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October 2014

www.mcguirewoods.com

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DEFENSES AND LIMITATIONS

Beck, et al. v. Mueller, 2014 Wisc. App. LEXIS 377 (Ct. App. Wisc., May 8, 2014)

The statute of limitations barred beneficiaries' claims where each beneficiary had previously received a copy of the trust agreement long before the trusts should have terminated and their claims were not filed until well after the trust termination should have occurred.

Facts: Norma Beck died in 1984. Her will created six trusts, one for each of six grandchildren. Gordon Mueller was named as trustee of each trust. Mueller had discretionary authority to distribute the principal and income of each trust to its beneficiary. Mueller was required to pay one-third of the trust's principal to its beneficiary when the beneficiary reached ages 23, 28 and 35. Each beneficiary reached age 35 between 1998 and 2007. Mueller did not make the principal distributions that the trust instrument mandated or provide the beneficiaries with any accountings.

In December 2011, the beneficiaries sued Mueller for intentional breach of fiduciary duties and intentional fraud for failure to make the required trust distributions and for failing to provide trust accountings.

Mueller asserted Wisconsin's two-year statute of limitations as a defense to the beneficiaries' claims and sought summary judgment. The circuit court denied Mueller's motion for summary judgment. On appeal, the Wisconsin Court of Appeals reversed the circuit court's judgment and directed that Mueller's motion for summary judgment be granted.

Law: In order for the beneficiaries' claims to have been timely filed the claims had to have accrued after December 2009, two years before the beneficiaries filed their claims. Under Wisconsin's discovery rule applicable to the beneficiaries' claims, "a cause of action accrues when the plaintiff discovered or, in the exercise of reasonable diligence, should have discovered his [or her] injury, its nature, its cause and the identity of the allegedly responsible defendant."

Holding: The beneficiaries asserted that they did not discover their injuries until June 2010 when Mueller provided them with a court-ordered accounting. The appellate court disagreed, finding that the beneficiaries should have reasonably discovered their injuries prior to December 2009.

For its ruling, the appellate court relied on the fact that each beneficiary had received a copy of the testator's will, either directly or constructively through a guardian well before December 2009. Moreover, each beneficiary had turned 35 by April 2007. The court was not persuaded by the beneficiaries' argument that Mueller's accounting was needed for the beneficiaries to discover their injuries when they otherwise had copies of the trust and knew assets remained in the trusts. Accordingly, the court directed that summary judgment be awarded to the trustee.

Practice Point: The trustee in this case was fortunate that he was able to successfully assert the statute of limitations as a defense for his failure to account and make the required trust distributions. However, the trustee would have likely avoided the litigation had he simply followed the terms of the trust instrument, made the required distributions to the beneficiaries of the trusts and provided them with periodic accountings for the trusts.

Davis v. Rael, No. B244897, 2014 Cal. App. Unpub. LEXIS 3914 (Cal. Ct. App. 2014)

Appellate court reversed trial court's surcharge of the trustee in excess of $1,200,000, where the statute of limitations barred the claim even though beneficiary claimed he had not received a copy of the trustee's accounting.

Facts: Decedent Tony G. Rael, Jr., created a joint inter vivos trust (the Trust) with his wife, Toni B. Rael, for the benefit of their three children, including their son, Mark Rael (Mark). Tony was widowed and remarried Cruz Cardenas in 2000. Tony died in 2003. After Tony's death, Cardenas brought a claim against the estate, arguing that Tony had agreed to amend his estate plan to provide Cardenas

with a one-third interest in the Trust. The trustee filed a First Account in 2005, which Mark argued he did not receive. Distributions from the Trust were postponed pending resolution of Cardenas' claim, which was settled in 2008. In 2009, Mark filed a petition to compel distribution of the Trust. He subsequently filed various objections to the trustee's accounting. Mark also asserted various breaches of fiduciary duty involving the sale of property in 2004 and various fees the trustee had charged.

The court found that the trustee breached his fiduciary duties and surcharged him in the total amount of $1,264,905. The trustee appealed.

Law: California law requires a beneficiary to raise objections to a trustee's actions within three years of the beneficiary's receipt of information sufficient to permit discovery of a claim, whether or not the beneficiary receives actual notice of the trustee's actions or receives a written account or report.

Holding: Whether or not Mark received a copy of the First Account in 2005, Mark was on inquiry notice in 2004 and 2005 of the trustee's actions related to that report, including the trustee's fees and the trustee's actions in selling property. Accordingly, Mark's claims in 2011 related to these alleged breaches of fiduciary duty were barred by the statute of limitations, regardless of whether Mark received actual notice or a copy of the First Account.

In addition, the court found that the trial court improperly determined the amount of fees the trustee had charged following the First Account. The court remanded the case for retrial on the issue of the trustee's fees.

Practice Point: The statute of limitations may begin to run on a beneficiary's claim before the beneficiary receives actual notice of the facts giving rise to the claim. If a beneficiary suspects that a trustee has acted improperly, the beneficiary should act quickly, and not wait for a formal account or other written notice of a trustee's actions. Conversely, a trustee who is concerned about a beneficiary's later challenge of an action may be able to take actions that put the beneficiary on inquiry notice of the claim, and to start the running of the statute of limitations, even if the trustee has not prepared or served a formal accounting.

In re Demesyeux, 978 N.Y.S.2d 608 (Nassau County Ct. 2013)

A mother who pled not guilty by reason of insanity to charges of murder was disqualified from sharing in the wrongful death proceeds arising from her children's deaths.

Facts: A mother was charged with murder after she drowned her five-year-old boys in a bathtub to protect them from voodoo. The mother entered a plea of not guilty by reason of mental disease or defect and was subsequently held in civil confinement at a psychiatric facility. The children's father received limited letters of administration and commenced a wrongful death action against Nassau County for Child Protective Services' failure to remove the children from their mother's care. The wrongful death action was settled for a total of $250,000 The father later commenced a proceeding to compromise the wrongful death action and settle his account. As part of that petition, the father requested that the mother be held to have forfeited her interest in the children's estates based on the doctrine that a wrongdoer should not profit from her own wrong. In this case of first impression in New York, the court considered whether a person who pleads not guilty by reason of mental disease or defect in a criminal proceeding is disqualified from sharing in the proceeds of a wrongful death compromise arising from the killing of her children at her own hands.

Law: It is well established law that one who takes the life of another should not be permitted to profit from his or her own wrong and shall be barred from inheriting from the estate of the person slain. On the other hand, not all wrongful conduct will disqualify a person as a distributee, e.g., if the killing was unintentional or accidental this principle will not be applied.

Holding: The court held that although the mother may not be criminally responsible for the deaths of her children, she was disqualified from sharing in the wrongful death proceeds therefrom since the proceeds existed only because of the mother's wrongful conduct.

Practice Point: In this case of first impression in New York, the court adopted the "Brewer Rule" that a person found not responsible for a crime due to mental disease or defect who has the ability to

recognize that his or her conduct was morally wrong when undertaken shall not financially benefit from that action.

RESIGNATION AND REMOVAL OF TRUSTEES

Spencer v. Di Cola, 2014 Ill. App. LEXIS 289 (App. Ct. Ill., May 1, 2014)

An individual trustee was entitled to summary judgment where the trust beneficiaries effectively sought to replace the trustee with a corporate trustee without cause for removal or the authority to replace the trustee under the terms of the trust.

Facts: Lyle Spencer, Sr., died in 1968. In his will Mr. Spencer created a trust for the benefit of his children. The terms of the trust named an individual trustee and a corporate trustee. In the event an individual trustee was not acting, a law firm was empowered to name a successor individual trustee. There was no requirement that a successor corporate trustee be named in the event the designated corporate trustee ceased to act. There was also no trust provision permitting the removal of an individual trustee.

The trustee was given broad discretion to manage the trust, make distributions from it to the beneficiaries (including unequally) and to name a substitute corporate trustee (including defining the scope of such substitute's appointment and duration of service). The beneficiaries, however, could force the trustee to appoint a substitute trustee. Separate court actions in the early 1980s: (a) permitted the resignation of the original corporate trustee (without replacement); and (b) eliminated the law firm's right to fill a vacancy of the individual trustee; this appointment power was given instead to the beneficiaries.

Disputes involving trust distributions and investment performance arose between the current beneficiaries of the trust and the then-acting individual trustee, Di Cola, a Boston trusts and estates attorney. The beneficiaries sought to remove the trustee and replace her with a corporate trustee. The parties filed cross motions for summary judgment.

The beneficiaries asserted they were entitled to substitute a corporate trustee in place of Di Cola. Di Cola asserted that the terms of the trust did not authorize removal of an acting trustee and that there was no trustee vacancy for the beneficiaries to fill. The trial court granted summary judgment in favor of the trustee. The court found that the beneficiaries did not have the right to tell the trustee whom to name as a substitute trustee and that there was no corporate trustee vacancy for the beneficiaries to fill. The trial court also awarded Di Cola attorneys' fees. The beneficiaries appealed.

Holding: On appeal, the Appellate Court of Illinois affirmed. The court found that the settlor intended for a substitute trustee to be appointed for a particular purpose and that the settlor gave the trustee (and not the beneficiaries) wide discretion to determine that trustee's role. The individual trustee was also given the power to remove any such substitute corporate trustee. The court found the trust language did not give the beneficiaries the right to micromanage the trust via a substitute trustee. The court found the beneficiaries' right to force the trustee to appoint a substitute trustee would protect their interests in the event the individual trustee was unable to act, but that such power could not be used to effectively replace the existing individual trustee. The court believed such interpretation was consistent with the settlor's intention to give the trustee wide discretion in the management of the trust.

The court also found that the 1980 court orders did not create a vacancy in the corporate trustee role. Because the corporate trustee position was eliminated upon the resignation of the original designated trustee, no vacancy existed to be filled. The court also affirmed the award of attorneys' fees to the trustee, finding that the trustee was entitled to be reimbursed from the trust for trust-related expenses and but for the beneficiaries' action against the trustee, Di Cola would not have incurred such fees.

Practice Point: This case highlights the importance of well-drafted trustee succession provisions for both drafting attorneys and trustees. Moreover, any subsequent modification of a trust's terms, by agreement of the parties or court order, should be equally well drafted to avoid later ambiguity and problems in trust administration.

ADMINISTRATION AND COMPENSATION

Weinstein v. Weinstein (In re Indenture Trust Dated January 13, 1964), 326 P.3d 307 (Ariz. Ct. App. 2014)

Beneficiary of a spendthrift trust cannot voluntarily assign his interest or ratify the assignment.

Facts: In 1964 Harold and Alice Weinstein created a trust for the benefit of their grandchildren, Steven, Carrie and Milton. The grandchildren's father, Bernard, was named trustee. The trust included a spendthrift provision precluding the voluntary or involuntary transfer of a beneficiary's interest. Following several amendments, the trust was to terminate upon Bernard's death.

In 2000 and in return for $75,000, Milton assigned his interest in the trust to Steven and Carrie to be held in trust for the benefit of Steven and Carrie's children. In 2010, Bernard died and subsequently the trust was terminated and the assets were distributed to the beneficiaries.

In 2012, Milton brought a petition for accounting against the trust. Steven and Carrie objected to the petition and filed a summary judgment motion on the grounds that (1) Milton lacked standing to file the petition because of the 2000 assignment of his interest and (2) because the doctrine of laches and the applicable statute of limitations barred any attempt to invalidate the assignment. The trial court granted summary judgment in favor of Steven and Carrie. The court concluded that the 2000 assignment was valid and, even if it were invalid, that laches and the statute of limitation precluded Milton's claims. Milton appealed.

Law: A spendthrift provision protects a beneficiary from himself. Moreover, for the same reason a beneficiary cannot voluntarily assign his beneficial interest, a beneficiary does not have the power to consent to or ratify the disposition of his beneficial interest in contravention of the purposes of a spendthrift trust. However, the doctrine of laches may preclude negating the invalid assignment when the delay in bringing an action to undo the assignment is unreasonable and it results in prejudice either to the opposing party or the administration of justice.

Holding: The Court of Appeals overturned the trial court's conclusion that Milton had assigned his interest in the spendthrift trust. The Court of Appeals concluded that because a spendthrift provision protects a beneficiary from himself, the voluntary assignment of a beneficial interest is invalid. Furthermore, Milton could not ratify the 2000 assignment by accepting $75,000 because that would allow him to avoid the spendthrift provision and undermine the wishes of the grantor. However, the doctrine of laches precluded the undoing of the 2000 assignment because in the 12 years between the assignment and Milton's bringing the action for an accounting, the trustee died, the trust terminated and the assets were distributed. To grant the relief Milton requested would substantially prejudice Steven and Carrie and the administration of justice. It would also undermine one of the primary goals of trust law, which is to provide finality in the administration of estates.

Practice Point: This case reaffirms the well-established doctrine that spendthrift provisions preclude the assignment, whether voluntary or involuntary, of a beneficiary's interest in a trust. The case goes one step further in providing that a beneficiary cannot consent to or ratify an invalid assignment, otherwise, the beneficiary could, as was attempted in this case, consent to his own invalid actions and thereby validate them. Finally, practitioners should always be mindful of the doctrine of laches and its interplay with the finality of trust administration.

Gray v. Director, Div. of Taxation, 28 N.J. Tax 28 (N.J. Tax Ct. 2014)

Transfers to trusts made more than three years before the grantor's death were not deemed transfers in contemplation of death.

Facts: In 2004, a resident of New Jersey created and funded two trusts, a grantor retained unitrust (GRUT) and a qualified personal residence trust (QPRT). Under the terms of the trust agreements, the grantor retained the right for a six-year period to receive income distributions from the GRUT and to utilize and occupy the real estate the QPRT owned. At the end of the six-year period, the assets of the

respective trusts would pass to the remainder beneficiaries, terminating the grantor's interest in the trusts.

The grantor died six years and eleven months after the creation of the trusts. Accordingly, the six-year period had passed and the grantor no longer had any interests in the trusts. Nevertheless, the New Jersey Division of Taxation, on audit of the grantor's state inheritance tax return, sought to include the value of the trusts in the grantor's estate.

Law: Under New Jersey law, transfers an individual makes in contemplation of the individual's death are includable in the individual's gross estate for state inheritance tax purposes. The New Jersey taxing authority argued that the grantor had health issues at the time the transfers were made, so the transfers were made while the grantor was considering her death. However, New Jersey also has a statute stating that transfers made over three years before the decedent's death are not deemed made in contemplation of death.

Holding: The Tax Court of New Jersey granted the personal representative's motion for summary judgment, holding that the statute precludes any actual inquiry into the decedent's state of mind at the time of the transfers. Hence, the transfers were not made in contemplation of death because the transfers were made more than three years before the grantor's death. Further, the fact that the grantor retained a beneficial interest in the trusts during the three-year period is not considered in the analysis. Therefore, the Tax Court held there is no basis for imposing an inheritance tax on the assets of the trusts.

Practice Point: In drafting estate planning documents, practitioners must always be careful to analyze the state tax consequences of any particular plan. Many estate planning techniques, such as the trusts the grantor used in this case, are primarily designed to have federal tax benefits. In this instance, the practitioner successfully navigated the state tax minefield and created trusts that withstood scrutiny of the state taxing authority.

Prestidge v. Dep't of Revenue, 2014 Ore. Tax LEXIS 75 (Or. T.C. 2014)

Decedent's beneficial interest in trust creates sufficient nexus in his state of residence for state inheritance tax to apply.

Facts: A husband and wife lived together in Oregon. At the wife's death in 2001, her estate planning documents created a marital trust for the benefit of the husband. In 2004, the husband resigned as trustee and a California branch of Wells Fargo Bank was appointed successor trustee. The assets of the trust and the legal situs of the trust were transferred to California during the husband's lifetime. At the husband's subsequent death, his personal representative filed an Oregon state inheritance tax return, taking the position that the assets of the marital trust were not includable in the husband's Oregon estate because the marital trust was now sitused in California. The Oregon Department of Revenue disagreed.

Law: Under the due process clause of the 14th Amendment to the Constitution of the United States, a state may not tax a trust over which it does not have sufficient contacts. The Oregon Department of Revenue argued that because the husband was a resident of Oregon at the time of his death and he was the sole beneficiary of the marital trust during his lifetime, an adequate connection with the state existed sufficient to tax the assets of the marital trust.

Holding: The Oregon Tax Court agreed with the analysis of the Oregon Department of Revenue and upheld Oregon's right to tax the assets of the marital trust. Although all the assets of the trust were located in California, because the decedent was a resident of Oregon and had a beneficial interest in the trust, the state had sufficient contacts to tax the assets of the trust.

Practice Point: In a world where beneficiaries and assets are increasingly mobile, practitioners and fiduciaries must always consider the state tax consequences of the situs and location of trust assets, as well as the effect of state long-arm statutes providing for the taxation of trust assets located out of state.

Greenberg v. JP Morgan Chase Bank, N.A., 2014 N.Y. Misc. LEXIS 2011 (N.Y. Sup. Ct. 2014)

Evidence of trustee's failure to reallocate assets in light of economic downturn sufficient to plead a case of breach of fiduciary duty.

Facts: In 2000, a grantor established a trust for the benefit of his three children, and named one son as trustee. A corporate trustee subsequently accepted fiduciary duties as a co-trustee, to serve with the son, and the son delegated all investment authority to the corporate fiduciary. In 2007 and 2008, the corporate fiduciary shifted the asset allocation of the trust assets away from fixed income and cash holdings to invest more heavily in equities. In 2008, at the beginning of the national recession, the grantor's children repeatedly requested that the corporate fiduciary modify the assets allocation to reduce the trust's interests in equities, out of concern that the equities market would continue to be volatile. The corporate trustee refused to reallocate the trust assets, citing corporate policy and investment outlook as the reasons. The value of the trust assets declined significantly and the co-trustee filed suit against the corporate trustee for breach of fiduciary duty.

Law: A trustee has a duty to prudently manage trust assets. Under the prudent investor standard, a trustee is not a guarantor of performance, but must engage the proper processes and considerations. A trust's economic losses alone are not sufficient to show a breach of fiduciary duty.

Holding: The Supreme Court of New York, New York County, denied the corporate fiduciary's motion to dismiss the co-trustee's claims. The court held that the co-trustee adequately demonstrated for purposes of its pleadings that the corporate fiduciary exposed the trust assets to excessive market risk and disregarded its obligations to reallocate the portfolio in light of changing circumstances.

Practice Point: Fiduciaries and investment managers cannot see the future. To minimize their risk in the face of beneficiary requests to alter investment strategies, fiduciaries should consider accepting beneficiary recommendations and obtaining consents and releases from beneficiaries related to the requested actions.

Abbot v. Brennemann (In re Brennemann Testamentary Trust), 288 Neb. 389 (June 27, 2014)

Trustees found not liable for breach of duty to inform and report where the breach was harmless.

Facts: The settlor died in 1976. His will established a testamentary trust for the benefit of his wife and descendants. The trust held a partial interest in the settlor's family business. The business's primary asset was a 5,425-acre ranch. After the settlor's death, two of his children and one grandchild served as successor trustees. The ranch was eventually sold to the grandchild serving as trustee pursuant to an installment sale. The trustees sought and received court approval of the sale. In 2006, the ranch was formally conveyed to the grandchild after all the payments had been made.

The other two children serving as trustees died, and their children (grandchildren of the settlor) became qualified beneficiaries of the trust. One of these grandchildren received a letter from the trust's accountant, recommending that the trust should be terminated because it had become too small and was "non-economical." The grandchild filed a complaint against the trustees seeking an accounting for the entire period of the trust's administration since 1976. The trustees provided an accounting covering 2002 through 2010, plus updates as the litigation proceeded.

The grandchild amended her complaint and alleged that the accounting was incomplete in violation of the trustees' fiduciary duties. The trial court rejected the grandchild's claim. The grandchild appealed to the Nebraska Court of Appeals, arguing that the trustees breached their fiduciary duty to keep beneficiaries "reasonably informed" of the trust and its administration.

The Nebraska Court of Appeals examined the grandchild's claim for three separate time periods: 1976 to 2002, 2002 to 2005, and 2005 to 2009. For the first period, the appellate court found that the grandchild had successfully met her burden of proof regarding the breach of fiduciary duty, but the court also found that the breach was harmless.

For the second period, the appellate court concluded that under Nebraska law at the time the trustees were not required to provide an accounting but were required instead to keep each beneficiary "reasonably informed" of the trust and its administration. Because the trustees had issued annual schedule K-1 tax reports to the grandchild, the appellate court held that they did not breach their duty for the second period.

For the third period, however, the appellate court noted that a change in Nebraska law imposed additional reporting requirements. The appellate court concluded that the issuance of schedule K-1 tax reports was not sufficient under the new law, but the court determined that the breach was harmless because the trustees had provided a full accounting for the period.

The grandchild appealed the appellate court's rulings on the reporting issue to the Nebraska Supreme Court. She argued that the issuance of schedule K-1 tax reports was insufficient to keep beneficiaries "reasonably informed" of the trust's administration because the reports only offer limited information pertaining to the recipient beneficiary. The reports do not provide information about the trust assets or the overall performance of the trust. The Nebraska Supreme Court agreed, noting that the report issued to the grandchild contained only information that pertained to the grandchild's taxable income from the trust, and not to the trust and its administration.

Holding: By providing K-1s only, the Nebraska Supreme Court held that the trustees did not satisfy their duty to keep beneficiaries reasonably informed of the trust and its administration. Providing an accounting, account statements or other records of trust administration were necessary for the trustee's to meet their burden to keep the beneficiaries reasonable informed.

Practice Point: Most state trust laws require trustees to keep beneficiaries reasonably informed of the trust and its administration. This case illustrates that there is an important difference between issuing a K-1 to a beneficiary for tax preparation purposes and providing that beneficiary with a summary of the administration of the trust itself disclosing important items such as overall trust receipts, disbursements, trust investments, income and fees.

In re Robert Stout Revocable Trust, No. 313063 2014 WL 265553, 2014 Mich. App. LEXIS 137 (Mich. Ct. App. Jan. 23, 2014)

Trustee breached fiduciary duties by failing to notify beneficiaries of change of trustee compensation and by requiring the beneficiaries to sign a release as a condition of receiving a trust distribution.

Facts: Robert Stout and Dolores Stout created various trusts for the benefit of their children. Robert died in 2009, and Dolores died in 2010. The terms of the trusts were slightly different, but they named their son Kevin as trustee of each. Disputes arose between Kevin, as trustee of the trusts, and three beneficiaries of the trust: Tara, a daughter of Robert and Dolores; and her two children, Alison and Kyle. Tara and her children brought various claims against Kevin for breach of fiduciary duties.

Tara and her children claimed that the trustee improperly conditioned distributions on the beneficiary's signing a release, and failed to notify the beneficiaries when the trustee's compensation changed from no compensation to reasonable compensation.

The probate court found that none of these claims established a breach of fiduciary duty. In fact, the probate court concluded that the petitioners' action was frivolous and sanctioned Tara $59,398, and also awarded the trustee his costs and attorneys' fees. Tara appealed this decision to the Michigan Court of Appeals

Law: The appellate court generally noted that Michigan law only provides a remedy for a beneficiary for a breach of fiduciary duty that actually harms the beneficiary and which warrants a remedy from the court.

While the Michigan Trust Code allows a beneficiary to give a trustee a release, the Michigan Trust Code does not allow a trustee to condition a distribution upon the beneficiary's signing a release, when the beneficiary is entitled to a mandatory distribution. Michigan law also requires the trustee to inform the beneficiaries in advance of a change in the method or rate of the trustee's compensation.

Holding: The appellate court held that certain of the trustees' actions did not result in any harm to the beneficiaries that warranted a court-imposed remedy. However, the trustee breached his fiduciary duties when he required the beneficiaries to sign a release as a condition for a distribution, and the trustee also breached his fiduciary duties when he failed to inform the beneficiaries of the change in his compensation.

The court of appeals remanded the case to the trial court to determine the damages suffered because of the trustee's requirement of the signing of a release. The court also vacated the award of trustee compensation and remanded the case for the probate court to determine if trustee compensation was appropriate in light of the trustee's failure to notify the beneficiaries of the change in compensation.

In view of these rulings, it followed that at least some of Tara's claims were not frivolous, so the court of appeals also vacated the trial court's sanctions against Tara.

Practice Points: Before asking that a beneficiary sign a release as a condition to a distribution, the trustee should carefully review applicable state law to ensure that such a condition is permissible in light of the particular circumstances of the distribution. Any conditions on a distribution that goes beyond state law the trustee should explicitly describe as merely a matter of contract rather than a requirement or right of the trustee under state law.

Moreover, the trustee should be careful to follow any statutes or terms of the trust regarding trustee compensation, including provisions that require notice to be given to the beneficiaries. In this case, the trustee's apparent failure to inform the beneficiaries in advance of his change of compensation jeopardized his ability to receive that compensation.

Wehle v. Bradley, 2014 WL 982973, 2014 Ala. LEXIS 37 (Ala. March 14, 2014)

Executor's total fee of almost five percent (5%) was reasonable but prepayment of executor fees without court approval was improper and the executors were required to pay interest on the fees from the date of payment.

Facts: Robert G. Wehle died in 2002, leaving a complex estate valued at more than $35,000,000, which included interests in hunting dogs, thoroughbred horses and artwork. His will named as executors James H. McGowan, an attorney; Grady Hartzog, a CPA; and Thomas H. Bradley III, an individual with experience dealing with thoroughbred horses and hunting dogs. The executors took as commission $1,964,367.82, or approximately 5 percent of the estate. Robert's daughters brought a claim against the executors for excessive fees. In addition, the daughters also sought removal of McGowan as trustee of the family trust, as they argued that his services were no longer necessary.

Following various court proceedings, including a first appeal to the Alabama Supreme Court in 2010, the trial court approved the executors' commission, granted the executors their attorneys' fees, and denied the daughters' claim for interest on those fees. The trial court also denied their request to remove McGowan as a trustee.

The daughters appealed to the Alabama Supreme Court.

Law: Alabama law allows the circuit court discretion in approving executors' commissions, but creates a maximum statutory limit of executor compensation of 2.5 percent of the value of the property received, and 2.5 percent of the value of the property distributed. However, Alabama law does not allow executors to pay their commission without court approval, unless the will expressly authorizes such a payment. Moreover, Alabama law only allows a court to remove a trustee under certain circumstances, including for a serious breach of trust, or the unfitness, unwillingness or persistent failure of the trustee to administer the trust.

Holding: The executors' fees were reasonable, because (1) the trial court exercised its discretion in approving the fees as reasonable under the circumstances, and (2) the fees were below the statutory limit in Alabama. However, because the executors had paid themselves their commission before receiving court approval, they were required to pay interest on that amount from the date it was paid.

In addition, the Alabama Supreme Court refused to remove McGowan as trustee. The court noted that the beneficiaries were simply arguing that he was no longer necessary for the administration of the

trust; the beneficiaries had failed to produce any evidence of impropriety on the part of McGowan that would justify his removal.

Practice Point: Before paying themselves compensation, the executors should carefully review not only the amount of compensation, but also the timing of the payment.

Ferri v. Powell-Ferri, 2014 WL 3397927 (Conn. Super. Ct. 2014)

Facts: A wife commenced a dissolution of marriage action against her husband in 2010. In 2011, the trustees of a trust for her husband's benefit (the 1983 Trust) decanted the 1983 Trust into a newly created trust (the 2011 Trust). The trusts were governed by Massachusetts law. After the decanting, the trustees filed an action in court seeking declaratory judgment that (1) their conduct in decanting the assets of the 1983 Trust to the 2011 Trust was a valid exercise of their authority under the 1983 Trust and (2) the husband had no right, title or interest in or to the 2011 Trust assets. The wife filed a cross motion for declaratory judgment, alleging the trustees' actions violated the terms of the 1983 Trust and public policy. The court granted summary judgment in favor of the wife on the cross-declaratory judgment actions. The wife then sought multiple remedies, including restoration of the 1983 Trust and attorneys' fees.

Law: Massachusetts law and broad principles of equity permit the court to order the restoration of that which was removed from an improperly decanted trust. Moreover, the probate court has discretion under Massachusetts law to shift fees and costs even when the claims or defenses to the losing party are not wholly insubstantial and frivolous.

Holding: The court held that the decantation was not permitted under Massachusetts law and therefore ordered the trustees to restore the 1983 Trust plus all income, dividends and gains attributable thereto, less the taxes paid by the trustees from the 2011 Trust attributable to those gains. The court also ordered the trustees to pay the wife's reasonable attorneys' fees incurred in her prosecution and defense of the declaratory judgment actions.

Practice Point: Massachusetts law that allows a party to recover attorneys' fees from another party deviates from the American Rule that provides that each party is responsible for his or her own legal fees.

CREATION, FUNDING AND CONSTRUCTION

Lidstrom v. Wilson-Blanc, 2014 Cal. App. Unpub. LEXIS 3085 (Cal. App. 2d Dist. Apr. 30, 2014)

> **California's Court of Appeals interpreted survivorship provision and found that estate of deceased beneficiary was entitled to distribution from trust where he was living at the grantor's death.**

Facts: A husband and wife executed a joint trust agreement with themselves as grantors and initial trustees. At the death of the surviving spouse, the terms of the trust provided for the division of the trust assets into "as many equal shares as there are children of Trustors then living and children of Trustors then deceased leaving issue then living." The terms of the trust agreement also included a survivorship provision that provided that "a person shall not be considered to survive another if he or she shall die within ninety (90) days of the death of such other."

The settlors had two children, a daughter and a son. Both children were alive at the death of the surviving spouse, but the son died 78 days after the surviving spouse. The son died without issue. The daughter became the successor trustee.

For three years following the death of the son, the executor of the son's estate sought trust accountings from the daughter. In 2011, the executor filed a petition to compel an accounting and for distribution of trust assets to the son's estate. In response, the daughter filed a petition for instructions. She argued that because the son died without issue less than 90 days after the surviving spouse, the son was not a beneficiary of the trust. In response, the trial court held that the executor of the son's estate was a

beneficiary of the trust. The trial court granted the executor's petition to compel an accounting, and the daughter appealed.

Law: On appeal, the daughter made several arguments that the son's estate was not a beneficiary of the trust. She argued that the provisions of the trust were evidence that the son was not intended to be a beneficiary unless he survived at least 90 days after the surviving spouse. She also cited sections of the California Probate Code that address various circumstances where a transferee fails to survive a transferor.

The appellate court reviewed the language of the trust agreement *de novo*, and concluded that the survivorship provision did not apply to the phrase "then living" in the distribution provisions of the trust. The court focused on the exact wording of the distribution provisions, noting that those provisions "refer to children 'then living' at the time of the surviving spouse's death" instead of referring to children "who 'survive' the trustors." Based on this close reading of the trust agreement, the court concluded that the son was not required to survive the surviving spouse for 90 days and his estate, therefore, was a beneficiary of the trust.

Holding: Having concluded that the survivorship provision was inapplicable to the case, the appellate court affirmed the trial court's determination that the son's estate was a beneficiary of the trust.

Practice Point: Preconditions of survival, whether phrased with the word "survive" or the phrase "then living," are bread-and-butter provisions in wills and trusts. Use of survivorship provisions is also near-universal. This case highlights the importance of paying close attention to the wording of these common provisions.

AMENDMENT, MODIFICATION AND TERMINATION

Mendoza v. Luquin, 2014 WL 1619161 (Cal. App. 4th Dist. Apr. 23, 2014)

California Court of Appeals finds that an instrument intended to be a trust may validly revoke an earlier trust instrument even if the instrument fails to meet the technical requirements for an enforceable trust.

Facts: A settlor established a revocable trust that directed the trustee to distribute all the trust assets equally to the settlor's children at her death. The settlor executed deeds transferring two parcels of real property into the trust. Several years later, the settlor established a second revocable trust that directed the trustee to distribute all the trust assets to five of the settlor's six children. The second trust contained a provision that expressly excluded one of the settlor's children. The second trust also contained a statement that the settlor "hereby transfers" the same two parcels of real property that were deeded to the first trust.

The successor trustee of the first trust was the child who was later excluded from the second trust. The successor trustees of the second trust were two other children of the settlor. After the settlor's death, the trustees of the second trust filed a petition seeking a judicial determination that the two parcels were assets of the second trust. The trustee of the first trust objected, arguing that the first trust was never revoked or amended and the trust became irrevocable at the settlor's death.

The trial court agreed with the trustee of the first trust and held that the two parcels remained property of the first trust. The trustee of the second trust appealed.

Law: The trustee of the first trust argued that no revocation of the first trust occurred because the second trust did not "expressly declare an intent to revoke or amend the first trust." The appellate court rejected this argument, noting that the California Probate Code provides that a revocable trust may be revoked "in any manner provided in the trust instrument" or "by a writing, other than a will, signed by the trustor and delivered to the trustee." The terms of the first trust also authorized the settlor to revoke the trust by delivering a signed writing to the trustee. The court also noted that under California law an instrument intended to be a trust may validly revoke an earlier trust even if the instrument fails to meet the technical requirements for an enforceable trust.

Holding: Relying on the California Probate Code and established case law, the court concluded that the second trust revoked the first trust, which caused the assets of the first trust to pass according to the settlor's pour-over will and into the second trust.

Practice Point: This litigation might have been avoided if the settlor had signed a document expressly revoking the first trust or retitled the two parcels in the name of the second trust. This case highlights the importance of addressing and dealing with obsolete documents when making changes to an estate plan. For corporate fiduciaries, this case highlights the importance of due diligence when accepting a new trusteeship — do you have copies of all of the settlor's current and in-force estate planning documents? Was there a proper implementation of prior changes to the settlor's plan?

JURISDICTION AND STANDING

Cartwright v. Garner, 751 F.3d 752 (6th Cir. 2014)

Princess Lida doctrine applied to alleged tort claims for fraud, mismanagement and conversion.

Facts: Alan C. Cartwright was the beneficiary of several trusts that his father had established. Following the death of his father and mother, Cartwright's sister, Alice Cartwright Garner, became the trustee of the trusts. As trustee, Garner, invested trust assets in several family limited partnerships. In 2004, Cartwright commenced an action in the state chancery court against Cartwright, her husband and certain family limited partnerships to replace the trustees and dissolve the family limited partnerships. In 2007, Cartwright filed in state circuit court a separate tort action against the same defendants, alleging tort claims, including fraud, mismanagement and conversion. Thereafter, Cartwright amended his chancery court claim to include the tort actions originally filed in circuit court.

After the chancery court granted summary judgment to the defendants and against Cartwright on all matters except the tort actions, Cartwright voluntarily dismissed his tort claims and appealed the chancery court's grant of summary judgment. While the appeal was pending, Cartwright filed a new action in the United States District Court for the Western District of Tennessee alleging the same tort claims he voluntarily dismissed from the chancery court. Importantly, the tort actions were not filed against Garner or her husband as trustees, but rather individually and in their capacity as partners of the family limited partnerships.

The defendants moved to dismiss the federal case based on lack of subject matter jurisdiction. The defendants alleged that the state court and district court actions are quasi in rem and, thus, implicate the *Princess Lida* doctrine which provides only one court may exercise jurisdiction over *in rem* or *quasi in rem* proceedings. The district court granted the motion to dismiss for lack of subject matter jurisdiction. Cartwright appealed to the 6th U.S. Circuit Court of Appeals on the grounds that the district court case is not a *quasi in rem* proceeding because it does not involve trust administration and instead the district court has *in personam* jurisdiction because it is directed against the defendants as individuals, partners and owners of corporate defendants.

Law: In *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456 (1939), the Supreme Court of the United States articulated a doctrine that applies when more than one court is asked to exercise jurisdiction in concurrent *in rem* or *quasi in rem* proceedings. Because *in rem* and *quasi in rem* proceedings require a court to have possession or assert some control over the subject property in order to grant the requested relief, the *Princess Lida* doctrine provides that only the first court to obtain jurisdiction may exercise that jurisdiction.

Holding: The 6th Circuit held that the *Princess Lida* doctrine applied because both actions are *quasi in rem*. The state court action is a suit involving trust administration that is well established as providing a court *quasi in rem* jurisdiction. The 6th Circuit also concluded that district court action was a *quasi in rem* action because, despite the failure to name the trusts or the trustees as defendants, Cartwright's allegations regarding the trusts and trust assets and his requested damages are matters of trust administration. If Cartwright were to prevail in the district court action, the district court would have to exercise some control over the partnerships and the trusts in order to implement Cartwright's requested remedy.

Practice Point: The *Princess Lida* doctrine will be applied based on the plaintiff's allegations and remedies requested regarding a trust and its assets, rather than based merely on the defendants named in a complaint. If a second lawsuit is filed in another court, only the first court may maintain and exercise jurisdiction over the trust and its assets.

Thea v. Kleinhandler, No. 13 Civ. 4895, 2014 U.S. Dist. LEXIS 67583 (S.D.N.Y. May 13, 2014)

An estate's administrator or executor is a necessary party to any action to enforce a contract to make a will.

Facts: Stanley Thea and his third wife, Frederica Thea, executed an agreement by which they agreed to execute mutually beneficial wills. Under the terms of the agreement, Stanley was to execute a will that bequeathed the majority of his estate to Frederica. If Frederica predeceased Stanley, Stanley's children, Donald and Deborah Thea, would inherit. In exchange, Frederica was to execute a will naming Stanley as the beneficiary of her estate. If Stanley predeceased her, the estate would go Stanley's children. Stanley ultimately predeceased Frederica and Frederica inherited the majority of Stanley's estate.

After Stanley's death, Frederica created a revocable trust, naming Neil Kleinhandler as sole trustee and the New School University as the sole beneficiary. Stanley's children brought an action for declaratory judgment requesting the court to declare that the trust's assets rightfully belonged to them, and that any transfers of assets in violation of the agreement between Stanley and Frederica are null and void.

Law: An action to enforce a contract to make a will must be prosecuted in two stages. First, the putative beneficiaries must bring an action against the estate to determine the validity and enforceability of the agreement. Then, a court may use its equitable powers to compel performance by parties in possession of estate assets. As a result, an estate's administrator, or its executor, is a necessary party to an action to enforce a contract to make a will.

Holding: The court held that Stanley's children lacked standing to bring an action directly against Kleinhandler, as trustee of the trust, to enforce the agreement between Stanley and Frederica. Since no administrator or executor was named a party to this lawsuit, the children lack standing to invalidate the trust or to obtain a declaration from the court.

Practice Point: Where litigation involves enforcement of a contract to make a will, actions must be brought against the estate and potentially also against the trustee of a trust, if the assets are held in trust. If no administrator or executor has been named or no probate proceedings have been initiated, the putative beneficiaries should seek to be appointed executor so that this standing requirement is satisfied.

Moore v. Chase, No. 14-CV-2119, 2014 U.S. Dist. LEXIS 82778 (D. Kan. June 17, 2014)

The "probate exception" does not preclude a federal court from asserting jurisdiction over trust assets, which are separate from the probate estate.

Facts: One of the trustees of a trust filed a petition in state court to remove the defendant co-trustee and asked the court to issue an order allowing the trust to withhold any distributions from the defendant until the defendant repaid funds allegedly owed to the trust. Defendant removed the case to federal court based on diversity of citizenship. Plaintiff argued that the district court lacked jurisdiction because the lawsuit fell under the "probate exception" to federal subject matter jurisdiction.

Law: A federal court has no jurisdiction to probate a will or administer an estate. While federal courts have interpreted the probate exception to block federal jurisdiction over a range of matters beyond probate of a will or administration of an estate, the probate exception applies only if the dispute concerns property within the custody of a state court.

Holding: The court held that the probate exception did not apply here as nothing in the facts alleged in the complaint suggested that the Kansas probate court had custody of the trust assets.

Practice Point: Assets placed in a living or *inter vivos* trust generally avoid probate, since such assets are owned by the trust, not the decedent, and are therefore not part of the decedent's estate. In such cases, the probate exception does not deprive a federal court of jurisdiction.

Kazeminy v. Kazeminy, A12-1701, 2014 Minn. App. Unpub. LEXIS 428 (May 5, 2014)

A court can enjoin a probate court from conducting parallel proceedings to ongoing litigation where the parties are substantially similar, the issues are similar and the first action can dispose of the action to be enjoined.

Facts: During the course of their divorce proceedings in state court, appellant Jibil Kazeminy sought to obtain financial information about three trusts for which the respondent, Nader Kazeminy, was beneficiary. After Nader objected to Jibil's requests for the financial information, Jibil sought trust accountings from Nader in probate court. Nader then requested the state court magistrate handling the divorce action to enjoin the probate court proceedings. The magistrate granted the motion and enjoined Jibil from pursuing an accounting of the trusts in probate pending the outcome of the divorce proceedings. Jibil appealed the magistrate's decision.

Law: A court may issue an antisuit injunction where the parties are substantially similar, the issues are similar and the first action can dispose of the action to be enjoined.

Holding: The appellate court upheld the magistrate's decision to enjoin the probate court from adjudicating discovery disputes, finding that the magistrate's decision was supported by the evidence. Here, because the two proceedings involved substantially similar parties and issues, and because the divorce proceeding's resolution will obviate the need for the discovery from the probate proceeding, the antisuit injunction was appropriate.

Practice Point: Where a litigant tries to make an end-run around a discovery ruling by seeking the same information from the probate court, the party opposing such discovery can ask the first court with jurisdiction to enjoin the probate proceedings where the parties are substantially similar, the issues are similar and the first action can dispose of the action to be enjoined.

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