Recent Cases of Interest to Fiduciaries

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Court approves "decanting" of a trust to effectively remove a beneficiary's future mandatory withdrawal right, thereby allowing the beneficiary to continue to qualify for governmental benefits.

Facts: A grandfather established a trust for his grandson. The grandson had certain disabilities for which he received Medicaid and Social Security income from New York state. Under the terms of the trust, when the grandson turned 21, he would have the right to withdraw all of the trust assets. At that time, the assets of the trust would be considered an available resource, thereby disqualifying the grandson from governmental benefits until the funds of the trust were depleted.

Six days before the grandson turned 21, the trustees purported to appoint the assets of the trust to a second trust, through a process referred to as "decanting" authorized by statute in New York. The terms of the second trust differed from the terms of the original trust; of relevance to this case, the second trust did not allow the grandson to withdraw the funds at any age, the second trust did not contain a provision that would reimburse Medicaid upon the grandson's death, and the second trust otherwise was designed to enable the grandson to continue qualifying for governmental benefits. At the time of the decanting, the value of the original trust was approximately $400,000.

The trustees petitioned the Surrogate's Court to approve the decanting, and the New York State Department of Health filed objections. The state argued that the decanting statute required the trustees to give the beneficiaries 30 days' notice of a decanting, and that the decanting did not comply with those requirements because it was effected six days before the beneficiary turned age 21. The state also argued that even if the decanting was appropriate, the second trust should be treated as being created by the beneficiary with the beneficiary's own assets. Thus, the state argued, for the beneficiary to continue receiving governmental benefits without including the trust assets as a countable resource, the second trust must contain a "payback" provision that would reimburse the state upon the beneficiary's death for any benefits received during his lifetime.

In an opinion issued in 2013, the Surrogate's Court found that the decanting was proper. As to the notice requirement, the Surrogate's Court found that the statute allowed the beneficiaries to waive that requirement, and that because the beneficiaries waived this requirement at the time of the decanting, the decanting complied with the statute. Lastly, the Surrogate's Court did not require the second trust to include a "payback" provision. The state appealed.

Law: Through "decanting," which is authorized by statute in many states, including New York, the trustees of a trust who have the discretion to invade trust assets may exercise that discretion to distribute those assets to a second trust, with different terms, so long as certain requirements are satisfied.

Meanwhile, New York's supplemental needs trust statutes provide that an individual may use his or her own assets to create a trust, without having those assets included as a countable resource for purposes of governmental benefits, so long as that trust contains a "payback" provision.

Holding: On appeal, the appellate court concluded that the provisions of the decanting statute had been met before the beneficiary had the right to withdraw the trust assets. Therefore, the assets of the trust were not treated as the grandson's for purposes of governmental benefits, and the trust did not need to include a "payback" provision. The court held that the trust was not a countable resource for purposes of Medicaid.

Practice Point: This case serves as an important reminder of two key principles regarding decanting. First, for decanting to be effective, the trustees must comply with the procedural requirements. In this case, had the trustees waited until after the beneficiary had turned 21, or if the trustees had not strictly complied with the notice provisions, then the beneficiary and the trust might have suffered an adverse result and missed an opportunity to preserve the trust as otherwise allowed by statute.

Second, this case highlights an important feature of decanting. In a decanting, it is the trustee(s), not the beneficiary, who acts to decant the trust assets. If a trust is modified in a way that requires the beneficiary's consent, then a creditor of the beneficiary might argue that the modification should be ignored since the beneficiary would have acted in a way to reduce the claims of the creditors. But a decanting typically does not need the beneficiary's consent. A decanting can therefore modify the terms of the trust in a way that might reduce a creditor's rights to the trust assets, and a creditor (such as Medicaid) cannot argue that the modification was achieved by the beneficiary.

Pfannenstiehl v. Pfannenstiehl, 55 N.E.3d 933 (Mass. April 5, 2016)

In divorce action, present value of a husband's beneficial interest in a discretionary trust is not included in the parties' divisible marital estate, overturning lower appellate court that held that the value was included.

Facts: The husband's father established a trust in 2004, with the father's descendants as beneficiaries. The terms of the trust provide that the trustee "shall pay to, or apply for the benefit of, a class composed of any one or more of the donor's then-living issue such amounts of income and principal as the Trustee, in its sole discretion, may deem advisable from time to time, whether in equal or unequal shares, to provide for the comfortable support, health, maintenance, and education of each or all members of such class." In 2010, the husband and wife filed for divorce. At that time, the value of the trust assets was approximately $2.2 million, and there were 11 living beneficiaries. The trust also contains a spendthrift provision.

During the parties' marriage, distributions were made to the husband, as well as other beneficiaries, and the trial court found that the distributions "augmented" the spouses' lifestyle. The trial court found that the value of the husband's interest in the trust should be included in the marital estate and be subject to division, and the court awarded 60 percent of that estate to the wife. As a result, the trial court ordered that 60 percent of the husband's interest in the trust was to be paid to the wife in 24 monthly installments of approximately $49,000, for a total payment of approximately $1.1 million (including interest at 3 percent).

The husband appealed the trial court's inclusion of his interest in the trust in the marital estate. An intermediate appellate court affirmed the trial court's determination. The husband then appealed to the Supreme Judicial Court of Massachusetts.

Law: Under Massachusetts divorce law, a trial court has broad discretion in dividing marital assets between a husband and wife. However, property that is a "mere expectancy" may not be included in the divisible estate of the parties. Whether an individual's interest in a trust may be considered part of the divisible estate depends on the trust instrument and whether the beneficiary's interest is a "fixed and enforceable" property right, or "too remote or speculative" to be included. Even if the trust interest is speculative, that interest may still be considered as assets that the beneficiary might receive in the future, which the court can consider in determining the marital estate.

Holding: The Supreme Judicial Court of Massachusetts (the "Court") concluded that the terms of the trust constituted an "ascertainable standard," because distributions were based upon a beneficiary's support, health, maintenance and education. However, under the circumstances and the terms of the trust, including the trustee's broad discretion in making distributions and the fact that the trust would also benefit an open class of future beneficiaries, the Court found the husband's interest in the trust to be "speculative." The Court held that it was error for the trial court to include the assets in the divisible estate as a fixed right. However, the Court remanded the case, noting that the trial court could still consider this "speculative" interest in the trust as an asset that the husband might receive in the future, and the trial court could include this interest for purposes of division of the marital estate.

Practice Point: Statutory and case law recognizes the ability of a spendthrift trust to protect assets of a trust from a beneficiary's creditors. However, that beneficiary's interest may be considered for other purposes, such as in divorce. Although the court in this case ultimately held that the assets of the trust were not part of the marital estate, the trial court and the lower appellate court held that the assets should be included. Advisors, practitioners,

and fiduciaries should be aware of the potential for divorcing spouses to argue that the assets of a trust should be included in the marital estate.

Ex Parte Scott, No. 1140645, 2016 WL 6310771 (Ala. Oct. 28, 2016)

Courts exercise in rem jurisdiction when supervising ancillary administration of an estate; therefore, an Alabama court overseeing the probate of an English decedent's U.S. assets lacked the authority to require the U.S. beneficiaries to pay distributions from the decedent's English estate into escrow to satisfy the administration expenses of the Alabama personal representative.

Facts: Kathryn Marie Lange was born in Alabama in 1930. In 1953, she married a Danish citizen and moved to Copenhagen. After her divorce in 1962, she became a resident of London, England. Lange remained a resident of London until her death in 2010, having never become a British subject. Lange's estate consisted of real and personal property in England and approximately $300,000 of personal property in Jefferson County, Alabama. Lange's nephew, Charles Lange Clark, filed a petition with the Jefferson County Probate Court in Alabama for appointment as Lange's administrator in January 2011. The Alabama court granted the petition.

A few days later, Clark was informed that an English solicitor was in possession of Lange's last will and testament. Clark obtained authorization from the Alabama court to retain solicitors in London to handle matters associated with Lange's English estate. In October 2010, certain charitable beneficiaries under Lange's will initiated proceedings in the London High Court of Justice, Chancery Division, to determine the validity of Lange's will. Clark retained Macfarlanes, LLP to represent him in the Chancery Court proceedings. The parties to the Chancery Court proceedings reached a settlement agreement under which the parties agreed that Lange's domicile was England and entitling Clark to reimbursement from Lange's estate for up to £265,000 in costs of the Chancery Court proceedings and £75,000 in costs for the Alabama Court proceedings.

Clark terminated his relationship with MacFarlanes and eventually incurred £126,611.21 in unpaid legal bills. Macfarlanes sued Clark in the High Court of Justice, Queen's Bench Division, and obtained a default judgment against Clark. Clark demanded that Lange's English personal representative indemnify him for the Macfarlanes judgment. When the English personal representative refused to indemnify Clark, he obtained an order from the Alabama Court requiring Lange's Alabama estate to indemnify him for the Macfarlanes judgment and all associated costs. By that point, Clark had distributed nearly all of Lange's Alabama estate to the beneficiaries.

Lange's English personal representative obtained an order from the Chancery Court declaring that under English law, Clark was not entitled to payment for costs incurred during his administration of Lange's Alabama estate or to indemnification for the Macfarlanes judgment. Following receipt of the Chancery Court's order, Clark filed a motion for escrow with the Alabama court, which the Alabama court granted, directing that any amounts distributed to the U.S. beneficiaries of Lange's estate be paid into escrow at the Alabama court in satisfaction of the order indemnifying Clark for his costs, including the Macfarlanes judgment. Joan McCullough Scott, a beneficiary of Lange's estate, petitioned the Alabama Supreme Court for a writ of mandamus directing the Jefferson County Probate Court to vacate its order.

Law: A court exercises in rem jurisdiction when supervising the administration of an estate. If a court overseeing ancillary administration issues an order requiring the estate to indemnify the personal representative acting in that jurisdiction, that order is not binding on the court exercising jurisdiction over the decedent's domiciliary estate. There is no privity between a personal representative in one jurisdiction and a personal representative in another jurisdiction.

Holding: The Jefferson County Probate Court had no jurisdiction over the assets in Lange's English estate because they did not derive from the property over which the court had jurisdiction. The court therefore exceeded the bounds of its jurisdiction by directing that distributions from Lange's English estate be paid into escrow.

Practice Point: Fiduciaries functioning only in ancillary administration should be aware that they might be able to obtain reimbursement for their expenses only from the assets comprising the ancillary estate. Fiduciaries should make sure they retain a sufficient reserve to cover expenses prior to making distribution of the estate to the

beneficiaries and should attempt to reach an enforceable agreement with the personal representative of the domiciliary estate to satisfy any expenses in excess of the value of the ancillary estate.

Jackson v. Nowland, 338 Ga. App. 614, 791 S.E.2d 190 (2016)

In determining the proper interpretation of a document, the "four corners" rule forbids parol evidence of the settlor's intent if there is any way to reconcile the provisions of a trust instrument so as to avoid the alleged ambiguity.

Facts: Jeffrey Jackson, the beneficiary of the Mary Jane Jackson Family Trust, appealed the trial court's order denying his petition to terminate the trust. At issue were two arguably ambiguous provisions of the Declaration of Trust. The first provision stated that the trust "will not automatically terminate" upon the settlor's death but instead "will be terminated at the discretion of my trustee at any time" after the settlor's death. The second provision stated, "At such time as Settlor is deceased and all of the Settlor's named family members have (a) attained the age of twenty-seven (27) years or died prior thereto, the Trust, including any accumulated income, then shall terminate." The trial court heard parol evidence that all of the trust beneficiaries were already 27 at the time of the trust's execution, and therefore concluded that the first provision granting the trustee the discretion to terminate the trust controlled.

Law: A court may consider parol evidence when interpreting a trust instrument only if the language of the instrument is ambiguous. If there is *any* way to reconcile two provisions without looking beyond the "four corners" of the instrument, that interpretation *must* prevail.

Holding: The court found that the two provisions could be read together so as not to create an ambiguity. The trustee had the discretion to terminate the trust at any time after the settlor's death and before all of the beneficiaries reached age 27, but must terminate the trust once all the beneficiaries reached age 27. Because this reading is plausible, the trial court erred in looking beyond the "four corners" of the Declaration of Trust and considering parol evidence.

Practice Point: The drafting lawyer must have a keen eye for identifying ambiguity in a trust instrument. If two provisions are arguably contradictory, a good drafter will provide in the trust instrument which provision prevails. This litigation never would have occurred had the drafting lawyer simply written "notwithstanding anything to the contrary herein" before stating that the trust would terminate when all the beneficiaries reached age 27.

Grueff v. Vito, 229 Md. App. 353, 145 A.3d 86, *cert. granted*, 150 A.3d 819 (Md. 2016)

A Maryland appeals court invalidates an amendment to an irrevocable trust made by three beneficiaries eliminating the interest of the fourth beneficiary because an amendment to an irrevocable trust cannot violate a material purpose of the settlor.

Facts: James B. Vito executed the James B. Vito Family Trust in 1986, naming his four children as both current and remainder beneficiaries. The trust required the trustee to distribute annually all of the net income to James's children. Item TENTH of the trust created a power of amendment, stating, "This Agreement may be revoked, altered or amended from time to time by an instrument in writing, signed by the holders of not less than seventy-five percent (75%) interest herein and delivered to the Trustee." The beneficiaries used Item TENTH to amend the trust four times, most recently to name Michael Vito and Judith Seal, two of James B. Vito's children, as co-trustees of the trust.

In 2013, Candace Vito Grueff, one of James B. Vito's children and a beneficiary of the trust, initiated litigation against Michael and Judith, as trustees of the trust, and joined her brother John Timothy Vito and a trust created by her mother Mary Vito as parties to the litigation. The litigation alleged various breaches of fiduciary duty, demanded accountings, and sought the removal of Michael and Judith as trustees.

A month after Candace filed her complaint, Michael, Judith, and Tim used Item TENTH of the trust to amend the trust a fifth time and eliminate Candace's one-fourth interest. Michael and Judith then asserted that Candace was

no longer an “interested person” in the trust under Maryland law and lacked standing to seek the removal of Michael and Judith as trustees and obtain an accounting of the trust. The trial court agreed and granted their motion to dismiss. Candace appealed, arguing the purported fifth amendment was invalid because it violated an express purpose of the trust.

Law: When interpreting the meaning of words used in a trust instrument, the court should seek to divine the settlor’s intent as expressed in the instrument, viewed in light of the trust’s purposes and all of its provisions. The grant of a power to amend a trust instrument does not extend to amendments that violate an express purpose of the settlor in establishing the trust.

Holding: Michael, Judith, and Tim’s purported amendment to the trust was invalid because it violated the settlor’s express purpose to benefit all four of his children. In reaching its conclusion, the court considered the preamble and the instruction to divide the trust assets evenly among all of James’s children upon its termination as evidence of James’s intent to benefit the children equally.

Practice Point: This Maryland decision affirms the principle that an amendment to an irrevocable trust cannot violate a material purpose of the trust, notwithstanding a broad grant of authority to amend in the trust instrument. Precatory language prefacing the amendment power may be helpful in determining when an amendment violates a material purpose of the trust. Finally, when granting the power to amend a trust instrument to the beneficiaries, as opposed to a separate fiduciary like an independent trustee or a trust protector, it is best to require that the beneficiaries amend only by unanimous decision. Otherwise, some of the beneficiaries may amend the instrument to their own advantage to reduce the interests of the other beneficiaries.

In re Estate of Jameson, 2016 WL 4249142 (Sup. Ct. NJ Aug. 12, 2016)

Court dismisses daughter’s petition to overturn a will that disinherited her for allegedly discriminatory reasons.

Facts: Kenneth Jameson created a last will and testament in 1987 devising his assets to his wife, if she survived him, or if not, to a charitable organization for the aid of handicapped individuals. The will specifically disinherited Jameson’s daughter, Stacy Wolin. After Jameson’s death, with his wife predeceasing him, Wolin filed a complaint in the Superior Court of New Jersey alleging the will invalid for various reasons, primarily that it was the product of religious discrimination because, according to Wolin, Jameson disinherited her solely because she married a Jewish man. The trial court dismissed the complaint for failure to state a claim. Wolin appealed.

Law: The motivation of a testator is not relevant to the validity of a decision to disinherit a putative heir. Under New Jersey law, a will cannot be set aside even if a putative heir is disinherited as a result of strong, violent, unjust, unreasonable, or discriminatory prejudice.

Holding: The Superior Court of New Jersey affirmed the trial court’s dismissal of the complaint. The court ruled that even if Wolin was correct about the reason for Jameson’s desired disposition of his assets, public policy would not overturn the disposition because of Jameson’s legal right to leave his assets as he wished. The court noted that although a testator may not impose a discriminatory condition upon inheritance, a testator may disinherit a person for any reason.

Practice Point: Planners must always take caution when designing testamentary instruments for individuals in families with challenging relationships. Planners should anticipate litigation when disinheriting a family member.

Stephenson v. Prudential Ins. Co. of Am., 2016 U.S. Dist. LEXIS 123888 (M.D. Fla. Sept. 13, 2016)

Insurance company permitted to interplead life insurance proceeds when beneficiary undetermined under the slayer statute.

Facts: Terry Rigby and Maurice McGriff were domestic partners. Rigby owned a Prudential life insurance policy on his life, with McGriff as the designated beneficiary. Rigby died in 2015 when he hit his head during an altercation with McGriff, who asserted he was acting in self-defense. Rigby's sister made a claim for the life insurance proceeds under the theory that Florida's slayer statute precluded McGriff from receiving the proceeds because McGriff killed Rigby. The state attorney investigated but did not pursue prosecution of McGriff for Ribgy's death. McGriff sued Prudential for the life insurance proceeds. In response, Prudential moved to interplead the proceeds with the court to permit the court to determine the proper beneficiary.

Law: Under Florida law, a life insurance beneficiary may not receive the proceeds of the policy if the beneficiary unlawfully and intentionally killed the insured. If a beneficiary is not convicted of an unlawful killing, the beneficiary is not precluded from receiving the proceeds unless a civil court determines by the greater weight of evidence that the killing was unlawful and intentional.

Holding: The District Court held that Prudential's interpleader of the life insurance proceeds was appropriate given the competing claims for the funds. The court held the funds are properly deposited with the court until it is determined whether McGriff is entitled to the proceeds.

Practice Point: Interpleader can be a very good option for institutions holding proceeds over which there is more than one potential claimant. In many circumstances, depositing the funds with the court while the true parties in interest dispute the proper ownership can allow the institution to extricate itself from the dispute.

U.S. v. Johnson, 118 A.F.T.R.2d 2016-6781; 2016-2 USTC P 60 (2016)

Executors and Trustees are not personally liable for unpaid estate taxes because the trust assets were included in gross estate under Code § 2033, rather than Code § 2034 to §2042, and because the Executors obtained a valid special lien under Code § 6324A.

Facts: During her lifetime, Anna S. Smith established the Anna Smith Family Trust and funded the trust with 11,466 shares of stock in State Line Hotel, Inc., which owned a casino. The trust named two of Anna's children, Mary Carol S. Johnson and James W. Smith as successor trustees. Anna's will also named Mary Carol and James as executors of her estate.

Anna's will directed that her debts, last illness, and funeral and burial expenses be paid as soon after her death as reasonably convenient. The will stated that claims against the estate could be settled and discharged within the discretion of the executors, and that the residue of her estate was to be distributed to the trustee of her trust.

Following Anna's death, Mary Carol and James timely filed a federal estate tax return. At the time of filing, they, as executors, paid $4 million in taxes and made a section 6166(a) election to defer payment of taxes attributable to the value of the hotel stock. Shares of stock in the hotel, a closely held business, made up the majority of Anna's estate. The total gross estate was valued at nearly $16 million, with $11.5 million attributable to the hotel stock. The IRS allowed the deferral election, subject to changes resulting from any subsequent examination of the return, and provided that the remaining taxes would be paid in 10 annual installments, the first to be paid in June 1997.

To avoid an extensive and expensive application process under Nevada gambling law to the trust to remain the owner of a casino, Mary Carol and James, as trustees, distributed the stock of the hotel to the beneficiaries. Pursuant to a distribution agreement executed Dec. 31, 1991, by the trustees and beneficiaries, the beneficiaries agreed to be equally liable to pay the remaining estate tax and any additional taxes, interest or penalties assessed against the estate. Prior to signing this agreement, the estate paid an additional $1 million on the tax owed.

Additional payments were made following the signing of the distribution agreement, totaling $1,399,221.87 by the hotel on behalf of the trustees and beneficiaries.

In May 1997, an agent of the IRS sent a letter to Mary Carol in her capacity as executor, advising her of her alternatives to personal liability for the unpaid, deferred estate tax. One alternative offered was for her to provide a special lien for estate tax deferred under section 6166 as provided in section 6324A. Mary Carol and James provided the IRS with an executed agreement to special lien signed by all beneficiaries of the estate and an agreement restricting the sale of the hotel stock during the time of the lien.

In January 2002, the hotel filed for Chapter 11 bankruptcy. The court approved the sale of the hotel's assets to a third party, free and clear of all claims, liens, and encumbrances. No beneficiary received value for any shares of stock. One year after the conclusion of the bankruptcy proceedings, the IRS sent Mary Carol and James delinquent billing notices for the estate tax due, informing them that the entire balance was due immediately in the event of default. Upon default in 2003, the IRS filed suit in District Court to collect the remaining estate tax from the beneficiaries of the estate as transferees and from Johnson and Smith as executors.

Law: A trustee may be personally liable for unpaid estate taxes up to the value of the trust assets under IRC Section 6324(a)(2) only if the trust assets are includable in the decedent's gross estate under IRC Sections 2034 to 2042, inclusive.

A personal representative of an estate will be discharged from personal liability for unpaid federal estate taxes where the estate tax owed is paid, or, if tax payments are deferred under IRC Section 6166, where the personal representative provides a valid special lien agreement under IRC Section 6324A.

Holding: The District Court initially held that the beneficiaries could not be held personally liable for the unpaid estate taxes as transferees of the trust assets under IRC Section 6324(a)(2), but concluded that Mary Carol and James were personally liable as executors under 31 U.S.C. Sec. 3713 and as trustees because the assets of the trust were includable in the decedent's gross estate under IRC Section 2036(a).

Later, the court reconsidered its ruling and held that the decedent's assets were in fact not includable in her estate under IRC Section 2036(a) because the beneficiaries did not have a legally enforceable interest at the "instant of death" so as to cause the trust assets to be includable in the estate pursuant to IRC Section 2036. The court held that there was no transfer of the trust assets during the decedent's lifetime such that she relinquished beneficial ownership. The court therefore held that Mary Carol and James were not liable as trustees for the estate tax because the assets were included in the gross estate of the decedent pursuant to IRC Section 2033.

The court also held that Mary Carol and James, as personal representatives of the estate, were not personally liable for the estate tax due because they had provided a valid special lien under IRC Section 6324A. Mary Carol and James made a timely election requesting the special lien and submitted the agreement to special lien. The court rejected the IRS's argument that the hotel stock was not expected to survive the deferral period and that its value was insufficient, noting that the issue of whether the value was sufficient was not material because the statute does not require a minimum value in order for the special lien to be effective.

Practice Point: Fiduciaries must take steps to protect themselves before distributing assets of their fiduciary estate to beneficiaries. Without adequate refunding agreements or other appropriate protections, a fiduciary may be liable in an individual capacity for unpaid claims.

Mennen, et al. v. Fiduciary Trust International of Delaware, C.A. No. 8432-VCL (Delaware, February 27, 2017), see also C.A. No. 84832-ML (Delaware, April 24, 2015)

Beneficiaries of a trust cannot pierce the co-trustee's own spendthrift trust to collect damages awarded against the co-trustee for fiduciary breaches.

Facts: George S. Mennen, the settlor, established four trusts on November 25, 1970, for the benefit of each of his children and their issue. One such trust was created for his son John H. Mennen and one trust was created for his son George Jeff ("Jeff") Mennen. In March 2013, the beneficiaries of John's trust filed a complaint against the

corporate trustee and Jeff, as individual trustee of the John's trust, for breach of fiduciary duties, claiming damages in excess of $100 million.

The beneficiaries claimed that the co-trustees breached their fiduciary duties related to Jeff's decisions to invest in and make loans to startup companies, for which Jeff served as a board member. These investments caused the value of John's trust to be depleted to nearly zero and the beneficiaries claimed the investments were self-interested and imprudent. The beneficiaries argued that the assets of Jeff's trust should be available to satisfy a judgment against Jeff for breach of his fiduciary duties. Owen Roberts, individual trustee of Jeff's trust, filed a motion for summary judgment, asserting that the spendthrift clause of Jeff's trust and Section 3536 of Title 12 of the Delaware Code prevented the assets of Jeff's trust from being subject to the claims of judgment creditors.

The beneficiaries asserted three alternative arguments in response: (1) that the spendthrift clause was unenforceable against them because they were not "creditors" for purposes of the spendthrift clause or Section 3536; (2) that if the spendthrift clause and Section 3536 did apply, then the court should recognize a public policy exception for "persistent wrongdoers" and allow them to recover from Jeff's trust; or (3) that they should be able to impound Jeff's interest in Jeff's trust because the trusts established in 1970 should be considered sub-trusts of one larger trust created by the settlor.

Law: Section 3536(a) provides that creditors of beneficiaries only have rights with respect to a beneficiary's interest in the trust as granted in the express terms of the trust instrument or by Delaware law. A spendthrift clause is enforceable, subject to the statutory limitations of Section 3536.

Holding: The court held that the beneficiaries would be "creditors" under Section 3536 if they in fact were successful in obtaining a judgement against Jeff for breach of his fiduciary duties, noting that the narrow exception created in *Garretson v. Garretson*, 302 A.2d 737 (Del. 1973) for familial support obligations did not extend beyond those facts to create other exceptions under Section 3536. As it had done in previous cases, the court refused to recognize a public policy exception where the beneficiary of a third-party spendthrift trust is subject to claims of a creditor for torts committed against that creditor.

The court further rejected the argument of the beneficiaries that they should not be treated as "creditors" because their claim was made against the trust of a family member who committed the breach. The court held that this case was of a completely different nature than *Garrettson* (where a wife sought maintenance and support from her husband who was a beneficiary of a third-party spendthrift trust) and found that the fact the dispute involved family members was insignificant and did not give them special creditor's rights.

The court refused to recognize a "persistent wrongdoer" public policy exception to Section 3536, noting that the argument was "compelling from the standpoint of fairness," but that creating such an exception would be "inconsistent with the role of the judiciary" where the statute was unambiguous.

Lastly, the court rejected the argument that the beneficiaries should be able to impound Jeff's trust because it was a sub-trust of one larger trust created by the settlor. "Impoundment applies when a trustee of a trust, who is also a beneficiary of the trust, commits a breach of trust that harms the trust's other beneficiaries." The theory applies when the trustee and the beneficiaries all share an interest in the trust at issue. The court stated that it does not "extend so far as to allow the beneficiaries of one trust to reach a trustee's interest in a separate trust, at least where the separate trust has additional beneficiaries." Therefore, impoundment was inapplicable to the facts of this case.

King v. Shou-King Wang, 663 Fed. Appx. 12; (August 26, 2016)

Beneficiaries are allowed to bring federal RICO claim against defendants for allegedly depriving beneficiaries of interest in decedent's estate.

Facts: C.C. Wang was a Chinese-American artist and collector. His daughter, Y.K. King and her husband K. King, filed suit against the defendants, including S.K. Wang and A. Wang, to recover works of art formerly belonging to the plaintiffs personally and to C.C. Wang's estate. C.C. Wang died in July 2003. Before his death, S.K. Wang worked with his father as bookkeeper and assistant beginning in the early 1980s. The plaintiffs allege

that during this time, S.K. Wang embezzled and removed approximately 160 paintings owned by C.C. Wang, and was fired by his father as a result. C.C. Wang turned over business management responsibilities to his daughter Y.K. King and son-in-law K. King.

In a January 2003 inventory, Y.K. King discovered that a total of 25 paintings were missing from a safety deposit box and the apartment. Y.K. King claimed to have witnessed defendants A. Wang and S.K. Wang leaving the apartment that day with two bags. A. Wang allegedly admitted that he and S.K. Wang had taken the paintings, and promised not to sell them if Y.K. King would give the remaining family assets to them. He later returned five of the paintings.

C.C. Wang died in July 2003. Y.K. King submitted a will dated July 13, 2000, and a codicil dated July 10, 2002, for probate in the New York Surrogate's Court. The 2002 will named Y.K. King as executor and principal beneficiary. The defendants submitted a second will executed by C.C. Wang on February 18, 2003, during the time of his alleged mental incapacity. The 2003 will designated A. Wang as executor, disinherited Y.K. Wang, and named A. Wang, his brother Stephen Wang, and S.K. Wang as beneficiaries.

Y.K. King filed suit challenging the 2003 will on legitimacy grounds. The Surrogate's Court issued preliminary testamentary letters to A. Wang. The plaintiffs allege that the defendants "orchestrate[d] a scheme in which Estate assets were ostensibly sold to collectors of the Chinese art community" and deprived them of their interests as beneficiaries. The plaintiffs further allege that the buyers where "straw men" and that A. Wang was actually acquiring the art for himself at deflated prices.

The plaintiffs filed an action asserting eight causes of action relating to property belonging to the plaintiffs and property of the estate. Among the causes of action were two claims under federal law for violations of the Racketeer Influence and Corrupt Organizations Act (RICO) and six claims under New York law to impose a constructive trust upon the property, conversion, common law fraud, breach of fiduciary duty, replevin, and violations of New York Debtor and Creditor Law.

Law: To state a RICO claim, the plaintiff must sufficiently allege a RICO violation by first showing that the defendant, by committing at least two predicate acts that establish a "pattern of racketeering activity, directly or indirectly invests in, maintains an investment in, or participates in an 'enterprise' affecting interstate or foreign commerce." The plaintiff must allege an open-ended or closed-ended pattern of activity, and the plaintiff must show injury to the plaintiff's business or property caused by the RICO violation.

The District Court dismissed the plaintiffs' RICO claim on the grounds that it failed to "plead a pattern of racketeering activity." The District Court held that the plaintiffs failed to establish that the acts were related and that they "amount[ed] to or pose[d] a threat of continued criminal activity." The District Court further found that the conduct involved a small group of actors, was directed at a few victims, and was undertaken for the purpose of gaining possession to the decedent's property. The District Court also noted that the acts related to administration of an estate, which is not an "inherently unlawful enterprise," and therefore did not amount to a RICO violation.

Holding: On appeal, the Court of Appeals vacated the District Court's ruling and found that the plaintiffs' complaint "adequately pleads closed-ended continuity," showing past criminal conduct that extended over a "substantial period of time." Specifically, the Court of Appeals noted that the alleged activity began in 2003, and that further predicate acts had been committed as recently as June 2010, when the defendants allegedly auctioned off two of the paintings. Based on this finding, the Court of Appeals remanded that case to the District Court.

Practice Point: In addition to a RICO claim, the plaintiffs should consider bringing a claim for breach of fiduciary duty in a civil action, which does not require establishing a threat of continued criminal activity.

Wang v. New Mighty U.S. Trust, 843 F.3d 487 (D.C. Cir. 2016)

A "traditional trust" assumes its trustee's citizenship for purposes of diversity jurisdiction.

Facts: Yung-Ching Wang (Y.C.) a wealthy Taiwanese businessman, died in 2008, leaving a widow, Yueh-Lan Wang, together with two mistresses with whom he had several children, including Winston Wen-Young Wong, whom Yueh-Lan raised as her son. Prior to his death, Y.C. allegedly attempted to reduce Yueh-Lan's share of the marital estate by making various transfers, including to the New Mighty U.S. Trust, which was formed under the law of the District of Columbia. After Y.C.'s death, Winston brought suit as Yueh-Lan's supposed attorney-in-fact against New Mighty, New Mighty's trustee, and one of New Mighty's beneficiaries in an attempt to account for and recoup her share of the marital estate. The defendants moved to dismiss on several grounds, including the absence of diversity jurisdiction.

The district court held that an artificial entity (such as New Mighty) assumed the citizenship of all of its members, including its beneficiaries, for purposes of diversity jurisdiction. The court found that complete diversity did not exist, as there was an alien plaintiff (Winston, a citizen of Taiwan) and at least one alien defendant (as New Mighty was deemed a citizen of Delaware, the District of Columbia and the British Virgin Islands). Winston moved for reconsideration, which the District Court denied, and Winston appealed. Shortly thereafter, Yueh-Lan died, and Winston moved to substitute the executors under Yueh-Lan's will (who were appointed through proceedings in Taiwan) as Yueh-Lan's personal representatives. The defendants opposed, arguing that Winston improperly initiated the lawsuit in the first place. The appellate court accordingly considered whether subject-matter jurisdiction existed and whether the substitution motion should be granted.

Law: The U.S. Court of Appeals for the District of Columbia examined three U.S. Supreme Court decisions to determine whether diversity jurisdiction existed.

- In *Navarro Savings Ass'n v. Lee*, the U.S. Supreme Court, affirming the 5th Circuit's decision, held that the plaintiff trust's trustees, not its beneficial shareholders, were the real parties to the controversy because they held legal title, they managed the assets and they controlled the litigation.
- In *Carden v. Arizona*, the U.S. Supreme Court clarified that *Navarro* did not address the citizenship of a trust, because the trustees in *Navarro* sued in their own names. Accordingly, the court must look to the citizenship of both the limited and general partners of the plaintiff limited partnership for purposes of diversity jurisdiction.
- Finally, in *Americold Realty Trust v. ConAgra Foods*, the U.S. Supreme Court recently relied on *Carden* to hold that the citizenship of a real estate investment trust included its shareholders under Maryland law. The *Americold* court appeared to distinguish between "traditional trusts" and unincorporated entities that, despite identifying themselves as "trusts," lack the characteristics typically associated with trusts.

The U.S. Court of Appeals for the District of Columbia noted the possibility of conflicting interpretations of *Americold*'s holding, as demonstrated by Winston's position (that *Americold* stood for the principle that a traditional trust's citizenship depends only on the citizenship of the trustees for purposes of diversity jurisdiction) and the defendants' position (that *Americold* did not meaningfully distinguish between traditional trusts and trusts in name only, but that the relevant distinction is between suits where the trust is the named party and suits where the trustee is the named party).

Holding: The U.S. Court of Appeals for the District of Columbia adopted Winston's reading of *Americold* — that the citizenship of a traditional trust depends upon the citizenship of the trustees only. The court further held that New Mighty was a traditional trust, noting that "traditional trusts" are fiduciary relationships concerning property where the trust cannot sue and be sued as an entity under state law, and lack juridical person status. Because New Mighty was a traditional trust, the citizenship of its trustee (which was a citizen of Virginia and the District of Columbia) controlled.

The court accordingly concluded that complete diversity existed. It reversed the District Court's dismissal, granted the motion for substitution without prejudice to the defendants' ability to renew their arguments before the district court, and denied the defendants' motion to dismiss without prejudice.

Practice Point: When filing suit on behalf of (or against) a "traditional trust," it is important to consider the citizenship of the trustee(s) of that trust (and whether complete diversity is established) when choosing a forum in which to litigate any trust claims.

Shu v. Wang, Civil Action No. 10-5302, 2016 WL 6080199 (D.N.J. Oct. 17, 2016)

Case involving Taiwanese parties and applying Taiwanese law is dismissed pursuant to doctrine of forum non conveniens.

Facts: This case arises out of a dispute among members of the same family as the *Wang* case, above. Yung-Ching Wang (Y.C.) a wealthy Taiwanese businessman, died intestate in 2008 in New Jersey. Y.C. left a widow, Yueh-Lan Wang. He also had two mistresses with whom he had several children, including Winston Wen-Young Wong; however, his wife Yueh-Lan raised Winston as her son. Prior to his death, Y.C. allegedly conducted various asset transfers with the intent to reduce Yueh-Lan's share of the marital estate.

Yueh-Lan granted Winston power of attorney and named him as sole beneficiary in her will. Yueh-Lan died in 2012 in Taiwan. Winston, on Yueh-Lan's behalf, sued one of Y.C.'s mistresses (P.C.) and two of P.C.'s family members (Susan and Vanessa) in order to identify the allegedly improperly transferred assets and to force their return to the marital estate. P.C. is a naturalized U.S. citizen who spends time in New Jersey, but maintains her primary residence in Taiwan. Susan is a United States citizen with a home in New Jersey, but when the complaint was filed, she was a citizen of Taiwan. Vanessa is a United States citizen residing in Pennsylvania.

Plaintiffs allege that defendants exercised undue influence over Y.C. after he became ill and used that influence (along with their positions of power and influence in one of Y.C.'s companies) to effect the allegedly improper transfers. Defendants asserted throughout the litigation that Winston lacked the authority to file lawsuits on Yueh-Lan's behalf under the power of attorney and also questioned Yueh-Lan's competency.

Yueh-Lan died in 2012, while this suit was pending, and litigation ensued in Taiwan to appoint executors under her will. The Court then permitted the substitution of the executors as plaintiffs with certain caveats. Defendants renewed a previously filed motion to dismiss pursuant to the doctrine of forum non conveniens, arguing that the case should be litigated in Taiwan.

Law: Determining whether to dismiss a case on forum non conveniens grounds requires consideration of the following factors: (1) whether an adequate forum exists, (2) the amount of deference to be accorded to the plaintiff's choice of forum, and (3) a balancing test of relevant public and private factors that largely deal with the convenience to and burden upon the parties and the court. Public factors include "the administrative difficulties with court congestion," "the local interests in having the case tried at home," "a desire to have the forum match the law that is to govern the case," and "the unfairness of burdening citizens in an unrelated forum with jury duty." Private factors include "the ease of access to sources of proof," "the ability to compel witness attendance," and "obstacles impeding an otherwise easy, cost-effective, and expeditious trial."

Specifically, the court may dismiss if the balance of the factors demonstrates that litigating in the plaintiff's chosen forum would lead to "oppressiveness or vexation to a defendant out of all proportion to the plaintiff's convenience." This determination is a "fact-sensitive" analysis, and a defendant bears a "heavy burden" to establish each element of the inquiry and a "strong preponderance" in favor of dismissal.

Holding: Applying this three-part test, the court determined the following.

1. Taiwan was an adequate alternative forum because certain witnesses either resided in Taiwan or consented to jurisdiction there, because the plaintiffs' claims could be litigated in Taiwan and they could obtain a satisfactory remedy there if they prevailed (in part because the defendants agreed to waive their statute of limitations defense).

2. The plaintiffs' choice of forum should be given some, but not full, deference, because all parties reside in or have a strong connection to Taiwan, rather than New Jersey, because the evidence is located throughout the world as opposed to concentrated in New Jersey, and the plaintiffs could not provide any specific facts tying the alleged wrongful conduct to New Jersey.

3. The public factors weighed heavily in favor of dismissal, and the private factors weighed slightly in favor of dismissal. Regarding the public factors, the court emphasized that Taiwanese law governed the claims, and that the parties offered two different interpretations of that law by different law professors from a Taiwanese law school. The court further emphasized that there was no local interest in trying the case in New Jersey (and it would be unfair to burden New Jersey citizens with jury duty to decide a case with no meaningful connection to the forum) and noted that the District of New Jersey was one of the busiest districts in the country. Regarding private factors, the court emphasized that the parties would incur significant expense and burden of translating documents and witness testimony, that much of the evidence was located in or near Taiwan, and that the court would be unable to compel certain witnesses to testify as to central issues in the case.

The court accordingly held that the case should be dismissed and litigated in Taiwan.

Practice Point: A court may dismiss a suit on the grounds of forum non conveniens where the case has no tangible connection to the forum. It is important to consider factors of convenience and fairness to the parties, the potential witnesses and the court when filing suit, particularly when foreign parties are involved and foreign law is at issue.

Kozel v. Kozel, Case No. 8:16-cv-1384-T-36TGW, 2016 WL 4163562 (M.D. Fla. Aug. 4, 2016)

The citizenship of all of a defendant trust's members determines the citizenship of a trust defendant for purposes of diversity jurisdiction.

Facts: Plaintiff Ashley Kozel, a citizen of Florida, was awarded a $34 million divorce judgment in a Florida state court. Ashley accused her ex-husband, former Gulf Keystone CEO Todd Kozel, of hiding assets by improperly transferring them to his current wife, Inga Kozel, and several entities: 212 West 18 LLC, 601 Setai, LLC, and the Gokana Trust (collectively with Inga, the defendants).

Ashley moved to implead the defendants in the state court divorce proceeding, claiming that Inga was assisting Todd in defrauding Ashley as a judgment creditor. The state court entered an order bringing Inga into the litigation as an impleader defendant, subject to any lawful defenses she may raise through a motion or responsive pleading. Inga subsequently filed several motions in the state court, including a motion to quash service, a motion to strike, and a motion to dismiss for lack of personal jurisdiction, while Ashley filed motions for contempt against Inga, claiming that Todd had transferred more than $1 million to Inga, and a motion to compel Inga's deposition. Inga then removed the dispute to federal court on the grounds of diversity jurisdiction. Ashley moved to remand, arguing, among other things, that the requirement of complete diversity had not been met. Inga then amended her notice of removal, and Ashley filed a second motion to remand. In her notice of removal, Inga identified only the trustee of the Gokana Trust, a "limited company" and did not identify its members and the citizenship of its members.

Law: The removing defendant bears the burden of establishing both the $75,000 threshold for the amount in controversy (which was not at issue here) and complete diversity of citizenship.

Under the U.S. Supreme Court's decision in *Navarro Savings Ass'n v. Lee* and the 11th Circuit's application of the same in *Wells Fargo Bank, N.A. v. Mitchell's Park, LLC*, a trustee of a trust is the real party in interest and can sue in its own right, without regard to the citizenship of the beneficiaries. Despite this, the court must look beyond the entity's designation as a "trust" for determining diversity of citizenship. The U.S. District Court for the Middle District of Florida noted that despite *Navarro* and *Wells Fargo* (in which a trustee was bringing claims on behalf of the trust), the 11th Circuit considers the citizenship of all trust members in determining diversity where, as here, the trust itself is a removing defendant. The U.S. District Court for the Middle District of Florida noted the confusion surrounding the citizenship of a trust (as recently expressed by the U.S. Supreme Court in *Americold*

Realty Trust v. ConAgra Foods) and cited *Americold* for the principle that, notwithstanding *Navarro*, when an artificial entity is sued in its name, its citizenship is that of each of its members.

Holding: The U.S. District Court for the Middle District of Florida held that Inga, as a citizen of Lithuania present in the United States on a tourist visa, was not a citizen of Florida. The court further held that the citizenship of 3601 Setai, LLC and 212 West, LLC, both foreign corporate entities, was unclear because the court lacked information as to whether they should be treated as corporations or limited liability companies.

Most importantly, assuming without deciding that the Gokana Trust's citizenship must be determined by the citizenship of its trustee, the court further held that because the trustee of the Gokana Trust was a "limited company" (and thus an unincorporated entity), the citizenship of each of the trustee's members must be considered. Accordingly, because Inga did not list all of the trustee's members and the citizenship of those members, she failed to adequately allege the Gokana Trust's citizenship. Because Inga did not meet her burden to establish complete diversity, the court remanded the matter to state court.

Practice Point: When representing a trust (or bringing suit against a trust), it is critical to consider the citizenship of the trustee (including the trustee's members, if applicable), in determining which court has jurisdiction over a dispute.