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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin Culbertson, Circuit Court Judge

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Appellate Case No. 2020-001291

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Julie Irving, Plaintiff/Respondent,

v.

Jeanne Poafpybitty, Donald Matthew Rothgeb and Steven Taylor Rothgeb,

Defendants,

of whom Jeanne Poafpybitty, Personal Representative of the Estate of Donald M. Rothgeb is

Defendant/Appellant.

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# FINAL BRIEF OF RESPONDENT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES



### STATUTES

## STATEMENT OF ISSUES ON APPEAL

1. In evaluating Appellant's most recent pleadings, the Court of Appeals should consider what has already become the law of the case.

2. The Probate Court found bad faith intentional breach by Appellant of her fiduciary duties, together with unjustified continuing defenses of her actions. These findings were not the fault of Respondent, her counsel or the Trial Judge. These findings were not the product of judicial bias or the misapplication of law.

3. The Probate Court did not reform Dr. Donald M. Rothgeb's Will.

4. The Probate Court acted properly to address evidentiary issues.

5. The Probate Court's reference to the South Carolina Trust Code did not amount to reversible error.

6. The Probate Court acted properly in determining a remedy within its discretion.

7. The record of this case includes numerous additional examples of Appellant's expensive defense efforts which do not meet the standards of S.C. Code Ann. §62-3-720 (Supp. 2013).

## STATEMENT OF THE CASE

> *"Defendant is correct, that rules of construction, in reviewing fiduciary service, shall promote a Decedent's intent as expressed in his Will."*
>
> The Honorable Carroll D. Padgett, Jr., Trial Judge, Horry County Probate Court in Order dated November 7, 2018 (R. p. 61, Lines 20 and 21)

After reading Appellant's April 19, 2021 Brief, is it surprising to see the above declaration, from our Trial Judge? In challenging the lower courts' Orders, Appellant, without good faith acknowledgment about our proceedings, claims that she is the only champion of Probate Code fundamentals.

Respondent offers further, for this statement, reference to the Facts, as outlined on pages 2 through 8 of that certain Order of the Honorable Benjamin H. Culbertson in this matter, dated September 16, 2020.

In addition, Respondent offers the following, in light of what Appellant has set forth as her Statement of the Case:

1. To the extent that Appellant speaks of negotiation with counsel for her stepchildren, such counsel was engaged by stepchildren, in response to Appellant's failing to follow through, when she responded to Respondent/Beneficiary Steven Rothgeb's cordial and polite 2015 request for Estate financial information. Appellant maintains that Respondent's request for financial information was not detailed enough. (At another time, Appellant has argued that, without filing a certain pleading with the Probate Court, (R. p. 1359, Lines 21 and 22) Estate beneficiaries could have anticipated limits with Appellant communications.)

2. In addition to communication issues, Appellant had also apparently given little consideration to that part of Dr. Rothgeb's Will, at Item I, which permitted realty distributions, subject to existing mortgage. Arguing that the Estate had no choice but expend time and resources to sell properties, and use sale proceeds to extinguish two mortgage debts, prior to Estate closure, Appellant quipped, with her incomplete financial report, "Well there isn't going to be any money today or tomorrow so I guess we all just need to get a grip." Concerned about these communications from Appellant, her stepchildren sought the services of an attorney, to protect their interests.

3. Appellant continues to assert, that which she has not established, and that which was basis for an expensive, unwarranted, counterclaim against Respondent - that the parties mutually agreed upon an appraiser, and a method for concluding Estate administration. The record is silent on these issues, in particular. Certainly, there is no record of any agreement which permitted Appellant to use Estate resources to rehabilitate an Estate residence she wished to acquire, and then to acquire it at a price that reflects its once disrepaired condition. Alternatively, there is no record of any agreement which permitted Appellant to acquire a residence for any other price, less than the property's fair market value. Both the Probate Court and the Circuit Court found that, although she continues complaining that Respondent has violated an Estate settlement agreement, Appellant has bypassed the first logical step. Appellant has not established the existence of any Estate settlement agreement. Further, in her appeal, Appellant has failed to address the lower Courts' analyses, in determining that no binding Estate settlement agreement was ever established at trial.

## ARGUMENT

### 1. IN EVALUATING APPELLANT'S MOST RECENT PLEADINGS, THE COURT OF APPEALS SHOULD CONSIDER WHAT HAS ALREADY BECOME THE LAW OF THE CASE.

Appellate practice recognizes a concept known as "Law of the Case." Essentially, a lower Court ruling, which is not challenged by an Appellant, requires affirmance by the Appellate Court. D.R. Horton, Inc. v. Westcott Land Company, LLC, 410 S.C. 319, 764 S.E. 2d 701 (2014) and Price v. Peachtree Electrical Services, Inc., 405 S.C. 455, 748 S.E. 2d 229 (2013).

Following are a listing of lower Court rulings, in this matter, which Appellant has not challenged on appeal. Respondent asserts that affirmation of the following will have a great deal to do with how Appellant's continuing prayers should be addressed:

1. Steven Rothgeb forwarded to Appellant a cordial and polite 2015 inquiry, about Estate financial matters, (R. p. 18, Lines 1-6) (R. p. 1309, Lines 16-37) (R. p. 1310, Lines 1-21) which Appellant should have been prepared to address. (R. p. 18, Lines 8-10) Appellant's October 2016 sworn affidavit about what occurred with the family "exactly one year" after Dr. Rothgeb's death (January 26, 2015) was not an accurate report of events. (R. p. 1314, Lines 18-22)

2. Dr. Rothgeb's Will, at Item I, (R. p. 1165, Lines 15-18) permits real properties of the Estate to be distributed, with the distributee taking title, subject to any outstanding mortgage debt. This is an opportunity, available to the Estate, as alternative to the time consuming and expensive action of selling real properties, and using sale proceeds to extinguish the Estate's mortgage debt. Payoff of the Estate's mortgage debt was not required, as a condition for Estate closure.

3. Two 2015 letters from stepchildren's counsel, Jack Scoville, the only record

contributions from Attorney Scoville, provided no details of any agreement between the Personal Representative and other Estate heirs. (R. p. 27, Lines 4-15) (R. p. 28, Lines 1-5) Heresay testimony and argument, from Estate counsel, (R. p. 99, Lines 3-21) was insufficient to give evidence of any such agreement. Mr. Scoville was not invited to give testimony, and nothing else in the Court record establishes any agreement. The trial Court found unjustified hostility from the Estate to Respondent, Julie Irving, (R. p. 27, Lines 4-15) (R. p. 28, Line 1-5) because of the Estate's mistaken allegation that a binding agreement had not been honored by Respondent.

4. Appellant's continuing complaints, about Respondent withdrawing her consent to an Estate settlement agreement, apparently moves forward in argument before this Honorable Court, without Appellant ever addressing how the Trial Court found failure of Appellant, to establish the existence of any such Estate settlement agreement. (R. p. 99, Lines 9-21)

5. The expenditure of more than $20,000.00 by the Estate, and its Personal Representative, to rehabilitate a once disrepaired Estate residence, created additional value which belonged to the whole Estate, and not to just one Estate beneficiary. (R. p. 65, Lines 3-5) This additional value, in fairness to all beneficiaries, had to be recognized as part of Estate settlement and final distributions.

6. Just prior to trial, Appellant informed the Court that resolution of the parties' dispute would include expert testimony from appraisers hired by the Estate and Respondent, (R. p. 1801, Lines 25-27) however, during trial of the case, it was revealed that Appellant's appraiser was never hired to give his opinion about value of the repaired residence, (R. p. 346, Lines 5-23) which was central to the parties' dispute.

7. The Trial Court found it to be not reasonable and not credible, (R. p. 70, Lines 12-23) (R. p. 71, Lines 1-4) when the Estate explained how it sought cost savings by not hiring its appraiser to give opinion about the value of a repaired residence, (R. p. 954, Lines 5-9) which was central to the parties' dispute. The appraiser was, nonetheless, hired to inspect the repaired residence, (R. p. 10, Lines 17-19) and he was, nonetheless, hired to appear, as expert witness, during the trial. According to the Trial Court, the absence of an opinion from Appellant's expert, on the value of a repaired residence, was due to the expert being unwilling or unable to support the valuation contained in Appellant's fiduciary filings. (R. p. 70, Lines 21-23)

8. Appellant abandoned her fiduciary asset valuation responsibilities, when in February 2017, she filed an accounting, under oath, placing a value on an Estate residence, when, at the time, Appellant believed that the sworn to residence value was not accurate. (R. p. 65, Lines 5-17) Appellant offers, as excuse, that she was trying to accommodate disagreeable beneficiaries. (R. p. 500, Lines 2-16) Whatever her motivation, however, Appellant is responsible for a false swearing with Court filed accountings.

9. Appellant's counterclaims against Respondent were determined by the Trial Court to be a waste of fiduciary authority. (R. p. 51, Lines 13-14)

10. It was a breach of fiduciary duty for Appellant, the Personal Representative, to continue referencing the disrepaired value of an Estate residence, while making calculations for her acquisition of the same residence, after it was transformed into a rehabilitated state. (R. p. 34, Lines 4-13) The rehabilitation had been accomplished, under Appellant's direction, with the use of more than $20,000.00 in Estate funds.

11. The Trial Court exercised proper discretion, under S.C. Ann. §62-1-111 (Supp.

2013), to award costs and expenses, including reasonable attorney's fees, as was included in its Orders. (R. p. 97, Lines 21-23) Appellant has not challenged the application of §62-1-111 in this matter.

12. Following issuance of the Trial Court's May 2017 email message, describing its ruling, a two month delay in proceedings occurred, due to the request of Appellant's counsel, associated with further matters counsel wished to present. (R. pp. 1871-1873, all lines)

13. Appellant has largely left unchallenged, the Trial Court's description, on pages 8-14 of its November 7, 2018 Order, as to why the Court considered Appellant's defenses, in this matter, to be outside the reimbursement qualifications of S.C. Code Ann. §62-3-720 (Supp. 2013), following proceedings for review, according to S.C. Code Ann. §62-3-721 (Supp. 2013).

14. The Appellant's early administration decision, not to litigate for a marital elective share of Dr. Rothgeb's Estate, does not foreclose an examination of Appellant's other decisions, to determine whether Appellant used fiduciary powers for wrongful purposes. (R. p. 99, Lines 9-21)

15. The Probate Court reached its final decisions in this matter, recognizing that Respondent Matthew Rothgeb never appeared at Trial to support 2016 affidavit allegation that Appellant had been untruthful with him. (R. p. 54, Lines 9-12) Mr. Rothgeb had submitted an affidavit, claiming that Appellant had been untruthful. Appellant appeared, in May 2016, at Motions Hearing, and had filed no responsive affidavit or other pleadings denying Matthew's allegations. In its Order of March 2, 2018, the Trial Judge included his position that the contents of Matthew Rothgeb's 2016 affidavit, were unsupported by any trial testimony from him.

16. In her April 19, 2021 brief, Appellant repeats her prior concerns about a Court Order for Special Administrator. This she does, however, without challenging the Circuit Court

Order which finds transcript record and Appellant's pre-trial written communications, establishing Appellant's awareness, that her removal as Personal Representative was among the contested issues, in this matter. (R. p. 100, Lines 10-19) (R. p. 1806, Lines 8-10) This is a case which clearly sought termination of Estate administration, and termination of Appellant's fiduciary authority.

**2. THE PROBATE COURT FOUND BAD FAITH INTENTIONAL BREACH BY APPELLANT OF HER FIDUCIARY DUTIES, TOGETHER WITH UNJUSTIFIED CONTINUING DEFENSES OF HER ACTIONS. THESE FINDINGS WERE NOT THE FAULT OF RESPONDENT, HER COUNSEL OR THE TRIAL JUDGE. THESE FINDINGS WERE NOT THE PRODUCT OF JUDICIAL BIAS OR THE MISAPPLICATION OF LAW.**

The trial Court's May 26, 2017 email to the parties, forwarding its initial impressions, included the following:

a. "I find in this case the P/R- wife has intentionally inhibited and delayed the closing of this estate and prolonged the division of the assets."

b. "The Court finds the P/R to have withheld information pertinent to the beneficiaries and requested by them. In addition the P/R clearly used her position as P/R to manipulate at least one if not more assets to her advantage over her step children, the remaining 75% devisees."

c. "Based on all the evidence and testimony, the Court finds the P/R wife and 25% beneficiary used her position to manipulate the estate assets to unjustly enrich herself at the expense of the other beneficiaries."

d. "Under the authority of §62-1-111, §62-3-701,et seq., 719, 720, 721 and others, I find that this litigation was not beneficial for the estate, but purely the wife-beneficiary seeking to improve her lot in the estate."

Respondent notes that, to the present time, Appellant continues to assert that no judicial finding of bad faith was determined at trial. Respondent has addressed similar arguments at trial, during Appellant's post trial Motions, during Appellant's Circuit Court appeal, and now responds, on appeal, once more.

While faced with concerns that have ultimately resulted in the Trial Court's above findings, Respondent records, here, actions that she has taken, both prior to and into litigation:

e. Communicate, in writing, with the Estate, and asking the Estate to recognize and address conflicts of interest. (R. pp. 1213-1214, all lines) Appellant's continuing assertion is false, that a disagreeable Respondent insisted upon only one settlement option, an equal quarter share distribution of all properties to four (4) beneficiaries. Appellant essentially ignored Respondent's pre-litigation request that the parties mediate, but with a funds distribution which would allow stepchildren to pay for their own legal advice.

f. Wait for closing documents, as Respondent was informed the Estate would file.

g. Invite the Estate to participate in Motion hearing, where opportunity for filing and review of distribution proposals could occur.

h. Invite the Estate to participate in mediation. Regarding mediation efforts, Respondent respectfully invites review of Argument 7.c. in this brief.

i. Permit an appraisal of an Estate personal residence, following its rehabilitation. (R. p. 10, Lines 14-20)

j. Invite the Estate to respond to discovery where, prior to Trial, the Estate's valuation of a repaired residence could be examined. (R. pp. 1254-1256 [with Respondent's note,

also, that the assembled record does not include exhibits which were attached to Plaintiff's Requests, and are relevant])

Prior to trial, Appellant was provided with numerous opportunities to back away from her position that appraisal of a disrepaired personal residence could support a property distribution proposal, after Appellant had used Estate money to repair the residence. Appellant, who continues to cite Respondent as a difficult party, took no steps during more than fourteen months, to abandon a flawed valuation argument which only served her own selfish interests.

As late as October, 2016, Appellant complained, through sworn affidavit, (R. p. 1315, Lines 13-18) which was filed with the Court, about the poor physical condition of her personal residence. The residence was in repair at this time, and also in May 2016, when Appellant, at hearing, challenged the vision of Respondent's appraiser, because the appraiser had not had opportunity to inspect the residence interior. (R. p. 194, Lines 78-93)

Respondent hereby references the following portions of Court Order to address the following continuing concerns of Appellant, as cited in her appellate efforts.

k. Alleged punitive terms which are not supported. Please see Paragraph H. of the Court's March 2, 2018 Order and Paragraph I. B. 11. of the Court's November 7, 2018 Order. The trial Court made specific reference to the cases of Cartee v. Lesley, 209 S.C. 333, 350 S.E. 2d 388 (1986) and Page v. Page, 243 S.C. 312, 133 S.E. 2d 829 (1963), and also the following statutes which provide authority: S.C. Code Ann. Sections 62-1-111, 62-3-703(a), 62-3-715(20), 62-3-719, 62-3-720, 62-3-721 (a) and 62-7-804. Also supportive of the Probate Court's actions are S.C. Code Ann. Section 62-3-607 which permits restraint on Personal Representative actions and Section 62-3-713, which holds that conflicting transactions of a Personal Representative are voidable.

l. Bias and improper balance. The Probate Court extended fair courtesies to all parties, including a nearly two month delay in 2017 post trial proceedings, so as to accommodate the calendars of Appellants' two attorneys. (R. pp. 1871-1873, all lines) Appellant, in her current brief, takes no responsibility for this two month delay, complaining to his Honorable Court about five months for Respondent to produce a proposed Court Order.

The standards set forth in Aakjer vs. Spagnoli, 291 S.C. 165, 352 S.E. 2d 503 (Ct. App. 1987) and State vs. Wasson, 229 S.C. 508, 386 S.E. 2d 255 (1989) have not been demonstrated by Appellant, who again seeks new opportunities to litigate. Please see Paragraph II. of the Trial Court's November 7, 2018 Order. (R. pp. 77-78, all lines) (R. p. 79, Lines 1-3)

m. Personal Representative to bear legal expenses and the Court denying the Personal Representative's counterclaims for such fees. Please see Paragraphs I. B. 3. and 10. of the Court's November 7, 2018 Order. In addition to numerous citations about unreasonable defense efforts, please see, also, Appellant's Initial Brief to the Circuit Court at page 29, footnote 10, (R. p. 1618, lines 21-24) where Appellant asked all involved to become influenced by her team's personal recollections of informal communications which may or may not have occurred, as is reported in the brief; communications which are not part of any record.

n. Personal Representative's commission. Please see Paragraphs I. B. 4. of the Court's November 7, 2018 Order.

o. Appointment of Special Administrator. Please see Paragraph I. B. 6. of the Court's November 7, 2018 Order. During trial, the parties squarely addressed merits contained in Blackmon v. Weaver, 366 S.C. 245, 621 S.E. 2d 42 (2005), Church v. McGee, (S.C. App. 2011), Maydwell v. Maydwell, 135 Tenn 1; 185 S.W. 712 (1916) and Floyd v. Floyd, 365 S.C. 56, 615 S.E.

2d 465 (2005).

p. Awarding Plaintiff (Respondent) her attorneys fees and costs. Please see Paragraph I. B. 11. and Paragraph IV. of the Court's November 7, 2018 Order. Respondent's brothers are squarely within the intent the Common Fund Doctrine. Sullivan v. Brown, 423 S.C. 476, 816 S.E. 2d 542 (S.C. 2018). The portion of the Estate's contribution representing a share from Appellant is explained by the Court. Appellant's quarter share contribution, here, is an alternative, and much less than it could have been, given Appellant's actions in this litigation. (R. p. 81, Lines 7-23) (R. p. 82, Lines 1-7)

q. Respectfully, Respondent invites examination of the exchange between Appellant's counsel and the Trial Judge recorded on pages 93 and 94 of the June 29, 2018 hearing in this matter. Please examine, also, the first two consecutive paragraphs of Appellant's April 19, 2021 brief, page 8. Appellant may find the concept of bad faith to be elusive, but other parties, and the lower courts, understand that intentional abuse of fiduciary authority, for the fiduciary's personal financial gain, at the expense of others, is clearly out of bounds.

r. If Respondent and the lower Courts are correct, that the record of this case does not reveal an Estate Settlement Agreement, and also does not reveal any Respondent action, to withdraw from any such binding Estate Settlement Agreement, what will this Honorable Court say about the concept of good faith, while Appellant nonetheless continues to argue?

### 3. THE PROBATE COURT DID NOT REFORM DR. DONALD M. ROTHGEB'S WILL.

In its Order of November 7, 2018, the Horry County Probate Court addressed Appellant's concerns, raised in her Motion for Reconsideration, that Dr. Rothgeb's Will had been improperly

reformed. (R. pp. 61-65, all lines) (R. p. 66, Lines 1-4) Appellant asserts that there is no basis for Will reformation, while the trial Court declares that no reformation has occurred.

Properly, the Probate Court ruled that will reformation is not what occurs, when a Court takes authority away from a fiduciary who has substantially abused this authority.

All parties acknowledge that the Testator's intent should govern Estate administration. S.C. Code Ann. Section 62-2-601 (A). In this case, Dr. Rothgeb intended for Appellant to exercise authority, but he also intended there to be faithful exercise of authority, in support of the interests of all beneficiaries. (R. p. 62, Lines 5-10)

The Trial Court action, here, to take authority away from an abusive fiduciary, is among the powers reserved for the Court, by our Probate Code, notwithstanding a Testator's nomination of Appellant in his Will. The Court's use of this power is designed to assist with the Testator's most significant intent, which is that all interested parties of the Estate be treated fairly.

Appellant continues to assert that no fiduciary breach has occurred, during this administration, and also asserts, in spite of clear terms set forth in its order, that the Probate Court found no such breach during our trial. Respondent observes that, with these conclusions and these arguments, and after the Circuit Court has rejected Appellant's arguments, Appellant now offers in her latest brief, concerns about disruption in the Personal Representative's authority, for no justified reason. This disruption by the Probate Court is seen by Appellant as an improper reformation of Dr. Rothgeb's written instructions.

The Probate Court, in Paragraph G of its March 2, 2018 Order and in Paragraph B. 1. b. in its March 7, 2018 Order, went to great lengths to outline reasons for its findings of fiduciary breach, which call out for remedy. The findings and the remedies are sound. They are well within the trial

Court's discretion. Further, the Court Order in Paragraph B. 1. a. and c. of its March 2, 2018 Order sets forth its view, affirmed by the Circuit Court, and now adopted in this brief, declaring that Dr. Rothgeb's Will was not improperly reformed.

### 4. THE PROBATE COURT ACTED PROPERLY TO ADDRESS EVIDENTIARY ISSUES.

Through her appeal to the Circuit Court, (and previously through her Motion for Mistrial/New Trial) Appellant complained that the trial Court erred, in not allowing consideration of what Appellant claims were hundreds of additional important exhibits. (R. p. 1631, Lines 7-19) (R. p. 1632, Lines 1-18) (R. p. 1508, Lines 4-12)

Appellant had, through pleadings and oral arguments, offered all of the following inconsistent justifications to explain why the subject additional proposed exhibits were not offered for consideration during trial of this case, and the trial Court considered each:

a. Appellant's team was unfairly rushed and pressured by the Trial Judge. (R. p. 1508, Lines 4-12)

b. Appellant's team purposely decided not to submit the subject exhibits, as part of its trial strategy. (R. p. 758, Lines 2-22)

c. Appellant's team is not entirely sure why it chose, during trial, not to offer the subject exhibits as evidence. (R. p. 963, Lines 15-25)

Respondent is unaware of what, precisely, Appellant demanded for submission as additional documentary evidence. This is because Appellant never made a proffer of what documents concerned her. Further, Appellant, during trial examination of witnesses, never once presented any of these documents for authentication or discussion. Whatever it might be, however, it is doubtful

that additional exhibits would modify the Trial Court's findings at Paragraph A. 3., 4. and 5. of its March 2, 2018 Order. Appellant herself, in written response to beneficiary inquiries, declared, "The reason I have not given any details recently is because there are no details to give." (R. p. 1201, Line 14) Curiously, when it appears to have assisted Appellant's litigation position, she has reported about extraordinary efforts of the Estate, associated with Dr. Rothgeb's lack of proper maintenance for rental residences filled with tenants. Certainly some details about Estate administration could have been of interest to Estate beneficiaries.

In 2015, practically speaking, Appellant essentially invited Respondent and her brothers to hire legal counsel in order to learn about their Father's Estate. Respondent mocked and criticized the natural curiosity of Estate beneficiaries, (R. p. 1202, Lines 6-9) regarding more than a year of Estate financial activities. Appellant informed the Trial Court, at one point of argument, that beneficiary failure to file pleadings with the Probate Court, may have provided justification for non-communication by the Personal Representative. (R. p. 1359, Lines 21 and 22) Ultimately, in 2015, Appellant voluntarily agreed to provide, but then failed to deliver, meaningful accounting information. (R. p. 1202, Lines 12 and 13)

Appellant has claimed, too late for consideration, that copies of numerous other exhibits could have presented a different picture of Appellant's communications care, in addressing the interests of beneficiaries to whom Appellant owed fiduciary duty.

For reasons now known only to Appellant, the most recent appeal to this Honorable Court includes no issue about alleged error of the Trial Court, in denying admission of documents, which Appellant wished the Court to consider. Appellant has apparently abandoned the issue, but not before all parties have suffered through very expensive examinations of Appellant's flawed

evidentiary claims.

### 5. THE PROBATE COURT'S REFERENCE TO THE SOUTH CAROLINA TRUST CODE DID NOT AMOUNT TO REVERSIBLE ERROR.

Our state legislature has authored both S.C. Code Ann. §62-3-703(a) (Supp. 2013) and S.C. Code Ann. §62-7-102 (Supp. 2013). Section 62-3-703 (a) declares that a Personal Representative is a fiduciary who shall observe the standards of care described by Section 62-7-804. Although §62-7-102 declares that Article 7 of the Probate Code does not apply to Decedent's Estates, §62-3-703(a) has specifically invited us to consider the Trust Code when determining the obligations of a Personal Representative. Black's law dictionary defines fiduciary with specific reference to Trustees.

The Circuit Court Order, essentially sees harmless error in the Trial Court citation to the South Carolina Trust Code. When evaluating the fiduciary service of a Personal Representative, with specific Probate Code Article 3 references to Probate Code Article 7 standards, the Circuit Court holds that a fiduciary, whether a Personal Representative or a Trustee, must act within similar recognized standards, and exercise reasonable care, skill and caution.

It is reasonable to ask what is Appellant's position, if §62-3-703 (a) is misplaced, and Probate Code Article 7 standards do not apply to Personal Representatives. Is a Personal Representative free to abandon loyalty obligations to beneficiaries? Does a Personal Representative have no duties to reasonably communicate with beneficiaries? Is it acceptable for Personal Representatives to self-deal, at the expense of beneficiaries? According to §62-3-703 (a), Appellant, as a fiduciary, has obligations to avoid selfish conflicts of interest, and our legislature, notwithstanding §62-7-102, has specifically invited us all to employ Trust Code standards in evaluating the performance of a Personal Representative. The codification of fiduciary duty serves only to assist those who step

forward to exercise this important duty.

### 6. THE PROBATE COURT ACTED PROPERLY IN DETERMINING A REMEDY WITHIN ITS DISCRETION.

Respondent, here, offers reference to what the Probate Court has set forth in Paragraphs F., G., H. and I. of its March 2, 2018 Order, and also in Paragraph I. B. 11 of its November 7, 2018 Order.

The Trial Judge properly used his discretion to determine that, given abuse of past fiduciary authority, Appellant should not continue in that capacity. Placing alternative fiduciary authority into the hands of a family member, other than Appellant, would likely spark additional disputes. A final probate distribution among equal beneficiaries would place all parties on even footing, and allow the parties to achieve resolutions, without permitting one or more beneficiaries to impose additional financial burdens upon others, due to the efforts of some particular beneficiary, and his/her chosen counsel.

### 7. THE RECORD OF THIS CASE INCLUDES NUMEROUS ADDITIONAL EXAMPLES OF APPELLANT'S EXPENSIVE DEFENSE EFFORTS WHICH DO NOT MEET THE STANDARDS OF S.C. CODE ANN. §62-3-720 (SUPP. 2013).

No party argues that Appellant, during the subject dispute, may not present advocacy for her positions. Respondent asserts, however, that while presenting her case, whatever it may be, Appellant has always been obligated to consider her continuing fiduciary duty, and to avoid conflicts of interest-S.C. Code Ann. §62-3-713 (Supp. 2013), to avoid the unnecessary, to avoid the unreasonable and to avoid any efforts which lack good faith. Respondent records, here, examples of additional Appellant actions, which have missed the fiduciary mark, have caused unjustified expense to all, and should not now be funded through Estate reimbursements:

a. Appellant cites her voluntary decision to forego challenging Dr. Rothgeb's Will, and seek, through litigation, a greater marital elective share portion of the Estate. Appellant asserts that, having taken this path, she now answers all concerns of every party, about how she may have, at any time, behaved during Estate administration. It's as if Appellant believes we are all unaware of what she has done, and what the Courts found she has done, through the exercise of fiduciary powers; powers she would have had to surrender, if a marital elective share lawsuit had been pursued by Appellant, against the terms of Dr. Rothgeb's Will.

Among the other unfair actions outlined throughout pleadings and Orders in this matter, describing Appellant's Personal Representative activities, Appellant has helped herself to years of rent free Estate residence occupancy, and also to thousands of dollars in personal utilities and TV cable bill expenses, all paid for through Appellant's continuing access to fiduciary funds, which belonged to the Estate. (R. pp. 1739-1742, all lines) As successful Petitioner for a marital elective share, Appellant would have lost her access to fiduciary power.

b. Following issuance of a Temporary Restraining Order, from a Hearing in May, 2016, the Probate Court ruled that, with certain limited exceptions, "...the Personal Representative shall, until further order of this Court, refrain from any additional Estate expenses..." (R. p. 196, Lines 73-75) (R. p. 7, Lines 2 and 3) In spite of this Order, Appellant issued four separate checks, totaling almost $20,000.00 to pay for legal services she subsequently authorized from Estate funds. The Trial Court did not impose sanctions for these expenditures, but did, as part of its March 2, 2018 Order, require Appellant to return these funds to the Estate, or alternatively, treat these funds as having been beneficiary distributions to Appellant. (R. p. 56, Lines 9-13)

c. In October 2016, Appellant offered pleadings to the Trial Court, and explained

why she unilaterally cancelled mediation which the parties had prepared for, and which the Trial Court had ordered. (R. p. 1318, Lines 14-18) According to Appellant, an initial Respondent settlement proposal was so extreme, and presumably so non-negotiable, that it established how mediation would be a waste of time for all parties. (R. p. 1317, Lines 19-22)

The mediator, Appellant claims, agreed with her assessment and with Appellant's action to cancel. Appellant has offered only, however, heresay, upon heresay, in a sworn affidavit, so as to give the mediator a voice in this regard. (R. p. 1318, Lines 6-8) Respondent offers that the mediator was, due to Appellant's cancellation, silenced, as to this entire matter. The mediator would have spoken through his mediation report, had Appellant decide to participate, as Respondent had taken important steps to participate.

As for her efforts to establish what Appellant considered to be an extreme and unworkable Respondent mediation proposal, Appellant's October 2016 pleadings contained, both, a redacted copy of what Respondent had forwarded for consideration, (R. pp. 159-160, all lines) and then, presumably, quoted excerpts from the very same Respondent's confidential writing. (R. p. 1317, Lines 9-18) Appellant wished the Trial Court to see, both, that she understood and properly acted to respect confidential settlement communications, and that Appellant also was justifiably shocked by what she says had been forwarded to her, notwithstanding the confidential nature of Respondent's proposal. According to Appellant, she bore no responsibility for failures in the parties' scheduled mediation.

d. Herein described, is a report of Appellant failures with her statutory duty to assemble an appellate record, for presentation before the Circuit Court. S.C. Code Ann. Section 62-1-308 (f) (Supp. 2013). In spite of clear designation by Respondent, of what she considered relevant,

(R. p. 1709, Lines 3-17) Appellant's record assembly omitted the following:

(i) Post trial writings between Appellant and the Court, displaying two (2) months of Court delay, accommodating Appellant, associated with matters Appellant wished the Court to consider. (R. pp. 1871-1873, all lines) (Appellant has complained of delays in Respondent's post trial actions, but has taken no responsibility for her own contribution to these post trial delays.)

(ii) Repair receipts for work, at the Estate's expense, on a residence desired by Appellant to become her own. (Respondent notes that such receipts are again not attached as exhibits to discovery which Appellant assembled for the Record R. pp. 1254-1256.) These omitted receipts show that the residence was no longer in disrepair, when Appellant, in December 2015, attempted to acquire title, for a $95,000.00 price, associated with the residence's once disrepaired condition.

(iii) Letter to the Court, from Appellant's counsel, dated January 12, 2017, which included the following:

A. Appellant believes she has done nothing to warrant being removed as Personal Representative in this matter. (R. p. 1804, Lines 8-10) (Appellant's awareness of her potential removal, as an issue, is acknowledged here.)

B. The parties' conflict can be resolved through competing presentations by their respective expert appraisers, (R. p. 1801, Lines 26-28) and

C. Largely because of item (iii) B., above, likely serving to resolve all essential issues, discovery, which Respondent has pursued, should be limited. (R. p. 1801, Lines 30-31)

Ultimately, a Circuit Court Motions hearing resolved the record issues in Respondent's favor, but not before Appellant's pre-hearing pleadings described the above document omissions by Appellant as "inadvertant." Dozens of other document omissions were also resolved, where Appellant's omissions, in document assembly, was based upon other grounds.

e. As if Appellant has no regard for the stress and expense to all parties, of needless continuing litigation (and no respect for fiduciary duty which requires Appellant to be careful), following are excerpts of Appellant advocacy, before the Circuit Court on appeal:

(i) Appellant continued with criticism of the Trial Court, because of documents Appellant wished to have added to the trial record. (R. p. 1631, Lines 7-19) (R. p. 1632, Lines 1-18) Please see Argument 4., above. Appellant took no responsibility for failing to proffer records for appellate review, and no responsibility for multiple inconsistent arguments. According to Appellant, the absence of important documents, of record, was Trial Court error, (R. p. 98, Lines 8-13) and Appellant has no responsibility for the error. (On appeal to this Honorable Court, Appellant's argument, here, is now abandoned.)

(ii) Appellant cited, as error, Respondent's and the Trial Court's consideration of an old case from Tennessee. (R. p. 1060, Lines 4-13) (R. p. 98, Lines 18-23) (R. p. 99, Lines 1-2) This, Appellant did, without recognition that our very own South Carolina Court of Appeals favorably cited the case of Maydwell v. Maydwell, 135 Tenn. 1, 185 S.W. 712 (1916) as persuasive, in deciding a case of fiduciary performance, from our neighboring Georgetown County, South Carolina. Floyd v. Floyd 365 S.C. 56, S.E. 2d 465 (Ct. App. 2005).

(iii) Respondent respectfully invites this Honorable Court to examine Appellant hostility at pages 50 through 53 of the transcript of hearing, before the Circuit Court on

January 22, 2020. (R. p. 1031, Lines 19-25) (R. pp. 1032-1034, all lines) According to Respondent, and confirmed by the Circuit Court, Appellant wished to employ heresay, to make a point about Dr. Rothgeb's disrepaired residence. Not only is the record silent about Appellant's desired point, but the point itself has no continuing relevance. Our case examines how a repaired residence was addressed by Appellant's Estate distribution. Heresay, to establish how the parties wished to address a residence, in its disrepaired state, is irrelevant, when, following residence rehabilitation, all parties, and the Trial Court asked that Appellant exercise proper care.

Following the Motion hearing in May 2016, Appellant was instructed to prepare reasonable final settlement documents. (R. p. 196, Lines 42-55) As it turns out, Appellant assigned a distribution value of $118,000.00, for the repaired residence, (R. p. 1740, Lines 24-25) and then later decided not to support/defend this value, at scheduled mediation and also at trial.

f. Appellant has continued complaining about Respondent's cooperation with income tax reporting, and takes no responsibility for having forwarded a 2016 shock to the beneficiaries that she serves.

For Estate income tax reporting in 2014, no communications occurred between Appellant and Estate beneficiaries. (R. p. 40, Lines 4-7) If there was any 2014 Estate income tax reporting, no issue was ever presented for Respondent and her brothers to address. For 2015 Estate income tax reporting, however, Appellant decided upon a plan which, unlike the prior year, would result with impact on the personal income tax returns for each Estate beneficiary. Appellant claims, in spite of this resulting impact, she was never obligated to have given tax advice to Estate beneficiaries.

Whenever it was, that Appellant's team decided upon its 2015 Estate income tax reporting plan, it was not disclosed to Respondent until a mere two (2) weeks before the 2015 individual

income tax reporting deadline, of April 15, 2016. (R. p. 25, Lines 11-14) (R. p. 26, Lines 1-8) When alerted by Appellant's slim notice, Respondent informed that she had already filed her 2015 personal income tax return. She had not been previously informed by the Estate that 2015 income tax issues would be addressed differently than the no-impact 2014 income tax issues, and she considered it unfair to ask that she become required to amend her personal 2015 return. Initially, Respondent withheld her social security number, and tried to protect herself.

Respondent did not expect Appellant to give her personal tax advice, but was alarmed that, with little or no notice, Appellant expected her to cooperate in an Estate plan which could upset Respondent's own personal income tax reporting. Appellant has not considered it reasonable, that Estate actions, which would likely impact the personal income tax reporting of beneficiaries, should have been more timely disclosed.

g. Appellant continues to argue, even after the Probate Court explained, that final Orders in this matter were not influenced by Matthew Rothgeb's pre-trial affidavit, charging Appellant with lying to him. Matthew did not testify at trial, and the matter was then settled. If, early on, any impression was created by Matthew Rothgeb's affidavit, Appellant should recognize that she filed no pre-trial responsive pleading, and, therefore, she has some responsibility for initial traction which may have been created by Matthew Rothgeb's pre-trial affidavit. Ultimately, however, the Trial Court acknowledged Matthew's failure to testify in support of his pre-trial affidavit. Why, may we ask Appellant, is this still an issue on appeal?

## CONCLUSION

Appellant continues to assert that the Trial Court did not determine Dr. Rothgeb's intention for administration of his Estate. The Trial Court acknowledged Dr. Rothgeb's grant of distribution discretion to Appellant, but not at the cost of mistreating others of his loved family.

Without persuasive record of any abuse in discretion, exercised by either the Trial Judge or the Circuit Court Judge, Appellant's continuing demands should be denied. According to Judge Culbertson, Dr. Rothgeb's children should not experience additional financial suffering. (R. p. 99, Lines 19-21) Granting appellate relief to the Personal Representative will only prolong a conflict which has now continued for way too long. A ruling in her favor will provide opportunity for Appellant to continue an adventure in advocacy, which is not supported by any record of judicial wrongdoing. Appellant has had ample opportunity to explain her behavior, and she should be informed that the results of all prior inquiries are correct.

Respectfully submitted,

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