THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

RECEIVED
AUG 23 2024
SC Court of Appeals

Case No. 2022-01785

Jirair Baghdassarian, Appellant,

v.

Judy Tupolo as Power of Attorney, Respondent,

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant originally filed this case in Oconee County Probate Court to have Judy Tupolo restrained from serving or continuing to perform as the agent for Donnie Wayne Adair under a recorded power of attorney. This action was titled, "Application For Restraint or Performance of Personal Representative". (R. pp. 1-22) The Application itself states, "The request for restraint relates primarily to the health care power of attorney, and, if possible, also the financial power of attorney granted by the above mentioned Donnie Wayne Adair to the agent Judy Tupolo. See documents attached." There were two attachments: Exhibit (A) which set out the facts relating to the requested relief (abuse of power, theft, right to revoke, etc.); and Exhibit (B) which was a 17-page Durable Power of Attorney executed by Donnie Wayne Adair on July 27, 2020 and recorded on July 27, 2020 designating Judy Tupolo as his "true and lawful agent to act for me . . ." Even though two powers of attorney were mentioned on page 1 of the Application, there was only one power of attorney attached. [FN1]

By motion of the Probate Court, the case was transferred to the Oconee County Circuit Court. (R. pp. 26-27) On July 6, 2022, the undersigned attorney filed a Notice of Appearance (R. pp. 29-30), and on July 11, 2022, prior to the hearing, filed a Memorandum in Opposition on behalf of the Respondent, Judy Tupolo. (R. pp. 31-36) See also [FN2]. This document was also sent to Judge Sprouse before the hearing. This document contained a motion to dismiss the case based on lack of standing.

At the hearing on July 11, 2022, Judge Sprouse heard from Appellant on his Application to remove Judy Tupolo as agent for Mr. Adair. He also heard from the undersigned, who made a verbal motion to dismiss for lack of standing in addition to his filed Memorandum which contained a motion to dismiss. (R. p. 301, lines 7-10, 17-18) Judge Sprouse did have my Memorandum "in hand" at the hearing, and he did briefly discuss it. Appellant complained that he had not seen it before the hearing, so Judge Sprouse instructed the undersigned attorney to forward a copy of it to Appellant, and he would have ten (10) days to respond to it. Judge Sprouse took the matter under advisement and later, on August 1, 2022 issued an Order Appointing Guardian ad Litem. (R. pp. 190-192) Judge Sprouse appointed Tjay Bagwell, a local attorney to "investigate this matter and issue a written report to the Court within thirty (30) days from receipt of this order."

After the hearing, I mailed Appellant a copy of my Memorandum in Opposition. Appellant responded to this document twice by filing Replies to the Memorandum. Mr. Bagwell investigated the matter and issued a written report, which was filed on September 20, 2022. (R. pp. 203-206) The report essentially said that Mr. Adair needed constant care and supervision, and Judy Tupolo had been providing good care to him. This is also attested to in a number of affidavits filed in the case. [FN3] Appellant told the GAL that, if he was appointed over the ward, he was willing to do whatever Donnie wanted. The GAL questioned Appellant's approach to care for Mr. Adair as to whether it was practical or reasonable based on Mr. Adair's condition at the time. The GAL referred to Appellant as an outsider – Appellant admired Mr. Adair for his religious teachings and he had talked to Mr. Adair a number of times over the phone, but he resided in Nevada.

Another hearing was held on October 25, 2022 to take testimony from the GAL and consider his report. (R. pp. 307-337) Both sides were also allowed to present arguments. At the conclusion of the hearing, Judge Sprouse took the matter under advisement. On November 8, 2022 a Form 4 Order was issued by Judge Sprouse (R. pp. 45-47) stating, "Upon careful consideration of the filings by the parties, applicable law, report of the Guardian ad Litem, and arguments at the hearing, the Court finds that the Plaintiff has failed to establish grounds for the Court to dissolve the power of attorney in question and grant the relief sought. Accordingly, this action is dismissed. This order is without prejudice to either party's right to petition the Probate Court for Oconee County for a Conservatorship. It appears that this dispute centers around where the best care for Mr. Adair can be provided. This is a matter in the jurisdiction of the Probate Court. There are also allegations about church funds which are not properly before the Court. Mr. Merck is directed to prepare a formal order within fifteen (15) days, setting forth full findings of fact and applicable law."

A Proposed Order was sent to Judge Sprouse for consideration, and an Order of Dismissal was signed and e-filed by him on November 22, 2022. (R. pp. 48-51) This Order dismissed his case for lack of standing and ordered the parties to split the Guardian ad Litem fees. Plaintiff (now Appellant) then filed what the Court considered a Motion for Reconsideration, and Judge Sprouse denied this motion. (R. p. 247) Plaintiff then filed this appeal.

STANDARD OF REVIEW

On appeal from an equitable action, an appellate court may find facts in accordance with its own view of the evidence. Townes Assoc. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). While this standard permits a broad scope of review, an appellate court will not disregard the findings of the trial court, which saw and heard the witnesses and was in a better position to evaluate their credibility. Tiger, Inc. v. Fisher Agro, Inc., 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989); Buffington v. T.O.E. Enterprises, 680 S.E.2d 289, 383 S.C. 388 (S.C. 2009).

FACTS

While Don Adair was alive, he was a very influential leader and teacher for a religious organization which is called The General Association of Davidian Seventh-Day Adventists located in Tamassee, South Carolina (Oconee County). Appellant basically considered himself a student of Don Adair who studied and respected his teachings, however Appellant lives in Nevada. According to filed affidavits, Appellant is really an outsider and is in direct opposition to the local religious organization; his real purpose in taking the actions he has taken in this case is to gain control over the valuable writings and publications that are in possession of the local association. See [FN4]

Even one affidavit filed in favor of Appellant states, "The Plaintiff, Jirair Baghdassarian, is not involved with the Salem Association. He is not a member of any Davidian Association. He is an independent SDA and Davidian. He is a very active member of the Abundant Life SDA Church in Las Vegas." (R. p. 238, paragraph 11) (Third Affidavit of Catherine Kerr). Appellant offered to care for Don Adair, but he had no real plan to care for him, and he told the GAL that he would let Don decide what he wanted to do. The GAL's opinion was that Don was in such a state of mind and body that he could not make these decisions for himself, and for him to be properly cared for, someone else would have to make these decisions. (R. pp. 40-43) Judy Tupolo had been supervising him, making those decisions and taking the required actions in a good and proper manner.

Judy Tupolo did not seek out this position as Don Adair's agent, but only agreed to do so because of the deplorable conditions he was living in. [FN5] Appellant filed a number of affidavits (and other documents) and lodged a host of allegations against Judy Tupolo. The assisted nursing home facility where Don was living for awhile also suffered the repercussions of not cooperating with Appellant and others on his behalf – threats, reports to law enforcement, etc. (R. pp. 57-59 - Affidavit of Kymberly Nichols) Appellant claims Don Adair's human rights have been violated by Judy Tupolo and the Trial Court primarily because neither have been willing to accept the alleged revocation by Don Adair of the power of attorney. Further, Judy Tupolo took actions to protect Mr. Adair, and she did protect him. Appellant is asking for compensation for his alleged efforts in this matter, however this request is not only unwarranted, but Appellant did not accomplish anything that benefitted Don Adair while he was alive.

Appellant's position on certain core issues is completely contradictory. For example, Appellant argues that the ward was competent to revoke the power of attorney and did revoke it. However, Appellant argues that he was acting as the "next friend" of Mr. Adair, pursuant to Rule 17, SCRCP. This Rule allows for the appointment of a "next friend" for an incompetent person, therefore Appellant is essentially conceding that the ward was incompetent. In addition, Appellant, in his filings, argues that this matter is governed by the vulnerable adult statute and states, "Don Adair falls under the category of a vulnerable adult due to impairment in the ability to provide for his own protection because of infirmities including, but not limited to his advanced age, history of organic brain damage, physical, cognitive and emotional limitations, social isolation . . . as well as his status of being a resident in a facility." (R. pp. 74-86, especially pp. 78-79) Also, if Appellant was looking out for the best interests of Don Adair, why would he repeatedly insist that Don Adair testify despite him classifying Don Adair as a vulnerable adult? It does not appear Appellant was truly looking out for Don Adairs best interests.

ARGUMENTS

I. BECAUSE THE ACTIONS OF THE TRIAL COURT WERE COMPLETELY REASONABLE AND PROPER UNDER THE CIRCUMSTANCES OF THE CASE, THE TRIAL COURT'S ORDER SHOULD BE AFFIRMED.

Appellant initiated this action by petitioning the Oconee County Probate Court to remove Judy Tupolo as Agent under a recorded power of attorney executed by Don Adair. The matter was transferred to the Circuit Court. Issues of competency were raised, and the ward was unrepresented in the matter. The Court appointed a Guardian ad Litem (Attorney) under Rule 17, SCRCP. The Guardian ad Litem investigated the matter and presented continued concerns of the competency of the ward, however he had no concerns of the agent not caring for the ward or taking advantage of the ward's property. At the second Hearing, the Court found no basis to remove the agent and further considered Defendant's Motion to Dismiss and found Petitioner did not have standing to bring the case.

In his Initial Brief (Argument #7), Appellant makes an argument that because Don Adair had not been proven to be incapacitated, it was error for the Trial Court to not accept his

revocation of the power of attorney. However we raised the issue of the possible incapacity of Don Adair, and the Guardian ad Litem had concerns as well, basically equating his status to a five-year old and saying he needs 24-hour care and supervision. (R. p. 40, end of second paragraph). The Trial Court also found that "it appears that Mr. Adair has been well-taken care of by Judy Tupolo." He further found that, "[t]here is enough question about Mr. Adair's capacity that his alleged verbal revocation of the powers of attorney cannot be accepted at this time." This was completely proper, and the Trial Judge was in the best position to make this decision. "Absent clear abuse of discretion amounting to an error of law, the trial court's ruling will not be disturbed on appeal." Creed v. City of Columbia, 310 S.C. 342, 344, 426 S.E.2d 785, 786 (1993).

II. BECAUSE THE TRIAL COURT'S APPOINTMENT OF A GUARDIAN AD LITEM (ATTORNEY) WAS COMPLETELY PROPER, THE TRIAL COURT'S ORDER SHOULD BE AFFIRMED.

Rule 17(d)(1), SCRCP clearly states that "guardians *ad litem* may be appointed by the court in which the action is pending . . . of the county wherein the . . . incompetent person resides, or in the county in which the action is pending or is to be filed." The case law interpreting Rule 17 also makes it clear that not only is this an inherent power of the Court, but it may be done whether or not incompetency or incapacity has been proven. See Wilson v. Ball, 337 S.C. 493, 523 S.E.2d 804 (Ct. App. 1999).

As the Wilson Court stated, "the authority for a circuit court to appoint a guardian *ad litem* is inherent in the court itself. Rule 17(c), SCRCP, expressly authorizes the circuit court to appoint a guardian *ad litem* for an incapacitated person, such as a minor or incompetent, if the incapacitated person "does not have a duly appointed representative." Id. Further, "Wilson's challenge to the trial court's jurisdiction to appoint a guardian *ad litem* without a

finding of incompetency by the probate court first having been made is manifestly without merit." Id.; See also Barr v. One 1935 V-8 Ford Truck, 188 S.C. 181, 198 S.E. 389 (S.C. 1938); Thompson v. Moore, 227 S.C. 417, 88 S.E.2d 354 (S.C. 1955); Grapner v. Atlantic Land Title Co., 307 S.C. 549, 416 S.E.2d 617 (1992); see Rule 17(c), SCRCP ("The court shall appoint a guardian *ad litem* for a minor or incompetent person not otherwise represented in an action or shall make such order as it deems proper for the protection of the minor or incompetent person ...."); cf. 6A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice & Procedure § 1570, at 776 (1991) (Even though Rule 17 uses the word incompetent, "[a] court's power to appoint a guardian *ad litem* has been broadly interpreted and has not been limited by a narrow construction of the words ... `incompetent person.'").

Appellant presents an argument in his Initial Brief (Argument #10) that the issue of competency had something to do with the dismissal of the case, however this is not why the case was dismissed. The Trial Court was presented with allegations, on the one hand, that the agent was acting improperly, and on the other hand (the defense side), that the ward was possibly incapacitated or incompetent. Therefore, the Trial Court appointed the guardian *ad litem* to investigate the matter and report back to the Court. Once the investigation was completed and a new hearing was held, the Trial Court determined there was not a sufficient basis to overturn the power of attorney, and further, that Plaintiff did not have standing to bring the action, so the Court dismissed the case.

III. BECAUSE APPELLANT HAS FAILED TO PROVE STANDING, THE TRIAL COURT'S ORDER SHOULD BE AFFIRMED.

A. Standing in General

Standing (generally) refers to a "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." Black's Law Dictionary 1625 (10th ed. 2014). "Standing is . . . that concept of justiciability that is concerned with whether a particular person may raise legal arguments or claims." 1A C.J.S. Actions § 101 (2005). It concerns an individual's "sufficient interest in the outcome of the litigation to warrant consideration of [the person's] position by a court." Id.

"Standing is comprised of three elements: First, the plaintiff must have suffered an 'injury in fact' - an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual' or 'imminent', not 'conjectural' or 'hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of - the injury has to be 'fairly ... trace[able] to the challenged action of the defendant, and not ...th[e] result [of] independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 75, 753 S.E.2d 846 (2014).

"The party seeking to establish standing carries the burden of demonstrating each of the three elements." Id. "As a general rule, to have standing, a litigant must have a personal stake in the subject matter of the litigation." Id. "One must be a real party in interest,

i.e., a party who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action." Powell ex rel. Kelley v. Bank of America, 379 S.C. 437, 444-445, 665 S.E.2d 237, 241 (Ct. App. 2008).

"Standing is a fundamental requirement for instituting an action. No justiciable controversy is presented unless the plaintiff has standing to maintain the action. Once it is determined a plaintiff has no standing to prosecute, the court must dismiss the action." Brock v. Bennett, 313 S.C. 513, 443, S.E.2d 409, 412-13 (Ct. App. 1994) (emphasis added).

B. Standing Specifically Applicable to this Case

More specifically to this case, S.C. Code Ann. § 62-8-116 (Suppl. 2018) sets out who may petition a court to construe a power of attorney or review the agent's conduct, and grant appropriate relief, as follows:

"SECTION 62-8-116. Judicial relief.

(a) The following persons may petition a court to construe a power of attorney or review the agent's conduct, and grant appropriate relief:
(1) the principal or the agent;
(2) a guardian, conservator, or other fiduciary acting for the principal;
(3) a person authorized to make health care decisions for the principal;
(4) the principal's spouse, parent, or adult descendant;
(5) an individual who would qualify as a presumptive heir of the principal;
(6) a person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate;
(7) a governmental agency having regulatory authority to protect the welfare of the principal;
(8) the principal's caregiver or another person that demonstrates sufficient interest in the principal's welfare; and
(9) a person asked to accept the power of attorney." Id.

I will address each of the above sub-sections (as I did in the Memorandum filed in the matter), as follows:

(1) *the principal or the agent;*

Appellant is/was not the principal or the agent. Donnie Wayne Adair was the principal, and Judy Tupolo was the agent.

(2) *a guardian, conservator, or other fiduciary acting for the principal;*

A guardian or conservator was never appointed, and Judy Tupolo was the only fiduciary at the time.

(3) *a person authorized to make health care decisions for the principal;*

No one other than Judy Tupolo was authorized to make health care decisions for Mr. Adair.

(4) *the principal's spouse, parent, or adult descendant;*

Appellant was none of these - he is not a relative.

(5) *an individual who would qualify as a presumptive heir of the principal;*

Appellant is not a presumptive heir.

(6) *a person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate;*

Donnie Wayne Adair had no assets with a designated beneficiary, and his Will does not name Appellant as a beneficiary.

(7) *a governmental agency having regulatory authority to protect the welfare of the principal;*

Appellant is not a governmental agency.

(8) *the principal's caregiver or another person that demonstrates sufficient interest in the principal's welfare;* and

Appellant never was the principal's caregiver. Appellant simply appeared from nowhere in an attempt to gain control over the principal's life for financial, proprietary or religious reasons and not based on what is best for the principal. Appellant has never visited Mr. Adair and does not live in the area, therefore this does not constitute sufficient interest in his welfare.

(9) *a person asked to accept the power of attorney.*

Appellant has not been asked to accept the power of attorney (at least not by a competent principal).

In addition, in Appellant's Motion to Proceed *In Forma Pauperis*, he stated, "The case does not relate to me. I am doing this as an act of benevolence for Donnie Wayne Adair because he has no one, or family to advocate for him. Thank you for understanding." (Motion to Proceed *In Forma Pauperis*).

C. Appellant's Rule 17 Argument of "Next Friend"

Appellant has not really contested my characterization of his relationship to the ward, but instead, argues: (1) that the alleged revocation of the power of attorney by Don Adair was valid (which would give him standing under certain parts of the above-mentioned statute); or (2) that he is a "next friend" of the ward pursuant to Rule 17(c), SCRCP.

Appellant cannot claim that he acted as a "next friend" in the action. In order to be appointed as "next friend", you must file a petition as "next friend". This person is usually a close relative. Rule 17(c) states as follows:

> ***(c) Minor or Incompetent Persons.*** *Whenever a minor or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the minor or incompetent person. If a minor or incompetent person does not have a duly appointed representative he may sue by his next friend or by guardian ad litem. The court shall appoint a guardian ad litem for a minor or incompetent person not otherwise represented in an action or shall make such order as it deems proper for the protection of the minor or incompetent person. A person imprisoned outside this State shall appear by guardian ad litem in an action by or against him; but if imprisoned in this State, and not a minor or incompetent, the court may, in its discretion appoint a guardian ad litem or order him to be brought personally to the trial to testify in accordance with Rule 43(a).*

According to Cornell School of Law Legal Information Institute which can be found online at https://www.law.cornell.edu/wex/next_friend: "The next friend is an individual who appears in court in place of another who is not competent to do so, usually because they are a minor or are deemed incompetent. Often, the role is filled by a parent or other relative; it can be any legally-competent person whose interests do not run counter to those of the person on whose behalf they are acting . The "next friend" is not a party to the proceeding, nor are they a formally-appointed guardian. Instead, they are considered an agent of the court whose role is to protect the rights of the incompetent person." This description appears to be consistent with the discussion of "next friend" in Clark v. Crout, 34 S.C. 417, 13 S.E. 602 (1891).

Rule 17(c) relates to minors or incompetent persons. The determination of a minor can be easily determined and verified, however whether a person is incompetent has to be made by a court, and the burden of proving mental incompetence is upon the one seeking to establish it.

Rouvet v. Rouvet, 388 S.C. 301, 311, 696 S.E.2d 204, 209 (Ct. App. 2010).

In addition, one of Appellant's primary arguments is that the ward was competent to revoke the power of attorney, however the only way Appellant could take any action as "next friend" is if the ward is incompetent. This goes beyond alternative pleading because Appellant is solely relying on the argument that he brought the action as the "next friend" of the ward to defeat his lack of standing. The proper action, if Appellant believed the ward was incompetent, would have been to bring a guardianship and/or conservatorship action instead of an action to remove an agent under a power of attorney.

D. The Proper Statute to Apply to this Case

Appellant Claims that the power of attorney at-issue in this case is governed by S.C. Code Ann. § 62-5-500 (1992) instead of S.C. Code Ann. § 62-8-101 (Suppl. 2018), however this is not correct.

1. The power(s) of attorney herein was/were executed and recorded in 2020.

The South Carolina Court of Appeals put in a footnote to a 2019 case as follows: *The General Assembly replaced section 62-5-501 with South Carolina's Uniform Power of Attorney Act (the Act), which became effective January 1, 2017. See S.C. Code Ann. § 62-8-101 through -403 (Supp. 2018). Although section 62-8-109(c) of the Act also requires durable powers of attorney to be recorded, section 62-8-403(c) of the Act states, "[T]he applicable law in effect before the effective date of this act applies to a power of attorney created or restated before the effective date of this act." Both of the powers of attorney at issue in this case were executed before January 1, 2017; therefore, we apply the previous version of the statute in effect at the time of the execution of the powers of attorney.* Stott v. White Oak Manor, Inc., 426 S.C. 568,

828 S.E.2d 82 (S.C. App. 2019) (footnote 4) (italicized to separate out from the facts of the present case).

There is a power of attorney that was attached to Appellant's original pleadings that was executed on July 27, 2020 and recorded on July 27, 2020. There is also a reference to a health care power of attorney executed on the same date, however it does not appear that this document was attached to the original pleadings or subsequently filed in the case.

Therefore, S.C. Code Ann. § 62-8-101 through -403 (Supp. 2018) is applicable to this case since any power of attorney involved in this case was executed and recorded after the effective date of this statute. S.C. Code Ann. § 62-5-500 is not applicable to this case since it would only apply to any power of attorney executed before the effective date of S.C. Code Ann. § 62-8-101 through -403 (Supp. 2018). See also [FN6]

2. Appellant failed to attach a health care power of attorney to his original pleadings.

The document that Appellant attached to his original Application was not a health care power of attorney, and it is not governed by S.C. Code Ann. § 62-5-500 (1992).

In Appellant's original Application for Restraint or Performance of Personal Representative, Appellant stated, "The request for restraint relates primarily to the health care power of attorney, and, if possible, also the financial power of attorney" (Application pg. 1) It then stated "See documents attached". Id. He attached a document, as Exhibit B to the Application, entitled, "Durable Power of Attorney", which was 17 pages long. Id. This document is a legal/financial power of attorney instead of a health care power of attorney.

The only healthcare provisions in the document relate to making payment arrangements for medical bills. (R. p. 17 #(5), (6) & (10). He did not attach a health care power of attorney because as he has stated a number of times in his documents, he has never seen it.

IV. BECAUSE THE TRIAL COURT'S REQUIREMENT THAT THE PARTIES SPLIT THE FEES FOR THE GUARDIAN AD LITEM (ATTORNEY) WAS COMPLETELY PROPER, THE TRIAL COURT'S ORDER SHOULD BE AFFIRMED.

"An award of guardian ad litem fees lies within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion." Nash v. Byrd, 298 S.C. 530, 381 S.E.2d 913 (S.C. App. 1989) (referencing Garris v. McDuffie, 288 S.C. 637, 344 S.E.2d 186 (Ct.App.1986)). See also Hollar v. Hollar, 536 S.E.2d 883, 342 S.C. 463 (S.C. App. 2000): "Because we feel both parties share the blame for the guardian's time and effort expended in this case, we decline to alter the family court's fifty-fifty allocation of the burden of paying the guardian's fee." Id.

In the present case, the guardian *ad litem* had to be appointed because of both parties' allegations, as previously mentioned, so each party should equally bear the burden of the fees. Judy Tupolo promptly paid her share and has not contested the Court's 50/50 allocation (even though the bulk of the allegations came from the Appellant).

In his Initial Brief (Argument #9), Appellant argues that Rule 41 of the Family Court Rules should apply to this case, and the award of Guardian ad Litem fees should be limited to $50.00 as set out in this Rule. First of all, the Family Court Rules do not apply to this case. This case was initiated in the Probate Court and transferred to the Circuit Court (Court of Common Pleas). Secondly, this specific Family Court Rule (Rule 41) applies to Abuse and Neglect cases. Other Family Court cases allow for the splitting of Guardian ad Litem fees,

sometimes on an equal basis, and other times, based on the income and assets of the parties. There is no "cap" on the fees as long as they are determined to be reasonable, according to an evaluation by the Family Court.

V. BECAUSE THIS CASE IS AN ACTION IN EQUITY FOR A SPECIFIC REMEDY AND NOT AN ACTION AT LAW, APPELLANT'S REQUEST FOR COMPENSATION SHOULD BE DENIED.

In civil cases in South Carolina, there is a clear line between actions at law and actions in equity. While a plaintiff pursuing a legal claim asks the court to award damages, a plaintiff bringing an equitable claim asks the court to either prompt or stop a particular action or event. See e.g. Van Robinson Ins. Agency, Inc. v. Harleysville Mut. Ins. Co., 272 S.C. 127, 249 S.E.2d 744 (1978). In the present case, Appellant initiated this action to restrain or remove the agent under a power of attorney. His pleadings are the standard pleadings for this type of matter, and there is no reference to any claim for damages. The action herein is similar to an injunction because the action was initiated in order to restrain or remove the agent from acting under the power of attorney.

Appellant is seeking compensation for the actions he has taken in this matter, however the facts do not warrant any such compensation. As a final note, what did the Appellant really accomplish for Don Adair? Mr. Adair was in a good situation as far as being cared for, and he remained in a good condition afterwards. The Trial Judge considered the relief requested by Appellant but he decided that he would not upset the stable environment enjoyed by the ward. If anything, Appellant really just added to his stress level while he was alive by the actions he took; he subpoenaed the ward to personally appear at a hearing. (R. p. 290, lines 4-10).

These are actions that should not be rewarded by our courts. See also Argument VII herein-below about the effectiveness of Appellant's actions in this matter.

VI. BECAUSE THERE IS NO EVIDENCE THAT DON ADAIR'S HUMAN RIGHTS WERE VIOLATED, THE TRIAL COURT'S ORDER SHOULD BE AFFIRMED.

In his Initial Brief and in a number of other documents he filed in the matter, Appellant argues that Don Adair's human rights were violated by Judy Tupolo and the Trial Court. Appellant's primary argument is that because Mr. Adair was competent and should be able to revoke his power of attorney, a failure of Judy Tupolo and the Trial Court to allow him to do this was a violation of his human rights.

It is undisputed that we all enjoy basic human rights, but we also have to balance human preservation and safety along with those human rights. Judy Tupolo was Mr. Adair's agent under a power of attorney, so she had a duty to care for him and do what was best for him, and according to the evidence, she did so. The appointed guardian *ad litem* in this case compared Mr. Adair to a 5-year old. (R. p. 40, end of second paragraph). A 5-year old has parents and even teachers that look out for him/her, and in Don Adair's case, he had Judy Tupolo looking out for him. The actions by Judy Tupolo served Don Adair well until his recent departure from this life. [FN7]

Appellant claims Judy Tupolo broke a number of criminal laws in this matter, such as kidnapping, etc. This is not a criminal case but a civil case. Appellant has involved the police in this matter a number of times, and the police have investigated a number of claims made by him against Judy Tupolo, as well as the nursing home he was living at for awhile.

(See Affidavit of Kymberly Nichols) (R. pp. 57-59). We are not aware of any criminal charges that have been brought. The State is the plaintiff in a criminal case, and, a criminal defendant is presumed innocent until proven guilty in a court of law. Judy Tupolo has not been charged with or convicted of any crime in regard to the care of Don Adair, so these claims by Appellant are baseless and should not be considered.

VII. BECAUSE EVEN IF DON ADAIR HAD BEEN COMPETENT, APELLANT'S ATTEMPT TO REVOKE THE POWER OF ATTORNEY WAS INEFFECTIVE.

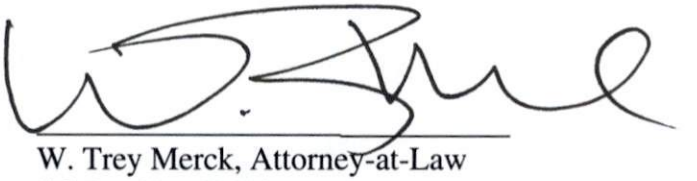
This is simply a final thought that really sounds to the ineffectiveness of the actions of Appellant herein. As set out herein-above in Argument III(D)(1) and in [FN6] below, S.C. Code Ann. § 62-8-101 through -403 (Supp. 2018) is applicable to this case and governs the recorded power of attorney in this case. S.C. Code Ann. § 62-8-110 specifies the manner in which a power of attorney that is governed by this Act can be revoked. Essentially the same formalities must be utilized and if the power of attorney is recorded, the revocation must also be recorded. See S.C. Code Ann. § 62-8-110(g) and § 62-8-105.

Appellant relied on a verbal revocation of a power of attorney to be effective, however it was not effective. There is also some mention by Appellant of a writing by Don Adair revoking the power of attorney, but if this document was only executed by Don Adair, it would not be an effective revocation or be in recordable form.

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the circuit court.

Respectfully submitted,



August 22, 2024

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FN1: It is clear that Appellant never had a copy of a health care power of attorney even though he filed this action on the basis of this document, and secondarily, on the basis of the recorded durable power of attorney that he attached to his Application. There does exist a health care power of attorney dated the same date as the recorded power of attorney, however it is clear from various documents filed by Appellant that he has not seen this document. Despite this, Appellant still analyzes which statute regulates this document that he has never seen. In addition, the health care power of attorney is not properly before the Court as it has never been admitted into evidence.

FN2: The document was e-filed before the hearing, however it appears that the Clerk of Court marked it as e-filed on the day after the hearing.

FN3: Affidavit of LaDell T. Garza (R. p.60) "They come to church each week … and he is clean, neatly dressed and appears to be well fed." Affidavit of Louis Hall, Jr. "Sister Tupolo has worked continually to make sure Don Adair has adequate housing, clean, well-fitting clothes, and a home-cooked meal seven days a week." Affidavit of Elissa Peters "She (Judy Tupolo) has taken him to the dentist, eye and doctors appointments, etc. . . . "Judy is a very generous, kind and caring person. I've witnessed her giving him great professional care. Don is really blessed to have her as his caretaker."

FN4: Affidavit of Rawle Watkins, Jr, ND (R. p. 61), Affidavit of Judy Tupolo (R. p. 65, last paragraph through beginning of p. 66); Affidavit of Louis Hall, Jr.

FN5: **Judy agreeing to serve:** "I contacted Judy since she was a friend of the Adair's [sic] for many years." (Affidavit of Elissa Peters, pg. 1, end of 4th paragraph; pg. 2, 1st full paragraph); "Judy and Don stayed with me a few months until she was able to get a place." **Deplorable conditions of Don's living situation prior to Judy stepping in:** (Affidavit of Elissa Peters, pg. 1, 4th paragraph; pg.2 last paragraph)

FN6: Even though the power of attorney attached to Appellant's Application was clearly executed and recorded in 2020, there are other reasons why this power of attorney is not governed by S..C. Code Ann. § 62-5-500 et seq, as follows:

(1) The power of attorney clearly references that it is governed by various subsections of S.C. Code Ann. § 62-8-101 et seq on 12 pages of the 17-page document, and it never states it is governed by S.C. Code Ann. § 62-5-500 et seq, or any of its sub-sections.

(2) It is not a health care power of attorney "substantially in the form set forth in S.C. Code Ann. § 62-5-504" (as required by S.C. Code Ann. § 62-5-503). S.C. Code Ann. § 62-5-502 makes it clear that if the health care power of attorney is not substantially in this form, the section does not apply to it.

(3) It is not a health care power of attorney, and S.C. Code Ann. § 62-5-500 et seq states it governs health care powers of attorney. The only paragraphs in it that relate to healthcare involve paying for healthcare.

FN7: Donnie Wayne Adair a/k/a Don Wayne Adair died on July 19, 2023.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Case No. 2022-01785

Jirair Baghdassarian, Appellant,

v.

Judy Tupolo as Power of Attorney, Respondent,

CERTIFICATE OF COUNSEL

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

August 22, 2024

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