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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS

Roger L. Couch, Circuit Court Judge

Irvin G. Condon, Probate Court Judge

Appellate Case No. 2016-001141

Circuit Court Case No. 2014-CP-10-4336

Probate Case No. 2013-GC-10-1029

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

v.

Keith S. Wellin, Respondent,

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. Did the lower courts err in holding the probate court had subject matter jurisdiction to order the Wellin Family 2009 Irrevocable Trust (the "Irrevocable Trust" or the "Trust") or the Wellin Children to pay $50 million to a special conservator, where the Probate Code and governing case law provide that subject matter jurisdiction over the dispute is lacking?

II. Did the lower courts err in holding the probate court had personal jurisdiction over the Irrevocable Trust, where the Trust is not a party to the underlying action and has not submitted to the jurisdiction of the court?

III. Did the lower courts err in finding the probate court's order requiring the Irrevocable Trust to pay $50 million to a special conservator did not violate principles of due process, where the probate court made its ruling in the absence of a summons and complaint, without affording the Trust an opportunity to conduct any discovery, and without an evidentiary hearing or trial?

IV. Did the lower courts err in finding South Carolina Rule of Civil Procedure 12(b)(8) did not require dismissal of Edward Bennett's request for relief, where the same parties are litigating the same claim in the United States District Court?

V. Did the circuit court err in finding Keith Wellin's death, and the appointment of his widow as Special Administrator of his estate, did not render moot the underlying Conservatorship Action and this appeal?

VI. Did the lower courts err in finding the special conservator, Edward Bennett, had standing to pursue disputed claims against the Wellin Children on Keith Wellin's behalf, where he lacked such authority under the South Carolina Probate Code and the order appointing him special conservator?

INTRODUCTION

This appeal arises from certain orders of the probate court in the underlying conservatorship proceeding (the "Conservatorship Action"), which required the Appellants Peter Wellin, Cynthia Wellin Plum, and Marjorie Wellin King (collectively, the "Wellin Children"), who are trustees of an irrevocable trust created by their late father, Keith S. Wellin ("Keith Wellin"), to pay $50 million from the trust to Synovus Trust Company ("Synovus"). The court ordered the funds to be held by Synovus as a special conservator during the pendency of certain litigation in the United States District Court concerning that same $50 million.

Although the factual and procedural history of this dispute is lengthy, the reasons why this Court should reverse the lower court orders are straightforward. The probate court ordered the Wellin Children to pay $50 million to Synovus based on an oral request by opposing counsel at a hearing. The court issued its order without any claim (or counterclaim) being asserted against the Wellin Children and, thus, prior to the Wellin Children having an opportunity to file an answer, assert affirmative defenses, conduct discovery or a trial, or otherwise take advantage of their due process rights and the South Carolina Rules of Civil Procedure. As far as Appellants can tell, the probate court's order is unprecedented in South Carolina jurisprudence, and it violates the South Carolina statutes that set clear limits on the scope of the probate court's jurisdiction. For this and several other good reasons explained in detail herein, this Court should reverse the lower court orders.

STATEMENT OF THE CASE

On July 19, 2013, the Wellin Children, in their individual capacities, filed the Conservatorship Action in the probate court seeking appointment of a conservator for Keith Wellin, whom the Wellin Children allege was incapacitated and being unduly influenced by his

fourth wife, Wendy Wellin. (Petition.) At a preliminary hearing held on July 26, 2013, the parties agreed to the appointment of attorney Edward Bennett, Esq. ("Bennett"), as a temporary Special Conservator for Keith Wellin until the parties could attend mediation to attempt to resolve litigation that Keith Wellin had previously filed against the Wellin Children in federal district court. (7/26/2013 Hr'g Tr.) On August 15, 2013, the probate court issued a consent order appointing Bennett as Special Conservator with the limited power and duty "to ensure that transfers of assets are not made without fair and adequate consideration." (8/15/2013 Order.) Meanwhile, litigation in the district court continued.

The district court litigation relates to certain sophisticated estate planning transactions executed by Keith Wellin, with assistance of counsel, beginning in 2003. (*Wellin I* Compl.) In 2003, Keith Wellin created Friendship Partners, LP ("Friendship Partners"), a family limited partnership, and transferred 896 shares of Berkshire Hathaway Class A stock ("BRKa Shares") to the partnership in exchange for a 99% limited partnership interest. (Petition ¶ 7; Partnership Agreement.) In 2009, Keith Wellin created the Wellin Family 2009 Irrevocable Trust "Irrevocable Trust" or the "Trust") and named the Wellin Children its trustees and beneficiaries. (Irrevocable Trust.) Shortly after the creation of the Trust, Keith Wellin sold his 99% limited partnership interest in Friendship Partners to the Trust in exchange for a promissory note with a face value of approximately $50 million (the "Promissory Note"). (Purchase & Sale Agreement.) In the district court litigation, Keith Wellin sought, *inter alia*, to rescind these 2009 transactions—both the creation of the Irrevocable Trust and the sale of the partnership interest (jointly, the "2009 Transaction")—on the alleged basis that the Wellin Children (and presumably his estate planning attorney) duped him into these transactions. (*Wellin I* Compl.)

On November 20, 2013, Bennett delivered to counsel for the Wellin Children a document executed the same day through which Keith Wellin purported to exercise a right under the Irrevocable Trust to substitute certain assets in exchange for Trust assets of equal value. (Bennett 11/20/2013 Letter to John Hagerty.) Specifically, he purported to forgive the Promissory Note by marking it "Paid in Full" in exchange for a 58% limited partnership interest in Friendship Partners (the "Swap Transaction"), which Bennett unilaterally determined to be an asset exchange of equal value. (Substitution of Assets.) The Wellin Children, in their capacity as trustees of the Irrevocable Trust, rejected the Swap Transaction on numerous grounds, and the validity of the Swap Transaction is a central disputed issue in the district court litigation, which remains pending. (John Hagerty 12/6/2013 Letter to Bennett.)

On or about December 1, 2013, Friendship Partners dissolved and liquidated its assets, which consisted of 906 BRKa Shares valued at approximately $157 million. (Dissolution Resolution & Plan of Liquidation.) In connection with the liquidation, Friendship Partners distributed the proceeds from the sale of the BRKa Shares to its limited partners in proportion to their respective financial interests in the partnership. (*Id.*) In making the distributions, Friendship Partners did not recognize the purported Swap Transaction. The Friendship Partners distribution to the Irrevocable Trust accordingly included the vast majority of the $157 million in proceeds, including the approximately $92 million in proceeds corresponding to the 58% limited partnership interest claimed by Keith Wellin as a result of the disputed the Swap Transaction. (*Id.*)

On or about December 6, 2013, the Wellin Children, on behalf of the Irrevocable Trust, tendered a check for approximately $50 million to Bennett as prepayment in full of the Promissory Note. (Hagerty 12/6/2013 Letter to Bennett.) Bennett rejected the payment, taking

the position that the Promissory Note ceased to exist after it was marked "Paid in Full" in connection with the purported Swap Transaction on November 20. (Bennett 12/6/2013 Letter to Hagerty.) Bennett also demanded the Trust immediately pay to Keith Wellin $92 million, which he claimed represented the liquidation proceeds corresponding to Keith Wellin's alleged 58% interest in Friendship Partners. (*Id.*) The Wellin Children, on behalf of the Trust, refused Bennett's demand.

Keith Wellin subsequently asserted claims in the district court against the Wellin Children seeking to recover these proceeds from the Friendship Partners liquidation. (*Wellin I* Am. Compl.; *Wellin II* Counterclaim; *Wellin IV* Compl.) Keith Wellin's attorneys, and other parties acting on his behalf, made multiple requests to the district court for preliminary injunctions with respect to the assets of Friendship Partners, which the district court denied. (*Wellin I* Order Den. Mot. for Prelim. Inj.; *Wellin II* Order Den. Mot. for Prelim. Inj.)

One week after the district court denied a motion for a preliminary injunction over the proceeds of the Friendship Partners liquidation, on January 14, 2014, Bennett delivered an *ex parte* "Application" to the probate court in the instant Conservatorship Action, in which he purported to request "guidance" regarding his fiduciary duties as Special Conservator pursuant to S.C. Ann. § 62-5-416(b). (1/14/2014 Application.) In the Application, Bennett stated his version of the disputed facts related to the purported Swap Transaction and the liquidation of Friendship Partners and alleged the Wellin Children had deprived Keith Wellin of $92 million. (*Id.*) He sought an order from the probate court requiring the Wellin Children to pay this amount to him as Special Conservator. (*Id.*)

After the probate court ordered Bennett to disclose his Application to counsel for the Wellin Children, on February 3, 2014, the Wellin Children moved to dismiss the Application on

the grounds, *inter alia*, that the probate court lacked subject matter jurisdiction over the dispute related to the Swap Transaction and the Friendship Partners liquidation, the dispute over these matters was already pending in the district court, Bennett had no standing to pursue claims on Keith Wellin's behalf, and ordering the Wellin Children to pay $92 million from the Trust without any pleadings, discovery, or a trial would violate the South Carolina Probate Code and fundamental principles of due process.[1] (2/3/2014 Mot. to Dismiss.) On February 5, 2014, Bennett responded to Petitioners' motion to dismiss with a letter, in which he modified his earlier request by stating that, if the probate court agreed Bennett had a duty to pursue the liquidation proceeds on Keith Wellin's behalf, Bennett would "bring a Petition to Return Assets and serve said petition upon all parties along with the required summons." (Tiffany Provence 2/5/2014 Letter.) That is, Bennett clarified that he was merely asking the probate court to expand his power as Special Conservator to grant him standing to file a summons and complaint on Keith Wellin's behalf in connection with the Swap Transaction and the Friendship Partners liquidation. (*Id.*)

At a hearing before the probate court on February 6, 2014, Bennett's counsel initially reiterated that Bennett was asking the court only for the authority to pursue the claims on Keith Wellin's behalf. (Hr'g Tr. 13:21-14:12.) At the end of the hearing, however, Bennett's counsel requested the probate court immediately order the Wellin Children to pay $50 million to Bennett as Special Conservator on the basis that it was allegedly "undisputed" that Keith Wellin is entitled to at least $50 million from the Trust, even though no claims or counterclaims had ever

[1] Neither Keith Wellin nor Bennett filed an answer or counterclaim or any other pleading in the instant conservatorship proceeding. Thus, the only pleading filed in the conservatorship proceeding was the complaint filed by the Wellin Children seeking a conservator for their father, and no pleading in the conservatorship action even references the Swap Transaction.

been asserted against the Wellin Children, much less the Trust, in the Conservatorship Action. (*Id.* at 55:4-15.) The Wellin Children objected to Bennett's characterization of Keith Wellin's claim to these funds as "undisputed" and argued that they had tendered payment of the $50 million from the Trust to Keith Wellin only in satisfaction of the Promissory Note and Bennett had rejected that tender of payment. (*Id.* at 33, 55-56, 58.) Following the hearing, the Wellin Children filed a written objection, on jurisdictional and other grounds, to Bennett's oral request at the hearing. (2/14/2014 Mem. in Opp'n to Oral Req. to Relief.)

On February 21, 2014, the probate court issued two orders (the "February Orders"). In one order, the probate court amended its prior order appointing Bennett as Special Conservator by granting him the additional power to pursue claims on Keith Wellin's behalf. (2/21/2014 Order.) In the other order, the court appointed Synovus as a second Special Conservator for Keith Wellin and ordered the Wellin Children to pay to Synovus the $50 million that Bennett characterized as the "undisputed funds" from the Friendship Partners liquidation. (2/21/2014 Order.) The Wellin Children timely filed a motion to alter or amend the latter order on March 3, 2014. (3/3/2014 Mot. to Alter or Amend.)

On February 26, 2014, Bennett and Keith Wellin jointly filed a summons and complaint against the Wellin Children in the probate court seeking to recover the same $50 million that the probate court had five days earlier ordered the Wellin Children to pay to Synovus, along with the additional $42 million, representing the total proceeds ($92 million) that Bennett alleges Keith Wellin should have received in connection with the Friendship Partners liquidation. (*Wellin III* Compl.) On March 3, 2014, the Wellin Children removed that complaint to the district court, and the district court subsequently dismissed the action on the basis that the claims stated therein

were duplicative of claims Keith Wellin had already asserted in other actions in the district court. (Notice of Removal; *Wellin III* Order of Dismissal.)

On May 5, 2014, the Wellin Children filed in the probate court, pursuant to Rule 41(a)(1)(A) of the South Carolina Rules of Civil Procedure, a notice of voluntary dismissal of the instant Conservatorship Action in favor of the district court proceedings. (Notice of Dismissal.) On July 3, 2014, the probate court issued two orders (the "July Orders"), one of which denied the Wellin Children's motion to alter or amend its prior February Order requiring them to pay $50 million to Synovus. (7/3/2014 Order.) The other order vacated the Wellin Children's notice of voluntary dismissal. (7/3/2014 Order.) On July 11, 2014, the Wellin Children timely filed and served their notice of appeal to the circuit court pursuant to S.C. Code Ann. § 62-1-308. (7/11/2014 Notice of Appeal.)

On January 13, 2016, the circuit court issued an order affirming the probate court's orders. (1/13/2016 Order.) The Wellin Children filed a motion to alter or amend the circuit court's ruling pursuant to Rule 59(e), which the circuit court denied in a written order dated May 16, 2016. (5/16/2016 Order.) On May 27, 2016, the Wellin Children timely filed and served their notice of appeal to this Court. (5/27/2016 Notice of Appeal.)

STATEMENT OF FACTS

I. Keith Wellin irrevocably transferred ownership and control of 896 shares of Berkshire Hathaway Class A stock to the Wellin Children via estate planning transactions in 2003 and 2009.

Keith Wellin was a businessman who amassed considerable wealth over his lifetime, largely through the appreciation of Berkshire Hathaway stock. (Petition ¶ 6; *Wellin I* Compl. ¶¶ 21-22.) His three adult children, the Wellin Children, are all from his first marriage. (Petition ¶ 7; *Id.* ¶ 24.) Keith Wellin's first wife and mother of his children passed away in 1970. (Petition ¶ 7;

Aff. of Peter Wellin ¶ 3.) In 2002, Keith Wellin married his fourth wife, Wendy Lane Wellin ("Wendy Wellin"). (*Id.*) Prior to their wedding, they entered into a prenuptial agreement that significantly limited Wendy Wellin's access to Keith Wellin's wealth. (Peter Wellin Aff. ¶¶ 9-10.)

In conjunction with the execution of his prenuptial agreement, Keith Wellin, guided by sophisticated tax and estate counsel, primarily Tom Farace ("Farace") with the New York law firm Nixon Peabody, designed an estate plan to transfer the bulk of his wealth to the Wellin Children in a tax-efficient manner and through structures intended to protect the assets from interference by any third party. (Petition ¶ 7; Aff. of Peter Wellin ¶¶ 9-12.) Wellin began implementing this plan in 2003, when he transferred approximately half of his wealth, consisting of the 896 BRKa Shares to Friendship Partners, a Delaware family limited partnership in which Keith Wellin was a limited partner and in which Friendship Management, LLC ("Friendship Management"), a Delaware limited liability company, was the general partner. (Petition ¶ 7; Peter Wellin Aff. ¶ 11; Partnership Agreement.) Following the 2003 transfer, a revocable trust of which Keith Wellin was trustee (the "Florida Revocable Trust") owned approximately 99% of the limited partnership units in Friendship Partners (the "LP Units"). However, the general partner, Friendship Management, held the sole right to manage the partnership and its assets, including the sole authority to sell the BRKa Shares owned by the partnership. (Peter Wellin Aff. ¶ 23-26; Partnership Agreement.) Friendship Management was controlled by its Manager, Cynthia Wellin Plum, who is Keith Wellin's oldest daughter. (Friendship Management Operating Agreement.)

In November 2009, Keith Wellin implemented the 2009 Transaction by establishing the Irrevocable Trust and then causing the Florida Revocable Trust to sell the LP Units to the

Irrevocable Trust in exchange for the Promissory Note, which had a face value of approximately $50 million. (Peter Wellin Aff. ¶ 23-26; Promissory Note; Purchase & Sale Agreement.) The Irrevocable Trust was established as an "intentionally-defective grantor trust" under Sections 671 through 679 of the Internal Revenue Code, which means that the Trust is disregarded for federal income tax purposes, and the grantor—in this case, Keith Wellin—continued to be taxed on any income realized by the Trust, thereby increasing the total assets available for the Trust's beneficiaries. The initial trustees of the Irrevocable Trust were the three Wellin Children and a corporate trustee, South Dakota Trust Company ("SDTC").[2] (Irrevocable Trust; *Wellin I* Compl. 63 ¶ 56). The named beneficiaries are the Wellin Children and their lineal descendants. (Trust Art. IV(B)(1)). The Trust agreement also provides for the position of "Trust Protector," which holds certain limited powers, including the power to amend the Trust "to achieve favorable tax status." (*Id.* Art. VI.) The initial Trust Protector was Tom Farace, Keith Wellin's long-standing trust and estate attorney and the architect of these transactions. (*Id.*)

II. Keith Wellin, acting through new counsel, launched an attack in 2013 on the Wellin Children and the Irrevocable Trust.

In the summer of 2013, Keith Wellin, almost 87 years old and in failing health, terminated Farace without notice to his children and retained new counsel in Charleston. (Petition ¶ 7.) His new counsel, who had no history with Keith Wellin and his family, assisted his efforts to transfer large amounts of money to his wife Wendy Wellin and to distance Wellin from his children and grandchildren. (Petition ¶ 7; Peter Wellin Aff. ¶ 37-38.) It is undisputed that Keith Wellin transferred at least $25 million to Wendy in June 2013 alone and at least $39.5 million in 2013. (*Id.*) Ultimately, through his new counsel, Keith Wellin sued the Wellin

[2] The Trust instrument provides that it shall be administered in South Dakota and subject to South Dakota law. (Irrevocable Trust Art. III.)

Children in federal court on July 3, 2013 ("*Wellin I*"), alleging that the Wellin Children defrauded him into entering into the 2009 Transaction and seeking to recover all assets in the Irrevocable Trust, plus punitive damages. (Petition ¶ 7; *Wellin I* Compl.) The Wellin Children alleged in the probate court and the federal district court that these and other financial transfers to Wendy Wellin and the *Wellin I* lawsuit are the product of manipulation and undue influence exerted by Wendy Wellin on Keith Wellin at a time when he lacked capacity to manage his affairs. (Petition ¶ 7; USDC SC Civil Action No.: 2:14-cv-04067-DCN, Compl.)

Simultaneously with the filing of the *Wellin I* lawsuit, Keith Wellin's lawyers requested and received an *ex parte* temporary restraining order ("TRO") from the district court that temporarily froze the assets in Friendship Partners and in the Irrevocable Trust. (*Wellin I* TRO.) On November 18, 2013, the district court held a hearing on Keith Wellin's motion to convert that TRO into a preliminary injunction. At that hearing, the Wellin Children argued that the motion should be denied and informed the district court and Keith Wellin's counsel that, if the court dissolved the TRO, the Wellin Children intended to cause Friendship Partners to sell its assets—thereby triggering a substantial federal income tax liability to Keith Wellin—but that the Wellin Children also intended to prepay the $50 million Promissory Note (which was not scheduled to mature until 2021), which would provide Keith Wellin with immediate liquidity to pay the taxes and have several million dollars left over. (11/18/2013 Hr'g Tr.) The district court took Keith Wellin's motion to extend the TRO under advisement, but the court's questions and comments at the hearing strongly indicated that it intended to dissolve the TRO and deny any further injunctive relief to Keith Wellin. (*Id.*)

III. Keith Wellin's counsel reversed their position regarding the 2009 Transaction, claiming Keith Wellin retained substantial rights in connection with the 2009 Transaction and purporting to exercise those rights.

Immediately after the November 20 hearing in the district court, and in anticipation of an order lifting the TRO and allowing Friendship Partners to sell the BRKa Shares, Keith Wellin's counsel pursued their Plan B, in which they reversed their prior position regarding the 2009 Transaction. Under this Plan B, Keith Wellin's attorneys sought to use the 2009 Transaction documents to their advantage while simultaneously alleging in *Wellin I* that the 2009 Transaction is void. On the night of November 20, 2013, two days after the hearing (and the night before the district court dissolved the TRO), Keith Wellin's counsel had him execute a series of extremely complicated documents designed to claw back assets of the Irrevocable Trust, to transfer the tax liability for the assets held by the Trust from Keith Wellin to the Trust, and to take certain powers granted to the Wellin Children as trustees of the Trust and place them in the hands of Charleston attorney Lester Schwartz ("Schwartz"), a stranger to all which had previously transpired. (Bennett 11/20/2013 Letter & Attachments.) Under this Plan B, Keith Wellin purported to execute the Swap Transaction, through which he claimed to take 58% of the limited partnership units in Friendship Partners from the Trust. (*Id.*)

Next, Keith purported to remove Tom Farace as the Trust Protector of the Irrevocable Trust, to appoint Schwartz as the new Trust Protector, and to have Schwartz immediately—the very day he was appointed—enact a long list of amendments to the Irrevocable Trust. (*Id.*) Through these amendments, which Schwartz later admitted were drafted by Keith Wellin's lawyers, Schwartz purported to "turn off" the grantor trust status of the Irrevocable Trust.[3] (*Id.*)

[3] In testimony before the district court, Schwartz confirmed that Bennett asked him to accept the appointment as Trust Protector, that Bennett's office prepared the purported amendments to the

If successful, this action would shift tens of millions of dollars in federal income tax liability associated with the Irrevocable Trust assets from Keith Wellin to the Trust. Another of Schwartz's purported amendments to the Irrevocable Trust granted Schwartz the power to settle the *Wellin I* litigation. (Trust Amendment.) Thus, Schwartz's amendments signaled an immediate and grave threat to the Irrevocable Trust and its beneficiaries. He attempted to cause the Irrevocable Trust to incur millions of dollars in capital gains taxes, which would result from a sale of BRKa Shares held by Friendship Partners, and he gave himself the power effectively to convey any or all of the Trust assets in settlement of *Wellin I*. (*Id.*)

IV. The Trustees took action to protect the Irrevocable Trust assets from Wendy Wellin and the purported Trust Protector.

On the morning of November 21, the Wellin Children obtained an emergency hearing in the district court, at which they asked the court to enter a TRO prohibiting Schwartz from purporting to settle the *Wellin I* litigation on behalf of the Trust. (11/21/13 Hr'g Tr.) The Wellin Children explained to the district court that, if Schwartz was permitted to settle the litigation on behalf of the Irrevocable Trust, Keith Wellin would effectively be on both sides of the "v.," as Keith Wellin's new attorneys had hired Schwartz and plainly were directing his actions, and Schwartz might attempt to deprive the court of jurisdiction over the litigation. (*Id.* at 3-4.) At the hearing, Wellin's counsel did not deny that one purpose of Schwartz's amendments was to grant Schwartz the power to settle *Wellin I* on behalf of the Trust.[4] (*Id.* at 15-16.) After the hearing, the

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Irrevocable Trust, and that Schwartz views his role as that of Keith Wellin's "agent." (12/31 2013 Hr'g Tr. at 45:20-46:6 and 54:1-55:6; Supp. Reply Mem. of Lester Schwartz, pp. 2-3.)

[4] Responding to the Wellin Children's request for an injunction to prevent Schwartz from purporting to settle the *Wellin I* suit on behalf of the Trust, counsel for Keith Wellin stated to the district court as follows:

district court dissolved the TRO previously granted to Keith Wellin and denied his request for a preliminary injunction, but also denied the Wellin Children's motion for a TRO, reasoning that no irreparable harm was present and the parties could sue each other for damages. (*Id.* at 21-22.)

Shortly after the hearing on November 21, 2013, Cynthia Wellin Plum, as Manager of Friendship Management, caused Friendship Partners to dissolve. (Dissolution Resolution & Plan of Liquidation.) Upon dissolution, Friendship Partners sold all of its BRKa Shares and distributed approximately $157 million in proceeds to the limited partners on a *pro rata* basis, pursuant to the terms of its Partnership Agreement. (*Id.*) Friendship Partners distributed the proceeds without regard to the purported Swap Transaction, which the Wellin Children had rejected in their capacities as trustees of the Irrevocable Trust. (*Id.*) Consequently, the Trust received the vast majority of the proceeds distributed. (*Id.*)

Upon dissolution of Friendship Partners, the Wellin Children, in their capacities as trustees of the Irrevocable Trust, tendered prepayment of the principal and interest on the Promissory Note held by the Florida Revocable Trust by sending a check for $50,228,000 to Bennett, as they had promised to do at the November 18 hearing. (John Hagerty 12/6/2013 Letter to Bennett.) Bennett rejected the check and returned it to the Wellin Children's lawyers the same day he received it, taking the position that the Promissory Note ceased to exist after it was marked "Paid in Full" in connection with the purported Swap Transaction on November 20. (Bennett 12/06/2013 Letter to John Hagerty.) Bennett also demanded that the Irrevocable Trust immediately pay to Keith Wellin $92 million, which Bennett claimed represented the liquidation

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> And I don't know how we have a trust protector who is not authorized to settle the lawsuit and then there is no one who could settle the lawsuit, so you would be enjoining the parties from ever settling a case which would be an interesting injunction.

(*Id.* at 15-16.)

proceeds corresponding to Keith Wellin's alleged 58% interest in Friendship Partners. (*Id.*) It is the $50 million, which the Irrevocable Trust tendered to Keith Wellin in satisfaction of the Promissory Note (and which his attorneys immediately rejected for strategic reasons), that is at issue in the instant appeal.

The Wellin Children subsequently caused the Irrevocable Trust to distribute its assets (other than the $50 million tendered in prepayment of the Promissory Note) to themselves as the beneficiaries of the Trust, resulting in approximately $32 million being distributed to each of the Wellin Children from the Trust. (Trust Distribution Resolution.) As the only members of Distribution Committee of the Irrevocable Trust, the Wellin Children had the authority to make these distributions in their sole and absolute discretion. (Trust Art. IV(B)(1); Art. VII(B).) The Wellin Children took these steps to, *inter alia,* avoid the threat to the Irrevocable Trust assets posed by Schwartz, who already had attempted to cause the Trust to incur tens of millions of dollars in tax liability and who had amended the Trust to give himself the power to settle *Wellin I* on behalf of the Trust by conveying the Trust's assets to Keith. Moreover, the Wellin Children took these steps only after the district court denied their request for an injunction that would have prohibited Schwartz from purporting to convey the Trust assets in settlement of *Wellin I.* The Wellin Children have never spent any of the money distributed to them from the Trust for any purpose other than to pay expenses associated with the litigation.

V. The Trust Protector sued the Wellin Children and obtained an *ex parte* TRO in the probate court with respect to the proceeds of the Friendship Partners liquidation. The Wellin Children removed the suit to federal court and the district court promptly dissolved the TRO.

On December 20, 2013, Schwartz, again acting as Wellin's "agent," filed a lawsuit in the probate court (Case No. 2013-GC-10-0129, "*Wellin II*") against the Wellin Children, in which he alleged the same facts at issue in this appeal. Schwartz alleged that the Wellin Children, by

dissolving Friendship Partners, liquidating the BRKa Shares, disregarding the purported Swap Transaction, and distributing Trust assets to themselves, breached duties owed to Keith Wellin and the beneficiaries of the Irrevocable Trust. (*Wellin II* Compl. ¶¶ 34-36.) Keith Wellin also became a party to *Wellin II*, and he specifically alleged that the Wellin Children breached duties to him in connection with the liquidation of Friendship Partners and distributions from the Irrevocable Trust, and that he validly and effectively swapped the Promissory Note for an interest in Friendship Partners on November 20. (*Wellin II* Ans. to Ctrclms., ¶¶ 15-17).

With the filing of *Wellin II*, Schwartz requested and received from the probate court an *ex parte* TRO that mirrored the one obtained by Keith Wellin's attorneys, also on an *ex parte* basis, in *Wellin I*, but which the district court had recently dissolved. (*Wellin II* TRO.) The TRO issued by the probate court in *Wellin II* ordered the proceeds of the Friendship Partners liquidation, including the $50 million at issue in this appeal, frozen. (*Id.* ¶¶ 34-36.) Thus, before the probate court issued the February Orders at issue in this appeal, it had already issued an *ex parte* TRO with respect to ***exactly the same funds*** in *Wellin II*.

The Wellin Children removed *Wellin II* to the district court. (Notice of Removal.) After removal, Schwartz filed a motion in the district court to convert the *ex parte* TRO issued by the probate court into a preliminary injunction. Following a hearing on December 31, 2013, the district court dissolved the TRO issued by the probate court in *Wellin II* and denied the motion for a preliminary injunction via written order on January 7, 2014. (1/7/2014 Order.)

VI. The Wellin Children filed the instant action for appointment of a conservator and Bennett was appointed Special Conservator with a limited role. Bennett made an *ex parte* "Application for Guidance" to the probate court in which he requested that the court order the Wellin Children to pay to him as Special Conservator $92 million in proceeds from the Friendship Partners liquidation.

After the filing of *Wellin I*, the Wellin Children, concerned over their father's uncharacteristic behavior and the apparent undue influence exerted over him by Wendy Wellin, filed the instant Conservatorship Action in the probate court on July 19, 2013, requesting only that the court appoint a conservator for Keith Wellin. (Petition.) On July 26, 2013, the probate court held a hearing, at which the parties agreed to Bennett's appointment as a temporary special conservator with limited powers to ensure that no transfers were made from Keith Wellin's assets without adequate consideration. (7/26/2013 Hr'g Tr.) The order of appointment expressly provides that Bennett does ***not*** have the powers or duties that would normally accrue to a conservator, other than those specifically provided for in the order. (8/15/2013 Order.) Nothing in the initial order grants Bennett the power to pursue legal claims on Keith Wellin's behalf, nor can such authority be implied from the order. (*Id.*)

Merely one week after the district court dissolved the *ex parte* TRO issued by the probate court in *Wellin II* (which had frozen the proceeds of the Friendship Partners liquidation), on January 14, 2014, Bennett made another attempt in the probate court to obtain relief in connection with the liquidation proceeds, again on an *ex parte* basis. Bennett submitted his *ex parte* Application, in which he requested that the probate court issue an order requiring the Wellin Children to pay Keith Wellin approximately $92 million in connection with the Swap Transaction and the LP liquidation and determine that the Trust, rather than Keith Wellin, is liable for the taxes resulting from the sale of the BRKa Shares. (Bennett Application.) Despite the fact that Bennett's *ex parte* letter to the probate court sought over $100 million in substantive

relief, he characterized the letter as a mere request for "guidance" from the court pursuant to S.C. Code Ann. § 62-5-416(b). (*Id.*) After the probate court required Bennett to disclose his Application to the Wellin Children, on February 3, 2014, the Wellin Children filed a motion to dismiss the Application. (2/3/2014 Mot. to Dismiss.)

On February 5, Bennett's counsel, Tiffany Provence ("Provence") sent a letter to the probate court responding to the Wellin Children's motion. (Provence 2/5/2014 Letter.) In her letter, Provence clarified that Bennett was ***not*** asking the court to order payment of any money right away, but rather was merely asking the court for instruction as to whether Bennett should *file an action* to recover money. (*Id.* at 2 ("Should this Court agree that [Bennett] has a duty, then he will most certainly bring a Petition to Return Assets and serve said petition upon all parties along with the required summons. To do so without this Court's permission would be both premature and expensive."))

The probate court held a hearing on February 6, 2014. At the beginning of the hearing, Provence reiterated that Bennett was seeking only instruction as to whether he should pursue an action and that he would pursue an action only if the probate court granted him such authority:

> This isn't a formal proceeding. [They've] made a motion to dismiss based on lack of jurisdiction, standing, lack of due process. I think that I want to be incredibly clear with the court that we're seeking this court's instruction as to whether or not Mr. Bennett has the authority, as special conservator, to bring an action to return these assets to the estate of Mr. Wellin. At that point, Your Honor, we are going to serve a summons, we're going to serve a complaint, there's going to be opportunity for discovery . . . .

(2/6/2014 Hr'g Tr. 13:21—14:12.)

During the hearing, counsel for the Wellin Children informed the probate court of the facts related to the Friendship Partners liquidation, that the Wellin Children, in their capacities as trustees of the Irrevocable Trust, had tendered payment of the $50 million to Bennett, as counsel

for Keith Wellin's Revocable Trust, in prepayment and satisfaction of the Promissory Note, that Bennett rejected the payment and sent the check back to counsel for the Irrevocable Trust, and that the $50 million was therefore in possession of the Irrevocable Trust. (2/6/2014 Hr'g Tr. 34-35.) Counsel for the Wellin Children explained to the court that the Wellin Children, at that point in time, remained willing to pay the $50 million to Keith Wellin, but only provided that he accepted the funds in satisfaction of the Promissory Note for which the funds were initially tendered. (*Id.* at 33, 55-56, 58 ("[The $50 million] belongs to Mr. Wellin, *but only in full exchange for payment of the note*.") (emphasis added).

Following this exchange with the probate court, Provence reversed her prior position that Bennett was only seeking the probate court's permission to pursue a claim on Keith Wellin's behalf and requested that the court immediately order—prior to the filing of any summons or complaint, without any discovery, and without taking any testimony or admitting any evidence—payment of $50 million to Bennett:

> Your Honor, may it please the court, could we ask that the court consider that Mr. Bennett be allowed to accept the $50 million that was originally tendered, absent the conditions, as special conservator, not as counsel, but accept what we've agreed upon is due him, due the length of time that this may stay in litigation and the aging health of the alleged incapacitated? Since it's been admitted today by both parties that that's a minimum of what he's owed, would they be willing to surrender that to Mr. Bennett as conservator?

(*Id.* at 55:4-15.) In other words, Provence requested the probate court order the Wellin Children to pay $50 million to Bennett without any strings attached (i.e. <u>not</u> in satisfaction of the Promissory Note for which the Wellin Children initially tendered the funds).

Later in the hearing, Provence characterized Bennett's request as one for a "judgment" for the $50 million. (*Id.* at 66:12-15 ("And Your Honor, I would repeat I believe this court has full jurisdiction over that asset, and we would seek that judgment before this court.") At the

hearing, Provence never cited any statute or case that would permit the court to order the Irrevocable Trust (or anyone else) to pay $50 million to Bennett in the absence of any claim or other formal process. In fact, the only argument made by anyone in support of the court's authority to grant Bennett this extraordinary relief came from Keith Wellin's attorney, who said that the probate court had jurisdiction to grant this relief because "[t]his is a court of equity." (*Id.* at 75:11-12.) At the end of the hearing, the court asked the parties to submit some "brief and proposed orders," and said: "Maybe if I don't sign that, there will be some separate litigation." (*Id.* at 75:25-76:3.)[5]

VII. The probate court ordered the Wellin Children to pay $50 million from the Irrevocable Trust to Synovus. Bennett and Keith Wellin filed additional lawsuits in the probate court and the district court seeking recovery of the same funds. The Wellin Children voluntarily dismissed the Conservatorship Action in favor of the district court actions, and the probate court effectively purported to vacate that dismissal.

On February 21, the probate court issued the two February Orders (2/21/2014 Orders.) In one order, the probate court amended its prior order appointing Bennett as Special Conservator by granting him the additional power to pursue claims on Keith Wellin's behalf.[6] In the other order, the court appointed Synovus as a second Special Conservator for Keith Wellin and

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[5] On February 11, Provence emailed the Probate Court and requested a deadline for the parties to submit "supplemental materials I offered the court or the submission of the dual proposed Orders requested by the Court." (Provence 2/11/2014 Email.) Provence suggested a deadline of February 14. (*Id.*) Counsel for the Wellin Children responded, stating that they did not know what Provence intended to submit and could not possibly respond to Provence's "supplemental materials" and proposed order before even seeing them. (*Id.*) Provence responded and stated that "the additional submission is simply the proposed Order on the $50,000,000.00 being held by the Wellin Children and a brief in support of the same." (*Id.*) Provence also stated that, at the hearing, she and Keith Wellin's attorney "both argued that the court had [jurisdiction and authority to require the children to surrender the funds] under the S.C. Code as well as equitable principals [sic]." (*Id.*) The probate court then responded and instructed the parties to submit any proposed orders and briefs by February 14 at noon. (*Id.*)

[6] The Wellin Children do not challenge this order granting Bennett authority to pursue claims on Keith Wellin's behalf.

ordered the Wellin Children to pay to Synovus the $50 million that Bennett characterized as the "undisputed funds" from the Friendship Partners liquidation.[7] The Wellin Children timely filed a motion to alter or amend the latter order on March 3, 2014. (3/3/2014 Mot. to Alter or Amend.)

On February 26, Bennett and Keith Wellin jointly commenced a new action in the probate court ("*Wellin III*") against the Wellin Children. (*Wellin III* Petition.) In *Wellin III*, Bennett and Keith Wellin sought to recover the same $50 million that the probate court ordered the Wellin Children to pay to Synovus in the instant Conservatorship Action, along with the additional $42 million, representing the total proceeds ($92 million) that they allege Keith Wellin should have received in connection with the Friendship Partners liquidation. (*Id.*) On March 3, 2014, the Wellin Children removed *Wellin III* to the district court. (*Wellin III* Removal Notice.)[8]

On May 5, 2014, the Wellin Children filed and served a Notice of Voluntary Dismissal under Rule 41(a)(1)(A), SCRCP, of the instant Conservatorship Action in the probate court. (5/5/2014 Notice of Dismissal.) In accordance with Rule 41(a)(1)(A), the notice was filed before Keith Wellin filed an answer or motion for summary judgment.

On July 3, 2014, the probate court issued two orders (the "July Orders"), one of which denied the Wellin Children's motion to alter or amend the court's prior order requiring them to

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[7] The order states that it "in no way interferes with any right to dispute ownership over the disputed fund of approximately $42,000,000", *i.e.*, the balance of the $92,000,000 that Bennett alleges is due from the Irrevocable Trust to Keith Wellin in connection with the Swap Transaction and Friendship Partners liquidation. (*Id.* at 6.)

[8] On February 28, Keith Wellin filed another action in the federal district court, Case No. 14-cv-0579 ("*Wellin IV*"), in which he asserted identical claims in connection with the Swap Transaction and Friendship Partners liquidation. (*Wellin IV* Compl.) On the same day, Keith Wellin filed an Amended Complaint in *Wellin I* to assert these identical claims in that action as well. (*Wellin I* Am. Compl.) Thus, by early March, there were four civil actions pending in the district court—and none in probate court—in which Keith Wellin and/or his proxies sought recovery of the same $50 million that is the subject of the instant appeal. On May 28, 2014, the district court dismissed *Wellin III* and *Wellin IV* on the basis that the claims asserted in those actions were duplicative of claims in *Wellin I*. (5/28/2014 Order of Dismissal.)

pay $50 million to Synovus. (7/3/14 Orders). In the other July Order, the probate court effectively purported to vacate the Wellin Children's notice of voluntary dismissal. (*Id.*) The Wellin Children timely filed their notice of appeal as to these rulings on July 11, 2014. (Notice of Appeal.) Keith Wellin passed away on September 14, 2014, and Wendy Wellin was subsequently appointed special administrator of his Estate and substituted herself in his place in the litigation pending in the district court. (Appointment of Special Administrator; *Wellin I* Consent Order Substituting Plaintiff.)

ARGUMENT

The orders entered by the probate court trample the most basic principles of jurisdiction and due process. The lower courts erred because the probate court lacked subject matter jurisdiction, authority, and personal jurisdiction necessary to order the Wellin Children to pay $50 million, and the court violated due process by issuing such an order in the absence of discovery, an evidentiary hearing, or even a pleading. In addition, the lower courts erred by not dismissing Bennett's request for the $50 million despite the multiple suits already pending between the same parties in connection with the same funds in the federal district court. Accordingly, this Court should reverse the lower courts' orders.

I. The lower courts erred in holding the probate court had subject matter jurisdiction in the Conservatorship Action to order the Irrevocable Trust or the Wellin Children to pay $50 Million to Synovus.

This Court should reverse the lower courts' orders finding the probate court had subject matter jurisdiction to order payment of $50 million to Synovus because the probate court lacked subject matter jurisdiction. "The probate court is a court of limited jurisdiction owing its present existence to creation by statute, rather than the Constitution, and as such, can exercise only such powers as are directly conferred upon it by legislative enactment . . . ." *Greenfield v. Greenfield*,

245 S.C. 604, 610, 141 S.E.2d 920, 923 (1965). In the absence of subject matter jurisdiction, a court's order or judgment is void. *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183, 561 S.E.2d 659, 661 (Ct. App. 2002).

The Probate Code expressly defines the scope of the probate court's jurisdiction upon the filing of a summons and petition for appointment of a conservator. Section 62-5-402 provides:

> After 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, the probate court in which the summons and petition are filed has:
>
> (1) exclusive jurisdiction to determine the need for a conservator or other protective order until the proceedings are terminated;
>
> (2) exclusive jurisdiction 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; and
>
> (3) concurrent jurisdiction to determine the validity of claims for or against the person or estate of the protected person except as limited by Section 62-5-433.

A. The probate court lacked subject matter jurisdiction pursuant to S.C. Code Ann. § 62-5-402(2).

The lower courts erroneously ruled that the probate court had jurisdiction to issue the February Order requiring payment of $50 million pursuant to its authority under § 62-5-402(2) to determine how Keith Wellin's estate must be managed, expended or distributed. But § 62-5-402(2) does not apply because the $50 million at issue was ***not*** part of Keith Wellin's estate. There is no genuine dispute over this fact. The $50 million addressed in the probate court's orders represents a portion of the proceeds from the liquidation of Friendship Partners that was distributed by the partnership to the Irrevocable Trust in December 2013. (*See* Statement of Facts § IV, *supra.*) It is undisputed that Friendship Partners (not Keith Wellin) owned the BRKa Shares that were sold to generate the funds, and that Friendship Partners distributed those funds

to the Irrevocable Trust (not to Keith Wellin). (*Id.*) Before his death, Keith Wellin asserted a disputed claim to those funds in the district court based upon the purported Swap Transaction, but that court has not yet decided the claim. (*Id.*) To this day, the subject funds remain in an account in the name of the Irrevocable Trust maintained with UBS Bank. Unless and until the district court enters a judgment stating otherwise, the funds belong to the Irrevocable Trust, and Keith Wellin's estate has nothing more than a disputed claim pending in federal court. Section 62-5-402(2) grants to the probate court jurisdiction only to manage assets that are already in the protected person's estate. The section does not grant the probate court jurisdiction to end run the federal judiciary by deciding a protected person's legal claim to assets in the hands of another party.

The lower courts conflated the subject $50 million, an asset held by the Irrevocable Trust, with the Promissory Note, an asset held by Keith Wellin's estate that the Wellin Children identified in their petition for appointment of a conservator. (*See* 2/21/2014 Order at 8, stating that the subject $50 million is an asset of the estate because "Petitioners expressly identified the *Promissory Note* as an estate asset of which they sought protection . . .") (emphasis added). But the $50 million in cash and the Promissory Note are completely different assets. The Wellin Children's statement that Keith Wellin owned a Promissory Note worth $50 million cannot possibly be construed as an acknowledgement that he also owns the $50 million in cash held by the Irrevocable Trust. Prior to the probate court's February Orders, the Wellin Children, on behalf of the Irrevocable Trust, had tendered a check for $50 million in prepayment of the Promissory Note, but Edward Bennett rejected that tender of payment on Keith Wellin's behalf. (*See* Statement of Facts § IV, *supra.*) By rejecting the tender, Bennett ensured that the $50

million did ***not*** become an asset of Keith Wellin's estate.[9] Thus, the statement in the probate court's orders that the subject $50 million was an asset of Keith Wellin's estate is demonstrably false. There is no basis for this Court to find that the probate court had jurisdiction under S.C. Code Ann. § 62-5-402(2) because the subject $50 million was not an asset of Keith Wellin's estate.[10]

B. The probate court lacked subject matter jurisdiction pursuant to S.C. Code Ann. § 62-5-402(3).

Because the $50 million was not an asset of Keith Wellin, but rather was the subject of a disputed ***claim*** asserted by Keith Wellin (and now Wendy Wellin) in the federal district court, the probate court's jurisdiction to grant any relief with respect to those funds should properly be analyzed under S.C. Code Ann. § 62-5-402(3). That section, which grants the probate court jurisdiction over "claims for or against the person or estate of the protected person," is directly on point. Neither the lower court orders, nor Respondents' briefing to those courts, even mention this section. Respondents avoid discussion of this section because the term "claim," as defined by the Probate Code, expressly excludes "demands or disputes regarding title of a . . . protected person to specific assets alleged to be included in the estate." S.C. Code Ann. § 62-1-201(4).

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[9] On February 26, 2014, five days *after* the probate court issued the order requiring the Wellin Children to pay $50 million to Synovus, Bennett filed the *Wellin III* complaint in the probate court in which he requested the identical substantive relief sought in his initial Application for guidance filed in the Conservatorship Action, thereby implicitly recognizing that the probate court lacked jurisdiction in the Conservatorship Action to order the relief requested. (*Wellin III* Compl.) If the $50 million in proceeds had been an asset of Keith Wellin's estate, Wellin and Bennett would have had no reason to file multiple lawsuits in an effort to obtain the proceeds from the Irrevocable Trust.

[10] The lower courts also concluded that the probate court had jurisdiction under S.C. Code Ann. § 62-5-408, which grants the probate court the "power to preserve and apply the property of the person to be protected as may be required for his benefit or the benefit of his dependents." (2/21/2014 Order at 4; 1/13/2016 Order at 8.) This statute also does not apply because the $50 million at issue was not "property of the person to be protected" for the reasons stated in this section.

There can be no question that the dispute between Keith Wellin and the Wellin Children over the $50 million held by the Irrevocable Trust is a dispute "regarding title of a . . . protected person to specific assets alleged to be included in the estate." Thus, the Probate Code unequivocally provides that the probate court does not have jurisdiction to decide whether or not Keith Wellin owns the $50 million.

The South Carolina Supreme Court's decision in *Matter of Howard* addresses the operation of S.C. Code Ann. § 62-1-201(4) and is directly on point. 315 S.C. 356, 434 S.E.2d 254 (1993). *Howard* involved a probate court proceeding concerning the estate of a decedent. The probate court decided *inter alia* that the personal representative should have title to a gun that was in the possession of a third party. On appeal, the Supreme Court held that the probate court lacked subject matter jurisdiction to decide ownership of the gun because the gun was not in the possession of the estate and § 62-1-201(4) expressly deprives the probate court of jurisdiction over the question of who should have title to the gun:

> The definition of "claims" in the Probate Code expressly excludes disputes regarding title of a decedent to specific assets alleged to be included in the estate. S.C.Code Ann. § 62-1-201(4) (1986). Therefore, the dispute about title to the gun is not a "claim" that could be presented to the probate court under Section 62-3-806.

315 S.C. at 364, 434 S.E.2d at 258 n.8. Likewise, in the instant case, the probate court lacked subject matter jurisdiction to determine ownership of the $50 million (an asset that Bennett alleged should be included in the estate).

Moreover, even if a dispute about ownership of the $50 million were not expressly excluded from the category of "claims" that may be presented to the probate court, no claim had been asserted in any pleading against the Wellin Children or the Irrevocable Trust in the probate court—in connection with the $50 million or otherwise—when the probate court issued its February Orders. Furthermore, even if Bennett's request for relief in his Application could

constitute a "claim" within the meaning of § 62-5-402(3), the probate court's jurisdiction under that subsection is expressly limited by § 62-5-433, which provides that the probate court lacks jurisdiction to resolve claims in an amount greater than $25,000.

In sum, the Probate Code squarely provides under S.C. Code Ann. §§ 62-5-402(3) and 62-1-201(4) that the probate court lacked jurisdiction to decide this dispute. Thus, this Court should reverse the lower court orders *in toto* and direct the lower courts to dismiss Bennett's request for relief.

C. The probate court lacked subject matter jurisdiction pursuant to S.C. Code Ann. § 62-5-416.

The lower courts erroneously ruled that the probate court had authority to issue the February Orders under S.C. Code Ann. § 62-5-416. This Court should reverse the lower court's orders because the probate court had no authority under § 62-5-416 to require the payment of $50 million to Synovus. Bennett's *ex parte* letter to the probate court—the letter that triggered the court's order to pay $50 million—stated it was an "application for guidance" pursuant to S.C. Code Ann. § 62-5-416(b). (Application at 1.) As explained below, § 62-5-416(b) does not allow a party to circumvent the Rules of Civil Procedure to obtain summary relief on a disputed claim under the guise of an informal "application for guidance."

Section 62-5-416 of the Probate Code sets forth the procedure for certain requests to the probate court in connection with a person for whom a conservator has been appointed. The statute distinguishes between certain requests for substantive relief, which are made pursuant to subsection (a), and requests by a conservator for "instructions concerning his fiduciary responsibility," which are made pursuant to subsection (b). S.C. Code Ann. § 62-5-416. The latter requests may be made by "application," which the Probate Code elsewhere defines as any informal written request to the probate court. *See* S.C. Code Ann. § 62-1-201(1). An application

does not require the filing of a summons and complaint. *Id.* The Code refers to proceedings commenced by "application" as "informal proceedings," which are not governed by the South Carolina Rules of Civil Procedure. *Id.* § 62-1-201(22).

By contrast, a request for substantive relief must be made by "filing a petition and summons with the appointing court." S.C. Code Ann. § 62-5-416(a). The Code refers to proceedings commenced by filing of a summons and complaint as "formal proceedings," which are governed by the South Carolina Rules of Civil Procedure. S.C. Code Ann. § 62-1-201(17) & (34). The Reporter's Comments state that the 2010 amendments to this subsection were intended to clarify that a formal proceeding, initiated by filing of a summons and complaint, is required in connection with requests for substantive relief under subsection (a). S.C. Code Ann. § 62-5-416, S.C. reporter's cmt.; *see also id.* § 62-1-304 ("A formal proceeding is a 'civil action' as defined in Rule 2, SCRCP, and must be commenced as provided in Rule 3, SCRCP.").

Likewise, proceedings in the probate court concerning the affairs of a trust must be maintained through "formal proceedings." S.C. Code § 62-7-201(a). Proceedings concerning the affairs of a trust for purposes of this statute include proceedings "concerning the administration and distribution of trusts, the declaration of rights, and the determination of other matters involving trustees and beneficiaries of trusts." *Id.* In formal proceedings, once the summons and complaint are filed against the party from whom relief is sought, that party is permitted to file an answer, assert affirmative defenses, file a motion to dismiss or for summary judgment, conduct discovery, demand a jury trial[11], and otherwise pursue their rights under the South Carolina

[11] "If duly demanded, a party is entitled to trial by jury in any proceeding involving an issue of fact in an action for the recovery of money only or of specific real or personal property, unless waived as provided in the rules of civil procedure for the courts of this State." S.C. Code § 62-1-

Rules of Civil Procedure. *See* S.C. Code Ann. § 62-1-201(17) ("Formal proceedings are governed by and subject to the rules of civil procedure adopted for circuit courts and other rules of procedure in this title.").

Here, Bennett styled his *ex parte* letter of January 14 as an "Application for the Court's guidance under § 62-5-416(b)." Subsection 62-5-416(b) authorized the probate court to do no more in response to the Application than to "instruct" Bennett regarding his fiduciary responsibility to Keith Wellin. An order requiring the Wellin Children to pay $50 million cannot possibly constitute "instruction" to Bennett under § 62-5-416(b). To the extent that the probate court would otherwise have had jurisdiction to award such relief, it could do so only under §62-5-416(a) via a formal proceeding subject to the South Carolina Rules of Civil Procedure upon filing and service of a summons and complaint. Because Bennett had not filed and served a summons and complaint when the Application was heard, the probate court lacked the authority to issue the February Order requiring payment of $50 million.

The lower courts erroneously relied upon § 62-5-416(c) as providing authority for the probate court's order. That section states "[a]fter notice and hearing as the court may direct, the court may give appropriate instructions or make any appropriate order." According to the lower courts, the probate court's authority to "make any appropriate order" encompassed the authority to require the Wellin Children to pay $50 million to Synovus. (2/6/2014 Order at 5; 1/3/2016 Order at 9.) Under this rationale, § 62-5-416(c) would allow the probate court to do virtually *anything* once a conservator requests instructions concerning his fiduciary duties under § 62-5-416(b). The statute provides no such authority.

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306. The Wellin Children did not waive their right to a jury trial on Bennett's request for $50 million.

Read as a whole, S.C. Code Ann. § 62-5-416 indicates that the probate court's authority under § 62-5-416(c) to issue "any appropriate order" relates to a request under § 62-5-416(a), not to § 62-5-416(b). Section 62-5-416(a) authorizes any interested person to "request an order" from the probate court for various forms of relief upon filing of a summons and complaint. Section 62-5-416(b) allows a conservator to "request instructions concerning his fiduciary duty" from the probate court via an informal written application. Section 62-5-416(c) permits the probate court to "give appropriate instructions" or "make any appropriate order". Thus, the provision in § 62-5-416(c) allowing the court to "give appropriate instruction" corresponds to § 62-5-416(b), and the provision allowing the court to "make any appropriate order" corresponds to § 62-5-416(a). Because Bennett "requested instructions" under § 62-5-416(b), the "any appropriate order" clause in § 62-5-416(c) does not apply.

In any event, § 62-5-416(c) does not permit the probate court to issue an order, in connection with a request under either § 62-5-416(a) or § 62-5-416(b), that exceeds the scope of its jurisdiction under S.C. Code Ann. § 62-5-402. *Greenfield v. Greenfield*, 245 S.C. 604, 610, 141 S.E.2d 920, 923 (1965) ("The probate court is a court of limited jurisdiction owing its present existence to creation by statute, rather than the Constitution, and as such, can exercise only such powers as are directly conferred upon it by legislative enactment . . . ."). Sections 62-5-402 and 62-7-201 expressly provide that the probate court has no authority to determine ownership of the disputed $50 million. (*See supra*, Section I.B.) Thus, the probate court did not have the power under § 62-5-416(c) to order the Wellin Children or the Irrevocable Trust to pay $50 million to a special conservator.

D. The probate court lacked subject matter jurisdiction pursuant to S.C. Code Ann. § 62-7-201.

The lower courts also erred in citing Section 62-7-201 as an additional jurisdictional basis for its order to pay $50 million.[12] (7/3/2014 Order at 2; 1/13/2016 Order at 8.) Section 62-7-201 addresses the probate court's jurisdiction over proceedings initiated by interested parties concerning the affairs of trusts. This section does not provide jurisdiction here because the Conservatorship Action was not a proceeding concerning the affairs of a trust—it was an action for appointment of a conservator for a person alleged to be incapacitated. (Petition.) In any event, the statute expressly provides that an action under § 62-7-201 "must be formal as defined by Section 62-1-201(17)," which requires the filing of a summons and complaint. No summons and complaint were filed under § 62-7-201 for the relief Bennett requested in his Application until Bennett and Wellin filed the *Wellin III* action, after the probate court had already issued its February Orders, and the *Wellin III* action was subsequently removed to federal court.[13] (*See* Statement of Facts § VII, *supra*.) Thus, § 62-7-201 cannot supply jurisdiction for the February Orders.

Moreover, § 62-7-201(e) expressly provides that the probate court "will not, over the objection of a party, entertain proceedings under this section involving a trust registered or having its principal place of administration in another state, unless . . . the interests of justice would be otherwise seriously impaired." It is undisputed that the Irrevocable Trust's principal

[12] The probate court did not rely on this statute as a jurisdictional basis until its July 3, 2014 order denying the Wellin Children's motion to alter or amend. The circuit court relied on the provision in its orders without any discussion of why it applies to the instant case. (1/13/2016 Order at 8.)

[13] To the extent that the *Wellin III* complaint ever provided the probate court with subject matter jurisdiction, that jurisdiction was divested by the Wellin Children's removal to the *Wellin III* action to the district court. *Limehouse v. Hulsey*, 404 S.C. 93, 105, 744 S.E.2d 566, 573 (2013).

place of administration is not South Carolina. (Irrevocable Trust Art. III.) Thus, the probate court lacked jurisdiction to address the affairs of the Irrevocable Trust over the Wellin Children's objection, unless the "interests of justice would be seriously impaired." The lower courts made no findings regarding why the "interests of justice would be seriously impaired" if the probate court failed to exercise jurisdiction—nor *could* they make any such findings. The parties were already litigating precisely the same issues in the federal district court, which is perfectly capable of protecting the interests of justice. Had the district court believed that preliminary relief such as that ordered by the probate court in connection with Bennett's Application was necessary, it could have fashioned such relief and is the only court with jurisdiction to do so.[14] Even if the instant action were deemed to be an action concerning a trust within the meaning of § 62-7-201 (which it is not), the legislature specifically excluded this type of dispute from the probate court's jurisdiction in §§ 62-5-408(1) and 62-7-201.

E. The probate court's jurisdiction was divested by the Wellin Children's notice of voluntary dismissal.

Rule 41(a)(1)(A) states that a plaintiff may voluntarily dismiss an action without a court order at any time before the opposing party files an answer or motion for summary judgment. Rule 41(a)(1)(A), SCRCP. A voluntary dismissal operates to leave the parties as if no action had been brought in the first place. *Truluck v. Snyder*, 362 S.C. 108, 116, 606 S.E.2d 792, 796 (Ct. App. 2004), abrogated on other grounds by *Fulmer v. Cain*, 380 S.C. 466, 670 S.E.2d 652 (2008); *Marex Titanic, Inc. v. Wrecked & Abandoned Vessel*, 2 F.3d 544, 546 (4th Cir. 1993). The dismissal divests the court of jurisdiction to conduct any further proceedings in connection with the action and "carries down with it previous proceedings and orders in the action, and all

[14] Indeed, the district court's refusal to order preliminary relief in connection with the proceeds of the Friendship Partners liquidation appears to be precisely why Bennett directed his request for relief to the probate court in this instance. (*See* Statement of Facts § VI, *supra*.)

pleadings, both of plaintiff and defendant, and all issues, with respect to plaintiff's claim." *In re Matthews*, 395 F.3d 477, 480 (4th Cir. 2005) (citing *In re Piper Aircraft Distrib. Sys. Antitrust Litig.*, 551 F.2d 213, 219 (8th Cir. 1977)); *see also Allen v. Southern Ry. Co.*, 218 S.C. 291, 297, 62 S.E.2d 507, 510 (1950) (voluntary non-suit not only terminates the case as a procedural matter, but eliminates all prior rulings of the court).

A plaintiff's right to voluntarily dismiss an action is "unconditional," and dismissal becomes effective when the notice is filed with the clerk. *Matter of Morrison*, 321 S.C. 370, 373, 468 S.E.2d 651, 653 (1996) (citing *Marex Titanic, Inc. v. Wrecked & Abandoned Vessel*, 2 F.3d 544 (4th Cir. 1993)). Judicial approval of the voluntary dismissal is not required. *See In re Matthews*, 395 F.3d 477, 480 (4th Cir. 2005). In *Morrison*, the South Carolina Supreme Court cited with approval *Marex Titanic, Inc.*, 2 F.3d at 546., in which the Fourth Circuit explained the operation of Rule 41(a)(1)(a) as follows:

> Rule 41(a)(1) is the shortest and surest route to abort a complaint when it is applicable. So long as plaintiff has not been served with his adversary's answer or motion for summary judgment he need do no more than file a *notice* of dismissal with the Clerk. That document itself closes the file. There is nothing the defendant can do to fan the ashes of that action into life and the court has no role to play. This is a matter of right running to the plaintiff and may not be extinguished or circumscribed by adversary or court. There is not even a perfunctory order of the court closing the file. Its alpha and omega was the doing of the plaintiff alone.

Marex Titanic, Inc., 2 F.3d at 546 n.2 (quoting *Am. Cyanamid Co. v. McGhee*, 317 F.2d 295, 297 (5th Cir. 1963)).

The lower courts based their rulings that the notice of voluntary dismissal was ineffective on the fact that the probate court had already held hearings and issued orders in the Conservatorship Action. (7/3/2014 Order at 2; 1/13/2016 Order at 14.) But a plaintiff's right to dismiss under Rule 41(a)(1)(A) is not cut off by any substantive action in the case other than the

filing of an answer or motion for summary judgment. *Matter of Morrison*, 321 S.C. at 373, 468 S.E.2d at 652. In *Morrison*, the Supreme Court rejected the defendant's argument that the plaintiff could not dismiss under Rule 41(a)(1)(A) after the court had taken evidence at a hearing. *Id.* The plaintiff had commenced an action against the defendant in the family court for child support and other relief. *Id.* at 371, 468 S.E.2d at 651. Before the defendant served his answer, the family court held a hearing, at which it took evidence. *Id.* at 371, 468 S.E.2d at 652. *Id.* Four days later, the plaintiff filed a notice of voluntary dismissal under Rule 41(a)(1)(A). *Id.* The family court subsequently issued a final order and decree in the action. *Id.* The Supreme Court held that plaintiff's notice of voluntary dismissal was timely, regardless of the fact that evidence was taken at the hearing, and that the notice deprived the family court of jurisdiction to issue the subsequent order. *Id.* at 373, 468 S.E.2d at 653. *See also Marex Titanic Inc.*, 2 F.3d at 546-47 (notice of voluntary dismissal filed after three days of hearings but before the defendant served an answer or summary judgment motion was timely and effective).

The lower courts also concluded that Rule 41(a)(1)(A) is inapplicable to conservatorship proceedings. Citing Rule 81, SCRCP,[15] the lower courts held that Rule 41(a)(1)(A) is inconsistent with probate court procedure because no answer is required in conservatorship proceedings. (7/3/2014 Order at 2; 1/13/2016 Order at 14.) This was error. The Probate Code provides that the South Carolina Rules of Civil Procedure "govern formal proceedings pursuant to this title." S.C. Code Ann. § 62-1-304; *see also In re Timmerman*, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (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

[15] That rule states that the South Carolina Rules of Civil Procedure "apply insofar as practicable in magistrate's court, probate courts, and family courts to the extent they are not inconsistent with the statutes and rules governing those courts," Rule 81, SCRCP.

rules. A motion to alter or amend a judgment pursuant to Rule 59(e), SCRCP, is not inconsistent with the Probate Code and is therefore applicable.").[16] Neither the Probate Code nor any probate court rule provides that either Rule 12, which requires the filing of an answer, or Rule 41, is inapplicable in conservatorship actions. The legislature could have carved out these rules from the rules of civil procedure that apply to conservatorship proceedings, but it did not do so. Thus, the Probate Code expressly provides that Rule 41(a)(1)(A) applies to this action.

In sum, the probate court lacked subjection matter jurisdiction because the subject funds are not part of Keith Wellin's estate, because there was no "claim" by the estate in this proceeding seeking $50 million, because the Probate Court expressly excludes this type of dispute from the probate court's jurisdiction, because the Irrevocable Trust is administered out-of-state, because Bennett's petition seeking to recover the funds was removed to federal court, and because the Wellin Children's notice of voluntary dismissal divested the probate court of jurisdiction and rendered its prior rulings void. Accordingly, the probate court's order was erroneous and void and should be reversed.

II. The lower court erred in holding that the probate court had personal jurisdiction over the Irrevocable Trust.

Even if the probate court had subject matter jurisdiction, the court still lacked personal jurisdiction to grant relief against the Irrevocable Trust.[17] The Trust was not made party to the

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[16] The instant Conservatorship Action was a "formal proceeding" that required the Wellin Children to file and serve a summons and petition. *See* S.C. Code Ann. § 62-5-401, S.C. rptr's cmts ("The 2010 amendment revised the first sentence of this section . . . to clarify that a summons and petition are required to commence a formal proceeding, *including a formal proceeding for appointment of a conservator* or other protective order.") (emphasis added).

[17] As previously noted, the $50 million at issue represents a portion of the liquidation proceeds distributed from Friendship Partners to the Irrevocable Trust. (*See* Statement of Facts § IV, *supra*.) Keith Wellin's claim to the funds is based upon the allegation that he validly substituted the Promissory Note for partnership units owned *by the Trust*. (*Id.*) The Promissory Note that

instant action and was never served with a summons and complaint before the Court ordered it to pay $50 million. Without a summons and complaint, the court does not acquire jurisdiction over the party against whom relief is sought. *Brown v. Evatt*, 322 S.C. 189, 194, 470 S.E.2d 848, 850 (1996) ("A summons is not a mere notice, but a means for giving jurisdiction to the court, and unless it is waived, the court cannot otherwise obtain personal jurisdiction."); *Louden v. Moragne*, 327 S.C. 465, 468, 486 S.E.2d 525, 526 (Ct. App. 1997) ("Service of the summons brings the defendant within the court's jurisdiction and gives the court the power to render a personal judgment against the person served.").

The probate court did not acquire jurisdiction over the Irrevocable Trust by virtue of the fact that the Wellin Children—who were parties to the instant action (i.e. the petitioners)—also happen to be trustees of the Irrevocable Trust. The petition filed by the Wellin Children in the probate court clearly demonstrates they brought this action in their individual capacities and not as trustees of the Irrevocable Trust. (Petition at 1) ("We are Keith Wellin's three children. We are concerned that our father can no longer manage his affairs and are concerned that his assets are at risk of being dissipated.") Thus, the filing of the petition did not create jurisdiction over the Irrevocable Trust. *In re Ashton*, 266 S.W.3d 602, 604 (Tex. Ct. App. 2008) ("[F]or relief to be ordered against a trust, its trustee must be properly before the trial court as a result of service, acceptance, or waiver of process, or an appearance. . . . Stated differently, for relief to be granted against a trust, the trust—through its trustee—must be made a party to the action.").

In *Ashton*, a husband and wife were involved in divorce proceedings, and the wife requested that the trial court order the husband, who was the sole trustee of a family trust, to pay

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Keith Wellin purported to substitute was an obligation of *the Trust*. (*See* Statement of Facts § I, *supra*.) At bottom, Bennett's request sought an order directing payment of $50 million *from the Trust*.

money to her. *Id.* at 603. The trial court granted the order. The Texas Court of Appeals granted a petition for writ of mandamus and held the trial court's order was erroneous and void because the trust was not a party to the action—the husband was only before the court in his individual capacity. *Id.* at 604 ("Although Ivan was before the court in his individual capacity, he was not sued in his capacity as trustee of the I.A. Trust. We conclude the trial court erroneously granted relief against the trust in that circumstance.").[18]

In support of their rulings, the lower courts erroneously relied upon *Ex Parte Cannon*, 385 S.C. 643, 685 S.E.2d 814 (Ct. App. 2009); *In re Estate of Ahern*, 835 N.E.2d 95 (Ill. Ct. App. 2005); *In re Conservatorship of Groves* 109 S.W.3d 317, 349-50 (Tenn. App. 2003); and *In re Guardianship of Brown*, 611 So.2d 1342 (Fla. App. 1993). (2/6/2014 Order at 5; 1/13/2016 Order at 9-10.) None of these cases support the lower courts' holdings. In *Cannon* and *Groves*, the courts held only that the appellants failed timely to object to the lower court's lack of personal jurisdiction. *Ex Parte Cannon*, 385 S.C. at 658, 685 S.E.2d at 822 ("The failure to object result[s] in waiver of personal jurisdiction[.]"); *In re Conservatorship of Groves* 109 S.W.3d at 349-50 ("Because Mr. Groves and his wife did not object during the proceedings below to the trial court's decision to address the issues regarding the disputed gifts, they cannot now take issue with this procedural misstep on appeal."). *Brown* contains no reasoning or recitation of the underlying facts or procedural posture and therefore provides no guidance.

[18] This well-settled legal principle is recognized in other contexts of South Carolina law. For example, to the extent Bennett's request could be construed as seeking a declaration of rights, the South Carolina Declaratory Judgment Act mandates that "all persons *shall be* made parties who have or claim any interest which would be affected by the declaration." S.C. Code Ann. § 15-53-80 (emphasis added). The code also mandates that "no declaration shall prejudice the rights of persons not parties to the proceeding." *Id.* Bennett's request plainly implicates the rights of the Irrevocable Trust, which cannot be declared or infringed by the court without notice and a jury trial. *Id.*

However, the decision cited as authority by the *Brown* court, *Finkelstein v. Southeast Bank, N.A.*, was clearly also based upon the trustee's failure to timely object to the lack of personal jurisdiction. 490 So. 2d 976, 979 (Fla. App. 1986) ("[The appellant trustees] did not raise jurisdiction as an issue in their motion to dismiss the complaint, or in their later motion to dissolve the agreed temporary restraining order . . . . By their actions, they waived any right to challenge jurisdiction because of appellee's failure to sue them in their capacity as trustees."). Thus, none of the cases cited by the lower courts stand for the principle that the probate court's personal jurisdiction over the Wellin Children, in their individual capacities, gave the court jurisdiction over the Irrevocable Trust.

Moreover, unlike the appellants in the cases cited by the lower courts, the Wellin Children repeatedly objected to the probate court's exercise of jurisdiction over the Irrevocable Trust. At the February 6, 2014 hearing before the probate court, counsel for the Wellin Children objected to the court's exercise of jurisdiction over the Trust on the basis that the Wellin Children had appeared only in their individual capacities and not as trustees:

> Mr. Rosen (attorney for Lester Schwartz): Your Honor, I'm a little confused. I thought the children were the trustees. The children are the trustees. They are parties. They brought this action, so they are parties.
> Mr. Brunson (attorney for Appellants): Not as trustees of the irrevocable trust.
> Mr. Rosen: I don't think that makes any difference.
> Mr. Brunson: It absolutely makes a difference.
> The Court: Well, they're the parties in the conservatorship, aren't they?
> Mr. Brunson: As the children, as individuals, not as trustees of a trust, which is a completely separate issue.

(2/6/2014 Hr'g Tr. at 74:5-20.) Subsequently, the Wellin Children reiterated their position in their March 3, 2014 motion to alter or amend and at the hearing on the motion:

> Mr. Brunson: I am counsel for the individual petitioners, Peter Wellin, Cynthia Plum, and Mari King, as individuals. They are also trustees of the Wellin Family 2009 Trust. I represent them in that capacity in other matters, but they are not appearing and have not appeared before this Court in their

> capacity as trustees, nor has the Wellin Family 2009 Trust made an appearance in this Court.
> My clients, as individuals, are making arguments as to why this Court cannot Order a nonparty to pay $50,000,000 over to the special conservator. But by doing so, the Trust itself is not making an appearance and my clients are not taking on the mantle of making arguments in their capacity as trustees on behalf of the Trust. I just want to make that crystal clear on the record.

(3/3/2014 Mot. to Alter or Amend; 4/1/2014 Hr'g Tr. at 5:1-19.) Because the Wellin Children timely objected to the probate court's exercise of personal jurisdiction over the Irrevocable Trust, the cases cited by lower courts are inapposite. Further, the cases cited by the lower courts involved *claims* asserted via formal pleadings against individuals that arguably appeared in their trustee capacity. Here, no claim or counterclaim was ever asserted in the Conservatorship Action against the Wellin Children, in any capacity.

III. The lower courts erred in finding that the probate court's order requiring the Irrevocable Trust to pay $50 million did not violate principles of due process.

This Court should reverse the lower courts rulings that the probate court's order requiring the payment of $50 million to Synovus did not violate the Wellin Children's and the Irrevocable Trust's due process rights. A fundamental requirement of procedural due process mandates that litigants be placed on notice of the issues which the court will consider and have the opportunity to be heard in a meaningful manner. *Blanton v. Stathos*, 351 S.C. 534, 542, 570 S.E.2d 565, 569 (Ct. App. 2002). Issuance of the February Order requiring the Wellin Children or the Irrevocable Trust to pay $50 million in the absence of a summons and complaint, discovery, or a trial by jury is a clear violation of their procedural due process rights. Indeed, appellants are not aware of any case in any jurisdiction in which a court has ordered a party to pay money in the absence of a claim even being asserted against that party.

In an unpublished opinion, this Court has held that the family court deprived a defendant of his right to procedural due process by summarily ruling at a hearing that he owed alimony

without requiring the claimant to file a summons and complaint and without allowing the defendant the opportunity to conduct discovery and adequately prepare his defense. *S. Carolina Dep't of Soc. Servs. v. Fleisig*, No. 2004-UP-535, 2004 WL 6336775 (Ct. App. Oct. 21, 2004).[19] The court also found that merely granting the defendant a 10-day extension of time in which to respond to the claimant's testimony at the hearing failed to cure the procedural errors. *Id.* Because the defendant was denied clear notice of the issues to be considered by the court and a meaningful opportunity to be heard and defend himself, this Court vacated the lower court order. *Id.*

Likewise, the probate court deprived the Wellin Children and the Irrevocable Trust of their rights to procedural due process in the instant case. Bennett's counsel assured all parties in advance of the hearing on his Application that Bennett was seeking only the authority *to pursue a claim* on Keith Wellin's behalf for the proceeds of the Friendship Partners liquidation and that he was not seeking substantive relief in connection with the Swap Transaction and the Friendship Partners liquidation. The probate court took no testimony at the hearing and admitted no evidence on the issues in dispute. Bennett's request that the court order the Wellin Children to pay him the allegedly "undisputed" $50 million was made orally in the middle of the hearing and was not even reduced to writing. Although Bennett submitted a proposed order granting his requested relief and a memorandum in support, the court required the Wellin Children to submit their own brief and order on the same day and did not allow them an opportunity to respond to Bennett's submission. Thus, the court required a non-party to this action, the Irrevocable Trust, to pay $50 million without service of a summons and complaint, without the opportunity to

[19] The Wellin Children are aware that Rule 268(d)(2), SCACR provides that unpublished opinions should not be cited as precedent. Accordingly, this ruling not cited as binding precedent but merely to note the similarity to the issue here.

conduct any discovery, without a trial, and without even the opportunity to respond in writing to the arguments made by Bennett in connection with his request.

The lower courts also erred in relying upon the probate court's "equitable powers" as a basis for its authority to summarily require the Irrevocable Trust to pay $50 million to Synovus. The probate court's equitable powers are not broad enough to allow it to disregard rules of procedure and due process. "When providing an equitable remedy, the court may not ignore statutes, rules, and other precedent." *Johnson v. Lloyd*, 399 S.C. 470, 476, 732 S.E.2d 198, 201 (Ct. App. 2012). In granting the relief requested by Bennett with the case in this posture, the probate court ignored the most fundamental statutes, rules, and precedent of our courts.[20]

Moreover, the probate court's February Order requiring payment of $50 million to Synovus is premised on unsupported and incorrect findings of fact. The order erroneously states

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[20] Further, "equitable relief is unnecessary when an adequate remedy for money damages is available at law." *Carolina Park Associates, LLC v. Marino*, 400 S.C. 1, 8, 732 S.E.2d 876, 879 (2012). Before the probate court issued its February Order, the district court denied Keith Wellin, or his proxies, preliminary equitable relief in connection with the same assets at issue here because no irreparable harm is present where, as here, Keith Wellin could sue—and did sue—his children for money damages, and Wellin failed to demonstrate a likelihood of success on the merits. (*See* Civil Action No. 2:13-cv-1831, Dkt. No. 79; Civil Action No. 2:13-3595, Dkt. No. 15.) Bennett did not even argue to the probate court, much less establish, that the elements necessary for obtaining injunctive relief are present here. *See Scratch Golf Co. v. Dunes West Residential Golf Properties, Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004) ("For a preliminary injunction to be granted, the plaintiff must establish that (1) it would suffer irreparable harm if the injunction is not granted: (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law."). Yet, the relief Bennett requested—that the Irrevocable Trust (or the Wellin Children) pay $50 million—is much broader than the injunctive relief that the district court twice found improper in the months before the February Order. Those injunctions merely froze the assets in the Irrevocable Trust's possession, whereas the probate court's February Order actually required the Trust to surrender the same assets to Synovus. Having twice lost their efforts to freeze these assets in the district court, Keith Wellin's attorneys went to the probate court seeking to circumvent the federal litigation entirely and take the assets from the Irrevocable Trust. Whatever equitable powers the probate court has, they cannot justify the trampling of due process rights and abandonment of judicial procedure that occurred in this case.

that the Wellin Children agree that Keith Wellin is entitled to "at least $50 million," referring to such money as "the undisputed funds." This was error. The Wellin Children unambiguously stated to the probate court that they *do* dispute Keith Wellin's claim that he should be entitled to accept the $50 million without any strings (i.e. not in satisfaction of the Promissory Note). The Wellin Children explained to the probate court at the hearing that, as trustees of the Irrevocable Trust, they tendered payment of the $50 million to Bennett in prepayment of the Promissory Note, that Bennett rejected the payment and sent the check back to counsel for the Irrevocable Trust, that the $50 million was therefore in possession of the Irrevocable Trust, and that Keith Wellin was at one point entitled to the funds, but only in satisfaction of the Promissory Note. (2/6/2014 Hr'g Tr. 33, 55-56, 58.) The transcript from the February 6 hearing before the probate court demonstrates counsel for the Wellin Children was explaining to the court that the Wellin Children, at that point in time, remained willing to pay the funds to Keith Wellin, but only provided that Keith Wellin accepted the funds in satisfaction of the Promissory Note. (*Id.*) At no point at the hearing or otherwise have the Wellin Children acknowledged that the $50 million belonged to Keith Wellin other than in satisfaction of the Promissory Note for which the Wellin Children tendered payment.[21] By erroneously characterizing the $50 million as "undisputed funds" the probate court deprived the Wellin Children of their rights to have the dispute over those funds decided in a proper and constitutional manner.

The probate court also made the following unsupported factual finding related to the Swap Transaction:

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[21] In any event, even if the Wellin Children had admitted that Keith Wellin was entitled to the $50 million—which they did not—such an admission would not somehow make the $50 million, which is and was undisputedly in the possession of the Irrevocable Trust, part of Keith Wellin's estate within the meaning of § 62-5-402(2).

> 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.

(2/21/2014 Order at 2). No evidence supports this finding. Neither Bennett nor Keith Wellin testified in the probate court proceeding. The Wellin Children dispute the validity and effectiveness of the Swap Transaction, the valuation of the Promissory Note and the partnership units used by Bennett, and the allegations regarding any steps Bennett claims to have taken prior to the purported Swap Transaction. The Wellin Children have numerous arguments why the Swap Transaction was invalid, but none of those arguments were advanced in the probate court because no claim was pending against the Wellin Children in the probate court. No party argued, either orally or in writing to the probate court, regarding the validity of the Swap Transaction. These issues are in dispute in litigation pending in the district court, and they will be decided by that court only upon a full evidentiary record following discovery. The probate court's factual findings are based solely on bare allegations and say-so that Bennett included in his proposed order submitted to the probate court.

Moreover, the probate court's factual findings related to the Swap Transaction were entirely gratuitous. The purpose of the probate court's February Orders was to secure the allegedly "undisputed" $50 million and to give Bennett the authority to sue for the additional $42 million, to which Bennett alleged Keith Wellin was entitled as a result of the disputed Swap Transaction and the Friendship Partners liquidation. (2/21/2014 Order at 6.) Accordingly, the probate court's order states that it "in no way interferes with any right to dispute ownership over

the disputed fund of approximately $42,000,000." (2/21/2014 Order at 6.) Thus, the probate court clearly did not intend to decide the validity of the Swap Transaction. Nevertheless, Wendy Wellin has taken the position in filings with the district court that the probate court, and the circuit court, have already determined that the Swap Transaction was effective. (*See* USDC SC Civil Action No.: 2:14-cv-04067-DCN, Docket No. 231 at 2.) In other words, Wendy Wellin takes the position that the probate court determined the entire $92 million dispute related to the Swap Transaction in Keith Wellin's favor despite the absence of pleading, discovery, trial or any semblance of due process. This Court should accordingly reverse the probate court's unsupported findings of fact.

This dispute involves highly complex issues of law and fact which remain in active litigation before the federal court. By granting Bennett the relief he sought without having the issues framed in pleadings, without affording the parties an opportunity to remove the action to federal court, without taking evidence pursuant to the rules of evidence, and without empanelling a jury to resolve factual disputes, the probate court, as affirmed by the circuit court, deprived the Wellin Children of due process and usurped the role of the federal court, which continues to consider the issues in a proper and constitutional manner. Because the probate court's rulings denied the Wellin Children and the Trust their rights to procedural due process, the orders should be vacated.

IV. The lower courts erred in finding that South Carolina Rule of Civil Procedure 12(b)(8) did not require dismissal of Bennett's request for relief.

This Court should reverse the lower courts' orders because the probate court should have dismissed Bennett's request for relief pursuant to Rule 12(b)(8), SCRCP, which provides for dismissal when "another action is pending between the same parties for the same claim." S.C. R. Civ. P. 12(b)(8); *State ex rel. Wilson v. Condon*, 410 S.C. 331, 333, 764 S.E.2d 247, 248 (2014) (holding Rule 12(b)(8) exists to prevent duplicative litigation between the same parties in multiple forums). The rule requires only that the claims or issues in the second case be "substantially the same," *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 106, 674 S.E.2d 524, 532 (Ct. App. 2009), or "based on the same facts or circumstances," *Corbett v. City of Myrtle Beach*, 336 S.C. 601, 610, 521 S.E.2d 276, 281 (Ct. App. 1999), as those asserted in the prior-filed litigation. Accordingly, there are three requirements for dismissal under Rule 12(b)(8): (1) a pending claim; (2) between the same parties; (3) for the same or substantially the same claim/issues or based on the same facts and circumstances. *See Corbett*, 336 S.C. at 610, 521 S.E.2d at 281; *Capital City*, 382 S.C. at 106, 674 S.E.2d at 532.

Each of these elements is satisfied with respect to the allegations asserted in Bennett's Application. As Bennett acknowledged in his Application, "there is extensive ongoing litigation between Mr. Wellin and his children in several different courts." (Application at 2.) Indeed, *Wellin I*, *Wellin II*, *Wellin III* and *Wellin IV* all assert allegations specifically relating to the dissolution of Friendship Partners, distributions from the Irrevocable Trust, and the purported Swap Transaction—precisely the issues raised in Bennett's Application. (*See* Statement of Facts §§ V, VI, *supra*.) Thus, the claims in these cases involve "the same or substantially the same claims or issues or [are] based on the same facts and circumstances" as the Application. *Corbett*, 336 S.C. at 610, 521 S.E.2d at 281. Consequently, even if the claims asserted in the Application

had been properly before the probate court via filing of a summons and complaint by the real party in interest, Rule 12(b)(8) still required their dismissal. *See State ex rel. Wilson*, 410 S.C. at 333, 764 S.E.2d at 247 (ordering state court to defer under Rule 12(b)(8) in favor of pending federal court litigation over same issues).

V. The circuit court erred in finding Keith Wellin's death and the appointment of his widow as Special Administrator of his estate did not render moot the underlying Conservatorship Action and this appeal.

"A case becomes moot when judgment, if rendered, will have no practical legal effect upon an existing controversy." *Byrd v. Irmo High School,* 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996). The underlying action and the orders at issue on appeal were premised upon the notion that Keith Wellin was a vulnerable adult whose estate was in need of protection. (2/6/2014 Order at 4.) Keith Wellin is now deceased, Wendy Wellin has been appointed Special Administrator of his Estate, and she has substituted herself as the plaintiff in the district court litigation in which she is seeking recovery of precisely the same assets at issue in this appeal. Consequently, there is currently no need for a conservator to protect Keith Wellin's assets, such that a judgment in the underlying action will have no practical legal effect. *See Byerly v. South Carolina Nat'l Bank Corp.*, 313 S.C. 385, 438 S.E.2d 233 (1993) (holding death of life tenant pending appeal rendered the appeal moot and required underlying orders to be vacated); *Ex parte McFarlin*, No. UP-073, 2007 WL 8326605, at *5 (Ct. App. 2007) (holding death of ward rendered conservatorship terminated and issues relating to orders entered during pendency of conservatorship moot). The federal district court can order any necessary preliminary relief in connection with the subject funds—indeed, the district court expressly denied Keith Wellin's requests for preliminary relief in connection with these assets—and is the only court with jurisdiction to do so.

The circuit court, relying upon *Curtis v. State*, 345 S.C. 557, 549 S.E.2d 591 (2001), erroneously applied an exception to the mootness doctrine for situations in which "a decision by the trial court may affect future events, or have collateral consequences for the parties." (1/13/2016 Order at 6.) The circuit court reasoned that, although there is currently no need for a conservator, the probate court's order had collateral consequences for Keith Wellin's Estate in that Synovus should have been holding the $50 million at Keith Wellin's death and his Estate should not have to bring separate litigation to recover it. (*Id.*) But the Estate is already pursuing separate litigation against the Wellin Children to recover the subject $50 million in the district court. In light of Keith Wellin's death, Wendy Wellin's appointment as Special Administrator of his Estate, and her substitution as a party in the district court litigation, the conservatorship proceeding and the probate court's orders are moot.

VI. The lower courts erred in finding that Bennett had standing to pursue a claim on Keith Wellin's behalf.

This Court should reverse the lower courts' ruling that Bennett had standing to pursue the substantive relief requested in his Application on Keith Wellin's behalf. Standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right. *Bank of America, N.A. v. Draper*, 405 S.C. 214, 219, 746 S.E.2d 478, 480 (Ct. App. 2013); *Powell ex rel. Kelley v. Bank of Am.*, 379 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct. App. 2008). It is a concept of justiciability that is concerned with whether a particular person may raise legal arguments or claims. *Draper*, 405 S.C. at 219, 746 S.E.2d at 480 (internal citations omitted). "Standing is a fundamental requirement for instituting an action." *Id.*

Generally, a party must be a real party in interest to the litigation to have standing. *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 22, 698 S.E.2d 612, 623 (2010). Rule 17(a) of the South Carolina Rules of Civil Procedure expressly requires that every action be prosecuted "in the name of

the real party in interest". *Id.* Ordinarily, ownership of the right to be enforced renders one the real party in interest. *Draper*, 405 S.C. at 220, 746 S.E.2d at 481 (internal citations omitted). Certain parties, including a conservator, may sue in their own names for the benefit of another. Rule 17(a), SCRCP; S.C. Code Ann. § 62-5-434(17). However, a special conservator has only limited authority to carry out specified duties as conferred by an order of the court. S.C. Code Ann. § 62-5-409(c).

Here, the consent order appointing Bennett as special conservator stated that he shall ***not*** have the rights and duties that would ordinarily accrue to a court-appointed conservator. (8/15/2013 Order ¶ A-C.) His role as special conservator was limited to ensuring that no transfers were made from Keith Wellin's assets without adequate consideration. (*Id.*) Until the probate court entered the order expanding Bennett's powers to include the right to pursue claims on Keith Wellin's behalf, Bennett had no standing to pursue the claims described in his Application. The probate court did not grant Bennett that authority until *after* the hearing on his Application. Because Bennett lacked standing to pursue claims on Keith Wellin's behalf when he submitted the Application and at the hearing, the probate court erred in granting him relief against the Wellin Children and the Trust.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgments of the lower courts and instruct the lower courts that the action has been dismissed and all rulings in the action are void, or failing that, vacate the lower court orders requiring payment of $50 million to Synovus and remand to the probate court for further proceedings.

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Charleston, South Carolina
August 15, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Common Pleas
Ninth Judicial Circuit
County of Charleston

APPEAL FROM CHARLESTON COUNTY PROBATE COURT

Irvin G. Condon, Circuit Court Judge

Appellate Case No. 2016-001141

Probate Case No.: 2013-GC-10-1029

Circuit Court Case No. 2014-CP-10-4336

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

v.

Keith S. Wellin, ... Respondent,

PROOF OF SERVICE

I HEREBY CERTIFY that I have served the Initial Brief of Appellants on Respondents by depositing copies of it in the United States Mail, postage prepaid, addressed to the below Counsel of Record:

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August 15, 2016

The Honorable Jenny Abbott Kitchings
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SC Court of Appeals
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RE: Peter J. Wellin, Cynthia W. Plum and Marjorie W. King v. Keith S. Wellin
S.C. Court of Appeals Case No. 2016-001141
Circuit Court Case No. 2014-CP-10-4336
Probate Court Case No. 2013-GC-10-0129
Our File No. 39113/01500

Dear Ms. Kitchings:

Enclosed please find the original and one copy each of the Initial Brief of Appellant and Appellant's Designation of Matter to be Included in the Record on Appeal in the above matter. We would ask that you file the originals and return clocked-in copies to us via the enclosed envelope.

By copy of this letter to counsel of record, we are serving them a copy of the initial brief and designation.

With kind regards, I remain

Very truly yours,

Merritt G. Abney

MGA:ls
Enclosures
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