THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Daniel B. Dorn, in his capacity as the Parent and Natural Guardian of E.D., R.D., and Y.D., Appellant

v.

Paul S. Cohen and Susan Cohen, Individually and in their capacity as the Co-Conservators of the person of Abbie Ilene Dorn, a protected person and ward, and in their capacity as Co-Trustees of the Abbie Dorn Special Needs Trust, Respondents

Paul S. Cohen, M.D. and Susan Cohen, Respondents,

v.

E.D., R.D., and Y.D., the Living Issue of Abbie Ilene Dorn, and the South Carolina Department of Health and Human Services, Respondents below,

Of Whom E.D., R.D., and Y.D., the Living Issue of Abbie Ilene Dorn are the Appellants,

and

The South Carolina Department of Health and Human Services is a Respondent.

In Re: The Abbie Dorn Special Needs Trust

Appellate Case No.: 2015-000659

The Honorable Deadra L. Jefferson
Horry County
Trial Court Case Nos.: 2013CP2608152, 2013CP2608139, 2014CP2601691, 2014CP2601744

FINAL BRIEF OF GUARDIAN AD LITEM AND ATTORNEY FOR ABBIE ILENE DORN

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STATEMENT OF THE CASE

This appeal arises from consolidated actions filed in the Horry County Probate Court regarding the Abbie Dorn Special Needs Trust (hereinafter, the "Trust"). The first Petition was brought by Appellant Daniel Dorn (hereinafter, "Mr. Dorn") requesting removal of the Co-Conservators and Co-Trustees of the Trust. (Dorn Summons and Petition, R. p. 50). The day after Mr. Dorn's petition was filed, Respondents Paul S. Cohen, M.D. and Susan Cohen (hereinafter, "Mr. Cohen" or "Mrs. Cohen" individually, or "the Cohens," collectively), who are Co-Conservators for Abbie Ilene Dorn (hereinafter, "Mrs. Dorn") and Co-Trustees of the Trust filed a petition requesting reformation of the Trust to allow them to expend funds from the Abbie Ilene Dorn Special Needs Trust in litigation. (Cohen Summons and Petition, R. p. 95). On February 21, 2011, the Probate Court issued orders under both cases which appointed V. Lee Moore as Guardian ad Litem for Abbie Ilene Dorn (Order Appointing V. Lee Moore, R. p. 28), appointed Lynette Rogers Hedgepath as attorney for Mrs. Dorn (Order

Appointing Attorney, R. p. 29), and appointed John Kachmarsky as attorney and Guardian ad Litem for the minor children (Order Appointing Attorney and Guardian ad Litem, R. p. 30).

A trial was commenced in Probate Court on February 25, 2013, and was recessed on March 7, 2013. During this recess and as a result of discussions that occurred at the trial, on December 5, 2013, the Probate Court issued an order sua sponte joining Abbie Ilene Dorn as a party to both cases. (Order Naming Abbie Ilene Dorn as Party to Action, R. p. 38). Mr. Dorn and Appellant Attorney Kachmarsky, as Guardian *ad Litem* for the minor children (hereinafter, "Appellant Children") filed Notice of Appeal to the Horry County Court of Common Pleas (Notice of Appeal to Horry County Court of Common Pleas), with such appeals being consolidated by the Circuit Court. (Order Consolidating Appeals). The Cohens then filed a Motion to Stay the appeal based on the unavailability of the presiding judge due to the loss of her bid for reelection (Motion to Stay, R. p. 358), and a Motion for Mistrial based on the Probate Court judge not being reelected (Motion for Mistrial, R. p. 346). On February 9, 2015, a hearing was held on the Cohen's Motion to Stay the appeal. At that hearing, the circuit judge dismissed the appeal as interlocutory (Order Dismissing Appeal, R. p. 43). Appellants appeal from that order.

FACTS

Mr. Dorn and Mrs. Dorn were married in 2002 in California. (Testimony of Susan Cohen, Tr. Transcript p. 467, l. 22, R. p. 686). After substantial difficulty in conceiving children, the couple found out in 2005 that they were expecting triplets. Testimony of Daniel Dorn, Tr. Transcript p. 1843, l. 9 – 1844, l. 4, R. p. 1032). During the birth of their triplets in 2006, Mrs. Dorn suffered catastrophic injuries which have left her permanently paralyzed and unable to speak. A medical malpractice claim was filed on Mrs. Dorn's behalf, which

was ultimately settled, and the proceeds of that action funded the Abbie Dorn Special Needs Trust.

Mr. Dorn practices the Orthodox Jewish faith, which denies him the ability to institute an action for divorce. For this reason, after Mrs. Dorn's injuries, Mr. Dorn requested that the Cohens institute such action, which they did. (Testimony of Daniel Dorn, Tr. Transcript, p. 1901 l. 17 – 1902, l. 21, R. p. 1046-1047). Surprisingly, once initiated, Mr. Dorn contested the action, requesting the payment of child support from the Trust (which would have disqualified Mrs. Dorn from Medicaid eligibility) and that the Court deny visitation with the minor children to Mrs. Dorn. (Testimony of Susan Cohen, Tr. Transcript, p. 182, ll. 8-12, R. p. 615). The Cohens used funds from the Trust to defend this litigation, which was ultimately concluded with an Order allowing visitation between Mrs. Dorn and the minor children and denying child support. The litigation was protracted and costly, with both parties spending close to $1,000,000.00 each on attorney's fees and costs.

In 2008, the Cohens, who are Mrs. Dorn's parents, moved her to Horry County, South Carolina, where she continues to live with them. She undergoes extensive therapy and is living far beyond what her doctors originally predicted. It is not clear to what extent she is cognizant of her surroundings, although there are indications that she is aware of what is going on around her, and she is able to communicate nonverbally through blinking her eyes.

In 2011, Mr. Dorn filed a petition in the Probate Court for Horry County, seeking to remove the Cohens as trustees of the Trust and requested monetary reimbursement to the Trust for the divorce-related legal expenses. (Dorn Summons and Petition, R. p. 50). The next day, the Cohens filed a separate petition against Mr. Dorn and the Appellant Children seeking to amend the terms of the Trust to allow the Cohens to incur legal fees without

advance court approval. (Cohen Summons and Petition, R. p. 95). While Mrs. Dorn was not named as a party in Mr. Dorn's action, she was named as a party in the Cohens' action.

Given the number of common issues, the Probate Court consolidated the two actions. Neither Mrs. Dorn nor her attorney or Guardian ad Litem have ever been served with the Petition filed by Appellant in this matter; however, counsel for Mrs. Dorn was served with the Cohen Petition, and filed an Answer related to same. (Answer of Abbie Ilene Dorn, R. p. 283). This Answer was served on all parties, including the Appellants (Certificate of Service filed May 5, 2011, R.p. 286-287). Additionally, no discovery requests were ever served on Mrs. Dorn's attorney or Guardian ad Litem. Prior to the trial, Mrs. Dorn's attorney and Guardian ad Litem participated in the numerous depositions that were taken, and during the trial, Mrs. Dorn's attorney and Guardian ad Litem participated fully in the presentation of evidence. The Probate Court allowed the attorney and Guardian ad Litem for Mrs. Dorn to make opening and closing statements and to cross examine witnesses. None of this participation was met with objection from the Appellant.

As the case progressed, there were delays in the presentation of evidence due to medical emergencies and illness of the attorneys. While the matter was scheduled for two weeks of trial, only six days of testimony were actually held. The Court indicated a belief that the action would not be resolved prior to the end of the scheduled time and that the hearing would have to be recessed and reconvened at a later time based on the court's schedule. On the morning of the sixth day of trial, which was the last day scheduled for the hearing on the court's docket, counsel for Appellant argued for the first time that the Attorney and Guardian ad Litem for Mrs. Dorn should not be allowed to call witnesses as Mrs. Dorn was not a named party in the action. In December of 2014, the Probate Court

issued an order sua sponte naming Abbie Ilene Dorn as a party. (Order Adding Abbie Ilene Dorn as a Named Party, R. p. 38). Mr. Dorn appealed that Order to the Circuit Court, where his appeal was dismissed as interlocutory. (Order Dismissing Appeal, R. p. 43-49). It is from this Order that he appeals.

Arguments

I. AS AN INTERESTED PARTY, ABBIE ILENE DORN WAS ENTITLED TO PARTICIPATE FULLY IN THE DISCOVERY AND TRIAL PROCESS, MAKING THE ORDER NAMING HER AS A PARTY TO THE ACTION UNNECESSARY.

Appellant argues that the Order Naming Abbie Ilene Dorn as a party affected a substantial right resulting in undue prejudice because the trial in regards to his claims to remove the Co-Trustees of the Trust was completed. Initially, it is clear that even by Appellant's own admission in Appellant's brief, the case was not concluded because the Attorney and Guardian ad Litem for the minor children still had witnesses and evidence to present. (Appellants Brief, R. pp. 396, l. 26 – p. 397, l. 2). There is simply no evidence of a substantial right being affected causing undue prejudice to the Appellant. The result in this matter would be exactly the same regardless of whether the ward was specifically named as a party because she is already an interested party. See S.C.Code Ann § 62-7-103(22) ("'Interested party' means any person or party deemed to be a necessary or proper party under Rule 19 of the South Carolina Rules of Civil Procedure.")

This case is analogous to the appointment of a Guardian ad Litem to protect the interest of minor children in a Family Court case. In these matters, the children are not named as parties in the action; however, the Guardian ad Litem has the right to call witnesses and present evidence to the Court in order to protect the interests of the children. Any rule

otherwise would result in the Guardians ad Litem serving solely at the whim of counsel for the parties, unable to call witnesses that were necessary to the presentation of the best interests of wards, protected persons, and children unless counsel for other parties determined their testimony helpful.

Appellant argues that there is no harm to Mrs. Dorn as an interested party in not being able to present witnesses and testimony as she is represented in this matter by the Cohens; however, this argument is illogical in the face of Appellant's argument that the Cohens be removed as Co-Trustees and Conservators for Mrs. Dorn because they do not adequately represent her interests. Additionally, Appellant gives no indication of why the Attorney/Guardian ad Litem for the minor children would be allowed to call witnesses and present evidence; however, the Attorney and Guardian ad Litem for Mrs. Dorn would not be able to do so.

II. THE OBJECTION TO ABBIE ILENE DORN PARTICIPATING AS A PARTY IN THE TRIAL WAS NOT TIMELY MADE, AND IS THEREFORE WAIVED.

Objections must be timely made in order to preserve the objection. See State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011); Rule 103(a)(1), SCRE (requiring a "timely objection"). Appellants objection to counsel and Guardian ad Litem for Mrs. Dorn being able to participate in the case in the same way as a party was not timely made. Attorneys Hedgepath and Moore attended and participated in depositions, participated fully in trial, and participated in the cross-examination of witnesses. To wait until the Petitioner's case was nearing conclusion to make such an objection was not timely, and such objection is therefore waived.

III. THE ORDER ADDING ABBIE ILENE DORN AS A NAMED PARTY IS INTERLOCUTORY AND IS, THEREFORE, NOT IMMEDIATELY APPEALABLE.

Despite the fact that the result would have been identical whether Mrs. Dorn was a named party or an unnamed but interested party, the Order adding Mrs. Dorn as a named party is interlocutory as it does not involve the merits of the action, and as such is not appealable. In relevant part, "a final order, sentence, or decree of a probate court may [be] appeal[ed] to the circuit court," S.C.Code Ann. § 62-1-308(a), and the Court of Appeals "has jurisdiction over any case in which an appeal is taken from an order, judgment, or decree of the circuit court," Id. at § 14-8-200(a).

Notably, however, "[a]s a general rule, only final judgments are appealable. Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final." Ex parte Wilson, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005) (citations omitted); e.g., Davis v. La-Z-Boy Chair Co., 287 S.C. 121, 121, 337 S.E.2d 238, 238 (1985) ("[A] Circuit Court order remanding a workers' compensation case for the taking of additional testimony does not involve the merits of the action and is therefore interlocutory and not reviewable for lack of finality."). The testimony has not concluded in this matter, thus leaving some further act to be done by the court before the rights of the parties could be determined.

While some limited interlocutory orders are appealable, this order does not qualify as an immediately appealable interlocutory order. The Supreme Court of South Carolina recently addressed the question of what constitutes an appealable interlocutory order.

> The determination of whether a trial court's order is immediately appealable is governed by statute. Hagood v. Sommerville, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005); see S.C.Code Ann. § 14-3-330 (1976 &

Supp. 2014). Pursuant to Section 14-3-330, appellate courts have jurisdiction to immediately review:

> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
>
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
>
> (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
>
> (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. Code Ann. § 14-3-330. The provisions of section 14-3-330 have been construed by this Court to serve the underlying policy favoring judicial economy by avoiding "piecemeal appeals." Hagood, 362 S.C. at 196, 607 S.E.2d at 709. By its nature, the question of whether an order is immediately appealable is determined on a case-by-case basis.

Morrow v. Fundamental Long-Term Care Holdings, LLC, 412 S.C. 534, 537-38, 773 S.E.2d 144, 145-46 (2015).

In Morrow, the circuit court granted the corporate defendants' motion to bifurcate the plaintiff's direct negligence claim from the vicarious negligence claim. See id. at 536, 773

S.E.2d at 145. The plaintiffs appealed and the defendants argued that the bifurcation order was not immediately appealable. See id. In relevant part, the Supreme Ccourt held that

> the trial court's order fits neatly within the statutory provision allowing immediate appeals where a substantial right is implicated. S.C. Code Ann. § 14-3-330(2)(a). The effect of this order is to prevent the Morrows from being architects of their own complaint, and deprives them of bringing their case against the defendant of their own choosing. *See* Neeltec Enters., Inc., v. Long, 397 S.C. 563, 566, 725 S.E.2d 926, 928 (2012) ("The right of the plaintiff to choose her defendant is a substantial right within the meaning of [section 14-3-330(2)(a)]").

Id.

In the instant case, Mr. Dorn seeks to analogize his case to that in Morrow so that his case likewise falls within the parameters of section 14-3-330(2)(a). (Appellant's Brief, p. 11). But as both Mr. Dorn and Morrow have noted, the question is extremely fact dependent and, thus, "determined on a case-by-case basis." Id. (citing *Morrow*, 412 S.C. 534, 773 S.E.2d 144). As such, Morrow is clearly distinguishable from the instant case.

Adding Mrs. Dorn as a party defendant in no way prejudices the Appellant because Mrs. Dorn was an unquestionably interested party to the litigation. Adding her as a named party does not terminate the action or prevent an appeal as required by section 14-3-330(2)(a). In his brief, Appellant asserts that had Mrs. Dorn not been added as a party, "the presentation of the evidence . . . would have been completed and the case would have been ready for decision." (Appellant's Brief pp. 11-12). However, he also admits that the "Attorney for the Dorn children intended to call a couple of witnesses [, but], it was only the presentation of that testimony which remained in order to complete trial." (Appellant's Brief pp. 8, 11). Even assuming that to be true, however, that scenario does not affirmatively have any effect on or truncate the litigation. Mrs. Dorn's interest as a beneficiary of the Trust at

issue in the litigation makes her a party necessary for the adjudication of the case. In fact, at the commencement of the trial, the court stated that it was unlikely that a ruling would be made after the presentation of Appellant's case. (See Trial Transcript, p.11, ll. 6-12, R. p. 572).

The question of whether an order adding parties to litigation is interlocutory for purposes of appeal has not been addressed by South Carolina courts. "When there is no case on point in South Carolina, our courts may look to other states to determine if the issue has been decided and if the decision is persuasive authority." Bass v. Isochem, 365 S.C. 454, 478, 617 S.E.2d 369, 381 (2005).

Several other jurisdictions have directly addressed this issue and held that the ruling on a motion to add parties is interlocutory and, thus, not subject to immediate appeal. See Foust v. Se. Pa. Transp. Auth., 756 A.2d 112, 116 (Pa. Commw. Ct. 2000) (noting "that an order granting a motion to amend a pleading [to add new parties] is interlocutory and appealable only by permission"); Bridges v. Dep't of Md. State Police, 441 F.3d 197, 206 (4th Cir. 2006) ("A denial of a motion to amend a complaint [to add new parties] is not a final order, nor is it an appealable interlocutory or collateral order."); Melancon v. Texaco, Inc., 659 F.2d 551, 553 (5th Cir. 1981) ("Orders granting or denying motions to add new parties to a pending suit are interlocutory and non-appealable."); Elec. Mobility Corp. v. Bourns Sensors/Controls, Inc., 87 F. Supp. 2d 394, 398-99 (D.N.J. 2000) (trial court would not certify for interlocutory appellate review denial of request to amend complaint to add new plaintiff).

IV. THE ORDER ADDING ABBIE ILENE DORN AS A NAMED PARTY DID NOT UNDULY PREJUDICE APPELANT'S SUBSTANTIAL RIGHT TO NAME HIS OWN DEFENDANTS AND TO CONTROL THE PRESENTATION OF EVIDENCE DURING TRIAL WITHIN THE PARAMETERS OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE.

Mrs. Dorn, as beneficiary of the Trust is a necessary party under Rule 19, SCRCP. See also S.C. Code Ann. § 62-5-405(a) (Supp. 2014) (service of Summons and Petition for protective order must be served on the person to be protected). Any action relating to the Trust or removal of the Co-Conservators necessarily requires the determination of rights of interested parties, which is the reason for the appointment of an Attorney and Guardian ad Litem. If the Court were to hold that the Attorney and Guardian ad Litem had no right to participate in the trial of this matter, the Court would in effect stop the ability of any necessary party to present a case to protect their interest in litigation. The right of Appellant to choose his own Defendant simply cannot be a right so absolute as to operate to the exclusion of an interested party.

In relevant part, Rule 19, SCRCP, states as follows:

> A person . . . shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

Rule 19(a), SCRCP.

"This Court has interpreted Rule 19, SCRCP to require that a party be a necessary party to be joined in an action pursuant to the rule. A necessary party is one whose rights must be ascertained and settled before the rights of the parties to the action can be determined." Ex parte Gov't Employee's Ins. Co., 373 S.C. 132, 136, 644 S.E.2d 699, 701 (2007) (internal quotation marks omitted). With respect to a trust, "[a]nyone legally or beneficially interested in the subject matter of a suit to establish or enforce a trust, and whose interests would be affected by a decree regarding the trust, is a necessary party." 90A C.J.S. Trusts § 801 (Westlaw database updated June 2015).[1]

Undisputedly, Mrs. Dorn has an interest in the Trust at issue here; indeed, the Trust was set up solely because of her physical and mental incapacities. Therefore, it cannot be legitimately disputed that Mrs. Dorn is a necessary party to the instant litigation wherein Appellant seeks to remove and replace the trustees thereof and further seeks reimbursement to the Trust. See Hasselmann v. Barnes, 700 S.E.2d 69, 70 (N.C. Ct. App. 2010) ("When dealing with a trust, the general rule in suits, respecting the trust property, brought either by or against the trustees, the . . . beneficiaries as well as the trustees also, are necessary parties." (internal quotation marks omitted)); Sunbelt Envtl. Servs. v. Rieder's Jiffy Mkt., Inc., 138 S.W.3d 130, 134 (Mo. Ct. App. 2004) ("[I]f a suit is brought that involves the trust property, it is the general rule that all trustees and beneficiaries are considered necessary parties."); Stevens v. Loomis, 334 F.2d 775, 778 (1st Cir. 1964) (other trust beneficiaries were necessary parties to a suit by one trust beneficiary seeking to charge the trustees to augment the trust corpus); see also Hebbard v. Colgrove, 105 Cal. Rptr. 172, 178 (Ct. App. 1972)

[1]See Bass, 365 S.C. at 478, 617 S.E.2d at 381 (analogous cases from other jurisdictions can be persuasive in the South Carolina courts).

("The basic purposes underlying the rule requiring joinder of beneficiaries as indispensable parties in an action against trustees are (1) to protect the trustees against a multiplicity of actions, and (2) to see that all beneficiaries are adequately represented.").

In his brief, Appellant argues that the addition of Mrs. Dorn as a party defendant was not necessary, because she was already represented in the proceedings by the Cohens as her Co-Guardians and Co-Conservators as well as Co-Trustees of the Trust. (Appellant's Brief 13-14). Yet, as noted by the Court of Appeals of South Carolina, there is a significant and substantive distinction between guardians and conservators on the one hand and Guardians ad Litem on the other.

> The terms "guardian" and "guardian ad litem" have separate and distinct legal meanings; thus, persons appointed to serve in those capacities are charged with separate and distinct duties and obligations. A "guardian" is one given the power and charged with the duty of taking care of a person who is considered incapable of administering his or her own affairs and of managing his or her property and rights. A "guardian ad litem," on the other hand, is one authorized to prosecute on behalf of or defend an incapacitated person in any suit to which the incapacitated person may be a party and to protect his or her interests in the particular litigation.

Wilson v. Ball, 337 S.C. 493, 496-97, 523 S.E.2d 804, 806 (Ct. App. 1999) (footnotes omitted).

Moreover, in relevant part, Rule 17, SCRCP, states as follows:

> 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.**

Rule 17(c), SCRCP (emphasis added).

Here, Mrs. Dorn is indeed represented by guardians and conservators, *as well as* a Guardian *ad Litem* and court-appointed independent counsel. The trial court in its discretion found that it was necessary in this case for Abbie to have separate representation from her guardians/conservators/trustees for purposes of the instant litigation. See Ex parte Foster, 350 S.C. 238, 243, 565 S.E.2d 290, 293 (2002) ("[T]he trial court is to exercise its discretion in making these appointment decisions.").

Thus, the mere fact that the Cohens represent Mrs. Dorn's interests as her Guardians, Conservators, and Co-Trustees does not automatically mean that they would be appropriate parties to represent her interests in litigations specifically alleging malfeasance on their parts. In this case, the trial court exercised its discretion to appoint separate legal counsel for Mrs. Dorn in this litigation. (Tr. Transcript p. 717, l. 3; p. 720, l.16, R. pp. 749-750).

Undeniably, "[a]mendments are liberally allowed within the sound discretion of the trial judge, and the opposing party must show prejudice to warrant reversal." Weaver v. Lentz, 348 S.C. 672, 677, 561 S.E.2d 360, 363 (Ct. App. 2002). In his brief, Mr. Dorn argues that allowing the amendment of the pleadings to add Mrs. Dorn as a party defendant in the action caused him "undue prejudice" warranting reversal. (Appellant's Br. P. 15).

"Prejudice occurs when the amendment states a new claim or defense which would require the opposing party to introduce additional or different evidence to prevail in the amended action." Weaver, 348 S.C. at 677, 561 S.E.2d at 363 (internal quotation marks omitted). Yet *undue prejudice* exists only when "[t]he harm resulting from a fact-trier's being exposed to evidence that is persuasive but inadmissible . . . or that so arouses the emotions that calm and logical reasoning is abandoned." Black's Law Dictionary "undue prejudice" (10th ed. 2014). Here, Mr. Dorn alleges that he was unduly prejudiced because

the late amendment adding Mrs. Dorn as a party defendant permitted Mrs. Dorn to call undisclosed witnesses to testify at trial. (Appellant's Brief, p. 17). There is absolutely no prejudice in this case, because the trial court made clear that the Attorney and Guardian ad Litem for Mrs. Dorn were two district roles. (Tr. Transcript, p. 16, l. 14-24, R. p. 573); comments by counsel for Appellant indicate that he believed that the Attorney and Guardian ad Litem could participate in discovery despite his having never served them with discovery requests compelling the disclosure of witnesses they planned to call at trial (Tr. Transcript p. 793, l. 23 – p. 794, l. 14; p. 799, ll. 19 – 23, R. pp. 768, 769). Furthermore, Appellant did not object to counsel for Mrs. Dorn making an opening statement (Tr. Transcript, p. 43, l. 1 – p. 45, l. 15, R. p. 580) or the Guardian ad Litem being given the same opportunity. Tr. Transcript, p. 47, ll. 6-8, R. p. 581). Appellant's counsel made no objection to the Attorney and Guardian ad Litem for Mrs. Dorn participating in trial in regards to the entry of evidence (Tr. Transcript, p. 55, l. 25 – p. 56, l. 6; p. 405, ll. 12-16; p. 406 l. 5-13; p. 560, l. 14-15; p. 606, ll. 4-5, R. pp. 583, 671, 710, 721) or cross-examining witnesses (Tr. Transcript p. 636, l. 4 – 637, l. 18, R. p. 729), or entering exhibits designating them as the second respondent in the action (Tr. Transcript p. 658, l. 4 – 660, l.9; p. 662, ll. 3-5; p. 739, ll. 4-20, R. p. 734-735, 754). In fact, it was not until the last day of testimony, two weeks after commencement of the trial, that Appellant indicated an objection to the Attorney and Guardian ad Litem for Mrs. Dorn calling witnesses to testify on their ward's behalf.

To the extent that the trial court erred by adding Mrs. Dorn as a party defendant in this case, any such error was harmless because the Guardian ad Litem and court-appointed attorney were free to advocate for Mrs. Dorn in these proceedings regardless of such amended pleading. See State v. Davis, 371 S.C. 170, 181-82, 638 S.E.2d 57, 63 (2006)

("Error is . . . harmless when it could not reasonably have affected the result of the trial." (internal quotation marks omitted)); e.g., Doe v. N. Greenville Hosp., 318 S.C. 459, 465, 458 S.E.2d 439, 442 (Ct. App. 1995) (any error committed by the trial court in allowing an amendment was harmless and therefore provides no basis for reversal).

As previously noted, "[t]he 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.*" Rule 17(c), SCRCP (emphasis added). In the instant case, even though Mrs. Dorn's interests were purportedly being represented by the Cohens as her guardians and conservators (and trustees of the Trust), the trial court nevertheless felt that the circumstances required that Mrs. Dorn's legal interests be separately represented by her own, independent counsel, i.e., the Guardian ad Litem and the court-appointed attorney. See Foster, 350 S.C. at 243, 565 S.E.2d at 293 ("[T]he trial court is to exercise its discretion in making these appointment decisions.").

Also as previously noted, the Guardian ad Litem's role is specifically to attend to the ward's best interests in a particular legal proceeding. See Wilson, 337 S.C. at 496-97, 523 S.E.2d at 806. As such, the Guardian ad Litem, in substance if not in name, has the authority to participate in the legal proceedings on behalf of the ward to the extent that the Guardian ad Litem deems necessary and appropriate to protect Mrs. Dorn's interests therein. See Fleming v. Asbill, 326 S.C. 49, 55, 483 S.E.2d 751, 754 (1997) ("[A] guardian ad litem in a private custody dispute functions as a representative of the court appointed to assist it in protecting the best interests of the ward. . . . by ascertaining the best interests of the ward *and advocating to the court the ward's best interest.*" (emphasis added)); Cumbie v. Cumbie, 245 S.C. 107, 112, 139 S.E.2d 477, 480 (1964) ("It is the duty of the court, *as well as that of the*

guardian ad litem and his attorney, to see that the rights of minors and incompetents are protected." (emphasis added); specifically mentioning filing an answer in the litigation on the wards' behalf).

In addition to these South Carolina authorities, the Court may also find several cases from other jurisdictions helpful. See Bass, 365 S.C. at 478, 617 S.E.2d at 381 (analogous cases from other jurisdictions can be persuasive in the South Carolina courts); e.g., K.D.H. v. T.L.H. III, 3 So. 3d 894, 900 (Ala. Civ. App. 2008) ("A guardian ad litem is an attorney entitled to argue his or her client's case to the court as is any other attorney[.]"); In re James F., 174 P.3d 180, 186 (Cal. 2008) (a parent who is mentally incompetent must appear through a guardian ad litem appointed by the court, the effect of which "is to transfer direction and control of the litigation from the parent to the guardian ad litem"); Owings v. Foote, 818 A.2d 1149, 1156 (Md. Ct. Spec. App. 2002) ("A court-appointed attorney in a guardianship proceeding must act in the client's best interest and diligently advocate his or her position."); In re Lugo's Guardianship, 172 N.Y.S.2d 104, 109 (Ct. Cl. 1958) ("A guardian ad litem . . . serves on behalf of the alleged incompetent as the conductor of the case during the vicissitudes it may encounter in court."), *rev'd on other grounds*, 187 N.Y.S.2d 59 (App. Div. 1959); *see also* 57 C.J.S. *Mental Health* § 316 (Westlaw database updated June 2015) ("[T]he guardian ad litem is best suited to determine what course of action to follow on behalf of the ward, and . . . . [h]e or she fully represents the rights and interests of the ward in the particular case, and his or her rights and powers generally extend to all matters in the particular litigation affecting the interests of the ward. A guardian ad litem may make tactical and even fundamental decisions affecting the litigation, but always with the interest

of the ward in mind[, including but not limited to, entering into] binding contracts for the retention of counsel and expert witnesses[.]" (footnotes omitted)).

CONCLUSION

The Probate Court did not err in adding Mrs. Dorn as a named party as her interests were necessary to the adjudication of matters related to the Trust under which she is sole beneficiary; however, to the extent that such a ruling was error, it did not prejudice the Appellant because the court-appointed Attorney and Guardian ad Litem for Mrs. Dorn would have had the ability to present her case as an interest party, whether named or not.

Respectfully submitted,

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November 25, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Daniel B. Dorn, in his capacity as the Parent and Natural Guardian of E.D., R.D., and Y.D., Appellant,

v.

Paul S. Cohen and Susan Cohen, Individually and in their capacity as the Co-Conservators of the person of Abbie Ilene Dorn, a protected person and ward, and in their capacity as Co-Trustees of the Abbie Dorn Special Needs Trust, Respondents

Paul S. Cohen, M.D. and Susan Cohen, Respondents,

v.

E.D., R.D., and Y.D., the Living Issue of Abbie Ilene Dorn, and the South Carolina Department of Health and Human Services, Respondents below,

Of Whom E.D., R.D., and Y.D., the Living Issue of Abbie Ilene Dorn are the Appellants,

and

The South Carolina Department of Health and Human Services is a Respondent.

In Re: The Abbie Dorn Special Needs Trust

Appellate Case No.: 2015-000659

The Honorable Deadra L. Jefferson
Horry County
Trial Court Case Nos.: 2013CP2608152, 2013CP2608139, 2014CP2601691, 2014CP2601744

CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

I HEREBY CERTIFY that I have served the **FINAL BRIEF OF GUARDIAN AD LITEM AND ATTORNEY FOR ABBIE ILENE DORN** and **CERTIFICATE OF COUNSEL**, by depositing copies of it in the United States Mail, postage prepaid on November 30, 2015 and addressed to the parties below:

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November 30, 2015

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