THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Kirk Griffin, Circuit Court Judge

Appellate Case No. 2021-000330

Case No. 2019-CP-40-03582

Julia B. Brooker,…….Respondent

v.

Beacham O. Brooker, Jr., in his individual capacity as Trustee and individually as a Beneficiary of the Janet B. Brooker Trust, and Ellen B. Corontzes individually and as a Beneficiary of the Janet B. Brooker Trust,…….Appellants

---

FINAL BRIEF OF APPELLANTS

Thornwell F. Sowell, III (SC Bar No. 5197)
Bess J. DuRant (SC Bar No. 77920)
SOWELL & DuRANT, LLC
1325 Park Street, Suite 100
Columbia, South Carolina 29201
803-722-1100
bsowell@sowelldurant.com
bdurant@sowelldurant.com

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF ISSUES 3

STATEMENT OF THE CASE 4

STATEMENT OF FACTS 6

I. The Equalization Distribution Language and Calculation 6

II. The Testimony of W. Steven Johnson, Esquire 9

STANDARD OF REVIEW 13

ARGUMENT 14

I. The Circuit Court erred in affirming the ruling the Trust Agreement was Ambiguous and that Janet the Settlor intended for Lifetime Gifts to predate the Trust Agreement, dated October 16, 2007 14

II. The Circuit Court erred in affirming the Probate Court's violation of the Dead Man's Statute by not limiting testimony solely to W. Steven Johnson and William Reynolds and ignoring the totality of Mr. Johnson's testimony 15

III. The Circuit Court erred in affirming the award of attorney's fees and professional's fees to Julia Brooker 19

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Campbell v. Carr, 361 S.C. 258, 603 S.E.2d 625 (Ct. App. 2004) 13

Crowder v. Crowder, 246 S.C. 299, 143 S.E.2d 580, (1965) 13

Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991) 20

Hanahan v. Simpson, 326 S.C. 140, 485 S.E.2d 903 (1997) 18, 19

In re Estate of Holden, 343 S.C. 267, 539 S.E.2d 703 (2000) 12, 13

Lewis v. Lewis, 392 S.C. 381, 709 S.E.2d 650 (2011) 13, 14

Nutt Corp. v. Howell Road, LLC, 396 S.C. 323, 721 S.E.2d 447 (Ct. App. 2011) 13

Waddell v. Kahdy, 309 S.C. 1, 419 S.E.2d 783 (1992) 13

ZAN, LLC v. Ripley Cove, LLC, 406 S.C. 404, 751 S.E.2d 664 (Ct. App. 2013) 13, 14

STATUTES

S.C. Code Ann. § 19-11-20.....19

S.C. Code Ann. § 62-7-1004.....20

SECONDARY SOURCES

Jean Hoefer Toal, et.al., *Appellate Practice in South Carolina* (3d ed. 2016) 13

Black's Law Dictionary (8th ed. 2005) 13

17A CJS, *Contracts*, §399-400 14

INTRODUCTION

This is a case about a mother trying to treat her three children equally in her estate planning, while trying to decrease the estate's tax liability due to soaring values of her largest asset, Lockheed Martin stock. The mother is Janet Brooker ("Janet"), and the three children are Beacham Brooker Jr. ("Beach"), Ellen Corontzes ("Ellen"), and Julia Brooker ("Julia"). The estate plan ("Trust Agreement") and the estate planner (W. Steven Johnson, Esquire) state that she intended for all of her children to be treated equally as possible through this new estate plan, just as they have been treated in the past. The major change in the estate plan was the spouses of the children and the grandchildren of the mother were now going to receive large gifts that fell under the annual gift tax exclusion. In other words, the mother was now going to include spouses and grandchildren in her estate plan (when prior she had been giving only to her children in equal shares) because she needed to engage in an aggressive gifting system. She wanted to include other recipients of her wealth to lessen the value of her estate, but not to the detriment of any of her three children.

To ensure that no child was disadvantaged, she stated that her unmarried, childless daughter, Julia, would receive an equalization distribution to make her whole as a result of this new, aggressive gifting program. The Trust Agreement provided that "from the date of the trust forward" Julia was to receive her share of funds that she would have received if she had children. To reach this result, the trustee (Beach) was to take all gifts to the spouses and grandchildren given under this new aggressive gifting program, total them, divide them in half (one half representing Beach's share for his wife and children and the other half representing Ellen's share for her husband and children), then 5% interest was added. An example would look like the following:

Child	Gifts to Children from Date of Trust	Gifts to Spouse from Date of Trust	Gifts to Grandchildren from Date of Trust	Total of Julia's Equalization Distribution (less interest)	Total Gifts at Death of Mother	Total Gifts Received with Equalization Distribution
Beach	$1MM	$100,000	$200,000		$1.3MM	$1.3MM
Ellen	$1MM	$100,000	$200,000		$1.3MM	$1.3MM
Julia	$1MM	$0	$0	$300,000	$1MM	$1.3MM

This methodology was drafted by W. Steven Johnson, Esquire ("Mr. Johnson") and was agreed to by the mother. But Julia objected. In contravention of the import and intent of the aggressive gifting program, Julia claims she is entitled to a calculation including all payments (regardless of whether they were gifts) conveyed to spouses or grandchildren. This could include a $10 payment to a grandchild for cutting the grass or a $20 birthday present to a spouse. Julia claims she is entitled to a credit for a portion of those payments. Stated simply, every penny conveyed to any spouse or grandchild must be accounted for and credit for such pennies must be given to Julia, even though she may have received the same penny.

This argument stretches the limits of credulity. The Trust Agreement, itself, unambiguously conveys the mother's intent that every child is to be treated equally and that once the aggressive gifting started – i.e. the date of the trust – Beach was to account for each of the gifts to the spouses and grandchildren so that Julia would not be made disadvantaged because of the aggressive gifting program. Contrary to Julia's argument, Beach, as Trustee, cannot look behind his mother and determine each and every gift she gave her children's spouses and her grandchildren. If she wanted to "catch up" Julia from years prior, she simply could have written her a check at the time she signed the trust, rather than imposing that substantial burden on her son, Beach. Contrary to her intent, she would have disadvantaged Beach by making him account for decades of gifts of which he had no personal knowledge.

Even if the Trust Agreement is ambiguous, the sole testimony that this Court can consider is that of the estate planner, Mr. Johnson, because all other testimony is barred by the Dead Man's Statute. Mr. Johnson, clearly and unequivocally, states that Janet, the mother, did not want Julia to be disadvantaged by the aggressive gifting programs and that all gifts from the date of the trust forward were to be accounted for Julia's benefit. At no time did he or Janet ever discuss looking backwards (years before the execution of the trust) with respect to disadvantaging or catching up Julia. All discussion was prospective, not retrospective.

The facts and the law support only two logical avenues. First, the Trust Agreement is unambiguous and only gifts from the date of the trust forward are to be considered in the equalizing distribution to Julia because of this language "from the date of this language forward." Or, if the Trust Agreement is ambiguous, the Court is constrained solely to the Trust Agreement and the testimony of Mr. Johnson, who testifies that the Trust Agreement was to catch up Julia only for gifts conveyed during the aggressive gifting program, which began with the execution of the Trust. Regardless of the intellectual avenue selected by the Court, the result is the same: calculation of the equalization distribution begins on the date of the execution of the Trust and Julia cannot look past this date in an attempt to grab as much money as she can.

STATEMENT OF ISSUES

I. Did the Circuit Court err in ruling the Trust Agreement was ambiguous and that the Mother intended for Lifetime Gifts to include gifts that predate the Trust Agreement, dated October 16, 2007?

II. Did the Circuit Court violate the Dead Man's Statute by relying on testimony other than that of W. Steven Johnson, the estate planner, and his law partner William Reynolds, who reviewed the Trust Agreement, and by failing to consider the totality of Johnson's testimony?

III. Did the Circuit Court err in affirming the award of attorney's fees and professional fees to Julia Brooker?

STATEMENT OF THE CASE

In the present matter, Beach and Ellen are appealing the order of the Circuit Court, dated March 22, 2021 (ROA 6-15), which affirmed three orders of the Probate Court: (1) the Order Calculating Equalization Distribution of Lifetime Gifts dated June 20, 2019 (ROA 31-40), (2) the Order Allowing Attorney's Fees dated August 5, 2019 (ROA 29-30), and (3) the Order Regarding Motion for Reconsideration and to Alter or Amend Under Rules 52 and 59(e), SCRCP dated October 28, 2019. (ROA 23-28).

These appeals originated from a Petition for Declaratory Relief filed in Richland County Probate Court filed on March 17, 2017 by Julia against Beach, in his official capacity as Trustee and individually as a Beneficiary of the Janet B. Brooker Trust and Ellen, individually as a Beneficiary of the Janet B. Brooker Trust. (ROA 100-129). The petition sought relief based on the interpretation of the Trust Agreement signed by Janet, the parties' mother. Beach and Ellen filed their Answer on May 17, 2017, denying that Julia is entitled to the relief requested and stating that their interpretation of the Trust Agreement is correct. (ROA 130-135).

On August 3, 2018, both parties filed Motions for Summary Judgment. (ROA 136-223). The Probate Court heard the Motions for Summary Judgment on October 16, 2018. On October 24, 2018, the Probate Court issued its Order Denying the Motions for Summary Judgment. (ROA 41).

On February 4, 2019, Beach and Ellen filed a Motion in Limine requesting an order limiting the testimony of Julia and her expert George W. DuRant based on the Dead Man's Statute. (ROA 224-237). The Probate Court heard the motion once the trial began on February 5, 2018 and warned the parties to be mindful of the Dead Man's Statute.

On February 5, 2019, the matter was tried non-jury before the Probate Court and evidence and the proceeding concluded on February 7, 2019. At the trial, Julia offered her own testimony and that of her expert George DuRant to support her case. Beach and Ellen offered the testimony of Beach, Mr. Johnson, and Mr. Reynolds.

On February 28, 2019, Julia filed an Affidavit in Support of Award of Attorney's Fees and Reimbursement of Expenses. (ROA 328-334). On April 10, 2019, Beach and Ellen filed a Memorandum in Opposition to the Fee Affidavit. (ROA 335-340). A hearing on the Affidavit for Attorneys' Fees was held on May 22, 2019.

On June 20, 2019, the Probate Court issued its Order Calculating Equalization Distribution of Lifetime Gifts in favor of Julia, ordering that Julia was entitled to $1,471,031.94, as of February 5, 2019 as her equalization distribution. (ROA 31-40). Beach and Ellen appealed this Order on July 1, 2019 (Appeal Case No. 2017-CP-40-03582) (ROA 377-388). In addition to the Appeal, Beach and Ellen filed a Motion for Reconsideration and to Alter or Amend Under Rules 52 and 59(e), SCRCP in the Probate Court (ROA 341-376) and Motion for Limited Remand in the Circuit Court on the same date, July 1, 2019. (ROA 42-94).

On August 5, 2019, the Probate Court issued its Order Allowing Attorney Fees in favor of Julia, in which it ordered Julia's attorney's and professional fees in the amount of $170,666.28 to be paid out of the Janet B. Brooker Trust. (ROA 29-30). Beach and Ellen appealed this order on August 13, 2019 (Appeal Case No. 2019-CP-40-04463) (ROA 389-392).

On August 27, 2019, the Circuit Court entered the Consent Order for Limited Remand and to Stay. (ROA 19-22). On October 28, 2019, the Probate Court denied the motion for reconsideration via Order Regarding Motion for Reconsideration and to Alter or Amend Under

Rules 52 and 59(e), SCRCP. (ROA 23-28). Beach and Ellen appealed this Order on November 5, 2019 (Appeal Case No. 2019-CP-40-06229) (ROA 393-400).

On November 13, 2019, the Parties filed a Consent Motion to consolidate the three appeals (ROA 95-99). By Order dated November 19, 2019, the Order Consolidated the Appeals under Civil Action Number 2019-CP-40-03582. (ROA 16-18). The notices of appeal were timely filed and served on July 2, 2019, August 13, 2019, and November 5, 2019. (ROA 377-400).

The Circuit Court, sitting in an appellate capacity, heard argument for this appeal on March 3, 2021. On March 22, 2021, the Circuit Court issued its Order affirming the rulings of the Probate Court (ROA 6-150). In response, Beach and Ellen timely filed a notice of appeal with this Court on March 26, 2021.

STATEMENT OF FACTS

I. THE EQUALIZATION DISTRIBUTION LANGUAGE AND CALCULATION.

Janet had three children: Beach, Ellen, and Julia. At all times and by all accounts, she treated them equally. This is true even when Beach and Ellen started their own families and Julia had none. This had not been an issue until Janet began to consider the aggressive gifting program, which would start gifting beyond the immediate family of Janet and her children to Janet, her children, their spouses, and her children's children. Janet recognized that this gifting schedule could place Julia in an unfair position where Beach's and Ellen's respective families were receiving more than Julia. To address this issue, she requested that Mr. Johnson make Julia whole for the gifts made under the aggressive gifting plan. Mr. Johnson resolved the issue with the equalization distribution language in the Trust Agreement, which provides, in pertinent part, as follows:

> **(2) Equalizing Distribution to the Settlor's Daughter, JULIA B. BROOKER.** The Settlor has previously made lifetime gifts and intends to continue such gifting program until the date of the Settlor's death to the Settlor's children, the Settlor's issue and spouses of the Settlor's children. Because the Settlor's daughter, **JULIA B. BROOKER** is not married and has no children or issue, the Settlor intends that at the Settlor's death, an equalizing distribution will be made to the Settlor's said daughter pursuant to the terms of this paragraph for lifetime gifts made to such daughter's siblings' spouses or siblings' issue which equalizing distribution will be determined as follows:
>
> (a) From the date of this trust forward, the Trustee shall determine the date and amount of any lifetime gifts made by the Settlor to issue of Ellen B. Corontzes and Beachum [sic] O. Brooker, Jr. as well as the spouses of Ellen B. Corontzes and Beachum [sic] O. Brooker, Jr.
>
> (b) To such amount specified above from the date of such gift an interest rate of five (5%) percent shall be applied to the amount of such gift which interest rate shall continue until this distribution is satisfied and which rate shall not compound.
>
> (c) The sum of (a) and (b) above shall be distributed to the Settlor's daughter, **JULIA B. BROOKER** if she shall survive the Settlor.

(Trust Agreement, Art. V, § 2 (emphasis added in underline; bold text in original), ROA 642) The plain language of the Trust Agreement provides that "[f]rom the date of this trust forward," the Trustee Beach shall determine the amount of the gifts made to the children and spouses of Beach and Ellen. Once that figure is calculated, interest is added and the distribution is to be offered to Julia, and this was accomplished and communicated to Julia in February 24. 2016. (ROA 447:14 – 448:11; ROA 656-657). In sum, Mr. Johnson drafted this language to make sure Julia was made whole from the aggressive gifting plan which began in October 2007.

After the execution of the Trust Agreement, each year, as soon as the new tax year began, Beach would cause Dino Corontzes, who handled Janet's accounts at Smith Barney and later Stephens, Inc., to transfer stock or cash in the amount of the annual federal gift tax exclusion to the family members mentioned above in addition to the three children. (ROA 472:14 – 473:24).

During the period between 2007 and the date of death in 2015, the annual exclusion amount increased by law from $12,000 per gift to $13,000, then $14,000. (*Id.*)

After Janet's death, Beach began calculations for the equalization share to be paid to Julia. Beach multiplied the amount of the annual gift exclusion each year by six, included $240,000 ($60,000 per child) funding for 529 "Future Scholar" accounts, and $24,000 given to the spouses of Beacham and Ellen in 2007. (ROA 472:14 – 473:6; See ROA 632). He then divided that sum by two to reflect the gift total to each family and added 5% interest from the date of each gift to the present. (ROA 451:14 – 452:4). The resulting amount, $525,528 was proffered to Julia through her then attorney, David Siddons, via email on February 24, 2016. (ROA 446 & 447:14 – 448:11; ROA 656).

At the trial, Julia called two witnesses, Julia and George DuRant. DuRant testified from a ledger he had created based upon brokerage and bank statements of Janet. (ROA 419:11-22). He testified that he simply collected all transfers to the spouses of Beacham Brooker and Ellen Corontzes and to their children. (ROA 420:6 – 421:16). No attempt was made to determine whether those transfers were paired with identical gifts to Julia (ROA 426:11-24) or whether they were gifts at all. (ROA 428:6 – 431:14, ROA 655).

After the close of testimony, the Probate Court made certain determinations and asked the parties for their calculations of the equalization amount based upon those determinations. (ROA 514-526). First, the Probate Court determined that tuition paid on behalf of the grandchildren after September 2007 should be added to the equalization principal along with the $240,000 future scholar contribution and the $24,000 gift to spouses immediately preceding the Trust date. (ROA 514-515). Then the Probate Court directed that interest on the "annual exclusion" gifts should accrue from the date of those gifts only through the date Julia refused the proffer of those amounts

to her (August 31, 2016), interest on the school tuition to run to the present date. (ROA 514-517). As a result, Julia's calculation was $732,235.86, approximately $12,000 lower than Beach's calculation. (ROA 521:9 – 522:13 & ROA 631). The Court then took the matter under advisement. (ROA 526).

The Court published its Order Calculating Equalization Distribution of Lifetime Gifts on June 20, 2018. (Order, Probate Court, June 20, 2019). (ROA 31-40). In it, the Probate Court acknowledged that it indicated at the hearing that only post-Trust gifts were being considered. However, it stated that those decisions were now amended after full review, and gifts prior to the Trust were to be included. (Order, Probate Court, June 20, 2019, p. 5.) (ROA 35). In its Order, the Probate Court adopted Julia's argument finding Janet intended to compensate Julia for all gifts to spouses and grandchildren made during her life and awarded Julia $1,471,031.94 (ROA 40).

Appellants moved to Reconsider the Order on July 1, 2019, arguing 1) that the Probate Court did not expressly rule that the Trust was ambiguous as a predicate to the use of extrinsic or parole evidence to interpret it; 2) that the Settlor's intent as testified by her attorney Johnson was ignored by the Probate Court and the Probate Court's interpretation rendered the phrase"[f]rom the date of this Trust forward…" meaningless; and 3) the Probate Court erroneously relied on the testimony of Julia Brooker in violation of the Dead Man's Statute. (ROA 341-376). That motion was denied in the October 28, 2019 Order. (ROA 23-28). The Circuit Court appeal followed, and it affirmed the Probate Court Order. (ROA 6-15).

II. THE TESTIMONY OF W. STEVEN JOHNSON, ESQUIRE

Mr. Johnson is no neophyte, nor he is a general practitioner. He is a certified specialist in estate planning and probate by the South Carolina Supreme Court. (ROA 437:3-14). He is one of the founding members of Todd & Johnson, one of the top estate planning firms in the State. (ROA

436:11 – 437:14). Al Todd has passed away, but Mr. Johnson has continued practicing at Todd & Johnson since 1980 and with William "Bill" Reynolds for at least fifteen years. (*Id.*) Julia's own expert praised Mr. Johnson with the following testimony: "I have great respect for Steve Johnson. I've relied on him all my career just about since 1986; he's a top lawyer, and I don't dispute a word he says." (ROA 427:18-21). Mr. Johnson began working with the Brooker family when Janet's husband died in 1990 in helping the Brooker family with the administration of Mr. Brooker's estate. (ROA 437:15-23). Mr. Johnson also helped Janet in setting up trusts for her grandchildren, establishing a qualified personal residence trust ("QPRT") for her residence and vacation home, and setting up generation-skipping trusts for Janet's three children and other devices. (ROA 437:23 – 438:7). He was no stranger to Janet or her family when he met with them about the aggressive gifting plan or resulting estate planning documents, which included the equalization distribution.

Once the Brookers discovered Janet's estate would be large, Janet came to Mr. Johnson to revise her estate planning. (ROA 438:10 – 439:13). A family meeting with Janet, all three children, and Mr. Johnson happened on September 25, 2007 to discuss, among other things, the aggressive gifting plan. (ROA 434:21 – 435:9 & 440:8 – 441:21). When Janet raised the issue that gifts to spouses may disadvantage Julia, Mr. Johnson discussed the possibility of an equalization distribution. (ROA 442:5 – 443:14). After the meeting, Mr. Johnson drafted the Last Will and Testament and the Trust Agreement. (ROA 440:2-7). Importantly, there was <u>never</u> a discussion about an equalization of retrospective gifts before, during, or after the execution until this lawsuit. (ROA 441:23 – 442:4). The <u>only</u> conversation with Janet was related to prospective gifts. (ROA 442:2-4). As testified to by Mr. Johnson, "[w]e never had a discussion about retroactive gifts so the discussion, ***the whole discussion*** centered around gifts going forward. Q: Was there ever any

discussion whatsoever about gifts going backward? A: ***No***." (ROA 444:5-13 (emphasis added)). In fact, he has a "specific recollection of discussing with [Janet] the terms of the equalization provision" in which he said, "***we'll catch Julie up at death for gifts made from the Trust Agreement forward so that she won't be prejudiced***." (ROA 463:8-16 (emphasis added)).

On the other hand, "[t]he subject [of previous gifts] never came up; we never discussed it." (ROA 458:23 – 459:1). He testified as to the following:

> My interpretation or my instructions of Mrs. Brooker's intent was to look at gifts that were given to Ellen's family and to look at gifts that were given to Beach's family from 2007, not looking back looking forward, to determine which was the larger number to add five percent to it and to distribute that much to Julie as an equalizing distribution. So she would not be disadvantaged; she would receive at least as much as of the higher amount that was either going to Ellen's side of the family or to Beach's side of the family.

(ROA 448:23 – 449:10). Mr. Johnson tried to make Julia whole with forward looking gifts with other estate planning documents that did not work for one reason or another. He tried a codicil "with an equalization provision for the gifts that were going to be given to Julie from that date forward." (ROA 456:18 – 457:4). But the codicil software would not allow him to modify the equalization language to make it capture only prospective gifts. (ROA 460:25 – 461:10). Mr. Johnson, consistent with his client's wishes, consistently aimed to equalize Julia. After all, "[t]he whole conversation with Janet was about prospective gifts, not retrospective gifts." (ROA 465:14-15).

Mr. Johnson testified "Janet, you know, was only going from 2007 forward." ." (ROA 466:10-11). If Janet had brought up gifts prior to 2007, Mr. Johnson testified he would have told Janet the following:

> I would have said to her let's equalize it right this minute, let's make a gift to her right this minute, let's give her – let's make a gift to Julie right now if she's been so disadvantaged. We're trying to reduce the size of your estate, let's give her an amount right now that will make her equal.

(ROA 466:16-23). This advice makes sense not only from a tax perspective: the need to reduce the tax estate, but also from a common sense perspective: Janet was in the best position to know the gifts she make to the various children and their families. She would have the knowledge in 2007 and could easily make that distribution, rather than waiting for her death and placing such a burden on the trustee to calculate all gifts, little of which he would have personal knowledge.

Mr. Johnson also sought another lawyer to ensure that he was properly reflecting Janet's intent. He asked Bill Reynolds, his law partner, to review it, which Mr. Reynolds did for fifteen minutes. (ROA 462:13-20; 478:22-482:5). Mr. Reynolds concluded the equalization distribution language properly captured Janet's intent. (ROA 478:22 – 482:5). As testified to by Mr. Reynolds,

> There was never any discussion about retrospective or looking back. I think, at least in my experience, if you look back, you gotta start somewhere. And if they had decided to look back, Steve [Johnson] would have asked Mrs. Brooker what the gifts you've given thus far; let's start with an amount or let's write a check to even up Julia. But that was never part of the discussion between Steve and I.

(ROA 480:22 – 481:6).

The testimony of Mr. Johnson and Mr. Reynolds establish that Janet intended only for post-trust gifts to be included in the equalization distribution. Their testimony is bolstered by the language in the Trust Agreement itself, which provides that "[f]rom the date of the trust forward [October 16, 2007]" the value of the gifts to Beach's and Ellen's children and spouses should be calculated, interest added, and equalization amount distributed to Julia. (ROA 579). This was nearly accomplished except that Julia disagreed with the equalization amount. This litigation and subsequent appeals followed. The sole competent evidence provides that the equalization distribution should be calculated only from post-trust, not pre- and post-trust gifts. The Probate Court's ruling to the contrary (and the Circuit Court's affirmance) should be overturned, and judgment should be entered in favor of Beach and Ellen.

STANDARD OF REVIEW

A proceeding in probate court may be at law or in equity, depending on the nature of the action. *In re Estate of Holden*, 343 S.C. 267, 278, 539 S.E.2d 703, 709 (2000). "Whether the action is one at law or in equity is determined by the nature of the pleadings and the character of the relief sought." *Id.* An action to construe or interpret a trust is equitable in nature. *Waddell v. Kahdy*, 309 S.C. 1, 4-5, 419 S.E.2d 783, 785-86 (1992) (stating "[i]t is firmly recognized as a rule and principle of law in this State that all possible trusts, *whether express or implied*, are within the jurisdiction of the chancellor . . . if [t]here is *an element* of trust in this case, *which, wherever it exists*, always confers jurisdiction in equity." (alterations and emphasis in original)).

"In an action in equity, tried by a judge alone without reference, on appeal the appellate court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence." *Campbell v. Carr*, 361 S.C. 258, 263, 603 S.E.2d 625, 627 (Ct. App. 2004). "'It is now well settled that this court has jurisdiction in appeals in equity cases to find the facts in accord with our view of the preponderance or greater weight of the evidence, in the absence of a verdict by a jury; and may reverse a factual finding by the lower court in such cases where the appellant satisfies this court that the finding is against the preponderance of the evidence. *Id.* (quoting *Crowder v. Crowder*, 246 S.C. 299, 301, 143 S.E.2d 580, 581 (1965)). This standard of review is called de novo, which "literally means 'anew.'" Jean Hoefer Toal, et.al., *Appellate Practice in South Carolina* 224 (3d ed. 2016) (quoting *Black's Law Dictionary* 368 (8th ed. 2005); *see also Nutt Corp. v. Howell Road, LLC*, 396 S.C. 323, 327, 721 S.E.2d 447, 449 (Ct. App. 2011) ("We review factual findings and legal conclusions in an equitable action de novo.").

De novo review is the "broadest form of appellate review, as it 'permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings.'" *Id.*

(quoting *Lewis v. Lewis*, 392 S.C. 381, 709 S.E.2d 650 (2011)). "'De novo review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings.'" *ZAN, LLC v. Ripley Cove, LLC*, 406 S.C. 404, 412, 751 S.E.2d 664, 669 (Ct. App. 2013) (quoting *Lewis*, 392 S.C. at 390, 709 S.E.2d at 654-55).

When applying this standard to the present matter, this Court should reverse the lower court for incorrect applications of the law, in addition to several unsupportable factual findings. A de novo analysis of the underlying facts and law shows that the Probate Court erred and judgment should be entered in favor of Beach and Ellen.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN AFFIRMING THE RULING THE TRUST AGREEMENT WAS AMBIGUOUS AND THAT JANET THE SETTLOR INTENDED FOR LIFETIME GIFTS TO PREDATE THE TRUST AGREEMENT, DATED OCTOBER 16, 2007.

A cardinal rule of contract or trust interpretation is that the choice and use of words in a document must mean something. 17A CJS *Contracts* §399-400 ("Without violating the plain language of the instrument or the parties' clear purpose, all parts of a contract must be taken into consideration and be given effect and assumed to have been inserted for a purpose. All words are to be given effect when consistent with the parties' intent and are to be made to operate according to that intent."). The interpretation of the equalization clause by the Probate Court, affirmed by the Circuit Court, renders the phrase "[f]rom the date of this trust forward" nugatory. More specifically, the Probate Court stated that its holding that the language merely indicated the beginning of the Trustee's duties is supported by the rules of contract interpretation which differ from the rules of statutory construction, the former standing for the proposition that interpretation of testamentary trusts must be reasonably supported by a plain reading of the document as a whole. Respectfully, the Probate Court's reading of the law is erroneous.

The Trust Agreement contains numerous duties of the Trustee which are to occur or may occur at varying times after the establishment of the Trust and the appointment of the Trustee. These are both *inter vivos* and post mortem and continuing and one-time duties. The only enumerated duty that is prefaced by the words, "From the date of this Trust forward" is that clause requiring the Trustee to calculate lifetime gifts at the Settlor's death. That the Probate Court's reading of this clause would cause the above phrase to be meaningless, superfluous, or surplusage, can be seen by striking it and reading the instruction beginning with "[T]he trustee shall determine the date and the amount . . . ." The equalization clause would then read like every other clause imposing duties on the Trustee, i.e. "The Trustee shall." Thus, the Probate Court's holding that the "From the date of this Trust forward," as denoting only the date that began the duties of the Trustee is redundant to his designation as Trustee in the first instance and simple surplusage. This is disfavored by the rules of contract interpretation.

By including the words "From the date of this Trust forward," Janet meant future gifts. This phrase must be given some meaning. The Probate Court's holding that this language is redundant of Trustee's appointment causes that term to be meaningless, superfluous, useless, and inexplicable and should be reversed.

II. THE CIRCUIT COURT ERRED IN AFFIRMING THE PROBATE COURT'S VIOLATION OF THE DEAD MAN'S STATUTE BY NOT LIMITING TESTIMONY TO W. STEVEN JOHNSON AND WILLIAM REYNOLDS AND IGNORING THE TOTALITY OF JOHNSON'S TESTIMONY.

If the Trust Agreement is ambiguous, the only admissible and competent testimony regarding the Settlor's intent, as a matter of law, is the testimony of Mr. Johnson, the Settlor's estate planner, and Mr. Reynolds, the law partner of Mr. Johnson who examined the equalization distribution language to ensure it conveyed the Settlor's intent. There was no competent evidence presented to support the Probate Court's finding that it was the settlor Janet's intent that the

equalization distribution include gifts made prior to the creation of the Trust and establishment of the equalization clause in the Trust Agreement. Neither of Julia's witnesses presented any evidence or testimony that Janet intended that gifts made prior to the date of the Trust, October 16, 2007, be included in the Trustee's calculation of the equalization payment to Julia at her death.

The Circuit Court looked to the Probate Court's reliance on the reference to two provisions in the Trust Agreement where the term "equal shares" appears—in providing for the distribution of household and personal effects and for the final distribution among the children, both at death.[1] Secondly, the Circuit Court noted that the Probate Court did cite the testimony of Mr. Johnson, that Janet did not want Julia to be disadvantaged by gifts to grandchildren and spouses, and thus, the provision was to be made to "catch up" Julia for such gifts. Finally, the Circuit Court referenced the Probate Court's reliance on a draft codicil that made no distinction between gifts made before or after the Trust was created that was prepared by Mr. Johnson's paralegal and internal office memorandum on the equalization issue.[2]

[1] No one disputes that Julia should not be treated equally with her siblings.

[2] Mr. Johnson easily explained why the draft codicil and internal office memorandum had no bearing on the issue at hand. Regarding the codicil, he testified that he thought maybe he could simply add an amendment to the existing estate plan by doing a codicil with an equalization provision. (ROA 456:18 – 457:4). He then testified that his paralegal created the draft codicil from a form and that he had no way to edit it. (ROA 460:25 – 461:10). "And when I got [the draft codicil] from my paralegal, my thought process was this is totally inadequate, this is totally inadequate. So then I went to my software and I drafted the pour-over will and the Trust Agreement with the equalization provision in it." (ROA 461:5-10). Importantly, the fact that Janet did not sign the codicil is evidence in and of itself that the codicil did not reflect her intent.

Regarding the internal memorandum, Mr. Johnson stated the date referenced in it was written by his paralegal, who was "simply mistaken" about the date, and he later corrected her. (ROA 468:14 – 469:2). Neither the draft codicil which was never presented to Janet nor the internal memorandum which simply included an error later corrected can render Mr. Johnson's testimony not credible, which the Probate Court has done. Mr. Johnson never swayed from his testimony that Janet's intent was to include only post-Trust gifts in the equalization distribution.

However, both the Circuit Court and Probate Court ignored the import and totality of Mr. Johnson's testimony which clearly supports the intent of the settlor Janet to only "catch up" Julia for the accelerated gifting program that began under the Trust from its date forward. Specifically, Mr. Johnson testified that all discussions with Janet regarding the accelerated gifting strategy and the equalization upon death regarded prospective gifts not those made retrospectively. Mr. Johnson testified concerning a meeting attended by all family members on September 25, 2007:

> Q. What was discussed at that meeting?
>
> A. That we would accelerate the gifts that Mrs. Brooker was going to make; that we were going to make gifts not only to children and grandchildren, but that we would also make gifts to in-laws. As an estate planner, you know, I was primarily relying on Internal Revenue Code Section 2503 and Code Section 529. And I talked with Mrs. Brooker at that time about the avenues that would be available to her to make gifts to the children, the grandchildren, and the spouses of the children. And when I mentioned to her about making gifts to the spouses –

(ROA 440:15 – 441:2). Further:

> Q. All right. Now, was there ever any discussion with Janet Brooker about an equalization for retrospective gifts?
>
> A. No.
>
> Q. Was the only conversation with her related to prospective gifts?
>
> A. Yes.
>
> Q. Now, when you drafted the Trust Agreement and specifically paragraph 2(a) (b) and (c)), which is denominated equalizing distribution to the Settlor's daughter

Julia B. Brooker, was that intended by Mrs. Brooker and by you to state that this equalization was only to be made going forward as indicated by paragraph (a)'s language, "From the date of the trust forward"?

A. That is correct[.]

(ROA 441:23 – 442:13).[3] This testimony was wholly ignored[4] by the Circuit Court and the Probate Court, resulting in severe prejudice to Beach and Ellen, especially considering Mr. Johnson is the sole competent witness as ***he was the only one present with Janet when she discussed her intent about the Trust and he is a disinterested witness under the Dead Man's Statute.*** *See Hanahan v. Simpson*, 326 S.C. 140, 152, 485 S.E.2d 903, 910 (1997), *superseded by statute on unrelated grounds* (stating "testimony of the attorney preparing the will is generally held admissible on the ground that the attorney is not an 'interested person.'").

In sum, the only competent evidence regarding the settlor Janet's intent comes from Mr. Johnson and Mr. Reynolds, her estate planner and his partner, and the ambiguous Trust Agreement. Neither Julia nor Mr. DuRant can testify as to Janet's intent. Julia's testimony is rendered

[3] At trial, there was no mention of any attempt by Janet during her lifetime to inform her son, the Trustee, of gifts she made prior to 2007, information uniquely within her knowledge. Logically, had her intent been to equalize Julia for gifts made to her siblings' families prior to the Trust, she could have accomplished that by simply writing a check to Julia before signing the Trust Agreement.

[4] Other testimony that was wholly ignored was the testimony concerning certain expensive foreign trips that Janet took with Julia Brooker, in which Janet paid for both her and Julia. (ROA 511:23 – 512:22.) However, no offset was ever mentioned in the Court's Orders. Had Janet truly wanted to equalize distributions at death for pre-Trust gifting, those values would be included. Instead, Julia presented calculations based on bank records and brokerage statements of transfers only to the grandchildren and spouses (no setoffs for Julia's trips around the world) and only from the arbitrary date of June 1, 1992. (ROA 417:18 – 418:17, ROA 543-549). No explanation for that date was given.

incompetent by the Dead Man's Statute, and Mr. DuRant is likewise incompetent to testify about the interpretation of the Trust or Janet's intent. *See Hanahan*, 326 S.C. at 151, 485 S.E.2d at 909 (1997) (noting the Dead Man's Statute, codified at S.C. Code Ann. § 19-11-20, serves to prohibit "any interested person from testifying concerning conversations or transactions with the decedent if the testimony could affect his or her interest."). Mr. Johnson, the key witness, was ***unequivocal*** that the gifts to be included in the calculation of the equalization distribution were to be gifts that postdated the creation of the Trust on October 16, 2007. There was no evidence before the Probate Court to contradict Mr. Johnson's and Mr. Reynolds' testimony. The Circuit Court and Probate Court erred in ruling that Mr. Johnson's testimony supported the proposition that the equalization distribution should include pre-Trust gifts. To the contrary, he steadfastly testified that the gifts were only prospective. The Probate Court, and ultimately the Circuit Court, contorted his testimony and erred in not relying on the repeated testimony that Janet's intent was to capture solely post-Trust gifts.[5]

III. THE CIRCUIT COURT ERRED IN AFFIRMING THE AWARD OF ATTORNEY'S AND PROFESSIONAL'S FEES TO JULIA BROOKER.

Because the Circuit Court and the Probate Court should have ruled in favor of Beach and Ellen, no award of attorney's and professional's fees to Julia should have been made. In this case, the Circuit Court affirmed the Probate Court's award of attorney's fees pursuant to section 62-7-1004, which provides that "[i]n a judicial proceeding involving the administration of a trust, the court, ***as justice and equity may require***, may award costs and expenses, including reasonable attorney's fees . . . ." (Emphasis added.) "This section codifies the court's historic authority to award costs and fees, including reasonable attorney's fees, in judicial proceedings grounded in

[5] Mr. Johnson's testimony, as noted by the Probate Court, "is going to have the heavy weight." (ROA 422:16-17).

equity." S.C. Code Ann. § 62-7-1004 cmt. If the Circuit Court and the Probate Court erred in their analyses and ultimate findings and conclusion, justice and equity do not support an award of attorney's fees and expenses to Julia.

Additionally, even if the Probate Court was correct with its orders, it did not find in favor of Julia, *in toto*. Typically, a court determines a prevailing party by evaluating the degree of success obtained. *See Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991) (holding one factor for attorney's fee analysis is "beneficial results obtained."). Julia pursued a claim that the total amount of gifts to Beach's family and the total amount of gifts to Ellen's family should simply be added and then interest applied, without dividing the sum by two to equalize Julia. Stated differently, Julia claimed the equalization provision stated that if Beach's family received $100 and Ellen's family received $100, then Julia should be entitled to $200, plus the applicable interest. The proper calculation, however, was to divide the $200 by two so that Julia would receive the equal share of $100, just as Beach's and Ellen's families did. Julia was seeking a windfall from this interpretation, and her expert's analysis focused on this point. But the Probate Court did not agree and found that the sum had to be divided by two to render the siblings equal. Julia did not prevail on this issue, and therefore, she should not be awarded attorney's fees for this large issue in the case.

CONCLUSION

For the above-reasons, this Court should reverse the Circuit Court and enter judgment in favor of the Appellants.

[Signature Page Follows.]

SOWELL & DuRANT, LLC

s/Bess J. DuRant

Thornwell F. Sowell, III (SC Bar No. 5197)
Bess J. DuRant (SC Bar No. 77920)
1325 Park Street, Suite 100
Columbia, South Carolina 29201
803-722-1100
bsowell@sowelldurant.com
bdurant@sowelldurant.com

Attorneys for Appellants Beacham O. Brooker, Jr., in his individual capacity as Trustee and individually as a Beneficiary of the Janet B. Brooker Trust; and Ellen B. Corontzes individually and as a Beneficiary of the Janet B. Brooker Trust

Columbia, South Carolina
November 8, 2021

RECEIVED
Nov 08 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Kirk Griffin, Circuit Court Judge

Appellate Case No. 2021-000330

Case No. 2019-CP-40-03582

Julia B. Brooker,……Respondent

v.

Beacham O. Brooker, Jr., in his individual capacity as Trustee and individually as a Beneficiary of the Janet B. Brooker Trust, and Ellen B. Corontzes individually and as a Beneficiary of the Janet B. Brooker Trust,……Appellants

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Appellants complies with Rule 211(b) SCACR.

SOWELL & DuRANT, LLC

s/Bess J. DuRant
Thornwell F. Sowell, III (SC Bar No. 5197)
Bess J. DuRant (SC Bar No. 77920)
1325 Park Street, Suite 100
Columbia, South Carolina 29201
803-722-1100
bsowell@sowelldurant.com
bdurant@sowelldurant.com

November 8, 2021 ***Attorneys for Appellants***