

ATTACHMENT 1

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MAY 31 2016

SC Court of Appeals

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Peter J. Wellin, Cynthia W. Plum and Marjorie)
W. King,)
Appellants,)
Versus)
Keith S. Wellin,)
Respondent.)

IN THE COURT OF COMMON PLEAS
Appeal from the Probate Court for
Charleston County
C/A No. 2014-CP-10-04336

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FILED
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JULIE J. ARBON
CLERK OF COURT
ORDER AFFIRMING PROBATE
RECEIVED COURT
MAY 31 2016
SC Court of Appeals

This matter comes before the Court on appeal from orders of the Charleston County Probate Court in a conservatorship proceeding, to wit: (1) the protective Order entered on February 21, 2014 requiring Petitioners/Appellants to transfer an estate asset of \$50,228,000.00 to a Special Conservator; (2) the Order Denying Petitioners' Motion to Alter or Amend Judgment entered on July 3, 2014; and (3) and the Order Regarding Petitioners' Notice of Voluntary Dismissal.

This appeal proceeded under the provisions of S.C. Code Ann. § 62-1-308, pursuant to which the parties submitted extensive briefs with legal arguments and a Record on Appeal containing all the matters designated by the parties as pertinent and necessary to the consideration of the issues raised. Oral Argument was heard on July 28, 2015.

Having considered all the issues raised, all the arguments made and the documents presented in the Record on Appeal, I find and conclude as to each issue as raised by the Appellants that:

1. The Probate Court did not err in holding that it had subject matter jurisdiction to

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issue the protective order;

2. The Probate Court did not err in finding that it had statutory authority to issue the protective order on application of the Special Conservator pursuant to S.C. Code Ann. §62-5-416;

3. The Probate Court did not err in holding that it had personal jurisdiction over the Petitioners/Appellants in their individual and fiduciary capacities as Trustees;

4. The Probate Court did not err in finding that the Special Conservator had standing to seek instruction and direction from the Probate Court regarding the \$50,228,000 estate asset;

5. The Probate Court did not err in finding that Rule 12(b)(8), SCRCP, did not require dismissal of the Special Conservator's application;

6. The Probate Court did not err in finding that the Appellants' due process right were not violated by the issuance of the protective order;

7. The Probate Court did not improperly invoke its equitable powers in issuing the protective order;

8. The Probate Court did not err in making findings of fact; and

9. The Probate Court did not err in vacating/nullifying, as ineffective under Rule 41(a)(1)(A), SCRCP, the Notice of Voluntary Dismissal filed by the Petitioners after the Probate Court had issued the protective order and while the Petitioners' own Motion to Alter or Amend was pending.

I further find that the death of Keith S. Wellin¹ during the pendency of this appeal does not require the dismissal of the appeal on the grounds of mootness because the Probate

¹ Mr. Wellin died on September 14, 2014, two days after the Petitioners/Appellants filed their initial brief in this appeal.

Court's orders may affect future events or have collateral consequences for the parties. Accordingly, the orders of the Probate Court are hereby AFFIRMED.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

This matter was commenced in the Probate Court on July 19, 2013, by the Petitioners/Appellants, Peter J. Wellin, Cynthia W. Plum, and Marjorie W. King [the Wellin Children], with the filing of a Petition for Protective Order and Appointment of Conservator for their father, Keith S. Wellin, in which they alleged that their father lacked capacity to manage his property and affairs. The Wellin Children alleged the need for a Conservator to protect Mr. Wellin's assets, including a "promissory note with a face value of approximately \$49 million."

Shortly after the filing of the Petition, all interested parties agreed to the appointment of Edward G. R. Bennett as Special Conservator and Special Trustee, pending resolution of the merits with regard to questions of Mr. Wellin's capacity, and an order of appointment was entered on August 15, 2013. Over the course of the next several months, the parties attempted -- unsuccessfully -- to mediate a resolution; however, certain transactions prompted the Special Conservator to seek guidance and instruction from the Probate Court, on application submitted January 14, 2014, pursuant to S.C. Code §62-5-416(b), and a hearing was held on February 6, 2014.

The Special Conservator's concern involves the aforementioned Promissory Note which was payable to Mr. Wellin by an Irrevocable Trust (the Wellin Family 2009 Irrevocable Trust), of which the three Wellin Children serve as Trustees. Pursuant to the provisions of the Trust, Mr. Wellin, as settlor, chose to substitute a 58% interest in



Friendship Partners, LP² of the same value, which on the date of the substitution, was valued at approximately \$50,211,447. The Order appointing Mr. Bennett as Special Conservator specifically required him to “ensure that transfers of assets are not made without fair and adequate consideration;” accordingly, he reviewed and approved the transaction, finding the exchange to be made for adequate consideration.

Shortly after the substitution of the note for the Friendship Partners interest, the Wellin Children unilaterally decided to liquidate the assets of Friendship Partners and dissolve the entity. As a result of the liquidation, the assets Mr. Wellin was due to receive from his interest in Friendship Partners were approximately \$92,000,000. However, the Wellin Children, individually and as Trustees, take the position that their father’s substitution was ineffective or incomplete and that they only owe on the outstanding Promissory Note (valued at \$50,228,000). They claim personal entitlement to the additional \$42 million under the Trust, which would prevent it from passing to his Revocable Trust. The Wellin Children attempted to tender payment of the \$50,228,000 in exchange for a full release of Mr. Wellin’s rights to the remaining \$42 million. The Special Conservator refused to accept tender of the check as he felt it was not in Mr. Wellin’s best interest (nor compliant with the Probate Court’s order) to accept payment under those terms thereby causing him a potential loss of \$42 million; and sought by his application, clarification from the Probate Court as to his duty and obligation with regard to this November 20, 2013 substitution. By order also dated February 28, 2014, the Probate Court amended its order appointing Bennett in order to “include the power to

² Friendship Partners is a partnership consisting of the three Wellin Children, as general partners, with Keith S. Wellin, as a limited partner.

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pursue any third party, including Petitioners, holding asserts belonging to the alleged incapacitated person....”

By the time of the February 6, 2014 hearing, the Wellin Children had already disbursed to themselves all of the \$92 million except for approximately \$52 million which amount included the \$50,228,000 they conceded is owed to Mr. Wellin under the original Note. The Special Conservator requested that the Probate Court take immediate protective measures to secure the undisputed \$50,228,000 and further provide him with the power to pursue the additional funds to which he felt Mr. Wellin was entitled. On February 21, 2014, the Probate Court issued an Order pursuant to Code Ann. §62-5-416(c), which ordered the Petitioners/Appellants to pay the \$50,228,000 held by the Irrevocable Trust to Synovus for safekeeping and further appointed Synovus as Special Conservator II, and further granted the Special Conservator the power to pursue the remaining \$42 million. The Wellin Children filed a Motion to Alter or Amend the protective order, which was denied; and they appeal from both orders. As discussed above a separate order was issued, from which no appeal has been taken, granting Bennett expanded powers to pursue additional claims.

DISCUSSION

Standard of Review

An appeal from the probate court is governed by the provisions of the Probate Code, which provides that a final order or decree of the probate court may be appealed to the circuit court. S.C. Code Ann. § 62-1-308(a). The circuit court “shall hear and determine the appeal according to the rules of law, and the hearing must be strictly on appeal and no new evidence may be presented.” S.C. Code Ann. § 62-1-308(i).

“[A]ccording to the rules of law” means according to the rules governing appeals. *Matter of Howard*, 315 S.C. 356, 360, 434 S.E.2d 254, 256-57 (1993); *In re Estate of Pallister*, 363 S.C. 437, 447, 611 S.E.2d 250, 256 (2005). While issues of law are subject to de novo review, factual findings should be upheld if supported by any evidence.

Threshold Issue of Mootness

As noted above, Mr. Wellin died on September 14, 2014, two days after the Petitioners/Appellants filed their initial brief in this appeal. The Petitioners/Appellants declined the opportunity to amend their brief to address this point; however, in their Reply brief, they interjected the issue arguing that the conservatorship and the protective order are now moot. “A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief.” *Mathis v. South Carolina State Highway Dep’t*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). An exception to mootness doctrine can be applied when “a decision by the trial court may affect future events or have collateral consequences for the parties.” *Curtis v. State*, 345 S.C. 557, 549 S.E.2d 591, 596 (2001). I decline to apply the mootness doctrine based on this exception because Mr. Wellin’s death does not moot the underlying dispute over the estate asset. Even if there technically is no longer a need for the conservatorship proceeding, there was no dispute that the \$50 million was owed to Mr. Wellin, and now his estate, and the Conservator should have been holding the funds at issue as ordered by the Charleston County Probate Court at the time of Mr. Wellin’s death. The Estate should not be required to expend more time and costs to bring an identical action in the exact same court. This issue is properly before the Court and should be decided.

Addressing below each of the Petitioners/Appellants issues in turn, I find that the Probate Court had jurisdiction over the subject matter of an asset of Mr. Wellin's estate and personal jurisdiction over the Petitioners in both their individual and fiduciary capacities, and I adopt and affirm the Probate Court's orders in full as if fully set forth below.

1. Subject Matter Jurisdiction -- The Probate Court had subject matter jurisdiction to issue the protective order.

The Probate Code, S.C. Code Ann. § 62-5-402, grants exclusive jurisdiction to the probate court "to determine the need for a conservator or other protective order until the proceedings are terminated;" and "to determine how the estate of the protected person which is subject to the laws of this State must be managed, expended, or distributed to or for the use of the protected person or any of his dependents." Once attached, the jurisdiction of the probate court is not only exclusive but continuous, commencing "[a]fter the service of the summons and petition in a proceeding seeking the appointment of a conservator or other protective order and until termination of the proceeding." S.C. Code Ann. § 62-5-402. Therefore, "if a probate court has original jurisdiction over the protective proceedings, it also has exclusive and continuous jurisdiction to determine the need for a conservator or the manner in which an estate is to be managed." 21 S.C. Jur. *Guardian and Conservator* § 9 (2015). Pursuant to this grant of statutory jurisdiction, "the probate court has the responsibility to determine whether the conservatorship estate of the [protected person] is effectively 'managed, expended, or distributed to or for the use of the protected person or any of his dependents.'" Plyler v. Burns, 373 S.C. 637, 647, 647 S.E.2d 188, 194 (2007) (finding that such determinations require the probate court to consider "whether the conservator is acting within the confines of the law with respect to the management of the conservatorship").



As found by the Probate Court, the Petitioners/Appellants commenced this action and invoked the exclusive jurisdiction of the Probate Court to determine the need for a conservator for their father and to determine how his estate should be managed. The Petitioners/Appellants argue that the Probate Court did not have jurisdiction over the \$50,228,000 proceeds of their liquidation of the Friendship Partnership because it was not an asset belonging to Mr. Wellin. However, that argument fails in view of the facts that the Petitioners expressly identified the Promissory Note as an estate asset of which they sought protection, and that irrespective of the ongoing dispute and litigation over the over \$42 million, the Petitioners acknowledged in open court that they have offered and continue to offer the \$50,228,000 to Mr. Wellin (and now his estate) in exchange for the cancellation of the Promissory Note. The very fact that the Petitioners offered to post that amount with the Probate Court belies their argument that the Probate Court does not have jurisdiction to order the same funds held for a Special Conservator.

I affirm and adopt the holding of the Probate Court that: "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), and pursuant to S.C. Code Ann. § 62-7-201, "when the interests of justice otherwise would seriously be impaired."

2. **Statutory Authority -- The Probate Court had statutory authority to issue the protective order on application of the Special Conservator pursuant to S.C. Code Ann. §62-5-416.**

As recited above and shown in the Record, the Protective Order was issued in connection with the Special Conservator's application under Section 62-5-416(b), which



provides that: "Upon application to the appointing court, a conservator may request instructions concerning his fiduciary responsibility." The Petitioners argue that the Probate Court did not have authority to award substantive relief in response to the Special Conservator's informal request for instruction made pursuant to §62-5-416(b) without service of a summons and complaint. However, §62-5-416(c) states, "After notice and hearing as the court may direct, the court may give appropriate instructions or make any appropriate order." The Petitioners were served with the application and participated in the hearing, and the Probate Court made an appropriate order to protect the estate asset as the Petitioners themselves had asked the Court to do.

3. Personal Jurisdiction -- The Probate Court has personal jurisdiction over the Petitioners/Appellants in their individual and fiduciary capacities as Trustees.

While Petitioners cannot contest that the Probate Court has personal jurisdiction over them by virtue of the fact that they commenced the conservatorship action, they argue that the Probate Court lacks jurisdiction over them to direct them to turn over the \$50,228,000 which they hold in their fiduciary capacity as Trustees of the Irrevocable Trust that technically holds the funds. However, the record shows that the Petitioners have not maintained their separate identities throughout the Probate Court proceedings. They are represented, in both their personal and fiduciary capacities, by the same counsel and they have made arguments in their capacity as both individuals and Trustees. In fact, as noted above, they offered to surrender the funds to the Probate Court in satisfaction of the Note³.

Based on the precedent in *Ex Parte Cannon*, 385 S.C. 643, 685 S.E.2d 814 (Ct.

³ The Probate Court could not accept the offer of surrender because it does not hold funds.



App. 2009), and the persuasive guidance of *In re Estate of Ahern*, 359 Ill. App. 805, 835 N.E.2d 95 (2005), *In re Conservatorship of Groves*, 109 S.W.3d 317, 350 (Tenn. Ct. App. 2003), and *In re Guardianship of Brown*, 611 So. 2d 1342 (Fla. Dist. Ct. App. 1993), I agree with the Probate Court's conclusion that the Petitioners have waived any objection by voluntarily submitting to the personal jurisdiction of the Probate Court in both their individual and fiduciary capacities. I further agree with the Probate Court that the Petitioners' reliance on *In re Ashton*, 266 S.W.3d 602, 604 (Tex. App. 2008), is misplaced because it is inconsistent with our Court of Appeals' decision in *Cannon* based on the facts that the Petitioners initiated this protective proceeding in Probate Court and they took affirmative positions and made proffers in their fiduciary capacities. I affirm and adopt the holding of the Probate Court that "the Wellin Children have voluntarily appeared as Trustees ...[and]... this Court has jurisdiction over them in all capacities as it relates to the assets of the protected person."

4. Standing -- The Special Conservator had standing to seek instruction and direction from the Probate Court regarding the \$50 million estate asset.

The Petitioners/Appellants argue that the protective order should be reversed because the Special Conservator had no standing to pursue the purported claim on Keith Wellin's behalf at the time he filed his application. However, upon his appointment the Special Conservator had the duty to protect Mr. Wellin's assets and the right to seek instruction from the Probate Court, pursuant to S.C. Code Ann. §62-4-41(b), regarding the Petitioners' tender of the \$50 million for the Note and to seek any appropriate order pursuant to S.C. Code Ann. §62-5-416(c). I adopt and affirm the conclusion of the Probate Court that these statutes offer the Special Conservator standing in the Probate Court to seek protection of the \$50 million estate asset.

5. Rule 12(b)(8), SCRCF, did not require dismissal of the Special Conservator's Application.

The Petitioners sought dismissal of the Special Conservator's application for instruction and an order of protection as to the \$50 million pursuant to Rule 12(b)(8), SCRCF, which provides for dismissal of a complaint when "another action is pending between the same parties for the same claim." The Probate Court did not err in denying the Motion to Dismiss because while there was litigation pending in other courts involving Mr. Wellin and his Children, as the Petitioners acknowledged at the February 2014 hearing, at the time the Special Conservator made his application to the Probate Court, the action pending in federal court did not contain a claim relating to the substitution of assets. I adopt and affirm the conclusion of the Probate Court that dismissal pursuant to Rule 12(b)(8) was not appropriate.

6. The Petitioners/Appellants' due process right were not violated by the issuance of the protective order.

The core of due process is the right to notice and a meaningful opportunity to be heard at a meaningful time and in a meaningful manner. *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985); *LaChance v. Erickson*, 522 U.S. 262, 266 (1998); *S.C Dep't Soc. Servs. v. Beeks*, 325 S.C. 243, 481 S.E.2d 703(1997). The Petitioners argue that their due process rights were violated by the issuance of the protective order in the absence of a summons and complaint, discovery, and trial by a jury. However, the Petitioners were afforded an opportunity to be heard at a meaningful time and in a meaningful manner. As the Probate Court correctly found that there was no due process violation under the circumstances which include the facts that: the Petitioners commenced the conservatorship action asking the Probate Court to protect Mr. Wellin's

assets; the Petitioners have affirmatively disavowed any rights in the \$50,228,000 which they acknowledge is due to Mr. Wellin's estate and which they offered to pay into the Probate Court; they received notice of the Special Conservator's application; they participated in the scheduling of the hearing; they appeared and were heard at all the hearings; and in addition they submitted extensive memoranda.

7. The Probate Court did not improperly invoke its equitable powers in issuing the protective order.

In the Order of February 21, 2014, the Probate Court stated that "returning the undisputed funds to the Special Conservator for the use and benefit of the alleged incapacitated is both legal and equitable," and in the Order Denying the Motion to Alter or Amend, the Probate Court also stated that: "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." Petitioners argue that the Probate Court incorrectly relied on its "equitable powers" as a basis for its authority to require them to pay the \$50 million to the Special Conservator II. However, while the Probate Court orders do contain references to equity, the Probate Court's order of protection is well founded on the statutory authority of Sections 62-5-402 and 62-5-416 of the South Carolina Probate Code.

8. The pertinent findings of fact are supported by the evidence.

In its "Statement of the Case," the Probate Court stated:

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.

The Probate Court made a finding of fact [¶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.”

The Petitioners challenge the Probate Court’s statement as an unsupported finding of fact, arguing that they dispute the validity and effectiveness of the Swap Transaction and they dispute Bennett’s valuation of the Promissory Note and the partnership units because no evidence or testimony was presented. The Petitioners argue that the finding and references to the \$50 million as “undisputed funds” is not supported by any evidence because they have unambiguously stated their position that Keith Wellin’s Revocable Trust is entitled to approximately \$50 million, but only in satisfaction of the Promissory Note.

The Petitioners’ arguments do not support reversal of the Probate Court’s orders. The Petitioners themselves valued the amount due under the Note at \$50,228,000 through their filings and submissions in the Probate Court, and through their Counsel, who represented to the Probate Court that: “My clients have no interest in that \$50 million. It belongs to Mr. Wellin, but only in full exchange for payment of the note.” The Probate Court’s protective order firmly rests on the undisputed concession that the Wellin Children have no legal interest in, at a minimum, the \$50 million, and the Probate Court wisely concluded that those funds should be held by a Special Conservator. It is worth noting that, if Mr. Wellin had not substituted the note for assets of the Trust, then, the Petitioners’ argument that Mr. Wellin was not yet entitled to the

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funds because the Promissory Note was not due until 2021 would ultimately fail because the Note became payable upon Mr. Wellin's passing.

To the extent that the Petitioners/Appellants also challenge the Probate Court's finding of jurisdiction over Mr. Wellin's assets as a "finding of fact", that finding is separately addressed above and affirmed as fully supported by the Record and the applicable law.

9. The Notice of Voluntary Dismissal was ineffective to divest the Probate Court of jurisdiction in the conservatorship to protect the estate assets.

The Petitioners claim that the protective order was rendered ineffective when they filed a Notice of Voluntary Dismissal pursuant to Rule 41(a)(1)(A) on May 5, 2014. By that time, the parties had engaged in months of proceedings regarding the capacity of Mr. Wellin, and the Probate Court had already issued its Orders appointing the Special Conservator and ordering transfer of the \$50 million to the Special Conservator II. The Petitioners had filed a motion to alter or amend the order of protection, and a hearing had been heard on their motion. The Probate Court correctly held that the Notice of Voluntary Dismissal was ineffective because Rule 41(a)(1)(A) is inapplicable to a conservatorship proceeding where there is no requirement for answers or responsive pleadings and because the Probate Court obtains exclusive jurisdiction under § 62-5-402 when a petition for a conservatorship is filed and the matter cannot be terminated except by final order of the court. I adopt the reasoning of the Probate Court and affirm the holding of the Probate Court that the Notice of Dismissal was not effective to allow the Petitioners to nullify the Probate Court's order for protection of Mr. Wellin's estate asset.

CONCLUSION

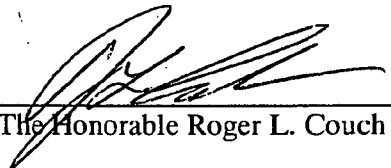
I have carefully considered each of the issues raised by the Petitioners/Appellants

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in this appeal and all the arguments made in the briefs and at the hearing, and I find no basis to reverse the Probate Court's orders. WHEREFORE, based on the Record before me, for the reasons discussed above, the Probate Court orders are AFFIRMED.

AND IT IS SO ORDERED.

1/7, 2016
Charleston, South Carolina


The Honorable Roger L. Couch



State of South Carolina
The Circuit Court of the Seventh Judicial Circuit

ROGER L. COUCH
JUDGE

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MEMORANDUM

TO: The Honorable Julie J. Armstrong, Charleston County Clerk of Court

FROM: Adam J. Mandell, Law Clerk to Roger L. Couch, Judge

RE: Order

DATE: January 7, 2016

Dear Ms. Armstrong;

I hope that this message finds you well. Please find enclosed herewith one (1) Order to be filed in the case as incaptioned therein.

Please file said Order and inform the parties of its filing according to the regular procedures of your office.

If you have any questions please feel free to contact our office.

Thank you,

A handwritten signature in black ink, appearing to read "Adam J. Mandell".

Adam J. Mandell
Law Clerk to Roger L. Couch