THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

DEC 27 2018

S.C. 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
Appellate Case No. 2018-002002

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.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENTS

I. CERTIORARI SHOULD BE GRANTED GIVEN THE PRESENT UNCERTAINTY INVOLVING THE APPEALABILITY OF INTERLOCUTORY OR INTERMEDIATE ORDERS OF THE PROBATE COURT AND THE IMPORTANCE OF ESTABLISHING UNIFORMITY IN OUR APPELLATE LAW.

Respondents Richard S. Henson and Vann K. Henson ("Respondents") argue that Petitioner Albert T. Henson, Jr.'s ("Petitioner") Petition does not raise any special or important reason justifying this Court's review. See Return pp. 5-6, 14-15. Petitioner respectfully disagrees.

Petitioner has consistently argued in the courts below that the Probate Court's order appointing a special fiduciary for a trust pursuant to S.C. CODE ANN. § 62-7-704(e) is appealable because (i) it is a final order affecting a substantial right made in a special proceeding under S.C. CODE ANN. § 14-3-330(3) and (ii) it granted, continued, or refused an injunction under § 14-3-330(4). The Court of Appeals' unpublished opinion summarily affirmed the Circuit Court's dismissal of Petitioner's appeal without addressing either statute. Instead, the Court relied solely on case law applying S.C. CODE ANN. § 62-1-308(a) of the South Carolina Probate Code (SCPC).

Although the Court's opinion is cryptic, it apparently accepted Respondents' arguments that all appeals from the Probate Court are governed *exclusively* by § 62-1-308, that § 14-3-330 is *never* applicable to such appeals, and that a Probate Court proceeding is not a "special proceeding." The Court also apparently construed the term "a final order, sentence, or decree" under § 62-1-308(a) as excluding any of the interlocutory or intermediate orders enumerated in § 14-3-330(1)-(4).

Section 62-1-308(a) refers to appeals from "a final order, sentence, or decree" of the Probate Court. It does not explicitly mention any of the types of interlocutory or intermediate orders listed in § 14-3-330 that are appealable before the disposition of the entire matter. The consequence of the

Court's opinion is that a party may not immediately appeal any intermediate or interlocutory order issued by the Probate Court even though the same order is appealable if issued by a Circuit Court or Family Court. The Court of Appeals offered no explanation for why this should be the case.

Under the Court of Appeals' ruling, we now follow conflicting rules involving the types of orders issued by courts in our unified judicial system that are immediately appealable—*i.e.*, one set of rules for Probate Court orders and a different set of rules for Circuit Court and Family Court orders. Our courts previously had not differentiated Probate Court orders from Circuit Court or Family Court orders with respect to appealability. For example, 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). This could not be so if § 62-1-308 *exclusively* governs appeals from the Probate Court.

Because the Court of Appeals' decision in this case creates an anomaly and incongruence in our appellate law involving the appealability of orders, Petitioner's Petition asks this Court to grant certiorari to abate the present uncertainty regarding what types of Probate Court orders are immediately appealable and to establish a unified and consistent standard for appeals to our appellate courts. Respondents' Return nowhere disagrees with—indeed, it validates—Petitioner's observation that the Court of Appeals' opinion results in contradictory rules for appeals from Probate Court orders as compared to other lower court orders. Instead, Respondents feebly postulate that this inconsistency "does not present any important or substantial questions of law that justify certiorari" because the Court of Appeals' unpublished opinion "has no precedential value." See Return p. 15. Respondents apparently believe this Court should avoid deciding the question raised in Petitioner's

Petition until it is presented to the Court in the form of a *published* decision. Of course, none of the considerations listed in SCACR 242 indicate that certiorari hinges on whether the lower court's decision is published or unpublished. Further, because there is no other case with "precedential value" resolving the issues raised in Petitioner's Petition, it means those issues will remain undecided for future cases, causing the present uncertainty and confusion as to the law to persist.

Petitioner respectfully submits that the importance of the Court of Appeals' opinion should not be minimized simply because it is unpublished. Rather than ignoring the dichotomy which the Court of Appeals has adopted with respect to appeals from interlocutory and intermediate orders of the Probate Court versus the same orders of the Circuit and Family Courts, Petitioner respectfully requests this Court to accept this appeal and to directly address this purported anomaly in our appellate law, to resolve this novel and important issue with finality, and to establish (or reestablish) uniformity and consistency in our appellate law. The issues raised in Petitioner's Petition are novel, important, and worthy of this Court's resolution.

II. THE PROVISIONS OF S.C. CODE ANN. § 62-1-308(a) DO NOT DISPLACE § 14-3-330; INSTEAD, THE STATUTES SHOULD BE RECONCILED.

Respondents argue that § 62-1-308 is a "specialized statute" completely displacing "the general appeal statute of § 14-3-330" with respect to Probate Court orders. See Return p.6. Respondents base their position on the opinions in Long v. Sealed Air Corp., 391 S.C. 483, 706 S.E.2d 34 (Ct. App. 2011) and Charlotte–Mecklenburg Hospital Authority v. South Carolina Department of Health & Environmental Control, 387 S.C. 265, 692 S.E.2d 894 (2010). Long stemmed from an appeal of a decision issued by an administrative agency (the Workers' Compensation Commission) and Charlotte–Mecklenburg involved an appeal from a decision of the

Administrative Law Court (ALC). The appeals in both cases were governed by the appellate provisions of the Administrative Procedures Act (APA), S.C. CODE ANN. §§ 1-23-380, -390, -610.

The APA allows for judicial review of a "final decision" of the administrative agency or the ALC. Id. §§ 1-23-380 & -610. In defining what is a "final decision" within the context of the APA, the Charlotte–Mecklenburg Court stated that "[i]f there is some further act which must be done by the [ALC] prior to a determination of the rights of the parties, the order is interlocutory." 387 S.C. at 267, 692 S.E.2d at 895 (citations omitted). Conversely, a final decision "disposes of the whole subject matter of the action ***or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined.***" Id. (emphasis added).

In Bone v. U.S. Food Serv., 399 S.C. 566, 733 S.E.2d 200 (2012), "[b]ecause of lingering confusion in this area," this Court again reviewed prior precedents interpreting the APA—including Long and Charlotte–Mecklenburg—in an effort "to provide clarification and a unified approach to appeals involving administrative agencies." Id. at 570, 733 S.E.2d at 202. Bone was a 3-2 divided Court. The majority opinion "reiterate[s] that appeals in administrative agency matters are handled differently than appeals in other cases," that the General Assembly "enacted the APA's mechanisms for review to provide uniform procedures after the exhaustion of administrative remedies," that "the APA's provisions are controlling in these agency matters and supersede any conflicting provisions," and that "while appeals from the circuit court in other cases are subject to the general appealability statute of section 14-3-330, which allows appeals from interlocutory orders in certain instances (such as where the interlocutory order involves the merits), *this provision and its concepts are inapplicable*

in matters subject to the APA." Id. at 574, 733 S.E.2d at 204 (emphasis added).[1]

The cases cited by Respondents were decided within the context of appeals in administrative agency matters subject to the APA, which are handled differently than other appeals. Appeals from the Probate Court are not subject to the APA. Respondents' cases do not hold that § 62-1-308 is a "specialized statute" like the APA which altogether displaces the provisions of § 14-3-330.

Instead of holding that § 62-1-308 completely supplants § 14-3-330, the Court should reconcile and harmonize those statutes to establish a uniform and consistent standard involving the types of interlocutory or intermediate orders that are appealable. This can be achieved only by finding that § 14-3-330 augments or supplements § 62-1-308. A "final order, sentence, or decree" for purposes of § 62-1-308(a) should encompass the types of interlocutory and intermediary orders that are appealable under § 14-3-330 or, at the very least, should include a "final order affecting a substantial right made in any special proceeding" under § 14-3-330(3) and an "interlocutory order or decree . . . granting, continuing, modifying, or refusing an injunction" under § 14-3-330(4).

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[1] Justice Hearn, joined by Justice Kittredge, authored a dissent challenging the majority's holding that a "final decision" under the APA does not include an interlocutory order which "finally determines an issue affecting a substantial right on the merits." Bone, 399 S.C. at 581, 733 S.E.2d at 208 (Hearn, J., dissenting). The dissent forcefully argued that "the test heretofore consistently applied in this State to determine whether an appellate decision is eligible for further review under section 1-23-390 is whether the order finally determines an issue affecting a substantial right on the merits." Id. (citing numerous cases). The dissent disagreed with the majority's conclusion that Charlotte–Mecklenburg had "implicitly overruled this line of cases." Id. at 587, 733 S.E.2d at 211.

Even assuming § 62-1-308 exclusively governs Probate Court appeals, our courts have never decided whether § 14-3-330's concepts nevertheless should be used to determine what is "a final order, sentence, or decree" for purposes of § 62-1-308(a).

III. THE PROBATE COURT'S ORDER IS A FINAL ORDER AFFECTING A SUBSTANTIAL RIGHT MADE IN A SPECIAL PROCEEDING.

The cases cited by Respondents do not hold that a "final order, sentence, or decree" as used in § 62-1-308(a) has exactly the same meaning as a "final decision" under the APA. However, even assuming *arguendo* those terms do have the same meaning, this Court in Charlotte–Mecklenburg held that an order is a "final decision" under the APA if it "terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." Id. As discussed below and in more detail in Petitioner's Petition, the Probate Court's order in this case constitutes a "final order" even using the APA's definition because the order terminated the particular proceeding before the Probate Court, leaving nothing to be done but to enforce the order.

Importantly, South Carolina is among the jurisdictions that have adopted Section 3-107 of the Uniform Probate Code (UPC). Under this section, "each proceeding 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 official 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.

Our appellate courts have not yet addressed the impact of § 62-3-107 on the appealability of Probate Court orders. However, the SCPC 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. Hoover v. Hoover, 271 S.C.

177, 182, 246 S.E.2d 179, 181 (1978).

Case law from other jurisdictions with 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."); De Ayala v. Mackie, 193 S.W.3d 575, 578 (Tex. 2006) ("Probate proceedings are an exception to the 'one final judgment' rule; in such cases, 'multiple judgments final for purposes of appeal can be rendered on certain discrete issues.'" (citation 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). "An order is final if it is dispositive as to the issues raised in the petition prompting the order." Clinesmith v. Temmerman, 298 P.3d 458, 467 (N.M. Ct. App. 2012). "[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). Instead, "[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); Matter of Estate of Olson, 440 N.W.2d 792, 793 (Wis. Ct. App. 1989).

"[I]t 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 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 an order is designated as "interim" does not negate the conclusion that it is appealable as a "final" order. Rentz v. Rentz, 793 S.E.2d 112, 116 (Ga. Ct. App. 2016) ("The probate court's caption as an 'interim' order does not require us to conclude that the order was not final."); In re Estate of Adams, 2013 WL 84925, *2 (Tex. Ct. App. Jan. 8, 2013) ("There may be appeals of interim orders rendered on discrete issues before the entire probate proceeding is concluded."); 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).[2]

[2] The Court of Appeals' decision in Estate of Boyce v. Work, 305 S.C. 43, 406 S.E.2d 184 (Ct. App. 1991), does not compel a different result. In that case, the Court held that a Probate Court order appointing two sisters as "special administrators" for an estate was "clearly temporary" and not a final order because it stated the sisters are appointed "until such time as a Personal Representative(s) shall be formally appointed." The order also forbade the sisters from distributing any estate assets and required them to post a substantial bond. First, the order at issue in this case is noticeably different from the one in Boyce. Although the order in this case states the "special fiduciary [is] to serve as the Interim Trustee," it nowhere states when the appointment will terminate. (R. p. 6 ¶ 26). The appointment is for an indefinite period.

More importantly, nothing in Boyce suggests the Court was aware of § 62-3-107 or considered its impact. The Court also was not presented with any argument that the order was a final order appealable under either §§ 14-3-330(3) or 14-3-330(4). In short, Boyce did not confront or decide the issues presented in this appeal. The Boyce case was appealed to this Court, but settled before this Court had an opportunity to decide the matter. Boyce-Abel In re Estate of Boyce v. Work, 308 S.C. 234, 417 S.E.2d 597 (1992).

In the case at bar, the Probate Court's order granted Respondents' separate petition or motion seeking the appointment of a special fiduciary pursuant to § 62-7-704(e), which framed the scope of the proceeding. The order fully and finally adjudicated the parties' rights involving the matters raised in the petition—the appointment of a special fiduciary. The order is "final" because no further action is required to determine the parties' rights with respect to the appointment of a special fiduciary. There is nothing left for the Probate Court to do on that topic. A special fiduciary was appointed and already has been—and is currently—acting pursuant to the Probate Court's authorization. The Probate Court already has finally decided that discrete issue.

Respondents do not attempt to discredit any of the cases from other jurisdictions applying versions of UPC § 3-107, but instead they claim those cases all involve "the probate of wills and decedents' estates" and that a proceeding to appoint a special fiduciary for a trust is not a "special proceeding." See Return p.9. However, the cases explicitly reject Respondent's claim that a Probate Court matter is not a "special proceeding" 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"); In re Tufford's Trust, 145 N.W.2d 59 (Minn. 1966) (order

making various rulings as to trust was appealable as final order affecting substantial right made in special proceeding); Miller v. Superior Court, 356 P.2d 699, 700 (Ariz. 1960) (order removing trustee was made in a special proceeding and was appealable).

Respondents also argue that "Article 3 of the Probate Code does not govern actions [for the appointment of a special fiduciary] under the Trust Code, such as this one." See Return p.10. Thus, they claim that § 62-3-107 is inapplicable because this proceeding supposedly involves only a trust under Article 7 of the SCPC and not the administration of an estate under Article 3 of the SCPC. Respondents' argument is misguided for at least two reasons. First, Respondents ignore the fact they prosecuted their petition for the appointment of a special fiduciary *in the 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 Mrs. Page's will. In Respondents' "Amended Petition to Appoint Successor Trustee and for Subsequent Estate Administration" filed 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). That pleading 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). Respondents' own pleading refutes their claim that the proceedings in the Probate Court do not involve the administration of an estate under Article 3.

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. (R. pp. 101-04). Respondents 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 SCPC. Despite Respondents' new argument to the contrary, their action in the Probate Court does involve a proceeding to administer Mrs. Page's estate, which is governed by Article 3 of the SCPC. The fact that Respondents combined separate requests for relief under Articles 3 and 7 into one petition does not render § 62-3-107 inapplicable.

Second, the statute that Respondents rely upon to support their request for the appointment of a special fiduciary expressly incorporates the procedures in Article 3. It 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 appointment of a special fiduciary under § 62-7-704(e) adopts the same procedure in Article 3 for the appointment of a special administrator.[3]

Finally, Respondents erroneously argue that a "final order" for purposes of § 14-3-330(3) is limited to the types of orders enumerated in § 14-3-330(2). See Return pp.10-11. Section 14-3-330(2) provides that "[a]n order affecting a substantial right made in an action [is appealable] when

[3] In Fisher v. Huckabee, 2016 WL 7495869, at *4 n.13 (S.C. Ct. App. Dec. 21, 2016), aff'd in part, rev' in part, 2018 WL 6528122 (S.C. Dec. 12, 2018), the Court of Appeals rejected the argument that a Probate Court's order appointing a special fiduciary under § 62-3-614 was interlocutory and not immediately appealable.

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. 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 reflects the difference between "special proceedings" and ordinary "actions." As discussed in Petitioner's Petition, 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, 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 specifically 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); In re Guardianship of Forster, 856 N.W.2d 134, 146 (Neb. Ct. App. 2014) ("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; In re Estate of Muncillo, 789 N.W.2d 37, 42 (Neb. 2010). "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). As analyzed in Petitioner's Petition, the Probate Court's order appointing a special fiduciary with power over the 605 North Main property involves a substantial right, not merely a technical or procedural matter.

The Probate Court's order in this case is a final order affecting a substantial right made in a special proceeding under § 14-3-330(3), which constitutes "a final order, sentence, or decree" within the meaning of § 62-1-308(a). The order is final and appealable even though it does not terminate nor constitute a final disposition of the entire probate matter. This Court should grant certiorari and reverse the Court of Appeals' holding that the Probate Court's order is not appealable.

IV. THIS APPEAL IS NOT MOOT.

Respondents erroneously claim that Petitioner's appeal of the Probate Court's order is moot because "the [Special Fiduciary as Interim Trustee] was authorized to perform limited tasks to preserve the [605 North Main] property from being foreclosed upon prior to the final hearing on the merits" and she allegedly has "fulfilled her duties." See Return pp. 13-14. Respondents also go outside the record and misstate the facts to argue that Petitioner supposedly has consented to the validity of the special fiduciary's actions taken after her appointment. Id.

Respondents essentially argue 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. Of course, Respondents ignore the fact that the Probate Court's order appoints a special fiduciary with powers over the property *for an indefinite period of time*. The Probate Court's order is still in effect and has not expired. The special fiduciary has not been discharged and is still authorized to act according to the Probate Court's order. Nothing the order says otherwise.

In S.C. Pub. Interest Found. v. S.C. Dep't of Transportation, 421 S.C. 110, 804 S.E.2d 854 (2017), this Court observed that "[a] case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy." Id. at 110, 804 S.E.2d at 860 (citing Sloan v. Greenville Cnty., 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009)). This Court also noted that there are "exceptions to mootness" including that if "the issue raised is capable of repetition but generally will evade review, the appellate court can take jurisdiction." Id.

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 Petitioner raised to the Circuit Court in his appeal from the Probate Court's order is that the special fiduciary was not validly appointed. (R. p. 185). That issue remains to be determined in the Circuit Court in the first instance. Because the special fiduciary is currently acting pursuant to the powers granted to her by the Probate Court and will continue to do so in the future, 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 S.C. Pub. Interest Found., 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.

Finally, without any citation to documents in the record, Respondents make the bare claim that Petitioner allegedly has consented to the special fiduciary's actions. See Return pp. 13-14. It is believed Respondents are referring to consent orders that were entered in the Probate Court to allow the Special Fiduciary to carry out some of her duties while this appeal is pending. If so, those consent orders, which are not part of the record, specifically provide in pertinent part as follows: "[B]y consenting and agreeing to this Consent Order, the Parties do not waive and expressly reserve any and all claims, counterclaims, defenses, motions and rights asserted or which could be asserted in this litigation and nothing herein shall be construed or deemed as a waiver, relinquishment, or abandonment of any claims, counterclaims, defenses, or rights by any Party existing as of the date of this Order." Respondents' Return conveniently ignores this provision.

Contrary to Respondents' new argument, the consent orders contain provisions expressly stipulating that Petitioner has not waived any of his claims or rights in this matter. The issues raised in Petitioner's appeal are still ripe and are not moot.

CONCLUSION

For the reasons stated, the Petitioner respectfully requests the Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM DORCHESTER COUNTY
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Edgar W. Dickson, Circuit Judge

Court of Common Pleas Case No. 2015-CP-08-00547
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Of whom ALBERT T. HENSON, JR. is the Petitioner.

PROOF OF SERVICE

I certify that I have served the Reply in Support of Petition for a Writ of Certiorari on the Respondents by mailing a copy to their attorneys of record on December 20, 2018, via first-class mail, postage prepaid, and addressed as follows:

Trudy H. Robertson, Esquire
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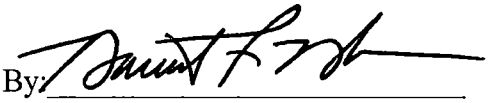
By: 

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