IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

IN RE THE GRACE L. JOHNSON TRUST	)	
	)	
Therese L. Kearney,	)	
Petitioner,	)	**CASE NO 13P8-PR01140**
	)	**CASE NO 1316-CV30279**
	)	**DIVISION 7**
vs.	)	
	)	
David M. Johnson, et al.,	)	
Respondents.	)	

JUDGMENT

NOW ON THIS DATE, the Court takes up for consideration the Motion to Enforce Settlement filed in the above-styled cause.[1] Evidence and arguments of counsel was heard on August 20, 2014. Petitioner appeared in person and by counsel, Michael R. Ong and Heather M. Hall. Defendant Steven Johnson appeared in person and by counsel, Michael B. Lowe. Defendants David Johnson, William Johns, Clare Kapperman, and Patricia Fries appeared in person and by counsel Gary M. Steinman. Mr. Steinman also appeared on behalf of Defendant Mary Schwartz who did not appear. Finally, Defendant John Johnson appeared *pro se*. Upon conclusion of the hearing, the Court took this matter under advisement. After due consideration of the evidence adduced and arguments made at the hearing, the pleadings filed by the parties, and applicable Missouri law, the Court finds that the parties reached a settlement agreement

[1] Case No. 1316-CV30279 was consolidated with Case No. 13P8-PR00140 by Order dated June 20, 2014.

through court-ordered mediation and therefore, the Motion should be **GRANTED.** In reaching this judgment, the Court makes the following findings of fact and conclusions of law:

1. On or about December 2, 2013, Therese Kearney filed a Petition for Declaratory Judgment in case number 13P8-PR01140 with the Probate Division seeking trust construction, instructions to trustee, approval of trustee accountings and appointment of a successor trustee. All beneficiaries were named as respondents.

2. On or about December 5, 2013, Patricia Fries, David Johnson, Mary Schwartz, William Johnson and Clare Kapperman filed a civil action against Theresa Kearney and Steven Johnson[2] in case no. 1316-CV30279 seeking removal of those defendants as trustees of the Grace L. Johnson Trust and certain amendments and modifications of the Trust. All parties are beneficiaries of the Grace L. Johnson trust. Said trust became irrevocable upon her death on March 8, 2008.

3. A Notice of Case Management Conference for Civil Case and Order for Mediation was sent to all parties by the 16th Judicial Court on December 16, 2013.

4. Pursuant to this Order, all parties, except Sandbrink, participated in mediation either in person or by telephone with Robert Kirkland on February 27, 2014. Also appearing at the mediation were attorneys Michael Lowe for Steven Johnson, Michael Ong for Therese Kearney, and Gary Steinman for the Plaintiffs in the civil action.

5. At the conclusion of the mediation, the agreement reached was memorialized in a document entitled "Agreement in Principle" and signed by all parties present and the attorneys. Sandbrink later signed the "Agreement in Principle" and returned it by email on March 4, 2014. Said agreement was introduced into evidence without

[2] Also named as interested parties were Abbie Emmons, Betsy Lasister, John Johnson, and Bernadette Sandbrink.

objection as Exhibits 2 and 3 (both are copies of the agreement but the latter appears to have portions of one of the signatures cutoff).

6. Later, on March 25, 2014, a formalized agreement prepared by Ong was circulated among the parties. Exhibit 4. Steinman, on behalf of his clients, rejected the formalized agreement and proposed an alternative. Exhibit 5. When it became apparent that the parties disagreed with regard to the wording and an impasse occurred, Kearney filed a Motion to Enforce Settlement in case number 13P8-PR01140. This Court consolidated both actions on June 20, 2014.

7. All parties agree that an agreement was reached at the mediation on February 27, 2014 which resolved all issues for both the probate and civil actions. In addition, all parties agree that it was expected that a more formal written agreement would be executed by all parties. Moreover, all parties agree that the sole issue before this Court is one specific clause contained in the "Agreement in Principle" which is number 7: "Therese warrants to all parties the accuracy and completeness of the accounting she has prepared and submitted to the beneficiaries." The Plaintiffs in the civil action maintain that clause means Kearney agreed to indemnify and hold harmless all beneficiaries should there be "any liability, including attorney fees, resulting from the completeness and accuracy of the accountings, Trust Inventory, and tax filings of the Trust, now or in the future." Exhibit 5, paragraph 2. Kearney and Steven Johnson disagree.

8. It has long been held in Missouri that settlements of disputed claims are favored under the law. Sheppard v. Travelers Protective Ass'n of America, 124 S.W.2d 602, 530 (Mo.App. W.D. 1939), *citing*, Wood v. Kansas City Home Telephone Co., 123 S.W. 537 (Mo. 1909). In fact, settlements, under the common law did not need to be

in writing to be enforceable. Williams v. Kansas City Title Loan Co., 314 S.W.3d 868, 872 (Mo.App. W.D. 2010).

9. Almost twenty years ago, the Missouri Supreme Court adopted Rule 17 which established the alternative dispute resolution program for the State of Missouri. Under Rule 17, a settlement agreement reached during a court-ordered mediation must be reduced to writing to be enforceable. Id. Such an agreement is admissible as evidence in a subsequent action to enforce its terms and the mediator may be called to testify for the limited purpose of "describing events following the conclusion of the alternative dispute resolution process."[3] Rule 17.06(d); Id. at 871.

10. Kirkland[4] testified that at the conclusion of the mediation, an agreement was reached among all parties which was reduced to writing and signed by all parties. The Agreement in Principle, Exhibits 2 and 3, contains all of the items agreed to by the parties, including mutual dismissal of the probate and civil actions. He further testified that although a "neater" and "more legalese-contained" document would be prepared, the Agreement in Principle contained the entire agreement between the parties.

11. As indicated *supra,* the parties agree that the sole issue before this Court is the interpretation of paragraph 7 of the Agreement in Principle wherein Kearney "warrants to all parties the accuracy and completeness of the accounting she has prepared. . . ."

[3] In the instant case, counsel for Plaintiffs in the civil action repeatedly objected to the mediator's testimony. However, such testimony is clearly and specifically permitted under Rule 17. To the extent that some testimony may have been inadvertently elicited beyond the parameters stated in Rule 17, this Court has made every effort to disregard such testimony.

[4] The Court notes that Kirkland's Mediation Contract goes beyond Rule 17 in that it provides that he would not be called to testify. For purposes of the motion to enforce, this Court ordered his testimony as provided in Rule 17.

12. An agreement is not "ambiguous simply because the parties later disagree on its meaning." LeKander v. Estate of LeKander, 345 S.W.3d 282, 286 (Mo.App. S.D. 2011).

13. In the instant case, plain language is used throughout the Agreement in Principle and the Court finds that there is no ambiguity present despite any assertion to the contrary. In analyzing the specific clause at issue, the Court considers the plain meaning of the word "warrants." As defined by the Merriam-Webster Dictionary, the word in verb tense means "to declare or maintain with certainty" or "to guarantee to be as represented." In this regard, the Court finds that the use of the word "warrants" in the Agreement in Principle to be similar to that which a person would use when making an oath or affidavit in that the testimony to be given or statements made are true and correct to the best of the person's knowledge and belief subject to penalty for perjury or making a false affidavit or declaration. See R.S.Mo. § 474.080 (Every document filed with the Court under the Probate Code must contain a statement that it is made "under oath or affirmation and that its representations are true and correct to the best knowledge and belief of the person signing same, subject to the penalties of making a false affidavit or declaration."); R.S.Mo. § 452.025 (All pleadings filed under Chapter 452 must contain an oath that the facts stated therein are true and correct to the person's best knowledge and belief); and Rules 57.01.c.5 and 57.03.d both of which require discovery responses to be made under oath.

14. Plaintiffs in the civil action urge this Court to find that the word "warrants" means Kearney will "indemnify and hold harmless" all parties and will be personally liable should any issue arise from the trust accounting. However, indemnification clauses must be stated in "clear and unequivocal terms" in order to be enforceable. Economy

Forms Corp. v. J.S. Alberici Constr., Co., 53 S.W.3d 552, 553 (Mo.App. E.D. 2000). "Mere general, broad, and seemingly all-inclusive language" is not sufficient to impose liability for the indemnifying party's actions. Id. When such specific language is absent or "where any doubt exists as to the parties' intentions" then the clause in question cannot be interpreted as one for indemnification. Id.

15. In the case at bar, the language in the Agreement in Principle does not contain any word or phrase which can be construed in any way to equate with indemnification in any manner. There is nothing about the word "warrants" which "clearly and unequivocally" mandates indemnification from Kearney. As a result, this Court finds that the Motion to Enforce should be **GRANTED**. In doing so, the Court finds that the parties reached a valid settlement agreement following mediation and the terms of such are contained in their Agreement in Principal. Pursuant to the terms of said agreement, the Court further finds that the within actions, 13P8-PR00140 and 1316-CV302279 should be dismissed with prejudice with the parties to bear their own costs except as otherwise provided herein.

16. The Court further finds that Kearney and Steven Johnson have incurred attorney's fees and expenses related to the prosecution of this motion and said fees shall be submitted under a separate application within ten (10) days of the date of this Judgment to be paid by Plaintiffs in the civil action who have opposed this Motion: David Johnson, William Johnson, Clare Kapperman, Patricia Fries and Mary Schwartz.

17. The Court further finds that the mediator has incurred fees and expenses related to the enforcement of this motion and said fees shall be submitted under a separate application within ten (10) days of the date of this Judgment and will be taxed as

costs to the Plaintiffs in the civil action who have opposed this Motion: David Johnson, William Johnson, Clare Kapperman, Patricia Fries and Mary Schwartz.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Motion to Enforce is **GRANTED.**

IT IS FUTHER ORDERED, ADJUDGED AND DECREED that the parties reached a valid settlement agreement following mediation and the terms of such are contained in their Agreement in Principal.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the attorney's fees incurred by Kearney and Steven Johnson in the enforcement of this agreement shall be paid by Plaintiffs in the civil action who have opposed this Motion: David Johnson, William Johnson, Clare Kapperman, Patricia Fries and Mary Schwartz.

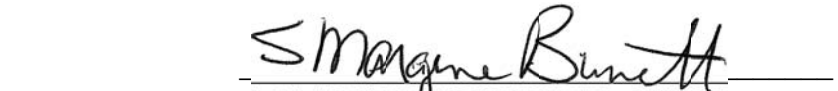
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the mediator's fees and expenses incurred herein shall be taxed as costs and paid by the Plaintiffs in the civil action who have opposed this Motion: David Johnson, William Johnson, Clare Kapperman, Patricia Fries and Mary Schwartz.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that parties shall preform the terms of their settlement agreement.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pursuant to the agreement of the parties the within actions, Case No. 13P8-PR00140 and 1316-CV302279 are dismissed with prejudice with parties to bear their own costs.

IT IS SO ORDERED.

Dated: January 23, 2015



S. MARGENE BURNETT, JUDGE

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing as hand delivered/faxed/emailed/mailed and/or sent through the eFiling system to the attorneys on January 23, 2015.

Judicial Administrative Assistant