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Recent Cases of Interest to Fiduciaries

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January 2019

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Lynch v. Barba, 2018 WL 1613834, C.A. No. 12083-MG (Del. Ch. Ct. 2018)

Trustee is entitled to summary judgment when beneficiary cannot substantiate his breach of fiduciary duty allegations and has waited too long to file his lawsuit against the trustee.

Facts: Ethel M. Lynch died in August 2010. She named her daughter, Rhonda Barba, executor of her estate and trustee of two testamentary trusts. Rhonda predeceased Mrs. Lynch, so Rhonda's husband, Francis Barba, qualified as the named successor executor and trustee.

Mrs. Lynch had transferred her property to a revocable trust, which was to be distributed at her death, one-half to a special needs trust for her husband, Mr. Lynch, and the rest to remain in the revocable trust for the benefit of Rhonda. Upon Rhonda's death, the revocable trust provided that the principal of the special needs trust would be distributed in accordance with Rhonda's testamentary power of appointment or to her surviving issue per stirpes. The beneficiaries after Mrs. Lynch's death are Mr. Lynch and Rhonda's two sons, Matthew and Eric Barba.

Mr. Barba and Mr. Lynch did not have a good relationship prior to Mr. Barba serving as trustee for Mr. Lynch's trust, and this additional relationship only exacerbated their disagreements. Mr. Lynch filed a 78-count complaint alleging that Mr. Barba did not act in good faith while serving as executor for Mrs. Lynch's estate and as trustee of the special needs trust.

Among his many complaints, Mr. Lynch claimed Mr. Barba breached the fiduciary duties he owed Mr. Lynch as trustee of the special needs trust by selling trust/estate property for less than its fair market value, refusing to change the name of the trust to remove "special needs," improperly moving and converting trust assets for personal use, failing to communicate with the beneficiary, failing to make distributions when requested, wasting trust assets and failing to provide accountings or other required reports as requested.

Mr. Barba filed a motion for summary judgment requesting the trial court dismiss Mr. Lynch's complaint, as there were no disputed facts to support the allegations that Mr. Barba had failed to meet his fiduciary obligations. Mr. Barba also asserted Mr. Lynch's claims were time-barred and that the doctrine of laches prevented Mr. Lynch from asserting them. Both Mr. Barba and Mr. Lynch requested that the special needs trust be terminated and all remaining assets be distributed to Mr. Lynch.

A plaintiff has the burden of proving his allegations. A plaintiff who fails to present specific evidence of a breach of duties owed by a trustee will not be successful.

Patricia Griffin, a master in the Court of Chancery of Delaware, submitted a report to the Chancery Court containing her recommendations for action on the pending motion for summary judgment. Overall, the master found that Mr. Barba did not violate his fiduciary duties as trustee.

The will granted the executor and trustee of the special needs trust broad fiduciary powers, along with the ability to hold or dispose of property in the trustee's discretion. When assessing the appropriateness of Mr. Barba's actions as trustee, Delaware applies a prudent investor standard. When trustees act with skill, care, diligence and prudence in light of the circumstances, they will not be found to violate their fiduciary duty to the beneficiary as a result of their actions.

In reviewing Mr. Barba's actions, the master found that Mr. Lynch presented insufficient evidence to support any of his claims for breach of fiduciary duty. Mr. Barba sold the real property held in the estate for their appraised values, and Mr. Lynch did not provide any factual support that the properties were sold for less than their fair market value. The master found that the special needs trust expressly authorized employing and compensating advisors for the proper administration of the trust. Mr. Barba also demonstrated his compliance with the trustee's duty to keep accurate records, contrary to the assertion of Mr. Lynch.

With respect to the exercise of Mr. Barba's discretion, the master held that, to determine if Mr. Barba breached his duties to Mr. Lynch, she had to determine whether the funds distributed to the beneficiary were consistent with the authority provided by the special needs trust and Delaware law, not whether Mr. Lynch received all of the payments he requested. Because Mr. Barba was granted the sole and uncontrolled discretion to make payments from the trust to Mr. Lynch, the master found that his failure to agree to every request from Mr. Lynch did not itself constitute a breach of the trustee's duty.

The master further found that, even if Mr. Lynch had one or more valid claims, laches would bar his claims. To support the affirmative defense of laches, the defendant must prove the claimant had knowledge of the claim,

the claimant unreasonably delayed in bringing the claim and that the delay resulted in prejudice to the defendant.

The master found that Mr. Lynch knew in September 2011 about the transfers of property and actions he complained of during the administration of Mrs. Lynch's estate. The inventory for Mrs. Lynch's estate was filed in March 2011 and the final accounting was filed in September 2011, a copy of which was sent to Mr. Lynch. Mrs. Lynch's estate closed in December 2011.

Mr. Lynch did not assert his claims until March 2016, over four and a half years after the claim arose. By that time, the estate was closed and all property had been distributed. Therefore, if Mr. Lynch were allowed to proceed, the estate would have to be reopened and beneficiaries would have to find a way to reimburse the estate to satisfy Mr. Lynch's claims. On these facts, the master found that all three requirements for laches were satisfied, barring Mr. Lynch's claims.

Lastly, the master addressed Mr. Lynch and Mr. Barba's request to terminate the special needs trust and to allow distribution of the assets to Mr. Lynch. Delaware law allows a court to terminate a trust if all beneficiaries consent and the court determines the settlor's objectives or purpose for the trust have become impossible to achieve, administration is difficult or impractical, and/or continuing the trust is not in the best interest of the beneficiaries.

The master found that termination of the special needs trust was appropriate because of the broad trust purposes to benefit Mr. Lynch and because of the unlikelihood of locating a successor trustee willing to serve. Mr. Barba was not willing to continue to serve as trustee and the successor trustee named in the trust instrument also declined to serve.

Bullard v. Hoffman (In re Mayette E. Hoffman Living Trust U/A dated Aug. 4, 1997), 812 S.E.2d 401 (N.C. Ct. App. 2018)

A trustee's egregious conduct is not a prerequisite to awarding attorney's fees under the UTC in a judicial proceeding involving the administration of a trust.

Facts: Kimberli Bullard and James Hoffman were co-trustees of a trust for the benefit of their father. The primary asset of the trust was the father's residence. When their father was moved to a nursing home, the father's attorneys notified Kimberli and James of their responsibility as fiduciaries to co-manage the property, including dealing with repair and maintenance of the residence. Kimberli and James could not agree on management of the property and the residence was left vacant, bills were unpaid, insurance lapsed and the property generally deteriorated.

After approximately two years, Kimberli sent James a letter alleging James' various breaches of fiduciary duty and requesting that he voluntarily resign as co-trustee. James acknowledged receipt of the letter but took no other action. Kimberli then petitioned the Guilford County Superior Court to remove James as co-trustee. While the removal case was pending, there was a tenant interested in leasing the property but James refused to sign the lease. Upon petition by Kimberli, the clerk of the Superior Court entered an order approving the lease.

After the clerk removed James as co-trustee, Kimberli filed a petition for attorney's fees in the amount of $26,096.70. The clerk awarded $7,243 in attorney's fees as reflective of the fees incurred during the time the petition to remove James as co-trustee was pending. The clerk found that James' actions during that period were "egregious and obstructionist" in a manner that warranted an award of attorney's fees. However, the attorney's fees incurred outside that time period were denied as irrelevant to James' "egregious and obstruction behavior." James' appeal of this fees award to the Guilford County Superior Court was denied. James appealed this decision to the North Carolina Court of Appeals.

Under the North Carolina Uniform Trust Code, a court may award costs and expenses, including reasonable attorney's fees, as provided in the general statutes. In turn, the general statutes permit the court to apportion costs amongst the parties in the court's discretion. At common law, litigation expenses were generally chargeable against the other party only in the case of egregious conduct, such as bad faith or fraud.

The North Carolina Court of Appeals denied James' appeal and upheld the award of attorney's fees. The Court of Appeals reasoned that the common law principle requiring egregious conduct for an award of attorney's fees is not required by the applicable statutes, which leave the award to the court's discretion. The Court of Appeals further held that, even if egregious conduct were a prerequisite to an award of attorney's fees, James' conduct while the removal action was pending was, in fact, egregious. James was aware that the trust property was continuing to lose value while vacant, but he refused to take corrective action. Therefore, the clerk did not abuse her discretion in her award of attorney's fees to Kimberli.

In re Estate of Forgey, 298 Neb. 865 (2018)

The Nebraska Supreme Court awards damages and legal fees for a trustee's failure to inform and report.

Facts: This dispute involved, among other related matters, the proper measure of damages for failing to provide an accounting for the Glenn G. Forgey revocable trust. The grantor of the trust, Glenn G. Forgey, died in 1993.

Under the terms of the trust, following the grantor's death and payment of the grantor's debts, funeral expenses, estate expenses and federal estate taxes, the remaining assets of the trust were to be divided into separate trusts for the benefit of each of the grantor's surviving children and the descendants of the grantor's children who did not survive him. The grantor had three surviving children: Lyle A. Forgey, Bessie I. Forgey-McCoy, and Wayne Forgey. Wayne died before the lawsuit commenced.

The trust instrument named Lyle sole trustee and gave him broad discretion to manage the trust. The trust instrument also required Lyle to provide an annual accounting to the beneficiaries.

Lyle failed to file timely the grantor's federal estate tax return, resulting in the assessment of interest and penalties. Because the trust owned mostly illiquid assets and none of the family members wanted to sell trust assets, Lyle made an election under the Internal Revenue Code to pay estate taxes on an installment basis. The installment payment of estate taxes contributed to a significant delay in terminating the trust.

The trust's primary assets consisted of agricultural land, stock in a small local bank, and cash. The trust instrument required allocation of all the bank stock to Lyle's share. Before the grantor's death, the grantor, Lyle and Wayne conducted jointly a cattle ranching business on the land and divided the profits 20 percent to the grantor, 45 percent to Lyle and 35 percent to Wayne. Although the grantor owned the land, Lyle and Wayne did not pay rent to the grantor. Lyle and Wayne continued operating the ranching business in the same manner after the grantor's death, but paid the grantor's 20 percent profit share to the trust.

In 2013, Wayne's surviving spouse, Marvel Forgey, and her children brought suit against Lyle because, after 20 years, the trust still had not been divided into separate shares. These plaintiffs also alleged various breaches of fiduciary duty and sought to remove Lyle as trustee. Among other claims, Marvel and Bessie contended that Lyle breached his fiduciary duties by failing to charge rent to himself and Wayne for use of the land in the ranching business. They also contended that Lyle breached his fiduciary duties by failing to timely file the federal estate tax return and by failing to render accounts as required by the trust instrument.

The trial court ultimately dismissed most of the breach of fiduciary duty claims, but ordered the termination and division of the trust. The court determined what the values of the trust assets were at the time of the grantor's death. The court assigned assets to each of the shares based on their values in 1993. Under this method, Lyle's share received all the bank stock and Wayne's and Bessie's shares each received one-half of the land. The court used cash and other assets to equalize the value of the shares. The court then allocated income and expenses to each share over the 20-year period, based on the asset to which the income and expenses related. For instance, Lyle's share received the benefit of all the bank stock dividends.

Marvel appealed the trial court's order, contending, among other things, that the trial court should have awarded Marvel and Bessie attorney's fees and that the trial court erred in failing to assess damages against Lyle for failing to render an accounting.

Nebraska law before 2005 required a trustee to keep the beneficiaries reasonably informed of the trust and its administration. After the enactment of the Uniform Trust Code in 2005, Nebraska law required a trustee to send the beneficiaries, at least annually, a report of the trust property, liabilities, receipts and disbursements. The trust instrument also required the trustee to account to the beneficiaries. Normally, an accounting is the appropriate remedy for failing to inform and report to the beneficiaries.

Typically, a trustee who successfully defends against claims for breach of fiduciary duty may reimburse himself for the attorney's fees from the trust. When the trustee creates the circumstances that permit the beneficiaries to question the trustee's actions, the trustee should bear his own attorney's fees.

The Nebraska Supreme Court held that, because Lyle's failure to keep the beneficiaries informed caused the misunderstandings and complications that led to the litigation, an accounting was not a complete remedy. In the court's opinion, Bessie failed to raise with Lyle the issue of rent for the agricultural land because she had no information about the ranching business or the value of the land. The court therefore ordered that Lyle transfer to Bessie's share an amount equal to one-half the rent he should have collected from himself and Wayne.

The court also ordered Lyle to transfer an amount equal to the assessed penalties and interest resulting from the failure to timely file the estate tax return equally to Bessie's and Wayne's shares. Finally, the court found that the trial court should have awarded the plaintiffs their attorney's fees. Without an award of attorney's fees, there would be no consequence for Lyle's failure to inform and report. Furthermore, Bessie and Marvel had expended considerable funds enforcing their statutory right to an accounting. In the court's opinion, failing to reimburse Bessie and Marvel would produce an inequitable result.

Morgan v. Superior Court of Orange County, 23 Cal. Rptr. 3d 647 (Cal. App. 2018)

A California court holds that a predecessor trustee cannot assert the attorney-client privilege against a successor trustee and that any provision of a trust instrument seeking to do so violates public policy.

Facts: This case arose during litigation between Thomas Edward Morgan III, the trustee and a beneficiary of the amended and completed restated Beverly C. Morgan family trust dated Nov. 6, 2013, and Nancy Morgan Shurtleff, John Evans Morgan, and Nancy Morgan Shurtleff's daughters Kathleen Shurtleff and Jessica Shurtleff (collectively, the Shurtleffs), who are beneficiaries of the trust. Morgan became sole trustee of the trust following the death of the settlor, Beverly C. Morgan, in January 2014. Shortly after Morgan became trustee, the Shurtleffs filed a petition in the Probate Court for Orange County, California, seeking reformation of the trust and removal of Morgan as trustee. The litigation continued for three years.

In April 2017, the probate court removed Morgan as trustee of the trust and named Bruce and Lee Ann Hitchman as successor co-trustees. The probate court ordered Morgan to turn over to the Hitchmans all communications he made in his capacity as trustee of the trust. Morgan objected to disclosing certain communications with his attorney, contending that both the attorney-client privilege and the terms of the trust instrument barred their disclosure. The section of the trust instrument in question provided that all communications with legal counsel "shall be absolutely protected and free from any duty or right of disclosure to any successor Trustee or any beneficiary and any duty to account."

The probate court held that the terms of the trust prohibiting disclosure of all communications with legal counsel violated California public policy, and entered an order compelling Morgan to disclose the privileged communications to the Hitchmans. The probate court's order explicitly prohibited the Hitchmans from disclosing these communications to the Shurtleffs. Morgan sought a writ of mandamus from the 4th District Court of Appeal stating that the probate court judge exceeded his authority in issuing the order.

Under California law, a trustee who seeks legal advice on behalf of a trust may assert the attorney-client privilege against a beneficiary or any third person with respect to any communications with the trustee's legal counsel. This privilege, however, vests in the office of trustee and not in the individual or entity serving as trustee. Accordingly, a former trustee must turn over all communications, including privileged communications, to a successor trustee upon request. The successor trustee can continue to assert the attorney-client privilege against the beneficiaries of the trust. A trustee who seeks legal advice regarding a charge of breach of fiduciary duty may hire a separate lawyer and pay the lawyer out of the trustee's personal funds.

Under California law, a trust instrument cannot absolve a trustee from liability for intentional misconduct, gross negligence or reckless indifference. Privileged communications may bear on a successor trustee's determination of whether a predecessor trustee acted with intentional misconduct, gross negligence or reckless indifference. Accordingly, a trust provision barring a predecessor trustee from disclosing privileged communications to a successor trustee is unenforceable.

The Court of Appeal upheld the probate court's order requiring Morgan to turn over the privileged communications to the Hitchmans. The provisions of the trust instrument barring disclosure of privileged communications to successor trustees violated California public policy and were unenforceable. Because Morgan did not distinguish between communications with his attorney on behalf of the trust and communications with his attorney to protect himself from liability, and because Morgan paid his attorney using trust funds, California law required him to turn over the privileged communications to the Hitchmans. Furthermore, the probate court correctly applied California law in barring the Hitchmans from disclosing any privileged communications to the Shurtleffs.

Carberry v. Kaltschmid, 2018 WL 2731898 (Cal. 2018)

Trust protectors do not have a general right to information allowing them to compel trust accountings.

Facts: The terms of a trust provided for a "trust protector" who held certain powers in a "fiduciary capacity." The trust protector was not a beneficiary, and the trust instrument did not explicitly grant the trust protector the right to compel an accounting. The trust protector filed a probate "Petition for Order Compelling Co-Trustees to Account and to Provide Information" in the wake of a dispute between the trustees and beneficiaries that, at the time of the trust protector's petition, was in the process of being settled. No trustee or beneficiary joined or supported the trust protector's petition.

The California Probate Code requires trustees to provide accountings to the beneficiaries of a trust with a present interest in either principal or income (§ 16062(a)). Further, a trustee or beneficiary may seek a court order to compel a trustee to account to a beneficiary (§ 17200(a) & (b)(7)(C)). The California Probate Code does not grant such rights to trust protectors.

The Probate Division of the San Mateo County Superior Court denied the trust protector's petition for an accounting, ruling that the trust protector lacked standing. The trust protector appealed. The California Court of Appeal, First District, Division 5, affirmed and awarded appellate costs, but not sanctions, to the respondents.

Although California law provides trust beneficiaries with the right to compel an accounting, the trust protector was not a beneficiary of the trust. Further, the terms of the trust did not give the trust protector the right to compel an accounting. Therefore, the trust protector did not have a right to compel an accounting and lacked standing to bring his "Petition for Order Compelling Co-Trustees to Account and to Provide Information."

Estate of Lee, 2018 WL 2374116 (Texas 2018)

The spendthrift provisions of a testamentary trust render invalid, for the purposes of a standing analysis, the terms of an agreement between former beneficiaries of the trust.

Facts: Testatrix Lucy Lee established a testamentary trust under the terms of her will for the lifetime benefit of her son, Jack O'Guinn (O'Guinn), and upon his death, for the benefit of her step-grandson, Michael Douglas Lee, and grandson Jack Lindsay O'Guinn (Jack). Lucy modified her will by a first codicil, which named Lucy's niece, Mary Elizabeth Whitten as the trust's sole remainder beneficiary in place of Lee and Jack. Lucy later executed a second codicil, changing her plan and leaving her entire estate to O'Guinn outright and free of trust.

After Lucy's death, Whitten and Lee entered into an agreement pursuant to which Lee would contest probate of the second codicil in exchange for Whitten's promise to share 40 percent of her share under the first codicil should Lee's contest of the second codicil be successful. The terms of the will, republished by the first codicil, provided that the beneficiaries held their interests subject to a spendthrift trust.

To have standing to contest a will or codicil, a party must be an "interested person," defined under Texas law as an "heir, devisee, spouse, creditor, or any other having a property right in or claim against an estate being administered" (Tex. Estates Code Ann. § 22.018(1)). Status as a former remainder beneficiary under the terms of a testamentary trust does not satisfy this definition. Further, because the spendthrift provisions of a trust may invalidate, for the purposes of a standing analysis, contractual agreements made between a trust's beneficiaries, being a party to an agreement with a trust beneficiary does not necessarily cause someone to be an "interested person" with respect to the trust or to the will that created the trust.

The County Court of Gregg County, Texas, denied Lee's petition contesting probate of the second codicil, ruling that Lee lacked standing. Lee appealed. The Court of Appeals of Texas, Texarkana, affirmed.

Although Lee was a former remainder beneficiary under the trust created by the will, this was not sufficient to give him standing to contest probate of the second codicil. To have standing to contest probate of the second codicil, Lee needed an interest under either the second codicil, which he was contesting, or the first codicil, which he hoped would be operative. However, Lee held no express interest under the terms of either the first codicil or the second codicil. Further, Lee held no interest under the agreement, which was invalidated by the spendthrift terms prohibiting alienation of trust assets of the trust as outlined in the will and as republished by the first codicil. Therefore, Lee did not have standing to contest the second codicil.

Rachins v. Minassian, 2018 WL 3387236 (Florida 2018)

> **The remainder beneficiaries of a family trust are qualified beneficiaries under Florida law with standing to challenge a trust's administration, even though they would receive their interests through newly created trusts.**

Facts: The settlor established a trust, which, at his death in 2010, when the federal estate tax was not in effect, funded a family trust with the settlor's entire residuary estate. The settlor's wife, who was not the mother of the settlor's children, had absolute discretion to make distributions from the family trust during her lifetime to herself for health, education and maintenance. Upon the death of the wife, the family trust would terminate and the trust would be divided into separate trusts for the benefit of each of the children. Soon after the death of the settlor, the children challenged the wife's administration of the trust for a number of reasons, including the wife's alleged gambling habit.

The wife successfully sought dismissal of the children's suit, claiming the children were neither beneficiaries nor qualified beneficiaries of the family trust. The children appealed, claiming they are qualified beneficiaries under the provisions of the Florida Trust Code and, therefore, had standing to question whether the wife is properly administering the trust corpus.

Section 736.0103(16) of the Florida Trust Code states that a qualified beneficiary "means a living beneficiary who, on the date the beneficiary's qualification is determined:

- is a distributee or permissible distributee of trust income or principal;
- would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in paragraph (a) terminated on that date without causing the trust to terminate; or
- would be a distributee or permissible distributee of trust income or principal if the trust terminated in accordance with its terms on that date."

Under Florida case law, qualified beneficiaries have standing to challenge the administration of a trust.

The District Court of Appeals of Florida, Fourth District, reversed holding that the children were qualified beneficiaries of the family trust. The children were qualified beneficiaries of the family trust with standing to challenge the administration of the family trust during the settlor's wife's lifetime, even though the family trust would terminate at the death of the wife, and even though the remaining principal of the family trust would flow to the children via newly created trusts rather than via outright distributions from the terminated family trust.

The children are beneficiaries because they have future beneficial interest in any property remaining in the family trust after the wife's death, since any remaining property remaining in the family trust will be disbursed to a new trust for the children's benefit under the terms of the original trust document. That means, because any remaining property in the family trust would be distributed to a new trust created for the benefit of the children upon the wife's death, the children will, at a minimum, have an equitable interest in any property in the family trust at that time.

The fact that any remaining principal of the family trust would flow into a new trust created for the children, as opposed to being distributed to the children outright, did not preclude the children from being beneficiaries of the family trust under the statutory definition.

Similarly, the fact that the family trust terminated upon the wife's death does not preclude the children from having a beneficial interest in the family trust as, by definition, a remainder interest in a trust refers to the right to receive trust property upon the termination of the trust.

The children are also qualified beneficiaries of the family trust because the term "qualified beneficiary" includes a living beneficiary who "[w]ould be a distributee or permissible distributee of trust income or principal if the trust terminated in accordance with its terms on that date." Here, the children are qualified beneficiaries under section 736.0103(16)(c), because they would be distributees of trust principal if the family trust terminated in accordance with its terms (i.e., the wife died).

The District Court of Appeals found the definition of "qualified beneficiary" under subsection (16)(c) includes the children in this situation, even though the family trust terminates at the wife's death and even though the children would be distributees of any remaining trust principal in the family trust only through a newly created trust for their benefit.

The District Court of Appeals concluded that the wife's unlimited power to invade the family trust was subject to implied limitations to protect beneficiaries with an interest in any property that might remain in the family upon the wife's death, which gave the children standing to challenge the wife's administration of the family trust.

EGW v. First Federal Savings Bank of Sheridan, 413 P.3d 106 (2018)

> **Wyoming strongly adheres to the notion that, assuming he is legally competent to do so, a testator has the absolute right to dispose of his property as he sees fit at his death, and therefore, *in terrorem* clauses do not violate public policy even when an action challenging such a clause is brought in good faith or is based on probable cause.**

Facts: Allen Willey created the Allen F. Willey trust in 2001 as a revocable trust to manage his assets during his lifetime and dispose of them at his death. Mr. Willey served as trustee during his life and initially named his son, Spencer, as successor trustee. The beneficiaries of the 2001 trust were Spencer's minor children, E.W. and A.W.

Mr. Willey amended the trust several times between 2006 and 2010 to add his wife's daughter and granddaughter as beneficiaries and to remove Spencer as a beneficiary. In 2014, another amendment to the 2001 trust removed Spencer from his role as successor trustee and replaced him with First Interstate Bank of Sheridan. Further, an *in terrorem*, or "no-contest clause," was also added to the 2001 trust. The no-contest clause specifically stated a challenge by Spencer, Mr. Willey's grandchildren, his sisters or their children, or anyone purportedly acting on behalf of any of them, shall terminate any interest they had in the 2001 trust.

Mr. Willey entered into a listing agreement with a real estate broker in 2013 to sell the Willey ranch, an asset of the 2001 trust. In an attempt to prevent the sale of the ranch, Spencer filed a complaint for injunction and declaratory judgment against (1) Mr. Willey in his individual capacity and as the trustee of the Allen F. Willey trust, and (2) Mr. Willey's wife, Bertha. The complaint sought to set aside the listing agreement for the ranch and remove Mr. Willey from the role of trustee on the basis of incapacity. Spencer also alleged Bertha exercised undue influence over Mr. Willey. Spencer further asserted an oral agreement existed, between his father and him, that Spencer was to inherit the Willey Ranch, and therefore, sale of the ranch would constitute a breach of that agreement.

Mr. Willey passed away during the proceedings. The trial court allowed Spencer's claims to proceed to trial, where the jury found the trust amendments were not a product of undue influence; this verdict was appealed and affirmed by the Supreme Court of Wyoming.

In 2016, while his first action was pending, Spencer filed the current action on behalf of his two minor children, E.W. and A.W. (the minors). The minors' action sought an injunction preventing the sale of the Willey ranch, a declaratory judgment that the *in terrorem* clause did not apply to them, removal of First Federal as trustee, and damages for First Federal's alleged breach of fiduciary duties.

First Federal Savings Bank of Sheridan, Wyoming, in its capacity as the successor trustee of the 2001 trust as amended, and Irma Bertha Willey, Susan Williams, Martin Martinez, Leslie Lube and Brittany Phillips (the defendants) opposed the requested relief and moved for summary judgment on the grounds that the *in terrorem* clause voided the beneficial interests of the minors as a result of Spencer's prior lawsuit.

The minors argued that, due to Spencer's lack of standing, as determined by the trial court in the prior litigation, the *in terrorem* clause was not triggered. They also argued that the *in terrorem* clause should be declared void as a violation of public policy.

The trial court granted the defendants' motion for summary judgment. The trial court rejected the minors' claims that Spencer lacked standing to bring the prior lawsuit. The trial court determined Spencer did have standing to challenge the 2010 trust in the prior action and that the challenge terminated the interests of E.W. and A.W. in the 2010 trust. Further, the trial court determined *in terrorem* clauses do not violate Wyoming public policy.

Wyoming public policy favors an absolute right of individuals to dispose of their property as they see fit at their death. *In terrorem* clauses are enforceable regardless of the good faith or probable cause reasoning for instituting the action. The plain and unambiguous language of the document governs the interpretation of a trust agreement.

After *de novo* review, the Supreme Court of Wyoming affirmed the rulings of the trial court. The Supreme Court reviewed the findings of the 2014 action to confirm the trial court's decision that Spencer no longer had an interest in the 2010 trust after the jury held there was no undue influence. There was not a decision stating Spencer lacked standing to assert that challenge.

The Wyoming Supreme Court reviewed, in depth, the public policy argument advanced by the appellants. The opinion pointed out that Wyoming courts, including the Wyoming Supreme Court, have well-established precedent that states it is “the absolute right of the testator to dispose of his property after death as he sees fit, provided he is legally qualified so to do and acts as the law directs.” The intent of the testator, as determined from the language of his will, controls the disposition of his property.

The Wyoming Supreme Court rejected the minors’ argument that using the action of a parent to deprive the minor child of a property right violates constitutional provisions protecting minors and providing for due process and access to courts. The Wyoming Supreme Court, relying on decisions from other jurisdictions, found that beneficiaries do not have a right to testamentary bequests and are granted only those bequests subject to the testator’s conditions. Where the testator clearly states the conditions in his will, it is not up to the court to alter those conditions based on what it deems “fair.”

The Wyoming Supreme Court also rejected the minors’ argument that Mr. Willey was alive at the time of the prior suit and therefore could have removed them as beneficiaries, but his failure to do so indicated he did not intend to disinherit them. The Wyoming Supreme Court distinguished all the cases the minors cited to support this argument and therefore they were not persuasive to the court.

In re Estate of Burkhalter, 806 S.E.2d 875 (Ga. Ct. App. 2017)

> **The probate court finding that the petitioners' proposed declaratory judgment actions would not violate a will's terrorem clause was wrongfully decided because (1) a question regarding the validity of an *in terrorem* clause must be raised and resolved in the first declaratory judgment action raising that issue, and (2) the request for a declaration that a future petition to remove the executors would not violate the *in terrorem* clause lacked sufficient specificity for the trial court to make the required analysis that such a request would not be a violation of the *in terrorem* clause.**

Facts: The will of Louise Ray Burkhalter contained an *in terrorem* clause that read, in part, "[a]ny person … who attacks in any court of law any provision of my [will], or the administration of my estate … shall be specifically disinherited from any portion of my estate that would go to them." Louise's sons, William and John, were the executors of Louise's estate, which was probated in the Bibb County Probate Court. Two of Louise's other children, Nancy and George, filed a petition for declaratory judgement requesting a ruling that they could, without triggering the *in terrorem* clause of the will, file additional declaratory judgment actions regarding (i) the substantive provisions of the will, (ii) the *in terrorem* clause of the will, and (iii) removal of William and John as executors.

The probate court denied the declaratory judgment regarding the substantive provisions of the will, but entered a declaratory judgment permitting Nancy and George to file subsequent petitions regarding the *in terrorem* clause and to remove the executors, without triggering the *in terrorem* clause. The executors appealed.

As interpreted by case law, the Georgia Declaratory Judgment Act permits an interested party to seek a declaration concerning the validity of an *in terrorem* clause without triggering the *in terrorem* clause. Additionally, Georgia courts previously held that a declaratory judgment can be used, without triggering the *in terrorem* clause, to determine whether the proposed actions would violate the *in terrorem* clause.

On appeal, the Court of Appeals of Georgia overruled the Probate Court's decision granting the petitioners' declaratory judgment request. The Court of Appeals found no authority to support "a procedure by which an interested party may file one declaratory judgment action to determine whether it may file a second declaratory judgment action to determine the validity of an *in terrorem* clause. Rather, a question regarding the validity of an *in terrorem* clause should be resolved in the first declaratory judgment action raising that issue."

The Court of Appeals also found that the probate court improperly granted the declaratory judgment request regarding the validity of an action to remove the executors.

The Court of Appeals explained that, although an action to remove executors is not necessarily a violation of an *in terrorem* clause, the petitioners did not provide the probate court with sufficient detail regarding their proposed removal action for the probate court to properly determine whether such action would be a violation of the *in terrorem* clause. The petition did not attach a proposed complaint seeking the executors' removal or otherwise stating the basis for a suit to remove them. "Absent such allegations," the Court of Appeals held that the record was insufficient to support the conclusion of the probate court that the "… proposed Petition to remove the executors [would] not violate the *in terrorem* clause." Therefore, the Court of Appeals remanded the decision to the probate court to undertake the proper analysis.

In the Matter of the Will of E. Warren Bradway, 2018 WL 3097060 (N.J. Sup. Ct. App. Div., June 25, 2018)

New Jersey court admits to probate a codicil written entirely in the purported testator's blood.

Facts: From 1997 to 2004, E. Warren Bradway and Marc Coleman were in a long-term relationship. Bradway and Coleman also operated a bed and breakfast together in Philadelphia. In 2001, Bradway executed a will naming Coleman as the primary beneficiary and executor of his estate.

In 2004, Bradway and Coleman ended their relationship. Bradway also won a judgment against Coleman related to the winding up of the bed and breakfast. Later that year, Bradway began a relationship with Kirston Baylock and eventually moved into Baylock's New Jersey home.

In 2006, using his own blood as ink, Bradway drafted a codicil to his 2001 will. This codicil named Baylock as primary beneficiary and executor of his estate by directing that Blaylock's name replace all references to Coleman in the 2001 will. The codicil also referenced the 2001 will and partially forgave the judgment against Coleman.

Bradway died in April 2016. The next month, Bradway's estate filed a petition to admit the 2001 will and the codicil to probate in the Chancery Division of the New Jersey Superior Court. Coleman filed an answer, claiming that the codicil was invalid.

At trial, DNA experts agreed that the blood used to write the codicil came from a full sibling of Bradway's brothers. Handwriting experts testified that the signature on the codicil matched Bradway's handwriting. However, Coleman's handwriting expert testified that the signature could have been inserted later using manual or digital "cut-and-paste" techniques.

After the expert witnesses testified, the estate moved for a directed verdict to admit the codicil to probate. Coleman opposed the motion and promised to call two witnesses who would testify that the codicil was unsigned at Bradway's death. Nonetheless, the trial court granted the estate's motion and admitted the codicil to probate. Coleman appealed.

New Jersey law recognizes traditional wills executed in accordance with testamentary formalities and holographic wills where the document is signed and the material portions are in the testator's handwriting. An unsigned document may also be admitted to probate if the proponent shows, by clear and convincing evidence, that the decedent intended the document to constitute his will, a codicil to his will, or a revocation or revival of his will or codicil.

The Appellate Division affirmed the trial court's decision to admit the codicil to probate. The appellate court first concluded, because all the handwriting experts agreed the body of the codicil was written in Bradway's handwriting, that there was clear and convincing evidence that Bradway wrote the codicil. The question then became whether there was clear and convincing evidence that Bradway intended the codicil to alter his 2001 will. On this point, the appellate court agreed that the trial court had correctly ruled that there was.

The appellate court ruled that the codicil's references to the 2001 will, Coleman, and the bed and breakfast debt all established that Bradway intended to amend his will. Although Bradway's use of his own blood was "eccentric," that, too, evidenced that Bradway intended the document to be a codicil. Therefore, the trial court did not err by admitting the codicil to probate.

Horgan v. Cosden, 2018 WL 2374443 (Fla. Dist. Ct. App. May 25, 2018), review denied, No. SC18-1112, 2018 WL 3650268 (Fla. July 30, 2018)

Early termination of a trust can only occur for the best interest of the beneficiaries when viewed in the light of the settlor's intentions.

Facts: Yvonne S. Cosden created a revocable trust in 1993. This trust was amended and restated in 1998 and on Jan. 24, 2004, as the second amendment to and restatement of the Yvonne S. Cosden revocable trust dated July 29. 1993. Mrs. Cosden died in 2010, and the trust became irrevocable. Joseph J. Horgan, Mrs. Cosden's personal assistant and friend, and Christopher E. Cosden, her only child, are the successor co-trustees. The trust provides Mr. Cosden the net income for life, and upon his death, three higher educational institutions receive the principal. The trust did not include a provision about early termination but did include a spendthrift provision.

In August 2015, Mr. Cosden and the remainder beneficiaries entered into an agreement to terminate the trust early and divide the $3 million in trust assets among them based on the actuarial value of their interests. Mr. Horgan, as co-trustee, did not agree with the early termination. In October 2015, Mr. Cosden filed a suit against Mr. Horgan, as co-trustee, seeking to terminate the trust and a court order directing the distribution of assets in accordance with the beneficiaries' agreement. Mr. Horgan responded, stating that the termination of the trust was against the settlor's wishes to provide for her son for the rest of his life.

Both Mr. Cosden and Mr. Horgan moved for summary judgment in their favor. The Florida trial court granted summary judgment in favor of Mr. Cosden. The trial court directed termination of the trust as provided in the agreement, relying on Florida statutes that allow a court to terminate a trust if termination is not inconsistent with the settlor's purpose and is in the best interests of the beneficiaries. Mr. Horgan appealed.

Florida law allows termination of a trust when the modification or termination is not inconsistent with the settlor's purpose and the trust's purpose no longer exists, has been fulfilled, or has become illegal, impossible, wasteful or impracticable to fulfill. A trust can also be terminated if such termination is in the best interest of the beneficiaries. However, it is not enough for the beneficiaries to all agree; rather, there must be evidence that the termination would not violate the settlor's intent.

On appeal, the 2nd District Court of Appeals reversed and remanded the case, directing the trial court to enter a final order of summary judgement denying the termination of the trust.

The 2nd District Court of Appeals held that the plain language of the trust determines the settlor's intent. The plain language showed Mrs. Cosden wanted to provide for her son financially via incremental distributions of income until he died and then give the remainder to the three educational institutions. The District Court found that early termination of the trust would frustrate these purposes of the trust. Here, the facts did not support a finding that trust assets were being wasted, that the purposes of the trust had been fulfilled or that an early termination was in the best interest of the beneficiaries when considered in view of the settlor's intent.