

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 ON MOTION FOR
 RECONSIDERATION**

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This matter came before me on August 25, 2016, for a hearing on Defendants' Amended Motion for Reconsideration. Representing the parties at the hearing were Daniel J. Ballou and John P. Gettys for Plaintiffs, and Desa A. Ballard for Defendants. The parties were not present at the hearing. Based on the record of the trial of the case and arguments of counsel, I find and conclude as follows.

The purpose of Rule 59(e), SCRCP, is to request the trial judge to "... reconsider matters properly encompassed in a decision on the merits." *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (Citations omitted); *Elam v. S.C. Dep't Transp.* 361 S.E. 9, 21-22, 602 S.E.2d 772, 779 (2004). A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment, but was not. *See Johnson v. Sonoco Products Co.*, 381 S.C. 172, 672 S.E.2d 567 (2009); and, *Poch v. Bayshore Concrete Products/South Carolina, Inc.*, 386 S.C. 13, 686 S.E.2d 689 (Ct. App. 2009). However, "... a party usually is allowed to ask a court to reconsider its decision even if it means rehashing all or

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part of an argument previously presented.” *Elam, supra*, 361 S.E. at 21, 602 S.E.2d at 778-779.

In this instance, Defendants raise a number of distinct issues that warrant specific discussion below.

1. Subject Matter Jurisdiction.

Defendants first challenge the subject matter jurisdiction of the court, and as a related matter, the standing of the parties. This case seeks a declaratory judgment requesting the court to interpret certain provisions of the Deborah Dereede Revocable Living Trust dated December 18, 2013 (the “Trust”). Defendants assert that the trust protector provisions contained in Article Three, Section 8(h), of the Trust establish an exclusive, and extra-judicial, remedy for resolution of disputes, claims or conflict between the beneficiaries the Trust by requiring that all disputes be resolved through a trust protector. They assert that because of this provision, the court does not have subject matter jurisdiction over the case. Defendants offered no authority for the proposition that a trust protector provision such as exists in the Trust deprives the court of subject matter jurisdiction, but argue that the provision operates similarly to an arbitration clause in a contract.

Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong. *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994) (Citations omitted). Sec. 8(h) of the Trust begins, “[t]he Trust Protector *may* unilaterally resolve any dispute, claim or conflict between beneficiaries . . . between a beneficiary and a trustee, or between trustees.” (Emphasis added.) The permissive nature of this clause indicates an element of discretion on the part of the trust protector, but does not suggest an exclusive venue for resolution of all disputes.

The second paragraph of Sec. 8(h) provides that “[n]o one may file or instigate a claim in a court of law without first submitting the claim to the Trust Protector for resolution.” This language of the Trust suggests that the trust protector mechanism is intended to be a form of alternative dispute resolution, not a jurisdictional bar that would preempt the jurisdiction of this Court. This is not unlike the ADR Rules applicable to nearly all civil actions.

This case was brought as a declaratory judgment, seeking interpretation of the terms of the Trust, and removed to this Court pursuant to S.C. Code Ann. § 62-1-302(d)(4). I find and conclude that it is the kind of case this court is empowered to hear. S.C. Code Ann. § 62-7-201(a). Thus, this Court has subject matter jurisdiction.

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At the time this dispute arose, no trust protector had been appointed under the Trust. Although Defendants requested, with the Plaintiffs consent, to the appointment of Catherine Kennedy to serve as trust protector in this matter, such appointment did not occur until late in the litigation, after substantial discovery had occurred, and numerous motions had been filed, and subsequently heard, by this Court. Moreover, it is clear from the record that Ms. Kennedy was not asked to “. . . unilaterally resolve any dispute” Rather she was asked to advise what the trustee should do to resolve the parites’ dispute, and to render an opinion as to whether the trustee acted in good faith. (Tr. 207-212.) Even then, she specifically declined to render an opinion as to probable cause on the part of the Plaintiffs, stating, “I think that’s for the Court to determine.” (Tr. at 223.) While her qualifications as an expert witness were unassailable, her testimony at trial was inconsistent with the arbiter role of a trust protector in the form described in the Trust, and it is apparent that the parties did not treat her as such in this case.

Significantly, this issue has not been raised heretofore in this case.¹ On the contrary, Defendants made no motion under Rule 12(b) to object to subject matter jurisdiction, and took action themselves invoke this court’s jurisdiction by removing the case from the Probate Court. Further, they have actively participated in the litigation since its filing. I therefore conclude that both by the language used in the trust, and the conduct of the parties in applying the trust protector provision, Art. Three, Sec. 8(h) does not deprive this court of subject matter jurisdiction to hear this case. Moreover, even if Defendants had the right under the Trust to require resolution of this dispute by a trust protector, I find and conclude they have waived that right, just as one can effectively waive the right to arbitration.

2. Standing.

Related to the question of subject matter jurisdiction, Defendants assert that under Art. Three Sec. 8(h), no person has standing to file a civil claim without first submitting it to the trust protector. Similarly, they argue that if Tyre Dealer Network Consultants, Inc. (“TDN”) is determined to be a mere creditor of the estate, it does not have standing at all to assert claims under the Trust, and its remedy was limited to filing a creditor’s claim against the estate.

As noted above, I find and conclude that Art. Three, Sec. 8(h) does not deprive this court of subject matter jurisdiction. Nevertheless, I would note that both Plaintiffs’ expert and

¹ I certainly recognize that the issue of subject matter jurisdiction may be raised at any time, and thus, can be raised at this juncture. Even so, Defendants have litigated this case in such a way that subject matter jurisdiction was obviously never a consideration of theirs.

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Defendants' expert, who was the trust protector, testified that TDN could be either a beneficiary, or a creditor, and that given the intent of the Settlor determined from the plain language of the Trust, it could be both. (Tr. 140-41, 217-19.) Because the Settlor saw fit to specifically require payment of the TDN loan out of the Trust, requiring it to separately file a creditor's claim against the estate would present an issue of double recovery, and would be contrary to the Settlor's intent. In any event, I find and conclude that these issues do not create a bar to Plaintiffs for lack of standing.

3. Interpretation of the Trust.

Defendants assert that the Trust is inherently ambiguous, precluding any finding of clear evidence of intent with respect to the order of distribution under the Trust. Whatever inconsistencies may exist in the Trust document, the critical language pertaining to prioritizing distributions could not be more plain. Those provisions, under Art. Five, Sec. 2, clearly require the payment and distribution scheme asserted by Plaintiffs, and establish an order of distributions that mandates payments to Plaintiffs ahead of other distributions. As a result, I decline to reconsider any of the findings or conclusions relating to prioritization or partiality of payment.

As for the grounds asserted regarding the trustee's justification for refusing to make payments to the Plaintiffs, I decline to reconsider the findings and conclusions contained in the Order. I specifically note that the trustee herself is a licensed attorney familiar with the law, and possesses greater knowledge of the obligations of a trustee and the legal requirements of a fiduciary. Additionally, while Defendants contend that the trustee was justified in delaying payments because of the possibility of a subsequent will of the Settlor, there is no evidence that any such will was ever alleged or presented. I find that using the possibility of a subsequent will as justification to disregard the clear language of the Trust is speculative and pretextual.

4. Probable Cause.

I further decline to reconsider my Order finding that Plaintiffs had probable cause to bring this action and did not violate the "no contest" clause of the Trust. Because of the clear intent of the Trust to require preferential distribution to Plaintiffs, the fact that the Trustee relies on arguments outside the plain language of the Trust to justify nonpayment, and the uncontroverted opinion testimony of Professor Medlin regarding probable cause, I conclude that the original determination of this issue in the Order is correct. (Tr. 158-163; 175; 224.)

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5. Attorney's Fees.

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.

The award of fees under this statute is not limited by the terms or conditions of the Trust, and can be made in favor of any party, not simply to the beneficiaries of the Trust, and against any party. *Id.* In light of my finding that the trustee breached her fiduciary duty to Plaintiffs, and the facts and circumstances of this case, I find that justice and equity require an award of fees to the Plaintiffs, and I choose not to alter or amend the Order in that regard. The separate question of the amount of fees to be awarded will be the subject of a petition for fees and costs to be submitted by Plaintiffs, and will be resolved after a hearing on that issue at a separate time.

6. Individual Liability of the Trustee.

Concerning remedies for breach of trust, S.C. Code Ann. § 62-7-1001(1976, as amended) provides:

(b) To remedy a breach of trust that has occurred or may occur, the court may:

.....
(3) compel the trustee to redress a breach of trust by paying money, restoring property, or other means;

.....
(10) order any other appropriate relief.

Defendants assert that defendant Courtney Feeley-Karp is not liable individually for payment of damages to Plaintiffs, since her actions were taken in her role as trustee under the Trust. While it is true that the Order specifically only finds Ms. Feeley-Karp liable for actions as trustee, that does not insulate her from personal liability, or limit recovery to whatever amount she may be entitled to as a trust beneficiary. If Ms. Feeley-Karp was not a beneficiary of the trust and recovery was limited to a trustee's entitlement under the trust, recovery against her for breach of trust would be frustrated. That would lead to an absurd result, frustrating Plaintiffs' recovery of damages for the trustee's malfeasance. Nor does the Order limit recovery by Plaintiffs to the value of the assets of the trust.

This determination applies to the statutory provision for the award of attorney's fees and

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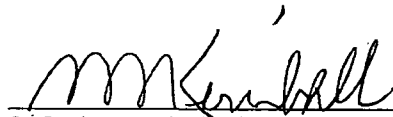
costs. Ms. Feeley-Karp may be ordered to pay money, and the court may find her to be personally liable for such payment as "any other appropriate relief." Accordingly, I do not alter or amend my findings or conclusions pertaining to her individual liability.

CONCLUSION

Based upon the record presented from the trial of this case, and the memoranda and arguments submitted by counsel for the parties, I find no matter presented that was not addressed expressly, or by clear implication, in the prior order. I further find no basis for reconsideration or amendment of the ruling rendered in the prior order. Therefore, I conclude that Defendants' motion must be denied.

AND IT IS SO ORDERED.

September 12, 2016



S. Jackson Kimball
Special Circuit Court Judge
York County

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