

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2014-CP-26-1665
Appellate Case No. 2015-000680

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SC Court of Appeals

Emily Carlson and Alice Preyer, Petitioners,

v.

John C. Dockery, III, Respondent.

In re Emily Cheshire Dockery,

Of Whom Emily Carlson and Alice Preyer.... are the Respondents,

and

Emily Cheshire Dockery..... is the Appellant.

**FINAL BRIEF OF GUARDIAN AD LITEM
FOR EMILY CHESHIRE DOCKERY**

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Guardian *ad Litem* for Emily Cheshire Dockery

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	2
ARGUMENT	
1. APPELLANT HAS NOT APPEALED THE COURT'S FINDING THAT EMILY CHESHIRE DOCKERY IS INCAPACITATED	8
2. THE PROBATE COURT DID NOT ERR IN ENFORCING THE SETTLEMENT AGREEMENT AGAINST JOHN C. DOCKERY, III AND THE GUARDIAN AD LITEM	10
3. THE PROBATE COURT DID NOT ERR IN REFUSING TO ALLOW AND/OR ADMIT TESTIMONY FROM JOHN C. DOCKERY, III	11
4. THE PROBATE COURT DID NOT ERR IN EXCLUDING PORTIONS OF DR. BENJAMIN'S TESTIMONY REGARDING HIS OPINION OF NEUROPSYCHIATRIC TESTING	12
5. THE PROBATE COURT DID NOT ERR IN APPOINTING AN INDEPENDENT THIRD PARTY AS CONSERVATOR FOR EMILY CHESHIRE DOCKERY DESPITE MR. DOCKERY HAVING BEEN PREVIOUSLY APPOINTED AS MS. DOCKERY'S ATTORNEY-IN-FACT..	13
6. THE PROBATE COURT DID NOT ERR IN ACCEPTING THE TESTIMONY OF DR. GOLDSCHMIDT OVER THAT OF DR. BENJAMIN..	13
7. APPELLANT DID NOT MAKE ANY ARGUMENT REGARDING AFTER-ACQUIRED EVIDENCE, SO THE ISSUE IS DEEMED ABANDONED	15
8. THE PROBATE COURT DID NOT ERR IN FINDING THAT MS. DOCKERY IS RESPONSIBLE FOR ALL FEES AND COSTS OF BOTH THE GUARDIAN AD LITEM AND DR. GOLDSCHMIDT	15
9. APPELLANT DID NOT MAKE ANY ARGUMENT REGARDING TERMINATION OF PREVIOUSLY EXECUTED POWERS OF ATTORNEY, SO THE ISSUE IS DEEMED ABANDONED.....	15
10. THE PROBATE COURT DID NOT ERR IN REFUSING TO ADMIT MR. CLIFFORD H. TALL, ESQUIRE AS AN EXPERT	16
CONCLUSION	16

TABLE OF AUTHORITIES

CASES	Pages
<u>ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche,</u> 327 S.C. 238, 489 S.E. 2d 470 (1997).....	8, 11
<u>First Savings Bank v. McLean,</u> 314 S.C. 361, 444 S.E. 2d 513 (1994).....	8, 15
<u>Patterson v. Reid,</u> 318 S.C. 183, 456 S. E. 2d (Ct. App. 1995).....	11
<u>State v. Santiago,</u> 370 S.C. 153, 634 S.E. 2d 23 (Ct. App. 2006).....	12
<u>Patterson v. Cook,</u> 288 S.C. 220, 341 S. E. 2d 782 (1986).....	13
<u>Greer v. Spartanburg Technical College,</u> 338 S.C. 76, 79 (Ct. App. 1999).....	14

STATUTES

S.C. Code Section 14-3-330(2).....	10
S.C. Code Section 62-5-410.....	13
S.C. Code Section 62-5-414.....	15

OTHER AUTHORITIES

Rule 208(b)(1)(B), SCACR.....	8
Rule 43(k), SCRCP.....	11

STATEMENT OF ISSUES ON APPEAL
(As Stated by Appellant in Appeal to Circuit Court)

Appellant has attempted to modify her Issues on Appeal from those presented to the Circuit Court; however, the Issues on Appeal are limited to those listed below and which were presented to the Circuit Court for consideration. (Initial Brief of Appellant)

1. Did the Probate Court err in enforcing a “settlement agreement” that was not signed by all parties, not entered into during mediation, and not read into the record?
2. Did the Probate Court err in refusing to allow and/or admit testimony from John C. Dockery, III?
3. Did the Probate Court err in excluding portions of Dr. Benjamin’s testimony regarding his opinion of neuropsychiatric testing?
4. Did the Probate Court err in appointing a person other than John C. Dockery, III, as conservator when John C. Dockery, III had priority pursuant to S.C. Code Section 62-5-410 as Ms. Dockery’s attorney-in-fact?
5. Did the Court err in accepting the testimony of Petitioner’s witness, Dr. Goldschmidt, who is not a medical doctor, but a psychologist, over that of a medically licensed neurologist, Dr. Benjamin?
6. Did the Court err in failing to consider after-acquired evidence that was presented to the Court showing pending litigation by Petitioners?
7. Did the Court err in finding that Ms. Dockery is responsible for all fees and costs of both the Guardian *ad Litem* and Dr. Goldschmidt?
8. Did the Court err in terminating any and all previous powers of attorney executed by Ms. Dockery?
9. Did the Court err in failing to admit Mr. Clifford H. Tall, Esquire as an expert?

STATEMENT OF THE CASE

This matter was commenced by the filing of a Petition for Appointment of Guardian and Petition for Appointment of Conservator (hereinafter collectively referred to as the “Petitions”) requesting the appointment of a guardian and conservator for Emily Cheshire Dockery (hereinafter, “Ms. Dockery”) on December 1, 2010. (Petition for Appointment of Guardian, R. pp. 98-102; Petition for Appointment of Conservator, R. pp. 103-106). On December 1, 2010, the Horry County Probate Court appointed V. Lee Moore (hereinafter referred to as “Ms. Moore”) as Attorney and Guardian *ad Litem* for Ms. Dockery. (Order Appointing Counsel, R. p. 8). On February 4, 2011, an Answer and Counterclaim was filed by the Brittain Law Firm on behalf of Emily Cheshire Dockery. (Answer and Counterclaim of Emily Cheshire Dockery, R. pp. 107-109). On February 7, 2011, the Probate Court relieved Ms. Moore as attorney, but ordered that she continue to serve in her capacity as Guardian ad Litem for Ms. Dockery. (Order Denying Motion to Remove V. Lee Moore, Esquire as Guardian ad Litem, R. pp. 22-24).

A reply to Ms. Dockery’s Answer and Counterclaim was submitted by Petitioners on February 16, 2011 (Petitioner’s Reply to Respondent’s Counterclaim, R. pp. 110-111). On February 17, 2011, an Answer to Petitions was filed by John C. Dockery, III. (Answer to Petitions, R. pp. 112-114). On February 16, 2011, Petitioners filed a Motion to Strike the Counterclaim of Emily Cheshire Dockery. (Petitioners Motion to Strike Respondent’s Counterclaim, R. p. 708-709). A hearing was held on this motion on April 6, 2011, and the motion was granted by order of the Court dated April 25, 2011. (Order Granting Motion to Strike Counterclaim of Emily Cheshire Dockery, R. p. 9). By Order also dated April 25, 2011, the Court appointed Dr. Jeffrey A. Benjamin and Dr. Leonard V. Goldschmidt as medical examiners. (Order Granting Motion to Appoint Medical Examiner, R. pp. 12-13).

On July 22, 2011, the parties engaged in mediation with John Leiter, Esquire acting as mediator. This mediation was ordered by the Probate Court. (Order Granting Motion to Continue, R. pp. 10-11). All parties and their attorneys, along with the Guardian ad Litem, were present at the mediation, with the exception of Ms. Dockery; however, her attorney was present at mediation. An agreement was reached by all parties except Ms. Dockery, and was subsequently communicated to the Probate Court by Petitioner's counsel without objection from any other party. (Motion to Enforce Settlement Agreement with Exhibits, R. pp. 710-712). Subsequent to this communication, Mr. Dockery's counsel informed counsel for the Petitioners that Mr. Dockery refused to sign the settlement agreement. (Motion to Enforce Settlement Agreement, R. pp. 710-712). Since Ms. Dockery was not in agreement, a hearing would be necessary to allow the presentation of testimony as to incapacity and to enable Ms. Dockery to present evidence as to who she may desire to have serve as Guardian and Conservator if she were found to be incapacitated. Various communications took place between counsel as to the consummation of the agreement including representations by counsel for John Dockery as to his continued desire and agreement to proceed with the settlement; however, the end result was that the executed agreement was not forthcoming. On August 31, 2011, counsel for Petitioners filed a Motion to Enforce the Settlement Agreement. (Motion to Enforce the Settlement Agreement, R. pp. 710-712). On September 14, 2011, John C. Dockery, III, filed a response to Petitioner's Motion to Enforce the Settlement Agreement. (Response to Motion to Enforce Settlement Agreement, R. pp. 713-716). A hearing was held on September 15, 2011, on Petitioner's Motion to Enforce the Settlement Agreement, and by order of the Court dated October 31, 2011, the Court enforced the parties' settlement agreement as to the Petitioners, Mr. Dockery, and the Guardian ad Litem. (Order Granting Motion to Enforce Settlement Agreement, R. pp. 17-21).

The Court specifically held that the agreement was not binding on either the Court or Ms. Dockery. (Order Granting Motion to Enforce Settlement Agreement, R. pp. 17-21).

On December 29, 2011, counsel for Ms. Dockery moved to void the Settlement Agreement based on Dr. Benjamin's deposition testimony opining that Ms. Dockery was not incapacitated. (Respondent's Motion to Void Settlement Agreement, R. pp. 717-718). The Court correctly found that this Motion was akin to a Motion to Reconsider the Court's October 31, 2011 Order enforcing the Settlement Agreement, and found that such Motion was not timely made. However, in the alternative, the Court also found that, even if it were timely made, the motion was without merit because the Settlement Agreement was not binding on either Ms. Dockery or the Court. (Order Denying Motion to Void Settlement Agreement, R. pp. 33-35).

On February 29, 2012, counsel for Ms. Dockery made a Motion to Require Petitioners to Pay Fees and Costs and Motion to Remove V. Lee Moore, Esq., as Guardian ad Litem. (Motion to Require Petitioners to Pay for Fees and Costs and Motion to Remove V. Lee Moore, Esq. as Guardian ad Litem, R. pp. 719-720). These motions were denied by the Court in separate orders. (Order Denying Motion to Remove V. Lee Moore, Esquire as Guardian ad Litem dated April 25, 2012, R. pp. 22-24; Order Denying Motion to Require Petitioners to Pay Fees and Costs, R. pp. 49-50).

The trial in the matter was bifurcated, with testimony being taken regarding Ms. Dockery's capacity on May 4, 2012, and on July 6, 2012. At the hearing on May 4, 2012, the Court heard testimony from Ms. Dockery, Emily Carlson, and Alice Preyer. Subject to various objections, the videotaped depositions of Dr. Goldschmidt and Dr. Benjamin were introduced. On July 6, 2012, testimony was taken from Dr. Leonard Goldschmidt, Debbie Costa, Pamela Moore, Rita Cauthen, Reagan J. Callaghan and V. Lee Moore.

On May 16, 2012, Petitioner's counsel moved to exclude certain portions of Dr. Benjamin's testimony based on the fact that he is not qualified to testify as to the field of neuropsychology. (Motion to Exclude Expert Testimony of Dr. Jeff Benjamin Regarding Raw Psychological Data, R. pp. 725-726). This motion was resolved via consent order of the parties submitted to the Court on July 2, 2012. (Consent Order to Exclude Expert Testimony of Dr. Benjamin Regarding Raw Psychological Data, R. pp. 27-32). On July 5, 2012, Petitioner's counsel moved to exclude certain portions of Dr. Benjamin's deposition testimony related to the field of neuropsychology. (Motion in Limine to Exclude Portions of Depositions and Live Testimony and Written Materials of Dr. Jeffrey Benjamin, R. pp. 727-729). This Motion was granted by Order of the Court dated January 22, 2013. (Order Granting Motion in Limine to Exclude Portions of Deposition and Live Testimony and Written Materials of Dr. Jeffrey Benjamin, R. p. 47-48).

On January 22, 2013, the Court issued its Order finding that Ms. Dockery was incapacitated. (Order Finding Incapacity, R. pp. 40-46). On January 30, 2013, counsel for Ms. Dockery and Mr. Dockery filed Motions to Reconsider/Alter or Amend the orders finding incapacity, denying the motion for Petitioners to pay fees and costs, excluding certain portions of Dr. Benjamin's deposition testimony, and denying the motion to void the settlement agreement. (Motion to Reconsider/Alter or Amend the Order Finding Incapacity of Emily C. Dockery, R. pp. 740-744; Motion to Reconsider/Alter or Amend the Order Denying Motion to Pay Fees and Costs, R. pp. 749-750; Motion to Reconsider/Alter or Amend the Order Granting Petitioner's Motion to Exclude Portions of Depositions and Live Testimony and Written Materials of Dr. Jeffrey Benjamin, R. pp. 751-752; Motion to Reconsider/Alter or Amend the Order Denying Motion to Void Settlement Agreement, R. pp. 745-748; Motion to Reconsider/Alter or Amend

the Order Denying Motion to Void Settlement Agreement on Behalf of John C. Dockery, III, R. pp. 753-756; Motion to Reconsider/Alter or Amend the Order Finding Incapacity of Emily C. Dockery on Behalf of John C. Dockery, III, R. pp. 757-760; Motion to Reconsider/Alter or Amend the Order Denying Motion to Pay Fees and Costs on Behalf of John C. Dockery, III, R. pp. 761-762; Motion to Reconsider/Alter or Amend the Order Granting Petitioner's Motion to Exclude Portions of Deposition and Live Testimony and Written Materials of Dr. Jeffrey Benjamin on Behalf of John C. Dockery, III, R. pp. 763-764). Petitioners filed a response to these Motions. (Petitioner's Response in Opposition to All Motions for Reconsideration, R. pp. 765-772). A hearing was held on September 16, 2013, and on March 10, 2014, the Court issued various orders clarifying its ruling on these matters. (Transcript of Hearing dated September 16, 2013, R. pp. 433-458; Order Granting Partial Relief on Motion to Reconsider Order Granting Petitioner's Motion for Attorney's Fees and Costs in Connection with Motion to Enforce Settlement Agreement, R. pp. 64-65; Order Granting Partial Relief on Motion to Reconsider Order Denying Motion in Limine to Exclude Any and All Evidence Relating to the Management of Ms. Dockery's Assets and Funds, R. pp. 66-67; Order Granting Partial Relief on Motion to Reconsider Order Granting Motion in Limine to Exclude Portions of Deposition and Live Testimony and Written Materials of Dr. Jeffrey Benjamin, R. pp. 68-69; Order Denying Motions to Reconsider/Alter or Amend Order Denying Motion to Void Settlement Agreement, R. pp. 70-72; Order Granting Partial Relief on Motion to Reconsider Order Denying Motion to Require Petitioners to Pay Fees and Costs, R. pp. 73-74; Order Granting Partial Relief on Motions to Reconsider/Alter or Amend Order Finding Incapacity, R. pp. 75-77; Order Denying Motions to Reconsider/Alter or Amend Order Appointing Guardian and Conservator, R. pp. 78-82).

On May 24, 2013, counsel for Ms. Dockery moved to exclude evidence related to the management of her assets by her son, Mr. Dockery. (Motion in Limine to Exclude Any and All Evidence Relating to the Management of Ms. Dockery's Assets and Funds, R. pp. 773-774), which was denied by the Court on June 10, 2013. (Order Denying Motion in Limine to Exclude Any and All Evidence Relating to the Management of Ms. Dockery's Assets and Funds, R. pp. 61-63). Testimony related to the appointment of a Guardian and Conservator was heard on May 30, 2013, from Cliff Tall, V. Lee Moore, and Walter Godbold. (Transcript from Hearing dated May 30, 2013, R. pp. 377-432), and an Order was issued appointing John C. Dockery, III, as Mrs. Dockery's limited guardian and Walter Godbold as her conservator. (Order Appointing Guardian and Conservator, R. pp. 51-57).

Appellant and John Dockery filed separate Notices of Appeal under two separate Circuit Court case numbers. (Notice of Intent to Appeal to Circuit Court by John Dockery, R. p. 822; Notice of Intent to Appeal by Emily Dockery, R. pp. 823-824). The Appeal to Circuit Court was heard by Judge Larry B. Hyman on October 1, 2014 with an Order being issued on October 13, 2014 affirming the Probate Court and later issued an Order on February 4, 2015, denying Appellant's Motion to Reconsider/Alter or Amend. (Order Affirming Probate Court, R. pp. 83-95; Order Denying Motion to Reconsider/alter or Amend the Order Affirming Probate Court, R. p. 96-97). Appellant filed a Notice of Appeal to the Court of Appeals on March 27, 2015. (Notice of Appeal, R. pp. 825-826).

ARGUMENT

1. APPELLANT HAS NOT APPEALED THE COURT'S FINDING THAT EMILY CHESHIRE DOCKERY IS INCAPACITATED.

Appellant has not specifically appealed the Probate Court's finding that Appellant is incapacitated. Appellant attempts to modify their Issues on Appeal by adding language to Issues III and IV (originally Issues 2 and 3 in Appellant's Initial Brief to the Circuit Court, R. pp. 796-814) Appellant's failure to include the court's finding of incapacity in their Statements of Issues on Appeal to the Circuit Court, along with their failure to argue the same in their Initial Briefs to the Circuit Court makes the Probate Court's finding that Appellant is an incapacitated person is final and therefore, not an issue in this appeal. (SCACR Rule 208(b)(1)(B); ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E. 2d 470 (1997). The review of the Circuit Court's Order Affirming Probate Court is limited to whether the Probate Court made any errors of law. (Order Affirming Probate Court, R. pp. 83-95). Because the issue regarding the court's finding of incapacity has not been raised, Appellant Issues on Appellant's Initial Brief to the Circuit Court, Nos. 1, 2, 3, 5, and 7 are, therefore, moot.

Furthermore, Appellant has failed to set forth any argument to support two issues raised in Appellant's Statement of Issues on Appeal listed in Appellant's Initial Brief to the Circuit Court. Appellant failed to set forth an argument on Issues Number 6 (Did the Court err in failing to consider after-acquired evidence that was presented to the Court showing pending litigation by Petitioners?) and Number 8 (Did the Court err in terminating any and all previous powers of attorney executed by Ms. Dockery?). Issues included in the Statement of Issues on Appeal, but not argued in Appellant's brief are deemed abandoned. First Savings Bank v. McLean, 314 S.C. 361, 444 S.E. 2d 513 (1994). The Circuit Court found that those issues were abandoned.

As such, the only two issues properly before this Court are Issues No. 4 and 9 as listed in Appellant's Statement of Issues on Appeal in Appellant's Initial Brief to the Circuit Court. In spite of Appellant's failure to raise and argue these issues, all issues will be addressed in this brief in the event that the Court finds that any other issues listed in Appellant's Statement of Issues on Appeal are actually preserved for review.

As to the issue of Appellant's incapacity, the evidence is overwhelming to support the Probate Court's finding that Ms. Dockery is impaired to the extent that she lacks sufficient understanding or capacity to make or communicate responsible decisions concerning her person or property. (Testimony of Emily Cheshire Dockery, Transcript from Hearing Dated May 4, 2012, p. 13, l. 10 – p. 24, l. 11, p. 42, l. 7 - p. 62, l. 25, R. p. 132, l. 10 – p. 143, l. 11, p. 161, l. 7 - p. 181, l. 25; Order Finding Incapacity, R. pp. 40-46; Order Appointing Guardian and Conservator, R. pp. 51-57; Order Granting Partial Relief on Motions to Reconsider/Alter or Amend Order Finding Incapacity, R. pp. 75-77; Order Denying Motions to Reconsider/Alter or Amend Order Appointing Guardian and Conservator, R. pp. 78-82). Emily Carlson testified that Ms. Dockery was very confused and did not know her name, the date, or the year during her deposition. (Testimony of Emily Carlson, Transcript from Hearing Dated May 4, 2012, p. 87, l. 6- p. 107, l. 25, R. p. 206, l. 6- p. 226, l. 25). Dr. Leonard V. Goldschmidt testified to all tests which were performed in his office which lead him to his opinion and conclusion that Ms. Dockery is incapacitated (Testimony of Dr. Goldschmidt, Deposition Transcript Dated March 15, 2012, p. 6-12, p. 14-23, p. 60-63, p. 66-78, p. 91-93, p. 95-99, p. 122-125, p. 150-155, p. 237-238, p. 241-258, p. 261-264, R. pp. 547-553, pp. 555-564, pp. 601-604, pp. 607-609, pp. 632-634, pp. 636-640, pp. 643-646, pp. 647-652, pp. 656-679; Testimony of Dr. Goldschmidt, Transcript from Hearing Dated July 6, 2012, p. 5, l. 13- p. 9, l. 9, p. 35, l. 4- p. 41, l. 21, p. 92, l.

20- p.103, l. 1, R. p. 266, l. 13- p. 270, l. 9, p. 296, l. 4- p. 302, l. 21, p. 322, l. 20- p. 333, l. 1), and the Probate Court found his testimony to be credible. (Order Finding Incapacity, R. pp. 40-46). Dr. Goldschmidt's and Dr. Benjamin's reports confirmed that Ms. Dockery is not capable of managing her own care and affairs without assistance. (Examiner's/Doctor's Affidavit and Report Regarding Capacity (Dr. Goldschmidt), R. pp. 115-117; Examiner's/Doctor's Affidavit and Report Regarding Capacity (Dr. Benjamin), R. pp. 118-120). Reagan Callaghan, an elder advocate retained by Ms. Dockery herself opined that Ms. Dockery was in need of assistance with these matters. (Testimony of Reagan Callaghan, Hearing Transcript dated July 6, 2012, p. 146, l. 14 – p. 148, l. 2, R. p. 367, l. 14 – p. 369, l. 2). While Dr. Benjamin offered an opinion that Ms. Dockery was not incapacitated, this testimony directly contradicted his report submitted to the Court and his deposition testimony wherein he admitted that Ms. Dockery could be easily taken advantage of and needed assistance handling her affairs. (Examiners Report of Dr. Benjamin, R. pp. 118-120; Deposition of Dr. Benjamin, p. 44, l. 8- p. 46, l. 4, p. 75, l. 23- p. 76, l. 15, R. p. 688, l. 8- p. 690, l. 4, p. 701, l. 23- p. 702, l. 15).

2. THE PROBATE COURT DID NOT ERR IN ENFORCING THE SETTLEMENT AGREEMENT AGAINST JOHN C. DOCKERY, III AND THE GUARDIAN AD LITEM.

Appellant argues that the Probate Court erred in enforcing the Settlement Agreement against John C. Dockery, III and the Guardian ad Litem. John C. Dockery, III did not appeal the Final Order, Appellant was not a party to the Settlement Agreement and Appellant was never bound by this agreement. This issue is briefed below in the event it is determined that Appellant does have standing to present this issue. John C. Dockery failed to appeal the Probate Court's Order Denying Motion for Continuance and Granting Motion to Enforce Settlement Agreement dated October 31, 2011. This ruling was appealable under South Carolina Code Ann. Section 14-

3-330(2), as it affected a substantial right of John C. Dockery, III. Because it was not appealed, this ruling became the law of the case. ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E. 2d 470 (1997).

Appellant's argument and case law is based on Rule 43(k), SCRCP; however, Appellant failed to raise the issue of Rule 43(k) in her Response to Motion to Enforce Settlement Agreement dated September 14, 2011. In the event that this Court disagreed that the ruling, as such was not appealed, it is the law of the case and Appellant, therefore, would still not be able to argue Rule 43(k) as a basis for failing to enforce the Settlement Agreement. Patterson v. Reid, 318 S.C. 183, 456 S. E. 2d 436 (S.C. App. 1995). (Order Denying Motion to Enforce Settlement Agreement, R. pp. 17-21).

Even if the Probate Court erred in enforcing the settlement agreement, the Probate Court made an independent finding of incapacity due to the agreement not being enforceable as to Ms. Dockery, herself or on the Court. (Order Denying Motion for Continuance and Granting Motion to Enforce Settlement Agreement, R. pp. 17-21; Order Denying Motion to Void Settlement Agreement, R. pp. 33-35; Order Finding Incapacity, R. pp. 40-46; Order Appointing Guardian and Conservator, R. pp. 51-57). Even Judge Hyman during the Circuit Court appeal hearing noted the fact that the agreement was absolutely irrelevant. (Transcript dated October 1, 2014, p. 45-46, R. 45-46). Therefore, any alleged error is harmless and would not have changed the ultimate outcome in this matter.

3. THE PROBATE COURT DID NOT ERR IN REFUSING TO ALLOW AND/OR ADMIT TESTIMONY FROM JOHN C. DOCKERY, III.

It is unclear upon what facts Appellant's argument is based to support their contention that the Probate Court refused to admit testimony of John C. Dockery, III. Mr. Dockery was present at all hearings in the matter, and had the opportunity to testify at any of these hearings.

Both Appellant's counsel and Mr. Dockery's counsel had an opportunity to call him as a witness, but did not. It was specifically discussed immediately preceding the beginning of the hearing as to the fact that one of the parties, specifically Attorney Monckton, would proffer the testimony as to the issue of incapacity. (Transcript from Hearing dated May 4, 2012, p. 7, l. 16- p. 11, l. 3, R. p. 127, l. 16 - p. 131, l. 3). The Court was not asked to allow or admit testimony of Mr. Dockery. He was never called as a witness in the matter. Additionally, no testimony was proffered that would inform the court as to the matters to which Mr. Dockery was prepared to testify. (Transcript from Hearing dated July 6, 2012, p. 104, l. 8- p. 106, l. 22, R. p. 334, l. 8- p. 336, l. 22) "A proffer of testimony is required to preserve the issue of whether testimony was properly excluded by the trial judge, and an appellate court will not consider error alleged in the exclusion of testimony unless the record on appeal shows fairly what excluded testimony would have been. State v. Santiago, 370 S.C. 153, 163, 634 S.E. 2d 23 (S.C. App. 2006).

Additionally, Appellant never raised an objection on this issue at the trial level "[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Id.

4. THE PROBATE COURT DID NOT ERR IN EXCLUDING PORTIONS OF DR. BENJAMIN'S TESTIMONY REGARDING HIS OPINION OF NEUROPSYCHIATRIC TESTING.

Dr. Benjamin was never qualified as an expert in neuropsychiatric testing, and is therefore not qualified to render an opinion as to raw psychological data, neuropsychology, or neuropsychological testing. Dr. Benjamin admitted that neuropsychiatry and neuropsychiatric testing were not with his expertise. (Benjamin letter dated May 11, 2012, R. p. 991).

5. THE PROBATE COURT DID NOT ERR IN APPOINTING AN INDEPENDENT THIRD PARTY AS CONSERVATOR FOR EMILY CHESHIRE DOCKERY DESPITE MR. DOCKERY HAVING BEEN PREVIOUSLY APPOINTED AS MS. DOCKERY'S ATTORNEY-IN-FACT.

South Carolina Code § 62-5-410 grants the Probate Court the discretion to choose who will serve as conservator for an incapacitated person. While a person nominated under a validly executed Power of Attorney has priority to serve over other individuals, the question of that attorney-in-fact's qualification to serve is left to the Probate Court. The Probate Court determined that good cause existed to appoint an independent third-party conservator in lieu of Mr. Dockery. (Order Appointing Guardian and Conservator, R. pp. 51-57). "The selection of a guardian/conservator for an incapacitated person is in the discretion of the appointing court with the paramount consideration being the best interests of the incompetent. Such appointment should not be overturned absent a finding of abuse of discretion." Patterson v. Cook, 288 S.C. 220, 341 S.E. 2d 782 (1986). The Guardian ad Litem testified that although it was difficult to investigate the case due to a lack of cooperation on the part of Ms. Dockery and although she did not have any concern over Mr. Dockery serving in the capacity as Guardian, she was concerned about him serving in the capacity of Conservator due to problems with finances as what brought out during the deposition of Mr. Dockery. (Transcript of Hearing dated July 6, 2012, p. 150, l. 9- p. 155, l. 1, R. p. 370, l. 9- p. 376, l. 1; Transcript of Hearing dated May 30, 2013, p. 72, l. 1- p. 101, l. 25 with Petitioner's Exhibits 1 & 2, R. p. 397, l. 1 - p. 423, l. 25)

6. THE PROBATE COURT DID NOT ERR IN ACCEPTING THE TESTIMONY OF DR. GOLDSCHMIDT OVER THAT OF DR. BENJAMIN.

Dr. Benjamin's report states that Ms. Dockery is not able to prepare meals and/or clean house; maintain bank accounts or funds; pay bills; and that she needs assistance to "effectively manager her property and affairs." (Examiner's/Doctor's Affidavit and Report Regarding

Capacity (Dr. Benjamin), R. pp. 118-120). The trial court was in the best position to hear testimony of witnesses and give proper weight to each person's testimony. While this Appellate Court may make its own findings of fact, generally appellate courts defer to the trial court judge who was in a better position to review the evidence before them, evaluate the credibility of the witnesses and assign the proper weight. Greer v. Spartanburg Technical College, 338 S.C. 76, 524 S.E.2d 856 (Ct. App. 1999).

Dr. Goldschmidt's testimony was supported by raw data and was the result of several meetings with Ms. Dockery over a long period of time. (Examiner's/Doctor's Affidavit and Report Regarding Capacity (Dr. Goldschmidt), R. pp. 115-117; Deposition of Leonard Goldschmidt dated March 15, 2012, p. 9, l. 19– p. 12, l. 1, R. p. 550, l. 19 – p. 553, l. 1; Testimony of Dr. Goldschmidt, Transcript of Hearing dated July 6, 2012, p. 35, ll. 4-11; R. p. 296, ll. 4-11). Additionally, Dr. Goldschmidt was originally consulted for neuropsychiatric testing by Cliff Tall, Ms. Dockery's attorney. (Deposition of Leonard Goldschmidt dated March 15, 2012, p. 9, ll. 10-18, R. p. 556, ll. 10-18; Testimony of Dr. Goldschmidt, Transcript of Hearing dated July 6, 2012, p. 24, ll. 9-15, R. p. 285, l. 9-15).

However, Dr. Benjamin's testimony was conflicting and was not supported by independent data. In fact, Dr. Benjamin stated that he conducted no testing other than a "Mini Mental" which he did not really consider to be a test. Dr. Benjamin also agreed that Ms. Dockery would need assistance with care and handling of her financial matters. (Examiners Report of Dr. Benjamin, R. pp. 118-120; Deposition of Dr. Benjamin dated December 29, 2011, p. 65, l. 16 – p. 66, l. 13, R. p. 692, l. 16 – p. 693, l. 13; Deposition of Dr. Benjamin dated February 7, 2012, p. 19, l. 3- p. 25, l. 9; p. 33, l. 4- p. 34, l. 23, p. 65, l. 17-p. 66, l. 6, R. p. 494, l. 3 - p. 500, l. 9; p. 508, l. 4- p. 509, l. 23, p. 540, l. 17-p. 541, l. 6). Of greatest concern in Dr. Benjamin's

testimony elicited under cross examination was the fact that due to her age and mental state, Ms. Dockery was someone subject to being taken to be taken advantage of and easily persuaded. (Deposition of Dr. Benjamin dated February 7, 2012, p. 61, l. 2- p. 62, l. 3, p. 68, ll. 4-11, R. p. 536, l. 2 – p. 537, l. 3, p. 543, ll. 4-11)

7. APPELLANT DID NOT MAKE ANY ARGUMENT REGARDING AFTER-ACQUIRED EVIDENCE, SO THE ISSUE IS DEEMED ABANDONED.

Appellant's Statement of Issues on Appeal includes the issue of whether the trial court failed to consider after-acquired evidence; however, Appellant has not argued the issue in their brief. Therefore, the issue is deemed abandoned. First Savings Bank v. McLean, 314 S.C. 361, 444 S.E. 2d 513 (1994).

8. THE PROBATE COURT DID NOT ERR IN FINDING THAT MS. DOCKERY IS RESPONSIBLE FOR ALL FEES AND COSTS OF BOTH THE GUARDIAN *AD LITEM* AND DR. GOLDSCHMIDT?

South Carolina Code Section 62-5-414 states that compensation for . . . any lawyer, physician . . . appointed in a protective proceeding is entitled to reasonable compensation from the estate."

The Probate Court cited to this statute as grounds for its award of fees to be paid from Ms. Dockery's estate. (Order Granting Partial Relief on Motion to Reconsider Order Denying Motion to Require Petitioner's to Pay Fees and Costs, R. pp. 73-74)

9. APPELLANT DID NOT MAKE ANY ARGUMENT REGARDING TERMINATION OF PREVIOUSLY EXECUTED POWERS OF ATTORNEY, SO THE ISSUE IS DEEMED ABANDONED.

Appellant's Statement of Issues on Appeal includes the issue of whether the trial court erred in terminating Powers of Attorney previously executed by Ms. Dockery; however, Appellant has not argued the issue in her brief. Therefore, the issue is deemed abandoned. First Savings Bank v. McLean, 314 S.C. 361, 444 S.E. 2d 513 (1994).

10. THE PROBATE COURT DID NOT ERR IN REFUSING TO ADMIT MR. CLIFFORD H. TALL, ESQUIRE AS AN EXPERT?

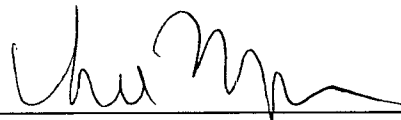
Counsel for Ms. Dockery called Clifford H. Tall, Esquire to testify regarding the facts surrounding the execution of Ms. Dockery's Power of Attorney in 2007. No expert testimony was necessary, nor was such testimony relevant to the issue of appointment of a conservator because the validity of any estate planning documents including the referenced Durable Power of Attorney was not at issue. Additionally, no expert testimony was proffered. The Court did not err in refusing to admit Mr. Clifford H. Tall, Esquire as an expert.

Additionally, even if the Court did err in refusing to admit Mr. Tall as an expert, this did not result in prejudice to the Appellant. Appellant did not object to the Court failing to qualify him as an expert. In addition, his testimony was not necessary to the determination of who to appoint as conservator. (Transcript of Hearing dated May 30, 2013, p. 33, l. 18- p. 42, l. 18, R. p. 378, l. 18 – p. 387, l. 18).

CONCLUSION

For the reasons stated, the Guardian ad Litem respectfully requests that this Court affirm the Circuit Court's Order Affirming the judgment of the Probate Court.

Respectfully Submitted,



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Guardian *ad Litem* for Emily Cheshire Dockery

Surfside Beach, SC
December 21, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2014-CP-26-1665
Appellate Case No. 2015-000680

Emily Carlson and Alice Preyer, Petitioners,

v.

John C. Dockery, III, Respondent.

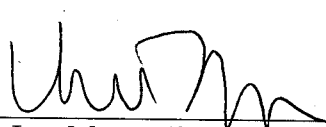
In re Emily Cheshire Dockery,

Of Whom Emily Carlson and Alice Preyer.... are the Respondents,
and

Emily Cheshire Dockery..... is the Appellant.

CERTIFICATE OF COUNSEL

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



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