

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
First Judicial Circuit

Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2019-001065

RECEIVED

JUL 29 2019
SC Court of Appeals

In Re: The Estate of Doris Duane Colucci,

Michael C. Fox, Named Personal Representative in the Last
Will of Doris Duane ColucciAppellant,

v.

Andrew W. Chandler, Esquire, in his capacity as Special
Administrator of the Estate of Doris Duane Colucci,
Michael C. Fox, Successor Trustee of the Colucci Living Trust,
Dated February 24, 2005, Ivo Francesco Colucci,
Michael Frederick Antonio Colucci, John Martin Antonio,
Henry Burkes, and Richard M. Hyman, Jr., Esquire Respondents.

MEMORANDUM OF THE ISSUE OF APPEALABILITY

Respondent Andrew W. Chandler, Esquire, as Special Administrator of the Estate of Doris Duane Colucci ("Estate"), respectfully submits this Memorandum on the Issue of the Appealability of the above-captioned matter as requested by this Court.

The Notice of Appeal filed by Appellant purports to appeal: 1) the denial of his Petition for Appointment (as personal representative of the Estate) by the Dorchester County Court of Common Pleas, which petition was first filed in the probate court and removed to circuit court by Appellant; 2) the circuit court's denial of his Emergency Petition for Writ of Supersedeas which

Appellant filed in connection with his appeal of nine (9) separate orders from the probate court to the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

The Decedent, Doris Duane Colucci, was shot in the head and killed by her husband, Ivo Francesco Colucci, on April 14, 2017. Shortly thereafter, Mr. Colucci was determined to be an incapacitated adult by the Dorchester County Probate Court and appointed both a conservator and a guardian.

Respondent Chandler was appointed as Special Administrator of the Estate by the Dorchester County Probate Court on June 9, 2017, on a temporary basis and then, by Consent Order dated July 10, 2017, on a permanent basis. In August 2017, the Decedent's Last Will and Testament, dated June 18, 2013 (the "Will"), was filed with the probate court, however, no one sought to have it admitted to probate at that point in time. The Decedent's Will named her husband, Mr. Colucci as the personal representative. Appellant is named as a successor personal representative.¹ On or about October 30, 2017, Appellant filed a Petition for Formal Testacy and Appointment in the probate court, seeking to have the Will admitted to probate and himself appointed as personal representative. Appellant removed the matter to circuit court, where it was given case no: 2017-CP-18-1816 (the "Appointment Proceeding"). After holding a hearing on August 13, 2018, the circuit court ordered that the Will be admitted to probate by order filed August 27, 2018, but took the matter of Appellant's appointment as personal representative under advisement. Respondent Chandler opposed Appellant's appointment on the basis that Appellant is not qualified to serve as personal representative due to his conflicts of interest and

¹ Appellant is also named as a successor trustee to the Colucci Living Trust, the sole devisee of Decedent's Will. Appellant has served in that capacity since he accepted the trusteeship on or about October 27, 2017.

further because his appointment would result in the waste of Estate assets and cause substantial delays in the administration of the Estate without providing any benefit to the Estate. See Ex parte Small, 69 S.C. 43, 48 S.E. 40, 40-41 (1904) (the appointment of an individual named as the personal representative in a decedent's will must be denied if it would defeat the "main purpose to be attained" in the administration of an estate: "[t]he right of those interested [in it] to have collection and distribution according to law.").

On February 13, 2019, the circuit court granted Appellant's Petition for Appointment, resulting in Appellant's appointment as personal representative of the Estate and, pursuant to S.C. Code Ann. § 62-3-618, the termination of Respondent Chandler's appointment as special administrator. The matter was remanded to the probate court and later that same day, the probate court temporarily restrained Appellant as personal representative and reappointed Respondent Chandler as special administrator on a temporary basis.

On February 25, 2019, in the Appointment Proceeding, Respondent Chandler filed a Motion to Reconsider, Alter, or Amend, asking the circuit court to reconsider its order appointing Appellant as personal representative. After extensive supplemental briefing at the court's request, the circuit court reconsidered its prior order, and by order filed May 28, 2019, denied Appellant's Petition for Appointment, finding that Appellant Fox was not qualified to serve as personal representative. This is one of the two orders Appellant has now appealed to this Court (the "Appointment Appeal").

Separately from the Appointment Proceeding, on April 18, 2019, Appellant, purportedly in his capacity as personal representative of the Estate, appealed nine (9) separate orders of the probate court by filing a Notice of Appeal in the circuit court. The appeal from probate court was

given case no. 2019-CP-18-0677 by the circuit court, which was sitting in its appellate capacity.

Those orders which Appellant appealed from the probate court consisted of the following:

1. 10/24/17 Order Denying Informal Probate
2. 10/26/17 Order to Sell Personal Property
3. 7/30/18 Order Authorizing the Sale of Real Estate
4. 8/27/18 Modified Order for Appointment of Special Administrator
5. 1/15/19 Order Authorizing Distribution from Estate
6. 2/7/19 Order Denying Fox's Petition for Removal of Special Administrator
7. 2/13/19 Order for Appointment of Temporary Special Administrator
8. 2/13/19 Temporary Order Restraining General Personal Representative
9. 4/17/19 Order for Temporary Restraint of General Personal Representative

Respondent Chandler filed a Motion to Dismiss Appeal on the basis that the appeals were either untimely, moot, and/or not final orders as required by S.C. Code Ann. § 62-1-308. Respondent Chandler also filed a Motion to Lift Stay² in the probate court, which was granted.

After the probate court granted Respondent Chandler's Motion to Lift Stay, Appellant, rather than petitioning the circuit court to review the granting of the Motion to Lift Stay pursuant to Rule 241(d)(2), SCACR, filed an "Emergency Petition for Writ of Supersedeas" in the circuit court, seeking to "suspend proceedings in the [probate] court." On May 28, 2019, the circuit court denied Appellant's petition on the basis that it was procedurally deficient. This denial is the second order Appellant has appealed to this Court (the "Supersedeas Appeal").

² The Motion to Lift Stay was filed out of an abundance of caution and requested the lifting of any stay that may have resulted from Appellant Fox's Notice of Appeal.

LEGAL ANALYSIS

I. The Order Denying Appellant's Emergency Petition for Writ of Supersedeas is not an immediately appealable order pursuant to S.C. Code Ann. § 14-3-330.

An order which does not finally end a case or prevent a final judgment from which a party may seek appellate review usually is considered an interlocutory order from which no immediate appeal is allowed. Hagood v. Sommerville, 362 S.C. 191, 195, 607 S.E.2d 707, 709 (2005). Absent some specialized statute, determining if an interlocutory order is immediately appealable depends on whether the order falls within one of the several categories of appealable judgments, decrees, or orders listed in S.C. Code Ann. § 14-3-330. Baldwin Const. Co. v. Graham, 357 S.C. 227, 230, 593 S.E.2d 146, 147 (2004).

The circuit court's denial of Appellant's Emergency Petition of Writ of Supersedeas is not a "final order" subject to this Court's review. Rather, it is an interlocutory order that is not immediately appealable because it does not fall into any of the categories set forth in S.C. Code Ann. § 14-3-330. Edwards v. SunCom, 369 S.C. 91, 93, 631 S.E.2d 529, 530 (2006) (an order granting a stay is not immediately appealable pursuant to S.C. Code Ann. § 14-3-330 as it does not involve the merits, affect a substantial right, or prevent a judgment from which an appeal may later be taken); Carolina Water Serv., Inc. v. Lexington Cty. Joint Mun. Water & Sewer Comm'n, 373 S.C. 96, 644 S.E.2d 681 (2007) (order lifting the stay is not immediately appealable); Williamsburg Rural Water & Sewer Co. v. Williamsburg Cty. Water & Sewer Auth., 2007 WL 8434643, at *2 (S.C. Sup. Ct. filed Dec. 17, 2007) (unpublished) (circuit court's order denying a stay is an interlocutory order that it is not immediately appealable).

Just as in Edwards, the circuit court's denial of Appellant's Emergency Petition for Writ of Supersedeas, which sought to "suspend proceedings" in the probate court, does not involve the merits of the underlying action (i.e., Appellant's appeal of nine separate probate court orders) as

it does not “finally determine some substantial matter forming the whole or a part of some cause of action or defense.” Mid-State Distribs. v. Century Importers, Inc., 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993). Likewise, the order does not affect a substantial right as it does not “discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense.” Id. at 335, n. 4, 426 S.E.2d at 780, n. 4. Rather, the Estate administration continues, with Appellant having the ability to seek judicial review of that administration when the Estate is closed.

Additionally, the order is not reviewable pursuant to that portion of S.C. Code Ann. § 14-3-330(1) that provides: “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.” Even assuming the order denying Appellant’s Petition for Appointment is immediately appealable³, that order was entered in a distinct matter and was unaffected by the order denying Appellant’s Emergency Petition for Writ of Supersedeas.

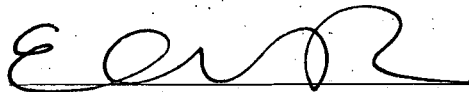
³ Respondent Chandler is unaware of any authority to support an argument that the circuit court’s order denying Appellant’s Petition for Appointment is not immediately appealable. If the Petition had not been removed from probate to circuit court, an argument could be made that, pursuant to S.C. Code Ann. § 62-1-308(a), which limits appeals from probate to circuit court to final orders, sentences, and decrees, and Dorn v. Cohen, 421 S.C. 517, 809 S.E.2d 53 (2017), which appears to construe § 62-1-308(a) to permit the appeal of a probate court’s order only if it decides the entire estate/case, the Petition is not immediately appealable as it does not conclude the entire Estate. However, Appellant removed the Petition to circuit court as a matter of right pursuant to S.C. Code Ann. § 62-1-302(d)(1), and the circuit court proceeded upon the matter de novo. Thus, it does not appear that the law governing appeals from probate courts applies, despite the fact that the appointment of a personal representative is inherently a probate matter. Respondent is further aware of S.C. Code Ann. § 62-3-107, which provides that “a proceeding for appointment of a personal representative is concluded by an order making or declining the appointment.” To the extent the circuit court’s order denying the Petition for Appointment “concluded” the proceeding, it stands to reason that it is a “final” order subject to appeal and, even if not, likely permissible as an interlocutory appeal pursuant to S.C. Code Ann. § 14-3-330.

CONCLUSION

Because the circuit court's order denying Appellant's Emergency Petition for Writ of Supersedeas is not immediately appealable, the appeal of that order must be dismissed.

Respectfully submitted,

ROSEN HAGOOD, LLC



Elizabeth J. Palmer, Esquire
151 Meeting Street, Suite 400
P.O. Box 893 (29402)
Charleston, SC 29401
Telephone: (843) 577-6726
Email: epalmer@rosenhagood.com

ATTORNEY FOR RESPONDENT ANDREW W.
CHANDLER, ESQUIRE

July 26, 2019
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
First Judicial Circuit

Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2019-001065

RECEIVED

JUL 29 2019

SC Court of Appeals

In Re: The Estate of Doris Duane Colucci,

Michael C. Fox, Named Personal Representative in the Last
Will of Doris Duane ColucciAppellant,

v.

Andrew W. Chandler, Esquire, in his capacity as Special
Administrator of the Estate of Doris Duane Colucci,
Michael C. Fox, Successor Trustee of the Colucci Living Trust,
Dated February 24, 2005, Ivo Francesco Colucci,
Michael Frederick Antonio Colucci, John Martin Antonio,
Henry Burkes, and Richard M. Hyman, Jr., Esquire Respondents.

PROOF OF SERVICE

I do hereby certify that on July 26, 2019, I have served all counsel in this action with a copy of the documents herein below specified by mailing a copy of the same by United States mail, postage prepaid, to the following address:

Documents: **Respondent Andrew W. Chandler's Memorandum of the Issue of Appealability**

Counsel Served:

Gordon H. Garrett, Esquire
1075 E. Montague Avenue
North Charleston, SC 29405

Angus M. Lawton, Esquire
496 Bramson Court, Suite 100
Mt. Pleasant, SC 29464

Adam Mlynarczyk, Esquire
1058 E. Montague Avenue
North Charleston, SC 29405

M. Richardson Hyman, Jr., Esquire
P.O. Box 127
Charleston, SC 29402

David K. Haller, Esquire
604 Savannah Highway
Charleston, SC 29407



Taylor Davis
Legal Assistant to Elizabeth J. Palmer
Rosen Hagood, LLC
151 Meeting Street, Suite 400
Charleston, SC 29401
(843) 577-6726

ROSEN | HAGOOD

Taylor Davis
tdavis@rosenhagood.com

July 26, 2019

RECEIVED

JUL 29 2019

SC Court of Appeals

VIA U.S. MAIL

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: In Re: The Estate of Doris Duane Colucci (Michael C. Fox v. Andrew Chandler)
Appellate Case No.: 2019-001065

Dear Ms. Kitchings:

Enclosed please find the original and one copy of Respondent Andrew Chandler's Memorandum of the Issue of Appealability, along with our Proof of Service in connection with the above referenced matter. I kindly ask that you please file the original and return a clocked copy to us in the self-addressed, stamped envelope provided.

Should you have any questions, please do not hesitate to contact us. Thank you for your assistance with this matter.

With kind regards, I am

Sincerely yours,



Taylor Davis
Legal Assistant to Elizabeth Palmer

/tnd

Enclosures

cc: Gordon H. Garrett, Esquire (via U.S. Mail)
Angus M. Lawton, Esquire (via U.S. Mail)
Adam Mlynarczyk, Esquire (via U.S. Mail)
M. Richardson Hyman, Jr., Esquire (via U.S. Mail)
David K. Haller, Esquire (via U.S. Mail)

