

EXHIBIT A

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

Appeal From Probate Court
Of Charleston County

Case Number: 2017-CP-10-04129

IN RE:
The KENNETH J. BONIFACE)
IRREVOCABLE INSURANCE)
TRUST AGREEMENT U/A)
DATED DECEMBER 30, 1994 and)
)
THE KENNETH J. BONIFACE)
FAMILY TRUST, A TESTAMENTARY)
TRUST UNDER WILL DATED APRIL 23,)
2001, AS AMENDED BY FIRST)
CODICIL DATED JUNE 28, 2002, AND)
BY SECOND CODICIL DATED)
JANUARY 29, 2004.)
)
MARY E. BONIFACE and BARBARA)
M. BONIFACE,)
)
Appellants,)
)
South State Bank as Trustee,)
)
)
Petitioner)

ORDER

FILED
2018 JAN 26 PM 4:04
JULIE J. HARRIS
CLERK OF COURT

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SC Court of Appeals

This matter came before the Court on January 12, 2018, for a hearing on Appellants' appeal from the Probate Court's order regarding the Petition filed by Respondent South State Bank ("Bank") requesting to be relieved as Trustee. After considering oral arguments and written briefs, the Court finds the probate court acted within its discretion and properly appointed George L. Garmendia as trustee for the Kenneth J. Boniface Irrevocable Insurance Trust and the Kenneth J. Boniface Family Trust and dismisses the appeal.

The appeal involves the estate of Kenneth J. Boniface, and specifically the administration of two Trusts. The Kenneth J. Boniface Irrevocable Insurance Trust was established on December

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30, 1994 (“Insurance Trust”). Under the provisions of the Insurance Trust, all seven of the children of Boniface are Beneficiaries, and distributions may be made in the Trustee’s discretion to any and all of the children. As to replacement or succession of Trustee, the Insurance Trust provides that the oldest living child shall file with the court having jurisdiction, the designation of the successor or substitute Trustee. Should the child fail to act, the court with jurisdiction would designate such successor. The second Trust at issue, is a testamentary trust created under the will of Kenneth J. Boniface dated April 23, 2002, and amended by a first codicil executed June 28, 2002, and amended by a second codicil dated January 29, 2004, shortly before the death of Mr. Boniface on February 17, 2004 (hereinafter “Family Trust”). The “Family Trust”, as amended, generally mirrored the provisions of the Insurance Trust with regard to distributions, but does contain a provision that the trustee should consider the circumstances of specifically Mary Boniface and Barbara Boniface prior to distributions to other children. The Testamentary Trust provision regarding successor was amended in the second codicil. The operative provision provides that the “children by a majority vote shall have the ability to remove Wachovia ... and appoint as a successor an individual, or a bank or trust company . . . to serve in their place.” South State Bank (“Bank”) served as Trustee of both Trusts.

On August 29, 2016, Bank filed a Summons and Petition to be relieved as Trustee of the trusts and for a final accounting of the Trusts’ accounts. Having received notice the current Trustee wished to resign, and pursuant to the Insurance Trust agreement, the oldest living child, Mr. Kenneth J. Boniface, Jr. entered into an agreement with Mr. George L. Garmendia and Hyland Rubby and Garland, LLC CPA, as successor Trustee for the Insurance Trust, and the Probate Court was notified of such on October 31, 2016. In the October 31, 2016 correspondence, the Court was also notified that under the Family Trust terms, a vote of the beneficiaries was to be

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held to name a new Trustee of the Family Trust. On November 4, 2016, Mary E. Boniface and Barbara Boniface (“Appellant Beneficiaries”) filed an Answer, Counterclaim and Cross-claim.

A hearing on the matter was held on March 1, 2017, Judge Irvin Condon presiding. At the hearing, all parties agree to the Bank’s resignation as Trustee of the two Trusts. The Respondents requested additional information and details on the accounting presented by the Bank before approval of accounts and relieving the Bank of its fiduciary duty to the Trusts, and Appellants likewise requested that the Court not relieve the Bank from its fiduciary duty. Further, Respondents presented information regarding the vote taken for appointment of a new Trustee in which George Garmendia and his firm were selected by a majority of the beneficiaries to serve as Trustee of the Family Trust. The Appellants were the two votes against Mr. Garmendia’s appointment. The Appellants argued there was a conflict between administration of the Trusts and issues among the beneficiaries, such that preclude the same Trustee from serving both Trusts. Following the hearing, the Probate Court issued an Order making the following findings: that the Bank should be relieved as Trustee; that the Bank’s accounting was not accepted as final; that George Garmendia and his firm were properly appointed as Trustee for the Trusts; and that the Trustees of the Trusts would not be necessary parties to litigation to preclude the same entity as serving as Trustee for both Trusts. Appellants appealed to this this Court.

Standard of Review

When an appeal of a final order of the probate court is made to the circuit court, the circuit court must apply the same standard of review that an appellate court would apply on appeal. In re Howard, 315 S.C. 356, 361, 434 S.E.2d 254, 257 (1993). The standard of review depends upon whether the underlying cause of action is at law or in equity. In re Estate of Hyman, 362 S.C. 20, 25, 606 S.E.2d 205, 207 (Ct. App. 2004); In re Thames, 344 S.C. 564, 568, 544 S.E.2d 854, 856

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(Ct. App. 2001). An action to remove a personal representative was deemed to be in equity. In the instant matter, the relief sought lies in equity regarding the appointment of Trustee, and therefore the appellate court may make findings in accordance with its view of the preponderance of the evidence. Dean v. Kilgore, 313 S.C. 257, 259, 437 S.E.2d 154, 155 (S.C. Ct. App. 1993).

Law and Analysis

“The appointment of a trustee by the court is not a ministerial act; it is an act of judicial discretion.” Bonney v. Granger, 356 S.E.2d 138, 145 (S.C. App. 1987)(citing In re Tempest, (1866) 1 Ch. App. 485 (Turner, L.J.); In re Chapman's Estate, 258 Wis. 442, 45 N.W.2d 927 (1951)). “In the exercise of that discretion, the court should always give careful consideration to the purposes of the trust and the best interest of all of the beneficiaries.” Id. “The award of attorneys' fees is left undisturbed absent abuse of the trial court's discretion.” Warren v. Yarborough, 2012 WL 10860503, at *2 (S.C. App. July 11, 2012).

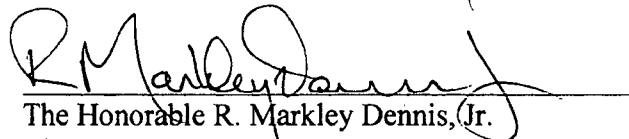
Appellants seek to have the Court set aside the probate court's findings that Mr. Garmendia and his firm are properly appointed as Trustee for both of the Trusts in issue¹. As stated above, there is judicial discretion in the appointment of a trustee. Based on the arguments at the hearing in this appeal and the briefings submitted, the Court finds that the probate court properly exercised its discretion in following the instructions of the Trust documents regarding Trustee succession and appointment, and properly found that George Garmendia and his firm are to be appointed Trustee for the Insurance Trust and Family Trust. Furthermore, the Court does not find that the probate court erred in failing to award Appellants' attorneys' fees and costs. There is no statute prescribing the award of attorneys' fees and costs in this matter, and the policy cited by Appellants

¹ Appellants also raised an issue as to whether the same entity could be appointed as Trustee for both trusts simultaneously. At this time, the Court does not issue an opinion regarding whether it is allowable for the same entity to serve as Trustee for both Trusts, but finds that there is nothing prohibiting same.

has not been adopted in South Carolina. There was no abuse of discretion in failing to award fees and costs.

Based on the foregoing, this Court AFFIRMS the findings of the probate court, concluding that Mr. Garmendia and Hyland Rubby and Garland, LLC CPA are properly appointed as Trustee for the Insurance Trust and Family Trust, and dismisses the appeal. It is further ordered that both Trusts are to be transferred for administration to Mr. Garmendia and his firm effectively immediately.

IT IS SO ORDERED.


The Honorable R. Markley Dennis, Jr.
Circuit Court Judge

1/26, 2018
Charleston, South Carolina

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