THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Civil Action No.: 2010-CP-30-0116

Willie D. Watson ..... Appellant.

v.

Nancy Carol Underwood, individually and as putative trustee of the Willie D. Watson Trust; John H. Watson, individually and as putative trustee of the Willie D. Watson Trust; and Future and Potential Heirs of Willie D. Watson ..... Respondents.

SUPPLEMENTAL RECORD ON APPEAL

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TABLE OF CONTENTS

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS

COUNTY OF LAURENS 2010 JUL -7 P 3:34 CASE NO. 2010-CP-30-0116

Willie D. Watson,

Plaintiff,

LAURENS COUNTY
CLERK OF COURT

v.

Nancy Carol Underwood, individually and as putative trustee of the Willie D. Watson Trust; John H. Watson, individually and as putative trustee of the Willie D. Watson Trust; and Future and Potential Heirs of Willie D. Watson;

Defendants.

Defendants' Return to Plaintiff's Petition/Motion to Terminate Trust

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Plaintiff wants to revoke her irrevocable trust and has petitioned or moved the Court to approve the attempted termination of her irrevocable trust agreement pursuant to S.C. Code Ann. §62-7-411(a). This Trust Code statute provides that a noncharitable irrevocable trust may be modified or terminated "with court approval upon consent of the settlor and all beneficiaries" even if the modification or termination of the trust is inconsistent with a material purpose of the trust. Plaintiff asserts that she, as Settlor, and Sherry Long, as the alleged sole devisee of Plaintiff's Last Will which, according to Plaintiff's argument, makes Sherry Long the sole beneficiary of the trust, are the only persons whose consent is necessary to satisfy the requirements of §62-7-411(a).[1]

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[1] Because the Plaintiff has elected to proceed in the form of a petition or motion in an existing case, rather than commencing a new case, the question arises about how to protect the interests of minor and unborn trust beneficiaries. The court can appoint a guardian ad litem to act on behalf of the minors and unborn beneficiaries, §62-1-403(4), or the co-trustees can represent and bind the minor and unborn beneficiaries by virtual representation. §62-1-403(2)(iii). Unless and until the court appoints a guardian ad litem, the co-trustees will speak for and defend the interests of the minor and unborn trust beneficiaries.

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Plaintiff's argument, though creative, is not supported in the law.

I. FACTS

(Defendant Underwood's [individually and as co-trustee] and Defendant Watson's [individually and as co-trustee] Affidavits are attached as **Exhibit 1**)

Plaintiff was married to John C. Watson, who died on March 31, 2009. They had three children, the defendants Nancy Underwood and John H. Watson, and Sherry Long, who is not a party to this case.

On October 5, 2006, the Plaintiff executed a Durable Power of Attorney (attached as **Exhibit 2**) naming her daughter, the defendant Nancy Underwood, as her attorney in fact. The power of attorney was prepared by attorney Richard Townsend, who had done other legal work for the Plaintiff, and it was executed by the Plaintiff in Mr. Townsend's office after Plaintiff had ample opportunity to read the power of attorney and to ask questions about its content. Fourteen enumerated paragraphs in the power of attorney describe the specific powers given to the attorney in fact. Paragraph 11 grants the power "To **establish** trust funds, revocable or irrevocable, funded or unfunded, for the benefit of me, my spouse, my children and my lineal descendants, and to transfer any of my assets to such trusts." (Emphasis added). Paragraph 10 grants to the attorney in fact the power to transfer by gift any of the Plaintiff's assets to "my spouse, my children and my lineal descendants by gift, including to any such person serving as attorney in fact, or to any trust funds which I may have established, revocable or irrevocable . . .."

On the same date, October 5, 2006, the Plaintiff executed a Last Will and Testament, also prepared by attorney Townsend and executed in his office. (Attached as **Exhibit 3**). Just as with the power of attorney, Plaintiff had ample opportunity to read the last will and to ask questions about its content. Devisees named in Plaintiff's October 5, 2006 Last Will are: her grandchildren living

at the time of her death; her great-grandchildren living at the time of her death; defendants Nancy Underwood and John H. Watson; Plaintiff's spouse, then living but now deceased; and Sherry Long. Sherry Long and Plaintiff's spouse were each devised a token gift of $1.00. Evidence will show that at the time there were good and sufficient reasons for Plaintiff to have executed the power of attorney and the Last Will, mostly related to the extremely poor and abusive relationships between the Plaintiff and her husband and between the Plaintiff and her daughter Sherry Long.

Through 2007 and 2008 the relationships between Plaintiff and her husband and Sherry Long remained strained and stressful, only to worsen in January, February and March 2009 in the weeks leading to Mr. Watson's (the husband) death. Plaintiff would constantly complain to Nancy Underwood and John H. Watson about Sherry Long's abusive behavior and about her constant threats that she was going to take Plaintiff's assets. Sherry Long's statements were taken seriously because she had done essentially the same thing with Plaintiff's husband during the last months of his life. It was not unusual for Plaintiff to be in tears when she would speak of her arguments with Sherry Long.

In mid-March 2009, as it turned out only a few days before Mr. Watson's death and following another telephone call from the Plaintiff in which she again was upset about something either said or done by Sherry Long, Nancy Underwood, John H. Watson and their spouses had heard enough. They visited with attorney Townsend to consider what, if anything, could be done to protect the Plaintiff and her assets from Sherry Long's duress and other mischief. Attorney Townsend proposed an irrevocable trust. Upon Mr. Townsend's advice and recommendation it was decided that an irrevocable trust would be executed, utilizing the express authority granted by Plaintiff in paragraph

11 of her October 5, 2006 power of attorney.[2] Mr. Watson died before the trust agreement could be executed, but the "Irrevocable Trust Agreement for the Benefit of Willie Dendy Lee Watson" was drafted by attorney Townsend, and on April 2, 2009 it was signed in his office by Nancy Underwood as attorney-in fact for the Plaintiff. (Attached as **Exhibit 4**). The trust was promptly funded with Plaintiff's bank accounts, car and real property. (see Exhibit A to Exhibit 4). Attorney Townsend prepared the necessary instruments to transfer the assets into the trust. Plaintiff was told of the trust very soon after its execution and did not voice an objection.

The provisions of the irrevocable trust that are most relevant to the pending motion to terminate the trust are:

- Section Two (a): "Willie Dendy Lee Watson shall receive or shall be disbursed for the benefit of Willie Dendy Lee Watson all of the net income and any principal deemed necessary for the upkeep, maintenance and support of Willie Dendy Lee Watson in the manner to which she is accustomed." (Naming Plaintiff as the lifetime income beneficiary).
- Section Two (b): "This trust agreement shall terminate upon the death of Willie Dendy Lee Watson and the proceeds remaining in trust shall distributed [sic] to the estate of Willie Dendy Lee Watson to be disposed of in accordance with the terms and conditions of her Last Will and Testament dated October 5, 2006." (Naming the remainder beneficiaries).

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[2] When acting within the scope of the powers authorized by the principal, the agent's acts are in legal effect equivalent to those of the principal. 2A C.J.S. Agency §145; Crim v. Hutton, 381 S.E.2d 492 (S.C. 1989); Carver v. Morrow, 48 S.E.2d 814 (S.C. 1948).

- Section Four: "This trust shall be irrevocable and shall not be revoked or terminated by the Trustor or any other person, nor shall it be amended or altered by Trustor or any other person."

Notwithstanding Section Four of the trust agreement which expressly prohibits termination or modification of the trust, S.C. Code Ann.§62-7-411(a) will permit modification or termination of the trust with the consent of the settlor (trustor) and all beneficiaries and with court approval.[3]

According to the trust agreement, on April 2, 2009 the settlor/trustor was the Plaintiff, and the beneficiaries were the Plaintiff, as the lifetime income beneficiary, and the devisees named in the Plaintiff's Last Will dated October 5, 2006 as the remainder beneficiaries. Consequently, in order to modify or terminate the trust pursuant to §62-7-411(a), all of those trust beneficiaries must consent to any modification to or termination of the trust. At present, the remainder beneficiaries of the trust are the devisees of the October 5, 2006 Last Will, namely Nancy Underwood, John H. Watson, Sherry Long and Plaintiff's five grandchildren and three great-grandchildren. (Four of the grandchildren and great-grandchildren are minors.)

Plaintiff now attempts to circumvent the requirements of the trust and the conditions of the governing statute by claiming that (1) in January 2010 she executed a codicil to the October 5, 2006 Last Will; (2) the January 2010 codicil removed Nancy Underwood, John H. Watson, the Plaintiff's grandchildren and the Plaintiff's great-grandchildren as devisees of the October 5, 2006 Last Will; (3) the codicil named Sherry Long as the sole devisee of the Last Will thereby making Sherry Long the sole remainder beneficiary of the trust; and (4) the argument continues, the only persons whose

[3] See discussion of irrevocable trusts in Section II. A. below.

consent is now required to modify or terminate the trust are the Plaintiff and Sherry Long.[4] Thew Plaintiff is wrong.

As discussed hereinbelow, there are three reasons why the codicil itself, even if effective to change the Plaintiff's Last Will for probate purposes, is nevertheless ineffective to change the Last Will as an incorporated document in the trust: (1) the codicil, as proposed to be used by the Plaintiff, is a modification of the trust that itself requires the consent of all trust beneficiaries; (2) the effective date of the codicil does not relate back to the time of the execution of the annexed October 5, 2006 will, rather the annexed will advances to become effective as of the time of the execution of the codicil, meaning that the codicil does not retain its identify as the Plaintiff's October 5, 2006 Last Will; and (3) a future document(i.e. the codicil) not in existence when the incorporating-host document (i.e. the trust agreement) is executed cannot be incorporated by reference into the host document.

II. LAW

A. Nature of an Irrevocable Trust

A trust is defined as a fiduciary relationship in which one person (the trustee(s)) holds legal title to property for the benefit of another (the beneficiary(ies)). Neel v. Clark, 8 S.E.2d 740 (S.C. 1940). South Carolina common law provided that a trust is deemed to be irrevocable unless the settlor indicates an intent to retain the right to revoke by expressly reserving the power to revoke in the instrument . Chiles v. Chiles, 242 S.E.2d 426 (S.C. 1978). An irrevocable trust is a trust that cannot be terminated solely by the settlor once it is created. Black's Law Dictionary (7th ed. 1999)

[4] The exact content of the Plaintiff's January 2010 codicil is known only by its description in the Plaintiff's motion and affidavit because a copy of the codicil has not heretofore been published with Plaintiff's submissions to the Court. The undersigned has been permitted to read the codicil, and it is essentially a totally new will. It changes the designated personal representative and it significantly changes the beneficiaries. See Section II. C. below.

p. 1516. See also §62-7-103 (13) where "revocable," as applied to trusts, is defined as a trust that is revocable by the settlor without the consent of the trustee or a person holding an adverse interest.

Once a trust is created and the settlor's title to assets is transferred to the trustee, the rights of the trust beneficiaries become vested. Coleman Karesh, Trusts 13-14 (1977) citing McElveen v. Adams, 94 S.E. 733 (S.C. 1917). Once the rights and interests of the trust beneficiaries are vested, those rights and interests can only be divested or revoked as permitted by law.[5] By analogy, the vesting of trust beneficiary rights in trust assets is similar to the effective delivery of an inter vivos gift. The intent to make a gift, accompanied by actual or constructive delivery or possession of the property, executes the gift, Barnwell v. Barnwell, 476 S.E.2d 492 (S.C. App. 1996), and in general, a valid and completed gift inter vivos cannot be revoked. 38A C.J.S. Gifts §61 (1996).

Pre-Trust Code common law provided that an otherwise irrevocable trust could be modified and/or terminated by the consent of the settlor and all the beneficiaries, who comprise all of the parties interested in the trust. Linder v. Nicholson Bank & Trust Co., 170 S.E. 429 (S.C. 1933); Klugh v. Seminole Securities Co, 87 S.E. 644 (S.C. 1916) ("Manifestly a trust agreement, like any contract, may be modified by all the parties in interest."). This is the same legal principle now codified in §62-7-411(a), the statute that the Plaintiff/settlor is attempting to invoke. Just as with legal instruments generally, parties to a trust instrument may abandon the instrument and release each other from the performance called for, and the rights accorded in, the instrument, thereby ending the agreement. 89 C.J.S. Trusts §88(a) (1955).

Also to be considered are the interests of the minor and unborn/unascertained trust

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[5] Using the terminology of the Trust Code, the devisees named in the October 5, 2006 Last Will became "qualified beneficiaries" of the trust on the date the trust was created and funded. §62-7-103(12). The Comment to this statute explains that a qualified beneficiary is one who will take if the primary or first-line beneficiary's interest terminates. The interests of qualified beneficiaries are not considered to be "remote and contingent." Id.

beneficiaries. In Chiles v. Chiles, supra. a settlor created an irrevocable inter vivos trust. The trust agreement provided for the settlor to receive distributions during his lifetime, and upon his death distributions were to be made to specified intermediate beneficiaries. In the group of intermediate remainder beneficiaries was a minor. The settlor commenced a proceeding to modify the trust for the purpose of extinguishing the interests of the intermediate remainder beneficiaries, including the minor. The trial court allowed the modification of the trust and the extinguishment of the minor's interest as a beneficiary. The Supreme Court reversed that result as to the minor, and in doing so, relied on the following legal principles: "[I]t is the duty of the courts to preserve, not destroy, trusts and to see to it that the rights of infants are not injuriously affected . . . Accordingly, the exercise of this power [referring to a court of equity's power to modify a trust to effectuate the intent of the settlor] can be justified only by some exigency or emergency which makes the action of the court in a sense indispensable to the preservation of the trust . . .."[6] Id. Applying this legal principle to the case at bar, a settlor who becomes unhappy with a beneficiary subsequent to the establishment of an irrevocable trust and who wants to change the trust to reflect the settlor's changed personal relationships with beneficiaries does not remotely begin to satisfy the "exigency or emergency" standard described above.

B. Doctrine of Incorporation by Reference

By the terms of Section Two (b) of the Irrevocable Trust Agreement, the settlor/trustor incorporated by reference into the trust agreement her Last Will and Testament dated October 5, 2006 for the purpose of identifying the remainder beneficiaries to the trust. (the incorporation was of a particular document with particular terms incorporated at a particular time for a particular

[6] In the case now under consideration, four of the trust's remainder beneficiaries are minors. (See affidavits at Exhibit 1).

purpose). The Trust Code does not expressly address the doctrine of "incorporation by reference," and having not codified "incorporation by reference" in the Trust Code, the common law and equitable principles remain the governing law on the subject. S.C. Code Ann. §62-7-106.[7] The Trust Code provides that rules of construction that apply to wills also apply to the construction of trusts, S.C. Code Ann. §62-7-112, so if §62-2-509 is a rule of construction that applies to wills, then it also applies to trusts. In any event, as is shown below, the requirements found in §62-2-509 are the same as found in the common law.

When an instrument incorporates a second document or writing by reference, the second document/writing is effectively inserted into the first instrument in its entirety and becomes as much a part of the instrument as if it had been set out verbatim, **at least to the extent of the designated purpose for the incorporation**. 17A C.J.S. Contracts §316 (1999); Wasson v. Schubert, 964 S.W.2d 520 (Mo. App. 1998); Booker v. Everhart, 240 S.E.2d 360 (N.C. 1978); In Re Marriage of Seymour, 536 P.2d 1172 (Colo. App. 1975); Arntz Contracting v. St. Paul Fire & Marine Ins., 47 Cal. App. 4th 464 (1996). Consequently, Items Two through Six of the October 5, 2006 last will, in which the devisees are named, were incorporated into Section Two (b) of the trust agreement as if set out verbatim for the purpose of naming the trust's remainder beneficiaries. **Taking a snapshot of the situation at the time of the execution of the irrevocable trust agreement on April 2, 2009, the beneficiaries identified in the trust instrument, from the October 5, 2006 last will, were the Plaintiff, her grandchildren (living at the time of her death), her great-grandchildren (living at the time of her death), defendants Nancy Underwood and John H. Watson, and Sherry**

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[7] With respect to the Probate Code and the law of Wills, §62-2-509 provides that "Any writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification." Section Two (b) of the trust agreement certainly satisfies these requirements when it incorporates by reference the October 5, 2006 last will.

Long.

To be effectively incorporated into a host document the terms of the incorporated document must be known or easily available to the parties, meaning that only a document in existence at the time of execution of the host document can be incorporated by reference into the host document. 17A C.J.S. Contracts §316, citing United California Bank v. Prudential Ins. Co. of America, 681 P.2d 390 (Ariz. App. 1983); Loomis, Inc. v. Cudahy, 656 P.2d 1359 (Idaho 1983). Other authorities applying this principle of law are: Alpert, Goldberg, Butler, Norton, Weiss v. Quinn, 983 A.2d 604 (N.J. Super 2009); DVD Copy Control Assn. v. Kaleidescape, 176 Cal. App. 4th 697 (2009); Peterson & Simpson v. IHC Health Serv., 217 P.3d 716 (Utah 2009); Ingersoll-Rand Co. v. El Dorado Chem., 283 S.W.3d 191 (Ark. 2008); Scott's Valley Fruit Exch. v. Growers Refrigeration Co., Inc., 184 P.2d 183 (Cal. Ct. App. 1947); Matter of Estate of O'Brien, 627 N.Y.S.2d 544 (1995), affirmed 649 N.Y.S.2d 220); Continental Ill. Nat. Bank & Trust Co. of Chicago v. Art Institute of Chicago, 94 N.E.2d 602 (Ill. App. 1950). The policy behind this principle of law is explained in DVD Copy, supra. as follows:

> This rule advances the primary goal of contract interpretation- ascertaining the mutual intent of the parties in cases where the parties intended to be bound by specific terms that were not mentioned in the contract. The clear and unequivocal reference to the extrinsic document and the contemporaneous availability of its terms shows that, at the time of contracting, the parties consented to those terms.

C. Codicil's Effect, if any, on the Trust Agreement

The host document is the April 2, 2009 Irrevocable Trust Agreement; the incorporated document is the October 5, 2006 Last Will to the extent of its identification of the Will's devisees who are being named as trust remainder beneficiaries. The issue presented is whether subsequent to the execution of the irrevocable trust agreement, in which the October 5, 2006 last will was incorporated by reference, may the Plaintiff execute a codicil to amend the incorporated October

5, 2006 last will, and thereby modify the terms of the trust, without the consent of all of the beneficiaries named in the host document-trust agreement, when the effect would be to terminate interests of remainder beneficiaries and to reduce the number of trust remainder beneficiaries who must then consent to the termination of the irrevocable trust.

Plaintiff's attempt to terminate the trust by consent is based on the theory that when the trust agreement incorporated by reference the October 5, 2006 last will, it contemplated that the last will might be changed in the future by the execution of a codicil and that the new and amended provisions of the last will would still be incorporated into the trust as the "Last Will and Testament dated October 5, 2006" - giving a retroactive or nunc pro tunc effect to the codicil. But, as shown above, incorporation by reference can only occur if the incorporated document is in existence at the time of execution of the host document, such that the parties either then know the terms of the incorporated document or have easy access available to the terms of the incorporated document. A document not yet in existence cannot be incorporated by reference. Consequently, the terms of the October 5, 2006 Last Will itself could be, and were, incorporated by reference into the trust agreement, to the extent that those terms identified devisees, but the codicil and its changes could not be incorporated because it was executed subsequent to the trust agreement, and the codicil's terms were not known, and could not have been known, by the parties when the trust agreement was executed.

A codicil is an instrument that may partially revoke and amend the last will to which it refers and confirm and republish the parts of the last will not addressed by the codicil. In 1 Page on Wills §1.3 (2d ed. 2003) a codicil is defined in several ways: an instrument by which a testator "changes, supplements or adds to the provisions of an existing will . . . an instrument that adds to or subtracts from a previous will." And, a codicil may even completely replace a previous will. Id. In South

Carolina case law a codicil is described as a part of a will to which it is annexed that expresses the testator's "**afterthought** or **amended** intention." Bethea v. Young, 161 S.E. 514 (S.C. 1931). (Emphasis added). It may confirm, alter, or altogether revoke an intention expressed in the body of the instrument to which it is annexed. Id. A codicil revokes the annexed will in so far as it is necessary to give effect to the terms of the codicil itself. As to other terms of the annexed will, the codicil confirms and republishes those. Id.

Of particular relevance to the timing of the codicil and the question of whether the codicil relates back to the date of its annexed last will, it is stated that a will and its codicil are to be regarded as a single and entire instrument, taking effect at the time of the testator's death, **as if both had been executed at the time of the making of the codicil.** This is the law of South Carolina, McLaurin v. Newton, 191 S.E. 59 (S.C. 1937), Werber v. Moses, 109 S.E. 396 (S.C. 1921), and it is the general common law. 79 Am. Jur. 2d Wills §593, citing several authorities. Other cases so holding include: Matter of Nicholas, 41 A.D. 2d 625 (N.Y. 1973); Matter of Estate of Eickholt, 365 N.W.2d 44 (Iowa App. 1985); Langston v. First Nat. Bank, 449 S.W. 2d 855 (Tx. Civ. App. 1969); Pullen v. Est. of Virgie Pullen, 460 S.W.2d 753 (Ark. 1970). The result is that once the codicil was signed, the Plaintiff's new last will, now comprised of the October 5, 2006 Will and the January 2010 codicil, was no longer "the Last Will and Testament dated October 5, 2006", but rather was, and is, considered to be the Plaintiff's last will dated January 2010.

All of this demonstrates that the Plaintiff's codicil, as it is described in the Plaintiff's petition/motion, was a significant modification to the October 5, 2006 last will and that it necessarily would also be a significant modification to the trust agreement. Before Sherry Long can be considered to be the only remainder beneficiary of the trust, the trust must be modified to give effect to the changes brought about by the subsequently executed codicil. To modify the trust to change

the number of remainder beneficiaries requires the consent of the trustor and all pre-modification beneficiaries of the trust. §62-7-411(a). **(the Plaintiff, her grandchildren, her great-grandchildren, defendants Nancy Underwood and John Watson, and Sherry Long).**

All beneficiaries have not, and do not, consent to a modification of the trust to change the number or identity of the remainder beneficiaries. Without the modification, the Plaintiff also needs the consent of all the trust beneficiaries named in the trust agreement by the incorporation of the pre-codicil last will, to terminate the trust. All beneficiaries have not, and do not, consent to the termination of the trust.

In Wheeler v. Queen, 510 S.E.2d 195 (N.C. App. 1999), a case with very similar facts, the North Carolina Court of Appeals was called upon to consider an irrevocable trust agreement that incorporated by reference a last will and testament (Will no. 1). The incorporated last will was later revoked by the execution of a second will (Will no. 2). The trust agreement provided that upon termination of the trust, all property remaining in the trust shall pass as directed under the terms and provisions of Will no. 1. Will no. 1 provided that the testator's real property was devised to her son, in trust, for the benefit of the testator's grandson and upon termination of the trust, the real property would be distributed to the grandson. (there was both an inter vivos trust deed and a testamentary trust).

Will no. 2 provided that the real property was devised directly to the grandson absolutely and in fee simple. The court was asked to determine and declare the rights of the parties with respect to the real property. The trial court ruled that Will no. 1 was properly incorporated by reference into the inter vivos trust deed, and that at decedent's death, title to the real property passed to the son, as trustee, according to Will no. 1, notwithstanding Will no. 1's later revocation by Will no. 2.

This result was affirmed on appeal, with the Court of Appeals explaining its decision as

follows:

- Settlor's intent must be determined from the language and purpose of the trust instrument;
- Although the language of the trust was somewhat ambiguous in saying that the trust assets would pass under the incorporated will, arguably treating the assets more like probate estate assets than trust assets, the court concluded that the dispositional language of the trust evidenced the intent that the trust assets be distributed to those persons designated to take assets in the particularly identified and incorporated Last Will no. 1;
- The execution of Will no. 2 did not alter the terms of the trust document; the trust document did not become a testamentary document subject to revocation by a later-drafted will;
- The trust document was a document with instructions for disposing of trust property, those instructions being provided by the incorporated document; and
- Although Will no. 2 would be effective to pass title to probate estate assets, passing title to trust assets continued to be controlled by the terms of the specifically referenced and incorporated Will no. 1.

D. Duty to Read Written Documents

Plaintiff tries to avoid the operation of the irrevocable trust agreement by alleging that when she signed her Durable Power of Attorney on October 5, 2006, notwithstanding its express provisions, she did not understand or appreciate the scope of the powers she was granting to her attorney-in-fact, and that she specifically did not understand that she was authorizing the attorney-in-fact to create or establish an irrevocable trust. Richard Townsend, the attorney who drafted the power of attorney and who supervised its execution, has testified at deposition that the Plaintiff had a full and unrestricted opportunity to read the power of attorney, to ask questions about it and to require revisions. (**Exhibit 5, p. 1-20**). In addition to the Plaintiff's having read the trust agreement, or

having had the opportunity to read it, attorney Townsend also explained that he orally advised Plaintiff about the broad nature of the powers being granted to the attorney-in-fact such that the attorney-in-fact could do virtually anything the Plaintiff could do herself. **(Exhibit 5, p. 41-42)**.There is no allegation or argument that Plaintiff was mentally incapacitated in October 2006 when she met with attorney Townsend and when she executed her power of attorney and last will.

"A person signing a document is responsible for reading the document and making sure of its contents. Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it." Regions Bank v. Schmauch, 582 S.E.2d 432 (S.C. App. 2003). One cannot complain of fraud and misrepresentation in the contents of a document if the truth could have been ascertained by reading the document. Burwell v. S. C. National Bank, 340 S.E.2d 786 (S.C. 1986). "If the person cannot read, he has the affirmative duty to ask someone to read the document to him. Simply stated, a person who signs a contract or other written document is bound by the terms and conditions of the writing." Ralph King Anderson, Jr., South Carolina Requests to Charge - Civil, 2002, §19-23.

III.. CONCLUSION

The irrevocable trust agreement herein provides that the remainder beneficiaries of the trust are those **particular persons** named in a **particular document** (October 5, 2006 last will) **at a particular time** (April 2, 2009 when the trust agreement-host document was executed and the October 5, 2006 last will was incorporated by reference).

The Plaintiff would have the Court find that the trust's language actually provides that the trust's remainder beneficiaries are to be determined by whatever last will is in existence when the testator either dies or the testator/settlor seeks court approval and beneficiary consent to modify or terminate the trust, whichever first occurs; even if the interests of minors as remainder beneficiaries

are extinguished.

Without the consent of all the trust's beneficiaries as named in the trust agreement at the time of its execution, the Plaintiff cannot effectively modify the trust to change the number and/or identity of the trust's remainder beneficiaries. And, without the consent of all the trust's beneficiaries as named in the trust agreement at the time of its execution, the Plaintiff cannot effectively terminate the trust.

The Plaintiff's Petition/Motion to terminate the trust must be denied.

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Attorney for Defendants Underwood and Watson, individually and as co-trustees

July 6, 2010

Documents Incorporated in this Return and Filed with the Court in Opposition to the Plaintiff's Petition/Motion

1. Affidavits of Nancy Underwood and John H. Watson;
2. The Plaintiff's Durable Power of Attorney dated October 5, 2006;
3. The Plaintiff's Last Will dated October 5, 2006;
4. The Irrevocable Trust Agreement dated April 2, 2009; and
5. Attorney Richard Townsend's deposition transcript.

STATE OF SOUTH CAROLINA

COUNTY OF LAURENS

IN THE COURT OF COMMON PLEAS

CASE NO. 2010-CP-30-0116

Willie D. Watson,

Plaintiff,

v.

Nancy Carol Underwood, individually and as putative trustee of the Willie D. Watson Trust; John H. Watson, individually and as putative trustee of the Willie D. Watson Trust; and Future and Potential Heirs of Willie D. Watson;

Defendants.

Defendants' Motion for Partial Summary Judgment and for a Continuance of Trial

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To: Plaintiff and her attorney, Edward S. McCallum, III, Esquire.

Summary Judgment

Please take notice that Defendants, through their undersigned attorney, move the Court for an order granting summary judgment in favor of the Defendants on the following issue of law:

> that the power to create an irrevocable trust may be expressly granted and delegated by a competent principal to his/her agent in a power of attorney, and that said power to create a trust under those circumstances is not personal and nondelegable as a matter of law and does not violate the public policy or the law of South Carolina.

This motion is made pursuant to Rule 56, SCRCP, on the ground that the matter presented is purely a question of law and there is no genuine issue of material fact which would entitle Plaintiff to a contrary judgment on the question presented.

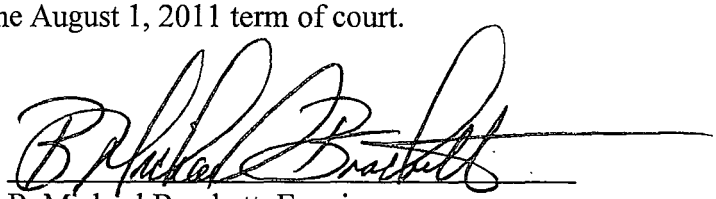
This motion will be supported by all matters of record herein, including the depositions of Plaintiff and attorney Richard Townsend, by affidavits previously filed with the Court, by all other pretrial discovery, by legal authorities of this and other jurisdictions and by Defendants' Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment to be filed hereafter. There is no duty of prior consultation with opposing counsel with respect to this motion.

Continuance

Related to the foregoing motion for summary judgment, Defendants also move the Court to continue this case past the August 1, 2011 term of court to give the parties and the Court the opportunity to present and decide the motion for summary judgment, which has the potential to resolve much, if not all, of the remaining issues without the time and expense of trial.

This motion is made pursuant to Rule 40(i), SCRCP, on the ground that hearing and deciding the summary judgment motion may make a trial unnecessary; this is the first time the case has appeared on the trial roster; and a continuance has not been heretofore requested or granted.

The undersigned is informed and believes that the parties are willing, and expressly request, to argue the motion for summary judgment during the August 1, 2011 term of court.



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Columbia, South Carolina
July 19, 2011

be handled.

A: All right. That's the only thing else that's in my file.

MR. MCCALLUM: And I would like a copy of all those e-mails, please, Mr. Townsend, before we leave.

MR. TOWNSEND: Okay. I'll run them for both of you.

Q: Now with respect to the trust agreement, Exhibit Four, that was signed in your office on April 2nd, 2009?

A: Correct.

Q: And what sort of, what sort of advice or discussion did you have with Nancy Underwood as the attorney in fact with respect to the particular provisions of the trust?

A: Well, they were telling me what they wanted in the trust. They wanted it to be only for the benefit of their mother, not for anyone else. When I was drafting the trust, I realized there had to be a contingent beneficiary. What I put in there was I had Ms. Watson's last will and testament, so I made it conform to her last will and testament and made the ultimate beneficiary the beneficiaries of her last will and testament.

time held under any provision of this my will, and the trust created under and without authorization by any court and in addition to any rights, powers, authority, and privileges granted by any other provision of this, my will, or by statute or general rules of law." Could you, sir, explain to me what that paragraph means?

A: On my .... and I know I can't figure out what happened in hindsight. In my secretary's computer she has two sets of powers that we use for personal representatives and trustees. One's the short form, and one's the long form, and I'm sure I dictated, inserted the long form powers, and she would have cut and pasted from her long form powers.

Q: And Mr. Townsend, I'm not intending to put you in a bad position, but did you read this document prior to advising Ms. Underwood to execute it?

A: I feel certain that I did, and I feel certain that she read it.

Q: And would you agree with me that the document which is Exhibit Number Three is in fact not a will?

A: No, it is not a will.

Q: Okay. Now ....

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Civil Action No.: 2010-CP-30-0116

Willie D. Watson ..... Appellant.

v.

Nancy Carol Underwood, individually and as putative trustee of the Willie D. Watson Trust; John H. Watson, individually and as putative trustee of the Willie D. Watson Trust; and Future and Potential Heirs of Willie D. Watson ..... Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Supplemental Record on Appeal contains all materials proposed to be included in this Supplemental Record on Appeal by any of the parties and not any other material.

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March 25, 2013