THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS

Roger L. Couch, Circuit Court Judge

Irvin G. Condon, Probate Court Judge

Appellate Case No. 2016-001141
Circuit Court Case No.: 2014-CP-10-4336
Probate Case No.: 2013-GC-10-1029

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

Appellants,

v.

Keith S. Wellin,

Respondent.

FINAL BRIEF OF RESPONDENT

Tiffany N. Provence, Esq. (SC #13912)
PROVENCE MESSERVY, LLC
300 N. Cedar Street, Suite A
Summerville, SC 29483
(843) 871-9500
(843) 261-7035 (fax)
Attorney for Edward G.R. Bennett as Special Conservator for Keith S. Wellin

Robert H. Hood, Sr., Esq. (SC# 2599)
James B. Hood, Esq. (SC #70212)
HOOD LAW FIRM, LLC
Post Office Box 1508
Charleston, SC 29402
(843)577-4435
(843) 722-1630 (fax)
Attorney for Keith S. Wellin

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

STATEMENT OF ISSUES ON APPEAL

Respondents would restate the issues on appeal as:

I. Did the Probate Court have subject matter jurisdiction pursuant to Probate Code §62-5-416, to order the Wellin Children to pay over the $50,228,000 owed to their Father to a special conservator where they had listed the Promissory Note as an asset of their Father when they filed their Petition for Appointment of a Conservator to protect his assets?

II. Did the Probate Court have personal jurisdiction over the Trust and the Wellin Children, as Trustees, by virtue of their filing the Petition and asserting arguments on behalf of the Trust?

III. Did the Probate Court comply with the proper statutory procedure and provide notice and an opportunity to be heard in compliance with Due Process requirements?

IV. Did South Carolina Rule of Civil Procedure 12(b)(8) require dismissal of Bennett's Application on the basis of the pending federal court litigation?

V. Did the Circuit Court properly apply an exception to the mootness doctrine in proceeding to consider the appeal from the Probate Court Order after Mr. Wellin's death?

VI. Did the lower courts correctly find that Edward Bennett, as Special Conservator, had standing to seek the Court's protection on behalf of Keith S. Wellin?

INTRODUCTION

Sadly, in situations of remarriage between spouses with adult children, family disputes often lead to litigation over control and distribution of assets. In this case, the adult children of Keith S. Wellin filed this action in Probate Court seeking appointment of a conservator ostensibly to "protect" Mr. Wellin's assets – as their anticipated inheritance – from their stepmother, Mrs. Wendy C. H. Wellin. With the consent of all parties, a special conservator was appointed. Despite the fact that the Wellin Children got what they sought in the Probate Court – appointment of a special conservator to protect their father's assets – they are not happy with the Probate Court's determination as to which of Mr. Wellin's assets should be controlled by the special conservator or the scope of the special conservator's role in protecting Mr. Wellin's assets from the Wellin Children themselves.

As it came to the attention of the Probate Court during the conservatorship proceedings, the Wellin Children were embroiled in litigation with their father in federal court over claims of their breaches of various fiduciary duties.[1] The Probate Court wisely saw through their procedural machinations and vexatious litigation strategy and concluded that a special conservator should hold and protect certain of Mr. Wellin's assets in the control of the Wellin Children. The Wellin Children became frustrated when the Probate Court ordered them to pay over $50 million, which they admitted to owe their father, to a special conservator. The Probate Court also authorized the special conservator to pursue claims against the Wellin Children to ensure that Mr. Wellin received adequate compensation for his interests.

[1] At that time, the federal court litigation contained fifteen claims ranging from breaches of fiduciary duties to unjust enrichment and for a constructive trust. The generalized descriptions and references to that litigation in the context of this probate appeal is not intended to be any limitation or concession as to the specific claims and allegations made in the federal proceedings.

Despite the fact that the Wellin Children invoked the jurisdiction of the Probate Court in filing for the appointment of a conservator for their father, they attempted to evade the directives and consequences of Probate Court order(s) 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 properly held that the voluntary dismissal was not effective to destroy the jurisdiction that had been invoked, and exercised its equity jurisdiction to order the Wellin Children to pay over the funds to a special conservator for safekeeping. On appeal, the Circuit Court correctly upheld the Probate Court orders against a multitude of challenges to the Probate Court's subject matter jurisdiction over the $50 million asset and the personal jurisdiction over the Wellin Children in their fiduciary capacities, and properly rejected the argument of due process violations. The Circuit Court also wisely refused to dismiss the appeal as moot based on the fact that Mr. Wellin died after the Probate Court issued its orders.

The central question before this Court is whether the Probate Court properly acted within its jurisdiction over the assets belonging to Mr. Wellin and properly issued orders for a special conservator to hold the $50 million and take other appropriate steps to protect Mr. Wellin's assets in connection with the pending federal court litigation. The Respondent maintains that the Probate Court had subject matter jurisdiction over the $50 million asset pursuant to Section 62-5-416, and that the Court had personal jurisdiction over the Wellin Children, in both their individual and in their fiduciary capacities, by virtue of their filing of the original petition. The Respondent further submits that the Probate Court was not divested of such jurisdiction by the Wellin Children's unilateral, tactical filing of a voluntary stipulation of dismissal.

While the Wellin Children initially filed this probate action for the asserted purpose of protecting their father from his own frailty and the undue influence of his wife, it became

apparent to the Probate Court that Mr. Wellin needed to be protected from his own children. Now, with the tables turned, they seek to keep control of their father's funds in order to bolster their legal leverage in the ongoing litigation between the parties. [ROA 1183; Special Conservator Hr'g Tr. 67:12-14.] The Probate Court wisely acted within its equitable jurisdiction in refusing to allow the Wellin Children to manipulate the legal process to prevent the Court from providing the protection they sought when they initially commenced this action under the guise of protecting their father.

Mr. Wellin and Bennett, as Special Conservator and Special Trustee for Wellin, maintain that the Probate Court was correct in determining that the funds should be protected by the Probate Court, which the Circuit Court correctly upheld. The Probate Court orders are fully supported by the law and the record evidence and they should be affirmed notwithstanding the death of Mr. Wellin because it would be an unnecessary duplication of judicial resources to relitigate the same issues in the same Probate Court in the context of the administration of the probate of Mr. Wellin's estate.

STATEMENT OF THE CASE[2]

On July 19, 2013, Peter J. Wellin, Cynthia W. Plum, and Marjorie W. King ("Wellin Children"), filed a Petition for Protective Order and Appointment of Conservator in the Charleston County Probate Court alleging that their father, Keith S. Wellin ("Mr. Wellin") lacked capacity to manage his property and affairs. [ROA 157; Conservatorship Petition.] One week later, at the request of the Wellin Children, the Court held an emergency hearing on July

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

26, 2013. At that time all interested parties[3] agreed to the appointment of Edward G. R. Bennett, Mr. Wellin's private counsel, as Special Conservator and Special Trustee for Mr. Wellin's Revocable Trust. On August 15, 2013, the Court entered an Order reflecting this agreement and appointing Mr. Bennett. [ROA 1; 8/15/13 Order.] The parties participated in a court-ordered mediation on October 15, 2013 but were unsuccessful in reaching an agreement.

Thereafter, on January 14, 2014, the Special Conservator filed an application pursuant to S.C. Code §62-5-416(b), requesting the Probate Court's guidance as it related to his duties to Mr. Wellin. [ROA 1757;1/14/14 Application.] At the direction of the Probate Court, a copy of the same was served on all parties, and a hearing was scheduled on the matter.[4] Prior to the hearing, the Wellin Children filed a motion to dismiss the Special Conservator's application. [ROA 787; 2/3/14 Motion to Dismiss.]

On February 6, 2014, the Probate Court held a hearing regarding assets in possession of the Wellin Children which the Special Conservator felt required the Court's immediate

---

[3] "Interested parties" is defined in the Probate code to include "heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person which may be affected by the proceeding. It also includes... other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding." S.C. Code Ann. § 62-1-201(23) (1987).

[4] After the Special Conservator sent 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 31; 7/3/14 Order #1.] A conservator is a court appointed fiduciary who reports to the Court and is entitled to seek guidance from the Court. All interested parties received a copy of the communication and participated in the scheduling of the subsequent hearing.

protection, namely, $50,228,000.00 owed to Mr. Wellin from his Children[5]. The Special Conservator also requested the Court's clarification as to his authority to pursue claims on behalf of Mr. Wellin to protect and/or collect other of his assets. [ROA 1169-70; 2/06/14 Hearing.] Thereupon, the Probate Court issued a protective order on February 21, 2014 requiring the Wellin Children to return the $50,228,000.00 by surrendering the same to Synovus Trust Company, N.A. ("Synovus") who would serve as Special Conservator II and protect the funds. [ROA 22; 2/21/14 Order #1.] Simultaneously, the Probate Court issued a second order granting the Special Conservator (Bennett) expanded powers to pursue additional claims on Wellin's behalf. [ROA 20; 2/21/14 Order #2.] The Wellin Children did not appeal from the second order.

On March 3, 2014, the Wellin Children filed a Motion to Alter or Amend the first February Order to avoid the payment of the funds to Synovus. [ROA 986; 3/3/14 Motion to Alter or Amend.] A hearing was held on their motion on March 31, 2014, however, before the Probate Court ruled on the Motion to Alter or Amend, the Wellin Children 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 1762; Notice of Voluntary Dismissal.]

On July 3, 2014, the Probate Court issued two orders: the first order denied the motion to alter or amend, [ROA 28; 7/3/14 Order #1]; and the second order held that the voluntary dismissal was ineffectual to the extent it attempted to terminate the Court's jurisdiction over Mr. Wellin and his assets [ROA 34; 7/3/14 Order #2.] On July 11, 2014, the Wellin Children filed a Notice of Appeal to the Circuit Court pursuant to S.C. Code Ann. § 62-1-308. [ROA 1765; 7/11/14 Notice of Appeal.] The Wellin Children filed their initial brief in the Circuit Court on

[5] This $50 million is the minimum amount acknowledged and indisputably owed by his Children to Mr. Wellin for claims asserted in the federal litigation. The additional monies claimed as due above that amount and the legal nature of the debt are at issue in the federal litigation.

September 12, 2014. After Mr. Wellin's death on September 14, 2014, the Wellin Children were given the opportunity to amend their brief to address this change of circumstance, but they declined to do so. After briefing was completed, and oral arguments were heard, the Circuit Court issued an order affirming the Probate Court's orders on January 13, 2016. [ROA 44; 1/13/16 Order.] On January 22, 2016, Wellin Children filed a motion to alter or amend the Circuit Court's Order, which the Circuit Court denied, after a second hearing, by Order filed May 16, 2016. [ROA 1139; Motion. ROA 59; Order.] The Wellin Children timely served and filed their Notice of Appeal to this Court. [ROA 2033; NOA.]

STATEMENT OF FACTS

Mr. Wellin was a businessman who amassed significant wealth as an entrepreneur and Wall Street investor. [ROA 176; *Wellin I* Compl. ¶¶ 21-22.] He married Wendy C. H. Wellin in 2002. Mr. Wellin's three adult children from a prior marriage are the Appellants in this matter. [ROA 176; *Wellin I* Compl. ¶ 24.] Mr. Wellin's assets consist solely of his own earnings. [ROA 157, 167; Conservatorship Petition.] Mr. Wellin, who was 86 years old at the filing of this action, was physically disabled after multiple strokes and tongue cancer but he maintains that he was mentally intact at all times and he also denied being under any undue influence by his wife.

Prior to June 2013, Mr. Wellin had executed a power of attorney and appointed two of his children, Peter Wellin and Cynthia Plum as his attorneys-in-fact. On or about June 20, 2013, he removed Peter and Cynthia 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 179; *Wellin I* Compl. ¶48.] Less than a month later, Mr. Wellin filed a lawsuit (*Wellin I)* related to transactions between himself and his children that is

currently pending, among other actions between these parties, in federal court. [ROA 174; *Wellin I* Compl.]

The Wellin Children have openly blamed Mrs. Wellin for Mr. Wellin's changes to his estate plan. They have alleged that "these and other financial transfers to Wendy Wellin and the Wellin I lawsuit are the product of manipulation and undue influence exerted by Wendy Wellin on Keith Wellin at a time when he lacked capacity to manage his affairs." [Appellants' Brief p. 11.] In response to their father's allegations, the lawsuit filed against them by Mr. Wellin, and their belief he would change his estate plan to include someone other than themselves (mainly, Mrs. Wellin), the Wellin Children sought to have their father deemed incapacitated by the Probate Court to preserve their expected inheritance under his then-existing estate plan.

They implemented their strategy with the filing of the Petition for Appointment of Conservator in the Charleston County Probate Court seeking protection of his assets. It is important to note, however, 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 had been for several years. Instead, they only sought to have the Probate Court restrict Mr. Wellin's 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. [6]

[6] While the Wellin Children 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 (subject to a no-contest clause) and to various charitable organizations.

In their Petition to the Probate Court, the Wellin Children identified certain assets which needed to be protected, including a "promissory note with a face value of approximately $49 million"[7] that is the subject of this appeal. [ROA 167; Conservatorship Petition.] As noted above in the procedural history, Edward Bennett, Wellin's private counsel, had been appointed Special Conservator and Special Trustee by consent of the Wellin Children and all other interested parties. The Wellin Children have acknowledged 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." [Appellants' Brief p. 17.] Section C of the Order Appointing Special Conservator specifically required Bennett to "ensure that transfers of assets are not made without fair and adequate consideration." [ROA 1; 8/15/13 Order ¶ C.]

On November 20, 2013, after the Special Conservator had already been appointed, Mr. Wellin made a transfer of the Promissory Note by substituting the Note for an interest in Friendship Partners in a family trust.[8] [ROA 1757; 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 $50,211,447.00, which was the

[7] The amount of $50,228,000.00 referenced in the Probate Court's order and this appeal reflects the face value of the promissory note and accrued interest as of November 21, 2013. [ROA 1752; Promissory Note, 12/6/13 Hagerty Letter to Bennett.]

[8] Mr. Wellin made the substitution pursuant to rights reserved to him in Article IX(A) of the Wellin Family 2009 Irrevocable Trust (the "Irrevocable Trust").

equivalent of a 58% interest in Friendship Partners. Id. Bennett considered the substitution as adequate consideration under the Court Order and supported the transaction.[9]

Shortly after the substitution, the Wellin Children (as Trustees of the Irrevocable Trust) decided to liquidate the assets of Friendship Partners and to dissolve the entity with no notice to Mr. Wellin or his Special Conservator. As a result of the liquidation, the 58% interest in Friendship Partners held by Mr. Wellin became worth approximately $92,000,000, as opposed to the original $50,211,447.[10] Id. No matter how hard they try, the Wellin Children cannot avoid the fact that they were the parties responsible for the sale and dissolution of Friendship Partners that triggered this increase in value and resulted in 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 him for the outstanding Promissory Note. Simply put, taking this position entitles the Wellin Children to a $42 million personal gain through the Trust and prevents that profit from passing through Mr. Wellin's probate estate. Despite their father's purposeful act of substituting the Promissory Note, as reviewed and approved by the Special Conservator, which is the subject of multiple pending lawsuits in federal court, the Wellin Children have already disbursed to themselves all but the $50,228,000 which they grudgingly acknowledge is owed to Mr. Wellin under the original

[9] The substitution documents also provided that the substitution was to be made by formula such that if the valuation were ever determined to differ from that used in effecting the substation, the percentage interest in the partnership received in exchange for the note would automatically adjust.

[10] 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 and lack of marketability. The decision of the Wellin Children to liquidate the partnership removed the lack of control and turned the otherwise illiquid asset into cash, resulting in the increased value.

Promissory Note, plus an addition $1.8mm, which they have been using to pay legal fees. [ROA 1175; Special Conservator Hr'g Tr. 34:21-25, 35:1-4.]

The Wellin Children 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 1752; 12/6/13 Hagerty Letter to Bennett.] However, the Special Conservator returned the check because he considered it not to be in his ward's best interest to accept payment under those terms thereby causing Mr. Wellin a potential loss of $42 million. [ROA 1754; 12/6/13 Bennett Letter to Hagerty.] Since their father's refusal to drop his claim for the additional $42 million, the Wellin Children are withholding the $50,228,000 which they indisputably owe their father. [ROA 1182; Special Conservator Hr'g Tr. 63:22-24.]

At that point, the Special Conservator brought the matter before the Probate Court for clarification as to his duty and obligation toward Mr. Wellin in regards to the substitution of the Promissory Note. Bennett's primary concern as Special Conservator and Special Trustee was that as a result of this transaction, Mr. Wellin exercised his absolute right of substitution and transferred an asset (the Promissory Note) to the Irrevocable Trust and received no consideration in exchange. During the hearing, it was explained that should the Wellin Children prevail (in federal court) 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 remaining profit of $42 million; however, should Mr. Wellin prevail in his interpretation of the transaction, he would be entitled to a total of approximately $92,000,000. Id. Under either scenario, the bottom line was that Mr. Wellin was owed no less than $50,228,000.

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 1183-84; Special Conservator Hr'g Tr. 69:25, 70:1-2.] He further acknowledged the Children's 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." [ROA 1178; Id. at 47:5-7.]

As a result of this acknowledgement, Bennett then requested that the Probate Court take immediate protective measures to secure the undisputed $50,228,000—the amount Mr. Wellin would be entitled to receive regardless of which party ultimately prevailed—and further provide Bennett with the power to pursue the additional funds to which he felt Mr. Wellin was entitled. [ROA 1178; Id. at 48:7-10.] During the hearing, the Wellin Children offered to surrender the undisputed funds to the Court. [ROA 1181; Id. at 58:12-14.]

Following that hearing, the Probate Court issued the order directing the Wellin Children to pay the $50,228,000 to a specially appointed Special Conservator II (Synovus).[11] Despite the fact that the Wellin Children had been willing to deposit the funds with the Court, they objected to paying the funds to Synovus.

ARGUMENT

Standard of Review

In a probate appeal, the Circuit Court, Court of Appeals, or Supreme Court shall hear and determine the appeal according to the rules of law. S.C. Code Ann. § 62-1-308(h) (2014). On appeal of a law action, the probate court's finding should be upheld if there is any evidence to support them; if the action is equitable, the appellate court may make findings in accordance with

[11] The Probate Court chose to have the funds held by a Special Conservator because the Court does not have the ability to hold such funds. [ROA 1181; 2/6/14 Hr'g Transcript 58:12-24.]

its own view of the preponderance of the Evidence. In re Estate of Weeks, 329 S.C. 251, 261, 495 S.E.2d 454, 460 (Ct. App. 1997) (emphasis added). 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 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. In re Howard, 315 S.C. 356, 361, 434 S.E.2d 254, 257 (1993); *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).

As explained in detail below, the Probate Court and the Circuit Court had an opportunity to hear from all parties on multiple occasions and had a clear understanding of the issues in this case. The clear and undisputable record shows that the Wellin Children sought the appointment of a Conservator for their father claiming the Probate Court needed to protect his assets. One of the assets they listed on their Petition was the Promissory Note, and irrespective of the ongoing litigation over the substitution of the Promissory Note for the Friendship Partnership interest, they acknowledge that Mr. Wellin is owed – at the least – $50,228,000. Yet, 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, the Wellin Children then attempted to avoid the consequences of their own actions when the Probate Court ordered them to surrender the $50 million asset that they were withholding from their father and his Special Conservator.

I. The Probate Court had subject matter jurisdiction to order the Wellin Children to pay over their father's $50,228,000 to a Special Conservator.

The lower courts held that jurisdiction over the parties and subject matter existed pursuant to S.C. Code Ann. § 62-5-102 and § 62-7-201. [ROA 29; 7/3/14 Order #1.] The Wellin Children challenge this jurisdiction by asserting that the Probate Court lacks subject matter jurisdiction because the $50,228,000.00 is currently held by a Trust (with the Wellin Children serving as the Trustees) and is therefore not an asset of Mr. Wellin's estate. The Probate Court correctly rejected their challenge because they listed the Promissory Note as an asset when they filed their Petition for Appointment of a Conservator, stating :

> 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 29; 7/3/14 Order #1.] The Circuit Court correctly agreed, adopting the Probate Court's reasoning:

> 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.

[ROA 51; 1/13/16 Order at 8.]

A. The Probate Court had exclusive, continuing jurisdiction to make orders regarding the protection of Mr. Wellin's assets, including the $50 million.

The Probate Code provides the Probate Court with exclusive jurisdiction in conservatorship proceedings:

> 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 Ann. § 62-5-402 (2010). Similarly, Probate Code Section 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." The Reporter's Comment to Section 62-5-408 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."

The Wellin Children argue that the proceeds of the liquidation of the Friendship Partnership are not an asset of Mr. Wellin's estate. In its Findings of Fact, the Probate Court found that promissory note had swapped for the interest in the partnership and that Mr. Wellin was entitled to proceeds from the liquidation of the partnership which would have a value of no less than (and perhaps $42mm more than) the value of the note. However, they 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 the Circuit Court, that they have offered and continued to offer $50,228,000 in exchange for the cancellation of the Promissory Note. Further, the Wellin Children acknowledged, "they agreed to pay the note that was in the hands ... of the [special] conservator." [ROA 1390; April 8, 2016 Transcript p. 17:3-

6.] Moreover, Appellants offered to pay the funds into Court, a practice in which the Probate Courts of this State do not participate. The Probate Court recognized that post swap, as a minimum, Mr. Wellin was entitled to no less than the value of the note and possibly more, hence the order granting the Special Conservator the authority to pursue the additional $42mm. The offer made by Counsel for the Wellin Children belies their argument that the Court lacks jurisdiction to order the same funds to be held by a Special Conservator pursuant to the Court's directive.

Once vested, the jurisdiction of the Probate Court is not only exclusive but continuous. [ROA 50; 1/13/16 Order at 7 (citing § 62-5-402).] This original, exclusive and continuous jurisdiction includes the 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). Thus, "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. 188, 194 (2007) (quoting § 62-5-402, and 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").

The Circuit Court noted that the Wellin Children "identified the Promissory Note as an estate asset and acknowledged multiple times in open court, both in the Probate Court and before this court, that they have offered and continue to offer $50,228,000 in exchange for the cancellation of the Promissory Note." [ROA 62; 5/16/16 Order at 4.] The Circuit Court further found that during the pendency of the action, the Probate Court's jurisdiction over Mr. Wellin's estate included the Promissory Note, the interest in Friendship Partners, L.P. and/or the proceeds

of the liquidation of Friendship Partners, L.P. which relate to the interest for which the Note was swapped.

The Wellin Children's attempt to distinguish between the Note and the $50,228,000 itself fails because the Note is evidence of the debt owed to Wellin, which by its terms is secured by an interest in Friendship Partners. Under basic contract finance law, "[t]he note given is only evidence of the debt and one of the means of collecting it, and if there is a mortgage, that is only another security for the same debt." Lever v. Lighting Galleries, Inc., 374 S.C. 30, 33, 647 S.E.2d 214, 217 (2007) (quoting Nichols v. Briggs, 18 S.C. 473, 484 (1883)).

The Wellin Children Appellants acknowledged the Probate Court's ability to protect and preserve at least that portion of the partnership liquidation proceeds equal to the $50,228,000 by offering to pay the same into Court. The Probate Court's statutory authority under § 62-5-408, to preserve and protect Mr. Wellin's assets, extends to protection of these funds. The Probate Court was the only court vested with the authority to do so, and the Court properly provided the needed protection by marshaling that asset to ensure it would not be dissipated or wasted during the pendency of litigation.

B. The Probate Court had subject matter jurisdiction over the $50 million asset on application of the Special Conservator pursuant to S.C. Code Ann. § 62-5-416.

The Wellin Children also challenge the Probate Court's jurisdiction over the $50 million asset based on the manner in which this particular matter came to the Court's attention, namely through the application filed by the 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 Probate 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. However, their challenges 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 (Ct. App. 2003).

When construing a statute, the cardinal rule is to ascertain the intent of the legislature. Id. "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 light of the intended purpose of the statute." Id. "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 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).

When a fiduciary (as opposed to an interested party) is seeking instruction from the Probate Court, both Probate Code Sections 62-5-416(b) and 416(c) apply. Section 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." Section 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.) The South Carolina Reporter's Comments note that the 2010 amendments to this section revised subsection (a) "to clarify that a summons and petition are required to commence a formal proceeding, including formal proceeding by an interested person for certain requests subsequent to appointment as set forth in this section." S.C.

Code Ann. § 62-5-416 S.C. Rep. Cmt. (2010). The Reporter's Comments also note that the 2010 amendments to subsection (b) replaced the requirement that a conservator request instruction by petition with the ability to do so by application. Id. Subsection 416(c) provides that the Probate Court "*may* ... make any appropriate order." Whether to make an appropriate order or issue instructions, and the contents of such order or instruction, are matters within the Probate Court's discretion. *See* State v. Hill, 314 S.C. 330, 332, 444 S.E.2d 255, 256 (1994)("The word 'may' ordinarily 'signifies permission and generally means the action spoken of is optional or discretionary.'"); *see also* Kerley v. Defalco, No. B161972, at 12-13 (Cal Ct. App. July 31, 2013) (Fastcase, Cal. Cases) ("Use of the word "may" suggests that whether to instruct the conservator is a matter within the court's discretion.").

Here, the Special Conservator filed an application under § 62-5-416(b). In the application, he requested that the Probate 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 acted within its discretion and chose to receive briefing and arguments from Mr. Wellin, the Special Conservator, and the Wellin Children. As a result of a hearing on the matter, of which all parties had notice and at which they appeared and participated, the Probate Court issued an appropriate order protecting the assets of Wellin under S.C. Code Ann. § 62-5-416(c). [ROA 20; 2/21/14 Order.] The Probate 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.

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 statutes provides ample authority for the Probate Court to enter its orders. Discussions or application of other sections or theories proffered by the Wellin Children is not necessary because the Probate Court clearly identified the sections upon which it relied. Likewise, their arguments about substantive relief are inapposite because the Probate Court did not order any substantive relief against the Wellin Children or the Irrevocable Trust. The money at issue does not belong to the Wellin Children, and while they may be left at some strategic disadvantage because loss of control of the funds will deprive them of the legal leverage they sought against their father in the federal litigation, the facts remain that this was a protective proceeding—which they initiated—and the protective order was appropriate under the circumstances appearing to the Probate Court on the record before it.

C. The Wellin Children could not divest the Probate Court of jurisdiction over Mr. Wellin's assets by attempting a voluntary dismissal of the conservatorship action they commenced.

Before the Probate Court could formally rule on the Appellants' Motion to Alter or Amend, the Wellin Children 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 1762; Notice of Voluntary Dismissal.] The Probate Court maintained it had "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 30-31; 7/3/14 Order #1.] The Probate Court also stated "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)(l)(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." The Wellin Children argue that because Mr. Wellin had neither filed an answer to their petition nor moved for summary judgment, their Notice of Voluntary Dismissal entitled them to dismissal of the entirety of this conservatorship proceeding. However, Rule 41(a) does not apply to divest a probate court of jurisdiction, once vested, in a conservatorship action.

In a typical civil action, 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, 426 S.E.2d 313, 314 (1992) ("the plaintiff is entitled to a voluntary non-suit without prejudice as a matter of right unless legal prejudice is shown by the defendant or important issues of public policy are present").While this may be true in other proceedings, the provisions of Rule 41(a)(l)(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, SCRCP.; *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 voluntary dismissal under Rule 41(a)(l)(A) is only available in a proceeding where the adverse party is required to file an answer or has 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). "Apodictically, the statutory scheme articulated in the South Carolina Probate Code does not mandate responsive pleadings." In re Estate of Weeks, 329 S.C. at 258, 495 S.E.2d at 458 (holding the probate court did not err in finding no default existed in will contest where no answer was filed because none was required).

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 the Wellin Children filed their petition, the Probate Court properly followed the above procedure and set a preliminary hearing.

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 (2010). 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, 666 S.E.2d 908, 911 (2008). It would be wholly inconsistent with the procedures and protective purpose of the conservatorship statutes to allow the Wellin Children to unilaterally terminate this proceeding and divest the Probate Court of jurisdiction by filing a Notice of Voluntary Dismissal, particularly after a Special Conservator has been appointed and protective orders issued.

II. The Probate Court has personal jurisdiction over the Trust and the Wellin Children, as the Trustees, because they have submitted to the jurisdiction of the Probate Court, both in their individual and fiduciary capacities, by filing the Petition and asserting arguments on behalf of the Trust.

A. Jurisdiction over the Trust

The Wellin Children argue that, subject matter jurisdiction aside, "the court still lacked personal jurisdiction to grant relief against the Irrevocable Trust." App. Brief p. 35. 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 1176; Special Conservator Hr'g Tr. 39:23-25.] However, they 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." [ROA 1183; Id. at 66:16-19.] They further argued, "The court cannot order a nonparty to do - to pay $50 million over to somebody else." [ROA 1184; Id. at 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. [ROA 1174; Id. at 32:5-10, 33:11-23.]

The trust holding the sum of $50,228,000 is the Irrevocable Trust which the Wellin Children stated in court "the three children are the three Trustees who were in place at the time." [ROA 1174; 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 1175; Special Conservator Hr'g Tr. 34:21-25, 35:1-4.] The Probate 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 29; 7/3/14 Order #1.] Interestingly enough, this Court is placed in the same position as the lower courts in that the Appellants' brief, filed by the Wellin Children as individuals, raises several issues on behalf of the Trust and Trustees, including lack of personal jurisdiction and lack of due process.

"In order to establish waiver of the right to contest jurisdiction, it is only necessary that a party by its conduct evince an intent to proceed to the merits of the case." Jenkinson v. Murrow Bros. Seed Co., 272 S.C. 148, 154, 249 S.E.2d 780, 783 (1978) (Ness, J., concurring). "An appearance may be expressly made by formal written or oral declaration, or record entry, or it may be implied from some act done with the intention of appearing and submitting to the court's jurisdiction." 4 Am. Jur.2d Appearance § 1 (1995). No specific act constitutes an appearance, as "a defendant may choose to come into court with trumpets, or quietly by the back door." Stephens v. Ringling, 102 S.C. 333, 342, 86 S.E. 683, 685 (1915). Accordingly, courts decide on a case by case basis whether a defendant's act demonstrates an intent to submit to the court's jurisdiction. Stearns Bank Nat. Ass'n v. Glenwood Falls, L.P., 373 S.C. 331, 644 S.E.2d 793, 796 (Ct. App. 2007). "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. Ass'n v. Glenwood Falls, L.P., 373 S.C. 331, 337, 644 S.E.2d 793, 796 (Ct. App. 2007)); *see also* 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). [See citations ROA 30; 7/3/14 Order #1.]

A similar effort to appear voluntarily in one capacity while hiding behind a different fiduciary title to avoid negative consequences previously has been addressed by this Court in Ex Parte Cannon, 385 S.C. 643, 685 S.E.2d 814 (Ct. App. 2009). This case was properly reviewed and cited by both lower courts in making their decisions.

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." Id. (citing Stearns Bank Nat. Ass'n v. Glenwood Falls, LP, 373 S.C. 331, 337, 644 S.E.2d 793, 796 (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 (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 (1956). Moreover, as the Probate Court noted, they have filed extensive memoranda and made multiple arguments, including arguments made on behalf of the Trust, which supports a finding of waiver. [ROA 31; 7/3/14 Order #1.]

The Wellin Children seek to have this Court rely on a Texas appellate decision in 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." 266 S.W.3d 602, 604 (Tex. App. 2008). While no South Carolina court has directly addressed the issue presented here, this Texas decision can be easily distinguished. In re Ashton was a divorce proceeding wherein the plaintiff/wife sought relief against the defendant/husband's trust.

This case is inapplicable to 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 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 own 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.

The Probate Court's decision is fully consistent with and supported by the Court's decision in Ex parte Cannon; and it is also supported by decisions in both Florida and Tennessee wherein it was held that when parties appear and participate in an action, they waive any right to challenge failure to separately name them in their capacities as trustees. *See, e.g.* 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."). The

Florida Court of Appeals 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 was appropriately persuaded by the decisions in In re Conservatorship of Groves, and In re Guardianship of Brown. [ROA 30; 7/3/14 Order #1.] The Court wisely explained that "these cases are in accord with the 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.

B. Jurisdiction over the Trustees

The Wellin Children have been represented by the same counsel individually and as Trustees for the Irrevocable Trust. [ROA 1184; Special Conservator Hr'g Tr. 73:15-25.] However, in an attempt to evade the Probate Court's order directing them to turn over the $50 million to the Special Conservator II, they argue that they have only been participating in these proceedings in their individual capacities and therefore the Probate Court lacks jurisdiction over them as Trustees of the Irrevocable Trust which technically holds the $50 million. The Probate Court properly found that they had not maintained or preserved any such distinction because

Counsel for the Wellin Children regularly spoke on behalf of both the Irrevocable Trust and the Wellin Children in their capacity as Trustees during the proceedings below.

The record below and the arguments made in briefing on appeal to this Court will show that the Wellin Children assert arguments and raise issues on appeal that belong only to the Irrevocable Trust. A prime example is where, speaking on behalf of the Wellin Children in their dual capacities, their Counsel offered to tender the funds in question to the Probate Court. [ROA 1181; Special Conservator Hr'g Tr. 58:12-14.] This representation on behalf of the Trust/Trustee was repeated when their 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 948; 2/14/14 Memo in Opposition, p. 3.] The Wellin Children attempt to distinguish this offer as one by them individually. However, this distinction fails upon the fact that, by their own statements, the Wellin Children are not parties to the Note. By offering to pay what they repeatedly claim not to otherwise owe, they prove the point—unless they have appeared as Trustees, the Wellin Children gain no benefit by their offer. If they have not appeared as Trustees, their interests are not affected by the Probate Court's order, and thus, they lack standing to raise those issues.

The record is replete with other examples of both statements and arguments made on behalf of the Trustees and the Trust who allegedly were not before the Probate Court. With that in mind, Respondent urges this Court to consider 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 were to deem

otherwise then a separate question would have to 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. § 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). Comparably, only a party aggrieved by an order, judgment, or sentence may appeal, Rule 201(b), SCACR, and the right of review is restricted to persons or parties aggrieved by the decision below. Bivens v. Knight, 254 S.C. 10, 173 S.E.2d 150 (1970). An aggrieved party is one who is aggrieved by the judgment or decree when it operates on his rights of property or bears directly on his interest, the word aggrieved referring to a substantial grievance, a denial of some personal or property right, or the imposition on a party of a burden or obligation. Cisson v. McWhorter, 255 S.C. 174, 177 S.E.2d 603 (1970). A party cannot appeal from a decision which does not affect his interest, however erroneous and prejudicial it may be to the rights and interests of some other person. Bivens, 254 S.C. at 13, 173 S.E.2d at 152.

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.,* ROA 987, 989-90; Motion to Alter or Amend Grounds 1b, 6, 7.] Respondent maintains 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 (Ct. App. 2009). However, should this Court find that holding incorrect, Respondent argues that the Wellin

Children do not have standing to raise those issues on appeal, as only the Trustees or Trust possess that ability.

III. The Probate Court fully complied with the Probate Code procedures and afforded fundamental due process rights of notice and an opportunity to be heard.

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 (1968). 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).

A. The Wellin Children were provided notice and an opportunity to be heard.

The Wellin Children argue their due process rights were violated by the Probate Court's issuance of the orders in the absence of a summons and complaint, discovery process, and a trial by jury. However, the Wellin Children made themselves subject to the Probate Court's jurisdiction when they decided to challenge Mr. Wellin's mental capacity to make his own decisions by petitioning the Probate Court and requesting an emergency protective hearing to restrain their father from transferring his wealth outside of their control. They appeared at the hearing and consented to appointment of Mr. Bennett as the Special Conservator. Thereafter, the Wellin Children received notice when the Special Conservator made known his concerns regarding the substitution transaction, and after being served, they actively participated in the scheduling of a hearing on the Special Conservator's application. Prior to the hearing on the application, the Petitioners filed a Motion to Dismiss, wherein they raised the same issues they now assert they did not have knowledge of. [ROA 787; 2/3/14 Motion to Dismiss.] 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 their Motion to Dismiss. By any fair description, the Wellin Children received due process notice.

Nonetheless, the Wellin Children still complain 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 on the Special Conservator's application. 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 986; 3/3/14 Motion to Alter or Amend, n.1.]

Lastly, the Wellin Children stubbornly ignore that the Probate Court made the decision to protect Mr. Wellin's funds by relying on the fact that they (as Trustees) offered to pay the $50,228,000 into the Court during the hearing and that counsel for the Trust Protector.[12] represented to the Court that he did not know where the $50,228,000 was located. [ROA 31; 7/3/14 Order #1.] They affirmatively disavowed any rights to the $50,228,000 which they acknowledged was due to Mr. Wellin. [ROA 1180; February 6, 2014 Hearing Transcript p. 55:23 - p. 58:4.] Fundamental fairness is not violated when a party has proper notice, participates in the proceedings, and then makes representations and offers to the court upon which that court relies. For these reasons, there is no showing of any due process violation to justify reversing the Probate Court's protective order.

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

The Wellin Children also contend that the order is, in essence, an injunctive order and the Probate Court incorrectly relied on its equitable powers as basis for the authority in issuing the

[12] The Trust Protector is a position held by Lester S. Schwartz, who is represented by the Rosen | Hagood firm in Charleston. Richard Rosen appeared at the hearing on behalf of the Trust Protector and sought information as to where the assets of the trust were being held.

order to pay the $50,228,000 to the Special Conservator II. [ROA 1418; April 8, 2016 Hearing Transcript p. 45:3-12.] While equity will always seek to provide a remedy where a right has been violated, the assertion that the Probate Court made an equitable order is incorrect. State ex rel. Daniel v. Strong, 185 S.C. 27, 192 S.E. 671, 681 (1937) ("equity abhors a wrong without a remedy"); Lane v. New York Life Ins. Co., 147 S.C. 333, 369, 145 S.E. 196, 207 (1928) ("[e]quity will not suffer a wrong without a remedy.").

Section 62-1-103 provides that principles of equity supplement the statutory provisions of the Probate Code, and 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 (Ct. App. 1983). The Probate Court cited such equitable principles as additional support for its orders. However, as discussed at length above, the Probate Court had ample statutory basis for its orders and a resort to equity was unnecessary.

Although Mr. Wellin was never adjudicated incompetent, he consented to the appointment of his personal counsel as Special Conservator, and he supported Bennett's application when it became apparent that he needed 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 32; 7/3/14 Order #1.]

C. 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 take issue with certain of the Probate Court's findings of fact as unsupported by the record because no evidentiary hearing was held and no evidence was officially admitted by the Probate Court. However, the Wellin Children submitted significant factual material, both in connection with their Petition, Motion to Dismiss, and other appended material which provides support for the Probate Court's findings.

The Wellin Children seek to have this Court overturn three findings of fact. First, they take issue with the use of the term "undisputed" as used in the Order to describe the funds that they offered to Mr. Wellin. Despite the position taken at the hearing whereby counsel stated the amount was owed, they have now changed their position to claim that is was an offer of prepayment of the Promissory Note that was not legally due and payable until 2021. However, they cannot now retreat from the position taken by their counsel at the hearing: "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 1178; 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 1181; Special Conservator Hr'g Tr. 58:12-14.] In addition, the official corporate 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 undisputedly owed to Mr. Wellin. [ROA 1089; 4/10/14 Supplemental Memo Opposing Reconsideration, Ex. C.]

Next, Appellants contend the Probate Court erred in making findings of fact relating to the Swap Transaction as being without evidentiary support. As shown in the record, the Special

Conservator had a duty to ensure that adequate consideration was received when Mr. Wellin made the substitution of the Promissory Note for the Friendship Partnership interest. The Wellin Children and the Probate Court were provided with all documents related to the substitution in question prior to the hearing. These documents provided an ample basis to support the Probate Court's determination as to the validity of the substitution by Mr. Wellin. Moreover, the Wellin Children themselves provided substantial factual information in their petition, various memoranda and appended material which provide information the Probate Court could—and did— consider in making its Orders. [ROA 157, 287, 946, 986; Conservatorship Petition; 2/3/14 Motion to Dismiss; 2/14/14 Memoranda in Opposition; 3/3/14 Motion to Alter or Amend Judgment.] For the reasons stated above, Respondent submits that the Court's findings are reasonably supported by the evidence and should not be overturned.

IV. The Special Conservator's application was not subject to dismissal under South Carolina Rule of Civil Procedure 12(b)(8) on the basis of the pending litigation in federal court.

The Wellin Children argue that the Special Conservator's application for instruction should have been dismissed pursuant to Rule 12(b)(8), SCRCP, because the issue of ownership of the $50 million is the subject of the pending federal court litigation. The Probate Court did not err in acting on 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.

In South Carolina, dismissal under Rule 12(b)(8) may be proper when there is (1) another action pending, (2) between the same parties, (3) for the same claim. Rule 12(b)(8), SCRCP. Whether dismissal is proper under Rule 12(b)(8) is determined by the court as a matter of law. Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 674 S.E.2d 524, 528 (Ct. App. 2009).

Dismissal under 12(b)(8) is a drastic remedy and the rule is interpreted narrowly. Id. Historically, under a similar statute providing for demurral, the Supreme Court has stated that this statute "only applied when there was identity of parties, causes of action and relief." Id. (citing S.C. Public Serv. Comm'n v. City of Rock Hill, 268 S.C. 405, 408, 234 S.E.2d 228, 229 (1977); James F. Flanagan, South Carolina Civil Procedure 96-97 (2d ed.1996)). To prevail on a motion to dismiss pursuant to Rule 12(b)(8), the movant must show that the actions in question are between the same parties in their same capacities. Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 322, 701 S.E.2d 39, 44 (Ct. App. 2010) (citing 1 C.J.S. Abatement and Revival § 54 (2005)).

During the hearing before the Probate Court in February 2014, the Wellin Children 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 1172; 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 1173; 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, which has been consolidated into the Federal Court actions, 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 law remains the same —Section § 62-1-302(2)(i) (1987) affords the Probate Court exclusive jurisdiction over ***all*** (emphasis added) subject matter related to protective proceedings under Article 5 of the Probate Code. Thereby, the Probate Court was vested with exclusive jurisdiction over Mr. Wellin's assets upon the Wellin Children's filing of the Petition

for Appointment of Conservator, and the Probate Court was the only court responsible for instructing Bennett, as Special Conservator, in regard to protecting the assets of Mr. Wellin.

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 32; 7/3/14 Order #1.]

V. 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).

The Wellin Children allege this appeal is moot because Mr. Wellin died on September 14, 2014, two days after they filed their initial brief in the Circuit Court appeal.[13] However, they had been given the opportunity to amend their brief to address this issue, but declined to do so. [ROA 1882; Sur reply Brief in Circuit Ct. p. 2.] Thus, the mootness issue was waived. McClurg v. Deaton, 395 S.C. 85, 87 n.2, 716 S.E.2d 887, 888 n.2 (2011) (An issue may not be raised for the first time in a reply brief.) In any event, the Circuit Court properly declined to apply the mootness doctrine based on the collateral consequences exception because Mr. Wellin's death does not moot the underlying dispute regarding the asset at issue. The parties already have acknowledged there was no dispute that the $50 million was owed to Mr. Wellin, and now, to his

[13] His wife, Wendy C. H. Wellin, was appointed as Special Administrator of his Probate Estate.

estate. Yet, Appellants attempt to evade the collateral consequences exception by arguing that the Probate Court's Orders are "preliminary relief." Br. at 46. However, the orders at issue are protective orders, determining how Mr. Wellin's assets---specifically the $50,228,000 should be managed for his protection and benefit.

While Mr. Wellin's death may provide grounds to terminate the conservatorship, see S.C. Code Ann. § 62-5-430(B) (2010), the Probate Court's orders have not expired and do not expire until the collateral litigation is resolved. S.C. Code Ann. § 62-5-709 (2010); *see also* Helmig v. Farley, Piazza & Assocs., 180 P.3d 749, 751 (Or. Ct. App. 2008), cert. denied 194 P.3d 147 (Or. 2008) (holding death of protected person did not render moot appeal regarding propriety of conservator's appointment); Schoolhouse Corp. v. Wood, 684 A.2d 1191 (Conn. Ct. App. 1996) (dismissed on other grounds) (finding death of protected person did not render moot right to appeal Probate Court's order approving sale of conservatorship property).

Further, the Probate Court's decision has collateral consequences regarding these same funds. Mr. Wellin's death has not changed the need to protect these funds, to which he was undisputedly entitled, during the pending federal litigation. At his death, the Conservatorship should have been holding the funds at issue for the use and benefit of his estate. If the validity of that order is not reviewed in this appeal, collateral consequences will arise for the parties because it will be necessary to re-litigate the same point in the administration of the decedent's estate. Such duplication of proceedings would not be in the interests of Mr. Wellin's estate or judicial economy.

VI. Edward Bennett, as Special Conservator, had standing to seek the Court's protection of the $50 million on behalf of his ward, Mr. Wellin.

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 953; 2/14/14 Memo in Opposition, p. 8.] Yet, they attempt to characterize the Application as a "request for substantive relief." Regardless, the point is that the protective order to pay the $50,228,000 to a Special Conservator II (Synovus) was made in response to the Wellin Children's own offer to pay the funds into court. [ROA 1181; February 6, 2014 Transcript, p. 58, ln. 12-24.] Even without their offer, the Probate Code provides a conservator with standing make application and to seek protective orders.

Probate Code § 62-5-417 provides that a conservator is a fiduciary and must observe a fiduciary standard of care. Section 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." As discussed above, the Special Conservator (Bennett) filed an application for the Court's guidance, requesting the Probate Court give him instructions regarding his duties in regards to an asset transfer where the consideration had not been received. As a fiduciary for Mr. Wellin, Bennett had the right and obligation to seek guidance from the Court regarding the asset at issue.

Secondly, to the extent the Court wishes to entertain a discussion about whether or not Bennett, as Special Conservator, had standing to file an application and bring this matter to the Probate Court's attention, Respondent would refer the Court to the original Order whereby Bennett was appointed as Special Conservator – with the consent of the Wellin Children. The Order is clear that Bennett has a duty to "ensure that transfers of assets are not made without fair

and adequate consideration." [ROA 1.] 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 Wellin Children 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.

CONCLUSION

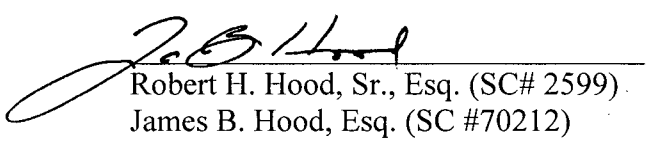
The Wellin Children commenced this action seeking the appointment of a Conservator in Probate Court to protect their Father's assets, allegedly from Mrs. Wellin's undue influence. What they were not anticipating was the Probate Court's realization that Mr. Wellin's assets needed to be protected, not from Mrs. Wellin, but from the Wellin Children themselves. The Probate Court offered endless opportunity for all parties to be heard and ultimately determined that Mr. Wellin's assets, did indeed, need protection as a result of the Wellin Children's own handling of Trust assets and distributions to themselves. In an effort to elude the Probate Court's jurisdiction, the Wellin Children attempted to dismiss the conservatorship proceeding, and now pursue an 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 37; 7/3/14 Order #1.] While it is sad Mr. Wellin passed away during the pendency of this appeal, 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 Respondent asks that this Court uphold the rulings of the lower courts and require the Wellin Children to surrender the assets to the Special Conservator II (Synovus) so that the funds might be protected until all other litigation is resolved.

Respectfully submitted,



Robert H. Hood, Sr., Esq. (SC# 2599)
James B. Hood, Esq. (SC #70212)
HOOD LAW FIRM, LLC
Post Office Box 1508
Charleston, SC 29402
(843)577-4435
(843) 722-1630 (fax)
Attorney for Keith S. Wellin

Tiffany N. Provence, Esq. (SC #13912)
PROVENCE MESSERVY, LLC
300 N. Cedar Street, Suite A
Summerville, SC 29483
(843) 871-9500
(843) 261-7035 (fax)
Attorney for Edward G.R. Bennett
as Special Conservator for Keith S. Wellin

January 20, 2017

Certification of Counsel

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

James B. Hood

January 24, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS

Roger L. Couch, Circuit Court Judge

Irvin G. Condon, Probate Court Judge

Appellate Case No. 2016-001141
Circuit Court Case No.: 2014-CP-10-4336
Probate Case No.: 2013-GC-10-1029

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

Appellants,

v.

Keith S. Wellin,

Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies that on this __th day of January, 2017, a copy of the Final Brief on behalf of Respondent, was served by depositing said copy in the U.S. Mail, with sufficient first class postage, on the following counsel at the addresses listed below:

Robert H. Brunson, Esquire/ Merritt G. Abney, Esquire
Patrick C. Wooten, Esquire
Nelson Mullins Riley & Scarborough LLP
Liberty Center, Suite 600
151 Meeting Street, Charleston, SC 29401-2239
Tel: 843.534.4226 Fax: 843.722.8700

A. Mattison Bogan, Esquire
Nelson Mullins Riley & Scarborough LLP
1320 Main Street/ 17th Floor
P.O. Box 11070 (29211-1070)
Columbia, SC 29201
Tel: 803.799.2000

HOOD LAW FIRM, LLC

Robert H. Hood, Sr., Esq. (SC# 2599)
James B. Hood, Esq. (SC #70212)
Post Office Box 1508
Charleston, SC 29402
(843)577-4435
(843) 722-1630 (fax)
Attorney for Keith S. Wellin

Tiffany N. Provence, Esq. (SC #13912)
PROVENCE MESSERVY, LLC
300 N. Cedar Street, Suite A
Summerville, SC 29483
(843) 871-9500
(843) 261-7035 (fax)
Attorney for Edward G.R. Bennett
as Special Conservator for Keith S. Wellin