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.

RESPONDENTS' BRIEF

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STATEMENT OF ISSUES ON APPEAL

Appellant has identified six issues on appeal, condensed into four arguments. One to five, inclusive, appear to relate to the Order dated December 9, 2011 Granting Respondents' Motion for Partial Summary Judgment and Denying Plaintiff's Motion for Summary Judgment. Issue on Appeal six relates to the Order dated October 1, 2010 Denying the Appellant's Petition/Motion to Terminate Trust. Respondents see the issues on appeal as follows and will first address Appellant's Issue on Appeal six.

1. The trial court's October 1, 2010 Order properly denied the Appellant's Petition/Motion to Terminate Trust because the requirements of S.C. Code Ann. §62-7-411 were not satisfied. (Appellant's Issue on Appeal 6.)

2. The trial court's Orders dated October 1, 2010 and December 9, 2011 properly decided that the creation and funding of the irrevocable trust by the attorney-in-fact did not violate the principle of law that the execution of a Last Will cannot be delegated to an agent in and by a power of attorney. (Appellant's Issues on Appeal 1 and 2.)

3. The trial court's December 9, 2011 Order, with respect to the deed issue, denied Appellant's motion for summary judgment and is not immediately appealable; nevertheless said Order properly held that the deed transferring real property to the irrevocable trust was not invalid because it identified the grantee as "the Trust" rather than the named trustees. (Appellant's Issue on Appeal 3.)

4. The trial court's December 9, 2011 Order sets out sufficient facts and legal analysis to support its ruling that the trust does not constitute an impermissible restriction of Appellant's right to modify or revoke her last will. (Appellant's Issue on Appeal 4, briefed by Appellant in Argument B.)

5. The trial court's December 9, 2011 Order did not address the question of the Respondent Underwood's, as agent under the power of attorney, fiduciary duties in transferring assets to the trust, because that question was not before the court. (Appellant's Issue on Appeal 5, briefed by Appellant in Argument B.)

STATEMENT OF THE CASE

Respondents object to the Appellant's Statement of the Case on the ground that it does not comply with Rule 208(b)(1)(C), SCACR. It contains more than just a concise procedural history of the proceedings and includes contested matters and argumentative statements on substantive issues. It is blatantly improper and should be disregarded.

Appellant filed her action on January 26, 2010 challenging the validity, and funding, of the Willie D. Watson Irrevocable Trust. (R. p. 48-67.) Respondents Underwood and Watson filed Answers on February 17, 2010. (R. p. 68-72.)

Appellant subsequently filed a Petition to Terminate Purported Trust on April 29,

2010. (R. p. 73-77.) [1] Respondents filed their Return to Plaintiff's Petition/Motion to Terminate Trust on July 7, 2010, supported by Respondents' affidavits and the transcript of attorney Richard Townsend's deposition. (Supp. R. p. 1-16.)

Appellant's Petition/Motion to Terminate Trust was heard on July 14, 2010. By Order dated October 1, 2010 Appellant's Petition/Motion was denied. (R. p. 17-29.) Appellant filed and served a Rule 59(e) Motion to Reconsider on or about October 14, 2010. (R. p. 78-80.) The Motion for Reconsideration was heard on November 10, 2010. By Order dated February 14, 2011, Appellant's Motion for Reconsideration was denied. (R. p. 30-44.)

Respondents filed their Motion for Partial Summary Judgment on July 20, 2011. (Supp. R. p. 17-18.) Appellant filed a Cross Motion for Summary Judgment on or about August 24, 2011 that was contained in Appellant's "Memorandum in Support of Plaintiff's Reply and Cross Motion for Summary Judgment" dated August 24, 2011. The cross-motions were heard by the trial court on August 26, 2011. By Order dated December 9, 2011 Respondents' motion was granted, and Appellant's motion was denied. (R. p. 3-15.) Appellant filed a Motion for Reconsideration which was denied by Order dated April 10, 2012. (R. p. 45-46.) This appeal followed.

STANDARD OF REVIEW

Three trial court Orders are being appealed: (1) Order dated October 1, 2010 Denying the Appellant's Petition/Motion to Terminate Trust (R. p. 17-29.); (2) Order dated December

[1] Although identified as a "Petition to Terminate Purported Trust," the pleading appeared under the caption of the January 13, 2010 Complaint and was not accompanied by a summons. The trial court treated the pleading as a motion. (R. p. 17, l. 16-17.)

9, 2011 Granting Respondents' Motion for Partial Summary Judgment and Denying Plaintiff's Motion for Summary Judgment (R. p. 3-15.); and (3) Order dated April 10, 2012 denying Appellant's Motion to Reconsider the December 9, 2011 Order (R. p. 45-46.)

A. With respect to the Order dated October 1, 2010 Denying the Appellant's Petition/Motion to Terminate Trust, the underlying action was one to have a trust declared to be void *ab initio*. As such, it is a proceeding in equity. Floyd v. Floyd, 365 S.C. 56, 615 S.E.2d 465 (Ct. App. 2005). On appeal from an action in equity, tried by a judge alone, this Court has jurisdiction to find facts in accordance with our view of the preponderance of the evidence. Id., citing Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976); Ingram v. Kasey's Assocs., 340 S.C. 98, 531 S.E.2d 287 (2000). However, this Court is not required to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility. Ingram at 105, 531 S.E.2d at 291.

The October 1, 2010 Order being appealed denied the Appellant's effort to have the trust terminated as an interlocutory matter without having to decide the ultimate question, i.e., was the trust void *ab initio*. Still, an equitable proceeding.

B. With respect to the Order dated December 9, 2011 Granting Respondents' Motion for Partial Summary Judgment and Denying Plaintiff's Motion for Summary Judgment, this Order decided cross motions for summary judgment. The granting of summary judgment is immediately appealable. Hon. Jean Hoefer Toal et al., Appellate Practice in South Carolina 97 (2d ed. 2002). An order denying summary judgment is not appealable. Id. at 98, even when another appealable issue is before the appellate court. Id. at 98, citing Hedgepath v. AT&T, 348 S.C. 340, 559 S.E.2d 327 (Ct.App. 2001) and Olson

v. Faculty House of Carolina, Inc., 344 S.C. 194, 544 S.E.2d 38 (Ct.App. 2001.)

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court." Appellate Practice in South Carolina, supra., at 196. 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. Rule 56, SCRCP; Osborne v. Adams, 346 S.C. 4, 550 S.E.2d 319 (2001). Under the summary judgment standard, the Court gives every benefit of the doubt to the non-moving party. Watters v. Terminix, 376 S.C. 632, 658 S.E.2d 110 (Ct. App. 2008). Summary judgment should not be granted even where there is no dispute as to evidentiary facts if there is dispute as to the conclusions to be drawn from such facts. Wade v. Berkeley County, 330 S.C. 311, 498 S.E.2d 684 (Ct. App. 1998).

STATEMENT OF THE FACTS

In Appellant's Petition/Motion to Terminate Trust, Appellant admitted, for the purpose of the Petition only, that the Trust was effectively created, but argued that the Trust should be terminated pursuant to S.C. Code Ann. §62-7-411. (R. p. 74, 2d ¶.) Appellant argued that her codicil reduced the number of beneficiaries who must consent to revocation of the irrevocable trust and that no material purpose remained for continuation of the Trust. The trial court disagreed. (R. p. 17-29.)

In their motion for partial summary judgment, the Respondents/co-Trustees sought summary judgment on a discreet 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. (Supp. R. p. 17-18.) The trial court granted this motion. (R. p. 3-15, and p. 15, l. 4-10.)

In her cross motion for summary judgment (actually two motions), the Appellant asked the trial court to rule as a matter of law that (1) the deed used to transfer Appellant's residence to the trust was void because it identified the trust, and not the trustees, as the Grantee, and (2) that the creation of an irrevocable trust by an attorney-in-fact that incorporates the terms of the principal's revocable last will in effect created a last will in violation of the law that execution of a last will cannot be delegated to an agent. (R. p. 100-108, specifically p. 103, l. 17 to p. 108). The trial court denied both motions. (R. p. 17-29.)

Relying heavily on the recitation of background facts from the trial court's December 9, 2011 Order, (R. p. 4-7) and other sources as identified below[2], the facts are:

Appellant was married to John C. Watson, who died on March 31, 2009. (R. p. 205, l. 15 -18 and p. 216, l. 23-25.) They had three children, the defendants Nancy Underwood and John H. Watson, and Sherry Long, who is not a party to this case but who impacts the case significantly because of the nature of her relationship with the Appellant. (R. p. 227-228, ¶ 2 and 5; p. 232-233, ¶ 2 and 5; R. p. 190, l. 24 to p. 194, l. 19.) Appellant was born

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[2] Most notably attorney Richard Townsend's deposition and Respondent Underwood's affidavit, and Respondent Watson's affidavit. Townsend's deposition was taken in two sessions. At the first session, Townsend would not answer certain questions because of attorney-client privilege concerns. Those concerns were resolved by the trial court in a subsequent Order that has not been appealed. Townsend's deposition was then completed in the second session.

on August 10, 1918, meaning that on October 5, 2006 she was age 88, and on April 2, 2009 she was age 90. (R. p. 252).

On October 5, 2006, the Appellant executed a Durable Power of Attorney and a Last Will. The power of attorney named her daughter, the defendant Nancy Underwood, as her attorney-in-fact.[3] (R. p. 240-243, 1st ¶). The Last Will left devises to Appellant's 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, Appellant's spouse, then living but now deceased, and Sherry Long. Although named as devisees, Sherry Long and Appellant's spouse were each devised a nominal gift of $1.00. (R. p. 236-239, Items Two, Three, Four, Five and Six).

Both instruments were prepared by Laurens, South Carolina attorney Richard Townsend, who had done other legal work for the Appellant, but who had never previously met, or done legal work for, the Respondents. (R. p. 180, l. 5-8). Townsend met with the Appellant prior to October 5, 2006 at which time Appellant "gave [Townsend] the instructions what [sic] she wanted done. . ." (R. p. 173, l. 10-17).

The Power of Attorney. It was Appellant's idea to visit Townsend in early October 2006 (R. p. 213, l. 4-21) and the idea to get a power of attorney was also the Appellant's. (R. p. 214, l. 1-8.) The power of attorney was executed by the Appellant in Mr. Townsend's office after Appellant had ample opportunity to read it and to ask questions about its content. (R. p. 170, l. 14 to p. 180, l. 13). Fourteen enumerated paragraphs in the power of attorney

[3] Subsequent to the creation of the Trust that is at issue herein, the Appellant revoked the October 5, 2006 Power of Attorney, but Appellant has not challenged, and is not now challenging, the validity of the Power of Attorney. (R. p. 283.)

describe the specific powers given to the attorney-in-fact. (R. p. 240-243). 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." (R. p. 241, ¶ 11). And, Paragraph 10 grants to the attorney-in-fact the power to transfer by gift any of the Appellant'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..." (R. p. 241, ¶ 10.)

Although Appellant has claimed in this proceeding that she thought the power of attorney was a springing power of attorney that would be effective only in the event of her incapacity, Appellant's power of attorney was not a springing power of attorney. A springing power of attorney is one in which the powers granted to the agent may be exercised only if and when the principal is incapacitated. Moon v. Darrow, 912 N.Y.S.2d 850 (2010); In the Matter of Blare, 589 N.W.2d 211 (S.D. 1999). Nothing in the power of attorney itself suggests that it was a springing power of attorney (R. p. 240-243), and Townsend confirmed that he was not asked by Appellant to prepare a springing power of attorney and that the instrument he prepared for the Appellant was not a springing power of attorney. (R. p. 181, l. 3-20).

The Last Will. Just as with the power of attorney, Appellant had ample opportunity to read the Last Will and to ask questions about its content. (R. p. 170, l. 14 to p. 180, l. 13).

The driving force behind the October 5, 2006 Power of Attorney and Last Will was the Appellant's stressful relationship with her spouse and her daughter Sherry Long. On October 5, 2006, Townsend considered Appellant to be his client on the basis of prior

meetings and consultations. In the second session of his deposition, Townsend described his history with the Appellant that affected his legal advice in the case now before the Court. Prior to October 5, 2006 Appellant had visited with Townsend "on at least three or four occasions" and had other visits with Townsend's secretary. (R. p. 193, l. 24 to p. 194, l. 7.) The subject of her consultations with Townsend centered on complaints about her spouse and her daughter Sherry Long. Appellant wanted to leave her husband because he just "sat around and did nothing," expecting Appellant to do everything and to use her money to pay bills. (R. p. 193, l. 3-15.) Appellant described her spouse to Townsend as mentally or psychologically abusive. (R. p. 194, l. 14-19.)

With respect to Appellant's relationship with Sherry Long, Appellant complained to Townsend that Sherry would support the husband's abusive behavior. (R. p. 193, l. 3-15.) Appellant indicated that she was "scared" of Sherry. (R. p. 194, l. 8-12.) And, according to Appellant's information to Townsend, Sherry had been physically abusive to Appellant in addition to being mentally abusive. (R. p. 194, l. 8-19.) There was also a Laurens County Sheriff's Office Incident Report delivered to Townsend on or about October 4, 2006 describing an incident of abusive behavior on the part of Sherry Long directed to Appellant. (R. p. 187, l. 4 to p. 189, l. 3; and p. 244.) Appellant confirmed in her deposition the abuse by Sherry Long that was described in the incident report. (R. p. 208, l. 12 to p. 212, l. 14; and p. 244)

The cumulative effect of this history satisfactorily explained to Townsend why Appellant left nominal devises to her spouse and to her daughter Sherry. (R. p. 194 , l. 20 to p. 196, l. 1), and why Appellant wanted a power of attorney so that Underwood could be

a buffer between Appellant and her spouse and daughter Sherry Long.

Appellant's attorney-in-fact (Underwood) and Respondent Watson visited attorney Richard Townsend in March 2009 to discuss recent events and how best to protect Appellant's assets. Appellant's spouse was ill and in the hospital. Appellant was again upset and complaining about matters involving Sherry Long. (R. p. 228-229, ¶ 5 and 6 and p. 233-234, ¶ 5 and 6.) Appellant admitted that she called John Watson's wife complaining that Sherry was then being mean and threatening. (R. p. 217, l. 10-14.) When Appellant's husband died, it was discovered that Sherry had engaged in conduct designed to enrich herself at the expense of Appellant.[4] Appellant's spouse died on March 31, 2009. (R. p. 228-229, ¶ 5 and 6 and p. 233-234, ¶ 5 and 6.) With the discovery of Sherry Long's mischief and having heard Appellant's repeated complaints and expressions of fear that Sherry was abusive and would eventually take everything, Underwood, as attorney-in-fact, and Respondent Watson, decided that "something had to be done." (R. p. 228-229, ¶ 5 and 6 and p. 233-234, ¶ 5 and 6.) They went back to attorney Townsend for help. (R. p. 228-229, ¶ 6 and p. 233-234, ¶ 6; also p. 182, l. 12 to p. 185, l. 12.) As expressed by Townsend in speaking of his recommendation in March 2009 that an irrevocable trust be created, "Nancy [Underwood] came in here and said I want to make sure my mother is protected." (R. p. 200, l. 14-20.)

Being mindful of the history of the relationship between Appellant and Sherry Long, and being made aware of Sherry's recent conduct regarding Appellant's spouse's bank

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[4] Using a power of attorney signed by Appellant's spouse, naming Sherry Long as agent, Sherry closed a POD account that named Appellant as the payable on death beneficiary. (R. p. 228-229, ¶ 6 and p. 233-234, ¶ 6; and p. 246-247.)

accounts at or about the time of the spouse's death and the stated objective of putting Appellant's assets beyond the reach of Sherry Long, Townsend recommended to the Respondents that an irrevocable trust would protect Appellant's assets. Townsend prepared the trust agreement and the documents needed to transfer title to assets to the trust. (R. p. 185, l. 13 to p. 186, l. 13; and p. 198, l. 5 to p. 204, l. 2). He further explained his thinking in his deposition to include that Appellant and Underwood appeared to have a good relationship and that he [Townsend] had never witnessed behavior by Underwood that even hinted at undue influence. (R. p. 200, l. 19 to p. 203, l. 10.) He also took into consideration information that a physician had indicated that Appellant could not live independently and needed 24-hour supervision (R. p. 203, l. 2-10), later confirmed in writing. (R. p. 282.)

The "Irrevocable Trust Agreement for the Benefit of Willie Dendy Lee Watson" was prepared by attorney Townsend, and on April 2, 2009 it was signed in his office by Nancy Underwood as attorney-in-fact for the Appellant. (R. p. 240-243.) The trust was promptly funded with Appellant's bank accounts, car and real property. Attorney Townsend prepared the necessary instruments to transfer the assets into the trust.[5]

Section Four of the trust instrument states that: "This trust shall be irrevocable and, shall not revoked or terminated by the Trustor or any other person, nor shall it be amended or altered by Trustor or any other person."[6] (R. p. 274-281, specifically 275, l. 4-7). Section

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[5] The Appellant's Power of Attorney expressly authorized the creation of an irrevocable trust and authorized the transfer of assets into the trust. (R. p. 241, ¶ 10 and 11.)

[6] Appellant sought to terminate the trust in a separate proceeding filed in this case, and by Order dated October 1, 2010 Appellant's Motion to Terminate Trust was denied. (R. p. 17-29)

Two (b) of the trust states that: "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). (R. p. 274-281, specifically p. 274, l. 24-27.) At present, the remainder beneficiaries of the trust are the devisees of the Appellant's October 5, 2006 Last Will, namely Nancy Underwood, John H. Watson, Sherry Long and Appellant's five grandchildren and three great-grandchildren. Four of the grandchildren and great-grandchildren are minors. (R. p. 229-230, ¶7.)

On January 12, 2012, laying the groundwork for her challenge to the trust, Appellant executed a codicil to her October 5, 2006 Last Will that changed the beneficiaries of the probate estate from the several family members identified above to only one person - Sherry Long. (R. p. 284-288.)

In January, 2009 Appellant was living in an assisted living facility known as Sterling House. (R. p. 215, l. 8-14.) Sherry Long moved Appellant out of Sterling House on March 13, 2009, at night, without telling other family members, and took Appellant to Sherry Long's boyfriend's house in Simpsonville. (R. p. 218, l. 13 to p. 220, l. 15.)

At the urging of Respondents, in May 2009 Appellant moved into another assisted living facility closer to Underwood, Generations in Chapin. (R. p. 252-253). Appellant signed the admission paperwork, including a restriction that the facility not share information with Sherry. (R. p. 257). Appellant became unhappy about being at Generations and called Sherry to come get her. (R. p. 221, l. 19 to p. 222, l. 3.) On June 18, 2009, Appellant was

reported missing from the Generations assisted living facility. Sherry Long had helped to remove Appellant from the assisted living facility, unannounced, (R. p. 230, ¶ 8), and Appellant thereafter revoked her October 5, 2006 power of attorney. (R. p. 263.) Since then, Appellant's relationships with her children have apparently reversed, and Appellant is tying to revoke the irrevocable trust, (R. p. 229-230, ¶ 7, 8 and 9), and is trying to walk back and revise history with respect to her repeated prior complaints about Sherry.

No one has claimed, or is now claiming, that Appellant was, or is, mentally incapacitated.

ARGUMENT

This is a case of buyer's remorse. After complaining for years about her abusive daughter and asking her agent (Underwood) and her attorney (Townsend) to protect her and her property from the abusive daughter, Appellant got exactly what she wanted. Now, she wants a "do-over." Irrevocable means irrevocable, unless the requirements of law are satisfied to permit revocation. Appellant expressly granted Underwood the power to create and fund the trust (R. p. 241, ¶ 10 and 11), and Appellant is bound by the content of the power of attorney she signed. "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, 354 S.C. 648, 582 S.E.2d 432 (Ct.App. 2003).

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, 193 S.C. 412, 8 S.E.2d 740 (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, 270 S.C. 379, 242 S.E.2d 426 (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) 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, 108 S.C. 437, 94 S.E. 733 (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.[7] 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.

[7] 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.

Barnwell, 323 S.C. 548, 476 S.E.2d 492 (Ct. 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.C. 373, 170 S.E. 429 (1933); Klugh v. Seminole Securities Co, 103 S.C. 120, 87 S.E. 644 (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 Appellant/settlor is attempting to invoke.

Also to be considered are the interests of the minor and unborn/unascertained trust 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 . . .."[8] 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.

1. The trial court's October 1, 2010 Order properly denied the Appellant's Petition/Motion to Terminate Trust because the requirements of S.C. Code Ann. §62-7-411 were not satisfied. (Appellant's Issue on Appeal 6, briefed by Appellant as Argument D).

Appellant argues that it was attorney Townsend's intention in drafting the trust to allow Appellant to amend the trust by amending her October 5, 2006 Last Will, but that is belied by the fact that the trust was expressly made irrevocable and non-amendable, and as attorney Townsend explained in his deposition: the trust agreement was not a last will (Supp. R. p. 20, lines 21-24), and

> What I put in there was I had Ms. Watson's last will and testament, so I made it [the trust] conform to her last will and testament and made the ultimate beneficiary the beneficiaries of the last will and testament. (Supp. R. p. 19, lines 13-25).

And, the creation and funding of the trust protected Ms. Watson's assets, and

> It still left Ms. Watson able to make a will and do whatever she wanted to with what other, **other property she had**. (R. p. 201-202 [particularly p. 202, l. 8-11].) (emphasis added.)

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[8] In the case now under consideration, four of the trust's remainder beneficiaries are minors. (R. p. 229-230 and 234-235, ¶ 7).

There was an understanding by the scrivener and by Appellant's attorney-in-fact, by her having signed the trust instrument, that there was a distinction between the trust and the last will and between the assets controlled by the trust and the assets to be controlled by the last will. Otherwise, the assets would not be protected and would remain reachable by Sherry Long via influence or coercive behavior.

Appellant's argument herein is that by executing a codicil to her October 5, 2006 last will, naming in the codicil only one beneficiary, Sherry Long, the codicil amended the trust beneficiary provision such that Sherry Long became the only remainder beneficiary of the trust, and that Sherry Long became the only beneficiary whose consent was needed to terminate the trust 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. Appellant asserts that she, as Settlor, and Sherry Long, as the alleged sole devisee of Appellant's Last Will which, according to Appellant'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).[9]

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[9] Because the Appellant 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 could appoint a guardian ad litem to act on behalf of the minors and unborn beneficiaries, §62-1-403(4), or the co-trustees could represent and bind the minor and unborn beneficiaries by virtual representation. §62-1-403(2)(iii). The trial court did not appoint a guardian ad litem, so the co-trustees necessarily spoke for and defended the interests of the minor and unborn trust beneficiaries

The provisions of the irrevocable trust that are most relevant to Appellant's 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."(R. p. 274, l. 17-24.) (Naming Appellant 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." (R. p. 274, l. 25-28) (Naming the remainder beneficiaries).
- 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." (R. p. 275, l. 4-7).

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.[10]

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[10] See discussion of irrevocable trusts, supra.

According to the trust agreement, on April 2, 2009 the settlor/trustor was the Appellant, and the beneficiaries were the Appellant, as the lifetime income beneficiary, and the devisees named in the Appellant'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 Appellant's five grandchildren and three great-grandchildren. (Four of the grandchildren and great-grandchildren are minors.) (R. p. 229-230 and 234-235, ¶ 7).

The trial court concluded that there are three reasons why the codicil itself, even if effective to change the Appellant's Last Will for probate purposes, is nevertheless ineffective to change the Last Will as an incorporated document in the trust: (1) the codicil cannot serve as a document incorporated by reference into the trust because 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; (2) the codicil, as proposed to be used by the Appellant, is a modification of the trust that itself requires the consent of all original trust beneficiaries; (3) 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 Appellant's October 5, 2006 Last Will. The trial court was correct on each point.

Ground 1 - Doctrine of Incorporation by Reference

By the terms of Section Two (b) of the Irrevocable Trust Agreement, the Appellant 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 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.[11] 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

[11] 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.

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 Appellant, 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 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.

Ground 2 - Codicil Itself a Modification of the Trust

The Appellant's codicil, as it is described in the Appellant's petition/motion, was a significant modification to the October 5, 2006 last will and 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 Appellant, 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 Appellant 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 North Carolina 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.

Ground 3 - The Effective Date of the Codicil

Appellant'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, 163 S.C. 355, 161 S.E. 514 (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, 183 S.C. 379, 191 S.E. 59 (1937), Werber v. Moses, 117 S.C. 157, 109 S.E. 396 (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 Appellant'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 Appellant's last will dated January 12, 2010.

2. The trial court's Orders dated October 1, 2010 and December 9, 2011 properly decided that the creation and funding of the irrevocable trust by the attorney-in-fact, pursuant to express authority in the trust instrument, did not violate the principle of law that the execution of a Last Will cannot be delegated to an agent in and by a power of attorney. (Appellant's Issues on Appeal 1 and 2, briefed by the Appellant as Argument A)

Appellant challenges the validity of the irrevocable trust on the ground that it restricts the scope of what she, the principal, can do in and by a last will, and that the express authority in her power of attorney allowing her agent to create an irrevocable trust and to fund the trust with the principal's assets is tantamount to the creation of a last will for the principal which is not a delegable power.

Power of Attorney.

A power of attorney is an instrument in writing by which one person, as principal, appoints another as his agent and confers upon him the authority to perform certain specified acts or kinds of acts on behalf of the principal. The written authorization itself is the power of attorney. Verdery v. Daniels, 344 S.C. 564, 544 S.E.2d 854 (Ct. App. 2001). A durable

power of attorney allows a person, the principal, to designate another as his or her attorney in fact to act on the principal's behalf as provided in the document even if the principal becomes mentally incompetent. Id., citing S.C. Code Ann. § 62-5-501.

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, 193 S.C. 412, 8 S.E.2d 740 (1940). 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) p. 1516. [12] 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, 270 S.C. 379, 242 S.E.2d 426 (1978). The South Carolina Trust Code reverses the common law to provide that a trust is presumed to be revocable unless the instrument expressly provides that it is irrevocable. S. C. Code Ann. §62-7-602(a). An important consideration with respect to the issues raised by the Appellant in this case is the difference between a last will and an irrevocable trust. An irrevocable trust is essentially a transfer of property by gift, whereas a revocable trust is generally viewed as a form of will substitute. 1 Scott and Ascher on Trusts §3.2 (2006). A Last Will is a written instrument executed with the required formalities of law, whereby a person makes a disposition of his property to take effect after his death. Black's Law Dictionary (rev. 4th ed. 1968) p. 1772. An irrevocable trust is an inter vivos disposition (gift), and a last will is a

[12] 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.

testamentary disposition.[13]

Elements for Creation of Trust

The trust at issue was created by a written instrument meeting the requirements of §62-7-402. Those requirements are: capacity, sufficient expression of intention to create a trust, definite beneficiary(ies), duties that the trustee is to perform, and no merger of the legal and beneficial interests. Pre- Trust Code law provided that for a trust to exist, certain elements must be present, including a declaration creating the trust, a trust *res* and designated beneficiaries. The declaration of trust can be oral except when trust property includes realty, in which case the trust has to be in writing. §62-7-402, South Carolina Comment, citing Whetstone v. Whetstone, 309 S.C. 227, 420 S.E.2d 877 (Ct. App. 1992). See also Coleman Karesh, Trusts 7 (S.C. Bar 1977).

Delegable Powers With Respect to Trusts.

The prevailing rule regarding the scope of what may be delegated by a principal to an agent is broad. Collins, Lombard, Moses and Spitler, Durable Powers of Attorney and Health Care Directives, §2.7 (3d ed. 1999), citing CJS and Am Jur 2d. In each of these legal encyclopedias it is stated that as a general rule, a person may properly appoint an agent to do the same acts and achieve the same legal consequences as if he/she (the principal) had acted personally. 3 Am Jur 2d Agency §18 (2002) and 2A CJS Agency §4 (2003).[14]

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[13] A Last Will speaks as of the time of the testator's death. An amendable revocable trust remains changeable during the Settlor's life and only becomes irrevocable at the death of the Settlor. An irrevocable trust is irrevocable immediately upon execution.

[14] 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

But, there are exceptions to that rule. The exceptions are described as:

- unless public policy or the agreement with the principal requires personal performance by the principal, 3 Am Jur 2d Agency §18 (2002);
- an act that, if done by the principal, would be illegal cannot be done for the principal by an agent, 2A CJS Agency §4 (2003);
- where a statute requires an act to be done personally, Id., [see Buonanno v. DiStefano, 430 A.2d 765 (R.I. 1981) where it is said that as a general rule, an agency may be created for the performance of any lawful act, including acts done under the authorization of a statute. In order to determine that the right conferred by statute shall only be exercised personally and cannot be delegated to an agent, something must be found in the act by express enactment or necessary implication that prevents the agent from acting, citing Smith v. Walcott, 85 N.M. 351, 512 P.2d 679 (1973) and Restatement, Second, Agency, § 17 comment a at 54 (1968)].
- where the act is so peculiarly personal that its performance cannot be delegated, Id.

> "'[a]n attorney-in-fact is essentially an alter ego of the principal and is authorized to act with respect to any and all matters on behalf of the principal with the exception of those acts which, by their nature, by public policy, or by contract require personal performance.'"

Heine v. Newman Tannenbaum, 856 F.Supp. 190 (SDNY 1994), *aff'd* 50 F.3d 2 (2d Cir. 1995). Examples of absolute nondelegable personal acts are:

- Divorce. It is generally held that marriage and divorce are acts which require

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§145; Crim v. E.F.Hutton, Inc., 298 S.C. 448, 381 S.E.2d 492 (1989); Carver v. Morrow, 213 S.C. 199, 48 S.E.2d 814 (1948).

personal performance and are not delegable to an agent. Heine v. Newman Tannenbaum, supra.. See Murray v. Murray, 310 S.C. 336, 426 S.E.2d 781 (1993) (bringing a divorce action is personal and cannot be delegated to an agent or guardian).

- Making of Affidavits on Knowledge. Restatement, Second, Agency §17, cmt. b.
- Execution of Last Wills. Restatement, Second, Agency §17, cmt. b.

The most recent edition of Bogert's treatise on trusts states that "A settlor may empower an agent to create a trust." Amy Morris Hess, George Gleason Bogert and George Taylor Bogert, The Law of Trusts and Trustees §41 (3rd Ed. 2007). "The general weight of authority suggests that the power to **create**, modify, or revoke a trust is personal and non-delegable to an attorney-in-fact **unless expressly granted in the power-of-attorney.**" Stafford v. Crane, 382 F.3d 1175 (10th Cir. 2004). (emphasis added). In Stafford, an irrevocable trust created by an attorney-in-fact was found to be void *ab initio* because the powers granted to the agent in the power of attorney, although broad in scope, did not specifically and expressly grant authority to create a trust.[15] Stafford cites other authorities supporting the legal principle that an agent may create a trust for the principal when the power of attorney expressly grants the power: In re Trust of Jameison, 8 P.3d 83 (Mont. 2000) (noting that "[t]he Power of Attorney [did] not specifically grant the authority to create

[15] Stafford made no distinction between revocable and irrevocable trusts. The clear implication of the opinion is that an agent can create an irrevocable trust for the principal if the POA expressly authorizes the creation of trusts.

a trust, reflect [the beneficiary's] intent to create a trust, or even mention a trust" and that, as a result, "the Power of Attorney [did] not authorize [the purported trustee] to transfer . . . property to herself as trustee and, as a result, [the trust] was not properly created"); Kotsch v. Kotsch, 608 So.2d 879 (Fla. Dist.Ct.App. 1992) (strictly construing a power of attorney and concluding that although the power of attorney granted authority to a son to manage the father's property during his lifetime, it did not authorize the disposition of the father's property by means of a trust.) In In re Estate of Kurrelmeyer, 895 A.2d 207 (Vt. 2006), the Vermont Supreme Court held that an agent could create a valid and enforceable trust for the principal where the express language of the power of attorney authorized such. The delineated powers in the Kurrelmeyer trust included: "to add all of my assets deemed appropriate by my said attorney to any trust of which I an the Donor," and ". . . I authorize my said attorney to : (i) execute and deliver any assignments, stock powers, deeds or trust instruments; . . ." The Court noted that the Restatement, Third, Trusts §11(5) (2003) provides that "it is proper for a principal to authorize an agent to create or modify a revocable inter vivos trust to serve purposes that are financially advantageous . . ." even though a revocable trust (unlike an irrevocable trust) shares characteristics of a last will. As noted hereinabove, an irrevocable trust is essentially a transfer of property by gift, whereas a revocable trust is generally viewed as a form of will substitute. 1 Scott and Ascher on Trusts §3.2 (2006). There can be no question that an agent may make gifts of the principal's assets if expressly authorized in a written power of attorney. Fender v. Fender, 285 S.C. 260, 329 S.E.2d 430 (1985.)

Appellant's Power of Attorney expressly and unambiguously authorized the creation of the trust now at issue. The construction of an agreement [power of attorney] is a matter of contract law. Stribling v. Stribling, 369 S.C. 400, 632 S.E.2d 291 (Ct. App. 2006). In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties. Id. If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect. Id. A contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear. Bruce v. Blalock, 241 S.C. 155, 127 S.E.2d 439 (1962). Parties are governed by their outward expressions, and the court is not at liberty to consider their secret intentions. Blakeley v. Rabon, 266 S.C. 68, 221 S.E.2d 767 (1976).

Paragraph 11 granted 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." Clear and direct. There is no ambiguity.

3. The trial court's December 9, 2011 Order, with respect to the deed issue, denied Appellant's motion for summary judgment and is not immediately appealable; nevertheless, said Order properly held that the deed transferring real property to the irrevocable trust was not invalid because it identified the grantee as "the Trust" rather than the named trustees. (Appellant's Issue on Appeal 3.). (Appellant's Issue on Appeal 3, briefed by Appellant as Argument C.)

This issue on appeal involves a denial of Appellant's motion for summary judgment

(R. p. 13, l. 16 to p. 15, l. 3.) Consequently, the issue cannot be immediately appealed. Hon. Jean Hoefer Toal et al., Appellate Practice in South Carolina 98 (2d ed. 2002), even when another appealable issue is before the appellate court, citing Hedgepath v. AT&T, 348 S.C. 340, 559 S.E.2d 327 (Ct.App. 2001) and Olson v. Faculty House of Carolina, Inc., 344 S.C. 194, 544 S.E.2d 38 (Ct.App. 2001.)

If the Court elects to consider the issue: Appellant tries to partially escape the trust by challenging the validity and effectiveness of the deed used to transfer title to her residence to fund the trust. Appellant complains that the deed that transferred title to her residence to the trust is void for lack of a properly named grantee. (R. p. 248-249). The grantee is identified in the deed as "the Willie Dendy Lee Watson Irrevocable Trust of even date herewith." (R. p. 248, l. 13.) Appellant argues that the grantee should have been and must have been "Nancy Carol Underwood and John H. Watson as Trustees of the Willie Dendy Lee Watson Irrevocable Trust of even date herewith."

Appellant cites Flinn v. Van Devere, 502 So.2d 454 (Fla.App. 3 Dist. 1986) as supporting authority for her argument. But, Flinn did not involve a deed without a properly named grantee. In Flinn, there was no deed at all. A Settlor executed a trust instrument and identified a particular piece of real property on the property schedule attached to the trust instrument, but did not execute, or attempt to execute, a deed. The argument made was that the trust instrument, including the property schedule, was sufficient to be considered as the functional equivalent of a deed. As a subsequent Florida appellate court opinion described the Flinn holding:

> The [Flinn] court explained that the trust documents themselves plainly cannot be regarded as such a deed "for the obvious reason that, although they comply with the necessary formalities of two witnesses and an adequate legal description, they contain no expression which purports to convey, grant or transfer the real estate."

Vaughan v. Boerckel, 963 So.2d 915 (Fla.App. 4 Dist. 2007).

To pass title, a deed must sufficiently specify a grantee. 9 Thompson on Real Property, Second Thomas Edition §82.08(a)(1) (1999); 26 C.J.S. Deeds §24b. However, a deed need not describe the grantee by name if it otherwise identifies him or makes him susceptible of identification by extrinsic evidence. 4 Tiffany, The Law of Real Property §967 (3d ed. 1975) and 23 Am.Jur.2d Deeds §27, citing Garraway v. Yonce, 549 So.2d 1341 (Miss. 1989). Courts are loath to invalidate a deed because the identity of the grantee is misspelled or misdescribed, Thompson on Real Property, supra., and will not invalidate a deed to a misnamed party if the party exists and the intention of the parties and the identity of the grantee can be ascertained. Pruitt v. Ferguson, 297 S.E.2d 714 (Va. 1982).

With specific reference to a deed identifying the grantee as a trust rather than the person or entity serving as trustee, it is generally held that a deed to a trust, without mention of trustee(es), if the trust is in existence at the time the deed is executed, is valid because the names of the trustees who get title can be shown by extrinsic evidence. Hodgkiss v. Northland Petroleum Consol., 57 P.2d 811 (Mont. 1937); Hill v. Hill, 102 P.3d 1131 (Idaho 2004).

4. The trial court's December 9, 2011 Order sets out sufficient facts and legal analysis to support its ruling that the trust does not constitute an impermissible restriction of Appellant's right to modify or revoke her last will. (Appellant's Issue on Appeal 4, briefed by Appellant as Argument B.)

Appellant challenges the content of the trial court's December 9, 2011 Order, specifically that it did not contain sufficient legal analysis and factual recitations to support its grant of summary judgment in favor of Respondents on the discreet issue before the court: 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. (Supp. R. p. 17-18.)

Appellate courts require that trial courts include in orders granting summary judgment "facts and accompanying legal analysis sufficient to permit meaningful appellate review." Bowen v. Lee Process Systems Company, 342 S.C. 232, 536 S.E.2d 86 (Ct. App. 2000). Such orders should "include those facts which the circuit court finds relevant, determinative of the issues and undisputed." Id. The "facts" referred to are not factual findings in the ordinary sense, but ". . .are statements made by the court as it views the evidence and its inferences . . .." Id.

Pages 2 - 5 of the December 9, 2011 Order set out the "factual backdrop" for the cross motions for summary judgment. (R. p. 4-7.) Appellant's motion for reconsideration also purported to challenge the sufficiency of the trial court's factual and legal analysis but

without having challenged or disputed the accuracy of any of the stated facts in the Order. Likewise, Appellant's Brief does not dispute the accuracy of any particular factual recitation or legal analysis in the Order being appealed.

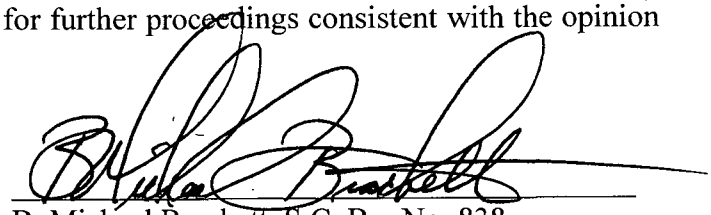
Appellant seems to misunderstand the scope of Respondents' motion for partial summary judgment by arguing that the Order granted summary judgment establishing the validity of the trust instrument. That is an overstatement. The Order merely ruled that "the Plaintiff's Power of Attorney expressly authorized the attorney-in-fact to create the trust that is at issue and that such power was legally delegable to then attorney-in-fact. . ." as a matter of law. (R. p. 15, l. 4-6.) The motion for partial summary judgment did not raise, and the Order under appeal did not address, and rightfully so, trust validity issues related to confidential relationship, undue influence or fiduciary duty, issues erroneously argued by Appellant in Argument B of her Brief. The Order does not include facts or analysis on these subjects because said subjects were not raised by the summary judgment motions. (Supp. R. p. 17-18) The trial court decided exactly what it was asked to decide and nothing more.

5. The trial court's December 9, 2011 Order did not address the question of the Respondent Underwood's, as agent under the power of attorney, fiduciary duties in transferring assets to the trust, because that question was not before the court. (Appellant's Issue on Appeal 5, briefed by Appellant in Argument B.)

Respondents incorporate by reference the argument set forth in Issue No. 4 above.

Conclusion

For the reasons set out above, the three Orders being appealed should be affirmed and the case remanded to the circuit court for further proceedings consistent with the opinion herein.



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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

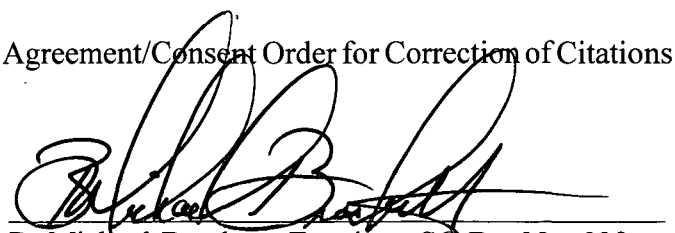
Willie D. Watson ..... Appellant.

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.

RULE 211(a) CERTIFICATE OF COUNSEL

The undersigned hereby certifies that Respondents' Final Brief complies with Rule 211(b), SCACR, and with the parties' Agreement/Consent Order for Correction of Citations.



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