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.

FINAL BRIEF OF APPELLANT

B. Michael Brackett, Esquire
Moses, Koon & Brackett, PC
P.O. Box 100261
Columbia, SC 29202-3261
(803) 461-2300
ATTORNEY FOR RESPONDENTS

T. Jeff Goodwyn, Jr., Esquire
Goodwyn Law Firm, LLC
2519 Devine Street
Suite A
Columbia, SC 29205
(803) 251-4517
ATTORNEY FOR APPELLANT

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6. Did the trial court err in denying Appellant's petition to terminate trust when all of the terms and conditions pursuant to 62-7-411 were satisfied and the trust should have been terminated?

STATEMENT OF THE CASE

Appellant filed this action January 26, 2010 after Respondent Nancy Carol Underwood ("Underwood"), using a power of attorney, transferred virtually all of Appellant's assets ($200K+) to an irrevocable trust naming herself and her brother, Respondent John H. Watson, as the trustees and attempting to name themselves as the residuary beneficiaries of the trust to the exclusion of their other sibling, Sherry Long. R. pp. 47-67. Ms. Underwood tried to accomplish this by creating an irrevocable trust using her power of attorney that left the remaining assets in the trust at the death of Appellant to the estate to be distributed as directed by Appellant's October 5, 2006 will. R. pp. 274-281. Ms. Underwood then transferred all of Appellant's major assets into this trust using her power of attorney without Appellant's knowledge in April 2009.

Appellant learned of this trust and the transfer of her assets into it shortly after and immediately revoked the power of attorney on June 18, 2009. R. p. 283. Appellant executed a codicil to the October 5, 2006 will on January 12, 2010 changing the beneficiaries of the will from Respondents to Sherry Long. R. pp. 284-288. After instituting this action, Appellant filed a Petition to Terminate Trust dated April 29, 2010 based on S.C. Code Ann. 62-7-411 based on the fact that both the lifetime beneficiary of the trust, Appellant, and the residuary beneficiary of the trust, Sherry Long, consented to its termination. R. pp. 73-77. This motion was denied by the trial court on October 1, 2010 R. pp. 17-29, and Appellant's timely motion to reconsider was denied in an Order dated February 14, 2011. R. pp. 30-44.

Both Appellant and Respondent filed cross motions for summary judgment on grounds related to the validity of the trust and potential questions of fact which a jury

may need to hear, as well as on the issue of whether the transfer of the real property was proper. These motions were heard by the trial judge August 26, 2011. The trial judge and granted Respondent's motion for summary judgment while denying Appellant's motion for summary judgment in an Order dated December 13, 2011. R. pp. 3-15. Appellant timely filed a motion to reconsider which was denied in a form 4 Order dated April 10, 2012. Appellant's Notice of Appeal was filed May 9, 2012 and served on counsel for Respondents the same date.

STATEMENT OF THE FACTS

Appellant granted to her daughter, Respondent Nancy Carol Underwood, ("Underwood") a durable power of attorney on October 5, 2006 with the understanding that Underwood would use the authority to aid Appellant should she become incapacitated. R. p. 214, pp. 259-261. On April 2, 2009, after admitting Appellant to a nursing facility, Underwood used the powers vested in her through the power of attorney to create an irrevocable trust naming herself and her brother, John H. Watson, as co-trustees, as well as the majority beneficiaries at Appellant's death. R. pp. 274-281. Mrs. Underwood then transferred the majority of Appellant's assets, including Appellant's home at 423 Free Bridge Road, Laurens, SC, into this trust. However, the deed transfers Appellant's property to the trust rather than to the trustees for the benefit of the beneficiaries as required under South Carolina law. R. pp. 248-251.

The trust is known as the Willie D. Watson Irrevocable Trust, and Section Two, subsection (b) of the trust document clearly indicates that the remaining assets in the trust at the death of Mrs. Watson will be distributed "to the estate of Willie Dendy Lee Watson..." R. p. 274. If this is all the trust indicated, the proper beneficiaries of the

estate of Appellant at her death would receive the residuary of the trust and there would be no dispute as to who would receive the remainder of the trust assets. The trust, however, then goes on to direct that the estate dispose of the remaining trust assets in a particular fashion. If this provision in the trust is allowed to control, this would prevent Appellant's personal representative from distributing estate assets in accordance with the ordinary protocol that estates are required to use to disburse estate assets - namely that the personal representative must abide by the terms of the last will and testament of the decedent. The trust states that Appellant's estate must distribute the trust proceeds that are distributed to Appellant's estate to the beneficiaries of Appellant's will dated October 5, 2006. R. p. 274. The trust incorporates this specific will by reference. Appellant was not asked or notified at the time of the trust's creation, R. p. 144, l. 6-19, and only learned about the trust in June of 2009. Upon learning of Mrs. Underwood's activities and the formation of the trust, Appellant revoked the Power of Attorney and demanded the return of her property but was refused by Mrs. Underwood and Mr. Watson. Appellant has also changed the terms of her will so that the beneficiaries of the current will are not the same as the will dated October 5, 2006 that is referred to in the trust. R. pp. 284-288. The fact that the trust is attempting to direct the an estate to distribute its assets in a manner inconsistent with the decedent's last will creates a questions as to the validity of a trust attempting to usurp the authority given to a will that is properly probated. These questions are examined and argued below.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP:

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. *White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 601 S.E.2d 342 (2004); *B & B Liquors, Inc. v. O'Neil*, 361 S.C. 267, 603 S.E.2d 629 (Ct. App. 2004); *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Medical Univ. of South Carolina v. Arnaud*, 360 S.C. 615, 602 S.E.2d 747 (2004); *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998). If triable issues exist, those issues must go to the jury. *Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271, 573 S.E.2d 830 (Ct. App. 2002); *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999).

ARGUMENT

A. The trial court erred in denying Appellant's motion for summary judgment and granting Respondent's motion for summary judgment on the question of the validity of the trust when examining the provision distributing the remainder of the trust at Appellant's death to her estate and then directing the estate to distribute the assets in a manner different than Appellant's last will and testament, the effect of which is to create a will in violation of the powers of Power of Attorney under South Carolina law.

Appellant argues a power of attorney cannot create a will or prevent revocation of a will. Appellant's entire estate is at present controlled and withheld from her by this trust. As discussed supra, the trust purports to make Appellant a lifetime beneficiary of the trust and Appellant's estate as the residuary beneficiary of the trust while also directing the estate that the beneficiaries of Appellant's October 2006 will (not her

current will) shall receive the remaining trust assets. R. pp. 274-281. This essentially turns the trust into a document that disposes of Appellant's probate assets at her death, or a de facto will.

A sane testator's right to dispose of his property as he chooses is protected under common law. *See Calhoun v. Calhoun*, 290 S.E.2d 415, 418 (S.C. 1982). ("Even though one may have unreasonable likes and dislikes and may act unjustly and even cruelly toward his family in the disposition of his estate, still his will, when legally expressed, must be supported. Therefore, the issue of undue influence should be resolved in the light of proposition that a sane testator has the right to dispose of his property as he chooses"). Only the testator, or someone who signs in the testator's name in the testator's conscious presence and by the testator's direction, can execute a will. S.C. Code Ann. § 62-2-502 (Amended 2005). Wills are freely revocable instruments as there is no limitation on the right of a testator to revoke a validly executed will, except in the case of a contract involving a will. S.C. Code Ann. § 62-2-701 (Amended 2005). This code section specifically invalidates any presumptive contract not to revoke a will, ie. joint or reciprocal wills do not create a presumptive contract not to revoke a will. *Id.*

The trust code does not provide to the trustee any power to execute a will for his agent. *See* S.C. Code Ann. §§ 62-7-815 and 62-7-816 (Amended 2005). Furthermore, the code drafters specifically provided for incorporation of documents into a will, but not for a trust. South Carolina Code Ann. § 62-2-509 (Amended 2005) provides for the incorporation by reference of any then existing writing into a will when the will is executed. However, no companion statute exists in the trust code, evidencing the legislature's intent not to provide for the incorporation of existing documents into a trust.

The trust as written strips Appellant of her right to determine the disposition of her estate after her death. Appellant does not desire to leave the bounty of her estate to those persons named in her will of October 2006 as evidenced by her revocation of that will and subsequent codicil to that will. R. p. 284. Appellant executed a codicil to the October 2006 will, naming her daughter, Sherry Long, as beneficiary of her estate. R. p. 284. However, the Circuit Court held that the codicil did not modify the trust. R. pp. 17-29. As it stands now, Nancy Underwood has, in fact, as power of attorney, created a will or circumvented the statute which requires strict adherence to create a contract not to revoke, by incorporating a fully revocable will in the irrevocable trust. She has prevented Appellant from passing her estate as she wishes. She has failed in her duty as both a daughter and a fiduciary.

A power of attorney as an agency device can empower the attorney-in-fact only with the ability to perform acts that the principal is competent to perform himself. However, South Carolina (as well as every other state) allows by statute the creation of a durable power of attorney, which remains valid despite the principal's subsequent incapacity. S.C. Code Ann. § 62-5-501. In some cases when a durable power of attorney empowers the attorney-in-fact to act for an incompetent principal, the attorney-in-fact may attempt to revoke or amend a trust created by the settlor. Because the principal may have created the trust as part of an overall estate plan, the trust's revocation or amendment would in effect change the principal's estate plan. South Carolina follows the generally accepted common law view that an agent cannot change a principal's will. See Moses & Pope, *Estate Planning, Liability, and the Durable Power of Attorney,* 30 S.C.L. Rev. 511 (1979), at 526, note 4; Restatement (Third) of Prop.: Wills and Other

Donative Transfers § 8.1 cmt. k (2003). Essentially, Mrs. Underwood is attempting to do just that, by referencing the Will in the irrevocable trust which purportedly has title to all but nominal assets of Appellant so Appellant cannot change her will.

This precise issue is addressed in *Gagnon v. Coombs*, 39 Mass. App CT 144, 654 N.E.2d 54 (1995) wherein an agent under a power of attorney violated her fiduciary duty of loyalty to her principal by conveying the principal's property to herself as trustee of an irrevocable trust, by refusing to obey the principal's direction that she re-convey the property to the principal, by failing to inform the principal of all relevant facts with respect to the transfer of the property and by her self-dealing with respect to the conveyance and as such, the conveyance was therefore revocable and the agent was to re-convey the property to the principal. *Id.* Nancy Underwood, the prior power of attorney at issue herein, was not granted the power to acquire interests adverse to those of the principal or to seek or derive personal advantage, profit or benefit from the agency or from any transactions undertaken pursuant thereto, just as in the case supra. Appellant did not have any knowledge that Underwood was acting in such capacity of power of attorney and Underwood was only to act under such power if Mrs. Watson could not do so herself. "An agent is authorized to do, and to do only, what is reasonable for him to infer that the principal desires him to do in the light of the principal's manifestation and the facts as the agent knows of should have known them at the time he acts." Restatement (Second) of Agency § 33. An agency differs from the other fiduciary relations in the fact that it is the agent's duty to obey the will of the principal, to respond to the principal's directions. Restatement (Second) of Agency § 14, 33, 385. In no event must (the agent) act contrary to what . . . the principal desires him to do," *Id.* at comment a, "even if the

principal's directions amount to a breach of the agency contract. *Id.* at §118 comment b. Underwood, through the creation of the trust by utilization of the power of attorney, benefits personally from the creation of the trust directly opposed and communicated by Appellant. R. p. 223. The power of attorney simply did not give Underwood agency powers to gain personal advantage without Mrs. Watson's consent. **Appellant's testimony is clear and unwavering on this point – the power of attorney was created by Appellant for one reason, and one reason only. In the event her health failed, Appellant wanted Underwood to have the power of attorney. R. p. 214. It is undisputed that Appellant is, and has been, of sound mind at all time relevant to these events.**

To allow an agent to create an irrevocable trust which references a freely revocable document, such as the October 2006 will, and thereby preclude the testator from revoking or modifying the will, allows the agent, in effect, to execute a will by thwarting free revocation. The irrevocable nature of the trust is extended to the will in direct contradiction of the obvious protections written into the statute. It allows an agent to do indirectly what he cannot do directly and is in violation of both South Carolina law and public policy.

For the foregoing reasons, the trial court erred as a matter of law in both denying Appellant's motion for summary judgment and in granting Respondent's motion for summary judgment. As a result, this Court should reverse the trial court's granting of Respondent's motion for summary judgment and for the same reasons reverse the trial court's denial of Appellant's motion for summary judgment on this issue.

While Appellant is arguing that summary judgment was improperly granted on this issue, it is also arguing that the trial court made insufficient findings of fact in its Orders relating to this issue. The Order granting summary judgment filed December 13, 2011 does not make any findings relating to the issue Appellant's counsel raised in his brief and in oral argument relating to whether or not a trust that references a will of a certain date and essentially precludes the individual from revoking or amending his or her will is valid. The Order focuses on the question of whether a properly granted power of attorney can create such an irrevocable trust. As argued to the trial judge at the hearing on the parties' cross-motions for summary judgment, R. pp. 143-166, Appellant doesn't dispute that, generally speaking, a power of attorney has the authority to create an irrevocable trust as long as the document granting the power of attorney indicates that this is one of the powers granted. The question before the Court that was not addressed in the Order is the validity of a trust, such as the one in this case, that claims to prevent an individual from revoking or amending their will.

Appellant filed a motion to reconsider December 30, 2011 raising the fact that no specific findings on these issues were in the Order, but this motion was denied with a form 4 Order dated April 10, 2012. As a result, as an additional ground to reverse and remand this case, Appellant is asking this Court to remand the case to the trial judge for specific findings of fact relating to these issues.

B. The trial court erred in granting summary judgment on the question of whether or not the irrevocable trust is valid since there are multiple questions of fact for a jury to determine relating to this inquiry.

Appellant argues the irrevocable trust is not for her benefit and, despite its recitations, was not created for the purpose of protecting her as the principal but was

instead a callous attempt by Nancy Underwood and John Watson to secure their inheritance and exclude their sibling. The creation of the irrevocable trust and the transfer of all of Appellant's real and personal property and bank accounts to the trust is a violation of Mrs. Underwood fiduciary duty to her mother. A confidential and fiduciary relationship existed between Appellant and Respondent Underwood.

To show a "confidential relationship" existed between the grantor and grantee, the grantor must present adequate evidence that she has placed her "trust and confidence in the grantee, and the grantee has exerted dominion over the grantor." *Brooks v. Kay*, 339 S.C. 479, 489, 530 S.E.2d 120, 125 (2000); *Middleton v. Middleton*, 300 S.C. 402, 404, 388 S.E.2d 639, 641 (1990); *Hudson v. Leopold*, 288 S.C. 194, 196, 341 S.E.2d 137, 138 (1986). Once a contestant has proven a confidential relationship existed at the time of conveyance, the burden shifts to the grantee to prove that the contestant's conveyance was not the product of undue influence. *Brooks*, 339 S.C. at 489, 530 S.E.2d at 125. In this case, since the transfer was by the fiduciary partially to the fiduciary without the true grantor's knowledge, undue influence may be presumed.

Underwood and Appellant were in a confidential relationship at the time of conveyance. First, the parties are related as mother and daughter. Although this Court has declined to hold that a familial relationship, alone, is sufficient evidence of a confidential relationship, a familial relationship certainly supports an argument that a confidential relationship exists. *See Hudson*, 288 S.C. at 196, 341 S.E.2d at 139. Second, Appellant gave Underwood a power of attorney to use if and when she became unable to handle her own affairs. This suggests Appellant placed some trust and confidence in Underwood to make decisions for her in case she had to be hospitalized or unable to carry

out her affairs. This, alone, creates a fiduciary relationship. *See In re Estate of Cumbee*, 333 S.C. 664 at 672-73, 511 S.E.2d 390 at 394 (S.C. App. 1999) (finding in will contest that fiduciary relationship, which created the presumption of undue influence, existed between son and mother where son had mother's power of attorney and managed her finances). "However, the existence of a confidential relationship creates a presumption that the instrument is invalid, and the burden then shifts to the proponent of the instrument to affirmatively show the absence of undue influence." *Macaulay v. Wachovia Bank of S.C., N.A.*, 351 S.C. 287, 299, 569 S.E.2d 371, 378 (Ct. App. 2002) (*citations omitted*). "A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interest of the one imposing the confidence." *Cumbee*, 333 S.C. at 672, 511 S.E.2d at 394 (quoting *Brown v. Pearson*, 326 S.C. 409, 422, 483 S.E.2d 477, 484 (Ct. App. 1997)). The presumption of invalidity in deed cases also applies to will cases. *Howard v. Nasser*, 364 S.C. 279, 287, 613 S.E.2d 64, 68 (Ct. App. 2005); *see Dixon v. Dixon*, 362 S.C. 388, 398 n.7, 608 S.E.2d 849, 854 n.7 (2005) ("[T]he analysis is the same regardless of whether the underlying document sought to be set aside on the grounds that the Appellant was unduly influenced is a will or a deed."); Restatement (Third) of Prop.: Wills and Other Donative Transfers § 8.3 cmt. f (2003) ("A presumption of undue influence arises if the alleged wrongdoer was in a confidential relationship with the donor . . . whether the transfer was by gift, trust, will, will substitute, or a donative transfer of any other types.").

Most of this (and other) state's jurisprudence on the issue of undue influence involves a contestant seeking to set aside a will, rather than a deed, as does the case

quoted above. *See First Nat'l Bank of Appleton v. Nennig*, 92 Wis.2d 518, 285 N.W.2d 614, 623, (Wis. 1979) (holding that "undue influence in the execution an of inter vivos conveyance is proved in the same way that undue influence is proved in the execution of a will"); *Lyons v. Elston*, 211 Mass. 478, 98 N.E. 93 (Mass. 1912) (holding that the analysis is the same regardless of whether the underlying document sought to be set aside on the grounds that the Appellant was unduly influenced is a will or a deed).

This Court should reverse and remand on the grounds that the trust should be set aside because Respondent Underwood used the power of attorney as a vehicle to secure her own inheritance and not for the benefit of her mother. The question of fact inherent in the above issue is whether or not Mrs. Underwood was acting in the best interest of her mother when she created the irrevocable trust. If she was not acting for the benefit of her mother, there is no valid trust. Therefore, summary judgment was inappropriate on this issue and the Court should reverse and remand the case.

While Appellant is arguing that summary judgment was improperly granted on this issue, it is also arguing that the trial court made insufficient findings of fact in its Orders relating to this issue. The Order granting summary judgment, R. pp. 3-15, does not make any findings relating to the issue Appellant's counsel raised in his brief (and in oral argument) relating to whether or not Ms. Underwood breached her fiduciary relationship with Mrs. Watson in forming this trust or whether forming this trust was in Mrs. Watson's best interests. The Order focuses on the question of whether a properly granted power of attorney can create such an irrevocable trust. As argued to the trial judge at hearing, R. pp. 143-166, Appellant doesn't dispute that, generally speaking, a power of attorney has the authority to create an irrevocable trust as long as the document

granting the power of attorney indicates that this is one of the powers granted. The question before the court that was not addressed in the Order is whether or not Ms. Underwood breached her fiduciary duty to Mrs. Watson in forming the trust or whether forming this trust was in Mrs. Watson's best interests.

Appellant filed a motion to reconsider December 30, 2011, raising the fact that no specific findings on these issues were in the Order, but this motion was denied with a Form 4 Order, dated April 10, 2012. As a result, as an additional ground to reverse and remand this case, Appellant is asking this Court to remand the case to the trial judge for specific findings of fact relating to whether or not a confidential relationship existed; whether a fiduciary relationship existed; whether the forming of the trust was in the best interest of Ms. Watson; and why these issues were not properly for a jury.

C. The trial court erred in denying Appellant's motion for summary judgment on the issue where a deed purports to transfer her property to a trust rather than to the trustees in trust for the beneficiaries it is violation of South Carolina law.

Mrs. Watson argues that her real property located at 423 Free Bridge Road, Laurens, South Carolina is not a part of the trust. A trust may be created by "transfer of property to **another person as trustee** during the settlor's lifetime ...." S.C. Code Ann. § 62-7-401 (Amended 2005). A trust is defined as "the right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title...." Black's Law Dictionary 1261 (8th ed. 2005). The proper form required to deed property is set out in S.C. Code Ann. § 27-7-10 which specifically allows transfers from one person to another or others. The deed created by Mrs. Underwood transferred the property to the trust rather than the trustees. R. pp. 248-251. Accordingly, the deed is

void and of no effect. Because legal title was never properly conveyed, the property remains owned by Appellant in fee simple.

In *Flinn v. Van Devere*, 12 Fla. L. Weekly 51, 502 So. 2d 454 (Fla. 3d DCA 1986), the Third District concluded that realty owned by the decedent was not validly transferred to a trust she established during her lifetime and thus remained an estate asset and the property passed under the residuary clause of her will rather than the trust. *Id.* at 454. The court held that the decedent's execution of a form instrument creating a standard inter vivos "living trust" of property owned by her and listed in an accompanying schedule was ineffective with respect to the real estate described because the settlor did not, as is required, also execute a deed which conveyed the realty to the trustees. *Id.* at 455. *(emphasis added).*

D. The trial court erred in denying Appellant's petition to terminate trust when all of the terms and conditions pursuant to 62-7-411 were satisfied and the trust should have been terminated.

This matter centers around a purported trust. Appellant alleges that the trust is invalid on its face; however, for purposes of this subsection and this argument only, Appellant avers that the purported trust is in effect and that the trial court erred in failing to grant its petition to terminate the trust pursuant to S.C. Code Ann. 62-7-411, which states:

> (a) 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 is inconsistent with a material purpose of the trust. A settlor's power to consent to a trust's modification or termination may be exercised by an agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust; by the settlor's conservator with the approval of the court supervising the conservator if an agent is not so authorized; or by the settlor's guardian with the approval of the court supervising the guardianship if an agent is not so authorized and a conservator has not been appointed.
>
> (b) A noncharitable irrevocable trust may be terminated upon consent of all beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A noncharitable irrevocable trust

> may be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.
>
> (c) Upon termination of a trust under subsection (a) or (b), the trustee shall distribute the trust property as ordered by the court.
>
> (d) If not all of the beneficiaries consent to a proposed modification or termination of the trust under subsection (a) or (b), the modification or termination may be approved by the court if the court is satisfied that:
>
> (1) if all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and
>
> (2) the interests of a beneficiary who does not consent will be adequately protected.

This is the so-called "American rule": when the continuance of the trust is necessary to carry out a material purpose of the trust, the beneficiaries cannot terminate the trust. Under the English rule, it is immaterial whether the purposes of the trust have been carried out; the beneficiaries, if all agree and are *sui juris*, can at any time insist on termination.

Our statutory provisions follow the Restatement, § 338:

> "(1) If the settlor and all of the beneficiaries of a trust consent and none of them is under an incapacity, they can compel the termination or modification of the trust, although the purposes of the trust have not been accomplished."
>
> "(2) Although one or more of the beneficiaries of a trust do not consent to its modification or termination or are under an incapacity, the other beneficiaries with the consent of the settlor can compel a modification or a partial termination of the trust if the interests of the beneficiaries who do not consent or are under an incapacity are not prejudiced thereby."

The statute restates the common law of most states, IV A. Scott, Scott on Trusts, § 338 (Fratcher's 4th ed. 1989) [hereinafter "Scott on Trusts"]. Getting the consent of all who are *sui juris* might be difficult in most cases; however, that is not the case here, where there are no minors and independent medical examiners have deemed Appellant

competent. The power to terminate includes the power to modify. Scott on Trusts § 338, n. 17.

However, even if all beneficiaries consent, as here, they must leap the hurdle of paragraph (b) of this section. If continuance of the trust "is necessary to carry out a material purpose of the trust" the court must first determine that the proposed change "substantially outweighs" the interest in accomplishing the material purpose. The statute clarifies that a trust may not be modified in a manner inconsistent with its material purpose without court approval. As such, the stated material purpose of this trust is to provide "for the sole benefit of Willie Dendy Lee Watson." Further, it is to provide the remainder interest following Appellant's death to be disposed of "in accordance with the terms and conditions of her Last Will and Testament dated October 5, 2006." As she has drafted and executed a codicil to that Will, naming Ms. Sherry Long, her daughter, as the sole beneficiary of her estate, pursuant to the Last Will and Testament, and Ms. Long has joined Appellant in requesting the termination of the trust, there is no basis for not terminating the trust *in toto*. R. p. 225. "Persons beneficially interested in a trust are necessary parties to a suit to terminate the trust." 89 C.J.S. Trusts § 93e (1955). There have been and are no allegations that Appellant is a spendthrift, irresponsible or in any way incompetent to handle her own affairs; in fact, she videotaped her execution of the codicil to ensure that no pressure nor undue influence was placed upon her during the amendment to her Will.

The law requires that the purported trust should be terminated and the assets turned over to Appellant for her own use and benefit. It certainly is not in Appellant's best interest to be fighting with her other two children for her assets and using monies

which are rightfully hers in order to defend and prosecute cases - *just to determine if her own assets should be returned to her.* As the purported trust's language states that it is created for **Appellant's** sole benefit, none of these actions are accomplishing anything other than using Appellant's money to secure assets which are hers rightfully to begin with. Clearly, this is of no benefit to Appellant.

The primary purpose of the trust is to provide for Willie Dendy Watson. The name of the trust actually states the purpose of the trust, "Irrevocable Trust Agreement for the Benefit of Willie Dendy Lee Watson." Pursuant to her doctor's reports, Appellant can provide for herself, she is competent and as her reports indicate, she is not suffering from dementia or any other type of issue where she cannot provide for herself. R. p. 282. There was no reason for the trust to be created to begin with and, as such, the goals of the trust are impossible and unachievable. Essentially, a trust is extinguished by the entire fulfillment of its object or upon its object becoming impossible or unlawful, as is here. When the purpose for which an express trust was created ceases, the trust should be dissolved or terminated *in toto*. As a result, the trial court erred in denying Appellant's Petition to Terminate Trust and her Motion to Reconsider this denial and this Court should reverse the trial court's ruling and grant this motion.

CONCLUSION

The trust as written clearly usurps Appellant's authority to dispose of her estate assets as she chooses. The trust language prevents Appellant from revoking or modifying her own will and compels that the portion of her estate that comes from the remainder of this trust be paid to the beneficiaries of her will of October 2006. The trial court has

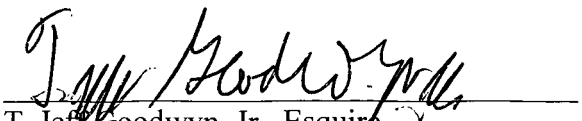
ruled that the fact that she modified her will since that date has no effect on the assets flowing from this trust. As a result, Respondent Underwood has used a power of attorney to create a de facto will when she created this trust. Doing so is a violation of South Carolina law and public policy and this Court should reverse the trial court and rule that the trust is invalid.

Should this Court not find that the trust is invalid, this Court should reverse and remand the case on the issue of whether or not a jury question existed on the issues surrounding the formation of the trust. Whether or not the trust was in the best interest of Appellant is clearly an issue of fact that a jury needs to determine.

As a third ground for reversal, the deed purportedly transferring Appellant's real property to the trust is improper on its face since the deed transfers the property to the trust and not the trustee as required by South Carolina law. This Court should reverse this decision of the trial court and grant Appellant's motion for summary judgment to invalidate the deed.

Lastly, the trial court erred in denying Appellant's petition to terminate the trust and her motion to reconsider pursuant to S.C. Code Ann. 62-7-411. Once the codicil to the October 5, 2010 will was executed and Sherry Long consented to the trust being terminated, both the lifetime and residual beneficiaries of the trust consented to the trust being terminated and the trial court should have granted Appellant's motion. As a result, this is an error of law and this Court should reverse the trial court on this issue.

Respectfully Submitted,



T. Jeff Goodwyn, Jr., Esquire
Goodwyn Law Firm, LLC
2519 Devine Street, Suite A
Columbia, SC 29205
(803) 251-4517
Attorney for Appellant

March 26, 2013

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 certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

Respectfully submitted,

T. Jeff Goodwyn, Jr., Esquire
Goodwyn Law Firm, LLC
2519 Devine Street
Suite A
Columbia, SC 29205
(803) 251-4517
Attorney for Appellant

Columbia, South Carolina
March 27, 2013