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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
Dorchester County Case Nos. 2019-CP-18-0677 and 2017-CP-18-1816

In Re: The Estate of Doris Duane Colucci,

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

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, Michael Frederick Antonio Colucci, John Martin Antonio, Henry Burkes, and Richard M. Hyman, Jr., Esquire .....Respondents.

INITIAL BRIEF OF RESPONDENT ANDREW W. CHANDLER, ESQUIRE, IN HIS CAPACITY AS SPECIAL ADMINISTRATOR OF THE ESTATE OF DORIS DUANE COLUCCI

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STATEMENT OF THE CASE

This appeal concerns two separate orders of the circuit court. The first is the circuit court's denial of Appellant's Petition for Appointment, seeking appointment as personal representative of the Estate of Doris Duane Colucci (the "Estate"). The second is the circuit court's order, issued in its appellate capacity, denying Appellant's Emergency Petition for Writ of Supersedeas. The Emergency Petition for Writ of Supersedeas was filed in connection with Appellant's appeal of nine separate probate court orders to the circuit court. In addition to denying the relief sought in the Emergency Petition, that order also dismissed Appellant's appeals of the nine probate court orders.

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

Respondent 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. (7/10/17 Order.)

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. As such, the Estate continued to be administered as an intestate estate, with Mr. Colucci and the Decedent's two sons, Michael Colucci and John Antonio, as the heirs.

The Decedent's Will names Mr. Colucci as the Estate's personal representative and Appellant, Henry Burkes, and Richard Hyman (in that order) as alternate personal representatives. (6/18/13 Will, p. 2-1.) The sole devisee of the Will is the Colucci Living Trust

(the "Trust"), dated February 24, 2005, which, in the First Amendment dated June 18, 2013, names Appellant as a successor trustee. (First Amend.to Trust, p. 4.) On October 27, 2017, Appellant accepted the trusteeship of the Trust and, to date, continues to serve in that capacity. (Acceptance of Trusteeship.)

On October 4, 2017, Respondent filed a Petition to Determine Heirs in probate court, which sought a determination as to whether Mr. Colucci "feloniously and intentionally" killed the Decedent, thus barring him from receiving any benefit from the Estate pursuant to the S.C. Code Ann. § 62-2-803 (the "Slayer action"). On October 19, 2017, Respondent initiated a wrongful death lawsuit in the Charleston County Court of Common Pleas on behalf of Decedent's statutory beneficiaries: Michael Colucci and John Antonio.

On October 30, 2017, Appellant filed a Petition for Formal Testacy and Appointment in the probate court, seeking both to have the Will admitted to probate and himself appointed as personal representative of the Estate. (10/30/17 Petition for Formal Testacy and Appointment.) Appellant removed the matter to circuit court. Respondent opposed Appellant's appointment on the basis that Appellant was not qualified to serve as personal representative due to his conflicts of interest and 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. (11/30/17 Answer and Objection of Chandler; 8/8/18 Partial Opp. to Summ. Judgment.) Respondent did not contest the validity of the Will. (Id.)

After months passed with no apparent attempt by Appellant to request a hearing on his Petition for Testacy and Appointment, counsel for Mr. Colucci filed a Motion for Summary Judgment on Appellant's Petition for Formal Testacy on May 21, 2018. (5/21/18 Motion for Sum. Judg.) Mr. Colucci's Motion argued that no issue of material fact existed, and Appellant's

Petition should be granted as a matter of law. (Id.) Respondent filed a Partial Opposition to the Motion for Summary Judgment, opposing the appointment of Appellant but not the admission of the Will. (8/8/18 Partial Opp. to Summ. Judgment.)

The circuit court held a duly noticed hearing on Mr. Colucci's Motion for Summary Judgment on August 13, 2018, which was treated as the hearing on Appellant's Petition for Formal Testacy and Appointment. During the hearing, the circuit court heard arguments of counsel for Appellant, Respondent, Michael Colucci, John Antonio, and Mr. Colucci, as well as from Respondent himself. (8/13/18 Transcript.) Thus, before the court were the heirs to the Estate (if intestate), as well as the Trust, the sole devisee of the testate Estate. The only sworn testimony offered was Respondent's Affidavit, which was filed five days in advance of the hearing. (8/8/18 Partial Opposition, Ex. 5.) No sworn testimony was offered by Appellant.

By order filed August 27, 2018, the circuit court ordered that the Will be admitted to probate (deciding the Petition for Testacy), but took the matter of Appellant's appointment (the Petition for Appointment) as personal representative under advisement. (8/27/18 Order.) Following the probate of the Will, the probate court, *sua sponte*, entered a Modified Order for the Appointment of a special administrator, confirming Respondent's appointment as special administrator in this matter and directing that he administer the Estate pursuant to the terms of the Will. (8/27/18 Modified Order of Appt.)

Upon the admission of the Will to probate, the Trust became the sole devisee of the Estate. As such, on November 20, 2018, Respondent filed an Application for Hearing to Approve Distribution, which sought a hearing before the probate court concerning the distribution of cash and property to the Trust. (11/20/18 Application.) By notice dated December 4, 2018, a hearing on Respondent's Application was set for January 9, 2019.

In the meantime, on November 26, 2018, Appellant filed a "Motion to Restrain Special Administrator" in circuit court. (11/26/18 Motion to Restrain SA.) Respondent filed a Motion to Dismiss on the basis that the circuit court lacked jurisdiction to entertain Appellant's Motion to Restrain Special Administrator. (12/6/18 Motion to Dismiss.) Appellant next, on January 4, 2019, filed a Petition for Removal of Special Administrator in probate court. (1/4/19 Pet. for Removal of SA.) Appellant's Petition was based on the same grounds and allegations as his Motion to Restrain Special Administrator. (Id.) Pursuant to S.C. Code Ann. § 62-3-611, the filing of this Petition acted so as to restrain Respondent from continuing his administration of the Estate. As such, Respondent filed a Motion for Emergency Hearing on January 8, 2019, which was granted and a hearing was set for the following day, the same day on which the hearing on Respondent's Application for Hearing to Approve Distribution (to the Trust) had previously been noticed. (1/8/19 Motion for Emerg. Hearing; 1/8/19 email from court and attached Amended Notice of Hearing.)

During the hearing, the only evidence or sworn testimony presented by Appellant in support of his Petition for Removal of Special Administrator was that of Respondent, who counsel for Appellant called to testify. (1/9/19 Transcript, pp. 11-46.) By Order filed February 7, 2019, the probate court denied Appellant's Petition to Remove Special Administrator, finding that "Petitioner Fox made a number of accusations against Respondent Chandler and his counsel but failed to present to this Court any evidence or law in support of his arguments that cause exists to remove Respondent Chandler as Special Administrator." (2/7/19 Order, p. 16.) The probate court further found that Appellant and his counsel had taken actions designed to frustrate the administration of the Estate and that, "[b]ased on the extremely litigious and multifaceted complications plaguing this Estate, removing the Special Administrator at this point would be

illogical" and "would cause an extreme hardship to the Estate for a new fiduciary to have to learn and understand all the management, negotiations, and issues" involved in the administration of the Estate. (2/7/19 Order, p. 16.) Finally, pursuant to S.C. Code Ann. § 62-1-111, the probate court found that justice and equity required Appellant to pay the costs and attorneys' fees incurred by the Estate in defending the Petition for Removal of Special Administrator. (Id., p. 17.)

Also heard on January 9, 2019, was Respondent's Application for Hearing to Approve Distribution by Special Administrator, which the probate court granted by Order filed January 15, 2019, authorizing the distribution of $100,000 from the Estate to Appellant as Trustee of the Trust. (1/15/19 Order.) Despite making expenditures from these funds, Appellant has since appealed this order to the circuit court. (4/17/19 Notice of Appeal.) The circuit court's dismissal of that appeal (along with Appellant's appeals of eight other probate court orders) is now before this Court.

On the morning of February 13, 2019, the circuit court issued an order granting Appellant's Petition for Appointment as personal representative of the Estate. (2/13/19 Order.) Pursuant to S.C. Code Ann. § 62-3-618, Respondent's appointment as special administrator of the Estate automatically terminated upon the issuance of that order. Upon emergency applications filed several hours later by counsel for Respondent, which at that point was a creditor of the Estate, the probate court, that afternoon, issued a Temporary Order Restraining General Personal Representative and an Order for Appointment of Temporary Special Administrator, appointing Respondent as special administrator on a temporary basis.

As required by S.C. Code Ann. § 62-3-607(b), the probate court held a Review Hearing on its Temporary Order Restraining Personal Representative on February 22, 2019, which

counsel for Respondent attended and presented argument. (4/17/19 Order, p. 3.) By order entered April 17, 2019, the probate court found that the continued restraint of Appellant on a temporary basis was in the best interests of the Estate both because of Appellant's "actual or potential conflicts of interest" and because there were "several pending litigation matters, business matters, and tax matters that require a fiduciary familiar with the issues". (Id., p. 4.) The probate court held that Appellant would continue to be restrained for a period of six months and confirmed that Respondent would continue to serve as special administrator on a temporary basis. (Id., pp. 5-6.) As described below, on April 18, 2019, Appellant appealed this order along with eight other probate court orders.

In the meantime, on February 25, 2019, Respondent filed a Motion to Reconsider, Alter, or Amend, asking the circuit court to reconsider its order appointing Appellant as personal representative. (2/25/19 Motion to Reconsider.) Respondent argued that the circuit court failed to fully understand the implications of replacing the Estate's fiduciary at that stage in the administration of the Estate or the extent of Appellant's conflicts of interest rendering him unsuitable to serve as the Estate's fiduciary. (Id.)

After additional supplemental briefing at the circuit court's request, the 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. (5/28/19 Order.) This is one of the two orders Appellant has appealed to this Court.

Separately, on April 18, 2019, Appellant, purportedly in his capacity as personal representative of the Estate, appealed nine (9) orders of the probate court by filing a Notice of Appeal in the circuit court. 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 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. (4/30/19 Motion to Dismiss.) Respondent also filed a Motion to Lift Stay[1] in the probate court, which was granted. (5/1/19 Motion to Lift Stay; 5/10/19 Order.) In the order granting the Motion to Lift Stay, the probate court noted that it was "intimately familiar with this Estate and the many attempts made by [Appellant] to frustrate its administration." (5/10/19 Order, p. 3.)

After the probate court granted Respondent'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." (5/15/19 Emerg. Pet. for Writ, p. 1.) Respondent filed an Opposition to Appellant's Emergency Petition for Writ of Supersedeas on May 22, 2019, explaining why a supersedeas was not necessary to either preserve jurisdiction of

[1] 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.

the appeal or to keep any contested issues from becoming moot. (5/22/19 Opp. to Emerg. Pet., pp. 2-4.)

On May 28, 2019, the circuit court denied Appellant's supersedeas petition on the basis that it was procedurally deficient. (5/28/19 Supersedeas Order, p. 4.) In this order, the circuit court also indicated that it was dismissing Appellant's appeals of the nine probate court orders, apparently on the basis that they were not final orders and, therefore, the circuit court lacked appellate jurisdiction. (5/28/19 Supersedeas Order, p. 4.) This is the second order Appellant has appealed to this Court.

Thus, the two orders which have been appealed to this Court are:

1) 5/28/19 Order which denied Appellant's Petition for Appointment – the circuit court reconsidered its prior order and denied the Petition (case no. 2017-CP-18-1816); and
2) 5/28/19 Order which denied Appellant's Emergency Petition for Writ of Supersedeas – the circuit court, sitting in its appellate capacity, denied Appellant's request for a writ of supersedeas and also dismissed Appellant's appeals of nine probate court orders (case no. 2019-CP-18-0677).

ARGUMENT

I. The circuit court correctly denied Appellant's Petition for Appointment.

At the outset, an important clarification is needed. Throughout his brief, Appellant argues that the circuit court erred, both procedurally and substantively, in "removing" Appellant as personal representative. In fact, an entire section of his brief is dedicated to the argument that "Fox's removal was procedurally flawed." (App. Brief, p. 18.) This mischaracterizes the proceedings below. The circuit court, after initially granting Appellant's Petition for Appointment, reconsidered that order and entered an order denying the Petition for Appointment. (5/28/19 Order.) Admittedly, the circuit court's order states that Appellant is to "be immediately removed as the Personal Representative." (5/28/19 Order, p. 2.) However, the use of such language did not act as to somehow transform the procedural posture of the matter before the court. There was no Petition for Removal of Personal Representative pending in the circuit court on which it could have even made such a ruling. Rather, before the circuit court was Appellant's Petition for Appointment, which, by virtue of Respondent's Motion to Reconsider, was denied. Therefore, before this Court is the issue of whether the circuit court abused its discretion in denying the Petition for Appointment. See Parkman v. Hanna, 311 S.C. 20, 22, 426 S.E.2d 743, 744 (1992) (the court's authority to deny administration of estate to person first entitled under statute will not be disturbed absent clear abuse of discretion).

A. Even if the circuit court erred in denying Appellant's Petition for Appointment on the basis that he was not the "best qualified" person to serve, the denial was still appropriate and supported by the record.

Upon review of the arguments and evidence submitted in connection with the Petition for Appointment and, then, Respondent's Motion for Reconsideration, the circuit court denied the Petition, holding that Appellant was not the "best qualified person to be the Personal

Representative for this estate." (5/28/19 Order, p. 2.) While the court, pursuant to S.C. Code Ann. § 62-3-414(b), is required to determine who is entitled and qualified to be appointed under S.C. Code Ann. § 62-3-203, its inquiry does not appear to require or even entail a determination as to who, amongst the potential appointees, is the "best" qualified. Rather, the court is empowered to determine who is entitled to priority for appointment and then whether or not that particular person is qualified and suitable to serve as personal representative. S.C. Code Ann. § 62-3-203(e). "No person is qualified to serve as a personal representative who is...a person whom the court finds unsuitable in formal proceedings." S.C. Code Ann. § 62-3-203(e)(2).

Even if the circuit court erred in denying the Petition for Appointment on the basis that Appellant was not the "best qualified," the record provides ample grounds to affirm the circuit court's denial of the Petition for Appointment on the basis that Appellant is not qualified or suitable. See Rule 220(c), SCACR; I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) (respondent may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court).

First, disqualification of a named personal representative is appropriate when conflicts of interest exist. See In re McClam's Estate, 245 S.C. 315, 140 S.E.2d 478 (1965); Ex parte Tolbert, 206 S.C. 300, 34 S.E.2d 49 (1945) (holding that qualification of a personal representative is not automatic and that disqualification is appropriate where conflicts of interest may arise as a result of the relationship between the proposed personal representative and the business and affairs of the decedent).

Appellant was the longtime bookkeeper for the Coluccis and their businesses and was a very close friend of Mr. Colucci. In fact, when deposed as a fact witness in the then-pending wrongful death lawsuit and Slayer action in January 2019, he testified as follows:

> And I will tell you this, that in regards to both parties you're talking about, I have been -- I've had a friendship with Ivo Colucci and Terry Weidberg[2] that was closer than I had with my own brother and my family. Those two fellows was the most honest fellows in the world and either one of them would do me a favor, anything I asked of them at any time, day or night, and I the same for them. They were -- they were -- so as far as a social relationship, they were my best of friends as well as my clients.

(2/25/19 Mot. Reconsider, Ex. 6.) If appointed, Appellant would have been charged with continuing the prosecution of the wrongful death lawsuit and the Slayer action, both of which aimed to relieve Mr. Colucci of assets and the latter of which required that the Estate prove Mr. Colucci, who was Appellant's "best friend," "feloniously and intentionally" killed the Decedent. Appellant's potential bias and his status as a fact witness in these lawsuits makes him unqualified to serve as personal representative.

Additionally, Appellant's involvement in, and potential liability for, erroneous tax returns for businesses partly owned by the Estate renders him unqualified. Respondent has testified as to the reasons he opposes Appellant's appointment, including the fact that the Estate faces multiple issues arising from tax returns that were improperly prepared by Appellant. In his affidavit, submitted in advance of the hearing on Appellant's Petition for Appointment, Respondent states:

> Another remaining issue we must deal with in this Estate is the review and potential audit by the IRS and S.C. Department of Revenue of prior filed tax returns, and any penalties and interest related thereto. [Appellant] would be a witness in those matters as he prepared the tax returns for many years. He would also have a conflict of interest related to his preparation of the tax returns in prior years.

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[2] Terry Weidberg, deceased, was a long-time business partner of Ivo Colucci.

(8/8/18 Partial Opp. to Mot. for Summ. Judg., Ex. 5, ¶ 10.) Also presented to the circuit court was Respondent's sworn testimony concerning Appellant's incorrect preparation of a tax return for a business in which the Estate held an interest, the negative ramifications facing the Estate as a result, and Appellant's refusal to take corrective action after being requested to do so, which in turn worked a "tremendous hardship" on the Estate. (2/25/19 Mot. for Reconsider., p. 7, Ex. 2, p. 15; 1/9/19 Emerg. Hearing Trans., pp. 39-41.) No evidence, as opposed to argument of counsel, was presented to the circuit court to the contrary by Appellant. The circuit court's order should be affirmed because Appellant's interests are adverse to those of the Estate. Ex parte Tolbert, 206 S.C. at 305, 34 S.E.2d at 51 (one interested against the heirs or the estate should not be appointed).

Second, the circuit court's denial of Appellant's Petition for Appointment should be affirmed because the record establishes that the appointment of Appellant would have substantially prejudiced the Estate and those interested in it by virtue of the additional and unnecessary costs, delay, and duplication of efforts, all of which would result in waste to the Estate. The Decedent was killed on April 14, 2017. Respondent was appointed as special administrator on June 9, 2017. Appellant did not file his Petition for Appointment until October 30, 2017, and never requested a hearing. It was not until August 2018 that the Petition was heard, and February 13, 2019, that the circuit court initially granted the Petition, which it later reconsidered and denied by order entered May 28, 2019.

From the outset, Appellant opposed the Petition for Appointment on the basis that it would cause waste and delay and was not in the best interests of the Estate. The Probate Code is to be "liberally construed and applied" in order to "promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to its successors." S.C. Code Ann.

§ 62-1-102(a), (b)(3). Moreover, just as the court may remove a personal representative when in the best interests of an estate, the court may deny a Petition for Appointment when in the best interests of an estate. See S.C. Code Ann. § 62-3-611(b); Ex parte Small, 69 S.C. 43, __, 48 S.E. 40 (1904) ("It has never been doubted that, under his general jurisdiction of matters of administration, the probate judge has power to revoke letters of administration for waste...and this without regard to the administrator having been appointed from the preferred class. ***It would be a curious legal rule which would allow the revocation of administration for cause, and would not allow its denial for like cause.***") (emphasis added).

The Decedent and her husband accumulated a substantial amount of real and personal property that was held individually, jointly, and by virtue of their ownership interests in various businesses. (11/30/17 Answer, ¶ 30.) In his Answer and Objection to the Petition, Respondent explained that he and his attorneys had spent a substantial amount of time reviewing financial, business, and property records and documents to sort out the structures and ownership of the various business and property interests, and were well into negotiations with Mr. Colucci's representatives to resolve these issues. Also, at that time there were multiple lawsuits involving one or more of the businesses in which the Estate claimed an interest, and numerous hours had been spent by Respondent and his attorneys reviewing, researching, and responding to the allegations and defenses in those lawsuits. (Id., ¶ 32.) In addition to the business-related lawsuits, Respondent and his attorneys had devoted substantial amounts of time, and made substantial progress in, the pending wrongful death lawsuit and the Slayer action. (Id., ¶ 34.)

Because of Appellant's failure to request a hearing on his Petition for Appointment, Mr. Colucci's attorney filed a Motion for Summary Judgment, seeking a ruling on Appellant's Petition. A hearing, which was properly noticed, was set for August 13, 2018. In advance of that

hearing, Respondent submitted a Partial Opposition to the Motion for Summary Judgment (partial because Respondent did not object to the admission of the Will to probate) as well as an affidavit. In his affidavit, Respondent averred that in serving as special administrator for over a year at that point, substantial progress had been made but numerous issues remained. (8/8/18 Partial Opp., Ex. 5, ¶ 3.) Respondent further averred that "[a] number of those remaining issues are technical and transitioning the administration of the Estate from myself and my attorney to Petitioner Fox and his attorney would necessarily cause substantial delays and result in the Estate incurring unnecessary, duplicative costs." (Id., ¶ 4.) Respondent pointed out that, if Appellant were to be appointed, his conflicts of interest would require that one or more special administrators be appointed to prosecute the wrongful death lawsuit and Slayer action, as well as to handle the tax-related issues. (Id., ¶¶ 6-11.) No sworn testimony was submitted or elicited by Appellant to rebut Respondent's testimony.

Following the circuit court's February 13, 2019, order granting Appellant's Petition for Appointment, Respondent filed a Motion to Reconsider, in which he argued that the circuit court had failed to fully appreciate the implications of replacing the Estate's fiduciary at that stage of the administration of the Estate. At that point in time, nearly two years had elapsed since the Decedent's death. The delay and expense the Estate would incur in transferring the knowledge and files from Respondent and his attorney to Appellant and his attorneys would be substantial. (2/25/19 Mot. Reconsider, p. 5.) It would take months and require the Estate to incur the fees and costs of all four of these individuals, all with no tangible benefit to the Estate or those interested in it. (Id.) In all likelihood, Respondent and his attorney would be required to remain involved for the foreseeable future, potentially up until the Estate was closed. (Id.) Putting the Estate in a position where it would be required to compensate two fiduciaries and/or two attorneys for the

same tasks, and worse, for tasks that are administrative in nature (i.e., the transition process) and that do not provide any benefit to the Estate at that stage in the administration, would be detrimental to the Estate's best interests and those who are interested in it.

Additionally, by this time the wrongful death lawsuit and Slayer action had been pending for well over a year. Two days of mediation had recently been conducted and, while the cases were not resolved at mediation, negotiations had continued and were making progress. (Id.) A significant amount of discovery had been conducted, including numerous depositions, the identification of a total of five expert witnesses, review of thousands of documents, witness interviews, and the review of more than 50 hours of video received from the Solicitor's Office. (Id., pp. 5-6.) To put these lawsuits on hold while Appellant and his attorney spent the hundreds of hours that would be required to get up to speed on those suits would have been extremely wasteful and contrary to the best interests of the Estate. In fact, prior to the circuit court's order denying the Petition for Appointment, both counsel for Mr. Colucci and counsel for the statutory beneficiaries (the Decedent's sons) wrote letters to Appellant's counsel urging him to cease activities designed to thwart the consummation of the settlements that had, by then, been negotiated but were being held up due to Appellant. Both of these letters were filed and made part of the record before the circuit court. (5/23/19 LT Lawton to Court; 5/17/19 Supp. to Emerg. Pet. for Supersedeas, encl. 5/1/19 LT Haller to Garrett.)

As found by the probate court, which was intimately familiar with this Estate and its administration, "[i]t would cause an extreme hardship to the Estate for a new fiduciary to have to learn and understand all the management, negotiations, and issues that have been handled and will continue to need to be handled." (2/25/19 Mot. Reconsider, Ex. 1, p. 16.)

It cannot be denied that Appellant was named by the Decedent as one of her alternative personal representatives and that, on that basis, he was entitled to be considered for the position. However, the existence of a will nominating a specific person as an alternative personal representative is but one factor that must be considered.

> [T]he Judge of Probate may deny administration to the person first entitled under the statute if upon the showing made before him he is satisfied that such person is not properly qualified for the position, and among other things the court calls attention to the fact that the granting of letters of administration is not automatic, because the law requires the issuance of a citation, to the end that the kindred or creditors of the intestate may show cause why the administration should not be granted to the person applying for it, notwithstanding such person may have the statutory priority...

In re McClam's Estate, 245 S.C. at 319, 140 S.E.2d at 479 (citing the identical language in the former citation of the statute).

In considering whether a person nominated by a decedent has an absolute right to appointment, the South Carolina Supreme Court explained the following:

> The law provides administration as a means for the collection and distribution of assets. The right of those interested to have collection and distribution according to law is the dominant right. The right of any particular person to take charge of the assets is a secondary right. If the allowance of the claim to exercise this secondary right would result in defeating the main purpose to be attained, it must be refused.

Ex parte Small, 69 S.C. at __, 48 S.E. at 40–41. Here, the right of Appellant to be appointed as personal representative is secondary to the right of those interested in the Estate to have collection and distribution. Appointing Appellant would have defeated that dominant right and, therefore, the circuit court did not err in denying the Petition for Appointment.[3]

B. The circuit court did not abuse its discretion in requesting and considering additional evidence and argument in connection with Respondent's Motion to Reconsider.

[3] It warrants pointing out that this appeal is the only barrier keeping the Estate from being closed and its remaining assets transferred to the Trust.

In support of his Motion to Reconsider, and to further support his argument that conflicts of interest rendered Appellant unsuitable to serve as personal representative, Respondent included the following excerpt from Appellant's deposition:

> And I will tell you this, that in regards to both parties you're talking about, I have been -- I've had a friendship with Ivo Colucci and Terry Weidberg that was closer than I had with my own brother and my family. Those two fellows was the most honest fellows in the world and either one of them would do me a favor, anything I asked of them at any time, day or night, and I the same for them. They were -- they were -- so as far as a social relationship, they were my best of friends as well as my clients.

(2/25/19 Motion to Reconsider, p. 8, Ex. 6). This deposition was taken in the then-pending wrongful death and Slayer Statute lawsuits on January 25, 2019. While taken prior to the circuit court's February 13, 2019, order initially granting the Petition for Appointment, the transcript was not provided to counsel until February 21, 2019. (2/21/19 EM from Ct. Rptr.) As discussed below, Appellant was given the opportunity to present argument concerning this additional evidence and did so. Thus, he was not prejudiced by the circuit court's consideration of the same (if, in fact, it was considered by the circuit court, which is unclear). See Baker v. Wolfe, 333 S.C. 605, 613, 510 S.E.2d 726, 730 (Ct. App. 1998) (no reversible error in the lower court's handling of the motion to reconsider where no prejudice because complaining party had opportunity to respond to challenged evidence).

Regardless, there is no error in the circuit court's consideration of this sworn testimony as part of Respondent's Motion for Reconsideration. Appellant's argument is based on the established premise that a party cannot use such a motion to present an ***issue*** which could have been raised prior to the judgment but was not. Poch v. Bayshore Concrete Prod./S.C., Inc., 386 S.C. 13, 31, 686 S.E.2d 689, 699 (Ct. App. 2009). However, Respondent was not raising an issue, i.e., the issue of Appellant's conflicts of interest, for the first time. Appellant has

acknowledged as much, previously arguing to the circuit court that the issues of "judicial economy, the alleged cost and time required to replace the Personal Representative, *the alleged conflict of interest of Mr. Fox*, [and] whether or not [the circuit court] had considered the February 7, 2019 Probate Court Order" were "previously raised multiple times before this Court" and "were carefully considered by this Court." (3/4/19 Return, p. 7.) (emphasis added). Importantly, Appellant also argued that, "even if this deposition transcript was considered, it has no probative value, as it establishes no new fact bearing on the decision to appoint Fox or remove Chandler." (3/4/19 Return, p. 8, fn. 4.)

The circuit court itself requested additional evidence and argument from both Appellant and Respondent in connection with Respondent's Motion for Reconsideration. Specifically, the circuit court first requested that the parties "get together and develop a timeline that explains the jurisdiction of the Circuit Court over this case and the jurisdiction of the Probate Court over this case." (3/5/19 Dickson email.) In response, the parties submitted a joint timeline and separate legal briefs addressing the respective jurisdiction of the circuit and probate courts as applied to the procedural posture of this Estate. (3/20/19 Timeline, Fox Jurisdictional Memo., Chandler Jurisdictional Memo.) Thereafter, the circuit court requested that the parties submit "outlines of qualifications" of both Appellant and Respondent for its consideration in ruling on Respondent's Motion to Reconsider. (5/21/19 Dickson email.) The parties complied, each submitting statements of qualifications and affidavits from both Appellant and Respondent. (5/22/19 Respondent Statement; 5/23/19 Appellant Statement and Supp. Memo. in Opp. to Mot. Reconsider.) Despite Appellant's contention that he objected to the circuit court's requests for additional evidence and argument in his May 23, 2019, pleading (App. Brief, p. 21), a review of that pleading does not reveal any such objection. (5/23/19 App. Stmt/Supp Memo.)

It cannot be gleaned from the circuit court's order whether or not any of this information was considered or given any emphasis in the court's deliberations and ultimate decision to reconsider its prior order and deny Appellant's Petition for Appointment. However, the circuit court did not err in requesting or accepting additional evidence and argument. The decision whether to reopen a record for additional evidence is within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion. Brenco v. S.C. Dep't of Transp., 377 S.C. 124, 127, 659 S.E.2d 167, 169 (2008) (citing Wright v. Strickland, 306 S.C. 187, 188, 410 S.E.2d 596, 597 (Ct. App. 1991)). The trial judge is endowed with considerable latitude and discretion in allowing a party to reopen a case. Id. Here, Appellant was given equal opportunity to submit materials for the court's consideration, and he took advantage of that opportunity.

Finally, even if the circuit court erred in taking additional evidence in connection with its consideration of Respondent's Motion for Reconsideration, Appellant failed to preserve that issue for appeal. In his Return to Respondent's Motion for Reconsideration, Appellant objected the circuit court's consideration of Appellant's own sworn testimony which Respondent submitted as support for his argument that Appellant's conflicts of interest rendered him unsuitable for appointment. (3/4/19 Return, p. 7.). However, the circuit court did not rule upon Appellant's objections, nor did Appellant file a post-trial motion after the circuit court granted the Motion for Reconsideration and denied the Petition for Appointment.[4] Although Appellant cites Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton, 311 S.C. 56, 427 S.E.2d 673 (1993), to presumably support his assertion that this issue was preserved, that case does not provide any such support. Rather, Pelican states the established premise that "where an issue has

[4] And, again, it is unclear whether the circuit court actually considered that testimony.

not been ruled upon by the trial judge nor raised in a post-trial motion, such issue may not be considered on appeal." Id. at 60, 427 S.E.2d at 675 (citing SSI Medical Services, Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 (1990)); Hoffman v. Powell, 298 S.C. 338, 380 S.E.2d 821 (1989)); Daniel v. Tower Trucking Co., 205 S.C. 333, 32 S.E.2d 5, 10 (1944) ("It is undoubtedly within the sound discretion of the trial Court to grant or refuse an application for the reopening of a case and the introduction of additional evidence by a litigant who has rested, even after the commencement of arguments to the jury and later.").

The circuit court's order denying the petition for Appointment should be affirmed.

II. The circuit court's denial of Appellant's Emergency Petition for Writ of Supersedeas is not a final order or otherwise immediately appealable.

By Notice of Appeal filed April 18, 2019, Appellant appealed nine separate probate court orders to the circuit court. The probate court orders appealed are as follows:

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 filed a Motion to Dismiss Appeal, arguing that the appeals were either moot, untimely, not ripe, or not appealable because not final orders. (4/30/19 Motion to Dismiss Appeal.) After the probate court granted Respondent's Motion to Lift Stay, Appellant filed an

Emergency Petition for Writ of Supersedeas in the circuit court pursuant to Rule 241, SCACR, seeking to "suspend proceedings in the lower court." (5/15/19 Emerg. Pet. for Writ of Supersedeas, p. 1.) The circuit court denied the Emergency Petition, which Appellant has appealed to this Court. (5/28/19 Order.) As discussed below, that order both denied the Emergency Petition for Writ of Supersedeas and also dismissed Appellant's appeals of the nine probate court orders.

The circuit court's order denying Appellant's request for the issuance of a writ of supersedeas pursuant to Rule 241, SCACR, is not a final order and not appealable. 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).

III. Even if immediately appealable, the circuit court's Order denying Appellant's Emergency Petition for Writ of Supersedeas should be affirmed.

The circuit court denied Appellant's request for a supersedeas on the basis that Appellant failed to comply with the procedural requirements set forth in Rule 241(d), SCACR. (5/28/19 Order, p. 4.) Specifically, the circuit court determined that there were no extraordinary circumstances making it impractical for Appellant to make his application for the supersedeas to

the lower court. The circuit court did not err in its determination and Appellant advances no argument in his brief to the contrary. See Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court.").

Rather, Appellant now argues that S.C. Code Ann. § 62-1-308(h) divests the probate court of jurisdiction to lift an automatic stay. This is the first time this argument has been made. It was not made in any pleadings, nor was it otherwise raised to or ruled on by the circuit court. See McNeely v. S.C. Farm Bureau Mut. Ins. Co., 259 S.C. 39, 41, 190 S.E.2d 499, 499 (1972) (claims or defenses not presented in pleadings will not be considered on appeal); Butler v. Town of Edgefield, 328 S.C. 238, 248, 493 S.E.2d 838, 843 (1997) (one cannot present and try his case on one theory and thereafter advocate another theory on appeal).

IV. The circuit court, sitting in its appellate capacity, properly dismissed Appellant's appeals of the nine probate court orders.

As set forth above, the circuit court's order denying Appellant's Emergency Petition for Writ of Supersedeas both denied the relief requested in that petition and dismissed Appellant's appeals of the nine probate court orders. (5/28/19 Order, p. 4.) The language of that order indicates that the circuit court determined it lacked appellate jurisdiction because the probate court's orders were not final orders subject to appeal pursuant to S.C. Code Ann. § 62-1-308. 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...") (emphasis added); Dorn v. Cohen, 421 S.C. 517, 809 S.E.2d 53 (2017) (appeals from orders of the probate court are governed exclusively by S.C. Code Ann. § 62-1-308).

In his brief, Appellant briefly argues that the circuit court erred in determining it lacked appellate jurisdiction to entertain the appeals, which argument is addressed below. However,

Appellant devotes the majority of his argument to the underlying merits of the majority of his appeals of the nine probate court orders, which merits have not yet even been presented to the circuit court. See I'On, LLC, 338 S.C. at 421-22, 526 S.E.2d at 724 ("The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.").

In effect, Appellant argues that this Court should determine at this juncture that the probate court erred, despite the fact that this matter is before this Court on the alleged error(s) of the circuit court in dismissing the appeals, not on the circuit court's alleged error in either affirming or reversing the probate court's orders from which Appellant appealed. If this Court determines that the circuit court erred in dismissing one or more of Appellant's appeals of the nine probate court orders, then the matter should be remanded to the circuit court for further proceedings in conformity with this Court's order. Instead, Appellant is asking this Court to entertain an appeal directly from the probate court, essentially ignoring that appeals from probate court "must be to the circuit court." S.C. Code Ann. § 62-1-308.

A. If the nine probate court orders are not final orders pursuant to S.C. Code Ann. § 62-1-308, the circuit court properly determined that it lacked appellate jurisdiction to entertain Appellant's appeals of those orders.

Appeals from orders of the probate court are governed exclusively by S.C. Code Ann. § 62-1-308. Dorn, 421 S.C. at 520, 809 S.E.2d at 54 (finding the lower court erred in applying S.C. Code Ann. § 14-3-330 to determine whether an order of the probate court was immediately appealable because appeals from probate court are governed by § 62-1-308); Fulmer v. Cain, 380

S.C. 466, 670 S.E.2d 652 (2008) ("Appeals from the probate court are governed by S.C. Code Ann. § 62-1-308.").

Only final orders from the probate court are appealable under S.C. Code Ann. § 62-1-308. 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...") (emphasis added); Dorn, 421 S.C. at 520, 809 S.E.2d at 54 ("Because the probate court's order adding a party to the action was not a final order, the order was not immediately appealable pursuant to section 62-1-308."); Fulmer, 380 S.C. at 469, 670 S.E.2d at 654 (2008) (holding that only final orders are reviewable under S.C. Code Ann. § 62-1-308); Estate of Boyce v. Work, 305 S.C. 43, 44, 406 S.E.2d 184, 185 (Ct. App. 1991) (S.C. Code Ann. § 62-1-308(a) provides that only final orders of the probate court may be appealed, a probate court order that is clearly temporary cannot be appealed, circuit court lacks subject matter jurisdiction to entertain appeal of probate court's temporary order).

Appellant argues that the April 17, 2019, probate court order, in which the probate court temporarily restrained Appellant as personal representative for a period of six months and indicated that Respondent would continue to serve as the special administrator on a temporary basis, was a final order that was timely appealed. Appellant summarily concludes that, as such, "the remaining orders were subject to review once the April 17, 2019, order was appealed." (App. Brief, p. 23.) Appellant cites Cox v. Woodmen of the World Ins. Co., 347 S.C. 460, 556 S.E.2d 397 (Ct. App. 2001), but provides no explanation or analysis to support his contention that the other eight probate court orders were appealable. See Solomon v. City Realty Co., 262 S.C. 198, 203 S.E.2d 435 (1974) (conclusory argument is deemed abandoned).

Presumably, Appellant's position is that the lower court erred in not exercising its discretion to consider orders that are not directly appealable when there is an appealable issue

before the court. As recently as 2017, the South Carolina Supreme Court "reiterate[d] that a party may appeal from a decision not amounting to a final judgment only where provided by statute." State v. Looper, 421 S.C. 384, 390, 807 S.E.2d 203, 206 (2017). Additionally, Respondent submits that the reasoning of Cox, i.e., that an appellate court has discretion to entertain appeals of interlocutory orders when coupled with a final order, is not applicable to appeals from a probate court which, again, are governed exclusively by S.C. Code Ann. § 62-1-308, and its mandate that only "final orders" may be appealed.

Even if this Court were to determine that the Cox line of cases permits the review of interlocutory probate court orders when coupled with a final order, the first determination must necessarily be whether, in fact, the April 17, 2019, probate court order is a final order. That order is clearly temporary in nature and, therefore, not a "final order" subject to appeal. See Estate of Boyce, 305 S.C. at 44, 406 S.E.2d at 185. Appellant advances no additional argument as to why the remaining probate court orders at issue were final orders or otherwise subject to appeal, and the circuit court's dismissal of each of the nine probate court orders should be affirmed.

Additionally, even if this Court were to determine that the April 17, 2019, probate court order was final, the circuit court did not err in refusing to exercise its discretion to review the remaining eight orders. The remaining eight probate court orders lack a sufficient nexus or companionship to justify the circuit court's exercise of immediate appellate review. See Brown v. Cty. of Berkeley, 366 S.C. 354, 362, 622 S.E.2d 533, 538, fn. 5 (2005) (denial of motion to dismiss based on immunity, filed by defendant individual members of county council in plaintiff county clerk of court's action for defamation lacked sufficient nexus to or companionship with immediately appealable order denying plaintiff's request for preliminary injunction to prevent special audit of county clerk of court's office, and thus, appellate court would not accept appeal

from interlocutory order). In fact, the probate code supports the circuit court's refusal to exercise this discretion in mandating that "each proceeding before the [probate court] is independent of any other proceeding involving the same estate." S.C. Code Ann. § 62-3-107.

B. Even if the circuit court erred in determining it lacked appellate jurisdiction to entertain Appellant's appeals of the nine probate court orders, sufficient additional grounds exist in the record to sustain the circuit court's dismissal of those appeals.

The following arguments present additional reasons, appearing in the record, that the circuit court's denial of the nine probate court orders should be affirmed. I'On, LLC, 338 S.C. at 420-21, 526 S.E.2d at 723 (respondent, as prevailing party in the lower court, may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court, although basis for respondent's additional sustaining grounds must appear in the record on appeal).

i. 10/24/17 Order Denying Informal Probate

This order denied Appellant's Application for Informal Probate, seeking the informal probate of the purported Will and appointment as personal representative. The Probate Code establishes that this is not a final order. See S.C. Code Ann. § 62-3-305 ("A declination of informal probate is not an adjudication and does not preclude formal probate proceedings.").

However, even if a final order, the circuit court's dismissal of Appellant's appeal of this order should be sustained for at least two reasons. First, the appeal was untimely. A notice of appeal from an order of the probate court must be served and filed on all parties not in default within ten days after receipt of written notice of the order appealed from. S.C. Code Ann. § 62-1-308(a). The timely service of the notice of appeal is a jurisdictional requirement, without which appellate courts lack the authority to hear and decide cases. Wells Fargo Bank, N.A. v. Fallon

Properties S.C., LLC, 422 S.C. 211, 220, 810 S.E.2d 856, 861 (2018). An email providing written notice of entry of an order or judgment triggers the time to appeal as long as the email is received from the court, an attorney of record, or a party. Id. at 217, 810 S.E.2d at 859. Appellant received notice of the order on October 24, 2017, via email from the probate court. (4/30/19 Mot. to Dismiss Appeal, Ex. 1.) His notice of appeal was not served until April 18, 2019, and is, therefore untimely.

Second, as acknowledged by Appellant in his brief, this issue is moot because Appellant thereafter filed a Formal Petition for Testacy and Appointment which he removed to circuit court and on which the circuit court has ruled. Wallace v. City of York, 276 S.C. 693, 694, 281 S.E.2d 487, 488 (1981) ("The function of appellate courts is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation. Accordingly, cases or issues which have become moot or academic in nature are not a proper subject of review.").

ii. 10/26/17 Order to Sell Personal Property

This order granted the application filed by Respondent requesting the probate court's permission to sell items of personal property belonging to the Decedent, specifically, a ring and a watch. The circuit court's dismissal of this order should be affirmed because, if a final order, the appeal was untimely. Additionally, the issue is moot, not preserved for appeal, and Appellant lacks standing to appeal it.

First, if the order was a final order, Appellant's appeal was untimely. Appellant received written notice of the entry of the order before November 20, 2017, as evidenced by his reference thereto in his Application to Restrain Special Administrator (11/20/17 App. to Restrain, ¶ 24). His notice of appeal was not filed until April 18, 2019.

Second, this issue is moot. As shown in settlement statements, the ring and watch were both sold in 2018 in arms'-length transactions with an unrelated third-party buyer. (4/30/19 Mot. to Dismiss Appeal, Ex. 3.)

Third, Appellant lacks standing to appeal this order because he did not raise any objections to the probate court. See Tupper v. Dorchester Cty., 326 S.C. 318, 324, 487 S.E.2d 187, 190 (1997) (issue preservation requires "that the objection in the trial court must have been made by the party who raises the issue in the appellate court."). Although Appellant filed an Application to Restrain Special Administrator, seeking to prevent Respondent from selling the personal property at issue, he later filed a "Motion to Withdrawal [sic] Application to Restrain Special Administrator" which was granted by the probate court. (11/20/17 App. to Restrain; 2/20/18 Mot. to Withdraw; 2/23/18 Order.)

Finally, Appellant failed to preserve this issue for appeal. None of the arguments made by Appellant were ruled upon by the probate court. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

iii. 7/30/18 Order Authorizing Sale of Real Estate

This order granted the petition filed by Respondent requesting the probate court's permission to sell real property which was jointly owned by the Decedent and her husband at the time of her death, specifically, a beach house on Edisto Island. The circuit court's dismissal of this order should be affirmed because the appeal was untimely, Appellant lacks standing, and no issues regarding this order were preserved for appeal.

The Edisto house was owned by the Decedent and her husband as joint tenants with right of survivorship. (5/22/19 Resp. Opp. to Emerg. Pet. for Writ of Super., p. 4, Ex. 3 – Deed.) As such, upon Decedent's death, the property became the sole property of her husband, and the Estate, as a matter of law, ceased to have ownership. Because Appellant, as a named alternate personal representative (or even as trustee of the Trust, sole devisee of the Estate), has no interest in that property, he cannot be aggrieved by the order authorizing its sale. See Rule 201(b), SCACR (limiting the ability to appeal to "[o]nly a party aggrieved by an order, judgment ... or decision...."); Beaufort Realty Co. v. Beaufort Cty., 346 S.C. 298, 301, 551 S.E.2d 588, 589–90 (Ct. App. 2001) ("A party cannot appeal from a decision which does not affect his or her interest, however erroneous and prejudicial it may be to some other person's rights and interests.).

Additionally, Appellant failed to raise any objections to the probate court concerning this order and, therefore, did not preserve any issues for appeal with regard to that order. Appellant now argues that the probate court erred because "the Trust, sole devisee of the Estate, was never served with the Petition to Sell Real Estate." (App. Brief, p. 25.) Even if this argument were preserved for appeal, it would fail because counsel for Appellant, who is also the Trustee of the Trust, was served with the petition both by email and regular mail. (3/20/19 email from Davis to Garrett and attached Petition to Sell Real Estate.)

Finally, Appellant's appeal of this order was untimely. Appellant has represented in a pleading filed on January 4, 2019, that he had obtained a copy of the probate court's entire file, over 700 pages, which certainly included a copy of this particular order. (4/30/19 Mot. to Dismiss Appeal, Ex. 4, ¶ 38.) He did not file his notice of appeal until April 18, 2019.

iv. 8/27/18 Modified Order for Appointment of Special Administrator

The probate court entered this order, *sua sponte*, after the circuit court probated the Will and took the issue of Appellant's appointment as personal representative under advisement. The circuit court's dismissal of Appellant's appeal of this order should be affirmed because, if a final order, Appellant's appeal is untimely. Appellant received written notice of the entry of the order on August 27, 2018, and did not file his notice of appeal until April 18, 2019. (4/30/19 Mot. to Dismiss Appeal, Ex. 5.)

It appears that Appellant's argument concerning his appeal of this order is that S.C. Code Ann. § 62-3-615 mandated that the probate court appoint him as special administrator rather than reaffirming Respondent's appointment as special administration. That argument was neither raised nor ruled upon in connection with the probate court's issuance of this order and is not preserved for appeal. Regardless, the argument lacks merit. The section cited by Appellant, S.C. Code Ann. § 62-3-615, concerns the appointment of a special administrator "pending the probate of a will which is the subject of a pending application or petition for probate." That was not the case here, where the circuit court had already admitted the Will to probate.

Finally, this issue is moot. Even if this Court were inclined to rule on whether or not the probate court erred in entering the order, as opposed to whether or not the circuit court erred in dismissing Appellant's appeal of the probate court's order, that ruling would have no effect. This is because intervening events, i.e., the later orders appointing Respondent as special administrator, have rendered this issue nonjusticiable. Sloan v. Greenville Cty., 356 S.C. 531, 552, 590 S.E.2d 338, 349 (Ct. App. 2003) ("A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy.").

v. 1/15/19 Order Authorizing Distribution from Estate

This order granted Respondent's Application for Hearing to Approve Distribution, which sought the probate court's approval to distribute $10,000.00 to the Trust, the sole devisee of the Estate. (11/20/18 App. for Hearing to App. Dist.) The circuit court's dismissal of this appeal should be affirmed.

First, if a final order, the appeal was untimely. Appellant received notice of the order on January 16, 2019, but did not file his notice of appeal until April 18, 2019. (4/30/19 Mot. to Dismiss Appeal, Ex. 6.)

Second, Appellant was present at the hearing, and not only did he fail to object to the Application, he, through his counsel, agreed that the amount distributed should be increased to $100,000.00. (1/9/19 Transcript of Hearing on App. for Hearing to App. Dist., pp. 18-20.) Therefore, the issue was not preserved for appeal and Appellant lacks standing to appeal this issue because he raised no objections to the probate court.

Third, any argument as to the merits of his appeal of this order are conclusory at best and should be deemed abandoned. Solomon, 262 S.C. at 202, 203 S.E.2d at 435 (conclusory argument is deemed abandoned). The circuit court's dismissal of this appeal should be affirmed.

vi. 2/7/19 Order Denying Appellant's Petition for Removal of Special Administrator

This order denied Appellant's Petition for Removal of Special Administrator and, pursuant to S.C. Code Ann. § 62-1-111, ordered Appellant to pay the Estate's attorneys' fees and costs in defending the Petition. (2/7/19 Order Denying Pet. for Removal of Spec. Admin.) The circuit court's dismissal of this appeal should be affirmed.

First, if a final order, the appeal was untimely. Appellant received notice of the order on February 7, 2019, but did not file his notice of appeal until April 18, 2019. (4/30/19 Mot. to Dismiss Appeal, Ex. 8.)

Second, if this Court is inclined to look to the merits of Appellant's appeal of this order, as opposed to the propriety of the circuit court's dismissal of Appellant's appeal, it appears that Appellant argues that the probate court erred in finding that Appellant had properly collected and distributed the Estate's assets because "neither the Probate Court nor [Respondent] had the authority to sell property that rightfully belonged to the Trust." (App. Brief, p. 28.) Regardless, that argument was not raised nor ruled upon by the probate court and is, therefore, not preserved for appeal. The circuit court's dismissal of the appeal of this order should be affirmed.

vii. 2/13/19 Order for Appointment of Temporary Special Administrator

If a final order, the circuit court's dismissal of Appellant's appeal of this order must be affirmed on the basis that the appeal was untimely.[5] Appellant received written notice of the entry of this order on February 13, 2019, but did not file a notice of appeal until April 18, 2019. (4/30/19 Mot. to Dismiss Appeal, Ex. 10.)

Additionally, it appears that the only argument made by Appellant to this Court concerning this order is that no "emergency" existed as required by S.C. Code Ann. § 62-3-614(2). (App. Brief, p. 30.) Although Appellant filed both a "Return to Emergency Application for Appointment of Temporary Special Administrator" and a "Motion to Amend Findings by the Court and Motion for Relief from Order or Judgment," this argument was not made in either filing. (2/22/19 Ret. to App. for Restraint of PR; 2/22/19 Mot. to Amend. Findings.) As such, even if this Court were inclined to reach the merits of Appellant's appeal of this order, as

5 Appellant has arguably conceded the point that this, and the 2/13/19 Temporary Order Restraining General Personal Representative, were final orders. He argues that the 4/17/19 Order for Temporary Restraint of General Personal Representative, which both temporarily restrained Appellant as personal representative and ordered that Respondent continue to serve as temporary special administrator, is a final order. (App. Brief, p. 23.) Following that logic, the 2/13/19 Order for Appointment of Temporary Special Administrator, as well as the 2/13/19 Temporary Order Restraining General Personal Representative, are also final orders. As such, the appeals are untimely.

opposed to the propriety of the circuit court's dismissal of the appeal of the order, the only argument made by Appellant was neither raised to nor ruled upon by either the probate court or the circuit court and, therefore, was not preserved for appeal, either in this Court or the circuit court.

Finally, with the circuit court's denial of Appellant's Petition for Appointment, the issue of whether the probate court erred in appointing Respondent as temporary special administrator (in the interim between the circuit court's initial order granting his Petition for Appointment and its May 28, 2019, order reconsidering and denying the Petition for Appointment) is moot. See Sloan, supra.

viii. 2/13/19 Temporary Order Restraining General Personal Representative

If a final order, the circuit court's dismissal of Appellant's appeal of this order must be affirmed on the basis that the appeal was untimely. Appellant received written notice of the entry of this order on February 13, 2019, but did not file a notice of appeal until April 18, 2019. (4/30/19 Mot. to Dismiss Appeal, Ex. 10.)

Additionally, it appears that the only argument made by Appellant to this Court concerning this order is that no "emergency" existed as required by S.C. Code Ann. § 62-3-614(2). (App. Brief, p. 30.) Although Appellant filed both a "Return to Emergency Application for Restraint of Personal Representative" and a "Motion to Amend Findings by the Court and Motion for Relief from Order or Judgment," this argument was not made in either filing. (2/22/19 Ret. to App. for Restraint of PR; 2/22/19 Mot. to Amend. Findings.) As such, even if this Court were inclined to reach the merits of Appellant's appeal of this order, as opposed to the propriety of the circuit court's dismissal of the appeal, the only argument made by Appellant was

neither raised to nor ruled upon by either the probate court or the circuit court and, therefore, was not preserved for appeal, either in this Court or the circuit court.

Finally, with the circuit court's denial of Appellant's Petition for Appointment, the issue of whether the probate court erred in temporarily restraining Appellant as personal representative (in the interim between the circuit court's initial order granting his Petition for Appointment and its May 28, 2019, order reconsidering and denying the Petition for Appointment) is moot. See Sloan, supra.

ix. 4/17/19 Order for Temporary Restraint of General Personal Representative

This order was issued by the probate court after its Review Hearing for its February 13, 2019, Temporary Order Restraining General Personal Representative. The order both extended the restraint of Appellant as general personal representative (for a period of six months) and indicated that Respondent would continue to serve as the temporary special administrator of the Estate.

As noted above, the circuit court dismissed Appellant's appeal of this order, apparently on the basis that it lacked appellate jurisdiction because it is not a final order. However, even if a final order, the circuit court's dismissal of Appellant's appeal of this order should be affirmed.

The only argument made by Appellant, which was not raised to, nor ruled upon, by either the probate court or the circuit court, appears to be that the probate court failed to hold a hearing before issuing this order as required by S.C. Code Ann. § 62-3-607. (App. Brief, p. 31.) This is not true. A hearing was held on February 22, 2019, and Appellant was in attendance. (4/17/19 Order, p. 3.)

Additionally, with the circuit court's denial of Appellant's Petition for Appointment, the issue of whether the probate court erred in temporarily restraining Appellant as personal

representative (in the interim between the circuit court's initial order granting his Petition for Appointment and its May 28, 2019, order reconsidering and denying the Petition for Appointment) is moot. See Sloan, supra.

The circuit court's denial of Appellant's appeal of this order should be affirmed.

C. Respondent's response to additional issues raised in Appellant's brief.

A number of arguments are made by Appellant that do not appear to arise out the circuit court orders which Appellant appealed and are now before this Court. However, out of an abundance of caution, Respondent will respond to some of those arguments.

- ***Respondent's Alleged Failure to Locate / Probate the Will.***

In a number of places in his brief, Appellant argues that Respondent made "no effort" to locate the Will and further criticizes Respondent for failing to seek to have the Will admitted to probate once it was located. Respondent fails to see how these arguments are relevant to the issues before this Court. However, to the extent they are relevant, they are either contradicted by the record or not supported by law.

Respondent testified, in response to questioning by counsel for Appellant, as to his efforts to locate the Will after he was appointed. (1/9/19 Trans. of Hrng on Pet. to Remove Spec. Admin., pp. 12-14.) Additionally, any assertion that Respondent acted inappropriately by failing to take steps to have the Will admitted to probate are without legal support, and Appellant has failed to cite any authority to the contrary.

- ***June 9, 2017, Order Appointing Respondent as Temporary Special Administrator.***

Appellant argues the probate court erred in issuing the June 9, 2017 order in which it appointed Respondent as temporary special administrator. Appellant did not file any notice of appeal from this order. See Rule 203(a), SCACR ("A party intending to appeal must serve and

file a notice of appeal and otherwise comply with these Rules."). The propriety of the probate court's June 9, 2019, order is not before this Court.

- ***The circuit court erred by failing to grant a hearing on Appellant's Motion to Restrain Special Administrator.***

Appellant argues the circuit court erred in failing to "grant" a hearing on his Motion to Restrain Special Administrator and/or for finding that the Motion was moot. (App. Brief, pp. 31-33.) Appellant did not appeal the circuit court's February 13, 2019, order in which it held that the Motion to Restrain Special Administrator was moot.

Even if an appealable "issue," the arguments made by Appellant were not raised to or ruled upon by the circuit court and were not preserved for appeal. Additionally, even if preserved for appeal, any denial of Appellant's Motion by the circuit court should be affirmed on the basis that the circuit court lacked jurisdiction to entertain that Motion.

The probate court has "exclusive original jurisdiction over all subject matter related to...the estates of decedents". S.C. Code Ann. § 62-1-302(a)(1). Certain matters are removable to circuit court as a matter of right, including formal proceedings for the "appointment of general personal representatives." S.C. Code Ann. § 62-1-302(d)(1).[6] The term "general personal representative" is defined to specifically exclude special administrators, such as Respondent. S.C. Code Ann. § 62-1-201(33) ("'General personal representative' excludes special administrator."). As such, absent the probate court's removal of an issue concerning special administrators to circuit court on its own accord pursuant to S.C. Code Ann. § 62-1-302(f), the circuit court lacks jurisdiction over such issues. Here, no issues concerning special administrators were ever removed to the circuit court. Rather, in granting Petitioner's Motion for Removal of

[6] This section, S.C. Code Ann. § 62-1-302(d)(1), was amended in 2008 specifically to add the word "general" before "personal representative."

the Petition for Formal Testacy and Appointment (requesting removal from probate court to circuit court), the probate court indicated that "[j]urisdiction is retained as to all other matters involving this case except for issues previously or subsequently removed." (11/20/17 Order for Removal.)

CONCLUSION

For the reasons and arguments presented above, this Court should affirm the circuit court's denials of Appellant's Petition for Appointment, his Emergency Petition for Writ of Supersedeas, and his appeals of the nine probate court orders.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT ANDREW W. CHANDLER, ESQUIRE

December 27, 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
Dorchester County Case Nos. 2019-CP-18-0677 and 2017-CP-18-1816

In Re: The Estate of Doris Duane Colucci,

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

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, 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 December 27, 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 addresses:

Documents: **Initial Brief of Respondent Andrew W. Chandler, in his Capacity as Special Administrator of the Estate of Doris Duane Colucci**

Respondent Chandler's Designation of Matter to be Included in the Record on Appeal

Counsel Served:

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North Charleston, SC 29405

Angus Lawton, Esquire
Lawton Law Firm, LLC
496 Bramson Court #100
Mt. Pleasant, SC 29464

Adam Mlynarczyk, Esquire
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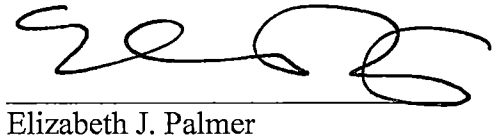

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December 27, 2019

VIA U.S. MAIL
The Honorable Jenny Abbott Kitchings
Clerk, 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 W. Chandler et al.
Appellate Case No.: 2019-001065

Dear Ms. Kitchings:

Enclosed please find the original and one (1) copy of the Initial Brief of Respondent Andrew W. Chandler, in his Capacity as Special Administrator of the Estate of Doris Duane Colucci, Designation of Matter and Proof of Service in the above referenced matter. I kindly ask that you file the original and return a clocked copy to me in the self-addressed, stamped envelope provided.

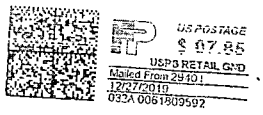
By copy of this letter to all counsel of record, we are serving them with a copy.

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

Sincerely yours,

Taylor Davis
Legal Assistant to Elizabeth Palmer

/tnd
Enclosures
cc: Gordon H. Garrett, Esquire
Angus Lawton, Esquire
Adam Mlynarczyk, Esquire
M. Richardson Hyman, Jr.



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The Honorable Jenny Abbott Kitchings
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