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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM YORK COUNTY COURT OF COMMON PLEAS  
Hon. William A. McKinnon, Circuit Court Judge

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Appellate Case No. 2025-002217  
Lower Court Case No. 2024-CP-46-02169

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In the Matter of: T.J. Martin

Virginia M. Morris, individually and in her capacity as Personal Representative of the Estate of T.J. Martin, Respondent,

v.

Pamela Ligato, as Guardian/Conservator for N.M.Y. a/k/a N.Y.M., a protected person, Appellant.

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**INITIAL BRIEF OF RESPONDENT**

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## ARGUMENT

### **I. Conservator Lacked Authority to Exercise the Right of Election Without a Court Order**

The orders appointing the conservator and guardian did not include authority to exercise the elective share right. The probate court's order authorized the conservator/guardian to "prosecute or defend actions, claims, or proceedings in any jurisdiction for the protection of estate assets and of the conservator in the performance of his duties,"; language mirroring S.C. Code Ann. § 62-5-422 which sets out the powers of conservators. The guardianship order quoted S.C. Code Ann. § 62-5-304A(B)(11) which states that a guardian may "bring or defend any action at law or equity." However, the authority to exercise a spousal elective share is not included within those enumerated powers.

Sections 62-5-422 and 62-5-304A outline those actions a conservator or guardian may take without a specific court order, and neither statute references the elective share. Section 62-2-203 specifically requires a court order to exercise the right of election on behalf of a protected person:

"In the case of a protected person, the right of election may be exercised only by order of the court in which protective proceedings as to his property are pending."

This statutory requirement is clear and unambiguous.

It is undisputed that N.M.Y. aka N.Y.M. was a protected person as of September 19, 2023, when the elective share action was filed, and equally undisputed that no court order authorized the action. Therefore, under the plain language of S.C. Code Ann. § 62-2-203, the filing was unauthorized.

### **II. Statutory Scheme Confirms Court Approval Is Required for a Protected Person's Election**

The Appellant contends that in order to read the statutes in harmony, S.C. Code Ann. §§ 62-3-304A and 62-5-422 would allow the bringing of a right of election. Actually, the

only way to read the statute in harmony is to interpret S.C. Code Ann. §§ 62-3-304A and 62-5-422 as not authorizing a right to election. Sections 62-3-304A and 62-5-522 lists items a conservator or guardian can do without a court order. Section 62-2-203 requires a court order before exercising a right of election. If S.C. Code Ann. §§ 62-3-304A and 62-5-422 already give authority to conservators and guardians to act without court order to exercise the right of election then S.C. Code Ann. § 62-2-203 would be a redundant statute. However, if there is a conflict between the statutes, S.C. Code Ann. § 62-2-203 would control since it is a specific statute dealing with the right of election while the other statutes are general statutes. When a general statute and a specific statute conflict the specific statute controls. (*Wilder v. South Carolina Highway Department*, 228 S.C. 448, 90 S.E.2d 635, 638 (1955))

### **III. Practice in Other Jurisdictions Supports Respondent's Position**

Although not directly on point as the issue raised in this case, the practice in states with similar statutes to this state is for a specific court order to be obtained for the exercise of a right of election.

In *Heartland v. Kaiser-Asmus*, 295 Neb 532, 891 N.W. 2d 84 (2017), the Nebraska court dealt with a statute which states “In the case of a protected person, the right of election may be exercised only by order of the court in which protective proceedings as to his property are pending.” *Neb. Rev. Stat. 30-2315 (Reissue 2016) Neb. Rev. Stat. 30-2653 (c) (24)* provides that a conservator “may act without court order or authorization or confirmation to.... Prosecute or defend actions, claims or proceedings in any jurisdiction for the protection of estate assets and of the conservator in the performance of his duties.” This is the identical language of the South Carolina statute. In *Heartland*, the conservator was appointed on July 23, 2014. The conservator filed a request for the Court to allow him to exercise the right of election on April 24, 2015. The issue in *Heartland* is not the same as the

present case, but it is clear from *Heartland* that the conservator was required to seek permission of the court to exercise the right of election despite the language of 30-2653(c)(24) which allows a conservator to prosecute claims without court order or authorization.

The Minnesota statute has the identical language of S.C. Code Ann. §§62-2-203 and *Neb. Rev. Stat. 30-2315*. Minnesota statute 524.5-417(c)(3) give conservators the duty to “collect all debts and claims in favor of the person subject to conservatorship” and to “institute suit on behalf of the person subject to conservatorship.” In *Re Guardianship of Durand*, 845 N.W. 2d 821 (Minn. 2014) the conservator was appointed in October 2010. On November 12, 2010, the conservator filed a petition for court authorization to file for an elective share. Although *Heartland* and *Durand* address different issues than those raised in the present case, it is clear from those cases that in states where the statutes are similar to the South Carolina statute, there is a requirement to obtain a court order before a conservator may exercise the right to an elective share. While S.C. Code Ann. § 62-2-203 does not give the court guidance on factors to consider in whether to grant the elective share as does the Nebraska and Minnesota statutes, the important factor is that a court order is required.

#### **IV. Conclusion**

Because South Carolina Code S.C. Code Ann. § 62-2-203 expressly requires a court order before exercising a right of election for a protected person, and because the conservator failed to obtain such an order, the Circuit Court correctly reinstated the statutory safeguard. Appellant’s interpretation would render S.C. Code Ann. § 62-2-203 meaningless, contrary to established canons of statutory construction and persuasive precedent.

For these reasons, the Circuit Court’s decision should be affirmed.

{Signature Page to Follow}

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