

6

80389

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

The Honorable Edgar W. Dickson

Appellate Case No. 2017-000095  
Lower Case No. 2016-CP-18-1849

**RECEIVED**  
APR 09 2018  
SC Court of Appeals

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

Richard S. Henson and Vann Kenneth Henson ..... Respondents,

v.

Albert T. Henson, Jr., and Julian Reid Henson, Respondents in the Court below,

Of Whom Albert T. Henson is the ..... Appellant.

MOTION FOR DETERMINATION TO LIFT STAY

Trudy H. Robertson  
Paul M. Lynch  
E. Brandon Gaskins  
MOORE & VAN ALLEN PLLC  
78 Wentworth Street  
Charleston, SC 29401  
(843) 579-7000

Attorneys for Respondents

## **INTRODUCTION**

Pursuant to S.C. Code Ann. § 62-1-308 and Rule 241, SCACR, Respondents Richard S. Henson and Vann K. Henson submit this Motion for Determination that Further Proceedings Are Not Affected by the Appeal, and in the alternative, Verified Motion to Lift Stay, if any, resulting from the Notice of Appeal of the Court's Order Appointing Special Fiduciary as Interim Trustee, which was filed by Respondent Albert T. Henson, Jr.

## **PROCEDURAL HISTORY**

This appeal arises from Respondents' action filed in Dorchester County Probate Court to appoint a successor trustee to the Trust EIP Created under the Last Will and Testament of Eunice I. Page, dated October 14, 1992 (the "Trust"). In the action, Respondents claim that the trusteeship of the Trust is vacant and they seek appointment of a successor trustee to administer the Trust. (Am. Pet., pp. 2-4.) In addition, Respondents assert that the Trust owns certain real property located at 605 North Main Street, Summerville, South Carolina (the "Subject Property"). Appellant denies that the Subject Property is an asset of the Trust and instead claims that the Subject Property was conveyed to him. (App.'s Answer, Counterclaim and Crossclaim, ¶¶ 54-57.)

On August 31, 2016, Dorchester County Associate Probate Judge Molly D. Edwards issued an Order Appointing Special Fiduciary as Interim Trustee (the "Order"), in which she appointed Ashley Andrews, Esq., as a special fiduciary to serve as interim trustee of the Trust pursuant to S.C. Code Ann. § 62-7-704. (Order Appointing Special Fiduciary.) In the Order, the Probate Court found that the former trustee of the Trust executed a promissory note, on behalf of the Trust, to borrow One Hundred Thousand Dollars (\$100,000) and that such note is secured by a mortgage on the Subject Property, which was to be satisfied on or before December 3, 2016. (Order p. 2.)

The note required the Trust to transfer the lender title to the Subject Property in lieu of foreclosure if it was not satisfied on or before December 3, 2016. (*Id.*)

The Probate Court found that “the outstanding mortgage Trust EIP has taken out, with 605 N. Main Street as collateral, poses a major risk to the ownership of this property. If this mortgage is not paid off or the due date extended prior to December 3, 2016, then all parties stand to lose.” (*Id.* at p. 8.) The Probate Court further concluded that the appointment of the interim trustee was “necessary to preserve 605 N. Main Street for all parties and to negotiate the extension of the current loan or other appropriate action to pay the mortgage in her sole discretion.” (*Id.*)

Based on these findings, the Probate Court appointed Ms. Andrews as interim trustee and authorized her to take the following actions: (1) negotiating with the lender and/or the parties to extend the due date of the current mortgage in order for litigation to be finalized or have the mortgage paid off prior to December 3, 2016; (2) determining if any other assets are titled to the Trust; (3) recovering all records Appellant may possess regarding the alleged transfer of the Subject Property from Ms. Page to Appellant; (4) collecting copies of all agreements Appellant, Ms. Page, or Ann Page Pittillo may have entered into with another party to lease the Subject Property; and (5) ensuring all actions taken by her are done in the interest of maintaining the status quo pending a final hearing on the merits in this case. (*Id.* at p. 10.)

On September 16, 2016, Appellant, pursuant to S.C. Code Ann. § 62-1-308, filed a Notice of Intent to Appeal the Order with the Dorchester County Court of Common Pleas. (Not. Intent Appeal, Sept. 9, 2016.) Respondents filed a Motion to Dismiss Appeal on October 26, 2016. (Mot. Dismiss Appeal, Oct. 26, 2016.) A hearing was held before the Honorable Edgar W. Dickson on November 21, 2016, and Judge Dickson entered an Order granting Respondents’ Motion to Dismiss on December 12, 2016. (Hearing Tr., Nov. 21, 2016; Order Dismiss Appeal, Dec. 12,

2016.) In dismissing Appellant's appeal, Judge Dickson ruled that the Order "is not appealable under S.C. Code Ann. § 62-1-308 because it provides only temporary relief and is not a final order." (*Id.* at p. 6.)

On December 3, 2016, Ms. Andrews negotiated an extension and modification of the note and mortgage relating to the Trust and the Subject Property. The terms of the modification of the note and mortgage extended the maturity date of the note and mortgage to December 3, 2017 and increased the principal amount of the loan to \$190,000.00. (Note Modification.)

On January 12, 2017, Appellant served his Notice of Appeal to this Court, thereby providing notice of this appeal. (Not. Appeal, Jan. 12, 2017.) The parties have fully briefed the issue on appeal, and the appeal is currently pending. The only issue on appeal is whether the Order is a final order subject to immediate appeal.

While the appeal was pending the Probate Court held a status conference on July 11, 2017. During that status conference the Probate Court learned of Appellant's appeal, and the Probate Court thereafter informed the parties that it would not move forward with a final hearing while this appeal was still pending. (Order Denying Mot. Determination Further Proceedings Not Affected by Appeal p. 3.) With the maturity date of December 3, 2017 for the modified note and mortgage looming, Respondents filed on September 19, 2017 a Motion for Determination that Further Proceedings are not Affected by the Appeal and, in the alternative, Verified Motion to Lift Stay (the "Motion").

Following the filing of the Motion, the Probate Court issued a consent order on October 31, 2017 that would permit Appellant and Respondents to attempt to reach a mutual agreement by November 1, 2017 to prevent the default from occurring under the modified note and mortgage. (Consent Order ¶ 5(a)-(b).) The consent order further provided that if the parties could not reach

an agreement by November 1, Ms. Andrews was authorized to extend the modified note and mortgage to avoid default. (*Id.* under ¶ 5(d).)

On November 15, 2017, the Probate Court denied Respondent's Motion. According to the Probate Court, a final merits hearing regarding the appointment of successor trustee and the rightful owner of the Subject Property was stayed because those proceedings were "in pursuance of the order" appointing Ms. Andrews as interim trustee. The Probate Court further denied Respondents' alternative motion to lift the stay because the consent order established a process to preserve the Subject Property and prevent the contested issue from becoming moot pending the appeal.

The parties were unable to reach an agreement regarding the note and mortgage by November 1, 2017, and pursuant to the consent order Ms. Andrews was forced to seek another extension from the lenders. Ultimately, Ms. Andrews negotiated and secured an extension of the modified note and mortgage to December 3, 2018. Under this second modification, the principal amount of the note and mortgage increased to \$247,000.00, with interest accruing at an annual rate of 30%.

### **LEGAL ARGUMENT**

#### **I. Appellant's appeal of the appointment of an interim trustee does not stay further proceedings on the merits.**

S.C. Code Ann. § 62-1-308(c) provides that "[w]hen 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." (Emphasis added.) "Section 62-1-308(c) 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.” *Ulmer v. Ulmer*, 369 S.C. 486, 492, 632 S.E.2d 858 (2006).

In this case, Appellant’s appeal of the Order appointing an interim trustee does not stay all matters involved in this action or the final resolution of this case on the merits. Rather, § 62-1-308 only stays those proceedings in pursuance of the Order. Because the Order provides only temporary relief and expressly declines to address the underlying merits of the claims and issues involved in this action, the Probate Court retains jurisdiction to determine dispositive motions and conduct a final hearing on the merits.

In denying the Motion, the Probate Court concluded Appellant’s appeal challenges whether the Probate Court “had the right to appoint someone else to control and indebt the Subject Property,” and thus, involves the underlying question to be decided at a final hearing about who owns the Subject Property. Based on this conclusion, the Probate Court ruled that a final hearing on the merits was “in pursuance” of the temporary appointment of an interim trustee.

The Probate Court erred by misconstruing the phrase “in pursuance of the order” as it is used in § 62-1-308. A final hearing on the merits is the ultimate proceeding in this case to determine the validity of the claims involved. It is not in pursuance of the Order, which provides merely temporary relief intended merely to preserve the Subject Property for final disposition. The fact that Appellant challenges the Order on the same grounds he relies on to defend the claims in this case does not alter this conclusion. While it can be said that the Order is in pursuance of the final hearing, it cannot be said that a final hearing is a proceeding in pursuance of an interim order appointing an interim trustee that has limited and temporary powers. This is especially true here, where the Probate Court’s appealed Order was specifically drafted to avoid determining the issues to be decided in a final hearing. Therefore, a final hearing of the case is not in pursuance of the

appealed Order, and the Probate Court has jurisdiction to consider dispositive motions and conduct a final hearing.

**II. To the extent that final resolution of the case is stayed by the appeal, the Court should lift the stay to prevent the loss of the Subject Property, which would render the action moot.**

The South Carolina Appellate Court Rules govern appeals under § 62-1-308. *See In re Howard*, 315 S.C. 356, 360, 434 S.E.2d 254 (1993). Under the South Carolina Appellate Court Rules, the procedure for lifting a stay arising from an appeal is provided in Rule 241, SCACR. *See also, In re Estate of Connor*, Unpublished Opinion No. 2009-UP-502, 2009 S.C. App. Unpub. LEXIS 524 (S.C. Ct. App. Oct. 29, 2009) (ruling that stay from an appeal under § 62-1-308 can be lifted pursuant to Rule 241, SCACR). Pursuant to Rule 241(c)(2), the Court, in determining whether to lift a stay arising from an appeal, “should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.”

In this case, any potential stay should be lifted to prevent the primary contested issue from becoming moot through default of the note and mortgage. The primary contested issue in this case is whether the Subject Property is owned by the Trust or Respondent. To ensure that this contested issue was not rendered moot and that the Subject Property was not forfeited to the lenders because of Trust’s default under the promissory note and mortgage discussed above, the Probate Court issued the Order appointing Ms. Andrews as the interim trustee for the limited purpose of negotiating an extension or satisfaction of the note. Ms. Andrews was able to obtain an extension until December 3, 2017. Subsequent to the consent order, she obtained a second extension until December 3, 2018.

As of the filing of this Motion, the parties have not been able to reach a final resolution to satisfy the note and mortgage or otherwise preserve the Subject Property from forfeiture

thereunder. Although Ms. Andrews obtained a second extension of the note and mortgage, she has no authority to preserve the property in the future. Moreover, the parties' prior experience suggests that no final resolution to satisfy the note and mortgage can be achieved absent a final hearing on the merits. Thus, there is substantial risk that the Subject Property may be lost if a final hearing is not had prior to the December 3, 2018 deadline.


To the extent that the prospect of Ms. Andrews securing another extension could be perceived as a possible remedy that would prevent the underlying case from becoming moot, continual extensions are not a final solution to the problem posed by the note and mortgage. Based on her limited authority, Ms. Andrews has little bargaining power and options. Therefore, she has been forced to accept predatory interest rates from the lenders in consideration for their extension of the note and mortgage. The principal balance over the life of the loan has increased from \$100,000 to \$247,000, and it is currently subject to a 30% annual interest rate. The continuously increasing debt on the property is reducing the net value of the property, and eventually it will become economically impractical to continue extending the note under unfavorable terms. Thus, it is becoming increasingly likely that the Subject Property will be forfeited if final resolution of its ownership is not decided before the note's maturity date.

In sum, if the Subject Property is transferred to the lenders as a result of default under the note and mortgage, then this action and its underlying contested issues will be rendered moot because the Subject Property is the only asset of the Trust. To avoid this result, it is imperative for the Court to lift any stay which could arguably deprive the Probate Court of jurisdiction over the final resolution of this matter.

## CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court declare that the pending appeal does not stay the final resolution of this case pursuant to dispositive motions or a final hearing. In the alternative, Respondents request that the Court lift any stay which would deprive the Probate Court of jurisdiction over the final disposition of this case.

Respectfully submitted,

  
Trudy H. Robertson (S.C. Bar No. 64856)  
Paul M. Lynch (S.C. Bar No. 12833)  
E. Brandon Gaskins (S.C. Bar No. 73274)  
MOORE & VAN ALLEN PLLC  
78 Wentworth Street  
Charleston, SC 29401  
(843) 579-7000  
trudyrobertson@mvalaw.com  
paullynch@mvalaw.com  
brandongaskins@mvalaw.com

Attorneys for Respondents

April 5, 2018

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

The Honorable Edgar W. Dickson

Appellate Case No. 2017-000095  
Lower Case No. 2016-CP-18-1849

**RECEIVED**  
APR 09 2018  
SC Court of Appeals

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

Richard S. Henson and Vann Kenneth Henson ..... Respondents,

v.

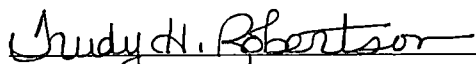
Albert T. Henson, Jr., and Julian Reid Henson, Respondents in the Court below,

Of Whom Albert T. Henson is the ..... Appellant.

PROOF OF SERVICE OF MOTION FOR DETERMINATION TO LIFT STAY

This is to certify that I have this day served counsel for the Appellant in the foregoing matter with a copy of the foregoing *Motion for Determination to Lift Stay* by depositing same in the United States Mail with adequate postage affixed thereon to ensure delivery, addressed as follows:

Daniel F. Blanchard, III, Esquire  
Rosen, Rosen & Hagood, LLC  
151 Meeting Street, Suite 400  
Post Office Box 893  
Charleston, SC 29402



Trudy H. Robertson (S.C. Bar No. 64856)

Paul M. Lynch (S.C. Bar No. 12833)

E. Brandon Gaskins (S.C. Bar No. 73274)

MOORE & VAN ALLEN PLLC

78 Wentworth Street

Charleston, SC 29401

(843) 579-7000

E-mail: [trudyrobertson@mvalaw.com](mailto:trudyrobertson@mvalaw.com)

[paullynch@mvalaw.com](mailto:paullynch@mvalaw.com)

[brandongaskins@mvalaw.com](mailto:brandongaskins@mvalaw.com)

*Attorneys for Respondents*

April 5, 2018

Charleston, South Carolina

**Moore&VanAllen**

April 5, 2018

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

**RECEIVED**  
APR 09 2018  
SC Court of Appeals

Trudy Hartzog Robertson  
Attorney at Law

T 843 579 7061  
F 843 579 8722  
trudyrobertson@mvalaw.com

Moore & Van Allen PLLC

78 Wentworth St.  
Charleston, SC 29401-1428

Mailing Address:  
Post Office Box 22828  
Charleston, SC 29413-2828

**Re: Richard S. Henson and Vann Kenneth Henson v. Albert T. Henson, Jr., and Julian Reid Henson**  
**Appellate Case No. 2017-000095**  
**Case No.: 2016-CP-18-1849**  
**Our File No.: 036899.000004**

Dear Ms. Kitchings:

Please find enclosed for filing an original and seven (7) copies of **Respondents' Motion for Determination to Lift Stay**, together with an original and one copy of the **Proof of Service** in the above referenced case. I have also enclosed a check in the amount of \$25.00 for the requisite filing fee.

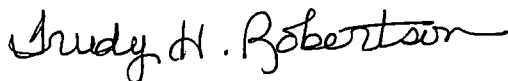
Please file the originals and return a date-stamped copy of the Motion and Proof of Service to me in the enclosed self-addressed stamped envelope provided.

By copy of this letter, I am serving all counsel of record with a copy of same.

Thank you for your assistance in this matter.

Sincerely,

Moore & Van Allen PLLC



Trudy H. Robertson

THR/ws

Enclosures: as stated

cc: Daniel F. Blanchard, III, Esquire

Charlotte, NC  
Research Triangle Park, NC  
Charleston, SC

NEOPOST

PRIORITY MAIL

04/05/2018

US POSTAGE \$006.70<sup>0</sup>



ZIP 29401  
041M11288443



**Moore & Van Allen**

Moore & Van Allen PLLC

78 Wentworth Street  
Post Office Box 22828  
Charleston, SC 29413-2828

**RECEIVED**

APR 09 2018

SC Court of Appeals

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

8669/36899.04