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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA  
In the Supreme Court

Appeal from Charleston County  
Court of Common Pleas  
The Honorable Frank R. Addy, Jr., Circuit Court Judge

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NOV 15 2019

SC Court of Appeals

App. No. 2019-001752

Wendy C.H. Wellin,

Respondent,

v.

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

Petitioners,

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.

**Return to Petition for Writ of Certiorari**

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Administrator of the Estate of Keith S. Wellin and  
as Trustee of the Keith S. Wellin Florida Revocable  
Living Trust, u/a/d Dec. 11, 2001

## STATEMENT OF THE ISSUES

- I. Did the Court of Appeals correctly dismiss the Petitioners' appeal of the Circuit Court order granting a bifurcated trial in this probate action to determine the validity of a will and revocable trust because the interlocutory order is not immediately appealable under S.C. Code §14-3-330?
- II. Did the Court of Appeals correctly deny the Petitioners' petition for a supersedeas to delay the Circuit Court from proceeding with the bifurcated trial on the validity of the will and revocable trust because the attempted appeal was premature?

## STATEMENT OF THE CASE

This is a probate action commenced by Wendy C.H. Wellin to probate the estate of her late husband, Keith S. Wellin, who died on September 14, 2014 at the age of 88. Mrs. Wellin thereafter submitted a Petition for Formal Probate in the Charleston County Probate Court, seeking probate of her husband's Last Will and Testament executed June 27, 2014. This probate action was removed to Circuit Court by Mr. Wellin's Children, who challenge the validity of the June 27, 2014 Last Will and Testament and related Revocable Trust based on the grounds that (1) Mr. Wellin lacked capacity to execute the June 27, 2014 Will and Revocable Trust; or (2) the Will and Revocable Trust were the product of undue influence, duress, fraud and/or mistake. The Wellin Children have counter-petitioned for the probate of an older will executed by Keith S. Wellin on August 11, 2011.<sup>1</sup>

In addition to this probate action, the parties have been entangled in other pending actions in federal court which involve facts and claims which intersect with the issues of Mr. Wellin's capacity which form the basis of the challenge to the June 27, 2014 Last Will and Testament and related Revocable Trust. These federal actions include an action initiated by Mr. Wellin, before

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<sup>1</sup> Mr. Wellin executed three other sets of estate planning documents in 2013-2014. Thus, under the Probate Code, the Appellants will have to prove the invalidity of each of those documents sequentially in order to succeed in their battle to validate the August 11, 2011 documents.

his death, asserting claims against his children for breach of fiduciary duties in connection with certain trusts he had established, an action initiated by the Trust Protector of a Trust created by Mr. Wellin against the Wellin Children, and an action initiated by the Wellin Children asserting a multitude of tort and contract claims against Mrs. Wellin. The Wellin Children have chosen to bring duplicative claims against Mrs. Wellin into this probate action which, by their own assertion, are precisely the same claims they commenced and continue to pursue in federal court.

This probate action was stayed for several years while litigation proceeded in federal court, but after two years, the Circuit Court lifted the stay and eventually granted this Respondent's motion to bifurcate trial on the issues of the validity of the June 27, 2014 Last Will and Testament and the Revocable Trust.

The Wellin Children filed a notice of appeal from the bifurcation order and attempted to avoid the trial set for June 2019. Though the Court of Appeals ultimately dismissed the appeal as interlocutory, the Wellin Children succeeded in delaying the trial until the first quarter of 2020 when the Circuit Court granted their motion for a continuance based on logistical issues with scheduling a two-week trial for a date certain. The Wellin Children filed a petition for rehearing which was denied by the Court of Appeals, and they now ask this Court to review that dismissal of their interlocutory appeal.

## ARGUMENT

### *Summary*

In their petition for a writ of certiorari, the Wellin Children present a biased and unnecessary narration of their allegations of underlying facts about “drastic revisions” that Mr. Wellin made to his estate plan when they claim he lacked capacity, was subject to undue influence, or revised his estate plan due to fraud, duress and/or mistake. The Wellin Children also have presented a skewed recitation of particular proceedings in the protracted procedural history of this action, and other related federal court actions, to unfairly portray the Respondents as manipulating the process and to criticize the Trial Court’s handling of the proceedings. However, the Wellin Children have not identified any special or important reasons to justify review of the Court of Appeals dismissal order.

Pursuant to Rule 242, SCACR, the standard for such discretionary review is the presentation of special and important reasons such as:

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

No such reasons are presented in this appeal.

The Respondent submits that the jurisdictional question before the Court was correctly answered by the Court of Appeals, without dissent, upon proper application of well-settled precedent on appellate jurisdiction over interlocutory decisions to the pivotal procedural matters

of record and the interlocutory nature of the order of which the Petitioners prematurely seek review. The pertinent procedural history is simple – this is a will contest in a probate action. The nature of the order is clear – the Circuit Court granted a motion to bifurcate the validity issues in this probate action. The order is not appealable under S.C. Code § 14-3-330 or related precedent.

**I. Section § 14-3-330 does not provide appellate jurisdiction for immediate review of bifurcation orders.**

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

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

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;

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

(4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

Supreme Court opinions provide well-settled precedent that discretionary rulings on bifurcation motions are not immediately appealable. *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000) (holding order bifurcating issue of exclusion under insurance contract from issue of occurrence was not appealable); *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 533 S.E.2d 575 (2000) (holding order bifurcating issues in contract case between liability and damages

was not immediately appealable). While the Wellin Children dismissively acknowledge this general rule, they contend that the order affects a mode of trial and affects their substantial right to control their own case. One fundamental flaw in their arguments is their refusal to acknowledge the primary nature of this probate action and the necessity of a threshold ruling on the validity of the Last Will and Testament and related Revocable Trust.

The bifurcation order issued by the Circuit Court is both necessary and compelled by the Probate Code because the first stage of this probate action must be to determine the validity of Mr. Wellin's will. S.C. Code § 62-3-102 (“[A] will must be declared to be valid by an order of informal probate by the court or an adjudication of probate by the court.”). Until that determination is made, priority for the appointment of a personal representative cannot be determined, S.C. Code § 62-3-203(a), and distributions cannot be made from the estate to its heirs or devisees.

Under the bifurcation order, the parties will have the opportunity to present their evidence and arguments in support of or against the elements of Mr. Wellin's capacity and the validity of the documents so that a jury can make the requisite threshold determination on the validity of Mr. Wellin's Last Will and Testament and related Revocable Trust. The bifurcation order does not grant judgment on or strike any part of the claims against Mrs. Wellin that the Wellin Children have been allowed to add to this probate action. Nor does the bifurcation order deprive the Wellin Children of any mode of trial to which they are entitled.

**A. The bifurcation order does not grant judgment on the Wellin Children's claims.**

The Wellin Children contend that the Court of Appeals has diverged from this Court's precedent in *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 773 S.E.2d 144 (2015), because they claim the bifurcation order has effectively granted potential judgment on their claims and prevents them from being the architects of their own case. However, a careful reading of the opinion in *Morrow* reveals that there are no germane parallels to authorize an immediate appeal of the bifurcation order.

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

Respondent maintains that the Circuit Court's ruling on bifurcation does not make any comparable ruling on the merits that affects any substantial rights in this probate action. No claims or defenses have been struck or pretermitted. The bifurcation order simply directs that the issues of validity of the Last Will and Testament and related Revocable Trust – the former over which the state court has exclusive jurisdiction – be presented to the fact-finder for decision first.

Accordingly, the Court of Appeals correctly held in its order of dismissal: “This case is distinguishable from *Morrow* as the underlying bifurcation order in this case does not state or even suggest that the first phase of the bifurcated trial will be dispositive of any claim tried in the second phase of the trial, and the order contains no language restricting the evidence Appellants are entitled to present in either phase.”

The Wellin Children attempt to build their argument for appealability from the Circuit Court’s reference to the potential claim/issue preclusion impact on the counterclaims or the federal claims. However, the Court’s comments did not amount to any legal ruling that disposes of their claims. If and when those claim/issue preclusion issues arise, they will be resolved by the appropriate court under the applicable law, and whatever that impact may be, it does not negate the statutory imperative of the threshold determination in the probate action.

The Wellin Children also contend that bifurcation affects their substantial rights because they are being forced to prove their challenges to the validity of Mr. Wellin’s Last Will at a higher burden of proof than they bear on their claims against Mrs. Wellin. The law establishes the burden the Wellin Children must meet to invalidate the will and revocable trust executed by their father. Their argument seems to suggest that if their tort and contract claims<sup>2</sup> were tried together with their challenges to the will and revocable trust,<sup>3</sup> they could muddle up their claims and prevail on their challenges without meeting the burden of proof. As with the collateral effect of the law on issue/claim preclusion, whatever the comparable burdens of proof may be, the Wellin Children cannot avoid the burden of proof for their challenges imposed by the law or negate the necessity

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<sup>2</sup> These tort and contract claims must be proved by a preponderance of the evidence.

<sup>3</sup> Challenges to wills and revocable trusts based on theories of undue influence must be proved by unmistakable and convincing evidence. S.C. Code § 62-3-407; *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 218, 578 S.E.2d 329, 334 (2003).

of resolving the validity issues surrounding the Last Will and Testament or related Revocable Trust first. Nor does either point change the interlocutory nature of the Circuit Court's procedural order for bifurcation which controls the appellate jurisdictional question presented at this time.

**B. The bifurcation order does not prevent the Wellin Children from being the architects of their own case.**

In finding the order appealable in *Morrow*, the Court found that: "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." 773 S.E.2d at 146 (citing *Neeltec Enters., Inc., v. Long*, 397 S.C. 563, 566, 725 S.E.2d 926, 928 (2012)). The Wellin Children contend that they, like the plaintiffs in *Morrow*, are being deprived of their substantial right to be the architects of their own case. However, this is, first and foremost, a probate action to probate Mr. Wellin's Last Will and Testament and related Revocable Trust. The Petitioners have challenged these documents and nothing in the bifurcation order deprives them of their rights to litigate the issues presented by their challenges for lack of capacity, undue influence, duress, fraud and mistake. Nothing in the bifurcation order alters the claims against Mrs. Wellin, personally, which they have inserted into the will contest.

In *Neeltec Enterprises, Inc. v. Long*, as cited in *Morrow*, the Court held that an order of substitution requiring the plaintiff to remove a named defendant from the suit and substitute two different defendants was immediately appealable because it deprived the plaintiff of her substantial right to choose her defendant. Here, the order of bifurcation does not remove or substitute any party. Nor does the bifurcation order compare to the disqualification of counsel as argued by the Wellin Children with citation to *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005).

The purpose of the probate action is to identify Mr. Wellin's final valid estate plan and then administer his estate accordingly. The Wellin Children seek damages from Mrs. Wellin on claims independent of this process. Although the counterclaims may have been joined in the circuit court with the probate action, they do not fall under the probate jurisdiction; rather, those claims repose in the circuit court's general common pleas jurisdiction. While there may be overlapping evidentiary facts relevant to the will contest and the counterclaims, the Wellin Children's argument about their "Hobson's Choice" and difficult litigation strategy decisions are of their own making. The fact is that the Wellin Children were allowed to amend their pleading to assert non-probate tort and contract counterclaims against Mrs. Wellin individually in this probate action does not allow them to avoid or confuse the will contest that needs to be settled first. In fact, the Wellin Children chose to initially bring their tort and contract claims against Mrs. Wellin in federal court, and only four years after litigating them in that venue did they add the duplicative claims into the present probate action. The fact that the Appellants chose to bring these duplicative claims into state court and conflate them with the will contest does not provide any basis to justify impeding the fundamental, core probate process.

**C. The bifurcation order does not prevent affect a mode of trial.**

Although the will contest issues will be tried to a jury, the Wellin Children also contend that the Circuit Court's order is immediately appealable because its ruling limiting the trial to two weeks violates due process and deprives them of a mode of trial. It is well established that an order regarding mode of trial court is immediately appealable and, in fact, must be immediately appealed to preserve error as stated in *Foggie v. CSX Transp., Inc.*, 313 S.C. 98, 23, 431 S.E.2d 587, 590 (1993); *Flagstar Corp., supra.* (order depriving a party of a mode of trial to which it is entitled to as a matter of right is immediately appealable). However, the Circuit Court's decision

to limit the trial to two weeks does not fall into this category because it does not abridge the Wellin Children's right to a jury trial. *Fulmer v. Cain*, 380 S.C. 466, 470, 670 S.E.2d 652, 654 (2008) (the mode of trial exception allowing interlocutory appeal only applies orders which abridge a party's constitutional right to trial by jury).

Nothing in the state statutes or the rules of court grant a party any right to consume as many weeks of court as they desire (or an unlimited number of weeks) to try their case to a jury. The Circuit Court has the discretion and even the duty to manage the court docket to provide for efficient use of judicial time and resources while providing the parties with the opportunity to present their claims and defenses. The Circuit Court's refusal to allow the Wellin Children up to ten (10) weeks of trial on the issues of validity of Mr. Wellin's estate planning documents is just the type of discretionary ruling that should not be allowed an interlocutory, piecemeal appeal. *See Townsend v. Townsend*, 323 S.C. 309, 313, 474 S.E.2d 424, 427 (1996) (an order denying a motion for a continuance is an interlocutory order not affecting the merits and, thus, is not immediately appealable); *Johnson ex rel. D'Andre G. v. Chaudhry*, No. 2013-UP-176, 2013 WL 8508086, at \*1 (S.C. Ct. App. May 1, 2013) (scheduling order not immediately appealable).

**II. The Court of Appeals correctly denied the Petitioners' petition for a supersedeas to delay the Circuit Court from proceeding with the bifurcated trial on the validity of the will(s) because the attempted appeal was premature.**

When the Wellin Children filed their interlocutory appeal in the Court of Appeals, they attempted to stop the trial set by the Circuit Court for June 2019, by petitioning the Court of Appeals for a writ of supersedeas. The Court of Appeals denied that petition along with its dismissal of the appeal as interlocutory. Meanwhile, however, the Circuit Court had granted the Wellin Children's motion for a continuance past June due to issues related to conflicts and the logistics of setting a two-week period.

Although this issue should be moot since the Wellin Children successfully pushed the trial date out by at least six months, they continue to seek this Court's review of the Court of Appeals refusal to grant their supersedeas petition. Contrary to the Wellin Children's wishes, however, a notice of intent to appeal from an interlocutory order outside of the provisions of §14-3-330, such as this bifurcation order, does not transfer jurisdiction to the appellate court, nor does it stay further proceedings in the lower court. *Crout v. S.C. Nat. Bank*, 278 S.C. 120, 293 S.E.2d 422 (1982); 15 S.C. Jur. Appeal and Error § 52 ("service of a notice of appeal does not transfer jurisdiction if the attempted appeal is from a nonappealable interlocutory order"); *see also S.C. Pub. Serv. Auth. v. Arnold*, 287 S.C. 584, 585–86, 340 S.E.2d 535, 536 (1986) (trial court had jurisdiction to proceed to trial after appellate court entered dismissal of interlocutory appeal even though remittitur was not issued until after trial was complete). To the extent that the Wellin Children have submitted a petition for supersedeas seeking to further delay the trial, the Respondent respectfully relies upon all the points and arguments found in the Return previously submitted to the Court as if fully restated herein.

Mr. Wellin died in 2014, yet five years later, there still has been no determination of the validity of his Last Will and Testament and related Revocable Trust. Under all the circumstances, the Court should refuse to allow any further delay through a supersedeas.

## CONCLUSION

WHEREFORE, based on the foregoing, the Respondent respectfully submits that the Court of Appeals properly dismissed the appeal as interlocutory, and there are no special or important reasons to grant the Petition for a Writ of Certiorari.

Respectfully submitted,



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November 14, 2019

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

Appeal from the Court of Common Pleas

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

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

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In the Matter of: Keith S. Wellin

Certificate of Service

The undersigned certifies that on this 14<sup>th</sup> day of November, 2019, a copy of the Return to Petition for Writ of Certiorari on behalf of Respondent Wendy C.H. Wellin, 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 Dec. 11, 2011 (collectively, the "Estate"), was served by depositing said copy in the U.S. Mail, with sufficient first class postage, on the following counsel at the addresses listed below:

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