion for Appointment of Special Fiduciary.

Therefore, the law governing injunctions precludes any sua sponte injunctions, especially when there are no specific facts justifying it and no hearing on the matter. In this case, the broad language of the order also intends to implicate Appellant's personal accounts, which Appellant could not have foreseen. Appellant has been deprived of a proper hearing on the matter.

2. Appellant was Required to Retain Estate Property to a "Duly Appointed" Personal Representative.

Contrary to the Probate Court's conclusion that Lisa Fisher lacked "legal fiduciary authority" to protect and preserve Alice Shaw Baker's assets, the South Carolina Probate Code Section 62-5-425 (d) 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 cotrustee 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)

This emphasizes the statutory scheme which provides for a continuing duty of a fiduciary/conservator to hold property until it can be delivered to the proper person.

The well settled legal authority governing Statutory interpretation is:

"Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers." Collins Music Co., Inc. v. IGT, 365 S.C. 544, 550, 619 S.E.2d 1, 3 (Ct. App. 2005) (quoting TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998)). Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention. Jones, 364 S.C. at 230, 612 S.E.2d at 723 (citing Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000))."

Here, in light of the orders extending the time to turn over the assets of the Conservatorship, Appellant has at all times acted appropriately, and in furtherance of the statutory scheme to protect the property of Ms. Shaw Baker. The Probate Court's failure to acknowledge the continuing duty to protect the assets is contrary to the accepted duty of all fiduciaries, and is at the core of a "fiduciaries" standard.

3. The Doctrine of Laches Supports Appellant's Continued Protection of the Estate

Bessie Huckabee cannot now object that the Estate is not protected. Almost three years have passed since Ms. Shaw Baker's death. Had Appellant not acted pursuant to the statutory duties outlined in 62-5-425 (d), and protected the Estate, it would have sustained losses and been contrary to Ms. Shaw Baker's intent.

Under Hallums v. Hallums, 296 S.C. 195, 198-99, 371 S.E.2d 525, 527 (1988), the doctrine of "Laches" is defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." (Emphasis added)

Here, Bessie Huckabee knew that Ms. Shaw Baker owned real property, required insurance, and was in fact, the named Agent under both the Power of attorney for finances and healthcare. Bessie Huckabee abandoned Ms. Shaw Baker in her time of need, so Appellant helped her great aunt during her life and made sure that at her death and pending the proper determination of her Wishes, these assets were not lost.

Therefore, Bessie Huckabee not only waived the argument that the property was not being properly taken care of, but consented to Appellant's continued protection of the estate pending final determination on Appeal by the doctrine of laches.

The disingenuous argument that Appellant was required to merely hold the assets pending transfer ignores the potential problems that would have resulted:

- A. No taxes would have been paid on the property leaving it vulnerable to a Tax sale;
- B. Insurance would have lapsed;
- C. No Estate tax returns would have been filed subjecting the Estate to fines and penalties;

- D. And the value of the real property would have been dissipated.

4. The Probate Court Lacks Jurisdiction to Hear this matter, in light of the fact that the Circuit Court has Control over the Estate Matter and the Appeal is currently before the Supreme Court.

Since this Probate matter was removed to the Circuit Court, once the conservatorship was terminated, any recourse regarding the assets would be in the Circuit Court.

(Emphasis added)

However, Bessie Huckabee forced this action back to this Probate Court and avoid the very protections that Alice Shaw Baker's heir at law, Betty Fisher, sought by Removal of the Probate action to the Circuit Court.

This court's jurisdiction under South Carolina Probate Code 62-5-102 ended upon the death of Ms. Shaw Baker, and now authority is conferred in the Circuit Court as it administers the decedent's probate.

//

//

//

*E. Due Process, Equal Protection, and the Takings Clauses
Under the Constitution Prohibit the Imposition of the
Order Freezing Assets*

The initial orders of October 14, 2011, and thereafter on November 9, 2011, improperly seek to freeze Appellant's bank accounts, even those not held on behalf of the conservatorship. These orders violate Rule 65 standards for injunctive relief. They were made without notice, include factual findings where no evidence was produced at the hearing and seek to invade Lisa Fisher's financial privacy and interfere with her ability to maintain her expenses.

The orders are in violation of Due Process laws. The requirements of due process include notice and an opportunity to be heard. (S.C. Dept of Soc. Serv. v. Holden, 319 S.C. 72, 78, 459 S.E.2d 846, 849 (1995).)

Ordering the freezing of these accounts without a hearing or evidence also denies Appellant's equal protection, and treats her differently from other similarly situated citizens who have served as Guardians and Fiduciaries thereby violates the Equal Protection Clauses of the United States and South Carolina Constitutions. U.S. Const. Amend. 14; S.C. Const., Art. I, § 3.

Freezing Appellant's personal and trust fund accounts also constitute a taking under both the South Carolina and

United States Constitutions. (See U.S. Const. Amend. V; S.C. Const. Art. I, § 13(A); See *Ex Parte Brown*, 393 S.C. 214, 711 S.E.2d 899 (2011) (holding that a court-appointed attorney's service is property for purposes of the Takings Clause).

V.
CONCLUSION

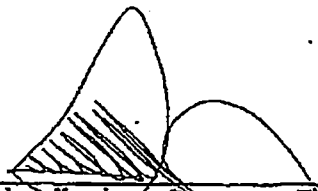
It doesn't take the wisdom of Solomon to know that Appellant has an obligation to protect the life works of Alice Shaw Baker.

In this case, no party requested any orders freezing Ms. Shaw Baker's assets, and pending final resolution of this matter, the Orders place Ms. Shaw Baker's property in jeopardy. Appellant has maintained the property, and ensured that it is safe and secure. Allowing the property to sit, without being maintained, while strangers to the Estate, here-- Bessie Huckabee, fight over property that rightfully belongs to Alice Shaw Baker's intended beneficiaries, Animal Charities, would be harmful.

While this fight takes priority for Appellant, the Probate Court's second order denying her fees and costs will have the same harmful effect.

Appellant respectfully prays that this Honorable Court
reverse the Orders in this matter.

January 5, 2012



John Hughes Cooper, Esquire
P.O. Box 395
Sullivan's Island, SC 29482
(843) 883-9099
Attorney for Appellant

**IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2011-CP-10-7819**

NOTICE OF APPEARANCE

V.

**BESSIE HUCKABEE, as Personal
Representative,
Defendant,
In the Matter of Alice Shaw Baker.
2008-GC-10-088**

Respectfully submitted,

Peter A. Kouten, Esquire
Kouten Law Firm, LLC
PO Box 340
Johns Island, SC 29457
ATTORNEY FOR DEFENDANT

537'

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

LISA FISHER

~~BETTY FISHER,~~
Plaintiff,

v.

BESSIE HUCKABEE, as Personal
Representative,
Defendant.

In the Matter of Alice Shaw Baker.
2008-GC-10-088

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2011-CP-10-7821

NOTICE OF APPEARANCE

FILED
2014 MAR 20 PM 12:16
CLERK OF COURT
THE J. ARISTOTLE

The undersigned hereby enters his appearance as counsel of record for Defendant Bessie Huckabee, as Personal Representative for the Estate of Alice Shaw Baker in the above captioned case. All papers to be served on the Defendant should be delivered to the undersigned at the address set out below.

Respectfully submitted,



Peter A. Kouten, Esquire
Kouten Law Firm, LLC
PO Box 340
Johns Island, SC 29457
ATTORNEY FOR DEFENDANT

Charleston, South Carolina
March 7, 2014

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

LISA FISHER,
Plaintiff,)

v.)

BESSIE HUCKABEE, as Personal
Representative,)
Defendant.)
In the Matter of Alice Shaw Baker.)
2008-GC-10-088)

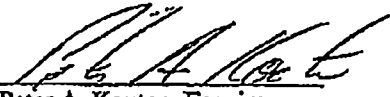
IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2011-CP-10-8657

NOTICE OF APPEARANCE

2014 MAR 11 PM 1:23
FILED
JULIE J. HIRSTROM
CLERK OF COURT
BY 

The undersigned hereby enters his appearance as counsel of record for Defendant Bessie Huckabee, as Personal Representative for the Estate of Alice Shaw Baker in the above captioned case. All papers to be served on the Defendant should be delivered to the undersigned at the address set out below.

Respectfully submitted,


Peter A. Kouten, Esquire
Kouten Law Firm, LLC
PO Box 340
Johns Island, SC 29457
ATTORNEY FOR DEFENDANT

Charleston, South Carolina
March 7, 2014

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Circuit Case No. 2011-CP-10-7819

FILED
2014 SEP 19 PM 12:22
JULIE L. ARMSTRONG
CLERK OF COURT
BY

BETTY FISHER Appellant

v.

BESSIE HUCKABEE Respondent

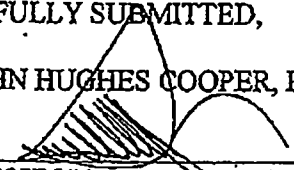
NOTICE OF APPEAL

Betty Fisher appeals the judgment of the Honorable J.C. Nicholson, Jr., dated August 14, 2014; and filed August 18, 2014, affirming the Probate Court order of September 28, 2011 in 2008-GC-10-088 appointing a Special Fiduciary, affirming the Probate Court order of October 14, 2011 in 2008-GC-10-088 denying Fisher's Motion to Set Aside Void Probate Court Order, and ending the Circuit Case. Appellant received written notice of entry of this judgment on August 22, 2014.

September 19, 2014

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By: 

JOHN HUGHES COOPER, ESQUIRE

Federal Court ID 298

South Carolina Bar 1387

State Bar of Georgia 185986

1476 Ben Sawyer Blvd. Ste. 7

Mount Pleasant, SC 29464

shiplaw@jhcooper.com

843-883-9099; fax 843-883-9335

ATTORNEYS FOR APPELLANT

Other Counsel of Record:

Peter A. Kouten, Esquire

P.O. Box 340

Johns Island, SC 29457

843-670-3919

Attorney for Respondent

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Circuit Case No. 2011-CP-10-7821

FILED
2014 SEP 19 PM 12:23
JULIE J. AUSTIN
CLERK OF COURT
BY

LISA FISHER Appellant

v.

BESSIE HUCKABEE Respondent

NOTICE OF APPEAL

Lisa Fisher appeals the judgment of the Honorable J.C. Nicholson, Jr., dated August 14, 2014, and filed August 18, 2014, affirming the Probate Court order of September 28, 2011 in 2008-GC-10-088 appointing a Special Fiduciary and denying Lisa Fisher's Motion to Strike and Opposing the Motion Appointing Special Fiduciary, affirming the Probate Court order of October 14, 2011 in 2008-GC-10-088 denying Fisher's Motion for Reconsideration of the Court's Order of September 28, 2011, ordering that Appellant Fisher has thirty (30) days from the date of the August 14, 2014 judgment to turn over estate assets to the appointed special Fiduciary, Heyward Harvey, and ending the Circuit Case. Appellant received written notice of entry of this judgment on August 22, 2014.

September 19, 2014

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By:

JOHN HUGHES COOPER, ESQUIRE

Federal Court ID 298

South Carolina Bar 1387

State Bar of Georgia 185986

1476 Ben Sawyer Blvd. Ste. 7

Mount Pleasant, SC 29464

shiplay@ihcooper.com

843-883-9099; fax 843-883-9335

ATTORNEYS FOR APPELLANT

Other Counsel of Record:

Peter A. Kouten, Esquire

P.O. Box 340

Johns Island, SC 29457

843-670-3919

Attorney for Respondent

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Circuit Case No. 2011-CP-10-8657

FILED
2014 SEP 19 PM 12:22
JULIE J. ARMSTRONG
CLERK OF COURT

LISA FISHER Appellant

v.

BESSIE HUCKABEE.....Respondent

NOTICE OF APPEAL

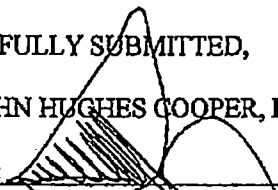
Lisa Fisher appeals the judgment of the Honorable J.C. Nicholson, Jr., dated August 14, 2014, and filed August 18, 2014, affirming the Probate Court order of November 9, 2011 in 2008-GC-10-088 denying Appellant's motion to amend the probate court's order freezing the estate assets, affirming the Probate Court order of November 9, 2011 in 2008-GC-10-088 denying the Appellant's motion to amend the court's order denying the approval of fees and expenses of guardian and conservator, and ending the Circuit Case. Appellant received written notice of entry of this judgment on August 22, 2014.

September 19, 2014

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By:


JOHN HUGHES COOPER, ESQUIRE

Federal Court ID 298

South Carolina Bar 1387

State Bar of Georgia 185986

1476 Ben Sawyer Blvd. Ste. 7

Mount Pleasant, SC 29464

shiylaw@jhcooper.com

843-883-9099; fax 843-883-9335

ATTORNEYS FOR APPELLANT

Other Counsel of Record:

Peter A. Kouten, Esquire

P.O. Box 340

Johns Island, SC 29457

843-670-3919

Attorney for Respondent

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Circuit Case No. 2011-CP-10-7821

FILED
2014 SEP 19 PM 12:22
JULIE J. AUSTIN
CLERK OF COURT

BETTY FISHER Appellant

v.

BESSIE HUCKABEE.....Respondent

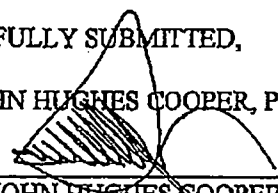
PROOF OF SERVICE

I certify that I have served the Notice of Appeal upon Respondent Bessie Huckabee by depositing a copy of it in the United States Mail, postage prepaid, on September 19, 2014, addressed to her attorney of record Peter A. Kouten, Esquire, P.O. Box 340, Johns Island, SC 29457.

September 19, 2014

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By: 

JOHN HUGHES COOPER, ESQUIRE

Federal Court ID 298

South Carolina Bar 1387

State Bar of Georgia 185986

1476 Ben Sawyer Blvd. Ste. 7

Mount Pleasant, SC 29464

shiplaw@jhcooper.com

843-883-9099; fax 843-883-9335

ATTORNEYS FOR APPELLANT

STATE OF SOUTH CAROLINA IN THE PROBATE COURT

COUNTY OF CHARLESTON 2008-GC-10088

IN THE MATTER OF ALICE SHAW-BAKER

BEFORE: THE HONORABLE TAMARA C. CURRY

DATE: August 17, 2011

TIME: 10:34 a.m.

LOCATION: Charleston County Probate Court
100 Broad Street, Room 3C
Charleston, SC

REPORTED BY: Ann P. Harris, NCRA Merit Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

Fast, Accurate & Friendly

Charleston, SC	Hilton Head, SC	Myrtle Beach, SC
(843) 722-8414	(843) 785-3263	(843) 839-3376

Columbia, SC	Greenville, SC	Charlotte, NC
(803) 731-5224	(864) 234-7030	(704) 573-3919

1 APPEARANCES OF COUNSEL:

2 ATTORNEYS FOR THE PETITIONER
3 BESSIE HUCKABEE:

4 KOUTEN LAW FIRM, LLC
5 BY: PETER A. KOUTEN
6 1363 River Road
7 Johns Island, SC 29455
8 (843) 559-4102
9 pkouten@gmail.com

10 ATTORNEYS FOR THE CONSERVATOR
11 LISA FISHER:

12 LAW OFFICE OF JOHN HUGHES COOPER
13 BY: JOHN HUGHES COOPER
14 1808 Middle Street
15 Sullivan's Island, SC 29482
16 (843) 883-9335
17 shiplaw@jhcooper.com

18 (INDEX AT REAR OF TRANSCRIPT)

19
20
21
22
23
24
25

Page 1 STATE OF SOUTH CAROLINA IN THE PROBATE COURT COUNTY OF CHARLESTON 2008-GC-10088 IN THE MATTER OF ALICE SHAW-BAKER BEFORE: THE HONORABLE TAMARA C. CURRY DATE: August 17, 2011 TIME: 10:34 a.m. LOCATION: Charleston County Probate Court 100 Broad Street, Room 3C Charleston, SC REPORTED BY: Ann P. Harris, NCRA Merit Reporter A. WILLIAM ROBERTS, JR., & ASSOCIATES Fast, Accurate & Friendly Charleston, SC Hilton Head, SC Myrtle Beach, SC (843) 722-8414 (843) 785-3263 (843) 839-3376 Columbia, SC Greenville, SC Charlotte, NC (803) 731-5224 (864) 234-7030 (704) 573-3919	Page 3 1 THE COURT: Ladies and gentlemen, this 2 is case number 2008-GC-10-008 in reference to Alice 3 Shaw Baker. We have Attorney Peter Kouten, who has 4 filed the motion with the Court to appoint a 5 special fiduciary for the conservatorship assets. 6 Are there any preliminary matters we 7 need to begin with? 8 MR. COOPER: Your Honor, I would remind 9 the Court that on May 18th, we filed a motion for a 10 90-day extension, which is still before the Court. 11 Mr. Kouten objected in his filing to that, and, of 12 course, Mr. Kouten filed his motion to appoint a 13 special fiduciary. We have on June 1st filed a 14 motion to strike Mr. Kouten's motion. So there is 15 actually three motions before the Court. 16 THE COURT: We didn't notice the other 17 two. Are you all waiving notice on the other two 18 issues? The notice we sent out was just for that 19 one issue, even though those other two matters have 20 been filed before the Court. Are you all ready to 21 argue the other two motions? 22 MR. KOUTEN: Judge, my motion was in 23 response to the motion for extension, so we will 24 waive any notice if we want to hear it today. 25 THE COURT: That's fine. Thank you.
Page 2 1 APPEARANCES OF COUNSEL: 2 ATTORNEYS FOR THE PETITIONER 3 BESSIE HUCKABEE: 4 KOUTEN LAW FIRM, LLC 5 BY: PETER A. KOUTEN 6 1363 River Road 7 Johns Island, SC 29455 (843) 559-4102 pkouten@gmail.com 8 ATTORNEYS FOR THE CONSERVATOR 9 LISA FISHER: 10 LAW OFFICE OF JOHN HUGHES COOPER 11 BY: JOHN HUGHES COOPER 12 1808 Middle Street 13 Sullivan's Island, SC 29482 14 (843) 883-9335 15 shiplaw@jhcooper.com 16 17 (INDEX AT REAR OF TRANSCRIPT) 18 19 20 21 22 23 24 25	Page 4 1 Are you ready to proceed? 2 MR. KOUTEN: I am, your Honor. Thank 3 you. 4 May it please the Court, Peter Kouten 5 for personal representative, Bessie Huckabee. Your 6 Honor, on May 11th, 2009, this Court signed an 7 order discharging Lisa Fisher from her duties as 8 conservator. That Court ordered that she provide 9 an estate accounting, including all account 10 activity. Finally, that order stated that the 11 conservator shall turn over the estate assets 12 within 15 days. That order, dated May 11th, 2009, 13 was not appealed and at this point could not be 14 appealed. 15 The conservator did, however, 16 subsequent to execution of the Court's order, seek 17 a motion for an extension in delivering the estate 18 assets to the personal representative. That first 19 extension was June of 2009. From there, the 20 respondent filed a series of motions for a 21 extension indicating that the conservator wanted to 22 hold the estate assets so that they can turn over 23 those assets to the proper party. 24 The issue here is that the conservator, 25 who has been discharged by this Court, has been

Page 5 1 continuing her activities as conservator without 2 this Court's authority. The conservator filed the 3 final accounting on May 27th, 2009, which was 4 required by this Court. From that time, over 5 two years ago, the conservator took no action to 6 follow up with the Court to show that the funds 7 were still properly being accounted for. This 8 Court asked the conservator to file these 9 subsequent accountings, and when she did finally 10 respond to the Court's request, it became clear 11 that the discharged conservator did not cease in 12 her actions as conservator. 13 What we would have expected, in 14 addition to the timely filing of these annual 15 accountings, is possible references to interest 16 earned on accounts. What we did find when the 17 discharge conservator did finally file her 18 accounting is that she improperly amended her final 19 accounting, which ran through her date of 20 discharge. 21 THE COURT: She improperly what? 22 MR. KOUTEN: She amended her 23 accounting. She did file a final accounting on 24 May 27th, 2009, as was required by this Court. It 25 ran through May 26th, 2009, and that is labeled	Page 7 1 raise the issue about whether or not annual 2 accountings were filed, and since that time, as he 3 has just stated, they have been filed, but I think 4 it is beyond the scope of this hearing to get into 5 the merits of whether or not those accountings are 6 accurate and those issues. That seems to be way 7 beyond -- at some point there should be a hearing 8 if there are contested issues about whether the 9 accountings are accurate or inaccurate, but this 10 doesn't seem to be the place for that, and so I 11 would object to getting into those issues. Thank 12 you, your Honor. 13 THE COURT: Attorney Kouten, your 14 response? 15 MR. KOUTEN: Your Honor, I would 16 respond in saying that is exactly correct. We 17 don't know whether these accountings are accurate. 18 What we do know is that -- 19 THE COURT: Your argument to his 20 response in limiting -- 21 MR. KOUTEN: They are filed with the 22 Court. They weren't part of the Court's file when 23 we filed our motion. The basis of appointing a 24 special fiduciary is directly related to the fact 25 that activity is continuing in this account,
Page 6 1 final accounting. When responses were made to this 2 Court to indicate that those funds being held in 3 trust were actually still there, she filed an 4 amended accounting that changed the dates, which 5 included the final accounting, and then she filed 6 an accounting for 2010. The problem that we have, 7 your Honor, is not only was that accounting 8 improperly amended, it ran through May 29th -- or 9 May 26th, 2009, and it was labeled final 10 accounting. 11 Her next accounting, as someone who is 12 holding these funds in trust, would be from 13 May 27th, 2009, until the end of the year. So that 14 is an improper filing. 15 In addition to that, your Honor, by 16 filing that amended accounting, after her 17 discharge, she increased the disbursements from the 18 estate by a hundred thousand dollars. She 19 transferred 80,500 from the estate after her 20 authority ceased. She closed the bank account with 21 the Bank of America after her authority had ceased. 22 She executed documents with Smith Barney and 23 received those proceeds. 24 MR. COOPER: Your Honor, I have an 25 objection. Certainly Mr. Kouten in his motion does	Page 8 1 properly or improperly, and that they are necessary 2 to show that a special fiduciary is needed in this 3 case. 4 THE COURT: I am going to allow 5 limited, but what I am not going to allow is for 6 you to go into specificity, but your arguments as 7 to why a special fiduciary should be appointed but 8 not with specificity amounts and just generalities. 9 MR. KOUTEN: Thank you, your Honor. 10 So without specificity, there is 11 indication that since the conservator has been 12 discharged, there have been activities in those 13 accounts held in trust by the discharged 14 conservator. The conservator proceeds are to be 15 held in trust for the estate. The conservator 16 asked that she be allowed to hold these funds in 17 trust. She was discharged of all authority. She 18 didn't seek through this Court to maintain any 19 authority to act on behalf of the estate, and she 20 has been acting on behalf of the estate without 21 authority. We ask that the Court pursuant to 22 62-7-704(e) appoint a special fiduciary to accept 23 the estate assets and be given the authority to 24 administer, and that no extensions further be 25 granted. Thank you, your Honor.

Page 9 1 THE COURT: Thank you. 2 Attorney Cooper? 3 MR. COOPER: Yes, your Honor. May it 4 please the Court, as I said, there are three 5 motions pending before this Court, and the first 6 one was our motion for a 90-day extension filed on 7 May 13th. 8 On May 20th, Mr. Kouten objected to any 9 extension and moved to appoint a special fiduciary. 10 On June the 1st, we moved to strike 11 Mr. Kouten's motion based on Rule 81, which makes 12 the Rules of Civil Procedure applicable in Probate 13 Court. 14 MR. KOUTEN: Objection, your Honor. 15 THE COURT: What's the basis of your 16 objection? 17 MR. KOUTEN: We did not waive notice on 18 that, and there has been no hearing set for the 19 motion to strike. 20 MR. COOPER: I think a motion to strike 21 his motion that we are here on a hearing about 22 certainly has to be a part of this hearing. We 23 have moved to strike that because of his failure to 24 comply with Rule 11. 25 At any rate, I'll just state it for the	Page 11 1 it is also clear that he had a duty to consult with 2 us before filing a motion for appointment of a 3 special fiduciary. At any rate, as I say, there 4 are four filings before the Court, four different 5 dates of filings. The May 13th is at our request 6 for motion for a 90-day extension. 7 His objection and motion to appoint on 8 May 20th. 9 On June 1st, we moved to strike under 10 Rule 11(a) and Rule 81, and we also at that time 11 filed the annual accountings for 2008 and '09 and 12 2010, as requested by the Court. 13 And then the fourth filing was 14 August 12th. We had a motion -- an objection that 15 we filed to his motion for appointment. 16 Now, I would like to not reiterate 17 everything that is in our briefs, your Honor, 18 because you have those, but what I would like to do 19 is just comment briefly on the issue about the 20 annual accountings. Procedurally under Rule 81 and 21 Rule 11(a), Mr. Kouten's motion is defective 22 because it doesn't comply with Rule 11(a), and we 23 did file a motion to strike, which is the proper 24 course for us to take under the circumstances. 25 In the meantime, with regard to the
Page 10 1 record, your Honor, and you can decide. It seems 2 like it certainly should be taken up at a certain 3 time. 4 THE COURT: Give me a few seconds, 5 please. 6 MR. COOPER: Yes, your Honor. 7 THE COURT: Your motion to strike is 8 only related to the accounting and not to the 9 appointment of a special fiduciary? 10 MR. COOPER: Yes, your Honor. 11 THE COURT: I am going to allow you to 12 deal with your motion to strike, but it's only 13 limited -- the heading appears to be related to 14 both issues, but in terms of his request for the 15 appointment of a special fiduciary, he has a right 16 to file that motion with the Court. 17 Now, in regards to the accounting, I am 18 just trying -- what I'll do, I'll allow you to make 19 your arguments, and then the Court will just make a 20 determination. 21 MR. COOPER: Yes, your Honor. Let me 22 correct one thing. I believe my motion to strike 23 was as to both because he had a duty to consult as 24 to both. It is clear that the accounting, that 25 issue is moot because we filed the accountings, but	Page 12 1 annual accountings, they have been filed, and so 2 that issue is moot, and that's the substantive and 3 practical effect of that part of it, is that the 4 accountings have been filed as requested by the 5 Court. 6 Now, one other comment I would like to 7 make is that back in May of 2009, your Honor 8 discharged Ms. Fisher from further duties as 9 conservator. However, within a timely fashion she 10 did request an extension, which was granted, and 11 further extensions, and I think there has been six 12 extensions granted so far. And the reason for this 13 is that Ms. Fisher wants to be sure that she turns 14 the assets over to the proper party, and the reason 15 there is a question about the proper party is 16 because in the estate case, which your Honor will 17 remember has been removed to the Circuit Court, 18 then was on appeal to the Court of Appeals and is 19 now before the South Carolina Supreme Court on writ 20 for cert., involves the issues of whether or not 21 Bessie Huckabee is properly appointed as PR, 22 whether or not someone else should be appointed as 23 PR. There is also a motion pending for a special 24 administrator to handle the estate. And there is a 25 motion in the Circuit Court still with regard to a

Page 13 1 special administrator that has never been heard. 2 So it's our position, your Honor, that, you know, 3 until the Circuit Court, the Supreme Court, whoever 4 ultimately makes that decision about who is going 5 to handle the estate of Alice Shaw-Baker in the 6 estate case, Ms. Fisher can't just hand the assets 7 over to potentially the wrong person. 8 THE COURT: So let me ask you a 9 question. 10 MR. COOPER: Yes, your Honor. 11 THE COURT: The Court discharged her, 12 and so what we have been requesting are annual 13 accountings. Technically she is no longer able to 14 act in her fiduciary capacity as conservator. 15 There has never been a motion filed to have her 16 restored in the interim, so when we look at the 17 accountings, then everything should be status quo, 18 and there should be, other than interest, no 19 activity because she doesn't have the authority, 20 and no one has the authority to act on behalf of 21 the conservatorship because there is no more 22 conservatorship except the fact that those moneys 23 need to be accounted for. So when you look at and 24 one of the arguments has to do with the accuracy of 25 the balances in his petition. So why is there a	Page 15 1 turn over the assets. And that was granted. 2 THE COURT: Correct. 3 MR. COOPER: Obviously, during that 4 time, whether she is officially conservator, she is 5 responsible for those assets. 6 THE COURT: But legally, technically, 7 in an estate when a person is alive, you have 8 conservators appointed. Once that person dies, 9 those assets should go in the estate through either 10 a special administrator, a personal representative, 11 but there has to be someone legally in the middle 12 whether or not there is litigation or not. And so 13 my question is in what capacity is she legally 14 acting if she is no longer the conservator and 15 those assets are not with either a special 16 administrator or personal representative? I 17 understand your argument about her responsibility, 18 but legally, in what authority are these payments 19 being done when there should be a legal entity who 20 has the legal responsibility to deal with the 21 estate whether or not it is through the 22 conservatorship or the estate during the litigation 23 period that you all are currently in? And I really 24 think that that is the real issue in the midst of 25 the litigation.
Page 14 1 difference, other than interest, in the 2 conservatorship when she is now discharged and can 3 no longer act as conservator? 4 MR. COOPER: Well, your Honor, let me 5 just say that in addition to having these various 6 savings accounts, funds, bank accounts, those types 7 of things, there is also real estate involved. 8 THE COURT: Correct. But doesn't that 9 go to the argument why there needs to be someone 10 appointed in the interim so that -- like I am 11 looking at one of the accountings, and I am seeing 12 that there is some administration bond. Well, if 13 she is no longer the conservator and discharged, 14 should the bond be coming out of the estate? I see 15 home maintenance. Who technically has the 16 authority to deal with all of the payments, the 17 taxes, and the repairs if she is discharged, and 18 there technically is no conservator, and they are 19 not being paid out of the estate? 20 MR. COOPER: Your Honor, I see the 21 Court's concern. What Ms. Fisher has been doing in 22 good faith, in May of 2009, she was discharged as 23 conservator. 24 THE COURT: Correct. 25 MR. COOPER: She asked an extension to	Page 16 1 MR. COOPER: Your Honor, I don't 2 disagree that that is the issue. Ms. Fisher, who 3 is an attorney in California, who has been admitted 4 by the Court here to be involved in the estate 5 action, since she has been handling these, can she 6 speak to the Court? 7 THE COURT: No, this is a motion, and 8 this is really between the attorneys, and I just 9 want to know what your position is, legal position, 10 as to what her legal authority is to still disburse 11 moneys when in fact the conservatorship has -- when 12 she has been discharged, and the only thing the 13 Court has been looking for are the annual 14 accountings. 15 MR. COOPER: Well, let me ask the 16 question first. My question is, that I'm not 17 certain what the name of it is, but I know that -- 18 I know that the Court is going to hold her 19 responsible for the proper administration of those 20 assets and the protection of the estate, and 21 whether or not the Court wants to call that, you 22 know, an implied trusteeship, whatever, but she 23 certainly has a duty and is bonded to properly 24 administer those assets, and that is what she has 25 been trying to do.

Page 17

1 I would like to also comment that
 2 although a conservator is required annually to file
 3 an annual accounting, here we had extensions of
 4 time for her to turn over the assets, but she
 5 wasn't technically a conservator.
 6 THE COURT: And that is my question.
 7 So she is not technically the conservator. There
 8 is no personal representative legally who is -- who
 9 has the legal responsibility to still pay assets
 10 because when a person dies, technically it should
 11 be done through their estate and not through the
 12 conservatorship. So even if there is a contest,
 13 either she could have sought to be appointed the
 14 special administrator to pay the funds or to pay
 15 for the expenses or an independent third person,
 16 but in reality it should not be through the
 17 conservatorship because that person is deceased,
 18 and so really the funds should be in the estate
 19 division through either a third independent person
 20 but should not be held, and if it is held, it
 21 should be held in status quo until someone next
 22 door or in the estate division is appointed because
 23 the conservatorship technically should end at the
 24 time of death, and there technically is a
 25 discharge.

Page 18

1 MR. COOPER: Your Honor, let me just
 2 say that certainly what she has been doing is to
 3 maintain the assets in the status quo.
 4 THE COURT: But under what legal
 5 authority, because she doesn't have -- her
 6 certificates would have ended. Even though the
 7 Court has granted the extensions, the extension was
 8 not for the full conservatorship. It was just to
 9 turn the funds over and to do a final accounting,
 10 but funds are actually being written out, and so
 11 she is signing them under what authority? Is it
 12 still in the conservatorship checking account,
 13 which technically should have ended at death. And
 14 that is my question. In what capacity is she
 15 signing the checks, because the discharge says she
 16 no longer has a certificate of appointment
 17 indicating that she is a conservator once the Court
 18 did the discharge.
 19 MR. COOPER: I understand, your Honor.
 20 THE COURT: So is there still a
 21 conservatorship checking account that still exists?
 22 MR. COOPER: Yes, your Honor. I am
 23 told there is.
 24 THE COURT: You can continue.
 25 MR. COOPER: Okay. I would just like

Page 19

1 to point out to the Court that, you know, within a
 2 relative short time after the Court asked for the
 3 accountings, Ms. Fisher did the accountings, and
 4 they are filed with the Court, and they are
 5 presumed to be accurate, although certainly
 6 whenever this period ends and the assets are turned
 7 over, certainly there is going to be an opportunity
 8 for any interested parties that would be
 9 appropriate to challenge the accountings or
 10 challenge how the funds were handled or challenge
 11 any of the expenditures to make those objections,
 12 and there can be a hearing on it, and Ms. Fisher is
 13 fully bonded still to the one and a half times the
 14 value of the liquid assets in the estate. The
 15 assets are protected as a practical matter.
 16 If the Court would feel better
 17 appointing Ms. Fisher in some capacity other than
 18 conservator, we would certainly be open to that,
 19 but what we believe, your Honor, is that the assets
 20 are protected, the status quo of the house and the
 21 other assets have been preserved. Ms. Fisher, you
 22 know, has not done anything wrong. She has
 23 properly protected the estate assets until it can
 24 be determined by the Supreme Court and Circuit
 25 Court as to who they should be turned over to.

Page 20

1 And the choice for this Court is to
 2 interrupt the status quo by handing the assets over
 3 to a special fiduciary, as suggested by Mr. Kouten,
 4 or to continue the status quo where the assets are
 5 protected by Ms. Fisher's bond and where there's no
 6 wrongdoing been shown, and she has properly handled
 7 the assets throughout.
 8 I would say, your Honor, that you know,
 9 these extensions -- the Court has granted six
 10 extensions for her to continue to hold the assets.
 11 Surely the Court didn't think she was not going to
 12 pay the insurance on the house. Surely the Court
 13 didn't think she wasn't going to pay the legitimate
 14 expenses --
 15 THE COURT: Well, because I am not
 16 privy to what is happening with the estate, I had
 17 no way of knowing whether or not certain assets
 18 were being funneled through the estate and whether
 19 or not the Circuit Court had authorized -- what
 20 normally happens is the general payment, in order
 21 to secure the assets and make sure that the assets
 22 are not depleted. So I can't tell you that I was
 23 privy to what was happening in the estate division
 24 until, and so that's not an accurate statement.
 25 MR. COOPER: Well, I will just say

Page 21	Page 23
1 that, you know, certainly the property has to be 2 maintained in the interim, and that has been done. 3 THE COURT: Where is the litigation in 4 Circuit Court? There is no personal representative 5 appointed; am I correct? Or has there been one 6 appointed? 7 MR. COOPER: There was a personal 8 representative that was informally appointed in the 9 Probate Court. That was challenged in the Circuit 10 Court. 11 THE COURT: There was also a motion 12 made in the Circuit Court for appointment of a 13 special administrator. 14 THE COURT: Was a special administrator 15 appointed? 16 MR. COOPER: No, none of that happened, 17 and the whole thing went up on appeal to the Court 18 of Appeals, and it is now on cert. to the South 19 Carolina Supreme Court. There is still pending in 20 the Circuit Court, I believe, a motion to appoint 21 a special administrator or to have a separate 22 personal representative of Ms. Fisher — not 23 Ms. Lisa Fisher but Ms. Betty Fisher appointed, but 24 anyhow, there are motions for appointment of her as 25 personal representative. So the whole issue about	1 that motion. That particular motion, which granted 2 her the authority to do administrative acts and to 3 not disburse, and also to get bonded, that one 4 issue is on appeal. The Court of Appeals found in 5 favor of the lower court. The Court of Appeals 6 denied a rehearing. In the Court of Appeals 7 response and order, it said that those other 8 issues, which Attorney Hughes just said, this is a 9 pending motion for appointment of a special 10 administrator. It has not been heard. They 11 continue to argue to the higher courts that it has 12 been, and it is on appeal. The only thing on 13 appeal is the motion to reconsider the breadth and 14 width of her authority as personal representative. 15 MR. COOPER: I disagree with that, your 16 Honor, but I would just say that, you know — 17 THE COURT: So technically there is a 18 personal representative, but that is on appeal? 19 MR. COOPER: There has been an informal 20 appointment of a personal representative, and 21 without notice to the heirs that were in the 22 petition. In other words, when the — 23 MR. KOUTEN: Objection, your Honor. 24 The answer to the question is that there is a 25 personal representative. This is an argument that
Page 22	Page 24
1 who is going to serve has not been resolved. 2 That's the bottom line. It hasn't been resolved in 3 the Supreme Court, and it hasn't been resolved in 4 the Circuit Court. 5 THE COURT: And so the Circuit Court 6 didn't appoint anyone in the interim to do anything 7 in relation to the estate? 8 MR. KOUTEN: Bessie Huckabee is in 9 place. 10 THE COURT: So she is still personal 11 representative? 12 MR. KOUTEN: That's correct, your 13 Honor. 14 MR. COOPER: That is on appeal, your 15 Honor. 16 THE COURT: But technically she is 17 still personal representative? 18 MR. KOUTEN: That is correct. 19 THE COURT: With no authority to do 20 anything? 21 MR. KOUTEN: Well, that was the initial 22 appeal. That was the initial Court's ruling. We 23 sought modification of that. The Court granted 24 modification to allow her to do administrative 25 acts. That was the only thing that was hers as to	1 is not before this Court. 2 MR. COOPER: Can I be heard, your 3 Honor? 4 THE COURT: Yes, I am going to allow 5 him to speak. Yes, sir. 6 MR. COOPER: Thank you, your Honor. We 7 are directly on appeal right now in our — 8 THE COURT: You have already gone 9 through Circuit Court, Court of Appeals, and now 10 your current motion is before the Supreme Court? 11 MR. COOPER: Correct. And Mr. Kouten 12 has his view of the evidence, but, you know, the 13 facts are clear, that they didn't — in the 14 petition for informal appointment of Ms. Bessie 15 Huckabee, Mr. Kouten didn't give proper notice to 16 the heirs, that they knew of, in name of Betty 17 Fisher. 18 THE COURT: But those are issues that 19 are on appeal, correct? 20 MR. COOPER: That's right; they are on 21 appeal. 22 THE COURT: I am just trying to 23 determine procedurally where we are. 24 MR. COOPER: Procedurally where we are, 25 we have a dispute over who should be personal

Page 25	Page 27
1 representative, and that issue is still on appeal. 2 In addition to that, once the appeal is decided, 3 still pending in the Circuit Court is another 4 motion having to do with appointment of a special 5 administrator, Frank Barnwell, or appointment of 6 Betty Fisher as personal representative. So those 7 motions have not been resolved in the Circuit Court 8 level. So it is just our opinion that this Court 9 really doesn't have jurisdiction to deal with that 10 because all of that has either been removed to the 11 Circuit Court and/or is on appeal. 12 THE COURT: Correct, and I agree with 13 that. I am interested in reference to what is 14 happening with the conservatorship accounts. 15 MR. COOPER: Right, that's right, your 16 Honor. 17 THE COURT: And that is why I was 18 asking procedurally where you were. 19 MR. COOPER: Right. Well, procedurally 20 that's where we are. Some motions are still 21 pending, and the Circuit Court hasn't been heard, 22 and some motions are on appeal to the Supreme 23 Court, all of them having to do with who should 24 handle this estate once it is turned over. Our 25 position is that there has been no showing, and	1 her as special fiduciary, special administrator, 2 some other title to give her authority from this 3 point on, you know, when it ends, there will be a 4 bonding company standing behind her, she will 5 answer all of the questions as to how she handled 6 everything, and then the Court will make some 7 decision, but the estate assets are going to be 8 protected by the bond, your Honor, and we just 9 think this is a way better way to do it to preserve 10 the status quo rather than breaking off in the 11 middle and switching horses to someone else. 12 Your Honor, my client, Lisa Fisher, 13 also tells me there is a concept in the law called 14 executor de son tort. I am not familiar with it, 15 but it is her position -- it is our position that 16 that would alleviate any need to come in to have 17 some special -- her be given special authority to 18 just protect the estate assets since she has the 19 responsibility to her bonding company to properly 20 administer the estate assets and to protect the 21 real estate and so forth. And this is true, your 22 Honor, only because we had the proper motions for 23 an extension. I would like to make that. Had we 24 not gotten motions, extensions of the time to turn 25 over the assets -- certainly if we had kept them
Page 26	Page 28
1 then maybe at a later hearing Mr. Kouten can show 2 where Ms. Fisher has done something wrong, but I am 3 not aware of it, and I don't think he will ever be 4 able to show that because I think she has handled 5 the assets properly. 6 I do think in hindsight, 20/20 7 hindsight, your Honor, probably we should have come 8 to the Court and gotten some specific authority, 9 but I think under the circumstances, she is going 10 to have the responsibility to maintain the 11 properties, and the Court is going to have to, you 12 know, impose some sort of implied trust on her. 13 THE COURT: But you have never 14 petitioned the Court asking the Court to grant her 15 any type of implied trust. 16 MR. COOPER: I haven't petitioned yet, 17 your Honor, you are right, but that doesn't mean 18 that Ms. Fisher has done anything improperly. 19 The other thing that I would say, 20 though, is that she is fully bonded. There has 21 been no showing that she has done anything wrong or 22 that the estate assets were in jeopardy in any way, 23 and we think to preserve the status quo with her 24 administering them is a better way to deal with it 25 when, if the Court would like, you know, to appoint	1 longer than the Court had ordered them, we would -- 2 you know, we would have run afoul of the Court's 3 protection, but since the Court had extended the 4 time, we had to do what was reasonable in the 5 meantime to take care of the estate assets, and I 6 just think that it is going to make it much clearer 7 at the end of the process as to, you know, how the 8 assets were handled if Ms. Fisher is allowed to 9 continue administering them until turnover. 10 THE COURT: Well, in response to that, 11 I mean, the Court was granting the extensions, but 12 we did not receive any additional accountings other 13 than the 2009 until we received these accountings 14 that were brought before the Court's attention in 15 June of 2011. And so there would have been no way 16 for the Court to have been aware, after granting 17 extensions, that payments and expenses were 18 actually still being paid out of the 19 conservatorship accounts because the last time I 20 looked, the last accounting prior to the one that 21 was filed in June was filed with this Court. 22 MR. COOPER: May of 2009. 23 THE COURT: May of 2009. 24 MR. COOPER: At the end of the 25 conservatorship, we filed that within the time

1 allowed by the Court --
 2 THE COURT: Correct, so --
 3 MR. COOPER: And after that -- if I
 4 could be heard, your Honor.
 5 THE COURT: Well, excuse me, because I
 6 was talking first.
 7 MR. COOPER: I am sorry.
 8 THE COURT: What I said was that what
 9 we had was what was filed in 2009. So the Court
 10 was granting extensions, but that was on the basis
 11 that those funds were not being expended in the
 12 conservator capacity, and we would have had no way
 13 of knowing that but for the fact that you filed
 14 these additional accountings a couple of months
 15 ago. You can continue.
 16 MR. COOPER: Your Honor, I would just
 17 point out that in hindsight certainly it would have
 18 been better to file annual accountings, but I will
 19 point out that the statute requires a conservator
 20 to file annual accountings, but, you know, Ms.
 21 Fisher, you know, was discharged as the
 22 conservator. So there was no technical statutory
 23 requirement for her to file those, and the Court
 24 never asked until I believe it was April of this
 25 year, 2011, asked for the accountings, and we

1 promptly filed them with the Court.
 2 THE COURT: So you are saying you
 3 weren't receiving annual letters from the Court,
 4 because I think we have copies in the file where
 5 requests for annual accountings were actually going
 6 out.
 7 MR. COOPER: No, your Honor, I never
 8 received those. My client says she didn't receive
 9 them either. Certainly if we had received those,
 10 we would have complied with them, your Honor.
 11 THE COURT: Okay. Anything further?
 12 MR. COOPER: We would just say, your
 13 Honor, that there are expenses, taxes, insurance,
 14 various expenses for real estate, and those have
 15 been paid, and those have been expended out of the
 16 account, but we have receipts for all of those, all
 17 of them are legitimate expenses, and nothing has
 18 been expended that was not supposed to, and they
 19 were paid timely, your Honor, to avoid penalties
 20 and interest and things of that nature, as your
 21 Honor knows, that would accrue on those if they
 22 weren't paid timely. So the IRS tax returns have
 23 been done, the property taxes have been paid, all
 24 legitimate expenses of insurance and other repairs
 25 and so forth have been done. So the property has

1 been kept up.
 2 Your Honor, at the end, let me just say
 3 that if your Honor decides to deny Mr. Kouten's
 4 motion, we do have another motion for extension I
 5 have prepared for your Honor's consideration.
 6 THE COURT: Attorney Kouten?
 7 MR. KOUTEN: Thank you, your Honor.
 8 In the words of Attorney Cooper, we
 9 think this is a better way to do it. What about
 10 the authority of this Court? They state the reason
 11 for extensions is to turn over the assets to the
 12 proper party. The discharged conservator is an
 13 attorney. She understands legal duties. She
 14 surely understands the word "discharge." They
 15 state that she has done nothing wrong, but she has.
 16 She is asking the Court to allow her to continue to
 17 do wrong, to act without authority. A single look
 18 at the accounting indicates that she is acting
 19 without authority.
 20 As to the lack of notice, your Honor,
 21 we ask the Court -- we asked Attorney Cooper on
 22 October 12th, 2010, we wanted an accounting. He
 23 did not recognize that as the proper authority
 24 because he does not recognize Bessie Huckabee. He
 25 does not recognize the Court's authority that she

1 is the personal representative. We sent him a
 2 subpoena for same accountings in November. It
 3 doesn't recognize the subpoena of the Circuit
 4 Court. Lisa Fisher herself asked this Court, who
 5 discharged her, consider and approve my final
 6 accounting. As an attorney, she understands that
 7 is complete and total discharge. She is asked to
 8 hold a box of money. The Court allows it. She has
 9 abused this Court's allowance in granting her
 10 simple request to hold the estate funds. She has
 11 not recognized or given any weight to the Court's
 12 order to discharging. She has not recognized or
 13 given any weight to the Court revoking all of her
 14 authority to act under any circumstances in her
 15 capacity as a conservator.
 16 THE COURT: And what is your argument
 17 regarding why she should not be appointed the
 18 special fiduciary?
 19 MR. KOUTEN: First, your Honor, is that
 20 she has been discharged by this Court. This Court
 21 in its order stated that she is no longer to act as
 22 the conservator and that she provide an accounting.
 23 In lieu of petitioning this Court to pay insurance,
 24 upkeep of houses, do maintenance, she took it upon
 25 her own authority. As someone who is an attorney,

Page 33 1 knowing that she doesn't have the rights and the 2 duties to do that, that's wrongdoing, Judge. And 3 then the accounting that she files indicates that 4 there has been a hundred thousand dollars spent, 5 after she has been removed, with no request from 6 this Court to approve these fees, no request from 7 this Court to allow her to act. This is a dispute. 8 It is a dispute between a personal representative, 9 it is a dispute between a decedent's will, and it 10 is a respondent holding on to the basket of money, 11 which is fine if we know that that basket of money 12 is safe, and if we had gotten an accounting showing 13 that the interest accrued and that the money is 14 safe, that's fine, we wouldn't even here. She is 15 spending the money. She is acting without 16 authority. Somebody has to do it. And if she is 17 acting without an authority before this Court, not 18 recognizing the Court's authority, we would prefer 19 that someone be appointed who does recognize this 20 Court's authority. We would ask that a special 21 fiduciary be appointed to receive the estate 22 assets, to review detailed accountings. These 23 accountings may be five line items that accumulate 24 to a hundred thousand dollars. Who knows where 25 that money is? They say: Well, there has been no	Page 35 1 just like to remind the Court that we did file an 2 objection pointing out that we believe that 3 granting Mr. Kouten's relief is beyond the 4 authority of the Court. 5 THE COURT: Thank you. 6 In regards to the motion to strike, the 7 Court is going to deny that particular motion. The 8 Court believes that it would be in the best 9 interest if -- well, first of all, the Court 10 believes that the conservatorship should be closed. 11 We believe that it would be in the best interest of 12 a third independent special fiduciary to be 13 appointed in order to file, in order to receive the 14 assets until the litigation is resolved and the 15 estate decision in regards to the appointment of a 16 personal representative. 17 The Court believes that Ms. Fisher did 18 not have the duty to act in a conservator capacity 19 once she had been discharged. The Court is going 20 to appoint Attorney Heyward Harvey to serve as the 21 special fiduciary in this particular matter, and 22 the Court is going to deny the motion for an 23 extension. 24 And so the Court is going to require 25 that Ms. Fisher turn over any and all assets to
Page 34 1 wrongdoing; why change horses in midstream? That 2 is not an accounting, and that would certainly put 3 anyone uneasy as to where these funds are. 4 Further, they refused to give us a copy of the 5 accountings. They did respond in providing 6 accountings in response to this motion. They 7 didn't respond to this Court's writing them letters 8 in January asking, "Please provide an accounting." 9 We ask that the Court appoint a special 10 fiduciary on behalf of the estate until such time 11 as the contested issues may be resolved. And as 12 respondent has admitted that she has acted 13 unilaterally without this Court's authority, we ask 14 that the Court grant any further relief as the 15 Court deems appropriate. 16 THE COURT: Anything further? Attorney 17 Cooper? 18 MR. COOPER: Your Honor, without going 19 through all of them, there are a lot of things that 20 Mr. Kouten said in terms of factual representations 21 about the expenditure and so forth, we disagree 22 with and certainly we think are beyond the scope of 23 this hearing. 24 THE COURT: Okay. Thank you. 25 MR. COOPER: Your Honor, also, I would	Page 36 1 Attorney Harvey within 15 days of the date of this 2 Court's order. 3 Attorney Kouten, we ask that you 4 prepare that order, to provide a copy to Attorney 5 Cooper, and then at that particular time if there 6 are any concerns or questions regarding the assets 7 since the time of Ms. Fisher's discharge, the 8 Special Fiduciary Harvey can file any motions or 9 petitions that he desires with the Court. 10 Anything further? 11 MR. KOUTEN: Nothing, your Honor. 12 MR. COOPER: Thank you; your Honor. 13 THE COURT: Thank you. 14 (The hearing was concluded at 11:22 15 a.m.) 16 17 18 19 20 21 22 23 24 25

CERTIFICATE OF REPORTER

I, Ann P. Harris, Certified Merit
Reporter and Notary Public for the State of South
Carolina at Large, do hereby certify that the
foregoing transcript is a true, accurate, and
complete record.

I further certify that I am neither
related to nor counsel for any party to the cause
pending or interested in the events thereof.

Witness my hand, I have hereunto
affixed my official seal this 3rd day of December
2011 at Charleston, Charleston County, South
Carolina.

Ann P. Harris, RMR
My Commission expires
June 23, 2018

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON) CASE NO.: 2011-CP-10-7819
) 2011-CP-10-7821
) 2011-CP-10-8657

LISA FISHER,)
)
 PLAINTIFF,)
)
VS.)
)
BESSIE HUCKABEE,)
)
)
 DEFENDANT.)
_____)

APPEALS HEARING

held before the Honorable J.C. Nicholson, Jr.
Mia Perron, Circuit Court Reporter, 9th Judicial Circuit
in the Charleston County Courthouse
Charleston, South Carolina
on Wednesday, July 16, 2014, Commencing at 10:22 a.m.

SUSAN "MIA" PERRON, CVR-CM-M
Circuit Court Reporter - 9th Judicial Circuit
Post Office Box 31865
Charleston, South Carolina 29417-1865
1-706-231-6028

: APPEARANCES OF COUNSEL

FOR THE PLAINTIFF: John H. Cooper, Esquire
Attorney at Law
1476 Ben Sawyer Boulevard, Suite 7
Mount Pleasant, South Carolina 29464

FOR THE DEFENDANT: Peter A. Kouten, Esquire
Attorney at Law
Post Office Box 340
Johns Island, South Carolina 29457

ALSO ATTENDING: Heyward Harvey, Esquire
Brook Wills, Esquire
John Robinson, Esquire

INDEX TO PROCEEDINGS

PAGE

PROCEEDINGS

4

CERTIFICATE OF COURT REPORTER

47

EXHIBITS

[None]

Fisher v. Huckabee
Appeal
July 16, 2014

PROCEEDINGS

1
2 THE COURT: Who's here for who on the Fisher
3 versus Huckabee?

4 MR. COOPER: John Hughes Cooper. I'm here for
5 Betty Fisher in 7819, and Lisa Fisher in 7821 and
6 8657.

7 THE COURT: And Betty Fisher in the other one?
8 You represent all three plaintiffs; right?

9 MR. COOPER: Yes, Your Honor.

10 THE COURT: And who's here on behalf of the
11 Huckabees?

12 MR. KOUTEN: Your Honor, Peter Kouten for Bessie
13 Huckabee as personal representative. Today attorney
14 Heyward Harvey is here -- he was the main special
15 fiduciary in the lower court's order -- his counsel,
16 John Robinson. And then counsel for Bessie Huckabee
17 individually is here, Brook Wills.

18 THE COURT: These are appeals from probate
19 court?

20 MR. COOPER: Yes, Your Honor.

21 THE COURT: Is this the same similar issue about
22 the -- I had before --

23 MR. COOPER: It's related --

24 THE COURT: -- a year and a half ago about the
25 issue was -- I'm trying to remember who was the --

MIA PERRON, CVR-CM-M

-4-

Fisher v. Huckabee
Appeal
July 16, 2014

1 MR. COOPER: Alice Shaw Baker is the deceased
2 and there was an adult protective action that was
3 brought by Lisa Fisher.

4 THE COURT: I think the question was who was the
5 devisees under the statute.

6 MR. KOUTEN: The underlying action is the will
7 contest, Your Honor. That's correct.

8 THE COURT: Right. Okay. Is this separate from
9 that, or is this the same case, or what is it?

10 MR. COOPER: It's separate but related.

11 THE COURT: Pardon?

12 MR. COOPER: It involves the same deceased, Your
13 Honor, but this is an appeal from the probate court.
14 In other words, the probate court conserved Alice Shaw
15 Baker during her life --

16 THE COURT: Because that last case, they were
17 trying to remove the administrator, if I remember
18 correctly, the one I'm referring to.

19 MR. KOUTEN: There's a couple going on, Your
20 Honor. One is obviously the determination and
21 validity of the will appointing a personal -- a
22 special administrator. The most recent one was an
23 action against the friends of the decedent under the
24 OMNIBUS Adult Protection Act.

25 THE COURT: I don't remember which one it was.

1 Which one do you want to hear first? Are they
2 all the same issue, all three cases?

3 MR. COOPER: They're related but not the same
4 issue, Your Honor. 7819 and 7821 are very related and
5 more related than 8657.

6 THE COURT: Which one do you want to do first?

7 MR. COOPER: Well, we could start with the 7819,
8 the lowest number, Betty Fisher versus Bessie
9 Huckabee.

10 THE COURT: So 7819 and 7821 are very similar,
11 you told me?

12 MR. COOPER: Yes, Your Honor. They're both
13 challenging the order of September 28th, 2011, by
14 which --

15 THE COURT: That's the probate court order?

16 MR. COOPER: Yes, Your Honor. It's the probate
17 court order that appoints Mr. Harvey as special
18 fiduciary.

19 THE COURT: Be glad to hear you.

20 MR. COOPER: Yes, Your Honor.

21 Well, we -- I'll just say that we've briefed
22 this extensively and we assume the Court has those
23 briefs and I'm not going to go into it.

24 THE COURT: Yes, I've got the briefs. I have
25 not looked at them but I have got them here. I will

Fisher v. Huckabee
Appeal
July 16, 2014

1 probably have to look at them before I make a
2 decision. But go ahead.

3 MR. COOPER: Yes, Your Honor.

4 THE COURT: If you can summarize the briefs,
5 that would be very helpful.

6 MR. COOPER: That's what I'm going to attempt to
7 do, Your Honor.

8 THE COURT: You don't have to reiterate
9 everything that's in there, okay, because I will read
10 them.

11 MR. COOPER: Thank you.

12 THE COURT: Or my law clerk and -- we both will
13 probably read them.

14 MR. COOPER: Thank you, Your Honor.

15 Basically what happened was that in May of 2009,
16 several months after Alice Shaw Baker died -- Ms. Lisa
17 Fisher was the conservator during Alice Shaw Baker's
18 lifetime, and several months after Alice Shaw Baker
19 died the Court relieved Ms. Fisher of her duties as
20 conservator and ordered at that time that Lisa Fisher
21 turn over the assets to the personal representative.
22 Upon motion, the Court --

23 THE COURT: Who was the personal representative,
24 so I can get the names right.

25 MR. COOPER: The personal representative,

MIA PERRON, CVR-CM-M

-7-

1 informally-appointed personal representative, was
2 Bessie Huckabee.

3 THE COURT: Was Bessie Huckabee. Okay.

4 MR. COOPER: And the probate court ordered Lisa
5 Fisher to turn over the assets. But Ms. Fisher timely
6 made a motion to extend the time out, to an extension
7 of time, to turn over the assets based on the fact
8 that the issue of whether or not Bessie Huckabee was
9 the properly-appointed personal representative was
10 before the Court of Appeals. And so there was a --
11 there's a problem, from Ms. Fisher's standpoint,
12 because she is obligated to turn it over to the
13 correct -- the duly-appointed personal representative.
14 And if there is an issue as to whether the personal
15 representative was properly appointed --

16 THE COURT: And that was in front of the Court
17 of Appeals. What did the Court of Appeals do?

18 MR. COOPER: Well, the Court of Appeals declined
19 to change the personal representative. Basically,
20 that has to await trial on the will contest. And the
21 reason is is that the will appoints or -- or nominates
22 Bessie Huckabee. But the will, we -- our position is
23 the will was revoked and so we have to have a trial on
24 the will contest to know whether or not Bessie
25 Huckabee is the duly-appointed personal

Fisher v. Huckabee
Appeal
July 16, 2014

1 representative.

2 And Ms. Fisher, of course, is bonded one and a
3 half times the value of the assets. And so it's our
4 position to the probate court that, you know, the
5 assets are protected. She's fully bonded. And she
6 has a duty -- not only authority, but the duty, under
7 the probate code trust division. Even after you've
8 resigned or after you are removed as a conservator,
9 you still have the duty and the authority to protect
10 the trust assets and to turn them over to the duly-
11 appointed personal representative. In this case,
12 because of the will contest issues, those have to be
13 resolved before we can determine whether Bessie
14 Huckabee is the duly-appointed personal
15 representative.

16 THE COURT: Well, have you had the will contest?

17 MR. COOPER: No, Your Honor.

18 THE COURT: Why not?

19 MR. COOPER: Well, it went up on appeal to the
20 Supreme Court, came back down. We had some discovery
21 period. Then there is another issue that's on appeal
22 to the Court of Appeals right now, and that has to be
23 resolved before we can get to the jury trial. It's a
24 jury trial on the will contest.

25 And so at the time that these orders were

MIA PERRON, CVR-CM-M

-9-

Fisher v. Huckabee
Appeal
July 16, 2014

1 issued, it was before the issue -- all these issues
2 were before the South Carolina Supreme Court. And,
3 therefore, it's our position that the court didn't
4 have -- the probate court did not have jurisdiction to
5 appoint Mr. Harvey or to appoint a special fiduciary
6 because those issues were being dealt with by the
7 South Carolina Supreme Court at that time, which was
8 considering cert from the Court of Appeals.

9 THE COURT: Have they -- did they accept cert?

10 MR. COOPER: They denied --

11 THE COURT: They denied cert --

12 MR. COOPER: -- they denied cert and the case
13 came back down. But that was after we had taken these
14 appeals. So the question is is were these orders
15 appropriate when issued. And our --

16 THE COURT: So your position is even though the
17 Court of Appeals had -- I assumed the Court of Appeals
18 ruled against removing her; right? That's what you
19 told me?

20 MR. COOPER: They ruled against -- they declined
21 to rule on one of the issues, and then on the other
22 issue they ruled against her.

23 THE COURT: And then cert was requested?

24 MR. COOPER: Requested and then ultimately
25 denied. And so then it came back down.

MIA PERRON, CVR-CM-M

-10-

-- " Fisher v. Huckabee " --
Appeal
July 16, 2014

1 THE COURT: So your position is since cert was
2 requested, the probate court didn't have jurisdiction
3 to hear it until that cert was determined one way or
4 the other?

5 MR. COOPER: Correct. And --

6 THE COURT: And I assume the probate judge took
7 a different position, since these orders were issued.

8 MR. COOPER: They took a different position,
9 Your Honor, and we think incorrectly.

10 THE COURT: What was their position on that
11 issue?

12 MR. COOPER: The Court --

13 THE COURT: That that cert that was not --
14 didn't deprive them of jurisdiction, or that's a
15 separate issue, or what?

16 MR. COOPER: Well, to be honest, I can't
17 remember exactly what Judge Curry decided about that.
18 I don't think she dealt with it in her order. She did
19 ask about it in the hearing, and we brought it up, and
20 we filed a motion for reconsideration, but she
21 basically just appointed Mr. Harvey as special
22 administrator -- fiduciary. Excuse me.

23 THE COURT: So your position is that order is
24 null and void because they didn't have jurisdiction,
25 i.e., because of the cert issue before the Supreme

MIA PERRON, CVR-CM-M

-11-

1 Court?

2 MR. COOPER: I believe it was the cert before
3 the Supreme Court. But certainly --

4 THE COURT: The request for --

5 MR. COOPER: -- it was in the appellate court
6 system.

7 THE COURT: The request for cert.

8 MR. COOPER: Right. It was in the appellate
9 court system at that time, either at the Court of
10 Appeals or the Supreme Court. I can't honestly
11 remember. But we did bring that up. And so we think
12 that the probate court did not have jurisdiction.

13 In addition to that, Your Honor, there was a
14 statutorily-required notice of twenty days and
15 Mr. Kouten, on behalf of Bessie Huckabee, did not give
16 the proper notice and so the Court in the hearing --

17 THE COURT: Statutory notice of twenty days for
18 what?

19 MR. COOPER: To consider a motion to appoint a
20 special fiduciary.

21 THE COURT: Okay.

22 MR. COOPER: And so I can't say that -- I can't
23 say that Lisa Fisher didn't get notice, because I did
24 get notice for her. But as an interested party and a
25 member of the family, Betty Fisher did not get the

1 statutorily-required notice.

2 Also, a member of another interested party in
3 this is the Attorney General's office as protector of
4 animal charities. In other words, Alice Shaw Baker
5 was all about animals. She loved animals. She was
6 really focused on animals, and everybody knew and
7 knows that that was -- you know, her desire was that
8 everything, her house, all her stuff, go to these
9 animal charities. And so the Attorney General is
10 involved in the will contest case, and they were not
11 given notice that there would be a special fiduciary
12 appointed, as well. So there's a notice issue. Not
13 with regard to all parties, but at least with regard
14 to Betty Fisher and with regard to the Attorney
15 General.

16 THE COURT: Well, was the Attorney General
17 officially involved in it or --

18 MR. COOPER: They were not involved in -- they
19 were involved in the will contest action.

20 The way this worked, Your Honor, is during Alice
21 Shaw Baker's lifetime, the case, which is 2008-88,
22 which is the case -- see, these orders are all issued
23 in the conservatorship case which had, at that time,
24 been over for some two years. And so actually the
25 Court is issuing orders in the conservatorship case

Fisher v. Huckabee
Appeal
July 16, 2014

1 when the conservator -- you know, simultaneously we
2 have the will contest and the -- you know, all of the
3 estate litigation. This is a totally separate case in
4 the probate part of the probate court, the estate
5 division, I guess, rather than the conservatorship
6 division. But these orders that we're appealing all
7 arose out of the conservatorship division.

8 And it's our position, Your Honor, that when a
9 conservator -- in South Carolina, when a conservator
10 either resigns or is removed the conservator still has
11 not only the authority to protect the assets but the
12 duty to protect the assets until they can be handed
13 over to the proper -- the duly-authorized personal
14 representative. And the problem that Ms. Fisher has,
15 she's bonded and if she gives it over to Bessie
16 Huckabee and it's ultimately determined that Bessie
17 Huckabee is not the duly-authorized personal
18 representative but an informally-appointed personal
19 representative, you know, without proper notice and so
20 forth, then she could be liable for turning them over
21 to the wrong personal representative or the wrong
22 party. So that's her position, is that she was going
23 to keep them. She had the authority to do so, under
24 the South Carolina Probate Code, and the duty to do
25 so.

MIA PERRON, CVR-CM-M.

-14-

Fisher v. Huckabee
Appeal
July 16, 2014

1 And so -- and the Court, the probate court,
2 granted I believe it was three or four different --
3 maybe more than that -- ninety-day extensions.
4 Multiple ninety-day extensions were granted to Lisa
5 Fisher to just hold onto the assets until the duly-
6 appointed personal representative could be determined
7 and she could hand them over to the right person.

8 And so this is not an issue where she didn't get
9 the extension. She got all of the extensions, every
10 ninety days we got another extension, until finally
11 approximately two years after we had been getting
12 these extensions, Bessie Huckabee and Mr. Kouten filed
13 a motion to appoint a special fiduciary but no notice
14 given at all as to who the, you know, special
15 fiduciary might be. We had no notice of that. And we
16 think, technically, we should have gotten a notice of
17 who, you know, would be appointed so we could be heard
18 on that as to whether we agree. And we didn't know
19 that the Court might appoint --

20 THE COURT: Well, underlying all this, were the
21 opposing parties thinking that Fisher was squandering
22 assets? Or what was the basic controversy about on
23 the fact that she didn't turn over the assets? They
24 don't think she was protecting the assets properly?
25 Or why did --

MIA PERRON, CVR-CM-M

-15-

1 MR. COOPER: They filed --

2 THE COURT: -- the Court appoint a special
3 conservator?

4 MR. COOPER: They filed no objection. But at
5 the -- just before this hearing, they did raise the
6 issue that no annual accountings had been filed..
7 Well, if you're a conservator, you have to file annual
8 accountings. Ms. Fisher had been relieved. I know I
9 represent a lot of conservators and we get a notice
10 from probate court, you know, about December, saying,
11 you know, by the end of January you've got to file
12 your annual accounting. We never got anything like
13 that. Had we been asked, of course we would have done
14 it right away.

15 But in 2011, Mr. Kouten did raise that issue and
16 we agreed we'll do the accountings, and we did them.
17 And what they show, of course, is -- Mr. Kouten wanted
18 to say, oh, they're spending money. Well, we paid the
19 taxes. We paid for the insurance premium. There's a
20 piece of property, real estate that's involved, with a
21 house on it, and so we paid the necessary expenses.
22 And Ms. Fisher is bonded to one and a half percent of
23 the assets. If it turns out she did something wrong,
24 of course the bond will take care of it. But, you
25 know, I can assure you I believe that she has done

1 nothing wrong and done everything to protect these
2 assets.

3 THE COURT: But the allegations are she has done
4 something wrong?

5 MR. COOPER: Yes, Your Honor.

6 THE COURT: Okay. All right.

7 MR. COOPER: But I will say that there was
8 allegations but there's no affidavits. There's no
9 proof. At this hearing we went to in the probate
10 court, there were no affidavits. There's no -- no
11 evidence was offered. We offered to testify and the
12 judge would not allow it. She didn't want to take any
13 testimony at all. So these orders are -- even though
14 they're required to be backed up by evidence, she
15 makes findings with no evidentiary basis. And all
16 this, of course, is briefed, Your Honor. I'm just
17 trying to hit the highlights.

18 THE COURT: I understand.

19 MR. COOPER: But it seems to me that there is a
20 jurisdictional issue, there's a notice issue, and then
21 there's no evidence to back up the orders appointing
22 Mr. Harvey.

23 One other thing is evident from the fact that no
24 evidence was taken. In order to appoint a special
25 fiduciary, the code provides that there needs to be an

Fisher v. Huckabee
Appeal
July 16, 2014

1 emergent need to do that. And how can you find that
2 it was an emergent need if you don't make any findings
3 of fact that are based on affidavits, evidence,
4 something, sworn testimony? Any of that could have
5 been done. But we get to the hearing and --

6 THE COURT: Were affidavits produced?

7 MR. COOPER: Not on behalf of appointing a -- I
8 think we had an affidavit opposed to it, but I don't
9 think there's any support for the findings that the
10 Court makes that there was an emergent need to protect
11 the assets.

12 THE COURT: Well, was testimony taken?

13 MR. COOPER: No, Your Honor.

14 THE COURT: Well, let me back up. What's the --
15 the will, I assume, is -- who was the deceased?

16 MR. COOPER: Alice Shaw Baker.

17 THE COURT: Alice Shaw Baker. I assume her will
18 left her assets to some -- as you said, to some animal
19 charitable organization and the will contest is to
20 contest that so it will go to her I guess
21 administrative heirs or --

22 MR. COOPER: No, Your Honor. There's a will --

23 THE COURT: What is the will contest about? I
24 guess that's --

25 MR. COOPER: The will contest about [phonetic]

MIA PERRON, CVR-CM-M

-18-

1 is whether the will remains valid or whether it was
2 revoked by Alice Shaw Baker during her lifetime.

3 THE COURT: It's a question whether it's valid
4 or revoked?

5 MR. COOPER: Yes, Your Honor.

6 THE COURT: So if it's -- and your position is
7 it was revoked or it was valid?

8 MR. COOPER: It was revoked.

9 THE COURT: And then it would go to the heirs?

10 MR. COOPER: It would go to the heirs, Your
11 Honor.

12 THE COURT: So that's the underlying dispute of
13 all this; is that correct?

14 MR. COOPER: As I --

15 MR. KOUTEN: That's the way I see it, Your
16 Honor.

17 MR. COOPER: As I remember the will, that's
18 right.

19 Now, just so the Court is aware, the only
20 remaining family that I'm aware of is in the courtroom
21 here today, Betty Fisher and Lisa Fisher, and they
22 want -- if not to themselves, they want it to go to
23 the animal charities. And there's assets that don't
24 go by the will. There are retirement accounts with
25 beneficiaries. There's all sorts of -- it's pretty

Fisher v. Huckabee
Appeal
July 16, 2014

1 complex. It's not a huge amount of money but it's a
2 complex assortment of assets. And some of it goes by
3 the will, some of it is in beneficiary designations
4 during her lifetime, and things like that. But at any
5 rate, everybody knew that -- you know, that Alice Shaw
6 Baker --

7 THE COURT: Well, has there ever been an order
8 ordering I guess Ms. Fisher to turn over the assets
9 and remove her as conservator? Or is that what's on
10 appeal?

11 MR. COOPER: No, that's not on appeal. The
12 probate court removed her as conservator and ordered
13 her to turn over --

14 THE COURT: So she's out but she just hasn't
15 turned over the assets --

16 MR. COOPER: She hasn't turned over the assets.

17 THE COURT: -- because that issue is on appeal?

18 MR. COOPER: No, Your Honor.

19 The Court -- and I believe it was either fifteen
20 days or thirty days they ordered the assets to be
21 turned over. We approached the Court with a motion
22 for extension of time until the proper person to turn
23 them over to could be determined, because Ms. Fisher
24 would be in jeopardy if she turns them over to the
25 wrong person.

1 THE COURT: So that's the reason the probate
2 judge appointed a new conservator, to turn the assets
3 over to that conservator?

4 MR. COOPER: No. For two years after that, they
5 kept extending the time. At first she was ordered to
6 turn them over within thirty days. Once we explained
7 that the issue of who the proper person to turn them
8 over to was on appeal, we asked for ninety days. They
9 gave it to us. We asked for another ninety days.
10 They gave it to us. It stayed on appeal for some
11 time. And we continued to ask until I believe it was
12 about May of 2011, something like that. And this is
13 long after May of 2009. And at that time, we wanted
14 another extension. Mr. Kouten brought up the issue of
15 the annual accountings and so we produced the annual
16 accountings. And then he made the motion to appoint a
17 special fiduciary. But the special fiduciary is not -
18 - even according to the order, the assets are less
19 secure.

20 And no offense intended to Mr. Harvey, but he's
21 not bonded. Ms. Fisher is bonded to one and a half
22 times the value of the assets. And so it seems like
23 the assets are much better protected with Ms. Fisher
24 than with Mr. Harvey or someone else that's not
25 bonded.

1 THE COURT: So your position is the assets can't
2 be turned over until you have the will contest?
3 MR. COOPER: Until we know who the duly-
4 authorized --
5 THE COURT: Duly authorized --
6 MR. COOPER: -- representative is.
7 [Off the record momentarily]
8 THE COURT: So that's what's on appeal, the real
9 representative versus personal representative; is that
10 correct?
11 MR. COOPER: It's not on -- it's not on -- yes.
12 That's on appeal now, but it was not --
13 THE COURT: That's on appeal now.
14 MR. COOPER: -- was not on appeal back when
15 these orders were issued.
16 THE COURT: But that's on appeal now; right?
17 MR. KOUTEN: Your Honor --
18 MR. COOPER: Yes, Your Honor.
19 MR. KOUTEN: -- if I may?
20 THE COURT: Is that in the -- where is it in the
21 Court of Appeals?
22 MR. COOPER: The reply brief has just been
23 filed, initial reply brief.
24 THE COURT: Well, that was what I was trying to
25 remember earlier, that case.

1 Okay. But go ahead.

2 MR. KOUTEN: Thank you, Your Honor.

3 If I may, counsel for the court-appointed
4 personal representative -- and when she was appointed,
5 a temporary restraining order was brought against her.
6 You signed an order, form order, that says she's
7 restrained from all things. That puts her in a
8 position of liability. She can't do anything. We
9 came back and asked for modification, allow her to do
10 administrative things, marshal assets and so forth,
11 and you found that reasonable and that was your order.

12 They appealed that in the Court of Appeals.
13 They appealed it to the Court of Appeals on -- they
14 upheld your order on both instances. When cert was
15 sought, it was denied. That issue --

16 THE COURT: Well, let me ask y'all this
17 question. Does the request for cert -- does the
18 interlocutory -- is it interlocutory or not, or do
19 y'all know?

20 MR. KOUTEN: In this instance I believe it is
21 interlocutory. But further, it is completely
22 unrelated to what these appeals have to do with.
23 These appeals have to do with conservatorship assets,
24 not personal-representative matters. So the appeals
25 here today are that upon the death --

1 THE COURT: So his position on the interlocutory
2 request for the cert is in a separate -- is in the
3 case of --

4 MR. KOUTEN: Completely unrelated, Your Honor.

5 THE COURT: Unrelated. That's the issue about
6 the -- what was it?

7 MR. KOUTEN: The appointment of a personal
8 representative.

9 THE COURT: Right. Versus real representative.

10 MR. KOUTEN: Now, your -- that is a complete
11 other issue where just prior to the expiration of the
12 statute of limitations three years from the date of
13 death, they brought an action under the OMNIBUS Adult
14 Protection Act stating that she was somehow abused by
15 certain people. I was named in that action. The
16 Court found that they had three years to be appointed
17 a special personal representative, to be appointed a
18 special administrator, to contest this will. And the
19 way they stand right now is they don't stand. They
20 don't have standing. And so it was dismissed. That's
21 on appeal right now.

22 The issue at bar is that upon the death of Alice
23 Shaw Baker her conservator, Lisa Fisher, a niece, who,
24 by the way, is an attorney, was supposed to seek
25 discharge and say, hey, my person is dead, this needs

Fisher v. Huckabee
Appeal
July 16, 2014

1 to be closed. She didn't do it. We asked through the
2 Court, motion, petition, and the Court ordered her to
3 seek discharge. She was discharged. Upon discharge,
4 her accounting was filed through date of service. So
5 we do have an accounting. She's discharged.
6 Everything is complete. She was ordered to turn over
7 the assets. She approached the Court through motion
8 of extension and said, we want to hold the assets
9 until a proper party is put in place. We believe
10 there is a proper party put in place. Bessie Huckabee
11 is court-appointed personal representative. Under
12 your authority, she has the authority to marshal
13 assets and do administrative things but she can't
14 dispose of property. But she has the authority of the
15 Court as personal representative right now. Just
16 because they don't believe that doesn't mean that
17 she's got liability to turn over those assets.

18 So through a series of motions for extension,
19 without notice to us, the probate court kept approving
20 them. The reason was to hold these assets until a
21 proper party could be found, to hold in a safe place,
22 to put in a strongbox as, you know, trust, to hold in
23 trust.

24 We asked for a subsequent accounting because
25 they've had the assets for going on two years. The

1 only accounting we have is upon their discharge. They
2 refused to recognize our authority. The Court then
3 did send them a letter. I have a copy of the letter
4 with the Court requesting an accounting from them for
5 the period of time she held those assets. They didn't
6 respond to the Court. We filed for an accounting and,
7 prior to the hearing, they supplied their accounting.

8 The final accounting they supplied had one
9 number. The subsequent accountings was first an
10 amended accounting, for the year-to-date, indicating
11 that monies were spent in excess of \$85,000 were
12 spent.

13 Here's the bottom line, Judge. She's an
14 attorney. She understands discharge. She understands
15 duties and responsibilities. She sought discharge and
16 she was terminated and she filed a final accounting.
17 She's spending money.

18 The Court order -- or the transcript said --
19 this is what Judge Curry said: the Court believes
20 that Ms. Fisher did not have the duty to act in a
21 conservator capacity once she was discharged. The
22 Court is going to appoint attorney Heyward Harvey to
23 serve as a special fiduciary in this particular matter
24 and the Court is going to deny the motion for an
25 extension.

1 So what the Court is saying is that we need
2 somebody to take these funds, she's spending them, she
3 shouldn't spend them, take them to Heyward Harvey.
4 That is what is on appeal. Additionally on appeal is
5 motion to reconsider. And it's all interrelated with
6 this one hearing to have those funds put in a position
7 where they're protected.

8 Now, Attorney Cooper argues that maybe the State
9 of South Carolina doesn't really know what the proper
10 thing is, we're bonded, he says, we're -- you know,
11 we're responsible people, we'll just do what we want
12 to do. And that's not how it works. The way it works
13 is that you follow this book right here. And this
14 book says you're discharged, if you ask to hold onto
15 the money, you hold onto it in a strongbox and you
16 don't spend it. There weren't any affidavits
17 provided, but their accounting showed that they're
18 spending the money. That was all Judge Curry needed.
19 And so with that, she appointed a special fiduciary.

20 And I don't know what else to say. I mean, I
21 can go into different facts presented by counsel, as
22 far as the will contest, as far as -- it's been five
23 years. I certainly would like to have a jury hear
24 this contested will, and whether it was revoked or
25 not, by someone who was incapacitated and had a

1 guardian conservator appointed to her. That day has
2 yet to come.

3 As it turns out, they really don't have
4 standing. And in the end, we believe they won't have
5 standing and the assets will go to where Alice Shaw
6 Baker wanted them to go: to her friends.

7 I'm going to ask the Court to uphold the Court's
8 order.

9 THE COURT: But this order was issued in the
10 conservator case; right?

11 MR. KOUTEN: That is correct.

12 THE COURT: I mean, why is the conservator case
13 even pending, since she's deceased?

14 MR. KOUTEN: It is not; It's --

15 THE COURT: I mean, how -- why are they even
16 issuing orders in that case?

17 MR. KOUTEN: The only reason it's continuing is
18 that they refuse to turn over the money, albeit with
19 the Court's --

20 THE COURT: Well, has a probate judge ever
21 ordered her to turn it over?

22 MR. KOUTEN: Yes, they have, Judge.

23 THE COURT: And what happened --

24 MR. KOUTEN: That's the order on appeal.

25 THE COURT: -- to that case?

Fisher v. Huckabee
Appeal
July 16, 2014

1 MR. KOUTEN: That's the order on appeal.

2 THE COURT: That's what's on appeal?

3 MR. KOUTEN: No. This is what they're appealing
4 today, right now, here, at bar.

5 If I may approach?

6 THE COURT: Yes, sir.

7 MR. KOUTEN: This is an order dated September
8 28th, order appointing a special fiduciary.

9 [Whereupon, Mr. Kouten proffers documents to the
10 Court]

11 MR. KOUTEN: If you will note, Judge, the Court
12 has ordered them to turn over the assets.

13 [Whereupon, the Court reviews documents]

14 THE COURT: I'm just going to have to read it
15 and try to wade through some of this. It's sort of --
16 y'all have got it very interwoven. But go ahead.

17 MR. KOUTEN: It is interwoven, Your Honor, and I
18 apologize for that.

19 THE COURT: Why hasn't the will contest gone to
20 trial?

21 MR. KOUTEN: There has been --

22 THE COURT: What's on appeal in that issue?

23 MR. KOUTEN: Dispositive motion after
24 dispositive motion by --

25 THE COURT: I mean, why hasn't that gone to

Fisher v. Huckabee
Appeal
July 16, 2014

1 trial, jury trial?

2 MR. KOUTEN: Your Honor, I --

3 THE COURT: I'm assuming you're going to do it
4 in circuit court?

5 MR. COOPER: Well, we have an appeal, Your
6 Honor, from -- an order that declined to disqualify
7 Mr. Kouten, and I believe that that was your order,
8 because Mr. Kouten served as court-appointed for Alice
9 Shaw Baker during her lifetime and then it's our
10 position he's taking a position after that --

11 THE COURT: That's in the will contest file?

12 MR. COOPER: Yes, Your Honor. And so that's on
13 appeal now. And we've --

14 THE COURT: What else is on appeal on that -- on
15 the will contest issue? Just was not failure to
16 remove him?

17 MR. COOPER: Failure to remove Mr. Kouten.

18 THE COURT: That's the only thing that's under
19 appeal?

20 MR. COOPER: That's -- yes, Your Honor.

21 MR. KOUTEN: But in this case 17 -- or 7819 is
22 appeal of that order you're holding. For simplicity
23 purposes, the notice of intent to appeal indicates
24 that they're also appealing under 7819, an October
25 14th order. That was a motion to reconsider, which

1 was denied. So basically it's the same issue --

2 THE COURT: Right.

3 MR. KOUTEN: -- do I turn it over or do I not.

4 And that is just the 7819. And we believe she acted
5 without authority, that is wrongdoing, and we believe
6 that the assets should be turned over in furtherance
7 of the lower court's order. And I would say that that
8 actually extends to 7821. The only distinction is
9 that Lisa Fisher, as conservator, filed one --

10 THE COURT: Well, why don't you associate a
11 lawyer and let that lawyer go try the will case?

12 MR. KOUTEN: Again, Your Honor?

13 THE COURT: I said why don't you associate a
14 lawyer and y'all go try the will case and get this
15 controversy over with?

16 MR. KOUTEN: Your Honor --

17 THE COURT: I mean, the issue of you being
18 removed is on appeal but I'm not so sure that would be
19 interlocutory to another lawyer trying the will case
20 and getting it over with and y'all be done with this.

21 MR. KOUTEN: There's no question, Judge, and
22 that's been done.

23 THE COURT: Pardon?

24 MR. KOUTEN: That's been done. Attorney Wills
25 represents the beneficiaries of the estate.

Fisher v. Huckabee
Appeal
July 16, 2014

1 THE COURT: Well, why don't you move and get the
2 thing tried?

3 MR. WILLS: Your Honor --

4 THE COURT: I mean, that's the underlying issue.
5 It needs to be resolved at some point in time before
6 all this other goes away.

7 MR. WILLS: Correct.

8 THE COURT: When are you going to set it for
9 trial?

10 MR. WILLS: That's what we'll do today.

11 THE COURT: Pardon?

12 MR. WILLS: We'll do that today.

13 THE COURT: I'm going to have to wade through
14 all this. Okay?

15 MR. COOPER: Yes, Your Honor.

16 If I could just remind the Court there is a
17 transcript of what took place at the hearing, but --

18 THE COURT: Did you provide that to me?

19 MR. COOPER: It's been filed. It was filed with
20 the Court.

21 THE COURT: It is?

22 MR. COOPER: Yes, sir.

23 THE COURT: I assume it's here.

24 MR. COOPER: I would assume so. But we'll be
25 happy to provide it, if you don't have it.

MIA PERRON, CVR-CM-M

-32-

Fisher v. Huckabee
Appeal
July 16, 2014

1 THE COURT: Well, let me ask you this. I
2 understand these are in the conservatory case; right?

3 MR. COOPER: Yes, Your Honor.

4 THE COURT: The will contest is on appeal?

5 MR. COOPER: Correct.

6 THE COURT: Now, how --

7 MR. KOUTEN: Judge --

8 THE COURT: I'm sorry?

9 MR...KOUTEN: The will contest has not been
10 brought. The will contest has not been heard.

11 THE COURT: But your removal is --

12 MR. KOUTEN: Yes.

13 THE COURT: -- in that case number, is what I'm
14 saying.

15 MR. KOUTEN: Our motion in that case number,
16 Judge.

17 THE COURT: Right.

18 MR. KOUTEN: Yes, sir.

19 THE COURT: That's on appeal. How can that be
20 interlocutory to the conservatory on a separate case?

21 MR. COOPER: Your Honor, there is --

22 THE COURT: How can that -- how is that
23 possible? I mean, you've got two cases going.

24 MR. COOPER: That's right.

25 THE COURT: So how can the appeal in one case be

1 interlocutory to a separate case? Please explain that
2 to me.

3 MR. COOPER: I'm not -- well, at the time -- at
4 the time that Judge Curry issued the orders that are
5 on appeal here before you today, at that time the
6 Court of Appeals or the Supreme Court, one of them,
7 was dealing with the issue of who was -- whether or
8 not Bessie Huckabee was the duly-appointed --

9 THE COURT: And they came back and said, we
10 can't determine that until you do the will contest..

11 MR. COOPER: Correct.

12 THE COURT: Okay?

13 MR. COOPER: Correct. But at the time -- at the
14 time that Judge Curry ruled, she has ruled that she's
15 going to appoint a special fiduciary at a time when
16 the whole issue of who should be the -- there was a
17 motion for a special --

18 THE COURT: The Court of Appeals has not kicked
19 that back saying, we're not going to rule on that
20 until y'all have a will contest; right?

21 MR. COOPER: Ultimately, that's what they did.
22 But at the time she made these rulings, it was up in
23 the air as to who -- you know, whether or not Bessie
24 Huckabee would be removed, whether or not somebody
25 else would be duly appointed. There were all kind of

Fisher v. Huckabee
Appeal
July 16, 2014

1 issues out there dealing with who would take the money
2 from the conservatorship and to administrate it in the
3 -- in the will.

4 THE COURT: All right. Okay.

5 MR. COOPER: And so, in other words, at that
6 time, all that was on appeal. We had a motion to
7 appoint a special administrator, Frank Barno
8 [phonetic]: We had a motion that Bessie Huckabee --
9 Betty Fisher be appointed as personal representative
10 to replace Bessie Huckabee.

11 THE COURT: Right.

12 MR. COOPER: There were motions to remove Bessie
13 Huckabee based on various things, failure of notice.
14 See, they got her appointed initially by not giving
15 any notice to the only living -- the direct heir,
16 Betty Fisher, was not given those. They went to
17 probate court and got the heir, Bessie Huckabee,
18 appointed without even putting down there on the form
19 that she had living relatives.

20 MR. KOUTEN: Judge --

21 MR. COOPER: And so you have a non relative --

22 THE COURT: Well, they got it pursuant to the
23 will, didn't they?

24 MR. KOUTEN: It is pursuant to the --

25 THE COURT: It's pursuant to the will. And the

Fisher v. Huckabee
Appeal
July 16, 2014

1 will gave everything, I assume, from what you said, to
2 a foundation for animals. This is under the will. So
3 what's wrong with that?

4 MR. COOPER: It actually gives it to Kay
5 Passalay Slade [phonetic], because she was running one
6 of these animal rescue --

7 THE COURT: Well, I mean, but they moved before
8 the probate court to approve the will, I would assume;
9 right?

10 MR. KOUTEN: That's correct, Your Honor.

11 THE COURT: So what's wrong with that? I mean,
12 you're insinuating to me there's something wrong with
13 that.

14 MR. KOUTEN: Statutorily, there's nothing wrong
15 with that, Judge. We had --

16 THE COURT: I understand. Let me hear
17 Mr. Cooper. I'll listen to you.

18 MR. KOUTEN: Yes, sir.

19 THE COURT: I mean, what's wrong with that,
20 Mr. Cooper?

21 MR. COOPER: It was our position that -- well,
22 they failed to follow the statute in giving notice to
23 Betty Fisher. In other words, she's the living --

24 THE COURT: Was she an advisee under the will?

25 MR. COOPER: I'm not sure about that.

Fisher v. Huckabee
Appeal
July 16, 2014

1 THE COURT: Well, who do you have to give notice
2 to, other than advisees under the will? I will move
3 under the will to appoint an executor and notify the
4 advisees. Who do you have to give notice to under the
5 statute?

6 MR. COOPER: I believe that you have to give
7 them to the family, even --

8 THE COURT: Well, I don't know. I'm asking a
9 question. I don't know what the probate statute says.
10 Does the statute say, I've got a will, I've got an
11 advisee, I've got an executor, you file the will to
12 prove the will? Does the statute say that in addition
13 to that, you've got to notify all the family members?

14 MR. COOPER: The heirs.

15 THE COURT: The heirs?

16 MR. COOPER: Yeah. The heirs and the --

17 THE COURT: Well, they're not heirs under the
18 will.

19 MR. COOPER: No. But if the will is knocked
20 out, if it's revoked --

21 THE COURT: Well, that's a separate problem.
22 You can come contest it. But you're insinuating they
23 did something wrong, and they didn't.

24 MR. COOPER: No.

25 THE COURT: You filed a will to prove the will,

MIA PERRON, CVR-CM-M

-37-

Fisher v. Huckabee
Appeal
July 16, 2014

1 you got an executor, you got the advisees, and you
2 asked the Court to approve it. Now you say you didn't
3 get notice for filing. But you had the right to come
4 in and contest the will, which you've done. So what
5 is wrong with that?

6 MR. COOPER: Well --

7 THE COURT: You keep insinuating they've done
8 something wrong by doing that, and I don't understand
9 your argument.

10 MR. COOPER: Well, there is a statute, Your
11 Honor, that says that when they go for informal
12 probate, even if there's a will that you have to give
13 notice to the known heirs and the devisees under the
14 will. So the known heirs have to be given notice.
15 They knew about Betty Fisher but they didn't give
16 notice --

17 THE COURT: Well, technically, are they heirs
18 under the will? I mean, you keep trying to confuse
19 the administration of a non-will estate versus a will
20 estate. Are they required to give notice to the heirs
21 if it was no will?

22 MR. KOUTEN: Your Honor --

23 MR. COOPER: I believe they --

24 MR. KOUTEN: -- the probate code says --

25 MR. COOPER: -- are, Your Honor.

1 THE COURT: Okay. Yes, sir?

2 MR. KOUTEN: The probate code says that once you
3 are appointed, the first document you send out is
4 what's called an information to heirs.

5 THE COURT: Right.

6 MR. KOUTEN: That form is subsequent to
7 appointment. It goes to not only to the devisees of
8 the will, but those who would be if the will was
9 invalid. And we did provide that subsequent to
10 appointment.

11 THE COURT: And then they have an opportunity to
12 come in and contest; right?

13 MR. KOUTEN: And they did. After --

14 THE COURT: That's what I thought.

15 MR. KOUTEN: And we did send them that
16 information to heirs subsequent to appointment.

17 THE COURT: All right.

18 MR. COOPER: But all that, Your Honor, was
19 ultimately determined against us in the Court of
20 Appeals. But it was on appeal when these orders were
21 issued, and we just think that when the Court of
22 Appeals or the Supreme Court is considering who should
23 be administering these assets, it's not for the
24 probate court to come back in in a conservatorship
25 action when the conservatorship has already ended.

1 And by statute --

2 THE COURT: I understand your argument. .

3 MR. COOPER: Yes. I --

4 THE COURT: Let me -- I'm going to have to read
5 it. Thank y'all very much.

6 MR. KOUTEN: Thank you, Judge.

7 MR. COOPER: Your Honor, there are separate
8 orders that are issued in 8657.

9 THE COURT: I'll look at all of them. I've got
10 all three files right here.

11 Have you got any separate arguments on the -- I
12 believe --

13 MR. COOPER: Your Honor, we don't have any
14 separate arguments --

15 THE COURT: I mean, have you got any separate
16 arguments on -- okay. Let me find the -- what's the
17 other remaining one?

18 MR. COOPER: 8657.

19 THE COURT: Have you got any separate arguments
20 under 8057?

21 MR. COOPER: 8657, Your Honor. And, yes, we do
22 have a lot of separate arguments.

23 THE COURT: What's different about that order?

24 MR. COOPER: Well, this order doesn't have
25 anything to do with appointment of Mr. Harvey. There

1 are two orders here. There's one motion that we have
2 for Ms. Fisher, Ms. Lisa Fisher, to be paid for her
3 work as conservator and the Court, without any
4 findings, denied that. And of course it's
5 well-briefed in our brief. But, you know, she was --
6 everybody else, attorneys, guardians ad litem,
7 everybody else in the case, has been paid. Ms. Fisher
8 filed this motion to be paid for her work while she
9 was conservator, and that was denied. Again, it was
10 properly motioned with affidavits. There was no
11 objection filed by Mr. Kouten, or by anybody else, and
12 the Court, without just cause, has denied those fees.

13 THE COURT: All right. What else?

14 MR. COOPER: The other thing -- the other thing,
15 Your Honor, is that the Court, after appointing
16 Mr. Harvey as special fiduciary, issued a series of
17 freeze orders. Now, those freeze orders, you know, we
18 feel like are inappropriate, with regard to Alice Shaw
19 Baker's estate, for a lot of reasons that we've
20 already argued here today.

21 But in addition to that, the freeze orders
22 specifically freeze Ms. Lisa Fisher's personal bank
23 accounts and there's no -- there was no reason, no
24 justification, for that. There was no evidence to
25 support any of these orders that the Court has. The

1 Court specifically, in the transcript, denies us the
2 opportunity to allow Ms. Fisher to testify. And so
3 it's just -- we just don't see how in the world --
4 again, there was no notice that she's going to issue
5 any freeze order. She froze all the bank accounts not
6 only of Alice Shaw Baker and Lisa Fisher as
7 conservator, but she's freezing Lisa Fisher's personal
8 bank accounts. Now, it didn't have any real effect
9 because Lisa Fisher didn't have any accounts here in
10 South Carolina personally --

11 THE COURT: She froze the account in South
12 Carolina? I assume it was an account in South
13 Carolina she froze?

14 MR. KOUTEN: Your Honor, there were several --

15 THE COURT: Hold on a second.

16 MR. COOPER: I believe they're -- I believe
17 they're in California.

18 THE COURT: What personal accounts did she
19 freeze of Ms. Fisher, is what I'm asking.

20 MR. COOPER: Well, none of them have -- I don't
21 think they've actually been impacted. But the order
22 does say that. And --

23 THE COURT: Well, which ones? What accounts?

24 MR. COOPER: It says accounts, Lisa Fisher
25 individually. And it seems like to me there's no

1 basis for that.

2 THE COURT: Well, does she have any individual
3 accounts in South Carolina?

4 MR. COOPER: No, Your Honor.

5 THE COURT: So she doesn't have any, so what's
6 the big deal?

7 MR. COOPER: All of the accounts I believe are
8 in California, Judge.

9 THE COURT: Well, the probate judge doesn't have
10 any authority to freeze her personal account in
11 California.

12 I mean, so what's the -- so what, is my question
13 to you. If she didn't have an account in South
14 Carolina and the probate judge froze it improperly, so
15 what --

16 MR. COOPER: Well, Your Honor --

17 THE COURT: -- is my question to you.

18 MR. COOPER: I'm not sure what effect it
19 actually had in terms of -- but it's improper for the
20 Court to order that.

21 THE COURT: Well, it may be. But so what?

22 MR. COOPER: Well, so we've appealed and we're
23 here on appeal, Your Honor, and you're here to
24 consider --

25 THE COURT: I mean, if there's nothing to

Fisher v. Huckabee
Appeal
July 16, 2014

1 freeze, what's the big deal --

2 MR. COOPER: Well, there were a lot of assets --

3 THE COURT: -- other than y'all want to squabble
4 with each other?

5 MR. COOPER: There were assets of Alice Shaw
6 Baker that were frozen.

7 THE COURT: Well, that's a separate problem.
8 Anything else on that --

9 MR. KOUTEN: Judge --

10 THE COURT: -- before I listen to the other
11 side?

12 MR. COOPER: No, Your Honor.

13 THE COURT: All right. Thank you very much.

14 Yes, sir?

15 MR. KOUTEN: For your convenience, Your Honor,
16 the two orders in this case --

17 [Whereupon, Mr. Kouten and Mr. Cooper confer]

18 MR. KOUTEN: If I may approach?

19 THE COURT: Yes, sir.

20 [Whereupon, Mr. Kouten proffers documents to the
21 Court]

22 MR. KOUTEN: In addition to those, there are
23 several orders freezing assets that the Court did sua
24 sponte. I had no idea that they were even in
25 existence. I didn't get copies of them. They are

1 fully consistent with the Court's order. The Court --
2 it does not show in the transcript how the Court
3 reacted to these funds being spent after discharge.
4 But having heard the case and then sua sponte later
5 issuing six or eight orders freezing assets, the Court
6 took that very seriously.

7 THE COURT: Are the assets -- is the -- is that
8 accounting somewhere in this paperwork?

9 MR. KOUTEN: I do -- it is not, Judge, but here
10 they are here, if I may approach again.

11 THE COURT: Let me have it. Let me look at it.

12 MR. KOUTEN: Here are all the orders freezing
13 the assets.

14 [Whereupon, Mr. Kouten proffers documents to the
15 Court]

16 THE COURT: But where is the one -- the final
17 accounting where the \$88,000 was spent? Is that part
18 of any of these orders?

19 MR. COOPER: No, Your Honor, it's not part of
20 the orders.

21 And, you know, again --

22 THE COURT: Well, is it part of my file, is what
23 I'm asking.

24 MR. KOUTEN: It is, Judge. There's --

25 THE COURT: That's all I want to know.

Fisher v. Huckabee
Appeal
July 16, 2014

1 MR. KOUTEN: -- an 800-page return, and it is a
2 part of the file.

3 THE COURT: Okay. That's fine. That's all I
4 wanted to know.

5 THE COURT: All right. Anything else?

6 MR. KOUTEN: There are three accountings: one
7 is upon discharge; one is a separate 2009 accounting;
8 and one is -- or separate 2009 and 2010. Therein you
9 will find where the discharge conservator was spending
10 estate assets without authority. So those will be --

11 THE COURT: I'm sure that's why the freeze was
12 issued.

13 MR. KOUTEN: Yes, sir.

14 THE COURT: Thank y'all very much.

15 MR. COOPER: Your Honor, one thing for the
16 record?

17 THE COURT: Thank you very much. I've heard
18 enough.

19 I'll review it. I'll review your memorandums.
20 I'll make them a part of the record. Okay? Thank
21 y'all very much.

22 MR. COOPER: Thank you.

23 [HEARING CONCLUDES AT 11:13 A.M.]
24
25

Fisher v. Huckabee
Appeal
July 16, 2014

C E R T I F I C A T E

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

RECEIVED

NOV 23 2015

SC Court of Appeals

I, the undersigned Mia Perron, Circuit Court
Reporter for the 9th Judicial Circuit of the State of
South Carolina, do hereby certify that the foregoing is a
true, accurate, and complete transcript of the hearing
before the Honorable J.C. Nicholson, Jr., on Wednesday,
July 16, 2014.

I do further certify that I am neither kin nor
counsel to any of the parties and have no interest in the
outcome of this action.

Dated this 6th day of December, 2014.

Mia Perron

Mia Perron, CVR-CM-M
Circuit Court Reporter
9th Judicial Circuit

MIA PERRON, CVR-CM-M

-47-

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Consolidated Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

November 19, 2015

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By:

JOHN HUGHES COOPER, ESQUIRE

Federal Court ID 298

South Carolina Bar 1387

State Bar of Georgia 185986

1476 Ben Sawyer Blvd. Ste. 7

Mount Pleasant, SC 29464

shiplaw@jhcooper.com

843-883-9099; fax 843-883-9335

RECEIVED

NOV 23 2015

SC Court of Appeals

ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA

In the Court of Appeals~

APPEALS FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge
Tamara Curry, Probate Court Judge

RECEIVED

DEC 11 2015

Appellate Case No. 2014-002020
Circuit Case No. 2011-CP-10-7819

SC Court of Appeals

BETTY FISHER.....Appellant

v.

BESSIE HUCKABEE.....Respondent

FINAL BRIEF OF APPELLANT

JOHN HUGHES COOPER, ESQUIRE
1476 Ben Sawyer Blvd. Ste. 7
Mount Pleasant, SC 29464
shiplaw@jhcooper.com
843-883-9099; fax 843-883-9335
(Attorney for Appellant)

TABLE OF CONTENTS AND AUTHORITIES

Table of Contents	2
Table of Authorities.....	3
I. INTRODUCTION.....	5
II. STATEMENT OF ISSUES ON APPEAL.....	5
III. STATEMENT OF THE CASE	6
ARGUMENT.....	9
IV. THE ORDER APPOINTING A SPECIAL FIDUCIARY IN THIS CASE MUST BE REVERSED, BECAUSE THE COURT DID NOT HAVE JURISDICTION TO MAKE SAID ORDER AND APPELLANT WAS ENTITLED TO NOTICE.....	9
A. <i>Standard of Review</i>	9
1) THE CIRCUIT COURT'S FAILURE TO ALLOW ORAL ARGUMENT INTERFERED WITH ITS ABILITY TO REVERSE THE PROBATE COURT'S ERRONEOUS ORDERS AND DEPRIVED APPELLANT OF DUE PROCESS.....	9
2) THE PROBATE COURT DID NOT HAVE JURISDICTION TO HEAR THIS MATTER, BECAUSE MATTER WAS ON APPEAL	11
3) THE ORDER APPOINTING A SPECIAL FIDUCIARY IS VOID, BECAUSE HUCKABEE FAILED TO PROVIDE BETTY FISHER WITH THE STATUTORY AND CONSTITUTIONALLY REQUIRED NOTICE OF HER INTENT TO SEEK APPOINTMENT OF THE APPOINTMENT OF SPECIAL FIDUCIARY.....	12
4) THE ORDER APPOINTING A SPECIAL FIDUCIARY IS VOID, BECAUSE HUCKABEE HAS NO STANDING TO BRING SAID MOTION WHEN ALICE SHAW BAKER REVOKED THE WILL NAMING HER PERSONAL REPRESENTATIVE.....	15

TABLE OF AUTHORITIES

Decisional Law:

<i>Dean v. Kilgore</i> , 313 S.C. 257 (1993).....	9
<i>Dukes & Dukes v. Hygrade Food Products</i> , 236 S.C. 69 (1960).....	11
<i>Eagles v. S.C. Nat'l Bank</i> , 301 S.C. 402, 408 (Ct. App. 1990).....	10
<i>FCC v. WJR, The Goodwill Station, Inc.</i> , 337 U.S. 265, 272 (1949).....	10
<i>Matter of Howard</i> , 315 S.C. 356, 360 (1993).....	9
<i>Neely v. Thomasson</i> , 365 S.C. 345(2005).....	9
<i>S.C. Dep't of Soc. Serv. V. Holden</i> , 319 S.C. 72 (1995).....	14
<i>Thomas v. Howard Co. & T.W. Graham and Co.</i> , 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995).....	14
<i>Tyron Fed. Sav. & Loan Ass'n v. Phelps</i> , 307 S.C. 391(1992).....	14
<i>Univ. of S. Cal. v. Moran</i> , 365 S.C. 270 (2005).....	9

South Carolina Statutes:

S.C. Code Ann. § 62-1-201(20).....	15, 16
S.C. Code Ann. § 62-1-302.....	16
S.C. Code Ann. § 62-1-308 (a).....	8, 10
S.C. Code Ann. § 62-1-401.....	13
S.C. Code Ann. § 62-3-106.....	14
S.C. Code Ann. § 62-3-614.....	13
S.C. Code Ann. § 62-3-803.....	13
S.C. Code Ann. § 62-5-309.....	15
S.C. Code Ann. § 62-5-425.....	12, 16
S.C. Code Ann. § 62-7-704.....	12, 13
S.C. Code Ann. § 62-7-706.....	15

TABLE OF AUTHORITIES CONT'D

South Carolina Rules:

Rule 201, SCACR	7
Rule 203, SCACR.....	11
Rule 205, SCACR.....	11
Rule 208, SCACR.....	6
Rule 241, SCACR.....	12
Rule 60, SCRCP.....	11

Miscellaneous:

United States Constitution, Amends. V and XIX, § 1.....	13, 14
South Carolina Constitution, Art. 13.....	14

I. INTRODUCTION

This is one in three appeals related to the orders of the probate court in the *Conservatorship of Alice Shaw Baker*, Probate Case no. 2008-GC-10-088. These orders relate to the Conservator Lisa Fisher's Accountings and the duties owed by a conservator to a conservatee's estate, after her death. These specifically involve orders dated September 28, 2011 appointing a Special Fiduciary and October 14, 2011 denying Appellant Betty Fisher's *Motion to Set Aside Void Probate Court Order*.

While these appeals involve to the same tragic factual issues related to Alice Shaw Baker's conservatorship, pending litigation related to a Will contest and revocation of Ms. Shaw Baker's Will, and the safeguarding of her estate assets pending resolution of these matters, each case involves slightly different legal issues. The errors of the Probate Court were not rectified by the Circuit court, so Appellant filed this appeal for this Court's review.

Pursuant to motion by Appellant, this court consolidated the record on appeal, however all briefing will be separate.

Appellant prays that this Court reverse the following Issues on Appeal:

II. STATEMENT OF ISSUES ON APPEAL

- 1) Did the Circuit Court's Failure to Consider Appellant's Statement of Grounds prior to Oral Argument, and Failure to reverse the Probate Court's Order amount to an abuse of discretion and a deprivation of due process?
- 2) Did the Probate Court have jurisdiction to Appoint a Special Fiduciary in light of the Appeal in the Supreme Court?
- 3) Is the Order Appointing a Special Fiduciary Void, because Huckabee failed to provide Betty Fisher with the statutorily and constitutionally required notice of her intent to seek appointment of the Appointment of Special Fiduciary?

- 4) Is the Order Appointing a Special Fiduciary Void, because Huckabee had no standing to bring said motion when Alice Shaw Baker revoked the Will naming her personal representative?

Further, Appellant Betty Fisher joins in Lisa Fisher's Initial Briefs, and requests that the court consider these issues in her appeal. (Rule 208(b)(6), SCACR)

III. STATEMENT OF THE CASE

On February 25, 2009, Alice Shaw Baker died. (R. 203, Death Certificate) Her great niece, Lisa Fisher, Esquire, had helped her since involuntary commitment proceedings were initiated without notice to her family, including her niece, Appellant Betty Fisher ("Appellant"). (R. 70, 73, 76), Petitions for Incapacity, Emergency, and Conservatorships, etc.) Though she was already conserved, the family rushed to her side from California. (R. 83, Petition for Appointment of Successor) After a hearing, on October 29, 2008, Lisa Fisher was appointed her guardian and conservator. (R. 83, Order Appointing Lisa Fisher as Guardian and Conservator) After her appointment, Lisa Fisher traveled regularly to South Carolina to visit her great aunt, and ensure her health and well being. (R. 249, Motion for Approval of Conservator/Guardian fees)

Appellant also visited with Ms. Shaw Baker before her death, and knew that she had revoked her Will, and reaffirmed her desire that all of her property benefit these animal charities. (R. 321, Motion for Reconsideration, p. 7)

After Ms. Shaw Baker's death, Appellant initiated litigation on April 27, 2009 in the Charleston County Probate Court and removed it to the Charleston County Court of Common Pleas on May 13, 2009 (Case no. 2009-CP-10-3010). (R. 219, p. 220, Opposition to Petition for Discharge) These proceedings included Alice Shaw Baker's family's attack of the validity of the informal appointment of Respondent Bessie Huckabee ("Respondent"), the Will Contest, the

appointment of a Special Administrator, the effect of Attorney Peter Kouten's ex-parte communication in the lower court proceedings, and bond provisions. (Pursuant to SCACR 201(d), Request for Judicial Notice, Court of Appeals, Case no. 2009-CP-10-03010)

After nearly three years of preservation of the status quo by Appellant's daughter Lisa Fisher, while these matters were before the Supreme Court, Respondent filed her *Motion for Special Fiduciary*. (R. 281, Respondent motion) At no time was Appellant served with her statutory and constitutional notice of the motion or the proceedings. (R.281, p. 284, Respondent's Motion, proof of service)

Respondent knew of Appellant's existence, and knew that the appointment of a Third Party Special Fiduciary, would affect the Estate litigation and was contrary to Ms. Shaw Baker's desires that the monies be used solely for Animal Charities. (R. 347, Motion to Set Aside) Appellant filed her *Motion to Set Aside the Void Order of September 28, 2011*, which the Probate Court denied. The Court Denied said Motion. (R.61, Order Denying Motion) Thereafter, appellant filed her Notice of Intent to Appeal filed October 25, 2011. (R. 396, Notice of Intent) Her *Statement of Grounds Supporting her Appeal Filed on October 25, 2001 seeking to void Probate Orders in Case 2008-GC-088* was timely filed on December 9, 2011. (R.401, Statement of Grounds) Respondent did not file her *Notice of Appearance* until March 11, 2014. (R. 537, *Notice of Appearance*).¹ The court set oral argument for hearing on July 16, 2014. (R. 560, Transcript) Thereafter, the court issued its Form 4–Judgment in Civil Case denying the appeal in this matter. (R. 67, Form 4) The court ruling was:

“Statement of Judgment by the Court: Appellant Fisher's appeal, filed on October 25, 2011, came before this Court on July 16, 2014.

¹ Respondent did not file any response or opposition to Appellant's Statement of Grounds. Thereafter, at oral argument, Respondent's counsel made arguments which were not factually correct and were not part of the record. (R. 583-587, 590, ll. 3-10, Transcript.)

Upon a review of the case, this Court affirms the probate court's order of September 28, 2011, appointing a Special Fiduciary and affirms the probate court's order of October 14, 2011, denying Fisher's Motion to Set Aside Void Probate Court Order." @. 67)

Appellant filed her Notice of Appeal on September 19, 2014. (R. 540, Notice of Appeal)

By this Appeal, Appellant attacks the Probate Court's orders of September 29, 2011 and October 14, 2011 appointing J. Heyward Harvey, Esquire as Special Fiduciary and denying Appellant's Motion to Void Orders.²

² This order includes findings not requested in the original motion and includes the court's sua sponte appointment of Heyward Harvey, without providing the parties with any information about Mr. Harvey and/or allowing the parties to object. Appellant had no ability to determine prejudice and/or conflict of interest. This is an unnecessary cost to the estate and in direct contravention to the desires of the decedent that her monies be used to benefit animal charities. The order requires the Special Fiduciary Heyward Harvey to:

"receive all assets held by Lisa Fisher within fifteen days of execution of this Order. That Mr. Harvey:

- a. marshall all assets, review accounts and 2009 and 2010 accountings with the powers and discretions as authorized by law with regard to same.
- b. seek formal approval of the final accounting and 2009 and 2010 accountings with authority to amend same, if necessary and further, seek to close the conservatorship estate.
- c. review needs for maintenance, taxes and insurance on real property with authority over same.
- d. maintain authority and control over all estate assets.
- e. keep records of his time devoted to this file and seek approval of his fees through separate order of this Court and it is further." (R. 55, p. 57)

Appellant contends that in light of the pending litigation in the Estate matter, this motion was improper on its face and she should not be forced to litigate the matter while there is a pending matter on Appeal. Appellant is fighting to preserve her Aunt's wishes that all monies benefit Animal Charities in the Estate matter, in light of the revoked will, Bessie Huckabee's interference prior to final determination in this matter is improper.

Further, by this Appeal, she seeks reversal of the Circuit Court's Order affirming the Probate Court Orders, and denial of oral argument as to the issues briefed when the Circuit Court Admitted it had not reviewed the briefing. (R. 560, pp. 565-566 , II. 24-25 and 1-13, respectively and R. 67, Transcript and Form 4)

The Appointment of the Special Fiduciary without notice to Appellant was in violation of Appellant's Due Process and Equal Protection rights and require immediate reversal.

ARGUMENT

IV.

THE ORDER APPOINTING A SPECIAL FIDUCIARY IN THIS CASE MUST BE REVERSED, BECAUSE THE COURT DID NOT HAVE JURISDICTION TO MAKE SAID ORDER AND APPELLANT WAS ENTITLED TO NOTICE

A. *Standard of Review*

It is well settled that the standard of review for Appeals from the probate court are governed by the provisions of the Probate Code. (*Matter of Howard*, 315 S.C. 356, 360, 434 S.E.2d 254, 256 (1993).) The Probate Code provides that a final order or decree of the probate court may be appealed to the circuit court. (S.C. Code Ann. § 62-1-308 (2009).)

Moreover, an issue regarding statutory interpretation is a question of law. (*Univ. of S. Cal. v. Moran* , 365 S.C. 270, 274-75, 617 S.E.2d 135, 137 (Ct. App. 2005). A petition to remove personal representative is in equity. (See *Dean v. Kilgore*, 313 S.C. 257, 259 (Ct. App. 1993).)

If the proceeding in the probate court is in the nature of an action at law, neither the circuit court nor the appellate court may "disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them." (*Neely v. Thomasson*, 365 S.C. 345, 349-50, 618 S.E.2d 884, 886 (2005).)

1) THE CIRCUIT COURT'S FAILURE TO ALLOW ORAL ARGUMENT INTERFERED WITH ITS ABILITY TO REVERSE THE PROBATE COURT'S ERRONEOUS ORDERS AND DEPRIVED APPELLANT OF DUE PROCESS

At the appeals hearing on July 16, 2014, the Court stated:

"Yes, I've got the briefs. I have not looked at them but I have got them here. I will probably have to look at them before I make a decision. But go ahead...You don't have to reiterate everything that's in there, okay, because I will read them...Or my law clerk and -we both will probably read them."

®. 560, pp. 565-566 , ll. 24-25 and 1-13, respectively)

The court concluded the argument without allowing counsel to complete the record, although the court did reassure the parties that he would review the memorandum. (R. 560, 566)

While it is true that the law provides:

"the right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances, as do other procedural regulations. Certainly the Constitution does not require oral argument in all cases where only insubstantial or frivolous questions of law, or indeed even substantial ones, are raised. Equally certainly, it has left wide discretion to Congress in creating the procedures to be followed in both administrative and judicial proceedings, as well as in their conjunction." (See *FCC v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 272 (1949), emphasis added)

Here, the court stated that it had not read the briefs, therefore the threshold questions as to the need for oral argument and the circumstances that gave rise to the substantial questions of law, raised here, could never be addressed, and mandated a different conclusion that oral argument was necessary. Appellant contends due process was implicated, and that she was deprived of these necessary protections.

Finally, the Circuit Court's deprivation of further argument on the records, prevented Appellant from curing any misunderstanding the court may have had about the complicated and important issues raised in this case. It also prevents Appellant from demonstrating that the court's ultimate judgment in this case was based on erroneous application of the law. In light of the fact that: "[b]eing an equity case, the circuit court, sitting as an appellate court, had jurisdiction to make findings in accordance with its own view of the preponderance of the evidence." (*Eagles v. S.C. Nat'l Bank*, 301 S.C. 402, 408 (Ct. App. 1990).) The court made no findings, and Appellant

contends this coupled with the underlying failure of the probate court to make findings based on appropriate evidence is fatal to the orders, and reversal is mandated.

2) **THE PROBATE COURT DID NOT HAVE JURISDICTION TO HEAR THIS MATTER, BECAUSE THE MATTER WAS ON APPEAL.**

Appellant contends that the Probate Court had no jurisdiction to hear this matter, because when a matter is on appeal the lower court loses jurisdiction pursuant to Rule 203, SCACR:

"Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal. (Rule 205, SCACR, emphasis added.)

Further, pursuant to S.C. Code Ann. § 62-1-308 (c):

"When an appeal according to law is taken from any sentence or decree of the probate court, all proceedings in pursuance of the order, sentence, or decree appealed from shall cease until the judgment of the circuit court, court of appeals, or Supreme Court is had. If the appellant, in writing, waives his appeal before the entry of the judgment, proceedings may be had in the probate court as if no appeal had been taken." (Emphasis added)

At the time of order, the issue of the proper appointment of the personal representative and the appointment of the special administrator was on appeal, thus the Probate Court had no jurisdiction to interfere with the Supreme Court's jurisdiction.

It is well settled law that a court can not interfere with another court's order which is subject to the pending litigation. (See Rule 60, SCACR; See also *Dukes & Dukes v. Hygrade Food Products*, 236 S.C. 69 (1960).)

Therefore, any and all orders issued in relationship to the Motion for Special Fiduciary must be reversed.

//

3) **THE ORDER APPOINTING A SPECIAL FIDUCIARY IS VOID, BECAUSE HUCKABEE FAILED TO PROVIDE BETTY FISHER WITH THE STATUTORY AND CONSTITUTIONALLY REQUIRED NOTICE OF HER INTENT TO SEEK APPOINTMENT OF THE APPOINTMENT OF SPECIAL FIDUCIARY**

Appellant contends that there is no statutory authority under the law governing conservatorships for appointment of a Special Fiduciary—that the Court’s expansive view of Trust law actually constituted an improper interference by the Court in Estate property in a decedent’s estate and acted as unwarranted “removal proceedings” of Lisa Fisher.

Respondent’s reliance on South Carolina Code Ann. § 62-7-704(e) can not interfere with the Appellate Jurisdiction of the Supreme Court. In light of the fact that the matter was on appeal about the very appointment of Respondent Huckabee, as personal representative (and the appointment of a potential special administrator), any orders issued while the underlying appeal was still going forward are void. Therefore, Lisa Fisher must protect the property until the determination of the appropriate person to deliver the property.

The law governing a conservatorship is set forth in § 62-5-425(d) provides in pertinent part:

"If a protected person dies, the conservator shall deliver to the court for safekeeping any will of the deceased protected person which may have come into his possession, inform the executor or a beneficiary named therein that he has done so, and retain the estate for delivery to a duly appointed personal representative of the decedent or other persons entitled thereto...."(Emphasis added)

Under this scenario, the controlling issue is who is duly appointed and/or entitled to delivery of the property. Additionally, the code mandates retention of the property by the conservator after conservatorship terminates as a matter of law by death. Appellant has joined in the argument that Lisa Fisher had a continuing duty pursuant to the statute.

However, even if trust law **did** control, the motion brought by Respondent would require notice as follows pursuant to § 62-7-704(e):

"(e) Whether 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. The procedure for such appointment and the notice requirement shall be the same as set forth for special administrators under South Carolina Code Section 62-3-614." (Emphasis added)

Thus, §62-7-704(e) and § 62-3-614 required Huckabee to provide notice to Betty Fisher.

The notice required is the type contemplated by § 62-1-401 which requires 20 days notice and a hearing.

The notice required is the same as for appointment of a special administrator:

"A special administrator may be appointed:

(1) informally by the court on the application of an interested person when necessary:

(a) to protect the estate of a decedent prior to the appointment of a general personal representative or if a prior appointment has been terminated as provided in Section 62-3-609; or

(b) for a creditor of the decedent's estate to institute any proceeding under Section 62-3-803(c);

(2) in a formal proceeding by order of the court on the petition of any interested person and finding, after notice and hearing, that appointment is necessary to preserve the estate or to secure its proper administration including its administration in circumstances where a general personal representative cannot or should not act. If it appears to the court that an emergency exists, appointment may be ordered without notice." (See § 62-3-614)

In light of the fact that there was **no** evidence presented at trial, **no** testimony, and **no** opportunity to be heard, there could be no support for the finding of an "emergent" situation warranting the Appointment of a Special Fiduciary without notice. (R. 313)

Moreover, the fundamental requirements of due process under the South Carolina and United States Constitutions include notice and an opportunity to be heard. (See U.S. Const. amends. V and XIV, § 1; S.C. Const. art. 1, § 22; *S.C. Dep't of Soc. Serv. v. Holden*, 319 S.C. 72, 78, 459 S.E. 2d 846, 849 (1995).) Appellant as the family member of Alice Shaw Baker had a right to object to the improper interference of Respondent Huckabee into the Estate of Alice Shaw Baker, however the lack of notice prevented her from exercising this right.

A void judgment is one that from its inception is a complete nullity and without legal effect. (*Thomas v. Howard Co. & T.W. Graham and Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995).) It is fundamental that no judgment or order affecting the rights of a party to the cause shall be made or rendered without notice to the party whose rights are to be affected. (*Tyron Fed. Sav. & Loan Ass'n v. Phelps*, 307 S.C. 361, 362, 415 S.E.2d 397, 398 (1992).)

In proceedings in the probate court where notice is required, an order is binding only as to persons given notice of the proceedings. (See S.C. Code Ann. § 62-3-106).

Appellant, Betty Fisher, the niece of Alice Shaw Baker and litigant in the Will Contest, etc. action did not receive actual notice. The Attorney General, on behalf of animal charities, did not receive actual notice. (R. 284, Motion to Appoint Special Fiduciary Certificate of service)

This failure and refusal by Respondent to give notice to persons entitled to notice deprived them from objecting to the appointment of a Special Fiduciary and is not binding against them. It has deprived them from inquiry into the cost, conflict of interest, and role of a Special Fiduciary in this action, and that is an abuse of discretion.

This court's unilateral choice of an "unknown" fiduciary, without opportunity to review his record and/or object is improper and mandates reversal in this case.

//

- 4) **THE ORDER APPOINTING A SPECIAL FIDUCIARY IS VOID; BECAUSE HUCKABEE HAS NO STANDING TO BRING SAID MOTION WHEN ALICE SHAW BAKER REVOKED THE WILL NAMING HER PERSONAL REPRESENTATIVE.**

The statutory definition for an "interested party" in a Probate matter is set forth in S.C.

Code Ann. § 62-1-201(20).

"Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative and other fiduciaries representing interested persons. **The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding.** (Emphasis added)

Bessie Huckabee had no standing while Ms. Shaw Baker was alive to involve herself in the conservatorship (S.C. Code § 62-5-309), and Appellant contends that the statutory language and facts of this case preclude her from intervening and attempting to gain favor in the Probate Court by her forum shopping.

The language governing Trusts also makes clear that she did not have standing to bring the motion as a "representative" because it amounted to a removal of Lisa Fisher and only a beneficiary can exercise this right, unless there is admissible evidence for the court to consider and initiate the removal after hearing. (See S.C. Code Ann. § 62-7-706 ["a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative."]) Here, the court did not "remove" Lisa Fisher on its own initiative, it was at the insistence of Respondents and in a assail of Lisa Fisher's character without evidence or testimony and without cause.

Due to their lack of standing in the conservatorship, both Respondent and Kay Passailague are merely interlopers who have now caused Appellant to incur costs to protect Alice Shaw Baker's Estate, where her daughter Lisa Fisher was (and continues to) properly protect the assets pending final resolution during the Appeal process.

The language of S.C. Code Ann. § 62-1-201(20) makes it clear that the role of an interested party may "vary from time to time" in litigation. Here, while the matter is on Appeal, the issue of the standing of Respondent is also on appeal. Therefore, any order's from the Probate Court in this matter is precluded and constitutes an improper interference with the Circuit Court's jurisdiction. (See S.C. Code Ann. § 62-1-302)

To allow Respondent to come in, seek the appointment of a third party, whose very appointment will squander away funds rightfully held for the protection of the animals, is inherently wrong.

Ms. Shaw Baker's life was about animals and their protection. Therefore, Respondent Huckabee must not be allowed to interfere with the protection and preservation of these assets, nor with the principles which mandate a conservator distribute assets only to the appropriate person. (See S.C. Code Ann. § 62-5-425(d).)

It doesn't take the wisdom of Solomon to understand that a Third Party Fiduciary's appointment, necessitates additional fees and costs to the estate, including attorney fees—all causing unnecessary waste to the estate, and ultimately undermines Alice Shaw Baker's desires that her monies be used for the benefit and protection of animals.

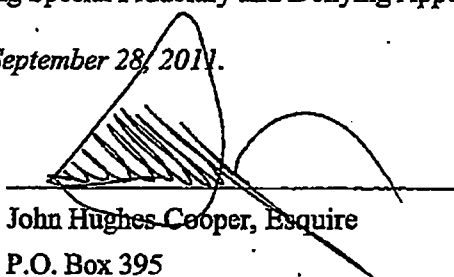
//

//

//

Appellant respectfully requests that the court reverse the Order of the Circuit Court affirming the Probate Court Order Appointing Special Fiduciary and Denying Appellant *Motion to Set Aside Void Probate Court Order dated September 28, 2011*.

December 8, 2015



John Hughes Cooper, Esquire
P.O. Box 395
Sullivan's Island, SC 29482
(843) 883-9099
Attorney for Appellant

Other Counsel of Record:

Peter A. Kouten, Esquire
Kouten Law Firm, LLC
P.O. Box 340
John's Island, SC 29457

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEALS FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge
Tamara Curry, Probate Court Judge

RECEIVED

DEC 11 2015

Appellate Case No. 2014-002028
Circuit Case No. 2011-CP-10-7821

SC Court of Appeals

LISA FISHER.....Appellant

v.

BESSIE HUCKABEE.....Respondent

FINAL BRIEF OF APPELLANT

JOHN HUGHES COOPER, ESQUIRE
1476 Ben Sawyer Blvd. Ste. 7
Mount Pleasant, SC 29464
shiplaw@jhcooper.com
843-883-9099; fax 843-883-9335
(Attorney for Appellant)

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEALS FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge
Tamara Curry, Probate Court Judge

Appellate Case No. 2014-002028
Circuit Case No. 2011-CP-10-7821

LISA FISHER.....Appellant

v.

BESSIE HUCKABEE.....Respondent

FINAL BRIEF OF APPELLANT

JOHN HUGHES COOPER, ESQUIRE
1476 Ben Sawyer Blvd. Ste. 7
Mount Pleasant, SC 29464
shiplaw@jhcooper.com
843-883-9099; fax 843-883-9335
(Attorney for Appellant)

TABLE OF CONTENTS AND AUTHORITIES

A. Table of Contents

Table of Contents and Authorities.....	2
A. Table of Contents.....	2
B. Table of Authorities.....	4
I. INTRODUCTION.....	7
II. STATEMENT OF ISSUES ON APPEAL.....	8
III. STATEMENT OF THE CASE.....	9
A. <i>Summary of Facts and Pleadings</i>	9
B. <i>Probate Court's Failure to Allow Testimony and Lack of Evidentiary Hearing</i>	11
C. <i>Probate Orders</i>	12
D. <i>Timely Appeal by Appellant of Probate Orders to the Circuit Court</i>	15
E. <i>Timely Appeal by Appellant of Circuit Court Orders</i>	16
IV. ARGUMENT.....	17
A. <i>Standard of Review</i>	17
1. <u>The Circuit Court's Failure to Allow Oral Argument Interfered with its Ability to Reverse the Probate Court's Erroneous Orders and Deprived Appellant of Due Process</u>	18
2. <u>At the time of the Order, The Probate Court did not have Jurisdiction To Appoint A Special Fiduciary</u>	19
3. <u>Appellant's Appeal in the Supreme Court precluded the Probate Court's Order Appointing a Special Fiduciary, because it attempted to Review another Judge's Order in Violation of Rule 60 and Decisional Law</u>	21
4. <u>Once A Personal Representative is Appointed, the Probate Court does not have Jurisdiction to Appoint a Special Fiduciary under Probate Code § 62-7-704(e)</u>	21

5.	<u>Respondent Huckabee's Standing was also on Appeal, so it was an Abuse of Discretion for the Court to Grant her Motion Which Amounts to a Removal without Cause of Appellant.....</u>	23
6.	<u>The Probate Court's Proceedings Were Pursuant to Protective Proceedings, however the Probate Court's Jurisdiction Ended at At Alice Shaw Baker's Death.....</u>	25
7.	<u>The Probate Court Erred in its Failure to Rule on Appellant's Objections to Respondent's Motion to Appoint Special Fiduciary and Made at the Hearing.....</u>	26
8.	<u>The Probate Court's Finding that Appellant did not have Authority to Pay Expenses on Behalf of the Estate was Erroneous, and Demonstrates that there was no Emergent Need for Appointment of A Special Fiduciary.....</u>	27
9.	<u>The Legal Principal Governing Laches Demonstrates that there is no "Emergent need" under S.C. Code Ann. § 62-7-704(e) for the Appointment of a Special Fiduciary.....</u>	30
10.	<u>The Probate Court Abused its Discretion by Refusing to Strike Respondent's Motion to Appoint Special Fiduciary due to her Failure to Comply with Rule 11, SCRPC.....</u>	31
11.	<u>The Probate Court's Erred in Failing to Grant Appellant's Extension of Time to Deliver Alice Shaw Baker's Property.....</u>	32
12.	<u>The Probate Court Erred in hearing the Motion to Appoint a Special Fiduciary when the record disclosed that interested parties, including the Attorney General of South Carolina, had not received statutory notice of the Proceedings, under S.C. Code Ann. § 62-3-614 and the United States Constitution, Amends. V and XIX, § 1 and the South Carolina Constitution, Art. 13.....</u>	32
V.	<u>CONCLUSION.....</u>	33

TABLE OF AUTHORITIES

Decisional Law:

<i>Bunkam v. Manor Props.</i> 321 S.C. 95, 98-99.....	20
<i>Dukes & Dukes v. Hygrade Food Products,</i> 236 S.C. 69 (1960).....	21
<i>Eagles v. S.C. Nat'l Bank,</i> 301 S.C. 402, 408 (1990).....	19
<i>Elam v. South Carolina Dept. of Transp.,</i> 361 S.C. 9, 602 S.E.2d 772 (2004)	15
<i>Ellis v. Procter & Gamble Dist. Co.,</i> 315 S.C. 283, 285, 433 S.E. 2d 856 (1993).....	31
<i>FCC v. WJR, The Goodwill Station, Inc.</i> 337 U.S. 265, 272 (1949).....	18
<i>Freeman v. McBee,</i> 280 S.C. 490, 313 S.E.2d 325 (1984).....	26
<i>Hallums v. Hallums,</i> 296 S.C. 195, 198-199 (1988).....	30
<i>In re Estate of Pallister,</i> 363 S.C. 437(2005).....	27
<i>Jackson v. Speed,</i> 326 S.C. 289, 486 S.E. 2d 750 (1997).....	31
<i>Joiner ex rel. Rivas v. Rivas,</i> 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000).....	24
<i>Matter of Howard,</i> 315 S.C. 356, 360, 434 S.E.2d 254, 256 (1993).....	17
<i>Neely v. Thomasson,</i> 365 S.C. 345(2005).....	17
<i>O'Shea v. Lesser,</i> 308 S.C. 10, 15.....	32
<i>S.C. Dep't of Soc. Serv. v. Holden,</i> 319 S.C. 72, 78, 459 S.E. 2d 846, 849 (1995).....	32
<i>Spectre, LLC v. S.C. Dept. of Health and Envtl. Control,</i> 386 S.C. 357 (2010).....	22
<i>State v. Najjar De'breece Byers,</i> No. 710 S.E. 2d 55 (2011).....	26
<i>State v. Stahlnecker,</i> 386 S.C. 609, 617 (2010).....	26

<i>Thomas v. Howard Co. & T.W. Graham and Co</i> , 318 S.C. 286, 291, 457 S.E. 2d 340,343 (1995).....	33
<i>Toyota v. Florence Inv. V. Lynch</i> (1994) 314 S.C. 257.....	27
<i>Tyron Fed. Sav. & Loan Ass'n v. Phelps</i> , 307 S.C. 361, 362, 415 S.E.2d 397, 398 (1992).....	33
<i>Univ. of S. Cal. v. Moran</i> , 365 S.C. 270, 274-75, 617 S.E.2d 135, 137 (Ct. App. 2005).....	17
<i>Wise v. Wise</i> , 394 S.C. 591, 716 S.E.2d 117 (Ct. App. 2011).....	27

South Carolina Statutes:

S.C. Code Ann. § 62-1-201(20).....	23, 24
S.C. Code Ann. § 62-1-302.....	24, 25
S.C. Code Ann. § 62-1-308	17, 19, 20
S.C. Code Ann. § 62-3-105.....	25
S.C. Code Ann. § 62-3-106.....	32
S.C. Code Ann. § 62-3-609.....	23
S.C. Code Ann. § 62-3-614.....	9, 22, 23, 32
S.C. Code Ann. § 62-3-803	22, 23
S.C. Code Ann. § 62-5-102	14, 25
S.C. Code Ann. § 62-5-306.....	25
S.C. Code Ann. § 62-5-309.....	24
S.C. Code Ann. § 62-5-417.....	28
S.C. Code Ann. § 62-5-425.....	18, 23, 25, 33
S.C. Code Ann. §62-7-303(a)(4).....	28
S.C. Code Ann. § 62-7-404.....	8, 22, 28
S.C. Code Ann. § 62-7-407.....	28

S.C. Code Ann. § 62-7-418.....	29
S.C. Code Ann. § 62-7-701.....	28, 29
S.C. Code Ann. § 62-7-704(e)).....	8, 13, 21, 27, 29, 30
S.C. Code Ann. §§ 62-7-706.....	24
S.C. Code Ann. § 62-7-707.....	29, 32
S.C. Code Ann. § 62-7-802.....	30
S.C. Code Ann. § 62-7-933.....	27, 28

South Carolina Rules:

Rule 11, SCRCP.....	8, 31
Rule 59, SCRCP.....	15, 16
Rule 60, SCRCP	8, 21
Rule 103(a)(1), SCRCP.....	26
Rule 203(b)(1), SCRCP.....	10, 15, 19
Rule 205, SCRCP.....	20
Rule 241, SCRCP.....	20

Miscellaneous:

Restatement (Third) of Trusts, § 34).....	11
South Carolina Rules of Professional Conduct, Rule 3.3.....	27
South Carolina Rules of Professional Conduct, Rule 4.1.....	27
South Carolina Rules of Professional Conduct, Rule 8.4.....	27
United States Constitution, Amends. V and XIX, § 1.....	9, 32
South Carolina Constitution, Art. 13.....	9, 32

I. INTRODUCTION

Alice Shaw Baker's intention was that her monies were to be used for Animals and Animal Charities. Appellant and Proposed Personal Representative Betty Fisher filed an action to demonstrate that the Will offered by Respondent Bessie Huckabee was revoked, and to challenge it by way of a Will Contest. Appellant's commitment to ensuring that her beloved great aunt's wishes are honored are at the core of this litigation, and the related Will Contest and appeals herein.

This is one in three appeals related to the orders of the probate court in the *Conservatorship of Alice Shaw Baker*, Probate Case no. 2008-GC-10-088. These orders relate to the Conservator Lisa Fisher's Accountings and will decide the duties owed by a conservator to a conservatee's estate, after her death. These specifically involve orders dated September 28, 2011 appointing a Special Fiduciary, denying Lisa Fisher's Motion to Strike, denying Fisher's Motion for Reconsideration of the Court's Order of September 28, 2011, and ordering that Appellant have 30 days to turn over estate assets to the appointed Special Fiduciary, and ending the Circuit Case. (R. 542, Notice of Appeal)

While these appeals involve to the same tragic factual issues related to Alice Shaw Baker's conservatorship, pending litigation related to a Will contest and revocation of Ms. Shaw Baker's Will, and the safeguarding of her estate assets pending resolution of these matters, each case involves slightly different legal issues. The errors of the Probate Court were not rectified by the Circuit court, so Appellant filed this appeal for this Court's review.

Pursuant to motion by Appellant, this court consolidated the record on appeal, however all briefing will be separate.

Appellant prays that this Court reverse the following Issues on Appeal:

II.
STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court's Failure to Consider Appellant's Statement of Grounds prior to Oral Argument, and Failure to reverse the Probate Court's Order amount to an abuse of discretion and a deprivation of due process?
2. Did the Pending Appeal in the South Carolina Supreme Court Preclude the Probate Court from Appointing a Special Fiduciary?
3. Did the Pending Appeal in the South Carolina Supreme Court preclude the Probate Court's Order Appointing a Special Fiduciary, because it attempts to a Review another Judge's Order in Violation of Rule 60 and Decisional Law.
4. Once a Personal Representative is Appointed, Does the Probate Court have Jurisdiction to Appoint a Special Fiduciary under Probate Code § 62-7-704 (e)?
5. Was it an Abuse of Discretion for the Court to Consider Bessie Huckabee's Motion, when her Standing is on Appeal, and when it amounts to a Removal without Cause of Appellant?
6. Did The Probate Court's Proceedings as Protective Proceedings end at Alice Shaw Baker's Death, thereby Precluding the Court from considering the Appointment of a Special Fiduciary?
7. Did the Probate Court Abuse its Discretion in its Failure to Rule on Appellant's Objections to Respondent's Motion to Appoint Special Fiduciary and Made at the Hearing?
8. Was the Probate Court's Finding that Appellant did not have Authority to Pay Expenses on Behalf of the Estate Erroneous, and Demonstrate that there was no Emergent Need?
9. Does the Legal Principal Governing Laches Demonstrate that there is no "Emergent need" under S.C. Code Ann. § 62-7-704(e) and Preclude the Appointment of a Special Fiduciary?
10. Did the Probate Court Abuse its Discretion by Refusing to Strike Respondent's Motion to Appoint Special Fiduciary due to her failure to comply with Rule 11, SCRCF?
11. Did The Probate Court's Abuse its Discretion in Failing to Grant Appellant's Extension of Time to Deliver Proper?
12. Did the Probate Court Err in hearing the Motion to Appoint a Special Fiduciary when the record disclosed that interested parties, including the Attorney General of South Carolina and Heir at Law Betty Fisher, had not received statutory notice of

the Proceedings, under S.C. Code Ann. § 62-3-614 and the United States Constitution, Amends. V and VIX, § 1 and the South Carolina Constitution, Art. 13?

III. STATEMENT OF THE CASE

A. *Summary of Facts and Pleadings*

On February 25, 2009, Alice Shaw Baker died. (R. 203, Death Certificate) Her great niece, Appellant Lisa Fisher, Esquire, had helped her since involuntary commitment proceedings were initiated without notice to her family, including her niece, Appellant Betty Fisher ("Appellant"). (R. 70, 73, 76, Petitions for Incapacity, Emergency, and Conservatorships, etc.) Though she was already conserved, the family rushed to her side from California. (R. 83, Petition for Appointment of Successor) After a hearing, on October 29, 2008, Lisa Fisher was appointed her guardian and conservator. (R. 28, Order Appointing Lisa Fisher as Guardian and Conservator) After her appointment, Lisa Fisher traveled regularly to South Carolina to visit her great aunt, and ensure her health and well being. (R. 249, P. 250, Motion for Approval of Conservator fees)

Appellant also visited with Ms. Shaw Baker before her death, and knew that she had revoked her Will, and reaffirmed her desire that all of her property benefit these animal charities. (R. 321, P. 342, Motion for Reconsideration)

After Ms. Shaw Baker's death, Appellant initiated litigation on April 27, 2009 in the Charleston County Probate Court and removed it to the Charleston County Court of Common Pleas on May 13, 2009 (Case no. 2009-CP-10-3010). (R. 219, P. 220, Opposition to Petition for Discharge) These proceedings included Alice Shaw Baker's family's attack of the validity of the informal appointment of Respondent Bessie Huckabee ("Respondent"), the Will Contest, the

appointment of a Special Administrator, the effect of Attorney Peter Kouten's ex-parte communication in the lower court proceedings, and bond provisions. (Pursuant to SCACR 201(d), Request for Judicial Notice, Court of Appeals, Case no. 2009-CP-10-03010)

Appellant obtained extensions regarding Ms. Shaw Baker's property from the Probate Court pending resolution by the Supreme Court and proper trial of the Will Contest, and at all times maintained proper control of Ms. Shaw Baker's property.¹

After nearly three years of preservation of the status quo by Appellant's daughter Lisa Fisher, while these matters were before the Supreme Court, Respondent filed her *Motion for Special Fiduciary*. (R. 281, Respondent motion) No affidavits were attached to the motion. (The certificate of service stated that it was served on May 19, 2011, however the letter to counsel was dated May 20, 2011). Respondent knew that the appointment of a Third Party Special Fiduciary, would affect the Estate litigation and was contrary to Ms. Shaw Baker's desires that the monies be used solely for Animal Charities. (R. 321, p. 327)

Appellant filed several pleadings addressing the deficiencies and the impropriety of granting Respondent's motion, including affidavits. These included her *Motion to Strike and Memorandum in Opposition to Bessie Huckabee's Motion to Appoint Special Fiduciary* dated June 1, 2011. (R. 285, *Motion to Strike*). She also filed *Objections by Lisa Fisher to Proposed Order by Bessie Huckabee* dated September 21, 2011. (R. 310, *Objections*), *Objection to Court's Consideration of Huckabee's Motion to Appoint Special Fiduciary* dated August 12, 2011 (R. 313 *Objection to Court's Consideration*), *Objections by Lisa Fisher, Esq. To Second, Duplicate Proposed Order by Bessie Huckabee* dated September 29, 2011 @. 318), and a *Motion of Reconsideration of Probate Court Order Dated September 28, 2011 Appointing*

¹ As will be evidenced in future proceedings, Appellant has advanced all monies for the protection of Alice Shaw Baker's properties to ensure that no losses are incurred and that her desires that her monies benefit Animal Charities. (See Restatement (Third) of Trusts, § 34))

Special Fiduciary and Lisa Fisher's Opposition to Motion to Appoint Special Fiduciary; Affidavit of Lisa Fisher; Affirmation of Consultation filed October 7, 2011. (R. 321, Motion for Reconsideration)

The court set the Motion for Appointment of a Special Fiduciary for hearing on August 17, 2011. (R. 548, transcript) At the hearing the Court appointed a Special Fiduciary, J. Heyward Harvey, Esquire, without any information about his record, any potential conflicts of interest, and/or his relationship to the parties.

B. Probate Court's Failure to Allow Testimony and Lack of Evidentiary Hearing

At the hearing, Appellant's counsel objected to Respondent's counsel, Peter Kouten,² discussion of contested issues relating to appellant's accounting. (R. 551, Reporter's Transcript, hearing on August 17, 2011, "R.T." 6: 24-25 and 7: 1-12, filed on December 5, 2011)

Over Appellant's objection, the court allowed Respondent's Counsel to discuss the accounts (without allowing him to "go into specificity" but "just generalities"). (R. 551, R.T.8:4-8)

During argument, Appellant's counsel requested authority to have Appellant speak, which the court denied as follows:

"THE COURT: No, this is a motion, and this is really between the attorneys, and I just want to know what your position is, legal position, as to what her legal authority is to still disburse moneys when in fact the conservatorship has -- when she has been discharged, and the only thing the Court has been looking for are the annual accountings."
(R. 553, R.T., 16: 7-14)

² Appellant does not waive her objections to the continuing representation of Peter Kouten as counsel to Huckabee, in light of his non-waiveable representation of Alice Shaw Baker in the underlying conservatorship case where he was court appointed counsel and a visitor.

Without taking any evidence or allowing any testimony, or even taking judicial notice of any proceedings, during further argument concerning the court's lack of jurisdiction, the court stated:

"THE COURT: I am just trying to determine procedurally where we are... I am interested in reference to what is happening with the conservatorship accounts." (R. 555, R.T., 24: 22-25 and 25: 1-14)

After Respondent's counsel made numerous statements and accusations, Appellant's counsel stated:

"MR. COOPER: Your Honor, without going through all of them, there are a lot of things that Mr. Kouten said in terms of factual representations about the expenditure and so forth, we disagree with and certainly we think are beyond the scope of this hearing." (R. 558, R.T., 34: 18-23)

Appellant contends that the court's failure to allow Appellant to testify, to require Respondent to present admissible evidence, or to set her *Motions for Reconsideration* on calendar precluded her from responding to the court's concerns and violated *her* Due process rights. Appellant filed an affidavit in her *Motion for Reconsideration*, and Respondent did not object nor did she oppose the Motion. However, the record is silent as to whether the court considered said affidavit. The Probate Court abused its discretion by Ordering the Appointment of a Special Fiduciary, and by denying her objections, the motion to strike, and the motion for reconsideration, and as such, the court's actions all mandate reversal.

C. Probate Orders

The probate court's order dated September 28, 2011 appointing Special Fiduciary made the following *Finding of Facts and Conclusions of Law* in pertinent part:

"This court has jurisdiction over this matter and venue is proper. Respondent Lisa Fisher was discharged as Conservator by Order of this Court on May 11, 2009. Movant Bessie Huckabee has argued that requests for account of estate assets have been made on several occasions and these accountings had been denied. Lisa Fisher continues to object to the jurisdiction of this Court with regard to the Estate of Alice Shaw Baker, in part due to the fact that any ruling by this court would intrude on decisions properly to be made in the Supreme Court and/or the Circuit Court. Respondent filed a final accounting on May 26, 2009. Respondent has sought and been granted extensions of time to turn over the estate and has held these estate assets in trust. Respondent has, on June 1, 2011, filed with the Court annual accountings for the estate assets for the years 2009 or 2010.

[¶] In reviewing the 2009 and 2010 accountings, it is determined that there are real property assets in the estate of decedent Alice Shaw-Baker and there are continuing requirements for upkeep and repair on this property. Further, review of the filed accountings indicate that there are needs for authority to deal with third parties with regard to this estate. Bessie Huckabee, as personal representative of the estate of decedent Alice Shaw-Baker (2009-ES-10-0378) is currently respondent to pending probate actions including action to appoint a special administrator. The Court finds an emergent need for authority as to these estate assets.

[¶] Whether or not a vacancy exists as to administration of these assets held in trust, the Court has the authority to appoint a special fiduciary. (South Carolina Probate code 62-7-704(e))

[¶] THEREFORE, based on the foregoing, it is hereby

[¶] **ORDERED, ADJUDGED AND DECREED** that Respondent's motion to strike and motion for extension to turn over estate assets be **DENIED** and that a special fiduciary be appointed, and it is further

[¶] **ORDERED, ADJUDGED AND DECREED** that Respondent's motion to strike and motion for extension to turn over estate assets be **DENIED** and that a special fiduciary be appointed, and it is further

[¶] **ORDERED, ADJUDGED AND DECREED** that Heyward Harvey, Esquire, be appointed Special Fiduciary for the estate assets of Alice Shaw-Baker, and it is further

[¶] **ORDERED, ADJUDGED AND DECREED** that Heyward Harvey receive all assets held by Lisa Fisher within fifteen days of execution of this Order. That Mr. Harvey:

- a. marshal all assets, review accounts and 2009 and 2010 accountings with all the powers and discretions as authorized by law with regard to same.
- b. Seek formal approval of the final accounting and 2009 and 2010 accountings with authority to amend same, if necessary, and further, seek to close the conservatorship estate.
- c. review needs for maintenance, taxes and insurance on real property with authority as fiduciary over same.

- d. maintain authority and control over all estate assets.
- e. keep records of his time devoted to this file and seek approval of his fees through separate order of this Court, and it is further

[¶] **ORDERED, ADJUDGED AND DECREED** that Mr. Harvey's appointment shall terminate upon final determination of proper authority over administration of the estate of Alice Shaw-Baker."
 (R. 55-58, Order Appointing Special Fiduciary)

On or about October 24, 2011, the Probate Court served its *Order Denying Motions for Reconsideration and Opposition of Probate Court Order Appointing Special Fiduciary, Motion to Strike, etc.* which states in pertinent part:

"...Petitioner asks the Court to reconsider the Court's Order, dated September 28, 2011. This motion is based on the Court's order concerning the Motion to Appoint a Special Fiduciary for Conservatorship Assets filed by Bessie Huckabee dated May 20, 2011 by and through her attorney, Peter A. Kouten, Esq. in response to Lisa Fischer [sic] 's Motion for Extension filed May 13, 2011, and her Motion to Strike file [sic] June 1, 2011 by and through her attorney, John Hughes Cooper, Esq. This Court's order denied the Respondents Motion to Strike and Motion for Extension to turn over assets and further ordered that a special fiduciary be appointed. The court further ordered that J. Heyward Harvey, Esq. be appointed Special Fiduciary for the estate assets of Alice Shaw Baker and that Lisa Fischer [sic] within fifteen days turn over these assets to Heyward Harvey, Esq.

[¶] At this time, having reviewed the Motions and the record, the Court hereby denies Respondents Motions. The probate court has jurisdiction of proceedings initiated by interested parties concerning the internal affairs over protective proceedings and guardianship proceedings (South Carolina Probate Code 62-5-102) This Court finds that Lisa Fischer's [sic] fiduciary role as Guardian and Conservator was terminated by this Court's Order dated May 11, 2009. Since Ms. Fischer's [sic] discharge she has held estate assets; has requested and been granted several extensions to perform the same, due to the ongoing litigation in the estate matter. The Court became aware at the August 17, 2011 hearing that Lisa Fischer [sic] has continued to expend funds since Alice Shaw-Baker's death from the Conservator accounts of Alice Shaw Baker.

[¶] The Court finds that Lisa Fischer [sic] has been terminated as Conservator and no longer has the authority to withdraw or pay expenses out of the estate which is being withdrawn without authorization from the Probate Court. The decedent's estate is seized with real property. On the court's own motion, to preserve the estate of Alice Shaw-Baker, this Court is freezing all money and assets in the name of Alice Shaw-Baker.

THEREFORE, IT IS ORDERED ADJUDGED AND DECREED THAT:

1. The Motion for Reconsideration of Probate Order Dated September 28, 2011 Appointing A Special Fiduciary, the Motion to Strike and Opposition to the Motion to Appoint A Special Fiduciary, the Renewed Motion for Approval of Fees and Expenses of Guardian and Conservator and the Motion to Set Aside Void Probate Court Order dated September 28, 2011 Appointing A Special Fiduciary is hereby Denied; it is further ordered
2. That Alice Shaw-Baker has funds currently in a number of banking institutions under the name of Alice Shaw-Baker Conservatorship and Lisa Fischer [sic] Conservatorship or individually. It is ordered that the assets in any and all accounts in the name of Alice Shaw Baker Conservatorship, or individually being held with any banking institution shall be frozen until J. Heyward Harvey, Jr., Esq. as Special Fiduciary takes control of said accounts." (R. 61-63, Orders denying)

D. Timely Appeal by Appellant of Probate Orders to the Circuit Court

On October 25, 2011, Appellant filed her *Notice of Intention to file Appeal* pursuant to S.C. Code Ann. 62-1-308(a). (R. 398, *Notice of Intention*) The time for filing said *Notice of Intention to file Appeal* is 10 days after written entry of notice, here October 24, 2011 on the *Motion for Reconsideration*.

In light of the fact that Appellant filed her *Motion for Reconsideration*, said time was extended pursuant to SCRCP 59(f) and SCACR 203(b)(1) by Appellant's *Motion for Reconsideration*. (See also *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004) ("A timely post-trial motion, including a motion to alter or amend the judgment pursuant

to Rule 59(e), SCRCF, stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such motion."

Appellant filed her Statement of Grounds on December 9, 2011. (R. 455, Statement of Grounds) Respondent filed her Notice of Appearance on March 20, 2014. (R. 538, Notice) . She failed to file any timely briefing or opposition to the statement of grounds. Thereafter, the court set the matter for hearing on July 16, 2014. (R. 560)

E. Timely Appeal by Appellant of Circuit Court Orders

On or about August 18, 2014, the court issued its Form 4 judgment on Appellant's appeal. The ruling was as follows:

"Statement of Judgement by the Court: Appellant Fisher's appeal, filed on October 25, 2011, came before this Court on July 16, 2014. Upon a review of the case, this Court affirms the probate court's order of September 28, 2011, appointing a Special Fiduciary and denying Lisa Fisher's Motion to Strike and Opposing the Motion Appointing Special Fiduciary, and affirms the probate court's order of October 14, 2011, denying Lisa Fisher's Motion for Reconsideration of the court's order of September 28, 2011. Appellant Fisher has thirty (30) days from the date of this Order to turn over estate assets to the appointed Special Fiduciary, Heyward Harvey."

Thereafter, Appellant timely filed her *Notice of Appeal* on September 19, 2014.(R. 542, Notice of Appeal) Thereafter, Appellant filed her *Motion to Consolidate the Record* for judicial economy and to determine appropriate briefing. This Court granted the *Motion to Consolidate*. The record on all three (3) appeals is the same, however due to the differing Legal issues, the briefing is separate. As set forth herein, Appellant contends these orders must be reversed.

IV. ARGUMENT

A. Standard of Review

It is well settled that the standard of review for Appeals from the probate court are governed by the provisions of the Probate Code. (*Matter of Howard*, 315 S.C. 356, 360, 434 S.E.2d 254, 256 (1993).) The Probate Code provides that a final order or decree of the probate court may be appealed to the circuit court. (S.C. Code Ann. § 62-1-308 (2009).)

If the proceeding in the probate court is in the nature of an action at law, neither the circuit court nor the appellate court may "disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them." (*Neely v. Thomasson*, 365 S.C. 345, 349-50, 618 S.E.2d 884, 886 (2005).)

Also, an issue regarding statutory interpretation is a question of law. (*Univ. of S. Cal. v. Moran*, 365 S.C. 270, 274-75, 617 S.E.2d 135, 137 (Ct. App. 2005). A petition to remove personal representative is in equity. (See *Dean v. Kilgore*, 313 S.C. 257, 259 (Ct. App. 1993).)

If the proceeding in the probate court is in the nature of an action at law, neither the circuit court nor the appellate court may "disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them." (*Neely v. Thomasson*, 365 S.C. 345, 349-50, 618 S.E.2d 884, 886 (2005).) The Probate Court's refusal to allow Appellant to testify supports her position that this court must reverse the findings of fact, because "there is no evidence to support them." (*Id.*)

//

//

Review of these orders discloses that there was no evidence to support the order, because the court did not allow testimony, Respondent failed to present any admissible evidence, objections were made to probate court's procedures. These due process failures, accompanied by the legal duty of a conservator to maintain the property pending final "receipt" by the proper Personal Representative (S.C. Code Ann. § 62-5-425(d)) all precluded the Probate court orders.

1) **The Circuit Court's Failure to Allow Oral Argument Interfered with its Ability to Reverse the Probate Court's Erroneous Orders and Deprived Appellant of Due Process**

At the Circuit Court's hearing on July 16, 2014, the Court stated:

"Yes, I've got the briefs. I have not looked at them but I have got them here. I will probably have to look at them before I make a decision. But go ahead... You don't have to reiterate everything that's in there, okay, because I will read them... Or my law clerk and -we both will probably read them."

(R. 560, pp. 565-566, ll. 24-25 and 1-13 respectively)

The court concluded the argument without allowing counsel to complete the record, although the court did reassure the parties that he would review the memorandum. (R. 560, pp. 565-566, ll. 24-25 and 1-13 respectively) While it is true that the law provides:

"the right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances, as do other procedural regulations. Certainly the Constitution does not require oral argument in all cases where only insubstantial or frivolous questions of law, or indeed even substantial ones, are raised. Equally certainly, it has left wide discretion to Congress in creating the procedures to be followed in both administrative and judicial proceedings, as well as in their conjunction." (See *FCC v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 272 (1949), emphasis added)

Here, the court stated that it had not read the briefs, therefore the threshold questions as to the need for oral argument and the circumstances that gave rise to the substantial questions of law,

raised here, could never be addressed, and mandated a different conclusion that oral argument was necessary. Appellant contends due process was implicated, and that she was deprived of these necessary protections.

Finally, the Circuit Court's deprivation of further argument on the records, prevented Appellant from curing any misunderstanding the court may have had about the complicated and important issues raised in this case. It also prevents Appellant from demonstrating that the court's ultimate judgment in this case was based on erroneous application of the law. In light of the fact that: "[b]eing an equity case, the circuit court, sitting as an appellate court, had jurisdiction to make findings in accordance with its own view of the preponderance of the evidence." (*Eagles v. S.C. Nat'l Bank*, 301 S.C. 402, 408 (Ct. App. 1990).) The court made no findings, and Appellant contends this coupled with the underlying failure of the probate court to make findings based on appropriate evidence is fatal to the orders, and reversal is mandated.

2. **At the time of the Order. The Probate Court did Not have Jurisdiction to Appoint a Special Fiduciary.**

Appellant contends that the Probate Court had no jurisdiction to hear this matter, because when a matter is on appeal the lower court loses jurisdiction pursuant to Rule 203, SCACR:

"Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal. (Rule 205, SCACR, emphasis added.)

Further, pursuant to S.C. Code Ann. § 62-1-308 (c):

" When an appeal according to law is taken from any sentence or decree of the probate court, all proceedings in pursuance of the order, sentence, or decree

appealed from shall cease until the judgment of the circuit court, court of appeals, or Supreme Court is had. If the appellant, in writing, waives his appeal before the entry of the judgment, proceedings may be had in the probate court as if no appeal had been taken.” (Emphasis added)

At the time of the hearing, the issue of the proper appointment of the personal representative and the appointment of the special administrator was on appeal, thus the Probate Court had no jurisdiction to interfere with the Supreme Court’s jurisdiction and issuance of any orders was in excess of the Court’s jurisdiction.

It is well settled that: “When an appeal according to law is taken from any sentence or decree of the probate court, all proceedings in pursuance of the order, sentence, or decree appealed from shall cease until the judgment of the [appellate court] is had.” (See S.C. Code Ann. 62-1-308(c).) The circuit court acts solely as an appellate court in appeals from the probate court. *Id.* Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal.” (Rule 205, SCACR) Once the notice of appeal is served, the circuit court has exclusive jurisdiction except for matters not affected by the appeal.” (See *Bunkum v. Manor Props.*, 321 S.C. 95, 98-99)

Here, there was the appeal in the Supreme Court which precluded Lisa Fisher as Conservator from turning monies over to any fiduciary, pending final determination. The probate court thereafter raised questions about whether the conservator had no powers pending final transfer to the proper administrator, or if she had a continuing duty to protect the assets. As set forth below, if Appellant did not continue to act pending final resolution of this matter Alice Shaw Baker’s estate would have suffered losses, and her intention that the monies benefit animal charities would have been defeated (or at least severely compromised by the unnecessary costs to the estate.)

3. Appellant's Appeal in the Supreme Court precluded the Probate Court's Order Appointing a Special Fiduciary, because it attempted to Review another Judge's Order in Violation of Rule 60 and Decisional Law.

When the Probate Court entertained Huckabee's motion, it was interfering with the appellate jurisdiction, and ultimately the order of another judge.

Despite Respondent's desire to interfere with Appellant's proper protection of Ms. Shaw Baker's estate assets by the filing of her motion, it was error for the Probate Court to entertain the motion because it essentially countered the actions in the Appeal.

It is well settled law that a court can not interfere with another court's order which is subject to the pending litigation. (See Rule 60, SCACR; See also *Dukes & Dukes v. Hygrade Food Products*, 236 S.C. 69 (1960).)

Therefore, any and all orders issued in relationship to the Motion for Special Fiduciary must be reversed.

4. Once a Personal Representative is Appointed, the Probate Court does not have Jurisdiction to Appoint a Special Fiduciary under Probate Code § 62-7-704 (e)

Here, the law and record supports Appellant's position that S.C. Code Ann. § 62-7-704(e), upon which Respondent relies, is very specific:

"Whether 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. The procedure for such appointment and the notice requirement shall be the same as set forth for special administrators under South Carolina Code Section 62-3-614." (Emphasis added).

While on the surface it appears that this Code provides the Probate Court unfettered discretion to appoint a Special Fiduciary, however as noted above, the procedure for appointment is governed by the code for appointment of Special administrator, § 62-3-614, which provides as follows:

"A special administrator may be appointed:

(1) informally by the court on the application of an interested person when necessary:

(a) to protect the estate of a decedent **prior to the appointment of a general personal representative** or if a prior appointment has been terminated as provided in Section 62-3-609; or

(b) for a creditor of the decedent's estate to institute any proceeding under Section 62-3-803 (c);

(2) in a formal proceeding by order of the court on the petition of any interested person and finding, after notice and hearing, that appointment is necessary to preserve the estate or to secure its proper administration including its administration in circumstances **where a general personal representative cannot or should not act**. If it appears to the court that an emergency exists, appointment may be ordered without notice." (Emphasis added) .

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. These very issues are on appeal.

So statutory interpretation of the conflict between § 62-7-704(e) and § 62-3-614 mandates reversal. The cardinal rule of statutory construction explains that:

"[w]here there is one statute addressing an issue in general terms and another statute dealing with the **identical issue in a more specific and definite manner**, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." *Spectre, LLC v. S.C. Dept. of Health and Envtl. Control*, 386 S.C. 357 688 S.E.2d 844, 853 (2010)." (Emphasis added)

The specific language in § 62-3-614 overlaps the general terms regarding the appointment of a representative of the estate. It is "well settled that statutes dealing with the same subject matter are in pari materia and must be construed together, if possible, to produce a single, harmonious result." (*Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000).) Viewing the statutes together, it is clear that appointment of a Special Fiduciary is not proper, while the issues on Appeal were pending before the Supreme Court, nor are they proper until there is final judgment in the Will Contest. As conservator, Appellant must turn over the assets to the proper individual, and has a duty to protect it pending that appointment. (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.³

5. **Respondent Huckabee's Standing was also on Appeal, so it was an Abuse of Discretion for the Court to Grant her Motion which Amounts to a Removal without Cause of Appellant.**

The statutory definition for an "interested party" in a Probate matter is set forth in S.C. Code Ann. § 62-1-201(20).

"Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative and other fiduciaries representing interested persons. **The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding.**" (Emphasis added)

³ For clarity, S.C. Code Ann. § 62-5-425(d) provides an alternative method for delivery of estate property, allowing the conservator to file if there is no other person appointed or petition pending, but here, when there are competing petitions, Appellant contends trust law will dictate Appellant's acts as conservator and her continuing duty to safeguard the property.

Respondent Bessie Huckabee had no standing while Ms. Shaw Baker was alive to involve herself in the conservatorship (S.C. Code § 62-5-309), and Appellant contends that the statutory language and facts of this case preclude her from intervening and attempting to gain favor in the Probate Court by her forum shopping.

The language governing Trusts also makes clear that she did not have standing to bring the motion as a "representative" because it amounted to a removal of Appellant without good cause and/or authority. (See S.C. Code Ann. § 62-7-706 ["a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative."] Here, the court did not "remove" Appellant on its own initiative, and Appellant asserts that her reputation and character is attacked by the removal without cause. More importantly, her removal would cause unnecessary costs and harm to the estate.

Due to their lack of standing, both Respondent and Kay Passailague are merely interlopers attempting to sully Appellant's name and interfere with the proper administration of the estate. These individuals proved that they were not even friends to Alice Shaw Baker in the end, and as such allowing them to interfere with the administration is contrary to Alice Shaw Baker's stated wishes. (R. 321, 342, Motion for Reconsideration)

The language of S.C. Code Ann. § 62-1-201(20) makes it clear that the role of an interested party may "vary from time to time" in litigation. Therefore, while the issue of the Representative was on Appeal, and the estate matter was removed to the Circuit Case, the Probate Court's jurisdiction is precluded and constitutes an improper interference with the Circuit Court's jurisdiction. (See S.C. Code Ann. § 62-1-302)

To allow Respondent to come in, seek the appointment of a third party, whose very appointment will squander away funds rightfully held for the protection of the animals, is inherently wrong and mandates equitable consideration.

Ms. Shaw Baker's life was about animals and their protection. Respondent Huckabee must not be allowed to undermine the jurisdiction of the Courts, by attempting to garner favor before the Probate court through innuendo and misrepresentation about Appellant's actions and role in Ms. Shaw Baker's life. (R. 281, *Motion for Special Fiduciary*)

6. The Probate Court's Proceedings were Pursuant to Protective Proceedings, however the Probate Court's Jurisdiction Ended at Alice Shaw Baker's Death.

Appellant is duty bound to maintain the property pending final "receipt" by the proper Personal Representative (S.C. Code Ann. § 62-5-425(d)).

Here, Huckabee can not use innuendo to gain control, or interfere with the estate, while they are a party to a known appeal dealing with the same subject. Said action implicates Due Process considerations, and Equal protections under the United States and South Carolina Constitutions.

Although the Probate Code retains "exclusive jurisdiction" of certain matters not removed (S.C. Code Ann. § 62-1-302 (e)), any attempt to characterize this as litigation relating to its jurisdiction of protective proceedings under § 62-5-102 is misplaced. At Ms. Shaw Baker's death, the Probate court lost jurisdiction to deal with the Estate property. (See S.C. Code Ann. § 62-5-306 (1987) (terminating the authority of a guardian upon the death of the ward).

Since there is a dispute as to who is legally "entitled" to delivery of Ms. Shaw Baker's property and/or to appointment or to receive "delivery", the Probate Court in its capacity in the protective proceedings can not interfere with the Probate Court's jurisdiction of Estate administration under S.C. Code Ann. § 62-3-105.

Respondent Huckabee attempted to forum shop by filing the Motion in Probate. She knew that the matter had been removed and was subject to "estate administration." No longer was it an affair for the Probate Court in its protective proceedings capacity. Therefore, it was improper for the Probate Court to interfere with the litigation pending the Appeal in the Supreme Court.

7. The Probate Court Erred in its Failure to Rule on Appellant's Objections to Respondent's Motion to Appoint Special Fiduciary and Made at the Hearing.

The transcript and the record discloses that Appellant objected to 1) the procedure, 2) the accusations and purported averments by Respondent's counsel, and 3) the conclusions of the court (both at the hearing and in its orders), and the Probate Court's rulings are not supported by the record. (R. 285, 310, 313, 318, 321 and R.T. 548)

It is well settled that an attorney does not have to use the word "objection" to Contest the court's consideration of evidence at a contested hearing. Recently, the South Carolina Supreme Court explained in *State v. Najjar De'breece Byers*, 710S.E. 2d 55 (2011), that a defense counsel's purpose would not have been made clearer had he used the word "objection" before making a motion to strike.

The court also said that for an admissibility error to be preserved, the objection must include a specific ground "if the specific ground was not apparent from the context." Rule 103(a)(1), SCRE. When supported by context, "[a] party need not use the exact name of a legal doctrine . . . , but it must be clear the argument has been presented on that ground." (*State v. Stahlnecker*, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010).)

In this case, under the Rules of Evidence, Appellant clearly preserved the issue of admissibility by moving to strike the pleadings of Respondent, and by objecting to the statements made at the hearing, and for the improper findings of fact in the orders. (See R.285, 310, 313, 318, 321, Motion to Strike, transcript, and Objections to Orders filed herein.)

This court is authorized to judicially notice the files and proceedings in this case. It is well settled that a court can take judicial notice of its own records, files, and proceedings for all proper purposes including facts established in its records. (See *Wise v. Wise*, 394 S.C. 591, 716 S.E.2d 117 (Ct. App. 2011); *Freeman v. McBee*, 280 S.C. 490, 313 S.E.2d 325 (Ct.App.1984); see also *In re Estate of Pallister*, 363 S.C. 437, 250, 256 (2005) (orders of the probate court subject to reversal if there is no evidence to support them.)

The motion filed by Respondent contained no affidavits, was filled with speculation and innuendo, and as evidenced by the counter-affidavit filed by Appellant (in her Motion for Reconsideration), was false. (R. 321, 342-344, Counter affidavit to Motion for Reconsideration) The allegations were an improper attempt to impugn Appellant Lisa Fisher's character. (See *Toyota v. Florence Inv. V. Lynch* (1994) 314 S.C. 257 [vicious, inflammatory argument resulting in clear prejudice support new trials]; see also South Carolina Rules of Professional Conduct, Rules 3.3, 4.1, 8.4(a), 8.4(d), and 8.4(e) provide that an attorney cannot provide a false statement of material fact to the court.)

Here, Respondents can not make any case of wrongdoing by Appellant, who has safeguarded the property throughout her tenure. Therefore, reversal is mandated.

8. The Probate Court's Finding that Appellant did not have Authority to Pay Expenses on Behalf of the Estate was Erroneous, and Demonstrates that there was no Emergent Need for Appointment of a Special Fiduciary.

Respondent relied on Trust law for her position that the Probate court had authority to appoint a Special Fiduciary under S. C. Code Ann. § 62-7-704, claiming Appellant no longer had authority to protect the Estate.

However, fleshing out the purpose and intent of trust law demonstrates that Appellant had not only a duty to protect the estate during Alice Shaw Baker's life but after her death, under S.C.

Code Ann. § 62-5-417 which provides: "...a conservator is to act as a fiduciary and shall observe the standards of care applicable to trustees as described by Section 62-7-933."

Therefore, under Trust law, there are numerous statutory obligations and safeguards that mandated Appellant's proper protection of the Estate and demonstrated that she has behaved in an appropriate manner, under relevant trust law.

The law is explicit as governed by South Carolina Probate Code § 62-7-303(a)(4), "a trustee may represent and bind the beneficiaries of the trust with respect to questions or disputes involving the trust."

Under § 62-7-404 provides "A trust may be created only to the extent its purposes are lawful and possible to achieve." Here, both the extension and the statutory mandate that Appellant delivers property to the personal representative demonstrates it is for a "lawful purpose."

A trust and its terms must be for the "benefit of its beneficiaries." Alice Shaw Baker's intentions made known, and evidenced in writing, did not require a formal trust document. (See § 62-7-407 ["...a trust need not be evidenced by a trust instrument."]) Alice Shaw Baker's estate belongs to Animal Charities. (R. 321, 342, Motion for Reconsideration)

Moreover, § 62-7-418(a) provides in pertinent part: "When any person shall be seized of any lands...the person or body politic that shall have such use, confidence, or trust...shall be deemed and adjudged in **lawful** seizing...to all intents, constructions, and purposes in law of and in such like estates as they shall have in **use, trust, or confidence of or in them.**" (Emphasis added).

It is clear that South Carolina protects estates under both formal and informal trusts. Appellant is protecting the assets pending proper transfer. Huckabee relies on trust law for this improper order, however § 62-7-701 (A)(2) provides that: "...if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, **by**

accepting delivery of the trust property, exercising powers or Performing duties as trustee, or otherwise indicating acceptance of the trusteeship." (Emphasis added)

So even under Huckabee's argument, Respondent had an obligation to protect the assets. Huckabee's counsel cites that this court has authority to appoint a special fiduciary under § 62-7-704(e). However, the purpose of the code is to provide the means for appointment of a special fiduciary when there is a "Vacancy in trusteeship." There is no vacancy in the trusteeship. Subsection (e)'s provision for appointment "whether or not a vacancy exists" still is not unlimited due to the limiting language controlling procedures related to a Special Administration, if it were, than any person without standing could act as an interloper and interfere with Estate administration. Here, assuming that the Will Contest is successful, Huckabee has no standing to interfere with this case.

There are no grounds for the Motion for Appointment of Special Fiduciary, except conjecture and speculation, and allowing such argument is adverse to the interests of justice. Moreover, this court's appointment of a stranger to the Estate compromises the purpose of the "trust" to benefit animal charities and allows dissipation of the trust at the whims of a stranger to the estate, and the court's conclusion that Appellant did not have authority to continue to act on behalf of the Estate is contrary to Trust law, and common sense. Had Appellant not acted, the Estate would have been subject to waste.

A trustee has a duty under S.C. Code Ann. § 62-7-707 to:

" Unless a cotrustee 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).

This emphasizes the statutory scheme which provides for a continuing duty of a fiduciary/conservator to hold property until it can be delivered to the proper person. Here, Appellant was never removed, there was never any action filed regarding the accounting, the court rejected allowing Appellant to testify, there was no formal hearing on the Accounting— but it all comes down to the fact that she has at all times acted appropriately, and in furtherance of the statutory scheme to protect the property of Ms. Shaw Baker, and continues to do so.

Finally, under a "trust", Appellant would be required to "...administer the trust solely in the interests of the beneficiaries." (§ 62-7-802) The beneficiaries of the trust are animal charities, and pending final determination of the litigation on their behalf, Appellant is required to take all action to protect the trust properties. Therefore, Appellant acts are in the best interests of the estate, and the court's orders were without authority.

9. **The Legal Principal Governing Laches Demonstrates that there is no "Emergent need" under S.C. Code Ann. § 62-7-704(e) for the Appointment of a Special Fiduciary.**

Respondent Bessie Huckabee knew that Appellant was safeguarding the property for Ms. Shaw Baker. She failed to object to all of the previously requested extensions filed by Appellant. She took no action whatsoever. Only Appellant's action has protected the Estate of Ms. Shaw Baker. Had appellant not taken this action, the Estate would have sustained serious injuries.

Under *Hallums v. Hallums*, 296 S.C. 195, 198-199, 371 S.E. 2d 525, 527 (1988), the doctrine of Laches is defined as "**neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence to do what in law should have done.**" (Emphasis added).

Respondent Huckabee is barred from arguing for the appointment of a Special Fiduciary, these years after Alice Shaw Baker's death.

10. The Probate Court Abused its Discretion by Refusing to Strike Respondent's Motion to Appoint Special Fiduciary due to her failure to comply with Rule 11, SCRPC

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

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

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

11. The Probate Court's Erred in Failing to Grant Appellant's Extension of Time to Deliver Proper.

Appellant sought lawful court orders to hold property during the determination by the Supreme Court. (R. 248, 273-280, Motions for Extensions) The Probate Court's conclusion that

"Ms. Fisher did not have the duty to act in a conservator capacity once she had been discharged" (R.T, p. 35, ll. 17-18) wasn't reasonable.

Just as a trustee must "protect the trust property" until delivery of the property (S.C. Code § 62-7-707), Appellant would have subjected herself to sanctions and/or possible litigation had she not protected the property.

The extensions granted gave Appellant the right, and duty, to act as a fiduciary until the Will Contest was heard.

12. The Probate Court Erred in hearing the Motion to Appoint a Special Fiduciary when the record disclosed that interested parties, including the Attorney General of South Carolina and Heir at law Betty Fisher, had not received statutory notice of the Proceedings, under S.C. Code Ann. § 62-3-614 and the United States Constitution, Amends. V and XIX, § 1 and the South Carolina Constitution, Art. 13.

A void judgment is one that from its inception is a complete nullity and without legal effect. (*Thomas v. Howard Co. & T.W. Graham and Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995).)

The requirements of due process include notice and an opportunity to be heard. (S.C. *Dep't of Soc. Serv. v. Holden*, 319 S.C. 72, 78, 459 S.E.2d 846, 849 (1995).)

It is fundamental that no judgment or order affecting the rights of a party to the cause shall be made or rendered without notice to the party whose rights are to be affected. (*Tyron Fed. Sav. & Loan Ass'n v. Phelps*, 307 S.C. 361, 362, 415 S.E.2d 397, 398 (1992).)

In proceedings in the probate court where notice is required, an order is binding only as to persons given notice of the proceedings. (See S.C. Code Ann. § 62-3-106).

Interested Person, Betty Fisher, the niece of Alice Shaw Baker and litigant in the Will Contest, etc. action, did not receive individual notice. The Attorney General, on behalf of animal charities, did not receive notice. This failure and refusal to give notice to persons entitled to notice deprived them from objecting to the appointment of a Special Fiduciary. It also deprived them from inquiry into the cost, conflict of interest, and role of a Special Fiduciary. This court's unilateral choice of an "unknown" fiduciary, without opportunity to review his record and/or object is improper and mandates reversal in this case.

V.
CONCLUSION

Aside from the familial relationship to Ms. Shaw Baker, as former conservator, Appellant understands that in "equity and good conscience" she is bound to act in good faith and with due regard to the interests" of Ms. Shaw Baker (See *O'Shea v. Lesser*, 308 S.C. 10, 15) . By appealing the Probate Court's orders, Appellant is continuing to observe the trust reposed in her by Ms. Shaw Baker—to protect her estate, prevent the depletion of the principle and ensure that animal charities benefit.

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.

//

//

//

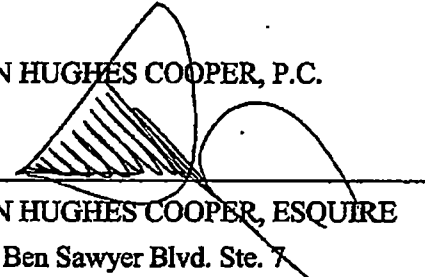
The main issue of who was the "duly appointed personal representative" will be resolved upon the trial of the Will Contest.

Appellant respectfully requests that this Honorable Court reverse the Orders in this matter.

December 8, 2015

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By: 

JOHN HUGHES COOPER, ESQUIRE

1476 Ben Sawyer Blvd. Ste. 7

Mount Pleasant, SC 29464

shiplaw@jhcooper.com

843-883-9099; fax 843-883-9335

Other Counsel of Record:

Peter A. Kouten, Esquire

Kouten Law Firm, LLC

P.O. Box 340

John's Island, SC 29457

RECEIVED
DEC 11 2015
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEALS FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge
Tamara Curry, Probate Court Judge

Appellate Case No. 2014-002034
Circuit Case No. 2011-CP-10-8657

LISA FISHER.....Appellant

v.

BESSIE HUCKABEE.....Respondent

FINAL BRIEF OF APPELLANT

JOHN HUGHES COOPER, ESQUIRE
1476 Ben Sawyer Blvd. Ste. 7
Mount Pleasant, SC 29464
shiplaw@jhcooper.com
843-883-9099; fax 843-883-9335
(Attorney for Appellant)

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEALS FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge
Tamara Curry, Probate Court Judge

Appellate Case No. 2014-002034
Circuit Case No. 2011-CP-10-8657

LISA FISHER.....Appellant

v.

BESSIE HUCKABEE.....Respondent

FINAL BRIEF OF APPELLANT

JOHN HUGHES COOPER, ESQUIRE
1476 Ben Sawyer Blvd. Ste. 7
Mount Pleasant, SC 29464
shiplaw@jhcooper.com
843-883-9099; fax 843-883-9335
(Attorney for Appellant)

TABLE OF CONTENTS AND AUTHORITIES

A. Table of Contents

Table of Contents and Authorities.....	2
A. Table of Contents.....	2
B. Table of Authorities.....	4
I. INTRODUCTION.....	7
II. STATEMENT OF ISSUES ON APPEAL.....	8
III. STATEMENT OF THE CASE.....	9
A. <i>Statement of Facts</i>	9
B. <i>Probate Orders</i>	10
1. Orders Denying Renewed Motion for Approval of Fees and Expenses of Guardian and Conservator.....	10
2. Orders after Rule 59 Motion on Fees Petition.....	11
3. Orders after Rule 59 Motion re: Orders Freezing Assets.....	12
C. <i>Timely Appeal Procedures</i>	12
ARGUMENT.....	14
IV. SUMMARY OF ISSUES FOR COURT'S CONSIDERATION:.....	14
A. REVERSAL OF PROBATE ORDER MANDATED, WHEN APPELLANT IS THE ONLY PERSON INVOLVED IN THE CASE WHO WAS DEPRIVED OF PAYMENT OF COMPENSATION FOR SERVICES RENDERED TO A "PROTECTED PERSON", and.....	14
B. REVERSAL IS MANDATED WHEN THE PROBATE COURT SUA SPONTE ISSUES ORDERS RELATING TO THE FREEZING OF ESTATE ASSETS WITHOUT NOTICE, HEARING, OPPORTUNITY TO BE HEARD, AND/OR JURISDICTION TO ISSUE SAID ORDERS	14
1. <i>Standard of Review</i>	16

TABLE OF CONTENTS CONT'D

2. <i>The Circuit Court's Failure to Allow Oral Argument Interfered with its Ability to Reverse the Probate Court's Erroneous Orders and Deprived Appellant of Due Process.....</i>	17
3. <i>The Probate Court Abused its Discretion by Depriving Appellant of her Right to Reasonable Compensation and Reimbursement of Fees by Denying her Request for Fees.....</i>	19
A. <u>Legal Authority.....</u>	19
B. <u>The Services Provided to Alice Shaw Baker constituted "Property interests" protected under the Takings Clause.....</u>	20
C. <u>The Probate Court's denial of Appellant's Request for Approval of Fees and Expenses is in Violation of the Equal Protection Clause</u>	21
D. <u>The Probate Court Abused its Discretion by issuance of an Order intending to Freeze not only the decedent, Alice Shaw-Baker's, assets, but Appellant's, Without Notice and Hearing.....</u>	23
1. <i>Legal Authority Governing Freezing of Bank Accounts.....</i>	23
2. <i>Appellant was Required to Retain Estate Property for the "Duly Appointed" Personal Representative for the Benefit of Alice Shaw Baker's Estate.....</i>	24
3. <i>The Doctrine of Laches Supports Appellant's Continued Protection of the Estate</i>	25
4. <i>The Probate Court Lacked Jurisdiction to Hear this matter, in light of the fact that the Circuit Court had Control over the Estate Matter and at the time of the Orders, there was an Appeal before the Supreme Court.....</i>	27
E. <u>Due Process, Equal Protection, and the Takings Clauses Under the Constitution Prohibit the Imposition of the Order Freezing Assets.....</u>	28
V. CONCLUSION.....	30

TABLE OF AUTHORITIES

South Carolina Decisional Law:

<i>Collins Music Co., Inc. v. IGT</i> , 365 S.C. 544, 550 (2005).....	24
<i>County of Richland v. Simpkins</i> , 348 S.C. 664,(2002).....	23
<i>Dowaliby v. Chambless</i> , 344 S.C. 558,(2001).....	19
<i>Eagles v. S.C.Nat' Bank</i> , 301 S.C. 402, 408 (1990).....	18
<i>Elam v. South Carolina Dept. of Transp.</i> , 361 S.C. 9 (2004)	11
<i>Ex Parte Brown</i> , 393 S.C. 214 (2011).....	14, 15, 20, 28
<i>First Financial Ins. Co. v. Sea Island Sport Fishing Society, Inc.</i> , 327 S.C. 12, 490 S.E. 2d 257 (1997).....	22
<i>Hallums v. Hallums</i> , 296 S.C. 195(1988)	26
<i>Grosshuesch v. Cramer</i> , 367 S.C. 1,(2005).....	23
<i>I'On, LLC v. Town of Mt. Pleasant</i> , 338 S.C. 406, 411, 526 S.E. 2d 716 (2000).....	17
<i>Matter of Howard</i> , 315 S.C. 356, 434 S.E. 2d 254 (1993).....	16
<i>Neely v. Thomasson</i> , 365 S.C. 345(2005).....	16, 17
<i>Patel v. Patel</i> , 359 S.C. 515(2004).....	17
<i>S.C. Dept. Of Soc. Serv. v. Holden</i> , 319 S.C. 72, 78, 459 S.E. 2d 846, 849 (1995).....	28
<i>Simpson v. Simpson</i> , 377 S.C. 519 (Ct.App. 2008).....	22
<i>TNS Mills, Inc. v. South Carolina Dep't of Revenue</i> , 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998).....	24
<i>Unisun Ins. Co. v. Schmidt</i> , 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000).....	25
<i>Univ. of S. Cal. v. Moran</i> , 365 S.C. 270, 274-75, 617 S.E.2d 135, 137 (Ct. App. 2005).....	16

TABLE OF AUTHORITIES CONT'D

Miscellaneous Court Decisions:

<i>Armstrong v. United States</i> , 364 U.S. 40 (1960).....	14, 21
<i>FCC v. WJR The Goodwill Station, Inc.</i> , 337 U.S. 265, 272 (1949).....	18
<i>State v. Smith</i> , 747 P.2d 816, 842 (Kan. 1987).....	20, 21

South Carolina Statutes:

S.C. Code Ann. § 62-1-201(20).....	16
S.C. Code Ann. § 62-1-308 (a).....	16
S.C. Code Ann. § 62-5-101.....	15, 20, 26
<i>S.C. Code Ann. § 62-5-102</i>	27
<i>S.C. Code Ann. § 62-5-309</i>	13, 16
<i>S.C. Code Ann. § 62-5-312</i>	8, 19
<i>S.C. Code Ann. § 62-5-414</i>	19
<i>S.C. Code Ann. § 62-5-425</i>	9, 24, 25
<i>S.C. Code Ann. § 62-7-706</i>	16
<i>S.C. Code Ann. § 62-7-707</i>	24

South Carolina Rules:

<i>Rule 59, SCRCP</i>	11
<i>Rule 65, SCRCP</i>	16, 23
<i>Rule 203(b)(1), SCACR</i>	11

//

//

TABLE OF AUTHORITIES CONT'D

Miscellaneous:

United States Constitution, Amends. V and XIV.....	8, 14, 15, 20, 21, 28
South Carolina Constitution, Art. 13.....	8, 20, 21, 28

I. INTRODUCTION

Appellant Lisa Fisher ("Appellant") was devoted to Alice Shaw Baker, and acted at all times to help her maintain her independence when guardianship and conservatorship proceedings in Charleston threatened to remove Ms. Shaw Baker from her. For the rest of her life, Alice Shaw Baker was cared for and protected by Appellant, only to die an untimely death the day before she was going to California.

This is one in three appeals related to the orders of the probate court in the *Conservatorship of Alice Shaw Baker*, Probate Case no. 2008-GC-10-088. These orders relate to the Appellant's *Motion for Approval of Fees*, and the probate court's sua sponte order freezing Alice Shaw Baker's conservatorship accounts.¹ All other individuals involved in initiating the conservatorship, including court appointed conservators, guardians, attorneys, visitors, doctors, and even Appellant's counsel's were granted fees in this matter. Despite Appellant advancing her own monies to ensure that Ms. Shaw Baker was not placed in an assisted living and that she was able to remain in her home, Appellant was denied her guardian and conservator fees. (R. 61 and 64, Order of 10/14/11 and Denial of Motion to Alter 11/9/11).

While the three appeals involve to the same tragic factual issues related to Alice Shaw Baker's conservatorship, pending litigation related to a Will contest and revocation of Ms. Shaw Baker's Will, and the safeguarding of her estate assets pending resolution of these matters, each case involves slightly different legal issues. The errors of the Probate Court were not rectified by the Circuit court, so Appellant filed this appeal for this Court's review.

Pursuant to motion by Appellant, this court consolidated the record on appeal, however all briefing will be separate.

¹ The order also referenced Lisa Fisher's individual account, however no individual accounts were actually frozen.

Appellant prays that this Court reverse the following Issues on Appeal:

**II.
STATEMENT OF ISSUES ON APPEAL**

1. Did the Circuit Court's Failure to Consider Appellant's Statement of Grounds prior to Oral Argument, and Failure to reverse the Probate Court's Order amount to an abuse of discretion and a deprivation of due process?
2. Did the Probate Court Abuse its Discretion in Depriving Appellant of her right to "reasonable compensation" and reimbursement of fees by denying her Motion for Approval of Fees and Expenses under S.C. Code Ann. § § 62-5-312(b) and well established legal precedent?
3. Did services by Appellant to her great-aunt, Alice Shaw Baker, constitute "property" interests entitling her to "just compensation" under the Takings Clause in the U.S. Const. Amend. V; S.C. Const. Art. I, § 13(a) and well established legal precedent?
4. Was the Probate Court's denial of Appellant's Request for Approval of Fees and Expenses in violation of the Equal Protection Clause of the United States Constitution in the U.S. Const. Amend. XIV; S.C. Const. Art. I, § and well established legal precedent?
5. Did the Probate Court Abuse its Discretion by issuance of an Order intending to Freeze not only the decedent, Alice Shaw-Baker's assets, but Appellant's personal Assets?
6. Were the Probate Court's Orders Freezing Accounts in violation of the Due Process Clause, Equal Protection Clause, and Takings Clause of the United States Constitution and well established legal precedent?

Additionally, this Appeal is related to the Appeals filed by Appellant and Appellant

Betty Fisher in Case nos. 2014-002020 and 2014-002028.

Appellant joins and restates these grounds as support for her appeal herein.

//

//

//

III. STATEMENT OF THE CASE

A. *Statement of Facts*

On February 25, 2009, Alice Shaw Baker died. (R. 203, Death certificate) Her great niece, Lisa Fisher, Esquire, had helped her since involuntary commitment proceedings were initiated without notice to her family, including her niece, Betty Fisher. (R. 70, 73, 76, Petitions for Incapacity, Emergency, and Conservatorships, etc.) Though she was already conserved, the family rushed to her side from California. (R. 83, Petition for Appointment of Successor) After a hearing, on October 29, 2008, Lisa Fisher was appointed her guardian and conservator. (R. 28, Order Appointing Lisa Fisher as Guardian and Conservator) After learning of the filing of the conservatorship/guardianship, Lisa Fisher travelled regularly to South Carolina to visit her great aunt, and ensure her health and well being. (R. 249, p. 250, Motion for Approval of Conservator fees.)

Appellant also visited with Ms. Shaw Baker before her death, and knew that she had revoked her Will, and reaffirmed her desire that all of her property benefit these animal charities. (R. 321, p. 342, Motion for Reconsideration.)

After Ms. Shaw Baker's death, Appellant initiated litigation on April 27, 2009 in the Charleston County Probate Court and removed it to the Charleston County Court of Common Pleas on May 13, 2009 (Case no. 2009-CP-10-3010). (R. 219, p. 220, Opposition to Petition for Discharge.) These proceedings included Alice Shaw Baker's family's attack of the validity of the informal appointment of Respondent Bessie Huckabee ("Respondent"), the Will Contest, the appointment of a Special Administrator, the effect of Attorney Peter Kouten's ex-parte communication in the lower court proceedings, and bond provisions. (Request for Judicial Notice, Court of Appeals, Case no. 2009-CP-10-03010)

At the time, there was an Appeal before the Supreme Court relating the improper appointment of the personal representative, on August 17, 2011, the Probate Court heard Respondent's *Motion for Appointment of Special Fiduciary*. (R.281, Motion for Special Fiduciary) Respondent presented no evidence, testimony, or request for judicial notice. The Probate Court refused to allow Appellant to testify. (R. 548, p. 553, reference to p. 16, ll. 7-14, R.T. of 8/17/2011) Thereafter, the court appointed J. Heyward Harvey, Esquire as Special Fiduciary without notice to all parties.

Respondent knew of Objector Betty Fisher's existence, and knew that the appointment of a Third Party Special Fiduciary, would affect the Estate litigation and was contrary to Ms. Shaw Baker's desires that the monies be used solely for Animal Charities. (R. 321, p. 327, Motion for Reconsideration dated October 7, 2011)

Appellant vigorously opposed the motion based on her legal duty to maintain the property pending final "receipt" by the proper Personal Representative (S.C. Code Ann. § 62-5-425(d)). (R. 285, 310, 313, and 321, objections, opposition, motion to strike, etc.) The court granted the motion for Special Fiduciary. By her related appeal, Case no. 2014-002028, Appellant attacks the Probate Court's orders of September 29, 2011 and October 14, 2011 appointing J. Heyward Harvey, Esquire as Special Fiduciary and denying Appellant's Motion to Void Orders.

B. Probate Orders

1. Orders Denying Renewed Motion for Approval of Fees and Expenses of Guardian and Conservator

The order of October 14, 2011 was a cumulative order regarding all of the Motions, i.e. "Motions for Reconsideration and Opposition of Probate Court Order Appointing Special Fiduciary, Motion to Strike, and Renewed Motion for Approval of Expenses of Guardian and Conservator."

In said order, the Probate Court made no findings regarding the Motion, and denied it in its entirety.

2. Orders after Rule 59 Motion on Fees Petition

The Probate Court's order dated November 9, 2011, "*Denial of Motion to Alter or Amend Denial of Renewed Motion for Approval of Fees and Expenses of Guardian and Conservator*" made the following *Finding of Facts and Conclusions of Law* in pertinent part:

"This matter comes before the Court on a motion to Alter or Amend Denial of Renewed Motion for Approval of Fees and Expenses of Guardian and Conservator dated October 20, 2011 by Lisa Fischer [sic], by and through her attorney, John Hughes Cooper, Esq. Lisa Fischer [sic] moves this Court to Alter or Amend its October 14, 2011 denial of her Renewed Motion for Approval of Fees and Expenses of Guardian and Conservator.

At this time, having reviewed the Motion and the record, the Court hereby denies Lisa Fischer's [sic] Motion to Alter or Amend Denial of Renewed Motion for Approval of Fees and Expenses of Guardian and Conservator dated October 20, 2011. The Court's position remains that Lisa Fischer's fiduciary role as Guardian and Conservator was terminated by this Court's Order dated May 11, 2009, and that Ms. Fischer withdrew monies from the Conservatorship account without having the legal fiduciary authority to do so. There is ongoing litigation in the Estate of Alice Shaw-Baker and the court has appointed J. Heyward Harvey, Esq. As Special Fiduciary during the pendency of the litigation to take control of all accounts in the name of Alice Shaw-Baker, and until Attorney Harvey takes control of the said accounts, no further transactions are authorized.

THEREFORE, IT IS ORDERED ADJUDGED AND DECREED THAT:

The Motion to Alter or Amend Denial of Renewed Motion for Approval of Fees and Expenses of Guardian and Conservator dated October 20, 2011 is hereby denied." (Emphasis added)

(R. 65)

//

//

3. *Orders after Rule 59 Motion re: Orders Freezing Assets*

The Probate Court order dated November 9, 2011, entitled *Denial of Motion to Alter or Amend the Orders Freezing Assets Dated October 14, 2011*:

..At this time, having reviewed the Motion and the record, the Court hereby denies Lisa Fischer's [sic] Motion to alter or Amend Orders Freezing Assets dated October 20, 2011. The Court's position remains that Lisa Fisher's fiduciary role as Guardian and Conservator was terminated by this court's Order dated May 11, 2009, and that Ms. Fischer [sic] withdrew monies from the Conservatorship account without having the legal fiduciary authority to do so.

THEREFORE, IT IS ORDERED ADJUDGE AND DECREED THAT:

1. The Motion to Alter or Amend the Orders Freezing Assets dated 10/20/11 is hereby denied;
2. That any assets in the name of the Alice Shaw-Baker Conservatorship and Lisa Fischer conservatorship or **individually** remains frozen;
3. That J. Heyward Harvey retains control of the assets in the name of the Alice Shaw Baker Conservatorship and Lisa Fischer [sic] conservatorship." ®. 64, Emphasis added)

C. *Timely Appeal Procedures*

Appellant timely filed her *Notice of Intent to Appeal* on November 21, 2011.

(R. 400)²

//

//

² The time for filing said *Notice of Intention to file Appeal* is 10 days after written entry of notice, here November 21, 2011, on the *Rule 59 motion*.

Therefore, said time was extended pursuant to SCRCP 59(f) and SCACR 203(b)(1) by Appellant's *Motion for Reconsideration*. (See also *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004) ("A timely post-trial motion, including a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such motion."))

Thereafter, Appellant filed her Statement of Grounds on December 9, 2011. (R. 502.) Respondent failed to file any opposition or response to the grounds, however by counsel, she filed a *Notice of Appearance* on March 11, 2014. (R. 539). The court set oral argument, and the matter was heard on July 16, 2014. (R. 560, R.T. 7/16/14)

The court denied the appeal, ruling:

“Statement of Judgment by the Court: Appellant Fisher’s appeal, filed on November 21, 2011, came before this Court on July 16, 2014. Upon a review of the case, this Court affirms the probate court’s order of November 9, 2011, denying Appellant’s motion to amend the probate court’s order freezing the estate assets , and affirms the probate court’s order of November 9, 2011, denying the Appellant’s motion to amend the court’s order denying the approval of fees and expenses of guardian and conservator.” (R. 69, Form 4, Judgment in a Civil Claim, dated 8/14/14)

Appellant filed her *Notice of Appeal* on September 19, 2014. (R.544) The court heard oral argument on July 16, 2014. She seeks reversal of both the Probate Court orders and the Circuit Court’s Order affirming the Probate Court Orders. Also, she contends that the denial of oral argument as to the issues briefed but not known to the Circuit Court at oral argument, when it admitted it had not reviewed the briefing. ³

The Denial of Appellant’s Motion for conservator/guardian fees must be reversed. The orders freezing Alice Shaw Baker’s accounts, and to the extent that it orders Lisa Fisher’s accounts frozen, must be reversed as set forth herein.

//

//

//

³ See R. 560, p. 565-566, ll. 24-25 and ll. 1-2, respectively, R.T. 7/16/14 p. 6-7.

ARGUMENT

IV.

SUMMARY OF ISSUES FOR COURT'S CONSIDERATION:

- A. REVERSAL OF PROBATE ORDER MANDATED, WHEN APPELLANT IS THE ONLY PERSON INVOLVED IN THIS CASE WHO WAS DEPRIVED OF PAYMENT OF COMPENSATION FOR SERVICES RENDERED TO A "PROTECTED PERSON", and**
- B. REVERSAL IS MANDATED WHEN THE PROBATE COURT SUA SPONTE ISSUES ORDERS RELATING TO THE FREEZING OF ESTATE ASSETS WITHOUT NOTICE, HEARING, OPPORTUNITY TO BE HEARD, AND/OR JURISDICTION TO ISSUE SAID ORDERS**

Appellant briefly summarizes the important legal issues raised by the Probate Court's orders denying Appellant her guardian/conservator fees and freezing monies held by Appellant and on behalf of Ms. Shaw Baker's estate.

The issue of compensation for an individual appointed by the court was discussed in the decision *Ex Parte Brown*, 393 S.C. 214, 711 S.E.2d 899 (2011). The court held that: "...the Fifth Amendment Takings Clause is implicated when an attorney is appointed to represent an indigent litigant. In such circumstances, the attorney's services constitute property entitling the attorney to just compensation."

The court limited its holding to cases involving "...an attorney's constitutional entitlement to compensation in appointed cases." However, in its analysis of the issue, the South Carolina Supreme Court reviewed precedent which demonstrates application in areas not limited to court appointed attorneys.

The United Supreme Court found in, *Armstrong v. United States* 364 U.S. 40, 49 (1960), that the Takings Clause was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

The inclusion of this "public service" rationale, coupled with the public policy of "protection of persons under disability and their property" set forth in S.C. Ann. Code § 62-5-101 et seq., supports an expansive view of the decision in *Brown* which focuses on the professionalism and public service duties of an attorney. Therefore, if these "duties" implicate the venerable principle enunciated in the United States Constitution, Fifth Amendment, *Takings Clause*, Appellant contends the "duties" imposed on a Guardian and Conservator, and the services thereafter provided, also implicate "property interests" under the *Takings Clause*.

Here, the court appointed Guardian and Conservator of Alice Shaw Baker's great niece, Appellant Lisa Fisher, who spent in excess of 450 hours to help Ms. Shaw Baker, spent in excess of \$14,000.00 to travel and assist Ms. Shaw Baker, and placed her own life and law practice on hold to help Ms. Shaw Baker maintain her independence and avoid institutionalization. ⁴ (R. 90 and R. 249)

The Probate Court's orders not only ignore this significant sacrifice, they go a step further by making sua sponte orders which were intended to freeze not only Ms. Shaw Baker's monies but Appellant's.⁵ These "Freeze" orders were also executed without any testimony or affidavits presented by Respondent Bessie Huckabee⁶ without any

⁴ Appellant Lisa Fisher is a California Attorney in Good Standing who traveled to South Carolina repeatedly to assist Ms. Shaw Baker and to ensure compliance with the probate courts orders. (R. 249, p. 250, Motion for Approval of Fees and Expenses of Guardian and Conservator)

⁵ These orders of November 9, 2011 also retell the earlier order that J. Heyward Harvey control assets in the name of Appellant and the conservatorship estate. Appellant contends that these orders and issues have been properly raised in the Appeals filed by Appellant and Betty Fisher. To avoid duplication, Appellant is not repeating the arguments relating to the Appointment and initial freeze orders, but she does not waive the underlying orders that precipitated these "freeze" orders.

⁶ Appellant does not waive her contention that Respondent does not have standing. She is not a beneficiary of the estate, and there is a pending action for her removal as informally

witnesses, and most significantly, without any evidence to support the findings of the probate court. (See *Neely v. Thomasson*, 365 S.C. 345, 349-50, 618 S.E.2d 884, 886 (2005) [probate court's findings of facts may not be disturbed unless a review of the record discloses there is no evidence to support them].)

As such, the record shows the Orders violate the principles set forth in Rule 65, SCRCP, and under Constitutional Principles enunciated in the Due Process and Equal Protection clauses.

Appellant respectfully contends that these principles mandate reversal under the proper standard of review.

1. Standard of Review

It is well settled that the standard of review for Appeals from the probate court are governed by the provisions of the Probate Code. (*Matter of Howard*, 315 S.C. 356, 360, 434 S.E.2d 254, 256 (1993).) The Probate Code provides that a final order or decree of the probate court may be appealed to the circuit court. (S.C. Code Ann. § 62-1-308 (2009).)

Moreover, an issue regarding statutory interpretation is a question of law. (*Univ. of S. Cal. v. Moran*, 365 S.C. 270, 274-75, 617 S.E.2d 135, 137 (Ct. App. 2005).)

If the proceeding in the Probate Court is in the nature of an action at law, neither the circuit court nor the appellate court may "disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them." (*Neely, supra*, at 349-50).

appointed administrator. (See S.C. Code Ann. § 62-1-201(20) ["interested party" definition]; S.C. Code § 62-5-309; S.C. Code Ann. § 62-7-706 [beneficiary may seek removal].)

Additionally, where a case raises a novel question of law, The court is free to decide the question with no particular deference to the lower court. (*I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 718-19 (2000).)

As will be set forth herein, the court failed to set the matter for hearing and there was no objection to the request for fees, therefore "there is no evidence to support" the court's decision to deny Appellants's fees. (*Patel v. Patel*, 359 S.C. 515, 529, 599 S.E.2d 114, 121 (2004) [An abuse of discretion occurs when the ruling lacks evidentiary support or is controlled by an error of law.]) And certainly no evidence to justify the deprivation of compensation for services rendered by Appellant, nor for an order intended to freeze her assets.

As in *Browne*, these interests are property for purposes of the Takings Clause, therefore Appellant contends deprivation of fees and expenses incurred on behalf of Ms. Shaw Baker and the subsequent Order freezing Assets must be reversed.

2. *The Circuit Court's Failure to Allow Oral Argument Interfered with its Ability to Reverse the Probate Court's Erroneous Orders and Deprived Appellant of Due Process*

At the appeals hearing on July 16, 2014, the Court stated:

"Yes, I've got the briefs. I have not looked at them but I have got them here. I will probably have to look at them before I make a decision. But go ahead...You don't have to reiterate everything that's in there, okay, because I will read them...Or my law clerk and -we both will probably read them."

(R. 560, pp. 565-566 , ll. 24-25 and 1-13, respectively)

The court concluded the argument without allowing counsel to complete the record, although the court did reassure the parties that he would review the memorandum.

(R. 560, pp. 565-566 , ll. 24-25 and 1-13, respectively) While it is true that the law provides:

"the right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances, as do other procedural regulations. Certainly the Constitution does not require oral argument in all cases where only insubstantial or frivolous questions of law, or indeed even substantial ones, are raised. Equally certainly, it has left wide discretion to Congress in creating the procedures to be followed in both administrative and judicial proceedings, as well as in their conjunction." (See *FCC v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 272 (1949), emphasis added)

Here, the court stated that it had not read the briefs, therefore the threshold questions as to the need for oral argument and the circumstances that gave rise to the substantial questions of law, raised here, could never be addressed, and mandated a different conclusion that oral argument was necessary. Appellant contends due process was implicated, and that she was deprived of these necessary protections.

Finally, the Circuit Court's deprivation of further argument on the records, prevented Appellant from curing any misunderstanding the court may have had about the complicated and important issues raised in this case. It also prevents Appellant from demonstrating that the court's ultimate judgment in this case was based on erroneous application of the law. In light of the fact that: "[b]eing an equity case, the circuit court, sitting as an appellate court, had jurisdiction to make findings in accordance with its own view of the preponderance of the evidence." (*Eagles v. S.C. Nat'l Bank*, 301 S.C. 402, 408 (Ct. App. 1990).) The court made no findings, and Appellant contends this coupled with the underlying failure of the probate court to make findings based on appropriate evidence is fatal to the orders, and reversal is mandated.

3. *The Probate Court Abused its Discretion by Depriving Appellant of her Right to Reasonable Compensation and Reimbursement of Fees by Denying her Request for Fees*

A. Legal Authority

The South Carolina Probate Code provides for reasonable compensation to Guardians and Conservators appointed in protective proceedings.

With regard to Conservators, S.C. Code Ann. § 62-5-414 provides, "If not otherwise compensated for services rendered, any visitor, lawyer, physician, **conservator, or special conservator appointed in a protective proceeding is entitled to reasonable compensation from the estate**, as determined by the court (emphasis added)."

S.C. Code Ann. § 62-5-312(b) provides as to Guardians, in pertinent part, "Any **guardian** of one for whom a conservator also has been appointed shall control the custody and care of the ward and **is entitled to receive reasonable sums for his services** and for room and board furnished to the ward as agreed upon between him and the conservator, **provided the amounts agreed upon are reasonable under the circumstances** (emphasis added)."

In *Dowaliby v. Chambliss*, 344 S.C. 558, 544 S.E.2d 646 (Ct. App. 2001), the court stated that, "an appointed guardian may be able to recover expenses prior to the formal appointment if such expenditures benefitted the ward."

In the instant case, Appellant was appointed Guardian and Conservator and served Ms. Shaw-Baker in both capacities. Ms. Fisher assisted Ms. Shaw-Baker to remain in her home, and to avoid placement in an institution. This was a great benefit to Ms. Shaw-Baker, who often expressed that remaining in her home was her primary goal.

As set forth above, Appellant spent in excess of 25 hours a week to help Ms. Shaw Baker remain in her home, traveled from California, and ensured that the Probate Court's orders for expert examinations and 24 hour care were followed. (R. 249, pp. 254-265,

Motion for Approval of Fees) To deprive Appellant of these fees is contrary to the public policy and purpose to protect and assist "protected persons." (S.C. Code Ann. § 62-5-101)

B. The Services Provided to Alice Shaw Baker constituted "Property interests" protected under the Takings Clause.

The services provided pursuant to the appointment of Guardians and Conservators to protect and assist the Elderly, i.e. protected person under S.C. Code § 62-5-101, implicates the Takings Clause of the Fifth Amendment to the United States Constitution. (See U.S. Const. amend. V ["[N]or shall private property be taken for public use without just compensation"] and South Carolina Constitution, Article 1, § 13.)

Appellant's services to Ms. Shaw Baker constituted a "property interest" entitling her to just compensation. As referenced above, the court in *Brown, supra*, implicates the *Takings Clause* mandating reversal, in light of Appellant's statutory entitlement to compensation for serving as Guardian and Conservator.

As the *Brown* court explained in relation to attorneys, a Conservator and/or Guardian are "conscripted" for the public good, and as the Probate Court's Order in effect requires Appellant to "donate funds out-of-pocket" to help a protected person (even if willingly for the benefit of a relative, as here), Appellant is deprived of property in the form of money.

Appellant respectfully argues that this implicates Fifth Amendment protection in conservatorship and guardianship proceedings. (See for example, *State v. Smith*, 747 P.2d 816, 842 (Kan. 1987); see also *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (noting that the Takings Clause was "designed to bar Government from forcing some people alone

to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"). Therefore, the order must be reversed.

C. The Probate Court's denial of Appellant's Request for Approval of Fees and Expenses is in Violation of the Equal Protection Clause.

Appellant contends that denial of fees and expenses to Appellant treats her differently from other similarly situated citizens who have served as Guardians and Conservators and thereby violates the Equal Protection Clauses of the United States and South Carolina Constitutions. (U.S. Const. Amend. 14; S.C. Const., Art. I, § 3.)

Moreover, in this case, Appellant is the only person being deprived compensation for her services and reimbursement for funds expended on behalf of Ms. Shaw Baker. All other previously appointed individuals received compensation from Ms. Shaw Baker's monies. The Probate Court approved Guardianship fees for Walter Kaufman, who served as Co-Guardian for Ms. Shaw-Baker in the early stages of this case, at a rate of \$120 per hour, in excess of \$4300.00. (R. 20, Order Awarding Fees to Temporary Co-Guardians for period from July 31, 2008 and August 27, 2008 dated November 10, 2008) All other individuals involved with the guardianship/conservatorship received payment for this pre-death services, including Jane Orenstein, Mac Gibson, Esquire, the in-home caregivers, and Court appointed counsel, Peter Kouten (now, Bessie Huckabee's counsel). (R. 22, 24, 27, 42, 38, 44, 46, 48, 50, 51, orders approving compensation) Appellant continues to object to Mr. Kouten's representation, due to the non-waiveable conflict of interest.⁷

⁷ Review of the final fee awards to Peter Kouten further demonstrate that they were not even served on Appellant, and again demonstrate Ex parte communications with the court. (R. 46 and 46, respectively, Order Approving Attorney Fees dated February 27, 2009 and Order Granting Fees by Court Appointed Guardian Ad Litem for Alice Shaw Baker for services from January 1, 2009 through February 25, 2009 and Final Discharge of GAL dated February 27,

(Even Appellant's counsel received payment of their attorney fees after noticed hearing.)

Many of these fees were paid without any formal petition and/or service of request on Appellant.

It is well settled that "A judge's impartiality might reasonably be questioned when his [or her] factual findings are not supported by the record." (*Simpson v. Simpson*, 377 S.C. 519, 660 S.E.2d 274, (S.C.App. 02/08/2008).)

In this instance, this court did not make any factual findings regarding the denial of Appellant's motion. Appellant was the person who came to her great-aunt's aid, when her power of attorney (Bessie Huckabee) renounced her duties, turned Ms. Shaw Baker into Adult Protective Services, and abandoned her.

Appellant showed her love and respect for Ms. Shaw Baker by traveling repeatedly to see her, help her, and attend to her needs. Appellant did not charge for all of the time expended to help her aunt, nor did she request fees for the travel fees for her mother, so that Ms. Shaw Baker had family present for Christmas. However, the failure to seek fees for the extra time and effort she expended did not mean that Appellant was waiving her fees.

Furthermore, only Appellant's counsel fees were approved by a noticed hearing, all other individuals involved (e.g. Walter Kaufman, Jane Orenstein, Peter Kouten).

2009) This type of communication is prohibited. Submission of a proposed order without sending a copy to opposing counsel is an *ex parte* communication after the effective date of Rule 5(b)(3), SCRCP. (See also *First Financial Ins. Co. v. Sea Island Sport Fishing Society, Inc.*, 327 S.C. 12, 490 S.E. 2d 257 (1997) (finding that submission of a proposed order without copying opposing counsel was not *ex parte* communication prior to the effective date of Rule 5(b)(3) where opposing counsel had opportunity to be heard on issues raised in it prior to the Court's ruling).

received approval of their fees without hearing, and without any opportunity to object. (R. 22, 24, 27, 42, 38, 44, 46, 48, 50, 51) Here, Appellant filed a proper motion for approval of her fees, which this court now denies without explanation. This mandates reversal.

D. The Probate Court Abused its Discretion by issuance of an Order intending to Freeze not only the decedent, Alice Shaw-Baker's Assets, but Appellant's, Without Notice and Hearing

1. *Legal Authority Governing Freezing of Bank Accounts*

Rule 65 (a) provides that "No temporary injunction shall be issued **without notice** to the adverse party." (Emphasis added)

Subsection (b)also provides: "No temporary restraining order shall be granted without notice of motion for the order to the adverse party unless it clearly appears from specific facts shown by affidavit or by a verified complaint that **immediate and irreparable** injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon." (Emphasis added).

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, 5, 623 S.E.2d 833, 835 (2005) [interpreting order freezing assets as an injunction].)

Under the South Carolina Code, injunctions are immediately appealable. To obtain an injunction, a party must demonstrate irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law. (See *County of Richland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002).)

In this case, no party requested these orders freezing the assets, there was no chance for irreparable harm (i.e. Appellant is bonded), and certainly the issues of likelihood of

success and absence of an adequate remedy are not even considered in the orders or in the originating Motion for Appointment of Special Fiduciary.

Therefore, the law governing injunctions precludes any sua sponte injunctions, especially when there are no specific facts justifying it and no hearing on the matter. In this case, the broad language of the order also intends to implicate Appellant's personal accounts, which Appellant could not have foreseen. Appellant has been deprived of a proper hearing on the matter, and as such the order should be reversed.

2. *Appellant was Required to Retain Estate Property for the "Duly Appointed" Personal Representative for the Benefit of Alice Shaw Baker's Estate.*

Contrary to the Probate Court's conclusion that Lisa Fisher lacked "legal fiduciary authority" to protect and preserve Alice Shaw Baker's assets, the South Carolina Probate Code Section 62-5-425 (d) 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)

This emphasizes the statutory scheme which provides for a continuing duty of a fiduciary/conservator to hold property until it can be delivered to the proper person.

The well settled legal authority governing Statutory interpretation is:

"Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers." *Collins Music Co., Inc. v. IGT*, 365 S.C. 544, 550, 619 S.E.2d 1, 3 (Ct. App. 2005) (quoting *TNS Mills, Inc. v. South Carolina Dep't of Revenue*, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998)). Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention. *Jones*, 364 S.C. at 230, 612 S.E.2d at 723 (citing *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000))." (Emphasis added)

Here, in light of the orders extending the time to turn over the assets of the Conservatorship, Appellant has at all times acted appropriately, and in furtherance of the statutory scheme to protect the property of Ms. Shaw Baker. The Probate Court's failure to acknowledge the continuing duty to protect the assets is contrary to the accepted duty of all fiduciaries, and is at the core of a "fiduciaries" standard. This too requires reversal.

3. *The Doctrine of Laches Supports Appellant's Continued Protection of the Estate*

Bessie Huckabee cannot now object that the Estate is not protected. All of the years that have passed since Ms. Shaw Baker's death were met without objection by Huckabee. Had Appellant not acted pursuant to the statutory duties outlined in 62-5-425 (d), and protected the Estate, it would have sustained losses and been contrary to Ms. Shaw Baker's intent.

Under *Hallums v. Hallums*, 296 S.C. 195, 198-99, 371 S.E.2d 525, 527 (1988), the doctrine of "Laches" is defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." (Emphasis added)

Here, Respondent knew that Ms. A

Shaw Baker owned real property, required insurance, and was in fact, the named Agent under both the Power of attorney for finances and healthcare. (R. 390, prg. 8) Respondent abandoned Ms. Shaw Baker in her time of need, so Appellant helped her great aunt during her life—and made sure that at her death and pending the proper determination of her Wishes, these assets were not lost.

Therefore, Respondent not only waived the argument that the property was not being properly taken care of, but consented to Appellant's continued protection of the estate pending final determination on Appeal by the doctrine of laches.

The disingenuous argument that Appellant was required to merely hold the assets pending transfer ignores the potential problems that would have resulted:

- A. No taxes would have been paid on the property
leaving it vulnerable to a Tax sale;
- B. Insurance would have lapsed;
- C. No Estate tax returns would have been filed subjecting the Estate to
fines and penalties;
- D. And the value of the real property would have been dissipated.

Due to Appellant's actions in protecting the assets pending resolution of the litigation, and continuing to this date, the Estate has maintained its value and increased in value.

4. *The Probate Court Lacked Jurisdiction to Hear this matter, in light of the fact that the Circuit Court had Control over the Estate Matter and at the time of the Orders, there was an Appeal before the Supreme Court.*

Since this Probate matter was removed to the Circuit Court, once the conservatorship was terminated, any recourse regarding the assets would be in the **Circuit Court.** (Emphasis added)

However, Respondent forced this action back to this Probate Court and avoid the very protections that Alice Shaw Baker's heir at law, Betty Fisher, sought by Removal of the Will Contest/Appointment of Administrator to the Circuit Court.

This court's jurisdiction under South Carolina Probate Code 62-5-102 ended upon the death of Ms. Shaw Baker, and now authority is conferred in the Circuit Court as it administers the decedent's estate. Therefore, all orders must be reversed.

E. Due Process, Equal Protection, and the Takings Clauses Under the Constitution Prohibit the Imposition of the Order Freezing Assets

The initial orders of October 14, 2011, and thereafter on November 9, 2011, improperly seek to freeze Appellant's bank accounts, even those not held on behalf of the conservatorship. (R. 59) These orders violated Rule 65 standards for injunctive relief. They were made without notice, include factual findings where no evidence was produced

at the hearing and seek to invade Lisa Fisher's financial privacy and interfere with her ability to maintain her expenses by their very orders.

The orders are in violation of Due Process laws. The requirements of due process include notice and an opportunity to be heard. (*S.C. Dept of Soc. Serv. v. Holden*, 319 S.C. 72, 78, 459 S.E.2d 846, 849 (1995).)

Ordering the freezing of these accounts without a hearing or evidence also denies Appellant's equal protection, and treats her differently from other similarly situated citizens who have served as Guardians and Fiduciaries thereby violates the Equal Protection Clauses of the United States and South Carolina Constitutions. (U.S. Const. Amend. 14; S.C. Const., Art. I, § 3.) This was demonstrated with the very uneven treatment of all other fiduciaries, visitors, examiners, and counsel in this case who received their compensation without a hearing. (R. 22, 24, 27, 42, 38, 44, 46, 48, 50, 51)

Freezing Appellant's personal and trust fund accounts also constitute a taking under both the South Carolina and United States Constitutions. (See U.S. Const. Amend. V; S.C. Const. Art. I, § 13(A); See *Ex Parte Brown*, 393 S.C. 214, 711 S.E.2d 899 (2011) (holding that a court-appointed attorney's service is property for purposes of the Takings Clause).

For all the reasons stated in this Appeal, Appellant seeks reversal of the probate court, and thereafter the Circuit Court, for their failure to reverse the orders based on the statutory and constitutional principals which govern this case.

//

//

//

V. CONCLUSION

V.
CONCLUSION

Love and Affection was the basis for Appellant's desire to help Alice Shaw Baker. Even without the fiduciary obligation, Appellant's desire is to protect the life works of Alice Shaw Baker.

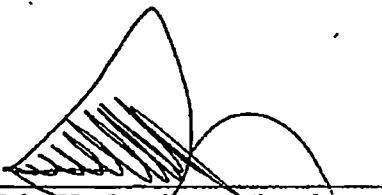
In this case, no party requested any orders freezing Ms. Shaw Baker's assets, and pending final resolution of this matter, the Orders place Ms. Shaw Baker's property in jeopardy.

Appellant has maintained the property, and ensured that it is safe and secure. Allowing the property to sit, without being maintained, while strangers to the Estate, here—Bessie Huckabee, fight over property that rightfully belongs to Alice Shaw Baker's intended beneficiaries, Animal Charities, would be harmful.

While this fight takes priority for Appellant, the Probate Court's second order denying her fees and costs has its own harmful effects, as years go by, as Appellant overcomes the lost of monies incurred in helping Alice live in her home and seek injunctions to prevent premature institutionalization. (R. 61)

Appellant respectfully prays that this Honorable Court reverse the Orders in this matter.

December 8, 2015



John Hughes Cooper, Esquire
P.O. Box 395
Sullivan's Island, SC 29482
(843) 883-9099
Attorney for Appellant

Other Counsel of Record:

Peter A. Kouten, Esquire
Kouten Law Firm, LLC
P.O. Box 340
John's Island, SC 29457

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM CHARLESTON COUNTY
Court Of Common Pleas

Honorable J.C. Nicholson, Jr., Circuit Court Judge
Tamara C. Curry, Probate Court Judge

Appellate Case No. 2014-002020
Case No. 2011-CP-10-7819

RECEIVED

DEC 18 2015

SC Court of Appeals

LISA FISHER.....Appellant,

v.

BESSIE HUCKABEE.....Respondent.

FINAL BRIEF OF RESPONDENT

Peter A. Kouten, Esquire
PO Box 340
Johns Island, SC 29455
843-789-9614
pkouten@gmail.com
Attorney for Respondent

Table of Contents

Table of Contents	2
Cases	3
Statement of the Case.....	4
Argument.....	7
Conclusion.....	13

Cases .

Dean v. Kilgore 437 S.E.2d 154 (Ct. App. 1993)	8
Eagles v. S.C. National Bank 301 S.C. 402, 408 (Ct. App. 1990)	8
Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24 (2004)	8
Ex Parte Dibble 279 S.C. 592 (1983)	11
Mayer v. MS Bailey & Son, 347 S.C. 353 (Ct. App. 2001)	7,9,10,12
Pye v. Estate of Fox, 369 S.C. 555, 565 (2006)	13
Watson v. Underwood 407 S.C. 443 (2014)	7,9,11,13

Statutes, Rules and Reference

Conservatorship of Alice Shaw-Baker, Probate Court Order 9/28/2011 p.2, last line)....	8
Estate of Alice Shaw-Baker, Probate Court Order 6/9/2009 p.3, lines 8-9.....	13
South Carolina Probate Code §62-5-402(1).....	12
S.C.Code Ann. § 62-1-201(20)	7,9,10,12
S.C.Code Ann. § 62-1-201(2)	7,9,10,12

STATEMENT OF THE CASE

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

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

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

the court had written to Lisa Fisher seeking an annual accounting after her discharge based on the fact that she was holding the funds. Lisa Fisher did not respond to the request in a timely matter. The Respondent corresponded with counsel for the Appellant seeking the requested accounting from Lisa Fisher and no response was had. Lisa Fisher sought additional extension when the previous extension expired and Respondent objected to the extension based on lack of accounting. The Respondent sought to appoint a special fiduciary. Prior to the hearing from which this appeal comes, Appellant and Lisa Fisher sought motion to strike Respondent's motion based on S.C. Rules of Civil Procedure notice requirement. Proper notice was given to the conservator. Appellant is not a party to whom notice was required. Prior to hearing on Motion for Appointment of Special Fiduciary, Lisa Fisher filed an amended final accounting three years after she was discharged as conservator and an accounting for the following calendar year, 2010. Lisa Fisher, who is a lawyer in California and who alleges to practice in the area of conservatorships in her home state, clearly represented in her account filings to the probate court that she continued to act in matters affecting the estate. She expended funds after she was discharged as conservator. "The court discharged her" (R. p. 433, Line 11), and Lisa Fisher "can no longer act as conservator." (R. p. 434, Lines 2 and 3) Further, counsel for Appellant at the motion hearing indicated that "we just think this is a better way to do it" (R. p. 447, Lines 8 and 9) The Appellant continues to expend estate assets without court authority and is unapologetic. The court asked whether the discharged conservator might have sought permission from the court to act in certain matters. (R. p. 446, Lines 13 and 14) Lisa Fisher did not nor has she since. The lower court granted the motion appointing a special fiduciary. The lower court found that Lisa Fisher, "did not have the duty to act in a conservator capacity." (Does not appear in

record as Hearing Transcript Page 35, Lines 17 and 18 was not provided as part of record)

Appellant appealed to the circuit court and was denied. The appellant filed the appeal at bar.

ARGUMENTS

I. Did the circuit court's failure to consider Appellant's statement of grounds prior to oral arguments and failure to reverse the probate court's order amount to an abuse of discretion and a deprivation of due process?

South Carolina Probate Code defines an "interested person" to include an heir, devisee, child, spouse, creditor, beneficiary, and any others having a property right in or claim against a trust estate...." S.C.Code Ann. § 62-1-201(20) A "beneficiary" of a trust is defined as including a person who has any present or future interest, vested or contingent ..." S.C.Code Ann. § 62-1-201(2) (See also Mayer v. MS Bailey & Son, 347 S.C. 353 (Ct. App. 2001) Here, Betty Fisher has filed a petition with the Charleston County Probate Court and has yet to seek hearing or determination that the last will of Alice Shaw-Baker is valid or invalid. The last will, the original of which has been accepted for probate, does not name the Appellant as a beneficiary and she has not perfected her claim that she is an heir. Therefore, she lacks standing and her appeal should be dismissed.

Further, under the probate code, a contingent remainderman has standing to pursue actions involving "alleged misconduct of a fiduciary....," Id. The Appellant has not been found to be a contingent remainderman. As such, she could not bring an action against the discharged conservator. Therefore, her appeal on this issue should be dismissed.

An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties' rights. Watson v. Underwood 407 S.C. 443 (2014) The lower court's order appointing a special fiduciary is not a final order. In fact, the order appointing a special fiduciary is a safeguard protecting estate assets for future distribution of those to whom the

estate will be distributed. For this reason, the order appointing special fiduciary is interlocutory and, therefore, Appellants issues on appeal should be dismissed.

The circuit court, as appeals court in this matter, did not abuse its discretion nor did it deprive the Appellant due process. Here, the Appellant comes to the conclusion that the trier of fact did not consider the statement of grounds. There is no indication by the appellate court that it did not consider the statement of grounds. The trier of fact indicated, in the transcript, that it had not read Appellant's Brief prior to hearing and further indicated that he would do so prior to ruling. Further, Appellant argues that because the appeals court upheld the lower court's ruling, it abused its discretion and somehow deprived the Appellant due process.

Appellant cites Eagles v. S.C. National Bank by stating that the circuit court, sitting as an appellate court, has jurisdiction to make findings in accordance with its own view of the preponderance of the evidence. 301 S.C. 402, 408 (Ct. App. 1990) Appellant fails to mention that Eagles further states that, although the appeals court may make finding with its own view, the standard of review followed was whether there is any evidence which "reasonably supports" the circuit court's findings. Id. (See also Dean v. Kilgore 437 S.E.2d 154 (Ct. App. 1993))

Finally, Appellant argues that the probate court made no findings of fact. The lower in the order on appeal found an "emergent need for authority as to these estate assets." (Conservatorship of Alice Shaw-Baker, Probate Court Order 9/28/2011 p.2, last line)

Therefore, the Court should uphold the ruling of the lower court based on findings of fact which reasonably support the lower court's ruling and Appellant's appeal on this issue should be denied.

II. Did the probate court have jurisdiction to appoint a special fiduciary in light of the appeal in the South Carolina Supreme Court.

South Carolina Probate Code defines an "interested person" to include an heir, devisee, child, spouse, creditor, beneficiary, and any others having a property right in or claim against a trust estate...." S.C.Code Ann. § 62-1-201(20) (1987) A "beneficiary" of a trust is defined as including a person who has any present or future interest, vested or contingent ..." S.C.Code Ann. § 62-1-201(2) (1987) (See also Mayer v. MS Bailey & Son, 347 S.C. 353 (Ct. App. 2001)) Here, Betty Fisher has filed a petition with the Charleston County Probate Court and has yet to seek hearing or determination that the last will of Alice Shaw-Baker is valid or invalid. The last will, the original of which has been accepted for probate, does not name the Appellant as a beneficiary and she has not perfected her claim that she is an heir. Therefore, she lacks standing and her appeal should be dismissed.

Further, under the probate code, a contingent remainderman has standing to pursue actions involving "alleged misconduct of a fiduciary...", Id. The Appellant has not been found to be a contingent remaindermen. As such, she could not bring an action against the discharged conservator. Therefore, her appeal on this issue should be dismissed.

An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties' rights. Watson v. Underwood 407 S.C. 443 (2014) The lower court's order appointing a special fiduciary is not a final order. In fact, the order appointing a special fiduciary is a safeguard protecting estate assets for future distribution of those to whom the estate will be distributed. For this reason, the order appointing special fiduciary is interlocutory and, therefore, Appellants issues on appeal should be dismissed.

Appellant's other issues on other pending appeal(s) have no relationship to the case at bar. The Appellant has filed a separate appeal with the Supreme Court and said appeal has nothing to do with the assets of the estate of Alice Shaw-Baker and the appointment of a special fiduciary has no effect on the outcome of Appellant's Supreme Court appeal. As there is no nexus between the appointment of special fiduciary or estate assets and Appellant's other appeal, the Court should uphold the lower court's ruling and Appellant's appeal on this issue should be denied.

III. Is the order appointing a special fiduciary void because Huckabee failed to provide Betty Fischer with the statutorily and constitutionally required notice of her intent to seek appointment of the appointment of special fiduciary.

South Carolina Probate Code defines an "interested person" to include an heir, devisee, child, spouse, creditor, beneficiary, and any others having a property right in or claim against a trust estate...." S.C.Code Ann. § 62-1-201(20) (1987) A "beneficiary" of a trust is defined as including a person who has any present or future interest, vested or contingent ..." S.C.Code Ann. § 62-1-201(2) (1987) (See also Mayer v. MS Bailey & Son, 347 S.C. 353 (Ct. App. 2001)) Here, Betty Fisher has filed a petition with the Charleston County Probate Court and has yet to seek hearing or determination that the last will of Alice Shaw-Baker is valid or invalid. The last will, the original of which has been accepted for probate, does not name the Appellant as a beneficiary and she has not perfected her claim that she is an heir. Therefore, she lacks standing and her appeal should be dismissed.

Further, under the probate code, a contingent remainderman has standing to pursue actions involving "alleged misconduct of a fiduciary...", Id. The Appellant has not

been found to be a contingent remainderman. As such, she could not bring an action against the discharged conservator. Therefore, her appeal on this issue should be dismissed.

An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties' rights. Watson v. Underwood 407 S.C. 443 (2014). The lower court's order appointing a special fiduciary is not a final order. In fact, the order appointing a special fiduciary is a safeguard protecting estate assets for future distribution of those to whom the estate will be distributed. For this reason, the order appointing special fiduciary is interlocutory and, therefore, Appellants' issues on appeal should be dismissed.

In response to this issue, the order appointing special fiduciary is not void. Counsel on several occasions discussed the matters of appointment of special administrator or financial intermediary appointment prior to the filing of the motion to appoint special fiduciary. The Appellant failed to appreciate that the motion for special fiduciary was a responsive pleading to the discharged conservator's motion for extension to hold estate assets. Each of the Conservator's motions for extension did not contain the required Rule 11 affirmation and the personal representative was never delivered a copy of the motion prior to the court's approval. Further, the lower court, based on the accountings and arguments of Appellant's counsel found that the appointment of a special fiduciary was emergent. Finally, the Appellant is not an interested party to the estate and therefore, is not interested in the assets of the conservatorship.

Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible. Ex Parte Dibble 279 S.C. 592 (1983). The probate court has exclusive jurisdiction to determine the need for a conservator or other

protective order until the proceeding is terminated. South Carolina Probate Code §62-5-402(1) Here, the lower court recognized conflicts in the final accounting and the amended final accounting and realized that the discharged conservator was continuing to expend funds. Under the circumstances, the court, in furtherance of protecting the assets of the estate, placed emergent authority in a special fiduciary. For the above reasons, the lower court's order should be upheld.

IV. Is the order appointing a special fiduciary void because Huckabee had no standing to bring said motion when Alice Shaw-Baker revoked the will naming her personal representative.

South Carolina Probate Code defines an "interested person" to include an heir, devisee, child, spouse, creditor, beneficiary, and any others having a property right in or claim against a trust estate...." S.C.Code Ann. § 62-1-201(20) (1987) A "beneficiary" of a trust is defined as including a person who has any present or future interest, vested or contingent ..." S.C.Code Ann. § 62-1-201(2) (1987) (See also Mayer v. MS Bailey & Son, 347 S.C. 353 (Ct. App. 2001)) Here, Betty Fisher has filed a petition with the Charleston County Probate Court and has yet to seek hearing or determination that the last will of Alice Shaw-Baker is valid or invalid. The last will, the original of which has been accepted for probate, does not name the Appellant as a beneficiary and she has not perfected her claim that she is an heir. Therefore, she lacks standing and her appeal should be dismissed.

Further, under the probate code, a contingent remainderman has standing to pursue actions involving "alleged misconduct of a fiduciary..." Id. The Appellant has not been found to be a contingent remaindermen. As such, she could not bring an action against the discharged conservator. Therefore, her appeal on this issue should be dismissed.

"Generally, an issue must be raised to and ruled upon by the circuit court to be preserved." Pye v. Estate of Fox, 369 S.C. 555, 565 (2006) (citing Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24 (2004)) Here, Appellant raises the issue of a conservatorship matter with asset protection and an estate matter regarding personal representative removal and seeks to create a nexus between the two. This issue was never raised at the lower court and has not been preserved. For this reason, the issue at bar on appeal should be dismissed.

An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties' rights. Watson v. Underwood 407 S.C. 443 (2014) The lower court's order appointing a special fiduciary is not a final order. In fact, the order appointing a special fiduciary is a safeguard protecting estate assets for future distribution of those to whom the estate will be distributed. For this reason, Appellants issues on appeal should be dismissed.

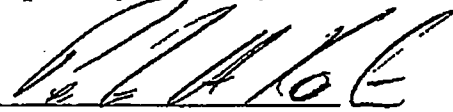
Appellant's argument that Respondent has no standing is misplaced. Bessie Huckabee is the court-appointed personal representative. The Appellant filed a will contest in 2009 and has yet to seek final hearing on the validity of Alice's last will. Until the probate court deems otherwise, Bessie Huckabee is the personal representative who, by court order, "may continue to administer and preserve the estate...." Estate of Alice Shaw-Baker, Probate Court Order 6/9/2009 p.3, lines 8-9

For the above reasons, Appellants issue regarding standing of personal representative should be dismissed and the lower court's order appointing special fiduciary should be upheld.

CONCLUSION

For the reasons stated, this Court should uphold the judgment of the lower court and dismiss Appellant's appeal or deny Appellant's appeal.

Respectfully submitted,



Peter A. Kouten
P.O. Box 340
Charleston, SC 29457
(843) 670-3919
Attorney for Respondent

December 15, 2015

RECEIVED

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

DEC 18 2015

SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court Of Common Pleas

Honorable J.C. Nicholson, Jr., Circuit Court Judge
Tamara C. Curry, Probate Court Judge

Appellate Case No. 2014-002028
Case No. 2011-CP-10-7821

LISA FISHER.....Appellant,

v.

BESSIE HUCKABEE.....Respondent.

FINAL BRIEF OF RESPONDENT

Peter A. Kouten, Esquire
PO Box 340
Johns Island, SC 29455
843-789-9614
pkouten@gmail.com
Attorney for Respondent

Table of Contents

Table of Contents	2
Cases	2
Statement of the Case.....	3
Statement of Issues of Appeal.....	6
Argument.....	7
Conclusion.....	10

Cases

Dean v. Kilgore 437 S.E.2d 154 (Ct. App. 1993)	8
Eagles v. S.C. National Bank 301 S.C. 402, 408 (Ct. App. 1990)	7
Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24 (2004)	8, 15
Ex Parte Dibble 279 S.C. 592 (1983)	8,9,12,13,16
Pye v. Estate of Fox, 369 S.C. 555, 565 (2006)	8, 15
Watson v. Underwood 407 S.C. 443 (2014)	7,8,9,11,12,13,14,15,16,17,18

Statutes, Rules and Reference

Conservatorship of Alice Shaw-Baker, Probate Court Order 9/28/2011 p.2, last line.....	8
Estate of Alice Shaw-Baker, Probate Court Order 6/9/2009 p.3, lines 8-9.....	10
South Carolina Probate Code §62-5-402(1).....	10,12,14,16
South Carolina Probate Code § 62-5-416(c)	14
South Carolina Probate Code §62-7-704(e).....	14
South Carolina Probate Code §62-3-614.....	18

STATEMENT OF THE CASE

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

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

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

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

court found that Lisa Fisher, "did not have the duty to act in a conservator capacity."

(R. _____ Transcript Page 35, Lines 17 and 18) Appellant appealed to the circuit court and was denied. The appellant filed the appeal at bar.

STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court's Failure to Consider Appellant's Statement of Grounds prior to Oral Argument, and Failure to reverse the Probate Court's Order amount to an abuse of discretion and a deprivation of due process?
2. Did the Pending Appeal in the South Carolina Supreme Court Preclude the Probate Court from Appointing a Special Fiduciary?
3. Did the Pending Appeal in the South Carolina Supreme Court preclude the Probate Court's Order Appointing a Special Fiduciary, because it attempts to a Review another Judge's Order in Violation of Rule 60 and Decisional Law.
4. Once a Personal Representative is Appointed, Does the Probate Court have Jurisdiction to Appoint a Special Fiduciary under Probate Code § 62-7-704 (e)?
5. Was it an Abuse of Discretion for the Court to Consider Bessie Huckabee's Motion, when her Standing is on Appeal, and when it amounts to a Removal without Cause of Appellant?
6. Did The Probate Court's Proceedings as Protective Proceedings end at Alice Shaw Baker's Death, thereby Precluding the Court from considering the Appointment of a Special Fiduciary?
7. Did the Probate Court Abuse its Discretion in its Failure to Rule on Appellant's Objections to Respondent's Motion to Appoint Special Fiduciary and Made at the Hearing?
8. Was the Probate Court's Finding that Appellant did not have Authority to Pay Expenses on Behalf of the Estate Erroneous, and Demonstrate that there was no Emergent Need?
9. Does the Legal Principal Governing Laches Demonstrate that there is no "Emergent need" under S.C. Code Ann. § 62-7-704(e) and Preclude the Appointment of a Special Fiduciary?
10. Did the Probate Court Abuse its Discretion by Refusing to Strike Respondent's Motion to Appoint Special Fiduciary due to her failure to comply with Rule 11, SCRCP?
11. Did The Probate Court's Abuse its Discretion in Failing to Grant Appellant's Extension of Time to Deliver Proper?
12. Did the Probate Court Err in hearing the Motion to Appoint a Special Fiduciary when the record disclosed that interested parties, including the Attorney General of South Carolina and Heir at Law Betty Fisher, had not received statutory notice of the Proceedings, under S.C. Code Ann. § 62-3-614 and the United States Constitution, Amends. V and XIX, § 1 and the South Carolina Constitution, Art. 13?

ARGUMENTS

1. Did the Circuit Court's Failure to Consider Appellant's Statement of Grounds prior to Oral Argument, and Failure to reverse the Probate Court's Order amount to an abuse of discretion and a deprivation of due process?

An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties' rights. Watson v. Underwood 407 S.C. 443 (2014) The lower court's order appointing a special fiduciary is not a final order. In fact, the order appointing a special fiduciary is a safeguard protecting estate assets for future distribution of those to whom the estate will be distributed. For this reason, the order appointing special fiduciary is interlocutory and, therefore, Appellants issues on appeal should be dismissed.

The circuit court, as appeals court in this matter, did not abuse its discretion nor did it deprive the Appellant due process. Here, the Appellant comes to the conclusion that the trier of fact did not consider the statement of grounds. There is no indication by the appellate court that it did not consider the statement of grounds. The trier of fact indicated, in the transcript, that it had not read Appellant's Brief prior to hearing and further indicated that he would do so prior to ruling. Further, Appellant argues that because the appeals court upheld the lower court's ruling, it abused its discretion and somehow deprived the Appellant due process.

Appellant cites Eagles v. S.C. National Bank by stating that the circuit court, sitting as an appellate court, has jurisdiction to make findings in accordance with its own view of the preponderance of the evidence. 301 S.C. 402, 408 (Ct. App. 1990) Appellant fails to mention that Eagles further states that, although the appeals court may make finding with its own view, the standard of review followed in Eagles was whether there is any

evidence which "reasonably supports" the circuit court's findings. Id. (See also Dean v. Kilgore 437 S.E.2d 154 (Ct. App. 1993))

Finally, Appellant argues that the probate court made no findings of fact. The probate court found an "emergent need for authority as to these estate assets." Conservatorship of Alice Shaw-Baker, Probate Court Order 9/28/2011 p.2. last line

Therefore, the Court should uphold the ruling of the lower court based on findings of fact which reasonably support the lower court's ruling and Appellant's appeal on this issue should be denied.

2. Did the Pending Appeal in the South Carolina Supreme Court Preclude the Probate Court from Appointing a Special Fiduciary?

An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties' rights. Watson v. Underwood 407 S.C. 443 (2014) The lower court's order appointing a special fiduciary is not a final order. In fact, the order appointing a special fiduciary is a safeguard protecting estate assets for future distribution of those to whom the estate will be distributed. For this reason, the order appointing special fiduciary is interlocutory and, therefore, Appellants issues on appeal should be dismissed.

Appellant's other issues on separate appeal have no relationship to the case at bar. The Appellant has filed an appeal with the Supreme Court on an estate matter and said appeal has nothing to do with the assets of the conservatorship of Alice Shaw-Baker. Further, the appointment of a special fiduciary has no effect on the outcome of Appellant's Supreme Court appeal. As there is no nexus between the appointment of special fiduciary or

conservatorship assets and Appellant's other appeal, the Court should uphold the lower court's ruling and Appellant's appeal on this issue should be denied.

3. Did the Pending Appeal in the South Carolina Supreme Court preclude the Probate Court's Order Appointing a Special Fiduciary, because it attempts to a Review another Judge's Order in Violation of Rule 60 and Decisional Law.

An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties' rights. Watson v. Underwood 407 S.C. 443 (2014) The lower court's order appointing a special fiduciary is not a final order. In fact, the order appointing a special fiduciary is a safeguard protecting estate assets for future distribution of those to whom the estate will be distributed. For this reason, the order appointing special fiduciary is interlocutory and, therefore, Appellants issues on appeal should be dismissed.

In response to this issue, the order appointing special fiduciary is not void. Counsel on several occasions discussed the matters of appointment of special administrator or financial intermediary appointment prior to the filing of the motion to appoint special fiduciary. The Appellant failed to appreciate that the motion for special fiduciary was a responsive pleading to the discharged conservator's motion for extension to hold estate assets. Each of the Conservator's motions for extension did not contain the required Rule 11 affirmation and the personal representative was never delivered a copy of the motion prior to the court's approval. Further, the lower court, based on the accountings and arguments of Appellant's counsel found that the appointment of a special fiduciary was emergent.

Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible. Ex Parte Dibble 279 S.C. 592 (1983) The probate court has exclusive jurisdiction to determine the need for a conservator or other

protective order until the proceeding is terminated. South Carolina Probate Code §62-5-402(1) Here, the lower court recognized conflicts in the final accounting and the amended final accounting and realized that the discharged conservator was continuing to expend funds. Under the circumstances, the court, in furtherance of protecting the assets of the estate, placed emergent authority in a special fiduciary. For the above reason, the lower court's order should be upheld.

4. Once a Personal Representative is Appointed, Does the Probate Court have Jurisdiction to Appoint a Special Fiduciary under Probate Code § 62-7-704 (e)?

An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties' rights. Watson v. Underwood 407 S.C. 443 (2014) The lower court's order appointing a special fiduciary is not a final order. In fact, the order appointing a special fiduciary is a safeguard protecting estate assets for future distribution of those to whom the estate will be distributed. For this reason, the order appointing special fiduciary is interlocutory and, therefore, Appellants issues on appeal should be dismissed.

In response to this issue, the order appointing special fiduciary was based on the accountings, which revealed that Appellant was spending the conservatorship funds after she was discharged. Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible. Ex Parte Dibble 279 S.C. 592 (1983) The probate court has exclusive jurisdiction to determine the need for a conservator or other protective order until the proceeding is terminated. South Carolina Probate Code §62-5-402(1) Here, the lower court recognized conflicts in the final accounting and the amended final accounting and realized that the discharged conservator

was continuing to expend funds. Under the circumstances, the court, in furtherance of protecting the assets of the estate, placed emergent authority in a special fiduciary. For the above reason, the lower court's order should be upheld.

5. Was it an Abuse of Discretion for the Court to Consider Bessie Huckabee's Motion, when her Standing is on Appeal, and when it amounts to a Removal without Cause of Appellant?

An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties' rights. Watson v. Underwood 407 S.C. 443 (2014) The lower court's order appointing a special fiduciary is not a final order. In fact, the order appointing a special fiduciary is a safeguard protecting estate assets for future distribution of those to whom the estate will be distributed. For this reason, the order appointing special fiduciary is interlocutory and, therefore, Appellants issues on appeal should be dismissed.

In response to this issue, the Respondent has standing as the court-appointed personal representative for the estate of Alice Shaw-Baker. In the event the Appellant brings the will contest to trial and until a court rules that Bessie Huckabee is no longer the personal representative, she has standing and is the person with authority to administer the estate of Alice Shaw-Baker.

Appellant argues that the appointment of special fiduciary is a removal without cause, however, she has been discharged as conservator, which, of itself is a removal. Appellant was granted an extension to hold funds of the conservatorship, in trust, and she has been spending the conservatorship assets without court authority. Appellant has no basis to push forward any idea that she has been wronged. She has been discharged as conservator. For the above reasons, the lower court's order should be upheld.

6. Did The Probate Court's Proceedings as Protective Proceedings end at Alice Shaw Baker's Death, thereby Precluding the Court from considering the Appointment of a Special Fiduciary?

An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties' rights. Watson v. Underwood 407 S.C. 443 (2014) The lower court's order appointing a special fiduciary is not a final order. In fact, the order appointing a special fiduciary is a safeguard protecting estate assets for future distribution of those to whom the estate will be distributed. For this reason, the order appointing special fiduciary is interlocutory and, therefore, Appellants issues on appeal should be dismissed.

In response to this issue, the order appointing special fiduciary is not void. Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible. Ex Parte Dibble 279 S.C. 592 (1983) The probate court has exclusive jurisdiction to determine the need for a conservator or other protective order until the proceeding is terminated. South Carolina Probate Code §62-5-402(1) Here, the lower court recognized conflicts in the final accounting and the amended final accounting and realized that the discharged conservator was continuing to expend funds. Under the circumstances, the court, in furtherance of protecting the assets of the estate, placed emergent authority in a special fiduciary. For the above reasons, the lower court's order should be upheld.

7. Did the Probate Court Abuse its Discretion in its Failure to Rule on Appellant's Objections to Respondent's Motion to Appoint Special Fiduciary and Made at the Hearing?

An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of

the parties' rights. Watson v. Underwood 407 S.C. 443 (2014) The lower court's order appointing a special fiduciary is not a final order. In fact, the order appointing a special fiduciary is a safeguard protecting estate assets for future distribution of those to whom the estate will be distributed. For this reason, the order appointing special fiduciary is interlocutory and, therefore, Appellants issues on appeal should be dismissed.

In response to this issue, the lower court, based on the accountings and statements of Appellant's counsel, found that the appointment of a special fiduciary was emergent. Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible. Ex Parte Dibble 279 S.C. 592 (1983) The probate court has exclusive jurisdiction to determine the need for a conservator or other protective order until the proceeding is terminated. South Carolina Probate Code §62-5-402(1) Here, the lower court recognized conflicts in the final accounting and the amended final accounting and realized that the discharged conservator was continuing to expend funds. Under the circumstances, the court, in furtherance of protecting the assets of the estate, placed emergent authority in a special fiduciary. For the above reason, the lower court's order should be upheld.

8. Was the Probate Court's Finding that Appellant did not have Authority to Pay Expenses on Behalf of the Estate Erroneous, and Demonstrate that there was no Emergent Need?

An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties' rights. Watson v. Underwood 407 S.C. 443 (2014) The lower court's order appointing a special fiduciary is not a final order. In fact, the order appointing a special fiduciary is a safeguard protecting estate assets for future distribution of those to whom the

estate will be distributed. For this reason, the order appointing special fiduciary is interlocutory and, therefore, Appellants issues on appeal should be dismissed.

In response to this issue, the lower court found that the conservator had been discharged and, as such, she had no authority to act on behalf of the conservatorship. Appellant sought to hold funds of the conservatorship and based her extensions to turn over estate funds on the argument that she was awaiting a court order in the pending petitions. She abused the court's grant by continuing to expend funds which were under her charge. The Appellant is an attorney. She certainly understands the word discharge. The probate court has exclusive jurisdiction to determine the need for a conservator or other protective order until the proceeding is terminated. South Carolina Probate Code §62-5-402(1) Here, the lower court recognized conflicts in the final accounting and the amended final accounting and realized that the discharged conservator was continuing to expend funds. The lower court did not extend authority to the Appellant to act as trustee and Appellant had no authority to act as trustee. Under the circumstances and with authority granted to the probate court under S.C. Probate Code Sections 62-5-416(c) and 62-7-704(e), the court, in furtherance of protecting the assets of the estate, placed emergent authority in a special fiduciary. For the above reasons, the lower court's order should be upheld.

9. Does the Legal Principal Governing Laches Demonstrate that there is no "Emergent need" under S.C. Code Ann. § 62-7-704(e) and Preclude the Appointment of a Special Fiduciary?

An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties' rights. Watson v. Underwood 407 S.C. 443 (2014) The lower court's order appointing a special fiduciary is not a final order. In fact, the order appointing a special

fiduciary is a safeguard protecting estate assets for future distribution of those to whom the estate will be distributed. For this reason, the order appointing special fiduciary is interlocutory and, therefore, Appellants issues on appeal should be dismissed.

"Generally, an issue must be raised to and ruled upon by the circuit court to be preserved." Pye v. Estate of Fox, 369 S.C. 555, 565 (2006) (citing Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24 (2004)) Here, Appellant raises the issue of laches. This issue was never raised at the lower court and has not been preserved. For this reason, the issue at bar on appeal should be dismissed.

In response to this issue, the order appointing special fiduciary was the result of the discharged conservator spending the conservatorship funds while seeking to hold the funds until certain matters have been adjudicated. Appellant looks to blame the personal representative for not recognizing Appellants breach of the court's trust in her. The personal representative was diligent in her review of the court's file and recognized the court's correspondence seeking an up to date accounting. It was the personal representative who contacted the Appellant's counsel and sought the accounting. It was the personal representative who sought review prior to issuance of another extension. The Appellant finally filed the court-requested accountings which revealed that Appellant was improperly expending conservatorship funds. For the above reason, the lower court's order should be upheld.

10. Did the Probate Court Abuse its Discretion by Refusing to Strike Respondent's Motion to Appoint Special Fiduciary due to her failure to comply with Rule 11, SCRPC?

An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of

the parties' rights. Watson v. Underwood 407 S.C. 443 (2014) The lower court's order appointing a special fiduciary is not a final order. In fact, the order appointing a special fiduciary is a safeguard protecting estate assets for future distribution of those to whom the estate will be distributed. For this reason, the order appointing special fiduciary is interlocutory and, therefore, Appellants issues on appeal should be dismissed.

Counsel on several occasions discussed the matters of appointment of special administrator or financial intermediary appointment prior to the filing of the motion to appoint special fiduciary. The Appellant failed to appreciate that the motion for special fiduciary was a responsive pleading to the discharged conservator's motion for extension to hold estate assets. Each of the Conservator's motions for extension did not contain the required Rule 11 affirmation and the personal representative was never served a copy of the motion prior to the court's approval. Further, the lower court, based on the accountings and arguments of Appellant's counsel found that the appointment of a special fiduciary was emergent.

Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible. Ex Parte Dibble 279 S.C. 592 (1983) The probate court has exclusive jurisdiction to determine the need for a conservator or other protective order until the proceeding is terminated. South Carolina Probate Code §62-5-402(1) Here, the lower court recognized conflicts in the final accounting and the amended final accounting and realized that the discharged conservator was continuing to expend funds. Under the circumstances, the court, in furtherance of protecting the assets of the estate, placed emergent authority in a special fiduciary. For the above reason, the lower court's order should be upheld.

11. Did The Probate Court's Abuse its Discretion in Failing to Grant Appellant's Extension of Time to Deliver Proper?

An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties' rights. Watson v. Underwood 407 S.C. 443 (2014) The lower court's order appointing a special fiduciary is not a final order. In fact, the order appointing a special fiduciary is a safeguard protecting estate assets for future distribution of those to whom the estate will be distributed. For this reason, the order appointing special fiduciary is interlocutory and, therefore, Appellants issues on appeal should be dismissed.

Appellant seeks to extend her authority beyond what is ordered by the probate court when Appellant's motion for extension is sought. The motion for extension allows the Appellant to indicate reason(s) for seeking extension. The Appellant sought extension to hold funds. The Appellant did not seek extension to continue to act as the conservator after her discharge. Once the court was informed that the Appellant was acting without authority, the special fiduciary was appointed. Based on Appellant's continued penchant for blaming the personal representative and now the probate judge for her continued improper acts after her discharge, it may be appropriate to remand this issue for sanctions. The Appellant is a licensed lawyer in California who has pro hac vice status in South Carolina. For these reasons, the Appellant should be denied relief and the lower courts order upheld.

12. Did the Probate Court Err in hearing the Motion to Appoint a Special Fiduciary when the record disclosed that interested parties, including the Attorney General of South Carolina and Heir at Law Betty Fisher, had not received statutory notice of the Proceedings, under S.C. Code Ann. § 62-3-614 and the United States Constitution, Amends. V and XIX, § 1 and the South Carolina Constitution, Art. 13?

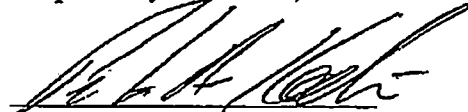
An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties' rights. Watson v. Underwood 407 S.C. 443 (2014) The lower court's order appointing a special fiduciary is not a final order. In fact, the order appointing a special fiduciary is a safeguard protecting estate assets for future distribution of those to whom the estate will be distributed. For this reason, the order appointing special fiduciary is interlocutory and, therefore, Appellants issues on appeal should be dismissed.

In response to this issue, the Attorney General is a party to the estate matters based on Appellants Amended Petition filed in 2009 which allege constructive trust. This matter is a conservatorship matter as the funds have yet to be received by the estate, therefore, the Attorney General of South Carolina is not an interested party. Additionally, Betty Fisher is not an interested party to this conservatorship action nor has she requested notice to any conservatorship actions. Betty Fisher has argued in her petition for appointment of personal representative that she should be appointed, however, she has yet to be granted any authority, and therefore, she is not an interested party who deserves notice to the conservatorship matter. Appellant cites S.C. Probate Code Section 62-3-614. There is no inherent notice requirement for the Attorney General of South Carolina or Betty Fisher under the statute cited. For these reasons, Appellant should be denied on this issue and the lower court's order should be upheld.

CONCLUSION

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

Respectfully submitted,



Peter A. Kouten
P.O. Box 340
Charleston, SC 29457
(843) 670-3919
Attorney for Respondent

December 15, 2015

CERTIFICATE OF COMPLIANCE

Counsel herein certifies that the Final Brief complies with Rule 211(b)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

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

Honorable C. Curry, Probate Court Judge

Appellate Case No. 2014-002034

Case No. 2011-GR-10-8657

Appellant

DISAFAISHER, JR.

Respondent

BESSIE HUNOKABEE

FINAL BRIEF OF RESPONDENT

Peter A. Kouen, Esquire
PO Box 340
Johns Island, SC 29455
843-789-9614
pkouen@gmail.com
Attorney for Respondent

Table of Contents

Table of Contents	2
Cases	2
Statement of the Case.....	3
Argument.....	6
Conclusion.....	10

Cases

Dean v. Kilgore 437 S.E.2d 154 (Ct. App. 1993)	6
Eagles v. S.C. National Bank 301 S.C. 402, 408 (Ct. App. 1990)	6
Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24 (2004)	8
Ex Parte Dibble 279 S.C. 592 (1983)	8
Pye v. Estate of Fox, 369 S.C. 555, 565 (2006)	8
Watson v. Underwood 407 S.C. 443 (2014)	6,7,8

Statutes, Rules and Reference

Conservatorship of Alice Shaw-Baker, Probate Court Order 9/28/2011 p.2, last line)....	7
Estate of Alice Shaw-Baker, Probate Court Order 6/9/2009 p.3, lines 8-9.....	10
South Carolina Probate Code §62-5-402(1).....	8

STATEMENT OF THE CASE

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

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

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

the court had written to Lisa Fisher seeking an annual accounting after her discharge based on the fact that she was holding the funds. Lisa Fisher did not respond to the request in a timely matter. The Respondent corresponded with counsel for the Appellant seeking the requested accounting from Lisa Fisher and no response was had. Lisa Fisher sought additional extension when the previous extension expired and Respondent objected to the extension based on lack of accounting. The Respondent sought to appoint a special fiduciary. Prior to the hearing from which this appeal comes, Appellant and Lisa Fisher sought motion to strike Respondent's motion based on S.C. Rules of Civil Procedure notice requirement. Proper notice was given to the conservator. Appellant is not a party to whom notice was required. Prior to hearing on Motion for Appointment of Special Fiduciary, Lisa Fisher filed an amended final accounting three years after she was discharged as conservator and an accounting for the following calendar year, 2010. Lisa Fisher, who is a lawyer in California and who alleges to practice in the area of conservatorships in her home state, clearly represented in her account filings to the probate court that she continued to act in matters affecting the estate. She expended funds after she was discharged as conservator. "The court discharged her" (R. p. 433, Line11), and Lisa Fisher "can no longer act as conservator." (R. p. 434, Lines 2 and 3) Further, counsel for Appellant at the motion hearing indicated that "we just think this is a better way to do it" (R. p. 447, Lines 8 and 9) The Appellant continues to expend estate assets without court authority and is unapologetic. The court asked whether the discharged conservator might have sought permission from the court to act in certain matters. (R. p. 446, Lines 13 and 14) Lisa Fisher did not nor has she since. The lower court granted the motion appointing a special fiduciary. The lower court found that Lisa Fisher, "did not have the duty to act in a conservator capacity." (Does not appear in

record as Hearing Transcript Page 35, Lines 17 and 18 was not provided as part of record)

Appellant appealed to the circuit court and was denied. The appellant filed the appeal at bar.

STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court's Failure to Consider Appellant's Statement of Grounds prior to Oral Argument, and Failure to reverse the Probate Court's Order amount to an abuse of discretion and a deprivation of due process?
2. Did the Probate Court Abuse its Discretion in Depriving Appellant of her right to "reasonable compensation" and reimbursement of fees by denying her Motion for Approval of Fees and Expenses under S.C. Code Ann. § § 62-5- 312(b) and well established legal precedent?
3. Did services by Appellant to her great-aunt, Alice Shaw Baker, constitute "property" interests entitling her to "just compensation" under the Takings Clause in the U.S. Const. Amend. V; S.C. Const. Art. I, § 13(a) and well established legal precedent?
4. Was the Probate Court's denial of Appellant's Request for Approval of Fees and Expenses in violation of the Equal Protection Clause of the United States Constitution in the U.S. Const. Amend. XIV; S.C. Const. Art. I, § and well established legal precedent?
5. Did the Probate Court Abuse its Discretion by issuance of an Order intending to Freeze not only the decedent, Alice Shaw-Baker's assets, but Appellant's personal Assets?
6. Were the Probate Court's Orders Freezing Accounts in violation of the Due Process Clause, Equal Protection Clause, and Takings Clause of the United States Constitution and well established legal precedent?

ARGUMENTS

1. Did the Circuit Court's Failure to Consider Appellant's Statement of Grounds prior to Oral Argument, and Failure to reverse the Probate Court's Order amount to an abuse of discretion and a deprivation of due process?

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

The findings of fact of the trial judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81 (1976) Here, the Appellant comes to the conclusion that the trier of fact did not consider the statement of grounds. There is no indication by the appellate court that it did not consider the statement of grounds. The trier of fact indicated, in the transcript, that it had not read Appellant's brief prior to hearing and further indicated that he would do so prior to ruling. In review of the evidence presented, the lower court upheld the order of the probate court. Appellant argues, with no evidence for the conclusion, that because the appeals court upheld the lower court's ruling, it abused its discretion and somehow deprived the Appellant due process. For the above reasons, the lower court's order should be upheld.

2. Did the Probate Court Abuse its Discretion in Depriving Appellant of her right to "reasonable compensation" and reimbursement of fees by denying her Motion for Approval of Fees and Expenses under S.C. Code Ann. § § 62-5- 312(b) and well established legal precedent?

"Generally, an issue must be raised to and ruled upon by the circuit court to be preserved." Pye v. Estate of Fox, 369 S.C. 555, 565 (2006) (citing Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24 (2004) Here, Appellant raises the issue of compensation for the

guardian from the conservator, by agreement, in furtherance of South Carolina Probate Code Section 62-5-312(b). This issue was never raised at the lower court and has not been preserved. For this reason, the issue at bar on appeal should be dismissed.

The plain language of South Carolina Probate Code Section 62-5-312(b) states that a guardian is entitled to receive sums for services and room and board as agreed upon between the guardian and conservator. Any agreement between the guardian and conservator would constitute a contract. Here, the Appellant has provided no evidence of a contract between the guardian and conservator. Further, the lower court has the authority to weight appropriate factors, including those contained in legal precedent, if any, which would constitute whether the services rendered were of benefit to the ward. The lower court has determined that, based on Appellant's disregard for the authority of the lower court as it pertains to holding assets in trust, the lower court has a right to protect the remaining conservatorship assets and deny Appellants request for fees. For the above reasons, the lower court's order should be upheld.

3. Did services by Appellant to her great-aunt, Alice Shaw Baker, constitute "property" interests entitling her to "just compensation" under the Takings Clause in the U.S. Const. Amend. V; S.C. Const. Art. I, § 13(a) and well established legal precedent?

The findings of fact of the trial judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81 (1976) Appellant cites case law which does not support her allegation of entitlement to compensation. Appellant was not appointed to represent an indigent litigant as in Ex Parte Brown, 393 S.C. 214 (2011) Appellant was not forced to bear public burdens as in Armstrong v. United States, 364 U.S. 40 (1960) The Appellant sought appointment as guardian and conservator of Alice Shaw-Baker. The Appellant went

to great lengths to secure her appointment. Now, the Appellant seeks reimbursement of fees to which the lower court has denied. It is well-established legal precedent that attorney's fees are not recoverable unless authorized by contract or statute. Dowaliby v. Chambliss 344 S.C. 558 (2001) Further, any compensation that may be reasonably established is subject to a determination by the court. S.C. Probate Code Section 62-5-414 Here, the lower court reviewed the request for fees and denied the request based on evidence that money in the conservatorship when the Appellant was discharged is no longer where it was held for safe keeping. The Appellant has spent conservatorship funds without authority. For the above reasons, the lower court's order should be upheld.

4. Was the Probate Court's denial of Appellant's Request for Approval of Fees and Expenses in violation of the Equal Protection Clause of the United States Constitution in the U.S. Const. Amend. XIV; S.C. Const. Art. I, § and well established legal precedent?

The findings of fact of the trial judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81 (1976) Appellant cites case law which does not support her allegation of entitlement to compensation. Appellant was not appointed to represent an indigent litigant as in Ex Parte Brown. 393 S.C. 214 (2011) Appellant was not forced to bear public burdens as in Armstrong v. United States. 364 U.S. 40 (1960) The Appellant sought appointment as guardian and conservator of Alice Shaw-Baker. The Appellant went to great lengths to secure her appointment. Now, the Appellant seeks reimbursement of fees to which the lower court has denied. It is well-established legal precedent that attorney's fees are not recoverable unless authorized by contract or statute. Dowaliby v. Chambliss 344 S.C. 558 (2001) Further, any compensation that may be reasonably established is subject to a determination by the court. S.C. Probate Code Section 62-5-414 Here, the lower court reviewed

the request for fees and denied the request based on evidence that money in the conservatorship when the Appellant was discharged is no longer where it was held for safe keeping. The Appellant has spent conservatorship funds without authority. For the above reasons, the lower court's order should be upheld.

5. Did the Probate Court Abuse its Discretion by issuance of an Order intending to Freeze not only the decedent, Alice Shaw-Baker's assets, but Appellant's personal Assets?

The Appellant argues that the probate court was without evidence to support her findings in freezing conservatorship and personal accounts of Appellant. At the same time, Appellant provides excerpts from the lower court's orders which indicate that "Ms. Fisher withdrew monies from the conservatorship account without having the legal fiduciary authority..." and "The Court's position remains that Lisa Fisher's fiduciary role as Guardian and Conservator was terminated by this court's Order dated May 11, 2009, and that Ms. Fisher withdrew monies from the Conservatorship account without having the legal fiduciary authority to do so."

In Grosshuesch v. Cramer, the respondent became a trustee of considerable assets belonging to a couple who trusted her. The couple transferred substantial assets to the trustee including liquid assets worth over \$3.5 million. They subsequently discovered that the trustee was improperly taking trust assets. They sought to prevent the respondent from transferring or otherwise disposing of the assets at issue. They sought a preliminary injunction preventing the respondent from exercising control over any of the subject assets and ordering an accounting for all funds. The trial court denied the request for an injunction, however, the appeals court granted the injunction freezing the respondent's accounts and any other assets. 367 S.C. 1 (2005) Here, the lower court has evidence provided by the Appellant that she has

expended funds from the conservatorship account without authority. The court is within its authority under Cramer to freeze not only the conservatorship accounts, but also personal accounts. Therefore, the Court should uphold the ruling of the lower court based on findings of fact which reasonably support the lower court's ruling and Appellant's appeal on this issue should be denied.

6. Were the Probate Court's Orders Freezing Accounts in violation of the Due Process Clause, Equal Protection Clause, and Takings Clause of the United States Constitution and well established legal precedent?

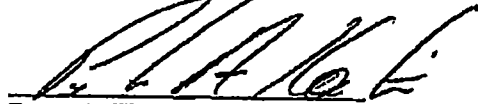
The court is within its authority under Cramer to freeze not only the conservatorship accounts, but also personal accounts. Id. Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible. Ex Parte Dibble 279 S.C. 592 (1983) The probate court has exclusive jurisdiction to determine the need for a conservator or other protective order until the proceeding is terminated. South Carolina Probate Code §62-5-402(1)

Here, the lower court determined that Ms. Fisher withdrew monies from the Conservatorship account without having the legal fiduciary authority. Therefore, the Court should uphold the ruling of the lower court based on findings of fact which reasonably support the lower court's ruling and Appellant's appeal on this issue should be denied.

CONCLUSION

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

Respectfully submitted,



Peter A. Kouten
P.O. Box 340
Charleston, SC 29457
(843) 670-3919
Attorney for Respondent

December 15, 2015

CERTIFICATE OF COMPLIANCE

Counsel herein certifies that the Final Brief complies with Rule 211(b)

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEALS FROM CHARLESTON COUNTY
Court of Common Pleas

RECEIVED

J.C. Nicholson, Jr., Circuit Court Judge
Tamara Curry, Probate Court Judge

DEC 11 2015

SC Court of Appeals

Appellate Case No. 2014-002020
Circuit Case No. 2011-CP-10-7819

BETTY FISHER.....Appellant

v.

BESSIE HUCKABEE.....Respondent

FINAL REPLY BRIEF OF APPELLANT

JOHN HUGHES COOPER, ESQUIRE
1476 Ben Sawyer Blvd. Ste. 7
Mount Pleasant, SC 29464
shiplaw@jhcooper.com
843-883-9099; fax 843-883-9335
(Attorney for Appellant)

TABLE OF CONTENTS AND AUTHORITIES

Table of Contents	2
Table of Authorities.....	3
INTRODUCTION.....	5
ARGUMENT	
I. The Circuit Court Abused its Discretion and Deprived Appellant of Due Process by Failing to Review the Statement of Grounds Prior to the Hearing.....	5
II. At the time of the hearing, All Actions were Stayed in the Circuit Court because of the Appeal in the South Carolina Supreme Court, therefore the Probate Court was without Power to Grant the Motion for Special Fiduciary.....	8
III. Reversal is Mandated Due to Respondent's Failure to Give Appellant Betty Fisher Notice.....	9
IV. The Order Appointing Special Fiduciary is Void, because Alice Shaw Baker revoked the Will Naming her Personal Representative.....	12
CONCLUSION.....	13

TABLE OF AUTHORITIES

Decisional Law:

<i>Bank of Am., N.A. v. Draper</i> , 405 S.C. 214, 219, 746 S.E. 2d 478, 480 (2013).....	9
<i>Blanton v. Stathos</i> , 351 S.C. 534 542, 570 S.E. 2d 565, 569 (2002).....	12
<i>Dean v. Kilgore</i> , 437 S.E. 2d 154 (1993)	7
<i>Eagles v. S.C. Nat'l Bank</i> , 301 S.C. 402, 408 (Ct. App. 1990).....	7
<i>First Union National Bank of South Carolina v. Cisa</i> , 293 S.C. 456, 361 S.E.2d 615 (1987).....	6
<i>First Union National Bank v. FCVS Communications</i> , 321 S.C. 496, 469 S.E. 2d 613 (1996).....	8
<i>First Union National Bank of S.C. v. Soden</i> , 333 S.C. 554, 566, 511 S.E.2d 372, 378 (1998).....	11
<i>Hite v. Thomas & Howard Co.</i> , 305 S.C. 358, 360, 409 S.E. 2d 340, 341 (1991).....	6
<i>Greenfield v. Greenfield</i> , 245 S.C. 604, 610, 141 S.E. 2d 920, 923 (1965).....	7
<i>Grosshuesch v. Cramer</i> , 367 S.C. at 5, 623 S.E.2d 833, 835 (2005).....	7
<i>Limehouse v. Hulsey</i> , 404 S.C. 93, 105, 744 S.E.2d 566, 573 (2013).....	11
<i>McConnell v. Akins</i> , 586 S.E.2d 688 (2003).....	8
<i>Smiley v. South Carolina Dept. Of Health & Envt'l Control</i> , 374 S.C. 326, 329, 649 S.E. 2d 31, 32-33 (2007).....	9
<i>Universal Benefits, Inc. v. McKinney</i> , 349 S.C. 179, 183, 561 S.E. 2d 659, 661 (2002).....	11
<i>Watson v. Undersood</i> , 407 S.C. 443 (2014).....	10

South Carolina Statutes:

S.C. Code Ann. § 14-3-330(4).....	7
S.C. Code Ann. § 62-1-201.....	5
S.C. Code Ann. § 62-1-308 (c).....	8, 10

TABLE OF AUTHORITIES CONT'D

S.C. Code Ann. § 62-1-401.....	12
S.C. Code Ann. § 62-5-416(C).....	12
S.C. Code Ann. § 62-3-614	12
S.C. Code Ann. §62-7-704(e)	12
S.C. Code Ann. § 62-5-425.....	8, 11, 13

South Carolina Rules:

Rule 203, SCACR	8, 10
Rule 208, SCACR	8, 11, 12
Rule 212, SCACR	8, 11, 12
Rule 12, SCRCPP	10

INTRODUCTION

Appellant Betty Fisher ("Appellant") is Alice Shaw Baker's niece, and in replying to Respondent Bessie Huckabee's ("Respondent") brief, she is challenged with overcoming mischaracterizations by Respondent's attorney, vindicating her Statutory and Due Process rights to Notice to object, and finally, bringing a voice to the longheld wishes of Alice Shaw Baker¹—by continuing to fight for the protection of her estate for the benefit of animal charities.

In so doing, Appellant outlines Respondent's false statements and legal flaws—flaws that support reversal of the order appointing a Special Fiduciary.

ARGUMENT

I. The Circuit Court Abused its Discretion and Deprived Appellant of Due Process by Failing to Review the Statement of Grounds Prior to the Hearing

Respondent's claim that Appellant does not have standing hinges entirely upon his unsupported claim that she is not an interested person under S.C. Code Ann. § 62-1-201(2). However, there is no dispute that Appellant filed a Will contest, seeking relief against Bessie Huckabee and third parties Kay Passailaigue Slade and Sandra Byrd, and that Appellant contends evidence exists that the will of Alice Shaw Baker was revoked once she learned that Kay Passailaigue Slade lied to her and did not operate animal charities. (R. 327, 363) As such, Appellant would be beneficiary. The Will Contest also includes causes of action which would provide the monies to animal charities, as Appellant contends they belong. Therefore, Appellant has standing, and her appeal should not be dismissed.

//

¹ Hereinafter referred to as "Alice Shaw Baker" or "Alice." Reference to her first name is meant merely for convenience, and not to disrespect Ms. Shaw Baker.

It is almost laughable that Respondent would claim Appellant seek to bring an action against the "discharged conservator", Lisa Fisher in this case. She has taken all action to protect the estate, both during Alice's life and after her death. However, Respondent is a fiduciary, and based on Respondent's own argument, a contingent remainderman has standing to pursue actions involving "misconduct of a fiduciary...", that being Respondent. Appointing a Special Fiduciary without proper notice allows strangers to be involved the estate and increase costs in contravention of Alice Shaw Baker's desires to have her monies used for animal charities. Here, Appellant contends that the Probate Court has no jurisdiction to order funds transferred to a Special Fiduciary.

Due to the contested title of personal representative, Respondent's attempt to gain an advantage by filing this in the probate court, rather than the circuit court, demonstrates her interests that are adverse to the real beneficiaries of the estate—either Appellant or animal charities, as Appellant contends. This is standing. The law is clear that it will not permit her to use her fiduciary position to promote her selfish interest over the best interest of a beneficiary. (See *First Union National Bank of South Carolina v. Cisa*, 293 S.C. 456, 361 S.E.2d 615 (1987).) This has been a continuing argument by Appellant that Respondent seeks to continue in her role as "alleged" personal representative, when she is adverse to Alice's true intentions.

Respondent relies heavily on the argument that the order involved in this case is interlocutory and not immediately appealable. However, courts have found that: "An order that is not directly appealable will nonetheless be considered if there is an appealable issue before the [c]ourt and a ruling on appeal will avoid unnecessary litigation." (See *Hite v. Thomas & Howard Co.*, 305 S.C. 358, 360, 409 S.E. 2d 340, 341 (1991).

Further, Appellant contends that since the "order freezing accounts" is tantamount to an injunction, and it is well settled that an order freezing the accounts is in the nature of an injunction.

(See *Grosshuesch v. Cramer*, 367 S.C. at 5, 623 S.E.2d 833, 835 (2005) (interpreting order freezing assets as an injunction). Also, under the South Carolina Code, injunctions are immediately appealable. S.C. Code Ann. § 14-3-330(4). Thus, the lack of jurisdiction of the probate court sitting in its capacity regarding the conservatorship estate coupled with the improper freezing order mandates direct appeal.

Respondent's counsel implies that Appellant misled the court by her cite to *Eagles v. S.C. National Bank*, 301 S.C. 402 (1990). Indeed, he directly claims that: "Appellant fails to mention that Eagles further states that, although the appeals court may make finding [sic] with its own view, the standard of review followed was whether there is any evidence which 'reasonably supports' the circuit court's findings." (See Respondent's brief, p. 8) Review of the case, does not reveal that the *Eagles* court makes that statement, although the case in *Dean v. Kilgore*, 437 S.E. 2d 154 (1993) does stand for that proposition. With that said, it does not change the facts in this case.

Despite Respondent's conclusions, "Emergent need" can not be a finding, when there was no notice, no evidence, no affidavit, no verification, nor any testimony. Respondent concludes that the Court Order of September 28, 2011 constitutes sufficient findings of fact, and thatt the order was somehow proper. Respondent argues that the probate court can do virtually *anything*. However, it is well settled that "The probate court is a court of limited jurisdiction owing its present existence to creation by statute rather than the Constitution, and as such, can exercise only such powers as are directly conferred upon it by legislative enactment..." (See *Greenfield v. Greenfield*, 245 S.C. 604, 610, 141 S.E. 2d 920, 923 (1965).) The court does NOT have a right nor get to change said.

In this case, the probate court lacked jurisdiction to make any orders related to the appointment of a fiduciary, when Appellant sought removal of the Estate case to the Circuit Court.

Thus, the probate court did not have power to order Lisa Fisher to turn the conservatorship assets over to a Special Fiduciary. The law is clear that Lisa Fisher was required to hold the monies for the proper personal representative. (See S.C. Code Ann. § 62-5-425)

II. At the time of the hearing, All Actions were Stayed in the Circuit Court because of the Appeal in the South Carolina Supreme Court, therefore the Probate Court was without Power to Grant the Motion for Special Fiduciary.

Respondent rehashes the same legal theories throughout this appeal—standing, interlocutory, and dismissal. These sections fail to address appellant’s arguments, and as such should have been treated as a failure to respond to the issues raised, 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).) Respondent’s counsel did not present any admissible evidence to the probate court, did not brief the appeal to the Circuit court, and now seeks to reference records in violation of the Rules of this court (i.e. records from the estate action).²

The issue raised in this section, that when there was a pending appeal, no party that authority under Rule 203, SCACR and S.C. Code Ann. § 62-1-308 (c) precluded bringing any motion while the matter was on appeal.

//

//

//

² Filed concurrently is Appellant’s Motion to Strike. Respondent seeks to reference records not presented to the probate or Circuit Court. Georgia courts have discussed the problems with allowing facts outside the record even in argument. The court in *McConnell v. Akins*, 586 S.E.2d 688 (2003) stating: “The law forbids introduction into case, by way of argument, facts which are not in the record and are calculated to prejudice party and render trial unfair.” It is well established by the rules of the court, Rules 208 and 212, SCACR, that this court is not to consider any alleged fact not cited in the record. Here, there is nothing in the record to allow the court to jump to this conclusion, and Appellant respectfully requests that the court ignore these improper conclusions. (See Concurrently Filed Motion to Strike)

III. Reversal is Mandated Due to Respondent's Failure to Give Appellant Betty Fisher Notice

Respondent again argues that Appellant is not an interested person, and does not have standing, however as set forth above, either Appellant or Animal Charities are the true beneficiaries, and dismissal is improper. "Standing is...that concept of justiciability that is concerned with whether a particular person may raise legal arguments or claims." (See *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 219, 746 S.E. 2d 478, 480 (2013).) It concerns an individual's sufficient interest in the outcome of the litigation to warrant consideration of [the person's position by a court." (*Id.* At 219, 20, 746 S.E. 2d at 480.) There are three requirements for standing:

"First, the plaintiff must have suffered an 'injury in fact'— an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly...traceable] to the challenged action of the defendant, and not...the result of the independent action of some third party not before the court. Third, it must be 'likely,' as opposed to merely 'speculative' that the injury will be 'redressed by a favorable decision." (*Id.* [quoting *Smiley v. South Carolina Dept. Of Health & Envi'l Control*, 374 S.C. 326, 329, 649 S.E. 2d 31, 32-33 (2007)]).

The Probate Court's order requiring the transfer of monies to the Special Fiduciary constitutes "Injury in fact" to the beneficial interest in the estate to Appellant, based on the Will Contest and relationship to Alice Shaw Baker. If a Third party Fiduciary is involved, both attorney fees and fiduciary fees, will substantially reduced with no corresponding benefit to the estate, and substantial losses to Appellant (and/or the intended beneficiaries—animal charities). Second, this interest is the direct result of the Probate court's attempt to exercise jurisdiction over estate assets, outside the control of the Circuit Court. Finally, a decision that the Probate court lacked jurisdiction would cause harm to the beneficial interest of Appellant (and/or the intended beneficiaries, animal charities.). Accordingly, Appellant has standing to object to the rulings affecting the Estate assets, and has brought this at the earliest opportunity after Respondent's

Motion for Appointment of Special Fiduciary. Therefore, Appellant did not waive the objection on jurisdictional grounds. (See 12, SCRCP.)

The conservatorship action is now moot, because Alice Shaw Baker died, and in connection with a separate action removed to the Circuit Court, Appellant seeks a formal probate of Alice Shaw Baker's estate. Appellant awaits determination of the appropriate person as Administrator. Respondent's informal appointment is challenged. Lisa Fisher continues to protect the property, pursuant to her fiduciary duties, and in fulfillment of the her mandatory duty to transfer to the appropriate personal representative.

Respondent also contends that the case is interlocutory, and not immediately appealable. As authority for her position, Respondent cites *Watson v. Undercook*, 407 S.C. 443 (2014), however this case does not support his position. Instead, it supports Appellant's position, and contains language directly instructive:

"An order that is not directly appealable will nonetheless be considered if there is an appealable issue before the [c]ourt and a ruling on appeal will avoid unnecessary litigation." (See *Hite v. Thomas & Howard Co.*, 305 S.C. 358, 360, 409 S.E. 2d 340, 341 (1991).)

It is important in the scheme of Respondent's argument to recall, that she filed a Motion for Special Fiduciary, without reference to evidence, without affidavit, and without notice. Respondent also knew that there was a pending appeal, and that authority under Rule 203, SCACR and S.C. Code Ann. § 62-1-308 (c) precluded bringing any motion.

On appeal to the Circuit Court, Respondent's counsel merely attended oral argument, he did not file any briefing.³ Appellant contends that based on authority from *First Union National*

³ Filed concurrently is Appellant's Motion to Strike. Respondent seeks to reference records not presented to the probate or Circuit Court. Georgia courts have discussed the problems with allowing facts outside the record even in argument. *McConnell v. Akins*, 586 S.E.2d 688 (2003) stating: "The law forbids introduction into case, by way of argument, facts which are not in the record and are calculated to prejudice party and render trial unfair." On p.

Bank, supra., 321 S.C. 496, 469 S.E. 2d 613 (1996), respondent's failure to respond to issues in Appellant's brief, in the Circuit Court on appeal, should have been treated as a failure to respond as a confession that appellant's position is correct.

Thus, the Probate Court did NOT have jurisdiction to enter the order appointing a Special Fiduciary. The nexus between the appointment of a special fiduciary and estate assets is which court had authority to enter any orders., in light of the Probate Court's jurisdiction over the decedent's estate.

Therefore, the Appointment of a Special Fiduciary is not interlocutory when there has been no notice of the order and the order is against the law. Here, Lisa Fisher is required to deliver the property to the proper personal representative pursuant to Probate Code § 62-5-425. The court in *First Union National Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) emphasizes that: "Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. The unchallenged ruling, right or wrong, is the law of the case and requires affirmance." In probate matters, which necessarily affect all of the decedent's estate, here Alice Shaw Baker's estate, no notice to family and beneficiaries mandates immediate review. Appellant and Lisa Fisher both objected to the Probate Court's exercise of jurisdiction over the Estate action which was removed to the Circuit Court. The Probate Court did not have jurisdiction to hear the motion for Special Fiduciary, and as such the order must be reversed.⁴

11 of Respondent's brief, there is a paragraph purporting to extol all of the events that took place in the probate court. The accuracy which is disputed by Appellant. It is well established by the rules of the court, Rules 208 and 212, SCACR, that this court is not to consider any alleged fact not cited in the record. Here, there is nothing in the record to allow the court to accept Respondent's narrative, and Appellant respectfully requests that the court ignore these improper references. (See Concurrently Filed Motion to Strike)

⁴ See *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183, 561 S.E. 2d 659, 661 (2002) [noting that a judgment is void if rendered by a court "which lacked subject matter jurisdiction or personal jurisdiction"] Moreover, even when a probate court has subject matter jurisdiction over the dispute, its jurisdiction can be divested. (See *Limehouse v. Hulsey*, 404 S.C.

And even if there was authority for a Motion, under constitutional and statutory notice provisions Respondent was required to give Appellant notice. (See §62-7-704(e) and § 62-3-614; § 62-1-401 [requires 20 days notice and a hearing].)⁵

Finally, Respondent argues that the courts have inherent power to do all things reasonably necessary to insure just results. (Respondent's brief, p. 11) Here, Respondent ignores the statutory and Constitutional Provisions, and basic principles that a court must make "appropriate order" (e.g. S.C. Code Ann. § 62-5-416(C).) Once the estate action was removed from the Circuit court, the probate court had no authority to act to appoint any fiduciary.

Therefore, the orders must be reversed.

IV. The Order Appointing Special Fiduciary is Void, because Alice Shaw Baker revoked the Will Naming her Personal Representative.

Respondent mischaracterizes Appellant's action in the Circuit Court, claiming that she "has yet to seek hearing or determination" that the last will is valid or invalid. This issue is not before this court, and requires reference to material outside the record in violation of Rule 208, 212, SCACR.

Respondent rehashes the same issues related to standing, interlocutory, and preservation of issues. Appellant contends the law and facts set forth above demonstrate that Appellant has standing and that this matter is not interlocutory.

Appellant brought these issues up in her objections and motions to alter. Therefore the Issues are preserved.

93, 105, 744 S.E.2d 566, 573 (2013). All of these issues together mandate compliance with the statute.

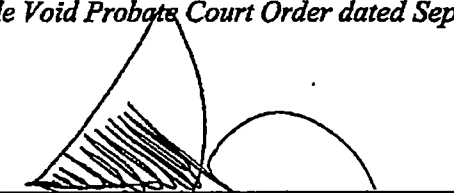
⁵ A fundamental requirement of procedural due process is the opportunity to be heard at a meaningful time and in a meaningful manner. (See *Blanton v. Stathos*, 351 S.C. 534 542, 570 S.E. 2d 565, 569 (2002).)

It is questionable why Respondent's counsel went to the Conservator court, he knew that jurisdiction for the estate property was in the Circuit Court. He further knew that after the death of Alice Shaw-Baker, the assets were estate property and by statute, Appellant was duty bound to protect the assets pending proper appointment. (See South Carolina Probate Code Section 62-5-425 (d).) 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. The issue of revocation and Bessie Huckabee's standing to bring the motion must be considered, and the bringing of the motion viewed with suspicion and

CONCLUSION

Appellant respectfully prays that this Honorable Court reverse the judgments of the Probate Court and the Order of the Circuit Court affirming the Probate Court Order Appointing Special Fiduciary and Denying Appellant *Motion to Set Aside Void Probate Court Order dated September 28, 2011*.

December 8, 2015



John Hughes Cooper, Esquire
1476 Ben Sawyer Blvd. Ste. 7
Mount Pleasant, SC 29464
shiplaw@jhcooper.com
(843) 883-9099
Attorney for Appellant

Other Counsel of Record:

Peter A. Kouten, Esquire
Kouten Law Firm, LLC
P.O. Box 340
John's Island, SC 29457

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEALS FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge
Tamara Curry, Probate Court Judge

Appellate Case No. 2014-002028
Circuit Case No. 2011-CP-10-7821

RECEIVED
RECEIVED
DEC 11 2015
SC Court of Appeals
SC Court of Appeals

LISA FISHER.....Appellant

v.

BESSIE HUCKABEE.....Respondent

FINAL REPLY BRIEF OF APPELLANT

JOHN HUGHES COOPER, ESQUIRE
1476 Ben Sawyer Blvd. Ste. 7
Mount Pleasant, SC 29464
shiplaw@jhcooper.com
843-883-9099; fax 843-883-9335
(Attorney for Appellant)

TABLE OF CONTENTS AND AUTHORITIES

Table of Contents	2
Table of Authorities.....	4
INTRODUCTION.....	6
ARGUMENT	
1. The Circuit Court's Failure to consider Appellant's Statement of Grounds prior to Oral Argument was an abuse of discretion and deprivation of due process.....	6
2. At the time of the hearing, All Actions were Stayed in the Circuit Court because of the Appeal in the South Carolina Supreme Court, therefore the Probate Court was without Power to Grant the Motion for Special Fiduciary.....	10
3. The Probate Court's Order Appointing A Special Fiduciary acted to Review another Judge's Order in violation of Rule 60 and Law.....	11
4. The Probate Court did not have Legal Authority to Appoint a Special Fiduciary, and it amounted to Appellant's Removal without Statutory or Due process notice and a Right to Be heard.....	12
5. It was an Abuse of Discretion for the Court to Grant Respondent's Motion when she did not have standing. Motion which Amounts to a Removal without Cause of Appellant.....	13
6. The Conservatorship Estate ended at Alice Shaw Baker's Death, therefore Probate Court had no Jurisdiction to exercise any control over Her Estate.....	13
7. The Probate Court Abused its Discretion in Failing to Rule on Appellant's Objections	14
8. There was No Emergent Need to Appoint a Special Fiduciary to Protect the Estate of Alice Shaw Baker, and no evidence to support any finding that Appellant did not have Authority to Pay Expenses.....	15

TABLE OF CONTENTS CONT'D

9.	The Court was Precluded from Appointing a Special Fiduciary under the principal of Laches.....	16
10.	The Probate Court Abused its Discretion in Refusing to Strike Respondent's Motion to Appoint Special Fiduciary due to Respondent's Failure to Comply with Rule 11, SCRCP.....	17
11.	The Probate Court Abused its Discretion in Failing to Grant Appellant's Extension of Time to Deliver Property.....	17
12.	The Probate Court Erred in hearing the Motion to Appoint a Special Fiduciary when Proper Notice had Not Been Given, in violation of Statutory and Constitutional law.....	18
CONCLUSION.....		19

TABLE OF AUTHORITIES

Decisional Law:

<i>Blanton v. Stathos</i> , 351 S.C. 534 542, 570 S.E. 2d 565, 569 (2002).....	18
<i>Dean v. Kilgore</i> , 437 S.E. 2d 154 (1993)	9
<i>Dukes & Dukes v. Hygrade Food Products</i> , 236 S.C. 69 (1960).....	11
<i>Eagles v. S.C. Nat'l Bank</i> , 301 S.C. 402, 408 (Ct. App. 1990).....	6, 9
<i>Eldridge v. City of Greenwood</i> , 308 S.C. 125, 127.....	8, 16
<i>Ex Parte Dibble</i> , 279 S.C. 592 (1983).....	14
<i>First Union National Bank v. FCVS Communications</i> , 321 S.C. 496, 469 S.E. 2d 613 (1996).....	9, 10, 14, 15
<i>Hite v. Thomas & Howard Co.</i> , 305 S.C. 358, 360, 409 S.E. 2d 340, 341 (1991).....	8, 14
<i>Greenfield v. Greenfield</i> , 245 S.C. 604, 610, 141 S.E. 2d 920, 923 (1965).....	9, 14
<i>Limehouse v. Hulsey</i> , 404 S.C. 93, 105, 744 S.E.2d 566, 573 (2013).....	18
<i>Pye v. Estate of Fox</i> , 369 S.C. 555, 565 (2006)	16
<i>S.C. Dep't of Soc. Serv. v. Holden</i> , 319 S.C. 72, 78, 459 S.E.2d 846, 849 (1995).....	18
<i>State v. Najjar Debrece Byers</i> , 392 S.C. 438 (2011).....	13
<i>Universal Benefits, Inc. v. McKinney</i> , 349 S.C. 179, 183, 561 S.E. 2d 659, 661 (2002).....	18
<i>Watson v. Underwood</i> , 407 S.C. 443 (2014).....	8, 11, 12, 13, 14, 15, 17

Other Decisional Law:

<i>FCC v. WJR, The Goodwill Station, Inc.</i> 337 US 265 (1949).....	6
<i>McConnell v. Akins</i> , 586 S.E.2d 688 (2003).....	10
<i>Schenk v. US</i> , 249 US 47 (1919).....	6

TABLE OF AUTHORITIES CONT'D

South Carolina Rules:

Rule 11, SCRCP.....	17
Rule 60, SCRCP.....	10
Rule 203, SCACR.....	10, 13
Rule 209, SCACR.....	6, 10, 11, 13
Rule 212, SCACR.....	6, 10, 11, 13

South Carolina Statutes:

S.C. Code Ann. § 14-3-330(4).....	8, 14
S.C. Code Ann. § 62-1-401.....	18
S.C. Code Ann. § 62-1-306.....	12, 14
S.C. Code Ann. § 62-1-308 (c).....	8, 10, 13
S.C. Code Ann. § 62-3-614.....	18
S.C. Code Ann. § 62-5-402.....	11, 14
S.C. Code Ann. § 62-5-415.....	12
S.C. Code Ann. § 62-5-416.....	11
S.C. Code Ann. § 62-5-425.....	7, 10, 14
S.C. Code Ann. § 62-7-708.....	18
S.C. Code Ann. § 62-7-707.....	7, 10, 14

INTRODUCTION

Appellant Lisa Fisher ("Appellant") replies to Respondent Bessie Huckabee's ("Respondent") brief regarding Respondent's motion for appointment of a Special Fiduciary. Her 3 page motion, without attachments, without exhibits, without verification, without any evidence has led to the necessity of Appellant outlining 12 errors of law. While it is always wise to hear both sides of the story before making a judgment, here Respondent only wants her side heard and ignores the appropriate issues and continues to reference material outside the record. (See Rules 209 and 212, SCACR).

It's been said, "The character of every act depends upon the circumstances in which it was done",¹ here Appellant has continued to fight for Alice Shaw Baker. The fight is for the proper administration of her estate and the protection of her assets. As the initial brief sets forth and this reply brief attempts to distinguish the facts as improperly set forth by Respondent,

ARGUMENT

- 1. The Circuit Court's Failure to Consider Appellant's Statement of Grounds prior to Oral Argument was an abuse of discretion and deprivation of due process.**

Respondent's brief begins with a pattern of ignoring appellant's arguments. The entirety of Respondent's brief is replete with these blatant attempts to undermine the argument by merely failing to respond to them.

In Appellant's opening brief, she argued in part that procedural due process mandated informed and substantial discussion in the oral argument as supported by *FCC v. WJR, The Goodwill Station, Inc.* 337 U.S. 265, 272 (1949). The Circuit Court had, upon review of the case, the ability to make necessary findings as set forth in *Eagles v. S.C. Nat'l Bank*, 301 S.C. 402

¹ See Justice Oliver Wendell Holmes, *Schenck v. U.S.* (1919), discussing issues of free speech, but Appellant contends also applicable when reviewing the actions by Appellant.

(1990). Therefore, Appellant contends that the Circuit Court's lack of review of the briefings made oral argument ineffective—she could not address the Court about the important questions it may have had, or humbly may say, should have had. This is not a case where Appellant's arguments are based on frivolous questions of law—it is in its most pure sense, a simple question of the Probate Court's jurisdiction. Did the Probate Court have any jurisdiction to hear, decide, interfere with the decedent's estate which had already been subject to Betty Fisher's formal petition to open the estate and thereafter removed to the Circuit court? If not, all of these alleged violations by the Probate Court were just salt in the wound, because the court should not have made any decisions. The statutory and constitutional violations just emphasized the lack of fair procedures and hearing in this case.

So Appellant's assertions that the subsequent judgment by the Circuit Court affirming the order was corrupted by the lack of proper argument is error. Respondent's argument in her brief fails to even address this argument, instead sidelining the issues into irrelevant arguments about interlocutory orders, making of inaccurate statements of law, and conclusionary support for the probate court's "finding" of emergent need.

Respondent fails to address these issues, because there is no legal basis supporting the decisions. The lack of appropriate argument is aggravated by the foundation of Respondent's case— a 3 page motion, lacking any evidentiary support—which has necessitated this appeal. Procedural safeguards should have prevented Respondent from getting into the hallowed court doors, or at least prevented these orders by noting the complete lack of evidence. Alice Shaw Baker's entire estate was essentially removed from the proper care of her conservator by the order, despite clear statutory authority supporting her duty to deliver assets to the proper personal representative under S.C. Code Ann. § 62-5-425 . Thereafter, the probate court appoints a stranger to the estate with the potential increase of costs and loss of principal to the decedent's estate. On

its face, it lacks any protection for Alice Shaw Baker's estate, and ultimately her-intended beneficiaries.

Respondent relies heavily on the argument that the order involved in this case is interlocutory and not immediately appealable. However, courts have found that :“An order that is not directly appealable will nonetheless be considered if there is an appealable issue before the [c]ourt and a ruling on appeal will avoid unnecessary litigation.” (See *Hite v. Thomas & Howard Co.*, 305 S.C. 358, 360, 409 S.E. 2d 340, 341 (1991).) See also § 14-3-33(4), *Eldridge v. City of Greenwood*, 308 S.C. 125, 127 [injunctions immediately appealable.]

The basis for Respondent's argument is the unsupported conclusion that a Motion for Special Fiduciary is interlocutory, and not immediately appealable. As authority for her position, Respondent cites *Watson v. Undercook*, 407 S.C. 443 (2014), however this case does not support his position. Instead, it supports Appellant's position, and contains language directly instructive:

“An order that is not directly appealable will nonetheless be considered if there is an appealable issue before the [c]ourt and a ruling on appeal will avoid unnecessary litigation.” (See *Hite v. Thomas & Howard Co.*, 305 S.C. 358, 360, 409 S.E. 2d 340, 341 (1991).)

Jurisdictional questions of this nature mandate review by this court, as it will continue to rear its ugly head in future proceedings, if the Special Fiduciary were to take over the control of the estate, undermining Betty Fisher's removal of estate proceedings to the Circuit Court.

Respondent failed to address any of these issues in her briefing.² As such , Appellant contends that Respondent's failure to respond to the issues raised, should be deemed as a

² Respondent filed no briefings in the underlying Circuit Court appeal, and instead her counsel merely appeared at oral argument with “unclean hands” attempting to influence the court without any legal argument. Appellant relies on the law. Respondent's counsel attempts to garner favors in this case. First by forum shopping to the Probate court, and then appearing without substantive briefing in the Circuit Court appeal. Therefore, Respondent's refusal to address these important questions, should not be rewarded.

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).)

Moreover, Respondent's attempts to imply wrongdoing by Appellant are false and misleading. For instance, Respondent's counsel asserts that Appellant's cite to *Eagles v. S.C. National Bank*, 301 S.C. 402 (1990) was inaccurate. Indeed, he directly claims that: "Appellant fails to mention that Eagles further states that, although the appeals court may make finding [sic] with its own view, the standard of review followed was whether there is any evidence which 'reasonably supports' the circuit court's findings." (See Respondent's brief, pp. 7-8) Review of the case, does not reveal that the *Eagles* court makes that statement, although the case in *Dean v. Kilgore*, 437 S.E. 2d 154 (1993) does stand for that proposition. With that said, it does not change the facts in this case.

Finally, Respondent's conclusions that the probate court found "Emergent need" can not be a finding, when there was no notice, no evidence, no affidavit, no verification, nor any testimony. Respondent concludes that the Court Order of September 28, 2011 constitutes sufficient findings of fact, and that the order was somehow proper. Respondent argues that the probate court can do virtually *anything*. However, it is well settled that "The probate court is a court of limited jurisdiction owing its present existence to creation by statute rather than the Constitution, and as such, can exercise only such powers as are directly conferred upon it by legislative enactment..." (See *Greenfield v. Greenfield*, 245 S.C. 604, 610, 141 S.E. 2d 920, 923 (1965).) Therefore, when Betty Fisher sought a formal probate—all jurisdiction ended in these protective proceedings, and the probate court could not exercise its jurisdiction over Alice Shaw Baker's assets.

//

2. **At the time of the hearing, All Actions were Stayed in the Circuit Court because of the Appeal in the South Carolina Supreme Court, therefore the Probate Court was without Power to Grant the Motion for Special Fiduciary.**

Respondent again references *Watson v. Underwood*, as support for the position that the probate order is interlocutory. He repeats this throughout his briefing, and he continues to fail to address appellant's arguments. Appellant again requests that the court treat the failure to respond to the issues raised 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).)³ Respondent's counsel did not present any admissible evidence to the probate court, did not brief the appeal to the Circuit court, and now seeks to reference records in violation of the Rules of this court (i.e. records from the estate action).⁴

The issue raised in this section, that when there was a pending appeal, no party that authority under Rule 203, SCACR and S.C. Code Ann. § 62-1-308 (c) precluded bringing any motion while the matter was on the Estate matter was on appeal.

Respondent concludes that the "conservatorship assets" are somehow different from the Estate assets, which was subject to removal to the Circuit Court, despite the affirmative duty of Appellant to deliver assets to the **"duly appointed personal representative of the decedent or other persons entitled thereto"** under § 62-5-425.

³ There are 3 appeals in this matter, consolidated for purpose of the record, 2014-002020 and 2014-002034. Appellant is forced to argue many of the same arguments, which have no bearing on the issue—which is the jurisdiction of the probate court.

⁴ See Appellant's Motion to Strike filed 7/22/15. Respondent seeks to reference records not presented to the probate or Circuit Court. Georgia courts have discussed the problems with allowing facts outside the record even in argument. The court in *McConnell v. Akins*, 586 S.E.2d 688 (2003) stating: "The law forbids introduction into case, by way of argument, facts which are not in the record and are calculated to prejudice party and render trial unfair." It is well established by the rules of the court, Rules 209 and 212, SCACR, that this court is not to consider any alleged fact not cited in the record. Here, there is nothing in the record to allow the court to jump to this conclusion, and Appellant respectfully requests that the court ignore these improper conclusions.

As a matter of law, the orders must be reversed.

3. The Probate Court's Order Appointing A Special Fiduciary acted to Review another Judge's Order in violation of Rule 60 and Law.

In Appellant's opening brief, she argued that a court can not interfere with another court's order which is the subject to the pending litigation. (See Rule 60, SCACR; See also *Dukes & Dukes v. Hygrade Food Products*, 236 S.C. 69 (1960).) Here, there are orders in the Estate Case and pending proceedings for the removal of Huckabee and appropriate appointment of a Special Administrator. Therefore, the probate court's interference by issuance of a new order appointing a Special Fiduciary is improper.⁵

Here, Respondent merely reargues *Watson v. Underwood*, *supra*, claiming again that the Order appointing Special Fiduciary is interlocutory. He further takes the position that a court can take all actions "reasonably necessary", however Appellant contends the law does not support a court's unfettered discretion to issue *any* orders. The probate court still must comply with jurisdictional issues, Statutory and Constitutional Provisions, and basic principles that a court must make "appropriate orders" (e.g. S.C. Code Ann. § 62-5-416(C).) Therefore, Respondent's analysis of *Ex Parte Dibble*, 279 S.C. 592 (1983) is without merit.

Finally, Respondent's reference to § 62-5-402 is misplaced. There is no dispute that the probate court has jurisdiction over conservatorship. However, upon Alice Shaw Baker's death, all

⁵ In this section, Respondent's counsel again attempts to interject improper and unsupported narrative without reference to the record and in a conclusionary and inaccurate manner. Appellant has filed a Motion to Strike. The court in *McConnell v. Akins*, 586 S.E.2d 688 (Ga. 2003) held: "The law forbids introduction into case, by way of argument, facts which are not in the record and are calculated to prejudice a party and render the trial unfair." It is well established by the rules of the court, Rules 209 and 212, SCACR, that this court is not to consider any alleged fact not cited in the record. Here, there is nothing in the record to allow the court to jump to these conclusion, and Appellant respectfully requests that the court ignore these improper conclusions. (See Filed Motion to Strike)

matters are to be resolved *in the Estate matter* which was subject to removal to the Circuit Court. Therefore, the probate court had no authority to act to appoint a Special Fiduciary, because it had no authority over the assets.

Therefore, the orders must be reversed.

4. The Probate Court did not have Legal Authority to Appoint a Special Fiduciary, and it amounted to Appellant's Removal without statutory or due process notice and a Right to Be heard.

The effect of the Order Appointing a Special Fiduciary is that it removed Appellant without cause. This is not an interlocutory order. (See S.C. Code § 62-5-415 [removal of conservator for good cause, upon notice and hearing]; see S.C. Code § 14-3-330)

Interlocutory orders as argued by Respondent and referenced in *Watson v. Underwood*, *supra*, do not apply. Courts have found that : "An order that is not directly appealable will nonetheless be considered if there is an appealable issue before the [c]ourt and a ruling on appeal will avoid unnecessary litigation." (See *Hite v. Thomas & Howard Co.*, 305 S.C. 358, 360, 409 S.E. 2d 340, 341 (1991).

Respondent goes on to argue that Appellant was removed, by the prior discharge. However, as a matter of practice, discharge and removal are quite different. Removal demands "good cause", and a conservator is discharged as a matter of law upon the death of a conservatee. (See S.C. Code Ann. § 62-5-306 (1987) (terminating the authority of a guardian upon the death of the ward).)

Respondent continues to argue issues not in the record regarding her status as "personal representative." Moreover, her conclusion that Appellant has some "idea that she has been wronged" is misplaced. Appellant continues to argue that the probate court lacked jurisdiction to make these orders, this is in itself-wrong, improper, and illegal. The statements made about Appellant are false and lacking in foundation. Yet, Appellant's goal is to seek redress for her great

aunt, who was greatly loved. Standing up for Alice Shaw Baker to ensure that her desires concerning her assets and estate plan to benefit animal charities is the main importance. Appellant is alive and able to make her own decisions, Alice's death rocked her family and led to this fight over monies that neither Responder or her cohorts are entitled to. Once Alice Shaw Baker knew that these individuals lied about owning animal charities, she rightly revoked her will. The probate court has no authority to involve itself in these proceedings, and thus the orders must be reversed.

5. It was an Abuse of Discretion for the Court to Grant Respondent's Motion when she did not have standing. Motion which Amounts to a Removal without Cause of Appellant.

Appellant continues to object to Respondent's failure to address the issues in this case. The issues of *Watson v. Underwood, supra*, have no merit in the context of Appellant's argument.

The issue raised in this section, that when there was a pending appeal, Bessie Huckabee lacked standing to bring this motion. She was in violation of the stay under Rule 203, SCACR and S.C. Code Ann. § 62-1-308 (c) precluded bringing any motion while the matter was on the Estate matter was on appeal.

Respondent's narrative is improper and references documents not part of the record in violation of Rules 209, SCACR and Rule 212, SCACR.

As a matter of law, the orders must be reversed.

6. The Conservatorship Estate ended at Alice Shaw Baker's Death, therefore Probate Court had no Jurisdiction to exercise any control over Her Estate.

Appellant repeats her argument against *Watson v. Underwood, supra*, as the Order Appointing Special Fiduciary is not an interlocutory order.

Respondent continues to argue that the probate court can do virtually *anything* . However, it is well settled that "The probate court is a court of limited jurisdiction owing its present

existence to creation by statute rather than the Constitution, and as such, can exercise only such powers as are directly conferred upon it by legislative enactment..." (See *Greenfield v. Greenfield*, 245 S.C. 604, 610, 141 S.E. 2d 920, 923 (1965).)

By statute, the guardianship/conservatorship expired upon Alice Shaw Baker's death. (See S.C. Code Ann. § 62-5-306 (1987). The circuit court has jurisdiction over her estate.

Since Appellant is duty bound to maintain the property pending final "receipt" by the proper Personal Representative (S.C. Code Ann. § 62-5-425(d)), the probate court can not interfere with that duty, in light of the Circuit Court's jurisdiction over Estate assets..

Therefore, Appellant contends that Respondent's failure to address these issues in her brief, instead making representations in her brief about Appellant, about non-existent findings of the probate court, that were never made and which was not cited to in the record, can not stand. (See *First Union National Bank v. FCVS Communications*, 321 S.C. 496, 469 S.E. 2d 613 (1996) [failure to address issues upon appeal grounds for deeming Respondent's confession.])

Appellant respectfully asks this court to reverse said orders.

7. The Probate Court Abused its Discretion in Failing to Rule on Appellant's Objections .

Respondent fails to address this issue at all during her briefing. She continues to argue *Watson v. Undersood, supra, Ex parte Dibble*, and the conservatorship statute under 62-5-402, which Appellant has repeatedly addressed in these briefings. However, the blatant failure to address the issues raised by this briefing warrants this court's attention.

As set forth in Appellant's initial brief, the transcript and the record discloses that Appellant objected to 1) the procedure, 2) the accusations and purported averments by Respondent's counsel, and 3) the conclusions of the court (both at the hearing and in its orders), and the Probate Court's rulings are not supported by the record. The motion was 3 pages, no

affidavits, no verifications, and no testimony at the hearing. Therefore, the court literally accepted Respondent's counsel's wrongful allegations, and granted his motion without addressing the serious objections brought by Appellant. (See R.285, 310, 313, 318, 321, Motion to Strike, transcript, and Objections to Orders filed herein.) The court refused Appellant's counsel's request to speak, and refused to allow Appellant to speak. (R. 553, R.T., 16: 7-14)

The probate court's failure to issue orders regarding Appellant's objections obviously prejudiced her and the state of the hearing. (See *State v. Najjar De'breece Byers*, 392 S.C. 438 (S.C. 05/23/2011)).

The court's refusal mandates reversal.

8. There was No Emergent Need to Appoint a Special Fiduciary to Protect the Estate of Alice Shaw Baker, and no evidence to support any finding that Appellant did not have Authority to Pay Expenses.

Appellant continues to object to Respondent's failure to address the issues in her briefing. She further requests that the court issue findings pursuant to *First Union National Bank v. FCVS Communications*, 321 S.C. 496, 469 S.E. 2d 613 (1996) that find Respondent's failure to address issues upon appeal are grounds for deeming confession. Appellant's initial briefing outlined her contentions, and respondent's failure to address them causes unnecessary repetition to preserve her objections to this briefing.

The principles set forth in *Watson v. Underwood, supra.* and the jurisdiction during the life of a conservatee are not grounds which address the authority of Appellant to protect the assets of Alice Shaw Baker. This is fully briefed in Appellant's initial brief. Appellant briefly reminds the court that pending final resolution, the court can rely on the statutory requirements for a conservator or on acts as a fiduciary/trustee where a trustee has the power under S.C. Code Ann. § 62-7-707 "to protect the trust property." (Emphasis added). Respondent can not legitimately

argue that upon discharge, Appellant had no duty to protect the property. Such a policy could hurt the elderly and most vulnerable disabled populations.

Alice Shaw Baker's property is protected, and has been protected through these proceedings, so the probate court's conclusion that Appellant was not able to pay expenses is in error. Without Appellant's protections, the real property taxes would not be paid, insurance would not be paid, and lack of maintenance of the property would all substantially reduce the value of the property. These are exactly the types of protections anticipated by S.C. Code Ann. § 62-7-707.

Therefore, said orders must be reverse.

9. The Court was Precluded from Appointing a Special Fiduciary under the principal of Laches.

Respondent again raises the *Watson v. Underwood* claim that this issue involves an interlocutory order, however the law is clear that "An order that is not directly appealable will nonetheless be considered if there is an appealable issue before the [c]ourt and a ruling on appeal will avoid unnecessary litigation." (See *Hite v. Thomas & Howard Co.*, 305 S.C. 358, 360, 409 S.E. 2d 340, 341 (1991).) Moreover, these orders act as an injunction preventing appellant from acting to protect Alice Shaw Baker's property pending final determination. These type of orders are always immediately appealable. (See § 14-3-33)(4), *Eldridge v. City of Greenwood*, 308 S.C. 125, 127 [injunctions immediately appealable.]

Instead of addressing the issues in this section of the brief, Respondent uses her space to make false claims and speculate about the underlying claims. E.g. Respondent's assertion that Laches was not raised in the lower court is wrong. Review of the record on appeal will reveal that Appellant raised it in her *Motion for Reconsideration*, p. 19. Therefore, his reliance on *Pye v. Estate of Fox*, 369 S.C. 555, 565 (2006) is misplaced.

Finally, Respondent's *ad hominem* attacks of Appellant to try and imply wrongdoing is merely a tactic to avoid addressing Appellant's argument. There is no record or evidence that the probate court made any findings that there was a "breach of court's trust in her." Moreover, the narrative that follows is not in the court records, and again should not be considered as they do not factually address the issues in the case.

10. The Probate Court Abused its Discretion in Refusing to Strike Respondent's Motion to Appoint Special Fiduciary due to Respondent's Failure to Comply with Rule 11, SCRCP

As explained above, *Watson v. Underwood*, 407 S.C. 443 (2014) does not apply. Appellant contends that in part because of the lack of jurisdiction by the lower court, the order appointing a Special Fiduciary is immediately appealable.

Further, Appellant continues to object to Respondent's counsel's narrative, the failure to site to the record, the conclusionary statements, and arguments that were waived (e.g. any failure under Rule 11 was waived, especially if the court were to interpret Respondent's *Motion for Special Fiduciary* as a responsive pleading.) There are no facts and/or a manipulation of facts used to justify Respondent's wrong doing.

Also, Respondent's conclusion that "the lower court, based on the accountings and arguments of Appellant's counsel found that the appointment of a special fiduciary was emergent" is not based on any statements by the court or the record on appeal.

Therefore the orders must be reversed.

11. The Probate Court Abused its Discretion in Failing to Grant Appellant's Extension of Time to Deliver Property.

Appellant objects to the reference to *Watson v. Underwood, supra*. Appellant continues to object to the lack of authority by Respondent in addressing the issues of this case. Responding

merely provides a narrative, not before this court with continued attacks on appellant. Further, Respondents asserts legal positions without authority as to the conclusion. For instance, "The Appellant did not seek extension to continue to act as the conservator after her discharge." Appellant contends that Respondent's failure to cite to any authority that she was required to do so. Rather, there is authority that Appellant was duty bound to preserve the money to turn over to the proper Estate representative.

12. The Probate Court Erred in hearing the Motion to Appoint a Special Fiduciary when Proper Notice had Not Been Given, in violation of statutory and constitutional law.

At Alice Shaw Baker's death, probate court had exclusive jurisdiction over the estate assets. Respondent contends that she was not required to give notice under S.C. Code Ann. § 62-3-61, however subsection (b)(2) requires notice and a hearing. (See also § 62-3-106)

The requirements of due process include notice and an opportunity to be heard. (S.C. *Dep't of Soc. Serv. v. Holden*, 319 S.C. 72, 78, 459 S.E.2d 846, 849 (1995).)

Respondent's assertion is without legal authority, even common sense would dictate that family is entitled to notice if someone new is seeking appointment. Respondent's continued failure to respect issues of notice mandate reversal.

(Appellant again objects to *Watson v. Underwood*, *supra* The Probate Court did not have jurisdiction to hear the motion for Special Fiduciary, and as such the order must be reversed.⁶

⁶ See *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183, 561 S.E. 2d 659, 661 (2002) [noting that a judgment is void if rendered by a court "which lacked subject matter jurisdiction or personal jurisdiction"] Moreover, even when a probate court has subject matter jurisdiction over the dispute, its jurisdiction can be divested. (See *Limehouse v. Hulsey*, 404 S.C. 93, 105, 744 S.E.2d 566, 573 (2013). All of these issues together mandate compliance with the statute.

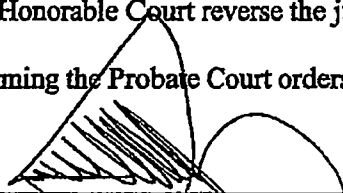
And even if there was authority for a Motion, under constitutional and statutory notice provisions Respondent was required to give Appellant notice. (See §62-7-704(e) and § 62-3-614; § 62-1-401 [requires 20 days notice and a hearing].)⁷

Therefore, the orders must be reversed.

CONCLUSION

Appellant respectfully prays that this Honorable Court reverse the judgments of the Probate Court and the Order of the Circuit Court affirming the Probate Court orders.

December 8, 2015



John Hughes Cooper, Esquire
1476 Ben Sawyer Blvd. Ste. 7
Mount Pleasant, SC 29464
shiplaw@jhcooper.com
(843) 883-9099
Attorney for Appellant

Other Counsel of Record:

Peter A. Kouten, Esquire
Kouten Law Firm, LLC
P.O. Box 340
John's Island, SC 29457

⁷ A fundamental requirement of procedural due process is the opportunity to be heard at a meaningful time and in a meaningful manner. (See *Blanton v. Stathos*, 351 S.C. 534 542, 570 S.E. 2d 565, 569 (2002).)

RECEIVED

DEC 11 2015

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEALS FROM CHARLESTON COUNTY

Court of Common Pleas

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

Tamara Curry, Probate Court Judge

Appellate Case No. 2014-002034

Circuit Case No. 2011-CP-10-8657

LISA FISHER.....Appellant

v.

BESSIE HUCKABEE.....Respondent

FINAL REPLY BRIEF OF APPELLANT

JOHN HUGHES COOPER, ESQUIRE

1476 Ben Sawyer Blvd. Ste. 7

Mount Pleasant, SC 29464

shiplaw@jhcooper.com

843-883-9099; fax 843-883-9335

(Attorney for Appellant)

TABLE OF CONTENTS AND AUTHORITIES

A. Table of Contents

Table of Contents and Authorities.....	2
A. Table of Contents.....	2
B. Table of Authorities.....	3
I. INTRODUCTION.....	5

ARGUMENT

1. The Circuit Court Abused its Discretion and Deprived Appellant of Due Process by Failing to Review the Statement of Grounds Prior to the Hearing.....	5
2. Respondent's Argument is Unintelligible and Ignores Facts Demonstrating that Appellant was Deprived of Reasonable Compensation Under Probate Code S.C. Code Ann § 62-5-312(b) and S.C. Code Ann. § 62-5-414.....	6
3. The Probate Court's Decision to Deny Compensation to Appellant for work in excess of 465 hours is on its Face Prejudicial and Amounts to a Deprivation Under the Takings Clause.....	10
4. Appellant was deprived of Compensation in violation of Equal Protection and established Legal Precedent.....	10
5. <i>Grosshuesch</i> Does not Support the Freezing of Appellant's Assets, as here when No Admissible Evidence or Testimony was Presented.....	13
6. Respondent's Arguments relating to the Freezing of Conservatorship Accounts in Violation of Constitutional and Legal Protections are Flawed, and Contrary to the Best Interests of Alice Shaw Baker's Estate and the Facts of this case.....	14
II. CONCLUSION.....	15

TABLE OF AUTHORITIES

South Carolina Decisional Law:

<i>Ex Parte Brown</i> , 393 S.C. 214 (2011).....	10
<i>First Union National Bank v. FCVS Communications</i> , 321 S.C. 496, 469 S.E. 2d 613 (1996).....	12
<i>Former v. Butler</i> , 319 S.C. 275, 277, 460 S.E.2d 425 (1995).....	5
<i>Grosshuesch v. Cramer</i> , 367 S.C. 1,(2005).....	13, 14
<i>Henning v. Kaye</i> , 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992).....	5
<i>Levine v. Spartanburg Regional Services District, Inc.</i> , 367 S.C. 458, 464 (2005).....	13
<i>State v. Amerson</i> , 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993).....	7
<i>Townes Associates, Ltd v. City of Greenville</i> , 266 S.C. 81 (1976).....	6

Miscellaneous Court Decisions:

<i>Frank v. Mangum</i> , 237 U.S. 309 (1915).....	5
<i>McConnell v. Akins</i> , 586 S.E.2d 688 (Ga. 2003)	9
<i>State v. Smith</i> , 747 P.2d 816, 842 (Kan. 1987).....	10

South Carolina Statutes:

<i>S.C. Code Ann. § 14-3-330</i>	14
<i>S.C. Code Ann. § 62-5-306</i>	14
<i>S.C. Code Ann. § 62-5-312</i>	8
<i>S.C. Code Ann. § 62-5-414</i>	8
<i>S.C. Code Ann. § 62-5-425</i>	12, 13, 14

TABLE OF AUTHORITIES CONT'D

South Carolina Rules:

<i>Rule 3.1, SCRPC.....</i>	<i>9</i>
<i>Rule 3.3., South Carolina Rules of Professionalism.....</i>	<i>6</i>
<i>Rule 65, SCRCP.....</i>	<i>13</i>
<i>Rule 208, SCACR.....</i>	<i>5, 9</i>
<i>Rule 210, SCACR.....</i>	<i>5</i>
<i>Rule 212, SCACR.....</i>	<i>5, 9</i>
<i>Rule 407, SCRPC.....</i>	<i>6</i>

I. INTRODUCTION

In Oliver Wendall Holmes' dissent in *Frank v. Mangum*, 237 U.S. 309 (1915), he simplified the most fundamental purpose of Constitutional protections, specifically due process:

"Whatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard." (*Id.*, Emphasis added)

Statutory provisions, legal precedent, and Constitutional provisions (including due process, equal protection, and reference to the takings clause) all play an important role in determining whether the probate court erred in denying Appellant Liša Fisher ("Appellant") compensation for her role as conservator and guardian of Alice Shaw Baker.

However, in the brief submitted by Respondent Bessie Huckabee ("Respondent"), she fails to address most of Appellant's arguments and precedent, instead she presents law by conjecture, speculation, and manipulation of the facts. Moreover, her brief fails to comply with Rules 208(b)(4) and 210(h), SCACR with appropriate reference to the record in her briefing.¹ The lack of reference to the record presents a challenge to Appellant who must show Respondent's manipulation and speculation without the benefit of Respondent's references. Appellant is prejudiced by false statements, like "The Appellant continues to expend estate assets

¹ 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. Only matters the parties deem not to be relevant to the appeal are properly excluded from the record. See *Former v. Butler*, 319 S.C. 275, 277 n.1, 460 S.E.2d 425, 427 n.1 (Ct. App. 1995). "[T]he South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State. It is incumbent upon counsel to provide material that complies with the Rules and facilitates appellate review." Appellant contends that these rules do not merely require the record, but require 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).

without court authority and is unapologetic.” (Respondent’s Brief, p. 4) There are no facts which support this statement, and it is in fact a misstatement.² These types of misstatements coupled with the errors of the probate court, if allowed to stand, prejudice Appellant.³ Respondent has obtained a favorable order in the wrong court, without testimony, without evidence, without any hearing whatsoever—this can not, and was not, justified by Respondent. Further, Respondent’s attempts to use improper material, documentation, and argument not provided to the probate court and not briefed to the Circuit Court mandates the filing of a *Motion to Strike*, filed concurrently.

Appellant replies briefly to Respondent’s contentions:

ARGUMENT

1. The Circuit Court Abused its Discretion and Deprived Appellant of Due Process by Failing to Review the Statement of Grounds Prior to the Hearing

Respondent’s conclusion, that the circuit court did not abuse its discretion nor deprive Appellant of due process, is not a surprise. However, reliance on *Townes Associates, Ltd v. City of Greenville*, 266 S.C. 81 (1976) is misplaced. The court in *Townes, supra*, had evidence at the lower court, and the appellate court determined that it was bound to determine whether there is any evidence which reasonably supports the factual findings of the judge.

² Rule 407, Rule 3.3, provides, “CANDOR TOWARD THE TRIBUNAL.(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.” Here, Respondent’s counsel makes a statement that he knows to be false. The court froze the conservatorship account, as evidenced by the appeal.

³ By making this statement in the present, there is an assertion that Appellant is using the conservatorship estate’s monies. Nothing could be further from the truth, as the facts will establish, that pending resolution on appeal, Appellant has been forced to pay for all expenses to protect the property. This is obvious and appropriate for the court to consider, in light of the fact that the conservatorship bank account is frozen and subject to this Appeal! @. 59, order freezing account)

Here, there was no hearing with regard to the Motion for Fees. Reference by the probate court to the hearing on the Special Fiduciary did not provide grounds for depriving Appellant of her fees, providing her with an opportunity to testify, and/or present evidence. The hearing on the Special Fiduciary failed to reference any evidence, and specifically precluded Appellant from testifying.⁴ No factual findings were or could be made. Moreover, The circuit court, sitting as an appellate court, made the following judgment "...this court affirms the probate court's order of November 9, 2011, denying the Appellant's motion to amend the court's order denying the approval of fees and expenses of guardian and conservator." (R. 69, Form 4 dated 8/14/14)

It is well settled that Appellate courts are bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law." (*State v. Amerson*, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993).) Appellant does not argue that the mere decision to uphold the probate court's order deprived her of due process. Instead, she argues that the court's failure to read the statement of grounds prior to hearing prevented Appellant from meaningfully arguing the merits of the case. She could surmise what the court might question, however that did not permit the court to seriously consider the appeal.

⁴ The motion for Special Fiduciary was heard nearly a month before the filing of the Renewed motion for fees (R. 360). At that hearing the court denied Appellant's request to testify:

"MR. COOPER: ...Ms. Fisher, who is an attorney in California, who has been admitted by the Court here to be involved in the estate action, since she has been handling these, can she speak to the Court?

THE COURT: No, this is a motion, and this is really between the attorneys, and I just want to know what your position is, legal position, as to what her legal authority is to still disburse moneys when in fact the conservatorship has when she has been discharged, and the only thing the Court has been looking for are the annual accountings. @. 553, Transcript, p. 16, ll. 1-14)

Finally, Appellant's *Brief* outlines the legal precedent and factual authority justifying the grant of Appellant's fees, and the probate court's order denying her fees demonstrates manifest prejudice against Appellant and is erroneous as a matter of law. The "error of law" mandates reversal.

2. Respondent's Argument is Unintelligible and Ignores Facts and Law Demonstrating that Appellant was Deprived of Reasonable Compensation Under Probate Code S.C. Code Ann. § 62-5-312(b) and S.C. Code Ann. § 62-5-414

Appellant contends that Respondent's argument is unintelligible regarding this issue, stating: "Appellant raises the issue of compensation for the guardian from the conservator, by agreement, in furtherance of South Carolina Probate Code Section 62-5-312(b). This issue was never raised at the lower court and has not been preserved. For this reasons, the issue at bar on appeal should be dismissed." (Respondent's brief, p. 6-7)

Appellant raised these issues in her *Motion to Alter* re: fees, and cites the code on p. 5 of her moving papers (R. 364). She continues to argue for appropriate compensation. The issue of "room and board" as set forth in Section 62-5-312(b) is secondary to the provision that guardian's and conservator's are entitled to compensation, it has nothing to do with a contract for rent.

Respondent cites no authority for the conclusion that: "The lower court has determined that based on Appellant's disregard for the authority of the lower court as it pertains to holding assets intrust, the lower court has a right to protect remaining conservatorship assets and deny Appellant's request for fees." (Respondent's brief, p. 7)⁵ Respondent fails to cite to the record,

⁵ Georgia courts have discussed the problems with allowing facts outside the record even in argument. *McConnell v. Akins*, 586 S.E.2d 688 (2003) stating: "The law forbids introduction into case, by way of argument, facts which are not in the record and are calculated to prejudice party and render trial unfair." Although not a trial, it is well established by the rules of the court, Rules 208 and 212, SCACR, that this court is not to consider any alleged fact not cited in the record. Here, there is nothing in the record to allow the court to jump to this conclusion, and Appellant respectfully requests that the court ignore these improper conclusions. (See Concurrently Filed Motion to Strike)

because there was no such finding. Additionally, there is nothing in the law which provides for this inequitable treatment, for a conservator/guardian who spent in excess of 400 hours caring and ensuring the well being of her loved one, to be the only person who was *not* compensated .

Even more disturbing is the false statement that Appellant disregarded the lower court. Appellant's legal position is not a violation of court orders, she has a tenable legal argument and is entitled to have appropriate judicial review. Commentary to South Carolina Rule 3.1 explains that does not preclude "a good faith argument for an extension, modification or reversal of existing law." The comment to Rule 3.1 also clarifies that a matter is "not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery," nor is a matter automatically deemed frivolous merely because the lawyer did not believe the client ultimately would prevail. Rule 3.1, cmt. For example, a lawyer properly may commence an action based upon a good faith argument that existing law ought to be reversed, even though the lawyer may not expect the argument to be adopted. See *id.* (See ABA/BNA Lawyers' Manual on Professional Conduct, "Trial Conduct: Meritorious Claims," pp. 61:101).

Appellant is entitled to appropriate compensation, therefore the orders must be reversed.

3. The Probate Court's Decision to Deny Compensation to Appellant for work in excess of 465 hours is on its Face Prejudicial and Amounts to a Deprivation Under the Takings Clause

In the case of *Ex Parte Brown* 393 S.C. 214 (2011), the court cited to a Supreme Court case in Kansas, which talked about the obligations of Attorneys, while it is true that Appellant was not acting as an attorney, on behalf of Alice Shaw Baker, the reasoning of the court applies:

"Attorneys make their living through their services. Their services are the means of their livelihood. We do not expect architects to design public buildings, engineers to design highways, dikes, and bridges, or physicians to treat the indigent without compensation.

When attorneys' services are conscripted for the public good, such a taking is akin to the taking of food or clothing from a merchant or the taking of services from any other professional for the public good. And certainly when attorneys are required to donate funds out-of-pocket to subsidize a defense for an indigent defendant, the attorneys are deprived of property in the form of money. We conclude that attorneys' services are property, and are thus subject to Fifth Amendment protection" (See *State v. Smith*, 242 Kan. 336, 747 P.2d 816, 842 (1987).)

Here, Appellant is an attorney, acting in the capacity of trustee, formerly acting as conservator and guardian. If the court fails to reverse the order, Appellant most certainly is being forced to bear the public burden for the care of a person in need of protective proceedings—Alice Shaw Baker. While Appellant loved Alice Shaw Baker, and her assistance was not based on any desire for compensation, the facts disclosed before and after her death support compensation. Appellant travelled from California, expended in excess of 465.85 hours and incurred costs in excess of \$11,912.50. (R. 249, p. 251, motion for fees). These hours were spent so that the conservatee, *Alice*, could remain in her home, help her retain independence, and preserve her assets. At the time of the initial conservatorship proceeding, the plan was to place Alice in a nursing/assisted living facility contrary to her desires.

Appellant wishes Alice Shaw Baker had lived to a great old age, where all her monies had been expended for her care. At that time, Appellant would have gladly waived her fees. But the Law does not require Appellant to work hard, pass on personal opportunities, and grieve over the struggles of her beloved Great -Aunt, as Respondent and her associates seek a windfall from the life work of Alice Shaw Baker. It would be grossly unfair to have her take on the job of conservator and guardian, act in Alice Shaw Baker's best interest, and do so without compensation. Every other person involved in Alice Shaw Baker's case—everyone, received their compensation without any hearings and/or review of their performance. (R. 22, 24, 27, 42, 38,

44, 46, 48, 50, 51, orders approving compensation) Respondent had no standing to object to the attorneys', guardian ad litem, visitor,⁶ doctor fees during Alice Shaw Baker's life.

Now, Respondent makes claims about Appellant that are untrue, and which do not even address the statutory or legal basis for the grant of fees. She does so, regarding the periods of time when Lisa Fisher stepped up to help Alice, despite Respondent's broken promises to help Alice. (R. 329)

Respondent claims: "the lower court reviewed the request for fees and denied the request based on evidence that money in the conservatorship when the Appellant was discharged in no longer where it was held for safe keeping. The Appellant has spent conservatorship funds without authority"--this claim is blatantly false--and false on its face. As set forth in Section 5. and 6l, Appellant also seeks reversal of the order freezing the conservatorship accounts. Respondent's acknowledgment of this order, in this very appeal, demonstrates that not only is she not spending any monies, but that she can't. Thus, there is no risk to the Estate--no immediate and irreparable harm. All of Alice Shaw Baker's money was safeguarded. Appellant has a bond. She had a good faith, legally tenable position that any such monies are to be provided to the "duly appointed personal representative." (See South Carolina Probate Code Section 62-5-425 (d).)⁷

⁶ This is even more disturbing *and telling*, because Respondent's counsel Peter Kouten was Alice Shaw Baker's court appointed attorney in the conservatorship. He received payment as attorney, guardian ad litem, and visitor. He received his payment without any "determination by the court", other than the signing of the order. Yet, here the argument is that only Appellant is to be burdened with this care

⁷ Respondent's brief fails to address all arguments raised by Appellant. (See *First Union National Bank v. FCVS Communications*, 321 S.C. 496, 469 S.E. 2d 613 (1996)[if respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that appellant's position is correct], reversed and remanded on other grounds, 328 S.C. 290, 494 S.E. 2d 67 (1997). The arguments Respondent does address, also references improper matter from its designation and speculative, conclusionary, and false facts.

As indicated more fully in her brief, without Appellant's protection of the assets— taxes, insurance, maintenance would not have been completed, without more fees and costs incurred. She has maintained her bond, and protected the property, now doing so with her own funds pending resolution of these appeals--All for the benefit of Alice Shaw Baker's estate and her ultimate beneficiaries—animal charities. The order denying Appellant's fees must be reversed.

4. Appellant was deprived of Compensation in violation of Equal Protection and established legal precedent

Respondent repeats her argument with regard to section 3 above, the Takings Clause. However, Appellant contends the Constitutional questions are different. The facts of Appellant's devotion to Alice Shaw Baker, in her time of trouble are the same, and Appellant is the only person who did not receive compensation for taking care of her great aunt. As stated in her brief, This mandates reversal.

5. Grosshuesch Does not Support the Freezing of Appellant's Assets, as here when No Admissible Evidence or Testimony was Presented

Appellant contends that the standards for injunctions require notice and a hearing under Rule 65(a), (b), and well established precedent. Respondent claims that the orders issued by the probate court, somehow constitute evidence. In review of the record, it is clear that there was no affidavit supporting the *Motion for Special Fiduciary*, no admissible evidence was presented, no testimony taken—only argument. Moreover, in light of Appellant's bond, there was no evidence of immediate and irreparable harm. These provisions could not be clearer. Any argument by Respondent that the probate court's unsupported conclusions supports the injunction is completely misplaced. The court in *Grosshuesch v. Cramer*, 367 S.C. 1, 623 S.C. 833, 834

(2005) had evidence that there were real estate property transfers and checks for cash deposited into the accounts of the alleged wrongdoers. Here, Appellant protected the status quo, so that the property would not be harmed—taxes paid, insurance paid, maintenance paid. There was no wrongdoing alleged, or could be alleged. The probate court denied the right to be heard by Appellant, even informally, at the hearing on the *Motion for Special Fiduciary*. It is questionable why Respondent's counsel went to the Conservator court, he knew that jurisdiction for the estate property was in the Circuit Court. He further knew that after the death of Alice Shaw-Baker, the assets were estate property and by statute, Appellant was duty bound to protect the assets pending proper appointment. (See South Carolina Probate Code Section 62-5-425 (d).) 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 court, Appellant 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.*, 367 S.C. 458, 464 (2005).) Thereafter, analyzed the statutory requirement that Appellant hold the monies for the proper personal representative. (See South Carolina Probate Code Section 62-5-425 (d).) The conclusion that the court had authority, even to freeze Alice Shaw Baker's accounts, are untenable.

Justice demands reversal, when counsel plays fast and loose with procedures to prejudice Appellant.

//
//
//

6. **Respondent's Arguments relating to the Freezing of Conservatorship Accounts in Violation of Constitutional and Legal Protections are Flawed, and Contrary to the Best Interests of Alice Shaw Baker's Estate and the Facts of this case.**

In her Brief, Respondent again mischaracterizes Appellant's action and the evidence in this case, by claiming that Appellant "withdrew monies from the Conservatorship account without having the legal fiduciary authority. In making this argument, Respondent invokes the "exclusive jurisdiction" of the probate court, without acknowledging the responsibility of the probate court over decedent's estate, and even more surprising (*or telling*) ignoring that the decedent's estate had been removed to the circuit court.

It is well settled that an order freezing the accounts is in the nature of an injunction. (See *Grosshuesch v. Cramer*, 367 S.C. at 5, 623 S.E.2d 833, 835 (2005) (interpreting order freezing assets as an injunction). Moreover, under the South Carolina Code, injunctions are immediately appealable. S.C. Code Ann. § 14-3-330(4).

Alice Shaw Baker's guardianship expired upon her death. S.C. Code Ann. § 62-5-306 (1987) (terminating the authority of a guardian upon the death of the ward). All claims related to the conservatorship may have to be decided by the probate court. Therefore, upon filing of the *Motion for Special Fiduciary*, the matter necessarily was an issue for the Circuit Court, subject to removal and subject to the stay on appeal. Here, Appellant reminds this court that no party requested any orders freezing Ms. Shaw Baker's assets.

So when all is said and done, Respondent's arguments are nothing more than mere smoke and mirrors, as it relies on conjecture, speculation, and prejudicial manipulation of the facts in this case. Respondent got out of the Circuit Court and created new and more brutal legal issues,

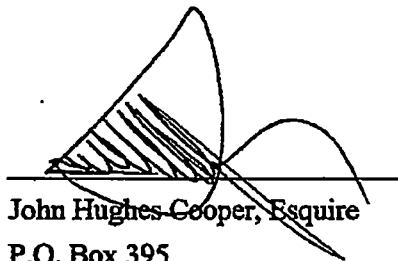
where Appellant has to protect Alice Shaw Baker's property pending final resolution of the Appeal. The orders must be reversed.

**V.
CONCLUSION**

Appellant contends that all Orders are erroneous as a matter of law, and mandate reversal. The injunction ("freezing order") should be lifted from Alice Shaw Baker's property pending final resolution, with orders to account in the Probate Court. The issue of compensation for Appellant should be reversed and remanded for hearing in the Probate Court, upon delivery of assets to the proper personal representative.

Appellant respectfully prays that this Honorable Court reverse the Orders in this matter.

December 8, 2015



John Hughes Cooper, Esquire
P.O. Box 395
Sullivan's Island, SC 29482
(843) 883-9099
Attorney for Appellant

Other Counsel of Record:

Peter A. Kouten, Esquire
Kouten Law Firm, LLC
P.O. Box 340
John's Island, SC 29457

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge
Tamara Curry, Probate Court Judge

Appellate Case No. 2014-002020
Circuit Court Case No.2011-CP-007819

RECEIVED
SEP 09 2016
SC Court of Appeals

Betty Fisher, ...Appellant
v.
Bessie Huckabee Respondent

Appellate Case No. 2014-002028
Circuit Court Case No.2011-CP-007821

Lisa Fisher, ...Appellant
v.
Bessie Huckabee Respondent

Appellate Case No. 2014-002034
Circuit Court Case No.2011-CP-008657

Lisa Fisher, ...Appellant
v.
Bessie Huckabee Respondent

**APPELLANTS' MOTION FOR ADMISSION OF LISA FISHER, ESQUIRE
AS PRO HAC VICE AND ASSOCIATED COUNSEL FOR PURPOSES OF SCHEDULED
CONSOLIDATED ORAL ARGUMENT
ON OCTOBER 3, 2016 AT 10:40 A.M. IN COURTROOM 1**

JOHN HUGHES COOPER, ESQUIRE
1476 Ben Sawyer Blvd. Ste. 11
Mount Pleasant, SC 29464
shiplaw@jhcooper.com
843-883-9099; fax 843-883-9335

(Attorneys for Appellants)

COME NOW Appellants Betty Fisher and Lisa Fisher, by counsel John Hughes Cooper, Esquire, as attorney in good standing in South Carolina, pursuant to South Carolina Appellate Court Rules, respectfully move this Court to grant Lisa Fisher, not being lawfully licensed and admitted to the practice of law in the State of South Carolina, the privilege to appear in this Court as attorney on behalf of Appellant Betty Fisher and as associated counsel on her own matters, for purposes of oral argument.

In support of this Motion, the Verified Application for Admission *Pro Hac Vice* of Lisa Fisher in the State of South Carolina is attached hereto. In addition, the prescribed fees for admission pro hac vice have been tendered with a copy of the application to the South Carolina Supreme Court simultaneously with the filing of this Motion.

Rule 404 of the South Carolina Appellate Court Rules provides for Admission *Pro Hac Vice* of attorneys in good standing in the highest Court of another state. Lisa Fisher, Esquire is such an attorney in good standing. (Attached hereto is a true and correct copy of said certificate from the California Supreme Court).

Finally, this motion also seeks to have Ms. Fisher associated as counsel in her own matters, Appellate case nos. 2014-002028 and 2014-002034. The court has consolidated for oral argument these appeals, and Ms. Fisher, as requested by our client Betty Fisher, and by our request, ask this court to permit her to appear and argue at this hearing.

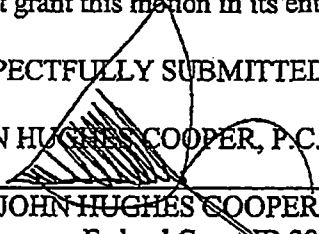
//

//

Appellants pray that this Court grant this motion in its entirety.

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By: 

JOHN HUGHES COOPER, ESQUIRE

Federal Court EQ 298

South Carolina Bar 1387

State Bar of Georgia 185986

1476 Ben Sawyer Blvd. Ste. 11

Mount Pleasant, SC 29464

shiplaw@jhcooper.com

843-883-9099; fax 843-883-9335

ATTORNEYS FOR APPELLANTS

September 9, 2016

RECEIVED

VERIFIED APPLICATION FOR ADMISSION *PRO HAC VICE*
IN THE STATE OF SOUTH CAROLINA

SEP 09 2016

SC Court of Appeals

The South Carolina Court of
Appeals

(For Oral Argument)

BETTY FISHER

2014-002020

LISA FISHER

2014-002028

LISA FISHER

2014-002034

Plaintiff

Case No.

Court

vs.

Mailing Address of Court: P.O. BOX 11629
Columbia, South Carolina 29211

BESSIE HUCKABEE

Defendant

Comes now Lisa Fisher, applicant herein, and respectfully represents the following:

1. Applicant resides at:

Law Offices of Lisa Fisher; P.O. Box 91112

Street Address

Long Beach

Los Angeles

CA

90809-1112

City

County

State

Zip Code

562-965-3267

Telephone

2. Applicant is an attorney and a member of the law firm of (or practices law under the name of) Law Office of Lisa Fisher, with offices at, at

P.O. Box 91112

Street Address

Long Beach

Los Angeles

CA

90809-1112

City

County

State

Zip Code

562-965-3267

Telephone

866-610-4371

Fax Number

3. Applicant has been retained personally or as a member of the above named law firm by Betty Fisher to provide legal representation in connection with the above case now pending before the above named court of the State of South Carolina.

4. Since December of 1997, applicant has been, and presently is, a member in good standing of the bar of the highest court of the District of Columbia or the State of California where applicant regularly practices law. Attached is a certificate of good standing.

5. Applicant has been admitted to practice before the following courts: (List all of the following courts applicant has been admitted to practice before: United States District Courts; United States Circuit Courts of Appeals; the Supreme Court of the United States; and courts of other states or the District of Columbia.)

Court:	Date Admitted:
Supreme Court of the United States	03-19-2001
California State, Appellate and Supreme Courts	12/1997
United State District Court, Central District of California	12/1997
United States District Court, Southern District of California	1997

Applicant is presently a member in good standing of the bars of those courts listed above, except as listed below:

(List any court named in the preceding paragraph that applicant is no longer admitted to practice before.)

Not Applicable

6. Applicant presently is not subject to any suspension or disbarment proceedings, and has not been formally notified of any complaints pending before a disciplinary agency, except as provided below (give particulars, e.g., jurisdiction, court, date):

Not Applicable

7. Applicant never has had any application for admission *pro hac vice* in this or any other jurisdiction denied or any *pro hac vice* admission revoked, except as provided below (give particulars, e.g., date, court, docket number, judge, circumstances; attach a copy of any order of denial or revocation):

Not Applicable

8. Applicant never has had any certificate or privilege to appear and practice before any administrative body suspended or revoked, except as provided below (give particulars, e.g., date, administrative body, date of suspension and reinstatement):

Not Applicable

9. Local counsel of record associated with applicant in this case is John Hughes Cooper, Esquire, of the John Hughes Cooper, P.C. law firm, which has offices at:

1476 Ben Sawyer Bl. Ste. 11

Street Address

Charleston

County

843-883-9099

Telephone

Mt. Pleasant

City

SC

State

29464

Zip Code

If applicable list all other firms/attorneys you are associated with in this matter

Not Applicable

10. Applicant has previously filed an application to appear *pro hac vice* in the following South Carolina cases (give case name and status of litigation, date of application, local counsel of record in each case, and state whether application is pending or was granted).

Betty Fisher v. Bessie Huckabee et al. In re Alice Shaw Baker; 2009-CP-10-3010; Case Pending for Trial; Order granted 6/17/2009; Local Counsel; John Hughes Cooper, Esquire

Betty Fisher v. Bessie Huckabee et al. In re Alice Shaw Baker; 2012-CP-10-1332; Case Dismissed; Order granted 3/29/12; Local Counsel; John Hughes Cooper, Esquire

Betty Fisher v. Bessie Huckabee et al. In re Alice Shaw Baker; 2014000175; Case Dismissed; Order granted 3/24/14; Local Counsel; John Hughes Cooper, Esquire

11. Applicant agrees to comply with the applicable statutes, laws and rules of the State of South Carolina and will familiarize him/herself with and comply with the South Carolina Rules of Professional Conduct. Applicant consents to the jurisdiction of the South Carolina courts and Commission on Lawyer Conduct.

12. Applicant respectfully requests to be admitted to practice in the above named court for this case only.
DATED this 8th day of September, 2016

APPLICANT

VERIFICATION

STATE OF California)

COUNTY OF Los Angeles)

I, Lisa Fisher, do hereby swear or affirm under penalty of perjury that I am the applicant in the above styled matter; that I have read the foregoing application and know the contents thereof; and that the contents are true of my own knowledge, except as to those matters stated on information and belief, and that as to those matters I believe them to be true.

APPLICANT/AFFIANT

Subscribed and sworn to before me this ___ day of ___, 20__.

Notary Public for the State of ___

My Commission Expires: ___

SEE ATTACHED

LOCAL COUNSEL CONSENT

I hereby consent, as local counsel of record, to the association of applicant in this cause pursuant to Rules Governing Admission *Pro Hac Vice* to the South Carolina Bar.

DATED this 9th day of September, 2016.

LOCAL COUNSEL OF RECORD

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this application upon the South Carolina Supreme Court by mail addressed to: South Carolina Supreme Court Office of Bar Admissions, PO Box 11330, Columbia, SC 29211, accompanied by payment of the \$250 filing fee payable to the South Carolina Supreme Court on this 9th day of September, 2016.

RECEIVED

SEP 09 2016

SC Court of Appeals

JURAT

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA

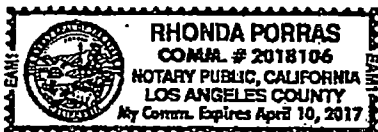
COUNTY OF LOS ANGELES

Subscribed and sworn to (or affirmed) before me on

this 8th day of September, 2016

by Lisa Fisher

proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.



(seal)

Signature

A handwritten signature in black ink, appearing to read 'Rhonda Porras', written over a horizontal line.

ATTACHED TO DOCUMENT: VERIFIED APPLICATION FOR ADMISSION PRO HAC VICE IN THE STATE OF SOUTH CAROLINA / VERIFICATION

PAGE: 3



THE STATE BAR OF CALIFORNIA

MEMBER RECORDS & COMPLIANCE

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1617

TELEPHONE: 888-800-3400

CERTIFICATE OF STANDING

June 20, 2016

TO WHOM IT MAY CONCERN:

This is to certify that according to the records of the State Bar, LISA FISHER, #192777 was admitted to the practice of law in this state by the Supreme Court of California on December 9, 1997; and has been since that date, and is at date hereof, an ACTIVE member of the State Bar of California; and that no recommendation for discipline for professional or other misconduct has ever been made by the Board of Trustees or a Disciplinary Board to the Supreme Court of the State of California.

THE STATE BAR OF CALIFORNIA

A handwritten signature in black ink, appearing to read "Kathan Lambert", is written over a horizontal line.

Kathan Lambert
Custodian of Membership Records

The South Carolina Court of Appeals

Lisa Fisher, Appellant,

v.

Bessie Huckabee, Respondent

Appellate Case No. 2014-002034

The Honorable J. C. Nicholson, Jr.
Charleston County
Trial Court Case No. 2011CP1008657

ORDER

The motion for admission of Lisa Fisher, Esquire as *pro hac vice* and associated counsel is Granted.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc:
John Hughes Cooper, Esquire
Peter A. Kouten, Esquire
Lisa Fisher, Esquire

FILED

September 26, 2016
JH

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Betty Fisher, Appellant,

v.

Bessie Huckabee, Respondent.

Lisa Fisher, Appellant,

v.

Bessie Huckabee, Respondent.

Appellate Case No. 2014-002020¹

Appeal From Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 2016-UP-528
Heard October 3, 2016 – Filed December 21, 2016

AFFIRMED IN PART and REMANDED IN PART

John Hughes Cooper, of John Hughes Cooper, PC, of
Mount Pleasant, and Lisa Fisher, of Long Beach, CA, for
Appellants.

¹ Consolidated with Appellate Case No. 2014-002028 and Appellate Case No. 2014-002034.

Peter A. Kouten, of Kouten Law Firm, LLC, of Johns Island, for Respondent.

PER CURIAM: In this consolidated probate case, Appellants Betty Fisher and Lisa Fisher separately appeal from the circuit court's affirmance of the probate court's orders appointing a special fiduciary, freezing assets, and denying the Fishers' motions for reconsideration, arguing twenty-two issues summarized as the following: (1) the circuit court erred in failing to consider the Fishers' Statement of Grounds or allow oral argument; (2) the probate court did not have jurisdiction because the matter was on appeal; (3) Respondent Bessie Huckabee did not have standing in the matter; (4) the probate court's order was void because Huckabee failed to provide the required notice and violated Rule 11, SCRPC; (5) the probate court erred in denying Lisa Fisher reasonable compensation; (6) the probate court erred in freezing decedent's accounts; (7) the probate court erred in appointing a special fiduciary; (8) the probate court erred in failing to grant Lisa Fisher an extension; and (9) the probate court erred in hearing the motion to appoint a special fiduciary when statutory notice was not given. We affirm in part and remand in part.

II. BACKGROUND FACTS²

Lisa Fisher was appointed as Alice Shaw-Baker's guardian and conservator by order dated November 19, 2008. Peter A. Kouten was appointed as Shaw-Baker's guardian ad litem. After Shaw-Baker died on February 25, 2009, and Huckabee was appointed personal representative based on her nomination in the will, Lisa Fisher was discharged as the conservator by order dated May 11, 2009. The order required Fisher to provide an estate accounting and turn over all estate assets within fifteen days of the date of the order.

In May 2011, Huckabee filed a motion entitled, "Motion to Appoint Special Fiduciary for Conservatorship Assets." Huckabee alleged Lisa Fisher was

² Additional background facts may be found in *Fisher v. Huckabee*, 415 S.C. 171, 173-75, 781 S.E.2d 156, 157-58 (Ct. App. 2015), *reh'g denied* (Jan. 21, 2016), *petition for cert. filed* (Feb. 22, 2016) and *In re Estate of Alice Shaw Baker*, Op. No. 2015-UP-359 (S.C. Ct. App. filed July 15, 2015), *reh'g denied* (Sept. 15, 2015).

discharged as the conservator of Shaw-Baker by the May 11, 2009 order, had been granted at least six extensions to turn over the estate assets, and had not filed annual accountings since 2008. Huckabee requested the court deny any further continuances, require Lisa Fisher to file the delinquent accountings for 2009 and 2010, require her to release estate funds, and to appoint a third-party special fiduciary to accept all assets of the estate. At a hearing on the motion, Huckabee argued Fisher did not appeal the order discharging her as conservator, but it had been two years and she had not turned over the estate assets.

Huckabee also argued that when Fisher finally turned in the annual accountings, "it became clear that the discharged conservator did not cease in her actions as conservator" and had disbursed \$80,500 from the estate after her authority ceased. Huckabee requested the court appoint a special fiduciary to accept the estate assets and that no further extensions be granted to Fisher.

Fisher argued she had motions pending, including a motion for a ninety-day extension and a motion to strike Huckabee's motion. Fisher also argued the court should strike the motion to appoint a special fiduciary. Fisher's motion to strike alleged the issue was moot because she filed the missing accountings with her motion; Kouten could not represent Huckabee because he had been Shaw-Baker's guardian ad litem; and Kouten had not satisfied the Rule 11(a), SCRCP requirement that a movant attempted in good faith to resolve an issue prior to filing a motion unless the movant certified that consultation would have served no useful purpose. Fisher argued she had been granted six extensions and was waiting for the appeals in circuit court and the supreme court to be decided prior to complying with the order to turn over the estate assets. By order dated September 28, 2011, the probate court denied Fisher's motions to strike and for an extension, granted the motion to appoint a special fiduciary, and appointed Heyward Harvey, Esq. to serve as the special fiduciary. The order required Fisher to turn over the estate assets within fifteen days.

Fisher moved for reconsideration, arguing the probate court did not have jurisdiction over the matter because an appeal was pending in the supreme court; no evidence of her wrongdoing was produced at the hearing; the probate court lacked statutory authority; Fisher had no ability to transfer the estate because a motion to appoint Betty Fisher as special administrator was pending in circuit court; and the probate court order was void. Betty Fisher also filed a motion as an "Interested Party" to void the September 28, 2011 order based on lack of notice and Huckabee's lack of standing. By order dated October 14, 2011, the probate

court denied the motions. The order also denied a pending "Renewed Motion for Approval of Fees and Expenses of Guardian and Conservator." In a separate order dated October 14, 2011, the probate court froze the assets in all of decedent's accounts.

Lisa Fisher moved to reconsider the denial of the renewed motion for fees. Fisher argued her motion was originally filed in July 2009 and the probate code provided for fees. Fisher also moved to reconsider the freezing of the assets, arguing the following: (1) the probate court requires a conservator to deliver estate assets to a "Duly Appointed" personal representative; (2) she is entitled by the doctrine of laches to continue protecting the estate; (3) the probate court lacked jurisdiction; (4) no party sought an order freezing the assets; and (5) the orders violated due process. On November 9, 2011, the probate court denied the motions for reconsideration. Fisher and Betty Fisher appealed to the circuit court.

At a hearing in the circuit court, the Fishers argued Lisa Fisher had a statutory duty to turn over the estate assets to a duly appointed personal representative and the order appointing Huckabee the personal representative was on appeal; thus, Fisher could not turn over the assets. The Fishers also argued the probate court did not have jurisdiction to appoint a special fiduciary because an appeal was pending. Betty Fisher next argued that as an interested party, she was entitled to the statutorily-required notice of twenty days before the probate court could consider a motion to appoint a special fiduciary. Betty Fisher further argued the Attorney General was entitled to notice as an interested party (as a protector of animal charities named in a prior will). Lisa Fisher next argued the probate court refused to take any testimony and made factual findings without any evidentiary support. Finally, Lisa Fisher argued the probate court erred in denying her motion to be paid fees as the conservator and in issuing orders freezing the assets.

Huckabee argued the issues in the current matter were unrelated to the pending appeals because they were related to conservatorship of the assets rather than personal representative matters. Huckabee also argued that although there were no affidavits or testimony before the probate court, Lisa Fisher's accountings indicated she was spending money from the estate after she was discharged, which was sufficient for the probate court to appoint a special fiduciary. In Form 4 orders, the circuit court affirmed the probate court's orders. This appeal followed.

III. STANDARD OF REVIEW

On appeal from a final order of the probate court, the circuit court must apply the same standard of review that an appellate court would apply on appeal. *In re Howard*, 315 S.C. 356, 361, 434 S.E.2d 254, 257 (1993). "The standard of review applicable to cases originating in the probate court depends upon whether the underlying cause of action is at law or in equity." *In re Estate of Hyman*, 362 S.C. 20, 25, 606 S.E.2d 205, 207 (Ct. App. 2004). The underlying nature of the matter before the probate court was the appointment of a special fiduciary to manage the estate assets, which we find akin to the removal of a personal representative; thus, the action is in equity. *See Dean v. Kilgore*, 313 S.C. 257, 259, 437 S.E.2d 154, 155 (Ct. App. 1993) (holding an action to remove a personal representative appointed pursuant to the terms of a will is equitable in nature). If probate proceedings are equitable in nature, then the circuit court on appeal may make factual findings according to its own view of the preponderance of the evidence. *Howard*, 315 S.C. at 361-62, 434 S.E.2d 254, 257-58.

IV. ISSUES ON APPEAL³

1. Did the circuit court err in failing to consider the Fishers' statement of grounds for appeal and failing to permit oral argument?⁴
2. Did the probate court lack jurisdiction because the matter was on appeal?⁵
3. Did Huckabee lack standing?⁶
4. Was the probate court order void because Huckabee failed to provide notice in violation of Rule 11, SCRCP?⁷
5. Did the probate court err in denying Lisa Fisher reasonable compensation?⁸

³ We have combined the Fishers' twenty-two issues on appeal into nine issues as noted. As to Lisa Fisher's brief in Appellate Case No. 2014-002034, we have listed her issues as they appear in the Statement of Issues on Appeal.

⁴ *Betty Fisher v. Huckabee*, Appellate Case No. 2014-002020 ("2020") - issue 1; *Lisa Fisher v. Huckabee*, Appellate Case No. 2014-002028 ("2028") - issue 1; *Lisa Fisher v. Huckabee*, Appellate Case No. 2014-002034 ("2034") - issue 1.

⁵ 2020 - issue 2; 2028 - issues 2, 3, 4, 6.

⁶ 2020 - issue 4; 2028 - issue 5.

⁷ 2028 - issue 10.

⁸ 2034 - issues 2, 3, 4.

6. Did the probate court err in issuing orders freezing assets?⁹
7. Did the probate court err in appointing a special fiduciary?¹⁰
8. Did the probate court err in failing to grant Lisa Fisher an extension?¹¹
9. Did the probate court err in hearing the motion to appoint a special fiduciary when statutory notice was not given?¹²

V. LAW/ANALYSIS

1. Failure to Consider Statement of Grounds or Permit Oral Argument

The Fishers argue the circuit court erred in failing to read the briefs prior to the hearing, depriving them of further argument on the record, and failing to make findings of fact. We disagree.

At the beginning of the hearing, the circuit court noted on the record that it remembered the parties from one of the previous cases. The Fishers' attorney began arguments, stating, "[W]e've briefed this extensively and we assume the Court has those briefs and I'm not going to go into it." The circuit court judge stated, "Yes, I've got the briefs. I have not looked at them but I have got them here. I will probably have to look at them before I make a decision. But go ahead. . . . If you can summarize the briefs, that would be very helpful." The Fishers' attorney responded, "That's what I'm going to attempt to do, Your Honor." The judge stated, "You don't have to reiterate everything that's in there . . . because I will read them . . . [o]r my law clerk and -- we both will probably read them." The court heard extensive arguments from counsel.

The hearing lasted from 10:22 a.m. until 11:13 a.m. The Fishers were permitted to fully argue the issues. At the conclusion of the hearing, the Fishers argued, "Your Honor, one thing for the record?" The judge stated, "Thank you very much. I've heard enough." However, as the Fishers concede, the judge next stated, "I'll review

⁹ 2034 - issues 5, 6.

¹⁰ 2028 - issues 7, 8, 9.

¹¹ 2028 - issue 11.

¹² 2020 - issue 3; 2028 - issue 12.

it. I'll review your memorand[a]. I'll make them a part of the record. Okay? Thank y'all very much." The Fishers' counsel replied, "Thank you."

We find no error by the circuit court. Although the circuit court sitting in an appellate capacity in an equity action may make factual findings according to its own view of the preponderance of the evidence, deference to the probate court's findings is appropriate in circumstances where it is apparent from the record that the credibility of the witnesses was a consideration. *Macaulay v. Wachovia Bank of S.C.*, 351 S.C. 287, 293-94, 569 S.E.2d 371, 375 (Ct. App. 2002). In this case, the accounting provided by Lisa Fisher established unauthorized depletion of the estate assets after Fisher was discharged as the conservator of the estate by order filed May 11, 2009. Further, the circuit court heard the Fishers' arguments at the hearing. We find no error. *See Porter v. Labor Depot*, 372 S.C. 560, 568, 643 S.E.2d 96, 100 (Ct. App. 2007) (stating "not all situations require a detailed order, and the trial court's form order may be sufficient if the appellate court can ascertain the basis for the trial court's ruling from the record on appeal").

2. Jurisdiction of the Probate Court

The Fishers next argue the probate court did not have jurisdiction to hear the motion to appoint a special fiduciary because related matters were pending on appeal and a personal representative had already been appointed. We disagree.¹³

The jurisdiction of the probate court is governed by the Probate Code and extends to subject matter related to estates of decedents. S.C. Code Ann. § 62-1-302(a) (Supp. 2015) ("To the full extent permitted by the Constitution, and except as otherwise specifically provided, the probate court has exclusive original jurisdiction over all subject matter related to: (1) estates of decedents . . ."). The probate court may appoint a special administrator informally prior to the appointment of a personal representative and in a formal proceeding "on the petition of any interested person and finding . . . that appointment is necessary to preserve the estate . . ." S.C. Code Ann. § 62-3-614 (Supp. 2015). The probate court has exclusive jurisdiction to determine the need for a conservator. S.C. Code Ann. § 62-5-402(1) (Supp. 2015).

¹³ Huckabee argues the order appointing a special fiduciary is interlocutory and not immediately appealable. We disagree. *See Ex parte Small*, 69 S.C. 43, 46, 48 S.E. 40, 41 (1904) (finding an order appointing an administrator was a final order and was immediately appealable).

The question of whether the probate court may proceed with a case after one of its orders has been appealed is also governed by the Probate Code. Section 62-1-308(h) (Supp. 2015) of the Probate Code provides the following:

When an appeal according to law is taken from any sentence or decree of the probate court, all proceedings in pursuance of the order, sentence, or decree appealed from shall cease until the judgment of the circuit court; court of appeals or Supreme Court is had. If the appellant, in writing, waives his appeal before the entry of the judgment, proceedings may be had in the probate court as if no appeal had been taken.

In *Ulmer v. Ulmer*, our supreme court explained that this section¹⁴ "does not apply to all orders of the probate court concerning the parties. The only proceedings required to cease are those proceedings addressed in the orders from which an appeal was taken." 369 S.C. 486, 491-92, 632 S.E.2d 858, 861 (2006).

In this case, the order on appeal at the time of the probate court hearing related to the appointment of Huckabee as the personal representative under the will. The Fishers' cause of action challenging the will remains pending in the probate court. We find Huckabee's status under the will is not related to the discharge of Lisa Fisher as the conservator and the appointment of an unrelated, special fiduciary to marshal the estate assets and maintain authority and control of the estate pending the final distribution of the estate. Further, we find the probate court had jurisdiction to appoint a special fiduciary under sections 62-1-302(a) and 62-3-614.

3. Huckabee's Standing

The Fishers argue Huckabee lacked standing to file the motion to appoint a special fiduciary. We disagree.

The Probate Code defines interested persons to include the following:

heirs, devisees, children, spouses, creditors, beneficiaries,
and any others having a property right in or claim against

¹⁴ Formerly section 62-1-308(c).

a trust estate or the estate of a decedent, ward, or protected person which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding.

S.C. Code Ann. § 62-1-201(23) (Supp. 2015). "[A]ll persons having any interest [in the probate of a will] are deemed parties and concluded by the decision therein." *Davis v. Davis*, 214 S.C. 247, 258, 52 S.E.2d 192, 197 (1949). Because Huckabee is the personal representative named in the will and is defined as an interested person, we find no merit to the Fishers' challenge to Huckabee's standing. As to the Fishers' challenge to Huckabee's standing based on the pending appeal of the order appointing her as the personal representative, we affirm for the reasons discussed in part 2 of this opinion.

4. Rule 11, SCRPC

Lisa Fisher argues the probate court's order was void because Huckabee failed to comply with the notice provisions of Rule 11, SCRPC. We disagree.

Rule 11 of the South Carolina Rules of Civil Procedure provides that "[a]ll motions filed shall contain an affirmation that the movant's counsel . . . has communicated . . . with opposing counsel and has attempted in good faith to resolve the matter . . . unless the movant's counsel certifies that consultation would serve no useful purpose" Rule 11, SCRPC. Rule 11 provides a motion not in compliance with the rule "shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant." *Id.* Finally, the rule provides the court "may impose upon the person who signed it, a represented party, or both, an appropriate sanction" *Id.*

In *Jackson v. Speed*, our supreme court affirmed the trial judge's refusal to strike a motion based on a similar Rule 11(a) violation, finding the trial judge did not abuse his discretion in refusing to strike the motion because an attempt to consult with opposing counsel about the matter would have been pointless. 326 S.C. 289, 310-11, 486 S.E.2d 750, 761 (1997). The court noted "[t]his finding by the trial judge

is adequate to cure the deficiency under the facts of this case." *Id.* at 311, 486 S.E.2d at 761.

In this case, the Fishers argued the motion to appoint a fiduciary should have been stricken based on the Rule 11 violation. Huckabee argued the motion was in response to Lisa Fisher's motion for an extension. In her brief, Huckabee also notes counsel had discussed the matter of the appointment of a special administrator on several occasions and the Fishers' motions for extensions likewise failed to comply with the Rule 11 affirmation requirements. The probate court did not make a specific finding on the record. However, the issue of the violation was argued to the probate court, and the court ruled at the hearing that Huckabee had "a right to file that motion with the Court." 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 S.E.2d 160, 162 (1996) (stating the imposition of sanctions under Rule 11 is subjected to an abuse of discretion standard of review).

5. Denial of Lisa Fisher's Request for Fees

Fisher argues the probate court erred in denying her request for fees. We remand this issue.

Fisher was appointed as the guardian and conservator by order dated November 19, 2008. After Shaw-Baker died on February 25, 2009, Huckabee was appointed personal representative based on her nomination in the will. Fisher was discharged as the conservator of the estate by order dated May 11, 2009. Fisher moved for fees and expenses of \$67,814.50 for services rendered between August 2008 and July 2009, which is approximately 17% of the estimated value of the estate of \$395,935.39. Fisher argued entitlement to fees under the probate code. By order dated October 14, 2011, the probate court summarily denied the motion.¹⁵ Fisher moved to reconsider the order, arguing (1) all other guardians and attorneys had been paid their fees; thus, she was entitled to fees under the equal protection clause of the United States and South Carolina constitutions; (2) the probate code provides for reasonable compensation to guardians and conservators; and (3) the takings clauses of the constitutions require compensation.

¹⁵ Fisher filed her motion in July 2009 and filed a renewed motion in October 2011.

The Probate Code provides, "[i]f not otherwise compensated for services rendered, any visitor, lawyer, physician, conservator, or special conservator appointed in a protective proceeding *is entitled to reasonable compensation* from the estate, as determined by the court." S.C. Code Ann. § 62-5-414 (2009) (emphasis added). The Probate Code also provides as follows:

Any guardian of one for whom a conservator also has been appointed shall control the custody and care of the ward and *is entitled to receive reasonable sums* for his services and for room and board furnished to the ward as agreed upon between him and the conservator, provided the amounts agreed upon are reasonable under the circumstances.

S.C. Code Ann. § 62-5-312(b) (2009) (emphasis added). In addition, the Probate Code requires a conservator to "retain the estate for delivery to a duly appointed personal representative of the decedent or other persons entitled thereto" if a protected person dies. S.C. Code Ann. § 62-5-425(d) (2009).

In this case, Lisa Fisher was the appointed guardian and conservator until Shaw-Baker died on February 25, 2009. Some of the expenses Fisher requested reimbursement for were incurred after her conservatorship ended. However, the accountings filed by Fisher include disbursements of \$68,523.79 in "Administrative/Legal Fees" incurred between December 23, 2008 and December 31, 2009 alone. Furthermore, Huckabee alleged the accountings indicate the estate has been depleted by more than \$80,000, but the accountings in the record indicate depletion of more than \$250,000. Because the probate court's order and the circuit court's order only summarily address the issue, we remand to the probate court.¹⁶

6. Freezing of Assets

Lisa Fisher argues the probate court erred in freezing assets. We disagree.

Fisher argues the order(s) freezing assets were issued without notice because this relief was not requested or raised; she was required to retain the estate property

¹⁶ We make no determination of the entitlement to, or the reasonableness of, the fees claimed.

until a "duly appointed" personal representative was appointed and the issue of the propriety of Huckabee's appointment is on appeal; the doctrine of laches supports her continued protection of the estate; and the freezing of the estate assets and Fisher's personal assets violated Fisher's constitutional rights.

Section 62-1-302 of the Probate Code generally defines the probate court's jurisdiction and provides in pertinent part: "(a) To the full extent permitted by the Constitution, and except as otherwise specifically provided, the probate court has exclusive original jurisdiction over all subject matter related to: (1) estates of decedents" S.C. Code Ann. § 62-1-302(a)(1) (Supp. 2015). The probate court has the authority to issue orders in the nature of injunctions. *See Greenfield v. Greenfield*, 245 S.C. 604, 611, 141 S.E.2d 920, 924 (1965) (finding the probate court had the authority to issue an order requiring relatives of a decedent to surrender the records of the decedent, and stating "[t]his power, we think, is one which is of necessity incident to the jurisdiction expressly granted the probate court over all matters of administration").

We find no merit to Fisher's arguments. As to her personal assets, Fisher admitted at the hearing before the circuit court that the order(s) freezing assets "didn't have any real effect because Lisa Fisher didn't have any accounts here in South Carolina personally." Thus, Fisher suffered no prejudice and there is no basis for reversal. *See In re Estate of Patterson v. Palmetto Bank*, 374 S.C. 116, 120, 646 S.E.2d 885, 887 (Ct. App. 2007) (holding a probate court's error that did not prejudice either party formed no basis for reversal). As to the estate assets, we find the probate court had the authority to freeze assets to protect the estate.

7. Appointing Special Fiduciary

Lisa Fisher next argues the probate court erred in appointing a special fiduciary. We disagree.

First, Fisher argues the probate court did not rule on her objections to the procedure and the accusations of her mismanagement of the estate. Second, she argues the probate court's rulings are not supported by the record. Third, relying on trust law, Fisher argues the probate court's finding that she did not have authority to pay expenses on behalf of the estate was erroneous and demonstrates no emergent need for a special fiduciary. Finally, Fisher argues Huckabee is barred from moving for the appointment of a special fiduciary under the doctrine of laches.

As to the first three issues, we find no merit. Initially, the probate court noted Fisher's continued objections to its jurisdiction. In addition, neither the probate court nor the circuit court found misconduct by Fisher in their written orders. Rather, the probate court found Fisher had been discharged in 2009; the estate contained real property assets requiring upkeep and repair; and the accounting indicated a need for authority to deal with third parties. To the extent the court's findings regarding Fisher's objections were deficient, we find adequate support in the record. *See Holcombe v. Hardee*, 304 S.C. 522, 524, 405 S.E.2d 821, 822 (1991) (allowing the appellate court to make its own findings of fact if the record is sufficient even though the family court may have failed to set forth specific findings of fact and conclusions of law to support its decision). Further, the accounting provided by Lisa Fisher established unauthorized depletion of the estate assets after Fisher was discharged as the conservator of the estate by order dated May 11, 2009. This is sufficient evidence in the record to constitute the emergent need found by the probate court. *See* S.C. Code Ann. § 62-7-704(e) (Supp. 2015) (providing the probate court with authority to appoint a special fiduciary to administer a trust whenever the court considers the appointment necessary for the administration of a trust); § 62-5-402(1) (Supp. 2015) (providing the probate court with exclusive jurisdiction to determine the need for a conservator or other protective order). To the extent Fisher argues trust law does not apply, the probate court has jurisdiction over the estate of decedents outside of the trust provisions of the Probate Code. *See* § 62-1-302(a) ("To the full extent permitted by the Constitution, and except as otherwise specifically provided, the probate court has exclusive original jurisdiction over all subject matter related to: (1) estates of decedents . . ."). Thus, any erroneous reliance by the probate court on trust law is insignificant because the probate court had authority under estate law.

As to Fisher's final issue, we find laches does not apply to bar Huckabee's request for the appointment of a special fiduciary. "The party seeking to establish laches must show: (1) a delay, (2) that was unreasonable under the circumstances, and (3) prejudice." *Robinson v. Estate of Harris*, 388 S.C. 616, 627, 698 S.E.2d 214, 220 (2010). In this case, even if Fisher can show Huckabee caused any delay, it would not be unreasonable delay. The issue of Huckabee's appointment as the personal representative was not affirmed by this court until April 2011. Huckabee filed the Motion to Appoint Special Fiduciary for Conservatorship Assets in May 2011.

8. Denial of Lisa Fisher's Request for Extension

Lisa Fisher argues the probate court erred in failing to grant her another extension to deliver the assets, averring the court erred in finding she did not have the duty to act once she had been discharged because she was required to protect the property until delivery. We find no reversible error.

The South Carolina Rules of Probate Court govern procedure in the probate court. *See* Rules 1-5, SCRPC. These rules address only a limited number of issues, and there is no procedural rule governing motions in probate court. However, the Probate Code provides the rules of civil procedure shall be applied in formal proceedings in the probate court. S.C. Code Ann. § 62-1-304 (Supp. 2015). "The manner of service, time for answering and other proceedings relating to the trial, except trial by jury, shall conform as nearly as may be to the practice in the courts of common pleas as provided in this Code." *In re Estate of Weeks*, 329 S.C. 251, 258, 495 S.E.2d 454, 458 (Ct. App. 1997) (quoting S.C. Code Ann. § 14-23-280 (1976)). We find the probate court's ruling on Fisher's motion for an extension to turn over the estate assets was within the sound discretion of the probate court. *See generally Beckham v. Durant*, 300 S.C. 329, 332, 387 S.E.2d 701, 703 (Ct. App. 1989) (finding the probate court's consideration of an enlargement of time to file an answer was within the discretion of the probate court). As to Fisher's argument the probate court erred in finding she did not have the duty to act once she had been discharged, we note this was a statement made by the probate court during the hearing, and the probate court did not make this finding in its final order. We find no merit to this argument. *See Ford v. State Ethics Comm'n*, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001) ("Until written and entered, the trial judge retains discretion to change his mind and amend his oral ruling accordingly."); *id.* ("The written order is the trial judge's final order and as such constitutes the final judgment of the court.").

9. Statutory Notice of the Hearing

The Fishers argue the probate court's order appointing a special fiduciary is void because neither Betty Fisher nor the Attorney General's office were provided notice of the Motion to Appoint Special Fiduciary for Conservatorship Assets. We disagree.

Betty Fisher again argues the probate court erred in relying on trust law to appoint a special fiduciary, which we considered above and found no reversible error. As to notice, we likewise find no reversible error. Under the Probate Code, "[a] special administrator may be appointed: (1) informally by the court on the

application of an interested person when necessary . . . (c) to take appropriate actions involving estate assets; (2) in a formal proceeding by order of the court on the petition of any interested person If it appears to the court that an emergency exists, appointment may be ordered without notice." S.C. Code Ann. § 62-3-614 (Supp. 2015). In this case, the issue before the court was the protection of the estate. Although the disposition of the estate would require notice to an "interested person," the Probate Code provided authority for the probate court to conduct this hearing without notice to Betty Fisher or the Attorney General. *See* S.C. Code Ann. § 62-1-201(23) (Supp. 2015) (defining an "interested person" as including "heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent . . ."). Neither Betty Fisher nor the animal charities are named in the last will.

V. CONCLUSION

For the foregoing reasons, we affirm in part and remand in part.

AFFIRMED IN PART and REMANDED IN PART.

HUFF and SHORT, JJ., and MOORE, A.J., concur.

82061

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

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

RECEIVED

JAN 03 2017

SC Court of Appeals

Betty Fisher and Lisa Fisher Appellants

v.

Bessie Huckabee.....Respondent

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

JOHN HUGHES COOPER, ESQUIRE
1476 Ben Sawyer Blvd. Ste. 11
Mount Pleasant, SC 29464
shiplaw@jhcooper.com
843-883-9099; fax 843-883-9335

and

LISA FISHER, ESQUIRE
c/o 1476 Ben Sawyer Blvd. Ste. 11
Mount Pleasant, SC 29464
shiplaw@jhcooper.com
843-883-9099; fax 843-883-9335
(Attorney for Appellants)

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

I. INTRODUCTION

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

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

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

"The decision to rehear a case is an equitable decision with the goal of attaining justice for the particular litigants involved, which is precisely what a legal system is supposed to do." (Wasserstrom, *Equity: The Case of an Equitable Decision Procedure* in Readings in Philosophy of Law 118 (1984), emphasis added)

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

² Rule 221(a) states in pertinent part:

"Petitions for rehearing must be actually received by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court. A petition for rehearing shall be in accordance with Rule 240, and shall state with particularity the points supposed to have been overlooked or misapprehended by the court." (Emphasis added)

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

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

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

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

II.

STANDARD FOR GRANT OF REHEARING

It is well settled that a rehearing is warranted when the Court has overlooked or misapprehended an argument. (See *Kennedy v. S.C. Retirement System*, 349 S.C. 531,

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

564, S.E. 2d 322 (2001), emphasis added.) Also, if the Court fails to address some of the arguments raised in the appeal, “a *prima facie* case for rehearing has been made.” (*Covar v. Sallat*, 22 S.C. 265, 272 (1885), emphasis added.) As set forth herein, rehearing must be granted on this principal alone.

The principles behind the concept of rehearing were discussed in the broad constitutional context in the United States Supreme Court decision, *Flynn v. United States*, 348 U.S. 956, 99 L.Ed. 1298, 1299 (1955), which provides:

“ The right to [a petition for rehearing] is not
to be deemed an empty formality...”

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

III. ARGUMENT

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

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

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

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

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

1. Summary

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

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

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

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

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

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

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

- d) The imposition of an injunction on funds held in California without following any formalities, when the assets were under the jurisdiction of the Circuit Court, and when none of the standards for "Emergent need" under S.C. Code Ann. § 62-7-704(e) were met created a Due Process and Equal Protection Violation;
- e) Further, this Court's consideration of Appellant Lisa Fisher's right to compensation led to the correct result of "remand" to preclude a takings by the Court, however the directions and factual assertions set forth by this Court give credibility to false accusations considering the valuation of Alice Shaw Baker's estate and any depletion of the estate. Moreover, the Court has remanded the issue to the probate court, however any order related to the approval of fees must be considered in the estate case (which was removed to the Circuit Court). These issues implicate Equal Protection, Due Process, and the Takings Clause.

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

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

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

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

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

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

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

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

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

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

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

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

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

At the same time this Court misapprehends the concepts related to oral argument, it also fails to consider the statutory scheme which provides for a continuing duty of a fiduciary/conservator to hold property until it can be delivered to the proper person under both statutory and trust law. Appellants cited in their brief the complex duty associated with the conservator and duty as a trustee. The Court contended that the circuit court heard the arguments at the hearing. However, "Fisher's arguments" could not have been

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

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

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

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

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

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

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

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

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

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

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

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

//

//

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

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

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

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

⁶ Equal Protection requires "all persons to be treated alike under like circumstances and conditions, both in privileges conferred and liabilities imposed. (See *GTE Sprint Comm'n's Corp v. Pub. Serv. Comm'n of South Carolina*, 288 S.C. 174, 181, 341 S.E.D. 2d 126, 129 (1986) U.S. Const. Amend. XIV, § 1, S.C. Const. Art. I, § 3.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A Rehearing on these issues must be granted.

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

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

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

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

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

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

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

//

//

//

//

//

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

1. *Huckabee Standing*

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

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

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

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

For these reasons, a rehearing is necessary.

2. ***Rule 11***

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

The refusal by Respondent to honor this rule mandates rehearing.

//

//

//

⁹ "A judge's impartiality might reasonably be questioned when his [or her] factual findings are not supported by the record." (*Simpson v. Simpson*, 377 S.C. 519, 660 S.E.2d 274, (S.C.App. 02/08/2008).)

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

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

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

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

//

//

//

//

//

//

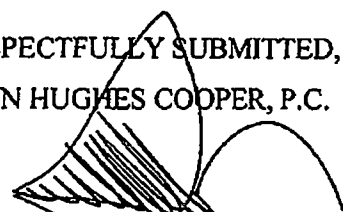
//

//

CONCLUSION

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

RESPECTFULLY SUBMITTED,
JOHN HUGHES COOPER, P.C.

By: 
JOHN HUGHES COOPER, ESQUIRE
Federal Court ID 298
South Carolina Bar 1387
State Bar of Georgia 185986
1476 Ben Sawyer Blvd. Ste. 11
Mount Pleasant, SC 29464
shiplaw@jhcooper.com
843-883-9099; fax 843-883-9335

and

LISA FISHER, ESQUIRE
c/o 1476 Ben Sawyer Blvd. Ste. 11
Mount Pleasant, SC 29464
shiplaw@jhcooper.com
843-883-9099; fax 843-883-9335

ATTORNEYS FOR APPELLANTS

January 3, 2017

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

RECEIVED

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Honorable J.C. Nicholson, Jr., Circuit Court Judge
JAN 13 2017
SC Court of Appeals

Appellate Case No. 2014-002020
Ct. Court Case No. 2011-CP-10-7819

Betty Fisher,

Appellant

v.

Bessie Huckabee,

Respondent (2)

Lisa Fisher,

Appellant

v.

Bessie Huckabee,

Respondent (3)

RESPONDENT'S RETURN TO APPELLANTS'
PETITION FOR REHEARING

Peter A. Kouten
PO Box 340
Johns Island, SC 29457
(843) 789-9614

Table of Contents

Table of Contents	2
Cases and Statutes.....	3
Argument.....	5
Conclusion.....	6

Cases

Holcombe v. Hardee, 304 S.C. 522, 524, 405 S.E.2d 821, 822 (1991).....	4
Jean H. Toal, Shahin Vafai & Robert Muckenfuss, Appellate Practice in South Carolina 309 (1999) (citing Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234 (1933)).....	5

Statutes, Rules and Reference

Rule 221(a), SCACR	4
S.C. Code Ann. § 62-7-704(e) (Supp. 2015)	4
S.C. Code Ann. § 62-5-402(1) (Supp. 2015)	4
S.C. Code Ann. § 62-1-302(a) (Supp. 2015).....	4

ARGUMENT

In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument. Rule 221(a), SCACR. The Appellants further argue that rehearing is proper in the event the Court fails to address certain arguments.

Appellants attack the Court's ruling that the probate court has the full authority to appoint a special fiduciary. This Court addressed every argument presented by Appellants to include the probate court's findings, jurisdiction, laches, and notice requirements. The Court recognized that there was adequate support in the record to allow this Court to make its own findings of fact. *Holcombe v. Hardee*, 304 S.C. 522, 524, 405 S.E.2d 821, 822 (1991) The Court recognized that there is overwhelming statutory authority for the probate court to protect estates, appoint fiduciaries and issue protective orders. See S.C. Code Ann. § 62-7-704(e) (Supp. 2015), S.C. Code Ann. § 62-5-402(1) (Supp. 2015), S.C. Code Ann. § 62-1-302(a) (Supp. 2015). The probate court had the authority to appoint a special fiduciary and this Court addressed all arguments of the Appellants.

Appellants attack the Court's ruling regarding failure to permit oral argument. In the probate proceeding, the Appellants were represented by their attorney. The probate court sought argument through counsel. On appeal, the Appellants provided a brief to the lower court and again were represented by counsel. As stated in the Order from which Appellants seek rehearing, "the circuit court heard the Fisher's arguments at the hearing." Further, the Appellant's memorandum was made part of the record. This Court found the Appellants were permitted to fully argue their case.

Appellants argue that there was no evidence presented by the Respondent regarding unauthorized depletion of the conservatorship account. The evidence appeared in the probate court file for Alice Shaw-Baker wherein a. Lisa Fisher was discharged as conservator having no authority to act as anything other than a safe-keeper of the funds, and b. Lisa Fisher provided accountings to the probate court which indicate that she was acting without authority in spending conservatorship funds. These facts were not overlooked or misapprehended. They were fully addressed by this Court.

The Appellants argue that the probate court is the improper court for remand. The issue on remand is properly remanded to the probate court based on the fact that the conservatorship is currently "open" although the subject of the conservatorship, Alice Shaw-Baker, has died. Issues regarding compensation in this matter is rightfully an issue of the conservatorship. In the event the probate court finds that compensation is appropriate, the claimant would then proceed with seeking payment of claim through the estate. The Appellant should not be granted rehearing on the remand issue.

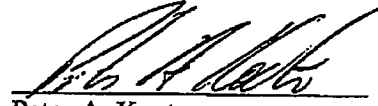
"The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." Jean H. Toal, Shahin Vafai & Robert Muckenfuss, Appellate Practice in South Carolina 309 (1999) (citing *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933)).

Based on the arguments presented, the Court should DENY Appellant's Petition for Rehearing.

CONCLUSION

For the reasons stated, this Court should uphold its ruling and DENY Appellant's Petition for Rehearing.

Respectfully submitted,



Peter A. Kouten
P.O. Box 340
Charleston, SC 29457
(843) 670-3919

January 11th 2017

RECEIVED

JAN 24 2017

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Appellate Case No. 2014-002020

Circuit Case No. 2011-CP-10-7819

BETTY FISHER and LISA FISHER.....Appellants

v.

BESSIE HUCKABEE.....Respondent

APPELLANTS' REPLY TO RESPONDENT'S RETURN
TO APPELLANTS' PETITION FOR REHEARING

COME NOW Betty Fisher and Lisa Fisher, Appellants in the above captioned appeal, and, reply to Respondent's Return to Appellants' Petition for Rehearing.

Appellants have received Respondent's Return, reviewed the superficial and unsupported arguments therein, and find Respondent's arguments without merit.

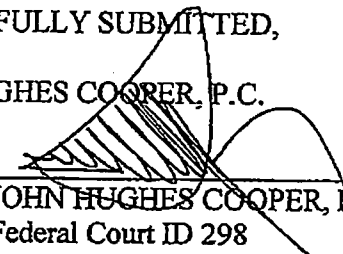
Appellants' position is fully set forth in Appellants' Petition for Rehearing Regarding Opinion No. 2016-UP-528 Filed December 21, 2016. In the interests of brevity and judicial economy, Appellants direct the Court to Appellants' Petition, and adopt by reference the positions set forth therein.

WHEREFORE, Appellants pray that this Honorable Court grant their Petition for Rehearing.

January 21, 2017

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By: 

JOHN HUGHES COOPER, ESQUIRE

Federal Court ID 298

South Carolina Bar 1387

State Bar of Georgia 185986

1476 Ben Sawyer Blvd. Ste. 11

Mount Pleasant, SC 29464

shiplaw@jhcooper.com

843-883-9099; fax 843-883-9335

ATTORNEYS FOR APPELLANT

The South Carolina Court of Appeals

Betty Fisher, Appellant,

v.

Bessie Huckabee, Respondent.

Lisa Fisher, Appellant,

v.

Bessie Huckabee, Respondent

Appellate Case Nos. 2014-002020; 2014-002028; 2014-002034

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas E. Huff J.

Paul G. Short, Jr. J.

James E. Moore A.J.

Columbia, South Carolina

cc:

John Hughes Cooper, Esquire

Peter A. Kouten, Esquire

Lisa Fisher, Esquire

FILED

February 24, 2017