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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

Irvin G. Condon, Probate Court Judge

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

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

Appellate Case No. 2016-001141

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

v.

Keith S. Wellin, ... Respondent.

RECORD ON APPEAL
Volume 5 of 5

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PURCHASE AGREEMENT

dated as of the 30th day of November, 2009

**by and between
WELLEN FAMILY 2009 IRREVOCABLE TRUST
u/a/d November 2, 2009**

and

**KEITH S. WELLEN FLORIDA REVOCABLE LIVING TRUST
u/a/d December 11, 2001, as amended and restated**

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THIS PURCHASE AGREEMENT dated as of the 30th day of November, 2009 is made and entered into by and between the WELLIN FAMILY 2009 IRREVOCABLE TRUST, created under agreement dated November 2, 2009, by and between KEITH S. WELLIN, as Grantor, and PETER J. WELLIN, CYNTHIA W. PLUM, MARJORIE W. KING, and SOUTH DAKOTA TRUST COMPANY LLC, as Trustees ("Purchaser"), and the KEITH S. WELLIN FLORIDA REVOCABLE LIVING TRUST, created under agreement dated December 11, 2001 as amended and restated, by and between KEITH S. WELLIN, as Grantor, and KEITH S. WELLIN, as Trustee ("Seller"). Capitalized terms not otherwise defined herein have the meanings set forth in Section 11.01.

WHEREAS, Seller owns a ninety-eight and eight thousand nine hundred sixty-three one ten-thousandths percent (98.8963%) limited partnership interest (988,963 limited partnership units) in FRIENDSHIP PARTNERS L.P., a Delaware limited partnership (the "Partnership"); and

WHEREAS, Seller desires to sell, and Purchaser desires to purchase from Seller, such ninety-eight and eight thousand nine hundred sixty-three one ten-thousandths percent (98.8963%) limited partnership interest (988,963 limited partnership units) in the Partnership (such interest being referred to herein as the "Interest") on the terms and subject to the conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and agreements set forth in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

ARTICLE I

SALE OF INTEREST AND CLOSING

1.01 Purchase and Sale. Seller agrees to sell to Purchaser, and Purchaser agrees to purchase from Seller, on the terms and subject to the conditions set forth in this Agreement, all of the right, title and interest of Seller in and to the lesser of (i) one hundred percent (100%) of the limited partnership units constituting the Interest or (ii) that fraction of the limited partnership units constituting the Interest of which the numerator is the Purchase Price and the denominator is the fair market value of the Interest as finally determined for Federal gift and estate tax purposes. Notwithstanding any other provision of this Agreement, if less than one hundred percent (100%) of the limited partnership units constituting the Interest are sold pursuant to this Agreement, Seller shall continue to own all of the remaining limited partnership units constituting the Interest. The Seller shall retain all right and title to and interest in such remaining limited partnership units, including, without limitation, all rights under the Partnership Agreement with respect to such units. This Agreement shall not be construed to confer upon the Purchaser any right or title to or interest in any limited partnership units constituting the Interest that are not sold pursuant to the terms of this Agreement.

1.02 Purchase Price. The aggregate Purchase Price for the Interest shall be an amount equal to the fair market value of the Interest as of the date of this Agreement, as determined by an independent appraiser selected by the law firm of Nixon Peabody LLP (the "Appraiser"), with interest at the applicable Federal rate so that under Section 7872 of the Internal Revenue Code of 1986, as amended (the "Code"), there is no forgone interest treated as transferred and/or retransferred between the parties to this Agreement, payable at the Closing in the manner provided in Section 1.03. The appraisal shall be delivered on or before fifteen (15) Business Days of this Agreement to the Seller. The costs incurred in connection with the fees of the Appraiser shall be borne equally by the Seller and the Purchaser. The entire Purchase Price shall be paid by delivery of a Note (which Note shall be in substantially the same form as that attached as Exhibit A hereto) made by the Purchaser payable to the Seller one day prior to the ninth (9th) anniversary of the date of the Note with interest at the applicable Federal mid-term rate in effect on the date of the Note as determined under Section 1274(d) of the Code (26 U.S.C. § 1274(d)) per annum, compounded annually, and the Note shall be secured by the limited partnership interests sold pursuant to this Agreement. Upon determination of the Purchase Price pursuant to the appraisal, it is agreed that Purchaser will execute a new promissory note in the exact form of the Note with the exception that the new promissory note will contain the actual amount of the Purchase Price in lieu of the words "\$ TO BE DETERMINED". Upon Purchaser's delivery of the new promissory note to Seller, Seller shall return the original promissory note to Purchaser and thereupon the new promissory note shall be the "Note" for purposes of this Agreement.

1.03 Closing. The Closing will take place on November 30, 2009 at the offices of Nixon Peabody LLP, or at such other place as Purchaser and Seller mutually agree, on the Closing Date. At the Closing, Purchaser will pay the Purchase Price by delivering to Seller cash, check, wire transfer and/or a promissory note in the amount equal to the purchase price. Simultaneously, Seller will assign and transfer to Purchaser all of Seller's right, title and interest in and to the Interest by delivering to Purchaser an assignment or assignments representing the Interest, provided, however, that such assignment or assignments shall not be construed to assign or transfer any right, title or interest in and to such limited partnership units constituting the Interest as are not sold pursuant to this Agreement.

1.04 Further Assurances; Post-Closing Cooperation.

A. Subject to the terms and conditions of this Agreement, at any time or from time to time after the Closing, each of the parties hereto shall execute and deliver such other documents and instruments, provide such materials and information and take such other actions as may reasonably be necessary, proper or advisable, to the extent permitted by Law, to fulfill his, her or its obligations under this Agreement, including, without limitation, any obligations of the Purchaser which may arise under Section 1.01 of this Agreement if less than one hundred percent (100%) of the limited partnership units constituting the Interest are sold pursuant to this Agreement.

B. Effective on the Closing Date, Seller hereby constitutes and appoints Purchaser the true and lawful attorney of Seller, with full power of substitution, in the name of Seller or Purchaser, but on behalf of and for the benefit of Purchaser: (i) to make endorsements and give receipts and releases for and in respect of Seller's interest in the Interest; (ii) to institute,

prosecute, compromise and settle any and all Actions or Proceedings that Purchaser may deem proper in order to collect, assert or enforce any claim, right or title of any kind in or to the Interest; (iii) to defend or compromise any or all Actions or Proceedings in respect of the Interest; and (iv) to do all such acts and things in relation to the matters set forth in the preceding clauses (i) through (iii) as Purchaser shall deem desirable. Seller hereby acknowledges that the appointment hereby made and the powers hereby granted are coupled with an interest and are not and shall not be revocable by it in any manner or for any reason. Purchaser shall indemnify and hold harmless Seller from any and all Losses caused by or arising out of any breach of Law by Purchaser in its exercise of such power of attorney.

C. Following the Closing, each party will afford the other party, its counsel and its accountants, during normal business hours, reasonable access to the books, records and other data relating to the Business or Condition of the Partnership in its possession with respect to periods prior to the Closing and the right to make copies and extracts therefrom, to the extent that such access may be reasonably required by the requesting party in connection with (i) the preparation of tax returns, (ii) the determination or enforcement of rights and obligations under this Agreement, (iii) compliance with the requirements of any Governmental or Regulatory Authority, (iv) the determination or enforcement of the rights and obligations of any party to this Agreement or (v) in connection with any actual or threatened Action or Proceeding.

ARTICLE II

REPRESENTATIONS AND WARRANTIES OF SELLER

Seller hereby represents and warrants to the Purchaser, to the Knowledge of the Seller, as follows:

2.01 Authority. This Agreement has been duly and validly executed and delivered by Seller and constitutes a legal, valid and binding obligation of Seller enforceable against Seller in accordance with its terms.

2.02 Valid Existence of the Partnership. The Partnership is duly formed, validly existing and in good standing under the Laws of the State of Delaware, and has full power and authority to conduct its business as and to the extent now conducted and to own, use and lease its Assets and Properties. The Partnership is duly qualified, licensed or admitted to do business and is in good standing in those jurisdictions in which the ownership, use or leasing of its Assets and Properties, or the conduct or nature of its business, makes such qualification, licensing or admission necessary, except for those jurisdictions in which the adverse effects of all such failures by the Partnership to be qualified, licensed or admitted and in good standing could not in the aggregate reasonably be expected to have a material adverse effect on the Business or Condition of the Partnership.

2.03 No Conflicts. The execution and delivery by Seller of this Agreement do not, the performance by Seller of its obligations under this Agreement and the consummation of the transactions contemplated hereby will not:

A. Conflict with or result in a violation or breach of any of the terms, conditions or provisions of the certificate of formation (or other comparable charter documents) of the Partnership;

B. Conflict with or result in a violation or breach of any term or provision of any Law or Order applicable to Seller or the Partnership or any of their respective Assets and Properties (other than such conflicts, violations or breaches (i) which could not in the aggregate reasonably be expected to adversely affect the validity or enforceability of this Agreement or to have a material adverse effect on the Business or Condition of the Partnership or (ii) as would occur solely as a result of the identity or the legal or regulatory status of Purchaser or any of its Affiliates); or

C. Could not, individually or in the aggregate, reasonably be expected to be materially adverse to the Business or Condition of the Partnership or to adversely affect the ability of Seller to consummate the transactions contemplated hereby or to perform his obligations hereunder, (i) conflict with or result in a violation or breach of, (ii) constitute (with or without notice or lapse of time or both) a default under, (iii) require Seller or the Partnership to obtain any consent, approval or action of, make any filing with or give any notice to any Person as a result or under the terms of, (iv) result in or give to any Person any right of termination, cancellation, acceleration or modification in or with respect to, or (v) result in the creation or imposition of any Lien upon Seller or the Partnership or any of their respective Assets and Properties under, any Contract or License to which Seller or the Partnership is/are a party or by which any of their respective Assets and Properties is bound.

2.04 Governmental Approvals and Filings. No consent, approval or action of, filing with or notice to any Governmental or Regulatory Authority on the part of Seller or, to the Knowledge of Seller, the Partnership, is required in connection with the execution, delivery and performance of this Agreement or the consummation of the transactions contemplated hereby, except (i) where the failure to obtain any such consent, approval or action, to make any such filing or to give any such notice could not reasonably be expected to adversely affect the ability of Seller to consummate the transactions contemplated by this Agreement or to perform his obligations hereunder, or to have a material adverse effect on the Business or Condition of the Partnership, and (ii) those as would be required solely as a result of the identity or the legal or regulatory status of Purchaser or any of its Affiliates.

2.05 Books and Records. To the Knowledge of Seller, the ledgers and other similar records of the Partnership as made available to Purchaser prior to the execution of this Agreement accurately reflect all record transfers prior to the execution of this Agreement in the interests of the Partnership.

2.06 Financial Statements and Condition. Except for the execution and delivery of this Agreement and the transactions to take place pursuant hereto on or prior to the Closing Date, to the Knowledge of Seller, the business of the Partnership has been operated in all material respects in the ordinary course and there has not been any material adverse change in the Business or Condition of the Partnership, other than those occurring as a result of general economic or financial conditions or other developments which are not unique to the Partnership

but also affect other Persons who participate or are engaged in the lines of business in which the Partnership participates or is engaged.

2.07 Legal Proceedings. There are no Actions or Proceedings pending against Seller or, to the Knowledge of Seller, pending or threatened against, relating to or affecting the Partnership or any of its Assets and Properties which could reasonably be expected (i) to result in the issuance of an Order restraining, enjoining or otherwise prohibiting or making illegal the consummation of any of the transactions contemplated by this Agreement, or (ii) individually or in the aggregate with other such Actions or Proceedings, to have a material adverse effect on the Business or Condition of the Partnership; and there are no Orders outstanding against the Partnership which, individually or in the aggregate with other such Orders, materially adversely affect the Business or Condition of the Partnership.

2.08 Compliance With Laws and Orders. To the Knowledge of Seller, the Partnership is not in violation of or in default under any Law or Order applicable to the Partnership or any of its Assets and Properties the effect of which, individually or in the aggregate with other such violations and defaults, could reasonably be expected to be materially adverse to the Business or Condition of the Partnership.

2.09 Contracts. Each Contract to which the Partnership is a party and which is material to the Business or Condition of the Partnership is in full force and effect and constitutes a legal, valid and binding agreement, enforceable in accordance with its terms, of the Partnership and, to the Knowledge of Seller, of each other party thereto; and neither the Partnership, nor, to the Knowledge of Seller, any other party to such Contract is in violation or breach of or default under any such Contract (or with notice or lapse of time or both, would be in violation or breach of or default under any such Contract), the effect of which, individually or in the aggregate, could reasonably be expected to be materially adverse to the Business or Condition of the Partnership.

2.10 Brokers. All negotiations relative to this Agreement and the transactions contemplated hereby have been carried out by Seller directly with Purchaser without the intervention of any Person on behalf of Seller in such manner as to give rise to any valid claim by any Person against Purchaser or the Partnership for a finder's fee, brokerage commission or similar payment.

ARTICLE III

REPRESENTATIONS AND WARRANTIES OF PURCHASER

Purchaser hereby represents and warrants to the Seller, to the Knowledge of the Purchaser, as follows:

3.01 Existence of Trust. Purchaser is a trust duly organized, validly existing and in good standing under the Laws of its jurisdiction of organization. Purchaser has full power and authority to execute and deliver this Agreement, to perform its obligations hereunder and to consummate the transactions contemplated hereby.

3.02 Authority. The execution and delivery by Purchaser of this Agreement, and the performance by Purchaser of its obligations hereunder, are within the authority of Purchaser. This Agreement has been duly and validly executed and delivered by Purchaser and constitutes a legal, valid and binding obligation of Purchaser enforceable against Purchaser in accordance with its terms.

3.03 No Conflicts. The execution and delivery by Purchaser of this Agreement do not, the performance by Purchaser of its obligations under this Agreement and the consummation of the transactions contemplated hereby will not:

A. Conflict with or result in a violation or breach of any of the terms, conditions or provisions of the trust agreement of Purchaser;

B. Conflict with or result in a violation or breach of any term or provision of any Law or Order applicable to Purchaser or any of its Assets and Properties (other than such conflicts, violations or breaches which could not in the aggregate reasonably be expected to adversely affect the validity or enforceability of this Agreement); or

C. Individually or in the aggregate, reasonably be expected to adversely affect the ability of Purchaser to consummate the transactions contemplated hereby or to perform its obligations hereunder, (i) conflict with or result in a violation or breach of, (ii) constitute (with or without notice or lapse of time or both) a default under, (iii) require Purchaser to obtain any consent, approval or action of, make any filing with or give any notice to any Person as a result or under the terms of, or (iv) result in the creation or imposition of any Lien upon Purchaser or any of its Assets or Properties under, any Contract or License to which Purchaser is a party or by which any of its Assets and Properties is bound.

3.04 Governmental Approvals and Filings. No consent, approval or action of, filing with or notice to any Governmental or Regulatory Authority on the part of Purchaser is required in connection with the execution, delivery and performance of this Agreement or the consummation of the transactions contemplated hereby, except where the failure to obtain any such consent, approval or action, to make any such filing or to give any such notice could not reasonably be expected to adversely affect the ability of Purchaser to consummate the transactions contemplated by this Agreement or to perform its obligations hereunder.

3.05 Legal Proceedings. There are no Actions or Proceedings pending or, to the Knowledge of Purchaser, threatened against, relating to or affecting Purchaser or any of its Assets and Properties which could reasonably be expected to result in the issuance of an Order restraining, enjoining or otherwise prohibiting or making illegal the consummation of any of the transactions contemplated by this Agreement.

3.06 Purchase for Investment. The Interest will be acquired by Purchaser (or, if applicable, its assignee pursuant to Section 12.07(b)) for its own account for the purpose of investment, it being understood that the right to dispose of such Interest shall be entirely within the discretion of Purchaser (or such assignee, as the case may be). Purchaser (or such assignee, as the case may be) will refrain from transferring or otherwise disposing of any of the Interest, or

any interest therein, in such manner as to cause Seller to be in violation of the registration requirements of the Securities Act of 1933, as amended, or applicable state securities or blue sky laws.

3.07 Brokers. All negotiations relative to this Agreement and the transactions contemplated hereby have been carried out by Purchaser directly with Seller without the intervention of any Person on behalf of Purchaser in such manner as to give rise to any valid claim by any Person against Seller or the Partnership for a finder's fee, brokerage commission or similar payment.

ARTICLE IV

COVENANTS OF SELLER

Seller covenants and agrees with Purchaser that, at all times from and after the date hereof until the Closing, Seller will comply with all covenants and provisions of this Article IV, except to the extent Purchaser may otherwise consent in writing.

4.01 Regulatory and Other Approvals. Seller will, as promptly as practicable (a) take all commercially reasonable steps necessary or desirable to obtain all consents, approvals or actions of, make all filings with and give all notices to Governmental or Regulatory Authorities or any other Person required of Seller to consummate the transactions contemplated hereby, (b) provide such other information and communications to such Governmental or Regulatory Authorities or other Persons as such Governmental or Regulatory Authorities or other Persons may reasonably request in connection therewith and (c) provide reasonable cooperation to Purchaser in connection with the performance of its obligations under Section 5.01. Seller will provide prompt notification to Purchaser when any such consent, approval, action, filing or notice referred to in clause (a) above is obtained, taken, made or given, as applicable, and will advise Purchaser of any communications (and, unless precluded by Law, provide copies of any such communications that are in writing) with any Governmental or Regulatory Authority or other Person regarding any of the transactions contemplated by this Agreement.

4.02 Fulfillment of Conditions. Seller will take all commercially reasonable steps necessary or desirable and proceed diligently and in good faith to satisfy each condition to the obligations of Purchaser contained in this Agreement and will not take or fail to take any action that could reasonably be expected to result in the nonfulfillment of any such condition.

4.03 Compliance with Partnership Agreement. Seller will as promptly as possible take all actions reasonably necessary to comply with Section 9.2 of the Partnership Agreement of the Partnership and will not take or fail to take any action that could reasonably be expected to result in the failure of the Purchaser to be admitted to the Partnership as a substituted partner.

ARTICLE V

COVENANTS OF PURCHASER

Purchaser covenants and agrees with Seller that, at all times from and after the date hereof until the Closing, Purchaser will comply with all covenants and provisions of this Article V, except to the extent Seller may otherwise consent in writing.

5.01 Regulatory and Other Approvals. Purchaser will as promptly as practicable (a) take all commercially reasonable steps necessary or desirable to obtain all consents, approvals or actions of, make all filings with and give all notices to Governmental or Regulatory Authorities or any other Person required of Purchaser to consummate the transactions contemplated hereby, (b) provide such other information and communications to such Governmental or Regulatory Authorities or other Persons as such Governmental or Regulatory Authorities or other Persons may reasonably request in connection therewith and (c) provide reasonable cooperation to Seller in connection with the performance of its obligations under Section 4.01. Purchaser will provide prompt notification to Seller when any such consent, approval, action, filing or notice referred to in clause (a) above is obtained, taken, made or given, as applicable, and will advise Seller of any communications (and, unless precluded by Law, provide copies of any such communications that are in writing) with any Governmental or Regulatory Authority or other Person regarding any of the transactions contemplated by this Agreement.

5.02 Fulfillment of Conditions. Purchaser will take all commercially reasonable steps necessary or desirable and proceed diligently and in good faith to satisfy each condition to the obligations of Seller contained in this Agreement and will not take or fail to take any action that could reasonably be expected to result in the nonfulfillment of any such condition.

5.03 Compliance with Partnership Agreement. Purchaser will as promptly as possible take all actions reasonably necessary to comply with Section 9.2 of the Partnership Agreement of the Partnership and will not take or fail to take any action that could reasonably be expected to result in the failure of the Purchaser to be admitted to the Partnership as a substituted member.

ARTICLE VI

CONDITIONS TO OBLIGATIONS OF PURCHASER

The obligations of Purchaser hereunder to purchase the Interest are subject to the fulfillment, at or before the Closing, of each of the following conditions (all or any of which may be waived in whole or in part by Purchaser in its sole discretion):

6.01 Representations and Warranties. The representations and warranties made by Seller in this Agreement, taken as a whole, shall be true and correct, in all respects material to the validity and enforceability of this Agreement and to the Business or Condition of

the Partnership, on and as of the Closing Date as though made on and as of the Closing Date or, in the case of representations and warranties made as of a specified date earlier than the Closing Date, on and as of such earlier date.

6.02 Performance. Seller shall have performed and complied with, in all material respects, the agreements, covenants and obligations required by this Agreement to be so performed or complied with by Seller at or before the Closing.

6.03 Orders and Laws. There shall not be in effect on the Closing Date any Order or Law restraining, enjoining or otherwise prohibiting or making illegal the consummation of any of the transactions contemplated by this Agreement.

6.04 Regulatory Consents and Approvals. All consents, approvals and actions of, filings with and notices to any Governmental or Regulatory Authority necessary to permit Purchaser and Seller to perform their obligations under this Agreement and to consummate the transactions contemplated hereby shall have been duly obtained, made or given and shall be in full force and effect, and all terminations or expirations of waiting periods imposed by any Governmental or Regulatory Authority necessary for the consummation of the transactions contemplated by this Agreement shall have occurred.

6.05 Compliance with Partnership Agreement. Section 9.2 of the Partnership Agreement of the Partnership will be complied with in all respects so that Purchaser shall be admitted to the Partnership as a substituted member.

ARTICLE VII

CONDITIONS TO OBLIGATIONS OF SELLER

The obligations of Seller hereunder to sell the Interests are subject to the fulfillment, at or before the Closing, of each of the following conditions (all or any of which may be waived in whole or in part by Seller in his sole discretion):

7.01 Representations and Warranties. The representations and warranties made by Purchaser in this Agreement, taken as a whole, shall be true and correct in all material respects on and as of the Closing Date as though made on and as of the Closing Date.

7.02 Performance. Purchaser shall have performed and complied with, in all material respects, the agreements, covenants and obligations required by this Agreement to be so performed or complied with by Purchaser at or before the Closing.

7.03 Orders and Laws. There shall not be in effect on the Closing Date any Order or Law restraining, enjoining or otherwise prohibiting or making illegal the consummation of any of the transactions contemplated by this Agreement.

7.04 Regulatory Consents and Approvals. All consents, approvals and actions of, filings with and notices to any Governmental or Regulatory Authority necessary to

permit Seller and Purchaser to perform their obligations under this Agreement and to consummate the transactions contemplated hereby shall have been duly obtained, made or given and shall be in full force and effect, and all terminations or expirations of waiting periods imposed by any Governmental or Regulatory Authority necessary for the consummation of the transactions contemplated by this Agreement shall have occurred.

7.05 Compliance with Partnership Agreement. Section 9.2 of the Partnership Agreement of the Partnership will be complied with in all respects so that Purchaser shall be admitted to the Partnership as a substituted member.

ARTICLE VIII

SURVIVAL; NO OTHER REPRESENTATIONS

8.01 Survival of Representations, Warranties, Covenants and Agreements.

The representations, warranties, covenants and agreements of Seller and Purchaser contained in this Agreement will survive the Closing until one year from the date hereof. This Section shall not limit in any way the survival and enforceability of any covenant or agreement of the parties hereto which by its terms contemplates performance after the Closing Date, which shall survive for the respective periods set forth herein.

8.02 No Other Representations. Notwithstanding anything to the contrary contained in this Agreement, it is the explicit intent of each party hereto that Seller is making no representation or warranty whatsoever, express or implied, except those representations and warranties contained in Article II.

ARTICLE IX

INDEMNIFICATION

9.01 Indemnification.

A. Seller shall indemnify the Purchaser Indemnified Parties in respect of, and hold each of them harmless from and against, any and all Losses suffered, incurred or sustained by any of them or to which any of them becomes subject, resulting from, arising out of or relating to any breach of representation or warranty or nonfulfillment of or failure to perform any covenant or agreement on the part of Seller contained in this Agreement.

B. Purchaser shall indemnify the Seller Indemnified Parties in respect of, and hold each of them harmless from and against, any and all Losses suffered, incurred or sustained by any of them or to which any of them becomes subject, resulting from, arising out of or relating to any breach of representation or warranty or nonfulfillment of or failure to perform any covenant or agreement on the part of Purchaser contained in this Agreement.

C. In the event any claim or demand in respect of which an Indemnified Party might seek indemnity under Section 9.01 is asserted against or sought to be collected from such

Indemnified Party by a Person other than Seller or any Affiliate of Seller or of Purchaser (a "Third Party Claim"), the Indemnified Party shall deliver a notice with reasonable promptness to the Indemnifying Party describing in reasonable detail such Third Party Claim. The Indemnified Party shall not settle any such Third Party Claim without the consent of the Indemnifying Party, which consent will not be unreasonably withheld.

9.02 Exclusivity. After the Closing, to the extent permitted by Law, the indemnities set forth in this Article IX shall be the exclusive remedies of Purchaser and Seller and their respective Trustees, employees, agents or other representatives, and Affiliates for any misrepresentation, breach of warranty or nonfulfillment or failure to be performed of any covenant or agreement contained in this Agreement, and the parties shall not be entitled to a rescission of this Agreement or to any further indemnification rights or claims of any nature whatsoever in respect thereof, all of which the parties hereto hereby waive.

ARTICLE X

TERMINATION

10.01 Termination. This Agreement may be terminated, and the transactions contemplated hereby may be abandoned:

A. At any time before the Closing, by mutual written agreement of Seller and Purchaser, or

B. At any time before the Closing, by Seller or Purchaser, in the event that any Order or Law becomes effective restraining, enjoining or otherwise prohibiting or making illegal the consummation of any of the transactions contemplated by this Agreement, upon notification of the non-terminating party by the terminating party.

10.02 Effect of Termination. If this Agreement is validly terminated pursuant to Section 10.01, this Agreement will forthwith become null and void, and there will be no liability or obligation on the part of Seller or Purchaser (or any of their respective Trustees, employees, agents or other representatives, or Affiliates), except that the provisions with respect to expenses in Section 12.03 will continue to apply following any such termination.

ARTICLE XI

DEFINITIONS

11.01 Definitions.

A. **Defined Terms.** As used in this Agreement, the following defined terms have the meanings indicated below:

"Actions or Proceedings" means any action, suit, proceeding, arbitration or Governmental or Regulatory Authority investigation.

"Affiliate" means any Person that directly, or indirectly through one or more intermediaries, controls or is controlled by or is under common control with the Person specified. For purposes of this definition, control of a Person means the power, direct or indirect, to direct or cause the direction of the management and policies of such Person whether by Contract or otherwise and, in any event and without limitation of the previous sentence, any Person owning ten percent (10%) or more of the voting securities of another Person shall be deemed to control that Person.

"Agreement" means this Purchase Agreement and the Schedules hereto, as the same shall be amended from time to time.

"Assets and Properties" of any Person means all assets and properties of every kind, nature, character and description (whether real, personal or mixed, whether tangible or intangible, and wherever situated), including the goodwill related thereto, operated, owned or leased by such Person.

"Books and Records" means all files, documents, instruments, papers, books and records relating to the Business or Condition of the Partnership, including without limitation financial statements, tax returns and related work papers and letters from accountants, budgets, pricing guidelines, ledgers, journals, deeds, title policies, minute books, stock certificates and books, stock transfer ledgers, Contracts, Licenses, customer lists, computer files and programs, retrieval programs, operating data and plans and environmental studies and plans.

"Business Day" means a day other than Saturday, Sunday or any day on which banks located in the State of Delaware are authorized or obligated to close.

"Business or Condition of the Partnership" means the business, financial condition or results of operations of the Partnership taken as a whole.

"Closing" means the closing of the transactions contemplated by Section 1.03.

"Closing Date" means (a) the second Business Day after the day on which the last of the consents, approvals, actions, filings, notices or waiting periods described in or related to the filings described in Sections 6.03, 6.04, 7.03 and 7.04 has been obtained, made or given or has expired, as applicable, or (b) such other date as Purchaser and Seller mutually agree upon.

"Contract" means any agreement, lease, license, evidence of Indebtedness, mortgage, indenture, security agreement or other contract.

"GAAP" means generally accepted accounting principles, consistently applied throughout the specified period and in the immediately prior comparable period.

"Governmental or Regulatory Authority" means any court, tribunal, arbitrator, authority, agency, commission, official or other instrumentality of the United States or any state,

county, city or other political subdivision.

"Indebtedness" of any Person means all obligations of such Person (i) for borrowed money, (ii) evidenced by notes, bonds, debentures or similar instruments, (iii) for the deferred purchase price of goods or services (other than trade payables or accruals incurred in the ordinary course of business), (iv) under capital leases and (v) in the nature of guarantees of the obligations described in clauses (i) through (iv) above of any other Person.

"Indemnified Party" means any Person claiming indemnification under any provision of Article IX.

"Indemnifying Party" means any Person against whom a claim for indemnification is being asserted under any provision of Article IX.

"Interest" has the meaning ascribed to it in the forepart of this Agreement.

"Knowledge of Purchaser" means the actual knowledge of Purchaser.

"Knowledge of Seller" means the actual knowledge of Seller.

"Laws" means all laws, statutes, rules, regulations, ordinances and other pronouncements having the effect of law of the United States or any state, county, city or other political subdivision or of any Governmental or Regulatory Authority.

"Licenses" means all licenses, permits, certificates of authority, authorizations, approvals, registrations, franchises and similar consents granted or issued by any Governmental or Regulatory Authority.

"Liens" means any mortgage, pledge, assessment, security interest, lease, lien, adverse claim, levy, charge or other encumbrance of any kind, or any conditional sale Contract, title retention Contract or other Contract to give any of the foregoing.

"Loss" means any and all damages, fines, penalties, deficiencies, losses and expenses (including without limitation interest, court costs, reasonable fees of attorneys, accountants and other experts or other reasonable expenses of litigation or other proceedings or of any claim, default or assessment).

"Partnership" has the meaning ascribed to it in the forepart of this Agreement.

"Partnership Agreement" shall mean the Partnership Agreement of Friendship Partners L.P., dated as of December 12, 2003, as amended from time to time.

"Order" means any writ, judgment, decree, injunction or similar order of any Governmental or Regulatory Authority (in each such case whether preliminary or final).

"Permitted Lien" means (i) any Lien for taxes not yet due or delinquent or being contested in good faith by appropriate proceedings for which adequate reserves have been

established in accordance with GAAP, (ii) any statutory Lien arising in the ordinary course of business by operation of Law with respect to a Liability that is not yet due or delinquent and (iii) any minor imperfection of title or similar Lien which individually or in the aggregate with other such Liens could not reasonably be expected to materially adversely affect the Business or Condition of the Partnership.

"Person" means any natural person, corporation, limited liability partnership, general partnership, limited partnership, proprietorship, other business organization, trust, union, association or Governmental or Regulatory Authority.

"Purchase Price" has the meaning ascribed to it in Section 1.02.

"Purchaser" has the meaning ascribed to it in the forepart of this Agreement.

"Purchaser Indemnified Parties" means Purchaser and its Trustees, employees, agents or other representatives and Affiliates.

"Seller" has the meaning ascribed to it in the forepart of this Agreement.

"Seller Indemnified Parties" means Seller and its employees, agents or other representatives and Affiliates.

"Third Party Claim" has the meaning ascribed to it in Section 9.01(C).

B. Construction of Certain Terms and Phrases. Unless the context of this Agreement otherwise requires, (i) words of any gender include each other gender; (ii) words using the singular or plural number also include the plural or singular number, respectively; (iii) the terms "hereof," "herein," "hereby" and derivative or similar words refer to this entire Agreement; (iv) the terms "Article" or "Section" refer to the specified Article or Section of this Agreement; and (v) the phrase "ordinary course of business" refers to the business of the Partnership. Whenever this Agreement refers to a number of days, such number shall refer to calendar days unless Business Days are specified. All accounting terms used herein and not expressly defined herein shall have the meanings given to them under GAAP. Any representation or warranty contained herein as to the enforceability of a Contract shall be subject to the effect of any bankruptcy, insolvency, reorganization, moratorium or other similar law affecting the enforcement of creditors' rights generally and to general equitable principles (regardless of whether such enforceability is considered in a proceeding in equity or at Law).

ARTICLE XII

MISCELLANEOUS

12.01 Notices. All notices, requests and other communications hereunder must be in writing and will be deemed to have been duly given only if delivered personally or mailed (first class postage prepaid) to the parties at the following addresses:

If to Purchaser, to:

South Dakota Trust Company LLC, Trustee
WELLIN FAMILY 2009 IRREVOCABLE TRUST
201 South Phillips Avenue
Suite 200
Sioux Falls, South Dakota 57104

With copies to:

Peter J. Wellin
65 Waites Landing
Falmouth, Maine 04105

Thomas M. Farace, Esq.
Nixon Peabody, LLP
1100 Clinton Square
Rochester, New York 14604

If to Seller, to:

Keith S. Wellin, Trustee
KEITH S. WELLIN FLORIDA REVOCABLE LIVING TRUST
161 Coquille Way
Vero Beach, Florida 32963-3468

With a copy to:

Thomas M. Farace, Esq.
Nixon Peabody, LLP
1100 Clinton Square
Rochester, New York 14604

All such notices, requests and other communications will (i) if delivered personally to the address as provided in this Section, be deemed given upon delivery, or (ii) if delivered by mail in the manner described above to the address as provided in this Section, be deemed given upon receipt (in each case regardless of whether such notice, request or other communication is received by any other Person to whom a copy of such notice, request or other communication is to be delivered pursuant to this Section). Any party from time to time may change its address or other information for the purpose of notices to that party by giving notice specifying such change to the other party hereto.

12.02 Entire Agreement. This Agreement supersedes all prior discussions and agreements between the parties with respect to the subject matter hereof, and contains the sole and entire agreement between the parties hereto with respect to the subject matter hereof.

12.03 Expenses. Except as otherwise expressly provided in this Agreement (including without limitation as provided in Section 10.02), whether or not the transactions contemplated hereby are consummated, each party will pay its own costs and expenses incurred in connection with the negotiation, execution and closing of this Agreement and the transactions contemplated hereby.

12.04 Waiver. Any term or condition of this Agreement may be waived at any time by the party that is entitled to the benefit thereof, but no such waiver shall be effective unless set forth in a written instrument duly executed by or on behalf of the party waiving such term or condition. No waiver by any party of any term or condition of this Agreement, in any one or more instances, shall be deemed to be or construed as a waiver of the same or any other term or condition of this Agreement on any future occasion. All remedies, either under this Agreement or by Law or otherwise afforded, will be cumulative and not alternative.

12.05 Amendment. This Agreement may be amended, supplemented or modified only by a written instrument duly executed by or on behalf of each party hereto.

12.06 No Third Party Beneficiary. The terms and provisions of this Agreement are intended solely for the benefit of each party hereto and their respective successors or permitted assigns, and it is not the intention of the parties to confer third-party beneficiary rights upon any other Person other than any Person entitled to indemnity under Article IX.

12.07 No Assignment; Binding Effect. Neither this Agreement nor any right, interest or obligation hereunder may be assigned by any party hereto without the prior written consent of the other party hereto and any attempt to do so will be void, except (a) for assignments and transfers by operation of Law and (b) that Purchaser may assign any or all of its rights, interests and obligations hereunder to a wholly-owned subsidiary, provided that any such subsidiary agrees in writing to be bound by all of the terms, conditions and provisions contained herein, but no such assignment referred to in clause (b) shall relieve Purchaser of its obligations hereunder. Subject to the preceding sentence, this Agreement is binding upon, inures to the benefit of and is enforceable by the parties hereto and their respective successors and assigns.

12.08 Headings. The headings used in this Agreement have been inserted for convenience of reference only and do not define or limit the provisions hereof.

12.09 Invalid Provisions. If any provision of this Agreement is held to be illegal, invalid or unenforceable under any present or future Law, and if the rights or obligations of any party hereto under this Agreement will not be materially and adversely affected thereby, (a) such provision will be fully severable, (b) this Agreement will be construed and enforced as if such illegal, invalid or unenforceable provision had never comprised a part hereof, and (c) the remaining provisions of this Agreement will remain in full force and effect and will not be affected by the illegal, invalid or unenforceable provision or by its severance herefrom.

12.10 Governing Law. This Agreement shall be governed by and construed in accordance with the Laws of the State of Delaware applicable to a Contract executed and performed in such State, without giving effect to the conflicts of laws principles thereof.

12.11 Counterparts. This Agreement may be executed in one or more written, fax, PDF and electronic counterparts, all of which taken together shall constitute one and the same instrument and shall have the same force and effect as though all of the signers had signed a single signature page.

IN WITNESS WHEREOF, each party hereto has signed this Agreement, or caused this Agreement to be signed by its representative thereunto duly authorized, as of the date first above written.

Seller:

KEITH S. WELLIN FLORIDA REVOCABLE LIVING TRUST
u/a/d December 11, 2001, as amended and restated


Keith S. Wellin, Trustee

Purchaser:

WELLIN FAMILY 2009 IRREVOCABLE TRUST
u/a/d November 2, 2009

Peter J. Wellin, Trustee

Cynthia W. Plum, Trustee

Marjorie W. King, Trustee

SOUTH DAKOTA TRUST COMPANY LLC, Trustee

By: _____

12.11 Counterparts. This Agreement may be executed in one or more written, fax, PDF and electronic counterparts, all of which taken together shall constitute one and the same instrument and shall have the same force and effect as though all of the signers had signed a single signature page.

IN WITNESS WHEREOF, each party hereto has signed this Agreement, or caused this Agreement to be signed by its representative thereunto duly authorized, as of the date first above written.

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Marjorie W. King, Trustee

SOUTH DAKOTA TRUST COMPANY LLC, Trustee

By: _____

12.11 Counterparts. This Agreement may be executed in one or more written, fax, PDF and electronic counterparts, all of which taken together shall constitute one and the same instrument and shall have the same force and effect as though all of the signers had signed a single signature page.

IN WITNESS WHEREOF, each party hereto has signed this Agreement, or caused this Agreement to be signed by its representative thereunto duly authorized, as of the date first above written.

Seller:

KEITH S. WELLIN FLORIDA REVOCABLE LIVING TRUST
u/a/d December 11, 2001, as amended and restated

Keith S. Wellin, Trustee

Purchaser:

WELLIN FAMILY 2009 IRREVOCABLE TRUST
u/a/d November 2, 2009

Peter J. Wellin, Trustee

Cynthia W. Plum, Trustee

Marjorie W. King

Marjorie W. King, Trustee

SOUTH DAKOTA TRUST COMPANY LLC, Trustee

By: _____

12.11 Counterparts. This Agreement may be executed in one or more written, fax, PDF and electronic counterparts, all of which taken together shall constitute one and the same instrument and shall have the same force and effect as though all of the signers had signed a single signature page.

IN WITNESS WHEREOF, each party hereto has signed this Agreement, or caused this Agreement to be signed by its representative thereunto duly authorized, as of the date first above written.

Seller:

KEITH S. WELLIN FLORIDA REVOCABLE LIVING TRUST
u/a/d December 11, 2001, as amended and restated

Keith S. Wellin, Trustee

Purchaser:

WELLIN FAMILY 2009 IRREVOCABLE TRUST
u/a/d November 2, 2009

Peter J. Wellin, Trustee

Cynthia W. Plum, Trustee

Marjorie W. King, Trustee

SOUTH DAKOTA TRUST COMPANY LLC; Trustee

By: Patti Graumann
Trust officer

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP
Attorneys and Counselors at Law
151 Meeting Street / Sixth Floor / Charleston, SC 29401-2239
Tel: 843.853.5200 Fax: 843.722.8700
www.nelsonmullins.com

John B. Hagerty
(Admitted in SC)
Tel: 843.720.4308
john.hagerty@nelsonmullins.com

December 6, 2013

Via Hand Delivery

Edward G.R. Bennett, Esq.
Evans, Carter, Kunes & Bennett, P.A.
115 Church Street
Charleston, SC 29401

Robert H. Hood, Esq.
The Hood Law Firm
172 Meeting Street
Charleston, SC 29401

RE: Keith Wellin, individually and as Trustee of the Keith S. Wellin Florida Revocable Living Trust u/a/d December 11, 2001 v. Peter J. Wellin, Cynthia W. Plum and Marjorie W. King, individually and as co-Trustees and beneficiaries of the Wellin Family 2009 Irrevocable Trust u/d/a November 2, 2009, South Dakota Trust Company, LLC as co-Trustee of the Wellin Family 2009 Irrevocable Trust u/a/d November 2, 2009, Friendship Management, LLC and Friendship Partners, LP
Civil Action No.: 2:13-cv-01831-DCN
NMRS File No.: 39113/01500

Dear Edward and Bobby:

Pursuant to Section 10.2(a)(i) of the Agreement of Limited Partnership of Friendship Partners, LP (the "Partnership Agreement"), Friendship Management, LLC (the "General Partner"), the sole general partner of Friendship Partners, LP (the "Partnership"), has dissolved the Partnership. In connection with the dissolution, the General Partner has liquidated the Partnership assets and is distributing them to the Limited Partners. As you know, the KSW 2011 Qualified Grantor Retained Annuity Trust and the KSW 2012 Qualified Grantor Retained Annuity Trust are Limited Partners of the Partnership. Thus, enclosed with this letter are checks representing distributions to these entities based upon their percentage interests in the Partnership.

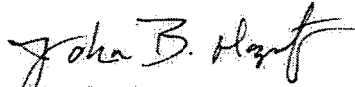
With offices in the District of Columbia, Florida, Georgia, Massachusetts, North Carolina, South Carolina, Tennessee and West Virginia

Edward G.R. Bennett, Esq.
Robert H. Hood, Esq.
December 6, 2013
Page 2

Please also find enclosed a check in the amount of \$50,228,000.00 to the Keith S. Wellin Florida Revocable Living Trust (the "Revocable Trust"), as Payee of the restated Promissory Note dated September 4, 2012 (the "Note"). This check is hereby tendered on behalf of the Wellin Family 2009 Irrevocable Trust (the "Irrevocable Trust") as payment in full of the outstanding balance on the Note.

Finally, we received correspondence from Edward on November 20, along with a document entitled "Exercise of Right of Substitution," via which Mr. Wellin purported to exercise the Power of Asset Substitution under the Irrevocable Trust by proposing to release the Trust's liability under the Note. This purported exercise of Mr. Wellin's Power of Asset Substitution was ineffective, and the Note remained outstanding until satisfied in full by virtue of the enclosed payment.

Very truly yours,


John B. Hagerty

EVANS, CARTER, KUNES & BENNETT, P. A.
ATTORNEYS AT LAW
115 CHURCH STREET
CHARLESTON, SOUTH CAROLINA 29401

T. HEYWARD CARTER, JR.†
ROBERT M. KUNES†
EDWARD G. R. BENNETT**
ANDREW W. CHANDLER*†
M. JEAN LEE
F. PATRICIA SCARBOROUGH**
DAVID H. KUNES**

MAILING ADDRESS:
P. O. BOX 369
CHARLESTON, SC 29402-0369
TELEPHONE (843) 577-2300
TELECOPIER (843) 577-2055
WWW.ECKB.COM

†CERTIFIED SPECIALIST IN ESTATE PLANNING AND PROBATE LAW

**LICENSED IN SC AND NY

*LICENSED IN SC AND GA

**LICENSED IN SC AND NC

December 6, 2013

By Hand

John B. Hagerty
Nelson Mullins
151 Meeting Street
Charleston, SC 29401

Re: Wellin Checks

Dear John:

Enclosed is the check for \$50,288,000 which you sent over this afternoon. As you know, Keith Wellin substituted the promissory note and accrued interest due him for interests in Friendship Partners, LP on November 20, 2013 thereby extinguishing the promissory note. Until such time as the Court makes a final determination on the validity of the trust and transfers in the first place, Keith clearly is entitled to no less than his pro-rata share of the partnership distribution. According to our computations, his share of the distribution should be somewhere in the range of \$90.8mm.

We have retained the checks made payable to the two GRATs as the two GRATs have a right to those distributions, subject, of course to the ongoing litigation which we believe will result in all of these transactions being set aside anyhow. As Keith paid the annuity payments due to him prior to these distributions, we will recompute the annuity distributions based on the percentages which were indicated in his payment documents of the 5th and remit to the children the appropriate amounts due to them on the trust termination, which, distribution, of course will be subject to the pending litigation. In addition, we will want a final accounting and true up with respect to these payments. We will note that the two checks are inconsistent in their computation of the total amount due (please see our tentative computations which show partnership assets of \$156,155,493.92 based on one of the checks and \$156,150,273.24 based on the other check).

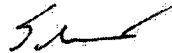
We are not accepting the check which you have tendered for the \$50,288,000 with its notation that it is in full payment of a promissory note which no longer exists. Rather, I am returning the check to you and hereby demand, on behalf of my client (subject, of course, to a final determination in the ongoing litigation) that the

Mr. John B. Hagerty
December 6, 2013
Page 2

partnership immediately distribute to him 58.15548645% of the all assets of the partnership which are being distributed in liquidation of the partnership.

Please give me a call if you have any questions. With my kindest regards, I am,

Yours truly,



Edward G. R. Bennett

cc: Keith S. Wellin
Robert H. Hood
James B. Hood

This percentage being subject to final determination as part of the final accounting.

2013 DEC 30 PM 03:15
FILED PROBATE OF OPENING

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

Lester S. Schwartz, as Trust Protector of
the Wellin Family 2009 Irrevocable Trust,

Plaintiff,

vs.

Peter J. Wellin, Cynthia W. Plum and
Marjorie W. King, Individually and as Co-
Trustees and Beneficiaries of the Wellin
Family 2009 Irrevocable Trust, Friendship
Management, LLC, Cynthia W. Plum as
Manager of Friendship Management, LLC,
Friendship Partners, LP and Keith Wellin,
Individually and as Trustee of the Keith S.
Wellin Florida Revocable Living Trust
u/a/d December 11, 2011¹, as Trustee of the
KSW 2011 Qualified Grantor Retained
Annuity Trust, and Trustee of the KSW
2012 Qualified Grantor Retained Annuity
Trust u/a/d November 28, 2012,

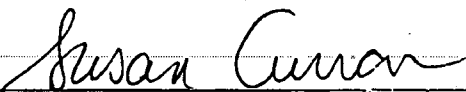
Defendant(s),

Civil Action No.: 2:13-cv-03595-DCN

Probate Court Case No.: 2013-GC-10-0129

**ACKNOWLEDGEMENT OF RECEIPT
OF NOTICE OF REMOVAL**

Receipt of a copy of the Notice of Removal filed by Defendants Peter J. Wellin, Cynthia W. Plum and Marjorie W. King, Individually and as Co-Trustees and Beneficiaries of the Wellin Family 2009 Irrevocable Trust, Friendship Management, LLC, Cynthia W. Plum as Manager of Friendship Management, LLC, and Friendship Partners, LP, by and through their attorneys in the above-captioned action, is hereby acknowledged this 30th day of December, 2013.


Clerk of Court, Charleston County

¹ This is a typographical error. The number "2011" should be "2001."

EVANS, CARTER, KUNES & BENNETT, P. A.
ATTORNEYS AT LAW

115 CHURCH STREET PM 12:21
CHARLESTON, SOUTH CAROLINA 29401

PROBATE COURT
CHARLESTON COUNTY

T. HEYWARD CARTER, JR.*
ROBERT M. KUNES†
EDWARD G. R. BENNETT**
ANDREW W. CHANDLER**
M. JEAN LEE
F. PATRICIA SCARBOROUGH**
DAVID M. KUNES**

*CERTIFIED SPECIALIST IN ESTATE PLANNING AND PROBATE LAW

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CHARLESTON, SC 29402-0369
TELEPHONE (843) 577-2300
TELECOPIER (843) 577-2055
WWW.ECKRB.COM

January 14, 2014

Honorable Irvin G. Condon
Charleston County Probate Court
100 Broad Street - Suite 469
Charleston, SC 29401

Re: Keith S. Wellin Conservatorship
Case No: 2013-GC10-0129

Dear Judge Condon:

I appreciate Michelle's call yesterday morning and I wanted to follow up with this letter which I would ask that you treat as an Application for the Court's guidance under §62-5-416(b).

I have notified counsel for both sides that I am requesting guidance, but have not notified them of the specifics of my request due to the confidentiality provisions of the original order granted on August 15th, 2013 [copy attached at Tab # 1].

Appointment and Authority

As I am sure you remember, my appointment was a compromise until mediation had been conducted in this case. There was no determination made of Mr. Wellin's capacity and I was appointed for the limited purpose of ensuring that substantial transfers of his assets were not made to third parties without consideration.

As confidentiality of financial information was important to the parties, it was also made clear in the appointment that financial information would be maintained by me, which would be provided to the Court on request, but not made available to the children/Petitioners.

Mr. Wellin's accountant provided me with a listing of his financial assets. Because the order provided that I was responsible for major transfers but not for day to day expenditures, the way in which I decided to execute my duties was to create a separate account to which the bulk of Mr. Wellin's financial

Honorable Irvin G. Condon
January 14, 2014
Page 2

assets were transferred. I became a joint signatory on the separate account such that assets could not be transferred from that account without my consent. Currently, I consent to regular transfers of funds from this account to Mr. and Mrs. Wellin's original account (their "household account") to provide their ongoing operating funds. I maintain no supervision or control over the household account.

Current Issue

Asset Ownership

As you are aware, there is extensive ongoing litigation between Mr. Wellin and his children in several different courts. While complex, the substance of the litigation is that Mr. Wellin is seeking (i) to set aside a transaction executed in November 2009 pursuant to which his 99% interest in a family partnership was transferred to the Wellin Family 2009 Irrevocable Trust (the "Trust") for the benefit of his issue, and (ii) to rescind certain transfers of \$10mm to each of his children which were made in 2013.

Without getting into the details, under the terms of the Trust [copy attached at Tab # 2] Mr. Wellin retained the unilateral right [Article IX, Section A of the Trust], without the approval or consent of the Trustee, to substitute assets into the Trust in exchange for assets of the Trust. Mr. Wellin exercised this power on November 20th and exchanged a promissory note which had been due to him from the Trust for an interest in the family partnership having an equivalent value, being an interest in Friendship Partners, LP equal to roughly 58% of the existing limited partnership interests. The substitution documents are attached at Tab # 3. Tab # 4 is a complete set of the instruments executed November 20th, 2013, which included the substitution.

I have been informed by counsel for the children that the General Partner of the Partnership sold all of the stock held by the partnership and liquidated the partnership in early December, 2013. I was also informed that a very significant portion of the liquidation proceeds of the partnership - including Mr. Wellin's 58% interest - were distributed directly to the Wellin children as a "deemed distribution" from the Partnership to the Trust, then outright to the children¹. This action appears to me to be nothing more than an outright conversion of Mr. Wellin's assets.

As Special Conservator, the issue I currently face is that Mr. Wellin exercised his rights under the Trust instrument and cancelled his promissory note and returned it to the Trustees in exchange for the assets, but he has now been denied possession of the exchanged assets. As Special Conservator, therefore, I am in the position whereby Mr. Wellin has relinquished assets (the note) without receiving corresponding value.

As Special Conservator for Mr. Wellin, I find myself in a position of needing to recover the liquidation proceeds relating to Mr. Wellin's 58% partnership interest so as not to violate my duties as Special Conservator for him². This duty exists completely separate from the existing lawsuits.

¹ Based on their "need" under the Trust's ascertainable standard language for roughly \$32mm each. Recovery of these funds for the benefit of the Trust is the subject of Lester Schwartz lawsuit in Judge Norton's court.

² A related issue which I confront is that the refusal by the Wellin children to recognize the Mr. Wellin's release of his substitution right which caused the Trust to cease to be a "Grantor Trust". The Wellin children have indicated that they do not recognize that Grantor Trust status for the Trust has terminated. I am concerned that they will report incorrect information to the IRS and thereby leave me in the position of deciding whether to consent to the

Honorable Irvin G. Condon
January 14, 2014
Page 3

Options

It seems to me that the appropriate course is to request instruction from the Court under §62-5-416(b), with the Court having the option to then give notice and hold a hearing on these issues, after which point it could issue an order as it determines appropriate.

Simply stated, my obligation is to take the necessary steps to recover for Mr. Wellin the proceeds of the 58% limited partnership interest to which he is entitled under the substitution right which he exercised on November 20, 2013.

Request

As I consider my role as Special Conservator and the need to recover Mr. Wellin's assets, I believe that the most appropriate action is to ask the Court to exercise its power under §62-5-416(c) and set a hearing to address these matters. I believe that there are no issues of fact, but rather a simple question of law which needs to be addressed to permit the fulfillment of my obligations.

Was Mr. Wellin's substitution of the assets effective?

If the Court believes it within its purview, I also think that the Court's willingness to address the grantor trust issue (outlined at Footnote # 1, above) would be very helpful in dealing with issues necessary to protect Mr. Wellin's assets. If the Court were so inclined, this would be dealt with by answering the question:

Was Mr. Wellin's release of his substitution power effective to turn off grantor trust status?

To answer this second question, I think that the Court will need (a) to determine the legal effectiveness of Mr. Schwartz appointment as Trust Protector, and (b) the validity of the amendments he made to the trust.

Assuming that such of the above questions as the Court is willing to address are solely matters of law, addressing them should only require a request that the interested parties brief the issues³, then present their arguments at a hearing. If the Court were to find for Mr. Wellin on these issues, I would ask that the Court then issue an order directing the return of proceeds of the liquidation of Mr. Wellin's interest in Friendship Partners, LLC to Mr. Wellin's account over which I am Special Conservator.

By returning the proceeds of the 58% to the Conservatorship account which is subject to the Court's continued supervision, those assets will remain protected pending the ultimate resolution of this Conservatorship action.

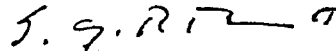
transfer of assets to third parties without appropriate consideration - i.e. to the IRS - solely to try to prevent penalties and interest which should not have been incurred in the first place.

While Mr. Schwartz case has been removed to Judge Norton's court, it may well be appropriate to ask Mr. Schwartz and his counsel to brief this matter and participate in any such hearing as interested parties.

Honorable Irvin G. Condon
January 14, 2014
Page 4

Finally, because of Mr. Wellin's age and health, coupled with the tax issues and the amount of money involved, I hope that the Court would see fit to address this in an expedient a manner as possible. Many thanks for your consideration. With my kindest regards, I am,

Yours truly,



Edward G. R. Bennett

Attachments

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE PROBATE COURT

FILED
14 MAR 24 PM 3:26

IN THE MATTER OF:
KEITH S. WELLIN

Case No. 2013-GC-10-0129

Edward G.R. Bennett, as Special
Conservator, and Keith S. Wellin,

Petitioners,

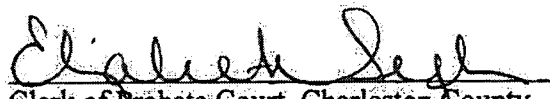
vs.

Peter Wellin, Cynthia Wellin Plum, and
Marjorie Wellin King,

Respondents.

**ACKNOWLEDGMENT OF RECEIPT
OF AMENDED NOTICE OF
REMOVAL OF SUMMONS AND
PETITION FILED 2.25.14**

Receipt of a copy of the Amended Notice of Removal filed by Respondents Peter J. Wellin, Cynthia W. Plum and Marjorie W. King, by and through their attorneys in the above-captioned action, as to the Summons and Petition to Return Assets filed by Tiffany Provence, Esq. on February 25, 2014 in the above matter is hereby acknowledged this 24 day of MARCH, 2014.


Clerk of Probate Court, Charleston County

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE PROBATE COURT

FILED
14 MAY -5 PM 4:55

IN THE MATTER OF:
KEITH S. WELLIN

Case No. 2013-000105 COURT
CHARLESTON COUNTY

Peter Wellin, Cynthia Wellin Plum, and
Marjorie Wellin King,

Petitioners,

vs.

Keith S. Wellin,

Respondent.

**NOTICE OF VOLUNTARY
DISMISSAL**

Petitioners Peter Wellin, Cynthia Wellin Plum, and Marjorie Wellin King, by and through their attorneys, hereby dismiss the above-captioned action, without prejudice, pursuant to Rule 41(a)(1)(A) of the South Carolina Rules of Civil Procedure. Petitioners filed this action on July 19, 2013, and Respondent has not served an answer or a motion for summary judgment.

WHEREFORE, pursuant to South Carolina Rule of Civil Procedure 41(a)(1)(A), Petitioners dismiss this action without prejudice.

[SIGNATURE BLOCK ON FOLLOWING PAGE]

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Robert H. Brunson

SC Bar No. 11987

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Bryson M. Geer

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Patrick C. Wooten

SC Bar No. 77985

E-Mail: patrick.wooten@nelsonmullins.com

151 Meeting Street / Sixth Floor

Post Office Box 1806 (29402-1806)

Charleston, SC 29401-2239

(843) 853-5200

*Attorneys for Peter Wellin, Cynthia Wellin Plum, and
Marjorie Wellin King*

Charleston, South Carolina
May 5, 2014

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Peter Wellin, Cynthia Wellin Plum, and Marjorie Wellin King, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: **NOTICE OF VOLUNTARY DISMISSAL**

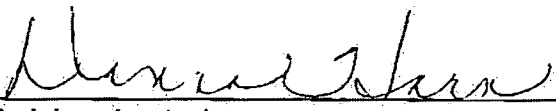
Counsel Served:

Gedney M. Howe, III, Esq.
Gedney M. Howe III, PA
PO Box 1034
Charleston, SC 29402

Robert H. Hood, Esq.
Molly H. Craig, Esq.
James B. Hood, Esq.
Hood Law Firm, LLC
PO Box 1508
Charleston, SC 29402

Edward G.R. Bennett, Esq.
Evans, Carter, Kunes & Bennett, P.A.
PO Box 369
Charleston, SC 29402-0369

Tiffany N. Provence, Esq.
Provence Messervy
300 North Cedar Street, Suite A
Summerville, SC 29483



Administrative Assistant

May 5, 2014

STATE OF SOUTH CAROLINA)
COUNTY OF SOUTH CAROLINA)
IN THE MATTER OF:)
KEITH S. WELLIN)
Peter Wellin, Cynthia Wellin Plum,)
and Marjorie Wellin King,)
Appellants,)
VS.)
Keith S. Wellin,)
Respondent.)

IN THE CIRCUIT COURT

Appeal from Probate Court for
Charleston County

CASE NUMBER:

NOTICE OF INTENT TO APPEAL
TO
CIRCUIT COURT

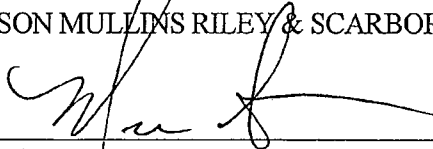
FILED
2014 JUL 11 PM 4:37
JULIE J. ARMSTRONG
CLERK OF COURT

Pursuant to S.C. Code Ann. § 62-1-308, Petitioners Peter Wellin, Cynthia Wellin Plum, and Marjorie Wellin King, by and through their attorneys, hereby provide this Notice of Intent to Appeal the following rulings of Judge Irvin G. Condon: 1) Order Directing Petitioners to Pay \$50,228,000 to Synovus Trust Company dated February 21, 2014 (Order #1); 2) Order Denying Petitioners' Motion to Alter or Amend Judgment dated July 3, 2014 (Order #2); and 3) Order Regarding Petitioners' Notice of Voluntary Dismissal dated July 3, 2014 (Order #3).

Counsel for Petitioners received Order #1 via email from the Probate Court on February 21, 2014, and timely filed a motion to alter or amend the Order pursuant to SCRCP 59(e) on March 3, 2014. Counsel for Petitioners received Order #2 and Order #3 via email from the Probate Court on July 3, 2014. Thus, this Notice of Intent to Appeal is timely filed pursuant to S.C. Code Ann. § 62-1-308(a). Copies of said Orders are attached.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Robert H. Brunson

SC Bar No. 11987

E-Mail: robert.brunson@nelsonmullins.com

Bryson M. Geer

SC Bar No. 13606

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Patrick C. Wooten

SC Bar No. 77985

E-Mail: patrick.wooten@nelsonmullins.com

151 Meeting Street / Sixth Floor

Post Office Box 1806 (29402-1806)

Charleston, SC 29401-2239

(843) 853-5200

*Attorneys for Peter Wellin, Cynthia Wellin Plum, and
Marjorie Wellin King*

SWORN to before me this 11th
day of July, 2014



Notary Public for South Carolina

My commission expires: 1-29-2017

IMPORTANT:

1. This Notice must be filed with the Probate Court, the Circuit Court, and all parties not in default within ten (10) days after receipt of written notice of the appealed from order, sentence, or decree of the Probate Court. Parties must comply with requirements set forth in SCPC 62-1-308.

2. This form is not intended for appeals other than appeals to the County Circuit Court. An Appeal to a Court other than the County Circuit Court must follow SCPC 62-1-308(l) and the South Carolina Appellate Court Rules, as applicable.

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Peter Wellin, Cynthia Wellin Plum, and Marjorie Wellin King, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: **NOTICE OF INTENT TO APPEAL**

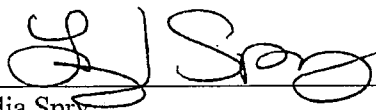
Counsel Served:

Gedney M. Howe, III, Esq.
Gedney M. Howe III, PA
PO Box 1034
Charleston, SC 29402

Robert H. Hood, Esq.
Molly H. Craig, Esq.
James B. Hood, Esq.
Hood Law Firm, LLC
PO Box 1508
Charleston, SC 29402

Edward G.R. Bennett, Esq.
Evans, Carter, Kunes & Bennett, P.A.
PO Box 369
Charleston, SC 29402-0369

Tiffany N. Provence, Esq.
Provence Messervy
300 North Cedar Street, Suite A
Summerville, SC 29483



Lydia Spry
Administrative Assistant

July 11, 2014

STATE OF SOUTH CAROLINA)
) IN THE PROBATE COURT
COUNTY OF CHARLESTON)

IN THE MATTER OF:
KEITH S. WELLIN

Case No. 2013-GC-10-0129

Peter Wellin, Cynthia Wellin Plum, and
Marjorie Wellin King,

Petitioners,

vs.

Keith S. Wellin,

Respondent.

STATEMENT OF ISSUES ON APPEAL

FILED
14 AUG 13 PM 4:06
PROBATE COURT
CHARLESTON COUNTY

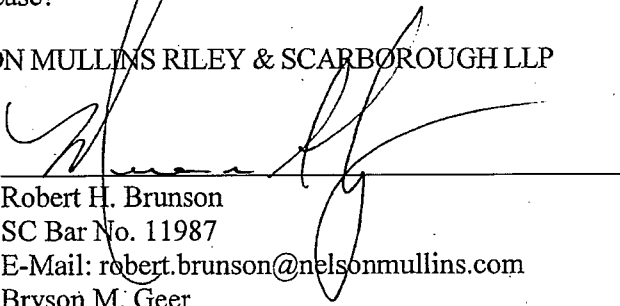
Pursuant to S.C. Code Ann. § 62-1-308(b), Appellants Peter Wellin, Cynthia Wellin Plum, and Marjorie Wellin King (the "Wellin Children") submit this Statement of Issues on Appeal:¹

- I. Did the Probate Court err in holding that it had subject matter jurisdiction to order the Wellin Family 2009 Irrevocable Trust (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 Probate Court err in holding that it had personal jurisdiction over the 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 Probate Court err in finding that special conservator Edward Bennett ("Bennett") had standing to pursue a claim on Keith Wellin's behalf, where he lacked such authority under the South Carolina Probate Code and the order appointing him special conservator?
- IV. Did the Probate Court err in finding that South Carolina Rule of Civil Procedure 12(b)(8) did not require dismissal of Bennett's request for relief, where the same parties are litigating the same claim in the South Carolina Federal District Court?

¹ The current version of S.C. Code Ann. § 62-1-308(b) requires the filing of this Statement in the Circuit Court only. Although the current version of the statute is applicable to this matter, because prior versions of the statute required filing of the grounds for appeal in the Probate Court, the Wellin Children have filed this Statement in this Court and the Circuit Court out of an abundance of caution.

- V. Did the Probate Court err in finding that its order requiring the Trust to pay \$50 million to a special conservator did not violate principles of due process, where the Court made its ruling in the absence of a summons and complaint, without affording the Trust an opportunity to conduct any discovery, and without a trial?
- VI. Did the Probate Court err in finding that it had authority to order the relief requested pursuant to an "application" under S.C. Code Ann. § 62-5-416(b), where the Probate Code requires commencement of a "formal proceeding" and no formal proceeding was commenced prior to the court issuing its order?
- VII. Did the Probate Court err in improperly invoking its equitable powers to grant the requested relief, where the relief was precluded by the Probate Code, the South Carolina Rules of Civil Procedure and principles of due process?
- VIII. Did the Probate Court err in making various unsupported findings of fact?
- IX. Did the Probate Court err in holding the Wellin Children's Notice of Voluntary Dismissal was ineffective, where the South Carolina Rules of Civil Procedure and case law provide that the Notice was effective to dismiss the action and vacate all prior orders issued in the case?

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CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Peter Wellin, Cynthia Wellin Plum, and Marjorie Wellin King, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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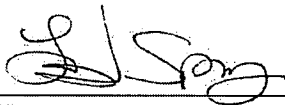
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CHARLESTON COUNTY

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

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,

FINAL BRIEF OF APPELLANTS

BY

JULIE J. ARMSTRONG
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STATEMENT OF ISSUES ON APPEAL

- I. Did the Probate Court err in holding that it had subject matter jurisdiction to order the Wellin Family 2009 Irrevocable Trust (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 Probate Court err in holding that it had personal jurisdiction over the 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 Probate Court err in finding that special conservator Edward Bennett ("Bennett") had standing to pursue a claim on Keith Wellin's behalf, where he lacked such authority under the South Carolina Probate Code and the order appointing him special conservator?
- IV. Did the Probate Court err in finding that South Carolina Rule of Civil Procedure 12(b)(8) did not require dismissal of Bennett's request for relief, where the same parties are litigating the same claim in the South Carolina Federal District Court?
- V. Did the Probate Court err in finding that its order requiring the Trust to pay \$50 million to a special conservator did not violate principles of due process, where the Court made its ruling in the absence of a summons and complaint, without affording the Trust an opportunity to conduct any discovery, and without a trial?
- VI. Did the Probate Court err in finding that it had authority to order the relief requested pursuant to an "application" under S.C. Code Ann. § 62-5-416(b), where the Probate Code requires commencement of a "formal proceeding" and no formal proceeding was commenced prior to the court issuing its order?
- VII. Did the Probate Court err in improperly invoking its equitable powers to grant the requested relief, where the relief was precluded by the Probate Code, the South Carolina Rules of Civil Procedure and principles of due process?
- VIII. Did the Probate Court err in making various unsupported findings of fact?
- IX. Did the Probate Court err in holding the Wellin Children's Notice of Voluntary Dismissal was ineffective, where the South Carolina Rules of Civil Procedure and case law provide that the Notice was effective to dismiss the action and vacate all prior orders issued in the case?

STATEMENT OF THE CASE

This case arises from a Petition filed in the Probate Court by Peter Wellin, Cynthia Wellin Plum, and Marjorie Wellin King (the "Wellin Children"), seeking appointment of a conservator for their father, Keith S. Wellin ("Keith Wellin" or "Wellin"). At a preliminary hearing held on July 26, 2013, the parties agreed to the temporary appointment of Keith Wellin's attorney, Edward Bennett, Esq. ("Bennett"), as a temporary Special Conservator for Keith Wellin until the parties could attend mediation to attempt to resolve litigation between them pending in the U.S. District Court. 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." Meanwhile, the litigation in federal court continued.

The federal litigation concerns, *inter alia*, a 2009 estate planning transaction (the "2009 Transaction") in which Keith Wellin created the Wellin Family 2009 Irrevocable Trust (the "Irrevocable Trust") and named the Wellin Children its trustees and beneficiaries. Shortly after the creation of the Irrevocable Trust, Keith Wellin sold a 99% limited partnership interest in Friendship Partners, LP ("Friendship Partners") to the Trust in exchange for a promissory note with a face value of approximately \$50 million (the "Promissory Note"). In the federal litigation, Keith Wellin seeks, *inter alia*, to unwind the 2009 Transaction – both the creation of the Irrevocable Trust and his sale of the partnership interest – on the basis that it was unfair to him and procured by fraud.

On November 20, 2013, while the instant action and the federal litigation were pending, Bennett delivered to counsel for the Irrevocable Trust a document executed the same day through which Keith Wellin purported to exercise a right under the Trust to substitute assets belonging to

him for Irrevocable Trust assets of equal value. Specifically, he purported to tender to the Irrevocable Trust the Promissory Note marked "Paid in Full" in exchange for a 58% interest in Friendship Partners (the "Swap Transaction"), which Bennett unilaterally determined to be an asset exchange of equal value. The Wellin Children, in their capacity as trustees of the Irrevocable Trust, take the position that the Swap Transaction was ineffective or incomplete and that the Promissory Note therefore remained outstanding.

On or about December 1, 2013, Friendship Partners dissolved and liquidated its assets, which consisted of approximately 900 shares of Berkshire Hathaway stock valued at approximately \$157 million. In connection with the liquidation, Friendship Partners made distributions to its limited partners *pro rata* in accordance with their respective interests. In making the distributions, Friendship Partners did not recognize the purported Swap Transaction, and it distributed to the Irrevocable Trust the approximately \$92 million in proceeds corresponding to the 58% interest claimed by Wellin in connection with the Swap Transaction.

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 pre-payment in full of the Promissory Note. Bennett rejected the payment, taking the position that the Promissory Note was satisfied when he marked it "Paid in Full" in connection with the purported Swap Transaction on November 20. He also demanded that the Irrevocable Trust pay to Wellin the \$92 million, which he claimed represented the proceeds corresponding to Wellin's alleged 58% interest in Friendship Partners. The Irrevocable Trust refused the demand. Wellin subsequently asserted claims against the Wellin Children, as trustees of the Irrevocable Trust and in their individual capacities, seeking to recover these proceeds in multiple lawsuits pending in federal court.

On January 14, 2014, Bennett sent an *ex parte* letter to the probate court requesting guidance as to his fiduciary duties pursuant to S.C. Ann. § 62-5-416(b). In the Application, Bennett stated his version of the facts related to the purported Swap Transaction and the liquidation of Friendship Partners. He alleged that the Wellin Children refused to recognize the Swap Transaction in distributing the proceeds from the Friendship Partners liquidation and thereby deprived Keith Wellin of \$92 million, and he asked the court to issue an order requiring the Wellin Children to pay this amount to him as Special Conservator.

After the court ordered Bennett to disclose his Application to all parties, on February 3, 2014, the Wellin Children moved to dismiss the Application on the grounds, *inter alia*, that the probate court lacked jurisdiction over the Irrevocable Trust and the subject matter – which was being litigated in federal court – and that ordering the Wellin Children to pay \$92 million without any pleadings, discovery, or a trial would violate their due process rights.¹ On February 5, 2014, Bennett responded to Petitioners' motion to dismiss with a letter, in which he modified his request for relief by stating that, if the probate court agreed that Bennett had a duty to pursue the assets at issue, Bennett would "bring a Petition to Return Assets and serve said petition upon all parties along with the required summons." That is, Bennett requested that the probate court 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.

At a hearing on the Application on February 6, 2014, Bennett's counsel initially stated that Bennett was asking the court only for the authority to pursue the claims on Keith Wellin's behalf. She subsequently reversed course and requested that the probate court immediately order

¹ Neither Wellin nor Bennett filed an answer or counterclaim in the instant action.

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 Irrevocable Trust. The Wellin Children objected to Bennett's characterization of Keith Wellin's claim to these funds as "undisputed" and argued that Wellin is only entitled to the \$50 million from the Irrevocable Trust in satisfaction of the Promissory Note. That is, Bennett cannot accept payment of the \$50 million and, at the same time, refuse to accept it in satisfaction of the Promissory Note for which it was tendered. Following the hearing, the Wellin Children filed a written objection, on jurisdictional and other grounds, to Bennett's oral request.

On February 21, 2014, the 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. In the other, the court appointed Synovus Trust Company ("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." The Wellin Children timely filed a motion to alter or amend the latter order on March 3, 2014.

On February 26, 2014, Bennett and Keith Wellin jointly filed a summons and petition against the Wellin Children in the probate court seeking to recover the same \$50 million that the Court ordered the Wellin Children to pay to Synovus, along with the additional \$42 million, representing the total proceeds (\$92 million) that Bennett alleges Wellin should have received in connection with the Friendship Partners liquidation. On March 3, 2014, the Wellin Children removed the petition to federal court, which subsequently dismissed the action on the basis that the claims were duplicative of claims asserted by Keith Wellin in another action in federal court.

On May 5, 2014, the Wellin Children filed in the probate court, pursuant to Rule 41(a)(1)(A), SCRCP, a notice of voluntary dismissal of the instant action in favor of the federal court proceedings. On July 3, 2014, the Probate Court issued two 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 and another, which purported to vacate the Wellin Children's notice of voluntary dismissal. On July 11, 2014, the Wellin Children timely filed and served their notice of appeal to this Court.

STATEMENT OF FACTS

I. Keith Wellin Irrevocably Transferred Ownership and Control of 906 Berkshire Hathaway Shares (Representing Less Than Half of His Estate) to His Children Via Transactions in 2003 and 2009.

Keith Wellin is an 88-year-old former businessman who amassed considerable wealth over his lifetime. (R. 59 *Wellin I* Compl. ¶¶ 21-22.) His three adult children, the Wellin Children, are all from his first marriage. (R. 59 ¶ 24.) Wellin's first wife and mother of his children passed away in 1970. (R. 453 Aff. of Peter Wellin ¶ 3.) In 2002, Wellin married his fourth and current wife, Wendy Lane Wellin. (R. 454 ¶ 9.) Prior to their wedding, they entered into a prenuptial agreement that significantly limited Wendy Wellin's access to her husband's wealth. (R. 454 ¶¶ 9-10.)

In conjunction with the execution of his prenuptial agreement, Keith Wellin, guided by sophisticated tax and estate counsel at the New York law firm of Nixon Peabody, designed an estate plan to transfer 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. (R. 454 ¶¶ 9-12.) Wellin began implementing the plan in 2003 when he transferred less than half of his wealth, consisting of 906 shares of Berkshire Hathaway Class A (the "BRKa Shares") to Friendship

Partners, a Delaware limited partnership in which Wellin was a limited partner and in which Friendship Management, LLC ("Friendship Management"), a Delaware limited liability company, was the general partner. (R. 455 ¶ 11; R. 708 Friendship Partners Partnership Agreement.) Following the 2003 transfer, a revocable trust of which Wellin was trustee (the "Revocable Trust") owned approximately 99% of the limited partnership interest (the "LP Interest"), but sole control over the partnership management and assets vested in the general partner, Friendship Management, which was controlled by the Wellin Children. (*Id.*)

In November 2009, Wellin, again guided by his counsel at Nixon Peabody, implemented the second stage of his estate plan – the 2009 Transaction – by establishing the Irrevocable Trust and then causing his Revocable Trust to sell the LP Interest to the Irrevocable Trust in exchange for the Promissory Note, which had a face value of approximately \$50 million. (R. 458 ¶ 23-26; R. 698 Promissory Note; R. 734 Purchase & Sale Agreement.) The Irrevocable Trust is what is known as an "intentionally-defective grantor trust", which means that it is disregarded for tax purposes, and the grantor – Keith Wellin – continues to be taxed on any income realized by the Trust. The initial trustees of the Irrevocable Trust were the three Wellin Children and a Corporate Trustee, South Dakota Trust Company ("SDTC"). (R. 198 Irrevocable Trust, Preamble.; R. 63 ¶ 56). The beneficiaries are the Wellin Children. (R. 202). These transactions were designed by Keith Wellin's attorneys, at his request, to ensure that a substantial portion of his wealth would pass to the Wellin Children without interference from any third party and to minimize the impact of gift, estate, and capital gains taxes. (R. 458 ¶ 23-24).

II. Keith Wellin, Acting Through New Counsel, Launched an Attack on His Children Beginning Around May of 2013, Arguing in a Lawsuit that the November 2009 Transaction Was Unfair to Keith Wellin and Procured by Fraud.

In approximately May of 2013, Keith Wellin, almost 87 years old and in failing health, suddenly replaced his long-standing tax and estate counsel and other professional advisors with new lawyers and advisors, including Bennett, and, without explanation to his children, began seeking to claw back the transfers of wealth he had previously made to them (but not transfers he made to Wendy Wellin). Specifically, on July 3, 2013, Wellin filed a lawsuit against the Wellin Children, Friendship Partners, Friendship Management, and SDTC in the United States District Court for the District of South Carolina (Civil Action No. 2:13-cv-01831-DCN) ("*Wellin I*") and simultaneously sought and obtained an *ex parte* temporary restraining order ("TRO") that prohibited the Wellin Children from operating the entities established in 2003 and 2009 to carry out Keith Wellin's long-standing estate planning objectives. (R. 57; R. 259.) Around this same timeframe, Bennett demanded that the Wellin Children prepay the Promissory Note (which was scheduled to mature in 2021) and indicated that Wellin wanted to give Wendy Wellin \$25 million. (R. 464 ¶ 38.) Also around this timeframe, Wellin transferred to Wendy Wellin approximately \$4.5 million in cash, which she used to purchase a beach house on Sullivan's Island.² (R. 463 ¶ 37.)

The *Wellin I* Complaint alleges that the Wellin Children duped their father into entering into the 2009 Transaction and that the transaction is consequently void and should be unwound. (R. 57.) Wellin claims that the 2009 Transaction was unfair to the Revocable Trust because the

² It is no secret that the Wellin Children believe that the filing of litigation and Keith Wellin's other uncharacteristic behavior were not the deliberate actions of their father, but were instead the product of duress and manipulation exerted by Wendy Wellin.

\$50 million purchase price for the LP Interest was too low and the Promissory Note it received in exchange was “essentially worthless.” (R. 64 ¶¶ 59-65, Prayer.) In seeking and obtaining the *ex parte* TRO from the federal district court in *Wellin I*, Keith Wellin’s counsel represented to the court that he would suffer irreparable harm in the form of a crippling \$43 million capital gains tax liability if no injunction were issued to prevent the Wellin Children from causing Friendship Partners to sell the BRKa Shares. Wellin’s counsel maintained this position all the way through the hearing on their motion to extend the TRO, which took place on November 18, 2013. At the hearing, Wellin’s counsel represented to the court repeatedly, through argument and expert testimony, that there was *nothing* Keith Wellin could do to “turn off” the grantor trust status of the Irrevocable Trust. (R. 264 Nov. 18, 2013, Hearing Transcript, at 60-61, 66-67, 87, 122-27.) Consequently, they argued, extension of the TRO was necessary in order to prevent Keith Wellin from facing financial ruin. (*Id.*)

III. Keith Wellin’s Counsel Subsequently 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.

At the November 18 hearing, the district court took Keith Wellin’s motion to extend the TRO under advisement, but the court’s questions and comments strongly indicated that it intended to dissolve the TRO and deny any further injunctive relief to Wellin. Thus, two days after the hearing, and obviously 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, Wellin’s attorneys sought to use the 2009 Transaction documents to their advantage despite the fact that *Wellin I* was premised on the allegation that the 2009 Transaction is void. Bennett delivered to the undersigned a package of legal documents through which: (1) Keith Wellin

purported to effect the Swap Transaction by exercising a right under the Irrevocable Trust to “swap” trust assets for other assets of equal value by tendering the Promissory Note marked “paid in full” for a 58% LP Interest, which Bennett unilaterally deemed to be an asset exchange of equal value; (2) Wellin purported to remove his long-standing estate counsel and the author of the Irrevocable Trust, Tom Farace, as the “Trust Protector” of the Irrevocable Trust, and in his place name Lester Schwartz (“Schwartz”) – until then a complete stranger to the Wellin family – as the new Trust Protector; and (3) Schwartz, within moments of his appointment as the new Trust Protector, purported to make a lengthy set of amendments to the Irrevocable Trust, all of which were drafted by Bennett’s office and were plainly designed to benefit Wendy Wellin at the expense of the Wellin Children. (R. 276 Bennett 11/20/2013 Letter & Attachments.) One of Schwartz’s amendments to the Irrevocable Trust purported to delete the Corporate Trustee’s power to add beneficiaries, the purpose of which was to assist Wellin in “turning off” grantor trust status and thereby shift the capital gains tax liability for any sale of the BRKa Shares from Keith Wellin to the Wellin Children – which Wellin’s attorneys had only two days earlier repeatedly assured Judge Norton was impossible. (R. 288.) Another amendment purported to grant to Schwartz the right to settle litigation brought against the Irrevocable Trust – apparently intended to give him the right to transfer the Irrevocable Trust’s remaining assets to Keith Wellin in return for dismissal of the litigation. (R. 281.)

IV. The Trustees Took Action to Protect the Irrevocable Trust Assets from Wendy Wellin and the Purported Trust Protector.

Schwartz’s amendments signaled an immediate and grave threat to the Irrevocable Trust and its beneficiaries – the purported “Trust Protector” had unequivocally demonstrated a desire to cause the Irrevocable Trust to incur over \$40 million in taxes that it otherwise did not owe, and had effectively threatened to transfer some or all of the remaining assets of the Irrevocable

Trust to Keith Wellin in settlement of the litigation. The Wellin Children assumed that Bennett was directing Schwartz's actions, and that assumption was later confirmed in court filings and testimony before the district court in which Schwartz confirmed that Bennett asked him to accept the appointment as Trust Protector, that Bennett's office prepared the purported amendments to the Irrevocable Trust, and that Schwartz views his role as that of Keith Wellin's "agent." (R. 301 Dec. 31, 2013, Hearing Tr., at 45:20-46:6 and 54:1-55:6; R. 303 Supp. Reply Mem. of Lester Schwartz, pp. 2-3.) After receiving the package of documents from Bennett on November 20, and after the district court dissolved the TRO on November 21 and declined to enter a TRO requested by the Wellin Children to protect the Irrevocable Trust, the Wellin Children exercised their rights under the Friendship Partners partnership agreement to liquidate and dissolve the partnership, selling the BRKa Shares (as their attorneys had stated that they would at the November 18 hearing before Judge Norton, and as they have been authorized to do since 2003) over the course of about a week, and distributed the proceeds of that sale to the limited partners, *pro rata*, pursuant to the partnership agreement. (R. 311-313 Friendship Partners Dissolution Resolution & Plan of Liquidation.)

The Wellin Children also tendered, in their capacities as trustees of the Irrevocable Trust, payment of the principal and interest on the Promissory Note held by the Revocable Trust by sending a check for \$50,228,000 to Bennett, also as the Wellin Children's attorneys stated they would at the November 18 hearing and in a follow-up letter to the district court. (R. 758 John Hagerty 12.6.13 Letter to Bennett.) After Wellin's litigation counsel had argued at the November 18 hearing that Wellin's very life was at stake due to his fear of the alleged financial ruin that could result from dissolution of the TRO, Bennett promptly rejected the check and

returned it to the Wellin Children's lawyers the same day he received it. (R. 760 Bennett 12.06.13 Letter to John Hagerty.)

The Wellin Children also exercised their authority under the Irrevocable Trust to distribute most of the remaining proceeds of the BRKa Shares that the Trust received from Friendship Partners (*i.e.*, the proceeds remaining after tender of the \$50 million in satisfaction of the Promissory Note) to the beneficiaries (*i.e.*, to themselves). (R. 317-319 Irrevocable Trust Distribution Resolution.) As the only beneficiaries of the Irrevocable Trust and, as the only members of its Distribution Committee, the Wellin Children had the authority to make these distributions in their sole discretion. (R. 202; Irrevocable Trust, Art. IV(B)(1); R. 211 Art. VII(B).)

V. The Trust Protector Sued the Wellin Children and Obtained an *Ex Parte* TRO in the Probate Court. The Suit Was Removed to Federal Court and the TRO Was Promptly Dissolved.

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 same defendants in *Wellin I* and simultaneously requested and received an *ex parte* TRO that effectively mirrored the one obtained by Keith Wellin's attorneys, also on a *ex parte* basis, in *Wellin I*, but which the district court had recently dissolved. The complaint in *Wellin II* alleges that the Wellin Children, by dissolving Friendship Partners, liquidating the BRKa Shares, disregarding Wellin's purported exercise of his swap power, and distributing Trust assets to themselves, breached duties owed to Wellin and other alleged beneficiaries of the Irrevocable Trust. (R. 153 ¶¶ 34-36.) The defendants removed *Wellin II* to the district court, and the case was assigned to Judge Norton, who also presides over *Wellin I*. (R. 769.) Schwartz subsequently filed a motion in the district court to extend the *ex parte* TRO issued by the probate court. Following briefing and a hearing

held on December 31, 2013, the district court dissolved the TRO in *Wellin II* via a written order issued on January 7, 2014. (R. 320.)

On January 17, 2014, the Wellin Children answered the complaint in *Wellin II* and asserted counterclaims against Schwartz and Keith Wellin. In their answer, the Wellin Children admitted some allegations regarding the dissolution and liquidation of Friendship Partners and the distributions from the Irrevocable Trust, but denied that they lacked the discretion or authority to take these actions or that the actions were otherwise improper. (USDC SC Civil Action No.: 2:1-cv-3595-DCN, Docket No. 22.) With their counterclaims, the Wellin Children sought a declaration from the district court that Schwartz's appointment as Trust Protector and his purported amendments to the Irrevocable Trust are invalid. (*Id.*). On January 31, 2014, Wellin filed an answer to the Wellin Children's counterclaims, in which he specifically alleges 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. (R. 334 ¶¶ 15-17). On April 17, 2014, the district court ruled that Schwartz cannot pursue his claims because he is not a real party in interest under Fed. R. Civ. P. 17. (USDC SC Civil Action No.: 2:13-cv-3595-DCN, Docket No. 65).

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 from the Probate Court and Modified His Request at the Hearing on the Application.

After the filing of *Wellin I* and a separate lawsuit filed by Keith Wellin against the same defendants in Delaware, the Wellin Children, concerned over their father's uncharacteristic behavior and the apparent duress and manipulation exerted over him by Wendy Wellin, filed the instant action in the probate court on July 19, 2013, requesting that the court appoint a

conservator for Keith Wellin. (R. 40-56.) On July 26, the 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 are made from Keith Wellin's assets without adequate consideration. (R. 1 ¶ A-C.) The order of appointment expressly provides that Bennett does *not* have the power or duties that would normally accrue to a conservator, other than those specifically provided for in the order. (*Id.*) Nothing in the initial order grants Bennett the power to pursue legal claims on Wellin's behalf, nor can such authority be implied from the order.

On January 14, 2014, Bennett sent an *ex parte* letter to the probate court requesting that it issue an order requiring the Wellin Children to pay Wellin approximately \$92 million in connection with the Swap Transaction and the Friendship Partners liquidation and determining that the Wellin Children, rather than Keith Wellin, are liable for the federal and state taxes resulting from the sale of the BKRa Shares. (R. 763.) Bennett characterized his request as an "application" for guidance submitted pursuant to S.C. Code Ann. § 62-5-416(b). (*Id.*) On February 3, the Wellin Children filed a motion to dismiss Bennett's Application. (R. 181.)

On February 5, Bennett's new counsel, Tiffany Provence ("Provence") sent a letter to the probate court responding to the Wellin Children's motion. (R. 356.) In the letter, Provence clarified that Bennett was *not* asking the Court to order payment of any money right away, but rather was asking the court for instruction as to whether Bennett should *file an action* to recover money. (R. 357 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."))

On February 6, the probate court held a hearing on Bennett's Application. 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, but as I mentioned earlier, I'm just not convinced that a finding of capacity in a month from now is going to eliminate the duty that my client had to this court when this substitution occurred.

(R. 563 Feb. 6, 2014 Hearing Tr. 13:21 — 14:12; *see also* R. 566 at 23:17 — 24:6 (stating that Bennett could have filed the summons and petition to return the assets without the court's blessing, but that Bennett was just being careful in seeking the court's blessing first.))

Subsequently, however, Provence reversed herself near the end of the hearing 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 other 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?

(R. 574 at 55:4-15.) Later in the hearing, Provence characterized Bennett's request as one for a "judgment" for the \$50 million. (R. 577 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 does have jurisdiction to grant this relief because “[t]his is a court of equity.” (R. 579 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.” (R. 579 at 75:25-76:3.)

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.” (R. 374.) 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.*)

VII. The Probate Court Ordered the Trust to Pay \$50,000,000 to a Second Special Conservator, and Bennett and Keith Wellin Filed Additional Lawsuits in the Probate Court and Federal Court Seeking Recovery of the Same Funds. The Wellin Children Voluntarily Dismissed the Probate Court Action in Favor of the Federal Actions, and the Probate Court Effectively Purported to Vacate that Dismissal.

On February 21, the probate court issued two orders (R. 20; R. 22, jointly, 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. (R. 20.) In the other, the court appointed Synovus Trust Company (“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”.³ (R. 22.) The Wellin Children timely filed a motion to alter or amend the latter order on March 3, 2014. (R. 393.)

On February 26, Bennett and Keith Wellin jointly commenced a new action in the Probate Court (“*Wellin III*”) against the Wellin Children. (R. 161 *Wellin III* Petition.) In *Wellin III*, Bennett and Keith Wellin sought to recover the same \$50 million that the Court ordered the Wellin Children to pay to Synovus, 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. (R. 162.) On March 3, 2014, the Wellin Children removed *Wellin III* to the federal district court. (USDC SC Civil Action No.: 2:14-cv-00652-DCN, Docket No. 1.)

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

³ 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. (R. 27.)

Transaction and Friendship Partners liquidation. (USDC SC Civil Action No.: 2:14-cv-00579-DCN, Docket No. 1.) On the same day, Wellin filed an Amended Complaint in *Wellin I* to assert these identical claims in that action as well. (USDC SC Civil Action No.: 2:13-cv-1831-DCN, Docket No. 112.) 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.⁴

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 proceeding in the probate court. (R. 770.) In accordance with Rule 41(a)(1)(A), the notice was filed before Keith Wellin filed an answer or motion for summary judgment and was therefore effective to end the case without further action by the probate court.

Nevertheless, 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 pay \$50 million to Synovus. (R. 28 7/3/14 Order #1). In the other July Order, the probate court effectively purported to vacate the Wellin Children’s notice of voluntary dismissal. (R. 34 7/3/14 Order #2.) The Wellin Children timely filed their notice of appeal as to these rulings on July 11, 2014. (R. 773.)

⁴ 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 asserted by in *Wellin I*. (USDC SC Civil Action No.: 2:14-00652-DCN, Docket No. 22 and USDC SC Civil Action No.: 2:14-00579-DCN, Docket No. 15.)

ARGUMENT

Although the procedural and factual background giving rise to this appeal are lengthy and complex, this appeal seeks review and reversal of three orders in the proceeding filed by the Wellin Children seeking appointment of a conservator for their father. Specifically, in that proceeding, the probate court issued orders that (1) ordered the Irrevocable Trust—which was not a party to that proceeding—to pay \$50 million to Synovus, (2) denied the Wellin Children’s motion to alter or amend the order requiring payment of \$50 million, and (3) purported to vacate their notice of voluntary dismissal.

As explained below, these orders erred because the probate court lacked the requisite subject matter jurisdiction, authority, and personal jurisdiction necessary to order the \$50 million payment and because Bennett lacked standing to seek the payment. In addition, the probate court erred by not dismissing Bennett’s request for the \$50 million despite the multiple, duplicitous suits already pending. Similarly, the probate court erred by failing to acknowledge that its order to pay \$50 million violated principles of due process and could not be justified by the court’s supposed exercise of its equitable powers. In addition, the probate court erred by making various unsupported factual findings, and by holding the Wellin Children’s voluntary dismissal of the proceeding was ineffective. Accordingly, as explained below, this Court should reverse the probate court’s orders.

I. The Probate Court Erred in Holding that It Had Subject Matter Jurisdiction to Order the Irrevocable Trust or the Wellin Children to Pay \$50 Million.

This Court should reverse the Probate Court’s order requiring the payment of \$50 million to Synovus because the Probate Court lacked subject matter jurisdiction to make such an order in this proceeding. “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. See *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183, 561 S.E.2d 659, 661 (Ct. App. 2002) (noting that a judgment is void if rendered by a court “which lacked subject matter jurisdiction or personal jurisdiction”) (citation omitted); *State v. Funderburk*, 259 S.C. 256, 261, 191 S.E.2d 520, 522 (1972) (“We think it elementary, with no need for citation of authority, that the acts of a court with respect to a matter as to which it has no jurisdiction are void.”); *Carnie v. Carnie*, 252 S.C. 471, 475, 167 S.E.2d 297, 299 (1969) (“A decree for the payment of money as alimony or for the payment of costs is void in the absence of actual jurisdiction over the person or property of the one against whom it is awarded.”) (citation omitted).

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.

S.C. Code § 62-5-402. Nowhere does this statutory grant of jurisdiction convey subject matter jurisdiction over assets and property of other persons or entities.

The probate court erroneously ruled that it had jurisdiction to issue the February Order requiring payment of \$50 million pursuant to its authority under Section 62-5-402(2) to determine how Keith Wellin's estate must be managed, expended or distributed. But subsection 62-5-402(2) does not apply because the \$50 million at issue was *not* part of Keith Wellin's estate. Those funds represent a portion of the proceeds from the liquidation of Friendship Partners that was distributed by the partnership to the Irrevocable Trust in December 2013. It is undisputed that Friendship Partners (not Keith Wellin) owned the BRKa Shares that were sold to generate the funds. Keith Wellin has asserted a *claim* to those funds in the district court, but the district court has not yet decided that claim. Unless and until the district court says otherwise, the funds belong to the Irrevocable Trust. Section 62-5-402(2) gives the probate court jurisdiction over the assets in a protected person's estate – it does not grant the probate court jurisdiction to summarily decide the protected person's legal claim to assets in the hands of another party.⁵

Similarly, section 62-5-402(3), related to "claims for or against the person or estate of the protected person," does not provide jurisdiction for the probate court's order. First, the term "claim" as defined by the probate code "does not include . . . 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). Second, even if a dispute about ownership of the \$50 million *could* be a claim, no such claim had been asserted against the Wellin Children or the Irrevocable Trust in the probate court in connection with the \$50 million when the court issued its order. Rather, Bennett

⁵ The probate court also concluded that it 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". This section also does not apply because the \$50 million at issue was not "property of the person to be protected" for the reasons previously stated.

merely raised the issue in an *ex parte* “application for guidance” under Section 62-5-416(b) and a subsequent oral request at a hearing on the Application. When a conservator wishes to assert a claim on behalf of a protected person, he does so by filing a lawsuit and asserting that claim in the pleadings.⁶ See, e.g., *Fisher v. Stevens*, 355 S.C. 290, 584 S.E.2d 149 (Ct. App. 2003) (noting that conservator of a disabled person filed a lawsuit to assert claims on behalf of the protected persons); *Tench v. S.C. Dept. of Ed.*, 347 S.C. 117, 553 S.E.2d 451 (2001) (same). In the absence of a complaint asserting a right to the \$50 million, there was no pending claim over which the probate court could exercise jurisdiction. Thus, the probate court had no jurisdiction over the request.

Furthermore, even if Bennett’s request in his “application for guidance” were a claim under subsection 62-5-402(3), the probate court’s jurisdiction under that subsection is expressly limited by Section 62-5-433, which provides that the probate court lacks jurisdiction to resolve claims in an amount greater than \$25,000. Consequently, the court lacked jurisdiction under Section 62-5-402(3) to order the Wellin Children to pay \$50 million to Synovus.

The probate court also erred in its subsequent denying the Wellin Children’s motion to alter or amend, in which the court cited Section 62-7-201 as an additional jurisdictional basis for its order to pay \$50 million.⁷ Section 62-7-201 addresses the court’s jurisdiction to resolve issues concerning the internal and external affairs of a trust, and it expressly provides that the probate court “will not, over the objection of a party, entertain proceedings under this section involving a

⁶ Bennett and Keith Wellin tacitly admitted this is the only appropriate way in which to make a claim when they did later file a summons and complaint on February 26, 2014 in *Wellin III*—a new and separate action in the probate court—seeking to recover the \$50 million (plus an additional \$42 million). That Complaint, however, was filed *after* the probate court issued the February Orders on February 21, 2014, and thus cannot form a viable basis upon which the probate court could have made its order. Moreover, *Wellin III* was promptly removed to federal court, where it was subsequently dismissed.

⁷ The Probate Court had not relied on this statute as a jurisdictional basis in its prior order on February 21, 2014.

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 place of administration is not South Carolina. 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 probate court made no findings regarding why the “interests of justice would be seriously impaired” if it failed to exercise jurisdiction – nor *could* the court make any such findings. The parties are 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 was necessary, it could have fashioned such relief and is the only court with jurisdiction to do so.

Finally, even if the probate court had subject matter jurisdiction over the dispute, its jurisdiction was divested by the Wellin Children’s removal of Bennett’s petition to the district court. *Limehouse v. Hulsey*, 404 S.C. 93, 105, 744 S.E.2d 566, 573 (2013).

In sum, 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 Irrevocable Trust is administered out-of-state, and because Bennett’s petition seeking to recover the funds was removed to federal court, the Probate Court had no subject matter jurisdiction upon which to base its order to pay \$50 million to Synovus. Accordingly, that order was erroneous and void and should be reversed.

II. The Probate Court Erred in Finding that It Had Authority to Order the Relief Requested Pursuant to an Informal “Application” under S.C. Code Ann. § 62-5-416(b).

This Court should reverse the probate court’s order requiring the payment of \$50 million to Synovus because the probate court had no authority to award substantive relief in response to an informal request for instruction regarding the conservator’s duties. Here, Bennett’s *ex parte* letter to the court—the letter that precipitated 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). (R. 763 at 1.) As explained below, however, Section 62-5-416(b) does not authorize a request for substantive relief.

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 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 request may be made by “application,” which the Probate Code elsewhere defines as any 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, SCRPC, and must be commenced as provided in Rule 3, SCRPC.").

Further, any 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 trial⁸, and otherwise take advantage of their rights under the South Carolina 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."); *id.* § 62-1-304 ("The South Carolina Rules of Civil Procedure (SCRPC) adopted for the circuit court and other rules of procedure in this title govern formal proceedings pursuant to this title. A formal proceeding is a 'civil action' as defined in Rule 2, SCRPC, and must be commenced as provided in Rule 3, SCRPC."); *In re Timmerman*, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998) ("The South Carolina

⁸ "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 § 62-1-306. The Wellin Children did not waive their right to a jury trial on Bennett's request for \$50 million.

Rules of Civil Procedure are applicable in the probate court to the extent they are not inconsistent with the Probate Code or probate court rules.”) (citation omitted).

In the instant case, 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 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 subsection 62-5-416(b). To the extent that the Court would otherwise have had jurisdiction to award such relief, it could do so only under subsection 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.⁹

III. The Probate Court Erred in Holding that It Had Personal Jurisdiction over the Irrevocable Trust.

Even if the probate court somehow had subject matter jurisdiction to grant the relief requested, the court still lacked personal jurisdiction over the Irrevocable Trust to grant this relief.¹⁰ The Irrevocable Trust was not made party to the instant action and was never served with a summons and complaint before the Court ordered it to pay \$50 million. Without a

⁹ To the extent that Bennett argues that the Court has authority to grant the requested relief pursuant to South Carolina Code Section 62-5-416(c), he is clearly incorrect. That subsection authorizes the probate court to issue the orders referenced in 62-5-416(a), as appropriate, after formal proceedings have been initiated, or give instructions, as appropriate, after informal proceedings have been initiated pursuant to 62-5-416(b). Here, Bennett has not initiated formal proceedings, so 62-5-416(c) does not apply.

¹⁰ As previously noted, the \$50 million at issue represents a portion of the liquidation proceeds distributed from Friendship Partners to the Irrevocable Trust. 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*. The Promissory Note that Keith Wellin purported to substitute was an obligation of *the Trust*. At bottom, Bennett's request sought an order directing payment of \$50 million *from the Trust*.

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) – are also trustees of the Irrevocable Trust. The petition filed by the Wellin Children in the probate court clearly demonstrates that they brought this action in their individual capacities and not as trustees of the Irrevocable Trust. 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 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 that 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.”).¹¹

South Carolina law also recognizes the distinction between a suit against an individual and suit against an individual in a representative capacity. *See, e.g.*, S.C. Code Ann. § 62-7-1010(c) (“A claim . . . may be asserted in a judicial proceeding against the trustee in the trustee’s fiduciary capacity, whether or not the trustee is personally liable for the claim.”); *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 600, 748 S.E.2d 781, 789 (2013) (noting that, “Auto-Owners acknowledged that Rhodes sued Eadon in his corporate capacity”); *Freemantle v. Preston*, 398 S.C. 186, 190, 728 S.E.2d 40, 42 (2012) (“Appellant named as Defendants . . . several former and current Council members in their official and individual capacities.”); *see also Stoltenberg v. Newman*, 179 Cal. App. 4th 287, 294 (Cal. Ct. App. 2009) (“Hence, a third person with a claim against the trust or trustee may assert the claim against the trust by bringing an action against the trustee in the trustee’s representative capacity.”).

Indeed, even Bennett recognizes the distinction. In the lawsuit he subsequently commenced to recover the liquidation proceeds – *after* the probate court had already ordered the Irrevocable Trust to pay \$50 million – he named the defendants as follows: “Peter J. Wellin, Cynthia W. Plum and Marjorie W. King, individually and as co-Trustees and beneficiaries of the Wellin Family 2009 Irrevocable Trust u/a/d November 2, 2009” (R. 161.) Bennett identified the defendants in this way for a reason — namely, if he had only named the Wellin Children in their individual capacities, the court would not obtain personal jurisdiction over the Irrevocable Trust.

¹¹ 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.*

As support for its ruling, the probate court cited to *Ex Parte Cannon*, 385 S.C. 643, 685 S.E.2d 814 (Ct. App. 2009) and *In re Estate of Ahern*, 835 N.E.2d 95 (Ill. Ct. App. 2005). (R. 26). Neither of these cases involves a court ordering a non-party to pay money in the absence of a summons, complaint, or even a claim against the individual or entity being ordered to pay, and, thus, the cases are distinguishable from the instant case and do not support the court's order. Because the Irrevocable Trust was not a party to the instant action and was not served with a summons and complaint, the probate court erred in finding that it had personal jurisdiction over the Irrevocable Trust.

IV. The Probate Court Erred in Finding that Bennett Had Standing to Pursue a Claim on Keith Wellin's Behalf.

This Court should reverse the probate court's order requiring the payment of \$50 million to Synovus because Bennett had no standing to pursue that purported claim 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. SCRC

17(a); 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).

In the instant case, the consent order appointing Bennett as special conservator expressly provided that he shall *not* have the rights and duties that would ordinarily accrue to a court-appointed conservator. (R. 1 ¶ A-C.) His role as special conservator was expressly 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 assert claims against the Irrevocable Trust.¹² The probate court did not grant Bennett that authority until *after* the hearing on his Application, on the same day it ordered the Wellin Children to pay \$50 million. Because Bennett lacked standing to request that relief on Keith Wellin's behalf, the probate court erred in granting the request.

V. The Probate Court 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 probate court's order requiring the payment of \$50 million to Synovus because that request for relief should have been dismissed pursuant to Rule 12(b)(8), SCRCP. That rule provides for dismissal when "another action is pending between the same parties for the same claim." S.C. R. Civ. P. 12(b)(8). 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

¹² As previously noted, once the Probate Court issued an order expanding Bennett's powers to include the power to pursue claims on Keith Wellin's behalf, Bennett filed the *Wellin III* action against the Wellin Children (in their individual capacities and in their capacities as trustees of the Irrevocable Trust) related to the Swap Transaction and the Friendship Partners liquidation. That suit was removed to federal court, which subsequently dismissed the case because Wellin was pursuing the same claim and seeking to recover the same money in a separate lawsuit pending in federal court (i.e. *Wellin I*).

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.” (R. 764 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. 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.

VI. The Probate Court Erred in Finding that Its Order Requiring the Trust to Pay \$50 million Did Not Violate Principles of Due Process.

This Court should reverse the probate court’s order requiring the payment of \$50 million to Synovus because that order infringed on the Wellin Children’s and the Irrevocable Trust’s due process rights. A fundamental requirement of procedural due process is the opportunity to be heard at a meaningful time and 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 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.

In an unpublished opinion, the Court of Appeals has held that the family court deprived a defendant of his right to procedural due process by summarily ruling 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).¹³ 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 a meaningful opportunity to be heard and defend himself, the Court of Appeals 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 made his request orally at the tail end of a hearing. Although he 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 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.

¹³ Appellants are aware that Rule 268(d)(2), SCACR provides that unpublished opinions should not be cited as precedent. Accordingly, Appellants mention this ruling not as binding precedent but merely to note the similarity to the issue here.

Moreover, this dispute involves highly complex issues of law and fact with respect to which the parties are currently engaged in discovery in federal court. A judicial determination of the issues set forth in Bennett's request, which go to the heart of the federal court dispute, before any discovery has taken place and in utter disregard for the South Carolina Rules of Procedure, deprived the Wellin Children of a meaningful opportunity to be heard. Summary determination of these issues without requiring a summons and complaint also denied the Wellin Children their statutory right to remove the action to federal court and their constitutional right to a trial by jury. The ruling effectively allowed Bennett to short-circuit the judicial process and evade prior rulings of the district court. Because the probate court's ruling denied the Wellin Children and the Trust their rights to procedural due process, the order should be vacated.

VII. The Probate Court Erred in Improperly Invoking Its Equitable Powers to Grant the Requested Relief.

This Court should reverse the probate court's order requiring the payment of \$50 million to Synovus because the probate court incorrectly relied on its "equitable powers" as a basis for its authority to 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 the 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). As explained above, granting the relief requested by Bennett with the case in this posture would require the Court to ignore the most fundamental statutes, rules, and precedent of our courts.

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). In the past year, two separate *ex parte* TROs have been entered against the Wellin Children, in their various capacities, restricting their ability to use the same \$50 million (or, in

the case of the first TRO, the stock that was liquidated to generate the \$50 million) at issue in Bennett's Application. The district court dissolved both of these TROs because, *inter alia*, no irreparable harm is present where, as here, Keith Wellin can sue — and has sued — 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 (dissolving *ex parte* TRO and finding that no irreparable harm existed and that the other elements necessary for injunctive relief had not been established); Civil Action No. 2:13-3595, Dkt. No. 15 (dissolving the *ex parte* TRO granted by the probate court and making similar findings)). 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 has *twice* found improper in the past year. Those injunctions merely froze the assets in the Irrevocable Trust's possession, whereas the probate court's February Orders actually require the Trust to surrender the same assets to a third party. 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 such an inequitable outcome.

Similarly, the relief granted by the probate court is broader than the equitable relief available under the "attachment" statute (S.C. Code Ann. § 15-19-10), and, in any event, Bennett

has not satisfied the requirements for even the lesser remedy of attachment. Under the attachment statute, a plaintiff may "at the time of issuing the summons or any time afterwards" have the property of a defendant attached, "as a security for the satisfaction of such judgment as the plaintiff may recover." S.C. Code § 15-19-10. "[T]he purpose of attachment generally is to take a defendant's property into legal custody so that it may be applied to the plaintiff's debt, when established." *Scratch Golf Co.*, 361 S.C. at 122, 603 S.E.2d at 908 (internal citation omitted). However, "[a]n attachment is merely a provisional remedy in aid of an action, and hence, to make it available, an action must be commenced in regular form." *Id.* (internal citation omitted). In the instant case, Bennett had not commenced "an action in regular form" when the probate court issued its February Orders (and when he did commence an action, it was dismissed by the district court). Because the equitable remedy of attachment was unavailable to Bennett, the broader relief granted by the February Orders was unavailable as well. The court therefore erred in relying upon its equitable powers as a basis for its rulings.

VIII. The Probate Court Erred in Making Various Unsupported Findings of Fact.

This Court should reverse the probate court's order requiring the payment of \$50 million to Synovus because that order is premised on incorrect and unsupported findings of fact. Specifically, the February Order requiring the payment of \$50 million repeatedly and erroneously states that the Wellin Children agree that Keith Wellin is entitled to "at least \$50 million," referring to such money as "the undisputed funds". The Wellin Children have unambiguously stated their position that Keith Wellin's Revocable Trust is entitled to approximately \$50 million, *but only in satisfaction of the Promissory Note*. The Wellin Children, in their capacities as trustees of the Irrevocable Trust, tendered payment in that amount to Bennett, as counsel for the Revocable Trust, in prepayment and satisfaction of the Note.

Bennett rejected the payment in breach of the Note, which expressly permits prepayment. The Irrevocable Trust remains ready, willing and able to make the payment, but only in satisfaction of the Note. Other than payment of the Promissory Note to Keith Wellin's Revocable Trust, the Wellin Children owe Keith Wellin nothing. Because the fundamental premise of the probate court's ruling – that the Wellin Children agree they owe Keith Wellin "at least \$50 million" – is incorrect, the order should be vacated.

The probate court also erred to the extent that it acknowledged the validity of the purported Swap Transaction, which is disputed and currently is the subject of the litigation in federal court. The February Order requiring payment of \$50 million states in relevant part:

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.

(R. 23 at 2.) The Wellin Children dispute the validity and effectiveness of the Swap Transaction and the unsupported findings regarding steps Bennett claims to have taken in connection with it. Further, the Wellin Children dispute Bennett's valuation of the Promissory Note and the partnership units. Neither Wellin nor Bennett presented evidence or testimony on these issues. The probate court's findings are based solely on Bennett's bare allegations contained in his Application and his proposed order. Further, because no claim relating to the Swap Transaction had been asserted in the probate court when it issued the order, the Wellin Children had no opportunity to assert affirmative defenses, conduct discovery, make legal arguments or present

their case to a jury regarding Bennett's allegations. The court cannot simply make findings on these matters in the absence of any evidence.

Finally, the February Order also states that "this Court has jurisdiction over the assets belonging to Keith S. Wellin, including the Promissory Note or any asset for which it was substituted." (R. 25 at 4.) This is error. As previously noted, the Wellin Children deny the validity of the Swap Transaction, and the probate court does not have jurisdiction over assets held by individuals or entities other than Keith Wellin merely because Wellin asserts a claim over them. Wellin's claim to the liquidation proceeds (including the subject \$50 million) is just that – a *disputed claim*. The court's jurisdictional findings demonstrate that it fundamentally misunderstood the subject transactions and nature of the parties' dispute.

IX. The Probate Court Erred in Holding the Wellin Children's Notice of Voluntary Dismissal Was Ineffective.

This Court should reverse the Probate Court's order finding the Wellin Children's voluntary dismissal ineffective, and should also reverse the order requiring the payment of \$50 million because the voluntary dismissal effectively eliminated that order. Rule 41 states, in relevant part, 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. Fed. R. Civ. P. 41(a)(1)(A). The 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. v. Wrecked & Abandoned Vessel*, 2 F.3d

544 (4th Cir. 1993), 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)).

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.*, 2 F.3d at 546 (citing *Dove v. CODESCO*, 569 F.2d 807, 809 n.3 (4th Cir. 1978)). The dismissal "carries down with it previous proceedings and orders in the action, and all pleadings, both of plaintiff and defendant, and all issues, with respect to plaintiff's claim." *Matthews*, 395 F.3d at 480 (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). It also divests the court of jurisdiction to conduct any further proceedings in connection with the action. *Id.* Thus, the Wellin Children's notice of dismissal deprived the probate court of jurisdiction going forward and rendered void all prior orders issued in the action.

The probate court based its ruling that the notice of voluntary dismissal was ineffective on the fact that the court had held hearings and taken evidence in the matter. However, 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*, for example, 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 parties attempted to negotiate a settlement. *Id.* at 371, 468 S.E.2d at 652. The family court held a hearing on August 6 for approval of the settlement, at which it took evidence and plaintiff consented to the agreement on the record. *Id.* On August 7, however, plaintiff's counsel contacted the family court and advised that his client felt pressured and was unwilling to honor the agreement. *Id.* The family court ordered counsel to continue preparing the settlement order as instructed. *Id.* On August 10, the plaintiff, through new counsel, filed a notice of voluntary dismissal under Rule 41(a)(1)(A). *Id.* On August 12, the family court issued a final order and decree based on the settlement agreement. *Id.* The Supreme Court held that the 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 August 12 order. *Id.* at 373, 468 S.E.2d at 653.

Similarly, in *Marex*, the plaintiff filed a notice of voluntary dismissal after three days of hearings but before the defendant served an answer or summary judgment motion. 2 F.3d at 545. The district court vacated the plaintiff's notice of dismissal, stating "it hasn't gone well for you so now you want to dismiss the case." *Id.* The Fourth Circuit reversed, holding that even though

the plaintiff's actions may have been downright fraudulent, Rule 41(a)(1)(A) is unambiguous and the plaintiff's notice of dismissal was timely and effective. *See id.* at 546–47. Accordingly, the fact here that the probate court had held hearings and taken other action in the case did not cut off the Wellin Children's right to dismiss the action under Rule 41(a)(1)(A).

The Probate Court also concluded that Rule 41(a)(1)(A) is inapplicable to conservatorship proceedings. Citing Rule 81, SCRCP,¹⁴ the court held that Rule 41(a)(1)(A) is inconsistent with Probate Court procedure because no Answer is required in conservatorship proceedings. This was error.

First, the Probate Code itself expressly states when the South Carolina Rules of Civil Procedure apply to probate court proceedings and when they do not. Specifically, 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 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.”). The Probate Code defines “formal proceedings” as follows:

“Formal proceedings” means actions commenced by the filing of a summons and petition with the probate court and service of the summons and petition upon the interested persons. *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.*

¹⁴ 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.

Id. § 62-1-201(17) (emphasis added). It is undisputed that the conservatorship action brought by the Wellin Children was a “formal proceeding” that required petitioners 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). Thus, Rule 41(a)(1)(A) is not inconsistent with conservatorship actions because the Probate Code expressly provides that the Rules of Civil Procedure (including Rule 41) apply to such actions.

Next, the Probate Court was incorrect that answers are never required in conservatorship actions. The 2010 Amendment to Section 62-1-304 “revised and essentially rewrote Section 62-1-304 in order to clarify that ‘formal proceedings’ are governed by and subject to the rules of civil procedure adopted for the circuit court [SCRCP] and other rules of procedure in this title and that the SCRCP also govern formal proceedings and commencement of same.” S.C. Code Ann. § 62-1-304, Official Comment. Thus, as noted above, the Rules of Civil Procedure apply to conservatorship actions absent a provision in the Probate Code stating otherwise. Because no provision of the Probate Code excuses the respondent from the obligation under Rule 12 to file an answer, an answer *is* required, even if the probate courts may excuse or ignore the requirement as a matter of course.

The probate court’s reliance upon *In re Estate of Weeks*, 329 S.C. 251, 495 S.E.2d 454 (Ct.App.1997), was misplaced. *Weeks* involved a formal testacy proceeding to determine whether the decedent’s will was valid. *Id.* at 258, 495 S.E.2d at 458. The Court of Appeals noted that the Probate Code and Probate Court Rules do not expressly require a responsive pleading in testacy proceedings. However, the court noted that the Probate Code incorporates

the SCRCP, which do require a responsive pleading. The court acknowledged that an answer may have been required under the SCRCP, but affirmed the trial court's finding that good cause existed to set aside any default. In any event, *Weeks* was based upon an older version of the Probate Code that was revised in 2010 to specifically provide that the SCRCP apply and that a formal proceeding is a "civil action" within the meaning of the SCRCP.¹⁵ Thus, *Weeks* does not support the probate court's ruling.

Finally, even assuming that no responsive pleading is required in conservatorship actions, that would not render Rule 41(a)(1)(A) "inconsistent" with the procedure for such actions for purposes of SCRCP 81. Plainly, Keith Wellin had the *option* to file an answer even if one was *not required*. Indeed, in response to a more recent petition for appointment of a conservator for Keith Wellin filed by Bennett, Wellin did file an answer within 30 days as required by SCRCP 12. By filing an answer in the instant action, Wellin could have cut off the Wellin Children's right to dismiss, but he elected not to do so. Accordingly, the Wellin Children's notice of voluntary dismissal under Rule 41(a)(1)(A) was timely and effective.

CONCLUSION

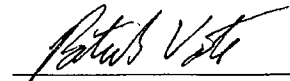
For the foregoing reasons, this Court should reverse the judgments of the probate court and instruct the court that the action has been dismissed and all rulings in the action are void, or failing that, vacate the February Order requiring payment of \$50 million to Synovus and remand to the probate court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

[Signature Block is on following page]

¹⁵ Rule 41(a)(1)(A) expressly provides that an "action" may be dismissed by the plaintiff at any time prior to the filing of an answer or motion for summary judgment.

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Charleston, South Carolina
July 13, 2015

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

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,

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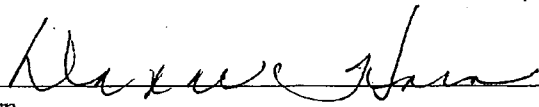
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ARGUMENT

Appellants Peter J. Wellin, Cynthia W. Plum and Marjorie W. King (the “Wellin Children” or “Appellants”) submit the following Reply to the Brief of Respondent, Edward Bennett, as special conservator for Keith Wellin (“Bennett” or “Respondent”).

I. The Probate Court lacked subject matter jurisdiction to order payment of \$50 million to a special conservator because the \$50 million at issue was not an asset of Keith Wellin’s estate.

Bennett’s argument that the Probate Court had subject matter jurisdiction hinges entirely upon his unsupported claim that the \$50 million at issue is an asset of Keith Wellin’s estate. (Respondent’s Brief at 16-17.)¹ But the \$50 million clearly is *not* an asset of Keith’s Wellin’s estate—it is an asset of the Irrevocable Trust. The funds are located in an account owned by the Irrevocable Trust and maintained at UBS Bank. Wellin and Bennett have sought to recover these funds from the Trust through litigation currently pending in federal court. If the \$50 million *had* been an asset of Keith Wellin’s estate, Wellin and Bennett would have had no reason to file lawsuits in an effort to recover it. The \$50 million is not an asset of Wellin’s estate unless and until the estate prevails on its disputed claims to those funds in federal court.

Moreover, the fact that Wellin held a Promissory Note from the Irrevocable Trust with a face value of \$50 million does not render the \$50 million held in the Trust’s bank account an asset of Wellin’s estate. Bennett conflates the Promissory Note (an asset held by Wellin’s estate) with the funds (an asset held by the Trust) (Respondent’s Brief at 16-17), but they are separate and distinct assets. A promissory note is a mere *promise* of payment pursuant to agreed terms. *Black’s Law Dictionary* (9th ed. 2009); *see also Don E. Williams Co. v. C. I. R.*, 429 U.S. 569, 582-83 (1977) (holding that a “promissory note, even when payable on demand and fully

¹ S.C. Code Ann. § 62-5-408(1) 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.” (emphasis added).

secured, is still, as its name implies, only a promise to pay, *and does not represent the paying out or reduction of assets*") (emphasis added). Keith Wellin held only the Promissory Note, not the \$50 million over which the Probate Court purported to exercise jurisdiction, at the time the Court issued its order (and at all times dating back to 2009²). The Irrevocable Trust had previously tendered prepayment of the Promissory Note to Keith Wellin, but Bennett rejected the payment on Wellin's behalf for strategic reasons. By doing so, Bennett ensured that the \$50 million did not become an asset of Wellin's estate.

Because the subject \$50 million was not an asset of Wellin's estate at the time the Court issued its order, the Probate Court lacked jurisdiction to order that the funds be paid to a conservator. As set forth in Appellant's Brief, the Probate Court has no jurisdiction to decide whether assets in the possession of others properly belong to a protected person's estate. S.C. Code Ann. § 62-1-201(4) (expressly excluding "demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate" from the definition of "claims" over which the probate court has jurisdiction); *see also Matter of Howard*, 315 S.C. 356, 364, 434 S.E.2d 254, 259, n.8 (1993) (probate court lacked jurisdiction to decide whether gun was asset of decedent's estate); (Appellants' Brief at 20.)

II. The Probate Court did not have the power to order payment of the \$50 million to a special conservator under S.C. Code Ann. § 62-5-416(c).

Bennett relies heavily upon the language in S.C. Code Ann. § 62-5-416(c) stating that the probate court can issue "any appropriate order". (Respondent's Brief at 17.) Indeed, he appears to argue that this provision allows the probate court to do virtually *anything* once a conservator

² In 2009, Keith Wellin sold his interest in a limited partnership, the liquidation of which in 2013 generated the subject \$50 million. Wellin received the Promissory Note in exchange for that partnership interest in 2009. (*See* Appellant's Brief at 6-7.)

requests instructions concerning his fiduciary duties under § 62-5-416(b). (*Id.*) The statute provides no such authority.

First, 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 . . ."). The Probate Court lacked jurisdiction to determine ownership of the disputed \$50 million. (*See supra*, Section I; Appellants' Brief at 20.) 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.

III. Personal jurisdiction over the Wellin Children, individually, does not confer personal jurisdiction over the Irrevocable Trust.

Bennett argues that the Probate Court had personal jurisdiction over the Irrevocable Trust because the Wellin Children, who filed the action in their individual capacities, are also trustees of the Trust. (Respondent's Brief at 19-23.) As authority for this position, Bennett cites *Ex Parte Cannon*, 385 S.C. 643, 685 S.E.2d 814 (Ct. App. 2009), on which the Probate Court relied, and two cases from other jurisdictions, *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). (Respondent's Brief at 21.) None of these cases support Bennett's argument. In *Cannon* and *Groves*, the courts held only that the appellants failed to timely 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. 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 Bennett 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 Bennett, the Wellin Children repeatedly and unequivocally objected to the Probate Court's exercise of jurisdiction over the Irrevocable Trust. At the February 6, 2014 hearing on Bennett's request for instructions, counsel for the Wellin Children clearly 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 the Trust Protector of the Trust, 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.

(R. 586 at 74:5-20.) Subsequently, the Wellin Children reiterated their position in their 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.

(R. 615 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 Bennett are inapposite.

IV. The Wellin Children have standing as beneficiaries of the Irrevocable Trust to object to the Probate Court's exercise of personal jurisdiction over Trust assets.

Bennett also argues that if the Wellin Children did not voluntarily appear in their capacities as trustees, then they lacked standing to object to the Probate Court's exercise of personal jurisdiction over the Irrevocable Trust.³ (Respondent's Brief at 15.) However, the Wellin Children had standing as beneficiaries of the Irrevocable Trust to raise the objection because the order requiring payment \$50 million directly affects their beneficial interests in the Trust's assets.

"Standing is . . . that concept of justiciability that is concerned with whether a particular person may raise legal arguments or claims." *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 219, 746 S.E.2d 478, 480 (Ct. App. 2013) (quoting *Powell ex rel. Kelley v. Bank of Am.*, 379 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct. App. 2008)). "It concerns an individual's 'sufficient interest in the outcome of the litigation to warrant consideration of [the person's] position by a court.'" *Id.* at 219-20, 746 S.E.2d at 480. There are three requirements for standing:

First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. (quoting *Smiley v. South Carolina Dep't of Health & Env't'l Control*, 374 S.C. 326, 329, 649 S.E.2d 31, 32-33 (2007)).

³ Even if the Wellin Children had appeared in this action in their trustee capacities—which they did not—the Probate Court would not have had jurisdiction to order payment of the \$50 million for the reasons discussed in the first section of this Brief and in Appellants' Initial Brief.

The Probate Court's order requiring the Irrevocable Trust to pay \$50 million constitutes a concrete "injury in fact" to the Wellin Children's beneficial interest in the Trust assets. If the Trust is required to pay \$50 million without satisfying the Promissory Note, the assets available to the Wellin Children as beneficiaries will substantially decrease with no corresponding reduction in Trust liabilities. Second, the injury is the direct result of the Probate Court's attempt to exercise jurisdiction over the Trust assets in connection with Bennett's request for instructions. Finally, a decision that the Probate Court lacked jurisdiction would prevent the harm to the Wellin Children's beneficial interests in the Trust and would allow the pending claims regarding the funds at issue to be litigated in federal court, the forum initially chosen by Keith Wellin for resolution of this dispute. Accordingly, the Wellin Children have standing as beneficiaries of the Irrevocable Trust to object to the Probate Court's rulings that affect the Trust's assets.

Moreover, the South Carolina Rules of Civil Procedure expressly allow the Wellin Children to raise arguments on the merits related to the Irrevocable Trust without submitting the Trust to the Probate Court's jurisdiction. South Carolina law no longer provides for a special appearance to contest jurisdiction only. James F. Flanagan, *South Carolina Civil Procedure* 37 (3rd ed. 2010). Challenges to personal jurisdiction are not waived by being presented with other defenses. S.C. R. Civ. P. 12(b). The Wellin Children challenged the Probate Court's jurisdiction at the earliest opportunity after Bennett made his request for instructions. By presenting other defenses related to the merits of Bennett's request for relief, the Wellin Children did not waive their objection on jurisdictional grounds. *Id.*

V. Keith Wellin's death and the appointment of his widow as Special Administrator of his estate rendered the underlying conservatorship proceeding moot.

Bennett argues that the Wellin Children could not terminate the conservatorship proceeding by filing a notice of voluntary dismissal under South Carolina Rule of Civil Procedure 41(a)(1) despite the plain language of the rule. For the reasons stated in Appellant's Initial Brief (Appellant's Brief at 37-42), the filing of the notice terminated the conservatorship action. In any event, the conservatorship action is now moot because Keith Wellin is deceased and, in connection with a separate action in the Probate Court seeking formal probate of his estate, Wendy Wellin has been appointed as Special Administrator of the estate. (Civ. No. 2014-ES-10-1478, 9/17/14 Order Appointing Special Administrator.)

"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. (See R. 29 at 2.) ("[T]he Court is convinced that the assets of Keith Wellin need protection"). Keith Wellin is now deceased, and a Special Administrator has been appointed for the estate. Consequently, there is no need for conservators to protect his assets, such that a judgment in the underlying action will have no practical legal effect. See *Ex parte McFarlin*, No. UP-073, 2007 WL 8326605, at *5 (S.C. Ct. App. 2007) (death of ward rendered conservatorship terminated and issues relating to orders entered during pendency of conservatorship moot). Moreover, Wendy Wellin, as Special Administrator, has filed a motion, which is unopposed, to substitute herself as the plaintiff in the federal action filed by Keith Wellin in which he sought to recover the same \$50 million at issue in this appeal. (USDC SC Civ. No. 2:13-cv-1831, ECF No. 221.) The federal court can order any necessary preliminary relief in connection with these funds and is the

only court with jurisdiction to do so. Thus, in light of Keith Wellin's death and Wendy Wellin's appointment as Special Administrator of his estate, the Orders at issue on appeal, and the entire proceeding in which they were issued, are now moot.

CONCLUSION

The remaining issues addressed in Respondent's Brief were adequately addressed in Appellants' Initial Brief. For the foregoing reasons, and those stated in the Appellants' Initial Brief, this Court should reverse the judgments of the Probate Court.

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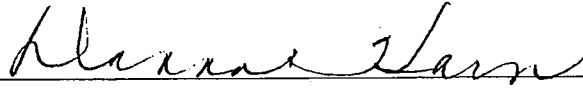
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STATEMENT OF ISSUES ON APPEAL

Respondents would restate the issues on appeal as:

- I. Can Appellants raise arguments on behalf of the Trust and themselves as Trustees while simultaneously claiming not to have appeared in those capacities?
- II. Did the Probate Court correctly hold that it had jurisdiction to order the Wellin Children, individually or in their capacity as fiduciaries to their father, to pay \$50,228,000 million held in trust to a special conservator?
- III. Did the Probate Court correctly find that Edward Bennett, as Special Conservator, had standing to seek the Court's protection on behalf of Keith Wellin's?
- IV. Did the Probate Court correctly find that South Carolina Rule of Civil Procedure 12(b)(8) did not require dismissal of Bennett's request for relief?
- V. Did the Probate Court correctly find that there were no due process violations?
- VI. Did the Probate Court properly invoke its equitable powers to grant the requested relief?
- VII. Are the Probate Court's findings of fact supported by the evidence?
- VIII. Did the Probate Court correctly hold that the Wellin Children's Notice of Voluntary Dismissal was ineffective?

INTRODUCTION

The Wellin Children purportedly commenced this action seeking appointment of a conservator to protect their father's assets (and more specifically, their hope in inheriting those assets) from the current Mrs. Wellin, their step-mother. With the consent of all parties, a Special Conservator was appointed; however, the Wellin Children became frustrated when the Probate Court saw through their procedural machinations and their vexatious litigation strategy and concluded that the Wellin Children should pay to a second court appointed special conservator \$50m to be distributed at the conclusion of the ongoing litigation between Mr. Wellin and the Wellin Children. The Probate Court also authorized that the Special Conservator to pursue claims against the Wellin Children to ensure that Mr. Wellin received adequate compensation for his interests. With various actions pending in Federal and State Court between Mr. Wellin and his Children and faced with an order directing them to pay over to a Special Conservator more than \$50m they admittedly owe their Father, the Wellin Children attempted to evade the Probate Court order by submitting a voluntary stipulation of dismissal in an apparent effort to "undo" the conservatorship they had sought and created through their explicit consent. However, the Probate Court correctly held that the voluntary dismissal was not effective to deprive it of jurisdiction, and the Court properly exercised its equity jurisdiction to order the Children to pay over the funds to a Special Conservator for safekeeping while the various litigation proceeds through the other courts.

STATEMENT OF THE CASE

Before this Court is the question of who is entitled to protect assets belonging to Keith S. Wellin ("Wellin") during the pendency of Federal Court litigation between Wellin and his children. This matter was before the Probate Court after the filing of a Petition for Protective Order and Appointment of Conservator on July 19, 2013 by Peter J. Wellin, Cynthia W. Plum, and Marjorie W. King ("Appellants" or "Wellin Children"), alleging that their father lacked capacity to manage his property and affairs. [ROA 0042; Conservatorship Petition.] One week later, at Appellants' request, the Court held an emergency hearing on July 26, 2013. At that time all interested parties agreed to the appointment of Edward G. R. Bennett ("Bennett") as Special Conservator and Special Trustee for Wellin. On August 15, 2013, the Court entered an Order reflecting this agreement and appointing Mr. Bennett. [ROA 0001; 8/15/13 Order.] The parties participated in a court ordered mediation on October 15, 2013 but were unsuccessful in reaching an agreement.

On January 14, 2014 pursuant to S.C. Code §62-5-416(b), Bennett filed an application requesting the Court's guidance as it related to his duties to Wellin. [ROA 0763; 1/14/14 Application.] At the direction of the Court, a copy of the same was served on all parties, and a hearing was scheduled on the matter. Prior to the hearing, Appellants filed a motion to dismiss. [ROA 0181; 2/3/14 Motion to Dismiss.]

On February 6, 2014, the Probate Court held a hearing wherein the Special Conservator sought the authority to pursue claims on behalf of Wellin and a discussion was held with the Court regarding assets in the Appellants' possession that Bennett felt required the Court's immediate protection. [ROA 0560; Special Conservator Hr'g Tr.]

As a result of that application and hearing, the Court issued a protective Order on February 21, 2014 requiring Appellants to return \$50,228,000.00 of Wellin's funds by surrendering the same to Synovus Trust Company, N.A. ("Synovus") who would serve as Special Conservator II and protect the funds during the pendency of the litigation between the parties. [ROA 0022; 2/21/14 Order #1.] A second Order was also issued granting Bennett expanded powers to pursue additional claims on Wellin's behalf. The second Order was not appealed. [ROA 0020; 2/21/14 Order #2.]

On March 3, 2014, Appellants filed a Motion to Alter or Amend the first February order to avoid the payment of the funds to Synovus. [ROA 0393; 3/3/14 Motion to Alter or Amend.] A hearing was held on their motion on March 31, 2014. Prior to this Court's ability to rule on the Motion to Alter or Amend, Petitioners filed a Notice of Voluntary Dismissal relying on Rule 41(a)(1)(A) of the South Carolina Rules of Civil Procedure on May 5, 2014. [ROA 0770; Notice of Voluntary Dismissal.]

On July 3, 2014, the Probate Court issued two orders, one that denied the Wellin Children's motion to alter or amend its first February Order, and another that held the Wellin Children's voluntary dismissal ineffectual to the extent it terminated the Court's jurisdiction over Wellin. [ROA 0028; 7/3/14 Order #1.] [ROA 0034; 7/3/14 Order #2.]

In addition to the hearings and orders mentioned above, there were multiple motions, petitions, and responses filed and argued in both the Probate and Federal Court that are not relevant to this appeal.

STATEMENT OF FACTS

The Wellin Children seek to keep their father's funds in their possession in order to bolster their legal leverage in the ongoing litigation between the parties. [ROA 0577; Special Conservator Hr'g Tr. 67:12-14.] Wellin and Bennett, as Special Conservator and Special Trustee for Wellin, argue that the Probate Court was correct in determining that the funds should be protected by the Probate Court.

Wellin was a businessman who amassed significant wealth as an entrepreneur and Wall Street investor. [ROA 0059; *Wellin I* Compl. ¶¶21-22.] He married Wendy C. H. Wellin (Mrs. Wellin) in 2002. Wellin's three adult children from a prior marriage are the Appellants in this matter. [ROA 0059; *Wellin I* Compl. ¶24.] Wellin's assets consist solely of his own earnings. [ROA 0050; Conservatorship Petition.] Wellin was physically disabled after multiple strokes and tongue cancer but Respondents' alleged at all times that he was mentally intact.

On or about June 20, 2013, Wellin removed two of his children, Peter Wellin and Cynthia W. Plum, as his attorneys-in-fact due to his belief that they breached their fiduciary duty to him through a series of transactions beginning in 2009 that benefited themselves and their sister. [ROA 0062; *Wellin I* Compl. ¶48.] Less than a month later, Wellin filed a lawsuit (*Wellin I*) related to transactions between himself and Appellants that is currently pending, among other actions between these parties, in Federal Court. [ROA 0057; *Wellin I* Compl.]

The Appellants have openly blamed Mrs. Wellin for Wellin's attempts to withhold funds from his children. They have labeled his attempts as "launching an attack on his children" and state that "it is no secret that the Wellin Children believe that the

filing of litigation and Wellin's other uncharacteristic behavior were not the deliberate actions of their father, but were instead the byproduct of duress and manipulation exerted by Wendy Wellin." [App. Brief, p. 8.]

In response to their father's allegations and the lawsuit filed against them by Wellin, and their belief he would change his estate plan to include someone other than themselves (mainly, Mrs. Wellin), Appellants then sought to have their father deemed incompetent by the Probate Court to preserve their expected inheritance under his then existing estate plan. To do so, they filed a Petition for Appointment of Conservator in the Charleston County Probate Court on July 19, 2013. [ROA 0042; Conservatorship Petition.] It is important to note that at no point did the Wellin Children file a Petition for Appointment of Guardian out of concern for his physical wellbeing, although the person they deemed a threat, Mrs. Wellin, was responsible for his daily care and has been for several years. Instead, they only sought to have the Probate Court restrict his individual rights as they related to his ability to manage his own assets, execute legal instruments, and conduct his own financial affairs. The Petition itself gives a detailed account of their concern that Mrs. Wellin might be influencing his decisions for her own benefit.¹ [ROA 0050; Conservatorship Petition.].

In their Petition to the Probate Court, the Wellin Children alleged the need for a Conservator to protect Wellin's assets; including the "promissory note with a face value of approximately \$49 million" that is the subject of this appeal. [ROA 0050;

¹ While the Appellants have expended a great deal of energy to vilify Mrs. Wellin and make allegations that she unduly influenced Mr. Wellin for her own personal gain, a significant portion of Mr. Wellin's estate was left not to Mrs. Wellin, but to two of his children and various charitable organizations.

Conservatorship Petition.] As a result of the Petition for Appointment of Conservator and Appellants' request for emergency hearing based on the need for immediate protection from Mrs. Wellin, a protective proceeding was held on this matter, and a Protective Order was issued by the Probate Court on August 15, 2013. [ROA 0001; 8/15/13 Order.]

Bennett, Wellin's private counsel, was named Special Conservator and Special Trustee by consent of the Appellants and all other interested parties. [ROA 0001; 8/15/13 Order.] The Appellants acknowledge in their brief that "[t]he parties agreed to Bennett's appointment as a temporary special conservator with limited powers to ensure that no transfers are made from Wellin's assets without adequate consideration." Section C of the Order Appointing Special Conservator specifically requires Bennett to "ensure that transfers of assets are not made without fair and adequate consideration." (*Id.* ¶C).

On November 20, 2013, after Bennett's appointment, pursuant to the right reserved to him in Article IX(A) of the Wellin Family 2009 Irrevocable Trust (the "Irrevocable Trust"), Wellin substituted the above-mentioned Promissory Note, valued by Appellants on their Petition for Appointment of Conservator at "approximately \$49,000,000," for an interest in Friendship Partners of the same value, as allowed by the Irrevocable Trust. [ROA 0763; 1/14/14 Application.] Prior to the substitution, Special Conservator Bennett reviewed the transaction per the Probate Court's Order to ensure adequate value was received for the transfer of assets. (*Id.*) On the date of the substitution, the Promissory Note was valued at approximately \$50,211,447. Based on the longstanding valuation methodology for interest in Friendship Partners, LP, which both Appellants and Wellin have used since 2009, this was the equivalent of a 58%

interest in Friendship Partners. (*Id.*) Bennett felt the substitution was for adequate consideration under the Court Order and supported the transaction.

Shortly after the substitution, the Wellin Children decided to liquidate the assets of Friendship Partners and dissolve the entity with no notice to Wellin or his Special Conservator. As a result of the liquidation, the 58% interest in Friendship Partners held by Wellin became worth approximately \$92,000,000, as opposed to the original \$50,211,447.² (*Id.*) Appellants work diligently to ignore the fact that they were the parties responsible for the sale and dissolution of Friendship Partners that triggered this increase in value and the resulting devastating tax consequences.

Instead, the Wellin Children, individually and as Trustees, are taking the position that their father's substitution was ineffective or incomplete and that they only owe on the outstanding Promissory Note. Simply put, taking this position entitles them personally to an additional \$42 million of Wellin's money and prevents it from passing through his estate. Despite their father's intended substitution and the multiple pending lawsuits, they acknowledged that they have already disbursed to themselves all but the \$50,228,000 owed under the original Promissory Note. [ROA 0569; Special Conservator Hr'g Tr. 34:21-25, 35:1-4.]

The Wellin Children then attempted to tender payment of the \$50,228,000 to their father under the condition that he release his rights to the remaining \$42 million. [ROA 0758; 12/6/13 Hagerty Letter to Bennett.] Bennett returned the check as he felt it was not

² The difference in value between the \$92,000,000 proceeds and the Promissory Note was the result of the fact that Mr. Wellin, as a limited partner, had no control over the partnership and his interests were discounted for that lack of control. The decision of the Appellants to liquidate the partnership removed the lack of control, resulting in the increased value.

in his ward's best interest to accept payment under those terms thereby causing him a potential loss of \$42 million. [ROA 0760; 12/6/13 Bennett Letter to Hagery.] Since their father's refusal to drop his claim for the additional \$42 million, the Wellin Children have refused to pay the Special Conservator the minimum amount due to their father of \$50,228,000. [ROA 0576; Special Conservator Hr'g Tr. 63:22-24.]

On January 14, 2014, pursuant to S. C. Code Ann. §62-5-416(b), Bennett, as Special Conservator, sought clarification from the Probate Court as to his duty and obligation toward Wellin, his ward, with regard to this November 20, 2013 substitution. [ROA 0763; 1/14/14 Application.] Bennett felt that the Wellin Children's actions caused him to violate the Court's Order requiring that he "ensure that transfers of assets are not made without fair and adequate consideration." (*Id.*). After sending a letter to the Court explaining his concerns, the Court instructed Bennett to serve the letter upon all interested parties so a hearing could be scheduled on the same. Appellants' constant labeling of this application as *ex parte* communication is simply an attempt to cast a negative light on Bennett, even though he followed the exact procedure and direction given by both S.C. Code §62-5-416(b) and the Probate Court. [ROA 0034; 7/3/14 Order #1.] All interested parties received a copy of the communication and participated in the scheduling of the subsequent hearing.

Bennett's primary concern as Special Conservator and Special Trustee was that as a result of this transaction, Wellin transferred an asset (the Promissory Note) to the Irrevocable Trust and received no consideration. Appellants opposed the Application. On February 6, 2014, the Court held a hearing and heard arguments from all parties. [ROA 0560; Special Conservator Hr'g Tr.] During the hearing, Appellants and the Special

Conservator explained that should Appellants prevail in their interpretation of the transaction, their father would be entitled to \$50,228,000 in exchange for the Promissory Note and they would be entitled to the remainder; however, should Wellin prevail in his interpretation of the transaction, he would be entitled to approximately \$92,000,000. (*Id.*) As a result of this acknowledgement, Bennett then requested that the Probate Court take immediate protective measures to secure the undisputed \$50,228,000 and further provide Bennett with the power to pursue the additional funds to which he felt Wellin was entitled. (*Id.* 48:7-10.) During the hearing, Appellants offered to surrender the undisputed funds to the Court. (*Id.* 58:12-14.)

On February 21, 2014, the Probate Court issued an Order pursuant to Code Ann. §62-5-416(c), which, inter alia, ordered Appellants to pay the \$50,228,000 held by the Irrevocable Trust to Synovus and further appointed Synovus as Special Conservator II. [ROA 0038; 2/21/14 Order #1.] The Court's Order directed that these funds be held until all litigation or mediation concerning these assets is resolved. (*Id.*) On the same day, the Probate Court issued a second Order amending the August 15, 2013 Order appointing Special Conservator to include "the power to pursue any third party, including Petitioners, holding assets belonging to the alleged incapacitated person which were transferred by the alleged incapacitated person on or after August 15, 2013." [ROA 0022; 2/21/14 Order #2.] Only after receipt of this second Order did Bennett file a subsequent action to obtain the additional \$42 million he felt was owed to Wellin. [ROA 0161; 2/26/14 Petition to Return Assets.]

On March 3, 2014, Appellants filed a Motion to Alter or Amend the February 21, 2014 Order to avoid the payment of the funds. [ROA 0393; 3/3/14 Motion to Alter or

Amend.] The Appellants did not include the second Order granting additional powers to the Special Conservator in their Motion to Alter or Amend. (*Id.*) Bennett, as Special Conservator, opposed the Motion and filed a Memorandum In Opposition with the Court on March 11, 2014. [ROA 0408; 3/11/14 Memo in Opposition.] A hearing was held on Appellants' Motion to Alter or Amend on April 1, 2014.

More than ten (10) months after the filing of their initial Petition, but notably prior to the Probate Court's ability to rule on the Appellants' Motion to Alter or Amend, Appellants filed a Notice of Voluntary Dismissal relying on Rule 41(a)(1)(A) of the South Carolina Rules of Civil Procedure stating that "Respondent has not served an answer or a motion for summary judgment." [ROA 0770; Notice of Voluntary Dismissal.]

On July 3, 2014, the Probate Court issued the two (2) Orders that are the subject of this appeal. The first Order denied their Motion to Alter or Amend, thereby upholding the requirement that they pay a Special Conservator the minimum amount owed to their father of \$50,228,000. [ROA 0028; 7/3/14 Order #1.] The second Order relied on S.C. Code Ann. § 62-5-402(1) to continue the Probate Court's jurisdiction over Wellin's best interest, thereby holding Appellants' attempt to vacate their own proceeding ineffectual [ROA 0034; 7/3/14 Order #2.]

Although discussed in detail in Appellants' Initial Brief, all other issues and litigation surrounding the multiple disputes between Appellants, Wellin, Mrs. Wellin, and even Larry Schwartz are not relevant to the case on appeal.

ARGUMENT

The Wellin Children sought the appointment of a Conservator for their father claiming the Probate Court needed to protect his assets. [ROA 0040; Conservatorship Petition.] After securing a Special Conservator through an emergency protective proceeding and more than ten (10) months of subjecting their father to incapacity allegations, invasion of privacy, examination by designated examiners, and extensive legal fees, they then attempted to vacate their own action in an effort to avoid the Probate Court's ruling that they surrender the assets in their control. While Appellants assert they abandoned their Conservatorship action in favor of proceedings in Federal Court, it is important to note they were already in Federal Court when they chose to bring this matter to Charleston County Probate Court. Once faced with unfavorable rulings, they attempted to abandon their cause for a second bite at the apple in a different Court.

The funds in question are an asset belonging to Wellin. [ROA 0040; Conservatorship Petition.] At the February hearing, Mr. Brunson, counsel for the Wellin Children (both individually and in their various fiduciary capacities), acknowledged that \$50 million is due to Mr. Wellin. "The \$50 million is what's due on the face of the note. I don't think there's any question about that." [ROA 0577; Special Conservator Hr'g Tr. 69:25, 70:1-2.] He further acknowledged the earlier attempt to pay said funds. "It's been offered to him, and he's turned it down. So it's not like anybody has taken money out of Mr. Wellin's account and run off with it." (*Id.* 47:5-7)

Appellants consistently choose to ignore the fact that they are the ones who listed the Promissory Note as an asset in need of the Probate Court's protection, that they are the ones who unilaterally decided to liquidate the assets of Friendship Partners and

triggered a duty to pay their father either the value of the Promissory Note (\$50,228,000) or the 58% interest in Friendship Partners (approximately \$92,000,000), and that they authorized their attorney to tender a check for \$50 million so long as their father waived his right to the remaining \$42 million that they had disbursed to themselves. Instead, they are appealing the Probate Court's Order in a continued attempt to hold the funds in an effort to force their father, and now his agents, to allow them to ignore the substitution for their personal gain.

The Appellants now seek to overturn the Probate Court orders which required them to pay \$50,228,000 to a Special Conservator until pending litigation was resolved, denied their motion to alter or amend the order requiring payment of the same, and continued the Probate Court's jurisdiction over Wellin's asset despite their attempts to voluntarily dismiss their action.

As explained below, the Probate Court had an opportunity to hear from all parties on multiple occasions and had a clear understanding of the issues in this case. In reviewing this matter, the Circuit Court "must hear and determine the appeal according to the rules of law." S.C. Code Ann. § 62-1-308(d) (2009). On appeal from the final order of the probate court, the Circuit Court must apply the same standard of review an appellate court would apply on appeal. *In re Estate of Pallister*, 363 S.C. 437, 447, 611 S.E.2d 250, 256 (2005). The South Carolina Supreme Court held in *In re Howard*, 315 S.C. 356, 434 S.E.2d 254 (1993) that the Circuit Court should apply the same standard of review when it considers an appeal from the Probate Court as an appellate court would apply on appeal. Thus, if the action is at law, the circuit court should uphold the findings of the probate court if there is *any* evidence to support them; if the action is equitable, the

circuit court may make findings in accordance with its own view of the preponderance of the evidence. *In re Estate of Weeks*, 495 S.E.2d 454, 329 S.C. 251 (S.C. App., 1997) (emphasis added).

Below is a discussion of why the Probate Court's rulings are correct and proper.

I. The Appellants cannot, as individuals, raise arguments on behalf of the Trust and themselves as Trustees while simultaneously claiming not to have appeared in those capacities.

A threshold question is worthy of this Court's attention. Counsel for the Wellin Children (as individuals) also represents them as Trustees for the Irrevocable Trust. [ROA 0578; Special Conservator Hr'g Tr. 73:15-25.] However, in an effort to avoid the Probate Court's jurisdiction, they have repeatedly maintained that they are only participating in these proceedings in their individual capacities and therefore the Probate Court lacks jurisdiction over them as Trustees and therefore cannot order them to surrender the money or exercise control over the Irrevocable Trust as a whole and lacks subject matter jurisdiction. (*Id.*) This Court will see that both of those issues are again raised in this brief in that the Wellin Children claim they are not here as Trustees but are raising issues on appeal that belong only to the Irrevocable Trust. The Probate Court did not accept this distinction as counsel for the Wellin Children regularly spoke on behalf of both the Irrevocable Trust and the Wellin Children in their capacity as Trustees during these proceedings. For example, on behalf of both, counsel offered to tender the funds in question to the Probate Court. (*Id.* 58:12-14) This was repeated when counsel wrote "If Bennett would like the Trust to 'return' the Note to Wellin so that Wellin is in the same position he was in at the time Bennett was appointed, the Trustees of the Trust are happy to do so." [ROA 0411; 3/11/14 Memo in Opposition, p.4.] The record is replete with

other examples of both statements and arguments made by the Trustees and the Trust who allegedly were not before the Probate Court.

With that in mind, Respondents urge this Court to ask a very simple, but somewhat circular question. If the Wellin Children claim they are only present as individuals, can they simultaneously raise several arguments in their Appeal on behalf of the Trust and themselves as Trustees? It seems clear that the Wellin Children are here in both capacities; however, if this Court deems otherwise then a separate question must be raised. Do individuals have the right to raise arguments on behalf of another party?

Generally, an individual may not raise issues on behalf of another who is not a party to the action. See §3531.9.2 *Rights Of Others—Party has Independent Standing*, 13A Fed. Prac. & Proc. Juris. § 3531.9.2 (3d ed.). However, the Court of Appeals has held “where a party has a duty to another party and might be held to account for breach of this duty, it has standing to assert a claim on the behalf of the second party.” *Peppertree Resorts, Ltd. v. Cabana Ltd. P'ship*, 315 S.C. 36, 40, 431 S.E.2d 598, 600-01 (Ct. App. 1993).

In this case, the Wellin Children are raising arguments on behalf of the Trust, and therefore the Wellin Children are acting in their capacities as Trustees. (See, e.g., Motion to Alter or Amend Grounds 1b, 6, 7). Respondents argue that *Ex parte Cannon* was appropriately relied upon by the Probate Court to find that the Appellants as Trustees and the Trust have appeared. *Ex Parte Cannon*, 385 S.C. 643, 685 S.E.2d 814 (S.C. Ct. App. 2009). However, should this Court find that holding incorrect, Respondents argue that they do not have standing to raise those issues on appeal, as only the Trustees or Trust possess that ability.

II. The Probate Court correctly held that it had both personal and subject matter jurisdiction to order the Wellin children, individually or in their capacity as fiduciaries to their father, to release their father's \$50,228,000 to a Special Conservator.

The Probate Court held that it had jurisdiction over the parties and subject matter pursuant to S.C. Code Ann. § 62-5-102 and §62-7-20. [ROA 0038; 7/3/14 Order #1.] As a result, the Wellin Children launched a series of jurisdictional attacks beginning with an assertion that the Court lacks subject matter jurisdiction because the \$50,228,000 belonging to Wellin is currently held by a Trust (with the same three children serving as the Trustees) and is therefore not an asset of Wellin's estate. The Probate Court correctly rejected their attacks when it stated that:

"Petitioners agreed to the jurisdiction of this Court by petitioning for the appointment of a conservator, and this Court has jurisdiction over the funds belonging to Keith Wellin in the 2009 Wellin Family Trust, pursuant to S.C. Code Ann. § 62-5-402 and 62-5-408(1), as an asset of Respondent's estate, and pursuant to S.C. Code Ann. § 62-7-201, when the interests of justice otherwise would seriously be impaired." [ROA 0034; 7/3/14 Order #1.]

S.C. Code Ann. § 62-5-402 states that "after the service of 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: (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." Similarly, S.C. Code Ann. § 62-5-408 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." For these reasons, the assets of Wellin, including his interest in the Promissory Note owned by the Trust, are under the Probate Court's jurisdiction.

Appellants' next jurisdictional attack is based on the manner in which this matter came to the Court's attention - through the filing of an application of Special Conservator pursuant to S.C. Code Ann. § 62-5-416(b). The Wellin Children's continued attempts to escape the jurisdiction of the Court through removal and misapplication of the S. C. Code are well documented in the Court's file, including their argument that Bennett failed to commence a formal proceeding as required by S. C. Code § 62-5-416(a) and therefore the Court lacked the jurisdiction and authority to Order protection of the funds.

Both of these attacks fail because "a statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute." *Georgia-Carolina Bail Bonds, Inc. v. County of Aiken*, 354 S.C. 18, 22-23, 579 S.E.2d 334, 336 (S.C. Ct. App. 2003).

When a fiduciary (as opposed to an interested party) is seeking instruction from the Court, S.C. Code Ann. § 62-5-416(b) and 416(c) apply. S.C. Code Ann. §62-5-416(b) states, "Upon application to the appointing court, a conservator may request instructions concerning his fiduciary responsibility. A denial of the application by the court is not adjudication and does not preclude a formal proceeding." S.C. Code Ann. §62-5-416(c) states, "After notice and hearing as the court may direct, the court may give appropriate instructions or make *any* appropriate order." (Emphasis added.) Here, the Special Conservator filed an application under S.C. Code Ann. §62-5-416(b). As a result of a hearing on the matter, of which all parties had notice and participated, the Court issued an appropriate Order protecting the assets of Wellin under S.C. Code Ann. § 62-5-416(c).

[ROA 0022; 2/21/14 Order.] The Court clearly referred to these laws when it stated, "As a fiduciary appointed by the Court, Mr. Bennett filed an Application under S.C. Code Ann. § 62-5-416(b) requesting instruction. The Court issued an Order, pursuant to Code Ann. § 62-5-416(c), concerning the assets of Keith Wellin." (*Id.*). Discussions or application of other sections or theories Appellants offer is not necessary because the Court clearly identified the sections upon which it relied.

Similarly, a discussion of substantive relief is unnecessary because this was not substantive relief against the Wellin Children or the Irrevocable Trust. The money at issue is not their money. While it might feel detrimental to them because loss of the funds will deprive them of the legal leverage they sought against their father, this was a protective proceeding and a protective order, both appropriate under the circumstances.

Next, the Appellants argue that "Even if the probate court somehow had subject matter jurisdiction to grant the relief requested, the court still lacked personal jurisdiction over the Irrevocable Trust to grant this relief." [App. Brief, p. 23.] They base their argument on the fact that the Irrevocable Trust was not made a party to the action. It is important to understand that the Wellin Children conceded in Court that their Petition subjects them, individually, to the personal jurisdiction of this Court. [ROA 0570; Special Conservator Hr'g Tr. 39:23-25.] However, Appellants developed a theory at the close of the February hearing that "the trust is not even a party to this proceeding. The owner of the asset is not here." (*Id.* 66:16-19). They further argued, "The court cannot order a nonparty to do - to pay \$50 million over to somebody else." (*Id.* 73:20-22). However, in discussing the Promissory Note, counsel for the Wellin Children made arguments

regarding the substitution transaction, which undisputedly involved trust assets and did not involve them individually. (*Id.* 32:5-10, 33:11-23).

The trust holding the sum of \$50,228,000 is the Irrevocable Trust of which the Appellants stated in court "the three children are the three Trustees who were in place at the time." [ROA 0568; Special Conservator Hr'g Tr. 32:9-10.] These are the same three Wellin Children, the same three Trustees who have already disbursed the remaining assets to themselves individually. [ROA 0569; Special Conservator Hr'g Tr. 34:21-25, 35:1-4.] The Court recognized the same when it stated, "Petitioners are also Trustees of this Trust and offered to surrender the \$50,228,000 to the Court in satisfaction of the Note, but this Court does not hold funds and defers to the Federal Court litigation concerning the ultimate disposition of the \$50,228,000 and the Promissory Note. The Petitioners have appeared and raised issues in this Court through their counsel as set forth in the transcripts from the hearings and the record." [ROA 0028; 7/3/14 Order #1.] Interestingly enough, this Court is placed in the same position as the Probate Court in that the Appellants' brief, filed by Appellants as individuals, raises several issues on behalf of the Trust and Trustees, including lack of personal jurisdiction and lack of due process.

A similar effort to appear voluntarily in one capacity while hiding behind a different fiduciary title to avoid negative consequences has been addressed in the Matter of *Ex Parte Cannon*. See *Ex Parte Cannon*, 385 S.C. 643, 685 S.E.2d 814 (S.C. Ct. App. 2009). This case was properly reviewed and cited by the Court in making its decision. Appellants' attempts to distinguish this case based on the assertion that this was a separate matter have no merit. Every action in the Probate Court has been brought under

the same case number and in relation to the same matter - the protection of Keith S. Wellin.

Cannon argued that the circuit court lacked personal jurisdiction over him because he was never made a party to any proceedings in his capacity as trustee, was never served with a rule, and was only before the circuit court in his capacity as personal representative. The Court disagreed, stating: "Although a court commonly obtains personal jurisdiction by the service of the summons and complaint, it may also obtain personal jurisdiction if the defendant makes a voluntary appearance." *Ex Parte Cannon* (citing *Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP*, 373 S.C. 331, 337, 644 S.E.2d 793, 796 (S.C. Ct. App. 2007)). Just like Cannon, the Wellin Children initiated these proceedings as Petitioners and have voluntarily appeared as Trustees in other matters before this Court. They clearly had notice of all proceedings because their counsel, who represents them in all of their capacities, appeared and argued on their behalf. Because of their actions, the Appellants have waived any defects, to the extent any could exist, that might have occurred. See *Stickland v. Consol. Energy Prods. Co.*, 274 S.C. 554, 555, 265 S.E.2d 682, 683 (S.C. 1980) ("A general appearance constitutes a voluntary submission to the jurisdiction of the court and waives any defects and irregularities in the service of process."); *H.S. Chisholm, Inc. v. Klinger*, 229 S.C. 8, 16, 91 S.E.2d 538, 542 (S.C. 1956).

The Wellin Children seek to have this Court rely on *In re Ashton* for its holding that "[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 or process, or an appearance." *In re Ashton*, 266 S.W.3d 602, 604 (Tex. App. 2008). While no South Carolina court has

directly addressed the issue presented here, it would be an error to rely on this case as it can be easily distinguished. *In re Ashton* was a divorce proceeding wherein the Plaintiff (Wife) sought relief against the Defendant's (Husband) Trust. This case is inapplicable in the Wellin matter for several reasons. First, the Wellin Children were the Petitioners in this matter, alleging that their father's assets were in need of protection and including this very asset on their Inventory and Appraisement. By petitioning this court, they submitted to its personal jurisdiction. They were not the Defendants in a marital dispute, nor has substantive relief been ordered against a Trust holding their personal assets, as they have acknowledged these funds belong to their father. Secondly, the Probate Code affords the Probate Court great latitude in protecting the assets of an alleged incapacitated party; therefore application of a family court case is not appropriate.

Ex parte Cannon was appropriately relied on by the Probate Court; but should this court seek guidance from cases outside of South Carolina regarding individuals who are also trustees of property that belong to the alleged incapacitated, there are more relevant decisions than even *In re Ashton*. Courts in both Florida and Tennessee have holdings relevant to the Probate Code and the decision before this court. Those courts held that when parties appear and participate in an action, they waive any right to challenge failure to sue them as trustees. *In re Conservatorship of Groves*, 109 S.W.3d 317, 350 (Tenn. Ct. App. 2003); *In re Guardianship of Brown*, 611 So. 2d 1342 (Fla. Dist. Ct. App. 1993) ("Wallace petitioned the court to be appointed guardian for the incompetent ward Delphene Wengatz Brown. In doing so, she clearly submitted herself individually to the court's jurisdiction... Thus, all interested parties were properly before the court, so that it was not necessary to name or serve Wallace in her capacity as trustee or depository.")

(internal citations omitted)); *Finkelstein v. Se. Bank, N.A.*, 490 So. 2d 976, 979 (Fla. Dist. Ct. App. 1986) (“They 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. Furthermore, the depository itself did not need to be named in the suit, where all parties interested in the trust res were before the court.”). Florida has further held that when an individual petitions to be appointed guardian for an incompetent, the individual submits to the court’s jurisdiction, and it is not necessary to name or serve that individual in their capacity as a trustee. *In re Guardianship of Brown*, 611 So. 2d 1342 (Fla. Dist. Ct. App. 1993). Conservatorship determinations vest jurisdiction over the person’s property in the trial court and it may, in appropriate circumstances, exercise control over the incapacitated person’s property indirectly through its power over persons whom it has jurisdiction. *In re Conservatorship of Groves*, 109 S.W.3d at 349.

When denying Appellants’ Motion to Alter or Amend, the Probate Court correctly explained that *In re Ashton* is “merely persuasive” and “this Court finds more persuasive *In re Conservatorship of Groves*, 109 S.W.3d 317, 350 (Tenn. Ct. App. 2003) (holding that where parties appear and participate in an action, they waive any right to challenge failure to sue them as trustees) and *In re Guardianship of Brown*, 611 So. 2d 1342 (Fla. Dist. Ct. App. 1993) (holding that it is not necessary to serve an individual who petitioned for appointment as guardian in their capacity as trustee).” [ROA 0028; 7/3/14 Order #1.] The Court further explained that “these cases are in accord with this Court’s application of *In re Estate of Ahem*, 359 Ill. App. 3d 805, 812, 835 N.E.2d 95, 101 (2005)

("However, we find that some of the arguments Robert made in objecting to the petition for guardianship and in contesting the award of fees to Dutton indicate that he did in fact appear on behalf of the Trust and thus subjected it to the trial court's personal jurisdiction.".)" (*Id.*)

As discussed at length above, the Wellin Children (individually) brought the Petition for Appointment of Conservator and specifically listed the Promissory Note that the Wellin Children (as Trustees) issued to Wellin, as an asset that must be protected. [ROA 0050; Conservatorship Petition.] Now, faced with the threat of surrendering the funds to a Special Conservator, the Wellin Children have attempted to invoke their fiduciary title to pretend they are not subject to this Court's jurisdiction because they are not named in their fiduciary capacity as a party.

Lastly, Appellants attempt to use Bennett's later decision to list the Wellin Children in both capacities in a subsequent filing as his sudden recognition of the distinction between the two. In reality, this should indicate nothing to the Court other than Bennett's attempt to reduce any future attempts by the children to hide behind their fiduciary titles while ignoring their fiduciary duties to their father.

After application of the appropriate S.C. Code sections, the Court issued an Order based on the fundamental premise that the Wellin Children owe their father at least \$50,228,000 that should be protected. "This Court does not find persuasive Petitioners' argument that the Promissory Note, which this Court ordered to be also held by Synovus Trust Company, N.A., is not due until 2021, and that therefore no funds are due Respondent. Regardless of the validity or value of the substitution, this Court finds that, in any event, Petitioner is currently owed no

less than that which would be due under the Note if it were still outstanding.” [ROA 0028; 7/3/14 Order #1.]

Whether or not Wellin is owed the additional \$42 million was not before the Court. [ROA 0022_; 2/21/14 Order.] Hiding the funds in a trust the Appellants control does not rob the Probate Court, or this one, of subject matter jurisdiction over the funds. Similarly, hiding behind their fiduciary titles while simultaneously appearing in Court does not create lack of personal jurisdiction.

Appellants hope to cloud the issue between the two sums by directing this Court’s attention toward a useless discussion of S.C. Code Ann. §62-5-402, continuing allegations of ex parte communications where they do not exist, and making allegations that Bennett’s later attempts to claim the remaining \$42 million by a formal action were somehow improper. Respondents ask this Court to ignore these distractions and uphold the Probate Court Order on the ground that it had the jurisdiction and authority to order the relief requested pursuant to an informal application under S.C. Code Ann. § 62-5-416(b).

III. The Probate Court correctly found that Edward Bennett, as Special Conservator, had standing to seek the Court’s protection on Keith Wellin’s behalf.

The Wellin Children argue that Bennett lacked standing to pursue any “claims” on Wellin’s behalf. This is incorrect for several reasons.

First, Bennett did not file a claim. Appellants acknowledge as much when they argued, “Bennett has not filed a summons or complaint otherwise asserted any type of claim against the Trust.” [ROA 0345; 3/11/14 Memo in Opposition, p.8.] As discussed above, Bennett filed an application for the Court’s guidance pursuant to S. C. Code Ann.

§62-5-416(b). [ROA 0763; 1/14/14 Application.] As a result of that application and the hearing on the same, the Court determined that the Wellin Children were holding assets included in their petition that belonged to the protected person. [ROA 0001; 8/15/13 Order.] S. C. Code Ann. § 62-5-416(c) allows such an Order to be entered.

Secondly, to the extent the Court wishes to entertain a discussion about whether or not Bennett had standing to file an application and bring this matter to the Probate Court's attention, Respondents would refer the Court to the original Order appointing Bennett as Special Conservator – with their consent. [ROA 0001; 8/15/13 Order.] The Order is clear that Bennett has a duty to “ensure that transfers of assets are not made without fair and adequate consideration.” (*Id.*). Common sense dictates that obligating a fiduciary with a duty and then denying him the basic powers needed to perform that duty is both practically and legally absurd. Bennett acted well within his powers when he sought guidance from the Court pursuant to S.C. Code Ann. § 62-5-416(b). Furthermore, since the Appellants attempted to tender the funds in dispute subject to a release, Bennett had standing to request that the Court immediately protect those funds until litigation was complete.

As to the later claim Bennett made with respect to the additional \$42 million which is not part of this appeal, the Probate Court clarified its intentions to allow him to do so by issuing a separate Order granting Bennett as Special Conservator the power to pursue legal action on behalf of the alleged incapacitated. [ROA 0034; /14 Order #2.] It is important to reiterate that absent the right of a fiduciary to take the steps necessary to protect the alleged incapacitated, the duty to do so is of little meaning. No doubt had Mrs.

Wellin been the party holding the funds, the Appellants would have had quite a different opinion on the Special Conservator's standing to remedy the situation.

IV. The Probate Court correctly found that South Carolina Rule of Civil Procedure 12(b)(8) did not require dismissal of Bennett's request for relief.

Appellants argue that the Probate Court erred in finding that South Carolina Rule of Civil Procedure 12(b)(8) did not require dismissal of Bennett's request for relief. This was not an error on behalf of the Court because, despite Appellants' allegations to the contrary, at the time the claim was filed, there was no other action pending related to the Wellin Children's refusal to surrender these funds to Bennett.

During the hearing before the Court in February 2014, Appellants acknowledged that there was no such action before the Federal Court or any other court. "That action does not currently contain a claim relating to this substitution of assets . . ." [ROA 0566; Special Conservator Hr'g Tr. 25:2-4.] In addition, no one contested the fact that Bennett as Special Conservator was not a party to any of the current litigation in Federal Court when these Orders were issued. [ROA 0567; Special Conservator Hr'g Tr. 28:13-20.] The fact that Bennett later attempted to fulfill his duties by seeking the additional \$42 million for his ward and his separate action was dismissed is not before this Court now because it was not before the Probate Court when these decisions were rendered.

If this Court chooses to review the other litigation in place at the time of the Probate Court's ruling, the fact remains that exclusive jurisdiction over Wellin's assets vested in the Probate Court upon the Wellin Children's filing of the Petition for Appointment of Conservator. S.C. Code Ann. §62-1-302(2)(i) (1987) affords the Probate

Court exclusive jurisdiction over *all* (emphasis added) subject matter related to protective proceedings and guardianship proceedings under Article 5.

For these reasons, the Probate Court correctly held that “dismissal pursuant to Rule 12(b)(8) is not appropriate” by reiterating its “exclusive jurisdiction to issue a protective order until these proceedings are terminated pursuant to S.C. Code Ann. § 62-5-402, 62-5-408(1) and 62-5-430.” [ROA 0028; 7/3/14 Order #1.] The Probate Court was the only court responsible for instructing Bennett as to protecting the assets of Wellin. For these reasons, the Court’s Order should be upheld.

V. The Probate Court Order requiring protection of \$50 million did not violate principles of due process.

Due process is violated when a party is denied fundamental fairness. *City of Spartanburg v. Parris*, 251 S.C. 187, 191, 161 S.E.2d 228, 230 (S.C. 1968). No violation has occurred in this matter, at least as it applies to the Appellants. It was the Appellants who petitioned the Probate Court and requested an emergency protective hearing to restrain their father from transferring his wealth outside of their control. As a result, it was Wellin who was subjected to allegations of incapacity and an emergency hearing without medical examination. Appellants made themselves subject to the Probate Court’s jurisdiction when they decided to challenge his mental capacity to make his own decisions. [ROA 0040; Conservatorship Petition.]

The Special Conservator, Bennett, made his concerns regarding the substitution transaction discussed above known to the parties by his January 14, 2014 letter, which the Court treated as an application under S. C. Code §62-5-416(a) and directed that he serve upon all interested parties. [ROA 0763; 1/14/14 Application.] After said service, the

Appellants actively participated in the scheduling of a hearing on the application. Prior to the hearing, the Petitioners filed a Motion to Dismiss, wherein they raised the same issues they now assert they did not have knowledge of. [ROA 0181; 2/3/14 Motion to Dismiss.] Lastly, counsel for the Special Conservator included in her Notice of Appearance a clarification of the issues to be addressed at the hearing and properly responded to the Appellants' Motion to Dismiss. [ROA 0351; App. Brief, p.14.]

Appellants further claim that they lacked knowledge of the issues to be addressed or that an oral amendment had been made that increased the scope of the hearing. This assertion is factually unfounded. The only oral amendment at the hearing was a reduction in the scope of the proceeding based on an agreement that a separate Summons and Petition may be required to address the additional \$42 million in dispute. [ROA 0393; 3/3/14 Motion to Alter or Amend, Footnote 1.]

Lastly, Appellants continue to ignore that the Court made the decision to protect Wellin's funds by relying on the fact that the Appellants (as Trustees) offered to pay the \$50,228,000 into the Court during the hearing and that counsel for the Trust Protector represented to the Court that he did not know where the \$50,228,000 was located. [ROA 0001; 7/3/14 Order #1.] Fundamental fairness is not violated when a party has proper notice, participates in the proceedings, and then makes an offer to the Court upon which that it relies. For these reasons, the Court was correct in finding that there have been no due process violations suffered by the Wellin Children.

VI. The Probate Court's application of equitable powers was appropriate.

Wellin was physically disabled after multiple strokes and tongue cancer that made communication incredibly difficult. Although Wellin was never adjudicated incompetent,

he sought the Probate Court's continued protection from the very children who alleged that he was in need of a Conservator. The Probate Court appropriately recognized this injustice when it stated, "As a Court of equity, this Court should not allow the Petitioners, who brought this very action under the guise of protecting their father, to now manipulate the legal process to prevent this Court from providing the protection they sought." [ROA 0001; 7/3/14 Order #1.]

The Probate Court can and should rely on the principles of equity to help protect Wellin's assets. "Persons of unsound mind, like infants, are under the special protection of the courts of with respect to their persons, property, and legal transactions." *Shepard v. First Am. Mortgage Co.*, 289 S.C. 516, 518, 347 S.E.2d 118, 119 (Ct. App. 1986); *Gaddy v. Douglass*, 359 S.C. 329, 333, 597 S.E.2d 12, 14 (Ct. App. 2004) (recognizing an action to set aside a power of attorney and an instrument revoking a power of attorney on the ground of a lack of mental capacity sounds in equity). "Equity will always seek to provide a remedy where a right has been violated." *State ex rel. Daniel v. Strong*, 185 S.C. 27, 192 S.E. 671, 681 (S.C. 1937). Courts also "have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible." *Ex Parte Dibble*, 279 S.C. 592, 310 S.E.2d 440, 442 (S.C. Ct. App. 1983).

The Wellin Children are holding \$50 million they have admitted belongs to their father pursuant to the Promissory Note he executed. What is missing from these proceedings and their brief is a single valid reason why they should continue to hold these funds. To permit the Appellants to hold those funds owed to their father would be a breach of the equitable duties and protective powers owed to Wellin. The Wellin Children have breached their father's trust by refusing to turn the proceeds over to him

while admitting the minimum amount owed (\$50,228,000) is not in dispute. ([ROA 0574; Special Conservator Hr'g Tr. 55:23-25, 56:1-4.] The Wellin Children cannot in good conscience be allowed to retain the undisputed funds, and the Probate Court was correct in exerting its equitable powers to ensure that Wellin's assets are protected.

VII. The Probate Court's Findings of Fact are supported by the evidence.

"For a proceeding in the nature of an action at law, the circuit court and the appellate court may not disturb the probate court's findings of fact unless a review of the record discloses no evidence supports them." *Neely v. Thomasson*, 365 S.C. 345, 349-50, 618 S.E.2d 884, 886 (2005).

The Wellin Children seek to have this Court overturn three findings of fact. First, Appellants take issue with the use of the term "undisputed" as used in the Order to describe the funds that Appellants' offered to Wellin. Despite the position taken at the hearing whereby counsel stated the amount was owed, they have now changed their position to claim that it was a prepayment of the Promissory Note that was not payable until 2021. "It's been offered to him, and he's turned it down. So it's not like anybody has taken money out of Mr. Wellin's account and run off with it." [ROA 0572; Special Conservator Hr'g Tr. 47:5-7.] Mr. Brunson further stated, "Your Honor, I have a proposal. We will pay the \$50 million into this probate court." [ROA 0575; Special Conservator Hr'g Tr. 58:12-14.] In addition, the resolution of the individual Trustees of the Irrevocable Trust, composed entirely of the Appellants, which resolved to pay the Promissory Note currently to Mr. Wellin, was presented to the Probate Court and provided an alternative basis on which the Probate Court could have determined that the

funds were undisputed. [ROA 0496; 4/10/14 Supplemental Memo Opposing Reconsideration, Ex. C.]

Next, Appellants contend the Probate Court erred to the "extent that it acknowledged the validity of the purported Swap Transaction." [App. Brief, p. 36.] When Mr. Wellin made that swap, the Special Conservator had a duty to ensure that adequate consideration was received. [ROA 0001; 8/15/13 Order.] His letter to the court, subsequent brief, and other supporting documents provided prior to the hearing all substantiate a finding that the Special Conservator reviewed the relevant documents in ensuring he was performing his duty to Wellin. [ROA 00763; 1/14/14 Application.] The Wellin Children and the Court have both been provided with all documents related to the substitution in question prior to the hearing. These documents provided an ample basis on which the Probate Court could have made its determination as to the validity of the substitution by Wellin.

Lastly, the Appellants contend the Court erred in finding that it has "jurisdiction over the assets belonging to Keith S. Wellin, including the Promissory Note or any asset for which it was substituted." [ROA 0022; 2/21/14 Order #2.] As discussed above, the finding is entirely appropriate because the Probate Court does have said jurisdiction and was granted such by the Appellants' own petition.

For the reasons stated above, Respondents submit that the Court's findings are reasonably supported by the evidence and should not be overturned.

VIII. The Probate Court correctly found the voluntary dismissal ineffective in terminating these proceedings.

Appellants contend that they have the right to voluntarily dismiss their own petition thereby removing Keith S. Wellin and his assets from the Probate Court's jurisdiction. Respondents vehemently disagree and ask the Court to consider dismissing their Appeal because they are no longer proper parties to this proceeding.

Before the Probate Court could formally rule on the Appellants' Motion to Alter or Amend, Appellants attempted to escape the Court's jurisdiction by filing a Notice of Voluntary Dismissal by relying on Rule 41(a)(1)(A) of the South Carolina Rules of Civil Procedure and stating that "Respondent has not served an answer or a motion for summary judgment." [ROA 0770; Notice of Voluntary Dismissal.] The Probate Court held that "dismissal pursuant to Rule 12(b)(8) is not appropriate" by reiterating its "exclusive jurisdiction to issue a protective order until these proceedings are terminated pursuant to S.C. Code Ann. §§ 62-5-402, 62-5-408(1) and 62-5-430." [ROA 0028; 7/3/14 Order #1.] The Court further addressed this matter when it stated that "in light of the Petitioners attempted dismissal of the conservatorship action (see separate Order dated July 3, 2014 denying dismissal and incorporating by reference that Order), the Court is convinced that the assets of Keith Wellin need protection." (*Id.*)

Rule 41(a)(1)(A) of the South Carolina Rules of Civil Procedure states that "an action may be dismissed by the plaintiff without order of court . . . by filing and serving a notice of dismissal at any time before service by the adverse party of an answer or motion for summary judgment, whichever first occurs." Thus, in a typical case, plaintiffs can use a Notice of Voluntary Dismissal "as a matter of right" without any leave of court to dismiss a case in all respects if the defendant has not yet filed either an answer or motion

for summary judgment. *Burry & Son Homebuilders, Inc. v. Ford*, 310 S.C. 529, 531 (1992). As such, Appellants assert that because Respondent has neither filed an answer to their petition nor moved for summary judgment, their Notice of Voluntary Dismissal entitles them to dismissal of the entirety of this conservatorship proceeding.

While this may be true in other proceedings, the provisions of Rule 41(a)(1)(A) do not apply to a conservatorship determination, and a Notice of Voluntary Dismissal is not an effective means to terminate the proceedings as to all parties and divest the Court of jurisdiction to appoint a conservator. Rule 81 of South Carolina Rules of Civil Procedure states that the Rules only apply in the Probate Court "insofar as practicable to the extent they are not inconsistent with the statutes and rules governing" proceedings in the Probate Court. Rule 81, S.C.R.C.P.; see *In re Timmerman*, 331 S.C. 455, 460 (Ct. App. 1998) ("The South Carolina Rules of Civil Procedure are applicable in the probate court to the extent they are not inconsistent with the Probate Code or probate court rules."). A prerequisite to the use of Rule 41(a)(1)(A) to dismiss a case is the requirement within the proceeding that an adverse party file an answer or have the ability to move for summary judgment. See *ISC Holding AG v. Nobel Biocare Fin. AG*, 688 F.3d 98, 116 (2d Cir. 2012) (finding that a petitioner could not use a Notice of Voluntary Dismissal to dismiss a petition to compel arbitration where respondent could not have filed an answer and summary judgment was unavailable). Within a conservatorship proceeding, there is simply no requirement for a respondent to file an answer and no ability to file a motion for summary judgment. The exclusive procedure for the Probate Court to appoint a conservator for an allegedly incapacitated person is set forth in S.C. Code Ann. § 62-5-407, which states:

Upon the filing of a summons and petition for appointment of a conservator or other protective order for reasons other than minority, and after service of the summons and the petition, the court shall set a date for hearing. Unless the person to be protected has counsel of his own choice, the court must appoint a lawyer to represent him who then has the powers and duties of a guardian ad litem. If the protected person already has representation by an attorney that attorney shall act as his guardian ad litem. If the alleged disability is mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, or chronic intoxication, the court shall direct that the person to be protected be examined by one or more physicians designated by the court, preferably physicians who are not connected with any institution which the person is a patient or is detained.

Nowhere within the above section does it state that an allegedly incapacitated person is required to file an answer to the petition. Forcing an allegedly incapacitated person to file an answer would be contrary to the primary purpose of a conservatorship proceeding, that is to protect the interests of such a person. Rather than requiring an answer, the statute directs the Court to set a hearing after service of the summons and petition. S.C. Code Ann. § 62-5-407(b). In fact, after Appellants filed their petition on July 19, 2013, the Court followed the above procedure and set a preliminary hearing on July 26, 2013.

Similarly, there is no summary judgment procedure available in a conservatorship proceeding. The statutory procedures listed above only allow the Court to make a conservatorship determination after it has appointed designated examiners and a full hearing is held wherein the parties are allowed to call witnesses and present all evidence regarding the capacity of the allegedly incapacitated person. S.C. Code Ann. §62-5-407. By conducting a full competency hearing and examining all the evidence before it regarding the person's capacity, the Court is able to "exercise its discretion with the best

interests of the allegedly incapacitated person in mind." *In re: Campbell*, 379 S.C. 593, 600 (2008).

The above procedures do not allow the Court to make any final determination about a respondent's competency until after a hearing is held. The allowance of summary judgment in a conservatorship proceeding would be entirely inconsistent with these procedures. Therefore, because it is inconsistent with the statute and rules governing conservatorship proceedings, Appellants cannot unilaterally terminate this proceeding and divest the Court of jurisdiction by filing a Notice of Voluntary Dismissal under Rule 41(a)(1)(A) of the South Carolina Rules of Civil Procedure. The Court continues to have jurisdiction over the Respondent and his estate, even in their absence.

The filing of the Notice of Voluntary Dismissal is yet another attempt by Appellants to evade the Court's February 21, 2014 order requiring them to pay "50,228,000.00 to Synovus Trust Company, as Special Conservator II, within ten days of the order." This order was put in place by the Probate Court for the protection of funds owed to Wellin from the liquidation of Friendship Partners, LP until the litigation pending in federal court is resolved. [ROA 0022; 2/21/14 Order.]

Finally, Respondents assert that because Appellants filed to vacate, they have abandoned any reconsideration of this order by withdrawing from these proceedings. Even if all parties were dismissed from this conservatorship proceeding, Appellants would still be subject to this order, and the Court could continue to exercise its jurisdiction to compel Appellants to pay the \$50,228,000.00 to Synovus. The Probate Code states, "a court that has appointed a guardian or issued a protective order consistent with this article has exclusive and continuing jurisdiction over the proceeding until it is

terminated by the court or the appointment or order expires by its own terms." S.C. Code Ann. § 62-5-709. The order appointing Synovus as Special Conservator II states that the \$50,228,000.00 is to be held by Synovus "until the litigation or mediation concerning these assets is resolved." [ROA 0022; 2/21/14 Order.] Thus, the order does not expire by its own terms until the pending litigation in federal court is resolved. As such, Petitioners are not allowed to circumvent this order by withdrawing from these proceedings or attempting to have the entire proceeding dismissed. Instead, they are simply no longer a party thereto and lose their rights to this appeal.

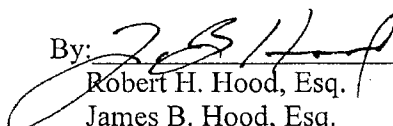
CONCLUSION

The Appellants sought the appointment of a Conservator in Probate Court to protect Wellin's assets. The Probate Court offered endless opportunity for all parties to be heard and ultimately felt that Wellin was indeed in need of protection as a result of the Wellin Children's own conduct. What Appellants were not anticipating was the Court's realization that it was not Mrs. Wellin posing the risk to his assets or his wellbeing, but the Petitioners themselves. Now, in an effort to escape the Probate Court's jurisdiction, Appellants sought to dismiss the conservatorship proceeding, and now pursue this appeal contesting that same Court's authority to require them to surrender the \$50,228,000 they are holding.

The Probate Court, after almost a year of attention to this file, summed it up when it stated, "In summary, Petitioners have subjected their father to significant legal and emotional expense and exposed him to psychological examination against his will under the guise of concern for his need for protection. Petitioners are abandoning their

request for a conservator for their father after one Court-appointed examiner has determined their father needs a conservator. This Court found that Petitioners should return assets for safekeeping until the conclusion of the litigation pending in Federal Court. Petitioners are attempting to abuse the protective process of this Court.” [ROA 0028; 7/3/14 Order #1.] It is absolutely devastating to Respondents that Keith S. Wellin passed away during the pendency of this appeal, but it only strengthens the resolve to see that his children are not rewarded for their complete disrespect for his wishes and his wealth.

For all the reasons above Respondents ask that this Court uphold the ruling of the Probate Court and require the Wellin Children to surrender the assets to the Conservatorship so that they might be protected until all other litigation is resolved.

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R. Bennett, as Special Conservator

for Keith S. Wellin

Charleston, South Carolina

July 27, 2015

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, Probate Court Judge

Probate Case No. 2013-GC-10-1029

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

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

Appellants,

v.

Keith S. Wellin

Respondent.

PROOF OF SERVICE

I hereby certify that I have served the **RESPONDENTS' FINAL BRIEF** on the below
counsel of record via email July 27, 2015.

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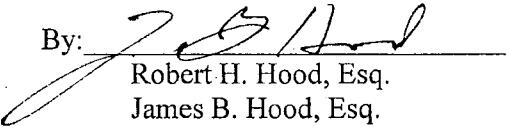
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THE STATE OF SOUTH CAROLINA
In The Court of Common Pleas
Ninth Judicial Circuit
County of Charleston

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JULIE J. ARMSTRONG
CLERK OF COURT

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RESPONDENTS' SUR-REPLY IN OPPOSITION TO REPLY BRIEF OF APPELLANTS

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Respondent seeks to file this Sur-Reply in order to respond to the new legal issues of mootness raised by Appellants in their Reply Brief.

I. APPELLANTS DID NOT INCLUDE THE ISSUE OF MOOTNESS IN THEIR ORIGINAL BRIEF AND SHOULD BE BARRED FROM RAISING IT IN THEIR REPLY BRIEF.

The Appellants failed to include the issue of mootness in their initial Brief, despite having an extension to make any amendments to the Brief after the death of the Respondent. The Appellants filed and served their initial Brief on September 12, 2014, and the named Respondent, Keith S. Wellin, passed away two days later. The attorneys for the Respondent offered the Appellants fifteen days to make any necessary amendments caused by the death of Keith S. Wellin to their initial Brief. After fifteen days, Appellants informed the attorneys for the Respondent of their decision to refrain from amending their initial Brief.

By declining to amend their initial brief after an extension offered to do so, Appellants deprived Respondent's attorneys of the opportunity to address the issue in their Brief. Appellants should be barred from raising any new issues in their Reply Brief, and the Court should ignore their arguments related to mootness.

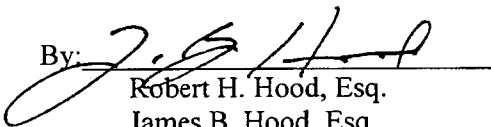
II. IF THE COURT CHOOSES TO ADDRESS THE NEWLY RAISED ISSUE, THE CONSERVATORSHIP PROCEEDING SHOULD NOT BE CONSIDERED MOOT.

An appellate court can take jurisdiction, despite mootness, under three general exceptions. The exception applicable here arises when "a decision by the trial court may affect future events or have collateral consequences for the parties." *Curtis v. State*, 345 S.C. 557, 549 S.E.2d 591, 596 (2001). At Respondent's death, the Conservatorship should have been holding the funds at issue as ordered by the Charleston County Probate Court. The death of the Respondent should

not deny him or his estate the right to hold property that is rightfully his or allow the Appellants to continue to hold his funds as a strategy in ongoing litigation. Regardless of his death and the appointment of Mrs. Wendy C. H. Wellin as Special Administrator of his Estate, ownership of the funds at issue must be established. If the Court fails to determine the ownership of the funds as part of this action, collateral consequences will arise for the parties. The Special Conservator will be deprived of his right to hold the funds and the Estate denied the ability to earn interest on those funds. Meanwhile, the Estate will need to expend more time and costs to bring an identical action in the exact same court. This issue is properly before the Court and should be decided despite the argument that Respondent's death makes this issue moot.

III. CONCLUSION

For the reasons stated above, as well as those set forth in Respondent's prior submissions to the Court, Appellants appeal should be denied.

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Charleston, South Carolina
July 27, 2015

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

APPEAL FROM CHARLESTON COUNTY PROBATE COURT

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

Appellants,

v.

Keith S. Wellin

Respondent.

PROOF OF SERVICE

I hereby certify that I have served the **RESPONDENTS' SUR-REPLY IN
OPPOSITION TO REPLY BRIEF OF APPELLANTS** on the below counsel of record via
email July 27, 2015.

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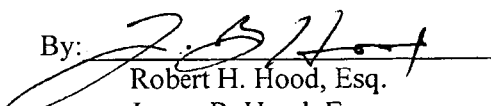
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	Appeal from the Probate Court for
	)	Charleston County
	)	
	)	C/A No. 2014-CP-10-04336
Peter J. Wellin, Cynthia W. Plum and Marjorie	)	
W. King,	)	
	)	
	)	ORDER AFFIRMING PROBATE
	)	COURT
Versus	)	
	)	
Keith S. Wellin,	)	
	)	
	)	
	)	
	)	

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

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

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

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

issue the protective order;

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

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

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

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

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

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

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

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

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

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

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

Pertinent Procedural History and Factual Background

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

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

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

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

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

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

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

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

Discussion

Standard of Review

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

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

Threshold Issue of Mootness

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

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

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

The Probate Code, S.C. Code Ann. § 62-5-402, grants exclusive jurisdiction to the Probate Court "to determine the need for a conservator or other protective order until the proceedings are terminated;" and "to determine how the estate of the protected person which is subject to the laws of this State must be managed, expended, or distributed to or for the use of the protected person or any of his dependents." As found by the Probate Court, the Petitioners/Appellants commenced this action and invoked the exclusive jurisdiction of the Probate Court to determine the need for a conservator for their father and to determine how his estate should be managed. The Petitioners/Appellants argue that the Probate Court did not have jurisdiction over the \$50,228,000 proceeds of their liquidation of the Friendship Partnership because it was not an asset belonging to Mr. Wellin. However, that argument fails in view of the facts that the Petitioners expressly identified the Promissory Note as an estate asset of which they sought protection, and that irrespective of the ongoing dispute and litigation over the over \$42 million, the Petitioners acknowledged in open court that the \$50,228,000 belongs to Mr. Wellin (and now his estate). The very fact that the Petitioners offered to post that amount with the Probate Court belies their argument that the Probate Court does not have jurisdiction to order the same funds held for a Special Conservator.

I affirm and adopt the holding of the Probate Court that: "Petitioners agreed to the jurisdiction of this Court by petitioning for the appointment of a conservator, and this Court has jurisdiction over the funds belonging to Keith Wellin in the 2009 Wellin Family Trust, pursuant to S.C. Code Ann. § 62-5-402 and 62-5-408(1), as an asset of Respondent's estate, and pursuant to S.C. Code Ann. § 62-7-201, when the interests of justice otherwise would seriously be impaired."

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

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

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

While Petitioners cannot contest that the Probate Court has personal jurisdiction over them by virtue of the fact that they commenced the conservatorship action, they argue that the Probate Court lacks jurisdiction over them to direct them to turn over the

\$50,228,000 which they hold in their fiduciary capacity as Trustees of the Irrevocable Trust that technically holds the funds. However, the record shows that the Petitioners have not maintained their separate identities throughout the Probate Court proceedings. They are represented, in both their personal and fiduciary capacities, by the same counsel and they have made arguments in their capacity as both individuals and Trustees. In fact, as noted above, they offered to surrender the funds to the Probate Court in satisfaction of the Note³.

Based on the precedent in *Ex Parte Cannon*, 385 S.C. 643, 685 S.E.2d 814 (Ct. App. 2009), and the persuasive guidance of *In re Estate of Ahern*, 359 Ill. App. 805, 835 N.E.2d 95 (2005), *In re Conservatorship of Groves*, 109 S.W.3d 317, 350 (Tenn. Ct. App. 2003), and *In re Guardianship of Brown*, 611 So. 2d 1342 (Fla. Dist. Ct. App. 1993), I agree with the Probate Court's conclusion that the Petitioners have waived any objection by voluntarily submitting to the personal jurisdiction of the Probate Court in both their individual and fiduciary capacities. I further agree with the Probate Court that the Petitioners' reliance on *In re Ashton*, 266 S.W.3d 602, 604 (Tex. App. 2008), is misplaced because it is inconsistent with our Court of Appeals' decision in *Cannon* based on the facts that the Petitioners initiated this protective proceeding in Probate Court and they took affirmative positions and made proffers in their fiduciary capacities. I affirm and adopt the holding of the Probate Court that "the Wellin Children have voluntarily appeared as Trustees ...[and]... this Court has jurisdiction over them in all capacities as it relates to the assets of the protected person."

4. Standing -- The Special Conservator had standing to seek instruction and

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

direction from the Probate Court regarding the \$50 million estate asset.

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

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

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

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

The core of due process is the right to notice and a meaningful opportunity to be heard at a meaningful time and in a meaningful manner. *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985); *LaChance v. Erickson*, 522 U.S. 262, 266 (1998); *S.C Dep't Soc. Servs. v. Beeks*, 325 S.C. 243, 481 S.E.2d 703(1997). The Petitioners argue that their due process rights were violated by the issuance of the protective order in the absence of a summons and complaint, discovery, and trial by a jury. However, the Petitioners were afforded an opportunity to be heard at a meaningful time and in a meaningful manner. As the Probate Court correctly found that there was no due process violation under the circumstances which include the facts that: the Petitioners commenced the conservatorship action asking the Probate Court to protect Mr. Wellin's assets; the Petitioners have affirmatively disavowed any rights in the \$50,228,000 which they acknowledge is due to Mr. Wellin's estate and which they offered to pay into the Probate Court; they received notice of the Special Conservator's application; they participated in the scheduling of the hearing; they appeared and were heard at all the hearings; and in addition they submitted extensive memoranda.

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

In the Order of February 21, 2014, the Probate Court stated that "returning the undisputed funds to the Special Conservator for the use and benefit of the alleged incapacitated is both legal and equitable," and in the Order Denying the Motion to Alter or Amend, the Probate Court also stated that: "As a Court of equity, this Court should not allow the Petitioners, who brought this very action under the guise of protecting their

father, to now manipulate the legal process to prevent this Court from providing the protection they sought.” Petitioners argue that the Probate Court incorrectly relied on its “equitable powers” as a basis for its authority to require them to pay the \$50 million to the Special Conservator II. However, while the Probate Court orders do contain references to equity, the Probate Court’s order of protection is well founded on the statutory authority of Sections 62-5-402 and 62-5-416 of the South Carolina Probate Code.

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

In its “Statement of the Case,” the Probate Court stated:

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

The Probate Court made a finding of fact [¶11] that “the Wellin Children have acknowledged that at a minimum, Wellin is owed \$50,228,000, being the value of the note plus interest through the date of their offer.”

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

Trust is entitled to approximately \$50 million, but only in satisfaction of the Promissory Note.

The Petitioners' arguments do not support reversal of the Probate Court's orders. The Petitioners themselves valued the amount due under the Note at \$50,228,000 through their filings and submissions in the Probate Court, and through their Counsel, who represented to the Probate Court that: "My clients have no interest in that \$50 million. It belongs to Mr. Wellin, but only in full exchange for payment of the note." The Probate Court's protective order firmly rests on the undisputed concession that the Wellin Children have no legal interest in, at a minimum, the \$50 million, and the Probate Court wisely concluded that those funds should be held by a Special Conservator. It is worth noting that, if Mr. Wellin had not substituted the note for assets of the Trust, then, the Petitioners' argument that Mr. Wellin was not yet entitled to the funds because the Promissory Note was not due until 2021 would ultimately fail because the Note became payable upon Mr. Wellin's passing.

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

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

The Petitioners claim that the protective order was rendered ineffective when they filed a Notice of Voluntary Dismissal pursuant to Rule 41(a)(1)(A) on May 5, 2014. By that time, the parties had engaged in months of proceedings regarding the capacity of Mr. Wellin, and the Probate Court had already issued its Orders appointing the Special

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

Conclusion

I have carefully considered each of the issues raised by the Petitioners/Appellants in this appeal and all the arguments made in the briefs and at the hearing, and I find no basis to reverse the Probate Court's orders. WHEREFORE, based on the Record before me, for the reasons discussed above, the Probate Court orders are AFFIRMED.

AND IT IS SO ORDERED.

_____, 2015
Charleston, South Carolina

The Honorable Roger L. Couch

EVANS, CARTER, KUNES & BENNETT, P. A.

ATTORNEYS AT LAW

115 CHURCH STREET

CHARLESTON, SOUTH CAROLINA 29401

T. HEYWARD CARTER, JR.†
ROBERT M. KUNES†
EDWARD G. R. BENNETT**
ANDREW W. CHANDLER**†
M. JEAN LEE
F. PATRICIA SCARBOROUGH**
DAVID H. KUNES**

†CERTIFIED SPECIALIST IN ESTATE PLANNING AND PROBATE LAW

**LICENSED IN SC AND NY

*LICENSED IN SC AND GA

**LICENSED IN SC AND NC

November 20, 2013

MAILING ADDRESS:
P. O. BOX 369
CHARLESTON, SC 29402-0369

TELEPHONE (843) 577-2300
TELECOPIER (843) 577-2055

WWW.ECKB.COM

RECEIVED

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NELSON, MULLINS

39113/01500

Mr. Peter J. Wellin
2 Ship Channel Road
S. Portland, ME 04106-5135

Mrs. Cynthia W. Plum
10 Waterman Avenue
Philadelphia, PA 19118

Mrs. Marjorie W. King
1884 Beans Bight Road NE
Bainbridge Island, WA 98110

Re: The Wellin 2009 Family Irrevocable Trust

Dear Mr. Wellin, Mrs. Plum and Mrs. King,

Please find enclosed the following:

1. An instrument signed by Keith S. Wellin removing Thomas Farace as Trust Protector of the above referenced Trust, and appointing Lester S. Schwartz, Esq., as the successor Trust Protector.
2. An instrument signed by Lester S. Schwartz, Esq., as Trust Protector of the above referenced Trust, removing South Dakota Trust Company LLC as Trustee and appointing in its place Brown Brothers Harriman Trust Company of Delaware, N.A. as successor Trustee.
3. An instrument signed by Lester S. Schwartz, Esq., as Trust Protector of the above referenced Trust, making certain amendments to the Trust pursuant to the authority granted to him in Article VI thereof.

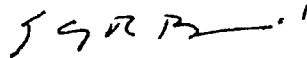
Mr. Peter J. Wellin
Mrs. Cynthia W. Plum
Mrs. Marjorie W. King
November 20, 2013
Page 2

4. An instrument signed by Keith S. Wellin on November 20, 2013 exercising the right granted to him under Article IX of the Trust to reacquire Trust assets, whereby he has substituted the note issued by the Trust to him with a face value of \$49,802,115 for interests in Friendship Partners, L.P. with an equivalent value. The original of the promissory note has been transmitted to Brown Brothers Harriman Trust Company of Delaware, N.A. marked "paid in full". Also enclosed is a calculation of the outstanding balance of the promissory note.
5. An instrument signed by Keith S. Wellin, which will be effective as of 11:59pm tonight, releasing his right to substitute Trust assets. With this release, the status of this Trust as a "grantor trust" is terminated.

Copies of the documents referenced in #1 and #2 above have been forwarded to South Dakota Trust Company. Copies of all documents referenced above have been forwarded to Brown Brothers Harriman Trust Company of Delaware, N.A.

For your records and information, the Trust's contact at Brown Brothers is Lynn W. Watson, 919 N. Market Street, Suite 420, Wilmington, DE 19801.

Best Regards,



Edward G. R. Bennett

cc: Mr. Robert H. Brunson
Mrs. Bryson M. Geer
Mr. John B. Hagerty
Mr. Patrick C. Wooten
Mrs. Lynn W. Watson
Mr. Robert B. Hood
Mr. James B. Hood
Mr. Lester S. Schwartz
Mr. Brett D. Sovine

TRUST PROTECTOR REMOVAL AND SUCCESSOR TRUST PROTECTOR APPOINTMENT

WELLIN FAMILY 2009 IRREVOCABLE TRUST

The Wellin Family 2009 Irrevocable Trust was created by agreement dated November 2, 2009 between Keith S. Wellin, as Grantor, and Peter J. Wellin, Marjorie W. King, Cynthia W. Plum and South Dakota Trust Company LLC, as Trustees.

Article VI, Section A, thereof, named Thomas M. Farace as the Trust Protector.

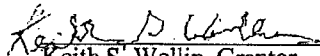
Article VI, Section A, Subsection 9 provides that "I [Keith S. Wellin] have the authority to remove a Trust Protector, to replace him or her with a different Trust Protector, and to do the same with successor Trust Protectors who are not yet serving and are just in line as successor Trust Protectors, as long as any new Trust Protector is not related or subordinate to me within the meaning of Internal Revenue Code section 672(c)."

Pursuant to the authority cited above, Thomas M. Farace is hereby removed as Trust Protector, effective the date hereof. Lester S. Schwartz, Esq., who is neither related or subordinate to the Grantor, is hereby appointed as successor Trust Protector, such appointment to be effective upon his execution of this instrument.

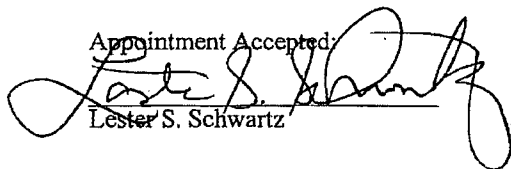
In witness whereof the undersigned has set his hand and seal this 20th day of November, 2013.



Lester S. Schwartz

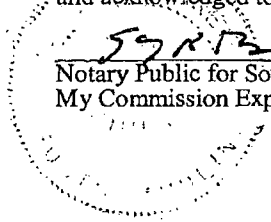


Keith S. Wellin, Grantor

Appointment Accepted:

Lester S. Schwartz

State of South Carolina
County of Charleston

PERSONALLY APPEARED before me on this 20th day of November, 2013, Keith S. Wellin, to me known and known to me to the individual described in and who acknowledged the foregoing instrument and acknowledged to me that he executed the same.

 (SEAL)
Notary Public for South Carolina
My Commission Expires: April 25, 2017

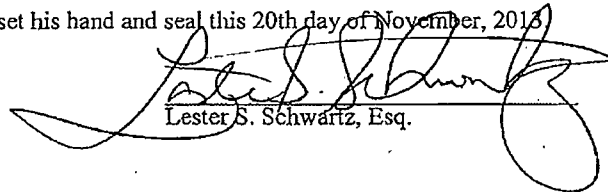
TRUSTEE REMOVAL AND SUCCESSOR TRUSTEE APPOINTMENT

By instrument dated November 2, 2009, South Dakota Trust Company LLC was appointed as a Trustee of that certain Trust originally executed on November 2, 2009 between Keith S. Wellin, as Grantor, and Peter J. Wellin, Marjorie W. King, Cynthia W. Plum and South Dakota Trust Company LLC, as Trustees and known as the Wellin Family 2009 Irrevocable Trust.

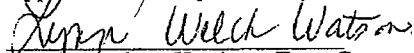
By instrument dated as of the date hereof, Lester S. Schwartz, Esq. was appointed as Trust Protector of the Wellin Family 2009 Irrevocable Trust.

Article VI(A)(1) thereof grants the Trust Protector "the authority to remove the Trustee, and to appoint a different trustee or additional Co-Trustees. The Trust Protector also has the authority to appoint successor Trustees." Pursuant to such authority, South Dakota trust Company LLC is hereby removed as Trustee, effective the date hereof. Furthermore, pursuant to such authority, Brown Brothers Harriman Trust Company of Delaware, N.A. is appointed as Trustee in place of South Dakota Trust Company LLC, such appointment to be effective upon execution of this instrument by a representative of Brown Brothers Harriman Trust Company of Delaware, N.A.

In witness whereof the undersigned has set his hand and seal this 20th day of November, 2013


Lester S. Schwartz, Esq.

Appointment Accepted:



Brown Brothers Harriman Trust Company of Delaware, N.A.

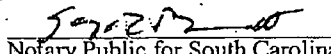
By: Lynn Welch Watson
Vice President

Its: _____

State of South Carolina

County of Charleston

PERSONALLY APPEARED before me on this 20th day of November, 2013, Lester S. Schwartz, to me known and known to me to the individual described in and who acknowledged the foregoing instrument and acknowledged to me that he executed the same.

 (SEAL)
Notary Public for South Carolina
My Commission Expires: 4/25/2022

TRUST AMENDMENT

The Wellin Family 2009 Irrevocable Trust

On November 30, 2009, a Trust was created between Keith S. Wellin, as Grantor, and Peter J. Wellin, Marjorie W. King, Cynthia W. Plum and South Dakota Trust Company LLC, as Trustees, such Trust being known as The Wellin Family 2009 Irrevocable Trust (the "Trust"). This Amendment, when coupled with the original Trust agreement, shall constitute the entire Trust agreement and may be relied upon by any person as constituting the entire Trust Agreement as of the date hereof without reference to any prior Amendment.

Under §A(3) of Article VI of that instrument, the Trust Protector is given the power:

"...to amend the provisions of the trust with regard to how the beneficiaries will benefit from the trust, and to amend the trust administrative provision. The Trust Protector has no authority, however to amend the trust with regard to the identities of the beneficiaries."

By instrument dated November 20, 2013, Lester S. Schwartz, Esq. was appointed as the Trust Protector of the Trust. He has determined to amend the Trust as follows:

1. The Trust shall have a situs in the State of Delaware; provided, however, that the Trust shall continue to be administered pursuant to the laws of the State of South Dakota until such time as the governing law is changed pursuant to the provisions of Article III of the Trust.

2. Article IV shall be amended by adding a new Section (E), which shall read as follows:

E. Notwithstanding the foregoing, each beneficiary shall have the right at his or her death to appoint by Will such portion or all of the accumulated income and principal of any trust held under this Article for his or her benefit; provided, however, that (i) such appointment may only be made in favor of a trust for the benefit of his or her spouse; (ii) such trust may grant to such spouse no greater than an income interest for life in the appointed assets, and (iii) such appointment may only be made with the consent of the corporate Trustee (which consent may be granted or withheld in its sole and absolute discretion).

3. Article VI(A)(9) is hereby amended by deleting the first paragraph therefrom and substituting the following in lieu thereof:

9. I have the authority to remove a Trust Protector, to replace him or her with a different Trust Protector, and to do the same with successor Trust Protectors who are not yet serving and are just in line as successor Trust Protectors, as long as any new Trust Protector is not related or subordinate to me within the meaning of Internal Revenue Code section 672(c).

Upon the later of my death or November 20, 2018, my children, PETER J. WELLIN, MARJORIE W. KING and CYNTHIA W. PLUM, acting by majority vote (or should there be separate Trust Protectors for each subtrust, as provided in Paragraph (A),

above, my child who is the beneficiary of each particular subtrust), may, not more frequently than once every five (5) years, by written notice to the then serving Trust Protector, have the right to request appointment of a committee of three individuals to consider whether a Trust Protector should be removed and replaced. The majority vote of such committee shall be sufficient to remove and replace any Trust Protector with such other Trust Protector as the committee may determine. The individuals who may be appointed to such committee (i) may not be beneficiaries of the Trust, (ii) may not be related or subordinate to either the Trust Protector or any of my children (or child, as the case may be) (within the meaning of §672(c) of the Internal Revenue Code), (iii) must each be Fellows of the American College of Trust and Estate Counsel (ACTEC), and (iv) must each be members of different law firms. Within thirty (30) days of the delivery to the Trust Protector of a written request by my children (or child, as the case may be), my children, by majority vote (or child, as the case may be), and the Trust Protector shall each appoint a committee member. A third committee member shall be chosen by the first two committee members, acting jointly; provided, however, that if a third committee member is not appointed within sixty (60) days of the written notice requesting the appointment of a committee, either my children (or child, as the case may be) or the Trust Protector may petition the Probate Court having jurisdiction over the Trust to appoint such third committee member. The appropriate compensation (at their customary hourly rates) shall be paid to any such committee (if nominated) from the Trust assets.

The committee shall consider information provided by the Trust Protector and my children (or child, as the case may be) (as well as information from such other person(s) as the committee may determine) and, within 30 days of the date of appointment of the last committee member, shall determine whether to remove and replace the Trust Protector. In making its determination, the committee shall consider all issues it considers relevant. As the role of Trust Protector is a limited role (unlike the role of Trustee), the committee is encouraged to consider the duties assigned to the Trust Protector under this Agreement and which, if any, of those duties are being actively undertaken by the Trust Protector, and the Trust Protector's experience with respect to the nature of the duties. Any such consideration shall consider whether any attempted change in Trust Protector may have been initiated for the purpose of seeking a Trust Protector who may not be as likely to honor the Settlor's intent or whether there are genuine personality, performance, and/or expense issues involved in seeking such change of Trust Protector.

Upon completion of the decision for which the committee is appointed, the committee shall have no further responsibility and its powers shall terminate.

This ability to request a committee to remove and replace the Trust Protector shall pass from PETER J. WELLIN, MARJORIE W. KING and CYNTHIA W. PLUM to whomever they designate either by an instrument in writing or by their Last Will and Testament admitted to probate and such designee shall exercise the authority in the same fashion and in the same manner as provided above. Each named designee shall have the right to pass this authority to request a committee to remove and replace the Trust Protector to whomever they designate either by an instrument in writing or by their Last Will and Testament admitted to probate and such designee shall exercise the authority in the same fashion and in the same manner as provided above. The last acting designee shall have the right to pass this authority to request a committee to remove and replace the Trust Protector

to whomever they designate and such designee shall exercise the authority in the same fashion and in the same manner as provided above, and so forth, down through the generations. If at any time there is no designee appointed or acting and thus there is a vacancy in this position to request a committee to remove and replace the Trust Protector, then the Distribution Committee shall have the right to pass this authority to request a committee to remove and replace the Trust Protector to whomever they designate and such designee shall exercise the authority in the same fashion and in the same manner as provided above.

4. Article IX shall be amended by deleting Section (B) therefrom.

5. Article IX shall be amended by deleting Section (C) therefrom and substituting the following in lieu thereof, which shall be re-labeled as (B):

B. Release of Powers. I hereby retain the power to release the power described in paragraph A of this Article by delivering to the Trustee a written statement to that effect. This power may be exercised by my agent acting under a duly executed Power of Attorney or by my duly appointed guardian, in the event of my disability or incapacity.

A corporate Trustee, with the prior written consent of the Trust Protector, may restore the released power at any time.

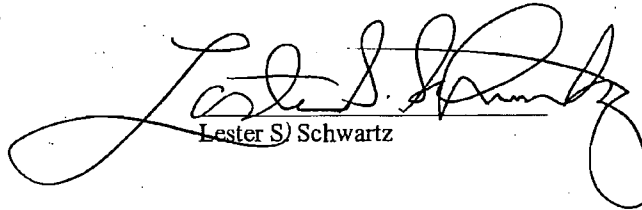
6. Article X(D) shall be amended by deleting Section (D) therefrom and substituting the following in lieu thereof:

D. Unless specifically provided otherwise, all powers and discretions conferred by law of this Agreement upon the Trustees must be exercised by the unanimous vote of the Trustees in office from time to time (excepting the vote of any Trustee who is also a beneficiary who is ineligible to participate in the exercise of the power or discretion because he, as a beneficiary, may be affected by the exercise of such power or discretion).

7. Article XII shall be amended by adding the following, which shall be Paragraph (I) thereof:

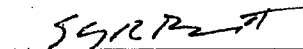
I. Notwithstanding any other provision of this Agreement, with respect to any litigation brought by or against any Trust created under this Agreement, if any Trustee of such is a party to such litigation in both an individual or corporate capacity and his or her capacity as a Trustee, then the Trust Protector shall represent such Trust with respect to such litigation, and shall have the power to pay, compromise, contest, submit to arbitration, or otherwise settle such litigation in favor of or against the trust, and may prosecute or defend such litigation for the protection of trust assets. The provisions of this Paragraph (H) shall apply notwithstanding the fact that there may be one or more co-Trustees then serving who are not parties to the litigation in an individual or corporate capacity.

In all other respects the Trust instrument shall remain as originally written, this amendment shall be effective this 20th day of November, 2013.


Lester S) Schwartz

State of South Carolina)
)
County of Charleston)

PERSONALLY APPEARED before me on this 20th day of November, 2013, Lester S. Schwartz, to me known and known to me to the individual described in and who acknowledged the foregoing instrument and acknowledged to me that he executed the same.

 (SEAL)
Notary Public for South Carolina
My Commission Expires: 4/25/2022

EXERCISE OF RIGHT OF SUBSTITUTION

THE WELLIN FAMILY 2009 IRREVOCABLE TRUST

The Wellin Family 2009 Irrevocable Trust was created by agreement dated November 2, 2009 between Keith S. Wellin, as Grantor, and Peter J. Wellin, Marjorie W. King, Cynthia W. Plum and South Dakota Trust Company LLC, as Trustees (the "2009 Trust").

Article IX(A) of the 2009 Trust provides as follows:

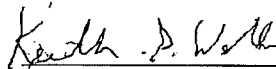
A. Power of Asset Substitution. I hereby retain the power, exercisable during my lifetime, at any time and from time to time, without the consent of or approval by the Trustee, to reacquire the trust corpus or a portion thereof by substituting other property of an equivalent value.

Effective this 20th day of November, 2013, the Grantor, Keith S. Wellin, does hereby exercise the right granted to him by Article IX(A) of the 2009 Trust and substitute the promissory note issued by the 2009 Trust in his favor on September 4th, 2012 with a face value of \$49,802,115 and a current outstanding balance of \$50,211,446.55 (being principal and accrued but unpaid interest as of the date hereof) (the "Note") in exchange for Units in Friendship Partners, LP representing an assignee interest therein with a fair market value equal to \$50,211,446.55.

The number of Units in Friendship Partners, L.P. transferred in substitution for the Note are determined in accordance with the calculations attached hereto as Schedule A. The discounts applied to the assets of Friendship Partners, LP and the individual units are consistent with the discounts applied by the general partner of Friendship Partners LP with respect to various transfers between the 2009 Trust and Keith S. Wellin from 2009 through 2012, and the calculation is consistent with the methodology employed by Management Planning Inc. in its report dated November 30, 2009.

Keith S. Wellin recognizes that the cash held by Friendship Partners, L.P. may be different than the estimated balance reflected on Schedule A. If the general partner of Friendship Partners, L.P. provides to Keith S. Wellin evidence of a different cash balance, the Units transferred to Keith S. Wellin shall be adjusted to reflect a number of Units transferred to Keith S. Wellin with a fair market value equal to the value determined by inserting the correct cash balance into the calculations on Schedule A.

In compliance with that Temporary Restraining Order issued by Judge David C. Norton on July 3, 2013 in the United States District Court, District of South Carolina, Charleston Division in *Wellin et. al. v. Wellin et. al.*, C/A No. 2:13c1813 DCN, this shall constitute the consent of Keith S. Wellin that the partnership interests be transferred by the 2009 Trust to Keith S. Wellin, individually.



Keith S. Wellin, individually and as Trustee of the Keith S. Wellin Florida Revocable Living Trust dated December 11, 2001, as subsequently amended and restated

5:12 PM 11/20/2013

Friendship Partners, LP

Freely Traded Value

As of November 20, 2013

Assets

Cash	\$	10,000
Equity Investment		
Berkshire Hathaway Inc. - 906 A Shares ¹	\$	<u>156,266,880</u>

Total Assets \$ 156,276,880

Liabilities and Partners' Capital

Liabilities		--
Partners' Capital (Net Asset Value)	\$	<u>156,276,880</u>
Total Liabilities and Partners' Capital	\$	<u>156,276,880</u>

Net Asset Value	\$	<u>156,276,880</u>
Less: Minority Interest Discount (15%)	\$	<u>(23,441,532)</u>
Freely Traded Value of Friendship Partners LP	\$	<u>132,835,348</u>
Freely Traded Value Per Unit (based on 1,000,000 units issued and outstanding)	\$	<u>132.835</u>

Freely Traded Value Per Unit	\$	132.835
Less: Marketability Discount of 35%	\$	<u>(46.49)</u>
Fair Market Value Per Unit	\$	<u>86.34</u>
Fair Market Value of 581,554.8645 Limited Partnership Units (based on 1,000,000 units issued and outstanding)	\$	<u>50,211,447</u>

¹Based on the closing price of Berkshire Hathaway Class A stock as of the date of substitution.

Compound Period : Annual

Nominal Annual Rate : 2.590 %

CASH FLOW DATA

Event	Date	Amount	Number	Period	End Date
1 Loan	11/30/2009	49,802,115.00	1		
2 Payment	11/30/2010	1,289,874.78	1		
3 Rate Change	12/06/2010	Rate: 1.530 %	Compounding: Annual		
4 Payment	11/30/2011	770,969.29	1		
5 Rate Change	11/30/2011	Rate: 1.200 %	Compounding: Annual		
6 Rate Change	09/04/2012	Rate: 0.840 %	Compounding: Annual		
7 Payment	11/30/2012	555,007.83	1		
8 Payment	11/20/2013	50,211,446.55	1		

AMORTIZATION SCHEDULE - Normal Amortization

	Date	Payment	Interest	Principal	Balance
Loan	11/30/2009				49,802,115.00
2009 Totals		0.00	0.00	0.00	
1	11/30/2010	1,289,874.78	1,289,874.78	0.00	49,802,115.00
Rate	12/06/2010		21,203.42	21,203.42-	49,823,318.42
	12/06/2010	Rate: 1.530 %	Compounding: Annual		
2010 Totals		1,289,874.78	1,311,078.20	21,203.42-	
2	11/30/2011	770,969.29	749,765.87	21,203.42	49,802,115.00
Rate	11/30/2011		0.00	0.00	49,802,115.00
	11/30/2011	Rate: 1.200 %	Compounding: Annual		
2011 Totals		770,969.29	749,765.87	21,203.42	
Rate	09/04/2012		456,815.02	456,815.02-	50,258,930.02
	09/04/2012	Rate: 0.840 %	Compounding: Annual		
3	11/30/2012	555,007.83	100,628.02	454,379.81	49,804,550.21
2012 Totals		555,007.83	557,443.04	2,435.21-	
4	11/20/2013	50,211,446.55	406,896.34	49,804,550.21	0.00
2013 Totals		50,211,446.55	406,896.34	49,804,550.21	
Grand Totals		52,827,298.45	3,025,183.45	49,802,115.00	

RELEASE OF RIGHT OF SUBSTITUTION
THE WELLIN FAMILY 2009 IRREVOCABLE TRUST

The Wellin Family 2009 Irrevocable Trust was created by agreement dated November 2, 2009 between Keith S. Wellin, as Grantor, and Peter J. Wellin, Marjorie W. King, Cynthia W. Plum and South Dakota Trust Company LLC, as Trustees (the "2009 Trust").

Article IX(A) of the 2009 Trust provides as follows:

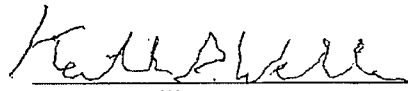
A. Power of Asset Substitution. I hereby retain the power, exercisable during my lifetime, at any time and from time to time, without the consent of or approval by the Trustee, to reacquire the trust corpus or a portion thereof by substituting other property of an equivalent value.

Article IX(B) of the 2009 Trust provides as follows:

B. Release of Powers. I hereby retain the power to release the power described in paragraph A of this Article by delivering to the Trustee a written statement to that effect. This power may be exercised by my agent acting under a duly executed Power of Attorney or by my duly appointed guardian, in the event of my disability or incapacity.

Effective as of 11:59pm this 20th day of November, 2013, the Grantor, Keith S. Wellin, does hereby release the power granted to him under Article IX(A) of the 2009 Trust and relinquish any right to reacquire the trust corpus, or any portion thereof, of the 2009 Trust.

Keith S. Wellin does acknowledge that, prior to the execution of this instrument, he did exercise the power granted to him in Article IX(A) of the 2009 Trust and reacquire a portion of the 2009 Trust's interest in Friendship Partners, L.P. in exchange for a promissory note issued by the 2009 Trust on September 4, 2012. This instrument is intended to be effective after the time of such exercise.

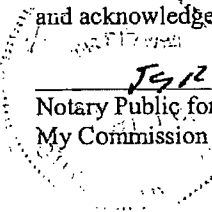


Keith S. Wellin

State of South Carolina

County of Charleston

PERSONALLY APPEARED before me on this 20th day of November, 2013, Keith S. Wellin, to me known and known to me to the individual described in and who acknowledged the foregoing instrument and acknowledged to me that he executed the same.

 J. R. [Signature] (SEAL)
Notary Public for South Carolina

My Commission Expires: April 25, 2022
5:15 PM 11/20/2013

PROMISSORY NOTE

\$49,802,115.00

Sioux Falls, South Dakota
September 4, 2012

1. FOR VALUE RECEIVED, PETER J. WELLIN, CYNTHIA W. PLUM, MARJORIE W. KING, and SOUTH DAKOTA TRUST COMPANY LLC, as Trustees, in their capacity as Trustees, and not individually, including any successor Trustee(s) serving from time to time, (the "Borrowers"), of the WELLIN FAMILY 2009 IRREVOCABLE TRUST, (the "Trust"), created under an Agreement of Trust dated November 2, 2009, by and between KEITH S. WELLIN, as Grantor, and PETER J. WELLIN, CYNTHIA W. PLUM, MARJORIE W. KING, and SOUTH DAKOTA TRUST COMPANY LLC, as Trustees, hereby unconditionally promise to pay to the order of the KEITH S. WELLIN FLORIDA REVOCABLE LIVING TRUST, created under an Agreement of Trust dated December 11, 2001, as amended and restated, by and between KEITH S. WELLIN as Grantor and KEITH S. WELLIN as Trustee (the "Payee") the principal sum equal to Forty-Nine Million Eight Hundred Two Thousand One Hundred Fifteen and 00/100 Dollars (\$49,802,115.00) on September 3, 2021 (the "Maturity Date"). The Note is given for the purpose of continuing, revising and restating the Note dated November 30, 2011, and is not intended to evidence or create any new indebtedness.

2. (a) The Borrowers hereby unconditionally promise to pay to the order of the Payee interest on the unpaid principal amount of this Promissory Note for the period from and including the date hereof to but excluding the Maturity Date, at the applicable federal mid-term rate in effect on the date hereof as determined under Section 1274(d) of the Internal Revenue Code (26 U.S.C. §1274(d)), per annum, compounded annually from the date of this Promissory Note, to wit 0.84%. The Borrowers shall pay to the Payee a partial year interest payment on November 30, 2012 (along with interest on the November 30, 2011, Note to date), and then shall pay the Payee annual interest only payments on each November 30 thereafter until paid in full. Interest shall be calculated on the basis of a year of 365 days and actual days elapsed (including the first day but excluding the last day) in the period for which it is payable. All accrued and unpaid interest shall be payable on the Maturity Date. This is an unqualified obligation of the Borrowers to pay the sum set forth above, with interest as provided, which obligation is payable as provided herein regardless of the income or lack thereof of the Borrowers.

(b) Notwithstanding the foregoing, the Borrowers hereby unconditionally promise to pay to the order of the Payee interest at a rate of 7% per annum (the "Post-Default Rate") calculated in the same manner as in paragraph 2(a), on any amount of principal or interest payable by the Borrowers under this Promissory Note that shall not be paid in full when due (whether at the Maturity Date, by acceleration, or otherwise) for the period from and including the due date of such payment to but excluding the date the same is paid in full.

(c) The Borrowers may, at the Borrowers' option, prepay all or any portion of the principal of this Promissory Note at any time without premium or penalty of any kind, provided that the Borrowers simultaneously pay accrued and unpaid fees, expenses, interest (including, to the extent applicable, interest at the Post-Default Rate), to but excluding the date of such prepayment, on the amount of principal so prepaid.

3. The Borrowers may, at the Borrowers' option, execute and deliver to the Payee on any anniversary of this Promissory Note another promissory note that (except as provided in the next sentence of this paragraph) is identical to this Promissory Note in form and substance (each other such promissory note being referred to herein as a "Capitalized Interest Note") in satisfaction of the Borrowers' obligation to pay interest hereon that has accrued and remains unpaid. Each Capitalized Interest Note shall be in a principal amount equal to the accrued and unpaid interest to which it relates, shall be dated the date of the execution and delivery thereof, and shall bear interest at the "Applicable Federal Rate" as defined in Section 7872 (or any successor provisions) of the Internal Revenue Code of 1986, as amended, and as determined by reference to the maturity of such Capitalized Interest Note. Without limiting the obligation of the Borrower under any Capitalized Interest Note, the execution and delivery of any Capitalized Interest Note shall constitute payment of the interest hereon to which such Capitalized Interest Note relates. The undersigned Borrower and maker of this Promissory Note shall have the right, but not the obligation, to make any payments due hereunder by transferring to the Payee one or more limited partnership units ("Units") of the FRIENDSHIP PARTNERS L.P. The value of the Units shall be determined by mutual agreement of the parties, or, if they are unable to agree, by an independent appraiser selected by the Payee.

4. Right of Set-Off. The Borrowers agree that, in addition to (and without limitation of) any right of set-off the Payee may otherwise have, the Payee shall be entitled, at its option, to offset amounts owing by the Payee to the Borrowers, in dollars or in any other currency (regardless of whether such amounts are then due to the Borrowers), against any amount payable by the Borrowers to the Payee under this Promissory Note that is not paid when due; provided that nothing contained herein shall require the Payee to exercise any such right.

5. Representations and Warranties. The Borrowers hereby represent and warrant to the Payee as follows:

(a) Organization; Powers. (i) The Borrowers are the Trustees of a trust duly organized and validly existing under the laws of the jurisdiction of its formation, (ii) the Trustees have all requisite power and authority to carry out the terms of its Trust, including, but not limited to, carry on its activities as now conducted, and (iii) the Investment Trustee has the legal capacity and full power and authority to execute and deliver, and to bind the Borrowers to perform their obligations under, this Promissory Note, and to execute and deliver any and all documents and instruments in connection therewith.

(b) Authorization; Enforceability. The Borrowers have all necessary corporate, trust, partnership or other power, authority and legal right to execute, deliver and perform its obligations under this Promissory Note; the execution, delivery and performance by the Borrowers of this Promissory Note have been duly authorized by all necessary trust action on its part (including, without limitation, any required approvals); and this Promissory Note has been duly and validly executed and delivered by the Borrowers and constitutes legal, valid and binding obligations, enforceable against the Borrowers in accordance with its terms, except as such enforceability may be limited by (a) bankruptcy, insolvency, reorganization, moratorium or similar laws of general applicability affecting the enforcement of creditors' rights and (b) the application of general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law).

(c) Approvals. No authorizations, approvals or consents of, and no filings or registrations with, any governmental or regulatory authority or agency, or any securities exchange, are necessary for the execution, delivery or performance by the Borrowers of this Promissory Note or for the legality, validity or enforceability hereof or thereof.

(d) No Breach. None of the execution and delivery of this Promissory Note, the consummation of the transactions herein and therein contemplated or compliance with the terms and provisions hereof and thereof will conflict with or result in a breach of, the fiduciary duties of the Trustees under the Trust, or any applicable law or regulation, or any order, writ, injunction or decree of any court or governmental authority or agency, or, to the knowledge of the Borrowers, any agreement or instrument to which the Borrowers are a party or by which they or their Property are bound or to which they are subject, or constitute a default under any such agreement or instrument, or result in the creation or imposition of any Lien upon any Property of the Borrowers pursuant to the terms of any such agreement or instrument.

(e) Indebtedness for Borrowed Money. To the knowledge of the Borrowers, there are no Liens on the assets or properties of the Borrowers existing as of the date hereof.

6. This Promissory Note evidences the obligation of the Borrowers to pay to the Payee the deferred purchase price for a 98.8963% limited partnership interest in FRIENDSHIP PARTNERS L.P., a Delaware limited partnership (herein referred to as the "Interest") transferred by the Payee to the Borrowers, and the payment hereof is secured by a pledge of the Interest, and the proceeds thereof (the "Pledged Interest"), under a Pledge Agreement dated November 30, 2009 (as the same may be modified and supplemented from time to time, the "Pledge Agreement") between the Borrowers and the Payee. Terms defined in the Pledge Agreement but not herein have the respective meanings ascribed to such terms in the Pledge Agreement.

7. Expenses. The Borrowers agree to pay or reimburse Payee for: (a) all reasonable out-of-pocket costs and expenses of Payee (including, without limitation, the reasonable fees and expenses of legal counsel) in connection with (i) any default and any enforcement or collection proceedings resulting therefrom, including, without limitation, all manner of participation in or other involvement with (x) bankruptcy, insolvency, receivership, foreclosure, winding up or liquidation proceedings, (y) judicial or regulatory proceedings and (z) workout, restructuring or other negotiations or proceedings (whether or not the workout, restructuring or transaction contemplated thereby is consummated); and (b) all transfer, stamp, documentary or other similar taxes, assessments or charges levied by any governmental or revenue authority in respect of this Promissory Note or any other document referred to herein.

8. Definitions. As used herein, the following terms shall have the following respective meanings:

"Business Day" shall mean a day other than Saturday, Sunday or any day on which banks located in the State of Delaware are authorized or obligated to close.

"Dollars" or "\$" refers to lawful money of the United States of America.

"Lien" shall mean, with respect to any Property, any mortgage, lien, pledge, charge, security interest or encumbrance of any kind in respect of such Property. For purposes of this Promissory Note, a Person shall be deemed to own subject to a Lien any Property that it has acquired or holds subject to the interest of a vendor or lessor under any conditional sale agreement, capital lease or other title retention agreement (other than an operating lease) relating to such Property.

"Person" shall mean any individual, corporation, company, voluntary association, partnership, joint venture, trust, unincorporated organization or government (or any agency, instrumentality or political subdivision thereof).

"Property" shall mean any right or interest in or to property of any kind whatsoever, whether real, personal or mixed and whether tangible or intangible.

9. If one or more of the following events shall occur and be continuing (each an "Event of Default"):

(a) The Borrowers shall default in the payment of any interest when due under this Promissory Note and the same shall continue for thirty (30) or more Business Days;

(b) Any representation or warranty made herein (or in any modification or supplement hereto) by the Borrowers, or any certificate furnished to Payee pursuant to the provisions hereof, shall prove to have been false or misleading as of the time made or furnished in any material respect;

(c) The Borrowers shall incur any indebtedness for borrowed money without the prior written consent of Payee (which consent shall not be unreasonably withheld) or any event specified in any note, agreement, indenture or other document evidencing or relating to any other indebtedness for borrowed money of the Borrowers shall occur if the effect of such event is to cause, or (with the giving of any notice or the lapse of time or both) to permit the holder or holders of such indebtedness (or a trustee or agent on behalf of such holder or holders) to cause, such indebtedness to become due, or to be prepaid in full (whether by redemption, purchase, offer to purchase or otherwise), prior to its stated maturity;

(d) A proceeding or case shall be commenced, without the application or consent of the Borrowers, in any court of competent jurisdiction, seeking (i) its reorganization, liquidation, dissolution, arrangement or winding-up, or the composition or readjustment of its debts, (ii) the appointment of a receiver, custodian, trustee, examiner, liquidator or the like of the Borrowers or of all or any substantial part of their Property, or (iii) similar relief in respect of the Borrowers under any law relating to bankruptcy, insolvency, reorganization, winding-up, or composition or adjustment of debts, and such proceeding or case shall continue undismissed, or an order, judgment or decree approving or ordering any of the foregoing shall be entered and continue unstayed and in effect, for a period of sixty (60) or more days; or an order for relief against the Borrowers shall be entered in an involuntary case under the Federal Bankruptcy Code of 1978, as amended from time to time, presently codified as Title 11 of the United States Code (the "Bankruptcy Code");

(e) The Borrowers shall (i) apply for or consent to the appointment of, or the taking of possession by, a receiver, custodian, trustee, examiner or liquidator of themselves or of all or a substantial part of their Property, (ii) make a general assignment for the benefit of their creditors, (iii) commence a voluntary case under the Bankruptcy Code, (iv) file a petition seeking to take advantage of any other law relating to bankruptcy, insolvency, reorganization, liquidation, dissolution, arrangement or winding-up, or composition or readjustment of debts, (v) fail to controvert in a timely and appropriate manner, or acquiesce in writing to, any petition filed against it in an involuntary case under the Bankruptcy Code or (vi) take any corporate action for the purpose of effecting any of the foregoing;

(f) A final judgment or judgments for the payment of money of \$50,000 or more in the aggregate shall be rendered by one or more courts, administrative tribunals or other bodies having jurisdiction against the Borrowers and the same shall not be discharged (or provision shall not be made for such discharge), or a stay of execution thereof shall not be procured, within thirty (30) days from the date of entry thereof and the Borrowers shall not, within such period of thirty (30) days, or such longer period during which execution of the same shall have been stayed, appeal therefrom and cause the execution thereof to be stayed during such appeal, or any action shall be legally taken by a judgment creditor to attach or levy upon any assets of the Borrowers to enforce any such judgment;

(g) The Borrowers shall default in the payment of any principal of or interest on this Promissory Note when due or in the performance of the Borrowers' obligations under the Pledge Agreement and any such default shall have continued unremedied for thirty (30) or more days after notice thereof by the Payee to the Borrowers;

(h) Any representation or warranty made in the Pledge Agreement by the Borrowers shall prove to have been false as of the time made in any material respect and shall have continued unremedied for thirty (30) or more days after notice thereof by the Payee to the Borrowers; or

(i) The Trust shall terminate, be liquidated or dissolved.

THEREUPON: (1) in the case of an Event of Default other than one referred to in clause (d) or (e) of this Section 9 with respect to the Borrowers, if not already fully due and payable at the Maturity Date, Payee may, by notice to the Borrowers, declare the principal amount then outstanding of, and the accrued interest on, this Promissory Note to be accelerated, whereupon such amounts shall be immediately due and payable without presentment, demand, protest or other formalities of any kind, all of which are hereby expressly waived by the Borrowers; and (2) in the case of the occurrence of an Event of Default referred to in clause (d) or (e) of this Section 9 with respect to the Borrowers, the principal amount then outstanding of, and the accrued interest on, this Promissory Note to be accelerated, whereupon such amounts shall automatically be immediately due and payable without presentment, demand, protest or other formalities of any kind, all of which are hereby expressly waived by the Borrowers.

10. Payments of principal and interest and any other amounts under this Promissory Note may be made in cash or in property (whether tangible or intangible) or a combination thereof. Any property other than cash transferred in payment of any amount of principal of or interest on this Promissory Note shall be valued as of the date of such payment in

accordance with the principles set forth in Treasury Regulations §§25.2512-1 to 25.2512-8 (26 C.F.R. §§25.2512-1 to 25.2512-8). Payments hereunder shall be made to the Payee at 161 Coquille Way, Vero Beach, Florida 32963-3468, or such other address as the Payee shall notify the Borrowers.

11. Notices to the Payee hereunder shall be sent by certified mail or delivered by a recognized commercial courier service to the Payee at 161 Coquille Way, Vero Beach, Florida 32963-3468, or such other address as the Payee shall notify the Borrowers. Notices to the Borrowers shall be sent by certified mail or delivered by a recognized commercial courier service to the Borrower, Wellin Family 2009 Irrevocable Trust, South Dakota Trust Company LLC, Trustee, 201 South Phillips Avenue, Suite 200, Sioux Falls, South Dakota 57104, or such other address as the Borrowers shall notify the Payee.

12. The terms of this Promissory Note may be waived, altered or amended only by an instrument in writing duly executed by the Payee and the Borrowers. No failure to exercise and no delay in exercising any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any right, power or privilege hereunder preclude any other right, power or privilege. The rights and remedies herein provided are cumulative and not exclusive of any rights or remedies provided by law.

13. The Investment Trustee has executed and delivered this Promissory Note for and on behalf of all of the Borrowers, in their capacity as Trustees, and in no case shall any Borrower be personally liable for or on account of any of the obligations of the Borrowers hereunder, recourse for which obligations shall be limited to the Collateral (which shall consist of the Pledged Interest) and any other assets of the Trust. Subject to the foregoing provisions of this paragraph, this Promissory Note shall be binding upon any successor Trustees of the Trust, and all references herein to the "Borrowers" shall include all such successor trustees but shall exclude any person or entity that, at the time of determination, shall have ceased to be a Trustee of the Trust. The Trust is personally obligated and fully liable for the amount due under this Promissory Note. The Payee has the right to sue on this Promissory Note and obtain a personal judgment against the Trust for satisfaction of the amount due under this Promissory Note either before or after a foreclosure of the Pledged Interest under the Delaware Uniform Commercial Code.

14. **Choice of Law.** This Promissory Note shall be governed by, and construed in accordance with, the law of the State of Delaware, without giving effect to any principles of choice of law thereof that could require the application of the law of another jurisdiction.

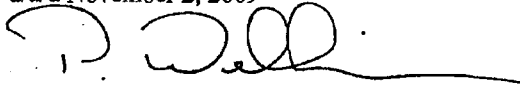
15. **Waiver of Jury Trial. THE BORROWERS AND, BY ITS ACCEPTANCE OF THIS PROMISSORY NOTE, PAYEE HEREBY IRREVOCABLY WAIVE, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY AND ALL RIGHT TO TRIAL BY JURY IN ANY LEGAL PROCEEDING ARISING OUT OF OR RELATING TO THIS PROMISSORY NOTE OR THE TRANSACTIONS CONTEMPLATED HEREBY.**

16. Counterparts. This Agreement may be executed in one or more written, fax, PDF and electronic counterparts, all of which taken together shall constitute one and the same instrument and shall have the same force and effect as though all of the signers had signed a single signature page.

IN WITNESS WHEREOF, the Borrowers hereto have caused this Promissory Note to be duly executed by its duly authorized representative, as of the day and year first above written.

BORROWER:

WELLIN FAMILY 2009 IRREVOCABLE TRUST
u/a/d November 2, 2009



Peter J. Wellin, Trustee

Cynthia W. Plum, Trustee

Marjorie W. King, Trustee

SOUTH DAKOTA TRUST COMPANY LLC,
Trustee

By: Patti Graumann
As its: Trust Officer

16. Counterparts. This Agreement may be executed in one or more written, fax, PDF and electronic counterparts, all of which taken together shall constitute one and the same instrument and shall have the same force and effect as though all of the signers had signed a single signature page.

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WELLIN FAMILY 2009 IRREVOCABLE TRUST
u/a/d November 2, 2009

Peter J. Wellin, Trustee



Cynthia W. Plum, Trustee

Marjorie W. King, Trustee

SOUTH DAKOTA TRUST COMPANY LLC,
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By: Patti Graumann
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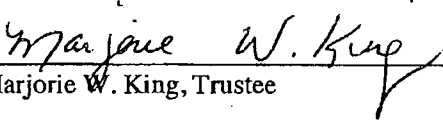
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Peter J. Wellin, Trustee

Cynthia W. Plum, Trustee



Marjorie W. King, Trustee

SOUTH DAKOTA TRUST COMPANY LLC,
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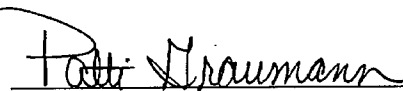
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SOUTH DAKOTA TRUST COMPANY LLC,
Trustee



By: Patti Graumann
As its: Trust Officer

EVANS, CARTER, KUNES & BENNETT, P. A.
ATTORNEYS AT LAW
115 CHURCH STREET
CHARLESTON, SOUTH CAROLINA 29401

T. HEYWARD CARTER, JR.†
ROBERT M. KUNES†
EDWARD G. R. BENNETT**
ANDREW W. CHANDLER*†
M. JEAN LEE
F. PATRICIA SCARBOROUGH**
DAVID H. KUNES**

MAILING ADDRESS:
P. O. BOX 369
CHARLESTON, SC 29402-0369
TELEPHONE (843) 577-2300
TELECOPIER (843) 577-2055
WWW.ECKB.COM

November 20, 2013

†CERTIFIED SPECIALIST IN ESTATE PLANNING AND PROBATE LAW
**LICENSED IN SC AND NY
*LICENSED IN SC AND GA
**LICENSED IN SC AND NC

Mrs. Lynn W. Watson
Brown Brothers Harriman Trust Company of Delaware, N.A.
919 N. Market Street, Suite 420
Wilmington, DE 19801

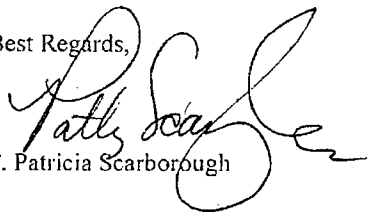
Dear Lynn,

Enclosed for your records are copies of correspondence to South Dakota Trust Company LLC, the Trustee for the Wellin Trust that has been removed, as well as correspondence to Mr. Wellin's children, the three individual Trustees.

I have also enclosed the originals of the documents listed in the letter to the individual trustees, along with an acknowledgment of receipt. If you would, please sign the acknowledgment and return it to me in the enclosed envelope.

If you need any additional documentation, please let me know.

Best Regards,


F. Patricia Scarborough

cc: Mr. Brett D. Sovine

EVANS, CARTER, KUNES & BENNETT, P. A.

ATTORNEYS AT LAW

115 CHURCH STREET

CHARLESTON, SOUTH CAROLINA 29401

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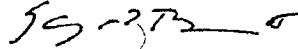
Ms. Patti Graumann
South Dakota Trust Company, LLC
201 S. Phillips Avenue, Suite 200
Sioux Falls, SD 57104

Re: The Wellin 2009 Family Irrevocable Trust

Dear Ms. Graumann,

Please find enclosed an instrument removing Thomas Farace as Trust Protector of the above referenced Trust, and appointing Lester S. Schwartz, Esq., as the successor Trust Protector. Also please find enclosed an instrument signed by Lester S. Schwartz, Esq., as Trust Protector of the above referenced Trust, removing South Dakota Trust Company LLC as Trustee and appointing in its place Brown Brothers Harriman Trust Company of Delaware, N.A. as successor Trustee. The Trust's contact at Brown Brothers is Lynn W. Watson, 919 N. Market Street, Suite 420, Wilmington, DE 19801. Please transmit to her all books and records for the above referenced Trust which are in your possession.

Best Regards,



Edward G. R. Bennett

cc: Ms. Nell E. Mathews
Ms. Nosizi Ralephata
Mrs. Lynn W. Watson (without attachments)
Mr. Brett D. Sovine (without attachments)
Mr. Lester S. Schwartz (without attachments)
Mr. Robert B. Hood
Mr. James B. Hood

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

Lester S. Schwartz, as Trust Protector of) Civil Action No. 2:13-cv-03595-DCN
the Wellin Family 2009 Irrevocable Trust,)

Plaintiff,)

vs.)

Peter J. Wellin, Cynthia W. Plum and)
Marjorie W. King, Individually and as Co-)
Trustees and Beneficiaries of the Wellin)
Family 2009 Irrevocable Trust, Friendship)
Management, LLC, Cynthia W. Plum as)
Manager of Friendship Management, LLC,)
Friendship Partners, LP and Keith Wellin,)
Individually and as Trustee of the Keith S.)
Wellin Florida Revocable Living Trust)
u/a/d December 11, 2011¹, as Trustee of the)
KSW 2011 Qualified Grantor Retained)
Annuity Trust, and Trustee of the KSW)
2012 Qualified Grantor Retained Annuity)
Trust u/a/d November 28, 2012,)

Defendant(s),)

NOTICE OF REMOVAL

TO: THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH
CAROLINA, CHARLESTON DIVISION:

Pursuant to 28 U.S.C. §§ 1441 and 1446, Defendants Peter J. Wellin, Cynthia W. Plum and Marjorie W. King, Individually and as Co-Trustees and Beneficiaries of the Wellin Family 2009 Irrevocable Trust, Friendship Management, LLC, Cynthia W. Plum as Manager of Friendship Management, LLC, and Friendship Partners, LP (collectively, "Defendants"), hereby remove this Action from the Probate Court, Charleston County, State of South Carolina, where it

¹ This is a typographical error. The number "2011" should be "2001."

was originally filed by Plaintiff Lester S. Schwartz, as Trust Protector of the Wellin Family 2009 Irrevocable Trust ("Plaintiff"), to the United States District Court for the District of South Carolina, Charleston Division. Pursuant to 28 U.S.C. § 1446(a), copies of all process, pleadings and orders served upon Defendants in this action are attached hereto as Exhibit A.

PROCEDURAL BACKGROUND AND RELEVANT FACTS

1. On or about December 17, 2013, Plaintiff commenced this action by filing a Complaint in the Probate Court, Charleston County, State of South Carolina against Defendants and Keith Wellin, Individually and as Trustee of the Keith S. Wellin Florida Revocable Living Trust u/a/d December 11, 2001², as Trustee of the KSW 2011 Qualified Grantor Retained Annuity Trust, and Trustee of the KSW 2012 Qualified Grantor Retained Annuity Trust u/a/d November 28, 2012, (hereinafter, "Keith Wellin").

2. On December 20, 2013, Plaintiff's counsel hand delivered a copy of the Summons and Complaint to Defendants' counsel.

3. With the Summons and Complaint, Plaintiff's counsel delivered to Defendant's counsel an *ex parte* Motion for Temporary Restraining Order and Order to Show Cause for Preliminary Injunction ("TRO Motion"), a memorandum in support of that motion, and an *ex parte* Order of the Probate Court granting the Order signed the same day that it was delivered (December 20). The *ex parte* TRO Motion requested a TRO enjoining Defendants from being able to sell, trade, negotiate, gift, or otherwise dispose of the proceeds of the sale of 896 Class A Berkshire Hathaway common shares or the 98.90% partnership interest in Friendship Partners, LP, without the authorization and consent of the Plaintiff.

² As noted above, Plaintiff incorrectly identified the date of the revocable trust as December 11, 2011, instead of December 11, 2001.

4. Charleston County Probate Judge Irving G. Condon signed the *ex parte* Order granting the Plaintiff's TRO Motion after holding an emergency *ex parte* hearing outside the presence of the Defendants on December 20, 2013. *See* Ex. A, Order, at 1. Judge Condon signed the *ex parte* Order on December 20, 2013, at 4:00 p.m. *See id.* at 14.

5. On December 27, 2013, Defendants' counsel accepted service of the Summons and Complaint on behalf of Defendants.

6. On December 27, 2013, Plaintiff's counsel delivered a Notice and Motion for Segregation of Trust Assets to Pay Fees of Trust Protector and His Attorneys to Defendants' counsel.

7. In addition to the instant action, there is also an action pending in this Court with most of the same parties. That action is Civil Action No. 2:13-CV-1831-DCN, and is entitled Keith Wellin, individually and as Trustee of the Keith S. Wellin Florida Revocable Living Trust u/a/d December 11, 2001 v. Peter J. Wellin, Cynthia W. Plum and Marjorie W. King, individually and as co-Trustees and beneficiaries of the Wellin Family 2009 Irrevocable Trust u/a/d November 2, 2009, South Dakota Trust Company, LLC as co-Trustee of the Wellin Family 2009 Irrevocable Trust u/a/d November 2, 2009, Friendship Management, LLC, Friendship Partners, LP. This action is pending before the Honorable David C. Norton.

STATEMENT OF STATUTORY BASIS FOR JURISDICTION

8. This matter is removable pursuant to 28 U.S.C. § 1441(a) and (b) as a civil action brought in a State court which the district courts of the United States have original jurisdiction. This Court is "the district court of the United States for the district and division embracing the place where such action is pending." *See* 28 U.S.C. § 1441(a).

9. This action is within the original jurisdiction of the U.S. District Court pursuant to 28 U.S.C. § 1332. This statute provides, in pertinent part, that “[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between . . . citizens of different States.” 28 U.S.C. § 1332(a)(1). As discussed in detail below, this action satisfies both statutory requirements.

10. This action may be removed directly from probate court to this Court. *See Beattie v. J.M. Tull Found.*, 941 F. Supp. 57, 59 (D.S.C. 1996) (permitting removal directly from South Carolina probate court to this Court where statutory requirements are met).

Amount in Controversy

11. In his complaint, Plaintiff alleges that Defendants sold more than \$155 million worth of Berkshire Hathaway stock (Compl. ¶ 27) and, “acting solely in their own selfish interests and in utter disregard for their duties as Trustees, partners, and fiduciaries and in disregard of the rights of other beneficiaries, as well as the intentions of the Grantor, divided the net proceeds of their illegal transaction among themselves.” (Compl. ¶ 29.) Plaintiff alleges that “[t]he sale of the Berkshire Hathaway stock [and] the distributions from the Trust were unlawful and without legal affect [sic].” (Compl. ¶ 30.) Based on the allegedly illegal sale and distribution of approximately \$155 million of Berkshire Hathaway stock, Plaintiff asserts causes of action against Defendants for breach of fiduciary duty and conversion and seeks several remedies, including actual and punitive damages and injunctive relief. (Compl. ¶¶ 33-43, 46-47, Prayer for Relief.) While Plaintiff does not allege a specific amount of damages, the above allegations clearly establish that the amount in controversy exceeds \$75,000. *See Francis v. Allstate Ins. Co.*, 709 F.3d 362, 367 (4th Cir. 2013) (“If a complaint ‘does not allege a specific

amount of damages, the removing defendant must prove by a preponderance of the evidence that the amount in controversy exceeds [\$75,000].”) (internal citation omitted).

12. Further, Plaintiff seeks to enjoin Defendants from exercising control over the proceeds of the sale of 896 shares of Berkshire Hathaway stock, which are worth more than \$155 million. (Compl. ¶¶ 54-57.) Thus, the injunctive relief requested by Plaintiff is also sufficient to meet the amount in controversy requirement for diversity jurisdiction. *See Francis*, 709 F.3d at 367 (“In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation.”).

13. Finally, Plaintiff seeks an award of punitive damages (Compl. ¶ 53; Prayer for Relief), which can be taken into account when determining the amount in controversy and which provides another basis for finding the amount in controversy requirement satisfied in this case. *See Am. Health & Life Ins. Co. v. Heyward*, 272 F. Supp. 2d 578, 581 (D.S.C. 2003) (holding that punitive damages must be included in calculation of amount in controversy); *Woodward v. Newcourt Commercial Fin. Corp.*, 60 F. Supp. 2d 530, 532 (D.S.C. 1999) (finding that the plaintiff’s “claim for punitive damages alone makes it virtually impossible to say that the claim is for less than the jurisdictional amount”).

14. Therefore, the amount in controversy easily exceeds \$75,000, and this jurisdictional requirement is satisfied.³

Citizenship of the Parties

15. Upon information and belief, at the time of the commencement of this action⁴, Plaintiff was a citizen of the State of South Carolina. (Compl. ¶ 1.)

³ Defendants reserve the right to challenge the Plaintiff’s alleged actual and punitive damages on all available grounds.

16. At the time of the commencement of this action, Defendant Peter Wellin was a citizen of the State of Maine.

17. At the time of the commencement of this action, Defendant Cynthia Plum was a citizen of the State of Pennsylvania.

18. At the time of the commencement of this action, Defendant Marjorie King was a citizen of the State of Washington.

19. At the time of the commencement of this action, Defendant Friendship Management, LLC was a limited liability company organized and existing under the laws of the State of Delaware, and none of its members were citizens of South Carolina for purposes of diversity jurisdiction.

20. At the time of the commencement of this action, Defendant Friendship Partners, LP was a limited partnership organized and existing under the laws of the State of Delaware. At the time of the commencement of this action, Friendship Management, LLC was the sole general partner of Friendship Partners, LP, and the limited partners of Friendship Partners, LP consisted of the following: Friendship Management, LLC⁵; the Wellin Family 2009 Irrevocable Trust; Peter Wellin; Cynthia Plum; Marjorie King; the KSW 2011 Qualified Grantor Retained Annuity Trust⁶; and the KSW 2012 Qualified Grantor Retained Annuity Trust. Upon information and belief, the citizenship of the two Qualified Grantor Retained Annuity Trusts at the time of the commencement of this action includes South Carolina due to Keith Wellin, who is trustee and a

⁴ "Diversity is determined at the time the action is commenced." *Clipper Air Cargo, Inc. v. Aviation Products Int'l, Inc.*, 981 F. Supp. 956, 958 (D.S.C. 1997).

⁵ Friendship Management, LLC is both the general partner and a limited partner of Friendship Partners, LP.

⁶ The status of the 2011 Qualified Grantor Retained Annuity Trust, which was scheduled to terminate on December 2, 2013, is unclear. Defendants reserve the right to argue that this trust is not a limited partner of Friendship Partners, LP.

beneficiary of these trusts, being a citizen of South Carolina. Thus, the citizenship of Friendship Partners, LP for purposes of analyzing diversity jurisdiction arguably includes South Carolina. However, the inclusion of Friendship Partners, LP as a defendant in this action does not defeat diversity jurisdiction because Friendship Partners, LP was fraudulently joined as a defendant to this action and is merely a nominal party, for the reasons set forth below.

21. Upon information and belief, at the time of the commencement of this action, Defendant Keith Wellin was a citizen of the State of South Carolina. However, the presence of Keith Wellin as a defendant, in his individual capacity and in his capacities of trustee of three different trusts, does not defeat diversity jurisdiction because Keith Wellin was fraudulently joined as a defendant to this action and is merely a nominal party, for the reasons set forth below. In the alternative, if the Court finds that Keith Wellin is a proper party to this action, the Court should realign Keith Wellin as a plaintiff to this action, in which case Keith Wellin does not defeat diversity jurisdiction.

22. Because Friendship Partners, LP and Keith Wellin are fraudulently joined and mere nominal parties and, in the case of Keith Wellin, subject to realignment as a plaintiff even if deemed a proper party, and because the citizenship of the remaining defendants is unquestionably diverse from the citizenship of the Plaintiff, the diversity of citizenship requirement of 28 U.S.C. § 1332 is satisfied.

Law Regarding Fraudulent Joinder and Nominal Party

23. The “fraudulent joinder” doctrine permits removal under certain circumstances even though a nondiverse party is named as a defendant in the case. *Mayes v. Rapoport*, 198 F.3d 457, 461 (4th Cir. 1999). “This doctrine effectively permits a district court to disregard, for

jurisdictional purposes, the citizenship of certain nondiverse defendants, assume jurisdiction over a case, dismiss the nondiverse defendants, and thereby retain jurisdiction.” *Id.*

24. To show fraudulent joinder, the removing party must demonstrate either outright fraud in the plaintiff’s pleading of jurisdictional facts, or that there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court. *See Hartley v. CSX Transp., Inc.*, 187 F.3d 422, 424 (4th Cir. 1999). Here, the removing Defendants do not assert fraud in the plaintiff’s pleading of jurisdictional facts. Rather, the fraudulent joinder doctrine applies in this case because there is no possibility that the plaintiff would be able to establish a cause of action against Friendship Partners, LP or Keith Wellin in state court.

25. The burden on a removing defendant who argues that a non-diverse defendant was fraudulently joined is a heavy one. *See id*; *see also Boss v. Nissan N. Am., Inc.*, 228 F. App’x 331, 334-35 (4th Cir. 2007). In discussing the standard courts should apply when a removing defendant asserts fraudulent joinder, the Fourth Circuit has recognized that “[a] claim need not ultimately succeed to defeat removal; only a possibility of a right to relief need be asserted.” *Baltimore Cnty. v. Cigna Healthcare*, 238 F. App’x 914, 920 (4th Cir. 2007) (internal citation omitted). Further, all legal and factual issues must be resolved in favor of the plaintiff. *Id.* A court making this assessment is not bound by the allegations of the pleadings, but may instead consider the entire record, and determine the basis for joinder by any means available. *Id.*

26. As explained by the Fourth Circuit:

“Fraudulent joinder” is a term of art, it does not reflect on the integrity of plaintiff or counsel, but is merely the rubric applied when a court finds either that no cause of action is stated against the nondiverse defendant, or *in fact* no cause of action exists. In

other words, a joinder is fraudulent if “there [is] no real intention to get a joint judgment, and . . . there [is] no colorable ground for so claiming.”

AIDS Counseling & Testing Centers v. Grp. W Television, Inc., 903 F.2d 1000, 1003 (4th Cir. 1990) (quoting *Lewis v. Time Inc.*, 83 F.R.D. 455, 460 (E.D. Cal. 1979)).

27. Closely related to the fraudulent joinder doctrine is the well-established rule that “a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy.” *Navarro Sav. Ass’n v. Lee*, 446 U.S. 458, 461 (1980); see also *Beaufort Cnty. Sch. Dist. v. United Nat. Ins. Co.*, 519 F. Supp. 2d 609, 615 (D.S.C. 2007). “The test to determine whether a party is nominal or not is similar to the test for fraudulent joinder.” *Beaufort Cnty. Sch. Dist.*, 519 F. Supp. 2d at 615; see also *Farias v. Bexar Cnty. Bd. of Trustees for Mental Health Mental Retardation Servs.*, 925 F.2d 866, 872 (5th Cir. 1991) (“The bottom line concern in determining a nominal party is whether the plaintiff can establish a cause of action against the nonremoving defendant in state court.”). “A defendant is nominal if there is no arguably reasonable basis for predicting that state law might impose liability on the [resident] defendant under the facts alleged. There need only be a possibility that a right to relief exists to avoid that conclusion.” *Id.* (quoting *Workman v. National Supaflu Systems, Inc.*, 676 F.Supp. 690, 693 (D.S.C. 1987)). Because the standards are identical or nearly identical, courts sometimes conflate the questions of whether a defendant is fraudulently joined and whether the defendant is merely nominal into a single analysis. See, e.g., *Workman v. Nat’l Supaflu Sys., Inc.*, 676 F. Supp. 690, 693 (D.S.C. 1987) (“Any argument that Carolina is a nominal defendant or was fraudulently joined is without merit.”).

**Application of the Law on Fraudulent Joinder and Nominal Defendant
to Friendship Partners, LP and Keith Wellin**

28. Here, the Court should not consider the citizenship of Friendship Partners, LP (the “LP”) or Keith Wellin for purposes of determining diversity jurisdiction because the LP and Keith Wellin are fraudulently joined as defendants and are merely nominal parties.

29. In the vast majority of reported decisions in which a removing defendant asserts fraudulent joinder, the plaintiff’s state court complaint asserts at least one cause of action against the non-diverse defendant and requests at least one form of relief from the non-diverse defendant. The removing party then must persuade the federal court that the plaintiff has no possible right to the relief sought from the non-diverse defendant pursuant to the asserted cause or causes of action. The cause of action asserted by the plaintiff against the non-diverse defendant is typically weak, and the court must determine whether there is “any possibility” that the plaintiff is entitled to the relief sought from the non-diverse defendant. If there is “any possibility,” then the removing defendant has not met its burden.

30. Here, however, Plaintiff has not even asserted a token cause of action against the LP or Keith Wellin. The Plaintiff’s Complaint asserts six “causes of action” (the last four of which are simply forms of relief Plaintiff is requesting): (1) breach of fiduciary duty, (2) conversion; (3) removal of trustees, (4) restitution, (5) recovery of attorneys fees, and (6) a temporary restraining order/temporary and permanent injunction. (*See generally* Compl.) None of these causes of action are asserted against the LP or Keith Wellin, and Plaintiff has no possibility of establishing any of these causes of action against the LP or Keith Wellin. Plaintiff does not allege that the LP or Keith Wellin owe him any fiduciary duties, nor could he. (*See* Compl. ¶¶ 33-37.) Further, Plaintiff’s conversion cause of action is only asserted against Defendants Peter Wellin, Cynthia Plum, and Marjorie King. (*See id.* ¶¶ 38-43.) The remaining

“causes of action” are not causes of action at all; rather, they are types of equitable relief that Plaintiff is seeking from the Court relating to Keith Wellin’s three children. (*See* Compl. at Prayer for Relief (only mentioning Keith Wellin’s three children)).

31. In the handful of cases identified by the undersigned in which a district court or circuit court addressed a fraudulent joinder argument in a case where the plaintiff failed to assert any cause of action against – or seek any relief from – the non-diverse defendant, the courts have uniformly held that the non-diverse defendant was fraudulently joined. *See, e.g., Bergstrom Imports Milwaukee, Inc. v. Chrysler Grp. LLC*, 12-CV-603, 2012 WL 2872635 (E.D. Wis. July 12, 2012) (finding the non-diverse defendant fraudulently joined despite plaintiff’s argument that the state court may grant some equitable relief against the non-diverse defendant, even though not expressly requested in the complaint, and holding that “for all practical purposes, a groundless claim is the same as no claim at all”); *Renaissance Mktg., Inc. v. Monitronics Int’l, Inc.*, 606 F. Supp. 2d 201, 208-09 (D.P.R. 2009) (finding fraudulent joinder where plaintiff mentioned the non-diverse defendant in the factual allegations but where “no cause of action is expressly stated nor any relief for damages or otherwise is requested” against the non-diverse defendant); *Whitaker v. Fresno Telsat Inc.*, 99 CIV. 6059 (SAS), 1999 WL 767432 (S.D.N.Y. Sept. 28, 1999), *aff’d in relevant part by Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196 (2d Cir. 2001) (finding fraudulent joinder where “plaintiff’s Amended Complaint [did] not assert a single cause of action against [the non-diverse defendant]” and requested relief on behalf of – not from – the non-diverse defendant).

32. In this case, the record demonstrates that Plaintiff has no possibility of establishing a cause of action against the LP or Keith Wellin in state court. Accordingly, the LP and Keith Wellin are fraudulently joined, and this Court should disregard the citizenship of these

defendants for jurisdictional purposes, assume jurisdiction of the case, and dismiss the LP and Keith Wellin as defendants.

**Alternative Request for the Court
to Realign Keith Wellin as a Plaintiff**

33. In the event the Court finds Keith Wellin is a necessary party to this dispute and therefore is not fraudulently joined (or otherwise finds that Keith Wellin is not fraudulently joined), the removing Defendants request that the Court realign Keith Wellin as a plaintiff to this action.

34. In the seminal case on realignment, the Supreme Court held:

To sustain diversity jurisdiction there must exist an actual, substantial controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side. Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who defendants. It is our duty, as it is that of the lower federal courts, to look beyond the pleadings and arrange the parties according to their sides in the dispute. Litigation is the pursuit of practical ends, not a game of chess. Whether the necessary collision of interests exists, is therefore not to be determined by mechanical rules. It must be ascertained from the principal purpose of the suit and the primary and controlling matter in dispute.

Indianapolis v. Chase Nat'l Bank, 314 U.S. 63 (1941) (quoted in *U.S. Fid. & Guar. Co. v. A & S Mfg. Co., Inc.*, 48 F.3d 131, 132-33 (4th Cir. 1995)).

35. In *A & S Mfg. Co., Inc.* ("A & S"), the Fourth Circuit affirmed the use of the "principal purpose" test for determining whether realignment of the parties is appropriate. *See A & S*, 48 F.3d at 133; *see also Gressette v. Sunset Grille, Inc.*, 447 F. Supp. 2d 533, 535-37 (D.S.C. 2006); *Lott v. Scottsdale Ins. Co.*, 811 F. Supp. 2d 1220, 1222-24 (E.D. Va. 2011). Application of the principal purpose test entails two steps. First, the court must determine the primary issue in the controversy. Next, the court should align the parties according to their

positions with respect to the primary issue. If the alignment differs from that in the complaint, the court must determine whether complete diversity continues to exist. *See A & S*, 48 F.3d at 133; *see also Gressette*, 447 F. Supp. 2d at 535-37.

36. Here, as noted above, Plaintiff does not assert any cause of action against Keith Wellin or seek any relief from Keith Wellin. Rather, Plaintiff alleges that the other defendants have breached duties owed to Keith Wellin. (*See, e.g.*, Compl. ¶¶ 26, 29, 33, 36.) Plaintiff's memorandum in support of his motion for TRO and preliminary injunction also demonstrates that, to the extent Keith Wellin is a proper party to this action, he should be aligned with the Plaintiff. (*See, e.g.*, Ex. A, Memorandum in Support of Motion, at 4 (arguing that Keith Wellin has been "very generous with the wealth he accumulated and has made substantial gifts to his children and his current wife, Wendy Wellin" and arguing that his defendant children's conduct is in contravention of the stated intentions of Keith Wellin, the Grantor of the Wellin Family 2009 Irrevocable Trust).)

37. In sum, Plaintiff purports to bring this lawsuit to remedy alleged wrongs committed by Keith Wellin's children against Keith Wellin, and Plaintiff does not allege a single wrongful act committed by Keith Wellin, assert a single cause of action against Keith Wellin, or request a single form of relief from Keith Wellin. Under these circumstances, the necessary "collision of interest" between Plaintiff and Keith Wellin does not exist, and Keith Wellin is properly aligned as a plaintiff to this action, if he is a proper party at all.

TIMELINESS OF REMOVAL

38. Defendants' Notice of Removal is timely as it has been made within 30 days after Defendants' receipt of Plaintiffs' Summons and Complaint, attached hereto as Exhibit A. *See* 28 U.S.C. § 1446(b).

JOINDER OR CONSENT BY ALL DEFENDANTS

39. All defendants are required to either join in or consent to removal actions, subject to three exceptions. Specifically, a defendant need not join in or consent to removal where “(1) removal is appropriate under § 1441(c); (2) the non-joining defendants have not been served with process at the time the removal petition was filed; or (3) those defendants which did not sign are merely nominal or formal.” *Toyota of Florence, Inc. v. Lynch*, 713 F. Supp. 898, 905, n.13 (D.S.C. 1989).

40. Here, the undersigned represents all Defendants except for Keith Wellin. All Defendants except for Keith Wellin join in and consent to this removal. The removing Defendants did not seek Keith Wellin’s consent to this removal as he is merely a nominal defendant, for the reasons explained above, and his consent is not necessary. *See id.* In the alternative, Keith Wellin should be realigned as a plaintiff in this action, and his consent is not necessary on that basis. *See Gressette v. Sunset Grille, Inc.*, 447 F. Supp. 2d 533, 537 (D.S.C. 2006) (holding that a defendant subject to realignment as a plaintiff need not consent to removal).

NOTICE

41. Pursuant to 28 U.S.C. § 1446(d), Defendants have given notice of the filing of this Notice of Removal to Plaintiffs as reflected in the Certificate of Service below, and a copy of this Notice of Removal is simultaneously being filed with the Clerk of the Charleston County Probate Court.

REQUEST FOR BRIEFING AND ORAL ARGUMENT

42. In the event any question arises as to the propriety of removal of this matter, Defendants request the opportunity to present briefs and oral argument in support of their position that removal of this action is proper.

CONCLUSION

WHEREFORE, pursuant to 28 U.S.C. §§ 1332, 1441(a), and 1441(b), this action should proceed in the United States District Court for the District of South Carolina, Charleston Division, as an action properly removed thereto.

[SIGNATURE PAGE FOLLOWING]

NELSON MULLINS RILEY & SCARBOROUGH LLP

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Charleston, South Carolina
December 27, 2013

STATE OF SOUTH CAROLINA) IN THE PROBATE COURT
COUNTY OF CHARLESTON) CASE NO.

Lester S. Schwartz, as Trust Protector
of the Wellin Family 2009 Irrevocable
Trust. Plaintiff

SUMMONS

vs.

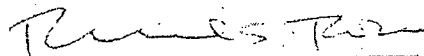
Peter J. Wellin, Cynthia W. Plum and
Marjorie W. King. Individually and as Co-
Trustees and Beneficiaries of the Wellin
Family 2009 Irrevocable Trust, Friendship
Management, LLC, Cynthia W. Plum as
Manager of Friendship Management, LLC,
Friendship Partners, LP and Keith S.
Wellin, Individually and as Trustee of the
Keith S. Wellin Florida Revocable Living
Trust u/a/d December 11, 2011, as Trustee
of the KSW 2011 Qualified Grantor
Retained Annuity Trust, and Trustee of the
KSW 2012 Qualified Grantor Retained
Annuity Trust u/a/d November 28, 2012
Defendant(s).

TO THE DEFENDANTS ABOVE NAMED

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action,
a copy of which is herewith served upon you, and to serve a copy of your Answer to said
Complaint upon the undersigned, Rosen, Rosen & Hagood, at their offices at 151 Meeting Street,
Suite 400, Charleston, South Carolina 29401, within thirty (30) days of the service hereof,
exclusive of the day of such service, and if you fail to answer the Complaint as required by this
Summons, Plaintiff will apply to the Court for the relief demanded in the Complaint.

Respectfully submitted.

ROSEN, ROSEN & HAGOOD, LLC

By: 

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H. Brewton Hagood, Esquire
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ATTORNEY FOR PLAINTIFF

Charleston, South Carolina
December 20, 2013.

STATE OF SOUTH CAROLINA) IN THE PROBATE COURT
COUNTY OF CHARLESTON) CASE NO.

Lester S. Schwartz, as Trust Protector
of the Wellin Family 2009 Irrevocable
Trust, Plaintiff

COMPLAINT

vs.

Peter J. Wellin, Cynthia W. Plum and
Marjorie W. King, Individually and as Co-
Trustees and Beneficiaries of the Wellin
Family 2009 Irrevocable Trust, Friendship
Management, LLC, Cynthia W. Plum as
Manager of Friendship Management, LLC,
Friendship Partners, LP and Keith S.
Wellin, Individually and as Trustee of the
Keith S. Wellin Florida Revocable Living
Trust u/a/d December 11, 2011, as Trustee
of the KSW 2011 Qualified Grantor
Retained Annuity Trust, and Trustee of the
KSW 2012 Qualified Grantor Retained
Annuity Trust u/a/d November 28, 2012
Defendant(s).

Petitioner, Lester S. Schwartz, as Trust Protector of the Wellin Family 2009 Irrevocable Trust, alleges and states as follows:

1. Plaintiff is a resident of South Carolina and is the duly appointed Trust Protector of the Wellin Family 2009 Irrevocable Trust having been appointed pursuant to the Trust Agreement by the Grantor Keith S. Wellin by document dated November 20, 2013.

2. The Defendants Peter J. Wellin, Cynthia W. Plum and Marjorie W. King are the children of Keith S. Wellin.

3. Keith S. Wellin is the Grantor of the Wellin Family 2009 Irrevocable Trust residing in Charleston, South Carolina.

4. Pursuant to the Wellin Family 2009 Irrevocable Trust the Trust Protector has the authority to remove the Trustee and to appoint a different Trustee or additional Co-Trustees. The Trust Protector also has the authority to appoint Successor Trustees.

5. The Trust Protector does not have the authority to remove a child of the Grantor, Keith S. Wellin.

6. Pursuant to the Wellin Family 2009 Irrevocable Trust the Trust Protector has the power during the lifetime of the Grantor, Keith S. Wellin, to amend the provisions of the Trust with regard to how the beneficiaries will benefit from the Trust and to amend the Trust administrative provisions.

7. The Trust Protector has the authority to use Trust assets to hire legal counsel to advise him to defend the Trust Protector in connection with any matter concerning the Trust.

8. The Defendants herein, Peter J. Wellin, Marjorie W. King and Cynthia W. Plum serve and have served as Co-Trustees of the Wellin Family 2009 Irrevocable Trust.

9. On November 20, 2013, the Trust Protector removed South Dakota Trust Company, N.A., as the corporate Trustee of the Wellin Family 2009 Irrevocable Trust and appointed Brown Brothers Harriman Trust Company of Delaware, N.A. ("Brown Brothers") as the corporate Trustee, and Brown Brothers accepted the appointment in writing on November 20, 2013.

10. The Trust Protector amended the provisions of the Wellin Family 2009 Irrevocable Trust requiring that actions of the Trustees required the unanimous vote of the Trustees, excepting the vote of any Trustee who is also a beneficiary who is ineligible to participate in the exercise of the power or discretion because, as a beneficiary, such party may be affected by the exercise of such power or discretion.

11. On December 5, 2013, Brown Brothers submitted its notice of resignation as Trustee to the Trust Protector, and such resignation has not yet been accepted and Brown Brothers has not been discharged from its duties as Trustee.

12. Peter J. Wellin, Cynthia W. Plum and Marjorie W. King are Members of Friendship Management, LLC a Delaware Limited Liability Company (the "Company" owning in the aggregate Sixty Percent (60%) of the Membership Interest in said Company), and Cynthia W. Plum is the Company's sole Manager.

13. Friendship Company, LLC is the general partner of Friendship Partners, LP, a Delaware Limited Partnership (the "Friendship Partners"), and the Wellin Family 2009 Irrevocable Trust is a Limited Partner owning a Limited Partnership interest of more than Ninety Percent (90%).

14. On or about December 1, 2013, Cynthia W. Plum, as Manager of Friendship Management, LLC, the general partner of Friendship Partners, LP, directed the liquidation of Friendship Partners, LP.

15. On or about December 6, 2013, Cynthia W. Plum, as the Manager of Friendship Management, LLC, while serving as Trustee of the Wellin Family 2009 Irrevocable Trust, acting solely in her own interest and in complete and utter disregard for her duties as a fiduciary with respect to Friendship Partners LP and the Wellin Family 2009 Irrevocable Trust, sold substantially all of the assets of the Partnership consisting of Berkshire Hathaway stock held in Friendship Partners LP a Delaware Limited Partnership. The sale of these assets was a violation of Defendants' fiduciary duties with respect to the Partnership and as Trustees as Defendants acted solely in their own financial interest in complete and utter disregard for the interest of the

Partnership, its Partners, and the Trust, for the intentions of the Grantor and the other beneficiaries of the Wellin Family 2009 Irrevocable Trust.

16. One or about December 1, 2013, the Defendants, Cynthia W. Plum, Peter J. Wellin, by Cynthia J. Plum, his attorney in fact, and Marjorie W. King, as the members of the Distribution Committee of the Wellin Family 2009 Irrevocable Trust, and as individual Trustees of the Wellin Family 2009 Irrevocable Trust, adopted by written consent without a meeting, a plan to distribute to themselves individually from the Wellin Family 2009 Irrevocable Trust, all of the proceeds from the liquidation of Friendship Partners, LP, exceeding the sum of \$52,000,000.00 (referred to in their written consent as the "Trust Retained Amount"), in equal shares to each of the three (3) individual Trustees/Defendants, directly from Friendship Partners, LP, as a deemed distribution first to the Wellin Family 2009 Irrevocable Trust, and then to themselves, individually, without actually making any distribution to the Wellin Family 2009 Irrevocable Trust.

17. That the Trust Retained Amount, reflects an amount that the Defendants allege is the sum due the Grantor, Keith S. Wellin, to satisfy a certain Promissory Note by and between the Grantor, Keith S. Wellin and the Defendants, Peter J. Wellin, Cynthia J. Plum and Marjorie W. King, as Trustees of the Wellin Family 2009 Irrevocable Trust, and presently in litigation.

18. That the actions of the Defendants, Peter J. Wellin, Cynthia J. Plum and Marjorie W. King, as Trustees of the Wellin Family 2009 Irrevocable Trust, have frustrated the intent and purposes of the Trust by distributing to themselves all of the Trust Estate except for that sum they have determined necessary to satisfy the debt owed to the Grantor, Keith S. Wellin, pursuant to his promissory note, leaving no Trust Estate available to make distributions to the qualified beneficiaries as intended.

19. These actions by Defendants, Peter J. Wellin, Cynthia J. Plum and Marjorie W. King were done without participation or consent of a Corporate Trustee.

20. There is currently pending in this Court a Petition filed by the Defendants Peter J. Wellin, Cynthia W. Plum and Marjorie W. King against Defendant Keith Wellin alleging the need for appointment of a Conservator for Keith Wellin, and alleging, among other things that the "central tenet" of Keith Wellin's estate planning was to protect his estate "for his lineal descendants"

21. There is currently pending other litigation involving the Wellin Family 2009 Irrevocable Trust including a Complaint for Injunctive and Declaratory Relief filed by Keith S. Wellin individually and as Trustee of the Keith S. Wellin Florida Revocable Living Trust u/a/d December 11, 2001, Trustee of the KSW 2011 Qualified Grantor Retained Annuity Trust u/a/d November 20, 2011 and Trustee of the KSW 2012 Qualified Grantor Retained Annuity Trust u/a/d November 28, 2012 v. Peter J. Wellin, Cynthia W. Plum and Marjorie W. King, individually, and as Co-Trustees and beneficiaries of the Wellin Family 2009 Irrevocable Trust u/a/d November 2, 2009, South Dakota Trust Company, LLC as Co-Trustee of the Wellin Family 2009 Irrevocable Trust u/a/d November 2, 2009, Friendship Management, LLC, Cynthia W. Plum, as Manager of Friendship Management, LLC and Friendship Partners, LP.

22. There is also pending in the United States District Court for the District of South Carolina a civil action entitled Keith Wellin, individually and as Trustee of the Keith S. Wellin Florida Revocable Living Trust u/a/d December 11, 2001 v. Peter J. Wellin, Cynthia W. Plum and Marjorie W. King, individually, and as Co-Trustees and beneficiaries of the Wellin Family 2009 Irrevocable Trust u/a/d November 2, 2009, South Dakota Trust Company, LLC as Co-

Trustee of the Wellin Family 2009 Irrevocable Trust u/a/d November 2, 2009, Friendship Management, LLC, Friendship Partners, LP.

23. The Wellin Family 2009 Irrevocable Trust is the subject matter of both lawsuits. Among other relief requested in the United States District Court for the District of South Carolina by Keith Wellin is imposition of a Constructive Trust; appointment of a Receiver to take control of the Wellin Family 2009 Irrevocable Trust, Friendship Partners, LP and Friendship Management, LLC and rescission of the entire transaction creating the Wellin Family 2009 Irrevocable Trust.

24. By Order dated the 3d day of July, 2013 the Honorable David Norton, United States District Judge ordered that the individual Defendants, except Keith Wellin, be temporarily restrained and enjoined from selling, trading, gifting, transferring, negotiating or other disposing of any and all of the 896 BRKA shares owned by Friendship Partners, LP or the 98.9% interest in Friendship Partners, LP owned by the Wellin Family 2009 Irrevocable Trust, without the express, written, and notarized consent of Keith Wellin or his current attorney-in-fact.

25. The Temporary Restraining Order issued by the United States District Court was dissolved on the 22nd day of November, 2013 and Keith Wellin's motion for preliminary injunction was denied.

26. Subsequently Defendants in violation of their fiduciary duties to the partners of the Partnership and as Trustees, in violation of their fiduciary and confidential relationship with their father, Keith S. Wellin, as well as their children and further descendants, embarked on a course of self-dealing and utter disregard of their fiduciary duties by selling all of the Berkshire Hathaway stock being held by Friendship Partners, LP.

27. The result of the sale of the Berkshire Hathaway stock is that more than \$155,000,000.00 were realized on the sale of the stock resulting in a tax consequence to the owners of the Partnership interests of more than \$40,000,000.00.

28. The Wellin Family 2009 Irrevocable Trust in Article IV, provides that the Trustee shall first pay to the beneficiary, or his or her living descendants, such amounts from the Trust income that the Trustee in its sole and absolute discretion shall deem needed for their health, support, maintenance or education (including a college education and professional or post-graduate study) or any other reasonable purpose. Such payments of income, if any, shall be made according to their respective needs and without regard to equality of distribution. Likewise, in addition to payments of income, the Wellin Family 2009 Irrevocable Trust provided that the Trustees may pay to beneficiary or to his or her living descendants, so much of the Trust principal as the Trustee in its sole discretion shall deem necessary or advisable for their health, support, maintenance, or education (including a college education and professional or post-graduate study), or any other reasonable purpose. Such principal payments are to be made on the basis of need and without regard to equality of distribution.

29. In utter disregard for the Trust provisions and in violation of their fiduciary duties, and duties of good faith, the Defendants Peter J. Wellin, Cynthia W. Plum and Marjorie W. King conspired to sell the assets held by Friendship Partners, LP, which partnership was an asset of the Wellin Family 2009 Irrevocable Trust. On or before December 5, 2013 sold all of the stock for cash, after which Defendants Peter J. Wellin, Cynthia W. Plum and Marjorie W. King acting solely in their own selfish interests, and in utter disregard for their duties as Trustees, partners and fiduciaries and in disregard of the rights of other beneficiaries, as well as the intentions of the Grantor, divided the net proceeds of their illegal transaction among themselves.

30. The sale of the Berkshire Hathaway stock the distributions from the Trust were unlawful and without legal affect.

31. Defendants left cash in the Partnership of approximately Fifty Two Million Two Hundred Twenty Eight Thousand (\$50,228,000) dollars in the Partnership which they improperly allege is due on a promissory note from the Trust to Keith S. Wellin, which note was satisfied on November 20, 2013 by a substitution of assets into the Trust by Mr. Wellin.

32. The sale of stock of Friendship Partners, LP and distributions from the Trust was done by Peter J. Wellin, Cynthia W. Plum and Marjorie W. King without requisite authorization or authority.

FIRST CAUSE OF ACTION
BREACH OF FIDUCIARY DUTY

33. Defendants Peter J. Wellin, Cynthia W. Plum and Marjorie W. King by accepting their appointment as Trustees under the Wellin Family 2009 Irrevocable Trust thereby assumed fiduciary duties and duties of the utmost trust and confidence to the Grantor, Keith Wellin as well to all the beneficiaries of the Trust including the children of Defendants and unborn children of Defendants. It was the intention of the Grantor Keith Wellin to benefit his grandchildren.

34. Furthermore, Defendant Cynthia Plum as Manager of the General Partner, Friendship Manager, LLC owed fiduciary duties to the Friendship Partners, LP of which the Wellin Trust was a partner. Defendant Plum breached these duties as set forth herein.

35. Defendants owed to the Trust and the beneficiaries and potential beneficiaries the utmost duty of care, loyalty and good faith.

36. Defendants breached their fiduciary duties by, among other things, failing to act in the best interests of the beneficiaries and intended beneficiaries of the Wellin Family 2009 Irrevocable Trust; by breaching their duty of loyalty to the Grantor and to the other intended

beneficiaries; by violating the terms of the Wellin Family 2009 Irrevocable Trust and by misappropriating funds which were not rightfully belonging to them.

37. As a result, and pursuant to S.C. Code § 62-7-1001, Plaintiff is entitled to an order of this Court requiring Defendants to immediately restore the proceeds of the sale of the Berkshire Hathaway stock to the Trust; or in the alternative for damages as well as punitive damages in amounts to be determined by the trier of fact.

**FOR A SECOND CAUSE OF ACTION
FOR CONVERSION**

38. Plaintiffs hereby allege and re-allege as if fully set forth herein the proceeding allegations of this Complaint.

39. Defendants Peter J. Wellin, Cynthia W. Plum and Marjorie W. King were heretofore appointed duly acting individual Trustees of the Wellin Family 2009 Irrevocable Trust. Defendants Peter J. Wellin, Cynthia W. Plum and Marjorie W. King have converted the Trust assets of the Wellin Family 2009 Irrevocable Trust to their own use and benefit and sold the Berkshire Hathaway stock which they controlled via the Partnership and as Trustees and fiduciaries.

40. Plaintiff is the duly appointed Trust Protector of the Wellin Family 2009 Irrevocable Trust and the assets converted by Defendants Peter J. Wellin, Cynthia W. Plum and Marjorie W. King are rightfully assets of the Wellin Family 2009 Irrevocable Trust which Defendants wrongfully have detained, diverted and converted for their own use and benefit.

41. Defendants Peter J. Wellin, Cynthia W. Plum and Marjorie W. King have wrongfully and illegally transferred cash received from the sale of the Berkshire Hathaway stock and the dissolution of Friendship Partners, LP for their own use and benefit.

42. Defendants Peter J. Wellin, Cynthia W. Plum and Marjorie W. King have acted jointly and severally in converting the Trust assets and are each duly liable for all damages suffered by the Trust.

43. As a result Plaintiff is entitled to a judgment against each of these Defendants in an amount to be determined by the trier of fact, as well as an award of attorneys' fees and punitive damages.

FOR A THIRD CAUSE OF ACTION
REMOVAL OF TRUSTEES

44. Plaintiffs hereby re-allege as if fully set forth herein the proceeding allegations of this Complaint.

45. Based on the gross misconduct of the Defendants, their self-dealing, misappropriation of Trust assets and serious breaches of duty, and pursuant to S.C. Code §62-7-706, and 62-7-1001, Trust Protector requests that this Court issue an Order removing Defendants Peter J. Wellin, Cynthia W. Plum and Marjorie W. King as Trustees of the Wellin Family 2009 Irrevocable Trust.

FOR A FOURTH CAUSE OF ACTION
RESTITUTION

46. Plaintiffs hereby re-allege as if fully set forth herein the proceeding allegations of this Complaint.

47. Because Defendants have illegally and in violation of their fiduciary duties misappropriated funds belonging to the Trust, Plaintiff requests an Order of this Court requiring Defendants to immediately restore those funds improperly taken to the Trust.

**FOR A FIFTH CAUSE OF ACTION
RECOVERY OF ATTORNEYS FEES**

48. Plaintiffs hereby allege and re-allege as if fully set forth herein the proceeding allegations of this Complaint.

49. The Wellin Family 2009 Irrevocable Trust provides in paragraph 7 of Article VI that the Trust Protector is authorized to hire legal counsel to advise and defend the Trust Protector in any matter concerning the Trust.

50. Pursuant to the provisions of Article IV, paragraph B.1(a) distributions are to be made for beneficiaries health, support, maintenance or education (including college and post graduate study), or any other reasonable purpose. Such payments of income shall be made according to the respective needs of the beneficiaries. Distributions of principal may only be made based on similar ascertainable standards, again "on the basis of need".

51. The distribution of \$31,876,714.15 to each of the three children, to the exclusion of all other beneficiaries, leaving the Trust with less than 2% of its original asset value far exceeds the above standards which must only be made on the basis of need.

52. In addition, the alleged distribution direction by the children as Distribution Advisors and as Trustees violated their fiduciary distribution authority by the reciprocal nature of their attempted distributions and attempted to circumvent the Trust, and its other serving fiduciaries via directed distributions from the Partnership.

53. Plaintiff pursuant to S.C. Code §62-7-1004 hereby requests an award of attorneys fees, costs and expenses from Defendants Peter J. Wellin, Cynthia W. Plum and Marjorie W. King individually.

FOR A SIXTH CAUSE OF ACTION
TEMPORARY RESTRAINING ORDER, TEMPORARY AND PERMANENT INJUNCTION

54. Plaintiffs hereby re-allege as if fully set forth herein the proceeding allegations of this Complaint.

55. That unless the Defendants are restrained by this Court, there is, based on their past conduct, including the attempted conversion of over \$95,000,000 in assets, a substantial likelihood that the assets of the Trust will be dissipated or lost.

56. The loss of assets of the Trust would result in irreparable harm to the Trust and the intended beneficiaries.

57. Plaintiff, as Trust Protector and pursuant to S.C. Code §62-7-706 hereby seeks an Order of this Court restraining and enjoining the Defendants from spending, reducing, pledging, distributing, sharing, or otherwise exercising any control or dominion over the cash assets of the Trust which defendants have misappropriated.

WHEREFORE, Plaintiffs pray for the following relief:

(a) an Order removing Defendants Peter J. Wellin, Cynthia W. Plum and Marjorie W.

King as Trustees of the Wellin Family 2009 Irrevocable Trust;

(b) an Order pursuant to S.C. Code §62-7-706(c) requiring Defendants Peter J. Wellin,

Cynthia W. Plum and Marjorie W. King to immediately restore to Plaintiff as Trust

Protector of the Wellin Family 2009 Irrevocable Trust, or to such Trustee as Plaintiff

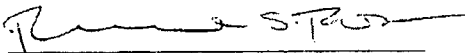
shall in his discretion appoint for the Trust, all distribution proceeds from the

liquidation of Friendship Partners LP, other than the proceeds applicable to the

11,037 units owned by the general partner to which the general partner is entitled:

- (c) an award of actual damages, punitive damages and an award of attorneys' fees and costs incurred in this matter from individual defendants Peter J. Wellin, Cynthia W. Plum and Marjorie W. King; and
- (d) an Order approving the authority of the Trust Protector to pay himself appropriate compensation for his services from the Trust and to pay appropriate fees and cost to counsel for the Trust Protector as permitted in paragraph 7 of Article VI of the Trust document;
- (e) such other and further relief as this Court deems appropriate

ROSEN, ROSEN & HAGOOD, LLC

By: 
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ATTORNEY FOR PLAINTIFF

Charleston, South Carolina
December ____, 2013.

STATE OF SOUTH CAROLINA

) IN THE PROBATE COURT
) CASE NO.

COUNTY OF CHARLESTON

)

Lester S. Schwartz, as Trust Protector
of the Wellin Family 2009 Irrevocable
Trust, Plaintiff

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)

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vs.

VERIFICATION

13 DEC 17 PM 3:51

Peter J. Wellin, Cynthia W. Plum and
Marjorie W. King. Individually and as Co-
Trustees and Beneficiaries of the Wellin
Family 2009 Irrevocable Trust, Friendship
Management, LLC, Cynthia W. Plum as
Manager of Friendship Management, LLC,
Friendship Partners. LP and Keith S.
Wellin, Individually and as Trustee of the
Keith S. Wellin Florida Revocable Living
Trust u/a/d December 11, 2011, as Trustee
of the KSW 2011 Qualified Grantor
Retained Annuity Trust, and Trustee of the
KSW 2012 Qualified Grantor Retained
Annuity Trust u/a/d November 28, 2012
Defendant(s).

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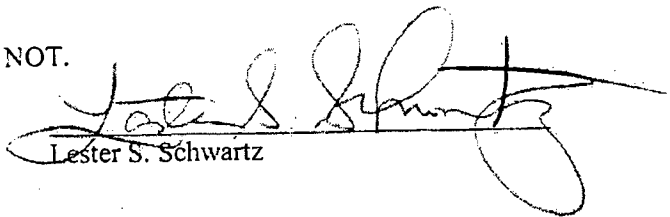
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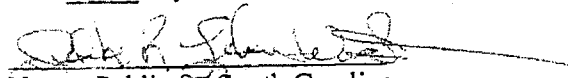
Personally appeared before me, Lester S. Schwartz, who being duly sworn does state as follows: I have read the Complaint and can verify under oath that the facts stated therein are true, except for those stated upon information and belief, and as to those allegations, the Affiant believes them to be true.

FURTHER AFFIANT SAYETH NOT.


Lester S. Schwartz

SWORN to before me

This 20th day of December, 2013.



Notary Public for South Carolina

My Commission Expires: March 8, 2017

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE PROBATE COURT
) CASE NO.
)

Lester S. Schwartz, as Trust Protector
of the Wellin Family 2009 Irrevocable
Trust, Plaintiff

vs.

) PLAINTIFF'S MOTION FOR
) TEMPORARY RESTRAINING ORDER
) AND ORDER TO SHOW CAUSE FOR
) PRELIMINARY INJUNCTION

Peter J. Wellin, Cynthia W. Plum and
Marjorie W. King, Individually and as Co-
Trustees and Beneficiaries of the Wellin
Family 2009 Irrevocable Trust, Friendship
Management, LLC, Cynthia W. Plum as
Manager of Friendship Management, LLC,
Friendship Partners, LP and Keith S.
Wellin, Individually and as Trustee of the
Keith S. Wellin Florida Revocable Living
Trust u/a/d December 11, 2011, as Trustee
of the KSW 2011 Qualified Grantor
Retained Annuity Trust, and Trustee of the
KSW 2012 Qualified Grantor Retained
Annuity Trust u/a/d November 28, 2012
Defendant(s).

Pursuant to S.C. R. Civ. Pro. 65, S.D. Codified Laws § 55-3-20.1, S.C. CODE ANN. § 62-7-706(c), and/or S.C. CODE ANN. § 62-7-1001(b)(2), Plaintiff Lester S. Schwartz, as Trust Protector of the Wellin Family 2009 Irrevocable Trust, hereby moves the Court to issue a temporary restraining order against Defendants to immediately restrain, enjoin, and prevent Defendants from being able to sell, trade, negotiate, gift, or otherwise dispose of the proceeds of the sale of the 896 Class A Berkshire Hathaway common shares transferred to Friendship Partners, LP by Keith S. Wellin in 2003 or from participating in, authorizing, or allowing any such transactions without the express, written, and notarized consent of the Plaintiff or further order of this Court. Plaintiff also

seeks to restrain, enjoin, and prevent Defendants from being able to sell, trade, negotiate, gift, transfer, or otherwise dispose of the 98.90% limited partnership interest in Friendship Partners, LP, which Keith S. Wellin sold to the Wellin Family 2009 Irrevocable Trust in 2009, without the express, written, and notarized consent of the Plaintiff. Plaintiff further moves the Court to issue an order to show cause why a subsequent preliminary injunction should not be entered to restrain, enjoin, and prevent Defendants from being able to sell, trade, negotiate, gift, or otherwise dispose of the proceeds received from the sale of the 896 Class A Berkshire Hathaway common shares and/or the 98.90% limited partnership interest in Friendship Partners, LP pending the resolution of the merits of this action, without the express, written, and notarized consent of the Plaintiff or further Order of this Court.

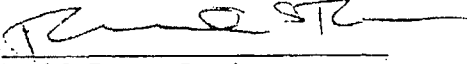
Unless a temporary restraining order is immediately granted to enjoin, restrain, and prevent the sale, trade, negotiation, gift, transfer, or other disposition of the sales proceeds and partnership interests referenced herein-above, the Wellin Family 2009 Irrevocable Trust will suffer irreparable harm and the proceeds and assets will be squandered, dissipated, and wasted by Defendants. As demonstrated in the attached Complaint and Memorandum of Law in Support of Motion for Temporary Restraining Order, the Plaintiff's likelihood of success on the merits of his claims is high. Plaintiff has no adequate remedy at law for the harm or damage done or threatened to be done by Defendants. Plaintiff has made a prima facie showing entitling him to injunctive relief. A temporary restraining order is needed to preserve this Court's ability to render complete relief and to protect the trust property and the interests of all of the beneficiaries.

The grounds for this Motion are stated more fully in the attached Complaint and Memorandum of Law in Support of Motion for Temporary Restraining Order.

Pursuant to S.C. R. Civ. Pro. 65(b)(1), this Motion is being made without notice to Defendants or their counsel to enjoin them from being able to unilaterally sell, trade, negotiate, gift, or otherwise dispose of the proceeds of the sale of the 896 Class A Berkshire Hathaway common shares and/or the 98.90% limited partnership interest in Friendship Partners, LP because such notice would likely prompt the Defendants to hide, spend, or otherwise transfer or secrete the funds and thus defeat, hinder, or frustrate this Court's Order and ability to grant complete, appropriate, and effective relief. For the same reasons, Plaintiff's counsel did not consult with opposing counsel prior to filing this Motion.

This Motion is based upon the conduct and actions set forth in the Affidavit of Lester S. Schwartz, Esquire, dated December 20, 2013, and in the Plaintiff's Verified Complaint, which are incorporated herein by reference.

ROSEN, ROSEN & HAGOOD, LLC

By: 

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ATTORNEYS FOR PLAINTIFF

Charleston, South Carolina

December 20, 2013.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE PROBATE COURT
CASE NO.

Lester S. Schwartz, as Trust Protector
of the Wellin Family 2009 Irrevocable
Trust, Plaintiff

vs.

Peter J. Wellin, Cynthia W. Plum and
Marjorie W. King, Individually and as Co-
Trustees and Beneficiaries of the Wellin
Family 2009 Irrevocable Trust, Friendship
Management, LLC, Cynthia W. Plum as
Manager of Friendship Management, LLC,
Friendship Partners, LP and Keith S.
Wellin, Individually and as Trustee of the
Keith S. Wellin Florida Revocable Living
Trust u/a/d December 11, 2011, as Trustee
of the KSW 2011 Qualified Grantor
Retained Annuity Trust, and Trustee of the
KSW 2012 Qualified Grantor Retained
Annuity Trust u/a/d November 28, 2012
Defendant(s).

PLAINTIFF'S MEMORANDUM OF LAW
IN SUPPORT OF TEMPORARY
RESTRAINING ORDER AND ORDER TO
SHOW CAUSE FOR PRELIMINARY
INJUNCTION

Pursuant to S.C. R. Civ. Pro. 65, S.D. Codified Laws § 55-3-20.1, S.C. CODE ANN. § 62-7-706(c), and/or S.C. CODE ANN. § 62-7-1001(b)(2), Plaintiff Lester S. Schwartz, as Trust Protector of the Wellin Family 2009 Irrevocable Trust, hereby moves the Court to issue a temporary restraining order against the above-named Defendants to immediately restrain, enjoin, and prevent Defendants from being able to sell, trade, negotiate, gift, or otherwise dispose of the proceeds of the sale of the 896 Class A Berkshire Hathaway common shares transferred to Friendship Partners, LP by Keith S. Wellin in 2003 or from participating in, authorizing, or allowing any such transactions without the express, written, and notarized consent of the Plaintiff or further order of this Court. Plaintiff also seeks to restrain, enjoin, and prevent Defendants

from being able to sell, trade, negotiate, gift, transfer, or otherwise dispose of the 98.90% limited partnership interest in Friendship Partners, LP, which Keith S. Wellin sold to the Wellin Family 2009 Irrevocable Trust in 2009, without the express, written, and notarized consent of the Plaintiff. Plaintiff further moves the Court to issue an order to show cause why a subsequent preliminary injunction should not be entered to restrain, enjoin, and prevent Defendants from being able to sell, trade, negotiate, gift, or otherwise dispose of the proceeds received from the sale of the 896 Class A Berkshire Hathaway common shares and/or the 98.90% limited partnership interest in Friendship Partners, LP pending the resolution of the merits of this action, without the express, written, and notarized consent of the Plaintiff or further Order of this Court.

Unless a temporary restraining order is immediately granted, the sale, trade, negotiation, gift, transfer, or disposition of the sales proceeds and partnership interests referenced hereinabove, the Wellin Family 2009 Irrevocable Trust will suffer irreparable harm and the proceeds and assets will be squandered, dissipated, and wasted by Defendants. As demonstrated in the attached Complaint and Memorandum of Law in Support of Motion for Temporary Restraining Order, the Plaintiff's likelihood of success on the merits of his claims is high. Plaintiff has no adequate remedy at law for the harm or damage done or threatened to be done by Defendants. Plaintiff has made a prima facie showing entitling him to injunctive relief.

BACKGROUND

Plaintiff Lester S. Schwartz was duly appointed the Trust Protector of the Wellin Family 2009 Irrevocable Trust. Peter J. Wellin, Cynthia W. Plum, and Marjorie W. King are children of Keith S. Wellin, the Grantor, and were named as Co-Trustees under the Wellin Family 2009 Irrevocable Trust document. Article III of the Trust provides that it shall be governed by South Dakota law. Previously a Corporate Trustee, first South Dakota Trust Company, LLC and

subsequently Brown Brothers Harriman Trust Company of Delaware, N.A. ("Brown Brothers"), acted as a corporate Co-Trustee.

South Dakota Trust Company was replaced by Brown Brothers, which subsequently attempted to resign as Corporate Trustee. During this interim period when there was no Corporate Trustee acting and protecting the trust, Defendants Peter J. Wellin, Cynthia W. Plum and Marjorie W. King embarked on a scheme to siphon all of the assets of the Wellin Family 2009 Irrevocable Trust, constituting approximately \$150,000,000.00. The Wellin children accomplished this scheme by selling all of the assets of a Limited Partnership known as the Friendship Partners, LP ("Friendship Partners"), a company created by the Grantor Keith S. Wellin, and to which Keith S. Wellin placed approximately 896 shares of Berkshire Hathaway stock. That stock grew in value over a period of time to be worth in excess of \$150,000,000.00.

Feeling that his children might do exactly as they did, that is, to liquidate Friendship Partners and take all the cash or proceeds for themselves, Keith S. Wellin previously brought a lawsuit in the United States District Court, cause of action No. 2013-CV-01813. In that action, the Honorable David Norton initially issued a Temporary Restraining Order enjoining or blocking any disposition of the shares of Berkshire Hathaway stock, but he subsequently dissolved the TRO based on his belief that Keith S. Wellin's inability to control the shares did not constitute an irreparable harm for which preliminary injunctive relief was appropriate and because Keith S. Wellin's wife, Wendy Wellin, had such resources to pay Keith S. Wellin's annual health care costs. *See* Order of Judge Norton, filed November 22, 2013.

Plaintiff Lester S. Schwartz, as Trust Protector, stands on a different ground than the Grantor, Keith S. Wellin. Mr. Schwartz as Trust Protector is charged with a responsibility to effectuate the purposes of the Trust, the intentions of the Grantor, and to protect all the

beneficiaries. The Defendants, Peter J. Wellin, Cynthia W. Plum and Marjorie W. King, who are Keith S. Wellin's children, are not the only beneficiaries of the Trust. In fact, Article IV of the Trust describes the Grantor's intentions and provides that the Trustees should pay such amounts from the Trust income as the Trustee in its sole and absolute discretion "shall deem needed for their health, support, maintenance or education (including a college education and professional or post-graduate study), or any other reasonable purpose, such payments of income, if any, shall be made according to respective needs and without regard to equality of distribution." The Grantor provided the same standard for payments from Trust principal. The Trustee in the Wellin Family 2009 Irrevocable Trust is defined as Mr. Wellin's children (Peter J. Wellin, Marjorie W. King, Cynthia W. Plum) and the corporate trustee, South Dakota Trust Company, LLC of Sioux Falls, South Dakota.

Keith S. Wellin has been very generous with the wealth he accumulated and has made substantial gifts to his children and his current wife, Wendy Wellin. Keith S. Wellin made gifts of \$10,000,000.00 each to his children and his wife within the last year. Documentation provided by counsel for the children shows that, within mere days of Judge Norton's Order recently lifting the TRO in the federal court action, the children not only sold the Berkshire Hathaway stock, but they also liquidated Friendship Partners and further have bypassed the Trust completely and distributed the proceeds of the stock sale equally amongst themselves. This conduct is in contravention of the Wellin Family 2009 Irrevocable Trust and the Grantor's stated intentions.

LAW AND ANALYSIS

"Actions seeking relief by injunction are equitable in nature." City of Myrtle Beach v. Juel P. Corp., 344 S.C. 43, 522 S.E.2d 153 (Ct. App. 1999), rev'd other grounds, 543 S.E.2d 538

(2001). Whether a temporary injunction should be granted rests in the sound discretion of the judge to whom the application is addressed. Seabrook v. Carolina Power & Light Co., 159 S.C. 1, 156 S.E. 1 (1930); Brandt v. Gooding, 630 S.E.2d 259 (S.C. 2006).

Applicable trust law also gives this Court a wide arsenal of legal and equitable powers to remedy a breach of trust. The South Dakota Trust Code provides that “[p]ending a final decision on a request to remove a trustee, the court may order such appropriate relief as may be necessary to protect the trust property or the interests of the beneficiaries.” S.D. Codified Laws § 55-3-20.1. Similarly, § 62-7-706(c) of the South Carolina Trust Code provides that “pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief under Section 62-7-1001(b) as may be necessary to protect the trust property or the interests of the beneficiaries.” Id. § 62-7-706(c) (emphasis added). Pending a final decision on the merits, this Court may suspend or remove a trustee, appoint a special fiduciary to possess and administer the trust property, reduce or deny compensation to the trustee, set aside wrongful acts of the trustee, and “order any other appropriate relief.” Id. § 62-7-1001(b)(5)-(10).

Under South Carolina law, a party seeking to obtain injunctive relief generally must demonstrate 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. FOC Lawshe Ltd. Partnership v. International Paper Co., 352 S.C. 408, 574 S.E.2d 228 (Ct. App. 2002). Our Supreme Court has clarified that there is no additional requirement that the trial judge must “balance the equities” before issuing an injunction. Poynter Investments, Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 694 S.E.2d 15, 17 (2010).

The purpose of an injunction is to preserve the status quo during litigation in order to prevent irreparable injury to the requesting party and to preserve the ability of the court to render complete relief. County Council of Charleston v. Felkel, 244 S.C. 480, 137 S.E.2d 577, 578 (1964) ("The sole object of a temporary injunction is to preserve the subject of controversy in the condition which it is at the time of the Order until opportunity is offered for full and deliberate investigation and to preserve the existing status during litigation."); see also JAMES F. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE 511 (2nd ed., 1996) ("A temporary injunction preserves the status quo pending the completion of the case."). An injunction is appropriate to preserve the status quo so that a party can enforce a disputed legal right. Seaboard Air Line Ry. v. Atlantic Coast Line R., 71 S.E. 39 (S.C. 1911).

"Irreparable injury means that the injunction is reasonably necessary to protect the rights of the plaintiff pending the litigation." FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE at 508; Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 22 F.3d 546, 551 (4th Cir. 1994) ("Generally, 'irreparable injury is suffered when monetary damages are difficult to ascertain or are inadequate.'" (citation omitted)). The element of irreparable harm is satisfied when it is difficult to calculate the amount of damages, such that an equitable remedy is necessary to make the aggrieved party whole. Bethel Methodist Episcopal Church v. City of Greenville, 211 S.C. 442, 45 S.E.2d 841 (1947) ("Irreparable injury, as used in the law of injunction, does not necessarily mean that the injury is beyond the possibility of compensation in damages.").

South Carolina law has long recognized that an injunction is the appropriate remedy to abate an alleged waste of property or assets while ownership of the same property or assets is being litigated. Kinsler v. Clarke, 1837 WL 1551 (S.C. Ct. App. 1837); Grosshuesch v. Cramer,

367 S.C. 1, 623 S.E.2d 833 (2005); Felkel, 137 S.E.2d at 578. In Grosshuesch, our Supreme Court observed that “the quintessential hallmark of an injunction” is the “preservation of the property at issue until the matter has been adjudicated.” 623 S.E.2d at 833. The Court in that case granted a preliminary injunction against a trustee which prevented the trustee from exercising any control over the trust assets (including funds in a Merrill Lynch investment account) pending the outcome of the litigation and which ordered a full accounting.

A party seeking an injunction is “not required to prove an absolute legal right when seeking a preliminary injunction, but [she] must present a reasonable question as to the existence of such a right.” AJG Holdings, LLC v. Dunn, 382 S.C. 43, 674 S.E.2d 505, 509 (Ct. App. 2009); see also Williams v. Jones & Amerman, 92 S.C. 342, 75 S.E. 705 (1912) (“This does not mean an absolute legal right or certainty of success but rather that he has a fair question to raise as to the existence of such a right.”). Courts have broadly construed this element and a litigant is required to do little more than state a cause of action or make a prima facie showing. County of Richland v. Simpkins, 348 S.C. 664, 560 S.E.2d 902 (Ct. App. 2002); Childs v. Columbia, 87 S.C. 566, 70 S.E. 296 (1911).

“The determination of whether to grant an injunction should not be based on the merits of the underlying case except insofar as the merits may assist the trial court in determining whether a prima facie showing has been made.” MailSource, L.L.C. v. M.A. Bailey & Assocs., 356 S.C. 363, 588 S.E.2d 635, 638 (Ct. App. 2003). “Once a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits.” Helsel v. City of N. Myrtle Beach, 307 S.C. 29, 413 S.E.2d 824, 826 (1992).

"[W]hether there is an adequate remedy at law for a wrong, [is a] question[] that [is] not decided by narrow and artificial rules." Kirk v. Clark, 191 S.C. 205, 4 S.E.2d 13, 15 (1939). "The adequacy of a legal remedy is a pragmatic determination based upon the certainty of fixing damages, the practicality of obtaining relief, and the efficiency of the legal remedy in the particular circumstances." FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE at 508. "[I]f the available legal remedy in a given case reduces itself to a matter of words, rather than to a matter of efficacy, because of its impracticability, or because the threatened acts may continue during the progress of an action at law, or because successive actions at law would be necessary to protect the plaintiff's rights, equity will hold that the existence of the legal remedy is not an obstacle to the exertion of the equitable power." Columbia Broadcasting Sys., Inc. v. Custom Recording Co., 258 S.C. 465, 189 S.E.2d 305, 312 (1972).

In this case, Plaintiff has demonstrated that (1) the Wellin Family 2009 Irrevocable Trust will suffer irreparable harm if an injunction is not granted; (2) he will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law.

Unless a temporary restraining order is immediately granted to enjoin, restrain, and prevent the sale, trade, negotiation, gift, transfer, or other disposition of the sales proceeds and partnership interests referenced herein-above, the Wellin Family 2009 Irrevocable Trust will suffer irreparable harm because the proceeds and assets belonging to the trust will be squandered, dissipated, and wasted by Defendants. Although the law provides that Defendants will be liable for damages, it will be difficult calculating the amount of damages because Defendants' actions in selling the shares have deprived the trust the benefit of the profits, gain, or appreciation that would have resulted if the stock was still held or owned by the trust. Moreover, it will also be difficult to trace the funds that Defendants improperly received after they have

been spent. Because the assets are liquid, they are easily disposed of. A money judgment against Defendants will do Plaintiff little good if Defendants are allowed to waste, spend, or dispose of the liquid assets before the Court can adjudicate the claims and enter an Order granting relief.

Moreover, Plaintiff's verified Complaint raises a "reasonable question" about Defendants' liability as co-trustees of the trust and makes a prima facie showing entitling Plaintiff to injunctive relief. A prima facie showing has been made that Defendants, as co-trustees, participated in and committed serious breaches of trust and are not serving solely the bests interests of all of the beneficiaries. A prima facie showing has been made that Defendants, as co-trustees, participated in or allowed self-serving transfers of trust assets to be made to the detriment of other beneficiaries of the trust (including Keith S. Wellin's grandchildren and other heirs). Those transfers involve in excess of \$150,000,000.00. The record shows that Defendants engaged in the sale, liquidation, and transfer of trust assets in disregard of the grantor's intent and their fiduciary obligations without any consideration for the interests of the other trust beneficiaries. These transactions suggest prohibited self-dealing. See S.D. Codified Laws § 55-2-1 ("In all matters connected with his trust a trustee is bound to act in the highest good faith toward his beneficiary and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind."); Bonney v. Granger, 292 S.C. 308, 356 S.E.2d 138 (1987) ("A trustee must exclude all selfish interest in his dealings on behalf of the beneficiaries of the trust."). A prima facie showing has been made that Defendants, as co-trustees, improperly sold, liquidated, and transferred the trust's assets, which depleted the assets of the trust and defeats or frustrates the grantor's intent, because all of the

trust assets have been transferred to Defendants to the detriment of Keith S. Wellin's grandchildren and other intended beneficiaries.

In short, a prima facie showing has been made that Defendants, as co-trustees, breached their duties of loyalty, impartiality, and good faith as trustees by pursuing actions that benefited themselves to the detriment of other beneficiaries. Such conduct warrants the issuance of a temporary restraining order restraining further such breaches of trust and protecting the trust property and the interests of the other beneficiaries.

Finally, Plaintiff has no adequate remedy at law for the harm or damage done or threatened to be done by Defendants. As in Grosshuesch v. Cramer, 367 S.C. 1, 623 S.E.2d 833 (2005), the purpose of Plaintiff's motion is to preserve the assets of the trust until the merits of this litigation have been adjudicated. In this case, a showing has been made that Defendants, as co-trustees, have repeatedly participated in and allowed distributions of all of the trust assets to themselves in violation of the grantor's intent and the governing law. Unless an injunction is issued, this conduct will continue to occur during the pendency of this action. The proceeds from the sale of trust assets will be depleted unless an injunction is granted. Even if Plaintiff obtains a money judgment against Defendants at the end of this case, it is doubtful that he would be able to fully recover it if Defendants are allowed to dispose of the proceeds from the sale of the stock and to use the money.

CONCLUSION

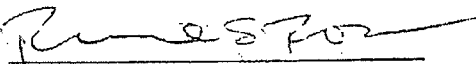
For the above reasons, the Trust Protector, Lester S. Schwartz, requests the Court to issue its immediate *ex parte* Order restraining, enjoining, and preventing the Wellin children from selling, trading, negotiating, gifting, alienating, hiding, disposing, or converting the proceeds of the sale of the Berkshire Hathaway stock or from participating in, authorizing, or allowing any

such transactions without the express, written, and notarized consent of the Plaintiff or further order of this Court. Plaintiff also seeks to restrain, enjoin, and prevent Defendants from being able to sell, trade, negotiate, gift, transfer, or otherwise dispose of the 98.90% limited partnership interest in Friendship Partners, LP, which Keith S. Wellin sold to the Wellin Family 2009 Irrevocable Trust in 2009, without the express, written, and notarized consent of the Plaintiff.

Finally, Plaintiff further moves the Court to issue an order to show cause why a subsequent preliminary injunction should not be entered to restrain, enjoin, and prevent Defendants from being able to sell, trade, negotiate, gift, or otherwise dispose of the proceeds received from the sale of the 896 Class A Berkshire Hathaway common shares and/or the 98.90% limited partnership interest in Friendship Partners, LP pending the resolution of the merits of this action, without the express, written, and notarized consent of the Plaintiff or further Order of this Court.

Respectfully submitted,

ROSEN, ROSEN & HAGOOD, LLC

By: 

Richard S. Rosen, Esquire
H. Brewton Hagood, Esquire
Daniel F. Blanchard, Esquire
151 Meeting Street, Suite 400
Charleston, SC 29401
(843) 577-6726
Email: rsrosen@rrhlawfirm.com

ATTORNEY FOR PLAINTIFF

Charleston, South Carolina
December 20, 2013.

STATE OF SOUTH CAROLINA) IN THE PROBATE COURT
COUNTY OF CHARLESTON) CASE NO. 2013-GC-10-0129
13 DEC 27 8 11 21 AM

Lester S. Schwartz, as Trust Protector
of the Wellin Family 2009 Irrevocable
Trust, Plaintiff

vs.

Peter J. Wellin, Cynthia W. Plum and
Marjorie W. King, Individually and as Co-
Trustees and Beneficiaries of the Wellin
Family 2009 Irrevocable Trust, Friendship
Management, LLC, Cynthia W. Plum as
Manager of Friendship Management, LLC,
Friendship Partners, LP and Keith S.
Wellin, Individually and as Trustee of the
Keith S. Wellin Florida Revocable Living
Trust u/a/d December 11, 2011, as Trustee
of the KSW 2011 Qualified Grantor
Retained Annuity Trust, and Trustee of the
KSW 2012 Qualified Grantor Retained
Annuity Trust u/a/d November 28, 2012
Defendant(s).

**NOTICE AND MOTION FOR
SEGREGATION OF TRUST ASSETS TO PAY
FEES OF TRUST PROTECTOR AND HIS
ATTORNEYS**

Plaintiff, Lester S. Schwartz, Trust Protector of Wellin Family 2009 Irrevocable Trust ("Trust"), hereby moves the Court for an Order segregating \$200,000 in Trust assets to fund fees and costs for the Plaintiff as Trust Protector, and attorneys fees and costs for counsel to represent him in this matter, other related matters, and any other litigation, or controversies involving the Wellin Family 2009 Irrevocable Trust.

1. In support of this Motion, Plaintiff would respectfully crave a reference to the Trust instruments involved in this case, namely, the Wellin Family 2009 Irrevocable Trust and the Amendments thereto which include the following provisions:

- (a) Original Trust Agreement, Article VI, Paragraph 7 provides that the Trust Protector has the authority to use Trust assets to hire legal counsel to advise and defend the Trust Protector in connection with any matter concerning the Trust, subject to the Trust Protectors responsibility to repay those assets if the Trust Protector is found liable of bad faith, fraud, or willful misconduct.
- (b) By Amendment dated November 20, 2013, Article XII, was amended to add paragraph (I):

Notwithstanding any other provision of this Agreement with respect to any litigation brought by or against any Trust created under this Agreement, if any Trustee of such is a party to such litigation in both an individual or corporate capacity, and his or her capacity as a Trustee, then the Trust Protector shall represent such Trust with respect to such litigation, and shall have the power to pay, compromise, contest, submit to all arbitration, or otherwise settle such litigation in favor of or against the Trust, and may prosecute or defend such litigation for the protection of Trust assets. The provisions of this paragraph (H) shall apply notwithstanding the fact that there may be one or more co-Trustees then serving who are not parties to the litigation in individual or corporate capacity.

- 2. The Wellin Family 2009 Irrevocable Trust is currently the subject of this litigation as well as other litigation pending in the United States District Court for the

District of South Carolina and the Chancery Court for the State of Delaware and the Second Judicial Circuit Court, County of Minnehaha, South Dakota.

3. Plaintiff craves reference to and incorporates herein the allegations contained in his Complaint filed December 20, 2013, as well as his Affidavit dated December 20, 2013 and the attachments thereto.

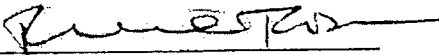
4. The Trust Protector's hourly rate is \$400.00 per hour. The hourly rates for his counsel are as follows: Richard S. Rosen - \$450.00; H. Brewton Hagood - \$400.00; Daniel F. Blanchard - \$300.00; and other attorneys bill at a rate of \$225.00 to \$300.00 per hour.

5. Fees of the Trust Protector and his counsel already exceed \$100,000.00 as of December 27, 2013.

6. Plaintiff respectfully requests that the Court shorten the term for Notice of a hearing on this Motion and hear this Motion at the hearing scheduled for Monday, December 30, 2013 at 2:00 p.m.

For the foregoing reasons the Plaintiff requests this Court issue an Order requiring that Trust assets of the Trust in the amount of \$200,000.00 be set aside and preserved to fund payment of current and future fees of the Trust Protector and his counsel as approved by this Court.

ROSEN, ROSEN & HAGOOD, LLC

By: 

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H. Brewton Hagood, Esquire
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ATTORNEYS FOR PLAINTIFF

Charleston, South Carolina
December 27, 2013.

STATE OF SOUTH CAROLINA) IN THE PROBATE COURT
COUNTY OF CHARLESTON) CASE NO. 2013-GC-10-0129
)

Lester S. Schwartz, as Trust Protector
of the Wellin Family 2009 Irrevocable
Trust, Plaintiff)

vs.)

Peter J. Wellin, Cynthia W. Plum and
Marjorie W. King, Individually and as Co-
Trustees and Beneficiaries of the Wellin
Family 2009 Irrevocable Trust, Friendship
Management, LLC, Cynthia W. Plum as
Manager of Friendship Management, LLC,
Friendship Partners, LP and Keith S.
Wellin, Individually and as Trustee of the
Keith S. Wellin Florida Revocable Living
Trust u/a/d December 11, 2011, as Trustee
of the KSW 2011 Qualified Grantor
Retained Annuity Trust, and Trustee of the
KSW 2012 Qualified Grantor Retained
Annuity Trust u/a/d November 28, 2012
Defendant(s).)

CERTIFICATE OF SERVICE

13 DEC 27 PM 2:49
FILED
CLERK OF COURT

The undersigned states that on December 27, 2013, a copy of Plaintiff's Notice and Motion for Segregation of Trust Assets to Pay Fees of Trust Protector and His Attorneys was served via electronic mail and hand delivery one copy to the following address(s):

Robert H. Brunson, Esquire
Nelson Mullins Riley & Scarborough, LLP
151 Meeting Street, Sixth Floor
Charleston, SC 29401-2239

Robert H. Hood, Esquire
Hood Law Firm, LLC
PO Box 1508
Charleston, SC 29402

John B. Hagerty, Esquire
Nelson Mullins Riley & Scarborough, LLP
151 Meeting Street, Sixth Floor
Charleston, SC 29401-2239

Jamie Hood, Esquire
Hood Law Firm, LLC
PO Box 1508
Charleston, SC 29402



Deborah Wooten, Legal Assistant

CERTIFICATE OF SERVICE

I, the undersigned of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Attorneys for Peter J. Wellin, Cynthia W. Plum and Marjorie W. King, Individually and as Co-Trustees and Beneficiaries of the Wellin Family 2009 Irrevocable Trust, Friendship Management, LLC, Cynthia W. Plum as Manager of Friendship Management, LLC and Friendship Partners, LP, do hereby certify that I am serving all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same via United States Mail, postage prepaid, to the following address(es):

Pleadings:

NOTICE OF REMOVAL

CIVIL COVER SHEET

DEFENDANTS' RESPONSES TO LOCAL RULE 26.01

Counsel Served:

Richard Rosen, Esq.
Rosen, Rosen & Hagood, LLC
PO Box 893
Charleston, SC 29402

Robert H. Hood, Esq.
The Hood Law Firm
172 Meeting Street
Charleston, SC 29401

/s/ Robert H. Brunson
Robert H. Brunson

December 27, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

Edward G. R. Bennett, as Special	)	Civil Action No. 2:14-cv-00652-DCN
Conservator, and Keith S. Wellin,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	<u>NOTICE OF REMOVAL</u>
Peter Wellin, Cynthia Wellin Plum, and	)	
Marjorie Wellin King,	)	
	)	
Defendants.	)	
	)	
	)	

TO: THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION:

Pursuant to 28 U.S.C. §§ 1441 and 1446, Defendants Peter Wellin, Cynthia Wellin Plum, and Marjorie Wellin King ("Defendants"), hereby remove this action from the Probate Court, Charleston County, State of South Carolina, where it was originally filed by Plaintiffs Edward G. R. Bennett, as Special Conservator, and Keith S. Wellin ("Plaintiffs"), to the United States District Court for the District of South Carolina, Charleston Division. Pursuant to 28 U.S.C. § 1446(a), copies of all process and pleadings served upon Defendants in this action are attached hereto as Exhibit A.

PROCEDURAL BACKGROUND AND RELEVANT FACTS

1. On February 25, 2014, Plaintiffs commenced this action by filing a Petition in the Probate Court, Charleston County, State of South Carolina against Defendants.
2. On February 26, 2014, Plaintiffs' counsel mailed a copy of the Summons and Petition to Defendants' counsel.

3. On February 27, 2014, Defendants' counsel accepted service of the Summons and Complaint on behalf of Defendants.

4. In addition to the instant action, three other actions that include many of the same parties – and exactly the same money sought by Plaintiff in this action – are pending before the Honorable David C. Norton. Specifically, Civil Action No. 2:13-CV-1831-DCN is entitled Keith Wellin, individually and as Trustee of the Keith S. Wellin Florida Revocable Living Trust u/a/d December 11, 2001 v. Peter J. Wellin, Cynthia W. Plum and Marjorie W. King, individually and as co-Trustees and beneficiaries of the Wellin Family 2009 Irrevocable Trust u/a/d November 2, 2009, and Friendship Management, LLC. Through that action, Plaintiff Keith Wellin is seeking to recover the same money that Plaintiff Keith Wellin is seeking to recover in this action. Also, Civil Action No. 2:13-CV-3595-DCN is entitled Lester S. Schwartz, as Trust Protector of the Wellin Family 2009 Irrevocable Trust v. Peter J. Wellin, Cynthia W. Plum and Marjorie W. King, Individually and as Co-Trustees and Beneficiaries of the Wellin Family 2009 Irrevocable Trust, Friendship Management, LLC, and Cynthia W. Plum as Manager of Friendship Management, LLC. Through that action, Plaintiff Lester Schwartz is seeking to recover on behalf of the Wellin Family 2009 Irrevocable Trust the same money that Plaintiff Keith Wellin is seeking to recover in this action and Civil Action No. 2:13-CV-1831-DCN. These two actions are both pending before the Honorable David C. Norton and have been consolidated for discovery purposes. Finally, Plaintiff Keith Wellin recently filed another action in this Court on his own behalf against Defendants seeking to recover the same money sought in the above-referenced actions. This action is 2:14-cv-00579-DCN.

STATEMENT OF STATUTORY BASIS FOR JURISDICTION

5. This matter is removable pursuant to 28 U.S.C. § 1441(a) and (b) as a civil action brought in a State court which the district courts of the United States have original jurisdiction. This Court is “the district court of the United States for the district and division embracing the place where such action is pending.” *See* 28 U.S.C. § 1441(a).

6. This action is within the original jurisdiction of the U.S. District Court pursuant to 28 U.S.C. § 1332. This statute provides, in pertinent part, that “[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between . . . citizens of different States.” 28 U.S.C. § 1332(a)(1). As discussed in detail below, this action satisfies both statutory requirements.

7. This action may be removed directly from probate court to this Court. *See Beattie v. J.M. Tull Found.*, 941 F. Supp. 57, 59 (D.S.C. 1996) (permitting removal directly from South Carolina probate court to this Court where statutory requirements are met).

Amount in Controversy

8. In their Petition, Plaintiffs allege that Plaintiff Keith S. Wellin substituted a promissory note worth a face value of approximately \$49 million for a 58% partnership interest in Friendship Partners, LP. (Compl. ¶ 6.) Plaintiffs allege that Defendants subsequently liquidated Friendship Partners, LP, and distributed the proceeds from the sale to the Wellin Family 2009 Irrevocable Trust (“the Trust”), then to themselves as beneficiaries of the Trust. (Compl. ¶¶ 7,10.) Plaintiffs allege that Plaintiff Keith S. Wellin was entitled to receive a share of the net proceeds from the liquidation of Friendship Partners, LP, and allege that such share was in excess of \$91 million. (Compl. ¶ 8.) Plaintiffs now seek a court order requiring Defendants

“to surrender funds belonging to [Plaintiff Keith S. Wellin] as a result of the liquidation of Friendship Partners, LP.” (Compl. ¶ 21; Prayer for Relief, ¶ B.) While Plaintiffs do not allege a specific amount of damages, the above allegations clearly establish that the amount in controversy exceeds \$75,000. *See Francis v. Allstate Ins. Co.*, 709 F.3d 362, 367 (4th Cir. 2013) (“If a complaint ‘does not allege a specific amount of damages, the removing defendant must prove by a preponderance of the evidence that the amount in controversy exceeds [\$75,000].’”) (internal citation omitted).

9. Further, Plaintiffs seek declaratory relief by asking the Court to determine the effectiveness of the substitution transaction and the amounts due to both Plaintiff Keith S. Wellin and Defendants as a result of the liquidation of Friendship Partners, LP. (Prayer for Relief, ¶ A.) Plaintiffs allege the value of the assets in question is in excess of \$91 million. (Compl. ¶ 8.) Thus, the declaratory relief requested by Plaintiffs is also sufficient to meet the amount in controversy requirement for diversity jurisdiction. *See Francis*, 709 F.3d at 367 (“In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation.”).

10. Therefore, the amount in controversy easily exceeds \$75,000, and this jurisdictional requirement is satisfied.¹

Citizenship of the Parties

11. Upon information and belief, at the time of the commencement of this action², Plaintiff Keith S. Wellin was a citizen of the State of South Carolina.

¹ Defendants reserve the right to challenge Plaintiff’s alleged damages on all available grounds.

² “Diversity is determined at the time the action is commenced.” *Clipper Air Cargo, Inc. v. Aviation Products Int’l, Inc.*, 981 F. Supp. 956, 958 (D.S.C. 1997).

12. Upon information and belief, at the time of the commencement of this action, Plaintiff Edward G. R. Bennett, as Special Conservator for Keith S. Wellin, was a citizen of the State of South Carolina.³

13. At the time of the commencement of this action, Defendant Peter Wellin was a citizen of the State of Maine.

14. At the time of the commencement of this action, Defendant Cynthia Wellin Plum was a citizen of the State of Pennsylvania.

15. At the time of the commencement of this action, Defendant Marjorie Wellin King was a citizen of the State of Washington.

16. Because the citizenship of the Defendants is diverse from the citizenship of the Plaintiffs, the diversity of citizenship requirement of 28 U.S.C. § 1332 is satisfied.

TIMELINESS OF REMOVAL

17. Defendants' Notice of Removal is timely because it has been made within 30 days after Defendants' receipt of Plaintiffs' Summons and Petition, attached hereto as Exhibit A. See 28 U.S.C. § 1446(b).

JOINDER OR CONSENT BY ALL DEFENDANTS

18. The undersigned represents all Defendants, and all Defendants join in and consent to this removal.

NOTICE

19. Pursuant to 28 U.S.C. § 1446(d), Defendants have given notice of the filing of this Notice of Removal to Plaintiffs as reflected in the Certificate of Service below, and a copy of this

³ A legal representative shares the citizenship of his ward for the purpose of determining the existence of diversity. *Long v. Sasser*, 91 F.3d 645, 647 (4th Cir. 1996) (citing 28 U.S.C. § 1332(c)(2) ("[T]he legal representative of an . . . incompetent shall be deemed to be a citizen only of the same State as the . . . incompetent.")).

Notice of Removal is simultaneously being filed with the Clerk of the Charleston County Probate Court.

REQUEST FOR BRIEFING AND ORAL ARGUMENT

20. In the event any question arises as to the propriety of removal of this matter, Defendants request the opportunity to present briefs and oral argument in support of their position that removal of this action is proper.

CONCLUSION

WHEREFORE, pursuant to 28 U.S.C. §§ 1332, 1441(a), and 1441(b), this action should proceed in the United States District Court for the District of South Carolina, Charleston Division, as an action properly removed thereto.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/PATRICK C. WOOTEN

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Charleston, SC 29401-2239
(843) 853-5200

Attorneys for Peter Wellin, Cynthia Wellin Plum, and Marjorie Wellin King

Charleston, South Carolina
March 3, 2014

EXHIBIT A

2014 FEB 25 PM 12:39

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE MATTER OF:

KEITH S. WELLIN

EDWARD G. R. BENNETT, as Special Conservator, and
KEITH S. WELLIN

Petitioners:

vs.

PETER WELLIN, CYNTHIA WELLIN PLUM,
and MARJORIE WELLIN KING

Respondents:

IN THE PROBATE COURT
FILED PROBATE CT CHAS CO

CASE 2013-GC-10-129

SUMMONS

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED to answer the Petition to Return Assets in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Petition on the Plaintiff or his attorney, Tiffany N. Provence, 300 North Cedar Street, Suite A, Summerville, South Carolina 29483, within thirty (30) days after the service hereof, exclusive of the day of such service.

YOU ARE HEREBY GIVEN NOTICE FURTHER that if you fail to appear and defend and fail to answer the Complaint as required by this Summons within thirty (30) days after the service hereof, exclusive of the day of such service, judgment by default will be entered against you for the relief demanded in the Complaint.

By:



Tiffany N. Provence, Esq.
300 North Cedar St., Ste A
Summerville, SC 29483
(843) 871-9500
ATTORNEY FOR PETITIONER
EDWARD G. R. BENNETT
AS SPECIAL CONSERVATOR

Summerville, SC
February 25, 2014

2014 FEB 25 PM 12:40

FILED PROBATE CT CHASN CO

STATE OF SOUTH CAROLINA	)	IN THE PROBATE COURT
	)	
COUNTY OF CHARLESTON	)	CASE 2013-GC-10-129
	)	
IN THE MATTER OF:	)	
KEITH S. WELLIN	)	
	)	
EDWARD G. R. BENNETT, as Special Conservator, and	)	
KEITH S. WELLIN	)	
	)	
Petitioners,	)	PETITION TO
vs.	)	RETURN ASSETS
	)	
PETER WELLIN, CYNTHIA WELLIN PLUM,	)	
and MARJORIE WELLIN KING,	)	
	)	
Respondents.	)	

Petitioner, by and through his undersigned attorney, Tiffany N. Provence Esquire, hereby seeks to have the Probate Court direct the Respondents to return to Keith S. Wellin assets rightfully belonging to him. In support of such, Petitioner alleges the following:

1. That this matter is properly before this court.
2. That the Wellin Children, Peter Wellin, Cynthia Wellin Plum, and Marjorie Wellin King Petitioned this Court for the Appointment of a Conservator seeking a finding of incapacity of their father, Keith S. Wellin.
3. That Respondents Peter Wellin, Cynthia Wellin Plum, and Marjorie Wellin King included in their Petition a list of assets of Mr. Wellin, including a Promissory Note with a face value of \$49,802,115 issued by the Wellin Family 2009 Irrevocable Trust (the "2009 Trust").
4. That as a result of the Respondents' request for an emergency hearing on the matter, Special Conservator Edward G. R. Bennett was appointed by a Protective Proceeding.
5. That this Court now has jurisdiction over Keith S. Wellin's assets, the Special Conservator and the Respondents in this matter.
6. That on November 20, 2013, pursuant to the rights granted to him by the 2009 Trust, Keith S. Wellin substituted the Promissory Note with a face value of \$49,802,115 (plus all accrued but unpaid interest) for an interest in Friendship Partners, LP of approximately 58%.¹

¹ The exact percentage received by Keith S. Wellin in the substitution was 58.15548645%. For simplicity, such percentage is referred to as the 58% hereinafter in this Petition.

7. That after the date of the substitution by Keith S. Wellin, the Respondents liquidated Friendship Partners, LP.
8. That as a result of this liquidation, Keith S. Wellin was entitled to 58% of the net proceeds of the liquidation, which the Petitioners believe to be in excess of \$91,000,000.²
9. That the Respondents distributed the proceeds of the Friendship Partners, LP liquidation in disregard of Keith S. Wellin's substitution and the 58% interest he acquired via the substitution.
10. That Friendship Partners, LP disbursed the partnership funds to which Keith S. Wellin was entitled to the 2009 Trust, and the Respondents subsequently purported to distribute those same funds from the 2009 Trust to themselves as beneficiaries of the 2009 Trust.
11. That the Respondents have asserted (both before this Court in the hearing on February 6, 2014 and in correspondence to Keith S. Wellin's attorneys) that the substitution was invalid, apparently in an effort to retain these additional funds for themselves.³
12. That the Respondents in this action have refused to surrender any amount to Keith S. Wellin or his Special Conservator, Edward G. R. Bennett, which was due to Keith S. Wellin on account of the substitution of the Promissory Note for the 58% partnership interest and the subsequent liquidation of Friendship Partners, LP.
13. That the Special Conservator has a duty to ensure Keith S. Wellin does not transfer any asset without fair and adequate consideration.
14. That the Special Conservator sought clarification from this Court as to his duty and obligation towards Keith S. Wellin, with regards to this November 20, 2013 transaction upon which Bennett alleged that Wellin has transferred an asset (a Promissory Note) and has received no compensation (the partnership interest and his share of the liquidation proceeds thereof).
15. That as a result of that application, the Court held a hearing on February 6, 2014.
16. That as a result of that application, the Court amended the Order Appointing Special Conservator dated August 15, 2013 to include the power to pursue any third party,

² The Partnership Agreement of Friendship Partners, LP grants all partners the right to inspect the books and records of the partnership. Despite the fact that it is undisputed that Keith S. Wellin, in his capacity as Trustee of two grantor retained annuity trusts, is a partner of the partnership, the Respondents have been unwilling to comply with the partnership agreement and grant Keith S. Wellin or his attorney access to the partnership records to determine the exact amount available for distribution to the partners upon the liquidation. The amount set forth in this Petition is based on the estimates of Petitioners taking into account the information which they received.

³ An action is currently pending in South Carolina Federal District Court for return of these funds to the 2009 Trust and removal of the Respondents as Trustees.

including Respondents, holding assets belonging to the alleged incapacitated person.

17. That the Special Conservator is requesting that this Court review the above stated substitution and determine the amount due to Keith S. Wellin as a result of the liquidation of Friendship Partners, LP.
18. That the Special Conservator is also requesting that this Court require Respondents to return to Keith S. Wellin's estate the sum due to him as a result of the liquidation of Friendship Partners, LP.
19. That, upon information and belief, Friendship Partners, LP owned 906 shares of Berkshire Hathaway Class A common stock and cash on hand of less than \$25,000 as of November 22, 2013⁴, and that Keith S. Wellin is entitled to 58% of such amount as his share of the partnership liquidation .
20. That \$50,228,000 of this amount has already been Ordered by this Court to be held by Special Conservator II pursuant to an Order issued February 2, 2014.
21. That the Special Conservator now seeks the review and ratification of Keith S. Wellin's substitution and a Court Order requiring Respondents to surrender funds belonging to their father as a result of the liquidation of Friendship Partners, LP.

WHEREFORE, Petitioners pray for the following relief and pray that the Court take the following action:

- A. Review the substitution made by Keith S. Wellin whereby he substituted a Promissory Note valued at approximately \$49,802,115 plus accrued but unpaid interest as of November 20, 2013 for a 58% interest in Friendship Partners and determine the amounts due to Keith S. Wellin as a result of the liquidation of Friendship Partners, LP, plus interest thereon from the date of the liquidation.
- B. Order the Respondents to surrender to Keith S. Wellin or his Special Conservator the amounts due to him as a result of the liquidation of Friendship Partners, LP, plus interest thereon from the date of liquidation.
- C. Any other appropriate relief.

SIGNATURE ON FOLLOWING PAGE

⁴ The Petitioners use November 22, 2013 as the date of reference as that is the date on which Judge David C. Norton of the South Carolina Federal District Court dissolved the temporary restraining order preventing the Respondents from selling or otherwise disposing of the Berkshire Hathaway stock.

Summerville, SC
February 25, 2014



Tiffany Provence, Esquire
300 N. Cedar Street, Suite A
Summerville, SC 29483
(843) 871-9500
Fax (843) 261-7035
Email: TNProvence@gmail.com

Attorney for Edward G. R. Bennett,
as Special Conservator

From: Couch, Roger L. Law Clerk (Adam Mandell) [mailto:rcouchlc@sccourts.org]
Sent: Tuesday, September 22, 2015 2:48 PM
To: Merritt Abney; Patrick Wooten; james.hood@hoodlaw.com; tiffany@provencemesservy.com
Subject: Peter J. Wellin, et al. v. Keith S. Wellin, 2014-CP-10-4336

Good afternoon,

I hope this message finds everyone well. Judge Couch has considered the matter presented before him on July 28, 2015 in Charleston County. Judge Couch has decided to affirm the judgment of the Probate Court. Specifically, Judge Couch has determined that the Probate Court had jurisdiction to order the amount held in trust to be paid to a special conservator.

Finding in favor of the respondents on this matter, Judge Couch requests that Ms. Provence and Mr. Hood prepare and submit a proposed order reflecting the decision noted above. The proposed order should be submitted to all parties in addition to me. From the date the proposed order is submitted, the appellants shall have ten (10) days to provide any objections.

If you have any questions concerning this request, please do not hesitate to contact me.

Thank you for your patience and cooperation,

Adam J. Mandell
Law Clerk to the Honorable Roger L. Couch
Seventh Judicial Circuit
180 Magnolia Street
Spartanburg, SC 29306
Office: (864) 596-2285
Fax: (864) 562-4234

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**From:** Jamie Hood [<mailto:james.hood@hoodlaw.com>]  
**Sent:** Monday, November 09, 2015 5:06 PM  
**To:** Couch, Roger L. Law Clerk (Adam Mandell); Merritt Abney; Patrick Wooten; [tiffany@provencemesservy.com](mailto:tiffany@provencemesservy.com)  
**Subject:** RE: Peter J. Wellin, et al. v. Keith S. Wellin, 2014-CP-10-4336

Good afternoon, attached is our proposed order for your consideration. Best, Jamie

---

**From:** Couch, Roger L. Law Clerk (Adam Mandell) [<mailto:rcouchlc@sccourts.org>]  
**Sent:** Thursday, October 1, 2015 9:24 AM  
**To:** [merritt.abney@nelsonmullins.com](mailto:merritt.abney@nelsonmullins.com); [patrick.wooten@nelsonmullins.com](mailto:patrick.wooten@nelsonmullins.com); Jamie Hood <[james.hood@hoodlaw.com](mailto:james.hood@hoodlaw.com)>; [tiffany@provencemesservy.com](mailto:tiffany@provencemesservy.com)  
**Subject:** RE: Peter J. Wellin, et al. v. Keith S. Wellin, 2014-CP-10-4336

Good morning,

By way of clarification to my September 22 email, Judge Couch has not set a time for which the Respondents are to submit the proposed order. He is allowing such flexibility to allow the parties to continue to engage in efforts to resolve this matter. From the date that the proposed order is submitted, then the appellants will have ten (10) days to respond with objections to the draft as proposed.

Additionally, Judge Couch prefers that the order be a short, simple affirmation of the lower court's conclusions. With regard to this preference, both parties should limit the substance of their drafts to the matter heard before Judge Couch.

I hope this explanation helps you as we move forward. Again, please do not hesitate to contact me if you have any questions concerning this matter.

Thank you,

Adam J. Mandell  
Law Clerk to the Honorable Roger L. Couch  
Seventh Judicial Circuit  
180 Magnolia Street  
Spartanburg, SC 29306  
Office: (864) 562-4235  
Fax: (864) 562-4234

---

**From:** Couch, Roger L. Law Clerk (Adam Mandell)

**Sent:** Tuesday, September 22, 2015 2:48 PM

**To:** 'merritt.abney@nelsonmullins.com'; 'patrick.wooten@nelsonmullins.com'; 'james.hood@hoodlaw.com'; 'tiffany@provencemesservy.com'

**Subject:** Peter J. Wellin, et al. v. Keith S. Wellin, 2014-CP-10-4336

Good afternoon,

I hope this message finds everyone well. Judge Couch has considered the matter presented before him on July 28, 2015 in Charleston County. Judge Couch has decided to affirm the judgment of the Probate Court. Specifically, Judge Couch has determined that the Probate Court had jurisdiction to order the amount held in trust to be paid to a special conservator.

Finding in favor of the respondents on this matter, Judge Couch requests that Ms. Provence and Mr. Hood prepare and submit a proposed order reflecting the decision noted above. The proposed order should be submitted to all parties in addition to me. From the date the proposed order is submitted, the appellants shall have ten (10) days to provide any objections.

If you have any questions concerning this request, please do not hesitate to contact me.

Thank you for your patience and cooperation,

Adam J. Mandell  
Law Clerk to the Honorable Roger L. Couch  
Seventh Judicial Circuit  
180 Magnolia Street  
Spartanburg, SC 29306  
Office: (864) 596-2285  
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From: Tiffany N. Provence <tiffany@provencemesservy.com>
Sent: Tuesday, May 10, 2016 11:04 AM
To: Couch, Roger L. Law Clerk (Adam Mandell)
Cc: James Hood; Robert Brunson; Merritt Abney
Subject: Re: Peter J. Wellin, et al. v. Keith S. Wellin, 2014-CP-10-4336
Attachments: 20160510_Proposed Order.docx

Adam,

Please find attached a copy of our proposed Order per the Court's request. Please let us know if we can provide anything further.

Thank you - Tiffany Provence

Tiffany N. Provence
Provence Messervy LLC
www.ProvenceMesservy.com
TNProvence@gmail.com
(843) 871-9500 (office)
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Charleston, SC 29492

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On Apr 19, 2016, at 3:32 PM, Couch, Roger L. Law Clerk (Adam Mandell)
<rcouchlc@sccourts.org> wrote:

Tiffany,

Thank you for bringing this to our attention. I will inform Judge Couch of the circumstances.

Adam J. Mandell

Law Clerk to the Honorable Roger L. Couch
Seventh Judicial Circuit
180 Magnolia Street
Spartanburg, SC 29306
Office: (864) 562-4235
Fax: (864) 562-4234

From: Tiffany N. Provence [<mailto:tiffany@provincemesservy.com>]
Sent: Tuesday, April 19, 2016 3:31 PM
To: Couch, Roger L. Law Clerk (Adam Mandell)
Cc: Jamie Hood; Robert Brunson; Merritt Abney
Subject: Re: Peter J. Wellin, et al. v. Keith S. Wellin, 2014-CP-10-4336

Adam,

Please note that despite paying the expedite fee the court reporter is unable to get us the transcript from this hearing until late this week (and perhaps as late as April 25th). I just wanted to explain the brief delay in the submission of our proposed Order.

Thank you -

Tiffany Provence

Tiffany N. Provence
Provence Messervy LLC
300 North Cedar Street, Suite A
Summerville, SC 29483

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On Apr 12, 2016, at 10:52 AM, Couch, Roger L. Law Clerk (Adam Mandell)
<rcouchlc@sccourts.org> wrote:

Good morning,

I hope that this message finds you well. Judge Couch would like to again thank everyone for joining us in Charleston last week for the hearing in this matter. After a careful consideration of the issues raised in the hearing and memoranda provided by the parties, Judge Couch has decided to deny Appellant's Motion to Alter or Amend.

Mr. Hood and Ms. Provence, the judge requests that you submit a proposed order for the Court's consideration reflecting this decision. Among the arguments put forth at the hearing and in the memoranda, Judge Couch would like a particularized discussion of the following issues: (1) personal jurisdiction over the Appellants in their capacities as Trustees; (2) the nature of and circumstances surrounding the tender of the approximately \$50 million to the Respondent; and (3) the authority of the probate court in responding to the special conservator's request for guidance as to the tender.

If you have any questions concerning this request, please do not hesitate to contact me.

Thank you for your cooperation,

Adam J. Mandell

Law Clerk to the Honorable Roger L. Couch
Seventh Judicial Circuit
180 Magnolia Street
Spartanburg, SC 29306
Office: (864) 562-4235
Fax: (864) 562-4234

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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, Probate Court Judge

---

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

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

---

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

Appellants.

v.

Keith S. Wellin

Respondent.

---

ORDER DENYING APPELLANTS' MOTION TO ALTER OR AMEND

---

This matter comes before the Court pursuant to Rule 59(e), SCRCP, on Appellants' Motion to Alter or Amend this Court's Order of January 13, 2016 affirming the Probate Court's Orders. A hearing on this motion was held April 8, 2016. Having considered all of the issues raised, the arguments made and the memoranda submitted by the parties, this Court declines to modify its Order of January 13, 2016.

#### **STANDARD OF REVIEW**

In a probate appeal, the circuit court, court of appeals, or Supreme Court hears and determines the appeal according to the rules of law. S.C. Code Ann. § 62-1-308(i) (2014). According to the rules of law means that, in the absence of a statute or rule of court providing a different standard of review, the circuit court must apply the same standard of review the Supreme Court would apply on appeal. *Matter of Howard*, 315 S.C. 356, 360, 434 S.E.2d 254, 256-57 (1993); *In re Estate of Pallister*, 363 S.C. 437, 447, 611 S.E.2d 250, 256 (2005). An issue regarding statutory interpretation is a question of law. *Wimberly v. Barr*, 359 S.C. 414, 597 S.E.2d 853 (Ct. App. 2004). Thus, "the circuit court may not disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them." *In re Howard*, 315 S.C. at 361, 434 S.E.2d at 257; see also *In re Estate of Pallister*, 363 S.C. 437, 447, 611 S.E.2d 250, 256 (2005) ("If the proceeding in the probate court is in the nature of an action at law, the circuit court and the appellate court may not disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them."). An appellate court may affirm the lower court's judgment for any reason appearing in the record on appeal. *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 420-21, 526 S.E.2d 716, 723 (2000).

## DISCUSSION

### **1. The Probate Court had subject matter jurisdiction to enter the protective orders.**

The Probate Code vests exclusive jurisdiction in the probate court 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.” S.C. Code Ann. § 62-5-402 (2014). This exclusive jurisdiction is continuous, beginning with “the service of the summons and petition in a proceeding seeking the appointment of a conservator or other protective order” and continuing “until termination of the proceeding.” *Id.* This vests in the probate court the “responsibility to determine whether the conservatorship estate... is effectively ‘managed, expended, or distributed to or for the use of the protected person or any of his dependents.’” *Plyler v. Burns*, 373 S.C. 637, 647, 647 S.E.2d 188, 194 (2007). The Reporter’s Comment to Section 62-5-402 notes “This section vests in the probate court, upon filing of the petition, exclusive jurisdiction over determination of the need for a conservator and the management of the protected person’s estate.” S.C. Code Ann. § 62-5-402 (2014).

The Probate Code also grants the power to the probate court “while a petition for appointment of a conservator is pending and after preliminary hearing upon such notice by the court as is reasonable under the circumstances, ... to preserve and apply the property of the person to be protected as may be required for his benefit...” S.C. Code Ann. § 62-5-408(1) (2014). The Reporter’s Comment to this section provides that “This section gives specific powers to the court to take action with respect to the estate and affairs of a person if necessary even if that person has not yet been judged incompetent.”

Appellants argue that the proceeds of the liquidation of the Friendship Partnership are not an asset of Mr. Wellin’s estate. However, Appellants identified the Promissory Note as an estate

asset in need of protection in their Petition and acknowledged multiple times in open court, both in the Probate Court and before this Court, that they have offered and continued to offer \$50,228,000 in exchange for the cancellation of the Promissory Note. Further, Appellants acknowledged, "they agreed to pay the note that was in the hands ... of the [special] conservator." April 8, 2016 Transcript p. 17, ln. 3-6. Moreover, Appellants offered to pay the funds into Court, a practice in which the Probate Courts of this State do not participate. This offer belies their argument that the Court lacks jurisdiction to order the same funds held for a Special Conservator pursuant to the Court's directive. During the pendency of this action, the Probate Court has had jurisdiction over the Note, the interest in Friendship Partners L.P. for which the note was swapped, and/or the proceeds of the liquidation of Friendship Partners, L.P. which relate to the interest for which the note was swapped, as well as the other assets belonging to Mr. Wellin under the broad grants of authority in S.C. Code Ann. §§ 62-5-402 and -408(1).

**2. The Probate Court had personal jurisdiction over the Wellin Children individually and as trustees.**

It is axiomatic that a party seeking relief from a court submits to its jurisdiction upon the filing of a summons and complaint. Here, the Wellin Children commenced the conservatorship action and do not dispute the Probate Court's finding that Wellin Children submitted to personal jurisdiction of the Court individually by virtue of their application for appointment of a conservator. However, they dispute the holding that Wellin Children submitted to jurisdiction in their trustee capacity by making arguments on behalf of the Trust.

"Although a court commonly obtains personal jurisdiction by the service of the summons and complaint, it may also obtain personal jurisdiction if the defendant makes a voluntary appearance." *Ex Parte Cannon*, 385 S.C. 643, 685 S.E.2d 814 (Ct. App. 2009) (citing *Stearns*

*Bank Nat'l Ass'n v. Glenwood Falls, LP*, 373 S.C. 331, 337, 644 S.E.2d 793, 796 (S.C. Ct. App. 2007)); *In re Conservatorship of Groves*, 109 S.W.3d 317, 350 (Tenn. Ct. App. 2003) (holding that where parties appear and participate in an action, they waive any right to challenge failure to sue them as trustees); *In re Guardianship of Brown*, 611 So. 2d 1342 (Fla. Dist. Ct. App. 1993) (holding that it is not necessary to serve an individual who petitioned for appointment as guardian in their capacity as trustee)." [ROA 0028; 7/3/14 Order #1.] The Probate Court further found that "these cases are in accord with this Court's application of *In re Estate of Ahem*, 359 Ill. App. 3d 805, 812, 835 N.E.2d 95, 101 (2005) ("However, we find that some of the arguments Robert made in objecting to the petition for guardianship and in contesting the award of fees to Dutton indicate that he did in fact appear on behalf of the Trust and thus subjected it to the trial court's personal jurisdiction.")." (*Id.*) This Court finds these cases persuasive and adopts their reasoning.

The Wellin Children initiated these proceedings as Petitioners and have voluntarily appeared as Trustees in other matters before this Court. They clearly had notice of all proceedings because their counsel, who represents them in all of their capacities, appeared and argued on their behalf. Because of their actions, the Appellants have waived any defects, to the extent any could exist, that might have occurred. See *Stickland v. Consol. Energy Prods. Co.*, 274 S.C. 554, 555, 265 S.E.2d 682, 683 (S.C. 1980) ("A general appearance constitutes a voluntary submission to the jurisdiction of the court and waives any defects and irregularities in the service of process."); *H.S. Chisholm, Inc. v. Klinger*, 229 S.C. 8, 16, 91 S.E.2d 538, 542 (S.C. 1956).

The Wellin Children seek to have this Court rely on *In re Ashton* for its holding that "[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 or process, or an appearance.” *In re Ashton*, 266 S.W.3d 602, 604 (Tex. App. 2008). While no South Carolina court has directly addressed the issue presented here, it would be an error to rely on this case as it can be easily distinguished. *In re Ashton* was a divorce proceeding wherein the Plaintiff (Wife) sought relief against the Defendant’s (Husband) Trust. This case is inapplicable in the Wellin matter for several reasons. First, the Wellin Children were the Petitioners in this matter, alleging that their father’s assets were in need of protection and including the promissory note which they listed on their Petition for the Appointment of a Conservator for their father. By petitioning the probate court, they submitted to its personal jurisdiction. They were not the Defendants in a marital dispute, nor has substantive relief been ordered against a Trust holding their personal assets, as they have acknowledged these funds belong to their father. Secondly, the Probate Code affords the Probate Court great latitude in protecting the assets of an alleged incapacitated party; therefore, application of a family court case is not appropriate.

**3. Appellants have only tendered the \$50 million at issue in exchange for cancellation of the promissory note, an asset of Wellin’s estate.**

On November 20, 2013, after Bennett’s appointment by consent of the parties, pursuant to the right reserved to him in Article IX(A) of the Wellin Family 2009 Irrevocable Trust (the “Irrevocable Trust”), Wellin substituted the above-mentioned Promissory Note, valued by Appellants on their Petition for Appointment of Conservator at “approximately \$49,000,000,” for an interest in Friendship Partners, L. P. of the same value, as allowed by the Irrevocable Trust. [ROA 0763; 1/14/14 Application.] Prior to the substitution, Special Conservator Bennett reviewed the transaction per the Probate Court’s Order to ensure adequate value was received for the transfer of assets. (*Id.*) On the date of the substitution, the Promissory Note was valued at

approximately \$50,211,447. Based on the longstanding valuation methodology for interest in Friendship Partners, LP, which both Appellants and Wellin have used every year since 2009, this was the equivalent of approximately a 58% interest in Friendship Partners. (*Id.*) Bennett felt the substitution was for adequate consideration under the Court Order and supported the transaction.

Shortly after the substitution, the Wellin Children decided to liquidate the assets of Friendship Partners and dissolve the entity with no notice to Wellin or his Special Conservator. Cynthia Plum, as Manager of Friendship Management, LLC, executed a resolution as General Partner of Friendship Partners, LP to dissolve and liquidate the entity. As a result of the liquidation, the 58% interest in Friendship Partners held by Wellin entitled him to a distribution of approximately \$92,000,000.<sup>1</sup> (*Id.*)

The Wellin Children then attempted to tender payment of the \$50,228,000, representing the amount owed under the original Promissory Note and funds representing additional interest through the date of tender, to their father by mailing a check to Bennett on December 6, 2013, with a letter which effectively conditioned the payment of the funds upon his release of the rights to the remaining \$42 million. [ROA 0758; 12/6/13 Hagerty Letter to Bennett.] Bennett returned the check as he felt it was not in Wellin's best interest to accept payment under those terms thereby causing him a potential loss of \$42 million. [ROA 0760; 12/6/13 Bennett Letter to Hagerty.] Since their father's refusal to drop his claim for the additional \$42 million, the Wellin Children have refused to pay the Special Conservator the minimum amount due to their father of \$50,228,000. [ROA 0576; Special Conservator Hr'g Tr. 63:22-24.]

---

<sup>1</sup> The difference in value between the \$92,000,000 distribution and the Promissory Note was the result of the fact that Mr. Wellin, as a limited partner, had no control over the partnership and the interest in Friendship Partners, LP was discounted for that lack of control. The decision of the Appellants to liquidate the partnership removed the lack of control, resulting in the increased value.

**4. The Probate Court had the authority to issue its orders pursuant to S.C. Code Ann. §§ 62-5-402, -408, and -416.**

When construing a statute, the cardinal rule is to ascertain the intent of the legislature. *Georgia-Carolina Bail Bonds, Inc. v. County of Aiken*, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct. App. 2003). "A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute." *Id.* at 22-23, 579 S.E.2d at 336. "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." *Id.* at 23, 579 S.E.2d at 336.

"The legislature's intent should be ascertained primarily from the plain language of the statute." *Id.* If, however, the language of the statute gives rise to doubt or uncertainty as to legislative intent, the construing court looks to the statute's language as a whole in light of its manifest purpose. *Id.* at 25, 579 S.E.2d at 337-38. The construing court may additionally look to the legislative history when determining the legislative intent. *State v. Byrd*, 267 S.C. 87, 92, 226 S.E.2d 244, 247 (1976).

S.C. Code Ann. § 62-5-402 states that "after the service of 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: (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." Under this provision, after service of the Children's Summons and Petition and until a final determination of capacity was made (which never occurred), the



Probate Court had jurisdiction to issue orders relating to Wellin's property. This jurisdiction would include the ability to preserve property, including the promissory note and, subsequent to the swap, the interest in Friendship Partners, LP, and after its liquidation, the proceeds of such liquidation which related to the interest received on the swap.

Similarly, S.C. Code Ann. § 62-5-408 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." S.C. Code Ann. §62-5-416(b) states, "Upon application to the appointing court, a conservator may request instructions concerning his fiduciary responsibility. A denial of the application by the court is not adjudication and does not preclude a formal proceeding." S.C. Code Ann. §62-5-416(c) states, "After notice and hearing as the court may direct, the court may give appropriate instructions or make *any* appropriate order." (Emphasis added.)

Here, the Special Conservator filed an application under S.C. Code Ann. §62-5-416(b). In the application, he requested that the court exercise its powers under §62-5-416(c) and allow the interested parties to brief the issues and present their arguments at a hearing. The Probate Court chose to exercise this power and received briefing and arguments from Wellin, the Special Conservator, and the Wellin Children. As a result of a hearing on the matter, in which all parties had notice and participated, the Court issued an appropriate Order protecting the assets of Wellin under S.C. Code Ann. § 62-5-416(c). As discussed above, Section 62-5-408 grants broad latitude to the Probate Court in issuing orders regarding the property of a protected person and allows it to exercise any and all powers over the estate of that person which he could exercise if present and not under disability. The plain language of these sections provide ample authority for the Probate Court to enter its orders.

**5. The Special Conservator had standing to seek instruction from the Probate Court regarding the subject \$50 million.**

Appellants argue in their motion to alter or amend that the Special Conservator lacked the authority to pursue claims on behalf of Mr. Wellin at the time his application to the court was made. Petitioners cite Section 62-5-409(c) as the authority that a special conservator has only the authority expressly conferred by the court in the order of appointment. However, Probate Code section 62-5-417 notes that a conservator is a fiduciary and must observe a fiduciary standard of care. S.C. Code Ann. § 62-5-417. S.C. Code Ann. § 62-5-416(b) expressly provides a mechanism for a conservator, special or general, to seek guidance from the Probate Court regarding their fiduciary duties in a particular matter. Subsection (c) of this statute also allows for the probate court to give instructions or make any appropriate order "after notice and hearing as the court may direct." S.C. Code Ann. § 62-5-416(c). As a fiduciary for Mr. Wellin, the Special Conservator had the right and obligation to seek guidance from the Court regarding the asset at issue. Appellants characterize the Probate Court's order to pay the \$50,228,000 to a second Special Conservator as "a request for substantive relief." However, review of the record reflects that this order was made in response to Appellants' offer to pay the funds into court. February 6, 2014 Transcript, p. 58, ln. 12-24. Appellants were served with the application and participated actively in the hearing. After hearing from the parties, the Probate Court made an appropriate order to protect assets belonging to Wellin specifically as the Appellants had requested in their Petition.

**6. Dismissal was not required pursuant to Rule 12(b)(8), SCRPC.**

Appellants argue that the Special Conservator's application for instruction should have been dismissed pursuant to Rule 12(b)(8), SCRCF on the basis that the issue of ownership of the \$50 million is the subject of the pending federal court litigation. Dismissal under Rule 12(b)(8) may be proper where there is (1) another action pending, (2) between the same parties, (3) for the same claim. *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 105-106, 674 S.E.2d 524, 531 (Ct. App. 2009) (emphasis added). The Probate Court did not err in declining to dismiss the application because, despite Appellants' allegations to the contrary, at the time the claim was filed, there was no other action pending related to the Wellin Children's refusal to surrender these funds to the Special Conservator.

During the hearing before the Court in February 2014, Appellants acknowledged that there was no such action before the Federal Court or any other court. "That action does not currently contain a claim relating to this substitution of assets . . ." [ROA 0566; Special Conservator Hr'g Tr. 25:2-4.] In addition, no one contested the fact that Bennett as Special Conservator was not a party to any of the current litigation in Federal Court when these Orders were issued. [ROA 0567; Special Conservator Hr'g Tr. 28:13-20.] The fact that Bennett later attempted to fulfill his duties by seeking the additional \$42 million for Wellin is not before this Court now because it was not before the Probate Court when these decisions were rendered. For these reasons, the Probate Court correctly held that "dismissal pursuant to Rule 12(b)(8) is not appropriate" by reiterating its "exclusive jurisdiction to issue a protective order until these proceedings are terminated pursuant to S.C. Code Ann. § 62-5-402, 62-5-408(1) and 62-5-430." [ROA 0028; 7/3/14 Order #1.] The Probate Court was the only court responsible for instructing Bennett as to protecting the assets of Wellin. For this reason, the Probate Court's denial of the Motion to Dismiss pursuant to Rule 12(b)(8), SCRCF was not error.

**7. There was no violation of Appellants' due process rights by issuance of the protective order.**

The core of due process is the right to notice and a meaningful opportunity to be heard at a meaningful time and in a meaningful manner. *Cleveland Bd. Of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985); *LaChance v. Erickson*, 522 U.S. 262, 266 (1998); *S.C. Dep't of Soc. Servs. v. Beeks*, 325 S.C. 243, 481 S.E.2d 703 (1997). Appellants argue their due process rights were violated by the court's issuance of the orders in the absence of a summons and complaint, discovery process and an eventual trial by jury. However, Appellants petitioned the Probate Court and requested an emergency protective hearing to restrain their father from transferring his wealth outside of their control. Appellants made themselves subject to the Probate Court's jurisdiction when they decided to challenge his mental capacity to make his own decisions. [ROA 0040; Conservatorship Petition.]

The Special Conservator, Bennett, made his concerns regarding the substitution transaction discussed above known to the parties by his January 14, 2014 letter, which the Court treated as an application under S.C. Code § 62-5-416(a) and directed that he serve it upon all interested parties. [ROA 0763; 1/14/14 Application.] After said service, the Appellants actively participated in the scheduling of a hearing on the application. Prior to the hearing, the Petitioners filed a Motion to Dismiss, wherein they raised the same issues they now assert they did not have knowledge of. [ROA 0181; 2/3/14 Motion to Dismiss.]

Appellants further claim that they lacked knowledge of the issues to be addressed or that an oral amendment had been made that increased the scope of the hearing. This assertion is factually unfounded. The only oral amendment at the hearing was a reduction in the scope of the

proceeding based on an agreement that a separate Summons and Petition may be required to address the additional \$42 million in dispute. [ROA 0393; 3/3/14 Motion to Alter or Amend, Footnote 1.]

Lastly, Appellants continue to ignore that the Court made the decision to protect Wellin's funds by relying on the fact that the Appellants (as Trustees) offered to pay the \$50,228,000 into the Court during the hearing and that counsel for the Trust Protector represented to the Court that he did not know where the \$50,228,000 was located. [ROA 0001; 7/3/14 Order #1.] The Appellants affirmatively disavowed any rights to the \$50,228,000 which they acknowledged was due to Mr. Wellin. February 6, 2014 Hearing Transcript p. 55 ln23- p. 58 ln. 4. Fundamental fairness is not violated when a party has proper notice, participates in the proceedings, and then makes an offer to the Court upon which that it relies. For this reason, the Probate Court did not violate Appellants' due process rights in issuance of the protective order.

**8. The Probate Court did not improperly invoke its equitable powers in issuing the order at issue.**

Appellants argue that the Probate Court incorrectly relied on its equitable powers as basis for the authority in issuing the order to pay the \$50 million to the Special Conservator II. Appellants' position is that this order is, in essence, an injunctive order granting equitable relief "to do what is necessary to protect the person." April 8, 2016 hearing p. 45, ln. 3-12. While "[e]quity will always seek to provide a remedy where a right has been violated," in this case resort to equity is unnecessary. *State ex rel. Daniel v. Strong*, 185 S.C. 27, 192 S.E. 671, 681 (S.C. 1937). Courts also "have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible." *Ex Parte Dibble*, 279 S.C. 592, 310 S.E.2d 440, 442 (S.C. Ct. App. 1983). This provides additional support for the Court's order, but

as discussed at length above, the statutory basis for the Court's order is founded in S.C. Code Ann. §§ 62-5-402, -416 (2014).

**9. The Probate Court's findings of fact are supported by the evidence.**

On appeal, the Circuit Court may not disturb the Probate Court's findings of fact unless the record reveals there is no evidence to support them. Appellants allege that certain of the Probate Court's factual findings are unsupported by the record because no evidence was admitted by the probate court and no evidentiary hearing was permitted. However, Appellants submitted significant factual material, both in connection with their Motion to Dismiss, their Petition for Appointment of Conservator, and their concessions at the hearing through Counsel. These findings, and their basis in the record, are discussed in detail in this Court's Order of January 13, 2016.

**10. The Notice of Dismissal did not divest the Probate Court's jurisdiction to protect the estate assets.**

Appellants contend that their Notice of Voluntary Dismissal pursuant to Rule 41(a)(1)(A), SCRCP, is unconditional and the dismissal became effective upon filing. They argue that Rule 41(a)(1)(A), SCRCP, is applicable to conservatorship proceedings and that Rule 81, SCRCP, does not apply. The provisions of Rule 41(a)(1)(A) do not apply to a conservatorship determination, and a Notice of Voluntary Dismissal is not an effective means to terminate the proceedings as to all parties and divest the Court of jurisdiction to appoint a conservator. Rule 81 of South Carolina Rules of Civil Procedure states that the Rules only apply in the Probate Court "insofar as practicable to the extent they are not inconsistent with the statutes and rules governing" proceedings in the Probate Court. Rule 81, S.C.R.C.P.; see *In re Timmerman*, 331 S.C. 455, 460 (Ct. App. 1998) ("The South Carolina Rules of Civil Procedure are applicable in

the probate court to the extent they are not inconsistent with the Probate Code or probate court rules.").

A prerequisite to the use of Rule 41(a)(1)(A) to dismiss a case is the requirement within the proceeding that an adverse party file an answer or have the ability to move for summary judgment. See *ISC Holding AG v. Nobel Biocare Fin. AG*, 688 F.3d 98, 116 (2d Cir. 2012) (finding that a petitioner could not use a Notice of Voluntary Dismissal to dismiss a petition to compel arbitration where respondent could not have filed an answer and summary judgment was unavailable). Within a conservatorship proceeding, there is simply no requirement for a respondent to file an answer and no ability to file a motion for summary judgment. The exclusive procedure for the Probate Court to appoint a conservator for an allegedly incapacitated person is set forth in S.C. Code Ann. § 62-5-407, which states:

Upon the filing of a summons and petition for appointment of a conservator or other protective order for reasons other than minority, and after service of the summons and the petition, the court shall set a date for hearing. Unless the person to be protected has counsel of his own choice, the court must appoint a lawyer to represent him who then has the powers and duties of a guardian ad litem. If the protected person already has representation by an attorney that attorney shall act as his guardian ad litem. If the alleged disability is mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, or chronic intoxication, the court shall direct that the person to be protected be examined by one or more physicians designated by the court, preferably physicians who are not connected with any institution which the person is a patient or is detained.

Nowhere within the above section does it state that an allegedly incapacitated person is required to file an answer to the petition. Forcing an allegedly incapacitated person to file an answer would be contrary to the primary purpose of a conservatorship proceeding, that is to protect the interests of such a person. Rather than requiring an answer, the statute directs the Court to set a hearing after service of the summons and petition. S.C. Code Ann. § 62-5-407(b). Further, under § 62-5-402, the Probate court obtains and retains exclusive jurisdiction upon the

filing of a petition that does not terminate except by final order of the court. The clear language of the statute indicates that a person seeking the court's protection over an alleged incapacitated individual cannot subsequently rescind that request for protection by unilateral action. For this reason, the Probate Court did not err in finding that the Notice of Voluntary Dismissal was ineffective.

**11. Application of the mootness doctrine would result in duplicative litigation over the same issues in the same court.**

"A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." *Mathis v. South Carolina State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). An exception to the mootness doctrine exists when "a decision by the trial court may affect future events or have collateral consequences for the parties." *Curtis v. State*, 345 S.C. 557, 549 S.E.2d 591, 596 (2001). Appellants allege this appeal is moot because Mr. Wellin died on September 14, 2014, two days after Appellants filed their initial brief in this matter. Appellants were given the opportunity to amend their brief to address this issue, but declined to do so. An issue may not be raised for the first time in a reply brief. *McClurg v. Deaton*, 395 S.C. 85, 87 n.2, 716 S.E.2d 887, 888 n.2 (2011). Thus, the mootness issue is arguably not properly before this Court.

Regardless, this Court declines to apply the mootness doctrine based on the collateral consequences exception because Mr. Wellin's death does not make moot the underlying dispute over the asset at issue. The parties have acknowledged there was no dispute that the \$50 million was owed to Mr. Wellin, and now, to his estate. Applying the mootness doctrine in this instance would require the Estate to expend more time and costs to bring the identical action in the same court. Such litigation would not be in the interests of judicial economy.



**CONCLUSION**

Wherefore, for the reasons stated above, this Court's Order of January 13, 2016, is  
AFFIRMED.

AND IT IS SO ORDERED.

\_\_\_\_\_  
The Honorable Roger L. Couch

\_\_\_\_\_, 2016  
Charleston, South Carolina

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**From:** Couch, Roger L. Law Clerk (Adam Mandell) [<mailto:rcouchlc@sccourts.org>]

**Sent:** Monday, May 16, 2016 12:43 PM

**To:** Merritt Abney

**Cc:** James Hood; Robert Brunson; Tiffany N. Provence

**Subject:** RE: Peter J. Wellin, et al. v. Keith S. Wellin, 2014-CP-10-4336

Mr. Abney,

After reviewing Ms. Provence's submission to the Court, Judge Couch determined that the proposed order was consistent with his findings and signed it. Having signed the order as proposed, the judge already submitted it to the Charleston Clerk of Court for filing.

**Adam J. Mandell**

Law Clerk to the Honorable Roger L. Couch

Seventh Judicial Circuit

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**From:** Merritt Abney [<mailto:merritt.abney@nelsonmullins.com>]

**Sent:** Monday, May 16, 2016 11:19 AM

**To:** Couch, Roger L. Law Clerk (Adam Mandell)

**Cc:** James Hood; Robert Brunson; Tiffany N. Provence

**Subject:** RE: Peter J. Wellin, et al. v. Keith S. Wellin, 2014-CP-10-4336

Adam – I was out of town last week and would like to have an opportunity to review Ms. Provence's proposed order this week and provide any objections to Judge Couch by this Friday. Could you please let me know whether that is acceptable?

Best regards,

Merritt

## **Nelson Mullins**

**Merritt G. Abney**

Partner

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(View Bio)

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**From:** Tiffany N. Provence [<mailto:tiffany@provincemesservy.com>]

**Sent:** Tuesday, May 10, 2016 11:04 AM

**To:** Couch, Roger L. Law Clerk (Adam Mandell)

**Cc:** James Hood; Robert Brunson; Merritt Abney

**Subject:** Re: Peter J. Wellin, et al. v. Keith S. Wellin, 2014-CP-10-4336

Adam,

Please find attached a copy of our proposed Order per the Court's request. Please let us know if we can provide anything further.

Thank you - Tiffany Provence

Tiffany N. Provence

Provence Messervy LLC

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On Apr 19, 2016, at 3:32 PM, Couch, Roger L. Law Clerk (Adam Mandell)  
<[rcouchlc@sccourts.org](mailto:rcouchlc@sccourts.org)> wrote:

Tiffany,

Thank you for bringing this to our attention. I will inform Judge Couch of the circumstances.

**Adam J. Mandell**  
Law Clerk to the Honorable Roger L. Couch  
Seventh Judicial Circuit  
180 Magnolia Street  
Spartanburg, SC 29306  
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Fax: (864) 562-4234

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**From:** Tiffany N. Provence [<mailto:tiffany@provencemesservy.com>]  
**Sent:** Tuesday, April 19, 2016 3:31 PM  
**To:** Couch, Roger L. Law Clerk (Adam Mandell)  
**Cc:** Jamie Hood; Robert Brunson; Merritt Abney  
**Subject:** Re: Peter J. Wellin, et al. v. Keith S. Wellin, 2014-CP-10-4336

Adam,

Please note that despite paying the expedite fee the court reporter is unable to get us the transcript from this hearing until late this week (and perhaps as late as April 25th). I just wanted to explain the brief delay in the submission of our proposed Order.

Thank you -

Tiffany Provence

Tiffany N. Provence  
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Summerville, SC 29483

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On Apr 12, 2016, at 10:52 AM, Couch, Roger L. Law Clerk (Adam Mandell)  
<[rcouchlc@sccourts.org](mailto:rcouchlc@sccourts.org)> wrote:

Good morning,

I hope that this message finds you well. Judge Couch would like to again thank everyone for joining us in Charleston last week for the hearing in this matter. After a careful consideration of the issues raised in the hearing and memoranda provided by the parties, Judge Couch has decided to deny Appellant's Motion to Alter or Amend.

Mr. Hood and Ms. Provence, the judge requests that you submit a proposed order for the Court's consideration reflecting this decision. Among the arguments put forth at the hearing and in the memoranda, Judge Couch would like a particularized discussion of the following issues: (1) personal jurisdiction over the Appellants in their capacities as Trustees; (2) the nature of and circumstances surrounding the tender of the approximately \$50 million to the Respondent; and (3) the authority of the probate court in responding to the special conservator's request for guidance as to the tender.

If you have any questions concerning this request, please do not hesitate to contact me.

Thank you for your cooperation,

**Adam J. Mandell**

Law Clerk to the Honorable Roger L. Couch

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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, Probate Court Judge

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

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

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

Appellants.

v.

Keith S. Wellin

Respondent.

ORDER DENYING APPELLANTS' MOTION TO ALTER OR AMEND

[Handwritten signature]
P1

FILED
2016 MAY 16 PM 1:33
JULIE J. ARMSTRONG
CLERK OF COURT

This matter comes before the Court pursuant to Rule 59(e), SCRCPP, on Appellants' Motion to Alter or Amend this Court's Order of January 13, 2016 affirming the Probate Court's Orders. A hearing on this motion was held April 8, 2016. Having considered all of the issues raised, the arguments made and the memoranda submitted by the parties, this Court declines to modify its Order of January 13, 2016.

STANDARD OF REVIEW

In a probate appeal, the circuit court, court of appeals, or Supreme Court hears and determines the appeal according to the rules of law. S.C. Code Ann. § 62-1-308(i) (2014). According to the rules of law means that, in the absence of a statute or rule of court providing a different standard of review, the circuit court must apply the same standard of review the Supreme Court would apply on appeal. *Matter of Howard*, 315 S.C. 356, 360, 434 S.E.2d 254, 256-57 (1993); *In re Estate of Pallister*, 363 S.C. 437, 447, 611 S.E.2d 250, 256 (2005). An issue regarding statutory interpretation is a question of law. *Wimberly v. Barr*, 359 S.C. 414, 597 S.E.2d 853 (Ct. App. 2004). Thus, "the circuit court may not disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them." *In re Howard*, 315 S.C. at 361, 434 S.E.2d at 257; see also *In re Estate of Pallister*, 363 S.C. 437, 447, 611 S.E.2d 250, 256 (2005) ("If the proceeding in the probate court is in the nature of an action at law, the circuit court and the appellate court may not disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them."). An appellate court may affirm the lower court's judgment for any reason appearing in the record on appeal. *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 420-21, 526 S.E.2d 716, 723 (2000).

Handwritten signature and initials, possibly "PZL" and "P2", in dark ink.

DISCUSSION

1. The Probate Court had subject matter jurisdiction to enter the protective orders.

The Probate Code vests exclusive jurisdiction in the probate court 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.” S.C. Code Ann. § 62-5-402 (2014). This exclusive jurisdiction is continuous, beginning with “the service of the summons and petition in a proceeding seeking the appointment of a conservator or other protective order” and continuing “until termination of the proceeding.” *Id.* This vests in the probate court the “responsibility to determine whether the conservatorship estate... is effectively ‘managed, expended, or distributed to or for the use of the protected person or any of his dependents.’” *Plyler v. Burns*, 373 S.C. 637, 647, 647 S.E.2d 188, 194 (2007). The Reporter’s Comment to Section 62-5-402 notes “This section vests in the probate court, upon filing of the petition, exclusive jurisdiction over determination of the need for a conservator and the management of the protected person’s estate.” S.C. Code Ann. § 62-5-402 (2014).

The Probate Code also grants the power to the probate court “while a petition for appointment of a conservator is pending and after preliminary hearing upon such notice by the court as is reasonable under the circumstances, ... to preserve and apply the property of the person to be protected as may be required for his benefit...” S.C. Code Ann. § 62-5-408(1) (2014). The Reporter’s Comment to this section provides that “This section gives specific powers to the court to take action with respect to the estate and affairs of a person if necessary even if that person has not yet been judged incompetent.”

Appellants argue that the proceeds of the liquidation of the Friendship Partnership are not an asset of Mr. Wellin’s estate. However, Appellants identified the Promissory Note as an estate

asset in need of protection in their Petition and acknowledged multiple times in open court, both in the Probate Court and before this Court, that they have offered and continued to offer \$50,228,000 in exchange for the cancellation of the Promissory Note. Further, Appellants acknowledged, "they agreed to pay the note that was in the hands ... of the [special] conservator." April 8, 2016 Transcript p. 17, ln. 3-6. Moreover, Appellants offered to pay the funds into Court, a practice in which the Probate Courts of this State do not participate. This offer belies their argument that the Court lacks jurisdiction to order the same funds held for a Special Conservator pursuant to the Court's directive. During the pendency of this action, the Probate Court has had jurisdiction over the Note, the interest in Friendship Partners L.P. for which the note was swapped, and/or the proceeds of the liquidation of Friendship Partners, L.P. which relate to the interest for which the note was swapped, as well as the other assets belonging to Mr. Wellin under the broad grants of authority in S.C. Code Ann. §§ 62-5-402 and -408(1).

2. The Probate Court had personal jurisdiction over the Wellin Children individually and as trustees.

It is axiomatic that a party seeking relief from a court submits to its jurisdiction upon the filing of a summons and complaint. Here, the Wellin Children commenced the conservatorship action and do not dispute the Probate Court's finding that Wellin Children submitted to personal jurisdiction of the Court individually by virtue of their application for appointment of a conservator. However, they dispute the holding that Wellin Children submitted to jurisdiction in their trustee capacity by making arguments on behalf of the Trust.

"Although a court commonly obtains personal jurisdiction by the service of the summons and complaint, it may also obtain personal jurisdiction if the defendant makes a voluntary appearance." *Ex Parte Cannon*, 385 S.C. 643, 685 S.E.2d 814 (Ct. App. 2009) (citing *Stearns*

Bank Nat'l Ass'n v. Glenwood Falls, LP, 373 S.C. 331, 337, 644 S.E.2d 793, 796 (S.C. Ct. App. 2007)); *In re Conservatorship of Groves*, 109 S.W.3d 317, 350 (Tenn. Ct. App. 2003) (holding that where parties appear and participate in an action, they waive any right to challenge failure to sue them as trustees); *In re Guardianship of Brown*, 611 So. 2d 1342 (Fla. Dist. Ct. App. 1993) (holding that it is not necessary to serve an individual who petitioned for appointment as guardian in their capacity as trustee)." [ROA 0028; 7/3/14 Order #1.] The Probate Court further found that "these cases are in accord with this Court's application of *In re Estate of Ahem*, 359 Ill. App. 3d 805, 812, 835 N.E.2d 95, 101 (2005) ("However, we find that some of the arguments Robert made in objecting to the petition for guardianship and in contesting the award of fees to Dutton indicate that he did in fact appear on behalf of the Trust and thus subjected it to the trial court's personal jurisdiction.")." (*Id.*) This Court finds these cases persuasive and adopts their reasoning.

The Wellin Children initiated these proceedings as Petitioners and have voluntarily appeared as Trustees in other matters before this Court. They clearly had notice of all proceedings because their counsel, who represents them in all of their capacities, appeared and argued on their behalf. Because of their actions, the Appellants have waived any defects, to the extent any could exist, that might have occurred. See *Stickland v. Consol. Energy Prods. Co.*, 274 S.C. 554, 555, 265 S.E.2d 682, 683 (S.C. 1980) ("A general appearance constitutes a voluntary submission to the jurisdiction of the court and waives any defects and irregularities in the service of process."); *H.S. Chisholm, Inc. v. Klinger*, 229 S.C. 8, 16, 91 S.E.2d 538, 542 (S.C. 1956).

The Wellin Children seek to have this Court rely on *In re Ashton* for its holding that "[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 or process, or an appearance." *In re Ashton*, 266 S.W.3d 602, 604 (Tex. App. 2008). While no South Carolina court has directly addressed the issue presented here, it would be an error to rely on this case as it can be easily distinguished. *In re Ashton* was a divorce proceeding wherein the Plaintiff (Wife) sought relief against the Defendant's (Husband) Trust. This case is inapplicable in the Wellin matter for several reasons. First, the Wellin Children were the Petitioners in this matter, alleging that their father's assets were in need of protection and including the promissory note which they listed on their Petition for the Appointment of a Conservator for their father. By petitioning the probate court, they submitted to its personal jurisdiction. They were not the Defendants in a marital dispute, nor has substantive relief been ordered against a Trust holding their personal assets, as they have acknowledged these funds belong to their father. Secondly, the Probate Code affords the Probate Court great latitude in protecting the assets of an alleged incapacitated party; therefore, application of a family court case is not appropriate.

3. Appellants have only tendered the \$50 million at issue in exchange for cancellation of the promissory note, an asset of Wellin's estate.

On November 20, 2013, after Bennett's appointment by consent of the parties, pursuant to the right reserved to him in Article IX(A) of the Wellin Family 2009 Irrevocable Trust (the "Irrevocable Trust"), Wellin substituted the above-mentioned Promissory Note, valued by Appellants on their Petition for Appointment of Conservator at "approximately \$49,000,000," for an interest in Friendship Partners, L. P. of the same value, as allowed by the Irrevocable Trust. [ROA 0763; 1/14/14 Application.] Prior to the substitution, Special Conservator Bennett reviewed the transaction per the Probate Court's Order to ensure adequate value was received for the transfer of assets. (*Id.*) On the date of the substitution, the Promissory Note was valued at

approximately \$50,211,447. Based on the longstanding valuation methodology for interest in Friendship Partners, LP, which both Appellants and Wellin have used every year since 2009, this was the equivalent of approximately a 58% interest in Friendship Partners. (*Id.*) Bennett felt the substitution was for adequate consideration under the Court Order and supported the transaction.

Shortly after the substitution, the Wellin Children decided to liquidate the assets of Friendship Partners and dissolve the entity with no notice to Wellin or his Special Conservator. Cynthia Plum, as Manager of Friendship Management, LLC, executed a resolution as General Partner of Friendship Partners, LP to dissolve and liquidate the entity. As a result of the liquidation, the 58% interest in Friendship Partners held by Wellin entitled him to a distribution of approximately \$92,000,000.¹ (*Id.*)

The Wellin Children then attempted to tender payment of the \$50,228,000, representing the amount owed under the original Promissory Note and funds representing additional interest through the date of tender, to their father by mailing a check to Bennett on December 6, 2013, with a letter which effectively conditioned the payment of the funds upon his release of the rights to the remaining \$42 million. [ROA 0758; 12/6/13 Hagerty Letter to Bennett.] Bennett returned the check as he felt it was not in Wellin's best interest to accept payment under those terms thereby causing him a potential loss of \$42 million. [ROA 0760; 12/6/13 Bennett Letter to Hagerty.] Since their father's refusal to drop his claim for the additional \$42 million, the Wellin Children have refused to pay the Special Conservator the minimum amount due to their father of \$50,228,000. [ROA 0576; Special Conservator Hr'g Tr. 63:22-24.]

¹ The difference in value between the \$92,000,000 distribution and the Promissory Note was the result of the fact that Mr. Wellin, as a limited partner, had no control over the partnership and the interest in Friendship Partners, LP was discounted for that lack of control. The decision of the Appellants to liquidate the partnership removed the lack of control, resulting in the increased value.

4. The Probate Court had the authority to issue its orders pursuant to S.C. Code Ann. §§ 62-5-402, -408, and -416.

When construing a statute, the cardinal rule is to ascertain the intent of the legislature. *Georgia-Carolina Bail Bonds, Inc. v. County of Aiken*, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct. App. 2003). "A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute." *Id.* at 22-23, 579 S.E.2d at 336. "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." *Id.* at 23, 579 S.E.2d at 336.

"The legislature's intent should be ascertained primarily from the plain language of the statute." *Id.* If, however, the language of the statute gives rise to doubt or uncertainty as to legislative intent, the construing court looks to the statute's language as a whole in light of its manifest purpose. *Id.* at 25, 579 S.E.2d at 337-38. The construing court may additionally look to the legislative history when determining the legislative intent. *State v. Byrd*, 267 S.C. 87, 92, 226 S.E.2d 244, 247 (1976).

S.C. Code Ann. § 62-5-402 states that "after the service of 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: (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." Under this provision, after service of the Children's Summons and Petition and until a final determination of capacity was made (which never occurred), the

Probate Court had jurisdiction to issue orders relating to Wellin's property. This jurisdiction would include the ability to preserve property, including the promissory note and, subsequent to the swap, the interest in Friendship Partners, LP, and after its liquidation, the proceeds of such liquidation which related to the interest received on the swap.

Similarly, S.C. Code Ann. § 62-5-408 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." S.C. Code Ann. §62-5-416(b) states, "Upon application to the appointing court, a conservator may request instructions concerning his fiduciary responsibility. A denial of the application by the court is not adjudication and does not preclude a formal proceeding." S.C. Code Ann. §62-5-416(c) states, "After notice and hearing as the court may direct, the court may give appropriate instructions or make *any* appropriate order." (Emphasis added.)

Here, the Special Conservator filed an application under S.C. Code Ann. §62-5-416(b). In the application, he requested that the court exercise its powers under §62-5-416(c) and allow the interested parties to brief the issues and present their arguments at a hearing. The Probate Court chose to exercise this power and received briefing and arguments from Wellin, the Special Conservator, and the Wellin Children. As a result of a hearing on the matter, in which all parties had notice and participated, the Court issued an appropriate Order protecting the assets of Wellin under S.C. Code Ann. § 62-5-416(c). As discussed above, Section 62-5-408 grants broad latitude to the Probate Court in issuing orders regarding the property of a protected person and allows it to exercise any and all powers over the estate of that person which he could exercise if present and not under disability. The plain language of these sections provide ample authority for the Probate Court to enter its orders.

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5. The Special Conservator had standing to seek instruction from the Probate Court regarding the subject \$50 million.

Appellants argue in their motion to alter or amend that the Special Conservator lacked the authority to pursue claims on behalf of Mr. Wellin at the time his application to the court was made. Petitioners cite Section 62-5-409(c) as the authority that a special conservator has only the authority expressly conferred by the court in the order of appointment. However, Probate Code section 62-5-417 notes that a conservator is a fiduciary and must observe a fiduciary standard of care. S.C. Code Ann. § 62-5-417. S.C. Code Ann. § 62-5-416(b) expressly provides a mechanism for a conservator, special or general, to seek guidance from the Probate Court regarding their fiduciary duties in a particular matter. Subsection (c) of this statute also allows for the probate court to give instructions or make any appropriate order "after notice and hearing as the court may direct." S.C. Code Ann. § 62-5-416(c). As a fiduciary for Mr. Wellin, the Special Conservator had the right and obligation to seek guidance from the Court regarding the asset at issue. Appellants characterize the Probate Court's order to pay the \$50,228,000 to a second Special Conservator as "a request for substantive relief." However, review of the record reflects that this order was made in response to Appellants' offer to pay the funds into court. February 6, 2014 Transcript, p. 58, ln. 12-24. Appellants were served with the application and participated actively in the hearing. After hearing from the parties, the Probate Court made an appropriate order to protect assets belonging to Wellin specifically as the Appellants had requested in their Petition.

6. Dismissal was not required pursuant to Rule 12(b)(8), SCRCP.

Appellants argue that the Special Conservator's application for instruction should have been dismissed pursuant to Rule 12(b)(8), SCRCF on the basis that the issue of ownership of the \$50 million is the subject of the pending federal court litigation. Dismissal under Rule 12(b)(8) *may* be proper where there is (1) another action pending, (2) between the same parties, (3) for the same claim. *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 105-106, 674 S.E.2d 524, 531 (Ct. App. 2009) (emphasis added). The Probate Court did not err in declining to dismiss the application because, despite Appellants' allegations to the contrary, at the time the claim was filed, there was no other action pending related to the Wellin Children's refusal to surrender these funds to the Special Conservator.

During the hearing before the Court in February 2014, Appellants acknowledged that there was no such action before the Federal Court or any other court. "That action does not currently contain a claim relating to this substitution of assets . . ." [ROA 0566; Special Conservator Hr'g Tr. 25:2-4.] In addition, no one contested the fact that Bennett as Special Conservator was not a party to any of the current litigation in Federal Court when these Orders were issued. [ROA 0567; Special Conservator Hr'g Tr. 28:13-20.] The fact that Bennett later attempted to fulfill his duties by seeking the additional \$42 million for Wellin is not before this Court now because it was not before the Probate Court when these decisions were rendered. For these reasons, the Probate Court correctly held that "dismissal pursuant to Rule 12(b)(8) is not appropriate" by reiterating its "exclusive jurisdiction to issue a protective order until these proceedings are terminated pursuant to S.C. Code Ann. § 62-5-402, 62-5-408(1) and 62-5-430." [ROA 0028; 7/3/14 Order #1.] The Probate Court was the only court responsible for instructing Bennett as to protecting the assets of Wellin. For this reason, the Probate Court's denial of the Motion to Dismiss pursuant to Rule 12(b)(8), SCRCF was not error.

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7. There was no violation of Appellants' due process rights by issuance of the protective order.

The core of due process is the right to notice and a meaningful opportunity to be heard at a meaningful time and in a meaningful manner. *Cleveland Bd. Of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985); *LaChance v. Erickson*, 522 U.S. 262, 266 (1998); *S.C. Dep't of Soc. Servs. v. Beeks*, 325 S.C. 243, 481 S.E.2d 703 (1997). Appellants argue their due process rights were violated by the court's issuance of the orders in the absence of a summons and complaint, discovery process and an eventual trial by jury. However, Appellants petitioned the Probate Court and requested an emergency protective hearing to restrain their father from transferring his wealth outside of their control. Appellants made themselves subject to the Probate Court's jurisdiction when they decided to challenge his mental capacity to make his own decisions. [ROA 0040; Conservatorship Petition.]

The Special Conservator, Bennett, made his concerns regarding the substitution transaction discussed above known to the parties by his January 14, 2014 letter, which the Court treated as an application under S.C. Code § 62-5-416(a) and directed that he serve it upon all interested parties. [ROA 0763; 1/14/14 Application.] After said service, the Appellants actively participated in the scheduling of a hearing on the application. Prior to the hearing, the Petitioners filed a Motion to Dismiss, wherein they raised the same issues they now assert they did not have knowledge of. [ROA 0181; 2/3/14 Motion to Dismiss.]

Appellants further claim that they lacked knowledge of the issues to be addressed or that an oral amendment had been made that increased the scope of the hearing. This assertion is factually unfounded. The only oral amendment at the hearing was a reduction in the scope of the

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proceeding based on an agreement that a separate Summons and Petition may be required to address the additional \$42 million in dispute. [ROA 0393; 3/3/14 Motion to Alter or Amend, Footnote 1.]

Lastly, Appellants continue to ignore that the Court made the decision to protect Wellin's funds by relying on the fact that the Appellants (as Trustees) offered to pay the \$50,228,000 into the Court during the hearing and that counsel for the Trust Protector represented to the Court that he did not know where the \$50,228,000 was located. [ROA 0001; 7/3/14 Order #1.] The Appellants affirmatively disavowed any rights to the \$50,228,000 which they acknowledged was due to Mr. Wellin. February 6, 2014 Hearing Transcript p. 55 ln23- p. 58 ln. 4. Fundamental fairness is not violated when a party has proper notice, participates in the proceedings, and then makes an offer to the Court upon which that it relies. For this reason, the Probate Court did not violate Appellants' due process rights in issuance of the protective order.

8. The Probate Court did not improperly invoke its equitable powers in issuing the order at issue.

Appellants argue that the Probate Court incorrectly relied on its equitable powers as basis for the authority in issuing the order to pay the \$50 million to the Special Conservator II. Appellants' position is that this order is, in essence, an injunctive order granting equitable relief "to do what is necessary to protect the person." April 8, 2016 hearing p. 45, ln. 3-12. While "[e]quity will always seek to provide a remedy where a right has been violated," in this case resort to equity is unnecessary. *State ex rel. Daniel v. Strong*, 185 S.C. 27, 192 S.E. 671, 681 (S.C. 1937). Courts also "have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible." *Ex Parte Dibble*, 279 S.C. 592, 310 S.E.2d 440, 442 (S.C. Ct. App. 1983). This provides additional support for the Court's order, but

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as discussed at length above, the statutory basis for the Court's order is founded in S.C. Code Ann. §§ 62-5-402, -416 (2014).

9. The Probate Court's findings of fact are supported by the evidence.

On appeal, the Circuit Court may not disturb the Probate Court's findings of fact unless the record reveals there is no evidence to support them. Appellants allege that certain of the Probate Court's factual findings are unsupported by the record because no evidence was admitted by the probate court and no evidentiary hearing was permitted. However, Appellants submitted significant factual material, both in connection with their Motion to Dismiss, their Petition for Appointment of Conservator, and their concessions at the hearing through Counsel. These findings, and their basis in the record, are discussed in detail in this Court's Order of January 13, 2016.

10. The Notice of Dismissal did not divest the Probate Court's jurisdiction to protect the estate assets.

Appellants contend that their Notice of Voluntary Dismissal pursuant to Rule 41(a)(1)(A), SCRCF, is unconditional and the dismissal became effective upon filing. They argue that Rule 41(a)(1)(A), SCRCF, is applicable to conservatorship proceedings and that Rule 81, SCRCF, does not apply. The provisions of Rule 41(a)(1)(A) do not apply to a conservatorship determination, and a Notice of Voluntary Dismissal is not an effective means to terminate the proceedings as to all parties and divest the Court of jurisdiction to appoint a conservator. Rule 81 of South Carolina Rules of Civil Procedure states that the Rules only apply in the Probate Court "insofar as practicable to the extent they are not inconsistent with the statutes and rules governing" proceedings in the Probate Court. Rule 81, S.C.R.C.P.; see *In re Timmerman*, 331 S.C. 455, 460 (Ct. App. 1998) ("The South Carolina Rules of Civil Procedure are applicable in

the probate court to the extent they are not inconsistent with the Probate Code or probate court rules.").

A prerequisite to the use of Rule 41(a)(1)(A) to dismiss a case is the requirement within the proceeding that an adverse party file an answer or have the ability to move for summary judgment. See *ISC Holding AG v. Nobel Biocare Fin. AG*, 688 F.3d 98, 116 (2d Cir. 2012) (finding that a petitioner could not use a Notice of Voluntary Dismissal to dismiss a petition to compel arbitration where respondent could not have filed an answer and summary judgment was unavailable). Within a conservatorship proceeding, there is simply no requirement for a respondent to file an answer and no ability to file a motion for summary judgment. The exclusive procedure for the Probate Court to appoint a conservator for an allegedly incapacitated person is set forth in S.C. Code Ann. § 62-5-407, which states:

Upon the filing of a summons and petition for appointment of a conservator or other protective order for reasons other than minority, and after service of the summons and the petition, the court shall set a date for hearing. Unless the person to be protected has counsel of his own choice, the court must appoint a lawyer to represent him who then has the powers and duties of a guardian ad litem. If the protected person already has representation by an attorney that attorney shall act as his guardian ad litem. If the alleged disability is mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, or chronic intoxication, the court shall direct that the person to be protected be examined by one or more physicians designated by the court, preferably physicians who are not connected with any institution which the person is a patient or is detained.

Nowhere within the above section does it state that an allegedly incapacitated person is required to file an answer to the petition. Forcing an allegedly incapacitated person to file an answer would be contrary to the primary purpose of a conservatorship proceeding, that is to protect the interests of such a person. Rather than requiring an answer, the statute directs the Court to set a hearing after service of the summons and petition. S.C. Code Ann. § 62-5-407(b). Further, under § 62-5-402, the Probate court obtains and retains exclusive jurisdiction upon the

filing of a petition that does not terminate except by final order of the court. The clear language of the statute indicates that a person seeking the court's protection over an alleged incapacitated individual cannot subsequently rescind that request for protection by unilateral action. For this reason, the Probate Court did not err in finding that the Notice of Voluntary Dismissal was ineffective.

11. Application of the mootness doctrine would result in duplicative litigation over the same issues in the same court.

"A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." *Mathis v. South Carolina State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). An exception to the mootness doctrine exists when "a decision by the trial court may affect future events or have collateral consequences for the parties." *Curtis v. State*, 345 S.C. 557, 549 S.E.2d 591, 596 (2001). Appellants allege this appeal is moot because Mr. Wellin died on September 14, 2014, two days after Appellants filed their initial brief in this matter. Appellants were given the opportunity to amend their brief to address this issue, but declined to do so. An issue may not be raised for the first time in a reply brief. *McClurg v. Deaton*, 395 S.C. 85, 87 n.2, 716 S.E.2d 887, 888 n.2 (2011). Thus, the mootness issue is arguably not properly before this Court.

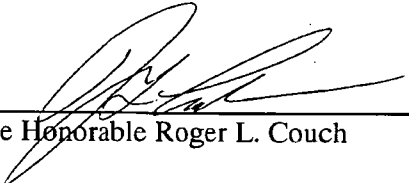
Regardless, this Court declines to apply the mootness doctrine based on the collateral consequences exception because Mr. Wellin's death does not make moot the underlying dispute over the asset at issue. The parties have acknowledged there was no dispute that the \$50 million was owed to Mr. Wellin, and now, to his estate. Applying the mootness doctrine in this instance would require the Estate to expend more time and costs to bring the identical action in the same court. Such litigation would not be in the interests of judicial economy.

CONCLUSION

Wherefore, for the reasons stated above, this Court's Order of January 13, 2016, is
AFFIRMED.

AND IT IS SO ORDERED.

May 13, 2016
Charleston, South Carolina



The Honorable Roger L. Couch

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

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

Probate Case No. 2013-GC-10-1029

FILED
2016 MAY 27 PM 1:14
JULIE J. ARMSTRONG
CLERK OF COURT

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

Appellants.

v.

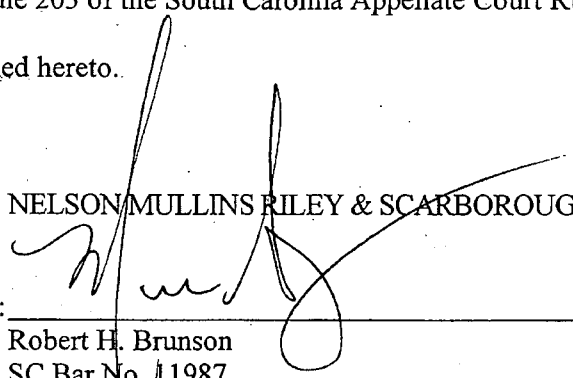
Keith S. Wellin,

Respondent.

NOTICE OF APPEAL

Pursuant to Rule 203 of the South Carolina Appellate Court Rules, Appellants Peter Wellin, Cynthia Wellin Plum, and Marjorie Wellin King, by and through their attorneys, hereby timely appeal the following orders: 1) Order Affirming Probate Court Orders entered on January 13, 2016 (Attachment 1), and; 2) Order Denying Appellants' Motion to Alter or Amend entered on May 16, 2016 (Attachment 2). *See also* underlying probate court orders from which Appellants timely appealed to the circuit court pursuant to S.C. Code Ann. § 62-1-308. (Attachment 3.) Counsel for Appellants received written notice of the entry of the circuit court order affirming the probate court on January 18, 2016, and timely filed a motion to alter or amend the Order pursuant to SCRCP 59(e) on January 22, 2016. Counsel for Petitioners received written notice of the entry of the order denying their Rule 59(e) motion on May 16, 2016. Thus, this Notice of

Appeal is timely filed pursuant to Rule 203 of the South Carolina Appellate Court Rules. Copies of the aforementioned orders are attached hereto.


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Charleston, South Carolina
May 26, 2016

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

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

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

BY

FILED
2016 MAY 27 PM 1:14
JULIE J. ARMSTRONG
CLERK OF COURT

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

Appellants,

v.

Keith S. Wellin,

Respondent.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

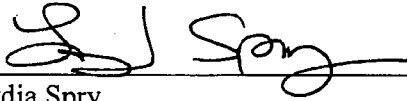
Notice of Appeal

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Administrative Assistant

May 26, 2016

ATTACHMENT 1

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

Appellants,

Versus

Keith S. Wellin,

Respondent.

) IN THE COURT OF COMMON PLEAS

) Appeal from the Probate Court for
) Charleston County

) C/A No. 2014-CP-10-04336

) **ORDER AFFIRMING PROBATE
COURT**

FILED
2016 JAN 13 PM 12:38
CLERK OF COURT
BY J. ARISTARQUE

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

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

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

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

Pl
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issue the protective order;

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

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

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

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

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

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

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

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

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

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

Court's orders may affect future events or have collateral consequences for the parties.

Accordingly, the orders of the Probate Court are hereby AFFIRMED.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

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

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

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



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

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

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

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

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

DISCUSSION

Standard of Review

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

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

Threshold Issue of Mootness

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

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

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

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



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

I affirm and adopt the holding of the Probate Court that: "Petitioners agreed to the jurisdiction of this Court by petitioning for the appointment of a conservator, and this Court has jurisdiction over the funds belonging to Keith Wellin in the 2009 Wellin Family Trust, pursuant to S.C. Code Ann. § 62-5-402 and 62-5-408(1), and pursuant to S.C. Code Ann. § 62-7-201, "when the interests of justice otherwise would seriously be impaired."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In the Order of February 21, 2014, the Probate Court stated that "returning the undisputed funds to the Special Conservator for the use and benefit of the alleged incapacitated is both legal and equitable," and in the Order Denying the Motion to Alter or Amend, the Probate Court also stated that: "As a Court of equity, this Court should not allow the Petitioners, who brought this very action under the guise of protecting their father, to now manipulate the legal process to prevent this Court from providing the protection they sought." Petitioners argue that the Probate Court incorrectly relied on its "equitable powers" as a basis for its authority to require them to pay the \$50 million to the Special Conservator II. However, while the Probate Court orders do contain references to equity, the Probate Court's order of protection is well founded on the statutory authority of Sections 62-5-402 and 62-5-416 of the South Carolina Probate Code.

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

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

On November 20, 2013, Wellin substituted the Promissory Note valued by Petitioners in their Petition at \$49,000,000 (plus interest) for a 58% interest in Friendship Partners. Prior to the substitution, Special Conservator Edward G. R. Bennett reviewed the transaction per this Court's Order to ensure adequate value was received for the transfer of

assets. On the date of the substitution, the Promissory Note was valued at approximately \$50,211,447. Based on the longstanding valuation of Friendship Partners, this was the equivalent of 58.15548645% interest in Friendship Partners; therefore, Bennett approved the substitution.

The Probate Court made a finding of fact [¶11] that "the Wellin Children have acknowledged that at a minimum, Wellin is owed \$50,228,000, being the value of the note plus interest through the date of their offer."

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

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

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

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

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

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

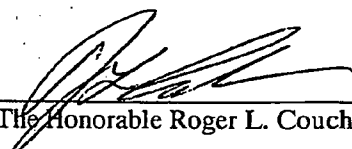
CONCLUSION

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

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

AND IT IS SO ORDERED.

1/7, 2016
Charleston, South Carolina


The Honorable Roger L. Couch



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

ROGER L. COUCH
JUDGE

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MEMORANDUM

TO: The Honorable Julie J. Armstrong, Charleston County Clerk of Court
FROM: Adam J. Mandell, Law Clerk to Roger L. Couch, Judge
RE: Order
DATE: January 7, 2016

Dear Ms. Armstrong;

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

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

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

Thank you,

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

Adam J. Mandell
Law Clerk to Roger L. Couch

ATTACHMENT 2

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, Probate Court Judge

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

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

FILED
2016 MAY 16 PM 1:33
JULIE J. ARMSTRONG
CLERK OF COURT

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

Appellants.

v.

Keith S. Wellin

Respondent.

ORDER DENYING APPELLANTS' MOTION TO ALTER OR AMEND

File
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This matter comes before the Court pursuant to Rule 59(e), SCRCP, on Appellants' Motion to Alter or Amend this Court's Order of January 13, 2016 affirming the Probate Court's Orders. A hearing on this motion was held April 8, 2016. Having considered all of the issues raised, the arguments made and the memoranda submitted by the parties, this Court declines to modify its Order of January 13, 2016.

STANDARD OF REVIEW

In a probate appeal, the circuit court, court of appeals, or Supreme Court hears and determines the appeal according to the rules of law. S.C. Code Ann. § 62-1-308(i) (2014). According to the rules of law means that, in the absence of a statute or rule of court providing a different standard of review, the circuit court must apply the same standard of review the Supreme Court would apply on appeal. *Matter of Howard*, 315 S.C. 356, 360, 434 S.E.2d 254, 256-57 (1993); *In re Estate of Pallister*, 363 S.C. 437, 447, 611 S.E.2d 250, 256 (2005). An issue regarding statutory interpretation is a question of law. *Wimberly v. Barr*, 359 S.C. 414, 597 S.E.2d 853 (Ct. App. 2004). Thus, "the circuit court may not disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them." *In re Howard*, 315 S.C. at 361, 434 S.E.2d at 257; see also *In re Estate of Pallister*, 363 S.C. 437, 447, 611 S.E.2d 250, 256 (2005) ("If the proceeding in the probate court is in the nature of an action at law, the circuit court and the appellate court may not disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them."). An appellate court may affirm the lower court's judgment for any reason appearing in the record on appeal. *l'On v. Town of Mt. Pleasant*, 338 S.C. 406, 420-21, 526 S.E.2d 716, 723 (2000).

DISCUSSION

1. The Probate Court had subject matter jurisdiction to enter the protective orders.

The Probate Code vests exclusive jurisdiction in the probate court 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.” S.C. Code Ann. § 62-5-402 (2014). This exclusive jurisdiction is continuous, beginning with “the service of the summons and petition in a proceeding seeking the appointment of a conservator or other protective order” and continuing “until termination of the proceeding.” *Id.* This vests in the probate court the “responsibility to determine whether the conservatorship estate... is effectively ‘managed, expended, or distributed to or for the use of the protected person or any of his dependents.’” *Plyler v. Burns*, 373 S.C. 637, 647, 647 S.E.2d 188, 194 (2007). The Reporter’s Comment to Section 62-5-402 notes “This section vests in the probate court, upon filing of the petition, exclusive jurisdiction over determination of the need for a conservator and the management of the protected person’s estate.” S.C. Code Ann. § 62-5-402 (2014).

The Probate Code also grants the power to the probate court “while a petition for appointment of a conservator is pending and after preliminary hearing upon such notice by the court as is reasonable under the circumstances, ... to preserve and apply the property of the person to be protected as may be required for his benefit...” S.C. Code Ann. § 62-5-408(1) (2014). The Reporter’s Comment to this section provides that “This section gives specific powers to the court to take action with respect to the estate and affairs of a person if necessary even if that person has not yet been judged incompetent.”

Appellants argue that the proceeds of the liquidation of the Friendship Partnership are not an asset of Mr. Wellin’s estate. However, Appellants identified the Promissory Note as an estate

asset in need of protection in their Petition and acknowledged multiple times in open court, both in the Probate Court and before this Court, that they have offered and continued to offer \$50,228,000 in exchange for the cancellation of the Promissory Note. Further, Appellants acknowledged, "they agreed to pay the note that was in the hands ... of the [special] conservator." April 8, 2016 Transcript p. 17, ln. 3-6. Moreover, Appellants offered to pay the funds into Court, a practice in which the Probate Courts of this State do not participate. This offer belies their argument that the Court lacks jurisdiction to order the same funds held for a Special Conservator pursuant to the Court's directive. During the pendency of this action, the Probate Court has had jurisdiction over the Note, the interest in Friendship Partners L.P. for which the note was swapped, and/or the proceeds of the liquidation of Friendship Partners, L.P. which relate to the interest for which the note was swapped, as well as the other assets belonging to Mr. Wellin under the broad grants of authority in S.C. Code Ann. §§ 62-5-402 and -408(1).

2. The Probate Court had personal jurisdiction over the Wellin Children individually and as trustees.

It is axiomatic that a party seeking relief from a court submits to its jurisdiction upon the filing of a summons and complaint. Here, the Wellin Children commenced the conservatorship action and do not dispute the Probate Court's finding that Wellin Children submitted to personal jurisdiction of the Court individually by virtue of their application for appointment of a conservator. However, they dispute the holding that Wellin Children submitted to jurisdiction in their trustee capacity by making arguments on behalf of the Trust.

"Although a court commonly obtains personal jurisdiction by the service of the summons and complaint, it may also obtain personal jurisdiction if the defendant makes a voluntary appearance." *Ex Parte Cannon*, 385 S.C. 643, 685 S.E.2d 814 (Ct. App. 2009) (citing *Stearns*

Bank Nat'l Ass'n v. Glenwood Falls, LP, 373 S.C. 331, 337, 644 S.E.2d 793, 796 (S.C. Ct. App. 2007)); *In re Conservatorship of Groves*, 109 S.W.3d 317, 350 (Tenn. Ct. App. 2003) (holding that where parties appear and participate in an action, they waive any right to challenge failure to sue them as trustees); *In re Guardianship of Brown*, 611 So. 2d 1342 (Fla. Dist. Ct. App. 1993) (holding that it is not necessary to serve an individual who petitioned for appointment as guardian in their capacity as trustee)." [ROA 0028; 7/3/14 Order #1.] The Probate Court further found that "these cases are in accord with this Court's application of *In re Estate of Ahem*, 359 Ill. App. 3d 805, 812, 835 N.E.2d 95, 101 (2005) ("However, we find that some of the arguments Robert made in objecting to the petition for guardianship and in contesting the award of fees to Dutton indicate that he did in fact appear on behalf of the Trust and thus subjected it to the trial court's personal jurisdiction.")." (*Id.*) This Court finds these cases persuasive and adopts their reasoning.

The Wellin Children initiated these proceedings as Petitioners and have voluntarily appeared as Trustees in other matters before this Court. They clearly had notice of all proceedings because their counsel, who represents them in all of their capacities, appeared and argued on their behalf. Because of their actions, the Appellants have waived any defects, to the extent any could exist, that might have occurred. See *Stickland v. Consol. Energy Prods. Co.*, 274 S.C. 554, 555, 265 S.E.2d 682, 683 (S.C. 1980) ("A general appearance constitutes a voluntary submission to the jurisdiction of the court and waives any defects and irregularities in the service of process."); *H.S. Chisholm, Inc. v. Klinger*, 229 S.C. 8, 16, 91 S.E.2d 538, 542 (S.C. 1956).

The Wellin Children seek to have this Court rely on *In re Ashton* for its holding that "[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 or process, or an appearance." *In re Ashton*, 266 S.W.3d 602, 604 (Tex. App. 2008). While no South Carolina court has directly addressed the issue presented here, it would be an error to rely on this case as it can be easily distinguished. *In re Ashton* was a divorce proceeding wherein the Plaintiff (Wife) sought relief against the Defendant's (Husband) Trust. This case is inapplicable in the Wellin matter for several reasons. First, the Wellin Children were the Petitioners in this matter, alleging that their father's assets were in need of protection and including the promissory note which they listed on their Petition for the Appointment of a Conservator for their father. By petitioning the probate court, they submitted to its personal jurisdiction. They were not the Defendants in a marital dispute, nor has substantive relief been ordered against a Trust holding their personal assets, as they have acknowledged these funds belong to their father. Secondly, the Probate Code affords the Probate Court great latitude in protecting the assets of an alleged incapacitated party; therefore, application of a family court case is not appropriate.

3. Appellants have only tendered the \$50 million at issue in exchange for cancellation of the promissory note, an asset of Wellin's estate.

On November 20, 2013, after Bennett's appointment by consent of the parties, pursuant to the right reserved to him in Article IX(A) of the Wellin Family 2009 Irrevocable Trust (the "Irrevocable Trust"), Wellin substituted the above-mentioned Promissory Note, valued by Appellants on their Petition for Appointment of Conservator at "approximately \$49,000,000," for an interest in Friendship Partners, L. P. of the same value, as allowed by the Irrevocable Trust. [ROA 0763; 1/14/14 Application.] Prior to the substitution, Special Conservator Bennett reviewed the transaction per the Probate Court's Order to ensure adequate value was received for the transfer of assets. (*Id.*) On the date of the substitution, the Promissory Note was valued at

approximately \$50,211,447. Based on the longstanding valuation methodology for interest in Friendship Partners, LP, which both Appellants and Wellin have used every year since 2009, this was the equivalent of approximately a 58% interest in Friendship Partners. (*Id.*) Bennett felt the substitution was for adequate consideration under the Court Order and supported the transaction.

Shortly after the substitution, the Wellin Children decided to liquidate the assets of Friendship Partners and dissolve the entity with no notice to Wellin or his Special Conservator. Cynthia Plum, as Manager of Friendship Management, LLC, executed a resolution as General Partner of Friendship Partners, LP to dissolve and liquidate the entity. As a result of the liquidation, the 58% interest in Friendship Partners held by Wellin entitled him to a distribution of approximately \$92,000,000.¹ (*Id.*)

The Wellin Children then attempted to tender payment of the \$50,228,000, representing the amount owed under the original Promissory Note and funds representing additional interest through the date of tender, to their father by mailing a check to Bennett on December 6, 2013, with a letter which effectively conditioned the payment of the funds upon his release of the rights to the remaining \$42 million. [ROA 0758; 12/6/13 Hagerty Letter to Bennett.] Bennett returned the check as he felt it was not in Wellin's best interest to accept payment under those terms thereby causing him a potential loss of \$42 million. [ROA 0760; 12/6/13 Bennett Letter to Hagerty.] Since their father's refusal to drop his claim for the additional \$42 million, the Wellin Children have refused to pay the Special Conservator the minimum amount due to their father of \$50,228,000. [ROA 0576; Special Conservator Hr'g Tr. 63:22-24.]

¹ The difference in value between the \$92,000,000 distribution and the Promissory Note was the result of the fact that Mr. Wellin, as a limited partner, had no control over the partnership and the interest in Friendship Partners, LP was discounted for that lack of control. The decision of the Appellants to liquidate the partnership removed the lack of control, resulting in the increased value.

4. The Probate Court had the authority to issue its orders pursuant to S.C. Code Ann. §§ 62-5-402, -408, and -416.

When construing a statute, the cardinal rule is to ascertain the intent of the legislature. *Georgia-Carolina Bail Bonds, Inc. v. County of Aiken*, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Cl. App. 2003). "A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute." *Id.* at 22-23, 579 S.E.2d at 336. "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." *Id.* at 23, 579 S.E.2d at 336.

"The legislature's intent should be ascertained primarily from the plain language of the statute." *Id.* If, however, the language of the statute gives rise to doubt or uncertainty as to legislative intent, the construing court looks to the statute's language as a whole in light of its manifest purpose. *Id.* at 25, 579 S.E.2d at 337-38. The construing court may additionally look to the legislative history when determining the legislative intent. *State v. Byrd*, 267 S.C. 87, 92, 226 S.E.2d 244, 247 (1976).

S.C. Code Ann. § 62-5-402 states that "after the service of 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: (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." Under this provision, after service of the Children's Summons and Petition and until a final determination of capacity was made (which never occurred), the

Probate Court had jurisdiction to issue orders relating to Wellin's property. This jurisdiction would include the ability to preserve property, including the promissory note and, subsequent to the swap, the interest in Friendship Partners, LP, and after its liquidation, the proceeds of such liquidation which related to the interest received on the swap.

Similarly, S.C. Code Ann. § 62-5-408 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." S.C. Code Ann. §62-5-416(b) states, "Upon application to the appointing court, a conservator may request instructions concerning his fiduciary responsibility. A denial of the application by the court is not adjudication and does not preclude a formal proceeding." S.C. Code Ann. §62-5-416(c) states, "After notice and hearing as the court may direct, the court may give appropriate instructions or make *any* appropriate order." (Emphasis added.)

Here, the Special Conservator filed an application under S.C. Code Ann. §62-5-416(b). In the application, he requested that the court exercise its powers under §62-5-416(c) and allow the interested parties to brief the issues and present their arguments at a hearing. The Probate Court chose to exercise this power and received briefing and arguments from Wellin, the Special Conservator, and the Wellin Children. As a result of a hearing on the matter, in which all parties had notice and participated, the Court issued an appropriate Order protecting the assets of Wellin under S.C. Code Ann. § 62-5-416(c). As discussed above, Section 62-5-408 grants broad latitude to the Probate Court in issuing orders regarding the property of a protected person and allows it to exercise any and all powers over the estate of that person which he could exercise if present and not under disability. The plain language of these sections provide ample authority for the Probate Court to enter its orders.

5. The Special Conservator had standing to seek instruction from the Probate Court regarding the subject \$50 million.

Appellants argue in their motion to alter or amend that the Special Conservator lacked the authority to pursue claims on behalf of Mr. Wellin at the time his application to the court was made. Petitioners cite Section 62-5-409(c) as the authority that a special conservator has only the authority expressly conferred by the court in the order of appointment. However, Probate Code section 62-5-417 notes that a conservator is a fiduciary and must observe a fiduciary standard of care. S.C. Code Ann. § 62-5-417. S.C. Code Ann. § 62-5-416(b) expressly provides a mechanism for a conservator, special or general, to seek guidance from the Probate Court regarding their fiduciary duties in a particular matter. Subsection (c) of this statute also allows for the probate court to give instructions or make any appropriate order "after notice and hearing as the court may direct." S.C. Code Ann. § 62-5-416(c). As a fiduciary for Mr. Wellin, the Special Conservator had the right and obligation to seek guidance from the Court regarding the asset at issue. Appellants characterize the Probate Court's order to pay the \$50,228,000 to a second Special Conservator as "a request for substantive relief." However, review of the record reflects that this order was made in response to Appellants' offer to pay the funds into court. February 6, 2014 Transcript, p. 58, ln. 12-24. Appellants were served with the application and participated actively in the hearing. After hearing from the parties, the Probate Court made an appropriate order to protect assets belonging to Wellin specifically as the Appellants had requested in their Petition.

6. Dismissal was not required pursuant to Rule 12(b)(8), SCRPC.

Appellants argue that the Special Conservator's application for instruction should have been dismissed pursuant to Rule 12(b)(8), SCRCP on the basis that the issue of ownership of the \$50 million is the subject of the pending federal court litigation. Dismissal under Rule 12(b)(8) may be proper where there is (1) another action pending, (2) between the same parties, (3) for the same claim. *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 105-106, 674 S.E.2d 524, 531 (Ct. App. 2009) (emphasis added). The Probate Court did not err in declining to dismiss the application because, despite Appellants' allegations to the contrary, at the time the claim was filed, there was no other action pending related to the Wellin Children's refusal to surrender these funds to the Special Conservator.

During the hearing before the Court in February 2014, Appellants acknowledged that there was no such action before the Federal Court or any other court. "That action does not currently contain a claim relating to this substitution of assets . . ." [ROA 0566; Special Conservator Hr'g Tr. 25:2-4.] In addition, no one contested the fact that Bennett as Special Conservator was not a party to any of the current litigation in Federal Court when these Orders were issued. [ROA 0567; Special Conservator Hr'g Tr. 28:13-20.] The fact that Bennett later attempted to fulfill his duties by seeking the additional \$42 million for Wellin is not before this Court now because it was not before the Probate Court when these decisions were rendered. For these reasons, the Probate Court correctly held that "dismissal pursuant to Rule 12(b)(8) is not appropriate" by reiterating its "exclusive jurisdiction to issue a protective order until these proceedings are terminated pursuant to S.C. Code Ann. § 62-5-402, 62-5-408(1) and 62-5-430." [ROA 0028; 7/3/14 Order #1.] The Probate Court was the only court responsible for instructing Bennett as to protecting the assets of Wellin. For this reason, the Probate Court's denial of the Motion to Dismiss pursuant to Rule 12(b)(8), SCRCP was not error.

7. There was no violation of Appellants' due process rights by issuance of the protective order.

The core of due process is the right to notice and a meaningful opportunity to be heard at a meaningful time and in a meaningful manner. *Cleveland Bd. Of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985); *LaChance v. Erickson*, 522 U.S. 262, 266 (1998); *S.C. Dep't of Soc. Servs. v. Beeks*, 325 S.C. 243, 481 S.E.2d 703 (1997). Appellants argue their due process rights were violated by the court's issuance of the orders in the absence of a summons and complaint, discovery process and an eventual trial by jury. However, Appellants petitioned the Probate Court and requested an emergency protective hearing to restrain their father from transferring his wealth outside of their control. Appellants made themselves subject to the Probate Court's jurisdiction when they decided to challenge his mental capacity to make his own decisions. [ROA 0040; Conservatorship Petition.]

The Special Conservator, Bennett, made his concerns regarding the substitution transaction discussed above known to the parties by his January 14, 2014 letter, which the Court treated as an application under S.C. Code § 62-5-416(a) and directed that he serve it upon all interested parties. [ROA 0763; 1/14/14 Application.] After said service, the Appellants actively participated in the scheduling of a hearing on the application. Prior to the hearing, the Petitioners filed a Motion to Dismiss, wherein they raised the same issues they now assert they did not have knowledge of. [ROA 0181; 2/3/14 Motion to Dismiss.]

Appellants further claim that they lacked knowledge of the issues to be addressed or that an oral amendment had been made that increased the scope of the hearing. This assertion is factually unfounded. The only oral amendment at the hearing was a reduction in the scope of the



proceeding based on an agreement that a separate Summons and Petition may be required to address the additional \$42 million in dispute. [ROA 0393; 3/3/14 Motion to Alter or Amend, Footnote 1.]

Lastly, Appellants continue to ignore that the Court made the decision to protect Wellin's funds by relying on the fact that the Appellants (as Trustees) offered to pay the \$50,228,000 into the Court during the hearing and that counsel for the Trust Protector represented to the Court that he did not know where the \$50,228,000 was located. [ROA 0001; 7/3/14 Order #1.] The Appellants affirmatively disavowed any rights to the \$50,228,000 which they acknowledged was due to Mr. Wellin. February 6, 2014 Hearing Transcript p. 55 ln23- p. 58 ln. 4. Fundamental fairness is not violated when a party has proper notice, participates in the proceedings, and then makes an offer to the Court upon which that it relies. For this reason, the Probate Court did not violate Appellants' due process rights in issuance of the protective order.

8. The Probate Court did not improperly invoke its equitable powers in issuing the order at issue.

Appellants argue that the Probate Court incorrectly relied on its equitable powers as basis for the authority in issuing the order to pay the \$50 million to the Special Conservator II. Appellants' position is that this order is, in essence, an injunctive order granting equitable relief "to do what is necessary to protect the person." April 8, 2016 hearing p. 45, ln. 3-12. While "[e]quity will always seek to provide a remedy where a right has been violated," in this case resort to equity is unnecessary. *State ex rel. Daniel v. Strong*, 185 S.C. 27, 192 S.E. 671, 681 (S.C. 1937). Courts also "have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible." *Ex Parte Dibble*, 279 S.C. 592, 310 S.E.2d 440, 442 (S.C. Ct. App. 1983). This provides additional support for the Court's order, but

as discussed at length above, the statutory basis for the Court's order is founded in S.C. Code Ann. §§ 62-5-402, -416 (2014).

9. The Probate Court's findings of fact are supported by the evidence.

On appeal, the Circuit Court may not disturb the Probate Court's findings of fact unless the record reveals there is no evidence to support them. Appellants allege that certain of the Probate Court's factual findings are unsupported by the record because no evidence was admitted by the probate court and no evidentiary hearing was permitted. However, Appellants submitted significant factual material, both in connection with their Motion to Dismiss, their Petition for Appointment of Conservator, and their concessions at the hearing through Counsel. These findings, and their basis in the record, are discussed in detail in this Court's Order of January 13, 2016.

10. The Notice of Dismissal did not divest the Probate Court's jurisdiction to protect the estate assets.

Appellants contend that their Notice of Voluntary Dismissal pursuant to Rule 41(a)(1)(A), SCRPC, is unconditional and the dismissal became effective upon filing. They argue that Rule 41(a)(1)(A), SCRPC, is applicable to conservatorship proceedings and that Rule 81, SCRPC, does not apply. The provisions of Rule 41(a)(1)(A) do not apply to a conservatorship determination, and a Notice of Voluntary Dismissal is not an effective means to terminate the proceedings as to all parties and divest the Court of jurisdiction to appoint a conservator. Rule 81 of South Carolina Rules of Civil Procedure states that the Rules only apply in the Probate Court "insofar as practicable to the extent they are not inconsistent with the statutes and rules governing" proceedings in the Probate Court. Rule 81, S.C.R.C.P.; see *In re Timmerman*, 331 S.C. 455, 460 (Ct. App. 1998) ("The South Carolina Rules of Civil Procedure are applicable in

the probate court to the extent they are not inconsistent with the Probate Code or probate court rules.").

A prerequisite to the use of Rule 41(a)(1)(A) to dismiss a case is the requirement within the proceeding that an adverse party file an answer or have the ability to move for summary judgment. See *ISC Holding AG v. Nobel Biocare Fin. AG*, 688 F.3d 98, 116 (2d Cir. 2012) (finding that a petitioner could not use a Notice of Voluntary Dismissal to dismiss a petition to compel arbitration where respondent could not have filed an answer and summary judgment was unavailable). Within a conservatorship proceeding, there is simply no requirement for a respondent to file an answer and no ability to file a motion for summary judgment. The exclusive procedure for the Probate Court to appoint a conservator for an allegedly incapacitated person is set forth in S.C. Code Ann. § 62-5-407, which states:

Upon the filing of a summons and petition for appointment of a conservator or other protective order for reasons other than minority, and after service of the summons and the petition, the court shall set a date for hearing. Unless the person to be protected has counsel of his own choice, the court must appoint a lawyer to represent him who then has the powers and duties of a guardian ad litem. If the protected person already has representation by an attorney that attorney shall act as his guardian ad litem. If the alleged disability is mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, or chronic intoxication, the court shall direct that the person to be protected be examined by one or more physicians designated by the court, preferably physicians who are not connected with any institution which the person is a patient or is detained.

Nowhere within the above section does it state that an allegedly incapacitated person is required to file an answer to the petition. Forcing an allegedly incapacitated person to file an answer would be contrary to the primary purpose of a conservatorship proceeding, that is to protect the interests of such a person. Rather than requiring an answer, the statute directs the Court to set a hearing after service of the summons and petition. S.C. Code Ann. § 62-5-407(b). Further, under § 62-5-402, the Probate court obtains and retains exclusive jurisdiction upon the

filing of a petition that does not terminate except by final order of the court. The clear language of the statute indicates that a person seeking the court's protection over an alleged incapacitated individual cannot subsequently rescind that request for protection by unilateral action. For this reason, the Probate Court did not err in finding that the Notice of Voluntary Dismissal was ineffective.

11. Application of the mootness doctrine would result in duplicative litigation over the same issues in the same court.

"A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." *Mathis v. South Carolina State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). An exception to the mootness doctrine exists when "a decision by the trial court may affect future events or have collateral consequences for the parties." *Curtis v. State*, 345 S.C. 557, 549 S.E.2d 591, 596 (2001). Appellants allege this appeal is moot because Mr. Wellin died on September 14, 2014, two days after Appellants filed their initial brief in this matter. Appellants were given the opportunity to amend their brief to address this issue, but declined to do so. An issue may not be raised for the first time in a reply brief. *McClurg v. Deaton*, 395 S.C. 85, 87 n.2, 716 S.E.2d 887, 888 n.2 (2011). Thus, the mootness issue is arguably not properly before this Court.

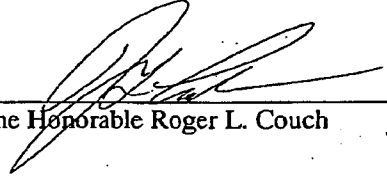
Regardless, this Court declines to apply the mootness doctrine based on the collateral consequences exception because Mr. Wellin's death does not make moot the underlying dispute over the asset at issue. The parties have acknowledged there was no dispute that the \$50 million was owed to Mr. Wellin, and now, to his estate. Applying the mootness doctrine in this instance would require the Estate to expend more time and costs to bring the identical action in the same court. Such litigation would not be in the interests of judicial economy.

CONCLUSION

Wherefore, for the reasons stated above, this Court's Order of January 13, 2016, is
AFFIRMED.

AND IT IS SO ORDERED.

May 13, 2016
Charleston, South Carolina


The Honorable Roger L. Couch



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

ROGER L. COUCH
JUDGE

180 MAGNOLIA STREET
POST OFFICE BOX 2614
SPARTANBURG, SOUTH CAROLINA 29304
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E-MAIL: rcouchj@sccourts.org

MEMORANDUM

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

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

RE: Order

DATE: May 12, 2016

Dear Ms. Armstrong;

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

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

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

Thank you,

A handwritten signature in black ink, appearing to read "Adam J. Mandell", written over a horizontal line.

Adam J. Mandell
Law Clerk to Roger L. Couch

ATTACHMENT 3

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STATEMENT OF THE CASE

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

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

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

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

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

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

ISSUES OF LAW

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

FINDINGS OF FACT

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

IT IS ORDERED, ADJUDGED, AND DECREED THAT:

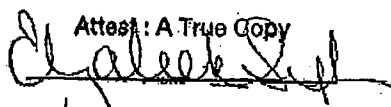
1. Petitioners shall pay the \$50,228,000 to Synovus Trust Company, N.A., the Special Conservator II appointed by this Court, within ten (10) days from the date of this Order.
2. Respondent and/or Special Conservator Bennett shall deliver the Promissory Note to Special Conservator II for safekeeping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

AND IT IS SO ORDERED!


Irvin G. Condon
Judge of Probate Court for Charleston County

Charleston, South Carolina
2/21/2014 

Page 6 of 6

Attest: A True Copy

Clerk Probate Court
Charleston County South Carolina



STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

In Matter of: Keith S. Wellin

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

Petitioners,

vs.

Keith S. Wellin,

Respondent.

IN THE PROBATE COURT

14 JUL 11 PM 4:43
CASE NO.: 2013-GC-10-0129

PROBATE COURT
CHARLESTON COUNTY

**ORDER DENYING PETITIONERS'
MOTION TO ALTER OR
AMEND JUDGMENT**

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

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

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

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

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

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

Petitioners' reliance on In re Ashton, 266 S.W.3d 602, 604 (Tex. App. 2008), is misplaced. First, Ashton, which is merely persuasive authority, is contrary to the South Carolina Court of Appeals holding in Cannon, which is controlling on this Court. Second, Ashton does allow relief against a trustee if a trustee makes an appearance. Id. Third, the South Carolina Probate Code provisions at issue here deal with the protection of alleged incapacitated adults, not adversarial proceedings between parties of equal standing as found in divorce actions. See S.C. Code Ann. §§ 62-5-401, -402, -408.

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

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

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

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

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

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

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

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

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

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

AND IT IS SO ORDERED!

Irvin G. Condon
IRVIN G. CONDON
Judge of Probate
County of Charleston

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

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

In Matter of: Keith S. Wellin

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

Petitioners,

vs.

Keith S. Wellin,

Respondent.

FILED

IN THE PROBATE COURT

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CASE NO.: 2013-GC-10-0129

PROBATE COURT
CHARLESTON COUNTY

ORDER REGARDING
PETITIONERS' NOTICE OF
VOLUNTARY DISMISSAL

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

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

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

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

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

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

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

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

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

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

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

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

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

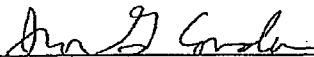
Lastly, Respondent filed, on May 15, 2014, a Petition to Continue Proceeding in Accordance with S.C. Code Ann. § 62-5-407. Respondent wishes to proceed with the conservatorship proceeding and seeks an order compelling the Petitioners to comply with this Court's previous orders. As discussed above, the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

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

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

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

AND IT IS SO ORDERED!



IRVIN G. CONDON
Judge of Probate
County of Charleston

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