

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM Horry COUNTY
Court of Common Pleas

DEC 18 2015

Larry B. Hyman, Jr., Circuit Court Judge

SC Court of Appeals

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.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL
(As Stated by Appellants in Appeal to Circuit Court)

Appellant improperly attempts to change her Issues on Appeal from those presented to the Circuit Court below. The Issues on Appeal are limited to those listed below which were presented to the Circuit Court. (Initial Brief of Appellant, R. pp. 796-814)

1. Did the Probate Court err in enforcing a "settlement agreement" that was not signed by all parties, not entered into during mediation, and not read into the record?
2. Did the Probate Court err in refusing to allow and/or admit testimony from John C. Dockery, III?
3. Did the Probate Court err in excluding portions of Dr. Benjamin's testimony regarding his opinion of neuropsychiatric testing?
4. Did the Probate Court err in appointing a person other than John C. Dockery, III as conservator when John C. Dockery, III had priority pursuant to S.C. Code Section 62-5-410 as Ms. Dockery's attorney-in-fact?
5. Did the Court err in accepting the testimony of Petitioner's witness, Dr. Goldschmidt who is not a medical doctor but a psychologist, over that of a medically licensed Neurologist, Dr. Benjamin?
6. Did the Court err in failing to consider after acquired evidence that was presented to the Court showing other pending litigation by the Petitioners?
7. Did the Court err in finding that Ms. Dockery is responsible for all fees and costs of both the Guardian ad litem, and Dr. Goldschmidt?

8. Did the Court err in terminating any and all previous power of attorneys executed by Ms. Dockery?
9. Did the Court err in failing to admit Mr. Clifford H. Tall, Esq. as an expert?

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 Respondents 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) The Probate Court appointed V. Lee Moore ("Ms. Moore") as counsel and Guardian ad Litem for Ms. Dockery on December 1, 2010. (Order Appointing Counsel, R. p. 8) The Probate Court appointed TeAnne Oehler ("Ms. Oehler") as visitor on December 3, 2010. On January 19, 2011, a Notice of Representation was filed by Thomas C. Brittain, Esq. indicating that he would be representing Ms. Dockery. Ms. Moore was relieved as counsel for Ms. Dockery by the Probate Court on February 7, 2011, but the Probate Court directed her to continue to serve as Guardian ad Litem for Ms. Dockery. Ms. Dockery filed an Answer and Counterclaim on February 4, 2011. (Answer and Counterclaim, R. pp. 107-109) John C. Dockery, III ("John Dockery") filed an Answer on February 17, 2011. (Answer, R. pp. 112-113) Respondents filed a motion to strike Ms. Dockery's counterclaim which was granted by the Probate Court by Order Granting Motion to Strike Counterclaim of Emily Cheshire Dockery dated April 25, 2011. (Petitioner's Motion to Strike Counterclaim, R. pp. 708-709; Order Granting Motion to Strike Counterclaim of Emily Cheshire Dockery, R. p. 9) Ms. Dockery filed a Motion to Remove TeAnne Oehler as the Visitor; Motion to Strike Her Report; and Motion to Appoint a New Visitor on or about March 3, 2011. The Probate Court removed Ms.

Oehler, struck her report and appointed Joan Clark ("Ms. Clark") as visitor by Order Granting Motions to Remove Visitor, Strike Visitor's Report and Appoint New Visitor dated October 27, 2011. (Order Granting Motions to Remove Visitor, Strike Visitor's Report and Appoint New Visitor, R. pp. 15-16; Order to Send Visitor Joan Clark, LISW, R. p. 14) Ms. Dockery filed a Motion to Appoint a Medical Examiner on or about March 3, 2011, which the Probate Court granted by Order Granting Motion to Appoint Medical Examiner dated July 26, 2011. (Order Granting Motion to Appoint Medical Examiner, R. pp. 12-13) The Probate Court appointed Jeffrey A. Benjamin, D.O. and Leonard Goldschmidt, Psy.D., J.D. as medical examiners. The Probate Court ordered the parties to participate in mediation by Order Granting Motion to Continue dated May 9, 2011. The parties, except Ms. Dockery, participated in mediation on or about July 22, 2011, with John M. Leiter, Esq. as the mediator. The mediation concluded with the Appellant John Dockery, both Respondents and Ms. Moore reaching a settlement agreement which was communicated to the Probate Court by Respondents' counsel pursuant to the agreement of all counsel and without objection by any party. Counsel's email indicated that Ms. Dockery was not in agreement, but that the remaining parties were in agreement, and that an abbreviated hearing would be required to present the medical examiner reports and allow Ms. Dockery to appear and testify before the Probate Court regarding her position regarding her capacity and who she may want as guardian and conservator if she was found to be incapacitated. (Exhibit to Motion to Enforce Settlement Agreement, R. pp. 832-840) The Probate Court requested by email whether any party had an objection to proceeding as stated by Respondents' counsel in the email to the Probate Court. (Exhibit to Motion to Enforce

Settlement Agreement, R. pp. 832-840) The Probate Court advised all counsel that pursuant to the stated agreement of the parties, the court date would be cancelled, unless the any of the parties objected. (Exhibit to Motion to Enforce Settlement Agreement, R. pp. 832-840) No objection was made to the Probate Court by any of the parties. Respondents' counsel subsequently circulated a written Settlement Agreement with the terms agreed to at mediation by John Dockery, Respondents and the Guardian ad Litem. Respondents' counsel sent multiple emails to counsel for John Dockery requesting that counsel have John Dockery sign the Settlement Agreement. (Exhibit to Motion to Enforce Settlement Agreement, R. pp. 832-840) Counsel for John Dockery indicated in multiple emails that John Dockery would be signing the Settlement Agreement and that there was no problem. (Exhibit to Motion to Enforce Settlement Agreement, R. pp. 832-840) Notwithstanding counsel's assurances, John Dockery refused to sign the Settlement Agreement. Respondents filed a Motion to Enforce Settlement Agreement on or about August 31, 2011. (Motion to Enforce Settlement Agreement, R. pp. 710-712) The Probate Court granted the Respondents' request to enforce the settlement agreement as to Respondents, John Dockery and the Guardian ad Litem, and specifically found that the agreement was not binding on the Court or Ms. Dockery by Order Denying Motion for Continuance and Granting Motion to Enforce Settlement Agreement dated October 31, 2011. (Order Denying Motion for Continuance and Granting Motion to Enforce Settlement Agreement, R. pp. 17-21) John Dockery filed a Motion to Void Settlement Agreement on December 30, 2011. (Motion to Void Settlement Agreement, R. pp. 717-718) The Probate Court denied that motion by Order Denying Motion to Void Settlement Agreement dated January 22,

2013. (Order Denying Motion to Void Settlement Agreement, R. pp. 33-35) Ms. Dockery filed a Motion to Require Petitioners to Pay for Fees and Costs and Motion to Remove Ms. Moore as Guardian ad Litem on or about February 29, 2011. (Motion to Require Petitioners to Pay for Fees and Costs and Motion to Remove Ms. Moore as Guardian ad Litem, R. pp. 719-720) The Probate Court denied the motion to remove the Guardian ad Litem by Order Denying Motion to Remove V. Lee Moore, Esquire as Guardian ad Litem dated April 25, 2012. (Order Denying Motion to Remove V. Lee Moore, Esquire as Guardian ad Litem, R. pp. 22-24) The Probate Court denied Ms. Dockery's Motion to Require Petitioners to Pay for Fees and Costs in an Order Denying Motion to Require Petitioners to Pay for Fees and Costs dated January 22, 2013. (Motion to Require Petitioners to Pay for Fees and Costs, R. pp. 719-720; Order Denying Motion to Require Petitioners to Pay for Fees and Costs, R. pp. 49-50) Ms. Dockery filed a Motion to Require All Court Examinations of Emily C. Dockery Be Administered in Writing on or about March 19, 2012. (Motion to Require All Court Examinations of Emily C. Dockery Be Administered in Writing, R. pp. 721-722) Ms. Dockery did not pursue this motion, and the concerns regarding her hearing impairment were eliminated by her use of her hearing aids during the hearings. (Order Dismissing Motion to Require all Court Examinations of Emily Cheshire Dockery be Administered in Writing, R. pp. 38-39) A hearing was held on May 4, 2012 on the issue of capacity only, at which time Ms. Dockery and both Respondents 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, appointed 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) Appellants subsequently filed numerous motions to alter/amend pursuant to Rule 59(e) which were effectively denied, though the Probate Court used the opportunity to clarify the basis of its findings on various issues. (Motion to Reconsider/Alter or Amend the Order Finding Incapacity of Emily C. Dockery, R. pp. 740-744; Motion to Reconsider/Alter or Amend Order Denying Motion to Pay Fees and Costs, R. pp. 749-750; Motion to Reconsider/Alter or Amend the Order Granting Petitioners Motion to Exclude Portions of Depositions and Live Testimony and Written Materials of Dr. Jeffrey Benjamin, R. pp. 751-752; Motion to Reconsider/Alter or Amend the Order Denying Motion to Void Settlement, R. pp. 745-748; Motion to Reconsider/Alter or Amend the Order Denying Motion to Void Settlement Agreement on Behalf of John C. Dockery, III, R. pp. 753-756; Motion to Reconsider/Alter or Amend the Order Finding Incapacity of Emily C. Dockery on Behalf of John C. Dockery, III, R. pp. 757-760; Motion to Reconsider/Alter or Amend Order Denying Motion to Pay Fees and Costs on behalf of John C. Dockery, III, R. pp. 761-762; Motion to Reconsider/Alter or Amend the Order Granting Petitioners Motion to Exclude Portions of Depositions and Live Testimony and Written Materials of Dr. Jeffrey Benjamin on behalf of John C. Dockery, III, R. pp. 763-764; Petitioners

Response in Opposition to All Motions for Reconsideration, R. pp. 765-772; Motion to Reconsider/Alter or Amend to Order Denying Motion in Limine to Exclude any and all Evidence Relating to the Management of Ms. Dockery's Assets and Funds, R. pp. 775-776; Motion to Reconsider/Alter or Amend the Order Appointing Guardian and Conservator, R. pp. 777-781; Motion to Reconsider/Alter or Amend the Order Granting Petitioner's Motion for Attorney Fees and Costs in connection with Motion to Enforce Settlement Agreement, R. pp. 782-784; Motion to Reconsider/Alter or Amend Order Denying Motion in Limine to Exclude any and all Evidence Relating to the Management of Ms. Dockery's Assets and Funds on Behalf of John C. Dockery, III, R. pp. 785-787; Motion to Reconsider/Alter or Amend the Order Appointing Guardian and Conservator on Behalf of John C. Dockery, III, R. pp. 788-792; Motion to Reconsider/Alter or Amend the Order Granting Petitioner's Motion for Attorney Fees and Costs in connection with Motion to Enforce Settlement Agreement on Behalf of John C. Dockery, III, R. pp. 793-795) Appellant and John Dockery filed separate notices of appeal under separate file numbers in the Circuit Court. (Notice of Intent to Appeal to Circuit Court of Emily Dockery, R. pp. 823-824; Notice of Intent to Appeal to Circuit Court of John C. Dockery, R. p. 822) 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) Appellant 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.

STANDARD OF REVIEW

The determination of the standard of review by an appellate court for matters originating in probate court is controlled by whether the cause of action is at law or in equity. Dean v. Kilgore, 313 S.C. 257, 259, 437 S.E.2d 154, 155 (Ct. App. 1993). To make this determination, the appellate court must look to the essential character of the cause of action alleged by the petitioners in the case. The essential subject matter of this case involves the capacity of Ms. Dockery, which is an equitable matter. Accordingly, if requested, the appellate court may make factual findings in accordance with its own view of the preponderance of evidence in the record. However, Appellant has not appealed the Probate Court's factual findings, so the Court's review is limited to whether the Probate Court made any errors of law.

In regard to the appointment of a conservator, the probate court should not be overturned absent an abuse of discretion. Patterson v. Cook, 288 S.C. 220, 221, 341 S.E.2d 782, 782 (1986) (interpreting an appointment statute similar to S.C. Code Section 62-5-410).

ARGUMENT

1. APPELLANT HAS NOT APPEALED THE PROBATE COURT'S FINDING THAT MS. DOCKERY IS AN INCAPACITATED PERSON AND FAILED TO PROVIDE ANY ARGUMENT WHATSOEVER TO THE CIRCUIT COURT ON 2 OF ITS 9 ISSUES ON APPEAL.

Appellant has not specifically appealed the Probate Court's finding that Appellant lacks sufficient understanding and capacity based upon her mental deficits to manage her property and make responsible decisions concerning her property and financial affairs. Accordingly, the Probate Court's finding that Ms. Dockery is an incapacitated person is final and is not an issue in this appeal, and the Court of Appeals review of the Circuit Court's Order Affirming Probate Court is limited to whether the Probate Court made any errors of law. (Order Affirming Probate Court, R. pp. 83-95) Appellants Initial Brief to the Circuit Court listed 9 issues on appeal, but Appellant failed to present any argument to the Circuit Court on 2 of the 9 issues (i.e. numbers 6 and 8), and the Circuit Court found that those issues were abandoned. The only 2 issues properly before this Court on appeal are numbers 4 and 9 as listed in the Statement of Issues on Appeal listed in Appellant's Initial Brief to the Circuit Court. Notwithstanding Respondents' position that the only issues properly on appeal before this Court are numbers 4 and 9, Respondent addresses each issue listed in Appellant's Initial Brief to the Circuit Court below.

Assuming for the sake of argument that Appellant's Statement of Issues on Appeal is interpreted broadly to include the Probate Court's finding that Ms. Dockery is an incapacitated person, the evidence of her incapacity is overwhelming. Ms. Dockery's testimony which was specifically noted by the Probate Court in the Order

Finding Incapacity showed a complete lack of understanding of the nature of the lawsuit and revealed her lack of ability to manage her financial affairs. (Transcript dated May 4, 2012, p. 13, line 10-p. 76, line 19, R. p. 132, line 10-p. 195, line 19; Order Finding Incapacity p. 4, R. p. 43; Order Granting Partial Relief on Motions to Reconsider/Alter or Amend Order Finding Incapacity p. 2, R. p. 76). The testimony of Dr. Leonard Goldschmidt was also specifically cited by the Probate Court as being credible and persuasive. (Order Finding Incapacity p. 4, R. 43; Order Granting Partial Relief on Motions to Reconsider/Alter or Amend Order Finding Incapacity p. 2, R. p. 76). The testimony of the Guardian ad Litem also supported the Probate Court's finding of incapacity. (Transcript dated May 30, 2013, p. 71, line 24-p. 102, line 2, R. p. 396, line 24-p. 427, line 2) The written reports of Dr. Goldschmidt and Dr. Jeff Benjamin also support the Probate Court's finding of incapacity. (Examiner's/Doctor's Affidavit and Report Regarding Capacity of Leonard Goldschmidt, Psy.D., J.D., R. pp. 115-117 and pp. 984-990; Examiner's/Doctor's Affidavit and Report Regarding Capacity of Jeff A. Benjamin, DO, R. pp. 118-120). Emily Carlson's testimony that Ms. Dockery did not know the day, month or year during her deposition on April 18, 2011, was uncontroverted. (Transcript dated May 4, 2012, p. 106, line 21-p.107, line 12, R. p. 225, line 21-p. 226, line 12). Even Reagan Callaghan, a paid elder advocate for Ms. Dockery, admitted that Ms. Dockery needs assistance managing her assets. (Transcript dated July 6, 2012, p. 146, line10-p.148, line 2, R. p. 367, line 10-p. 369, line 2). Other than two caregivers who admitted that they had no discussions with Ms. Dockery regarding her finances, the only evidence presented that Ms. Dockery did not lack capacity was the testimony of

Dr. Benjamin which was at odds with his own written report, inconsistent, and ambiguous. Dr. Benjamin admitted to conducting almost no testing and having no raw data to support his opinion. (Benjamin Deposition dated February 7, 2012, p. 19, line 3-p. 25, line 9; p. 33, line 4-p. 37, line 21; p. 65, line 17-p. 66, line 1; p. 67, line 24-p. 68, line 3, R. p. 494, line 3-p. 500, line 9; p. 508, line 4-p. 512, line 21; p. 540, line 17-p. 541, line 1; p. 542, line 24-p. 543, line 3). Dr. Benjamin based his opinion on capacity in part on the fact that Ms. Dockery had a Power of Attorney, a fact that has nothing whatsoever to do with Ms. Dockery's ability to manage her own affairs. (Benjamin Deposition dated February 7, 2012, p. 11, lines 16-24, R. p. 486, lines 16-24). Dr. Benjamin even opined incredibly that Ms. Dockery was "sharper than 85% of the people in Horry County." (Benjamin Deposition dated December 9, 2011, p. 76, lines 4-8, R. p. 702 lines 4-8; Benjamin Deposition dated February 7, 2012, p. 57, line 17-p. 58, line 4, R. p. 532, line 17-p. 533, line 4). Ultimately, even Dr. Benjamin admitted that Ms. Dockery needed assistance with her financial affairs and could be easily taken advantage of. (Benjamin Deposition dated February 7, 2012, p. 59, line 6-p. 60, line 1 and p. 61, lines 2-22, R. p. 534, line 6-p. 535, line 1 and p. 536, lines 2-22). Dr. Benjamin's testimony to the extent he tried to say that Ms. Dockery was not incapacitated was simply not credible or persuasive.

2. THE PROBATE COURT DID NOT ERR IN ENFORCING THE SETTLEMENT AGREEMENT AGAINST JOHN C. DOCKERY, III AND THE GUARDIAN AD LITEM.

As noted by the Circuit Court, Appellant, Emily Dockery, has no standing to object to the enforcement of the Settlement Agreement. Appellant was not a party to the Settlement Agreement and was not bound by the Settlement Agreement in any way.

However, in the unlikely event this Court believes that Appellant somehow has standing to appeal the Probate Court's enforcement of the Settlement Agreement, Respondents address the issue below.

Appellant's counsel has misstated repeatedly both the facts related to the Settlement Agreement and the Probate Court's position in regard to the Settlement Agreement. The Probate Court has made the facts and its position clear in no less than five (5) separate orders (Order Denying Motion for Continuance and Granting Motion to Enforce Settlement Agreement, R. pp. 17-21; Order Denying Motion to Void Settlement Agreement, R. pp. 33-35; Order Denying Motions to Reconsider/Alter or Amend Order Denying Motion to Void Settlement Agreement, R. pp. 70-72; Order Granting Partial Relief on Motions to Reconsider/Alter or Amend Order Finding Incapacity, R. pp. 75-77; Order Denying Motions to Reconsider/Alter or Amend Order Appointing Guardian and Conservator, R. pp. 78-82) and numerous times during hearings. Appellant has never filed any motion, notice or appeal disputing the facts as found by the Probate Court in regard to the Settlement Agreement, and does not cite anything in the record to support the version of events described in her Initial Brief. The Circuit Court also noted in its Order Affirming the Probate Court that Appellant's version of the facts was simply not supported by the record. Appellant's counsel has now again intentionally misstated the facts regarding the Settlement Agreement and the Probate Court's position in regard to the enforcement of the Settlement Agreement to this Court again without citing any evidence in the record or any basis for his assertions.

The record is clear and the facts are not in dispute. The Probate Court ordered the parties to participate in mediation by Order Granting Motion to Continue dated May 9, 2011. (Order Granting Motion to Continue, R. pp. 10-11). The parties, except Ms. Dockery, participated in mediation on or about July 22, 2011, with John M. Leiter, Esq. as the mediator. The mediation concluded with John Dockery, both Respondents and Ms. Moore reaching a settlement agreement which was communicated to the Probate Court by Respondents' counsel pursuant to the agreement of all counsel and without objection by any party. Respondents' Counsel's email indicated that Ms. Dockery was not in agreement, but that the remaining parties were in agreement, and that an abbreviated hearing would be required to present the medical examiner reports and allow Ms. Dockery to appear before the court. The Probate Court requested by email whether any party had an objection to proceeding as stated by Respondents' counsel in the email to the Probate Court. The Probate Court advised all counsel that pursuant to the stated agreement of the parties, the reserved court date would be cancelled, unless any of the parties objected. No objection was made to the Probate Court by any of the parties. Respondents' counsel subsequently circulated a written settlement agreement with the terms agreed to at mediation by John Dockery, Respondents and the Guardian ad Litem. Respondents' counsel sent multiple emails to counsel for John Dockery requesting that counsel have John Dockery sign the settlement agreement. Counsel for John Dockery indicated in multiple emails that John Dockery would be signing the settlement agreement and that there was no problem. Notwithstanding counsel's assurances, John Dockery refused to sign the settlement agreement. The Probate Court enforced the Settlement Agreement against John

Dockery in part because the Probate Court believed John Dockery's actions were relied upon by the Probate Court and Respondents in allowing the hearing date to be cancelled. By the time John Dockery had changed his position, the Probate Court no longer had the same date and time available to try the case. (Order Denying Motion for Continuance and Granting Motion to Enforce Settlement Agreement, R. pp. 17-21).

The Probate Court denied John Dockery's requests to reconsider the Probate Court's enforcement of the Settlement Agreement. (Order Denying Motions to Reconsider/Alter or Amend Amended Order Denying Motion to Void Settlement Agreement, R. pp. 70-72). The Probate Court quoted Patterson v. Reid, 456 S.E.2d 436 (Ct. App. 1995) in denying John Dockery's motion. "A party cannot use Rule 59(e), SCRCF, to present to the trial court an issue the party could have raised prior to judgment but did not." The Probate Court noted that neither John Dockery nor Appellant raised Rule 43(k) at the hearing held on September 15, 2011 on Respondents' Motion to Enforce Settlement Agreement, or at the hearing on July 6, 2012 on John Dockery's Motion to Void Settlement. (Motion to Enforce Settlement Agreement, R. pp. 710-712; Motion to Void Settlement, R. pp. 717-718). Appellant has not disputed the Probate Court's finding that Rule 43(k) was never raised by John Dockery or Appellant at the time the Probate Court was ruling on the issue and offer no cite to any evidence in the record that contradicts the Probate Court's findings. Issues are preserved for appellate review only when they are raised and ruled on by the lower court. Elam v. South Carolina Department of Transportation, 361 S.C. 9, 602 S.E.2d 772 (2004) and Wilder Corporation v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998).

Because Appellant failed to raise Rule 43(k) in the Probate Court, the issue is not properly preserved for appeal.

Appellant's argument that Respondents' counsel has violated the Mediation Rules also relies on assertions by Appellants that are not supported by the record. The Probate Court set forth the facts upon which it relied in finding that Respondents' counsel had clearly not violated any of the Mediation Rules. (Order Denying Motions to Reconsider/Alter or Amend Order Denying Motion to Void Settlement Agreement, ¶ 2, R. pp. 70-72). Appellant once again intentionally misrepresents the facts in Appellant's Initial Brief by ignoring the key facts (as found by the Probate Court and affirmed by the Circuit Court) that John Dockery's counsel and Appellant's counsel authorized Respondents' counsel to communicate the parties' settlement agreement to the Probate Court and all counsel were notified simultaneously when the Probate Court was notified of same via email communication. There was no objection at the time nor was there any claim that Rule 8 of the Mediation Rules had been violated. The omission of these undisputed facts by Appellant's counsel is a clear attempt to mislead the Court and may violate counsel's obligation of candor to the tribunal under Rule 3.3 of the South Carolina Rules of Professional Conduct.

Finally, even if the Probate Court erred in enforcing the Settlement Agreement against John Dockery, the Probate Court was very clear that not only was the Probate Court not bound by the Settlement Agreement, but that the Probate Court's findings in this matter "were based upon the evidence presented at trial and not the Settlement Agreement." (Order Denying Motions to Reconsider/Alter or Amend Order Appointing Guardian and Conservator, ¶ 4, R. pp. 78-82). Additionally, at the Circuit

Court appeal hearing Judge Hyman states "I say the whole agreement is absolutely irrelevant." (Transcript dated October 1, 2014, p. 45, line 22-p.46, line 1, R. p. 477, line 22-p. 478, line 1) Accordingly, any alleged error was harmless and would not change the Probate Court's findings in this case and the Circuit Court Order Affirming Probate Court decision should be upheld.

3. THE PROBATE COURT DID NOT REFUSE TO ALLOW TESTIMONY FROM JOHN C. DOCKERY, III AND COMMITTED NO ERROR IN LIMITING HIS TESTIMONY IN ACCORDANCE WITH THE SETTLEMENT AGREEMENT.

The Probate Court did not refuse to allow testimony from John Dockery. John Dockery was given the opportunity to testify at the hearing, but neither his attorney nor Appellant's attorney chose to call John Dockery as a witness and failed to proffer any testimony. The Circuit Court also questioned counsel at the appeal hearing as to if any testimony was proffered and Appellant's counsel stated "No, sir." (Transcript dated October 1, 2014, p. 16, lines 9-23 and p. 44, lines 23-24, R. p. 472, lines 9-23 and p. 476, lines 23-24) Accordingly, this issue is not properly preserved for appeal. State v. Santiago, 370 S.C. 153, 634 S.E.2d 23 (Ct. App. 2006). Appellant's claim that John Dockery was not allowed to testify is simply another assertion by Appellant's counsel that counsel knows (or should know based on the record) is false. Furthermore, The Probate Court reminded the parties on multiple occasions that the Probate Court was not bound by the Settlement Agreement and would make its findings based on all of the evidence. (Order Denying Motions to Reconsider/Alter or Amend Order Appointing Guardian and Conservator, ¶ 5, R. pp. 78-82).

4. THE PROBATE COURT DID NOT ERR IN EXCLUDING PORTIONS OF DR. BENJAMIN'S TESTIMONY REGARDING HIS OPINION OF NEUROPSYCHIATRIC TESTING.

Dr. Benjamin was not qualified as an expert in neuropsychology or neuropsychiatric testing and admitted that he is not a neuropsychiatrist and has never interpreted the studies run on Ms. Dockery. He admitted that neuropsychology and neuropsychiatric testing were way out of his area of expertise. (Benjamin letter dated May 11, 2012, R. p. 991) Accordingly, the Probate Court did not err in striking his testimony as it related to his opinion on neuropsychology and neuropsychiatric testing. Ironically, Dr. Benjamin admitted to having referred patients to Dr. Goldschmidt on numerous occasions for neuropsychiatric testing, and even suggested in correspondence that Ms. Dockery be referred for additional neuropsychiatric testing. (Benjamin Deposition dated February 7, 2012, p. 66, lines 7-10, R. p. 541, lines 7-10; Goldschmidt Deposition dated March 15, 2012, p. 170, line 7-p. 172, line 2, R. p. 653, line 7-p. 655, line 2). Appellant's counsel signed a Consent Order to Exclude Expert Testimony of Dr. Jeff Benjamin Regarding Raw Psychological Data. As part of that order, the parties specifically agreed that Dr. Benjamin "is not qualified to testify regarding the interpretation of the raw psychological data." (Consent Order to Exclude Expert Testimony of Dr. Jeff Benjamin Regarding Raw Psychological Data, R. pp. 27-32) It is almost incomprehensible that counsel would now suggest to this Court that the Probate Court erred in not allowing portions of Dr. Benjamin's testimony that counsel agreed Dr. Benjamin was not qualified to testify about.

5. THE PROBATE COURT DID NOT ERR IN PASSING OVER JOHN DOCKERY AND APPOINTING A THIRD PARTY AS CONSERVATOR BECAUSE THE COURT FOUND GOOD CAUSE FOR PASSING OVER JOHN DOCKERY.

The specific choice of who should serve as conservator is decided under the Probate Court's discretion. "The matter of selection of a conservator is within the discretion of the court, and the appellate court ordinarily will not interfere unless a clear abuse of discretion is shown." 39 C.J.S. *Guardian and Ward* Section 38 (2008). The relevant statute in this case, S.C. Code Section 62-5-410, indicates that the appointing court has discretion by using the phrase "the court may appoint ... as conservator." The appointing court will not be overturned absent an abuse of discretion. Patterson v. Cook, 288 S.C. 220, 341 S.E.2d 782, 782 (1986). Accordingly, the Probate Court's decision to appoint a third party conservator should not be overturned unless this Court finds an abuse of discretion.

The Probate Court found good cause for passing over John Dockery and appointing a third party conservator based in part on the testimony of the Guardian ad Litem that there were multiple instances of questionable financial decisions by John Dockery in matters affecting Ms. Dockery's assets, including commingling of funds, potential self-dealing and general confusion regarding Ms. Dockery's assets. The Guardian ad Litem's stated that her testimony was based on her investigation and John Dockery's sworn deposition testimony. The Probate Court also noted that the Settlement Agreement called for a third party conservator. Furthermore, the Probate Court found that it was clear from all of the evidence that Ms. Dockery's children cannot get along with each other and the Probate Court's appointment of any one of her children as conservator of her property over her other children would lead to continued fighting among the children, which would ultimately be detrimental to Ms. Dockery's health and well-being. (Order Appointing Guardian and Conservator, R. pp. 51-57;

Order Denying Motions to Reconsider/Alter or Amend Order Appointing Guardian and Conservator, R. pp. 78-82; Transcript dated May 30, 2013, p. 105, line 17-p. 108, line 18, R. p. 428, line 17-p. 430, line 18). There is more than sufficient evidence in the record to support the Probate Court's decision to pass over John Dockery and appoint a third party conservator, and Appellant has cited no evidence or authority suggesting that the Probate Court abused its discretion. Accordingly, the Circuit's Court Order Affirming Probate Court should be upheld.

6. THE PROBATE COURT DID NOT ERR IN FINDING THE TESTIMONY OF DR. GOLDSCHMIDT TO BE CREDIBLE AND PERSUASIVE.

As the finder of fact in this matter, the findings of the Probate Court as to the credibility of the witnesses is a matter best left to the Probate Court which had an opportunity to hear all of the testimony and observe the demeanor of all of the witnesses. While generally this Court on appeal of a matter based in equity may make its own findings of fact based on the record before it, Appellant has not appealed the factual findings of the Probate Court. In addition, appellate courts generally defer to the trial court which was in the best position to determine the credibility of the witnesses based on all of the evidence and the demeanor of the witnesses.

The Probate Court noted that Dr. Goldschmidt had performed extensive testing of Ms. Dockery on multiple occasions, and had submitted all of the testing data to the Probate Court. His explanations of Ms. Dockery's deficits were completely consistent with her testimony on cross examination by Respondents' counsel, and the Guardian ad Litem's testimony. In contrast, Dr. Benjamin's testimony that Ms. Dockery was not incapacitated was at odds with his written report to the Probate Court (in which he found that Ms. Dockery could not prepare meals and/or clean house, maintain bank

accounts or funds, or pay bills and needed assistance to effectively manage her property and financial affairs). (Examiner's/Doctor's Affidavit and Report Regarding Capacity of Dr. Jeff Benjamin, R. pp. 118-120). He admitted to conducting almost no testing and having no raw data to support his opinion. (Benjamin Deposition dated February 7, 2012, p. 19, line 3-p. 25, line 9; p. 33, line 4-p. 37, line 21; p. 65, line 17-p. 66, line 1; p. 67, line 24-p. 68, line 3, R. p. 494, line 3-p. 500, line 9; p. 508, line 4-p. 512, line 21; p. 540, line 17-p. 541, line 1; p. 542, line 24-p. 543, line 3). Dr. Benjamin based his opinion that Ms. Dockery did have capacity in part on the fact that Ms. Dockery had a Power of Attorney, a fact that has nothing whatsoever to do with her ability to manage her own affairs. (Benjamin Deposition dated February 7, 2012, p. 11, lines 16-24, R. p. 486, lines 16-24). Dr. Benjamin even opined incredibly that Ms. Dockery was "sharper than 85% of the people in Horry County." (Benjamin Deposition dated December 9, 2011, p. 76, lines 4-8, R. p. 702, lines 4-8; Benjamin Deposition dated February 7, 2012, p. 57, line 17-p. 58, line 4, R. p. 532, line 17-p. 533, line 4). On cross examination, Dr. Benjamin admitted that Ms. Dockery could not prepare meals, maintain bank accounts or pay bills. (Benjamin Deposition dated February 7, 2012, p. 61, lines 2-5, R. p. 536, lines 2-5). He admitted that she needed assistance to effectively manage her property and financial affairs, and he admitted that due to her age and mental state that she was subject to being easily persuaded and taken advantage of. (Benjamin Deposition dated February 7, 2012, p. 61, lines 2-22; p. 68, lines 4-11, R. p. 536, lines 2-22; p. 543, lines 4-11). Dr. Benjamin's testimony overall was riddled with mistakes and inconsistencies and simply not credible or persuasive to the extent he attempted to claim that Ms. Dockery was not incapacitated, particularly in

light of all of the other evidence presented in the case indicating that she was incapacitated. One moment Dr. Benjamin would claim that Ms. Dockery could not handle her on affairs without assistance, and the next he was claiming that she was "sharper than 85% of the people in Horry County." Appellant suggests that the Probate Court erred in accepting the testimony of Dr. Goldschmidt over Dr. Benjamin. Respondents suggest that it would be more accurate to say that the Probate Court simply rejected that portion of Dr. Benjamin's testimony that was inconsistent with all of the other evidence presented. Dr. Benjamin's testimony that Ms. Dockery needs assistance to effectively manage her financial affairs, and is subject to being easily persuaded and taken advantage of was much more believable than his opinions that she was not incapacitated because she had a power of attorney and that she was "sharper than 85% of the people in Horry County".

7. APPELLANTS DID NOT MAKE ANY ARGUMENT REGARDING AFTER ACQUIRED EVIDENCE SO THE ISSUE IS THEREFORE DEEMED ABANDONED.

Appellant listed as an issue on appeal whether the Probate Court erred in failing to consider after acquired evidence. Appellant failed to include any argument on this issue in their Initial Brief to the Circuit Court. Accordingly, under the South Carolina Appellate Court Rules and J.W. Hunt v. Forestry Commission, 358 S.C. 564, 595 S.E.2d 846 (Ct. App. 2004) and In re McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001) such issue is deemed to have been abandoned by Appellant.

8. THE PROBATE COURT CORRECTLY FOUND THAT MS. DOCKERY IS RESPONSIBLE FOR THE FEES AND COSTS OF DR. GOLDSCHMIDT AND THE GUARDIAN AD LITEM.

The Probate Court clearly cited S.C. Code Sections 62-5-303 and 62-5-414 as the statutory basis for the Court's conclusion that Ms. Dockery is responsible for the

fees and costs for the court-appointed examiners and the court-appointed guardian ad litem. (Order Granting Partial Relief on Motions to Reconsider/Alter or Amend Order Finding Incapacity, ¶ 3, R. pp. 75-77). Appellant's assertion to the contrary is simply false, and part of a disturbing pattern by Appellant's counsel of misrepresenting the facts to this Court. Appellant has offered no authority in support of their position on this issue.

9. APPELLANT DID NOT MAKE ANY ARGUMENT REGARDING TERMINATION OF PREVIOUS POWERS OF ATTORNEY SO THE ISSUE IS THEREFORE DEEMED ABANDONED.

Appellant listed as an issue on appeal whether the Probate Court erred in terminating all previous powers of attorney. Appellant failed to include any argument on this issue in their Initial Brief. Accordingly, under the South Carolina Appellate Court Rules and J.W. Hunt v. Forestry Commission, 358 S.C. 564, 595 S.E.2d 846 (Ct. App. 2004) and In re McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001) such issue is deemed to have been abandoned by Appellant.

10. THE PROBATE COURT DID NOT ERR IN DENYING TO CERTIFY MR. CLIFFORD H. TALL, ESQ. AS AN EXPERT.

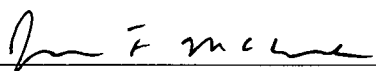
Appellant called Clifford H. Tall, Esq. as a fact witness, during the phase of the trial that dealt solely with the issue of who to appoint as conservator, to testify regarding his previous dealings with Appellant. Mr. Tall testified very briefly regarding his educational background and his law practice. Counsel for Ms. Dockery then moved to have him deemed an expert. Respondents objected on the grounds that no notice was given that Ms. Dockery intended to call Mr. Tall as an expert, and there was no notice given of what he may offer an expert opinion on. The Probate Court properly refused to find Mr. Tall as an expert. Mr. Tall continued to testify, and the

record reflects that Appellant's counsel was allowed to ask each and every question he desired. (Transcript dated May 30, 2013, p. 33, line 18-p. 42, line 18, R. p. 378, line 18-p. 387, line 18). All testimony of Mr. Tall was allowed into the record and Appellant's counsel did not proffer any additional "expert" testimony that could have been considered by the Probate Court. Accordingly, Appellant's argument on this issue is not only without merit, but made in bad faith as all testimony that was offered was allowed into the record by the Probate Court and considered by the Probate Court in reaching its decision in this matter and the Circuit's Court Order Affirming Probate Court should be upheld.

CONCLUSION

For the foregoing reasons, Respondents respectfully requests that this Court affirm the Circuit Court's Order Affirming Probate Court and all of the Probate Court's findings and rulings in all of the orders subject to this appeal.

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December 17, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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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.

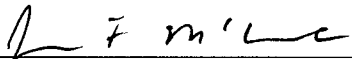
CERTIFICATE OF COUNSEL

The undersigned hereby certify that this Final Brief complies with Rule 211(b).

SCACR.

[Signature on Next Page]

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