Recent Cases of Interest to Fiduciaries

Ronald D. Aucutt
703.712.5497 | raucutt@mcguirewoods.com

Michael H. Barker
804.775.1679 | mbarker@mcguirewoods.com

Dennis I. Belcher
804.775.4304 | dbelcher@mcguirewoods.com

Adam M. Damerow
312.849.3681 | adamerow@mcguirewoods.com

W. Birch Douglass III
804.775.4315 | bdouglass@mcguirewoods.com

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

Charles D. Fox IV
434.977.2597 | cfox@mcguirewoods.com

Meghan L. Gehr
804.775.4714 | mgehr@mcguirewoods.com

William M. Long
312.750.8916 | wlong@mcguirewoods.com

Michele A. W. McKinnon
804.775.1060 | mmckinnon@mcguirewoods.com

John B. O'Grady
804.775.1023 | jogrady@mcguirewoods.com

Justin F. Trent
804.775.4728 | jtrent@mcguirewoods.com

www.mcguirewoods.com

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Reliance Trust Company v. Candler et al., 2012 Ga. App. LEXIS 336 (March 26, 2012)

Trustee surcharged for excessive and arbitrary discretionary distributions to surviving spouse from marital trust.

Upon her death, Claire Candler created a marital trust for the benefit of her husband, Buddy, during his lifetime that allowed discretionary principal distributions if net income distributions were deemed insufficient. Buddy also held a limited power of appointment over the remainder of the trust assets. Buddy served as co-trustee of the trust. At the time Reliance Trust Company was appointed as co-trustee the trust assets were valued at $2.1 million. Reliance authorized over $1 million in distribution requests made by Buddy prior to his death in December 2005. Buddy exercised his power of appointment over the remaining trust assets, valued at his death at only $838,762, in favor of his eight grandchildren.

The grandchildren sued Reliance alleging improper distributions. Reliance moved unsuccessfully for summary judgment and, following a jury trial, judgment was entered in favor of the grandchildren. Reliance's motion for a new trial was denied and Reliance appealed.

On appeal, the Georgia Court of Appeals affirmed the trial court on the grounds that: (1) a new trial was not warranted because there was evidence to support the jury's verdict and the damages award; (2) Reliance owed a fiduciary duty to the grandchildren as remainder beneficiaries; (3) Reliance breached its fiduciary duties to the grandchildren by failing to administer the trust as to preserve a fair balance between Buddy and the grandchildren; (4) Reliance abused its discretion because its decisions were infected with arbitrariness – budgets to support Buddy's requests were sometimes required and sometimes not, some encroachment requests for attorneys fees were paid and some were not, and there were no consistent explanations for the disparities; (5) the reduction in trust corpus of $1,140,924.41 as a result of the encroachments was evidence of damages; (6) the exclusion of testimony about prior litigation between the parties over Buddy's competence was not error because Buddy's competence was irrelevant to the trustee's exercise of discretion; and (7) the interest should have been awarded to the grandchildren from the date of encroachment forward.

Lawton et al. v. Bank of America, 2011 U.S. Dist. LEXIS 95052 (Rhode Island, August 24, 2011)

Executor surcharged for delay in distributing stock to beneficiaries, conditioning distributions on signing releases and approving an inaccurate accounting, and allowing court ordered sale of stock from estate at discounted price.

Magda L. Burt died in August 1987. Under her will she gave the residue of her estate, including 2,256 shares of Class A non-voting common stock in a closely held company called Nyman Manufacturing, to 10 beneficiaries. Bank of America and Robert Gates were appointed co-executors under the will. A valuation of the stock was completed in February 1988 and after an IRS audit the stock was valued at $403.35 per share.

Early in the administration of the estate, the bank approached Nyman about buying the stock from the estate, but Nyman rejected the proposal. The bank corresponded with the estate beneficiaries on multiple occasions and indicated that the co-executors were preparing the final accounting for filing with the court. By January 18, 1991, the final accounting had still not been completed or sent to the beneficiaries for review but a partial distribution of $1,000 was made to each beneficiary at that time. On March 18, 1991, the bank sent the beneficiaries a first and final accounting along with a receipt, release, and indemnity form for them to sign and return if they approved the accounting. The final accounting showed the shares of Nyman stock as having been distributed in kind to the beneficiaries, but no such distribution had taken place. The beneficiaries refused to sign the agreement.

In April 1991, one of the beneficiaries, Roland Burt, hired an attorney and demanded a complete audit of the estate and an appraisal of the stock. A revised accounting for the estate was sent to Burt. In 1992, new regulations of national banks were issued by the Comptroller of Currency and the bank was required to review certain closely held assets, including the Nyman stock, resulting in further delays. The beneficiaries continued to request that the final accounting be prepared and the estate closed. On March 12, 1993, Burt filed suit in Rhode Island Superior Court against the bank alleging negligence and breach of fiduciary duties and seeking a distribution of cash for his share of the estate.

Based on discussions with Burt and his preference for a cash distribution, the bank again approached Nyman about purchasing the stock but Nyman declined. The bank advised the other beneficiaries of the issues related to Burt's litigation and pointed to the litigation as a reason for further delays. A final account was again prepared and sent to the beneficiaries with a receipt, release, and indemnification agreement, again showing that the stock had been distributed to the beneficiaries when in fact it had not been distributed. The beneficiaries again refused to sign the release agreement.

On January 30, 1995, before resolution of the issues related to the release agreement, Nyman approached the executors about purchasing the stock at a low price. The bank pointed to this overture as an additional reason for delay in completing the administration of the estate and distribution of the estate assets.

On August 4, 1995, Nyman formally offered to purchase the stock from the estate for $145.36 per share on the condition that the beneficiaries approved the offer. The executors provided the offer materials to the beneficiaries but did not request additional information, review the offer, or do independent research. Several beneficiaries approved the offer but others did not.

The bank then decided that an in-kind distribution of the stock was in the best interests of the beneficiaries. On September 28, 1995, the executors petitioned the probate court for distribution of the stock. On October 19, 1995, a hearing was held before the probate court on the amended account of the executors and the executors' petition for distribution of the stock. At the hearing, a representative of Nyman appeared and urged the sale of the stock to Nyman pursuant to the terms of Nyman's previous offer and presented the sale as a great deal for the beneficiaries. The probate court allowed the executors account and ordered the sale of stock to Nyman for $145.36 per share.

On September 29, 1997, Nyman was sold to Royal Packaging Industries Van Leer and holders of the Class A stock of Nyman received $1,667.38 per share in the sale.

The beneficiaries sued the Bank alleging breach of their fiduciary duties to the beneficiaries by: (1) undue delay in closing the estate and distributing the stock; (2) failing to properly advocate for distribution of the stock at the hearing; (3) failing to appeal the probate court's order to sell the stock; (4) failing to apprise the beneficiaries of their right to appeal the probate court's order to sell the stock; (5) deficiencies in the negotiations with Nyman and failing to independently evaluate the sales price; (6) conflicts of interest; and (7) excessive fees.

The trial court found in favor of the beneficiaries on all counts on the following grounds: (1) there was no evidence that the bank had interpreted the will as requiring a bargain sale to Nyman at the time of the sale; (2) the bank had unduly delayed distribution of the stock; (3) requiring receipt and release or indemnity forms was not a legal precondition for the distribution of the stock; (4) to the extent Rhode Island law provides any authority for such a requirement, it must be imposed by the probate court and the executors did not seek a release from the court until 1995; (5) the bank breached its duty by requesting that the beneficiaries attest to something that was inaccurate in the accountings they had received; (6) the bank waited more than three years before they sent any form of an accounting to the beneficiaries; (7) the bank had failed to act in the best interests of the beneficiaries by meaningfully advocating for a distribution of the stock in kind at the hearing; (8) the bank breached its duties by failing to appeal the probate court's order compelling the sale; (9) the bank breached its duties in connection with Nyman's offer to purchase by failing to check the accuracy of the data, investigate the business to appraise the stock, and failing to negotiate; and (10) the bank breached its duties by collaborating with Nyman on the petition with the court and seeking remuneration from Nyman for its contents.

On the issue of damages the court found as follows: (1) for beneficiaries who would have held on to their stock had it been distributed and then sold to Van Leer, appropriate damages were the difference between the price per share in the sale to Van Leer and the sale to Nyman times the number of shares plus interest; and (2) for the beneficiaries who would have sold their stock to Nyman pursuant to its offer had the stock been distributed to them, damages would not be awarded and these beneficiaries had no entitlement to recover for the bank's breaches of its fiduciary duties.

The court found in favor of the bank on its fees and found payment of the executors' fees appropriate because they were merely negligent and there was no showing of bad faith, intentional misconduct, or improper motive.

Bellamy v. Langfitt, 2012 Fla. App. LEXIS 6379 (2012)

Settlement agreement that discharged corporate co-trustee, without naming a replacement as required by the trust terms, rejected as an improper trust modification.

Robert Bellamy created an *inter vivos* trust and named his wife, two adult daughters, his accountant, and Northern Trust as successor co-trustees upon his death. Robert died in 2006. In 2009, one of his adult daughters filed a petition seeking to remove Robert's accountant as co-trustee for breach of fiduciary duty. While that petition was pending, Robert's wife, Northern Trust, and the accountant voted to adopt several proposals that were opposed by the two adult daughters. In 2010, the adult daughters and the accountant entered into a settlement agreement that permitted the accountant to resign without liability for any breach of fiduciary duty. This settlement agreement was opposed by Robert's wife.

In 2011, the adult daughters and Northern Trust entered into a settlement agreement discharging Northern Trust as co-trustee and providing that Merrill Lynch would act as custodian of the trust assets. The daughters filed a petition for court approval of the agreement, which the wife opposed. The wife filed a counter-petition seeking to remove Northern Trust and replace it with a successor corporate trustee because the trust terms required the appointment of a corporate co-trustee. As part of her counter-petition, the wife claimed that Northern Trust breached its fiduciary duties by entering into the settlement agreement.

The trial court approved the settlement agreement, approved Northern Trust's resignation, and released Northern Trust from liability. The trial court also dismissed the wife's counter-petition with prejudice. The wife appealed arguing that the trial court erred in removing the clear requirement for a corporate trustee.

On appeal, the Florida Court of Appeals reversed the trial court and reinstated Northern Trust as co-trustee on the grounds that: (1) the trust terms specifically prohibited court modification of the trust under the relevant Florida statutes; (2) the requirement of a corporate co-trustee was intended by the settlor as essential to the trust's administration.

Nederlander, et al. v. Papiano, 2012 Cal. App. Unpub. LEXIS 1717 (March 6, 2012)

Lawyer serving as trustee surcharged for distributing assets pursuant to trust amendments that affected partial revocation requiring consent of co-trustees, and double damages awarded for bad faith in allowing amendments in order to extract payment of lawyer's fees out of the trust assets.

Neil Papiano, a lawyer, served as co-trustee, along with Wells Fargo, of two trusts created by Scott Nederlander for the benefit of Scott's minor daughters. Scott retained the power to revoke each trust so long as the independent trustee consented to the revocation. The trust terms also permitted Scott to amend each trust, but the amendment provision did not explicitly require the consent of the independent trustee.

Over the course of several years, Scott amended the trusts eight times to allow him to withdraw cash from the trusts. Scott's aggregate withdrawals over a three year period totaled $1,770,000. The withdrawals were deposited into a separate irrevocable trust with Scott as beneficiary and Neil as trustee. Neil, acting as co-trustee of the daughter's trusts, conditioned Scott's withdrawals from the trusts on Scott paying legal bills owed to Neil's law firm totaling $240,000.

Scott's daughters sued Scott, Wells Fargo, and Neil in connection with the withdrawals from the trusts for their benefit. Scott and Wells Fargo settled leaving only Neil's liability to the trusts at issue.

The trial court determined that since the daughters' trusts could only be amended with the consent of the trustees, Neil owed a fiduciary duty to the daughters that he breached by allowing the trust amendments. The court offset the damages owed by Neil by the settlement payments made by Scott and Wells Fargo, and assessed damages against Neil in the amount of $191,500 for each trust. The court also held that Neil acted in bad faith by allowing funds from the daughters' trusts to be distributed for Scott's personal legal fees that were not a benefit to the daughters' trusts and assessed an additional $100,000 in damages against Neil for each trust.

On appeal, the California Appellate Court affirmed the trial court on the grounds that: (1) the amendments affected partial revocations that required the trustees' consent; (2) conditioning Scott's revocation of the trusts on the consent of the trustees granted present rights to the daughters as trust beneficiaries; (3) the trustee was obligated to protect the beneficiaries' rights; (4) Neil breached his fiduciary duties to the beneficiaries by permitting Scott to make the withdrawals from the trusts for the benefit of Scott and Neil's law firm; (4) Neil acted in bad faith by injecting "his own personal interest ahead of the interests of the beneficiaries by conditioning the withdrawal of funds on Scott's payment of legal fees" to Neil's firm; and (5) by California statute, an award for bad faith requires double damages and therefore the court doubled the damage award against Neil.

Martin v. Martin, 2012 Tex. App. LEXIS 2146 (Tex. App., 2012)

Exculpation clause in trust cannot bar claim for breach of duty to act in good faith, but trust beneficiaries cannot sue for lost value to company held in trust and also failed to prove mental anguish.

Ruben S. Martin, III created a trust for the benefit of his children, Courtney and Robin, and designated his brother Scott as the initial trustee. Ruben funded the trust with shares of stock in the closely-held energy company that he and Scott jointly managed. The trust terms included an exculpatory clause that provided that restrictions on self-dealing and the duty of loyalty would not apply to the trustee's dealings with the trust. Not long after the trust was created the relationship between Ruben and Scott turned acrimonious and each brother struggled to take control of the company.

In 2008, Ruben believed that the company required additional capital and sought to obtain a line of credit for the company. Scott disagreed and filed suit against the company and Ruben. As a result of the suit, which was disclosed to the prospective lender, the line of credit was cancelled. This forced the company to sell assets to raise working capital and resulted in a substantial decrease in the value of the company's stock.

Courtney and Robin sued Scott for breach of fiduciary duty. The jury determined that Scott breached his fiduciary duties and awarded compensatory and mental anguish damages to each of Courtney and Robin. Scott appealed.

On appeal, Scott argued that he could not have breached his fiduciary duties to the beneficiaries because of the exculpatory clause in the trust agreement. The Texas Court of Appeals held that Scott owed certain non-waiveable fiduciary duties to the beneficiaries under the Texas Trust Code, including the duty to act in good faith and in accordance with the trust purposes, and there was sufficient evidence for the jury to conclude that Scott filed the Harris County lawsuit in bad faith. However, the court overturned the jury's award of compensatory damages and mental anguish damages on the grounds that: (1) under Texas law, damages resulting from the devaluation of corporate stock are damages incurred by the corporation; (2) the beneficiaries, as equitable shareowners, had no independent right to recover damages for corporate losses, including corporate value decline; (3) Courtney and Robin failed to establish the high degree of mental pain and distress resulting from Scott's breach of fiduciary duties required for mental anguish damages; (4) the beneficiaries' mere disappointment, anger, resentment, and embarrassment was insufficient for this purpose; and (5) despite Scott's breach of trust, the beneficiaries were not entitled to any compensation.

Steingass v. Steingass, 2012 Ohio 1647 (Ohio Ct. App., 2012)

2010 decedent's trust formula funding provision directs all assets to marital trust because no federal estate tax.

In 2006, Frank L. Steingass created a revocable trust for his wife, Donna, his stepson, and his stepson's children. The trust agreement acknowledged the uncertain nature of the federal estate tax in 2006, and provided that upon Frank's death (1) if the estate tax was then in effect the assets would be divided between a marital trust and a family trust and (2) if the estate tax was not then in effect all of the trust assets would pass to the marital trust. Frank died on December 11, 2010 (just before the passage of the 2010 Tax Act). Donna sued for declaratory judgment that all of the trust assets should pass to the marital trust. The court found in Donna's favor and the family trust beneficiaries appealed.

On appeal, the family trust beneficiaries argued that the 2010 Tax Act retroactively reinstated the estate tax for all of 2010 so the estate tax was effective as of the date of Frank's death. Donna argued that the opt-out provision of the 2010 Tax Act, which allowed the estate of the 2010 decedent to remain under the repeal regime, created circumstances under which the federal estate tax was not applicable to Frank's estate at the time of this death.

The Court of Appeals of Ohio affirmed the trial court and held that the federal estate tax was not in effect as of the date of Frank's death and all of the trust assets should be allocated to the marital trust on the grounds that: (1) on the actual date of Frank's death, the 2010 Tax Act had not yet been enacted so there was no federal estate tax in effect; (2) because the 2010 Tax Act gave Frank's estate the option to remain under the federal estate tax repeal regime it was as if the estate tax had never been reenacted; and (3) it was Frank's intent to pay as little federal estate tax as possible while primarily benefitting Donna and therefore passing the assets to the marital trust comports with Frank's intent and the terms of the trust agreement.

United States v. MacIntyre, 2012 U.S. Dist. LEXIS 42487 (S.D. Tex., 2012)

Income beneficiary liable for gift taxes owed by terminated GRIT.

As a result of her divorce from J. Howard Marshall, II, Eleanor Stevens received stock in a company called MPI. In 1989, she transferred MPI stock to a Grantor Retained Income Trust (GRIT) with a 10-year term. During the term, the GRIT paid all of its income to her. At the end of the term the trust would terminate and the trust assets would be distributed to Pierce Marshall. During the GRIT term and shortly before his death, Marshall sold his MPI stock back to MPI at a below market price, thereby increasing the ownership interest of the other MPI shareholders. The IRS audited the transaction and assessed gift taxes against Marshall's estate for the indirect gifts to the other MPI shareholders. The United States Tax Court found deficiencies in gift taxes against the Marshall estate, but the Marshall estate failed to fully pay the gift taxes due.

Thereafter, Stevens died and the United States sued her estate in federal court for the gift taxes owed by Marshall's estate, arguing that Stevens was liable for the unpaid gift taxes as the donee of the indirect gift. The estate argued that (1) at the time of the indirect gift the MPI stock had been transferred to the GRIT and therefore Stevens could not be the donee of the gift, (2) because the GRIT had terminated at the time of the suit, the remainder beneficiary, and Stevens, as income beneficiary, should be liable for the taxes due on a gift that enlarged the trust principal.

The court rejected the estate's arguments and held that Stevens was the donee of the gift on the grounds that: (1) a donee for gift tax liability purposes follows the Supreme Court's definition of a donee for purposes of determining whether a gift is eligible for the gift tax exclusion; (2) because gift tax exclusions apply only to present interest gifts and do not apply with respect to future interests, the current beneficiaries and not the remainder beneficiaries constituted the donees of a gift to the trust; (3) at the time of the gift, Stevens was the sole current beneficiary of the GRIT; (4) the gift taxes should have been paid out of the principal of the GRIT; (5) the remainder beneficiary's interest in the GRIT was an uncertain future interest; (6) the principal of the trust could have been depleted before the termination of the trust by its terms; (7) the gift tax liability should be paid from a known present source of funds; and (8) therefore, the current beneficiary, even though she was only an income beneficiary, was determined to be the donee of the gift and liable for the tax.

Lifetime beneficiary of ILIT not entitled to death benefit proceeds – Leventhal v. Montelione, 2012 Cal. App. Unpub. LEXIS 2964 (Cal. App. 2d Dist., 2012)

In 1996, Frank Montelione created an ILIT for the benefit of his daughter, Michelle, and his stepson, Shaun. The trust terms granted Crummey withdrawal rights during Frank's lifetime to Michelle, Shaun, and any child subsequently born to or adopted by Frank. Upon Frank's death, the proceeds of the life insurance policy and any other trust assets were to be held in separate trusts for Michelle and Shaun, with Michelle's trust receiving an 80% share and Shaun's trust receiving a 20% share. In 2003, Frank and his wife had another child named Gianfranco.

Frank made periodic gifts to the trust to pay the insurance premiums. Under the trust terms, written Crummey notices were not required because the beneficiaries were minors and the trustee was only required to inform the beneficiaries' legal and natural guardians of the gifts. The lifetime beneficiaries never exercised their withdrawal rights.

Frank died in 2007 and the life insurance proceeds were paid to the trust. The trustee divided the trust assets to separate trusts for the benefit of Michelle and Shaun. In 2009, Gianfranco, through his guardian *ad litem*, brought a suit seeking to declare that as a lifetime beneficiary of the trust he was entitled to an interest in the life insurance proceeds. The trial court determined that Gianfranco's interest was limited to his Crummey withdrawal rights and that he had no interest in the life insurance proceeds. Gianfranco appealed.

On appeal, Gianfranco argued that he is entitled to a *pro rata* share of the life insurance proceeds because: (1) the trustee failed to provide written notice of his withdrawal rights so the withdrawal rights did not lapse; (2) Frank could not waive Gianfranco's withdrawal rights because he had a conflict of interest; and (3) the trustee misappropriated trust funds by not maintaining the funds that Gianfranco had a right to withdraw in a separate trust for Gianfranco's benefit and instead investing those assets in an insurance policy for the benefit of other beneficiaries.

The California Court of Appeals rejected Gianfranco's arguments and held that Gianfranco has no interest in the life insurance proceeds on the grounds that: (1) the trust terms did not require written notice of withdrawal rights to minor beneficiaries; (2) Frank, as legal and natural guardian, had actual notice of the gifts because he made the gifts; (3) Frank, as the settlor of the trust, was also aware of the beneficiaries' withdrawal rights; (4) the trust terms authorized Frank to waive the withdrawal rights on behalf of the minor beneficiaries so any alleged conflict of interest was contemplated by the settlor; (5) the trust terms and Frank's intent were clear that all of Frank's children had Crummey withdrawal rights but only Michelle and Shaun were to be beneficiaries of the life insurance proceeds.

In the Matter of the Estate of Bernadine J. Moncur, 2012 SD 17 (2012)

Trustee is entitled to purchase trust assets at a properly conducted auction following notice to the beneficiaries.

Bernadine Moncur created a trust in 2002 for the benefit of her daughters with herself as initial trustee and two of her daughters, Miki and Dianne, as successor trustees. Bernadine died in 2007 and Miki and Dianne qualified as personal representatives under the will and became co-trustees of the trust. The trust assets included real property in Butte County.

The trustees arranged for a public auction of the property, and gave notice of the auction, including the date, terms and conditions of sale, to the other beneficiaries. The trustees also sent the other beneficiaries the auctioneer's employment contract that included an addendum stating that family members were permitted to bid at the auction. The trustees used a surrogate bidder and purchased the property at the auction for $309,000.

The other daughters, Shirley and Janet, sued to remove the trustees, alleging breach of duty for purchasing the property at auction. The trial court rejected their claims on the grounds that: (1) Shirley and Janet had the capacity to contract and were aware of the details of the auction; (2) they were aware of Miki and Dianne's intention to bid on the property and raised no protests; and (3) therefore the trustees had not breached their duty of loyalty.

On appeal, the court of appeals affirmed the trial court and rejected the claims on the grounds that: (1) the appellate court concluded that Miki and Dianne had overcome the statutory presumption of insufficient consideration and undue influence; (2) Shirley and Janet had sufficient knowledge of the transaction; (3) the record included testimony from the auctioneer and an auction bidder who "aggressively" bid against the trustees; and (4) there was no evidence in the record to support the claims that the trustees had intentionally delayed the auction to depress its price of the property.

Swendsen v. Corey, 2012 U.S. Dist. LEXIS 24203 (Idaho, February 22, 2012)

Beneficiary does not have standing to sue on behalf of the trust without first seeking to compel trustee to bring the claim.

Sean Swendsen filed suit individually as remainder beneficiary of the Richard I. Swendsen Trust and derivatively on behalf of the trust against the former trustee of the Trust, Richard Corey. Corey moved for dismissal for lack of standing.

The U.S. District Court for the District of Idaho granted Corey's motion finding that Sean lacked standing for his claims on the grounds that: (1) generally a beneficiary may not sue in the name of the trust because he is not the real party in interest; (2) there is an exception that confers standing on a beneficiary only where the trustee cannot or will not enforce a valid cause of action against a third party; and (3) without having first sought judicial compulsion against the current trustee, Sean had no standing to step in the shoes of the trustee and sue on behalf of the trust.

Jacobson v. Sklaire, 2012 Fla. App. LEXIS 6373 (2012)

Trustees liable for beneficiary's legal fees for refusal to make required trust distribution.

Jacob Sklaire created an *inter vivos* trust that provided after his death for the distribution of $475,000 to his wife and the remainder to his two daughters, and named his daughters as co-trustees. After Jacob's death, his daughters refused to distribute assets to his wife, and his wife sued to compel the distribution. Jacob's wife prevailed at trial and the court awarded her costs and legal fees. The daughters agreed to pay the legal fees from the trust but were unable to do so because they had paid their own legal fees out of the trust and the trust assets were insufficient to both make the required distribution and pay the legal fees. The wife moved to compel the payment and to hold the daughters personally liable for breach of fiduciary duty.

The trial court found that the daughters were jointly and severally liable for the legal fees. On appeal, the Florida Court of Appeals affirmed, with one justice dissenting on the grounds that the daughters were not before the court in their individual capacities. Another justice that concurred with the majority decision wrote separately to reject the dissenting justice's analysis on the grounds that the daughters were defendants before the court who had participated in the litigation for over seven years and had made unauthorized transfers to themselves from the trust during that time.

Wilbourn v. Wilbourn, 2012 Miss. App. LEXIS 232 (2012)

Co-Trustee removed and denied compensation for actions as chairman of bank owned in part by trust.

Richard Wilbourn II, the largest shareholder of Citizens National Bank of Meridian, left his bank stock in a testamentary trust for the lifetime benefit of his wife, Deanna, with the remainder passing to his children Elizabeth, Garnett, and Richard III ("Richard"). He named his wife, Deanna, and his son Richard as co-trustees.

Although the co-trustees initially agreed on the trust administration and the voting of the bank stock held in the trust, discord arose between them. Richard became chairman of the bank and, distrustful of the bank's CEO, began interfering with the bank's daily management, upset the balance between the bank's board and its management, and lowered employee morale. The CEO complained to Deanna, who confronted Richard about his actions. Richard secretly taped their conversations. As a result of Richard's behavior, the holding company that owned the bank, controlled by Deanna, Garnett, the bank's CEO, and the CEO's father, removed Richard as chairman of the holding company and chairman of the bank.

Three months later, Deanna, Elizabeth, and Garnett attempted to remove Richard as co-trustee pursuant to the trust terms. Richard sued to oppose his removal and counterclaimed to remove Deanna. The trial court held that good cause existed to remove Richard as co-trustee, and Richard appealed.

On appeal, the Mississippi Court of Appeals affirmed the trial court on the grounds that: (1) Richard breached his fiduciary duties by acting as Deanna's attorney, advisor, and as co-trustee while at the same time he was gathering evidence to have Deanna declared incompetent and removed as co-trustee; (2) Richard refused to cooperate with Deanna in voting the bank shares, which resulted in a dilution of their family's control over the bank; (3) Richard pursued his personal interests over the interests of his family when he interfered with the bank's daily management; (4) Richard had engaged in self-dealing, violated his ethical duties as an attorney, and violated the terms of the trust when he attempted to convince Deanna to use the trust to guarantee a $12 million loan and to transfer the bank shares held in the trust to a new trust; (5) the hostility between Richard and his family, caused by Richard's actions, warranted his removal; (6) Richard's hostility towards the trust's beneficiaries defeated the purpose of the trust; (7) Deanna should not be removed as trustee because Deanna, Elizabeth, and Garnett had credible explanations for their attempt to remove Richard and they had acted in good faith; and (8) because Richard presented no evidence that he provided services to the trust, he was not entitled to any trustee's fees.

Reed v. JP Morgan Chase Bank, NA, 2011 OK 93 (2011)

Suit for instructions construing trust terms and settlor's intent does not bar later claim to modify trust terms.

B.B. Weatherby established a testamentary trust for the benefit of his daughter, Reed, and her four children. The trust terms limited discretionary distributions to Reed to only half of the trust income and principal, and could only be made by the corporate trustee as necessary for Reed's health, happiness, maintenance, welfare, or comfort. Reed initially served as co-trustee with Bank One Trust Company.

In 1998, Reed petitioned the court to seek guidance on the payment of certain expenses from the trust and the court authorized the payments out of trust principal. The court also concluded that Reed was entitled to payments of principal until the trust principal was reduced to one-half.

In 2007, Reed, joined by three of her four children, filed an action for an emergency modification of the trust's terms to authorize J.P. Morgan Chase Bank, the successor in interest to Bank One Trust Company, to pay Reed's expenses from the remaining one-half of the trust principal on the grounds that Reed was mentally and physically disabled and the settlor would have wanted Reed to have the funds. J.P. Morgan Chase and Reed's fourth child, Hollon, opposed the modification on the basis that the court's 1998 decision established the settlor's intent as to principal payments and the petition for modification was barred by the doctrines of *res judicata* and collateral estoppel.

The trial court held that the claims were barred by the court's 1998 decision, and Reed appealed. On appeal, the Oklahoma Supreme Court reversed the trial court and remanded the case on the grounds that: (1) although the subject matter, parties, and capacities of the parties remained the same between the two actions, the causes of action in 1998 and 2007 differed; (2) the 1998 action was a request for court instructions to make payments of certain expenses that were expressly provided for in the trust agreement; and (3) the prior action did not involve a request for modification and there was no medical emergency present at that time.

Merrill Lynch Trust Company v. Mary F.C. Campbell, 2011 Del. Ch. LEXIS 205 (January 24, 2011)

Court reverses dismissal of beneficiary claims on laches.

See our prior discussion of the trial court decision.

Mary Campbell individually and as beneficiary of the Mary F.C. Campbell Charitable Remainder Unitrust (the "CRUT") filed suit against Merrill Lynch Trust Company alleging fraud and misrepresentation in connection with the creation of the CRUT. The Delaware Chancery Court found that the alleged misrepresentations were known in 1996 at the time the CRUT was established and the claims were not asserted until 10 years later in 2006 and were thus time barred by the doctrine of laches.

Mary appealed and the Supreme Court of Delaware remanded the case to the Delaware Court of Chancery for reconsideration of its ruling on laches.

On remand, the Delaware Chancery Court reversed its ruling and found dismissal was premature under the doctrine of laches on the grounds that: (1) importing the applicable statute of limitations for fraud to dismiss the claims under the equitable defense of laches was hasty and the traditional test for laches as an equitable defense should have been considered; (2) the traditional test for laches requires the defendant to demonstrate that the plaintiff waited an unreasonable length of time before bringing suit and the delay unfairly prejudiced the defendant; (3) the investment strategy that ultimately caused losses to the CRUT was the product of the CRUTs unusual payout terms; (4) the earliest possible time for charging Mary with knowledge of the faulty terms and investment strategy was the date on which she received a letter from Merrill Lynch discussing the downsides of the CRUT and the investment strategy, rather then the date on which the CRUT had been established; (5) this letter was received less than three years before Mary first asserted her claim and the court found that it could not properly infer that Mary's delay in filing suit was unreasonable given Mary's age, her reasonable reliance on Merrill Lynch as her fiduciary, and the difficulty in linking the CRUT's annual payout to Merrill Lynch's investment strategy; (6) Merrill Lynch had not met its burden in demonstrating that it would suffer prejudice where the claims were largely dependent on documents and recorded investment and trust administration practices; and (7) dismissal under the laches doctrine was inappropriate as premature (but the court noted that a further hearing may render dismissal appropriate).

Commonwealth Bank & Trust Co., et al. v. Young, et al., 2012 Ky. App. LEXIS 40 (February 24, 2012)

Suit against trustee for breach of duty is not a contest that triggers forfeiture clause.

Virginia and William Steineker were married from 1974 until Virginia's death in 2000. Virginia had four children from a prior marriage. Virginia's estate plan included a living trust that established a credit shelter trust and two separate marital trusts. The three trusts had a combined value of approximately $5.7 million. William was the lifetime beneficiary of the trusts and Virginia's children were the remainder beneficiaries. Under the terms of at least one of the marital trusts, William had the right to withdraw 5% of the trust principal annually. William also received the net income from the credit shelter trust. The trusts included a no-contest clause that would be triggered by a beneficiary contesting the validity of the trust.

William died six years later in 2006. National City Bank served as trustee of the three trusts held for William's benefit and it also served as executor of William's estate until it resigned and was replaced as executor by Commonwealth Bank & Trust Company in 2009.

Following William's death, three of Virginia's children filed claims with William's estate and National City Bank alleging that National City Bank distributed to William more of the trust assets than he was entitled to receive. In response, National City Bank sued seeking a determination whether the children's claims triggered the no-contest clause. The children sued on their claims in Kentucky circuit court. Commonwealth became a substitute party to the litigation following its replacement of National City Bank as executor.

The trial court held that the children's action against William's estate did not violate the no-contest clause. On appeal, the Kentucky Court of Appeals affirmed the trial court on the grounds that: (1) the clause was enforceable but the issue was the scope of the clause; (2) the children's claims were not an attempt to invalidate the trust terms, but rather were seeking an interpretation of the trust and a determination whether National City Bank acted improperly under the trust terms; and (3) therefore, the no-contest clause was not violated as it did not apply to the children's claims.

NorthShore University Health System v. Graham, 2012 Ill. App. Unpub. LEXIS 762 (March 30, 2012)

Appellate court reverses award of attorneys' fees against trustee for breach of trust and remands to determine if trustee's conduct justifies the award.

Ruth Stafford created a trust that provided for the distribution on her death in 2009 of 15% of the trust assets to "Evanston Hospital and Glenbrook Hospital." Edward Graham was trustee of the trust following Ruth's death. NorthShore University Health System is a tax-exempt healthcare system whose facilities include Evanston Hospital and Glenbrook Hospital.

In connection with the distribution of the trust assets, the trustee requested that NorthShore execute a release to indemnify the trustee personally and as trustee.

NorthShore requested that the trustee provide a copy of the pertinent portion of the trust evidencing its interest in the trust and an accounting of the trust's assets. The trustee further requested that NorthShore substantiate that it was the proper party to receive the bequest to Evanston Hospital and Glenbrook Hospital. NorthShore complied with this request by providing documentation showing name changes and change in corporate ownership. The Illinois Attorney General's office also opined that it was clear that NorthShore was the entity legally entitled to the distribution. The trustee refused to make the distribution to NorthShore and indicated that the distribution to Evanston Hospital and Glenbrook Hospital may be void or may have lapsed.

NorthShore sued to compel the trustee to make the distribution and provide an accounting and information, and alleged breach of fiduciary duty. On the parties' cross-motions for summary judgment, the trial court granted NorthShore's motion for summary judgment and found that (1) NorthShore was the proper beneficiary of the bequest because the two hospitals were operating at the same locations as they were at the time Stafford created her trust and (2) the trustee breached his fiduciary duties by not recognizing NorthShore as a trust beneficiary, failing to account and provide information, and wasting trust assets. The court awarded NorthShore its attorneys' fees and costs from Graham personally.

On appeal, the Illinois Appellate Court reversed the trial court award of fees against Graham personally on the grounds that: (1) Illinois courts disfavor assessing fees against a losing party and will not do so unless payment of such fees is provided in an agreement between the parties or by statute; (2) the Illinois statute on intentional misuse of charitable assets did not apply; (3) the award of attorneys' fees against Graham personally was punitive; and (4) a punitive damages award is not proper unless the record indicated that Graham's conduct was willful or if there were other aggravating factors existing in the case. The court remanded the case to the trial court to determine whether Graham acted willfully or whether aggravating factors were present to justify punitive damages against Graham.

Clower, et al. v. Wells Fargo Bank, 2012 U.S. Dist. LEXIS 30093 (E.D. Texas, March 7, 2012)

Court dismisses suit attempting to remove corporate trustee because only predecessor bank was named in trust documents.

The beneficiaries of Texas trusts created between 1966 and 1972 sued Wells Fargo Bank alleging constructive fraud on the grounds that Wells Fargo was not named as trustee under the original Texas trust documents. First Wichita National Bank was the initial named trustee of the trusts and through bank mergers Wells Fargo became the trustee of the trusts. The beneficiaries also alleged that Wells Fargo and the prior trustees did not follow the procedures set forth in the trusts to become successor trustee, and sought to remove Wells Fargo as trustee. The District Court for the Eastern District of Texas granted Wells Fargo's motion for summary judgment. The beneficiaries filed what the court deemed a motion to reconsider that the court denied on the grounds that the beneficiaries did not offer any new evidence or identify manifest errors of law or fact, but rather recycled the prior arguments that had been fully briefed, argued and rejected by the trial court.

In re Estate of Alden v. Alden, 2011 VT 64 (Vt. 2011)

Limitations period in trust instrument bars claims against trustee for breach of fiduciary duty.

William C. Alden created a trust in 1973 for the benefit of his second wife, Nancy, their two children together, and William's three children from a prior marriage. Nancy and two independent trustees served as trustees of the trust. Under the trust terms, during Nancy's lifetime the trustees had discretion to distribute income and principal to Nancy and the children for their "comfort, support, education, and happiness." Distributions to Nancy could be made only by the independent trustees. The trust instrument also required that the trustees provide an annual accounting to the beneficiaries and any objection to an item on an accounting had to be made within 60 days or the objection would be deemed to have been waived by the beneficiary.

In 1982, Nancy purchased a two-thirds interest in land in Williamstown, Massachusetts. The trust owned the other one-third interest in the property. In 1993, Nancy sent a letter to all five children stating that she desired that the trust distribute the remaining one-third interest to her. In 2000, Nancy made a formal request to the independent trustees for the distribution of the one-third interest in the property. The independent trustees approved the request and the property was distributed to Nancy. That same year, Nancy purchased a life insurance policy and the independent trustees approved an increase in her monthly distributions from the trust to cover the premiums.

In 1999, one of the independent trustees resigned for health reasons. Nancy's attorney recommended a local accountant as successor trustee and the accountant was appointed by a court order as successor trustee.

In 2006, Nancy sued to remove and replace the two independent trustees. Two of William's children from a prior marriage, Todd and Julia, objected and filed counterclaims alleging that Nancy breached her fiduciary duty by purchasing the Williamstown property and accepting distributions from the trust of the interest in the property and the extra funds to pay insurance premiums, and committed fraud in the appointment of the accountant as successor independent trustee. The trial court granted Nancy's motion for summary judgment and Todd and Julia appealed.

On appeal, the Vermont Supreme Court affirmed the judgment of the trial court on the grounds that: (1) the claim that Nancy breached her fiduciary duties by purchasing the two-thirds interest in the Williamstown property was barred by the applicable six-year statute of limitations, with the limitations period starting on their receipt of Nancy's letter stating her intention to obtain the remaining one-third interest in the trust; (2) the claims regarding Nancy's receipt of distributions from the trust were also time-barred because they were reflected on the annual accountings prepared by the trustees, Todd and Julia each received copies of the accountings, and they failed to object within the 60 day period in the trust agreement; and (3) the fact that accountant appointed as successor independent trustee was not sufficient to show that he lacked independence.

2006 Frank Calandra, Jr. Irrevocable Trust v. Signature Bank Corp., 816 F. Supp. 2d 222 (S.D.N.Y. 2011)

Bank holding trust accounts not liable for trustee's breach of trust.

In 2006, Frank Calandra Jr. created and funded a life insurance trust to own a life insurance policy on his wife's life. Frank named his two children, Kara and Kristin, as well as Edward Stein, as trustees. During the lifetime of Frank's wife, the sole function of the trustees was to pay the policy premiums. The trustees established a checking account at Signature Bank to hold assets received and to pay the insurance premiums. The contract with the bank provided that each trustee could act individually with respect to the trust account.

In 2007, Stein as trustee requested that the address for the trust account be changed so that the monthly statements of account activity would be sent only to his address. Shortly thereafter, Stein stole $750,000 from the trust account by completing a series of wire transfers and writing checks to his personal business entities. Stein falsely informed the bank officer that these transfers were trust investments. The other trustees learned of the fraud when the SEC obtained an asset freeze against Stein and his business entities in 2009 for securities and wire fraud. Stein was sentenced to nine years imprisonment. The other trustees of the insurance trust sued Signature Bank in the U.S. District Court for the Southern District of New York based upon the bank's conduct in failing to monitor the account and for processing the checks and wire transfers to Stein's business entities.

The District Court granted summary judgment for the bank on the grounds that: (1) the bank contract explicitly authorized each trustee to act individually on behalf of the trust; (2) the trust agreement governs only the duties and obligations of the trustees whereas the duties of the bank are set out in the bank contract; (3) it was the duty of the trustees, not the bank, to ensure that the signing authority on the account was consistent with the terms of the trust instrument; (4) the bank met all of its contractual obligations and had no additional obligation to safely protect the trust assets against theft; (5) the bank did not aid and abet Stein in defrauding the trust because the bank did not knowingly or intentionally assist in the embezzlement; (6) it was the duty of the trustees and not the bank to investigate Stein's actions; and (7) the bank was not grossly negligent in protecting the trust's funds because under New York law a depository bank has no general duty to monitor fiduciary accounts to safeguard the assets from fiduciary misappropriation.

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