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SC Court of Appeals

ATTACHMENT 3

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PROBATE COURT
CHARLESTON COUNTY

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE MATTER OF:
KEITH S. WELLIN

PETER WELLIN, CYNTHIA WELLIN PLUM, and
MARJORIE WELLIN KING,

Petitioners.

vs.

KEITH S. WELLIN,

Respondent.

) IN THE PROBATE COURT

) CASE 2013-GC-10-129

) ORDER

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MAY 31 2016

SC Court of Appeals

HEARING DATE:

February 6, 2014

JUDGE:

Irvin G. Condón

PETITIONERS' ATTORNEY:

Robert H. Brunson, Esquire

RESPONDENT'S ATTORNEY:

James B. Hood, Esquire

SPECIAL CONSERVATOR'S ATTORNEY:

Tiffany N. Provence, Esquire

PROCEDURAL HISTORY

THIS MATTER was before the Court pursuant to a filing by the Special Conservator, Edward G. R. Bennett, of an Application on January 14, 2014, pursuant to S.C. Code Ann. §62-5-416(b). Edward G. R. Bennett was appointed by the Court as Special Conservator and Special Trustee on August 15, 2013, by consent of Petitioners. Section C of the Order Appointing Special Conservator requires Edward G. R. Bennett to "ensure that transfers of assets are not made without fair and adequate consideration." In the above stated Application, Bennett sought clarification from this Court as to his duty and obligation towards Keith S. Wellin, his protected person, with regards to a November 20, 2013 transaction, upon which Bennett alleges that Wellin has transferred an asset and has received no compensation. Upon instruction from the Court, the Petitioner was served with a copy of the Application and related attachments and had proper notice of today's hearing.

Present before the Court were the Petitioner's counsel, Robert Brunson, Esquire, Bryson M. Geer, Esquire, and Merritt G. Abney, Esquire, all of Nelson Mullins. Respondent, Keith Wellin, was represented by his counsel, Robert H. Hood, Sr., Esquire, and James B. Hood, Esquire. Also in appearance were Edward Bennett as Special Conservator with his counsel, Tiffany N. Provence, Esquire. The Trust Protector, Lester Schwartz, and his counsel, Richard S. Rosen, Esquire, and H. Brewton Hagood, Esquire, were also in attendance.

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STATEMENT OF THE CASE

Petitioners brought this matter to the attention of the Court by a July 19, 2013 filing of a Petition for Appointment of Conservator, alleging their father, Keith S. Wellin, was in need of Conservator to protect his assets. Keith S. Wellin is an 87-year old businessman with significant wealth earned as an entrepreneur and Wall Street Investor. Petitioners further requested a Protective Order be issued, citing an immediate need to protect their father's assets due to his frail health and alleged undue influence asserted by his wife and caretaker, Wendy Wellin. Petitioners included a Promissory Note valued at \$49,802,115 as an asset belonging to Wellin on their Petition. As a result of their Petition, this Court issued a Protective Order on August 15, 2013, naming Edward G. R. Bennett as Special Conservator by consent of all parties. Section C of that Order specifically states "Edward G. R. Bennett, Esq. is to ensure that transfers of assets are not made without fair and adequate consideration to any person."

On November 20, 2013, Wellin substituted the Promissory Note, valued by Petitioners in their Petition at \$49,000,000 (plus interest) for a 58% interest in Friendship Partners. Prior to the substitution, Special Conservator Edward G. R. Bennett reviewed the transaction per this Court's Order to ensure adequate value was received for the transfer of assets. On the date of the substitution, the Promissory Note was valued at approximately \$50,211,447. Based on the longstanding valuation of Friendship Partners, this was the equivalent of 58.15548645% interest in Friendship Partners; therefore, Bennett approved the substitution.

Shortly after the substitution, the Wellin Children decided to liquidate the assets of Friendship Partners and then dissolve the entity. As a result of the liquidation, the 58.15548645% interest in Friendship Partners became worth approximately \$92,000,000. Petitioners have acknowledged the sale and dissolution of Friendship Partners. Further, they have acknowledged that despite their knowledge of their father's substitution they have disbursed all but roughly \$52,000,000, being the \$50,211,447 owed under the original Promissory Note and some additional funds, claiming Wellin's substitution was invalid. The remainder of the funds they have distributed to themselves. The other issues surrounding the Wellin Children's dispute over this substitution are not before the Court at this time.

To date, the Wellin Children have refused to pay the undisputed amount of \$50,211,447 (plus any accrued interest) to the Special Conservator who is responsible for protecting Wellin's assets per their request. Petitioners acknowledge in their Motion to Dismiss and in the hearing before this Court that "The Wellin Children also tendered, on behalf of the Irrevocable Trust, payment of the principal and interest on the Promissory Note held by the Revocable Trust by sending a check for \$50,228,000 to Bennett;" [such additional amount presumably being due to additional interest due through the date of tender] however, they fail to mention the reason this purported payment was rejected. Petitioners have asked that Wellin

(who they allege is incapacitated) accept said payment as payment in full of the Promissory Note, thereby removing his opportunity to assert his right to the additional \$42,000,000 difference between the Promissory Note and the value of the 58.15548645% interest in Friendship Partners.

On January 14, 2014, pursuant to S.C. Code Ann. §62-5-416(b), Edward G. R. Bennett, as Special Conservator, sought clarification from this Court as to his duty and obligation towards Keith S. Wellin, his protected person, with regards to this November 20, 2013 transaction. Petitioners and the Special Conservator all acknowledged before this Court that should Petitioners prevail in their interpretation of the above transaction, their father is entitled to \$50,211,447 (plus interest) and they are entitled to the remainder; however, should Wellin prevail in his interpretation of the above transaction, he is entitled to approximately \$92,000,000.

ISSUES OF LAW

Does this Court have jurisdiction to require Petitioners to pay the undisputed amount of \$50,211,447 (plus interest) to a Special Conservator appointed by this Court to protect Wellin's assets?

FINDINGS OF FACT

1. That this matter is properly before this Court.
2. That the Wellin Children, Peter Wellin, Cynthia Wellin Plum, and Marjorie Wellin King are the Petitioners in this matter.
3. That Petitioners filed a Petition for Appointment of Conservator on July 19, 2013, seeking a finding of incapacity of their father, Keith S. Wellin.
4. That Petitioners included in their Petition a list of assets of Mr. Wellin, including a Promissory Note valued at approximately \$49,000,000.
5. That as a result of their request for an emergency hearing on the matter, a Special Conservator was appointed by a Protective Proceeding.
6. That the Wellin Children consented to the appointment of Wellin's private counsel, Edward G. R. Bennett, to serve as Special Conservator.
7. That the Protective Order dated August 15, 2013 outlines the duties of Edward G. R. Bennett.
8. That Section C of that Order specifically states "Edward G. R. Bennett, Esq. is to ensure that transfers of assets are not made without fair and adequate consideration to any person."
9. That on November 20, 2013, Wellin substituted the Promissory Note valued at approximately \$49,802,115 for a 58.15548645% interest in Friendship Partners.

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10. That the Wellin Children are now challenging that substitution under various legal theories in an effort to disburse additional funds to themselves.
11. That the Wellin Children have acknowledged that at a minimum, Wellin is owed \$50,228,000, being the value of the note plus interest through the date of their offer.
12. That Wellin asserts he is due a significantly larger amount resulting from the Petitioners decision to liquidate Friendship Partners.
13. That the Petition to determine the full amount owed to Wellin is not before the Court at this time.
14. That the Petitioners in this action have refused to surrender the undisputed funds of \$50,228,000 to Wellin or his Special Conservator, Edward G. R. Bennett.
15. That the Petitioners refuse to surrender these funds absent the alleged incapacitated releasing his right to dispute the full amount owed.
16. That the Petitioners are holding these undisputed funds as the Trustees for the Wellin Family 2009 Irrevocable Trust.
17. That the Petitioners' counsel stated, "[m]y clients have no interest in that \$50 million. It belongs to Mr. Wellin, but only in full exchange for payment of the note." Hearing Tr. 58:19-21.
18. That the Special Conservator has requested that this Court require Petitioners to return to his care an asset that they acknowledge is his; namely \$50,228,000, plus interest through the date such funds are returned.
19. That this Court has jurisdiction over Wellin's assets, the Petitioners and the Special Conservator in this matter.
20. That all parties had adequate notice of and participated in the hearing held on this matter.

CONCLUSIONS OF LAW

Pursuant to S.C. Code Ann. §62-5-408(1), this Court has the power to preserve and apply the property of the person to be protected as may be required for his benefit. Further, S.C. Code Ann. §62-5-408(3)(a) gives this Court, for the benefit of the person and of his estate, all the powers over his estate and affairs which he could exercise if present and not under disability, except the power to make a will. For these reasons, this Court has jurisdiction over the assets belonging to Keith S. Wellin, including the Promissory Note or any asset for which it was substituted.

In addition to lack of jurisdiction over the asset, Petitioners make several other arguments in an effort to maintain control over these funds including lack of standing of the Special Conservator, lack of

personal jurisdiction over the Wellin Children as Trustees holding the funds, and lack of due process on behalf of the Wellin Children. This Court does not find these arguments persuasive in light of the Petitioner's actions that led to the original Protective Order.

The Wellin Children brought this action and sought the immediate appointment of a Conservator and a Protective Order. In doing so, Keith Wellin was not afforded an opportunity to defend his capacity nor avoid this Court's involvement in his financial affairs prior to an emergency appointment. As a result of the Wellin Children's Petition, this Court held an emergency hearing and issued a Protective Order dated August 15, 2013, thereby subjecting Wellin, his assets, and the Petitioners to the jurisdiction of this court. This Order, which was entered by the consent of the Wellin Children, appointed a Special Conservator to protect these assets and ensure Wellin received fair and adequate consideration for any transfers.

Upon the appointment of the Special Conservator, he had the duty to protect Keith S. Wellin from all third parties, including the Wellin Children. Furthermore, he had the right to seek instruction pursuant to S.C. Code Ann. §62-5-416(b) and to seek any appropriate order pursuant to S.C. Code Ann. §62-5-416(c). This sections and a clear reading of the statute offer the Special Conservator standing in this Court.

As to jurisdiction over the Wellin Children, Petitioners agree that they are here individually, but argue that this Court lacks jurisdiction over them as Trustees over the 2009 Wellin Family Irrevocable Trust, which currently holds the \$50,228,000 asset in question. The case law in South Carolina is not consistent with this position. See Ex Parte Cannon, 385 S.C. 643, 685 S.E.2d 814 (Ct. App. 2009). Cannon argued that he was never made a party to any proceedings in his capacity as trustee, was never served with a rule, and was only before the circuit court in his capacity as personal representative, and therefore, the circuit court lacked personal jurisdiction over him. The Court disagreed.

Further, although it is not binding precedent in South Carolina, this Court also relies on the reasoning found in In re Estate of Ahern, 359 Ill. App. 3d 805, 835 N.E.2d 95 (2005). In Ahern, counsel for a guardianship estate brought enforcement proceedings after a ward's death against the trustee of the ward's trust for payment of attorney fees. Even though personal service was never made on the trustee, the circuit court concluded that it had personal jurisdiction over the ward's trust and its trustee in guardianship proceedings because the trustee waived objection to lack of service with general appearance on behalf of trust by entering pleadings on behalf of trust and otherwise participating in guardianship proceedings in a capacity that indicated control over the trust. 359 Ill. App. 3d at 813, 835 N.E.2d at 101.

In this matter, the Wellin Children participated in the hearing through counsel that represents them individually and in their fiduciary role to their father. Similar to Cannon, this Court will not allow

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the Wellin Children to hide behind a different fiduciary title to avoid negative consequences. As in Cannon and in Ahern, the Wellin Children have voluntarily appeared as Trustees in other matters before this Court. For these reasons, this Court has jurisdiction over them in all capacities as it relates to the assets of the protected person.

Lastly, the Wellin Children argue a lack of due process. While this Court finds that the Wellin Children do have due process rights as to the amount of the funds in dispute (namely the \$42,000,000 difference in question), those rights do not extend to the undisputed funds belonging to their father and well within the jurisdiction of this court. They cannot possibly allege harm in the Court seeking to protect the very assets they requested the Court to protect. Further, their participation in the scheduling of this hearing and participation in the same allowed them an adequate opportunity to be heard on the matter.

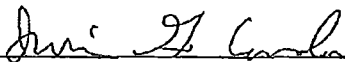
The Probate Court is a court of equity and although it is unnecessary to address the equitable arguments made by the Special Conservator, the Court acknowledges that returning the undisputed funds to the Special Conservator for the use and benefit of the alleged incapacitated is both legal and equitable.


Based upon the foregoing findings of fact and conclusions of law,

IT IS ORDERED, ADJUDGED, AND DECREED THAT:

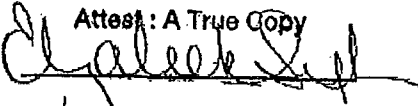
1. Petitioners shall pay the \$50,228,000 to Synovus Trust Company, N.A., the Special Conservator II appointed by this Court, within ten (10) days from the date of this Order.
2. Respondent and/or Special Conservator Bennett shall deliver the Promissory Note to Special Conservator II for safekeeping within ten (10) days from the date of this Order.
3. Special Conservator II shall hold the funds and the Promissory Note until the litigation or mediation concerning these assets is resolved. No withdrawals shall be made unless agreed to by the parties and/or ordered by this Court.
4. This Order in no way interferes with any right to dispute ownership over the disputed funds of approximately \$42,000,000.

AND IT IS SO ORDERED!


Irvin G. Condon
Judge of Probate Court for Charleston County

Charleston, South Carolina
2/21/2014 

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Attest: A True Copy

Clerk Probate Court
Charleston County South Carolina

