

**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

RECEIVED
JUN 05 2019
SC Court of Appeals

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

**MEMORANDUM ADDRESSING
THE ISSUE OF APPEALABILITY**

Respondent Wendy C.H. Wellin, in her representative capacities as Special Administrator and Trustee (collectively, the "Estate"), respectfully submits this memorandum addressing the issue of appealability as requested by this Court's May 23, 2019 correspondence to the parties. On May 23, 2019, this Court wrote to all parties regarding its preliminary assessment that the

orders challenged on appeal may not be appealable. Prior to the Estate's receipt of the Court's correspondence, the Estate filed a Motion to Dismiss this appeal. Mrs. Wellin, individually, also filed a Motion to Dismiss the appeal prior to receiving the Court's correspondence. Both Motions to Dismiss, which appear to have crossed in the mail with this Court's letter requesting memoranda on the issue of appealability, outline why the orders challenged on appeal are not appealable at this time.

The Estate responded to this Court's request for memoranda initially on May 29, 2019, identifying its earlier Motion to Dismiss which addresses the issue of appealability and offering to submit the same in a different format if the Court so preferred. Having not received any further correspondence on this matter, the Estate separately submits this memorandum addressing the issue of appealability to ensure compliance with the Court's request.

The Court's preliminary assessment is correct: The orders challenged on appeal are not appealable at this time under S.C. Code Ann. § 14-3-330. The Appellants have appealed an interlocutory order issued by the Honorable Frank R. Addy, Jr. ruling upon several procedural motions which addressed discovery and scheduling issues aimed at moving forward with a phased trial on the merits to determine the validity of Keith S. Wellin's estate plan, including his will and related revocable trust. They also seek review of two prior interlocutory orders in which the Honorable J.C. Nicholson, Jr. lifted a stay of the probate litigation and Judge Addy declined to reinstate the stay. These orders do not include any final ruling on any issue on the merits of this probate action. Appellants should not be allowed to further delay this matter by pursuing a piecemeal appeal of discretionary procedural rulings. The grounds for this memorandum are more fully set forth herein.

PROCEDURAL HISTORY

The decedent in this probate matter, Keith S. Wellin, died on September 14, 2014, at the age of 88, as a resident of Charleston County. His surviving spouse is Respondent Wendy C. H. Wellin, to whom he was married in 2002. Mr. Wellin had three adult children from a prior marriage, Peter J. Wellin, Cynthia W. Plum and Marjorie W. King, the Appellants in this matter.

Mr. Wellin was a businessman who amassed significant wealth as an entrepreneur and Wall Street investor. As might be expected of any wise businessman, Mr. Wellin retained and consulted with tax and estate planning attorneys regarding his plans for distributing his assets. In addition to executing a last will and testament, over his lifetime Mr. Wellin also executed other documents creating trusts and a family partnership to manage his assets during his life and upon his death.

After Mr. Wellin's death, Mrs. Wellin filed a Petition for Formal Probate and an Application for Informal Appointment of Personal Representative in the Charleston County Probate Court presenting for probate her husband's Last Will and Testament, executed June 27, 2014. By separate Application, Mrs. Wellin was appointed as Special Administrator of her husband's estate on September 17, 2014. The Appellants opposed the probate of the June 27, 2014 Last Will and Testament and petitioned the Court to probate an older will executed by their father on August 11, 2011.¹ The Appellants challenge the validity of the June 27, 2014 Last Will and Testament on the grounds that (1) Mr. Wellin lacked capacity to execute the June 27, 2014 Will; (2) the Will was the product of undue influence exerted by Mrs. Wellin; and (3) the Will is

¹ Mr. Wellin executed three other sets of estate planning documents in 2013-2014. Thus, under the Probate Code, S.C. Code § 62-3-407, the Appellants will have to prove the invalidity of each of those documents sequentially in order to succeed in their battle to proceed with probate under the August 11, 2011 will.

the product of duress, fraud, or misrepresentation. Thereafter, Mr. Wellin's children filed a motion for removal, and the Petition for the Formal Probate of the will was removed to Circuit Court in October 2014.

In addition to this probate action, there are other pending actions in federal court regarding related matters. These federal actions include a 2013 action initiated by Mr. Wellin, before his death, asserting claims against his children for mismanagement and breach of fiduciary duties in connection with certain estate planning entities he had established; a 2013 action initiated by a Trust Protector against the Wellin Children; and a 2014 action initiated by the Wellin Children asserting a multitude of tort claims against Mrs. Wellin individually and challenging the validity of Mr. Wellin's amendments to his Revocable Trust.

In January 2015, the Wellin Children moved to stay this state court probate action based on their claim that resolution of the federal action would resolve the issues in the will contest. By order of July 2, 2015, the Circuit Court granted the motion to stay. However, after several years of protracted discovery practice and no major progress toward resolution in the federal action the Estate filed a Motion to Lift the Stay in 2017. By order of October 20, 2017, Judge Nicholson granted the motion and lifted the stay, stating: "Having been over two (2) years since this matter was originally stayed by the Court, this Court concludes that the interest of justice is best served by lifting the stay to permit the probate of the Last Will and Testament of Keith S. Wellin." The Appellants filed another motion to stay this state probate action on May 1, 2018, which was denied by Judge Addy on August 24, 2018. In his Form 4 Order, Judge Addy ordered that there be no further delays of this case.

After the stay was lifted, the Appellants amended their pleadings to add their challenges to Keith Wellin's Revocable Trust amendments, as well as their federal court tort claims.²

Various motions were filed. On December 4, 2018, the Supreme Court appointed Judge Addy with exclusive jurisdiction to hear and dispose of this case. On May 15, 2019, Judge Addy issued an order ruling on five pending motions, to wit:

- On February 23, 2018, Appellants made a motion for a status conference to plan logistics for an anticipated 8-10 weeks of trial. Judge Addy essentially denied the motion; instead, he explained that he had consulted with Judge Norton (who presides over the related litigation in federal court), who agreed the actions pending in state court should be tried prior to the federal action in order to promote judicial economy. Per Judge Addy's order, the case is to be tried in June 2019, and it will be limited to two weeks.
- On August 17, 2018, the Estate made a motion to bifurcate a trial on the issues of the validity of the June 27, 2014 Will, and the restated Revocable Trust executed that same day. Judge Addy granted the motion, ruling that he will try validity issues including whether Mr. Wellin had testamentary capacity to execute the June 27, 2014 Will and related Revocable Trust and whether his execution of the Will or Revocable Trust was the result of undue influence, fraud, duress, or mistake. However, Judge Addy refused to limit the bifurcation of these issues as to only the June 27, 2014 documents; instead, the circuit court will try the issues of duress/undue influence and testamentary capacity for all changes to Keith Wellin's estate plan from 2013-2014, stating:

² The Appellants assert tort claims against Mrs. Wellin, individually, for defamation, interference with inheritance, interference with prospective economic advantage, breach of fiduciary duty, breach of prenuptial agreement, breach of contract accompanied by a fraudulent act, barratry, and negligence.

[T]he trial will decide the issues of undue influence and testamentary capacity for the relevant period of time. Of course, the Wellin children will be entitled to present all evidence concerning the prior estate plan, the circumstances surrounding its formulation and execution, plan, and the jury will ultimately decide which estate plan and/or revocable trust controls.

- On October 16, 2018, Mrs. Wellin, individually, made a motion for a protective order and to quash any further deposition of her in state court, in light of the extensive deposition already given by her in the related federal court litigation. Judge Addy declined to completely prevent any further depositions of Mrs. Wellin; however, he did limit any further deposition to only six additional hours.
- On October 31, 2018, non-party attorneys, Patricia Scarborough and Edward Bennett, made a motion to quash subpoenas and for protective orders from any further depositions in state court, in light of the extensive depositions already given by them in the related federal court litigation. Judge Addy granted their motion.
- On January 9, 2019, the Estate made a motion for a protective order to object to a subpoena issued for materials from a consulting expert retained in separate, though related federal litigation. Judge Addy denied that motion and ordered production.

Appellants have appealed from Judge Addy's Order of May 15, 2019, and also from the prior orders of October 20, 2017, and August 24, 2018.

ARGUMENT – LACK OF APPELLATE JURISDICTION

Appellate jurisdiction is granted to review final judgments and such interlocutory orders as specifically provided by statute, S.C. Code § 14-3-330:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

- (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;

(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;

(3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and

(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.

Respondent have moved for dismissal of the appeal on the ground that there is no final judgment and none of the interlocutory rulings in the orders of May 15, 2019, October 20, 2017, and August 24, 2018 fall within the jurisdiction of Section 14-3-330.

I. There is no appellate jurisdiction for immediate review of discretionary rulings pertaining to motions to stay litigation.

Neither Judge Nicholson's order of October 20, 2017, lifting the stay, nor Judge Addy's order of August 24, 2018 Order, denying the motion to reinstate the stay are immediately appealable under any provision of Section 14-3-330. *Edwards v. SunCom*, 369 S.C. 91, 93, 631 S.E.2d 529, 530 (2006) (order granting a stay not immediately appealable); *Carolina Water Serv., Inc. v. Lexington Cty. Joint Mun. Water & Sewer Comm'n*, 373 S.C. 96, 98, 644 S.E.2d 681, 682 (2007) (order lifting a stay not immediately appealable).

Appellants openly acknowledge that Judge Nicholson and Judge Addy's stay orders are not immediately appealable. However, by a footnote in their Notice of Appeal, they preemptively claim that these orders are appealable because there is another appealable issue

before the court. As discussed below, none of the interlocutory rulings encompassed in Judge Addy's order of May 15, 2019 are immediately appealable under Section 14-3-330.

II. No jurisdiction for immediate review of discovery orders.

It is well settled that discovery orders are interlocutory and not immediately appealable. *Hamm v. S.C. Pub. Serv. Comm'n*, 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994); *Ex parte Whetstone*, 289 S.C. 580, 347 S.E.2d 881 (1986). Therefore, there is no jurisdiction to review Judge Addy's rulings on the motions for protection filed by Mrs. Wellin, individually, the Estate or non-party Attorneys Bennett and Scarborough.

III. No jurisdiction for immediate review of bifurcation orders.

The law is equally well-settled that discretionary rulings on bifurcation motions are not immediately appealable. *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).

Based on a footnote in their Notice of Appeal, Appellants would appear to take the preemptive position that Judge Addy's bifurcation decision is immediately appealable under S.C. Code Ann. § 14-3-330(2) and *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 537–40, 773 S.E.2d 144, 145–47 (2015), because the order supposedly affects their substantial rights. In the footnote, Appellants have not articulated what "substantial right" has been affected by the bifurcation ruling; however, as outlined in more detail below, Respondent submits that citation to *Morrow* is inapposite because Judge Addy's order does not affect any "substantial right" comparable to *Morrow*.

The opinion in *Morrow* arose from a nursing home negligence action which included claims of corporate negligence as well as vicarious liability against numerous corporate entities. The corporate entities moved to bifurcate trial on the nursing home negligence claims separate from the corporate negligence claims, and to stay discovery related to the corporate negligence claims. In granting the motion, the trial court ruled that the claims for corporate negligence could not proceed without first proving negligence against the nursing home. While acknowledging the precedent on appealability of bifurcation orders, the Court held that the trial court's ruling was not in the nature of the usual procedural bifurcation ruling, but instead, affected a substantial right of the petitioners, under § 14-3-330(2)(a), because the trial court's ruling had effectively granted summary judgment against the plaintiff on the merits of issues of direct corporate liability.

Respondent maintains that Judge Addy's ruling on bifurcation does not make any comparable ruling on the merits that affects any substantial rights in this probate action. The bifurcation order simply directs that the issues of validity of the will(s) – over which the state court has exclusive jurisdiction – and revocable trust(s) be presented to the fact-finder for decision first.

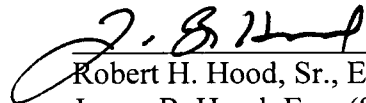
Separate from any of the pending federal litigation and whatever may be the overlapping, interrelated facts and legal issues, *this action* was removed to circuit court by the Appellants on petition for formal probate to determine the validity of Mr. Wellin's will. *This action* was amended by the Appellants to add validity issues surrounding their father's amendments to his revocable trust. While the Appellants have raised other issues and assert assorted and varied counterclaims in this probate action, the court needs to resolve the core issue of validity of the will(s) over which the state court has exclusive jurisdiction, and the related revocable trust amendments. This case has already been delayed several years due to the first stay granted to

defer to the pending federal litigation, but that federal litigation has been dragged out with no resolution yet of any merits. Under the circumstances, Judge Nicholson wisely lifted that stay to move this probate action forward, and Judge Addy wisely continues in the same vein.

CONCLUSION

Mr. Wellin died in 2014, yet five years later there still has been no determination of the validity of his last will and testament and the estate plan he intended to handle management and distribution of his assets. No further delay is warranted with a piece-meal appeal of these interlocutory orders. For all of these reasons, as well as the reasons presented in the Estate's Motion to Dismiss, and in Mrs. Wellin's Motion to Dismiss, the Estate respectfully submits that the orders challenged on appeal are not appealable at this time.

Respectfully submitted,



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June 3, 2019

THE STATE OF SOUTH CAROLINA
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J.C. Nicholson, Jr., Circuit Court Judge

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Respondents.

In the Matter of: Keith S. Wellin

Certificate of Service

The undersigned certifies that on this 3rd day of June, 2019, a copy of the Memorandum Addressing the Issue of Appealability on behalf of Respondent Wendy C.H. Wellin, in her representative capacities as Special Administrator and Trustee (collectively, the "Estate"), 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:

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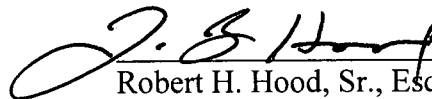
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June 3, 2019

June 3, 2019

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

Re: Wendy C.H. Wellin 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 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
In the Matter of: Keith S. Wellin
Case No. 2014-CP-10-07038, Charleston CP
Appellate Case No. 2019-000833
HLF File No. 528.000

Dear Ms. Kitchings:

Enclosed please find the original plus seven (7) copies of the Estate's Memorandum Addressing the Issue of Appealability in the above matter, along with the Certificate of Service. I am serving all counsel of record with copies of each. Please return a clocked-in copy of each in the envelope provided.

Kind regards,

Yours truly,


James B. Hood

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Enclosure(s)

cc: Robert H. Brunson, Esquire/Merritt G. Abney, Esquire/Patrick C. Wooten, Esquire
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