

THE STATE OF SOUTH CAROLINA

In the Supreme Court

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ON PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS,  
WRIT GRANTED ON 08-02-18

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Appellate Case No. 2017-000743

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Betty Fisher and Lisa Fisher, .....Petitioner

v.

Bessie Huckabee.....Respondent

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**PETITIONERS' BRIEF ON THE MERITS;  
JOINDER BY BETTY FISHER IN BRIEF ON THE MERITS  
OF THE PETITION FOR WRIT OF CERTIORARI**

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## CERTIFICATION BY PETITIONERS

On December 21, 2016, the Court of Appeals issued its decision, Unpublished Opinion No. **2016-UP-528** (“Opinion”), affirming in part the lower court orders and remanding in part. (App. 790)

The Court consolidated its Opinion for the three separate appeals, Appellate case nos. 2014-002020, 2014-002028, and 2014-002034.

Petitioners, Betty Fisher and Lisa Fisher (“Petitioners”), filed their Petition for Rehearing on January 3, 2017 (App. 805), which was denied by Order filed February 24, 2017. (App. 836)

On August 2, 2018, this court granted certiorari on Questions 2 through 9. The court granted an expedited briefing<sup>1</sup> and held that the matters will be a submitted case to be heard at the same time as the matter, *Fisher v. Huckabee*, Appellate Case no. 2018-000566 and *Ex Parte Cooper*, Appellate Case No. 2018-000662.

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<sup>1</sup> The court indicated that Respondent’s motion to expedite the matter, which was filed on January 5, 2018, was unopposed. Petitioners did file a return to the motion objecting to the facts and information set forth in the motion. The court did not rule on these objections, and Petitioners do request that the court strike or not consider the purported factual contents of Respondent’s motion. This is mentioned solely to prevent waiver, Petitioners of course believe the court will rely solely on the record. Therefore, Petitioners file this brief on the merits.

## QUESTIONS PRESENTED FOR REVIEW

In the Consolidated Opinion, the Court of Appeals summarized Petitioners' questions presented. The complex issues related to Alice Shaw Baker's estate are interconnected and mandate reversal by this Court.

Pursuant to the requirements set forth in Rule 242(I), the questions presented will be deemed to include every subsidiary question fairly comprised therein as requested by this Court's order. Petitioners do not waive any argument, and repeat and restate all questions originally presented in their briefing, and as set forth in their Petition for Rehearing. It also provides the basis of petitioners' good faith arguments supporting these issues.

Since this Court ordered Petitioner Lisa Fisher to turn over Alice Shaw Baker's property to Respondent Bessie Huckabee on June 13, 2018, consideration by this Supreme Court will give other litigants direction and precedent to prevent injustice in the future.

Petitioners respectfully request the court consider the importance of the issues:

2) and 7) Whether the Probate Court erred in appointing a Special Fiduciary, *when* the court lacked jurisdiction to make any orders related to the assets of Alice Shaw Baker, due to her death which was a denial of Due Process and Equal Protection?<sup>2</sup>

3) Whether the Court of Appeal erred in finding that Respondent Bessie Huckabee had standing, when there is pending litigation regarding revocation of Alice Shaw Baker's will and related will contest?

4) Whether the Court of Appeals erred in requiring Rule 11 notice in this matter?

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<sup>2</sup>  
- It is important to note that the entire case had been removed to the Circuit Court. Petitioners contend that Peter Kouten, on behalf of Respondents, sought relief in the Probate Court due to his personal relationship with Judges Condon and Curry, in an effort to forum shop.

- 5) Whether the Court of Appeal's consideration of Petitioner Lisa Fisher's right to compensation led to the correct result of "remand" to preclude a takings by the Court, yet led to directions and factual assertions that give credibility to false accusations considering the valuation of Alice Shaw Baker's estate and any depletion of the estate, and are prejudicial? Also, Whether the Court of Appeal erred in remanding the issue of Petitioner Lisa Fisher's right to compensation to the probate court, when any order related to the approval of fees must be considered in the estate case (which was removed to the Circuit Court)? If so, Do these issues implicate Equal Protection, Due Process, and the Takings Clause?
- 6) Whether the Probate court's 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?
- 8) Whether the probate court erred in failing to grant Lisa Fisher an extension, when there is pending litigation and appellate review?
- 9) Whether the failure to give Petitioner Betty Fisher constitutionally (and statutory) required notice related to the Motion for a Special Fiduciary was prejudicial and in violation of Due Process?

## INTRODUCTION

Some might say that the decision by this Honorable Court (in the related matter, case no. 2018-000566) to order Petitioner Lisa Fisher to turn over Alice Shaw Baker's property to Bessie Huckabee cut out the heart of this case, ( i.e. Alice Shaw Baker's property was turned over to those who breached their duty to her) and essentially decided this petition.

Petitioner Lisa Fisher argues that while the heart of the case may be gone, the soul (i.e. legal analysis) of the case will still mandate reversal—a reversal that will provide for clear authority for litigants in the future and establish the good faith of Petitioners and protect Alice Shaw Baker's property.

This case began simply. A proper will contest/constructive trust case. However, the analysis of legal principles toward the path to justice, was ravaged by disquiet, error, and confusion. This was a direct result of Attorney Peter Kouten's blatant refusal to recuse himself from acting as counsel for Respondents. He had been court appointed attorney, guardian ad litem and visitor for Alice Shaw Baker in the underlying guardian/conservatorship case.<sup>3</sup> He knew or should have known that his representation of Respondents, while attorney for Alice, violated ethical principles and precedent outlined in the case of *Townsend v. Townsend*, 474 S.E. 2d 424

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<sup>3</sup> In the related action, the trial transcript shows that now Peter Kouten indicated that he was acting solely as guardian ad litem. Thereby, implicitly arguing that he did not violate any ethical rules. The problem with this argument is that it is not a correct statement of the law as outlined in *Townsend* and had never been raised by him or Respondents in the 9 years of litigation! The assertion cripples accepted prohibitions against Court appointed attorneys profiting from such appointments and from representing adverse interests. (Model Rule 1.7) This is especially important since the legislature has changed the procedure and duties of appointment of court appointed attorneys and guardian ad litem based on the Constitutional issues, inherent conflict between the roles of GAL and attorneys, and protections necessary to protect the elderly or vulnerable adults. (See S.C. Code § 62-5-403(b) and 62-5-101). Said changes to go into effect in 2019.

(1996). His representation corrupted the entire proceedings, and delayed the trial in this matter.<sup>4</sup>

All of petitioners' actions were in good faith and meant to ensure that Alice Shaw Baker's intentions were honored. South Carolina relies on this modern view of law governing wills and trusts—as demonstrated by the statutory authority in S.C. Code § 62-2-601 which mandates reformation of a will “even if unambiguous, to conform the terms to the testator's intention if it is proved by clear and convincing evidence that the testator's intent and the terms of the will were affected by a mistake of fact or law, whether in expression or inducement.” (Emphasis added) See also S.C. Code § 62-7-407; 62-7-602(c)(2)(B). Petitioners contend that this is a case where following the statutory authorities and ensuring Constitutional protections can result in only one conclusion, i.e. the Court of Appeal's Opinion must be reversed.

The Opinion certainly impacts the *Estate of Alice Shaw Baker* and her family on a personal level, however the specter of the future and public policy precedents that will effect the citizens of South Carolina make it ripe for consideration. This court has an opportunity to clarify

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<sup>4</sup> The court in *PDHC v. Estate of Thompson*, 418 S.C. 557 (2016) explained :

“The main purpose of Rule 11, however, is to deter future litigation abuse, not compensate the opposing party. By waiting until the case has been fully litigated and decided by the appellate courts on the merits, the Estate failed to challenge or prevent any litigation abuse from occurring in this case. Instead, **the Estate made the tactical decision of waiting until the conclusion of the case to recover attorney's fees for all of the abuses that took place over a three-year period.** In our view, the Estate's delay in bringing the motion for sanctions failed to serve the deterrence and efficiency purposes of Rule 11 and, therefore, was unreasonable.” (Emphasis added)

The *Estate of Thompson* stands for the proposition that the Respondents can not sit on their rights or make tactical decisions to unjustly enrich themselves. Petitioner Lisa Fisher's actions were in good faith, and Respondents can not now complain.

policies that will support the statutory protections which mandate due process.

Petitioners have argued that the laws governing the issues set forth herein will provide guidance in many settings.

For instance:

1) If a conservator is not permitted to protect the assets of a conservatee after her death, than the Court is effectively forcing an estate to incur unnecessary costs, and allowing decedent's estates to be subject to control by strangers. This is contrary to long held principles mandating a conservator/fiduciary to protect the assets and distribute to the proper personal representative.

2) If the probate court is allowed unrestrained authority to impose injunctive relief without following statutory mandates under S.C. Code § 62-7-704(e), than parties in probate litigation are not provided with the same Due Process rights and Equal protection of the Law provided to civil litigants.

3) If the probate court is allowed to interfere with a circuit court's jurisdiction over decedent's estates, than parties will be subject to surprise and the legislative mandate for removal under S.C. Code § 62-1-302 is meaningless and contrary to statutory provisions.

Additionally, these unavoidable public policies created by the Court of Appeals Opinion will stand in sharp contrast to the traditional values guaranteeing protection of decedent's estates by conservators/fiduciaries/trustees after their ward dies.

The Court of Appeals' Opinion creates confusion that disrupts the future protection of decedents' estates. South Carolina Fiduciaries will be led down a path of destruction, as houses are left unprotected, taxes are not filed, and those who seek recovery of their loved ones's estates may end up in the spotlight, rather than wrongdoers who seek to abscond with the Estate, based on an unbending rule that a conservator may not expend estate assets after the death of their ward.

The Opinion establishes dangerous public policies that impairs and compels a breach of fiduciary duty if a conservator cannot protect the assets of a decedent. At the same time, the opinion effectively morphs Petitioners' arguments into legal trivialities, despite the effect such a decision has on the life and death of Alice Shaw Baker. It replaces the important legal concept of "preservation of the status quo" with unfettered authority of a probate court to appoint an unknown Special Fiduciary which will significantly dissipate the Estate of Alice Shaw Baker and diminish her wish that her estate go to animal charities.

As set forth herein, it is contrary to the law related to temporary trustees and fiduciaries, and laws establishing a continuing duty to protect a decedent's property until there is delivery to the proper person.

Reversal of the Court of Appeals' Opinion will be the first "action" necessary to preserve estate assets, and provide fiduciaries/conservators with guidance in cases involving elder abuse as set forth herein.

Petitioners pray that this Court **reverse** the Court of Appeals' decision, Opinion No. 2016-UP-528, Heard October 3, 2016-Filed December 21, 2016, the probate court orders, and the Circuit Court orders affirming said orders.

## STANDARD OF REVIEW

It is well settled that this court is free to decide questions of law with no particular deference to the lower court. *See* S.C. Const. art. V, §§ 5 and 9; S.C. Code Ann. §§ 14-3-320 and -330 (1976 & Supp.1999); S.C. Code Ann. § 14-8-200 (Supp.1999) (granting Supreme Court and Court of Appeals the jurisdiction to correct errors of law in both law and equity actions); *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000).)

Rule 242, SCACR specifically addresses the types of cases that this Supreme Court will generally consider:

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court."

The Supreme Court did not give any direction as to the basis for the grant, other than the fact that the related case will be considered by this Court at the same time as the related case.

The traditional view requiring a former fiduciary /conservator to protect estate assets until there is an appropriate appointment is not novel. Yet, its application by both the probate court and the Court of Appeals will create distinct and novel questions of law.

The United States Supreme Court has explained that where there is insufficient public policy on a subject, **it may be the function of the courts by their judgments to establish**

**public policy where none on the subject exists...”** (*See Page v. Winter*, 240 S.C. 516, 126 S.E. 2d 570 (1962), emphasis added.)

As briefly referenced, the Legislature has already addressed some of the concerns which Lisa Fisher raised in this case. The duplicity of Peter Kouten in representing both Alice and Respondents, at the same time and after her death, raises ethical questions by permitting a court appointed attorney to use the case to generate future fees. Having one person act as the court appointed attorney and the guardian ad litem is an inherent conflict of interests. These are not whimsical arguments, trivial pursuits, or efforts to delay prosecution of the case. As set forth by the statutory scheme that goes into effect in 2019, these issues were, are, and will continue to require analysis, so that the very citizens that conservatorships are meant to protect, will have some protections. If Peter Kouten had done his job, he would have known that Alice Shaw Baker did not want her monies to go to Respondents, he would have known that the life well lived, by Alice Shaw Baker, was a life devoted to the protection and care of animals. He made a conscious choice to put his financial position above his duty to Alice—it was a non waiveable conflict.<sup>5</sup>

Therefore, whether this court deems it appropriate to reverse based on the novel aspects of the case, the Constitutional importance of the case, the statutory requirements, or the public policy arguments , Petitioners believe that the law of South Carolina mandates reversal.

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<sup>5</sup> The relationship of Peter Kouten with the Charleston Probate Court, made it suspect that he planned the unprecedented decision to return to the probate court for the filing of the Motion for Special Fiduciary, rather than remain in the Circuit Court (where the case had been previously removed). Petitioners should not be required to forego legal procedures and protections, because of the favor wrongly garnered on Respondents due to personal relationships.

## STATEMENT OF THE CASE

On February 25, 2009, Alice Shaw Baker died. (Appendix . 203)<sup>6</sup> Her great niece, Petitioner Lisa Fisher, Esquire, had helped her since involuntary commitment proceedings were initiated without notice to her family, including her niece, Petitioner Betty Fisher. (App. 70, 73, 76.)

On October 29, 2008, Lisa Fisher was appointed her guardian and conservator. (App. 28) After her appointment, Lisa Fisher traveled regularly to South Carolina to visit her great aunt, and ensure her health and well being. (App. 249, P. 250)

Petitioner 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. (App. 321, 342)

After Ms. Shaw Baker's death, Petitioner 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). (App. 219, 220). 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. 2014-001267)

Petitioner 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

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<sup>6</sup> Appendix is hereinafter referred as "App." Said Appendix is filed concurrently.

times maintained proper control of Ms. Shaw Baker's property.<sup>7</sup>

After nearly three years of preservation of the status quo by Petitioner's daughter Lisa Fisher, while these matters were before the Supreme Court, Respondent filed her *Motion for Special Fiduciary*. (App. 281) No affidavits were attached to the motion. 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. (App. 321, 327)

Petitioner filed several pleadings objecting and opposing said motion. The court set the Motion for Appointment of a Special Fiduciary for hearing on August 17, 2011. ( App. 548) 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.

At the hearing, Petitioners' counsel objected to Respondent's counsel, Peter Kouten's discussion of contested issues relating to Petitioner's accounting. (App. 551)

Over Petitioner's objection, the court allowed Respondent's Counsel to discuss the accounts (without allowing him to "go into specificity" but "just generalities"). ( App. 551)

During argument, the court denied Petitioner the authority to speak:

"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." (App. 553, 575)

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<sup>7</sup> Petitioner 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 is honored. (See Restatement (Third) of Trusts §34)

Without taking any evidence or allowing any testimony, or even taking judicial notice of any proceedings, Respondent's counsel made numerous statements and accusations, Petitioner'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.” (App. 558, 593 , ll. 18-23)

The Court's failure to allow Petitioner 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. Respondent did not object nor did she oppose the Motion. However, the record is silent as to whether the court considered said affidavits. The order dated September 28, 2011 appointed the Special Fiduciary. (App. 55)

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.* (App. 61-63 )

Petitioners timely appealed. (App. 398) Prior to the change in rules governing probate appeals, Petitioners filed their Statement of Grounds on December 9, 2011. (App.455) Respondent did not file her Notice of Appearance until March 20, 2014. (App. 538) . Respondent failed to file any timely opposition. The court set the matter for hearing on July 16, 2014. (App. 560)

On or about August 18, 2014, the court issued its Form 4 judgment on Petitioner's appeal. Petitioner timely filed her *Notice of Appeal* on September 19, 2014.( App. 542)

From the beginning of these cases, they have been fraught with factual inaccuracies based on the lower Courts' reliance on Respondent's unsubstantiated reference to "facts". The record demonstrates that there was no record referenced by Respondent.

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. (App. 281) Moreover, the court denied Petitioners' request to rebut the argument. (App. 551, 567, ll.4-8, 548, 553, 575, ll. 7-14)

Therefore, the lower Court's orders are based on Nothing--an invisible record claimed by Respondents, but not supported by evidence. Respondent made no effort to properly oppose the appeal in the circuit court and failed to reference the record in the Petitioner'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.

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## ARGUMENT

### I.

**THE SOUTH CAROLINA COURT OF APPEALS ERRED IN APPOINTING A SPECIAL FIDUCIARY, *WHEN THE COURT LACKED JURISDICTION TO MAKE ANY ORDERS RELATED TO THE ASSETS OF ALICE SHAW BAKER, DUE TO HER DEATH. ALSO, PETITIONERS WERE DENIED DUE PROCESS AND EQUAL PROTECTION DUE TO THE COURT'S CONSIDERATION OF IMPROPER EVIDENCE AND SUBJECTED TO SPECULATION AND PREJUDICIAL COMMENTS.***

There are 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 held a fiduciary may be appointed to "preserve the estate." Yet, this conclusion begs the Question:

Was Alice Shaw Baker's Estate ever in jeopardy, where the conservator Petitioner 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 to suggest otherwise?

The appointment of a Special Fiduciary mandates a vacancy in the office of Trustee, and as the facts demonstrate in this case, there was no vacancy. For the court to create a vacancy by Petitioner Lisa Fisher it had to take action to remove her.<sup>8</sup> 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.)

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<sup>8</sup> There is no doubt that Respondents will argue that Lisa Fisher was no longer formally conservator, however her duties remained until such time as she delivered the property.

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.

The Court's Opinion 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 of Appeals 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* Petitioner 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 Petitioner Lisa Fisher's knowledge that the will by which Bessie Huckabee was appointed was revoked.<sup>9</sup>

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 Petitioner's 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

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<sup>9</sup> 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 evidence 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).)

hearing, than Petitioners are deprived of due Process and Equal Protection.<sup>10</sup>

The Court of Appeals 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. § 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.

Further, the Court also misapprehended the facts related to Respondent Huckabee's filing of the Motion, prior to resolution of the Appeal.<sup>11</sup> 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).) Close reading of the Opinion also leads Petitioners to believe that there is a misunderstanding by the Court concerning the Will Contest, in that it states that "Fishers' cause of action challenging the Will remains pending in the probate court."

This case was removed to the Circuit Court pursuant to S.C. Code Ann § 62-1-302(d). Therefore, the public policy governing Administration of a decedent's estate requires reversal of

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<sup>10</sup> Equal protection requires "all persons to be treated alike under like circumstances and conditions, both in privileges conferred and liabilities imposed. (See *GTE Sprint Corp v. Pub. Serv. Comm'n of South Carolina*, 288 S.C. 174, 181, 341 S.ED. 2d 126, 129 (1986) U.S. Const. Amend. XIV, § 1, S.C. Const. Art. I, § 3.)

<sup>11</sup> The 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. Moreover, the issue of her appointment is part and parcel of the underlying related appeal.

the Opinion, since the case was removed, the probate court has no authority to interfere with the Circuit Court's authority over the estate, and it had no jurisdiction to make any orders when the matter was still on appeal.

## II. THE SOUTH CAROLINA COURT OF APPEALS ERRED IN FINDING BESSIE HUCKABEE HAD STANDING

The Opinion again gives credence to the viability of the Will,<sup>12</sup> when this issue must be resolved after a proper trial in the lower court. The Court of Appeals affirmed 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 of Appeal 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 Petitioner's position in that it cites law relating to the intent of a person to revoke a will.

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<sup>12</sup> The threshold issue of Standing plagues all facets of this case, because the issue of "fiduciary" third party standing is confused with the underling principles of individual standing. Lisa Fisher has separate standing that she acquired as conservator, is subject to immunity, and has a continuing duty that could subject her to liability to third persons. (This issue has already reared its ugly head as Respondent's counsel brought an action for ejectment in the magistrate's court. This Supreme Court ultimately issued an order that *Lisa Fisher* turn over property to Huckabee.)

The *Davis* court further sets forth that the issue of the "will or no will" is to be determined in the first instance.

Petitioners 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.

Petitioner Lisa Fisher has a bond, no one else has a bond--the court has appointed not merely a stranger but a stranger with connections to the court. The property is now in the hands of Bessie Huckabee, and there is no protection for Petitioners or the Estate. Lisa Fisher had paid for the insurance and taxes of the house. At this point, Respondent Huckabee is in possession, however the cash assets are in the court's possession, so there are serious questions about protection of the assets.

This creates its own conflict, and demands reversals to ensure transparency and proper notice. Reversal is mandated.

### **III. THE COURT OF APPEALS ERRED IN FAILING TO REQUIRE RULE 11 NOTICE.**

It is clear that Rule 11 requires "[all] 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. (App. 35, ll. 6) No procedural safeguards were honored in this case on behalf of Petitioners. No testimony was allowed. The court made findings of fact where the record is devoid 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]).

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. Even more disturbing is that the Court accepts these "conclusions" when Respondents failed to file any pleadings in the underlying case

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.<sup>13</sup>

The refusal by Respondent to honor this rule mandates reversal.

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<sup>13</sup> "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).)

IV.

**THE COURT OF APPEAL ERRED IN GIVING CREDIBILITY TO THE FALSE ACCUSATIONS AND SPECULATION CONSIDERING THE VALUATION OF ALICE SHAW BAKER'S ESTATE AND ANY DEPLETION OF THE ESTATE, AND SUCH CONCLUSIONS WILL PREJUDICE PETITIONER IN HER COMPENSATION**

This Court's consideration of Petitioner 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.<sup>14</sup>

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. (See *Ex Parte Brown*, 393 S.C. 214 (2011).)

While Petitioner 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 revoked. Moreover, the valuation of the estate does not include the monies that are interpled 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.

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<sup>14</sup> It's important to remember that this was a voluntary conservatorship/guardianship. Alice Shaw Baker's trust in Petitioner 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 Petitioner 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 S.C. Code § 62-5-425 (d) and § 62-7-707).

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. The Court said: "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. Petitioners 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 Petitioner 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 reversal to ensure that Due Process and Equal Protection principles are guaranteed to Petitioners.

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V.

**THE SOUTH CAROLINA COURT OF APPEALS ERRED IN FAILING TO FIND THAT THE PROBATE COURT'S 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**

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).)

The Court of Appeals 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 it is authority to compel property of a decedent to be transferred to the litigant.

The Court of Appeal relied 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 Petitioner 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 Petitioners' 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.

**VI.**  
**THE SOUTH CAROLINA COURT OF APPEALS ERRED IN FINDING THAT THE COURT HAD A RIGHT TO DENY AN EXTENSION, WHICH INTERFERED WITH THE STATUS *QUO*.**

As previously explained, the Court of Appeal'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, § 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 Petitioner Lisa Fisher to take action to protect the estate. The rules for enlargement of time can not change Petitioner's duty to deliver pursuant to the statutory scheme. The court's discretion can not interfere with a statutory duty, and the need for an extension.

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**VII.**  
**THE SOUTH CAROLINA COURT OF APPEALS ERRED IN FAILING TO FIND THAT  
BETTY FISHER WAS NOT ENTITLED TO NOTICE**

The Court of Appeals 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 § 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 ~~\*\*\*~~(3) written motions... shall be served upon each of the parties of Record.”

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 Petitioners’ objections. The transcript and the record discloses that Petitioners 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. ( App.285, 310, 313, 318, 321 and App. 548) (See *State v. Niger Daybreak Byers*, 392 S.C. 438, 710 S.E. 2d 55 (2011).)

The rationale set forth by the Court embraces the principles of notice, but sets Petitioners apart as notice is deemed unnecessary to Petitioner 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.

### CONCLUSION

The famous poet Ella Wheeler Wilcox once said: "To Sin by silence when they should protect, makes cowards of men."

Petitioners seek to protect Alice Shaw Baker's estate, not for their own benefit, but for that of Alice's intended beneficiaries, animal charities. While legal briefing and hearings could make petitioners' weary, they choose to honor Alice's wishes, and seek reversal of the Court of Appeals' decision.

Here, the Opinion is not based on the truth, as Petitioners again state that the probate court heard no testimony, no exhibits were introduced, no evidence was introduced at all-- other than Attorney Peter Kouten's unsubstantiated argument. It is well settled that an attorney's argument is not considered by the court as evidence. (See *Gilmore v. Ivey* 290 S.C. 53 (1986) [factual statements of counsel whether made during oral argument or in written briefs or memoranda ordinary may not be so considered]; see also *McManus v. Bank of Greenwood*, 171 S.C. 84, 89 (1933).)

Further, certainly justice is avoided when the Opinion is based on rank speculation which illustrates the extremes where Due Process is denied, as here to Petitioners. The public policies established by the Opinion must be stopped to preserve the integrity of the law. Alice Shaw Baker's estate has and continues to be protected, at a financial cost to Petitioner, nevertheless, by evaluating this case on the true facts, i.e. petitioner Lisa Fisher, the conservator of Alice Shaw Baker's estate, is bonded, has protected and secured the assets, and was duty

bound to distribute the property to the rightful personal representative, reversal is mandated.  
Such decision will unite the heart and soul of the case.

August 20, 2018

RESPECTFULLY SUBMITTED,

By: \_\_\_\_\_

Lisa Fisher

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**RECEIVED**

AUG 24 2018

**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA

In the Supreme Court

ON PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS,  
WRIT GRANTED ON 08-02-18

Appellate Case No. 2017-000743

Betty Fisher and Lisa Fisher, .....Petitioner

v.

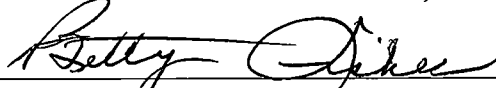
Bessie Huckabee.....Respondent

In the Matter of the Estate of Alice Shaw-Baker.

**JOINDER BY BETTY FISHER IN  
BRIEF ON THE MERITS OF THE  
PETITION FOR WRIT OF CERTIORARI**

I BETTY FISHER do hereby join in Lisa Fisher’s Brief on the Merits of the Petition for Writ for Certiorari. I have requested that this joinder be part of the record and agree and support the Brief and the Appendix filed herein.

RESPECTFULLY SUBMITTED,



BETTY FISHER (*Pro Se*)  
P.O. Box 91112  
Long Beach, CA 90809-1112

**RECEIVED**

AUG 24 2018

**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA

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ON PETITION FOR WRIT OF CERTIORARI  
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v.

Bessie Huckabee.....Respondent

**PROOF OF SERVICE**

I certify that I have served **PETITIONERS' BRIEF ON THE MERITS; JOINDER BY BETTY FISHER IN BRIEF ON THE MERITS OF THE PETITION FOR WRIT OF CERTIORARI AND APPENDIX IN SUPPORT OF PETITIONER'S BRIEF** upon the following parties by depositing a copy of it in the United States Mail, postage prepaid, on August 22, 2018 (and via email) addressed as follows:

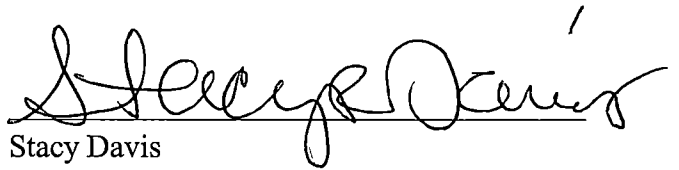
Jessica L. Crowley, Esquire  
PO Box 30189  
Charleston, SC 29417

Courtesy Copy via email to:

W. Westbrook Wills III, Esquire  
PO Box 822  
Folly Beach, SC 29439

Hon. Mary France Jowers, Esquire  
Assistant Attorney General  
PO Box 11549  
Columbia, SC 29211

August 22, 2018



Stacy Davis  
Legal Eagle  
107 Legrand Blvd.  
Greenville, SC 2960

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AUG 24 2018

**S.C. SUPREME COURT**