

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas**

Edgar W. Dickson, Circuit Court Judge

**Appellate Case No. 2019-001065
Dorchester County Case No(s). 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 ColucciAppellant,**

v.

**Andrew W. Chandler, 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 Fredrick Antonio Colucci, John Martin Antonio,
Henry Burkes, and Richard M. Hyman, Jr.....Respondents.**

BRIEF OF APPELLANT

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ISSUES ON APPEAL

- I. Did the circuit court err, both substantively and procedurally, in finding that Fox should not remain as Personal Representative because he was not the best qualified to serve?
- II. Did the Circuit Court err in dismissing an appeal from Probate Court, despite it being timely filed and from an order South Carolina law recognized as appealable?
- III. Did the Circuit Court err by failing to grant injunctive relief or otherwise hold a hearing on injunctive relief?
- IV. Did the Probate Court have the authority to lift the automatic stay and did the Circuit Court err by failing to review it?

STATEMENT OF THE CASE

This is the appeal of the contested appointment of a special administrator and a personal representative.

Doris and Ivo Colucci were a married couple residing in Dorchester County. (R. p. 1). They moved to South Carolina in the 1970s, opening and operating a profitable jewelry store. (R. p. 523). During their time together, they purchased commercial real estate throughout the tri-county area. (Id.)

In 2005, the couple had engaged an estate attorney and established an extensive estate plan. (R. pp. 101-10; 823-953). Mrs. Colucci executed a pour-over will (hereinafter referred to as the “Last Will”), without a power of sale and with a strong no-contest clause, that devised all assets to the Colucci Living Trust (hereinafter referred to as the “Trust”). (R. pp. 106; 108-109). The Coluccis amended the Trust again on June 18, 2013. (R. pp. 935-52).

Ivo Colucci killed Doris Colucci on April 14, 2017. (R. p. 113). In the aftermath, Ivo Colucci was taken into custody and ruled incompetent due to severe dementia. (R. pp. 113-14). Ivo Colucci has remained under the care of Christa Yantis, a conservator, ever since. (R. p. 6).

With Doris Colucci deceased and Ivo Colucci incapacitated, the two principals of the family business and properties were gone, creating an issue of managing the many family assets. Other family members acted to establish a representative. (R. pp. 90-99). An attorney who briefly represented two of Doris Colucci's children, Lester Schwartz, filed an Application for Appointment of Special Administrator on May 3, 2017. (Id.) This application revealed the existence of the Doris Colucci's Last Will, identifying the document by date, but the contents were not presented to the court and the location listed as unknown. (Id.)

The Court denied Mr. Schwartz's application and instead, Judge Mary Blunt ("Judge Blunt"), appointed Andrew Chandler, Esq., to be Special Administrator, (hereinafter, the "Temporary Order") pursuant to S.C. Code § 62-3-614. (R. pp. 1-4). This order was in place "unless and until," the Last Will could be found. (R. p. 1). Under this order Mr. Chandler was appointed to "preserve the estate, to secure its proper administration, and to protect its assets." (R. p. 2).

On July 10, 2017, the Dorchester County Probate Court signed a consent order that granted Chandler the powers under Part 7 of the Probate Code pursuant to § 62-3-617. (R. p. 4). This order established a fee structure for Chandler, stated that Ivo Colucci was now under a conservatorship, but also permitted Andrew Chandler to retain a personal injury attorney. (R. pp. 5-13). While this order acknowledges the existence of Doris Colucci's will, it proceeds to re-appoint Chandler as Special Administrator. (Id.) Despite Chandler's and the Court's knowledge that a copy of the will was available, the named Personal Representatives (Fox, Henry Burkes, and Richard Hyman) were not made parties to, served with, or made aware of the formal application. This order also to find that Doris Colucci died intestate or that any effort was made to locate the will. (Id.) Furthermore,

this order adopts the same language as the June 9, 2017 Temporary Order that the intestate succession rules shall only apply “unless and until” the Last Will is located. (R. p. 5).

On, July 24, 2017, the Dorchester County Probate Court, pursuant to its July 10, 2017 order signed, an additional order to permit the Special Administrator to hire Rosen & Hagood with the association of Lester Schwartz, Esquire, to pursue a wrongful death case against Ivo Colucci. (R. pp. 14-16). This Order established a contingency fee to be split between Rosen & Hagood and the original attorney for Doris Colucci’s children, Lester Schwartz, as well as an hourly fee structure. (R. p. 16).

One month later, on August 24, 2017, Doris Colucci’s Last Will was delivered to the Dorchester County Probate Court. (R. p. 111). On September 13, 2017 the Dorchester County Probate Court sent a letter to several parties notifying them that the Last Will, “has been added to the file, just as a matter of record.” (*Id.*) It did not advise the Appellant, Michael C. Fox, that he was named both as the next Successor Personal Representative and as the next successor Trustee of the Colucci Family Trust. (*Id.*)

Michael Fox had been a close family friend of the Colucci’s and their bookkeeper for over forty years. (R. p. 431). Fox was familiar with the Colucci’s business and their real estate companies. (R. pp. 431-32). Considering this, he decided to take on the Trusteeship of the Trust. (R. p. 225). Schwartz would resign as counsel, but retained his fee interest “as counsel” in the wrongful death suit.

Meanwhile, Chandler filed an Information to Heirs and Devisees on August 4, 2017 as notice of his formal appointment. (R. p. 101). The notification was only sent out to Ivo Colucci, Michael Antonio Colucci, John Martin Antonio, and David Haller, attorney for Ivo Colucci’s

conservator. (Id.) This notice excluded the Trust, Michael Fox, Henry Burkes, and Richard Hyman. (Id.)

On October 24, 2017, Fox filed an Application for Informal Testacy and Informal Appointment as Personal Representative of the Estate of Doris Colucci. (R. pp. 147-55). Without any findings of fact, the Dorchester County Probate denied informal probate of the will and any informal appointment of a representative. (Id.)

In response, Fox filed for formal probate of the will and for appointment of representative. (R. pp. 156-66). In addition, Fox filed for removal of the determination of the validity of the Last Will and the Appointment of the Special Administrator to the Court of Common of Pleas. (R. p. 167). While all other parties agreed to accept service of the formal petition, Chandler did not. (R. p. 187). All of the interested parties (under intestate proceedings and under the Last Will) were served before December 15, 2017. (R. pp. 184-200).

Fox learned that Chandler intended to sell some of the Estate's jewelry. Concerned, Fox wrote Chandler's attorney and in response, on November 4, 2017, Chandler's attorney wrote to Fox via his attorney and stated that, "until there is an order admitting the will to probate, the estate will continue to be administered as if it were intestate per the code." (R. p. 263).

On November 11, 2017, the Special Administrator filed an Answer and Objection to Fox's Petition. (R. pp. 170-83). Among his other objections, the Special Administrator argued that appointment of a named Personal Representative "would frustrate judicial economy and prejudice the Estate and others with unnecessary cost, delay, and duplication of efforts," and that "there is no requirement that a Personal Representative even be appointed." (R. pp. 177-78). Further, the Special Administrator stated that Michael Fox is unsuitable and therefore not qualified to serve

and that, “he will be called on to make an accounting for his acts and doings with reference to the work he performed for the Colucci’s and their businesses.” (R. p. 178).

During the period from Chandler filing his objections on November 30, 2017, Chandler sold nearly every asset belonging to the estate of Doris Colucci; in effect, a complete liquidation. (R. pp. 136-40; 551; 487-91; 507-10). Chandler did not communicate his attempts to do this to Fox, nor did he seek any written order of the court to do so. (Id.) Most critically, these assets included multiple income producing commercial properties that were to fund the Trust’s income over the coming decades. (Id.)

A hearing was held on August 13, 2018, in the Dorchester County Court of Common Pleas for Formal Appointment and Testacy. (R. pp. 708-34). Chandler was the only party that objected to the appointment of a Personal Representative. Counsel for the Special Administrator stated: “The fact of the matter is a Personal Representative never has to be appointed. The Will can be admitted to Probate without a Personal Representative being appointed.” (R. p. 718). However, in reference to the Successor Personal Representative’s disqualification, counsel stated:

And I want to make it clear to the Court and to Mr. Fox that our objection has nothing to do with his character, calling into question his character; it is nothing to that extent at all.

[O]ur objection is because first of all this estate has been administered by Mr. Chandler and to some extent myself as his attorney for over 14 months at this point.”

(Id.) The Special Administrator directly addressed the court in regard to Mr. Fox and stated:

But the things that remain are complicated and frankly ones that -- and I’m not saying that Mr. Fox wouldn’t otherwise be capable of doing them but he is also a witness to many of them. And in those cases typically the Probate Court is going to appoint a Special Administrator anyway and then you have two fiduciaries serving, which definitely seems inefficient and unnecessary.

(R. p. 723). The hearing concluded with the Special Administrator consenting to probate the Last Will of Doris Colucci, but continuing to object to the appointment of a Personal Representative.

(R. p. 732). By order dated August 27, 2018, the Circuit Court admitted the Will to Probate. (R. pp. 32-34). The appointment of a personal representative was taken under advisement. (R. p. 732).

Following the August 13, 2019 hearing, Fox was unaware of the extent of Chandler's sales of property and had no notice that the Dorchester County Probate Court had directed a liquidation. (R. pp. 432-32).

With no resolution regarding the appointment of a Personal Representative, concerns mounting that Chandler was selling assets, and clear indications that Chandler intended to freeze out Fox (and the other named Personal Representatives out of the Estate), on November 26, 2018, Fox moved in the Circuit Court to Restrain the Special Administrator. (R. pp. 250-75). The Dorchester County Court of Common Pleas did not set a hearing within the ten-day period nor did it schedule a hearing at any point on Fox's Motion to Restrain.

Concerned by the delay at the Circuit Court, as well as appointment under Section 62-3-615, on January 4, 2019, Fox filed the same Motion to Restrain in the Dorchester County Probate Court and moved for the removal of the issue to the Circuit Court. (R. pp. 279-81; 250-75). The Probate Court denied the motion to remove the Petition to Restrain to the Circuit Court and instead set the matter for an emergency hearing. (R. pp. 42-58).

On January 9, 2019, the Emergency hearing for Fox's Petition was held in the Probate Court. (R. pp. 735-803). At the hearing, during Chandler's direct examination, Chandler stated that he had spoken with the Dorchester County Probate Court the day before on the telephone. (R. p. 761). Neither the judge nor Chandler elaborated further on the content of this conversation except to say that it involved "scheduling." (Id.) Chandler did explain that he was "not an attorney"

in this matter and was free to speak privately the day before with the judge conducting the hearing. (Id.) Fox's motion to restrain was denied and Fox was personally sanctioned \$10,000.00 by a Probate Court order dated February 7, 2019. (R. pp. 42-58). On February 8, 2019, Chandler filed a supplemental Motion to Dismiss with Circuit Court. (R. pp. 955-58).

On February 13, 2019, at 8:45 A.M., the Dorchester County Court of Common Pleas formally appointed Fox as the Personal Representative. (R. pp. 59-51). The Court further directed Fox to, "ensure that there has been no waste, abuse, or fraud." (R. p. 60). This Order additionally dismissed Fox's motion to restrain as moot. (Id.)

Hours after the February 13, 2019 order was issued, Elizabeth Palmer, Esq., Chandler's attorney from Rosen & Hagood, submitted an invoice for an unpaid balance of \$6,301.72 to the Dorchester County Probate Court. (R. p. 296). This invoice was never submitted to Fox nor was he made aware of it outside of court filings. (R. pp. 303-304). Additionally, Chandler never attempted to make the funds available to Fox to pay the alleged invoice. (R. p. 304). Instead, Palmer attached the invoice as an exhibit to an Emergency Application to Restrain the Personal Representative and Appointment of a Temporary Special Administrator in the Probate Court. (Id.) At 2:38 P.M., that same day, Probate Court ordered that Fox be temporarily restrained and Chandler be reappointed as the temporary special administrator. (R. pp. 62-70). In response, on February 22, 2019 Fox moved in the Probate Court to Amend the February 13, 2019 Emergency Orders. (R. pp. 337-41; 347-51). Neither motion been heard or explicitly ruled upon.

On February 14, 2019, Fox, based on Chandler's actions, moved the Circuit Court for a Rule to Show Cause. (R. pp. 303-305). While the Court of Common Pleas would request a jurisdictional memorandum, it ultimately chose not to grant a hearing. (R. pp. 433-37; 451-52; 82-84).

After the expiration of the Emergency Orders, on April 17, 2019, the Probate Court issued another order, this time extending Fox's Restraint as Personal Representative for an additional six months and reinstalling Chandler as the Special Administrator. (R. pp. 72-77).

Fox appealed the April 17, 2019 Order, along with ten other Probate Court orders to the Court of Common Pleas. (R. pp. 453-55).

Meanwhile, Fox filed a motion for reconsideration on February 22, 2019, but this motion has not been heard or explicitly ruled on. (R. pp. 352-58). Ivo Colucci filed a Motion in Support of Reconsideration in which he admits that no one was more trusted to the Coluccis than Michael Fox and states that the Probate Court had ordered the liquidation of the Estate. (R. pp. 507-10). Chandler thereafter filed a motion for reconsideration on February 28, 2019. (R. pp. 359-82).

On May 1, 2019, Chandler moved to lift the automatic stay imposed by the appeal of the Probate Court order. (R. pp. 479-483). Without any hearing, on May 10, 2019, the Dorchester County Probate Court lifted the automatic stay and Chandler proceeded to settle the wrongful death suit against Ivo Colucci for \$700,000.00. (R. pp. 78-81).

In response, on May 15, 2019, Fox moved the Court of Common Pleas for a Writ of Supersedeas and also requested review of the Probate Court's lift of the automatic stay. (R. pp. 492-99). The Court of Common Pleas scheduled a May 30, 2019 hearing for Fox's Petition for Writ of Supersedeas, Fox's Rule to Show Cause, and Chandler's Motion for Reconsideration. (R. p 535).

On May 21, 2019, the Court of Common Pleas sent an email and requested that Fox and Chandler submit their respective qualifications to serve as personal representative and special administrator, respectively. (R. p. 429). Additionally, Ivo Colucci filed a memorandum in support

of Chandler's Motion to Alter or Amend, Colucci stated that the Probate Court had ordered the Estate to be "liquidated." (R. p. 509).

On May 28, 2019, the Circuit Court amended its February 13, 2019 Order, finding Fox unqualified to serve as Personal Representative, barring Fox from seeking any further appellate relief, and ruling that the February 13, 2019 order did not remove Chandler as Special Administrator. (R. p. 82). Additionally, the Circuit Court denied Fox's Writ of Supersedeas and declined to review the Probate Court's lift of the automatic stay. (R. p. 88). On May 29, 2019 the attorney for Michael A. Colucci and John M. Antonio contacted the Circuit Court to confirm that the May 30, 2019 hearing was cancelled. Judge Dickson's law clerk responded, stating:

In light of the orders that were filed yesterday, tomorrow's hearing is cancelled. In accordance with the orders, the Probate Court now has sole jurisdiction over the case and it cannot be removed to Circuit Court until the case ends.

(R. p. 429). Fox timely appealed the May 28, 2019 orders. (R. pp. 549-50).

STANDARD OF REVIEW

All decisions in this matter are equitable or otherwise reviewed de novo, with this Court taking its own view of the preponderance of the evidence and deciding any questions of law without deference to the lower court. See Blackmon v. Weaver, 366 S.C. 245, 248, 621 S.E.2d 42, 43 (Ct. App. 2005) ("An action to remove a personal representative is equitable in nature."); accord Church v. McGee, 391 S.C. 334, 705 S.E.2d 481 (Ct. App. 2011); Skipper v. Perrone, 382 S.C. 53, 674 S.E.2d 510 (Ct.App. 2009) (de novo review of equitable actions); Matter of Estate of Kay, 423 S.C. 476, 481, 816 S.E.2d 542, 545 (2018) (de novo review of circuit court review of probate actions).¹

¹ Even if any decisions in this appeal are subject to abuse of discretion review, questions of law may be decided with no particular deference to the lower court. Neely v. Thomasson, 365 S.C. 345, 350, 618 S.E.2d 884, 886 (2005).

ARGUMENT

I. The circuit court erred, both substantively and procedurally, in finding that Fox should not remain as Personal Representative because he was not the best qualified to serve.

The cardinal rule in trusts and estates law is that the intent of the testator must prevail whenever possible. Wilson v. Dallas, 403 S.C. 411, 453, 743 S.E.2d 746, 769 (2013) (Toal, J. concurring) (citing Johnson v. Thornton, 264 S.C. 252, 257, 214 S.E.2d 124, 127 (1975)).

[A]ll presumptions are in favor of the claimant to whom the statute gives a preference, and letters should be granted to such claimant, unless the testimony is so strong as to produce an abiding conviction that such grant would practically defeat, rather than promote, the ends of administration

Ex parte Small, 69 S.C. 43, 48 S.E. 40, 41 (1904). The qualifications set forth in the Code to serve as a personal representative are minimal: a prospective personal representative must be (1) over the age of eighteen, (2) not found by the court to be unsuitable in formal proceedings, (3) not a foreign corporation, and (4) the probate judge within their jurisdiction (with some exceptions). S.C. Code Ann § 62-3-203(e). If qualified, the person nominated by a power conferred in a will, has priority among all others to be appointed. S.C. Code Ann. § 62-3-203(a)(1). “[T]here is a strong deference shown to the personal representative chosen by the testator. ‘The Courts have ever been reluctant to take the management of an estate from those to whom it has been confided by the testator, for to that extent the intention expressed in his will would be defeated.’” Blackmon, 366 S.C. at 251, 621 S.E.2d at 45 (quoting Smith v. Heyward, 115 S.C. 145, 164, 105 S.E. 275, 282 (1920)).

After the Will was filed with the Probate Court, both the Circuit Court and the Probate Court had numerous opportunities to determine whether Fox was unsuitable and hold him as such.²

² Fox was also named as first successor trustee for the Colucci Living Trust, sole devisee of the Will. On October 27, 2017, Fox accepted the trusteeship of the Trust and has served in that capacity since. (R. p. 225).

The Probate Court never made any findings of fact regarding Fox's suitability nor did it ever make any holdings regarding his suitability.³ (R. pp. 147-55; 42-58; 62-70; 78-21). Likewise, the Circuit Court never found Fox unsuitable in formal proceedings⁴. To the contrary, the Circuit Court found that Fox was qualified on February 13, 2019. (R. p. 60). Even after the Circuit Court reversed its February 13, 2019 Order on May 28, 2019, it once again, did not find that Fox was unsuitable. (R. pp. 82-83). Instead, the Circuit Court held that Fox, "is not *the best qualified* person to be the Personal Representative for this estate." (R. p. 83) (emphasis added).

The standard that the Circuit Court applied to Fox is not the standard set forth Section 62-3-203(e) of the Code. If this elevated standard is allowed to stand, it would turn the practice of estate planning on its head. Any person nominated in will, who is suitable, and has priority of appointment, would be subject to removal if another person (whether named in the will or not) is subjectively better qualified. The standard set forth in the code is meant to be a floor, not an amorphous ceiling. A court may not redraft a will, nor may it doctor a crucial part. Limehouse v. Limehouse, 256 S.C. 255, 257, 182 S.E.2d 58, 59 (1971). To ignore a named personal representative in favor of an unnamed and uncontemplated person would lead to, "a chilling effect on future testators in South Carolina." Dallas, 403 S.C. at 453, 743 S.E.2d at 769 (Toal, J. concurring).

In Dallas, the Attorney General excluded the estate's trustees, disregarded a carefully executed testamentary devisee, and inserted himself into the day-to-day operations of a new trust, created out of whole cloth. Id. The similarities between the Attorney General's actions in Dallas

³ Denial of informal appointment is not an adjudication and does not preclude appointment in formal proceedings. S.C. Code Ann. § 62-3-309.

⁴ Fox was present for the Summary Judgment hearing and the Circuit Court declined to examine him. (R. p. 176).

and Chandler's actions in the present case are rather striking. Here, instead of an Attorney General, a special administrator has effected a total takeover of Mrs. Colucci's Estate; thwarting all of the nominated personal representatives, against the wishes of the trust beneficiaries,⁵ in an attempt to invalidate the testator's devise. Dallas, 403 S.C. at 453, 743 S.E.2d at 769 (Toal, J. concurring).

A. There was Insufficient Cause for Fox's Removal.

In Dallas, the three original fiduciaries either died, resigned, or were removed from their positions as personal representatives and trustees. Dallas, 403 S.C. at 419, 743 S.E.2d at 751 n. 2. Doubtless that the court was justified in removing them, as at least one of them entered an Alford plea on charges for taking money from James Brown. Id. Yet, even a disbarred attorney is not per se disqualified, absent acts of fraud, deceit, or untrustworthiness. Parkman v. Hanna, 311 S.C. 20, 22, 426 S.E.2d 743, 744 (1992). "The power to remove a personal representative 'should be executed with great caution, and not at all, unless it is made to appear to be necessary for the protection of the estate, to prevent loss or injury to it from misappropriation, maladministration or fraud.'" Blackmon, 366 S.C. at 251, 621 S.E.2d at 45 (quoting Heyward, 115 S.C. at 164-65, 105 S.E. at 282). Section 62-3-611(b) of the South Carolina Code governs the grounds for removal of a personal representative. Grounds for removal exist when it is in the best interest of the estate, when the personal representative intentionally misrepresented material facts leading to his appointment, or when the personal representative has failed to perform any duty pertaining to his office. S.C. Code Ann. § 62-3-611(b). A court may not remove a personal representative without

⁵ Three of the Colucci children wanted Chandler removed and Fox appointed. (R. pp. 384-86).

a showing of fault. Blackmon, 366 S.C. at 252, 621 S.E.2d at 45 (citing Reed v. South Carolina Nat'l Bank, 293 S.C. 357, 360 S.E.2d 527 (Ct.App.1987)).

The Court, in its order removing Fox, did not cite a single ground under Section 62-3-611(b) to justify removal. (R. p. 82-83). Instead, the Court removed Fox because “[he] is not *the best qualified person* to be the Personal Representative for this estate.” (R. p. 83). (emphasis added). Yet, the standard for removal is not whether there is another is better qualified to serve, the standard requires an affirmative act by the personal representative that jeopardizes the administration of the estate. S.C. Code Ann. § 62-3-611(b). Absent such an act, a court cannot remove a personal representative. Blackmon, 366 S.C. at 252, 621 S.E.2d at 45.

While Chandler has consistently maintained he believed Fox to be unsuitable to serve as Personal Representative, his basis for this position was ever-changing. Following the Will’s delivery to the Probate Court on August 24, 2017, on October 30, 2017, Fox petitioned for formal testacy and appointment, and the removal of those issues to the Circuit Court. At no time between the Will’s delivery to the Probate Court and Fox’s Petition for Formal testacy and appointment, did Chandler act to probate the Will. On November 30, 2017, Chandler filed his objection to the appointment of a personal representative. (R. pp. 170-83). Chandler objected to Fox’s appointment on the grounds that Fox’s appointment, “would frustrate judicial economy and prejudice the Estate,” (R. p. 176) and that, “[Fox] is [not] qualified or entitled to be appointed as Personal Representative.” (R. p. 177). Chandler also objected to admitting the Will to Probate because, “Respondent takes no position on the validity of the Will.” (R. p. 171).

On May 23, 2018, Ivo Colucci filed for summary judgment on the issues of formal testacy and appointment. (R. pp. 220-23). On August 8, 2018, Chandler filed his Memorandum in Partial Opposition to Summary Judgment. (R. pp. 224-42). This time, Chandler claimed that the only

reason Fox was unsuitable to serve as personal representative was because it would negatively affect the estate. (R. pp. 227-28). Additionally, Chandler argued that the Estate is too complex for anyone to administer. (R. p. 228). However, at this time, Chandler supported admitting the Will. (R. p. 226). The Summary Judgment Hearing was held on August 13, 2018. No members of the Colucci family appeared nor did they object to Fox's appointment as Personal Representative. To the contrary, only the Special Administrator objected to the appointment of a Personal Representative. Counsel for the Special Administrator stated:

And I want to make it clear to the Court and to Mr. Fox that our objection has nothing to do with his character, calling into question his character; it is nothing to that extent at all...Our objection is because first of all this estate has been administered by Mr. Chandler and to some extent myself as his attorney for over 14 months at this point."

(R. p. 718). Additionally, Chandler stated:

But the things that remain are complicated and frankly ones that -- and I'm not saying that Mr. Fox wouldn't otherwise be capable of doing them but he is also a witness to many of them. And in those cases typically the Probate Court is going to appoint a Special Administrator anyway and then you have two fiduciaries serving, which definitely seems inefficient and unnecessary.

(R. p. 723). Following the hearing, on August 27, 2018, the Court ordered the Will be admitted to probate, but took the decision on appointment of the personal representative under advisement. (R. pp. 32-34). Roughly four months passed without a decision on Fox's appointment.

On January 4, 2019, Fox Petitioned the Probate Court for removal of the special administrator. (R. pp. 279-81). In response, on January 8, 2019, Chandler contacted the Probate Court *ex parte*, and requested an Emergency Hearing. (R. pp. 756-57). The Probate Court obliged

and ordered an emergency hearing for the following day. When Chandler was questioned about the discovery of the Will, he responded:

MR. GARRETT: Did the discovery of the will have any impact on your legal duty as special administrator?

MR. CHANDLER: The discovery of the will?

MR. GARRETT: Yes.

MR. CHANDLER: No.

MR. GARRETT: Did the filing of the formal probate proceedings have any impact on your legal duty as special administrator?

MR. CHANDLER: The filing of the formal probate? No.

MR. GARRETT: So you don't believe that Section 615 would have required for you to step down as the special administrator and for the named executor under the will to become the special administrator?

MR. CHANDLER: I do not. Because the Probate Code requires that the court appoint the personal representative, whatever it may be, that they be qualified. And there's a qualification process that every probate court in South Carolina goes through to determine if a person is named or not named is appropriately qualified and therefore appointed. So the mere naming of someone in a will does not mean anything, other than you may be first in line based on the statute.

(R. pp. 15-16). When Chandler was asked what he based his objection on Fox's appointment on, he responded:

Let me back up and say, when you filed formal probate, it was removed at your request. I was served. I answered, as is required. I'd have to review my answer. And I'm happy, if you want to hand me my answers. But as I recall, by that point, because it had been several months, but at that point we were fully engaged in the administration of this estate. Which is not a simple estate. And so there's -- there has been or there is a vast array of litigation. But I'd have to review my answer. But as I recall, I believe Mr. Fox, or anyone else, frankly, nothing necessarily to do with Mr. Fox, it would be very inefficient for the court to appoint someone at that point as the personal representative because we'd already begun the process and were involved in a variety of pieces of litigation. It's, again, a complex estate. It had lots of moving parts. And the time it takes to be up to speed on all of those issues is not insignificant.

(R. pp. 750-51). When Chandler was asked whether he could have consented to Fox's appointment and whether a consent order could have been entered, without a hearing, in August of 2017:

I would say no. Without a hearing? You're saying a consent order without a hearing? No. I'm saying that couldn't occur.⁶ Because again, a probate judge in a formal probate, a probate judge makes determinations regarding qualifications. Frankly, in informal probate, the application is made to the Probate Court. The Probate Court could choose not to appoint someone in informal probate, it's not automatic. Certainly in probate, formal probate, it is the judge's determination to determine who is appropriate to serve as fiduciary. So no, I don't think I have to enter into a settlement agreement, nor was I asked to. Go ahead.

(R. pp. 754-55). When Chandler was asked about formal probate in general, he responded:

I think two things. One, that you already brought a petition before formal probate which is diminutive. So you're bringing a second petition for formal probate, which is wasteful and obligatory.

In my view, what you have done is force me to spend a lot of hours, a lot of time to put my carrier on notice because you make baseless claims in your petition and make me come up here and sit here before the judge.

(R. pp. 756-58). When asked about his opinion on Fox's attempt at appointment:

MR. GARRETT: Do you think a will that says I appoint Michael Fox as the personal representative is frivolous?

MR. CHANDLER: It's not my will.

MR. GARRETT: That's my question. Do you believe a will that says I appoint Michael Fox as my personal representative is frivolous?

MR. CHANDLER: The will appoints Mr. Fox as a successor personal representative. And no, I don't believe that it was frivolous.

MR. GARRETT: Do you believe it's frivolous for him to attempt to become personal representative?

MR. CHANDLER: No.

(R. p. 769).

⁶ Chandler was appointed by consent on July 10, 2017. (R. pp. 5-13). However, a hearing is mandatory in formal testacy proceedings. S.C. Code Ann. § 62-3-403.

Despite Chandler's objections based upon the length of time from the Will's admission to Probate, on February 13, 2019, at 8:45 AM, the Circuit Court held that, "After careful consideration of the arguments of counsel and the record, this Court finds...Michael C. Fox is qualified to serve as the Personal Representative of the Estate of Doris Colucci, and appoints him to serve in this position in accordance with the Last Will." (R. pp. 56-60). That same day, beginning at 12:10 PM, Chandler's counsel filed an Emergency Application for Restraint of Personal Representative and an Emergency Application for Appointment of Temporary Special Administrator with the Probate Court. (R. pp. 297-302). The applications were not filed on behalf of Chandler, but on behalf of Chandler's counsel's firm. (*Id.*) The "emergency" basis for those applications was a Statement of Creditors Claim. Chandler's counsel asserted a claim on behalf of her law firm for, "Legal Services Rendered" in the amount of \$6,301.72. (R. p. 296). At 2:13 PM, the Probate Court issued two *ex parte* orders, one restraining Fox as personal representative and the other reappointing Chandler as special administrator. (R. pp. 62-70). Following those orders, the applications were heard in the Probate Court on February 22, 2019. Following the hearing, on April 17, 2019, the Probate Court extended Fox's restraint for an additional six months. (R. pp. 72-77). In response, Fox timely appealed that order, along with nine other orders, to the Court of Common Pleas (See Argument II). (R. pp. 453-55).

"A party may not complain on appeal of error or object to a trial procedure which his own conduct has induced." Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 476, 629 S.E.2d 653, 670 (2006) E.g. Shearer v. DeShon, 240 S.C. 472, 484, 126 S.E.2d 514, 520 (1962); Floyd v. Thornton, 220 S.C. 414, 425-26, 68 S.E.2d 334, 339 (1951). From Chandler's appointment as Special Administrator on July 10, 2017, to the April 17, 2019 hearing, Chandler has stonewalled the appointment of any personal representative based on varying objections to Fox's qualifications.

Chandler's only consistent argument is that because the length of time between his initial appointment as special administrator and Fox's removal on May 28, 2019 Fox is unqualified to serve as Personal Representative. (R. pp. 708-34; 224-42; 170-83; 511-18). Chandler cannot complain that Fox is unqualified because it is now too late to appoint him; Chandler's conduct induced any delay and he should not profit from it. Equivest Fin., LLC v. Ravenel, 422 S.C. 499, 505, 812 S.E.2d 438, 441 (Ct. App. 2018).

B. Fox's removal was procedurally flawed.

The May 28, 2019 Order Removing Fox was the product of a Rule 59(e), SCRPC, Motion to Reconsider, filed after the Circuit Court remanded the case back to the Probate Court, and granted without a hearing. (R. pp. 59-61; 359-82; 82-84). While the Circuit Court's decision complied with the letter of Rule 59(e), it does not meet the mandates of the South Carolina Probate Code.

Under Rule 59(f), SCRPC, a Rule 59(e) motion "may in the discretion of the court be determined on the briefs filed by the parties, *without oral argument*." Pollard v. Cty. of Florence, 314 S.C. 397, 402, 444 S.E.2d 534, 536 (Ct. App. 1994) (emphasis in original). Yet, under Section 62-3-111(a) of the South Carolina Code, "Upon filing the petition [to remove a personal representative], the court *shall fix a time and place for hearing*." (emphasis added). However, a court may modify or vacate a formal testacy order *for good cause shown*. S.C. Code Ann. § 62-3-413 (emphasis added). Even when a personal representative is temporarily restrained, a court is bound to hold a hearing. S.C. Code Ann. § 62-3-607. If a Rule 59(e) motion may be used to remove a personal representative following their appointment, the court is at liberty to do so without a hearing. Curious would be a rule that a hearing must be held for the temporary restraint of a personal representative, but hearings for the removal of a personal representative may be avoided. Thankfully, our legislature clarified this issue. "Unless displaced by the particular provisions of

this Code, the principles of law and equity supplement its provisions.” S.C. Code Ann. § 62-1-103 see also Hodges v. Rainey, 341 S.C. 79, 91, 533 S.E.2d 578, 584 (2000) (“The goal of statutory construction is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd.”) The legislature clearly intended for Section 62-3-111(a) of Code to be the only means to remove a personal representative. Therefore, the Court abused its discretion by removing Fox without a hearing.

C. The Court Improperly Considered Evidence Outside of the Record.

“A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that 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); Dixon v. Dixon, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (finding issue raised for first time in Rule 59, SCRPC, motion is not preserved for review); Kiawah Prop. Owners Grp. v. Public Serv. Comm'n., 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (stating an issue raised for first time in petition for rehearing not preserved); Mozingo v. Ford Motor Company, Op. No. 2009-UP-282 (S.C. Ct. App. 2009) (“a party cannot use Rule 59(e) to present new evidence to the court”).

On February 13, 2019, “After careful consideration of the arguments of counsel and the record, [the] [Circuit] Court...[found] Michael C. Fox [] qualified to serve as the Personal Representative of the Estate of Doris Colucci, and [] [appointed] him to serve in [that] position in accordance with the Last Will.” (R. pp. 59-60). On February 25, 2019, Chandler filed a Rule 59 (e) Motion, requesting that the Court reconsider its February 13, 2019 Order appointing Fox as Personal Representative. (R. pp. 359-67). Exhibit 6 to that motion, Chandler included excerpts from Fox’s deposition in Lee v. Colluci, et al., 2017-CP-10-2897. (R. pp. 371-82). Fox’s deposition took place on January 25, 2019, nineteen days before the Court appointed Fox as

Personal Representative. “A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.” Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990). On February 28, 2019, Fox filed his Return to Chandler’s Motion to Reconsider, Alter, or Amend. (R. pp. 383-428). In Fox’s Return, he specifically objected to any evidence introduced subsequent to the February 13, 2019 Order appointing him. (Id.) Therefore, Fox preserved the issue of whether the trial court improperly considered evidence that had not previously been raised. E.g., Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton, 311 S.C. 56, 60, 427 S.E.2d 673, 675 (1993); see also Deskins v. Boltin, 317 S.C. 310, 314, 454 S.E.2d 322, 324 (Ct. App. 1994), cert. granted, judgment vacated, 319 S.C. 356, 461 S.E.2d 395 (1995) (waiver of the issue of whether the trial court improperly considered evidence that had not introduced by failing to raise the issue before the trial court). Thus, the presentation of this evidence and the consideration of this evidence was in error.

On May 21, 2019, via email, the Circuit Court requested that:

In order to assist [the Court] with the Motion to reconsider, [the Court] would like following:

An outline of the qualifications of Mr. Fox (in an effort to help [the Court] decide why he should remain as the Personal Representative)
An outline of the qualifications of Mr. Chandler (in an effort to help [the Court] decide why he should be appointed as the Personal Representative)

When submitting their qualifications please provide the following information about both Mr. Fox and Mr. Chandler –

- 1.) Knowledge
- 2.) Skill
- 3.) Experience
- 4.) Training and/or
- 5.) Education

This is all as it relates to the handling of estate matters and the matters involved in this case specifically.

(R. p. 959). Fox placed the Court on notice on February 28, 2019, that it was improper for the

Court to consider any additional evidence not raised prior to the judgment. (R. pp. 383-425). Over Fox's objection the Court requested evidence that could have been raised prior to its February 13, 2019 Order that held him qualified and appointed him as Personal Representative. (R. pp. 59-61; 959). In response, Fox filed a supplemental memorandum to his Return. (R. pp. 519-25). Fox reiterated his objections and submitted the requested statement of his qualification. (*Id.*) The Court not only erred by considering an issue that could have been raised prior to judgement, but also by requesting additional evidence that also could have been raised prior to judgment.

Assuming, *arguendo*, that Fox's deposition transcript and his statement of qualifications were properly before the Circuit Court, that evidence does not disqualify Fox. "The mere existence of conflict between a personal representative and a beneficiary is an inadequate reason for removal of the personal representative. Without a showing of fault, the court will not remove a personal representative." Blackmon, 366 S.C. at 252, 621 S.E.2d at 45 (citing Reed, 293 S.C. 357, 360 S.E.2d 527. A conflict of interest warranting disqualification may be found when a representative has management or control over a testator's businesses and affairs. In re McClam's Estate, 245 S.C. 315, 318, 140 S.E.2d 478, 479 (1965). See also Rowell v. Adams, 83 S.C. 124, 65 S.E. 124 (1909) (holding that one with adverse interests against the heirs or one who is surviving business partner of the testator cannot be appointed administrator). The distinction between McClam, Rowell, and the present case is that Fox worked for the Colucci Family as accountant. Fox did not have management or control of their businesses or affairs, nor was he their business partner. Additionally, disqualification is not confined to intellectual competency or skill. Ex parte Tolbert, 206 SC 300, 305, 34 SE2d 49, 51 (1945); McClam, 245 S.C. at 318, 140 S.E.2d at 479. Otherwise, the provision in the Code that permits a personal representative to hire attorneys or auditors would be redundant. S.C. Code Ann. § 62-3-715.

II. The Circuit Court wrongfully dismissed Fox's meritorious appeal of the Probate Court orders.

The Circuit Court's May 28, 2019, order denying supersedeas also remanded this case back to the Probate Court, effectively dismissing Fox's appeal of the Probate Court's ten orders. (R. pp. 85-89; 453-55). The Circuit Court's dismissal of Fox's appeal was confirmed by Judge Dickson's law clerk via email on May 29, 2019, informing the parties that a hearing would not proceed. (R. pp. 535-37). This decision is a reversible error.

Fox's appealed ten Probate Court orders that effected the Estate of Doris Colucci, and restraining Fox and appointing Chandler as Temporary Special Administrator (April 17, 2019). The April 17, 2019, order is immediately appealable, as the appointment of an administrator is immediately appealable. Small, 69 S.C. 43, 48 S.E. at 41, *supra*. The temporary nature of Chandler's appointment does not affect the order's appealability. See Fisher v. Huckabee, No. 2014-002020, 2016 WL 7495869, at *4 (S.C. Ct. App. Dec. 21, 2016), *aff'd in part, rev'd in part*, No. 2017-000743, 2018 WL 6528122 (S.C. Dec. 12, 2018). This order was timely appealed. S.C. Code Ann. § 62-1-308(a). The remaining orders were subject to review once the April 17, 2019, order was appealed. Cox v. Woodmen of the World Ins. Co., 347 S.C. 460, 556 S.E.2d 397 (Ct. App. 2001).

A. The Probate Court Lacked Personal Jurisdiction and Failed to Properly commence Probate Proceedings.

The administration that commenced with the application of Lester Schwartz May 1, 2017 has been defective from its initiation. Schwartz's Summons and Petition did not notify the only named devisee in Colucci's will, (the Colucci Family Trust) and all three of the Successor Personal Representatives (Fox, Burkes, & Hyman) named in the Will. It is obvious from Schwartz's application that he was aware that Doris Colucci had executed a valid will, in his petition he refers to the exact date of its execution (June 18, 2013). (R. pp. 90-99). Schwartz's intentional exclusion

violates the underlying purpose of the probate code which is to discover and make effective the decedent's intent in the distribution of her property. S.C. Code Ann. § 62-1-102. Further, the probate court is given by statute jurisdiction over all matters of administration, and before granting letters he is required to, "[i]ssue a citation to the kindred or creditors of the intestate, or person deceased, to show cause, if any they have, why administration shall not be granted to the person or persons applying therefor." Small, 69 S.C. 43, 48 S.E. at 40.

Schwartz submitted his application via a Form #300ES. On this form, Schwartz simply does not fill out any of the questions in Part II, Page 3 of 7 regarding the Decedent's will. (R. p. 92). These questions specifically address lost wills and are required by law to be answered. 62-3-402 requires that a petition for formal testacy must present to the court a statement of whether the original last will is in the possession of the court or accompanies the petition. When the last will is not presented, but is known to exist, the petition must also contain a statement as to the contents of the will and an indication of whether it is lost, destroyed, or otherwise unavailable. Schwartz additionally attaches a list of exhibits to the application indicating he did not attach a copy of the will or any statement as to its contents.⁷

The Court further failed to inquire or include the necessary parties and further failed to conduct a hearing pursuant to its statutory duties. Section 62-3-409 details the findings that the Probate Court must make: find service proper, the testatrix to be dead, venue proper, her heirs, and her state of testacy clarifying that, "any will that is valid and unrevoked must be formally probated"

⁷ Contrast this with the basic facts in Golini: "Willie Mae Arant executed her Last Will and Testament on August 5, 1992. Arant executed her will, which had been drafted by an attorney, in her home with two witnesses present. The original will could not be found after Arant's death, so a copy of the will was filed in Calhoun County Probate Court. The probate court issued an order of informal probate and appointed Melvin R. Bolton personal representative under the will. Golini v. Bolton, 326 S.C. 333, 482 S.E.2d 784 (Ct. App. 1997).

after any necessary hearings. Section 62-3-614(2) requires a formal probate proceeding for appointment of a Special Administrator.

Instead, the Court issued an order on June, 9, 2017 appointing Chandler pursuant to Section 62-3-616. This Order, in paragraph 2, states, “The Decedent’s originally executed Last Will and Testament has not yet been located and presented to the Court.” (R. p. 1). Paragraph 2, along with Schwartz’s mention of the will in his Petition, is sufficient to indicate the Court had knowledge as early as June 9, 2017 that the decedent had validly executed a last will.

Due to the pleading’s fatal flaws and the Court’s ensuing decision to not notify the Trust or the named personal representatives, the June 9, 2017 Order denies basic rights to the named successor personal representatives and the sole devisee, the Colucci Living Trust. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. S.C. Dep’t. of Soc. Servs. v. Beeks, 325 S.C. 243, 246, 481 S.E.2d 703, 705 (1997); Theisen v. Theisen, 382 S.C. 213, 676 S.E.2d 133 (2009).

Even after Chandler is appointed as Special Administrator on an Emergency Basis on June 9, 2017, he makes no effort to locate the copy of the will referred to in Lester Schwartz’s Application or notify the individuals that Doris Colucci nominated to administer and receive her estate. (R. pp. 746-47; 90-99). Instead, Chandler sets about arranging for his permanent appointment via the July 10, 2017 Order. (R. pp. 5-13).

The Probate Court likewise lacked jurisdiction to order the sale of real property on July 20, 2018, and to order the sale of personal property on December 7, 2017. (R. pp. 29-31). The Order Authorizing the Sale of Real Property was in error because the Trust, sole devisee of the Estate, was never served with the Petition to Sell Real Estate. (R. pp. 208-11). (See Argument II-A). The Court also lacked jurisdiction to order the sale of personal property. The personal property subject

to Chandler's Application for the Sale of Personal Property was never served upon any of the named personal representatives nor the Trust, despite the clear language of the Will, that was filed with the Probate Court. (See Argument II-A).

B. Fox's Informal Application for Appointment Should Have Been Granted.

Although Fox's Formal Appointment may moot this issue, the Probate Court erred in denying Fox's Application for Informal Probate and Appointment. (R. pp. 147-55). The Probate Court also erred by failing to make the proper findings of fact. S.C. Code Ann. §§ 62-3-302, 62-3-303, 62-3-308. Fox was the first named successor Personal Representative in the Will. (R. p. 105). The Will had been on file with the Probate Court since August 24, 2017 and no party, other than Chandler, objected to its admission to Probate. As there was no controversy regarding the authenticity of the Will and its named Personal Representatives, the Probate Court should have appointed Fox. Instead, the Probate Court summarily denied Fox's Application, and offered no explanation as to why it did so. (R. p. 152).

C. Fox Should Have Been Appointed Special Administrator Prior to Appointment of a Personal Representative.

Fox filed for Formal Testacy and Appointment on October 30, 2017. (R. pp. 156-66). While Fox's Petition was pending, Fox was the only proper person to be appointed as Special Administrator. S.C. Code Ann. § 62-3-615. There is no ambiguity in Section 62-3-615 that would allow for any other person to be appointed as Special Administrator of the Estate. The mandate in that Section is abundantly clear, "If a special administrator is to be appointed pending the probate of a will which is the subject of a pending application or petition for probate, *the person named executor in the will shall be appointed* if available and qualified." S.C. Code Ann. § 62-3-615(a) (emphasis added). As Fox was never found to be unqualified (See Argument I), his appointment

should have been automatic and without question. Despite the clear mandate of the statute, the admission of the Will on August 27, 2018 at 10:01 AM, the Probate Court, that same day at 12:16 PM, issued a *sua sponte* order that reaffirmed Chandler's capacity as Special Administrator. (R. pp. 35-37).

D. The Court Erred in Ordering Distributions from the Estate.

As discussed in Argument III, the decedent had a pour-over will, that devised all assets to the Trust. (R. p. 101-10). Additionally, the Will did not have a power of sale clause. (*Id.*) Therefore, neither the Probate Court nor Chandler had the authority to sell property that rightfully belonged to the Trust.

E. The Court Erred in Sanctioning Fox and Declining to Remove Chandler.

After it became clear that Chandler was not going to relinquish the estate assets, Fox had no choice but to move to restrain him. Since Fox's petition for appointment was removed to Circuit Court, Fox first moved in the Circuit Court for a hearing to restrain. The Circuit Court did not grant a hearing for this petition as required by Section 62-3-607. As a result, Fox refiled his Motion to Restrain along with a Motion for Removal to Circuit Court. The Probate Court denied the Motion for Removal and ordered an emergency hearing. It was at this hearing that Chandler was questioned about his *ex parte* contact with the Court:

MR. GARRETT: When is the last time you had a telephone conversation with Judge Blunt?

MR. CHANDLER: Probably yesterday, because I saw the court's deference to hold emergency hearing today.

MR. GARRETT: Was I present at that conversation?

MR. CHANDLER: No.

MR. GARRETT: Do you believe that you and I are both parties to this action?

MR. CHANDLER: Mr. Garrett, I am appointed by the court. I'm a court-appointed fiduciary. I can always speak to the court. I am not a lawyer in this action, Mr. Garrett. I am a court-appointed fiduciary.

And I am permitted to speak to the judges whenever they're willing to speak to me.⁸

(R. pp. 761-62).

By Order dated February 7, 2019, the Probate Court sanctioned Fox \$10,000.00 for petitioning the Court for Chandler's removal and denied Fox's Petition. (R. pp. 279-81; 42-58).

The Probate Court first erred by stating that Section 62-3-615 does not mandate Chandler's removal because Chandler was appointed under Section 62-3-615, but was instead appointed pursuant to Section 62-3-617. (R. p. 46). Regardless of how Chandler was appointed, the Probate Court willfully ignored the mandate of Section 62-3-615. Fox filed for Formal Testacy and Appointment on October 30, 2017. (R. pp. 156-66). The Will was admitted to Probate by the Circuit Court on August 27, 2018, at 10:01 AM. (R. pp. 32-34). The Probate Court, that same day at 12:16 PM, issued a *sua sponte* order that reaffirmed Chandler's capacity as Special Administrator. (R. pp. 35-37). The Probate Court was duty bound to appoint Fox, but instead chose to solidify Chandler as the Special Administrator.⁹

The Probate Court's second error was finding that Chandler had appropriately collected and distributed the Estate's assets. (R. p. 47). The Probate Court and Andrew Chandler knew of the Will and its contents as early as May 3, 2017, and certainly when it was filed with the Court on November 1, 2017. (R. pp. 90-99; 1-13). As discussed in Argument X, the decedent had a pour-over will, that devised all assets to the Trust. (R. pp. 101-10). Additionally, the Will did not have

⁸ Chandler's assertions are incorrect. The Reporter's Comment for S.C. Code Ann. § 62-3-602 states, "[E]xcept for personal representatives appointed pursuant to Section 62-3-502, appointees are not deemed to be officers of the appointing court or to be parties in one continuous judicial proceeding that extends until the final settlement."

⁹ "[E]ach proceeding before the court is independent of any other proceeding involving the same estate." S.C. Code Ann. § 62-3-107.

a power of sale clause. (Id.) Therefore, neither the Probate Court nor Chandler had the authority to sell property that rightfully belonged to the Trust.

The Probate Court's third and final error was assessing fees against Fox. The Probate Court cited Section 62-1-111 as its justification for assessing fees against Fox. (R. p. 44). Yet, Chandler, by his own testimony, admitted that it was not frivolous for Fox to seek appointment. (R. p. 769). Awarding costs and fees to any party is only appropriate when justice and equity require it. S.C. Code Ann. § 62-1-111. Justice and equity did not require Fox to be assessed \$10,000.00 in sanctions. Justice and equity required Fox to seek appointment. Even prior to his appointment, fox is explicitly authorized to protect the property of the decedent's estate. S.C. Code Ann. § 62-3-701. Upon appointment, Fox was also explicitly authorized to prosecute and defend claims for the protection of the estate and himself, in his capacity as Personal representative. S.C. Code Ann. § 62-3-715. Finally, Fox had an absolute duty, as Trustee of the Trust; to take reasonable steps to defend the Trust. S.C. Code Ann. § 62-7-811. Therefore, the Probate Court erred in sanction Fox as he not only was authorized to seek Chandler's removal as a nominated Personal Representative, but was obligated to do so as Trustee of the Trust.

F. The Probate Court Erred by Restraining Fox Immediately After His Appointment.

In the hours after the Formal Appointment on February 13, 2019, Chandler's attorney, Palmer, submits a petition to restrain the Personal Representative for unpaid legal services. Palmer made no effort to collect the bill and never even submitted the bill to Fox for payment. In the Matter of James, the Court reviewed a grievance complaint where the respondent failed, as executor, to make good faith attempted to collect on the policy of insurance without litigation, and deliberately failed to reveal his dual capacity as executor and attorney in this ensuing litigation.

The Court found that the Board of Commissioners on Grievances and Discipline “correctly outlined the duties of respondent as follows:

In order to act properly in his capacity as executor/lawyer respondent would have to have (1) determined in good faith, after exhausting all nonlitigative means (as executor) that the insurance company would not voluntarily pay the benefits due, (2) explained this fact fully and disclosed the fee arrangement with the estate beneficiaries, (3) obtained the consent of the estate beneficiaries to act in the dual capacity, and (4) fully disclosed all relevant facts to the court approving his fee and the court approving the accounting rendered.

Matter of James, 267 S.C. 474, 477, 229 S.E.2d 594, 596 (1976).

In addition, Chandler’s attorney had a fee agreement for 40% of the wrongful death settlement proceeds. Fox’s formal appointment as Personal Representative threatened those fees. Both Chandler and Palmer’s fee arrangements were in question after Fox’s appointment pursuant to 62-3-612. In her dual capacity as the attorney for the estate and the attorney seeking a valuable contingent fee in the wrongful death case, her motives are transparent. The Court abused its emergency powers to issue an *ex parte* order to reappoint Chandler. This is a statutory violation of 62-3-614(2) that requires an actual emergency exist. It is obvious that the only emergency that occurred on February 13, 2019 was the formal appointment of Fox by the Circuit Court. The Probate Court’s improper use of its emergency powers had the effect of depriving Fox of his due process rights and rights under this statute.

In addition to the above arguments, the Probate Court erred because the Circuit Court’s Order was a final order and was subject to Section 62-3-412 which states:

[S]ubject to appeal and subject to vacation as provided herein and in Section 62-3-413, a formal testacy order under Sections 62-3-409 through 62-3-411, including an order that the decedent left no valid will and determining heirs, is final as to all persons with respect to all issues concerning the decedent's estate that the court considered

or might have considered incident to its rendition relevant to the question of whether the decedent left a valid will.

Because the Probate Court only waited a few hours after the Circuit Court February 13, 2019 Order before issuing its February 13, 2019 Order, there was simply no time for Fox to have done anything that would give rise to his restraint or removal pursuant to Section 63-3-607. Instead, this Order, from an inferior court, attempts to circumvent a valid final Order that had resolved any questions of Fox's qualifications.

G. The Probate Court Erred in Extending Fox's Restraint.

In contrast to the February 13, 2019 Order, the April 17, 2019 Order restrained Fox for a longer duration, sufficient for Chandler to settle the wrongful death case for \$700,000.00, triggering her fee of \$280,000.00 from the 40% fee agreement. (R. pp. 14-16). The Court issued this Order pursuant to an email request by Chandler's attorney to the Dorchester County Probate Court. (R. pp. 14-16). There was no hearing and there was no notice pursuant to Section 62-3-614(2).

III. The Circuit Erred by Failing to Grant a Hearing for Injunctive Relief or to Restrain Chandler.

The May 28, 2019 Order granting Chandler's Rule 59(e), SCRC Motion modified the Circuit Court's February 13, 2019 Order appointing Fox. (R. pp. 59-61; 82-84). The Circuit Court, in its February 13, 2019 Order, held that Fox's Petition to Restrain the Special Administrator (Chandler) was moot. (R. pp. 59-61). However, Fox's Petition regained its justiciability when, only hours after his appointment, the Probate Court restrained him, and re-appointed Chandler as Temporary Special Administrator. (R. pp. 62-70). Even more so, when Fox was removed by the Circuit Court on May 28, 2019.

Fox filed for Formal Testacy and Appointment on October 30, 2017. (R. pp. 156-66). Petitions for Formal Testacy and Appointment are governed by Section 62-3-401 of the Code.

Upon receipt of a Petition, “[The personal representative]¹⁰ must refrain from exercising his power to make any further distribution of the estate during the pendency of the formal proceeding.” S.C. Code Ann. § 62-3-401. Yet, the mandate by Section 62-3-401 of the Code was completely disregarded. Chandler, with approval from the Probate Court, liquidated numerous portions of the Estate’s assets. (R. pp. 507-10). However, the Decedent did not have a “power of sale” clause in her Will. (R. pp. 101-10). Without a power of sale, “a personal representative may not sell real property of the estate except as authorized pursuant to the procedures described in Sections 62-3-911 or Sections 62-3-1301 *et seq.*” S.C. Code Ann. § 62-3-711. Both Section 62-3-911 and Section 62-3-1301 *et seq.* of the Code mandate that a summons and petition be filed and served prior to the sale of estate assets. Chandler, nor any of the interested parties ever filed a petition for sale. Additionally, the Decedent’s Will contained a pour over provision, pouring the Estate’s assets into the Colucci Living Trust. (R. pp. 101-10). Fox, as Trustee of the Colucci Living Trust, became concerned that the Estate’s assets were being sold and not poured over into the Will. In an attempt to halt any further liquidation of the Estate, on November 26, 2018, Fox moved the Circuit Court to Restrain Chandler as Special Administrator. One of Fox’s chief complaints was that Chandler had acted against the interests of the decedent and failed to disburse the Estate’s assets according to the Will. (R. pp. 279-81).

Section 62-3-414(a) of the Code mandates that upon a petition regarding the priority or qualification of a personal representative that precedes any appointment of a personal representative, it shall stay any informal appointment proceedings. If the proceeding is commenced after appointment of a personal representative, the previously appointed personal representative,

¹⁰“‘Personal representative’ includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status. ‘General personal representative’ excludes special administrator.” S.C. Code Ann. § 62-1-201(46).

after receipt of notice, shall refrain from exercising any power of administration except as necessary to preserve the estate or unless the court orders otherwise. Id. After service of the petition, the court must, “determine who is entitled to appointment under Section 62-3-203, make a proper appointment, and, if appropriate, terminate any prior appointment found to have been improper as provided in cases of removal under Section 62-3-611. S.C. Code Ann. § 62-3-414(b). Upon either a petition for restraint or removal, the Court must set a hearing on the issue. S.C. Code Ann. §§ 62-3-607 and 62-3-611. Yet, no hearing was held for Fox’s appointment as personal representative or Chandler’s restraint as Special Administrator. The only hearing held at the Circuit Court was upon motion for summary judgment on August 27, 2018. All that was decided at that hearing was the admission of the Will to Probate. (R. pp. 32-34). As a result, Fox’s appointment and Chandler’s restraint remained in limbo from November 1, 2017 until February 13, 2019.

IV. The Probate Court Lacked Jurisdiction to Lift the Stay and the Circuit Court Erred by Failing to Review the Probate Court’s Lift of the Stay.

On April 17, 2019, the Dorchester County Probate Court issued a third order reincorporating the terms of the two February 13, 2019 orders. This order would last for at least six months and included language that completely bars Fox from, “prosecut[ing] all claims on behalf of the Estate of Doris Duane Colucci, including, but not limited to Chandler v. Colucci, et al., Case No. 2017-CP-10-5393, and Chandler v. Colucci, et al., Case No. 2017-CP-18-1816 (an action pending under the “Slayer’s Act”), with authority to settle the same, and to execute releases on behalf of the Estate, its devisees, and its statutory beneficiaries, pursuant to orders approving any settlement of those claims.” (R. pp. 72-77).

On April 18, 2019, the Appellant filed his Notice of Appeal from the Dorchester County Probate Court to the Court of Common Pleas, automatically staying the proceedings in the Probate

Court.¹¹ (R. pp. 453-55). Following service of the Notice of Appeal, on May 1, 2019, Respondent moved the Probate Court to lift the automatic stay. On May 10, 2019, the Probate Court granted Respondent's Motion to Lift Stay. (R. pp. 78-81). On May 14, 2019, Chandler filed a Petition for Approval of Settlement of Litigation in the Probate Court. (R. pp. 487-91). In response, on May 15, 2019, Fox filed an Emergency Petition for Supersedeas and also requested review of the Order Lifting Automatic Stay. (R. pp. 492-499).

When an appeal according to law is taken from any sentence or decree of the probate court, *all proceedings in pursuance of the order, sentence, or decree appealed from shall cease until the judgment of the circuit court, court of appeals or Supreme Court is had.* If the appellant, in writing, waives his appeal before the entry of the judgment, proceedings may be had in the probate court as if no appeal had been taken.

S.C. Code Ann. § 62-1-308(h) (emphasis added). The proceedings required to cease are only those proceedings addressed in the orders from which an appeal is taken. Ulmer v. Ulmer, 369 S.C. 486, 492, 632 S.E.2d 858, 861 (2006). "Unless displaced by the particular provisions of this Code, the principles of law and equity supplement its provisions." S.C. Code Ann. § 62-1-103. The legislature, instead of mandating that probate appeals be governed exclusively by Rule 241, SCACR, specifically carved out separate and distinct procedures concerning probate appeals. In light of the holding in Ulmer, it is clear why the legislature wrote a separate and distinct appellate statute that excluded Rule 241, SCACR. The legislature intended for the proceedings of the estate not affected by an appeal to continue in a speedy and efficient manner. Otherwise the automatic stay provision in Rule 241, SCACR, would supplant and not supplement the automatic stay provision in Section 62-1-308. "The probate court's jurisdiction is limited as it owes 'its present existence to creation by statute, rather than the Constitution, and as such, can exercise only such

¹¹ See S.C. Code Ann. § 62-1-308(h)

powers as are directly conferred upon it by legislative enactment and such as may be necessarily incident to the execution of the powers expressly granted.” Wellin v. Wellin, 427 S.C. 15, 22, 828 S.E.2d 767, 771 (Ct. App. 2019) (quoting Greenfield v. Greenfield, 245 S.C. 604, 610, 141 S.E.2d 920, 923 (1965)).

In the present case, Fox’s appeal to the Circuit Court can be boiled down to two issues: 1) Chandler’s appointment and removal as special administrator, and 2) Fox’s restraint as Personal Representative. Under Section 62-1-308(h), the moment Fox appealed those orders, all proceedings concerning Chandler’s appointment and removal, and Fox’s restraint were automatically stayed pending appeal. Thus, the Probate Court was divested of jurisdiction concerning those issues. As there is no provision in Section 62-1-308 that permits a lower court to lift an automatic stay, the Probate Court was without jurisdiction to do so.

Assuming, *arguendo*, that Rule 241(c), SCACR permits a probate court to lift an automatic stay, the Circuit Court erred to review the lift of stay or grant Fox’s Writ of Supersedeas. “*Except where extraordinary circumstances make it impracticable*, an application for an order lifting the automatic stay or for supersedeas must first be made to the lower court or administrative tribunal which entered the order or decision on appeal.” Rule 241(d)(1), SCACR (emphasis added). “In determining whether an order should issue pursuant to this Rule, the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court should consider *whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot*.” Rule 241(c)(2), SCACR (emphasis added).

Shortly after Chandler moved the Probate Court for a lift of the automatic stay, the Probate Court requested that Chandler prepare a proposed order. Upon learning of this request, Fox objected and filed a return to the Chandler’s motion. After Fox filed his return, Chandler submitted

a second proposed order with language dispensing of Fox's arguments. The Probate Court then requested Chandler file a formal reply to Appellant's return. Despite this, the Probate Court signed the second proposed order, unchanged, without a hearing. On May 10, 2019, the Dorchester County Probate Court granted Chandler's Motion to Lift Stay. (R. pp. 78-81). On May 14, 2019, the Respondent filed a Petition for Approval of Settlement of Litigation. The Petition for Approval of Settlement of Litigation (See Argument IV) disposed of property and assets that rightfully belong to the Trust and was done over the objection of the Fox.

On May 15, 2019, Fox filed an Emergency Petition for Writ of Supersedeas and also requested review of the Order Lifting Automatic Stay. (R. pp. 492-99). On May 22, 2019, the full extent of Chandler's disposal of Trust property became abundantly clear. Ivo Colucci filed a Memorandum in Support of Chandler's Motion for Reconsider, stating that the Probate Court directed the liquidation of the Estate's assets. (R. p. 508). There was no valid liquidation order and such direction was impermissible under Colucci's will, which had no power of sale. (R. pp. 101-10). Further, the Will called for a direct pour over of the estate assets into the trust, meaning no sales should have occurred beyond the necessity to settle debts, and after proper notice and hearing. S.C. Code Ann. § 62-3-711. Chandler never consulted with or made Fox or the Trust aware of a single transaction. Despite the imminent liquidations of the real properties and the settlement of pending lawsuits, the Circuit Court dismissed Fox's Writ of Supersedeas and declined to review the Probate Court's lift of the automatic stay. (R. pp. 85-89).

"Under Rule 205 and...Rule [241], the lower court may not act or issue orders that affect an issue on appeal. Under Rule 225, the lower court may act only to enforce matters not stayed by the appeal." Arnal v. Fraser, 371 S.C. 512, 519, 641 S.E.2d 419, 422 (2007). Here, the administration of the Estate, the resolution of the aforementioned cases, and the disposition of the

real properties, were contested issues, all of which were subject to the appeal from the Probate Court to the Circuit Court. Given their time sensitive nature and imminence, it would be impracticable to move the lower court that lifted the automatic stay for Supersedeas.¹² This is particularly apparent because once the properties were sold and the lawsuits were settled, those issues would become moot. Additionally, the Probate Court had already issued several *ex parte* orders that Fox believes were inappropriate (See argument I-A). Nonetheless, the Court denied Fox's Writ of Supersedeas and declined to review the Probate Court's lift of the automatic stay. (R. pp. 85-89). Additionally, the Circuit Court ordered that, "No appeals to the Circuit Court may be had or filed until the case is completed." (*Id.*) Not only did the Court fail to grant Supersedeas or even review the Probate Court's Order lifting the automatic stay, the Court, *sua sponte*, enjoined Fox from appealing any appealable issue to the Circuit Court.

CONCLUSION

For the argument set forth above, Michael C. Fox asks this Court to reverse the decisions of the Dorchester County Court of Common Pleas, vacate the orders of the Probate Court that followed this appeal, award him all such other and further relief as this Court deems just and proper.

¹² Fox filed three Motions to Alter or Amend with the Probate Court, moved for removal to the Circuit Court, and moved for transfer of venue. The Probate Court has never addressed any of these motions but would address any concerns of Chandler within hours.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

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Edgar W. Dickson, Circuit Court Judge

SC Court of Appeals

Appellate Case No. 2019-001065
Dorchester County Case No(s). 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 ColucciAppellant,

v.

Andrew W. Chandler, 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 Fredrick Antonio Colucci, John Martin Antonio,
Henry Burkes, and Richard M. Hyman, Jr.....Respondents.

RULE 211(B), SCACR, CERTIFICATION

The undersigned certifies that the final briefs in this matter comply with Rule 211(b),
SCACR.

Dated: March 10, 2020



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