

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS
Initial Case Court of Common Pleas
S. Jackson Kimball III, Master-in-Equity

Opinion No. 5639 (S.C. Ct. App. filed July 3, 2019)

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, ...Petitioner,

v.

Deborah Dereede Living Trust dated December
18, 2013, Hugh Dereede and Tyre Dealer Network
Consultants, Inc., ...Respondent.

APPENDIX
VOLUME II

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

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

AUG 15 2017
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.

RECORD ON APPEAL
VOLUME II OF II

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Certificate of Counsel

Recall Hugh Dereede Further Exam by Mr. Nosal

1 Judge Kimball - Mr. Gettys?

2 Mr. Gettys - None, Your Honor.

3 Judge Kimball - Thank you, ma'am. You may step

4 down, and I'm sure you want to be excused.

5 Ms. Kennedy - Thank you.

6 Mr. Nosal - Yes, Your Honor. May she be

7 excused?

8 Judge Kimball - Yes. Certainly, she may.

9 Mr. Nosal - Okay.

10 Judge Kimball - Anything further from the

11 defense?

12 Mr. Nosal - Yes, Your Honor. We call Hugh

13 Dereede.

14 Judge Kimball - Excuse me?

15 Mr. Nosal - Hugh Dereede.

16 Judge Kimball - All right. Mr. Dereede?

17 Mr. Dereede - Is this your book, ma'am?

18 Judge Kimball - You remain under oath, sir.

19 Ms. Kennedy - It is my book, yes. Thank you.

20 Oh, no. No, that's not mine.

21 Mr. Dereede - Oh, okay.

22 Ms. Kennedy - I thought that was my codes. I'd

23 be lost without my code.

24 Judge Kimball - Mr. Dereede, you're still under

25 oath.

ROA 0407

Recall Hugh Dereede Further Exam by Mr. Nosal
Mr. Dereede - Thank you, sir.

FURTHER EXAMINATION

BY MR. NOSAL:

Q Hugh, take me back - - - Or, Mr. Dereede, take me
back to 2012 when Deborah purchased the Whispering
Pines residence. Where did that money come from?

A My money.

Judge Kimball - That's been testified to in
detail. Move on to something else.

Q Mr. Dereede, when did the house in Lake Wylie go up
for sale?

A I believe she put it up for sale just before she
moved to Boston, where her mother got treated in
Boston for cancer.

Q Okay. And at what point did it go into contract?

A Meaning?

Q A contract for sale.

A You mean what date?

Q Yeah. Just about what time?

A I would say around - - - probably around May.

Q No. When she sold the house, I apologize. When she
was selling - - - When Courtney was selling the
house.

A The house was sold on December 19th.

Q No. When did it go under contract? When did you

ROA 0408

Recall Hugh Dereede Further Exam by Mr. Nosal

1 Q It was written by - - -

2 A If you look at the address.

3 Judge Kimball - Are you saying PDN?

4 Mr. Nosal - TDN.

5 Mr. Gettys - TDN, Your Honor.

6 Mr. Nosal - Where it says, Tyre - - -

7 Judge Kimball - Oh, okay. Tyre, okay.

8 Mr. Nosal - It's signed Hugh Dereede.

9 A Yeah, it's - - - It's an abbreviation of my company.

10 FURTHER EXAMINATION

11 BY MR. NOSAL:

12 Q It's signed Hugh Dereede?

13 A Yeah. I'm the president of the company.

14 Q So you are the company?

15 A Pardon me?

16 Q You are the company?

17 A I am the company?

18 Q Is that what you're saying?

19 A I'm the sole shareholder, yes.

20 Q So you are the company, the company - - -

21 Judge Kimball - He is the sole - - - He's the
22 company. Let's go on now.

23 Mr. Nosal - Okay. All right.

24 Judge Kimball - He's already testified
25 extensively.

ROA 0409

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2014 DEC 23 PM 3:25 ROA 0410

JUDGE OF PROBATE
YORK COUNTY, SC

This
REVOCABLE FAMILY WEALTH TRUST

prepared for
DEBORAH DEREDE

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ROA 0410

EXHIBIT

P-1



A.000424

DEBORAH DEREDE REVOCABLE LIVING TRUST

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DEBORAH DEREDE REVOCABLE LIVING TRUST

Article One - Creation of My Trust

Section 1. Parties

My Trust Agreement, dated December 18, 2013, is made between DEBORAH DEREDE, the Trustor, and the Initial Trustee as appointed under Section 4 of Article Three.

Section 2. Trust Name

My Trust may be referred to as the:

DEBORAH DEREDE REVOCABLE LIVING TRUST, dated December 18, 2013.

The formal name of my Trust and the designation to be used for the transfer of title to the name of my Trust is:

DEBORAH DEREDE, Trustee, or her successors in trust, under the DEBORAH DEREDE REVOCABLE LIVING TRUST, dated December 18, 2013, and any amendments thereto.

Section 3. Trust is Revocable

My Trust is a revocable trust. My Trust is a grantor trust under the provisions of Sections 673-677 of the Code. Use my Social Security Number as the tax identification number of my Trust.

Section 4. Family Members

All references to "children" are to (i) all of the children so identified in this Section 4 (subject to the exclusion of any child under subsequent provisions of this Section 4) and (ii) any children conceived or adopted by me subsequent to the execution of this instrument and prior to my death.

a. Marital Status

I am presently married and the name of my Spouse is HUGH DEREDE.

b. My Children

The names and birth dates of my children are as follows:

ROA 0413

Name

Birth Date

COURTNEY FEELEY-KARP
MICHAEL FEHILY

March 26, 1977
August 14, 1979

Section 5. Citizenship of Trustor and Spouse

DEBORAH DEREDE is a citizen of the United States of America. HUGH DEREDE is a citizen of Canada.

Article Two - Trust Property

Section 1. Initial Trust Property

I hereby assign, convey, transfer and deliver to my Trustee all property set forth on Schedule A, attached hereto, and made part of my Trust Estate. My Trustee acknowledges receipt of all assets listed on the attached Schedule and agrees to hold, manage and distribute my Trust Estate under the provisions set forth in my Trust Agreement.

All assets titled in the name of my Trust, in the name of my Trustee, or in the name of a nominee as authorized under my Trust Agreement but not listed on Schedule A, shall be considered a part of my Trust Estate as if they had been set forth on the attached Schedule.

I acknowledge and understand the nature of my property as tenancy-in-common property with my Spouse.

Section 2. Additional Trust Property

I, or any other person or entity, may transfer or devise to my Trustee additional assets, real or personal, and may name my Trustee as the beneficiary of life insurance policies, annuities, retirement plans or similar contracts. Except where such transfer would cause the loss of a Marital Deduction, such assets, policies and proceeds, upon notice and acceptance by my Trustee, shall be a part of my Trust Estate and subject to all the terms of my Trust Agreement.

Section 3. Character of Trust Property

All property transferred by me into my Trust shall retain its character. All such property transferred, and income thereon, less withdrawals thereof, shall be my Trust Estate.

Section 4. Acceptance of Trust Property

All property transferred to my Trust, and accepted by my Trustee, shall be held, administered and distributed according to the terms of my Trust Agreement.

Article Three - Trustees

Section 1. Definition

All uses of the word "Trustee" in my Trust Agreement shall be deemed a reference to the person or entity then serving as Trustee and shall include alternate Successor or Co-Trustees (if multiple Trustees are serving), unless the context requires otherwise.

Section 2. Trustee's Resignation

Any Trustee may resign at any time without court approval by giving written notice to me if I am living and competent. If I am not then living and competent, written notice shall be given to my next Successor Trustee; or if there is no next Successor Trustee, to the beneficiaries then entitled to receive income or principal distributions under my Trust Agreement or their respective Personal Representatives, or if any of such beneficiaries are then minors, to the persons having the care or custody of any such minor. Such resignation shall be effective upon the appointment of a Successor Trustee.

Section 3. Trustee's Removal

Any Trustee may be removed under my Trust Agreement as follows:

a. While Alive and Competent

While I am alive and competent, I shall have the right to add a Trustee, or to remove or replace any other Trustee appointed under my Trust Agreement at any time without cause.

b. Removal by Other than Me

After my death or incapacity, a majority in interest of the beneficiaries then entitled to receive income or principal distributions from a separate trust, or their respective Legal Representatives, shall have the discretion and power to remove any serving Trustee of such separate trust at any time for cause, as defined under Section 20 of Article Fourteen. The serving Trustee who is being removed for cause may accept such removal, or may, within thirty days of receiving written notice of removal, petition a court of competent jurisdiction for a determination as to whether sufficient cause exists for such Trustee's removal and shall continue to serve until otherwise ordered by such court. A majority in interest of the then living income beneficiaries of any trust hereunder (in the case of a minor beneficiary, the legal guardian or natural parent of the minor beneficiary) shall have the right to remove any corporate trustee of such trust by a written instrument duly acknowledged and delivered to such corporation. Concurrent with the exercise of this right, the income beneficiaries (in the case of a minor

beneficiary, the legal guardian or natural parent of the minor beneficiary) shall appoint a corporate Successor Trustee by a written instrument duly acknowledged and delivered to the corporation appointed Successor Trustee; provided, however that such corporation must be a trust company or bank possessing trust powers organized under the laws of the United States of America or one of the states thereof and it must have under its management a minimum of One Hundred Million Dollars in trust assets. Upon receipt by the removed corporation of the written notice of acceptance of appointment by the successor corporation, the removed corporation shall forthwith surrender and deliver to the corporate Successor Trustee all of the assets in the trust estate, and the trusteeship of the removed corporation shall terminate.

c. Notice to Removed Trustee

Unless a serving Trustee has petitioned, or will petition within thirty days, a court as provided in the paragraphs above, written notice of removal under my Trust Agreement shall be effective immediately when signed by the person or persons authorized to make the removal and delivered to my Trustee personally, or within three business days after mailing by certified mail, return receipt requested. The written notice removing a Trustee shall identify the Successor Trustee appointed pursuant to the other provisions of this Article.

d. Transfer of Trust Property

Unless petitioning the court as provided above, my Trustee so removed shall promptly transfer and deliver to the Successor Trustee all property of my Trust under the removed Trustee's possession and control.

Section 4. Appointment of Trustees

I shall serve as the Initial Trustee of my Trust. If for any reason I am unwilling or unable to serve or continue to serve as Trustee, then COURTNEY FEELEY-KARP shall serve as Successor Trustee. If for any reason COURTNEY FEELEY-KARP were unwilling or unable to serve as Trustee, then HUGH DEREDE shall serve as Trustee. If for any reason all of the above named Successor Trustees are unwilling or unable to serve, then a Successor Trustee shall be appointed as provided under Section 5 of this Article.

Section 5. No Designated and Qualified Successor Trustees

If at any time there is no Trustee acting under my Trust Agreement and there is no person or entity designated and qualified as a Successor Trustee, a majority in interest of the beneficiaries then eligible to receive distributions of income or principal under my Trust Agreement, or their Legal Representatives, shall appoint a Successor Trustee. If any trust existing under my Trust Agreement lacks a Trustee and no successor is appointed pursuant to this Article, the vacancy shall be filled by a court of competent jurisdiction.

Section 6. Rights, Responsibilities, and Duties of Successor Trustees

Other than amending or revoking my Trust, or appointing or removing a Trustee, a Successor Trustee shall have the same rights, powers, duties, discretion and immunities as if named as an Initial Trustee under my Trust Agreement. No Successor Trustee shall be personally liable for any act, or failure to act, of any predecessor Trustee or shall have any duty to examine the records of any predecessor Trustee. A Successor Trustee may accept the account rendered and the property delivered by, or on behalf of, a predecessor Trustee as a full and complete discharge of the duties of the predecessor Trustee without incurring any responsibility or liability for doing so.

Section 7. Co-Trustee's Responsibility for Acts of Other Co-Trustees

No Co-Trustee shall be responsible for the act, omission or default of any other Co-Trustee without actual knowledge thereof.

Section 8. Trust Protector Provisions

The function of the Trust Protector is to protect the financial resources controlled and governed by my Trust and the interests of the beneficiaries.

a. Appointment of Trust Protectors

In the event a Trust Protector is needed to act, the first Successor Trustee who is independent within the meaning set forth in Code Section 672(c) shall act as Trust Protector, or if no such individual is available, a majority of the Successor Trustees designated under Section 4 of this Article, shall have the right to designate by written instrument a Trust Protector who is qualified, as defined in Paragraph b. hereunder.

b. Qualifications of Trust Protector

A candidate for service as Trust Protector must be independent and may not be related to, or be subordinate to, any member of my family or the family of any direct or indirect beneficiary. Any person or corporation who provides professional services to any one or more members of my family is not per se a prohibited person if compensation for services rendered constitutes, excluding compensation for service as Trust Protector, two percent or less of his, her or its income during any calendar year.

c. Trust Protector May Not Serve as Trustee

Except for the special fiduciary authority given to a Trust Protector, a Trust Protector, including any Successor Trust Protector, may not serve as a Trustee. This is in keeping with my intent and purpose that the Trust Protector's only

interest will be to protect the financial resources governed by my Trust Agreement and the beneficiaries thereto. It is further provided and required that the Trust Protector may never have any personal financial interest in any property of my Trust or in the outcome of any transaction or any business by or for my Trust other than the payment of a fair and reasonable compensation for his, her or its services as the Trust Protector. The responsibilities of the Trust Protector shall be limited to the exercise of the power, duty, or discretionary authority as provided throughout my Trust Agreement. Said Trust Protector shall not be concerned with, nor shall have, any authority with respect to any other aspects of administration of my Trust Estate.

d. Special Fiduciary Authority of Trust Protector

In addition to the authority specifically given to the Trust Protector under various provisions throughout my Trust Agreement, the Trust Protector will have the authority to perform any one or more of the following functions to the extent that the discretionary authority of my Trustee to perform a function might constitute an act of self-dealing or might jeopardize the tax status of my Trust.

1. Valuation

The value of certain property of my Trust may not be readily ascertainable, for example, real estate and securities held in a closely held corporation, partnership, limited liability company or other investment or business organization. Marketable securities shall be included in this category if and to the extent that market quotations are not readily available for trades of the security in an established securities market. Whenever my Trustee's right to determine the value of this kind of property may be self-serving or may produce a possible conflict of interest or adverse taxation issues, the Trust Protector is to value the property of my Trust.

2. Voting Rights

Whenever my Trustee's right to vote an equity interest in a corporation, partnership, Limited Liability Company, investment trust or business trust or other entity may be interpreted as self-serving or may produce a possible conflict of interest or adverse taxation issues, the Trust Protector will have the right to vote the equity interest. Voting rights will include decision-making authority with regard to the sale, exchange, or liquidation of any equity interest in a closely held corporation, partnership, Limited Liability Company, investment trust or business trust or other entity.

3. Life Insurance Policies

Whenever my Trustee's rights as to the control and maintenance of a life insurance policy or any interest in a life insurance policy could result in the inclusion of the proceeds of the policy in the estate of the insured for tax purposes, decision making with regard to a life insurance policy or interest in a policy is to be made by the Trust Protector.

4. Discretionary Distributions of Trust Income and Principal

To the extent my Trustee has the discretionary authority to make distributions of income or principal to or among beneficiaries or to retain all or any part of the income, and to the extent this discretionary authority may result in, or appear to be, a conflict of interest or an opportunity for self-dealing or may produce adverse tax consequences, the Trust Protector is to make all decisions with regard to the discretionary distributions of income and principal and the retention of income.

5. Gifting Powers

To the extent my Trustee has the authority to make gifts of income or principal to such Trustee and to the extent this authority to gift may result in, or appear to be, a conflict of interest or an opportunity for self-dealing or may produce adverse tax consequences, the Trust Protector is to make all decisions with regard to any gifts made to such Trustee.

6. Property Located In Another Jurisdiction

The Trust Protector may appoint an Ancillary Trustee to control and administer property located in another jurisdiction.

e. Amendment Powers

1. Changes in Law or Beneficiary Circumstances

The Trust Protector may, from time to time, amend my Trust Agreement, including any sub-trust created hereunder, to address changes in federal or state law, or other circumstances which may affect my Trust and its beneficiaries or to delete provisions rendered obsolete due to changes in law or beneficiary circumstances. In exercising such power, the Trust Protector shall consider the overall best interest of the present and future

beneficiaries and shall be guided by what the Trust Protector believes, in his or her discretion, would have been my intent in light of such changed circumstances.

2. Repeal of Federal Death Taxes

In the event of the repeal of the federal estate tax and generation-skipping transfer tax (as currently set forth in Chapters 11 and 13 of the Code) after my death or disability, the Trust Protector may terminate my Trust Agreement, or any sub-trust created hereunder, by distributing the trust principal to my living descendants in whatever proportion the Trust Protector deems appropriate. In exercising such power, the Trust Protector shall, in addition to the factors set forth in the preceding paragraph, consider the following:

- A. The enactment of any federal income, capital gains or other tax which would impact adversely on, or offset, the tax benefits of any proposed trust or sub-trust termination;
- B. The benefits afforded to the beneficiaries by the continuation of my Trust, such as protection against the claims of judgment creditors, divorcing spouses, and insulation from the reach of governmental agencies; and
- C. The likelihood of re-enactment of a federal estate, gift, or generation-skipping transfer tax or comparable tax which would subject my Trust Estate to the imposition of such tax or taxes in the hands of, or upon lifetime or testamentary transfers by, the beneficiaries to whom my Trust Estate would have been distributed upon termination.

f. Consultation

My Trustee is authorized to consult with the Trust Protector as to any matter relating to the investment of assets, discretionary distributions and the use of

principal, tax matters, dealings with the beneficiaries, and any other matter relating to the administration of my Trust in keeping with the objectives and purpose of this Trust Agreement. My Trustee will not be 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.

g. Accounting and Transaction Reports

The Trust Protector will have the authority to receive and review any and all accounting reports, records, tax returns, transaction reports and ownership records concerning my Trust. All records of my Trust must be open for inspection at all reasonable times by the Trust Protector.

h. Resolution of Disputes

The Trust Protector may unilaterally resolve any dispute, claim or conflict between beneficiaries, including those who have, or claim to have, a present or future interest in property, between a beneficiary and a trustee, or between trustees. Such resolution shall be binding on all parties to my Trust and shall not be subject to review.

No one may file or instigate a claim in a court of law without first submitting the claim to the Trust Protector for resolution together with detailed supporting information and a detailed supporting memorandum of law. In the event the Trust Protector finds the supporting information or memorandum of law insufficient, the Trust Protector may request such additional information as the Trust Protector reasonably feels necessary to resolve such claim. The Trust Protector may employ, and may act upon the advice of, legal counsel in making a resolution of any issue of fact and law. The Trust Protector may submit the claim or dispute for mediation and/or binding arbitration. Subsequent to his or her review, the Trust Protector may give any claimant the authority to file and maintain an action in a court of law. The granting of such authority by the Trust Protector shall in no way nullify the "No Contest" provision provided under the "Other Trust Provisions" of my Trust. Whenever a dispute, conflict, or claim involves an interpretation or construction of my Trust Agreement, the Trust Protector may file an action in a court of competent jurisdiction for the interpretation and construction of such Trust Agreement, or the Trust Protector may instruct my Trustee to do so.

i. Business Judgment

The Trust Protector is permitted and authorized to exercise "Business Judgment" in the course of service in the capacity of Trust Protector. The Trust Protector will not be liable for any act or omission to act unless it is conclusively established that the act or omission to act was motivated by an actual intent to

harm my Trust or a beneficiary of my Trust or is an act of self-dealing for personal pecuniary benefit. My Trust will pay or reimburse the costs of defending and/or settling any claim made against the Trust Protector unless it is conclusively established that the Trust Protector's conduct was motivated by an actual intent to harm my Trust or a beneficiary of my Trust. All provisions of my Trust Agreement that limit the liability of my Trustee will likewise apply in limiting the liability of the Trust Protector.

j. Authority of Successor Trust Protector

A Successor Trust Protector will have all of the authority and duties of the Trust Protector by original appointment, but will not be responsible for the acts, or omissions to act, of his, her, or its predecessor.

k. Compensation

A Trust Protector may receive reasonable compensation as an expense of administration. The Trust Protector is entitled to reasonable reimbursement for expenses and costs incurred on behalf of my Trust. Payment of compensation shall be from the funds of my Trust.

l. Bond

Unless otherwise required in written articles of appointment, the Trust Protector will serve without the requirement of bond or other security.

Article Four – My Lifetime Rights

Section 1. Income and Principal

a. Right to Trust Income and Principal

My Trustee shall pay to me, or apply for my benefit during my lifetime, all or such part of the income and principal of my Trust Estate as I may direct.

b. Trustee Liability

Upon any distribution of the income or principal of my Trust Estate authorized or directed by me, my Trustee shall incur no liability, and shall be under no obligation or responsibility for such distribution.

Section 2. My Incapacity

a. Intent to Return Home

Notwithstanding any other provision of my Trust Agreement, as a notification to any governmental benefits provider, if I become incapacitated it is conclusively presumed that I intend to return home.

b. Distribution of Income and Principal

During any period of my incapacity, my Trustee shall pay to my legal representative, or apply for my benefit, as much of the net income and principal of my Trust Estate as my Trustee, in my Trustee's discretion, shall deem necessary or advisable. Any undistributed net income shall be added to principal.

Section 3. Right to Amend or Revoke Trust

a. Power to Revoke and Amend

While I am alive, I may at any time or times amend any provision of my Trust Agreement or revoke my Trust in whole or in part.

b. Method to Revoke or Amend

Any amendment or revocation of my Trust Agreement made during my life shall be by a written instrument signed by me and delivered to my Trustee.

c. Trustee Consent

Any exercise of a power of amendment substantially affecting the duties, rights and liabilities of my Trustee shall be effective upon my Trustee only if agreed to by my Trustee in writing.

d. Delivery of Property After Revocation

After any revocation with respect to my Trust, my Trustee shall promptly deliver the Trust Estate to me.

e. Trustee's Retention of Assets Upon Revocation

In the event of any revocation of all or part of my Trust, my Trustee shall be entitled to retain sufficient assets to reasonably secure the payment of liabilities my Trustee has lawfully incurred in administering my Trust unless I indemnify my Trustee against loss or expense.

Section 4. Exercise of My Rights and Powers by Others

Any right or power, other than (i) an amendment by Will, or (ii) any right or power that would constitute a general power of appointment if held by my Attorney-in-Fact, may be exercised for and on my behalf by any Attorney-in-Fact who, at the time of the exercise, is duly appointed and acting for me under a valid and enforceable Power of Attorney executed by me. Only if no such Attorney-in-Fact is then available may a legal representative appointed by a court of competent jurisdiction exercise such right or power.

Other than as provided in this Section, my powers under my Trust Agreement are personal to me and may not be exercised by any other person or entity.

Section 5. Property Held as Nominee

For administrative convenience, it is contemplated that certain assets may be added to my Trust Estate, from time to time, with the possession and control thereof retained by or redelivered to me. Notwithstanding such control or redelivery, such assets shall be assets of my Trust Estate and held by me as the nominee of my Trustee. During the period such assets are in my possession, they shall be subject to the following terms and conditions:

- a. I may receive directly and devote to my own use and benefit any dividends, interest, income, or proceeds or distributions from or upon such assets and neither I nor my Trustee shall have any duty of accounting to the other or to any other person with regard thereto.
- b. Any sale, exchange or other transfer of such assets by me shall constitute a withdrawal of such assets from my Trust Estate, and my Trustee shall have no further interest therein or duties with regard thereto. Though not a

condition precedent to any such withdrawal, I agree to notify my Trustee of all such withdrawals.

- c. I shall be responsible for reporting the income from such assets to the appropriate taxing authorities; and my Trustee shall have no responsibility for including such income on any fiduciary returns prepared by my Trustee or for the preparation of any other government filing with respect thereto unless I duly notify my Trustee of such income items and a full and adequate accounting thereof is made and presented to my Trustee.
- d. I shall protect and indemnify my Trustee against all losses, liabilities and expenses that may result directly or indirectly from my use, possession, management or control of such assets.
- e. Upon my death or incapacity, my Trustee shall remain entitled to the possession thereof and shall continue to have all the rights, powers and duties with respect to such assets that are granted to my Trustee herein. My Trustee is not responsible for assets held by me as nominee. However, it is also understood that my Trustee shall use any reasonable and prudent means to secure possession of any trust assets of which my Trustee has knowledge. My Trustee shall have no duty, accountability or responsibility to me or to any other person with respect to any assets of which my Trustee has no knowledge or of which my Trustee is unable to obtain possession and control.

Section 6. Government Assistance and Medicaid Planning

If at any time during my lifetime I become incapacitated, my Trustee shall have the power to deal with governmental agencies and to make applications for, receive and administer benefits on my behalf, including but not limited to, Social Security, Medicare, Medicaid, Supplemental Security Income, In-Home Support Services, and any other government resources and community support services available to the elderly or incapacitated. My Trustee shall also cooperate in government assistance and Medicaid planning initiated by my Attorney-in-Fact appointed under a Durable Power of Attorney; or, if none, with any legal representative that may be appointed by a court of competent jurisdiction. Such planning shall include, but is not necessarily limited to, the power and authority to:

- a. Transfer ownership of the assets of my Trust Estate from my Trust back to ownership in my name;
- b. Make home improvements and additions to my family residence;
- c. Pay off, partly or in full, the encumbrance, if any, on my family residence;
- d. Purchase a family residence, if I do not own one;

- e. Purchase a more expensive family residence;
- f. Purchase an annuity under the guidelines provided by HCFA Transmittal No. 64 or any successor guidelines issued by the Centers for Medicare and Medicaid Services or similar government agency;
- g. Make gifts as directed by my Attorney-in-Fact;
- h. Make payments under any care contract negotiated by my Attorney-in-Fact; and
- i. Make payments as generally suggested as part of a "spend-down" program by my Attorney-in-Fact.

In exercising the above powers, my Trustee shall take into consideration that my primary concern shall be for my welfare and all government assistance and Medicaid Planning shall be of secondary importance to my welfare.

Article Five - Trust Administration at My Death

Section 1. My Testamentary Power of Appointment

Subject to any payments required under Section 3 of this Article, upon my death, my Trustee shall distribute my Trust Estate to any person or entity, and upon any trust terms and conditions, as I shall appoint by my Will or codicil, or by any other written instrument filed with my Trustee prior to my death and specifically referring to and exercising this testamentary general power of appointment. This power of appointment shall be exercisable by me alone and in all events. My Trustee may rely upon any instrument that my Trustee, in good faith, believes to comply with the provisions above in carrying out the terms of this power of appointment and shall not be liable for any good faith act in reliance upon that Will, codicil, or other written instrument even if for any reason it is later determined to be invalid with respect to its purported exercise of this power of appointment. If my Trustee receives no notice, within six (6) months after my death, of the existence of any Will or codicil, that exercises this power of appointment, my Trustee may distribute my Trust Estate as though this power of appointment had not been exercised and shall be conclusively presumed to have acted in good faith even if a valid Will or codicil exercising this power is thereafter discovered.

Section 2. Immediate Distribution of Specific Devises

As soon as practicable after my death, my Trustee shall make certain distributions from my Trust Estate in the manner and amounts and to the persons and/or entities specified in Article Six of my Trust Agreement. The remainder of my Trust Estate, after all the foregoing distributions have been made, and including any lapsed gifts (unless otherwise stated in Article Six), shall be held, administered and distributed as set forth in Section 3 of this Article.

Section 3. Creation, Administration and Distribution of Administrative Trust Upon and After Death

Upon my death, my Trust Estate, including any additions thereto by reason of my death, shall thereafter be known as the "Administrative Trust." My Trustee shall:

- a. Pay all expenses, debts, claims and taxes from the Administrative Trust as provided in Section 4 of this Article;
- b. Distribute that portion of the Administrative Trust consisting of any property effectively appointed pursuant to the provisions of Section 1 of this Article (the "Appointed Property"); and
- c. Distribute the remainder of the Administrative Trust (the "Remainder Property") as provided under the Articles that follow.

My Trustee may distribute the Appointed Property and allocate the Remainder Property in a single distribution or allocation or in a series of partial distributions or allocations. If an allocation is to be made to one or more trusts, then until full allocation has been made to any such trust, my Trustee of the Administrative Trust may pay to any beneficiary of such trust such amounts of income and/or principal as are consistent with the terms of such trust. Such payments shall be in lieu of, and thus credited toward, the income and/or principal remaining to be allocated to such trust. No payment shall be made to any beneficiary of any trust which exceeds the amount of income and/or principal then remaining to be allocated to such trust as provided herein, nor shall any payment of income and/or principal be made to any beneficiary of any trust which exceeds the amount which might properly be distributed to such beneficiary at that time under the terms of such trust. No payment shall be made to my Spouse and credited toward any amount which would otherwise be allocated to the Marital Trust, if any, if such payment involves trust assets which are prohibited from being allocated to the Marital Trust under the provisions of Article Seven.

Section 4. Payment of Expenses, Debts, Claims and Taxes

Unless other provisions for payment have been made, my Trustee shall pay the following expenses, debts, claims and taxes:

- a. Final medical expenses and all funeral costs;
- b. Legally enforceable claims against me;
- c. Reasonable expenses of the administration of my Trust, including those attributable to my Probate Estate or those attributable to the distribution of any bequest;
- d. Any allowances mandated by a court of competent jurisdiction to those dependent upon me;
- e. Any estate, inheritance, succession, generation-skipping transfer, or similar taxes payable by reason of my death; and
- f. Any penalties or interest on any of the above expenses, claims, debts or taxes owed by my Probate Estate or me.

Section 5. Source of Payment of Death Taxes, Claims and Expenses

a. Payment Out of Trust Property

Except as specifically provided for elsewhere in my Trust Agreement, all Death Taxes, claims and expenses payable under the provisions of this Article may be paid by my Trustee out of the Administrative Trust. Such payments may be allocated, partly or wholly, in my Trustee's discretion, to income or principal,

keeping in mind the provisions of Treasury Regulation Section 20.2056(b)-4(d)(1)(ii).

b. Exception for Trust Retirement Assets

The provisions of Paragraphs h. and i. of Section 1 of Article Fourteen shall control the payment of all Death Taxes, claims and expenses attributable to Retirement Plan Death Benefits payable to my Trustee as the result of my death.

c. Exception for Property Passing Outside of Trust

All Death Taxes, claims and expenses attributable to assets passing outside of my Trust or my Probate Estate shall be assessed against those persons receiving such property. Notwithstanding the preceding sentence, my Trustee may, in my Trustee's discretion, pay all or part of that portion of the Death Taxes, claims and expenses attributable to assets passing outside of my Trust that would otherwise be chargeable against a beneficiary's interest in such outside property using funds provided by such beneficiary, funds from such beneficiary's share of the Trust Estate, or both.

Section 6. Apportionment of Expenses, Claims, Taxes and Liabilities

Unless specifically directed otherwise by another separate provision of my Trust Agreement, all expenses, claims, taxes and liabilities attributable to any specifically distributed property shall be apportioned to the beneficiaries of such specific distributions. Any distribution of specific trust property under my Trust Agreement shall pass subject to all liens, mortgages or encumbrances attributable thereto.

Section 7. Exceptions to Apportionment of Death Taxes

a. No Apportionment of Death Taxes to Property Qualifying for Marital or Charitable Deduction

Notwithstanding any provision in my Trust Agreement to the contrary, it is my intent that no Death Taxes shall be apportioned to, or against, any part of my Trust Estate, or any beneficiary thereof, which qualifies for the federal estate tax Marital or Charitable Deduction.

b. Apportionment to Exempt and Non-Exempt Trusts

Death Taxes chargeable among trusts hereunder that are substantially identical except that one trust is exempt and the other trust is non-exempt shall be charged first to the Non-Exempt Trust until exhausted and then to the Exempt Trust. The preceding sentence shall not apply to the extent that charging and paying such taxes as provided in such sentence increases the Inclusion Ratio of any Exempt Trust hereunder.

Section 8. Payment by Trustee or Personal Representative

My Trustee, in my Trustee's discretion, may make distributions authorized under this Article either directly to the person or entities to whom payment is owed or to the Personal Representative of my Probate Estate. Written statements by my Personal Representative that such sums are due and payable by the estate shall be sufficient evidence of their amount and propriety for the protection of my Trustee. My Trustee shall be under no duty to see to the application of any such payments made to my Personal Representative.

Section 9. Tax Elections

If no Personal Representative has been appointed, with regard to the payment of any income tax, gift tax, estate tax, inheritance tax, generation-skipping transfer tax or any other tax due because of my death, my Trustee shall have the right to make any available elections allowed under the law or to sign and file any tax return. If a Personal Representative has been appointed, the Personal Representative shall have such rights and duties.

Section 10. Termination of Administrative Trust

The Administrative Trust shall be deemed terminated when all of the assets of the Administrative Trust have been paid or distributed in accordance with the provisions of Section 3 of this Article, except for a reasonable amount which is set aside for the payment of unascertained or contingent liabilities and expenses (excluding any claim by a beneficiary in his or her capacity as such).

Article Six - Specific Distributions of Trust Estate

Section 1. Distributions Other Than as Provided Under Article Six

Except for the distributions directed in the following Sections of this Article Six, all distributions of my Trust Estate shall be made in accordance with the Articles that follow.

Section 2. Disposition of Tangible Personal Property by Separate Writing

If at the death of my Spouse and me, my Trust Estate, other than any specific devises provided for under this Article, is comprised of tangible articles of a personal nature of mine, such as jewelry, clothing, household furniture and furnishings, musical instruments, books, pictures, paintings, objects of art, silverware and silver pieces, rugs, linen, automobiles and the like, then such assets shall be distributed, to the extent permitted by state law, according to the provisions of a written instrument signed by me and delivered to my Trustee. To the extent that all such property is not effectively disposed of by such written instrument or in the event I fail to execute such written instrument directing the distribution of my tangible personal property, then my Trustee shall distribute such assets with the remainder of my Trust Estate as if it had been an original part thereof. With respect to any property to which a minor child shall become entitled under this Section, my Trustee may, if my Trustee in my Trustee's reasonable discretion deems such property unsuitable for such minor's use, sell such property and add the proceeds from such sale to such minor child's share of my Trust Estate. Any such property which my Trustee, in my Trustee's reasonable discretion, shall deem suitable for such minor's use shall be delivered either (i) without bond to the Guardian of the person of such child, or if there is no such Guardian, to any suitable person who has the care or control of such child; or (ii) directly to such child if, in my Trustee's judgment, such minor child is of maturity to properly administer such property. Notwithstanding any other provision of my Trust Agreement, property distributed under this Section shall not be subject to apportionment and/or the payment of any estate, inheritance or other death taxes.

Section 3. Specific Distribution Not Part of My Trust Estate

If the property making up any specific distribution set forth in this Article is not a part of my Trust Estate at the time such specific distribution is directed to be made, and will not become a part thereof within a reasonable time, my Trustee shall disregard that specific distribution.

Section 4. Specific Gifts

My Trustee shall make the following specific distributions of trust property.

a. **Specific Distribution of Real Estate Sales Proceeds, Household Contents, and Certain Vehicles to HUGH DEREDE**

As soon as practicable following my death, my Trustee shall sell the house and lot located at 131 WHISPERING PINES DR., LAKE WYLIE, SC 29710. The sales proceeds shall be used first to pay off any mortgage against the property, and second to pay off that certain promissory note given by me to TYRE DEALER NETWORK CONSULTANTS, INC. Said promissory note, at the time of the execution of my Trust, is in the amount of \$250,000.00, but in no event shall the amount due exceed one-half of the sales price of the property. After payoff of said mortgage and said note, my Trustee shall then distribute one-half of the remaining net sales proceeds to HUGH DEREDE, outright and free of trust. The other one-half of the remaining net sales proceeds shall be distributed in accordance with the Articles that follow. Until the sale of the property, HUGH DEREDE may continue to use and occupy the premises. In addition, my trustee shall distribute to HUGH DEREDE, outright and free of trust, all my or my Trust's interest in and to the following items: the HOUSEHOLD CONTENTS OF 131 WHISPERING PINES DR., LAKE WYLIE, SC 29710; the 2013 CADILLAC CTS; the 2008 GMC ENVOY; and, the 1999 MAXUM CABIN CRUISER.

If HUGH DEREDE dies prior to my death, these provisions shall lapse and my Trustee shall administer these specific distributions in accordance with the Articles that follow. The specific distribution recipient shall bear all expenses, claims, liens, encumbrances and taxes (including Death Taxes) relative to this specific distribution.

Article Seven - Division into Family Trust and Marital Trust

Section 1. Division of Remainder Property

There shall be no division of the Remainder Property into a Family Trust and Marital Trust. Upon my death, my Trustee shall instead allocate and distribute the Remainder Property as provided in the Articles that follow.

Article Eight - Family Trust

Section 1. No Family Trust

There shall be no Family Trust. Upon my death, my Trustee shall instead allocate and distribute the Remainder Property as provided in the Articles that follow.

Article Nine - Marital Trust

Section 1. No Marital Trust

There shall be no Marital Trust. Upon my death, my Trustee shall instead allocate and distribute the Remainder Property as provided in the Articles that follow.

Article Ten - Distributions to Beneficiaries

Section 1. Division of Trust Estate Into Shares

Upon my death, my Trustee shall divide the Remainder Property into separate and equal shares (and for purposes of determining such division and subsequent distributions shall take into account the exclusion of any descendant as may be directed in Article One) as follows:

a. One Share for Each Living Child

My Trustee shall create one share for each of my children then living.

b. One Share for Each Deceased Child Leaving Descendants

My Trustee shall create one share for each of my deceased children who have then living descendants, to be further subdivided, per stirpes.

Each share shall constitute a separate and independent trust, and Exempt Trusts shall remain separate from Non-Exempt Trusts. The decisions of my Trustee as to the assets to constitute each such trust or sub-trust shall be conclusive, subject only to the requirement that said trusts or sub-trusts shall be of the respective values. The trusts for living children shall be held, administered and distributed pursuant to Section 3. The trusts for the descendants of deceased children shall be held, administered and distributed pursuant to Section 4.

Section 2. Trustee(s) for Beneficiaries

My Trustee appointed under Article Three shall serve as my Trustee for the trust created for a beneficiary. The last Trustee to serve shall have the right to designate one or more Successor Trustees by written instrument delivered to such Successor Trustee(s). In the event the last Trustee fails to appoint a Successor Trustee, then a Successor Trustee shall be appointed by the Trust Protector appointed under my Trust.

Section 3. Distribution to Family Access Trust for Living Children

Unless distributions from a trust are withheld pursuant to Section 5 of this Article, my Trustee shall hold the trust for a living child as a Family Access Trust, to be administered and distributed as follows:

a. Income Accumulated

The entire net income of the Family Access Trust shall be accumulated and added to principal on an annual basis if not distributed under the provisions of the paragraphs immediately following.

b. Child's Withdrawal Power

Subject to the provisions of Section 5 of this Article and provided the child for whom a Family Access Trust is created is competent, my Trustee shall distribute to such child the portion or portions of the net income and/or principal of such child's Family Access Trust, up to the whole thereof, as such child may, from time to time, demand in a writing delivered to my Trustee. No limitation shall be placed by my Trustee on such child as to either the amount of or the reasons for such invasion or invasions of net income and principal from such living child's trust. The Trustee shall comply with and shall have no responsibility to inquire into or to determine for what purpose any such withdrawals are being made.

c. Fully Discretionary Payments

If the child for whom a Family Access Trust is created is unable or unwilling to exercise his or her power of withdrawal as set forth above, my Trustee may, from time to time, pay to, or for the benefit of such child and/or such child's descendants, such portion or portions of the income and/or principal (as appropriate) of such child's trust, up to the whole thereof, as the Trustee, in its discretion, deems appropriate.

d. Guidelines for Discretionary Distributions

In exercising discretion, my Trustee shall, at all times, give primary consideration to the needs of the child for whom the Family Access Trust was created. The needs of such child's descendants shall be secondary. No amount paid to or applied for the benefit of such child or his/her descendants need thereafter be repaid to the Trustee or restored to such child's trust. My Trustee shall give consideration to all other income and resources then known to be available to the child and his/her descendants before making a discretionary distribution of principal. My Trustee shall be entitled to rely upon the written certification of such beneficiary or Legal Representative of such beneficiary as to the nature and extent of such beneficiary's needs and the inadequacy of such beneficiary's resources apart from the Trust. As to these matters, when relying upon such certification, my Trustee shall not be required to make further inquiry into the authenticity of the need or to the availability of other resources to satisfy the need. It is my desire that my Trustee consider the needs of the beneficiary in keeping with the standard of living that has been previously enjoyed by such beneficiary.

e. Failure to Withdraw Trust Estate

If a child fails to withdraw a portion of his/her Family Access Trust to which he/she is entitled as provided above, or if such child withdraws only a part of such portion, my Trustee shall continue to hold and administer the undrawn portion in accordance with the provisions herein, provided however, that such child shall

have the continuing right to effect withdrawals of said undrawn portion upon the terms and conditions set forth above.

f. Death of Child Before Complete Distribution

In the event of the death of a child for whom a Family Access Trust has been set aside, subsequent to the creation of said child's trust and before the complete distribution of said child's Family Access Trust, such Family Access Trust shall lapse, and my Trustee shall distribute and deliver the remaining balance of said Family Access Trust, subject to the provisions of Section 5, pursuant to said child's general power of appointment as provided below. In the event such child fails to exercise his or her general power of appointment, then my Trustee shall distribute, subject to provisions of Section 5, such child's Family Access Trust to the Family Access Trusts created for such child's then living descendants, per stirpes, to be further held, administered and distributed as provided in Section 4. In the event such child dies without descendants then living, my Trustee shall deliver the remaining balance of said Family Access Trust, outright and free of trust, to my descendants, per stirpes. If I have no descendants then living, my Trustee shall deliver the remaining balance of said Family Access Trust in accordance with the provisions of Article Eleven.

g. General Power of Appointment

Each child for whom a Family Access Trust is created shall have a general power of appointment, exercisable by such child's Will, or a codicil thereto, specifically referring to and exercising this power of appointment, in favor of any person or entity, including such child, such child's creditors, the estate of such child, and the creditors of such child's estate, outright or in trust, some or all of the principal of such child's Family Access Trust as it exists at such child's death. If my Trustee receives no notice during the life of such child of the existence of a Will or codicil that exercises this power of appointment, my Trustee may distribute the assets of such child's Family Access Trust as though this power of appointment had not been exercised and shall be conclusively presumed to have acted in good faith even if such Will or codicil is thereafter discovered.

Section 4. Distribution of Family Access Trust for Descendants

Unless distributions from a trust are withheld pursuant to Section 5 of this Article, my Trustee shall hold the trust for a descendant as a Family Access Trust, to be administered and distributed as follows:

a. Trustee

Subject to the provisions of paragraph e. of Section 5, of this Article, the Trustee of each Family Access Trust for a descendant shall be the descendant for whom

beneficiary's needs and the inadequacy of such beneficiary's resources apart from the Trust. As to these matters, when relying upon such certification, my Trustee shall not be required to make further inquiry into the authenticity of the need or to the availability of other resources to satisfy the need. It is my desire that my Trustee consider the needs of the beneficiary in keeping with the standard of living that has been previously enjoyed by such beneficiary.

f. Failure to Withdraw Trust Estate

If a descendant fails to withdraw a portion of such descendant's Family Access Trust to which such descendant is entitled as provided above, or if such descendant withdraws only a part of such portion, my Trustee shall continue to hold and administer the undrawn portion in accordance with the provisions herein, provided however, that such descendant shall have the continuing right to effect withdrawals of said undrawn portion upon the terms and conditions set forth above.

g. Death of Descendant Before Complete Distribution

In the event of the death of a descendant, subsequent to the creation of such descendant's Family Access Trust and before complete distribution of his or her Family Access Trust, the Family Access Trust set aside for such descendant's benefit shall lapse, and my Trustee shall distribute and deliver the remaining balance of such descendant's Family Access Trust, subject to the provisions of Section 5, pursuant to such descendant's general power of appointment as provided below. In the event such descendant fails to exercise his or her general power of appointment, then my Trustee shall distribute, subject to provisions of Section 5, such descendant's Family Access Trust to Family Access Trusts created for such descendant's then living issue, per stirpes, to be further held, administered and distributed as provided above. In the event such descendant dies without issue then living, my Trustee shall deliver the remaining balance of said Family Access Trust, outright and free of trust, to my descendants, per stirpes. If I have no descendants then living, my Trustee shall deliver the remaining balance of said Family Access Trust in accordance with the provisions of Article Eleven.

h. General Power of Appointment

A descendant shall have a general power of appointment, exercisable by such descendant's Will, or a codicil thereto, specifically referring to and exercising this power of appointment, in favor of any person or entity, including such descendant, such descendant's creditors, the estate of such descendant, and the creditors of such descendant's estate, outright or in trust, some or all of the principal of such descendant's Family Access Trust as it exists at such descendant's death. If my Trustee receives no notice during the life of such

descendant of the existence of a Will or codicil that exercises this power of appointment, my Trustee may distribute the assets of such descendant's Family Access Trust as though this power of appointment had not been exercised and shall be conclusively presumed to have acted in good faith even if such Will or codicil is thereafter discovered.

Section 5. Postponement of Distribution by Trustee

Subject to the provisions of Section 7 of Article Fourteen, but notwithstanding any other provisions of this Article, if my Trustee determines that there is a compelling reason to postpone a distribution to a beneficiary, then my Trustee shall continue to hold and administer such beneficiary's trust as follows:

a. Income Accumulated

The entire net income of such beneficiary's trust shall be accumulated and added to principal on an annual basis if not distributed under the provisions of the paragraph immediately following.

b. Discretionary Payment of Principal

My Trustee shall pay to, or apply for the benefit of, such beneficiary only as much of the principal and accumulated income of such beneficiary's trust as my Trustee, in my Trustee's sole discretion, considers necessary for the proper health, education, maintenance and support of such beneficiary. Notwithstanding the preceding sentence, all discretionary distributions of principal and accumulated income to a Special Needs Beneficiary shall be governed by the provisions of paragraph c. immediately following.

c. Discretionary Payment of Income and Principal for Special Needs Beneficiaries

My Trustee shall apply for the benefit of a Special Needs Beneficiary such amounts of principal and accumulated income of the Special Needs Beneficiary's trust as provided for under Section 3 of Article Fourteen.

d. Guidelines for Trustee's Discretion in Making Distributions

My Trustee shall take into consideration, to the extent my Trustee considers it advisable, any other income or resources of such beneficiary known to the Trustee. When, in my Trustee's discretion, the compelling reason for the postponement of a distribution ceases to exist, my Trustee shall make available for withdrawal by such beneficiary the postponed distribution(s), which such beneficiary shall request by written instrument filed with my Trustee. Notwithstanding the preceding sentence, the termination of the postponement of

distributions to a Special Needs Beneficiary shall be governed by the provisions under Section 3 of Article Fourteen. Furthermore, if the sole reason for the postponement of such beneficiary's distribution was due to such beneficiary not yet attaining the age of eighteen, my Trustee shall make the required distribution upon the beneficiary attaining such age, unless my Trustee determines, in my Trustee's discretion, that there are other compelling reasons to continue to hold and administer such beneficiary's trust under the provisions of this Section.

e. Compelling Reason

A compelling reason includes, but is not limited to, the following:

1. The beneficiary has not attained the age of eighteen;
2. The beneficiary is a Special Needs Beneficiary as defined under Section 3 of Article Fourteen;
3. The susceptibility of the beneficiary to undue influence or duress by an individual or a group;
4. Alcohol or substance abuse by the beneficiary;
5. The beneficiary has a gambling or compulsive gambling problem;
6. A pending marital separation or dissolution of marriage or divorce of the beneficiary;
7. Potential financial difficulty or a proven inability of the beneficiary to manage money;
8. A serious tax disadvantage upon distribution to the beneficiary;
9. Minimization of income, gift, estate, generation-skipping, or other transfer taxes of a beneficiary, or beneficiaries, or the Trust Agreement; and
10. Substituting income, gift, estate, generation-skipping or other transfer taxes of the beneficiary for another.

f. Distributions Withheld

Any distribution may be postponed, including distributions of income or principal, whether in complete or partial termination of the beneficiary's trust, one or more of a series of payments, or otherwise.

g. **Evidence of a Compelling Reason**

In connection with the foregoing, and in furtherance thereof, my Trustee is authorized to require the beneficiary to submit to my Trustee for review appropriate evidence as to the existence or non-existence of the compelling reason for which the postponement of a distribution of income or principal has been made or is being considered. Upon the request of my Trustee, such evidence shall include the submission to blood tests or similar tests showing the absence of alcohol addiction or substance abuse, said tests to be conducted and administered by medical personnel approved by my Trustee.

h. **Notice to Beneficiary; Request for Reconsideration**

If my Trustee decides to postpone a beneficiary's distribution, then my Trustee shall provide written notification to such beneficiary of such postponement decision. Upon notification by my Trustee of the intent to postpone a distribution, such beneficiary may request reconsideration of such decision and submit to my Trustee such reports, information, or other evidence as such beneficiary deems appropriate. If a beneficiary seeks the advice, counsel, or representation of an attorney with regard to postponed distributions, then such beneficiary shall be entitled to reimbursement of the legal fees and costs incurred for such representation. Such reimbursement shall be limited to no more than one-half of one percent of the value of such beneficiary's trust at the beginning of the calendar year in which such reimbursement is requested. A request for such reimbursement of legal fees and costs shall be limited to once every two calendar years.

Section 6. General Power of Appointment Over Non-Exempt Assets

Should a beneficiary die prior to the creation of his or her separate trust of my Trust Agreement or die subsequent to the creation of such trust but before complete distribution of such trust, and as a result of said death a portion of my Trust Agreement would be subject to GST Tax but for the provisions of this Section, the beneficiary may, pursuant to a General Power of Appointment exercised in his or her last Will (but not in a codicil) and specifically referring to this power of appointment, provide for such trust to pass to the creditors of such beneficiary's estate, in accordance with the terms set forth below. The asset value subject to such general power of appointment shall be the maximum amount, if any, which, when added to the beneficiary's net taxable estate (computed prior to said power), will cause the federal estate tax marginal rate to increase until it equals the GST Tax marginal rate; but in no case shall such general power of appointment exceed the asset value of such beneficiary's trust. To the extent the beneficiary does not effectively exercise the general power of appointment, the unappointed asset value shall be held, administered and distributed in accordance with the other provisions of my Trust Agreement.

Article Eleven - Lack of Designated Beneficiaries

Section 1. Remainder by Intestate Succession

If at any time there is no beneficiary entitled to receive all or any part of my Trust Estate under the preceding Articles, all of the remaining portion of my Trust Estate shall then be distributed, outright and free of trust, to those persons who would be my heirs at law had I died intestate owning my Trust Estate.

Notwithstanding the preceding, any Retirement Plan Assets that come under the control of my Trustee shall not be distributed to any charitable beneficiary and shall only be distributed to Heirs at Law that are younger than the oldest beneficiary named under the provisions of Article Ten (and disregarding all testamentary powers of appointment contained therein).

Article Twelve - Trustee Provisions

Section 1. Co-Trustees Voting Provisions

a. Co-Trustee May Not Act Independently

All Co-Trustees acting under my Trust Agreement must act in concert with other Co-Trustees as provided in the other provisions of this Section.

b. Unanimous Vote for Two Trustees

Other than as provided in Section 1.a. of this Article, if only two Trustees are serving, they shall act unanimously in the exercise of all powers and discretion granted to them under my Trust Agreement.

c. Majority Vote for More Than Two Trustees

Other than as provided in Section 1.a. of this Article, if more than two Trustees are serving under my Trust Agreement, they shall act by majority vote and any exercise of a power or discretion by a majority of my Trustees shall have the same effect as an exercise by all of them.

d. Trust Protector Resolves Disputes

Other than as provided in Section 1.a. of this Article, if my Trustees are not able to reach an agreement on any decision as set forth in this Section, they shall consult with the Trust Protector as provided under Section 8 of Article Three of my Trust Agreement.

Section 2. Delegation of Trustee Powers and Discretions

Notwithstanding any other provision of my Trust Agreement, any one or more of the Co-Trustees serving under my Trust Agreement may, from time to time, delegate to another Co-Trustee or Co-Trustees any or all of such Co-Trustee's powers and discretion by an instrument in writing delivered to the other Co-Trustees and may revoke such designation at will in the same manner; provided, however, the foregoing shall not apply to a "Trust Protector" appointed under Trust Protector Provisions of Article Three. For example, a Co-Trustee may authorize withdrawals of trust funds from any savings and/or checking account upon the signature of one of the others serving as Co-Trustee. Also, a Co-Trustee may authorize the opening and maintaining of bank accounts or safe deposit boxes, in the name of the Co-Trustee, with any bank, trust company or savings and loan association authorized and doing business in any state of the United States of America, and may authorize such bank, trust company or savings and loan association to make distributions to or for the benefit of the beneficiaries hereunder. Additionally, if a corporation, bank or trust company and an individual serve as Co-Trustees, the individual Co-Trustee shall not be obligated (but may so act if he or she wishes) to sign or

countersign checks for disbursements of trust funds held by the corporation, bank or trust company. The delegating Co-Trustee shall incur no liability to any beneficiary of any trust created hereunder with respect to the administration of such trust during the period of any such delegation.

Section 3. No Trustee Bond Required

No Trustee specifically named under my Trust Agreement shall be required to post any bond for the faithful performance of such Trustee's responsibilities.

Section 4. Compensation of Trustee

Other than when I am serving as Trustee, my Trustee shall be entitled to reasonable compensation for services rendered. Such compensation is payable without the need of a court order. In calculating the amount of compensation, customary charges for similar services, in the same geographic area, for the same time period shall be used as guidelines. Any corporate fiduciary shall be entitled to receive compensation for its services in accordance with its published fee schedule in effect from time to time and any trustee who is normally compensated on an hourly basis shall be so compensated. My Trustee shall also be entitled to reimbursement for reasonable costs and expenses incurred during the exercise of my Trustee's duties under my Trust Agreement.

Section 5. Change in Corporate Trustee

Any corporate successor to the trust business of any corporate trustee named under my Trust Agreement, or acting hereunder, shall succeed to the capacity of its predecessor without reconveyance or transfer of trust property.

Section 6. Notice to Trustee

Until my Trustee receives written notice of any death or other event which triggers the right to payments from any trust or trust shares created under my Trust Agreement, my Trustee shall incur no liability for distributions made in good faith to persons whose interests may have been affected by such event.

Section 7. Duty to Account

My Trustee shall render accounts, upon request, to the income beneficiaries under my Trust Agreement at least annually, at the termination of a trust created hereunder and upon a change in my Trustees in the manner required by law.

Section 8. No Court Supervision

No trust or trust share created under my Trust Agreement shall require the active supervision of any state or federal court.

Article Thirteen - Powers of My Trustee

Section 1. Powers

In addition to any power hereinafter specifically granted to my Trustee, it is my intention that my Trustee has all powers granted to a trustee under state law, as well as those powers respecting property in my Trust Estate that an absolute owner of such property would have. In accordance with such intention, any power my Trustee needs to administer my Trust Estate, which is not hereinafter listed, shall be considered as provided for herein. All powers shall be exercised only in a fiduciary capacity, and such powers may be exercised without the approval or supervision of any court. It is also my intention that the investment of Trust assets shall be governed by the Uniform Prudent Investor Act, as enacted under the statutes that govern my Trust. If the Uniform Prudent Investor Act has not been enacted by the state whose law governs this document, then the Uniform Prudent Investor Act itself shall apply.

a. Retention of Property

My Trustee shall have the power to retain any ownership interest, partial or complete, in real property, farming and other family business enterprises, as well as other illiquid investments, such as restricted securities transferred, devised or bequeathed to my Trustee, regardless of any lack of diversification, risk, or non-productivity and regardless of whether or not such property is of a character authorized by state law for the investment of trust funds. My Trustee shall have the power to continue the operation of any such property or business enterprises at the risk of my Trust Estate as long as my Trustee believes that the retention of such property is in furtherance of my goals in creating my Trust and is in the best interest of my beneficiaries. Notwithstanding the above, my Spouse shall have the power to require underproductive property to be made reasonably productive. My Trustee shall diversify the balance of my Trust Estate in accordance with the Uniform Prudent Investor Act, as enacted under the statutes that govern my Trust.

b. Additions

My Trustee shall have the power to receive additions to the assets of the various trusts created under my Trust Agreement from any source.

c. Business Participation

My Trustee shall have, notwithstanding any overall effect on the fair market value of the property held in any trust or trust share, the power to form, terminate, continue or participate in the operation of any business enterprise including a corporation, a sole proprietorship, a general or limited partnership (as a general or limited partner) or a limited liability company (as a managing or non-managing member) and to effect any form of incorporation, dissolution, liquidation or

reorganization, including, but not limited to, the recapitalization and reallocation of classes of shares or other changes in the form of the business enterprise or to lend money or make a capital contribution to any such business enterprise.

d. Banking Powers

My Trustee shall have the following additional powers regarding financial transactions:

1. Existing Accounts

My Trustee may continue, modify, and terminate an account or other prior banking arrangement.

2. New Accounts

My Trustee may establish any type of account (including, but not limited to, checking, savings, and certificates of deposit) or other banking arrangement with a bank, trust company, savings and loan association, credit union, thrift company, industrial loan company, brokerage firm, or other financial institution.

3. Establishing, Entering and Closing Safe Deposit Boxes

My Trustee may open a new safe deposit box or space in a bank vault, access an existing safe deposit box or vault space containing trust property and withdraw or add to its contents, or close a safe deposit box or space in a bank vault.

4. Contracting Services

My Trustee may contract to procure other services that my Trustee considers appropriate which are offered by banks or other financial institutions.

5. Checks, Drafts, and Negotiable Paper; Withdrawals

My Trustee may make, assign, draw, endorse, discount, guarantee, and negotiate promissory notes, checks, drafts, and other negotiable or non-negotiable paper of mine, or payable to me or to my order, and deposit or receive the cash or other proceeds of those transactions. Furthermore, my Trustee may withdraw by check, order, or otherwise my money or property deposited with or left in the custody of a financial institution.

6. Receiving Negotiable or Non-Negotiable Instruments

My Trustee may receive for me and act upon a sight draft, warehouse receipt, or other negotiable or non-negotiable instrument.

7. Letters of Credit, Credit Cards, and Travelers Checks

My Trustee may apply for and receive letters of credit, credit cards, and traveler's checks from a financial institution, and give an indemnity or other agreement in connection with letters of credit as my Trustee finds necessary for the proper maintenance of trust property and financial needs.

8. Extensions to Pay

My Trustee may consent to extend the time of payment, due to or from me, with respect to any financial transaction with a bank or other financial institution.

e. Make Investments

My Trustee shall have the power to invest in any type of investment that plays an appropriate role in achieving the investment goals as set forth in my Trust Agreement, which investment shall be considered as part of the total portfolio. No category or type of investment shall be prohibited. I specifically do not wish to limit the universe of trust investments in any way other than is dictated by my Trustee's exercise of reasonable care, skill and caution. In connection with my Trustee's investment and management decisions with respect to my Trust, my Trustee is specifically entitled to take into account general economic conditions, the possible effect of inflation or deflation, the expected tax consequences of investment decisions or strategies, the role that each investment or course of action may play within the overall trust portfolio that may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property; the expected total return from income and the appreciation of capital, and the asset's special relationship or special value, if any, to the purposes of my Trust or to one or more of the beneficiaries. My Trustee shall not be limited to any one investment strategy or theory, including modern portfolio theory, the efficient markets theory or otherwise, but should be free to consider any appropriate investment strategy or theory under all circumstances.

My Trustee may delegate investment and management functions that a prudent person of comparable skills would properly delegate under the circumstances. Should my Trustee delegate such function, my Trustee shall exercise reasonable care, skill and caution in selecting an Investment Advisor and shall establish, in writing, the scope and terms of the delegation consistent with the purposes and

terms of my Trust. Such writing shall cover the terms of the Investment Advisor's duties and describe the Trust assets to be managed by the Investment Advisor.

Notwithstanding the general powers of my Trustee, the following provisions shall apply to each trust from time to time held hereunder which is being managed by an Investment Advisor (subject to any limitations or modifications contained in the written agreement between my Trustee and such Investment Advisor or Advisors):

1. My Trustee shall follow the directions of the Investment Advisor with respect to the retention, purchase, sale or encumbrance of my Trust assets subject to management by such Investment Advisor and the investment and reinvestment of any funds derived from those assets, and shall have no duty to make or participate in making any decision regarding the same. The sole authority and discretion regarding the management of such assets shall belong to the Investment Advisor.
2. So long as my Trustee follows the direction or advice of the Investment Advisor, my Trustee shall be under no duty to review the assets subject to such Investment Advisor's management or to make any recommendations with respect to the investment or reinvestment thereof or to determine whether any direction or advice received from the Investment Advisor is proper.
3. My Trustee shall not be accountable for any loss or depreciation in value sustained by reason of any action: (i) taken with the direction or approval of the Investment Advisor, or (ii) not taken by reason of direction, disapproval or inaction by the Investment Advisor pursuant to the preceding provisions of this Section 1.e. In addition, my Trustee may issue proxies to vote all securities included among the assets subject to management by the Investment Advisor, and my Trustee shall not thereafter be liable for the manner in which those securities are voted, for any direct or indirect result of that voting, or for any failure to vote such securities.
4. Except as modified by the provisions of this Section 1.e., the powers and duties of my Trustee with respect to the assets of my Trust Estate managed by an Investment Advisor shall be the same as those with respect to all other assets of my Trust Estate.

5. An Investment Advisor, by written notice to my Trustee, may resign at any time, or may, from time to time, waive any or all such Investment Advisor's rights, powers and duties. By accepting the delegation of the trust asset management function and acting as Investment Advisor, such Advisor submits to the jurisdiction of the courts of this state. An Investment Advisor shall be entitled to reasonable compensation, and such compensation shall be paid from the assets of my Trust and may be charged, in my Trustee's discretion, to income or principal, or partly to each. My Trustee shall incur no personal liability for the payment of such fees. The rights and powers herein conferred to an Investment Advisor shall be exercisable only in a fiduciary capacity.

f. Digital Assets

In addition to any other powers held, my Trustee shall have the power to open, continue, modify, terminate, access, view, make use of, and give instructions in regards to any financial, social media, or other account or other arrangement on the world wide web (also known as the internet) and/or on any other public or private network, and to access, view, and transfer any or all data owned by or concerning me or my Trust, in any format, including any electronic or digital data, no matter where it may be located, in this state, another state, or another country.

My Trustee may obtain password and/or login information and have complete access to any electronic account maintained by me or on my behalf, including, without limitation, electronic mail and on-line financial accounts.

g. Manage Securities

My Trustee shall have the power to buy, sell and trade in securities of any nature, including options, futures contracts, short sales, and for such purposes, may maintain and operate margin accounts with brokers, and may pledge any securities held or purchased by my Trustee with such brokers as security for loans and advances made to my Trustee. My Trustee shall have all the rights, powers and privileges of any owner with respect to securities held in trust, including, but not limited to, the power to vote and give proxies and pay assessments or other charges, participate in voting trusts, pooling agreements, foreclosures, reorganizations, consolidations, mergers and liquidations and, in connection therewith, to deposit securities with and transfer title to any protective or other committee under such terms as my Trustee may deem advisable, and do all other acts which persons of prudence, discretion and intelligence would do or take for their own account.

h. Allocation of Principal and Income

Except as otherwise specifically provided in my Trust Agreement, the determination of all matters with respect to what is principal and income of my Trust Estate (including the power of adjustment between principal and income under Section 104 of the Uniform Principal and Income Act of 1997 or similar provision under the law that governs this document), and the apportionment and allocation of receipts and expenses between these accounts shall be governed by the provisions of the Uniform Principal and Income Act of 1997 as from time to time enacted by the state statute which governs my Trust Agreement. Any such matter not provided for either in my Trust Agreement or under the Uniform Principal and Income Act of 1997 shall be determined by my Trustee in my Trustee's discretion.

My Trustee's powers shall be subject to my Trustee's duty to treat income beneficiaries and remainder beneficiaries equitably, except as provided below:

1. A reasonable reserve for the depreciation of all income-producing, depreciable real and personal property, and capital improvements and extraordinary repairs on income-producing property, shall be charged to income from time to time;
2. A reasonable reserve for the depletion of all depletable natural resources, including, but not limited to, oil, gas and mineral, and timber property, shall be charged to income from time to time;
3. Distributions by mutual funds and similar entities of gains from the sale or other disposition of property shall be credited to principal;
4. A reasonable reserve for the amortization of all intangible property having a limited economic life including, but not limited to, patents and copyrights, shall be charged to income from time to time; and
5. All premiums paid and all discounts received in connection with the purchase of any bond or other obligation shall be amortized by making an appropriate charge or credit to income as the case may be; provided, however, my Trustee shall not set aside out of income a reserve for the depreciation, depletion, obsolescence, repair, replacement, improvement or amortization of capital assets (tangible or intangible) contributed to my Trust during my lifetimes or

by Will upon my death. Further provided, if my Trust is a partner in a partnership, my Trustee shall be entitled to accept, with respect to such partnership interest, any accounting methods used by the partnership, regardless of whether such methods include depreciation reserves, regardless of the assumptions on which any such reserve may be based, and regardless of whether such accounting methods are inconsistent with those methods used by my Trustee with respect to other property of my Trust Estate.

The income and principal of Retirement Assets and Annuities shall be governed by the provisions under Section 1 of Article Fourteen.

i. Sell, Exchange and Repair

My Trustee shall have the power to manage, control, grant options on, sell (for cash or on deferred payments), convey, exchange, partition, divide, improve and repair Trust property.

j. Lease

My Trustee shall have the power to lease Trust property for terms within or beyond the terms of the Trust and for any purpose, including exploration for and removal of gas, oil and other minerals; and to enter into community oil leases, pooling and unitization agreements.

k. Permit Beneficiaries to Use or Reside Upon Trust Assets

Unless in conflict with the provisions of Section 3. e. of Article Fourteen, my Trustee may permit any beneficiary to reside upon or occupy any real property in my Trust Estate or use any personal property in my Trust Estate, upon such terms, provisions and conditions as my Trustee determines. Notwithstanding the above, to the extent that Section 5 of Article Fourteen grants my Spouse the right to reside upon Trust Estate property, such other provision shall take precedence and its terms and conditions shall prevail.

l. Borrow

My Trustee shall have the power to borrow money for any trust purpose upon terms and conditions as my Trustee may deem proper and to obligate my Trust Estate for repayment; to encumber my Trust Estate or any of its property by mortgage, deed of trust, pledge or otherwise, using such procedure or procedures to consummate the transaction or transactions as my Trustee may deem advisable (including securing or guaranteeing a loan to me in my individual capacities for a purpose not connected with my Trust). My Trustee shall have the power to borrow money on behalf of one trust from any other trust provided for under my

Trust Agreement, and to obligate the borrowing trust to repay such borrowed money, provided that such loan shall be adequately secured and shall bear interest at current bank rates. Notwithstanding the above, the assets of the Family Trust may not be used to secure or guarantee a loan for my Spouse in his or her individual capacity, should such loan or guarantee cause inclusion of such assets in my Spouse's estate. Furthermore, the assets of the Marital Trust, if any, may not be used to secure or guarantee a loan that would in any way endanger the federal estate Marital Deduction.

m. Guarantees

My Trustee shall have the power to unconditionally or conditionally guarantee the payment of any and all indebtedness, advances, obligations and liabilities currently in existence or hereafter made, incurred or created by me, individually or jointly with others, or incurred or created by any person or any partnership (general or limited), or other legal entity, provided my Trustee holds an interest in such corporation, partnership or entity, and such guarantee benefits directly or indirectly my Trust Estate or its beneficiaries. Guarantees may be made to secure indebtedness, advances, obligations and liabilities to banks, savings and loans, real estate investment trusts, any and all institutional investors, persons, corporations, partnerships and other legal entities. Notwithstanding the above, the assets of the Family Trust may not be used to secure or guarantee a loan for my Spouse in his or her individual capacity, should such loan or guarantee cause inclusion of such assets in my Spouse's estate. Furthermore, the assets of the Marital Trust, if any, may not be used to secure or guarantee a loan that would in any way endanger the federal estate Marital Deduction.

n. Make Loans

My Trustee shall have the power to lend Trust money to my Personal Representative or to any beneficiary under my Trust (including me) or to a trust for the benefit of any such beneficiary, as may be agreed upon between my Trustee and such parties, provided, however, that any such loan shall be adequately secured and shall bear a reasonable rate of interest. My Trustee shall also have the power to loan or advance my Trustee's own funds to my Trust for any Trust purpose, with interest at current rates, and to receive security for such loans in the form of a mortgage, pledge, deed of trust, or other encumbrance of any assets of my Trust.

o. Purchase Assets from My Estate

My Trustee may use Trust funds to purchase any securities or other property tendered to it by my Personal Representative or any Trustee of any trust established by me, at any time and from time to time at the then market value of such property. If there is any question as to the market value of such property,

such value shall be determined by the Trust Protector, as provided for under Section 8 of Article Three of my Trust Agreement.

p. Deal With Other Trusts

My Trustee may advance cash or other assets to any other trust or estate of which my Trust is a beneficiary in an amount equal to all or any portion of any expense, debt and other charges, and estate, inheritance, succession, transfer and other death taxes which are attributable to my Trust's share of such other trust or estate.

q. Insure

My Trustee shall have the power to carry, at the expense of my Trust, insurance of such kinds and in such amounts as my Trustee deems advisable to protect my Trust Estate and my Trustee against any hazard.

r. Agents

My Trustee shall have the power to employ managers, agents, attorneys, accountants, auditors, depositories and proxies, with or without discretionary powers, and to rely on the advice given by such advisors.

s. Litigation

Subject to the provisions of Section 8 of Article Three, my Trustee shall have the power to commence or defend, at the expense of my Trust, such litigation with respect to my Trust or any property of my Trust as my Trustee may deem advisable, and to compromise or otherwise adjust any claims or litigation against or in favor of my Trust.

t. Accept Gifts

My Trustee shall be authorized to accept gifts from any individual who desires to contribute to the principal of the respective trusts created hereunder. Such acceptance of any additional gift shall be in the discretion of my Trustee.

u. Pay Gift Taxes

If at any time any gift tax becomes due from me, by reason of my Trust Estate or any interest therein being includible for such tax purposes, such gift tax, together with interest, penalties, costs, Trustee's compensation and attorney's fees, in the discretion of my Trustee, may be paid by my Trustee from my Trust Estate, unless other adequate provision shall have been made therefor. Any such payments shall be charged to the principal of the share of my Trust Estate or any interest therein so included for such tax purposes.

v. Payment of Expenses

My Trustee shall have the power to pay any taxes, assessments, reasonable compensation of my Trustee and other expenses incurred in the collection, management, care, protection and conservation of my Trust Estate.

w. Corporate Fiduciary

If any stock of a corporate entity that is my Trustee, or of any affiliate or successor of such Trustee, shall be included in the assets of my Trust, my Trustee shall have full authority, in my Trustee's discretion, and notwithstanding any regulation or rule of law to the contrary, to retain the stock and any increases resulting from stock dividends and stock splits and from the exercise of purchase rights and the purchase of fractional shares needed to round out fractional share holdings that may arise concerning the stock. My Trustee shall vote such stock either directly or by proxy. However, to the extent my Trustee is prohibited by law from voting such stock, my Trustee shall vote in accordance with the written instructions of the Trust Protector appointed under Section 8 of Article Three.

x. Investment Transactions

With regard to record keeping for investment transactions, my Trustee need not provide copies of confirmations or similar notifications each time a trade or investment transaction occurs, but investment transactions shall be set forth in my Trustee's periodic accounting.

y. Farm or Ranch Property

With respect to farm or ranch property, my Trustee shall have all necessary powers to participate in and operate any farming (including tree farming) or ranch operation, personally or with hired labor, tenants or sharecroppers; to lease any farm for cash or a share of crops under a lease that permits or precludes the material participation of my Trustee to fertilize and improve the soil; to employ conservation practices; to participate in government programs; and to perform any other acts deemed by my Trustee as necessary or desirable to operate the property. In making a decision whether to materially participate in farming or ranch operations, my Trustee shall consider whether an election should be made or has been made under Sections 2032A of the Code to qualify for special farm-use valuation or the qualified family owned business interest deduction, or both.

z. Power to Divide or Combine Trusts

My Trustee shall have the power to divide a single trust or share thereof into separate divisions, each to be administered in accordance with the terms and conditions of the single trust from which they were created (or in accordance with such terms and conditions as they may be affected by my Trustee's power to

comply with "S" Corporation requirements) when my Trustee, in my Trustee's discretion, determines that division is desirable or advisable in view of tax considerations, including considerations related to income tax, gift tax, inheritance tax or generation-skipping transfer tax or other objectives of the trusts and their beneficiaries.

My Trustee shall not be required to make a physical segregation or division of the various trust subdivisions created under my Trust Agreement except as segregation or division may be required by reason of the termination and distribution of any of the trust subdivisions, but my Trustee shall keep separate accounts and records for different undivided interests.

My Trustee, in my Trustee's discretion, shall have the further power to combine two or more trusts or trust subdivisions having substantially the same terms into a single trust for purposes of administration when tax or other factors indicate that such combination would be desirable or advisable. In deciding whether to combine trusts or trust subdivisions, my Trustee shall consider the generation-skipping "inclusion ratio" of the trusts or trust subdivisions to be combined. Trusts or trust subdivisions having the same inclusion ratios may be combined. Trusts or trust subdivisions having different inclusion ratios should generally not be combined unless their inclusion ratios are maintained unchanged through substantially separate and independent shares of different beneficiaries within the meaning of Section 2654(b) of the Code and the applicable regulations thereunder. Specifically, unless there is a Personal Representative, my Trustee has the authority to allocate any portion of my exemptions under Section 2631(a) of the Code to property as to which I am the respective Transferor, including any property transferred by me during my lifetime as to which I did not make an allocation prior to my death. My Trustee also has the authority to make the special election under Section 2652(a)(3) of the Code. If Sections 2631(a) or 2652(a)(3) of the Code are not interpreted to allow a Trustee to exercise such election, then a Personal Representative shall be appointed and is authorized to allocate my exemption and to exercise the said special election.

aa. Termination of Small Trust

If at any time after my death the costs of administration of my Trust (or any share thereof) are of such an amount in relation to the then principal and undistributed income of my Trust (or any share thereof) that my Trustee, in my Trustee's discretion, determines that my purposes in establishing my Trust (or any share thereof) would no longer be served, and if my Trustee deems it advisable to distribute the then principal and undistributed income of my Trust (or any share thereof) to the then living beneficiary or beneficiaries and thereby cause the termination of such trust or share, my Trustee (other than my estate and any then current beneficiary of my Trust) may do so without responsibility on the part of my Trustee. If no such Trustee is then serving, the Trust Protector appointed

under Section 8 of Article Three shall serve for the purpose of determining the advisability of termination and administering the termination process.

bb. Power to Subject Trust Property to Probate

It is my intention to avoid probate through the use of my Trust. If, however, my Trustee and Personal Representative mutually determine that it shall be in the best interests of the beneficiaries of my Trust, and the beneficial interests of the beneficiaries are not thereby altered, my Trustee may subject any asset to probate to accomplish a result unavailable without probate. This power shall be strictly construed and shall only be used to secure any tax or other benefit otherwise unavailable to my Trust. Accordingly, other than a distribution that would cause a Marital or Charitable Deduction to fail, my Trustee, in my Trustee's discretion, may accomplish this objective by distributing such property to my estate.

cc. Power to Change Situs

My Trustee shall have the power, exercisable by written instrument signed and acknowledged by my Trustee, to change the situs of any trust or trust share held by my Trustee; and, in conjunction with any such change and without any need to obtain the approval of any court, to elect that such trust or trust share shall be subject to the jurisdiction of the new situs. In addition, my Trustee may move the assets of such trust or trust share to the location of the new situs. In no event, however, may this power be exercised in a manner that would cause the denial of Marital Deduction qualification for any portion of my Trust Estate, or that would prevent a trust or trust share from qualifying as a permitted shareholder of "S" corporation stock for federal income tax purposes.

dd. Release of Trustee Powers

Each Trustee who determines it to be in the best interest of any beneficiary may, at any time, by instrument executed with all the formalities of a deed and delivered personally or sent by certified mail to another then acting Trustee, if any, or to some beneficiary of the affected trust or trusts, release and relinquish or disclaim upon any terms, either in whole or in part, temporarily or permanently, revocably or irrevocably, with or without binding successors, any one or more of the powers, rights, authorities, and discretions conferred upon such Trustee by any provision or provisions of my Trust Agreement or generally pursuant to law, which release and relinquishment or disclaimer shall be binding on all affected beneficiaries. If the release and relinquishment or disclaimer of a power, right, authority, or discretion is made by less than all of my Trustees upon whom it is conferred, such power, right, authority, or discretion shall continue to be exercisable in full by my Trustee or Trustees (other than any Successor Trustees on whom it is, by its terms, binding) who have not thus released and relinquished or disclaimed it.

ee. Pay Death and Generation-skipping Transfer Taxes of Beneficiaries

Upon the death of any beneficiary other than me, any estate, inheritance, succession, or other death taxes (including any generation-skipping transfer taxes), duties, charges, or assessments, together with interest, penalties, costs, Trustee's compensation and attorneys' fees, which shall become due by reason of my Trust Estate or any interest therein being includible for such tax purposes, may be paid by my Trustee from my Trust Estate (other than the Marital Trust, if any,) unless other adequate provision shall have been made therefor. Any such payments shall be charged to the principal of the share of my Trust Estate or the separate trust so included. If my Trustee considers that any distribution from a trust hereunder, other than pursuant to a power to withdraw or appoint, is a taxable distribution subject to a generation-skipping transfer tax payable by the distributee, my Trustee shall augment the distribution by an amount which my Trustee estimates to be sufficient to pay the tax and shall charge the same against the trust to which the tax relates. If my Trustee considers that any termination of any interest in or power over trust property hereunder is a taxable termination subject to a generation-skipping transfer tax, my Trustee shall pay the tax from the trust property to which the tax relates, without any adjustment of the relative interests of the beneficiaries. If the tax is imposed in part by reason of trust property hereunder and in part by reason of other property, my Trustee shall pay that portion thereof which the value of the trust property bears to the total property taxed, taking into consideration deductions, exemptions and other factors which my Trustee deems pertinent. My Trustee may make any such payments directly, or to a Legal Representative or other fiduciary, and my Trustee may rely upon a written statement of such fiduciary as to the amount and propriety of such taxes, interest, penalties and other costs, and shall be under no duty to see to the application of any funds so paid.

Section 2. Gifts by Trustee

a. General Gift Authority

My Trustee is authorized to make gifts, grants, or other transfers without consideration, either outright or in trust, for any legitimate estate planning purpose, to or for my benefit, my descendants, or charitable organizations (including, without limitation, any Private Charitable Foundation, Charitable Remainder Trust, or Charitable Lead Trust established by me, as well as any public charity), even if the donee is serving as my Trustee. Such gifts may include the forgiveness of indebtedness, the completion of any charitable pledges I have made, and the direct payment of tuition and medical care for the benefit of any such persons pursuant to the provisions of Section 2503(e) of the Code. Such gifts may be made in cash, in kind, or partly in each on a pro rata or non-pro rata basis. If any gifts are made to any individuals, then such gifts shall be made equally to all descendants of the same generation. For example, if a gift is made

to my child or grandchild, as the case may be, then a similar gift or gifts of the same amount must be made to each of my then living children or grandchildren, as the case may be.

b. Deathbed Gifts

1. Circumstances for Making and Amount of Deathbed Gifts

Without limiting my Trustee's authority to make gifts under Paragraph a. immediately preceding, if my Trustee determines that (i) I am terminally ill and it is unlikely that I will live, and (ii) my estate is or may be subject to death taxes, then my Trustee, in my Trustee's sole discretion, may make gifts up to the full amount of the federal gift tax annual exclusion amount under Section 2503(b) of the Code or successor statute, taking into account, if I am married, the amount that may be given by me from my separate property, if any, if my Spouse is willing and able to sign a consent to split the gift pursuant to Section 2513 of the Code (hereinafter referred to as "deathbed gifts").

2. Permissible Donees

My Trustee is authorized to make deathbed gifts to the following individuals: (i) First, to my then living children; provided, however, that if sufficient funds or suitable assets are not available to make the full amount of such gifts to all of my said children, then the funds or assets that are available shall be apportioned equally among said children; (ii) Second, if there are sufficient funds or suitable assets remaining after making the foregoing gifts to my then living children, then out of the remaining funds or assets, gifts shall be made to the then living children of my children (i.e., my grandchildren), in equal shares, per capita and not by right of representation; provided, however, that if sufficient funds or suitable assets are not available to make the full amount of such gifts to all such grandchildren, then the funds or assets that are available shall be apportioned equally among said grandchildren.

3. Completion of Deathbed Gifts Prior to My Death

I request that my Trustee take all action reasonably necessary to insure that the deathbed gifts authorized hereunder are completed for federal gift tax purposes prior to my death, including making gifts by wire transfer, electronic funds transfer, or other method

that is reasonably calculated to complete such gifts prior to my death. If I am in an irreversible coma or vegetative state and my life is being prolonged solely by artificial means under circumstances where the timing of my death may be subject to the control of my Health Care Agent, the Conservator of my person, or other legal representative, then I request that my Trustee hereunder confer with such Health Care Agent, Conservator, or legal representative concerning the timing of such gifts in relation to the timing of my death.

4. Effect on Testamentary Plan

It is my desire that my Trustee make such deathbed gifts in order to save Death Taxes even if doing so is inconsistent with my testamentary plan. For example, if my Will or my Trust Agreement provides for the distribution of my estate to my children in equal shares upon my death, it nevertheless is my desire that my Trustee include my grandchildren in such deathbed gifts if Death Taxes could thereby be reduced, even if the effect would be to reduce the amounts passing to my children at my death or shift the total amount passing to each line of descent.

c. Limitation on Gifts to Trustee

Notwithstanding the provisions of Subsections a. and b. above, any gifts my Trustee is authorized to make to himself or herself, or for his or her benefit, either directly or indirectly, including the discharge of his or her legal obligations, shall be limited to the greater of (i) five thousand dollars (\$5,000), or (ii) five percent (5%) of my Trust Estate during any calendar year, which power shall be non-cumulative and shall lapse at the end of each calendar year; provided, however, that gifts to my Trustee may exceed such limitation if any one of the following conditions is met: (i) the Trust Protector provided for under Article Three of my Trust Agreement consents in writing to the gift to such Trustee, (ii) my then living adult children (other than my Trustee) unanimously consent in writing to the gift to such Trustee, or (iii) court approval of the gift to my Trustee is obtained on petition by my Trustee or any other interested person pursuant to state law.

d. Income Tax Effects

In making gifts hereunder, my Trustee may, but shall not be required to, consider the income tax effects of making a gift of any asset, the income tax basis of which differs from the fair market value, including the possibility of a step-up in basis at my death pursuant to Section 1014 of the Code. In that regard, my Trustee shall have the sole discretion to determine whether the estate tax savings of making such gifts outweighs the income tax consequences.

e. Gifts are Discretionary

My Trustee shall have the sole discretion to determine whether and to what extent to make gifts hereunder; provided, however, that, except as otherwise provided above in Section 2.b., it is my desire that the donees of each generation be treated equally. Nothing stated herein shall be construed to require my Trustee to make any such gifts and my Trustee shall not be liable to any person for failing to make any gifts authorized hereunder, or for the manner in which such gifts are made, except for his or her bad faith, willful misconduct, or gross negligence, including without limitation the death tax or income tax consequences to my estate, beneficiaries, or heirs at law. My Trustee shall be held free and harmless from any such liability, loss, cost, or expense, including reasonable attorney's fees, arising from my Trustee's acts or omissions in connection with making any gifts under the provisions of my Trust Agreement.

f. Payments to or for Benefit of Minors

If a gift is made hereunder to any person who is under the age of twenty-one (21), and if no trust is established for such person, such person's gift may, in the discretion of my Trustee, be distributed to an adult member of such person's family (to be selected by my Trustee) as custodian until such age as my Trustee determines (but not to exceed the age of 21), under the Uniform Transfers to Minors Act or the Uniform Gifts to Minors Act.

g. Consent to Split Gifts

My Trustee is authorized to consent to split gifts made by either my Spouse or me (if I am married at such time) under Section 2513 of the Code or successor statute, and similar provisions of any state or local gift tax.

Section 3. Trustee Environmental Powers

a. Trustee Authorized to Inspect Property Prior to Acceptance

1. Actions at Expense of Trust Estate

Prior to acceptance of the position of Trustee by any proposed or designated Trustee (and prior to acceptance of any asset by any proposed, designated, or acting Trustee), such Trustee or proposed or designated Trustee shall have the right to take the following actions at the expense of my Trust Estate:

A. Enter Property

To enter and inspect any existing or proposed asset of my Trust (or of any partnership, limited liability

company, or corporation in which my Trust holds an interest) for the purpose of determining the existence, location, nature, and magnitude of any past or present release or threatened release of any hazardous substance; and

B. Review Records

To review my records and those of the currently acting Trustee (or of any partnership, limited liability company, or corporation in which my Trust holds an interest) for the purpose of determining compliance with environmental laws and regulations, including those records relating to permits, licenses, notices, reporting requirements, and governmental monitoring of hazardous waste.

C. Rights Equivalent to Partner, Member, or Shareholder

The right of the proposed, designated, or acting Trustee to enter and inspect assets and records of a partnership, limited liability company, or corporation under this provision is equivalent to the right under state law of a partner, member, or shareholder to inspect assets and records under similar circumstances.

D. Right to Still Refuse Acceptance of Trusteeship

Acts performed by the proposed or designated Trustee under this provision shall not constitute acceptance of my Trust.

E. Right to Accept Trusteeship Over Other Assets Only

If an asset of my Trust is discovered, upon environmental audit by the acting Trustee or any proposed or designated Trustee, to be contaminated with hazardous waste or otherwise not in compliance with environmental law or regulation, my Trustee may decline to act as Trustee solely as to such asset, and accept the Trusteeship as to all other assets of my trust. My Trustee, in his or her

discretion, may petition a court to appoint a receiver or Special Trustee to hold and manage the rejected asset, pending its final disposition.

F. Right to Reject Asset

Any currently acting Trustee shall have the right to reject any asset proposed to be transferred to such Trustee.

b. Termination, Bifurcation or Modification of Trust Due to Environmental Liability

1. Trustee's Powers over Hazardous Waste Property

If my Trust Estate holds one or more assets, the nature, condition, or operation of which is likely to give rise to liability under, or is an actual or threatened violation of, any federal, state, or local environmental law or regulation, my Trustee may take one or more of the following actions, if my Trustee, in my Trustee's discretion, determines that such action is in the best interest of my Trust and its beneficiaries:

A. Modify Trust

Modification of trust provisions, upon court approval, granting my Trustee such additional powers as are required to protect my Trust and its beneficiaries from liability or damage relating to the actual or threatened violation of any federal, state, or local environmental law or regulations, with it being my desire that my Trustee keep in mind my dispositive wishes expressed elsewhere in my Trust and that my Trustee consider and weigh any potentially negative federal and state income, gift, estate, or inheritance tax consequences to my Trustee, my Trust and its beneficiaries;

B. Bifurcate Trust

Bifurcation of my Trust to separate said asset from other assets of my Trust Estate;

C. Appoint a Special Trustee

Appointment of a Special Trustee to administer said asset; and/or

D. Abandon Property

Abandonment of such asset.

2. Termination of Trust or Distribution of Other Assets

With court approval, my Trustee may terminate my Trust or partially or totally distribute my Trust Estate to my beneficiaries.

3. Broad Discretion

It is my intent that my Trustee shall have the widest discretion in the identification of, and response to, administration problems connected with potential environmental law liability to my Trust Estate and my Trustee, in order to protect the interests of my Trust, my Trustee and the beneficiaries of my Trust.

4. Trustee's Powers Relating to Environmental Laws

My Trustee shall have the power to take, on behalf of my Trust, any action necessary to prevent, abate, avoid, or otherwise remedy any actual or threatened violation of any federal, state, or local environmental law or regulation, or any condition which may reasonably give rise to liability under any federal, state, or local environmental law or regulation, including, but not limited to, investigations, audits, and actions falling within the definition of "response" as defined in 42 U.S.C. § 9601(25), or any successor statute, relating to any asset that is or has been held by my Trustee as part of my Trust Estate.

c. Indemnification of Trustee from Trust Assets for Environmental Expenses**1. Indemnification and Reimbursement for Good Faith Actions**

My Trustee shall be indemnified and reimbursed from my Trust Estate for any liabilities, losses, damages, penalties, costs, or expenses arising out of, or relating to, federal, state, or local environmental laws or regulations (hereinafter "environmental expenses"), except those resulting from my Trustee's intentional

5. Exoneration of Trustee for Good Faith Acts Relating to Environmental Law

My Trustee shall not be liable to any beneficiary of my Trust or to any other party for any good faith action or inaction relating to any environmental law or regulation, or for the payment of any environmental expense (as defined above); provided, however, that my Trustee shall be liable for any such action, inaction, or payment which is a breach of trust and is committed in bad faith or with reckless or intentional disregard of his or her fiduciary obligations.

6. Allocation of Environmental Expenses and Receipts Between Principal and Income

My Trustee may, in my Trustee's discretion, allocate between the income and principal of my Trust Estate environmental expenses (as defined above) and reimbursements or other funds received from third parties relating to environmental expenses. In making such allocation, my Trustee shall consider the effect of such allocation upon income available for distribution, the value of Trust principal, and the income tax treatment of such expenses and receipts. My Trustee may, in my Trustee's discretion, create a reserve for the payment of anticipated environmental expenses.

Article Fourteen - Other Trust Provisions

Section 1. Provisions Respecting Retirement Assets

a. Explanation of Section

It is my intent, and the sole purpose of the following provisions, to insure that the beneficiaries of my Trust who are subject to the Minimum Required Distribution Rules be identifiable individuals and that they be treated as Designated Beneficiaries under such rules, so that the life expectancies of such beneficiaries may be used to calculate the Minimum Required Distributions mandated by the Code. This Section shall be interpreted with this intent and purpose being paramount to any other direction in it.

b. Definitions

As used in my Trust Agreement, the following terms, whether or not capitalized, have the following meanings, unless the context very clearly indicates otherwise.

1. Retirement Plan and Retirement Plan Proceeds

The term "Retirement Plan" means an annuity, employee pension plan, a qualified or non-qualified plan of deferred compensation, an individual retirement account or individual retirement annuity ("IRA"), or similar arrangement. The term includes any plan or arrangement described in Sections 401(a), 403, or 408(a), (b) or (k) of the Code. The term "Retirement Plan Proceeds" means proceeds receivable by any beneficiary (including a fiduciary) under a Retirement Plan upon or following the death of the participant.

2. Eligible Retirement Plan

The term "Eligible Retirement Plan" has the meaning given under Section 402(c)(8)(B) of the Code and generally means any Retirement Plan that is eligible to receive a tax-free rollover.

3. Participant, Employee and Employee's Benefit

The term "Participant," as used in this Section, includes any individual who has contributed to, directly or indirectly (through contribution by an employer on the employee's behalf), any Retirement Plan as defined above, including the owner of an IRA or Roth IRA. The term "Employee" shall have the same meaning as the term "Participant" and the term "Employee's Benefit" shall

include benefits under any Retirement Plan, including an IRA or Roth IRA.

4. Required Beginning Date

The term "Required Beginning Date" ("RBD") will have the meaning given by Section 401(a)(9) of the Code and the Treasury Regulations hereunder. The RBD generally refers to April 1st following the calendar year in which the Participant attains age 70½, except that with regard to a qualified plan, if the participant is not a five percent (5%) owner (as defined in Section 416 of the Code) the RBD may be April 1st following the calendar year in which the Participant retires, if later.

5. Applicable Date

The term "Applicable Date," as used in this Section, means September 30th of the year after the Participant's death.

6. Minimum Required Distribution Rules

The "Minimum Required Distribution Rules" ("MRD Rules") are the rules described in Section 401(a)(9) and Sections 408(a)(6) or (b)(3) of the Code (or anywhere else Section 401(a)(9) of the Code is made applicable by cross-reference, as the case may be).

7. Designated Beneficiary

A "Designated Beneficiary" means an identifiable individual who is entitled to any portion of Retirement Plan Proceeds, contingent on the Participant's death or another specified event, but in any case is to be given the meaning used in the Treasury Regulations under Section 401(a)(9) of the Code, as then in effect. To the extent members of a class of beneficiaries capable of expansion or contraction can be treated as being identifiable under the Proposed Treasury Regulations because of the possibility at the Applicable Date of identifying the class member with the shortest life expectancy, such class of beneficiaries shall be treated as a Designated Beneficiary, even though members of the class may be unborn at that time.

8. Contingent Beneficiary

A "Contingent Beneficiary," for purposes of this Section only, is a Designated Beneficiary who is entitled to any portion of

Retirement Plan Proceeds, contingent on a specified event, other than the Participant's death (e.g., death of another beneficiary).

9. Retirement Account Trustee

The term "Retirement Account Trustee," as used in a beneficiary designation form or other document designating the beneficiary of Retirement Plan Proceeds, shall be interpreted to mean the then acting Trustee of my Trust Agreement.

c. Trustee May Be Named As Death Beneficiary of Retirement Plan

My Trustee may be named as a Designated Beneficiary of Retirement Plan Proceeds. If so, my Trustee will be treated as owning the right to receive distributions from the Retirement Plan as fully as any other person or individual who was named as a Designated Beneficiary, except that such ownership shall be in a fiduciary capacity. Such interest (i.e., the right to receive distributions from the Retirement Plan) will be treated as an asset of my Trust and will be subject, generally, to the same provisions applicable to other trust assets. The death of a beneficiary of my Trust will not terminate the interest that my Trust has in a Retirement Plan.

d. Agreement to Provide Copies of All Amendments to Trust

In the case where, prior to my death, I, as the Participant, am required under the Treasury Regulations for Section 401(a)(9) of the Code to provide a copy of my Trust Agreement to the plan administrator, plan trustee, or IRA sponsor, trustee, or custodian, as the case may be, I agree that if my Trust Agreement is amended at any time in the future (but before my death), I will, within a reasonable time, provide to such plan trustee, plan administrator, or IRA sponsor, custodian, or trustee, as the case may be, a copy of each such amendment.

e. Method of Distribution under Retirement Plans

To the extent my Trustee has an interest in a Retirement Plan, my Trustee shall have the power to determine the form and manner of distribution from such Retirement Plan.

f. Rollovers and Transfers

My Trustee will have the unrestricted power to transfer or rollover any interest in a Retirement Plan to any other Eligible Retirement Plan or Plans, in order to effectuate the requirements of this Section, or as my Trustee may otherwise determine to be in the best interest of the beneficiaries, provided that in such case my Trustee shall continue as the holder of the interest, to the same extent as before.

g. Coordination with Minimum Required Distribution Rules

If my Trustee is named as the beneficiary of Retirement Plan Proceeds that are subject to the MRD Rules, and if, under the circumstances existing on the Applicable Date, the Retirement Plan Proceeds or the right to receive the Retirement Plan Proceeds are or may be payable to my Trustee, then the beneficiaries of my Trust are intended to be Designated Beneficiaries under the MRD Rules, and the following provisions shall apply:

1. Use of Retirement Plan Proceeds

Except as otherwise specifically provided to the contrary in the paragraph immediately below, but notwithstanding anything else herein to the contrary, Retirement Plan Proceeds shall be used entirely and exclusively for the benefit of the Designated Beneficiaries who are living at the Applicable Date.

2. Unborn Beneficiaries

Notwithstanding the immediately preceding paragraph, in the event that all of the primary Designated Beneficiaries of a particular trust who were living at the Applicable Date have died, my Trustee shall make distributions to those beneficiaries who would otherwise benefit under such trust, but only in the manner and to the extent consistent with my intent and the purpose for this Section as set forth in Paragraph a. of this Section.

3. Trustee Required to Distribute During Life Expectancy of Beneficiary

Unless the law applicable to MRDs from qualified plans and IRAs, interpreted in accordance with my intent and the purpose for this Section as set forth in Subsection a. above, clearly allows for a less rapid distribution from my Trust, all Retirement Plan Proceeds received by my Trust must be distributed to one or more Designated Beneficiaries of my Trust before the expiration of the life expectancy of the youngest Designated Beneficiary of my Trust to which this rule is applied, unless such beneficiary dies prior to the expiration of such life expectancy, taking into account only those beneficiaries alive as of the Applicable Date.

h. Use of Retirement Plan Proceeds to Pay Debts or Expenses

Use of Retirement Plan Proceeds for the payment of debts and expenses directly attributable and proportionate to the estate tax value of such Retirement Plan Proceeds is limited to those payments that can actually be made prior to the

Applicable Date or would otherwise not cause my Trust to fail to be a qualified beneficiary. Notwithstanding the rules otherwise applicable to apportionment, abatement and the payment of debts and expenses, Retirement Plan Proceeds shall not be used to pay any of my debts or expenses still outstanding as of the Applicable Date and thereafter, or would otherwise cause my Trust not to be a qualified beneficiary.

i. Use of Retirement Plan Proceeds to Pay Debts or Expenses

Use of Retirement Plan Proceeds for the payment of Death Taxes directly attributable and proportionate to the estate tax value of such Retirement Plan Proceeds is limited to those payments that can actually be made prior to the Applicable Date, or would otherwise not cause my Trust to fail to be a qualified beneficiary. Notwithstanding the rules otherwise applicable to apportionment, abatement and the payment of Death Taxes, Retirement Plan Proceeds shall not be used to pay any Death Taxes still outstanding as of the Applicable Date and thereafter. However, in that case, the Death Taxes attributable and proportionate to such Retirement Plan Proceeds, to the extent otherwise apportionable under this instrument, shall, in my Trustee's discretion, be paid from funds provided by such beneficiary or charged against other property or trust distribution receivable by the beneficiary as a result of my death (provided that such other property is not otherwise eligible for the Marital Deduction).

j. No Power of Appointment Over Retirement Plan Proceeds

Except as provided below in this Section, but notwithstanding anything else to the contrary, no one (other than me) will have any power of appointment over any Retirement Plan Proceeds held in trust, except that my Spouse shall have all such demand rights over income that are otherwise provided herein, in cases where my Spouse has a qualifying income interest for life in a trust or in a Retirement Plan. Any power of appointment that would otherwise have been applicable but for this paragraph will be treated as if it existed but was unexercised.

k. Separate Account and Special Distribution Requirements

My Trustee will separately account for all Retirement Plan Proceeds, using sub-trusts if necessary, and will see to it that those benefits are only distributed to Designated Beneficiaries (as defined above) who are identifiable on the Applicable Date, as long as any Designated Beneficiary of such trust (or sub-trust, as the case may be) is alive. Further, my Trustee will actually distribute those benefits to those beneficiaries within such time as is required under applicable tax law, or under Treasury Regulations (whether proposed, temporary, or final) in order to carry out the purpose of this Section as provided under Subsection a. above.

l. Application of Rules to Sub-trusts

I realize that a sub-trust may be the beneficiary of Retirement Plan Proceeds. In that case, the rules of this Section are to be applied within the particular sub-trust involved, and are not meant to give the beneficiaries of other sub-trusts an interest they would not otherwise have had.

m. Incorporation by Reference of Terms of Beneficiary Designation

If the terms of any beneficiary designation signed by me would otherwise fail because such terms are not a part of my will and/or Trust, I incorporate such terms by reference, as a part of my Trust as if fully set out in this document.

n. Principal and Income Allocations of Payments from Retirement Plans

My Trustee shall allocate to income that portion of each "Payment" (up to the whole thereof) that equals (i) the amount of "Inside Income" that my Trustee reasonably determines has occurred since the right to receive Payments became subject to trust; reduced by (ii) the amount of prior Payments from the same contractual, custodial, or trust arrangement that was allocated to trust income. My Trustee shall allocate the balance of the Payment, if any, to principal.

The term "Payment" refers to an amount that is received or withdrawn pursuant to a contractual, custodial, or trust arrangement under a Retirement Plan. The term "Inside Income" with respect to each contractual, custodial, or trust arrangement, refers to that portion of Payments that are characterized by the payor as interest, dividends, or a dividend equivalent. To the extent any portion of a Payment is not so characterized by the payor, Inside Income shall consist of any amounts that would be allocable to income under applicable state law governing the allocation of principal and income for trusts, if said statutes were applied to a trust holding the assets that fund all Payments to which my Trust is entitled under such arrangements. If my Trustee cannot identify the character, amount, or nature of said assets, my Trustee may reasonably estimate the character, amount and nature of such assets.

Section 2. Provisions Relating to Income in Respect of a Decedent

Upon my death, if my Spouse survives me and if my Trustee (other than my Spouse) determines in my Trustee's discretion, that it is in the best interest of any beneficiary of my Trust, my Trustee may disclaim all or any right to receive any Income in Respect of a Decedent ("IRD") assets. If my Trustee so disclaims, such disclaimed IRD assets shall pass outright to my Spouse. If my Spouse is the only Trustee at the relevant time, the Trust Protector provided for under Section 8 of Article Three shall act as Trustee for this purpose.

l. Application of Rules to Sub-trusts

I realize that a sub-trust may be the beneficiary of Retirement Plan Proceeds. In that case, the rules of this Section are to be applied within the particular sub-trust involved, and are not meant to give the beneficiaries of other sub-trusts an interest they would not otherwise have had.

m. Incorporation by Reference of Terms of Beneficiary Designation

If the terms of any beneficiary designation signed by me would otherwise fail because such terms are not a part of my will and/or Trust, I incorporate such terms by reference, as a part of my Trust as if fully set out in this document.

n. Principal and Income Allocations of Payments from Retirement Plans

My Trustee shall allocate to income that portion of each "Payment" (up to the whole thereof) that equals (i) the amount of "Inside Income" that my Trustee reasonably determines has occurred since the right to receive Payments became subject to trust; reduced by (ii) the amount of prior Payments from the same contractual, custodial, or trust arrangement that was allocated to trust income. My Trustee shall allocate the balance of the Payment, if any, to principal.

The term "Payment" refers to an amount that is received or withdrawn pursuant to a contractual, custodial, or trust arrangement under a Retirement Plan. The term "Inside Income" with respect to each contractual, custodial, or trust arrangement, refers to that portion of Payments that are characterized by the payor as interest, dividends, or a dividend equivalent. To the extent any portion of a Payment is not so characterized by the payor, Inside Income shall consist of any amounts that would be allocable to income under applicable state law governing the allocation of principal and income for trusts, if said statutes were applied to a trust holding the assets that fund all Payments to which my Trust is entitled under such arrangements. If my Trustee cannot identify the character, amount, or nature of said assets, my Trustee may reasonably estimate the character, amount and nature of such assets.

Section 2. Provisions Relating to Income in Respect of a Decedent

Upon my death, if my Spouse survives me and if my Trustee (other than my Spouse) determines in my Trustee's discretion, that it is in the best interest of any beneficiary of my Trust, my Trustee may disclaim all or any right to receive any Income in Respect of a Decedent ("IRD") assets. If my Trustee so disclaims, such disclaimed IRD assets shall pass outright to my Spouse. If my Spouse is the only Trustee at the relevant time, the Trust Protector provided for under Section 8 of Article Three shall act as Trustee for this purpose.

Section 3. Special Needs Provisions

a. Definition of "Special Needs Beneficiary"

For purposes of my Trust Agreement, the term "Special Needs Beneficiary" refers to a beneficiary who is entitled to receive any form of need-based government or private support or benefit, including, but not limited to, such programs as Medicaid, Supplemental Security Income ("SSI"), In-Home Supportive Services, Medicare, and Aid for Dependent Children.

b. Definition of "Special Needs"

For purposes of my Trust Agreement, the term "Special Needs" refers to supplemental, non-support expenditures from my Trust assets that, pursuant to the other provisions of this Section, my Trustee is authorized to disburse, in my Trustee's sole and absolute discretion. Special Needs, subject to the general supplemental, non-support limitation, include, but are not limited to, medical, dental, diagnostic or therapeutic treatment, or nursing or home care services for which the Special Needs Beneficiary is not receiving government or private benefits, and is not eligible to receive such benefits. Special Needs also includes the differential between any treatment, service or care that the Special Needs Beneficiary is receiving from any government or private source and the level of treatment, service or care my Trustee deems appropriate for the beneficiary. Disbursements for education, travel (including travel by those my Trustee believes the companionship of which will benefit the Special Needs Beneficiary), entertainment devices or events and electronic devices are also to be considered Special Needs.

c. Overall Limitation on Distribution

It is my intention that distributions from my Trust Estate supplement, but not supplant, impair or diminish, any forms of government or private support or benefit which a beneficiary of my Trust is then receiving or becomes eligible to receive. For purposes of this Section, the term "support" refers to food, clothing or shelter. The terms of my Trust Agreement shall be read and interpreted to prevent any action by my Trustee which would supplant, impair, diminish or otherwise interfere with, limit or reduce the Special Needs Beneficiary's receipt of, or eligibility for, any form of government or private benefits. Any power of distribution (whether or not exercised), granted to my Trustee pursuant to the terms of my Trust Agreement that would result in the loss, diminishment or ineligibility for government or private benefits is hereby revoked; and, only such powers as will not result in ineligibility for such benefits, or loss, diminishment or impairment, thereof, shall remain exercisable by my Trustee.

d. Discretionary Distribution of Accumulated Income and Principal

My Trustee may pay for the benefit of a Special Needs Beneficiary such accumulated income and principal of such beneficiary's share, up to the whole thereof, as my Trustee, in his or her discretion, shall determine from time to time, for the Special Needs of the Special Needs Beneficiary. My Trustee, in exercising discretion under this paragraph, shall consider all income or resources available to the Special Needs Beneficiary. The Special Needs Beneficiary has no rights to any distributions under my Trust.

e. Treatment of Any Residence Held by Trust

Notwithstanding the provisions of Section 1. k. of Article Thirteen, my Trustee may charge the Special Needs Beneficiary rent on any residence owned, in whole or in part, by the Special Needs Beneficiary's share. My Trustee must charge rent if the failure to do so would cause ineligibility for any government or private benefits.

f. Rights of Creditors and Others

My Trust assets are not intended to be used for the support of the Special Needs Beneficiary, but are only intended to supplement resources, income or government or private assistance available to the Special Needs Beneficiary. No part of my Trust Estate, neither principal nor income, shall be subject to anticipation or assignment by the Special Needs Beneficiary, nor be subject to attachment by any creditor of the Special Needs Beneficiary, governmental agencies or any other individual or entity, including any who may have provided goods or services to the Special Needs Beneficiary.

g. Power to Terminate Beneficiary's Share of Trust

If my Trustee determines that the existence of my Trust renders the Special Needs Beneficiary ineligible for governmental or private benefits that, in the discretion of my Trustee, substantially outweigh the benefits my Trust can bestow upon such beneficiary, or my Trustee determines that, notwithstanding the spendthrift provisions of my Trust, a substantial portion or all of the principal and accumulated income of the Special Needs Beneficiary's share is subject to invasion, garnishment, attachment, execution or other similar action by a creditor or a government agency, my Trustee may terminate such share and distribute the principal and accrued income in accordance with the paragraph that follows. Furthermore, in the event a court of competent jurisdiction determines the provisions of this Section are contrary to law or public policy, then subject to any right of appeal, the Special Needs Beneficiary's share of my Trust shall be deemed unavailable for purposes of qualifying for or maintaining any public or private support benefits or services, regardless of whether the beneficiary is

actually entitled to such benefits or services, and if this is not sufficient to cure any deficiency then the Special Needs Beneficiary's share shall be deemed to have failed and my Trustee shall distribute the principal and accrued income of such share in accordance with the paragraph that follows.

h. Payment and Distributions on Termination of Discretionary Trust

In the event a share for a Special Needs Beneficiary is terminated subject to the paragraph immediately above, my Trustee shall distribute the remaining principal and accrued income of such share to the Special Needs Beneficiary's siblings, per stirpes. If the Special Needs Beneficiary has no then living siblings but has living descendants who are of the age of majority, my Trustee shall distribute the remaining principal and accrued income of such share to such descendants of the Special Needs Beneficiary, per stirpes. If the Special Needs Beneficiary has no living descendants who are of the age of majority, my Trustee shall distribute the remaining principal and accrued income of such beneficiary's share to my then living descendants, per stirpes. If I have no then living descendants, my Trustee shall distribute the balance of the Special Needs Beneficiary's share of my Trust as provided in the paragraph that follows. It is my hope, wish and desire that any beneficiary under this paragraph will use any distribution received hereunder to provide for the supplemental needs, as defined above, of the Special Needs Beneficiary.

i. Payment and Distributions on Death of Beneficiary

Unless terminated under the paragraphs immediately above, or by the exhaustion of the corpus, the Special Needs Beneficiary's share of my Trust shall terminate upon such beneficiary's death. My Trustee may pay the expenses of such beneficiary's last illness and funeral, and all administrative expenses relating to such beneficiary's share, including reasonable attorney's and accountant's fees, if, in my Trustee's discretion, other satisfactory provisions have not been made for the payment of such expenses. My Trustee shall divide and distribute, free of trust, the balance of the Special Needs Beneficiary's share into as many shares of equal value as there are then surviving children of the beneficiary, if any, plus one share for each deceased child of such beneficiary leaving descendants then surviving, each of said descendant's interests to be determined per stirpes. Should there be no children or descendants of the beneficiary then surviving, my Trustee shall divide and distribute, free of trust, the balance of the beneficiary's share into as many shares of equal value as I have then surviving children, if any, plus one share for each of my deceased children leaving descendants then surviving, each of said descendant's interests to be determined per stirpes. Should I have no children or descendants then surviving, the Special Needs Beneficiary's share shall terminate and my Trustee shall distribute the balance of the beneficiary's share according to the provisions of Article Eleven of my Trust.

Section 4. Life Insurance

Notwithstanding anything to the contrary contained in my Trust Agreement, with respect to any policy of life insurance owned by me as my separate property or being held in my Trust, I shall retain, during my lifetime, all incidents of ownership with respect to such policies (including, but not limited to, all rights and powers to sell, transfer, assign or hypothecate such policies or any of them, to change the beneficiary of any policy, to borrow any sum from the insurer or from any other person and to assign any policy to such lender, and to receive all payments, dividends, surrender values, benefits or privileges of any kind which may accrue on account of said policies). Any other person on whose life such policies are held ('Insured') shall have no incidents of ownership with respect to such policies only by reason of being an Insured with respect to such policies and shall not act as my Trustee of such policies. The above provisions shall not prohibit or restrict me from owning any policies as Community Property. Such policies shall be governed as follows:

a. Trust as Owner

My Trustee shall not be required to pay premiums, assessments, or other charges on any life insurance policy of which my Trust is the owner, which are required to keep it a binding insurance contract, nor shall my Trustee be responsible for determining whether such payments have been made. However, my Trustee may pay, from income or from principal of my Trust, any and all premiums, assessments, or other charges with respect to such insurance policies that may be required in order to preserve them as binding contracts, and my Trustee may exercise any non-forfeitures or dividend options under the policies. In the event that my Trustee receives any notice requiring the payment of a premium, or whenever my Trustee intends to cancel, convert or substantially modify any insurance policy, my Trustee shall give me written notice of the event.

b. Trust as Beneficiary

With respect to any policy of life insurance which designates my Trust as a primary or contingent beneficiary in any manner:

1. Except as provided in Section 4.a. of this Article, my Trustee shall have no responsibility, with respect to any policy, for the payment of premiums, notification of premiums due, or for any action required to keep any policy in force.
2. On receipt of proof of death of any Insured and on obtaining possession of an insurance policy, my Trustee shall use reasonable efforts to collect all sums payable under policy terms. All sums received shall be principal of my Trust Estate, except for interest paid by the insurer,

which shall be income. Subject to any contrary provision in the beneficiary designation of any policy, all sums payable under any policy shall be allocated to the trusts created hereunder based on the ownership of the policy immediately before the Insured's death;

3. My Trustee shall have full power to compromise, arbitrate or otherwise adjust any claim, dispute or controversy arising under any policy, and shall have authority to initiate, defend, settle and compromise any legal proceeding necessary, in my Trustee's opinion, to collect the proceeds of any policy. My Trustee shall not be obligated to engage in litigation to enforce the payment of any policy unless my Trustee is indemnified to its satisfaction against any resulting expenses and liability; and
4. My Trustee's receipt of payment for policy proceeds to any insurer shall be considered to be full discharge, and the insurer shall not be under any duty to inquire concerning the application of policy proceeds by my Trustee.

c. Simultaneous Death

Notwithstanding anything in my Trust Agreement to the contrary:

1. Where the Insured and the beneficiary in a policy of life or accident insurance have died and there is no sufficient evidence that they have died other than simultaneously, the proceeds of the policy shall be distributed as if the Insured had survived the beneficiary; and
2. Where the owner and the Insured in a policy of life or accident insurance have died and there is no sufficient evidence that they have died other than simultaneously, the policy shall be distributed as if the Insured had survived the owner.

d. Purchase of Additional Insurance

My Trustee may apply for and receive life insurance on the life of any beneficiary under my Trust.

Section 5. Residence and Vacation Residence Usage by Spouse

Notwithstanding anything to the contrary hereinabove, from and after my death, my Spouse, at his election, shall have the right to possess and occupy, during his life, the real property in my

Trust Estate that we were using for our principal residence and/or vacation residence at the time of my death, without any obligation upon my Spouse to pay rent. While my Spouse shall possess and occupy said residence, my Spouse shall manage, care for and protect it.

My Trustee shall pay a portion (set forth below) of any mortgage or trust deed payments (both principal and interest), any property taxes, assessments, insurance, maintenance and repairs on all such residential property, or any rent or lease payments, out of principal and/or income of the Family Trust and the Marital Trust, if any such share exists. The portion of such payments and expenses paid by my Trustee shall be an amount that is or was proportionate to the respective interests in such residential property held by the Family Trust and the Marital Trust. The remaining portion of such payments and expenses shall be paid by my Spouse.

My Trustee may exchange such residential property for other residential property, or sell such residential property, only with the consent of my Spouse, if competent to give such consent, or if my Spouse is not competent to give such consent, with the consent of his/her Attorney-in-Fact. My Trustee may also use my Trust Estate to purchase, rent or lease other residential property selected by my Spouse or his/her Attorney-in-Fact, as the case may be. Any sale or purchase may be solely for cash or partly for cash and partly on credit, and at such price and upon such terms as shall be mutually agreed upon by my Trustee and my Spouse. The purchase price for the replacement residential property, or the value of the other residential property which is rented or leased, however, shall not exceed the selling price, less selling expenses, of the property sold, unless my Spouse shall contribute the amount of such excess, as determined by my Trustee, either by paying or agreeing to exonerate or indemnify my Trust Estate against any liability for the amount of such excess. My Spouse shall not be obligated to give security for his/her liability under such agreement of exoneration or indemnification. In the event that my Trustee sells any residential property and my Spouse does not request the purchase, rental or lease of a replacement residence, my Trustee shall invest and reinvest the proceeds of any such sale or distribute the same in accordance with the other provisions of my Trust Agreement. The right, title and interest of my Spouse and of my Trustee in any other residential property acquired under the provisions of this Section shall be proportionate to their respective contributions to the purchase price. The right, title and interest of my Trust Estate in any other residential property received in exchange or by purchase, shall be subject to all the terms and conditions of this Section, including the provisions hereof relating to the possession and occupancy, sale or exchange, and the acquisition of other residential property in place thereof. If any residential property possessed or occupied by my Spouse is located on realty used for commercial or farming purposes, this Section shall apply only with respect to the residential structures thereon, along with the land on which they stand and the land reasonably necessary for the exercise of the right of ingress thereto and egress therefrom, and my Trustee, in my Trustee's discretion, may continue to use the balance of the real property for commercial or farming purposes.

If my Spouse is acting as Trustee hereof at the time my Trustee is called upon to exercise any of his powers, duties, or discretionary authority set forth above in this Section, then such powers, duties and discretionary authority may be limited as set forth in Section 8 of Article Three. This Section shall also apply to our principal residence, in the event we are living but neither of us is acting as Trustee and references to the Family Trust and Marital Trust shall be irrelevant.

Section 6. "S" Corporation Stock

Notwithstanding any other provisions of my Trust Agreement, my Trustee shall not allocate any Subchapter "S" Corporation Stock (as defined by Section 1361 et. seq. of the Code) held in my Trust Estate at my death, to the extent possible, to any trust or trust share created under my Trust Agreement which would have the effect of causing the "S" Corporation status to be terminated because the trust or the trust share was not a qualified Subchapter "S" shareholder, or was not a Qualified Subchapter "S" Corporation Trust ("QSST"), as defined at Section 1361 of the Code, as amended. In furtherance of the above, it is my intention that my Trustee shall have the right, in my Trustee's sole discretion (but keeping in mind my dispositive wishes as set forth elsewhere in my Trust Agreement), to bifurcate any and all trusts created hereunder, at any time or from time to time after my death, to create trusts which hold "S" Corporation stock and shall at all times be classified as QSSTs within the meaning of Section 1361 of the Code and the corresponding provisions of state law. The above provisions may be limited as set forth in Section 8 of Article Three of my Trust Agreement.

To that end, all such QSSTs shall be subject to the following rules:

- a. During the life of the current income beneficiary there shall be only one income beneficiary of a QSST;
- b. Any principal distributed during the life of the current income beneficiary may be distributed only to such beneficiary;
- c. The income interest of the current income beneficiary in the QSST shall terminate on the earlier of such beneficiary's death or the termination of the QSST;
- d. Upon termination of the QSST during the life of the current income beneficiary, the QSST shall distribute all of its assets to such beneficiary; and
- e. All of the income (within the meaning of Section 643 (b) of the Code) shall be distributed (or shall be required to be distributed) currently to one individual who is a citizen or resident of the United States of America.

My Trustee, in his or her discretion, may, in the alternative, attempt to exchange, sell, or convey such stock to such persons or entities who would not cause the "S" Corporation election to be revoked or terminated for any reason attributable to that person's or entity's ownership of such stock and the proceeds or property received from such exchange, sale, or conveyance shall then be applied in accordance with the provisions of my Trust Agreement. It is further provided that, notwithstanding this paragraph, my Trustee shall hold, administer, and dispose of any and all of my Trust Estate such that the continuation of the "S" Corporation election shall be of secondary consideration in deference to my primary intent that the total value of my Trust Estate distributed under the terms of my Trust Agreement be maximized to the extent possible, considering all

income tax, estate tax, and any other taxes or expenses that could potentially diminish the value of such Trust Estate.

Section 7. The Rule Against Perpetuities

Notwithstanding any other provision of my Trust Agreement, unless sooner terminated or vested in accordance with other provisions of my Trust Agreement, all interests in the Trust Estate not otherwise vested, including, but not limited to, all trusts and powers of appointment created hereunder, shall terminate: (i) one day prior to twenty-one years after the death of the last survivor of the group composed of: 1) those beneficiaries described herein, 2) each of my spouse's and my descendants living on the date of my death (or such other date my Trust becomes irrevocable), 3) my spouse, and 4) me, or (ii) if longer, the maximum period or term as may be authorized under the laws of the state identified in the Governing State Law Section of this Article or such other jurisdiction whose laws are applicable to my Trust. At that time, distribution of all principal and all accrued, accumulated, and undistributed income share shall be made to the persons (or their representatives as authorized herein) then entitled to distributions of income or principal and in the manner and proportions herein stated, irrespective of their then attained ages.

Section 8. Spendthrift Protection

To the fullest extent permissible by law, no interest in the principal or income of any trust created hereunder shall be anticipated, assigned, encumbered or subject to any creditor's claim or to legal process prior to its actual receipt by the beneficiary. Notwithstanding any provision herein to the contrary, this Section shall not apply to Qualified Disclaimers (as defined in Section 2518 of the Code) made by any beneficiary as to his or her interest in my Trust. Except as herein otherwise expressly provided, all income or principal to be paid to any beneficiary shall be paid by my Trustee directly and only to such beneficiary, to the Legal Representative of such beneficiary, or, where authorized, applied for the benefit of such beneficiary. If any creditor or other claimant attempts, by any means, to subject to the satisfaction of the claim of such creditor or claimant the interest of any beneficiary to receive income or periodic payments from principal or income, or both, then notwithstanding any other provisions herein, and in the absolute discretion of my Trustee, my Trustee may suspend such beneficiary's payments from my Trust. To the extent that the provisions of this Section would exclude any portion of my Trust Estate from qualifying for the Marital Deduction, it shall be null and void.

Section 9. Incapacity and Competency

A person shall be considered incapacitated in the event such person has been determined to be so by a court of competent jurisdiction; has been certified by two licensed physicians to be unable to properly handle his or her own affairs by reason of physical illness or mental illness; is unavailable for a period of not less than six months when his or her whereabouts are unknown and it is not known whether he or she is dead or alive; or, in the case of a trustee, such trustee is prevented by state law from exercising a power or powers granted to such trustee under my Trust Agreement. To the extent a trustee is prevented by state law from exercising a power or powers

granted to such trustee under my Trust Agreement, the Successor Trustee shall have the power to exercise such power or powers, provided such power is not a general power of appointment if held by a Successor Trustee. If a Successor Trustee is prevented from exercising a power or powers because such power or powers would constitute a general power of appointment, the Trust Protector appointed under the provisions of Section 8 of Article Three shall exercise such denied power or powers. A person shall be considered to have regained capacity, as applicable, upon such a determination by a court of competent jurisdiction; upon certification by two licensed physicians that the person is able to properly handle his or her own affairs; upon his or her renewed availability; or if any state law proscription as to the exercise of a power or powers is removed. The term "incapacity" is intended to be interchangeable with the terms "disability" and "incompetency." The term "competent" in my Trust Agreement refers to a person who is not incapacitated.

Section 10. Income and Principal Payments

Unless prohibited by state law or a court of competent jurisdiction and other than as directed in the Special Needs Provisions of this Article, all payments of income or principal shall be made in such of the following ways as my Fiduciary determines appropriate:

- a. To each respective beneficiary in person upon his or her personal receipt;
- b. Deposited in any bank to the credit of such beneficiary in any account carried in his or her name or jointly with another or others;
- c. To the parent or Legal Representative of the beneficiary;
- d. To a Custodian under a Uniform Transfers to Minors Act or Uniform Gifts to Minors Act selected by my Trustee for such period of time under applicable law as my Trustee determines appropriate;
- e. To some near relative, friend or institution having primary responsibility for the care and custody of the beneficiary;
- f. By my Trustee using such payment directly for the benefit of such beneficiary; or
- g. To the Trustee of any revocable trust of which the beneficiary is me.

Section 11. Limit on Trustee's Discretion

Notwithstanding any other provision in my Trust Agreement except for the general power of appointment specifically provided under the Section entitled "General Power of Appointment Over Non-Exempt Assets" in Article Ten, no individual Trustee, other than myself, who is also a beneficiary hereunder ("Trustee-beneficiary") shall have any right, power, duty or discretion concerning my Trust Estate if such right, power, duty or discretion conferred upon such Trustee-beneficiary under my Trust Agreement would constitute a general power of appointment under

Code Sections 2041 or 2514 that would cause any assets of my Trust Estate to be included in the estate of such Trustee-beneficiary. Any such right, power, duty or discretion with such effect shall be null and void with respect to such Trustee-beneficiary. No Trustee who is under a legal obligation to any beneficiary of my Trust Agreement or other person shall under any circumstances partake in any decisions relating to any discretionary distributions of income or principal of my Trust Estate that can be used to discharge any such legal obligation of such Trustee.

If, however, such powers may be possessed without violating the restrictions imposed by my Trustee acting jointly with the Trust Protector appointed under the provisions of Section 8 of Article Three, then my Trustee may possess those powers and authorities without violating this Section. Such Trust Protector shall act jointly with my Trustee whenever the joint possession of a power or authority would not violate the restrictions imposed by this Section. Such Trust Protector shall act alone whenever only sole possession of a power or authority would not violate the restrictions imposed by this Section.

Section 12. Disclaimer by Beneficiary

Any beneficiary under my Trust Agreement shall be entitled to disclaim all or any portion of such beneficiary's interest in my Trust.

Section 13. Captions

The captions of Articles, Sections and Paragraphs used in my Trust Agreement are for convenience of reference only and shall have no significance in the construction or interpretation of my Trust Agreement.

Section 14. Severability

Should any of the provisions of my Trust Agreement be, for any reason, declared invalid, such invalidity shall not affect any of the other provisions of my Trust Agreement, and all invalid provisions shall be wholly disregarded in interpreting my Trust Agreement.

Section 15. Statutory References

Unless the context clearly requires another construction, each statutory reference in my Trust Agreement shall be construed to refer to the statutory section mentioned, related successor sections, and corresponding provisions of any subsequent law, including all amendments.

Section 16. Survivorship

a. Simultaneous Deaths

For purposes of my Trust Agreement, if my Spouse and me die under circumstances in which the order of my deaths cannot be established, and I die with the smaller Taxable Estate, then I shall be deemed to have survived my

Spouse. If I die with the larger Taxable Estate, then my Spouse shall be deemed to have survived me. If both of my Taxable Estates are equal, then my Spouse shall be deemed to have survived me.

If any beneficiary under my Trust Agreement and I die under circumstances in which the order of deaths cannot be established, I shall be deemed to have survived the beneficiary, and my Trust Agreement shall be construed accordingly.

b. Generation-Skipping Transfer Tax Matters

A person (the "Non-Skip Person") shall not be deemed to have been alive on the date of the death of any person upon whose death a transfer is deemed to occur for generation-skipping transfer tax purposes or the date of any distribution from, or any termination of, any interest in any trust or share under my Trust Agreement for which the date of the Non-Skip Person's death is relevant (the "Transfer Date") if: (i) the Non-Skip Person is actually alive on the Transfer Date; (ii) the Non-Skip Person is not actually alive on the date ninety (90) days following the Transfer Date; and (iii) the existence of such a condition of survivorship causes another person who would otherwise be assigned to a generation below that of the Non-Skip Person to be assigned to the generation of the Non-Skip Person for generation-skipping transfer tax purposes.

Section 17. Gender and Number

In my Trust Agreement, where appropriate, except where the context otherwise requires, the singular includes the plural and vice versa, and words of any gender shall not be limited to that gender.

Section 18. Governing State Law

My Trust Agreement and the trusts created under it shall be construed, regulated and governed by and in accordance with the laws of the State of South Carolina.

Section 19. Reliance on Affidavit of Trust

Any person may act in reliance upon a properly issued Affidavit or Certificate of Trust reflecting the relevant terms of my Trust Agreement without risk or incurring any liability to me, my Trustees or the beneficiaries of my Trust.

Section 20. Definitions

The following terms as used in my Trust Agreement are defined as indicated:

a. **Beneficiary Designation**

The term "Beneficiary Designation" means any document executed by me that affects the manner of payment of amounts held in a plan (of whatever type) subject to the distribution rules of Section 401(a)(9) of the Code, any commercial annuity or any similar deferred payment arrangement, or life insurance contract.

b. **Business Judgment**

The term "Business Judgment" means that the fiduciary acted on an informed basis, in good faith, and with the honest belief that his or her actions are in the best interest of my Trust and its beneficiaries.

c. **Child, Children and Descendants**

The terms "child" or "children" mean lawful blood descendants in the first degree of the parent designated; and "descendants" means the lawful blood issue, in any degree, of the ancestor designated; provided, however, that if a person has been adopted, that person shall be considered a child of such adopting parent or parents, and such adopted child and his or her issue shall be considered issue of the adopting parent or parents and of anyone who is, by blood or adoption, an ancestor of the adopting parent or either of the adopting parents. The terms "child," "children," "descendant" and "descendants" or those terms preceded by the terms "living" or "then living" shall include the lawful blood descendant, in the appropriate degree, of the ancestor designated even though such descendant is born after the death of a parent. Notwithstanding the preceding provisions of this Section, the terms of Article One may exclude certain descendants from being treated as such hereunder by restricting the availability of Trust benefits.

d. **Code**

The term "Code" means the Internal Revenue Code of 1986, as amended from time to time. The terms "Income in Respect of a Decedent," "Gross Estate," "Taxable Estate," "State Death Tax Credit," "Marital Deduction," "Exclusion," "Disclaimer" and any other terms that, from the context in which they are used, refer to the Code, shall have the same meaning as such terms have for the purposes of applying the Code to my Trust Agreement.

e. **Death Taxes**

The term "Death Taxes" means all inheritance, estate, succession and other similar taxes that are payable by any person on account of that person's interest in the estate of the decedent or by reason of the decedent's death, including penalties and interest, but excluding the following:

1. Any additional tax that may be assessed under Sections 2032A of the Code; and
2. Any federal or state tax imposed on a generation-skipping transfer, as that term is defined in the federal tax laws, unless that generation-skipping transfer tax is payable directly out of the assets of a trust created by my Trust Agreement.

f. Education

The term "education" shall be given broad interpretation and may include, but not be limited to:

1. High School

Education at public or private elementary, middle, junior high or high schools, including boarding schools;

2. College

Undergraduate and graduate study in any and all fields whatsoever, whether of a professional character in colleges or other institutions of higher learning;

3. Specialized Training

Specialized formal or informal training in music, the stage, handicrafts, the arts, or vocational or trade schools, whether by private instruction or otherwise; and

4. Other Educational Activities

Any other activity including foreign or domestic travel that shall tend to develop fully the talents and potentialities of each beneficiary regardless of age.

g. Family Access Trust

The term "Family Access Trust" shall mean a trust designed to give the beneficiary liberal access to the income and principal of the trust while preserving the separate property character of an inheritance of a beneficiary, thereby affording the beneficiary a degree of asset protection in the event the beneficiary becomes involved in a legal separation, marital dissolution or divorce proceeding.

h. Family Sentry Trust

The term "Family Sentry Trust" shall mean a third party fully discretionary spendthrift trust designed to provide maximum protection from the creditors of the trust beneficiary as well as from divorcing spouses. The trust is known as a Family Sentry Trust because of these asset protection features.

i. For Cause

The term "for cause" means and includes any material act or omission to act by a trustee or other fiduciary constituting ordinary negligence, gross negligence, self-dealing, or intentional fraud. The term "material" identifies a significant monetary damage to my Trust or to any beneficiary of my Trust as the result of the act or omission to act by a trustee or other fiduciary constituting ordinary negligence, gross negligence, self-dealing or intentional fraud. The term "material" does not include incidental or insignificant monetary damage to my Trust or a trust beneficiary; monetary damages realized by someone who is not a beneficiary of my Trust; nor an intangible loss or damage that cannot be valued under the fair market valuation standards of the tax laws of the United States of America.

j. Heirs at Law

References to "heirs at law" mean individuals who are living at the time when property is directed to be distributed to them. Those individuals' identities and the shares of the distributable property that they each receive shall be determined under the intestacy laws of the State of South Carolina which then govern the distribution of the personal property of a resident dying at such time, without creditors, and owning only the distributable assets.

k. Investment Trustee

The Investment Trustee serves in the capacity of a co-trustee with regard to a Family Access Trust for my Spouse or any Family Sentry Trust established herein. The sole role of the Investment Trustee is to make investment decisions with regard to the sub-trust assets. The Investment Trustee is a fiduciary and is bound by the duties and liabilities of a Trustee dealing with investments as more fully described in Section 1 of Article Thirteen of my Trust Agreement. The Investment Trustee holds none of the daily administrative and distributive powers over the sub-trust. These powers remain with my Trustee.

l. Personal Representative

The term "Personal Representative" means executor, executrix, administrator, or administratrix. The term Legal Representative shall include Personal

Representative, conservator, guardian, custodian or an agent under a power of attorney for property.

m. Per Stirpes

In every case in which a disposition of an interest is to be made to the descendants of a person "per stirpes," it is intended that such disposition shall be made in accordance with the principle of representation. This principle, in relation to my Trust Agreement, means that whenever property is to be distributed to the descendants of a person, such property shall be divided into as many shares as there are, at the time of disposition, then living descendants in the nearest degree of kinship to such person and then deceased descendants in the same degree who left descendants who are then living; each then living descendant in the nearest degree receiving one share, and one share for each then deceased descendant in the same degree, being further subdivided among his or her descendants in the same manner.

n. Trust Estate

The term "Trust Estate" means all of the property, real and personal, intangible and tangible, which has been transferred to my Trustee, whether or not listed on any Schedules.

o. Trustee's Discretion

The term "discretion" with regard to a Trustee means such Trustee's sole but reasonable judgment. In exercising any discretionary power with respect to my Trust, my Trustee shall, at all times, act in accordance with fiduciary principles and shall act reasonably under the circumstances and not in bad faith or in disregard of the purposes of my Trust.

p. Trustor

The term "Trustor" shall be interchangeable with the terms "settlor," "grantor," "donor" or other similar terms.

Section 21. No Contest Clause

Notwithstanding the "Resolution of Disputes" provisions under Section 8 of Article Three of my Trust, if any devisee, legatee, or beneficiary under my Trust, or any amendment thereto, no matter how remote or contingent such beneficiary's interest appears, or any of my legal heirs, or any person claiming under any of them, directly or indirectly, does any of the following, then in that event I specifically disinherit such person or persons, and all such legacies, bequests, devises and interests given to such person or persons under my Trust, or any amendment thereto, or any other Trust document created by me at any time, shall be forfeited and shall be distributed as provided elsewhere herein as though such person or persons had predeceased me without issue:

- a. Unsuccessfully challenges the appointment of any person named as a trustee in my Trust Agreement, or any amendment thereto, or unsuccessfully seeks the removal of any person acting as a trustee;
- b. Objects in any manner to any action taken or proposed to be taken in good faith by my Trustee under my Trust Agreement, or any amendment thereto, whether my Trustee is acting under court order, notice of proposed action or otherwise, and said action or proposed action is later adjudicated by a court of competent jurisdiction to have been taken in good faith;
- c. Objects to any construction or interpretation of my Trust Agreement, or any amendment thereto, or to the provisions of either, that is adopted or proposed in good faith by my Trustee, and said objection is later adjudicated by a court of competent jurisdiction to be an invalid objection;
- d. Claims entitlement to (or an interest in) any asset alleged by my Trustee to belong to the Probate or Trust Estate, whether such claim is based upon a community or separate property right, Marvin rights, a contract or other right or device, and said claim is later adjudicated by a court of competent jurisdiction to be invalid;
- e. Files a creditor's claim against the assets of the Probate or Trust Estate and such claim is later adjudicated by a court of competent jurisdiction to be invalid;
- f. Anyone, other than me, attacks or seeks to impair or invalidate (whether or not any such attack or attempt is successful) any designation of beneficiaries for any insurance policy on my life or any designation of beneficiaries for any pension plan, Keogh, SEP, or IRA;
- g. In any other manner contests my Trust Agreement, or any amendment thereto, executed by me, or in any other manner, attacks or seeks to impair or invalidate any of my Trust's provisions; or
- h. Conspires with or voluntarily assists anyone attempting to do any of the above acts.

Expenses to resist any above contest or other attack of any nature upon any provision of my Trust Agreement, or any amendment thereto, shall be paid from the trusts created hereunder as expenses of administration.

In the event that any provision of this Section is held to be invalid, void, or illegal, the same shall be deemed severable from the remainder of the provisions in this Section and shall in no way affect, impair, or invalidate any other provision in this Section. If such provision is deemed

invalid due to its scope and breadth, such provision shall be deemed valid to the extent of the scope or breadth permitted by law.

The authority of the Trust Protector appointed under Section 8 of Article Three to resolve disputes between Co-Trustees, beneficiary and Trustee, and among beneficiaries in no way nullifies the provisions of this Section. The provisions of this Section shall not apply to any disclaimer by any person of any benefit under my Trust Agreement, or any amendment thereto.

Execution

I have executed my Trust Agreement on the date set forth on the first page of my Trust Agreement.

I certify that I understand my Trust Agreement and that it correctly states the terms and conditions under which my Trust Estate is to be held, managed and disposed of by my Trustee. I approve this revocable living trust in all particulars and request my Trustee to execute it.

Trustor and Trustee:

Deborah Deree
DEBORAH DEREDE

Witnesses:

Doree Lane
SIGNATURE OF FIRST WITNESS

Doree Lane
NAME OF FIRST WITNESS

1875 Davis Circle
STREET ADDRESS

Clinton, SC 29710
CITY, STATE, ZIP

Angie A. Belling
SIGNATURE OF SECOND WITNESS

Angie A. Belling
NAME OF SECOND WITNESS

50 William Landing Dr
STREET ADDRESS

York SC 29745
CITY, STATE, ZIP

STATE OF SOUTH CAROLINA

)

COUNTY OF YORK

SS
)

PERSONALLY appeared the undersigned witness and made oath that (s)he saw the within named DEBORAH DEREDE, sign, seal and as her act and deed deliver the within instrument and that deponent with the other witness whose name is subscribed above witnessed the execution thereof.

D. Lane
WITNESS

Sworn to before me this December 18, 2013 by DEBORAH DEREDE, and the above named witness.

Q. B. J.
Notary Public for South Carolina
My Commission Expires: 11/29/2014

Prepared by:
Phillip J. Corson
Haselden, Owen, Boloyan & Corson, LLC
4609 Charlotte Hwy., Ste. 1
Lake Wylie, SC 29710
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STATE OF SOUTH CAROLINA

COUNTY OF: York

IN THE PROBATE COURT

INVENTORY AND APPRAISEMENT

EXHIBIT

☐ ORIGINAL☒ SUPPLEMENTARY, AMENDED OR CORRECTED

(must restate the unchanged information from the original inventory)

IN THE MATTER OF:

Deborah Dereede aka Deborah Feeley-

Whiton

(Decedent)

FILED RECEIVED

2015 SEP -1 AM 8:18

JUDGE OF PROBATE
YORK COUNTY, SC

CASE NUMBER: 2104ES4601082

File the original inventory and Appraisement with the Probate Court within ninety (90) days following the fiduciary appointment. A copy shall be sent to each interested person who has demanded it. A Proof of Delivery must be filed with the Court. The gross fair market value of all probate assets, regardless of location (whether in this state or elsewhere), should be listed as of the date of death. Continue on additional sheets if necessary. A Supplementary, Amended, or Corrected inventory should be utilized for correcting, adjusting or adding to an original inventory, and must restate the unchanged information from the original inventory. A qualified and disinterested appraiser may be employed to ascertain the value of any asset. If an appraiser is employed, his/her name and address must be indicated with the item or items he/she appraised.

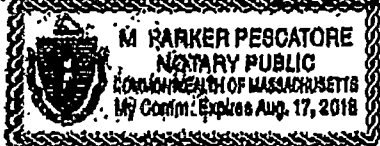
RECAPITULATION

	Non-Probate (OPTIONAL)	Probate
Schedule A - Real Estate		\$416,000
Schedule B - Stocks and Bonds		\$
Schedule C - Notes Due Decedent and Cash		\$619.25
Schedule D - Insurance on Decedent's Life - Part 1 - Payable to Estate		\$
Part 2 - Payable to Beneficiary	\$	
Schedule E - Jointly Owned Property	\$	
Schedule F - Other Miscellaneous Assets Payable to Estate		\$28,500
Schedule G - Transfers During Decedent's Life	\$	\$
Schedule H - Powers of Appointment	\$	\$
Schedule I - Annuities and Retirement Accounts	\$	\$
TOTAL GROSS VALUE OF PROBATE ESTATE		\$445,119.25
ENCUMBRANCES		(118,343.65)
TOTAL NET WORTH OF PROBATE ESTATE / PROBATE ESTATE VALUE		\$326,775.60

The undersigned, being sworn, states: That the following schedules contain a complete and accurate inventory and appraisement of all probate real and personal property of this estate so far as the undersigned is informed; that he/she has estimated and/or appraised all listed property at its fair market value, according to the best of his/her knowledge and ability.

COMMONWEALTH OF MASSACHUSETTS, Suffolk S.S.

SWORN to before me this 27th day of August, 2015

Notary Public for South Carolina
My Commission Expires: 9-17-2018

Personal Representative

Signature:

Print Name:

Address:

Telephone (Work):

(Home):

(Cell):

(Email):

Courtney Feeley Karp
42 Hamman Street
Roslindale, MA 02131

(617) 522-2123
cfeeleykarp@gmail.com

Co-Personal Representative

Signature (if applicable)

Name:

Address:

Telephone (Work):

Telephone (Home):

(Cell):

ROA (E992)

WHEN COMPLETING THE FOLLOWING SCHEDULES LIST ALL PROBATE ASSETS, REGARDLESS OF LOCATION. **ROA 0493**
ALL OUT-OF-STATE PROBATE ASSETS MUST BE DISCLOSED. NON-PROBATE PROPERTY NEED NOT BE DISCLOSED.

SCHEDULE A - REAL ESTATE. List below any real estate in Decedent's name alone or tenants in common (not as joint with right of survivorship or tenants in the entirety). Describe each property by listing its full address, tax map number, deed book and page, and description consistently (for example: house, lot, buildings, acreage). Also list oil/mineral rights and time shares if it is real property. If none, so state. If the property is encumbered, list the full fair market value of the property here and the encumbrance on the Encumbrance Schedule below. (For jointly owned property with right of survivorship, you may list in Schedule E.)

Item No.	Description	Fair Market Value	Value of Decedent's Interest (Indicate fraction, if not 100%)
1.	10 Cunningham Drive; Derry, NH 03038 Tax Map Number: Book 4571/Page 2235 (house on 1+ acre)	196,000	
2.	19225 N. 39 th Way; Phoenix, AZ 85060 Tax Map Number: Book 391/Page 17 (house and lot)	220,000	
3.	Tax Map Number:		

TOTAL SCHEDULE A

(also enter under recapitulation, page 1)

\$ 416,000

SCHEDULE B - STOCKS AND BONDS. List below all stocks and bonds in the Decedent's name alone or tenants in common (not as joint with right of survivorship). Identify each type of security and the number of shares. If none, so state. (For jointly owned property with right of survivorship, you may list in Schedule E.)

Item No.	Description	Face Value	Appraised Value
1.			
2.			
3.			
4.			

TOTAL SCHEDULE B

(also enter under recapitulation, page 1)

\$ _____

SCHEDULE C - CASH, BANK ACCOUNTS, NOTES RECEIVABLES. List all bank accounts owned by Decedent alone or as tenants in common (checking, savings, CDs, money market, brokerage, employment bonus, cash award, final paycheck, etc.), cash on hand, notes payable to Decedent, and survival action proceeds. If none, so state. List each separate account type and institution and last two digits of the account. (For jointly owned property with right of survivorship, you may list in Schedule E.)

Item No.	Description	Value
1.	CapitalOne 360 Savings Account	626.46
2.	Royal Bank of Canada (RBC) Account	92.80
3.		

TOTAL SCHEDULE C

(also enter under recapitulation, page 1)

\$ 619.25

SCHEDULE D - LIFE INSURANCE (if none, so state.)

Part 1 - Life Insurance - List the insurance on the life of the Decedent which is payable to the Estate.

Item No.	Description	Value
1.		
2.		
3.		

TOTAL PART 1

(also enter under recapitulation, page 1)

\$ _____

ROA 0493

(If more space is required, insert additional sheets of same size.)

ROA 0494

Part 2 (OPTIONAL) - You may list here the insurance on the life of the Decedent which is payable to beneficiaries.

Item No.	Description	Beneficiary	Value
1.			
2.			
3.			

TOTAL PART 2

(also enter under recapitulation, page 1)

\$ _____

SCHEDULE E - (OPTIONAL) JOINT WITH RIGHT OF SURVIVORSHIP— You may list below any non-probate property jointly owned by the Decedent with another with right of survivorship. List each separate account type and institution and the last two digits of each account.

Item No.	Description	Joint Owner(s)	Percentage Includible	Value of Decedent's Interest
1.				
2.				
3.				

\$ _____

TOTAL SCHEDULE E

(also enter under recapitulation, page 1)

SCHEDULE F - OTHER MISCELLANEOUS ASSETS PAYABLE TO ESTATE. List below any tangible personal property, including household goods & furnishings, vehicles, boats/motors/trailers, mobile homes that are not de-titled, airplanes, equipment, interest in a partnership or unincorporated business, articles or collections having either artistic or intrinsic value, including coins, guns, artwork, jewelry, etc., and any other miscellaneous probate items not listed elsewhere, including any digital assets. If none, so state. (For jointly owned tangible personal property with right of survivorship, you may list in Schedule E.)

Item No.	Description (including ID# and VIN#)	Value
1.	2012 Cadillac CTS; VIN# 1G6DP1E31C012700	15,000
2.	1997 Lincoln Continental; VIN# 1LNLM97V0VY603428	3,500
3.	1999 Maxum Cabin Cruiser ID#	10,000
4.		
5.		

TOTAL SCHEDULE F

(also enter under recapitulation, page 1)

\$ 28,500

NOTE: FOR SCHEDULES G, H, AND I. LIST VALUES ONLY IF PAYABLE TO ESTATE.

SCHEDULE G - TRANSFERS DURING DECEDENT'S LIFE. List any transfers intended to take effect at death if such property is payable to the Estate. You may list in the "Optional" section below any non-probate transfers intended to take effect at death not payable to the Estate, including United States Government Bonds "Payable on Death," accounts which are "Transfer on Death," a trust created by Decedent in which income for life was retained by the Decedent, power to revoke or other incidents of ownership retained by the Decedent, lifetime transfers of real property in which Decedent retained life estate, etc. If none, so state.

List date and type of transfer and list total amount payable to estate:

1.		
2.		

(OPTIONAL) describe and list amounts not payable to estate:

1.		
2.		

TOTAL SCHEDULE G

(also enter under recapitulation, page 1)

\$ _____

(If more space is required, insert additional sheets of same size.)

SCHEDULE H - POWERS OF APPOINTMENT. List property, both real and personal, over which Decedent possessed power of appointment whether testamentary or otherwise, if such property is payable to the Estate. You may list property subject to such power if it was not payable to the Estate in the "Optional" section below. If none, so state.

Describe and list total amount payable to estate:

1.		
2.		

(OPTIONAL) describe and list amounts not payable to estate:

1.		
2.		

TOTAL SCHEDULE H

(also enter under recapitulation, page 1)

\$ _____

SCHEDULE I - ANNUITIES AND RETIREMENT ACCOUNTS (IRA's, 401(K), etc.). List any annuities or retirement accounts owned by the Decedent and payable to the Estate. You may list in the "Optional" section below any accounts payable to a beneficiary which is not payable to the Estate.

Describe and list total amount payable to estate:

1.		
2.		
3.		

(OPTIONAL) describe and list amounts not payable to estate:

1.		
2.		
3.		

TOTAL SCHEDULE I

(also enter under recapitulation, page 1)

\$ _____

ENCUMBRANCES (e.g., mortgages, liens, judgments, etc., but not general debts of the estate). List debts of the Decedent secured by assets on the above Schedules and describe the debt and the specific asset encumbered.

Item No.	Schedule & Item Number Encumbered Thereby	Description & Amount
1.	Citi Mortgage-Schedule A Item 2	
2.	Bank of America-Schedule A Item 2	61,177.36
3.		57,166.29

TOTAL ENCUMBRANCES

(also enter under recapitulation, page 1)

\$ 118,343.65

(If more space is required, insert additional sheets of same size.)

ROA 0495



A. Settlement Statement (HUD-1)

OMB Approval No. 2502-0203

EXHIBIT

P-6 ROA 0496

B. Type of Loan1. ☐ FHA 2. ☐ RHS 3. ☒ Conv. Unins.
4. ☐ VA 5. ☐ Conv. Ins.6. File Number:
HARLANDWHITE7. Loan Number:
8000088576

8. Mortgage

C. Note: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "(p.o.o.)" were paid outside the closing; they are shown here for informational purposes and are not included in the totals.

D. Name and Address of Borrower:Todd Bedford Harland-White and
Faith Ann Harland-White
131 Whispering Pines Court
Clover, SC 29710**E. Name and Address of Seller:**Courtney Feeley Karp, Trustee
42 Herman Street
Roslindale, MA 02131**F. Name and Address of Lender:**CBC National Bank
3010 Royal Blvd. South, Suite 230
Alpharetta, GA 30022**G. Property Location:**
131 Whispering Pines Court
Clover, SC 29710
York County, South Carolina**H. Settlement Agent:**
Mack and Mack, Attorneys
101 Allison Street
Fort Mill, SC 29716
Place of Settlement:
101 Allison Street
Fort Mill, SC 29716

Ph. (803) 548-7200

I. Settlement Date:

December 19, 2014

J. Summary of Borrower's transaction

100. Gross Amount Due from Borrower:	
101. Contract sales price	615,000.00
102. Personal property	
103. Settlement Charges to Borrower (Line 1400)	5,804.73
104.	
105.	
Adjustments for items paid by Seller in advance	
106. City/Town Taxes to	
107. County Taxes 12/20/14 to 01/01/15	62.03
108. Assessments 12/20/14 to 01/01/15	87.39
109.	
110.	
111.	
112.	
120. Gross Amount Due from Borrower	620,824.16
200. Amounts Paid by or in Behalf of Borrower	
201. Deposit or earnest money	0,000.00
202. Principal amount of new loan(s)	417,000.00
203. Existing loan(s) taken subject to	
204. Funding from 2nd	135,888.00
205.	
206.	
207.	
208. Seller Paid CC	6,236.16
209.	
Adjustments for items unpaid by Seller	
310. City/Town Taxes to	
311. County Taxes to	
312. Assessments to	
313.	
314.	
315.	
316.	
317.	
318.	
319.	
220. Total Paid by/for Borrower	685,124.16
400. Cash at Settlement from/to Borrower	
401. Gross amount due from Borrower (line 120)	620,824.16
402. Less amount paid by/for Borrower (line 220)	(685,124.16)
403. Cash ☒ From ☐ To Borrower	55,600.00

K. Summary of Seller's transaction

400. Gross Amount Due to Seller:	
401. Contract sales price	615,000.00
402. Personal property	
403.	
404.	
405.	
Adjustments for items paid by Seller in advance	
406. City/Town Taxes to	
407. County Taxes to	
408. Assessments to	
409.	
410.	
411.	
412.	
420. Gross Amount Due to Seller	615,000.00
500. Reductions in Amount Due to Seller	
501. Excess deposit (see instructions)	
502. Settlement charges to Seller (Line 1400)	45,985.50
503. Existing loan(s) taken subject to	
504. Payoff First Mortgage to Bank of America	204,320.20
505. Payoff Second Mortgage	
506.	
507. (Deposit disb. as proceeds)	
508. Seller Paid CC	6,236.16
509.	
Adjustments for items unpaid by Seller	
610. City/Town Taxes to	
611. County Taxes 01/01/14 to 12/20/14	1,824.68
612. Assessments 10/01/14 to 12/20/14	362.81
613.	
614.	
615.	
616.	
617.	
618.	
619.	
520. Total Reduction Amount Due Seller	268,767.14
600. Cash at settlement to/from Seller	
601. Gross amount due to Seller (line 420)	615,000.00
602. Less reductions due Seller (line 520)	(268,767.14)
603. Cash ☒ To ☐ From Seller	356,242.86

* Paid outside of closing by borrower(s), seller(s), lender(s), or third party(ies).

The undersigned hereby acknowledge receipt of a completed copy of this statement & any attachments referred to herein.

Borrower

Todd Bedford Harland-White
Faith Ann Harland-White

Seller

Courtney Feeley Karp, Trustee

The Public Reporting Burden for this collection of information is estimated at 35 minutes per response for collecting, reviewing, and reporting the data. This agency may not collect this information, and you are not required to complete this form, unless it displays a currently valid OMB control number. No consistent burden reduction can be achieved if the collection of information is mandatory. This is designed to provide the parties to a RESPA covered transaction with information during the settlement process.

ROA 0496

Page 1 of 3

(HARLANDWHITE.PFD/HARLANDWHITE/65)

HUD-1

A.000510

L. Settlement Charges

703. Total Real Estate Broker Fees	\$ 33,825.00			
Division of commission (line 703) as follows:				
701. \$ 16,912.50	to	Allen Tate		
702. \$ 16,912.50	to	Coldwell Banker		
Note: Line 702 Includes Adjustment of -560.00 For Home Warranty				
703. Commission paid at settlement				33,825.00
704.				
705.				
800. Items Payable In Connection With Loan				
801. Our origination charge	\$	995.00	(from GFE #1)	
802. Your credit or charge (points) for the specific interest rate chosen	\$	808.98	(from GFE #2)	
803. Your adjusted origination charges			(from GFE #A)	1,803.98
804. Appraisal fee	to	Valuation	(from GFE #3)	P.O.C. \$525.00(B)*
805. Credit Report	to	CBC Innovis	(from GFE #3)	36.20
806. Tax service	to		(from GFE #3)	
807. Flood certification	to		(from GFE #3)	
808.			(from GFE #3)	
809.			(from GFE #3)	
810.			(from GFE #3)	
811.			(from GFE #3)	
900. Items Required by Lender to Be Paid in Advance				
901. Daily interest charges from 12/19/14 to 01/01/15	13 @ \$45.584380/day	(from GFE #10)	592.60	
902. Mortgage Insurance premium for	months to	(from GFE #3)		
903. Homeowner's Insurance for	1.0 years to Allstate	(from GFE #11)	854.95	
904.		(from GFE #11)		
905.		(from GFE #11)		
1000. Reserves Deposited with Lender				
1001. Initial deposit for your escrow account		(from GFE #9)		
1002. Homeowner's Insurance	months @ \$	per month	\$	
1003. Mortgage Insurance	months @ \$	per month	\$	
1004. Property taxes			\$	
County Taxes	months @ \$	per month		
Assessments	months @ \$	per month		
1005.			\$	
1006.	months @ \$	per month	\$	
1007.	months @ \$	per month	\$	
1008.			\$	
1009.			\$	
1100. Title Charges			\$	
1101. Title services and lender's title insurance		(from GFE #4)	1,690.70	230.00
1102. Settlement or closing fee	to Mack and Mack, Attorneys	\$ 500.00		
1103. Owner's title insurance to Investors Title Insurance Company		(from GFE #5)	481.30	
1104. Lender's title insurance to Investors Title Insurance Company		\$ 995.70		
1105. Lender's title policy limit	\$ 417,000.00			
1106. Owner's title policy limit	\$ 615,000.00			
1107. Agent's portion of the total title insurance premium	to Mack Title Insurance Agency, Inc.	\$ 688.20		
1108. Underwriter's portion of the total title insurance premium	to Investors Title Insurance Company	\$ 590.80		
1109.		\$		
1110.		\$		
1111.		\$		
1112.		\$		
1113.		\$		
1200. Government Recording and Transfer Charges				
1201. Government recording charges	to York County Register of Deeds	(from GFE #7)	36.00	
1202. Deed \$ 10.00	Mortgage \$ 26.00	Releases \$	Other \$ 5.00	6.00
1203. Transfer taxes				
1204. City/County tax/stamps	\$	\$		
1205. State tax/stamps	\$ 2,275.50	\$		2,275.50
1206.				
1207.				
1300. Additional Settlement Charges				
1301. Required services that you can shop for		(from GFE #6)		
1302.		\$		
1303.		\$		
1304. Repairs	to Incentive Builders, LLC	\$		4,260.00
1305. Repairs	to Palmetto	\$		1,100.00
1306. Home Warranty/pd. by Realtor	to American Home Shield	\$		660.00
1307. Repairs	to Incentive Builders, LLC	\$		2,500.00
1308. Repairs	to Incentive Builders, LLC	\$		1,800.00
1400. Total Settlement Charges (enter on lines 103, Section J and 502, Section K)			6,504.73	45,985.50

* Paid outside of closing by borrower(s), seller(s), lender(s), or third-party(ies)

By signing page 1 of this statement, the signatories acknowledge receipt of a completed copy of page 2 & 3 of this three-page statement.

Certified to be a true copy.

Mack and Mack, Attorneys, Settlement Agent

Comparison of Good Faith Estimate (GFE) and HUD-1 Charges		Good Faith Estimate	HUD-1
Charges That Cannot Increase			
Our origination charge	HUD-1 Line Number # 801		
Your credit or charge (points) for the specific rate chosen	# 802	995.00	995.00
Your adjusted origination charges	# 803	808.98	808.98
		1,803.98	1,803.98

ROA 0498

Charges That In Total Cannot Increase More than 10%		Good Faith Estimate	HUD-1
Government recording charges	#1201	118.00	36.00
Appraisal fee	# 804	525.00	525.00
Credit report	# 805	25.00	35.20
Total		668.00	596.20
Increase between GFE and HUD-1 Charges		\$ -71.80 or	-10.75%

Charges That Can Change		Good Faith Estimate	HUD-1
Daily interest charges	# 901 \$ 45.584380/day	708.90	592.60
Homeowner's insurance	# 903	865.00	864.95
Title services and lender's title insurance	#1101	2,320.00	1,690.70
Owner's title insurance, to Investors Title Insurance Company	#1103	60.00	481.30

Loan Terms

Your initial loan amount is	\$ 417,000.00
Your loan term is	30.00 years
Your initial interest rate is	3.9900 %
Your initial monthly amount owed for principal, interest and any mortgage insurance is	\$ 1,988.42 Includes ☒ Principal ☒ Interest ☐ Mortgage Insurance
Can your interest rate rise?	☒ No ☐ Yes, it can rise to a maximum of ____%. The first change will be on ____ and can change again every ____ months after _____. Every change date, your interest rate can increase or decrease by ____%. Over the life of the loan, your interest rate is guaranteed to never be lower than ____% or higher than ____%.
Even if you make payments on time, can your loan balance rise?	☒ No ☐ Yes, it can rise to a maximum of \$ _____.
Even if you make payments on time, can your monthly amount owed for principal, interest, and mortgage insurance rise?	☒ No ☐ Yes, the first increase can be on _____ and the monthly amount owed can rise to \$ _____. The maximum it can ever rise to is \$ _____.
Does your loan have a prepayment penalty?	☒ No ☐ Yes, your maximum prepayment penalty is \$ _____.
Does your loan have a balloon payment?	☒ No ☐ Yes, you have a balloon payment of \$ _____ due in ____ years on _____.
Total monthly amount owed including escrow account payments	☒ You do not have a monthly escrow payment for items, such as property taxes and homeowner's insurance. You must pay these items directly yourself. ☐ You have an additional monthly escrow payment of \$N/A that results in a total initial monthly amount owed of \$N/A. This includes principal, interest, any mortgage insurance and any items checked below: ☐ Property taxes ☐ Flood insurance ☐ ☐ Homeowner's insurance ☐ ☐

Note: If you have any questions about the Settlement Charges and Loan Terms listed on this form, please contact your lender.

ROA 0498

Page 3 of 3

HUD-1

A.000512

HUD-1 Attachment

Borrower(s): Todd Bedford Harland-White and Faith Ann Harland-White
 131 Whispering Pines Court
 Clover, SC 29710
Lender: CBC National Bank
Settlement Agent: Mack and Mack, Attorneys
 (803)548-7200
Place of Settlement: 101 Allison Street
 Fort Mill, SC 29715
Settlement Date: December 19, 2014
Property Location: 131 Whispering Pines Court
 Clover, SC 29710
 York County, South Carolina

Seller(s): Courtney Feeley Karp, Trustee **ROA 0499**
 42 Hemman Street
 Roslindale, MA 02131

Seller Loan Payoff Details

Payoff First Mortgage	to Bank of America		
Loan Payoff	204,328.20	As of 12/01/14	
Total Additional Interest		18 days @	Per Diem
Total Loan Payoff	204,328.20		

Adjusted Origination Charge Details

Origination Charge	
Origination Charge	
to CBC National Bank	995.00
Total \$	995.00
Origination Credit/Charge (points) for the specific interest rate chosen	
Credit/Charge	
to CBC National Bank	808.98
Total \$	808.98
Adjusted Origination Charges \$	1,803.98

Title Services and Lender's Title Insurance Details

	BORROWER	SELLER
Title Binder Fee		
to Mack Title Insurance Agency, Inc.	125.00	
Courier Fee		
to Mack and Mack, Attorneys	45.00	30.00
CPL Issuance Fee		
to Investors Title Insurance Company	25.00	
Doc Prep Fee- Deed		
to Mack and Mack, Attorneys		200.00
Settlement Fee		
to Mack and Mack, Attorneys	500.00	
Lender's title Insurance		
to Investors Title Insurance Company	995.70	
Total	\$ 1,690.70	\$ 230.00

WARNING: It is a crime to knowingly make false statements to the United States on this or any similar form. Penalties upon conviction can include a fine and imprisonment. For details see: Title 18 U.S. Code Section 1001 and Section 1010.

ROA 0499

(HARLANDWHITE.PFD/HARLANDWHITE/69)

A.000513

ROA 0500

Owner's Title Insurance		BORROWER	SELLER
Owner's Policy Premium to Investors Title Insurance Company		481.30	
Total		\$ 481.30	\$ 0.00

Lender's Title Insurance		BORROWER	SELLER
*Fees also shown above in Title Services and Lender's Title Insurance Details			
Lender's Policy Premium to Investors Title Insurance Company		995.70	
Total		\$ 995.70	\$ 0.00

I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction. I further certify that I have received a copy of the HUD-1 Settlement Statement.

Todd Bedford Harland-White
Todd Bedford Harland-White

Faith Ann Harland-White
Faith Ann Harland-White

Courtney Feeley Karp
Courtney Feeley Karp, Trustee

WARNING: It is a crime to knowingly make false statements to the United States on this or any similar form. Penalties upon conviction can include a fine and imprisonment. For details see: Title 18 U.S. Code Section 1001 and Section 1010.

ROA 0500

(HARLANDWHITE.PFD/HARLANDWHITE/68)

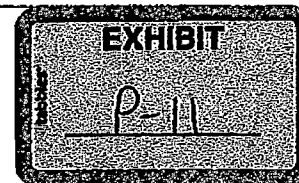
A.000514

Dawn Hardee

ROA 0501

Subject: FW: closing of 131 Whispering Pines

From: cfeeleykarp@gmail.com
To: Tdndereede@aol.com
CC: roy.karp@comcast.net
Sent: 12/11/2014 10:57:44 P.M. Eastern Standard Time
Subj: Re: closing of 131 Whispering Pines



Dear Hugh:

As I have explained before, estate law requires that all debts and expenses of Mom's estate be paid and settled before any distributions are made. This includes anything in the Trust as the Trust has legal responsibility for paying the debts of the estate. Therefore, I cannot within my fiduciary obligations make any distributions until then. Once the estate's debts have been paid and probate has closed I will be able to make distributions, including the amount of money owed to you under the Trust from the sale of the house. As I have repeatedly said, I do not know when or how long that will take as this is a complicated estate and cannot provide any date certain for such distributions.

Thank you,
Courtney

On Thu, Dec 11, 2014 at 8:54 PM, <Tdndereede@aol.com> wrote:
Dear Courtney,

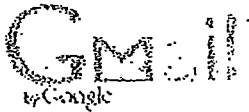
In light of the upcoming closing of the above property, Monday December 15th, 2014, I would like you to confirm that you will be following your mother's instructions in her Trust by having the proceeds of the sale of the house forwarded to me after the bank has been paid out.

Please advise when I can expect the money to be send to me after or on Monday, the 15th of December 2014.

Thanks in advance,

Hugh Dereede

ROA 0501



ROA 0502

Pete Nosal <pete@nosajeterlaw.com>

Fwd: 131 whispering pines

Courtney Feeley Karp <cfeeleykarp@gmail.com>
To: Pete Nosal <pete@nosajeterlaw.com>

Thu, Feb 12, 2015 at 4:31 PM

Email from Hugh re: payout.
----- Forwarded message -----
From: <Tndereede@aol.com>
Date: Mon, Dec 22, 2014 at 1:26 PM
Subject: 131 whispering pines
To: cfkarp@comcast.net
Cc: mjtfehily@gmail.com, eran.fehily@gmail.com

Dear Courtney and Roy,

I understand the closing has occurred and you are now in possession of the proceeds of sale. Please accept this as a request that you pay both my company and myself as directed under the terms of the Trust. I understand you have a position contrary to what I believe is appropriate under the terms of the Trust. If you are not agreeable to paying the monies as directed per your mother's wishes, I hope you can see the opportunity presented by my going to the expense of filing a lawsuit.

If you are truly worried about liability issues, then an Order from a Court of competent jurisdiction directing you to pay my company and me as per the terms of the trust should be the "protection" you seek. If this is the case, I hope you will file the appropriate paperwork, confirming my position and request the Court issue such an Order to pay such monies thereby protecting you from additional creditors.

Regardless, I do request a final email from you, now that you have the funds as to when I can expect payment on behalf of my company and a check for one half the net proceeds."

Wishing the three of you a merry Christmas and Happy 2015.

Best regards,

Hugh

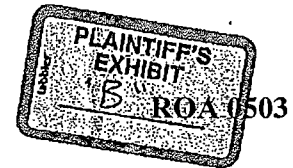


STATE OF SOUTH CAROLINA
COUNTY OF YORK

FILED-RECEIVED

2015 JUN 11 PM 2:17

AFFIDAVIT



DAVID HAMILTON
Personally appeared before me the undersigned who being first duly sworn, deposes and says:

1. My name is Hugh Dereede and I am beneficiary of the Deborah Dereede Living Trust ("Trust" or "the Trust").

2. Prior to her death, my business, Tyre Dealer Network Consultants, Inc. ("TDNC"), made a loan to Deborah Dereede, as Trustee to Deborah Dereede Living Trust dated December 18, 2013 to assist with the purchase of a parcel of property located at 131 Whispering Pines Drive, Lake Wylie, South Carolina ("the property").

3. Article Five, Section Two of the Trust states, "as soon as practicable after my death" my Trustee shall make certain distributions from my Trust Estate in the manner and the amounts to the persons and/or entities specified in Article Six of my Trust Agreement."

4. Article Six, Section 4(a) reads as follows: "As soon as practicable following my death, my Trustee shall sell the house and lot located at 131 Whispering Pines Drive, Lake Wylie, SC 29710. The sales proceeds shall be used first to pay off any mortgage against the property, and second to pay off that certain promissory note given by me to TYRE DEALER NETWORK CONSULTANTS, INC. Said promissory note, at the time of the execution of my Trust, is in the amount of \$250,000.00, but in no event shall the amount due exceed one-half of the sales price of the property. After payoff of said mortgage and said note, my Trustee shall then distribute one-half of the remaining net sales proceeds to HUGH DEREDEDE, outright and free of trust. The other one-half of the remaining net sales proceeds shall be distributed in

accordance with the Articles that follow. Until the sale of the property, HUGH DEREDE may continue to use and occupy the premises. In addition, my trustees shall distribute to HUGH DEREDE, outright and free of trust, all my or my Trust's interest in and to the following items: the HOUSEHOLD CONTENTS OF 131 WHISPERING PINES DR., LAKE WYLIE, SC 29710; the 2013 CADILLAC CTS; the 2008 GMC ENVOY; and, the 1999 MAXUM CABIN CRUISER."

5. This Trust provision was included in the Living Trust because my business loaned money to my wife to purchase the property.

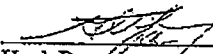
6. Throughout the administration period of the Trust, I have sought reassurance from Courtney Feeley-Karp, as Successor Trustee, that her mother's directive to pay the money owed to TDNC would be honored. However, despite consistent effort on my part over an extended period of time, I did not receive such assurances or resolution of any kind on the issue.

7. In my opinion, had I not engaged an attorney to protect my interests, I believe that the money owed to TDNC would not have been properly accounted for or paid by Courtney Feeley-Karp.

8. In addition, I have not been given possession or ownership of the 2013 Cadillac CTS as directed pursuant to Article Six, Section 4(a).

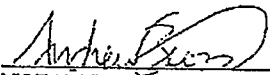
9. As my company has still not been repaid as directed, per the terms of the trust, I believe my actions, seeking guidance from the court in this regard, have been made in good faith.

FURTHER AFFIANT SAYETH NOT.



Hugh Deresde

SWORN AND SUBSCRIBED TO
BEFORE ME THIS 5th OF JUNE, 2015



NOTARY PUBLIC FOR Ontario
MY COMMISSION EXPIRES: N/A

STATE OF SOUTH CAROLINA

IN THE CIRCUIT COURT

ROA 0506

COUNTY OF YORK

CASE NO: 2015 CP 4601409

HUGH DEREDE and TYRE DEALER
NETWORK CONSULTANTS, INC.

Plaintiffs,

vs.

**AFFIDAVIT OF COURTNEY FEELEY
KARP**

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.

I, COURTNEY FEELEY KARP, being first duly sworn do state for my affidavit as follows:

1. I am a resident of Suffolk County, Massachusetts. I am over eighteen (18) years of age and am fully competent.
2. I am the Personal Representative of the Estate of Deborah Dereede and the Trustee of the Deborah Dereede Living Trust, dated December 18, 2013 (the "Trust").
3. I have known Hugh Dereede for more than five years and acknowledge that he was married to my mother, Deborah Dereede, at the time of her death.
4. I know that Hugh Dereede is the sole employee and agent for Tyre Dealer Network Consultants, Inc.
5. In June of 2004 my mother purchased a house located at 19225 N 39th Way, Phoenix, Arizona, 85050 as her primary residence as a result of a recent promotion which required her to move to Phoenix.
6. In September 2012, my mother was diagnosed with breast cancer and began receiving treatment, including chemotherapy, surgery, and radiation in Charlotte, North Carolina. In the summer of 2013, doctors found no evidence of cancer in my mother.

ROA 0506

A.000520

7. On or around October 7, 2013, my mother had imaging testing on her lungs because of shortness of breath, during which a spot was seen on her liver and a later biopsy confirmed was malignant. After researching her treatment options, she became a patient at Dana Farber Cancer Institute in Boston, Massachusetts.
8. On December 18, 2013, my mother executed an estate plan, including a Last Will and creation of the Deborah Dereede Living Trust, dated December 18, 2013, at South Carolina attorney Phillip Corson's office.
9. My mother was in Boston on February 3, 2014 for a chemo treatment. Afterwards, we planned to go out to dinner to celebrate her birthday and to tell her that I was pregnant.
10. My mom was thrilled to learn about my pregnancy and insisted that I not go with her to chemo treatments with her anymore due to my compromised immune system during pregnancy.
11. In March 2014, her condition took a turn for the worst. The treatment was no longer working and she needed a blood transfusion. Her doctors advised her to move to Boston to focus on a new treatment.
12. In April 2014, my mother moved to the Boston area.
13. On June 16, 2014, I gave birth to my daughter Louisa Catherine Karp (Louisa), who was born at 26 weeks of gestation, weighing 1 pound, 6 ounces. Louisa's extremely premature birth has led to significant, ongoing health challenges, most significantly Bronchopulmonary Dysplasia, also known as Chronic Lung Disease.
14. Louisa spent the next 141 days – almost five months – in the Newborn Intensive Care Unit (NICU) at Beth Israel Deaconess Medical Center in Boston. She was intubated until her 20th day of life and received Continuous Positive Airway Pressure (CPAP) until September 10, 2014, when she was transferred to oxygen support through a RAM cannula. On October 20, 2014 we learned that Louisa was aspirating her feeds by mouth, so we were forced to discontinue all oral feeding, and a week later she had surgery at Boston Children's Hospital to implant a gastric feeding tube in her stomach. On November 4, 2014, she was discharged from Beth Israel NICU, and we brought her home with the feeding tube and continuous oxygen support.
15. To this day, my daughter requires continuous care and has been hospitalized multiple times since her discharge from the NICU.
16. On July 25, 2014, my mother collapsed and was rushed by ambulance to Lahey Hospital where she was unresponsive and ultimately intubated.
17. On July 28, 2014, Hugh, my brother Michal Fehily, and I, made the decision to

extubate my mother, with the hope that she might regain consciousness.

18. Throughout Mom's incapacitation, Hugh demanded her wallet, phone, and other personal effects from me. He insisted he needed to address "financial" matters.
19. When myself and other relatives made it clear to Hugh that we would not discuss financial matters, he left the hospital.
20. Approximately 20 minutes after leaving the hospital, Hugh called my husband to inform him that he remembered that my mother wanted his adopted granddaughter to have her fur coat. Roy informed Hugh that my mother had regained consciousness and that she was able to communicate again. Hugh did not return to see her, but asked us to tell her he loved her.
21. On August 3, 2014, I received an email from Hugh in which he said that "he can no longer take it sitting in a hospital room watching and waiting for my wife to die" and was returning his home to Canada and that we would be back for the funeral.
22. My family and I tried to make my mom as comfortable as possible while she fought her last illness.
23. On or around August 11, 2014, Hugh returned and would stay until Mom's funeral.
24. On August 15, 2014, my mother passed away.
25. On August 16, 2014, I met with my husband, Hugh and the funeral director to begin planning the wake and funeral. When the issue of payment arose, I asked if we could use her life insurance proceeds to pay the bill.
26. Hugh was present for this conversation and we all agreed that was the most logical way to address payment.
27. The wake was held on August 22, 2014 and the funeral on August 23, 2014. Roy and I planned a luncheon reception for family and friends after the burial. Hugh decided to return straight to Canada from the cemetery rather than attend the luncheon.
28. On or about September 2, 2014, I submitted my mom's Will to the York County Probate Court and was appointed her Personal Representative.
29. Upon my mother's death, I became the Trustee of the Trust and was made responsible for carrying out its terms and, specifically, the distribution upon death provisions.

30. Before taking any action as Personal Representative or Trustee, I thoroughly read both the Last Will of Deborah Dereede and the Deborah Dereede Living Trust, dated December 18, 2013.
31. I understood that my mother's Will was a "pour-over will," which distributed the residuary of her Estate to her Trust.
32. I read and understood Article Six, Section 4 ("Specific Gifts"), Sub-section (a) ("Specific Distribution of Real Estate Sales Proceeds, Household Contest, and Certain Vehicles to HUGH DEREDE). I understood that it named Hugh Dereede and Tyre Dealer Network Consultants, Inc. as beneficiaries under the Article. Tyre Dealer Network Consultants was to receive, under the terms of a promissory note, a distribution from the Trust of \$250,000 after the sale of the Trust property located at 131 Whispering Pines Dr., Lake Wylie, South Carolina, 29710, and Hugh Dereede was to receive half of the net proceeds of the sale of the house, as well as two cars and a boat. I also understood that Hugh Dereede and Tyre Dealer Networks Consultants were responsible for all costs associated with these specific bequests.
33. I read and understood Article 14, Section 21 of the Trust, the "No Contest Clause." The Clause opens with the language "Notwithstanding the "Resolution of Disputes" provisions under Section 8 of Article Three of my Trust, or any amendment thereto, no matter how remote or contingent such beneficiary's interest appears, or any of my legal heirs, or any person claiming under any of them, directly or indirectly, does any of the following, then in that event I specifically disinherit such person or persons, and all such legacies, bequests, devises and interests given to such person or persons under my Trust, or any amendment thereto, or any other Trust document created by me at any time, shall be forfeited and shall be distributed as provided elsewhere herein as though such person or persons had predeceased me without issue." Sub-section (b) provides for disinheritance in the instance any person "Objects in any manner to any action taken or proposed to be taken in good faith by my Trustee under my Trust Agreement, or any amendment thereto whether my Trustee is acting under court order, notice of proposed action or otherwise, and said action or proposed action is later adjudicated by a court of competent jurisdiction to have been taken in good faith."
34. I am a licensed attorney in good standing with the Massachusetts Bar.
35. I took my roles as Personal Representative and Trustee very seriously, and researched South Carolina Probate and Trust law to ensure that I carried out my duties properly.
36. In my research I became familiar with South Carolina Trust Code § 62-7-505(a)(3), which states "After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, and except to the

extent state or federal law exempts any property of the trust from claims, costs, expenses, or allowances, the property held in a revocable trust at the time of the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances, unless barred by Section 62-3-801 et seq."

37. My mother's Trust was a revocable trust at the time of her death, so I knew that South Carolina Trust Code § 62-7-505(a)(3) governed and made the Trust liable for valid debts of the Estate.
38. I am also familiar with South Carolina Trust Code § 62-7-604. I determined that this statute was not applicable to the creditor claim period based on the language and the Reporters Comments, which state "This section does not address possible liability for the debts of the deceased settlor or a trustee's possible liability to creditors for distributing trust assets. For possible liability of the trust, see Section 62-7-505(a)(3) and Comment." I followed the terms of South Carolina Trust Code § 62-7-505 when determining how and when to distribute from the Trust.
39. My mother seemed to have a complex estate. She had lived in many different cities and states during her lifetime. She owned real property in three states and, prior to her employment at Continental General Tire, had owned a small tire business in Massachusetts that closed in 1995. I was generally aware that there had been litigation around such closure, although my mother was living in Texas at the time and I was in college. I had no idea if there were any outstanding claims, judgments or creditors related to this past litigation.
40. Soon after I was appointed Personal Representative, I contacted her employer, Continental General Tire, Co., regarding Mom's benefits. I was told, despite expressly naming my brother and me as her beneficiaries, under federal law, her retirement 401(k) and life insurance benefits would be paid to Hugh, as he had not expressly waived these benefits so that my mother's wishes would be honored.
41. Hugh would not agree to disclaim his rights to her ERISA benefits.
42. There is a provision in my mom's Trust that purported to allow her surviving spouse rights to any "marital or vacation residence." The provision was vague and ambiguous as to who would be responsible for costs associated with any such residence. Hugh asserted an intent to live in her Arizona house during the winter via an email sent to me on September 18, 2014.
43. In September 2014, the Estate had no liquid assets or other means to pay the debts and expenses of the Estate. Because Hugh would not waive his right to my mom's life insurance, there wasn't even enough cash in the estate to pay for

her funeral.

44. I knew that, because my mom's Trust was revocable until she died, the Trust's assets would have to be used to satisfy legitimate Estate debts if the Estate did not have sufficient resources.
45. I also believed, based on my due diligence research of South Carolina Trust Law, that if I made preliminary distributions of Trust or Estate assets and creditors asserted claims, I would be personal liable to those creditors to the extent that I made a distribution too soon under South Carolina Trust Code § 62-7-1010 (b).
46. In order to protect myself, legitimate known and unknown creditors, I decided not to make any preliminary distributions from the Trust or Estate until the end of the South Carolina Probate Code § 62-3-801 eight (8) month creditor claim period.
47. The eight (8) month creditor claim period for my mother's Estate did not end until June 2, 2015.
48. In October 2014, I left my daughter in the hospital to fly to Arizona to pack up my mom's Arizona house and to meet with an estate attorney and realtor.
49. I wanted to meet with Edward Ribadeneira, an Arizona Trust and Estate attorney, because of Hugh's assertion that was going to occupy the residence and I wanted to be certain that the trust complied with Arizona law.
50. The funeral director wanted to be paid and the Arizona house needed work, so my husband and I personally paid over \$13,000 for the funeral, burial, and related expenses as well as more than \$10,000 to bring my mother's utility bills up to date and address other necessary maintenance. We did this knowing we had no legal obligation to do so but certain expenses were necessary in furtherance of the administrations of estate, such as yard work, house cleaning, etc... in order to put the houses on the market.
51. My mother had put the Trust property located at 131 Whispering Pines Court, Lake Wylie, South Carolina up for sale during her lifetime.
52. I continued to keep the property on the market and received the first offer in September 2014 and ultimately negotiated the terms of the sale to close in December 2014.
53. On December 11, 2014, I learned from the closing attorney, Barry Mack, that John Gettys sent him a letter, in his capacity as counsel for Hugh Dereede and Tyre Dealer Network Consultants, Inc., demanding that Hugh Dereede be paid \$250,000 at closing. Later that day, Hugh Dereede demanded immediate payment from the sale, via email communication.

ROA 0511

54. The letter from John Gettys was an objection to my actions as Trustee.
55. The email from Hugh Dereede was an objection to my actions as Trustee.
56. I responded to Hugh's email and reminded him of the Trust's liability for Estate debts and my decision to wait until the creditor claims were all known before distributing from the Trust.
57. I contacted my trust administration attorney, Edward Ribadeneira, to address the situation with Mr. Gettys, as the closing attorney informed me that we needed to resolve the issue before we would close on the house.
58. Ed told Mr. Gettys that I had decided to protect myself, legitimate known and unknown creditors, and would not make any preliminary distributions from the Trust or Estate until the eight (8) month South Carolina creditor claim period had closed.
59. I understand that Mr. Gettys told Ed that my decision was reasonable.
60. At the time of the closing, the Estate had no liquid assets and had significant outstanding debts and fiduciary obligations.
61. The Trust property at 131 Whispering Pines Dr., Lake Wylie, SC, 29710 was scheduled to close sale on December 15, 2014. I continued to take steps to move forward with the sale of the house, reviewing and signing closing documents and communicating with the closing attorney.
62. The house closed on December 19, 2014, after a delay of four days, due in part to Hugh's decision to challenge my decision not to pay him at closing.
63. On December 22, 2014, the proceeds from the sale of the South Carolina house were wire transferred to the Trust's account.
64. Later that day, Hugh Dereede once again demanded, via email, immediate payment and threatened to initiate legal action if immediate payment was not made.
65. Due to the repeated explanations of the reasoning and rationale for my behavior and Hugh's continued disregard for both it and South Carolina Probate and Trust law, I consider this email demand to be a contest to my good faith actions taken as Trustee and in violation of Article 14, Section 21 of the Trust.
66. Later that day, I contacted my estate attorney to discuss how to best respond to this demand following the Christmas holiday, which for my husband and I would be spent in Boston Children's Hospital NICU with Louisa.

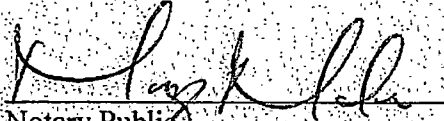
67. On December 23, 2014, Hugh Dereede filed this action.
68. The filing of this action and its continued litigation is another contest to my good faith actions taken as Trustee.
69. I am familiar with South Carolina Trust Code § 62-7-605, which states "A provision in a revocable trust purporting to penalize any interested person for contesting the validity of the trust or instituting other proceedings relating to the trust is unenforceable if probable cause exists for instituting proceedings."
70. Hugh Dereede and Tyre Dealer Network Consultants, Inc. did not have probable cause to bring this action. I explained to both that my decision not to make immediate distributions from the Trust was based on South Carolina law. I told them that I would make distributions after the statutory creditor's period had expired.
71. Hugh is an impatient man and refused to wait for his money.
72. As Trustee, I have the fiduciary obligation to uphold the terms of the Trust.
73. The "No Contest Clause" is a provision of this Trust.
74. I have the fiduciary duty to uphold this provision if a beneficiary's actions require it.
75. This action was initiated because Hugh wanted me to immediately uphold the terms of the Trust that were beneficial to him, even if that meant that I would be held personally liable to creditors that presented claims at the end of the filing period.
76. Additionally, Hugh wants me to ignore the "No Contest Clause" provision in the Trust despite the fact that it was included to prevent the pattern of behavior he has exhibited. Hugh also is not concerned about my liability to other beneficiaries if I did not hold him and his company accountable for violating the terms of the Trust.
77. I have done my best to uphold the terms of the Trust and to follow South Carolina law. I regret that Hugh filed this lawsuit, but now I understand why this Trust has a "No Contest" provision.
78. Hugh's actions and decisions have been a significant burden on me, my family, and have strained my relationship with my brother.

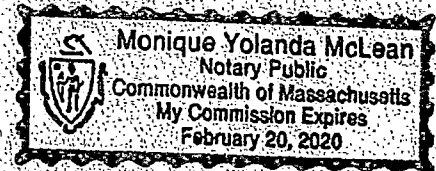
Further the Affiant sayeth not.

This the 18th day of August, 2015.


COURTNEY FEELEY KARP

Sworn to and subscribed before me this 18th day of August, 2015.


Notary Public
My commission expires: 2/20/2020



STATE OF ARIZONA
COUNTY OF MARICOPA

IN THE CIRCUIT COURT

CASE NO: 2015 CP 4601409

HUGH DEREDE and TYRE DEALER
NETWORK CONSULTANTS, INC.

Plaintiffs,

vs.

**AFFIDAVIT OF EDWARD J.
RIBADENEIRA**

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.

I, EDWARD J. RIBADENEIRA, being first duly sworn do state for my affidavit as follows:

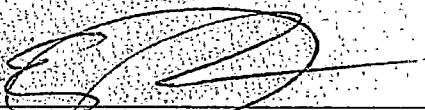
1. I am a resident of Maricopa County, Arizona. I am over eighteen (18) years of age and am fully competent.
2. I am an attorney in good standing and licensed to practice with the State of Arizona, Bar No. 018123.
3. Courtney Feely Karp, the Personal Representative of Deborah Dereede (the "Estate") and the Trustee of the Deborah Dereede Living Trust, dated December 18, 2013, (the "Trust") engaged my services on or around October 24, 2014, on behalf of the Estate and the Trust to assist with the sale of certain real property located in Arizona.
4. During the course of representation, Mrs. Karp asked me to correspond with John Gettys, the attorney for Hugh Dereede, with regard to certain demands being made by Mr. Dereede against the Estate and the Trust relative to the sale of the South Carolina property. At that time Mr. Dereede was demanding payment from the proceeds derived from the sale of the South Carolina property and threatening suit.
5. On December 16, 2014 I had a discussion with Mr. Gettys regarding his client's demand for payment from the Trust and the promissory note referenced in the Trust. During this conversation, Mr. Gettys and I discussed

ROA 0515

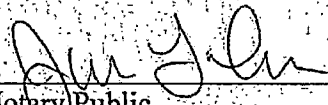
the proper order of payments from an estate or a trust, that creditors have priority of payment, that all creditors had not yet been determined, that the personal representative/executor/trustee could be held personally responsible if funds were distributed to beneficiaries prior to paying third party creditors and that neither the Trust nor the Estate would be making any large distributions of assets prior to the payment of all administrative expenses and third party debts. He acknowledged that he would advise his client similarly if he were in my position. After this conversation, I was very confident that no lawsuit would be forthcoming and that the Mrs. Karp would be able to complete the administration of the Trust and the Estate without undue interference from Mr. Dereede.

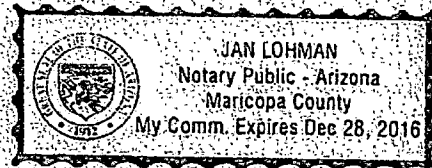
Further the Affiant sayeth not.

This the 12th day of August, 2015.


EDWARD J. RIBADENEIRA

Sworn to and subscribed before me this 12th day of August, 2015.


Notary Public
My commission expires: 12/28/2016



STATE OF SOUTH CAROLINA) IN THE CIRCUIT COURT

COUNTY OF YORK)

CASE NO.: 2015-CP-4601409

IN RE:)

Deborah Dereede Living Trust
dated December 18, 2013)Hugh Dereede and Tyre Dealer
Network Consultants, Inc.)

Plaintiffs,)

AFFIDAVIT OF S. ALAN MEDLIN

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.)

PERSONALLY APPEARED BEFORE ME, S. Alan Medlin, who, first being duly sworn,
deposes and states the following:

1. I am the David W. Robinson Professor of Law at the University of South Carolina School of Law, and I have been a licensed attorney in South Carolina since 1979. A summary of my credentials is attached as Schedule A. On a regular basis, I confer with South Carolina estate planning and probate lawyers and trustees. I have been accepted as an expert on trust and estate matters in both South Carolina and federal courts.

2. I have been asked to express my opinion about certain rights under the Revocable Family Wealth Trust prepared for Deborah Dereede ("trust"). My opinion is based on my review of the trust; relevant provisions of the South Carolina Probate Code ("SCPC") and South Carolina Trust Code ("SCTC") (contained within the SCPC); the Uniform Probate Code ("UPC") and the Uniform Trust Code; the relevant Complaint; the Motion for Removal to Circuit Court, Motion to Dismiss, Affirmative Defenses, and Answer, Defendant Courtney Feeley Karp's Amended Motion for Summary Judgment Against Plaintiffs Hugh Dereede and Tyre Dealer Network Consultants, Inc.; Defendant Courtney Feeley Karp's Second Amended Motion for Summary

Affidavit of S. Alan Medlin

Page 1 of 6

Judgment Against Plaintiffs Hugh Dereede and Tyre Dealer Network Consultants, Inc.; the report of the Trust Protector; and conversations with counsel for the parties. I reserve the right to amend my opinion and this affidavit upon discovery of additional information.

Trustee Refusal to Make Payment and Distribution

3. The Settlor indicated her intent to prefer (1) the reimbursement to Tyre Dealer Network Consultants, Inc. ("Tyre") and (2) the distribution to her husband Hugh Dereede ("Hugh") over all other payments and distributions from the Trust. Article Five, Section 2 of the trust is entitled "*Immediate Distribution of Specific Devises*" (emphasis added) and provides for the distributions to the persons and entities named in Article Six. Article Five, Section 2 provides for distributions from the *remainder* (emphasis added) of the trust only after the distributions made in Article Six. Thus, the Settlor's payment and distribution scheme is, first, to Tyre and Hugh pursuant to Article Six, and, second, all other distributions. Following the title indicating the Settlor's intent for immediate distribution to Tyre and Hugh, Article Five, Section 2 further elaborates that the distributions to Tyre and Hugh be made as soon as practicable after the Settlor's death. Article Six provides similarly as to the preference for and timing of the payment and distribution to Tyre and Hugh. The Settlor's requirement for payment and distribution to Tyre and Hugh to be immediate and as soon as practicable should be read consistently to indicate her intention that such payment and distribution should be made sooner than any other payment and distribution and should not be unduly delayed.

4. A trustee has a duty to follow the directions of the settlor. Although normally a trustee is to treat all beneficiaries fairly, equitably, and impartially, a trustee must treat with partiality any beneficiary that the settlor directs be treated with partiality. As discussed in the preceding paragraph, the Settlor directed that Tyre and Hugh be treated with partiality as to the payment and distribution required by Article Six. The trustee should therefore prioritize the interests of Tyre and Hugh over all other payments and distributions from the trust and any other beneficiaries of the trust, including any individual interests of the trustee. If the trustee did not want to accept the responsibility of following the Settlor's directions, she did not have to accept the position of trustee. Having willingly accepted the position, the trustee must follow the directions and priorities of the Settlor and cannot let her self-interest override the Settlor's directions or the interests of Tyre and Hugh.

5. In relevant part, Article Six requires the Settlor to sell the house and lot at 131 Whispering Pines Drive and from the proceeds to: first, pay off the mortgage against the property; second, pay the \$250,000 note owing to Tyre (although there is some limiting language for this payment, that limit is inapplicable because I understand that the sales price for the property was \$615,000); third, pay half the remaining balance of the sales proceeds to Hugh; and, fourth and last, pay the other half of the remaining balance in accordance with the lesser prioritized remaining provisions of the trust, which include possible distributions to the trustee in her individual beneficiary capacity and to her brother. This prioritization by the Settlor in Article Six makes particular sense given that, as I understand it, Tyre lent \$250,000 to the Settlor towards the purchase of 131 Whispering Pines.



6. While a trustee is entitled to protect herself, a trustee should not put her interests above those of the settlor and those the settlor intends to benefit. When a trustee is also a remainder beneficiary and disregards the settlor's directions in order to protect her own beneficial interests over the interest of a preferred beneficiary, the trustee would be in breach of her duty.

7. It is my understanding that SCTC section 62-7-604(b) protects a trustee from personal liability for postmortem distributions from a revocable trust unless the trustee knows about or has received notice of a contest of the trust's validity. SCTC section 62-7-604(b) does not specifically and expressly limit the protection of the trustee for such distributions only to situations involving contests of the trust's validity. My understanding of the purpose of the protection afforded distributions pursuant to section 62-7-604(b) is to allow distributions from revocable trusts sooner than would otherwise be allowed by probate, which is consistent with a major reason for using revocable trusts rather than wills and testamentary trusts — to avoid probate. This is consistent with my understanding of the scheme and purpose of sections 7-604 and 6-102 of the UPC: to allow distributions from a revocable trust before the probate claims period has expired if a trustee lacks notice of claims about the trust's validity or the need for trust assets to augment an insolvent estate's ability to pay probate creditors. Under that scheme and purpose, trust beneficiaries, rather than the trustee, would be subject to reimbursing probate creditors entitled to revocable trust assets to pay their claims.

8. Although I thus disagree with the trustee's position on the interaction of SCTC sections 62-7-604(b) and 62-7-505(a)(3) — i.e., that because section 62-7-505(a)(3) allows revocable trust assets to be subject to probate claims if the probate estate is insufficient to pay probate creditors, the trustee could thus be personally liable — I do understand how the trustee could take such a position, given the lack of a SCPC provision similar to UPC section 6-102. However, it is my further understanding that a personal representative is not personally liable under sections 62-3-808 for distribution of assets from a revocable trust nor is a trustee liable under section 62-3-1010(b). My understanding of those sections is that a personal representative or trustee is personally liable, only when personally at fault, for torts or for obligations caused by the estate or trust controlling or owning assets (such as taxes — an example given in the Comment to UPC section 3-808). Moreover, section 62-7-1002 provides that a trustee is liable only to "beneficiaries" for breach of fiduciary duty. I believe that the trustee's position effectively renders the purpose of section 62-7-604(b) meaningless.

9. Just because the probate estate had only de minimus liquid assets at the time of the sale of 131 Whispering Pines is not necessarily a reason to refuse distribution. Apparently, the probate estate had other significant assets that could have been liquidated to pay any claims. Moreover, it is my understanding that the trust would have had liquidity of approximately \$53,000 remaining after the payments to Tyre and Hugh in accordance with Article Six, which could have been used as a source of liquidity to pay probate creditors if necessary. Also, there was apparently another nonprobate asset, a bank account, that could also have been made available to pay probate creditors, although I do not know the specifics of that account, such as amount, ownership, and location.

10. Based on the foregoing, it is my opinion that the trustee could have made the payments and distributions from the proceeds of the sale, as required by Article Five, Section 2 and Article Six of the trust, without waiting for the probate creditor's claim time period to expire and without incurring personal liability under sections 62-7-505(a)(3), 62-7-1010(b), and 62-3-808. Rather, Hugh would have been subject to any creditor's claim assessable against his beneficial interest, and only in the priority as expressed by the settlor's preference versus the other trust beneficiaries (as discussed below, SCTC section 62-7-505(a)(3) allows the settlor to direct the source of payment from a revocable trust when its assets become subject to probate creditors).

No Contest Provision

11. Regardless of whether the trustee was justified in withholding the payment and distribution to Tyre and Hugh until the expiration of the probate claims period, the trustee should immediately make such payment and distribution now that the probate claims period has expired, based on my understanding that the revocable trust assets required to make such payment and distribution will not be necessary to pay probate creditors under SCTC section 62-7-505(a)(3).

12. The trustee's contention that somehow Tyre and Hugh forfeited their rights pursuant to Article Fourteen, Section 21, entitled "No Contest Clause," is unsupportable, particularly in light of the Settlor's expressed preference for the rights of Tyre and Hugh over other beneficiaries, the fact that the loan from Tyre enabled the Settlor to purchase the subject property of the trust, and that the trustee has a conflict of interest in asserting such a position because she stands to benefit in her individual beneficiary capacity.

13. First, the no contest clause applies to "any devisee, legatee, or beneficiary . . . or legal heirs, or any person claiming under any of them." The no contest clause does not apply to "any person," but rather only to those listed in the preceding sentence. Tyre is not a beneficiary but is a creditor, to which the no contest clause does not apply. (Nor I am aware of how a testator or settlor could ever properly apply a no contest provision against a creditor.) The Settlor expresses her intent to repay the loan from Tyre used to purchase the subject property of the trust. (The expression of the Settlor's intent to repay Tyre before any other payment or distribution — other than the mortgage — is consistent with her right under section 62-7-505(a)(3) to direct the source of the payment to probate creditors.) Tyre is entitled to repayment according to the terms of the trust, which directs payment from the trust, regardless of whether Tyre filed a claim as a probate creditor.

14. The trustee takes the inequitable position that she and her brother should receive a windfall and be unjustly enriched by enforcing a forfeiture clause against the creditor that supplied funds for the purchase of the subject property.

15. Thus, the first \$250,000 of the remaining proceeds should be paid immediately to Tyre, the creditor. This leaves approximately \$53,000 due to Hugh as trust beneficiary subject to dispute under the no contest clause. (My analysis below as to Hugh's right as beneficiary would also apply to Tyre, in the event that Tyre were a beneficiary subject to the no contest clause rather

Affidavit of S. Alan Medlin

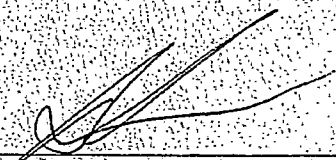
Page 4 of 6 

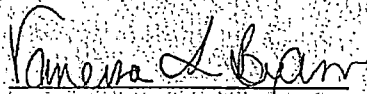
than a creditor not subject to the no contest clause).

16. Under South Carolina law, as well as general common law principles, no contest clauses can be enforced unless probable cause exists for the contest. See SCPC section 62-3-905 (wills) and SCTC section 62-7-605 (revocable trusts). The probable cause exception balances the policies involved: on one hand, courts want to limit frivolous claims against an estate, yet courts want beneficiaries to have a voice when attempting to remedy such problems as undue influence and other failures to recognize the true intent of a testator or settlor. Application of any no contest clause should also be subject to the general maxim that "courts abhor a forfeiture."

17. Although Hugh's status as beneficiary arguably makes him subject to the no contest clause, his interest is not forfeited. It is questionable whether his action for a declaration of rights or legal relations is an objection covered by Article Fourteen, Section 12(b) and (c). But even if it were, Hugh certainly had probable cause to request a distribution in accordance with the Settlor's expressed intention for payment to him to be immediate and as soon as practicable, as discussed above. Although I have recognized above that the trustee may have had some argument for her position that payment should be delayed until the expiration of the probate claims period, I have expressed above my opinion that the better argument is that she would not have been subject to personal liability for making the distribution when requested. Following that reasoning and in accordance with the Settlor's expressed directions and preferences discussed above, Hugh had probable cause to question whether the trustee should have made a distribution when requested.

FURTHER AFFIANT SAYETH NOT.


S. Alan Medlin



SWORN to before me this
23rd day of February, 2016.

Notary Public for South Carolina
My Commission Expires July 5, 2016

Affidavit of S. Alan Medlin

Page 5 of 6 

ROA 0521

Function of the Trust Protector

Under the terms of the Deborah Dereede Revocable Living Trust dated December 18, 2013 (the "Trust"), the Trust Protector is to protect the financial resources of the Trust and the interests of the beneficiaries thereto. In Article Three, Section 8 of the Trust, Deborah Dereede (the "Decedent") provided for the authority of a Trust Protector but did not specifically appoint a Trust Protector. Among other powers, she granted the Trust Protector the power to resolve a dispute or conflict between the beneficiary and the trustee. The present dispute is with regard to a distribution required under the Trust and is between Courtney Feeley-Karp, the Decedent's daughter and an attorney, in her capacity as trustee of the Trust (the "Trustee") and two trust beneficiaries, Tyre Dealer Network Consultants, Inc. ("Tyre") and Hugh Dereede, the Decedent's spouse and a trust beneficiary (the "Spouse").

In this instance the dispute resulted in a lawsuit being filed by the Spouse in late 2014. At that point no Trust Protector was serving. The undersigned Trust Protector was not appointed until October 2015. Although the Trust Agreement provides that "no one may file or instigate a claim in a court of law without first submitting the claim to the Trust Protector for resolution. . ." no Trust Protector was in place at the time the suit was filed. Nevertheless, if the undersigned can resolve the dispute, I will attempt to do so.

Pertinent Facts**ROA 0523**

The background on the Decedent, as I understand it, is that she had been married several times and used a number of different names. She had lived and/or worked in New Hampshire, Massachusetts, Arizona, South Carolina, North Carolina and Canada. The Decedent had aggressive medical treatment for her cancer in the months prior to her death.

The pertinent dates are as follows:

12/18/2013	Trust Agreement Created 131 Whispering Pines Drive transferred to Trust
08/15/2014	Deborah Dereede died
09/12/2014	Estate opened; Courtney Feeley-Karp appointed as PR
10/02/2014	1 st Notice to Creditors published
11/12/2014	Inventory filed
12/19/2014	Closing of sale of 131 Whispering Pines Net proceeds of \$356,242.86 paid to Trust
12/23/2014	Lawsuit filed by Hugh Dereede
06/02/2015	8 months for unknown creditors to file claims expired 2 claims filed with probate court prior to 12/2014: \$ 250.14; \$14,843.54
08/15/2015	1 year expired – absolute bar to claims Supplemental Inventory filed

The probate assets were:

New Hampshire home	
Phoenix, AZ home	
Cadillac car	} Specifically left to Hugh Dereede via Trust
Cabin cruiser boat	} Specifically left to Hugh Dereede via Trust
Lincoln car	\$3,500 value per Supplemental I&A
2 bank accounts	\$619.25.

The only asset in the Trust was 131 Whispering Pines Drive. Some non-probate assets such as an IRA, a 401(k) and a bank account passed outside the Decedent's Will and Trust.

Distributions

The Trustee was directed “as soon as practicable after [the Decedent’s] death” to make certain distributions from the Trust Estate as set forth in Article Six of the Trust. Article Six, Section 4 is denominated as “Specific Gifts,” but it begins by directing the Trustee, as soon as practicable following [the Decedent’s] death, to sell 131 Whispering Pines Drive, Lake Wylie, SC (“Lake Wylie”). The proceeds are to be used first to pay off any mortgage on Lake Wylie, second to pay off the balance owing on a promissory note to Tyre, not to exceed one-half of the sales price, and then to distribute one half of the remaining proceeds to the Spouse. It is this provision in Article Six that is the cause of the dispute between the Trustee and the Spouse.

The Trustee was also to distribute to the Spouse the contents of Lake Wylie, the Cadillac, a 2008 GMC Envoy (which apparently the Decedent did not own at her death) and the Maxum Cabin Cruiser. No dispute regarding these items was raised in the lawsuit.

The net Trust Estate after the Article Six distributions and after payment of claims (see below) was to be divided into shares for the Decedent’s children and held in a “Family Access Trust” pursuant to the provisions of Article Ten.

Claims

The Trust Estate, after the distributions set forth in Article Six of the Trust, was to be used to pay expenses, debts, claims and taxes except as specifically provided elsewhere in the Trust.

In Section 6 of Article 5 and in Section 4.a. of Article Six, all expenses, claims, liens, encumbrances, taxes (including Death Taxes) and liabilities attributable to any specifically distributed property were to be allocated to the specific distributions.

No Contest Clause

Article 14, Section 21 is the “No Contest Clause.” This provision disinherits any person who does a prohibited action, and all interests given to such person are forfeited and distributed as though the person predeceased the Decedent without issue. Part b prohibits any objection in any manner to any action taken by the Trustee in “good faith” if the Trustee’s action is “later adjudicated by a court of competent jurisdiction to have been taken in good faith.” Part c prohibits a person from objecting to any construction or interpretation of the Trust adopted in good faith by the Trustee if the objection is “later adjudicated by a court of competent jurisdiction to be an invalid objection.”

Trust Protector

Article 3, Section 8 authorizes the appointment of a Trust Protector by a majority of the Successor Trustees designated in Section 4 of Article 3. Section 4 names Courtney Feeley-Karp (the Trustee) and Hugh Dereede (the Spouse) as the successive Successor Trustees.

Claims

South Carolina law subjects the probate assets first to the payment of debts, claims and expenses. See S.C. Code Ann. § 62-3-801 *et seq.* If the probate assets are insufficient, then the property in the Trust at the Decedent's death is liable for the claims of the Decedent's creditors, costs of administration, and funeral and burial expenses. See S.C. Code Ann. § 62-7-505(a)(3). This Code section recognizes that a settlor, in this case the Decedent, has the right to specify the source from which liabilities will be paid.

Distribution of Trust Property

Once a formerly revocable trust becomes irrevocable due to the settlor's death, S.C. Code § 62-7-604 allows, but does not mandate, a trustee to distribute trust property in accordance with the terms of the trust. Unless the trustee is on notice of a possible action to contest the trust, the trustee incurs no liability if the trust is later determined to be invalid. The beneficiary who receives a distribution from a trust that is later determined to be invalid is liable to return the distribution. The comments to this section make it clear that the liability of the trust assets for the debts of the settlor and the trustee's possible liability to creditors for such distribution is not addressed in this section.

Penalty Clause for Contest

S.C. Code § 62-7-605 provides that a no contest or penalty clause in a trust is not enforceable if "probable cause exists for instituting proceedings."

Duty to Administer Trust

S.C. Code § 62-7-806 requires a trustee to administer the trust in good faith in accordance with its terms and purposes and the interests of the beneficiaries and in accordance with the South Carolina Trust Code.

Special Skills Of Trustee

S.C. Code § 62-7-806 requires a trustee with special skills or expertise to use those skills or expertise in administration of the trust.

With this understanding of the facts, the Trust provisions and the law, we turn to the Trustee's actions in this matter.

I understand that Lake Wylie was on the market for sale at the time of the Decedent's death. The Trustee continued to market the property. So clearly she attempted to sell Lake Wylie as soon as practicable after the Decedent's death, as directed in the Trust.

Lake Wylie sold in December 2014, four months after the Decedent's death. The mortgage to Bank of America was paid off from the proceeds. After payment of the closing costs attributable to the Trust as seller, the Trust netted \$356,242.86. It would appear that there existed \$250,000 to pay the debt to Tyre, assuming that was the amount owing. The maximum amount that could be paid to Tyre from the literal provisions of the Trust was \$307,500. It would therefore appear that additional proceeds existed to be divided as directed in the Trust, with one-half being paid to the Spouse.

This transaction cannot be considered in a vacuum, however. What was happening with the remainder of the Decedent's Estate and Trust? There existed \$619.25 in liquid assets at the Decedent's death. Funeral and burial expenses had to be paid from some source. Expenses of administration, including court costs had to be paid from some source. Until their sale, three houses had to be maintained with their attendant expenses and real estate taxes. Two cars and a boat generated expenses and personal property taxes. Additionally, two claims had been filed against the estate and the claims period had five more months to run for unknown creditors and 8 ½ more months to run for those creditors that were known, if any. The Lincoln car could be sold to generate a small amount of cash, but there was clearly an insufficient amount of cash to maintain the estate and trust assets.

At the sale of Lake Wylie, the other two parcels of real estate had not yet been sold and any such sales might not occur for some time, if at all (the Phoenix real estate was encumbered by two mortgages). There were considerable medical expenses incurred prior to the Decedent's death that might result in substantial claims. The Decedent owned real estate in three different states and worked in another state from which creditors' claims might arise.

In Section 4 of Article Five, "unless other provisions for payment have been made," the Trustee was mandated to pay from trust assets the Decedent's final medical expenses and funeral costs, legally enforceable claims against the Decedent, and reasonable expenses of trust administration including expenses related to the probate estate. Once Lake Wylie sold, a fund existed to pay these debts, expenses and claims, albeit a fund that might have to be reimbursed given the order for payment of debts set out in the Trust.

In December 2014 the Trustee would have been foolish, if not in breach of her fiduciary duties, to immediately distribute the net proceeds received from the sale of Lake Wylie. Her actions served to fulfill her fiduciary responsibility to uphold the terms of the trust and to administer trust assets for all the beneficiaries and for actual and potential creditors of the Decedent's estate and Trust. As an attorney, she was bound to use her special expertise to administer the trust. Had she done as the Spouse requested, she would have potentially subjected

herself to personal liability should insufficient funds have existed in the probate estate to pay creditors. Furthermore, given that the Spouse was a “citizen and resident of Canada” as stated in his Complaint, pursuing him for assets that needed to be returned to pay creditors would have been costly and difficult. Moreover, the Trustee was required to follow the terms of the Trust not only in the payment of debts, claims and expenses, but also in that she was directed in Article Five, Section 2 to make the specific distributions “*as soon as practicable*” not “*immediately*”. It would not have been practicable or feasible to distribute to the Spouse at the time of closing. In my opinion the Trustee acted reasonably and prudently and in accordance with the terms of the Trust in refusing the Spouse’s demands in December 2014.

Prior to the closing of the Lake Wylie sale, the Spouse requested that he and Tyre be paid by the closing attorney at the closing. The Trustee disagreed with the Spouse’s request and so informed the Spouse. The sale closed on a Friday and the following Tuesday the Spouse filed a declaratory judgment action seeking an interpretation of the Trust with regard to distribution of the proceeds and seeking a determination that probable cause existed for filing the action. It appears that the Spouse and Tyre disagreed with the action taken, or, in this case, not taken, by the Trustee and with the Trustee’s interpretation of the Trust as to when the distribution should be made. Thus the Spouse’s and Tyre’s legal action appears to invoke the provisions of the No Contest Clause. The Spouse and Tyre seemed to recognize this possibility since in their Complaint they sought a determination that they had probable cause.

In early June 2015, the time frame for unknown creditors to file claims expired. It is my understanding that the Spouse thereafter requested distribution although the lawsuit was still pending. In August 2015, the ultimate time frame for creditors’ claims expired. It is my understanding that the Spouse again requested distribution.

The Trustee resisted the Spouse’s requests in June and thereafter on the basis that, if the Spouse’s and Tyre’s actions violated the No Contest Clause, then neither was entitled to a distribution from the Trust. The Trustee was thus looking to the terms of the Trust itself in withholding distribution after the claims period expired since the application of the No Contest clause had been placed squarely before the court. It is my opinion that, due to the Spouse’s and Tyre’s actions in bringing suit, the Trustee was justified in not distributing any assets to them until the applicability of the No Contest Clause was adjudicated.

Summary

The Decedent’s provision for a Trust Protector to be able to resolve disputes was an effort to avoid controversy over her Trust and to resolve disagreements without the expense, delay and acrimony that is usually involved in a court proceeding. In that no Trust Protector was serving at the time suit was filed, there was no one to review the Spouse’s and Tyre’s claims in an attempt to resolve the dispute or to grant permission for the filing of the lawsuit.

The Spouse could have contacted the Trustee to request the appointment of a Trust Protector prior to filing suit. However they were already in a dispute. Given that the Spouse and the Trustee, as the only two named successors, had to act jointly to appoint a Trust Protector, there certainly was no guarantee that the Trustee would have responded positively and that his

ROA 0528

request would have been be honored. It does not seem to me that the later appointment of a Trust Protector relates back to require dismissal of the suit a year after it has was filed.

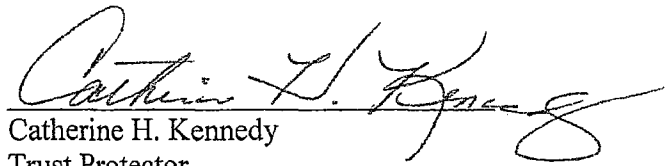
Nonetheless, given the facts as I understand them as recited above, had I been appointed, I would not have granted the Spouse and Tyre the authority to maintain a court action. I believe I would have resolved the issue through a direction to the Trustee as to what amount to distribute at what time. Mediation would also have been an alternative.

We are beyond that point. Presently, two inter-related issues remain to be resolved: One- Did the Trustee take the action and make the interpretation in good faith? Two- Did the Spouse and Tyre have probable cause to bring the action?

If the Trustee lacked good faith and the Spouse's and Tyre's objections were valid, then it would appear that probable cause existed to bring the action. Therefore the Spouse and Tyre would not forfeit their distributions. On the other hand, if the Trustee acted in good faith in her refusal to distribute and in her adoption of her construction of the Trust Agreement, then the terms of the No Contest Clause of the Trust itself are met. The issue of probable cause would then affect the enforceability of that provision.

Clearly the issue of good faith, by the terms of the Trust itself, must be adjudicated by a court of competent jurisdiction, not by the Trust Protector. Since the determination of probable cause is so connected to the good faith adjudication and since it is already pending before the court, the Trustee is instructed to seek resolution of those issues in the present forum.

Respectfully submitted,


Catherine H. Kennedy
Trust Protector

January 15, 2016

STATE OF SOUTH CAROLINA
COUNTY OF YORK

ROA 0529
IN THE CIRCUIT COURT
CASE NO: 2015 CP 4601409

HUGH DEREDE and TYRE DEALER
NETWORK CONSULTANTS, INC.

Plaintiffs,

vs.

DEFENDANT COURTNEY FEELEY
KARP'S (INDIVIDUALLY AND AS
TRUSTEE) REQUESTS FOR ADMISSION
TO PLAINTIFF HUGH DEREDE

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.

To: Hugh Dereede, Plaintiff
c/o John Gettys, Jr., Plaintiff's Attorney
331 E. Main Street, Suite 300
Rock Hill, SC 29730

DEFENDANT COURTNEY FEELEY KARP (as Trustee), pursuant to Rule 36 of the South Carolina Rules of Civil Procedure, requests that you admit the truth of the following facts within thirty (30) days. Please note that, pursuant to Rule 37(c) of the South Carolina Rules of Civil Procedure, if the truth of any matter denied herein is later established, the Defendant will apply to the Court for an Order requiring you to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees.

ADMIT

1. Prior to December 3, 2014, you read Articles Five, Six, and Fourteen of the Deborah Dereede Living Trust, dated December 18, 2013 (the "Trust").
2. That the Trustee informed you that, per South Carolina estate law, the Trust could be responsible for valid debts of the estate.
3. That the Trustee informed you that she was not going to make any trust distributions until all valid debts were settled.
4. That you have objected to actions Courtney Feeley Karp has made as Trustee of the Trust.

ROA 0529

A.000543

5. That upon the death of Deborah A. Dereede, you received various payments from Continental General Tire, Inc. including +/- \$119,000.00 in life insurance proceeds, +/- \$41,673.59 from a 401k, and +/- \$287.50 / week pension payment.

6. That the last General Tire Designation of Beneficiary Form completed by Deborah Dereede indicated that she intended for her son and daughter to receive her Continental General Tire, Inc. retirement benefits.

7. That in September 2014 you emailed the Trustee and told her that you elected to utilize the Trust real estate in Arizona as a vacation residence.

8. That in October 2014 you understood that the Trust lacked sufficient liquid capital to pay routine bills associated with its real estate.

9. That your attorney, John Gettys, wrote a letter to Philip Corson (c.c. Barry Mack) dated December 3, 2014, indicating that you and your company wanted a trust distribution to be made to you at the closing of the sale of 131 Whispering Pines Drive, Lake Wylie, SC (the "closing").

10. That the December 3, 2014 letter references a payment to Tyre Dealer Network Consultants, Inc. for \$250,000.00, but Deborah Dereede never executed an enforceable Promissory Note.

11. That you objected to the Trustee's decision not to include payments to you or your company on the closing Settlement Statement.

12. That the closing was scheduled for December 15, 2014.

13. That, because of your attempt to be included on the Settlement Statement, the closing was delayed until December 19, 2014.

14. That on December 22, 2014 you emailed the Trustee (Defendant's Exhibit C) and noted your objection to a position she had taken as Trustee to not make distributions to Trust beneficiaries until all valid debts of the estate were known and paid.

15. That upon filing the complaint on December 23, 2014, you objected to the Trustees decision not to make Trust distributions until all valid debts of the estate were known and settled.

16. That the Trustee's decision to not make distributions to Trust beneficiaries until "all debts and expenses" of Deborah Dereede's estate were paid and settled was an action taken in good faith by the Trustee.

17. That Deborah Dereede included the "No Contest Clause" in the Trust to discourage challenges and objections to the Trustee's decisions.

18. That you paid Michael Fehily a sum of money or assets that resulted in him not filing an Answer to this action.

This the 27 day of June, 2015

By: _____



Peter Nosal

State Bar No. 79152

NOSAL & JETER, LLP

852 Gold Hill Road #201

Fort Mill, SC 29709

Phone: (803) 351 – 3597

Fax: (803) 403 – 9515

Email: pete@nosaljeterlaw.com

Attorney for Defendant Courtney Feeley Karp

STATE OF SOUTH CAROLINA

IN THE CIRCUIT COURT **ROA 0532**

COUNTY OF YORK

CASE NO: 2015 CP 4601409

HUGH DEREDEE and TYRE DEALER
NETWORK CONSULTANTS, INC.

Plaintiffs,

vs.

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.

**DEFENDANT COURTNEY FEELEY
KARP'S (INDIVIDUALLY AND AS
TRUSTEE) REQUESTS FOR ADMISSION
TO PLAINTIFF TYRE DEALER
NETWORK CONSULTANTS, INC.**

**To: Tyre Dealer Network Consultants, Inc., Plaintiff
c/o John Gettys, Jr., Plaintiff's Attorney
331 E. Main Street, Suite 300
Rock Hill, SC 29730**

DEFENDANT COURTNEY FEELEY KARP (as Trustee), pursuant to Rule 36 of the South Carolina Rules of Civil Procedure, requests that you admit the truth of the following facts within thirty (30) days. Please note that, pursuant to Rule 37(c) of the South Carolina Rules of Civil Procedure, if the truth of any matter denied herein is later established, the Defendant will apply to the Court for an Order requiring you to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees.

ADMIT

1. That Tyre Dealer Network Consultants, Inc. is Hugh Dereede's entity.
2. That Tyre Dealer Network Consultants, Inc. has no employees.
3. That Hugh Dereede is the agent of Tyre Dealer Network Consultants, Inc.
4. That Plaintiffs claim that the Tyre Dealer Network Consultants, Inc. gave money to Deborah Dereede to use for the down payment on 131 Whispering Pines Drive, Lake Wylie, SC.
5. That neither Plaintiff in this action holds a valid Promissory Note signed by Deborah Dereede.

ROA 0532

6. That you were informed that the Trustee was not going to make any trust distributions until all valid debts of the estate of Deborah Dereede were settled.

7. That you have objected to actions Courtney Feeley Karp has made as Trustee of the Trust.

8. That in October 2014 you understood that the Trust lacked sufficient liquid capital to pay routine bills associated with its real estate.

9. That your attorney, John Gettys, wrote a letter to Philip Corson (c.c. Barry Mack) dated December 3, 2014, indicating that the company and Hugh Dereede wanted a trust distribution to be made to you at the closing of the sale of 131 Whispering Pines Drive, Lake Wylie, SC (the "closing").

10. That the December 3, 2014 letter references a payment to Tyre Dealer Network Consultants, Inc. for \$250,000.00, but Deborah Dereede never executed an enforceable Promissory Note.

11. That you objected to the Trustee's decision not to include payments to you or Hugh Dereede on the closing Settlement Statement.

12. That the closing was scheduled for December 15, 2014.

13. That, because of your attempt to be included on the Settlement Statement, the closing was delayed until December 19, 2014.

14. That on December 22, 2014 Hugh Dereede emailed the Trustee (Defendant's Exhibit C) and noted your objection to a position she had taken as Trustee to not make distributions to Trust beneficiaries until all valid debts of the estate were known and paid.

15. That upon filing the complaint on December 23, 2014, you objected to the Trustees decision not to make Trust distributions until all valid debts of the estate were known and settled.

16. That the Trustee's decision to not make distributions to Trust beneficiaries until "all debts and expenses" of Deborah Dereede's estate were paid and settled was an action taken in good faith by the Trustee.

17. That Deborah Dereede included the "No Contest Clause" in the Trust to discourage challenges and objections to the Trustee's decisions.

18. That you paid Michael Fehily a sum of money or assets that resulted in him not filing an Answer to this action.

This the 24 day of June, 2015

By: _____



Peter Nosal
State Bar No. 79152
NOSAL & JETER, LLP
852 Gold Hill Road #201
Fort Mill, SC 29709
Phone: (803) 351 – 3597
Fax: (803) 403 – 9515
Email: pete@nosaljeterlaw.com
Attorney for Defendant Courtney Feeley Karp

STATE OF SOUTH CAROLINA

IN THE CIRCUIT COURT **ROA 0535**

COUNTY OF YORK

CASE NO: 2015 CP 4601409

HUGH DEREDEDE and TYRE DEALER
NETWORK CONSULTANTS, INC.,

Plaintiffs,

vs.

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.

**DEFENDANT COURTNEY FEELEY
KARP'S (INDIVIDUALLY AND AS
TRUSTEE) INTERROGATORIES TO
PLAINTIFF TYRE DEALER NETWORK
CONSULTANTS, INC.**

TO: Tyre Dealer Network Consultants, Inc. as Plaintiff in this matter and Attorney for Plaintiff;

Pursuant to Rule 33, SCRCP, Defendant Courtney Feeley Karp, individually and as Trustee, (the "Defendant") propounds the following interrogatories to the Plaintiff:

1. Give the names and addresses of persons known to the Plaintiff or Plaintiff's counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.
2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the Plaintiff or the Plaintiff's counsel, that relate to the claim or defense in the case.
3. List the names and addresses of any expert witnesses whom the Plaintiff or the Plaintiff's counsel proposes to use a witness at the trial of the case.
4. For each person known to the Plaintiff or Plaintiff's counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the Defendants of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.
5. Identify and describe the specific evidence relied upon by the Plaintiff (whether documentary, oral, or otherwise) to allege and prove that Plaintiff provided a loan

for the purchase of 131 Whispering Pines Drive, Lake Wylie, SC to decedent Deborah Dereede.

6. Identify and describe the specific evidence relied upon by the Plaintiff (whether documentary, oral, or otherwise) to allege and prove that Defendant refused to acknowledge her responsibility, and in fact disputed her responsibility, to distribute the proceeds of sale of the home at 131 Whispering Pines Drive, Lake Wylie, SC as soon as practicable as required under Article Six Section 4(a) of the Deborah Dereede Living Trust dated December 18, 2013.
7. Identify and describe the specific evidence relied upon by the Plaintiff (whether documentary, oral, or otherwise) to allege and prove that there was valid probable cause to bring the complaint at the time of Plaintiff's filing.
8. Identify and describe the specific evidence relied upon by the Plaintiff (whether documentary, oral, or otherwise) to allege and prove that the Defendant was not acting in good faith in her roles as Personal Representative of the Estate of Deborah Dereede or Trustee of the Deborah Dereede Living Trust, dated December 18, 2013.

This the 27 day of June, 2015

By: 

Peter Nosal
State Bar No. 79152
NOSAL & JETER, LLP
852 Gold Hill Road #201
Fort Mill, SC 29709
Phone: (803) 351 – 3597
Fax: (803) 403 – 9515
Email: pete@nosaljeterlaw.com
Attorney for Defendant Courtney Feeley Karp

STATE OF SOUTH CAROLINA

IN THE CIRCUIT COURT **ROA 0537**

COUNTY OF YORK

CASE NO: 2015 CP 4601409

HUGH DEREDE and TYRE DEALER
NETWORK CONSULTANTS, INC.,

Plaintiffs,

vs.

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.

**DEFENDANT COURTNEY FEELEY
KARP'S (INDIVIDUALLY AND AS
TRUSTEE) REQUEST FOR PRODUCTION
OF DOCUMENTS TO PLAINTIFF TYRE
DEALER NETWORK CONSULTANTS,
INC.**

TO: Tyre Dealer Network Consultants, Inc. as Plaintiff in this matter and Attorney for Plaintiff:

Pursuant to Rule 34, SCRPC, Defendant Courtney Feeley Karp (the "Defendant") requests that Plaintiff Hugh Dereede produce and permit the inspection and copying of the following:

1. All photographs, plats, sketches or other prepared documents identified by the Defendant in the Defendant's Interrogatory to Tyre Dealer Network Consultants, Inc. #2.
2. Any other document identified by Plaintiff in Answer to any of Defendant's Interrogatories to Plaintiff Tyre Dealer Network Consultants, Inc.
3. Any document pertaining to the creation and maintenance of TYRE DEALER NETWORK CONSULTANTS, INC.
4. Any document serving as a corporate record of TYRE DEALER NETWORK CONSULTANTS, INC.
5. A copy of all tax filings for the years 2009 through 2014 for TYRE DEALER NETWORK CONSULTANTS, INC.
6. A copy of all bank statements for the years 2009 through 2014 for TYRE DEALER NETWORK CONSULTANTS, INC.

ROA 0537

7. Any document in possession of TYRE DEALER NETWORK CONSULTANTS, INC. that is related to Courtney Feeley Karp's position as Trustee.
8. Any document in possession of TYRE DEALER NETWORK CONSULTANTS, INC. that relates to the residence at 131 Whispering Pines Drive, Lake Wylie, SC.
9. Any document requested in Defendant's Request for Interrogatories of Hugh Dereede that is in Tyre Dealer Network Consultants, Inc.'s possession.
10. Any document in possession of TYRE DEALER NETWORK CONSULTANTS, INC. that is a communication between it and the Defendant regarding the Deborah Dereede Living Trust, dated December 18, 2013 or its assets.

This the 27 day of June, 2015

By: 

Peter Nosal
State Bar No. 79152
NOSAL & JETER, LLP
852 Gold Hill Road #201
Fort Mill, SC 29709
Phone: (803) 351 - 3597
Fax: (803) 403 - 9515
Email: pete@nosaljeterlaw.com
Attorney for Defendant Courtney Feeley Karp

STATE OF SOUTH CAROLINA

IN THE CIRCUIT COURT **ROA 0539**

COUNTY OF YORK

CASE NO: 2015 CP 4601409

HUGH DEREDE and TYRE DEALER
NETWORK CONSULTANTS, INC.,

Plaintiffs,

vs.

**DEFENDANT COURTNEY FEELEY
KARP'S (INDIVIDUALLY AND AS
TRUSTEE) INTERROGATORIES TO
PLAINTIFF HUGH DEREDE**

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.

TO: Hugh Dereede as Plaintiff in this matter and Attorney for Plaintiff:

Pursuant to Rule 33, SCRCP, Defendant Courtney Feeley Karp (the "Defendant")
propounds the following interrogatories to the Plaintiff:

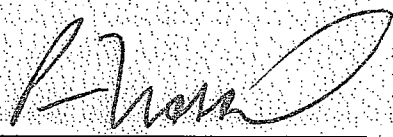
1. Give the names and addresses of persons known to the Plaintiff or Plaintiff's counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.
2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the Plaintiff or the Plaintiff's counsel, that relate to the claim or defense in the case.
3. List the names and addresses of any expert witnesses whom the Plaintiff or the Plaintiff's counsel proposes to use as a witness at the trial of the case.
4. For each person known to the Plaintiff or Plaintiff's counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the Defendants of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.
5. Identify and describe the specific evidence relied upon by the Plaintiff (whether documentary, oral, or otherwise) to allege and prove that Defendant intended to not distribute assets of the Deborah Dereede Living Trust dated December 18, 2013 (the "Trust") as soon as practicable.

ROA 0539

6. Identify and describe the specific evidence relied upon by the Plaintiff (whether documentary, oral, or otherwise) to allege and prove that Defendant refused to acknowledge her responsibility, and in fact disputed her responsibility, to, as soon as practicable, distribute the proceeds of sale of the home at 131 Whispering Pines Drive, Lake Wylie, SC as required under Article Six Section 4(a) of the Trust.
7. Identify and describe the specific evidence relied upon by the Plaintiff (whether documentary, oral, or otherwise) to allege and prove that the Defendant was not acting in good faith when she failed to make a trust distribution at the December 19, 2014 closing of 131 Whispering Pines Drive, Lake Wylie, SC.
8. Identify and describe the specific evidence relied upon by the Plaintiff (whether documentary, oral, or otherwise) to allege and prove that the Defendant could have or should have reasonably known the extent of the claims against the Estate before the end of the creditor claim period.
9. Identify and describe the specific evidence relied upon by the Plaintiff (whether documentary, oral, or otherwise) to allege and prove that there was valid probable cause to bring the complaint at the time of Plaintiff's filing.
10. Identify and describe the specific evidence relied upon by the Plaintiff (whether documentary, oral, or otherwise) to allege and prove that the Defendant was not acting in good faith in her roles as Personal Representative of the Estate of Deborah Dereede or Trustee of the Deborah Dereede Living Trust, dated December 18, 2013.

This the 24 day of June, 2015

By: _____


Peter Nosal
State Bar No. 79152
NOSAL & JETER, LLP
852 Gold Hill Road #201
Fort Mill, SC 29709
Phone: (803) 351 – 3597
Fax: (803) 403 – 9515
Email: pete@nosaljeterlaw.com
Attorney for Defendant Courtney Feeley Karp

STATE OF SOUTH CAROLINA

IN THE CIRCUIT COURT

COUNTY OF YORK

CASE NO: 2015 CP 4601409

HUGH DEREDE and TYRE DEALER
NETWORK CONSULTANTS, INC.,

Plaintiffs,

vs.

**DEFENDANT COURTNEY FEELEY
KARP'S (INDIVIDUALLY AND AS
TRUSTEE) REQUEST FOR PRODUCTION
OF DOCUMENTS TO PLAINTIFF HUGH
DEREDE**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.

TO: Hugh Dereede as Plaintiff in this matter and Attorney for Plaintiff:

Pursuant to Rule 34, SCRCP, Defendant Courtney Feeley Karp (the "Defendant") requests that Plaintiff Hugh Dereede produce and permit the inspection and copying of the following:

1. All photographs, plats, sketches or other prepared documents identified by the identified by the Defendant in the Defendant's Interrogatory to Hugh Dereede #2.
2. Any other document identified by Plaintiff in Answer to any of Defendant's Interrogatories to Plaintiff Hugh Dereede.
3. Any document in possession of the Plaintiff which pertains to the Defendant's role as Trustee or Personal Representative of the Estate of Deborah Dereede.
4. Any document in possession of the Plaintiff that relates to the purchase of the residence at 131 Whispering Pines Drive, Lake Wylie, SC.
5. Any document in possession of the Plaintiff that relates to the sale 131 Whispering Pines Drive, Lake Wylie, SC.
6. Any document requested in Defendant's Request for Interrogatories of Tyre Dealer Network Consultants, Inc. that is in Hugh Dereede's possession.

- ROA 0542
7. Any document in possession of the Plaintiff that is a communication between the Plaintiff and the Defendant regarding the Trust or its assets.
 8. Any document in possession of the Plaintiff that is a communication between the Plaintiff and the Defendant regarding the Estate of Deborah Dereede or its assets.

This the 24 day of June, 2015

By: 

Peter Nosal
State Bar No. 79152
NOSAL & JETER, LLP
852 Gold Hill Road #201
Fort Mill, SC 29709
Phone: (803) 351 – 3597
Fax: (803) 403 – 9515
Email: pete@nosaljeterlaw.com
Attorney for Defendant Courtney Feeley Karp

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) SIXTEENTH JUDICIAL CIRCUIT
) C/A No.: 2015-CP-46-01409

Hugh Dereede and Tyre Dealer Network
Consultants, Inc.

Plaintiffs,

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.

**PLAINTIFF HUGH DEREDEE'S
ANSWER TO DEFENDANT COURTNEY
FEELEY KARP'S (INDIVIDUALLY AND
AS TRUSTEE) REQUESTS FOR
ADMISSION**

TO: Courtney Feeley Karp, Defendant
c/o Peter J. Nosal, Defendant's Attorney
852 Gold Hill Road, Unit 201
Fort Mill, SC 29708

The Plaintiff, Hugh Dereede, pursuant to Rule 36 of the South Carolina Rules of Civil Procedure, hereby responds to the Defendant's requests for admissions as follows:

1. Admit that prior to December 3, 2014, Plaintiff read Articles Five, Six, and Fourteen of the Deborah Dereede Living Trust, dated December 18, 2013 (the "Trust").

Response: Admitted.

2. Admit that Defendant, as Trustee, informed you that, per South Carolina estate law, the Trust could be responsible for valid debts of the estate.

Response: Admitted only to the extent that Defendant has cited this argument, however incorrect or improper the same may be, as her justification for

withholding the appropriate distributions due to Plaintiff and Tyre Dealer Network Consultants, Inc. per the terms of the Trust.

3. Admit that the Trustee informed Plaintiff that she was not going to make any trust distributions until all valid debts were settled.

Response: Plaintiff admits only that Trustee informed him that she was not making any distributions beyond what she feels to be proper or "valid."

4. Admit that Plaintiff has objected to actions Defendant has made as Trustee of the Trust.

Response: Admitted.

5. Admit that upon the death of Deborah A. Dereede, Plaintiff received various payments from Continental General Tire, Inc. including +/- \$119,000.00 in life insurance proceeds, +/- \$41,673.59 from a 401k, and +/- \$287.50 / week pension payment.

Response: The Plaintiff objects to this Request on the basis that it is not relevant to any claim or defense of any party to this action. Subject to and without waiving the foregoing general and specific objections, Plaintiff admits this Request.

6. Admit that the last General Tire Designation of Beneficiary Form completed by Deborah Dereede indicated that she intended for her son and daughter to receive her Continental General Tire, Inc. retirement benefits.

Response: The Plaintiff objects to this Request on the basis that it is not relevant to any claim or defense of any party to this action. Subject to and without waiving the foregoing general and specific objections, Plaintiff denies this Request.

7. Admit that in September 2014 Plaintiff emailed the Trustee and told her that Plaintiff elected to utilize the Trust real estate in Arizona as a vacation residence.

Response: The Plaintiff objects to this Request on the basis that it is not relevant to any claim or defense of any party to this action. Subject to and without waiving the foregoing general and specific objections, Plaintiff admits this Request.

8. Admit that in October 2014 Plaintiff understood that the Trust lacked sufficient liquid capital to pay routine bills associated with its real estate.

Response: The Plaintiff objects to this Request on the basis that it is not relevant to any claim or defense of any party to this action. Subject to and without waiving the foregoing general and specific objections, Plaintiff admits that the Trustee stated this to be the case.

9. Admit that Plaintiff's attorney, John Gettys, wrote a letter to Philip Corson (c.c. Barry Mack) dated December 3, 2014, indicating that Plaintiff and Tyre Dealer Network Consultants Inc. wanted a trust distribution to be made to Plaintiff at the closing of the sale of 131 Whispering Pines Drive, Lake Wylie, SC (the "closing").

Response: Admitted to the extent that Plaintiff's attorney wrote a letter requesting, on behalf of both Plaintiff and Tyre Dealer Network Consultants, Inc., that a distribution be made to Plaintiff at the closing of the sale of 131 Whispering Pines Drive, Lake Wylie, SC, as is required per the terms of the trust. However, the Plaintiff denies the allegation of paragraph 9 to the extent it implies that a trust distribution, rather than a distribution of the sale proceeds as required by the Trust Agreement, was requested.

10. Admit that the December 3, 2014 letter references a payment to Tyre Dealer Network Consultants, Inc. for \$250,000.00, but Deborah Dereede never executed an enforceable Promissory Note.

Response: The Plaintiff admits only so much of the allegations of paragraph 10 which state that a letter existed referencing a payment to Tyre Dealer Network Consultants, Inc. for \$250,000.00. However, as related to the clause (“but Deborah Dereede never executed an enforceable Promissory Note”), the Plaintiff can neither admit nor deny this request for admission because the Plaintiff does not have sufficient knowledge or information, after having made a reasonable inquiry of the information available to it, to form a belief as to the truth or falsity of this matter.

11. Admit that Plaintiff objected to the Trustee’s decision not to include payments to Plaintiff or Tyre Dealer Network Consultants, Inc. on the closing Settlement Statement.

Response: Plaintiff will admit that he requested the Trustee direct the closing attorney to show the payoff to Tyre Dealer Network Consultants, Inc. on the Settlement Statement.

12. Admit that the closing was scheduled for December 15, 2014.

Response: The Plaintiff objects to this Request on the basis that it is not relevant to any claim or defense of any party to this action. Subject to and without waiving the foregoing general and specific objections, Plaintiff admits this Request.

13. Admit that, because of Plaintiff’s attempt to be included on the Settlement Statement, the closing was delayed until December 19, 2014.

Response: The Plaintiff objects to this Request on the basis that it is not relevant to any claim or defense of any party to this action. Subject to and without waiving the foregoing general and specific objections, Plaintiff denies this Request.

14. Admit that on December 22, 2014 Plaintiff emailed the Trustee (Defendant's Exhibit C) and noted Plaintiff's objection to a position Defendant had taken as Trustee to not make distributions to Trust beneficiaries until all valid debts of the estate were known and paid.

Response: Admitted only to the extent that Plaintiff did email Trustee objecting to the Defendant's cited argument, however incorrect or improper the same may be, as her justification for withholding the appropriate distributions due to Plaintiff and Tyre Dealer Network Consultants, Inc. per the terms of the Trust.

15. Admit that upon filing the complaint on December 23, 2014, Plaintiff objected to the Trustee's decision not to make Trust distributions until all valid debts of the estate were known and settled.

Response: Admitted.

16. Admit that the Trustee's decision to not make distributions to Trust beneficiaries until "all debts and expenses" of Deborah Dereede's estate were paid and settled was an action taken in good faith by the Trustee.

Response: Denied.

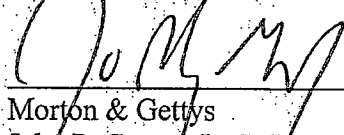
17. Admit that Deborah Dereede included the "No Contest Clause" in the Trust to discourage challenges and objections to the Trustee's decisions.

Response: Denied.

18. Admit that Plaintiff paid Michael Fehily a sum of money or assets that resulted in him not filing an Answer to this action.

Response: The Plaintiff objects to this Request on the basis that it is not relevant to any claim or defense of any party to this action. Subject to and without waiving the foregoing general and specific objections, Plaintiff admits that he made a financial gift to Michael Fehily. As to any other questions within this request regarding the cause of his failure to file an Answer to this action, a response would be better forthcoming from Mr. Fehily himself.

Respectfully submitted,



Morton & Gettys
John P. Gettys, Jr. S.C. Bar No. 8673
331 E. Main St., Suite 300
Rock Hill, SC 29731
John.gettys@mortongettys.com
(803) 366-3373 Telephone
(803) 366-4044 Fax

Rock Hill, SC
Dated: July 23, 2015

ATTORNEY FOR THE PLAINTIFFS

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK	)	C/A No.: 2015-CP-46-01409
Hugh Dereede and Tyre Dealer Network	)	
Consultants, Inc.	)	
	)	
Plaintiffs,	)	
	)	PLAINTIFF TYRE DEALER NETWORK
v.	)	CONSULTANTS, INC.'S ANSWER TO
	)	DEFENDANT COURTNEY FEELEY
Courtney Feeley-Karp, Individually and	)	KARP'S (INDIVIDUALLY AND AS
as Trustee of the Deborah Dereede	)	TRUSTEE) REQUESTS FOR ADMISSION
Living Trust Dated December 18, 2013	)	
and Michael Fehily, as a qualified	)	
beneficiary of the Deborah Dereede	)	
Living Trust Dated December 18, 2013,	)	
	)	
Defendants.	)	

TO: Courtney Feeley Karp, Defendant
 c/o Peter J. Nosal, Defendant's Attorney
 852 Gold Hill Road, Unit 201
 Fort Mill, SC 29708

The Plaintiff, Tyre Dealer Network Consultants, Inc., pursuant to Rule 36 of the South Carolina Rules of Civil Procedure, hereby responds to the Defendant's requests for admissions as follows:

1. Admit that Plaintiff is Hugh Dereede's entity.

Response: The Plaintiff objects to this Request on the basis that it is not relevant to any claim or defense of any party to this action. Subject to and without waiving the foregoing general and specific objections, Plaintiff admits this Request.

2. Admit that Plaintiff has no employees.

Response: The Plaintiff objects to this Request on the basis that it is not relevant to any claim or defense of any party to this action. Subject to and without waiving the foregoing general and specific objections, Plaintiff admits this Request.

3. Admit that Hugh Dereede is Plaintiff's agent.

Response: The Plaintiff objects to this Request on the basis that it is not relevant to any claim or defense of any party to this action. Subject to and without waiving the foregoing general and specific objections, Plaintiff admits this Request.

4. Admit that Plaintiff and Hugh Dereede claim that Plaintiff gave money to Deborah Dereede to use for the down payment on 131 Whispering Pines Drive, Lake Wylie, SC.

Response: Plaintiff admits the allegations of paragraph 4 to the extent that Deborah Dereede was loaned \$250,000.00 by Plaintiff and Hugh Dereede to be repaid upon the sale of the house, as she acknowledged in her trust agreement.

5. Admit that neither Plaintiff nor Hugh Dereede holds a valid Promissory Note signed by Deborah Dereede.

Response: Plaintiff admits that it does not have possession of a promissory note signed by Deborah Dereede.

6. Admit that Plaintiff was informed that Defendant, as Trustee, was not going to make any trust distributions until all valid debts of the estate of Deborah Dereede were settled.

Response: Admitted only to the extent that Plaintiff was informed of Defendant's argument, however incorrect or improper the same may be, as

her justification for withholding the appropriate distributions due to Plaintiff Tyre Dealer Network Consultants, Inc. per the terms of the Trust.

7. Admit that Plaintiff has objected to actions Defendant has made as Trustee of the Trust.

Response: Admitted.

8. Admit that in October 2014 Plaintiff understood that the Trust lacked sufficient liquid capital to pay routine bills associated with its real estate.

Response: The Plaintiff objects to this Request on the basis that it is not relevant to any claim or defense of any party to this action. Subject to and without waiving the foregoing general and specific objections, Plaintiff admits that the Trustee told him this was the case.

9. Admit that Plaintiff's attorney, John Gettys, wrote a letter to Philip Corson (c.c. Barry Mack) dated December 3, 2014, indicating that Plaintiff and Hugh Dereede wanted a trust distribution to be made to Plaintiff at the closing of the sale of 131 Whispering Pines Drive, Lake Wylie, SC (the "closing").

Response: Admitted to the extent that Plaintiff's attorney wrote a letter requesting, on behalf of both Plaintiff and Hugh Dereede, that a distribution be made to Plaintiff at the closing of the sale of 131 Whispering Pines Drive, Lake Wylie, SC, as is required per the terms of the trust. However, the Plaintiff denies the allegation of paragraph 9 to the extent it implies that a trust distribution, rather than a distribution of the sale proceeds as required by the Trust Agreement, was requested.

10. Admit that the December 3, 2014 letter references a payment to Plaintiff for \$250,000.00, but Deborah Dereede never executed an enforceable Promissory Note.

Response: The Plaintiff admits only so much of the allegations of paragraph 10 which state that a letter existed referencing a payment to Plaintiff for \$250,000.00. However, as related to the clause ("but Deborah Dereede never executed an enforceable Promissory Note"), the Plaintiff can neither admit nor deny this request for admission because the Plaintiff does not have sufficient knowledge or information, after having made a reasonable inquiry of the information available to it, to form a belief as to the truth or falsity of this matter.

11. Admit that Plaintiff objected to the Trustee's decision not to include payments to Plaintiff or Hugh Dereede on the closing Settlement Statement.

Response: Plaintiff will admit that it requested the Trustee direct the closing attorney to show the payoff to Plaintiff on the Settlement Statement.

12. Admit that the closing was scheduled for December 15, 2014.

Response: The Plaintiff objects to this Request on the basis that it is not relevant to any claim or defense of any party to this action. Subject to and without waiving the foregoing general and specific objections, Plaintiff admits this Request.

13. Admit that, because of Plaintiff's attempt to be included on the Settlement Statement, the closing was delayed until December 19, 2014.

Response: The Plaintiff objects to this Request on the basis that it is not relevant to any claim or defense of any party to this action. Subject to and without waiving the foregoing general and specific objections, Plaintiff denies this Request.

14. Admit that on December 22, 2014 Hugh Dereede emailed the Trustee (Defendant's Exhibit C) and noted Plaintiff's objection to a position Defendant had taken as Trustee to not make distributions to Trust beneficiaries until all valid debts of the estate were known and paid.

Response: Admitted only to the extent that Hugh Dereede did email Trustee objecting to the Defendant's cited argument, however incorrect or improper the same may be, as her justification for withholding the appropriate distributions due to Plaintiff and Hugh Dereede per the terms of the Trust.

15. Admit that upon filing the complaint on December 23, 2014, Plaintiff objected to the Trustee's decision not to make Trust distributions until all valid debts of the estate were known and settled.

Response: Admitted.

16. Admit that the Trustee's decision to not make distributions to Trust beneficiaries until "all debts and expenses" of Deborah Dereede's estate were paid and settled was an action taken in good faith by the Trustee.

Response: Denied.

17. Admit that Deborah Dereede included the "No Contest Clause" in the Trust to discourage challenges and objections to the Trustee's decisions.

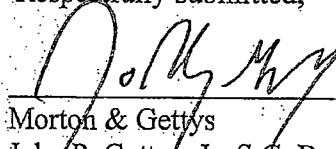
Response: Denied.

18. Admit that Plaintiff paid Michael Fehily a sum of money or assets that resulted in him not filing an Answer to this action.

Response: The Plaintiff objects to this Request on the basis that it is not relevant to any claim or defense of any party to this action. Subject to and

without waiving the foregoing general and specific objections, Plaintiff admits that it made a financial gift to Michael Fehily. As to any other questions within this request regarding the cause of his failure to file an Answer to this action, a response would be better forthcoming from Mr. Fehily himself.

Respectfully submitted,



Morton & Gettys
John P. Gettys, Jr. S.C. Bar No. 8673
331 E. Main St., Suite 300
Rock Hill, SC 29731
John.gettys@mortongettys.com
(803) 366-3373 Telephone
(803) 366-4044 Fax

Rock Hill, SC
Dated: July 23, 2015

ATTORNEY FOR THE PLAINTIFFS

Hugh Dereede Cross Exam by Mr. Nosal

1 Q The second paragraph, 18 - - -

2 Judge Kimball - Is it a verified complaint?

3 Mr. Gettys - No, sir.

4 Mr. Nosal - Well, in South Carolina, it doesn't
5 have to be. It's signed by a lawyer.

6 Judge Kimball - No, it doesn't have to be, but
7 it does have something to do with how it's
8 treated.

9 FURTHER EXAMINATION

10 BY MR. NOSAL:

11 Q Well, did you read the complaint before it was - - -

12 A I would say I scanned it.

13 Q But you didn't - - - Did you read the trust before
14 December 23rd - - -

15 A Unlike - - - Unlike the other person, I'm not a
16 lawyer.

17 Q You knew about hearsay.

18 A Excuse me?

19 Q Previously while you were testifying for Mr. Gettys -
20 - - -

21 A Well, I mean, I've learned - - -

22 Q You understood hearsay.

23 A A lot this morning. Thank you.

24 Q Okay. Well, I don't remember anybody talking about
25 hearsay. Did you read the trust prior to filing this

Hugh Dereede Cross Exam by Mr. Nosal

1 lawsuit?

2 A I scanned the trust and re-read the article that

3 dealt - - - The trust didn't really deal with me,

4 only the Section 6 did.

5 Q So that's the only section you really read?

6 A The only one that I would probably be able to

7 understand because it was actually written in

8 English.

9 Q Do you understand that - - - Well, the whole trust is

10 written in English, right?

11 A Other than the legalese for me, so - - -

12 Q Did you - - -

13 A I gave it to a lawyer.

14 Q Do you understand that a trust - - - I believe you

15 sent an email to Courtney at one time, saying that

16 this was simple. This was a simple estate.

17 A It read simple to me.

18 Q Okay. Does this look like a simple document?

19 A I don't know why you're trying to put words in my

20 mouth.

21 Q No. I'm just asking you.

22 A Yeah, it looks like a simple document.

23 Q Okay. So - - - But you only read one of the

24 provisions?

25 A Well, I was shut out of the rest, sir.

S. Alan Medlin Direct Exam by Mr. Gettys

1 contest clause. Did the trustee act in good faith?
2 I can't say that I have any reason to think the
3 trustee acted absent good faith, knowing what the
4 arguments are. I don't agree with them, but I
5 understand the arguments. I think that, in my
6 opinion, it would be difficult to say there was a
7 lack of good faith. That raises, to me, the
8 dispositive question, which is whether there was
9 probable cause. Just because there's good faith by
10 the trustee doesn't obviate Section 62-7-605, which
11 has always been an overlay under the law. Even
12 before there was a trust code, we had similar
13 provisions usually - - - usually with respect to
14 wills. But generally, we'll treat revocable trusts
15 like wills anyway, even if we didn't have a statute.
16 So the ultimate question becomes, did Mr. Dereede
17 and, if TDN falls into that same beneficiary
18 category, TDN have probable cause? Well, of course,
19 I think they had probable cause because I don't think
20 they should have had those payments and distributions
21 withheld to begin with, for the reasons of waiting
22 until the creditors' claim period has expired and for
23 the reasons that I've explained. So I think they
24 certainly have probable cause. Compounded by the
25 fact that the asset was purchased with TDN money, and

ROA-0557

S. Alan Medlin Cross Exam by Mr. Jeter

1 ascertain what is the amount that is owed. My point
2 being, is that a claim was never filed, and you - - -
3 And you read the complaint that showed where the
4 plaintiffs pled that they were a beneficiary?

5 A Well, I'm not sure I agree with that language in the
6 complaint.

7 Q That they didn't plead it, that they were a
8 beneficiary?

9 A That they were a ben - - - That TDN was a
10 beneficiary. I'm not sure I remember exactly where
11 that would be.

12 Q Okay.

13 A It talked about, if I remember what Peter said
14 earlier - - - And again, I may be missing that
15 entirely, Thomas, and you can correct me, obviously.
16 He talked about some statement about owing a duty to
17 the beneficiaries. That's not the same thing as
18 saying TDN is a beneficiary, but I may have misheard
19 that.

20 Q Okay. I'm just going to get a copy of the complaint.

21 A Yeah. Also, I don't really care what the complaint
22 said insofar as what I'm construing the trust to say.
23 I'm not saying I agree with everything in the
24 complaint.

25 Judge Kimball - I see no need to go over the

ROA-0558

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
 2 COUNTY OF YORK) C.A. NO.: 2015-CP-46-01409
 3
 4 IN RE:)
 5 DEBORAH DEREDEE LIVING TRUST,)
 6 DATED DECEMBER 18, 2013.)
 7)
 8 HUGH DEREDEE AND TYRE DEALER)
 9 NETWORK CONSULTANTS, INC.,)
 10 Plaintiffs,)
 11 vs.) TRANSCRIPT OF PROCEEDINGS
 12) York, South Carolina
 13 COURTNEY FEELEY-KARP,) August 24, 2016
 14 INDIVIDUALLY AND AS TRUSTEE) 9:34 a.m.
 15 OF THE DEBORAH DEREDEE LIVING)
 16 TRUST DATED DECEMBER 18, 2013,))
 17 AND MICHAEL FEHILY, AS A)
 18 QUALIFIED BENEFICIARY OF THE)
 19 DEBORAH DEREDEE LIVING TRUST)
 20 DATED DECEMBER 18, 2013.)
 21 Defendants.)
 22 _____)
 23 BEFORE:
 24 The Honorable S. Jackson Kimball, III, Master-In-Equity For
 25 York County

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-and-

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1 And the last issue, Your Honor, is Issue
2 22 --

3 THE COURT: Yes.

4 MS. BALLARD: -- the court erred in
5 awarding judgments against the trustee in her
6 individual capacity. And our argument is that
7 -- and I can cite you to the page. Page 25 of
8 the transcript, Mr. Gettys asked the question.

9 THE COURT: Trustee in her individual
10 capacity.

11 MS. BALLARD: Page 25, at the very bottom
12 of the page --

13 THE COURT: Of the transcript?

14 MS. BALLARD: Yes, of the transcript, Your
15 Honor. Mr. Gettys asked the question
16 beginning on Line 22. The language in this
17 trust, about the middle of the first
18 paragraph, I believe it says "all powers shall
19 be exercised only in a fiduciary capacity."
20 And the Defendant answered "Correct." Mr.
21 Gettys said, "Any dispute with that?" Her
22 answer was "No."

23 So I believe the only evidence of record
24 is that her actions were taken solely in her
25 capacity as trustee and that any judgment that

1 would be entered in this case would be only
2 against her in her capacity as trustee and not
3 against her individually.

4 THE COURT: How would you -- in the order
5 -- let me -- hang on one second. How --

6 MS. BALLARD: I just think it's not clear.
7 I have to assume --

8 THE COURT: Everything I say, if you look
9 at -- I'm looking at numbered Paragraphs 1
10 through 7 --

11 MS. BALLARD: Yes, sir.

12 THE COURT: -- in the Order, how did I --
13 two questions. One is how did I enter a
14 judgment apart from her capacity as trustee --

15 MS. BALLARD: I think it's --

16 THE COURT: -- number one. And number
17 two, a trustee is -- if you enter a judgement
18 against a trustee at all it is an individual
19 judgment, it has to be.

20 MS. BALLARD: No, sir. Our position --

21 THE COURT: It would be like if you
22 entered a judgment against the sheriff of York
23 County, it would be in his -- it would be
24 against the sheriff of York County.

25 MS. BALLARD: And not his personal

1 property. The property he owns in his
2 capacity as sheriff. And my argument here is
3 it's not clear whether you're -- the caption
4 of the case names my client as a defendant
5 both individually --

6 THE COURT: Yes.

7 MS. BALLARD: -- and in her capacity as
8 trustee.

9 THE COURT: Yes.

10 MS. BALLARD: So the way the Order is
11 written, it enters a judgement and obligates
12 the attorney's fees obligation both against
13 the trust and against her individually. And I
14 think based on Mr. Getty's questioning of her
15 it is undisputed that she was solely acting in
16 her capacity as a trustee and that neither the
17 judgment nor the attorney's fee award should
18 be entered against her individually.

19 So their remedy would be limited to the
20 trust and --

21 THE COURT: I see where you're headed.

22 MS. BALLARD: -- the trust assets.

23 THE COURT: Yeah.

24 MS. BALLARD: Trust assets, yes, Your
25 Honor. For instance, her home, her personal

1 home that she owns should not be --

2 THE COURT: I understand.

3 MS. BALLARD: -- subject to this
4 judgment. And I think that just needs to be
5 clarified that the judgment is against her
6 solely in her capacity as trustee based on the
7 testimony. There's no testimony in this
8 record that suggests that she was acting in a
9 personal --

10 THE COURT: Do you have any --

11 MS. BALLARD: -- capacity.

12 THE COURT: Do you have any cases about
13 that? I frankly never have considered it.

14 MS. BALLARD: No, sir. I simply went by
15 the way it was captioned and the way the award
16 was written. The award does not specify that
17 it's only against her in her trustee capacity
18 and therefore out of an abundance of caution I
19 have to read as having been entered against
20 her in both capacities.

21 THE COURT: But what -- look at this one.
22 For example, look at the second paragraph on
23 Page 7 -- numbered Paragraph 2 on Page 7.

24 MS. BALLARD: Of your Order?

25 THE COURT: Yes, ma'am.

1 MS. BALLARD: Okay.

2 THE COURT: The trustee breached her
3 fiduciary duty as trustee by failing to
4 distribute \$250,000 to TDN and so on. You
5 can't enter a judgment against a trust only
6 where there's a breach of fiduciary duty, you
7 can only enter a judgment against the
8 fiduciary.

9 MS. BALLARD: And that's my point. I'd
10 like the Order to be very clear that this
11 judgment is not entered against her in her
12 individual --

13 THE COURT: How would that --

14 MS. BALLARD: -- capacity.

15 THE COURT: -- my point is that the
16 fiduciary is the judgment debtor. She,
17 herself, personally.

18 MS. BALLARD: And I think the Order needs
19 to make clear that she in her individual
20 capacity does not have a judgment entered
21 against her.

22 THE COURT: How -- well I -- let me hear
23 from them about that.

24 MS. BALLARD: Okay.

25 THE COURT: Anything else?

1 MS. BALLARD: No. Thank you, Your Honor.

2 THE COURT: I see what you're saying.

3 What do you have to say about that?

4 MR. BALLOU: Judge, I thought your Order
5 was pretty clear. I guess the question is
6 whether or not the caption of the case creates
7 a separate liability from her liability acting
8 as trustee?

9 THE COURT: Well, but --

10 MR. BALLOU: Because if there is liability
11 -- is personal liability, excuse me, as
12 trustee as fiduciary, then the Order stands as
13 it is written.

14 THE COURT: Well, nobody -- once again, I
15 think, Ms. Ballard, that's something that has
16 never been raised until right now.

17 MS. BALLARD: Well, the judgment wasn't
18 entered until the Order was entered.

19 THE COURT: Well, -- but we have a caption
20 that says individually and as trustee.

21 MS. BALLARD: I'm trying to remember what
22 the answer said. I'm looking.

23 THE COURT: You're correct about the
24 testimony. But my point is this, how else --
25 let's just say that the -- as you said earlier

1 on that there were insufficient assets to pay
2 all the creditors in the trust. I'm trying to
3 think of an example.

4 I guess what I'm trying to say is this,
5 if for some reason the net assets of the trust
6 were not sufficient to pay the entire amount
7 due -- we'll just say TDN; we talked about it
8 -- and as a result the trust assets were
9 exhausted by that payment. The only way one
10 could enforce a judgment against the trustee
11 for a breach of fiduciary duty would be
12 against the trustee's individual assets.

13 MS. BALLARD: That's my point. I believe
14 their judgment is limited to assets of the
15 trust.

16 THE COURT: And what I'm saying is suppose
17 there weren't sufficient assets -- see this
18 dispute is not over the trustee engaging in
19 some nefarious act to steal money from the
20 trust or -- in other words, the trustee
21 herself has not depleted the assets of the
22 trust, whatever was there, was there.

23 The basis of this claim is that she
24 didn't pay out the money in time, that's
25 shorthand, in time, and has not to this day, I

1 don't think.

2 MS. BALLARD: No, sir.

3 THE COURT: So this action was simply to
4 -- was couched in terms of an action to -- as
5 a declaratory judgment and that's the way I
6 treated it. There would be no way to enforce
7 the judgment against a fiduciary who breached
8 their fiduciary duty except to -- in other
9 words, you could be letting a trustee who
10 breached their fiduciary duty off the hook --

11 MS. BALLARD: You get judgments.

12 THE COURT: -- because you could only
13 bring it against the -- collect from the
14 assets of the trust --

15 MS. BALLARD: And that's my point, Your
16 Honor.

17 THE COURT: -- that seems to me to be --
18 well, that doesn't make any sense.

19 MS. BALLARD: Well, you get judgments
20 against insolvent corporations all the time.

21 THE COURT: Well, of course, you do.

22 MS. BALLARD: And you can't, without
23 piercing the corporate veil, you cannot
24 attempt to recover your judgment against that
25 corporation from the personal assets of the

1 corporate officials.

2 THE COURT: But when you -- no, let's just
3 talk about the corporate assets, the corporate
4 officer.

5 MS. BALLARD: Okay.

6 THE COURT: If that corporate officer is a
7 managing member of the LLC -- if that managing
8 member violated their fiduciary duty to the
9 other members, you get a judgment against the
10 managing -- that individual for breach of
11 fiduciary duty.

12 MS. BALLARD: My recollection of the
13 complaint, and I'm trying to find it in the
14 complaint, is that the prayer was against her
15 in her capacity as trustee or from her share
16 of the distribution of the trust assets. It
17 was not a request to enter judgment against
18 her individually.

19 THE COURT: No, but the linchpin is, if
20 you want to call it this, the punishment of
21 the fiduciary for breaching their fiduciary
22 duty whether that -- you don't have a claim of
23 breach of fiduciary duty against the trust or
24 in your example against the corporation. You
25 have a claim of breach of fiduciary duty

1 against the trustee or the officer of the
2 corporation who breached their fiduciary duty.

3 MS. BALLARD: But it's limited -- the
4 collection of that would be limited to the
5 assets of the corporation.

6 THE COURT: I don't think so.

7 MS. BALLARD: And that's the question I'm
8 raising.

9 THE COURT: Okay. Let's hear --

10 MS. BALLARD: I believe the complaint --
11 I'm trying to find the language in the
12 complaint where they specifically said that
13 they wanted the damages awarded, paid by the
14 trust or from her distributor share of the
15 trust --

16 THE COURT: Uh-huh.

17 MS. BALLARD: -- not against her
18 individually. And because she's named
19 individually in the caption, I think the
20 distinction has to be made.

21 THE COURT: Well, your point is taken.

22 MS. BALLARD: Thank you, Your Honor.

23 THE COURT: I know no other way to deal
24 with a fiduciary.

25 MS. BALLARD: I appreciate it.

1 THE COURT: We'll see.

2 MS. BALLARD: Thank you very much, Your

3 Honor.

4 THE COURT: Anything else?

5 MR. BALLOU: We simply -- I don't believe

6 this issue had been raised prior to this 59E

7 --

8 THE COURT: I think that's true.

9 MR. BALLOU: -- so --

10 THE COURT: But she's saying it couldn't

11 be until the judgment was entered. I still

12 think it had to --

13 MR. BALLOU: The caption was standing.

14 THE COURT: -- that would be the subject

15 of some kind of a motion or something, but I

16 --

17 MR. BALLOU: That's --

18 THE COURT: In any event, I rule that the

19 judgment is against the assets of the

20 fiduciary for breach of fiduciary duty.

21 MS. BALLARD: Her personal assets?

22 THE COURT: Yes, ma'am.

23 MS. BALLARD: Okay.

24 THE COURT: Anything else?

25 MS. BALLARD: Nothing from the Defendant,

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

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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. THE TRIAL COURT ERRED IN EXERCISING SUBJECT MATTER JURISDICTION IN THIS MATTER, WHEN THE TERMS OF THE TRUST AGREEMENT CLEARLY PROVIDE FOR DISPUTES TO BE DECIDED BY A TRUST PROTECTOR. IN THE ALTERNATIVE, THE COURT SHOULD HAVE DECLINED TO EXERCISE SUBJECT MATTER JURISDICTION IN LIGHT OF THE SETTLOR'S CLEAR INTENT, AS EXPRESSED IN THE TRUST AGREEMENT, THAT DISPUTES REGARDING HER TRUST BE ADJUDICATED OUT OF COURT UNLESS THE TRUST PROTECTOR DETERMINED OTHERWISE.
- II. THE TRIAL JUDGE ERRED IN FAILING TO GRANT SUMMARY JUDGMENT IN FAVOR OF THE TRUSTEE WHEN THE FACTS WERE STIPULATED AND THE TRUST PROTECTOR HAD VALIDATED THE DECISIONS OF THE TRUSTEE. AS A RESULT, THE TRUSTEE WAS ENTITLED TO JUDGMENT IN HER FAVOR ON LIABILITY AND THE NO CONTEST CLAUSE.
- III. THE TRIAL COURT ERRED IN DETERMINING THAT THE TRUSTEE'S OBLIGATIONS REGARDING DISTRIBUTION TO HUGH AND HIS COMPANY WERE CLEAR FROM THE LANGUAGE OF THE TRUST AGREEMENT, BECAUSE THE TRUST AGREEMENT WAS AMBIGUOUS IN MULTIPLE RESPECTS. AS A RESULT, THE TRIAL JUDGE SHOULD HAVE DEFERRED TO THE OPINION OF THE TRUST PROTECTOR THAT APPELLANT HAD ACTED APPROPRIATELY.
- IV. THE TRIAL COURT ERRED IN DETERMINING THAT HUGH'S COMPANY WAS BOTH A BENEFICIARY AND A CREDITOR AND THAT APPELLANT HAD VIOLATED HER FIDUCIARY DUTY WITH RESPECT TO THE CORPORATION. THE TRIAL COURT ERRED IN FAILING TO CONCLUDE THAT RESPONDENTS VIOLATED THE "NO CONTEST" PROVISION OF THE TRUST AGREEMENT AND IN DETERMINING RESPONDENTS HAD PROBABLE CAUSE TO BRING THIS ACTION.
- V. THE TRIAL COURT ERRED IN ENTERING JUDGMENT AGAINST APPELLANT IN HER INDIVIDUAL CAPACITY, BECAUSE THE EVIDENCE REFLECTED THAT SHE ACTED ONLY IN HER REPRESENTATIVE CAPACITY FOR ALL MATTERS RELEVANT TO THIS MATTER.
- VI. THE TRIAL COURT ERRED IN AWARDING ATTORNEY FEES AND COSTS TO RESPONDENTS.

STATEMENT OF THE CASE

This is an appeal from two orders of the circuit court in a matter which originated in probate court. Appellant Courtney Feeley-Karp (hereafter "Courtney") is the adult daughter of the decedent, Deborah Dereede (hereafter "decedent" or "Courtney's/her mother"). By designation of the decedent, Courtney serves both as personal representative of her mother's estate and successor trustee of the decedent's trust (decedent serving as the initial trustee during her lifetime). Respondent Hugh Dereede (hereafter "Hugh") had been the decedent's husband since 2010 ¹. Respondent Tyre Dealer Network Consultants Inc. (hereafter "Hugh's company") is, on information and belief, a Canadian company owned or controlled by Hugh.

Hugh and his company filed suit against Courtney four months after her mother's death, asserting that Courtney had breached her fiduciary duty to him and his company by failing to make a priority distribution to him from the trust immediately after the sale of real property owned by the Trust, notwithstanding Courtney's other obligations under the trust agreement and notwithstanding financial obligations of the estate which had to be paid from the trust and the mandatory claims period for the estate. In essence, he claimed the distribution to his company and to himself had to be made regardless of any other obligations of the trust or estate debts.

Courtney moved for judgment on the pleadings and for summary judgment, both of which were denied. Following a nonjury trial, the Circuit Court found Courtney had breached her fiduciary duty to Hugh and his company, and awarded damages and attorney's fees to both (not

¹ Decedent also had an adult son, Michael Fehily, who was named as a defendant but has not participated in this action.

distinguishing between the two). On reconsideration, the circuit court clarified that Courtney was liable to Hugh and his corporation both individually and in her capacity as Trustee. This appeal followed.

STATEMENT OF FACTS²

Decedent executed a revocable trust agreement on December 18, 2013, while she was married to Hugh, but after she began treatment for the cancer that would take her life. (R. pp. 506-507 ¶¶ 6-8). On the same day she created the trust, Decedent transferred a residence in York County, South Carolina into the trust, which was recorded at Book 13883, Page 240³. At the time of her death, decedent owned two (2) other homes, not in South Carolina, neither of which had been put in the trust. (R. p. 244, lines 6-23).

Decedent died on August 15, 2014. (R. p. 508, ¶ 24). Pursuant to decedent's directives, her daughter Courtney was appointed as personal representative and assumed the duties of Trustee of her mother's now-irrevocable trust. (R. p. 508, ¶¶ 28 & 29).

The estate had liquid no assets, not even enough to pay for the decedent's funeral. (R. pp. 510-512, ¶¶ 43 & 56; R. p. 256, lines 12-17). The estate had significant debts and expenses, and one of decedent's three houses (in Arizona, which had two mortgages on it) was in pre-foreclosure. (R. p. 256, line 12 – p. 257, line 13). "There were costs associated with the estate, including the maintenance of three houses, the preparing for the sale of the other two houses, among other things." (R. p. 256, lines 14-17; R. p. 260, lines 6-9; lines 19-23).

As PR, Courtney prevented the house in Arizona from going into foreclosure so she could maximize its value for the estate. (R. p. 258, lines 4-12). There were medical bills associated with the decedent's continuing treatment for breast cancer leading up to her death. (R. p. 258, lines 15-16; R. p. 259, line 20 – p. 260, line 8). There was credit card debt. (R. p. 258, lines 15-22).

² This Statement of Facts includes a recitation of all facts relevant to the multiple issues raised on appeal.

³ The deed is not designated for inclusion in the record as its status as a trust asset is not disputed.

Courtney, who is a practicing lawyer in Massachusetts, construed South Carolina law to require the Trust to pay any debts of the estate before making any trust distributions. (R. p. 250, lines 2-9; R. pp. 509-511, ¶¶ 32, 33, 35 - 38, 45). She familiarized herself with the requirements of South Carolina law to properly administer the trust and estate. (R. p. 250, lines 5-11).⁴ The estate was complex, since the decedent had owned real property in three states, and Courtney recalled her mother being in litigation some years prior as a result of the closure of a business. (R. p. 510, ¶ 39). Because the estate could not do so, Courtney and her husband paid for her mother's funeral expenses. (R. p. 511, ¶ 50; R. p. 262, lines 7-14).

Courtney's life was complicated at this time not only by her mother's death and her new responsibilities as personal representative and trustee. Shortly before her mother died⁵, Courtney gave birth to a child, who was born at 26 weeks' gestation, weighing one pound and six ounces. Lucy was still in the neonatal intensive care unit when Courtney's mother died and Courtney became the personal representative and trustee. (R. p. 507, ¶¶ 13-15; R. p. 311, lines 1-8). She was also returning to work. *Id.* (lines 8-12).

The trust agreement had conflicting terms but Courtney attempted to balance the provisions and act appropriately. (R. pp. 509-510, ¶¶ 32, 33, 35-38), Courtney interpreted Section 1 of the trust as a testamentary power of appointment where the settlor had reserved the right to make other gifts, other trusts, or otherwise provide for disposition of her property during her lifetime and she was required to allow the estate creditor period to expire before she made any distributions from

⁴ The trial judge interrupted Courtney's answer but the content reflects that Courtney did, in fact, consult South Carolina law. *Id.* She later confirmed that she had educated herself on South Carolina trust law. (R. p. 296, line 25 - p. 297, line 5).

⁵ Decedent died on August 15, 2014. Courtney's baby, Louisa Catherine Karp ("Lucy") was born on June 16, 2014. (R. p. 303, lines 9-15; R. p. 311, lines 3-8).

the trust. (R. p. 302, lines 11–18). She believed her decision was mandated by the trust agreement. (R. p. 303, line 21 – p.304, line 1). She also interpreted the trust to require that all trust beneficiaries were subject to the six-month requirement of the trust, *i.e.*, required to respect the instruction set forth in the trust to wait six months before distribution. (R. p. 304, lines 2–10). She was certain that if she paid money to Hugh before the six-month period passed and a contingency arose which required payment of estate debts or devise by subsequent will, Hugh would not have returned any money to the trust. (R. p. 304, lines 6-10).

Courtney obtained a purchaser and scheduled a closing to occur in December 2014, only four (4) months after her mother's death. (R. p. 511, ¶¶ 51 & 52). Through his counsel, Hugh contacted the closing attorney and directed that \$250,000.00 of the sales proceeds be paid to his company per the trust and Hugh wanted his half of the net sales proceeds. *Id.* At Para. 53.

Courtney explained to Hugh that she could not make any trust distributions until all of the estate creditors were identified and satisfied. *Id.* At 54-56. Courtney consulted with counsel and confirmed that her reading of the trust documents prevented her from making any distributions from the trust at that time. *Id.* At 57 & 58. (R. pp. 515-516, ¶ 5). The trust's counsel (in Arizona, who was representing the trust and estate in dealing with the probate issues in Arizona), communicated with Hugh's counsel, who "acknowledged that he would advise his client similarly if he were in my position." *Id.*

The closing for the sale of the house occurred on December 19, 2014, a Friday. (R. p. 306, lines 11–13). Proceeds were transferred to the trust's bank account the following Monday, December 22, 2014. (R. p. 512, ¶¶ 61-63; R. p. 304, lines 14-18). Hugh demanded a total payment of almost \$300,000.00 that day. (R. p. 501; R. p. 502; R. pp. 511-512 ¶¶ 53, 64).

Courtney contacted her Arizona attorney to please communicate with Hugh's attorney since Courtney and her husband wanted to be in Boston where their daughter remained in NICU. (R. p. 512, ¶ 66). Hugh and his company filed suit against Courtney, individually and as Trustee, the day after the sales proceeds were released to Courtney. (R. p. 502; R. pp. 39-133; R. p. 306, lines 16-20). Courtney removed the case to circuit court. (R. pp. 134-138).

Courtney's motion for judgment on the pleadings was denied, with Judge Kimball concluding the pleadings raised "an issue of fact" and that he required "clarification of the facts and circumstances affecting the legal issues presented." (R. pp. 4-5).

Courtney and Hugh triggered the provision of the trust to appoint a "trust protector" whose responsibility under the trust agreement, *inter alia*, was to resolve disputes regarding the trust. Catherine Kennedy, Esquire, was appointed as Trust Protector in October 2015. (R. pp. 206-210). The parties stipulated to the facts to be considered by Ms. Kennedy. (R. p. 196).

Ms. Kennedy issued a report in January 2016 based on the stipulated facts. In her report, Ms. Kennedy concluded that "the trustee would have been foolish, if not in breach of her fiduciary duties, to immediately distribute the net proceeds received from the sale" of the real estate as Hugh demanded. (R. pp. 522-528). The record now reflected the "clarification of the facts and circumstances affecting the legal issues presented" that Judge Kimball required before ruling on the legal issues presented. (R. pp. 4-5). The issues were therefore ripe for summary judgment based on the stipulated facts.

With the factual issues resolved, Courtney moved for summary judgment⁶, providing a

⁶ The motion that was actually heard was the Second Amended Motion for Summary Judgment. (R. pp. 188-210). The affidavits of Courtney and Mr. Ribadeneira were attached to the original Motion for Summary Judgment, as was

recitation of the undisputed facts, and the report of the trust protector, whose decisions were binding on the parties. (R. pp. 188-205; R. pp. 506-514; R. pp. 515-516; R. p. 421). The trust agreement provided that the “[t]rustee will not be 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). Since the Trust Protector had validated Courtney’s concerns, the trust required that Courtney be found “not liable for any act or omission” because her actions had been approved, albeit after the fact, by the trust protector.

Judge Kimball denied summary judgment, even though the facts were stipulated, and the Trust Protector had validated Courtney’s handling of the trust assets (and her refusal to make a priority distribution to Hugh). (R. pp. 6-7). In denying the motion, Judge Kimball again ruled that “it would be inappropriate to end the case at this juncture. . . without further clarification of the facts affecting the legal issues presented.” *Id.* That was the same standard he had relied upon to denying judgment on the pleadings. (R. pp. 4-5). While stating that the non-moving party needed only submit “a mere scintilla of evidence” to withstand summary judgment, Judge Kimball did not identify any facts that were in dispute. (R. pp. 6-7).

Judge Kimball tried the case nonjury on April 19, 2016. While multiple witnesses testified, no new facts were introduced into the record⁷. Nonetheless, Judge Kimball issued an order finding

the report of the Trust Protector and the stipulated facts. (R. pp. 152-179).

⁷ Hugh presented trial testimony of Professor Alan Medlin, who Judge Kimball recognized as an expert, but qualified the recognition by saying “I’m not going to say he’s an expert in his interpretation.” (R. p. 343, lines 1-9). As he had in his earlier affidavit in opposition to Summary Judgment, Professor Medlin opined that the settlor intended Hugh and his company to be treated with priority. (R. p. 345, lines 2 – 12; R. p. 346, line 20 – p. 347, line 6; R. p. 351 lines 19-21). He had also opined as much at the summary judgment stage. (R. p. 518, ¶ 4). However, Professor Medlin also concluded in his affidavit and testimony that he could understand how Courtney came to the conclusion that she did. *Id.* at Paragraph 8; R. p. 557, lines 4-5 (“I don’t agree with them, but I understand them.”) His opinion was that Courtney could have the trust distribution to Hugh, not that she was required to. (R. p. 519, ¶8). Professor Medlin,

in favor of Hugh and his company, concluding that Courtney had breached her fiduciary duty to both of them (even though the company was also determined to be a creditor) by not immediately distributing the demanded amount of funds to them following the sale. (R. pp. 10-19).

Judge Kimball found that the trust agreement required Hugh and his company to be treated with priority over any estate creditors, or other estate or trust beneficiaries, notwithstanding Courtney's other obligations under the trust agreement and/or the estate. *Id.* Judge Kimball also concluded that Hugh and his company had probable cause to file this suit against Courtney and they were therefore not barred by the "no-contest" from recovering from the trust. Upon motion for reconsideration by Courtney, the trial judge affirmed his order in total, clarified that his order had intended to adjudicate Courtney liable *personally* as well as trustee and that the judgment was entered against her in both capacities. (R. pp. 20-27).

Judge Kimball suggested during trial that he had drawn conclusions prior to actually hearing the case, which is logical under these circumstances because the facts were stipulated and trial testimony really added nothing useful to the record. By way of example of what may have been pre-determined decisions, the following sample is provided:

- "... I believe the agreement does require that she sell the property to pay the note." (R. p. 231, lines 8-9)
- "It's clear that the plaintiff loses his interest, whatever it may be." (R. p. 253, lines 20-21) (discussing the no-contest clause)
- "Look it's apparent from the documents who that is. . . We don't need to ask that. I know who profits. It's not a profit, as a matter of fact. It's just . . . increasing what they get the benefits." Q: (directed at witness) "Who benefits from the forfeiture?" Judge: "Well, the other people." (R. p. 256, lines 5-13)
- "You already testified you didn't know what her intent was." (R. p. 285, line 25 – p. 286, line 1).

drew a different conclusion than did Ms. Kennedy, but he did not find fault with how Courtney had proceeded.

- “Look, the documents are what they are. She’s alleged it’s a mistake. There’s no evidence that it was a mistake.” (R. p. 287, lines 10-12) (during the first witnesses’ examination)
- “It doesn’t matter whether she thinks it’s fair or not.” (R. p. 293, line 25 – p. 294, line 1) (discussing Courtney’s good faith)
- “It doesn’t matter whether she believes it or not. . . It doesn’t matter what she believes she ought to do, if the statutes tell her what she must do. I am not going to hear testimony about it.” (R. p. 297, lines 14-21).
- “[The trust]. . it’s pretty specific about paying those items. I’m not going to call them a debt or a claim or whatever. Paying those items. . . the amount of money is to be paid is clearly defined in that article. So what happened?”. (R. p. 312, lines 10–19).
- “Did you think you had a duty to protect the specific amounts that are mentioned in here? Witness: Yes. I think my – my intent was to ascertain all the known debts all.. Judge: That isn’t what this days. . . It just directs a payment in a specific amount as soon as practicable after my death.” (R. p. 314, lines 9-19)

ARGUMENT

Standard of Review

[S]ubject matter jurisdiction is a question of law for the court." *Doe v. Barnwell Sch. Dist.* 45, 369 S.C. 659 (S.C. Ct. App. 2006) *citing* *Murphy v. Owens-Corning Fiberglas Corp.*, 346 S.C. 37, 43, 550 S.E.2d 589, 592 (Ct. App. 2001), *overruled on other grounds by* *Farmer v. Monsanto Corp.*, 353 S.C. 553, 579 S.E.2d 325 (2003). “Questions of law may be decided with no particular deference to the trial court.” *Id. citing* *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000).

As to the questions relating to breach of fiduciary duty and the no-contest clause, the standard of review will depend on whether the action sounds in law or in equity. If the essential nature of the cause of action is legal, the action to be taken by the circuit court is controlled by its determination of whether or not there is any evidence to support the factual findings of the court below. *NationsBank of South Carolina v. Greenwood*, 321 S.C. 386 (Ct. App. 1996), *citing* *Dean v. Kilgore*, 313 S.C. 257, 437 S.E.2d 154 (Ct. App. 1993). In an action at law, on appeal of a case

tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. *Id. citing Townes Assoc., Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). Accordingly, the standard of review in a case sounding in law is whether there is any evidence which reasonably supports the circuit court's findings.

Construction of the trust instrument is a question of law. *Germann v. New York Life Ins. Co.*, 286 S.C. 34 (Ct. App. 1985). An action for breach of fiduciary duty is an action at law and the trial judge's findings of fact will be upheld unless without evidentiary support" (although here the facts were stipulated). *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579 (Ct. App. 2000) citing *Corley v. Ott*, 326 S.C. 89, 485 S.E.2d 97 (1997).; *Future Group, II v. Nationsbank*, 324 S.C. 89, 478 S.E.2d 45 (1996).

"In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. The rule is the same whether the judge's findings are made with or without, a reference. The judge's findings are equivalent to a jury's findings in a law action. *Chapman v. Allstate Ins. Co.*, 263 S.C. 565, 211 S.E.2d 876 (1974)." *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579 (Ct. App. 2000) citing *Townes Assocs. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). Again, however, the facts were stipulated prior to the summary judgment hearing.

ISSUE ONE

The trial court erred in exercising subject matter jurisdiction in this matter, when the terms of the trust agreement clearly provide for disputes to be decided by a Trust Protector. In the alternative, the court should have declined to exercise subject matter jurisdiction in light of the settlor's clear intent, as expressed in the trust agreement, that disputes regarding her trust be adjudicated out of court unless the Trust Protector determined otherwise.

Among other things, the 83-page trust agreement provided in Article 1, Section 8 for appointment of a "Trust Protector" with broad powers, among which is an express delegation of authority to "unilaterally resolve any dispute, claim or conflict between beneficiaries, . . . between a beneficiary and a trustee . . . Such resolution shall be binding on all parties to my Trust and shall not be subject to review." (R. p. 421). More importantly:

No one may file or instigate a claim in a court of law without first submitting the claim to the Trust Protector for resolution together with submitting information and a detailed supporting memorandum of law.

Id. The Trust Protector was vested with what appears to be exclusive authority to adjudicate any disputes between the trustee and beneficiaries, and only when the Trust Protector decides that a lawsuit is necessary regarding the "dispute, conflict or claim involve[ing] an interpretation or construction of my Trust Agreement" may an action be filed in court of competent jurisdiction.

Id. Similar to a party who requires an arbitration provision in an agreement, the decedent didn't want her financial affairs litigated in the public eye. Professor Medlin agreed that the Trust Protector's authority would include authority to decide "any of these claims." (R. p. 375, lines 19-23).

South Carolina recognized the concept of a Trust Protector for the first time in 2014 with the adoption of S.C. Code Ann. Sections 62-7-103(27) and 62-7-818. There is no known South Carolina jurisprudence discussing the concept. The concept has received much criticism nationally, suggesting that the role merely complicates the administration of a trust. *Bowe, The Case Against the Trust Protector*, 37 *Aztec Law Journal* 77⁸.

⁸ The article cites to earlier articles that point out the confusion caused by the use of Trust Protectors. Alexander, *Who Will Watch the Watchmen?*, 27 *Cardozo L. Rev.* 2807 (2006); Ausness, *The Role of Trust Protectors in American*

South Carolina law does not expressly grant the Trust Protector the authority to adjudicate disputes arising from the trust or to authorize suits to be brought. S.C. Code Ann. Section 62-7-818. However, the statutory terms are subservient to the governing instrument itself. *Id.* Thus, the inclusion in this particular trust agreement of the adjudicatory and gatekeeper roles for the trust protector in this case is especially unique. Here is a settlor who granted the trust protector with unparalleled authority solely to keep her private affairs away from public litigation unless an independent third party determined there was no other choice.

Hugh never even asked for a trust protector. Hugh's counsel thought Courtney's only option, in light of those conflicts, was to resign. (R. p. 255, line 16 – p. 256, line 2). Professor Medlin referred to certain provisions of the trust as a "maze." (R. p. 365, line 14; R. p. 367, lines 12-13). Ms. Kennedy agreed. (R. p. 405, line 17). Thus, the trust agreement was impossible to implement as written⁹.

Of course, if Courtney had resigned, Hugh would have become the successor trustee (R. p. 416). He would have been subject to the same terms. (R. p. 417). By his argument, Hugh is apparently asserting he would have ignored the conflicts, and give himself priority to the detriment

Trust Law, 45 Real Prop. Est. & Tr. J. 319 (2010); Sterk, *Trust Protectors, Agency Costs and Fiduciary Duty*, 27 Cardozo L. Rev. 276 (2006).

⁹ Hugh's position, as adopted by the trial judge, would enable a property owner to isolate her property from her personal debts, even pre-existing debts, by requiring a priority distribution of trust assets to a specified trust beneficiary to the detriment of estate creditors, and to other beneficiaries. Courtney questions whether such a structure would even be legal, insofar as the estate creditors would be prejudiced by the priority trust distribution to Hugh. Query, under Hugh's and the Judge's interpretation of the trust, what would have been Courtney's obligation if the South Carolina property had sold for less than the mortgage and costs of sale? Obviously, other trust assets would have been swallowed up by the shortage. However, there were no other trust assets.

of the other beneficiaries. Professor Medlin did not address this conundrum, and he “understood” how Courtney had exercised the caution that she exercised. (R. p. 519, ¶8; R. p. 351, lines 7-10).

The real property in the trust was for sale when the decedent died. (R. p. 332, lines 5-6). Courtney was required by the trust to sell the real property. (R. p. 230, lines 1 – 11). She kept the existing listing and signed a contract to sell the real property within a few months of the decedent’s death. (R. pp. 496-500).

A portion of Article Six of the trust provides that

As soon as practicable¹⁰ following my death, my Trustee shall sell [the South Carolina house]. The sales proceeds shall be used to first to pay off any mortgage against the property, and second to pay off that certain promissory note given to me by [Hugh’s company] . . . after payoff of said mortgage [on the South Carolina house owned by the trust] and said note, my trustee shall . . . distribute one-half of the remaining net proceeds to Hugh Dereede, outright and free of trust.”

(R. p. 432, Section 4(a).) Hugh took the position that this distribution to him was required to be done as soon as the sale closed, notwithstanding the debts of the estate (which would have to be paid from the trust if the probate estate was insufficient) or the trustee’s other obligations under the trust. (Complaint).

Courtney, who is a licensed attorney in Massachusetts, believed the provision of the trust upon which Hugh was relying conflicted with other provisions of the trust, and she attempted to apply the “as soon as practicable” language with her other obligations as trustee. The trust did not require any immediate distributions, so discretion was required. (R. p. 256, line 12 – p. 257, line 13). There was other real estate in the estate, some of which had mortgages and required repairs,

¹⁰ The Trust Protector pointed out that “as soon as practicable after my death” does not equate to “immediately.” (R. p. 527). Professor Medlin agreed. (R. p. 345, lines 7-12).

and Courtney felt she had to address the debts of the estate before she could make any trust distributions. (R. p. 230, line 1 – p. 287, line 6; R. p. 289, line 4 – p. 290, line 14; R. p. 292, line 2 – p. 293, line 6; R. p. 296, line 25 – p. 297, line 10; R. p. 301, line 25 – p. 302, line 3; R. p. 303, line 19 – p. 306, line 20; R. p. 307, line 1 – p. 308, line 24; R. p. 309, line 18 – p. 311, line 16; R. p. 316, line 15 – p. 317, line 18; R. p. 133).

Courtney repeatedly explained her concerns to Hugh, but instead of listening, he filed suit against her the day after the sales proceeds from the sale of the house were released. (R. p. 502). No Trust Protector had been appointed when suit was filed, but within a few months, the parties (through counsel) agreed to appoint attorney Catherine Kennedy as trust protector. (R. pp. 34-38; R. p. 307, lines 8 – 22; R. p. 379, lines 13-19).

On three occasions, Professor Medlin called the trust a “maze.” (R. p. 359, line 8; R. p. 365, line 14; R. p. 367, lines 12-14). Ms. Kennedy was also critical of the trust and even pointed out that she would not have drafted it the way it was written. (R. p. 379, lines 6-10). Ms. Kennedy agreed with Professor Medlin that the trust was a “maze.” (R. p. 405, line 17). Upon her appointment, Ms. Kennedy reviewed trust agreement and applicable law, and undertook her duty, pursuant to the trust agreement, to advise Courtney (as trustee) as to “what I thought she should do in this circumstance.” (R. p. 379, line 20 – p. 380, line 8). Ms. Kennedy concluded that Courtney had acted in good faith in carrying out her duties as trustee, including not making a priority distribution to Hugh or his company prior to addressing other claims of the estate and trust. (R. p. 380, lines 17-19; R. p. 382, line 1 – p. 384, line 5). Ms. Kennedy specifically opined that the provisions of S.C. Code Ann. 62-7-505 supported Courtney’s decision not to immediately

distribute to Hugh, because the trust may be secondarily liable for creditors' claims if the probate estate is insufficient to satisfy the estate debts. (R. p. 384, line 6- p. 386, line 7).

Ms. Kennedy also opined that, when Hugh decided he may have had a claim against the trust, he should have complied with the provisions of the trust and request the appointment of a trust protector prior to filing suit. (R. p. 393, line 20-p.394, line 13). She would have recommended that a client in that situation try to work with the other trustee to appoint a trust protector, but "the trust protector can grant authority for somebody to bring a contest." *Id.* (Lines 17-25).

There appears to be little authority on the question of subject-matter jurisdiction of a court when the trust provides for a trust protector to decide conflicts or otherwise carry out the settlor's intent. On one case, however, the appellate court said that the settlor, by including a provision in the trust for a trust protector to resolve disputes the settlor expressed his intent that "where his trust was ambiguous or imperfectly drafted, the use of a trust protector would be [the settlor's] preferred method of resolving those issues."¹¹ *Minassian v. Rachins*, 152 So.3d 719, 727 (Fla. App. 2014). While the case did not focus on subject matter jurisdiction¹², the court did conclude that the settlor's intent was that the trust protector be used as "preferred method of resolving issues", then "[r]emoving that authority from the trust protector and assigning it to a court violates the intent of the settlor." *Id.*

¹¹ Under the facts, it is clear that the trust protector in the Florida case was appointed after the litigation between the parties had begun. *Minassian*, 152 So.3d at 720.

¹² In a footnote, the appellate court said that it had limited jurisdiction to decide whether the amendments to the trust made by the trust protector were valid and was "the only issue for which this court has jurisdiction at this time." *Id.* (Footnote 1).

Having determined the trust protector in that case had authority to make amendments to the trust to effectuate the intent of the settlor, the case was remanded “with directions that the trust protector’s amendments are valid.” The effect of the court’s decision was to effectively conclude the litigation among the parties, since the trust protector’s amendments to the trust, made after litigation began, clarified the issues about which there was confusion and allowed the matter to be concluded.

In this case, the settlor clearly indicated her desire that “all” disputes were to be resolved by the trust protector. (R. pp. 421, Section 8(h).) The settlor said that the trust protector’s function, *inter alia*, was to “protect the financial recourses controlled and governed by my Trust. . .” *Id.* That seems to be a clear indication that the settlor intended that her personal affairs not be subjected to lengthy, expensive litigation and instead that any disputes be resolved by the trust protector, whose decision was “binding on all parties to my Trust and shall not be subject to review.” *Id.* Section 8(h). This conclusion is amplified by the inclusion of the “no-contest” provision in the trust. (R. p. 487).

In fact, the trust agreement vests the trust protector with such wide-spread and all-encompassing authority to resolve disputes, that the trust provides that “[n]o one may file or instigate a claim in a court of law without first submitting the claim to the Trust Protector. . .” who can decide the dispute herself, “submit the claim or dispute for mediation and/or binding arbitration.” *Id.* Only after the trust protector has exhausted the procedures spelled out in the trust for resolution of disputes may the trust protector then “give any claimant the authority to file and maintain an action in a court of law.” *Id.*

While much of the trust agreement in this case is ambiguous and the provisions give conflicting directions to the Trustee, one thing is clear: the settlor did not want her personal affairs submitted to a court. She built in a specific, detailed dispute resolution process for any dispute about the Trust which was required to be employed by anyone claiming funds from the trust. The trust agreement authorized the Trust Protector (not the beneficiary) to bring suit “in a court of competent jurisdiction for the interpretation and construction of such Trust Agreement, or the Trust Protector may instruct my Trustee to do so.” *Id.* The no-contest provision still applies even if the Trust protector grants authority for a suit to be brought. *Id.*

Indeed, the Trust Protector herself suggested the determination of rights under the trust would have been hers to decide, had the suit not been brought without a trust protector in place. After determining that Courtney, as trustee, would have been “foolish” to accede to Hugh’s demands, Ms. Kennedy said she would not have granted Hugh the right to file this lawsuit in December 2014, had she been the trust protector before suit was filed. (R. p. 528). However, since the suit had been brought, Ms. Kennedy determined that she must leave the issues of good faith and probable cause to bring the case to the court. *Id.*

That is precisely what the decedent did not want. By ignoring the provisions of the trust requiring a dispute to be submitted to a trust protector, Hugh, in effect, eviscerated the intent of the decedent by usurping the trust protector’s authority and transferring it to the court. This is contrary to the express intent of the decedent, who wanted disputes about her trust decided out of court, by the trust protector. Because the trust protector was appointed after the lawsuit was initiated, she felt she could not adjudicate issues between the parties.

Hugh completely ignored the provisions of the trust agreement that required the appointment of a trust protector to address disputes about the trust. Hugh violated the trust provisions filing suit. No court had jurisdiction to decide the issues presented unless or until the Trust Protector authorized the action to be filed, which did not occur. Alternatively, the court erred in declining to address the issues raised by Hugh unless or until a Trust Protector authorized the suit to be filed. Once that occurred, summary judgment was appropriate. *See discussion, infra.*

ISSUES TWO AND THREE

The trial judge erred in failing to grant summary judgment in favor of the Trustee when the trust protector had validated the decision-making of the Appellant and the trust agreement made the Trust Protector's decisions final, and also in failing to rule as a matter of law that Hugh was barred from receiving trust distributions by the no-contest clause.

The trial court erred in determining that the trustee's obligations regarding distribution to Respondent were clear from the language of the trust agreement, because the trust agreement was ambiguous in multiple respects. As a result, the trial court erred in finding that Appellant had breached her fiduciary duty to Respondents, especially since the Trust Protector validated Appellant's decisions.

As discussed above in more detail, Courtney filed a motion for summary judgment, with affidavits and the report of the trust protector, seeking an order that she was entitled as a matter of law to a ruling that her actions were reasonable and made in good faith, and that Hugh's actions violated the no-contest provision of the trust. (R. pp. 506-514, R. pp. 515-516; R. p. 196; R. pp. 522-528; R. pp. 188-205).

First in denying the motion for judgment on the pleadings, Judge Kimball thought there were facts to be adjudicated. Once the facts were stipulated to the Trust Protector, and she issued her report regarding the dispute, her decision was "binding on all parties . . . and not subject to

review.” (R. p. 421, Section 8(h)). For that reason, summary judgment was appropriate at that point. Judge Kimball’s denial of summary judgment was error and should be reversed¹³.

Additionally, the trial judge erred in finding that Courtney had breached her fiduciary duty following trial. Not only should summary judgment have been granted in Courtney’s favor, no new evidence was introduced at trial, which merely provided a forum to re-hash the undisputed evidence already established at summary judgment. The trust protector’s determination that Courtney’s decision was reasonable in light of the conflicting obligations set forth in the trust agreement should have determined the issue in Courtney’s favor. Additionally, even after trial, the evidence is susceptible of only one inference, *i.e.*, that Courtney acted reasonably in light of the conflicting obligations the trust agreement placed upon her.

Prior to the sale of the South Carolina house (which was the source of the claim by Hugh of a monetary distribution), Courtney’s Arizona attorney contacted Hugh’s attorney and explained the requirement under the trust that “neither the trust nor the estate would be making any large distribution of assets prior to payment of all administrative expenses and third-party debts.” (R. pp. 515-516, ¶ 5). Nonetheless, as outlined above, Hugh filed suit the day the sales proceeds were forwarded to Courtney (as trustee).

Article VI, Section 4 (a) of the decedent’s trust agreement stated:

My Trustee shall make the following specific distribution of trust property:

¹³ Appellant asserts that the rule established in *Holloman v. McAllister*, 289 S.C. 183, 345 S.E.2d 728 (1986) and its progeny is incorrect, in that S.C. Code Section 14-3-330(1) expressly permits an appeal after final judgment of an interlocutory order (that a would not have been immediately appealable because of its interlocutory nature at the time) which affected the final judgment. Where, as here, the facts were stipulated, there were no factual issues which required a trial, and the actual trial provided no factual information that was not already of record, it is respectfully asserted that the appeal of the denial of summary judgment should be permitted. Appellant will file a motion pursuant to Rule 217, SCACR.

A. Specific distribution of Real Estate Sales Proceeds, Household Contents, and Certain Vehicles to HUGH DEREDE.

As soon as practicable following my death, my Trustee shall sell the house and lot located at 131 Whispering Pines Drive. . . The sales proceeds shall be used first to pay off any mortgage against the property, and second to pay off that certain promissory note given by me to Tyre Dealer Network Consultants, Inc. Said promissory note, at the time of the execution of my Trust, is in the amount of \$250,000.00, but in no event shall the amount due exceed one-half of the sales price of the property. After payoff of said mortgage and said note, my Trustee shall then distribute one-half of the remaining net sales proceeds to HUGH DEERDE, outright and free of trust. . .

(R. p. 431-432).

No promissory note exists. It seems clear from the record whether one ever existed. Hugh said that the decedent went to a lawyer who created a trust said that "the promissory note was no longer necessary."¹⁴ (R. p. 318, lines 1-22). The note "went away when . . . after the house was put in the trust. I was told by the lawyer and by [decedent] that now takes care of that note, because it was going to be dealt with in the trust." (R. p. 321, line 21 – p. 322)¹⁵. As PR, Courtney had possession of all of her mother's papers and did not find a note, so she believed it never existed. (R. p. 270, lines 4-15). Courtney also believed that the lack of the existence of a note distinguished Hugh's company from being a creditor, and made it a beneficiary. (R. p. 272, lines 2-4). It is undisputed that Hugh's company did not to file a claim against the estate.

¹⁴ Hugh testified that he and the decedent purchased the house "just for the two of us, and we would each own fifty percent of it." (R. p. 319, lines 3-7). Although he offered no documentary evidence, he claimed he had to loan the decedent her one-half of the purchase price because her bank backed out of the mortgage she had executed because "her income had been made in Canada as opposed to the United States." (R. p. 319, lines 8-25). He said they agreed "for [his company's] benefit" to do a promissory note "which was dictated by the equivalent of your IRS. . . and that I could take money from the company provided there was a percentage of interest applied to it over a period of time." (R. p. 320, line 24 – p. 321, line 13).

¹⁵ The terms of the mysterious note are not known and there was no testimony as to who owed the note (the estate, the trust, a company owned by the decedent, etc.), the terms of the note, or whether any payments had been made during the decedent's lifetime or what the balance supposedly was at the time of death. It is not known whether the note was payable to Hugh, or to his company.

Hugh was aware that the Rock Hill house had been put into a trust, because “the South Carolina tax people . . . charge[d] us the eight thousand instead of the two thousand.” (R. p. 318, lines 14-19). The decedent also told Courtney that the trust was created for tax purposes. (R. p. 243, lines 22-23; R. p. 244, lines 6-12).

Before Courtney (as trustee) closed on the sale of the house, Hugh emailed on December 11, 2014 and demanded that he be paid from the sales proceeds (he did not mention his company). (R. p. 133). Courtney responded and explained that “estate law requires that all debts and expenses of Mom’s estate be paid and settled before any distributions are made. This includes anything in the Trust as the Trust has legal responsibility for paying the debts of the estate.” *Id.* She then went on to explain fiduciary duty and her concern about the complicated nature of the estate. *Id.* He then filed suit immediately after the closing was completed.

Courtney was right. Article Two, Section 4 of the trust agreement said that “[A]ll property transferred to my Trust. . . shall be held, administered and distributed according to the terms of my Trust Agreement.” (R. p. 53). The trust contained a provision for revocation or amendment by the settlor, (R. p. 62-63, Section 3 (*Id.* R. p. 62)), a provision for the settlor to amend the terms of the trust by a subsequent will or codicil (R. p. 66, Section 1), and any subsequent trust or will could have eviscerated the trust, if another had surfaced after the settlor’s death. The estate owed multiple mortgages and other debts which may have had to be paid from trust assets.

While the trust did require “immediate distribution of specific devises” from “my Trust Estate”) as set forth in Article Six, (R. p. 66, Section 2) the document itself provided no guidance for how to interpret the specific devises with respect to their impact on the Trustee’s other obligations. Article Five also requires the trust to “pay all expenses, claims and taxes from the

Administrative Trust.¹⁶ (R. p. 66, Section 3(a)). The Trustee was also obligated to pay “final medical expenses and all funeral costs, legally enforceable claims against me, reasonable expenses of the administration of my Trust, including those attributable to my Probate Estate. . .”) (*Id.* R. p. 67, Section 4). The Administrative Trust was also obligated to pay “all Death Taxes. . .” Article Five, Section 5, p. 5.2. And, just to make sure everything was confusing, Article Six, Section 1 provided that “[e]xcept for the distributions directed in the following Section of this Article Six, all distributions of my Trust Estate shall be made in accordance with the Articles that follow.” P. 6-1. Section Four of Article 6 provided for the “specific distribution” to Hugh. *Id.* P. 6-2. Section Four was one of “the Articles that follow.” *Id.*

Lastly, Article Ten, Section 5 specifically provided that “if my Trustee determines that there is a compelling reason to postpone a distribution to a beneficiary, then my Trustee shall continue to hold and administer such beneficiary’s trust . . .” While that section might be intended to apply only to the trusts created by the remainder assets of the Trust, it does not say that.

Courtney knew that she had to enforce the trust “in its entirety.” (R. p. 232, lines 5-6).

Hugh’s suit was for, *inter alia*, payment of a promissory note that didn’t exist, and when no one knew the balance on the note if it did exist. No demand was made to Courtney for payment of the note, and no documentation was presented showing whether any money remained due on the note when the death occurred. (R. p. 304, lines 20-23). Hugh wanted Courtney to ignore all of her other responsibilities as trustee to other beneficiaries of the trust, and as personal representative to creditors, and pay him first, from the proceeds of the sale of the house, even if the Estate or Trust owed other obligations. Presumably a trust agreement could have been prepared

¹⁶ Of course, none of these terms is defined in the trust agreement.

that required a Trustee to do that, but this trust agreement was too ambiguous and conflicting for any Trustee to be able to responsibly carry out all of the duties incumbent upon her and also make a priority distribution to Hugh (and/or his company) on a promissory note that did not exist¹⁷.

Hugh's position presumes that there are other assets to pay the debts owed by the decedent at her death, that the mortgage on the subject real estate was sufficiently small so that there would be leftover proceed. He presumed a lot.

As noted above, the trust protector, Catherine Kennedy, concluded the trust was ambiguous and gave conflicting direction, and she supported Courtney's decision to determine all estate claims prior to making any trust distributions. Even Hugh's expert, Professor Alan Medlin, said Courtney's only option was to resign. (R. p. 351, lines 8-10; R. p. 358, lines 1-3). That, of course, would not have solved any problem, because either the successor trustee Hugh would have abandoned his obligation to the other beneficiaries in favor of himself, or he would have been burdened by the same conflicts that Courtney had. There was no middle ground. The language of the trust agreement made it impossible to administer the trust.

Professor Medlin testified only that, in his opinion, Courtney "could have" made the distribution to Hugh and his company without incurring liability to others. (R. p. 358, lines 17-21). He did not opine that her failure to do so was a breach of fiduciary duty. In fact, he "under[stood] how a trustee could take such a position." (R. p. 519, ¶ 8). Professor Medlin's testimony might have been helpful in the beginning, when Courtney was trying to determine what she should do, but it offered no insight into how Courtney should have resolved the dispute (other

¹⁷ During testimony, Hugh's attorney and Courtney read through multiple provisions of the trust, and even they disagreed on whether the "one-half of the net proceeds" from the sale of the house was a part of the estate or a part of the trust. (R. p. 235, line 2 – p. 238, line 23).

than to resign and leave the dispute for someone else) or in determining whether she breached any fiduciary duty.

Professor Medlin provided no solution to the problems created by the ambiguities in the trust agreement; instead he offered Courtney the option to resign, which would have resulted in a successor trustee with the same conflicts and confusion that crippled Courtney. *See discussion supra*. Perhaps he offered a scholastic solution, but a meaningless one.

The trial judge erred in concluding there was evidence to support a conclusion that Courtney breached her fiduciary duty to Hugh and his company (assuming his company was a beneficiary of the trust, *see discussion below*). There was no evidence to support that conclusion. Both experts supported Courtney conclusion, although Professor Medlin suggested a resignation would have avoided the problem (or left it for someone else to deal with). The trial judge's ruling should be reversed.

ISSUES FOUR AND FIVE

The trial court erred in determining that Respondent Tyre Dealer Network Consultants Inc (Hugh's company) was both a beneficiary and a creditor and that Appellant had violated her fiduciary duty to Hugh's company. Hugh's company could not be both a creditor and a beneficiary at the same time.

The trial court erred in failing to conclude that Respondents violated the "no contest" provision of the trust agreement and in determining Respondents had probable cause to bring this action.

The 83-page trust agreement did not define "beneficiary." By including reference to a promissory note in the trust agreement, the decedent seems to be referring to a debt, which would make Hugh's company a creditor. The trial judge concluded, inexplicably, that it was both a

creditor and a beneficiary. (R. p. 16) ("In effect, TDN's position . . . is essentially that of a creditor for the repayment of a loan. . . [t]he Trustee's failure to pay TDN . . . was a breach of fiduciary duty."). (R. p. 17). ("TDN is a creditor, not a beneficiary. The no-contest clause does not apply to creditors."). Respectfully, it must be one or the other.

The complaint alleged that Hugh's company was a beneficiary of the trust. (R. p. 40, ¶ 2). The answer acknowledged that Hugh's company was a beneficiary, as did the amended answer. (R. p. 136, ¶ 2; R. p. 141, ¶ 2). Courtney considered it a beneficiary. (R. p. 272, lines 2-4). Professor Medlin thought it was a creditor that could have filed a claim against the estate. (R. p. 346, line 25 – p. 348, line 8). Hugh thought his company was a creditor. (R. p. 336, lines 21-24). "I'm a creditor then, if you want to know the answer." (R. p. 338, lines 11-12).

(R. p. 348, lines 1-17). However, he also opined Hugh's company might be a beneficiary, so "maybe he gets paid twice." (R. p. 348, lines 16-17). Testimony at trial never tied down exactly what Hugh's company was, but the pleadings established by allegation and answer that Hugh's company was a beneficiary. (R. p. 372, line 1-25; R. p. 558, lines 1-24). Oddly, Judge Kimball said it really didn't matter what the complaint said, (R. p. 372, line 25; R. p. 558, lines 1-25; p. 373, lines 1- 7). "It's not a verified complaint. It doesn't bind anybody. People could amend it according to a change in the proof, to conform to the proof in the file. I'm not interested in going over the complaint." *Id.* However, no amendment was made, perhaps leading to the trial judge's inconsistent ruling that Hugh's company was both a creditor and a beneficiary.

If Hugh's company was a creditor, its one and only chance to get paid was to file a claim against the estate, which it did not do. (R. p. 558, lines 1-2). The trial judge refused to penalize Hugh's company under the no-contest clause, because it was a creditor. (R. p. 17). However, it

also found that Courtney breached a fiduciary duty to TDN/Tyre because it was a beneficiary. There was no other way to assess liability against Courtney (as Trustee) for the claim by Hugh's company except to conclude it was a trust beneficiary.¹⁸

Respectfully, it has to be one or the other. If it is a creditor, it missed the deadline for filing a claim with the estate. If it is a beneficiary, the trial judge erred in finding that Courtney breached her fiduciary duty to it. *See discussion infra.*

The trial judge erred in finding that Hugh (and TDN/Tyre, if it is, in fact, a beneficiary) had probable cause to bring this lawsuit. The order found that the no-contest provision would not apply to TDN/Tyre because it was a creditor. If that's true, then it's only remedy was against the estate. This lawsuit is not against the estate. In that event, judgment against Courtney in favor of TDN/Tyre was error.

The judge erred in finding that there was probable cause for Hugh and/or his company to bring the lawsuit. The judge's rationale was that the language of the trust agreement was "clear" so there was "probable cause" to bring the lawsuit. (R. pp. 17-18). As discussed above in detail, there was nothing about this trust agreement that was clear. The language of the trust agreement was so confusing and conflicting, no one knows if the company was a creditor or beneficiary (assuming a note even existed), and things don't get any clearer from there.

Professor Medlin testified that the trust agreement placed Courtney in a position of conflict so her only option was to resign. That would have solved nothing, because the successor trustee,

¹⁸ This entire argument relates to a promissory note that doesn't exist, and that seems to be conceded. The trust could not create the promissory note simply by referring to one in the abstract, although Hugh's testimony was that they did not need a promissory note because of the trust. (R. p. 318, lines 19-22).

as designated by the trust agreement, was Hugh, and he would have the same conflict.

Instead, the trust obligated Hugh (and any other beneficiary) to invoke the Trust Protector provisions of the trust for any dispute. Hugh made no effort to do that. He directly contradicted the trust agreement by filing suit. There could be no other example of "lack of probable cause" than an intentional violation of the trust agreement under which Hugh was seeking a recovery.

There is no evidence to suggest that Hugh (and/or his company) had probable cause to bring this suit, especially since it related to an imaginary promissory note. The no-contest provision should have been applied as a matter of law, to bar any recovery by Hugh and/or his creditor/beneficiary company. The trial judge's order on that issue should be reversed and the matter should be remanded with direction to enter an order in Courtney's favor, barring the claims of Hugh (and his creditor/beneficiary company) on the basis of the no-contest clause.

ISSUE SIX

The trial court erred in entering judgment against Appellant in her individual capacity, because the evidence reflected that she acted only in her representative capacity for all matters relevant to this matter.

The complaint in this matter alleged wrongdoing by Courtney in her capacity as trustee of the trust. (R. p. 41, ¶ 8). There are no allegations in the complaint made against Courtney in her individual capacity.

The complaint sought relief against Courtney only in her capacity as trustee.

... Plaintiff prays for the following:

- (a) For an order finding that the proceeds of sale . . . shall be paid. . .
- (b) For an order finding that Courtney Feeley-Karp breached her fiduciary duty...
- (c) For... attorney fees and costs... for the Trustee's actions...

(R. p. 46).

Hugh's own lawyer established in his examination of Courtney that all of her actions were taken in her capacity as trustee. (R. p. 228, lines 1-2).

Q. The language in this trust, about middle of the first paragraph, I believe it says, all powers shall be exercised only in a fiduciary capacity?

A. Correct.

Q. Any dispute with that?

A. No.

(R. p. 246, line 23 – p. 247, line 3).

The order awarding judgment in favor of Hugh and his company addressed Courtney only in her capacity as Trustee. (R. pp. 18-19).

1. The Trustee was required. . .
2. The Trustee breached her fiduciary duty. . .
3. The Trustee breached her fiduciary duty . . .

Id.

The final order did not distinguish against Courtney in her individual capacity versus her capacity as trustee, but in its silence, it must be construed to enter judgment against Courtney only in her capacity as Trustee. That's the way it was pleaded, that's the way the evidence was presented, and that's what the order said.

On motion for reconsideration, Courtney raised the issue to clarify that, because no findings against her individually had been made. (R. p. 239, ¶22). That is precisely what she was required to do. *Fryar v. South Carolina Law Enforcement Division*, 369 S.C. 395, 631 S.E.2d 918 (Ct. App. 2006) (when a judge grants relief not requested, aggrieved party must raise issue on motion to reconsider).

Ordinarily, a party may not obtain relief not requested in the pleadings. *Barnett v. Barnett*, 282 S.C. 343, 318 S.E.2d 570 (Ct. App. 1984). *See also Pittman Mortgage Company v Edwards*, 327 S.C. 72, 488 S.E.2d 335 (1997) (absent an amendment to the pleadings or implied consent to consider relief not requested, the pleadings define the issues). Simply naming Courtney in her individual capacity did not submit her individual person to the claims expressly made in the complaint against the trustee only. *See Quality Trailer Products v. CSL Equipment*, 349 S.C. 216, 562 S.E.2d 615 (2002) (reviewing the content of the motion for the relief sought, despite a caption which suggested the relief sought was different than the motion itself sought). *See also Valentine v. Davis*, 319 S.C. 169, 460 S.E.2d 218 (1995) (persons cannot become parties to an action merely by adding their names to the caption); *See also Collins Music Co. v. IGT*, 353 S.C. 559, 579 S.E.2d 524 (Ct. App. 2002) (looking to the content of the filing rather than the caption to determine the substance of the relief sought).

In his order denying reconsideration, the trial judge acknowledged that the earlier order made no findings of wrongdoing against Courtney individually, nor did it grant judgment against her individually. (R. p. 26). Instead of enforcing the pleadings and order as written, he concluded that he must include Courtney individually because, he reasoned, doing so would “frustrate” Hugh and his company’s ability to recover. *Id.*

During oral argument on the motion, Judge Kimball stated that the issue had not been pointed out prior to trial. (R. p. 559, line 1-p. 571, line 23). Doing so, however, would have given Hugh and his counsel notice of their failure of allegations and failure of proof. Failure to offer proof of an element of the claim is fatal to recovery. *See Ford v. Atlantic Ry Co.*, 169 S.C. 41, 168 S.E. 143 (1933), affirmed 287 U.S. 502 (the burden of proof remains on the party against whom it

was initially cast). As it is, Hugh made no amendment to his pleading to conform to the testimony (although conflicting) that Hugh's company was a creditor. Raising the issue prior to reconsideration would have simply given Hugh and his company an opportunity to fix their omission.

ISSUE SEVEN

The trial court erred in awarding attorney fees and costs to Respondents.

In the trial judge's order determining liability, he concluded that Hugh and his company were entitled to recover attorney's fees under S.C. Code Ann. §62-7-1004, which permits assessment of attorney's fees and costs in "a judicial proceeding involving the administration of a trust." He concluded that "this action involved the administration of a trust." (R. p. 18, ¶ 5). He deferred a ruling on the actual amount of the fees and costs to be awarded to a later date. *Id.*

Courtney properly raised this issue in her Motion for Reconsideration. (R. p. 219, ¶22), noting that she would again address the issue after a final order on attorney's fees and costs was issued. Hugh's counsel subsequently submitted an affidavit for attorney's fees and costs.

Courtney did not take issue with the amount of fees and costs sought by Hugh and his company, but asserted that fees should not be awarded at all because liability should not have been assessed. (R. pp. 28-33). Consistent with her failure to address the specific amount, Courtney's return to the affidavit of attorney fees pointed out numerous reasons why no fees and costs should be awarded at all. (R. pp. 221-224).

The main reason fees should not have been awarded is that the judgment on the merits was erroneous for the reasons set forth previously. Setting aside the award against Courtney resolves

this issue without further inquiry. The award of attorney's fees and costs should be reversed in its entirety.

Neither Hugh nor his company sought an award of attorney fees or cost pursuant to §62-7-1004. They did seek attorney's fees and costs, but without citing any authority for the award. The trial judge supplied the authority to award attorney's fees and costs on his own. As discussed above in detail, and in the return to affidavit of attorney's fees, the trial judge should not have awarded relief that was not prayed for in the complaint. *Barnett v. Barnett*, 282 S.C. 343, 318 S.E.2d 570 (Ct. App. 1984).

The trial judge did not differentiate to whom the attorney's fees and costs were awarded, *i.e.*, to Hugh or to his company or to both (nor did the Affidavit of Attorney's Fees). If the appellate court agrees with Courtney's argument set forth above that Hugh's company as a creditor and therefor lost any right to recover by not filing a claim against the estate, then Hugh's company is not entitled to fees. Yet the award does not differentiate between Hugh and his company; the judgment is vague and incapable of properly being entered. Since the attorney's fees are not differentiated, a reversal as to only one of the two Respondents will require an allocation of attorney's fees. The record will not support such an allocation.

Lastly, consistent with the decedent's clearly articulated desire that disputes regarding her trust not be aired publicly (and instead reserved to the Trust Protector), the trust itself limited the amount of attorney fees that could be awarded in a dispute regarding the Trustee's decision to delay a distribution. Article 10, Section 5, Paragraph (h) expressly limits the amount of fees that can be awarded to a beneficiary who objects to the Trustee's decision to delay a distribution. (R. p. 82). Moreover, the prayer for attorney's fees was based, apparently, on a common-law

argument, and not on any statute or provision of the trust.

The award of attorney's fees and costs should be reversed, primarily because the trial judge erred in finding that Courtney had breached her fiduciary duty to one or both Hugh and/or his company. Even if those awards are upheld, however, the award of fees cannot stand for the reasons set forth herein.

CONCLUSION

This matter was specifically intended by the decedent to be resolved separately; but for Hugh's impatience in respecting the Trustee's multiple and conflicting obligations, this matter would have never been brought to this Court. The decedent did not want it here. Whether that is subject matter jurisdiction or summary judgment, it's clear that the relief sought in this court by Hugh and his company should not have been awarded to them.

Additionally, the evidence does not support the findings that Courtney breached her fiduciary duty (especially to a creditor to whom she owed no duty). The experts actually agreed that Courtney's position was a difficult one and was not unreasonable (although Professor Medlin opined that the problem could have somehow been resolved by Courtney's resignation; however, he did not suggest what would happen next).

The decision of the trial judge to deny summary judgment and to award judgment in favor of Hugh and his company should be reversed. Moreover, the trial judge erred in failing to find that the no-contest provision of the trust should be enforced against Hugh (and his company, if it is a beneficiary) because he/they lacked probable cause (even according to their own expert) to file this action when they did.

Courtney prays for an order vacating the trial judge's order in their entirety and remanding for entry of a judgment denying the relief requested by Hugh and his company and concluding, as a matter of law, that they are barred from recovering from the trust by virtue of the no contest clause.

Alternatively, judgment in favor of Hugh's company should be set aside since it is a creditor and it never filed a claim with the estate.

Fees should be vacated in their entirety.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Desa Ballard", followed by a horizontal line and the initials "by [unclear]".

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ATTORNEYS FOR APPELLANT

August 14, 2017

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

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.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,


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August 24, 2017

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

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 Fehilly, 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 is Appellant.

RESPONDENTS' FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. **The Trial Court correctly exercised jurisdiction over this matter.**
2. **The Trial Court correctly decided the merits of the case.**
3. **Respondents had probable cause to bring this action.**
4. **The Trial Court correctly found liability on behalf of the Appellant as
Trustee and in her individual capacity, including liability for attorney's fees.**

STATEMENT OF THE CASE

This appeal arises from the Orders of the Honorable S. Jackson Kimball, involving the interpretation of the Deborah Dereede Revocable Living Trust, dated December 18, 2013 ("Trust"). At the time of her death, Deborah Dereede ("Deborah") had two adult children, the Appellant, Courtney Feeley-Karp who was personal representative of Deborah's estate, and trustee of the Trust ("Appellant"), and a son Michael Feeley. Deborah died on April 15, 2014, leaving a surviving spouse, Hugh Dereede ("Hugh"), whom she had married in 2010. Hugh is the sole owner and shareholder of Tyre Dealer Network Consultants, Inc., a Canadian company ("Tyre") (collectively, Hugh and Tyre are referred to as "Respondents").

This case was initially filed by Hugh and Tyre, on December 23, 2014, in the Probate Court of York County, seeking a declaratory judgment as to the construction and interpretation of the Trust, and specifically as to whether the Appellant acted in good faith in refusing to convey specific assets to Respondents as directed by the Trust. The case was removed from Probate Court to the Circuit Court on May 12, 2015 by the Appellant.

Respondents contend that the Appellant's failure to convey specific assets in a timely manner violated the express and unambiguous terms of the Trust, violated her fiduciary duties to the Respondents and that they filed this action with probable cause, so as to avoid the no-contest provisions of the Trust. Appellant contends that she acted in good faith and that the Respondents action triggered a forfeiture under the no-contest clause in the Trust.

Following removal of the case, the parties engaged in substantial discovery, and the Appellant filed a motion for judgment on the pleadings, and several motions for summary

judgment, which were denied. The case was tried before the Honorable S. Jackson Kimball on April 19, 2016. The Trial Court found that the Appellant had breached her fiduciary duty to Hugh and Tyre, and that the Respondents had probable cause to bring the case. The Trial Court also denied the Appellant's Motion for Reconsideration, and this appeal followed.

STATEMENT OF FACTS

The facts in this case are relatively straightforward. Almost one year prior to her death, Deborah executed the Deborah Dereede Living Trust Dated December 18, 2013 (R. 410; 503). Deborah was married to Hugh at the time she executed the Trust, and named the Appellant as Trustee. The Trust was initially funded by a deed of real property located at 131 Whispering Pines Drive in Clover, South Carolina (the "Property"). The Trust required the Appellant, upon the sale of the Property after Deborah's death, to "pay off that certain promissory note given to Tyre Dealer Network Consultants, Inc." (R. 431, 432). Next, after paying off the Tyre note, the Appellant was directed to distribute one-half to the remaining net sales proceeds to Hugh outright and free of interest. (R. 431-432). The Appellant was also directed to convey a 2013 Cadillac CTS, a 2008 GMC Envoy and a 1999 Maxum Cabin Cruiser to Hugh following the Trust's receipt of such assets from her estate (R. 431-432; 503). The language of the Trust did not identify any other specific distributions, only the general directive that all other assets of the decedent pass to her children, share and share alike (R. 436). The remaining assets of Deborah's estate included but were not limited to the remaining one-half of proceeds of sale of the Property, and additional parcels of real property located in New Hampshire and Virginia.

All of Deborah's assets other than the Property were probate assets of her estate which were directly subject to creditor's claims and other costs relative to the probating of the estate (R. 492-495). Although the Property was also subject to creditors of the estate, the Trust clearly specified that the proceeds of the sale of the Property were to be given preferential treatment by the trustee (R. 353). This scheme of distribution was confirmed by Respondent's expert Professor Alan Medlin (R. 344, lines 20-22).

The Property was put up for sale following Deborah's death resulting in a purchase contract that eventually closed on December 19, 2014 (R. 496, Plaintiff's Exhibit 6). Despite repeated personal requests and requests via electronic mail (R. 502, Defendant's Exhibit 1), the Appellant refused to acknowledge to Hugh that the loan repayment and the proceeds of sale would be forthcoming from the sale of the Property.

After the closing on the sale of the Property, Hugh asked the Appellant to reconsider her decision not to disburse the proceeds pursuant to the terms of the Trust. (R. 512). Hugh even offered to enter into a "friendly" declaratory judgment action so as to provide Appellant the protection from creditors she alleged to justify refusal to disburse funds. (R. 149). Based on this refusal, Hugh believed he had probable cause to seek a declaration from the court that Appellant had violated her fiduciary duties. (R. 503; 328-337). He thereafter authorized the filing of this action to protect his interests and those of Tyre as specific beneficiaries of the Trust so that Trust assets would not be squandered, improperly disbursed and/or improperly converted for personal use.

Appellant hired counsel and removed the proceedings from Probate Court to Circuit Court and asserted numerous affirmative defenses seeking, among other remedies, the forfeiture of Hugh's distributions under the Trust. (R. 134-138). Appellant justified this

hostile action under the guise of alleged concerns for claims by “known and unknown creditors” that had not yet materialized during the creditors’ period. (R. 506, 507). By effectively giving those “known and unknown creditors” preference over the claims of the Respondents, the Appellant directly disregarded Deborah’s clearly stated intent, manifesting a plan to disinherit Hugh and Tyre from the specific distributions required under her mother’s Trust.

Deborah’s estate had assets that it could have uses to manage claims, and had “plenty of liquidity.” (R. 354-355). Moreover, the Appellant’s stated concerns about her own liability to creditors really had no legal basis, as her primary fiduciary duty was to “follow the settlor’s direction and to honor the rights of the beneficiaries.” (R. 355-357). Nevertheless, on June 2, 2015, the time for creditors’ claims (and the stated reason for the Appellant’s refusal to pay) lapsed. (R. 511). Instead of simply complying with the Trust directives, the Appellant noticed a hearing for June 8, 2015, six days later, on a motion to dismiss the case on its pleadings and for forfeiture of the monies due the Respondents under to the no contest clause in the Trust.

Judge Kimball denied this motion, and the Appellants then served written discovery specifically directed towards the forfeiture provision of the no contest clause of the Trust. Appellant made no distributions to the Respondents, even though she has held the proceeds of sale, no other creditors have appeared, and the time for their claims had lapsed.

1. After the parties exchanged extensive written discovery including interrogatories, requests for production and requests for admission, Appellant moved for summary judgment (R. 152-155). In the midst of this active litigation, in October of 2015, the Appellant proposed the appointment of a trust protector, as described in the Trust.

Without waiving any rights in the litigation, the Respondents agreed, and the Honorable Catherine Kennedy was appointed to review the issues in the case and assist with seeking a resolution among the parties. (R. 034-038). The Appellant proposed Kennedy as an independent neutral who would impartially help the parties interpret the Trust, which was acceptable to the Respondents. The Appointment of Trust Protector specifically noted Hugh's belief that the appointment was not necessary, however, he did agree to the appointment. (R. 034).

Less than two weeks later, the Appellant filed an amended motion for summary judgment on the grounds that the Trust Protector had been appointed and should decide the case, but alternatively seeking forfeiture on the issue of Respondents' probable cause. (R. 180-187). The Trust Protector issued a report on January 15, 2016, specifically refusing to address the issues of good faith and probable cause central to this case. (R. 528). Undaunted, the Appellant filed a second amended motion for summary judgment on February 18, 2016, again seeking to enforce the no contest clause against the Respondents. (R. 188-193).

The Appellant's successive summary judgment motions sought primarily to aggressively pursue the forfeiture provisions under the no contest clause. Whatever her purpose, Appellant never treated the Trust Protector as the neutral arbiter she was proposed to be. As it turns out, the Trust Protector refused to weigh in on the issues of the Appellant's good faith or the Respondents' probable cause, and deferred to the Trial Court for rulings on those issues. (R. 528).

Once summary judgment was denied by Judge Kimball, the case was tried non-jury on April 19, 2016. At trial, Hugh testified that his company Tyre loaned money to Deborah

to assist her in purchasing the Property (R. 321). Further, Hugh testified that Deborah intended the home and specific items of personal property to be placed in the Trust since these assets had been purchased during their marriage. (R. 318- 321).

The remaining probate assets were assets owned by Deborah prior to her marriage to Hugh and were assets to which Hugh had no claim or interest. (R. 322). It is important to note that Hugh did not seek an elective share or other remedy available to him under law as the surviving spouse, only the assets specifically left to him per Deborah's wishes as enumerated in the relevant portion of the Trust (R. 431-432). All he asked was that the payments to Tyre and him be made as Deborah had specified in her Trust, which the Appellant refused to do.

2. The Court, in its Order of June 9, 2016, interpreted the Trust to require the Appellant to distribute the proceeds of sale of the Property to Tyre to pay off the debt due to the company immediately upon the sale of the Property and to then distribute one-half of the remaining proceeds to Hugh (R. 015-016). Further, the Court found that the Respondents had probable cause to file the declaratory judgment action seeking the Court's interpretation of the terms of the Trust upon the Appellant's refusal to distribute the monies due to Hugh and Tyre (R. 017). Finally, the Court found the Trustee's refusal to pay the proceeds of sale was a breach of her fiduciary duty and that she was therefore responsible for the Respondents' attorney fees and costs, determined in a subsequent hearing. (R. 016-017).

STANDARD OF REVIEW

Declaratory judgments are neither inherently legal or equitable, so the standard of review is therefore determined by the nature of the underlying issue. *Felts v. Richland*

County, 303 S.C. 354, 400 S.E.2d 781 (1991); *Wiedemann v. Town of Hilton Head Island*, 344 S.C. 233, 542 S.E.2d 752 (Ct.App.2001). *Doe v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n*, 347 S.C. 642, 557 S.E.2d 670 (2001). A claim of breach of fiduciary duty is an action at law and the trial judge's findings will be upheld unless without evidentiary support. *Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005). The construction of a trust is likewise a question of law. *Germann v. New York Life Ins. Co.*, 286 S.C. 34, 331 S.E.2d 385 (Ct. App. 1985). In an action at law tried without a jury, "the findings of fact of the judge will not disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." *Townes Assocs. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

ARGUMENT

1. The Trial Court correctly exercised jurisdiction over this matter

The bulk of the Appellant's appeal centers around the role of a trust protector and the authority of the Trust Protector in this case to adjudicate disputes arising from the Trust. Trust protectors were first explicitly recognized in this state with the adoption of the 2013 amendments to the South Carolina Probate Code. S.C. Code § 62-7-1005A (2013). As a relatively recent addition to probate practice, trust protectors have evolved as agents of settlors given limited powers to guide the behavior of trustees. See, Stewart E. Sterk, Trust Protectors, Agency Costs, and Fiduciary Duty, 27 Cardozo L. Rev. 2761, 2763 (2006).

The Trust generally allows the appointment of a trust protector to protect the financial resources of the Trust and the interests of its beneficiaries. (R. 417-422).

However, nothing in the Probate Code confers exclusive jurisdiction upon trust protectors over disputes that would otherwise be heard by the Probate Court or Circuit Court. While no South Carolina court has interpreted the trust protector provisions of the 2013 Probate Code amendments, under either the Code or the language of the Trust itself, the Appellant incorrectly characterizes this provision as a jurisdictional bar to the Trial Court's action. This position being contrary to the findings of the actual Trust Protector in the case at hand who refused to resolve the issues of good faith and probable cause and advised that they needed to be resolved by the Trial Court. (R. 528).

Appellant first argues that the trust protector provisions deprived the Trial Court of subject matter jurisdiction over the case. Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong. *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994); *Ward v. State*, 343 S.C. 14, 538 S.E.2d 245 (2000). The Complaint seeks a declaratory judgment to interpret the terms of the trust as to the issues of the parties' good faith and probable cause, and alleges a justiciable controversy that the Circuit Court is specifically empowered to hear. S.C. Code Ann. 15-53-20 (2005). As courts of record within York County, both the Probate Court and the Circuit Court plainly have subject matter jurisdiction over such claims.

Nothing in the Code suggests that the trust protector mechanism was intended to deprive the Probate Court or the Circuit Court of jurisdiction to resolve disputes. So too, the terms of the Trust do not create a mandatory or exclusive dispute resolution procedure. Rather, the clear language of the Trust creates a permissive mechanism available to the Trustee and beneficiaries "[i]n the event a Trust Protector is needed to act." (R. 417, Sec.

8(a)). No decision was made that a trust protector was needed to act prior to the initiation of this action. In fact, no suggestion of the need for a trust protector occurred until well into the litigation, and after substantial discovery and motions had been served. The Trial Court therefore had jurisdiction over the case from the outset and did not err by retaining jurisdiction throughout.

Nor does a provision for a trust protector equate to an arbitration agreement, as suggested by the Appellant. No policy in favor of trust protectors exists under state or federal law, and no statutory scheme prefers resolution of disputes by trust protectors instead of courts. *Cf., Heffner v. Destiny, Inc.*, 321 S.C. 536, 471 S.E.2d 135 (1995) (noting both state and federal policy favoring arbitration where valid arbitration agreements exist). In fact, the trust protector provisions of the Trust specifically empower the trust protector to file an action in a court of competent jurisdiction for the interpretation and construction of the Trust, or “may instruct the Trustee to do so.” (R. 421, Sec. 8(h)). This authority is plainly inconsistent with the argument that the Trust Protector has exclusive and binding jurisdiction over disputes regarding the Trust.

Finally, even if the Trust contemplated a binding process for resolving disputes through a trust protector, or is analogous to an arbitration clause, the Appellant waived her rights under it, having removed the case from Probate Court and invoking the Court’s jurisdiction (R. 134-138), actively participated in litigation for over ten months, including extensive discovery (R. 529-542), and successive dispositive motions before and after the Trust Protector was appointed (R. 151, 152- 179, 180-187, 188-205).

At trial, the Appellant effectively converted the Trust Protector from an agent of the settlor, Deborah, to an agent for herself, employing Ms. Kennedy as an expert witness

at trial. To the extent the Appellant had any right to insist on adjudication by the Trust Protector, it was therefore waived. See, *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 647 S.E.2d 249 (Ct. App.2007) (noting factors for waiver of arbitration agreements). The Appellant clearly took advantage of substantial discovery and motions practice before and after the Trust Protector was appointed, as well as a full trial of the case before Judge Kimball, and cannot now complain the dispute should have been adjudicated in another venue.

Appellant next suggests, without any supporting authority, that the Trial Court should have declined to exercise subject matter jurisdiction over the case. This position directly contradicts the report of the Trust Protector herself, who in her report declined to make any decision as to good faith or probable cause, and directed the Trustee to "seek resolution of those issues in the present forum." (R. 528). By the time the possibility of a trust protector had been broached by the parties, the litigation had long since commenced. No basis exists for the Trial Court to abstain from deciding these issues within its jurisdiction, and in fact, the Appellant never requested abstention. Moreover, the Trust Protector herself stated that "[i]t does not seem to me that the later appointment of a Trust Protector relates back to require dismissal of the suit a year after it was filed." (R. 528). As noted by the Trial Court, the parties initially asked the Trust Protector to advise the Trustee, not "unilaterally resolve any dispute." (R. 24)

Having never moved to stay the proceedings in favor of having the Trust Protector adjudicate the dispute, the Appellant only raised this issue after she had lost at trial. So too, the Appellant abandoned any pretense that the Trust Protector was impartial when she converted Kennedy from, at best, a neutral arbiter into a partisan expert. (R. 380). Once

she became an expert witness, the Trust Protector ceased to be an agent of the settlor or impartial fiduciary of the Trust and its beneficiaries, and since she was no longer independent, was no longer qualified to serve as Trust Protector. (R. 34). Stewart E. Sterk, Trust Protectors, Agency Costs, and Fiduciary Duty, 27 Cardozo L. Rev. 2761, 2763 (2006).

The Trial Court unquestionably had subject matter jurisdiction to hear this case from the outset, and rightfully retained jurisdiction throughout the case. To the extent that any right existed to insist that the dispute be resolved by the Trust Protector, such right was waived by the conduct of the Appellant herself.

2. The Trial Court correctly decided the merits of the case.

Implicit within Appellant's Issues Two and Three is an argument that the opinions and report of the Trust Protector are entitled to deference and a presumption of correctness. Two fatal flaws in this argument exist. First, the issues presented for trial concerned (1) whether the Appellant, as Trustee, had acted in good faith in failing to pay the proceeds of the sale of Property to the Respondents, and (2) whether probable cause existed for the initiation of this action. The Trust Protector specifically (and correctly) refused to take any position on those issues in her report of January 15, 2016, and instructed the parties to have them "adjudicated by a court of competent jurisdiction." (R. 528). Second, having issued her report, Ms. Kennedy ceased acting in the role of neutral trust protector, and thereafter became an expert witness for the Trustee. In fact, having been proffered as an expert witness at trial, she testified specifically on behalf of the interests of the Trustee, not on behalf of the settlor, or as protector of the Trust or the other beneficiaries. (R. 380-381).

Therefore, her opinions are entitled to no more deference than those of any expert witness, and the Trial Court properly treated her testimony on par with that of Respondent's expert, Professor Alan Medlin.

In her report, the Trust Protector specifically refused to resolve the issues that were presented for trial. (R. 528). Contrary to the Appellant's characterization, the "stipulated" facts included in her motion for summary judgment merely laid out the timeline of the dispute, not the facts necessary to determine good faith and probable cause. (R. 196). Not only was summary judgment as to good faith and probable cause inappropriate prior to a merits hearing, but the Trust Protector specifically deferred to Judge Kimball on those specific issues. Again, by the time of trial, the Trustee abandoned any notion that the Trust Protector was acting as a neutral, and called upon her as an expert witness.

Respondents do not dispute that Ms. Kennedy possessed sufficient qualifications and experience to provide expert testimony, but she could no longer continue to exercise any authority she might have had as Trust Protector, and her opinions are due no additional weight merely because she expressed them. Certainly, her opinions as an expert are not entitled to be considered as findings of fact binding on the Trial Court.

The Trial Court properly focused its analysis of the case on the language of the Trust itself, and the evidence of the loan given to Deborah by Tyre to assist her in the purchase of the Property. Deborah acknowledged the existence of the promissory note and the underlying debt in the Trust instrument as well as a very specific scheme for payment of proceeds upon the sale of the Property. (R. 346-352). That scheme was clearly and unambiguously set forth in Art. VI, Section 4(a), and contemplated immediate payment under Art. V, Sec. 2. The Trial Court concluded that the Trustee's refusal to pay the

proceeds in accordance with the Trust, particularly when sufficient funds remained in the Trust to pay any remaining hypothetical expenses, breached her duty of loyalty and good faith to the Respondents. (R. 016-017) Indeed, the Trustee offered no evidence of any additional expenses or claims that would have justified any delay in payment, and that the Court concluded that the reasons she gave for withholding payment were "speculative and pretextual." (R. 025, Sec. 3).

Appellant argues that the Trust was ambiguous in multiple respects, none of which involve the specific directions to pay the proceeds of the sale of the Property. While a payment scheme is described in the Trust, the first directive specifies that the Respondents be paid out of the proceeds of the sale of the Property after the satisfaction of any mortgage. (R. 428). Appellant's arguments prop up the same false dilemma she argued at trial, that she was faced with an impossible choice of either paying the Respondents according to the Trust or saving the proceeds to pay hypothetical claimants that never appeared. (R. 255-265). Professor Medlin testified that in his opinion she should have just paid the Respondents per the Trust, and that her refusal to do so violated Deborah's specific directives. (R. 358-359) By her own testimony, more than \$50,000.00 was available after payment of monies due to Hugh and Tyre to pay any additional expenses, and no other unusual or unknown creditors ever materialized (R. 258, 264-265).

Nor does Professor Medlin's testimony offer any support for the Appellant's argument, even if he sympathized with her situation. His affidavit clearly explains that any fear she may have had of paying claims out over hypothetical and unknown creditors would effectively be borne by Hugh, without her incurring any personal liability. (R. 517-520, 353-358). Under S.C. Code Ann. § 62-7-604(b), Appellant was protected from personal

liability for making the distribution to the Respondents as required by the Trust. Medlin opined that the dilemma claimed by the Appellant to justify not paying the proceeds was not supported by the Probate Code, any actual asserted claims or the legal framework surrounding her role as Trustee. *Id.*

Finally, the Trial Court noted that the Appellant's conduct must be viewed in light of the fact that she is a licensed attorney with "great knowledge of the obligations of a trustee and the legal requirements of a fiduciary." (R.-25). Under these circumstances, the Court concluded that the Appellant had pretextually withheld payment from the Respondents without justification in violation of her duties as Trustee. (*Id.*) In any event, the Trial Court properly viewed the applicable language of the Trust, found it to be unambiguous, and correctly found that the Appellant had breached her fiduciary duties by disregarding it.

3. Respondents had probable cause to bring this action.

The Appellant's Issues Four and Five posit a false choice as to the status of Tyre as either a creditor or a beneficiary, and whether it is entitled to assert probable cause. Hugh Dereede is both a beneficiary of the Trust individually, and the sole shareholder of Tyre, which is a beneficiary of the Trust by virtue of the reference to the loan used to purchase the Property. In a colloquial sense, Tyre was a creditor of Deborah, but in drafting the Trust, she created a specific scheme of distribution that ensured that the loan she had received to purchase the Property would be repaid out of the proceeds of its sale. (R. 347-349). Had Tyre's interest been represented solely by a promissory note, it would arguably be required to assert a claim against the estate like any other outside creditor. Clearly,

however, neither Hugh nor Deborah saw things this way, and as a result, Deborah wrote Tyre specifically into the Trust as a beneficiary entitled to preferred payment. Both experts who testified at trial agreed that under the language of the Trust, Tyre could be viewed as both a creditor and a beneficiary, but was not treated a creditor in the traditional sense. (R. 348, 389-391).

The absence of a promissory note supports the notion that Deborah treated Tyre as a beneficiary, since having described Tyre specifically in the Trust as a distributee, there was no need to reduce the claim to a note. Professor Medlin speculated that Tyre could have claimed as both a creditor and a beneficiary, and theoretically been entitled to payment twice, but that scheme seemed contrary to the intent of the Trust. (R. 348-349). Instead, by elevating Tyre from outside creditor to qualified beneficiary entitled to repayment of the loan before other beneficiaries, the Trust clearly established the Respondents' claim. Likewise, Ms. Kennedy agreed that Tyre was likely a beneficiary of the Trust. (R. 390). As such, Tyre was entitled to the same fiduciary duties as other beneficiaries from the Appellant, and Judge Kimball correctly concluded it was entitled to payment according to the Trust.

Moreover, Tyre was entitled to assert claims as a beneficiary in the same manner as Hugh, and subject to the same probable cause analysis. Tyre was specifically identified in the Trust as a specific and preferred distributee, entitled to payment out of the proceeds even before Hugh. Likewise, Tyre was entitled to bring this litigation when the Appellant violated her clear and unambiguous duties to distribute proceeds, and had a reasonable expectation of success in reliance on the language of the Trust. S.C. Code Ann. § 62-7-605.

While the Appellant argues that ambiguities in the Trust language abound, the only part of the Trust that matters in this case was crystal clear. Because the loan from Tyre made possible Deborah's purchase of the Property, she made the repayment obligation preferred to other beneficiaries and creditors, followed by the distribution, if any, of one-half of the proceeds of sale to Hugh individually. The Appellant's justification for refusing to follow the Trust was found to be pretextual, and given her knowledge and experience as a licensed attorney, the Trial Court correctly rejected this argument. (R. 025).

4. The Trial Court correctly found liability on behalf of the Appellant as Trustee and in her individual capacity, including liability for attorney's fees.

Judge Kimball found that the Appellant breached her fiduciary duties owed as Trustee under South Carolina law. (R. 018-019). As a result, even if the Appellant acted solely in the capacity as Trustee in refusing to properly distribute Trust assets, the Court was not willing to insulate her personally from having to reimburse the Trust. (R.026). Under S.C. Code. § 62-7-1001(b), the remedies for breach of trust include requiring a trustee to pay money or property out of their own assets. As the Court noted, absolving Appellant of any personal liability for her breach of the Trust, including an award of attorney's fees, "would lead to an absurd result." (R.026). Capping a trustee's liability for breaches of fiduciary duties to the assets of the trust would create a moral hazard and incentivize unreasonable conduct by trustees.

So too, the Respondents do not make specific allegations against the Appellant outside the scope of her duties as Trustee, and therefore had no basis under Rule 11, S.C.R.Civ. P. to include claims against her individually. However, even if no claims are

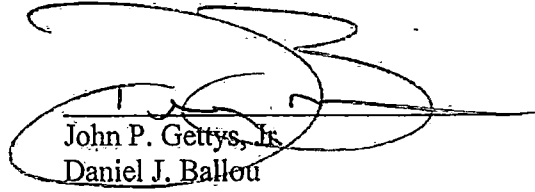
asserted against the Appellant in her individual capacity, the remedies for breaching her fiduciary duties, are not and cannot be limited to the corpus of the Trust as argued by the Appellant, and the Trial Court correctly refused to so limit her liability. (R.026).

Finally, the Trial Court awarded reasonable attorneys' fees and costs pursuant to S.C. Code. § 62-7-1004, which allows such an award "as justice and equity may require." (R.025). Whether the Respondents specifically cited this precise Code section as a basis for this award is immaterial, since an award of fees and costs is included in the prayer of the Complaint, and the Court determined that justice and equity required it. Nor can the Appellant now claim that she was only "postponing" the Respondents' distribution, under Article 10, Section 5 of the Trust so as to impose a cap on fees that can be awarded. No notice of such postponement was ever given by the Appellant, nor any of the justifications warranting postponement even mentioned prior to this appeal. (R. 442, Sec, 5(h)). This after-the-fact rationalization does not hold water, and should be summarily rejected on appeal.

CONCLUSION

Courtney forced Hugh's hand in this dispute by refusing to comply with her mother's express wishes as expressed by her in the Trust. She could have paid the monies due to Hugh and Tyre at any time after the expiration of the creditor's claims period and refused to do so. Judge Kimball correctly found that she knowingly breached the Trust and violated her fiduciary duties to Hugh and Tyre, and ample evidence exists in the record and in the language of the Trust to support his ruling. For the reasons set forth herein, his orders should be affirmed in all respects.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to be 'John P. Gettys, Jr.', is written over the printed name.

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August 15, 2017

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

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,

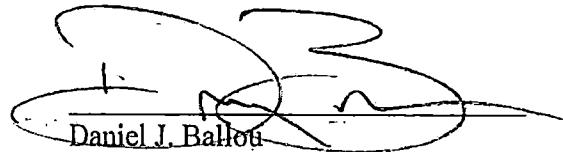
Courtney Feeley Karp, Individually and
As Trustee of the Deborah Dereede Living
Trust dated December 18, 2013 is Appellant.

PROOF OF SERVICE

The undersigned certifies that he has served this Respondents' Final Brief on the
Appellant by depositing a copy of it in the United States Mail, postage prepaid, on
August 15, 2017, addressed to its attorney of record, Desa Ballard, P.O. Box 6338, West

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8/15, 2017
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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

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.

FINAL REPLY BRIEF

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26 C.F.R. 1.897.1(c).....	4

REPLY TO RESPONDENT'S STATEMENT OF FACTS

Hugh cites to the transcript in support of his statement (on page 4 of his brief) that "the Trust clearly specified that the proceeds of the sale of the Property were to be given preferential treatment by the Trustee." However, the citation provided (R. p. 353, lines 1-9) does not say that. The lines cited are a statement by Professor Alan Medlin, the expert called by Hugh. The referenced testimony actually says:

... That note was to one afforded the highest priority of payment. So because 7-505 - - - 62-7-505(a)(3) allows a direction of where payment should be made that should be the most protected payment... . The settlor has directed that that's where that payment is to come from, so that TDN note would be the first to be paid, even if we had to get into the revocable trust assets."

(R. p. 353, lines 1-9).

That was Professor Medlin's opinion, based on his construction of an ambiguous document. Professor Medlin did not say that anything about the trust agreement was clear, because it was not. That is the reason the trial judge was hearing testimony from him, and from the Trust Protector, because nothing was clear. Professor Medlin even agreed with Courtney and the Trust Protector that, if it was appropriate to invoke the no-contest clause then it was fair not to make distributions from the trust until after the creditor period expired. (R. p. 372, lines 3-5).

Similarly, Hugh claimed "This scheme of distribution was confirmed by Respondent's expert Professor Alan Medlin" and cited to Tr. P. 136, line 20-22. That statement, quoted from the transcript, actually says:

Judge Kimball: All right. I find that Professor Medlin is qualified as an expert on trusts and estate law and practice - - -

(R. p. 344, lines 20-22).

The trust protector, Catherine Kennedy, said she agreed with "Professor Medlin that there was a scheme set out by the settlor as to what assets were to be used to pay the claims first. Of course, it was the probate assets that were to be used, by law." (R. p. 385, lines 10-15) (emphasis added). She further explained:

Then if anything flowed from the probate estate into the trust, then anything that was to fall into the residue, or the amount that was to go to Ms. Feeley Karp and her brother, was to be used first to pay the claims. They . . . did have priority. The amount to be paid to Tyre and the amount to be paid to Tyre and the amount to be paid to Mr. Dereedee were - - - were the last things.

(R. p. 385, lines 15 – 22) (emphasis added).

Ms. Kennedy concluded that Courtney "would have been foolish to get rid of the cash that she had [to pay the demands asserted by Hugh], because it just didn't seem practicable to do it at that point. She was only supposed to pay this as soon as practicable." (R. p. 386, lines 1-4).

Ms. Kennedy also opined that the trust agreement provided that Courtney was "conclusively presumed to have acted in good faith" by waiting for the six-month period with respect to the power of appointment to expire before making any distributions. That was so because of language in the Trust Agreement at Article Five, Section 1. (R. p. 388, line 6-22). Ms. Kennedy characterized that provision of the Trust Agreement as a "safe harbor" for a trustee who needed more information and needed the six months to be certain. Of course, Hugh sued before the six months had expired, so once the suit was brought, Courtney's (and to a lesser extent, the Trust Protector's) hands were tied.

Ms. Kennedy also pointed out the uncertainty of the balance due on the note (if such a note existed) at the time of the decedent's death, as to which Hugh gave no information to Courtney prior to the suit or to the Court in this testimony that day.

... She indicated, at least on the date that this trust was executed, that there was a note. Did that note still exist on the date of death? I don't know. I don't know if the trustee knows... Everybody seems to assume it's two hundred and fifty thousand dollars.... perhaps it's more than two fifty. Perhaps she made some payments on it.

(R. p. 390, line 24 – p. 391, line 18).¹

Hugh's brief asserts that he only filed the lawsuit "to protect his interests . . . so that Trust assets would not be squandered, improperly disbursed and/or improperly converted for personal use," now impugning Courtney's honesty; Courtney is a licensed attorney (in Massachusetts). (Initial Response Brief, p. 4). That's creative packaging. Hugh testified he filed suit against Courtney "to get a ruling as to when [he was] entitled to [recover] money," (R. p. 329, lines 1 - 21); and because Courtney had not treated him "fairly." (R. p. 336, lines 15-18).²

Courtney's counsel attempted to point out that Hugh's "tax scheme", if enforced, enabled Hugh to evade tax responsibility in the United States that he would otherwise owe under the Foreign Investment in Real Property Tax Act (FIRPTA), Chapter 61, Section 12, Foreign

¹ Ms. Kennedy even pointed out the ambiguity of Hugh's testimony at the hearing which, if true, might have meant that the amount due on the note was \$500,000.00. (R. p. 391, lines 14 – 21). Ms. Kennedy was correct. The purchase of the price was \$500,000.00, and the decedent's contribution was paid by the decedent by way of a mortgage through Bank of America, and which was satisfied at closing. (R. p. 496, line 504). Hugh finally acknowledged that he did not pay for the whole price of the house, although his testimony seems intended to confuse this issue. (R. p. 319, line 3- p. 320, line 18 ("I came up with another quarter of a million dollars.")). Even if Hugh did come up with a "second quarter of a million dollars, he got it back immediately when the decedent's BOA mortgage went through. For reasons that are not clear, the trial judge seemed not to want to focus on Hugh's attempt to mislead the Court, because he cut off Courtney's counsel's efforts to clarify Hugh's earlier misstatements, which seem intended to make it appear he paid for the entire house. "Move on to something else." (R. p. 408, lines 4 – 9).

² Hugh testified that the trust existed only to enable he and the decedent to escape taxes that would have been levied on the residence by South Carolina tax authorities, and other taxes that would be due under Canadian law, because Hugh was a Canadian citizen, because he didn't have a "green card." (R. p. 339, line 21). According to Hugh, the entire trust was scheme for tax evasion, which Hugh seeks to have the court both give its blessing and enforce. (R. p. 318, lines 5 – 17; R. p.320, line 25 – p. 321, line 13; R. p. 324, lines 7 – 13; R. p. 325, line 23 – p. 326, line 2; R. p. 326, line 20 – p. 327, line 14; R. p. 339, line 5- p. 340, line 24).

Investment in Real Property Tax Act. (R. p. 341, line 6 – p.342, line 6) However, the trial judge cut him off, stating “[w]e’re going to talk about something else.” *Id.*³

Had the trial judge allowed the argument to proceed, he would have learned that 26 U.S.C. 897(c) and 26 C.F.R. 1.897.1(c) provides an exclusion from the FIRPTA tax if the property interest that is subject to FIRPTA is held as a “creditor” only. See *Haber v. Commissioner*, 52 T.C. 255 (1969), affirmed 422 F.2d 198 (5th Cir. 1970). Now the real reason for Hugh’s tax scheme makes sense. He was avoiding taxes, and using the trust to do so.

It’s clear, when comparing the property tax obligations of a foreign national that become due upon sale of the property, to Hugh’s testimony, that the trust was a tax scheme which sought to enable Hugh to avoid paying any of the money recovered from the sale of the house to the IRS which would otherwise be required by FIRPTA. Hugh understood at least a part of the tax scheme because he insisted his company was a “creditor.”

Q (by Hugh’ Counsel): Do you believe that these monies, the two hundred and fifty thousand dollars, is a bequest to you or payment of a deb?

A. Payment of a debt.

Q. Why do you believe that?

A. Because it was covered by a promissory note and later put into the trust accordingly, referring to the promissory note.

(R. p. 330, lines 9 – 16).

This becomes more evident on cross examination of Hugh by Courtney’s counsel:

Q. But if you owned property in the U.S., you would have a liability to pay taxes?

A. Correct. . .

³ Had the trial judge considered FIRPTA, he would have realized that it requires a foreign national to pay to the IRS a fifteen percent (15%) tax based on the gross sales proceeds when real property in the United States which is titled in the name of the foreign national is sold. The trial judge clearly did not understand FIRPTA. (R. p. 341, lines 22-23) (“That law does not say that he pays the IRS a nickel.”).

Q. So that's the real reason behind this trust, is that if your name was on the deed and you owned half of this property, you would be liable for taxes upon its sale? . . .

A. It was only there to protect me in the form of a promissory note.

Q. But had you owned half the house in your name - - -

A. But I didn't.

Q. Well, I'm saying that's why we're here, is because you didn't want to pay taxes in America?

A. No. I was advised not to do that, so I would have to pay in both countries, which is a normal thing.

Q. So you were advised by Canadian lawyers not to pay taxes in America?

[Hugh's Counsel]: Objection, Your Honor.⁴

(R. p. 339, line 25 – p. 340, line 22).

Again, the trial judge made his disinterest in this issue clear. "Judge Kimball: Let's move on." (R. p. 341, line 4).

The tax scheme, and Hugh's basic knowledge of it, explains why Hugh became combative and refused to acknowledge that his pleadings had asserted that his solely-owned company, was a "beneficiary" of the trust rather than a creditor.

Q. If your company is a creditor, why did you plead in your lawsuit . . . that it was a beneficiary?

A. Because it's written up as a beneficiary into the trust.

Q. Okay. So it's a beneficiary . . .

A. No, no, no. I didn't say that . . . I didn't say that. You said that.

Q. You just said it's a beneficiary. Okay. Why did you plead that it was a beneficiary in your complaint?

⁴ Neither Courtney nor her counsel believe Hugh's counsel was aware of or participated in Hugh's efforts to avoid paying taxes in the United States or anywhere else. However, the effect of the trial judge's order is to permit exactly that, particularly to deprive the IRS of the taxes on Hugh's half interest in the real estate which was supposed to be hidden by the trust.

A. Because that's what I read in the trust, is what I said. . . The trust deals with TDN Consultants and Hugh Dereede in one sentence.

Q. And the trust says you are a bene - - - Tyre is a beneficiary?

A. If that's the interpretation.

Q. So [the decedent] believed that you were a beneficiary?

A. No, that's not what it says. You're putting words into my mouth.

Q. Well, no. You said, if the trust says you were a beneficiary, that's [the decedent's] trust. The trust speaks for her.

A. No. I'm a creditor then, if you want to know the answer.

Q. Then why did you plead that you were a beneficiary?

A. I don't remember pleading as a beneficiary.

(R. p. 337, line 7 – p. 338, line 14).

As noted in Courtney's Appellant's brief, the complaint did, in fact, plead that Hugh and his company were beneficiaries. (R. p. 40, ¶ 2). As further noted in Courtney's brief, the trial judge treated Hugh and his company both as a beneficiary and as a creditor. (Issues four and five, Appellant's Brief).

Once it becomes apparent what the real motivation for the trust was, *i.e.*, to allow Hugh to receive the sales proceeds of the South Carolina home without having to pay the taxes required by FIRPTA, it makes sense that the supposed "loan" made by Hugh's company and the mysterious promissory note that no one has ever seen are likely fabrications. Surely a "loan" of \$250,000.00 would have some paperwork to document its existence but Hugh produced none.

Consider how a promissory note for a quarter of a million dollars simply "disappears."

Q. ... Why did that note disappear, go away?

A. It went away when - - - after the house was put in the trust. I was told by the lawyer. . . that that now takes care of the note, because it was going to be dealt with in the trust. . .

(R. p. 321, line 21 – p. 322, line 1)

No explanation was offered for how the promissory note “disappeared.” Did it simply vanish? Was it torn up? Did it disintegrate? The mysterious “promissory note” seems to have existed only in Hugh’s mind; it seems likely his tax “scheme” was designed to allow him to receive sales proceeds for real property for which he may have furnished purchase proceeds in order to allow him to escape paying the IRS taxes that would be due under FIRTPA. It’s just as likely that the decedent paid the purchase price of the house and the trust was devised as a scheme to allow him to inherit the sales price of the property outside of probate, as well as avoid paying taxes due to the IRS. Maybe the decedent played along; maybe she was ignorant of the scheme. It seems odd that a magic promissory note that no one ever saw, and which now does not exist (and perhaps never did), should not form the basis of a breach of fiduciary duty claim when allowing recovery on that claim is an obvious violation of United States tax law.

Glaringly absent from the record is the testimony from the lawyer who prepared the trust agreement. Perhaps he had seen the magic promissory note, if it ever really existed. Perhaps he could explain why the trust is ambiguous as to whether Hugh and his company were creditors or beneficiaries. Or perhaps his testimony would have confirmed the tax scheme that was designed to allow Hugh to evade FIRPTA taxes, which would certainly have been detrimental to Hugh’s position. *In the Matter of Gonzalez*, 409 S.C. 621, 763 S.E.2d 210 (2014) (discussing the history of the rule permitting an evidentiary inference when a party fails to call a witness whose testimony is material to the issues presented and is within the control of the party).⁵

⁵ While the lawyer who prepared the trust may have been the decedent’s lawyer, Hugh’s testimony makes clear that he also consulted the lawyer and relied upon his advice, specifically as to his ability to recover on the promissory note. (R. p. 318, lines 16-22) “I was told by the lawyer the note . . . was no longer necessary” (R. p. 321, lines 8-11). “That amount got disputed by the lawyer . . . and they asked if I would waive that one percent.”, (R. p. 321, lines 24-25). “I was told by the lawyer that that now takes care of that note. . .”).

Scope of Review

Based on Hugh's brief at PP. 6-7, it does not appear that the parties disagree on the scope of review, although Hugh did not discuss the scope of review as to the jurisdictional issues raised.

Issue One

The parties seem to agree on the novel nature of the role of trust protector and the absence of authority in South Carolina regarding the role of the trust protector. However, they disagree as to the specifics of the role assigned to the trust protector under this particular trust. Hugh asserts that "nothing in the Probate Code confers exclusive jurisdiction upon trust protectors over disputes that would otherwise be heard by the . . . Court." (Response Brief p. 8). That's true. However, the actual trust agreement in this case, does provide that a court action cannot proceed unless or until the trust protector has authorized the action. (R. p. 60). The terms of the trust trump the provisions of the trust code. S.C. Code Ann. Section 62-7-818. Additionally, the involvement of and decisions of the Trust Protector "are binding on all other persons," which includes Hugh and his company. Section 62-7-818.

The decedent went out of her way to prevent lawsuits regarding her assets following her death. Hugh is simply incorrect in his assertion that the mandates of the trust agreement regarding resolution of disputes create "a permissive mechanism" for dispute resolution. (Respondent's Brief p. 9). There is nothing "permissive" about it. The trust expressly states that an action may "not be filed in "a court of law without first submitting the claim to the Trust Protector. . . "(R. p. 60). Under the terms of this particular trust (notwithstanding any provision of the trust code) only if and when the Trust Protector authorizes it may suit be filed in court.

As with any contract, the parties are free to include such terms as they choose in a contract, as long as the terms do not violate public policy. *South Carolina Department of Consumer Affairs*

v. Rent-A-Center Inc., 345 S.C. 251, 547 S.E.2d 881 (Ct. App. 2001). The first page of the trust agreement defines the trust as an agreement between “Deborah Dereede, the Trustor, and the Initial Trustee.” (R. p. 51, Section 1). Under simple contract theory, the beneficiaries of the trust are basic third-party beneficiaries. *Helms Realty Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 611 S.E.2d 485 (2005), citing *Touchberry v. City of Florence*, 295 S.C. 47, 367 S.E.2d 150 (1988).

As a third-party beneficiary, Hugh (and his company, if it is ever determined to be a beneficiary as opposed to a creditor) gain their rights from the language of the contract, which requires, Under the plain language of the trust, the mandate for the involvement of the Trust Protector to adjudicate disputes is, in essence, a condition precedent seeking to benefit from the trust in any manner.

Just as in arbitration agreements, the parties’ own agreement can define when and whether the resolution of a dispute can fall within the jurisdiction of a court or whether private resolution is required. Our appellate courts have discussed this as an issue of jurisdiction; at some points during the dispute resolution, the court may have jurisdiction but in other points in the process, it does not. *Steinmetz v. Am. Media Servs. LLC*, 393 S.C. 72, 709 S.E.2d 708 (Ct. App. 2011); *Main Corp v. Black*, 357 S.C. 179, 592 S.E.2d 200 (2004). A determination of whether a court lacks subject matter jurisdiction over issues embraced by the arbitration provision in a contract is based on the language of the contract itself; the courts use applicable law to determine to what degree the parties have bound themselves to private resolution. *Bradley v. Brentwood Homes Inc.*, 398 S.C. 447, 739 S.E.2d 312 (2012).

Hugh has done nothing pursuant of the terms of the trust agreement. His access to a judicial resolution is barred by his failure to comply with the Trust Protector provisions of the trust agreement. The court’s order should be vacated and the matter remanded for entry of a judgment

denying the relief requested by Hugh and his company and concluding, as a matter of law, that they are barred from recovering from the trust by virtue of the terms of the trust agreement and its no-contest clause.⁶

Issues Two and Three

Hugh asserts that the opinions of the Trust Protector during the case are irrelevant to the factual issues presented to the trial court. Ms. Kennedy was appointed as Trust Protector, with the agreement of Hugh. (R. pp. 34-38). Under the specific language of the trust, Ms. Kennedy's job was to opine on the Trustee's obligations and recommend her course of action. She did so. It is incredulous for Hugh to now argue that, because the Trust Protector agreed with Courtney, she abandoned her duties and became an advocate.

Ms. Kennedy served and testified as Trust Protector and testified as Trust Protector. (R. p. 379, lines 14-15). The parties even had a dialogue with the trial judge as whether Ms. Kennedy was testifying as an expert witness or as Trust Protector, and the trial judge did not qualify her as an expert witness. (R. p. 380, line 20 – p. 381, line 23). Her testimony must be afforded more weight than that of Professor Medlin, because Ms. Kennedy was testifying in official position as Trust Protector⁷ and, not as Hugh asserts, rejected in its entirety. (Respondent's Brief p. 12-13).

The only substantive argument Hugh makes in his response to Courtney's issues two and three is that Courtney is a lawyer, so she should have known how to construe the trust. (Respondent's Brief pp. 14-15). The trial judge improperly considered Courtney's status as a

⁶ Hugh's argument that Courtney converted the existing Trust Protector from a neutral to a "partisan expert" is silly. Ms. Kennedy testified to her construction of the trust agreement, and her belief as to how Courtney should have proceeded in the past, and how she should now proceed. That is the job assigned to her by the trust agreement.

⁷ Ms. Kennedy did note that the "trust was not particularly artfully drafted", which may be one point on which all parties agree. (R. p. 382, lines 22-23). Her opinion on that point, however, was not as an expert witness, but as Trust Protector, explaining the basis for her belief Courtney had acted prudently in light of the poor drafting of the trust.

lawyer and his finding that she had “great knowledge of the obligations of a trustee and the legal requirements of a fiduciary” is completely without evidence. (R. p. 25; Respondent’s Brief at PP. 14-15).

The entirety of Courtney’s qualifications as an attorney were contained in her testimony:

A. I’m an attorney, Your Honor. I graduated from Northeastern University School of Law in Boston, Massachusetts. I worked for the Commonwealth of Massachusetts for ten years, and now, I’m in private practice.

(R. p. 247, lines 11-15⁸).

It is impossible to support a conclusion that Courtney had any expertise in trust matters based on this record. To do so would suggest that every attorney, regardless of practice or experience, has “great knowledge of the obligations of a trustee and the legal requirements of a fiduciary.” This record establishes that the many lawyers involved prior to litigation, during litigation, and even now, all of whom differ on the meaning of the trust. The mind-numbing colloquy between Courtney and Hugh’s counsel during Courtney’s direct testimony established her considerable inability to understand the trust, despite her status as an attorney⁹. (R. pp. 227-301).

It was inappropriate to consider Courtney’s status as an attorney in determining that she had breached her fiduciary duty. It was even more error for the trial judge to conclude that Courtney had any kind of specialized trust knowledge, when the record is completely silent on that issue.

⁸ Courtney also noted, in an attempt at levity, “You know I’m a lawyer, right? I don’t do math.” (R. p. 315, line 4).

⁹ This is not unique to Courtney. As explained more fully in Courtney’s Appellant’s Brief, the trust agreement is inherently contradictory and ambiguous and was virtually impossible for Courtney to administer as written. The true fault for the circumstance in which Courtney found herself, as trustee, is the drafting of the trust agreement.

While he is not a lawyer, Hugh acknowledged the trust agreement was difficult to understand. He solved that by reading only the section that applied to him.

Q. Did you read the trust prior to filing this lawsuit?

A. I scanned the trust and re-read the article that dealt - - - the trust didn't really deal with me, only Section 6 did.

Q. So that's the only section you really read?

A. The only one that I would probably be able to understand because it was actually written in English.

Q. ... Well, the whole trust is written in English, right?

A. Other than the legalese... I gave it to a lawyer.

(R. pp. 555-556).

And we can all see where that got the parties.

Issues Four and Five

Hugh attempts to solve the conundrum as to whether his company is a creditor or beneficiary by claiming, in his Response Brief, that it is both. He also now acknowledges what was suspected all along – there never was a promissory note. (Respondent's Brief p. 15). And using the same magic with which the promissory note "disappeared" (Issue One, *supra.*) his new theory is that "the Trust clearly established the Respondent's claim" so it doesn't really matter anyway. (Respondent's Brief p. 16).

Only if Hugh's company is a beneficiary does it have any status to sue (or be awarded damages) under a breach of fiduciary duty claim. Here, where no one knows whether the company is a creditor or beneficiary based on the language of the trust agreement, that is called an "ambiguity" which has to be construed against the drafter. *i.e.*, the decedent. *Davis v. Pruitt Corporation*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016). Since Hugh's company is claiming a right to receive payment as a beneficiary (and was awarded judgment on that basis), the ambiguity

must be construed against Hugh, since his claim is derivative of the Trust, *i.e.*, the drafter.

It cannot be both. As argued in detail in Courtney's Appellant's Brief, if Hugh's company is a creditor, it lost its chance to seek recovery by failing to file a claim against the estate. If Hugh's company is unable to sue as a beneficiary because of the ambiguity of the language of the trust, perhaps he has a remedy against the lawyer who drafted the trust. Hugh's testimony makes clear that he (and the decedent) was benefitting from the tax scheme that the trust was intended to create by not having to pay higher taxes,¹⁰ (R. p. 318, lines 5 – 17; R. p. 320, line 25 – p. 321, line 13; R. p. 324, lines 7 – 13; R. p. 325, line 23 – p. 326, line 2; R. p. 326, line 20 – p. 327, line 14; R. p. 339, line 5- p. 340, line 24). The only person involved in this litigation who had no involvement in the language of the trust is Courtney, and she is being penalized with a judgment against her (as trustee and personally) on the basis of an ambiguous document over which she had no control, and tried desperately to interpret and apply.

Hugh asserts that the inability of the Court (or anyone else) to figure out whether Hugh's company is a creditor or a beneficiary under the terms of the trust agreement is a "false choice." (Respondent's Brief p. 15). He now asserts the decedent intentionally "elevated" his company from creditor to beneficiary to put it in a priority position. There is absolutely no evidence of that at all. Hugh now admits there was not a promissory note. So, the language of the trust agreement that requires payment of a "note" has an entirely false predicate. There is no note. Now we know; Hugh's company is neither a creditor nor a beneficiary.

Lastly, Hugh argues that this Court must (as the trial court did) read only one portion of the trust agreement in isolation, *i.e.* the only one that Hugh read, in order to affirm the trial judge's

¹⁰ Hugh's testimony about exactly what kind of taxes he/they was trying to avoid is not really clear, but it certainly includes taxes to the IRS. *See* Issue One, *supra*. However, his testimony suggests York County and Canadian taxing authorities were involved as well.

decision. Read in isolation, Article Six could be construed as clear and unambiguous. Unfortunately, South Carolina law does not support Hugh's assertion, mandating that an ambiguous contract be construed as a whole. *Three States Coal Co. v. Mollohon Mfg. Co.*, 137 S.C. 345, 135 S.E. 380 (1926); *SC Department of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 550 S.E.2d 299 (2001). Even if it did not, Courtney, as a trustee, had to consider all obligations of the trust in determining how to proceed. (R. pp. 522-528).

Again, Hugh argues that Courtney should be held to some "super standard" of care as a trustee since she has a law degree. As explained above, there is no evidence Courtney has any experience as a trustee or with fiduciary obligations (other than the crash course she obtained in this litigation, and as guided by the Trust Protector).

Issue Six

Hugh acknowledges in his Respondent's brief that neither he nor his company made any allegations against Courtney in her individual capacity. (Respondent's Brief p. 17). His acknowledgement asserts Rule 11, SCRCP, as the basis upon which he could not have made any allegations against Courtney personally.

That answers that. Neither Hugh nor his company may obtain relief not requested in the pleadings. *Gainey v. Gainey*, 279 S. 68, 301 S.E.2d 763 (1983) *Tinsley v. Tinsley*, 326 S.C. 374, 483 S.E.2d 198 (Ct App. 1996). Hugh argues that the windfall to him effected by the trial judge's decision on rehearing to specifically impose personal liability upon Courtney was issued because "the Court was not willing to insulate her personally from having to reimburse the trust." (Respondent's Brief p. 16).

Courtney respectfully asserts that there must be some evidence to support a conclusion that she acted outside of her capacity as trustee before she can become personally liable in her individual capacity. Here, there is none, and Hugh and his company acknowledge that, even citing to Rule 11, SCRCF, for the reason they did not so claim.

Courtney did exactly as she was required to do, she raised this issue by Motion for Reconsideration because the trial judge's order was not clear. That did not create an opportunity for the trial judge, as an afterthought, to change the relief requested or awarded, or to supplement the evidence presented, simply because it didn't occur to anyone until the order was issued that Courtney might have personal liability until the order which did not clearly limit her liability.

Courtney respectfully asserts that this record does not support the entry of an order against her personally, and before any court can determine that she bears individual liability must exist, there must be some evidence. Hugh's 11th hour argument that not imposing liability upon a trustee personally would "create a moral hazard and incentivize unreasonable conduct by trustees" is not supported by case law, and Hugh cites none. (Respondent's Brief p. 17).

Entry of individual liability against Courtney is an issue that could be addressed only when and if it is determined that the trust lacks the assets to satisfy its obligations (not just to Hugh but to all beneficiaries), and judicial inquiry is made to determine whether evidence shows Courtney acted outside of her responsibility as a trustee or some other evidence of malfeasance is provided. An inquiry analogous to piercing the corporate veil would be required before Courtney can be held to have any *personal* liability. See e.g., *Dumas v. InfoSafe Corp.* 320 S.C. 188, 463 S.E.2d 641 (Ct. App. 1995). See also *Daniels v. Berry*, 148 S.C. 446, 146 S.E.2d 420 (1929). The issue was clearly not litigated here and there is no evidence to support entry of judgment against Courtney individually.

Issue Seven¹¹

The attorney's fees award must be vacated because the judgment must be vacated.

However, even if all or part of the judgment remains, and even if all or part of the judgment is entered against Courtney individually, the award of attorney's fees must be vacated. Hugh did not plead any statute as a basis for the attorney's fees to be awarded, and it seems he acknowledges that. (Respondent's Brief p. 17). He argues that his prayer did, in fact, pray for attorney's fees, so it was permissible for the trial judge to *sua sponte* search the South Carolina Code for a basis upon which to award them.

In reality, the "prayer" of the complaint to which Hugh refers is the third cause of action, which seeks "litigation costs" and, in paragraph 27, does so "pursuant to the terms of the Trust." (R. p. 46¶ 27). Instead of following the request for fees by consulting the Trust Agreement, the trial judge cast about for a statute upon which to award fees.

Under common law, each party bears his own attorney's fees. *Prevatte v. Asbury Arms*, 302 S.C. 413, 396 S.E.2d 642 (Ct. App. 1990). So, a party may not recover attorney's fees from the other side absent a contract or a statute. *Duke Power Co. v. South Carolina Public Service Commission*, 284 S.C. 81, 326 S.E.2d 395 (1985).

In both instances, some standard for the award of attorney's fees is set (whether by contract or by statute) and the party seeking to recover the attorney's fees has the burden to establish that they have met the burden which allows them to recover the fees. Hugh and his company did neither.

¹¹ Hugh did not set forth a separate response to Courtney's Issue Seven; however, he does briefly mention the issue of attorney fees in his response to Courtney's Issue Six, and for that reason, Courtney will reply. The reply to this issue also raises a new issue related to subject matter jurisdiction, which can be raised at any time. *Bardoon Properties, NV v. Eidolon Corporation*, 326 S.C. 166, 485 S.E.2d 371 (1997).

The trial judge chose S.C. Code Ann. Section 62-7-1004 as the basis upon which to award attorney's fees. It's unclear why he did so (clearly the statute was not pleaded). If this claim for breach of fiduciary had been brought in circuit court, there would have been no basis upon which to award attorney's fees, because Section 62-7-1004 only applies to matters filed in probate court regarding "the administration of a trust."

It was error for the trial judge to be permitted to cast about to find a statutory basis upon which to award attorney's fees, and in selecting S.C. Code Ann. Section 62-7-1004 as the basis upon which to do so. The claim for fees was asserted to be the trust agreement, although no specific part of it was asserted as a basis for the claim. The trial judge could not simply choose to award attorney's fees on the basis of his choosing.

Perhaps it was because this action was initially filed in probate court that the trial judge elected to rely upon Section 62-7-1004 to award attorney's fees. (R. p. 39; R. pp. 134-138). However, that raises another question.

The trial court lacked subject matter jurisdiction to adjudicate a breach of fiduciary duty claim based on Hugh's jurisdictional allegations

Lost in the noise is the fact that this case was initially filed in the probate court. (R. p. 39). The basis for which subject matter jurisdiction was asserted was S.C. Code Ann. Section 62-7-201(a). *Id.* ¶ 6. The case was removed to circuit court upon Courtney's motion and based upon Section 62-1-302(d)(4) (R. pp. 134-138).

Upon reflection, it seems likely that the probate court never had subject matter jurisdiction to entertain a claim for damages for breach of fiduciary duty, based on the failure of Hugh and his company to plead the proper jurisdictional statute. Removal to the circuit court certainly did not change the nature of the action (despite Judge Rogers' order; *see discussion infra*).

Consequentially, no claim for breach of fiduciary duty, a matter external to the trust, was ever vested in the circuit court.

The complaint in this matter did not even plead a claim for breach of fiduciary duty; nor was the complaint ever amended to assert that claim. The causes of action pleaded were, in fact, internal to the trust.

The complaint had three causes of action:

- (1) declaratory judgment seeking an order to require Courtney to “divide the net proceeds from such said, after payment to Plaintiff Tyre Dealer Consultants, Inc., such that he receives a sum certain as was the wishes of the decedent, directed in Article Six, Section 4(a) of said Trust Agreement;
- (2) “probable cause”; and
- (3) “litigation costs.”

(R. pp. 39-46).

The prayer, on the other hand, pleaded for:

- (1) the declaratory judgment requested in the first cause of action;
- (2) for “an order finding that Courtney . . . breached her fiduciary duty owed to each of the Plaintiffs, and awarding actual and punitive damages to the Petitioner...” and
- (3) attorney fees pursuant to the trust agreement. (R. p. 46).

The alleged jurisdictional basis for this lawsuit, S.C. Code Ann. Section 62-7-201(a), grants the probate court exclusive jurisdiction over “proceeding initiated by interested parties concerning the internal affairs of trusts.” By filing in probate court, pleading Section 62-7-201(a) as the basis of jurisdiction, and asserting causes of action which related solely to the internal affairs of the trust, Hugh and his company defined their claims as being “internal” to the trust.

Judge Rogers (the probate judge) issued an order dated May 7, 2015 removing the matter to the circuit court. (R. pp. 1-3). She did so pursuant to S.C. Code Ann. Section 62-1-302(d)(4),

which permits removal of “matters involving the internal or external affairs of trusts as provided in Section 62-7-201. . .”. (emphasis added). However, the removal was of an action which pleaded jurisdictional claims exclusively related to the internal affairs of the trust. Judge Rogers could only remove the matters that had been pleaded, and all of those were internal to the trust. As a result, the circuit court only had jurisdiction to address the causes of action internal to the trust, absent an order permitting an amendment to the complaint and the filing of an amended complaint, neither of which occurred.

Hugh could have filed an action for breach of fiduciary duty in either probate court or circuit court, pursuant S.C. Code Ann. Section 62-7-201(c)(3), which grants concurrent jurisdiction to the two courts to deal with matters external to the trust. An external claim would include an action for damages (such as breach of fiduciary duty). But he did not do so; his causes of action invoked jurisdiction only for matters related to the internal affairs of the trust, which precluded an action for damages, and he pleaded causes of action which would have, indeed, been internal to the trust. As a result, the jurisdiction acquired by the probate court, and removed to the circuit court, was limited to matters internal to the trust. As a result, the circuit court lacked jurisdiction in this action to award relief for breach of fiduciary duty, because the jurisdictional predicate of Section 62-7-201(c)(3) was not pleaded and therefore not triggered.

Just as family courts are creatures of statute with limited jurisdiction as fixed by the legislature, *Katzburg v. Katzburg, infra*, so, too, is the probate court a statutory court of limited jurisdiction. *Judy v. Judy, infra*.

As a lesser argument along the same lines, Hugh’s complaint did not plead for (although it prayed for) a claim for breach of fiduciary duty. As with the award of attorney’s fees discussed above, it seems pretty clear that a prayer in a complaint, without more, is not enough to assert a

cause of action¹². There has to be a cause of action pleaded in addition to a prayer for relief. Rule 8(a), SCRCP; *Watson & Howell Builders v. Billingsley*, 310 S.C. 39, 425 S.E.2d 43 (Ct. App. 1992). *See also Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 723 S.E.2d 835 (Ct. App. 2012) (pleading must contain facts and statutes upon which the court's jurisdiction depends.).

A complaint must contain (a) a statement of grounds including facts and statutes upon which jurisdiction is based; (2) a statement of facts supporting the claim for relief; and (3) a prayer or demand for judgment sought. *Justice v. The Pantry*, 330 S.C. 37, 496 S.E.2d 871 (Ct. App. 1998), *affirmed as modified* 335 S.C. 572, 518 S.E.2d 40 (1999).

The South Carolina Supreme Court has analyzed probate court jurisdiction insofar as it relates to what issues could have been pleaded in that action. *Judy v. Judy*, 393 S.C. 160, 712 S.E.2d 408 (2011). In that case, the Supreme Court's analysis of a claim of *res judicata* depended on a determination of what actions *could have* been pleaded in an earlier probate action. The decision turned on what causes of action could have been pleaded in the probate court, and concluded that a claim for damages for waste could have been adjudicated in probate court. For that reason, a subsequent circuit court action was barred by *res judicata*.

Since the jurisdictional allegations of the complaint in this action did not invoke jurisdiction to litigate matters external to the trust, such as breach of fiduciary duty, or to award damages in tort, it follows that the circuit court's jurisdiction was similarly lacking. *Katzburg v. Katzburg*, 410 S.C. 184, 764 S.E.2d 3 (Ct. App. 2014).

Notwithstanding the jurisdictional allegations of the complaint, it is incongruous to affirm an award of damages for breach of fiduciary duty when no cause of action for breach of fiduciary

¹² As discussed above, the claim for attorney's fees sought recovery pursuant to some unidentified provision of the trust agreement. The award of attorney's fees, however, was based on a statute randomly chosen by the trial judge.

duty was even pleaded (except in the prayer, which took it out of the subject matter jurisdiction invoked by Section 62-7-201(a)). *Standard Roofing Co. Inc. v. Dean Const. Co., Inc.*, 284 S.C. 40, 324 S.E.2d 334 (Ct. App. 1984) (“the trial court erred by going beyond the scope of the pleadings and granting relief on theories not pleaded. Judgments ‘not support by the theories of action on which the pleadings [are] framed [are] fatally defective’”), citing *Crocker v. Crocker*, 281 S.C. 154, 314 S.E.2d 343 (Ct. App. 1984). “This court has made it clear it will not affirm a judgment that grants relief on an issue not pled.” *Mayhill Homes Corp v. Family Federal Sav. And Loan Ass’n*, 284 S.C. 60 324 S.E.2d 340, (Ct. App. 1984).

Conclusion

Courtney incorporates her conclusion in her initial brief. Additionally, she asks that this Court examine the subject matter jurisdiction issue that became apparent on examination on the limited jurisdictional pleading, as argued in the last section herein, and vacate the judgment in its entirety.

Respectfully submitted,



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August 14, 2017

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

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,

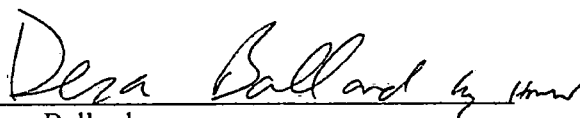
Of which

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

Respectfully submitted,


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August 14, 2017



The South Carolina Court of Appeals

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Re: IN RE: Deborah Dereede Living Trust dated December 18, 2013
Appellate Case No. 2016-001921

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: The Honorable S. Jackson Kimball, III

THE STATE OF SOUTH CAROLINA
In The 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 whom Courtney Feeley Karp, Individually and As
Trustee of the Deborah Dereede Living Trust dated
December 18, 2013, is the Appellant.

Appellate Case No. 2016-001921

Appeal From York County
S. Jackson Kimball, III, Special Circuit Court Judge

Opinion No. 5639
Heard December 6, 2018 – Filed April 10, 2019

AFFIRMED IN PART AND DISMISSED IN PART

Desa Ballard and Harvey M. Watson, III, both of Ballard
& Watson, Attorneys at Law, of West Columbia; and
Peter John Nosal and Thomas Carroll Jeter, III, both of
Nosal & Jeter, LLP, of Fort Mill, all for Appellant.

John P. Gettys, Jr. and Daniel Joseph Ballou, both of
Morton & Gettys, LLC, of Rock Hill, for Respondents.

HILL, J.: After a bench trial, the trial court ruled that Courtney Feely Karp breached her fiduciary duty as Trustee of a trust created by her late mother by not timely distributing certain trust proceeds to Hugh Dereede (Hugh), Karp's stepfather, and to Tyre Dealer Network Consultants, Inc. (Tyre), Hugh's company. The trial court also awarded Hugh attorney's fees and held Karp personally liable for the verdict. Karp appeals these rulings, which we now affirm.

I.

Some eight months before her death, Deborah Dereede (Deborah), Karp's mother, executed a revocable trust. She named herself trustee and designated Karp as successor trustee. The only asset in the trust was a home located in Lake Wylie, South Carolina, which Deborah put on the market for sale a few months later. Several months after Deborah's death, Karp sold the house, netting \$356,242.86.

This appeal turns on the following trust provision:

As soon as practicable following my death, my Trustee shall sell the house and lot located at 131 WHISPERING PINES DR., LAKE WYLIE, SC 29710. The sales proceeds shall be used first to pay off any mortgage against the property, and second to pay off that certain promissory note given by me to TYRE DEALER NETWORK CONSULTANTS, INC. Said promissory note, at the time of the execution of my Trust, is in the amount of \$250,000.00, but in no event shall the amount due exceed one-half of the sales price of the property. After payoff of said mortgage and said note, my Trustee shall then distribute one-half of the remaining net sales proceeds to HUGH DEREDE, outright and free of trust. The other one-half of the remaining net sales proceeds shall be distributed in accordance with the Articles that follow.

After the sale of the house closed, Hugh demanded immediate payment of his and Tyre's share of the proceeds. Karp, who was also the personal representative of

Deborah's estate, believed she could not distribute the proceeds until she was certain of the net assets of the trust and the estate, and the time for creditor's claims had expired. Hugh would not be delayed, however, and filed this action in the probate court seeking a declaratory judgment for immediate payment. After procedural sparring, Karp removed the case to circuit court. She continued to refuse Hugh's distribution request but now also claimed that, by suing her, Hugh and Tyre had triggered the trust's no-contest clause thereby forfeiting their right to the proceeds. In the event of such a forfeiture, the disputed monies would go to Karp and her siblings as remainder beneficiaries.

Ten months into the litigation, Karp appointed, with Hugh's consent, Catherine H. Kennedy as trust protector as contemplated by the trust. Kennedy filed a report concluding Karp was justified in waiting on any creditor's claims to clear before making any trust distributions and that the issues of whether Karp exercised good faith in invoking the no contest clause and whether probable cause supported Hugh and Tyre's claims should be decided by the court.

Karp and Hugh testified at the bench trial. Karp called Kennedy as a witness, while Hugh presented S. Alan Medlin as his expert. The trial court ruled (1) Karp breached her fiduciary duty by not timely distributing the house sale proceeds to Tyre and Hugh; (2) Hugh had probable cause to bring this action, and therefore the no contest clause did not apply; (3) because Tyre was a creditor, the no contest clause was inapplicable to it; and (4) Tyre and Hugh were entitled to attorney's fees and costs from Karp.

II.

Because a breach of fiduciary duty claim can be legal or equitable, *see Verenes v. Alvanos*, 387 S.C. 11, 17, 690 S.E.2d 771, 773 (2010) (stating "an action alleging a breach of fiduciary duty is an action at law," but also that "a breach of fiduciary duty may sound in equity if the relief sought is equitable"), we look to the main purpose of the action to define our scope of review. *Id.* at 16, 690 S.E.2d at 773 ("Characterization of an action as equitable or legal depends on the . . . main purpose in bringing the action." (internal quotation and citations omitted)). Here, the main purpose is to enforce an alleged unconditional duty to pay a beneficiary. Actions involving trusts are almost always equitable, but there is an exception that applies here: an action against a trustee under an alleged immediate and unconditional obligation to pay money to a beneficiary is a legal action. 4 Scott & Ascher on Trusts § 24.2.1 at 1660 (5th ed. 2007); Restatement (Second) of Trusts § 198(1) (Am. Law Inst. 1959); *see also* S.C. Code Ann. § 62-7-1001 cmt. (Supp. 2018) (noting only

traditional remedy at law for breach of trust was limited to suits to enforce obligations to pay money and deliver chattels, otherwise, remedies for breach of trust were "exclusively equitable"). We must affirm the verdict in a legal action tried by a judge alone if any evidence reasonably supports it. *See Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976), *abrogated on other grounds by In re Estate of Kay*, 423 S.C. 476, 816 S.E.2d 542 (2018).

Although *Verenes* involved the right to a jury trial rather than standards of review, its holding rested on a conclusion that the main purpose of the damages action against the trustee there was equitable, as it sought the classic equitable remedies of restitution and disgorgement. 387 S.C. at 17, 690 S.E.2d at 773–74. Based on the complaint here, and the historical classification of suits seeking enforcement of a trustee's obligation to pay money as legal actions—as recognized in the comment to section 62-7-1001 quoted above—we hold that this is an action at law rather than equity. We acknowledge it is possible that after *Verenes* this action's main purpose could be classified as the equitable remedy of specific performance. If so, our scope of review would expand to de novo, and we may find the facts based on our view of the evidence. *See* S.C. Const. art. V, § 5; *see also Doe v. Clark*, 318 S.C. 274, 276, 457 S.E.2d 336, 337 (1995). However, expanding the scope of review would not change our decision in this appeal.

III.

A. Breach of Trust/Fiduciary Duty

The South Carolina Trust Code describes the duties of trustees and mandates that a trustee "shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries" S.C. Code Ann. § 62-7-801 (Supp. 2018). The Code also imposes a duty of loyalty on the Trustee. S.C. Code Ann. § 62-7-802(a) (Supp. 2018) ("A trustee shall administer the trust solely in the interests of the beneficiaries."). Where, as here, a trust has two or more beneficiaries, the duty of loyalty includes a duty to "act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests." S.C. Code Ann. § 62-7-803 (Supp. 2018). The Code also incorporates the common law of trusts and principles of equity to the extent they supplement its provisions. S.C. Code Ann. § 62-7-106 (Supp. 2018).

A breach of trust is simply a "violation by a trustee of a duty the trustee owes to a beneficiary" S.C. Code Ann. § 62-7-1001(a) (Supp. 2018); *see also*

Restatement (Second) of Trusts § 201 (Am. Law Inst. 1959); Restatement (Third) of Trusts § 93 (Am. Law Inst. 2012); 4 Scott & Ascher on Trusts, § 24.5.

The trust instrument has been likened to a map on which the settlor has set the course the trustee must faithfully follow, and from which the trustee departs at his peril. *Rodgers v. Herron*, 226 S.C. 317, 330, 85 S.E.2d 104, 110 (1954); *Womack v. Austin*, 1 S.C. 421, 438 (1870); see Restatement (Third) of Trusts § 73, cmt. (c) (Am. Law Inst. 2007) ("A fundamental duty of the trustee is to carry out the directions of the testator or settlor as expressed in the terms of the trust." (quoting Bogert, *The Law of Trusts and Trustees* § 541 (rev. 2d ed. 1993))).

As the trial court noted, Karp's duty to execute Deborah's intent expressed in Article 6, Section 4 in distributing the proceeds was absolute, not discretionary. See *Cartee v. Lesley*, 290 S.C. 333, 336, 350 S.E.2d 388, 389 (1986) ("The powers of a trustee are either mandatory or discretionary. A power is mandatory when it authorizes and commands the trustee to perform some positive act, and is discretionary when the trustee may refrain from exercising it.").

We agree with the trial court that the trust's directive that Karp sell the house and distribute the proceeds "as soon as practicable" to Tyre and Hugh did not permit Karp to wait until she could ascertain the liquidity of the estate and the extent of any creditors' claims. Such a delay is common and often required in the probate of a person's estate, but as Medlin testified, the rules are different for trust administration. Medlin acknowledged Karp's position was understandable and not one of bad faith, for § 62-3-505(a)(3) makes revocable trust assets subject to probate claims if the probate estate is insufficient to pay its creditors. But, as Medlin emphasized, Karp risked no personal liability by following Deborah's intent to expedite distribution of the house sale proceeds, as the Trust Code insulated her and allowed creditors to follow the money and recover against the distributee. See S.C. Code Ann. § 62-7-604(b) (Supp. 2018). Medlin also noted in his affidavit that a personal representative or trustee is only liable to non-beneficiaries if they are personally at fault. See S.C. Code Ann. § 62-3-808 (Supp. 2018); S.C. Code Ann. § 62-7-1010(b) (Supp. 2018); see also S.C. Code Ann. § 62-7-1002 (Supp. 2018) (stating trustee only liable to beneficiaries for breach of fiduciary duty).

Karp attempted to justify her delay by pointing to the possibility that Deborah could have, without Karp's knowledge, changed the terms of the trust by exercising her testamentary power of appointment by will or codicil. Even if we accept Karp's premise, the trust provides that if the trustee receives no notice of such a will or codicil within six months of Deborah's death, the trustee may distribute the trust "as

though this power of appointment had not been exercised." Because Karp's delay far exceeded this six month window, her continued withholding of trust distributions in reliance on a potential revision of the trust was untenable.

There is no evidence Karp acted in bad faith. While a Trustee is duty-bound to act in good faith, good faith alone will not excuse a breach of trust. Once it is determined the trustee has failed to carry out the express terms of a trust, good faith "counts for nothing" in the breach of trust calculus. *Rollins v. May*, 473 F. Supp. 358, 365 (D.S.C. 1978); *see* 4 Scott & Ascher, § 24.5 ("A trustee who does the best it can, does, however, commit a breach of trust if the trustee's best is not good enough.").

The trial court's factual findings concerning Karp's breach of trust are supported by evidence, and we decline to disturb them. *See Townes Assocs.*, 266 S.C. at 86, 221 S.E.2d at 775.

B. The No-Contest Provision of the Trust

We likewise affirm the trial court's finding that Hugh had probable cause to bring this action, rendering the no contest provision inoperable. *See* S.C. Code Ann. § 62-7-605 (Supp. 2018) ("A provision in a revocable trust purporting to penalize any interested person for contesting the validity of the trust or instituting other proceedings relating to the trust is unenforceable if probable cause exists for instituting proceedings."); *see also* Restatement (Third) of Property, *Wills* § 8.5 cmt. (c) (Am. Law Inst. 2003) ("Probable cause exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful."). This again is a factual matter we are bound to uphold if supported by any evidence. *See Townes Assocs.*, 266 S.C. at 86, 221 S.E.2d at 775. Professor Medlin's testimony, together with Deborah's intent as expressed in Article 6, Section 4 of the trust, demonstrates that Hugh acted reasonably in pursuing this action and there was a high probability he would prevail.

C. Tyre's Status: Beneficiary or Creditor?

Karp insists the trial court erred in treating Tyre as both a creditor and a beneficiary. She claims Tyre cannot be both (Medlin disagreed). In Karp's view, Tyre was a creditor, and therefore, she could not be liable to Tyre for breach of trust, a cause of action only available to beneficiaries. But this argument leads to a cul-de-sac, for even if Tyre was a creditor, it would not affect Karp's liability for breach of trust to Hugh due to her lack of timely distribution to him, nor would it affect our holding that probable cause existed for this lawsuit. Assuming Tyre was a creditor, the no

contest clause would not bind it. If Tyre was a beneficiary, the no contest clause would not apply because Tyre had the same probable cause as Hugh to challenge Karp's actions. A good argument could be made that Tyre was a beneficiary according to the Trust Code, which includes within the definition of beneficiary any person that "has a present or future beneficial interest in a trust" S.C. Code Ann. § 62-7-103(2)(A) (Supp. 2018). We explain all of this to demonstrate that Karp's argument may be disposed of by one of the great appellate truths: "whatever doesn't make any difference, doesn't matter." *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987).

D. Karp's Personal Liability

Karp contends the trial court erred by making her liable in both her capacity as trustee, and personally. We conclude the trial court did not err.

A trustee is liable to the beneficiaries for a breach of trust. § 62-7-1002. This liability is personal, and the trustee must pay any damages from his own funds. *See* Restatement (Third) of Trusts § 100 cmt. a (Am. Law Inst. 2012) ("This Section addresses the measure of a trustee's personal liability for a breach of trust.").

Karp argues section 62-7-1010 protects her from personal liability unless she was personally at fault. This section, however, applies only to a trustee's liability to third parties and does not affect the trustee's personal liability to beneficiaries for breach of trust. *See* South Carolina Trust Code Article 7, Part 10, General Comment ("Sections 62-7-1010 through 62-7-1013 address trustee relations with persons other than beneficiaries."). Section 1010 does, though, highlight that Karp had little risk of personal liability to third party creditors of Deborah's probate estate for promptly distributing the house sale proceeds as directed by the trust.

Although Karp acted in good faith, a trustee is nevertheless personally liable for breach of trust. *See Crayton v. Fowler*, 140 S.C. 517, 519, 139 S.E. 161, 161 (1927) ("[I]t is clear under the law and the facts of the case that he must be held personally responsible for said loss. It is a general rule of law that 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."); *see also Hogg v. Walker*, 622 A.2d 648, 653 (Del. 1993) ("A trustee's liability for a breach of trust is personal in character with all the consequences and incidents of personal liability."); *In re Wills of Jacobs*, 370 S.E.2d 860, 865 (N.C. Ct. App. 1988) ("General common law principles hold that a trustee's breach of trust subjects him to personal liability."); 90A C.J.S. *Trusts* § 343.

E. Award of Attorney's Fees to Hugh

Karp next claims error in the award of attorney's fees. The Trust Code empowers trial courts to order attorney's fees in trust administration cases "as justice may require." S.C. Code Ann. § 62-7-1004 (Supp. 2018). We must affirm a trial court's fee award if any evidence supports it. *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993). The trial court's comprehensive written attorney's fee award tracked the criteria of *Baron Data Systems v. Loter*, 297 S.C. 382, 384–85, 377 S.E.2d 296, 297 (1989), and its factual conclusions are well anchored by the record.

F. The Trust Protector and Subject Matter Jurisdiction

Karp contends the trial court lacked subject matter jurisdiction over this action because the trust gives exclusive jurisdiction to the trust protector to resolve any disputes.

"Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237–38, 442 S.E.2d 598, 600 (1994) (internal quotations omitted). Whether a court has subject matter jurisdiction is a question of law we review de novo. *See Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009).

A trust protector is defined as "a person, committee of persons or entity who is or who are designated as a trust protector whose appointment is provided for in the trust instrument." S.C. Code Ann. § 62-7-103(27) (Supp. 2018). "The powers and discretions of a trust protector are as provided in the governing instrument and may be exercised or not exercised, in the best interests of the trust, in the sole and absolute discretion of the trust protector and are binding on all other persons." S.C. Code Ann. § 62-7-818 (Supp. 2018). There is no case law interpreting the role of trust protectors in South Carolina or their effect, if any, on subject matter jurisdiction.

The parties designated Kennedy as Trust Protector. Article 3, Section 8(h) of the Trust states, "The Trust Protector *may* unilaterally resolve any dispute, claim or conflict" between beneficiaries and the Trustee. (emphasis added). In the event the trust protector elects to resolve such disputes, the "resolution shall be binding on all parties to [the] Trust and shall not be subject to review." Additionally, Section 8(h) declares:

No one may file or instigate a claim in a court of law without first submitting the claim to the Trust Protector for resolution The Trust Protector *may* submit the claim or dispute for mediation and/or binding arbitration. Subsequent to his or her review, the Trust Protector *may* give any claimant the authority to file and maintain an action in a court of law. . . . Whenever a dispute, conflict, or claim involves an interpretation or construction of [the] Trust Agreement, the Trust Protector *may* file an action in a court of competent jurisdiction for the interpretation and construction of such Trust Agreement, or *may* instruct [the] Trustee to do so.

(emphasis added).

The plain language of the trust shows Deborah intended a trust protector could, under certain circumstances, have binding authority to resolve disputes like the one that triggered this lawsuit. It is not necessary for us to detail these circumstances, because none of them exist here. By way of example, the trust protector provision arguably requires that any dispute be first presented to the trust protector before a lawsuit can be filed. Yet here the trust protector was not appointed until months after filing. Likewise, the trust protector provision states the trust protector may unilaterally resolve disputes, submit the dispute to mediation or arbitration, file a lawsuit to resolve the dispute, allow a claimant to file suit, or instruct the trustee to file suit. Here, Kennedy in her report not only declined to resolve the dispute but encouraged Karp to seek judicial resolution.

Whatever the contours of the trust protector's authority, we hold that under the circumstances here they do not extend to stripping the trial court of subject matter jurisdiction. Probate Courts and Circuit Courts are specifically empowered to hear trust administration disputes. *See* S.C. Code Ann. § 62-7-201 (Supp. 2018).

IV.

We therefore affirm the ruling of the trial court. Our decision and its underlying reasoning would be the same even if we had reviewed this appeal de novo and found the facts based on our own view of the greater weight of the evidence. Finally, we dismiss Karp's appeal of the denial of her summary judgment motion. *See, e.g., Holloman v. McAllister*, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986) ("[T]he

denial of a motion for summary judgment before trial is not reviewable after a trial of a case on its merits.").

Accordingly, the trial court's order is

AFFIRMED IN PART AND DISMISSED IN PART.

KONDUROS and MCDONALD, JJ., concur.

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. Sirrine*, 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

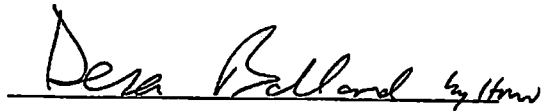
⁴ The South Carolina Trust Code (S.C. Code 62-7-100 et seq.) was adopted subsequent to much of the authority cited in this Court’s opinion, but is not specifically stated as to whether that adoption of the UTC had any effect on the issue of trustee liability in this particular context or more broadly.

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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ATTORNEYS FOR PETITIONER

April 25, 2019

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
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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.

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:

John Gettys, Jr., Esquire
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Beth Cogan, Paralegal

April 25, 2019
West Columbia, South Carolina



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
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Of which,

Courtney Feeley Karp, Individually and
As Trustee of the Deborah Dereede Living
Trust dated December 18, 2013 is Appellant.

**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.

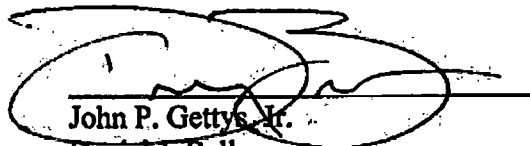
A breach of trust does not require a finding of bad faith. Rollins v. May, 473 F. Supp. 358, 365 (D.S.C. 1978)(noting that “the law in South Carolina is crystal-clear that if a trustee departs from the express provisions of the trust instrument, he does so at his own peril, and not even good faith nor 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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ATTORNEYS FOR RESPONDENTS

May __ 2019

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

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,

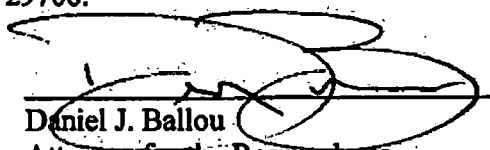
Courtney Feeley Karp, Individually and
As Trustee of the Deborah Dereede Living
Trust dated December 18, 2013 is Appellant.

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



Daniel J. Ballou
Attorney for the Respondents



The South Carolina Court of Appeals

IN RE: Deborah Dereede Living Trust dated December 18, 2013, Hugh Dereede and Tyre Dealer Network Consultants, Inc., Respondents,

v.

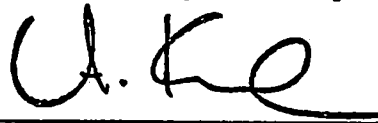
Courtney Feeley Karp, Individually and As Trustee of the Deborah Dereede Living Trust dated December 18, 2013 and Michael Fehily, as a qualified beneficiary of the Deborah Dereede Living Trust dated December 18, 2013, Defendants,

Of whom Courtney Feeley Karp, Individually and As Trustee of the Deborah Dereede Living Trust dated December 18, 2013, is the Appellant.

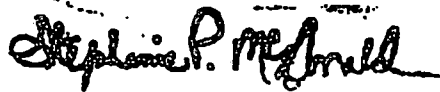
Appellate Case No. 2016-001921

ORDER

The petition for rehearing is granted. We dispense with further briefing and argument. The attached opinion is substituted for the previous opinion, which is withdrawn.



J.



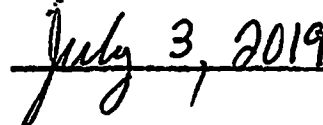
J.



J.

Columbia, South Carolina

FILED



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cc: Desa Ballard, Esquire
Harvey M. Watson, III, Esquire
Peter John Nosal, Esquire
Thomas Carroll Jeter, III, Esquire
John P. Gettys, Jr., Esquire
Daniel Joseph Ballou, Esquire

THE STATE OF SOUTH CAROLINA
In The 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 whom Courtney Feeley Karp, Individually and As
Trustee of the Deborah Dereede Living Trust dated
December 18, 2013, is the Appellant.

Appellate Case No. 2016-001921

Appeal From York County
S. Jackson Kimball, III, Special Circuit Court Judge

Opinion No. 5639
Heard December 6, 2018 – April 10, 2019
Withdrawn, Substituted and Refiled July 3, 2019

AFFIRMED IN PART AND DISMISSED IN PART

Desa Ballard and Harvey M. Watson, III, both of Ballard
& Watson, Attorneys at Law, of West Columbia; and

Peter John Nosal and Thomas Carroll Jeter, III, both of
Nosal & Jeter, LLP, of Fort Mill, all for Appellant.

John P. Gettys, Jr. and Daniel Joseph Ballou, both of
Morton & Gettys, LLC, of Rock Hill, for Respondents.

HILL, J.: After a bench trial, the trial court ruled that Courtney Feely Karp breached her fiduciary duty as Trustee of a trust created by her late mother by not timely distributing certain trust proceeds to Hugh Dereede (Hugh), Karp's stepfather, and to Tyre Dealer Network Consultants, Inc. (Tyre), Hugh's company. The trial court also awarded Hugh attorney's fees and held Karp personally liable for the verdict. Karp appeals these rulings, which we now affirm.

I.

Some eight months before her death, Deborah Dereede (Deborah), Karp's mother, executed a revocable trust. She named herself trustee and designated Karp as successor trustee. The only asset in the trust was a home located in Lake Wylie, South Carolina, which Deborah put on the market for sale a few months later. Several months after Deborah's death, Karp sold the house, netting \$356,242.86.

This appeal turns on the following trust provision:

As soon as practicable following my death, my Trustee shall sell the house and lot located at 131 WHISPERING PINES DR., LAKE WYLIE, SC. 29710. The sales proceeds shall be used first to pay off any mortgage against the property, and second to pay off that certain promissory note given by me to TYRE DEALER NETWORK CONSULTANTS, INC. Said promissory note, at the time of the execution of my Trust, is in the amount of \$250,000.00, but in no event shall the amount due exceed one-half of the sales price of the property. After payoff of said mortgage and said note, my Trustee shall then distribute one-half of the remaining net sales proceeds to HUGH DEREDEDE, outright and free of trust. The other one-half of the remaining net sales proceeds

shall be distributed in accordance with the Articles that follow.

After the sale of the house closed, Hugh demanded immediate payment of his and Tyre's share of the proceeds. Karp, who was also the personal representative of Deborah's estate, believed she could not distribute the proceeds until she was certain of the net assets of the trust and the estate, and the time for creditor's claims had expired. Hugh would not be delayed, however, and filed this action in the probate court seeking a declaratory judgment for immediate payment. After procedural sparring, Karp removed the case to circuit court. She continued to refuse Hugh's distribution request but now also claimed that, by suing her, Hugh and Tyre had triggered the trust's no-contest clause thereby forfeiting their right to the proceeds. In the event of such a forfeiture, the disputed monies would go to Karp and her siblings as remainder beneficiaries.

Ten months into the litigation, Karp appointed, with Hugh's consent, Catherine H. Kennedy as trust protector as contemplated by the trust. Kennedy filed a report concluding Karp was justified in waiting on any creditor's claims to clear before making any trust distributions and that the issues of whether Karp exercised good faith in invoking the no contest clause and whether probable cause supported Hugh and Tyre's claims should be decided by the court.

Karp and Hugh testified at the bench trial. Karp called Kennedy as a witness, while Hugh presented S. Alan Medlin as his expert. The trial court ruled (1) Karp breached her fiduciary duty by not timely distributing the house sale proceeds to Tyre and Hugh; (2) Hugh had probable cause to bring this action, and therefore the no contest clause did not apply; (3) because Tyre was a creditor, the no contest clause was inapplicable to it; and (4) Tyre and Hugh were entitled to attorney's fees and costs from Karp.

II.

Because a breach of fiduciary duty claim can be legal or equitable, *see Verenes v. Alvanos*, 387 S.C. 11, 17, 690 S.E.2d 771, 773 (2010) (stating "an action alleging a breach of fiduciary duty is an action at law," but also that "a breach of fiduciary duty may sound in equity if the relief sought is equitable"), we look to the main purpose of the action to define our scope of review. *Id.* at 16, 690 S.E.2d at 773 ("Characterization of an action as equitable or legal depends on the . . . main purpose

in bringing the action." (internal quotation and citations omitted)). Here, the main purpose is to enforce an alleged unconditional duty to pay a beneficiary. Actions involving trusts are almost always equitable, but there is an exception that applies here: an action against a trustee under an alleged immediate and unconditional obligation to pay money to a beneficiary is a legal action. 4 Scott & Ascher on Trusts § 24.2.1 at 1660 (5th ed. 2007); Restatement (Second) of Trusts § 198(1) (Am. Law Inst. 1959); *see also* S.C. Code Ann. § 62-7-1001 cmt. (Supp. 2018) (noting only traditional remedy at law for breach of trust was limited to suits to enforce obligations to pay money and deliver chattels, otherwise, remedies for breach of trust were "exclusively equitable"). We must affirm the verdict in a legal action tried by a judge alone if any evidence reasonably supports it. *See Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976), *abrogated on other grounds by In re Estate of Kay*, 423 S.C. 476, 816 S.E.2d 542 (2018).

Although *Verenes* involved the right to a jury trial rather than standards of review, its holding rested on a conclusion that the main purpose of the damages action against the trustee there was equitable, as it sought the classic equitable remedies of restitution and disgorgement. 387 S.C. at 17, 690 S.E.2d at 773–74. Based on the complaint here, and the historical classification of suits seeking enforcement of a trustee's obligation to pay money as legal actions—as recognized in the comment to section 62-7-1001 quoted above—we hold that this is an action at law rather than equity. We acknowledge it is possible that after *Verenes* this action's main purpose could be classified as the equitable remedy of specific performance. If so, our scope of review would expand to de novo, and we may find the facts based on our view of the evidence. *See* S.C. Const. art. V, § 5; *see also Doe v. Clark*, 318 S.C. 274, 276, 457 S.E.2d 336, 337 (1995).

III.

A. Breach of Trust/Fiduciary Duty

The South Carolina Trust Code describes the duties of trustees and mandates that a trustee "shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries" S.C. Code Ann. § 62-7-801 (Supp. 2018). The Code also imposes a duty of loyalty on the Trustee. S.C. Code Ann. § 62-7-802(a) (Supp. 2018) ("A trustee shall administer the trust solely in the interests of the beneficiaries."). Where, as here, a trust has two or more beneficiaries, the duty of loyalty includes a duty to "act impartially in investing, managing, and

distributing the trust property, giving due regard to the beneficiaries' respective interests." S.C. Code Ann. § 62-7-803 (Supp. 2018). The Code also incorporates the common law of trusts and principles of equity to the extent they supplement its provisions. S.C. Code Ann. § 62-7-106 (Supp. 2018).

A breach of trust is simply a "violation by a trustee of a duty the trustee owes to a beneficiary" S.C. Code Ann. § 62-7-1001(a) (Supp. 2018); *see also* Restatement (Second) of Trusts § 201 (Am. Law Inst. 1959); Restatement (Third) of Trusts § 93 (Am. Law Inst. 2012); 4 Scott & Ascher on Trusts, § 24.5.

The trust instrument has been likened to a map on which the settlor has set the course the trustee must faithfully follow, and from which the trustee departs at his peril. *Rodgers v. Herron*, 226 S.C. 317, 330, 85 S.E.2d 104, 110 (1954); *Womack v. Austin*, 1 S.C. 421, 438 (1870); *see* Restatement (Third) of Trusts § 73, cmt. (c) (Am. Law Inst. 2007) ("A fundamental duty of the trustee is to carry out the directions of the testator or settlor as expressed in the terms of the trust." (quoting Bogert, *The Law of Trusts and Trustees* § 541 (rev. 2d ed. 1993))).

As the trial court noted, Karp's duty to execute Deborah's intent expressed in Article 6, Section 4 in distributing the proceeds was absolute, not discretionary. *See Cartee v. Lesley*, 290 S.C. 333, 336, 350 S.E.2d 388, 389 (1986) ("The powers of a trustee are either mandatory or discretionary. A power is mandatory when it authorizes and commands the trustee to perform some positive act, and is discretionary when the trustee may refrain from exercising it.").

We agree with the trial court that the trust's directive that Karp sell the house "as soon as practicable" and distribute the proceeds to Tyre and Hugh did not permit Karp to wait until she could ascertain the liquidity of the estate and the extent of any creditors' claims. Such a delay is common and often required in the probate of a person's estate, but as Medlin testified, the unique trust provision here required expedited distribution to Tyre and Hugh. Medlin acknowledged Karp's position was understandable and not one of bad faith, for § 62-3-505(a)(3) makes revocable trust assets subject to probate claims if the probate estate is insufficient to pay its creditors. But, as Medlin emphasized, Karp risked no personal liability by following Deborah's intent to expedite distribution of the house sale proceeds, as the Trust Code insulated her and allowed creditors to follow the money and recover against the distributee. *See* S.C. Code Ann. § 62-7-604(b) (Supp. 2018). Medlin also noted in his affidavit that a personal representative or trustee is only liable to non-beneficiaries if they are personally at fault. *See* S.C. Code Ann. § 62-3-808 (Supp. 2018); S.C. Code Ann. §

62-7-1010(b) (Supp. 2018); *see also* S.C. Code Ann. § 62-7-1002 (Supp. 2018) (stating trustee only liable to beneficiaries for breach of fiduciary duty). He also testified the trust provision at issue was an expression of Deborah's intent that the distributions to Tyre and Hugh be given priority and expedited.

We emphasize our holding is limited to the specific facts of this case and the specific language of this trust provision, which was part of an eighty page trust document that both Kennedy and Medlin deemed "a maze." We acknowledge Karp was placed in a difficult spot, and the "soon as practicable" language limited her options. Karp maintained she had not only the right but the duty to wait until the extent of the creditors' claims could be determined. Kennedy agreed. As we noted, that is the usual procedure for trustees and personal representatives. However, there is nothing in the record that tells us what the assets and liabilities (including any potential estate tax liabilities) of either the Trust or Deborah's probate estate were. Without this information, Karp's position falters. Medlin testified it appeared the Trust had sufficient assets to safely distribute the house sale proceeds to Tyre and Hugh. Without contrary evidence, we are constrained by the "any evidence" standard of review to affirm the trial court's ruling. Our decision might be different were we viewing this issue through the *de novo* scope.

Karp also attempted to justify her delay by pointing to the possibility that Deborah could have, without Karp's knowledge, changed the terms of the trust by exercising her testamentary power of appointment by will or codicil. Even if we accept Karp's premise, the trust provides that if the trustee receives no notice of such a will or codicil within six months of Deborah's death, the trustee may distribute the trust "as though this power of appointment had not been exercised." Because Karp's delay far exceeded this six month window, her continued withholding of trust distributions in reliance on a potential revision of the trust was untenable.

There is no evidence Karp acted in bad faith. While a Trustee is duty-bound to act in good faith, good faith alone will not excuse a breach of trust. Once it is determined the trustee has failed to carry out the express terms of a trust, good faith "counts for nothing" in the breach of trust calculus. *Rollins v. May*, 473 F. Supp. 358, 365 (D.S.C. 1978); *see* 4 Scott & Ascher, § 24.5 ("A trustee who does the best it can, does, however, commit a breach of trust if the trustee's best is not good enough.").

The trial court's factual findings concerning Karp's breach of trust are supported by evidence, and we must therefore affirm them. *See Townes Assocs.*, 266 S.C. at 86, 221 S.E.2d at 775.

B. The No-Contest Provision of the Trust

We likewise affirm the trial court's finding that Hugh had probable cause to bring this action, rendering the no contest provision inoperable. *See* S.C. Code Ann. § 62-7-605 (Supp. 2018) ("A provision in a revocable trust purporting to penalize any interested person for contesting the validity of the trust or instituting other proceedings relating to the trust is unenforceable if probable cause exists for instituting proceedings."); *see also* Restatement (Third) of Property, *Wills* § 8.5 cmt. (c) (Am. Law Inst. 2003) ("Probable cause exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful."). This again is a factual matter we are bound to uphold if supported by any evidence. *See Townes Assocs.*, 266 S.C. at 86, 221 S.E.2d at 775. Professor Medlin's testimony, together with Deborah's intent as expressed in Article 6, Section 4 of the trust, supports the conclusion that Hugh acted reasonably in pursuing this action and it was likely he would prevail.

C. Tyre's Status: Beneficiary or Creditor?

Karp insists the trial court erred in treating Tyre as both a creditor and a beneficiary. She claims Tyre cannot be both (Medlin disagreed). In Karp's view, Tyre was a creditor, and therefore, she could not be liable to Tyre for breach of trust, a cause of action only available to beneficiaries. But this argument leads to a cul-de-sac, for even if Tyre was a creditor, it would not affect Karp's liability for breach of trust to Hugh due to her lack of timely distribution to him, nor would it affect our holding that probable cause existed for this lawsuit. Assuming Tyre was a creditor, the no contest clause would not bind it. If Tyre was a beneficiary, the no contest clause would not apply because Tyre had the same probable cause as Hugh to challenge Karp's actions. A good argument could be made that Tyre was a beneficiary according to the Trust Code, which includes within the definition of beneficiary any person that "has a present or future beneficial interest in a trust" S.C. Code Ann. § 62-7-103(2)(A) (Supp. 2018). We explain all of this to demonstrate that Karp's argument may be disposed of by one of the great appellate truths: "whatever doesn't make any difference, doesn't matter." *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987).

D. Karp's Personal Liability

Karp contends the trial court erred by making her liable in both her capacity as trustee, and personally. We conclude the trial court did not err.

A trustee is liable to the beneficiaries for a breach of trust. § 62-7-1002. This liability is personal, and the trustee must pay any damages from his own funds. *See* Restatement (Third) of Trusts § 100 cmt. a (Am. Law Inst. 2012) ("This Section addresses the measure of a trustee's personal liability for a breach of trust.").

Karp argues section 62-7-1010 protects her from personal liability unless she was personally at fault. This section, however, applies only to a trustee's liability to third parties and does not affect the trustee's personal liability to beneficiaries for breach of trust. *See* South Carolina Trust Code Article 7, Part 10, General Comment ("Sections 62-7-1010 through 62-7-1013 address trustee relations with persons other than beneficiaries."). Section 1010 does, though, highlight that Karp had little risk of personal liability to third party creditors of Deborah's probate estate for promptly distributing the house sale proceeds as directed by the trust.

Although Karp acted in good faith, a trustee is nevertheless personally liable for breach of trust. *See Crayton v. Fowler*, 140 S.C. 517, 519, 139 S.E. 161, 161 (1927) ("[I]t is clear under the law and the facts of the case that he must be held personally responsible for said loss. It is a general rule of law that 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."); *see also Hogg v. Walker*, 622 A.2d 648, 653 (Del. 1993) ("A trustee's liability for a breach of trust is personal in character with all the consequences and incidents of personal liability."); *In re Wills of Jacobs*, 370 S.E.2d 860, 865 (N.C. Ct. App. 1988) ("General common law principles hold that a trustee's breach of trust subjects him to personal liability."); 90A C.J.S. *Trusts* § 343.

E. Award of Attorney's Fees to Hugh

Karp next claims error in the award of attorney's fees. The Trust Code empowers trial courts to order attorney's fees in trust administration cases "as justice may require." S.C. Code Ann. § 62-7-1004 (Supp. 2018). We must affirm a trial court's fee award if any evidence supports it. *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993). The trial court's comprehensive written attorney's fee award tracked the criteria of *Baron Data Systems v. Loter*, 297 S.C. 382, 384–85,

377 S.E.2d 296, 297 (1989), and its factual conclusions are well anchored by the record.

F. The Trust Protector and Subject Matter Jurisdiction

Karp contends the trial court lacked subject matter jurisdiction over this action because the trust gives exclusive jurisdiction to the trust protector to resolve any disputes.

"Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237–38, 442 S.E.2d 598, 600 (1994) (internal quotations omitted). Whether a court has subject matter jurisdiction is a question of law we review de novo. *See Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009).

A trust protector is defined as "a person, committee of persons or entity who is or who are designated as a trust protector whose appointment is provided for in the trust instrument." S.C. Code Ann. § 62-7-103(27) (Supp. 2018). "The powers and discretions of a trust protector are as provided in the governing instrument and may be exercised or not exercised, in the best interests of the trust, in the sole and absolute discretion of the trust protector and are binding on all other persons." S.C. Code Ann. § 62-7-818 (Supp. 2018). There is no case law interpreting the role of trust protectors in South Carolina or their effect, if any, on subject matter jurisdiction.

The parties designated Kennedy as Trust Protector. Article 3, Section 8(h) of the Trust states, "The Trust Protector *may* unilaterally resolve any dispute, claim or conflict" between beneficiaries and the Trustee. (emphasis added). In the event the trust protector elects to resolve such disputes, the "resolution shall be binding on all parties to [the] Trust and shall not be subject to review." Additionally, Section 8(h) declares:

No one may file or instigate a claim in a court of law without first submitting the claim to the Trust Protector for resolution The Trust Protector *may* submit the claim or dispute for mediation and/or binding arbitration. Subsequent to his or her review, the Trust Protector *may* give any claimant the authority to file and maintain an

action in a court of law. . . . Whenever a dispute, conflict, or claim involves an interpretation or construction of [the] Trust Agreement, the Trust Protector *may* file an action in a court of competent jurisdiction for the interpretation and construction of such Trust Agreement, or *may* instruct [the] Trustee to do so.

(emphasis added).

The plain language of the trust shows Deborah intended a trust protector could, under certain circumstances, have binding authority to resolve disputes like the one that triggered this lawsuit. It is not necessary for us to detail these circumstances, because none of them exist here. By way of example, the trust protector provision arguably requires that any dispute be first presented to the trust protector before a lawsuit can be filed. Yet here the trust protector was not appointed until months after filing. Likewise, the trust protector provision states the trust protector may unilaterally resolve disputes, submit the dispute to mediation or arbitration, file a lawsuit to resolve the dispute, allow a claimant to file suit, or instruct the trustee to file suit. Here, Kennedy in her report not only declined to resolve the dispute but encouraged Karp to seek judicial resolution.

Whatever the contours of the trust protector's authority, we hold that under the circumstances here they do not extend to stripping the trial court of subject matter jurisdiction. Probate Courts and Circuit Courts are specifically empowered to hear trust administration disputes. *See* S.C. Code Ann. § 62-7-201 (Supp. 2018).

IV.

We therefore affirm the ruling of the trial court. Finally, we dismiss Karp's appeal of the denial of her summary judgment motion. *See, e.g., Holloman v. McAllister*, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986) ("[T]he denial of a motion for summary judgment before trial is not reviewable after a trial of a case on its merits.").

Accordingly, the trial court's order is

AFFIRMED IN PART AND DISMISSED IN PART.

KONDUROS and MCDONALD, JJ., concur.