

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Carmen T. Mullen, Circuit Court Judge

Case No. 2015-CP-07-1980

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JAN 29 2018

SC Court of Appeals

In Re: Eleanor McCarthy Lenahan Trust under agreement Dated July 12, 2001.

Kathleen Suzanne Heslin and Maureen Teresa Mosley, in their capacities as
Cotrustees of the Eleanor McCarthy Lenahan Trust under agreement
dated July 12, 2001.....Appellants,

v.

Mary Kathleen Lenahan, individually and in her capacity as Trustee of the
Art. X(35) MKL Trust Share UAD 071201, Jean Marie Qualliu, Joan Eleanor
DeMaio, and Christine Ann Lenahan Respondents,

Of Whom Mary Kathleen Lenahan and Jean Marie Qualliu are Respondents.

APPELLANTS' FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. Did the circuit court err in granting partial summary judgment, despite the presence of a disputed issue of fact?**
- II. Did the circuit court err in holding that the Respondents' objections to the Appellants' actions did not violate the "No Contest" clause of the Trust or breach the party's Agreement because the objections are contained in letters to the ODC?**
- III. Did the circuit court err in its construction of and application of Lawyer Disciplinary Rule 13?**
- IV. Did the circuit court err in holding that "no contest" clauses violate South Carolina public policy?**

STATEMENT OF THE CASE

Eleanor McCarthy Lenahan was the Settlor of the Eleanor McCarthy Lenahan Trust, which was created in 2001 (the "Trust"). In 2012, the Fourth Amendment and Restatement of Trust Agreement of Eleanor McCarthy Lenahan, dated February 22, 2012 was created (the "Trust Agreement"). (R. p. 62) The Trust Agreement set forth, among other things, that the Trustee of the Trust is to divide its assets into shares for the beneficiaries of the Trust upon the death of the Settlor. Subsection 3 of Article VIII of the Trust Agreement limits the Trustee's regular compensation (as opposed to extraordinary compensation) to a one-time payment of \$10,000.00, no matter how long the Trustee serves in such capacity, and no matter the difficulties encountered in serving in such capacity. (R. p. 67)

Subsection 1 of Article XI of the Trust Agreement sets forth as follows, in pertinent part:

No Contest Restriction. The Settlor has, intentionally and with full knowledge, either failed to provide for more beneficiaries and/or provided for such beneficiaries in a more limited manner than other beneficiaries in this Trust Agreement.

- (1) Impact on Beneficiary of Action Taken by Beneficiary. If any beneficiary under this Trust Agreement, singly or in conjunction with any other person or persons, directly or indirectly,
 - (I) contests in any court the validity of this Trust Agreement or, in any manner, seeks to impair or invalidate any of its provisions; . . .
 - (iv) objects in any manner to any action taken or proposed to be taken in good faith by the Trustee;
 - (v) objects to any construction or interpretation of this Trust Agreement, or any provision of it, that is adopted or is proposed in good faith by the acting Trustee; . . .
 - (xi) participates, conspires, or assists with another in any of the previous

actions in a manner adverse to this Trust Agreement, then and in that event that person's right to take any interest given to him or her by or under this Trust Agreement shall be determined as it would have been determined if the person had predeceased the execution of this instrument without surviving issue. (R. p. 74)

Subsection 3 of Article XI holds that the Trustee is authorized to defend any violations of Subsection 1, and deduct the costs of such defense from the share, if any, of the challenging beneficiary(ies). (R. p. 74)

The Settlor passed away on or about August 8, 2012, and the Appellants began their tenure as cotrustees of the Trust. Thereafter, Respondent Mary Lenahan began objecting to the Appellants about their administration and operation of the Trust, and contesting their interpretation of certain provisions of the Trust Agreement. Among other actions, Mary Lenahan objected to the Appellants' planned distributions and refused to consent to the same. Concerned that Mary Lenahan's actions would delay the winding up of the Trust, the Appellants hired counsel to deal with Mary Lenahan's demands; Mary Lenahan hired her own attorney to represent her interests relative to the Trust. (R. p. 99)

While the Appellants were dealing with Mary Lenahan's demands, in 2014, Respondent Qualliu joined with Mary Lenahan in contesting the Appellants' actions and objecting to the Appellants' interpretation of the Trust. Qualliu, too, eventually hired her own attorney to represent her interests relative to the Trust. (R. p. 99)

Although the Appellants had the authority under the Trust Agreement to enforce the "No Contest" clause of Article XI of the Trust Agreement, in an effort to avoid the Trust remaining open indefinitely, they chose instead to accommodate the Respondents and try to

assuage their objections. Ultimately, this led to Appellants creating the “MKL Trust,” in which a real property asset owned by the Trust was placed, and over which Mary Lenahan would serve as trustee.

In late 2014, the Appellants reached an agreement (“Agreement”) relating both to the creation of the MKL Trust and resolution of all remaining matters, complaints, and objections asserted by Respondents Mary Lenahan and Qualliu, as well as disposition and distribution of Trust assets among all beneficiaries. Among other things agreed to, the parties confirmed their understanding that Mary Lenahan would become sole trustee and beneficiary of the MKL Trust and that she would have no further interest in the Trust or its assets. The Agreement was reduced to writing,¹ and also recited that the beneficiaries had satisfied themselves with the Trust accounting and the Appellants’ plans for administration, distribution and disposition of trust assets, and that all of the beneficiaries had had the opportunity to secure the advice of counsel prior to entering into the Agreement. As part of the Agreement, it was understood by all that the Agreement was meant to buy everyone’s “peace,” and that Mary Lenahan and Qualliu would cease all contests of and objections to the Appellants’ actions, no matter where asserted. (R. p. 100) Moreover, it was specifically contemplated that the beneficiaries would execute the proposal for distribution already agreed to. (R. p. 99) Thus, the Appellants would then be able to “wrap up” the Trust quickly – for the benefit of all beneficiaries – with no further concern that a beneficiary might renege on the terms of the Agreement and the parties’ understanding. All of the beneficiaries,

¹The Agreement was styled as a petition to comply with S.C. Code Ann. Section 62-7-111, in the event the Petitioners elected to later file the same in the probate court. (R. p. 100)

including Mary Lenahan and Qualliu, executed the Agreement. (R. pp. 93-96, 99)

The Agreement also contained release, indemnification and hold harmless provisions, wherein the Respondents agreed to indemnify and hold the Appellants harmless, as well as their privies, for any actions taken on behalf of the Trust, including both the MKL Trust creation and preparation of the Agreement itself. Furthermore, the release reflects that in the event that the Appellants were made a party to any action, claim, suit or proceeding, the party or parties making the Appellants a part of such proceeding would be obligated to fully and entirely indemnify and hold harmless the Appellants from any and all costs and attorney's fees incurred in defense against such proceedings. (R. pp. 90-92)

In March of 2015, as contemplated by the parties and the Agreement, the Appellants sent Qualliu a proposal for distribution and requested that she sign the same and return it. Despite having previously executed the Agreement, Respondent Qualliu refused to sign the proposal for distribution, renewing her contest of the Appellants' actions and objections to the Appellants' interpretation of the Trust, and demanding additional account information. Thereafter, the Appellants tried to appease Qualliu by sending her additional account information, and repeated their request that Qualliu sign the proposal for distribution. Despite these efforts, Qualliu not only refused, but her objections only became more explicit, and were accompanied by threats of legal action against the Appellants.

Unbeknownst to the Appellants, at the same time Qualliu first refused to sign the proposal for distribution and began renewing her objections, on or about March 23, 2015, Qualliu sent a letter to the South Carolina Supreme Court's Office of Disciplinary Counsel ("ODC") contesting the matters she had resolved via the executed Agreement. The complaint

letter not only objected to the terms of the Agreement (which she had recently signed), but also contested the Appellants' other actions and authority under the Trust.

On or about April 9, 2015, Mary Lenahan sent a letter to the ODC contesting the matters she had resolved via the executed Agreement, and accusing the Appellants of, among other things, breaching their fiduciary duties. Subsequently, Qualliu sent additional complaint letters dated April 15, April 27 and September 1, 2015 wherein she accused the Appellants of committing improper, questionable and illegitimate acts during their tenure as co-trustees. Neither Respondent sent copies of their complaint letters to the Appellants.²

Thereafter, the Appellants commenced their lawsuit against the Respondents,³ asserting two causes of action: (1) declaratory judgment that the actions of the Respondents violated the no contest provision; and (2) breach of contract for violation of the parties' Agreement. (R. p. 24)⁴ The Respondents did not answer but moved to dismiss the Appellants' case on the grounds, among others, that Lawyer Disciplinary Enforcement Rule 13, under Rule 413, SCACR, rendered the Respondents' complaints about the Appellants absolutely privileged and, therefore, unable to serve as a basis for the Appellants' lawsuit.

²The ODC complaints themselves are not a part of the circuit court's record below, as at least one circuit court judge has opined that such documents are privileged, and has suggested that disclosure of the letters would violate the S.C. Lawyer Disciplinary Rules. The Beaufort County Master in Equity interpreted Lawyer Disciplinary Enforcement Rule 12, under Rule 413, SCACR, to mean that "even the existence of a pending case is confidential and privileged, which would also obviously include the filings," and subsequently held that complaints in the ODC matter and any communications – written or verbal – concerning the same were shielded from disclosure by Mary Lenahan and Qualliu until the ODC matter concludes. (R. p. 14)

³For purposes of this Brief, "Respondents" refers to Mary Lenahan and Jean Qualliu only.

⁴The Appellants' Petition for Declaratory Judgment and Other Relief was later amended to include an additional cause of action against the Respondents for defamation.

(R. p. 109) Via Form 4 Order, the circuit court denied the Respondents' motion. (R. p. 16)

During discovery, and despite the circuit court's previous denial of the motion to dismiss, the Respondents objected to producing documents and answering questions concerning the ODC complaints. The Appellants moved to compel the responses, based partially upon the court's prior denial of the Respondents' motion to dismiss. Thereafter, the court issued an order denying the Appellants' motion to compel,⁵ finding that the ODC complaints and communications concerning the same were privileged and not subject to disclosure. Nevertheless, the court further held that, once the ODC matter concluded, the documents and other testimony regarding the ODC complaints would be discoverable. (R. p. 14-15)

Largely on the basis of the circuit court's holding that the ODC matters would be discoverable once the ODC matter concluded, the Appellants moved to stay the litigation until such time as the ODC proceeding concluded. (R. p. 112) After a hearing, the court issued a Form 4 Order denying Appellants' motion in this regard, without explanation. (R. p. 20)

Thereafter, the Respondents moved for partial summary judgment, seeking a ruling that the ODC complaints could not serve as the basis for either the declaratory judgment or breach of contract causes of action. (R. p. 120) After a hearing, the court issued a Form 4 Order granting Appellants' motion in this regard, without explanation. (R. p. 9)

On or about February 10, 2017, the Appellants filed and served a motion to

⁵The Form 4 order denying the motion to dismiss was issued by Judge Carmen Mullen; the order denying Appellants' motion to compel was issued by Judge Marvin Dukes, Beaufort County Master in Equity.

reconsider, alter or amend the order. (R. p. 115) The circuit court subsequently issued its Supplemental Order, dated March 14, 2017, which contained the specific grounds and reasoning for the court's prior grant of partial summary judgment. (R. p. 1) The Supplemental Order held that, although the Respondents' complaints and objections about the Appellants constituted a contest, the court was nevertheless ruling that such did not trigger the "No Contest" clause of the Trust Agreement. The Appellants received the Supplemental Order on or about March 14, 2017, and timely filed their notice of appeal from both the Form 4 Order and the Supplemental Order.

ARGUMENT

I. The circuit court erred by holding, without any evidence, that there was probable cause for the Respondents' contest and objections, which is a disputed issue of material fact.

In granting the Respondents partial summary judgment, the circuit court held that the Respondents' contest of the Trust and complaints about the Appellants to the ODC were supported by probable cause despite a lack of any evidence on the issue.

"When reviewing the grant of a summary judgment motion, an appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP, which provides that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Proctor v. Whitlark & Whitlark, Inc.*, 2015 WL 5834209 (2015). Summary judgment is a drastic remedy and should be cautiously invoked so that a litigant will not be improperly deprived of trial on disputed

factual issues. *Hoard ex rel. Hoard v. Roper Hosp., Inc.*, 387 S.C. 539, 694 S.E.2d 1 (2010), citing *Cunningham ex rel. Grice v. Helping Hands, Inc.*, 352 S.C. 485, 575 S.E.2d 549 (2003). In South Carolina, the issue of probable cause is a question of fact and usually one for a jury. *Wortman v. Spartanburg*, 310 S.C. 1, 425 S.E.2d 18 (1992); *Gist v. Berkeley County Sheriff's Dept.*, 336 S.C. 611, 521 S.E.2d 163 (Ct.App. 1999); *Jones v. City of Columbia*, 301 S.C. 62, 389 S.E.2d 662 (1990).

In the Supplemental Order, the trial court held that public policy precludes enforcement of the Trust's "No Contest" provision against the Respondents because "probable cause exists for the contest." (R. p. 4) This is erroneous for several reasons. First, absolutely no evidence was submitted – either prior to or at the hearing on Respondents' motion for summary judgment – reflecting that the Respondents had probable cause to contest the Appellants' actions, in their letters to the ODC or otherwise.⁶ Second, had any evidence of the existence of probable cause been submitted by the Respondents, such would have merely created a disputed question of fact that would have precluded summary judgment, in any event. Third, in holding that probable cause existed for the Respondents' contest, the Supplemental Order makes no reference to any actual evidence; instead, the holding appears to serve mainly as justification for the circuit court's concomitant holding,

⁶Respondents' counsel apparently conceded this point at the partial summary judgment hearing when she asserted that "if you have good faith and you genuinely believe that there is a reason for this **and there's going to be** probable cause, you – even if it was an actual contest of the trust, it wouldn't be enforced against my clients." (R. p. 47, lines 8-12) (Emphasis supplied.) Far from confirming the existence of actual probable cause at the time of the objections to the Appellants' actions, counsel's statement instead indicates that the Respondents had "faith" and "believed" they could show probable cause in the future, and intended to demonstrate this at some later point – perhaps once the ODC matter had concluded.

to wit: that the Respondent's letters to the ODC concerning the Appellants, while clearly a contest, nevertheless did not trigger the "No Contest" provision.

II. The circuit court erred in holding that the Respondents' letters to the ODC and objections therein did not violate the "No Contest" clause of the Trust or breach the parties' Agreement due to privilege, because such holding disregards the Trust language and eventual discoverability of the letters.

The circuit court's determination that the Respondents' contest of the Trust and objections about the Appellants to the ODC could not constitute either a violation of the Trust or a breach of the parties' Agreement because such are contained in letters to the ODC, and are therefore privileged, is erroneous.

"The primary consideration in construing a trust is to discern the settlor's intent." *Bowles v. Bradley*, 319 S.C. 377, 461 S.E.2d 811 (1995); *Chiles v. Chiles*, 270 S.C. 379, 242 S.E.2d 426 (1978). If the language of the trust instrument is plain and capable of legal construction, that language determines the force and effect of the instrument, and extrinsic evidence will not be admitted to alter the plain language of the instrument. *Bowles*, at 380.

Under Article XI, Subsection 1 of the Trust Agreement, the trustees are authorized to divest, or disinherit, any beneficiary of her interest in the Trust if that beneficiary:

- (I) contests in any court the validity of this Trust Agreement or, in any manner, seeks to impair or invalidate any of its provisions;
- (iv) objects in any manner to any action taken or proposed to be taken in good faith by the Trustee;

- (v) objects to any construction or interpretation of this Trust Agreement, or any provision of it, that is adopted or is proposed in good faith by the acting Trustee;
- (xi) participates, conspires, or assists with another in any of the previous actions in a manner adverse to this Trust Agreement. (R. p. 74)

The lower court did not consider whether the Respondents' complaints to the ODC about the Appellants violated these provisions; instead, the court held, in its Supplemental Order, that because the complaints were made in letters sent to the ODC and the ODC's jurisdiction is limited to complaints involving attorneys, such complaints "cannot harm" the Appellants, as they are "privileged" and, the Order implies, not subject to disclosure. This holding is erroneous for two reasons: First, the "No Contest" provision of the Trust Agreement establishes no requirement that objections by beneficiaries be made in a particular manner or forum before the "No Contest" clause will apply; the lack of such a requirement was presumably intended by the Settlor (which is the primary consideration in trust construction).⁷ As Respondents' counsel herself conceded at the partial summary judgment hearing, the "No Contest" clause at issue here "is very broad." (R. p. 45, line 24) Second, whatever privilege may apply to the ODC complaints and communications concerning the same, they will nevertheless be fully discoverable once the ODC matter is no longer pending. (R. p. 15) Thus, the complaints may very well appear in the public sphere when the ODC

⁷Any argument that such construction is unduly harsh (and, thus, could not have been the Settlor's intent) ignores that the Settlor balanced the consequences of the "No Contest" clause with a corresponding limitation on the Trustees: Subsection 3 of Article VIII of the Trust Agreement limits the Trustee's regular compensation (as opposed to extraordinary compensation) to a one-time payment of \$10,000.00, no matter how long the Trustee serves in such capacity, and no matter the difficulties encountered in serving in such capacity. (R. p. 67)

matter concludes, which could most certainly result in “harm” to the Appellants. Moreover, considering that the circuit court has already determined that probable cause existed and exists for the complaints made about the Appellants to the ODC – without first providing the Appellants with an opportunity to try the issue, and without any evidence to support such determination – the Appellants have already been harmed.

III. In holding that the Respondents’ objections to the ODC are privileged, the circuit court erroneously interpreted Lawyer Disciplinary Rule 13.

Lawyer Disciplinary Rule 13 does not render the objections made by the Respondents in their letters to the ODC privileged in this case, and it was error for the circuit court to so rule.

Rule 13 sets forth as follows, in pertinent part:

Communications to the commission, commission counsel, disciplinary counsel or their staffs **relating to misconduct**, incapacity, or the inability to participate in the disciplinary investigation or assist in the defense of formal proceedings and testimony given in the proceedings **shall be absolutely privileged**, and **no civil lawsuit predicated thereon** may be instituted against any complainant or witness. (Emphasis supplied.)

It is indisputable that the Lawyer Disciplinary Rules govern the conduct and regulate the activities of lawyers – they do not govern the conduct and regulate the activities of non-lawyers. Thus, “[c]ommunications . . . relating to misconduct” can only apply to communications relating to the misconduct *of lawyers*, as the Lawyer Disciplinary Rules cannot proscribe conduct engaged in by non-lawyers. Furthermore, “no civil lawsuit predicated thereon may be instituted against a complainant” necessarily means that no

lawsuit predicated upon on communications relating to the misconduct *of lawyers* will lie against a complainant.

The Appellants' lawsuit is not predicated on communications relating to the misconduct of an attorney. Instead, the Appellant's lawsuit involves (though it is not predicated solely on) the Trust contest mounted by the Respondents in their complaints to the ODC about the *Appellants'* actions.⁸ Accordingly, the communications at issue in the instant case are not privileged, and it was error for the trial court to so hold.

IV. Under South Carolina law, “no contest” clauses are enforceable, and do not automatically violate public policy.

No contest provisions are enforceable under South Carolina law, and it was error for the trial court to hold otherwise.

A provision in a revocable trust purporting to penalize any interested person for contesting the validity of the trust or instituting other proceedings relating to the trust is unenforceable *if* probable cause exists for instituting proceedings. S.C. Code Ann. Section 62-7-605. In general, clauses in a will or trust designed to penalize a beneficiary for

⁸The circuit court's holding on this issue, as reflected in the Supplemental Order, appears to conflict with its previous ruling on the Respondents' motion to dismiss, which was also based on Rule 13. (R. p. 109) While the motion to dismiss was denied with a Form 4 order (R. p. 16), the court's statements from the bench in January of 2016 seem to reflect that the presiding judge did not believe Rule 13 would prevent the Appellants from suing the Respondents, based upon complaints made by them about the Appellants to the ODC. (“That’s to protect lawyers, and that’s to protect complaining clients about their lawyers.”) (R. p. 61, lines 3-5) Given that the Respondents' dismissal motion and summary judgment motion both essentially sought the court's interpretation and/or application of Rule 13, it is unclear how the same judge reached two different conclusions on this issue.

contesting the will or trust or instituting other proceedings relating to the estate are valid and enforceable. *Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 633 S.E.2d 722 (2006). Such “no contest” clauses can protect estates “from costly and time-consuming litigation”. *Id* at 12.

The *Russell* case is instructive here. In *Russell*, the children filed actions to set aside the will and trusts established by their father, Russell (“Testator”). Eventually, the Testator moved for summary judgment on the “no contest” clause contained in the will and trusts. The trial court denied the motion, finding probable cause for the children’s contest, given the evidence of undue influence. In reversing the trial court, the Supreme Court held that family discord and strife, combined with a less-than-favorable inheritance, “do not constitute probable cause.” *Id.* at 15. Moreover, in finding that the Testator had not been unduly influenced, the Court found it significant that Russell had amended his trust to include language “explicitly providing that beneficiaries who contested the validity of the estate plan would have their interest revoked and ‘shall be deemed to have predeceased [him]’” *Id.* at 16.

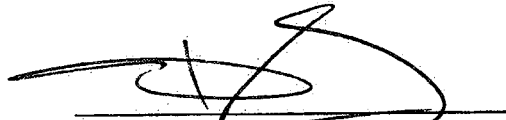
The “no contest” clause in the *Russell* case is similar the “No Contest” provision in the instant case, and the circuit court’s holding that South Carolina public policy prohibits enforcement of such clauses was erroneous.⁹

CONCLUSION

The circuit court in the instant case committed reversible error by granting partial

⁹Although the Respondents’ counsel, at the partial summary judgment hearing, repeatedly associated a “good faith” standard with the “probable cause” exception, Section 62-7-605 does not use the term “good faith.”

summary judgment to Respondents Mary Lenahan and Jean Marie Qualliu, and the circuit court's Supplemental Order should be accordingly reversed.

A handwritten signature in black ink, appearing to read 'Sean Michael Bolchoz', written over a horizontal line.

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CERTIFICATE OF COUNSEL

The undersigned certifies that Appellants' Final Brief complies with Rule 211(b),
SCACR.

(Signature on next page following.)



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