THE STATE OF SOUTH CAROLINA
In The Supreme Court of South Carolina

Certiorari to the Court of Appeals
APPEAL FROM RICHLAND COUNTY
Probate Court

Amy W. McCulloch
Probate Judge

Appellate Case No. 2024-001115

RECEIVED
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S.C. SUPREME COURT

Julia B. Brooker,…….Respondent

v.

Beacham O. Brooker, Jr., in his individual capacity as Trustee and individually as a Beneficiary of the Janet B. Brooker Trust, and Ellen B. Corontzes individually and as a Beneficiary of the Janet B. Brooker Trust,…….Petitioners

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

One point on which both parties agree is that the Settlor/Mother, Janet Brooker ("Janet" or "Settlor"), wanted her three children, Beacham Brooker ("Beach"), Ellen Corontzes ("Ellen"), and Julia Brooker ("Julia"), to be treated as equally as possible. Where the parties part is where Julia takes this conclusion to the extreme. She wants to be equalized for every transfer of money that Janet made to each grandchild or spouse – whether that be a birthday gift or payment for mowing Janet's yard. This is true from the beginning of her siblings' marriages in the late 1980s and the births of her nieces and nephews in the 1990s, even though Janet created the Trust twenty years later.

A second point on which the parties agree is that Beach and Ellen disagree with the weight afforded to the testimony of W. Steven Johnson, Janet's estate planner. Mr. Johnson was "in the room"—he knows Janet's intent. Rather than relying on this direct evidence, Julia wants this Court to look at the actions of his staff. One of which was the creation of a codicil by a paralegal that Mr. Johnson rejected because it did not capture Janet's intent. The second is a note from another paralegal that references collecting the number of gifts given to the grandchildren and spouses from May 1997. Mr. Johnson testified this note was made in error. Moreover, this note does not support Julia's argument that all gifts given during Janet's lifetime should be counted because the purported start date is May 1997 – a year well after the spouses and grandchildren entered the picture.

A third point on which the parties agree is that there was an aggressive gift-giving program set up in the new estate plan, which was signed on October 16, 2007. What changed, and the reason for the full revision of the estate plan in 2007, was that, due to the increase in market value of the securities held, the total value of the estate exceeded the $2 million exclusion from the

Federal combined estate and gift tax of 55% of the estate's value. Thus, the Brooker family requested the assistance of Todd & Johnson regarding strategies to reduce the potential amount of tax owed. Those strategies included a 529 plan for grandchildren college tuition, personal residence trusts on Janet's home and beach condo, a family LLC to which Janet contributed Lockheed Martin stock as part of her capital contribution, and, most importantly for present purposes, an accelerated annual gifting plan where she would gift up to the federal annual gift tax exclusion (which increased over the period from $12,000 to $13,000 to $14,000) to all available family members including the non-blood relative spouses of Beach and Ellen. Because Julia was not married and had no children, a provision was included that an equal amount of the aggregate gifts to each of Beach's and Ellen's families prior to death would be paid out to Julia from the estate post-mortem.

Thus, the sole impetus for the equalization clause for Julia was the accelerated gifting program which did not pre-exist the 2007 estate plan revisions. The pre-2007 estate plan had no such clause. As Mr. Johnson testified when he spoke with Janet, the only gifts to be considered in the calculation of the equalization distribution are the gifts made after the Trust's execution in 2007. (R. 441-442.) Julia's interpretation of the Trust, the Court of Appeals' and the probate court's ignoring the testimony of Mr. Johnson or calling it into question, and the probate court's reliance on a codicil never executed or presented to Janet, *Julia's* interpretation (not Mr. Johnson's) of the notes of paralegals of Todd & Johnson all require this Court to look into the fallacies of the probate court's orders, affirmed by the Court of Appeals.

Where the parties split ways is the meaning of "[f]rom the date of this trust forward" and the weight of Mr. Johnson's testimony. Julia has no legally valid argument to explain "[f]rom the date of this trust forward[.]" She claims it means the date that Beach's trustee duties arose.

Beach's duties arose, however, when he signed the trust document, along with Janet, the settlor, by operation of law. S.C. Code Ann. § 62-7-801. Under Julia's argument, there is no need for the language of "[f]rom the date of this trust forward" because the imposition of trustee's duties occurred when Beach accepted being a trustee when he signed the Trust Agreement on October 16, 2007. The inability to present a legally valid explanation of the meaning of "[f]rom the date of this trust forward" is problematic for Julia. Also, placing more weight behind the actions of two paralegals rather than the attorney who drafted the estate plan is misguided and does not fully support Julia's argument. This Court should reverse the Court of Appeals and enter judgment in favor of Beach and Ellen.

FACTUAL BACKGROUND

Prior to the 2007 estate plan amendments, Janet, the Settlor, had established trusts for each of her grandchildren at their birth and funded those trusts annually for a number of years through transfers of common stock. (R. 414:1-9; 437:25 – 438:1.) In addition, Settlor paid private school tuition for the grandchildren for a number of years. (R. 457:6-9.) In an attempt of fairness toward Julia, Settlor paid for a number of international trips for the two of them including China, Africa, Peru and the Galapagos Islands, and Europe. (R. 511:23 – 512:23.)[1]

Julia focuses on paltry documentary evidence in an effort to avoid the clear testimony of Mr. Johnson. More specifically, Julia focuses on (1) a draft of codicil by office staff that was never used or shown to Settlor, (2) notes purportedly taken by Mr. Johnson during the September 25,

[1] Julia takes issue with this position. (Return to Pet. for Writ of Cert. ("Return") at 13.) However, the testimony is clear that Julia's trips were more numerous and exotic (Peru, Galapagos Islands, Japan, Bali, Hong Kong, Spain, and Kenya) than any trips allegedly given to her siblings (Disney World, Grand Canyon, and Yellowstone). (R. 512-13.) Undeniably, Janet was generous with trips to her children.

2007 family meeting,[2] and (3) notes from Mr. Johnson's paralegal that referred to gifts from 1997. Regarding the codicil, Mr. Johnson testified that he was hoping it would be a quick fix to address the equalization issue, but realized the software that generated the codicil would not allow him to accomplish Settlor's intent. (R. 456:18 – 457:4; 460:25 – 461:10.) There is no evidence that Settlor reviewed the codicil, much less executed it. In fact, her ignorance of the codicil and resulting failure to sign it is evidence, in and of itself, that the codicil does not reflect her intent. Second, the only references to equalization or lifetime gifts in Mr. Johnson's notes (R. 571-572) is "(1) Do codicil – with equalization provision" on the first page and "equalization clause" on the second page. There is nothing regarding lifetime gifts or that Julia should receive gifts from the early 1990s. It is a stretch to say that anything beyond an equalization provision was discussed. Finally, Mr. Johnson's paralegal was "simply mistaken" when she referenced another year (1997) for the collection of gifts, rather than 2007. (R. 468:14 – 469:2.)

None of this evidence is sufficient to establish that "lifetime gifts" meant to Settlor all of the gifts she ever gave to her grandchildren or her children's spouses. Yet, the probate court (and the Court of Appeals) erroneously concluded this evidence trumped the very language in the Trust

[2] In a footnote, Julia also suggests that because Mr. Johnson did not use "future gifting" or "acceleration of gifting" in a time entry in which he wrote "discuss gifts of assets to children" then Mr. Johnson must mean that he discussed more than "future gifts" which presumably was gifts made in the past. (Return at 3 n.1.) Julia is seeking perfection in a lawyer's description of his time spent. Quite frankly, Mr. Johnson's use of "discuss gifts of assets to children" does not mean that he spoke about any gifts other than the ones Janet was about to aggressively pursue.

In fact, Julia's own Return suggests that Mr. Johnson was not talking about prior gifts. In her Return, Julia places emphasis on the fact that Mr. Johnson had no explicit knowledge of the alleged approximately $900,000 worth of gifts. (Return at 12.) But this emphasis is without merit. His alleged lack of knowledge of the amount of "gifts" given by Settlor is of no moment. What is of moment is his explicit knowledge of her intent with respect to her estate plan and the equalization distribution. Julia is looking for meaning when none exists, other than the fact that Mr. Johnson discussed "gifts of assets to children."

Agreement and the unambiguous testimony of Mr. Johnson that Settlor intended for the trust to be prospective only, not retrospective. There is no evidence, much less a preponderance of the evidence, to support Julia's version of her mother's intent. The only competent evidence is (1) Mr. Johnson's testimony, who drafted the estate documents and was well-aware of Settlor's intent,[3] and (2) the trust agreement, itself, which as testified to Mr. Johnson reveals Settlor's intent to capture gifts after October 2007, in conjunction with the aggressive gifting plan. The remaining evidence of a codicil that was never signed supports Beach's and Ellen's position that the equalization distribution was to be prospective, not retrospective. And the other evidence of the paralegals' notes are mere references made mistakenly as testified to by Mr. Johnson.

Next, Julia takes issue with Beach and Ellen's treatment of George DuRant, Julia's expert. Specifically, she argues that Beach and Ellen cannot complain about Mr. DuRant when they agreed to his numbers during the trial. (Return at 8.) Additionally, they cannot complain about the nature of the alleged "gift" – whether it was a true gift or simply a transfer of funds – when they agreed to Mr. DuRant's calculations. (*Id.*) First, the probate court informed the parties that it was going to rule in favor of Beach and Ellen with respect to the issue of lifetime gifts consisting of those only from 2007 forward, i.e. the gifts from the aggressive gifting plan. (R at 35 ("This Court also indicated to the parties that only after Trust gifts were being considered.")) Consequently, there was no need to challenge Mr. DuRant's calculations or characterization of gifts pre-2007, which were much more varied and not consistent across the board like they were post-2007. (R. 545-49.) The calculations to which Beach agreed were those presented by both parties at the trial where the judge asked for the amount of post-2007 gifts with interest running to the date of the Trustee's

[3] William Reynolds, Mr. Johnson's law partner, also testified and reviewed the Trust Agreement. His evidence is also competent. However, Mr. Reynolds' testimony is redundant of Mr. Johnson.

tender to Julia. (R. 516:6 – 517:5.) Mr. DuRant presented $732,235.86 (R. 631), while the Trustee presented $744,644 (R. 659-661)—a number larger than the number of Mr. DuRant, Julia's expert.

Second, Beach and Ellen's complaint against Mr. DuRant's work product is that he simply listed all transfers to the spouses and grandchildren without investigating whether it was a gift or if an equal offsetting gift was made to Julia. An example would be the entry of $9,883 debt forgiveness to Dino Corontzes on December 31, 1995. This involved a financing plan for the Brooker family to acquire a building in Five Points where the Corontzeses decided for their own estate planning purposes to take title in Dino's name rather than Ellen's. The debt forgiveness by Settlor benefitted Julia's one-third share just as it did Beach's, as the Settlor forgave their similar debt too. No child was treated differently.

In sum, the testimony of Mr. Johnson and the Trust Agreement provide that lifetime gifts were only prospective and consisted of those gifts from October 2007 forward. Their testimony and the Trust Agreement were the only competent testimony in front of the probate court regarding Settlor's intent. No competent evidence was before the probate court that supports Julia's position. This Court should reverse the Court of Appeals that affirmed the probate court.

ARGUMENT

I. SETTLOR'S INTENT IS NOT FOUND IN JULIA'S INTERPRETATION OF THE TRUST.

Julia contends that she should be made whole from all the gifts given to Settlor's grandchildren and children's spouses from the day they became Settlor's grandchildren or children's spouses to the date of Settlor's death. From a common sense perspective, this interpretation of Settlor's intent is nonsensical because Settlor could not have intended Julia to receive a "credit" in her column for every $10 birthday gift given to each grandchild or every meal

she may have bought for another sibling's family. Of course, Settlor wanted each child, including Beach and Ellen, to be treated equally, but within reason.

Julia looks to (1) the use of "equal shares" in the trust agreement, (2) the preamble to the equalization distribution clause which states that Settlor "previously made gifts" and the use of past tense in the equalization clause to indicate that pre-2007 gifts were to be used; and (3) the evidence at trial, including testimony that Julia was not to be disadvantaged and treated equally, that Mr. Johnson did not know about gifts worth approximately $900,000 before 2007, and that Mr. Johnson's staff created documents with incorrect information as discussed above. But none of these reasons collectively trumps the solid and consistent testimony of Mr. Johnson that the Settlor wanted lifetime gifts to be those made only after the creation of the Trust. And both sides agree that the Settlor's intent is of paramount concern. Mr. Johnson clearly and succinctly provided the probate court with what the Settlor's intent was – to equalize Julia with gifts from the Trust forward. The testimony has been continually ignored, including by the Court of Appeals, in violation of this Court's precedent.

Regarding the "equal shares" argument, no one disputes that the Settlor wanted her children to be treated equally. But Julia's reliance on the use of "equal shares" ignores the fact that the Settlor previously had a will and trust with the same provisions and, under that plan, had attempted to treat her children equally. She had set up and funded trusts for the grandchildren, funded them with minimal contributions, and made tax advantaged payments[4] for the grandchildren's private school tuition. To compensate Julia, she paid for several expensive overseas trips for herself and

[4] The Estate and Gift tax element emphasizes another inequity in the probate court's order. The equalization amounts the Court ordered are to be paid in post-tax dollars thus disregarding the fact that Julia benefits from the gifting program's tax savings of 55% of the amount of those gifts while Beach and Ellen do not.

Julia. Had she believed this was not adequate compensation, she would have paid Julia an equal share contemporaneously, as would have been the advice of Mr. Johnson. (R. 466.) Prior to the 2007 change in estate planning, she had never given federal gift tax annual exclusion gifts to non-blood relatives (the spouses of Beach and Ellen).[5] (R. 545-48.) The landscape of the Settlor's estate plan changed with the aggressive gifting program; thus, the Settlor's new concern of Julia being disadvantaged.

Next, regarding the preamble/use of past tense argument, Julia argues that verb tense evidences the intent for Janet to include pre-Trust gifts. (Return at 11-12.) However, this argument ignores the language "[f]rom the date of this trust forward" in subparagraph (2)(a) of the equalization clause. Importantly, the phrase of "[f]rom the date of this trust forward" dictates how the equalization distribution is to be calculated. This phrase appears only once in the trust—in the equalization clause—indicating a differing timeline for that clause than other duties imposed by the trust on the Trustee. Settlor had always been fair in her gifting and included an equalization clause to make up for the accelerated gifting to grandchildren and non-blood relatives under the 2007 Trust. Those gifts and the equalization payment were to be made ***under*** and ***from*** the Trust which did not exist prior to 2007.

Next, Julia repeats her argument, that, in reference to the Trustee's duties, use of the past tense of the verb "to make" indicates an intent to include all gifts made during Settlor's lifetime. However, the trust language is referring to a duty to be performed ***in the future*** (after death) to compensate for actions done ***in the past*** (from 2007 until death). The past tense is appropriate and says nothing about the date from which gifts were to be calculated. That part of the instruction is

[5] Janet did give the spouses the annual exclusion gift for 2007 days before the Trust was signed. But Janet made the gifts in contemplation of the aggressive gifting program and wanted to ensure she captured the 2007 tax exclusions.

contained in the phrase, "[f]rom the date of this trust forward." That phrase must be given meaning. If Julia's argument means it refers only to the beginning of the Trustee's duties, then it causes those words to be redundant and superfluous and violates the rule of construction that, "A construction rendering a provision, term, or part meaningless, superfluous, surplusage, useless, inexplicable, or nugatory should be avoided." 17A CJS, *Contracts*, §§399-400, pp. 289-91.

Julia tries to avoid the import of "[f]rom the date of this trust forward" by arguing that the Court should not be constrained by formal rules of construction when there is other evidence of the Settlor's intent. However, Julia forgets that the only competent evidence of the Settlor's intent, besides the Trust Agreement itself, is the testimony of Mr. Johnson, which undeniably provides that lifetime gifts were to be post-Trust and that Settlor had no desire to include pre-Trust gifts in the equalization distribution calculation. This is not a "form over substance" argument. This language serves to capture the Settlor's intent that only post-Trust gifts are to be considered.

II. Johnson's Testimony Is of Utmost Value.

Julia advances her opinion that Steve Johnson, the estate's attorney, was confused about his client's intentions in revising her estate plan. Julia argues in the negative that Settlor never expressed to him a desire that pre-2007 gifts be excluded from the equalization calculation. (Return at 17.) The point is, however, that Settlor never said anything to the effect that, "I feel that I have been treating Julia unfairly and I want a clause causing the Trustee at my death to go back in time and determine the gifts I have given during my life to Beach's and Ellen's spouses and children." Logically, Janet, the Settlor and gift-giver, who long retained accountants and estate attorneys, was in a better position than the newly appointed Trustee to calculate those amounts. She could have simply written a check to Julia or transferred stock to make up the difference

instead of placing the burden on the Trustee to do such investigation at an undetermined date in the future.

Additionally, Julia argues that Mr. Johnson testified that Settlor never expressed a desire that lifetime gifts made prior to the Trust be excluded from the calculation of the equalization provision. However, this attempt at a negative inference is clearly contradicted by Mr. Johnson's testimony at trial.

> Q. Now, when you drafted the Trust Agreement and specifically paragraph 2(a) (b) and (c), which is denominated equalizing distribution to the Settlor's daughter Julia B. Brooker, was that intended by Mrs. Brooker and by you to state that this equalization was only to be made going forward as indicated by paragraph (a)'s language, "From the date of the trust forward"?
>
> A. That is correct.

(R. 442:5-13.)

Finally, Julia again argues that certain internal memoranda and draft instruments obtained through discovery from attorney Steve Johnson's office are competent evidence of Janet Brooker's intent that the equalization clause apply to lifetime gifts preceding the 2007 trust. These documents include a draft of a codicil prepared by a non-lawyer paralegal identified as CKO and notes prepared by a second paralegal, Ms. McMahan. This argument must be rejected for at least three reasons: 1) the codicil was rejected by Mr. Johnson because it did not capture the Settlor's intent and the notes from the second paralegal were simply wrong; 2) the law firm's non-lawyer employees never met or corresponded with Janet, the Settlor, and are not qualified to express her intentions in legal instruments; and 3) to the extent that their work product may contradict the plain language of the trust, that evidence is barred by the doctrine of merger.

Regarding the first and second reasons, Mr. Johnson, a member of the bar of this State, is the only individual within his firm who may represent the wishes of his client, Janet. Employees

of his office serve under his direction, and he may freely accept or reject their advice. In this case, he obviously rejected it. (R. 460-61.) Additionally, he testified that his paralegal's notes were simply in error. (R. 468-69.)

Regarding the third reason, South Carolina's well recognized merger doctrine precludes consideration of these erroneous drafts and notes. As expressed by this Court:

> The doctrine of merger is founded upon the privilege, which parties always possess, of changing their contract obligations by further agreement prior to performance. [291 S.C. 311] The execution, delivery, and acceptance of a deed varying the terms of the antecedent contract indicates an amendment of the original contract, and generally the rights of the parties are fixed by their expressions as contained in the deed [citations omitted].

Shoney's Inc. v. Cooke, 291 S.C. 307, 310, 353 S.E.2d 300, 303 (Ct. App. 1986) (*quoting Charleston & Western Carolina Rwy. Co. v. Joyce*, 231 S.C. 493, 99 S.E.2d 187 (1957). Thus, even if the codicil draft had represented a negotiated instrument with the client, it was superseded by the trust instrument itself and merged into it. But importantly, the codicil was rejected by Mr. Johnson and never presented to the Settlor.

In sum, the Court cannot ignore or discount the testimony of Mr. Johnson. He was there, present with Settlor, when she discussed her intentions, and then he put them into writing, which Settlor signed, indicating her agreement with his words. He captured her intent. Considering the Court of Appeals and the probate court found the Trust Agreement ambiguous, the only other avenue to determine Settlor's intent is Mr. Johnson, Settlor's estate planner. Employee erroneous documents and notes do not change the clear testimony of Mr. Johnson.[6] The weight of their

[6] Julia is asking this Court to put more weight behind a (1) codicil that was never presented to or signed by the Settlor and (2) notes of Todd & Johnson's paralegals, who did not appear before the probate court, over the testimony of Mr. Johnson, a dean of the South Carolina trust and estates bar. Stated simply, Julia wants this Court to believe that Mr. Johnson was not telling the truth on the witness stand and that the codicil and her own interpretation of the paralegals' notes tell the true story of what the Settlor's intent was. Mr. Johnson told the truth on the stand. The probate

testimony, along with the construction of the Trust Agreement, requires a reversal of the Court of Appeals.

III. The Award and Amount of Attorney's and Professional Fees Are In Error.

Petitioners rely on their argument in their Petition and maintain that Julia did not win the case, *in toto*, which could have led to a judgment worth several more millions of dollars. Justice and equity do not require Julia to receive all of her attorney's fees and expert fees, especially when her conduct adds to the substantial fees accrued by her attorneys and expert.

CONCLUSION

For the above-stated reasons and for those stated in the Petition for Writ of Certiorari, this Court should reverse the Court of Appeals and probate court and enter judgment in favor of the Petitioner.

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court never questioned Mr. Johnson's veracity in court or in its orders. Mr. Johnson's employees' errors should not call into question his integrity.