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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS

Roger L. Couch, Circuit Court Judge

Irvin G. Condon, Probate Court Judge

Appellate Case No. 2016-001141

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

Probate Case No. 2013-GC-10-1029

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

v.

Keith S. Wellin, Respondent,

FINAL REPLY BRIEF OF APPELLANTS

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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, Keith S. Wellin ("Keith Wellin" or "Respondent").

I. Respondent misstates the standard of review.

Respondent argues the underlying action in the probate court is legal in nature and, therefore, the probate court's factual and legal conclusions should be upheld if any evidence supports them. (Respt's Br. 12-13.) It is not. The underlying action is equitable in nature, not legal, and the majority of the errors below were errors of law, which are subject to a *de novo* standard.

If the probate proceeding is equitable in nature, the appellate court may make factual findings according to its own view of the preponderance of the evidence. *In re Thames*, 344 S.C. 564, 568, 544 S.E.2d 854, 855 (Ct. App. 2001); *Townes Assoc. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). The proceeding below is equitable in nature. No party filed a legal claim against the Wellin Children. Bennett and Keith Wellin expressly requested the probate court exercise its equitable powers to order the Wellin Children to pay $50 million to Synovus (R. p. 1185(75)), and the probate court expressly relied upon its equitable powers in making its rulings. (R. p. 32; p. 1185(75)). The relief ordered is in the nature of a mandatory injunction, and actions for injunctive relief are equitable in nature. *Miller v. Borg-Warner Accepatance Corp.*, 279 S.C. 90, 92, 302 S.E.2d 340, 341 (1983); *Wiedman v. Town of Hilton Head Island*, 344 S.C. 233, 237, 542 S.E.2d 752, 753 (Ct. App. 2001). Because the probate proceeding was equitable in nature, this Court may review the probate court's factual findings according to its own view of the preponderance of the evidence. *Wiedman*, 344 S.C. at 237, 542 S.E.2d at 753; *In re Thames*, 344 S.C. at 571, 544 S.E.2d at 857.

The majority of the issues on appeal are subject to *de novo* review because they present issues of law for the court. *See Berry v. S.C. Dep't of Health & Envtl. Control*, 402 S.C. 358, 363, 742 S.E.2d 2, 3 (2013) (the presence of subject matter jurisdiction is an issue of law for the court); *Stewart v. Richland Mem'l Hosp.*, 350 S.C. 589, 593, 567 S.E.2d 510, 512 (Ct. App. 2002) (statutory interpretation is a question of law); *Hidria, USA, Inc. v. Delo*, 415 S.C. 533, 538, 783 S.E.2d 839, 842 (Ct. App. 2016) (trial court's determination regarding personal jurisdiction is subject to appellate review for errors of law); *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 583–87, 686 S.E.2d 176, 183–85 (2009) (establishing a *de novo* standard of review for determination of whether defendant's due process rights are violated); *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009) ("[T]he application of Rule 12(b)(8) [is] determined as a matter of law and thus we apply a de novo standard of review to the grant or denial of this motion."). Appellate courts decide questions of law with no deference to the lower court. *Berry*, 402 S.C. at 363, 742 S.E.2d at 3.

II. The Probate Court lacked subject matter jurisdiction under S.C. Code Ann. § 62-5-402 to order payment of $50 million to a special conservator because the $50 million in proceeds received by the Irrevocable Trust from Friendship Partners' liquidation was not an asset of Keith Wellin's estate.

Respondent's argument that the probate court had subject matter jurisdiction hinges entirely upon his unsupported claim that the $50 million in proceeds from Friendship Partners' liquidation is an asset of Keith Wellin's estate under S.C. Code § 62-5-402(2) and 62-5-408(1).[1] (Respt's Br. 14-17.) But the $50 million in liquidation proceeds is *not* an asset of Keith's

[1] S.C. Code Ann. § 62-5-402(2) grants the probate court jurisdiction in conservatorship proceedings "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." (emphasis added). Likewise, Section 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).

Wellin's estate—it is an asset of the Irrevocable Trust. (Appellant's Br. 23-25.) If the $50 million were an asset of Keith's estate, then his estate would not be suing to recover that $50 million in federal court, nor would it be pursuing this appeal. Respondent devotes much of his brief to arguing how strong he believes his claim to the $50 million is, in light of the Promissory Note and certain (out of context and incomplete) statements made by Appellants' counsel at a probate court hearing. But no matter how strong a claim Respondent believes he has to the $50 million, the $50 million is not an asset of the estate—it is the subject of a disputed claim—and therefore is not subject to the probate court's jurisdiction. (*Id.*) In sum, the $50 million at issue indisputably is not an asset that is actually in Keith Wellin's estate, and that fact is dispositive of this appeal. There is nothing unfair about this outcome, as Respondent has the right to sue the Wellin Children to recover the $50 million, which is precisely what Respondent did prior to his death, and precisely what Wendy Wellin continued doing in her capacity as Special Administrator after his death.

Respondent argues the Wellin Children admitted the $50 million in liquidation proceeds is an asset of Keith Wellin's estate because they "listed the *Promissory Note* as an [estate] asset" in their Petition for appointment of a conservator. (Respt's Br. 14) (emphasis added). By this rationale, the Wellin Children might also admit Keith's ownership of a dog by listing a cat among his assets. Like a cat and a dog, the liquidation proceeds and the Promissory Note are completely different things. The Irrevocable Trust owned the liquidation proceeds. Keith Wellin owned the Promissory Note. By listing the Promissory Note among Keith's assets, the Wellin Children did not admit he also owned any portion of the liquidation proceeds.

Respondent also argues the liquidation proceeds were an asset of Keith Wellin because the Wellin Children *tendered* the funds to Keith "in exchange for cancellation of the Promissory

Note." (Respt's Br. 14-15.) But the Wellin Children's tender of $50 million in prepayment of the Promissory Note did render the funds property of Keith Wellin because Bennett expressly rejected the tender on Keith's behalf. By rejecting the tendered funds, Bennett ensured the funds remained property of the Irrevocable Trust and not property of Keith Wellin.

Respondent also argues the Wellin Children's counsel *admitted* at the February 7 hearing that at least $50 million of the liquidation proceeds belonged to Keith Wellin. (Respt's Br. 11-12.) Respondent selectively quotes the Wellin Children's counsel and misrepresents the record. The Wellin Children's counsel, Robert Brunson, stated repeatedly at the February 6 hearing that the Irrevocable Trust offered Keith Wellin $50 million *only in satisfaction of the Promissory Note* and therefore the $50 million belonged to him, *but only if he accepted it in satisfaction of the Note*. (R. pp. 1174(33), line 8-1175(34), line 6; p. 1178(47), lines 1-9; p. 1180(55), line 23-1180(56), line 4; p. 1181(58), lines 17-21; p. 1182(62), lines 6-10; p. 1182(63), lines 22-24; p. 1183(67), lines 10-14; p. 1185(75), lines 17-24.) Counsel for the Wellin Children repeatedly disputed Respondent's characterization of the Wellin Children's position on this issue:

> MS PROVENCE: Well, your Honor, I'm just confused because they just acknowledged that [the $50 million] is [Keith Wellin's] money.
> MR BRUNSON: It's only his when he marks the note completely satisfied.
>
> (R. p. 1182(62), lines 6-10.)
>
> THE COURT: Mr. Brunson do you concede that that $50 million is Mr. Wellin's?
> MR BRUNSON: As soon as he signs off that it's paid in satisfaction of the note, he's entitled to receive that consideration.
>
> (R. p. 1183(67), lines 10-14.)
>
> MR BRUNSON: I just think I need clarify one thing for the record. If I said it's Keith Wellin's money, the context of that statement was as soon as he agrees to mark the note as satisfied. I mean, nobody is going to pay a debt if the creditor is unwilling to say this in full and fair satisfaction of the debt.
>
> (R. p. 1185(75), lines 17-23.)

Because Bennett refused to accept the $50 million in satisfaction of the Promissory Note for which the funds were tendered, the $50 million remained property of the Irrevocable Trust. The Wellin Children have never admitted that Keith Wellin was entitled to the $50 million other than in satisfaction of the Promissory Note for which it was tendered. In any event, even if counsel for the Wellin Children *had* admitted that the Trust owed $50 million to Keith Wellin irrespective of the Promissory Note, such an admission would not somehow render the $50 million part of Keith's estate and subject to the probate court's jurisdiction.

Respondent also argues the $50 million became property of Keith Wellin by virtue of the Swap Transaction. (Respt's Br. 15.) Again, Respondent has a *claim* that he is entitled to the $50 million (plus an additional $42 million) by virtue of the Swap Transaction. Respondent, however, does not actually have possession of the $50 million in his estate, which is what would be required under S.C. Code § 62-5-408(1) for the probate court to have jurisdiction over the $50 million. The Wellin Children, as trustees of the Irrevocable Trust, rejected the Swap Transaction, and the Estate's disputed claim in connection with the Swap Transaction is one of the primary issues currently being litigated before Judge Norton in federal court.

The Probate Code expressly provides the probate court does not have jurisdiction to decide a disputed claim, such as Respondent's claim based on the purported Swap Transaction. (Appellant's Br. 26-27.) In their initial brief, Appellants discussed S.C. Code § 62-5-402(3) at length, explaining how that subsection is squarely on point in this appeal because it addresses when the probate court does and does not have jurisdiction over an alleged incapacitated person's disputed claim over funds held in the hands of a third party. Appellants also pointed out how, notwithstanding the fact that it is squarely on point, Respondent has failed to ever discuss or even reference that subsection in his briefs. (*See id.*) In his response brief, Respondent

ignores this entire section of Appellants' brief and once again avoids discussion of this section. (*See generally* Respondent's Br.) As explained in Appellants' initial brief, the term "claim," as defined by the Probate Code, expressly excludes "demands or disputes regarding title of a . . . protected person to specific assets alleged to be included in the estate." S.C. Code Ann. § 62-1-201(4). The claim that Keith Wellin's estate was entitled to liquidation proceeds held by the Irrevocable Trust is plainly a "dispute regarding title of a . . . protected person to specific assets alleged to be included in the estate." (Appellant's Br. 26-27.) Thus, the Probate Code expressly provides the probate court does not have jurisdiction over this dispute. S.C. Code Ann. § 62-5-402(3); § 62-1-201(4); *Matter of Howard*, 315 S.C. 356, 364, 434 S.E.2d 254, 259, n.8 (1993) (probate court lacked jurisdiction to decide whether a gun held by a third party was asset of decedent's estate). The Court should reverse the lower courts' orders based on this undisputed argument.[2]

III. The probate court did not have subject matter jurisdiction to order payment of the $50 million to a special conservator under S.C. Code Ann. § 62-5-416(c).

Respondent argues that, irrespective of the limitations on probate court jurisdiction as set forth in the Probate Code, the probate court had subject matter jurisdiction pursuant to S.C. Code Ann. § 62-5-416(c), which states the probate court "may issue any appropriate order." (Respt's Br. 17-20.) Respondent acknowledges no limitation whatsoever on the probate court's authority under § 62-5-416(c). (Respt's Br. 19.) That is, according to Respondent, the specific provisions of §§ 62-5-402 and 62-7-201, which expressly govern the scope of the probate court's

[2] To provide an analogous example: If a petitioner brings a conservatorship action and identifies a promissory note with a face value of $100 as an asset of the alleged incapacitated person, and if the probate court determines that the promissory note is a valid debt that is due and owed by the petitioner, the probate court would not somehow have jurisdiction over $100 worth of the petitioner's assets. Rather, the probate court would only have jurisdiction over the promissory note, plus any other assets in the alleged incapacitated person's estate. If the alleged incapacitated person wanted to pursue collection of the $100, he (or a conservator appointed on his behalf) could file a lawsuit against the petitioner seeking to enforce the promissory note.

jurisdiction, cease to apply as soon as a conservator files an "application for guidance" pursuant to Section 62-5-416(b). According to Respondent, when a conservator files such an "application for guidance," the probate court suddenly obtains unlimited jurisdiction to "issue any appropriate order," irrespective of the specific limitations on probate court jurisdiction set forth elsewhere in the Probate Code. But this is not, and cannot be, the law. Section 62-5-416(c) does not grant the probate court unlimited power to issue whatever orders it sees fit, much less in the absence of a summons and complaint. A cardinal rule of statutory construction holds a specific statute prevails over a more general one. *Mims v. Alston*, 312 S.C. 311, 440 S.E.2d 357 (1994). The specific provisions of §§ 62-5-402 and 62-7-201 trump the general authority in § 62-5-416(c) to "issue any appropriate order."

A reading of § 62-5-416 as a whole establishes the probate court's authority under § 62-5-416(c) to issue "any appropriate order" only when a party makes a request for substantive relief under § 62-5-416(a). The "any appropriate order" provision does not apply to a fiduciary's request for instructions under § 62-5-416(b). In connection with a request for instructions under § 62-5-416(b), § 62-5-416(c) authorizes the probate court only to "give appropriate instructions." Because Bennett "requested instructions" under § 62-5-416(b), the "any appropriate order" clause in § 62-5-416(c) does not apply. In their initial brief, the Wellin Children explain why such an interpretation of the statute, when read in its entirety, makes sense. (Appellant's Br. 28-31.) In his response brief, Respondent does not specifically respond to this argument. (Respt's Br. 17-20.) Rather, Respondent cites several general rules of statutory construction but then fails to provide a clear explanation as to why these rules support the interpretation of § 62-5-416 that Respondent is advancing. (*See id.*).

Allowing Bennett to obtain an order requiring the Wellin Children to pay $50 million in connection with a disputed claim pursuant to an informal request for instructions, in the absence of summons and complaint and the procedural protections afforded litigants in a "formal proceeding" pursuant to § 62-1-201, would undermine the purpose of distinguishing in § 62-5-416 between requests which may be made by "application" in an informal proceeding and those requests which must be made by filing a summons and complaint in a formal proceeding subject to the South Carolina Rule of Civil Procedure. The statute requires the types of requests listed under § 62-5-416(a) to be made in a formal proceeding because these types of requests substantively impact parties' rights. The statute also recognizes a formal proceeding is unnecessary in connection with a mere request for the court's guidance § 62-5-416(a) because the court's guidance is not likely to substantively impact parties' rights. *See* S.C. Code Ann. § 62-1-201 S.C. reporter's cmt. ("The 2010 amendments in this section and throughout other portions of the Probate Code are intended to ... expressly clarify that a "formal proceeding" is commenced by a summons and petition and governed by the rules of civil procedure adopted for the circuit court and other rules of procedure in this title, and that an "application" does not require a summons and is not governed by or subject to the rules of civil procedure adopted for the circuit court.). Respondent's interpretation of § 62-5-416(c) would require a formal proceeding subject to the Rules of Civil Procedure in connection with a mere request for an accounting, but would allow the probate court to order the extraordinary remedy of requiring the Wellin Children to pay $50 million to a special conservator in the absence of any procedural protections afforded under the rules. The Court should reject Respondent's reading § 62-5-416 because it produces an absurd result. *Duke Energy Corp. v. South Carolina Dept. of Revenue*,

415 S.C. 351, 355, 782 S.E.2d 590, 582 (2016) (finding statutes should not be construed so as to lead to an absurd result).

Respondent states the Wellin Children's "arguments about substantive relief are inapposite because the Probate Court did not order any substantive relief against the Wellin Children or the Irrevocable Trust." (Respt's Br. 20.) This statement is patently false. The probate court ordered the Wellin Children to turn over $50 million from the Irrevocable Trust to a special conservator in connection with a disputed claim. The order dramatically impacts the rights of the Wellin Children and the remaining beneficiaries of the Irrevocable Trust.

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

Rule 41(a)(1)(A) is not inconsistent with conservatorship actions because the Probate Code expressly provides that the South Carolina Rules of Civil Procedure (including Rule 12 and Rule 41) apply to such actions. (Appellant's Br. 34-35.) Because no provision of the Probate Code excuses a 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. Moreover, even if an answer were not required, it is undisputed that an answer is *allowed*, such that Respondent and his counsel could have filed an answer and cut off Appellants' ability to unilaterally dismiss the conservatorship action.

Respondent's reliance upon *In re Estate of Weeks*, 329 S.C. 251, 495 S.E.2d 454 (Ct.App.1997), is 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 South Carolina Rules of Civil Procedure, 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. *Id.* at 259, 495 S.E.2d at 459 ("In our view, an answer was not mandated by *the probate court rules* in this instance and the circuit court did not err in finding *even if responsive pleadings were necessary under the SCRCP*, the probate court did not abuse its discretion in determining there was good cause to excuse any technical default.") (emphasis added). In any event, *Weeks* was based upon an older version of the Probate Code, before it 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.[3] Thus, *Weeks* does not support Respondent's position.

Even if a respondent in a conservatorship proceeding is not *required* to file an answer, the respondent still has the *option* to file an answer and thereby cut off the petitioner's right to voluntarily dismiss the action under Rule 41(a)(1)(A). Rule 41 provides a plaintiff with an absolute right to unilateral dismissal before an adversary serves either "an answer or a motion for summary judgment." S.C. R. Civ. P. 41(a)(1)(A)(i). The Rule presupposes only that an adversary has the *option* to serve either an answer or a motion for summary judgment. For present purposes, then, the question is whether a respondent in a conservatorship action *may* serve one of those papers. 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 (Bennett's 8/1/2014 Petition for Conservator for Keith Wellin, R. p. 282), Keith *did* file an answer within 30 days as required by S.C. R. Civ. P. 12. (Ans. to Petition by Keith Wellin, R. p. 296.) 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.

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[3] 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.

In his response brief, Respondent relies on *ISC Holding AG v. Nobel Biocare Fin. AG*, 688 F.3d 98, 116 (2d Cir. 2012) for the proposition that "[a] voluntary dismissal under Rule 41(a)(1)(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." (Respt's Br. 22.) (emphasis added). But this is not what *ISC Holding AG* held. Rather, in *ISC Holding AG*, the Second Circuit held it was unfair to allow a party to unilaterally dismiss an arbitration action under Rule 41(a)(1)(A) where the adverse party *was not allowed* to file either an answer or a motion for summary judgment. *See ISC Holding AG*, 688 F.3d at 116 ("But, importantly, Nobel unquestionably *could not have filed an answer* in this case . . . .") (emphasis in original). The critical point emphasized by the Second Circuit was *the inability* of the adverse party to file an answer, and the unfairness that would exist if the adverse party *could not* cut off the other party's ability to file a notice of voluntary dismissal. *See id.* at 114 n.31 (holding that the legislative history of Rule 41 "does not suggest, much less demonstrate, that the rule should apply when answers, foreign to petitions to compel arbitration, are *totally unavailable*.") (emphasis added). Here, Respondent plainly had the ability to file an answer; indeed, he did just that in response to a more recent petition for appointment of a conservator filed by Bennett. (R. p. 296.) Accordingly, the Wellin Children's notice of voluntary dismissal under Rule 41(a)(1)(A) was timely and effective.

V. The Wellin Children did not make a voluntary appearance on behalf of the Irrevocable Trust by arguing that the probate court lacked jurisdiction or authority to decide the issues raised in Bennett's Application.

The Wellin Children did not make a voluntary appearance in their capacities as trustees of the Irrevocable Trust by making arguments in the probate court that belong to the Trust. A voluntary appearance requires submission to jurisdiction of the court, and the Wellin Children

contested the probate court's jurisdiction over this dispute and Irrevocable Trust at every stage of the proceeding.[4]

Rule 4(d) of the South Carolina Rules of Civil Procedure states a "[v]oluntary appearance by defendant is equivalent to personal service . . . ." S.C. R. Civ. P. 4(d). A voluntary appearance requires some "overt act by which one against whom suit has been commenced submits himself to the court's jurisdiction." *Stearns Bank Nat'l Assn. v. Glenwood Falls*, 373 S.C. 331, 338, 644 S.E.2d 793, 796 (Ct. App. 2007). An appearance may be express, or it may be implied from some act "'done with the intention of appearing and submitting to the court's jurisdiction.' . . . [C]ourts decide on a case by case basis whether a defendant's act demonstrates an intent to submit to the court's jurisdiction." *Id.*

The law is clear that a party does not waive the right to challenge personal jurisdiction merely by appearing in court to challenge personal jurisdiction or other jurisdictional defects. *Maybin v. Northside Correctional Center*, 891 F.2d 72, 75 (4th Cir. 1989) (under South Carolina law, defendant that was improperly served did not make voluntary appearance sufficient to waive personal jurisdiction simply because it argued other jurisdictional defects as well, as long as it did not argue the merits of the underlying dispute); S.C. R. Civ. P. 12(b) (challenges to personal jurisdiction are not waived by being presented with other defenses).

The Wellin Children challenged the probate court's jurisdiction at the earliest opportunity after Bennett made his Application and consistently thereafter. (2/6/2014 Hr'g Tr., R. p. 1176(41), lines 3-20; pp. 1182(65), line 23-1183(66), line 19; p. 1184(70), lines 3-17; p. 987.)

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[4] Appellant's initial brief adequately addresses why the Wellin Children's mere filing of the petition for appointment of a conservator in their individual capacities did not give the probate court jurisdiction over them in their capacities as trustees of the Irrevocable Trust. (Appellant's Br. 36-40.) This section addresses Respondent's separate argument that the Wellin Children made a voluntary appearance by making arguments in the probate court and in this appeal that belong only to the Irrevocable Trust. (Respondent's Brief at 28-31.)

The Wellin Children never demonstrated an intention to have the probate court address the merits of the issues raised in Bennett's Application. Plainly, arguing the court lacks the ability to decide the case cannot indicate an intention to come within the jurisdiction of the court. *Maybin*, 891 F.3d at 75. Thus, the Wellin Children did not waive their objection on jurisdictional grounds by arguing various reasons why the probate court lacked jurisdiction to resolve this dispute.

Respondent's reliance on *Ex parte Cannon*, 385 S.C. 643, 685 S.E.2d 814, 822 (S.C. App. 2009) is misplaced. In *Cannon*, a trustee and personal representative (Cannon) who was removed from both posts and found to be in criminal contempt in an action to remove the personal representative, appealed these findings, arguing he was never made a party to any proceedings in his capacity as trustee, was never served with a rule to show cause for contempt, and was only before the court in his capacity as personal representative, such that the court lacked personal jurisdiction over him. *Id.* at 657-658, 685 S.E.2d at 822. This Court disagreed, finding Cannon made a voluntary appearance by appearing in court and arguing the merits of the request for removal multiple times without objection to personal jurisdiction. *Id.* ("By appearing *and arguing the merits of the action multiple times before the circuit court*, we find Cannon consented to the circuit court's personal jurisdiction and waived any defense of lack of personal jurisdiction") (emphasis added). *Cannon* is easily distinguishable from the instant case in that the Wellin Children never consented to have the probate court address the merits of Bennett's Application and consistently argued to the probate court that it lacked jurisdiction to do so.

Respondent argues the Wellin Children's counsel committed an overt act indicating their willingness to proceed on the merits of Bennett's Application by offering to pay the $50 million into the probate court pending resolution the federal court litigation. (Appellant's Br. 29.) The record demonstrates counsel for the Wellin Children merely proposed the possibility of paying

the funds into the probate court or federal court as part of a potential preliminary settlement—not as a concession that the probate court had jurisdiction. (2/6/2014 Hr'g Tr., R. pp. 1181(58), line 12-1183(66), line 19.) The probate court recognized the colloquy as settlement discussions on the record. (R. p. 1182(62), lines 17-18) ("He's offering a settlement. I'm trying to get you a middle ground here."). After Ms. Provence stated Bennett would agree to such a proposal only if Bennett and Keith Wellin could have access to the funds paid into court, counsel for the Wellin Children immediately stated that condition was unacceptable and withdrew the proposal. (R. p. 1182(62), line 17-1182(64), line 25.) Throughout this discussion, Mr. Brunson repeatedly stated the probate court lacked jurisdiction over the $50 million or the dispute regarding the Swap Transaction:

> MR. BRUNSON: I mean, the court doesn't have jurisdiction over the asset [the $50 million]. The trust is not even party to this proceeding. The owner of the asset is not here.

(R. p. 1183(66), lines 16-19.)

> THE COURT: Let me ask you this: Any issue with the special conservator holding the $50 million and also the note until the litigation's resolved?
> MR. BRUNSON: I just don't think it accomplishes anything. The money's safe right where it is. It's in a trust for his—for payment of that note.
> And you know, Your Honor, we've tried to work it out. This court doesn't have jurisdiction to order us to pay that note, because the party's not here who owns—who has the $50 million. That's not my clients individually, that's the trust. I'm not sure we're making progress.

(R. p. 1184(70), lines 3-16.) Participation by the Wellin Children's counsel in discussion regarding the possibility of paying the $50 million into court does not establish the Wellin Children consented to have the probate court decide the merits, particularly when counsel for the Wellin Children repeatedly asserted the court lacked subject matter and personal jurisdiction.

VI. 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.

Respondent argues the Wellin Children lack standing in their individual capacities to object to the probate court's exercise of personal jurisdiction over the Irrevocable Trust. (Respt's Br. 29-30.)[5] The Wellin Children have standing, not only as trustees, but also as the primary named beneficiaries of the Irrevocable Trust to raise the objection because the order requiring payment of $50 million directly affects their beneficial interests in the Trust's assets. *See Huff v. Huff*, 892 N.E.2d 1241, 1247 n.6 (Ind. Ct. App. 2008); *Gould v. Gould*, 280 S.W.3d 137, 142 (Mo. Ct. App. 2009); *In re Estate of Hedke*, 775 N.W.2d 13, 33 (Neb. 2009).

There are three requirements for standing under South Carolina law:

> 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."

Bank of Am., N.A. v. Draper, 405 S.C. 214, 219, 746 S.E.2d 478, 480 (Ct. App. 2013).

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 Application. Finally, a

[5] Respondent concedes the Wellin Children have standing as trustees to challenge the probate court's jurisdiction over the Trust, but he wrongly assumes the Wellin Children cannot make arguments to the probate court in their capacity as trustees for the purpose of objecting to the court's exercise of jurisdiction over the Irrevocable Trust without making a voluntary appearance. (*See* Section V, *supra.*)

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 the 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.

VII. The lower courts erred in concluding Rule 12(b)(8) does not require dismissal of the Application.

Respondent argues Rule 12(b)(8) does not apply because, when Bennett made his request for relief to the probate court, no cause of action pending in federal court specifically alleged that the Wellin Children refused to surrender the $50 million in liquidation proceeds to the Special Conservator and Bennett was not party to any of the federal litigation. (Respondent's Br. 35-37.) But when the parties appeared before the probate court at the February 2014 hearing on Bennett's Application, claims based upon the same facts and circumstances described in Bennett's Application were pending between the same parties or their proxies, which is sufficient for purposes of Rule 12(b)(8).

Rule 12(b)(8) applies more broadly than Respondent allows. It does not require strict identity of parties or causes of action. For example, the South Carolina Supreme Court recently dismissed an action filed in its original jurisdiction related to the validity of same-sex marriages despite the fact that the parties in the two actions were not identical. *State ex rel. Wilson v. Condon*, 410 S.C. 331, 333, 764 S.E.2d 247, 248 (2014) ("[A]lthough the parties in this matter and the federal case are not identical, the principle underlying Rule 12(b)(8) of the South Carolina Rules of Civil Procedure that duplicative litigation should be avoided applies to this case.") In addition, this Court has dismissed a plaintiff's cause of action for negligent infliction of emotional distress against a beach service, finding it involved the same claim as the plaintiff's

prior wrongful death action against the beach service and the City of Myrtle Beach because the two cases were "based upon the same facts and circumstances." *Corbett v. City of Myrtle Beach, S.C.*, 336 S.C. 601, 610, 521 S.E.2d 276, 281 (Ct. App. 1999).

On December 20, 2013, Schwartz, who was retained and directed as the replacement Trust Protector by Bennett (R. pp. 908-911), and has described himself as Keith Wellin's "agent" (R. pp. 913-914), filed *Wellin II* against the Wellin Children, in which he alleged the same facts at issue in this appeal. Schwartz alleged that the Wellin Children, by dissolving Friendship Partners, liquidating the BRKa Shares, disregarding the purported Swap Transaction, and distributing Trust assets to themselves, breached duties owed to Keith Wellin and the beneficiaries of the Irrevocable Trust. (R. p. 270-271, ¶¶ 34-36.) Keith also became a party to *Wellin II*, and on January 31, 2014, he specifically alleged that the Wellin Children breached duties to him in connection with the liquidation of Friendship Partners and distributions from the Irrevocable Trust, and that he validly and effectively swapped the Promissory Note for an interest in Friendship Partners on November 20. (R. pp. 942-943, ¶¶ 15-17). All of these allegations were pending at the time of the February 2014 hearing in the probate court.[6]

Moreover, the parties to the Conservatorship Action are the same as the parties to federal court litigation for purposes of Rule 12(b)(8). Privity between the parties to the two actions is sufficient to establish identity of parties for purposes of the rule. *Whaley v. Slater*, 202 S. C. 182, 24 S. E. 2d 266 (1943). "Privity" means one so identified in interest with another that he

[6] Five days after the probate court issued its February 2014 Orders, Bennett and Keith Wellin filed additional actions in the federal district court to recover the same $50 million that the probate court ordered the Wellin Children to pay to Synovus in the instant Conservatorship Action, along with the additional $42 million, representing the total proceeds ($92 million) that they allege Keith Wellin should have received in connection with the Friendship Partners liquidation. (Appellant's Br. 20-21.) The district court dismissed these actions on the basis that the claims asserted in those actions were duplicative of claims alleged in *Wellin I* and *Wellin II*, both of which were pending before Bennett filed his Application. (R. p. 101.)

represents the same legal right. *Carrigg v. Cannon*, 347 S.C. 75, 552 S.E.2d 767 (Ct. App. 2001). There is no question that a ward and his conservator are in privity with each other. *See First Nat'l Bank of Greenville v. United States Fid. & Guar. Co.*, 207 S.C. 15, 26, 35 S.E.2d 47, 57 (1945) ("[W]e do not think there could be a much clearer case of mutual relationship than that existing between a ward and her guardian."). Although Bennett did not become a party to the federal court litigation until after the probate court issued its February Orders, Keith Wellin was party to *Wellin I* and *Wellin II* at the time of the February 2014 hearing before the probate court, and Bennett is in privity with Keith Wellin because he is pursuing the claim related to the Swap Transaction on Wellin's behalf pursuant to his power as special conservator. (R. p. 1757.) Thus, the probate court should have dismissed the Application pursuant to Rule 12(b)(8).

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

Respondent concedes Keith Wellin's death "may" provide grounds to terminate the conservatorship. (Respt's Br. 38). However, he argues the appeal is not moot because S.C. Code Ann. § 62-5-709 provides a probate court's protective orders do not expire until terminated by the court or by the terms of the orders, and the probate court's February Order provides it does not expire until the federal litigation ends.[7] The Wellin Children's position is not that the probate court's February Order terminated automatically at Keith Wellin's death, but rather that the order should be vacated, and the appeal dismissed as moot, because there is plainly no longer any need for a conservator to protect Keith's assets in light of his death, Wendy Wellin's appointment as Special Administrator of his Estate, and her substitution as the plaintiff in the district court litigation in which she is seeking recovery of precisely the same assets at issue in this appeal. *See Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 597 (2001) (holding an appellate court should

[7] The probate court's February 21 2014 Order #1 provides Synovus "shall hold the funds and the Promissory Note until the [federal] litigation or mediation is resolved." (R. p. 27.)

not review the merits of an appeal of an order granting or denying an injunction where intervening events have rendered the injunction unnecessary); (Appellant's Br. 46-47.)

The case law Respondent relies upon from other jurisdictions is inapposite. In *Helmig v. Farley, Piazza & Assocs.*, the Oregon Court of Appeals held the death of the ward did not moot an appeal regarding the propriety of the conservator's appointment because the conservator had a continuing duty under Oregon law to pay claims against the estate and account for administration of the ward's estate. 180 P.3d 749, 751 (Or. Ct. App. 2008). The specific Oregon code provisions and the concerns addressed by the court are not present in the instant case. In *Schoolhouse Corp. v. Wood*, the Connecticut Court of Appeals held a ward's death did not defeat the plaintiff's right to appeal from a probate court order approving a sale of the ward's property by conservator, but the plaintiff's failure to timely substitute the ward's executor as the defendant resulted in dismissal of the appeal. 684 A.2d 1191, 1195 (Ct. App. Conn. 1996). This holding has no bearing upon the instant case, which involves an appeal of a protective order where the need for a conservator no longer exists in light of the ward's death and his widow's appointment as special administrator of his estate.

Respondent argues the lower court appropriately applied the collateral consequences exception to the mootness doctrine because dismissal of the appeal will result in the need to "re-litigate" ownership of the $50 million. (Respt's Br. 38.) But the parties did not finally litigate ownership of the $50 million in the probate court. The probate court ordered the $50 million placed with a special conservator *pending conclusion of the federal court litigation over ownership of that same $50 million.* (R. p. 27.) The court further stated that it "defers to the Federal Court litigation concerning the ultimate disposition of $50,228,000 and the Promissory Note." (R. p. 29.) The parties are currently litigating precisely that issue and others related to

Friendship Partners' liquidation and the Swap Transaction in the district court. (Appellant's Br. 21.) And the action filed by Wendy Wellin in the probate court for formal probate of the Estate has been stayed pending resolution of the federal court litigation. (R. pp. 41-43.) Thus, the parties will litigate ownership of the $50 million in federal court regardless of whether this appeal proceeds, and there is no danger of needing to re-litigate the matter again in the probate court.

Respondent argues "Mr. Wellin's death has not changed the need to protect [the $50 million], to which he was undisputedly entitled, during the federal litigation." (Respondent's Br. 38.) But the federal district court can make any protective order or provide any preliminary relief in connection with the subject funds to the extent necessary. Respondent simply wishes to avoid making such a motion to the district court because that court has twice determined that no injunctive or preliminary relief is warranted with respect to these same funds. (Appellant's Br. 11-16.)

Finally, Respondent argues the Wellin Children waived their argument that this appeal is moot because they did not amend their initial brief in the Circuit Court to assert the argument and, instead, made the argument in their reply brief. (Respt's Br. 37.) Obviously, the Wellin Children could not have included the argument in their initial brief filed on September 12, 2014, because Keith Wellin did not die until after it was filed. The South Carolina Appellate Court Rules provide no procedure for filing an amended initial appellate brief. Moreover, the Wellin Children did not become aware Wendy Wellin had been appointed Special Administrator of the Estate until several weeks after Keith Wellin's death, and Wendy Wellin did not move to be substituted as a party to the federal litigation until October 30, 2014 (R. p. 1118), at which point Respondent had already filed his initial brief. The Wellin Children asserted the mootness

argument based on all of these facts in their reply brief, which was filed on November 17, 2016. Thus, the Wellin Children asserted their mootness argument at their first opportunity once all of the facts relevant to the argument became available. In any event, Respondent plainly was not prejudiced by the Wellin Children raising the argument in their reply brief, as opposed to filing an amended initial brief. Respondent filed a sur-reply (R. p. 1881), in which he addressed the Wellin Children's mootness argument, and the circuit court considered the arguments of both parties and addressed the issue on the merits. (R. p. 49-50.)

IX. The Wellin Children have not engaged in vexatious litigation.

Respondent accuses the Wellin Children of instituting vexatious litigation in the probate court and manipulating the legal process. (Respt's Br. 2-4.) Nothing could be further from the truth. The Wellin Children did not initiate litigation with their father. Keith Wellin, who had previously had a close and loving relationship with his children, inexplicably sued the Wellin Children seeking to claw back property that he conveyed several years earlier to the Irrevocable Trust for the Wellin Children's benefit. (Appellant's Br. 10-13.) Keith's counsel pursued a disjointed and grossly inefficient litigation strategy, filing multiple lawsuits against the Wellin Children in different jurisdictions in which the legal theories and factual allegations are at times redundant and at others patently contradictory. (*Id.*) The Wellin Children allege these lawsuits were commenced after Keith became incapacitated and subject to undue influence by Wendy Wellin, who hired Bennett and Keith's litigation counsel and directed the litigation in an effort to unwind his prior estate planning for her benefit. (*Id.*)

After Keith sued the Wellin Children, they filed the Conservatorship Action out of genuine concern over their father's apparent incapacity and the apparent undue influence exerted over him by Wendy Wellin. (R. pp. 167-173.) Indeed, the initial *Wellin I* Complaint filed on

Keith's behalf expressly alleged "[Keith's] medical conditions and medications at times rendered him unable to manage the complexities of his financial affairs" and alleged that Keith Wellin gave away $40 million in January 2013 because he believed that he had over $100 million more in assets than he actually had. (R. p. 175, ¶¶ 5; pp. 182-83, ¶¶ 72-74.) The Wellin Children were concerned specifically that Wendy Wellin would cause Keith Wellin to transfer additional assets to her. (R. p. 169.) They filed the action in the probate court not as part of a vexatious litigation strategy, but because the probate court was the only court with jurisdiction to appoint a conservator for Keith Wellin to prevent Wendy Wellin from taking his assets. S.C. Code Ann. § 62-5-402.[8] The Wellin Children never sought any relief from the probate court other than appointment of a conservator, and they have consistently argued the disputes related to Friendship Partners and the Irrevocable Trust should remain in federal court, the forum initially chosen by Keith's attorneys. There is nothing vexatious or improper about the Wellin Children voluntarily dismissing the Conservatorship Action pursuant to the plain language of Rule 41 after the probate court exceeded its jurisdiction and issued its February Orders without any claim (or counterclaim) being asserted against the Wellin Children or the Irrevocable Trust.

X. Bennett manipulated the probate court to obtain the orders at issue in this appeal.

Respondent argues Bennett made the Application in a genuine attempt to obtain the probate court's guidance regarding his fiduciary duty as Special Conservator after the Wellin Children rejected the Swap Transaction. (Respt's Br. 9-11.) But the Application does not request

[8] Respondent argues the fact the Wellin Children did not also request appointment of a guardian for Keith is evidence they had an improper motive in requesting appointment of a conservator. (Respt's Br. 8.) The Wellin Children were aware of facts indicating Wendy Wellin was attempting to change Wellin's estate plan and obtain his assets for her benefit. Although they also had concerns regarding her care of Keith, they were unaware of any facts indicating Keith was in danger of imminent physical harm to justify appointment of a guardian.

the court's guidance. Bennett requested the probate court summarily decide Keith Wellin's disputed claim to the Friendship Partners liquidation proceeds in the absence of a pleading, discovery, or trial. (R. pp. 1757-1760.) The Application was a litigation maneuver intended to circumvent the federal district court because it had recently denied Keith Wellin and Lester Schwartz injunctive relief in connection with the same assets at issue in this appeal and dissolved the restraining orders issued by the district court in *Wellin I* and by the probate court in *Wellin II*.[9] (Appellant's Br. 13-17.) Bennett made the request via informal application, rather than filing a summons and complaint, in an effort to prevent removal of the dispute to federal court.[10]

In an effort to legitimize the Application as a genuine request for guidance, Respondent mischaracterizes Bennett's role in the Swap Transaction and the purpose of the order appointing Bennett temporary Special Conservator. Respondent states Bennett merely "reviewed" the purported Swap Transaction to ensure Keith received equivalent value for the transfer. (Respt's Br. 10). But Bennett engineered the Swap Transaction, drafted the transaction documents, and presented the transaction to the Wellin Children. (Appellant's Br. 12-14.) The Wellin Children allege in the district court Bennett took these actions at the direction of Wendy Wellin in an effort to recover property of the Irrevocable Trust for her benefit.

Moreover, the order appointing Bennett Special Conservator did not authorize him to pursue the relief requested in the Application. The provision in the Order Appointing Special

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[9] Bennett submitted his Application one week after the district court dissolved the temporary restraining order over the liquidation proceeds issued by the probate court in *Wellin II*. (Appellant's Br. 17.)

[10] If Bennett had presented the claims described in the Application to the probate court via summons and complaint as required by the Probate Code, the Wellin Children would have removed the action to the district court. After the probate court issued the February Order authorizing Bennett to pursue claims on Keith's behalf, Bennett did file a complaint setting forth the disputed claims in connection with the Swap Transaction. The Wellin Children removed the complaint to the district court, which dismissed the complaint on the basis that it merely restated claims already pending in the district court. (Appellant's Br. 21-22.)

Conservator requiring Bennett to "ensure that no transfers of assets are not made without fair and adequate consideration" was intended to require Bennett to prevent Wendy from siphoning assets from Keith, not to empower Bennett to pursue claims against the Wellin Children in connection with a transfer engineered by Bennett. (R. p. 1, ¶ C.) The Wellin Children agreed to Bennett's temporary appointment solely to maintain the status quo while the parties attempted to resolve the federal court litigation. (Appellant's Br. 17-18.) Bennett explained the parties' agreement to the probate court as follows:

> *My job as special conservator and special trustee will be to keep everything status quo pending mediation.* The Wellins or Mr. Wellin will continue to be able to use his funds for the customary and ordinary living expenses as they have been living over the past years. We will only stop - - *My role really is just to stop transfers of his assets to third parties or to Mrs. Wellin* from anything on (sic) that.

(7/26/2013 Hr'g Tr., R. p. 1159, line 21-p. 1160, line 3.) (emphasis added).[11] In making his Application, Bennett merely exploited the language of the Order for strategic ends.

XI. Respondent mischaracterizes Keith Wellin's amendments to his estate plan.

Without citation to the record on appeal, Respondent claims "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." (Respt's Br. 8, n. 6.) Because Keith's estate planning documents are not in the record on appeal, this Court should disregard Respondent's statement. SCACR 210(h) ("Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the

[11] What the Wellin Children were unaware of at the time, and what Bennett did not disclose to the Wellin Children or the probate court, was that Wendy Wellin had only weeks earlier received $25 million from Keith, in addition to the $14.5 million she received from him earlier in the year. (R. p. 1032(28), lines 10-11.) Whether or not Bennett actively facilitated this transfer, he allowed it to happen and did not inform the probate court once he became Special Conservator or seek to return the funds to Keith.

appellate court will not consider any fact which does not appear in the Record on Appeal.") In any event, Respondent's characterization of the changes to Keith's estate plan is misleading.

Before Keith Wellin commenced this litigation in 2013, the Wellin Children were the residual beneficiaries of his estate pursuant to his Revocable Trust. As a result of changes made to Keith's Revocable Trust after the litigation began, Wendy Wellin's bequest increased by $25 million and, potentially, much more because the amendments named Wendy trustee and empowered her to increase her own bequest at the expense of devisees. The amendments completely disinherited Keith's son, and dramatically reduced the bequests to his daughters. After Keith died, Wendy took the position in the federal estate tax return that the bequests to Keith's daughters have been forfeited pursuant to the no-contest clause and that these bequests now flow, in part, to her. The amendments did increase bequests to charities, but the charities are first in the order of abatement, and it appears highly unlikely that the Estate will have assets sufficient to fund these gifts. In all, the amendments suggest a strategic effort to dramatically increase the amount of money and authority passing to Wendy, while creating the appearance of benefitting charities, in order to render the instrument more defensible to an attack on the ground of undue influence.

CONCLUSION

The remaining issues addressed in Respondent's Brief were adequately addressed in Appellants' Initial Brief.[12] For the foregoing reasons, and those stated in the Appellants' Initial Brief, this Court should reverse the judgments of the lower courts.

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[12] Respondent's arguments regarding due process are sufficiently addressed by Appellants' initial brief and do not warrant a separate section in this reply brief. However, it is worth noting that Respondent has failed to identify a single case in American jurisprudence in which a court ordered a party to pay money (much less $50 million) to the adverse party prior to a claim (or counterclaim) ever being asserted against the party. Respondent does not explain why such an

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unprecedented order is permissible in this case where Appellants never had the opportunity to file an answer, assert affirmative defenses, conduct discovery, or demand a jury trial, and the order was entered in response to an oral request made at the end of a hearing. If the lower courts' orders are affirmed, South Carolina will presumably become the first state to allow defendants to obtain substantive relief without ever asserting a claim seeking such relief.