THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the Court of Common Pleas

Frank R. Addy, Jr. Circuit Court Judge
J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2014-CP-10-07038
Appellate Case No. 2019-000833

Wendy C.H. Wellin,

Respondent,

v.

Peter Wellin, Cynthia W. Plum and Marjorie W. King,
Individually and as Co-Trustees and Beneficiaries of the
Wellin Family 2009 Irrevocable Trust, u/a/b November 2, 2009,

Appellants,

v.

Wendy C. H. Wellin, Individually and as Trustee of the Keith S. Wellin
Florida Revocable Living Trust u/a/d December 11, 2001, Hamilton College,
Keith S. Wellin Florida Revocable Living Trust, Campbell Hart, and Heather Lane,

Respondents.

In the Matter of: Keith S. Wellin

BENEFICIARY RESPONDENTS' MOTION TO DISMISS

Respondents Wendy C.H. Wellin, individually, ("Mrs. Wellin"); Hamilton College; Campbell Hart; and Heather Lane (herein collectively the "Beneficiary Respondents") respectfully move the South Carolina Court of Appeals to dismiss this appeal because it is premature under S.C. Code Ann. § 14-3-330. The Appellants have appealed an interlocutory

order issued by the Honorable Frank R. Addy, Jr. that addressed only procedural issues – specifically discovery and bifurcation – in order to position this case for an imminent, phased trial on the merits. The case is not over, and Appellants cannot further delay a trial of this matter by pursuing an improper, premature appeal of interlocutory decisions. The provisions of § 14-3-330 ensure judicial economy and dictate that the parties try this case and proceed to resolution on the merits prior to any appeal. The grounds for this motion are more fully set forth herein.

PROCEDURAL HISTORY

The above-captioned action began as a petition for formal probate following the September 2014 passing of Keith S. Wellin, wherein Mrs. Wellin requested that the Probate Court of Charleston County probate Mr. Wellin's June 27, 2014 Last Will & Testament ("June 27, 2014 Will") and informally appoint her as personal representative of her late husband's estate. As required by South Carolina law, all potential heirs of Mr. Wellin's estate were named as Respondents to the petition, including Appellants Peter Wellin, Cynthia W. Plum, and Marjorie W. King (collectively, the "Wellin Children"). Shortly after the petition was filed, Mrs. Wellin was named the Special Administrator of the Estate of Keith S. Wellin.[1]

On October 20, 2014, the Wellin Children contested Mrs. Wellin's request to probate the June 27, 2014 Will by filing an Answer, Counterclaims, and Counter-Petition in their individual capacities (the "Will Contest") and requesting removal of the matter[2] from Probate Court to Circuit Court. The Wellin Children's Will Contest named Mrs. Wellin, individually; Hamilton College; the Keith S. Wellin Florida Revocable Living Trust; Campbell Hart; and Heather Lane as "Counter-Respondents." The Wellin Children claimed that the June 27, 2014 Will should be

[1] At this time, no personal representative has been appointed to represent Mr. Wellin's Estate, so Mrs. Wellin has continued to serve as the Special Administrator.

[2] The removal was granted on October 23, 2014.

declared invalid on the basis of incapacity, undue influence, duress, fraud, and mistake, and instead sought to probate Keith Wellin's August 2011 estate plan.

Shortly after the Wellin Children filed their Will Contest in this matter, they also launched an attack against Mrs. Wellin personally by filing *in personam* claims against her in the District of South Carolina (the "Federal Action"). Then in January 2015, the Wellin Children moved to stay the Will Contest because they claimed that "resolution of the broader, Federal Action will resolve the issues in this Will Contest Action." Although the motion to stay was contested, the Circuit Court granted the motion in July 2015, and this matter was stayed for several years.

On October 20, 2017, the Circuit Court lifted the stay of this matter, (Notice of Appeal, Ex. 2), after which the Wellin Children sought to amend their Will Contest to include the same in personam claims against Mrs. Wellin that were already pending in the separate Federal Action. Even though the Wellin Children had previously assured the federal court that the in personam claims did not affect the Will Contest (and therefore did not implicate the probate exception to federal jurisdiction) and over objections from the other parties, the Wellin Children convinced the Circuit Court that their previously-pending in personam claims also needed to be included as part of the Will Contest as "mandatory counterclaims." On February 6, 2018, the Wellin Children filed their amended Answer, Counterclaims, and Counter-petition, adding their in personam claims, along with their representative capacities as "new parties," to this probate litigation.

In May 2018, the Wellin Children filed ***another*** Motion to Stay all proceedings in this now-expanded matter – the probate portion of which had been pending by that time for almost four (4) years. The Wellin Children again argued to the Circuit Court that this matter should be

stayed to permit resolution of the Federal Action first. That motion to stay was denied by interlocutory order signed by Judge Addy on August 24, 2018, and the order noted "No further delays in this case. Chief Admin Judge should set for trial (2 weeks max) as soon as practicable." (Notice of Appeal, Ex. 3).

In August 2018, the Estate of Keith S. Wellin (the "Estate") filed a Motion to Bifurcate or for Separate Trial seeking bifurcation of all validity issues associated with Mr. Wellin's June 27, 2014 Will and the amended and restated Keith S. Wellin Florida Revocable Living Trust executed June 27, 2014 ("2014 Revocable Trust"), to include (1) whether Mr. Wellin possessed sufficient mental capacity to execute both documents; and (2) whether Mr. Wellin's execution of the June 27, 2014 Will or the 2014 Revocable Trust was the result of undue influence, fraud, duress, or mistake (hereinafter collectively, the "Validity Issues"). The Estate moved to bifurcate because the Validity Issues undergird many – if not most – of the major allegations in this litigation, such that bifurcating the Validity Issues to be tried first would promote efficiency, economy and fairness. Moreover, trial of the Validity Issues first ensures that the state court fulfills the exclusive jurisdiction granted to it by the General Assembly to decide competing petitions for formal testacy – matters which could not ever be resolved in the Federal Action.

ISSUES DECIDED BY THE ORDER ON APPEAL

The primary order Appellants seek to appeal is Judge Addy's interlocutory decision to bifurcate the trial of this matter, which established that the first phase of trial will be comprised of the Validity Issues for all changes to Keith Wellin's estate plan from 2013-2014. (Notice of Appeal, Ex. 1, at 3-4)(the "Bifurcation Order"). Although the Bifurcation Order ruled on six (6) motions in total – four (4) motions seeking protection from certain depositions, a motion by Appellants for a status conference, and the Estate's Motion to Bifurcate – the Notice of Appeal

singles out ***only the bifurcation decision*** for this interlocutory appeal with its citation of *Morrow v. Fundamental Long-Term Care Holdings, LLC,* 412 S.C. 534, 537-40, 773 S.E.2d 144, 145-47 (2015) and accompanying parenthetical "holding order granting motion to bifurcate was immediately appealable because it affected a substantial right of appellant." (Notice of Appeal, p. 2 n.1 (also citing generally to S.C. Code Ann. § 14-3-330)). It is for good reason that Appellants have not tried to appeal the other discovery and status conference decisions by Judge Addy contained in the Bifurcation Order, because the law is well-settled those decisions are not immediately appealable. *See, e.g., Grosshuesch v. Cramer,*377 S.C. 12, 659 S.E.2d 112 (2008)(holding that "discovery orders, in general, are interlocutory and are not immediately appealable"); *Ex parte Wilson,* 367 S.C. 7, 625 S.E.2d 205 (2005)(finding an order quashing a subpoena duces tecum issued to a non-party is not immediately appealable because it neither involves the merits nor affects a substantial right); *Waddell v. Kahdy*, 309 S.C. 1, 419 S.E.2d 783 (1992)(holding an order requiring a party to submit to deposition is not immediately appealable); *Fulmer v. Cain,* 380 S.C. 466, 670 S.E.2d 652 (2008)(holding that the "mode of trial" exception to the general rule that only final orders are immediately appealable is confined to orders which abridge a party's constitutional right to trial by jury). As outlined below, this appeal must be dismissed because Judge Addy's bifurcation decision to try the Validity Issues first is not immediately appealable either.[3]

[3] Although Appellants' Notice of Appeal also attaches prior circuit court orders (entered October 20, 2017 and August 24, 2018) which rejected Appellants' repeated effort to stay the probate proceedings indefinitely while the Federal Action proceeds, Appellants admit those orders "are not ordinarily immediately appealable" unless "there is another appealable issue before the court." (Notice of Appeal, p. 2, Exs. 2-3). Because there is no other immediately appealable issue at this time, as outlined *infra*, these orders are not properly on appeal either.

ARGUMENT

The Bifurcation Order is a non-final, interlocutory order, and the law is well-settled that bifurcation is not an immediately appealable issue. *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000) (holding order bifurcating issue of exclusion under insurance contract from issue of occurrence was not appealable); *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 533 S.E.2d 575 (2000) (holding order bifurcating issues in contract case between liability and damages was not immediately appealable). Nevertheless, Appellants attempt to appeal the Bifurcation Order, citing § 14-3-330 and *Morrow* for their assertion that "the order affects a substantial right of Appellants." (Notice of Appeal, p. 2, n.1). Appellants have not endeavored to explain what "substantial right" they believe was impacted by the Bifurcation Order, and as outlined in more detail below, their citation to *Morrow* is inapposite because the "substantial right" *Morrow* sought to protect is not at stake here. Dismissal of Appellants' premature appeal of the Bifurcation Order is necessary because there is no statutory basis for their immediate appeal in this case – under *Morrow* or any other case law interpreting the General Assembly's § 14-3-330 definition of appealable interlocutory orders.

"Generally only final judgments are appealable." *Tillman v. Tillman*, 420 S.C. 246, 248-49, 801 S.E.2d 757, 759 (Ct. App. 2017); *see also Doe v. Howe*, 362 S.C. 212, 216, 607 S.E.2d 354, 356 (Ct. App. 2004) ("'Final judgment' is a term of art referring to the disposition of all the issues in the case."). An order like the Bifurcation Order in this case which "reserve[es] an issue, or leav[es] open the possibility of further action by the trial court before the rights of the parties are resolved, is interlocutory." *Tillman*, 420 S.C. at 248-49, 801 S.E.2d at 759 (*citing Ex parte Wilson*, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005)). The *only* interlocutory orders that may be appealed are those defined in the narrow exceptions of S.C. Code Ann. § 14-3-330:

> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
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> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
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> (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
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> (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. Code Ann. § 14-3-330 (1976 & Supp. 2014); *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005)("An order generally must fall into one of several categories set forth in that statute in order to be immediately appealable."); *see also Tillman*, 420 S.C. at 250-51, 801 S.E.2d at 760 (finding that "[t]o avoid circuitous litigation and needless appeals, we construe section 14-3-330 narrowly"). Narrow construction of § 14-3-330 furthers judicial economy by avoiding "piecemeal appeals." *Hagood*, 362 S.C. at 196, 607 S.E.2d at 709.

The South Carolina Supreme Court has repeatedly held that bifurcation orders are not immediately appealable under § 14-3-330, *Flagstar* and *Senter, supra,* yet Appellants claim Judge Addy's Bifurcation Order is immediately appealable because it "affects a substantial right of Appellants." (Notice of Appeal, p. 2, n.1)(citing generally to § 14-3-330). The Appellants' Notice of Appeal fails to differentiate Judge Addy's Bifurcation Order from those previously rejected for immediate appeal, and the Notice of Appeal fails to identify which of the § 14-3-330 "substantial right' subsections Appellants have invoked to support their appeal in this case. A

plain reading of the statute reveals Subsection (2)(a) to be the only "substantial right" provision of the statute even potentially applicable to the Bifurcation Order,[4] and Subsection (2)(a) was the only provision relied on by the Court in *Morrow*, to which Appellants have cited. (Notice of Appeal, p. 2, n.1 (citing *Morrow*, 412 S.C. at 539; 773 S.E.2d at 146)).

For an order to qualify as having impacted a substantial right under § 14-3-330(2)(a), it must be "[a]n order involving the merits . . . [that] finally determine[s] some substantial matter forming the whole or a part of some cause of action or defense in the case in which the order is entitled." *Duncan v. Gov't Emps. Ins. Co.*, 331 S.C. 484, 485, 449 S.E.2d 580, 580 (1994) (quoting *Knowles v. Standard Sav. & Loan Ass'n*, 274 S.C. 58, 59, 261 S.E.2d 49, 49 (1979)). Section 14-3-330(2)(a) does not permit the immediate appeal of just any pretrial order affecting a substantial right. Rather, the statutory language makes clear that an order affecting a substantial right is immediately appealable only "when such order would discontinue an action, prevent an appeal, ... or strike out an action or defense." *Mid-State Distribs. v. Century Imps.*, 310 S.C. 330, 334 n.4, 426 S.E.2d 777, 780 (1993).

None of these circumstances apply to the Bifurcation Order in this case, which simply orders the presentation of issues to the fact-finder for decision, extracting salient determinations - over which the state court has exclusive jurisdiction - to be decided first. No claims or defenses have been struck or pretermitted; the Bifurcation Order merely establishes the framework in which those claims and defenses will be presented. Importantly, the Validity Issues that Judge Addy slated to be tried first are the fundamental probate determinations that, according to the

[4] The Bifurcation Order did not "grant[] or refuse[] a new trial" or "strike[] out an answer or any part thereof or any pleading in any action," to invoke Subsection 2(b) or 2(c), respectively. Nor is the Bifurcation Order "[a] final order" that qualifies as immediately appealable pursuant to Subsection (3). Subsection 2(a) is the only potentially applicable statutory grant of immediate appealability here.

General Assembly, can only be determined within the exclusive jurisdiction of South Carolina state courts. The fact cannot be ignored that Appellants have chosen to pursue portions of this underlying litigation in ***two different cases*** proceeding simultaneously in state and federal court. Judge Addy's Bifurcation Order simply streamlines trial of the state court matter by ensuring the state court tries first that portion of the litigation that only it can: The validity of testamentary documents. As the Bifurcation Order notes, "bifurcation of the [Validity I]ssues will promote convenience, efficiency, and economy in that these issues can only be decided in state court and resolution of these issues will likely result in resolution of much of the federal litigation." (Bifurcation Order, p. 3). The Bifurcation Order does not impact a "substantial right" of Appellants as required by § 14-3-330(2)(a).

Nor can Appellants seek solace in the Supreme Court's *Morrow* opinion, which only found that the bifurcation order entered in that case was immediately appealable because it impacted the "'[t]he [substantial] right of the plaintiff to choose her defendant.'" *Morrow*, 412 S.C. at 539; 773 S.E.2d at 146 (parenthetically quoting *Neeltec Enters., Inc., v. Long*, 397 S.C. 563, 566, 725 S.E.2d 926, 928 (2012)). This case is not *Morrow*, where the trial court's order was plagued by a "material misunderstanding" of the Morrows' claims and improperly "conflate[d] the theories of vicarious liability and direct liability by determining the Morrows can move forward on their claims against the corporate defendants only if they first recover against Magnolia Place." 412 S.C. at 538; 773 S.E.2d at 146. There was no material misunderstanding of Appellants' claims by Judge Addy in this case, nor does the Bifurcation Order make the second phase of trial contingent on the first phase as did the trial court in *Morrow*. The Bifurcation Order merely establishes the order of issues to be tried; it does not treat certain claims as "dependent" upon other claims, "effectively grant[ing] . . . potential

summary judgment" on certain issues like in *Morrow*. 412 S.C. at 539; 773 S.E.2d at 146. Judge Addy's order contemplates that all of the issues will be tried at some point, but that some will be tried before others.

Perhaps most significant to the question of appealability in this case is what the Court explicitly ***refused*** to do in *Morrow*: It "decline[d] the . . . invitation to base our decision on the manner in which the motion was characterized—one of bifurcation" and set apart the bifurcation order in *Morrow* as "quite distinct from other orders of bifurcation which have come before this Court." 412 S.C. at 539-40; 773 S.E.2d at 147 (comparing *Morrow* to *Flagstar* and *Senter*, *supra*). The narrow tailoring of the *Morrow* opinion prevents it from serving as a blanket authorization to immediately appeal any bifurcation order, yet that is *exactly* the result that Appellants' Notice of Appeal urges in this case with its cursory citation to *Morrow* as authority to appeal an "order granting motion to bifurcate." (Notice of Appeal, p. 2, n.1). *Morrow* offers no reason to abrogate the Court's rejection of bifurcation as an immediately appealable issue in *Flagstar* and *Senter* and it does not elevate Judge Addy's Bifurcation Order for an immediate appeal.

Allowing Appellants to appeal the Bifurcation Order would impermissibly expand the reach of § 14-3-330(2)(a) to encompass a category of procedural orders that fall squarely within the trial court's discretion for trial management. *See* Rule 42(b), SCRCP ("The court, in furtherance of convenience . . . may order a separate trial of any . . . separate issue . . . ."); *Durham v. Vinson*, 360 S.C. 639, 644-45 n.2, 602 S.E.2d 760, 762 n.2 (2004) (finding the circuit court has discretion to bifurcate a trial). If bifurcation decisions are immediately appealable, no judge will ever consider bifurcating issues for trial even if it would serve the ends of justice; ordering bifurcation would virtually guarantee that a piecemeal appeal thwarts any forward

progress of a case toward resolution. It is for this very reason that immediately appealable interlocutory orders are the exception and not the rule under § 14-3-330. This case has already been delayed several years due to Appellants' efforts to stay the probate proceedings. *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. at 94, 529 S.E.2d at 13-14 ("[W]e believe avoiding piecemeal litigation is the best policy to follow. The current case reveals why such appeals are disfavored. ... Already the progress of this case has been delayed several years."). No further delay is warranted, and this Court's observation in *Tillman* is equally applicable here:

> Appellant's rights have yet to be finally determined by the circuit court. Appellant has not reached the end of the road, however long and winding he may have made it. The order is not immediately appealable.

Tillman, 420 S.C. at 251, 801 S.E.2d at 760.

CONCLUSION

For all of these reasons, the Beneficiary Respondents respectfully request that the Court dismiss the prematurely-filed appeal and allows this case to proceed toward trial in the Circuit Court.

Respectfully submitted,

GALLIVAN, WHITE & BOYD, P.A.

John T. Lay, Jr. (S.C. Bar No. 64526)
Gray T. Culbreath (S.C. Bar No. 11907)
John D. Hudson, Jr. (S.C. Bar No. 68646)
Lindsay A. Joyner (S.C. Bar No. 77437)
1201 Main Street, Suite 1200
Post Office Box 7368
Columbia, South Carolina 29202
(803) 779-1833
(803) 779-1767 (f)
jlay@gwblawfirm.com
gculbreath@gwblawfirm.com

jhudson@GWBlawfirm.com
ljoyner@GWBlawfirm.com

Attorneys for Respondent
Wendy C.H. Wellin, Individually

ADAMS AND REESE, LLP
John Beach, Esq.
Lyndey Z. Bryant, Esq.
1501 Main Street
5th Floor
Columbia, SC 29201

Attorneys for Respondent Hamilton College

BARNWELL WHALEY PATTERSON & HELMS, LLC
Marvin D. Infinger, Esq.
288 Meeting Street, Suite 200
Charleston, SC 29401

Attorney for Respondents Campbell Hart and Heather Lane

PROOF OF SERVICE

I, the undersigned Paralegal of the law offices of Gallivan, White & Boyd, P.A., attorneys for Wendy C. H. Wellin, individually, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) herein below specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

BENEFICIARY RESPONDENTS' MOTION TO DISMISS

Counsel Served:

Attorneys for Appellants Robert H. Brunson, Esq. Patrick Wooten, Esq. Merritt G. Abney, Esq. Nelson Mullins Riley & Scarborough P.O. Box 1806 Charleston, SC 29402	**Attorneys for Wendy C.H. Wellin, as Special Administrator and Trustee for the Keith S. Wellin Florida Revocable Living Trust** Robert H. Hood, Esq. James B. Hood, Esq. Molly H. Craig, Esq. Virginia Rogers Floyd, Esq. Hood Law Firm, LLC 172 Meeting Street Charleston, SC 29402
Attorneys for F. Patricia Scarborough, Esq. and Edward G.R. Bennett, Esq. M. Dawes Cooke, Jr., Esq. Barnwell Whaley Patterson & Helms, LLC PO Drawer H Charleston, SC 29402	**Attorneys for Hamilton College** John Beach, Esq. Lyndey Bryant, Esq. Adams and Reese, LLP 1501 Main Street, 5th Floor Columbia, SC 29201
Attorneys for Heather Lane and Campbell Hart Marvin D. Infinger, Esq. Barnwell Whaley Patterson & Helms, LLC PO Drawer H Charleston, SC 29402	**Attorneys for the Estate** F. Patricia Scarborough, Esq. Edward G.R. Bennett, Esq. Evans, Carter, Kunes & Bennett, P.A. PO Box 369 Charleston, South Carolina 29402

Melissa Lee Urch

Melissa Lee Urch
Paralegal

May 24, 2019