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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

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SC Court of Appeals

Appellate Case No. 2016-001141
Op. No. 5608, filed January 4, 2019

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

Appellants,

v.

Keith S. Wellin,

Respondent.

PETITION FOR REHEARING

This matter is before the Court on appeal from the Circuit Court order affirming the Probate Court's order that required the Wellin Family 2009 Irrevocable Trust to pay approximately \$50 million to Synovus Bank as Special Conservator II for their father, Keith S. Wellin. This Court issued its opinion on January 4, 2019, reversing the Circuit Court order on the ground that the Probate Court did not have subject matter jurisdiction and authority to issue the disputed order. Pursuant to Rule 221, SCACR, the Respondent petitions for rehearing on grounds that the Court overlooked and/or misapprehended the items set forth below.

1. The Court overlooked and misapprehended facts and law in holding that the \$50 million at issue was not part of Wellin's estate over which the Probate Court had jurisdiction. The clear and undisputable record shows that the Wellin Children instituted this action, seeking the

appointment of a Conservator for their father claiming the Probate Court needed to protect his assets, and they listed the Promissory Note as an asset of their Father when they filed their Petition for Appointment of a Conservator to protect his assets. [ROA 167.] These uncontestable facts support the Probate Court's ruling that it has jurisdiction over the funds belonging to Keith Wellin in the 2009 Wellin Family Trust, pursuant to S.C. Code Ann. § 62-5-402 and 62-5-408(1), as an asset of Respondent's estate, and also pursuant to S.C. Code Ann. § 62-7-201, when the interests of justice otherwise would seriously be impaired. [ROA 29.]

In addition, irrespective of the ongoing litigation over the substitution of the Promissory Note for the Friendship Partnership interest in other pending litigation, the Appellants have acknowledged that Mr. Wellin is owed – at the least – \$50,228,000, and thus, the Record fully supports the Circuit Court's finding that the Wellin Children “identified the Promissory Note as an estate asset and acknowledged multiple times in open court, both in the Probate Court and before this court, that they have offered and continue to offer \$50,228,000 in exchange for the cancellation of the Promissory Note.” [ROA 62.] The Probate Court correctly recognized that post swap, at a minimum, Mr. Wellin was entitled to no less than the value of the note. Thus, the offer made by Counsel for the Wellin Children belies their argument that the Court lacks jurisdiction to order the same funds to be held by a Special Conservator pursuant to the Court's directive.

The Circuit Court correctly agreed, adopting the Probate Court's reasoning:

Petitioners expressly identified the Promissory Note as an estate asset of which they sought protection, and that irrespective of the ongoing dispute and litigation over the other \$42 million, the Petitioners acknowledged in open court that they have offered and continue to offer the \$50,228,000 to Mr. Wellin (and now his estate) in exchange for the cancellation of the Promissory Note. The very fact that the Petitioners offered to post that amount with the Probate Court belies their argument that the Probate Court does not have jurisdiction to order the same funds held for a Special Conservator.

[ROA 51.] Once vested, the jurisdiction of the Probate Court is not only exclusive but continuous; and notably, the Wellin Children could not divest the Probate Court of jurisdiction over Mr. Wellin's assets by attempting a voluntary dismissal of the conservatorship action they commenced. As more fully discussed in the Respondent's Final Brief, the Probate Court did have subject matter jurisdiction over the \$50 million pursuant to §62-5-416.

2. The Court overlooked and misapprehended facts and law in holding that the probate court lacked authority to issue the disputed order based on Bennett's failure to file a petition and summons with the probate court under S.C. Code § 62-5-416(a). Under the Probate Code, when a fiduciary is seeking instruction from the Probate Court, both Probate Code Sections 62-5-416(b) and 416(c) apply. Section 62-5-416(b) states, "Upon application to the appointing court, a conservator may request instructions concerning his fiduciary responsibility. A denial of the application by the court is not adjudication and does not preclude a formal proceeding." Section 62-5-416(c) states, "After notice and hearing as the court may direct, the court may give appropriate instructions or make *any* appropriate order." (Emphasis added.) The Reporter's Comments also note that the 2010 amendments to subsection (b) replaced the requirement that a conservator request instruction by petition with the ability to do so by application. Whether to make an appropriate order or issue instructions, and the contents of such order or instruction, are matters within the Probate Court's discretion. *See State v. Hill*, 314 S.C. 330, 332, 444 S.E.2d 255, 256 (1994)("The word 'may' ordinarily 'signifies permission and generally means the action spoken of is optional or discretionary.'").

The Record shows that the Special Conservator complied with the Probate Code by filing an application under § 62-5-416(b), and requesting that the Probate Court exercise its powers under § 62-5-416(c). After briefing and hearing all parties, the Probate Court issued an appropriate order

protecting the assets of Wellin under S.C. Code Ann. § 62-5-416(c). [ROA 20.] As more fully discussed in the Respondent's Final Brief, the Court's constrictive interpretation of subsection 416(a) fails to give the statute as a whole, including (b) & (c), the appropriate reasonable and practical construction consistent with the purpose and policy expressed in the statute. Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 22-23, 579 S.E.2d 334, 336 (Ct. App. 2003).

3. The Court overlooked and misapprehended facts and law in holding the Probate Court order had no authority to require action by the Trust because the Trust had not been made a party to the conservatorship action and the Trustees had not waived personal jurisdiction on behalf of the Trust.

“In order to establish waiver of the right to contest jurisdiction, it is only necessary that a party by its conduct evince an intent to proceed to the merits of the case.” Jenkinson v. Murrow Bros. Seed Co., 272 S.C. 148, 154, 249 S.E.2d 780, 783 (1978) (Ness, J., concurring). The Record evidences such an intent and fully supports the Probate Court's finding that they had not maintained or preserved any such distinction because Counsel for the Wellin Children regularly spoke on behalf of both the Irrevocable Trust and the Wellin Children in their capacity as Trustees during the proceedings below.

First, the Wellin Children initiated these proceedings as Petitioners, and they have voluntarily appeared as Trustees in other matters before the Probate Court. The Record shows that the Wellin Children have been represented by the same counsel individually and as Trustees for the Irrevocable Trust. [ROA 1184:15-25.] The Appellants had notice of proceedings and their counsel, who represents them in all of their capacities, appeared and argued on their behalf without preserving differentiation between any supposed separate capacities. Moreover, they have filed

extensive memoranda and made multiple arguments, including arguments made on behalf of the Trust, which supports a finding of waiver. [See ROA 31.] As discussed more fully in the Respondent's Final Brief, the Probate Court had personal jurisdiction over the Trust and the Wellin Children, as Trustees, by virtue of their filing the Petition and asserting arguments on behalf of the Trust.

4. In addition to seeking rehearing of the holdings on the core issues presented on appeal, the Respondent seeks rehearing of specific factual statements and legal conclusions in the Court's opinion which may have an unforeseen and unintended impact on related pending litigation in other courts. In order to minimize any ramification or impact of a factual statement in the Opinion of the Court of Appeals in related litigation, Respondent respectfully requests that the Opinion of the Court of Appeals be corrected and revised on these points:

a. The counsel for Respondent has been inaccurately identified in the caption of the opinion. Namely, Mr. Bennett and Ms. Provence were not counsel of record for Mr. Wellin in this matter. The Record on Appeal reflects that Mr. Bennett was Keith S. Wellin's attorney and also was appointed to serve as Special Conservator for him, as appointed by order of the Probate Court. [ROA 1.] Ms. Provence appears as Counsel for Mr. Bennett. [See ROA 20-21.] The misidentification of these individuals and their capacity in this matter has potential implications to their obligations and authority in this case and the related pending matters. Accordingly, Respondent respectfully requests that the paragraph identifying counsel be revised to accurately reflect the parties and their representation as:

Robert H. Hood, Mary Agnes Hood Craig, and James Bernard Hood, all of Hood Law Firm, LLC, of Charleston, for Respondent,

And

Tiffany Nicole Provence, of Provence Messervy, LLC, of Summerville, for Edward G. R. Bennett, as Special Conservator for Keith S. Wellin.

b. In the first paragraph of the section titled “FACTS/PROCEDURAL BACKGROUND”, the Court makes an inaccurate and/or incomplete statement of fact in regard to Mr. Wellin’s participation in the Friendship Partners. More specifically, the Court states that:

Wellin was a limited partner in Friendship Partners although he owned 98.9% of its assets through a trust, the Florida Revocable Trust, for which he was trustee.

The Record on Appeal establishes that while Mr. Wellin initially owned 98.9% of the partnership, he subsequently transferred his limited partnership units to a trust in 2007. [ROA 376-409, 1748-51.] While the Respondent maintains that Mr. Wellin remained a limited partner throughout his lifetime, the Appellants dispute this in other pending matters. Therefore, this statement may be read as a legal conclusion with respect to Mr. Wellin’s status as a limited partner and, as such, may have a potential impact on this issue in other pending litigation. Accordingly, Respondent respectfully requests that paragraph be revised to state:

Wellin individually was a limited Partner in Friendship Partners, initially owning limited partnership units representing 98.9% of the partnership. In 2007, Wellin transferred his limited partnership units to a trust, the Florida Revocable Trust, for which he was both trustee and sole lifetime beneficiary.”

c. In the first paragraph in the section titled “FACTS/PROCEDURAL BACKGROUND”, the Court makes an inaccurate statement of fact in regard to the timing of certain gifts. More specifically, the Court states that: “Also in 2003, Wellin gifted \$10 million to each of his children and to Wendy as well.” However, the Record on Appeal evidences that the gifts were made in 2013. [ROA 329]. This factual point has potential impact on the issue of Wellin’s claims related to these gifts in other pending litigation. Accordingly, Respondent respectfully requests

that paragraph be revised to state that: “In January 2013, Wellin gifted \$10 million to each of his children and to Wendy as well.”

d. In the first paragraph in the section titled “FACTS/PROCEDURAL BACKGROUND”, the Court makes an inaccurate and/or incomplete statement of fact regarding the transfer of Mr. Wellin's limited partnership units in the Friendship Trust on November 30, 2009. The Court states: “Wellin funded the Trust by transferring his interest in Friendship Partners to the Trust in exchange for a Promissory Note (the Note) for approximately \$50 million with provisions for periodic interest.” However, the Purchase and Sale Agreement of November 30, 2009, evidences the details of the sale of the partnership units to the Trust after its creation. [ROA 1670-79.] This factual point has potential impact on the issue of Wellin’s claims related to the November 30, 2009 transaction in other pending litigation. Accordingly, Respondent respectfully requests that paragraph be revised to state:

Shortly after forming the Trust, Wellin, through the Florida Revocable Trust, sold limited partnership units, representing a 98.9% interest in Friendship Partners, to the Trust in exchange for a Promissory Note (the Note) issued by the Trust for approximately \$50 million with provisions for periodic interest.

e. As noted above, the Court made an inaccurate statement regarding the timing of certain gifts being made in 2003. [ROA 174–205.] In the second paragraph in the section titled “FACTS/PROCEDURAL BACKGROUND”, the Court again makes inaccurate statement of fact in regards to the year of that gift. More specifically, the Court states that:

In July 2013, Wellin filed an action in federal district court seeking to set aside the 2003 gifts to Appellants, but not to Wendy, and the 2009 transactions that benefitted his children and lineal descendants via the Trust (*Wellin I*).

The Respondent respectfully requests that the paragraph be revised to state:

In July 2013, Wellin filed an action in federal district court seeking to set aside the January 2013 gifts to Appellants, but not to Wendy, and the 2009 transactions that benefitted his children and lineal descendants via the Trust (*Wellin I*).

f. In the third paragraph in the section titled “FACTS/PROCEDURAL BACKGROUND”, the Court makes an inaccurate statement of fact in regard to the appointment of Mr. Bennett. More specifically, the Court states that Edward Bennett was appointed as temporary conservator; however, the Probate Court order found in the Record on Appeal evidences that Mr. Bennett was appointed as Special Conservator. [ROA 1.] This point has potential consequences to Mr. Bennett’s authority and obligations under the role to which he was appointed. Accordingly, the Respondent respectfully requests that the statement be revised to state:

In August 2013, the probate court appointed Edward Bennett as Special Conservator, pending mediation or a full hearing, with the role of ‘ensur[ing] that transfers of assets are not made without fair and adequate consideration.

g. In the third paragraph in the section titled “FACTS/PROCEDURAL BACKGROUND”, the Court makes an inaccurate and/or incomplete statement of fact in regard to the swap for the Note. The Court states that: “To effectuate this swap, Wellin forgave the Note by marking it ‘Paid in Full,’ in exchange for a 58% limited partnership in Friendship Partners.” The exact nature of the transaction is evidenced by the documents and cover letter found in the Record on Appeal. [ROA 1908-10, 1912-21.] In related pending litigation, the validity of Mr. Wellin’s substitution of assets, including the exchange of the Note for the partnership units held by the 2009 Trust, is in dispute. To the extent that the Court’s use of the term “forgave” has legal implications that potentially impacts the issue of Wellin’s right to recover either the liquidation proceeds due to him upon dissolution of Friendship Partners, LP or his right to receive payment under the Note in the event that his substitution of assets is found ineffective, issues which are disputed in other pending litigation, the Respondent respectfully requests that paragraph be revised to state:

To effectuate this swap, Wellin tendered the Note to the Trust, marking it ‘Paid in Full’, in exchange for partnership interest of an equivalent value which was at that

time calculated to represent approximately 58% of the partnership interest in Friendship Partners.

h. In the fourth paragraph in the section titled “FACTS/PROCEDURAL BACKGROUND”, the Court makes an inaccurate and/or incomplete statement of fact in regard to distributions to the Trust. Namely, the Court states that: “The proceeds were distributed to the Trust;” and in a related footnote, the Court further states that: “Appellants maintain this was done to prevent the Trust from incurring significant tax liability.” Based on the relevant documents in the Record on Appeal [ROA 580–89], the Respondent respectfully request that the paragraph be revised to state that: “The proceeds were distributed from Friendship Partners to Appellants and Friendship Management LLC and Friendship Partners was dissolved;” and the related footnote be revised to “Appellants maintain this was done to protect the Trust assets.”

i. In the fourth paragraph in the section titled “FACTS/PROCEDURAL BACKGROUND”, the Court makes an inaccurate and/or incomplete statement of fact in regard to Mr. Bennett’s actions in rejecting payment on the Note. More specifically, the Court states: “Bennett rejected the payment, taking the position the Note ceased to exist after it was marked ‘Paid in Full’ as part of the swap transaction.” However, the Record of Appeal evidences that Mr. Bennett acted on behalf of Wellin in regards to that transaction. [ROA 1754–55.] This factual point has potential impact on the issue of Mr. Bennett’s obligations and authority, and accordingly, Respondent respectfully requests that paragraph be revised to state:

Wellin, through Bennett, rejected the payment, taking the position the Note ceased to exist after it was satisfied as part of as part of the swap transaction.”

j In the fourth paragraph in the section titled “FACTS/PROCEDURAL BACKGROUND”, the Court makes an inaccurate and/or incomplete statement of fact in regard to Mr. Bennett’s actions relating to his efforts to collect/protect Mr. Wellin’s partnership interests.

The Court states: “Bennett also demanded the Trust pay Wellin \$92 million representing the value of a 58% interest in Friendship Partners.” However, the Record on Appeal evidences the details of that demand. [ROA 1754–55.] To the extent that Mr. Bennett’s actions encompass issues related to the pending litigation, the Respondent respectfully requests that paragraph be revised to state:

Bennett also demanded that Wellin receive a pro-rata distribution of liquidation proceeds from Friendship Partners representative of the interest he obtained from the swap transaction, estimated to be approximately 58% of Friendship Partners.

5. Alternately, in order to minimize any ramification or impact of a factual statement in the Opinion of the Court of Appeals in related litigation, Respondent respectfully requests that the Opinion of the Court of Appeals clarify its opinion that any factual statements or statements of the procedural background associated with this matter are not intended to be construed as binding findings of fact and have no preclusive effect upon any factual dispute in the present or any related litigation.

Conclusion

For the reasons above, in addition to those asserted in his Final Brief, Respondent asks this Court to reconsider its ruling and affirm the Circuit Court order. In the alternative, the Respondent asks the Court to revise its opinion and adopt the modifications requested above in order to correct and/or clarify the identified factual inaccuracies and/or ambiguities in order to abate the potential impact of the Court’s factual statements on all other litigation currently pending in both state and federal court.

Respectfully submitted,

James B. Hood
With Permission by *Deborah H. Sheffield*
Deborah Harrison Sheffield
Of Counsel (#2757)

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

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

February 1, 2019

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Certificate of Service

SC Court of Appeals

The undersigned certifies that on this 1st day of February, 2019, a copy of the foregoing Petition for Rehearing, was served by depositing said copy in the U.S. Mail, with sufficient first-class postage, on the following counsel at the addresses listed below:

Robert H. Brunson, Esquire
Merritt G. Abney, Esquire
Patrick C. Wooten, Esquire
Nelson Mullins Riley & Scarborough LLP
151 Meeting Street, Suite 600
Charleston, SC 29401-2239

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

Deborah H. Sheffield
Deborah Harrison Sheffield

February 1, 2019

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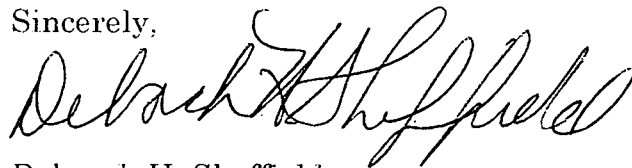
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Wellin v. Wellin; Appellate Case No. 2016-001141

Dear Clerk:

Enclosed for filing is the original and six (6) copies of the Respondent's Petition for Rehearing. I am enclosing a check for the \$50.00 filing fee, and I am serving a copy upon Counsel of Record by copy of this letter as evidenced on the Certificate of Service.

Sincerely,



Deborah H. Sheffield

cc: Robert H. Brunson, Esquire
Merritt G. Abney, Esquire
Patrick C. Wooten, Esquire
Mattison Bogan, Esquire
Tiffany Provence, Esquire

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