

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

In Matter of: Keith S. Wellin

Peter J. Wellin, Cynthia W. Plum, and Marjorie
W. King,

Petitioners,

vs.

Keith S. Wellin,

Respondent.

FILED

IN THE PROBATE COURT

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CASE NO.: 2013-GC-10-0129

PROBATE COURT
CHARLESTON COUNTY

**ORDER REGARDING
PETITIONERS' NOTICE OF
VOLUNTARY DISMISSAL**

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SC Court of Appeals

THIS MATTER is before the Court on the filing of a Petition for Protective Order and Appointment of Conservator (hereinafter "Petition") on July 19, 2013, by Peter J. Wellin, Cynthia W. Plum, and Marjorie W. King (hereinafter "Petitioners"), alleging that their father, Keith S. Wellin (hereinafter "Respondent"), lacks capacity to manage his property and affairs, and that a neutral third-party conservator capable of managing very large portfolios is needed to manage and protect their father's estate. At Petitioners' request, the Court held an emergency hearing on July 26, 2013, at which time Respondent and Petitioners agreed to the appointment of Edward G. R. Bennett as Special Conservator. On August 15, 2013, the Court entered a Protective Order reflecting this agreement and appointing Mr. Bennett.

The parties participated in a Court-ordered mediation on October 15, 2013, but were unsuccessful in reaching an agreement. This Court held a hearing on February 6, 2014, pursuant to S.C. Code Ann. § 62-5-416(b), whereby the Special Conservator filed an Application requesting this Court's guidance. As a result of that Application, this Court issued an Order on February 21, 2014, requiring Petitioners to return \$50,228,000 of Respondent's funds by

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surrendering the same to Synovus Trust Company, N.A., who would serve as Special Conservator II. Petitioner's filed a Motion to Alter or Amend the February Order to avoid the payment of the funds. A hearing was held on their motion on April 1, 2014. Prior to this Court's ruling on the Motion to Alter or Amend, Petitioners filed a Notice of Voluntary Dismissal, relying on Rule 41(a)(1)(A) of the South Carolina Rules of Civil Procedure. In addition to the hearings and orders mentioned above, there were multiple motions, petitions and responses filed and argued in this Court related to the capacity of Keith Wellin over the last eleven months, prior to the filing of the voluntary dismissal.

Having reviewed the Notice of Voluntary Dismissal, the stated purpose behind Rule 41(a)(1)(A), and the prior orders, multiple motions, pleadings, and prior arguments of both sides made during this case, the Court holds that a voluntary dismissal is not applicable. Rule 41(a)(1)(A) of the South Carolina Rules of Civil Procedure provides that

[s]ubject to the provisions of Rule 23(c), of Rule 66(a), and of any statute, an action may be dismissed by the plaintiff without order of [the] court (A) by filing and serving a notice of dismissal at any time before service by the adverse party of an answer or motion for summary judgment, whichever first occurs, or (B) by filing a stipulation of dismissal signed by all parties who have appeared in the action (emphasis added).

The South Carolina Probate Code and its provisions render inapplicable Rule 41 of the South Carolina Rules of Civil Procedure. South Carolina Code Ann. § 62-5-402 states that the probate court in which a summons and petition seeking the appointment of a conservator are filed has exclusive continuing jurisdiction to determine the need for a conservator until the proceedings are terminated by a final order. South Carolina Code Ann. § 62-5-430 states that only a court may terminate a conservatorship, upon determining after notice and hearing, that the protected person's disability has ceased. To permit otherwise would leave alleged incapacitated adults without proper protection. To permit otherwise would leave the court with knowledge of an

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alleged incapacitated adult and no case to determine whether the alleged incapacitated adult is a person needing protection.

Furthermore, Petitioners contend that because Respondent has neither filed an answer to their Petition for the appointment of a conservator nor moved for summary judgment, they are entitled to dismissal of this proceeding despite the Probate Code, the multiple appearances and orders stemming from their Petition, the appointment of a Special Conservator, and the significant costs and stress incurred by the Respondent as a result of their allegations. Most notably, Petitioners, even with a designated examiner report clearly in their favor, attempt to use this rule to shield themselves from the prior order of this Court requiring the return of \$50,228,000 of Respondent's funds for safekeeping.

Petitioners ignore that the South Carolina Rules of Civil Procedure only apply in the probate court "insofar as practicable . . . to the extent they are not inconsistent with the statutes and rules governing." Rule 81, S.C.R.C.P.; see In re Timmerman, 331 S.C. 455, 460 (Ct. App. 1998) ("The South Carolina Rules of Civil Procedure are applicable in the probate court to the extent they are not inconsistent with the Probate Code or probate court rules."). Additionally, "the statutory scheme articulated in the South Carolina Probate Code does not mandate responsive pleadings." In re Estate of Weeks, 495 S.E.2d 454, 458 (S.C.App. 1997).

The procedure for a probate court to appoint a conservator for an allegedly incapacitated person is set forth in S.C. Code Ann. § 62-5-407. The South Carolina Probate Code does not require an allegedly incapacitated person to file an answer nor provide an opportunity for summary judgment. Forcing an allegedly incapacitated person to file an answer would be contrary to the primary purpose of a conservatorship proceeding to protect the interest of such a person. Rather than requiring an answer, the statute directs the court to set a hearing after

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service of summons and petition. As the proceedings at hand are exclusively governed by the South Carolina Probate Code, the timing provision of Rule 41(a)(1)(A) of the South Carolina Rules of Civil Procedure that allows dismissal of a case without leave of court if a respondent has not yet filed an answer or motion for summary judgment, is inconsistent and inapplicable. To allow application of Rule 41(a)(1)(A) at this time would be inequitable to the alleged incapacitated person this Court is designed to protect.

This Court reiterates that Petitioners attempted to voluntarily dismiss this case after the Court appointed two designated examiners pursuant to S.C. Code Ann. § 62-5-407(b), and Linda S. Austin, M.D., submitted her Report of Designated Examiner, which is favorable to Petitioner's Petition. (Note that the other Court-appointed examiner, Gordon Teichner, Ph.D., ABPP, has not yet completed his report.) Dr. Austin's report determined that Keith Wellin's incapacity requires the appointment of a conservator to manage his property. Dr. Austin's report finds Keith Wellin does not have the ability to dispose of property, real and personal; execute instruments; make purchases; enter into contractual relationships; hold a driver's license; marry or divorce; or to ship, transport, possess or receive a firearm or ammunition.

In summary, Petitioners have subjected their father to significant legal and emotional expense and exposed him to psychological examination against his will under the guise of concern for his need for protection. Petitioners are abandoning their request for a conservator for their father after one Court-appointed examiner has determined their father needs a conservator. This Court found that Petitioners should return assets for safekeeping until the conclusion of the litigation pending in Federal Court. Petitioners are attempting to abuse the protective process of this Court.

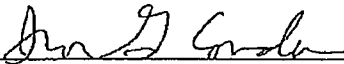
Lastly, Respondent filed, on May 15, 2014, a Petition to Continue Proceeding in Accordance with S.C. Code Ann. § 62-5-407. Respondent wishes to proceed with the conservatorship proceeding and seeks an order compelling the Petitioners to comply with this Court's previous orders. As discussed above, the Court finds that Rule 41(a)(1)(A) of the South Carolina Rules of Civil Procedure is inapplicable to this proceeding and the Court retains jurisdiction to act in Respondent's best interest and determine the need for the appointment of a conservator. The Court will hold a merits hearing to ensure that Keith Wellin is adequately protected and that his best interests are served. The Petitioners are not required to participate, but will be given notice of all proceedings. As these proceedings progress, the Court must continue to provide protection and to act in the best interests of Keith Wellin.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

1. Petitioners' Notice of Voluntary Dismissal pursuant to Rule 41(a)(1)(A) of the South Carolina Rules of Civil Procedure is not applicable.
2. Pursuant to S.C. Code Ann. § 62-5-402, this Court accepts continuing jurisdiction over the best interests and welfare of Keith Wellin until this matter is terminated by final Order of the Court. As such, this Court's prior orders are hereby affirmed.
3. The Court further affirms its prior ruling of February 21, 2014, and denies the Petitioners Motion to Alter or Amend the same. (See separate Order dated July 3, 2014 addressing this issue.) The February 21, 2014 Order holds that Petitioners shall surrender for safekeeping the \$50,228,000 to Synovus Trust Company, N.A., the Special Conservator II, within ten (10) days from the date of the Order.
4. Edward G. R. Bennett shall continue to serve as Special Conservator until further order of this Court.

5. Gordon Teichner, Ph.D., ABPP, the Court-appointed Designated Examiner by Order dated January 17, 2014, shall submit his Designated Examiner Report to this Court by July 18, 2014.
6. This Court's appointment of Glenn P. Churchill as Guardian *ad Litem* for Keith Wellin remains in effect. Mr. Churchill is ordered to meet with Keith Wellin and his regularly attending physicians and caregivers and report to the Court regarding his status. The Guardian *ad Litem* shall file an initial report no later than July 25, 2014.

AND IT IS SO ORDERED!



IRVIN G. CONDON
Judge of Probate
County of Charleston

This 3rd day of July, 2014
Charleston, South Carolina.

