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SC Court of Appeals

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 Colucci .....Appellant,

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.

REPLY BRIEF OF APPELLANT

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I. Fox was Removed as Personal Representative, his application for appointment was not denied.

Chandler contends that Fox was not removed as Personal Representative and instead, his Petition for Appointment was outright denied. (Resp't Initial Br, p. 10). To the contrary, the Circuit Court's order specifically states that Fox is to, "[b]e immediately *removed as Personal Representative*." (R. p. 83) (emphasis added). Chandler essentially argues against the clear language and effect of the May 28, 2019 Order. The effect to the Estate was the same: the appointment of a stranger as administrator against the wishes of the testator and in violation of the South Carolina priority of appointment statute. S.C. Code Ann. § 62-3-203.

a. There is not a conflict of interest and the record does not support the existence of one.

Chandler's argument that the record supports Fox's removal is without merit. Rather than point to some act of negligence or a non-existence criminal act on the part of Fox, Chandler points instead to Fox's deposition testimony, from a collateral matter, as proof that Fox is biased and unqualified. (Resp't Initial Br., p. 12). Unfortunately, Chandler's argument is not credible as they have shifted their reasoning repeatedly throughout the administration of the Estate. Fox was the longtime bookkeeper for the Colucci family and a close family friend. If the Court were to accept Chandler's argument that any friend of a testator is inherently disqualified to serve as their personal representative by virtue of their friendship with the testator, it would upend centuries of precedent. "The right to make a will directing the ultimate disposition of one's property is one of the basic rights known to our civilization, and it encompasses the right to make it according to the testator's pleasure and in his absolute discretion." Wilson v. Dallas, 403 S.C. 411, 445, 743 S.E.2d 746, 765 (2013). Chandler's position, if accepted, would require testators to nominate total strangers, lest

their chosen Personal Representative be disqualified due to alleged biases. Chandler's quixotic position runs counter to the policies set forth in priority of appointment under Section 62-3-203(a) of the Code. Assuming, *arguendo*, that the decedent in the present case died intestate, one of her children would be placed in the same situation as Fox; namely, whether or not they wish to pursue a wrongful death lawsuit or Slayer action against their own father. Arguably, the same alleged biases would still exist and if Chandler's argument was followed to its logical conclusion, they too would be disqualified. Such a proposition runs counter to the historical bedrock of estate administration, which favors appointment of those close to a decedent and not a complete stranger. See also In re Youmans' Estate, 165 S.C. 337, 163 S.E. 884, 886 (1932) (holding that it is error of law to appoint a stranger to the estate who is neither related to the parties nor a creditor of the estate).

Chandler's assertion that Fox allegedly prepared erroneous tax returns for businesses partly owned by the Estate and is thus unqualified to serve as Personal Representative, is wholly unsupported by the record. Chandler offers only his own vague testimony to support this allegation. "An action to remove a personal representative is equitable in nature." Church v. McGee, 391 S.C. 334, 705 S.E.2d 481 (Ct. App. 2011). Equitable actions are reviewed de novo. Matter of Estate of Kay, 423 S.C. 476, 481, 816 S.E.2d 542, 545 (2018). This Court may take its own view of the preponderance of the evidence without deference to the lower court. See Blackmon v. Weaver, 366 S.C. 245, 248, 621 S.E.2d 42, 43 (Ct. App. 2005). "It is true that negligence may be established by circumstantial evidence as well as by positive evidence; but it is also a well settled precept founded upon the soundest principles of justice that a verdict must be supported by the evidence and not based upon conjecture, speculation, and surmise." Hunsucker v. State Highway Dep't, 182 S.C. 441, 189 S.E. 652, 654 (1937). Most importantly,

neither the Probate Court nor the Circuit Court qualified Chandler to testify as an expert in tax preparation. Chandler further failed to offer sworn testimony stating the standard of care owed and the deviation from that standard of care. See also Walker v. The Bluffs Apartments, 324 S.C. 350, 354, 477 S.E.2d 472, 474 (Ct. App. 1996) (to survive summary judgment in a professional negligence case, a plaintiff must offer expert testimony to establish both the standard of care and the defendant's deviation from that standard). More importantly, there is no evidence in the record to support criminal or professional misconduct by Fox.

Chandler juxtaposes the allegations against Fox with Ex parte Tolbert, positing that Fox should not be appointed because his interests are against the heirs and the Estate. Tolbert involves an intestate decedent and the analysis of priority amongst Tolbert's intestate heirs. (Resp't Initial Br., p. 13). However, here, Doris Colucci had a will that appointed specific people that Colucci believed were the right choices to serve as her administrator. Colucci knew Fox for years and had the capacity to consider Chandler's concerns about Fox for herself.

More alarmingly, it is not the role of a special administrator to frustrate the appointment of a named personal representative because he disagrees with the decedent's choices. To the contrary, Chandler owed the highest fiduciary responsibility to the Estate. In re James, 267 SC 474, 478, 229 S.E.2d 594, 596 (1976). Chandler's duty included the duty to discover and make effective the intent of a decedent in the distribution of her property (even if that meant that Chandler could not continue to be the administrator) S.C. Code Ann. §§ 62-1-102; 62-3-616; 62-3-617.

Chandler's reliance on Ex parte Tolbert is further misplaced and is inapplicable to the present case because the Appellant in Ex parte Tolbert was denied appointment because of the potential for self-dealing, as the Appellant was the brother and business partner of the decedent,

and he continued to exercise control of the business and the business's assets that belonged to the estate. Ex parte Tolbert, 206 S.C. 300, 305, 34 S.E.2d 49, 51 (1945). Ex parte Tolbert is distinguishable from the present case because the case involved intestacy and the statute in question has been replaced with Section 62-3-203 of the Code. Further, Fox does not have a pecuniary interest adverse to the Estate, nor has Chandler accused him of such. His former work for the decedent and the decedent's family does not raise the specter of impropriety or self-dealing.

b. Fox's appointment is in the best interest of the Estate.

Chandler's assertion that the Fox's appointment is not in the best interest of the Estate is likewise without merit. Chandler cites Ex parte Small as justification for their argument. "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*." Ex parte Small, 69 S.C. 43, 48 S.E. 40 (1904) (emphasis added). The first grounds 'for cause' alleged by Chandler is that Fox's appointment would, "necessarily cause substantial delays and result in the Estate incurring unnecessary, duplicative costs." (R. p. 240). It is up to this Court to determine whether appointing Colucci's named representative is an unnecessary delay. This should not be a difficult determination when the current administrator is a stranger to the estate and has attempted to carry out a complete liquidation of the estate without any power of sale. Yet, the accusation that any delays were the cause of Fox is particularly disingenuous when Chandler's actions are examined.

The decedent passed away on April 14, 2017. (R. p. 113). 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 Fox, Burkes, or Hyman that they were named both as the next Successor Personal Representative

and as the next successor Trustee of the Colucci Family Trust. (Id.) Neither Chandler, nor any of the Respondents, petitioned for admission of the Will to probate. Upon learning that the will had been delivered to the Probate Court and that he was named as the Successor Personal Representative, 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). Fox's Informal Application was denied and on October 30, 2017, Fox filed for formal testacy and appointment. (R. pp. 156-66). Unlike Chandler, Fox served all the proper parties as mandated by Section 62-3-401. Fox subsequently removed his Petition to the Court of Common Pleas. (R. pp. 167-68). On November 11, 2017, the Special Administrator filed an Answer and Objection to Fox's Petition and has since continuously fought against Fox's appointment. (R. pp. 170-83).

Throughout all of these proceedings, Chandler does not deny that he conducted *ex parte* communications between himself and the Court. Evidence of *ex parte* contact was alleged in Fox's brief, supported by transcript testimony, and Chandler has simply ignored the allegation. These communications, which Fox has requested through discovery and been denied, have now become the basis for a January 24, 2020 Motion for Recusal filed by Colucci's children. These communications undermined Fox's access to the Probate Court and made it impossible for the Fox to have an unbiased and fair probate administration. (R. pp. 555-707).

"[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). The delay in administering this nearly three-year-old Estate and the alleged unnecessary costs to the Estate were entirely manufactured by Chandler, which he justifies as grounds for Fox's removal as Personal Representative. And, in

fact, after Fox had used proper procedure to become the formal personal representative, Chandler's counsel simply filed a creditor's claim a few hours later, without notice to the Estate, and Chandler was reappointed. Chandler, an absolute stranger to the decedent and her Estate, has continuously thwarted the decedent's wishes by his continued objection to Fox, and now seeks approval of his conduct.

In addition to the delay in Fox's appointment, Chandler also cites the wrongful death action and Slayer Action as grounds to remove Fox. Chandler had no authority to prosecute these claims following Fox's commencement of Testacy and Appointment proceedings. "If the [formal appointment] proceeding is commenced after appointment, the previously appointed personal representative[1], after receipt of notice thereof, *shall refrain from exercising any power of administration except as necessary to preserve the estate* or unless the court orders otherwise." S.C. Code Ann. § 62-3-414(a) (emphasis added). The logic behind Section 62-3-414 is sound. It prevents a previously appointed representative from acting beyond preserving the Estate until the issue of appointment is decided. Otherwise, the previously appointed representative could take actions on behalf of the estate that cannot easily be undone. In the present case, Chandler on October 4, 2017, commenced a Slayer Action. On October 19, 2017, Chandler commenced a wrongful death action. Fox filed for Formal Testacy and Appointment on October 30, 2017. Despite Fox's Petition, Chandler continued prosecuting those claims and liquidating Estate property.[2]

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[1] "'Personal Representative' includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status." S.C. Code Ann. § 62-1-201(33).

[2] Additionally, on January 4, 2019, Fox moved to restrain and remove Chandler as Special Administrator. "[A]fter service of the summons and petition upon the personal representative and receipt of notice of removal proceedings, the personal representative shall not act except to account, to correct maladministration, or preserve the estate." S.C. Code. Ann. § 62-3-611(a). Chandler continued complete administration of the Estate despite Fox's Petition.

Chandler next alleges that because Fox failed to request a hearing on his Petition for Appointment, it "[w]ould cause substantial delays and result in the Estate incurring unnecessary, duplicative costs." (R. p. 238). Yet, there is no such requirement in the Code. All that is required is, "[a]n interested person filing and serving a summons and a petition as described in Section 62-3-402(a) in which he requests that the court, after notice and hearing, enter an order probating a will." S.C. Code. Ann § 62-3-401. "Upon commencement of a formal testacy proceeding or at any time after that, *the court shall fix a time and place of hearing*." S.C. Code. Ann § 62-3-401 (emphasis added). Chandler does not contest that Fox properly commenced formal testacy proceedings. Further, Chandler does not cite any authority to support his proposition that Fox had a duty to request a hearing. Fox's Petition for Formal Testacy and Appointment is in and of itself a request for hearing.

c. The Standard for Appointment is "qualified", not "best qualified", and Fox's appointment is in the best interests of the Estate.

Chandler does not contest that Fox meets the definition of qualified. Instead, Chandler seeks to raise the standard for appointment to a new standard of "best qualified." Chandler relies on In re McClam's Estate to support this proposition. Yet, In re McClam's Estate, does not empower a court to disregard a testator's chosen personal representative, for another it finds more suitable. It only empowers a court to remove a personal representative, "[u]pon the showing made before him he is not satisfied that such a person *is not properly qualified* for the position." In re McClam's Estate, 245 S.C. 315, 319, 140 S.E.2d 478, 479 (1965) (emphasis added). Chandler also cites Ex parte Small, as further support for their argument. Although Ex parte Small, states that appointment of a particular person is a secondary right, Ex parte Small, also states the court may only deny appointment when there has been, "[w]aste or misappropriation of the assets, or

complete unfitness for the trust." Ex parte Small, 69 S.C. 43, 48 S.E. 40, 40 (1904). Fox has never once been found unqualified to serve as Personal Representative. At worst, Fox was found to not be the "best qualified." Yet, this is not the standard. Even more so if a total stranger is administering the estate, contrary to the wishes of a testator.

> But as against a stranger, any of the enumerated persons in the statute are entitled to preference, and the ordinary would be bound to so commit administration. According to Thompson v. Huchet, 2 Hill. 347, he would at the instance of any of these parties, be bound to revoke administration committed to a stranger, and grant it to the applicant. Indeed, according to that case, a stranger, to whom administration is committed, is the mere nominee of the ordinary, and he may revoke his appointment and commit it to another. In that view, I am disposed to concur. But it is sufficient for this case, that the appellee is entitled by law to the administration, in preference to the appellant-and that to fulfil the law, the ordinary did right in revoking the appellant's administration and committing it to the appellee.

Smith v. Wingo, 24 S.C.L. 287, 289 (S.C. App. L. 1839). Fox is the first named successor Personal Representative in the decedent's Will. As he has never be found unqualified, and Chandler is but a stranger to the Estate, Fox is entitled to appointment.

d. The Circuit Court erred in considering additional evidence on Chandler's Motion to Alter or Amend.

Chandler's assertion that the Circuit Court properly considered additional evidence is without merit. Fox timely objected to the additional evidence submitted in Chandler's Motion to Reconsider. Specifically, Fox stated, "Mr. Chandler is attempting to impermissibly introduce new evidence and introduce evidence that should have been presented prior to this Court's February 13, 2019 Order via a Rule 59 motion." (R. p. 379). Fox was deposed in a collateral matter on January 25, 2019, 19 days prior to the Circuit Court's order appointing Fox as Personal Representative. (R. pp. 59-61). Chandler argues that Fox was not prejudiced by Chandler's submission of additional evidence. (Resp't Initial Br, p. 18) In support of his argument Chandler

cites Baker v. Wolfe, 333 S.C. 605, 510 S.E.2d 726 (Ct. App. 1988). Yet, Chandler's reliance on Baker is misplaced. The Appellants in Baker, "[c]halleng[ed] only the procedural aspect of the [Respondent's] rule 59(e) motion- they did not argue that the family court abused its discretion." Baker, 333 S.C. at 613, 510 S.E.2d at 730, fn. 5 (Ct. App. 1998). Therefore, the Court held that the Appellants were not, "[p]rejudiced by the manner in which the motion to reconsider was handled." Id. at 613, 510 S.E.2d at 730.

Chandler has asserted that Fox allegedly has a conflict of interest with the Estate. As discussed in Argument I-a, *supra,* this argument is without merit. Regardless, any consideration of Fox's deposition transcript to prove this allegation was in error. Spreeuw v. Barker, 385 S.C. 45, 63, 682 S.E.2d 843, 852 (Ct. App. 2009) (holding that a party cannot obtain relief from a final judgment based on newly discovered evidence if the evidence could have been discovered through the exercise of due diligence). Chandler had ample time to at least produce a rough copy of Fox's deposition transcript to the Court prior to February 13, 2019. Instead, Chandler waited until February 25, 2019, almost an entire month from Fox's deposition, to submit it to the Circuit Court. Additionally, Chandler made no showing that the additional testimony would make any difference in the outcome of the case. Wright v. Strickland, 306 S.C. 187, 188, 410 S.E.2d 596, 597 (Ct. App. 1991). "Apparently, he simply seeks the opportunity to embark on 'a fishing expedition.'" Id. Being a close friend of a testator and the testator's family is in no way probative of a conflict of interest. The very notion is repugnant to centuries of probate law.

Chandler also contends that Fox did not preserve the issue of the Circuit Court's consideration of additional evidence. This argument fails on five grounds. First, Fox clearly objected to the introduction of his deposition transcript in his March 4, 2019 Return to Chandler's Motion to Reconsider, Alter, Amend. (R. pp. 376-80). Second, the Court did not formally order

the parties to submit their "outlines of qualification," it informally requested them to do so. (R. p. 959). Third, the submission of Fox's "outline of qualification," was a supplement to his March 4, 2019 Return to Chandler's Motion to Reconsider, Alter, Amend, in which he clearly objected to additional evidence. (R. pp. 373-82; 519-25). Fourth, it was not necessary for Fox to request the Court to reconsider its May 28, 2019 Order, a product of Chandler's motion for reconsideration. See Also Goddard v. Fairways Dev. Gen. Partnership, 310 S.C. 408, 426 S.E.2d 828 (Ct. App. 1993) (holding that if the ruling on one party also applies to the other party, e.g., where the facts and/or law are identical as to the two parties or the ruling implicitly applies to both parties, it may not be necessary to make a post-trial motion). Fifth and finally, Fox timely filed his Notice of Appeal of the May 28, 2019 Order, a product of Chandler's Rule, 59(e), SCRCP motion.

II. Interlocutory orders are appealable along with a final order.

Chandler's argument that the denial of Fox's Emergency Petition for Writ of Supersedeas is not appealable is without merit. The May 28, 2019 Order removing Fox as Personal Representative is a final order. As such, the May 28, 2019 Order Denying Appellant's Emergency Petition for Writ of Supersedeas is likewise reviewable. S.C. Code § 14-3-330(1); Cox v. Woodmen of the World Ins. Co., 347 S.C. 460, 556 S.E.2d 397 (Ct. App. 2001) (An order that is not directly appealable will be considered if there is an appealable issue before the court). Here, the May 28, 2019 Order removing Fox as Personal Representative is appealable and therefore, any other interlocutory orders raised in this appeal are properly before this Court. In fact, this is the first and only opportunity in which to address the interlocutory orders.

III. The Circuit Court's Denial of Fox's Writ of Supersedeas is Properly Preserved for Review.

Chandler's argument that Fox has not previously raised the argument of whether a probate court may lift an automatic stay is disingenuous. Prior to the Probate Court's lift of the Automatic

Stay, contrary to Chandler's assertion, Fox objected to the lift of the stay. Specifically, Fox argued the Probate Court lacked jurisdiction to lift the stay because S.C. Code Ann. §62-1-208 supplants the general rules of appellate procedure and devests a probate court of jurisdiction to lift an automatic stay. (R. pp. 484-86). The Probate Court acknowledged as much in its May 10, 2019 Order Lifting Stay. (R. pp. 78-81). The Probate Court's Order Lifting Stay was also included as Exhibit B to Fox's Petition for Writ of Supersedeas at the Circuit Court. "[L]ack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised *sua sponte* by the court. Nix v. Columbia Staffing, Inc., 322 S.C. 277, 280, 471 S.E.2d 718, 719 (Ct. App. 1996). Issues relating to subject matter jurisdiction cannot be waived. Bunkum v. Manor Properties, 321 S.C. 95, 100, 467 S.E.2d 758, 761 (Ct. App. 1996). Fox did not waive or could he waive the issue of subject matter jurisdiction.

IV. The Circuit Court Improperly Dismissed Fox's Appeal from the Probate Court.

Chandler's argument that the Circuit Court dismissed Fox's appeal for lack of jurisdiction is without merit. Absent from the Circuit Court's Order is any language indicating that it dismissed Fox's appeal for lack of jurisdiction. Specifically, the Court ordered:

> Should there be any part of this estate that is under a true time constraint, then this Court would not continually be put in a position of seemingly being used against the Probate Court and that the Probate Court is in turn being used against the Circuit Court.
>
> ***
>
> **IT IS THEREFORE ORDERED** that, the Appellant's Emergency Petition for Writ of Supersedeas be and is DENIED. **IT IS FURTHER ORDERED** that the issue be remanded back to Probate Court to allow the Probate Court the opportunity for corrective action should it be inclined to do so. **IT IS FURTHER ORDERED** that this estate is to remain in the complete jurisdiction of the Probate Court until a final order is issued by the Probate Court disposing of all matters before it. At that point, should any appeals be necessary, only then can parties petition the Circuit Court in an

> appellate fashion. No appeals to the Circuit Court may be had or filed until this case is completed in Probate Court.

(R. pp. 85-89) (emphasis in original). Contrary to Chandler's assertion, at no point has Fox argued that the Circuit Court erred in determining it lacked appellate jurisdiction to entertain the appeal. As discussed above, the Circuit Court never addressed whether or not it lacked jurisdiction.

a. The Court Had Jurisdiction to review the Probate Court orders.

Chandler concedes that, "Appeals from orders of the probate court are governed exclusively by S.C. Code Ann § 62-1-308." (Resp't Initial Br, p. 24). Section 62-1-308 of the Code specifically sets forth that, "[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." S.C. Code Ann. § 62-1-308(h). One of two things must be true, either the automatic stay cannot be lifted in a probate appeal, or sub-section 'h' within Section 62-1-308 is superfluous.

Next, Chandler argues that the April 17, 2019 Probate Court order that 'temporarily' restrained Fox as Personal Representative is interlocutory and therefore it was not properly before the Circuit Court. However, this argument is nothing more than a red herring. Fox's 'temporary' restraint as Personal Representative was for a renewed period of six months, handed down in the midst of two separate lawsuits (wrongful death and Slayer Action) and the pending sale of real properties that belonged to the Trust. "*The label given to the order is not determinative of its immediate appealability.*" Spalt v. S.C. Dep't of Motor Vehicles, 423 S.C. 576, 584, 816 S.E.2d 579, 583 (2018) (emphasis added). "Whether an order is final depends—as we explained in Charlotte-Mecklenburg—on the substance of the order: whether it 'disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined.'" Id. (quoting Charlotte-Mecklenburg

Hospital Authority v. South Carolina Department of Health & Environmental Control, 387 S.C. 265, 692 S.E.2d 894, 895 (2010)). Effectively, Fox was Personal Representative in name only. His six-month restraint as Personal Representative operated as a removal by a different name. "The underlying nature of the matter before the probate court was the appointment of a special fiduciary to manage the estate assets, which we find akin to the removal of a personal representative." Fisher v. Huckabee, No. 2014-002020, 2016 WL 7495869, at *3 (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).

Finally, Chandler asserts that even if the April 17, 2019 Probate Court order 'temporarily' restraining Fox was properly before the Circuit Court, the remaining eight Probate Court orders are not, because they lack a sufficient nexus to the April 17, 2019 Order. (Resp't Initial Br., p. 26). Chandler points to Brown v. City. of Berkeley, 366 S.C. 354, 622 S.E.2d 533 (2005) in support of his theory. In Brown, the Court found no nexus between a denial of a preliminary injunction preventing a special audit and denial of a motion to dismiss because the preliminary injunction was unrelated to the underlying claims of defamation, defamation *per se,* and intentional infliction of emotional distress. Id. 366 S.C. at 362, 622 at 538, n. 5. Unlike Brown, there is a sufficient nexus between the administrator of the Estate and the administrator's administration of the Estate. It is true that Section 62-3-107 of the Code establishes that, "[e]ach proceeding before the [probate court] is independent of any other proceeding involving the same estate." S.C. Code Ann. § 62-3-107. However, Chandler's reliance on Section 62-3-107 is misplaced. It does not support the proposition that a Circuit Court may exercise its discretion and decline to hear appeals of interlocutory orders that are otherwise properly before it. Such a proposition would create an absurd result, barring litigants from appealing interlocutory orders along with a final order.

b. The Circuit Court did not determine that it lacked appellate jurisdiction and there are not sufficient additional grounds to sustain the Court's dismissal of Fox's appeal.

Chandler has raised additional arguments in support of the Circuit Court's dismissal of Fox's appeal of the nine Probate Court orders. Chandler contends the nine Probate Court that Fox appealed are either untimely, moot, interlocutory, unpreserved, or some combination thereof. (Resp. Brief pp. 27-36). As discussed in Argument II, *supra,* an order that is not directly appealable will be considered if there is an appealable issue before the court. Cox, 347 S.C. 460, 556 S.E.2d 397 (Ct. App. 2001). Interlocutory orders are not directly appealable if not accompanied by a final order. If Chandler's timelessness argument is followed to its logical conclusion, it would eviscerate the holding in Cox, and any interlocutory orders would not be reviewable due to untimeliness. Such a proposition would limit appeals only to final orders. The same can be said for preservation of the issue. As an interlocutory order cannot be appealed by itself, the order cannot be appealed until a final order is issued. Chandler's proposition would leave all interlocutory orders unpreserved for review.

The orders appealed by Fox are not moot. "[A]fter receipt of notice of the commencement of a formal probate proceeding, [the previously appointed personal representative] 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. On October 30, 2017, Fox filed for formal testacy and appointment. (R. pp. 156-66). The decedent's Will was not admitted to probate until August 27, 2018.[3] (R. pp. 32-34). Fox would not be appointed as Personal Representative until February 13, 2019. (R. pp. 59-61). The orders issued by the Probate Court between October 30, 2017 and

[3] Interestingly, upon admission of the Will to probate, the Probate Court, that same day, issued a *sua sponte* order, permanently appointing Chandler as Special Administrator, despite a validly probated Will that nominated Fox as successor Personal Representative. (R. pp. 32-34).

August 27, 2018 (arguably as late as February 13, 2019), are void. "A void judgment is one that, from its inception, is a complete nullity and is without legal effect." Innovative Waste Mgmt. Inc. v. Crest Energy Partners GP, LLC, 423 S.C. 611, 613, 815 S.E.2d 780, 781 (Ct. App. 2018), reh'g denied (July 18, 2018), cert. granted (Feb. 6, 2019), aff'd as modified, 425 S.C. 568, 824 S.E.2d 214 (2019) (quoting Belle Hall Plantation Homeowner's Ass'n, Inc. v. Murray, 419 S.C. 605, 617, 799 S.E.2d 310, 316 (Ct. App. 2017). Void judgments are defined as those from courts that lacked personal or subject matter jurisdiction or failed to provide due process." Innovative Waste Mgmt. Inc., 423 S.C. at 613, 815 S.E.2d at 781. Should this Court determine that, 1) Fox's Petition for Formal Testacy and Appointment prohibited the sale of the decedent's real and personal property; and 2) that Fox should have been appointed as early as 2017 (when Fox's Informal Application was denied), then the orders issued and actions taken during that time period may be undone.[4]

The same can be said for the other orders unrelated to the real and personal property of the decedent. The February 7, 2019 Order Denying Fox's Petition to Remove Special Administrator is properly before this Court. Concerned by the delay at the Circuit Court and the disposition of property that rightfully belonged to the Trust, Fox on January 4, 2019, Fox reincorporated the arguments of his Petition to Restrain filed with the Circuit Court, in his Petition for Removal in the Dorchester County Probate Court, and moved for the removal of the issue to the Circuit Court. (R. pp. 250-75; 279-81). The Probate Court denied the motion to remove Fox's Petition to the Circuit Court and instead set the matter for an emergency hearing. (R. pp. 38-39). Fox's Motion to Remove was denied and Fox was personally sanctioned $10,000.00 by the Probate Court by order dated February 7, 2019. (R. pp. 42-58). If this Court finds that Fox's Petition should have

[4] Alternatively, the issues raised by Fox, namely, the right of a testator to nominate a personal representative and the right of a testator to have their wishes carried out, are of public interest and should be decided for future guidance. Ashmore v. Greater Greenville Sewer Dist., 211 S.C. 77, 96, 44 S.E.2d 88, 97 (1947).

been granted, relief can be granted for any action that Chandler took following Fox's petition. Additionally, this Court may likewise review Fox's $10,000.00 sanction. It merits review because otherwise, it would set a chilling precedent against individuals nominated in a will who seek appointment over another. Certainly so, when that person is an absolute stranger to the Estate.

The two February 13, 2019 orders issued by the Probate Court, hours after Fox's appointment as Personal Representative, are properly before this Court. In the few hours that Fox was the unrestrained Personal Representative, he did not yet have access to the Estate records or accounts. Chandler contends that there was an emergency because a nominated personal representative from a will was appointed by the Court to that position. Yet, Fox was restrained *before* he took any action on behalf of the Estate. Chandler's counsel submitted an invoice for an unpaid balance of $6,301.72 to the Dorchester County Probate Court. (R. pp. 290-96). 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. 296). Based on the 'unpaid' creditors claim, the Probate Court 'temporarily' restrained Fox and 'temporarily' reappointed Chandler as Special Administrator. Chandler's actions on February 13, 2019 are a clear abuse of Section § 62-3-607 of the Code. If Chandler's actions are allowed to stand, it will set a dangerous precedent. It will only embolden 'professional' administrators to use the Probate Code to take back the reins of an estate.

Finally, as discussed in argument II, *supra,* the April 17, 2019 Probate Court order that 'temporarily' restrained him as Personal Representative is a final order, properly before this Court.

c. Fox did not raise additional issues on Appeal.

Chandler's assertion that Fox has raised additional issues on appeal is unsupported. Fox's appeal strikes to the very core of centuries of probate jurisprudence. "The underlying purposes and

policies of this code are...*to discover and make effective the intent of a decedent in the distribution of his property*. S.C. Code Ann. § 62-1-102 (emphasis added). On November 26, 2018, Fox moved the Circuit Court to restrain Chandler as Special Administrator. (R. pp. 250-75). On January 4, 2019, Fox moved for Chandler's removal as Special Administrator, reincorporating his arguments from his November 26, 2018 Motion to Restrain. (R. pp. 279-81). Specifically, Fox alleged, "From August 24, 2017 through October 24, 2017, [Chandler] did not act to probate the Last Will." (R. pp. 250-75). An emergency hearing on Fox's Petition to Remove the Special Administrator was held on January 9, 2019. During Chandler's direct examination, he was asked about his efforts to probate the Estate.

> 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 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. 749-48) (emphasis added). Fox's allegation that Chandler failed to take steps to have the Will admitted is wholly supported by the pleadings and the record. Additionally, the issues Fox raised were ruled upon by the Probate Court on February 7, 2019. (R. pp. 42-58). Fox timely filed

a Motion to Alter or Amend the Probate Court's February 7, 2019 Order. (R. pp. 352-58). The Probate Court implied denied Fox's motion by not ruling upon it. Furthermore, Fox properly appealed the February 7, 2019 Order along with the April 17, 2019 final order. Therefore, the issue of whether Chandler took appropriate action to probate the decedent's will is properly before this Court.

Chandler has also asserted that Fox raised additional issues concerning the June 9, 2017 Order Appointing Temporary Special Administrator. The June 9, 2017 order is interlocutory. As discussed in argument IV-a, *supra,* interlocutory orders may be appealed in conjunction with a final order.

CONCLUSION

Fox should have been granted informal appointment from the outset of this Estate. Instead, The Probate Code was used time and time again throughout these proceedings to frustrate Doris Colucci's testamentary intentions. The February 13, 2019 incident makes crystal clear that neither Chandler or the Probate Court would permit Fox's appointment. Her Will was unambiguous: turn over the assets to the Trust and have the Trustee retain the property for its intended beneficiaries. Fox prays that this Court will put Colucci's Estate in the position that it should have been, without unlawful interference by third parties into her Estate's administration.

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

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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 Colucci .....Appellant,

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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