

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.

IN THE PROBATE COURT

CASE NO.: 2013-GC-10-0129

PROBATE COURT
CHARLESTON COUNTY

FILED

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ORDER DENYING PETITIONERS'
MOTION TO ALTER OR
AMEND JUDGMENT

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SC Court of Appeals

THIS MATTER is before the Charleston County Probate Court upon Petitioners' Motion to Alter or Amend an Order dated February 21, 2014, pursuant to Rule 59(e), SCRCP. Petitioners are the adult children of the Respondent. For the reasons stated herein, Petitioners' Motion is denied.

A condensed summary of events is as follows: (1) The Court appointed Edward G. R. Bennett as Special Conservator on August 15, 2013 by mutual consent of the Petitioners and Respondent. (2) On January 14, 2014, Mr. Bennett filed an Application with the Court pursuant to S.C. Code Ann. § 62-5-416(b), seeking clarification of his duty and obligation toward Respondent Keith Wellin, his protected person, regarding his previous estate planning and a November 20, 2013 transaction involving the Wellin Family Trust and a Promissory Note, currently being litigated in Federal Court. Petitioners opposed the Application. (3) On February 6, 2014, the Court held a hearing wherein it heard arguments from all parties. On February 21, 2014, the Court issued an Order which, inter alia, ordered Petitioners to pay \$50,228,000 held by the Wellin Family 2009 Irrevocable Trust to Synovus Trust Company, N.A., and further appointed Synovus as Special Conservator II. The Court's Order further directed that these

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funds and the Promissory Note be held until litigation or mediation concerning these assets is resolved. (4) On March 3, 2014, Petitioners filed the present Motion asking the Court to reconsider its ruling and vacate the February 21, 2014 Order. Edward G.R. Bennett, the Special Conservator, opposed this Motion and filed a Memorandum in Opposition with the Court on March 11, 2014. The Court held a hearing on this Motion on April 1, 2014.

Having reviewed the Motion, the pleadings in this case, the arguments of both sides made at the February 6, 2014 and April 1, 2014 hearings, and in light of the Petitioners attempted dismissal of the conservatorship-action (see separate Order dated July 3, 2014 denying dismissal and incorporating by reference that Order), the Court is convinced that the assets of Keith Wellin need protection.

This Court has jurisdiction over the parties and subject matter. S.C. Code Ann. §§ 62-5-102, 62-7-201. As a fiduciary appointed by the Court, Mr. Bennett filed an Application under S.C. Code Ann. § 62-5-416(b) requesting instruction. The Court issued an Order, pursuant to S.C. Code Ann. § 62-5-416(c), concerning the assets of Keith Wellin. Petitioners agreed to the jurisdiction of this Court by petitioning for the appointment of a conservator, and this Court has jurisdiction over the funds belonging to Keith Wellin in the 2009 Wellin Family Trust, pursuant to S.C. Code Ann. §§ 62-5-402 and 62-5-408(1), as an asset of Respondent's estate, and pursuant to S.C. Code Ann. § 62-7-201, to an out of state trust when the interests of justice otherwise would seriously be impaired. Petitioners are also Trustees of this Trust and offered to surrender the \$50,228,000 to the Court in satisfaction of the Note, but this Court does not hold funds and defers to the Federal Court litigation concerning the ultimate disposition of the \$50,228,000 and the Promissory Note. The Petitioners have appeared and raised issues in this Court through their counsel as set forth in the transcripts from the hearings and the record. All interested parties

were properly before the Court, and it was and is not necessary to name the Petitioners in their capacity as Trustees. See Ex Parte Cannon, 385 S.C. 643, 685 S.E.2d 814 (Ct. App. 2009); In re Guardianship of Brown, 611 So. 2d 1342 (Fla. Dist. Ct. App. 1993); In re Conservatorship of Groves, 109 S.W.3d 317, 350 (Tenn. Ct. App. 2003).

Petitioners' reliance on In re Ashton, 266 S.W3d 602, 604 (Tex. App. 2008), is misplaced. First, Ashton, which is merely persuasive authority, is contrary to the South Carolina Court of Appeals holding in Cannon, which is controlling on this Court. Second, Ashton does allow relief against a trustee if a trustee makes an appearance. Id. Third, the South Carolina Probate Code provisions at issue here deal with the protection of alleged incapacitated adults, not adversarial proceedings between parties of equal standing as found in divorce actions. See S.C. Code Ann. §§ 62-5-401, -402, -408.

Further, this Court finds more persuasive In re Conservatorship of Groves, 109 S.W.3d 317, 350 (Tenn. Ct. App. 2003) (holding that where parties appear and participate in an action, they waive any right to challenge failure to sue them as trustees) and In re Guardianship of Brown, 611 So. 2d 1342 (Fla. Dist. Ct. App. 1993) (holding that it is not necessary to serve an individual who petitioned for appointment as guardian in their capacity as trustee). These cases are in accord with this Court's application of In re Estate of Ahern, 359 Ill. App. 3d 805, 812, 835 N.E.2d 95, 101 (2005) ("However, we find that some of the arguments Robert made in objecting to the petition for guardianship and in contesting the award of fees to Dutton indicate that he did in fact appear on behalf of the Trust and thus subjected it to the trial court's personal jurisdiction.").

Dismissal pursuant to Rule 12(b)(8) is not appropriate. This Court again reiterates its exclusive jurisdiction to issue a protective order until these proceedings are terminated pursuant

to S.C. Code Ann. §§ 62-5-402, 62-5-408(1) and 62-5-430. This Court also notes that Federal Court has no conservatorship cases, that this Court has established and monitors many federal veterans' conservatorship cases, that the federal government in GAO reports has been critical of state courts for not protecting the assets of incapacitated adults, that the Petitioners as Trustees offered to pay the \$50,228,000 into the Court in satisfaction of the Promissory Note, and that counsel for the Trust Protector represented to this Court that they do not know where the \$50,228,000 is located.

This Court does not find persuasive Petitioners' argument that the Promissory Note, which this Court ordered to be also held by Synovus Trust Company, N.A., is not due until 2021, and that therefore no funds are due Respondent. Regardless of the validity or value of the substitution, this Court finds that, in any event, Petitioner is currently owed no less than that which would be due under the Note if it were still outstanding. Petitioners have also acknowledged in submissions to the Court and arguments of counsel that the funds at issue would satisfy the Note. Petitioners further acknowledge that these funds do not belong to them. Feb. 6, 2014 Transcript at 47 ln. 5-7, 69 ln.25, 70 ln. 1-2.

The Court finds there was no violation of due process because Petitioners had notice of and participated in the hearings on the Application. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. S.C. Dep't of Soc. Servs. v. Beeks, 325 S.C. 243, 246, 481 S.E.2d 703, 705 (1997). The Court notes that Petitioners were served with a copy of the Special Conservator's Application pursuant to the Court's instruction and have attended and presented arguments through counsel at all hearings, in addition to filing extensive memoranda. Further, prior to the February 6, 2014 hearing, Petitioners filed a Motion to Dismiss in this action raising many of the same grounds. Moreover,

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the Court notes that Petitioners brought this action seeking the immediate appointment of a conservator and a protective order and consented to the appointment of the Special Conservator. The Petitioners offered to pay the \$50,228,000 into the Court in satisfaction of the Promissory Note, but the Court does not hold funds. These facts support the Court's holding that Petitioners' procedural due process rights have not been violated.

The Court notes that S.C. Code Ann. § 62-5-402(3), which references S.C. Code Ann. § 62-5-433, deals primarily with tort claims. South Carolina Code Ann. §§ 62-5-402(2) and 62-5-408(1) provide this Court with exclusive jurisdiction to determine how the estate or assets of the protected person must be managed. Accordingly, the Court holds that the \$50,228,000 and the Promissory Note shall be held by Synovus Trust Company, N.A., until the conclusion of the Federal Court litigation and/or further Order of this Court.

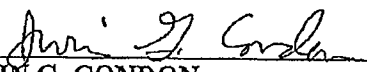
Finally, the principles of law and equity supplement the provisions of the South Carolina Probate Code. S.C. Code Ann. § 62-1-103. As a Court of equity, this Court should not allow the Petitioners, who brought this very action under the guise of protecting their father, to now manipulate the legal process to prevent this Court from providing the protection they sought.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

1. Petitioners' Motion to Alter or Amend Judgment is DENIED and the \$50,228,000 and the Promissory Note shall be held for safekeeping by Synovus Trust Company, N.A., until the conclusion of the Federal Court litigation and/or further Order of this Court.
2. Petitioners are directed to fully comply with this Court's February 21, 2014 Order.

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AND IT IS SO ORDERED!


IRVIN G. CONDON
Judge of Probate
County of Charleston

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

