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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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OCT 11 2017

SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2014-CP-26-1665
Appellate Case No. 2015-000680

Emily Carlson and Alice Preyer, Petitioners,
v.
John C. Dockery, III, Respondent.

In re Emily Cheshire Dockery,
Of Whom Emily Carlson and Alice Preyer..... are the Respondents,
and
Emily Cheshire Dockery..... is the Appellant.

PETITION FOR REHEARING

James F. McCrackin
SC Bar No. 064140
E-Mail: jim.mccrackin@nelsonmullins.com
NELSON MULLINS RILEY & SCARBOROUGH LLP
3751 Robert M. Grissom Parkway / Suite 300
Post Office Box 3939 (29578-3939)
Myrtle Beach, SC 29577-6412
(843) 448-3500

Attorneys for Respondents Emily Carlson and Alice
Preyer

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Respondents, Emily Carlson and Alice Preyer, hereby file this Petition for Rehearing of the above-referenced matter, which resulted in Unpublished Opinion number 2017-UP-359 filed September 27, 2017 (the "Opinion"). This Petition for Rehearing is based on the ground that the Court overlooked substantial evidence in the Record on Appeal that supported the Probate Court's finding of good cause for passing over John Dockery in the appointment of a third-party conservator.

FACTUAL BACKGROUND

The Court affirmed the Probate Court's finding that Emily Dockery is incapacitated, but reversed and remanded the Probate Court's appointment of a third-party conservator and remanded the case to the Probate Court with instructions to appoint John Dockery as conservator. The Court stated that the record lacks "concrete evidence" to support the Probate Court's finding of good cause to pass over John Dockery and appoint a third-party conservator.

LEGAL ARGUMENT

The Court appears to have overlooked substantial evidence in the Record on Appeal that supports the Probate Court's finding of good cause to pass over John Dockery and appoint a third-party conservator. Specifically, the uncontested testimony of the Guardian ad Litem ("GAL") describes specific instances of commingling, self-dealing and lack of proper accounting by John Dockery.

South Carolina Code Section 62-5-410 provides guidelines to the Probate Court for the appointment of a conservator when a person is found to be incapacitated and has

assets that require management. S.C. Code Section 62-5-410 reads as follows in its entirety:

(a) The court may appoint an individual, or a corporation with general power to serve as trustee, as conservator of the estate of a protected person. The following are entitled to consideration for appointment in the order listed:

(1) a conservator, guardian of property, or other like fiduciary appointed or recognized by the appropriate court of any other jurisdiction in which the protected person resides;

(2) an individual or corporation nominated by the protected person if he is fourteen or more years of age and has, in the opinion of the court, sufficient mental capacity to make an intelligent choice;

(3) an attorney in fact appointed by such protected person pursuant to Section 62-5-501;

(4) the spouse of the protected person;

(5) an adult child of the protected person;

(6) a parent of the protected person, or a person nominated by the will of a deceased parent;

(7) any other relative of the protected person;

(8) a person nominated by the person who is caring for him or paying benefits to him.

(b) A person in priorities (1), (4), (5), (6), or (7) may nominate in writing a person to serve in his stead. With respect to persons having equal priority, the court is to select the one who is best qualified of those willing to serve. The court, for good

cause, may pass over a person having priority and appoint a person having less priority or no priority.

(c) A probate judge or an employee of the probate court shall not serve as a conservator of an estate of a protected person; however, a probate judge or an employee of the probate court may serve as a conservator of the estate of a family member if such service does not interfere with the proper performance of the probate judge's or the employee's official duties. For purposes of this subsection, "family member" means a spouse, parent, child, brother, sister, niece, nephew, mother-in-law, father-in-law, son-in-law, daughter-in-law, grandparent, or grandchild.

Like its predecessor, prior Section 44-23-730, Section 62-5-410 creates broad discretion in the Probate Court in appointing a conservator. Subsection (a) creates an order of priority, but does not require the Probate Court to appoint anyone with priority. Subsection (a) simply says that "(T)he following are entitled to consideration for appointment in the order listed" (emphasis added). Subsection (b) says in part that "(T)he court, for good cause, may pass over a person having priority and appoint a person having less priority or no priority." As this Court acknowledged, the Probate Court's finding of good cause to pass over John Dockery and appoint a third-party conservator must be upheld if there is any evidence in the record supporting the Probate Court's finding. Good cause has not been specifically defined by any court in South Carolina, but the ordinary meaning of the term suggest that good cause is a cause that a reasonable person would find as justification for passing over an individual with higher priority and appointing someone with lesser or no priority. Evidence generally consists

of the sworn testimony from the witnesses at trial and any documentary evidence admitted at trial.

The sworn testimony of the GAL at trial was extensive. On the issue of good cause, the GAL's testimony can be found in the Record on Appeal, R. p. 378, line 2-p. 409, line 9. The GAL's testimony included her specific reasons for opposing John Dockery as conservator. The GAL stated that "there was a continual commingling of funds and there was no clear accounting of funds spent on behalf of his mother verses on his own behalf." R. p. 379, lines 13-16. "In this litigation, he had been taking positions as to the title or division of assets not supported by the records or for which there was no documentary evidence." R. p. 379, lines 17-20. The GAL specifically described John Dockery's receiving and depositing into his own personal account rent that was received from the rental of a portion of the property owned by Twenty Ninth Ave. Corp. which was owned by Emily Dockery, John Dockery, Emily Carlson and Alice Preyer. R. p. 379, line 21-p. 380, line 21. The GAL also specifically described the improper payment of taxes and insurance out of Emily Dockery's funds on the residence that Emily Dockery and John Dockery were living in which John Dockery was the life tenant and specifically responsible for the paying such taxes and insurance. R. p. 380, line 22-p. 381, line 11. The GAL advised the Probate Court that her knowledge of these matters was gleaned from her personal investigation and sworn testimony given by John Dockery at his deposition. The GAL stated that "it was very clear in listening to Mr. Dockery in his deposition that he cannot distinguish and delineate or maintain clear and accurate records to account for his activities in these various fiduciary roles." R. p. 381, lines 12-22.

The GAL was also concerned about transactions involving the Whitlark Limited Partnership and the Rockingham house. John Dockery was involved in the sale of property by Whitlark Limited Partnership in which he admitted at his deposition that he took 50% of the proceeds even though the Limited Partnership Agreement showed that he only owned a 1% interest in the limited partnership. R. p. 381, line 23-p. 382, line 14. The GAL testified that to compound the problem, John Dockery commingled the funds from the sale so that there was no way to determine what proceeds may belong to John Dockery and what proceeds belong to Emily Dockery. R. p. 382, lines 15-23. The GAL testified that John Dockery received an interest in a home located in Rockingham, North Carolina from his mother for no stated consideration. The GAL testified that John Dockery stated that the consideration was \$50,000, but could produce no documentation that any money had been transferred to his mother for the property. R. p. 383, line 6-p. 384, line 3.

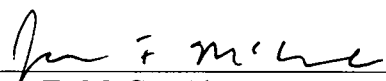
The GAL's extensive testimony was admitted as evidence at trial without objection, and it was not contested or contradicted by any other witness. Furthermore, the deed to the Twenty Ninth Ave. Corp. property and the Partnership Agreement for Whitlark Limited Partnership were admitted into evidence without objection corroborating the GAL's testimony regarding (i) rent improperly taken by John Dockery from property owned by Twenty Ninth Ave. Corp. and (ii) that John Dockery owned only a 1% interest in the Limited Partnership yet took 50% of the proceeds of sale. R. p. 403, line 9-p. 406, line 15; R. pp. 933-935; R. pp. 936-961. John Dockery chose not to testify and presented no evidence contradicting any of the GAL's testimony. Under the circumstances, it is hard to imagine how this Court reaches its

conclusion that "the record lacks concrete evidence to support" the Probate Court's finding of good cause.

CONCLUSION

As set forth above, Respondents, Emily Carlson and Alice Preyer respectfully requests that this Court grant its Petition for Rehearing as the Court has overlooked substantial evidence in the Record on Appeal supporting the Probate Court's finding of good cause to pass over John Dockery and appoint a third-party conservator.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 
James F. McCrackin
SC Bar No. 064140
E-Mail: jim.mccrackin@nelsonmullins.com
3751 Robert M. Grissom Parkway / Suite 300
Post Office Box 3939 (29578-3939)
Myrtle Beach, SC 29577-6412
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Attorneys for Respondents Emily Carlson and Alice Preyer

Myrtle Beach, South Carolina

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and

Emily Cheshire Dockery..... is the Appellant.

PROOF OF SERVICE

I, the undersigned Paralegal of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondents, Emily Carlson and Alice Preyer, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

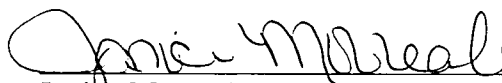
Pleadings:

Petition for Rehearing

Counsel Served:

Thomas C. Brittain, Esq.
Mary Madison Brittain Langway, Esq.
The Brittain Law Firm, P.A.
4614 Oleander Dr.
Myrtle Beach, SC 29577

V. Lee Moore, Esquire
Moore, Johnson & Saraniti
P. O. Box 14737
Surfside Beach, SC 29587



Janice Morreale
Paralegal

October 10, 2017



NELSON MULLINS

James F. McCrackin
Certified Specialist in Taxation Law and
Certified Specialist in Estate Planning
and Probate Law
By the South Carolina Supreme Court
(Admitted in SC & NC)
T 843.946.5659 F 843.946.5632
jim.mccrackin@nelsonmullins.com

NELSON MULLINS RILEY & SCARBOROUGH LLP
ATTORNEYS AND COUNSELORS AT LAW

3751 Robert M. Grissom Parkway | Suite 300
Myrtle Beach, SC 29577-6412
T 843.448.3500 F 843.448.3437
nelsonmullins.com

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Via Hand Delivery

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

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SC Court of Appeals

RE: Emily Carlson v. John C. Dockery
Appellate Case No. 2015-000680
Our File No. 36618/09000

Dear Ms. Kitchings:

Enclosed for filing are the originals and seven (7) copies of the following:

1. Respondents Petition for Rehearing; and
2. Proof of Service for Petition for Rehearing.

We have also enclosed the required \$25.00 filing fee. Please file the original and return a file-stamped copy me via our courier. By copy of this letter the Petition for Rehearing and the Proof of Service are being served upon the Appellant.

Very truly yours,

James F. McCrackin

JFM:jm

Enclosures

cc: Thomas C. Brittain, Esquire
Mary Madison Brittain Langway, Esquire
V. Lee Moore, Esquire