

THE STATE OF SOUTH CAROLINA
In The 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. 2018-000765

Ex parte Emily Carlson and Emily Preyer,..... Petitioners,

v.

John C. Dockery, III.

In re Emily Cheshire Dockery, an alleged
Incapacitated Person,Respondent

RETURN TO PETITION FOR
A WRIT OF CERTIORARI

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May 24, 2018

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S.C. SUPREME COURT

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COUNTER STATEMENT OF QUESTIONS PRESENTED

- I. WHETHER THE COURT OF APPEALS CORRECTLY APPLIED S.C. CODE SECTION 62-5-410 (2009) TO HOLD THAT THE PROBATE COURT ABUSED ITS DISCRETION IN FINDING COOD CUASE TO PASS OVER SON FOR PRIORITY AS DOCKERY'S CONSERVATOR.

- II. WHETHER THERE IS ANY COMPELLING REASON TO GRANT CERTIORARI IN THIS CASE WHERE THE CONSIDERATIONS ENUMERATED IN RULE 242(b), SCACR, ARE NOT APPLICABLE.

COUNTER- STATEMENT OF THE CASE

Respondents, Emily Carlson and Alice Preyer filed a summons and petition for a finding of incapacity as to their mother, Emily Cheshire Dockery and for an order appointing them as guardian and conservator over their mother's well-being and financial affairs (App., pp. 199-207). Ms. Emily Cheshire Dockery filed an Answer and Counterclaim stating she was fully competent and able to make all decisions associated with her financial, physical and social well-being, and did not desire to have a guardian or conservator appointed to handle such decisions for her (App., pp. 208-210). In addition, Ms. Dockery stated that if a guardian or conservator was to be required pursuant to the Court, her desire was for her son, John C. Dockery, III who has been living and taking care of her for many years, be appointed to make such decisions on her behalf. Ms. Dockery also filed a counterclaim alleging the action brought was frivolous and requesting her daughters be responsible for her attorney's fees and the costs of the litigation. Respondents filed a Reply (App., pp. 211-212).

The Probate Court initially appointed Dr. Leonard Goldschmidt, a neuropsychiatrist, as the medical examiner. Upon motion of counsel for Ms. Dockery a second medical examiner, Dr. Jeffrey Benjamin, a neurologist, who was a treating physician of Ms. Dockery, was appointed (App., pp. 113-114). The Court appointed V. Lee Moore as guardian ad litem for Ms. Dockery (App. p. 109).

On July 22, 2011, the parties participated in mediation. Present at the mediation were Respondents, Emily Carlson and Alice Preyer along with their attorney James F. McCrackin; John C. Dockery, III, and his attorney William H. Monckton; Mary Madison Brittain Langway attorney for Mrs. Dockery, and V. Lee Moore, Guardian ad Litem for Ms. Dockery. Ms. Dockery did not attend the mediation. All parties willingly participated in the mediation and attempted to reach a

resolution. Ms. Langway consistently reminded all counsel that she would not be able to agree to anything at the mediation, since her client was not in attendance, but would meet with her client subsequent to the mediation and discuss any potential settlement agreement with her at that time.

An agreement was not reached at the mediation. Those present made progress and were able to agree on a few issues, but not all. No settlement document was signed at the mediation. Subsequent to the mediation, Respondent's attorney, James F. McCrackin circulated a settlement agreement to all counsel for their signature and their client's signature. Neither petitioner John C. Dockery, III nor his attorney signed the document. Ms. Dockery did not sign the document, nor did her attorneys, Thomas C. Brittain and Ms. Langway. The only parties who signed the document were the Respondents and V. Lee Moore (App., pp. 929-933).

On August 31, 2011, Counsel for Respondents filed a motion to enforce the "settlement Agreement" (App., pp. 811-813). Counsel for Ms. Dockery and John C. Dockery objected to the enforcement of this document at the hearing, on the basis that there was no settlement agreement since all parties had not signed it. The Probate Court found that the agreement was enforceable, but not binding on Ms. Dockery and therefore the action would still go forward as to her incapacity (App. pp. 118-122). The probate Court found that the "settlement agreement" was enforceable to the extent that it named John C. Dockery, III as the guardian of Ms. Dockery and stated that a third party would be appointed as the conservator of Ms. Dockery. The Probate Court further held that John C. Dockery would only be allowed to testify at the hearing on capacity to the extent that it was consistent with the "settlement agreement," which stated that Ms. Dockery was incapacitated.

May 4, 2012 and July 6, 2012, the court heard testimony on the capacity of Ms. Dockery (App., pp. 227-476), and ruled on January 22, 2013 that she was incapacitated, and in need of a limited conservatorship, because she was able to participate in decisions affecting her care and

well-being, but in need of a conservatorship because she was not able to participate in decisions with respect to her finances (App., pp. 141-147).

On May 30, 2013, the Probate Court held a hearing to determine who would be appointed as conservator (App., pp. 477-532). At this hearing, counsel for Ms. Dockery and counsel for John C. Dockery, III introduced into evidence Ms. Dockery's power of attorney, which had been drafted and prepared by Cliff Tall, Esquire, in 2007 (App., pp. 943-948). This document named John C. Dockery, III as her power of attorney and it specifically stated that her appointment of him as power of attorney shall survive any determination by a court that she is incapacitated. Respondent's asked that Walter B. Godbold be appointed as a third-party conservator, pursuant to the "settlement agreement." Respondents did not introduce any evidence tending to show that John C. Dockery was incapable of functioning as power of attorney for Ms. Dockery. The only mention of John Dockery's abilities as a conservator came from V. Lee Moore, the Guardian ad Litem, whose positions were generally not approved by Ms. Dockery voluntarily gave her "opinion" to the court. She was not asked to testify by any of the parties, Counsel for the Petitioners did not call her as a witness or introduce any of her reports, findings, etc. as evidence. The Probate Court enforced the "settlement agreement" and appointed Walter B. Godbold as conservator of Ms. Emily Cheshire Dockery (App., pp. 152-158). Ms. Dockery and John C. Dockery, III filed numerous Motions to reconsider pursuant to Rule 59 (e) (App., pp. 841-865), which were denied by the Probate Court. Ms. Dockery filed her notice of intent to appeal on March 17, 2014 (App., pp. 924-925), and John C. Dockery, III, filed his notice of intent to appeal on March 14, 2014 (App., p. 923).

On October 1, 2014, the Honorable Judge Larry B. Hyman, Jr. heard the appeal from Probate Court (App., pp. 560-579). The Circuit Court found no error in the application of South

Carolina Code §62-5-410, which governs the appointment of a conservator, nor any abuse of discretion by the Probate Court in passing over John Dockery and appointing an independent party. On October 13, 2014, Judge Hyman signed his Order affirming the Probate Court (App., pp. 184-196). Ms. Dockery filed a Motion to Reconsider/Alter or Amend pursuant to rule 50 (e) on October 30, 2014 (App., pp. 916-922). Judge Hyman denied Ms. Dockery's motion on February 4, 2015 (App., pp. 197-198). Ms. Emily Cheshire Dockery appealed the Probates' findings to the South Carolina Court of Appeals on Date. The South Carolina Court of Appeals issued an Unpublished opinion in September of 2017 in which it affirmed in part, reversed in part, and remanded to the Probate Court for the appointment of Son as Ms. Dockery's conservator pursuant to S.C. Code Ann section 62-5-410(a) (2009). Up. Op. No. 2017-UP-359 (S.C. Ct. App. Filed September 27, 2017) (App., pp. 81-85). Petitioners filed a Petition for Rehearing, which was denied by the South Carolina Court of Appeals on March 26, 2018. Petitioners then filed this petition for a Writ of Certiorari to review the decision of the South Carolina Court of Appeals.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY RULED THAT THE PROBATE COURT ERRED IN FINDING GOOD CAUSE TO PASS OVER SON FOR PRIORITY AS DOCKERY'S CONSERVATOR.

A. Statute S.C. Code Ann Section 62-5-410(a)(3) (2009).

The South Carolina Court of Appeals correctly applied S.C. Code Ann Section 62-5-410 (2009), which provides a list of priority for the probate court to follow when appointing a conservator of an incapacitated person. S.C. Code Section 62-5-410 provides as follows:

(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 or 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 section, "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.

While the statute is very clear on this issue, providing both a list of priority and requiring good cause to pass over a person with priority, the statute does not define "good cause." However, Black's law dictionary defines good cause as "a legally sufficient reason. Good cause is often the burden placed on the litigant to show why a request should be granted or excused." Black's Law Dictionary 235 (8th ed. 2004). As such, Petitioners had the burden of showing a legally sufficient reason why Ms. Dockery's son should not have been appointed as her conservator.

In addition to the statute, Ms. Dockery went one step further and stated her intentions in her durable power of attorney executed on November 1, 2007, wherein she named her son, John C. Dockery, III her power of attorney. On p. 4 of Ms. Dockery's power of attorney, it states as follows, "It is my intention that this power of attorney shall not be affected by my physical disability or mental incompetence, which renders me incapable of managing my own estate...It is

further my intention that my said attorney-in-fact (or alternate) shall serve as such and shall continue to exercise the authority granted herein in spite of any attempt to appoint a guardian or conservator on my behalf, it being my specific intent that my said attorney-in-fact (or alternate) shall fulfill the obligations ordinarily reserved for a guardian and conservator, and that no application to court for the appointment of any other person(s) in either capacity shall be effective while my said attorney-in-fact (or alternative) is willing and able to so serve.” (App., p. 946). Clifford Tall, esquire of Myrtle Beach, South Carolina drafted the durable power of attorney in 2007 and testified that Ms. Dockery was fully capable of executing the power of attorney at that time. Furthermore, the validity of the durable power of attorney has not been challenged.

John C. Dockery, III has priority pursuant to S.C. Code Section 62-5-410(b), and the Court could only appoint someone other than John C. Dockery, III for “good cause” shown, a burden which falls to the petitioner to show a legally sufficient reason why he should be passed over, and as the Court of Appeals found, Petitioners failed to do so. The Court of Appeals properly relied on the most pertinent part of §62-5-410(b) which states that “the court, for **good cause**, may pass over a person having priority and appoint a person having less or no priority.” (emphasis added). The probate court relied solely on the testimony of the GAL, which was voluntarily given; she was not called as a witness by any of the parties to this action, including and most importantly, by the Petitioners. (App., p. 496, lines 2-21). The GAL did not introduce a written report, or any documents detailing or supporting her opinions regarding Mr. Dockery. Petitioners argue that the sworn testimony of the GAL constitutes “good cause” shown, however as the court of appeals correctly found, “although the GAL testified her conclusions were the result of an investigation, she failed to elaborate or present any evidence verifying specific instances of financial misconduct.” Up. Op. No. 2017-UP-359 (S.C. Ct. App. Filed September 27, 2017) (App., p. 83).

Petitioners point to several instances in the record which they purport shows good cause, however this information is all part of the Record on Appeal which was reviewed by the Court of Appeals as well. The information Petitioners point to, consists of statements made by the GAL, and as the Court of Appeals properly found, the GAL offered no concrete evidence, no detailed findings, documentation, or even a written report to support her conclusions.

The GAL called herself to the stand stating to the presiding Judge, "I know that Ms. Dockery has always wanted her son to be serving in the capacity of guardian and conservator. And I feel there needs to be something placed on the record as to why I felt that it was so important for it to be an independent conservator." (App., p. 496, lines 2-8). On cross-examination by counsel for Respondent, the GAL was asked "do you have any other supporting evidence other than Mr. Dockery's deposition for what you're contending is his inability to manage her estate?" to which the GAL responded, "No." (App., p. 517, lines 17-21).

Petitioners have failed to point to any documentation, or written report that supports the GAL's statements. Furthermore, the probate court failed to articulate specific findings as to why a third party would better serve as a conservator than Ms. Dockery's son, but instead stated in its order that it believed a third-party conservator would prevent family infighting and give Ms. Dockery peace of mind, which does not amount to good cause shown and is simply not enough to pass over a person with priority pursuant to S.C. Code §62-5-410.

Moreover, Ms. Dockery's durable power of attorney plainly states her intentions that her son be responsible for her welfare and handle her financial matters, and that if necessary he be appointed as the guardian and conservator. Her intentions could not be more clear. As such, the court must be very cautious and specific in its findings of 'good cause' or else it runs the risk of essentially taking away a person's right to choose his or her own person to handle their well-being

and financial affairs. Certainly, a person of sound mind who properly executes a document selecting a person to manage their well-being and financial affairs if/when needed should have every expectation that his or her selection will be upheld absent a specific finding of abuse or fraud on the part of the person he or she selected. The right of a person to make that selection cannot and should not be taken lightly, and/or cast aside easily.

Petitioners did not present any evidence proving that John Dockery had mismanaged any of Ms. Dockery's assets or finances. The sworn statements of a GAL alone without any documentation to support it, simply is not enough to constitute good cause to pass over a person with statutory priority and the person selected by the protected person. Absent any evidence of John Dockery's mismanagement of funds, it was an error of the Court to find good cause to disregard Ms. Dockery's right to appoint a conservator of her choice and liking, and the Court of Appeals properly reversed the probate court's ruling and remanded it to the probate court for Ms. Dockery's son to be appointed as her conservator.

II. THERE IS NO COMPELLING REASON FOR GRANTING CERTIORARI IN THIS CASE.

Rule 242(b) SCACR sets out five considerations for granting certiorari and they are as follows:

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) Where substantial constitution issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the Unites States supreme Court.

None of the above-mentioned considerations apply here. The issue presented does not involve novel questions of law. In fact, the law is clear, involving a Statue that has been in existence since Date, and prior to that date was in existence, but as §44-23-730 prior to the new codification in date. In addition, both petitioners and respondents cite the same statue in their Petitions that the Court of Appeals cited in its decision.

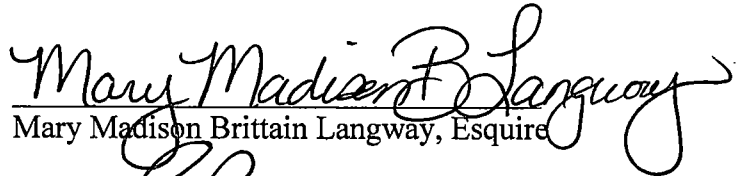
There was not a dissent in the decision of the Court of Appeals, it was in fact a “per curiam” opinion. Respondents are not aware of any prior decision of the Supreme Court that is in conflict with the decision of the Court of Appeal, and Petitioners certainly have not raised that the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court. Likewise, neither party has raised any substantial constitutional issues. And finally, it does not involve a federal question and the decision is not in conflict with the United States Supreme Court. Therefore, there is no compelling reason for granting certiorari in this case.


CONCLUSION

The Court of Appeals correctly held that the probate court abused its discretion in finding good cause to pass over Son for priority as Mrs. Dockery's conservator, and thereby remanding it to the probate court for Son to be appointed as Mrs. Dockery's conservator. This decision was rendered after both written and oral arguments were made on the issue, and the Court of Appeals also declined to grant the petition for rehearing, finding, as such, no viable reason exists to grant certiorari in this case. The Petition for Certiorari should be denied.

Respectfully submitted, this 24th day of May, 2018.

Respectfully submitted,


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PROOF OF SERVICE

I, Allison Lazar, do hereby certify that I am an employee of The Brittain Law Firm, P.A., attorneys for the Appellant Emily Cheshire Dockery in the above-entitled action, and that I have this 24th day of May, 2016, caused to be served upon the following parties the **Return to Petition for a Writ of Certiorari** by depositing a copy of same in the United States Mail, with sufficient first class postage affixed thereto, addressed as follows:

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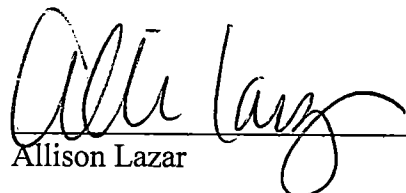
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Allison Lazar

SWORN AND SUBSCRIBED before me
this 24 day of May, 2018.


NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 6-11-24