THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Court of Common Pleas Case No. 2015-CP-08-00547
Opinion No. 2018-UP-244 (S.C. Court of Appeals filed June 13, 2018)

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 Petitioner.

APPENDIX (Volume 1 of 2)

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In Re: Trust EIP Created Under the Last Will and Testament of Eunice I. Page Dated October 14, 1992,

Richard S. Henson and Vann Kenneth Henson,
Respondents,

v.

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

Of Whom Albert T. Henson is the Appellant.

Appellate Case No. 2017-000095

Appeal From Dorchester County
Edgar W. Dickson, Circuit Court Judge

Unpublished Opinion No. 2018-UP-244
Submitted May 1, 2018 – Filed June 13, 2018

AFFIRMED

Daniel Francis Blanchard, III, of Rosen Rosen & Hagood, LLC, of Charleston, for Appellant.

Paul M. Lynch, Trudy Hartzog Robertson, and E. Brandon Gaskins, all of Moore & Van Allen, PLLC, of Charleston, for Respondents.

PER CURIAM: Albert Henson, Jr. appeals a circuit court order dismissing his appeal of a probate court order. On appeal, Henson argues the circuit court erred in holding the probate court order was not immediately appealable because the probate court order (1) affected a substantial right made in a special proceeding under section 14-3-330(3) of the South Carolina Code (2016) and (2) granted, continued, or refused an injunction under section 14-3-330(4) of the South Carolina Code (2016). We affirm[1] pursuant to Rule 220(b), SCACR, and the following authorities:

As to the appealability of the probate court order: *Lollis v. Dutton*, 421 S.C. 467, 477, 807 S.E.2d 723, 728 (Ct. App. 2017) ("This [c]ourt reviews all questions of law de novo." (alteration in original) (quoting *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009))); *Ex parte Wilson*, 367 S.C. 7, 13, 625 S.E.2d 205, 208 (2005) ("*Absent some specialized statute*, the immediate appealability of an interlocutory or intermediate order depends on whether the order falls within [section] 14-3-330." (emphasis added)); *Fulmer v. Cain*, 380 S.C. 466, 469, 670 S.E.2d 652, 654 (2008) ("Appeals from the probate court are governed by [section 62-1-308 of the South Carolina Code (2009 & Supp. 2017)]."); § 62-1-308(a) (providing "a person interested in a *final* order, sentence, or decree of a probate court may appeal to the circuit court in the same county" (emphasis added)); *Estate of Boyce v. Work*, 305 S.C. 43, 44, 406 S.E.2d 184, 185 (Ct. App. 1991) (holding a probate court order was "clearly temporary" and not final under section 62-1-308(a) when the order appointed special administrators to an estate until a personal representative could be formally appointed and forbade distribution of the estate's assets).

As to Henson's remaining issues: *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

AFFIRMED.

SHORT, THOMAS, and HILL, JJ., concur.

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

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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;
>
> (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

[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,

ROSEN, ROSEN & HAGOOD, LLC

By: _____

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June 26, 2018.

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.

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:

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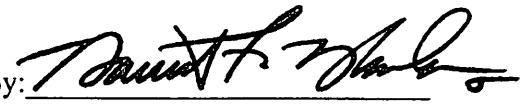
By: 

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THE STATE OF SOUTH CAROLINA
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v.

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

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

RETURN TO PETITION FOR REHEARING

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Pursuant to Rules 221 and 240, SCACR, Respondents Richard S. Henson and Vann K. Henson submit this Return to the Petition for Rehearing.[1] For the reasons stated below, Appellant's Motion for Rehearing should be denied in its entirety.

STANDARD FOR REHEARING

The scope of review for deciding a petition for rehearing is limited to whether the Court "overlooked or misapprehended" a point in reaching its decision. Rule 221, SCACR. Rule 221, SCACR, states: "[a] petition for rehearing shall be in accordance with Rule 240, and shall state with particularity the points supposed to have been overlooked or misapprehended by the court." In order to prevail on a petition for rehearing, a party must demonstrate that the Court overlooked or misapprehended its argument. *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001).

ARGUMENT

I. The Court correctly decided the straightforward question presented to it, and Appellant has grossly overstated the import of the decision.

While most of Appellant's Petition for Rehearing merely repeats the arguments that were previously made to and rejected by this Court, Appellant also incredibly claims that the Court's unpublished opinion "will fundamentally curtail the types of Probate Court orders that are immediately appealable and will create an incongruent and irrational appellate system." Put simply, Appellant has dramatically overstated the effect of the Court's decision in this case, which

[1] It is Respondents' understanding that Rule 219(b), which states that "[n]o response [to a petition for rehearing *en banc*] shall be filed by other parties unless the Court shall so order," and the Clerk of Court's correspondence of June 29, 2018 do not require or request Respondents' response to Appellant's request for a rehearing *en banc*. Furthermore, Appellant has failed to argue that rehearing *en banc* is appropriate under the factors set forth in Rule 219(a)(1)-(2). Therefore, this return addresses solely Appellant's Petition for Rehearing without addressing whether such requested rehearing should occur *en banc*.

is neither exceptional nor involves a novel question. Contrary to Appellant's characterization, this case involves a simple, straightforward question: whether the appointment of a temporary interim trustee is a final order which is immediately appealable under S.C. Code Ann. § 62-1-308(a). The Court correctly concluded that such a temporary appointment is not immediately appealable, and therefore, there is no basis for a rehearing.

In seeking a rehearing, Appellant lists several cases in which South Carolina appellate courts have found that non-final orders are immediately appealable under S.C. Code Ann. § 14-3-330. And without conducting any comparison of the facts and analysis of those cases to those involved in the present case, Appellant resorts to hyperbole to predict judicial calamity will ensue if the Court does not reconcile its decision in this case under § 62-1-308(a) with prior decisions under § 14-3-330. According to Appellant, the failure to reconcile § 62-1-308 and § 14-3-330 "will demarcate a radical change to South Carolina law as heretofore understood by members of the bar." Appellant then alleges that such question "will fundamentally curtail" probate court orders and will create an appellate system that is "incongruent and irrational," as well as "illogical and contradictory."

Appellant's dire predictions, however, are contradicted by Rule 268(d)(2), SCACR, which dictates that the Court's decision has no precedential value beyond this case. While this case is obviously important to the parties, the Court's unpublished decision does not constitute a threat to the appellate system as Appellant suggests, especially considering that issues of immediate appealability must be determined on a case-by-case basis. *See Morrow v. Fundamental Long-Term Care*, 412 S.C. 534, 537-38, 773 S.E.2d 144, 146 (2015) ("By its nature, the question of whether an order is immediately appealable is determined on a case-by-case basis."). Thus, Respondents respectfully request that the Court deny Appellant's Petition for Rehearing.

II. Appellant's arguments in support of the appeal and rehearing are inconsistent with the interests of judicial economy.

In Sections B-C of the Petition for Rehearing, Appellant repeats the same arguments he made in his initial and reply briefs. Specifically, Appellant argues that the appointment of the interim trustee was a final order in a special proceeding or, alternatively, an injunction, which would be immediately appealable under § 14-3-330(3) or (4), respectively. The arguments and authority contained in Respondents' brief prove why Appellant's arguments are unavailing, and the Court's decision shows that it correctly understood the issues and arguments made by counsel. By repeating his arguments, Appellant demonstrates that he disagrees with the Court's decision, but mere disagreement is not sufficient to demonstrate that the Court misapprehended or overlooked Appellant's arguments, which is the standard for a rehearing to be warranted.

Repeating Respondents' arguments previously made to the Court in reply to the same arguments which have already been rejected by the Court would be inefficient and superfluous, but it is important to note that Appellant's litigation strategy and arguments, if adopted, conflict with the significant interests of judicial economy. As noted previously in Respondents' brief, the South Carolina Supreme Court has "narrowly construed" § 14-3-330 to avoid "piecemeal appeals." *Hagood v. Sommerville*, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005). Yet, Appellant's appeal seeks to apply § 14-3-330 in a manner which would cause undue delay and result in piecemeal appeals.

In this case, Appellant's appeal has stayed the action in the Probate Court, thereby delaying resolution of the case on its merits. As explained in the briefs on this appeal and in Respondents' motion to lift stay, the subject property is encumbered by a mortgage which can only be renegotiated by a trustee of the Trust. In the absence of a permanent trustee, an interim trustee must necessarily be appointed to secure the property during the pendency of this action. However,

prior to the final hearing, Appellant has filed the current appeal challenging the appointment of the interim trustee, despite the fact that said interim trustee has already acted pursuant to the authority delegated to her by the Probate Court.[2] This appeal is inconsistent with the policy favoring judicial economy because it is unnecessarily delaying the resolution of the action and exposing the subject property to future loss. To promote judicial economy, the Petition for Rehearing should be denied, which would allow the action to proceed to a hearing on the merits.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny Appellant's Petition for Rehearing.

Respectfully submitted,

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Attorneys for Respondents

July 9, 2018

[2] As previously argued by Respondents, Appellant's appeal is moot because the trustee has fulfilled her duties under the Probate Court's order of appointment.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
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v.

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

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

PROOF OF SERVICE

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

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July 9, 2018

Charleston, South Carolina

The South Carolina Court of Appeals

In Re: Trust EIP Created Under the Last Will and Testament of Eunice I. Page Dated October 14, 1992,

Richard S. Henson and Vann Kenneth Henson,
Respondents,

v.

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

Of Whom Albert T. Henson is the Appellant.

Appellate Case No. 2017-000095

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Short, Jr. J.

J.

J.

Columbia, South Carolina

FILED
October 10, 2018

cc: Daniel Francis Blanchard, III, Esquire
Trudy Hartzog Robertson, Esquire
Paul M. Lynch, Esquire
E. Brandon Gaskins, Esquire

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Court of Common Pleas
Edgar W. Dickson, Circuit Judge

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ALBERT T. HENSON, JR. AND JULIAN REID HENSON,
Respondents in the Court below,

Of whom ALBERT T. HENSON, JR. is the Appellant.

BRIEF OF APPELLANT

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ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court err as a matter of law by holding that the Probate Court's order appointing a special fiduciary as interim trustee for a trust pursuant to S.C. CODE ANN. § 62-7-704(e) is not immediately appealable when the order is a final order affecting a substantial right made in a special proceeding under S.C. CODE ANN. § 14–3–330(3)?

II. Did the Circuit Court err as a matter of law by holding that the Probate Court's order appointing a special fiduciary as interim trustee for a trust pursuant to S.C. CODE ANN. § 62-7-704(e) is not immediately appealable when the order grants, continues, or refuses an injunction under S.C. CODE ANN. § 14–3–330(4)?

INTRODUCTION

This case involves the issue of whether a party may immediately appeal from an order of the Probate Court appointing a Special Fiduciary as Interim Trustee for a Trust pursuant to S.C. CODE ANN. § 62-7-704(e) or whether the party must await the Probate Court's resolution of other petitions involving the Trust before an appeal can be pursued. After Appellant Albert T. Henson, Jr. (hereinafter "Appellant") timely filed an appeal from the Probate Court's order to the Circuit Court in accordance with S.C. CODE ANN. § 62-1-308, upon the motion of Respondents Richard S. Henson and Vann K. Henson (hereinafter "Respondents"), the Circuit Court dismissed Appellant's appeal based on its conclusion that the Probate Court's order grants "only temporary relief" and "is not a final order subject to appeal" because it did not resolve all the petitions pending before the Probate Court. However, Appellant's appeal involves (a) a final order affecting a substantial right made in a special proceeding under S.C. CODE ANN. § 14–3–330(3) and/or (b) an order that grants, continues, or refuses an injunction under § 14–3–330(4). As such, the order is immediately appealable. The Circuit Court erred as a matter of law by dismissing Appellant's appeal.

As discussed below, South Carolina is among the considerable number of jurisdictions that have adopted Section 3-107 of the Uniform Probate Code (UPC). Under this section, unless supervised administration of an estate is involved, which is inapplicable here, "each proceeding before the [Probate Court] is independent of any other proceeding involving the same estate." S.C. CODE ANN. § 62-3-107. Thus far our state appellate courts have not yet addressed the significance of this particular section on the appealability of Probate Court orders rendered in our state. However, the South Carolina Probate Code mandates that our courts must liberally construe and apply this provision to effectuate its underlying purpose to make uniform the law of those states which have

enacted it. See S.C. CODE ANN. § 62-1-102. As a result, decisions from other states that have adopted this provision of the uniform act are especially persuasive.

Decisions from other jurisdictions that have adopted the uniform act make clear that each petition in a probate file ordinarily is considered as initiating an independent proceeding, so that an order disposing of the matters raised in the petition is considered a final, appealable order even though it does not resolve the entire estate. The administration of a decedent's estate can involve several special proceedings, and the final orders entered in each such proceeding are independently appealable. In other words, multiple judgments final for purposes of appeal can be rendered on discrete issues in a single probate matter. 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 order to authorize an appeal in a probate matter, it is not necessary that the order on appeal be one which fully and finally disposes of the entire probate proceeding. All that is required for a probate order to be appealable is that the order must finally dispose or be conclusive of the issue or controverted question for which the particular part of the proceeding was brought. In the present case, because the Probate Court has entered a final order in a special proceeding affecting a substantial right and has concluded or disposed of the particular issue raised in the Respondents' motion or petition, the Probate Court's order is appealable under S.C. CODE ANN. § 14–3–330(3).

Additionally, the Probate Court's order in this case has the effect of granting or refusing an injunction. Orders granting or refusing an injunction are immediately appealable under state law. Although not styled as seeking an injunction, the substance of Respondents' motion in the Probate Court sought a mandatory injunction against Appellant. The motion requested the Probate Court to alter the *status quo* by appointing a special fiduciary and to require Appellant to immediately turn

over and relinquish possession, use, control, and ownership of certain property to the special fiduciary, even though ownership of the property is in dispute. Although the Probate Court's order did not grant all of the relief requested by Respondents, the order nevertheless alters the parties' legal relationship. The order appoints a special fiduciary with powers over the Trust for an indefinite period of time. The order expressly permits the special fiduciary to negotiate an extension of a loan and mortgage involving the real property in controversy and to take "other appropriate action . . . in her sole discretion," including placing a mortgage on the subject property. 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. 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. The order also necessarily denied or refused Appellant's request to be appointed as the special fiduciary for the Trust, which relief he requested in the alternative should such an appointment be deemed necessary. In short, because the Probate Court's order has the effect of granting or refusing an injunction, it is appealable under S.C. CODE ANN. § 14–3–330(4).

STATEMENT OF THE CASE

This litigation arises from a dispute among three brothers over the ownership of valuable commercial property located at 605 North Main Street, Summerville, South Carolina. Appellant and Respondents are brothers and are the grandchildren of Eunice I. Page, who died on October 6, 1993. (R. pp. 137-38 ¶¶ 2-3). Appellant asserts that he is the owner of the 605 North Main property based on an agreement that he entered into with Mrs. Page in 1988. (R. pp. 138-41 ¶¶ 4-9; pp. 148-51; pp. 152-53 ¶¶ 3-6; p. 154 ¶ 2; p. 158 ¶¶ 4-5; pp. 159-60 ¶ 3). Pursuant to that agreement, Appellant has been in exclusive possession of the property since 1988; has continuously possessed and used the

property since 1988; has paid the taxes, insurance, and expenses for the property since 1988; has kept his personal property, equipment, and tools on the property since 1988; has made permanent improvements to the property; has leased portions of the property to tenants for many years; and earns his livelihood from the business that he conducts on the property. (R. pp. 142-44, 146 ¶¶ 10-13, 19; pp. 152-53 ¶ 3; pp. 159-60 ¶ 3). The property is Appellant's sole source of income. (R. p. 143 ¶ 11).

On January 26, 2015, Appellant's brothers (the Respondents) filed a petition in the Probate Court entitled "Petition to Appoint a Successor Trustee," in which they seek to divest Appellant of ownership of the 605 North Main property. (R. pp. 21-42). Respondents allege in their petition that the property is owned by a Trust EIP created under the Last Will and Testament of Eunice I. Page dated October 14, 1992 ("the EIP Trust"). Id. The EIP Trust named Ann P. Pittillo as Trustee. Mrs. Pittillo is the mother of Appellant and Respondents and is Mrs. Page's daughter. Mrs. Pittillo died on April 20, 2014. Respondents allege that they along with Appellant and Julian R. Henson (Respondent Richard Henson's daughter) are the "sole remaining qualified beneficiaries of the" EIP Trust. According to Respondents' petition, "[Respondents] desire for the Court to appoint themselves as the successor co-trustees of the Trust for the sole purpose of dissolving the Trust and distributing the [605 North Main property] to its designated beneficiaries." (R. p. 22). Respondents ask the Court to deem the Trust to be the owner of the property, to immediately dissolve the Trust, and to disburse the property (i.e., proceeds from its sale) to themselves and Appellant. Id.

On April 2, 2015, Appellant filed an Answer to Respondents' petition and denied that the 605 North Main property is owned by the EIP Trust. (R. pp. 43-46). On May 4, 2015, Appellant filed an Amended Answer, Counterclaims, and Cross-Claim seeking, *inter alia*, a declaratory judgment

declaring that Appellant is the rightful owner of the property. (R. pp. 83-90).

On October 12, 2015, before a trial or evidentiary hearing was conducted or any action was taken on Respondents' Petition to Appoint a Successor Trustee or involving Appellant's Counterclaims or Cross-Claim, Respondents then filed a separate "Motion for Appointment of Special Fiduciary as Interim Trustee" under S.C. CODE ANN. § 62-7-704(e). (R. pp. 101-04). Section 62-7-704(e) of Probate Code states that "[w]hether 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." S.C. CODE ANN. § 62-7-704(e). On December 9, 2015, Respondents also moved for an expedited hearing on their Motion for Appointment of Special Fiduciary as Interim Trustee. (R. pp. 105-21).

Respondents' Motion for Appointment of Special Fiduciary as Interim Trustee and their Motion for Expedited Hearing requested that a special fiduciary be appointed with the authorization to immediately have "access to all records concerning the assets of the Trust," "authority over Trust assets," and payment of "reasonable compensation." (R. p. 103). Their motions also asked the Probate Court to alter the *status quo* by authorizing the special fiduciary to have immediate possession, control, and authority over the 605 North Main property, including "management" of the property, "collection of rents and other income generated by" the property, and potentially selling the property. (R. p. 106). The motions effectively requested the Probate Court to order Appellant to vacate the property and to relinquish ownership and possession of the property to the special fiduciary. The motions also argued that it was imperative that the Probate Court appoint a special fiduciary because Mrs. Pittillo had previously executed a Promissory Note and Mortgage using the 605 North Main property as collateral that was scheduled to become due on December 3, 2016.

Respondents did not file any affidavit or evidence to support either of their motions. Instead, they simply relied on the statement in their motions that "[t]he possibility of the Mortgage being foreclosed for non-payment of the Note is a real threat to the Trust's main asset, and immediate measures need to be taken to protect this asset, including the possible sale of the property." Id.

On June 29, 2016, Appellant filed an opposition to the Motion for Appointment of Special Fiduciary. (R. pp. 122-36). Appellant simultaneously filed sworn affidavits of Appellant and several witnesses, including Jim Wright, Lee Agnew, Sharon Burbage, and Kane Wright. (R. pp. 137-61). In his opposition to Respondents' motions, Appellant argued that the substance of the motions sought a mandatory injunction against Appellant, that Respondents failed to show that injunctive relief is necessary to preserve the *status quo*, and that the motions improperly sought to alter the *status quo* 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 the property's ownership is in dispute. Appellant also argued that the Probate Court could not grant the relief requested by Respondents without requiring them to post a bond under S.C. R. CIV. PRO. 65(c), which Respondents had not shown they were capable of providing. Finally, as an alternative position, Appellant requested that the Probate Court appoint him as the special fiduciary should the Court determine that it is necessary and appropriate to appoint such a person under § 62-7-704(e).

On June 29, 2016, Associate Probate Judge Molly D. Edwards conducted a hearing on Respondents' motions. (R. pp. 247-96). No testimony was proffered at the hearing. On August 31, 2016, Judge Edwards issued an order appointing Ashley Andrews, Esquire "as the special fiduciary to serve as the Interim Trustee." (R. p. 6 ¶ 26). In delineating the special fiduciary's "duties and

responsibilities," the order states 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. pp. 6-7 ¶ 32). The order also finds that "[w]hile on the face of the Motion, [Respondents] 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 [Respondents], that would be the effect." (R. p. 7 ¶¶ 33, 38). However, Judge Edwards concluded that the outstanding mortgage taken out on the 605 North Main property by Mrs. Pittillo "poses a major risk to the ownership of this property," thus she ruled that the "appointment of a Special Fiduciary is necessary in order to preserve 605 N. Main Street for all parties and to negotiate an extension of the current loan or other appropriate action to pay the mortgage in her sole discretion." (R. p. 8 ¶¶ 41-42). 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). By appointing Ms. Andrews as the special fiduciary, Judge Edwards necessarily denied Appellant's competing request that he be the person appointed to that position. The order also affirmatively requires that Appellant turn over certain records to the special fiduciary regarding the 605 North Main property. (R. pp. 8, 10). The order further states that the special fiduciary "shall be compensated at $200/hour." (R. p. 9).

Appellant's counsel received written notice of the entry of the order via regular mail on September 6, 2016. On September 16, 2016, Appellant timely filed and served his Notice of Intent to Appeal to the Circuit Court in accordance with S.C. CODE ANN. § 62-1-308. (R. pp. 177-84). On October 21, 2016, Appellant timely served his Statement of Issues on Appeal in the Circuit Court

pursuant to S.C. CODE ANN. § 62-1-308(b). (R. pp. 185-87).

On October 26, 2016, Petitioners filed a Motion to Dismiss Appeal arguing that the Probate Court's order grants "only temporary relief" and "is not a final order subject to appeal" until there is "a final hearing on the merits" and a resolution of Respondents' separate Petition to Appoint a Successor Trustee and Appellant's Counterclaims and Cross-Claim. (R. pp. 190-91). Respondent filed his opposition to the motion on November 21, 2016, and asserted that the Probate Court's order is appealable because it involves (a) a final order affecting a substantial right made in a special proceeding under S.C. CODE ANN. § 14–3–330(3) and/or (b) an order that grants, continues, or refuses an injunction under § 14–3–330(4). (R. pp. 203-24). Circuit Judge Edgar W. Dickson conducted a hearing on the Petitioners' motion on November 21, 2016. (R. pp. 320-62).

On December 12, 2016, Judge Dickson entered an Order granting the Respondents' motion to dismiss Appellant's appeal. (R. pp. 12-20). Appellant's counsel received written notice of entry of the Order on December 15, 2016. On January 12, 2017, Appellant timely served his Notice of Appeal to this Court. (R. pp. 242-46).

ARGUMENTS

I. STANDARD OF REVIEW.

Questions of law are reviewed *de novo* and the appellate court will reverse the lower court's decision when it is controlled by an error of law. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); see also Ex parte TLC Laser Eye Centers (Piedmont/Atlanta), LLC, 404 S.C. 385, 392, 745 S.E.2d 105, 109 (2013) ("Questions of law are reviewed de novo.").

II. THE CIRCUIT COURT ERRED AS A MATTER OF LAW BY DISMISSING APPELLANT'S APPEAL OF THE PROBATE COURT'S ORDER APPOINTING A SPECIAL FIDUCIARY AS INTERIM TRUSTEE ON THE GROUNDS THAT THE ORDER IS NOT IMMEDIATELY APPEALABLE.

Appeals from the Probate Court to the Circuit Court are governed by S.C. CODE ANN. § 62-1-308. 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). It further states that "[t]he circuit court . . . shall hear and determine the appeal according to the rules of law." Id. § 62-1-308(i). "As 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).

"[T]he question of whether an order is immediately appealable is determined on a case-by-case basis." Dorn v. Cohen, 418 S.C. 126, 138, 791 S.E.2d 313, 319 (Ct. App. 2016) (citation omitted). "The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by S.C. CODE ANN. § 14–3–330." Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 6-7, 630 S.E.2d 464, 467 (2006); see also Edwards v. SunCom, 369 S.C. 91, 93, 631

S.E.2d 529, 530 (2006) ("Absent some specialized statute, the immediate appealability of an interlocutory or intermediate order depends on whether the order falls within S.C. CODE ANN. § 14-3-330."); Levi v. N. Anderson Cnty. EMS, 409 S.C. 374, 379-80, 762 S.E.2d 44, 47 (Ct. App. 2014); Tatnall v. Gardner, 350 S.C. 135, 137, 564 S.E.2d 377, 378 (Ct. App. 2002).

The types of orders that are appealable pursuant to § 14-3-330 include *inter alia*:

> (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 (emphasis added); see also Edwards, 369 S.C. at 93-94, 631 S.E.2d at 530. Although § 14-3-330(4) does not explicitly refer to "probate court" orders involving injunctions, our appellate courts have applied this provision to such orders. See, e.g., Ex parte McFarlin, 2007 WL 8326605, at *2 (S.C. Ct. App. Feb. 12, 2007).

Where a specialized statute exists, it controls over § 14-3-330. Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control, 387 S.C. 265, 266, 692 S.E.2d 894 (2010); see also Ex parte Capital U-Drive-It, Inc., 369 S.C. at 6, 630 S.E.2d at 467.

A. 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).

The Probate Court's order constitutes a final order affecting a substantial right made in a special proceeding within the meaning of § 14-3-330(3).

1. Distinction Between "Actions" and "Special Proceedings."

Despite the fact that § 14-3-330(3) and its predecessor versions have been around for over a

century and a half, South Carolina has few reported decisions addressing this subsection. Our state law has historically divided 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").

Our state law is consistent with the law in a substantial majority of our sister states. See, e.g., Agricultural Labor Bd. v. Superior Court, 196 Cal. Rptr. 920, 923 (Cal. Ct. App. 1983) ("'[A]ctions' are distinguished from 'special proceedings' according to the remedy sought. Thus, '[a]n action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.' A 'special proceeding' is '[e]very other remedy . . . .'" (citations omitted)); Phil Mechanic Const. Co., Inc. v. Haywood, 325 S.E.2d 1, 2 (N.C. Ct. App. 1985) (North Carolina statutory law "provides that '[r]emedies in the courts of justice are divided into (1) Actions' and '(2) Special Proceedings.' . . . '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 or prevention of a public offense," while . . . '[e]very other remedy is a special proceeding.'" (citations omitted)); Morton v. Beery, 1933 WL 2222, *3 (Ohio Ct. App. 1933) ("'The codes do not in express terms define a special proceeding, but merely divide remedies into actions and special proceedings, defining an action, and then providing that every other remedy is a special proceeding. The phrase 'special proceeding' is therefore a generic term for all civil remedies in courts of justice which are not ordinary actions.'" (citations omitted)); State ex rel. Reid v. District Court of Fifth Judicial Dist. in and for Madison County, 256 P.2d 546, 549 (Mont. 1953) ("[J]udicial remedies administered by the courts of justice or by judicial officers are divided into two classes, namely, (1) actions, and (2) special proceedings. 'An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.' 'Every other remedy is a special proceeding.' (citations omitted)); West Branch Pants Co. v. Gordon, 200 N.W. 908, 909 (N.D. 1924) ("Our statute divides all remedies into (1) actions, and (2) special proceedings. An action is distinguished from a special proceeding, and vice versa. The term 'special proceedings' includes only remedies not furnished by actions. . . . [T]he two terms, 'action' and 'special proceeding,' are used in the Code in contradistinction to each other.'" (citations omitted)).

In applying statutes identical to § 14-3-330(3), other states have held that "[a] special proceeding includes every special statutory remedy which is not in itself an action." Williams v. Baird, 735 N.W.2d 383, 389 (Neb. 2007); Sullivan v. Storz, 55 N.W.2d 499, 502 (Neb. 1952) ("A special proceeding may be said to include every special statutory remedy which is not in itself an action."); 4 AM. JUR. 2D Appellate Review § 116 (2016) (citing cases). "A special proceeding is defined as usually meaning such a proceeding as may be commenced independently of a pending

action by petition or motion, upon notice, in order to obtain special relief." In re GlaxoSmithKline PLC, 699 N.W.2d 749, 756 (Minn. 2005). "Its existence is not dependent upon the existence of any other action and it therefore is not an integral part of the original action but is separate and apart" and "[i]t adjudicates by final order a substantial right distinct from any judgment entered upon the merits of the original action." Id.; see also In re Estate of Janecek, 610 N.W.2d 638, 642 (Minn. 2000) (stating that a special proceeding is a "generic term for a remedy that is not part of the underlying action and that is brought by motion or petition, upon notice, for action by the court independent of the merits of the underlying action"); Schuster v. Schuster, 87 N.W. 1014, 1015 (Minn. 1901) ("The phrase 'special proceeding,' within its proper definition, is a generic term for all civil remedies in courts of justice which are not ordinary actions. Where the law confers a right, and authorizes a special application to a court to enforce it, the proceeding is special, within the ordinary meaning of the term 'special proceeding.'").

AMERICAN JURISPRUDENCE (SECOND) explains the difference between an "action" and a "special proceeding" as follows:

> The word "action" refers to an entire proceeding, not to one or more parts within a proceeding. Specifically, an action not only encompasses the complaint but also refers to the entire judicial proceeding at least through judgment. An "action" is an ordinary proceeding.
>
> The phrase "special proceeding" has no reference to provisional remedies in actions at law or in equity, and it has reference only to such proceedings as may be commenced independently of a pending action by petition or motion upon notice in order to obtain special relief. Special proceedings include civil statutory remedies not encompassed in the civil procedure statutes. As a general rule, a special proceeding is confined to the type of case which was not, under the common law or equity practice, either an action at law or a suit in equity. A special proceeding instead arises from a right conferred by a statute which authorizes a special application to the courts to enforce the right. Special proceedings have been distinguished from actions by characterizing the latter as

> ordinary proceedings in court by which one party prosecutes another for a declaration, enforcement, or protection of a right; or the redress or prevention of a wrong, with all other remedies being deemed special proceedings. Special proceedings have also been distinguished from actions by characterizing actions as ordinary proceedings for the punishment of a public offense. Additionally, special proceedings may be distinguished from other civil actions by the manner of pleading, practice, and procedure prescribed by the law.

1 AM. JUR. 2D Actions § 3 (2016) (footnotes omitted).

Importantly, 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) ("Probate is a series of special proceedings."); Reid, 256 P.2d at 549 ("The administration of an estate of a deceased person is neither an action at law nor a suit in equity but it is a special proceeding."); Pfeil v. State, 727 N.W.2d 214, 218 (Neb. 2007) ("[A] special proceeding includes every special statutory remedy which is not in itself an action. . . . Examples of special proceedings include . . . probate actions . . . ."); Williams, 735 N.W.2d at 389 ("Examples of special proceedings include juvenile court proceedings, probate actions, and workers' compensation cases."); see also 4 AM. JUR. 2D Appellate Review § 116 (citing cases); In re Guardianship of Forster, 856 N.W.2d 134, 146 (Neb. Ct. App. 2014) (proceedings under the Nebraska Probate Code are "special proceedings"); In re Trust of Rosenberg, 693 N.W.2d 500, 504 (Neb. 2005) (proceeding in county probate court to remove trustee was "special proceeding"); Wead v. Lutz, 831 N.E.2d 482, 485 (Ohio Ct. App. 2005) ("Generally, matters related to estate administration are treated as special proceedings."); In re Estate of Janet N. Price, 1995 WL 628344 (Ohio Ct. App. Oct. 26, 1995) (appeal from probate court's order denying an application to administer an estate was a final, appealable order because it affected a substantial right and was made in a special proceeding); Sheets v. Antes, 470 N.E.2d 931, 934 (Ohio Ct. App. 1984) (observing that probate court orders "such as an order authorizing a claimant to present a claim

against the estate after the expiration of the time allowed for presentation and an order making an election for an incompetent surviving spouse [were] orders made in special proceedings"); In re Putka, 2001 WL 210027, at *1 n.1 (Ohio Ct. App. Mar. 1, 2001) (appeal from probate court's denial of an application for appointment as executor of the decedent's estate was final order made in a special proceeding and affected a substantial right).

In applying statutes identical to § 14-3-330(3), courts have held that "[a] substantial right is an essential legal right as distinguished from a mere technical one." Sullivan, 55 N.W.2d at 502; In re Estate of Muncillo, 789 N.W.2d 37, 42 (Neb. 2010) ("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);[1] see also In re GlaxoSmithKline PLC, 699 N.W.2d at 754 (substantial right defined as "[a]n essential right that potentially affects the outcome of a lawsuit and is capable of legal enforcement and protection, as distinguished from a mere technical or procedural right" (quoting BLACK'S LAW DICTIONARY 1349 (8th ed. 2004)).

2. Impact of S.C. CODE ANN. § 62-3-107.

The fact that South Carolina is among the jurisdictions that have adopted Section 3-107 of the UPC is vitally important to the resolution of the instant appeal. Under this section, unless supervised administration of an estate is involved, which is not applicable here, "each proceeding

[1] In Pocisk v. Sea Coast Const. of Beaufort, 380 S.C. 584, 589, 671 S.E.2d 98, 101 (Ct. App. 2008), our Court of Appeals pointed out the similarity of our statute to North Carolina's statute involving appealability of orders affecting a "substantial right."

before the [Probate Court] is independent of any other proceeding involving the same estate." S.C. CODE ANN. § 62-3-107; see also UPC § 3-107; Cotty v. Yartzeff, 309 S.C. 259, 422 S.E.2d 100, 102 (1992) (quoting § 62-3-107). The comment to UPC § 3–107 provides in part: "When 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.

Thus far our appellate courts have not yet addressed the significance of § 62-3-107 on the appealability of Probate Court orders in our state. However, the South Carolina Probate Code statutorily mandates that our courts must liberally construe and apply this provision to effectuate its underlying purpose to make uniform the law of those states which have enacted it. See S.C. CODE ANN. § 62-1-102 (mandating that "[t]his Code shall be liberally construed and applied to promote its underlying purposes and policies" and that "[t]he underlying purposes and policies of this Code are . . . to make uniform the law among the various jurisdictions"). As a result, decisions from other states that have adopted this provision of the uniform act are particularly persuasive. See Hoover v. Hoover, 271 S.C. 177, 182, 246 S.E.2d 179, 181 (1978) ("In accord with the directive [in the Uniform Reciprocal Enforcement of Support Act that it] 'be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it,'" our state supreme court "follow[ed] the courts of our sister states" in interpreting the statute (citations omitted)); see also In re Estate of Geier, 809 N.W.2d 355, 359 (S.D. 2012) ("[W]e are statutorily mandated to interpret uniform laws such as the UPC 'to effectuate its general purpose to make uniform the law of those states which enact it.'" (citations omitted)); In re Estate of Zimmerman, 633 N.W.2d 594, 599 (N.D. 2001) ("We interpret uniform laws in a uniform manner, and we may seek guidance from decisions in other states which have interpreted similar provisions in a uniform law.

We also may look to the Editorial Board Comments of the Uniform Probate Code to interpret its provisions." (citations omitted)); Savig v. First Nat. Bank of Omaha, 781 N.W.2d 335, 346 (Minn. 2010) ("If possible, we should construe the Minnesota [statute] consistently with courts from other jurisdictions that have faced the same issue under the Uniform Probate Code. . . . '[W]e give great weight to other states' interpretations of a uniform law.'" (citation omitted)); In re Estate of Kotowski, 704 N.W.2d 522, 526 (Minn. Ct. App. 2005) ("Because uniform laws are intended to encourage common interpretation among jurisdictions, caselaw from other UPC jurisdictions has substantial persuasive value here."); In re Swanson's Estate, 397 So.2d 465, 466 (Fla. Ct. App. 1981) ("When a statute has its origins in a uniform law, it should receive a uniform interpretation in all adopting states if the beneficial purpose of uniformity is to be served."); Teague v. Estate of Hoskins, 709 So.2d 1373, 1374 (Fla. 1998) ("In construing a statute modeled after a uniform law, 'it is pertinent to resort to the holdings in other jurisdictions where the act is in force.'" (citation omitted)).

Case law from other jurisdictions applying their versions of 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) ("Because each proceeding in an unsupervised probate is considered independent of other proceedings involving the same estate, there need be finality only as to that proceeding, not the entire estate."). "[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); White v. Pope, 664 S.W.2d 105, 107 (Tex. Ct. App. 1983) ("An order may be final and appealable even though the decision does not fully and finally dispose of the entire probate proceeding.").

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 also Kelley, 188 S.W.2d at 386 ("[I]t must be one which finally disposes of and is conclusive of the issue or controverted question for which that particular part of the proceeding was brought."); In re Estate of McKillip, 820 N.W.2d 868, 875–76 (Neb. 2012) ("In the context of multifaceted special proceedings that are designed to administer the affairs of a person, the word 'case' means a discrete phase of the proceedings" and "[a]n order that ends a discrete phase of the proceedings affects a substantial right because it finally resolves the issues raised in that phase."); Matter of Estate of Olson, 440 N.W.2d 792, 793 (Wis. Ct. App. 1989) ("Mozelle's effort to have the premarital

agreement declared void began with a petition; the resulting judgment disposed of the matters raised in the petition. We are persuaded that this special proceeding, although occurring within the confines of the larger probate proceeding, nevertheless satisfies the statutory requirement of disposing of the 'entire matter in litigation as to one or more of the parties . . . .'").

"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, 55 N.W.2d at 502; 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 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) (holding that wife's petition for spouse's elective share and wife's creditor's claim initiated independent proceedings, thus the probate court's order disposing of the wife's creditor's claim was a "final order" for appellate purposes even though the probate court had not ruled on the wife's elective share claim).

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) ("The nature of an order as final or interlocutory is determined by its substance and not on the basis of the designation given to by the court."); Howell v. Reimann, 288 P.2d 649, 651 (Idaho 1955) ("Whether an instrument is an appealable order or judgment must be determined by its content and substance, and not by its title."); Airline Ground Serv. Inc. v. Checker Cab Co., 39 N.W.2d 809, 811 (Neb. 1949) ("It is fundamental

of course that the form of an order or the label placed upon it does not determine its character. It is the substance of the order which is controlling in determining its nature."); Peninsula Prop. Co. v. Santa Cruz County, 235 P.2d 635, 640 (Cal. Dist. Ct. App.1951) ("The label placed upon the order or judgment by the trial court is not conclusive. . . . [A]n appellate court must determine from the substance and effect of the order or judgment whether it is final or interlocutory.").

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) ("The probate court's caption as an 'interim' order does not require us to conclude that the order was not final. Rather, we look to the substance of the order to determine whether it was final. In this case, the probate court's order resolved the issue pending before it—the sale of the estate property. Accordingly, the probate court's order was final for purposes of the superior court's jurisdiction." (citations omitted)); In re Estate of Adams, 2013 WL 84925, *2 (Tex. Ct. App. Jan. 8, 2013) ("A probate proceeding consists of a continuing series of events, in which the probate court may make decisions at various points in the administration of the estate on which later decisions will be based. In probate cases, it is possible to have more than one final, appealable order. *There may be appeals of interim orders rendered on discrete issues before the entire probate proceeding is concluded*. . . ." (emphasis added)); In re Merlino's Estate, 294 P.2d 941, 943 (Wash. 1956) (holding that an "interim order made during the course of probate" was "final in its nature" and immediately appealable); In re Estate of Williams, 2011 WL 345848, at *5 (Tex. App. Feb. 3, 2011) ("[P]robate proceedings give rise to a recognized exception to the general rule that only final judgments are appealable. *This exception accommodates appeals of interim orders rendered on discrete issues before the entire probate proceeding is concluded.*" (emphasis added)).

In the case at bar, Respondents' motion seeking the appointment of a special fiduciary pursuant to § 62-7-704(e) of the South Carolina Probate Code 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 for appointment of a special fiduciary is not essential to Respondents' original petition and is discrete from that petition. The original petition did not seek appointment of an interim special fiduciary. It is unnecessary for the Probate Court to appoint a special fiduciary on an interim basis in order to adjudicate Respondents' original petition, which seeks the appointment of a successor trustee to administer and dissolve the Trust after a final hearing on the merits. The appointment of a special fiduciary on an interim basis is not an integral part of the original petition, but is separate and apart from that petition. It is merely collateral to it; a special and independent step.

The Probate Court's order also 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 the discrete issue involving the appointment of a special fiduciary. 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. In fact, the special fiduciary has already been—and is currently—acting pursuant to the authorization granted to her in the Probate Court's order.

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 expressly 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 could 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. Indeed, 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 for the extension. (R. pp. 363-67).[2] The Probate Court also denied Appellant's request to be appointed to the position of special fiduciary, thus depriving him of this right. The order affirmatively requires that Appellant turn over records to the special fiduciary regarding his ownership of the 605 North Main 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). In

[2] Because the modification document did not exist until December 6, 2016, which was after Judge Edwards issued her August 31, 2016 order appointing a special fiduciary, the document was not presented to Judge Edwards. However, this Court can take judicial notice of the document because it is a matter of public record (it is recorded with the Dorchester County Register of Deeds) and is undisputed. See Wise v. Wise, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011); MIA Funding, LLC v. Sizer, No. 2010-UP-443, 2010 WL 10085566, at *2 n.5 (S.C. Ct. App. Oct. 14, 2010); Freeman v. McBee, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984); S.C. Dep't of Soc. Servs. v. Janice C., 383 S.C. 221, 227, 678 S.E.2d 463, 467 (Ct. App. 2009).

short, the order undoubtedly involves substantial rights.

Notably, even if the Circuit Court or this Court should later determine that the Probate Court erred in appointing a special fiduciary and in allowing transactions involving the 605 North Main property to proceed, it will be impossible to undo the particular transactions that have already taken place under the Probate Court's order before the appellate court has ruled on the validity of that order. The transactions will have already occurred and there is nothing this Court could do to rectify the Probate Court's improper rulings. If the special fiduciary is allowed to undertake transactions involving the 605 North Main property, this Court will not be able to provide an effective remedy to Appellant if he has to wait until the entire controversy is disposed of before he can appeal the order.[3] See Ex parte Capital U-Drive-It, Inc., 369 S.C. at 8, 630 S.E.2d at 468 (agreeing that order unsealing family court records was immediately appealable because no appellate remedy is likely to repair any damage done by an improper disclosure); Muncillo, 789 N.W.2d at 41-42 (Court held that probate court order denying application for appointment of a special administrator was a "special proceeding" and "affects an essential legal right" which "cannot be vindicated upon appeal from entry of the later final judgment" because "[i]t is not uncommon for the probate of an estate to remain open for years, and a special administrator cannot go back in time and preserve or administer the estate long after the application to appoint has been denied." Accordingly, Court held "the probate court's ruling in this case affected a substantial right of the appellant in a special proceeding, and is therefore a final, appealable order . . . .").

[3] The Probate Court's order rejected Appellant's request that Respondents be required to give a bond or otherwise indemnify Appellant for any loss he may sustain if it should finally be determined the Probate Court's order was improperly entered. (R. p. 134). The Probate Court's order does not require either Respondents or the special fiduciary to post a bond of any sort.

In summary, because the Probate Court has entered a final order in a special proceeding affecting a substantial right, the Probate Court's order is appealable.

3. The Opinion in Estate of Boyce is not Controlling.

Respondents and the Circuit Court placed considerable reliance on this Court's decision in Estate of Boyce v. Work, 305 S.C. 43, 406 S.E.2d 184 (Ct. App. 1991).[4] However, that reliance is misplaced because this Court was never asked to—and did not—address the appealability of a Probate Court's order under either § 14–3–330(3) or § 14–3–330(4) in that case. The Court in Estate of Boyce also did not address the impact of S.C. CODE ANN. § 62-3-107, which adopted UPC § 3-107 and significantly affects the appealability of Probate Court orders that rule on independent proceedings involving the same estate.

In Estate of Boyce, this Court held that a Probate Court order appointing two sisters as "special administrators" for an estate was "clearly temporary" because it stated the sisters are appointed "until such time as a Personal Representative(s) shall be formally appointed."[5] The order also forbade the sisters from distributing any estate assets and required them to post a substantial bond. On appeal to the Circuit Court, the Circuit Court disqualified one of the sisters from serving as special administrator. The sisters then appealed to this Court, which vacated the Circuit Court's order based on its conclusion that the Probate Court's "temporary order" was not final.

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[4] This Court's opinion in Estate of Boyce was appealed to our state supreme court. However, the parties settled before the supreme court decided the merits of the matter. Boyce-Abel In re Estate of Boyce v. Work, 308 S.C. 234, 417 S.E.2d 597 (1992).

[5] The order at issue in this case is noticeably different from the order in Estate of Boyce. 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). Instead, the special fiduciary is appointed for an indefinite period.

However, nothing in the Court's opinion indicates that it was presented with any argument that the order was a final order affecting a substantial right made in a special proceeding under § 14–3–330(3) or an order that grants, continues, or refuses an injunction under § 14–3–330(4). The Court also did not address the impact of § 62-3-107. As former Chief Judge Alex Sanders so aptly stated, "appellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." State v. Austin, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991). This Court in Estate of Boyce did not decide the issues presented in this case and that decision is not controlling of the issues raised in Appellant's appeal.

B. 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).

The Probate Court's order also has the effect of granting or refusing an injunction within the meaning of § 14-3-330(4).

Orders granting or refusing an injunction are immediately appealable. Babb v. Scott, 2005 WL 7084291, *1 (S.C. Ct. App. 2005) ("A grant of an injunction is immediately appealable."); Shapemasters Golf Course Builders, Inc. v. Shapemasters, Inc., 360 S.C. 473, 602 S.E.2d 83, 86 (Ct. App. 2004) ("Appellants correctly argue that the refusal to grant a restraining order is immediately appealable."); Appeal of Paslay, 230 S.C. 55, 94 S.E.2d 57, 61 (1956) (appeal lay from the restraining order or temporary injunction); S.C. CODE ANN. § 14–3–330(4).

"In determining what constitutes an injunction subject to interlocutory review the court should look to the substance of the order rather than its form." Jordan v. Officer, 508 N.E.2d 1077, 1079 (Ill. App. Ct. 1987). "An 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).

Our state supreme court has recognized that labels are not determinative; instead, it is the substance of the requested relief that matters. Sanford v. South Carolina State Ethics Com'n, 385 S.C. 483, 495-96, 685 S.E.2d 600, 607 (2009) ("Because it is 'the substance of the requested relief that matters' and not the form in which the petition for relief is framed, we may construe the Governor's request as one for injunctive relief if that is substantively what he is requesting."); Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 437, 673 S.E.2d 448, 458 (2009); see also McDevitt v. Wellin, 2016 WL 199626, *3 (D.S.C. 2016) ("The trust plaintiffs' motion also seeks to compel the Wellin children to make certain payments and take certain actions with respect to the Trust assets going forward. Thus, it falls within the definition of injunctive relief outlined above."); Richland County v. Kaiser, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002) ("Although the petition in this case was styled as a request for a writ of mandamus, we find that based on the relief sought, the County's pleading is more properly characterized as a request for an injunction. It is the substance of the requested relief that matters 'regardless of the form in which the request for relief was framed.'").

Although Respondents' motions did not expressly ask for or analyze the requirements for injunctive relief, the substance of their motions 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 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 Ms. 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 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 $247,000.00 and by executing a corresponding mortgage using the 605 North Main property as

security for the extension. (R. pp. 363-67). The order also mandates that Appellant must turn over records to the special fiduciary regarding his ownership of the 605 North Main 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. 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 a new loan and place a new mortgage on the property, it necessarily alters the parties existing legal relationship. The order also denied or refused Appellant's request to be appointed as special fiduciary.

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,

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August 25, 2017.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Edgar W. Dickson

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

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.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

This appeal results from the circuit court's dismissal of an appeal from the Dorchester County Probate Court's order appointing an interim trustee under S.C. Code Ann. § 62-7-704(e). The circuit court dismissed Appellant Albert J. Henson, Jr.'s appeal of the Probate Court's order because it was not a final order subject to immediate appeal under S.C. Code Ann. § 62-1-308.

Eunice I. Page, the grandmother of Respondents Richard S. Henson and Vann Kenneth Henson and Appellant Albert J. Henson, Jr., owned certain real property located at 605 North Main Street, Summerville, South Carolina (the "Subject Property"), which was transferred to the Trust EIP Created under the Last Will and Testament of Eunice I. Page, dated October 14, 1992 (the "Trust") by deed on July 22, 1997. (R. pp. 297-310, 311-313) (June 29, 2016 Hearing Tr. Exs. 1-2.) Appellant and Respondents are brothers and beneficiaries of the Trust. Respondents assert that the Subject Property is the sole asset of the Trust. (R. pp. 48-50) (Am. Pet. pp. 2-4.) Appellant denies that the Subject Property is an asset of the Trust and instead claims that Ms. Page conveyed the Subject Property to him prior to her death. (R. pp. 83-90) (First Amended Answer, Counterclaim & Crossclaim, May 4, 2015.)

Ann Pittillo, Appellant's and Respondents' mother, served as trustee of the Trust until her death on April 20, 2014. (R. pp. 47-82) (Am. Pet.) Prior to her death, Pittillo, as trustee of the Trust, executed a promissory note borrowing One Hundred Thousand Dollars ($100,000.00), which was secured by a mortgage on the Subject Property. (R. pp 256-257, 265, 314-315) (June 29, 2016 Hearing Tr. pp. 10-11, 19, Ex. 3.) The promissory note provided that if the note was not paid off on or before December 3, 2016 the borrower would transfer title of the Subject Property to the lender in lieu of foreclosure. (*Id.*)

On January 26, 2015, Respondents filed in Dorchester County Probate Court a Petition to Appoint a Successor Trustee of the Trust and filed an Amended Petition on May 4, 2015. (R. pp. 21-46, 47-82) (Pet.; Am. Pet.) In the Amended Petition, Respondents claim that the trusteeship of the Trust is vacant, and they seek appointment of a successor trustee to administer the Trust. (*Id.*)

On October 12, 2015, Respondents filed a Motion for the Appointment of a Special Fiduciary as an Interim Trustee, and also filed subsequent Motions for an Expedited Hearing. (R. pp. 101-104, 105-121, 194-196) (Mot. Appointment Special Fiduciary, Oct. 12, 2015; Mot. Expedited Hearing, Dec. 9, 2015; Mot. Expedited Hearing, Nov. 1, 2016.) Under those motions, Respondents sought, pursuant to S.C. Code Ann. § 62-7-704(e), the appointment of a special fiduciary who would serve as interim trustee of the Trust and, among other things, ensure that the Subject Property was not foreclosed upon by the lender who holds the mortgage on the Subject Property. (*Id.*)

Dorchester County Associate Probate Judge Molly D. Edwards held a hearing on the Motion for the Appointment of a Special Fiduciary as an Interim Trustee on June 29, 2016. (R. pp. 247-296) (June 29, 2016 Hearing Tr. pp. 1-50.) On August 31, 2016, Judge Edwards issued an Order Appointing Special Fiduciary as Interim Trustee (the "Order"), in which she appointed Ashley Andrews, Esq., as a special fiduciary to serve as interim trustee of the Trust pursuant to S.C. Code Ann. § 62-7-704. (R. pp. 1-11) (Order Appointing Special Fiduciary as Interim Trustee, Aug. 31, 2016.) Under the Order, the interim trustee's powers are limited to the following: (1) negotiating with the lender and/or the parties to extend the due date of the current mortgage in order for litigation to be finalized or have the mortgage paid off prior to December 3, 2016; (2) determining if any other assets are titled to the Trust; (3) recovering all records Appellant may possess regarding the alleged transfer of the Subject Property from Ms. Page to Appellant; (4)

collecting copies of all agreements Appellant, Ms. Page, or Ann Page Pittillo may have entered into with another party to lease the Subject Property; and (5) ensuring all actions taken by her are done in the interest of maintaining the status quo pending a final hearing on the merits in this case. (R. p. 10) (*Id.* at p. 10.) The Probate Court noted that the primary dispute regarding the ownership of the Subject Property was not before the Court and would be decided after a full merit's hearing. (R. p. 7) (*Id.* at p. 7.) In the Order, the Probate Court expressly stated that it would not dispossess Appellant of the Subject Property at the time. (R. p. 8) (*Id.* at p. 8.)

On September 16, 2016, Appellant, pursuant to S.C. Code Ann. § 62-1-308, filed a Notice of Intent to Appeal the Order with the Dorchester County Court of Common Pleas. (R. p. 181) (Not. Intent Appeal, Sept. 16, 2016.) Respondents filed a Motion to Dismiss Appeal on October 26, 2016. (R. pp. 188-193) (Mot. Dismiss Appeal, Oct. 26, 2016.) A hearing was held before the Honorable Edgar W. Dickson on November 21, 2016 (R. pp. 320-362) (Nov. 21, 2016 Hearing Tr.), and Judge Dickson entered an Order granting Respondents' Motion to Dismiss on Appeal on December 12, 2016 (R. pp. 12-20) (Order Dismissing Appeal, Dec. 12, 2016). In dismissing Appellant's appeal, Judge Dickson ruled that the Order "is not appealable under S.C. Code Ann. § 62-1-308 because it provides only temporary relief and is not a final order." (R. p. 16) (*Id.* at p. 3.) On January 12, 2017, Appellant served his Notice of Appeal to this Court, thereby providing notice of this appeal. (R. pp. 242-243) (Not. Appeal, Jan. 12, 2017.)

ARGUMENT

I. A PROBATE COURT'S APPOINTMENT OF AN INTERIM TRUSTEE PURSUANT TO S.C. CODE ANN. § 62-7-704 IS NOT A FINAL ORDER SUBJECT TO IMMEDIATE APPEAL UNDER S.C. CODE ANN. § 62-1-308.

The right of appeal is governed by statutory law. *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 266, 692 S.E.2d 894 (2010). Although S.C.

Code Ann. § 14-3-330 generally governs the right to appeal, that statute does not apply when a specialized statute governing an appeal exists. *Id.*

In this case, Appellant's argument that the Order is immediately appealable fails because it is based on the incorrect assertion that S.C. Code Ann. § 14-3-330(3) and (4) governs the appealability of the Order. Contrary to Appellant's claim, § 14-3-330 does not control Appellant's appeal because appeals from the probate court are governed by a specialized statute, specifically § 62-1-308. Section 62-1-308(a) provides, in pertinent part, that a "person interested in a final order, sentence, or decree of a probate court and considering himself injured by it may appeal to the circuit court in the same county." Because § 62-1-308 is a more specific statute than the general appeal statute of § 14-3-330, § 62-1-308, and not § 14-3-330, governs whether the Order is immediately appealable in this case. *See Long v. Sealed Air Corp.*, 391 S.C. 483, 486, 706 S.E.2d 34, 35 (Ct. App. 2011) (ruling that general appealability provisions of § 14-3-330 did not apply because more specific appeal provision of § 1-23-610 governed).

An order from the probate court that is not a final order is not reviewable under § 62-1-308. *Fulmer v. Cain*, 380 S.C. 466, 469, 670 S.E.2d 652, 654 (2008). Courts of common pleas lack subject matter jurisdiction over appeals of a temporary order issued by a probate court. *Boyce-Abel v. Work*, 305 S.C. 43, 44, 406 S.E.2d 184, 185 (Ct. App. 1991).

In this case, the Order provides only temporary relief pending a final hearing on the merits, and it is not a final order subject to appeal under § 62-1-308. The temporary nature of the relief provided in the Order is clear. The appointment of the interim trustee is *per se* temporary because it applies only in the interim period between the date of appointment and a final hearing on the merits. The Order expressly limits the interim trustee's powers to maintaining the status quo "pending a final hearing on the merits." (R. p. 8) (Order p. 8.) In addition, the Probate Court was

careful not to resolve the primary dispute between Appellant and Respondents because that "will need to be decided after a full merit's hearing." (R. p. 7) (*Id.* at p. 7.) The Order also did not dispossess Appellant of his current possession of the Subject Property and is instead a temporary measure intended to preserve the Subject Property from being transferred under mortgage. Therefore, the Order is not an appealable final order under § 62-1-308.

The South Carolina Court of Appeal's decision in *Boyce-Abel* is controlling on the issue of whether the Order is appealable under § 62-1-308. In *Boyce-Abel*, the probate court appointed special administrators of a decedent's estate until a personal representative could be formally appointed. *Id.*, 305 S.C. at 44, 406 S.E.2d at 185. The special administrators' siblings appealed the appointment to the circuit court, and the circuit court disqualified one of the special administrators. *Id.* The Court of Appeals vacated the circuit court's appellate decision and remanded the case to the probate court for further proceedings because the circuit court lacked subject matter jurisdiction over the appeal of the probate order. *Id.* According to the Court of Appeals, the circuit court did not have jurisdiction under § 62-1-308 because the probate court's appointment of the special administrators was not a final order. *Id.* Instead, the probate order was "clearly temporary" pending the formal appointment of a personal representative and only provided the special administrators with limited powers to administer the estate in an interim period. *Id.*

There is no material difference between the appointment of the special fiduciary as interim trustee in this case and the appointment of the special administrators in *Boyce-Abel* for the purpose of determining whether the Order is a final order subject to appeal under § 62-1-308. Just as the appointment of the special administrators in *Boyce-Abel* was temporary, the appointment of the interim trustee in this case is similarly temporary. And like the special administrators appointed

in *Boyce-Abel*, the interim trustee in this case is authorized only to perform certain acts to maintain the status quo until final resolution. Furthermore, the procedure used for the appointment of the special administrators in *Boyce-Abel* is the same procedure used in this case for the appointment of the interim trustee. Section § 62-7-704(e) provides that the "procedure for such appointment . . . shall be the same as set forth for special administrators" under § 62-3-614 of the probate code. As such, the appeal in *Boyce-Abel* arose from the same statutory procedure as the appeal arises in this case, and *Boyce-Abel* directly controls the determination of the issue presented in this case.

Although Appellant acknowledges that § 62-1-308 governs this appeal, he summarily dismisses the clear applicability of *Boyce-Abel* to this case by arguing that this Court did not address in *Boyce-Abel* whether an appointment of a special administrator is a special proceeding under § 14-3-330(3) or the issuance of an injunction under § 14-3-330(4). Appellant's attempt to distinguish *Boyce-Abel* from this case is unconvincing.

Appellant argues that *Boyce-Abel* is not controlling in this case because the Court of Appeals failed to address the argument he presents in this case. According to Appellant, the Court of Appeals, like "well-behaved children," should only answer questions when it is asked. (App. Initial Br. p. 26.) Appellants' dismissive view of this Court's authority, however, disregards that the Court may address *sua sponte* issues relating to subject matter jurisdiction over an appeal and is not limited to answering only questions presented by the parties. *See Town of Hilton Head Island v. Godwin*, 370 S.C. 221, 223, 370 S.C. 221, 634 S.E.2d 59, 60-61 (stating that lack of subject matter jurisdiction can be raised *sua sponte* by the court and that the appellate court must always take notice of the lack of subject matter jurisdiction). The Court of Appeals in *Boyce-Abel* could have addressed the argument presented by Appellant in this case, but it had no need to do so because the appeal in that case was governed by § 62-1-308 rather than § 14-3-330. Therefore,

the Court's opinion in *Boyce-Abel* controls the issue in this appeal regardless of whether the parties in *Boyce-Abel* actually presented the exact argument advanced by Appellant, and the Court should affirm the circuit court's dismissal of the appeal.

II. A PROBATE COURT'S APPOINTMENT OF AN INTERIM TRUSTEE PURSUANT TO S.C. CODE ANN. § 62-7-704 IS NOT SUBJECT TO IMMEDIATE APPEAL UNDER S.C. CODE ANN. § 14-3-330(3) BECAUSE IT NEITHER ARISES FROM A SPECIAL PROCEEDING NOR AFFECTS A SUBSTANTIAL RIGHT.

Although Appellant acknowledges that § 62-1-308 governs the appeal in this case, he devotes the overwhelming majority of his argument attempting to persuade the Court that the motion for appointment of an interim trustee under § 62-7-704(e) is a "special proceeding" which is subject to immediate appeal under § 14-3-330(3). In so doing, Appellant relies on inapplicable case law from other jurisdictions which cannot override the Court's decision in *Boyce-Abel* The Court should reject Appellant's attempt to overcomplicate the simple issue that has been presented.

Assuming *arguendo* that § 14-3-330 applies rather than § 62-1-308, Appellant nevertheless fails to establish that the appointment of an interim trustee under the South Carolina Trust Code is a special proceeding. Because Appellant cannot rely on any authority from South Carolina to support his argument, he relies solely on decisions from other jurisdictions involving the probate of wills and decedents' estates in which certain decisions were deemed final orders in special proceedings. Notably absent from Appellants' litany of cases supporting his "special proceeding" argument, however, is a single case arising from an action seeking the appointment of a trustee to a vacant trusteeship, either on a permanent or temporary basis. Thus, the cases on which Appellant relies cannot support the conclusion that a motion seeking the appointment of an interim trustee is a "special proceeding" under § 14-3-330(3).

Appellants' reliance on special proceedings involving the probate of wills and decedents' estates arises from an apparent misunderstanding between the nature of actions under the South

Carolina Trust Code and the administration of decedents' estates under Article 3 of the South Carolina Probate Code. For example, Appellant argues that the fact that South Carolina has adopted Section 3-107 of the Uniform Probate Code (codified as S.C. Code Ann. § 62-3-107) is "vitally important to the resolution of the instant appeal," but fails to recognize that Article 3 of the Probate Code does not govern actions arising under the Trust Code. Rather, the Trust Code is established under Article 7 of the Probate Code, which expressly states that the Trust Code does not apply to decedent's estates and is thus separate and independent from Article 3. *See* S.C. Code Ann. § 62-7-102 ("This article does not apply to . . . administration of decedent's estates . . . ."). Moreover, judicial proceedings under the Trust Code are governed by § 62-7-201 – not § 62-3-107, and nothing in § 62-7-201 indicates that each separate motion or request for relief arising in an action involving the Trust Code is an independent special proceeding under § 14-3-330(3). As a result, Appellant's argument that § 62-3-107 renders a motion to appoint an interim trustee a "special proceeding" is misguided and incorrect.

Even if a motion to appoint an interim trustee under § 62-7-704(e) is a "special proceeding" under § 14-3-330(3), Appellant cannot establish that the Order was a "final order affecting a substantial right" under that provision. As the South Carolina Supreme Court has stated, the "provisions of Section 14-3-330 . . . have been narrowly construed" to avoid "[p]iecemeal appeals." *Hagood v. Sommerville*, 362 S.C. 191, 196, 607 S.E.2d 707 (2005). Although the term "substantial right" is not defined in § 14-3-330(3), that term is defined in § 14-3-330(2) to mean when an 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 of any pleading in any action." The South Carolina Supreme Court has further clarified that "[o]rders affecting a substantial right discontinue an action, prevent an appeal,

grant or refuse a new trial, or strike out an action or defense." *Edwards v. SunCom*, 369 S.C. 91, 94, 631 S.E.2d 529, 530 (2006) (internal quotations omitted).

Here, the circuit court expressly found that, under the Order, the Appellant "has not lost or had affected any 'substantial right' as that term has been defined by South Carolina law." (R. p. 18) (Order Dismissing Appeal p. 5.) In arguing that the Order did affect a "substantial right," Appellant ignores how "substantial right" has been defined under § 14-3-330 by the circuit court and other South Carolina courts. He instead advances a broader definition that is unsupported by South Carolina judicial precedent. Appellant asserts that the Order affects certain rights because (1) the interim trustee can extend or modify the preexisting loan to ensure that the Subject Property is not foreclosed upon before a hearing date, (2) he is required to turn over records to the interim trustee, and (3) the interim trustee will receive compensation. None of these temporary remedies affects substantial rights that would discontinue the action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense. Rather, the Order merely ensures that the subject of this litigation is temporarily preserved so that the case can proceed to a trial on the merits without prejudicing any of the parties. As a result, the Order does not affect substantial rights which would warrant an immediate appeal. *See Terry v. Terry*, 400 S.C. 453, 457, 734 S.E.2d 646, 648 (2012) (holding that temporary order of family court granting temporary possession of marital residence, while clearly important to the parties, neither constituted a "substantial right" or raised issues warranting immediate appellate court intervention).

III. THE PROBATE COURT'S APPOINTMENT OF AN INTERIM TRUSTEE PURSUANT TO S.C. CODE ANN. § 62-7-704 IS NOT SUBJECT TO IMMEDIATE APPEAL UNDER S.C. CODE ANN. § 14-3-330(4) BECAUSE IT DID NOT ISSUE AN INJUNCTION.

Appellant's final argument mistakenly claims that the Order is immediately appealable as an order issuing an injunction under § 14-3-330(4) because the Order's practical effect is to restrain

him from exercising complete and full ownership over his property. This argument misconstrues the nature of an injunction. Rather than requiring or prohibiting any actions of the parties, the Order merely authorizes the interim trustee, "[i]n her sole discretion, negotiate with the lender and/or parties to extend the due date on the current mortgage," take steps to determine if other assets of the Trust exist, and recover records relating to the Trust and the Subject Property. Because the Order does not require the parties to take any action or prohibit the parties from taking any action, the circuit court correctly ruled that the Order is not an injunction subject to immediate appeal.

Injunctions or injunctive relief typically are characterized as mandatory injunctions or prohibitory injunctions. "A prohibitory injunction prohibits a party from taking action and preserves the status quo pending a determination on the merits of the action. A mandatory injunction orders a responsible party to take action." *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH& Co.*, 571 F.3d 873, 878-79 (9th Cir 2009); *see also Gore v. Skipper*, 255 S.C. 18, 21, 176 S.E.2d 569 (1970) (contrasting mandatory injunction against prohibitory injunction); *Sanford v. South Carolina State Ethics Comm'n*, 385 S.C. 483, 496, 685 S.E.2d 600, 607 fn. 6 (2009) ("A prohibitory injunction is defined as an injunction that forbids or restrains an act.").

In this case, Appellant fails to articulate how the Order appointing an interim trustee for limited purposes constitutes either a prohibitory or mandatory injunction. The Order does not restrain any party from taking action; nor does it require any party to take any action. Instead, as the circuit court properly recognized, the Order merely authorized the interim trustee to negotiate an extension or modification of the loan and mortgage and seek information relating to the Subject Property and the Trust. The Probate Court purposefully avoided granting any relief which would have restrained Appellant's control and possession over the Subject Property. The Probate Court

further stated it was intentionally limiting the requested relief of Respondents to avoid issuing an injunction and would not dispossess Appellant of the property. (R. pp. 7-8 ¶¶ 33-40) (Order ¶¶ 33-40.) Therefore, Appellant's argument that the Order effectively serves as an injunction which is subject to immediate appeal is incorrect and should be rejected.

IV. APPELLANT'S APPEAL IS MOOT BECAUSE THE INTERIM TRUSTEE FULFILLED HER DUTIES UNDER THE ORDER OF APPOINTMENT AND THE RESOLUTION OF THIS APPEAL WILL HAVE NO PRACTICAL EFFECT ON THE UNDERLYING ACTION.

"An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001). "A case 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.*

In this case, the determination of whether the Order appointing the interim trustee is subject to immediate appeal under § 14-3-330(3) or (4) is a moot and academic question that should be avoided because the Court's ruling would have no practical legal effect. As explained above, the interim trustee was authorized to performed limited tasks to preserve the Subject Property from being foreclosed upon prior to the final hearing on the merits. Appellant acknowledges in his initial brief that the interim trustee has fulfilled her duties by extending and modifying the note and mortgage on the Subject Property, which was filed with the Dorchester County Register of Deeds. (App.'s Initial Brief p. 23.) Appellant does not argue that this extension and modification was ineffective or otherwise challenge it in this appeal. Moreover, Appellant does not contend that the interim trustee is otherwise interfering with his possession of the Subject Property or even has the authority to do so. It also does not appear that the Court's reversal of the circuit court's dismissal of Appellant's appeal from the Probate Court's Order would have any practical effect on

the underlying action or the parties' relationships to each other and the Subject Property. As a result, this appeal is moot and should be dismissed.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court affirm the circuit court's dismissal of Appellant's appeal from the Probate Court's order appointing the interim trustee.[1]

Respectfully submitted,

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August 28, 2017

[1] Because the appeal does not involve a final order subject to immediate appeal and is moot, Respondents contend that the Court may dismiss this appeal without further briefing, and they reserve the right to file a motion to dismiss at any time. To the extent that the Court wishes to address the merits of Appellant's appeal, the appeal should be decided on the briefs and without oral argument pursuant to Rule 215, SCACR, because the appeal does not involve a final judgment.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Edgar W. Dickson

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

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 ..... Petitioners,

v.

Albert T. Henson, Jr., and Julian Reid Henson..... Respondents,

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

CERTIFICATE OF RESPONDENTS' COUNSEL

The undersigned certifies that Final Brief of Respondents complies with Rule 211(b), SCACR.

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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.

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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").

[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

[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,

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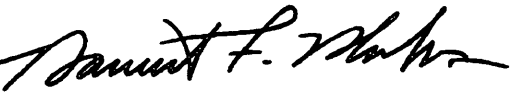
By: 

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