No Respondent's Brief Filed

RECEIVED
NOV 20 2014
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2014-001267
Circuit Case No.2009-CP-10-3010

In the matter of the Estate of Alice Shaw Baker.

Betty Fisher and Lisa Fisher, ...Appellants

v.

Bessie Huckabee, Kay Passailague Slade,
Sandra Byrd, and Henry McMaster, in his Capacity as Attorney General of South Carolina, Defendants,

Of whom Bessie Huckabee, Kay Passailague Slade, and Sandra Byrd, are the Respondents
.....

FINAL BRIEF OF APPELLANTS

JOHN HUGHES COOPER, ESQUIRE
1476 Ben Sawyer Blvd. Ste. 7
Mount Pleasant, SC 29464
shiplaw@jhcooper.com
843-883-9099; fax 843-883-9335
(Attorney for Appellants)

TABLE OF CONTENTS AND AUTHORITIES

A. Table of Contents

A. Table of Contents
Continued

B. Table of Authorities

Cases:

Codes:

Rules:

B. Table of Authorities
Continued

U.S. Supreme Court Authority:

***Out of State Cases*:**

Federal Cases:

Federal Codes:

//

B. Table of Authorities
Continued

Constitutional Provisions:

Miscellaneous:

//

//

//

//

//

//

//

//

//

//

//

//

//

//

B. Table of Authorities
Continued

Treatises:

I.
STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE CIRCUIT COURT'S ORDER DENYING A MOTION TO DISQUALIFY COUNSEL IS IMMEDIATELY APPEALABLE ?

2. WHETHER THE CIRCUIT COURT'S ORDER DENYING A MOTION TO DISQUALIFY ATTORNEY KOUTEN CONFLICTS WITH THE PRINCIPLES ENUNCIATED IN *TOWNSEND V. TOWNSEND,* 323 S.C. 309, 474 S.E.2d 424 (1996)?

3. WHETHER THE CIRCUIT COURT'S ORDER DENYING A MOTION TO DISQUALIFY ATTORNEY KOUTEN WAS ERROR WHERE EVIDENCE ESTABLISHED A NON-WAIVEABLE CONFLICT OF INTEREST?

4. WHETHER THE CIRCUIT COURT'S ORDER DENYING A MOTION TO DISQUALIFY ATTORNEY KOUTEN CONFLICTS WITH ACCEPTED PRINCIPLES MANDATING PROTECTION OF ATTORNEY CLIENT PRIVILEGE?

5. WHETHER THE CONSENT ORDER SUBSTITUTING W. WESTBROOK WILLS IS VALID, IN LIGHT OF THE FAILURE TO COMPLY WITH RULES 5, 11, AND CONSTITUTIONAL PRINCIPALS OF DUE PROCESS, AND THE PROHIBITION AGAINST EX PARTE COMMUNICATION WITH THE COURT?

//

//

//

//

//

//

II.
STATEMENT OF THE CASE

Alice Shaw Baker did not choose Attorney Peter Kouten ("Attorney Kouten") to represent her in the underlying Guardianship/Conservatorship proceeding. (*Conservatorship of Alice Shaw Baker*, Case no. 2008-GC-10-088 ("Conservatorship case") .)

Alice Shaw Baker did not have the ability to contest his position as court appointed counsel, visitor, and guardian ad litem. These roles are determined by the statutory scheme under South Carolina Code Ann. § 62-5-101 et seq. when incapacitated individuals are brought before the probate court.

Alice Shaw Baker did not provide written consent to Attorney Kouten to permit him to represent Respondents Bessie Huckabee, Kay Passailaigue Slade, or Sandra Byrd in this Will Contest.

She was a vulnerable adult, subject to the dictates of the probate court.

Now after her death, Appellants Betty Fisher and Lisa Fisher ("Appellants") finally have the opportunity to have this court consider their timely filed *Motion to Disqualify Attorney Peter Kouten.* Appellants contend that the circuit court's denial of this motion must be reversed, for the following reasons:

1) Under the important policy considerations governing motions to disqualify, the denial of the motion affects Alice Shaw Baker's substantial rights and compromises these rights as Attorney Kouten uses his "court appointed attorney" status , information previously

acquired in the guardianship/conservatorship proceeding, and places his own interest above that of his Ward--Alice Shaw Baker. All actions taken on behalf of Alice Shaw Baker by Appellants will be prejudiced if forced to proceed with Attorney Kouten acting as counsel for Respondents, and Respondents will reap a windfall as they receive confidential information that they were never entitled to receive and compromise Alice's claims through the manipulation of the prior representation;

2) Under the principles of *Townsend v. Townsend,* 323 S.C. 309, 474 S.E.2d 424 (1996), the circuit court had a mandatory duty to remove Attorney Kouten due to his previous representation of Alice Shaw Baker;

3) Under rules of professional responsibility, the circuit court should have found that he was representing adverse interests and a non-waiveable conflict of interest exists;

4) Under the principles governing attorney client privilege, Attorney Kouten should have been removed to ensure that Alice Shaw Baker's rights concerning her communications was preserved;

5) Under rules 5, 11, and constitutional provisions governing Due Process, Attorney Kouten's efforts to substitute W. Westbrook Wills were ex parte communications and remain a ruse to mislead the court as to the representation of Respondents. Attorney Kouten continues to appear and argue on their behalf, necessitating this Court's decision on the *Motion to Disqualify.*

Attorney Kouten's acts have been wholly self-serving and contrary to the best interest of his Ward. He has put his financial position above the sanctity of his role as court appointed counsel, guardian ad litem, and visitor. His actions create both the appearance of impropriety and demonstrate actual impropriety, because he blatantly ignores his responsibilities in these court appointments and takes on clients who had adverse claims against Alice Shaw Baker. Additionally, his continued representation demonstrate that he failed to properly perform his duties when she was alive, because he would have known that she had revoked the Will. Or, Attorney Kouten is merely failing to inform the court of the revocation to ensure that he financially benefits by representing Respondents.

The Legislature's implementation of a statutory scheme which safeguards vulnerable adults by the appointment of court appointed counsel in conservatorship/guardianship proceedings has been completely undermined in this case, where court appointed counsel ignored the obvious conflicts of interest of representing individuals who took an adverse position against Alice Shaw Baker in

the guardianship/conservatorship proceeding and then continues to take an adverse position in the Will Contest/Revocation proceeding.

This case warrants immediate appeal, because of the prejudice that will be suffered on behalf of Alice Shaw Baker. Appellants pray that this Court reverse the Circuit Court decision denying the motion to disqualify Attorney Kouten. Everything that Attorney Kouten does to represent Alice Shaw Baker's adversaries necessarily will have an injurious affect on Alice Shaw Baker's estate, and South Carolina law does not support such an outcome.

III.

STATEMENT OF FACTS

a. Background Facts

Alice Shaw Baker had long been an important member of South Carolina's community. She was a member in good standing of her church. She volunteered her time rescuing animals. She had devoted her life to caring for animals and supporting animal charities. (R. 17)

She was born August 14, 1929 in San Francisco, California. Ms. Shaw-Baker was enlisted in the United States Navy for four years and, during her enlistment, stationed in Charleston, South Carolina. (R. 15-16)

Thereafter, Appellants allege that Ms. Shaw-Baker worked for Charleston Memorial Hospital for approximately twenty years until her retirement. Appellant contends that Respondents Huckabee, Slade, and Byrd worked for Ms. Shaw Baker

at Charleston Memorial Hospital, and used their working relationship with Ms. Shaw Baker to gain information about her private life, her finances, and her estate plan. Furthermore, Respondents used this information to gain control over Ms. Shaw Baker's mind and her will, and to interfere with the known estate plan that Ms. Shaw Baker had established for the benefit and protection of animals. Also, Appellants alleged that Respondents falsely claimed that Slade owned an animal rescue in their effort to deceive Ms. Shaw Baker. ®. 15-20)

During these proceedings, the probate court appointed Respondent Attorney Peter Kouten as Court Appointed Counsel, Guardian Ad litem, and visitor to Alice Shaw Baker in the Conservatorship proceedings. However, Ms. Shaw Baker agreed to the appointment of her great niece Lisa Fisher as conservator/guardian in October 2008. (R. 21-23)

Thereafter, Appellants allege that Respondent Kouten dually represented the other Respondents while Alice Shaw Baker was still alive and at her home, **and not merely after her death.** These actions are alleged to be in violation of Rules of Professional Conduct and were actions that were adverse to the wishes of Ms. Shaw Baker. These actions were discovered after Alice Shaw Baker's death, and brought to this court's attention at the earliest opportunity, in an early appeal. Appellants have taken said action, and ask the court to consider the evidence in Exhibits A through Q which demonstrate the dual representation of Attorney Kouten and his access to confidential information of Alice Shaw Baker. (R. 114-174)

b. Procedural History

On or about April 27, 2009, Appellants filed their Verified Complaint, Addendum to Petition for Formal Testacy. (R. 12)

After the filing of this petition, Appellants filed an appeal regarding preliminary issues in the case. In said Appeal, Appellants raised the issue of conflict, although the court denied the motion, it ruled:

> "This decision, however, is limited to the proceeding in this court and **is without prejudice to Appellants to raise their concerns and move for relief under appropriate circumstances in either the probate court or the circuit court.**" (R. 10, Court of Appeals March 4, 2011 Order, p. 2, emphasis added).

Therefore, upon return to the circuit court, Appellants filed their *Motion to Disqualify and Remove Opposing Counsel Peter Kouten due to Non-Waiveable Conflict of Interest* at the first opportunity on August 1, 2012. (R. 45)

Attorney Kouten filed his *Memorandum Opposing Disqualification and Removal of Counsel* on November 12, 2012. (R. 68)

New counsel W. Westbrook Wills filed a notice of appearance, however Attorney Kouten continues to appear, file documents as counsel for Respondents, and argue at the hearings. Appellants filed *Objections and Oppositions to Notice of Appearance filed by counsel W. Westbrook Wills* on [October 4, 2013, not August], due to the procedural deficits. Instead of filing the documents correctly, Respondents filed a *Consent Order substituting W. Westbrook Wills* on October 14, 2013. (R. 5) This document was presented to the court ex parte and not served on

Appellants until after the court signed the consent order. (R. 7) Still, Attorney Kouten continues to appear at the hearings and file the motions, contrary to the order. (R. 175)

The court denied the *Motion to Disqualify* by Form 4-Judgment in a Civil Case filed February 4, 2014. (R. 8)

Thereafter, Appellants filed their *Motion to Reconsider, Alter, Amend, and Vacate February 10, 2014 [sic, February 4, 2014] Order Denying Motion To Disqualify and Remove Opposing Counsel Peter Kouten due to Non-Waiveable Conflict of Interest; Memorandum of Law; Affidavit of Lisa Fisher* on February 18, 2014. (R. 76)

The court did not set this matter for hearing, instead denying said motion as a matter of course and pursuant to Form 4-Judgment in a Civil Case filed May 7, 2014. (R. 9)

Thereafter, Appellants filed their Notice of Appeal on June 10, 2014. (R. 109)

//

//

//

//

//

//

//

ARGUMENT

IV.
THE COURT MUST REVERSE THE ORDER DENYING THE MOTION TO DISQUALIFY ATTORNEY PETER KOUTEN, BECAUSE IT CONFLICTS WITH STATUTORY AND CASE LAW

A. Appellants must bring this Interlocutory Appeal to Ensure that they Do Not Waive Attorney Kouten's Conflict of Interest.

Rule 201, SCARC, provides that an "appeal may be taken, as provided by law, from any final judgment or appealable order."

There are certain interlocutory orders which are immediately appealable. Under S.C. Code § 14-3-330, exceptions exist which allow a party to immediately appeal. For instance, under subsection (2), when a substantial right is affected, an interlocutory appeal may be taken. This includes a "denial of a party's right to a particular mode of trial."

Hagood v. Sommerville, 362 S.C. 191 (2005) is the seminal case supporting the reversal of orders on motions to disqualify. Although the reasons are different, *Hagood* supports an immediate appeal of the motion to disqualify Attorney in *this* case. Appellants seek to restrain counsel from acting against the interests of his former client, here Alice Shaw Baker. It also seeks to restrain counsel from waiving the attorney client privilege/attorney work product, etc. This is tantamount to a request for an injunction against Attorney Kouten. Under S. C. Code Ann. § 14-3-330(4), the court has appellate jurisdiction over orders "granting, continuing,

modifying, or *refusing* an injunction." (S.C. Code Ann. § 14-3-330(4); see also *Williams v. Northwestern Sec. Life Inc. Co.*, 307 S.C. 462 (1992), emphasis added.)

Also, the important policy considerations governing motions to disqualify also support immediate appeal of this case. Alice Shaw Baker's substantial rights are compromised by Attorney Kouten using his "court appointed attorney" status , information previously acquired in the guardianship/conservatorship proceeding, and placing his own interest above that of his Ward--Alice Shaw Baker. All actions taken on behalf of Alice Shaw Baker by Appellants will be prejudiced if forced to proceed with Attorney Kouten acting as counsel for Respondents, and Respondents will reap a windfall as they receive confidential information that they were never entitled to receive and compromise Alice's claims through the manipulation of Attorney Kouten's prior representation.

In *Doe v. Howe,* 362 S.C. 212 (2004), the court found that an order denying motion to proceed anonymously was immediately appealable. The court reasoned that the order denying the motion had the effect of revealing his identity, the very thing he was seeking to keep confidential.

Attorney Kouten represented Alice Shaw-Baker at her most vulnerable time, as she was opposing conservatorship/guardianship proceedings. He did so as an officer of the court, not an attorney that she hired on her own. He had mandatory duties, and now he seeks to represent the very individuals that he knew or should have known had mislead her and were acting contrary to her best interest. It should have been a simple decision, court appointed counsel should not represent any party

after the death of his Ward. Instead, Appellants were forced to bring this morning. They contend that if they do not seek review at this time they will waive the issue of conflict

Also, the issue relating to the denial of an Order to Disqualify counsel when a non-waiveable conflict of interest exists based on prior represenation by opposing counsel in court appointed counsel/guardian ad litem context raises an issue of first impression in South Carolina, and requires review by this court.

Therefore, this case is immediately appealable, and failure to seek this appeal at this time would constitute waiver. (See *Creed v. Stokes,* 285 S.C. 542(1985)).

//

//

//

//

//

//

//

//

//

//

//

//

//

B. *The Circuit Court's Orders Denying the Motion to Disqualify, and the subsequent Motion to Reconsider, is in Direct Conflict of Interest with the Principles in Townsend v. Townsend,* 323 S.C. 309, 474 S.E.2d 424 (1996).

Despite the fact that the case deals with family law issues and minor children, Appellants assert that *Townsend v. Townsend,* 323 S.C. 309, 474 S.E. 2d 424 (1996) mandates Attorney Kouten's immediate disqualification. It is on point, and it is the only case that discusses the duties of a guardian ad litem to his Ward. There will be few opportunities for an elderly incapacitated individual to ever question or seek disqualification of a guardian ad litem, and after the death of the elderly individual, few opportunities for family to realize the import of a guardian ad litem representing any individual in litigation. At it's core, allowing a guardian ad litem/court appointed attorney to continue to financially benefit when his/her initial appointment is to assist the court is wrong, and as more fully developed, constitutes a non-waiveable conflict of interest.

In *Townsend,* the court sua sponte ordered a father's attorney disqualified, because a few years earlier the attorney had served as a guardian ad litem for the daughter. The court held that service as a guardian ad litem had created a non-waiveable conflict of interest and removal as counsel was correct.

The *Townsend* court analyzed Rule 1.9(a) of the Rules of Professional Conduct, which provides:

> "(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that

person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
(1) whose interests are materially adverse to that person; and
(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;
unless the former client gives informed consent, confirmed in writing.
(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client."

In *Townsend,* the court found that while a guardian ad litem does not *technically* have an attorney client relationship with the minor children, a guardian ad litem's ultimate responsibility is to assist the Court in protecting the best interests of the child. They accomplish this role by performing a variety of roles including that of advocate or fact finder. The court noted that "[p]articularly in performing this investigatory function, a competent guardian ad litem hopes to gain the trust and confidence of the child he seeks to protect and of the child's family."

The court concluded that "to allow a guardian ad litem to represent a parent in a proceeding substantially related to the action for custody or visitation would

completely undermine the trust and confidence necessary to an informed recommendation by the guardian ad litem." The court found that, for purposes of the rules relating to attorney conflict of interest, it should apply to guardian ad litem.

Therefore, the court determined that "it seems reasonable to find that matters are 'substantially related' when the guardian ad litem reasonably could have gained information in the first matter that will be relevant in the second matter."

The court noted the "risk" that information he gained during the custody matter in which he was Daughter's guardian ad litem might prove relevant to the child support claim and particularly to the college support claim in the action in which he represented Father.

Finally, the court found other reasons to justify the disqualification of the attorney, concluding:

> "A ward of an attorney guardian ad litem should not have to encounter that person in subsequent litigation in which the former guardian ad litem is representing anyone whose interests are potentially or actually adverse to the ward's. A guardian ad litem has the duty of advocating the best interests of his ward and should not, in future proceedings, represent parties with interests opposed to the best interests of his former ward. To do so is **unseemly** and inappropriate. We can perceive no greater conflict with one's duties to advocate the best interests of a child than to represent the parent of that child against the child herself in a future proceeding. **The family court judge had ample authority, and, in fact, a duty to remove Lawyer from his representation of Father. The family court must ensure the integrity of the proceedings before it. There was no error."** (*Id.* at 429, Emphasis added)

Alice Shaw-Baker was a citizen of South Carolina at her death. She was entitled to the same protections as other citizens, including those of minor children. She was entitled to proper representation and protection prior to her death. This case demonstrates the real problems that arise when counsel fails to act for the best interest of their Ward. Respondent Peter Kouten essentially admitted this at the hearing on November 28, 2012:

> "Everybody who signed on as defendants under my representation -- and don't get me wrong, Judge, looking at this kind of hindsight 20/20 thing, probably that was a mistake, but **I didn't understand it.**
>
> ***
>
> All the clients have signed retainer agreements that said there is a possibility that there is, and I may just have to say I can't -- I can't represent you any more, they have all signed off and said that's fine." (R. 188, ll. 11-16 and R. 189, ll. 16-20, emphasis added.)

Here, Attorney Kouten has clearly stated that he didn't "understand" this matter, still he admits that a conflict exists which required his "current" clients to sign a waiver of conflict of interest. This smacks of rank disregard for Alice Shaw-Baker--the most important person in this case. Alice did not sign a waiver, nor can she. His admission of this non-waiveable conflict requires Attorney Kouten to withdraw. Since he refuses, these are grounds for this Court to act.

Alice Shaw Baker was Respondent Attorney Kouten's Ward. Furthermore, he was her court appointed attorney. He refuses to withdraw from a case, where there is an admitted conflict. He tries to distinguish the obligation owed to a minor, to that

owed to Alice, an elderly disabled woman. She must be entitled to at least the same obligation owed to a child.

All of these actions harmed Alice Shaw Baker and her estate–*during her life* and now *after her death*, where the rights of Respondents cast a shadow over the ***memory and rights of Alice.***

Denial of Appellants' *Motion to Disqualify* is contrary to the principles set forth in *Townsend,* and undermine the duty owed to Alice Shaw Baker. There can be no more unseemly act than to ignore the rights of a vulnerable, disabled adult. The probate code established a statutory scheme meant to protect these individuals. These individuals rights owed to Alice Shaw Baker have all been undone by the relentless attempt by Attorney Kouten to remain counsel, when the Rules of Professional Responsibility mandate his discharge. Appellants request that the court reverse the circuit court's decision , both to maintain the integrity of *these* proceedings and to ensure that Alice Shaw-Baker and her estate are not subjected to this improper conflict of interest.

C. This Case Involves a Non-Waiveable Conflict of Interest which mandates Attorney Kouten's Removal.

Under S.C. Rules Prof. Conduct, Rule 1.9, a lawyer who has formerly represented a client in a matter **shall not** thereafter represent another person in the same or a **substantially related matter** in which that person's interests are materially adverse to the interests of the former client unless the former client **gives informed consent, confirmed in writing.** (Emphasis added)

It is well settled that under the rules relating to attorney conflicts of interest, a lawyer owes a duty of loyalty to **former clients**. *(In re Johnson*, 386 S.C. 550, 689 S.E.2d 623 (2010), Rule 407, SCACR, Rule 1.9, emphasis added)

Moreover, South Carolina Ethical Opinion 94-14 (1994) explains the relationship in cases of "conflict of interest" in conservatorship and estate proceedings. In said case, the attorney represented the grandmother as personal representative of the estate of her son and as conservator of her grandson. A conflict of interest arose with regard to life insurance proceeds. The conflict of interest between the grandmother and grandson required the attorney to withdraw from representation of the grandmother and also would prohibit the attorney from assuming representation of the grandson without the grandmother's consent.

Other jurisdictions have also discussed the significance of former representation, See *In re Hostetter*, 238 P. 3d 13 (2010), where the Oregon Supreme Court found an attorney is prohibited from engaging in a former-client conflict of interest even when the former client is deceased.

S. C. Ethical Opinion, Opinion 12-10 provides that a lawyer must not release confidential information to an adverse executor of the estate without obtaining an order from the probate court or as specifically authorized by the deceased client.

The well accepted principles governing dual representation and informed consent are set forth in the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132 (2000) which provides in pertinent part that "[A] lawyer who has represented a client in a matter may not thereafter represent another

client in the same or a substantially related matter in which the interests of the former client are materially adverse." (See also ABA MODEL RULES OF PROF. CONDUCT § 1.9(a) (1996).)

Further, pursuant to the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 (2000):

> "Informed consent requires that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client."

One of the issues at trial in this matter will be Ms. Shaw Baker's revocation of the alleged "Will" probated by Defendants. Attorney Kouten can not ignore the fact that he has failed to obtain written informed consent, and that he can not *now* get informed consent, due to Ms. Shaw Baker's death.

Attorney Kouten was her, Alice Shaw Baker's, court appointed attorney, so under S.C. Rules Prof. Conduct, rule 3.7, he is not allowed to "act as advocate at a trial in which the lawyer is likely to be a necessary witness...]"; see also S.C. Bar Eth. Adv. Op. 91-26 [where an attorney was both guardian ad litem and advocate in a potential involuntary commitment proceeding, that attorney may not act as witness and advocate (citing Rule 3.7 of the Rules of Professional Conduct); and see Rule 1.6.390 [confidential communications])

There is no doubt that concurrent conflicts of interest can arise from a lawyer's responsibilities to a former client. (*See* Rule 407, SCACR, Rule 1.7, Comment 1.)

In analyzing these Rules of Professional Conduct, the recurring problem is that these ethical rules are supposed to be self promoting. Attorneys are supposed to self-check, so the rights of vulnerable clients are not subject to the ability of a family member to fight and protect the rights. Attorney Kouten knows or should know that his role as court appointed attorney, guardian ad litem, visitor, etc. all precluded him from representing Respondents in this matter. His only concern is his duty to Respondents, NOTHING about his duty to Alice Shaw Baker. It is unseemly to have an attorney get a court appointment, and thereafter ignore the rights of that Ward after her death. Attorney Kouten is attempting to gain financial status from cases which are inherently public service appointments.

Appellants respectfully request that this Court reverse the Circuit Court's denial of the *Motion to Disqualify.*

D. The Court Erred by Failing to Disqualify Attorney Kouten, when Principles governing the Attorney Client Privilege Preclude him from Representing Respondents

Respondent Kouten admitted that: "Judge, I was appointed as her guardian ad litem. I don't have any confidential information on Alice Shaw Baker because she had 24 hour care. Every time I met with her, I met with her with somebody else. Any time I got information from her, I provided it to the court." (R. 186, ll. 14-20.)

This is clearly wrong. Confidential communications do not lose their confidential status merely because a third party is present who is reasonably necessary for the protection of the client's interests in the particular circumstances. (See *McCormick on Evidence, § 91)* He could and should have told third parties to leave the room.

These admissions at the hearing also raise further questions into Respondent Kouten's representation of Ms. Shaw Baker. In a matter which was so important dealing with her potential loss of liberties, he had a ***duty*** to speak to her privately to ensure that she was able to communicate ***freely.***

This is generally the accepted practice for individuals who may be vulnerable in the trust and estate community. Under the standard in *Sims v. Hall,* 357 S.C. 288, 295-96, 592 S.E.2d 315, 319 (2003), the court held that the standard of care was established by the attorney's admission of wrongdoing. Appellants contend Kouten's admissions demonstrate a breach of the standard of care, and demonstrate ***non-waiveable*** conflicts of interest.

Moreover, in *Swidler & Berlin v. United States*, 524 U.S. 399, 405 (1998), the attorney client privilege is one of the oldest recognized privileges for confidential communications. (See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Hunt* v. *Blackburn,* 128 U.S. 464, 470 (1888)). The privilege is intended to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." (*Upjohn, supra,* at 389.) The *Swidler* court held that the

issue presented here is the scope of that privilege; more particularly, the extent to which the privilege survives the death of the client. Our interpretation of the privilege's scope is guided by "the principles of the common law ... as interpreted by the courts ... in the light of reason and experience." Fed. Rule Evid. 501; *Funk* v. *United States,* 290 U.S. 371 (1933). Such testamentary exception cases consistently presume the privilege survives. (See, *e.g., United States* v. *Osborn*, 561 F.2d 1334, 1340 (CA9 1977); *DeLoach* v. *Myers*, 215 Ga. 255, 259—260, 109 S. E. 2d 777, 780—781 (1959); *Doyle* v. *Reeves*, 112 Conn. 521, 152 A. 882 (1931).) They view testamentary disclosure of communications as an exception to the privilege: "[T]he general rule with respect to confidential communications ... is that such communications are privileged during the testator's lifetime and, also, after the testator's death unless sought to be disclosed in litigation between the testator's heirs." (See *Osborn*, 561 U.S., at 1340.)

The rationale for such disclosure is that it furthers the client's intent. (*Id.*, at 1340, n. 11) Commentators on the law also recognize that the general rule is that the attorney-client privilege continues after death. See, *e.g.*, 8 Wigmore, Evidence §2323 (McNaughton rev. 1961); Frankel, The Attorney-Client Privilege After the Death of the Client, 6 Geo. J. Legal Ethics 45, 78—79 (1992); 1 J. Strong, McCormick on Evidence §94, p. 348 (4th ed. 1992).

Here, we have a case where the attorney client privilege may continue after death, and it may be open to an exception concerning the heirs. However, Respondent Kouten can not merely make the decision to disclose information to his

new clients, and waive Alice Shaw Baker's rights. This is a decision that requires appropriate motions in limine and/or motions to obtain said information. Attorney Kouten took no action to protect Alice Shaw Baker's rights, instead claiming that he obtained no confidential communications. Appellants contend that this further outlines Respondent Kouten's commitment to clients who have adverse interests to Alice Shaw Baker. Alice Shaw Baker's monies were to **benefit animal charities**, the claim in the litigation in part is that Respondents falsely claimed ownership in animal charities to obtain the estate. Once discovered, Alice Shaw Baker revoked said Will--Respondent Kouten took no action to protect these interests despite knowing that Alice's life had been committed to animal charities.

Although time has elapsed in this case, change of counsel will not work a substantial hardship on Respondents. Disqualification of Attorney Kouten is mandated by his prior relationship. Respondents had no right to rely on Attorney Kouten as their counsel, because they knew that he represented Alice Shaw Baker. (See Rule 3.7(a)(3), RPC, Rule 407, SCACR; *International Woodworkers of America, AFL-CIO, CLC vs. Chesapeake Bay*, 659 F. 2d 1259 (4thCir. 1981).)

Moreover, the move by Attorney Kouten to use W. Westbrook Wills as a straw attorney can't be sanctioned either. It is well settled that a law firm should not provide another attorney to act as an advocate in the case since they would be most probably precluded from doing so by Rule. 1.7, RPC, Rule 407, SCACR and Rule 1.9, RPC, Rule 407, SCACR, has not filed any documents in this case, save the Consent Order naming him as counsel. (See below) Despite this Order only Attorney

Kouten has filed papers or argued, Appellants contend that Attorney Kouten's action are merely meant to act as subterfuge to avoid an appropriate ruling in this case. Further, by allowing Attorney Kouten to use W. Westbrook Wills' name, this proceeding is undermined by unchecked opportunism which will have long term effects on the practice of law.

Appellants respectfully pray that this Court reverse the *Order Denying the Motion to Disqualify.*

E. The Consent Order Substituting W. Westbrook Wills is Invalid, in light of Respondents Failure to Comply with Rules 5, 11, and Constitutional Principals Governing Due Process, and Prohibitions Against Ex Parte Communications with the Court.

Submission of a proposed order without sending a copy to opposing counsel is an *ex parte* communication after the effective date of Rule 5(b)(3), SCRCP. (See also *First Financial Ins. Co. v. Sea Island Sport Fishing Society, Inc.,* 327 S.C. 12, 490 S.E. 2d 257 (1997) (finding that submission of a proposed order without copying opposing counsel was not *ex parte* communication prior to the effective date of Rule 5(b)(3) where opposing counsel had opportunity to be heard on issues raised in it prior to the Court's ruling).

The *Consent Order* was clearly affected by Respondents ex parte submission of the Order. The Order is ineffective, in that Respondent Kouten continues to

represent and appear on behalf of Respondents, nevertheless Respondents failure to serve the ex parte proposed order on Appellants violated Rule 5(b)(3), SCRCP; U.S. Const. amends V and XIV, § 1 (Due Process) and S.C.Const. art. I, § 3 (Due Process). It also represents a continuing problem with Respondent Kouten having ex parte communications with the court.

Appellants objected to Respondents first attempt to name W. Westbrook Wills, because they failed to follow proper procedures. Instead of following the law, Respondents used ex parte communications to obtain the Consent Order. As the court in *Culbertson v. Clemens,* 322 S.C. 20, 471 S.E.2d 163 (1996) explained "In all actions, it is of vital importance, not only to the parties but to the court as well, that the correct attorneys are listed as the attorneys of record. The best way to achieve is by strict adherence to Rule 11. Respondents failed to follow the procedures, and for that reason and the fact that Respondent Kouten is continuing to act as counsel, said Order must be reversed.

CONCLUSION

The California Supreme Court in *People ex rel. Dept. of Corp. v. SpeeDee Oil Change Systems,* 20 Cal.4th 1135, 1146 (1999) has eloquently put into words the problem with dual representation, when it stated:

> "The most egregious conflict of interest is representation of clients whose interests are directly adverse in the same litigation...Such patently improper dual representation suggests to the clients–and to the public at large–that the attorney is completely indifferent

to the duty of loyalty and the duty to preserve confidences. (See *People* at 1147)"

Attorney Kouten seeks to further the rights of his current clients, all to the detriment of his former client, Alice Shaw Baker. Attorney Kouten took steps to obtain waivers from his new clients and informed the Circuit Court of this action, without any thought to the fact that he never obtained a written waiver from Alice Shaw Baker. A guardian ad litem, court appointed counsel, and visitor sullies these important roles by promoting third parties with adverse interests–and sullies the concept that these vulnerable incapacitated adults are being protected, when they become future fees to those like Attorney Kouten.

The legislature cared enough about vulnerable adults to ensure safeguards of counsel and purportedly independent assessments. One attorney's decision to ignore these safeguards, here Attorney Kouten, will compromise Appellants' ability to pursue the Will contest and demonstrate revocation, as Attorney Kouten stands with those who deceived Alice Shaw Baker.

For all of the reasons stated herein, Appellant respectfully requests that the Court reverse:

1. Consent order for Substitution of Counsel dated October 10, 2013 and filed October 14, 2013;
2. Judgment dated January 30, 2014 and filed February 4, 2014;
3. Judgment dated May 5, 2014 and filed May 7, 2014.

Further, that this Court make findings mandating the immediate disqualification of Attorney Peter Kouten, and precluding W. Westbrook Wills from proceeding in light of the association with Attorney Kouten.

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By: _____

JOHN HUGHES COOPER, ESQUIRE
Federal Court ID 298
South Carolina Bar 1387
State Bar of Georgia 185986
1476 Ben Sawyer Blvd. Ste. 7
Mount Pleasant, SC 29464
shiplaw@jhcooper.com
843-883-9099; fax 843-883-9335

ATTORNEYS FOR PLAINTIFF

November 18, 2014

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

RECEIVED
NOV 20 2014
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2014-001267
Circuit Case No.2009-CP-10-3010

In the matter of the Estate of Alice Shaw Baker.

Betty Fisher and Lisa Fisher, ...Appellants

v.

Bessie Huckabee, Kay Passailague Slade,
Sandra Byrd, and Henry McMaster, in his Capacity as Attorney General, Defendants,

Of whom Bessie Huckabee, Kay Passailague Slade, and Sandra Byrd,
.....Respondents

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

November 18, 2014

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By: _____
JOHN HUGHES COOPER, ESQUIRE
1476 Ben Sawyer Blvd. Ste. 7
Mount Pleasant, SC 29464
shiplaw@jhcooper.com
843-883-9099; fax 843-883-9335
843-883-9099; fax 843-883-9335

RECEIVED

NOV 2 0 2014

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2014-001267
Circuit Case No.2009-CP-10-3010

In the matter of the Estate of Alice Shaw Baker.

Betty Fisher and Lisa Fisher, ...Appellants

v.

Bessie Huckabee, Kay Passailague Slade,
Sandra Byrd, and Henry McMaster, in his Capacity as Attorney General, Defendants,

Of whom Bessie Huckabee, Kay Passailague Slade, and Sandra Byrd,
.....Respondents

PROOF OF SERVICE

I certify that I have served the **FINAL BRIEF OF APPELLANTS** on the following counsel and parties by depositing a copy of it in the United States Mail, postage prepaid, on November 18, 2014, addressed as follows:

Hon. Mary Frances Jowers, Assistant Attorney General
PO Box 11549
Columbia, SC 29211
(By email)

//

W. Westbrook Wills III, Esquire
38 Broad Street Ste. 200
Charleston, SC 29401

Peter A. Kouten, Esquire
Kouten Law Firm, LLC
P.O. Box 340
John's Island, SC 29457

November 18, 2014

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By: _____
JOHN HUGHES COOPER, ESQUIRE
Federal Court ID 298
South Carolina Bar 1387
State Bar of Georgia 185986
1476 Ben Sawyer Blvd. Ste. 7
Mount Pleasant, SC 29464
shiplaw@jhcooper.com
843-883-9099; fax 843-883-9335

ATTORNEYS FOR APPELLANT