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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

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

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, JR. is the Appellant.

REPLY BRIEF OF APPELLANT

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I. THE CIRCUIT COURT'S ORDER DISMISSING APPELLANT'S APPEAL OF THE PROBATE COURT'S ORDER APPOINTING A SPECIAL FIDUCIARY AS INTERIM TRUSTEE IS IMMEDIATELY APPEALABLE.

A. S.C. CODE ANN. § 14–3–330 Applies to Appeals from Probate Court Orders.

Respondents argue for the first time in this Court that the provisions of S.C. CODE ANN. § 14-3-330 have no application to appeals from Probate Court orders.[1] According to Respondents, appeals from the Probate Court to the Circuit Court are governed exclusively by S.C. CODE ANN. § 62-1-308, not by § 14-3-330. State law contradicts Respondents' arguments.

Section 62-1-308 provides that "[a] person interested in a final order, sentence, or decree of a probate court may appeal to the circuit court in the same county . . . ." Id. § 62-1-308(a). This section further states that "[t]he circuit court, court of appeals, or Supreme Court shall hear and determine the appeal according to the rules of law." Id. § 62-1-308(i). In numerous decisions, our appellate courts have held that "[a]s used in this statute, the phrase 'according to the rules of law' means according to the rules governing appeals." Univ. of S. California v. Moran, 365 S.C. 270, 274, 617 S.E.2d 135, 137 (Ct. App. 2005) (citation omitted); Matter of Howard, 315 S.C. 356, 434 S.E.2d 254, 257 (1993). Accordingly, "a circuit court hearing an appeal from the probate court must apply

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[1] Respondents never raised these arguments to the Circuit Court and the Circuit Court never ruled on them. As our state supreme court observed in I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000), "[w]hile the current rules do not require the respondent to present an issue to the lower court in order to raise it as an additional sustaining ground, an appellate court is less likely to rely on such a ground when the respondent has failed to present it to the lower court." 526 S.E.2d at 724. "In such cases, the appellate court likely would perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal." Id. "Stated another way, the respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it." Id.; see also Semken v. Semken, 379 S.C. 71, 664 S.E.2d 493, 497-98 (Ct. App. 2008) (same).

the same rules of law as an appellate court would apply on appeal." In re Estate of Pallister, 363 S.C. 437, 447, 611 S.E.2d 250, 256 (2005); see also Howard, 315 S.C. at 361, 434 S.E.2d at 257 (the circuit court "must apply the same standard that [the South Carolina Supreme Court] or the Court of Appeals would apply were the appeal taken directly to either of them.").

In this case, the Circuit Court was required to the same rules of law that an appellate court (*i.e.*, this Court) would apply on appeal. The "rules of law" that our appellate courts must apply to determine whether a particular order is appealable include the provisions of § 14-3-330. The types of orders that are appealable under § 14-3-330 include, *inter alia*, "[a] final order affecting a substantial right made in any special proceeding" and "[a]n interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction . . . ." S.C. CODE ANN. § 14-3-330(3)-(4). For the reasons discussed in Appellant's initial brief and herein, the Probate Court's order is appealable under both of these sections.

"[I]n addition to applying in appeals from circuit courts, section 14-3-330 also applies to other trial courts." JEAN H. TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 141 (3rd ed. 2016). "For example, it applies to family court orders and judgments." Id. (citations omitted). Our appellate courts have also applied § 14-3-330 to appeals involving Probate Court orders. See, e.g., Ex parte McFarlin, 2007 WL 8326605, at *2 (S.C. Ct. App. Feb. 12, 2007); Dorn v. Cohen, 418 S.C. 126, 791 S.E.2d 313 (Ct. App. 2016). In McFarlin, an appeal was taken from the Probate Court's order freezing certain accounts "until a court may conduct a full hearing on the merits." 2007 WL 8326605, at *2. Because the order freezing the accounts was in the nature of an injunction, the Court held that the Probate Court's order was immediately appealable under § 14-3-330(4). Id. In Dorn, this Court applied § 14-3-330 to an appeal from a Probate Court's order which had the effect of

granting a trust beneficiary's motion to intervene in an action seeking to remove the trustees of the trust created for her benefit. The Court applied § 14-3-330 to determine whether the Probate Court's order was appealable, although the Court held the order was not appealable in that particular case.

Respondents' new claim that § 14-3-330 is inapplicable to this appeal lacks merit.

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

Respondents now argue for the first time in this Court that a proceeding in the Probate Court seeking the appointment of a special fiduciary is not a "special proceeding."[2] Our state law divides the remedies in the courts of justice into (1) "actions" and (2) "special proceedings." Actions are distinguished from special proceedings according to the remedy sought. The two terms are used in contradistinction to each other. An "action" is an "ordinary proceeding in a Court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence." Allen v. Partlow, 3 S.C. 417, 418, 1872 WL 5562, *1-2 (1872). In contrast, a "special proceeding" is any other remedy—"such proceedings being in their nature independent remedies, that cannot be taken by an action." Id.; see also Gibbes v. Elliott, 8 S.C. 50, 62, 1876 WL 6768, *8 (1876) (noting that "special proceedings" are defined "as being every remedy other than the ordinary proceeding in a Court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense").

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[2] Respondents never raised this argument to the Circuit Court and the Circuit Court never ruled on it. It was first presented to this Court, thus this Court "is likely to ignore it." I'On, L.L.C., 526 S.E.2d at 724.

As thoroughly briefed in Appellant's initial brief, our state law involving the distinction between "actions" and "special proceedings" is consistent with the law in a substantial majority of our sister states. See App. Initial Brief pp. 12-16 (citing cases); Agricultural Labor Bd. v. Superior Court, 196 Cal. Rptr. 920, 923 (Cal. Ct. App. 1983); Phil Mechanic Const. Co., Inc. v. Haywood, 325 S.E.2d 1, 2 (N.C. Ct. App. 1985); Morton v. Beery, 1933 WL 2222, *3 (Ohio Ct. App. 1933); State ex rel. Reid v. District Court of Fifth Judicial Dist. in and for Madison County, 256 P.2d 546, 549 (Mont. 1953); West Branch Pants Co. v. Gordon, 200 N.W. 908, 909 (N.D. 1924); Williams v. Baird, 735 N.W.2d 383, 389 (Neb. 2007); In re GlaxoSmithKline PLC, 699 N.W.2d 749, 756 (Minn. 2005). Those courts hold that proceedings in the Probate Court are examples of a "special proceeding." See Matter of Estate of O'Neill, 519 N.W.2d 750, 752 (Wis. Ct. App. 1994); Reid, 256 P.2d at 549; Williams, 735 N.W.2d at 389; In re Guardianship of Forster, 856 N.W.2d 134, 146 (Neb. Ct. App. 2014); Wead v. Lutz, 831 N.E.2d 482, 485 (Ohio Ct. App. 2005); 4 AM. JUR. 2D Appellate Review § 116 (2016) (citing cases).

Respondents do not attempt to discredit or otherwise specifically respond to any of these cases, but instead argue in conclusory fashion that those cases all involve "the probate of wills and decedents' estates" and that a Probate Court proceeding to appoint a special fiduciary for a trust is somehow different. However, the case law specifically reject Respondent's current claim that a Probate Court matter is not a "special proceeding" simply because it involves a trust rather than an estate. See, e.g., Schwartz v. Tedrick, 61 N.E.3d 797, 801 (Ohio Ct. App. 2016) (In holding that an order which removed a trustee but did not address all claims in the complaint affected a substantial right and was made in a special proceeding, and thus was a final, appealable order, the Court specifically noted the fact "this case involves the probate court's decision regarding the trustee of a

trust, rather than an executor of a will, is a distinction without a difference."); In re Trust of Rosenberg, 693 N.W.2d 500, 504 (Neb. 2005) (proceeding in county Probate Court to remove a trustee was a "special proceeding"); In re Rosenfeldt's Will, 238 N.W. 687 (Minn. 1931) (Order accepting resignation of trustee of testamentary trust and settling his account held appealable as "final order affecting substantial rights in special proceeding"); Miller v. Superior Court, 356 P.2d 699, 700 (Ariz. 1960) (order removing trustee affected a substantial right and was made in a special proceeding and, therefore, was appealable).

Respondents also make the new claim for the first time in this Court that S.C. CODE ANN. § 62-3-107 is inapplicable to the instant appeal because this proceeding supposedly involves only a trust under Article 7 of the Probate Code and not the administration of an estate under Article 3.[3] Under § 62-3-107, "each proceeding before the [Probate Court] is independent of any other proceeding involving the same estate." S.C. CODE ANN. § 62-3-107. As discussed in Appellant's initial brief, this section is derived from Section 3-107 of the Uniform Probate Code (UPC). Case law applying UPC § 3–107 hold that "as a practical matter each petition in a probate file should ordinarily be considered as initiating an independent proceeding, so that an order disposing of the matters raised in the petition should be considered a final, appealable order." Matter of Estate of Newalla, 837 P.2d 1373, 1377 (N.M. 1992); In re Estate of Sanders, 750 N.W.2d 806, 813 (Wis. 2008); Estate of Marsh, 2016 WL 6581173, at *5 (Cal. Ct. App. Nov. 7, 2016). "Because each proceeding [before the Probate Court] is independent, there needs to be finality, for purposes of appealability, only for the proceeding being appealed." In re Estate of Ketterling, 885 N.W.2d 85, 87

[3] Again, Respondents never raised this argument to the Circuit Court and the Circuit Court never ruled on it, thus this Court "is likely to ignore it." I'On, L.L.C., 526 S.E.2d at 724.

(N.D. 2016). All that is required for a probate order to be appealable is that "[t]he order must finally dispose or be conclusive of the issue or controverted question for which the particular part of the proceeding was brought." Wittner v. Scanlan, 959 S.W.2d 640, 641 (Tex. Ct. App. 1995). Because the Probate Court's order in this case fully and finally adjudicates the parties' rights involving Respondents' request for the appointment of a special fiduciary, the order is "final" because no further action is required in the Probate Court to determine the parties' rights with respect to that discrete issue and the order is appealable under §§ 14-3-330(3) and 62-3-107.

Respondents now argue that § 62-3-107 is inapplicable based on their contention that "Article 3 of the Probate Code does not govern actions [for the appointment of a special fiduciary] under the Trust Code." See Resp. Brief. p. 9.[4] Respondents' argument is misguided for several reasons. First, Respondents ignore the fact that they prosecuted their petition seeking the appointment of a special fiduciary *in the existing case involving the administration of the Estate of Eunice I. Page*, Case No. 1994-ES-18-00147. Mrs. Page's estate was opened in the Probate Court in 1994 following her death on October 6, 1993. The trust in question is a testamentary trust created by virtue of her Last Will and Testament. In Respondents' "Amended Petition to Appoint Successor Trustee and for

[4] The validity of this assertion is doubtful. When the South Carolina legislature amended the Probate Code effective on January 1, 2014, the official Editor's Note accompanying the amendments to Article 3 explain that "(1) this act applies to any estates of decedents dying thereafter and to all trusts created before, on, or after its effective date; (2) the act applies to all judicial proceedings concerning estates of decedents and trusts commenced on or after its effective date; [and] (3) this act applies to judicial proceedings concerning estates of decedents and trusts commenced before its effective date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of this act does not apply and the superseded law applies." See S.C. CODE ANN. § 62-3-101 (2016 Supp.) (Editor's Note accompanying 2013 Act No. 100, § 4).

Subsequent Estate Administration" filed with the Probate Court on May 4, 2015, Respondents combined and joined in one pleading their request for the appointment of a successor trustee for the testamentary trust along with their requests to be appointed as personal representatives for Mrs. Page's estate and to allow for the subsequent administration of her estate so that the Respondents can transfer certain property from her estate to the trust. (R. pp. 51-52). Respondents' Amended Petition specifically requests "a subsequent administration [of Mrs. Page's estate], pursuant to S.C. CODE ANN. § 62-3-1008" and also seeks various relief under S.C. CODE ANN. § 62-3-203 (priority among persons seeking appointment as personal representative) and § 62-3-613 (successor personal representative). (R. p. 51). It strains credulity for Respondents to now claim in this Court that the proceedings in the Probate Court do not involve the administration of an estate under Article 3 when their pleading in the Probate Court states otherwise.

On October 12, 2015, before any action was taken on Respondents' Amended Petition, Respondents then filed a "Motion for Appointment of Special Fiduciary as Interim Trustee" under § 62-7-704(e) in the existing estate action pending in the Probate Court. (R. pp. 101-04). Respondents' own pleadings show they prosecuted their motion for the appointment of a special fiduciary for the trust in the existing case involving the administration of Mrs. Page's estate. In that case, Respondents have requested relief under Articles 3 and 7 of the Probate Code. Despite Respondents' new argument in this Court, their action in the Probate Court does involve a proceeding to administer Mrs. Page's estate, which is governed by Article 3 of the Probate Code. The fact that Respondents combined separate requests for relief under Articles 3 and 7 of the Probate Code into one petition does not render § 62-3-107 inapplicable.

Second, the statutory provision that Respondents cite to support their request for the

appointment of a special fiduciary expressly incorporates the procedures set forth in Article 3 of the Probate Code. Section 62-7-704(e) provides:

> (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.

S.C. CODE ANN. § 62-7-704(e) (emphasis added). The procedure for appointment of a special fiduciary under § 62-7-704(e) is governed by the same procedure in Article 3 involving appointment of a special administrator. In Fisher v. Huckabee, 2016 WL 7495869, at *4 n.13 (S.C. Ct. App. Dec. 21, 2016), this Court rejected the argument that a Probate Court's order appointing a special fiduciary under § 62-3-614 was interlocutory and not immediately appealable. See also In re Estate of Muncillo, 789 N.W.2d 37, 41 (Neb. 2010) (holding that Probate Court order denying application for appointment of a special administrator "affected a substantial right of the appellant in a special proceeding, and is therefore a final, appealable order . . . .").[5]

Finally, Respondents erroneously argue that a "final order affecting a substantial right made

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[5] Respondents' brief also reiterates their position in the Circuit Court that this Court's decision in Estate of Boyce v. Work, 305 S.C. 43, 406 S.E.2d 184 (Ct. App. 1991), is controlling. However, for the reasons discussed in Appellant's initial brief, the Court in that case did not decide the issues presented in this case and that decision is not controlling of the issues raised in this appeal. See App. Initial Brief pp. 25-26. Further, unlike the present case, the Probate Court's order in Estate of Boyce was "clearly temporary" and it prohibited the special administrators from disposing of estate assets and required them to post a substantial bond. In contrast, although the Probate Court's order in this case states the "special fiduciary [is] to serve as the Interim Trustee," it nowhere states when the special fiduciary's appointment will terminate. (R. p. 6 ¶ 26). The special fiduciary is appointed indefinitely. The special fiduciary in this case is also authorized to immediately take action involving the property in dispute, including executing mortgages against the property and placing debt on the property, and was not required to post a bond.

in any special proceeding" for purposes of S.C. CODE ANN. § 14-3-330(3) is limited to the types of orders enumerated in § 14-3-330(2). Section 14-3-330(2) provides that "[a]n order affecting a substantial right made in an action [is appealable] when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action." S.C. CODE ANN. § 14-3-330(2). In contrast, § 14-3-330(3) simply provides that "[a] final order affecting a substantial right made in any special proceeding" is appealable. Id. § 14-3-330(3). Pursuant to § 14-3-330(3), the only requirement for finality in regard to an order in a "special proceeding" is that it must affect a substantial right of a party to the action. Unlike § 14-3-330(2), § 14-3-330(3) does not require that the order in the special proceeding must also determine an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense in order to be appealable. This omission clearly was intended to permit appeals from orders in special proceedings that would otherwise be considered interlocutory orders in "non-special" actions. As discussed above, a special proceeding which affects a substantial right is, by definition, not an action. Given that special proceedings by their nature are independent remedies, which are not in themselves actions, but which request special relief that is not dependent upon the existence of any other action, it would render § 14-3-330(3) meaningless to judicially engraft upon that section the requirements of § 14-3-330(2). Doing so would essentially eliminate the distinction between the two types of orders that are appealable under §§ 14-3-330(2) & (3).

In fact, numerous courts with provisions identical to § 14-3-330(3) have held that an order "affecting a substantial right, when made in a special proceeding is a final order and is appealable, even though it does not terminate the action, nor constitute a final disposition of the case." Sullivan

v. Storz, 55 N.W.2d 499, 502 (Neb. 1952); Forster, 856 N.W.2d at 146 ("If a substantial right is affected, an order is directly appealable as a final order even though it does not terminate the action or constitute a final disposition of the case."); In re Estate of Snover, 443 N.W.2d 894, 897 (Neb. 1989). Instead, as used in statutes identical to § 14-3-330(3), a "substantial right" simply means "an essential legal right as distinguished from a mere technical one." Sullivan, 55 N.W.2d at 502; Muncillo, 789 N.W.2d at 42 ("A substantial right is an essential legal right, not a mere technical right."). "A 'substantial right' is 'a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a man is entitled to have preserved and protected by law: a material right.'" Barnes v. Kochhar, 633 S.E.2d 474, 479 (N.C. Ct. App. 2006) (citation omitted). As analyzed in detail in Appellant's initial brief, the Probate Court's order appointing a special fiduciary with power over the property in dispute involves a substantial right, not merely a technical or procedural matter.

Because the Probate Court's order appointing a special fiduciary is a final order in a special proceeding affecting a substantial right, the Probate Court's order is appealable. See Ex parte Small, 69 S.C. 43, 48 S.E. 40 (1904) (Probate Court order appointing an administrator is a final order and appealable.); Fisher, 2016 WL 7495869, at *4 n.13 (Probate Court order appointing a special fiduciary under S.C. CODE ANN. § 62-3-614 held to be immediately appealable.).

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

Respondents incorrectly assert that the Probate Court's order does not have the effect of granting or refusing an injunction within the meaning of § 14-3-330(4). Respondents' brief ignores the well-settled rule that "[a]n order—including a postjudgment order—is properly characterized as

an 'injunction' when it substantially and obviously alters the parties' pre-existing legal relationship." Jones-El v. Berge, 374 F.3d 541, 544 (7th Cir. 2004); Jamie S. v. Milwaukee Pub. Sch., 668 F.3d 481, 490 (7th Cir. 2012); Pimentel & Sons Guitar Makers, Inc. v. Pimentel, 477 F.3d 1151, 1154 (10th Cir. 2007). Despite Respondents' claims to the contrary, the Probate Court's order in this case does alter the *status quo*.

Respondents' motion requested the Probate Court to alter the *status quo* existing among the parties by appointing a special fiduciary and to require Appellant to immediately turn over and relinquish possession, use, control, and ownership of the 605 North Main property to the special fiduciary, even though ownership of the property is in dispute. Despite the fact that Appellant possesses and uses the property and claims ownership of the property, Respondents nevertheless asked the Court to authorize the special fiduciary to have immediate possession, control, and authority over the property, including "management" of the property, "collection" of the rents and income generated thereby, and potentially selling the property.

In the Probate Court's order appointing a special fiduciary, the court specifically acknowledged that "it is important that the Court treads lightly in regards to the duties and responsibilities assigned to a special fiduciary in order to ensure that the *status quo* is maintained in this matter to the greatest extent possible." (R. p. 7 ¶ 32). The order also expressly found that "[w]hile on the face of the Motion, Petitioners did not request an injunction, it appears that some of their requested relief would have the consequence of altering the *status quo*" and that "[w]hile injunctive relief was not plead by Petitioners, that would be the effect." (R. p. 7 ¶¶ 33, 38). By appointing Ashley Andrews as special fiduciary, the order also necessarily denied Appellant's alternative request that he be the person appointed to that position if an appointment was deemed

necessary.

The Probate Court's order alters the parties' legal relationship. The order appoints a special fiduciary with powers over the 605 North Main property for an indefinite period of time. Even though ownership of the property is in dispute, the order expressly permits the special fiduciary "to negotiate an extension of the current loan or other appropriate action to pay the mortgage in her sole discretion." (R. p. 8 ¶ 42). "In her sole discretion, [the special fiduciary may] negotiate with the lender and/or parties to extend the due date on the current mortgage in order for litigation to be finalized or [to] have the mortgage paid off prior to the December 3, 2016 due date." (R. p. 10). Pursuant to the powers granted to her in the order, the special fiduciary already has extended the original loan that became due on December 3, 2016 by increasing the amount due from $190,000.00 to $247,000.00 and by executing a corresponding mortgage using the 605 North Main property as security. (R. pp. 363-67). Pursuant to the powers granted by the Probate Court, the special fiduciary has placed more debt on the property and encumbered the property with a much higher mortgage amount. The order also mandates that Appellant must turn over records to the special fiduciary regarding his ownership of the property and any leases of the property. (R. pp. 8, 10 ¶ 44). The order further states that the special fiduciary "shall be compensated at $200/hour." (R. p. 9 ¶ 46).

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

II. THIS APPEAL IS NOT MOOT.

Respondents now claim for the first time in this Court that Appellant's appeal of the Probate Court's order is moot because "the interim trustee was authorized to perform limited tasks to preserve the Subject Property from being foreclosed upon prior to the final hearing on the merits" and she allegedly has "fulfilled her duties." See Resp. Initial Brief p. 12.[6] Respondents apparently contend this case was appealable only during the 97-day window of time in between the Probate Court's August 31, 2016 order appointing the special fiduciary and the special fiduciary's December 6, 2016 execution of a loan extension and mortgage modification.

Respondents' brief omits any discussion of the fact that the Probate Court's order appoints a special fiduciary with powers over the property at issue in this case *for an indefinite period of time*. The Probate Court's order is still in effect and has not expired by its own terms. The special fiduciary is still authorized to act according to the Probate Court's order. Indeed, Respondents' brief nowhere claims—and makes no showing—that the Probate Court's order has expired, that the special fiduciary has been discharged, or that the special fiduciary is no longer authorized to continue to take actions with respect to the 605 North Main property even when ownership of the property is in dispute. For example, under the terms of the Probate Court's order which the Appellant is attempting to appeal, the special fiduciary is currently authorized to execute another mortgage on the subject property and to further increase the debt against the property.

The South Carolina Supreme Court succinctly stated the mootness doctrine in Linda Mc Company, Inc. v. Shore 390 S.C. 543, 557, 703 S.E.2d 499, 506 (2010), when it stated: "'A case

[6] Again, Respondents never raised this argument to the Circuit Court and the Circuit Court never ruled on it, thus this Court "is likely to ignore it." I'On, L.L.C., 526 S.E.2d at 724.

becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy.... This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief.'" Id. (internal citations omitted). Our supreme ourt has also held that "[a] court may take jurisdiction, despite mootness, if 'the issue raised is 'capable of repetition but evading review.'" Charleston Cty. Sch. Dist. v. Charleston Cty. Election Comm'n, 336 S.C. 174, 180, 519 S.E.2d 567, 571 (1999) (citations omitted).

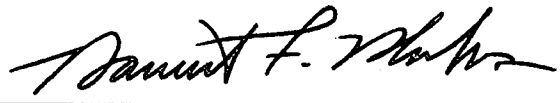
Here, the fact that the special fiduciary has already taken action pursuant to the Probate Court's order does not render this appeal moot because the dispute over Respondents' entitlement to the appointment of a special fiduciary and the special fiduciary's continued power to act is still in controversy. The primary issue that the Appellant raised to the Circuit Court in his appeal from the Probate Court's order is whether the special fiduciary was validly appointed. Because the special fiduciary is currently acting pursuant to the powers granted to her in the Probate Court's order, the issue is not moot. There clearly is an existing controversy and this Court's ruling will have a practical legal effect upon the controversy. Furthermore, as held in Charleston Cty. Sch. Dist., even if the Court should find that this particular case is somehow moot, the Court should still decide the appeal because the same situation could arise again, yet evade review.

CONCLUSION

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

Respectfully submitted,

ROSEN, ROSEN & HAGOOD, LLC

By: 

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