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Nov 17 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley Price
Circuit Court Judge

Appellate Case No.: 2022-000592

Pamela Holliday Wallin; Mark Bennett Holliday; Kingsley K. Holliday; Sara Jane Holliday; and John C. Holliday ..... Appellants,

vs.

Ross Samuel Holliday as Personal Representative of the Estate of Warren Phillip Holliday; Ross Samuel Holliday, individually, Warren Lea Holliday, individually; 2233 Highway 17 North, LLC; 2237 Highway 17 North, LLC; 2805 Highway 17 North, LLC; 1606 Meeting Street, LLC; Bacons Bridge Road, LLC; 4687 Franchise Street, LLC; Zeezrom Properties, LLC; John Doe Leased Vehicle; 1905 North Main Street, Summerville, LLC; 815 Folly Road, LLC; 832 Coleman Blvd., LLC; 2189 Discher Avenue, LLC; New Space Science, LLC; Pirates Plunder, LLC; Sawgrass Technologies, Inc.; Holliday Amusement Company, Inc.; and The Revocable Trust Agreement between Warren P. Holliday as Settlor and as Trustee ..... Respondents.

RESPONDENTS' INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

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II. Did the circuit court err in finding that Warren Holliday had the requisite capacity to revoke his 2008 Revocable Trust and did so free of undue influence?

III. Did the circuit court err in finding that Appellants' claims for constructive trust, breach of fiduciary duty, demand for accounting and receivership, and declaratory judgment must fail because the 2008 Revocable Trust was validly revoked?

IV. Did the circuit err in finding that Appellants' claim for intentional interference with inheritance must fail because the cause of action has not been adopted by the South Carolina Supreme Court, because Appellants failed to set forth sufficient evidence of wrongful interference, and because the probate court did not have subject matter jurisdiction over this tort claim?

COUNTER-STATEMENT OF THE CASE

Pursuant to Rule 208(b)(2), Respondents provide this counter-statement of the case.[1] This is an appeal from the circuit court's grant of summary judgment in favor of Respondents by Order dated March 3, 2022, and the Order dated April 22, 2022, which denied Appellant's Motion for Reconsideration. The case was brought by Appellants, former beneficiaries of the 2008 Warren P. Holliday's Revocable Trust, who seek to invalidate a 2016 Revocation document that was executed by Warren P. Holliday. The circuit court granted summary judgment on all claims regarding the validity of the revocation of trust for the following stated reasons:

(1) S.C. Code § 62-7-604(a) bars Appellants' claims that contest the validity of the 2008 Revocable Trust because the action was not commenced within one year after the settlor's death;

(2) the doctrine of laches bars this action;

(3) Warren revoked his trust by showing a clear and definite purpose to do so; and

(4) Warren had capacity to, and was not subjected to undue influence, when he executed the Trust Revocation on September 15, 2016.

In addition, the circuit court granted summary judgment to Respondents as to the constructive trust, breach of fiduciary duties, and declaratory judgment causes of action because the court found that, if the Revocation was valid, each of these causes of actions must fail.

STATEMENT OF FACTS

Warren and Patricia Holliday were married for approximately 50 years. They had four children: Mark Bennett Holliday, Pamela Holliday Wallin, Ross Holliday and Lea Holliday. Mark and Pamela are the primary Appellants, and Ross and Lea are the primary Respondents.

[1] Appellants' section titled "Statement of the Case and Facts" is replete with misstatements, self-serving conjecture, and impermissible statements of contested matters under Rule 208(b)(2).

On October 29, 2008, the decedent Warren Holliday ("Warren") executed a Revocable Trust (the "Trust"), in which he provided that, on his death, his assets would go to his then wife, Patricia, during her life, and, upon her death, to their four children in equal shares. (Mot. For Summ. J., 5/7/2021, Ex. A). The Trust was comprised of the predominance of Warren's assets, including Zeezrom Properties, LLC, which constituted the primary asset. Article 3 of the Revocable Trust expressly reserved to Warren the right to revoke the trust and provided in pertinent part: "The Settlor [Warren Holliday] shall have and possess, and hereby reserves the right to revoke this Trust . . . without the consent of the Trustee, or any beneficiary . . . ." Id. At some point in 2012, Ross Holliday became the Trustee.

On December 9, 2013, the Family Court of Charleston County entered an Order of Divorce for Patricia and Warren, incorporating into it a Marital Settlement Agreement. (Supp. Mem., 9/24/21, Ex. A). The Marital Settlement Agreement divided all marital assets and additionally provided Patricia with a monthly payment of $16,000 to be paid out of Zeezrom Properties, LLC, an asset formerly designated as part of the Trust. Id. The agreement made no mention of the Trust and was signed by Warren in his individual capacity and not as trustee. See id.

On March 21, 2014, Warren executed a new will in which he allocated 40% of his assets to each of Ross and Lea, 15% to Mark, and 5% to Pamela. (Am. Mot. for Summ. J., 9/1/2020, Ex. A). On January 7, 2016, Warren executed a codicil to the 2014 Will and provided specific bequests to Mark and Pamela of $300,000 and $100,000 respectively, with the remainder of his assets going to Ross and Lea in equal amounts. (Am. Mot. for Summ. J., 9/1/2020, Ex. B). These estate planning documents were prepared by and executed in the presence of Truett Nettles, Warren's longtime attorney. Mr. Nettles testified that, at the time these documents were signed, Warren was capable of knowing what he owned, who his children were, and to whom he wanted to give his

assets. (Am. Mot. for Summ. J., 9/1/2020, Nettles Aff., ¶¶ 10, 14). Neither the 2014 Will nor the 2016 Codicil specifically mentions the Trust.

On September 15, 2016, Warren executed a Revocation to the trust in the presence of Mr. Nettles, his attorney; Aliecia Bores, an associate in Mr. Nettles's office at the time and currently a lawyer with BB&T Bank; and Greg Bosch, Warren's personal trainer who worked with Warren twice a week for approximately two years. (Am. Mot. for Summ. J., 9/1/2020, Ex. C). See id. (Nettles Aff., Bores Aff., Bosch Aff., Holliday Aff.). While Mr. Bosch was providing therapy to Warren on September 15, Warren requested that he stay and witness a document that Warren intended to sign. (Am. Mot. for Summ. J., 9/1/2020, Bosch Aff., ¶ 6). Warren explained to Mr. Bosch that he wished for his assets to be distributed as set forth in the 2014 Will and that he wanted Mr. Bosch to be available to testify that "Mr. Holliday knew exactly what he was doing." Id. at ¶ 7. Warren told Mr. Bosch that he knew Pamela and Mark would not be happy. Id. All of the witnesses present at the time of execution testified that Warren was capable of knowing what he owned, who his children were, and to whom he wanted to give his assets. See (Am. Mot. for Summ. J., 9/1/2020, Bosch Aff., Holliday Aff., Nettles Aff.). The Medical University of South Carolina ("MUSC") medical records subsequent to September 15, 2016, further show that Warren was capable of making, and did make, his own decisions. (Am. Mot. for Summ. J., 9/1/2020, at 3 (citing MUSC 07906, 07911)).

Nathan Hale and David Goltra, friends of Warren, testified that Warren was upset and disappointed with Pamela and Mark because they took the side of Patricia in the divorce and afterwards. (Supp. Mem., 9/24/21, Hale Dep., 29:22-30:6, 31:10-23, 32:16-20, 36:4-11); (Resp't Reply Supp. Summ. J., 12/24/22, Goltra Aff., ¶¶ 8, 9). Warren told them that he was not going to divide his assets equally among the children and that Warren had discussed who he wanted to

leave the bulk of his assets to. (Supp. Mem., 9/24/2l, Hale Depo, p. 30); (Supp. Mem., 9/24/2l, Goltra Depo, p. 91-92, 100-101).

Warren died on September 28, 2016, while Mark and Pamela were with him. The MUSC records that Respondents submitted show that Pamela repeatedly told the medical staff that her father makes his own decisions. (Am. Mot. for Summ. J., 9/1/2020, at 3 (citing MUSC 07906, 07911)).

Warren named Ross to be his Personal Representative in both the 2014 Will and 2016 Codicil. In accordance with those documents, Ross disbursed the specific devises of money to Mark and Pamela and then disbursed the remainder of Warren's assets to Lea and himself. All disbursements were made by January of 2018.

On September 19, 2018, almost two years after Warren's death and well after the estate had administered its bequests and distributed its assets, Mark, Pamela, and Mark's children brought this action seeking to set aside and invalidate the Revocation. They do not challenge the 2014 Will or 2016 Codicil.[2]

STANDARD OF REVIEW

When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. Turner v. Milliman, 392 S.C. 116, 121–22, 708 S.E.2d 766, 769 (2011). Summary judgment should be affirmed if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Companion Prop. & Cas. Ins. Co. v. Airborne Exp., Inc., 369 S.C. 388, 390, 631 S.E.2d 915, 916 (Ct. App.

[2] The Codicil has an *in terrorem*, or "no contest" clause, which provides that Warren "specifically disinherits" any person (and their descendants) who, "directly or indirectly, contests or attacks the validity of this [Codicil], or claims undue influence, fraud, menace, duress or lack of testamentary capacity or otherwise objects to the administration of my estate or any actions taken by the personal representative of my estate . . . ." (Am. Mot. for Summ. J., 9/1/2020, Ex. B).

2006). Where the record is devoid of any allegation or evidence tending to show there is a material fact in issue, the moving party is entitled to summary judgment as a matter of law. Milligan v. Liberty Life Ins. Co., 313 S.C. 478, 481, 443 S.E.2d 381, 382 (1994); Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 117, 410 S.E.2d 537, 546 (1991) ("[B]ald allegations are insufficient to create a genuine issue of fact."); George v. Empire Fire & Marine Ins. Co., 344 S.C. 582, 593, 545 S.E.2d 500, 505 (2001) ("The party opposing summary judgment cannot simply rest on mere allegations or denials contained in the pleadings."). Thus, the appellants cannot rely upon the mere allegations of their complaint, but instead, they must offer proof of the existence of a genuine issue of fact. Dyer v. Moss, 284 S.C. 208, 211, 325 S.E.2d 69, 70 (Ct. App. 1985).

Appellate courts may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal. See Rule 220, SCACR; see also I'On, L.L.C. v. Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000).

ARGUMENT

I. Appellants' Claims Involving the Alleged Invalidity of the 2016 Revocation and the Validity of the 2008 Revocable Trust are Time Barred by Statute.

The circuit court properly found that Appellants' action to declare the Revocation invalid is barred by § 62-7-604, which sets forth the applicable time limit to file an action regarding the validity of a revocable trust. S.C. Code Ann. § 62-7-604.

Section 604 provides that:

> a person must commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within the earlier of (1) one year after the settlor's death; or (2) one hundred twenty days after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding.

S.C. Code Ann. § 62-7-604(a).

Appellants argue the circuit court's finding is in error because, they contend, the statute applies only to actions seeking to invalidate a trust. See (Initial Br., at 36). Appellants base their argument on the premise that the term "contest," as used in the statute, "is an action to invalidate all or part of the terms of the trust." See id. at 38. Appellants argue their claim is outside the ambit of § 62-7-604 because they are not seeking to invalidate the Trust.[3]

Appellants provide no cases that adopt the narrow interpretation they advance. Rather, they argue simply that the "plain language" of the statute supports their position, and they cite to neighboring provisions of the South Carolina Trust Code for support that "an action 'contesting' a trust is distinct from an action to validate a trust." Appellants' interpretation contradicts the statute's defined terms and intended purpose, and it completely ignores the practical effect of Appellants' challenge to the Revocation.[4]

A. "Terms of a Trust," as Defined in the Trust Code.

Appellants argue that § 62-7-604 cannot operate to bar their claim because the statute is limited to a trust "contest," which the statute defines as "an action to invalidate all or part of *the terms of the trust* or of property transfers to the trustee." S.C. Code Ann. § 62-7-604 Reporter's Comment (emphasis added). In relying on their argument regarding the "plain language" of the

[3] Warren died on September 28, 2016. See Pet., ¶ 51. It is undisputed that, if it applies, § 604(a) required Appellants to file their Petition no later than September 28, 2017. Appellants filed their Petition September 19, 2018, almost one year out of time under the statute. Appellants do not contend that equitable tolling, fraud, or any other exception applies here to extend the filing deadline. Instead, Appellants argue only that the statute does not apply. Alternatively, Appellants contend, if the statute does in fact apply to the Petition, it does not apply to Appellants' equitable claims.

[4] While addressed shortly herein, it is helpful to understand that Appellants and Respondents agree on the definition of "contest" under § 62-7-604. See (Initial Br., at 38 (citing the Reporter's Comments to Section 62-7-604 for the definition of "contest" which is defined as "an action to invalidate all or part of the terms of the trust")). The only difference between the parties' positions on this point is that Respondents contend the Revocation is a "term of the trust." If the Court finds the Revocation is a term of the trust as the statute defines and other courts have held, the statute applies to bar Appellants' claims.

statute, Appellants fail to address that the South Carolina Trust Code defines the phrase "terms of a trust," which phrase is used uniformly throughout the Trust Code and is not isolated to § 62-7-604. See S.C. Code Ann. § 62-7-103 Reporter's Comment ("'Terms of a trust' . . . is a defined term used frequently in the [South Carolina Trust Code]").

Section 62-7-604, which is modeled on Uniform Trust Code § 604, incorporates the definition of "terms of a trust," which includes "the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument *or as may be established by other evidence that would be admissible in a judicial proceeding*." S.C. Code Ann. § 62-7-103(17) (emphasis added); see also Restatement (Second) of Trusts § 4 (1959); Restatement (Third) of Trusts § 63 (2003) (cited by the Reporter's Comment to § 62-7-604). In other words, and contrary to Appellants' argument regarding plain language, the phrase "terms of a trust" is not limited in scope to only what is written in the original trust document; rather, the phrase "terms of a trust" encompasses "other evidence" that manifests the settlor's intent regarding the trust or its provisions.

For instance, the settlor can manifest his intent in a document revoking his trust. In fact, the South Carolina Trust Code explicitly states that "[t]he settlor *may revoke or amend* a revocable trust . . . [by] any other written method, other than a later will or codicil, delivered to the trustee *and manifesting clear and convincing evidence of the settlor's intent*." See S.C. Code Ann. § 62-7-602(c)(2)(C) (emphasis added). The Reporter's Comment reinforces that "[w]hile the wording of a written trust instrument is almost always the most important determinant of a trust's terms, the definition is not so limited." Id. at § 62-7-103 Reporter's Comment. Such "other evidence" of the settlor's intent certainly includes the settlor's written document expressing his intent to revoke his trust.

Indeed, courts have treated a subsequent document that revokes a previously executed revocable trust as being part of the terms of the revocable trust. See In re Tr. Created by Isvik, 741 N.W.2d 638, 645 (Neb. 2007) (holding that a document by which a settlor purports to revoke a revocable trust constitutes a term of that trust). While Appellants do not address the Isvik case in their initial brief, they argued before the circuit court that the holding in Isvik should be limited to the meaning of Nebraska's § 30-3841, which is our state's version of § 62-7-415.[5] Appellants altogether disregard the fact that "terms of a trust" is a statutorily defined phrase that must be interpreted consistently with how it is used throughout the South Carolina Trust Code. S.C. Code Ann. § 62-7-103(17); § 62-7-103 Reporter's Comments. Nebraska has adopted the exact same definition of "terms of a trust." See Neb. Rev. Stat. Ann. § 30-3803.

Warren's execution of the Revocation clearly shows that he—the settlor—intended for the initial trust instrument to no longer govern the disposition of his property. The Revocation is a "manifestation of the settlor's intent" and is a "term" of the Trust within the meaning of §§ 62-7-103(17) and 62-7-604. Because Appellants' lawsuit contests the validity of the Revocation—i.e., the "terms of a trust"—Appellants were required to commence their contest within the one-year limitations period set forth in § 62-7-604. They failed to do so and their action is thus barred by operation of the statute.

B. Common Logic and Other State Decisions Support Respondents' Position.

Furthermore, Appellants' interpretation of § 62-7-604 is nonsensical because it requires the Court to accept that the statute applies to an action that challenges the creation of a revocable

[5] Section 62-7-415 reads, "[t]he court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence what the settlor's intention was and that the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement."

trust, but not to an action that challenges the termination of that trust. There is no support for this interpretation in either the body of relevant case law or in our state's statutory law.[6]

A simple hypothetical is illustrative of the problem with Appellants' argument. Suppose that instead of revoking his revocable trust, Warren decided to amend his revocable trust to reduce Appellants' inheritance consistent with the bequeathal as set forth in the 2014 Will and 2016 Codicil. If Appellants had filed an action to contest the validity of Warren's amendment to his trust (and therefore contested the amendment's validity), there is no question that § 62-7-604 would bar this contest if Appellants did not commence it within one year of Warren's death. See S.C. Code Ann. § 62-7-103(18) ("'Trust instrument' means an instrument executed by the settlor that contains terms of the trust, including any amendments thereto"); id. at § 62-7-103 Reporter's Comment ("'Trust instrument' . . . is a subset of the definition of 'terms of a trust' . . ., referring to only such terms as are found in an instrument executed by the settlor"). Other jurisdictions to consider the question have found that application of the statute does not turn arbitrarily on the testamentary instrument the decedent elected to use.

In Derringer v. Emerson, 435 F. Appx. 4 (D.C. Cir. 2011), for example, trust beneficiaries filed a declaratory judgment action seeking a declaration that a summary and memorandum executed by the settlor did not amend a trust. Id. at 6-7. The court held that the beneficiaries' action constituted a trust "contest" for purposes of Virginia's version of Uniform Trust Code § 604

[6] At summary judgment, Appellants relied on "common dictionary definitions" to support their assertion that § 62-7-604 does not apply to bar their claims. According to the definitions Appellants referenced, "contest" means "to make the subject of dispute, contention or litigation," and "validity" means "the state of being acceptable according to the law." (Mem. Opp'n, 7/21/21, at 5). According to these common definitions, to contest the validity of a revocable trust is "to make the subject of dispute, contention, or litigation" whether the trust is "acceptable according to the law." This is an apt description of Appellants' action because Appellants are quite literally litigating whether Warren's trust is acceptable according to the law. In short, Appellants' claims fall within the plain meaning of § 62-7-604 even according to their proffered definitions.

because "[a]t base, [the beneficiaries] are not seeking guidance as to what the Summary and Memorandum *mean,* but rather, a judicial determination that the Summary and Memorandum are not valid amendments" to the settlor's trust. Id. The court ruled that the beneficiaries "are contesting the trust's amendments, and as such, their claims are time barred by" Virginia's statute patterned on Uniform Trust Code § 604. Id.; see also In re Beatrice C. Skillen 1995 Tr. Agreement, No. 2018-0612, 2019 WL 4165179, at *1 (N.H. Aug. 15, 2019) (holding that petition to set aside amendments and restatements of the settlor's trust agreement was time barred under Uniform Trust Code § 604); Matter of Elizabeth A. Briggs Revocable Living Tr., 898 N.W.2d 465, 469 (S.D. 2017) (Uniform Trust Code § 604 "plainly impose[s] time limits for commencing judicial proceedings to contest whether the designated trusts and amendments were validly created."); Wintersteen Revocable Tr. Agreement, 907 N.W.2d 785, 790 (S.D. 2018) (holding that challenge to the validity of trust amendment "falls directly within the provisions of" Uniform Trust Code § 604); Herman v. Herman, 934 N.W.2d 874, 876 (N.D. 2019) (applying Uniform Trust Code § 604 to action challenging modification of a trust); Shelton v. Tr. Created by Joint Tr. Agreement of Larry E. Shelton & Katherine Shelton, 946 N.W.2d 540 (Iowa Ct. App. 2020) (same); Zeglinski v. Paziuk, No. 7:18-CV-114-FL, 2019 WL 2252145, at *11 (E.D.N.C. May 24, 2019), order vacated in part on reconsideration, No. 7:18-CV-114-FL, 2019 WL 3851629 (E.D.N.C. Aug. 15, 2019) (applying Uniform Trust Code § 604 to a claim for reformation of a revocable trust); In re Eleanor Chappell Revocable Living Tr., No. W201702541COAR3CV, 2018 WL 6445731, at *4 (Tenn. Ct. App. Dec. 10, 2018) (applying Tennessee's § 604 to bar an action to set aside certain trust amendments).

In this case, Appellants argue the Court must reach a different result merely because Warren revoked—rather than amended—his Trust. Warren elected to alter the disposition of his

property; significantly, he could achieve his testamentary goals through either the revocation of the Trust or through its modification. Appellants argue that because Warren revoked the Trust, rather than amend it, there is no statute of limitations to govern their claim contesting Warren's actions. If Appellants are correct in their argument, the necessary result is there exists no statute of limitations applicable to a contest challenging a settlor's revocation of his revocable trust. This omission would leave a glaring hole in the state's Trust Code. Notably, there is no provision in the South Carolina Trust Code, and similarly no suggestion by Appellants, to support that the Legislature intended such an outcome. Indeed, Appellants fail altogether to explain why the South Carolina Trust Code would establish a time limit for contests to the validity of an initial trust document, as well as to amendments, modifications, and restatements to that document, but would set no time limit for contests to an instrument revoking those very documents.

Appellants conceded before the circuit court that § 62-7-604's intended purpose is "to allow an adequate time in which to bring a contest while at the same time permitting the expeditious distribution of the trust property following the settlor's death." (Mem. Opp'n, 7/21/21, at 7). The statute achieves this purpose by limiting the time frame during which an individual can commence a trust contest following the settlor's death. See S.C. Code Ann. § 62-7-604 Reporter's Comment ("This section provides finality to the question of when a contest of a revocable trust may be brought"). The same purpose applies to the expeditious distribution of estate assets following a testator's death. This is especially true here, where the property that Warren's estate distributed is the very property that Appellants claim the Trust owns. Appellants' contrary interpretation of Section 62-7-604 would thwart the expeditious distribution of Warren's estate and indeed subverts the statute's intended purpose.[7]

[7] Appellants argue that "it makes sense that Section 62-7-604 would impose a one-year limitation to actions to invalidate a trust, so the creditors of the probate estate may know whether there is any claim that may

There is no principled reason to differentiate between contests to the initial trust or trust amendments and contests to a revocation document. Our courts have consistently held they will not "construe a statute in a way which leads to an absurd result or renders it meaningless." State v. Cty. of Florence, 406 S.C. 169, 174, 749 S.E.2d 516, 518 (2013).

C. Other Jurisdictions Interpret the Scope of § 62-7-604 Consistent with Respondents' Position.

While there is no South Carolina case describing the scope of the statute of limitations as it pertains to a challenge to a trust revocation, other jurisdictions, which have enacted identical Uniform Trust Code provisions, have considered the issue and have found that such a challenge is barred if not brought within one year from the settlor's death. [8,9] Kansas, which follows the Uniform Trust Code and therefore has a nearly *identical* provision,[10] bars a beneficiary of a revocable trust from filing an action addressing the validity of a revocable trust if the action is not

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increase the estate's ability to pay before settling their claims" because "[d]elay in asserting a claim to invalidate a trust could negatively affect innocent third parties, such as creditors of the decedent's probate estate." However, the logical extension of Appellants' argument is that an action to validate a trust could also negatively impact innocent third parties in that a finding that the trust exists would result in a diminished probate estate.

[8] Some courts describe § 604 as operating as a statute of repose. Bates v. Howell, No. 2016-CV-282518, 2018 WL 10670568, at *2 (Ga. Super. Feb. 26, 2018) (interpreting an identical statute to South Carolina's); see also Matter of Elizabeth A. Briggs Revocable Living Trust, 898 N.W.2d 465 (S.D. 2017) (describing its version as "very similar" to Section 604 of the UTC and a "statute of repose"); In re Wintersteen Revocable Tr. Agreement, 907 N.W.2d 785, 793 (S.D. 2018) (same). Regardless of the classification used, all of these courts reject the argument that the "discovery rule" is applicable to this statute. See Ast v. Mesker, 480 P.3d 795, 799 (Kan. Ct. App. 2020).

[9] South Carolina follows the UTC and encourages its courts to promote uniformity of the law with respect to its subject matter among states that enact its provisions. S.C. Code Ann. § 62-7-1101. As a result, decisions from other states that have adopted the UTC are especially persuasive. See Hoover v. Hoover, 271 S.C. 177, 182, 246 S.E.2d 179, 181 (1978). Because South Carolina case law on the UTC is scarce, the court should look to other states' case law interpreting their UTC provisions as guidance in applying § 62-7-604.

[10] The only difference between subsection (a) of these statutes is semantical—South Carolina's version says "one hundred twenty days" while Kansas's version says "four months."

brought within the earlier of one year after the settlor's death or four months after the trustee sent the person a copy of the trust instrument along with notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing an action. Ast v. Mesker, 480 P.3d 795, 798 (Kan. Ct. App. 2020). In that case, the petitioners sought an order invalidating a trust based on undue influence. The Kansas court of appeals held "that the statute expressly requires that any legal proceeding contesting the validity of a trust revocable at the time of the settlor's death must be filed within one year after the settlor dies." Id. The court thus determined that petitioners' "undue influence claim arising out of the final amendment that their grandfather made to his revocable living trust is barred by the one-year statute of limitations in [604]." Id. at 800.

The South Dakota Supreme Court case of Matter of Elizabeth A. Briggs Revocable Living Trust. is similarly illustrative. 898 N.W.2d at 467.[11] In Briggs, the settlor amended her revocable trust to expressly disinherit her son, the plaintiff. Id. at 467. More than a year after the settlor's death, the plaintiff brought a claim to attack certain trust amendments based on lack of capacity and undue influence. Id. Plaintiff also brought a claim for breach of fiduciary duty and demanded an accounting of the trust. Id. In rejecting plaintiff's claims as time-barred, the court held that regardless of whether the plaintiff was a named beneficiary under the settlor's original trust, the settlor reserved the power to amend her revocable trust, and she amended it to specifically disinherit him. Id. at 471-472. Because the plaintiff failed to commence a timely contest, the court found that plaintiff was barred from contesting the validity of the amendments and, because he lost his ability to contest the amendments, he could no longer claim to have an interest in the trust. Id.; see also Wintersteen, 907 N.W.2d at 793-94 (In rejecting claims that the settlor of a revocable

[11] Although not identical to the South Carolina and Kansas versions of § 604, South Dakota's statute is "very similar," according to the South Dakota Supreme Court. Id. at 469.

trust was unduly influenced into executing an amendment to the trust and that he lacked capacity to create the amendment, the court held that the claims were time barred based on the failure to file them within the one-year time limitation as set forth in South Dakota's version of § 604.); Gray v. Gray, No. 18-CV-522-JL, 2020 WL 4194964, at *11 (D.N.H. July 20, 2020) (holding that § 604 applies to trust contests on the ground of undue influence).[12]

Georgia is but another example of a state interpreting a statute modeled after § 604 of the Uniform Trust Code. Georgia has interpreted its version of § 604 to operate as an absolute bar to any claim concerning the validity of a revocable trust, which is not timely commenced within the period specified in the statute. Bates v. Howell, No. 2016-CV-282518, 2018 WL 10670568, at *2 (Ga. Super. Feb. 26, 2018). Georgia's version of § 604 requires an action contesting the validity of a trust to be commenced within two years of the settlor's death. In Bates, the plaintiff raised her claims against the trustee contesting the validity of the settlor's revocable trust more than two years after the settlor's death. The trial court granted summary judgment to the trustee, explaining that the time to challenge the validity of the trust, including any challenge of undue influence, was time barred by Georgia's statute of repose, which the court observed is modeled after § 604. Id. at 2-3. In dismissing the claims, the court emphasized that the statute's purpose is to provide certainty and finality, thus it "cannot be tolled for any reason." Id. at *2. Consequently, the plaintiff's claims were extinguished upon the expiration of the statutory period "even if the injury [had] not occurred or been discovered." Id.

The "plain and unambiguous" language of Uniform Trust Code § 604, upon which § 62-7-604 is modeled, "expressly requires that *any legal proceeding* contesting the validity of a trust

[12] Clearly, Appellants are mistaken to the extent they persist in asserting that Respondents fail to cite authority from other jurisdictions that have applied § 62-7-604 to bar equitable claims, such as undue influence.

revocable at the time of the settlor's death must be filed within one year after the settlor dies." See, e.g., Art, 480 P.3d at 798 (emphasis added). As noted in Briggs, "the [Uniform Trust Code] uses claims of undue influence and lack of capacity as specific examples of claims that are subject to [UTC § 604's] time limits." Briggs, 898 N.W.2d at 470 n.7 (citing Uniform Trust Code § 604 cmt.). Undue influence and lack of capacity are equitable claims. Uniform Trust Code § 604 clearly applies to all claims seeking to invalidate the terms of a trust, whether legal or equitable.

D. The Doctrine of Laches Precludes Appellants' Equitable Claims.

Finally, Appellants argue that even if § 62-7-604 bars their claims at law, the statute does not apply to their equitable claims. Respondents maintain that § 62-7-604 operates to bar Appellants' legal and equitable claims alike. However, regardless of whether the scope of § 62-7-604 extends to limit Appellants' equitable claims, those claims are precluded under the laches doctrine.

Laches is an equitable doctrine defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Hallums v. Hallums, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). Section 62-7-604 supports by analogy Respondents' laches defense. In equity cases in which corresponding relief is available at law, the existence of laches is determined with reference to the analogous statute of limitations. McKinnon v. Summers, 224 S.C. 331, 79 S.E.2d 146, 148 (1953) (statute of limitations applied to claims at law and "[w]here, however, an equitable action must be brought, by analogy a court of equity will follow the period fixed in law cases by statute"); Thomerson v. DeVito, 430 S.C. 246, 844 S.E.2d 378, 380-81 (2020); see also Lothian v. Detroit, 324 N.W.2d 9 (Mich. 1982) ("[I]n equity cases in which corresponding relief is available at law, the existence of laches generally will be ascertained with reference to an analogous statute of

limitations."); Rumford v. Marini, No. CV 2018-0563-PWG, 2021 WL 1250469, at *3 (Del. Ch. Apr. 5, 2021) ("Rumford's equitable claims seek equitable relief, so the doctrine of laches applies and the court considers comparable statutes of limitations at law, which will be 'given great weight in deciding whether the claims are barred by laches'").

Appellants did not file their lawsuit until September 19, 2018, almost two years after Warren had passed away. By analogy to the one-year limitation in § 62-7-604, Appellants waited an unreasonable length of time before asserting their claim. Moreover, Appellants accepted their inheritance checks pursuant to the 2014 Will and 2016 Codicil and retained the funds. To date, they have not returned those monies to the estate.

Furthermore, the same property that Appellants claim the Trust owns was in fact distributed in accordance with the 2014 Will and 2016 Codicil as part of Warren's estate. Appellants therefore seek to hold Respondent Ross Holliday liable for actions he took in connection with his duty as Personal Representative of Warren's estate, which disregards the protections that § 62-7-604 affords a trustee.[13] Although the case law in the trust context suggests that it is unnecessary for Respondents to show prejudice, Respondents will suffer prejudice if Appellants' stale claims are

[13] Appellants repeatedly assert the baseless claim that Ross Holliday cannot be a trustee because of his position that Warren revoked the Trust and the Trust no longer exists. See e.g., (Initial Br., at 42). Appellants' argument ignores the fact that the terms "trustee" and "trust property" are defined by statute. The term "trustee" includes original, additional, and successor trustees. See S.C. Code Ann. § 62-7-103(19). The term "property" means "anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein." Id. at § 62-7-103(11). The term "property" as used in the statute is intended to be as expansive as possible and to encompass anything that "may be" the subject of ownership. Id. at § 62-7-103(11) Reporter's Comment. Pursuant to these unambiguous statutory definitions, Ross Holliday is a "trustee" and the property to which Appellants claim ownership through the Trust is indeed "trust property," irrespective of whether the Trust existed at Warren's death. Appellants' assertion that § 62-7-604 cannot apply because Ross allegedly did not act as trustee and he purportedly did not treat the property in question as "trust property," is a red herring and moreover disregards the clear definitions as set forth in the statute, definitions which Appellants fail to cite or even mention. Because Ross is a statutorily-defined "trustee," he is protected by statute.

allowed to proceed. The circuit court properly found that Appellants' equitable claims are barred under the laches doctrine.

In conclusion, because it is undisputed that Warren passed away on September 28, 2016, and Appellants did not file this action until September 19, 2018, Appellants are time-barred from contesting the Revocation. Additionally, because Appellants' claims are time barred, they likewise cannot assert any claims predicated on the Trust.

II. The 2016 Revocation of Trust was Valid.

Appellants argue that the circuit court erred in finding that the Marital Settlement Agreement, the 2014 Will, and the 2016 Codicil serve as evidence of Warren's intention to revoke the Trust or operate to revoke the Trust. Appellants further argue that the Revocation is not valid because questions of fact exist as to Warren's testamentary capacity and whether he was subject to undue influence. As the circuit court properly found, Warren revoked the Trust by showing a clear and definite purpose to do so and he acted with the requisite capacity and without the presence of undue influence.

A. Events Constituting Revocation of the Trust.

The current version of § 62-7-602 of the South Carolina Code states that where the terms of the trust do not provide for a method for revocation, the settlor may revoke a revocable trust by "any [] written method, other than a later will or codicil, delivered to the trustee and manifesting clear and convincing evidence of the settlor's intent." S.C. Code § 62-7-602(c)(2)(C). Appellants refer to this version of the statute to argue that the circuit court "erroneously found that the 2013 divorce, 2014 Will, and the 2016 Codicil revoked the Trust . . . ." (Initial Br., 9/7/22, at 15). Appellants argue the finding "is manifest error as a matter of law and fact," because the court "overlooked that Section 62-7-602(c) differs from the Uniform Trust Code by 'requiring a writing

to revoke or amend a trust unless the trust was created orally.'" *Id.* (citing S.C. Code Ann. § 62-7-602(c) (Reporter's Comments)). Appellants fail to acknowledge or address that the version of the statute they refer to does not govern the Trust.

For revocable trusts created prior to January 1, 2014, "any mode sufficiently showing an intention to revoke" is effective, so long as the terms of the trust grant the settlor the authority to revoke it. Reporter's Comment, S.C. Code Ann. § 62-7-602(a). Warren created the Trust in 2008 and therefore the prior version of the law applies here. It is undisputed both that Warren reserved the right to revoke the Trust and that the Trust set forth no particular method by which to effect revocation. Accordingly, Warren was able to revoke the Trust by accomplishing any event that demonstrated a clear and definite purpose to so revoke. See Peoples National Bank of Greenville v. Peden et al., 229 S.C. 167, 92 S.E.2d 163 (1956) (holding that the settlor had the authority under her trust to revoke it and that she had revoked it in accordance with the terms of the trust) (citing 54 Am. Jur., Trusts, Sec. 77) ("Where the right to revoke is reserved and no particular mode is specified, any mode sufficiently manifesting an intention of the trustor to revoke is effective. Revocation may be accomplished by a devise of the corpus of the trust by a will if duly executed. Whether a will impliedly revokes a revocable trust is a question of intention")).

In relying on the current version of § 62-7-602(c), rather than the law that controls trusts created prior to 2014, Appellants mistakenly contend the circuit court erred as to a matter of law and as to fact. Appellants argue that they are "entitled to the reasonable inference that the failure to mention revoking the Trust in [the 2014 Will and 2016 Codicil] is evidence that Warren did not intend that result [to revoke]." (Initial Br., 9/7/22, at 16). Appellants impose a writing requirement where none exists and improperly claim entitlement to a rebuttable presumption. As the circuit court found, Warren acted with the clear and definite intention to revoke the Trust when he used

trust assets to fund the Marital Settlement Agreement and make monthly payments to Patricia; and when he executed the 2014 Will and the 2016 Codicil, through which he bequeathed unequal shares of the estate to his children, in direct conflict with the provisions of the Trust.[14]

Testimony from Mr. Hale and Dr. Goltra provide further evidence that Warren undertook these testamentary acts with the clear and definite purpose to revoke the Trust. Mr. Hale and Dr. Goltra testified that Warren was very upset with Pamela and Mark because they took the side of Patricia in the divorce and that, as a result, Warren did not want Pamela and Mark to inherit his business.

Appellants failed to marshal sufficient evidence to demonstrate a genuine question of fact regarding Warren's intention as it pertains to the Marital Settlement Agreement, the 2014 Codicil, and the 2016 Will. Accordingly, the circuit court properly found that these events, viewed separately or all together, demonstrate a valid revocation of the Trust.

B. The 2016 Revocation.

Putting aside the effects on the Trust of the Marital Settlement Agreement, the 2014 Will, and the 2016 Codicil, Warren executed a valid Revocation on September 15, 2016. The burden of proof to invalidate a testamentary document always remains with the contestants of the will. Hairston v. McMillan, 387 S.C. 439, 446-47, 692 S.E.2d 549, 553. (Ct. App. 2010). The Probate

[14] Appellants argue the Court should infer that Warren intended the Trust to survive and for his children to inherit in equal shares because he devised his probate estate evenly among the children and, Appellants contend, it is nonsensible that Warren would have treated his non-probate estate differently. It is worth noting that when Warren created the Trust, he initially put all of his assets in the Trust. When he divorced from Patricia, Warren was constrained to relying on Trust assets to provide for his ex-wife's support; namely, the use of income from Zeezrom Properties, LLC. This use of Zeezrom Properties, LLC in the Marital Settlement Agreement is entirely inconsistent with the notion that Warren intended the Trust to survive the divorce—the Trust, of which Zeezrom Properties, LLC was the primary asset, provided for Warren's assets to go to Patricia upon Warren's death, and not before. Appellants' argument, which requires the court to infer that Warren expected his Trust to survive, would render his Will and Codicil completely meaningless because all of Warren's assets would be in the Trust.

Code further establishes the burdens in contested cases: ". . . Contestants of a will have the burden of establishing undue influence, fraud, duress, mistake, revocation or lack of testamentary intent or capacity. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof." S.C. Code Ann. § 62-3-407.

Accordingly, the question before the circuit court was whether the record contained sufficient evidence to support Appellants' contention that Warren lacked testamentary capacity or was subject to undue influence at the time he signed the Revocation. The circuit court properly found that Appellants offered no evidence to create a genuine issue of material fact as to either contention.

1. Warren Possessed Testamentary Capacity.

The capacity necessary to revoke a revocable trust is the same as that required to make a will. S.C. Code Ann. § 62-7-601. In South Carolina, testamentary capacity requires proof that the testator knew: (1) his estate, his assets; (2) the objects of his affection, or his loved ones; and (3) the persons to whom he wished to give his property. In re Estate of Weeks, 329 S.C. 251, 263, 495 S.E.2d 454, 461 (Ct. App. 1997). The "capacity to know or understand, rather than the actual knowledge or understanding, is sufficient." Id. at 461. Notably, this standard is lower than what is required to execute a deed or contract. Id. (citing McCollum v. Banks, et al., 213 S.C. 476, 50 S.E.2d 199 (S.C. 1948)). This standard is also lower than what is required to execute an irrevocable trust. To execute an irrevocable trust, the settlor must be able to understand the nature of the trust and its probable consequences. Macauley, et al. v. Wachovia Bank, et al., 351 S.C. 287, 569 S.E.2d 371 (S.C. Ct. App. 2002). Finally, the question of capacity is determined at the time the testator executes a will. See In re Estate of Weeks, 495 S.E.2d at 461 ("even an insane person may execute a will if it is done during a sane interval, and a prior determination of insanity is not conclusive").

See also id. at 462 (citing 94 C.J.S. Wills § 27(a)(1956)("Not every weakness incident to the ravages of age unfits a person for making a will. So, an aged person is not incapacitated by failing or defective memory, or partial loss of memory, absent-mindedness, nervousness, failure to recognize old friends, relatives, or members of the testator's family, inability to recognize acquaintances, a liking for dwelling on happenings of the past, pain and suffering, vacillating judgment, childishness, untidy habits, slovenliness or untidyness [sic] in dress, eccentricities or peculiarities, as in habit or speech, even though they may indicate a failing mentality, or even delusions or hallucinations if they do not affect the execution of the will . . . ")); Cathcart v. Stewart, 142 S.E. 498, 502 (S.C. 1928) (holding that the plaintiffs failed to establish mental incapacity at the time of execution of the will in question, observing that "[t]he test is not whether the grantor's mental powers were impaired, but whether, at the very time of the execution of the deed, he had sufficient capacity to understand in a reasonable manner the nature and effect of the act which he was performing").

It is clear from Appellants' brief that the evidence they rely on to create a dispute of fact is not material to whether Warren possessed the necessary capacity *at the time he executed the Revocation*, which is the only temporal event that matters with respect to the question of capacity.

Appellants seek to create disputes of fact based on Warren's medical history, rather than on his state of mind at the time he executed the Revocation. Appellants rely largely on the opinion of Kimberly A. Collins, M.D., a forensic pathologist, for support that Warren lacked testamentary capacity. (Initial Br., 9/7/22, at 21). Dr. Collins never met Warren. She based her expert opinion not on personal knowledge of Warren, but on his medical records, which she stated reflected "long standing dementia and cognitive impairments," "declining health," and "the introduction of a new narcotic drug." Id. Appellants emphasize that Dr. Collins's testimony is "unrefuted." Id.

However, as the circuit court noted, Dr. Collins had no personal knowledge of Warren and, most importantly, Dr. Collins was not present at the time Warren signed the Revocation. (Order Granting Mot. Summ. J., 3/3/22, at 12). The case law is clear that a testator's medical issues and historical diagnoses cannot form the basis, in and of themselves, for finding a lack of testamentary capacity.

Appellants also rely on Dr. Goltra's testimony that Warren was suffering "'delirium, poor judgment, confusion, forgetfulness,' and other cognitive defects 'in the few days' before his death." (Initial Br., 9/7/22, at 25). And they cite to Mr. Hale's testimony that Warren "never mentioned any intent to divide the Trust properties unevenly." Id. at 25-26. First, as Appellants acknowledge, neither Dr. Goltra nor Mr. Hale was present at the time Warren signed the Revocation, which event occurred more than a "few days" before Warren's death. Id. Second, Dr. Goltra attested that "Warren had definite strong opinions about the children to whom he wanted to leave the bulk of his estate," and that Warren "talked about his various business investments and certainly knew what he owned." (Supp. Mem., 9/24/21, p. 9). Mr. Hale testified that Warren always knew who his children were, generally knew what assets he owned, and knew to whom he wanted to leave his assets. Id. at 10. Mr. Hale testified that Warren told him that "he was definitely not going to provide equal distribution" to his children and that he wanted to leave the bulk of his assets to his sons, Ross and Lea. Id. This testimony, unlike the evidence Appellants cite, goes directly to the elements of testamentary capacity.

Finally, Appellants place great emphasis on whether Warren was able to read the Revocation and understand the legal significance of the document, issues that are immaterial to the question of Warren's testamentary capacity. Appellants contend that the record contains a dispute as to whether Warren could independently read the Revocation. They argue this dispute

is significant because Mr. Nettles testified that he did not read the entire document to Warren and rather directed him to certain sections. (Initial Br., 9/7/22, at 27). Appellants also cite to what they characterize as "Nettles' admissions that [] Warren never mentioned the Trust to him; [] Nettles never explained the effect of the Revocation on the Trust properties; [] and Warren did not understand the legal importance of the Trust . . . ." (Initial Br., 9/7/22, at 27). Appellants contend that this evidence of record, when considered all together, is particularly significant to the issue of Warren's testamentary capacity. It is not. The evidence is immaterial to the question on appeal because it is not incompatible with the court's finding that Warren knew his estate, knew the objects of his affection, and knew to whom he wished to give his property. Appellants assert that Warren thought he was signing a will. As discussed herein, the capacity to execute a will or a trust revocation is the same. It matters not to the Court's analysis of testamentary capacity that Warren may have read limited sections of an instrument he may have mistakenly believed to be a will. The law requires simply that the testator know and understand the meaning and consequences of his act (not the legal significance of a document) as well as the manner and effect of the desired distribution. See In re Washington's Estate, 212 S.C. 379, 385-86, 46 S.E.2d 287, 289 (1948).

The circuit court found that "there is unrefuted testimony from those persons who witnessed the execution of the estate planning documents at issue that Warren knew what he owned, who his children were, and to whom he wanted to give his assets." (Order Granting Mot. Summ. J., 3/2/22, at 12). In rendering this finding, the court relied in relevant part on the following undisputed evidence:

> Warren requested that [Mr. Bosch] stay and be a witness to the document that he was going to sign. Warren explained to Mr. Bosch that he wanted his assets to be distributed as set forth in his will and that he wanted Mr. Bosch to be around to testify that "Mr. Holliday knew exactly what he was doing." Warren told Mr. Bosch that he knew Pamela and Mark would not be happy.

(Order Granting Mot. Summ. J., 3/3/22, at 4). By contrast, the court found, Appellants "failed to present any competent evidence that Warren lacked capacity at the time he executed his 2014 will, his 2016 codicil, and/or the Revocation of Trust." (Order Granting Mot. Summ. J., 3/3/22, at 12). "[T]he mind is presumed to be sound until the contrary is clearly proved." In re Estate of Weeks, 263 S.E.2d at 264. While Warren may have been experiencing a decline in his health and may not have possessed the capacity to run his businesses at his age, there is no evidence in the record that he was insane or suffered any mental illness at the time he executed the Revocation. Rather, the record is clear that at the time he signed the Revocation, Warren knew of and appreciated the nature and extent of his property, was capable of identifying the members comprising his family, and was able to designate those members to whom he wished to bequeath his property. [15] Accordingly, the circuit court properly found that no issue of material fact exists regarding Warren's capacity at the time he signed the document.

2. No Evidence of Undue Influence.

Appellants carry the burden of proving undue influence, which requires evidence that the alleged influence "was brought directly to bear on the testamentary act." Mock v. Dowling, 266 S.C. 274, 277, 222 S.E.2d 773, 774 (1976). "General influence is not enough." Id. Also, an unequal distribution of assets in a will alone is not sufficient to set aside the will for undue influence. Smith v. Whetstone, 209 S.C. 78, 90, 39 S.E.2d 127, 132 (1946). "[I]n cases requiring a heightened burden of proof . . . the non-moving party must submit more than a mere scintilla of evidence to

[15] Appellants argue that the circuit court relied "on *portions* of Warren's medical records to justify its ruling," and, in finding those records competent and relevant to the issue of testamentary capacity, "it was error to ignore *the rest* of the records confirming Warren's dementia and serious mental defects." (Initial Br., 9/7/22, at 23, n.21). Respondents posit that should the Court find that the circuit court improperly engaged in weighing the significance of various medical records, any such error is harmless because the testimony concerning Warren's testamentary capacity at the time he signed the Revocation is undisputed.

withstand a motion for summary judgment." Swiger v. Smith, 426 S.C. 408, 415, 827 S.E.2d 200, 203 (Ct. App. 2019) (quoting Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330–31, 673 S.E.2d 801, 803 (2009)). "Since the standard of proof in an undue influence case is unmistakable and convincing evidence, there must be more than a scintilla of evidence in order to defeat a motion for summary judgment." Id. (quoting Russell v. Wachovia Bank, N.A., 353 S.C. 208, 218, 578 S.E.2d 329, 334 (2003)).

In cases where a will has been set aside for undue influence, there generally is evidence either of threats, force, and/or restricted visitation, or of an existing fiduciary relationship." Swiger, 827 S.E.2d at 205 (citing Russell, 578 S.E.2d at 333). "A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interest of the one imposing the confidence." Id. (quoting In re Estate of Cumbee, 333 S.C. 664, 672, 511 S.E.2d 390, 394 (Ct. App. 1999) (further citation omitted). "The existence of a fiduciary relationship between a testator and beneficiary raises a presumption of undue influence. If evidence of such a relationship is presented, the proponents of the will must offer rebuttal evidence." Id. (quoting Hairston v. McMillan, 387 S.C. 439, 447, 692 S.E.2d 549, 553 (Ct. App. 2010)). However, the proponents of the will, or in this case, the Revocation, are not required to affirmatively disprove the existence of undue influence. Id. Significantly, Appellants "retain the ultimate burden of proof to invalidate" the Revocation. Id. (citing Howard v. Nasser, 364 S.C. 279, 288, 613 S.E.2d 64, 68-69 (Ct. App. 2005)). In addition to the existence of a confidential or fiduciary relationship, Appellants were required to marshal evidence that demonstrated the presence of "an unnatural disposition making the person charged with the undue influence chief beneficiary, and that such person generally dominated the testatrix." Id.

Appellants argue that the circuit court failed to address the rebuttable presumption of undue influence caused by Warren and Ross's relationship. (Initial Br., 9/7/22, at 29). Appellants further argue that the circuit court failed to consider "the myriad of evidence" demonstrating Ross's undue influence over Warren. (Initial Br., 9/7/22, at 30). The circuit court properly found that Respondents rebutted the presumption of undue influence created by the confidential or fiduciary relationship and that Appellants failed to marshal sufficient evidence to sustain their burden of proof.

Addressing the issue of a rebuttable presumption first, Respondents concede that a confidential or fiduciary relationship existed between Warren and Ross, and that such relationship raised a presumption of undue influence. However, Respondents offered the following evidence in rebuttal. Each witness who was present at the signing of the Revocation testified that Ross did nothing to "force" or "coerce" his father to leave the bulk of his assets to Lea and him. Am. Mot. for Summ. J., 9/1/2020, Nettles Aff., Bores Aff., Bosch Aff.). Rather, the evidence of record reflects that Warren acted consistently over a period of several years in bequeathing unequal shares of inheritance to his four children, as is evident in both the 2014 Will and 2016 Codicil.[16] Mr. Bosch testified that Warren predicted exactly what would occur after his death, that Pamela and Mark would contest his division of assets on the basis that they inherited less than Ross and Lea, and that Warren clarified it was in fact his intention to treat Pamela and Mark differently. (Am.

[16] The Will specifically stated, "[t]he bequest to each child is intentionally and purposely disproportionate and unequal." (Am. Mot. for Summ. J., 9/1/2020, Ex. A). The Codicil also provided, "[i]n my Will . . ., I made a bequest and devise to each of my four children which were intentionally and purposely disproportionate and unequal. Since the execution of that Will, it has become apparent and clear to me that some of my children are inclined to dispute, contest or challenge legal actions by their siblings regarding my personal and business affairs. In order to prevent any such controversy in the administration of my probate estate, I have decided to make certain bequests in a sum certain of money rather than a percentage of assets." (Am. Mot. for Summ. J., 9/1/2020, Ex. B).

Mot. for Summ. J., 9/1/2020, Bosch Aff., ¶¶ 10, 17). Dr. Goltra attested that Warren spoke to him almost daily and made it clear that he had signed a new will and was treating his children unequally, because Pamela and Mark had "betrayed" him when they took their mother's side during the divorce proceeding. (Resp't Reply Supp. Summ. J., 12/24/22, Goltra Aff., ¶ 8). Additionally, there is no evidence that Ross or Lea ever prevented Pamela and Mark from visiting Warren.[17] Rather, it is undisputed that Ross text messaged the family in early September of 2016 regarding Warren's health and suggested everyone make plans to visit Warren. (Compl., 9/17/18, at 11, ¶ 48). Indeed, Pamela visited Warren at the hospital on September 23, 2016, approximately one week after Warren signed the Revocation. Pamela repeatedly told the medical staff that her father made his own decisions and therefore their questions should be directed to him. (Am. Mot. for Summ. J., 9/1/2020, at 3). Furthermore, Pamela visited with Warren outside the presence of Ross and had every opportunity to ask her father to execute a new testamentary instrument. See, e.g., Hembree v. Hembree, 311 S.C. 192, 197, 428 S.E2d 3, 5 (Ct. App. 1993) (holding that where decedent had an unhampered opportunity to revoke will but made no change to it, testimony of undue influence is generally destroyed).

With respect to the affirmative evidence they introduced before the circuit court, Appellants contend the court erred in failing to find a dispute of fact regarding whether Ross

[17] During the time Warren was a resident at Sweetgrass Village Assisted Living Community, he specified in writing that Ross, Lea, and Martha were the only guests he authorized to visit him. He signed this form on May 19, 2011. (Mem. Opp'n., 11/21/21, Ex. 22). Respondents dispute that this form is evidence of restricted visitation. But even if the Court treats it as such, the form does not support a finding that *Ross* restricted anyone from visiting Warren, or that Ross restricted anyone from visiting Warren during and around the time Warren signed the Revocation. Indeed, Warren had moved out of Sweetgrass by April of 2013, well before he signed the 2014 Will or 2016 Codicil. See (Compl., 9/17/18, at 8, ¶ 36). Moreover, Appellants put forth no evidence that anyone other than Ross, Lea, and Martha sought to visit Warren while he resided at Sweetgrass. Cf. Swiger, 827 S.E.2d at 206 (affirming summary judgment for beneficiaries that no undue influence was exerted and finding support for ruling where record contained no indication as to when, if ever, contestants to will attempted to visit the testator and were unsuccessful).

exerted undue influence over Warren. See (Initial Br., 9/7/22, at 31-36).

At the outset, it is worth emphasizing that there is no evidence that Ross exerted influence over Warren *at the time Warren signed the Revocation*. Appellants were required to show that the alleged undue influence was brought directly to bear on the testamentary act, i.e., the Revocation; therefore, the absence of any such evidence is on its own potentially dispositive of the assertion of undue influence. South Carolina courts have recognized that undue influence may be demonstrated through the introduction of circumstantial evidence. However, such evidence must show that an individual's influence "was unfairly and unlawfully exerted, so as to dominate [the testator's] will at the time" he signed the instrument. Smith, 39 S.E.2d at 132. See Byrd v. Byrd, 279 S.C. 425, 308 S.E.2d 788, 789 (S.C. 1983) (holding circumstantial evidence "must point unmistakenly and convincingly to the fact that the mind of the testator was subject to that of some other person so the will is that of the latter and not of the former"). There are no South Carolina appellate opinions upholding a contestant's claim of undue influence without a single piece of evidence of a threat, restricted visitation, or coercion. The cases are absolutely clear that the existence of a fiduciary duty is not enough to withstand summary judgment. Nor is a mere showing of opportunity or motive sufficient to create an issue of fact surrounding undue influence. In re Estate of Smith, 419 S.C. 111, 796 S.E.2d 158 (Ct. App. 2016).

With this controlling standard in mind, the circuit court considered whether Appellants had carried their burden of showing that Ross had exerted undue influence over Warren at the time Warren signed the Revocation. Because the standard of proof in an undue influence case is heightened, Appellants were required to make this showing by setting forth more than a scintilla of evidence, in order to defeat Respondents' motion for summary judgment. See Swiger, 827 S.E.2d at 205 (affirming circuit court's finding of no undue influence where contestant to will

"failed to provide more than a scintilla of evidence to establish undue influence was exerted upon Decedent *when he executed the Will*") (citation omitted) (emphasis in original). Appellants failed to introduce sufficient evidence.[18]

The evidence Appellants cite in support of their argument establishes no more than the fact that Ross was merely presented with opportunities to exert influence over Warren and that Ross may have exerted *general* influence over his father. See (Initial Br., 9/7/22, 31-36). "A mere showing of opportunity or motive does not create an issue of fact regarding undue influence." Swiger, 827 S.E.2d at 204 (quoting In re Estate of Cumbee, 333 S.C. 664, 511 S.E.2d 390, 394 (Ct. App. 1999)). See Smith, 39 S.E.2d at 132 ("It is axiomatic that to make a good will a man must be a free agent, but all influences are not unlawful. It is not enough that there be motive and opportunity, . . . the influence must be exercised and take effect so as to destroy the free agency of the testator, and control the disposition of the property under the codicil when it is made"). "If the testator had the testamentary capacity to dispose of his property and was free and unrestrained in his volition at the time of making the will, the influence that may have inspired it or some provision of it will not be undue influence." Swiger, 827 S.E.2d at 204, 207 (quoting Howard, 613 S.E.2d at 69).

As discussed above, there is no dispute of material fact that Warren possessed testamentary capacity at the time he signed the Revocation and there is no testamentary evidence from the

[18] According to Appellants, Warren was unduly influenced for nearly five years. There is simply no case in South Carolina that allows for an undue influence claim over a span of five years and certainly not without any evidence of a threat, restricted visitation, or coercion. In fact, courts have routinely granted summary judgment where there is evidence of several, sometimes all, of those factors. See, e.g., Russell, 353 S.C. 208, 218; Smoak, 286 S.C. 419 (finding that the case should not have gone to the jury because there was insufficient evidence of undue influence despite the fact that the testator was bedridden and the beneficiary's attorney drafted the will); Calhoun, 277 S.C. 527 (finding that the case should not have gone to the jury because there was insufficient evidence of undue influence despite evidence that testator was confined to a nursing home, in feeble physical condition, and the beneficiary drove testator to the attorney's office).

individuals who watched Warren sign the Revocation to suggest that he did not act of his own free will and accord. As the South Carolina Supreme Court opined many decades ago, "[p]erhaps no man has ever existed who was so entirely self-willed as to be wholly uninfluenced by the opinions and wishes of those with whom he was connected. Not merely in the ordinary affairs of life, but in the disposal of his property, even the sternest man is sometimes influenced by the wishes and advice of a friend, a wife, etc." Smith, 39 S.E.2d at 129 (citation omitted). Appellants failed to show that Ross's influence was unfairly and unlawfully exerted, so as to dominate Warren's will at the time Warren signed the Revocation, and therefore it is not material that Ross was interested in the Revocation, or had better opportunities for solicitation or persuasion than had the Appellants. Id. at 132. The evidence Appellants put forth, and the evidence to which they now refer, is confined to mere innuendo and suspicion. Accordingly, the circuit court properly found that summary judgment should enter in Respondents' favor on the issue of undue capacity.

III. The Circuit Court Properly Granted Summary Judgment to Respondents on the Claims for Constructive Trust, Breach of Fiduciary Duty, Demand for Accounting and Receivership, and Declaratory Judgment.

Appellants argue that the circuit court erred in granting summary judgment in favor of Respondents on the claims for constructive trust, breach of fiduciary duty, demand for accounting and receivership, and declaratory judgment. Appellants contend the court erred because the ruling is premised on the finding that Warren effectively revoked the Trust and, alternatively, that the arguments regarding lack of capacity and undue influence were time barred. Appellants additionally assert that the court improperly penalized them for failing to present sufficient evidence in support of these claims when "[a]ny perceived shortfall" in the evidence was the result of the court's limiting the scope of discovery to issues of testamentary capacity and undue influence. (Initial Br., 9/7/22, at 47-48).

A. Constructive Trust.

The circuit court found that summary judgment on the claim for constructive trust was appropriate because Appellants "failed to show that Respondents did anything inequitable to obtain legal title to the property." (Order Granting Mot. Summ. J., 3/3/22, at 14). The circuit court further found that because Appellants are time barred from contesting the validity of the Revocation, they lack standing as beneficiaries to assert legal title to assets held in the Trust. Id.

Under South Carolina law, a constructive trust arises "whenever the circumstances under which property was acquired make it inequitable that it should be retained by the one holding the legal title. Lollis v. Lollis, 291 S.C. 525, 529, 354 S.E.2d 559, 561 (S.C. 1987) (citations omitted). "A constructive trust results from fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution." Id. (citation omitted). See SSI Medical Services, Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789, 793–94 (S.C. 1990) ("A constructive trust arises whenever a party has obtained money which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty") (citation omitted). "In order to establish a constructive trust, the evidence must be clear and convincing." Id. at 794 (citation omitted).

As Respondents argued below and the circuit court found, there is no evidence that Ross or Lea engaged in any conduct that would render their inheritance inequitable. The mere fact that Ross and Lea received a greater bequeathal of assets than did Mark and Pamela does not constitute "clear, definite, and unequivocal" evidence sufficient to support imposing a constructive trust. Lollis, 354 S.E.2d at 561. The record is devoid of evidence of fraud, wrongdoing, or abuse.

Furthermore, the law favors the disposition of property as intended by the testator so long as the testator meets the three elements for testamentary capacity. Appellants do not contest the 2014 Will or 2016 Codicil. And, for the reasons discussed *supra*, there can be no dispute that Warren possessed the requisite capacity to execute the Revocation. Accordingly, summary judgment in favor of Respondents was proper.

B. Claims for Breach of Fiduciary Duty, Accounting, Appointment of a Receiver, and for Declaratory Judgment.

The circuit court found that the claims for breach of fiduciary duty, an accounting, appointment of a receiver, and for declaratory judgment fail because Warren executed a valid revocation of the Trust, either by way of the Marital Settlement Agreement and the 2014 Will and 2016 Codicil, or by way of the Revocation. (Order Granting Mot. Summ. J., 3/3/22, at 14). Additionally, the circuit court properly found that Appellants are barred from contesting the validity of the Revocation, which finding necessitates a determination that the Trust was validly revoked and therefore no longer exists. Appellants retain no beneficiary status with respect to a dissolved Trust and therefore lack standing to assert these challenges. Furthermore, Appellants have no claim to damages where the Trust ceases to exist.

The breach of fiduciary duty claim is asserted under § 62-7-802, which states that a trustee shall administer the trust solely in the interests of the beneficiaries. S.C. Code Ann. § 62-7-802(a). The court found that the breach of duty claim is barred under § 62-7-603, which provides that "[w]hile a trust is revocable, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor." (Order Granting Mot. Summ. J., 3/3/22, at 14). The court explained that even if the Trust was in existence prior to Warren's death, Appellants have no claim against Ross as trustee during Warren's life. Id. It also bears mentioning that the Complaint in this matter contains no particularized allegations of Ross or Lea mismanaging Trust

assets. The Complaint alleges only that Patricia brought a Rule to Show Cause motion against Warren in 2015, "out of her concern for dissipating of assets of [] Zeezrom, LLC," (Compl., 9/17/18, at 9, ¶ 42); and that Pamela "began to question the finances and operations of Mr. Holliday's real estate businesses to provide for her mother Patricia Holliday," (Compl., 9/17/18, at 10, ¶ 44). In their Initial Brief, Appellants indirectly suggest that Ross mismanaged Trust assets but they do not raise a direct, evidence-based allegation. See (Initial Br., 9/7/22, at 3 & n.2) ("Ultimately, Martha stopped keeping the books in June of 2015, by which time Ross had personally withdrawn more than $4,000,000.00 from the businesses; "Martha said Ross' withdrawals made managing the finances difficult"). In any event, the remedies available for a statutory breach of duty are subject to the exceptions listed in § 62-7-802(b) and the limitations period set forth in § 62-7-1005. Reporter's Comment, S.C. Code Ann. § 62-7-802. To the extent Appellants would rely on allegations of asset mismanagement prior to Warren's death, they clearly were aware of the transactions of which they now complain and thus are time-barred under § 62-7-1005(a) from now taking issue with them. S.C. Code Ann. § 627-1005(a) (imposing a one-year statute of limitation for any proceeding by beneficiary against trustee premised on a transaction for which a report was sent to beneficiary and which report adequately disclosed the existence of a potential claim). In addition to the findings that Warren effectively revoked the Trust and that Appellants are barred from contesting the validity of the Revocation, Appellants provide no evidentiary support for the claim and are moreover time-barred under § 62-7-802 from asserting it.

Under South Carolina law, an accounting in equity is available where the proponent demonstrates fraud involving a fiduciary and trust relationship or a breach of a fiduciary relationship. See Jacobson v. Yaschik, 249 S.C. 577, 587, 155 S.E.2d 601, 606 (S.C. 1967). See

also Rogers v. Salisbury Brick Corp., 299 S.C. 141, 382 S.E.2d 915, 917 (1989) ("As an equitable remedy, an accounting is designed to prevent unjust enrichment by disclosing and requiring the relinquishment of profits received as the result of a breach of a confidential or fiduciary duty"). As discussed *supra*, the record contains no evidence of either fraud or a breach of fiduciary duty. As such, there is similarly no basis for appointment of a receiver.

Finally, the claim for declaratory judgment essentially sought a declaration that the Revocation is invalid and the Trust remains valid. This claim fails in light of the various findings that Appellants are barred from challenging the validity of the Revocation; Warren executed the Marital Settlement Agreement, 2014 Will, and 2016 Codicil with a clear and definite purpose to revoke the Trust; and Warren executed a valid revocation of the Trust on September 15, 2016.

Appellants contend that the circuit court prevented them from engaging in the discovery necessary to garner evidence to support these claims, but the record evidence in this case is voluminous. Appellants do not identify what other discovery they would have sought in furtherance of these claims. Furthermore, as the circuit court properly recognized, additional discovery is moot where the Trust was validly revoked.

IV. The Circuit Court Properly Granted Summary Judgment to Respondents on the Claim for Intentional Interference with Inheritance.

As a final point of contention, Appellants argue the circuit court erred in granting summary judgment to Respondents on the claim for Intentional Interference with Inheritance ("IIWI"). (Initial Br., 9/7/22, at 42). Appellants contend the circuit court mistakenly relied on its finding that the Trust was revoked and also erred in concluding both that South Carolina does not recognize any such cause of action and that it would lack subject matter jurisdiction over the claim. As discussed below, the ruling contains no error.

To begin, the case law is clear that South Carolina has not adopted an IIWI claim as a cause

of action. See, e.g., Malloy v. Thompson, 409 S.C. 557, 762 S.E.2d 690, 692 (S.C. 2014) (specifying the opinion "must not be understood as either adopting or rejecting" this style of claim). However, even if this Court were inclined to consider the claim, Appellants cannot carry their burden of proof. In recognizing that this claim does not exist in this state's jurisprudence, South Carolina courts have identified that such a claim would require proof of (1) the existence of an expectancy, (2) an intentional interference with that expectancy through tortious conduct, (3) a reasonable certainty that the expectancy would have been realized but for the interference, and (4) damages. See, e.g., Douglass ex rel. Louthian v. Boyce, 344 S.C. 5, 542 S.E.2d 715, 717 & n.4 (S.C. 2001). Warren effected a valid revocation of the Trust and Appellants do not contest the validity of the 2014 Will and 2016 Codicil; therefore, Appellants cannot establish an expectancy. Additionally, there is no evidence of tortious conduct of any kind, let alone conduct that interfered with their inheritance.

Second, this cause of action is designed for plaintiffs who do not have an adequate remedy through probate proceedings. For plaintiffs who have an adequate remedy through probate proceedings, the tort claim is not allowed. See Litherland v. Jurgens, 869 N.W.2d 92, 96 (Neb. 2015) (collecting cases); Jackson v. Kelly, 44 S.W.3d 328, 331–34 (Ark. 2001); DeWitt v. Duce, 408 So.2d 216, 218 (Fla. 1981); In re Estate of Roeseler, 679 N.E.2d 393, 406 (Ill. Ct. App. 1997); Plimpton v. Gerrard, 668 A.2d 882, 886 (Me. 1995); Brandin v. Brandin, 918 S.W.2d 835, 840 (Mo. Ct. App. 1996); Wilson v. Fritschy, 55 P.3d 997, 1001 (N.M. Ct. App. 2002). See also, Wellin v. Wellin, 135 F. Supp. 3d 502, 517-18 (D.S.C. 2015) (finding that the South Carolina Supreme Court would likely restrict the tort to cases where the plaintiff has no adequate remedy at probate, reasoning that "[t]his approach is consistent with the goal of protecting beneficiaries who would otherwise be left without a remedy, which has been a significant justification for the

expansion of tort liability to protect inheritance expectancies in many jurisdictions, including South Carolina").

In Matter of Robert Boydston & Joan Boydston 1990 Living Revocable Tr., No. 1 CA–CV 16–0074, 2017 WL 1325230 (Ariz. Ct. App. Apr. 11, 2017), for instance, the plaintiffs attempted to amend their pleadings to raise a claim for IIWI based on an amendment to a revocable trust that had disinherited them. In denying the proposed amendment on the grounds that it would be futile, the court noted that the plaintiffs had neither alleged nor established the lack of an adequate remedy via probate proceedings. Id. at *4. The court further observed that the probate code authorizes the court to intervene in the administration of a trust if invoked by an interested person and it also empowers the court to void a trust if its creation was induced by fraud, duress, or undue influence. Consequently, the court ruled that the plaintiffs "could have sued in probate court to void the [trust amendment], and, if successful, could have restored their 'proper inheritance as illustrated by the estate planning documents prior to [the defendant] . . . interfering with [plaintiffs'] right to the inheritance.'" Id. at *5.

Similarly, in this case, Appellants had an adequate remedy available to them in probate court. However, they failed to file a timely contest in accordance with S.C. Code Ann. § 62-7-604. Had they filed a timely contest, such claim, if successful, would have invalidated the Revocation and reinstated the Trust, thereby providing Appellants with beneficiary status. Notably, Appellants do not address or refute in their Initial Brief that probate court would have provided them an adequate remedy.[19] Having failed to timely pursue the adequate remedy

[19] The Wellin v. Wellin matter provides an example of beneficiaries raising a challenge to various testamentary instruments for which there was *not* an adequate remedy in probate court. In that case, the court noted that at a minimum "the damages arising from wrongful inter vivos transfers could not be recovered through probate remedies." Wellin, 135 F. Supp. 3d at 518. There are no such damages at issue here.

available to them, Appellants cannot now circumvent the limitations in § 62-7-604 by asserting an IIWI claim. See Youngblut v. Youngblut, 945 N.W.2d 25, 35, 40 (Iowa 2020); Munn v. Briggs, 110 Cal. Rptr.3d 783, 793 (Cal. Ct. App. 2010).

Finally, even if the IIWI claim is viable under state law and even if the probate proceedings did not provide Appellants with an adequate remedy, the circuit court lacked jurisdiction to consider the claim. Appellants initiated this action in probate court and, on April 25, 2019, Respondents removed the action to circuit court pursuant to § 62-1-302. The Probate Code continues to govern an action that originated in probate court even after removal to circuit court. See, e.g., Waddell v. Kahdy, 309 S.C. 1, 4, 419 S.E.2d 783, 785 (1992). In such cases, the circuit court derives its jurisdiction from the probate court, whose jurisdiction is limited to that which is vested in it by the South Carolina General Assembly. S.C. Code Ann. § 62-1-302; Judy v. Judy, 393 S.C. 160, 169, 712 S.E.2d 408, 412 (2011). The probate court does not have subject matter jurisdiction to adjudicate tort claims seeking to vindicate personal rights. An action for IIWI, is *in personam* in nature, seeking monetary damages against Respondents, and therefore, does not involve the recovery of estate assets. A ruling in favor of Appellants on the IIWI claim would result in a judgment against Respondents' personal assets alone—not the assets of the Estate of Warren Holliday. Quite simply, to the extent that South Carolina would recognize a claim for IIWI, the Probate Code does not confer subject matter jurisdiction upon the probate court to hear such a claim. Because the circuit court was exercising the original jurisdiction of the probate court pursuant to the removal statute, the court properly found it lacked jurisdiction to decide Appellants' IIWI claim.

CONCLUSION

For all the above reasons, Respondents respectfully request that this Court affirm the circuit court's grant of summary judgment to Respondents, and further affirm the circuit court's denial of Appellants' Motion for Reconsideration.

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November 17, 2022