

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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 Petitioners,

and

Emily Cheshire Dockery..... is the Respondent.

PETITION FOR A WRIT OF CERTIORARI

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
(843) 448-3500

Attorneys for Petitioners Emily Carlson and Alice Preyer

Other Counsel of Record:

Thomas C. Brittain, Esq.
Mary Madison Brittain Langway, Esq.
4614 Oleander Drive
Myrtle Beach, SC 29577
Attorney for Respondent

V. Lee Moore, Esq.
P.O. Box 14737
Surfside Beach, SC 29587
Guardian ad Litem for Respondent

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Certification of Counsel

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 26, 2018.

Questions Presented for Review

1. Did the Court of Appeals err in reversing the probate court's decision to appoint a third-party conservator?

Statement of the Case

This matter began with the filing of a Petition for Finding Incapacity and Appointment of Guardian and the Petition for Appointment of Conservator (collectively the "Petitions") for Emily Cheshire Dockery ("Ms. Dockery") filed by Petitioners on December 1, 2010, requesting the appointment of a guardian and a conservator. (Petition for Finding Incapacity and Appointment of Guardian, R. pp. 98-102; Petition for Appointment of Conservator, R. pp. 103-106) A hearing was held in probate court on May 4, 2012 on the issue of capacity only, at which time Ms. Dockery and both Petitioners testified. On July 6, 2012, the hearing resumed at which time Leonard Goldschmidt, Psy.D., J.D., Debbie Costa, Pamela Moore, Rita Cauthen, Reagan J. Callaghan and V. Lee Moore, Esquire testified. The videotaped depositions of Jeffrey A. Benjamin, D.O. and Leonard Goldschmidt, Psy.D., J.D., were also submitted as evidence subject to various objections. A hearing was held on May 30, 2013, for the purpose of appointing a guardian and conservator for Ms. Dockery pursuant to the probate court's Order of Incapacity. The probate court issued an Order Appointing Guardian and Conservator on June 10, 2013, appointing John Dockery as limited guardian and Walter Godbold, a local certified public accountant, as full conservator. (Order Appointing Guardian and Conservator, R. pp. 51-57)

The Honorable Larry B. Hyman, Jr., presided over the appeal to circuit court on October

1, 2014 and issued an Order Affirming the Probate Court on October 13, 2014, and denied Appellant's Motion for Reconsideration by Order Denying Motion to Reconsider/Alter or Amend the Order Affirming Probate Court dated February 4, 2015. (Order Affirming Probate Court, R. pp. 83-95; Order Denying Motion to Reconsider/Alter or Amend the Order Affirming Probate Court, R. pp. 96-97) Respondent filed a Notice of Appeal to the Court of Appeals on March 27, 2015. (Notice of Appeal, R. pp. 825-826) John Dockery did not appeal the circuit court Order Affirming the Probate Court

The Court of Appeals affirmed in part, reversed in part, and remanded to the probate court. In re Emily Cheshire Dockery, of whom Emily Carlson and Alice Preyer are the Respondents and Emily Cheshire Dockery is the Appellant. Up. Op. No. 2017-UP-359 (S.C. Ct. App. filed September 27, 2017). Petitioners seek a writ of certiorari to review that decision.

Argument

I. The Court of Appeals erred in reversing the probate court's decision to appoint a third-party conservator.

The Court of Appeals' found the probate court abused its discretion in finding good cause to pass over John Dockery and appoint a third-party conservator. The Court of Appeals further found that there was no evidence in the record to support the probate court's decision. The Court of Appeals has erred.

The Court of Appeals 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 and multiple 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 the Court of Appeals 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 (emphasis added). Good cause has not been specifically defined by the statute or 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

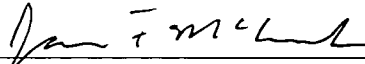
way to determine what proceeds may belong to John Dockery and what proceeds belong to Emily Dockery. R. p. 382, lines 15-23. The GAL testified that John Dockery received an interest in a home located in Rockingham, North Carolina from his mother for no stated consideration. The GAL testified that John 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. Curiously, the Court of Appeals stated that the record lacks “concrete evidence” to support the probate court’s findings. The Court of Appeals offered no explanation or guidance as to what “concrete evidence” is or why the undisputed testimony of the GAL is not evidence for purposes of affirming the probate court’s decision. There is substantial undisputed evidence in the record to support the probate court's decision to pass over John Dockery and appoint a third-party conservator. This Court should grant certiorari and reverse the Court of Appeals, and affirm the probate court’s appointment of a third-party conservator.

Conclusion

Based on the foregoing, this Court should grant the petition for a writ of certiorari.

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

(843) 448-3500

Attorneys for Emily Carlson and Alice Preyer

Myrtle Beach, South Carolina

April 24, 2018

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CERTIFICATE OF SERVICE

I, the undersigned, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for 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):

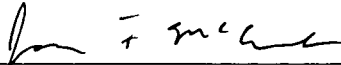
Pleadings:

Petition for Writ of Certiorari
Appendix

Counsel Served:

Thomas C. Brittain, Esq.
Mary Madison Brittain Langway, Esq.
4614 Oleander Drive
Myrtle Beach, SC 29577
Attorney for Respondent

V. Lee Moore, Esq.
P.O. Box 14737
Surfside Beach, SC 29587
Guardian ad Litem for Respondent



James F. McCrackin

April 24, 2018