

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY  
Probate Court

S.C. SUPREME COURT

\_\_\_\_\_  
Tamara C. Curry, Associate Probate Court Judge

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Case No. 2013-ES-10-1054  
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Richard Stein, Sarah Stein, and Nichole Stein Jones ..... Respondents,

v.

Victoria Martindale Stein, Personal Representative of the Estate of  
Paul J. Stein ..... Appellant,

and

Marian Stein-Steinfeld ..... Intervening Respondent, Cross-Appellant.

\_\_\_\_\_  
NOTICE OF APPEAL OF INTERVENING RESPONDENT  
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In response to the appeal of Victoria Martindale Stein, Personal Representative of the Estate of Paul J. Stein on October 17, 2017, Intervening-Respondents Marian Stein-Steinfeld, Intervening Respondent, hereby cross appeals the Order of the Honorable Tamara C. Curry, filed April 6, 2017, granting summary judgment against Cross-Appellant, and the Order filed September 14, 2017, denying Cross-Appellant's Motion to Alter of Amend the Order of April 6, 2017, received by the undersigned on September 14, 2017, copies of which are attached.

October 19, 2017



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THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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Richard Stein, Sarah Stein, and Nichole Stein Jones..... Respondents,

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Victoria Martindale Stein, Personal Representative of the Estate of  
Paul J. Stein ..... Appellant,

and

Marian Stein-Steinfeld ..... Intervening Respondent/Cross-Appellant.

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CERTIFICATE OF SERVICE  
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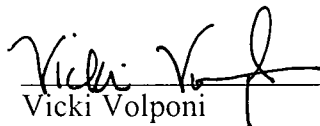
I, Vicki Volponi, an employee of Walker Gressette Freeman & Linton, LLC, hereby certify that I have served this 19<sup>th</sup> day of October 2017, a copy of the **Notice of Appeal of Intervening Respondent/Appellant** on counsel of record by placing the same in the United States mail, first-class postage pre-paid, to:

John A. Massalon, Esq.  
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ATTORNEYS FOR RESPONDENT

Charleston, South Carolina

  
Vicki Volponi

STATE OF SOUTH CAROLINA )

IN THE PROBATE COURT

COUNTY OF CHARLESTON )

Case No.: 2013-ES-10-1054

IN RE ESTATE OF: )  
PAUL J. STEIN )

RICHARD STEIN, SARAH STEIN, and )  
NICHOLE STEIN JONES, )

Petitioners, )

v. )

**ORDER DENYING INTERVENING  
RESPONDENT'S MOTION TO  
ALTER OR AMEND**

VICTORIA MARTINDALE STEIN, )  
Personal Representative of the Estate of )  
PAUL J. STEIN, )

Respondent. )

MARIAN STEIN-STEINFELD, )

Intervening Respondent. )

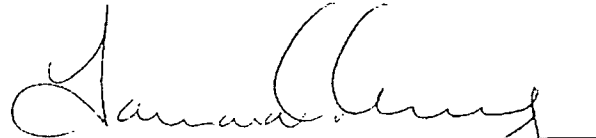
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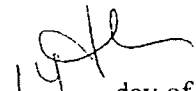
**THIS MATTER** comes before the Court upon a Motion to Alter or Amend filed by Intervening Respondent Marian Stein-Steinfeld, by and through her counsel G. Trenholm Walker, Esq., pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. Intervening Respondent filed the present Motion to Alter or Amend on April 19, 2017 in response to this Court's Order dated April 6, 2017, granting Respondent's Motion to Exclude the Testimony of Christian Koch, granting Respondent's Motion for Summary Judgment, and denying Intervening Respondent's Motion for Summary Judgment.

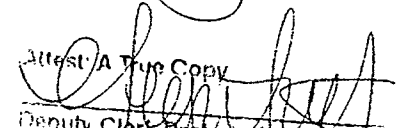
Intervening Respondent's Motion to Alter or Amend raises no new arguments, therefore, it is hereby:

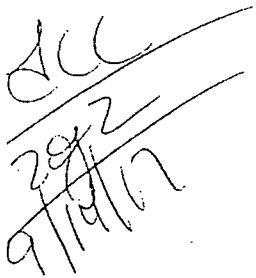
**ORDERED, ADJUDGED, AND DECREED** that Intervening Respondent's Motion to Alter or Amend is respectfully **DENIED**.

**AND IT IS SO ORDERED.**

  
**TAMARA C. CURRY**  
Associate Judge of Probate  
Charleston County

  
This 19 day of September, 2017  
Charleston, South Carolina.

  
Attest: A True Copy  
Deputy Clerk Probate Court  
Charleston County, South Carolina

  
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STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )  
IN RE ESTATE OF: )  
PAUL J. STEIN )  
RICHARD STEIN, SARAH STEIN, and )  
NICHOLE STEIN JONES, )  
Petitioners, )  
v. )  
VICTORIA MARTINDALE STEIN, Personal )  
Representative of the Estate of PAUL J. )  
STEIN, )  
Respondent. )  
MARIAN STEIN-STEINFELD, )  
Intervening Respondent. )

IN THE PROBATE COURT  
Case No.: 2013-ES-10-1054

**ORDER GRANTING SUMMARY  
JUDGMENT IN FAVOR OF  
RESPONDENT AS TO CLAIMS BY  
INTERVENING RESPONDENT AND  
GRANTING RESPONDENT'S MOTION TO  
EXCLUDE OR LIMIT TESTIMONY OF  
CHRISTIAN KOCH, DESIGNATED EXPERT  
FOR MARIAN STEIN-STEINFELD**

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**Hearing Date:** January 23, 2017  
**Presiding Judge:** Honorable Tamara C. Curry  
**Petitioners:** Richard Stein, Sarah Stein, & Nichole Stein Jones  
**Petitioners' Attorneys:** Jack Cordray, Esq., Richard S. Rosen, Esq., & Daniel F. Blanchard, III, Esq.  
**Respondent:** Victoria Martindale Stein  
**Respondent's Attorney:** Christy F. Allen, Esq. & John A. Massalon, Esq.  
**Intervening Respondent:** Marian Stein-Steinfeld  
**Intervening Respondent's Attorney:** G. Trenholm, Walker, Esq.  
**Court Reporter:** Anne Bouley Meyer, Clark & Assoc., Inc.

**THIS MATTER** comes before the Court upon the following motions: (1) Respondent's Motion for Summary Judgment as to Intervening Respondent Marian Stein-Steinfeld filed December 2, 2016; (2) Intervening Respondent's Motion for Summary Judgment filed December

5, 2016; and (3) Respondent's Motion to Exclude or Limit Testimony of Christian Koch, Designated Expert for Marian Stein-Steinfeld filed December 22, 2016.

A hearing was held on January 23, 2017. Present at the hearing were Petitioners Richard Stein, Sarah Stein, and Nichole Stein Jones, along with their counsel, Jack Cordray, Esq., Richard S. Rosen, Esq., and Daniel F. Blanchard, Esq. and Respondent Victoria Martindale Stein, along with her counsel, Christy F. Allen, Esq. and John A. Massalon, Esq. Intervening Respondent was not present at the hearing but was represented by her counsel G. Trenholm Walker, Esq. Based upon careful consideration of the motions, the pleadings, affidavits, deposition testimony, documentary evidence, legal memoranda, materials in the record, and the arguments of counsel, Respondent's Motion for Summary Judgment as to Intervening Respondent Marian Stein-Steinfeld is **GRANTED**, Intervening Respondent's Motion for Summary Judgment is **DENIED**, and Respondent's Motion to Exclude or Limit Testimony of Christian Koch is hereby **GRANTED** for the reasons discussed herein-below.

FACTUAL BACKGROUND

Intervening Respondent is the sister of Paul Stein (the "Decedent"), and is a citizen and resident of Germany. She has intervened in this case seeking declaratory judgment regarding the status of an art collection in Decedent's possession at the time of his death. Intervening Respondent has repeatedly stated that the claims she is making are "to make sure that the art collection that was in my brother's house will go to his children and remain in the family." (M. Steinfeld Depo. at 22-23).

The portion of the art collection the Decedent received from his mother originated as part of Barbara Rawling's inheritance from her mother/the Decedent's grandmother, Hannah Bekker VomRath, who died in Germany in 1983 (hereinafter HBvR). (N. Ewert Depo. at 8). The

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Decedent's mother, Barbara Rawling, was one of two surviving children of HBvR, a German artist and collector. (N. Ewert Depo at 12-13). Rawling was an American citizen living in the US. In the late 1980s and pursuant to the "probate" of HBvR's German Will, Rawling inherited approximately half of her mother's estate, with the other half going to her sister Maximiliane Kraft (a German citizen and resident). (See Ex. 1. M. Steinfeld Depo. at 12, 14; N. Ewert Depo. at 13-16). As part of their inheritance, Rawling and Kraft divided their mother's large art collection into substantially two equal portions, which division was agreed upon by the family and the executors of the German will. Id. Rawling returned to the United States with her half of the German art collection; Kraft stayed in Germany with her half of the German art collection. (M. Steinfeld Depo. at 12-13; N. Ewert Depo. at 19).

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Barbara Rawling had three (3) children: the Decedent, Natalie ("Tasha") Ewert, and Intervening Respondent. Tasha Ewert resides in Ohio but is not a party to this action. (N. Ewert Depo. at 7). Intervening Respondent was raised by Maximilliane Kraft in Germany, and continues to reside in Germany. In the mid to late 1990s, Rawling gave her art to her son, Decedent, and daughter, Tasha Ewert, for them to divide equally. (M. Steinfeld Depo. at 16). The Decedent and Natasha agreed upon a division based on equal value, and the two halves of the Rawling art collection were generally moved to Charleston, SC and Toledo, OH respectively. (N. Ewert Depo. at 23-24, 29-32, N. Ewert Depo. Exs. 3-4). The Decedent kept his art in his home, some framed and hung, but much of it stored unframed in art cabinets. Over the years, the Decedent and Tasha Ewert sold pieces of their respective art collection. (M. Steinfeld Depo. at 16-17). No person from Germany, not Kraft nor Intervening Respondent ever challenged or objected to the transport of the art to the United States, the division of Barbara's art between the Decedent and Tasha Ewert, nor

the sale by the Decedent and Tasha Ewert of certain pieces over the years. (N. Ewert Depo. at 18, 22, 40) (M. Steinfeld Depo. at 12-13, 16-19).<sup>1</sup>

### RELEVANT PROCEDURAL HISTORY

On October 7, 2014, Petitioners filed an Amended Petition seeking, *inter alia*, an Order of this Court finding that certain e-mails of the Decedent amount to a written statement or list disposing of items of tangible personal property as provided in Article II of the Decedent's Last Will and Testament and under Section 62-2-512 of the South Carolina Probate Code. On October 27, 2014, Respondent filed an Answer and Counterclaim, seeking the imposition of a constructive trust and alleging unjust enrichment/quantum meruit related to certain funds Petitioners received via a TOD account Decedent held at Merrill Lynch. On November 19, 2014, Intervening Respondent filed an Answer and Cross-Claims against Respondent seeking, *inter alia*, a declaratory judgment that Respondent has no right, title, or interest in the HBvR collection, that Barbara Rawling has a life interest in the collection, and that Intervening Respondent has a contingent remainder interest in the collection. On December 18, 2014, Respondent filed a Reply to Cross-Claim and Cross-Claim against Intervening Respondent seeking a declaratory judgment that Intervening Respondent has no rightful or legal claim to the HBvR collection.

On November 14, 2016, Petitioners filed a Motion for Summary Judgment seeking summary judgment in their favor as to all claims in their Amended Petition and as to Respondent's Answer and Counterclaim filed October 27, 2014. On December 2, 2016, Respondent filed a Motion for Summary Judgment as to Petitioners' Claims as well as a Motion for Summary Judgment as to Intervening Respondent. On December 5, 2016, Intervening Respondent filed a Motion for Summary Judgment.

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<sup>1</sup> Marian Stein-Steinfeld stated in her deposition that Paul had notified her prior to selling art, and even asked at least on one occasion whether she or Max would be able to purchase it from him. (M Steinfeld Depo. at 19, 29, 32).

## GOVERNING STANDARD

### I. Summary Judgment.

Rule 56(c) states summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law. Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." Grimsley v. S.C. Law Enft Div., 415 S.C. 33, 40, 780 S.E.2d 897, 900 (2015). "Even though courts are required to view the facts in the light most favorable to the nonmoving party, to survive a motion for summary judgment, 'it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.'" Id. (quoting Town of Hollywood v. Floyd, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013)). "The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." Bennett v. Inv'rs Title Ins. Co., 370 S.C. 578, 588- 89, 635 S.E.2d 649, 654 (Ct. App. 2006). If the moving party is successful, the nonmoving party must then come forward with specific facts showing there is a genuine issue for trial. Id.

### II. Admission of Expert Testimony.

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion

or otherwise.” SCRE 702. “Whether a witness has qualified as an expert, and whether his opinion is admissible on a fact in issue, are matters largely in the discretion of the trial judge.” Prince v. Associated Petroleum Carriers, 262 S.C. 358, 204 S.E.2d 575, 579 (1974).

### LEGAL ANALYSIS

#### **I. The Testimony of Christian Koch, Designated Expert for Marian Stein-Steinfeld is Not Admissible.**

In South Carolina, the party offering the expert has the burden of showing the witness possesses the necessary learning, skill, or practical experience to enable the witness to give opinion testimony. Gadson v. Mikasa Corp., 368 S.C. 214, 228, 628 S.E.2d 262, 270 (Ct. App. 2006). All expert testimony must meet the requirements of Rule 702, regardless of whether it is scientific, technical, or otherwise. State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009).

In determining whether to admit expert testimony, the court must make three inquiries.

First, the court must determine whether “the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury.” Watson v. Ford Motor Co., 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). Second, the expert must have “acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter.” Id. Finally, the substance of the testimony must be reliable. Id. It is this final requirement of reliability which is the central feature of the inquiry. White, 382 S.C. at 270, 676 S.E.2d at 686. The first prong of this three-prong test is not at issue in the present case. Thus, the Court will only address the second and third prongs of this test.

#### **A. Koch does not have the requisite knowledge and skill to qualify as an expert in German inheritance law.**

When a trial court is “determining a witness's qualification as an expert, [it] should make an inquiry broad in scope.” Fields v. J. Hayne Waters Builders, Inc., 376 S.C. 545, 556, 658 S.E.2d

80, 86 (2008). Specifically, the trial court ought to take into account the factors delineated in the rules of evidence, the statutory law, and any other sources of authority that may be relevant to a purported expert witness's level of skill or knowledge; and the trial court must further determine whether the offered testimony will assist the trier of fact. Id.

Here, Mr. Koch's experience and qualifications are not sufficient to qualify him as an expert in German inheritance law. While he may be an expert in German tax law, his testimony revealed that the majority of his work is related to tax law. He does not offer himself out as providing legal services in reference to wills, inheritance, or probate on his website, which he personally reviews on a monthly basis. Other than being the equivalent to a Certified Public Accountant in the U.S, he holds no "specialization" in inheritance law as is available in Germany.

Lastly, after he described the various means a person can legally challenge the acts or omissions of a provisional or subsequent heir within the German Civil Code provisions – which include the filing of declaratory judgment claims and the filing of actions for "preliminary protection," he admitted that he had never once handled such a claim.

Generally, foreign law determinations are treated as questions of law requiring de novo review. In re Qimonda AG Bankruptcy Litigation, 433 B.R. 547 (E.D.Va. 2010) (on remand 462 B.R. 165.). The purpose of an expert witness in foreign law is to aid the court in determining the content of the applicable foreign law, not to apply it to the facts of the case. Minebea Co., Ltd. v. Papst, 444 F.Supp.2d 68 (D.D.C. 2006). In this instance, the court finds that his qualification and experience as lawyer, who is plainly qualified as to matters of tax law in German and other general commercial law, is not sufficient on complex issues related to German wills and the law interpreting them.

**B. The substance of Koch's testimony is not reliable.**

Even when non-scientific in nature, the court must still exercise its role as gatekeeper and determine whether the proffered evidence is reliable. White, 382 S.C. at 270, 676 S.E.2d at 686. Thus, while a challenge to an opinion's reliability generally goes to weight and not admissibility, this "familiar evidentiary mantra" may not be invoked until the circuit court has vetted its reliability in the first instance and deemed the testimony admissible. Id. at 274, 676 S.E.2d at 689.

According to Mr. Koch, the German will of HBvR includes what has been described as "preliminary" or "provisional" and "subsequent" heirship, a German legal construct. It is undisputed that this "provisional/subsequent" heirship paradigm does not exist in U.S., nor South Carolina. (Koch at 30). In its most basic terms, he testified that the HBVR German Will provided: (1) that Rawling and Kraft were to receive their mother's estate "divided in equal shares" as "exempt or freed provisional" heirs; (2) that Rawling's three children, the Decedent, Natalie Ewert, and Intervening Respondent, were to be the "subsequent heirs;" (3) that the subsequent inheritance would take effect upon the death of Rawling and Kraft; and (4) that the subsequent heirs shall also be substitute heirs. This German construct is governed by the German Civil Code and other law. (Koch at 30). Mr. Koch generally described the complexities of this legal paradigm, which include many detailed requirements, exemptions, prohibitions, and remedies. (Koch at 43-50).

Mr. Koch has not read the Decedent's Will. (Koch at 23). He is not offering an opinion on the identity of Mr. Stein's heirs, and agrees that such would be a matter of US law. (Koch at 42-43). Mr. Koch admitted he had no opinion on US Law, nor has he formed any opinions on whether it would be appropriate to apply the German "provisional/subsequent" heirship construct in US Courts. (Koch at 11-12, 31-32) ("...I'm not qualified to opine or give opinion on U.S. law.")

Id. Further, he holds no opinion on whether or not the 1989 Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions governs US courts. Id. at 64.

Mr. Koch's opinion that the Decedent had no "legal title" in the subject art is limited to the circumstances where Mr. Stein were a German resident, if the subject art were in Germany, and if all of his relatives were also in Germany. (Koch at 31 (ll. 22-25) – 32 (ll. 1-15)). He testified that, under German law, Mr. Stein held only some kind of "remainder interest" in the art collection at the time of his death, (Koch Trial at 20), but agreed that whatever this remainder interest was, it did not disappear or vanish upon his death. (Koch at 64). He also testified that the HBvR Will was not clear regarding what happened in the instance where a subsequent heir predeceases the provisional heir. The German Code of Laws, however, provides the default rule: a subsequent interest is either transferred to the Decedent's heirs under his will, if he had a will, or to his heirs at [German] law, if he had no will. (Koch at 40-42, 63). Koch offers no opinion about the Decedent's will or the identity of his heirs under his will. Id. at 40.

He also testified that with regard to gifts and sales of the assets subject to this construct, that all heirs (provisional and subsequent) can consent, either orally or in writing, to permit gifts or sales of the assets. (Koch 58-59). Under German law, a subsequent heir who believes himself aggrieved by some action (sale, gift, etc.) of a provisional or other subsequent heir has several remedies to address such complaints: file a declaratory judgment action (Koch at 47) or file for "preliminary protection" from a court. (Koch at 49). And, the general statute of limitations in Germany to file a declaratory judgment is "three years beginning with the end of the year of the sale [or challenged event]." Id. at 48.

In conclusion, this case is about how to interpret the Decedent's Will, not the 1975 German Will of the Decedent's grandmother. The subject matter of Mr. Koch's testimony -- how one

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would interpret the Decedent's grandmother's 1975 Will if one were in Germany and if the art collection at issue were in Germany – is not relevant to any issue before this court. Mr. Koch also acknowledges that he holds no opinion on US law, had not read the Decedent's will, and agrees that US or South Carolina law should determine the identity of the Decedent's heirs under his Will.

Because Koch does not have the requisite knowledge and skill to qualify as an expert in German inheritance law and because the substance of his testimony is not reliable, Respondent's Motion to Exclude or Limit Testimony of Christian Koch, Designated Expert for Marian Stein-Steinfeld is hereby **GRANTED**.

## II. Intervening Respondent Lacks Standing.

The Declaratory Judgment Act provides:

Any person interested under a deed, will ... whose rights, status or other legal relations are affected by a statute ... may have determined any question of construction or validity arising under the ... statute ... and obtain a declaration of rights, status or other legal relations thereunder.

S.C. Code Ann. § 15-53-30 (1977). "In declaratory judgment actions '[t]he interest of the parties ... to the subject matter of the controversy must be more than merely general. It must be a substantial, direct, and legally protected present interest in the relief sought.'" Quinn v. City of Columbia, 303 S.C. 405, 407-08, 401 S.E.2d 165, 167 (1991) (footnote omitted) (citation omitted) (emphasis added). And, the requirement that a party have legal standing applies equally in the context of probate disputes as other cases. See Wilson v. Dallas, 403 S.C. 411, 743 S.E.2d 746 (2013) (applying standing to trustee in James Brown probate litigation). In Wilson v. Dallas, the court referred to "black letter" standing doctrine:

"Before any action can be maintained, there must exist a justiciable controversy." Byrd v. Irmo High Sch., 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996). Justiciability encompasses several doctrines, including ripeness, mootness, and standing. Jackson v. State, 331 S.C. 486, 491 n.2, 489 S.E.2d 915, 917 n.2 (1997) (citation omitted). "Standing refers to a party's right to make a legal claim

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or seek judicial enforcement of a duty or right." *Michael P. v. Greenville County Dep't of Soc. Servs.*, 385 S.C. 407, 415, 684 S.E.2d 211, 215 (Ct. App. 2009). "Generally, to have standing, a litigant must *have a personal stake* in the subject matter of the litigation." *Id.* at 415-16, 684 S.E.2d at 215.

(emphasis added). The court determined that the Attorney General and former trustee had standing in that case. However, said finding was based on terms of the written trust document giving the trustee the authority to handle claims, and South Carolina statutory authority granting the Attorney General a cause of action to maintain a charitable trust. *Id.* at 423-424. Here, there is no trust document, and there is no special statute which applies.

A party seeking to establish standing must prove the "irreducible constitutional minimum of standing," which consists of three elements: (1) the plaintiff must have suffered an injury in fact; (2) the injury and the conduct complained of must be causally connected; and (3) it must be likely, rather than merely speculative, that the injury will be redressed by a favorable decision. See Pines Ass'n for the Prot. of Wildlife, Inc. v. South Carolina Dep't of Natural Res., 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)); see also Beaufort Realty Co., Inc. v. Beaufort County, 346 S.C. 298, 551 S.E.2d 588 (Ct.App.2001) ("The United States Supreme Court has established the following requirements to show standing: (1) the plaintiff must suffer an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.").

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Doe v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n, 347 S.C. 642, 645, 557 S.E.2d 670, 672 (2001); Felts v. Richland County, 303 S.C. 354, 355, 400 S.E.2d 781, 781 (1991); Travelers Indem. Co. v. Auto World of Orangeburg, 334 S.C.

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137, 140, 511 S.E.2d 692, 694 (Ct.App.1999). Here, the underlying issue is that Intervening Respondent wants this court to award the art to the Petitioners so that the art will go to her brother's children and "remain in the family." (M. Steinfeld Depo. at 23). She also relies on her German lawyer expert for the proposition that the Decedent had no interest in the art because the provisional heirs Rawling and Kraft, having received a provisional interest in the art per the German will, had not yet passed away.

Even though Intervening Respondent couches her claim as those for declaratory judgment, her testimony reflects that she has not suffered, nor is facing any injury in fact. She does not claim any part of the art which is the subject to this dispute. Therefore, regardless of whether the court chooses to interpret German law and a German will, or whether the art collection is determined to go to Respondent Victoria Stein under the Decedent's Will or to the Decedent's children pursuant to the subject emails, such findings do not impact Intervening Respondent's interest. She repeatedly affirmed, under oath, that she is not seeking to claim or take possession of the subject art. Id. at 9, 45, 52.

This court is charged with interpreting the Will of the Decedent. This case, as brought by the Petitioners, is the equivalent of a will contest. Petitioners are contesting the will's directive that Respondent Victoria Stein receive the property of the Decedent. Intervening Respondent is not named in the Decedent's Will. She is his sister. Intervening Respondent testified that she has no authority to act for anyone other than herself, individually, in this case. (M. Steinfeld Depo. at 8-9). She does not claim to be a trustee of any trust. She does not claim to be acting on behalf of any German authority, and importantly, she does not claim to be acting on behalf of the Estate of Hannah Bekker vomRath, nor is she acting on behalf of the person she claims are the living "provisional" owner to the art. Id. She does not meet the definition of devisee under the Probate

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Code, section 62-1-101 (8); she does not meet the definition of a distributee, section 62-1-101 (10), nor is she a fiduciary as defined in section 62-1-101 (15). Intervening Respondent's unverified pleadings which claim that she and the Decedent have remainder interests in the subject art, pursuant to the German law and an interpretation by her expert of that German Will, cannot override her sworn testimony that she is seeking nothing other than that the art go to the Decedent's children.

Intervening Respondent relies heavily on the case of Waller v. Waller, 220 S.C. 212, 66 S.E.2d 876,882 (1951) in support of standing for a determination of her rights under a will. However, she is not seeking any determination of her rights under the Decedent's will and her own expert's testimony reflects that if the Decedent predeceased Rawling and Kraft, which he did, that his remainder interest would pass to his heirs under his will. Therefore, even if the court were to accept her expert's testimony on the interpretation of the HBvR Will in German law, the resulting conclusion addresses no injury of Intervening Respondent. Neither the Decedent's Will nor the HBvR Will address the rights of "the children" – meaning the generation following that of the Decedent, Intervening Respondent, and Tasha Ewert. If the court were to address the question of whether the subsequent heirs (i.e. the Decedent or Intervening Respondent) can devise by valid will the art to anyone outside of the blood line of the subsequent heirs, this court would be giving an advisory opinion because all the persons on whom such a decision would need to be binding are not parties to this case.

In this case, there is no injury in fact or risk of injury to Intervening Respondent in the context of these claims. She already has constructive possession of one-half of the art collection – that which was divided and stayed with Maximilliane Kraft, what happened to the one-fourth that the Decedent had does not injure or risk injury to Intervening Respondent.

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Therefore, this court does not need to reach the issue of whether this court has the jurisdiction to consider the application of German probate law to this personal property of the Decedent because there is no issue of fact to preclude summary judgment against Intervening Respondent due to her lack of standing.

**III. No Genuine Issue as to Any Material Fact Exists Relating to the Claims Between Respondent and Intervening Respondent.**

Summary judgment standards require this court give all reasonable inferences to the non-moving party, in this context, Intervening Respondent. Therefore, the court will presume its ability to consider the German law as presented by Intervening Respondent's expert Christian Koch. Mr. Koch testified that Intervening Respondent, the Decedent, and Tasha Ewert are "subsequent heirs" with regard to all of the art passed on from their grandmother pursuant to their grandmother's German Will. (M. Steinfeld Depo. at 47-48). Reading Mr. Koch's testimony in the light most favorable to Intervening Respondent, he opines that the German will made Rawling and Kraft "provisional heirs," an interest something akin to a life estate with special provisions and prohibitions under German law; that the art collection passes between Rawling and Kraft to the Decedent, Tasha Ewert, and Intervening Respondent via the German Will; and that only upon the death of Rawling and Kraft does the art ultimately belong to Intervening Respondent, the Decedent, and Tasha Ewert.<sup>2</sup>

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Mr. Koch concluded, however, that the German Will was ambiguous about what happens when a subsequent heir predeceases the provisional heirs. (Koch Tr. at 16-17, 39, Koch at 33-34). Mr. Koch testified that there is language in the Will stating that the final or subsequent heirs are also substitute heirs. But, his opinion was that it was not clear whether this meant that the

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<sup>2</sup> The parties and witnesses appear to use the following words interchangeably: provisional, preliminary, and vested as the interest of Rawling and Kraft; and subsequent or final as the interest of Marian, Paul, and Tasha.

subsequent heirs (the Decedent, Intervening Respondent, or Tasha Ewert) were intended to substitute in for a provisional heir had a provisional heir died before the devolution of the inheritance (the death of HBvR herself), or whether the subsequent heirs were intended to substitute for one another should one of them predecease the death of the preliminary heirs. (Koch Tr. at 23-24, Koch 39-40).

Intervening Respondent argues that this “ambiguity” provides support for her claim that the Decedent’s interest in the art expired upon his death, which results in his remainder interest being, in effect, redistributed to Intervening Respondent and Tasha Ewert as the only subsequent heirs. However, the court does not fully understand such a position because Intervening Respondent has presented no evidence or method to resolve this “ambiguity.” Instead, Mr. Koch testified that “it’s impossible for me to say that (how the ambiguity comes out) because the facts are insufficient for me,” and “we do not have sufficient fact what is” HBvR’s intent. (Koch Tr. 24-25, 26-27, Koch 36). Then, when asked about the German Civil Code’s default rules applicable to provisional/subsequent heirship, German Civil Code Section 2108, Mr. Koch agreed that, unless the will is clear to the contrary, if a subsequent heir predeceases the preliminary heir prior to the triggering event, then the “subsequent interest” can be devised by the subsequent heir to anyone in his will, if he has a will, or will pass to the subsequent heir’s heirs at law, if he had no will. (Koch at 29-42, Koch Tr. at 41-42). Mr. Koch was not prepared to give any testimony about Hannah Bekker vomRath’s intent, *id.* at Tr. 44, nor has Intervening Respondent offered or presented any other evidence to that effect. Mr. Koch conceded he was giving no opinion about who the Decedent’s heirs are under his will or otherwise, and that such determination was a matter of U.S. law. *Id.* at 42.

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Based on this testimony, and lack of extrinsic evidence of contrary intent, the only reasonable inference the court can draw is that, under German law, in the light most favorable to Intervening Respondent, the Decedent's interest in the art was more akin to a vested remainder interest, which could be devised by his will. Intervening Respondent's argument that the Decedent's interest was a remainder subject to divestment is inconsistent with the entirety of Mr. Koch's testimony. Therefore, summary judgement on the declaratory judgment claim is granted because there is no material issue of fact or law to support the claim of Intervening Respondent.

**CONCLUSION**

Based upon the foregoing, it is now, therefore, hereby:

**ORDERED, ADJUDGED, AND DECREED** that Respondent's Motion to Exclude or Limit Testimony of Christian Koch, Designated Expert for Marian Stein-Steinfeld is **GRANTED**;

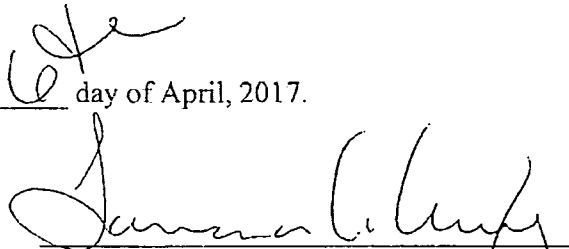
it is further

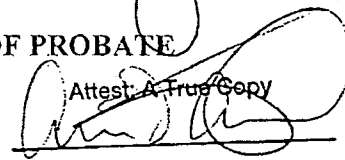
**ORDERED, ADJUDGED, AND DECREED** that summary judgment shall be granted in favor of Respondent and Respondent's Motion for Summary Judgment as to Intervening Respondent's Claims is **GRANTED**; it is further

**ORDERED, ADJUDGED, AND DECREED** that Intervening Respondent's Motion for Summary Judgment is **DENIED**; it is further

**ORDERED, ADJUDGED, AND DECREED** that a ruling on the issue of attorney's fees and costs shall be held in abeyance until after the trial on the merits.

AND IT IS SO ORDERED this 6 day of April, 2017.

  
TAMARA C. CURRY  
ASSOCIATE JUDGE OF PROBATE

  
Attest: A True Copy

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STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )  
IN RE ESTATE OF: )  
PAUL J. STEIN )  
RICHARD STEIN, SARAH STEIN, and )  
NICHOLE STEIN JONES, )  
Petitioners, )  
v. )  
VICTORIA MARTINDALE STEIN, )  
Personal Representative of the Estate of )  
PAUL J. STEIN, )  
Respondent. )  
MARIAN STEIN-STEINFELD, )  
Intervening Respondent. )

IN THE PROBATE COURT  
Case No.: 2013-ES-10-1054

**ORDER DENYING INTERVENING  
RESPONDENT'S MOTION TO  
ALTER OR AMEND**

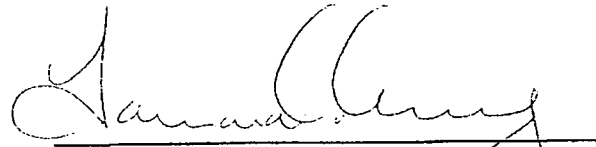
*Handwritten initials and date:*  
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**THIS MATTER** comes before the Court upon a Motion to Alter or Amend filed by Intervening Respondent Marian Stein-Steinfeld, by and through her counsel G. Trenholm Walker, Esq., pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. Intervening Respondent filed the present Motion to Alter or Amend on April 19, 2017 in response to this Court's Order dated April 6, 2017, granting Respondent's Motion to Exclude the Testimony of Christian Koch, granting Respondent's Motion for Summary Judgment, and denying Intervening Respondent's Motion for Summary Judgment.

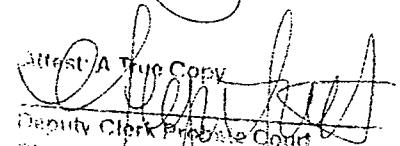
Intervening Respondent's Motion to Alter or Amend raises no new arguments, therefore, it is hereby:

**ORDERED, ADJUDGED, AND DECREED** that Intervening Respondent's Motion to Alter or Amend is respectfully **DENIED**.

**AND IT IS SO ORDERED.**

  
**TAMARA C. CURRY**  
Associate Judge of Probate  
Charleston County

This 19<sup>th</sup> day of September, 2017  
Charleston, South Carolina.

Attest: A True Copy  
  
Deputy Clerk Probate Court  
Charleston County, South Carolina

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STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )  
IN RE ESTATE OF: )  
PAUL J. STEIN )  
RICHARD STEIN, SARAH STEIN, and )  
NICHOLE STEIN JONES, )  
Petitioners, )  
v. )  
VICTORIA MARTINDALE STEIN, Personal )  
Representative of the Estate of PAUL J. )  
STEIN, )  
Respondent. )  
MARIAN STEIN-STEINFELD, )  
Intervening Respondent. )

IN THE PROBATE COURT  
Case No.: 2013-ES-10-1054

**ORDER GRANTING SUMMARY  
JUDGMENT IN FAVOR OF  
RESPONDENT AS TO CLAIMS BY  
INTERVENING RESPONDENT AND  
GRANTING RESPONDENT'S MOTION TO  
EXCLUDE OR LIMIT TESTIMONY OF  
CHRISTIAN KOCH, DESIGNATED EXPERT  
FOR MARIAN STEIN-STEINFELD**

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**Hearing Date:** January 23, 2017  
**Presiding Judge:** Honorable Tamara C. Curry  
**Petitioners:** Richard Stein, Sarah Stein, & Nichole Stein Jones  
**Petitioners' Attorneys:** Jack Cordray, Esq., Richard S. Rosen, Esq., & Daniel F. Blanchard, III, Esq.  
**Respondent:** Victoria Martindale Stein  
**Respondent's Attorney:** Christy F. Allen, Esq. & John A. Massalon, Esq.  
**Intervening Respondent:** Marian Stein-Steinfeld  
**Intervening Respondent's Attorney:** G. Trenholm, Walker, Esq.  
**Court Reporter:** Anne Bouley Meyer, Clark & Assoc., Inc.

THIS MATTER comes before the Court upon the following motions: (1) Respondent's Motion for Summary Judgment as to Intervening Respondent Marian Stein-Steinfeld filed December 2, 2016; (2) Intervening Respondent's Motion for Summary Judgment filed December

5, 2016; and (3) Respondent's Motion to Exclude or Limit Testimony of Christian Koch, Designated Expert for Marian Stein-Steinfeld filed December 22, 2016.

A hearing was held on January 23, 2017. Present at the hearing were Petitioners Richard Stein, Sarah Stein, and Nichole Stein Jones, along with their counsel, Jack Cordray, Esq., Richard S. Rosen, Esq., and Daniel F. Blanchard, Esq. and Respondent Victoria Martindale Stein, along with her counsel, Christy F. Allen, Esq. and John A. Massalon, Esq. Intervening Respondent was not present at the hearing but was represented by her counsel G. Trenholm Walker, Esq. Based upon careful consideration of the motions, the pleadings, affidavits, deposition testimony, documentary evidence, legal memoranda, materials in the record, and the arguments of counsel, Respondent's Motion for Summary Judgment as to Intervening Respondent Marian Stein-Steinfeld is **GRANTED**, Intervening Respondent's Motion for Summary Judgment is **DENIED**, and Respondent's Motion to Exclude or Limit Testimony of Christian Koch is hereby **GRANTED** for the reasons discussed herein-below.

FACTUAL BACKGROUND

Intervening Respondent is the sister of Paul Stein (the "Decedent"), and is a citizen and resident of Germany. She has intervened in this case seeking declaratory judgment regarding the status of an art collection in Decedent's possession at the time of his death. Intervening Respondent has repeatedly stated that the claims she is making are "to make sure that the art collection that was in my brother's house will go to his children and remain in the family." (M. Steinfeld Depo. at 22-23).

The portion of the art collection the Decedent received from his mother originated as part of Barbara Rawling's inheritance from her mother/the Decedent's grandmother, Hannah Bekker VomRath, who died in Germany in 1983 (hereinafter HBvR). (N. Ewert Depo. at 8). The

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Decedent's mother, Barbara Rawling, was one of two surviving children of HBvR, a German artist and collector. (N. Ewert Depo at 12-13). Rawling was an American citizen living in the US. In the late 1980s and pursuant to the "probate" of HBvR's German Will, Rawling inherited approximately half of her mother's estate, with the other half going to her sister Maximiliane Kraft (a German citizen and resident). (See Ex. 1. M. Steinfeld Depo. at 12, 14; N. Ewert Depo. at 13-16). As part of their inheritance, Rawling and Kraft divided their mother's large art collection into substantially two equal portions, which division was agreed upon by the family and the executors of the German will. Id. Rawling returned to the United States with her half of the German art collection; Kraft stayed in Germany with her half of the German art collection. (M. Steinfeld Depo. at 12-13; N. Ewert Depo. at 19).

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Barbara Rawling had three (3) children: the Decedent, Natalie ("Tasha") Ewert, and Intervening Respondent. Tasha Ewert resides in Ohio but is not a party to this action. (N. Ewert Depo. at 7). Intervening Respondent was raised by Maximilliane Kraft in Germany, and continues to reside in Germany. In the mid to late 1990s, Rawling gave her art to her son, Decedent, and daughter, Tasha Ewert, for them to divide equally. (M. Steinfeld Depo. at 16). The Decedent and Natasha agreed upon a division based on equal value, and the two halves of the Rawling art collection were generally moved to Charleston, SC and Toledo, OH respectively. (N. Ewert Depo. at 23-24, 29-32, N. Ewert Depo. Exs. 3-4). The Decedent kept his art in his home, some framed and hung, but much of it stored unframed in art cabinets. Over the years, the Decedent and Tasha Ewert sold pieces of their respective art collection. (M. Steinfeld Depo. at 16-17). No person from Germany, not Kraft nor Intervening Respondent ever challenged or objected to the transport of the art to the United States, the division of Barbara's art between the Decedent and Tasha Ewert, nor

the sale by the Decedent and Tasha Ewert of certain pieces over the years. (N. Ewert Depo. at 18, 22, 40) (M. Steinfeld Depo. at 12-13, 16-19).<sup>1</sup>

### RELEVANT PROCEDURAL HISTORY

On October 7, 2014, Petitioners filed an Amended Petition seeking, *inter alia*, an Order of this Court finding that certain e-mails of the Decedent amount to a written statement or list disposing of items of tangible personal property as provided in Article II of the Decedent's Last Will and Testament and under Section 62-2-512 of the South Carolina Probate Code. On October 27, 2014, Respondent filed an Answer and Counterclaim, seeking the imposition of a constructive trust and alleging unjust enrichment/quantum meruit related to certain funds Petitioners received via a TOD account Decedent held at Merrill Lynch. On November 19, 2014, Intervening Respondent filed an Answer and Cross-Claims against Respondent seeking, *inter alia*, a declaratory judgment that Respondent has no right, title, or interest in the HBvR collection, that Barbara Rawling has a life interest in the collection, and that Intervening Respondent has a contingent remainder interest in the collection. On December 18, 2014, Respondent filed a Reply to Cross-Claim and Cross-Claim against Intervening Respondent seeking a declaratory judgment that Intervening Respondent has no rightful or legal claim to the HBvR collection.

On November 14, 2016, Petitioners filed a Motion for Summary Judgment seeking summary judgment in their favor as to all claims in their Amended Petition and as to Respondent's Answer and Counterclaim filed October 27, 2014. On December 2, 2016, Respondent filed a Motion for Summary Judgment as to Petitioners' Claims as well as a Motion for Summary Judgment as to Intervening Respondent. On December 5, 2016, Intervening Respondent filed a Motion for Summary Judgment.

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<sup>1</sup> Marian Stein-Steinfeld stated in her deposition that Paul had notified her prior to selling art, and even asked at least on one occasion whether she or Max would be able to purchase it from him. (M Steinfeld Depo. at 19, 29, 32).

## GOVERNING STANDARD

### I. Summary Judgment.

Rule 56(c) states summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." Grimsley v. S.C. Law Enft Div., 415 S.C. 33, 40, 780 S.E.2d 897, 900 (2015). "Even though courts are required to view the facts in the light most favorable to the nonmoving party, to survive a motion for summary judgment, 'it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.'" Id. (quoting Town of Hollywood v. Floyd, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013)). "The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." Bennett v. Inv'rs Title Ins. Co., 370 S.C. 578, 588– 89, 635 S.E.2d 649, 654 (Ct. App. 2006). If the moving party is successful, the nonmoving party must then come forward with specific facts showing there is a genuine issue for trial. Id.

### II. Admission of Expert Testimony.

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion

or otherwise.” SCRE 702. “Whether a witness has qualified as an expert, and whether his opinion is admissible on a fact in issue, are matters largely in the discretion of the trial judge.” Prince v. Associated Petroleum Carriers, 262 S.C. 358, 204 S.E.2d 575, 579 (1974).

### LEGAL ANALYSIS

#### **I. The Testimony of Christian Koch, Designated Expert for Marian Stein-Steinfeld is Not Admissible.**

In South Carolina, the party offering the expert has the burden of showing the witness possesses the necessary learning, skill, or practical experience to enable the witness to give opinion testimony. Gadson v. Mikasa Corp., 368 S.C. 214, 228, 628 S.E.2d 262, 270 (Ct. App. 2006). All expert testimony must meet the requirements of Rule 702, regardless of whether it is scientific, technical, or otherwise. State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009).

In determining whether to admit expert testimony, the court must make three inquiries. First, the court must determine whether “the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury.” Watson v. Ford Motor Co., 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). Second, the expert must have “acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter.” Id. Finally, the substance of the testimony must be reliable. Id. It is this final requirement of reliability which is the central feature of the inquiry. White, 382 S.C. at 270, 676 S.E.2d at 686. The first prong of this three-prong test is not at issue in the present case. Thus, the Court will only address the second and third prongs of this test.

#### **A. Koch does not have the requisite knowledge and skill to qualify as an expert in German inheritance law.**

When a trial court is “determining a witness’s qualification as an expert, [it] should make an inquiry broad in scope.” Fields v. J. Hayne Waters Builders, Inc., 376 S.C. 545, 556, 658 S.E.2d

80, 86 (2008). Specifically, the trial court ought to take into account the factors delineated in the rules of evidence, the statutory law, and any other sources of authority that may be relevant to a purported expert witness's level of skill or knowledge; and the trial court must further determine whether the offered testimony will assist the trier of fact. Id.

Here, Mr. Koch's experience and qualifications are not sufficient to qualify him as an expert in German inheritance law. While he may be an expert in German tax law, his testimony revealed that the majority of his work is related to tax law. He does not offer himself out as providing legal services in reference to wills, inheritance, or probate on his website, which he personally reviews on a monthly basis. Other than being the equivalent to a Certified Public Accountant in the U.S, he holds no "specialization" in inheritance law as is available in Germany.

Lastly, after he described the various means a person can legally challenge the acts or omissions of a provisional or subsequent heir within the German Civil Code provisions – which include the filing of declaratory judgment claims and the filing of actions for "preliminary protection," he admitted that he had never once handled such a claim.

Generally, foreign law determinations are treated as questions of law requiring de novo review. In re Qimonda AG Bankruptcy Litigation, 433 B.R. 547 (E.D.Va. 2010) (on remand 462 B.R. 165.). The purpose of an expert witness in foreign law is to aid the court in determining the content of the applicable foreign law, not to apply it to the facts of the case. Minebea Co., Ltd. v. Papst, 444 F.Supp.2d 68 (D.D.C. 2006). In this instance, the court finds that his qualification and experience as lawyer, who is plainly qualified as to matters of tax law in German and other general commercial law, is not sufficient on complex issues related to German wills and the law interpreting them.

**B. The substance of Koch's testimony is not reliable.**

Even when non-scientific in nature, the court must still exercise its role as gatekeeper and determine whether the proffered evidence is reliable. White, 382 S.C. at 270, 676 S.E.2d at 686. Thus, while a challenge to an opinion's reliability generally goes to weight and not admissibility, this "familiar evidentiary mantra" may not be invoked until the circuit court has vetted its reliability in the first instance and deemed the testimony admissible. Id. at 274, 676 S.E.2d at 689.

According to Mr. Koch, the German will of HBvR includes what has been described as "preliminary" or "provisional" and "subsequent" heirship, a German legal construct. It is undisputed that this "provisional/subsequent" heirship paradigm does not exist in U.S., nor South Carolina. (Koch at 30). In its most basic terms, he testified that the HBVR German Will provided: (1) that Rawling and Kraft were to receive their mother's estate "divided in equal shares" as "exempt or freed provisional" heirs; (2) that Rawling's three children, the Decedent, Natalie Ewert, and Intervening Respondent, were to be the "subsequent heirs;" (3) that the subsequent inheritance would take effect upon the death of Rawling and Kraft; and (4) that the subsequent heirs shall also be substitute heirs. This German construct is governed by the German Civil Code and other law. (Koch at 30). Mr. Koch generally described the complexities of this legal paradigm, which include many detailed requirements, exemptions, prohibitions, and remedies. (Koch at 43-50).

Mr. Koch has not read the Decedent's Will. (Koch at 23). He is not offering an opinion on the identity of Mr. Stein's heirs, and agrees that such would be a matter of US law. (Koch at 42-43). Mr. Koch admitted he had no opinion on US Law, nor has he formed any opinions on whether it would be appropriate to apply the German "provisional/subsequent" heirship construct in US Courts. (Koch at 11-12, 31-32) ("...I'm not qualified to opine or give opinion on U.S. law.")

Id. Further, he holds no opinion on whether or not the 1989 Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions governs US courts. Id. at 64.

Mr. Koch's opinion that the Decedent had no "legal title" in the subject art is limited to the circumstances where Mr. Stein were a German resident, if the subject art were in Germany, and if all of his relatives were also in Germany. (Koch at 31 (ll. 22-25) – 32 (ll. 1-15)). He testified that, under German law, Mr. Stein held only some kind of "remainder interest" in the art collection at the time of his death, (Koch Trial at 20), but agreed that whatever this remainder interest was, it did not disappear or vanish upon his death. (Koch at 64). He also testified that the HBvR Will was not clear regarding what happened in the instance where a subsequent heir predeceases the provisional heir. The German Code of Laws, however, provides the default rule: a subsequent interest is either transferred to the Decedent's heirs under his will, if he had a will, or to his heirs at [German] law, if he had no will. (Koch at 40-42, 63). Koch offers no opinion about the Decedent's will or the identity of his heirs under his will. Id. at 40.

He also testified that with regard to gifts and sales of the assets subject to this construct, that all heirs (provisional and subsequent) can consent, either orally or in writing, to permit gifts or sales of the assets. (Koch 58-59). Under German law, a subsequent heir who believes himself aggrieved by some action (sale, gift, etc.) of a provisional or other subsequent heir has several remedies to address such complaints: file a declaratory judgment action (Koch at 47) or file for "preliminary protection" from a court. (Koch at 49). And, the general statute of limitations in Germany to file a declaratory judgment is "three years beginning with the end of the year of the sale [or challenged event]." Id. at 48.

In conclusion, this case is about how to interpret the Decedent's Will, not the 1975 German Will of the Decedent's grandmother. The subject matter of Mr. Koch's testimony -- how one

would interpret the Decedent's grandmother's 1975 Will if one were in Germany and if the art collection at issue were in Germany – is not relevant to any issue before this court. Mr. Koch also acknowledges that he holds no opinion on US law, had not read the Decedent's will, and agrees that US or South Carolina law should determine the identity of the Decedent's heirs under his Will.

Because Koch does not have the requisite knowledge and skill to qualify as an expert in German inheritance law and because the substance of his testimony is not reliable, Respondent's Motion to Exclude or Limit Testimony of Christian Koch, Designated Expert for Marian Stein-Steinfeld is hereby **GRANTED**.

## II. Intervening Respondent Lacks Standing.

The Declaratory Judgment Act provides:

Any person interested under a deed, will ... whose rights, status or other legal relations are affected by a statute ... may have determined any question of construction or validity arising under the ... statute ... and obtain a declaration of rights, status or other legal relations thereunder.

S.C. Code Ann. § 15-53-30 (1977). "In declaratory judgment actions '[t]he interest of the parties ... to the subject matter of the controversy must be more than merely general. It must be a substantial, direct, and legally protected present interest in the relief sought.'" Quinn v. City of Columbia, 303 S.C. 405, 407-08, 401 S.E.2d 165, 167 (1991) (footnote omitted) (citation omitted) (emphasis added). And, the requirement that a party have legal standing applies equally in the context of probate disputes as other cases. See Wilson v. Dallas, 403 S.C. 411, 743 S.E.2d 746 (2013) (applying standing to trustee in James Brown probate litigation). In Wilson v. Dallas, the court referred to "black letter" standing doctrine:

"Before any action can be maintained, there must exist a justiciable controversy." Byrd v. Irmo High Sch., 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996). Justiciability encompasses several doctrines, including ripeness, mootness, and standing. Jackson v. State, 331 S.C. 486, 491 n.2, 489 S.E.2d 915, 917 n.2 (1997) (citation omitted). "Standing refers to a party's right to make a legal claim

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or seek judicial enforcement of a duty or right." *Michael P. v. Greenville County Dep't of Soc. Servs.*, 385 S.C. 407, 415, 684 S.E.2d 211, 215 (Ct. App. 2009). "Generally, to have standing, a litigant must *have a personal stake* in the subject matter of the litigation." *Id.* at 415-16, 684 S.E.2d at 215.

(emphasis added). The court determined that the Attorney General and former trustee had standing in that case. However, said finding was based on terms of the written trust document giving the trustee the authority to handle claims, and South Carolina statutory authority granting the Attorney General a cause of action to maintain a charitable trust. *Id.* at 423-424. Here, there is no trust document, and there is no special statute which applies.

A party seeking to establish standing must prove the "irreducible constitutional minimum of standing," which consists of three elements: (1) the plaintiff must have suffered an injury in fact; (2) the injury and the conduct complained of must be causally connected; and (3) it must be likely, rather than merely speculative, that the injury will be redressed by a favorable decision. *Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. South Carolina Dep't of Natural Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)); see also *Beaufort Realty Co., Inc. v. Beaufort County*, 346 S.C. 298, 551 S.E.2d 588 (Ct.App.2001) ("The United States Supreme Court has established the following requirements to show standing: (1) the plaintiff must suffer an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.").

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Doe v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n*, 347 S.C. 642, 645, 557 S.E.2d 670, 672 (2001); *Felts v. Richland County*, 303 S.C. 354, 355, 400 S.E.2d 781, 781 (1991); *Travelers Indem. Co. v. Auto World of Orangeburg*, 334 S.C.

137, 140, 511 S.E.2d 692, 694 (Ct.App.1999). Here, the underlying issue is that Intervening Respondent wants this court to award the art to the Petitioners so that the art will go to her brother's children and "remain in the family." (M. Steinfeld Depo. at 23). She also relies on her German lawyer expert for the proposition that the Decedent had no interest in the art because the provisional heirs Rawling and Kraft, having received a provisional interest in the art per the German will, had not yet passed away.

Even though Intervening Respondent couches her claim as those for declaratory judgment, her testimony reflects that she has not suffered, nor is facing any injury in fact. She does not claim any part of the art which is the subject to this dispute. Therefore, regardless of whether the court chooses to interpret German law and a German will, or whether the art collection is determined to go to Respondent Victoria Stein under the Decedent's Will or to the Decedent's children pursuant to the subject emails, such findings do not impact Intervening Respondent's interest. She repeatedly affirmed, under oath, that she is not seeking to claim or take possession of the subject art. Id. at 9, 45, 52.

This court is charged with interpreting the Will of the Decedent. This case, as brought by the Petitioners, is the equivalent of a will contest. Petitioners are contesting the will's directive that Respondent Victoria Stein receive the property of the Decedent. Intervening Respondent is not named in the Decedent's Will. She is his sister. Intervening Respondent testified that she has no authority to act for anyone other than herself, individually, in this case. (M. Steinfeld Depo. at 8-9). She does not claim to be a trustee of any trust. She does not claim to be acting on behalf of any German authority, and importantly, she does not claim to be acting on behalf of the Estate of Hannah Bekker vomRath, nor is she acting on behalf of the person she claims are the living "provisional" owner to the art. Id. She does not meet the definition of devisee under the Probate

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Code, section 62-1-101 (8); she does not meet the definition of a distributee, section 62-1-101 (10), nor is she a fiduciary as defined in section 62-1-101 (15). Intervening Respondent's unverified pleadings which claim that she and the Decedent have remainder interests in the subject art, pursuant to the German law and an interpretation by her expert of that German Will, cannot override her sworn testimony that she is seeking nothing other than that the art go to the Decedent's children.

Intervening Respondent relies heavily on the case of Waller v. Waller, 220 S.C. 212, 66 S.E.2d 876,882 (1951) in support of standing for a determination of her rights under a will. However, she is not seeking any determination of her rights under the Decedent's will and her own expert's testimony reflects that if the Decedent predeceased Rawling and Kraft, which he did, that his remainder interest would pass to his heirs under his will. Therefore, even if the court were to accept her expert's testimony on the interpretation of the HBvR Will in German law, the resulting conclusion addresses no injury of Intervening Respondent. Neither the Decedent's Will nor the HBvR Will address the rights of "the children" – meaning the generation following that of the Decedent, Intervening Respondent, and Tasha Ewert. If the court were to address the question of whether the subsequent heirs (i.e. the Decedent or Intervening Respondent) can devise by valid will the art to anyone outside of the blood line of the subsequent heirs, this court would be giving an advisory opinion because all the persons on whom such a decision would need to be binding are not parties to this case.

In this case, there is no injury in fact or risk of injury to Intervening Respondent in the context of these claims. She already has constructive possession of one-half of the art collection – that which was divided and stayed with Maximilliane Kraft, what happened to the one-fourth that the Decedent had does not injure or risk injury to Intervening Respondent.

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Therefore, this court does not need to reach the issue of whether this court has the jurisdiction to consider the application of German probate law to this personal property of the Decedent because there is no issue of fact to preclude summary judgment against Intervening Respondent due to her lack of standing.

**III. No Genuine Issue as to Any Material Fact Exists Relating to the Claims Between Respondent and Intervening Respondent.**

Summary judgment standards require this court give all reasonable inferences to the non-moving party, in this context, Intervening Respondent. Therefore, the court will presume its ability to consider the German law as presented by Intervening Respondent's expert Christian Koch. Mr. Koch testified that Intervening Respondent, the Decedent, and Tasha Ewert are "subsequent heirs" with regard to all of the art passed on from their grandmother pursuant to their grandmother's German Will. (M. Steinfeld Depo. at 47-48). Reading Mr. Koch's testimony in the light most favorable to Intervening Respondent, he opines that the German will made Rawling and Kraft "provisional heirs," an interest something akin to a life estate with special provisions and prohibitions under German law; that the art collection passes between Rawling and Kraft to the Decedent, Tasha Ewert, and Intervening Respondent via the German Will; and that only upon the death of Rawling and Kraft does the art ultimately belong to Intervening Respondent, the Decedent, and Tasha Ewert.<sup>2</sup>

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Mr. Koch concluded, however, that the German Will was ambiguous about what happens when a subsequent heir predeceases the provisional heirs. (Koch Tr. at 16-17, 39, Koch at 33-34). Mr. Koch testified that there is language in the Will stating that the final or subsequent heirs are also substitute heirs. But, his opinion was that it was not clear whether this meant that the

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<sup>2</sup> The parties and witnesses appear to use the following words interchangeably: provisional, preliminary, and vested as the interest of Rawling and Kraft; and subsequent or final as the interest of Marian, Paul, and Tasha.

subsequent heirs (the Decedent, Intervening Respondent, or Tasha Ewert) were intended to substitute in for a provisional heir had a provisional heir died before the devolution of the inheritance (the death of HBvR herself), or whether the subsequent heirs were intended to substitute for one another should one of them predecease the death of the preliminary heirs. (Koch Tr. at 23-24, Koch 39-40).

Intervening Respondent argues that this “ambiguity” provides support for her claim that the Decedent’s interest in the art expired upon his death, which results in his remainder interest being, in effect, redistributed to Intervening Respondent and Tasha Ewert as the only subsequent heirs. However, the court does not fully understand such a position because Intervening Respondent has presented no evidence or method to resolve this “ambiguity.” Instead, Mr. Koch testified that “it’s impossible for me to say that (how the ambiguity comes out) because the facts are insufficient for me,” and “we do not have sufficient fact what is” HBvR’s intent. (Koch Tr. 24-25, 26-27, Koch 36). Then, when asked about the German Civil Code’s default rules applicable to provisional/subsequent heirship, German Civil Code Section 2108, Mr. Koch agreed that, unless the will is clear to the contrary, if a subsequent heir predeceases the preliminary heir prior to the triggering event, then the “subsequent interest” can be devised by the subsequent heir to anyone in his will, if he has a will, or will pass to the subsequent heir’s heirs at law, if he had no will. (Koch at 29-42, Koch Tr. at 41-42). Mr. Koch was not prepared to give any testimony about Hannah Bekker vomRath’s intent, *id.* at Tr. 44, nor has Intervening Respondent offered or presented any other evidence to that effect. Mr. Koch conceded he was giving no opinion about who the Decedent’s heirs are under his will or otherwise, and that such determination was a matter of U.S. law. *Id.* at 42.

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Based on this testimony, and lack of extrinsic evidence of contrary intent, the only reasonable inference the court can draw is that, under German law, in the light most favorable to Intervening Respondent, the Decedent's interest in the art was more akin to a vested remainder interest, which could be devised by his will. Intervening Respondent's argument that the Decedent's interest was a remainder subject to divestment is inconsistent with the entirety of Mr. Koch's testimony. Therefore, summary judgement on the declaratory judgment claim is granted because there is no material issue of fact or law to support the claim of Intervening Respondent.

**CONCLUSION**

Based upon the foregoing, it is now, therefore, hereby:

**ORDERED, ADJUDGED, AND DECREED** that Respondent's Motion to Exclude or Limit Testimony of Christian Koch, Designated Expert for Marian Stein-Steinfeld is **GRANTED**;

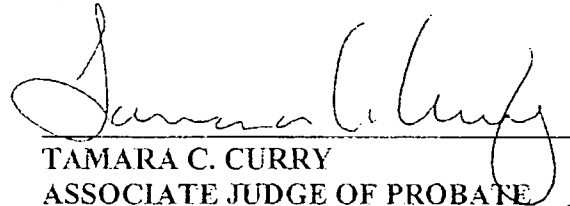
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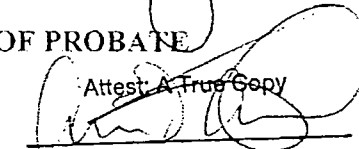
**ORDERED, ADJUDGED, AND DECREED** that summary judgment shall be granted in favor of Respondent and Respondent's Motion for Summary Judgment as to Intervening Respondent's Claims is **GRANTED**; it is further

**ORDERED, ADJUDGED, AND DECREED** that Intervening Respondent's Motion for Summary Judgment is **DENIED**; it is further

**ORDERED, ADJUDGED, AND DECREED** that a ruling on the issue of attorney's fees and costs shall be held in abeyance until after the trial on the merits.

AND IT IS SO ORDERED this 6 day of April, 2017.

  
TAMARA C. CURRY  
ASSOCIATE JUDGE OF PROBATE

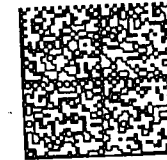
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