

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
IN THE COURT OF COMMON PLEAS
THE HONORABLE WALTON J. MCLEOD, IV
CIRCUIT COURT JUDGE

CASE NO. 2018-002112

IN RE: The Estate of Leroy Fulmer

Mattie Lou Fulmer, Respondent

v.

Elizabeth S. Gainey as Personal
Representative; Elizabeth S. Gainey,
individually; and Dennis C. Gainey,

Of Which Elizabeth S. Gainey as Personal
Representative is the Appellant.

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SC Court of Appeals

RETURN TO RESPONDENT'S MOTION TO DISMISS

Since 1904, the appointment of a personal representative in South Carolina has been immediately appealable. *See Ex parte Small*, 69 S.C. 43, 48 S.E. 40 (1904). This court in *Boyce-Abel*, 305 S.C. 43, 406 S.E.2d 184 (Ct. App. 1991), found an order appointing special administrators “until such time as a Personal Representative(s) shall be formally appointed” and forbade distribution of estate assets) not immediately appealable because it was not a final order. Respondent asserts the orders in this case are similar to the one found in *Boyce-Abel*. However, nothing in the circuit court’s orders indicates the removal of Mrs. Gainey is temporary, and Respondent’s reliance on *Boyce-Abel* is therefore, inapposite.

The testator, Leroy Fulmer, selected Elizabeth Gainey to serve as the personal representative of his estate. *See* Exhibit A (Mr. Fulmer's will). The probate court honored Mr. Fulmer's selection when it issued letters of administration to Mrs. Gainey. Respondent subsequently requested the circuit court remove Mrs. Gainey based on an allegedly improper sale of burial plots pursuant to powers expressly granted to Mrs. Gainey in Mr. Fulmer's will. *See* Exhibit B (Respondent's Motion)

On October 17, 2018 the circuit court granted Respondent's motion, removed Mrs. Gainey, and appointed Carlos Gibbons as special administrator for the estate. *See* Exhibit C (October 17 Order). The order reads:

Therefore, it is hereby ordered that

Elizabeth S. Gainey is removed as Personal Representative and Dennis C. Gainey is disqualified to serve as Personal Representative. It is further ordered that attorney Carlos Gibbons shall be appointed as the Special Administrator of the Estate of Leroy Fulmer to administrate the Estate with the same powers of a personal representative pursuant to the Probate Code.

Exhibit C.

In reaching that conclusion, the court recited that it had concluded that Attorney Carlos Gibbons "is an appropriate person to carry on the administration of the estate during the pendency of the litigation in this matter." Exhibit C. The court said nothing about Ms. Gainey ever returning as PR of the Estate.

Appellant filed a motion to reconsider on the grounds that there was no evidence of good cause for the removal of Ms. Gainey as PR. *See* Exhibit D (Appellant's Motion to Reconsider).

The circuit court denied the motion to reconsider by order entered November 13, 2018 (stating new grounds for the removal), concluding, “The Court’s Form 4 Order dated October 16, 2018 stands.” Exhibit E (November 13, 2018 Order).

In neither order did the circuit court indicate that Ms. Gainey’s removal was temporary. The circuit court did not even suggest a process by which Mrs. Gainey could resume the role selected for her by Mr. Fulmer. The removal of Ms. Gainey as personal representative was permanent. The order is therefore a final order affecting her substantial right to serve as personal representative and affecting Mr. Fulmer’s right to appoint the person of his choice to administer his estate.

“The courts have ever been reluctant to take the management of an estate from those to whom it has been confided by the testator, for to that extent the intention expressed in his will would be defeated.” *Blackmon v. Weaver*, 366 S.C. 245, 251, 621 S.E.2d 42, 45 (Ct. App. 2004), (quoting *Smith v. Heyward*, 115 S.C. 145, 164, 105 S.E. 275, 282 (1920)).

Respondent seeks to interject ambiguity where none exists by citing six words from the first order and three words from the second related to the appointment of Mr. Gibbons: “During the pendency of the litigation” (from the first order) and “at this time” (from the second). However, as with contracts and statutes, a court’s order should be read as a whole, and single clauses should not be read in isolation to create ambiguity. *See e.g., Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 150-51, 533 S.E.2d 597, 601 (Ct. App. 2000) (“All of the policy provisions should be considered, ‘and one may not, by pointing out a single sentence or clause, create an ambiguity’” (quoting *Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976))). Respondent ignores the context of that statement and the plain

language of the circuit court's order. Nothing in the decree portion of either order contains language of limitation on the length of Mr. Gibbons' service.

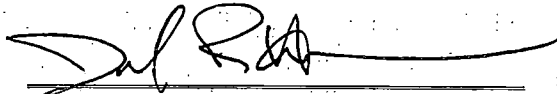
Furthermore, Appellant's reliance on *Trust EIP Created Under the Will of Page v. Henson*, 2018 S.C. App. Unpub. LEXIS 260 (June 13, 2018), while improper under the appellate court rules, nonetheless adds nothing of value to Respondent's argument. See Rule 268(d)(2), SCACR ("Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved."). At any rate, a cursory review of the order on appeal in *Henson* demonstrates the temporary nature of the appointment of a special administrator as *interim* trustee. See Exhibit F.

However, even if the language from the court's order does indicate Mr. Gibbons' appointment has some temporal aspect, none of the language Respondent relies on is related to the removal of Mrs. Gainey. Rather, the court discusses the appointment of Carlos Gibbons "at this time" and "during the pendency of the litigation." However, Mrs. Gainey appeals her removal, not Mr. Gibbons' appointment.

Accordingly, this court should deny Respondent's motion and allow this appeal to proceed.

[SIGNATURE PAGE TO FOLLOW]

December 10, 2018



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Fulmer*

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
IN THE COURT OF COMMON PLEAS
THE HONORABLE WALTON J. MCLEOD, IV
CIRCUIT COURT JUDGE

CASE NO. 2018-CP-32-00315

IN RE: The Estate of Leroy Fulmer

Mattie Lou Fulmer, Respondent

v.

Elizabeth S. Gainey as Personal
Representative; Elizabeth S. Gainey,
individually; and Dennis C. Gainey,

Of Which Elizabeth S. Gainey as Personal
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PROOF OF SERVICE

I certify that I have served the Return to Respondent's Motion to Dismiss on Mattie Lou Fulmer by depositing a copy of it in the United States Mail, postage prepaid, on December, 10, 2018, addressed to her attorney of record, Amy Hill, Esq., P.O Box 7368, Columbia, South Carolina 29202.

December 10, 2018

Tabitha Emanuelli

Tabitha Emanuelli

Paralegal to Robert P. Wood

cc:

Carrie A. Warner, Esquire

Amy L.B. Hill, Esquire

Jonathan E. Spitz, Esquire

Carlos W. Gibbons, Jr., Esquire

Exhibit A

17-03-00

LAST WILL AND TESTAMENT

OF

LEROY FULMER

I, **Leroy Fulmer**, a resident of and domiciled in the County of Lexington and State of South Carolina, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking all Wills and Codicils at any time heretofore made by me. I am currently married to **Mattie Lou Fulmer**. We have two children: **Regina Ooten** and **Lawana Lynn Tribble**. We have three grandchildren, namely: **Elizabeth S. Gainey, Kayla Minick and Dalyn Tribble**.

ITEM I

Provision for Debts. Except as hereinafter provided, I direct that all my legally enforceable debts, secured and unsecured, be paid from my residuary estate as soon as practicable after my death. Notwithstanding this direction, my Personal Representative may cause any debt of mine to be carried, renewed or refinanced from time to time upon such terms and with such securities for its repayment as my Personal Representative deems advisable taking into consideration the best interest of the beneficiaries. Furthermore, if at the time of my death any of the real or personal property herein devised is subject to a mortgage or lien, I direct that the devisee taking such property shall take it subject to the mortgage or lien and that the devisee shall not be entitled to have the obligation secured thereby paid out of my general estate.

ITEM II

General Bequest of Personal and Household Effects. I give and bequeath all of my personal and household effects of every kind including but not limited to furniture, appliances, furnishings, pictures, silverware, china, glass, books, jewelry, wearing apparel, boats, automobiles, and other vehicles, and all policies of fire, burglary, property damage, and other insurance on or in connection with the use of this property as set forth below.

1. I may leave written memoranda disposing of certain items of my tangible personal property and direct that the property be distributed in such manner as may be specified by me in any memorandum

"Memoranda") from time to time and at any time signed by me directing the disposition of this property or any part thereof; provided however that if no such Memoranda are found and identified as such by my Personal Representative within 90 days after my death, then such Memoranda shall be null, void and of no effect whatever. Any property given and devised to a beneficiary who is not living at the time of my death and for whom no effective alternate provision has been made shall pass according to the provisions of the following paragraph, and not pursuant to any anti-lapse statute.

2. In default of such Memoranda or to the extent that such Memoranda do not completely dispose of the property passing hereunder, then I give and bequeath all of such property (or such thereof as is not disposed of by such memorandum or memoranda) to my **wife** if she shall survive me. If my said wife shall not survive me, I give and bequeath **all** of said property to **my children and grandchildren, share and share alike, to be theirs absolutely in fee simple.**

If my beneficiaries do not agree among themselves to the division of the said property devised to them under subparagraph (2) of this Item, my Personal Representative shall make such division among them, the decision of my Personal Representative to be in all respects binding upon my beneficiaries. If any beneficiary hereunder is a minor, my Personal Representative may distribute such minor's share to such minor or for such minor's use to any person with whom such minor is residing or who has the care or control of such minor without further responsibility and the receipt of the person to whom it is distributed shall be a complete discharge of my Personal Representative. The cost of packing and shipping such property shall be charged against my estate as an expense of administration.

ITEM III

Disposition of Residue.

1. I give, devise, and bequeath **undivided one-third of interest in and to** all the rest, residue and remainder of my property of every kind and description (including lapsed legacies and devises), wherever situate and whether acquired before or after the execution of this Will, absolutely in fee simple to my wife, **Mattie Lou Fulmer**, if she shall survive me, and I give an **undivided two-thirds interest** in and to said property as follows:

- A.. One share to my Trustee hereinafter named to be held, administered and distributed for the benefit of **Regina Ooten**, according to the terms of the Supplemental Needs Trust set up in **Item IIV** hereunder.

- B. One share to be held by my Trustee hereinafter named for the benefit of **Dalyn Tribble.**
 - C. One share to be held by my Trustee hereinafter named for the benefit of **Kayla Minick.**
 - D. One share to be distributed to **Lawana Lynn Tribble.**
 - E. One share to be distributed to **Elizabeth S. Gainey.**
2. In the event that my wife, Mattie Lou Fulmer, does not survive me, then I give her undivided one-third interest as follows:
- A. One share to my Trustee hereinafter named to be held, administered and distributed for the benefit of **Regina Ooten**, according to the terms of the Supplemental Needs Trust set up in **Item III** hereunder.
 - B. One share to be held by my Trustee hereinafter named for the benefit of **Dalyn Tribble.**
 - C. One share to be held by my Trustee hereinafter named for the benefit of **Kayla Minick.**
 - D. One share to be distributed to **Lawana Lynn Tribble.**
 - E. One share to be distributed to **Elizabeth S. Gainey.**

ITEM IV

Administration of Supplemental Needs Trust. The Supplemental Needs Trust shall be held, administered and distributed as follows:

1. My Trustee may make distributions to or for the benefit of **Regina Ooten** (name of disabled person), hereinafter referred to as "Beneficiary," subject to the limitations below, or may refrain from making distributions of income and principal to or for the benefit of the Beneficiary during her(his) lifetime. Any income from this Trust which is not distributed shall be added to principal. This trust is intended to provide for the benefit of the Beneficiary and only incidentally to provide for remaindermen in the event of the death of the Beneficiary. This



trust is intended to help assure that the Beneficiary will be able to achieve her(his) maximum potential, to live as independently as the circumstances of her situation permits, and to experience life to the greatest extent possible in as optimum a manner as possible. If ever necessary in my Trustee's opinion, due to judicial decisions or interpretations or the changes in any laws or rules, to conform the Trust provisions to operate and to fully comply with the expressly stated intentions, purposes, and goals in establishing this Trust, the Trustee of this Trust may amend and/or reform this instrument so that it conforms with any regulations that are approved by any governing body or agency relating to 42 U.S.C. § 1396p or related statutes, including state statutes that are consistent with the provisions and purposes of the Revenue Reconciliation Act of 1993 and amendments to such Act.

2. My Trustee shall take into consideration the Special Needs of the Beneficiary. As used herein, "Special Needs" refers to the requisites for maintaining the health, safety and welfare of the Beneficiary available from a public agency, office or department of the state where she resides or from the federal government. "Special Needs" may include, but not be limited to the following:

- A. The purchase of an appropriate house or apartment for the Beneficiary to use as his/her residence and, if appropriate, the residence of the Beneficiary's family or a life estate interest in such property.
- B. The construction or removal of any structures or improvements to an existing structure that will improve the residence for the Beneficiary, whether or not such residence is solely owned by the Beneficiary. Such construction or removal may provide accessible bath and kitchen facilities, access and egress from the Beneficiary's room, widened doorways, or other architectural adaptations necessary to make the dwelling safe and barrier-free or to enhance the residence to provide therapeutic treatment such as a hydrotherapy pool.
- C. Medical expenses to provide the Beneficiary with the full range of medical goods, services, therapies, treatments, surgeries, as well as medicines, food supplements, hearing aids, corrective lenses and other health aids if such goods and services are not provided to the Beneficiary by any public benefits program or other governmental agency or the Beneficiary is not eligible to receive such goods and services from any public benefits program or other governmental agency. Medical expenses shall include the purchase of health and dental insurance. Therapeutic services may include physical therapy, hydrotherapy, occupational therapy, psychological counseling, and speech therapy. Further, services may include ongoing support such as professional childcare, personal attendant care, and visiting nurse services.



- D. Rehabilitative aids and equipment to assist with mobility, activities of daily living and access to and from residential and public buildings, including, without limitation, all forms, standers, advancement chairs, one or more ambulation chairs for each of school and home, a van with wheelchair lift and tie downs, specially adapted car seats, and the replacement of such items as may be needed from time to time.
 - E. Educational expenses including: tuition, books, activity fees, lab fees, and tutoring.
 - F. Educational and recreational equipment such as computers (both hardware and software); musical instruments, and sports equipment that will promote the Beneficiary's health and well-being.
 - G. Travel and lodging expenses and other related transportation costs to assist the Beneficiary with the procurement of any goods or services to improve or enhance the Beneficiary's health, maintenance or education.
 - H. Expenses in connection with the care and upkeep of any pet belonging to the Beneficiary.
 - I. A prepaid burial plan or similar burial arrangements.
3. At any time when it is determined by the Trustee to be in the Beneficiary's best interest to qualify for Supplemental Security Income, Medicaid or similar benefits under the then existing rules and regulations relating to the respective programs and except for this Trust, her(his) expenses would be paid by the state or federal government or a private agency, the Trustee must limit payments made from this Trust to or for the benefit of the Beneficiary to such amounts from the principal or income, as the Trustee, in its sole discretion, shall determine to be appropriate for the satisfaction of the Beneficiary's Special Needs and the Trustee shall not make payments from the Trust to or for the Beneficiary's benefit which would disqualify the Beneficiary for such benefits.
 4. Any distributions made to Beneficiary which would otherwise disqualify her(him) for benefits identified by the Trustee may be treated as a loan to Beneficiary, and the Trustee must furnish the South Carolina Department of Health and Human Services with schedule (schedule of the monthly payments of principal and interest) that is at a reasonable rate of interest and is actuarially sound (paid back over the life expectancy of the Beneficiary), without any type of self-canceling provision.
 5. The Trustee shall have the authority to expend trust income and/or principal on resources which are "excluded resources", including but not limited to a home or

[Handwritten initials and signatures]

an interest in a home, a car, personal effects or household goods, and preneed burial arrangements, for purposes of government benefits qualification, regardless of whether such investments meet the Trustee's normal standard for investments.

6. The Trustee may, in its discretion, pay from the trust estate reasonable costs incurred in the creation and administration of this Trust and any administrative costs associated with any conservatorship or guardianship or other protective order which may be advisable for the Beneficiary.
7. Unless sooner terminated by exhaustion of corpus, this Trust shall terminate upon the death of the Beneficiary and any remaining balance shall be distributed to the then living issue of the Beneficiary, per stirpes, or if none, to my then living issue, per stirpes.
8. This is a spendthrift trust. the Beneficiary's access to the trust is restricted. No part of the income, accumulated income or principal of this Trust shall be subject to transfer, assignment, sale, pledge or anticipation in any manner by the Beneficiary or any remainderman, nor are the interests of the Beneficiary or any remainderman to be seized in any manner or held liable for the debts, contracts, obligations or engagements of any kind whatsoever of the Beneficiary or any remainderman.
9. For purposes of determining the Beneficiary's eligibility for benefits, no part of the principal or income of the trust estate shall be considered available to the Beneficiary. Additionally; the Trustee is authorized specifically as follows:
 - A. In the event the Trustee is requested by any department or agency to release principal or income of the Trust to or on behalf of the Beneficiary to pay for equipment, medication, private agencies, or in the event the Trustee is requested by any department or agency administering such benefits to petition the Court or any other administrative agency for the payment out of trust principal or income for this purpose, the Trustee may deny such request.
 - B. The Trustee is authorized to contest and defend, including appeals, at the expense of the trust estate, any proceeding in any court of competent jurisdiction by any organization or governmental agency seeking to reduce or eliminate the Beneficiary's eligibility for government financial and other assistance, or seeking payment or reimbursement for benefits extended to or for the benefit of the Beneficiary or any other proceeding for the same or any similar purpose. The Trustee shall have discretion with regard to the defense of any such claim, including the management of all litigation which may result. The Trustee shall also be authorized, in its complete discretion, to settle, in whole or in part, or otherwise

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compromise any such claim or litigation.

- C. The Trustee shall investigate and determine whether any governmental or private assistance programs exist for which the Beneficiary may be eligible, and whether the distribution by the Trustee would reduce or eliminate any benefits to which the Beneficiary may be eligible or may be receiving from government or private assistance programs. The Trustee is authorized to employ, at the expense of the Trust, attorneys, accountants, financial advisors, or other professionals to assist in making determinations required hereunder. It is suggested that my Trustee arrange for an annual evaluation of the Beneficiary to address the following topics:

- i. her(his) physical condition, rehabilitation, and training progress;
- ii. recreational, leisure time, and social needs, and the appropriateness of existing program services; and
- iii. laws and administrative practices relating to various governmental financial assistance.

ITEM V

Nomination of Personal Representative. I hereby nominate, constitute

and appoint **Elizabeth S. Gainey** as Personal Representative of this my Last

Will and Testament and direct that no bond shall be required. If for any reason (s) he shall be unable or unwilling to serve or to continue to serve, then I nominate as substitute or successor Personal Representative **Dennis C. Gainey** with the same authority and responsibility and direct that no bond shall be required.

ITEM VI

Nomination of Trustee. I hereby nominate, constitute and appoint **Elizabeth S. Gainey** as Trustee of any Trusts created herein, and direct that no bond shall be required. If for any reason (s) he shall be unable or unwilling to serve or to continue to serve, then I nominate **Dennis C. Gainey** as substitute or successor Trustee with the same authority and responsibility and direct that no bond shall be required.



ITEM VII

Definition of Personal Representative and Trustee. Whenever the word "Personal Representative" or "Trustee" or any modifying or substituted pronoun therefore is used in this my Will, such words and respective pronouns shall be held and taken to include both the singular and the plural, the masculine, feminine and neuter gender thereof, and shall apply equally to the Personal Representative or Trustee named herein and to any successor or substitute Personal Representative or Trustee acting hereunder, and such successor or substitute Personal Representative or Trustee shall possess all the rights, powers and duties, authority and responsibility conferred upon the Personal Representative or Trustee originally named herein.

ITEM VIII

Powers of Personal Representative and Trustee. My Personal Representative or Personal Representatives and successors thereto (hereinafter called "Personal Representative") and my Trustee or Trustees and successors thereto (hereinafter called "Trustee"), in the capacity of fiduciary, are authorized in its or their absolute discretion with respect to any property, real or personal, at any time held under any provision of this my Will and without authorization by any court and in addition to any other rights, powers, authority and privileges granted by any other provision of this my Will or by statute or general rules of law:

1. **Retaining property.** To retain any property or undivided interests in property owned by me at the time of my death, including residential property, regardless of any lack of diversification or risk of nonproductivity, as long as deemed by my Personal Representative or Trustee advisable, and to exchange any such security or property for other securities or properties and to retain such items received in exchange, although said property represents a large percentage of the total property of my Estate or the Trust Estate or even the entirety thereof.
2. **Investing.** To invest and reinvest all or any part of my Estate or the Trust Estate in any property or interests, including undivided interests, in property, real, personal, intangible and/or mixed, wherever located, including without being limited to securities of all kinds, stocks of corporations regardless of class, interests in limited partnerships, real estate or any interest in real estate whether or not productive at the time of investment, commodities contracts of all kinds, interests in trusts, investments trusts, whether of the open and/or closed fund types, and participation in common, collective or pooled trust funds or annuity contracts without being limited by any statute or rule of law concerning

investments by fiduciaries; to sell, including short sales, and terminate any investments whether made by me or my Personal Representative or Trustee; to establish, utilize and terminate savings and money market accounts with financial institutions of all kinds; to establish, utilize and terminate accounts with security brokers and in such accounts, to make short sales and to buy on margin and, for such purposes, my Personal Representative and Trustee may pledge any securities so held or purchased with such brokers as security for loans and advances made to the account.

3. **Sales, exchanges, etc.** To sell or dispose of or grant options to purchase any property, real or personal, constituting a part of my Estate or the Trust Estate, for cash or upon credit, to exchange any property of my Estate or the Trust Estate for other property, at such times and upon such terms and conditions as my Personal Representative or Trustee may deem best, and no person dealing with my Personal Representative or Trustee shall be bound to see to the application of any monies paid. [Optional: Provided, however, my Personal Representative may not sell any property which is specifically devised herein or in any Memoranda referred to herein unless necessary to pay my debts or expenses of administration.]
4. **Registration of securities.** To hold any securities or other property in the name of my Personal Representative or Trustee, in its or their own name, in the name of a nominee (with or without disclosure of any fiduciary relationship) or in bearer form.
5. **Cash.** To keep all or any portion of my Estate or the Trust Estate in cash and uninvested for reasonable periods of time, without liability for any loss in income by reason thereof.
6. **Stock rights.** To sell or exercise stock subscription rights or conversion rights and similar rights.
7. **Voting stock.** To refrain from voting or to vote shares of stock owned by my Estate or the Trust Estate at shareholders' meetings in person or by special, limited, or general proxy and in general to exercise all the rights, powers and privileges of an owner in respect to any securities constituting a part of my Estate or the Trust Estate.
8. **Mergers, reorganization.** To participate in any plan of reorganization or consolidation or merger involving any company or companies whose stock or other securities shall be part of my Estate or the Trust Estate, and to deposit such stock or other securities under any plan of reorganization or with any protective committee and to delegate to such committee discretionary power with

relation thereto, to pay a proportionate part of the expenses of such committee and any assessments levied under any such plan, to accept and retain new securities received by my Personal Representative or Trustee pursuant to any such plan, or exercise all conversion, subscription, voting and other rights, of whatsoever nature pertaining to such property, and to pay any amount or amounts of money as my Personal Representative or Trustee may deem advisable in connection therewith.

9. **Borrowing.** To borrow money and to encumber, mortgage or pledge any asset of my Estate or the Trust Estate for a term within or extending beyond the term of the trust, in connection with the exercise of any power vested in my Personal Representative or Trustee.
10. **Leasing.** To enter for any purpose into a lease as lessor or lessee with or without option to purchase or renew for a term within or extending beyond the term of the trust.
11. **Developing.** To subdivide, develop, or dedicate real property to public use or to make or obtain the vacation of plats and adjust boundaries, to adjust differences in valuation on exchange or partition by giving or receiving consideration, and to dedicate easements to public use without consideration.
12. **Repairing.** To make ordinary or extraordinary repairs or alterations in buildings or other structures, to demolish any improvements, to raze existing or erect new party walls or buildings.
13. **Collecting.** To collect, receive, and receipt for rents, issues, profits, and income of my Estate or the Trust Estate.
14. **Insuring.** To insure the assets of my Estate or the Trust Estate against damage or loss and my Personal Representative or Trustee against liability with respect to third persons.
15. **Dual positions.** In buying and selling assets, in lending and borrowing money, and in all other transactions, irrespective of the occupancy by the same person of dual positions, to deal with itself in its separate, or any fiduciary capacity.
16. **Compromising and settling.** To compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims in favor of or against my Estate or the Trust Estate as my Personal Representative or Trustee shall deem best.
17. **Agents, etc.** To employ and compensate agents, accountants, investments

advisers, brokers, attorneys-in-fact, attorneys-at-law, tax specialists, realtors and other assistants and advisors deemed by my Personal Representative or Trustee needful for the proper administration of my Estate or the Trust Estate, and to do so without liability for any neglect, omission, misconduct, or default of any such agent or professional representative provided such person was selected and retained with reasonable care.

18. **Principal and income allocations.** To determine irrespective statute or rule of law, what shall be fairly and equitably charged or credited to Income and what to principal notwithstanding any determination by the courts or by any custom or statute, and whether or not to establish depreciation reserves; however, the discretion granted herein is not absolute, but rather is subject to the standard of reasonableness and good faith to all beneficiaries, impartiality between income and remainder beneficiaries, and may only be exercised in a fiduciary capacity.
19. **Accounting.** To hold and retain the principal of my Estate or the Trust Estate undivided until actual division shall become necessary in order to make distributions; to hold, manage, invest, and account for the several shares or parts thereof by appropriate entries on my Personal Representative's or Trustee's books of account; and to allocate to each share or part of share its proportionate part of all receipts and expenses; provided, however, the carrying of several trusts as one shall not defer the vesting in title or in possession of any share or part of share thereof.
20. **Payments.** To make payment in cash or in kind, or partly in cash and partly in kind upon any division or distribution of my Estate or the Trust Estate (including the satisfaction of any pecuniary distribution) without regard to the income tax basis of any specific property allocated to any beneficiary and to value and appraise any asset; to distribute, in substitution for fractional interests in property, the entire interests in any property having a value equal to such fractional interests, (and to distribute cash, in addition to such entire interests in property, if necessary, in order that the sum of such entire interests and cash shall be equal in value to such fractional interests), and to distribute such asset in kind at its appraised value.
21. **Exercising fiduciary powers.** To exercise any power herein granted with reference to the control, management, investment or disposition of my Estate or the Trust Estate either as Personal Representative or trustee without having to declare in which capacity my Personal Representative or Trustee is acting.
22. **Renunciation and disclaimers.** To disclaim and renounce any interest in any property that I may have at the time of my death; and to surrender, release, renounce, or disclaim any one or more

(Any surrender, release, renunciation, or disclaimer shall be made by written instrument. After any power has been so surrendered, released, renounced, or disclaimed, it shall never again be exercised by any Personal Representative or Trustees.)

23. **Combining and dividing trusts.** To combine assets of two or more trusts if the provisions and terms of each trust are substantially identical, and to administer them as a single trust, if my Trustees reasonably determine that the administration as a single trust is consistent with my intent, and facilitates the trust's administration without defeating or impairing the interests of the beneficiaries; and to divide any trust into separate shares or separate trusts if my Trustees reasonably deem appropriate and the division is consistent with my intent, and facilitates the trust's administration without defeating or impairing the interests of the beneficiaries; or to divide any trust with an inclusion ratio (as defined in Internal Revenue Code Section 2642) of neither one nor zero into two separate trusts representing two fractional shares of the property being divided, one to have an inclusion ratio of one and the other to have an inclusion ratio of zero.
24. **Occupying residence.** To permit any beneficiary or beneficiaries to occupy rent free any residence constituting a part of the assets of a trust for such beneficiary or beneficiaries and to pay the real estate taxes thereon, expenses of maintaining said residence in suitable repair and condition and hazard insurance premiums on said residence.
25. **In general.** In general, to exercise all powers in the management of my Estate or of the Trust Estate which any individual could exercise in such individual's own right, upon such terms and conditions as my Personal Representative and Trustee may deem best, and to do all acts which my Personal Representative and Trustee may deem necessary or proper to carry out the purposes of this my Will.

ITEM IX

Beneficiary Under Age Twenty-Five. If any property hereunder becomes distributable to a beneficiary who has not attained the age of twenty-five (25) years at the time of my death, then such property shall immediately vest in such beneficiary, but notwithstanding the provisions herein, my Personal Representative acting as Trustee shall retain possession of such property in trust for such beneficiary until such beneficiary attains the age of twenty-five (25) years, using so much of the net income and principal of such share as my Trustee deems necessary to provide for the proper medical care, education, support and maintenance in reasonable comfort of the

and such child and his or her issue shall not be considered as issue of such person and of anyone who is by blood or adoption an ancestor of the person.

- (4) **Definition of Per Stirpes.** The term "per stirpes" as used herein has the identical meaning as the term "taking by representation" as defined in the South Carolina Probate Code.
- (5) **Definition of Words Relating to the Internal Revenue Code.** As used herein, any words which from the context in which they are used refer to the Internal Revenue Code shall have the same meaning as such words have for the purposes of applying the Internal Revenue Code to my estate. Reference to the Internal Revenue Code shall refer to the Internal Revenue Code amended to the date of my death.

ITEM XI

Appointment of Guardian, Custodian and Conservator.

I hereby nominate, constitute and appoint **Elizabeth S. Gainey** as testamentary guardian of the person and as custodian of and conservator for the property of **Regina Ooten** and to the extent allowed by law direct that such fiduciary shall serve without bond. If **Elizabeth S. Gainey** shall die, resign or refuse or is otherwise unable to act, then I appoint **Dennis C. Gainey** as testamentary guardian of the person and conservator of the property of **Regina Ooten** and direct that such successor fiduciary shall also serve without bond.

ITEM XII

Contingent Disposition. If, at any time, there is no person qualified to receive my property hereunder, then such property shall be distributed to My heirs at law.

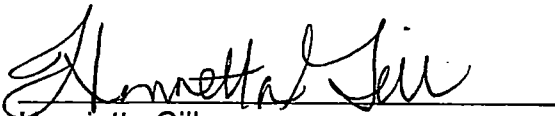
ITEM XIII

Provision Presuming Beneficiary Predeceases Testator. If any beneficiary should die within thirty (30) days of my death, then it shall be conclusively presumed for the purposes of this Will that the beneficiary predeceased me.

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Subscribed, sworn to and acknowledged before me by the Testator/Testatrix whose name appears above and subscribed and sworn to before me by the other witness whose name appears above this 15th day of July, 2016 .



Henrietta Gill
Notary Public of South Carolina (L. S.)

My commission expires: 7/31/2018

JG



f

Exhibit B

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

2017-ES-32-286
2018-CP-32-315

IN RE: The Estate of Leroy Fulmer
Mattie Lou Fulmer,

Plaintiff,

vs.

Elizabeth S. Gainey, as PR, Elizabeth S.
Gainey, Individually, and Dennis C. Gainey

Defendants.

**PLAINTIFF'S EXPEDITED MOTION
TO REMOVE DEFENDANT
ELIZABETH S. GAINERY AS PERSONAL
REPRESENTATIVE, TO DISQUALIFY
DENNIS C. GAINERY FROM ACTING AS
PERSONAL REPRESENTATIVE, AND TO
APPOINT A SPECIAL ADMINISTRATOR
FOR THE ESTATE OF LEROY FULMER**

PLEASE TAKE NOTICE that Plaintiff Mattie Lou Fulmer, the widow of Leroy Fulmer, by and through her undersigned counsel, respectfully moves the Court on an expedited basis and requests 1) Defendant Elizabeth Gainey ("Elizabeth") be removed as the Personal Representative because she gave away the Estate owned burial plots to her husband Defendant Dennis Gainey ("Dennis"), 2) Dennis should be disqualified from serving as alternate personal representative, 3) Dennis should be required to return the Estate's burial plots, for which he paid no compensation in an effort to hinder Plaintiff's ability to be buried next to her husband, and 4) a special administrator be appointed for the Estate of Leroy Fulmer.

As will be described below, Elizabeth has breached her fiduciary duty owed to the Estate and its beneficiaries by giving away valuable and sentimental Estate property and further misrepresenting the ownership of the same to the Court and beneficiaries. Dennis aided and abetted Elizabeth in her breach of fiduciary duty by receiving the property and is unfit to serve as personal representative and should immediately be required to return the burial plots to the Estate. The urgency of the situation is the fear that Dennis will sell or otherwise dispose of the burial plots such that Plaintiff will not be able to be buried next to her husband of 58 years.

Plaintiff Mattie Lou Fulmer (“Plaintiff” or “Mattie Lou”) is a 77 year old widow who was married to Leroy Fulmer for 58 years prior to his death in February 2017. Mattie Lou is also Elizabeth’s grandmother. In the late spring of 2016, after a prolonged illness, Leroy Fulmer began hospice care at his home that he shared with Mattie Lou. After attempting to care for her husband, Mattie Lou, who suffers health problems herself, was advised by hospice to take a break from caregiving and stay with her daughter who lived next door for a few days. Elizabeth and her husband Dennis quickly volunteered to care for Leroy in Mattie Lou’s absence.

However, once Elizabeth and Dennis began caring for Leroy, they convinced him that Mattie Lou had abandoned him. Leroy developed a demeaning and questioning attitude towards Mattie Lou. When Mattie Lou removed money from the joint savings account that she shared with her husband, Elizabeth and Dennis began a campaign against Mattie Lou claiming that she had stolen money from Leroy referring to the joint account which represented the couple’s life savings. At the same time, Elizabeth and Dennis convinced Leroy to remove Mattie Lou as his Power of Attorney and instead appoint Elizabeth. Further, Elizabeth and Dennis convinced Leroy to deed the vast majority of his real estate to Elizabeth, retaining only a life estate for Leroy. The result was that Mattie Lou’s house and surrounding acreage, which was originally a gift from her family, is now owned 50% by Elizabeth. Despite the fact that Elizabeth and Dennis had succeeded in having almost all of Leroy’s assets transferred to Elizabeth, they convinced him to draft a new will in October 2016, leaving only an elective share for Mattie Lou despite his prior will where Mattie Lou was essentially his sole beneficiary. Mattie Lou has filed the above action questioning the validity of the October 2016 Will.

Although Mattie Lou denies the validity of her husband’s October 2016 Will submitted for probate, the 2016 Will names Elizabeth to serve as personal representative and her husband

Dennis to serve as personal representative in the event Elizabeth cannot serve. Mattie Lou has filed a Complaint asking that the 2016 Will be declared invalid as well as the lifetime transfers to Elizabeth from Leroy pursuant to mistake and undue influence asserted against Leroy by Elizabeth and Dennis. While Mattie Lou's case regarding the validity of the Will and the nonprobate transfers is litigated, Elizabeth has been serving as personal representative of Leroy Fulmer's Estate.

However, Mattie Lou recently became aware that Elizabeth, acting as personal representative, has sold the three burial plots owned by Leroy but purchased during their marriage with marital funds for the express purpose of allowing his wife and two daughters to be buried beside him. Through her attorneys, Mattie Lou demanded information regarding the burial plots from Elizabeth, but received none. Only upon subpoenaing the cemetery was Mattie Lou able to discover that Elizabeth had not sold the burial plots adjacent to Mattie Lou's husband of 58 years, but instead Elizabeth gave the burial plots away for no compensation to her husband Dennis. The document purporting to accomplish this gift is attached here to as Exhibit A.

This "gift" was made on September 29, 2017. Yet, attempting to cover up her actions, Elizabeth continued to list the burial plots as inventory owned by Leroy Fulmer in January 2018. See initial inventory and appraisal filed July 14, 2017 and compare the same with the amended inventory signed by Elizabeth and filed January 19, 2018, months after she had given the burial plots away in September 2017. (Both appraisements are attached hereto as Exhibit B).

Burial plots are not typical inventory or real estate. The Supreme Court recognized in *Lanford v. West Oakwood Cemetery Addition, Inc.*, 223 S.C. 350, 356-357, 75 S.E.2d 865, 867-868 (1953) that, "a cemetery plot where one has his close...kin buried occupies an entirely different status from that of any other plot or piece of land which one could own, and from time

immemorial, has been looked upon as hallowed land; and it is but natural that a family desires to be buried in the same burial plot.” The Landford Court found that burial plots have “considerable more than a monetary value...and the loss of a burial plot is irreparable” where a family member can no longer be buried next to their relatives. In this case, Elizabeth’s actions are an attempt to bar her grandmother from being buried next to her husband of 58 years. So, ignoring for the moment the fact that Elizabeth, as personal representative of the Estate simply gave away an asset that she previously valued at \$3,000, the sentimental trauma and anguish that she is inflicting upon her grandmother is immeasurable. Elizabeth has breached her fiduciary duties and should be removed as personal representative immediately.

Pursuant to S.C. Code Ann. § 62-3-703 (2017), “[a] personal representative has a duty to settle and distribute the estate of the decedent in accordance with the terms of a probated and effective will and this code, and as expeditiously and efficiently as is consistent with the best interests of the estate.” Moreover, a personal representative “shall use the authority conferred upon him by this code, the terms of the will, and any order in proceedings to which he is a party for the best interests of successors to the estate.” § 62-3-703. Elizabeth’s actions are in violation of her fiduciary duty as personal representative and thus, she should not be able to continue to act on behalf of the decedent.

Further, the fact that Dennis would participate in this scheme to harm Mattie Lou by accepting the burial plots in exchange for no consideration disqualifies him from acting as personal representative of the Estate upon Elizabeth’s removal. ***Dennis should be required to return the ownership of the burial plots to the Estate immediately.***

For the foregoing reasons, Plaintiff respectfully requests that the Court thereby remove and disqualify Elizabeth from acting as Personal Representative to the Estate of Leroy Fulmer

and disqualify Dennis from being appointed. Plaintiff further asks that this Court appoint a special administrator to administer the Estate of Leroy Fulmer. Finally, but most importantly, Plaintiff asks that the Court require Dennis to return the burial plots to the Estate immediately.

By: /s/Amy L.B. Hill
Amy L.B. Hill, SC Bar # 68541
Gallivan White & Boyd, PA
PO Box 7368
Columbia, SC 29202
ahill@gwblawfirm.com
(803) 779-1833 Ofc
(803) 779-1767 Fax

Attorney for Plaintiff Mattie Lou Fulmer

Columbia, South Carolina
July 5, 2018

Exhibit C

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2018-CP-32-00315

Leroy Fulmer et al
PLAINTIFFS

Elizabeth S Gainey et al
DEFENDANTS

Submitted by: Walton J. McLeod, IV, Presiding Judge	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

This matter came before the Court on October 10, 2018, on the Plaintiff's Expedited Motion to Remove Defendant Elizabeth S. Gainey as Personal Representative, to Disqualify Dennis C. Gainey from Acting as Personal Representative, and to Appoint a Special Administrator for the Estate of Leroy Fulmer. Present at the hearing were attorney Robert Wood for the current Personal Representative in her capacity as such, attorney Carrie Warner for the Defendants individually, and attorney Amy Hill for Plaintiff. The parties indicated that if the motion were to be granted, they would approve the appointment of attorney Carlos Gibbons as Special Administrator. Dennis C. Gainey also provided on the record that he would not dispose of the burial plots without approval by this Court.

Based on the documents on file and the testimony given during the hearing, the Court determined that good cause exists for the removal of Elizabeth S. Gainey as the Personal Representative and the disqualification of Dennis C. Gainey as the same. The Court also concluded that attorney Carlos Gibbons is an appropriate person to carry on the administration of the Estate during the pendency of the litigation in this matter.

Therefore, it is hereby ordered that Elizabeth S. Gainey is removed as the Personal Representative and Dennis C. Gainey is disqualified to serve as Personal Representative. It is further ordered that attorney Carlos Gibbons shall be appointed as the Special Administrator of the Estate of Leroy Fulmer to administrate the Estate with the same powers of a personal representative pursuant to the Probate Code.

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

ELECTRONICALLY FILED - 2018 Oct 17 9:14 AM - LEXINGTON - COMMON PLEAS - CASE#2018CP3200315



Lexington Common Pleas

Case Caption: Leroy Fulmer , plaintiff, et al VS Elizabeth S Gainey , defendant, et al

Case Number: 2018CP3200315

Type: Order/Form 4

So Ordered

s/Walton J. McLeod, 2765

Exhibit D

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

Case No. 2017-ES-32-00286
2018-CP-32-315

IN RE: The Estate of Leroy Fulmer,
Mattie Lou Fulmer,

Plaintiff,

v.

Elizabeth S. Gainey as Personal
Representative; Elizabeth S. Gainey,
individually; and Dennis C. Gainey,

Defendants.

**AMENDED
MOTION TO ALTER OR AMEND
ORDER REMOVING PERSONAL
REPRESENTATIVE
PURSUANT TO SCRPC 59(e)**

TO: Amy L.B. Hill, Esquire and Jonathan E. Spitz, Esquire, Attorneys for Mattie Lou Fulmer:

YOU WILL PLEASE TAKE NOTICE that Elizabeth S. Gainey as Personal Representative hereby moves to alter or amend this Court's Order Removing Elizabeth S. Gainey as Personal Representative, Disqualifying Dennis C. Gainey from Acting as Personal Representative, and Appointing a Special Administrator for the Estate of Leroy Fulmer (hereinafter referred to as the "Removal Order"), attached as Exhibit A, which order was filed on October 17, 2018. Specifically, Elizabeth S. Gainey as Personal Representative seeks to have the order reformed to deny the Plaintiff's motion *in toto*.

This motion is based upon the fact that there is no evidence in the record to support a finding that Elizabeth S. Gainey should be removed as Personal Representative or that Dennis C. Gainey should be disqualified as an alternate. In fact, our courts abhor the removal of a personal representative and, instead, seek to protect the wishes of the testator. *See Smith v. Heyward*, 116 S.C. 145, 164, 105 S.E. 275, 282 (1920), a copy of which is attached hereto as Exhibit B.

The recent case of *Blackmon v. Weaver*, 366 S.C. 245, 621 S.E.2d 42 (Ct. App. 2005), is analogous to the facts here. A copy of that case is attached hereto as Exhibit C. In *Blackmon*, the circuit court removed the personal representative based on hostility among the personal representative and other heirs. As in this matter, there was no evidence of the personal representative failing to perform any duties pertaining to the office, misrepresenting material facts

leading to her appointment, or disregarding any order of the court. Those are the only causes for removal pursuant to S.C. Code Ann. § 62-3-611(b), a copy of which is attached as Exhibit D. The Court of Appeals in *Blackmon* reversed the circuit court, holding that there is a “strong deference shown to the personal representative chosen by the testator,” and the “mere existence of conflict between personal representative and a beneficiary is an inadequate reason for removal of the personal representative. Without a showing of fault, the court will not remove a personal representative simply because the parties do not get along.” *Blackmon*, 366 S.C. at 251, 621 S.E.2d at 45. The *Blackmon* court further held that even where a personal representative favors her own interests, there is no basis for removal. *See id.*

Plaintiff offered no evidence that Elizabeth S. Gainey or Dennis C. Gainey conducted themselves in any way that would be cause for removal under S.C. Code Ann. § 62-3-611(b). In his Last Will and Testament, Leroy Fulmer expressed his intention for Elizabeth S. Gainey to serve as the Personal Representative of his estate and for Dennis C. Gainey to serve in the event that Elizabeth Gainey was unable to perform the necessary duties. Deference must be given to this intent.

Therefore, Elizabeth S. Gainey as Personal Representative respectfully moves for an order amending the Removal Order so as to deny Plaintiff Mattie Lou Fulmer’s Motion to Remove Elizabeth S. Gainey as Personal Representative, to Disqualify Dennis C. Gainey and to Appoint a Special Administrator *in toto*.

Respectfully submitted,

s/Robert P. Wood

Robert P. Wood (6206)

Verne McGough (74972)

Rogers Townsend & Thomas, PC

PO Box 100200

Columbia, SC 29202

(803) 771-7900

robert.wood@rtt-law.com

*Attorneys for Defendant Elizabeth S. Gainey as
Personal Representative of the Estate of Leroy
Fulmer*

October 26, 2018

Exhibit E

A personal representative owes a fiduciary duty to all beneficiaries of the estate. S.C. Code Ann. § 62-3-703(a) (2017) (stating “[a] personal representative is a fiduciary” and must “use the authority conferred upon him . . . for the best interests of successors to the estate”); see also Turpin v. Lowther, 404 S.C. 581, 589-90, 745 S.E.2d 397, 401 (Ct. App. 2013). The existence of a fiduciary duty is a question of law for the court. Turpin, at 589, 745 S.E.2d at 401. The court in Turpin determined that this duty required the personal representative to disclose information affecting the value of the beneficiaries’ interests in the estate before he could negotiate those interests. Id. at 590-91, 745 S.E.2d at 402; see also Moore v. Moore, 360 S.C. 241, 251, 599 S.E.2d 467, 472 (Ct. App. 2004) (providing that a fiduciary must fully disclose to a beneficiary all known information that is significant and material and that when the duty to disclose is triggered, silence may constitute a breach of that duty).

During the hearing on the Expedited Motion to Remove Personal Representative on October 10, 2018, the court asked Ms. Gainey, in her capacity as the Personal Representative of the Estate, if she had communicated with Ms. Fulmer after Mr. Fulmer’s death to which Ms. Gainey replied, “no”. The court declines to determine that Ms. Gainey violated her fiduciary duties based on this response; however, the court determines that because the former Personal Representative had not been communicating with a beneficiary of the Estate regarding the Estate’s administration, the Personal Representative had not been performing her duty. Due to this lack of performance, the court also believes that removing the Personal Representative is in the best interest of the Estate. Additionally, given the close relationship of the former Personal Representative and Mr. Gainey, it is not in the best interest of the Estate for Mr. Gainey to serve as the alternate Personal Representative. Having Special Administrator Carlos Gibbons is in the best interest of the Estate at this time.

Ms. Gainey also argues that Smith v. Heyward, 116 S.C. 145, 105 S.E. 275 (1920) and Blackmon v. Weaver, 366 S.C. 245, 621 S.E.2d 42 (Ct. App. 2005) provide that a court may not remove a personal representative named in a testator’s will based on hostility among the personal representative and other heirs. Ms. Gainey’s argument is misplaced. The court did not remove the former Personal Representative based on mere hostility or the mere existence of conflict between the parties.

Therefore, the Defendant’s aforementioned motion is DENIED. The Court’s Form 4 Order dated October 16, 2018 stands.

ORDER INFORMATION

This order ends does not end the case.
 Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate “N/A” in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$

		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Lexington Common Pleas

Case Caption: Leroy Fulmer , plaintiff, et al VS Elizabeth S Gainey , defendant, et al
Case Number: 2018CP3200315
Type: Order/Form 4

So Ordered

s/Walton J. McLeod, 2765

Exhibit F

CERTIFIED U.S.
PROBATE JUDGE
DORCHESTER COUNTY

Mary Blunt

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER) **2016 SEP -1 PM 12:48**

IN THE PROBATE COURT

CASE NO.: 1994-ES-18-000147-2

CASE NO.: 2014-ES-18-00592

IN RE:)

TRUST EIP CREATED UNDER THE LAST)
WILL AND TESTAMENT OF EUNICE I.)
PAGE DATED OCTOBER 14, 1992)

**ORDER APPOINTING
A SPECIAL FIDUCIARY
AS INTERIM TRUSTEE**

RICHARD S. HENSON AND VANN K.
HENSON,

Petitioners,

v.

ALBERT T. HENSON, JR. and JULIAN
REID HENSON,

Respondents.

PROBATE JUDGE
DORCHESTER COUNTY
2016 AUG 31 PM 3:36

This matter came before the Court on June 29, 2016 on the Petitioners' Motion for the Appointment of a Special Fiduciary as an Interim Trustee. Present for the hearing were Richard S. Henson with his attorney, Trudy H. Robertson, Esq.; Barry Baker, Esq., as attorney for Richard S. Henson and Vann K. Henson concerning the estate matters; and Albert T. Henson, Jr. with his attorney, Daniel F. Blanchard, Esq. Jurisdiction and venue are properly within this Court. Notice of the hearing was properly provided to all of the interested parties.

PROCEDURAL HISTORY

1. Eunice I. Page ("Decedent") passed away on October 6, 1993 with a Last Will and Testament dated October 14, 1992. Decedent's Will left all her cash assets to her daughter, Ann P. Pittillo, and the remainder of her estate to a testamentary trust known as Trust EIP.

2. The primary beneficiary of Trust EIP was Ann P. Pittillo. Trust EIP provides that at the death of Ann P. Pittillo, the Trustee of the Trust EIP shall divide the trust corpus into three

UME
8/31/16

(3) equal shares, subject to certain adjustments, for the benefit of her three (3) grandsons: Albert T. Henson, Jr., Richard S. Henson, and Vann K. Henson.

3. Decedent named Ann P. Pittillo as the Trustee of Trust EIP and named George Hollis Cone to serve as substitute or successor Trustee. Decedent also provided that if Ann P. Pittillo and George Hollis Cone were unable or unwilling to serve, then a "majority of the adult beneficiaries shall designate in a written instrument filed with the Court having jurisdiction over my Will or this Trust, a successor or substitute corporate . . . trustee which shall be a bank or trust company."

4. On July 22, 1997, Ann P. Pittillo, as Personal Representative of the Estate of Eunice I. Page, signed a Deed of Distribution transferring ownership of 605 N. Main Street, Summerville, South Carolina 29483 to "Ann P. Pittillo, as Trustee of Trust EIP created under the Last Will and Testament of Eunice I. Page."

5. As Trustee, Ann P. Pittillo executed a Promissory Note to borrow One Hundred Thousand and 00/100 Dollars from David Whitfield and Glenn Little in the name of the EIP Trust. The Promissory Note was dated December 4, 2013 and required satisfaction of the mortgage by December 3, 2016.

6. The terms of the Promissory Note provide that the lenders will receive twenty percent (20%) interest the first year, twenty-five percent (25%) interest the second year, and thirty percent (30%) interest the third year. There is no duty on Trust EIP to make interim payments, but the note provides that if "balloon payment is not made on or before December 3, 2016, borrower agrees to transfer title to lender in lieu of foreclosure."

7. On April 20, 2014, Ann P. Pittillo passed away leaving the Trustee position for Trust EIP vacant. The named Successor Trustee, George Hollis Cones, predeceased Ann P.

Pitillo. According to the Petitioners, they have been unable to find a corporate trustee willing to take on the position as Successor Trustee.

8. From January 26, 2015 to July 10, 2015, the Court received seven (7) filings from the parties, including:

i. a Petition to Appoint a Successor Trustee (January 26, 2015) filed by Richard S. Henson and Vann K. Henson (hereinafter collectively referred to as "Petitioners");

ii. an Answer (April 2, 2015) filed by Albert T. Henson (hereinafter referred to as "Respondent");

iii. Respondent's Amended Answer, Counterclaim, and Cross-Claim (May 4, 2015);

iv. an Amended Petition to Appoint Successor Trustee and for Subsequent Estate Administration (May 4, 2015) filed by Petitioners;

v. Petitioners' Answers to the Counterclaim and Cross-Claim of Respondent (May 26, 2015);

vi. Respondent's Answer, Counterclaim and Cross-Claim to the Petitioner's Amended Petition to Appoint Successor Trustee and for Subsequent Estate Administration (June 10, 2015); and

vii. Petitioner's Answer to Respondent's Restated Counterclaim and Cross-claim (July 10, 2015).

9. The primary issue outstanding between the parties is the ownership of 605 N. Main Street, Summerville, South Carolina 29483 (hereinafter referred to as "605 N. Main Street.").

10. Petitioners assert that this property is wholly owned by Trust EIP.

11. Respondent alleges that in 1988, prior to Eunice I. Page's death, she conveyed to him the property located at 605 N. Main Street for \$334,000.00 with the understanding that it would be paid as he had money available.

12. On July 15, 2015, this Court ordered the parties to mediate this matter within thirty (30) days of the Order. This Order was amended on August 19, 2015 naming David Whittington, Esq. as the mediator. This Order was again amended on October 14, 2015 naming Robert Watson, Esq. as the mediator because David Whittington, Esq. was unable to serve.

13. On October 12, 2015, the instant Motion was filed, wherein Petitioners requested that a special fiduciary be appointed to serve as interim trustee with the authorization to have access to all records concerning the assets of the Trust and authority over all trust assets.

14. On December 9, 2015, Petitioner's requested an expedited hearing on the Motion for Appointment of Special Fiduciary. The Petitioners claim that the outstanding mortgage poses a threat to the Trust's main asset, 605 N. Main Street.

15. On December 14, 2015, the Court received Respondent's Response to the Motion for an Expedited Hearing, wherein he asserts that an expedited hearing was not necessary as the case was currently pending mediation and the maturity date on the Note was not until the following December. Respondent requested that the Court deny the Motion for Expedited Hearing to allow the parties to mediate.

16. On December 9, 2015, the same day Petitioners filed their expedited motion, the Court sent the Petitioners' attorney a Request for Hearing form in order to schedule the hearing based on the parties' unavailable dates. The Court never received the completed Request for Hearing form from Petitioners in order to schedule the Motion.

17. On April 27, 2016, the Court held a hearing to allow Respondent's attorneys at the time to withdraw from the matter. At the same hearing, the Petitioners, through their attorney Barry Baker, Esq., made a motion for the Court to set a hearing date on their Motion for Appointment of a Special Fiduciary as Successor Trustee. The instant hearing was scheduled at that time.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

A. Appointment of a Special Fiduciary as Interim Trustee of Trust EIP

18. In the instant Motion, Petitioners requested that this Court appoint a special fiduciary as interim trustee as provided for in South Carolina Code § 62-7-704(e). They request that the special fiduciary have the power to access all records concerning the assets of the Trust, have authority over the Trust assets, and receive reasonable compensation.

19. South Carolina Code § 62-7-704(e) provides that "[w]hether or not a vacancy in a trusteeship exists or is required to be filled, the court may appoint an additional trustee or special fiduciary whenever the court considers the appointment necessary for the administration of the trust."

20. The Petitioners also rely on South Carolina Code § 62-7-704(b) which states that a "vacancy in a trusteeship must be filled if the trust has no remaining trustee."

21. At this time, Trust EIP does not have a trustee.

22. On June 29, 2016, Respondent, by and through his attorney Daniel F. Blanchard, III, filed a Memorandum of Law in Opposition to the Motion for Appointment of Special Fiduciary as Interim Trustee.

23. Respondent asserted that one reason the Petitioners' Motion should be denied is because they did not properly support their motion with an affidavit in accordance with South Carolina Rules of Civil Procedures 6(d).

24. South Carolina Rules of Civil Procedures 6(d) states that "[w]hen a motion is to be supported by affidavit, the affidavit shall be served with the motion."

25. The Court finds that the Petitioners' Motion does not require an affidavit. Rule 6(d) is not a mandatory rule for all motions. South Carolina Code § 62-7-704(b) only requires a showing that there is a vacancy in the trusteeship. The Court's file for Trust EIP is replete with evidence that there is a vacancy in the trusteeship. As such, an affidavit is not required.

26. Therefore, based on South Carolina Code § 62-7-704(b) and (e), the Court finds that there is a vacancy in the trusteeship that needs to be filled and hereby appoints Ashley Andrews, Esq. as the special fiduciary to serve as the Interim Trustee.

B. Duties and Responsibilities of the Special Fiduciary

27. Respondent also argued that through the substance of their Motion, Petitioners were requesting injunctive relief because the requests of their motion will alter the *status quo*.

28. Petitioners have requested that the appointed special fiduciary have access to all of Respondent's records concerning the assets of the Trust EIP and have authority over Trust EIP assets to include collection of rent and other income generated by 605 N. Main Street.

29. Petitioners asserted on the record that their primary goal is to preserve the asset of 605 N. Main Street to ensure that the mortgage is paid or that the due date is extended.

30. Currently, Respondent asserts that he is in possession of, storing assets on, and leasing portions 605 N. Main Street. Additionally, it was asserted that Respondent has also been paying all taxes associated with the property.

31. The primary dispute regarding the ownership of 605 N. Main Street is not currently before the Court, but will need to be decided after a full merit's hearing.

32. Because of this outstanding issue, it is important that the Court treads lightly in regards to the duties and responsibilities assigned to a special fiduciary in order to ensure that the *status quo* is maintained in this matter to the greatest extent possible.

33. While on the face of the Motion, Petitioners did not request an injunction, it appears that some of their requested relief would have the consequence of altering the *status quo*.

34. Respondent provided his own affidavit wherein he asserted that he has had exclusive possession of 605 N. Main Street since 1988, that he has made improvements to the land, that he stores property on the land, and that he has leased the land. Affidavit of Albert T. Henson, Jr., ¶¶ 10-13.

35. Petitioners did not provide the Court with any testimony or evidence contradicting or denying the Respondent's claims.

36. While the recorded Deed of Distribution and outstanding mortgage shows the owner of 605 N. Main Street as Trust EIP, Respondent is currently in possession of it.

37. By giving the Special Fiduciary control over the property as well as the collection of rent and other incomes generated by 605 N. Main Street, the Court would be effectively dispossessing Respondent of the property and in turn awarding Petitioners' injunctive relief.

38. While injunctive relief was not plead by Petitioners, that would be the effect.

39. The South Carolina Court of Appeals has stated that "[o]rdinarily the purpose of a temporary injunction is merely to preserve the existing status during the litigation, and as a general rule, subject to some exceptions, it will not be allowed to have the effect of transferring

the possession of property from a litigant in possession to another who claims a right to possess.”
Marshall v. Pence, 2005 WL 7083978, *3 (S.C. Ct. App. 2005).

40. Here, the Respondent is in possession of 605 N. Main Street, and the Court will not dispossess him of this property at this time.

41. However, the outstanding mortgage Trust EIP has taken out, with 605 N. Main Street as collateral, poses a major risk to the ownership of this property. If this mortgage is not paid off or the due date extended prior to December 3, 2016, then all parties stand to lose.

42. The Mortgage was taken out by Ann P. Pittillo as Trustee of the Trust EIP. At this time, no party has standing to renegotiate the outstanding mortgage on behalf of the Trust. Therefore, the appointment of a Special Fiduciary is necessary in order to preserve 605 N. Main Street for all parties and to negotiate an extension of the current loan or other appropriate action to pay the mortgage in her sole discretion.

43. While Petitioners assert that the only asset of Trust EIP is 605 N. Main Street, the Special Fiduciary shall ensure there are no other assets titled in the name of Trust EIP.

44. Respondent asserts that he purchased this property from his grandmother, Eunice I. Page, prior to her passing and before it was titled in the name of the Trust. Respondent shall work with the Special Fiduciary to provide any records he may have regarding this transfer. Additionally, he shall provide her copies of all agreements he, Eunice I. Page, and/or Ann Page Pittillo may have entered in with another party to lease a portion or all of the land at 605 N. Main Street since January 1, 1988.

45. All actions taken by the Special Fiduciary shall be done in the interest of maintaining the *status quo* pending a final hearing on the merits.

46. The Special Fiduciary shall be compensated at \$200/hour. The Court will make a determination as to how her fees shall be paid at the final hearing on the merits.

C. Respondent's Supporting Affidavits and the Dead Man's Statute.

47. Respondent supports his position by filing with the Court his own affidavit as well as the affidavits of Sharon Burbage, Jim Wright, Lee Agnew, and Kane Wright (collectively referred to as the "Affidavits").

48. Petitioners requested that the Court's strike and refuse to consider the affidavits filed by Respondent because they contain inadmissible hearsay and testimony barred by the Dead Man's Statute.

49. While the Petitioners and Respondents made arguments concerning the Dead Man's Statute, at this time, the Court will decline to rule on this issue as the Court did not consider statements that would be objectionable under the statute. Any statements that related to Eunice I. Page, Ann P. Pittillo, or the purchase and/or ownership of 605 N. Main Street are irrelevant to the underlying motion.

50. The Court considered only portions of the Affidavit of Albert T. Henson, Jr. The portions considered were paragraphs 10 – 14, which related directly to his current possession and use of 605 N. Main Street. The Court did not consider any further information from the Affidavit of Albert T. Henson, Jr. as it was irrelevant to the underlying Motion.

51. While the Affidavits of Sharon Burbage, Jim Wright, Lee Agnew, and Kane Wright will be included in the Court's files for the Estate of Ann Page Pittillo and Estate of Eunice I. Page, the Court did not consider these documents in making this decision.

THEREFORE, it is ORDERED, ADJUDGED, and DECREED that:

A. Ashley Andrews, Esq. is hereby appointed as a special fiduciary to serve as Interim Trustee of the Trust EIP;

B. As Special Fiduciary, Ms. Andrews shall:

i. In her sole discretion, negotiate with the lender and/or parties to extend the due date on the current mortgage in order for litigation to be finalized or have the mortgage paid off prior to the December 3, 2016 due date;

ii. Determine if any other assets (including bank accounts) are titled in the name of Trust EIP;

iii. Recover all records Respondent may possess that evidences any transfer that Eunice I. Page may have made to Respondent of 605 N. Main Street;

iv. Collect copies of all agreements Respondent, Eunice I. Page, and/or Ann Page Pittillo may have entered into with another party to lease a portion or all of the land at 605 N. Main Street since January 1, 1988; and

v. Ensure all actions taken as Special Fiduciary are done in the interest of maintaining the status quo pending a final hearing on the merits;

C. The Special Fiduciary shall be compensated at \$200/hour. She shall submit an Affidavit of her fees and expenses and shall include a detailed billing statement for the Court's review;

D. The Court shall make a determination as to how the Special Fiduciary's fees will be paid at the final hearing on the merits; and

IT IS SO ORDERED!

31st day of August, 2016
St. George, South Carolina

Molly D. Edwards

Molly D. Edwards
Associate Probate Judge
Dorchester County Probate Court

4779
8/31/16