

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
S. JACKSON KIMBALL, SPECIAL CIRCUIT COURT JUDGE

Case Nos. 2015-CP-01409
Appellate Case No.: 2016-001921

RECEIVED
MAY 21 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 18, 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 18, 2013 isAppellant.

**RESPONDENTS' RETURN
TO PETITION FOR REHEARING**

Hugh Dereede (“Hugh”) and Tyre Dealer Network Consultants, Inc. (“TDN”)(collectively, “Dereede”) submit the following return in opposition to the Petition for Rehearing filed by Appellant Courtney Feely Karp (“Karp”).

ARGUMENT

1. Karp has not presented any point supposed to have been overlooked or misapprehended by the Court.

Karp’s Petition for Rehearing recasts the fundamental points argued on appeal and presents no point that the Court supposedly overlooked or misapprehended. She simply disagrees with the Court’s decision. The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time. Herron v. Century BMW, 719 S.E.2d 640 (S.C. 2011); Kennedy v. S.C. Retirement Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001); S.C.A.C.R. Rule 221(a). Here, Karp has offered a slew of arguments that have already been addressed, combined with complaints about issues that were not raised in the original appeal. Accordingly, her Petition should be denied.

Distilling Karp’s 20 points of alleged error to their essence, she makes several basic arguments that were considered and rejected by this Court, or which were never raised at trial:

A. She should not have to pay Dereede because the Trust was ambiguous.

Both the Trial Court and this Court concluded that the language in question regarding the payment to Dereede was unambiguous and plain. The fact that Karp created a conflict by pitting Dereede’s interests against those of her and the other estate

beneficiaries does not create an ambiguity in the Trust itself. Sufficient funds existed in the Trust to pay Dereede, and no evidence exists that the probate estate did not have sufficient assets to cover all possible claims, whether initially or after the claims period had expired.

B. She should not have to pay Dereede because she had conflicting obligations to other beneficiaries.

Again, to the extent Karp felt she had a dilemma as to who she should pay, it was one she created for herself. Karp testified that after paying Dereede, the Trust would have had more than \$50,000 available to pay creditors of the estate. [R.0264-65]. So too, had she simply paid Dereede according to the Trust, liability for any probate estate deficiencies that did result would have been passed on to Dereede pursuant to S.C. Code Sec. 62-7-604(b). [R. 0519]. Since we now know such deficiencies never materialized, the decision to require her to fulfill her trustee duties is absolutely correct and fair. Moreover, had she even simply promised to pay Dereede per the Trust at the conclusion of the claims period, Hugh's own testimony cited by Karp establishes she could have avoided this action altogether.

C. She should not have to pay Dereede because Dereede filed suit too quickly.

As noted by Judge Kimball, Karp had many opportunities to agree to assurances that she would pay Dereede according the Trust. [R. at 0013, 0025]. Between Deborah Dereede's death and the closing on sale of the Lake Wylie property, Karp was steadfast in her refusal to pay Dereede, and has been to this day. Moreover, Dereede brought this case as a declaratory judgment action only and did not assert claims for breach of fiduciary duty.

Karp's response was to seek to enforce the no contest provision of the Trust, and that defense became the primary justification for Karp's refusal to pay.

D. Dereede did not specifically allege causes of action against Karp in her individual capacity.

General common law principles hold that a trustee's breach of trust subjects him to personal liability. Bogert, *The Law of Trusts and Trustees*, sections 718, 731 (rev. 2d ed. 1982); IIIA *Scott on Trusts*, section 261 (4th ed. 1988); 76 *Am.Jur.2d*, *Trusts*, section 304. As a long-standing rule, when a trustee departs from the directions contained in the trust instrument, he is liable for any loss occasioned, irrespective of good faith or his best judgment. Crayton v. Fowler 140 S.C. 517, 519, 139 S.E.2d 161, 161 (1927). Moreover, the court may fashion its order "to fit the nature and gravity of the breach and the consequences to the beneficiaries and trustee." Bogert, section 543(V). Even though no causes of action were asserted against Karp in her individual capacity, the law is clear that she can be personally responsible for her actions taken as trustee. To hold otherwise would effectively immunize her from the effects of refusing to follow the terms of the Trust.

E. The trial court should have deferred to the trust protector.

Karp now acknowledges that the appointment of a trust protector does not implicate subject matter jurisdiction but seeks "consequences" against Dereede for not agreeing to allow her to resolve the dispute. The question becomes, what consequences await the trustee who actively continues to participate in the trial of the case after appointment of a trust protector, and then proffers the trust protector as her own expert witness. If, as suggested by Karp, the trust protector is effectively an alternate dispute resolution device, then the law is clear that such devices can be and were waived by the parties. Rhodes v.

Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 647 S.E.2d 249 (Ct. App. 2007)(holding that arbitration clause was waived by conduct of the party seeking to enforce it).

Even if waiver did not exist, the trust protector herself refused to answer the essential questions that were presented for trial, effectively abdicating any role she might have had in resolving the dispute. [R. at 0528].

Finally, no objection was raised or motion made at trial with regard to proceeding before Judge Kimball instead of the trust protector. The first time Karp ever raised the question of the trust protector's authority was in her 59(e) Motion, and since Karp agrees that the issue is not one of subject matter jurisdiction, it is waived. [R. 0024]. Dixon v. Dixon, 362 S.C. 388, 608 S.E.2d 849 (2005)(holding that issue first raised in post-trial motion is not preserved for appellate review).

F. The trial court cannot award attorney's fees or should have limited them.

The trial court has inherent power to award fees, among other remedies. S.C. Code Ann. Sec. 62-7-1004 (Supp. 2018) gives the trial court broad plenary power to award attorney's fees "as justice may require." No separate cause of action is required or contemplated by the Probate Code, and the prayer of the Complaint clearly requests an award of fees. Karp then argues that Section 5(h) of the Trust limits the recovery of attorney's fees to one half of one percent of the value of the trust. This section of the Trust is specific to decisions by the Trustee to "postpone a beneficiary's distribution" and requires certain notices by the Trustee in such a case. Not only does this section have no bearing whatsoever on Karp's outright refusal to pay as required, as opposed to a decision

to “postpone” such payment, but the issue was never raised prior to this appeal, and has been waived.

2. The Court’s Opinion is consistent with established law and should stand.

Having purposefully refused to distribute funds as specifically required by the Trust, Karp invokes the alleged fears of trustees across the state over the supposed implications of this Court’s decision. Her catastrophizing is misplaced. To answer the question posed by the ghost of Chief Justice Harwell, the long-term effect of this decision is to simply affirm that trustees should do their job and follow the express terms of their trusts.

Here, Karp initially refused to agree to pay Dereede in December of 2014, based on the pretextual concern of conflicting creditor’s claims, even though excess funds were available. As is now clear and undisputed, no such claims ever materialized. Once the claims period expired, Dereede again asked Karp to comply with the Trust’s directive. Again, she refused, this time relying upon the Trust’s no contest provision. Both the trial court and this Court looked to the testimony of Professor Alan Medlin and the plain language of the Trust to conclude that Dereede had probable cause to bring this action, negating Karp’s final justification for nonpayment.

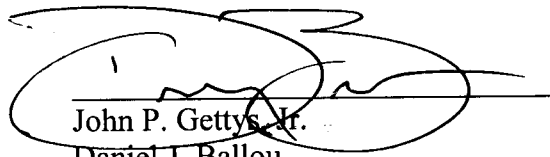
A breach of trust does not require a finding of bad faith. Rollins v. May, 473 F. Supp. 358, 365 (D.S.C. 1978)(noting that “the law in South Carolina is crystal-clear that if a trustee departs from the express provisions of the trust instrument, he does so at his own peril, and not even good faith nor the exercise of his best judgment will absolve him from liability”). As Judge Kimball noted, Karp is a licensed attorney familiar with the law, with greater knowledge of the obligations of a trustee and the legal requirements of a fiduciary.

[R. at 0025]. Even if Karp in good faith believed that her mother's creditors had claims to be asserted against the estate, the claims period has long since expired and yet she has steadfastly refused to comply with the Trust to this day. Hugh was Deborah Dereede's second husband and is not Karp's father. Following his wife's death, he made repeated requests for assurances that the distributions required by the Trust would be made, and for whatever reasons Karp responded with excuses that the Court found to be pretextual. [R. at 0025]. Whether her actions rose to the level of bad faith or not, they did not follow the directives of and therefore breached the Trust, for which she is, and should be, personally accountable.

CONCLUSION

For the reasons set forth herein and in the Respondents' briefs previously filed in this appeal, Dereede respectfully requests that all relief sought by Karp in this Petition, including the request for *en banc* rehearing, be denied.

Respectfully submitted,



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May __ 2019

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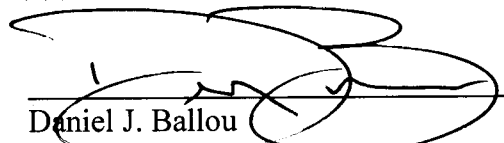
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PROOF OF SERVICE

The undersigned certifies that he has served this Respondents' Return to Petition for Rehearing on the Appellant by depositing a copy of it in the United States Mail, postage prepaid, on May 20, 2019, addressed to its attorney of record, Desa Ballard,

P.O. Box 6338, West Columbia, South Carolina 29171 and Peter J. Nosal, 852 Gold Hill
Road; Suite 201, Fort Mill, South Carolina 29708.

May 20, 2019
Rock Hill, South Carolina



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May 20, 2019

The Honorable Jenny Abbott Kitchings
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Appellate Case No. : 2016-001921

Ms. Kitchings:

Enclosed please find the original and seven copies of the Respondents' Return to Petition for Rehearing and Proof of Service. Please file the original and return one clocked copy in the self-addressed stamped envelope provided for your convenience.

Please do not hesitate to contact our office with any questions. I can be reached directly at 803-366-3416. With kind regards, I am

Sincerely,


Breanna N. Norris

Legal Secretary for Daniel J. Ballou

DJB/bn

enclosures

cc: CLIENT (via electronic mail)
Pete Nosal, Esquire (via regular mail)
Desa Ballard, Esquire (via regular mail)

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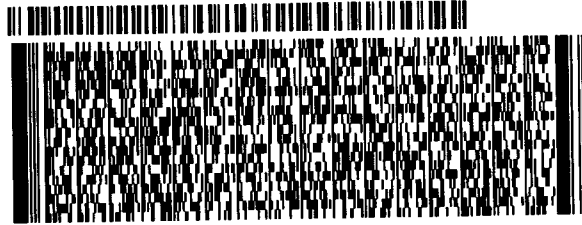
TO SOUTH CAROLINA COURT OF APPEALS

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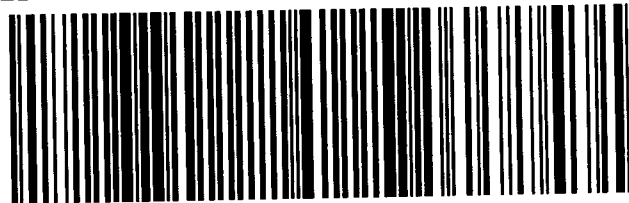


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