Recent Cases of Interest to Fiduciaries: Part 1 – Defenses and Limitations to Actions, Arbitration, and Settlements

Dana G. Fitzsimons, Jr.
804.775.7622 | dfitzsimons@mcguirewoods.com

Meghan L. Gehr
804.775.4714 | mgehr@mcguirewoods.com

McGuireWoods LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219-4030

www.mcguirewoods.com

McGUIREWOODS

TABLE OF CONTENTS

Page

In the Matter of Trust for Grandchildren of Wilbert L. and Genevieve W. Gore, 2010 Del. Ch. LEXIS 188 (September 1, 2010)

In 1972, Wilbert and Genevieve Gore established the Pokeberry Trust for the benefit of their grandchildren. During the initial trust term, the grandchildren would receive equal distributions of the trust's income. At the death of the last surviving of Mr. and Mrs. Gore, the trust would be divided into shares, with each grandchild then living receiving one share of the trust. Pursuant to the formula in the trust, the size of each grandchild's share was determined by the number of siblings each grandchild had at the division date, with more siblings resulting in a larger share.

Susan, one of the Gore's daughters, had three children where each of her siblings had four. Under the formula, her children would therefore receive substantially smaller shares than their cousins. Mrs. Gore and the other beneficiaries refused to amend the formula. Therefore, Susan adopted her ex-husband, Jan, on July 7, 2003 in Wyoming state court proceedings. Jan agreed that he would take no personal economic benefit from the trust, and that his only reason in participating in the adoption was to correct the trust distribution plan that treated his children unfairly. Prior to the adoption, Susan had an attorney prepare a pre-adoption agreement, but it was never executed.

By December 2004, Jan had decided to keep any trust interest passing to him for himself. Susan filed a petition for construction, asking the Delaware Chancery Court to determine whether Jan waived his beneficial interest in the trust or whether he was precluded from taking a personal economic benefit by unclean hands.

The court dismissed Jan's argument that unclean hands could only be used defensively, and noted that the doctrine of unclean hands is a rule of public policy to protect courts of equity from misuse, where conduct is so offensive to the integrity of the court that the claims should be denied regardless of their merit. The court held that the trust which existed between Jan, his ex-wife, and his children, which he had the power to abuse, created a confidential relationship and fiduciary duties under which Jan was obligated to meet his pre-adoption commitments.

Jan's decision was motivated by greed and anger, and his conduct was a violation of this confidential relationship and constituted unclean hands. The court further held that Jan's "grossly inequitable conduct" would not be countenanced by the court, and barred Jan from claiming any personal economic benefit from the trust. The court did not decide whether Jan would be considered a beneficiary of the trust based on his status as Susan's adopted son.

Stuart et al. v. Snyder, 2010 Conn. App. LEXIS 556 (October 19, 2010)

In 1993, beneficiaries of their father Kenneth J. Stuart's (Stuart Sr.) estate filed an action against their brother, Stuart Jr., as executor under Stuart Sr.'s will and as trustee under Stuart Sr.'s trust, alleging that Stuart Jr. had misappropriated property from the estate for his own benefit without their consent and in contravention of Stuart Sr.'s estate plan.

On April 12, 2006, the beneficiaries also filed a tort action against the father's estate planning attorney and Stuart Jr.'s attorney in the prior fiduciary action, claiming that the attorney provided legal assistance to Stuart Jr. and unlawfully converted estate assets.

The attorney moved for summary judgment asserting the three-year statute of limitations for tort actions. In support of his motion, the attorney filed affidavits and billing records demonstrating that the last time he had provided legal services was on February 5, 2003. The beneficiaries offered no contrary evidence, but argued that the statue of limitations was tolled by the continuing course of conduct doctrine and by fraudulent concealment of their cause of action. The trial court granted the attorney summary judgment in his favor, and the beneficiaries appealed.

On appeal, the Connecticut Appellate Court affirmed the grant of summary judgment in favor of the attorney, and rejected the claim that the attorney's service as an attorney for the estate and trust created a special relationship giving rise to a continuing duty. The court noted that for the continuing course of conduct doctrine to toll the state of limitations, there must be evidence of the breach of duty that remained in existence after commission of the original wrong, and some special relationship giving rise to a continuing duty. Because the alleged wrongdoings occurred during the pendency of the 1993 action when the attorney owed duties to the estate and Stuart Jr. as his actual clients, the attorney could not possibly have owed a simultaneous duty to the beneficiaries who were adverse to his clients. Further, the court found that even if Snyder owed the plaintiffs some duty as estate beneficiaries, that duty did not continue past the three-year statute of limitations period.

The court noted that for the statute of limitations to toll on the basis of fraudulent concealment, the beneficiaries have the burden of proving by of clear, precise and unequivocal evidence that: (1) the attorney was aware of the facts necessary to establish the cause of action; (2) the attorney intentionally concealed those facts from the beneficiaries; and (3) the concealment was directed to the very point of obtaining the delay. Because the beneficiaries offered no evidence and merely stated facts without support in opposition to the attorney's affidavits and billing reports, dismissal of the claims was proper.

John H. Meeks, Trustee v. Successor Trustee of the trusts under the will of Michael Holliday, 2010 Tenn. App. LEXIS 554 (July 28, 2010)

Michael Edward Holliday died on August 31, 2001 leaving a will that established a credit shelter trust and a martial trust for the benefit of his wife and children. Michael appointed a friend, John Meeks, as trustee. Meeks served as trustee from 2002 until May of 2007, when Mrs. Holliday sent him an e-mail thanking him for his service and informing him that she had decided to become trustee of the marital trust and that her sons would be serving as co-trustees of the credit shelter trust.

In September of 2007, Meeks wrote to the investment manager for the trusts at Morgan Stanley requesting a check for $250,000 in commissions for 2002 to 2006. The family objected, and Meeks filed a lawsuit seeking $250,000 in compensation, claiming unjust enrichment, and requesting declaratory judgment that he was replaced as trustee and released from any liability for his actions as trustee.

The family moved for summary judgment on the monetary claims on the basis of waiver, estoppel, laches, and the statute of limitations, alleging that Meeks said he would not charge a fee, was never paid a fee, and never mentioned a fee until 2007 (notwithstanding that the will authorized him to receive reasonable compensation). The trial court granted summary judgment, and found that Meeks waived the right to a fee by his conduct, and was equitably estopped because the family could have removed him earlier if they had known he would later seek fees. Meeks appealed.

On appeal, the court affirmed on the grounds Meeks waived his rights to fees by his words and deeds that created a reasonable basis for belief that compensation would not be sought, and that the beneficiaries were entitled to rely on that belief. The court found that Meeks expressly waived fees, making proof of reliance unnecessary. The court denied Meeks' claims for attorneys fees because the lawsuit was not related to the trust administration.

Jefferson State Bank v. Lenk, 2010 Tex. LEXIS 618 (February 16, 2010)

On March 2000, Mickey Marcus died with an account at Jefferson State Bank. The following month, Melvyn Spillman presented the bank with fraudulent letters of administration purporting to appoint himself as administrator of Mickey's estate. The bank, relying on what it believed to be valid letters, gave Spillman access to the account. Throughout the next several months, Spillman withdrew most of the account balance other than $1,000. Spillman was arrested for fraud.

Mickey had no legitimate estate representative until September 2003, when the probate court appointed Christa Lenk as administrator. Lenk was aware of Spillman's fraud at the time of her appointment. Lenk did not contact the bank for two years. The bank, unaware of Lenk's appointment, did not inform Lenk about the account or send her statements, although it did send some statements to Spillman. In June 2005, Lenk sent the bank a written demand for payment in the amount of $185,785, the amount allegedly withdrawn by Spillman. The bank refused to pay, and Lenk sued the bank.

The bank moved for summary judgment asserting the defense that Lenk failed to timely notify the bank of the unauthorized transactions as required by Texas statutes. Lenk moved for summary judgment asserting that the bank failed to satisfy its obligation to send or make available the account statements as required by law. The trial court granted the bank summary judgment. The Texas Court of Appeals reversed, holding that retaining account statements at the bank was insufficient to fulfill the bank's duties to provide statements. The bank appealed.

The Supreme Court of Texas reversed the court of appeals and rendered judgment in favor of the bank on the grounds that: (1) the bank had satisfied its burden, and the statute of repose period began to run upon Lenk's appointment as administrator; (2) Lenk had the duty and authority to act on her appointment; and (3) Lenk did not demand payment from the bank until after the statute of repose period, and therefore was barred by time. The court observed that its holding, which benefits customers by delaying the start of the repose period, had the effect of extending the bank's potential liability well beyond one year, and refused to extend the period even further by delaying the start of the repose period until the administrator becomes aware of the account.

Decker v. Bookstaver, 2010 U.S. Dist. LEXIS 52428 (E.D. Missouri May 26, 2010)

In 2004, acting on the advice of an employee of Edward Jones, Lila Decker and her husband terminated their existing trusts, created new revocable living trusts, and executed a Fiduciary/Trust Account Authorization and Acknowledgement Form that contained a binding arbitration provision. The arbitration provision provided that "any controversy arising out of or relating to any of my accounts or transactions with you, your officers, directors, agents and/or employees for me, to this Agreement … shall be settled by arbitration." The agreement provided that Missouri law would apply to the arbitration.

After her husband's death, Lila sued Edward Jones and its employee for fraud, negligent misrepresentation, breach of fiduciary duty, and negligence. The company and its employee moved to dismiss and to compel arbitration. Lila argued that: (1) Missouri rather than federal law should be applied to determine whether the arbitration provision was enforceable; (2) the trust documents were induced by fraud and undue influence rendering the arbitration provisions unenforceable under Missouri law; and (3) alternatively, if federal law applied, the dispute was outside the scope of the arbitration provision.

The federal district court rejected Lila's claims, and held that the choice of law provision in the agreement did not manifest a clear intention to foreclose application of the Federal Arbitration Act (FAA). Therefore, the FAA applied, and the court's role under the FAA was limited to determining whether a valid agreement to arbitrate existed and, if so, whether the agreement encompassed the dispute. The court found that the language of the arbitration provision was "quite broad" and covered Lila's claims.

Relying on *Houlihan v. Offerman & Co. Inc.*, 31 F.3d 692 (8th Cir. 1994), the court held that the arbitration agreement was valid and encompassed the dispute, and rejected Lila's argument that the absence of language specifically indicating that the arbitration provision applied to any agreement entered "before, or, or after the date the account was opened," and the execution of the account authorization (which included the arbitration agreement) subsequent to the execution of the trusts precluded retroactive application to her claims arising from the formation of the trusts.

In Re Estate of Billy Joe Stricklan, 2010 Tenn. App. LEXIS 410 (June 28, 2010)

Billy Joe Stricklan died leaving two wills, both of which were admitted to probate. In the first will (the 1982 Will), he gave his entire estate to his daughter, Diane Stricklan Coleman. In his second will (the 2004 Will), he gave his entire estate, other than $100 to his daughter, to his great-grandchildren.

On June 22, 2007, Diane filed a petition to probate the 1982 Will, and claimed the 2004 Will was invalid because of her father's incompetence at the time of execution. Diane requested the appointment of a guardian *ad litem* for the great-grandchildren, and an attorney was appointed to serve as GAL. Three days later, Billy Joe's son, Reed, the executor under the 2004 Will, offered the 2004 Will for probate. The probate court certified the will contest to the circuit court for trial.

In April 2009, after lengthy negotiations, Diane filed a motion and order for transfer endorsed by all parties (but not Reed), requesting that the case be transferred back to the probate court, on the basis that no one disputed the validity of the 2004 Will and the parties were prepared to file a petition for approval of a settlement agreement. The proposed settlement awarded half of the estate to Diane and half to the great-grandchildren to be held in trust. Reed was not a party to the settlement. The motion was granted, and after a hearing the probate court approved the settlement agreement.

Reed appealed on the basis of his claims that: (1) the probate court erred when it approved the settlement reached between the beneficiaries of the will without obtaining Reed's approval, without conducting a hearing to determine whether the settlement was fair, reasonable, and in the best interests of the great-grandchildren; and (2) the settlement agreement should be set aside and the case remanded for probate of the 2004 Will, since Diane admitted that the 2004 Will was valid.

On appeal, the court held that, because Reed was not a beneficiary under the 1982 Will or the 2004 Will or an intestate heir, he did not have standing to bring the appeal. Despite Reed's lack of standing, the court addressed the Tennessee statutory requirement under section 34-1-121(b) that a probate court approve the compromise of matters in controversy on behalf of the minors by determining whether settlement would be in the best interests of the great-grandchildren.

In reviewing the probate court's decision, the court found no transcript of the hearing to approve the settlement in the record and only a perfunctory order, both of which the court deemed insufficient grounds for concluding that the best interests of the minors had been adequately considered. The court vacated the probate court's approval of the settlement agreement and remanded the case for a hearing on whether the settlement would serve the best interests of the great-grandchildren.

Kevin McNulty Saunders v. Sondra Muratori, 2010 Colo. App. LEXIS 1170 (August 19, 2010)

In 1992, B.R. McNulty formed the McNulty Ranch Trust to provide income for his daughter, Sondra, and his grandson, Scott, during Sondra's lifetime. Thereafter, the trust corpus was to be distributed to Mr. McNulty's grandchildren, Scott, Kevin, Lisa and Kassi, in stated percentages. The trust corpus of the trust consisted of a ranch in Park County, Colorado, and the trust specified that Scott would continue as ranch manager.

The initial trustees of the trust eventually resigned, and Sondra became the sole trustee. Sondra sold the ranch to Scott and his wife for $1,750,000. Sondra used the $300,000 down payment from Scott and his wife to buy a home in the Bahamas. In 2006, Scott sold the property in several pieces for a total price of $10,037,000, after having sold conservation easements for a total price of $856,200.

Scott's siblings petitioned the court for Sondra's removal as trustee, an accounting, and surcharge against Sondra and Scott. The siblings sought damages from Sondra and Scott for both breach of fiduciary duty and for aiding and abetting in breach of fiduciary duty. They also requested a declaratory judgment voiding the sale of the property and ordering Scott to forfeit his remainder interest in the trust.

The parties engaged in mediation. The first conference was unsuccessful, but the second mediation conference resulted in settlement and a signed settlement stipulation. Kevin was not physically present at the mediation conference, but Kevin's attorney signed Kevin's name to the stipulation.

Thereafter, Kevin informed his attorney that he had not agreed to the settlement terms, and his attorney scratched his signature out of the stipulation. The remaining parties then sought direction from the district court. Scott's counsel proposed proceeding by way of motion of Sondra, as trustee, asking the court to approve the settlement stipulation and then allowing the other parties to file any responses as appropriate. The court agreed, Kevin's new counsel agreed, and Sondra filed the motion. Kevin objected to the motion and the court's authority to enforce the stipulation, and filed an affidavit stating that he had not given his counsel permission to sign the stipulation on his behalf, and asserted that because of a conflict of interest Sondra could not act on behalf of the trust.

After a hearing, the trial court held that the settlement stipulation was enforceable because: (1) the stipulation was prudent, offered in good faith, and was fair, reasonable, and in the best interests of the parties; and (2) the stipulation was an enforceable contract under Colorado law, because the actions of Kevin's counsel were indicative of Kevin's agreement. Kevin appealed.

On appeal, the court in a matter of first impression held that when trust beneficiaries bring suit for the benefit of a trust, a court may properly approve the settlement agreement, even over the objection of one of the beneficiaries, if the settlement is just and reasonable and that the district court did not err in approving the settlement stipulation. The court rejected Kevin's objection to Sondra, settling claims on behalf of the trust where the siblings all had attorneys and were adequately represented, and she merely filed the motion for approval.

The court noted that in equity, trust beneficiaries may bring suit for the benefit of the trust when trustees fail to do so, which is analogous to a shareholder derivative suit on behalf of a corporation. The court explained that in a derivative action, a court may approve the settlement agreement over the objections of a shareholder even if the shareholder is a named plaintiff in the suit, and extended this reasoning to the trust context. The court noted that where Kevin, Sondra and Scott, and the trial court all agreed that the underlying petition was in the nature of a derivative action in which the siblings were acting as representatives of the trust, the district court was authorized to approve the settlement of the beneficiaries' claims even over Kevin's objections.

Examining whether the district court properly approved the settlement stipulation, the court again turned to shareholder derivative suits for guidance, and applied the principal articulated in *In re Norwest Bank*, 80 P.3d 98 (N.M. Ct. App. 2003) that in order to be approved, a mediated settlement must be fair, adequate, reasonable, and free from collusion or fraud, and satisfy a four factor test: (1) whether the proposed settlement was fair and honestly negotiated; (2) whether serious questions of law and fact existed, placing the ultimate outcome of litigation in doubt; (3) whether the value of an immediate recovery outweighed the mere possibility of future relief after protracted and extensive litigation; and (4) the judgment of the parties that the settlement is fair and reasonable. Based on *Norwest*, the court found that the lower court had adequately sought to determine whether the settlement was just and reasonable, and acted well within its discretion in approving the settlement.

The court dismissed Kevin's contention that the trial court approved an alleged unilateral modification to the stipulation terms by changing certain release provisions, and did not address the court's alternative reasoning that the settlement was binding as an enforceable contract.

***Phyllis Sigal Carlin v. Leslie Javorek*, Fla. App. LEXIS 10339 (July 14, 2010)**

Phyllis Carlin, as executor of her mother's estate, was involved in a probate dispute with her sister, Leslie Javorek, over the distribution of estate assets and disclosure of their mother's medical records. In 2007, Phyllis and Leslie executed a settlement agreement and the court reserved jurisdiction to enforce the agreement. Under the agreement, Phyllis was required to provide Leslie with certain medical documents, a list of providers, and a signed HIPAA release within forty-five days of execution of the agreement, with a failure to do so resulting in an order to comply and a duty to pay Leslie's attorneys' fees.

In 2008, Leslie moved to compel compliance with the agreement. The trial court held an adversarial hearing and found that Phyllis had not breached the agreement by failing to provide medical records, but had breached the agreement by failing to sign the HIPAA release. The trial court determined that each party was responsible for her own attorneys' fees because Phyllis had substantially complied and because her breach was immaterial. Phyllis appealed arguing that as the prevailing party, she was entitled to recover her attorneys' fees.

On appeal, the Florida appellate court affirmed the trial court's denial of payment of Phyllis' attorneys' fees because Leslie had been successful on her motion to compel compliance. The court reversed the trial court with respect to Leslie's attorneys' fees and ordered Phyllis to pay Leslie's fees on the grounds that: (1) Leslie's efforts to secure Phyllis's compliance rendered Phyllis's breach material; (2) Leslie was entitled to recover attorneys' fees from Phyllis as the prevailing party; and (3) Leslie was entitled to fees as a special remedy for having to compel compliance under the agreement.

In Re Estate of Helen Bandemer, George Bandemer and Marvin Bandemer v. Martin Bandemer and Normal Bandemer, 2010 Mich. App. LEXIS 1922 (October 12, 2010)

In May 2002, Helen Bandemer created a will giving her estate equally to her four sons, George, Marvin, Martin, and Norman. Prior to her death, Mrs. Bandemer expressed the intent that any assets she held jointly with her sons pass under her will, and she was advised to re-title and disjoin certain assets that she held jointly with Martin and Norman. Mrs. Bandemer did not act on this advice. Rather, she sent Martin a letter asking him to either place certain assets in her name alone, or to jointly title certain assets in his and his brothers' names.

Martin never re-titled the assets, and Mrs. Bandemer died. After the probate court declined to recognize Mrs. Bandemer's letter as an amendment to her will, George and Marvin filed a twelve-count complaint against Martin and Norman seeking damages and imposition of a constructive trust over the assets held by Martin and Norman. George and Marvin's claims included tortious interference with a prospective advantage, tortious interference with a trust, intentional infliction of emotional distress, negligent infliction of emotional distress, fraud, unjust enrichment, creation of an express oral trust, conversion, constructive trust, undue influence, and breach of a fiduciary duty.

The trial court dismissed all of the claims. On appeal, the court affirmed the dismissal of the claims, and noted that the conduct was not tortious or wrongful, and while their conduct indicated that they were selfish and inconsiderate, their actions were not so extreme or outrageous as to warrant imposition of liability.

The court rejected the claims of an oral trust and conversion because there was no evidence that Mrs. Bandemer asked Martin to hold the property in trust for his brothers, and there was no evidence of intent to create a trust at the time she transferred assets to or placed Martin or Norman's names on her assets. The court refused to impose a constructive trust, and dismissed the claims of undue influence and breach of fiduciary duty, because there was no evidence of wrongful conduct, and no fiduciary relationship between Martin and Mrs. Bandemer that would give rise to a presumption of undue influence.

Judith Bristol et al. v. Andrew R. Clark, Jr. and Rebecca E. Moore, 2010 Cal. App. Unpub. LEXIS 8169 (October 14, 2010)

On January 20, 2007, Mildren Clark created a revocable trust for the benefit of her five children. Her son Andrew became trustee after her death. Under the trust terms, Andrew had discretion to divide Mildren's personal property, and Andrew was directed to convert real property and the residue assets to cash and distribute the proceeds equally among the five children.

Andrew sold assets, and his sisters, Judith and Laura, challenged the sale and petitioned the probate court for an accounting. Andrew hired counsel for the trust and to represent Andrew in responding to the lawsuit. Andrew's counsel assisted in preparing the accountings.

On February 20, 2009, the parties' stipulated to an accounting to settle the account. On April 2, 2009, the court authorized payment of $11,104.98 to Andrew's counsel for prior work. Thereafter, Andrew's counsel provided additional services in the amount of $6,902.69 which Andrew paid from the trust without further court order. After Andrew made a partial distribution of the trust assets, Judith and Laura petitioned for removal of Andrew as trustee and objected to the payment to counsel without court order. The trial court removed Andrew as trustee, and ordered his counsel to return all sums not approved in the prior court order. Andrew's counsel appealed the order.

On appeal, California Court of Appeals found that, although counsel was not a party to the lawsuit, she had standing to appeal on the issue of the fees because of her immediate, pecuniary, and substantial interest, and the adverse affect on her rights. Counsel was not allowed to appeal Andrew's removal as trustee for lack of standing. The court reversed the trial court with respect to the fees on the basis that trust law authorizes a trustee to retain professional services including legal representation and to pay reasonable compensation for services necessary to administer the trust, which does not require prior court order. The court noted that the case would have been different if the attorney had provided legal services to an individual acting as both the personal representative and the trustee pursuant to Rule 7.700 of the California Rules of Court, which is separate and distinct from the provisions pertaining to trusts, and requires a prior court order for payment of attorney fees arising from legal services to a personal representative of an estate.

Daniel L. Hemphill v. Jay F. Shore, 2010 Kan. App. LEXIS 112 (September 24, 2010)

On December 28, 1984, Lee and Linna Shore created the Shore Family Trust with their two children, Jay and Susan, as trustees. The trust provided for discretionary income and principal to Jay, Susan, or their issue for their health, education, support, and maintenance. The trust terms relieved the trustees from all inventory and accounting duties under K.S.A. 59-1601 *et. seq*. and waived any bond requirement. The trust was to terminate at the death of the survivor of Jay and Susan and the assets were to be distributed one-half to Jay's descendants, *per stirpes*, and one-half to Susan's descendants, *per stirpes*. Susan died in 1992, survived by her one son, Daniel.

On April 8, 2009, Daniel sued Jay alleging breach of trust, breach of fiduciary duty, and conversion of trust property for personal use. Jay moved to dismiss the action on grounds that in 1995 all of the trust assets had been distributed, the trust terminated, and the final tax return was filed, and Daniel was barred by the applicable statute of limitations. Daniel argued that Jay's fraudulent and wrongful conduct prevented him from filing his claim within the applicable statute of limitations period, and therefore the period should be legally and equitably tolled.

The trial court dismissed Daniel's claims on the basis that: (1) the trust was a discretionary trust giving Jay the sole discretion to determine whether invasion of the principal was necessary; (2) Daniel failed to allege any specific acts of fraudulent conduct, misuse or theft of trust assets; (3) the applicable statute of limitations had not been tolled; and (4) Daniels's claims were filed outside the applicable period.

On appeal, the court affirmed the statute of limitations bar on the breach of fiduciary duty claim, the conversion claim, and the breach of trust claim. The court held that the claim for conversion was barred by the two-year statute of limitations period proscribed in K.S.A. 60-513(a)(2) or by the ten-year statute of repose period under K.S.A. 60-513(b). The court found that the breach of fiduciary duty claim was also barred by the ten-year statute of repose period in K.S.A. 50-513(b). The court also noted that although Daniel did not turn 18 until September 9, 2005, entitling him to bring an action within one year of his reaching the age of majority, the statute of repose under K.S.A. 60-515(a) ultimately limits the time during which a cause of action can arise to eight years after the time of the act giving rise to the cause of action. Because the acts occurred in 1993, Daniel's 2009 claim was barred because it was filed beyond the eight-year period.

Kristofer Kastner v. InTrust Bank, 2010 U.S. Dist. LEXIS 120927 (November 15, 2010)

On June 5, 1996, Jessie I. Brooks executed a trust, with InTrust Bank as trustee, for the lifetime benefit of her daughter, Nola, with the remainder of the assets distributable to her grandchild Kristofer.

After the trust lost $40,485.60 from 2000 through 2008, Kristofer sued the corporate trustee, the trustee's CEO, and several trust officers in his capacity as a trust beneficiary and as claimed representative of his deceased grandmother and her estate (although he was not the actual personal representative), claiming: (1) breach of fiduciary duty in the creation and execution of the trust; (2) breach of fiduciary duty to refrain from self-dealing to Jessie in entering into the trust agreement; (3) failing to advise Jessie on the waiver of the negligence and prudent investor standards in the trust agreement; (4) breach of trust against Jessie, her estate, and Kristofer; (5) negligent misrepresentations to Jessie, her estate, and Kristofer as to the nature of the trust agreement and the consequences of its waiver provisions; (6) fraud by silence by failing to disclose the legal effect of the form of the trust or waiver provisions; (7) fraud by silence by failing to disclose material facts concerning the nature of the trust investments or explain poor investments; (8) fraud in the creation and investment of the trust agreement; and (9) reformation of the trust agreement to remove the provisions concerning waivers of the negligent and prudent investor standards.

The trustee moved to dismiss on the grounds that: (1) the trust provisions were appropriate and in accordance with the Uniform Trustee's Powers Act and the Prudent Investor Act as they existed in 1996 when the trust was prepared; (2) Kristofer's claims were barred by the ten-year Kansas statute of repose, because all of the alleged wrongful conduct was predicated on the consequences of the waiver provisions in the trust agreement, which was executed on June 5, 1996; (3) the failure to join Nola as a party; (4) Kristofer was only a contingent beneficiary and did not have standing to bring a claim for reformation of the trust; and (5) Jessie, Jessie's estate, and Kristopher as claimed representative did not have standing to bring the suit.

Applying Kansas law and construing the pleadings liberally based on Kristofer having brought the suit *pro se*, the court concluded that the claims for breach of trust, fraud by silence, failure to disclose material facts, and fraud in the creation and investment of the trust agreement were not barred by the ten-year statute of repose under Kansas law. The court reasoned that Kristofer's broad allegations that the trustee had mismanaged the trust by failing to disclose pertinent information and poor performance was in part due to poor investment strategy and that the alleged misconduct could have occurred subsequent to 1996 and through the filing of the complaint.

The court held that Kristofer's claims premised on the creation or execution of the trust agreement and the inclusion of certain provisions were barred by the ten-year statute of repose because Kristofer brought the action 14 years after his grandmother executed the trust agreement. The court noted that a statute of repose extinguishes causes of action after a certain time even though the action or injury may not yet have accrued. Under that statute, the court barred the claims arising out of the execution of the trust agreement and its terms.

The court could not conclude as a matter of law that Kristofer was not a qualified beneficiary, and denied the defendants motion to dismiss on this ground, and also found no basis for dismissal pursuant to Rule 12(b)(7) and Rule 19 for failure to join Nola as a necessary party. The court noted that the trustee had not met its burden of demonstrating that Nola was a necessary party by their failure to address the feasibility of her joining in the action or whether the action could continue without her joinder "in equity and good conscience."

The court granted the motion to strike Jessie from the suit because a decedent lacks the capacity to sue or be sued, as well as her estate because only the personal representative of the estate is entitled to represent the estate and Kristofer was not named as personal representative.

Schmitz et al. v. Merrill Lynch et al., 2010 Ill. App. LEXIS 1160 (October 27, 2010)

Marvin Huth and his wife, Shirley, created the Marvin F. Huth Revocable Trust for the benefit of their descendants, and served as co-trustees of the trust until Shirley's death. After Shirley died, Marvin remarried and amended the trust twice to name his new wife, Patricia, as a beneficiary and trustee of the trust. Marvin subsequently died.

On October 26, 2009, the trust beneficiaries sued Merrill Lynch, where trust assets exceeding $2.364 million had been deposited, based on alleged withdrawals from the trust by Patricia after Marvin's death, and claiming breach of trust and professional negligence.

Merrill Lynch filed a motion to dismiss and compel arbitration, based on the arbitration clauses in the client relationship agreements and trustee certifications signed by Marvin as trustee of the trust, and also by Patricia as successor trustee. The trial court denied the motion to dismiss and to compel arbitration, and Merrill Lynch appealed.

On appeal, the court affirmed the trial court, and held that the beneficiaries were not bound by the arbitration clause because: (1) a trustee does not act as an agent for a beneficiary and therefore has no power to subject beneficiaries to liability in contract or tort; (2) Marvin and Patricia were not acting as agents for the beneficiaries when they signed the agreements; (3) the beneficiaries had no contractual relationship with Merrill Lynch, and therefore were not bound by the terms of the agreements; and (4) the agreements did not include language purporting to bind any heirs, beneficiaries, assigns or any other party, offering further support that the agreements were not meant to bind the trust beneficiaries.

Suzanne C. Radford v. Melinda Shehorn, 2010 Cal. App. LEXIS 1455 (August 19, 2010)

Suzanne Radford and Melinda Shehorn were beneficiaries of a trust established by their parents, who died leaving Melinda as sole trustee. In 2008, Suzanne filed a petition in probate court challenging Melinda's distribution of the trust assets.

The trial court ordered the parties to mediate, and the mediation ended with a settlement agreement consisting of two pages. The first page: (1) was printed on a form provided by the mediator; (2) provided that the settlement was binding on all parties and admissible in court; (3) had "Page 1 of 2" handwritten on the bottom; and (4) was signed by Melinda and her attorney but was not signed by Suzanne and her attorney. The second page of the agreement titled "Settlement Agreement" was: (1) entirely handwritten; (2) contained the substantive terms of the settlement; (3) was signed by both parties; (4) required that the parties execute mutual releases, but unlike the first page, did not specify that the release included unknown claims; and (5) had "Page 2 of 2" written on the bottom.

The day before the parties were to report the results of mediation to the court, a new attorney retained by Suzanne informed Melinda's attorney that Suzanne was not bound by the agreement. Melinda moved to enforce the settlement. Suzanne and Melinda submitted conflicting affidavits, and the mediator submitted an affidavit supporting Melinda and the validity of the agreement.

Suzanne objected to the mediator's affidavit. The trial court overruled the objection, finding that the settlement agreement contained two pages, and that the first page contained a waiver allowing the mediator to testify. Suzanne appealed.

On appeal, Suzanne conceded that the first page of the agreement contained an adequate waiver of objections to admissibility, but argued that this page was not part of the agreement. The second page of the settlement agreement did not contain a waiver. The court held that the trial court erred in admitting the mediator's declarations into evidence, because the mediation confidentiality statutes prohibit a mediator from testifying to anything about the agreement including the number of pages it contains. Nevertheless, the court found that the trial court's error was harmless, and that Suzanne's own declarations contained probative evidence supporting the finding of a two-page agreement.

Fiduciary Advisory Services

McGuireWoods' **Fiduciary Advisory Services** and **Private Wealth Services** Teams stand ready to advise financial institutions and other clients about planning, tax, and fiduciary matters. Private Wealth Services is ranked by *Chambers and Partners*, the international rating service for lawyers, as one of two top-band private wealth services practice groups in the country. Please click **here** for a full listing of Fiduciary Advisory Services lawyers and their locations.