



STATE OF SOUTH CAROLINA  
COUNTY OF YORK

Vicki Lynn Vergeldt, Individually,  
and as Successor Trustee of the John  
Vergeldt, Jr. Revocable Living Trust  
dated September 27, 1978,

Petitioner,

vs.

John Edward Vergeldt,

Respondent.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2016-CP46-00820

FINAL ORDER

**RECEIVED**

**Aug 02 2021**

**SC Court of Appeals**

THIS MATTER came before the Court for a final hearing on January 30, 2020. Present at the hearing was Petitioner Vicki Lynn Vergeldt (“Petitioner”), Individually, and as Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978, her counsel, Taylor A. Peace, Esq., and Respondent John Edward Vergeldt (“Respondent”), who appeared pro se. The following witnesses appeared and testified: Kathleen Palinski, Esq., Court appointed Limited Special Trustee (“Palinski”); Charles E. Bosler, Jr. (“Bosler”); and Audry Scheible.

#### FACTUAL AND PROCEDURAL BACKGROUND

This is the second legal proceeding between Petitioner and Respondent who are siblings and the last surviving heirs of John Vergeldt, Jr (“Settlor”). Another sister, Patricia Vergeldt Downey (“Patti”) survived the Settlor, but she died on September 28, 2018. Both actions concern Respondent’s handling and administration of the Trust as Co-Trustee and Successor Trustee.

In the first action, (C/A No.: 2014-46-1956), Petitioner sought to have certain provisions of the trust construed regarding Respondent’s duty to account and produce records as well as to have the Court declare the date when the Settlor became incapacitated.

Petitioner brought the current action in the York County Probate Court on February 1, 2016 seeking to have Respondent removed as Successor Trustee, and Respondent timely responded to the same. Initially, Respondent was represented by Daniel J. Ballou, Esq. The action was removed to the Court of Common Pleas for York County on March 16, 2016.

Due to the matters at issue, the parties consented to appoint Kathleen Palinski, Esq. (“Palinski”), as non-fiduciary Limited Special Trustee, who was empowered and authorized to obtain documents and information about the Trust related to any account(s) at any bank, investment house, or other financial institution, including, but not limited to, statements, account ownership documents/signature cards, correspondence and/or check copies.

On April 29, 2019, Respondent resigned his position as Successor Trustee of the Trust and Petitioner became the Second Successor Trustee. Having resigned as trustee, Respondent filed a motion to have the action dismissed. The motion was denied, and Petitioner was allowed to file an Amended Petition for Removal of Trustee and Related Relief on June 20, 2019.

At trial in January 2020, Respondent objected to certain exhibits offered by Petitioner, stating he had not received the exhibits. This matter was deferred, and an order issued on May 12, 2020 allowing the Respondent thirty days to provide responding affidavits. On August 31, 2020, an order was filed specifying what affidavits or exhibits filed by Respondent after the trial were received into evidence.

With this factual and procedural background set forth, based upon the testimony and other evidence, I make the following Findings of Fact and Conclusions of Law.

### **FINDINGS OF FACT**

1. On September 27, 1978, Mr. Vergeldt (“Settlor”), executed the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978, in which he identified himself as Trustee and

beneficiary. This trust was amended seven times prior to the current Restatement of Trust, executed on July 29, 2009. The Restatement appointed Respondent to serve as Co-trustee of the trust during the Settlor's lifetime, vesting him with all of the powers, duties and obligations of trustee, and giving him binding decision-making authority for the trust as if made by the Settlor as trustee.

2. Following the Restatement, the trust was amended two additional times; first in February 2010 to account for the death of the Settlor's son, David Leigh Vergeldt (NINTH AMENDMENT); and second in March 2011 to name Respondent as the initial successor trustee and amend other portions (TENTH AMENDMENT).

3. Relevant paragraphs of the trust include the FIFTH (residuary trust), SIXTH (cottage and beneficiary distributions), FOURTEENTH (trustee duties), and EIGHTEENTH (forfeiture). Portions of these paragraphs were amended by the TENTH AMENDMENT.

4. From approximately 2005 through his death on July 9, 2013, the Settlor experienced a decline in his mental and physical condition brought on by Parkinson's disease. The symptoms the Settlor experienced were primarily related to his physical condition, but they, over time, impaired his ability to function physically and mentally until his death on July 9, 2013.

5. In 2008, the Settlor lived independently in a retirement community where he remained until sometime in 2010 when he moved in with Petitioner. In October 2011, the Settlor was moved to Patti's home, and resided there until his transfer to Respondent's home in South Carolina in January 2012. The Settlor resided with the Respondent in South Carolina until his death in July 2013.

6. Following the Settlor's death, Petitioner requested that Respondent provide her with records and accounting as he had proposed distributing assets. It was at this point that the

relationship between the Petitioner and the Respondent became strained and hostile. While Petitioner continued to make request for records and information, the Respondent demanded she sign a release, or be disinherited. Ultimately, Petitioner filed the first civil action between the parties.

7. The first action was presided over by the Honorable S. Jackson Kimball, III, Master-In-Equity for York County and resulted in a bench trial. As discussed previously, this action decided what reporting and accounting duties were owed to the Petitioner. No findings or conclusions were made as to whether or not Respondent breached those duties.

8. After trial, Judge Kimball ordered as follows (“2015 Final Order”):

- a) the Settlor became mentally incapacitated under the terms of the trust as of May 6, 2013;
- b) Respondent became Co-Trustee on July 29, 2009, and Successor Trustee on May 6, 2013;
- c) Respondent has a duty to provide Petitioner with “a copy of the terms of the trust that describe or affect the trust beneficiary’s interest and relevant information about the trust property” without limitation as to time.
- d) Respondent has a duty to provide statements of account, at least annually, to Petitioner, and to permit inspection of the records since the Settlor’s death.

9. Following the 2015 Final Order, this action was brought in probate court where Palinski was appointed as limited special trustee for the purpose of reviewing Respondent’s administration of the trust. Palinski received some records from Respondent, but also had to subpoena various financial institutions to piece together how the assets were disposed. She

prepared an accounting of the trust's accounts, finances and assets covering the period between January 1, 2009 and December 31, 2016. Petitioner called her as an expert witness.

10. Petitioner also called Bosler as an expert witness who reviewed the records received by Palinski. Bosler generated an accounting from the available data, and conducted a *pro forma* and prudent man standard assessment, starting from December 31, 2008, and ending April 30, 2019. The *pro forma* amount shows the adjustment made from the available data to the Prudent Man standard.

11. Both experts determined that the Respondent, while acting as Co-Trustee or Successor Trustee, failed to adhere to the terms of the trust and his fiduciary duties, including as follows:

- a. Comingling trust funds with his personal account;
- b. Comingling funds with accounts jointly owned with the Settlor or the trust;
- c. Failing to keep and maintain adequate records, and account for numerous cash withdrawals by check or ATM card;
- d. Failing to provide records or other information to Petitioner as beneficiary;
- e. Failing to be impartial and loyal to Petitioner as beneficiary;
- f. Failing to administer and distribute funds as directed by the trust.

12. Due to the lack of recordkeeping and comingling of funds, Palinski was unable to verify the frequent transfers to and from Respondent's personal account First Citizen's #9209; numerous checks written to cash from joint owned First Citizens account #4009; and frequent use of an ATM card from this same account. Bosler was also unable to resolve these and other transactions, including a \$17,000.00 withdrawal from a Fifth Third joint owned account in 2011. This was the same year that Respondent failed to provide an annual statement. The amount of

unresolved withdrawals made while Respondent was Trustee reached \$64,410.00 at the time of Settlor's death. This amount increased to \$127,770.00 through his remaining time as trustee. Bosler's report also demonstrates the inaccuracies of Respondent's annual statements in comparison with the available data.

13. In addition to the unresolved transactions, Respondent also mishandled the Residuary Trust. Paragraphs FIFTH A and SIXTH direct how the Residuary Trust would be administered by the Successor Trustee. Initially, \$50,000.00 was to be separated from the Residuary Trust and placed in a "Cottage Trust", to be used solely for the Cottage's maintenance and expenses.<sup>1</sup> Second, \$6,000.00 was to be paid to each grandchild. Thereafter, the Successor Trustee "shall divide the balance of assets of the Residuary Trust into equal shares, one (1) share for each of Settlor's children."

14. At the time of the Settlor's passing in July 2013, the trust assets totaled \$479,703.00. Respondent paid \$48,000.00 to the grandchildren, \$60,000 to himself, \$60,000.00 to Petitioner, and \$51,000.00 to Patti.<sup>2</sup> Petitioner received no further payments, yet Respondent continued to distribute assets to himself and Patti. Notably in 2014, Respondent paid himself \$45,826.00, Patti \$35,836.00, and nothing to Petitioner.

15. Respondent also failed to follow the terms of the trust by allocating \$50,000.00 solely for the maintenance and upkeep of the Cottage. Also, while Respondent was Successor Trustee, the Cottage experienced mold, mildew or water and other damage, decreasing in value from \$62,500.00 at the time of Settlor's death to \$25,000.00.<sup>3</sup>

16. Based on the above, I find that Respondent, during his time as Co-Trustee and

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<sup>1</sup> The "Cottage" is real estate located in Michigan described in more detail in Petitioner's exhibit 9.

<sup>2</sup> Patti's amount may have reduced to account for a vehicle gifted to her prior to the Settlor's death valued at \$10,000.00.

<sup>3</sup> Petitioner's exhibit 9 contains a copy of the appraisal and estimate.

Successor Trustee, not only failed to abide by the terms of the trust, but also failed in his fiduciary duties owed to the trust and the Petitioner as a beneficiary. As a result, Petitioner and the trust have suffered actual and consequential damages.

### **CONCLUSIONS OF LAW**

Based on the forgoing Findings of Fact, the Court makes the following Conclusions of Law:

1. This Court has jurisdiction over the subject matter and parties and venue is proper pursuant to Rule 53, SCRCP and the Order of Reference filed in this matter on March 27, 2018.

2. As noted in paragraph FOURTEENTH E, the trust must be administered and construed in accordance with Michigan Law, thus this court will determine this matter according to the Michigan Trust Code, §700.7101 *et. al.*, and other applicable Michigan law.

3. First and foremost, a trustee should follow the terms of the trust. “Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, expeditiously, in accordance with its terms and purposes ...” M.C.L.A. §700.7801 (2010). Paragraphs FIFTH and SIXTH set clear terms for administration and disbursement of the Residuary Trust. Respondent ignored those terms as to the “Cottage Trust”, and failed to disburse funds equally between the beneficiaries.

4. Respondent, as Successor Trustee, also failed to follow the terms of the trust in FOURTEENTH A and C. Paragraph FOURTEENTH A required the Successor Trustee keep “full and accurate records of assets, receipts and disbursements, and other financial transactions relative to each trust”, and allow for inspection. Further, the burden rests upon the trustee, under either Michigan or South Carolina law, to show the correctness of his accounting. *See Long v. Earle*, 277 Mich. 505, 269 N.W. 577 (1936); *Neely v. People’s Bank of Anderson*, 133 S.C. 43, 130 S.E. 550 (1925). Respondent failed to adequately account for numerous transactions to his personal

account, checks written to cash, and ATM purchases/withdrawals. He also failed to provide full and accurate annual statements, or make them available for Petitioner at her request. Respondent also failed to pay all “proper” disbursements as required by FOURTEENTH C by withholding funds from the Petitioner.

5. In addition to the terms of the trust, Michigan Trust Code §700.7811(1) required Respondent to maintain adequate records. In this case, Respondent failed to provide a 2011 annual statement, and the statements or other information he did provide were incorrect or insufficient.

6. Respondent breached the trust by comingling funds. “A trustee shall keep trust property separate from the trustee’s own property” M.C.L.A. §700.7811(2) (2010). It is apparent that Respondent over several years as both Co-Trustee and Successor Trustee comingled trust funds with his own personal account First Citizen account #9209, or accounts he jointly owned with the Settlor or the trust.<sup>4</sup>

7. Respondent failed in his statutory duties to provide information and records to the Petitioner, as a beneficiary. According to Michigan Trust Code §700.7814, a trustee shall:

Upon the reasonable request of a trust beneficiary, promptly furnish to the trust beneficiary a copy of the terms of the trust that describe or affect the trust beneficiary’s interest and relevant information about the trust property.” M.C.L.A. §700.7814(2)(a) (2010); and

[S]end to ... qualified or nonqualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust property and, if feasible, their respective market values ...”

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<sup>4</sup> A more detailed list of the joint owned accounts is found in Palinksi’s report. (Petitioner’s 2, Tab 1).

M.C.L.A. §700.7814(3) (2010).

Respondent breached his duties to the Petitioner by failing to account and report on the assets and funds despite Petitioner's multiple requests to do so, thus concealing from Petitioner his commingling and self-dealing of trust property.

8. Respondent, as trustee, owed a duty of loyalty to the beneficiaries. A trustee is obligated to protect the trust property, administering its assets as would a prudent person in accordance with the applicable statutes, for the benefit of the trust beneficiaries. M.C.L.A. §§ 700.7810, 700.7802, 700.7803 (2010). Respondent failed in these duties for the same reasons as discussed above. He failed to keep or provide records to Petitioner, comingled funds, distributed assets to Petitioner's harm and detriment, and failed to follow the terms of the trust regarding the Cottage and protect its value.

9. Respondent as trustee was to expeditiously distribute the trust property to those entitled, upon termination or partial termination of the trust. M.C.L.A. §700.7821 (2010). Following the Settlor's passing, Respondent partially terminated the Residuary Trust by making disbursements to the child beneficiaries in 2013. He should have promptly disbursed the remaining assets.

10. As a remedy for breach of trust, the trustee may be ordered to pay the amount needed to restore the value of the trust to what it would have been had the breach not occurred. M.C.L.A. §700.7902(2)(a) (2010). It is the opinion of this court that this analysis begins by establishing what amount the Residuary Trust should have been prior to any breach. I find that amount to be \$544,113.00, which includes the total assets that existed at the time of Settlor's death according to the available data (\$479,703.00), and the total of unaccounted for expenditures during Respondent's time as Co-Trustee prior to Settlor's death (\$64,410.00).

11. Recognizing that Respondent made some beneficiary distributions, I conclude the amount stated above should be offset by the following: (1) \$48,000 to the grandchildren, (2) \$102,496.00 to Patti, and (3) \$60,000.00 to Petitioner. Further reduction should be made to include the remaining value of the Cottage (\$25,000.00), and by the amount of funds returned to the trust in November 2019 following Respondent's resignation as trustee (\$8,906.74). Therefore, I conclude the amount to restore the trust is \$299,710.26.

12. The trust is also entitled to be reimbursed for \$5,870.00 in costs related to determining the conditions of the Trust's assets and finances. *See* M.C.L.A. §700.7901(c) and (j) (2010) (The court may order the trustee to pay money, or other appropriate relief).

13. Respondent shall also pay reasonable attorney's fees and costs. *See* M.C.L.A. §700.7904 (2010) (Costs, expenses, and reasonable attorney fees, may be awarded to any party who enhances, preserves, or protects trust property...). Petitioner and the Trust have incurred attorney's fees and other related to costs to enforce her and its rights against Respondent in the amount of \$55,512.62. The Court concludes that Petitioner's attorneys' fees are reasonable, and she is entitled to the same under Deborah Dereede v. Living Trust dated December 18, 2013 v. Karp, 427 S.C. 336, 831 S.E. 2d 435 (Ct. App. 2019) and S.C. Code Ann. §62-7-1004 (Supp. 2018). In particular,

- a. Nature, Extent and Difficulty of the Legal Services Rendered. This is an action to remove Respondent as Trustee of the Trust and to seek damages from breaches of his fiduciary duties. The case involved complex issues of probate law including the preparation and examination of pleadings, discovery and the trial preparations. A two-day hearing was held by the York County Master-In-Equity, who required an order to be prepared by Petitioner's counsel. Accordingly, the factual and legal issues presented were complex and detailed in nature, the extent of the work performed was necessary to adequately prepare and try these matters, and the matters decided were of legal and factual difficulty.

- b. Time and Labor Necessarily Devoted to the Case. As stated above, this case involved difficult issues of both legal and factual natures. Approximately One Hundred Seventy-Four (174) hours were devoted to the case by Petitioner's counsel's firm. This does not include amount by Petitioner's previous counsel. Accordingly, the time and labor devoted to this case were necessary to properly prepare and try this case.
- c. Professional Standing of Counsel. The attorneys representing Petitioner in this case are licensed members of the Bar of the State of South Carolina. Collectively, they have many years of experience in practice in South Carolina. The practice of Petitioner's attorneys consists of foreclosure cases, collection cases, real property closing transactions, real property litigation, land title questions, other land related litigation, probate and estate administration and related litigation. Accordingly, Petitioner's attorney has high professional standing in general and in this area of practices.
- d. Contingency of Compensation. As recited above, Petitioner is being charged an hourly rate in the pursuit of this matter, and the contingency of compensation is not appropriate.
- e. Customary Fee Charged on the Locality for Similar Services. I am aware from discussions with other attorneys in the Probate/Estate Bar in the Midlands region of South Carolina, and from my general familiarity with the legal profession, that the fees charged for services similar to those in this case are similar to those charged in other like cases. Accordingly, the fees charged in this case are within the fee range charged in this locality for similar services.
- f. Beneficial Results Obtained. This attorney obtained beneficial results for the Petitioner in this action in that the Court found in favor of the Petitioner. Accordingly, it is submitted that beneficial results were obtained by this firm on the Petitioner's behalf.

14. In addition, any interest Respondent may have in these trust assets has been forfeited. According to paragraph EIGHTEENTH of the Tenth Amendment, "[i]f any beneficiary of this trust ... in any manner, ... seeks to impair or invalidate any of its provisions ... then that person's right to take an interest given to him or her by this trust shall be determined as it would have been determined if the person had predeceased the execution of this Trust Agreement." Respondent's actions as outlined in this order, impaired or invalidated the terms of the trust; therefore, he should be treated as having predeceased the Settlor.

15. As Respondent has failed to present any evidence related to his counterclaims, they are dismissed.

16. It is also appropriate that the Trust be wound up with the assets, property, and/or funds constituting the same be distributed according to the terms of the trust.

**ORDER**

Accordingly, and based on the Findings of Fact and Conclusions of Law set forth above,

**IT IS ORDERED, ADJUDGED AND DECREED** that the Trust, as a result of the above, is hereby granted judgment against Respondent in the total amount of \$361,092.88, said amount being comprised of: \$299,710.26, to restore the trust assets; additional expenses of \$5,870.00; and Attorney's fees and costs of \$55,512.62;

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that Respondent is hereby and shall be treated as having predeceased the Settlor;

**IT IS ADDITIONALLY ORDERED** that the judgment granted herein shall accrue interest at the legal post judgment legal interest rate; and

**MOREOVER, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Petitioner shall take all reasonable and necessary steps to wind up the Trust's business and distribute any remaining assets to the living beneficiaries thereof not having been deemed to predecease Mr. Vergeldt.

**FINALLY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that Respondent's counterclaims are herein **DISMISSED**.

*[Judge's Signature Page to Follow]*

**FORM 4**

**STATE OF SOUTH CAROLINA  
COUNTY OF YORK  
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE**

**CASE NO. 2016-CP-46-00820**

Vicki Lynn Vergeldt

PLAINTIFF(S)

John Edward Vergeldt,

DEFENDANT(S)

<b>Submitted by:</b>	<b>Attorney for :</b> <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant or <input type="checkbox"/> Self-Represented Litigant
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**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:**  See attached order (formal order to follow)  Statement of Judgment by the Court:

**ORDER INFORMATION**

This order  ends  does not end the case.

Additional Information for the Clerk \_\_\_\_\_

<b>INFORMATION FOR THE JUDGMENT INDEX</b>		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
<b>Vicki Lynn Vergeldt</b>	<b>John Edward Vergeldt</b>	\$361,092.88
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

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**Aug 02 2021**

SC Court of Appeals





York Common Pleas

**Case Caption:** Vicki Lynn Vergeldt VS John Edward Vergeldt

**Case Number:** 2016CP4600820

**Type:** Order/Judgment and Form 4

So Ordered

s/ Teasa K. Weaver 3084