

2015CP46-1409

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN RE:

Deborah Dereede Living Trust
dated December 18, 2013,

Hugh Dereede and Tyre Dealer
Network Consultants, Inc.,

Plaintiffs,

vs.

Courtney Feeley-Karp, Individually
and as Trustee of the Deborah
Dereede Living Trust dated
December 18, 2013 and Michael Fehily, as a
qualified beneficiary Of the Deborah
Dereede Living Trust Dated December 18,
2013,

Defendants.

IN THE COURT OF PROBATE
SIXTEENTH JUDICIAL CIRCUIT
CASE NO. 2015-GC-46-01409

ORDER

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SEP 15 2016

SC Court of Appeals

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CLERK DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

This matter came before me on April 19, 2016, for a trial. Representing the parties were John P. Gettys for Plaintiffs, and Peter J. Nosal for Defendant, Courtney Feeley-Karp ("Karp" or "Trustee"). Also present were the parties. Michael Fehily did not enter an appearance in this action and was, therefore, not present for the hearing. Both sides presented exhibits and the testimony of witnesses, including Professor Alan Medlin, and the Trust Protector, Catherine Kennedy, each of whom was recognized by the Court as an expert in the field of trust and estate law. Based on the testimony, exhibits, and arguments of counsel, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

The following are findings of fact, presented in narrative format, which I find to be based on all the evidence, and after consideration of any applicable burden of proof. I have also considered the credibility of the witnesses in reaching these findings.

This is a declaratory judgment action brought by Plaintiff, requesting the court interpret certain provisions of the Deborah Dereede Revocable Living Trust dated December 18, 2013 ("Trust"), that became irrevocable upon the death of the Settlor, Deborah Dereede ("Settlor" or "Deborah").

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Deborah transferred title of the real property having the address of 131 Whispering Pines Drive, Lake Wylie, South Carolina ("Whispering Pines"), to herself as Trustee simultaneously with the creation of the Living Trust on December 18, 2013, thereby bringing this real property within the corpus of the Trust. This real property was initially purchased with the assistance of \$250,000.00 loan from Plaintiff Tyre Dealer Network Consultants, Inc. ("TDN").

Article VI, Section 4(a) of the aforethe Trust Agreement, reads as follows:

Section 4. Specific Gifts

My Trustee shall make the following specific distribution of trust property.

- a. Specific Distribution of Real Estate Sales Proceeds, Household Contents, and Certain Vehicles to HUGH DEREDE.

As soon as practicable following my death, my Trustee shall sell the house and lot located at 131 Whispering Pines Dr., Lake Wylie, SC 29710. The sales proceeds shall be used first to pay off any mortgage against the property, and second to pay off that certain promissory note given by me to Tyre Dealer Network Consultants, Inc. Said promissory note, at the time of the execution of my Trust, is in the amount of \$250,000.00 but in no event shall the amount due exceed one-half of the sales price of the property. After payoff of said mortgage and said note, my Trustee shall then distribute one-half of the remaining net sales proceeds to HUGH DEREDE, outright and free of trust. The other one-half of the remaining net sales proceeds shall be distributed in accordance with the Articles that follow. Until the sale of the property, HUGH DEREDE may continue to use and occupy the premises. In addition, my Trustee shall distribute to HUGH DEREDE, outright and free of trust, all my or my Trust's interest in and to the following items: the HOUSEHOLD CONTENTS OF 131 WHISPERING PINES DR., LAKE WYLIE, SC 29710; THE 2013 CADILLAC CTS; THE 2008 GMC ENVOY; and, the 1999 MAXUM CABIN CRUISER.

Deborah died on August 15, 2014. Thereafter, Karp became Trustee of the Trust and, upon acceptance of this position, Karp assumed fiduciary responsibility to all beneficiaries of the Trust. Subsequent to the death of the Settlor all probate assets of decedent became assets of the Trust pursuant to a Pour Over Will filed and probated in the York County Probate Court. In December, 2014, Whispering Pines was sold to an unrelated third party, with the net proceeds of sale totaling \$356,242.86. Both before and after the closing, Plaintiffs, by and through Plaintiff Hugh Dereede ("Dereede") requested from the Trustee assurance that the terms of the Trust would be fulfilled, so that Dereede and TDN would receive each of their distributions immediately upon sale of the real property. The Trustee, citing estate law and fiduciary obligations, refused to distribute monies to Dereede and TDN, as requested.

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In relevant part, Article Six, Section 4.a., of the Trust requires the Trustee to sell the house and lot at 131 Whispering Pines Drive "as soon as practicable" after the Settlor's death, and to distribute the proceeds as follows: first, pay off the mortgage against the property; second, pay the \$250,000.00 note owing to TDN; third, pay half the remaining balance of the sales proceeds to Dereede; and fourth and last, pay the other half of the remaining balance in accordance with the lesser prioritized remaining provisions of the Trust, which include possible distributions to the Trustee in her individual beneficiary capacity, and to her brother. This prioritization by the Settlor in Article Six makes particular sense given that \$250,000.00 was loaned to the Settlor towards the purchase of Whispering Pines by TDN.

Thereafter, Plaintiff filed an action seeking "... a declaration of rights of legal relations ... relating solely to the construction and interpretation of the Trust Agreement. ..." In their prayer for relief, they requested the Court to order the proceeds of sale of Whispering Pines paid as directed by the Settlor, to find that the Trustee breached her fiduciary duty to each of the Plaintiffs, and to award attorney's fees and costs for the Trustee's action.

In response, the Trustee filed a Motion for Removal to Circuit Court, Motion to Dismiss, Affirmative Defenses and Answer, in which she, as Trustee, pled Article XIV, Section 21 of the Trust, the no-contest clause, to "... disinherit [each] Plaintiff's interest under the Trust and dismiss this suit."

CONCLUSIONS OF LAW

Based on the findings of fact herein, I make the following conclusions of law.

It is axiomatic that "[w]here an agreement is clear and capable of legal interpretation, the courts only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." *Ellis, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct.App 2004) (quoting *Heins v. Heins*, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct.App. 2001)). As with statutory construction or interpretation, construction and interpretation of a contract is a question of law to be decided by the court. *Hawkins v. Greenwood Development Corp.*, 328 S.C. 585, 493 S.E.2d 875 (Ct.App 1997).

The same rule of construction applies to trust agreements. "(R)esort is first to be had to [the instrument's] language, and if such is perfectly plain and capable of legal construction, such language determines the force and effect of the instrument." *Chiles v. Chiles*, 270 S.C. 379, 383-384, 242 S.E.2d 426, 429 (1978).

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1. Interpretation of Trust Language.

To determine the intent of the Settlor in the payment of monies from the Trust, and the timeliness of payment, one must look first at the relevant terms of the Trust document. In doing so, I conclude that the plain meaning of the Trust language, expresses the Settlor's intent to prefer (1) the repayment of the note given to TDN, and (2) the distribution to her husband, Dereede, over all other payments and distributions from the Trust.

Article Five, Section 2 of the trust is entitled "Immediate Distribution of Specific Devises", and provides for the distributions to the persons and entities named in Article Six. Article Five, Section 2, provides for distributions from the remainder of the trust only after the distributions made in Article Six. Thus, I conclude that the Settlor's payment and distribution scheme is first to TDN and Dereede pursuant to Article Six, and second, to all other distributions.

Article Five, Section 2, further directs that the distributions to TDN and Dereede be made "[a]s soon as practicable . . ." after the Settlor's death. Article Six provides similarly as to the preference for, and timing of, the payment and distribution to TDN and Dereede. The Settlor's requirement for payment and distribution to TDN and Dereede to be the first priority, and as soon as practicable, should be read, consistent with other provisions, to indicate her intention that such distribution be made sooner than any other distribution, and not be unduly delayed.

A trustee has a duty to follow the directions of the settlor. Although normally a trustee is to treat all beneficiaries fairly, equitably, and impartially, a trustee must treat with partiality any beneficiary that the settlor directs be so treated. Here, the Settlor directed that TDN and Dereede be given first priority as to the distribution required by Article Six. Thus, the Trustee should have prioritized the interests of TDN and Dereede over all other payments and distributions from the Trust, including her own.

The fact that the probate estate had only *de minimus* liquid assets at the time of the sale of Whispering Pines is not necessarily a reason to refuse distribution. The probate estate had other significant assets that could have been liquidated to pay any claims. Moreover, the Trust had approximately \$53,000 in funds remaining, even after the payments to TDN and Dereede, which could have been used to pay probate creditors if necessary.

Based on the foregoing, I conclude that the trustee could have, and should have, made the payments and distributions from the proceeds of the sale, as required by Article Five, Section 2, and Article Six of the Trust, without waiting for the creditor's claim time period to expire, and

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without incurring personal liability under S.C. Code Ann. § 62-7-505(a)(3), 62-7-1010(b) and/or 62-3-808.¹

2. Trustee's Breach of Duty.

A trustee, as a fiduciary, is under a duty of loyalty to act solely in the best interest of the beneficiary. *Yates v. Yates*, 292 S.C. 49, 51, 354 S.E.2d 800, 801 (Ct. App. 1987). A trustee must exclude all selfish interest in his dealings on behalf of the beneficiaries. *Cartee v. Lesly*, 290 S.C. 333, 336, 350 S.E.2d 388, 389-90 (1986). While a trustee is entitled to protect himself, a trustee should not put his interests above those of the settlor, and those the settlor intends to benefit. When a trustee is also a remainder beneficiary, and disregards the settlor's directions in order to protect his own beneficial interests over the interest of a preferred beneficiary, the trustee is in breach of his duty. I conclude that to be the case in this instance.

In effect, TDN's position, as indicated by the language of the Trust, is essentially that of a creditor for the repayment of a loan, and the instruction to honor this commitment upon the sale of the real property was explicit. The Trustee's failure to pay TDN upon consummation of the sale of Whispering Pines was a breach of her fiduciary duty. Similarly, based on the clear language of the Trust, the Trustee should have distributed one-half of the net proceeds of sale, after payment of the mortgage lien holder and TDN, to Dereede upon the tolling of the creditor's period.² Her failure to do so is, likewise, a breach of her fiduciary duty to Dereede.

In *Cartee, supra*, the Court clearly stated,

The powers of a trustee are either mandatory or discretionary. A power is mandatory when it authorizes and commands the trustee to perform some positive act and is discretionary when the trustee may refrain from exercising it. (citing *Page v. Page*, 243 S.C. 312, 133 S.E.2d 829 (1963)). Absolute liability arises when the trustee fails to do some mandatory act required by the express terms of the trust instrument. 290 S.C. at 336, 350 S.E.2d at 389.

While she asserts otherwise, I conclude that Karp had no sufficient legal reason for withholding a distribution to either TDN, or Dereede. She was protected from personal liability from making such distributions. S.C. Code Ann. § 62-7-604(b) protects a trustee from personal liability for postmortem distributions from a revocable trust unless the trustee knows about or has

¹ Rather, Dereede would have been subject to any creditor's claim assessable against his beneficial interest, and only in the priority as expressed by the Settlor's preference versus the other Trust beneficiaries S.C. Code Ann. § 62-7-505(a)(3) allows a Settlor to direct the source of payment from a revocable trust when its assets become subject to probate creditors.

² The period ended in June, 2015.

received notice of a contest of the trust's validity.³

The purpose of the protection afforded distributions pursuant to § 62-7-604(b) is to allow distributions from revocable trusts sooner than would otherwise be allowed by probate. This is consistent with the use of revocable trusts, rather than wills and testamentary trusts, to avoid probate. This Rule is also consistent with the scheme and purpose of the section to allow distributions from a revocable trust before the probate claims period has expired, if a trustee lacks notice of claims about the trust's validity, or the need for trust assets to augment an insolvent estate's ability to pay probate creditors. Under the statute, trust beneficiaries, rather than the trustee, would be subject to reimbursing probate creditors entitled to revocable trust assets to pay their claims. In other words, the Trustee was protected by statute from personal liability for making such distributions, had she made them as directed to be done by the Settlor.

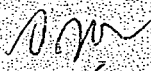
3. No-contest Clause - Probable Cause.

No-contest clauses are intended to protect estates from litigation and beneficiary fights over the testator's or trustor's competency, and the amounts bequeathed to each beneficiary. See *Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 12, 633 S.F.2d 722, 725-26 (2006). As a general rule, no-contest clauses are enforceable and work to keep certain aspects of the deceased's private life private. *Id.* However, South Carolina, along with many other states, recognize an exception when the challenger of a trust, or terms of a trust, has probable cause for instituting proceedings. S.C. Code Ann. § 62-7-605. The Restatement provides that probable cause, with respect to will and trust contests, amounts to a reasonable expectation of success in the contest and significant evidence for such expectation. See RESTATEMENT 3RD, PROPERTY & WILLS, § 8.5.

In the present case, I find and conclude that probable cause existed for the filing of the suit. First, as discussed above, the Settlor expressed a clear preference for the rights of TDN and Dereede over other beneficiaries. Second, the loan from TDN enabled the Settlor to purchase the subject property of the trust. The no-contest clause applies only to "any devisee, legatee, or beneficiary . . . or legal heirs, or any person claiming under any of them." TDN is a creditor, not a beneficiary. The no-contest clause does not apply to creditors. TDN is entitled to repayment according to the terms of the Trust, regardless of whether it filed a claim as a probate creditor.

The expression of the Settlor's intent to repay TDN and Dereede before any other

³ § 62-7-604(b) does not specifically and expressly limit the protection of the trustee for distributions to situations involving contests of the trust's validity.


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payment or distribution, other than the mortgagee of Whispering Pines, is consistent with her right under § 62-7-505(a)(3) to direct the source of the payment to probate creditors.

Based upon the discussion herein, I conclude that Plaintiffs were justified in seeking the Court's intervention in this regard. Therefore, the necessary probable cause existed, and, as allowed under § 62-7-605, Karp cannot enforce the no-contest clause to defeat their claim.

4. **Bad Faith.**

Although I find and conclude that the Trustee breached her fiduciary duty to both Dereede and Tyre as discussed herein, I do not find that she acted in bad faith. The testimony of Professor Alan Medlin, who was Plaintiffs' expert witness, and the testimony of the Trust Protector, Catherine H. Kennedy, was that they could not say that there was a lack of good faith on the part of the Trustee. My finding and conclusion in this regard is largely based upon the expert opinion of these eminently qualified witnesses.

5. **Attorney's fees and costs.**

S.C. Code Ann. § 62-7-1004 (1976, as amended) provides:

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, to any party, to be paid by another party or from the trust that is the subject of the controversy.

As pleaded by Plaintiffs, this action involved the administration of the Trust. Under the facts and circumstances of this case, I find and conclude that the equities of the parties, and justice, dictates an award of fees and costs to the Plaintiffs. The amount of the award will be determined in subsequent proceedings in accordance with the order below.

ORDER

Based on the findings of fact and conclusions of law herein, it is declared and ordered as follows:

1. The Trustee was required to distribute \$250,000.00 to TDN upon the sale of Whispering Pines.
2. The Trustee breached her fiduciary duty as Trustee by failing to distribute \$250,000 to TDN upon the sale of Whispering Pines in payment TDN's loan to the Settlor.
3. The Trustee breached her fiduciary duty as Trustee by failing to pay to Dereede fifty percent of the remaining net proceeds of the sale of Whispering Pines upon the tolling of the claims period, at the latest.

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4. TDN is a creditor of the Estate, and therefore, the no-contest clause is not applicable to TDN for the purposes of disallowing TDN's interests due to filing this action.

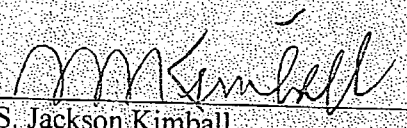
5. Dereede had probable cause to file this action, and therefore, his claim for payment is not disallowed by the no-contest clause in the Trust.

6. The Trustee did not act in bad faith in her breach of fiduciary duties to TDN and Dereede.

7. Plaintiffs are granted an award of attorney's fees and costs pursuant to S.C. Code Ann. § 62-7-1004 in an amount to be determined by separate order of this Court. Plaintiffs shall submit to the Court an affidavit of attorneys' fees and costs, along with applicable time and billing records, within fifteen days of the date of this Order, and simultaneously, shall serve the same on Defendant Feeley-Karp's counsel. Defendant Feeley-Karp shall have fifteen days to serve and file any objection to the requested award. If objection is made, the Court will hold a hearing to determine the amount of the award. If no objection is timely made, the Court will enter an order granting an award as submitted by Plaintiffs.

ALL OF WHICH IS SO ORDERED.

June 9, 2016


S. Jackson Kimball
Special Circuit Court Judge
York County



STATE OF SOUTH CAROLINA
COUNTY OF York
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

RECEIVED

CASE NO. 2015-CP-46-01409

SEP 15 2016

Deborah Dereede Living Trust dated December 18, 2013

Courtney Feeley-Karp, Individually and as Trustee
of the Deborah Dereede Living Trust dated
December 18, 2013

SC Court of Appeals

Hugh Dereede and Tyre Dealer Network Consultants,
Inc.

Michael Fehily, as qualified beneficiary of the
Deborah Dereede Living Trust dated December 18,
2013

PLAINTIFF(S)

DERENDANT(S)

Submitted by: John P. Gettys, Jr.

Attorney for: ☒ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 43(k), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk:

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Deborah Dereede Living Trust dated December 18, 2013, Hugh Dereede and Tyre Dealer Network Consultants, Inc.	Courtney Feeley-Karp, Individually and as Trustee of the Deborah Dereede Living Trust dated December 18, 2013	\$250,000.00
		\$

		\$
If applicable, describe the property, including tax map information and address, referenced in the order: 131 Whispering Pines Drive, Clover, SC 29710, Tax Map No. 577-19-01-012		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Spec *M. Kimball*
Circuit Court Judge

3063
Judge Code

6/13/16
Date

For Clerk of Court Office Use Only

This judgment was entered on the 15th day of Jun, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 15th day of Jun, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

John P. Gettys, Jr.

331 E. Main St, Ste 300

Rock Hill, SC 29730

ATTORNEY(S) FOR THE PLAINTIFF(S)

David H. Harshaw
PO Box 977, York, SC 29745
Peter Nosal

852 Gold Hill Road, #201

Fort Mill, SC 29708

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton
CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.