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Recent Cases of Interest to Fiduciaries

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Tangwall v. Wacker, 2019 WL 4746742 (Montana September 30, 2019)

Vexatious litigant's attempts to evade collection through fraudulent transfers to self-settled domestic asset protection trust were denied.

Facts: Donald Tangwall, for himself and as trustee of the Toni 1 Trust, filed several lawsuits against William and Barbara Wacker in Montana state court, which resulted in a Montana state district court's judgment in favor of the Wackers. Before the issuance of the last of the default judgments in favor of the Wackers, Toni Bertran and Barbara Tangwall transferred parcels of real property to an Alaska self-settled domestic asset protection trust, the Toni 1 Trust. The Montana district court held that the members of the Tangwall family had fraudulently transferred property to the Toni 1 Trust, and the court rescinded the transfer.

Donald Tangwall, as trustee of the Toni 1 Trust, filed a complaint on behalf of the trust asking the U.S. District Court to reverse the state district court's judgment. The Wackers then filed a motion to declare that Tangwall was a vexatious litigant.

The court outlined many of the cases filed by Tangwall over the years, illustrating his pattern of vexatious *pro se* litigation. The court highlighted Tangwall's 20-year history of filing frivolous and patently meritless lawsuits, and noted in detail Tangwall's bad faith, his filings' lack of clarity or basis in law or fact, his frequent failures to attend hearings or respond to motions, his incomplete and unsupported briefs, and his attempt to represent corporate entities as an unlicensed attorney.

Law: Pursuant to 28 U.S.C. § 1651(a), the court may impose filing restrictions on abusive litigants. However, before imposing a filing restriction, the court must: (1) give litigants notice and opportunity to oppose the order before it is entered; (2) compile an adequate record for appellate review, including a listing of all the cases and motions that led the district court to conclude that a vexatious litigant order was needed; (3) make substantive findings of frivolousness or harassment; and (4) tailor the order narrowly so as "to closely fit the specific vice encountered."

Holding: The U.S. District Court granted the Wackers' motion to declare Tangwall a vexatious litigant, finding that the Wackers had thoroughly documented Tangwall's history of vexatious litigation. The court noted that Tangwall's litigation activity has spanned 20 years and numerous state and federal venues, that he has been declared a vexatious litigant in four other jurisdictions, and that three such rulings stem directly from Tangwall's litigation against the Wackers over the course of eight years.

Tangwall's history of litigation involved frequent actions on behalf of trusts, corporate entities and individuals, though he did not have a law license. His actions demonstrated a belief that he could fraudulently transfer assets to a trust and protect them from actions for recovery so long as he sufficiently badgered the opposing parties with repeated meritless filings, forcing them to back down or settle. While noting that Tangwall has a right to seek redress with courts, the U.S. District Court found his filings to be numerous and redundant, and to commonly lack any basis in fact or law. The court found he acted fraudulently and in bad faith, and that he harasses his opponents, in particular, the Wackers.

Lastly, in holding that Tangwall was a vexatious litigant, the court ordered that Tangwall must obtain preapproval before filing any further documents in the case at issue and any new complaints against the Wackers or their attorney. In addition, the court extended the limitation to other entities and individuals acting under Tangwall's direction, to address Tangwall's habit of ghost-writing complaints and other documents on behalf of legal entities and other individuals.

In the Matter of Estate of Cooney, 454 P.3d 1190 (Montana December 24, 2019)

Contract to make a will claim was not within the jurisdiction of the probate court.

Facts: John Cooney II and Loriann Cooney divorced in 1980. As part of the divorce settlement, they agreed that the "ranch property" John II owned at the time of his death would be distributed to their daughters and any other children born after the divorce to John II, in equal shares. John II later had two more children. He died in 2015. His will left all of his real property to his son, John III.

John II's will was admitted to probate and his three daughters — Jonnie, Melissa and Jill — filed a motion to invalidate portions of the will that left the ranch property entirely to John III. The district court denied the motion. The daughters appealed, arguing that the court erred in determining that they could not enforce the divorce settlement agreement in the probate proceeding. They argued that the probate court had jurisdiction to administer the estate in accordance with the divorce settlement agreement because it involves John II's property and the issue of the rightful heirs and successor to the property.

Law: A district court sitting in probate has limited jurisdiction and has only those special and limited powers expressly conferred by statute, including all subject matter relating to (a) estates of decedents, including construction of wills and determination of heirs and successors of decedents, and estates of protected persons; and (b) protection of minors and incapacitated persons.

Holding: On appeal, the court of appeals emphasized that the probate court has subject matter jurisdiction over estates of decedents and their administration, and that such is not an action at law nor a suit in equity. A probate court does not have jurisdiction to consider equitable matters.

Here, the daughters sought the enforcement of a contract to make a will. Montana law authorizes the use of succession contracts, or a written contract to dispose of a person's property by will, and the court noted that the divorce settlement agreement constituted such a succession contract. However, the remedy for a breach of contract is not a proceeding in probate court; rather, the equitable remedy of specific performance of the contract must be sought through an action in equity in a court of general jurisdiction. The claimant under a succession contract has a "right or interest in the estate, an equitable ownership therein." The court of appeals therefore upheld the district court's ruling, affirming that the probate court lacks jurisdiction to adjudicate a breach of contract claim related to a succession contract.

Waldron v. Susan R. Winking Trust, 2019 WL 3024767, 2019 Tex. App. LEXIS 5867 (Tex. Ct. App. July 10, 2019)

A Texas Court of Appeals held that a trustee's fiduciary duties are not discharged until the trustee has been replaced by a successor trustee.

Facts: Susan R. Waldron was the beneficiary of a trust created by her parents. The current trustee resigned and the named successor trustee declined to serve. Pursuant to the trust agreement, if the named successor trustee failed or ceased to serve, a bank or a trust company was to be appointed as successor trustee. The trust agreement also provided that Susan could terminate a trustee, without cause, by written letter if both grantors were legally disabled or deceased.

Susan was unable to find a bank or trust company willing to serve as trustee and filed an application with the 241st Judicial District Court in Smith County, Texas, to appoint Raymond W. Cozby III as the successor trustee. Several days later, the district court approved Susan's request.

Less than a year later, Susan filed a *pro se* application asking the district court to appoint her as trustee. Susan alleged that Cozby refused to resign as trustee of the trust and as a result of his conduct, she would be forced to relocate to Tyler, Texas, "bereft, homeless, penniless and needlessly in danger." Cozby stated that he was willing to resign and had no objection to his removal upon the appointment of an appropriate successor trustee as provided in the trust agreement, or as otherwise determined by the court. He asked for a declaratory judgment and requested a finding that he complied with the trust's terms, that he be removed or allowed to resign, that an appropriate successor trustee be appointed and that he be discharged from any further liability.

After a bench trial, the trial court found that the final accounting fairly and accurately set forth the trust's assets, liabilities, income and expenses, and the court approved it. The trial court further found that Cozby administered the trust in accordance with its terms and the applicable law and was not liable to Susan on any claims. The trial court also found that all expenses and professional fees Cozby paid or incurred were reasonable and necessary. The trial court appointed another individual as successor trustee with her term to begin 10 days after the judgment became final or all appeals exhausted, whichever was later.

Susan appealed, claiming that pursuant to the terms of the trust, she could terminate a trustee immediately, without cause, by written letter if both grantors were legally disabled or deceased. Accordingly, Susan argued that Cozby's resignation was complete the moment Cozby received her

termination letter and he was not entitled to reimbursement for professional expenses incurred thereafter.

Law: The terms of the trust prevail over any provision of the Texas Trust Code with certain exceptions that are not applicable in this case. However, where a trust agreement is silent, the Texas Trust Code controls. Pursuant to the Texas Trust Code, where a successor trustee is not selected under the terms of the trust instrument, a court may, and on the petition of an interested person shall, appoint a successor trustee. Moreover, the resigning trustee's fiduciary duties are not discharged until the trustee is replaced by a successor trustee.

Holding: The Court of Appeals of Texas affirmed the trial court's judgment. The trust agreement provided that Susan could terminate a trustee by letter and appoint a successor bank or trust company that was willing to serve, but no bank or trust company was willing to serve. Accordingly, the court of appeals held that Susan's attempt at removal by letter without naming a bank or trust company as successor was ineffective. Rather, the only procedure available to replace Cozby under these circumstances was by petition to the district court for the appointment of a trustee. The court of appeals held that although ready and willing to be replaced, Cozby, as trustee, was obligated to continue in the performance of his duties until replaced by a successor trustee, and thus was entitled to reimbursement for professional expenses incurred until he was properly replaced.

Sibley v. Sibley, 273 So. 3d 1062 (Fla. Ct. App. 2019)

A Florida appellate court held that an administratively dissolved private foundation is not in existence on the decedent's date of death for purposes of a bequest to that foundation, even when the private foundation is later reinstated.

Facts: Curtiss F. Sibley executed a revocable trust under which his brother, Charles Sibley, was named trustee upon Curtiss' death. Pursuant to the terms of the trust, Curtiss left the residue of his estate to his private foundation, the Curtiss F. Sibley Charitable Foundation, if then in existence. If the private foundation was no longer in existence at Curtiss' death, Curtiss left the residue of his estate to the Fellowship House Foundation, a charitable organization in South Miami, Florida.

On Sept. 23, 2011, the private foundation was administratively dissolved. Three months later, Curtiss passed away. On July 9, 2012, approximately seven months after Curtiss' death, the private foundation was reinstated. However, Charles never opened a bank account for the private foundation, he did not file any paperwork for the private foundation with the IRS, and he never funded the private foundation, despite being in control of the trust funds.

In 2017, the Fellowship House Foundation filed a petition to reopen for subsequent administration, alleging that the private foundation was no longer in existence on the date of Curtiss' death and, therefore, pursuant to the trust agreement, the residuary trust estate should be distributed to Fellowship House.

The trial court concluded that the private foundation was not in existence at the time of Curtiss' death and ordered Charles to distribute the residuary trust assets to the Fellowship House. Charles appealed.

Law: The Florida Statutes provides that an administratively dissolved corporation continues its corporate existence for the purpose of winding up and liquidating its business and affairs. A corporation administratively dissolved may apply for reinstatement, and if granted, the reinstatement relates back to the date of administrative dissolution. (See Fla. Stat. § 607.1422.) However, it is black letter law that in construing the terms of a trust, the court must ascertain and give effect to the settlor's intent.

Holding: The Florida District Court of Appeals held that the private foundation was no longer in existence at the time of Curtiss' death and the reinstatement of the private foundation's corporate status seven months later did not relate back to the date of death.

First, the Florida District Court of Appeals viewed the lack of funding, the lack of a bank account and the failure to file any IRS filings as evidence that the

private foundation was non-functioning on the date of Curtiss' death. As the administratively dissolved foundation was non-functioning and could not take any actions at the moment of Curtiss' death except to complete its dissolution, the Florida District Court of Appeals held that the private foundation was no longer in existence at the time of Curtiss' death.

Second, the Florida District Court of Appeals held that the statute providing that the reinstatement of an administratively dissolved corporation relates back to the date of administrative dissolution is not applicable to the determination of whether the private foundation existed on the date of Curtiss' death. The Florida District Court of Appeals reasoned that to hold otherwise would frustrate Curtiss' intent to make his testamentary gift to the private foundation contingent on its existence on the date of his death because the foundation could possibly always be in existence so long as someone prospectively filed the necessary annual reports and paid the delinquent fees.

Liebovich v. Tobin, 2019 Cal. App. Unpub. LEXIS 5930

Remainder beneficiaries have standing to challenge a court order amending a revocable trust to partially disinherit these beneficiaries when one of the settlors was not given proper notice of the request for entry of such an order.

Facts: In 1984, Theodore and Shirley Liebovich created the Liebovich 1984 Trust. Thereafter, they executed multiple amendments. Specifically, the sixth amendment provided that either spouse could modify or amend the trust during their lifetime if they acted jointly. Together with the sixth amendment, the spouses executed limited durable powers of attorney. Theodore went on to execute four more amendments to the trust, signing for himself and on the basis of the power of attorney for Shirley. These amendments effectively disinherited their grandchildren.

In 2013, Theodore filed a petition to modify the sixth amendment, to modify Shirley's power of attorney, and to validate the four additional amendments that were executed after the sixth amendment. Theodore served the petition on his children and grandchildren, but he executed a waiver of notice for Shirley as her attorney-in-fact. The probate court granted the petition and the order recited "all notices have been given as required by law."

After the death of both Theodore and Shirley, the grandchildren filed a motion to vacate the 2013 order as void for two reasons: (1) the grandchildren did not receive notice of the petition or the hearing, and (2) Shirley did not receive such notice. The probate court denied their motion on the grounds that the grandchildren were not entitled to mandatory notice since the trust was revocable and that any deficiency in serving Shirley was not applicable because she was not a party to the motion. The grandchildren appealed.

Law: A party seeking to modify a trust under the California Probate Code must serve notice of hearing upon all trustees holding the power to revoke the trust. (See Cal Prob Code §17203.) A party seeking to modify a power of attorney must notify the principal. (See Cal Prob Code § 4544.) A void order is a "nullity" and it may be set aside not only by the parties and their privies, but also by a stranger to the action. (See *Mitchell v. Automobile Owners Indem. Underwriters* (1941) 19 Cal.2d 1, 7, 118 P.2d 815; and *Plaza Hollister Ltd Partnership v. County of San Benito* (1999) 72 Cal.App.4th 1, 15-16, 84 Cal. Rptr. 2d 715.) A stranger must point to some right or interest that would be affected.

Holding: The Court of Appeals of California granted the grandchildren's appeal, but only to the extent of holding the 2013 order was void for lack of notice to Shirley. The court of appeals held that the grandchildren were not entitled to notice regarding either the order modifying the sixth amendment or the order modifying the power of attorney. However, the court of appeals came to a different conclusion regarding notice to Shirley.

The court of appeals first addressed whether Shirley received proper notice. The court of appeals ruled Theodore lacked the power to execute the waiver of notice since the power of attorney did not grant Theodore the power to waive notice on Shirley's behalf. This conclusion meant the 2013 order was void.

Next, the court of appeals turned to whether the grandchildren, as strangers to the action, had standing to request that the 2013 order be declared void. In answering this question, the court of appeals noted that because the 2013 order dramatically reduced the grandchildren's inheritance, their rights were affected, and thus they did have standing to challenge the 2013 order and have it set aside, reinstating the inheritance they had lost.

Matter of Troy S. Poe Trust, 2019 WL 4058593 (Tex. Ct. App. August 28, 2019)

Texas appellate court determined that jury trials are available in trust modification actions to determine disputed facts.

Facts: The settlor had two adult sons, Troy and Richard. The settlor established a trust for the benefit of Troy, which named himself, Richard and Anthony Bock, an accountant, as trustees. The trust contained a provision requiring the trustees to take actions unanimously. However, despite the terms, the settlor typically made decisions regarding distributions from the trust.

In September 2010, the trust entered into a care agreement with Angel Reyes Jr., who would be reimbursed for reasonable out-of-pocket expenses for Troy's care and maintenance. After the settlor's death, Bock looked at the history of distributions the settlor had regularly made and attempted to follow the same pattern. However, Richard insisted that Bock strictly comply with the trust terms demanding the trustees act jointly in taking actions. As a result, Bock and Richard disagreed on expenditures relating to Angel Reyes Jr.

Bock filed a petition to modify the unanimity requirement and add an extra trustee because of changed circumstances since the settlor's death. The petition asserted that the purposes of the trust had become impossible to fulfill, and modification would further trust purposes. The probate court set the matter for a bench trial despite Richard's request for a jury trial. The probate court entered a judgment modifying the trust in two ways. First, it appointed a family friend as successor trustee. Second, the order set a procedure for always ensuring there would be three trustees who could make decisions by majority vote. Richard appealed.

Law: The Texas Trust Code, contained in the Texas Property Code, § 115.012, provides that normal civil procedure rules and statutes apply to trust actions. The Texas civil procedure rules and the Texas Constitution guarantee the right to a jury trial. Under Texas law, the right to a jury trial extends to disputed issues of fact in equitable, as well as legal proceedings. (See *San Jacinto Oil Co. v. Culberson*, 100 Tex. 462, 101 S.W. 197, 198 (1907).) As a general rule, where contested facts issues must be resolved before equitable relief can be determined, a party is entitled to have a jury resolve them. (See *Hill v. Shamoun & Norman, LLP*, 544 S.W.3d 724, 741 (Tex. 2018).)

Holding: The Court of Appeals of Texas set aside the order modifying the trust and remanded for a new trial.

Richard raised two issues for review. He claimed first that the probate court's modification was improper because it contravened the settlor's unambiguous

intent, and second, that the probate court improperly denied him a jury trial. Richard argued that the questions of whether there were changed circumstances, or that the purpose of the trust had become impossible to fulfill, were for a jury to resolve. The court of appeals agreed with Richard in holding that whether a trust needed to be modified was a factual question that should have been decided by a jury upon proper jury demand.

Bock asserted three reasons why the right of a jury trial did not apply here: (1) Richard failed to pay the jury fee; (2) Richard, a trustee, had no justiciable interest in the terms of the trust; and (3) as a matter of law, the result would be the same.

The court of appeals rejected the jury fee argument because Bock failed to raise the issue in the probate court. In addition, the court of appeals rejected Bock's argument that Richard had no justiciable interest due to the fact that Bock had named Richard as a party, and that fact gave him a right to a jury trial. Last, the court of appeals held that questions as to the changed circumstances and impossibility of performance were disputed factual questions, and thus the refusal to grant a jury trial amounted to a harmful error.

Because the court remanded for a jury trial on these issues, it did not comment on Richard's first claim regarding the appropriateness of the probate court's modification order.

Blech v. Blech, 38 Cal.App.5th 941 (2019)

In California, creditors may request trust assets be made payable directly to the creditor even from a spendthrift trust once the amount to be distributed to a beneficiary is determined.

Facts: Richard Blech is the beneficiary of a spendthrift trust his father created. The trust provides for annual distributions to Richard of the entire trust principal over the course of 10 years in non-discretionary predetermined amounts. The trust contains a spendthrift provision that states, in part, "[a]ll of the income and principal [of the] Trust shall be transferable, payable and deliverable only to [Richard] at the time [Richard] is entitled to take under the terms of [the] Trust."

Richard owed money to his siblings as a result of a settlement agreement he entered into with them. The siblings obtained money judgments against Richard and the probate court ordered the trustee of the trust to pay 25 percent of future trust distributions directly to the siblings, until their judgments were satisfied, pursuant to Section 15306.5 of the California Probate Code. Subsequently, the siblings and a third-party creditor filed petitions to enforce their money judgments against the remaining 75 percent of Richard's distributions, pursuant to section 15301(b) of the California Probate Code.

The court heard arguments on the matter three days before a scheduled distribution to Richard. After argument, the court ordered the trustee of the trust to proceed with payment of the 25 percent to the creditors on the scheduled distribution date but to retain the remaining 75 percent of the distribution in the trust until the court gave its ruling. Six days after the scheduled distribution, the court ruled in favor of the creditors. Richard appealed.

Law: California law generally holds that a beneficiary's interest in a spendthrift trust is not subject to enforcement of a money order until payment is made to the beneficiary. (See Sec. 15300 and 15301 of the California Probate Code.) However, 15306.5 of the California Probate Code permits creditors to obtain a court order directing the trustee to pay up to 25 percent of a beneficiary's future trust interest directly to such creditor until the creditor's judgment is satisfied, provided such funds are not necessary for the support of the beneficiary and his or her dependents. If there is more than one creditor proceeding against the trust under 15306.5, the aggregate amount payable directly to creditors from the trust cannot exceed 25 percent of future distributions.

In addition to this provision, Section 15301(b) provides that "after an amount of principal has become payable to the beneficiary under the trust instrument, upon petition to the court … by a judgment creditor, the court may make an order directing the trustee to satisfy the money judgment out of that principal amount." In *Carmack v. Reynolds*, 2 Cal.5th 844 (2017), the California

Supreme Court construed that provision to mean that creditors may reach principal already set up to be distributed to a beneficiary despite a spendthrift provision.

Holding: On appeal, the Court of Appeals of California for the 5th Circuit affirmed the probate court's decision and rejected all four of Richard's arguments. The court of appeals rejected Richard's argument that 15301(b) bars a creditor from *filing* a petition to enforce a judgment before a trust distribution is due and payable based on the plain language of the statute.

The court of appeals explained that if Richard's interpretation of the statute was correct and creditors were barred from filing a petition until after the distribution is paid to the beneficiary, there would be no window in which the remedy provided in 15301(b) of the California Probate Code could be utilized by creditors. Further the court of appeals ruled Richard's interpretation of the trust as requiring the trustee to make all payments directly to Richard as factually inaccurate because the trust left the receipt of payment to the discretion of the trustees.

Additionally, the court of appeals rejected Richard's argument that the probate court's decision should be overturned because it failed to consider what portion of the distribution should be unreachable by creditors because it was necessary to support Richard and Richard's dependents. The court of appeals determined the trust was not a support trust because the distributions of income and principal were mandatory and based on factors other than Richard's education and support. Accordingly, assessment of Richard's needs and other available resources was not a necessary consideration for the probate court. The court of appeals did note that the trust included language that the spendthrift clause "shall not restrict … the Trustee to use and disburse funds for the support maintenance, health and education of [Richard]." Still, the court of appeals was not persuaded that such language converted the trust to a support trust where its primary purpose was clearly nondiscretionary distributions of principal over a set term.

Finally, the court of appeals held that the probate court was within its discretion to release a written opinion rather than rule from the bench and to order the trustee to withhold Richard's distribution until such written opinion could be finalized.

Matter of Sochurek, 174 A.D.3d 908 (NY App. Div. 2019)

Beneficiary claim against an executor for breach of fiduciary duty does not necessarily cause that beneficiary to violate an in terrorem clause.

Facts: A decedent was survived by his wife, Anna Marie T. Sochurek, and his two daughters from a prior marriage, Lynn Ammirato and Lisa Birch. The decedent's will gave the wife a life estate in the decedent's interest in a limited liability company, including "all of the duties and responsibilities for the operation of [the company] as if she was the owner and member thereof." Upon the wife's death, her life estate would terminate and her interest would pass to the daughters in equal shares.

The will left the remainder of the decedent's estate to the wife outright, and made the wife the decedent's executor, with the power to "run, manage and direct any business of which [the decedent] may die possessed, temporarily or permanently, or to sell or otherwise dispose of such business and all the assets thereof upon any terms which [the executor] deem[s] advisable." The will contained an *in terrorem* clause that provided for the revocation of the interest of any beneficiary who "institute[s]… any proceedings to set aside, interfere with, or make null any provision of [the will] … or shall in any manner, directly or indirectly, consent the probate thereof."

After probating the will and being appointed as the executor, the wife sold the company, retaining for herself a 50 percent share of the sale proceeds. The wife and the daughters entered a standstill agreement whereby the wife agreed to hold the proceeds from the sale of the company in a segregated bank account until the wife and daughters agreed on the daughters' interests in the liquidated assets of the company as the remainder beneficiaries of the wife's life estate. The daughters then filed an action in the Supreme Court against the wife for breach of fiduciary duty to the daughters, as remainder beneficiaries, in retaining the sale proceeds for herself.

While the Supreme Court case was pending, the wife petitioned the Surrogate's Court of Dutchess County to construe the *in terrorem* clause of the will. The Surrogate's Court ruled that the daughters' commencement of the Supreme Court action interfered with the wife's administration of the estate in violation of the *in terrorem* clause and thus forfeited their legacies under the will. The daughters appealed.

Law: In New York, *in terrorem* clauses are enforceable, but case law provides that such clauses are not favored and must be strictly construed based on the testator's intent. The testator's intent must be determined from reading the will in its entirety and in view of all the facts and circumstances under which the provisions of the will were framed.

Holding: The Supreme Court, Appellate Division, held that the beneficiaries did not violate the *in terrorem* clause. The Supreme Court rejected the daughters' argument that the pending Supreme Court action effected a bar to the wife's proceeding in the Surrogate's Court, but found in favor of the daughters on the merits.

The daughters' allegations against the wife in the Supreme Court action did not violate the *in terrorem* clause because the daughters' breach of fiduciary duty allegations did not raise any contest as to the validity of the will, or "otherwise interfere[] with its provisions granting [the wife] discretion to dispose of the estate assets in her capacity as executor." Further, the daughters' allegations that the wife violated the standstill agreement did not implicate any challenge to the will. Accordingly, the Supreme Court reversed the Surrogate's Court and remitted the case to the Surrogate's Court for entry of an amended decree declaring that the daughters' action did not violate the *in terrorem* clause of the will and did not forfeit their legacies under the will.

Bazazzadegan v. Vernon, 588 S.W. 3d 796 (Ark. Ct. App. 2019)

Arkansas Court of Appeals holds that an arbitration provision in a trust is mandatory and bound successor co-trustees and beneficiaries of the trust.

Facts: Dolores Cannon created the Dolores E. Cannon Living Trust on April 4, 2014. After Dolores' death, her daughters, Julia Bazazzadegan and Nancy Vernon, became co-trustees of the trust. Julia and Nancy were also beneficiaries of the trust.

Nancy filed a lawsuit against Julia alleging breach of trust, breach of fiduciary duties as a corporate officer, and misappropriation of funds. In response, Julia moved to compel mediation or arbitration of Nancy's claims.

The trust agreement contained three provisions related to alternative dispute resolution. First, in Section 12.24, the trust agreement empowered the trustee to settle any claims against or in favor of the trust by compromise, adjustment, arbitration or other means.

In Section 11.04 of the trust agreement, Dolores "requested" that any questions or disputes arising during the administration of the trust be resolved by mediation and, if necessary, arbitration.

Finally, in Section 11.14 of the trust agreement, Dolores again "requested" that the trustees settle any matters by mediation or arbitration, unless the trustees agreed otherwise.

The trial court denied Julia's motion to compel mediation and arbitration. Julia appealed.

Law: In construing a trust, the grantor's intent is paramount. The Arkansas Supreme Court has held that the words "I request" represent mandatory direction rather than a permissive or precatory wish.

Furthermore, when a trustee agrees to act as such, the trustee accepts the terms of the trust.

Holding: The Arkansas Court of Appeals, Division IV, held that the trust agreement required mediation and arbitration of Nancy's claims. The court found that the word "request" indicated that Dolores intended to require arbitration, rather than merely to give the trustee the choice to arbitrate claims.

The court also held that the arbitration provisions were enforceable against Nancy. Although neither Julia nor Nancy was a party to the trust agreement, each of them had accepted the terms of the trust when she became a trustee.

Nancy, as a beneficiary, was also bound by the trust in her individual capacity as a beneficiary, having accepted the benefits of the trust intended for her.

Matter of Bruce F. Evertson Dynasty Trust, 446 P.3d 705 (Wyo. 2019)

Wyoming Supreme Court holds that a trustee with the power to distribute income and principal for any purpose had the authority to decant a trust. However, the Supreme Court held that the trial court erred by considering whether a specific decanting proposal was permissible.

Facts: Bruce Evertson created the Bruce F. Evertson Dynasty Trust, with Evertson Fiduciary Management Corporation as trustee. The beneficiaries of the trust were Bruce's wife, his two children and his children's descendants. Bruce funded the trust with 2,300 acres of ranch and recreational property in Nebraska.

After Bruce's death, the trustee filed a petition for instruction asking the court to confirm it had the power to decant the trust. The trustee also sought approval of its proposed decanting, which involved dividing the trust into two separate trusts, with one trust for Bruce's wife and his daughter and the other trust for Bruce's son, Edward. The trustee claimed that the proposed decanting was in the best interests of the beneficiaries and consistent with Bruce's intent.

Edward objected to the petition and argued, among other things, that the proposed decanting contradicted his father's intentions and constituted a breach of trust. In response, the trustee filed a motion for judgment granting its petition for instructions.

The trial court held that the trustee had the power to decant the trust. Over Edward's objection, the trial court also held that the specific decanting proposal was not a breach of fiduciary duty because the decanting was consistent with Bruce's intent.

Edward appealed.

Law: A judgment on the pleadings is appropriate only if all material facts are admitted in the pleadings and only questions of law remain. If a material fact is in dispute, then judgment on the pleadings is not appropriate.

Holding: The Supreme Court of Wyoming affirmed the trial court's ruling that the trustee had the authority to decant the trust. However, the Supreme Court reversed the trial court's finding that the proposed decanting was not a breach of fiduciary duty. The Supreme Court found that Bruce's intent in creating the trust was a material fact for determining whether the decanting constituted a breach of trust, and that the parties disputed what Bruce's intent was. Therefore, the trial court erred by granting a motion on the pleadings except on the limited question of whether the trustee had the power to decant the trust generally.

Practice Point: Decanting is a powerful tool for trustees to modify a trust in light of changes in the law or family circumstances. Although court approval is often not required to exercise the decanting power, a trustee should consider seeking court approval if a beneficiary or another party, such as the IRS or a local tax authority, might contest the decanting.

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