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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Probate Court

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Amy W. McCulloch, Richland County Probate Judge

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Trial Court Case No. 2020GC4000072
Appellate Case Nos. 2022-001328 and 2022-001226

Jane E. Baskin .....Respondent,

v.

William B. Walkup .....Appellant.

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# REPLY BRIEF

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Jane Baskin's brief focuses on the wishes of Jane Baskin. There is little discussion of the Will of Eldridge Baskin ("Settlor" or "Mr. Baskin") or of Mr. Baskin's wishes. Instead, Baskin repeats her pattern of playing on sympathy in an effort to mask the probate court's errors. Walkup, on the other hand, remains committed to the promise he made to Mr. Baskin and to the language of the Will directing that the trust should provide for Baskin "so long as she shall live." The Will provides Walkup with "absolute discretion" in fulfilling the trust's purpose. The probate court's orders fail to consider that language and fail to apply the law correctly. As such, they must be reversed.

## ADDITIONAL FACTS

Contrary to footnote 3 of Baskin's brief, Walkup disagrees with many of the probate court's factual findings. Many of those disputed findings, however, were not the basis for the probate court's conclusions of law and ultimate decision to remove Walkup as trustee, and are therefore not addressed in Walkup's appellant's brief.

Baskin paints an incomplete and inaccurate picture of the facts, likely in the hopes of creating sympathy and distracting the Court from the language of the Will and the applicable law. The probate court noted Walkup's frustration with what he considers "lies and false allegations" asserted by Baskin and those surrounding her.[1] (R. at 163 ¶48). Baskin continues that pattern in her brief.

[1] Walkup was not the only witness to present evidence with respect to the truthfulness of Baskin's allegations. Long before this litigation was filed, Baskin's first cousin, Anne Webster, wrote Baskin's attorney, Alex Weatherly, an email addressing "several of the charges [Baskin] made to you about Bill Walkup's treatment of her." That letter states in part:

> "4. That Bill [Walkup] is mean to her. Over the years Jane [Baskin] has told this tale to everyone she gets to know. She considers it mean that he won't let her have free access to her trust money, but she never tells them about the credit card debt

As an initial matter, there is competent evidence that Baskin lacks the ability to manage her own finances and to understand financial reporting without assistance.[2] Both Walkup and Anne Webster testified that Mr. Baskin would not have wanted Baskin to have control over the trust assets. (*See* R. at 1302:1-15, 2541:2-22). The very fact that Mr. Baskin put his assets in a trust suggests that he did not want his daughter to have control over the funds. Otherwise, he would have given them to her outright in his Will.

In addition, Baskin's brief erroneously refers to testimony from Ken Wingate as being that of an "expert." Wingate was not qualified as an expert. (R. at 929:18-30:15). Nor could he have provided expert testimony as to matters of law—despite Baskin's attempt in her brief to assert otherwise—such as what reporting was required by statute or what constitutes an accounting. *Dawkins v. Fields*, 354 S.C. 58, 65-66, 580 S.E.2d 433, 437 (2003); *O'Quinn v. Beach Assocs.*, 272 S.C. 95, 107, 249 S.E.2d 734, 740 (1978).

Moreover, Baskin's brief inaccurately portrays the evidence relating to the spending by the trust for the care of Baskin. The record shows that hundreds of thousands of dollars of trust principal has been spent on Baskin's care. (R. at 1024:6-14, 1392:8-17). A complete recitation of

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> she allowed to grow to $15,000 when she had only $800 per month for discretionary spending or about the other times I have had to bail her out of smaller debt situations. . .
>
> Please recognize that when Jane gets terribly upset, she makes charges the way a child does, without realizing the facts will not back her up. Sometimes she has false memories of situations. At other times she lies to support her agenda. That this behavior comes from a person who elicits sympathy because of her physical condition often obfuscates the truth of the issue. . ."

(R. at 1515-16).

[2] This testimony is directly contrary to the probate court's second finding of fact and to Baskin's statement of facts in her brief.

all of the spending on Baskin's behalf since 2015 can be found in the record, along with a profit and loss statement since 2010 and a disclosure of management fees since 2015. (R. at 1716-2106, 2315-22, 2323-33). For example, in 2019 alone, $53,000 of trust principal was spent for Baskin's care. (R. at 1027:6-13). As calculated by Albert Moses, $320,000 in trust principal over the last ten years was spent for Baskin's care as of the time of trial, and around $484,000 in principal and income was spent over that same period (resulting in annual payments from the trust of around $48,000/year). (R. at 1392:8-17). Those trust funds were spent on:

> Many things. House taxes and insurance and repairs, like a new roof on her house, appliances, new air conditioning and furnace in her house. Painting the interior of her house after she left, the entire interior. Her electric and gas bills and water bills, phone bills, doctors, drugs, glasses and eye appointments, car repairs, yard maintenance, vet bills for boarding her dogs. And that included all of the years that she went to her cousin Anne's in North Carolina twice a year for two weeks at a time. We paid for the boarding of all the dogs all those times. Car taxes and insurance, Christmas and birthday money, spending money for her two trips to Anne's each year, medicines.

(R. at 1064:25-65:14). In the past, trust funds were used to purchase a car for Baskin. (R. at 1067:5-6). Contrary to Baskin's argument, it is simply not true that the trust corpus grew because Walkup failed to spend principal on Baskin's care. Instead, the principal grew because it had been prudently invested by Walkup with the goal that the trust would continue to provide for Baskin "so long as she shall live."

Similarly, the chronology for when Baskin moved to the apartment, the accessibility of the apartment, and the reasoning for Baskin's move to the apartment have all been misstated in Baskin's brief. Rather than the pattern of neglect argued by Baskin, Walkup moved Baskin to the apartment in 2015 because it was better equipped for her needs, and he was better able to monitor and assess her needs. (R. at 997:14-17). Unlike Baskin's house, the apartment was designed to

be handicap accessible and had been certified by the Department of Health and Environmental Control. (R. at 997:14-17, 2459).

Based on his continuing monitoring of Baskin's condition, Walkup began hiring assistance for Baskin. He hired Jenny Vega, a certified nursing assistant, to assist Baskin in 2017. (R. at 848:12-17, 1716-2106, 2459-61). In this same time period, Walkup became concerned that Baskin might need even more care due to a history of falls and began investigating options, including residential facilities. (R. at 1054:2-59:17).

At about the same time, Michelle Moseley[3] and Alex Weatherly entered the picture. Weatherly initially reached out to Walkup and to Anne Webster to relay some concerns from Baskin. (R. at 1513-16, 1525-26). Walkup and Webster refuted each of Baskin's initial complaints. (R. at 1513-16). However, rather than working with Walkup to determine the truth of the matter and reach a resolution that would provide for Baskin for the rest of her life, Moseley and Weatherly instructed Walkup in May of 2018 that he was to have no further contact with Baskin and they began pursuing a path toward litigation. (R. at 1076:2-77:3, 1594-95). Thus, the absence of contact between Walkup and Baskin over this period is attributable to Baskin, not Walkup.

[3] Moseley was not hired by the trust, and there was never any agreement by the trust to pay her. (R. at 1062:13-22). Walkup's first awareness of Moseley came in the form of a demand for payment. (R. at 2590:25-92:7).

## ARGUMENT IN REPLY

### I. The probate court did not apply the proper legal standard and did not consider the stated purpose of the trust in removing Walkup as trustee.

#### A. Neither Baskin nor the probate court have offered any explanation as to what will happen to Baskin if the trust principal is exhausted, despite the Will's directive that the trust is to be managed to provide for Baskin "so long as she shall live."

"The sole purpose of the trust created hereunder being to provide for the well being of Jane E. Baskin so long as she shall live." (R. at 1466). The testimony further reflected that Mr. Baskin had concerns about his daughter's ability to manage money on her own. (*See* R. at 2541:2-22). As testified by Anne Webster, Baskin's inability to manage money was "[t]he reason the money was not left to her in the first place[.]" (R. at 1302:1-15). Evidence presented by Walkup showed that under Baskin's proposed budget, the funds would be depleted within 34 months. (R. at 1459:6-14, 170). Baskin had no response when asked what would happen when the money was gone. (R. at 812:20-22). Walkup, on the other hand, presented a budget that was designed to provide for Baskin "so long as she shall live." (R. at 2164-65).

Tellingly absent from Baskin's brief is any reference to, much less discussion of, *Page v. Page*, 243 S.C. 312, 315-16, 133 S.E.2d 829, 831 (1963). Opting to ignore *Page*, Baskin skips the analysis to be applied in considering whether a trustee has abused its discretion:

> 1. "In the administration of a trust, the intent of the testator is of controlling importance."
> 2. "If the trustee exercises his discretionary power in good faith, without fraud or collusion, the Court will not interfere or control his discretion." Or otherwise stated, the probate court cannot supplant the trustee's discretion simply because it might have made a different decision.
> 3. "The burden is not upon the trustee to show good reasons for its actions but rather is upon those who question its actions to prove an abuse of discretion."

*Id.* at 315-17, 133 S.E.2d at 831-32. This Court has articulated these basic rules as follows:

> It is self-evident that the establishment of a trust involves some degree of confidence in the integrity, ability, and genuineness of another individual or entity, the trustee. This truism is given increased credence when the trustee is bestowed a discretionary power, which the trustee may either exercise or refrain from exercising. When determining the extent of a trustee's discretionary power, courts should keep in mind that the allocation of discretionary authority is done out of a desire to obtain the trustee's honest judgment, perhaps even to the exclusion of the judgment of the court. The mere fact that if the discretion had been conferred upon the court, it would have exercised the power differently is not a sufficient reason for interfering with the exercise of the power by the trustee.

*Estate of Stevens v. Lutch*, 365 S.C. 427, 431, 617 S.E.2d 736, 738 (Ct. App. 2005) (internal quotations and citations omitted).

There is no indication that Baskin or the probate court considered the language of the Will as a whole. There is no allegation or finding of fraud or bad faith on Walkup's part. The only evidence is that Baskin's proposed budget will exhaust the trust's assets long before the end of her life expectancy. Walkup, on the other hand, had a plan to make those funds last, which was disregarded by the probate court in its haste to accommodate Baskin. This substitution of the probate court's discretion over Walkup's discretion is improper given the rule in *Page* and the purpose of the trust as stated in the Will. Simply, Baskin and the probate court have ignored the Settlor's directive "so long as she shall live" in the Will. This was error.

**B. The probate court failed to consider the applicable statutes and the absence of harm in determining there was a "serious breach" for purposes of S.C. Code Ann. § 62-7-706(b).**

Under S.C. Code Ann. § 62-7-706(b), a court may remove a trustee if:

(1) the trustee has committed a serious breach of trust;

(2) lack of cooperation among cotrustees substantially impairs the administration of the trust;

(3) because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or

(4) there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.

For purposes of section 1, a "serious breach of trust" is "either: a single act that causes significant harm or involves flagrant misconduct, or a series of smaller breaches, none of which individually justify removal when considered alone, but which do so when considered together." S.C. Code Ann. § 62-7-103(24). The probate court did not make any finding of harm. Nor could it, given the performance of the trust. Therefore, there could not have been a "serious breach of trust."

Section 2 does not apply. With respect to sections 3 and 4, the comments make clear that the "interests of the beneficiaries" are not to be defined by the beneficiaries, but rather "means the beneficial interests as provided in the terms of the trust." S.C. Code Ann. § 62-7-706 at cmt. "Friction between the trustee and beneficiar[y] is ordinarily not a basis for removal." *Id.* This is particularly true in this case where the absence of contact between Walkup and Baskin was attributable to Weatherly's and Moseley's direction that Walkup was not to contact Baskin. The probate court disregarded the language of the Will and placed heavy emphasis on its perception of friction between the trustee and the beneficiary in removing the trustee. (R. at 163, 170-71). This was error.

**1. The probate court created its own reporting standard for this trust that differs from the standard set by the General Assembly.**

The probate court focused on what it perceived to be deficient reporting, creating a new standard that has no basis in statute or the common law. Walkup produced financial information on request as required by the applicable statute. That should have been the end of the inquiry.

Instead, the probate court created a new "goldilocks" standard that required the production of certain specific items, discounted the production of materials that showed the same information, and found that Walkup's production was simultaneously inadequate and a document dump. This was an error of law.

This trust, which became irrevocable upon Settlor's death in 1990, is controlled by the version of the trust code that was in place in at that time, which provided:

> From the time at which a trust becomes irrevocable, the trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration and, in addition:
> (a) within thirty days after his acceptance of the trust, the trustee shall inform in writing the current beneficiaries and if possible one or more persons who under § 62-1-403 may represent beneficiaries with future interest of his name and address;
> (b) *upon reasonable request*, the trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect his interest and with relevant information about the assets of the trust and the particulars relating to the administration;
> (c) *upon reasonable request*, a beneficiary is entitled to a statement of the accounts of the trust annually and on termination of the trust or change of the trustee.

S.C. Code Ann. § 62-7-303 (1990) (emphasis added); *see also* Act No. 539, 1986 S.C. Acts 3821-22. The Comment adopted with the statute further provided,

> Section 62-7-303 governs the duty of a trustee to inform the trust's beneficiaries concerning the administration of the trust. The section (a) mandates timely, written, initial disclosure of the trustee's acceptance of the trust, (b) provides for further disclosure of detailed information relevant to the interests of the beneficiaries *requesting it*, and (c) provides for annual and terminal disclosure of the accounts of the trustee to those beneficiaries *requesting them*. *Importantly, there is no mandatory reporting to the probate court and continuing reporting to the beneficiaries is required only if they request it.*

(Emphasis added). All that is required is "a copy of the terms of the trust which describe or affect his interest and with relevant information about the assets of the trust and the particulars relating to the administration" or "a statement of the accounts of the trust annually" and then only "upon reasonable request." This construction of former § 62-7-303 is consistent with the South Carolina

Reporter's Comments at the time the Uniform Trust Code was enacted in 2005, which stated, "[t]he corresponding section under the former law was SCPC Section 62-7-303, which required a trustee to notify requisite beneficiaries within 30 days of becoming the trustee of an irrevocable trust of the existence of the trust and, *upon request*, to provide a copy of the trust document and periodic accountings. *SCTC Section 62-7-813 expands upon these trustee responsibilities.*" Act No. 66, 2005 S.C. Acts ____ (emphasis added).

There is no duty under § 62-7-303 to provide information absent a request. Nor is any particular form or format required when information is requested. Nor is there any requirement that the trustee be able to instantly generate any requested information. The probate court committed an error of law in ruling otherwise. (*See* R. at 167-71).

The record shows that Walkup visited Baskin shortly after her father's death and explained to her what was in the trust. (R. at 778:19-79:4). In addition, he provided information as requested by Baskin's counsel in 2008 and in 2017-2018. (R. at 779:25-80:3, 1471-74, 786:18-25, 1525-80, 1583-92, 1595-99, 1602-1700, 1703). In doing so, he complied fully with § 62-7-303. The probate court erred as a matter of law in finding that Walkup's actions with respect to reporting amounted to a serious breach of trust and in relying on S.C. Code Ann. § 62-7-813, which does not apply to this trust by its terms because this trust became irrevocable on Mr. Baskin's death in 1990 (well before the statute's effective date in 2006).

Baskin's counsel did not indicate that the information provided was inadequate, nor was an action based on any inadequacy brought within the applicable statute of limitations, S.C. Code Ann. § 62-7-1005(a) ("Unless previously barred by adjudication, consent, or limitation, a beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the date the beneficiary or a representative of the beneficiary was sent a report that

adequately disclosed the existence of a potential claim for breach of trust."). Multiple attorneys were provided with information, and no claim was made within the limitations period, and yet the probate court declined to find the claims were time barred because it determined that Walkup had not provided adequate reporting. (R. at 164-66). The probate court's ruling on the statute of limitations is baffling: somehow Baskin's attorney (Weatherly) was not on notice of a possible claim for inadequate reporting when provided the very reporting he claims was inadequate? Without question, Baskin was on notice of any possible claims more than a year before she filed this action in July 2020. Therefore, the probate court erred in failing to apply § 62-7-1005 and its one year limitations period.

**2. The trust expressly allows self-dealing and does not impose any additional disclosure standards.**

Again, there has been no finding of fraud or bad faith in this case. Nor has there been any showing of harm with respect to the investment of trust assets. By all accounts, "Baskin does not challenge that Walkup has purported to be a good financial investor and has made a lot of money for the trust." (R. at 161 ¶10).

The probate court's assignment of fault under the "Conflict of Interest" section of its order again flowed from the probate court's erroneous ruling as to the required reporting, rather than from any provision of the Will or harm to Baskin. (R. at 170). As stated by the probate court:

> Walkup has *failed to inform* Baskin of the fees Walkup charges the Trust for managing the investment entities. Walkup's *duty as Trustee to report* his fees for investments in companies he owns or has an interest in is a higher duty than the normal accounting/reporting duty by version of his several conflicts of interest. Once Walkup invested Baskin Trust money in Equity95 and Columbia Cash Reserve, entities *he* owned or owned a portion of, he created a presumption of a conflict of interest. The presumption can *be* overcome *by reporting* how the funds are invested and what fee or compensation the Trustee is receiving as the investor. *Walkup was required to report this to Baskin, at least annually, without being asked.* He failed to comply so conflict and the presumption of conflict must be presumed. A conflict Walkup failed to dispel before this litigation began.

(bolding removed, emphasis added). This section of the order does not assign any breach to the underlying decisions by the trustee, including the collection of rent or the payment of annual fees.[4]

With respect to any possible conflict of interest, the probate court failed to acknowledge that the Will allows the trustee "to deal with itself." (R. at 1469). As such, there is nothing suspect about any transaction involving Walkup under S.C. Code Ann. § 62-7-802(b)(1). *Id.* ("Subject to the rights of persons dealing with or assisting the trustee as provided in Section 62-7-1012, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless: (1) the transaction was authorized by the terms of the trust[.]"). Mr. Baskin gave Walkup "absolute discretion" to carry out the purposes of the trust, and all of Walkup's actions were authorized by the trust language. (R. at 1467). As a result, there is no breach of the duty of loyalty for purposes of S.C. Code Ann. § 62-7-802.

Instead of looking to the Will and to section (b) of the statute, the probate court focused on section (c) and the current version of S.C. Code Ann. § 62-7-813 to find there were certain mandatory reporting requirements. (R. at 169-70). The court then used that failure to report as the basis for presuming some improper conflict of interest. Once again, the court erred in applying its own view of how things ought to be as opposed to considering the Will as a whole and the applicable statutory requirements.

[4] Moreover, the payment of annual fees is not precluded by S.C. Code Ann. § 62-7-802 as long as it is fair to the beneficiaries. S.C. Code Ann. § 62-7-802(h).

## II. The probate court erred in holding Walkup in contempt because there was no clear and convincing evidence showing that Walkup intended to violate a court order.

As this Court has very recently reiterated, a finding of contempt must rest on clear and convincing evidence of intent to violate the law. *Hook v. S.C. Dep't of Health & Env't Control*, 439 S.C. 52, 77, 885 S.E.2d 442, 455 (Ct. App. 2023). In this case, given the language of the Temporary Settlement Agreement, there is no such evidence. (R. at 122-23). Walkup remained trustee, albeit for limited purposes, and was not told he could not pursue other litigation. The mere filing of a law suit in Lexington County does not show any intent by Walkup to violate the terms of the Temporary Settlement Agreement, and Walkup's actions were not expressly barred by the Temporary Settlement Agreement.[5] Thus, the finding of contempt cannot stand.

## CONCLUSION

For these reasons and those set forth in Appellant's brief, Walkup asks that the probate court's orders in this matter be reversed or reversed and remanded for a new trial before an unbiased court.

[5] In the event that Baskin is correct that the Lexington County suit was duplicative of this action, the South Carolina Rules of Civil Procedure provide a remedy in the form of a Rule 12(b)(8) motion to dismiss.

Respectfully submitted,

*s/ Sarah P. Spruill*

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