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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Daniel Dewitt Hall, Circuit Court Judge

Appellate Case No. 2022-000682
Case No. 2019-CP-46-04238

Philip Pringle, as the duly appointed Gurdian ad Litem for Alex Pringle,.....Respondent

v.

Janet Mewshaw, individually and as Trustee,.....Appellant

FINAL REPLY BRIEF OF APPELLANT

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Introduction

Respondent Philip Pringle, as Guardian ad Litem, (“Respondent”) continues to misinterpret the trust language, contort or disregard the record, and argue red herrings to avoid the conclusion that Janet or Brent should be the trustee. Additionally, he ignores statutory law that provides that the funds located in the Founders Joint Bank Account passed to Janet Mewshaw (“Janet” or “Appellant”) upon the death of her daughter, Sabrina Pringle (“Sabrina” or “Settlor”). Likewise, he ignores Sabrina’s expressed intent in her will and trust that she wanted the family home to stay with the family for the benefit of her only child, Alex. As for the Merrill Lynch IRAs, he muddies the record with testimony from Steve Lang, Sabrina’s financial advisor, to assert that Janet wanted to steal money from her own grandson for her own benefit. This simply is incorrect. Respondent continues to argue his pleadings, but the evidence submitted at trial does not support his arguments. This conclusion is evident by the fact that Respondent barely cited to the record and simply made bald allegations.

Respondent avoids key arguments of Janet. For example, Respondent summarily denies the South Carolina Code and the terms of the Founder’s Joint Bank Account provide that Janet, as the survivor and as an individual, retains possession of the funds in the joint account. In an effort to ignore this conclusion, Respondent simply states “[t]he fact that the account is a joint account with a right of survivorship is not relevant to this analysis.” (Br. of Resp’t at 24.) To the contrary, the fact that the account is one with rights of survivorship is *everything* with respect to this aspect of the case. The South Carolina Code provides that it is, as do the terms of the joint account. Respondent cannot ignore this salient point.

Similarly, he devotes considerable attention to the Merrill Lynch IRAs and newly discovered evidence that he found in his lawsuit against Merrill Lynch over Merrill Lynch’s

treatment of the IRAs as accounts of Janet, individually. It is undisputed that Steven Lang, Sabrina's financial advisor, wrote a letter stating that the IRAs were Janet's, individually. (ROA 1098.) This argument, however, is only one of two arguments as to why the IRAs belong to Janet, individually. The trust agreement itself states that trust assets do not include property held by Sabrina "solely for investment purposes" (ROA 288, Art. I(A)), nor is it property payable to the Trustee as a result of Sabrina's death (ROA 289, Art. II (A)) because Janet received the funds of the IRAs which were payable to her individually, not as Trustee. The conflation of Janet as Trustee versus Janet, individually, runs rampant throughout Respondent's brief, and it must be clarified.

Finally, Respondent confuses the standard of review. As pled by Respondent, the allegations and relief sought sound in equity. He asked the court to interpret the trust and apply the interpretation to the potential assets. Additionally, he sought an accounting of the potential assets, including repayment of any trust assets that were expended. These allegations and relief are equitable. Consequently, the case is subject to de novo review.

ARGUMENT

I. THE STANDARD OF REVIEW IS DE NOVO.

In an effort to correct and adjust the lens through which this Court must review the case, Appellant will first address Respondent's erroneous position about the standard of review. In South Carolina, the determination of whether an action is at law or in equity depends on "the nature of the pleadings and the character of the relief sought." *In re Estate of Holden*, 343 S.C. 267, 278, 539 S.E.2d 703, 709 (2000). It is well established law in South Carolina that an action to construe or interpret a trust in equitable in nature. *Waddell v. Kahdy*, 309 S.C. 1, 4-5, 419 S.E.2d 783, 785-86 (1992). In fact, the South Carolina Supreme Court has stated "[i]t is firmly recognized as a rule and principle of law in this State that all possible trusts, *whether express or implied*, are within the

jurisdiction of the chancellor . . . if [t]here is *an element* of trust in this case, *which, wherever it exists*, always confers jurisdiction in equity. *Id.* (alterations and emphasis in original) (quoting *Davis v. Greenwood-United Telephone Co.*, 253 S.C. 318, 322, 170 S.E.2d 384, 385 (1969)). Thus, this Court can consider the record as a whole and is not bound by the findings of fact included in the probate court’s order, affirmed by the circuit court.

Additionally, an action for accounting is an equitable action. *Fesmire v. Digh*, 385 S.C. 296, 303, 683 S.E.2d 803, 807 (Ct. App. 2009). Removal of a trustee is subject to an abuse of discretion standard, but “[t]he appellate tribunals may find facts in accordance with their own view of the preponderance of evidence.” *Floyd v. Floyd*, 365 S.C. 56, 93-98, 615 S.E.2d 465, 485-87 (Ct. App. 2005), *overturned due to legislative action*. Finally, a party seeking a remedy of restitution or disgorgement is seeking an equitable remedy. *Verenes v. Alvanos*, 387 S.C. 11, 17, 690 S.E.2d 771, 773 (2010).

Here, the first cause of action seeks the removal of Janet as the trustee and an accounting. (ROA 33-35 ¶¶ 1-11). The second cause of action requests the sale of the home, a trust asset, or the imposition of rent on Janet. (ROA 35 ¶¶ 12-16.) The third cause of action seeks an accounting of assets prior to Sabrina’s death. (ROA 35-36 ¶¶ 17-24.) Finally, in the prayer, Respondent seeks for Janet “to repay all monies” she may have allegedly wrongfully taken. The “nature of the pleadings and the character of the relief sought” reveals that the totality of this action is one in equity. *See In re Estate of Holden*, 343 S.C. at 278, 539 S.E.2d at 709.

This case requires the court to review and interpret the trust language, determine what are trust assets, conduct an accounting, and determine if a child’s home should be sold if it is a waste on the trust or if rent should be assessed. This case is steeped in equity. Therefore, this Court is free to review the facts of this case “in accordance with its own view of the preponderance of the

evidence.” *Fesmire v. Digh*, 385 S.C. at 304, 683 S.E.2d at 807. Stated differently, this standard of review for this Court is de novo, which “literally means anew” and is “the broadest form of appellate review[.]” Jean Hoefler Toal, *et. al.*, *Appellate Practice in South Carolina* 224 (3d ed 2016).

II. SOUTH CAROLINA LAW REQUIRES THE JOINT BANK ACCOUNT AND IRAs BELONG TO JANET, INDIVIDUALLY.

Turning to the substance of the case and analyzing it under the proper de novo lens, tenets of South Carolina law and the record require a conclusion that the Founder’s Joint Bank Account and the Merrill Lynch IRAs belong to Janet, individually.

First, addressing the Founder’s Joint Bank Account, Respondent blatantly ignores the statutory argument that provides the terms of the bank account control at the time of death. Sabrina’s and Janet’s Founder’s Joint Bank Account had a term of rights of survivorship. Under Sections 62-6-202 and 62-6-203, the funds at the time of Sabrina’s death belong to Janet, individually. Respondent tries to confuse the issue by referring to Sabrina’s son’s Social Security benefits that were deposited into the joint account prior to the death of Sabrina. He superficially references fiduciary duties allegedly created by a power of attorney (even though Janet testified she never used the power of attorney), Social Security forms, and accountings of the Social Security benefits. (Br. of Resp’t at 10, 23-24; ROA 171:4-9.) None of these digressions, however, has anything to do with the titleholder of the Founder’s Joint Bank Account. According to the South Carolina Code and the terms of the joint account, itself, the funds belong to Janet, individually. A term of the joint account is that it is one with rights of survivorship. (ROA 336-337.) Janet has no obligation to transmute the bank account funds into trust funds. She can still spend every dollar on Alex, but they do not need to be designated as trust funds. In sum, the Probate Court erred in concluding the funds in the joint bank account are trust assets.

Second, addressing the Merrill Lynch IRAs, Respondent ignores Sabrina’s clear intent as expressed in her will and trust regarding investment accounts. Sabrina carves out “property that was not held by me solely for investment purposes” from her will, and therefore, her trust. (ROA 288, Art. I, (A)). Next, she states that “[t]he property *payable to the Trustee* as a resulting of my death, including any property given to the Trustee under this will” shall become trust assets (ROA 289, Art. II(A)). In other words, no investment accounts (*i.e.* IRAs) are subject to the will and trust, and the property subject to the trust is that which is payable to the Trustee (not Janet, individually) as a result of Sabrina’s death. Consequently, the IRAs never became part of the trust property because (1) they were specifically carved out by Sabrina and (2) the IRAs were payable to Janet, individually, not as Trustee.

Respondent tries to avoid this result by relying on the deposition testimony of Steve Lang, Sabrina’s financial advisor. Facing a lawsuit over his handling of these IRAs, Steve Lang was deposed over how he addressed the IRAs after Sabrina’s death. (ROA 21-24.) His testimony establishes there was confusion amongst all parties, including Merrill Lynch, but Lang cannot avoid that he informed Janet that the funds were hers personally and that he wrote a letter confirming as such. (ROA 1098; ROA 103:21 – 104:4.) Respondent’s attempt to cast Janet as a bad actor is misguided. She was dealing with her daughter’s premature death, paying her daughter’s medical and funeral bills, while tending to her grandson who lost his mother. If Merrill Lynch was confused, its instructions to Janet should be at issue, not Janet’s actions.

III. THE SETTLOR’S INTENT REQUIRES JANET OR BRENT TO SERVE AS TRUSTEE.

Well-established South Carolina law provides that the settlor’s intent is of paramount concern when a court analyzes a trust. *Epworth Children’s Home v. Beasley*, 365 S.C. 157, 166, 616 S.E.2d 710, 715 (2005) (“holding “the primary consideration in construing a trust is to discern

a settlor's intent."); *Chiles v. Chiles*, 270 S.C. 379, 384, 242 S.E.2d 426, 429 (1978) ("Its construction depends upon the trustor's intent at the time of execution as shown by the face of the document and not on any secret wishes, desires or thoughts after the event." (internal citation and quotation marks omitted)). Here, the trust is clear and unambiguous that Sabrina, the settlor, wanted her mother Janet to serve as trustee.¹ (ROA 292, Art. IV(B).) If for any reason, Janet cannot serve, her brother Brent Cannon is to serve. (*Id.* Art. IV(B).) Sabrina "doubled down" on keeping a family member as the trustee when she required that if her mother did not want to serve as trustee, Janet *must* ask Brent if he would like to be the trustee before Janet could go to a third party to see if it would serve. (*Id.* Art. IV(B).) In direct contravention of Sabrina's clear words, the Probate Court appointed a third party to serve as trustee. It jumped over Brent, in favor of an accounting firm, who has already sat in judgment of this family. This is a clear error of law. To the extent Janet cannot serve as trustee, Brent should be appointed. He, not an accounting firm, should make the financial decisions in the best interests of his nephew, for whom he has a much tighter and significant bond than the firm.

IV. THE RECORD IS DEVOID OF ANY EVIDENCE OF WASTE CAUSED BY THE HOME.

There is no evidence – testimony or documentary – to support the conclusion that the house at 507 Ann Shaw is a waste to the trust. For this reason alone, this Court should reverse the Probate Court on this conclusion, which requires Janet to sell the home within six months of the order's date. (ROA 19.) Should Janet retain her trustee status or Brent be appointed, they are most capable of determining whether Alex's childhood home should be sold to protect the trust. Importantly,

¹ Respondent agrees as he states "the four corners of the will is what controls." (Br. of Resp't at 12.)

Sabrina clearly left this decision up to the sole discretion of the trustee, even if that was her mother. (ROA 289, Art. II(B)(1)(b).) The Settlor's intent is again being thwarted.

Respondent erroneously argues that rent and a written rental agreement are required under the trust. (Br. of Resp't at 25.) This is not so. The trust states, in pertinent part as follows:

As long as the Residence is part of the trust property, my mother and my stepfather, or the survivor as between them, shall have ***the right to rent*** the Residence for fair market value. Fair market value rent and the other terms and conditions of the rental agreement shall be determined by the Trustee, ***in the Trustee's sole discretion***, even if my mother is then serving as Trustee.

(ROA 289, Art.II(B)(1)(b) (emphasis added).) Sabrina gives Janet ***the right*** to rent. She does not impose an obligation on them to rent, contrary to Respondent's assertions. Moreover, there is nothing in this language or anywhere else in the trust that requires a written rental agreement. Sabrina simply contemplates that if there is a rental agreement, the trustee shall have the sole discretion to determine the value of the rent, along with the agreement's terms and conditions. There is no indication from Sabrina that she required that the home be rented. To the contrary, she placed that decision squarely in the hands of her mother or Brent, the trustees she specifically appointed in her trust. No back rent is required, and the Court's imposition into the decision to rent, or much less sell, the home is improper. Janet and her husband were paying the mortgage, taxes, insurance, and utilities from the Founders Joint Bank Account. (ROA 281-283, 284-287.) As discussed above, the funds in the Founders Joint Bank Account belonged to Janet, solely, once Sabrina passed, as a matter of law. To the extent paying the mortgage and keeping the house running constitutes rent, Janet was paying it. Regardless, Sabrina left the issue of rent solely in the hands of the trustee, and Janet properly exercised this power. This ruling is another one in contravention of Sabrina's intent.

V. THE CONTRONE REPORT SHOULD BE GIVEN LITTLE WEIGHT.

Instead of attempting to correct the flaws in the Controne report as discussed in Appellant's initial brief, Respondent attempts to call into question Janet's cooperation. To be clear, Janet cooperated as best as she could with Ms. Controne. Janet gave over 365 pages of receipts, invoices, statements, and other financial documents to Controne. (ROA 348-841.) Controne went beyond what the Court ordered and started to delve into areas that are not related or relevant to the trust interpretation question before the Probate Court. (ROA 7-8.) There is nothing in the Consent Order that allows Controne to look at Sabrina's and Janet's finances before Sabrina's death or the Social Security payments of Sabrina and Alex. Respondent again tries to paint Janet's expenditures in the custody case as wrongful, but he forgets that the powers given to the trustee to spend funds for the welfare of Alex are broad. (ROA 294, Article V K, L.) If Janet, as trustee, had concerns about her nine year old grandson, being unsupervised, in a large town across the country, she not only had every right to investigate his well-being, but also she, as trustee, had a duty to do so.

Similarly, Respondent continues to delve into a Social Security payment that was made for Alex's behalf and deposited in the Founder's Joint Account. Sabrina, whether right or wrong, had the ability to determine whether the funds should have been segregated in a different account. Likewise, whether right or wrong, Sabrina was still Alex's mother, and she had the ability to determine when and how his funds should be spent. The fact that Janet had Sabrina's power of attorney is of no moment, as Janet testified that she never used the power of attorney. (ROA 171:4-9.) Janet had nothing to do with the deposit of the Social Security funds. This repeated argument is nothing but a red herring.

VI. THE ATTORNEY FEE AWARD IS PROPERLY CONTESTED.

Justice and equity do not allow for an award of attorney’s fees when an appellate court overturns an order which involves attorney’s fees. *See* S.C. Code 62-7-1004 (“In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney’s fees”) Respondent argues that the attorney’s fee issue was not preserved, but no specific objection is required if the appellate court finds that the Respondent is not the prevailing party and should not be awarded attorney’s fees. If there are no grounds to support the award of attorney’s fees at the end of the appeal, the appellate court is free to reverse the award of attorney’s fees as well. Justice and equity require it. S.C. Code 62-7-1004.

VII. THE LAW OF THE CASE DOCTRINE HAS NO APPLICATION.

Appellant’s challenge is to the probate court’s order removing her as trustee. She also challenges the probate court’s order’s erroneous findings of fact and conclusions of law regarding the Founders Joint Account, the Merrill Lynch IRAs, and the family home. Appellant contends the findings of fact and conclusions of law regarding these issues are erroneous. The order, dated November 23, 2021 (ROA 21-24), makes evidentiary findings and admits additional evidence, but it does not preclude this Court from reviewing the order on appeal. The underlying issues on appeal have not changed in light of the supplemental order. The “law of the case” doctrine does not keep this Court from reviewing the order that was timely appealed to this Court.

CONCLUSION

While the Probate Court overreached and made findings and conclusions that are unsupported by the record, one conclusion in the Probate Court’s order is abundantly true. “Respondent is a loving mother and grandmother[.]” (ROA 17 at 6.) Janet now knows the

difference between her “grandmother’s hat” and her “trustee’s hat.” Brent knows the types of and scope of his fiduciary duties as well, should he be appointed.

Sabrina’s intent could not be clearer. She wanted Alex protected by her family. She had the financial ability to protect him after her death and did so through her estate planning. But, as trustee and grandmother, Janet had an overwhelming concern about her grandson moving across the country to a large town with seemingly little to no supervision, only a few months after losing his mother. This is more than a valid reason to seek relief from the court system. She, as trustee, should not be punished for using trust funds for trying to protect him.

Nor should she be punished for using her own personal funds, although at times she thought they were trust funds. Her “grandmother hat” informed her that all of Sabrina’s money was for Alex, but this is very different than her making the legal conclusion that the funds were trust funds. Rather, the joint bank account and IRA funds were Janet’s funds, individually, for which she was free to spend on Alex.

This family needs to be brought back together, and the wrongful insertion of a third-party trustee, along with the numerous errors over the various accounts and the family home, needs to be remedied. The record does not support the Probate Court’s findings or conclusions of law, but for the fact that Janet is a loving mother and grandmother.

For the above-reasons and those stated in the brief in chief, this Court should reverse the circuit court’s order summarily affirming the probate court’s order and enter judgment in favor of the Appellant.

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