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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
S. JACKSON KIMBALL, SPECIAL CIRCUIT COURT JUDGE
Case No. 2015-CP-46-01409
Appellate Case No.: 2016-001921

RECEIVED
APR 25 2019
SC Court of Appeals

IN RE:

Deborah Dereede Living Trust dated
December 18, 2013

Hugh Dereede and Tyre Dealer Network
Consultants, Inc., Respondents,

v.

Courtney Feeley Karp, Individually and
As Trustee of the Deborah Dereede Living
Trust dated December 19, 2013 and Michael
Fehily, as a qualified beneficiary of the
Deborah Dereede Living Trust dated
December 18, 2013, Defendants,

Of which

Courtney Feeley Karp, Individually and
As trustee of the Deborah Dereede Living
Trust dated December 19, 2013 is the, Appellant.

PETITION FOR REHEARING
OR REHEARING *EN BANC*

Appellant/Petitioner Courtney Feeley Karp (hereafter "Courtney"), asks this Honorable Court to reconsider its ruling in the referenced matter, which was issued as Opinion No. 5639 on April 10, 2019. This petition is filed pursuant to Rule 221(a), SCACR.

Additionally, pursuant to Rule 219, SCACR and because of the novel issues of exceptional importance presented here related to Trust Protector and personal liability of a trustee (both novel questions with significant impact), Courtney requests that rehearing be considered *en banc*.

Oral arguments are requested upon the granting of rehearing *en banc*.

It is respectfully asserted that the Court of Appeals erred in its decision in the following respects:

1. The preface of the Court's opinion is fundamentally in error. The Court states that "[t]his appeal turns on the following trust provision," which is identified as the same single provision of the trust agreement upon which the Respondents Hugh Dereede and Tyre Dealer Networks ("Hugh" and "TDN" respectively and collectively the "Respondents") rely. In doing so, the Court overlooks and ignores the multiple other provisions not of some ancillary document, but from the same trust agreement which imposes conflicting obligations on Courtney in furtherance of the settlor's whole intent as expressed in the Trust.
2. The Court's declaration that a single trust provision determines the outcome of this case improperly excludes any consideration of those conflicting directions set forth in the trust agreement, all of which as Trustee Courtney was obligated to carry out as a fiduciary with respect to all beneficiaries, not just particular parties named in one single provision, not to mention duties to creditors. Further, the Court's analysis of mandatory and discretionary distributions from the trust is in error. All obligations placed upon Courtney by the trust agreement were equally mandatory, which is one

of the reasons her obligations were unclear. The distributions to Michael (and to Courtney in her individual capacity) were also mandatory distributions.

3. Likewise, the Court erred in basing its analysis solely on Courtney's role as successor trustee. Courtney was also the personal representative and had obligations to the creditors of the estate, who could look to trust property to satisfy claims once all such claims were known and if estate assets were insufficient. In fact, her duties as personal representative had to be dealt with simultaneously with her duties as trustee. Courtney did not choose both roles for herself; she was designated as both by her late mother.
4. The Court has over-simplified the factors that constitute a breach of trust. In concluding that a breach of trust is "simply a violation by a trustee of a duty the trustee owes to a beneficiary..." the Court overlooked and stripped Courtney's conflicting obligations as trustee, even just among beneficiaries. The income or main beneficiaries of the Trust were Deborah's children, Courtney and her brother Michael. If Courtney had complied with the immediate directive of Hugh to disburse to him, in by so doing ignoring other obligations she had as Trustee pursuant to broader and other provisions of the trust agreement, application of this Court's standard would mean that her treatment of Hugh with such priority would amount to "simply a violation by a trustee of a duty owed to a beneficiary [Michael]" and thus a breach of her fiduciary duty to Michael.
5. Respondents' own expert, Professor Medlin, testified that Courtney's position in not immediately disbursing funds to Hugh and TDN was understandable in light of

conflicting trust provisions. In addition, the Court completely overlooks the conclusions in the report of the Trust Protector¹ in which she stated that Courtney “would have been foolish if not in breach of her fiduciary duties, to immediately distribute the net proceeds received from the sale of the Lake Wylie [house]. Her actions served to fulfill her fiduciary responsibilities to uphold the terms of the trust and administer trust assets for all beneficiaries and for actual and potential creditors of the Decedent’s estate and Trust.” (R. p. 526).

6. As pointed out in Courtney’s brief, multiple provisions regarding the trust became operative “at my death” but the trust provision supposedly violated by Courtney with respect to Hugh and TDN uses the phrasing “after my death,” suggesting different trigger points for when the trustee’s respective obligations called for action. With conflicting trigger points, the trustee’s obligations to Hugh arising “after” death could well have been viewed as secondary to the obligations that arose “at” death. The language of the trust agreement was ambiguous and, even with legal advice, Courtney’s inability to differentiate between her conflicting obligations obviate any finding of a breach of fiduciary duty.
7. In addition, the specific provision stated that the Courtney was to make dispositions “as soon as practicable after my death” which the Trust Protector stated was not the same as “immediately” (R. p. 527), to which Professor Medlin agreed (R. p. 345, lines 7-12), although that is essentially the thrust of Respondents’ claims. Again, the Trust Protector affirmed that Courtney’s other obligations to beneficiaries regarding

¹ Catherine H. Kennedy of Turner Padget was appointed as Trust Protector on October 23, 2015 and her report was issued on January 20, 2016.

trust and estate assets meant it was in fact not practicable for her to distribute to Respondents at closing as they demanded and claimed.

8. The Court overlooked the significant difference treatment between a creditor and a beneficiary of a trust as to this particular party. Had TDN been a creditor, its rights would have been determined during the administration of the decedent's estate, where TDN did not even file a claim. TDN never produced the alleged promissory note which defined its claim and was referenced in the Trust provision.² If TDN was a creditor and did not file a claim, it had no interest in the Trust. It cannot be both. The distinction is critical. If TDN is a beneficiary, it is subject to the "no-contest" clause of the trust agreement.
9. The Court erred in concluding that the trial court's factual findings were supported by the evidence. The evidence established that Hugh refused to wait any period of time before filing suit once the house was sold (the funds from the sale of the Lake Wylie house were received on December 22, 2014 and Respondents filed suit the next day), despite his counsel having stated to Courtney's counsel that her decision to wait until the creditor's period was over was entirely reasonable and that he (counsel) would advise her similarly if he was representing her (R. 516), while also establishing that Courtney struggled with how to deal with her conflicting obligations.
10. The court also erred in its finding of probable cause. It is not clear on the record what facts provide the basis for probable cause. By Hugh's own admission at trial, when asked why he didn't simply wait for payment after the creditor period had expired, he

² Hugh testified that the note previously "went away." (R. p. 321, lines 21-25)

stated “if somebody had said to me hey we can’t so do anything until June of the following year, when this period expires, I would have just sucked it up and gone with it.” (R. p. 120, lines 7-10). Hugh was in fact informed by Courtney and his own counsel about the creditor period, so this belies his claim that Respondents needed to file in court to secure their interests under the Trust. Hugh knew that Courtney would pay him under the Trust, he simply disagreed with her decision to not pay him when he requested, i.e. immediately, a decision which was explicitly affirmed by the Trust Protector in her report.

11. The Court’s opinion upholding an award of personal liability against Courtney is error, first because there was no pleading asking that personal liability be imposed on Courtney, and the issue was raised on rehearing solely because the caption named her individually. The trial judge never attempted to differentiate between Courtney’s role as an individual and her role as a trustee, because the issue was not pleaded. In other words, Hugh did not ask for an award against Courtney personally, and a sloppy caption was the reason the issue appeared after judgment was entered. Hugh specifically testified that Courtney was acting as the trustee and not in her personal capacity. (R. p. 229, lines 1-2; p. 246, lines 23 – p. 247, line 3).
12. In upholding a finding of personal liability, the Court has again operated with blinders and improperly limited its focus on a single provision of the Trust, erring by not considering settlor intent and the other terms of the trust, which provides that the Trustee will not be found “liable for any act or omission to act if acting according to the written instructions of, or with the written consent of, the Trust Protector.” (R. p 421). The Trust Protector not only affirmed Courtney’s decision to not make an

immediate distribution to Respondents but pointed out that she would have been foolish to do so and likely in breach of her fiduciary obligations. (R. 526).

13. In addition, neither Alan Medlin nor the trial court found that Courtney acted in bad faith. (R. 18). The Trust Protector stated in her report that Courtney “acted reasonably and prudently and in accordance with the terms of the Trust” in not paying the Respondents immediately. (R. p. 527).
14. The Court takes the position that where Courtney failed to carry out the express terms of a trust, good faith does not save Courtney from a find of a breach of trust, citing *Rollins v. May*, 473 F. Supp 358, 365 (D.S.C. 1978). But the court erred in not recognizing “the general rule in reference to the accountability of trustees is that they shall use such diligence in the management of the trust fund as a prudent man would do in the relation of his own affairs and they shall not be charged with loss except for neglect of duty.” *Rogers et al. v. Herron*, 226 S.C. 317, 330 (1954) (citing *International Shoe Co. v. United States Fidelity & Guaranty Co.*, 186 S.C. 271, 195 S.E. 546, 549); *Turnipseed v. Serrine*, 60 S.C. 272, 38 S.E. 423; *Epworth Orphanage v. Long*, 207 S.C. 384, 36 S.E.2d 37; *Weston v. Weston*, 210 S.C. 1, 41 S.E.2d 372).
15. It is thus only where the provisions that are so express and clear that the trustee should or can be found personally liable. Courtney did not neglect her duty, but exercised it “reasonably and prudently” and in good faith according to the Trust Protector, and in the context of what Respondents’ own expert³ characterized and acknowledged was

³ “I think this provision is a maze.” (R. 365, line 14).

a “maze” of a provision she was trying to implement, all within a larger context of multiple, competing and un-prioritized provisions.

16. It is incumbent upon this Court to clarify its jurisprudence on when a trustee can be found personally liable and whether it is being broadly defined by this opinion.⁴ For example, the slavish and narrow focus on a particular provision in this case would seem to create a broader rule going forward that encourages, and would actually compel, trustees to fully honor terms calling for immediate disbursement to beneficiaries even when it conflicts with broader duties to creditors and would circumvent their claims.
17. As the late Chief Justice Harwell used to ask from the bench, “what is the long-term effect of this decision?” If a trustee can act in good faith and still have personal liability imposed on her, then no reasonable person will ever agree to serve as a trustee in South Carolina again.
18. The Court also erred in its summary disposition of the provisions regarding Trust Protector, a novel issue in South Carolina (and in most other states), and by ignoring the specific directive of the decedent/settlor to keep any disputes regarding her estate completely private. Hugh completely ignored the settlor’s stated intention that her estate and disputes regarding it be kept private and decided by a Trust Protector, and brought to court only when a Trust Protector authorized it. While it is true that the parties cannot agree to confer subject matter jurisdiction on a court, it is also true that

⁴ The South Carolina Trust Code (S.C. Code 62-7-100 et seq.) was adopted subsequent to much of the authority cited in this Court’s opinion, but is not specifically stated as to whether that adoption of the UTC had any effect on the issue of trustee liability in this particular context or more broadly.

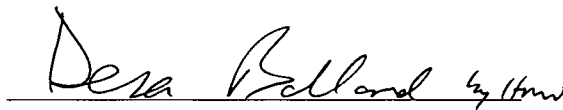
the parties (in this case the settlor and any beneficiary who claims under her) can restrict access to a judicial remedy by providing for mandatory alternate dispute resolution, as settlor did here. Courtney does not disagree with the Court that a court has subject matter jurisdiction over trust matters generally, but when the settlor has required a Trust Protector for private resolution of disputes among beneficiaries, a beneficiary may not simply violate the Trust agreement and expect no consequences.

19. The Court erred in its ruling on the “no-contest” clause, again looking solely at the provision set forth in Article 6, Section 4 of the trust agreement, and ignoring the conflicting obligations facing the trustee, whoever she might be. Both the trial court and this Court focused solely, in error, on the single provision of the trust provision when applying the “probable cause” issue. The no-contest clause provides that if a beneficiary challenges a judgment of the trustee to be found to have been made in good faith by a court of competent jurisdiction, he shall be disinherited. The Trust Protector found it prudent for Courtney to withhold distributions to the Respondents until the no contest clause question could be adjudicated. Courtney was upholding an express provision of the trust here. Given the conflicting provisions and directions, the Court erred in simply concluding that there was a breach of trust for not immediately distributing to the Respondents. There was certainly not a “high probability” that Hugh would prevail.

20. The court erred in affirming the award of attorney fees to Hugh and in failing to address Issue Six of Courtney’s brief, which presented the legal issue of whether attorney fees could be awarded under S.C. Code Ann. Section 62-7-1004 when that relief was not prayed for in the complaint. The Court also failed to address Courtney’s

argument that Article 10, Section 5(h) of the trust agreement limited the attorney's fees that could be awarded to "no more than one-half of one percent of the value of such beneficiaries' trust at the beginning of the calendar year in which such reimbursement is requested." Lastly, Courtney also asserts that the award of attorney fees was error because the judgment was in error, as set forth above.

Wherefore, for the reasons set forth above, Courtney respectfully prays that the decision of the Court be reconsidered, and that rehearing *en banc* be granted to consider the novel issues presented here. In the alternative, it is requested that rehearing be granted, and a new decision issued reversing the trial court for the reasons set forth herein and in Courtney's Appellant and Reply briefs.



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April 25, 2019

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
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PROOF OF SERVICE

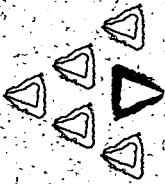
I, Beth Cogan, an employee with Ballard & Watson, Attorneys at Law, do hereby
certify that on, April 25, 2019, I served a copy of the **Petition for Rehearing** in the above-
captioned case on the following individual by electronic mail and by United States Mail,
with sufficient first-class postage affixed, addressed as follows:

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April 25, 2019

Via Hand-Delivery

Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *Deborah Dereede Living Trust, et al. v. Feeley Karp, et al.*
Appellate Case No: 2016-001921

Dear Ms. Kitchings:

Please find enclosed for filing an original and seven (7) copies of the **Petition for Rehearing and Proof of Service** in the above-referenced matter. Also enclosed is our check for the filing fee. After both pleadings have been filed, please return a set of clocked copies to our office by the courier.

By copy of this letter to opposing counsel, I am notifying them of my communication with the Court and serving a copy of the enclosures as evidenced by the Proof of Service. Please do not hesitate to contact our office if you should have any questions. With warm personal regards, I am,

Sincerely yours,

Desa Ballard /kk

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desab@desaballard.com

cc: Via U.S. Mail and Email
John Gettys, Jr., Esquire
Dan Ballou, Esquire

Via Email
Pete Nosal, Esquire
Courtney Feeley Karp, Esquire

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