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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In re Ruby G. Owen Trust, 2012 Ark. App. 381 (Ark. Ct. App. 2012)

Courts Refuse to Modify Trust to Create Special Needs Trust

In 2009, Ruby Owen created a trust for the benefit of her grandchildren, including her granddaughter, Kristian Owen. One year later, Kristian was diagnosed with schizophrenia and shortly thereafter Ruby died. Pine Bluff National Bank, as successor trustee, petitioned the Jefferson County Circuit Court to modify Kristian's trust to become a special-needs trust. The trial court rejected the petition, finding that the proposed modification would violate Arkansas public policy forbidding the use of trusts to sequester resources to qualify for government assistance. The trustee appealed.

On appeal, the trustee argued that under the Arkansas Trust Code a court can consent to a modification of a trust if the court finds the modification would provide a general benefit to the beneficiary or, separately, if the court finds the modification will further the trust purposes given circumstances unanticipated by the settlor. The trustee further argued that the trust instrument required the trustee to always consider other assets available to Kristian before making distributions and to make preservation of principal a priority. According to the trustee, these clauses indicated Ruby's intention that the trust assets be used as Kristian's secondary resource and not her primary means of care.

The Arkansas Court of Appeals affirmed the trial court on the grounds that: (1) Arkansas law explicitly prohibits the use of trusts as devices to sequester assets to qualify for medical assistance; and (2) because the purpose of the modification was to assist Kristian in qualifying for public benefits, the modified trust terms would be void on public policy grounds since the change would serve to artificially impoverish the beneficiary.

Hawk v. Comm'r, T.C. Memo 2012-154 (T.C. 2012)

Tax Court Denies Summary Judgment for Marital Trusts in Transferee Liability Case

Billy F. Hawk, Jr. owned Holiday Bowl, Inc., a corporation that owned and operated bowling alleys. After his death in 2000, Mr. Hawk's stock in Holiday Bowl passed to his wife and to marital trusts for her benefit. Mrs. Hawk and the trustees decided to sell the bowling alleys and the company. While in negotiation with a potential purchaser, the trustees and Mrs. Hawk were approached by a representative of Mid Coast Investments, Inc. who stated that Mid Coast was interested in purchasing the Holiday Bowl stock after the bowling alleys had been sold. Mid Coast indicated that it would be receiving a loan from an offshore company to purchase the Holiday Bowl stock and would use the proceeds from the sale of the bowling alleys to operate a new business.

Holiday Bowl sold the bowling alleys in March 2003. In November 2003, Mrs. Hawk and the trustees sold the Holiday Bowl stock to Mid Coast. Mid Coast then immediately sold the Holiday Bowl stock to its offshore investor. In 2004, Holiday Bowl filed its 2003 corporate income tax return reporting gains and losses. The Internal Revenue Service audited the return in 2005 and assessed income tax deficiencies of almost $1 million against Holiday Bowl. By this time, Holiday Bowl had been dissolved. The IRS asserted that the assets of Holiday Bowl had been transferred to Mrs. Hawk and further that Mrs. Hawk and the trustees were liable for Holiday Bowl's deficiency. Mrs. Hawk and the trustees petitioned the case to the U.S. Tax Court and filed a motion for summary judgment.

The IRS argued that the sale to Mid Coast was a fraudulent conveyance under Tennessee law, designed to defraud the IRS out of income tax due because, as a result of the transaction, the cash on hand resulting from the sale of the bowling alleys was removed by the purchaser, rendering the corporation insolvent and unable to pay its income tax liability. The IRS argued that, in form, the transaction was a disguised liquidation in which the assets of Holiday Bowl were distributed to Mrs. Hawk and the trustees. Therefore, under Tennessee and federal law, Mrs. Hawk and the trustees would be liable, as Holiday Bowl's transferees, for Holiday Bowl's income tax liability. Mrs. Hawk and the trustees countered that Holiday Bowl was solvent after the transaction and that the funds used to purchase Holiday Bowl came from the cash Mid Coast received from its offshore lender. The IRS argued that there was no evidence that Mid Coast received a loan from its offshore lender to purchase Holiday Bowl. Accordingly, the Tax Court concluded that there are disputed issues of material fact and thus denied the motion for summary judgment.

Kesling v. Kesling, 967 N.E.2d 66 (Ind. Ct. App. 2012)

Settlor is the Owner of Revocable Trust's Stock for Shareholder Agreement Purposes

Peter Kesling and his children were the primary shareholders of TP Orthodontics, Inc. (TPO), a closely-held corporation organized under Subchapter S of the Internal Revenue Code. Peter's son Andrew served as president of TPO. TPO's shareholder agreement provided that any proposed transfer to a person or entity that was not then a current shareholder of TPO was void unless the current shareholders were given a first right to purchase the shares to be transferred. An exception to this provision existed for transfers from a shareholder to his or her revocable trust for estate planning purposes so long as certain requirements were met.

In 2001, Andrew created a revocable trust naming himself as trustee and beneficiary, and transferred all of his shares of TPO to his revocable trust in accordance with the shareholder agreement. In 2004, tension developed between Peter and Andrew related to company matters. Andrew and Peter agreed that Andrew would purchase some of Peter's shares of TPO such that Andrew would become a 51 percent and controlling shareholder of the company. The sale from Peter to Andrew was completed in June 2004.

In 2008, Andrew's siblings filed a complaint in the Lake, Indiana Superior Court claiming that because Andrew had transferred his shares of TPO to his revocable trust in 2001, the 2004 sale from Peter to Andrew was a sale to a person other than a current shareholder that should have triggered the right of first purchase provisions of the shareholder agreement. The siblings asserted their rights, as the other shareholders, to purchase Peter's shares. Peter asserted that the sale should be rescinded and the stock returned to him.

The trial court held that: (1) Andrew was not a shareholder from 2001 to 2004 because he had transferred his shares to the trustee of his revocable trust; (2) Andrew's status as an existing shareholder was material to the transaction because of the terms of the shareholder agreement; (3) a mutual mistake of material fact existed between the parties with respect to Andrew's status as an existing shareholder at the time of the transaction; and (4) therefore the transaction should be rescinded. Andrew appealed.

On appeal, the Court of Appeals of Indiana reversed the trial court on the grounds that: (1) because Andrew was the grantor, trustee, and lifetime beneficiary of the revocable trust he should be deemed to be a shareholder for purposes of the shareholder agreement at the time of the 2004 sale; (2) for many state law and federal tax purposes, including creditor's rights and estate tax purposes, a revocable trust and its grantor are considered an inseparable single entity; and (3) although legal title to the TPO shares was held by the trustee, Andrew should be deemed an existing shareholder with respect to the 2004 sale because assets owned by a revocable trust should be treated as owned by the individual grantor and trustee.

McCann v. McCann, 275 P.3d 824 (Idaho 2012)

Corporate Squeeze-Out is Not a Derivative Claim

Before his death in 1997, William McCann operated McCann Ranch & Livestock Company, Inc., a closely-held corporation, with his wife, Gertrude, and his two sons, Ron and Bill. After William's death, Bill became president and CEO of the corporation. Relations soured between Bill and Ron. In 2000, Ron filed a complaint in the Idaho District Court alleging certain derivative claims against Bill and the directors of the corporation for breach of fiduciary duties, negligence, self-dealing and conversion of corporate assets. The court dismissed Ron's suit for failure to meet Idaho's statutory requirements for filing a corporate derivative action.

After the initial lawsuit, Bill's salary substantially increased. In addition, the corporation paid Gertrude unsubstantiated consulting fees and otherwise provided financial benefits to Gertrude and Bill. The corporation also reduced its dividends and refused to hire Ron as a corporate employee. In 2008, Ron filed a second lawsuit whereby he amended his complaint to allege individual harm as opposed to a derivative action. Ron's complaint alleged that the corporation engaged in a "squeeze-out," defined as actions taken by controlling shareholders to deprive a minority shareholder of his interest in the business or a fair return on his investment. Ron requested that the corporation be dissolved.

The trial court denied Ron's claims on the grounds that they were derivative claims that did not meet the statutory requirements for a derivative action, and granted summary judgment to the corporation. Ron appealed.

On appeal, the Idaho Supreme Court reversed the trial court on the grounds that: (1) Ron's breach of fiduciary duty claim against the corporation was an individual claim and not a derivative claim; (2) some of the actions appear derivative in nature because the most obvious victim of the phony transactions with Gertrude is the corporate coffers; (3) nevertheless, much of the harm done affected Ron to a greater degree than the shareholders in general; (4) although Ron is not entitled to a dividend or a corporate job, these facts may evidence a corporate squeeze-out; (5) because each of these actions hurt Ron individually, and more than other shareholders, a material question of fact existed as to whether the corporation engaged in a squeeze-out; and (6) therefore summary judgment in favor of the corporation was improper.

Further, the Idaho Supreme Court held that the district court erred in granting summary judgment on the issue of the corporate dissolution on the grounds that: (1) Ron had presented sufficient facts to establish that the corporation was suffering irreparable harm; (2) the assets that were transferred to Gertrude and could not be recovered resulted in irreparable financial harm to the corporation; (3) the foreseeable tax penalties related to the allegedly fraudulent actions also would result in irreparable harm to the corporation; and (4) if, on remand, the district court finds that Ron was squeezed out of the corporation, the dissolution of the corporation would be a proper equitable remedy under Idaho law.

Puritas Metal Prods. v. Cook, 2012 Ohio 2116 (Ohio Ct. App., 2012)

Funding of Marital Trust Following Death of Grantor Not a Transfer that Triggers Right of First Refusal on Corporate Stock

In 1997, Robert Cook and four others incorporated Puritas Metal Products, Inc. Robert then transferred his shares to his revocable trust. The five owners then created a corporate code of regulations to govern, among other things, the transfer of Puritas shares. The regulations provided a right of first refusal for the corporation and the shareholders in the event any shareholder attempted to transfer his shares to any person who was not a current shareholder.

Robert died in 2002. In accordance with the terms of his revocable trust, after certain assets were transferred outright to his children, the remaining trust assets were to be held in a marital trust for the benefit of Robert's wife, Barbara. Christopher Cole, one of the other Puritas shareholders, filed a complaint in the Lorain County Common Pleas Court alleging that Robert's death triggered the right of first refusal under the regulations. The trial court held that the marital trust was a separate trust from Robert's revocable trust and that Robert's shares had to be first offered to Puritas and the shareholders before they could be validly transferred to the marital trust. Barbara appealed.

On appeal, the Ohio Court of Appeals reversed the trial court and held that no transfer occurred that triggered the right of first refusal under the regulations on the grounds that: (1) applying its policy of strictly construing share-transfer restrictions, the marital trust was not a new independent legal entity and therefore no transfer occurred at Robert's death; (2) in order to conclude that a particular transfer is prohibited under a shareholder agreement, the restriction must be expressly provided for and not merely implied; and (3) under the terms of Robert's revocable trust, at Robert's death the Puritas shares were to be "held" as a marital trust as opposed to transferred to a marital trust.

Matter of Korn, 36 Misc. 3d 1224A (N.Y. Sur. Ct. 2012)

Trustee Acted Prudently by Declining Option to Purchase Interest in Family-Owned Real Property

Robert Korn, Sr., died in 1989 survived by his wife and three sons. Under his will, Mr. Korn created a marital trust for the benefit of his wife, Edith, with his son Edward as trustee. In 2008, Edward filed an accounting for the trust in the Surrogate's Court of New York. Edward's brother, Robert, filed a series of objections to the accounting, with his primary objection being that the trustee's investments were imprudent.

Robert alleged that the trustee was negligent in failing to purchase a 51.66 percent tenant-in-common interest in real property located in Florida owned by other members of the extended Korn family. Under the tenancy-in-common agreement, the marital trust had a right of first refusal of the interest for sale. The interest was offered for $2.5 million. Robert argued that his appraiser valued the interest at $3.3 million and thus the failure to purchase the interest was imprudent.

The court determined that the trustee acted prudently and did not breach his fiduciary duties with respect to the Florida real estate on the grounds that: (1) the prudent person standard of investing governed the trustee and required that the trustee employ diligence and prudence in the care of the trust assets equivalent to that of a prudent person of discretion and intelligence in managing his or her own affairs; (2) it was appropriate that the trustee did not purchase the real estate interest because the trust was already heavily invested in real estate and the trust did not have sufficient liquid assets to purchase the interest without borrowing cash; and (3) the trustee's appraiser valued the real estate interest at less than $2.5 million.

Robert also claimed that the trustee overpaid with respect to certain costs and expenses related to the trust. First, Robert objected to the trustee's payment of expenses in connection with the trust's real estate in Colorado, including the painting of the house and replacing of cabinets and a dishwasher. The court rejected these objections and stated that the expenses were ordinary and necessary maintenance expenses and a fiduciary is authorized to make ordinary repairs and further has a fiduciary duty to preserve trust property. Robert also objected to the payment of the trustee's legal fees related to the trust out of the trust assets. The court also denied this objection and found that the attorneys' fees were just and reasonable given the extent of the work required.

Blankenship v. Wash. Trust Bank, 281 P.3d 1070 (Idaho 2012)

Beneficiaries of Separate Trusts Lacked Standing to Challenge Loan by Trustee Out of Trust Assets

Althea Bowman was survived by her four children, Ryan, William, Teresa, and Eric. Under her will, Althea created separate trusts for each child with Washington Trust Bank as trustee. In 2007, the trustee executed a loan to Ryan from the assets of Ryan's trust and secured the loan by placing a mortgage on real property owned by Ryan's trust. Shortly thereafter, Ryan's siblings sued the trustee, alleging that the trustee breached its fiduciary duties by completing the loan transaction with Ryan. The trustee argued that it had lawfully managed the trust assets and that the siblings lacked standing to object to the loan to Ryan. The trial court dismissed the siblings' claim because the loan was authorized under Idaho law and Althea's will. The siblings appealed.

On appeal, the Idaho Supreme Court did not reach the merits of the trustee's actions because it dismissed the siblings' claims for lack of standing on the grounds that: (1) the plain language of the trust provided that each of Althea's children would be a beneficiary of a separate trust consisting of one-quarter of Althea's residuary estate; and (2) because the loan to Ryan affected only Ryan's trust, the siblings failed to allege a personal stake in the outcome of the controversy required to establish standing.

In re: the Trust created by Lydia Butler Dwight, 2012 NY Slip Op 22229 (August 10, 2012)

Term "Lawful Issue" in Trust Created in 1971 Does not Include Child Born out of Wedlock

Lydia Butler Dwight created a trust for the benefit of her "lawful issue" per stirpes. Linda was survived by three children, Maitland Sr., Jacqueline and Robert. Maitland Sr. died and his income became distributable to his three children, Mary, Margaret and Maitland Jr. Maitland Jr. died survived by one nonmarital child, Heather. JPMorgan Chase Bank, N.A., as trustee of the trust filed a suit for aid and direction to determine whether the trust term "lawful issue" included Heather.

Heather submitted evidence that she was Maitland Jr.'s daughter, including affidavits from both of her paternal aunts who would have otherwise received her share; her birth certificate listing Maitland Jr. as her father; photos; letters; a copy of the will of Maitland Sr. specifically naming Heather as his granddaughter and beneficiary; and a copy of the will of Maitland Jr., naming Heather as his daughter, executor, and beneficiary.

The court held that the term "lawful issue" could only be interpreted to include marital children on the grounds that: (1) in spite of the extensive evidence of paternity that would have allowed Heather to take under the laws of intestacy from her father, the evidence did not suffice to qualify her as "lawful issue" under the terms of the trust instrument; (2) under the law as it existed when the trust was created in 1971, "lawful issue" included only those children born in wedlock; (3) after the execution of the trust instrument, New York enacted a law that allows for a child born out of wedlock to be adjudicated legitimized and thus deemed "lawful issue," but this statute was ineffective to render Heather a beneficiary because it was not the law when the trust was executed and would be applied only where there was a court adjudication of legitimacy.

In re: the Cecilia Kincaid Gift Trust for George, 2012 MT 119 (May 29, 2012)

Child Given Up for Adoption Excluded as Beneficiary by Trust Terms

In 1976, Cecilia Kincaid Bates created a trust for the benefit of her son, George. George died intestate on Oct. 15, 2009, triggering the termination of the trust and the distribution of the remaining trust assets under the trust instrument. In November 2010, the trustees filed a final account and petitioned for settlement and distribution of the trust assets. George's child, Jennifer Fazio, whom George had given up for adoption, objected to being omitted from the proposed trust distribution. The trust terms instrument provided upon George's death for distribution to George's "living descendants" defined to include lawful blood descendants, but also provided that an adopted child would be considered the child of the adopting parent and not the natural parents. The trial court construed the trust to limit the adopted child provisions to only children adopted into the family (and not Jennifer who was adopted out of the family) and held that Jennifer was entitled to a distribution from the trust. The trustees appealed.

On appeal, the Montana Supreme Court reversed the trial court and excluded Jennifer from the trust distributions on the grounds that: (1) the trust terms were not ambiguous and that the plain meaning of the trust made no distinction between children adopted into the family and children adopted out of the family; (2) language would need to be added to include Jennifer, and adding terms to the trust was improper; and (3) the plain language of the trust excluded Jennifer as George's descendant.

Estate of Emma Boehm, et al. v. Ramos, 2012 ND 104 (May 17, 2012)

Court Applies Probate Code to Construe Will and Include Child Given up for Adoption as Beneficiary

Alicia Rae Ramos was born to Kelly McCormick and William Boehm on Aug. 15, 1979. Kelly and William never married and ended their relationship several years later. In July 1982, Kelly married Bernard Schumacher, and in November 1983 Schumacher adopted Alicia, at which time William's parental rights were terminated. William ceased seeing and spending time with Alicia at that point but later, when Alicia attained age 15, William became reacquainted with his daughter and spent time with her.

In February 1995, William's mother, Emma, executed her will that divided the residue of her estate into seven shares for her children. For any child that predeceased her, Emma provided in her will that the child's "surviving issue shall take by right of representation." Emma Boehm died in 2010 and William predeceased her. William's child petitioned to determine her status under Emma's will. The trial court included Alicia as a devisee under Emma's will because William functioned as a parent to Alicia before her 18th birthday. The personal representative under Emma's will appealed.

On appeal, North Dakota Supreme Court affirmed the trial court on the grounds that: (1) the North Dakota probate code defines the terms "issue" and "child" for purposes of intestate succession; (2) those terms were not defined in Emma's will; (3) the probate code in effect at the signing of the will provided that an adopted child was still the child of the natural parent where the child is adopted by the spouse of a natural parent; (4) this provision applied to Alicia, who was adopted by her mother's spouse, and therefore she was entitled to take under Emma's will; (5) a conflicting provision of the Uniform Adoption Act did not apply because the probate code must control probate matters, such as construction of a will.

Heath v. Heath, 2012 Conn. Super. LEXIS 1437 (June 5, 2012)

Court Refuses to Interpret "Legal Representatives" in Trust As Meaning Settlor's Children

In 1953, Aloise Buckley Heath created the Hembdt trust. The trust assets consisted of oil, gas and mineral rights. The trust terms provided that upon Aloise's death the royalty interests would pass to her legal representatives, heirs-at-law, or next of kin. Upon Aloise's death in 1967, the trustees and the executors under Aloise's will determined that the trust terms required that the royalty interests pass to the decedent's estate, which resulted in the royalty interests being distributed between the marital trust (for her husband's benefit) and the children's trusts (for the benefit of her 10 children). The distribution of assets was determined and agreed to be approximately 54.4 percent to the marital trust and 45.6 percent to the children's trusts.

Six of Aloise's 10 children sued alleging that the entirety of the royalty interests should have been distributed to them as the decedent's heirs-at-law and should not have passed to the estate. The children claimed that the settlor intended that the assets pass to her children and that the term "legal representatives" in the trust meant Aloise's children. The children sought damages (including treble damages), an accounting, and declaratory judgment. Aloise's surviving husband and the trustees raised special defenses of laches, waiver, and equitable estoppel.

The court found that the trustees had not abused their discretion when interpreting the terms of the trust to mean that the royalty interests passed to the estate, on the grounds that: (1) the terms of the trust were not ambiguous; (2) consideration of extrinsic evidence was not appropriate; (3) Connecticut law regards the term "legal representative" as an expression that has no fixed meaning; rather, its meaning varies depending on the context and circumstances of its use; (4) the trust instrument stated that the beneficiary's interests would pass to her legal representatives, heirs-at-law, *or* next of kin and not legal representatives, heirs-at-law, *and* next of kin, which would allow the trust interests to potentially go to different recipients; (5) the trust terms provided that the decedent's interests would pass to the recipients in the order clearly provided by the trust instrument; and (6) if the decedent had intended her trust interests to pass to only her children or lineal descendants she could have specified as much in will.

Taplin v. Taplin, 88 So. 3d 344 (May 9, 2012)

Appellate Court Reverses Summary Judgment for Trustees on Dismissal under UTC Shortened Limitations Period

Sol M. Taplin created a trust during his lifetime for the benefit of his son Martin's three children, Andrew, Jennifer, and Kristopher, with Martin and Moises Chorowski as co-trustees. Andrew sued the trustees alleging that they failed to properly account, withheld distributions, and for acts of self dealing. The trustees moved for summary judgment arguing that Andrew's action was barred under the Florida Uniform Trust Code provisions that shorten the statute of limitations following certain disclosures, or alternatively by the four-year statute of limitations period for intentional torts. The trial court granted summary judgment and dismissed the lawsuit. Andrew appealed.

On appeal, the Florida Court of Appeal reversed the trial court on the grounds that: (1) the shortened limitations periods under the Florida Uniform Trust Code required that the beneficiary receive a report or account; (2) the petition alleged that Andrew had not received any account, and therefore the limitations period was not a proper basis for dismissal on summary judgment; and (3) the limitations period for intentional torts does not apply to actions by beneficiaries against trustees.

Taylor, et al. v. Barberino et al., 136 Conn. App. 283 (June 19, 2012)

Accounting Firm Not Liable for Trustee's Failure to Maintain Records and Account

In 1973, Stephen Barberino, Sr. established two trusts for the principal benefit of his daughter, Taylor. Taylor sued the successor trustee, Ann Hall, alleging that Hall had engaged in conduct detrimental to the trust's pecuniary interest and refused to turn over historical trust information. Taylor also sued an accounting firm alleging that Stephen Barberino, who was an employee of the accounting firm and Taylor's brother, had usurped control of the trusts in the early 1980s and falsely held himself out as trustee, engaged in conduct that was detrimental to the trusts, and failed to accurately maintain trust records and account.

The accounting firm moved for summary judgment for lack of evidence that the firm was engaged by the trusts to maintain trust records or account for the trust. Rather, the accounting firm had prepared trust tax returns based on information furnished by its clients. In support of its motion, the firm submitted affidavits of employees. The court granted summary judgment for the accounting firm because Taylor failed to provide an evidentiary foundation to substantiate her allegation that the accounting firm was responsible for regularly maintaining records and accounting for financial activities of the trust.

In re Estate of Pappas, 36 Misc. 3d 1204A (May 9, 2012)

Court Refuses to Approve Estate Settlement Agreement Without Proof of Value of Stock Surrendered by Estate in the Deal

Christo Pappas died on June 6, 2003. His estate was worth approximately $31,700,000 and he owned an 82 percent interest in Byron Chemical Company. At the time of his death two company employees, Laura Candela and Nicholas Cola, each owned 9 percent of the company. Mr. Pappas' stock was subject to a shareholder agreement and irrevocable proxy that provided for the sale of shares to Cola for $1,721,081. The company redeemed Candela's shares and she opted not to purchase the estate's remaining 82 shares. After the sale, Cola owned 100 shares of the company and the estate owned 82 shares.

Shortly after the estate was opened, contentious litigation arose between the company, Cola, and Candela on various issues. Candela sued the estate, Cola and the company for breach of her employment contract by failure to pay her bonuses equaling 10 percent of the company's pretax profits. Candela prevailed and obtained a judgment in excess of $5.5 million. The judgment reduced the value of the estate's interest in the company and also triggered additional litigation between Cola and the company.

Cola and the company sued the estate seeking in excess of $10 million in damages for the decedent's alleged breach of fiduciary duties. In response, the estate asserted several derivative claims against Cola as an officer of the company. The executors then brought an action against the company seeking unpaid compensation of roughly $1.4 million earned by the decedent prior to his death and $2.95 million for the unpaid balance of loans the decedent had made to the company. Cola asserted counterclaims against the estate alleging that he was entitled to a refund of the entire amount he had paid for the shares in 2003 because the shares were now essentially valueless.

The executors ultimately reached a settlement and release agreement that resolved all claims among the estate, Cola, and the company. Under the settlement agreement, the estate would recover from the company $1,999,297.84, the amount of outstanding loans to the estate from the company. In turn, the estate would refund Cola $1,536,581.80 of the total amount (approximately $1.721 million) that Cola paid for his purchase of the 82 shares of the estate's stock in December 2003. Additionally, the company would purchase the remaining 82 shares of the estate's stock for $202,725.

The parties sought court approval of the estate settlement agreement, and argued to the court that settlement was in the best interests of the estate because it resolved all pending litigation, avoided further risk of loss and additional legal fees, and resulted in the estate receiving $462,716.04 in liquid assets plus $202,725 for the estate's minority interest in the company.

Candela opposed the settlement, and asserted that the fiduciaries had not demonstrated that the settlement was in the best interests of the estate because the fiduciaries had not set forth the value of the estate's minority interest in Byron Chemical for which Cola would pay the estate $202,725. The court denied approval of the settlement without prejudice on the grounds that: (1) on the record the court was not in a position to evaluate whether the settlement agreement was in the best interests of the estate; (2) that determination would at a minimum require knowledge of the value of all parts of the deal and the petitioners did not offer an appraisal for the estate's shares of Byron Chemical that they proposed to transfer to Cola for $202,725; (3) by asking the court to consider the estate's minority interests and the company's financial statements as a basis for valuation, the petitioners were essentially asking the court to act as its own expert, which the court refused to do; and (4) in the absence of a credible appraisal of the 82 shares the fiduciaries were offering to surrender as part of the deal, the fiduciaries could not plausibly know the total value of what they proposed to give in settlement or be acting in the best interests of the estate.

Oliveira v. Kiesler et al., 206 Cal. App. 4th 1349 (June 15, 2012)

Jury Verdict Against Attorneys Reduced to Zero by Court-Approved Settlement with Other Parties

Elaine Oliveira was married to Richard Oliveira. Rick and Patrick were Richard's sons from a prior marriage. Elaine and Richard owned a number of properties in California as joint tenants and as community property, and intended that the properties pass to the survivor of them.

Rick desired to obtain control over his father's assets and hired attorneys to set up an estate plan for his father. While Richard was in failing health, the attorneys prepared a trust and deeds that severed the joint tenancies and transferred Richard's undivided 50 percent interest in each property to the trust. The trust left property 70 percent to Rick and 30 percent to Patrick, rather than passing to Elaine if she survived her husband.

After Richard's death, Elaine sued Rick and Patrick alleging undue influence, malice, oppression, fraudulent concealment, negligence, and also legal malpractice against the attorneys. Elaine entered into a settlement agreement with Rick and Patrick. Rick, Patrick and the attorneys sought and obtained court approval of the settlement, and Elaine did not object. The relevant California civil statute provided that the settlement would not release the attorneys, but it would reduce the claims by the greater of the amount stipulated in the release or the amount paid as consideration for the release.

Elaine pursued her claims against the attorneys and won a $200,000 jury verdict against the attorneys. The attorneys sought to offset the settlement payment against the verdict, thereby reducing it to zero, and the trial court agreed. Elaine appealed.

On appeal, the California Court of Appeals affirmed the trial court on the grounds that: (1) only one injury had been sustained — the loss of anticipated survivorship interests in certain properties due to the creation and implementation of an estate plan that terminated the joint tenancies; (2) the alleged tortious activities (even to the extent labeled as different causes of action) were not independent; (3) therefore it was appropriate to apply the offset statute to bar Elaine's recovery against the attorneys; and (4) the fact that legal professionals were involved as defendants did not change the result and Elaine should not have been permitted to obtain double recovery just because of the identity of defendants.

In Re Berg Trust, 2012 Mich. App. LEXIS 1228 (2012)

Trustee Removed for Failing to Act to Administer and Protect Trust Assets

The Donald R. Berg Trust owned a coin collection worth $800,000. The trust terms provided that the coin collection was distributable in equal shares to Donald's grandchildren and his daughter Suzanne Berg, so long as Suzanne served as trustee of the collection after Donald's death. Donald served as trustee until several months prior to his death in 2007 when two individual trustees succeeded Donald as trustee.

In 2009, the trustees filed a trust inventory that included the coin collection. Donald's son, Scott, objected to the inventory and claimed that the coins belonged to the trust for Scott's mother, Sally (under which Scott was a beneficiary). Suzanne also objected, claiming that some of the coins belonged to the trust for her benefit.

In 2010, Suzanne filed a petition asserting that she had been appointed the special trustee of the coins and seeking to compel the trustees to turn the coins over to her. Certain trust beneficiaries objected to Suzanne's petition, arguing that she failed to defend the trust against Scott's litigation and that Suzanne herself joined in some of Scott's claims, and therefore trustees should retain possession of the coins. The probate court denied Suzanne's petition finding that she never acted as trustee of the coins, ordered that the coins stay with the trustees, and removed Suzanne as trustee of the coins.

On appeal, the Michigan Court of Appeals affirmed the probate court on the grounds that: (1) although Suzanne nominally accepted the office of trustee, she failed to perform any duties required of trustees under the trust instrument and the Michigan Trust Code; (2) she did not take steps to acquire possession of the coins, preserve them or administer the trust for the benefit of the beneficiaries; (3) it took Suzanne nearly three years, while Scott's litigation against the trust was pending, to file a petition for custody of the coins; (4) Suzanne failed to keep records of the coins, have them appraised and arrange for their safe storage; (5) all of the trustee duties with respect to the coins were performed by the other trustees; (6) Suzanne did not attempt to protect the trust from Scott's claims that the coins belonged to Sally's trust; (7) since Suzanne did not perform any trust duties required of her, the probate court did not clearly err when it determined she failed to act as trustee; and (8) the probate court did not abuse its discretion when it removed Suzanne as trustee since she failed to act as trustee of the coins.

In re: Estate of Mumma, 2012 Pa. Super. LEXIS 45 (2012)

Court Refuses to Remove Fiduciary Chosen By Settlors Without Proof of Breach of Duty

Robert Mumma, Sr. and his wife, Barbara, each created a will and trust that named their daughter, Lisa, as executrix and trustee. Robert Sr.'s trust provided that, upon Barbara's death, his four children were entitled to equal one-quarter distributions of his trust. Barbara's trust provided that, upon her death, Lisa would be the sole beneficiary. Lisa's brother, Robert, Jr., sued to disqualify Lisa as the executrix and trustee of both trusts and estates alleging conflict of interest. Robert Jr. also alleged Lisa committed a breach of fiduciary duty for allegedly transferring assets from Robert Sr.'s trust to Barbara's trust, which would inure to Lisa's benefit as the sole beneficiary of Barbara's trust. The trial court denied Robert Jr.'s petition to disqualify and remove Lisa as executrix and trustee of both trusts and estates, and Robert Jr. appealed.

On appeal, the Pennsylvania Superior Court affirmed the trial court on the grounds that: (1) the removal of a trustee is a drastic remedy and that removal should generally occur only if necessary to protect the property of the trust; (2) the courts give deference to the settlor's expressed confidence in designating a trustee; (3) a beneficiary's displeasure with a trustee is not a sufficient grounds for removal and instead requires evidence of a trustee's breach of a fiduciary duty; (4) Lisa did not refuse to make the distributions required by Robert Sr.'s trust; rather she was simply completing the administration, obtaining appraisals and determining a plan of distribution and therefore did not breach her duties; (5) there was no evidence that Lisa improperly transferred assets from Robert Sr.'s estate to Barbara's estate (Barbara had a right to withdraw 5 percent of the principal of Robert Sr.'s marital trust during her lifetime, but no distributions from Robert Sr.'s trust to Barbara's trust occurred following Barbara's death and the lapse of her withdrawal right); (6) Lisa's multiple roles as executrix and trustee of all the estates and trusts was not an inherent conflict of interest that necessitated Lisa's removal; (7) the administration of the estates and trusts did not present a situation in which Lisa's personal financial interests directly conflicted with her duties as a fiduciary; and (8) Lisa had performed the duties required of her as executrix and trustee, and since she had not engaged in wrongdoing or an improper transfer of assets, there were no grounds to remove her.

Regions Bank v. Kramer, et. al., 2012 Ala. LEXIS 74 (2012)

Court Refuses to Dismiss State Securities Law Claims Against Trustee

Regions Bank served as trustee of four separate trusts for the benefit of Ernest Kramer and Kenyon Kirkland. In two separate actions, Kramer and Kirkland each sued Regions claiming that Regions' management breached its fiduciary duties and also raising state common law and securities laws claims. Regions Bank sought dismissal of all claims other than the breach of fiduciary duty claims on the basis that the Alabama Supreme Court case, *Regions Bank v. Reed, 60 So. 3d 868 (Ala. 2010)*, held that the only claim plaintiffs can maintain against trustees is a claim for breach of trust when the claims relate to the trustees' administration of a trust.

In both cases, the trial court denied Regions Bank's motions to dismiss the securities law claims but dismissed the common law claims. The sole issue on appeal was whether the plaintiffs could maintain their securities law claims against Regions. The Alabama Supreme Court affirmed the trial court on the grounds that: (1) its holding in *Reed* was jurisdictional, namely that Alabama circuit courts have concurrent jurisdiction with Alabama probate courts over certain matters and, as such, the probate court may hear certain claims brought by beneficiaries in a circuit court action; (2) its opinion in Reed did not mean that a plaintiffs' sole remedy against a trustee for its acts and omissions related to trust administration is a breach of trust action; and (3) to the contrary, plaintiffs retain common law and statutory claims, including the securities law claims, and those claims may be litigated in probate court.

Mayfield, et. al. v. Heiman, et. al., 2012 Ga. App. LEXIS 688 (2012)

Surcharge Claims Barred by Statute of Limitations

Curtis Mayfield III and Sharon Lavigne, children of legendary singer Curtis Mayfield, Jr., sued an accounting firm and its president for alleged breaches of fiduciary duties and mismanagement of the assets of the Mayfield Family Trust created by their father. The firm's president was also as co-trustee of the trust. The dispute related a transaction in which the trustee purchased the beneficiaries' copyright interests in their father's musical works for $65,000 each, obtained a $5.41 million loan, paid the beneficiaries for their copyright interests, and paid himself a $541,000 commission on the loan.

The parties filed cross-motions for summary judgment, and the court granted summary judgment for the defendants on the grounds that the claims were barred by the applicable six-year statute of limitations.

On appeal, the Georgia Court of Appeals affirmed the trial court on the grounds that: (1) a cause of action for breach of a fiduciary duty concerning the management of a trust begins to run at the time a wrongful act occurs; (2) the statute of limitations barred the claims because the loan closed in 2000 and the beneficiaries did not bring their suit until 2007; and (3) there was no evidence of fraudulent concealment or that some other action existed to toll the running of the statute of limitations.

Gill v. Gill, 2012 Cal. App. Unpub. LEXIS 3412 (2012)

Trustee Did Not Breach His Duties by Hiring His Wife to Oversee Successful Renovations to Trust Property

David Gill died in 1990 leaving a family trust that owned his family's home in Pebble Beach, California. David was survived by his six children and his wife, Elizabeth, the children's stepmother. David's son Brian, an attorney experienced with trust and estate matters, served as successor trustee of the family trust for 17 years. Elizabeth was given a life estate in the Pebble Beach home but she could not afford to maintain the property. Brian, as trustee, and Elizabeth negotiated an agreement whereby Elizabeth relinquished her life estate in the property in exchange for being relieved of the responsibility of maintaining the property. Brian planned to rehabilitate the home by obtaining a personal loan of $500,000, lending the money to the family trust without interest to pay for the improvements, and hiring his wife, an interior designer by trade, to handle the project. The improvements were made and the home eventually sold in 2007 for $2.7 million. Without the improvements it was estimated that the home would have sold for approximately $1.2 to $1.5 million.

Brian resigned as trustee and two of his brothers became successor trustees. In 2008, the brothers sued Brian to recover approximately $55,000 plus interest allegedly taken by Brian and for allegedly making excessive $75,000 payments to his wife, Kim, for the services she performed to rehabilitate the home. The trial court rejected their claims, finding that Brian had not diverted trust funds and that the compensation paid to Kim was reasonable. Brian was also awarded more than $200,000 in attorney fees.

On appeal, the California Court of Appeals affirmed the trial court on the grounds that: (1) the payments to Brian's wife were reasonable and benefited the trust; (2) her fees were discounted and she did not charge customary markups on materials purchased at a discount; (3) the trust document gave Brian the authority to manage the trust property, which included hiring his wife to perform trust services, and the beneficiaries' consent was not required to employ her; (4) Brian did not make improper payments to himself over his 17 years as trustee; (5) over 17 years Brian received $123,277 in combined trustee/attorney fees, or $7,251 per year for the trustee and legal work he performed for the trust; (6) these amounts were significantly less than what Brian's hourly attorney rate would have been had he charged the trust for the hundreds of hours he spent on trust matters each year; (7) Brian acted reasonably and in good faith when he requested the beneficiaries to release him from liability prior to distributing the trust funds where the trust beneficiaries had threatened litigation against Brian over the payments to Kim; and (8) since Brian successfully defended against the claims, Brian was entitled to the attorney fee award.

Principal Life Ins. Co. v. Lawrence Rucker 2007 Insurance Trust, 2012 U.S. Dist. LEXIS 88313 (Delaware, 2012)

Court Refuses to Grant Summary STOLI Summary Judgment to Insurer Where Life Insurance is Sold Shortly After Issuance and Broker Provided Premium Payments

In this stranger-owned life insurance (STOLI) policy case, Principal Life Insurance Company sought a judgment that a policy owned by the Lawrence Rucker 2007 Insurance Trust was void because of misrepresentations on the insurance application or for lack of an insurable interest.

Lawrence Rucker created the Lawrence Rucker 2007 Family Trust, naming himself as beneficiary, and the Insurance Trust, naming the Family Trust as beneficiary. Christiana Bank served as trustee of both trusts. Rucker initially funded the Insurance Trust with $100. A $3.5 million life insurance policy on Rucker's life was later transferred to the Insurance Trust. The policy named the Insurance Trust as its beneficiary. Rucker could not afford the policy's premium and the insurance broker provided him with nearly $80,000 that Rucker used to pay the premiums. Within a month after Rucker obtained the policy, Rucker sold his beneficial interest in the Family Trust to a third-party purchaser who became the sole beneficiary of the policy. After selling his interest in the policy, Rucker repaid the policy premium to the broker.

In a prior 2010 opinion, the court had ruled in favor of Principal, finding a policy void due to a lack of insurable interest. Subsequent to the 2010 opinion, the Delaware Supreme Court addressed the insurable interest question in two other unrelated STOLI cases (collectively "*Price Dawe*"). Under *Price Dawe* (1) an insured's intent to immediately transfer a life insurance policy to a third-party without an insurable interest does not violate the insurable interest rule provided that the policy was obtained by the insured and was not cover for a wager; (2) the insured cannot be used by a third party as a conduit to obtain a policy that the third party could not otherwise obtain due to the insurable interest rule; (3) the party paying the insurance premium is determinative of whether the third party, or the insured, is obtaining the policy; and (4) in a trust setting, the same rules apply and require the insured to fund the trust's purchase of the policy.

In light of the recent Delaware decision, the U.S. district court rejected Principal's motion for summary judgment on the grounds that: (1) genuine issues of material fact remained to be determined regarding Rucker obtaining and funding the policy; (2) it is expressly permitted and common for insurance companies and agents to loan premiums payments to insureds; (3) if Rucker's payment of the policy premium was actually a loan, then such financing would satisfy the requirement that Rucker obtain the policy; (4) the ultimate source of the funds that Rucker used to pay the policy's premium was a factual issue to be determined by a jury; and (5) it is unclear whether Rucker was induced by a third party to obtain the policy, and whether Rucker created the Insurance Trust and Family Trust for his benefit or for the benefit of the third-party purchaser of the policy.

Wells Fargo Bank, N.A. v. American National Ins. Co. (9th Cir.) – 2012 U.S. App. LEXIS 16725

Court Rejects Insurer's Claim of Lack of Insurable Interest Where Policy Transferred to Third Party Shortly After Being Issued

Benjamin Cabal created an insurance trust with his wife, Thelma, as beneficiary. The trust applied for and purchased a life insurance policy on Benjamin's life. After the policy was obtained, Thelma transferred her interest in the policy to a third-party trust in 2008.

At issue was whether the insurance policy was void due to the trust not having an insurable interest in Benjamin's life under the pre-2010 California Insurance Code. The trial court entered summary judgment in favor of the trust, finding that the policy was not void for lack of an insurable interest. American National Insurance Company appealed.

On appeal, the 9th Circuit Court of Appeals affirmed the trial court on the grounds that: (1) the trust had an insurable interest in Benjamin's life at the time the policy was purchased; (2) under California law, after a policy takes effect, a policy may be freely transferred to a third party and no insurable interest is required; and (3) under the pre-2010 California Insurance Code, a party's intent to transfer a policy at the time the policy is obtained does not eliminate the insurable interest that existed at the time the policy was obtained.

Penn Mutual Life Ins. Co. v. Greatbanc Trust Co., 2012 U.S. Dist. LEXIS 115016 (N.D. Illinois, 2012)

Where Trustee of Insurance Trust Admits Lack of Insurable Interest, Court Allows Trustee to Pursue Claim for Refund of Premiums under Unjust Enrichment Theory

In another STOLI case, the defendant trustee of a life insurance trust employed the unusual litigation tactic of conceding that a disputed life insurance policy was obtained with material misrepresentations and that the trust that owned the policy had no insurable interest on the insured's life when the policy was obtained.

GreatBanc Trust Company was named the trustee of the Natalie Rosenblatt-Spitzer Insurance Trust. The Insurance Trust was the nominal owner and beneficiary of a life insurance policy issued by plaintiff Penn Mutual Life Insurance Company on Natalie Rosenblatt-Spitzer's life. GreatBanc, as trustee of the Insurance Trust, transferred the beneficial interest in the policy to a third-party institutional investor at nearly the same time as the policy was issued. GreatBanc pleaded that the policy was procured illegally and without its knowledge.

Penn Mutual moved for summary judgment on its claim that the policy was void *ab initio* because the policy was obtained through material misrepresentations and that the policy owner did not have an insurable interest, and asked the court to order that it could retain the premiums it received on the policy. Penn Mutual also sought summary judgment on GreatBanc's counterclaims in which the trustee sought rescission of the policy and a return of premiums paid, or alternatively, to recoup the premiums on a theory of unjust enrichment.

Since GreatBanc conceded that the policy was invalid, the district court granted Penn Mutual's motion for summary judgment and declared the policy void *ab initio*. However, the court declined to make a determination on the allocation of the policy's premiums. The court held that because the policy was void *ab initio*, the insurance contract never existed, and as such rescission was not a proper remedy because rescission of a contract is only applicable where a contract exists.

The court noted that no apparent Illinois authority controlled the disposition of premiums when a STOLI contract is declared void *ab initio*. Examining law from Florida and Delaware (including the 2011 decision in *Rucker*), the court ultimately concluded that under general contract law principles in Illinois, life insurance contracts with no insurable interests are akin to illegal wagering contracts. As such, Illinois courts will not take action with regard to such contracts.

However, the court further held that GreatBanc's unjust enrichment claim was not precluded by the determination that the insurance policy was void *ab initio*, and that genuine issues of material fact existed as to whether Penn Mutual was partially culpable in the STOLI scheme that resulted in the policy being issued and whether such culpability supported GreatBanc's unjust enrichment claim. Accordingly, Penn Mutual was granted summary judgment in its favor on all claims except for GreatBanc's unjust enrichment claim.

In re Estate of Milmet, 2012 Mich. App. LEXIS 1551 (2012)

Court Reverses Summary Judgment in Favor of Surviving Spouse Where She Breached Agreement to Return Assets to Beneficiaries Who Disclaimed to Avoid Taxes

Morris Milmet was survived by his wife, Sarah, and also by David Solomon, Robert Solomon, and Lois Renee Solomon Richards who were named as residuary beneficiaries under Morris's estate. The Solomons and Sarah entered into an agreement whereby the Solomons would disclaim their interests in Morris's residuary estate in an effort to avoid estate taxes being owed on the Solomons' shares of the residuary estate, in exchange for Sarah agreeing to distribute (through the marital trust created by Morris for her benefit) the Solomons' interests in the residuary estate. The disclaimers caused the Solomons' interests in the residuary estate to pass to the marital trust, which qualified for the federal estate tax marital deduction. The Solomons' disclaimers were also purportedly motivated by the parties' attempt to protect an investment firm from liquidating in order to pay applicable estate taxes. The Solomons were advised by legal counsel prior to executing their disclaimers. After the federal estate tax return was filed, Sarah allegedly refused to honor her agreement with the Solomons and kept the assets received as a result of the disclaimer.

The Solomons sued Sarah for breach of fiduciary duty, breach of contract, and various common law and equitable claims. The trial court granted summary judgment for Sarah on the grounds that the Solomons failed to properly state claims and that the Solomons' disclaimers were irrevocable and binding under applicable Michigan law because the affect of the disclaimers was to treat the Solomons as having predeceased Morris. The Solomons appealed.

On appeal, the Michigan Court of Appeals reversed the trial court on the grounds that: (1) a genuine issue of material fact existed as to whether Michigan law barred the Solomons' disclaimers because the Solomons had entered into an agreement with Sarah regarding the ultimate disposition of their interest in Morris's residuary estate; (2) the trial court failed to consider whether the existence of a contractual agreement between Sarah and the Solomons would preclude the Solomons from disclaiming their interests in the residuary estate; (3) summary judgment was not proper where Sarah could be liable for breach of fiduciary duty if she fraudulently induced the Solomons to disclaim their interests in Morris's residuary estate; (4) there were facts to support the unjust enrichment and breach of contract claims against Sarah; and (5) the case should be remanded on the issue of whether the agreement between the Solomons and Sarah constituted an illegal tax evasion scheme or was otherwise void as against public policy.

Sefton v. Sefton, et al., 2012 Cal. App. LEXIS 643 (2012)

Validity of Exercise of Testamentary Power of Appointment Determined under Law in Effect When Grantor of Power Died and Not When Power Exercised

In a case of first impression in California, the California Court of Appeals was asked to determine the affect that a California statute, enacted after the creation of a power appointment, had on the permissible appointees of the power.

At his death, J.W. Sefton, Jr., owned a highly valuable controlling interest in San Diego Trust & Savings Bank. J.W. executed a will in 1955 and died in 1966. Under his will, J.W. gave his son, Thomas, a life estate in certain property. J.W. also gave Thomas testamentary limited power of appointment over 75 percent of J.W.'s estate that could be exercised in favor of Thomas's then living issue. Thomas' children were identified in J.W.'s will as Thomas Sefton Jr., Laurie Sefton, and Harley Sefton. Thomas died in 2006 and under his will he exercised his power of appointment in favor of Laurie and Harley, but he excluded Thomas Jr. Thomas Jr. challenged his father's exercise of the power of appointment, arguing that his father exceeded the scope of the power of appointment.

Under the common law existing at the time that J.W. executed his will and at the time of his death, J.W.'s will would be interpreted as giving Thomas a "non-exclusive power of appointment" that required that each of the grandchildren receive a "substantial" part of the trust. In 1970, prior to Thomas's death but after J.W.'s death, California changed its common law by implementing a statute that presumed that a power of appointment was "exclusive" so that one or more persons in a defined class of appointees could be excluded unless the grantor of the power specified otherwise.

The trial court dismissed Thomas Jr.'s petition, applying the law in effect at the time of Thomas's death (and therefore the time of the exercise of the power).

On appeal, California Court of Appeals reversed the trial court on the grounds that: (1) the California statute that changed the law on powers of appointment did not apply to powers of appointment that were created prior to July 1, 1970; (2) the court presumed that J.W. and the attorney that prepared his will were aware of the prevailing law at the time the will was created, as well as the time of J.W.'s death, and further presumed that J.W. intended to benefit all of the grandchildren; (3) had the 1970 change in law been retroactive, it would change the intent of donors and substantive parts of wills and would likely be unconstitutional; and (4) Thomas Jr. was entitled to a "substantial" share of J.W.'s trust and remanded the matter for further determination as to what would constitute a substantial share.

In the Matter of the Estate of Lois L. Hord, 2012 Iowa App. LEXIS 616 (2012)

Assignment of Remainder Interest in Trust Violated Spendthrift Clause and is Void

Carl and Lois Hord owned farmland in Iowa as tenants in common. They had no children. Under his will, Carl created a trust for his farmland that provided Lois with a life estate in the farmland and as much of the income and principal as necessary to maintain her manner of living, provided that as trustee she could not participate in distribution decisions. The independent trustee was a longtime family friend who was also a tenant on the farmland. The remainder interest was divided between the couple's niece and nephews. The trust terms contained a spendthrift provision prohibiting the transfer by any beneficiary of the beneficiary's interest in trust assets.

Carl died in 1992, and the farmland was conveyed to Lois and the independent trustee as trustees. Upon Lois's request, five of the six remainder beneficiaries executed assignments of their trust interests and quitclaim deeds to Lois. The independent trustee had no knowledge of these transactions. At Lois's death in 2009, the remainder beneficiaries became aware of the spendthrift clause in Carl's will and petitioned the court to interpret the trust and determine whether the quitclaim deeds were void. They also claimed that the independent trustee breached his fiduciary duty for failing to prevent the transactions.

The trial court held that the remainder beneficiaries could assign their interests in the trust, but as a result of the spendthrift clause the assignments were voidable until Lois's death. The court dismissed the fiduciary claims as barred by laches. The remainder beneficiaries appealed.

On appeal, the Iowa Court of Appeals reversed the trial court on the grounds that none of the exceptions to spendthrift clauses applied to the trust and therefore the assignments were void, and remanded the case to the trial court to order distribution of the farmland pursuant to the will.

Morey v. Everbank, 2012 Fla. App. LEXIS 11876 (2012)

Trust Direction to Apply Life Insurance Proceeds to Payment of Estate Obligations is Valid

Carlton Morey, Jr. created a trust for the benefit of his estate and his daughters. He acquired a life insurance policy that he made payable to the trust. Under the trust terms, the trustee was directed to pay to Carlton's estate the amount of money necessary to pay Carlton's "death obligations" — which included Carlton's last expenses, expenses of administration, debts and various taxes. After the payment of these obligations, and after funding the cash bequests under Carlton's will, the trustee was directed to distribute the remainder into trust for the benefit of Carlton's children.

Upon Carlton's death, his brother, as trustee, filed a petition seeking a court determination that the life insurance proceeds were exempt from the provision requiring payment of Carlton's "death obligations" alleging that: (1) a Florida statute that required that life insurance be exclusively for the benefit of the beneficiary precluded the use of the insurance proceeds to pay the death obligations; (2) the general direction to pay the death obligations in the trust could not override the statute; (3) the insurance proceeds should be treated like homestead property that receives higher protection under the Florida constitution; and (4) the trust should be reformed to exclude the insurance proceeds from the funds used to pay the death obligations. The trial court refused the trustee's petition and the trustee appealed.

On appeal, the Florida Court of Appeals affirmed the trial court on the grounds that: (1) by statute insurance proceeds payable to a trust are to be disposed of in accordance with the trust terms; (2) one of the main purposes of the trust was the payment of Carlton's death obligations; (3) the straightforward and unambiguous provisions required the payment of the death obligations before any distributions to the remainder beneficiaries; (4) the specific direction to pay the death obligations, coupled with other Florida law, overrode the exemption for insurance proceeds relied on by the trustee; (5) insurance proceeds are not subject to the same restrictions on transfer that Florida law imposes on homestead property; (6) Carlton had reviewed the relevant trust documents prior to executing them, and there was no evidence suggesting that he was unable to understand their terms; (7) Carlton's assets were mainly illiquid, and included operating businesses and, according to the attorney, Carlton did not want his businesses to be sold in order to provide liquidity to his estate; and (8) given the need for liquidity and the clear terms of the trust, there is no need to reform the trust to conform to Carlton's intent.

Tindall v. H & S Homes, LLC, 2012 U.S. Dist. LEXIS 66800 (2012)

Court Allows Claim Against Revocable Trust for Settlor's Torts to Proceed

Plaintiff Tindall filed civil conspiracy claims against three trusts. The claims were dismissed on summary judgment. In a motion for reconsideration, Tindall filed supplemental briefs on the issue of whether the trusts could be held liable for the alleged conspiratorial acts of their sole trustee, Dudley. The general rule, as stated by the court, is that a trust will not be held liable for the torts of its trustee unless the trust actually benefited from or was complicit in the alleged conspiracy. The court had explained in its previous opinions in the matter that Tindall would have to provide evidence of a specific benefit to the trusts, or the use of the trusts in furtherance of the alleged conspiracy, or knowledge of the conspiracy by the trust beneficiaries.

Tindall attempted to identify additional evidence, which created a jury question on the issue of the trusts' liability. She demonstrated that Dudley was the sole trustee and beneficiary of one of his revocable trusts and made several deposits and two key withdrawals from the trust. His revocable trust issued two checks to Dudley near the time of a mass auction and liquidation of business assets from H&S Homes, one of Dudley's businesses, and Tindall challenged these transactions as fraudulent. The court noted that it was undisputed that the business assets were later re-purchased by other companies operated by Dudley. Tindall also alleged that the trusts were unjustly enriched because they retained value in Horton Industries stock and Dudley had complete control over Horton Industries. Tindall argued that the decision not to pay her judgment would benefit the bottom line of Horton Industries, which benefit would then flow through to the trusts as the major shareholders of the company.

Dudley claimed that the withdrawals from his revocable trust were unrelated to the auctions of the H&S Homes business assets, and that they were payments on loans that he had made to his trust. Dudley also claimed that the trusts did not receive any benefits from Horton Industries or the liquidation of the assets.

As to two of the trusts that were family trusts established by Dudley's parents, the court found that there was not sufficient evidence to establish liability on either of those trusts. The only evidence offered by Tindall was evidence that they generally benefitted from Horton Industries. Without other evidence of a benefit or of culpability, the court would not reconsider its grant of summary judgment in favor of the two family trusts.

With respect to Dudley's revocable trust, the court vacated its summary judgment on the grounds that: (1) the financial interests of Dudley, his revocable trust, and Horton

Industries were intertwined; (2) Dudley's two withdrawals from his revocable trust were evidence of conspiratorial knowledge; (3) a jury could potentially find that it was "more than mere coincidence" that the withdrawals occurred at the time of the allegedly fraudulent asset purchases; and (4) Tindall had offered sufficient evidence to create a jury question on the issue of the revocable trust's benefit from or complicity in the alleged conspiracy.

Shaaf v. Fifth Third Bancorp et al., 2012 Ind. App. Unpub. LEXIS 1065

Incapacity for Guardianship Purposes Does not Deprive Settlor of Capacity to Execute a Trust

Guido Joiko created a revocable trust in 2002 that he amended in 2006. The trust provided for the distribution of assets after Guido's death in equal parts to his sister-in-law, his accountant, and to Mike Krantz and Mark Krantz. In May 2007, Guido began living with Geralyn Bradley, an old friend with whom he renewed his friendship. Earlier in that same month, Mark Krantz filed a petition to appoint Guido's accountant as his guardian. The trial court found Guido to be incapacitated and appointed the guardian. A few weeks later Guido objected to the appointment and petitioned the court for termination of the guardianship. After negotiation, the parties agreed that the accountant could remain as guardian of Guido's estate but that Geralyn would become guardian of Guido's person.

In May 2009, Guido petitioned the court and requested the removal of his accountant as guardian of his property claiming that he was acting out of self-interest as a beneficiary of Guido's trust. Although the court found that the accountant had acted appropriately, it found that Guido's negative feelings toward his accountant were causing Guido extreme stress and replaced the accountant with Fifth Third Bancorp.

In 2010, Fifth Third Bancorp petitioned the court to approve the proposed transfer of Guido's assets to a revocable trust created by Guido on Oct. 15, 2010. Under this trust, Guido left the majority of his assets to Geralyn and nothing to his accountant. The accountant moved to intervene in the suit claiming Guido lacked capacity to execute the new trust. At trial, Guido presented extensive evidence supporting his capacity to execute the trust, and the trial court held that Guido had capacity to execute the 2010 trust. The accountant appealed.

On appeal, the Indiana Court of Appeals affirmed the trial court on the grounds that: (1) a person incapacitated under the guardianship law was not automatically precluded from executing a will or trust; and (2) the trial testimony established that Guido had capacity to execute the 2010 trust.

Rose et al. v. Waldrip, 2012 Ga. App. LEXIS 659 (2012)

After-Acquired Property Clause in Trust Not Sufficient to Transfer Assets into Trust

Lee Waldrip died on March 10, 2008, survived by his daughter, Linda; granddaughter, Joy; and wife, Colleen (who was unrelated to Linda and Joy). During his lifetime, Lee had established a revocable trust agreement that named Colleen as the primary beneficiary. Linda and Joy were named as beneficiaries under Lee's will that provided a trust for Linda's benefit and the cancellation of certain debts owed by Joy to Lee.

When Lee created the revocable trust in 2002, he purported to convey all of his assets to the trust. In addition to identifying all of the property then owned by Lee, the provisions of the trust included an "after-acquired property" clause that identified all future property as property to be conveyed by Lee to his trust. At the same time that he executed the trust, Lee executed a "comprehensive transfer document" containing similar language and a bill of sale granting himself as trustee his interest in all his tangible personal property.

Colleen filed a declaratory judgment action to determine what assets remained in Lee's estate in light of the after-acquired property language in the trust agreement and related documents. Linda and Joy counterclaimed, asserting that Lee's estate had sufficient assets to fund Linda's trust. Linda and Joy claimed that not all of Lee's property had been transferred into the trust. The trial court found that Lee intended for all after-acquired property to become part of the trust assets and the after-acquired property clauses of the documents were enforceable under Georgia law. Linda and Joy appealed.

The appellate court affirmed the trial court's determination of Lee's intent, finding that the trial court's determination was entitled to be upheld if any evidence supported it. The appellate court then examined the enforceability of the after-acquired property clauses.

Linda and Joy argued that Lee failed to follow Georgia legal requirements to transfer later-acquired assets. For support, they pointed to Georgia statutes providing that transfers to a trust must transfer title to the trustee, and further providing that transfers of real property to a trust must be recorded. The appellate court noted that those laws were enacted more than eight years after Lee executed the trust documents, and more than a year after his death. The appellate court then held that retroactive application of those statutes was impermissible because Colleen's interest in the trust was already vested.

Because no Georgia authority was on point, the court examined relevant Kentucky case law, the position taken in the second and third Restatements of Trusts, and the Bogert treatise. These sources supported the position that the legal formalities for transfer generally do not apply to transfers of property to a trustee. Property that Lee owned before creating the 2002 trust was therefore part of the trust, notwithstanding the lack of formalities. The court then turned to the question of after-acquired property.

The court examined whether the trust documents were sufficient to bring after-acquired property into the trust, and concluded that they were not. Where a settlor receives consideration for his declaration of trust with regard to property not yet owned, the declaration is treated as a contract to create a trust. By contrast, where no consideration was received, there is no enforceable promise and the settlor must later confirm his prior intent to hold the after-acquired property in trust. The appellate court concluded that a factual inquiry must be conducted by the trial court to determine which, if any, of the after-acquired property was transferred by Lee to his trust. The appellate court reversed the trial court's declaratory judgment that the trust documents themselves were sufficient to bring all of Lee's property into his trust.

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