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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

R. Markley Dennis, Jr., Circuit Court Judge
Trial Court Case No. 2017-CP-10-04129

RECEIVED
OCT 29 2018
SC Court of Appeals

APPELATE CASE NO. 2018-000932

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,
2002, as amended by first codicil dated June 28, 2001, and by second codicil dated
January 29, 2004.

Mary E. Boniface and Barbara M. Boniface, Appellants,

-vs-

John L. Boniface, Marian C. Boniface, Anne M. Boniface, Joan Boniface Jaindl,
Kenneth J. Boniface, Jr. (deceased), and South State Bank, as Trustee, Respondents.

MOTION TO REINSTATE APPEAL AND TO FILE
THE INITIAL BRIEF OF APPELLANT AND DESIGNATION
OF MATTER OUTSIDE OF TIME

Counsel for the Appellants respectfully requests that this Court reinstate Appellants' Appeal
and permit Appellants to file the Initial Brief of Appellant(s) and Designation of Matter in the above-
referenced case outside of time. In support of this request, counsel shows:

1. The Initial Brief of Appellants and Designation of Matter were due to be filed on September 6, 2018, following two extensions granted at the request of counsel for the Appellants. The above-captioned Appellate Case was dismissed by this Court on September 28, 2018, and an Order of Remittitur was entered on or about October 12, 2018.

2. The complexity of the estate plan implemented by the grantor, the issues raised on behalf of various parties, the decision of the probate court at trial and the decision of the court of common pleas on appeal have all combined to create complex legal issues to be resolved by this Court.

3. Filing of the Appellants' Initial Brief and Designation of Matter has been delayed due to unanticipated transitions with counsel's practice as well as acts of nature beyond counsel's control, and this request for reinstatement of Appellants' Appeal and to file the Initial Brief and Designation of Matter outside of time is being requested in good faith and for good cause, and not for purposes of delay.

4. More specifically, delay of required filings was caused by Hurricane Florence, which resulted in court closures as well as suspension of computation of time for most court filings from September 11, 2018 through September 21, 2018. Delay of required filings was caused by Tropical Storm Michael, which resulted in court closures as well as suspension of computation of time for most court filings on October 11, 2018. The ability of counsel to draft and effect service of required filings was significantly impaired as a result of these natural disasters.

5. In addition, at the time this case was filed, counsel for the Appellants operated his practice with the sole assistance of his law partner. Counsel's law partner has entered into employment with a state agency, substantially increasing the affairs of the law practice that now must be handled solely by counsel for the Appellants. This transition has significantly affected counsel both personally and professionally. Counsel is actively working to alleviate and resolve this issue, but has not yet achieved a complete resolution.

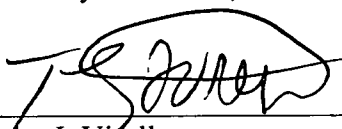
6. Counsel has attached a draft of the Initial Brief of Appellants hereto as Exhibit A, and if the Court should grant counsel's requests herein, counsel requests that the time limits for completing the required filings be extended for 15 days from the date that the Order of this Court is filed and mailed.

7. Counsel for all other parties of record have been copied on this Motion.

WHEREFORE, the undersigned counsel would respectfully request that the above-captioned case be reinstated and the time limits for filing the initial brief of appellant and designation of matter be extended for 15 days from the date that the order of reinstatement is filed and mailed.

Respectfully submitted,

October 27, 2018



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Joan Boniface Jaindl, and Kenneth J. Boniface, Jr. (deceased)*

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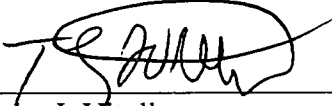
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SC Court of Appeals

I certify that I have served the Motion to reinstate appeal and to submit filings outside of time herein on all parties hereto by depositing a copy of it in the United States Mail, postage prepaid, on the date shown below, addressed to the counsel of record for the parties as follows:

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EXHIBIT A

THE STATE OF SOUTH CAROLINA

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second codicil dated January 29, 2004.

Mary E. Boniface and Barbara M. Boniface, Appellants,

-vs-

John L. Boniface, Marian C. Boniface, Anne M. Boniface, Joan Boniface
Jaindl, Kenneth J. Boniface, Jr. (deceased), and South State Bank, as
Trustee, Respondents.

INITIAL BRIEF OF APPELLANTS

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ATTORNEY FOR APPELLANTS

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4. The circuit court erred in affirming the probate court’s ruling that failed to award the Appellants their attorney’s fees and costs, when the Appellants are beneficiaries of both of the trust estates at issue, and the Appellants are both disabled and heavily reliant on distributions from the trusts, and the Petition filed by the Petitioner contemplated a final distribution of the assets of the trusts, and the Respondent Beneficiaries moved the court to cease making distributions for the benefit of the Appellants35

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STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court err in affirming the probate court's ruling that it would be appropriate for the individual and/or CPA firm solicited by the Respondent beneficiaries to serve simultaneously as trustee of both the Insurance Trust and the Family Trust, and that such would not constitute a conflict of interest, when the trustee of the Family Trust and the Appellant beneficiaries have a *prima facie* action against one or more of the Respondent beneficiaries for breach of fiduciary duty?

II. Did the circuit court err in affirming the probate court's ruling that George L. Garmedia, CPA [sic] was properly appointed as trustee of both the Insurance Trust and the Family Trust, when South State Bank had already invoked the jurisdiction of the probate court; and when neither George L. Garmedia, CPA [sic] or Hyland Ruddy & Garbett, CPAs, LLC met the qualifications set forth in the provisions of the Insurance Trust; and when the Family Trust agreement does not contain any provisions in regards to the appointment, replacement, or substitution of a trustee that would be applicable to South State Bank; and when the record does not contain any evidence that any vote by the beneficiaries of the trust had been completed?

III. Did the circuit court err in affirming the probate court's ruling that George L. Garmedia, CPA [sic] with Hyland Ruddy & Garbett, CPAs, LLC is an appropriate trustee for both the Insurance Trust and the Family Trust, when there is substantial discord and irreconcilable differences between the Appellant beneficiaries and the Respondent beneficiaries, and the Appellant beneficiaries rely heavily on distributions from the Insurance Trust, and the letter of acceptance evidences partiality towards the Respondent beneficiaries, and when Mary E. Boniface is the oldest living beneficiary of the Insurance Trust and she is not in agreement with the appointment of George L. Garmedia, CPA or Hyland Ruddy & Garbett, CPAs, LLC as the trustee of the trust?

IV. Did the circuit court err in affirming the probate court's ruling that failed to award the Appellants their attorney's fees and costs, when the Appellants are beneficiaries of both of the trust estates at issue, and the Appellants are both disabled and heavily reliant on distributions from the trusts, and the Petition filed by the Petitioner contemplated a final distribution of the assets of the trusts, and the Respondent beneficiaries moved the court to order the acting trustee to cease making distributions for the benefit of the Appellants?

STATEMENT OF THE CASE

On August 29, 2016, Respondent South State Bank filed a Summons and Petition for Instructions, for Review of Trustee Accounts, and for Appointment of Successor Trustee with the Probate Court for the County of Charleston, South Carolina. On or about October 13, 2016 a Return¹ was filed by Mark H. Wall, Esquire on behalf of John L. Boniface, Marian C. Boniface, Kenneth J. Boniface, Jr. and Joan Boniface Jaindl² (hereinafter the “Respondent Beneficiaries”). On October 31, 2016, counsel for the Respondent Beneficiaries submitted a letter³ to the court indicating that George L. Garmendia, CPA and his firm had agreed to serve as trustee of the two trust estates at issue. On or about November 4, 2016, Timothy J. Vitollo, Esquire filed an Answer, Counterclaim and Cross-Claim on behalf of Mary E. Boniface and Barbara M. Boniface (hereinafter the “Appellants”).

The matter was heard on March 1, 2017. Although no formal discovery requests were filed by any party, at the hearing counsel for the Respondent Beneficiaries asked for the opportunity to review trust records in more detail, *Transcr. p. 94, lines 13-15*, and the court advised that Mr. Wall's clients would be given more time to look at additional records, and then the matter would be resolved either by reconvening the hearing or by proposed orders submitted by the parties. *Transcr. p. 100, lines 10-13*. On May 11, 2017, South State Bank filed a motion asking that the court reconvene the hearing, or in the alternative,

¹ The Return filed on October 13, 2016 also mistakenly indicated on page 1 that it was filed on behalf of Mary E. Boniface, and on page 3 that Wall Templeton & Haldrup, P.A. represented Mary E. Boniface. Vitollo Law Firm, LLC filed a response on behalf of Mary E. Boniface (and Barbara M. Boniface) on or about November 4, 2016.

² The Return filed on October 13, 2016 referred to Joan Boniface Jaindl as “Joan Boniface Jindel.”

³ The letter was dated October 4, 2016, more than 30 days after South State Bank filed its Petition.

rule in accordance with the proposed order attached to its motion. On or about June 14, 2017, the Respondent Beneficiaries filed a return to the motion requesting certain relief in the event that the court agreed to reconvene the hearing, including a request that the trustee be instructed to cease making distributions to the Appellants.

On June 27, 2017, the presiding judge signed an order intended to dispose of the matter. The order dated June 27, 2017 does not show the date and time that the order was filed with the court, and it appears that the order was never filed.⁴ The order was placed in the mail to counsel for the Appellants on August 4, 2017. The Appellants filed a Notice of Intent to Appeal with the Circuit Court, the probate court, and counsel for all parties on August 11, 2017, and the Appellants subsequently filed a Motion to Reconsider Alter or Amend.

Appellants filed a separate Complaint against South State Bank relating to the trust estates at issue on September 22, 2017, along with a Motion to Remove that Complaint to Circuit Court. Subsequent to the filing of that Complaint, but prior to service of that Complaint or Motion, the probate court executed a form order removing the Complaint to Circuit Court and included language indicating that “The related matters of the trust are also removed to serve the best interest of the Estate and/or the interest of judicial economy.” The probate court mailed the order granting Appellants motion for removal to counsel for the Appellants on October 5, 2017, and upon information and believe, also mailed the order to counsel for South State Bank and counsel for the Respondent Beneficiaries. On October 4, 2017, the Respondent Beneficiaries filed a motion with the probate court asking that the

⁴ The copy of the order contained in the return of the probate court does not appear to bear a file stamp showing the date and time that the order was entered with the court.

Appellants (referred to as the “Minority Beneficiaries”) be required to post a bond in the amount of \$130,000.00 “if they desire to receive improper distributions” from the trust from the “dismissed Trustee,” the request presumably based on the theory that South State Bank was making improper distributions from one or more of the trusts to or for the benefit of the Appellants, both of whom are disabled. That same day, counsel for the Respondent Beneficiaries filed a Motion to Dismiss Appeal, asking the Circuit Court to dismiss Appellants' Notice of Intent to Appeal on the grounds that the probate court order dated June 27, 2017 was not a final order because of the SCRCP Rule 59(e) motion of the Appellants that was filed in the probate court subsequent to the Notice of Intent to Appeal being filed in the Circuit Court.

On December 6, 2018, the clerk of the Charleston County Court of Common Pleas e-mailed notice to all interested parties that the Motion to Dismiss Appeal filed on behalf of the Respondent Beneficiaries would be heard on January 12, 2018. At the hearing on the Motion to Dismiss, counsel for the Respondent Beneficiaries withdrew the Motion to Dismiss Appeal and asked to proceed with oral arguments on the merits of the Appeal. *Comm. Pl. Transcr. p. 3, lines 17-20; p. 12, lines 11-12.* Counsel for Appellants moved the court to rule on the Motion to Dismiss Appeal, and hear oral arguments on the merits of the Appeal on the next available date. *Id. at p. 8, lines 1-4.* The presiding judge informed the parties that he would hear the appeal. *Id. at p. 13, lines 10-14.*

On January 26, 2018, the presiding judge entered an order affirming the rulings of the probate court. *Cir. Ct. Order, at p. 1.* Counsel for Appellants received notice of the entry of the circuit court's order in the mail on February 5, 2018, and filed a Motion to Reconsider, Alter or Amend on February 14, 2018, requesting in pertinent part that the

court reconsider whether the circuit court's ruling should be stayed or dismissed on account of the Motion to Reconsider pending in the Charleston County Probate Court. *Cir. Ct. Mot. to Reconsider, at pp. 1-3*. Appellants' Motion to Reconsider was heard on March 27, 2018, and on April 12, 2018 the court entered its order denying reconsideration, finding in pertinent part that the motion to reconsider had been denied by the probate court. *Order Denying Reconsideration, at pp. 1-2*.

Counsel for Appellants received notice of the entry of the Order Denying Reconsideration by mail on April 19, 2018, and filed a Notice of Appeal with this Court on or about May 17, 2018. *Not. of App., at pp. 1-2*.

This Appeal follows.

STATEMENT OF FACTS

1. Background

Parties. Kenneth J. Boniface, as Settlor, created the Kenneth J. Boniface Irrevocable Insurance Trust on December 30, 1994 (the “Insurance Trust”), and all seven of his children are permissible distributees of the 1994 Trust, pursuant to Article 5(1) and Article 5(2). *Ins. Tr. p. 12.* Kenneth J. Boniface died testate in Charleston County, South Carolina on February 17, 2004, and was survived by his seven (7) children, to wit: John L. Boniface, Marian C. Boniface, Anne M. Boniface, Kenneth J. Boniface, Jr., Joan Boniface Jandl, Mary E. Boniface, and Barbara M. Boniface. *SSB Petition p. 1-2.*

Kenneth J. Boniface, Jr. was the oldest living Boniface child as of August 29, 2016 when South State Bank filed its Petition. Kenneth J. Boniface, Jr. died on January 10, 2017, leaving Mary E. Boniface as the oldest Boniface child as of this date and as of the date of the hearing in the probate court that was held on March 1, 2017. *Transcr. p. 18, lines 3-14.*

The trusts. In his Last Will and Testament dated April 23, 2002, Kenneth J. Boniface created a testamentary trust known as the Kenneth J. Boniface Family Trust (the “Family Trust”). The provisions of the Family Trust were modified by a First Codicil, dated June 28, 2002, and a Second Codicil, dated January 29, 2004. *Will p. 11; Codicil I p. 2; Codicil II p. 4.*

The Insurance Trust, of which all seven of the Settlor's children are beneficiaries, holds title to a home at 509 Upland Place, in Mount Pleasant, South Carolina, and has liquid assets managed by the trustee; the home was purchased by First Southeast in 2008 when it served as trustee of the Insurance Trust as a home for Mary E. Boniface and Barbara M. Boniface, who currently reside there⁵. *SSB Petition p. 2.*

Insurance Trust provisions. Article 5(2) of the Insurance Trust requires the trustee to make distributions to the beneficiaries pursuant to an ascertainable standard, and particularly “to provide proper care and support for any who is not self-supporting through no fault of his or her own [...] to meet extraordinary requirements caused by illness or misfortune” or “to provide any child with a home of the child’s own.” *Ins. Tr. p. 12-13* (emphasis added). Article 5(1) and Article 5(2) of the Insurance Trust permit the trustee to take into consideration any other income or resources available to a beneficiary, to the extent that the trustee deems advisable. *Id.*

Pursuant to Article 7 of the Insurance Trust, in the event of a vacancy in the office of trustee, the successor trustee shall be a bank or trust company qualified to do business in the state of South Carolina, and is to be “designated in a written instrument filed with the court [...] and signed by [...] the Settlor’s oldest living child,” and if the oldest living child fails to act, then the bank or trust company to act as successor trustee is to be designated “by the court having jurisdiction over this Trust.” *Ins. Tr. p. 14-15* (emphasis added). Article 12 of the Insurance Trust prescribes the same procedure in the event that a trustee resigns. *Id. at 24.*

⁵ These facts were admitted by the Appellants in their response to the Petition of South State Bank, and are deemed admitted by the Respondent Beneficiaries pursuant to SCRCF Rule 8(d).

Family Trust provisions. The initial provisions of the Family Trust are contained in the Last Will and Testament of Kenneth J. Boniface, as amended by two codicils. The codicils progressively increased the proportion of the probate assets to be utilized for the benefit of two of Mr. Boniface's disabled daughters, Mary E. Boniface and Barbara M. Boniface. Prior to amendment, the Will gifted twenty percent (20%) of the residuary estate to the Family Trust and generally mirrored the provisions of the Insurance Trust, while reciting the testator's intention that the trustee "consider the circumstances of [...] Mary E. Boniface and Barbara M. Boniface first, prior to making any distributions to [...] other children." *Will p. 2-3.*

The First Codicil to the Will eliminated a charitable bequest and increased the percentage of the residuary estate gifted to the Family Trust to twenty five percent (25%). *Codicil I p. 1.* The Second Codicil to the Will increased the percentage of the residuary estate gifted to the Family Trust to fifty percent (50%), and made Mary E. Boniface and Barbara M. Boniface the sole beneficiaries of the trust during their lifetimes. *Codicil II pp. 1-2.* The increase in the percentage of the residuary estate passing to the Family Trust was accomplished by decreasing the percentage of the residuary estate passing to John L. Boniface and Marian C. Boniface, from thirty percent (30%) each to ten percent (10%) each respectively. *Id.*

In regards to trustee succession, the effective provisions of the Family Trust do not contain any provisions regarding trustee succession that would be applicable to any fiduciary other than Wachovia Bank, National Association (hereinafter "Wachovia"). The effective provisions of Item X of the Family Trust, contained in the Second Codicil to the Will of Kenneth J. Boniface, appoint Wachovia as trustee of the Family Trust and provide

a mechanism for the testator's children to replace Wachovia by majority vote, but the provisions of Item X are silent as to the appointment of any subsequent successor. *Codicil II p. 3*. The effective provisions of Item XI of the Trust, contained in the original Will, allow the oldest living Boniface child to nominate a successor if Wachovia fails to qualify or ceases to act, but the provisions of Item XI are silent as to any subsequent successor. *Will p. 4*.

Appellants as sole Lifetime Beneficiaries. The provisions of Item XII(1) and Item XII(2) result in Mary E. Boniface and Barbara M. Boniface being the sole beneficiaries of the Family Trust during their lifetimes. *Codicil II p. 2*. The increase in assets to be utilized for the benefit of Mary E. Boniface and Barbara M. Boniface has caused the Respondent Beneficiaries- particularly John L. Boniface- to harbor substantial resentment towards the Appellants, Mary E. Boniface and Barbara M. Boniface. At the probate court hearing, John L. Boniface lamented on the record that "the other codicil was done shortly before his death⁶." *Transcr. p. 58, lines 12-13*. In regards to disbursements being made for the Appellants- his sisters who are both disabled- John L. Boniface opined that "we're wasting a lot of money that could be used for different people's care" and that "we're looking for some relief from wasting money." *Transcr. p. 75, lines 14-15 and 22-23*. In addition, throughout their pleadings, the Respondent Beneficiaries make a concerted effort to encourage the court to think of them as "the Majority Beneficiaries." For example, in one set of pleadings the Respondent Beneficiaries plead that "the Majority Beneficiaries [...] are not aware of the desires of Mary E. Boniface and Barbara M. Boniface to manage

⁶ The second Codicil to the Will was executed on January 29, 2004; Kenneth J. Boniface died on February 17, 2004. Attorney Paul M. Lynch of Moore & Van Allen, PLLC drafted all codicils and the original Will.

and/or mismanage the assets, as they are minority beneficiaries⁷.” *Resp. Response to Countercl., para. 4.*

Appellants are both Disabled. In Item XXIII, the testator, Kenneth J. Boniface, mandated that his daughter Barbara M. Boniface “shall be considered disabled” for purposes of the administration of his Will, *Will p. 10*, and on the record John L. Boniface effectively acknowledged that both of the Appellants are disabled. In response to a question from Appellants’ counsel, John L. Boniface replied that (in addition to the Appellants) “right now we have a another sister who is disabled [...]” *Transcr. p. 75, lines 16-17 [sic]*.

FLP as asset of the Family Trust.⁸ The basic facts relating to the ownership interest in the family limited partnership held by the trustee of the Family Trust are largely undisputed. All liquid assets of the Trust have been depleted, and the sole remaining asset is a 31.06% interest in The Boniface Family Limited Partnership (the “FLP”). The primary asset owned by the FLP is a beach rental house located at 1856 Iron Avenue, Sullivan’s Island, South Carolina. The general partner of the FLP is the Boniface Family, LLC, and Marian Boniface is the sole member of this LLC. *Will p. 2 (Item IV)*. The fair market

⁷ Referring to beneficiaries of a trust as “majority beneficiaries” or “minority beneficiaries” is inconsistent with fundamental principles of trust law, as it is axiomatic that the interpretation and administration of the trust is not primarily guided by the desires of one or more beneficiaries, but rather by the intention of the settlor as set forth in the provisions of the trust document. *See, e.g., Bryan v. Dethlefs*, 959 So. 2d 314, 317 (Fla App. 2007) (“the polestar of trust or will interpretation is the settlor’s intent”); *In re Western Pennsylvania Nat. Bank*, 225 A.2d 676, 678 (Pa. 1967) (“It has long been the well established law in Pennsylvania that a testator’s intent is the polestar in interpreting a will”).

⁸ A general discussion of the innerworkings of the family limited partnership, ownership of the partnership, the beach rental property that is essentially the sole asset of the family limited partnership, the ownership interest in the family limited partnership held by the trustee of the Family Trust, and the dispute over the lack of income generated by the rental of the beach house is contained in the *Transcript* on page 9, line 23 to page 10, line 6; page 14, line 18 to page 15, line 6; page 19, line 24 to page 20, line 11; page 24, line 7 to page 26, line 3; page 29, line 4 to page 30, line 22; page 36, lines 11-16; page 37, line 24 to page 39, line 7; page 54, line 2 to page 56, line 16; page 61, line 16 to page 62, line 10; page 62, line 25 to page 63, line 13; page 71, line 19 to page 75, line 15; page 80, lines 17-19; page 89, lines 3-16.

value of the beach house has been appraised at \$1,650,000.00, and the only lien against the house is a line of credit in the approximate amount of \$100,000.00; however, the general partner has failed to operate the FLP in a manner calculated to produce net rental income. As John L. Boniface and counsel for the Respondent Beneficiaries have confirmed, the FLP has never made any distributions for the benefit of the limited partners (the Boniface children, pursuant to Item VI of the Will as amended⁹, *Codicil II p. 1*).

2. *Pleadings and Procedural Facts*

Pleadings prior to Hearing. On August 29, 2016, Respondent South State Bank filed its Petition for Instructions, for Review of Trustee Accounts, and for Appointment of Successor Trustee. The Petition of South State Bank alleges in part that it is unable to continue administration of the Insurance Trust and the Family Trust due to the composition of the assets of the trusts and the contention among the beneficiaries, and requests that the probate court appoint a successor trustee, require the beneficiaries to participate in a mediation as to a division of the remaining assets of the trusts, and review and approve its accounts. *SSB Petition pp. 3-4*. A Return was filed on behalf of the Respondent Beneficiaries on or about October 13, 2016. The Response filed on October 13, 2016 did not contain a general denial and was not responsive to all of the allegations contained in the Petition filed by South State Bank. The Response filed by the Respondent Beneficiaries generally denied that the probate court had the authority to require the beneficiaries/children of the trust's settlor to participate in mediation, requested that South

⁹ The primary asset composing the residue of the probate estate of Kenneth J. Boniface was an approximate 60% ownership interest as a limited partner of the FLP; upon his death, this interest passed as part of the residue of his estate.

State Bank as trustee be required to account for all the years it and its predecessors were trustee, and objected to the court “attempting to appoint a successor trustee.” *Resp. Response para. 4-6.*

On or about October 31, 2016, counsel for the Respondent Beneficiaries submitted a letter to the probate court advising that Hyland Ruddy & Garbett, CPAs, LLC and George L. Garmendia, CPA accepted trusteeship of both trusts, and that “South State Bank is hereby relieved of the duties of being Trustee.” *MHW letter 10312016.* The letter also indicated that the “family will be calling for a vote shortly.” *Id.*

The Answer, Counterclaim and Cross-Claim of Respondents Mary E. Boniface and Barbara M. Boniface was filed on or about November 4, 2016. The Appellants’ Cross-Claim generally requested that the probate court stay any substitution of trustee during the pendency of the action, or in the alternative, appoint a special administrator. *App. Answer p. 5.* The Respondent Beneficiaries filed a Response to the Appellants’ Counterclaim and Cross Claim on or about November 28, 2016. On or about December 20, 2016, South State Bank filed a Response to the Respondent Beneficiaries’ Response to the Appellant Beneficiaries’ Counterclaim and Cross Claim.

Hearing and Post-Hearing. The matter was heard by the court on March 1, 2017, and an order was adopted and signed by the Probate Judge for Charleston County, South Carolina on June 27, 2017; however, the order does not bear a file-stamp showing the date and time that it was entered, making it difficult to determine whether the order was ever entered by the probate court. The order was placed in the mail to counsel for the Appellants on August 4, 2017. Counsel for the Appellants filed a Notice of Intent to Appeal with the circuit court, the probate court, and counsel for all parties on August 11, 2017. Counsel

for the Appellants subsequently filed a Motion to Reconsider Alter or Amend with the probate court on August 22, 2017, which was denied¹⁰. Appellants appeal was heard by the circuit court on January 12, 2018, and an order denying the appeal was entered on January 26, 2018. After the circuit court denied Appellants' Motion to Reconsider, Appellants filed a Notice of Appeal with this Court on or about May 17, 2018.

¹⁰ On April 11, 2018, the circuit court entered an order finding that the motion to reconsider alter or amend filed in probate court had been denied by the probate court, and that order has not been appealed.

ARGUMENT

1. The circuit court erred in affirming the probate court's ruling that it would be appropriate for Mr. Garmendia and/or the CPA firm to serve simultaneously as trustee of both the Insurance Trust and the Family Trust, and that such would not be a conflict of interest.

1(a). The appointment of Mr. Garmendia and/or the CPA firm to serve simultaneously as trustee of both trusts amounts to an abuse of judicial discretion.

Standard of Review. The determination of the standard of review by an appellate court of matters originating in the probate court is controlled by whether the cause of action is at law or in equity. *Dean v. Kilgore*, 313 S.C. 257, 259, 437 S.E.2d 154, 155 (Ct. App. 1993). If the petitioner's cause of action seeks equitable relief, the appellate court has jurisdiction to make findings of fact in accordance with its own view of the preponderance of the evidence. *Id.* If the cause of action is one at law, the factual findings of the trial court may be disturbed only if there is no evidence to support the findings. *Id.* Actions concerning the removal and replacement of a fiduciary are generally considered actions in equity; however, when the factual findings of the probate court have been affirmed by the circuit court, as in the case at hand, the "two-judge" rule applies, and the probate court's findings of fact may only be disturbed if there is no evidence to support the findings. *See Dean v. Kilgore*, 313 S.C. 257, 260, 437 S.E.2d 154, 160 (Ct. App. 1993). In the case at hand, almost all of the basic controlling facts are undisputed. An appellate court may make its own findings of law without deference to the trial court.

Judicial Discretion to Appoint Trustee. The appointment of a trustee by the court is an act of judicial discretion. *Bonney v. Granger*, 292 S.C. 308, 319, 356 S.E.2d 138, 145 (Ct. App. 1987) (citations omitted). A court exercising its discretion to appoint a trustee “should always give careful consideration to the purposes of the trust and the best interest of all of the beneficiaries.” *Id.* (citing *Steger v. Northen*, 229 Ill. App. 529 (1923)). In *Bonney v. Granger*, the trial court judge affirmed the appointment of a certain trustee, reasoning that “it is quite clear that if the ministerial act of filing a lawsuit to amend the trust to add Mrs. Granger as a trustee had been undertaken, there is no question that such action would have been quickly and routinely approved.” *Id.* The appellate court reversed, noting that the respective trustee was a beneficiary of the trust, and that as a result, “[i]n the circumstances of this case, the appointment of Hilda as trustee could hardly have been ‘quickly and routinely approved.’” *Id.*

A review of the record reveals that the probate court relied primarily on the fact that George L. Garmendia, CPA and Hyland Ruddy & Garbett, CPAs, LLC were selected to be the trustee of both trusts by Kenneth J. Boniface, Jr. who was the oldest living child of the settlor as of the date that Respondent South State Bank filed its petition, and the court gave minimal or no consideration to the purposes of the trusts or the best interests of the various beneficiaries. *Transcr. p. 18, lines 8-14; p. 19, lines 2-17; p. 21, line 16 to p. 22, line 11; p. 102, line 5 to p. 103, line 2.* The final order signed by the probate judge includes a finding of law that “there are irreconcilable differences” between the parties and contemplates the possibility of “future litigation,” but nonetheless finds that the individual solicited and selected by the Respondent beneficiaries “was properly appointed” and “voted on” to become the trustee of both trusts, and is “an appropriate Trustee of both

Trusts.” *Probate Order*, pp. 2-3. The final order signed by the probate judge does not reference the best interests of any beneficiaries or the purposes of the various trusts. The order entered by the circuit court on January 26, 2018 references the designation by Kenneth J. Boniface, Jr., as well as a purported vote by the beneficiaries, and recites the provisions of Item VII(1) of the testamentary trust contained in the settlor’s original Will, even though these provisions were amended and contradict the controlling provisions contained in the second codicil to that Will. *See Cir. Ct. Order pp. 2-3; Will p. 3; Codicil II p. 2.*

In the case at hand, the probate court appointed the same individual and/or CPA firm to serve simultaneously as trustee of both the insurance trust and the family trust. The probate court noted that there were “irreconcilable differences” between the needs and desires of the various beneficiaries and also noted the likelihood of “future litigation,” but failed to give due consideration to the wide discretion that the trustee of the trusts will be vested with and the impact that the exercise of this discretion will have as to the outcome of future litigation and the fulfillment of non-fulfillment of the settlor’s purposes for creating the trusts, particularly the family trust for the benefit of the Appellant Beneficiaries. As in *Bonney v. Granger*, the presiding probate court judge treated the appointment of successor trustees for the trusts as a ministerial act without giving much if any consideration to the purposes of the trusts and best interests of the beneficiaries with diverse needs, and the circuit court’s affirmation of the probate court’s decision amounts to an abuse of judicial discretion.

1(b). The Trustee of the Family Trust will hold an ownership interest in the FLP and will be the proper party to bring an action against the general partner of the FLP, and the trustee will have a duty to enforce claims of the trust.

The circuit court erred in affirming the probate court's finding of law that the trustee would only be a "nominal" party and not a "necessary" party as to any lawsuits, as it is a fundamental doctrine of trust law that the trustee holds legal title to the assets of the trust: this is why assets titled to the trustee of a trust are not subject to the probate process upon the death of a settlor. For this reason, the trustee becomes the holder of legal title with authority to enforce claims on behalf of a trust. The trustee of the Family Trust will hold an interest in the FLP and will be the property party to bring an action on behalf of the Family Trust against the general partner of the FLP. The provisions of the Family/Testamentary Trust reflect this, as Item XV(17) specifically grants the trustee power to "compromise [...], *sue on or defend* [...] and settle claims in favor of or against my [trust] estate." *Will p. 7* (emphasis added). This is also why S.C. Code Ann. Sec. 62-7-811 mandates that "a trustee shall take reasonable steps *to enforce claims of the trust* and to defend claims against the trust [emphasis added]."

The successor trustee of the family trust will hold an ownership interest in the FLP and will have a duty to take reasonable steps to enforce the claims that the family trust likely has against the general partner of the FLP, and the circuit court's affirmation of the probate court's finding that the trustee will be a "nominal" part and not a "necessary" party amounts to an error of law.

1(c). The Trustee of the Family Trust will have a *prima facie* action against the general partner of the FLP, and the general partner of the FLP is a beneficiary of the Insurance Trust, such that it would be a conflict of interest for the individual and/or CPA firm sought out by the Respondent Beneficiaries to serve simultaneously as trustee of both the Insurance Trust and the Family Trust.

The fair market value of the beach rental house held by the FLP has been appraised at \$1,650,000.00, and the only lien against the house is a line of credit in the approximate amount of \$100,000.00 (*SSB Petition*); nonetheless, it is uncontested that subsequent to the death of Kenneth J. Boniface in 2004, the beach rental house held by the FLP has not produced net income sufficient to make any cash distributions for the benefit of any limited partners, and as the legal titleholder of an ownership interest in the FLP, the trustee of the Family Trust will have a *prima facie* action against the general partner of the FLP for breach of fiduciary duty. At the hearing on March 1, 2017, counsel for the Respondent Beneficiaries went so far as to indicate that “there are never going to be any liquid assets to discuss,” *Transcr. p. 29 lines 12-13*, and John L. Boniface took the untenable position that the FLP was deliberately “designed” not to produce distributable income, but rather for any gain to accrue solely as a result of the appreciation of the value of the real property. *Transcr. p. 72, line 16 to p. 73, line 11.*

The trustee of the Family Trust will be called upon to make consequential decisions, including whether to redeem the Family Trust’s interest in the FLP and whether to take legal action on behalf of the Family Trust and against various limited and general partners of the FLP, all of whom are directly or indirectly potential beneficiaries of the Insurance Trust. In other words, under the ruling made by the probate court and affirmed by the

circuit court, the trustee serving as fiduciary of both the Insurance Trust and the Family Trust may have a duty to sue multiple beneficiaries of the Insurance Trust in the trustee's capacity as trustee of the Family Trust, while fulfilling the trustee's duty to administer both trusts impartially and with due regard for the respective interests of all the beneficiaries pursuant to S.C. Code Ann. Sec. 62-7-803. For this reason, the circuit erred in affirming the probate court's finding of law that the individual and/or CPA firm sought out by the Respondent Beneficiaries would be an appropriate party to serve simultaneously as the trustee of both the Insurance Trust and the Family Trust without experiencing a conflict of interest, and the probate court's appointment of the individual and/or CPA firm to serve simultaneously as the trustee of both trusts amounts to an abuse of judicial discretion.

2. The circuit court erred in affirming the probate court's ruling that George L. Garmedia, CPA [sic] was properly appointed as trustee of both the Insurance Trust and the Family Trust.

2(a). George L. Garmedia, CPA [sic] was not properly appointed as trustee of the Insurance Trust because South State Bank had already invoked the jurisdiction of the probate court prior to the attempted exercise of the appointment, and because neither George L. Garmedia, CPA [sic] nor Hyland Ruddy & Garbett, CPAs, LLC met the qualifications set forth in the provisions of the Insurance Trust.

South State Bank had Already Invoked the Jurisdiction of the Probate Court.

Pursuant to S.C. Code Ann. Sec. 62-7-201(a)(4), "[...] the probate court has exclusive jurisdiction of *proceedings initiated by interested parties* [including] proceedings to [...] appoint or remove a trustee [emphasis added]." Pursuant to S.C. Code Ann. Sec. 62-7-201(b), an action initiated in probate court does not result in continuing supervising

proceedings, and the removal and replacement of trustees and other aspects of the trust administration are to proceed expeditiously, free of judicial intervention, subject to the court's jurisdiction "*as invoked by interested parties* [emphasis added]."

It is undisputed that South State Bank filed and served its Sumons and Petition prior to the date that George L. Garmendia, CPA signed a letter on behalf of Hyland Ruddy & Garbett, CPAs, LLC whereby the accounting firm agreed to serve as trustee of the Insurance Trust. The Summons and Petition of South State Bank are file-stamped August 29, 2016, the proof of delivery is file-stamped August 30, 2016, and the letter signed on behalf of Hyland Ruddy & Garbett, CPAs, LLC is dated October 4, 2016. In addition, counsel for the Respondent Beneficiaries filed a Return on behalf of the Respondent Beneficiaries on or about October 13, 2016, eighteen days before the letter signed by George L. Garmendia, CPA was mailed to the probate court. The attempted designation of a successor trustee by Kenneth J. Boniface, Jr. was not completed and the purported acceptance of trustee signed on behalf of Hyland Ruddy & Garbett, CPAs, LLC was not executed until well after the jurisdiction of the probate court had been invoked by an interested party, and therefore the designation was ineffective, with the result that any appointment of a successor trustee subsequent to the filing of the Petition would be subject to the jurisdiction and approval of the probate court.

Individual and/or CPA firm did not Meet Qualifications set out in Trust Document. The record reflects that "George L. Garmedia, CPA [sic]" is a certified public accountant, and neither a bank institution nor trust company. The letter submitted to the probate court on or about October 31, 2016 clearly shows that Hyland Ruddy & Garbett, CPAs, LLC is an accounting firm and neither a bank institution nor trust company. The

provisions of Article 7 of the Insurance Trust unambiguously require that the successor “shall be some bank or trust company” qualified to do business in the State of South Carolina, and neither George L. Garmendia, CPA nor Hyland Ruddy & Garbett, CPAs, LLC is a bank or trust company; therefore, the attempted designation of a successor by Kenneth J. Boniface, Jr. was ineffective as it did not comply with the express provisions of the Insurance Trust, with the result that any appointment of a successor trustee would be subject to the jurisdiction and approval of the probate court.

2(b). George L. Garmedia, CPA [sic] was not properly appointed as trustee of the Family Trust because South State Bank had already invoked the jurisdiction of the probate court, and because the provisions in the trust document for appointment of a successor would not be applicable to South State Bank, and because there is no evidence on the record that the required vote had actually taken place.

South State Bank had Already Invoked the Jurisdiction of the Probate Court. As detailed above under section 2(a), the attempted designation of a successor trustee by Kenneth J. Boniface, Jr. was not completed and the purported acceptance of trustee signed on behalf of Hyland Ruddy & Garbett, CPAs, LLC was not executed until well after the jurisdiction of the probate court had been invoked by an interested party, and therefore, pursuant to S.C. Code Ann. Sec. 62-7-201(a)(4) and Sec. 62-7-201(b), the designation was ineffective, with the result that any appointment of a successor trustee subsequent to the filing of the Petition would be subject to the jurisdiction and approval of the probate court.

Provisions for Appointment of a Successor Inapplicable to South State Bank.

Unlike the provisions of the Insurance Trust, which include succession provisions applicable to any fiduciary, including but not limited to Wachovia Bank, N.A., the mechanism for naming a successor set out in the provisions of the Family Trust is only applicable to Wachovia Bank. For comparison, Article 7 of the Insurance Trust expressly provides a mechanism for trustee succession in the event that “WACHOVIA BANK OF SOUTH CAROLINA, N.A., or any successor as herein defined should fail to qualify [...] or for any reason should fail or cease to act.” *Ins. Tr. p. 14* (emphasis added). Likewise, Article 12 of the Insurance Trust provides that “Any Trustee may resign this trusteeship” and dictates that in such event a successor is to be named pursuant to the provisions in Article 7. *Ins. Tr. p. 24* (emphasis added). In contrast, the mechanisms set forth in Item X and Item XI of the effective provisions of the Family Trust are made applicable solely to the appointment of a successor of Wachovia Bank, and the provisions are silent as to the substitution of any subsequent successors. For this reason, any trustee that replaced Wachovia Bank, such as the Petitioner South State Bank, could only be removed or replaced by an order of a court of competent jurisdiction; therefore, the order adopted by the probate court finding that George L. Garmedia, CPA [sic] was properly appointed as trustee of the Family Trust is erroneous, as is the ruling of the circuit court affirming the probate court’s findings.

Vote Not Taken prior to Hearing; no Evidence on the Record that Vote took Place at all. The effective provisions of the Family Trust relating to the appointment of a successor trustee are contained in Item X and Item XI. First, Item X provides that the testator’s children acting “by a majority vote shall have the ability to remove *Wachovia*

Bank, National Association as my Personal Representative and Trustee” and appoint a successor. *Codicil II p. 3* (emphasis added). Item XI provides that “if *Wachovia Bank, N.A.* should fail to qualify [...] or for any reason should cease to act [...] the successor [...] shall be an individual or another bank or trust company [...] designated by my oldest living child” or by the court if the oldest living child fails to act. *Will p. 4* (emphasis added).

In regards to Item XI of the Family Trust, no one has argued that Petitioner South State Bank ceased to act; however, even if it had, it is undisputed that the attempted designation of a trustee by the oldest sibling had not been completed prior to the date that South State Bank filed and served its Summons and Petition, and therefore any attempted designation of a successor trustee of the Family Trust would be ineffective for the same reason that such an attempted designation would be ineffective as to the Insurance Trust. In fact, the Petition of South State Bank was filed on August 29, 2016 and served on August 30, 2016, and the letter of designation and acceptance was not mailed to the probate court until October 31, 2016. *MHW letter*. In that letter, counsel for the Respondent Beneficiaries writes that in regards to the Family Trust, “*the family will be calling for a vote shortly* and will advise the Court as to the results of such vote [emphasis added].” Ultimately, a hearing on South State Bank’s Petition was held on March 1, 2017; a vote to replace South State Bank was not attempted until March 15, 2017; the probate court issued its final order on June 27, 2017; no evidence of the vote was ever submitted to the probate court; and the evidence of the vote was not even submitted to the circuit court until on or about October 11, 2017. Because South State Bank had filed and served its Summons and Petition, and invoked the jurisdiction of the probate court before any vote had taken place, any effort to replace South State Bank by majority vote after such filing- particularly after

the hearing- would be ineffective and would be subject to the review and approval of the probate court.

Finally, as can be seen from the timeline in the above paragraph, the Respondent Beneficiaries did not submit any evidence to the probate court that would indicate that any vote as to trustee succession had taken place prior to June 27, 2017, the date on which the probate judge signed the order that is being appealed; furthermore, the Respondent Beneficiaries did not submit any such evidence to the probate court at all.¹¹ Pursuant to S.C. Code Ann. Sec. 62-1-308(i), no new evidence may be presented to the appellate court presiding over the appeal, so any evidence that the Respondent Beneficiaries may attempt to introduce in this regard, or may have already attempted to introduce in this regard, would not be properly part of the record that may be considered by the court.

¹¹ On October 11, 2017, counsel for the Respondent Beneficiaries filed a Return of the Respondents in response to Appellants' Statement of Issues on Appeal. Documents evidencing a family vote taken on March 15, 2017 were attached to the Return as Exhibit 2. The documents show that the vote was not completed until two weeks after the hearing on March 1, 2017. Furthermore, the documents were never submitted to the probate court or the circuit court until October 11, 2017, more than three months after the probate judge signed the order of June 27, 2017; thus, pursuant to S.C. Code Ann. Sec. 62-1-308(i), the documents regarding the family vote are "new evidence" that may not be presented for consideration on appeal.

3. The circuit court erred in affirming the probate court's ruling that George L. Garmedia, CPA [sic] is an appropriate trustee for both the Insurance Trust and the Family Trust.

3(a). The attempted designation by Kenneth J. Boniface, Jr. was ineffective, and any opportunity to designate a successor trustee of the Insurance Trust should have been vested in Mary E. Boniface, the oldest Boniface child as of the date of the hearing on March 1, 2017.

For the reasons set out above in section 2(a), the attempted designation by Kenneth J. Boniface, Jr. was ineffective, and subsequent to the failed designation attempt by Kenneth J. Boniface, Jr. in October of 2016, Kenneth J. Boniface, Jr. died on January 10, 2017, making Mary E. Boniface the oldest Boniface child and the oldest living beneficiary of the Insurance Trust. The Settlor / Testator of the Insurance Trust and Family Trust likely did not anticipate the vitriolic discord between the various beneficiaries at the time that Item XI of the Family Trust and Articles 7 and 12 of the Insurance Trust were drafted; however, to the extent that the probate court was inclined to show deference to the desires of the oldest Boniface child in regards to trustee succession, the probate court should have shown greater deference to the desires of Mary E. Boniface than those of the deceased Kenneth J. Boniface, Jr. At the hearing, the Court was made aware that Kenneth J. Boniface, Jr. was deceased and that Mary E. Boniface was the oldest living Boniface child as of the date of the hearing. *Transcr. p. 18, lines 3-14*. Further, the court was made aware that Mary E. Boniface did not agree to the appointment of the accounting firm or its partner as successor, and any show of greater deference to the desires of Kenneth J. Boniface, Jr. than to the desires of Mary E. Boniface would amount to an abuse of judicial discretion.

3(b). The Appellant Beneficiaries are the sole beneficiaries of the Family Trust and rely heavily on distributions from the Insurance Trust; there is substantial discord and irreconcilable differences between the Appellant Beneficiaries and the Respondent Beneficiaries; the letter of acceptance evidences partiality towards the Respondent Beneficiaries; and George L. Garmendia, CPA is a longtime personal friend of one of the Respondent Beneficiaries and counsel for the Respondent Beneficiaries.

Appellants are Sole Lifetime Beneficiaries of the Family Trust and Rely Heavily on Distributions from the Insurance Trust. The Appellants are the sole lifetime beneficiaries of the Family Trust. The Testator's concern for the wellbeing of the Appellants is evidence by the fact that the Testator amended the provisions of his original twice, progressively increasing the percentage of the residuary passing to the Family Trust as well as the protection of the Appellants' interests. *See Original Will, Codicil I, and Codicil II.* In considering the purposes of the Family Trust and the best interests of the sole lifetime beneficiaries of the Family Trust, the court should have given more weight to the fact that the Appellants disagreed with the appointment of Mr. Garmendia and the CPA firm as successor trustee of the Family Trust. In addition, the provisions of the Family Trust contained in Item XI permit the oldest living Boniface child to name the successor of Wachovia Bank, N.A., and so the court should have also given due consideration to the desires of Mary E. Boniface as the oldest living Boniface child. The liquid assets of the Family Trust have been completely expended for the benefit of the Appellants, and the sole remaining asset of the Family Trust is a 31.06% interest in the FLP; as a result, the assets of the Insurance Trust are now the sole source of distributions to the Appellants. *Prob Transcr. p. 9, line 23 to p. 10, line 10.*

As a result of the depletion of the liquid assets of the Family Trust, the Appellants are now heavily reliant on distributions from the Insurance Trust. Both of the Appellants are disabled and are unable to earn an income, and the Appellants live in the residence that is titled in the name of the Insurance Trust. In 2016, nearly \$40,000.00 in distributions were made from the trusts for the benefit of the Appellants, including expenses relating to the Mount Pleasant residence. *Ins. Tr. Acct. p. 1; Will Tr. Acct. p. 1.* In 2015, more than \$65,000.00 in distributions were made from the trusts for the benefit of the Appellants, including expenses relating to the Mount Pleasant residence. *Ins. Tr. Acct. p. 2; Will Tr. Acct. p. 2.* In 2014, more than \$60,000.00 in distributions were made from the trusts for the benefit of the Appellants, including expenses relating to the Mount Pleasant residence. *Ins. Tr. Acct. p. 3; Will Tr. Acct. p. 3.*

Substantial Discord. It is clear from the record that there is substantial discord and irreconcilable differences between the Appellant Beneficiaries and the Respondent Beneficiaries. Throughout their pleadings the Respondents characterize themselves as the “Majority Beneficiaries” and the Appellants as the “Minority Beneficiaries,” and in its order, the probate court finds that there are “irreconcilable differences between the positions of the majority beneficiaries and the minority beneficiaries” which are at least somewhat likely to result in future litigation. In order to create liquidity, the Appellants and Respondent South State Bank voted to sell the beach house that has failed to produce any distributable funds for the limited partners, and all of the Respondent Beneficiaries voted not to sell the beach house¹². *SSB Petition p. 2.* At the hearing on March 1, 2017, John L. Boniface repeatedly asserted that funds from the Insurance Trust were being

¹² This fact is deemed to be admitted by the Respondent Beneficiaries pursuant to Rule 8(d), SCRPC.

wasted by way of disbursements from the trust for the benefit of the Appellants, much of which was used to pay for the residence that the Appellants lived in and for the Appellants' health insurance. *See Ins. Tr. Acct. pp. 1-3.* Counsel for the Respondent Beneficiaries and John L. Boniface vigorously argued that the trustee of the Insurance Trust was obligated to withhold distributions for the benefit of the Appellants until the FLP interests of the Appellants and the Will Trust were liquidated, even though the amount that John L. Boniface indicated was to be paid for the interests was far less than the corresponding fair market value of the underlying asset of the FLP (the beach house has been appraised at \$1,650,000.00 and the Appellants and the Will Trust hold a combined 40% interest in the FLP; John L. Boniface indicated their interests could be redeemed for approximately \$138,000.00). *Prob. Transcr. p. 71, line 13 to p. 72, line 11.* Also on or about June 14, 2017, a motion was filed on behalf of the Respondent Beneficiaries asking the probate court to order South State Bank to cease distributions to the Appellants or at least reduce the amount of the distributions to the Appellants. *Prob. Ct. Motion.*

The Letter of Acceptance Evidences Partiality. The letter of acceptance signed by George L. Garmendia, CPA whereby Hyland Ruddy & Garbett, CPAs, LLC agrees to become the successor trustee of the trust estates evidences partiality toward the Respondent Beneficiaries. Pursuant to S.C. Code Ann. Sec. 62-7-803, a trustee has a duty to act impartially in administering the assets of a trust; however, the actions by which the Respondent Beneficiaries attempted to name the accounting firm as successor trustee evidenced an unmasked attempt to circumvent the jurisdiction of the probate court and obtain a fiduciary who would be subservient and/or partial to their interests. In their Return filed on or about October 13, 2016, the Respondent Beneficiaries indicated that they

“object to the Court attempting to appoint a successor trustee,” arguing that the authority of the probate court- even after the jurisdiction of the court had been invoked by an interested party- is subordinate to the administrative provisions contained in the estate planning instrument. *Resp. Response para. 6.* The letter of acceptance by the accounting firm provided further evidence of partiality, as the letter was addressed to “Mr. Ken Boniface, Trustee” when in fact South State Bank was trustee. In addition, the letter indicates that it was “accepted by K J Boniface” as “Partner” on 10/10/2016, apparently with the knowledge and approval of the accounting firm. The fact that George L. Garmendia, CPA, as partner of the firm addressed the letter individually to one of the Respondent Beneficiaries and incorrectly identified the beneficiary as a fiduciary, and then allowed the same beneficiary to accept the substitution as a “Partner” of the FLP instead of as the trustee or beneficiary of one or more of the trusts, provides evidence of partiality in that it demonstrates that Mr. Garmendia either was not fully aware of the circumstances in which he was agreeing to serve or that Mr. Garmendia attributed a greater duty to Mr. Ken Boniface (Kenneth J. Boniface, Jr.) than was actually owed, and also demonstrates a lack of understanding of trust and estate law.

George L. Garmendia, CPA is a Personal Friend of John L. Boniface and Counsel for Respondent Beneficiaries. George L. Garmendia, CPA is a longtime personal friend of Respondent John L. Boniface, as well as counsel for the Respondent Beneficiaries, and it appears that Mr. Garmendia was misled in regards to the circumstances under which he was agreeing on behalf of his accounting firm to serve as successor trustee of the trusts. On March 7, 2018, George L. Garmendia, CPA sent an email to counsel for the Appellants in which Mr. Garmendia advises as follows: “Not

knowing anything about the law and conflicts of interest, I'm informing by this email that I know both Mark Wall and John Boniface from our school days-they were the ones who contacted me once Ken decided he couldn't continue as trustee and asked me if I would agree to replace him." *GLG email 03072018* (emphasis added). Under S.C. Code Ann. Sec. 62-7-803, a trustee has a duty to act impartially in administering the assets of a trust, and the longtime personal relationship between Mr. Garmendia and the Respondent beneficiaries would substantially impair Mr. Garmendia's ability to act impartially in regards to the respective interests of the Appellant Beneficiaries and the Respondent Beneficiaries. Appellants acknowledge that the email referenced herein was not received by the undersigned counsel or submitted to the court until after entry of the probate court's final order entered on June 27, 2017, and that this Court would ordinarily be barred from considering such evidence pursuant to S.C. Code Ann. Sec. 62-7-308(i); however, the Appellants contend that Appellants would not be barred from introducing the email as evidence at a subsequent proceeding in the trial court, and would ask the Court to take the email evidence into account in the interest of judicial economy.

4. The circuit court erred in affirming the probate court's ruling that failed to award the Appellants their attorney's fees and costs, when the Appellants are beneficiaries of both of the trust estates at issue, and the Appellants are both disabled and heavily reliant on distributions from the trusts, and the Petition filed by the Petitioner contemplated a final distribution of the assets of the trusts, and the Respondent Beneficiaries moved the court to order the acting trustee to cease making distributions for the benefit of the Appellants.

Relevant Law. Both the South Carolina Probate Code and the South Carolina Trust Code permit a court to award attorney's fees and costs in the interest of justice. S.C. Code Ann. Sec. 62-1-111 provides that "in a formal proceeding, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the estate that is the subject of the controversy." Similarly, S.C. Code Ann. Sec. 62-7-1004 provides that "in a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy."

In addition, section 503(b)(2) of the Uniform Trust Code promulgated by the National Conference of Commissioners on Uniform State Laws provides an exception to a spendthrift trust for a creditor who has provided services for the protection of a beneficiary's interest in the trust. The policy justification for this exception to spendthrift protection is that it allows a beneficiary of modest means to overcome an obstacle that might otherwise prevent the beneficiary from obtaining services essential to the protection or enforcement of the beneficiary's rights under the trust. *See* UTC Sec. 503(b)(2), *comment*. Even though South Carolina has not adopted this provision verbatim, the underlying policy justifying awards of legal expenses in formal judicial proceedings regarding a trust is the same.

Examples where courts in other jurisdictions have found it appropriate to make an award of attorney's fees include actions where the litigation is necessary for the proper administration of the trust, *see, e.g., Allard v. Pacific Nat'l Bank*, 663 P.2d 104, 112 (Wash. 1983), and in actions to construe the provisions of a trust when there are adverse claims, *see Northern Trust Co. v. Heuer*, 560 N.E.2d 961, 964 (Ill. App. Ct. 1990). Other courts have required one or more beneficiaries to indemnify the trust estate when the beneficiaries are in disagreement as to the necessity of an accounting. *See, e.g., Bryan v. Seiffert*, 94 P.2d 526 (Okla. 1939).

Argument. The Appellants are both disabled and heavily reliant on distributions from the Insurance Trust and the Family Trust. The matter has been staunchly litigated and the Respondent Beneficiaries have moved the probate court to discontinue distributions for the benefit of the Appellants. The original Petition filed by South State Bank contemplated a full and complete division and/or distribution of the assets of the Insurance Trust and the Family Trust, and it was necessary for the Appellants to incur legal expenses in order to protect their interests in the various trusts. Therefore, the circuit court erred in affirming the probate court's ruling that failed to award attorney's fees and costs to the Appellants.

CONCLUSION

The circuit court erred in affirming the probate court's ruling that it would be appropriate for the individual and/or CPA firm solicited by the Respondent Beneficiaries to serve simultaneously as trustee of both the Insurance Trust and the Family Trust, and that such would not be a conflict of interest. The probate court found that there were "irreconcilable differences" between the needs and desires of the various beneficiaries and noted the likelihood of "future litigation"; nonetheless, the probate court treated the appointment of successor trustees for the trusts as a ministerial act, and gave minimal if any consideration to the purposes of the trusts and best interests of the beneficiaries with diverse needs. The circuit court affirmed the probate court's ruling that the trustee would be a "nominal" party and not a "necessary" party as to any lawsuits, even though the trustee of the Family Trust will hold an ownership interest in the FLP and will be the proper party to bring an action against the general partner of the FLP, and will have a duty to enforce claims of the trust. The trustee of the Family Trust will have a *prima facie* action against the general partner of the FLP, and the general partner of the FLP is an LLC that has one of the Respondent Beneficiaries as its sole member. Therefore, the appointment of the individual and/or CPA firm solicited by the Respondent Beneficiaries to serve simultaneously as trustee of both trusts is an abuse of judicial discretion, and the circuit court's ruling should be reversed.

The circuit erred in affirming the probate court's ruling that George L. Garmedia, CPA [sic] was properly appointed as trustee of the Insurance Trust and the Family Trust. South State Bank had already invoked the jurisdiction of the probate court prior to the

attempted exercise of the appointment of a trustee for either of the trusts. Neither George L. Garmedia, CPA [sic] nor Hyland Ruddy & Garbett, CPAs, LLC met the qualifications set forth in the provisions of the Insurance Trust. The trustee succession provisions in the Family Trust relied upon by the Respondent Beneficiaries and the lower courts are not applicable to South State Bank, and there is no evidence properly on the record to support the lower courts' findings that the vote required by the Family Trust provisions had actually taken place. Therefore, this Court should reverse the circuit court and the probate court because the ruling of the lower courts that a trustee had been properly appointed for the Insurance Trust amounts to an error of law, and the ruling of the lower courts that a trustee had been properly appointed for the Family Trust amounts to an error of law and relies on findings of fact that are not supported by the record.

The circuit court erred in affirming the probate court's ruling that George L. Garmedia, CPA [sic] would be an appropriate trustee for the Insurance Trust and an appropriate trustee for the Family Trust. The attempted designation by Kenneth J. Boniface, Jr. was ineffective, and any opportunity to designate a successor trustee of the Insurance Trust should have been vested in Mary E. Boniface. The Appellant Beneficiaries are the sole beneficiaries of the Family Trust and rely heavily on distributions from the Insurance Trust. There is substantial discord between the beneficiaries. The letter of acceptance evidences partiality towards the Respondent Beneficiaries and George L. Garmedia, CPA is a longtime personal friend of Respondent John L. Boniface as well as counsel for the Respondent Beneficiaries. This Court should reverse the rulings of the lower courts which find that Mr. Garmedia is an appropriate trustee for each of the trusts as an abuse of judicial discretion.

The circuit court erred in affirming the probate court's ruling that failed to award the Appellants their attorney's fees and costs. The Appellants are beneficiaries of both of the trust estates at issue, and the Petition filed by Respondent South State Bank contemplated a final distribution of the assets of the trusts. The Respondent Beneficiaries moved the probate court to order the acting trustee to cease making distributions for the benefit of the Appellants, and the Appellants are both disabled and heavily reliant on distributions from the trusts. This Court should reverse the rulings of the lower courts that failed to award the Appellants their attorney's fees and costs.

Wherefore, the Appellants ask this Court to reverse the rulings of the lower courts and remand the matter for the Circuit Court to ascertain an appropriate successor trustee or special administrator of the Insurance Trust, and to ascertain an appropriate successor trustee or special administrator of the Family Trust, and to make a determination as to the reasonable attorney's fees and costs incurred by the Appellants and order that such reasonable attorney's fees and costs be paid to the Appellants by either the Respondent Beneficiaries and/or from the assets of one or more of the trust estates.

Respectfully submitted,

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This _____ day of _____, 2018