

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 Fredrick
Antonio Colucci, John Martin Antonio,
Henry Burkes, and Richard M. Hyman, Jr., EsquireRespondents.

MEMORANDUM ON APPEALABILITY

Appellant Michael C. Fox submits the following in response to the Clerk of Court's July 16, 2019 letter:

- I. **The May 28, 2019 Order under Case No. 2017-CP-18-1816, appoints an Administer of the Estate. Appointment of an Administrator is immediately appealable.**

“An order appointing an administrator in the probate court is immediately appealable.”

Jean Hoefer Toal et al., Appellate Practice in South Carolina 165 (3d ed. 2016) (citing Ex parte

Small, 69 S.C. 43, 48 S.E. 40, 41 (1904)). “The order of Probate Judge Jones decreeing that the letters of administration should be granted to Mrs. Small was really the final order adjudicating the rights of the parties, and was therefore appealable. The consideration of the appeal from this order necessarily involved the right to the administration.” Small, 69 S.C. at 43, 48 S.E. at 40. Small is still good law in this state. Accord Fisher v. Huckabee, No. 2014-002020, 2016 WL 7495869, at *4 (S.C. Ct. App. filed Dec. 21, 2016), *aff’d in part, rev’d in part*, No. 2017-000743, 2018 WL 6528122 (S.C. filed Dec. 12, 2018). Matter of Howard, 315 S.C. 356, 434 S.E.2d 254 (1993); Parkman v. Hanna, 311 S.C. 20, 426 S.E.2d 743 (1992); In re McClam’s Estate, 245 S.C. 315, 140 S.E.2d 478 (1965); In re Est. of Weeks, 329 S.C. 251, 495 S.E.2d 454 (S.C. App. 1997).

An order granting, or declining the removal of a personal representative, is likewise reviewable. Church v. McGee, 391 S.C. 334, 705 S.E.2d 481 (Ct. App. 2011). In McGee, the Plaintiff petitioned the Probate Court for the removal of the personal representative of the estate. Id. That issue was removed to the Circuit Court. Id. The Circuit Court denied the petition and this Court granted certiorari. Id. “Where a trustee is affected by a judgment in his official capacity, he is aggrieved and may appeal” Wilson v. Dallas, 403 S.C. 411, 424, 743 S.E.2d 746, 753 (2013) (quoting Columbia Union Nat’l Bank & Trust Co. v. Bundschu, 641 S.W.2d 864, 879 n. 10 (Mo.Ct.App.1982)). Further, the Court of Appeals has recently held that an order appointing a special fiduciary, even on a temporary basis, was immediately appealable. Fisher, 2016 WL 7495869, at *3.

II. The Circuit Court’s orders are appealable under South Carolina’s general appeal statute, section 14-3-330 of the South Carolina Code.

On October 27, 2017, Appellant Fox filed a Petition for Formal Testacy and Appointment of a Personal Representative. These issues were subsequently removed to the Dorchester County Circuit Court by order dated November 20, 2017. The Petition for Formal Testacy and

Appointment was heard on August 13, 2018, and on August 27, 2018. On August 27, 2018, the Dorchester County Circuit Court admitted the Will to Probate; appointment of a personal representative was taken under advisement. On February 13, 2019, the Dorchester County Circuit Court appointed Appellant Fox as Personal Representative of the Estate. On February 25, 2019, Respondent Chandler moved the Court to Reconsider, Alter, or Amend its February 13, 2019 Order appointing Appellant Fox. On May 28, 2019, the Court granted the Respondent's motion and removed Appellant Fox as Personal Representative; Respondent Andrew Chandler's capacity as special administrator was reinstated.

The Circuit Court issued the May 28, 2019 Order removing Appellant Fox in its capacity as court of general jurisdiction. See S.C. Code § 62-1-302(d) (Circuit Court has concurrent jurisdiction with Probate Court upon removal). Section 62-1-308 is inapplicable here, as it applies solely to appeals from the Probate Court to the Circuit Court. See S.C. Code 62-1-308(a) (“A person interested in a final order, sentence, or decree of a probate court may appeal to the circuit court in the same county”); Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007) (“When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning”). Accordingly, the general rules of appeal found in the SCACR and section 14-3-330 are applicable here. Otherwise, an issue removed to the Circuit Court, once the Circuit Court renders its decision, aggrieved parties would be required to appeal the decision to the Circuit Court. This result could not have been intended by the legislature. See Hodges v. Rainey, 341 S.C. 79, 91, 533 S.E.2d 578, 584 (2000) (“The goal of statutory construction is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd”).

III. The May 28, 2019 Order removing Appellant Fox as Personal Representative is a final order that is immediately appealable.

An order is final when it results in a binding adjudication of the rights of the parties. Keels v. Powell, 213 S. C. 570, 50 S. E. 2d 704 (1948); Good v. Hartford Accident & Indem. Co., 201 S.C. 32, 21 S. E. 2d 209 (1942).

A judgment, order, or decree, to be final for purposes of an appeal or error, must dispose of the cause, or a distinct branch thereof, as to all the parties, reserving no further questions or directions for future determination. It must finally dispose of the whole subject-matter or be a termination of the particular proceedings or action, leaving nothing to be done but to enforce by execution what has been determined. In other words, a final judgment is one which operates to divest some right in such a manner as to put it beyond the power of the Court making the order to place the parties in their original condition after the expiration of the term; that is, it must put the case out of Court, and must be final in all matters within the pleadings.

Good, 201 S.C. at 32, 21 S.E.2d at 212 (quoting 2 Am. Jur. 2d, Appeal and Error § 22). Appellant Fox was the first successor Personal Representative named in the Last Will and Testament of Doris Duane Colucci. Having a particular person administer an estate is an established right. Small, 69 S.C. at 43, 48 S.E. at 40. An order appointing an administrator is a final order and is appealable. Id.

The May 28, 2019 Order removing Appellant Fox as Personal Representative reserves no further questions for future determination. He was permanently removed from his position as Personal Representative of the Estate. Respondent Chandler's capacity as Special Administrator of the Estate was reinstated. That order divested Appellant Fox of the right to administer the Estate. As such, it is now beyond the power of the Circuit Court to restore Appellant Fox's capacity as Personal Representative of the Estate. Therefore, the May 28, 2019 Order removing him as Personal Representative is a final order, properly before this Court for review.

IV. Interlocutory orders can be reviewed when a final order is appealed.

As discussed above, the May 28, 2019 Order removing Appellant Fox as Personal Representative is a final order. As such, the May 28, 2019 Order Denying Appellant's Emergency Petition for Writ of Supersedeas is likewise reviewable. S.C. Code § 14-3-330(1); Cox v. Woodmen of the World Ins. Co., 347 S.C. 460, 556 S.E.2d 397 (Ct. App. 2001) (An order that is not directly appealable will be considered if there is an appealable issue before the court). Here, the May 28, 2019 Order removing Appellant Fox as Personal Representative is appealable and therefore, any other interlocutory orders raised in this appeal are properly before this Court.

V. The May 28, 2019 Order denying Appellant Fox's Writ of Supersedeas affects a substantial right.

Further, the May 28, 2019 Order Denying Appellant's Emergency Petition of Writ of Supersedeas affects a substantial right of Appellant Fox. In particular, it was ordered that:

[The] estate is to remain in the complete jurisdiction of the Probate Court until a final order is issued by the Probate Court disposing of all matters before it. At that point, should any appeals be necessary, only then can parties petition the Circuit Court in an appellate fashion. No appeals to the Circuit Court may be had or filed until this case is completed in Probate Court.

This language clearly prohibits Appellant Fox from appealing any final order of the Probate Court to the Circuit Court until all matters are disposed of in the Probate Court. "In every case, and on every matter, a party has the right to appeal from a decision made in the Courts below." Pinckney v. Henegan, 33 S.C.L. 250, 255 (S.C. App. L. 1848). South Carolina law does not require a party to wait until the Probate Court disposes of all matters before it, before they may appeal to the Circuit Court. A party has an absolute right to appeal any final order of the Probate Court to the Circuit Court. See S.C. Code Ann. 62-1-308(a) ("A person interested in a final order, sentence, or decree of a probate court may appeal to the circuit court in the same county"). However, in order

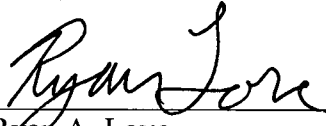
to appeal, parties are required to file their intention to appeal within ten days after written receipt of the order. S.C. Code Ann. 62-1-308(a).

Presumably, if the Probate Court issues a final order, but had not disposed of the remaining issues before it, Appellant Fox would be barred from filing his intention to appeal that order, until the Probate Court disposed of the remain issues before it. Should more than ten days pass from receipt of the written order and the Probate Court had not disposed of the remaining issues before it, Appellant Fox would be barred from timely filling his intention to appeal. The issue would not preserved for review.

The May 28, 2019 Order Denying Appellant's Emergency Petition of Writ of Supersedeas denies Appellant Fox the right to appeal final orders of the Probate Court to the Circuit Court. Furthermore, it places Appellant Fox in the unusual position of potentially being unable to preserve an issue for review. Therefore, the May 28, 2019 Order Denying Appellant's Emergency Petition of Writ of Supersedeas affects substantial rights and is properly before the Court for review.

Accordingly, Fox asks this Court to issue an order declaring the May 28, 2019 order removing Appellant Fox as Personal Representative and May 28, 2019 Order Denying Appellant's Emergency Petition for Writ of Supersedeas are appealable. Further, Fox requests that this Court grant such other and further relief as it deems just and proper.

Dated: 7/24/19


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**APPEAL FROM DORCHESTER COUNTY
First Judicial Circuit**

Edgar W. Dickson, Circuit Court Judge

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Henry Burkes, and Richard M. Hyman, Jr., EsquireRespondents.**

CERTIFICATE OF SERVICE

The undersigned certifies that the persons set forth below were served with the Memorandum on Appealability and the Notice of Appearance for Ryan A. Love in the above-referenced case by placing it in the U.S. Mail, first class, postage-prepaid on the date below to the following addresses:

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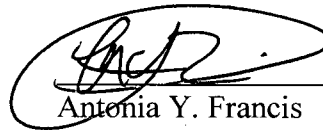
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Dated: July 24, 2019



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24 July 2019

Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
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SC Court of Appeals

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

Dear Ms. Kitchings:

Please find the enclosed Memorandum on Appealability, Notice of Appearance, and the Certificate of Service for the same.

Please do not hesitate to contact our office should you need any additional information.

Sincerely,


Ryan A. Love

/RAL

Enclosures

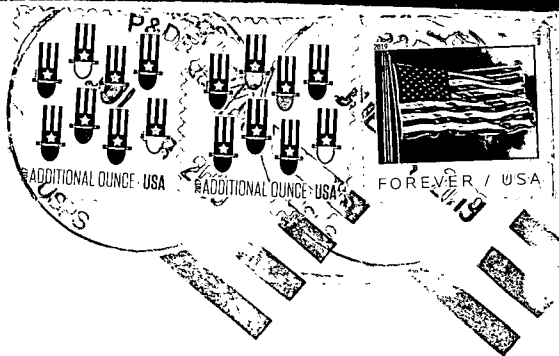
Cc: David K. Haller, Esquire, Elizabeth J. Palmer, Esquire, Angus Lawton, Esquire, Adam Mlynarczyk, Esquire, M. Richard M. Hyman, Esquire, and Gordon H. Garrett, Esquire.

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