

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF KERSHAW

IN THE MATTER OF:

LEMUEL WHITAKER BOYKIN, II, deceased

Case No. 2017-CP-28-00831

Rigdon H. Boykin, as sole disinterested Co-Trustee
of the Lemuel Whitaker Boykin, II Residuary Trusts
A and B;

Petitioner,

v.

Mary Deas Wortley, individually, as Co-Trustee of
the Lemuel Whitaker Boykin, II Residuary Trusts A
and B, Co-Trustee of the Lemuel Whitaker Boykin
Marital Deduction Trusts A and B, and as Co-
Personal Representative of the Estate of Alice S.
Boykin; et al.;

Respondents.

**ORDER DENYING MOTIONS
TO ALTER OR AMEND FINAL
ORDER AND JUDGMENT**

RECEIVED
OCT 08 2019
SC Court of Appeals

Before this Court are three post-trial motions: Petitioner's Motion to Alter or Amend dated June 3, 2019; Respondents' Amended Motion to Alter or Amend dated June 3, 2019; Petitioner's Re-Filing of his Motion to Alter or Amend dated June 13, 2019. The Court has reviewed the memoranda in support and opposition of these motions that were filed by Petitioner, Respondents, and Cross-Claimants. In addition, the Court has reviewed the Petitioner's Supplemental Memorandum regarding Post Trial Motions and the Respondent's Reply to the same. For the reasons stated below, the Court denies each of these motions.

FACTUAL AND PROCEDURAL BACKGROUND

This case arose out of a dispute among the co-trustees of the Lemuel Whitaker Boykin, II Residuary Trusts A and B (the "Residuary Trust" or the "Trust"), a family trust created by the will

(“Will”) of Lemuel Whitaker Boykin, II (the “Testator”) concerning the governance of the Trust and its assets. Trustee Rigdon H. Boykin (“Petitioner”) alleged that his Co-trustees, Mary Deas Wortley and Alice Boykin Belger (collectively, “Respondents”) have failed to prudently manage the Residuary Trust in numerous respects.

Petitioner complained, among other things, that the Trustees must re-allocate the Trust’s assets and do so as quickly as possible by selling 85% of the Trust’s real property holdings within two to four years, including certain properties that the Testator specified in the Will should be preserved, if at all possible. Petitioner also requested that the Court remove Respondents as Trustees of the Trust, as they were not fit or competent to serve in that capacity. Respondents Lemuel Whitaker Boykin, III and May Cantey Boykin (“Cross-Claimants”), who two of Testator’s four children and are income beneficiaries of the Residuary Trust, originally joined in Petitioner’s request that Respondents be removed as Trustees.

Respondents, who are the remaining children of Testator, argued that, as Trustees, they were bound to follow the clear and unambiguous terms of the Will by preserving those properties identified as legacy property by the Testator. Respondents also asked the Court to remove Petitioner removed as a Trustee.

This case was tried in two phases, with the first phase taking place on July 9 and 10, 2018 and the second phase taking place on September 27 and 28, 2018. Following trial, this Court left the record open to allow the parties to submit additional evidence, including deposition testimony of a rebuttal expert for Petitioner.

On May 24, 2019, this court issued its Final Order and Judgment (the, “Final Order”), in which the Court granted final judgement in favor of the Respondents and ordered that Petitioner be removed as a Trustee of the Residuary Trust.

Following this order, both Petitioner and Respondents filed Motions to Alter or Amend pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure on June 3, 2019. Petitioner filed his Rule 59(e) motion *pro se*. On June 13, 2019, Wallace K. Lightsey and Wade S. Kolb III filed a notice of appearance on behalf of Petitioner. That same day, Petitioner re-filed his Motion to Alter or Amend, this time signed by his new counsel.

CONCLUSIONS OF LAW

A. Petitioner's Motions to Alter or Amend

The Court finds that Petitioner's original Motion to Alter or Amend filed on June 3, 2019 was not properly filed with the Court as it was filed by Petitioner *pro se*. Petitioner, while an attorney, is not licensed to practice in South Carolina. South Carolina law is clear that "[n]o person may either practice law or solicit the legal cause of another person or entity in this State unless he is enrolled as a member of the South Carolina Bar pursuant to applicable court rules, or otherwise authorized to perform prescribed legal activities by action of the Supreme Court of South Carolina." S.C. Code Ann. 40-5-310. As a trustee, Petitioner is acting in a representative capacity bringing this action on behalf of the beneficiaries of the Trust. An unpublished opinion from our Court of Appeals considered this exact issue and found that a non-attorney trustee cannot represent a trust in South Carolina court. *See Real Estate Unlimited, LLC v. Rainbow Living Trust*, Unpublished Opinion No. 2004-UP-019, (S.C. Ct. App. filed Jan. 15, 2004). Further, neither Petitioner, nor his counsel, filed a motion to withdraw or remove the counsel that represented him at trial. Accordingly, at the time he filed his first Motion to Alter or Amend, Petitioner was still represented by that same counsel. To the extent Petitioner wanted to move before this Court, he should have done so through his trial counsel. Accordingly, the Court finds that Petitioner's Motion to Alter or Amend was improperly filed and dismisses the same.

In an apparent attempt to correct this error, Petitioner subsequently obtained additional counsel, who appeared in this case and then re-filed the same motion. This second motion was signed by Petitioner's new counsel, who were licensed to practice in South Carolina. However, Rule 59(e) requires that motions to alter or amend be served no later than 10 days after the written notice of the entry of the order. Accordingly, Petitioner's re-filed motion was not timely and is therefore also dismissed.

In addition to the fact that his motions are not properly before this court, either by virtue of Petitioner's first *pro se* filing or his second untimely filing, Petitioner has not raised any valid grounds for altering or amending the Court's Final Order. Petitioner outlines five arguments in his two motions. Each of these arguments is addressed in turn below.

Petitioner first argues that the Final Order fails to account for the fact that the Residuary Trust had virtually "no net fiduciary income for the years 2017 and 2018 and is unlikely to have any net fiduciary income going forward without substantial and immediate diversification." While it is certainly true that the Trust has had little to no net fiduciary income for the last two years, this has been in large part due to the nature of the Trust's current assets, which is primarily timber land. However, during the last two years, the Trustees have sold numerous stands of timber that have generated significant income for the Trust. While this income is not net fiduciary income, that does not mean that the Trust has not had cash to operate or make distributions to its beneficiaries. In addition, the diversification sought by Petitioner is addressed in Respondents' investment plan, although not to the same extreme advocated by Petitioner. Ultimately, the Court stands by its decision to endorse the investment plan advanced by Respondents, which the Court feels adequately balances the interests of the various beneficiaries and the Testator's preferences set forth in his Will.

Petitioner next argues that the Court erred in failing to rule on “a critical issue in the case – the net asset value of the Residuary Trust.” The Court was not required to make a finding of fact concerning the overall value of the Trust’s assets in order to resolve the legal issues before it. The issues before the Court included: an action for declaratory relief, an action to modify the terms of the Trust, multiple actions to remove one or more of the Trustees, requests for miscellaneous relief sought at the conclusion of the final hearing (such as the request to spit the trust), and requests for the award of attorney’s fees. None of these issues require a finding of fact concerning the value of the Trust’s assets. Further, contrary to Petitioner’s insistence that this is a critical issue for both the Trustees and the Court, under the unambiguous terms of the Trust, the Trustees are not required to determine the value of the Trust’s assets in order to make a distribution to the income beneficiaries. Item VIII of the Will simply requires the “net income” from the Residuary Trust be distributed “in convenient installments at least annually” to the income beneficiaries. Further, as noted by Respondents, the value of these assets will continuously change as markets for Timber and real property fluctuate up and down, making this figure even less useful. Ultimately, the Court finds the issue of the net asset value is not critical to any of the issues before the Court or to the administration of the Trust generally.

In his third argument, Petitioner argues that the Final Order does not distinguish between Residuary Trust property which are subject to the Testator’s stated desire for retention and those that are not identified to be retained. The Final Order states that: Testator’s desires are expressed in the terms of the Will; the parties all agree these desires are precatory, rather than mandatory; and the Testator’s preferences expressed in the Will are entitled to respect. The Final Order also states:

While this preference is entitled to respect, the Testator’s stated desire to retain property cannot overrule the common sense of the

Trustees he put in charge of his legacy. As times change, the Trustees must use their best judgment to prudently manage the Trust and maximize the Trust's benefits to all beneficiaries.

Final Order at 49. The Final Order is clear on the appropriate deference that should be given to the Testator's desires for retaining property outlined in the Will.

In his fourth argument, Petitioner argues that the Trial Court erred in appointing Cheryl Holland as the substitute co-trustee to replace Petitioner. Petitioner argues that the third trustee who serves with Respondents should "adequately represent the interests of [Cross-Claimants] Whit and May Boykin." To begin, Cheryl Holland is extremely qualified to serve as a Trustee of the Residuary Trust. Ms. Holland is a certified financial planner and is the founder and president of Abacus Planning Group. She is an expert in the fields of financial planning and investments and fiduciary standards for investing. Ms. Holland is also a certified family business planner, and testified that she advises families that have shared assets, such as a closely held business, real estate, timber, or commercial real estate, regarding disposition of those assets. Ms. Holland also testified that during her professional practice, she has provided investment and planning advice to approximately 150 trusts, and that the values of those trusts have ranged from \$150,000.00 to \$22 million. Notably, Ms. Holland testified that she has experience advising clients with assets similar to those of the Trust. Further, based upon her testimony at the final hearing, the Court is confident that Ms. Holland will manage the trust and advise her co-trustees in an objective manner, using her best professional judgment. Finally, Petitioner's argument that the third trustee should represent the interest of Cross-Claimant ignores the fact that every Trustee owes fiduciary duties to all the Trust's beneficiary. Accordingly, the Trustees, including Ms. Holland and Respondents, must manage the Trust in such a way that is mindful of both the income and residual beneficiaries' interests.

In his final argument, Petitioner argues that the Court misconstrued the parties arguments

concerning the “underproductive property rule.” Petitioner’s argument in support of this position does not make sense. In the Final Order, the Court cites the Testator’s waiving of the unproductive property rule as evidence of “a preference for the interest of the remainder beneficiaries over those of the income beneficiaries.” In Petitioner’s own words,

The unproductive property rule was to the effect that if an unproductive asset was at some point made productive (such as by the sale of the asset) the trust beneficiaries were to be made whole by the trustees’ [sic] paying them “delayed income,” that is, income which would have been received by them during the period when the asset was unproductive. When the [Testator] in this case said he waived the delayed income requirement, he was providing that the four beneficiaries (Respondents Wortley, Belger, Whit Boykin, and May Boykin) were not to be made whole.

Pet. Mot. to Alter or Amend at 4. By Petitioner’s own description of this rule, the waiver of the unproductive property rule supports the point being made in the Final Order, which was that the Will contains many terms that benefit the remainder beneficiaries at the expense of the income beneficiaries. The Court does not see how the waiver of this rule “is indicative of [Testator’s] belief that real estate must be sold.” To the contrary, the Testator expressly stated a preference for the retention of property in numerous places throughout the terms of his Will. As noted previously, the Trustees should be mindful of Testator’s stated desires as they manage the Trust’s assets and fulfill their duties as trustees.

In conclusion, Petitioner’s two Motions to Alter or Amend are not properly before the Court. Petitioner’s first motion was improperly filed by Petitioner, who is not licensed to practice in this state and therefore cannot proceed in this case *pro se*. Petitioner’s second motion is untimely. Finally, none of the arguments raised by Petitioner have merit, and as a result, the Court would have denied these motions if either were properly before the Court.

B. Respondents’ Motion to Alter or Amend:

Respondents have also filed a Motion to Alter or Amend related to the Court’s Final Order.

For the reasons outlined below, this motion is denied.

This motion raises two grounds for reconsideration. The first ground relates to the Court's failure to address the Respondents' outstanding Motion to Compel Petitioner and Cross-Claimants to Consent to an IRC §2032A Tax Election, which was filed with this Court on November 28, 2018. This motion will be addressed in a separate order to be entered by this Court. Accordingly, the issues raised in Respondents' motion to compel are moot.

The second ground of Respondents' Motion to Alter or Amend focuses on the Court's award of attorney's fees to counsel for Petitioner and Cross-Claimants. Specifically, Respondents argue that (1) there is no legal basis on which to award fees and expenses to Cross-Claimants, (2) the award of attorney's fees to Petitioner should be stricken or substantially reduced, and (3) the award to Petitioner's trust and estate expert, James Hardin III, should be eliminated or further reduced.

Under Section 62-7-1004 of the Trust Code, the Court has the authority to award costs and expenses, including reasonable attorney's fees "as justice and equity may require . . . to any party, to be paid by another party or from the trust that it the subject of the controversy." Under this provision, the awards of attorney's fees made in the Final Order are all authorized by the South Carolina Trust Code.

With regard to the attorney's fees awarded to Cross-Claimants, the Court is also concerned with the practical effect of not awarding attorney's fees to Cross Claimants. Specifically, from their testimony at trial, the Court is aware that Cross-Claimants lack independent means to pay hundreds of thousands of dollars towards legal fees related to this litigation. As a practical matter, if the Court did not award fees in this case, it would seem likely that the Cross-Claimants would petition the Trustees to make a distribution to help pay for this outstanding debt.

Further, the Court has repeatedly noted its belief that while Petitioner's action ultimately failed under the prevailing law and applicable terms of the Will, this action was nevertheless brought in good faith out of Petitioner's desire to appropriately manage the Trust's assets. The Court further notes that the action resulted in the Trustees developing comprehensive, long-term plans for the management of the Trust's assets. These plans are certainly beneficial to the Trust and its beneficiaries. The Court stands by its prior decision to award attorney's fees and to reduce those fees pursuant to the *Glasscock* factors as laid out in the Final Order.

Ultimately, this action is a sad and complicated dispute between family members about how the Testator's legacy should be managed. The costs of this dispute ballooned rapidly, resulting in an enormous amount spending on legal fees and expenses that have resulted in little financial benefit to any of the Trust's beneficiaries. As the Court stated at the final hearing, it hopes the resolution of this action will help heal the divisions that has developed within this family and allow these siblings to move forward in their relationships. The Court urges this family to put this dispute behind them and reconcile their differences so that the Testator's legacy is not squandered on fighting amongst his children.

Finally, in his Supplemental Memorandum regarding Post-Trial Motions, Petitioner expresses a concern that the Final Order "merely sets the stage for future litigation." The Court hopes that all of the parties have learned from this action about the costs of litigation. This action has certainly taken a hefty toll on both the assets of the Trust and the relationships in the Boykin family. Most of the disputes concerning the appropriate approach to managing the Trust and the Trustees' authority for doing so have been squarely resolved by the current litigation. The Court has a hard time envisioning how additional litigation would be beneficial to the Trust or its beneficiaries. Accordingly, the Court would caution anyone considering filing additional litigation

to think long and hard before filing another action as the Court will be reluctant to permit the cost of any future litigation to be paid out of the Trust's assets.

CONCLUSION

Based on the foregoing, the Court:

1. Dismisses Petitioner's Motion to Alter or Amend as improperly filed;
2. Dismisses Petitioner's Re-Filed Motion to Alter or Amend as untimely; and
3. Denies Respondent's Motion to Alter or Amend.

AND IT IS SO ORDERED.

The Honorable Jean H. Toal
Presiding Judge

August __, 2019



Kershaw Common Pleas

Case Caption: Rigdon Boykin Co-Trustee , plaintiff, et al VS Mary Deas Wortley ,
defendant, et al
Case Number: 2017CP2800831
Type: Order/Amend

IT IS SO ORDERED.

s/ Jean H. Toal #2758