

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
S. JACKSON KIMBALL, SPECIAL CIRCUIT COURT JUDGE

Case Nos. 2015-CP-01409
Appellate Case No.: 2016-001921

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SC Court of Appeals

IN RE:

Deborah Dereede Living Trust
dated December 18, 2013

Hugh Dereede and
Tyre Dealer Network Consultants, Inc. Respondents,

v.

Courtney Feeley Karp, Individually and
As Trustee of the Deborah Dereede Living
Trust dated December 18, 2013 and Michael Fehily Defendants,

Of which,

Courtney Feeley Karp, Individually and
As Trustee of the Deborah Dereede Living
Trust dated December 18, 2013 is Appellant.

RESPONDENTS' INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- 1. The Trial Court correctly exercised jurisdiction over this matter.**
- 2. The Trial Court correctly decided the merits of the case.**
- 3. Respondents had probable cause to bring this action.**
- 4. The Trial Court correctly found liability on behalf of the Appellant as Trustee and in her individual capacity, including liability for attorney's fees.**

STATEMENT OF THE CASE

This appeal arises from the Orders of the Honorable S. Jackson Kimball, involving the interpretation of the Deborah Dereede Revocable Living Trust, dated December 18, 2013 (“Trust”). At the time of her death, Deborah Dereede (“Deborah”) had two adult children, the Appellant, Courtney Feeley-Karp who was personal representative of Deborah’s estate, and trustee of the Trust (“Appellant”), and a son Michael Feeley. Deborah died on April 15, 2014, leaving a surviving spouse, Hugh Dereede (“Hugh”), whom she had married in 2010. Hugh is the sole owner and shareholder of Tyre Dealer Network Consultants, Inc., a Canadian company (“Tyre”) (collectively, Hugh and Tyre are referred to as “Respondents”).

This case was initially filed by Hugh and Tyre, on December 23, 2014, in the Probate Court of York County, seeking a declaratory judgment as to the construction and interpretation of the Trust, and specifically as to whether the Appellant acted in good faith in refusing to convey specific assets to Respondents as directed by the Trust. The case was removed from Probate Court to the Circuit Court on May 12, 2015 by the Appellant.

Respondents contend that the Appellant’s failure to convey specific assets in a timely manner violated the express and unambiguous terms of the Trust, violated her fiduciary duties to the Respondents and that they filed this action with probable cause, so as to avoid the no-contest provisions of the Trust. Appellant contends that she acted in good faith and that the Respondents action triggered a forfeiture under the no-contest clause in the Trust.

Following removal of the case, the parties engaged in substantial discovery, and the Appellant filed a motion for judgment on the pleadings, and several motions for summary judgment, which were denied. The case was tried before the Honorable S. Jackson Kimball on April 19, 2016. The Trial Court found that the Appellant had breached her fiduciary duty to Hugh

and Tyre, and that the Respondents had probable cause to bring the case. The Trial Court also denied the Appellant's Motion for Reconsideration, and this appeal followed.

STATEMENT OF FACTS

The facts in this case are relatively straightforward. Almost one year prior to her death, Deborah executed the Deborah Dereede Living Trust Dated December 18, 2013 (Plaintiffs' Exhibit 1; Affidavit of Hugh Dereede at 1). Deborah was married to Hugh at the time she executed the Trust, and named the Appellant as Trustee. The Trust was initially funded by a deed of real property located at 131 Whispering Pines Drive in Clover, South Carolina (the "Property"). The Trust required the Appellant, upon the sale of the Property after Deborah's death, to "pay off that certain promissory note given to Tyre Dealer Network Consultants, Inc." (Trust at 6-1, 2, Article Six, Section 4). Next, after paying off the Tyre note, the Appellant was directed to distribute one-half to the remaining net sales proceeds to Hugh outright and free of interest. (Trust page 6-2, Article Six, Section 4). The Appellant was also directed to convey a 2013 Cadillac CTS, a 2008 GMC Envoy and a 1999 Maxum Cabin Cruiser to Hugh following the Trust's receipt of such assets from her estate (Trust Page 6-2, Article Six, Section 4; Affidavit of Hugh Dereede at 1). The language of the Trust did not identify any other specific distributions, only the general directive that all other assets of the decedent pass to her children, share and share alike (Trust, Page 10-1, Article Ten, Section 1). The remaining assets of Deborah's estate included but were not limited to the remaining one-half of proceeds of sale of the Property, and additional parcels of real property located in New Hampshire and Virginia.

All of Deborah's assets other than the Property were probate assets of her estate which were directly subject to creditor's claims and other costs relative to the probating of the estate (Plaintiff's Exhibit 5). Although the Property was also subject to creditors of the estate, the Trust

clearly specified that the proceeds of the sale of the Property were to be given preferential treatment by the trustee (Tr. at 152, lines 1-9). This scheme of distribution was confirmed by Respondent's expert Professor Alan Medlin (Tr. at 136, lines 20-22).

The Property was put up for sale following Deborah's death resulting in a purchase contract that eventually closed on December 19, 2014 (Plaintiff's Exhibit 6). Despite repeated personal requests and requests via electronic mail (Defendant's Exhibit 1), the Appellant refused to acknowledge to Hugh that the loan repayment and the proceeds of sale would be forthcoming from the sale of the Property.

After the closing on the sale of the Property, Hugh asked the Appellant to reconsider her decision not to disburse the proceeds pursuant to the terms of the Trust. (Affidavit of Courtney Feeley-Karp, August 18, 2015, ¶¶ 64-65). Hugh even offered to enter into a "friendly" declaratory judgment action so as to provide Appellant the protection from creditors she alleged to justify refusal to disburse funds. (Exhibit C to Answer). Based on this refusal, Hugh believed he had probable cause to seek a declaration from the court that Appellant had violated her fiduciary duties. (Affidavit of Hugh Dereede at 1-2; Tr. at 114-123). He thereafter authorized the filing of this action to protect his interests and those of Tyre as specific beneficiaries of the Trust so that Trust assets would not be squandered, improperly disbursed and/or improperly converted for personal use.

Appellant hired counsel and removed the proceedings from Probate Court to Circuit Court and asserted numerous affirmative defenses seeking, among other remedies, the forfeiture of Hugh's distributions under the Trust. (Motion for Removal, March 23, 2015). Appellant justified this hostile action under the guise of alleged concerns for claims by "known and unknown creditors" that had not yet materialized during the creditors' period. (Affidavit of Courtney Feeley-Karp, at 6, 7). By effectively giving those "known and unknown creditors" preference over

the claims of the Respondents, the Appellant directly disregarded Deborah's clearly stated intent, manifesting a plan to disinherit Hugh and Tyre from the specific distributions required under her mother's Trust.

Deborah's estate had assets that it could have uses to manage claims, and had "plenty of liquidity." (Tr. at 153-154). Moreover, the Appellant's stated concerns about her own liability to creditors really had no legal basis, as her primary fiduciary duty was to "follow the settlor's direction and to honor the rights of the beneficiaries." (Tr. at 154- 156). Nevertheless, on June 2, 2015, the time for creditors' claims (and the stated reason for the Appellant's refusal to pay) lapsed. (Affidavit of Courtney Feeley-Karp, ¶ 47). Instead of simply complying with the Trust directives, the Appellant noticed a hearing for June 8, 2015, six days later, on a motion to dismiss the case on its pleadings and for forfeiture of the monies due the Respondents under to the no contest clause in the Trust.

Judge Kimball denied this motion, and the Appellants then served written discovery specifically directed towards the forfeiture provision of the no contest clause of the Trust. Appellant made no distributions to the Respondents, even though she has held the proceeds of sale, no other creditors have appeared, and the time for their claims had lapsed.

1. After the parties exchanged extensive written discovery including interrogatories, requests for production and requests for admission, Appellant moved for summary judgment (Motion for Summary Judgment, September 2, 2015). In the midst of this active litigation, in October of 2015, the Appellant proposed the appointment of a trust protector, as described in the Trust. Without waiving any rights in the litigation, the Respondents agreed, and the Honorable Catherine Kennedy was appointed to review the issues in the case and assist with seeking a resolution among the parties. (Appointment of Trust Protector, October 23, 2015). The Appellant

proposed Kennedy as an independent neutral who would impartially help the parties interpret the Trust, which was acceptable to the Respondents. The Appointment of Trust Protector specifically noted Hugh's belief that the appointment was not necessary, however, he did agree to the appointment. (Appointment of Trust Protector, at 1).

Less than two weeks later, the Appellant filed an amended motion for summary judgment on the grounds that the Trust Protector had been appointed and should decide the case, but alternatively seeking forfeiture on the issue of Respondents' probable cause. (Amended Motion for Summary Judgment, November 6, 2015). The Trust Protector issued a report on January 15, 2016, specifically refusing to address the issues of good faith and probable cause central to this case. (Report of Trust Protector, January 15, 2016 at 7). Undaunted, the Appellant filed a second amended motion for summary judgment on February 18, 2016, again seeking to enforce the no contest clause against the Respondents. (Second Amended Motion for Summary Judgment, February 18, 2016).

The Appellant's successive summary judgment motions sought primarily to aggressively pursue the forfeiture provisions under the no contest clause. Whatever her purpose, Appellant never treated the Trust Protector as the neutral arbiter she was proposed to be. As it turns out, the Trust Protector refused to weigh in on the issues of the Appellant's good faith or the Respondents' probable cause, and deferred to the Trial Court for rulings on those issues. (Report of Trust Protector, at 7).

Once summary judgment was denied by Judge Kimball, the case was tried non-jury on April 19, 2016. At trial, Hugh testified that his company Tyre loaned money to Deborah to assist her in purchasing the Property (Tr., at 106). Further, Hugh testified that Deborah intended the

home and specific items of personal property to be placed in the Trust since these assets had been purchased during their marriage. (Tr., at 103-106).

The remaining probate assets were assets owned by Deborah prior to her marriage to Hugh and were assets to which Hugh had no claim or interest. (Tr., at 107). It is important to note that Hugh did not seek an elective share or other remedy available to him under law as the surviving spouse, only the assets specifically left to him per Deborah's wishes as enumerated in the relevant portion of the Trust (Trust, Article Six, Section 4). All he asked was that the payments to Tyre and him be made as Deborah had specified in her Trust, which the Appellant refused to do.

2. The Court, in its Order of June 9, 2016, interpreted the Trust to require the Appellant to distribute the proceeds of sale of the Property to Tyre to pay off the debt due to the company immediately upon the sale of the Property and to then distribute one-half of the remaining proceeds to Hugh (Order of Judge Kimball, June 15, 2016, at 4-5). Further, the Court found that the Respondents had probable cause to file the declaratory judgment action seeking the Court's interpretation of the terms of the Trust upon the Appellant's refusal to distribute the monies due to Hugh and Tyre (Order, at 6). Finally, the Court found the Trustee's refusal to pay the proceeds of sale was a breach of her fiduciary duty and that she was therefore responsible for the Respondents' attorney fees and costs, determined in a subsequent hearing. (Order, at 5-6).

STANDARD OF REVIEW

Declaratory judgments are neither inherently legal or equitable, so the standard of review is therefore determined by the nature of the underlying issue. *Felts v. Richland County*, 303 S.C. 354, 400 S.E.2d 781 (1991); *Wiedemann v. Town of Hilton Head Island*, 344 S.C. 233, 542 S.E.2d 752 (Ct.App.2001). *Doe v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n*, 347 S.C. 642, 557 S.E.2d 670 (2001). A claim of breach of fiduciary duty is an action at law and the

trial judge's findings will be upheld unless without evidentiary support. *Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005). The construction of a trust is likewise a question of law. *Germann v. New York Life Ins. Co.*, 286 S.C. 34, 331 S.E.2d 385 (Ct. App. 1985). In an action at law tried without a jury, “the findings of fact of the judge will not disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings.” *Townes Assocs. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

ARGUMENT

1. The Trial Court correctly exercised jurisdiction over this matter

The bulk of the Appellant’s appeal centers around the role of a trust protector and the authority of the Trust Protector in this case to adjudicate disputes arising from the Trust. Trust protectors were first explicitly recognized in this state with the adoption of the 2013 amendments to the South Carolina Probate Code. S.C. Code § 62-7-1005A (2013). As a relatively recent addition to probate practice, trust protectors have evolved as agents of settlors given limited powers to guide the behavior of trustees. See, Stewart E. Sterk, Trust Protectors, Agency Costs, and Fiduciary Duty, 27 *Cardozo L. Rev.* 2761, 2763 (2006).

The Trust generally allows the appointment of a trust protector to protect the financial resources of the Trust and the interests of its beneficiaries. (Trust, Article Three, Section 8). However, nothing in the Probate Code confers exclusive jurisdiction upon trust protectors over disputes that would otherwise be heard by the Probate Court or Circuit Court. While no South Carolina court has interpreted the trust protector provisions of the 2013 Probate Code amendments, under either the Code or the language of the Trust itself, the Appellant incorrectly characterizes this provision as a jurisdictional bar to the Trial Court’s action. This position being contrary to the findings of the actual Trust Protector in the case at hand who refused to resolve the issues of good

faith and probable cause and advised that they needed to be resolved by the Trial Court. (Report of Trust Protector, at 7).

Appellant first argues that the trust protector provisions deprived the Trial Court of subject matter jurisdiction over the case. 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); *Ward v. State*, 343 S.C. 14, 538 S.E.2d 245 (2000). The Complaint seeks a declaratory judgment to interpret the terms of the trust as to the issues of the parties' good faith and probable cause, and alleges a justiciable controversy that the Circuit Court is specifically empowered to hear. S.C. Code Ann. 15-53-20 (2005). As courts of record within York County, both the Probate Court and the Circuit Court plainly have subject matter jurisdiction over such claims.

Nothing in the Code suggests that the trust protector mechanism was intended to deprive the Probate Court or the Circuit Court of jurisdiction to resolve disputes. So too, the terms of the Trust do not create a mandatory or exclusive dispute resolution procedure. Rather, the clear language of the Trust creates a permissive mechanism available to the Trustee and beneficiaries "[i]n the event a Trust Protector is needed to act." (Trust, at 3-3, Sec. 8(a)). No decision was made that a trust protector was needed to act prior to the initiation of this action. In fact, no suggestion of the need for a trust protector occurred until well into the litigation, and after substantial discovery and motions had been served. The Trial Court therefore had jurisdiction over the case from the outset and did not err by retaining jurisdiction throughout.

Nor does a provision for a trust protector equate to an arbitration agreement, as suggested by the Appellant. No policy in favor of trust protectors exists under state or federal law, and no statutory scheme prefers resolution of disputes by trust protectors instead of courts. *Cf., Heffner*

v. Destiny, Inc., 321 S.C. 536, 471 S.E.2d 135 (1995) (noting both state and federal policy favoring arbitration where valid arbitration agreements exist). In fact, the trust protector provisions of the Trust specifically empower the trust protector to file an action in a court of competent jurisdiction for the interpretation and construction of the Trust, or “may instruct the Trustee to do so.” (Trust, at 3-7). This authority is plainly inconsistent with the argument that the Trust Protector has exclusive and binding jurisdiction over disputes regarding the Trust.

Finally, even if the Trust contemplated a binding process for resolving disputes through a trust protector, or is analogous to an arbitration clause, the Appellant waived her rights under it, having removed the case from Probate Court and invoking the Court’s jurisdiction (Motion for Removal to Circuit Court, Motion to Dismiss, Affirmative Defenses and Amended Answer, March 15, 2015), actively participated in litigation for over ten months, including extensive discovery (Defendant’s Interrogatories, Requests for Production and Requests for Admission to Tyre Dealer Network Consultants, Inc. and Hugh Dereede, June 24, 2015), and successive dispositive motions before and after the Trust Protector was appointed (Motion for Judgment on the Pleadings, May 13, 2015; Motion for Summary Judgment, September 2, 2015; Amended Motion for Summary Judgment, November 6, 2015; Second Amended Motion for Summary Judgment, February 17, 2016).

At trial, the Appellant effectively converted the Trust Protector from an agent of the settlor, Deborah, to an agent for herself, employing Ms. Kennedy as an expert witness at trial. To the extent the Appellant had any right to insist on adjudication by the Trust Protector, it was therefore waived. See, *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 647 S.E.2d 249 (Ct. App.2007) (noting factors for waiver of arbitration agreements). The Appellant clearly took advantage of substantial discovery and motions practice before and after the Trust Protector was

appointed, as well as a full trial of the case before Judge Kimball, and cannot now complain the dispute should have been adjudicated in another venue.

Appellant next suggests, without any supporting authority, that the Trial Court should have declined to exercise subject matter jurisdiction over the case. This position directly contradicts the report of the Trust Protector herself, who in her report declined to make any decision as to good faith or probable cause, and directed the Trustee to “seek resolution of those issues in the present forum.” (Report of Trust Protector, January 15, 2016 at 7). By the time the possibility of a trust protector had been broached by the parties, the litigation had long since commenced. No basis exists for the Trial Court to abstain from deciding these issues within its jurisdiction, and in fact, the Appellant never requested abstention. Moreover, the Trust Protector herself stated that “[i]t does not seem to me that the later appointment of a Trust Protector relates back to require dismissal of the suit a year after it was filed.” (Report of Trust Protector, January 15, 2016 at 7). As noted by the Trial Court, the parties initially asked the Trust Protector to advise the Trustee, not “unilaterally resolve any dispute.” (Order on Motion for Reconsideration at 3.)

Having never moved to stay the proceedings in favor of having the Trust Protector adjudicate the dispute, the Appellant only raised this issue after she had lost at trial. So too, the Appellant abandoned any pretense that the Trust Protector was impartial when she converted Kennedy from, at best, a neutral arbiter into a partisan expert. (Tr. at 208). Once she became an expert witness, the Trust Protector ceased to be an agent of the settlor or impartial fiduciary of the Trust and its beneficiaries, and since she was no longer independent, was no longer qualified to serve as Trust Protector. (See, Appointment of Trust Protector at 1). Stewart E. Sterk, Trust Protectors, Agency Costs, and Fiduciary Duty, 27 *Cardozo L. Rev.* 2761, 2763 (2006).

The Trial Court unquestionably had subject matter jurisdiction to hear this case from the outset, and rightfully retained jurisdiction throughout the case. To the extent that any right existed to insist that the dispute be resolved by the Trust Protector, such right was waived by the conduct of the Appellant herself.

2. The Trial Court correctly decided the merits of the case.

Implicit within Appellant's Issues Two and Three is an argument that the opinions and report of the Trust Protector are entitled to deference and a presumption of correctness. Two fatal flaws in this argument exist. First, the issues presented for trial concerned (1) whether the Appellant, as Trustee, had acted in good faith in failing to pay the proceeds of the sale of Property to the Respondents, and (2) whether probable cause existed for the initiation of this action. The Trust Protector specifically (and correctly) refused to take any position on those issues in her report of January 15, 2016, and instructed the parties to have them "adjudicated by a court of competent jurisdiction." (Report of Trust Protector, at 7). Second, having issued her report, Ms. Kennedy ceased acting in the role of neutral trust protector, and thereafter became an expert witness for the Trustee. In fact, having been proffered as an expert witness at trial, she testified specifically on behalf of the interests of the Trustee, not on behalf of the settlor, or as protector of the Trust or the other beneficiaries. (Tr. at 208-09). Therefore, her opinions are entitled to no more deference than those of any expert witness, and the Trial Court properly treated her testimony on par with that of Respondent's expert, Professor Alan Medlin.

In her report, the Trust Protector specifically refused to resolve the issues that were presented for trial. (Report of Trust Protector, at 7). Contrary to the Appellant's characterization, the "stipulated" facts included in her motion for summary judgment merely laid out the timeline of the dispute, not the facts necessary to determine good faith and probable cause. (Exhibit B to

Second Amended Motion for Summary Judgment, February 17, 2016). Not only was summary judgment as to good faith and probable cause inappropriate prior to a merits hearing, but the Trust Protector specifically deferred to Judge Kimball on those specific issues. Again, by the time of trial, the Trustee abandoned any notion that the Trust Protector was acting as a neutral, and called upon her as an expert witness.

Respondents do not dispute that Ms. Kennedy possessed sufficient qualifications and experience to provide expert testimony, but she could no longer continue to exercise any authority she might have had as Trust Protector, and her opinions are due no additional weight merely because she expressed them. Certainly, her opinions as an expert are not entitled to be considered as findings of fact binding on the Trial Court.

The Trial Court properly focused its analysis of the case on the language of the Trust itself, and the evidence of the loan given to Deborah by Tyre to assist her in the purchase of the Property. Deborah acknowledged the existence of the promissory note and the underlying debt in the Trust instrument as well as a very specific scheme for payment of proceeds upon the sale of the Property. (Tr. at 139-145). That scheme was clearly and unambiguously set forth in Art. VI, Section 4(a), and contemplated immediate payment under Art. V, Sec. 2. The Trial Court concluded that the Trustee's refusal to pay the proceeds in accordance with the Trust, particularly when sufficient funds remained in the Trust to pay any remaining hypothetical expenses, breached her duty of loyalty and good faith to the Respondents. (Order, June 9, 2016 at 5 - 6) Indeed, the Trustee offered no evidence of any additional expenses or claims that would have justified any delay in payment, and that the Court concluded that the reasons she gave for withholding payment were "speculative and pretextual." (Order on Reconsideration, September 13, 2016, at 4).

Appellant argues that the Trust was ambiguous in multiple respects, none of which involve the specific directions to pay the proceeds of the sale of the Property. While a payment scheme is described in the Trust, the first directive specifies that the Respondents be paid out of the proceeds of the sale of the Property after the satisfaction of any mortgage. (Trust, Art., Sec. 4(a)). Appellant's arguments prop up the same false dilemma she argued at trial, that she was faced with an impossible choice of either paying the Respondents according to the Trust or saving the proceeds to pay hypothetical claimants that never appeared. (Tr. at 35-44). Professor Medlin testified that in his opinion she should have just paid the Respondents per the Trust, and that her refusal to do so violated Deborah's specific directives. (Tr. P. 157-58) By her own testimony, more than \$50,000.00 was available after payment of monies due to Hugh and Tyre to pay any additional expenses, and no other unusual or unknown creditors ever materialized (Tr. at 37, 43-44).

Nor does Professor Medlin's testimony offer any support for the Appellant's argument, even if he sympathized with her situation. His affidavit clearly explains that any fear she may have had of paying claims out over hypothetical and unknown creditors would effectively be borne by Hugh, without her incurring any personal liability. (Affidavit of Alan Medlin, February 23, 2016, at 4, para. 10; Tr. at 152-157). Under S.C. Code Ann. § 62-7-604(b), Appellant was protected from personal liability for making the distribution to the Respondents as required by the Trust. Medlin opined that the dilemma claimed by the Appellant to justify not paying the proceeds was not supported by the Probate Code, any actual asserted claims or the legal framework surrounding her role as Trustee. *Id.*

Finally, the Trial Court noted that the Appellant's conduct must be viewed in light of the fact that she is a licensed attorney with "great knowledge of the obligations of a trustee and the

legal requirements of a fiduciary.” (Order on Motion for Reconsideration at 4). Under these circumstances, the Court concluded that the Appellant had pretextually withheld payment from the Respondents without justification in violation of her duties as Trustee. (Id.) In any event, the Trial Court properly viewed the applicable language of the Trust, found it to be unambiguous, and correctly found that the Appellant had breached her fiduciary duties by disregarding it.

3. Respondents had probable cause to bring this action.

The Appellant’s Issues Four and Five posit a false choice as to the status of Tyre as either a creditor or a beneficiary, and whether it is entitled to assert probable cause. Hugh Dereede is both a beneficiary of the Trust individually, and the sole shareholder of Tyre, which is a beneficiary of the Trust by virtue of the reference to the loan used to purchase the Property. In a colloquial sense, Tyre was a creditor of Deborah, but in drafting the Trust, she created a specific scheme of distribution that ensured that the loan she had received to purchase the Property would be repaid out of the proceeds of its sale. (Tr.at 140-142). Had Tyre’s interest been represented solely by a promissory note, it would arguably be required to assert a claim against the estate like any other outside creditor. Clearly, however, neither Hugh nor Deborah saw things this way, and as a result, Deborah wrote Tyre specifically into the Trust as a beneficiary entitled to preferred payment. Both experts who testified at trial agreed that under the language of the Trust, Tyre could be viewed as both a creditor and a beneficiary, but was not treated a creditor in the traditional sense. (Tr. at 141; 217-19).

The absence of a promissory note supports the notion that Deborah treated Tyre as a beneficiary, since having described Tyre specifically in the Trust as a distributee, there was no need to reduce the claim to a note. Professor Medlin speculated that Tyre could have claimed as both a creditor and a beneficiary, and theoretically been entitled to payment twice, but that scheme

seemed contrary to the intent of the Trust. (Tr. 140-41). Instead, by elevating Tyre from outside creditor to qualified beneficiary entitled to repayment of the loan before other beneficiaries, the Trust clearly established the Respondents' claim. Likewise, Ms. Kennedy agreed that Tyre was likely a beneficiary of the Trust. (Tr. at 218). As such, Tyre was entitled to the same fiduciary duties as other beneficiaries from the Appellant, and Judge Kimball correctly concluded it was entitled to payment according to the Trust.

Moreover, Tyre was entitled to assert claims as a beneficiary in the same manner as Hugh, and subject to the same probable cause analysis. Tyre was specifically identified in the Trust as a specific and preferred distributee, entitled to payment out of the proceeds even before Hugh. Likewise, Tyre was entitled to bring this litigation when the Appellant violated her clear and unambiguous duties to distribute proceeds, and had a reasonable expectation of success in reliance on the language of the Trust. S.C. Code Ann. § 62-7-605.

While the Appellant argues that ambiguities in the Trust language abound, the only part of the Trust that matters in this case was crystal clear. Because the loan from Tyre made possible Deborah's purchase of the Property, she made the repayment obligation preferred to other beneficiaries and creditors, followed by the distribution, if any, of one-half of the proceeds of sale to Hugh individually. The Appellant's justification for refusing to follow the Trust was found to be pretextual, and given her knowledge and experience as a licensed attorney, the Trial Court correctly rejected this argument. (Order on Reconsideration, September 13, 2016, at 4).

4. The Trial Court correctly found liability on behalf of the Appellant as Trustee and in her individual capacity, including liability for attorney's fees.

Judge Kimball found that the Appellant breached her fiduciary duties owed as Trustee under South Carolina law. (Order, June 9, 2016, at 7-8). As a result, even if the Appellant acted solely in the capacity as Trustee in refusing to properly distribute Trust assets, the Court was not

willing to insulate her personally from having to reimburse the Trust. (Order on Reconsideration, at 5). Under S.C. Code. § 62-7-1001(b), the remedies for breach of trust include requiring a trustee to pay money or property out of their own assets. As the Court noted, absolving Appellant of any personal liability for her breach of the Trust, including an award of attorney's fees, "would lead to an absurd result." (Order on Reconsideration, at 5). Capping a trustee's liability for breaches of fiduciary duties to the assets of the trust would create a moral hazard and incentivize unreasonable conduct by trustees.

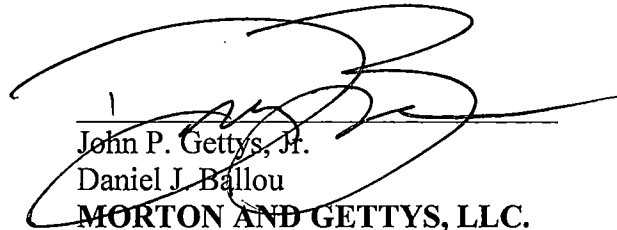
So too, the Respondents do not make specific allegations against the Appellant outside the scope of her duties as Trustee, and therefore had no basis under Rule 11, S.C.R.Civ. P. to include claims against her individually. However, even if no claims are asserted against the Appellant in her individual capacity, the remedies for breaching her fiduciary duties, are not and cannot be limited to the corpus of the Trust as argued by the Appellant, and the Trial Court correctly refused to so limit her liability. (Order on Reconsideration, at 5).

Finally, the Trial Court awarded reasonable attorneys' fees and costs pursuant to S.C. Code. § 62-7-1004, which allows such an award "as justice and equity may require." (Order on Reconsideration, at 4). Whether the Respondents specifically cited this precise Code section as a basis for this award is immaterial, since an award of fees and costs is included in the prayer of the Complaint, and the Court determined that justice and equity required it. Nor can the Appellant now claim that she was only "postponing" the Respondents' distribution, under Article 10, Section 5 of the Trust so as to impose a cap on fees that can be awarded. No notice of such postponement was ever given by the Appellant, nor any of the justifications warranting postponement even mentioned prior to this appeal. (Trust, Art. 10, Sec, 5(h)). This after-the-fact rationalization does not hold water, and should be summarily rejected on appeal.

CONCLUSION

Courtney forced Hugh's hand in this dispute by refusing to comply with her mother's express wishes as expressed by her in the Trust. She could have paid the monies due to Hugh and Tyre at any time after the expiration of the creditor's claims period and refused to do so. Judge Kimball correctly found that she knowingly breached the Trust and violated her fiduciary duties to Hugh and Tyre, and ample evidence exists in the record and in the language of the Trust to support his ruling. For the reasons set forth herein, his orders should be affirmed in all respects.

Respectfully submitted,



John P. Gettys, Jr.
Daniel J. Ballou
MORTON AND GETTYS, LLC.
331 E Main St, Suite 300
Post Office Box 707 (29732)
Rock Hill, SC 29730
Phone: (803) 366-3388
Fax: (803) 366-4044
Email: johngettys@mortongettys.com

May 30, 2017

ATTORNEYS FOR RESPONDENTS

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable S. Jackson Kimball, III, Special Circuit Court Judge

Case No.: 2015-CP-46-01409
Appellate Case No. 2016-001921

Courtney Feeley Karp, et al.,

Appellant,

v.

Hugh Dereede, et al.

Respondent.

PROOF OF SERVICE

The undersigned certifies that he has served this Respondents' Initial Brief on the Appellant by depositing a copy of it in the United States Mail, postage prepaid, on May 30, 2017, addressed to its attorney of record, Desa Ballard, P.O. Box 6338, West Columbia, South Carolina 29171 and Peter J. Nosal, 852 Gold Hill Road; Suite 201, Fort Mill, South Carolina 29708.

5/30, 2017
Rock Hill, South Carolina


Leah Anderson McCraney
Paralegal for Morton & Gettys

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SC Court of Appeals

MORTON & GETTYS

ATTORNEYS AT LAW

JAMES M. MORTON

JOHN P. GETTYS, JR. *

MICHAEL B. SMITH †

JOSHUA B. VANN

ELIZABETH SMITH OWEN

J. RICHARDS MCCRAE, III

MICHAEL K. HATCH ‡

MELISSA G. CASSELL §

JOHN MARK SHIFLET

JOSEPH L. RAAD ¶

DANIEL J. BALLOU •

JAMES D. DUNCAN §

May 30, 2017

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

**RE: In re: Deborah Dereede Living Trust dated December 18, 2013
Appellate Case No. : 2016-001921**

Ms. Kitchings:

Enclosed please find the original and one copy of the Respondents' Initial Brief and Respondents' Designations.

Please file the original and return the clocked copies in the self-addressed stamped envelope provided. Please do not hesitate to contact our office with any questions. I can be reached directly at 803-366-3425. With kind regards, I am

Sincerely,


Leah Anderson McCraney
Paralegal for Daniel J. Ballou

DJB/lm

enclosure

cc: CLIENT (via electronic mail)
Pete Nosal, Esquire (via regular mail)
Desa Ballard, Esquire (via regular mail)

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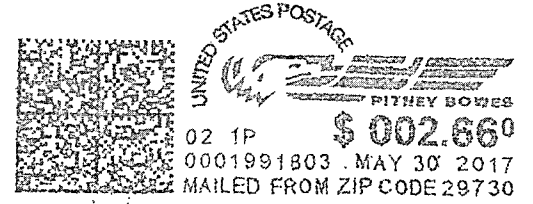
JUN 02 2017

SC Court of Appeals

www.mortongettys.com

Fountain Park Place
331 E Main Street, Suite 300
Post Office Box 707
Rock Hill, SC 29731
office 803.366.3388
fax 803.366.4044

A LIMITED LIABILITY COMPANY



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JUN 02 2017
SC Court of Appeals

MORTON & GETTYS
ATTORNEYS AT LAW
331 E. Main Street; Suite 300
PO Box 707
Rock Hill, SC 29731

To:
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211