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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.

PETITION FOR REHEARING *EN BANC*

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Appellant Albert T. Henson, Jr. ("Appellant") respectfully petitions this Court for a rehearing of its opinion filed on June 13, 2018 pursuant to SCACR 221(a). If not withdrawn, the opinion will fundamentally curtail the types of Probate Court orders that are immediately appealable and will necessarily create an incongruent and irrational appellate system in which the very same types of interlocutory orders are immediately appealable if issued by a Circuit Court or Family Court, but are not immediately appealable if issued by a Probate Court. Instead, the Court should reconcile the provisions of S.C. CODE ANN. § 62-1-308(a) with those of S.C. CODE ANN. § 14-3-330 so as to establish a uniform and consistent standard governing what types of interlocutory or intermediate orders issued by inferior courts are immediately appealable to our state appellate courts. In light of the exceptional importance and novelty of the issues addressed in this appeal, Appellant requests the Court to rehear this case *en banc* in accordance with SCACR 219.

As background, Appellant appealed the Circuit Court's dismissal of his appeal from an order of the Probate Court appointing a special fiduciary pursuant to S.C. CODE ANN. § 62-7-704(e). Although the special fiduciary has been exercising the authority which the Probate Court granted to her since her appointment, including her execution and recordation of mortgage modifications increasing the debt on the real property which is the subject of the underlying litigation from $190,000.00 to $321,000.00 during this litigation, the Circuit Court held the Probate Court's order is interlocutory and not immediately appealable pursuant to § 62-1-308(a). On appeal to this Court, Appellant argued the Circuit Court erred because the Probate Court's order (i) is a final order affecting a substantial right made in a special proceeding under § 14-3-330(3) and (ii) granted, continued, or refused an injunction under § 14-3-330(4), thus it is immediately appealable.

This Court's unpublished opinion summarily affirmed the Circuit Court without specifically

addressing either §§ 14-3-330(3) or 14-3-330(4). Instead, the opinion cites to case law applying § 62-1-308(a), although it does not clearly elucidate how those cases resolve the present appeal. It appears the Court may have accepted the Respondents' argument raised for the first time on appeal that §§ 14-3-330(3) and 14-3-330(4) do not apply to appeals of Probate Court orders. The Court apparently found that appeals from the Probate Court are governed *exclusively* by § 62-1-308 and that § 14-3-330 is altogether inapplicable to Probate Court appeals. However, for the reasons discussed below, this Court has overlooked or misapprehended important points.

A. Applicability of S.C. CODE ANN. § 14-3-330 to Probate Court Orders.

Our case law holds that "[a]bsent a specialized statute, an order must fall into one of several categories set forth in [§ 14-3-330] in order to be immediately appealable." Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006); see also Watson v. Underwood, 407 S.C. 443, 458, 756 S.E.2d 155, 163 (Ct. App. 2014) ("Absent a specialized statute, an order must fall into one of several categories set forth in [s]ection 14-3-330 in order to be immediately appealable." (citing Ex parte Capital U-Drive-It)). Section 14-3-330, which establishes the "appellate jurisdiction" of our state appellate courts to correct "errors of law in law cases," has been in place in various forms for at least 150 years. It was last amended in 1991. In its present form, § 14-3-330 provides that the following types of orders are immediately appealable:

> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
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> (2) An order affecting a substantial right made in an action 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;

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

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

S.C. CODE ANN. § 14-3-330; see also S.C. CODE ANN. § 18-9-10 ("An appeal may be taken to the Supreme Court or the Court of Appeals in the cases mentioned in Sections 14-3-320 and 14-3-330. The procedure for taking an appeal is as provided by the South Carolina Appellate Court Rules.").[1]

Pursuant to § 14-3-330, our appellate courts have held that a multitude of interlocutory, intermediate, and non-final orders issued by Circuit Courts, Family Courts, or other lower courts are immediately appealable. Although not intended as an exhaustive list, some of the non-final orders that our appellate courts have held are immediately appealable under § 14-3-330 include:

- Cooke v. Palmetto Health All., 367 S.C. 167, 624 S.E.2d 439 (Ct. App. 2005) (circuit court's order rejecting one of the defendant's defenses, but not yet disposing of merits of plaintiff's claim, was immediately appealable pursuant to § 14-3-330(1) as involving the merits of case since the circuit court had finally determined a substantial matter forming part of the defendant's defense)

- Kay v. Meadors, 216 S.C. 483, 58 S.E.2d 893 (1950) (circuit court order refusing to dissolve an attachment is immediately appealable under statutory predecessor to § 14-3-330(1) because it involves the merits)

- Lebovitz v. Mudd, 289 S.C. 476, 347 S.E.2d 94 (1986) (circuit court order granting a Rule 12(b)(6) motion to dismiss as to one of multiple claims is immediately appealable under §

[1] S.C. CODE ANN. § 18-9-30 further provides that "[t]he Supreme Court and the Court of Appeals shall have jurisdiction of all questions of law arising in the course of the proceedings of the circuit court in probate matters in the same manner as provided by law in other cases." S.C. CODE ANN. § 18-9-30 (emphasis added). When hearing an appeal from a Probate Court order in a law case, our appellate courts have the same jurisdiction to correct errors of law that they would have if deciding an appeal from another inferior court.

14-3-330(2) because it affects a substantial right and strikes out part of a pleading)

- Link v. School Dist. of Pickens County, 302 S.C. 1, 393 S.E.2d 176 (1990) (circuit court order granting summary judgment as to one of plaintiff's four claims is immediately appealable under § 14-3-330(1) as "involving merits" and under § 14-3-330(2) because it has the effect of striking out a pleading)

- Morrow v. Fundamental Long-Term Care Holdings, LLC, 412 S.C. 534, 773 S.E.2d 144 (2015) (circuit court's bifurcation order which effectively granted summary judgment against plaintiffs on one of their claims is immediately appealable under § 14-3-330(2) because a substantial right is implicated)

- Murphy v. Owens-Corning Fiberglas Corp., 346 S.C. 37, 550 S.E.2d 589 (Ct. App. 2001), overruled on other grounds by Farmer v. Monsanto Corp., 353 S.C. 553, 579 S.E.2d 325 (2003) (circuit court order granting motion to dismiss as to some, but not all of the defendants in a case, is immediately appealable under § 14-3-330(2) because it affects a substantial right and strikes out part of a pleading)

- Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005) (circuit court order granting a motion to disqualify a party's attorney in a civil case affects a substantial right and is immediately appealable under § 14-3-330(2))

- Neeltec Enterprises, Inc. v. Long, 397 S.C. 563, 725 S.E.2d 926 (2012) (circuit court order requiring plaintiff to substitute alleged corporate owners of competitor for defendant named in complaint is immediately appealable interlocutory order under § 14-3-330(2) because it affects plaintiff's substantial right to name his defendant)

- City of Columbia v. Pic-A-Flick Video, Inc., 340 S.C. 278, 531 S.E.2d 518 (2000) (circuit court order denying motion for preliminary injunction is immediately appealable under § 14-3-330(4))

- Babb v. Scott, No. 2005-UP-424, 2005 WL 7084291 (S.C. Ct. App. June 29, 2005) (circuit court order restraining party from issuing and signing subpoenas on his own behalf and temporarily restraining him from having the clerk issue subpoenas for him until his deposition is taken is immediately appealable under § 14-3-330(4))

In all of these cases, the interlocutory or intermediate orders were immediately appealable despite the fact they did not constitute "final" orders or "final" judgments.

Section 62-1-308 is part of the South Carolina Probate Code, which first became effective on July 1, 1987. Section 62-1-308(a) simply states 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 . . . ." S.C. CODE ANN. § 62-1-308(a). Section 62-1-308 nowhere explicitly addresses interlocutory or intermediate orders of any kind, including orders involving the merits, affecting a substantial right, or granting, modifying, or refusing an injunction. There is no provision in § 62-1-308 reiterating or emulating the provisions in § 14–3–330 involving interlocutory or intermediate orders.

Although not explicitly stated in this Court's opinion in this case, the Court apparently held that § 62-1-308 is a "specialized statute," thus concluding that § 14-3-330 cannot be applied to appeals from the Probate Court. To accept this Court's holding necessarily means that none of the types of orders at issue in the cases summarized above would be immediately appealable if a Probate Court—rather than a Circuit Court or Family Court—had issued them. It means that appeals cannot be taken from the Probate Court until the entire case is concluded and a final judgment is entered. As examples, if a Probate Court granted a motion to dismiss and struck some of the petitioner's claims or dismissed some of the parties from the suit, granted summary judgment as to some but not all of the petitioner's claims, compelled the petitioner to substitute parties, refused to dissolve an attachment, disqualified a party's legal counsel, or granted or denied a preliminary injunction, such orders could not be immediately appealed under this Court's holding because § 14-3-330 is inapplicable and they are not "final" orders for purposes of § 62-1-308(a).

Appellant respectfully submits there is no principled basis to hold that these types of orders are immediately appealable if issued by the Circuit Court or Family Court, but are not immediately appealable if issued by the Probate Court. In the past, our courts have tried to reconcile or harmonize different statutes whenever possible. For example, in Mims v. Alston, 312 S.C. 311, 440 S.E.2d 357 (1994), our state supreme court rejected the argument that the South Carolina legislature implicitly

repealed another provision of the South Carolina Code when it enacted § 62-1-308. The appellant in that case had pointed out the Probate Code was enacted subsequent to § 44-17-620, which addresses appeals of involuntary commitment orders, and therefore argued that § 62-1-308 had repealed § 44-17-620 by implication. However, in rejecting this argument, the Supreme Court stated:

> A later enacted general statute does not repeal an earlier more specific statute. Furthermore, repeal by implication is not favored and will be applied only when two statutes are incapable of any reasonable reconcilement. Section 44-17-60 specifically addresses appeals of commitment orders from the probate court while § 62-1-308 addresses appeals of other orders from the probate court. The statutes are capable of reconcilement.

Id. at 313-14, 440 S.E.2d at 358-59 (citations omitted); see also Atlas Food Systems and Services, Inc. v. Crane Nat. Vendors Div. of Unidynamics Corp., 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995) ("The enactment of a later general statute does not repeal an earlier more specific statute. Similarly, we decline to hold the amendment of a general statute impliedly affects an earlier specific statute. Further, repeal by implication is disfavored, and is found only when two statutes are incapable of any reasonable reconcilement.").

In the present case, although § 62-1-308 governs appeals from a "final" order of a Probate Court, nothing in that statute purports to deal with appeals from interlocutory or intermediate Probate Court orders that do not constitute a "final" order. This Court's opinion apparently holds that the omission in § 62-1-308 of any mention of interlocutory or intermediate orders means the legislature repealed by implication the applicability of § 14-3-330 to Probate Court orders. However, nothing in § 62-1-308 indicates it cannot be reconciled with § 14-3-330. Section 62-1-308 simply contains a general statement that "final" orders may be appealed, but it nowhere states that only "final" orders may be appealed. It nowhere states that the specific types of interlocutory and intermediate orders

delineated in § 14-3-330 are not appealable if issued by the Probate Court.

Appellant respectfully submits that §§ 62-1-308 and 14-3-330 are capable of reasonable reconcilement. Those statutes can be reconciled by holding that § 62-1-308(a) states the general rule that "final" orders in the Probate Court may be appealed and by holding that § 14-3-330 supplements the Probate Code with respect to appeals from interlocutory orders of the Probate Court. See S.C. CODE ANN. § 62-1-103 (stating that "the principles of law and equity supplement" the provisions of the Probate Code). Indeed, this Court has already reached a similar result in a prior case. In Ex parte McFarlin, No. 2007-UP-073, 2007 WL 8326605, at *2 (S.C. Ct. App. Feb. 12, 2007), the Court held that a Probate Court's order freezing certain bank accounts "until a court may conduct a full hearing on the merits" was "in the nature of an injunction" and was immediately appealable pursuant to § 14–3–330(4).

If §§ 62-1-308 and 14-3-330 are not reconciled, it will demarcate a radical change to South Carolina law as heretofore understood by members of our state bar. It will fundamentally curtail the types of Probate Court orders that are immediately appealable and will create an incongruent and irrational appellate system in which the same types of interlocutory orders are immediately appealable if issued by a Circuit Court or Family Court, but are not immediately appealable if issued by a Probate Court. Instead of such an illogical and contradictory system, the Court should reconcile the statutes and establish a uniform and consistent standard involving what types of interlocutory or intermediate orders issued by inferior courts are immediately appealable to our state appellate courts.

B. The Probate Court's Order is a "Final" Order.

This Court's opinion fails to directly respond to Appellant's argument that a Probate Court order granting a motion for appointment of a special fiduciary constitutes a "final" order affecting a

substantial right made in a special proceeding, thus it is immediately appealable under §§ 14–3–330(3) or 62-1-308(a). 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 v. Huckabee, 2016 WL 7495869, at *4 n.13 (S.C. Ct. App. Dec. 21, 2016) (Probate Court order appointing a special fiduciary under S.C. CODE ANN. §§ 62-1-302(a) and 62-3-614 held to be immediately appealable.).

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). A "special proceeding" is any other remedy—"such proceedings being in their nature independent remedies, that cannot be taken by an action." Id.

Our law is consistent with the law in a substantial majority of our sister states. See 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 have held 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).

This Court's opinion also ignores S.C. CODE ANN. § 62-3-107, which states that unless supervised administration of an estate is involved, which is not applicable here, "each proceeding before the [Probate Court] is independent of any other proceeding involving the same estate." S.C. CODE ANN. § 62-3-107 (adopting UNIFORM PROBATE CODE § 3-107). The comment to UPC § 3–107 provides that "[w]hen resort to the judge is necessary or desirable to resolve a dispute or to gain protection, the scope of the proceeding if not otherwise prescribed by the Code is framed by the petition." UPC § 3–107 cmt. Jurisdictions which have adopted UPC § 3–107 have held that "as a practical matter each petition in a probate file should ordinarily be considered as initiating an independent proceeding, so that an order disposing of the matters raised in the petition should be considered a final, appealable order." Matter of Estate of Newalla, 837 P.2d 1373, 1377 (N.M. 1992); In re Estate of Sanders, 750 N.W.2d 806, 813 (Wis. 2008) ("Because the probate of an estate may consist of a series of special proceedings, unlike other forms of litigation, probate can result in a series of potentially final orders."); Estate of Marsh, 2016 WL 6581173, at *5 (Cal. Ct. App. Nov. 7, 2016) ("The administration of a decedent's estate can involve several 'independent collateral proceedings,' and the 'final orders' entered in each such proceeding are independently appealable and can be the basis for a res judicata defense." (citations omitted)).

"Because each proceeding [before the Probate Court] is independent, there needs to be finality, for purposes of appealability, only for the proceeding being appealed." In re Estate of Ketterling, 885 N.W.2d 85, 87 (N.D. 2016); see Schmidt v. Schmidt, 540 N.W.2d 605, 607 (N.D. 1995). "[M]ultiple judgments final for purposes of appeal can be rendered on certain discrete issues" in a single probate matter. In re Guardianship of Glasser, 297 S.W.3d 369, 372 (Tex. App. 2009)

(citation omitted). "[I]n order to authorize an appeal in a probate matter, it is not necessary that the decision, order, decree, or judgment referred to therein be one which fully and finally disposes of the entire probate proceeding." Kelley v. Barnhill, 188 S.W.2d 385, 386 (Tex. 1945); see White v. Pope, 664 S.W.2d 105, 107 (Tex. Ct. App. 1983). All that is required for a probate order to be appealable is that "[t]he order must finally dispose or be conclusive of the issue or controverted question for which the particular part of the proceeding was brought." Wittner v. Scanlan, 959 S.W.2d 640, 641 (Tex. Ct. App. 1995); see Kelley, 188 S.W.2d at 386; In re Estate of McKillip, 820 N.W.2d 868, 875-76 (Neb. 2012).

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; In re Estate of Snover, 443 N.W.2d 894, 897 (Neb. 1989). "In other words, 'an order is appealable if it finally adjudicates some substantial right, whereas if it merely leads to further hearings on the issue, it is interlocutory.'" White, 664 S.W.2d at 107 (citation omitted); see also In re the Estate of Paul J. Gadash, 2017 WL 1404237, *4 (Colo. Ct. App. 2017). 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).

Importantly, "it is substance and not mere nomenclature which determines the nature and finality of the order." In re Estate of Sims, 540 S.E.2d 650, 651 (Ga. Ct. App. 2000); see also Gomes v. Kauwe's Heirs, 472 P.2d 119, 119-120 (Haw. 1970); Howell v. Reimann, 288 P.2d 649, 651 (Idaho 1955); Airline Ground Serv. Inc. v. Checker Cab Co., 39 N.W.2d 809, 811 (Neb. 1949); Peninsula Prop. Co. v. Santa Cruz County, 235 P.2d 635, 640 (Cal. Dist. Ct. App.1951). The fact that a probate order is designated as "interim" does not negate the conclusion that it is appealable as a "final" order under § 14-3-330(3). See, e.g., Rentz v. Rentz, 2016 WL 6270439, at *3 (Ga. Ct. App. Oct. 26, 2016); In re Estate of Adams, 2013 WL 84925, *2 (Tex. Ct. App. Jan. 8, 2013); In re Merlino's Estate, 294 P.2d 941, 943 (Wash. 1956); In re Estate of Williams, 2011 WL 345848, at *5 (Tex. App. Feb. 3, 2011).

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

Because the Probate Court's order 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. The order does not advise that any further hearings or proceedings will occur on whether to appoint a special fiduciary. There is nothing left for the Probate Court to do involving Respondents' request for appointment of a special fiduciary. Instead, the Probate Court has already decided that discrete issue.

Finally, the Probate Court's appointment of a special fiduciary involves a substantial right, not merely a technical or procedural matter. The Probate Court's order specifically authorizes the special fiduciary "to negotiate an extension of the current loan or other appropriate action to pay the mortgage in her sole discretion." (R. p. 8 ¶ 42). The order authorizes the special fiduciary "[i]n her sole discretion, [to] negotiate with the lender and/or parties to extend the due date on the current mortgage in order for litigation to be finalized or [to] have the mortgage paid off prior to the December 3, 2016 due date." (R. p. 10). For example, pursuant to the powers granted to the special fiduciary in the Probate Court's order, the special fiduciary can borrow money or obtain a loan from a lender to pay off the existing loan and place a mortgage or other lien on the 605 North Main property, which Appellant maintains that he alone owns. The special fiduciary has already been—and is currently—acting pursuant to the authorization granted to her in the Probate Court's order. She already has extended the original loan that became due on December 3, 2016 by increasing the amount due from $190,000.00 to $321,000.00 and by executing corresponding mortgages using the 605 North Main property as security for the extension. (R. pp. 363-67).

Because the Probate Court's order appointing a special fiduciary is a final order in a special proceeding affecting a substantial right, the order is immediately appealable. See Ex parte Small, 69 S.C. at 43, 48 S.E. at 40 (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. §§ 62-1-302(a) and 62-3-614 held to be immediately appealable.).[2]

C. Even if Not a "Final" Order, the Probate Court's Order Grants or Refuses an Injunction, Which is Immediately Appealable.

This Court's opinion also does not address Appellant's argument that a Probate Court's interlocutory order granting, continuing, or refusing an injunction is immediately appealable under § 14-3-330(4). In Ex parte McFarlin, which is discussed above, this Court held that a Probate Court's order freezing certain bank accounts until a full hearing on the merits could be held was "in the nature of an injunction" and was immediately appealable pursuant to § 14-3-330(4). See 2007 WL 8326605 at *2. This Court's opinion in the present case fails to explain why § 14-3-330(4) would apply to the Probate Court's order at issue in McFarlin, but would not apply to the Probate Court's order in the present case.

The substance of Respondents' motions in the Probate Court sought a mandatory injunction against Appellant. Respondents' motions requested the Probate Court to alter the *status quo* by appointing a special fiduciary and to require Appellant to immediately turn over and relinquish

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[2] The decision in Estate of Boyce v. Work, 305 S.C. 43, 406 S.E.2d 184 (Ct. App. 1991), is not controlling. This Court was never asked in that case to address either §§ 14-3-330(3) or 14-3-330(4) nor the impact of § 62-3-107, which affects the appealability of Probate Court orders that rule on independent proceedings in the same estate. Further, unlike the present case, the Probate Court's order in 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 for an indefinite period. The special fiduciary 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. See Fisher, 2016 WL 7495869 at *4 n.13 (Probate Court order appointing a special fiduciary under S.C. CODE ANN. §§ 62-1-302(a) and 62-3-614 held to be immediately appealable.).

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. (R. p. 106).

In the Probate Court's order appointing a special fiduciary, it specifically acknowledged that "it is important that the Court treads lightly in regards to the duties and responsibilities assigned to a special fiduciary in order to ensure that the *status quo* is maintained in this matter to the greatest extent possible." (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 a third party as special fiduciary, the order also necessarily denied Appellant's alternative request that he be the person appointed to that position if an appointment was deemed necessary.

The Probate Court's order alters the parties' legal relationship. The order appoints a special fiduciary with powers over the Trust for an indefinite period of time. Even though ownership of the 605 North Main property is in dispute, the order expressly permits the special fiduciary "to negotiate an extension of the current loan or other appropriate action to pay the mortgage in her sole discretion." (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 $321,000.00 and by executing corresponding mortgages using the 605 North Main property as security for the extension. (R. pp. 363-67).

The practical effect of the Probate Court's order is to grant injunctive relief because it effectively restrains Appellant from exercising complete and full ownership over his property. By granting the special fiduciary the power to negotiate and obtain an extension of the existing note and mortgage involving the property and to take steps to obtain new loans and place new mortgages on the property, it necessarily alters the parties existing legal relationship—it alters the *status quo*.

For the forgoing reasons, Appellant respectfully submits the Court has overlooked or failed to apprehend important legal principles in adjudicating Appellant's appeal. For this reason, Appellant respectfully requests this Court to grant a rehearing on the issues in this appeal. In light of the exceptional importance and novelty of the issues addressed in this appeal, Appellant further requests the Court to rehear this case *en banc*.

Respectfully submitted,

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June 26, 2018.

THE STATE OF SOUTH CAROLINA
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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.

PROOF OF SERVICE

I certify that I have served Appellant's Petition for Rehearing *En Banc* on the Respondents by mailing a copy to their attorneys of record on June 26, 2018, via first-class mail, postage prepaid, and addressed as follows:

Trudy H. Robertson, Esquire
Paul Lynch, Esquire
E. Brandon Gaskins, Esquire
Moore & Van Allen, PLLC
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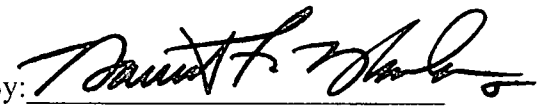
Charleston, SC 29401

ROSEN, ROSEN & HAGOOD, LLC

By: 

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ATTORNEYS FOR APPELLANT

June 26, 2018.

ROSEN | HAGOOD

Daniel F Blanchard, III
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843-266-8123

June 26, 2018

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

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

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven copies of the Petition for Rehearing *En Banc* in the above case. We are also enclosing the original and one copy of the Proof of Service as well as our filing fee check of $25.00. We would greatly appreciate your filing these documents with the Court and returning clocked-in copies to us in the enclosed envelope.

Thank you for your attention to this matter and please do not hesitate to contact me if you have any questions about the above. With kind professional regards, I am

Sincerely,

Daniel F. Blanchard, III

DFB/db
Encls.

Cc: Trudy H. Robertson, Esquire (w/ encl.)
Paul Lynch, Esquire (w/ encl.)
E. Brandon Gaskins, Esquire (w/ encl.)
Mr. Albert T. Henson, Jr. (w/ encl.)

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