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SC Court of Appeals

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE MATTER OF:
JOHN M. AND MARILYN W. BUNN
CHARITABLE REMAINDER TRUST

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

CASE NUMBER 2014-CP-07-1732

MARILYN W. BUNN, A PERSON *NON*
COMPOS MENTIS BY AND THROUGH
HER GUARDIAN, DENISE SUDDER,
AND MARGARET BUNN LOCHMANDY,

PLAINTIFFS,

v.

DOUGLAS S. DELANEY, AS TRUSTEE
AND IN HIS INDIVIDUAL CAPACITY,
ALAN WILSON, THE SOUTH CAROLINA
ATTORNEY GENERAL, SACRED HEART-
GRIFFIN HIGH SCHOOL, ST. JOSEPH'S
HOME, QUINCY UNIVERSITY, NOTRE
DAME, THE LAWRENCEVILLE SCHOOL,
ALL SAINTS CATHOLIC CHURCH, AND
HABITAT FOR HUMANITY c/o ALL
SAINTS CATHOLIC CHURCH,

DEFENDANTS.

2015 APR 30 AM 10:07
JENNIFER ANN HODGSON
BEAUFORT COUNTY, S.C.
CLERK OF COURT

**ORDER GRANTING PLAINTIFFS'
MOTION FOR PARTIAL
SUMMARY JUDGMENT**

THIS MATTER came before this Court on a Motion for Partial Summary Judgment filed by Marilyn W. Bunn, a Person *Non Compos Mentis* by and through Her Guardian, Denise Suddes, and Margaret Bunn Lochmandy, seeking to remove Doug Delaney as the independent successor to the Corporate Trustee of the John M. and Marilyn W. Bunn Charitable Remainder Trust u/a/d December 16, 1993 ("Trust") and, in the alternative, to modify the Trust. Having

conducted a hearing on this matter on March 16, 2015, the Court makes the following ruling based on the legal memoranda filed by the Parties and arguments of counsel.

BACKGROUND

On or about December 16, 1993, John M. Bunn and Marilyn W. Bunn, as Settlers ("Settlers") created the Trust, the purpose of which was to provide income to the Settlers during their lives; upon the death of the surviving Settlor, the balance of the trust estate is to be distributed to certain charities set forth in the Trust. John M. Bunn and Marilyn W. Bunn were named as the individual co-trustees (the "Individual Trustees") of the Trust. Security Investment Management and Trust Co., was named as the corporate trustee (the "Corporate Trustee") (the Individual Trustees and Corporate Trustee are collectively referred to as the "Trustees" and individually as, a "Trustee", as applicable). During the lifetimes of Settlers, the Trust was required to make a monthly distribution to the Settlers or surviving Settlor based on a formula provided in the Trust (the "Unitrust Payment"). Marilyn W. Bunn, the surviving Settlor, who lives in Gwinnett County, Georgia, is entitled to the Unitrust Payment for the remainder of her life.

The Trust sets forth the limited powers and duties of the Corporate Trustee, as well as the broader powers and duties of the Individual Trustees. The Trust authorizes the Settlers to "remove the Corporate Trustee at any time or times, with or without cause, and appoint an individual or corporation as a successor independent trustee" as long as the successor independent trustee is not a person or corporation either controlled by the Settlers or obligated to the Settlers. Marilyn Bunn appointed Douglas Delaney as successor Independent Trustee in 2001. The Trust names Margaret Bunn Lochmandy and Kelly Kathleen Bunn¹ ("K.K. Bunn") as

¹ Kelly Kathleen Bunn died in 2014.

successors to the Individual Trustees. The Trust gives the Individual Trustees the power to remove the Corporate Trustee, and, except where otherwise expressly provided or prohibited, all other discretionary decisions not otherwise delineated under the Trust agreement. At the time of the hearing, both Lochmandy and Delaney claimed to be the successor Individual Trustee, and neither recognized the other's authority.

STANDARD

The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. See George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).

ANALYSIS

Delaney denies that Lochmandy is the successor Individual Trustee and believes that a vacancy occurred when a guardian was appointed for Marilyn Bunn. He claims that Lochmandy did not accept the position of Trustee, and that the role of Individual Trustee cannot be automatically imposed on Lochmandy. Delaney also argues that the successor Independent Trustee, having the same powers and duties as the previous Corporate Trustee, is not subject to the same removal provisions. He asserts that the Trust contains no provision for removal of the successor Independent Trustee, and thus removal can only be made for cause under the South Carolina Trust Code. Delaney presented a sworn affidavit to the Court in support of his position that he is also the successor Independent Trustee, having appointed himself as such on June 17, 2014.

Interpretation of Trusts

The primary consideration in interpreting and construing a trust is to discern the testator's intent. *Holcombe-Burdette v. Bank of America*, 371 S.C. 648, 657, 640 S.E.2d 480, 484 (Ct. App. 2006) (citing *Epworth Children's Home v. Beasley*, 365 S.C. 157, 166, 616 S.E.2d 710, 715; *Bowles v. Bradley*, 319 S.C. 377, 380, 461 S.E.2d 811, 813 (1995) ("The primary consideration in construing a trust is to discern the settlor's intent.")). "In ascertaining a settlor's intent, if the language of the trust instrument is perfectly plain and capable of legal construction, such language determines the force and the effect of the instrument." *Holcombe-Burdette v. Bank of America*, 371 S.C. at 658, 640 S.E.2d at 485 (citing *Chiles v. Chiles*, 270 S.C. 379, 384, 242 S.E.2d 426, 429 (1978); *Floyd v. Floyd*, 365 S.C. 56, 615 S.E.2d 465 (Ct.App.2005) (affirming trial court's construction of testamentary trust language relating to trustee's discretionary powers); *Univ. of S. Cal. v. Moran*, 365 S.C. 270, 617 S.E.2d 135 (Ct. App. 2005)(construing the plain language of trust specifically to authorize trustee to enter into settlements); and *Estate of Stevens v. Lutch*, 365 S.C. 427, 617 S.E.2d 736 (Ct.App.2005) (relying on the trust language as most persuasive of settlor's intent regarding discretionary power of trustee)).

It is well-accepted in this state that the rules of construction for wills apply to the interpretation of trust documents. S.C. Code Ann. §62-7-112 (Supp. 2014); see also *Epworth Children's Home*, 365 S.C. at 166, 616 S.E.2d at 715 ("In fact, the law relating to discerning the drafter's intent is identical for wills and trusts.") (citing *All Saints Parish, Waccamaw v. Protestant Episcopal Church*, 358 S.C. 209, 224 n. 10, 595 S.E.2d 253, 262 n. 10 (Ct.App.2004)). "The paramount rule of will construction is to determine and give effect to the testator's intent." *Estate of Gill v. Clemson Univ. Found.*, 397 S.C. 419, 725 S.E.2d 516, (S.C. App. 2012) (citation omitted).

"[C]onstruction 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." *Chiles*, 270 S.C. at 384, 242 S.E.2d at 429 (quoting *Brock v. Hall*, 33 Cal.2d 885, 206 P.2d 360 (1949)). "Extrinsic evidence is not admissible to alter the plain language of a trust instrument." *Holcombe-Burdette v. Bank of America*, 371 S.C. at 658, 640 S.E.2d at 485 (citing *Bowles*, 319 S.C. at 380, 461 S.E.2d at 813).

The Individual Trustee

John M. Bunn predeceased Marilyn W. Bunn, leaving her as the sole Individual Trustee. When Marilyn W. Bunn was declared incapacitated in 2013, she was no longer competent to act as Individual Trustee. Citing the South Carolina Trust Code, which states a vacancy occurs in a trusteeship if a guardian is appointed for the trustee (S.C. Code Ann. § 62-7-704(a)(6)), Delaney maintains that the position of Individual Trustee was vacated upon the Georgia probate court's appointment of a guardian for Marilyn Bunn. Delaney ignores the language of the Trust, the Settlers' intent as expressed in the Trust, and the South Carolina Trust Code, especially paragraphs one through five of § 62-7-704(a), and § 62-7-704(d),²⁴ which mandates that the person designated in the terms of the trust must be given first priority as to any vacancy occurring in a trusteeship of a charitable trust.

The rules for Individual Trustee succession are set forth in the Trust. The terms of succession are mandatory and automatic; the successor trustees are not required to take any formal steps to accept their position. Upon the death of one of the Settlers, the surviving Settlor

²⁴A vacancy in a trusteeship of a charitable trust that is required to be filled must be filled in the following order of priority: (1) by a person designated in the terms of the trust to act as successor trustee. . . ." S.C. Code Ann. § 62-7-704(d)(1).

“shall act as the sole individual trustee hereunder.” Should the surviving spouse resign or be unable to serve as trustee, Lochmandy and her sister K.K. Bunn, daughters of the Settlor, “shall act as the successor individual co-trustees hereunder.” If one of the daughters was unable to serve because of resignation, refusal or inability,³ the surviving daughter “shall act as the individual trustee hereunder.” The language of the Trust is unambiguous. The Settlor’s intent is clear—should the surviving Settlor be incapacitated, her daughters succeed to the trusteeship.

Delaney maintains that K.K. Bunn and Lochmandy were required to take formal measures and affirmatively accept their positions as Individual Trustees, and concludes that because there were no outward formalities accepting the position, they had rejected the trusteeship. This is contrary not only to the language of the Trust, but also to the law of this state. “Unless directed otherwise by the court or the trust instrument, a successor trustee appointed by the court *or the trust instrument succeeds* to all the powers, duties and discretionary authority given to the predecessor trustee.” S.C. Code § 62-7-812 (Supp. 2014) (emphasis added). There are no requirements for a named successor trustee to take any steps to accept or immediately affirm her position. Should the successor trustee not wish to serve, the South Carolina Trust Code requires the named successor trustee to reject the trusteeship, to resign or to be disqualified, or to be removed in order for a vacancy to occur (S.C. Code § 62-7-704(a) (Supp. 2014)). In other words, the named successor trustee must take some action to disclaim the trusteeship, or some action must be taken to remove the successor trustee. Delaney presents no evidence that K.K. Bunn or Lochmandy took any actions evidencing rejection of the trusteeship, resignation therefrom, or disqualification. As a matter of law, no vacancy occurred in the present case; and upon the incapacity of the surviving Settlor, K.K. Bunn and Lochmandy

³ This language reflects the language of S.C. Code Ann. § 62-7-704(a)(1-3).

became the successor Individual Trustees. When K.K. Bunn died, Lochmandy became the sole successor Individual Trustee.

Successor Trustees

Under the Trust, the successor trustees are treated the same as the original trustees. This applies to the Individual Trustee as well as the Corporate Trustee. The Trust unambiguously gives the Individual Trustees the right to "remove the corporate trustee at any time or times, with or without cause, and appoint an individual or a corporation as successor independent trustee...."

The plain and unambiguous language of the Trust proves the Settlers' intention for the Individual Trustees to have the authority to replace the Corporate Trustee and any successors. The Settlers' intent is apparent in the following provisions. First, the Trust places no significance on the identity of the corporate trustee or its successors. Security Investment Management and Trust, Co. is named as the original Corporate Trustee, but the Trust contemplates removal for cause and without cause. The Trust does not specify the identity of the independent successor to the Corporate Trustee, but gives the power and responsibility to select the successor to the Settlers and the Individual Trustees. Second, the only restriction on the selection of the independent successor to the Corporate Trustee is that it cannot be a company or person controlled by or legally obligated to the Settlers. This prohibition on the selection of the successor independent trustee demonstrates the Settlers did provide limitations in the Trust document where wanted; if the Settlers intended to prohibit not-for-cause removal of the successor independent trustee by the Individual Trustee or the Settlers, they would have provided so in the Trust. Third, the Trust does not state that the independent successor of the Corporate Trustee shall serve as a permanent trustee or that there is no way to remove the successor. To the contrary, the Trust states that the "every successor trustee shall have all the powers given the

originally named trustees." A successor is generally an entity who takes over and continues the role or position of another. Additional powers or protections would be rare and would need to be specified. Reading the removal provision in conjunction with this provision on successor trustee powers leads to only one logical conclusion: successor trustees step into the shoes of the original trustees and provisions applying to the removal original trustees also apply to the removal of successor trustees.

Delaney's argument that the Trust does not expressly empower the Individual Trustee to remove the independent successor of the Corporate Trustee is to no avail. It ignores the catchall provision granting the requisite authority to the Individual Trustees. The Trust conferred "except where expressly prohibited, all other discretionary decisions not otherwise delineated under this agreement [to] the individual trustees." Lest there be any confusion as to the removal powers, the Trust ensures that the Individual Trustees and their successors are authorized to carry out the intention of the Settlers. Given that the Settlers clearly and unambiguously authorized the removal of the Corporate Trustee, it only follows reason that the Individual Trustees and their successors are authorized to remove the independent successor of the Corporate Trustee.

Finally, the rules for successor trustees in the S.C. Trust Code support the clear position that the removal provision applies equally to the independent successor to the Corporate Trustee. SC Code Ann. § 62-7-812 states "Unless directed otherwise by the court or by the trust instrument, a successor trustee appointed by the court or by the trust instrument succeeds to all the powers, duties, and discretionary authority given to the predecessor trustee". SC Code Ann. § 62-7-812 (Supp. 2014).

As a matter of law, this Court finds the Trust plainly authorizes the successor Individual Trustee to remove the independent successor of the Corporate Trustee without cause. The intent

of the Settlers is clear and any uncertainty is clarified by the catchall provision regarding the powers of the Individual Trustees.

The Settlor

The Trust also provides the Settlor may remove the Corporate Trustee without cause. “[T]he settlors during their lifetime, the survivor of them after one of their deaths, . . . may remove the corporate trustee at any time or times, with or without cause, and appoint an individual or corporation as successor independent trustee . . .” When the Settlers established the Trust, they foresaw a possibility of future incapacity and provided for it: “The guardian or conservator of a settlor under disability or an agent of the settlors acting pursuant to a durable power of attorney shall receive notice and have *authority to act for settlors* under this article.” The intent of the Settlers at the time the Trust was created is unambiguous in their provision for appointment of a guardian with authority to act on their behalf.

Marilyn W. Bunn is the surviving Settlor of the Trust. On September 5, 2013, the Probate Court of Gwinnett County, Georgia, where she resides, determined that Mrs. Bunn was incapacitated and appointed Denise Suddes as Guardian. The Probate Court’s Order expressly authorizes the guardian “to initiate or respond to litigation, as necessary, to modify the Trusts, remove and replace the current trustees of the Trusts, and pursue damages arising out of the conduct of one or more of the trustees of the Trusts.” The Order is entitled to full faith and credit by the courts of the State of South Carolina. U.S. Const. art. IV, § 1. *See Durfee v. Duke*, 375 U.S. 106, 109, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963) (finding full faith and credit “generally requires every State to give to a judgment at least the res judicata effect which the judgment would be accorded in the State which rendered it.”)

Under both the terms of the Trust and the Probate Court Order, Marilyn Bunn's Guardian has the power to act for her. As set forth above in the discussion of Successor Trustees, Delaney, as the successor independent trustee to the Corporate Trustee stands in the shoes of the original Corporate Trustee. Just as the Individual Trustees were shown to have the power to remove the successor independent trustee, it is clear the Settlor's power, by and through her Guardian, to remove the Corporate Trustee without cause also applies to the successor independent trustee to the Corporate Trustee.

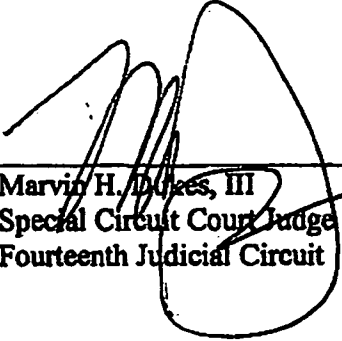
Modification of the Trust

This Court makes no findings as to the alternative cause of action requesting modification of the Trust. The requested modification would have allowed the surviving children of the Settlor to appoint an individual trustee as the sole trustee, thus removing the current successor independent trustee. Because the Individual Trustee and the Settlor have the power to remove the successor independent trustee under the Trust, the Court refrains from ruling on this question.

IN CONCLUSION, this Court grants Plaintiffs' motion for partial summary judgment and finds, as a matter of law, that under the terms of the Trust and the law of South Carolina, Margaret Lochmandy is the sole Individual Trustee of the Trust. Further, as a matter of law, the successor independent trustee to the Corporate Trustee not only succeeds to the Corporate Trustee's duties and powers, but is also subjected to the same restrictions and the same provisions for removal as the Corporate Trustee. Pursuant to the terms of the Trust and the law of South Carolina, both the Individual Trustee and the surviving Settlor, by and through her Guardian, have the power to remove the successor independent trustee.

AND IT IS SO ORDERED.

This 28 day of April 2015.
Beaufort, South Carolina


Marvin H. Jones, III
Special Circuit Court Judge
Fourteenth Judicial Circuit

M/H

14-1732