Recent Cases of Interest to Fiduciaries

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Wortman v. Hutaff, 2012 NCBC 9 (N.C. Super. Ct. 2012)

Trustees owe fiduciary duties until proper resignation under the Uniform Trust Code.

Dan L. Moser died in 2006 with a will designating Thomas M. Moyer III and Richard R. Hutaff as executors. The will directed that, after payment of taxes, the residuary estate poured over to a trust with Moyer and Hutaff as trustees. The executors probated the will and began administration of the estate. In 2007, Moyer and Hutaff filed their written resignations as executors and trustees with the court clerk, and there was no hearing or court approval of the resignations. No successor trustee was appointed by the trust beneficiaries as permitted by the terms of the trust.

In 2009, during the estate administration, one of the primary estate assets, a limited liability company of which Moser had been a one-third member, went into default on a loan with BB&T Trust Company. The bank foreclosed on real property owned by the LLC and the property was purchased at a foreclosure sale, for less than the value of the loan, by a limited liability company owned by the other members of the LLC, of which Moser was a member. The trust beneficiaries sued Moyer and Hutaff for breaches of fiduciary duty related to their failing to participate in and monitor the management of the LLC after their purported resignations. Moyer and Hutaff filed a motion to dismiss on the grounds that they owed no fiduciary duties to the trust beneficiaries because of their purported resignations.

The court denied the motion to dismiss and held that Moyer and Hutaff had not properly resigned in accordance with the terms of the North Carolina Uniform Trust Code, and therefore still owed fiduciary duties to the trust beneficiaries. Pursuant to the North Carolina UTC, a trustee may resign only upon written notice to the qualified beneficiaries of the trust or by court approval. Here, because the trustees merely filed resignation papers with the clerk and did not give written notice to the qualified beneficiaries or obtain court approval of their resignations, the resignations were not effective.

Christie v. Kimball, 202 Cal. App. 4th 1407 (Cal. App. 2d Dist. 2012)

Court has the authority to compel trust accountings.

In 2005, Mary Schwartz created a trust for the benefit of her two daughters, Danita Christie and Paulette Kimball, and named Christie as the sole trustee. Schwartz died in 2008. In 2009, a dispute between Kimball and Christie arose over whether certain real property located in Camarillo, California, was trust property. Kimball filed a petition in the superior court to compel an accounting, and the court ordered Christie to file a formal trust accounting. Christie appealed, arguing that Kimball was not a beneficiary with standing to request an accounting.

The Court of Appeal of California affirmed the trial court on the grounds that: (1) pursuant to the California Probate Code, a court's order that a trustee produce an account or report of the trustee's acts is not appealable; (2) regardless of whether Kimball had standing to request an accounting, the court had the authority to compel an accounting *sua sponte*; (3) where an accounting is necessary to determine the status of trust assets, the court may order one on its own accord pursuant to the court's duty to supervise the trust administration; (4) in this case there were substantial reasons for the court to seek to review the trustee's actions, including claims by Kimball that Christie had removed $129,000 from the trust account and statements by Christie that the trust assets had been depleted; and (5) therefore, the court could reasonably conclude that an accounting was necessary to track trust assets and it was appropriate for the court to order an accounting.

Dunmore v. Dunmore, 2012 Cal. App. Unpub. LEXIS 747 (Cal. App. 3d Dist. 2012)

Trustee has the ability to assign the trust's claims in exchange for a percentage of any recover on the claims.

George and Ruth Dunmore created the Dunmore Family Trust in 1977. During their lifetimes, George and Ruth personally guaranteed a series of bank loans made to their grandsons and their grandsons' company, GSJ Company, LLC. The grandsons and the LLC defaulted on roughly $15 million of these loans. After George's death in 2007, Ruth, as sole trustee, divided the trust in accordance with its terms into two equal shares, one for the benefit of Ruth and one for the benefit of Ruth and her descendants.

Ruth asserted that the trusts held claims against the grandsons and the LLC related to undue influence and forgery in procuring the loan guarantees. Due to her advanced age, she did not feel able to pursue the claims as trustee. She was also unable to find an attorney to help her enforce the claims on a contingent fee basis. Ruth, therefore, desired to sell the claims to her son Steven in exchange for $1 and 55 percent of any recovery. The proposed sale terms required Steven to initiate legal action on the claims within three months or Ruth could revoke the assignment. Ruth petitioned the court to approve the proposed sale. Ruth's son Sidney, the father of the grandsons subject to the claims, objected to the proposed sale, claiming that the proposed assignment lacked consideration and constituted a breach of Ruth's fiduciary duties as trustee. The trial court granted Ruth's petition to allow the sale and Sidney appealed.

On appeal, the California Court of Appeals affirmed the ruling on the grounds that: (1) the sale was for adequate consideration and did not constitute a breach of fiduciary duties; (2) any benefit conferred or agreed to by the parties may constitute valid consideration for a contract; (3) the proposed assignment provided Ruth, as trustee, with a benefit she was not otherwise entitled to receive that was sufficient consideration; (4) the fact that Ruth would have the authority to revoke the assignment if Steven did not initiate legal action within three months of the contract did not render the contract illusory because the right to cancel the contract was not an unqualified right, but rather a time-restricted right; (5) the trust terms and the California Probate Code authorize the trustee to exchange or sell any kind of property and to sell a chose in action in the same manner as personal property; (6) Ruth had the discretionary authority to assign the claims against the grandsons and the LLC; (7) the proposed sale was not an abuse of this discretion because the claims were nonperforming assets of the trust and the assignment of the claims to Steven allowed the trust to potentially recover some funds that Ruth may not otherwise have been able to recover; and (8) the sale also did not violate Ruth's duty of impartiality among the trust beneficiaries because it did not render any additional benefit under the trust to Steven, and Steven will not receive a greater share of the trust assets received as a result of the sale.

Zimmerman v. Patricia E. Zirpolo Trust, 2012 Ohio 364 (Ohio Ct. App., 2012)

Trustee is required under the UTC to provide trust information to the minor beneficiaries' parent as their representative where there is no conflict of interest.

In 2003, Patricia E. Zirpolo created a trust with Paul Milano as trustee and Andrienne Monnot Zimmerman as beneficiary. In 2007, Zirpolo amended the trust instrument to remove Zimmerman as beneficiary and name Zimmerman's children as beneficiaries. Zirpolo died in 2008.

In 2009, on behalf of her minor children, Zimmerman requested that the trustee provide her with a copy of the trust instrument and a report of trust assets and distributions. Milano refused because the trust terms instructed the trustee not to provide information regarding the trust or its proceeds to the beneficiaries until the beneficiaries reach age 35 and were entitled to receive the trust assets.

Zimmerman sued, seeking a copy of the trust instrument and an accounting. The trial court denied Zimmerman's request on the grounds that the settlor's intent regarding disclosure should control and that Zimmerman, as a former beneficiary, was not a proper party to request a copy of the trust instrument and an accounting because she had a conflict of interest with respect to her children. Zimmerman appealed.

On appeal, the Court of Appeals of Ohio reversed the trial court and held that Zimmerman, on behalf of her children, was entitled to a copy of the trust instrument and an accounting on the grounds that: (1) under Ohio's version of the Uniform Trust Code, a parent may represent a minor beneficiary to the extent that no conflict of interest exists; (2) although Zimmerman was a former trust beneficiary, she did not challenge her removal as a beneficiary; (3) because Zimmerman filed her complaint solely in her representative capacity on behalf of her children and did not challenge her removal as a beneficiary, no conflict of interest existed and Zimmerman would be allowed to represent her minor children; (4) a settlor's intent controls unless such intent is contrary to law; (5) the settlor's intent was contrary to the Ohio UTC's provisions requiring a trustee to furnish to a beneficiary upon request a copy of the trust instrument and to keep the current beneficiaries reasonably informed; (5) the statute takes precedence over the settlor's intent and therefore the trustee had the duty to provide the requested documents to the beneficiaries, or, in this case, Zimmerman, as their representative.

Fellows v. Colburn, 162 N.H. 685 (N.H. 2011)

Court does not have personal jurisdiction over trustees and beneficiaries for environmental liability claim over in-state land held in an out-of-state trust.

In 1981, Marvin and Thelma Tennant, residents of Florida, purchased real property in Concord, New Hampshire. In 1991, Marvin and Thelma created a Florida trust for the benefit of their four children, Barbara, Robin, Richard and Ronald, called the Tennant Family Trust and named themselves as trustees. Marvin and Thelma conveyed the Concord property to the trust in 1994. In 1996, the New Hampshire Division of Public Health Services issued an order of abatement, ordering Marvin and Thelma, as trustees, to abate lead paint contamination on the Concord property. Marvin and Thelma did not resolve the lead paint issue. When they sold the property in 2000, they did not warn the purchasers that a lead paint problem existed.

Thelma died in 2004 and Marvin resigned as trustee. Richard and Robin became successor trustees. In 2006, the trustees made a final terminating distribution of trust assets to themselves and their siblings as trust beneficiaries. In 2009, the purchasers of the Concord property sued the successor trustees and the trust beneficiaries in the Merrimack Superior Court for violation of federal law with respect to the failure of the initial trustees to abate the lead paint issue. The successor trustees and beneficiaries filed a motion to dismiss, arguing that the court lacked personal jurisdiction over them since none of them were New Hampshire residents. The trial court held that it had jurisdiction over the successor trustees and beneficiaries, and the successor trustees and beneficiaries appealed.

On appeal, the New Hampshire Supreme Court reversed the trial court and held that New Hampshire did not have personal jurisdiction over the successor trustees or the beneficiaries on the grounds that: (1) Robin and Richard accepted the appointment as successor trustees more than four years after the Concord property was sold, and there was no showing that they had any knowledge of the abatement order or the lead paint problem or had any other involvement with the Concord property; (2) the acts of the successor trustees did not evidence any deliberate contacts with New Hampshire required for personal jurisdiction; (3) the mere receipt of trust property by the beneficiaries, over six years after the sale of the property, did not establish sufficient contacts for personal jurisdiction; (4) the fact that a person became a successor trustee of a trust is not sufficient to show a *prima facie* case of purposeful availment of New Hampshire's laws; (5) under the New Hampshire Uniform Trust Code, if the principal place of trust administration is New Hampshire, the trustees and beneficiaries accept personal jurisdiction by the New Hampshire courts; (6) as a Florida trust, there was no showing that New Hampshire was the principal place of trust administration; and (7) therefore the court did not have personal jurisdiction over the successor trustees or beneficiaries.

In re Pike Family Trusts, 2012 ME 8 (2012)

UTC reverses the common law presumption that a trust cannot be terminated over a spendthrift clause.

Clifton and Doris Pike, husband and wife, executed substantially similar wills on the same day in 1999. Each of the wills provided that the residue of the estate was to be used to establish a family trust for the benefit of the surviving spouse and descendants of the decedent. Each of the wills also contained a spendthrift clause restraining voluntary and involuntary transfers of a beneficiary's interest in the trust. Clifton died in 2003 and Doris died in 2007.

After Doris's death, Joyce and Elaine, the children of Clifton and Doris, filed a petition requesting that the trusts created under Clifton's will and Doris's will be combined and then terminated so that the trust assets would be distributed outright to Joyce and Elaine, as the sole current trust beneficiaries. The contingent beneficiaries consented to the termination and renounced their interests in the trusts. Jeffrey Buhrman, the sole trustee, opposed the termination of the trusts and argued that the spendthrift clauses indicated the intent to retain the trust assets for the beneficiaries rather than having the trusts terminated. The trial court granted the petition of the beneficiaries and the trustee appealed.

On appeal, the Maine Supreme Judicial Court affirmed the trial court on the grounds that: (1) under the Maine Uniform Trust Code, a noncharitable irrevocable trust may be terminated upon consent of all the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust; (2) under Maine pre-UTC law, the common law presumed that a spendthrift clause in a trust indicated that a material trust purpose was to prohibit beneficiaries from control and management of the trust assets; (3) the Maine UTC expressly eliminated this presumption and provides that a spendthrift clause is not presumed to constitute a material trust purpose; and (4) without this presumption, the trustee failed to show that the termination of the trust would violate a material trust purpose.

Snyder v. Snyder, 2012 Cal. App. Unpub. LEXIS 1006 (Cal. App. 2d Dist. 2012)

Trustee may not unilaterally act against votes of majority of trustees.

Brothers Scott, Guy and Thomas Snyder were the settlors, beneficiaries and trustees of the Snyder Family Trust, which was used by the family to manage its real estate holdings in southern California. Beginning in 2008, Thomas began to suspect that Scott and Guy were mismanaging trust assets and committing fraud against the trust. Thomas requested that the trustees hire an auditor to investigate the actions of the trustees. Scott and Guy disagreed with Thomas's proposal and refused to hire an auditor.

In 2009, Thomas unilaterally withdrew $20,000 from the trust account and hired a lawyer to investigate any breaches of trust and prepare an accounting. Scott and Guy objected and demanded that Thomas return the funds. Months later, Thomas withdrew an additional $60,000 to pay the attorney. In 2010, Scott and Guy filed a petition seeking an order stating that the trust instrument does not permit Thomas to unilaterally act over the objections of the other two trustees and ordering Thomas to return the $80,000. The trial court concluded that the trust instrument permitted unilateral action by a trustee. Scott and Guy appealed.

On appeal, the California Court of Appeals overruled the trial court and held that Thomas was not entitled to act unilaterally with respect to the withdrawal of trust assets on the grounds that: (1) although the trust instrument provided that any trustee "shall have the full and exclusive power to operate the business and affairs of the Trust as if such Trustee was the individual and absolute owner thereof," the trust instrument later stated that "[i]f more than one Trustee is acting at any time, and a difference arises among the Trustees which affects the Trust, the decision of a majority in number of the Trustees then acting shall control"; (2) reading both provisions together, where the co-trustees have acting together to consider a proposed action and the majority of the trustees has expressly disapproved of such action, a single trustee may not take unilateral action in contravention of that majority decision; and (3) it was therefore not permissible for Thomas to withdraw the trust assets to pay the lawyer after the majority of the trustees decided against that action.

Jervis v. Tucker et al., 2012 Fla. App. LEXIS 1781 (Feb. 8, 2012)

Post-guardianship trust amendment invalid where capacity not restored in the manner required by trust terms.

Bernice Meikle created a trust in 1991 and designated herself as co-trustee. She named her three siblings, including Donald Jervis, and her sister-in-law as beneficiaries. Meikle later executed a will and a first amendment to the trust that provided for the distribution of the trust assets between her siblings, her stepdaughter and her step-grandchildren.

Years later while Meikle was staying at a rehabilitation facility, she began a friendly relationship with a security guard. Meikle's family believed that the guard was disturbing her life and taking her money, and felt that Meikle was unable to protect herself. As a result, Donald Jervis filed a petition to determine whether Meikle lacked capacity to handle her affairs, and also sought a limited guardianship. On October 30, 2000, the court entered an order declaring Meikle incapacitated and appointed Jervis as limited guardian of her person and property. On December 27, 2001, Meikle executed a second amendment to her trust that reallocated the distribution of her assets.

After Meikle's death in 2007, John Tucker, Larry Tucker, Susan Burrell and Sandra Gigler filed a complaint against Jervis as trustee of the trust, arguing that the second amendment was invalid because Meikle never obtained court approval to execute the second amendment. The trial court granted summary judgment in favor of the beneficiaries, finding that Meikle was incapacitated at the time of the second amendment, rendering it void and of no legal effect. Jervis appealed, arguing that there was evidence from Meikle's treating physicians that proved that she had the requisite capacity to execute testamentary documents and thus execute the second trust amendment. The beneficiaries argued that Meikle's capacity at the time of the amendment was irrelevant because she had previously been declared incapacitated by the court and her capacity had not been restored by court order prior to her execution of the amendment.

On appeal, the Florida Court of Appeals affirmed the trial court on the grounds that: (1) the plain language of the first amendment provided for suspension of Meikle's rights pertaining to the trust if adjudicated incapacitated by a court; (2) the first amendment also made clear that after an adjudication of incapacity by the court, Meikle's rights relating to the trust could be restored only by court order or by the opinion of two licensed physicians; (3) even though Jervis proffered the opinion of a licensed physician, the additional opinion rendered by a nursing home administrator without a medical license was insufficient to meet the requisite two opinions required to restore Meikle's power to control her trust property; and (4) because the first amendment was validly made before the determination that Meikle was incapacitated, and expressly stated that certain things had to occur in order to restore capacity, the trial court had appropriately stayed within the four corners of the document in finding that Meikle lacked the capacity to execute the second amendment.

Bellamy v. Langfitt et al., 2012 Fla. App. LEXIS 1543 (Feb. 8, 2012)

Court cannot reform a trust to eliminate corporate co-trustee directly contrary to settlor's intent and trust terms.

Robert Bellamy created a trust in 1982 that he also subsequently amended. Following his death in 2006, the remaining co-trustees were his wife; his wife's adult daughters from a previous marriage, named Langfitt and McMerty; his accountant, Kathryn Posten; and Northern Trust as corporate trustee. The trust instrument provided that a corporate co-trustee would serve at all times after the settlor's death. The trust provided for cash gifts and for the creation of two sub-trusts, a family trust and a grandchildren's trust.

In 2009, Langfitt petitioned to remove the accountant as co-trustee for breach of fiduciary duties. While this petition was pending, the co-trustees drafted proposals pertaining to the administration and distribution of the trust assets among the trusts. Northern Trust, Mrs. Bellamy and Ms. Posten voted to adopt several proposals that were opposed by the adult daughters. In July 2010, the adult daughters entered into a settlement agreement with Ms. Posten, allowing her to resign as trustee and releasing her from liability. Despite Mrs. Bellamy's opposition, the trial court approved the settlement agreement.

In January 2011, the adult daughters and Northern Trust entered into a settlement agreement, subject to court approval, that discharged and released Northern Trust as corporate trustee and provided that Merrill Lynch would act as custodian to receive and hold the income from the trust and pay the trust expenses. The adult daughters then filed a joint petition for approval of the settlement agreement and the discharge of Northern Trust as corporate trustee.

Mrs. Bellamy answered the suit, requesting that a corporate successor trustee be appointed and seeking damages against Northern Trust, alleging that it had breached its fiduciary duties by entering into the settlement agreement and by requesting that the court modify the trust to allow for a corporate custodian rather than a corporate trustee to serve in its place.

The trial court entered an order granting the joint petition approving the settlement agreement as fair and reasonable and in the best interests of the trust, Mr. Bellamy's estate, the sub-trusts and the beneficiaries. The trial court also approved Northern Trust's resignation and discharge as trustee and authorized Northern Trust to transfer the trust assets to Merrill Lynch to serve as custodian. In approving the settlement agreement, the trial court found that modification of the trust in favor of a custodian over a corporate trustee was permissible because the purpose of the corporate trustee was no longer served because the trust was substantially administered, the court had determined the issues regarding funding of the sub-trusts and both sides of the dispute over the funding of the sub-trusts were represented by counsel. Lastly, the trial court dismissed Mrs. Bellamy's complaint with prejudice, finding that the claim for removal of Northern Trust was moot and that Northern Trust had not breached its fiduciary duties by entering into the settlement agreement with the adult daughters. Mrs. Bellamy appealed.

On appeal, the Florida Court of Appeals agreed with Mrs. Bellamy and reversed and remanded the case on the grounds that: (1) the direction that there always be a corporate trustee after the settlor ceased to serve and the provisions requiring replacement after any resignation reflected the settlor's determination that a corporate trustee was essential to the administration and distribution of trust assets; (2) Mr. Bellamy had specifically addressed and prohibited judicial modification of the trust even as allowed by statute and even if a court found modification to be in the best interests of the beneficiaries; (3) accordingly, the trial court had impermissibly modified the trust contrary to the terms of the trust instrument expressing the settlor's intent; (4) a custodial arrangement in lieu of a corporate trustee was not appropriate because the trust had not been fulfilled and more than routine ministerial functions remained; and (5) although Mrs. Bellamy had agreed to Northern Trust's resignation, she did not agree to excuse Northern Trust from its duty to provide a final accounting or release it from liability, if any.

In re Estate of Mumma, 2012 Pa. Super LEXIS 41 (Feb. 22, 2012)

Multiple roles as fiduciary and beneficiary are not enough to justify removal of trustee named by settlor in the absence of a breach of trust.

Robert M. Mumma died on April 12, 1986, leaving a will that established two trusts, a marital trust and a residual trust. Mr. Mumma named his wife, Barbara Mumma, and one of his daughters, Morgan, as the co-trustees of both trusts and co-executrixes of his estate. On July 10, 2010, Mrs. Mumma died and Morgan became the sole trustee of the two trusts created by Mr. Mumma. Mrs. Mumma had named Morgan as the executrix of her estate and the principal beneficiary of her will. Morgan also served as the sole trustee of a trust that Mrs. Mumma had established during her lifetime for which Morgan was the sole beneficiary.

Prior to Mrs. Mumma's death, Morgan and Mrs. Mumma filed a final accounting for Mr. Mumma's estate, including accountings for the marital trust and the residual trust. Robert Mumma II and his sister Barbara M. Mumma filed numerous objections to the accounts and various motions related to the estate and accounts. After Mrs. Mumma's death, Morgan filed a final account for the two trusts and petitioned the trial court for confirmation of the accounts. Robert and Barbara objected to the accounts.

Robert filed a motion for disqualification, seeking removal of Morgan as executrix of Mr. Mumma's estate and as trustee of the marital and residual trusts. Robert argued that Morgan's dual roles as executrix and primary beneficiary of the estate of Mrs. Mumma and co-executrix and trustee of the estate of Mr. Mumma established a conflict of interest resulting in a breach of Morgan's fiduciary duties through her failure to avoid placing herself in a position where her own interests conflicted with interests of Mr. Mumma's estate, the residuary trusts and the beneficiaries of each.

Hearings were held on the objections to the accounts and the motion for disqualification. The trial court found no impermissible actions or omissions by Morgan, approved her manner of obtaining appraisals for the trust assets and her proposed plan for termination of the trusts and distribution of the trust assets, and denied Robert's motion for disqualification. Robert appealed.

On appeal, the Pennsylvania Superior Court consolidated Robert's six counts, finding that Robert essentially presented a single issue for consideration: whether Morgan's dual roles in connection with the estates of Mr. Mumma and Mrs. Mumma constituted a conflict of interest requiring her disqualification and removal.

The court first noted that to remove a trustee under Pennsylvania law is a drastic remedy and that the need for such action must be clear. Further, removal under 20 Pa C.S.A. 3182 must be viewed in conjunction with the settlor's expressed confidence in the selected trustee, should only occur when required to protect the trust property and cannot occur unless some fiduciary duty has been violated. The mere displeasure of the beneficiary is not sufficient grounds for removal. The court found that Morgan had not breached her fiduciary duty where she was granted considerable discretion in the trust instrument when distributing assets from the trusts to the beneficiaries at the death of Mrs. Mumma, and that the record contained no evidence that funds were improperly transferred from Mr. Mumma's estate to Mrs. Mumma's estate (of which Morgan was the primary beneficiary) prior to Mrs. Mumma's death. The court rejected Robert's contention that Morgan's dual roles constituted an inherent conflict of interest requiring her removal without any proof of bad faith or fraudulent intent. The court found that no "intractable conflict of interest" existed and that while Morgan was the executrix and trustee in connection with both her father's and her mother's estates and trusts and also the beneficiary of both, this did not, in itself and without a more specific conflict, present the type of conflict of interest that would prevent her from carrying out her fiduciary duties in all her various roles.

In re Estate of Fridenberg, 2011 Pa. LEXIS 2820 (Nov. 23, 2011)

Pennsylvania Supreme Court upholds modern fiduciary statutes and eliminates arcane common law restrictions on trustee compensation.

Anna Fridenberg died on March 26, 1940, leaving a will that provided that the residue of her estate and appointive property be held in trust for five named individuals. At the death of each individual, the remainder of the net income was granted to the Jewish Hospital Association of Philadelphia for the perpetual upkeep, maintenance and support of the Fridenberg Memorial Surgical Building. Mrs. Fridenberg appointed Philip Goldsmith and Fidelity-Philadelphia Trust Company as executors of her estate and as trustees under her will. Wachovia Bank, N.A., was the successor to Fidelity and, after the individual successor trustee died, Wachovia filed the third account of the Fridenberg Trust, detailing the trust activities from the close of the second account period in 1978 to the death of the individual successor trustee in March of 2005.

The accounting included requests for commissions to be paid out of the principal for Wachovia and Mr. Taylor. The Pennsylvania attorney general objected to this request, arguing that the law in effect at the time the trust was created prevented parties who served as both executors and trustees under a will from receiving more than one commission from principal and that Wachovia's corporate predecessor had already received such a commission. The Orphans' Court sustained the objection, holding that the law at the time the trust was created barred more than one commission despite subsequent changes in the law.

Wachovia appealed and the Pennsylvania Superior Court reversed, holding that numerous legislative enactments over the past 50 years permitting more than one commission for a previously established trust were constitutionally valid. The attorney general petitioned for appeal, which the Superior Court granted to consider the sole issue of whether testamentary trustees who were paid a commission of principal for executor services prior to 1945 may receive an additional commission on principal for ordinary services as trustees.

On appeal, the attorney general argued that the court should be bound by prior Pennsylvania case law, *Williamson's Estate*, 368 Pa. 343 (Pa. 1951) and *Scott's Estate,* 418 Pa. 332 (Pa. 1965), which denied retroactively allowing more than one commission of principal, arguing that such a retroactive application would be unconstitutional and violate the beneficiaries' due process rights and the contract clause. Wachovia responded by arguing that all concerns about unconstitutional retroactivity were unwarranted where between 1998 and 2005, the period during which Wachovia sought commissions, the same Section 7185 of the Pennsylvania Probate, Estates and Fiduciaries Code governed trustee compensation and allowed a court to award to a trustee compensation that was determined to be reasonable and just under the circumstances and that was allowed from trust principal. Further, Section 7185 stated that it applied to all trusts created before, on or after Feb. 18, 1982, and unlike *Williamson's Estate*, the law in effect during the entire time the trustee was seeking compensation allowed for more than one commission from principal.

Turning to an examination of legislative intent and the various changes in statutory trust law over the years, the court rejected the attorney general's argument and upheld the commissions. The court noted that the fiduciary landscape had changed significantly since the trust was created, when preserving principal was the priority and where there was little flexibility in the investments that trustees could make. The court noted that with the adoption of the "prudent person standard" and later the "prudent investor standard" for evaluating a trustee's investment and modern portfolio theory, trustees became more active in managing the trust portfolio and investment risks became more tolerable, requiring considerable research and analysis of each potential investment and overall strategy. The court noted that the legislature proscribed that Section 7185 should apply to trusts created before 1982 and departure from *Williamson's Estate* was warranted where, examined in light of modern reality, the reasons for the precedent no longer existed.

The court also rejected the attorney general's argument that the beneficiaries' rights under the contract clause were being infringed upon. The court found that where the trust instrument itself contained no compensation clause, compensation was left largely to relevant statutes and the discretion of the courts, and the contract clause was not implicated. Accordingly, the court found that the legislature intended to do away with the prohibition against receiving more than one commission from principal and that the legislature's statutory enactments to that effect were constitutional, rendering Wachovia's request for additional commissions from principal valid.

Downey, et. al. v. Keltz, 2012 U.S. Dist. LEXIS 11453 (Jan. 31, 2012)

The probate exception to federal court jurisdiction does not apply to an action to compel a trustee to account.

William P. Drewry established a trust and served as sole trustee until his death in 2009. At that time, Marshall Keltz became the sole successor trustee of the trust. Keltz was Drewry's partner and was also named beneficiary of the trust. Under the trust terms, Keltz was to receive an immediate benefit from the trust and was also the beneficiary of a continuing trust. Upon Keltz's death, 13 beneficiaries, including the plaintiffs Anna Downey and Jacob Drewry, were to take the remaining trust proceeds. The terms of the trust required the trustee to provide an accounting to each adult vested beneficiary of the trust. The plaintiffs requested an accounting and inventory of the trust assets. Keltz failed to provide one. The plaintiffs sued Keltz in federal court, seeking an accounting and alleged that Keltz's failure to provide an accounting was a breach of Keltz's fiduciary duty.

Keltz sought to dismiss the claims under the probate exception to federal court's subject matter jurisdiction. The U.S. district court agreed with the plaintiffs, finding that the claims were not covered by the probate exception to federal subject matter jurisdiction.

Faville v. Burns, 2011 Ill. App. LEXIS 1062 (Sept. 30, 2011)

Appellate court reverses dismissal of claims by adopted children to be declared trust beneficiaries and to remove trustee for conflict of interest arising from status as contingent remainderman and objection to adopted children being recognized as beneficiaries.

Martin Burns died in 1939. His will divided his estate into three equal trusts, one for his wife, one for his son, Martin Jr., and one for his daughter, Barbara. Upon the death of Martin's wife, her share was divided equally between Martin Jr.'s and Barbara's trusts. Barbara was the sole lifetime beneficiary of her trust. She received the trust's income, but the principal of the trust was reserved for the trust's remaindermen, Barbara's then-living descendants, *per stirpes*.

Barbara appointed Martin Jr. as trustee of her trust in 1979. Barbara's and Martin Jr.'s relationship later deteriorated to the point that Barbara asked that Martin Jr. resign as trustee of her trust. He refused to resign and Barbara sought to appoint American Bank as successor trustee, but Martin Jr. would not transfer Barbara's trust property to American Bank. In 2009, Barbara legally adopted the plaintiffs, Andrew and William Faville, who were Barbara's adult stepchildren. Prior to Barbara's adoption of the plaintiffs, Martin Jr. would have been the sole remainderman of Barbara's trust.

Barbara sought a declaratory judgment that she had the power to remove Martin Jr. as trustee of her trust and that the plaintiffs were her descendants for purposes of distributing the remainder of her trust. One month after filing her action, Barbara died. The plaintiffs filed an amended complaint naming themselves as plaintiffs in the declaratory judgment action. The trial court granted Martin Jr.'s motion to dismiss the plaintiffs' action under an adult adoption provision of the Illinois Probate Act and held that the plaintiffs failed to state a cause of action under the Illinois prudent investor rule.

On appeal, the Illinois Appellate Court reversed the trial court's dismissal of the plaintiffs' claim that they were Barbara's descendants. The court found that the trial court relied on a section of the Illinois Probate Act that concerned the determination of Barbara's legal descendants under the terms of the trust that was inapplicable to Martin Burns' 1939 will.

The appellate court also considered the plaintiffs' claim that Martin Jr. should be removed as trustee of Barbara's trust because of Martin's alleged conflict of interest as a remainder beneficiary of Barbara's trust. The court agreed that the plaintiffs stated a sufficient claim that Martin Jr.'s status as a contingent remainderman of Barbara's trust created a conflict of interest that rendered him unfit to serve as trustee of the trust. The court cited Illinois precedent established by the Illinois Supreme Court where it was held that it is proper for a court to remove a trustee who is a contingent remainderman of the trust due to the conflict between the trustee's contingent remainder interest in a trust and the life beneficiary's present interest. The court looked to Martin Jr.'s refusal to resign as trustee, even upon the insistence of Barbara, and Martin Jr.'s refusal to acknowledge the plaintiffs as Barbara's legally adopted children as sufficient evidence to support the plaintiffs' claim that Martin Jr. should be removed as trustee. Accordingly, the appellate court found that the trial court erred in dismissing the plaintiffs' claim to remove the trustee.

The court otherwise found that the plaintiffs had failed to plead sufficient facts to state a claim that the trustee violated the prudent investor rule where the trust instrument gave the trustee wide discretion to invest the trust assets. The trustee was not required to invest the trust assets in order to produce a certain level of income, nor was the trustee required to maximize the trust principal.

Carter v. Carter, 2012 Ill. App. LEXIS 84 (Feb. 7, 2012)

Court affirms dismissal of surcharge claim against surviving spouse for investing marital trust assets as trustee in municipal bonds to increase her own income distributions from trust.

Luther Reynolds Carter Jr. created a living trust that, upon his death in 2003, created three separate trusts, including a marital trust. Luther's wife, Audrey Carter, was the sole trustee of the marital trust. The terms of the marital trust directed that Audrey was to receive all income from the trust but none of the principal. Upon Audrey's death, the remainder of the marital trust was to pass to Luther's daughter, Tiffany Carter. Tiffany was Audrey's stepdaughter.

Following Luther's death, Audrey invested the entire principal of the marital trust in municipal bonds. The terms of the marital trust gave the trustee broad discretionary investment powers and specifically permitted the trustee "to invest in bonds, common or preferred stocks … of any investment company … regardless of diversification." Tiffany sued her stepmother, alleging breaches of the duty of impartiality, duty of prudent investment, duty to properly manage trust assets and duty to preserve trust property.

On the parties' cross-motions for summary judgment, the trial court granted summary judgment in favor of Audrey. On appeal, Tiffany contended that the trial court misinterpreted Luther's intention for creating the marital trust and she urged the appellate court to find that Audrey was prohibited from investing only in municipal bonds by the common law fiduciary duties of impartiality and prudence and the provisions of Illinois' prudent investor rule.

The Illinois Court of Appeals rejected Tiffany's arguments and affirmed the trial court on the grounds that: (1) under the clear terms of the martial trust, Luther intended that all income payments were to go to Audrey during her lifetime; (2) the trust instrument authorized the trustee to invest in property "regardless of diversification" and Luther intended Audrey to be able to generate income for her benefit from nearly any investment; (3) no language in the marital trust required Tiffany's remainder interest in the marital trust to be protected against the impacts of inflation; (4) even though Audrey's investment strategy of investing only in municipal bonds could cause the principal of the marital trust to erode due to inflation, Audrey's strategy was nevertheless consistent with Luther's intent in creating the marital trust; (5) Illinois' prudent investor rule permits the rule to be "expanded, restricted, eliminated or otherwise altered" by a trust instrument; and (6) Luther expressly gave Audrey the authority to make investments without regard to diversification and therefore specifically altered the requirements of the prudent investor rule.

Estate of Boyar v. Dixon, 2012 Ill. App. LEXIS 51 (Jan. 26, 2012)

The doctrine of election applies to a trust and bars claims to invalidate a trust amendment brought after receiving a distribution.

Robert Boyar executed a pour-over will that transferred all his assets to his trust. In 2003, Boyar also executed instruments that caused his tangible personal property to be transferred to the trust. The trust was amended six times. Until the sixth amendment to the trust, Boyar's son Robert and the Northern Trust Company were designated as successor trustees of the trust. In the sixth amendment to the trust, Boyar named his neighbor, Grant Dixon, as sole successor trustee. Under this amendment, the trustee could not be removed by a majority of the trust's beneficiaries, who were Boyar's five children.

Following Boyar's death in 2010, Dixon became sole trustee of the Boyar Trust. Plaintiff Robert Boyar filed a probate petition and was appointed the representative of Boyar's estate. Upon learning of the sixth amendment to the Boyar Trust, Robert filed suit against Dixon, alleging that: (1) Boyar suffered from dementia and lacked the mental capacity to execute the sixth amendment; (2) Dixon breached a fiduciary duty to the trust beneficiaries by orchestrating his placement as trustee of the trust and not allowing the trustee to be removed; and (3) Dixon exerted undue influence on Boyar during the creation of the sixth amendment.

Dixon filed a petition to discover and recover assets that belonged to the trust, pursuant to Boyar's lifetime assignment of his personal property to the trust. After some delay, Robert provided Dixon with a receipt for 14 items of personal property that Robert acknowledged taking from Boyar's home. Robert stated that he and his siblings divided Boyar's items among themselves, consistent with the trust terms. While Dixon's petition to discover and recover assets was pending, Dixon filed a motion to dismiss Robert's petition to contest the sixth amendment to the trust. Dixon asserted that Robert's petition was barred by Illinois' doctrine of election, which prohibits a party from accepting a benefit under a will and simultaneously contesting the validity of the will.

The circuit court granted Dixon's motion to dismiss Robert's petition in its entirety based on the doctrine of election. On appeal, the Illinois Court of Appeals affirmed the dismissal of Robert's petition challenging the sixth trust amendment based on the doctrine of election, and on the grounds that: (1) although the issue of whether the doctrine of election applies to trusts was one of first impression in Illinois, Illinois courts generally apply the same rules of construction to trusts as they do wills; (2) the doctrine of election should apply to trust construction in Illinois; (3) Robert was barred from challenging the sixth amendment to the trust because he had accepted personal property from the Boyar Trust on two occasions; (4) the "taking of inconsistent positions … rather than the value of the property" controls the doctrine of election, and therefore a small distribution could trigger the doctrine; and (5) none of the exceptions to the doctrine of election applied because Robert had full knowledge of the relevant facts and circumstances related to the trust and its sixth amendment, the sixth trust amendment was not contrary to public policy and Robert did not volunteer to return the personal property he had taken from the Boyar Trust until after the circuit court had granted Dixon's motion to dismiss, some nine months after Robert had accepted the trust property.

Whitman v. Whitman, 2012 Ohio 405, 2012 Ohio App. LEXIS 366 (Feb. 6, 2012)

Appellate court affirms criminal sentence for custodian and trustee who defied court order and refused to account.

Between 1984 and 1994, Jeffrey Whitman, a licensed Ohio attorney, established several custodial accounts for the benefit of his son, Justin, under the Uniform Gift to Minors Act (UGMA) and Uniform Transfer to Minors Act (UTMA). He also established three trusts for Justin's benefit: a "College Fund Trust," a "Revocable Trust" and a

"Grandfather Trust." The College Fund Trust contained custodial funds belonging to Justin. The Revocable Trust allegedly contained Jeffrey's personal money. The Grandfather Trust was established pursuant to the will of Jeffrey's father. Jeffrey served as fiduciary for all these accounts and trusts.

In 2007, Justin filed a petition for an accounting of the custodial accounts and the trusts, alleging that Jeffrey had failed or refused to provide an accounting upon request. On July 21, 2008, in a hearing on Justin's petition, the trial court held that Justin was entitled to an accounting on all the above accounts and trusts. The trial court gave Jeffrey 30 days to file an accounting of the College Fund Trust and 60 days to file an accounting of the other accounts and trusts. In its docket entry describing the order, the court stated that Jeffrey's accounting must comply with the definition of an "accounting" as applied "in terms of a fiduciary accounting in probate court."

On September 16, 2008, well past the 30-day deadline regarding the College Fund Trust, Justin filed a motion for contempt, alleging that Jeffrey failed to comply with the previous order. On September 19, 2008, Jeffrey filed a two-page document, along with more than 40 pages of supporting documents, as the accounting of all the accounts and trusts. Jeffrey's filing provided no information about the UGMA/UTMA custodial accounts and consisted of financial statements, letters from the financial entities that issues the statements and a two-page list of disbursements prepared and signed by Jeffrey. On November 4, 2008, Justin supplemented his motion for contempt with a motion to strike the accounting and requested an investigation.

At a November 7, 2008, hearing on Justin's motion for contempt, Jeffrey admitted that his accounting was inadequate. The trial court gave Jeffrey two weeks to submit an appropriate accounting. On November 26, more than two weeks after the November 7 hearing, Jeffrey filed a second accounting in which he provided more detail for each account, including beginning and ending balances, but again omitted the UGMA/UTMA accounts, claiming that he had no records prior to 2000 for those accounts and that the account funds had been rolled into the College Fund Trust.

The trial court held two hearings on Justin's motion for contempt. Through evidence presented during the hearings, it became clear that Jeffrey had made several withdrawals from the College Fund Trust that were not included in his accountings to the court. Jeffrey also represented to the court that the Revocable Trust contained only his personal funds and that he was entitled to revoke it at any time. The trial court found that Jeffrey's accounting of the Grandfather Trust was sufficient, and that Jeffrey had sufficiently purged his contempt with respect to the Revocable Trust, but that Jeffrey failed to properly account for College Fund Trust and the UGMA/UTMA accounts.

The trial court held Jeffrey in civil contempt and appointed a forensic accountant to conduct an investigation into the College Fund Trust and the UGMA/UTMA accounts. The trial court ordered Jeffrey to cooperate with the forensic accountant and explicitly warned Jeffrey that further noncompliance could result in jail time.

On February 22, 2010, the forensic accountant filed her report with the court. She found that the College Fund Trust consisted of the funds from the UGMA/UTMA accounts and that approximately half of the funds were transferred out of the trust. She could not determine the purpose of those transfers, and Jeffrey provided no explanation. In examining the UGMA/UTMA accounts, the accountant determined that $65,085 had been transferred into the Revocable Trust and that this amount was the largest sum of funds deposited in that trust, so she also conducted an accounting of that trust. The accountant also determined that two W-2s had been issued to Justin by Jeffrey's business, reflecting income paid to Justin as an employee. Jeffrey admitted that Justin never worked for his business.

After reviewing the evidence, the trail court held Jeffrey in civil contempt for failing to account for the UGMA/UTMA accounts and the College Fund Trust. The trial court withdrew its finding that Jeffrey purged himself of contempt regarding the Revocable Trust and found him in contempt for failure to account for the funds in that trust. The trial court ordered Jeffrey to pay the accountant's fees and sentenced him to serve three days in jail. The trial court awarded Justin the remaining funds in the College Fund Trust and the Revocable Trust. The trial court also awarded Justin $104,128.57 in attorney fees.

Jeffrey appealed, asserting three assignments of error. In his first assignment, he claimed that the trial court erred in finding him in civil contempt because no principal was missing from the funds at issue and all the funds were identifiable and traceable. The Ohio Court of Appeals noted that the underlying controversy centered around Jeffrey's failure to provide an accounting upon request and not the issue of misappropriation of funds, which Justin did not pursue. The facts raised by Jeffrey, that no principal was missing and all funds were identifiable and traceable, were irrelevant to the trial court's finding of contempt for failure to provide an adequate accounting. The appellate court noted that the trial court gave Jeffrey multiple opportunities to comply with its order for an appropriate accounting, that Jeffrey failed to cooperate with the accountant as ordered and that Jeffrey misrepresented to the trial court the source of the funds in the Revocable Trust. The appellate court overruled Jeffrey's first assignment.

In his second assignment of error, Jeffrey claimed that the trial court abused its discretion in sentencing him to jail, claiming that his jail sentence was a criminal contempt sanction not available for a finding of civil contempt. The appellate court noted that the Ohio statute for civil contempt expressly permits imprisonment for up to 30 days, that the trial court gave Jeffrey an opportunity to cooperate and comply with the court's order and that the trial court expressly warned Jeffrey that further noncompliance could result in jail time. The appellate court upheld the civil contempt finding and the jail sentence and overruled Jeffrey's second assignment.

In his third assignment of error, Jeffrey claimed that Justin was not the correct party to be awarded fees, that the trial court awarded fees for an incorrect period of representation and that the trial court's award of fees violated the local rules of court. The appellate court found that Justin was the correct party, having personally signed the fee agreement with his attorneys. The court also noted that Justin's attorneys presented detailed information documenting their representation of Justin and that Jeffrey's failure to cooperate was the primary cause of the fees. The court dismissed as irrelevant the local rule of court cited by Jeffrey and overruled his third assignment.

Damas v. Damas, 2011 Ohio 6311, 2011 Ohio App. LEXIS 5180 (Dec. 9, 2011)

Beneficiary-trustee did not breach his fiduciary duty by, pursuant to the trust terms, distributing trust assets to a LLC of which he was a member.

Mike Damas was a past mayor of Toledo, Ohio, and a real estate businessman. He created a revocable trust in 2001 to which he contributed shares to three real estate holding companies that he had formed with a sister in the 1950s; these shares were reflected on Schedule A to the trust. Mike amended the trust on February 22, 2003, and died on April 13, 2003. He had three nephews, Nage, Tom and Rick. At Mike's death, Nage succeeded Mike as trustee.

In 1996, Mike had encouraged the three brothers to form a real estate business ("CB3"), to which he contributed the seed money. Six years later, after a falling-out among the brothers, Nage left CB3. In January 2003, Rick agreed to purchase both Nage's and

Tom's interests in CB3. Meanwhile, Nage operated another real estate business, Camel Investments, which he owned with a partner.

Mike amended the trust on February 22, 2003, to provide that the trustee "may, in his discretion, transfer the securities reflected in Schedule A to Camel Investments, LLC." Previously, the trust contained an identical provision permitting the transfer to CB3. The amended trust agreement also provided for the creation of an education trust for the purpose of assisting Mike's nieces and nephews with their education costs. If the trustee did not distribute the securities, they would become additional assets of the education trust. Nage, as successor trustee after Mike's death, distributed the securities to Camel Investments on May 15, 2003.

Nage filed a declaratory judgment action on December 14, 2004, asking the court to declare (1) that the trust agreement was validly executed and amended and (2) that the distribution of securities to Camel Investments was proper. Tom, Tom's children and Rick (the "Appellants") opposed Nage's action and asked the court to declare the amendment invalid and to set aside the transfer of securities. In addition, they asked the court to order an accounting, remove Nage as trustee and award attorney fees. Nage moved for summary judgment.

The trial court granted Nage's motion for summary judgment, declaring the trust and amendment valid, and holding that the distribution of securities was proper. The trial court also awarded attorney fees to Nage, which were to be paid from trust assets. The appellants appealed, asserting three assignments of error.

Their first assignment of error claimed that the court erred in finding that the distribution of securities was not a breach of Nage's fiduciary duties of loyalty and impartiality. Nage argued that the distribution was expressly authorized by the terms of the trust, and therefore he could not have breached his fiduciary duty. The trial court agreed, relying on a provision of the Ohio code that dealt with self-interested sales of trust assets, which provided that such transactions were not breaches of fiduciary duty. The appellate court noted that although the provision concerned the sale of trust assets and was not directed at distributions to beneficiaries, the principle espoused nonetheless applied as a matter of common law to distributions to beneficiaries. Relying on the express authority granted in the trust agreement, the appellate court concluded that Nage did not violate his duties of loyalty and impartiality when he distributed the securities to Camel Investments, and overruled the first assignment.

The Appellants' second assignment of error concerned the application of Section 1340 of the Ohio code, which prohibits a fiduciary from exercising discretionary authority to make a distribution to the fiduciary in his or her individual capacity. Nage argued that the distribution to Camel Investments, of which he was a partner, did not qualify as a distribution to himself in his individual capacity. The appellate court, concluding that the statute's language was clear and unambiguous, held that the distribution was not to Nage in his individual capacity and overruled the assignment.

The appellants' third assignment of error contested the trial court's award of attorney fees. Nage also appealed the award, and argued that the trial court should have awarded the fees against the Appellants personally instead of against the trust assets. The award of attorney fees in declaratory judgment actions is proper if a provision of the Ohio code authorizes the award for the underlying legal claims. Section 5810.04 of the Ohio code authorizes the award of attorney fees in proceedings involving the administration of a trust. The appellate court overruled both assignments.

Cohen v. Cohen, 34 Misc. 3d 1207A, 2012 N.Y. Misc. LEXIS 25 (Jan. 5, 2012)

Court rejects standing challenge and allows third party claims in connection with a lawsuit concerning a family limited partnership due to public policy against the judicial enforcement of illegal contracts.

In 1972, Stanley and Lorraine created a for-profit college known as Five Towns College and were its sole shareholders until 2002. In 1992, they created a grantor trust as part of a sophisticated estate plan. They had three children: Janet, David,, and Martin. The trust was intended to hold real property on which Five Towns College was to be located. Stanley was the president of the college. With a $900,000 down payment from Stanley, the trust financed the rest of the land purchase with a local industrial development agency bond and a loan from a local bank. Stanley paid off the mortgage over the next several years, taking back a promissory note from the trust in the amount of $2,454,670.

Under the terms of a lease agreement between the trust and the college, the college had an option to purchase the property at a specific point in the future at the higher of $3,000,000 or the fair market value of the property. The lease agreement was apparently amended to reduce the college's option to purchase to the value of 30 vacant one-acre residential lots. Additionally, the college entered into a loan agreement with the trust for $10 million to be used for the exercise of its purchase option. Allegedly, the resulting debt was to be forgiven.

In 2002, Stanley and Lorraine created a family limited partnership for the purpose of transferring their stock in the college to their children. They gave six limited partnership shares and sold six limited partnership shares to each child, resulting in each child owning 22 percent of the limited partnership. For the six shares sold to each child, the child executed a promissory note. Allegedly, the college made distributions to the children, at Stanley's direction, to enable the children to pay the interest on the notes.

In 2004, Lorraine died. According to David and Janet, Stanley began using his position as president of the college to pay himself large sums that would otherwise have been used to pay the children and make rent payments to the trust. In 2008, Stanley fired Janet as general counsel to the college. In retaliation, she petitioned the probate court for an accounting of the trust. Stanley then tried to remove her as a partner of the family limited partnership.

Meanwhile, David also filed an action against Stanley, seeking an accounting of the family limited partnership, removing Stanley from the partnership and restricting the powers of Stanley and the college to prevent any additional payments to Stanley. In 2009, Janet brought an additional action against Stanley, the college and its board of trustees, alleging breach of fiduciary duties.

In evidence presented to the court, many improprieties came to light. Both Janet and David presented sworn affidavits in which they claimed that Stanley was well aware of his children's inability to repay the various promissory notes involved in the plan, and assured them that he would cause distributions to be made from the partnership for purposes of repaying the notes. They also claimed that Stanley admitted the issuance of the notes was a formality intended to avoid gift tax liability. Stanley's trust and estate lawyer presented an affidavit in which he disavowed knowledge of the sham transactions. According to the various affidavits, payments on the notes were not made from the children's personal funds. Despite previous statements suggesting otherwise, David and Janet denied that tax fraud was the purpose of the family limited partnership and trust.

In 2011, the college and its board of trustees intervened in the actions brought by David and Janet, and moved for summary judgment dismissing their complaints. The college asserted that the purpose of the family limited partnership and the trust was tax fraud, and that enforcement of the partnership agreement and trust agreement would result in judicial enforcement of illegal contracts. Additionally, the college alleged that it paid salaries to the three children and to Stanley, which were taxed only as personal income and not as profits of the family limited partnership as required by Internal Revenue Code § 162(a)(1).

David and Janet challenged the college's intervention, arguing that the college lacked standing to challenge the enforceability of the partnership and trust agreements. They also argued that even if the underlying transactions resulted in the imposition of the gift tax, the failure of Stanley and Lorraine to pay gift tax would not affect the enforceability of the partnership and trust agreements. They also argued that the college came to the court with unclean hands because the college was aware of Stanley's actions and aided him in the implementation of the plan. Finally, given that the college knew of the agreements since 1992 and 2004, they argued that the college was barred by laches for waiting until late 2010 to bring its motion. As part of their challenge, David and Janet asked for sanctions against the college for its motion.

The Supreme Court of New York for Suffolk County, although sympathetic to the college's arguments, ultimately dismissed the college's motion for summary judgment. The court held that the issue of standing was not relevant to the proceeding, because New York case law permits a court to allow a motion based on illegality that invokes principles of public policy, regardless of the movant's standing. The court also dismissed David and Janet's argument that the college's motion was barred by the doctrine of unclean hands and laches, because public policy prevented the court from ignoring the potential illegality of Stanley and Lorraine's estate plan. Despite its rejection of David and Janet's challenges to the college's motion for summary judgment, the court concluded that David and Janet had raised genuine disputes as to material facts — particularly, the legitimacy of the partnership and trust. The court dismissed the college's motion for summary judgment but also dismissed the motions for sanctions against the college, noting that the issues raised by the college were far from frivolous.

Matter of Deneny v. Rossem, 34 Misc. 3d 1203A, 2011 N.Y. Misc. LEXIS 6357 (Dec. 29, 2011)

Co-trustee removed for refusal to cooperate and failure to manage trust property that caused harm to the trust.

John Deneny created a revocable trust for the benefit of his son, Sean, and his daughter, Barbara. John intended for the trust to hold a certain apartment building located in New York City. He appointed Sean and Barbara as co-trustees of the trust.

As co-trustees, Sean and Barbara acquired title to the building in 2005. Barbara moved in and began using the building as her primary residence. Sean lived in California from 2007 until 2010, when he returned to New York. Sean and Barbara agreed that Barbara would be responsible for collecting rent checks and managing the property.

Sean petitioned the court to remove Barbara as co-trustee, alleging that she failed to administer the trust properly. Sean alleged that Barbara filled 10 of the 20 apartments with excrement, vermin and garbage. The court noted that the trust's bank account was nearly depleted, and that any trust income was spent on trust expenses or used by Barbara for her personal shopping. Barbara also failed to pay the water bill, resulting in an acceleration of all unpaid water bills, which totaled $21,426.74. She failed to file a real property income and expense report, which subjected the trust to a penalty of up to 3 percent of the building's actual assessed value. Sean alleged that the poor condition of the property resulted in tenants complaining, breaking their leases and abandoning the property. Finally, Sean also alleged that Barbara was abusive toward him and his children and refused to cooperate with him in the administration of the trust.

Barbara denied Sean's allegations, and charged that Sean failed to manage the trust's finances. She alleged that Sean failed to pay for repairs, pay vendors and taxes and make the required filings. Barbara petitioned the court to terminate the trust.

Sean opposed Barbara's petition for termination of the trust, arguing that he repaired the property, rented five units and increased the income-producing potential of the property.

The court found that it was an undisputed fact that Barbara failed to maintain the property and the trust's finances appropriately, and that her unwillingness to cooperate with Sean had impeded Sean's efforts to maintain the property. Due to these facts, the court granted Sean's petition to remove Barbara as co-trustee. Finding that there was no dispute as to the property's income-generating capability, the court concluded that termination of the trust was unwarranted.

Matter of Chantarasmi, 2012 N.Y. Misc. LEXIS 302 (Jan. 26, 2012)

Constructive trust imposed to enforce premarital agreement.

Walter Braun was married to his wife, Pia, with two infant children, Cameron and Skye. Walter and Pia had executed a prenuptial agreement, under which Pia waived her right to share in his estate if they had no children. Walter agreed that if they were married and had children, he would leave 30 percent of his estate in a trust for the benefit of his wife and 70 percent of his estate in a trust for the benefit of his children. The agreement specified that the trustees of both trusts would be Pia; Walter's father, Peter; and Walter's brother, Christopher. Walter died intestate.

Pia, Peter and Christopher petitioned the Surrogate's Court of New York for Westchester County to impose a constructive trust on 70 percent of the estate. They asked the court to authorize the distribution of 70 percent of the estate to two irrevocable trusts for the benefit of Cameron and Skye. The proposed trusts would permit the trustees to make discretionary payments of income and principal to the beneficiaries. Each trust would terminate upon the beneficiary reaching age 35, and the trustees would make partial distributions of principal when the beneficiary reached ages 25 and 30. The trustees waived their right to commissions under the proposed trust agreements. The terms of the trusts waived the need for a bond, established a nonjudicial procedure for a trustee to resign, relieved the trustees of the duty to account and exonerated the trustees from liability for the acts of their co-trustees. The terms also included the right to arbitrate any dispute.

The court first concluded that it could create a constructive trust on these facts, as Walter's failure to leave a will constituted a breach of the premarital agreement. Pia, Peter and Christopher, as guardians of the property, could enforce the contract by means of a constructive trust.

The court generally approved the creation of the trusts. It noted that the prenuptial agreement clearly designated the beneficiaries, the trustees and the subject property of the proposed trusts. It approved most of the proposed terms, including the trust's duration, the discretionary standard for distributions of income and principal, and the appointment of Pia, Peter and Christopher as co-trustees. The court found that certain provisions could not be included, as Walter could not have included them in a trust created under his will. The problematic provisions included the nonjudicial process for resignation of a trustee, the waiver of the duty to account, the exoneration of trustees from the acts of their co-trustees and the right to arbitrate disputes.

Having identified and rejected the problematic provisions, the court authorized the creation of the proposed trusts, subject to revisions removing those provisions.

Vinton v. Virzi, 2012 Co. 10, 2012 Colo. LEXIS 92 (Feb. 13, 2012)

Appellate court rejects amended fraud claim that added trustee's attorney as a party and forcing the attorney to withdraw.

Walter and Elaine created a trust in 2002, with themselves as initial trustees and their daughter Debra as successor trustee upon their deaths. Debra became successor trustee in 2007, after the death of Elaine. The trust provided for the distribution of three-quarters of the trust assets to Debra and one-quarter to Sharon, her half-sister. The trust included two pieces of real property in California.

After disputes arose over the administration of the trust, Sharon requested an accounting of the trust property. She received several accountings and then petitioned the probate court to review Debra's actions as trustee. Sharon alleged that Debra undervalued the trust property and committed fraud by falsely listing the California real property as trust assets. The California real property had previously been titled in Debra's name.

During a deposition, Debra provided statements that were interpreted by Sharon to be concessions that Debra's attorney was aware of the correct titling of the California real estate when Debra provided the accountings. In light of these statements, Sharon amended her fraud claim and added Debra's attorney, Amanda, as a defendant. The probate court permitted the amendment, which forced Amanda to withdraw as Debra's counsel. Amanda filed two motions to dismiss for lack of subject matter jurisdiction and failure to state a claim. The probate court denied both and took the extra step of awarding attorney fees to Sharon on the ground that Amanda's motions were frivolous. Amanda petitioned directly to the Supreme Court of Colorado for relief.

The Supreme Court of Colorado dismissed Sharon's claim of fraud against Amanda and overturned the probate court's award of attorney fees. The court noted that strong public policy concerns require a trial court to "carefully scrutinize the totality of the circumstances" to determine if permitting an amended pleading amounts to undue prejudice when it forces the removal of an adverse party's counsel. The court stated that a determinative factor of the analysis is whether the amended pleading would be "futile" — unable to withstand a motion to dismiss.

Sharon's claim of fraud lacked a necessary element because she failed to establish that she relied on Amanda's representations concerning the ownership of the California real property. The deeds were publicly accessible and Colorado case law does not permit a party claiming fraud to rely on a false representation where the true facts are equally available to both parties. Additionally, Debra was never required to title the property with reference to the trust in order to hold the property as a trust asset. Merely titling the real estate in her name did not contradict the inventories' listing the same as assets of the trust. For these reasons, the Supreme Court of Colorado concluded that Sharon's amended claim of fraud against Amanda was futile, and should not have been granted in light of the undue prejudice to Debra that resulted.

The court also held that Amanda's motions to dismiss were rational arguments based on Colorado statutory authority and case law, as well as legal principles from other states.

The court held that her motions were therefore not frivolous and the award of attorney fees was in error.

Waterfield v. The Trust Company of Oxford, 960 N.E.2d 800, 2011 Ind. App. LEXIS 1973 (Dec. 30, 2011)

Appellate court affirms dismissal of summary judgment for trustee on claims that beneficiary consents to trust reformation were obtained by fraud where their mother and grandmother presented the signature pages at a holiday family meeting.

In 1997, John and Ruth established a trust for the benefit of their daughter, Julie, and her three children, and named themselves as co-trustees along with The Trust Company of Oxford. Richard and Randall are Julie's sons. Under the initial terms of the trust, Julie was entitled to an annual distribution of $100,000, and the trustees could distribute income and principal to Richard and Randall for their health, education, maintenance and support, as determined in the trustees' discretion. At the termination of the trust, the remaining assets poured into two other trusts created by John and Ruth. Under the terms of those trusts, Richard and Randall were each entitled to an annual distribution of $25,000 and could receive discretionary distributions of income and principal. After John's death, Ruth served as co-trustee with the trust company.

In 2002, Ruth pledged $1.5 million to a university to be funded with stock from her personal assets. The stock later became worthless. After some discussion, Ruth and the trust company agreed that the trust would have to be reformed so that Ruth could achieve her charitable goals. Under the terms of the trust, Ruth was required to get court approval for the proposed reformation. The trust company, working with Ruth's attorney, filed a petition to reform the trust. Among other things, the petition increased the amount of Julie's annual distributions from $100,000 to $275,000. The court granted the petition, provided that all primary, remainder and contingent beneficiaries filed a written consent to the reformation.

Ruth's lawyer prepared the consent forms, which he read to Ruth and Julie. Ruth and Julie told the lawyer that they would obtain the signatures of Julie's children over the holidays. On December 26, at a family meeting at Ruth's house, Julie's children executed the consent form. According to Richard, they signed just the signature page a few days before the meeting and did not see the entire consent form at that time. On January 6, 2003, the trust company filed the executed consent forms with the court, and the court granted the petition for reformation. On January 8, 2003, Ruth's lawyer then sent a letter enclosing the complete consent form to Richard.

On March 24, 2006, more than three years later, Richard and Randall entered into a tolling agreement with Julie and the trust company that preserved any causes of action not yet tolled. On March 22, 2007, they filed a complaint against Julie and the trust company, alleging that their signatures had been obtained by fraud and alleging breach of fiduciary duty and breach of trust. Julie and the trust company moved for summary judgment, which the trial court granted. Richard and Randall appealed that decision.

The Court of Appeals of Indiana affirmed the trial court's order granting summary judgment. The sons' claim of breach of fiduciary duty alleged injury to personal property, for which the statute of limitations in Indiana was two years. The statute of limitation for their claim of a breach of trust was three years. The appellate court noted that Ruth's lawyer sent his letter enclosing copies of the executed consents on January 8, 2003. Richard and Randall's claims for breach of fiduciary duty and breach of trust began to run on that day, and expired on January 8, 2005, and January 8, 2006. Having concluded that these two claims were time barred, the appellate court affirmed dismissal.

Because the statute of limitations regarding claims of fraud and constructive fraud was six years, the appellate court examined the sufficiency of Richard and Randall's claims. The court concluded that the sons' claims of fraud and constructive fraud were insufficient for failure to show an actual injury as a result of the alleged fraud. The trust was expected to pass more than $32 million into the trusts for Richard and Randall's benefit, and the expected total distributions to Richard and Randall was slightly less than $15 million. The court found that Julie's increased annual distributions would have "no discernible effect" on distributions to Richard and Randall.

Richard and Randall argued that an allegation of harm to the body of a trust is sufficient injury to sustain a claim of fraud. The appellate court noted that Indiana case law supporting this position, however, refers to claims for breach of fiduciary duty or breach of trust — both of which were time barred in this case. The court also held that mere "legal injury" was insufficient.

The appellate court, having concluded that Richard and Randall failed to allege injury on their claims of fraud, affirmed the trial court's order dismissing Richard and Randall's claims and granting summary judgment for the trust company and Julie.