

STATE OF NORTH CAROLINA
NEW HANOVER COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23 CVS 715

DAVID RUSSELL CUNNINGHAM,
as Guardian for DAVID WAYNE
CUNNINGHAM,

Plaintiff,

v.

CAROLYN A. WAFF; HUNTER S.
WAFF; and ALEXA G. WAFF,

Defendants.

ORDER ON DESIGNATION

1. **THIS MATTER** is before the Court pursuant to the Determination Order issued on 6 April 2023 by the Honorable Paul Newby, Chief Justice of the Supreme Court of North Carolina, directing the undersigned to determine whether this action is properly designated as a mandatory complex business case in accord with N.C.G.S. § 7A-45.4(a). (Determination Order, ECF No. 1.)

2. Plaintiff David Russell Cunningham (“Russ”), guardian for David Wayne Cunningham (“David”), filed the Complaint initiating this action in New Hanover County Superior Court on 2 March 2023, asserting claims for constructive fraud and battery against Defendant Carolyn A. Waff (“Carolyn”), and claims for declaratory judgment, unjust enrichment, conversion, and constructive trust against Carolyn and Defendants Hunter S. Waff (“Hunter”) and Alexa G. Waff (“Alexa”; collectively, the “Waffs”). (See Compl. ¶¶ 293–338, ECF No. 2.) Carolyn and Alexa accepted service

of the Complaint on 20 March 2023, (Acceptance Serv. 2, ECF No. 4),¹ and timely filed the NOD on 4 April 2023, (NOD 1).

3. Carolyn and Alexa contend that designation as a mandatory complex business case is proper under N.C.G.S. § 7A-45.4(a)(1). Designation under this section is proper if the action involves a material issue related to “[d]isputes involving the law governing corporations, except charitable and religious organizations qualified under G.S. 55A-1-40(4) on the grounds of religious purpose, partnerships, and limited liability companies, including disputes arising under Chapters 55, 55A, 55B, 57D, and 59 of the General Statutes.”

4. This case arises out of an incompetency proceeding. Russ alleges that, beginning in 2018, his father David, a retired successful businessman, engaged in increasingly erratic and self-destructive behaviors. (*See* Compl. ¶¶ 25–48.) After David became acquainted with the Waffs in 2021, the Complaint alleges that the Waffs took advantage of David’s “diminished mental capacity and susceptibility to undue influence[.]” to extract “millions of dollars in financial and material benefits from David[.]” (Compl. ¶ 2; *see also* ¶¶ 56–277.) According to the Complaint, David purchased a beach house in Wrightsville Beach, North Carolina in August 2021 and titled the house to Brawndo AG Realty, LLC (“Brawndo”). (*See* Compl. ¶¶ 83, 87–89.) Disputes arose between David and Carolyn regarding Carolyn’s alleged ownership

¹ Although the Notice of Designation of Action as Mandatory Complex Business Case Under N.C.G.S. § 7A-45.4 (the “NOD”) represents that Carolyn and Alexa accepted service of the Complaint on 6 March 2023, (*see* Notice Designation Action as Mandatory Complex Bus. Case Under N.C.G.S. § 7A-45.4 at 2 [hereinafter “NOD”], ECF No. 9), the Acceptance of Service is dated 20 March 2023, (*see* Acceptance Serv. 2). This discrepancy is immaterial, however, because the NOD is timely filed using either date. *See* N.C.G.S. § 7A-45.4(d)(3).

interest in and alleged right to use the house. (See Compl. ¶¶ 96–109, 115–18, 202–78.) David was adjudicated as incompetent on 14 November 2022, (see Compl. Ex. A), and Russ initiated this action to recover the financial and material benefits David conveyed to the Waffs and to seek a declaration that any agreements David entered into during this period were invalid and unenforceable, (see Compl. ¶¶ 293–338).

5. In support of designation under section 7A-45.4(a)(1), Carolyn and Alexa first argue that the dispute centers, in part, “on the purchase and use of the [beach house], improvements to and investments made in the [beach house], and Carolyn Waff’s status as a member of [Brawndo].” (NOD 3.) Carolyn and Alexa further contend that designation is appropriate because the Court will have to determine “how to allocate the assets of [Brawndo] in a dispute regarding membership and corporate rights in a limited liability company.” (NOD 2.)

6. The Complaint alleges that Brawndo’s 1 August 2021 operating agreement is invalid and unenforceable either because Carolyn forged David’s signature on it or because Carolyn “took advantage of his incapacity and/or diminished capacity and susceptibility to undue influence to cause David to sign the [Brawndo] ‘operating agreement’ without full knowledge of what he was doing.” (Compl. ¶¶ 243–44, 304–07.) The Complaint additionally alleges that subsequent agreements related to Brawndo and the disposition of the beach house are similarly invalid and unenforceable. (See Compl. 255–70, 300–03, 308.) However, resolution of these issues requires only a straightforward application of contract law principles and does not implicate the law governing limited liability companies under N.C.G.S. § 7A-

45.4(a)(1), because “the laws of agency and contract . . . govern the administration and enforcement of operating agreements.” N.C.G.S. § 57D-2-30(e); *see Parker v. Brock*, 2021 NCBC LEXIS 49, at *3–4 (N.C. Super. Ct. May 7, 2021) (declining to designate under (a)(1) where plaintiff’s claims involved a contract dispute requiring a determination of the rights of LLC members and did not implicate the law governing limited liability companies) (collecting cases).

7. Carolyn and Alexa additionally argue that designation under section 7A-45.4(a)(1) is proper because the Court will need to determine whether Russ, as guardian, has standing to bring an action on behalf of David as a member of Brawndo because David was declared incompetent and N.C.G.S. § 57D-3-02(a)(2) provides that “[a] person ceases to be a member [of an LLC] upon . . . [i]n the case of an individual, the person’s . . . being adjudicated by a court of competent jurisdiction as incompetent to manage his or her person or property.” (NOD 8.)

8. Although the issue of whether Russ has standing to bring claims related to David’s membership interest in Brawndo may constitute a dispute involving the law governing LLCs under section 7A-45.4(a)(1), designation under this section must be based on a *pleading*, not a forecasted defense. *See Mary Annette, LLC v. Crider*, 2022 NCBC LEXIS 41, at *3 (N.C. Super. Ct. May 4, 2022) (“[T]he pleading upon which designation is based must raise a material issue that falls within one of the categories specified in section 7A-45.4.” (quoting *Composite Fabrics of Am., LLC v. Edge Structural Composites, Inc.*, 2016 NCBC LEXIS 11, at *11 (N.C. Super. Ct. Feb. 5, 2016))). Consequently, the Court “may not consider may not consider any issues that

may or may not be raised in a future pleading when determining whether designation is proper.” *Stout v. Alcon Ent., LLC*, 2020 NCBC LEXIS 77, at *4 (N.C. Super. Ct. June 30, 2020).

9. Based on the foregoing, the Court determines that this action shall not proceed as a mandatory complex business case under N.C.G.S. § 7A-45.4(a) and thus shall not be assigned to a Special Superior Court Judge for Complex Business Cases.

10. Consistent with the Determination Order, the Court hereby advises the Senior Resident Superior Court Judge of Judicial District 5 that this action is not properly designated as a mandatory complex business case so that the action may be treated as any other civil action, wherein the parties may pursue designation as a Rule 2.1 exceptional case with the Senior Resident Superior Court Judge.

11. The Court’s ruling is without prejudice to the right of parties to otherwise seek designation of this matter as a mandatory complex business case as may be provided under section 7A-45.4.

SO ORDERED, this the 10th day of April, 2023.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge