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Recent Cases of Interest to Fiduciaries

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Smith v. Szeyller, 31 Cal. App. 5^{th} 450 (2019)

A beneficiary who received notice but did not participate in litigation between another beneficiary and the trustees found herself with no recourse to object to the settlement reached between the litigating beneficiary and the trustees, even where the settlement agreement provided that a portion of the litigating beneficiary's legal fees be paid out of the non-participating beneficiary's trust share.

Facts: Mr. and Mrs. Smith created a trust naming their five children as beneficiaries. At Mr. Smith's death, Mrs. Smith became the sole trustee of the trust. Mrs. Smith named her daughter, Joann, as her co-trustee, and Joann's husband, Edward, as her successor trustee. After Mrs. Smith's death, Joann and Edward served as co-trustees of the trust (the trustees).

One of Joann's brothers, Don, objected to an accounting the trustees provided and filed a verified petition questioning trust expenditures and gifts made to Joann and Edward from the trust before Mrs. Smith's death. Don's petition requested that the court freeze the trust assets, remove the trustees and pay Don's attorney's fees from the trust assets. The trustees agreed to freeze trust assets, make a distribution of $200,000 to each of the beneficiaries before trial and revised their accountings. The trustees petitioned the court for approval of their revised accountings. Don filed objections and a petition for financial elder abuse. The other three siblings — Donna (through her conservator), Dave and Dee — were all notified of the petitions but did not respond. Additionally, Don specifically asked Donna (through her conservator) if she wanted to join the litigation and she declined.

After three days of trial, the trustees advised that they had revised their accountings again to address Don's concerns. The trustees and Don then reached a settlement agreement that the court approved. The agreement provided, in part, for the payment of Don's attorney's fees from the trust assets. Donna (through her conservator) filed post-trial motions for a new trial and to vacate the judgment on the grounds that she had been denied due process and challenging the award of attorney's fees.

Law: In general, the "American rule" requires successful litigants, including a beneficiary challenging the actions of a trustee, to pay their own attorney's fees. An exception to this rule is the "common fund doctrine," which permits the court to require that non-litigants who receive a pecuniary benefit as a result of the litigation bear a portion of the legal fees. The substantial benefit doctrine extends the common fund doctrine to permit a court to require passive parties who receive non-pecuniary benefits as a result of litigation to bear a portion of the legal fees.

Holding: On appeal, the California Court of Appeals affirmed the trial court's ruling and upheld the settlement agreement, including the award of attorney's fees from trust assets. The Court of Appeals rejected Donna's due process argument because Donna had been notified about the litigation and chose not to participate. Because Donna chose not to participate in the litigation, the California Court of Appeals determined that she was not entitled to additional notice regarding the proposed settlement agreement, which addressed matters already before the court. Additionally, the Court of Appeals found that the award of attorney's fees and the application of the substantial benefit doctrine were appropriate in this case because the non-participating beneficiaries received the benefit of more accurate trust accountings, refunds to the trust from the trustees and a stop to further inappropriate depletion of the trust assets by the trustees, all of which benefitted all of the beneficiaries, not just the litigating party.

Practice Point: The substantial benefit theory has rarely, if ever, been applied in the trust context before. Further application of the substantial benefit theory in the trust context may lead more disgruntled beneficiaries to act unilaterally to initiate litigation if there is a possibility to spread their legal fees amongst all the beneficiaries even without their consent. At the same time, beneficiaries who previously may have been disinclined to join in litigation may be more likely to do so based on this case. As Donna learned the hard way in this case, by failing to participate in the litigation, a beneficiary may lose her seat at the negotiating table and miss the chance to object to settlement terms with which she disagrees, such as payment of fees out of her trust share.

Matter of Fund for Encouragement of Self Reliance, 440 P. 3d 30 (2019) (4th Dist., April 25, 2019)

> **Where the terms of a charitable trust appointed multiple trustees and did not explicitly provide that the trustees could act alone, consent by all of the co-trustees was required to decant the trust, despite the reference in the decanting statute to "a Trustee," in the singular.**

Facts: The terms of a charitable trust appointed co-trustees. The trust did not include provisions giving any one trustee the ability to act unilaterally. When a dispute arose among the co-trustees, the 8th Judicial District Court, Clark County, Nevada, ordered that half of the property be decanted into a new trust with the same purpose as the original trust, but to be administered by only one of the original trustees, against the objection of the co-trustees. The co-trustees appealed on the grounds that consent of all of the co-trustees was required to decant the trust.

Law: The Nevada decanting statute provides that "unless the terms of … [the] irrevocable trust provide otherwise, a trustee with discretion or authority to distribute trust income or principal to or for a beneficiary of the trust may exercise such discretion or authority by appointing the property subject to such discretion or authority in favor of a second trust as provided in this section." NRS 163.556(1). The term "trustee" is defined by NRS 163.500 to mean "a trustee, trustees, person or persons possessing a power or powers referred to in [the Charitable Trust Act]." The governor of Nevada amended that law on June 5, 2019, but not in a way that substantively changed the law relied on in this case.

Holding: The Nevada Supreme Court overruled the lower court and held that the decanting statute does not permit decanting of the trust without the consent of all of the trustees. In reaching its decision, the Nevada Supreme Court noted that, in relevant part, the trust provided that the "*Trustees* … may, in *their* discretion" manage trust property and income (emphasis added by the Nevada Supreme Court). Quoting Bogert's *Law of Trusts and Trustees*, the Nevada Supreme Court explained, "In the absence of statute or contrary direction in the trust instrument, the trustees are regarded as a unit."

Because neither the statutory definition of trustee, nor the terms of the trust contradicted that presumption, the Nevada Supreme Court found that the unanimous consent of all of the co-trustees was required to exercise a discretionary power, including the statutory decanting power. However, because the Nevada Supreme Court found consent from all of the co-trustees was required, they did not need to address the issue of whether the Nevada decanting statute even applies to charitable trusts.

Practice Point: This case is a reminder to practitioners to be deliberate in drafting and to be aware of statutory default rules regarding the ability or inability of trustees to take unilateral action.

In re Deborah Dereede Living Trust dated December 18, 2013, 2019 WL 1549157 (S.C. App. April 10, 2019)

A trustee's reasonable, good-faith departure from the express terms of a trust nevertheless constituted a breach of fiduciary duty.

Facts: Courtney Feely Karp was the personal representative of the estate of her mother, Deborah Dereede (the decedent), and the successor trustee of the decedent's revocable trust agreement, which became irrevocable at the decedent's death. The decedent's revocable trust agreement provided that "as soon as practicable" after the decedent's death, the trustee should sell certain real property, discharge the mortgage secured by the property and distribute one-half of the net proceeds of sale to Karp's stepfather, Hugh Dereede.

Because she was also serving as personal representative of the decedent's estate, Karp believed that she could not sell the real property and distribute the proceeds until the time for creditor's claims against the estate expired. Hugh Dereede disagreed and brought an action in the applicable South Carolina Circuit Court. In response, Karp claimed Dereede violated a no-contest clause in the decedent's revocable trust by initiating the lawsuit. The Circuit Court ruled that Karp breached her fiduciary duties by failing to sell the real property and distribute the property to Dereede as soon as possible. Karp appealed.

Law: A trustee is obligated to administer a trust in accordance with its express terms. In particular, a trustee must adhere strictly to express directions as to how and when to dispose of trust property. While personal representatives often must delay the distribution of assets until the personal representative determines that the estate has sufficient liquidity to satisfy all creditors' claims, that rule does not apply in the case of trustees. According to the Court of Appeals, a trustee breaches her fiduciary duties by failing to act in strict compliance with the terms of the trust agreement, even if the trustee does so reasonably and in good faith. Furthermore, according to the appellate court, a no-contest clause in a will or trust agreement cannot be enforced against an interested person who has probable cause to contest the validity of the document or the actions of the fiduciary.

Holding: The Court of Appeals upheld the Circuit Court's decision, finding that Karp breached her fiduciary duties by failing to take any action to sell the real estate within six months of the decedent's death. The Court of Appeals also held that Dereede did not trigger the no-contest clause in the trust agreement because he had probable cause for bringing his action against Karp.

Practice Point: A trustee's bad faith nearly always constitutes a breach of fiduciary duty. This case is a reminder that even a trustee's reasonable, good-faith actions can still constitute a breach of trust when the trustee's actions violate the express terms of the trust.

Campbell v. Commissioner, T.C. Memo 2019-4 (2019)

U.S. Tax Court respected a foreign asset protection trust and held that the IRS could not consider the trust assets in determining the taxpayer's assets for purposes of collecting a tax liability.

Facts: In 2002 and while a resident of Connecticut, John F. Campbell filed his personal income tax return for 2001. Campbell's return reported taxable income of just over $20,000 and a tax liability of about $60,000.

Near the end of 2002, Campbell and his family moved to the island of St. Thomas in the U.S. Virgin Islands. In 2004, while a resident of St. Thomas, Campbell created the First Aeolian Islands Trust pursuant to the law of Nevis, West Indies. Campbell named Meridian Trust Co. Ltd. as the initial trustee, although the trust protector, who held the power to remove and replace the trustee, later replaced Meridian Trust with Southpac Trust Nevis Ltd. The trust was structured as an irrevocable foreign asset protection trust. Campbell funded the trust with $5 million in cash and marketable securities.

At the time he created the trust, Campbell had a net worth of approximately $25 million. Campbell and members of his family could receive distributions from the trust in the sole discretion of the trustee, but Campbell never received any distributions of trust assets. Campbell could not appoint or remove the trustee nor direct the trustee to make any distributions or investments. The trust was a grantor trust as to Campbell for federal income tax purposes.

During 2001, Campbell had engaged in a tax shelter transaction (a custom adjustable-rate debt structure, or CARDS transaction). In 2004, the IRS initiated an examination of Campbell's 2001 income tax return. In 2006, Campbell made a $27 million investment in the "GO-Zone" initiative in the U.S. Gulf Coast Region. Campbell's investments consisted of commercial and residential real estate. In 2009, about half of the residential real estate was declared uninhabitable because it had been built using toxic drywall.

As a result of the drywall issues and the 2008 housing crash, Campbell's investments generated an approximately $10.5 million net operating loss. Through a series of transactions in 2009, Antilles Offshore Investors Ltd., which was a subsidiary of Antilles Master Fund, a foreign entity the trust created, loaned money to one of Campbell's business entities in the Gulf Coast Region. Because of personal guarantees on a number of other loans, Campbell effectively became insolvent by 2010.

In 2007, the IRS completed its examination of Campbell's 2001 return and issued a notice of deficiency for approximately $13.9 million. Campbell filed a petition with the U.S. Tax Court contesting the deficiency. Campbell and the IRS ultimately settled and Campbell was able to deduct his net operating loss carryback against his 2001 deficiency. The settlement left Campbell with an approximately $1 million deficiency and a $100,000 accuracy-related penalty.

In 2010, the IRS issued a notice of intent to levy against Campbell's assets, to which Campbell objected. In 2012, Campbell filed a petition with the Tax Court seeking to bar the levy. The Tax Court remanded the petition to the IRS Appeals Office.

At the Appeals Office hearings, Campbell submitted an offer in compromise on the basis of doubt of collectability and offered to settle all his outstanding debts for $12,603. The IRS stated that Campbell was ineligible for doubt of collectability status because he had "net realizable equity" of approximately $1.5 million in the trust. As negotiations collapsed, the IRS increased Campbell's reasonable collection potential to more than $19.5 million by including the $5 million Campbell placed in the trust as dissipated assets. In 2018, the IRS formally rejected Campbell's offer in compromise. Campbell appealed to the Tax Court.

Law: The Tax Court reviews the IRS' administrative determinations for abuse of discretion. Section 7122(a) of the Internal Revenue Code permits the IRS to compromise civil cases arising under the Internal Revenue Code. Regulations promulgated under Section 7122 list three grounds for compromise: (1) doubt as to liability, (2) doubt as to collectability and (3) promotion of effective tax administration.

Doubt as to collectability exists when the taxpayer's income and assets are less than the amount of the tax liability. Doubt as to collectability is assessed on the basis of the taxpayer's reasonable collection potential. A taxpayer's reasonable collection potential is based on (1) assets, including dissipated assets; (2) future income; (3) assets collectible from third parties; and (4) assets available to the taxpayer but beyond the reach of the government.

Dissipated assets include assets that the taxpayer sold, transferred, encumbered or disposed of in an attempt to avoid the tax liability after the tax was assessed or for up to a period of six months before the assessment. According to the U.S. Supreme Court, assets collectible from third parties include assets that a third party is holding as a nominee or alter ego of the taxpayer.

The "nominee theory" focuses on whether the taxpayer is the true beneficial owner of the property. The "alter ego" theory focuses on whether the taxpayer has pierced the corporate veil. According to the Supreme Court, both theories look first at what rights the taxpayer has in the property under state law and then at federal tax law to determine whether the taxpayer's rights constitute a property right for collectability purposes.

Holding: The Tax Court ultimately found that the IRS abused its discretion in considering the trust an asset for purposes of Campbell's reasonable collection potential. The Tax Court held that the $5 million Campbell placed in the trust were not dissipated assets. Campbell placed the assets in the trust in 2002, three years before the IRS informed Campbell his 2001 return was under examination, six years before the assessment of the deficiency and 10 years before his offer in compromise. Accordingly, the transfer to the trust was beyond the permissible period for inclusion as a dissipated asset. Furthermore, even if the transfer to the trust took place within the permitted periods, Campbell had a net worth of over $25 million at the time he funded the trust.

The Tax Court also held that the trust was not considered an asset Campbell could collect from a third party. In making this finding, the Tax Court focused on two facts. First, Campbell had no control over the trustee and could not force the trustee to make distributions or investments. Second, Connecticut law, which governed Campbell's state law rights in the trust at the time the tax deficiency arose in 2001, did not have a developed body of law as to whether Campbell had any property rights in a foreign asset protection trust. Because the IRS could not defend its position that Campbell had a property right in the trust under state law, the Tax Court held that the IRS' position that the trust was available to Campbell was an abuse of discretion.

Finally, because Campbell did not have sufficient control over the trustee or the trust to compel a distribution or investment, the Tax Court held that the trust was not an asset of Campbell's beyond the reach of the government. The Tax Court made this finding despite the IRS' argument that Campbell had the de facto right to remove and replace the trustee through the trust protector and that the trustee loaned money to Campbell's business at Campbell's effective direction.

Practice Point: This case demonstrates that the Tax Court will respect a properly structured foreign asset protection trust. Most reported decisions involving asset protection trusts have held that the transfers to the trusts were fraudulent transfers or voluntary conveyances. Recently, however, cases with facts favorable to grantors have resulted in findings that respect asset protection trusts. In this case, the Tax Court respected a foreign asset protection trust when the trustee was fully independent of the grantor, the grantor could not remove or replace the trustee, the trustee had total discretion over distributions and investments, the grantor created the trust while the grantor was solvent, and the grantor had received no distributions from the trust.

Gibbons v. Anderson, 2019 Ark. App. 193 (April 3, 2019)

Arkansas Court of Appeals held that the arbitration provision in a trust agreement was unenforceable in a suit challenging the validity of the trust on grounds of undue influence.

Facts: Woodrow W. Anderson Jr. executed a trust agreement on April 1, 2014, with himself as initial trustee, and his children, Woodrow Anderson III and Kandice Gibbons, as successor trustees. The trust provided that the trust would pay for the college educations of all grandchildren of the grantor up to $100,000 total, and no more than $25,000 each. Each grandchild was to receive a car, not to exceed $30,000, after completing one semester or two terms in college. The trust further provided that each grandchild was to receive $500 per month for expenses.

On Nov. 7, 2014, Woodrow Jr., Woodrow III and Gibbons executed the first amendment to the trust, making several significant changes to the terms of the trust. Woodrow Jr. was in poor health and under the influence of narcotics at the time. He died 17 days later.

On Jan. 4, 2017, Seth Anderson and Trevor Anderson, grandchildren of Woodrow Jr., filed a complaint for breach of trust, alleging that the amendment was executed as a result of undue influence and that the changes to the terms of the trust were not in the best interests of the beneficiaries. Specifically, the amendment gave the trustees the sole discretion to make distributions for education, and removed the specific provisions originally included. Seth and Trevor further alleged that the trustees had breached the trust and acted in bad faith by failing to provide $500 per month for expenses and a vehicle as set forth by the original terms of the trust.

The complaint sought to set aside the amendment, to remove the trustees, to appoint new trustees, to obtain an accounting of the trust, to restore any funds improperly distributed under the amendment and to impose a constructive trust against any property improperly removed from the trust. They also requested a judgement against the trustees and the trust for the value of the vehicles that should have been purchased, the payment of $500 per month that should have been paid pursuant to the trust, and to recover the amounts the trustees had expended on educational expenses.

The trustees filed a motion to dismiss, or in the alternative, to compel arbitration in accordance with the arbitration clauses contained in the trust and the amendment. Seth and Trevor filed a response to the motion, alleging that the arbitration clause in the trust did not purport to bind the beneficiaries, and the arbitration clause in the amendment was not valid because the grantor was not competent at the time of execution of the amendment.

The trial court held that the question went to the integrity of the amendment and whether the grantor was under undue influence at the time of execution of the amendment, and that was a question for the court to decide, not an arbitrator. The trial court denied the motion to compel arbitration. The trustees appealed.

Law: Arkansas law is silent on whether a trust may contain any arbitration provision, and Arkansas has not enacted a law addressing the applicability of an arbitration clause to a dispute concerning the validity of a trust.

Holding: The Court of Appeals stated that the dispute concerned the testamentary capacity of the grantor and the validity of the trust and the amendment, and that where there is an allegation of undue influence or incompetency of the grantor, arbitration cannot determine the validity of the trust. The Court of Appeals held that the validity of the trust and the amendment were within the jurisdiction of the trial court, irrespective of the arbitration provisions contained in both.

In holding that the question of trust validity was one for the court rather than arbitration, the Court of Appeals looked to statutes enacted in Florida and Arizona concerning arbitration clauses in trusts, both of which exclude disputes over the validity of a trust from arbitration. The court also looked to case law in California, where in *McArthur v. McArthur*, 224 Cal. App. 4th, 651 (2014), the California Court of Appeals denied a motion to compel arbitration as to the validity of a trust where a trust instrument contained an arbitration clause, thus indirectly holding that the validity of a trust agreement is not subject to arbitration.

Because Seth and Trevor sought to set aside the amendment on grounds of undue influence, this constituted a challenge to the validity of the instrument and therefore not an issue to be resolved through arbitration.

Practice Point: Practitioners should be cognizant of the enforceability of arbitration clauses contained in testamentary instruments under applicable state law, as well as the applicability of such clauses to questions of validity of the instrument. State laws on this issue continue to develop, and practitioners should review applicable state law developments before advising clients on the validity and enforceability of arbitration clauses in this context.

In re Antonia Gualtieri Living Trust, 2019 WL 1265167 (Mich. Ct. App. March 19, 2019)

The court could not compel income distributions for payment of child support from a discretionary trust.

Facts: Charles Anton is the beneficiary of the Antonia Gualtieri Living Trust. Petitioner Linda Anton sought to compel the trustees of the trust to make income payments to Charles so Linda might seek payment of child support and alimony arrearages from Charles. The trial court denied Linda's petition for distribution based on the fact that the trust is a purely discretionary trust, and that Linda was not entitled to compensation for the outstanding arrearages out of income distributions made to Charles from the trust. Linda appealed. On appeal, Linda and the trustees disagreed as to whether the trust at issue is a support or spendthrift trust, or a discretionary trust.

Law: Pursuant to Michigan law, a discretionary trust allows the trustee to pay to the beneficiary as much of the income and principal as the trustee determines appropriate in his discretion, whereas a support trust allows a trustee to pay income and principal of the trust to the beneficiary for support, maintenance and welfare. A spendthrift trust provides that the beneficiary's interest shall not be transferable or subject to the claims of creditors. Creditors cannot compel the trustee of a discretionary trust to pay any part of income or principal in order that the creditors be paid.

Holding: The Court of Appeals held that the trust at issue is a discretionary trust, not a spendthrift trust, and therefore Linda cannot compel income distributions in order to obtain compensation for unpaid child support and alimony.

The terms of the trust provided that the trustee "in its sole and absolute discretion, shall apply to, or for the benefit of Charles Anton as much of the principal from the trust as the Trustee deems advisable for his education, health, maintenance, and support." Linda argued that the use of the term "shall" indicates mandatory distributions and therefore a support or spendthrift trust; the trustees argued that the use of the words "sole and absolute discretion" indicates a discretionary trust. The Court of Appeals held that while the term "shall" typically indicates a mandatory provision, the fact that the word "shall" is immediately preceded by the words "sole and absolute discretion" renders the trust discretionary.

The appellate court noted that, in attempting to construe a trust instrument, a court must ascertain and give effect to the settlor's intent. Here, the trust document states multiple times that the trustees are permitted to use their "sole and absolute discretion." The trust document also contains provisions providing guidelines for discretionary distributions, including: (1) conservative exercise of discretion, (2) consideration of other income and resources available to the beneficiary, and (3) preservation of assets as the primary purpose. Taken together, it was clear to the court that the trust does not mandate distributions to Charles, regardless of the use of the term "shall."

The Court of Appeals also noted that the Michigan Trust Code provides further support for the holding that the trust is discretionary, citing MCL 700.7102(D). That statutory provision defines "discretionary trust provision" to mean "a provision in a trust . . . that provides that the trustee has discretion . . . to determine," among other decisions, whether to make distributions, in what amount, when and to whom.

Lastly, the Court of Appeals addressed Linda's argument that public policy supports the argument that she be compensated for the arrearages via income distributions from the trust. The case law Linda cited in support of such argument applied specifically to spendthrift trusts. Because the trust at issue is a discretionary trust, the court rejected Linda's public policy argument.

Practice Point: State law determines the type of trust and the access rights of creditors. Practitioners should carefully review the distribution language of a trust and applicable state law to determine whether a trust is considered a discretionary trust, support trust or spendthrift trust, and be cognizant of the rights of creditors to access the assets of each such trust.

Ray v. Ready, 296 Va. 553 (Dec. 20, 2018)

Supreme Court of Virginia affirmed the dismissal of a lawsuit that named the estate of the decedent rather than the personal representative as a party. The court further held that the plaintiff could not amend her complaint under the "safe harbor."

Facts: Keith Ready executed a holographic will that excluded his wife, Patricia Ray. After Ready's death, the will was admitted to probate on Aug. 25, 2016, and Katherine Ready qualified as administratrix of the estate. Ray filed a lawsuit to claim her elective share of the augmented estate.

In her complaint, Ray styled the lawsuit "Patricia L. Ray v. Estate of Keith F. Ready." But Ray directed the summons to Katherine Ready as administratrix of the estate. Katherine answered the complaint and signed it "Katherine E. Ready, Administratrix c.t.a. of the Estate of Keith F. Ready."

At an evidentiary hearing on March 3, 2017, Katherine pointed out that Ray had failed to name Katherine in her capacity as administratrix. Therefore, Katherine argued that the lawsuit was a nullity and the only remedy was dismissal. Furthermore, because the statute of limitations period had passed, Katherine argued that Ray could not be allowed to amend her complaint.

Ray responded that Katherine had in fact appeared before the court in her capacity as administratrix. Ray noted that Katherine signed her answer to the complaint in a fiduciary capacity, and that the summons named Katherine as administratrix of the estate. Ray asked the court to add Katherine, as administratrix of the estate, as a defendant in the case rather than dismiss the case.

The Circuit Court for Henrico County agreed with Katherine that the complaint was styled incorrectly. It also held that the only remedy was dismissal of the case. The court dismissed the case and held that the statute of limitations barred Ray from amending her complaint. Ray appealed.

Law: Lawsuits in Virginia must be prosecuted by and against living parties, either in their individual or representative capacity. A lawsuit in the name of a fiduciary must identify the fiduciary's name, the nature of the fiduciary relationship and the name of the subject of the fiduciary relationship.

Virginia law provides a "safe harbor" which allows a party to retroactively amend its pleading if the pleading otherwise identifies the proper parties in the case. This safe harbor allows a party to correct its pleadings and maintain a lawsuit even after the statute of limitations period has passed.

Holding: The Supreme Court of Virginia agreed that Ray should have named Katherine, as administratrix, as the defendant. Ray's complaint did not identify a party in either her individual or fiduciary capacity. Therefore, the Supreme Court affirmed the trial court's ruling that dismissal was the only remedy. Because the statute of limitations period had passed, the Supreme Court also upheld the trial court's decision to dismiss the case with prejudice.

Furthermore, the Supreme Court noted that Ray did not identify Katherine as administratrix in the caption or the body of her complaint. Accordingly, the Supreme Court held that Ray's complaint failed to identify the proper party and that Ray could not retroactively amend her complaint under the safe harbor provision.

Practice Point: Attorneys must pay careful attention to the rules for captioning cases brought by or against fiduciaries. In Virginia, it is critical that the fiduciary itself be named in the pleadings, rather than the subject of the fiduciary relationship (such as an estate or trust). While certain safe harbors exist, these safe harbors may be strictly applied.

In re Estate of Rabin, 2018 WL 6801812

Colorado Court of Appeals held that the personal representative was entitled to the decedent's file with the decedent's former attorney.

Facts: Mark Freirich represented Louis Rabin in several matters over Louis' lifetime, including the preparation of promissory notes payable to Louis' former spouse, Suyue Rabin.

After Louis died, his surviving spouse, Claudine, qualified as personal representative of Louis' estate. During the administration of the estate, Claudine issued a subpoena to Freirich for Louis' file. Freirich responded with a motion to quash the subpoena on the grounds that disclosure would violate the attorney-client privilege. Claudine later identified the files related to the promissory notes as being particularly relevant. Freirich produced those files, but he refused to produce Louis' other files.

The trial court ruled in favor of Freirich and awarded him attorney's fees. While Claudine's motion to reconsider was pending, Claudine and Suyue settled the claims related to the promissory notes. In denying Claudine's motion to reconsider, the trial court found that the controversy would soon be resolved and the files were not necessary to evaluate the claims against Louis' estate. Claudine appealed.

Law: The personal representative of an estate is entitled to take control or possession of the decedent's probate estate. Furthermore, the personal representative succeeds the decedent as the client and the holder of the attorney-client privilege established during the decedent's lifetime.

Holding: The Colorado Court of Appeals held that Claudine was entitled to Louis' entire file. As the personal representative of Louis' estate, Claudine was entitled to take possession of Louis' entire probate estate. A deceased client's file with his prior attorney is not an asset that can be inherited or transferred. However, it is still the property of the client during his lifetime and the property of the estate after the client's death. Therefore, the personal representative has a right to take possession or control over it.

Furthermore, the court held that a decedent's estate includes intangible personal property, such as legal claims against third parties. Claudine, as personal representative, was responsible for bringing those claims on behalf of the estate. Information contained in Louis' file may have been necessary for her to recognize and prosecute those claims. Claudine could not effectively perform her duties as personal representative without access to the file.

The Court of Appeals also held that Claudine, as personal representative, stepped into Louis' shoes as Freirich's client. Therefore, Freirich could produce Louis' file to Claudine without violating the attorney-client privilege.

Practice Point: The personal representative of an estate steps into the shoes of the decedent. Accordingly, the personal representative has the right to take possession or control of the decedent's property, including files in the custody of the decedent's former attorney. A decedent's attorney should be aware of this right and so advise the client when drafting estate planning documents for the client.