THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Frank Addy, 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 Marjory 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.

APPELLANTS' RETURN TO RESPONDENTS' MOTIONS TO DISMISS[1]

Pursuant to Rule 240, SCACR, and in response to the Clerk's letter dated May 23, 2019 requesting memoranda regarding the appealability of the orders challenged on appeal, Appellants file this Return to the various Respondents' Motions to Dismiss. Those motions should be denied because the matters challenged in this appeal are properly before this Court. Appellants' Notice of

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[1] Appellants request the Court to permit this Return to serve also as Appellants' memorandum in response to the Clerk's letter of May 23, 2019 requesting memoranda addressing the appealability of the Orders Appellants have challenged on appeal.

Appeal challenges three of the circuit court's orders: (1) an order that, among other things, set a truncated two-week trial in which Appellants may not assert their claims and the jury may not consider them, but which the circuit court nevertheless intends to be dispositive of certain of their claims; (2) an order granting one Respondent's motion to lift a stay in this case; and (3) an order denying Appellants' motion to reinstate a stay in this case. As explained more fully below, the first of these three orders is immediately appealable because it deprives Appellants of substantial rights, deprives them of a mode of trial to which they are entitled, denies them the right to be the architects and masters of their case, and limits the relief available to them. The latter two orders may also be considered on appeal to conserve the resources of the lower court and the litigants by avoiding later, unnecessary litigation.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND[2]

This appeal arises from a dispute over a multi-hundred million dollar estate left by the decedent Keith S. Wellin ("Keith"). Appellants are Keith's three adult children of his first wife: Peter J. Wellin, Cynthia Plum, and Marjorie King (collectively "the Wellin Children" or "Appellants"). Respondents include Wendy C.H. Wellin ("Wendy"), who was Keith's fourth wife and is the Special Administrator of the Estate, her two daughters, and Hamilton College.

Keith amassed substantial wealth during his lifetime and made extensive arrangements to convey the bulk of his estate to his children, with whom he had always had a close and loving relationship. In the summer of 2013, however, Keith, who was then in very poor health, became convinced that his children had "stolen" millions of dollars from him. Subsequently, Keith sued his children multiple times in various venues and largely disinherited them. With various lawsuits

[2] A more complete recitation of the facts is set forth in *Wellin et al. v. Wellin*, Ct. App. Op. No 5608 (May 29, 2019), *available at* 2019 WL 2313587, which is a recently-decided appeal in a related matter arising from a dispute between the same parties.

still ongoing in federal court, Keith died on September 14, 2014. The next day, Wendy submitted his final will (dated June 27, 2014) for probate in the Probate Court for Charleston County. On October 20, 2014, the Wellin Children removed the probate action to the circuit court and counter-petitioned the circuit court to probate the 2011 version of Keith's will because the subsequent versions were executed at times when Keith lacked capacity and was subject to Wendy's undue influence. At the same time, the Wellin Children sued Wendy in federal court for various tort and breach of contract claims seeking damages arising from, among other things, Keith's decisions in the final year and a half of his life to sue and disinherit his children, to transfer nearly $30 million dollars of assets *inter vivos* to Wendy, and to attempt to undo much of his prior transfers of wealth to his children .[3]

The Wellin Children's challenges to the validity of Keith's estate planning documents on the grounds of incapacity and undue influence are based on virtually the same evidence as the Wellin Children's tort and breach of contract claims against Wendy. In short, the Wellin Children are challenging the validity of Keith's estate planning documents on the grounds that Wendy convinced Keith—when his capacity was diminished—that his children stole from him, and the Wellin Children assert various tort and breach of contract claims against Wendy based on essentially this same theory, but with damages arising not from the will—which passed nothing—but from *inter vivos* transfers Keith made, revisions to his non-probate revocable trust, and other actions Keith took to harm the financial well-being of his children and grandchildren.

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[3] These claims include defamation, intentional interference with inheritance, intentional interference with prospective economic relations, breach of fiduciary duty, breaches of the prenuptial agreement, breach of contract accompanied by a fraudulent act, barratry, and negligence per se. It is important to note that the claims against Wendy seek damages for actions that are unrelated to Keith's will which is being probated. The will passed no assets, and the estate has little or no assets.

In light of the pending federal court action between the Wellin Children and Wendy, the circuit court issued an order on July 6, 2015 granting the Wellin Children's motion to stay the state court action, ruling: "In the absence of a stay, the parties would be forced to litigate the overlapping issues in this action and in the Federal Action, which would create the risk of inconsistent judgments and waste the resources of this Court and the parties." *See* Order at 2–3 (attached as **Exhibit A**). While the state court action was stayed, the federal suit moved steadily toward trial. In the federal action, the parties have taken more than 120 depositions, disclosed more than two dozen expert witnesses, and had dozens of hearings and status conferences before Judge Norton and the Special Master to assist with the extensive motions practice. More than 2,000 ECF entries have been entered in the federal litigation.

On June 30, 2017, Wendy as Special Administrator ("the Estate") filed a motion to lift the stay in the state circuit court action. The circuit court subsequently granted the motion over the Wellin Children's objections. The Wellin Children, concerned about potential preclusive effect on their claims against Wendy should the state court proceed to trial first, subsequently sought and obtained an order allowing them to amend their pleading in the state circuit court action to assert counterclaims against Wendy that mirror the claims they are asserting against her in federal court. Since the stay was lifted, the Estate, Wendy, and Hamilton College have aggressively pursued a strategy to procure a partial trial in the state circuit court focused solely on the issues of whether Keith lacked capacity and was under undue influence when he executed his final will and trust on June 27, 2014—that is, the issues with the most difficult burden for the Wellin Children—with the express intention of using the outcome in the partial trial to preclude the Wellin Children from pursuing their tort and breach of contract claims against Wendy in the state and federal court actions—that is, the claims with the most favorable burden for the Wellin Children.

On May 2, 2018, the Wellin Children again moved to stay the state court action pending the outcome of the federal litigation, on the grounds that, among other things, Judge Norton had capably handled the federal litigation for five years and was intimately familiar with the issues in this litigation, whereas no state court judge had any familiarity with this litigation. On August 22, 2018, Judge Addy, who was serving as a visiting judge hearing motions in the Ninth Circuit Court of Common Pleas, heard and denied the Wellin Children's motion to stay based primarily on the age of the case. Although the length and mode of trial was not before him, Judge Addy stated at the hearing on the motion to stay that he would recommend to Judge Young, the Chief Administrative Judge, that the trial of this action be limited to two weeks. As Judge Addy acknowledged, however, his recommendation was not based on the anticipated number of witnesses, the anticipated length of their testimony, or any other facts bearing on the expected length of trial—indeed, Judge Addy did not have any of this information—but rather was based on his belief that limiting the trial to two weeks would drive the parties to settle. *See* Hearing Tr. at 31:9 to 32:6 (Aug. 22, 2018) (attached as **Exhibit B**). Judge Addy also stated that, while federal judges might be willing to try the case for eight weeks, no state court judge would be willing to try the case for this long. *Id.* at 12:14-19. The next day, Judge Addy signed a Form 4 Order denying the Wellin Children's motion to stay, and he handwrote in the margin of the Order: "No further delays in this case. Chief Admin judge should set for trial (2 weeks max) as soon as practicable." Order (attached as **Exhibit C**).

On December 4, 2018, the Chief Justice assigned Judge Addy to the state court Wellin case. On February 12, 2019, Judge Addy held a hearing on a number of pending motions, including (i) the Wellin Children's motion for a status conference and scheduling order, which requested

Judge Addy hold a hearing regarding the appropriate length of trial based on the facts of this case, and (ii) the Estate's "Motion to Bifurcate or for Separate Trial of Validity Issues."

In its memorandum in support of its motion to "bifurcate" trial, the Estate (*i.e.*, Wendy) asked the Court to hold a trial only on the claims that present the Wellin Children with the most onerous burden of proof—namely, the claims relating to whether Keith's will and revocable trust are invalid by virtue of incapacity or undue influence. *See* Memorandum in Support of Motion to Bifurcate (attached as **Exhibit D**). The truncated trial of severed claims the Estate requested would not include the Wellin Children's tort and breach of contract counterclaims against Wendy which, though based on the same evidence, have a lower standard of proof. The Estate argued that severing the claims in this way would "streamline" the remainder of the case and that the first trial (with the more onerous standard for the Wellin Children) "could be dispositive of the entire case." *Id.* at 7. Further, the Estate argued in its memorandum that the severed trial with the more onerous burden for the Wellin Children could be dispositive of "the Wellin Children's individual tort claims against Mrs. Wellin relating to her alleged involvement with or influence over Keith and his estate planning." *Id.* at 8. Likewise, Wendy's counsel argued at the hearing on the motion that, if Wendy and the Estate are successful during the severed trial, "it eviscerates the lawsuit" as to "virtually every cause of action that" the Wellin Children have against Wendy. *See* Hearing Tr., at 27:25–28:1 (Feb. 11, 2019) (attached as **Exhibit E**). Finally, although South Carolina law provides that "[a] trial should be bifurcated only if the issues are *so distinct* that trial of each alone would not result in injustice," *Creighton v. Coligny Ltd. P'ship*, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct. App. 1998) (emphasis added), the Estate attempted to turn this law on its head, arguing that the Court should bifurcate because the issues to be bifurcated are *not distinct from*—but, instead, permeate—the remaining claims. *See id.* at 8:17–19 (arguing the Court should bifurcate because

"Keith Wellin's capacity and issues surrounding the same permeate the claims between the parties in both this action in state court and also the federal court litigation").

In opposing the Estate's motion, the Wellin Children argued the Court should not sever the issues of capacity and undue influence because the Wellin Children's tort and breach of contract claims against Wendy are based on the same evidence as the Wellin Children's challenges to Keith's estate planning documents on incapacity and undue influence grounds.[4] *See* Memorandum in Opposition (attached as **Exhibit F**). Further, the Wellin Children argued that severing the trial in the way proposed by the Estate could only have two potential outcomes: (1) in the second trial, all the same evidence from the first trial is introduced again, resulting in a colossal waste of resources, or (2) in the second trial, Wendy will argue, as she did successfully in support of the motion, the Wellin Children are precluded from pursuing their claims against Wendy or from introducing the evidence relevant to those claims. Thus, the Wellin Children argued, the Estate's proposed mode of trial is either (1) massively inefficient or (2) massively prejudicial to the Wellin Children's right to pursue their claims against Wendy.

Judge Addy took the Estate's motion under advisement. At the hearing, however, he made clear that he would not sever the issue of undue influence from the Wellin Children's claims against Wendy because of the extent to which the issue of undue influence is overlapping with the Wellin Children's claims against Wendy. *See* **Exhibit E** at 41:16–17 (stating "I wouldn't be

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[4] The South Carolina District Court, applying Federal Rule of Civil Procedure 42 on bifurcation, which is substantially identical to South Carolina Rule of Civil Procedure 42, has held that separability of the issues "constitutes a threshold inquiry" on a motion to bifurcate, and "the issues must be truly separable before separate trials can be ordered without the risk of untoward consequences." *Dodgeland of Columbia, Inc. v. Federated Mut. Ins. Co.*, No. CV 3:09-1190-JFA, 2009 WL 10710815, at *2 (D.S.C. July 15, 2009). Further, "bifurcation is 'improper where the issues are so closely interwoven that plaintiff would have to present the same evidence twice in separate trials. In such circumstances, judicial economy is fostered by a single trial.'" *Id.* (quoting 8 Moore's Federal Practice 3d § 42.20[7][c]).

bifurcating undue influence because that's the crux of your case."); *id.* at 41:25 – 42:2 (stating to the Wellin Children's counsel: "So if you're talking or worried about undue influence, hey, we're not going to have any evidence of undue influence [in the bifurcated trial]"). Indeed, Judge Addy recognized how devastating to the Wellin Children it would be if he severed undue influence from the Wellin Children's claims against Wendy, stating:

> But if I were to do that – you know, if I were to bifurcate, I wouldn't lift [undue influence from the remainder of the case] because that means they'll do it in one step and it has an effect. ***That's your entire case.***

Id. at 42:23 – 43:1 (emphasis added).[5]

Notwithstanding Judge Addy's assurance at the hearing that he would not bifurcate the issue of undue influence from the Wellin Children's claims against Wendy, Judge Addy issued an Order on May 15, 2019, doing just that. In its Order, the circuit court stated:

> This Court will try the issues of undue influence and testamentary capacity for all changes to Keith Wellin's estate plan from 2013-2014 in state court. Put another way, the 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 formation and execution, plan and the jury will ultimately decide which estate plan and/or revocable trust controls.

Order at 4 (attached as **Exhibit G**). Moreover, in the Order, the circuit court declined to hold a hearing to determine the length of trial that would be needed to permit the parties to adequately present their evidence and pursue their claims. Instead, the court imposed an arbitrary two-week cap on the length of trial and stated it would begin at an unspecified date in June 2019. Stated differently, the Order sets a trial in which the parties are to submit all the evidence (or at least

[5] The circuit court also stated that, if the parties did not waive their right to a jury trial, "we're not going to bifurcate." **Exhibit E** at 25:25 – 26:1. He then said that this was only his "initial default setting" and that "perhaps . . . we would" bifurcate a jury trial. *Id.* at 26:3–4.

however much they can squeeze into a two-week trial) relating to Keith's estate plan and the changes to it, but the jury will be permitted to decide *only* the two issues that present the Wellin Children with the most onerous standard of proof—Keith's capacity and Wendy's undue influence—and not their tort and breach of contract claims against Wendy that are subject to a lower standard of proof.

Even worse, the circuit court stated this severed, truncated trial will likely dispose of at least some of the Wellin Children's claims, which would not be presented to the jury in the initial phase. *See id.* at 4 (stating this phasing of trial is intended to "promote convenience, efficiency, and economy" and that the "resolution of these issues will likely result in resolution of much of the federal litigation").[6] Of course, severing the issues in this manner will promote efficiency and economy *only* if the first phase of trial has a preclusive effect on the remaining claims. That is, if the circuit court intended to permit the Wellin Children to fully pursue their claims against Wendy during the second phase of trial regardless of the outcome of the first phase of trial, then the circuit court could not possibly have found that the bifurcation will "promote convenience, efficiency, and economy."

Upon receiving the Court's May 15, 2019 Order, the Wellin Children immediately appealed lest their ability to appeal be lost forever.[7]

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[6] The claims the Wellin Children are pursuing against Wendy in the federal litigation are precisely the same claims the Wellin Children are pursuing against Wendy in the state litigation.

[7] *See Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997) (stating a party that fails to appeal an order affecting a substantial right waives the right to appeal it later); *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985) (holding the failure to immediately appeal a ruling affecting the mode of trial and a substantial right meant the appeal was waived); *Bateman v. Rouse*, 358 S.C. 667, 675, 596 S.E.2d 386, 390 (Ct. App. 2004) (purpose of immediate appeal on right to particular mode of trial is to preserve party's constitutional right to jury trial which would otherwise be lost).

ARGUMENTS

I. The May 15, 2019 Order setting a truncated trial in which the Wellin Children may not pursue their claims but may nevertheless lose them is immediately appealable.

The appealability of an interlocutory order is governed primarily by S.C. Code Ann. § 14-3-330, which permits the immediate appeal of certain interlocutory orders, including those involving the merits, affecting a substantial right, or effectively striking out a portion of a pleading:

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

S.C. Code Ann. § 14-3-330.[8] The Supreme Court has explained that subsection 14-3-330(2) permits the immediate appeal of orders affecting the "mode of trial," including orders that deny or limit a party's jury trial right, orders that prevent a party from trying a case using counsel of their choosing, and orders that limit a party's ability to be the master and architect of its own case. *See, e.g., Hagood v. Sommerville*, 362 S.C. 191, 198, 607 S.E.2d 707, 710 (2005) (collecting cases); *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539, 773 S.E.2d 144, 146 (2015). As explained more fully in the arguments that follow, the circuit court's Order dated May 15, 2019 is such an order and is immediately appealable on the basis of at least two of the rulings contained therein, either of which is sufficient to allow an immediate appeal of the order.

[8] The Court of Appeals' jurisdiction to consider appeals from interlocutory orders is the same. *See* S.C. Code Ann. § 14-3-330.

A. The circuit court's "bifurcation" ruling, just like the one in *Morrow*, is immediately appealable because it would deprive the Wellin Children of a substantial right.

Garden-variety bifurcation orders typically are not immediately appealable. The circuit court's "bifurcation" in this suit, however, is no ordinary bifurcation order. Indeed, the Order in this case is not even a bifurcation order because it does not define a second phase, only a single truncated trial on severed claims. It is analogous to the order in *Morrow*, in which the Supreme Court held a "bifurcation" order was immediately appealable because it effectively granted "potential" summary judgment on certain issues not included in the truncated trial and deprived plaintiffs of their substantive right to be the architects of their case. *See Morrow*, 412 S.C. at 539, 773 S.E.2d at 146,

In *Morrow*, the plaintiffs sued a nursing home and its parent companies for injuries sustained by Mr. Morrow. Plaintiffs alleged the parent companies were vicariously liable for the nursing home's alleged negligence *and* were directly liable for their own alleged wrongdoing in underfunding the nursing home. The trial court ordered a "bifurcated" trial with a first phase in which only "trial on the nursing home negligence claims could go forward, and only if the Morrows were successful, a new jury could hear the corporate negligence claims in a later proceeding." *Morrow*, 412 S.C. at 536, 773 S.E.2d at 145.

The Morrows appealed, and the Supreme Court ruled the trial court's order—though it was styled as one for bifurcation—was immediately appealable because it "affects a substantial right." *Id.* at 538, 773 S.E.2d at 146. Specifically, the Supreme Court focused on the trial court's express intent and erroneous belief that the first phase of trial could and should resolve other claims that were not asserted in that trial or considered by that jury and which were not derivative of the claims that actually were pursued and resolved by the jury:

> By considering the Morrow's claims against the [parent companies] as dependent upon their claim against Magnolia Place, the trial court's order effectively grants the [parent companies] potential summary judgment on the issues of direct corporate liability.
>
> Accordingly, we find the trial court's order fits neatly within the statutory provision allowing immediate appeals where a substantial right is implicated. S.C. Code Ann. § 14-3-330(2)(a). The effect of this order is to prevent the Morrows from being architects of their own complaint, and deprives them of bringing their case against the defendant of their own choosing.

Id. at 539, 773 S.E.2d at 146 (footnotes and citation omitted). Stated differently, the immediately appealable error in *Morrow* was that the trial court intended for one trial before one jury on one set of claims against one party to be potentially dispositive of a different set of claims against different parties implicating potentially different standards and burdens of proof.

The Order here commits the same error. The Order expressly contemplates and intends that the outcome of a jury trial where no claims against Wendy are tried or decided by the jury will be dispositive of the Wellin Children's claims against Wendy. The truncated and severed jury trial will involve the issues of capacity and undue influence with one set of standards and may be dispositive of claims against Wendy that would therefore never be tried to a jury and that involve different elements and different (and less rigorous) standards. *See* Order at 3–4 (**Exhibit G**) (stating the circuit court's expectation and intent that the resolution of the two hand-picked issues in the "phase 1" trial "will likely result in resolution of much of the federal litigation"). Thus, the circuit court's order provides Wendy, who will have no claims tried against her, with "potential" summary judgment without ever facing a jury trial, just as the circuit court's order in *Morrow* provided the corporate parents, who would have had no claims tried against them in the first phase of trial, with "potential" summary judgment without ever facing a jury trial. Indeed, if the circuit court's Order promotes "convenience, efficiency, and economy," as it claims to do, *see* Order, **Exhibit G**, at 4, then the Order *must* intend for severed trial to be dispositive of some or all of the

Wellin Children's claims against Wendy. The only alternative would be for the severed trial not to be dispositive of any of the Wellin Children's claims against Wendy, in which case the Order would require the parties to have essentially the same trials with the same evidence two or more times but with different claims and different juries. This cannot possibly be what the circuit court intended, particularly where the circuit court specifically stated that the order would result in "convenience, efficiency, and economy," and specifically stated that the first phase of trial "will likely result in resolution of much of the federal litigation." *Id.* at 4.[9]

Notably, during the oral argument in *Morrow*, the South Carolina Supreme Court asked counsel for the parent corporations—*i.e.*, the parties who had obtained the "bifurcation" order and who were arguing that it was not immediately appealable—whether he would stipulate that, if the plaintiffs lost the first phase of trial, the plaintiffs nevertheless would have the right to pursue their claims against the corporate defendants. *See* Oral Argument Tr., at 19:25 – 20:6 (January 13, 2015) (attached as **Exhibit H**). Respondent's counsel would not so stipulate. *See id.* at 20:5. Here, Wendy not only refuses to stipulate that the Wellin Children will be permitted to pursue all their claims against her even if the Wellin Children lose the first phase of trial, Wendy argues that the Wellin Children losing the first phase of trial would "eviscerate[] the lawsuit" as to "virtually every cause of action that" the Wellin Children have against Wendy. *See* **Exhibit E**, at 27:25 – 28:1; *see also* Memorandum in Support of Motion to Bifurcate (attached as **Exhibit D**), at 7 (Wendy as Special Administrator arguing that the first trial "could be dispositive of the entire case").

This truncated trial of severed claims could wrongly result in disposition of many of the Wellin Children's claims and counterclaims arising from at least a dozen challenged transactions

[9] The Wellin Children's claims against Wendy in federal court are the same as their claims against Wendy in state court.

which the Wellin Children claim were the result of Wendy's tortious misconduct, which overlaps largely with her undue influence of Keith in his estate planning. Several examples should suffice:

- The truncated and severed trial would include evidence relating to Keith's abrupt transfer of $4.5 million to Wendy in April 2013 to buy a beach house. This incident and the evidence related to it is highly relevant to the issues of undue influence and testamentary capacity, *i.e.*, it demonstrates the way in which Wendy began to overtake Keith's will and eventually turned him against his children in the Spring and Summer of 2013. That incident and evidence are also highly relevant to the Wellin Children's counterclaim against Wendy for, *inter alia*, breach of the prenuptial agreement. It is possible the jury in the severed trial would conclude that the evidence of undue influence relating to Keith's estate planning transactions in 2013-2014 is insufficient to meet the exacting standards of undue influence and incapacity under South Carolina law. Wendy clearly intends to use such a determination of "fact"—no undue influence over Keith's estate planning—to preclude a trial on the breach of contract claim—a claim involving different elements, a different standard, and potentially different or additional evidence.[10]

- Likewise, in the truncated, severed trial, the Wellin Children would introduce documents and testimony relating to the critical events of November 20, 2013, when Keith undertook numerous, complicated steps to remove $90 million worth of assets from an Irrevocable Trust he had previously established for his children and replaced them with assets worth only $50 million. This "swap" transaction is a large potential component of the damages sought against Wendy individually by the Wellin Children. The Wellin Children maintain the swap was invalid and should be undone. If the swap is not unwound, however, the Wellin Children will instead seek to recover the tens of millions of dollars in losses from Wendy pursuant to claims for, among other things, breach of contract and intentional interference with inheritance. In the truncated trial, because the Wellin Children are not allowed to present their claims to the jury, the sole issues would be whether Keith was under undue influence and/or had capacity when he made his changes to his estate plan. If the jury were to find (again, under the demanding standard applicable to those issues) that Keith had capacity and was not unduly influenced, the circuit court's order contemplates and, indeed, encourages Wendy to use that finding offensively to preclude a trial on the intentional interference with inheritance and breach of contract claims relating in part to the swap—claims that,

[10] Wendy and the other Respondents are ready to capitalize on the potential outcome of the circuit court's "bifurcation." In the Estate's memorandum in support of its motion to bifurcate, the Estate made no effort to disguise its intention to use any findings and rulings from the first phase of trial offensively to dispose of the Wellin Children's untried claims and counterclaims. *See* Estate's Mem. in Support of Mot. to Bifurcate at 12 (Feb. 12, 2019) (attached hereto as **Exhibit D**) (arguing the outcome of a trial limited to the issues of undue influence and capacity "has a strong potential to resolve and/or streamline the claims going forward"); *id.* at 7 (stating that bifurcation is appropriate because "resolution of certain issues could be dispositive *of the entire case*") (emphasis added).

again, involve different elements, different standards, and potentially different or additional evidence.

These are but two examples of the incidents, issues, and claims that—without actually being tried—could be effectively disposed of under the circuit court's phasing of the trial. This is as bad or worse than the deprivation of a substantial right that was held to be immediately appealable in *Morrow*, namely a threatened disposition of untried claims based on the erroneous belief that the untried claims are dependent on or derivative of other claims to be tried.

Another parallel between *Morrow* and the instant suit is that the circuit court's Order "prevent[s] [the Wellin Children] from being architects of their own complaint, and deprives them of bringing their case against the defendant of their choosing." *Morrow*, 412 S.C. at 539, 773 S.E.2d at 146. Wendy, the person the Wellin Children are suing and from whom the Wellin Children are seeking to recover, will have no claims asserted against her during the truncated and severed trial. Further, the circuit court's Order forces the Wellin Children into a Hobson's choice of either (i) choosing to introduce evidence, arguments, and witnesses to support their position on the issues of undue influence and incapacity, knowing that if the jury rules against them they might be precluded from "relitigating" those facts in a subsequent trial of their tort claims against Wendy, or (ii) choosing instead to reserve those arguments, evidence, and facts for a possible future tort and breach of contract trial, and thus be hamstrung in their prosecution of the issues of incapacity and undue influence, which are based on the same evidence as the Wellin Children's tort and breach of contract claims. The Hobson's Choice effect of the Order is particularly important because these choices will be pervasive throughout the trial. Counsel for the Wellin Children will have to choose as to each piece of evidence whether to present it to maximize the chance of prevailing in the present or holding it back to mitigate the risk of a possible future finding that a fact was "actually litigated" and hence gives rise to collateral estoppel in a future trial.

Preservation of a record as to these choices that would enable the appellate courts in the future to provide a meaningful review would pose potentially unsurmountable challenges. It would be similar to disqualification of counsel, which the Supreme Court has found is immediately appealable because it is "one of those rare orders which, in effect, could determine the action and prevent a judgment from which an appeal might be taken." *Hagood v. Sommerville*, 362 S.C. 191, 197–98, 607 S.E.2d 707, 710 (2005).

Also, in *Morrow*, the South Carolina Supreme Court held that, "[t]o prevent the Morrows from appealing the order immediately would encourage piecemeal litigation and limit their appellate remedies after the first trial on nursing home negligence and its subsequent appeal." *Morrow*, 412 S.C. at 539, 773 S.E.2d at 146–47. Likewise, in this case, preventing the Wellin Children from appealing the order immediately would encourage piecemeal litigation and limit their appellate remedies after the first trial on the issues of undue influence and capacity and its subsequent appeal. Piecemeal litigation would be guaranteed because, after this truncated trial, the losing party would be forced to appeal or waive their rights to do so. *See Stone v. Thompson*, 426 S.C. 291, 826 S.E.2d 868, 870 (2019) (upholding appeal "following a bifurcated hearing [in which] a claim or defense has been finally determined."). Appellate rights would be affected as explained above because of the extent to which the Hobson's Choice would permeate the truncated trial, but would be virtually impossible to preserve in the record.

In sum, the circuit court's Order establishing the mode of trial wrongly threatens to deprive the Wellin Children of a jury trial on their claims in which all the applicable evidence is presented and the jury is instructed on the applicable standards for the Wellin Children's claims against Wendy. This deprivation involves a substantial right and is immediately appealable, regardless of whether the ruling is characterized by the circuit court as a bifurcation order. *See Morrow*, *supra*.

Further, because the order *may* be immediately appealed, it *must* be immediately appealed. *See Hagood,* 362 S.C. 191, 198, 607 S.E.2d 707, 710 (2005) (holding an order disqualifying a party's attorney in a civil case affected a substantial right, is "closely related to the right to a particular mode of trial," and must be immediately appealed or else be lost forever). Here, just as in *Morrow*, the circuit court's ruling placed a limitation on the relief sought by and available to the Wellin Children, forcing them to present their evidence and arguments but without an opportunity to recover the damages sought in their counterclaims (and, rather, a chance of a verdict that would later be used by Wendy to foreclose them from ever litigating their claims). Interlocutory rulings such as this one regarding the mode of trial or limitations on relief may be, and must be, immediately appealed. *See Foggie v. CSX Transp., Inc.* 313 S.C. 98, 431 S.E.2d 587 (1993). For all of these reasons, this appeal is properly before this Court.

B. The circuit court's "bifurcation" ruling effectively strikes out a portion of the Wellin Children's pleading and is therefore immediately appealable.

As noted above, Code section 14-3-330 permits the immediate appeal of an interlocutory order that "strikes out an answer or any part thereof or any pleading in any action." S.C. Code Ann. § 14-3-330(2)(c). The circuit court's May 15, 2019 order does so. Although the order is characterized as a "bifurcation," the *effect* of it—as explained at length in the preceding argument section—is to potentially prevent the Wellin Children from ever bringing their claims before a jury, *e.g.*, it effectively strikes out a portion of their pleading, namely their counterclaims. This Court has previously explained that, when analyzing this subsection, the Court looks to the effect, not the label, of the order being appealed:

> [A]n appellate court should look to the effect of an interlocutory order to determine its appealability under section 14–3–330(2)(c). An order affects a substantial right by striking a pleading if the order removes a material issue from the case, thereby preventing the issue from being litigated on the merits, and preventing the party from seeking to correct any errors in the order during or after trial.

Thornton v. S.C. Elec. & Gas Corp., 391 S.C. 297, 705 S.E.2d 475 (Ct. App. 2011). In the instant litigation, the effect of the circuit court's "bifurcation" order is potentially to prevent a fact finder from ever considering the Wellin Children's counterclaims and thus to prevent those claims from ever being litigated on the merits.

C. The circuit court's decision to impose an arbitrary time limit on the trial, unless the parties waive their constitutional right to a jury trial, is immediately appealable as a deprivation of a substantial right and/or of the right to a meaningful jury trial.

The circuit court's May 15, 2019 Order is immediately appealable for the additional reason that it deprives the Wellin Children of their substantial right to the mode of trial to which they are entitled by preventing them from conducting a meaningful and substantive jury trial and/or by attempting to strong-arm them into "voluntarily" relinquishing that right. For one, the circuit court did not seek, analyze, or articulate any meaningful basis upon which to determine the length needed for a trial of the party's claims. Indeed, the court denied the Wellin Children's request that the circuit court simply hold a hearing where the parties could present such information. *See* Order (attached as **Exhibit G**) (holding that the trial will be two weeks but providing no basis for this limitation, and stating that the order ruled upon the Wellin Children's motion for a status conference and scheduling order wherein the Wellin Children requested a hearing to address the appropriate length of trial). The circuit court does not know, and has declined to hold a hearing where the parties disclose to it, the number of witnesses the various parties anticipate calling and their expected length of testimony; what evidence will be presented; or any other facts bearing on the expected length of trial.

Indeed, the trial court has admitted its time limit on the trial is based not on any consideration of due process, fairness, or the volume of testimony and evidence to be presented at

trial but, rather, as a bald attempt to put the parties into such an untenable position that they will be forced to settle. When Judge Addy, prior to being appointed to handle this case, announced that he would recommend limiting the trial to two weeks, he stated:

> I am firmly convinced and I have the strongest suspicion that when the trial court as I recommend to Judge Young when Judge Young directs, that this case will last no more than two weeks and everyone will have to expedite and stipulate and agree to exhibits and you will be confined to a mere two weeks to try this case I am very confident that this case will resolve and the federal litigation will also resolve. And I really don't mind saying that out loud. Because that is exactly what I forced to happen over in Beaufort County about two years ago when somebody all of a sudden on the week before trial told me that this was being a case that involved tens of millions of dollars was being tried in front of a jury. Where the entire time I had been led to believe it was just going to be a bench trial which means that I can go start at 8:30 and I can go until 9:00 or 930 and I can roll through it and I can get it done in five days. With a jury that would not have been possible. The case settled. Everybody went home. And the waste -- or the deletion of the estate assets ceased. So my recommendation to Judge Young who will have the ultimate call on this is that this will be limited to two weeks.

See Hearing Tr. at 31:9 to 32:6 (Aug. 22, 2018) (attached as **Exhibit B**); *see also id.* at 12:14-19 (stating that, while federal judges might be willing to try the case for eight weeks, no state court judge would be willing to try the case for this long). Thus, after the Wellin Children invested six years of their lives litigating this dispute and paying for more than 120 depositions and more than a dozen experts with the reasonable expectation that they eventually would be permitted to fully present their case to a jury, they were told that they would only receive a few days during a two week trial to present their case—not because that is how long it would take to try this case, but because the circuit court is seeking to force the parties to settle. In effect, even though the state constitution provides a right to a jury trial is inviolate, *see* S.C. Const. art. I, § 14, the circuit court held that litigants in South Carolina do not have a constitutional right to a jury trial if their trial will take more than two weeks.

The circuit court's May 15, 2019 Order regarding the length of trial is consistent with the circuit court's statements at the August 22, 2018, hearing, as it provides no basis for the two-week limit, gives no consideration to the parties' rights to present all the relevant evidence and testimony, and, by setting an extremely abbreviated trial and giving the parties extremely limited notice of the date when the trial will start, apparently attempts to force the parties to settle.

A full trial of the issues of capacity and undue influence would take significantly longer than two weeks. The parties have taken more than 120 depositions in the related federal litigation, most of which have related to issues of capacity or undue influence. The Estate has identified 132 witnesses in its interrogatory responses in this action. On the issues of capacity and undue influence, Wendy and the Estate have disclosed eight retained testifying experts and have identified dozens of treating physicians and fact witnesses. Likewise, the Wellin Children have identified six retained expert witnesses on these subjects along with numerous fact witnesses. Indeed, although the Estate's counsel has consistently pushed for a truncated trial, even he has admitted that litigating the issues of capacity and undue influence would require significantly more than two weeks. *See* Hearing Tr. at 4:13 – 5:7 (July 20, 2016) (attached as **Exhibit I**) (the Estate's counsel stating to Judge Norton that "the issue of capacity and competence" would require "three to four weeks of testimony," and stating: "we estimate that between the expert witnesses, the care providers, the doctors, the friends, the family members, you know, upwards of 50 witnesses specifically related to the issue of capacity, validity issues, undue influence, et cetera").

For the Wellin Children to fully present their case on the issues of capacity and undue influence, they must tell the jury the story of, among other things, the relationship between Keith and his children and grandchildren, Keith's relationship with Wendy, Keith's extensive estate planning and how it changed over the years, the events surrounding Keith's suddenly adopting the

belief in the summer of 2013 that his children had stolen from him and that he wanted to undo his prior estate planning, and the irrationality of Keith's behavior throughout the portion of this litigation where he was living. Notably, the circuit court recognized at the February 11, 2019, hearing on the Estate's motion to bifurcate that "the relationship that Mr. Wellin had with his kids and grandkids and great-grandkids throughout their lives is certainly relevant to the issue of what happened in 2013 and 2014 as it relates to assessment of estate plans." **Exhibit E** at 37:17–21; *see also id.* at 10:15 (stating that "[c]ontext is everything" and agreeing that the Wellin Children would need to address "[w]hat kind of relationship did [Keith] have after his first wife—after his first marriage ended? How did that evolve among the three kids, the grandkids, the one with the property in Maine? I understand how all that is intertied into this."). But Judge Addy's order limiting the trial to only two weeks effectively prevents the Wellin Children from presenting evidence on most of these issues.

Even if pretrial motions, jury selection, opening statements, directed verdict motions, and closing statements take only two days, and even if the Wellin Children received half of the remaining trial time (while Wendy, the Estate, and Hamilton shared the remaining half),[11] the Wellin Children would have only four days to present their case. Keith amended his trust more than a dozen times in his life and amended his trust five different times during 2013 and 2014. The Wellin Children will not attempt to describe the categories of evidence in this case, but the more than 120 depositions (most of which relate to capacity and undue influence) and the six years of litigation in federal court indicate that this is not the type of case where the Wellin Children can

[11] The Court's May 15, 2019 Order stated that "the parties will have to streamline their presentations pursuant to a future order concerning the allocation of available time." Order, **Exhibit G**, at 3. Because the circuit court has never issued this future order concerning the allocation of time, the Wellin Children do not know how many trial days they would receive during the two weeks.

present their case in four days. Thus, the practical effect of limiting the trial to two weeks is to exclude the vast majority of the Wellin Children's relevant evidence from trial, thereby denying the Wellin Children a full and fair opportunity to try their case and violating their due process rights.

In cases where a trial court has arbitrarily restricted the length of trial without considering the relevant evidence regarding the anticipated length of trial, courts have held that the trial court violated the constitutional due process rights of the parties. For example, in *Goodwin v. Goodwin*, 618 So. 2d 579, 583–84 (La. Ct. App. 1993), the court held:

> [B]efore imposing time limitations in a case, the trial judge should be thoroughly familiar with the case through pretrial proceedings, including status and pretrial conferences, and discovery. The judge should be familiar with the claims of the parties, the proposed testimony and number of witnesses, and the documentary evidence to be presented. Each litigant should be required to estimate the length of his or her case, and if necessary, the amount of time needed for each witness. Armed with this information, the trial judge should be in a good position to set reasonable time limits for the presentation of the evidence, rather than arbitrary time limits.

Likewise, in *Ingram v. Ingram*, 125 P.3d 694, 698 (Ok. Civ. App. 2005), the court held that "parties in litigation are entitled to a meaningful and full opportunity to be heard, so rigid time limits are disfavored," and where time limits are imposed, "[t]he court should thoroughly familiarize itself with the case through pretrial proceedings before imposing limitations, should require litigants to estimate length of their cases and, if necessary, amount of time for each witness."

The circuit court's use of a two-week time limit goes further than merely restricting the jury trial right in hopes of forcing a settlement. In an off-the-record status conference on January 31, 2019, Judge Addy stated that the parties would be limited to a two-week trial if the case is tried to a jury (regardless of whether the trial was bifurcated), but that the trial could last as long as the parties reasonably needed if counsel waived their right to a jury trial and agreed to a bench trial

instead. The circuit court returned to this theme in its May 15, 2019 order, noting that "[*a*]*ssuming that this action remains on the jury trial roster*, the trial in state court will be limited to two weeks . . . ." *See* Order at 3 (emphasis added) (**Exhibit G**). Again, this presented the Wellin Children with a Hobson's choice: agree to waive their right to a jury trial and thereby waive their appellate rights with respect to their right to a jury trial (because they would have consented to try the case non-jury), or have a jury trial that is limited to two weeks where the Wellin Children are unable to fully present the majority of their case. This sort of high stakes brinkmanship—significantly limiting a party's jury trial in hopes of forcing a settlement, and offering the parties the right to fully try their case only if they waive their constitutional right to a jury trial—has the effect of depriving the Wellin Children of a mode of trial and therefore should be immediately appealable. *See Hagood*, 362 S.C. at 198, 607 S.E.2d at 710 (holding that even the disqualification of a party's attorney in a civil case was "closely related to the right to a particular mode of trial" and thus was immediately appealable); *Bateman v. Rouse*, 358 S.C. 667, 674, 596 S.E.2d 386, 389–90 (Ct. App. 2004) ("Orders of the trial judge denying a request for a jury trial involve the mode of trial, affect substantial rights under section 14-3-330(2) of the South Carolina Code, and are immediately appealable.").

D. Because at least some aspects of the May 15, 2019 order are immediately appealable, the entirety of the order is reviewable on appeal.

As explained in the foregoing argument sections, several of the portions of the circuit court's May 15, 2019 order are immediately appealable. When at least one portion of an order is immediately appealable, the *entire* order may be considered upon appeal. *See Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 565, 564 S.E.2d 94, 98 (2002) ("This Court reviews interlocutory orders when they contain other appealable issues.") (citing *Hite v. Thomas & Howard Co.*, 305 S.C. 358, 360, 409 S.E.2d 340, 341 (1991)); *Rice Hope Plantation v. S.C.*

Pub. Serv. Auth., 216 S.C. 500, 511, 59 S.E.2d 132, 136 (1950), *overruled on other grounds*, *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985) ("We have here a single order from a part of which an appeal admittedly will lie, but it is manifest that the entire order should be considered upon this appeal; and the cases cited are sufficient to support this conclusion."); *see also* Toal, *Appellate Practice in South Carolina* 88 ("Where there is a single order that is admittedly appealable in part, the entire order should be considered upon the appeal.").

II. The October 20, 2017 and August 23, 2018 orders, while not themselves immediately appealable, may be joined in the appeal of another immediately appealable order.

The Wellin Children also appeal from the circuit court's October 20, 2017 order granting Wendy's motion to lift the stay and from the circuit court's August 23, 2018 order denying the Wellin Children's motion to stay further progress in this suit. These orders, if standing alone, would not be immediately appealable. *See Carolina Water Serv., Inc. v. Lexington Cnty. Joint Mun. Water & Sewer Comm'n*, 373 S.C. 96, 644 S.E.2d 681 (2007) (holding order lifting a stay was not immediately appealable); *Edwards v. Suncom*, 369 S.C. 91, 631 S.E.2d 529 (2006). In the context of this appeal, however, these orders do not stand alone. "[A]n order that is not directly appealable will nonetheless be considered if there is an appealable issue before the court and a ruling on appeal will avoid unnecessary litigation." *Watson v. Underwood*, 407 S.C. 443, 459, 756 S.E.2d 155, 163 (Ct. App. 2014) (citation omitted). In the instant appeal, there is an immediately appealable issue, *see* Argument I, *supra*, and this Court's simultaneous consideration of the prior orders will spare the lower court and the parties from expending needless resources litigating what could otherwise be resolved by this Court.

CONCLUSION

Because one of the orders being appealed is immediately appealable, and because the related orders—even if not themselves immediately appealable—may be joined in the appeal of

an appealable ruling, this Court has jurisdiction to consider and rule upon each of the orders appealed in the Wellin Children's Notice of Appeal.

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Charleston, South Carolina
June 7, 2019

EXHIBIT A

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT

Wendy C. H. Wellin,

Petitioner,

vs.

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

Respondents and Counter-Petitioners,

vs.

Wendy C.H. Wellin, Hamilton College, Keith S. Wellin Florida Revocable Living Trust, Campbell Hart and Heather Lane,

Counter-Respondents.

IN THE MATTER OF:

Keith S. Wellin

Civil Action No. 2014-CP-10-07038

ORDER GRANTING MOTION TO STAY

This matter comes before the Court on a motion to stay filed by Respondents and Counter-Petitioners Peter J. Wellin, Cynthia W. Plum, and Marjorie W. King ("Respondents"). Through their motion, Respondents ask the Court to stay this action pending resolution of a related action currently pending between Respondents and Petitioner Wendy C.H. Wellin in the United States District Court for the District of South Carolina, Civil Action Number 2:14-cv-4067-DCN (the "Federal Action").

On May 5, 2015, Respondents filed a memorandum in support of their motion to stay. On May 7, 2015, Petitioner filed a memorandum in opposition to Respondents'

motion to stay. Also on May 7, the Court held a hearing on the motion to stay where the Court heard oral arguments from the parties. After considering the memoranda and oral arguments of the parties and the applicable law, the Court grants Respondents' motion to stay.

"The granting of a motion for a stay of proceedings rests entirely within the discretion of the trial Judge." *City of Spartanburg v. Belk's Dept. Store of Clinton*, 199 S.C. 458, 20 S.E.2d 157, 167 (1942); *see also Stone v. I.N.S.*, 514 U.S. 386, 411 (1995) (Breyer, J., dissenting) (noting that the United States Supreme Court has "long recognized that courts have inherent power to stay proceedings and 'to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants'"). "Courts generally employ a 'stay' of proceedings when there is another issue pending between the same parties in another action and the resolution of that issue will affect the action sought to be stayed." *Talley v. John-Mansville Sales Corp.*, 285 S.C. 117, 120, 328 S.E.2d 621, 623 (1985) (Littlejohn, J., dissenting). As recently held by the South Carolina Supreme Court, "[a]voiding concurrent litigation in both the courts of this state and the Federal District Court will foster wise judicial administration and conserve judicial resources." *State ex rel. Wilson v. Condon*, 410 S.C. 331, 333, 764 S.E.2d 247, 248 (2014).

Here, the Court finds that this action and the Federal Action involve overlapping issues and that resolution of the Federal Action is likely to reduce or eliminate the issues that must be litigated in this action. In the absence of a stay, the parties would be forced to litigate the overlapping issues in this action and in the Federal Action, which would create the risk of inconsistent judgments and waste the resources of this Court and the

parties. Staying this action pending resolution of the Federal Action, on the other hand, will serve to conserve the resources of this Court and the parties and will eliminate the risk of inconsistent judgments. Moreover, the Court agrees with Respondents that staying this action pending resolution of the Federal Action is unlikely to cause prejudice to any of the parties, and the Court finds that any prejudice that might be caused to any party by the stay is outweighed by the benefits of the stay.

For the foregoing reasons, the Court hereby grants Respondents' motion to stay. This action is hereby stayed and shall remain stayed until the Federal Action, including any appeals in that action, is finally resolved, or until further order of this Court.

AND IT IS SO ORDERED.

The Honorable J. C. Nicholson, Jr.

Charleston, South Carolina
7/2, 2015

EXHIBIT B

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	COURT OF COMMON PLEAS
Wendy C. H. Wellin, **PLAINTIFF**, vs. Peter J. Wellin, Cynthia W. Plum, Marjorie King, ***RESPONDENTS AND COUNTER-PETITIONERS***, vs, Wendy C.H. Wellin, Hamilton College, Keith S. Wellin Florida Revocable Living Trust, Campbell Hart and Heather Lane, **COUNTER-RESPONDENTS.** IN THE MATTER OF: The Estate of Keith S. Wellin.	CASE 2014-CP-10-07038 TRANSCRIPT OF RECORD

August 22, 2018

Charleston, South Carolina

B E F O R E:

The Honorable Frank R. Addy, Jr.

A P P E A R A N C E S:

James Bernard Hood, Esquire
For the Estate

John Fisher Beach, Esquire
For the Plaintiff, Hamilton College

John T. Lay, Jr., Esquire
For the Plaintiff, Ms. Wendy C. H. Wellin

Robert H. Brunson and Patrick Wooten, Esquire
For the Defense

Certified Transcript Provided For: Nelson Mullins

Phyllis Norton, CVR-Master, Nationally Certified Verbatim Court Reporter
636 Long Point Road, Unit G, #74, Mt. Pleasant, South Carolina 29464
PNorton@sccourts.org

Nicholson accepted without giving us an opportunity to respond at that hearing.

Subsequently, to his credit, Mr. Hood sent an e-mail to Judge Nicholson sometime later correcting that. And it is now undisputed that there are no beneficiaries of this will who are waiting to receive anything while the will is not being probated.

THE COURT: Forgive me for interrupting. The court has the same concern. You brought up Judge Jefferson's. This court has the same concern as Judge Jefferson does.

And I know in your memorandum you indicated that this case would perhaps take eight to ten weeks to try. I seriously doubt that. I don't know of any will contest that is going to take six to eight weeks. And I don't know of any judge who is going to have the patience on the trial level. You can get federal judges to do it. But no trial-level judge is going to spend eight weeks trying this case when the Roof case was successfully tried in, what was it, two weeks.

So, yeah, that -- first of all, that is not going to happen. Second of all, this is an old case. I am very hesitant to issue any stay -- and I appreciate the procedural background and everything. But I am very very hesitant to authorize any stay in any case that begins with 2014 for any reason.

time, whether it is a college or a 77-year-old person or some kids or somebody else, somebody is entitled to get what Mr. Wellin produced during the course of his life.

And whether that happens in state court or federal court, and whether it happens first in state court or second in state court, or first in federal court and second in federal court, I really don't care. But depletion of assets has to stop.

Which brings me to my third and final point. I am firmly convinced and I have the strongest suspicion that when the trial court as I recommend to Judge Young when Judge Young directs, that this case will last no more than two weeks and everyone will have to expedite and stipulate and agree to exhibits and you will be confined to a mere two weeks to try this case I am very confident that this case will resolve and the federal litigation will also resolve.

And I really don't mind saying that out loud. Because that is exactly what I forced to happen over in Beaufort County about two years ago when somebody all of a sudden on the week before trial told me that this was being a case that involved tens of millions of dollars was being tried in front of a jury. Where the entire time I had been led to believe it was just going to be a bench trial which means that I can go start at 8:30 and I can go until 9:00 or 930 and I can roll through it and I can get it done in five

days. With a jury that would not have been possible. The case settled. Everybody went home. And the waste -- or the deletion of the estate assets ceased.

So my recommendation to Judge Young who will have the ultimate call on this is that this will be limited to two weeks. If you want a jury trial that is perfectly fine. If you get one, everybody will need to be prepared to come in here.

And if he wants to invite me back down to Charleston to try it, I love Charleston. The food is great, and I don't mind coming. But we will do it in two weeks if it actually is going to be tried.

So that will be my ruling. There will be no stay. And we are going to move forward. Whichever case we reach first is the case we reach first. And it is a pleasure to see you people. The court will now take a break. Thank y'all very much.

(WHEREUPON, the hearing concluded 10:52 a.m.)

EXHIBIT C

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2014CP1007038

Wendy C H Wellin
PLAINTIFF(S)

Peter Wellin Cynthia
DEFENDANT(S)

Submitted by:	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

FILED
2018 AUG 24 PM 3:21
CLERK OF COURT
CHARLESTON COUNTY

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

No further delays in this case. Chief Admin Judge should set for trial (2 weeks max) as soon as practicable. JM

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk:

Motion/ Stay by Respondent & Counter Petitioners – Denied

Amended Motion/ Stay by respondents, crt/srv – Denied

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	**Judgment Against (List name(s) below)**	**Judgment Amount to be Enrolled (List amount(s) below)**
		$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

2159
Judge Code

8-23-18
Date

EXHIBIT D

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	
Wendy C. H. Wellin,	)	C/A No. 2014-CP-10-07038
Petitioner,	)	**MEMORANDUM IN SUPPORT OF MOTION TO BIFURCATE OR FOR SEPARATE TRIAL OF VALIDITY ISSUES**
Versus	)	
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/d November 2, 2009,	)	
Respondents and Counter-Petitioners,	)	
Versus	)	
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,	)	
Counter-Respondents.	)	
IN THE MATTER OF:	)	
Keith S. Wellin	)	

Wendy C. H. Wellin, as Petitioner and in her capacities as Special Administrator of the Estate of Keith S. Wellin and as Trustee of the Keith S. Wellin Florida Revocable Living Trust u/a/d December 11, 2001 (hereinafter "Petitioner"), by and through her undersigned counsel, submits this Memorandum in Support of her Motion to Bifurcate or for Separate Trial filed August 17, 2018. Specifically, Petitioner seeks bifurcation of all validity issues associated with the Last Will and Testament of Keith S. Wellin executed June 27, 2014 (the "2014 Will") and the amended and restated Keith S. Wellin Florida Revocable Living Trust executed June 27, 2014 (the "2014

Revocable Trust"), including (a) whether Keith S. Wellin ("Keith") possessed sufficient mental capacity to execute the 2014 Will and the 2014 Revocable Trust and (b) whether Keith's execution of the 2014 Will or the 2014 Revocable Trust was the result of undue influence, fraud, duress or mistake (hereinafter collectively, the "Validity Issues").

The validity of the June 27, 2014 Will and Revocable Trust undergirds many – if not most – of the major allegations in this litigation, and early resolution of these fundamental Validity Issues has a strong potential to resolve and/or streamline the claims going forward. Therefore, for the reasons outlined below, this Court should bifurcate the Validity Issues to promote efficiency, economy, and fairness for all involved.

Factual Background

Keith Wellin passed away on September 14, 2014, leaving as a final written expression of his wishes his 2014 Will and 2014 Revocable Trust. These documents were executed on June 27, 2014 in the presence of several witnesses, including F. Patricia Scarborough, Esq. and M. Jean Lee, Esq. (two estate planning attorneys who signed the documents as witnesses), estate planning attorney Edward G. R. Bennett, Esq., speech therapist Amy Hider, and nationally-recognized capacity expert Daniel C. Marson, JD, PhD.

The validity of Keith's 2014 Will has been an issue pending before this Court in this action since the fall of 2014 – Keith's widow Wendy C. H. Wellin filed a Petition for Formal Testacy shortly after his passing. Keith's three adult children, Peter Wellin, Cynthia Plum and Marjorie King (collectively, the "Wellin Children"), answered the Petition and counter-petitioned for formal testacy of an earlier Will in October, 2014. Last year, the Wellin Children amended their pleadings in this matter to add a request for declaratory judgment as to the validity of Keith's 2014 Revocable Trust and a variety of other claims against Mrs. Wellin. By adding the issue of the validity of

Keith's 2014 Revocable Trust into this action, for the first time the Validity Issues surrounding the 2014 Will and the 2014 Revocable Trust are unified in one single proceeding.

Petitioner maintains that the 2014 Will and the 2014 Revocable Trust are valid, effective and represent Keith's final and dispositive estate plan. The Wellin Children allege that these documents are invalid due to any of the following: (i) Keith lacked capacity at the time they were executed; (ii) Keith was subject to undue influence at the time they were executed; (iii) Keith was under duress at the time they were executed; (iv) the documents were executed as a result of fraud; or (v) the documents were executed as a result of mistake. The Wellin Children also allege that the 2014 Revocable Trust is invalid because Peter Wellin did not receive a copy of the document while his father, the Decedent, was living.

Also pending before the Court in this action are various other claims raised by the Wellin Children in their amended pleading last year. These claims fall into three general categories: (1) a Counter-Petition for formal testacy of Keith Wellin's earlier Will executed on August 30, 2011[1]; (2) individual tort and contract claims against Mrs. Wellin relating to her alleged involvement with or influence over Keith Wellin and his estate planning; and (3) individual tort and equitable claims against Mrs. Wellin relating to matters other than her alleged involvement with or influence over the Decedent's estate planning.

Most recently, Friendship Management, LLC (the "LLC") intervened in this matter to raise two claims against Mrs. Wellin duplicative of those raised by the Wellin Children. While it does not appear to Petitioner that these claims touch upon the Validity Issues identified above, to the extent that the LLC's claims involve a Validity Issue Petitioner requests that they also be bifurcated.

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[1] This Counter-Petition ignores other Wills executed by Keith on July 11, 2013, July 1, 2013, and a Codicil executed by Keith on June 20, 2013.

Argument

I. Bifurcation of the Validity Issues is appropriate and warranted in this matter.

Rule 42(b) of the South Carolina Rules of Civil Procedure permits a court to bifurcate issues or claims where such an action will promote convenience, efficiency and economy. Rule 42(b) of the South Carolina Rules of Civil Procedure provides:

> "The court, in furtherance of convenience or to avoid prejudice, or when separate trials would be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Constitution or as given by a statute of the State."

Rule 42(b), SCRCP. Considerable discretion is allotted when a court determines to bifurcate a trial, and the exercise of that discretion will be set aside only if clearly abused. *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 77, 533 S.E.2d 575, 577 (2000).

The South Carolina Supreme Court has encouraged trial courts to bifurcate trials, such as complex medical malpractice trials, where bifurcation helps to clarify and simplify the issues. *E.g.*, *Durham v. Vinson*, 360 S.C. 639, 644 n.2, 602 S.E.2d 760, 762 n.2 (2004). Bifurcation of a trial is appropriate where the issues are distinct, such that trial of issues separately would not result in injustice. *Wright v. Heiester Const. Co., Inc.*, 389 S.C. 504, 516, 698 S.E.2d 822, 828 (Ct. App. 2010).

Rule 42 does not require that legal and equitable claims be tried separately. Rather, "when convenience so directs", such claims may be tried together. *Johnson v. S.C. Nat'l Bank*, 292 S.C. 51, 55, 354 S.E.2d 895, 897 (1987). Moreover, there is no per se rule that the same jury must decide both issues after a trial is bifurcated. *Fortune v. Gibson*, 304 S.C. 279, 281, 403 S.E.2d 674, 675 (Ct. App. 1991).

A. Bifurcation of the Validity Issues is both permitted and encouraged by Rule 42, SCRCP.

Considerations of expediency and economy are appropriate bases upon which to order bifurcation of issues at trial. For example, bifurcation is appropriate where most witnesses on the issue of liability would not be called during a subsequent damages phase of a trial. *See, e.g., Winthrop Univ. Trs. v. Pickens Roofing & Sheet Metals, Inc.*, 418 S.C. 142, 166, 791 S.E.2d 152, 165 (Ct. App. 2016); *Creighton v. Coligny Plaza Ltd. Partnership*, 334 S.C. 96, 109, 512 S.E.2d 510, 517 (Ct. App. 1998). In *Creighton*, the trial court concluded that the potential expense of the plaintiff's damages testimony could be avoided entirely if a jury entered a verdict on liability in favor of the defendant. *Creighton*, 334 S.C. at 109, 512 S.E.2d at 517. The trial judge in *Winthrop* applied the same rationale when bifurcating liability and damage issues for trial, reasoning that it would save time and resources by trying the liability phase separately from the damages phase. 418 S.C. at 166, 791 S.E.2d at 165. The Court of Appeals, affirming the bifurcation of the trial, noted that convenience and judicial economy are legitimate reasons for bifurcation. *Id.*

Courts in other jurisdictions have exercised their discretionary power to bifurcate trials in which there are competing will contests. For example, in *Barber v. Cangelosi*, the trial court bifurcated the validity issue surrounding a testator's 2004 will, leaving for later disposition the will contestant's competing applications for probate of the testator's prior 1989 and 1983 wills. No. 01-08-00781-CV, 2010 Tex. App. LEXIS 247, at *6 (Tex. Ct. App. Jan. 14, 2010). Approving of the bifurcated trial, the Texas Court of Appeals noted that the separation of the competing will contests was appropriate where "resolution of a discrete issue in the first part of the proceeding may obviate the need for extensive evidence and possible confusion concerning multiple [wills]." *Barber*, 2010 Tex. App. LEXIS 247, at *15. Thus, the bifurcation of the validity issues surrounding the most recent will "kept the competing [wills] in the same proceeding and, at the

same time, avoided presentation of potentially confusing or unnecessary issues." *Id.* Similarly, in *Slusarekno v. Slusarenko* the trial court consolidated two actions involving testamentary documents executed by the same decedent and subsequently bifurcated the issues of capacity and undue influence for trial. 147 P.3d 920, 929 (Ore. Ct. App. 2006) (referencing bifurcated trial but reversing the trial court's holding on the merits).

In this case, there are competing petitions for formal testacy associated with Keith's 2014 Will and Revocable Trust and with a Will and Revocable Trust executed by Keith in August 2011. There are also a myriad of other claims raised by the Wellin Children which are fact-intensive and involve evidence spanning many years. However, the Validity Issues associated with the 2014 Will and the 2014 Revocable Trust involve only the evidence of Keith's actions on a single day – June 27, 2014. The evidentiary showings required for the Validity Issues are focused and limited, while the evidentiary showings required for the Wellin Children's other claims against Mrs. Wellin (some of which are not recognized claims in this State) are not.

Bifurcation as contemplated in Rule 42(b), SCRCP, is primed and poised to address these very circumstances. Here, the fundamental and penultimate issue in dispute between the parties is the validity and effect of the 2014 Will and the 2014 Revocable Trust – in short, the very Validity Issues for which Petitioner seeks bifurcation. A bifurcated trial on the Validity Issues will permit all entities – parties, jurors, and the Court – to focus on this fundamental question without unnecessary noise and confusion relating to the other claims now pending in this action.

Furthermore, a bifurcated trial for the Validity Issues involving *both* the 2014 Will and the 2014 Revocable Trust will also prevent potentially inconsistent adjudications of Keith's capacity and alleged susceptibility to undue influence. These documents were executed on the same day and before the same witnesses. Bifurcating the Petition for Formal Testacy (involving the 2014

Will), the Wellin Children's challenges to the same, and the Wellin Children's claim for Declaratory Judgment (involving the 2014 Revocable Trust) will increase the expediency of the trial of this matter and would be far more economical than bifurcating only the Validity Issues involving either document on its own. Moreover, an adjudication of the Validity Issues involving both the 2014 Will and the 2014 Revocable Trust by way of a bifurcated trial in this action will have preclusive effect in certain related federal litigation currently pending between the same parties – litigation in which the Wellin Children raise a duplicative claim for declaratory judgment of the validity of Keith's 2014 Revocable Trust but are unable (due to the Probate Court's exclusive jurisdiction over the ~~probate~~ of wills) to raise a claim related to Keith's 2014 Will.

B. Many other claims pending in this matter are predicated upon, or will be streamlined by, bifurcation of the Validity Issues.

Bifurcation is particularly appropriate where – as here – resolution of certain issues could be dispositive of the entire case. *Cook v. United Servs. Auto. Ass'n*, 169 F.R.D. 359, 361 (D. Nev. 1996) (citing 9 Wright & Miller, *Federal Practice & Proc., Civil* 2d § 2388). The federal courts also favor bifurcation in such circumstances: "Resolution of a key issue may determine the outcome of an entire proceeding. In such a case, and so long as the issue may reasonably be separated from the remainder of the case, bifurcation of that issue for trial is likely to be conducive to judicial economy and expedition." 8 *Moore's Federal Practice – Civil* § 42.20. As the comments to Rule 42 note, Rule 42, SCRCP is substantially identical to the Federal Rules of Civil Procedure, and Rule 42(b), SCRCP as adopted was similar to existing state practice.

Other trial courts have exercised their discretion to bifurcate issues where the validity of testamentary documents (such as wills or trusts) is disputed along with other claims for breach of trust or breach of fiduciary duty under the same. *See, e.g.*, *Callaway v. Calloway*, 932 N.E.2d 215, 219 (Ind. Ct. App. 2010); *Hilbert v. Benson*, 917 P.2d 1152, 1155 (Wyo. 1996).

The Validity Issues are potentially dispositive of several claims or defenses involved in this case, including (i) the Petition for Formal Testacy; (ii) the Wellin Children's challenges to the same; and (iii) the Wellin Children's individual tort claims against Mrs. Wellin relating to her alleged involvement with or influence over Keith and his estate planning. Additionally, the resolution of the remaining claims between the parties would be streamlined after a determination as to Keith's mental capacity and a resolution of the Validity Issues.

By way of example, the Wellin Children raise a claim for intentional interference with inheritance against Mrs. Wellin. If, however, a bifurcated trial determines that Keith's 2014 Will and 2014 Revocable Trust are valid, this claim will likely fail as a matter of law and no further trial proceeding would be needed to adjudicate the same.

If the Court elects to bifurcate the Validity Issues, the parties would be able to present all evidence relating to Keith's execution of the 2014 Will and the 2014 Revocable Trust in a single, efficient proceeding. This proceeding would substantially reduce judicial resources by providing an efficient and streamlined opportunity to resolve related issues that are fundamental not only to the present action but also in the "Related Federal Litigation".[2] The cost to the parties of litigating the same issues on multiple occasions would likewise be dramatically reduced.

Additionally, the single determination of the Validity Issues associated with the 2014 Will and the 2014 Revocable Trust, would be binding with respect to the Related Federal Litigation, but would not cause prejudice as all parties litigating the duplicative issue in federal court are participating in the present action. This would reduce the time required to subsequently litigate the other pending actions and would also preclude the parties from re-litigating the same issue

[2] *Wellin v. Wellin et al.*, C/A No. 2:13-cv-01831-DCN (D.S.C.); *McDevitt v. Wellin et al.*, 2:13-cv-03595-DCN (D.S.C.); and *Wellin et al v. Wellin*, 2:14-cv-04067-DCN (D.S.C.).

multiple times. Future litigation costs and resources will be dramatically reduced if the Court utilizes the procedures available to it under the authority of Rule 42.

Conclusion

At its core, this case is about effectuating the wishes of Keith Wellin, the Decedent. In order to achieve this goal, the validity of the 2014 Will and the 2014 Revocable Trust – the final written expressions of Keith's wishes – must be established. By bifurcating these common factual Validity Issues, the Court would effectively provide an opportunity to resolve substantial threshold issues in this matter. Therefore, Petitioner respectfully requests that the Court bifurcate the Validity Issues identified above, including: (a) whether Keith possessed sufficient mental capacity to execute the 2014 Will and the 2014 Revocable Trust and (b) whether Keith's execution of the 2014 Will or the 2014 Revocable Trust was the result of undue influence, fraud, duress or mistake.

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Feb 11, 2019

Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the ***MEMORANDUM IN SUPPORT OF MOTION TO BIFURCATE OR FOR SEPARATE TRIAL OF VALIDITY ISSUES*** was served on each counsel of record present at the hearing via hand delivery on February 11, 2019 and via email on February 12, 2019 to the counsel of record not present at the hearing.

Virginia G. Rogers

EXHIBIT E

State of South Carolina	)	Court of Common Pleas
	)	Ninth Judicial Circuit
County of Charleston	)	Case No. 2014-CP-10-07038
	)	
	)	
Wendy C.H. Wellin,	)	
	)	
Petitioner,	)	
	)	
-vs-	)	Transcript of Record
	)	
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/d November 2, 2009,	)	
	)	
Respondents and Counter-Petitioners,	)	
	)	
-vs-	)	
	)	
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,	)	
	)	
Counter-Respondents.	)	
	)	
IN THE MATTER OF:	)	
	)	
Keith S. Wellin	)	
	)	

February 11, 2019
Columbia, South Carolina

B E F O R E:

The Honorable Frank Addy, Judge

those who actually signed as witnesses after Mr. Wellin applied his signature and also those who were in the room and participating in the final meeting during which he signed these documents -- these witnesses can provide clear and cogent testimony about circumstances surrounding Keith's execution of the documents and also his capacity.

There are other issues pending between the parties involving other claims for tortious conduct or breaches of contract that occurred at different points in time or may have occurred at different points in time. Bifurcation under Rule 42 is appropriate here so that we can clarify, crystallize, and zero in on the key issue in this case, the validity of the 2014 estate plan.

Additionally, Your Honor -- and I will let Mr. Lay speak to this in a little bit more detail. Bifurcation has the greatest chance to resolve a dispositive issue in this case.

Keith Wellin's capacity and issues surrounding the same permeate the claims between the parties in both this action in state court and also the federal court litigation. A dispositive determination of Keith's capacity, the validity of these documents, which is what we're asking for here today, has the potential to have great impact on the resolution of the rest of the case, whether by adjudication or through some sort of settlement.

We do believe it's appropriate. We believe it's

Wendy Wellin individually, and I maintain that position. She would be okay with a non-jury trial, if we were able to get some of these -- you know, what -- depending on what the format of the trial is going to be, that would make a lot of sense. I mean, obviously, it would be a very tensious [sic] process.

THE COURT: Right. And --

MR. BEACH: Hamilton College is in the exact same situation. We would be amenable to a non-jury trial, Your Honor, assuming that we can come together on an appropriate structure --

THE COURT: Right.

MR. BEACH: -- for all of it.

THE COURT: Okay. And that leads me -- maybe -- maybe you would care to address this question, Ms. Rogers, but I'm putting my old probate -- probate hat on, but unless there's been some change in the law, my understanding is that to create a will, you have -- you have to have a pretty low legal standard in terms of just knowing the objects of your affection.

For creation of a trust, my recollection is -- and mercifully, I haven't had -- I haven't had to touch this much in the last eight years, but it's basically a contract capacity. Am I wrong?

MS. ROGERS: As far as the standards for execution, Your

dropping back and trying a 2013 and doing it like that. That is inherently inefficient, but I'm somewhat more receptive to the idea, especially if it is done as a bench trial, to try the events, you know, the changes in the documents in 2013 and 2014 collectively because I think that that's kind of when the children are alleging that most of this undue influence really came in and pen got put to paper.

And the reason I say that is because perhaps resolution of that issue would help drive or at least clarify the issues for benefit of the federal court, if they were to reach Wellin 3 prior to us being able to reconvene on your counterclaims in state court.

Do you kind of get what I'm saying?

MR. WOOTEN: I guess what I don't understand, Your Honor, is whether in that first trial -- if we had a trial on all of the versions, 2013, 2014, are we -- it seems like there are only two options.

Either we are allowed to put in our evidence on the undue influence and capacity challenges, in which case we put in our evidence on the tort claims, and then we're telling the jury don't decide those claims. They've put the evidence in, but you shall not decide that, even though we just all spent weeks here trying this case. Or even if it's to Your Honor, if we do it --

THE COURT: If we do it with the jury, we're not going

to bifurcate.

MR. WOOTEN: Okay. So --

THE COURT: That's my initial default setting, but at the same time perhaps -- perhaps -- perhaps, we would. Do you want to chime in on it?

MR. LAY: I do, if you don't mind.

THE COURT: Go ahead.

MR. LAY: And let me -- and let me deal with this from a more practical standpoint.

Whether this is jury or non-jury, I think the statement the evidence is all the same is untrue. And what we need to sort of look at practically is how the case would actually get tried if you look at it from their perspective.

If you try -- we have two different standards that apply. One of the things that they are trying to prove is defamation. They are trying to establish this defamation claim, which is not a continuing tort. It's is there a defamatory comment that's within the statute of limitations that causes some change to the testamentary documents. That's one of their causes of action that they say is by a preponderance of the evidence.

And what that effectively does is turn estate planning on its head. This is an undue influence and capacity case. What they have to do under undue influence is this heightened standard, and they've got to prove that up.

Now, imagine if we put all this together. We just mixed it up into a stew. All right? Somebody gets -- a witness gets up on the stand and they start testifying about a particular statement. I get up and I object, and I'm going to say, Your Honor, I am going to need to have a discussion with you outside the presence of the jury because we are going to need a limiting instruction here.

So the jury goes out and then there's a comment. Is it defamatory? Is it even defamatory? If it's not -- if it is defamatory, is it something that's excluded because of the statute of limitations or is it something that should come in? Or is it something that should go to an undue influence standard?

And then how do you deal with the jury when they are trying to decide the particular standard here when a particular statement is being put up. It literally will be every statement that anyone says there's going to be an attempt, either by them or by us, on a limiting standard -- limiting instruction on how the evidence is going to come in. It will make it impossible to try this case.

The beauty of the validity issue is this. You've got not just the will, not just the rev trust, there was also ratification of an inter vivos gift, the $25 million. There was also ratification of even bringing the suit.

So virtually every cause of action that they've got, if

it's determined to be valid, it eviscerates the lawsuit. It does. It has a dramatic impact on their damages.

If we lose, it has a dramatic impact on their damages too, to their benefit. Either one drives resolution in this case.

There is no perfect solution. There's no way that we're going to have one trial that takes care of everything, but if we have a validity of the documents -- so it's going to be undue influence and capacity of duress that impact the validity of the documents in June of 2014. That is bringing the lawsuit. That's the $25 million inter vivos gift. That's the rev trust and that's the will. If the answer to that is no, then you look at what causes of action are left in a subsequent trial.

You have really a lot of novel claims. If you look at the claims that they have privately, you have intentional interference with inheritance. Well, if the 2014 documents are valid, they are going to have a very difficult time proving up any sort of intentional interference with inheritance. In fact, I think that probably ends that.

If we lose that case, then that's going to establish damages from their perspective. They will have -- then, it will be a rollback from 2014 to another will. That would be impactful on what they say would be the interference with their inheritance.

The only evidence that comes in is what happened on the day where we controlled the entire environment for Mr. Wellin. We brought in our lawyer, our expert --

THE COURT: And I'll stop you there. Even if I were to bifurcate this, I think that I don't -- I'm certain that I would not admit that -- that sliver of 15 minutes where he comes into his lawyer's office and signs off --

MR. WOOTEN: Right.

THE COURT: -- on his will. Okay?

So because I understand you a hundred percent. Context is everything. What kind of relationship did he have after his first wife -- after his first marriage ended? How did that evolve among the three kids, the grandkids, the one with the property in Maine? I understand how all that is intertied into this.

And so from an evidentiary standpoint as far as your case is concerned, yes, the relationship that Mr. Wellin had with his kids and grandkids and great-grandkids throughout their lives is certainly relevant to the issue of what happened in 2013 and 2014 as it relates to assessment of estate plans. So you don't need to worry about that.

MR. WOOTEN: Right.

THE COURT: That's -- you know, the course of dealing is very important and there has to be some reason. Everything happens for a reason and so he was either out of his mind and

to the claims challenging the versions of the trust.

THE COURT: Tortious interference with inheritance. Okay? You alleged that counterclaim in the federal suit and in the state cause of action. Okay?

So obviously, there's going to be some testimony that relates to that. I don't know what that testimony is going to be. You guys may have a better idea, but I can definitely envision something that is relevant maybe to that cause of action or to the defamation cause of action that should not pertain to the question of whether he had testamentary capacity in 2013 and 2014. I can envision some of that.

MR. WOOTEN: So I can envision that, but what we're talking about is not bifurcating only testamentary capacity. We're talking about bifurcating undue influence, and it is almost impossible to conceive of --

THE COURT: Yeah. I wouldn't be bifurcating undue influence because that's the crux of your case. So --

MR. WOOTEN: Oh.

THE COURT: Yeah. I mean I'm -- I'm talking about your -- to the extent that you claim undue influence, that goes hand in hand with the testamentary capacity issue. I don't think they're going to disagree with that.

MR. WOOTEN: Okay.

MR. LAY: We didn't.

THE COURT: So -- yeah. So if you're talking or worried

about undue influence, hey, we're not going to have any evidence of undue influence.

MR. WOOTEN: So this is a very important point. So the -- the motion that they filed is only a couple of sentences.

THE COURT: Right.

MR. WOOTEN: And I think it does not delineate between these two things. In federal court, the discussion was we would bifurcate capacity and undue influence. Those were together.

And so if their -- if their motion is to bifurcate only capacity, I think it's probably not a good motion for a lot of the same reasons, but that's a different motion than the one I thought.

THE COURT: Yeah. It's more palatable than what you were concerned with. I hear what you're saying. All right.

Since I haven't read Ms. Rogers' submission --

MR. WOOTEN: And just to --

THE COURT: Yes, sir.

MR. WOOTEN: Just to clarify, they are going to -- they just handed this. It says that they are seeking to bifurcate as to not only capacity but also as to undue influence. That would be part of what they're chopping off.

THE COURT: But if I were to do that -- you know, if I were to bifurcate, I wouldn't lift that because that means they'll do it in one step and it has an effect. That's your

entire case.

MR. WOOTEN: Right. And so -- and I think the key point as to the motion you are entertaining, which is just the capacity issue, I think this is the viewpoint that I would want to leave you with. And that is that Mr. Wellin's cognitive state, his mental state, if he had diminished capacity, that is highly relevant evidence for our tort claims, our defamation claims and additional interference with inheritance.

To the extent Mr. Wellin was told a lie while he was 100 percent, you know, a young 50-year-old man, that is much less likely to affect him and have causation for our damages than him being told a lie when he is -- his known capacity has diminished a great deal and he's elderly and on medication, even if he has testamentary capacity.

So the point of that is, Your Honor, the capacity evidence -- we would be introducing that, the very same evidence, in both the tort claims and in the -- the will challenge claims.

And juries get and, you know, must follow jury instructions all the time. If -- I think if this sort of paradigm Mr. Lay is suggesting were correct, the law would say when there are truly overlapping issues, you should bifurcate so the jury doesn't get confused. That's the opposite of what the cases say.

EXHIBIT F

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT
Wendy C. H. Wellin, Petitioner, vs. 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/d November 2, 2009, Respondents and Counter-Petitioners, vs. 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, Counter-Respondents. IN THE MATTER OF: Keith S. Wellin	)	Civil Action No. 2014-CP-10-07038 **THE WELLIN CHILDREN'S RESPONSE IN OPPOSITION TO THE ESTATE'S MOTION TO BIFURCATE**

Respondents, Counter-Petitioners, and Counterclaimants Peter Wellin, Cynthia W. Plum, and Marjorie W. King (collectively the "Wellin Children"), by and through their undersigned counsel, hereby submit this memorandum in opposition to the motion to bifurcate filed by Wendy Wellin in her capacity as Special Administrator of the Estate and Trustee of the Revocable Trust (the "Estate").

I. Introduction

This action is a trust and estates dispute relating to the estate of Keith S. Wellin ("Keith"), who passed away in 2014 after amassing a large fortune during his lifetime. His three adult children—the Wellin Children—allege that his fourth wife and widow, Wendy Wellin ("Wendy") unduly influenced Keith at a time when his mental capacity was diminished, and challenge Keith's purported amendments to his estate planning documents and seek to recover damages from Wendy based on tort and contract claims. Critically, all of the claims pending in this action center on Keith's capacity and Wendy's alleged undue influence over Keith such that having a trial on only a subset of these claims would be incredibly inefficient and would make no sense, because all evidence relating to all claims would have to be introduced at the bifurcated trial, and also at the subsequent trial.

Specifically, the Estate's motion to bifurcate should be denied because bifurcating in the manner suggested by the Estate would require the parties, this Court, and the witnesses to participate in two nearly identical trials, each of which would be lengthy and expensive, and each of which would require the parties to introduce the same evidence regarding the same issues—namely, the mental capacity of Keith and the influence exerted on Keith by Wendy. Such an approach would be incredibly inefficient and—to the extent the Estate seeks to use the outcome of the first trial as a basis to exclude relevant evidence in the second trial, which is apparently the Estate's intent—incredibly prejudicial to the Wellin Children. In short, this motion is a transparent attempt by the Estate to have an initial trial where the jury decides only the claims with a burden of proof most favorable to the Estate, thereby allowing the Estate to attempt to use the outcome of the first trial offensively in the second trial. But this perceived strategic advantage for the Estate is not a legitimate reason to bifurcate, and bifurcating will force the parties, this Court, and the

witnesses to participate in two nearly identical trials, which would be an incredibly inefficient and expensive outcome.

"[T]he bifurcation of issues and the separate trial of them is not the usual course of events," and all other things being equal, "a single trial will be more expedient and efficient." *In re Safety-Kleen Corp. Bondholders Litig.*, 2004 U.S. Dist. LEXIS 31748, *8-10 (D.S.C. Oct. 29, 2004).[1] Here, not only would bifurcation in the manner suggested by the Estate fail to increase efficiency or reduce costs; it would dramatically *decrease* inefficiency and *increase* costs. The Estate's motion should be denied.

II. Relevant Factual and Procedural Background

This case is related to several civil actions pending before Judge Norton in federal district court that the parties have litigated for more than five years. Well over one hundred million dollars are at stake in these actions, and more than 100 depositions have been taken. However, the reason that the Estate's motion to bifurcate should be denied is straightforward and only requires a basic understanding of the claims at issue in this action. Thus, the Wellin Children will provide only a brief overview of the factual background relevant to the Estate's motion.

Keith, who amassed a large fortune during his lifetime, passed away on September 14, 2014. During his lifetime and upon his death, Keith maintained most or all of his assets in a revocable trust that he created in 2001 named The Keith S. Wellin Florida Revocable Living Trust (the "Trust"). Also, all relevant versions of Keith's will—including the 2011 version that the Wellin Children are seeking to probate in this action and the 2014 version that Wendy Wellin ("Wendy") is seeking to probate in this action—are "pour over" wills that provide for the assets

[1] A copy of this case, which does not appear to be available on Westlaw, is attached hereto as Exhibit A.

remaining in Keith's estate, if any, to "pour over" to his Trust upon his death and be distributed pursuant to the Trust's terms. As a result, the version of Keith's will that is probated through this action will have little practical effect, but the version of Keith's Trust that is deemed effective will have significant practical effect. At all times prior to the summer of 2013, Keith's estate planning provided for the bulk and residuary of his estate to pass in equal shares to the Wellin Children, and for a smaller, fixed amount of cash to pass to Wendy.

Around the summer of 2013, however, things changed abruptly. Keith fired his long-standing estate planning lawyer and other advisors and hired new lawyers and advisors selected by Wendy, and he began transferring large amounts of his remaining wealth to Wendy, transferring approximately $40 million to her in 2013 alone. Keith also became convinced that his children had "stolen" all or most of his money and that he was at risk for going bankrupt because of his children (not because of Wendy), and he removed his children from various fiduciary positions (such as Power of Attorney) and replaced them with Wendy. On July 3, 2013, Keith sued his children in federal court and sought to recover various assets transferred to them and entities created for their benefit, and he simultaneously purported to amend the Trust to disinherit or severely reduce the inheritance of the Wellin Children and increase the inheritance of Wendy. In April 2014—two months before Keith executed his final Trust and Will—an independent examiner appointed by the Probate Court examined Keith and issued a report opining that he was incapacitated.

Keith passed away on September 14, 2014. Shortly after Keith's death, the Wellin Children sued Wendy in federal court for intentional interference with inheritance, breach of the prenuptial agreement, defamation, and several other causes of action, alleging that Wendy, among other things, lied to Keith, convinced him that his children stole money from him, and caused Keith to sue, disinherit, and take or attempt to take other actions to the detriment of his children and other

lineal descendants and for the benefit of Wendy, and that she did so at times when Keith lacked capacity and was under Wendy's undue influence. The day after Keith's death, Wendy filed this action to probate Keith's final Will, and the Wellin Children subsequently asserted the same counterclaims against Wendy that they asserted in the federal court action against Wendy.[2]

The claims and counterclaims pending in the above-captioned action are comprised of the claims relating to which version of Keith's Will and Trust should be enforced, and whether and the extent to which Wendy owes the Wellin Children damages for influencing Keith while his capacity was diminished. Critically, all of these claims and counterclaims will require introduction of the evidence relating to Keith's capacity and Wendy's influence over Keith. This fact—which cannot reasonably be disputed—is fatal to the Estate's motion to bifurcate.

III. Relevant law

South Carolina Rule of Civil Procedure 42(b) provides:

> **(b) Separate Trials.** The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Constitution or as given by a statute of the State.

SCRCP 42(b). "A trial should be bifurcated only if the issues are so distinct that trial of each alone would not result in injustice." *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct. App. 1998). Most of the South Carolina cases discussing bifurcation involve requests to bifurcate liability from damages, because this is the most common type of bifurcation. In

[2] The above-captioned action was stayed, pending resolution of the federal action, for approximately two years, but the Estate successfully lifted the stay last year over the Wellin Children's objections.

discussing Federal Rule of Civil Procedure 42(b), which is substantially identical to SCRCP 42(b), the South Carolina District Court held:

> The court is permitted considerable discretion in exercising its powers under the rule. Notwithstanding the broad discretion conferred by Rule 42(b), the bifurcation of issues and the separate trial of them is not the usual course of events. Nothing else appearing, a single trial will be more expedient and efficient. The party requesting separate trials bears the burden of convincing the court that such an exercise of its discretion will promote greater convenience to the parties, witnesses, jurors, and the court, be conducive to expedition and economy, and not result in undue prejudice to any party. Merely presenting some proof which supports bifurcation is not enough. The decision to bifurcate must be made on a case-by-case basis after consideration of all of the relevant factors and the individual circumstances.

In re Safety-Kleen Corp. Bondholders Litig., 2004 U.S. Dist. LEXIS 31748, *8-10.

As explained in *Safety-Kleen*, courts typically consider five factors in deciding a motion to bifurcate. *See id.* at *10-14. First, courts consider the separability of the issues. Courts "will likely decline to bifurcate if there will be a significant overlap of evidence at the two trials which would make separation inefficient and inexpedient." *Id.* As a result, the most common type of bifurcation is of the issues of liability and damages. *Id.* Second, courts consider whether the claims to be tried are legal or equitable, and "[c]ourts tend to favor bifurcation where the claims to be tried are equitable rather than legal." *Id.* Third, courts consider the posture of discovery and, specifically, whether bifurcation will allow the parties to defer costly discovery pending resolution of the issue to be tried first. *Id.* Fourth (and closely related to the first factor), courts consider whether there will be significant overlapping evidence in the separate trials. Finally, courts consider whether bifurcation will cause any prejudice to the parties. *Id.*

IV. Argument

In its motion, which is only three sentences, the Estate asks this Court "to issue an order bifurcating for trial the validity of Keith S. Wellin's June 27, 2014 estate plan, including the Last Will and Testament and Amended and Restated Revocable Trust executed by Mr. Wellin on that

day, from the remaining claims and counterclaims currently pending in this matter." In this action, the Wellin Children have challenged Keith's purported amendments to his Will and Revocable Trust in 2013 and 2014 on the grounds of, among other things, Keith's lack of capacity and Wendy's undue influence. The Wellin Children allege that Wendy unduly influenced Keith by, among other things, convincing Keith in the summer of 2013 that his children "stole" his money—a belief Keith continued to hold for the remainder of his life, including on June 27, 2014. Thus, litigating the validity of the June 27, 2014 versions of Keith's Will and Trust will require introduction of all evidence relevant to Keith's capacity and Wendy's influence over Keith, including all evidence from 2013 relating to Keith coming to believe the fiction that his children stole from him, and all evidence from 2013 and 2014 demonstrating Keith's cognitive decline.

Under these circumstances, bifurcating the trial as the Estate suggests is not proper for at least two reasons. First, the bifurcated trial the Estate requests—one in which the parties litigate the validity of the June 27, 2014 versions of Keith's Trust and Will—would require the parties to introduce all the evidence relevant to the remaining claims and counterclaims. If such a bifurcated trial were held, the Wellin Children would introduce all evidence supporting their tort and breach of contract claims against Wendy, because this is the same evidence that demonstrates Wendy's undue influence over Keith and Keith's diminished capacity rendering the June 27, 2014 Will and Trust invalid. For example, the evidence that Wendy defamed the Wellin Children to their father and intentionally interfered with their inheritance is also evidence supporting a finding that Wendy unduly influenced Keith. Thus, if the Estate's motion were granted, the jury for the bifurcated trial would hear all the evidence relating to all the Wellin Children's claims, but the jury would not be permitted to decide these claims. Rather, the jury would only be permitted to decide the claims relating to the validity of the Trust and the Will. This would be incredibly inefficient. If the jury

hears all the evidence relating to the Wellin Children's claims, the jury should be permitted to decide all those claims.

Second, if the Estate's motion were granted and the Court held an initial trial only on the validity of the June 27, 2014 Trust and Will, the parties may nevertheless be required to introduce all the same evidence from the first trial again in the second trial on the remaining claims. That is, even if a jury found in the first trial that, on June 27, 2014, Keith had testamentary capacity and Wendy's influence over Keith was not sufficiently great to meet the undue influence standard, this would not somehow preclude the Wellin Children from introducing all evidence of Keith's diminished capacity and Wendy's influence over Keith in the second trial. For example, regardless of the *degree* to which Keith's capacity was diminished or Wendy influenced Keith, such diminished capacity and influence is highly relevant to the Wellin Children's claims that Wendy defamed Keith and that such defamation was successful in causing Keith to disinherit and sue his children. Likewise, Keith's diminished capacity and Wendy's influence over Keith—regardless of the degree—is highly relevant to the Wellin Children's claim that Wendy intentionally interfered with their inheritance. Mental capacity and undue influence occur on a spectrum, and the Wellin Children are not required to prove Keith's diminished capacity or Wendy's undue influence to any particular standard for such evidence to be relevant to the Wellin Children's tort and breach of contract claims against Wendy. Thus, if the Court bifurcated the trial as the Estate suggests, the second trial may end up including the same evidence from the first trial.

The reason the Estate is seeking to bifurcate the trial in this manner is that the Wellin Children's challenges to the June 27, 2014 versions of Keith's Will and Trust are subject to a higher burden of proof than their tort and breach of contract claims against Wendy. Thus, the Estate

is seeking to try the claims with the most favorable standard of proof first, and then if the Estate is successful in this first trial, use the outcome from the first trial offensively in the second trial.

Regardless of whether bifurcation as suggested by the Estate is strategically advantageous to Wendy, however, it is not supported by any of the factors courts consider when deciding motions to bifurcate. To the contrary, all these factors weigh against bifurcation. First, courts consider the separability of the issues, and courts "will likely decline to bifurcate if there will be a significant overlap of evidence at the two trials which would make separation inefficient and inexpedient." *In re Safety-Kleen Corp. Bondholders Litig.*, 2004 U.S. Dist. LEXIS 31748, *8-10. This is a textbook case where granting the motion to bifurcate would require significant overlap of evidence that would make the separate trials inefficient and inexpedient.

Second, courts consider whether the claims to be tried are legal or equitable, and "[c]ourts tend to favor bifurcation where the claims to be tried are equitable rather than legal." *Id.* Here, most of the pending claims are legal, not equitable.

Third, courts consider the posture of discovery and, specifically, whether bifurcation will allow the parties to defer costly discovery pending resolution of the issue to be tried first. *Id.* Here, the Estate is not seeking to bifurcate discovery at all. Thus, bifurcation would not allow the parties to defer any discovery.

Fourth (and closely related to the first factor), courts consider whether there will be significant overlapping evidence in the separate trials. Again, this factor strongly weighs against bifurcation.

Finally, courts consider whether bifurcation will cause any prejudice to the parties. *Id.* This factor weighs most heavily against bifurcation in this case. As explained above, having a trial as to the validity of the Will and Trust—but where the numerous claims for which capacity

and undue influence evidence is relevant are not decided—would be incredibly inefficient and expensive. Further, all of the evidence from the initial trial on the validity of the Will and Trust may need to be introduced again when the remaining claims are tried. In the alternative, if the Court somehow decided to exclude evidence regarding capacity and undue influence from the subsequent trial on the Wellin Children's claims, as the Estate apparently envisions, the Wellin Children would be terribly prejudiced. This scenario is difficult to even fathom, as Keith's capacity and Wendy's influence over Keith are at the heart of the Wellin Children's claims against Wendy, and almost all the evidence in these cases relates to those issues to some extent.

Moreover, the Estate's motion does not explain how, as a practical matter, it envisions this proposal operating, making it difficult to assess the true level of prejudice that would result if the Court granted the motion. For example, how would the determinations made in the initial trial regarding the validity of the Will and Trust impact the subsequent litigation? Would a failure to meet the burden of proof to establish incapacity and undue influence mean the Wellin Children were barred from introducing certain evidence in the subsequent trial? What standard of proof would apply in the initial trial, and how could the determinations made in the initial trial be binding in subsequent litigation of claims with a different standard of proof? These questions and many others are not addressed in the Estate's motion, which is only three sentences. Thus, the true level of prejudice envisioned by the motion is impossible to assess.

V. Conclusion

Bifurcation should only be allowed where doing so would increase efficiency and reduce costs. Here, bifurcation as requested by the Estate would dramatically reduce inefficiency and increase costs. For the foregoing reasons, and any additional reasons provided before or during any hearing on this motion, the Estate's motion should be denied.

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September 25, 2018

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Peter Wellin, Cynthia W. Plum and Marjorie W. King, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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September 25, 2018

EXHIBIT A

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1. *In re Safety-Kleen Corp. Bondholders Litig., 2004 U.S. Dist. LEXIS 31748*
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In re Safety-Kleen Corp. Bondholders Litig.

United States District Court for the District of South Carolina, Columbia Division

October 29, 2004, Decided; October 29, 2004, Filed

Case No. 3:00-1145-17

Reporter
2004 U.S. Dist. LEXIS 31748 *

IN RE SAFETY-KLEEN CORP. BONDHOLDERS LITIGATION

Subsequent History: Motion denied by, Motion granted by, Motion granted by, in part, Motion withdrawn by *In re Safety-Kleen, 2005 U.S. Dist. LEXIS 46268 (D.S.C., Feb. 4, 2005)*

Prior History: *In re Safety-Kleen Corp. Bondholders Litig., 2004 U.S. Dist. LEXIS 31099 (D.S.C., Oct. 29, 2004)*

Core Terms

bifurcation, Securities, separate trial, issues, discovery, witnesses, damages, parties, require proof, plaintiffs', separable, scienter, weighs

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Judges: Joseph F. Anderson, Jr., United States District Judge.

Opinion by: Joseph F. Anderson, Jr.

Opinion

ORDER NO. 157 DENYING PLAINTIFFS' MOTION TO BIFURCATE TRIAL

This case comes before the court on motion by plaintiffs American High-Income Trust ("AHIT") and State Street Research Income Trust ("SSRIT") filed on July 23, 2004 on behalf of themselves and the class, for an order bifurcating the trial of this action so that the class's claims pursuant to *Sections 11* and *15* of the Securities Act of 1933 ("Securities Act claims") are tried first, followed by separate trials of claims made pursuant to *Sections 10(b)*, *18* and *20(a)* of the Securities Exchange Act of 1934 ("Exchange Act claims"). On August 9, 2004, defendant PricewaterhouseCoopers LLP ("PwC") filed a response to the motion in which it did not oppose bifurcation. By memorandum filed August 10, 2004, defendants James R. Bullock, Leslie W. Haworth, Henry B. Tippie, James L. Wareham and Robert W. Luba ("Defendant Directors"), opposed bifurcation. Plaintiffs filed a reply on August [*5] 12, 2004. On October 6, 2004, this court heard extensive oral argument on the motion.

The grounds for plaintiffs' motion to bifurcate primarily revolve around the risk of juror confusion. Plaintiffs argue that if the Securities Act claims and Exchange Act claims are tried together, there is a significant risk that jurors will apply the wrong legal standards to the different sets of claims. They assert that bifurcation is appropriate in light of the differences in the elements of each of the claims, including differences in the measure of damages, burdens of proof regarding causation and state of mind, as well as the absence of reliance and scienter requirements under the Securities Act. Defendant Directors argue against bifurcation, claiming it would produce inefficiencies because evidence of the underlying facts and circumstances would be relevant to both trials, through identical witnesses and evidence. They further oppose bifurcation on the grounds that bifurcation would work an unfair hardship on them.

I. NATURE OF CLAIMS:

This is a securities fraud case in which plaintiffs have asserted claims under the 1933 Securities Act and the 1934 Exchange Act. A brief description of the differences [*6] among the claims follows for the purpose of highlighting the nature of the anticipated trial proceedings.

A. 1933 Securities Act Claims

1. Section 11 Claims:

The Section 11 claims are limited to false statements in the registration statements. They do not require proof of reliance, scienter or causation. Defendants bear the burden of proving the affirmative defense that they had no reasonable ground to believe and did not believe that the registration statements were untrue or misleading under essentially a negligence standard. Damages under *Section 11* are calculated based on a statutory formula and are limited to post-registration purchases.

2. Section 15 Claims:

The Section 15 claims do not require proof of reliance or scienter. The affirmative defense requires defendants to prove they had no knowledge of or no reasonable ground to believe in the existence of the facts giving rise to Safety-Kleen's violation. Section 15 claims are derivative of Section 11 claims, and damages are calculated based on the same statutory formula.

B. 1934 Exchange Act Claims

1. Section 10(b) Claims:

The Section 10(b) claims are based on false statements in the

registration statements, offering memoranda and Form [*7] 10-K filings. They require proof of reliance and scienter. The burden is on plaintiffs to prove that the defendants acted intentionally or recklessly. Damages are calculated, not according to statutory formula, but by the fact-finder on an out-of-pocket measure. The Section 10(b) claims are based on all purchases of the bonds during the class period, not just post-registration.

2. Section 18 Claims:

The Section 18 claims are based on false statements in the Form 10-K filings. They require proof of reliance. The burden is on plaintiffs to prove that they actually read and relied on the false statements in the SEC filing. *Section 18* does not require proof of scienter, but provides an affirmative defense to those defendants to prove that they acted in good faith and had no knowledge that the statement was false or misleading.

3. Section 20(a) Claims:

The Section 20(a) claims are based on control person liability against those who controlled Safety-Kleen. The Section 20(a) claims arise out of Safety-Kleen's violations of *Section 10(b)* and *Section 18*. Therefore, plaintiffs have the burden of proving all the elements of a *Section 10(b)* or Section 18 claim, plus establishing defendants' control [*8] of Safety-Kleen. Defendants bear the burden of proving that they acted in good faith and did not directly or indirectly induce the act(s) constituting the violation.

II. LEGAL ANALYSIS:

A. Standard of Review

Rule 42(b) of the Federal Rules of Civil Procedure governs motions to bifurcate an action into separate trials. This rule provides:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the *Seventh Amendment to the Constitution* or as given by a statute of the United States.

Fed. R. Civ. P. 42(b).

The court is permitted considerable discretion in exercising its powers under the rule. *Shetterly v. Raymark Indus., 117 F.3d 776, 782 (4th Cir. 1997)*; *White v. Bloomberg, 501 F.2d 1379 (4th Cir. 1974)*. Notwithstanding the broad discretion conferred by *Rule 42(b)*, the bifurcation of issues and the separate trial of them is not the usual [*9] course of events. *See* 9 Charles Alan Wright, et al., *Federal Practice and Procedure* § 2381, 2387-92, at 474 (1990). Nothing else appearing, a single trial will be more expedient and efficient. *Industrias Metalicas Marva, Inc. v. Lausell, 172 F.R.D. 1, 2 (D.P.R.1997)*; *Johns Hopkins University v. Cellpro, 160 F.R.D. 30, 35 (D.Del. 1995)*.

The party requesting separate trials bears the burden of convincing the court that such an exercise of its discretion will promote greater convenience to the parties, witnesses, jurors, and the court, be conducive to expedition and economy, and not result in undue prejudice to any party. *Smith v. Alyeska Pipeline Service, 538 F.Supp. 977 (D.Del.1982)*, *aff'd, 758 F.2d 668 (Fed.Cir. 1984)*, *cert. denied, 471 U.S. 1066, 105 S. Ct. 2142, 85 L. Ed. 2d 499 (1985)*. *Novapharm, Ltd. v. Torpharm, Inc., 181 F.R.D. 308, 310 (E.D.N.C. 1998)*. Merely presenting some proof which supports bifurcation is not enough. *Willemijn Houdstermaatschaapij BV v. Apollo Computer Inc., 707 F.Supp. 1429, 1433-34 (D.Del. 1989)*.

The decision to bifurcate must be made on a case-by-case basis after consideration of all of the relevant factors and the individual circumstances. *Id.*; *Lis v. Robert Packer Hospital, 579 F.2d 819, 824 (3rd Cir. 1978)*, [*10] *cert. denied, 439 U.S. 955, 99 S. Ct. 354, 58 L. Ed. 2d 346 (1978)*.

B. Factors Relevant to Determining Whether to Bifurcate

In general, courts consider the following five factors relevant to a bifurcation decision.

1. Separability of the Issues

This factor constitutes a threshold inquiry because bifurcation raises the possibility that any delay between separate trials may result in the loss of one or more jurors which would require the selection of a new jury. In that instance, if the issues were not truly separable, the result would be that different juries would have considered the same issue, in violation of the *Seventh Amendment*. *See* Wright, *supra* at 512 (p. 110, 1999 Pocket Part), *citing Matter of Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1303 (7th Cir. 1995)*, *cert. denied,*

516 U.S. 867, 116 S. Ct. 184, 133 L. Ed. 2d 122 (1995); *Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996)*. Consequently, the issues must be truly separable before separate trials can be ordered without the risk of untoward consequences. Even if the issues are separable for purposes of the *Seventh Amendment*, a court will likely decline to bifurcate if there will be a significant overlap of evidence at the two **[*11]** trials which would make separation inefficient and inexpedient. Further, bifurcation is "improper where the issues are so closely interwoven that plaintiff would have to present the same evidence twice in separate trials. In such circumstances, judicial economy is fostered by a single trial." 8 *Moore's Federal Practice 3d § 42.20[7][c]*.

The most common justification for separate trials is that the discovery and/or the trial of the issues of liability and damages are sufficiently complex so that the two issues should proceed separately. Determination of complexity, in turn, requires an examination of the amount and kind of evidence that will be used to support each issue. *Willemijn at 1435*; *Home Elevators, Inc. v. Millar Elevator Serv. Co., 933 F.Supp. 1090, 1091 (N.D.Ga.1996)*.

In the present case, both the Securities Act and Exchange Act claims will involve presentation of much of the same evidence on many of the same issues through the same witnesses. For example, the question of misstatement of Safety-Kleen's financial statements, market conditions, and the director's exercise of good faith and reasonable care are all issues involved in both sets of claims. Their resolution will likely **[*12]** involve testimony from many of the same witnesses. Plaintiffs themselves do not deny that there will be considerable overlap between the evidence and witnesses in the trial of the Securities Act and Exchange Act claims. Pl. Reply Br. at 2. Therefore, this factor weighs against bifurcation.

2. Jury-Tried Claims

Courts tend to favor bifurcation where the claims to be tried are equitable rather than legal. *E.g., Dollar Sys., Inc. v. Avcar Leasing Sys., Inc., 890 F.2d 165, 170 (9th Cir. 1989)*. In this case, the claims are all legal claims to be tried to a jury. Therefore, this factor weighs against bifurcation.

3. Posture of Discovery

One of the "primary purposes of bifurcation is to defer costly discovery pending resolution of preliminary issues such as liability." 8 Moore's Federal Practice 3d § 2.23[3]. If bifurcation were ordered, there would be no substantial saving of the parties' time insofar as discovery is concerned. Discovery has already been completed. This is not a case in which a request for bifurcation was made early in the proceedings based on the contention that time and expense would be saved if discovery relating to some of the claims was deferred. Therefore, this factor **[*13]** weighs against bifurcation.

4. Overlapping Evidence in Separate Trials

Although there may be some difference in the evidence to be presented in the two sets of claims, the parties anticipate there will be extensive overlap between the evidence and witnesses in the trial of the Securities Act claims and Exchange Act claims, as discussed above. Therefore, this factor weighs against bifurcation.

5. Prejudice to parties.

Bifurcating a case adds costs to the parties in the form of the additional expense associated with two trials and adds delay in final resolution. *Willemijn at 1435, citing H.B. Fuller Co. v. National Starch & Chem. Corp., 595 F.Supp. 622, 625 (D.Del. 1984)*. Defendant Directors argue they will be prejudiced by bifurcation of the claims because they would incur additional costs and delay. Plaintiffs concede the trials would be collectively longer in the event of bifurcation than not. The court finds this factor also weighs against bifurcation.

The Court finds its ruling on decertification sufficient to foreclose further consideration of bifurcating the trial. Cases granting bifurcation have usually involved additional elements of complexity or involve separation of liability **[*14]** and damages phases. There are no similar additional complicating factors in this case. The court finds that any potential confusion can be eliminated with clear jury instructions and special verdict forms.

On the record here, this court concludes that the plaintiffs have not satisfied their burden of showing that separate trials in this case would further the convenience of the parties and would be conducive to expedition and economy.

III. CONCLUSION

The court denies plaintiffs' motion to bifurcate the trial. This case will proceed to trial as a class action as to the Securities Act claims. The class having been decertified as to plaintiffs' claims under *Section 10*, *Section 20(a)* and *Section 18*

pursuant to the Exchange Act, only the two named plaintiffs' Exchange Act claims will be tried at the same time as the trial of the class's Securities Act claims (*Section 11* and *Section 15*).

IT IS SO ORDERED.

/s/ Joseph F. Anderson, Jr.

Joseph F. Anderson, Jr.

United States District Judge

October 29, 2004

Columbia, South Carolina

End of Document

EXHIBIT G

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

THE COURT OF COMMON PLEAS

Civil Action No. 2014-CP-10-07038

Wendy C. H. Wellin,
Petitioner,

vs.

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,
Respondents and Counter- Petitioners

vs.

Wendy C.H. Wellin, Invidiually 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 Hard, and Heather Lane
Counter-Respondents.

IN THE MATTER OF:
Keith S. Wellin

ORDER

THIS MATTER COMES BEFORE THE COURT on multiple motions: Wendy Wellin's Motion for a Protective Order, Edward Bennett and Patricia Scarborough's Motions to Quash Subpoenas and for Protective Orders, Dr. David Bachman's Motion to Quash a Subpoena Duces Tecum and motion for a Protective Order, the Wellin Children's Motion for a Status Conference, and Wendy Wellin's Motion to Bifurcate.

The pending action is a dispute over Keith S. Wellin's estate plans. Mr. Wellin died in 2014 and his most recent will and revocable trust were executed on June 27, 2014. Wendy Wellin filed a Petition for Formal Testacy after Keith Wellin's death. His three adult children ("the Wellin Children") answered the petition and counter-petitioned for formal testacy of an earlier Will. There are actions pending in federal court as well. In August of 2018, the Court ordered the stay in State Court be lifted. This jurist was given exclusive jurisdiction over this case. The parties filed the motions listed above and a hearing was scheduled on February 11, 2019 in Columbia, SC. After a complete hearing on all the motions listed above and after a full review of the facts and the law the Court finds as follows.

Wendy Wellin has already been subject to 14 hours of depositions as part of discovery in the pending action. She also participated in an additional 6 hours of deposition testimony for a malpractice case related to this lawsuit. The Court understands that is a considerable amount of time to be deposed. However, the Court finds it is not unreasonable to allow the Defendants to depose Mrs. Wellin again now that the stay has been lifted in state court and this case is positioned to be tried in the coming weeks. Therefore, the Court denies Mrs. Wellin's Motion for a Protective Order and orders that the Defendants may depose Mrs. Wellin for an additional 6 hours total.

Counsel for Edward Bennett, Esq. and F. Patricia Scarborough, Esq. also filed Motions to Quash Subpoenas and Motions for Protective Orders from further depositions. These two attorneys served as estate planning counsel to Keith Wellin in 2013 and 2014. They have already been deposed by the Defendants during discovery in the federal action. Attorney Bennett was deposed for 12 hours and Attorney Scarborough was deposed for 7 hours. As these attorneys are not parties to this litigation and they have both been deposed in depth, the Court finds it is unreasonable to allow the Defendants to depose them any further. Therefore the subpoenas regarding Mr. Bennett

and Ms. Scarborough will be quashed, and they are both entitled to a protective order from further depositions in this case.

Counsel for the Plaintiff filed a Motion for a Protective Order on behalf of Dr. David Bachman. Dr. Bachman was hired by Plaintiff's counsel in 2014 as a consultant. The Defendants filed a Subpoena Duces Tecum for Dr. Bachman's records from working with Keith Wellin before he died. Dr. Bachman asserts the records are subject to privilege and therefore he is entitled to a Protective Order from this Subpoena Duces Tecum. The Court finds that any such privilege which may exist is waived pursuant to South Carolina Rule of Civil Procedure 35(b). Therefore, the Motion for a Protective Order is denied, and Dr. Bachman is ordered to produce the documents requested.

The Wellin Children filed a Motion for a Status Conference in this case. This jurist recently consulted with Judge Norton who has jurisdiction over the federal court action. Both courts agree that the actions pending in state court should be tried prior to the federal action in order to promote judicial economy. Therefore, the Court orders that the pending state court action will be tried before the federal court action. Assuming that this action remains on the jury trial roster, the trial in state court will be limited to two weeks and take place in June of this year; the parties will have to streamline their presentations pursuant to a future order concerning the allocation of available time.

The final motion is Wendy Wellin's Motion to Bifurcate. Mrs. Wellin's Motion seeks bifurcation of only the validity issues associated with the Last Will and Testament and the amended and restated trust of Keith Wellin, both executed on June 27, 2014. These validity issues include whether Keith Wellin had testamentary capacity to execute the 2014 Will and the 2014 Revocable Trust and whether his execution of the Will or Revocable Trust was the result of undue influence,

fraud, duress, or mistake. This Court finds that bifurcation of the issues 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. However, the Court denies Ms. Wellin's motion to limit bifurcation only to Keith Wellin's most recent estate plan.

This Court will try the issues of undue influence and testamentary capacity for all changes to Keith Wellin's estate plan from 2013-2014 in state court. Put another way, the 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.

IT IS SO ORDERED.[1]

Frank R. Addy, Jr.
Circuit Court Judge
Eighth Judicial Circuit

May 9, 2019
Greenwood, South Carolina

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK C.P.G.S. & F.C.
BY
DEPUTY CLERK

[1] The Court is aware that other motions have been filed since the hearing on this matter. The Court will address those other motions in due course.

EXHIBIT H

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CASE NO. 2012-212871

LAWRENCE E. MORROW AND EVELYN M. MORROW,

Petitioners,

v.

FUNDAMENTAL LONG-TERM CARE HOLDINGS, LLC,

ET AL.,

Respondents.

TRANSCRIPT OF DVD PROCEEDINGS

separate theory of liability, and the trial court recognized it, which is direct liability, direct negligence.

MR. HINES: Your Honor, let me maybe answer that by explaining what I think the trial court actually did and how I think respectfully it's not quite -- it's not quite that.

JUSTICE TOAL: Liability is not derivative, but the Court apparently assumed that because it said that Magnolia facility can avoid liability and it might avoid liability because it is somebody else's fault.

MR. HINES: To be clear now, Your Honor --

JUSTICE TOAL: And if they avoid liability, even if they pin the fault directly on the other corporations, they have, by avoiding liability themselves, also precluded plaintiff from pursuing its independent claims against the other entities. That's the great big doubt about this kind of bifurcation.

MR. HINES: To be clear, Your Honor, there is no attempt at avoiding liability by the facility by making such an argument. That is not an issue that's raised in this case.

JUSTICE KITTREDGE: So you would stipulate

that even with the plaintiff losing in the, quote, first trial, you would stipulate they have an absolute right then to pursue the claims against the corporate defendants?

MR. HINES: Your Honor, I would not.

JUSTICE KITTREDGE: Then you just answered Chief Justice's question.

JUSTICE PLEICONES: Absolutely. And there is nothing about this order that promotes efficiency or that does anything but squander judicial resources. But addressing the rule, you must conclude or you must admit that assuming Mr. Nichols and his side gets met with a summary judgment order against these corporate defendants because they lost the first trial, that they can appeal that and that summary judgment would likely be wrong. And if they lose that first trial because they were deprived of the opportunity to present certain amounts of certain pieces of evidence, because if they related purportedly only to the corporate defendants, that they would have a clear appeal on that and they probably win on that. So what have you done?

Now, clearly the rule operates in your

EXHIBIT I

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

KEITH WELLIN, et al.	:	
	:	
vs.	:	
	:	
PETER J. WELLIN, et al.	:	2:13 CV 1831
LESTER S. SCHWARTZ	:	
	:	
vs.	:	
	:	
PETER J. WELLIN, et al.	:	2:13 CV 3595
PETER J. WELLIN, et al.	:	
	:	
vs.	:	
	:	
WENDY WELLIN	:	2:14 CV 4067
PETER J. WELLIN, et al.	:	
	:	
vs.	:	
	:	
WENDY C.H. WELLIN	:	2:15 CV 1171
WENDY C.H. WELLIN	:	
	:	
vs.	:	
	:	
THOMAS M. FARACE, ESQ., et al.	:	2:16 CV 414

Motion hearing in the above-captioned matters held Wednesday, July 20, 2016, commencing at 2:08 p.m., before the Hon. David C. Norton, Courtroom II, United States Courthouse, 83 Meeting St., Charleston, South Carolina, 29401.

REPORTED BY DEBRA LEE POTOCKI, RMR, RDR, CRR
Official Court Reporter for the U.S. District Court
P.O. Box 835
Charleston, SC 29402
843/723-2208

And then the last case that the Wellin children filed was what we're referring to as a defamation case. Interlaced through all three of these claims is a common issue that surfaces across the spectrum of time, related to capacity, competence, undue influence and duress. It's in our briefing what we referred to as the validity issues.

And so we've identified in our briefing, 12 specific points of time in about an 18- or 19-month window where specific transactions were executed that are relevant to the determination of claims in all three of those cases, some of which are limited to one case and some are which related to all three cases.

And as you sort of take a step back, and the issue of capacity and competence has been raised by the Wellin children, and it will be used likely as a defense or an affirmative defense to many of the causes of action. And so when I thought about how we would envision a trial where that was a component, we estimate that between the expert witnesses, the care providers, the doctors, the friends, the family members, you know, upwards of 50 witnesses specifically related to the issue of capacity, validity issues, undue influence, et cetera. And when we started mapping out what that would look like, it would look like three to four weeks of testimony specifically related to issues of validity. And if we separate -- if we proceeded as other cases are filed,

and we proceeded with our trial first, that means we'd have three or four weeks of that testimony, coupled with all the other issues. And then in the trust protector case you'd have the same validity issues, coupled with the trust-specific cases. And then in the defamation case you'd have the same three or four weeks, coupled with then the defamation claims that are associated therein.

So we looked at Rule 42. Forty-two gives you great discretion. There's not a whole lot of guidance for us to go look to in terms of common law interpreting Rule 42 in this context. You know, I think that what we envisioned was a combined 42(a) and 42(b) effort by the Court, if the Court is so inclined, where you could bifurcate particular issues as permitted, and consolidate those issues for a particular trial.

The options really available to us, if you look at these three cases, and I tried to identify what the potential options are, and there may be others, but the first would be to have simply three separate trials where there's no consolidation, no bifurcation. And that's what I alluded to a moment ago, where you'd have the same capacity validity issues, coupled with the case specific ones.

And in our primary case, if you take the capacity and the fiduciary issues, we would estimate that that would be a five- or six-week trial.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Frank Addy, 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 Marjory 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.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Peter Wellin, Cynthia Wellin Plum, and Marjorie Wellin King Individually and as Co-Trustees and Beneficiaries of the Wellin Family 2009 Irrevocable Trust, u/a/d November 2, 2009, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

VERIFIED PETITION FOR A WRIT OF SUPERSEDEAS

MOTION FOR EXPEDITED CONSIDERATION

APPELLANTS' RETURN TO RESPONDENTS' MOTIONS TO DISMISS

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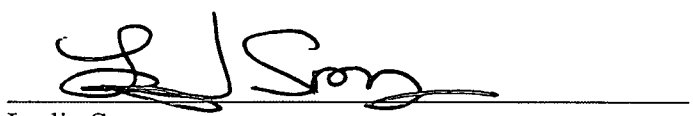

Lydia Spry
Administrative Assistant

June 7, 2019

NELSON MULLINS

NELSON MULLINS RILEY & SCARBOROUGH LLP
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June 7, 2019

Via Hand Delivery
The Honorable Jenny Abbott Kitchings
Clerk of Court
The South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Petition for a Writ of Supersedeas | Return to the Motions to Dismiss
Wendy C.H. Wellin v. Peter Wellin at al.
Appellate Case No. 2019-000833
Civil Action No. 2014-CP-10-7038
Our File No. 039113/01500

Dear Ms. Kitchings:

Please find enclosed an original and seven copies of an emergency Petition for a Writ of Supersedeas in regard to the above-referenced matter. We ask that you file the original and return a clocked-in copy to us via our courier. We are filing the petition with a copy of the signed client verification required by Rule 241(d)(3), SCACR. The original, notarized verification has been placed in the mail for delivery to the Court. Also enclosed is a Firm check for the petition filing fee described in Rule 240, SCACR.

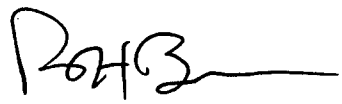
In light of the fact that this Petition and the above-referenced appeal are related to a proceeding decided by a panel of this Court one week ago—*Wellin et al. v. Wellin*, Ct. App. Op. No 5608 (May 29, 2019)—for which the remittitur has not yet been issued, and in light of the extraordinary and exigent circumstances giving rise to this Petition, we respectfully direct this Petition to the attention of the panel that decided that case, namely Judges Konduros, McDonald, and Hill (*i.e.*, "the appellate court where the appeal is pending," *see* Rule 241(d)). Please assist us by delivering this Petition to them through the appropriate internal avenues at the Court with all possible haste. Our clients' appeal is currently pending, but the trial court has informed us it intends to proceed with trial in 10 days. Thus this Petition is necessary to preserve our clients' substantial rights at both the trial and appellate levels.

Also enclosed is an original and seven copies of a Motion for Expedited Consideration of the petition in light of the exigency of the matter. We ask that you file the original and return a clocked-in copy to us via our courier. Also enclosed is a Firm check for the motion filing fee.

Finally, you will also find enclosed an original and seven copies of Appellants' Return to the Motions to Dismiss the Appeal. We ask that you file the original and return a clocked-in copy to us via our courier. We also ask that you permit this Return also to serve as Appellants' memorandum addressing appealability as requested by your letter dated May 23, 2019.

By copy of this letter to counsel of record, we are serving them with copies of the Petition, the Motion, and the Return to the Motions to Dismiss the Appeal.

Very truly yours,



Robert H. Brunson

RHB:ls
Enclosures
cc: Robert H. Hood, Esq.
Molly H. Craig, Esq.
James B. Hood, Esq.
Virginia R. Flood, Esq.
John T. Lay, Jr., Esq.
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