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Wellin v. Farace, 2021 WL 5445968 (4th Cir. Nov. 22, 2021) (unpublished)

The Fourth Circuit held that the statute of limitations for attorney malpractice did not begin when the client became aware of the attorney's divided loyalty, and instead began to run when the client consulted with a new attorney regarding the transaction at issue.

Facts

Keith Wellin retained attorney Thomas Farace to provide various estate planning services. In 2003, based on Farace's advice, Wellin and his three children from a prior marriage established Friendship Partners LP, which was funded with shares of stock valued at $90 million. Wellin owned 98.9% of Friendship Partners, while a separate limited liability company controlled by Wellin's children owned 1.1% of Friendship Partners. The transactions were designed to reduce Wellin's estate assets by exchanging the stock for less-valuable limited partnership units.

In 2006, Farace advised Wellin that the strategy on which the 2003 transactions were based was considered questionable as a method of reducing estate taxes. Farace recommended a new tax-saving technique, including a sale of Wellin's limited partnership units to an "intentionally defective grantor trust." Wellin did not immediately follow Farace's advice.

In 2008, Farace again recommended that Wellin consider selling his limited partnership units to an intentionally defective grantor trust. In 2009, Wellin implemented the strategy. With Farace's assistance, Wellin established the Wellin Family 2009 Irrevocable Trust, which named the Wellin children as trustees. In November 2009, Wellin signed the trust agreement and sold his 98.9% interest in Friendship Partners to the irrevocable trust in exchange for a promissory note worth about $50 million, a substantial reduction from the original value of the stock. Farace predicted that the 2009 transaction would result in estate tax savings between $14 million and $18 million.

Afterward, Wellin expressed confusion regarding the impact of the 2009 transaction. In response, Farace sent Wellin letters in 2010 and 2011 explaining that the sale was "a very efficient strategy for reducing estate tax," because the transaction serves to "freeze" the estate.

In February 2012, Wellin's wife sent an email to Farace's assistant expressing concern over Farace's loyalty to Wellin, suggesting that Farace improperly gave priority to the interests of the Wellin children.

In 2013, Wellin terminated his attorney-client relationship with Farace and hired a new attorney, Edward Bennett, who provided advice regarding the 2009 transaction. In 2013, Bennett filed a suit against the Wellin children to set aside the 2009 transaction. Wellin alleged that he did not know or understand that he had relinquished control of his partnership interests or that he would retain income tax liability if the Wellin children sold their partnership interests during his lifetime. The suit settled.

Meanwhile, in November and December 2013, the Wellin children sold the shares held by Friendship Partners for $157 million. Wellin died in 2014.

In 2016, the executors of Wellin's estate filed an action against Farace and his law firm for failing to inform Wellin about the risks and consequences of the 2009 transaction, specifically Wellin's substantial tax exposure.

In the district court, the executors submitted reports prepared by Bennett and other experts, stating that Farace "misrepresented the actual risks and benefits" of the 2009 transaction. One expert, Jerome Hesch, opined that the 2009 transaction exposed Wellin to a potential gift tax liability of $17.5 million, plus penalties and interest, in exchange for only a potential savings in estate tax. Hesch also stated that Farace failed to inform Wellin that he risked income tax liability if the Wellin children liquidated the assets in Friendship Partners during Wellin's lifetime.

The defendants moved for summary judgment on numerous grounds, including that the estate's claims were barred by a three-year statute of limitations that expired in 2015 because the February 2012 email from Wellin's wife to Farace triggered the running of the statute of limitations period. The executor contended that Wellin did not learn that the defendants had failed to inform him fully about the risks of the 2009 transaction until he hired Bennett in 2013 because the February 2012 email related only to Farace's advice about Wellin's personal property. The district court granted defendants' motion for summary judgment and held that the 2009 transaction was not separate and distinct from the dispute over Wellin's personal property because both harms stemmed from Farace's alleged divided loyalties. The estate appealed the district court's judgment.

Law

Under South Carolina law, the statute of limitations period begins to run when the "injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct." *True v. Monteith*, 489 S.E.2d 615, 616 (S.C. 1996). The three-year clock starts when "the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist." *Stokes-Craven Holding*, 787 S.E.2d at 489.

Holding

The Fourth Circuit stated that there were two different types of injuries: (1) Wellin's potentially increased tax exposure from the 2009 transaction; and (2) the effect of Farace's alleged conflict of interest on the disposition of Wellin's personal property. Thus, although the two claims both related to Farace's representation of Wellin, they involved different conduct and different injuries.

The Fourth Circuit emphasized that the February 2012 email exchange between Wellin's wife and Farace did not mention the 2009 transaction. Accordingly, the Fourth Circuit ruled that knowledge of Farace's interaction with the Wellin children concerning personal property did not place Wellin on notice that he should investigate Wellin's work regarding the tax strategy.

In addition, the Fourth Circuit held that a person of common knowledge would not have known that Wellin should investigate the accuracy of the tax advice he received. Thus, the

Fourth Circuit concluded that there is evidence in the record that the risks and consequences of the 2009 transaction were not readily discoverable by Wellin until he consulted with his new attorney, Bennett, in 2013.

For these reasons, the Fourth Circuit vacated the judgment of the district court and remanded the case for further proceedings.

McMurtrie v. McMurtrie, No. 200404, 2021 WL 1569396 (Va. Apr. 22, 2021)

The Virginia Supreme Court held that a trust's no-contest clause applied to the settlor's suit against the trustees after a co-trustee refused to distribute the trust proceeds to him.

Facts

Alexander B. McMurtrie Jr. created the Alexander B. McMurtrie Jr. Revocable Trust, of which McMurtrie was the sole beneficiary during his lifetime. The trust included a no-contest clause, which stated that "any devisee, legatee, or beneficiary" of the trust will forfeit their interest in the trust, and that of any descendants, if they seek to impair or invalidate any provision of the trust.

The trust had three trustees. In 2019, McMurtrie asked one of the co-trustees to distribute the trust's principal to him. The co-trustee refused the request on the basis that, under the terms of the trust, the co-trustee had absolute discretion as to distributions of the trust's assets.

McMurtrie filed a complaint in the circuit court seeking a declaratory judgment regarding the applicability of the no-contest clause to McMurtrie and to any claim he might bring under Section 64-729 of the Uniform Trust Code. After the trustees' answer, McMurtrie filed a motion for summary judgment asking the circuit court to conclude that he was not subject to the no-contest clause as the settlor of the trust, or to alternatively hold that, even if he is subject to it, the no-contest clause is inapplicable to any claim he might bring (1) to terminate the trust under Section 64-729 of the Uniform Trust Code or (2) against the trustees for breach of their fiduciary duties.

The circuit court agreed with McMurtrie on both counts and granted his motion for summary judgment. In addition, the circuit court ruled that McMurtrie did not violate the no-contest clause by seeking those declarations. The trustees appealed.

Law

Under Virginia law, in construing the language of a trust, if the language is clear and unambiguous, the court will apply the plain meaning of the words used in the trust. *Harbour v. SunTrust Bank*, 278 Va. 514, 519 (2009). No-contest clauses are strictly enforced and strictly construed according to their terms. *Hunter v. Hunter*, 298 Va. 414, 424 (2020). Under this provision, the court enforces the language of a no-contest clause "without any **wincing**" concerning its alleged "harshness or unfairness."

Holding

On appeal, the Supreme Court reversed the judgment of the Circuit Court, but only to the extent the court held that McMurtrie was not subject to the no-contest clause. The Supreme Court held that the no-contest clause applied to "any devisee, legatee, or beneficiary" and that McMurtrie was the sole beneficiary of the trust; therefore, the no-contest clause applied to McMurtrie.

Notably, however, the Supreme Court held that the Circuit Court's ruling did not bar McMurtrie from raising a claim under the Uniform Trust Code or from bringing a claim that the trustees breached their fiduciary duty. Thus, without triggering the no-contest clause, McMurtrie may pursue any remedies to modify or terminate the trust that may be provided under Section 64.2-729 of the Uniform Trust Code, and any other claims concerning the trustees' alleged breach of their fiduciary duties.

Sacks v. Dissinger, 178 N.E.3d 388 (Mass. 2021)

The Supreme Judicial Court of Massachusetts held that claims for intentional interference with expectancy and unjust enrichment did not challenge the validity of a trust and therefore were not time-barred under the one-year statute of limitations.

Facts

Aaron and Sheila Sacks had five children: Jeffrey Sacks, Nancy Dissinger, Joan Rosenthal, Donna Sacks and Cheryl Sacks O'Toole. At the time of the filing of the lawsuit, Aaron, Sheila and Jeffrey were all deceased.

In August 2011, Aaron created the Aaron H. Sacks Revocable Trust, originally providing that after the death of Aaron and his wife, Sheila, their five children would each receive an equal share of the trust and that, if any of Aaron and Sheila's children predeceased them, that child's share would be distributed to that child's heirs. Aaron and Sheila also executed wills and codicils leaving the residue of their respective estates, including their family home, to the trust.

In June 2012 following a two-year battle, Jeffrey died of a brain tumor. Shortly before his death, he declined further treatment, and Sheila and Nancy blamed Matthew, Donna and Joan for the purported "murder" of Jeffrey because they supported Jeffrey's decision to decline further treatment at the end of his life.

Shortly after Jeffrey's death, Sheila and Nancy convinced Aaron to amend the trust such that the trust assets would instead be divided among Aaron and Sheila's four daughters, removing any interest for Jeffrey's children, Matthew and Rebecca.

In August 2017, Aaron died. At that time, the trust became irrevocable and the trust assets were solely available for Sheila's health, education, support and maintenance. In July 2019, Sheila died.

In November 2019, over two years after Aaron's death, Jeffrey's surviving children Matthew and Rebecca (plaintiffs) filed a three-count complaint for: (i) rescission of the 2012 trust amendment; (ii) intentional interference with advantageous relations against Sheila's estate and against Nancy; and (iii) unjust enrichment against all four of their aunts. Each of the claims was premised on the allegation that Sheila and Nancy unduly influenced Aaron to change his estate plan.

Unidentified defendants moved to dismiss on the grounds that, pursuant to G. L. c. 203E, § 604, plaintiffs' claims were time-barred. Thereafter, plaintiffs voluntarily dismissed count I for rescission. The Superior Court dismissed the remaining claims as time-barred.

Law

Section 604 provides, in relevant part: "A person may commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within ... [one] year after the settlor's death." G. L. c. 203E, § 604(a)(1).

On appeal, plaintiffs argued that their claims for intentional interference with advantageous relations and unjust enrichment are not contesting the validity of the trust, but rather, distinct causes of action not subject to the one-year statute of limitations.

The Supreme Judicial Court of Massachusetts therefore analyzed and ruled upon the following question: “What does it mean to litigate, call into question or challenge the validity of a trust?”

As a threshold matter, the appellate court acknowledged that the claim for rescission (that had been voluntarily dismissed) was clearly a trust contest. The court then likened will contests and trust contests, finding will contests informative. With respect to wills, the court “recognized the distinction between contests, which seek to determine the validity of a legal instrument, and other causes of action, which do not.” Under that premise, the court held that a trust contest is “an action where the underlying facts are assessed for their effect on all or part of a trust (e.g., invalidity), while a noncontest is an action where the underlying facts are assessed for their effect on a person (e.g., harm)” and that “[t]he ultimate object of a contest is a determination of a trust’s validity, not the personal liability or even culpability of the settlors, beneficiaries, or trustees.”

Applying this analysis, the appellate court found that the plaintiffs’ claims for intentional interference and unjust enrichment were not claims contesting the validity of the trust and therefore were not subject to the one-year statute of limitations.

With respect to plaintiffs’ intentional interference with advantageous relations claim, the court noted a comment in the Uniform Trust Code’s complementary provision that expressly clarifies that intentional interference is not a trust contest. See Uniform Trust Code § 604 comment (“An action against a beneficiary or other person for intentional interference with an inheritance or gift, not being a contest, is not subject to this section”). The appellate court further explained that this type of claim “derives from the harm one person causes another” and is an *in personam* action rather than *in rem* or *quasi in rem* action. The court noted that plaintiffs’ claim for intentional interference was specifically related to harm caused by Nancy and Sheila and not the validity of the trust.

The appellate court further distinguished *Brignati v. Medenwald*, 315 Mass. 636, 53 N.E.2d 673 (1944), and the *Brignati* holding that a party may not bring a separate claim for intentional interference where a final probate order addresses/resolves the claim. In doing so, the court noted that wills and trusts are different in that courts generally must declare the validity of a will prior to approving transfers/distributions in the probate process, whereas trusts are generally private and usually subject to a determination of validity only when there is a contest. Put simply, wills are probated and trusts are not, and trust beneficiaries are less likely to become aware of their exclusion from a trust than from an estate. Therefore, the court distinguished *Brignati* and declined to extend its reasoning. For these reasons, the appellate court reversed dismissal of the intents and interference claim and found that it is subject to the three-year statute of limitations under G. L. c. 260, § 2A.

With respect to plaintiffs’ unjust enrichment claim, the court found that even though liability for unjust enrichment may extend to innocent recipients, these parties stood to benefit directly from the tortious interference, and therefore a claim for unjust enrichment related to "the effects of tortious conduct on people and not to the validity of a legal instrument."

Holding

The appellate court found that plaintiffs' claims for intentional interference with advantageous relations and for unjust enrichment were not trust contests and therefore not subject to the one-year statute of limitations under Section 604. As a result, the appellate court reversed the order granting the motion to dismiss and remanded the action to the trial court for further proceedings.

Trust under Deed of Walter R. Garrison, 264 A.3d 398 (Pennsylvania 2021)

In a non-precedential decision, the Superior Court of Pennsylvania denied a petition for declaratory judgment and ruled that (1) nonjudicial trust modification agreements between the settlor and beneficiaries of three irrevocable trusts and purporting to grant the beneficiaries the power to remove and replace the independent trustees after the settlor's death were ineffective and invalid under the Pennsylvania Uniform Trust Act; and (2) the purported removals and replacements of trustees pursuant to the nonjudicial trust modification agreements were also invalid.

Facts

In 1967, 1970 and 1973, Walter R. Garrison established three separate irrevocable trusts for the benefit of his son, Mark R. Garrison, and Mark's descendants, with substantially identical terms. Walter had certain powers under the trust agreement to fill a trustee vacancy during his lifetime. The trust agreement further provided that, in the event of the death or resignation of an independent trustee at a time when Walter was not living and competent, each trustee had the power to designate his successor. The trust agreement did not include provisions permitting the beneficiaries to remove or replace the trustees.

In 2017, Walter, as settlor, and Mark and Mark's adult children, as the current beneficiaries, entered into nonjudicial trust modification agreements, and by unanimous consent, agreed to amend the trust agreement to grant a majority of the income beneficiaries the power to remove and appoint independent trustees after Walter's lifetime or in the event of Walter's incapacity.

Walter died on Feb. 24, 2019. Soon after Walter's death, Mark and the other current income beneficiaries attempted to invoke the power granted to them under the nonjudicial trust modification agreement to remove and replace the then-serving independent trustees of each trust, effective April 27, 2019.

On July 19, 2019, Mark petitioned the Orphans' Court for declaratory judgment seeking a determination as to the validity of the nonjudicial trust modification agreements and confirming the removal and replacement of trustees.

On Nov. 8, 2019, Mark filed a motion in the same court for judgment on the pleadings, asserting that he was entitled to judgment as a matter of law (1) that the nonjudicial trust modification agreements were valid and enforceable, and (2) confirming the authority of the trustees appointed by the beneficiaries.

On June 16, 2020, the Orphans' Court entered an order denying the petition for declaratory judgment and motion for judgment on the pleadings. The order declared that the provisions of the nonjudicial trust modification agreements regarding the removal and replacement of trustees and the beneficiaries' purported removal and replacement of trustees pursuant to the authority granted thereunder was ineffective. It also clarified that the named independent trustees continued to serve and could be removed and replaced only (1) pursuant to the original terms of the trust agreement or (2) in proceedings meeting the requirements set forth in Section 7766 of the Pennsylvania Uniform Trust Act (UTA). Mark and related beneficiaries appealed the order.

Law

Section 7766 of the UTA provides: The court may remove a trustee on its own initiative or at the request of the settlor, a co-trustee or a beneficiary, in specific circumstances provided that the court finds that (1) the removal serves the best interests of the beneficiaries, (2) the removal is not inconsistent with a material purpose of the trust, and (3) a suitable co-trustee or successor trustee is available to serve.

Section 7740.1(a) of the UTA provides: ***Without*** court approval, a noncharitable irrevocable trust may be modified upon consent of the settlor and all beneficiaries even if the modification or termination is inconsistent with a material purpose of the trust.

Section 7740.1(b) of the UTA provides: ***With*** court approval, a noncharitable irrevocable trust may be modified upon the consent of all the beneficiaries only if the court concludes that the modification is not inconsistent with a material purpose of the trust.

In *Trust under Agreement of Edward Winslow Taylor*, 640 Pa. 629, 164 A.3d 1147 (Pa. 2017), the Pennsylvania Supreme Court concluded that the broad modification powers allowed under Section 7740.1 of the UTA do not override the requirements of a narrower provision of the UTA. Specifically, the court held that because Section 7766 of the UTA explicitly addresses the modification of a trust dealing with the removal and replacement of a trustee, such modifications are outside the scope of Section 7740.1 of the UTA. Accordingly, absent specific language in a trust agreement, Section 7766 of the UTA is the exclusive means of removing a trustee. In *Taylor*, the court reasoned that there must be a presumption that the General Assembly intended the entire statute and all of its provisions to be effective and, therefore, unless the statute expressly says so, the statutory sections must not be construed in such a way that one section operates to nullify, exclude or cancel another.

Holding

After reviewing the record and applicable law, the Superior Court affirmed the Orphans' Court's ruling. The court considered and analyzed Pennsylvania legislative history and case law and reviewed the comments supplementing the Uniform Trust Code in reaching its decision. Building on the foundation of the 2017 Pennsylvania Supreme Court opinion in Taylor, the Superior Court agreed with the Orphans' Court's application of the Taylor court's analysis to the facts of the instant case.

Citing the decision in *Taylor*, the Orphans' Court held that a trust modification allowing for removal and replacement of trustees is governed by UTA section 7766, and UTA section 7740.1(a) cannot be used to override the requirements of UTA section 7766 even where the settlor and all beneficiaries consent.

The *Garrison* court opined that Section 7766 of the UTA is the exclusive statutory provision for removal and replacement of trustees under Pennsylvania law and, therefore, the modification of a trust agreement to permit the removal and replacement of trustees in a manner that was not available under the original terms of the trust agreement would undermine the legislative intent behind Section 7766 of the UTA.

The legislative history cited by the *Taylor* court and the *Garrison* court revealed the General Assembly's intent for the removal and replacement of trustees to be considered only at the time such removal and replacement are ripe for consideration.

Absent a contrary provision in the original trust agreement, the ruling of the *Garrison* court may have a chilling effect on nonjudicial settlement agreements governed by Pennsylvania law because Section 7766 of the UTA will prohibit any modification to the removal and replacement of trustee provisions by consent of the beneficiaries, with or without court approval.

Even where the settlor and beneficiaries desire to consent to a modification regarding the removal and replacement of trustee provisions, the trustee does not object and the modification is not inconsistent with a material purpose of the trust, the modification is prohibited under Pennsylvania law because Section 7766 of the UTA is the exclusive statutory provision for removal and replacement of trustees. This means the settlor and beneficiaries would not be able to enter into a nonjudicial settlement agreement to modify a trust agreement to allow an independent powerholder to remove and replace the trustee even if the powerholder is a fiduciary and must act in the best interests of the beneficiaries.

Instead, the only parties having standing to make a request of the court for the removal of a trustee are the settlor, a co-trustee or a beneficiary, although the court may also remove a trustee on its own initiative. The court may remove a trustee only if the court finds that (1) the removal serves the best interests of the beneficiaries, (2) the removal is not inconsistent with a material purpose of the trust, ***and*** (3) a suitable co-trustee or successor trustee is available to serve.

In the Matter of Falkowsky, 197 A.D.3d 1300, 154 N.Y.S.3d 125 (2021)

The New York Supreme Court, Appellate Division, Second Department, affirmed the decision of the Westchester County Surrogate's Court to deny the admission of a decedent's will to probate because the proponent of the decedent's will failed to prove that the decedent possessed testamentary capacity at the time the purported will was executed due to his failure to know the nature and extent of the property of which he was disposing.

Facts

Harold Falkowsky, a retired accountant in his 80s, owned a cooperative apartment in Brooklyn, New York, where he lived alone after his wife died in 2006. Falkowsky's sister, Alice Sobel, lived in Mount Kisco, New York. After suffering a fall on August 31, 2014, Falkowsky was treated at the local hospital. After five days in the hospital, he was transferred to a rehabilitation center/nursing home in Brooklyn.

When the nursing home needed to discharge Falkowsky, Sobel applied for him to be admitted to a senior living facility in Westchester, New York, near her home in Mount Kisco. Sobel signed the senior living facility application and lease agreement as Falkowsky's "POA" (power of attorney), even though Falkowsky had not designated Sobel as his agent at that time.

Sometime thereafter, Sobel contacted her attorney, Allison Gurthrie Fischer, who met with Falkowsky and Sobel at the senior living facility on Oct. 21, 2014. Fischer prepared a power of attorney and healthcare proxy naming Sobel as Falkowsky's agent for financial and health matters. Falkowsky signed the power of attorney and healthcare proxy on the day of that first meeting. Also at that first meeting, Sobel asked Fischer to ask Falkowsky to prepare a last will and testament. Sobel was present throughout Falkowsky's meeting with Fischer. Fischer asked Falkowsky several questions about his assets, but according to Fischer, Falkowsky was uncomfortable talking in front of Sobel. Falkowsky told Fischer about several of his assets but omitted other assets. Additionally, Falkowsky stated that he did not know the value of his cooperative apartment in Brooklyn.

Six weeks later, on Dec. 1, 2014, Falkowsky was taken from the senior living facility to the hospital by ambulance. On Dec. 4, 2014, Falkowsky went into respiratory and cardiac arrest requiring cardiopulmonary resuscitation and intubation and transfer to the intensive care unit. Sobel consented to surgery on behalf of Falkowsky. During the next two days, Sobel wrote and signed checks as Falkowsky's agent, including one for $15,000 payable to herself.

After Sobel called Fischer a dozen or more times, Fischer met with Falkowsky three more times while Falkowsky was in the ICU. According to Fischer, at their meeting on Dec. 6, 2014, Falkowsky understood his assets to be in the $1.5 million range and knew that this was not a taxable estate. Falkowsky claimed to have approximately $1 million in stocks and investments and $200,000 in bank accounts, but he could not remember the names of the banks. He mentioned that he had a cooperative apartment, but he did not know the fair market value. He had an IRA, but he did not know the beneficiary.

At their meeting on Dec. 8, 2014, Fischer returned to the hospital and met with Falkowsky in the ICU. Fischer testified that she told Falkowsky that the will as drafted “just doesn’t work” and, to avoid a will contest, encouraged Falkowsky to leave $100,000 or $200,000 to each of his sons. Falkowsky agreed to leave $20,000 to each son. The contemporaneous medical records from that date noted that Falkowsky was critically ill, his speech was slurred and he suffered from right lateral gaze palsy.

Falkowsky’s son Jeffrey Falkowsky testified that Sobel failed to notify him that Falkowsky was in the hospital until that date — one week after Falkowsky arrived at the hospital.

On Dec. 13 and 14, 2015, acting as Falkowsky’s healthcare agent, Sobel instructed the hospital to take lifesaving measures, including intubation and ventilation. Falkowsky was unable to speak and remained intubated and on a ventilator when he executed his last will and testament on Dec. 15, 2014. Although a nurse advised Fischer that Falkowsky could not sign anything, Fischer testified that Falkowsky waived the nurse out of the room and signed his last will and testament in the presence of Fischer, Fischer’s law partner and a paralegal.

The medical records from Dec. 14, 2014, and the morning of Dec. 15, 2015, provided that Falkowsky “exhibited an inability to follow instructions, disorientation, confusion, inability to benefit from education, impulsive behavior, and a potential to injure himself.” The medical records indicated that Falkowsky was “awake and alert” around the time he executed his last will and testament and again four hours later and noted that he was able to follow commands, was involved in discussions of medications and side effects, and was awake, responsive and alert.

Falkowsky owned several assets that he did not mention to Fischer during any of their meetings. First, he did not provide Fischer with any information regarding a tax-deferred annuity valued at approximately $885,000. Second, Falkowsky did not provide Fischer with any information about two bank accounts held in trust for his sons valued at approximately $167,700.

While Sobel testified that she did not know the kinds of assets Falkowsky owned prior to his death, the day after Falkowsky signed his last will and testament, Sobel withdrew the funds and closed the two bank accounts held in trust for Falkowsky’s sons.

Fischer further testified that she discouraged Falkowsky from leaving his entire estate to Sobel. Falkowsky then decided to leave $82,000 to five different named charities, with the balance to Sobel.

Falkowsky died on Jan. 14, 2015, survived by his two sons, Ira Falkowsky and Jeffrey Falkowsky, and his sister, Alice Sobel.

Sobel filed a petition for probate of Falkowsky’s last will and testament dated Dec. 15, 2014, in the Westchester County Surrogate’s Court. Jeffrey Falkowsky objected to probate of the will, alleging that Falkowsky lacked the requisite testamentary capacity; specifically, Sobel failed to establish that Falkowsky knew the nature and extent of the property of which he was disposing. The Westchester County Surrogate’s Court denied the admission of the decedent’s will to probate and determined that Sobel failed to meet her burden of proof.

Law

Testamentary Capacity: In a will contest, the burden of proof is on the will proponent to prove that the testator had testamentary capacity. To determine testamentary capacity, the court considers whether the testator (1) understood the nature and consequences of executing a will, (2) knew the nature and extent of the property of which he was disposing, and (3) knew the natural objects of his bounty.

Understanding Nature and Extent of Property: While a testator need not have precise knowledge of the size of his estate, the proponent of a will cannot prove testamentary capacity where a testator is not aware of the general nature and extent of his real and personal property.

Holding

The proceeding raised issues of (1) whether the decedent had testamentary capacity, and (2) whether the will was procured by undue influence.

The court held that Falkowsky's inability to recall the existence of a tax-deferred annuity valued at approximately $885,000 and two bank accounts held in trust for his sons valued at approximately $167,700 is evidence that Falkowsky did not know the nature and extent of the property of which he was disposing, and, therefore, lacked testamentary capacity.

In reaching its determination, the court found it particularly relevant that no physician testified as to Falkowsky's capacity despite his medical history, and that medical records indicated that Falkowsky "exhibited an inability to follow instructions, disorientation, confusion, inability to benefit from education, impulsive behavior, and a potential to injure himself" hours before execution of the purported will.

Dissent

Dillon, J. dissented and voted to reverse the decree of the Westchester County Surrogate's Court concluding that Sobel met her burden of establishing that Falkowsky knew the general nature and extent of his real and personal property, and as a result, proved by a preponderance of the evidence that Falkowsky possessed testamentary capacity at the time the purported will was executed. The dissenting opinion focused on the total value of Falkowsky's probate property rather than the specific assets and concluded that "[Falkowsky's] description of his assets and their values, while general in some respects, was sufficiently accurate and need not be specific."

In the Matter of the Colecchia Fam. Irrevocable Tr., 180 N.E.3d 988 (Mass. App. Ct. 2021)

In this case of first impression, the Massachusetts Appellate Court held that, for purposes of a trustee's duty to inform and account, an individual becomes a qualified beneficiary on the date when a beneficiary's entitlement under the trust is triggered.

Facts

Husband and wife Mario and Lillian Colecchia created an irrevocable trust for their benefit during their lifetimes, with two of their daughters, Donna and Denise, as trustees.

One of the assets transferred to the trust was Mario and Lillian's interest in their home (the property). Under the terms of the trust, Mario and Lillian reserved the right to use and occupy the property during their lifetimes and were permitted, in their discretion, to pay the expenses relating to the property, including maintenance, repairs, expenses and taxes. The trust further provided that after the death of the survivor of Mario and Lillian, the trust would be divided among their six children: Mario Jr., Michael, Mark, Denise, Donna and Diane. The three brothers would each receive 10% of the trust, and the remaining 70% would be divided equally among the three sisters.

One of the children, Michael, was unaware of the trust, its terms and the fact that the property was no longer owned by his parents in their individual capacities. Believing that his parents still owned the home and that each of the children would inherit equally, Michael performed various maintenance tasks and repairs for the property without compensation. At the death of the survivor of his parents (Lillian), Michael learned of the trust and the unequal distributive provisions contained therein.

As part of their administration of the trust, the trustees sold the property to a third party. The proceeds from the sale of the property were placed in an interest on lawyers' trust account, which remained with the closing attorney for approximately nine months. Michael objected to the original sale, the time it took to distribute the funds to the beneficiaries and the fact that the funds were not placed in an appropriate interest-bearing account by the trustees prior to being distributed.

Michael filed a general trust petition with the Probate and Family Court Department, Essex Division, with a complaint attached. His complaint asserted that the trustees breached their duty of loyalty by (a) not informing him of the trust; (b) not informing him of the trust's ownership of the property, as well as his parents' lack of ownership in the property in their individual capacity; (c) failing to deal with Michael on fair contractual terms; and (d) accepting and benefiting from Michael's work without disclosing that they would receive a greater share in the trust's assets at their parent's death (collectively, count 1).

Michael further asserted that the trustees (a) breached their duty of care in their handling of the proceeds from the sale of the property (count 2); (b) breached their duty to inform the beneficiaries of the trust and its assets (count 3); (c) took personal items from the property after Lillian's death without proper accounting or inventory (count 4); and (d) asserted undue influence on their parents, resulting in the trust's unequal division among the children (count 6). Michael also asserted a claim of quantum meruit for his work performed on the property without compensation (count 5). Michael later filed an additional amended complaint, which built upon the factual allegations he made in his original pleading.

The trustees filed affidavits of objection to Michael's petition and complaint, and they moved for partial judgment with respect to counts 1, 3, 4, 5 and 6.

The trial court agreed with the trustees as to counts 1, 4, 5 and 6. In dismissing counts 1 and 5, the judge explained that because Mario and Lillian were life tenants of the property and responsible for its maintenance, and because the trust did not hold use or occupancy rights to the property, the trustees did not receive any personal gain or benefit from Michael's work. The judge dismissed counts 4 and 6 because Michael's complaint did not allege specific information as to the property removed by the trustees from the property, or the facts and basis for the alleged undue influence.

However, the judge only partially dismissed count 3, agreeing that the trustees' duty to inform began upon Lillian's death and allowed the claim to proceed as it related to the failure to inform the beneficiaries after her death.

The trustees then filed a motion for judgment on count 2 and the remainder of count 3, and a motion to dismiss all of the counts for Michael's failure to comply with the court's supplemental rules 3 and 6, which relate to proper service of process. The judge dismissed all counts due to Michael's failure to comply with the Probate and Family Court of Massachusetts Supplemental rules 3 and 6. Michael appealed.

Law

A trustee is required to keep the qualified beneficiaries of a trust reasonably informed about the administration of a trust, including notifying the qualified beneficiaries of the trustee's name and address and providing an account to the qualified beneficiaries at least annually and at the termination of the trust. Mass. Gen. Laws Ann. ch. 203E, § 813.

A "qualified beneficiary" is a beneficiary who, on the date the beneficiary's qualification is determined: (i) is a distributee or permissible distributee of trust income or principal; or (ii) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date. Mass. Gen. Laws Ann. ch. 203E, § 103.

Supplemental Rule 6 of the Probate and Family Court of Massachusetts provides certain service requirements, including service by hand delivery, mail and/or publication, except where otherwise required by statute or ordered by the court.

Supplemental Rule 3 of the Probate and Family Court of Massachusetts provides, in pertinent part, that "when notice of a petition has been given by service of a citation, notice of any pleading asserting new or additional claims for relief not asserted in the original petition shall be given by service of a new citation."

Holding

In addition to addressing whether the trustees breached certain duties to Michael in their administration of the trust, discussed below, the court clarified that an individual becomes a qualified beneficiary under the Massachusetts' Uniform Trust Code when an event occurs that triggers a beneficiary's entitlement under the terms of the trust instrument.

For Michael's purposes, that triggering event was the death of his mother, because after her death, Michael became a distributee of the trust. Prior to Lilian's death, however, Michael did not have that same entitlement and therefore was not a qualified beneficiary to whom the trustees owed a duty to inform or account. Once Michael became a qualified beneficiary, the trustees did owe Michael these duties, but because he did not allege damages that were causally connected to these duties as they related to the improvements to the property, his claims relating to the property's upkeep and maintenance were properly dismissed. But the court held that his claim for an accounting as it related to the sale of the property and the handling of the proceeds from such sale was properly pleaded and should not have been dismissed.

In addressing whether the trustees breached their duty of loyalty to Michael, and Michael's claims of quantum meruit for his repairs and maintenance to the property, the court agreed with the lower court that these claims were improper, because the maintenance of the property fell on Mario and Lillian during their lifetimes. As the life tenants, it was their responsibility to care for the property, and despite those improvements potentially enhancing the property's value, the trustees did not benefit from Michael's work on the property. Accordingly, the trustees did not breach their duty of loyalty, and Michael was not owed any amounts in compensation for his prior work.

The court also rejected Michael's argument that the trustees breached their duty of care in the handling of the proceeds relating to the sale of the property. Because the trust contained language allowing the trustees to invest trust assets without being subject to legal limitations on investments, and because Michael did not assert any claims of bad faith or reckless indifference, the court determined that the language in the trust shielded the trustees from liability under that claim.

In determining whether the trustees improperly distributed Lillian's personal items at death, the court clarified that Michael had no claim against his two sisters as trustees because it was never suggested that the items were assets of the trust. Accordingly, any potential claim would need to be made in another type of suit that related to the administration of Lillian's estate, not against the trustees of the trust.

In re Tr. B Created Under Karam Fam. Tr., No. 2 CA-CV 2021-0018, 2021 WL 6013442 (Ariz. Ct. App. 2021)

The Court of Appeals of Arizona held that where a beneficiary properly removed a remainder beneficiary through the exercise of her limited power of appointment, a subsequent trust termination with the consent of the remaining beneficiaries was valid.

Facts

George and Jane Karam (the settlors) were a married couple in Arizona with four children, Celina, Paula, Rose and Michael. In December 1992, the settlors created the Karam Family Trust, with both settlors also serving as initial co-trustees. The terms of the trust provided that upon the death of the first spouse, the trust would be divided to create two trusts, trust A and trust B.

Trust A was to be funded with the surviving spouse's portion of the settlors' community property held by the original trust, as well as the least possible amount of assets to result in the least possible federal estate tax at the first spouse's death. Under the terms of the original trust, the surviving spouse was entitled to all the income and principal of trust A during the spouse's lifetime and was granted an unlimited power of appointment over trust A's assets.

Trust B would be funded with the original trust's remaining assets after trust A was funded. The surviving spouse was entitled to all the income generated by trust B during his or her lifetime and could receive distributions of principal for his or her support, so long as there were not readily available assets in trust A. The terms of the original trust also provided that the surviving spouse had a limited power of appointment over the assets in trust B to any one or more of the settlors' descendants. To exercise the power of appointment, the original trust required that the surviving spouse designate such appointment in writing (or by reference in his or her will) and deliver the writing to the trustee. Upon the death of the surviving spouse, any assets not appointed were to be divided into equal shares among the settlors' children or, if a child predeceased both settlors, among such child's children.

George died in December 1995, survived by Jane and their four children. Pursuant to the terms of the original trust, the original trust was divided into trust A and trust B, with Jane as the sole trustee of each trust.

Several years later, in April 2015, Jane notified Celina, Paula, Rose and, because Michael had since died, Michael's two children of her desire to terminate trust B and move the venue of any related proceedings from Santa Cruz County, Arizona, to Pima County, Arizona. She also noted that each beneficiary would need to consent to the proposed termination. Each beneficiary except Rose signed the applicable consent form.

In May 2015, Jane filed a petition to terminate trust B through decanting the assets from trust B to trust A. In her petition, Jane stated that the primary purpose of trust B had been to mitigate any potential exposure to federal estate tax upon her later death but that, due to changes in federal and state tax laws since the original trust's creation decades earlier, trust B was no longer necessary. She further stated that she exercised her power of appointment to remove Rose and her descendants as remainder beneficiaries of trust B.

The trial court granted Jane's petition to terminate trust B and ordered that all assets from trust B be transferred to Jane, as trustee of trust A.

In May 2020, five years after Jane's petition, Rose filed an objection to the termination of the trust and filed a motion to reinstate trust B. In her objection and motion, Rose argued that her mother did not have the authority to amend trust B to remove her as a beneficiary because the trust was irrevocable and therefore incapable of being amended. Thus, because she was still a beneficiary, she was improperly omitted from her mother's 2015 petition and did not receive proper notice of the proceedings. She further argued that the termination was illegal and that trust B's assets had been subject to conversion.

Jane filed a motion to dismiss her daughter's action, stating that Rose had been properly removed as a beneficiary and therefore was not entitled to notice and did not have any interest in seeking trust B's reinstatement. The trial court agreed and granted Jane's motion.

Rose appealed, arguing that her mother's motion was untimely and that the trial court did not fully consider, among other things, that she was still a beneficiary of trust B at its termination.

Rose had also initiated a separate civil lawsuit against her mother, arguing that Jane was retaliating against Rose for not consenting to trust B's termination. See generally *Karam v. Karam*, No. 2 CA-CV 2021-0073 2021 WL 5856677 (Ariz. Ct. App. 2021). Jane filed a motion to dismiss in that matter, and the trial court ruled that, because the claim arose out of the same action as the other probate matter, Rose was barred from relitigating the claim in the civil case. *Id*. at 2. Rose appealed, and the Court of Appeals agreed with the trial court, upholding the dismissal. *Id*. at 4.

Law

Under Section 14-10411 of the Arizona Trust Code, a noncharitable irrevocable trust may be terminated on consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. If not all of the beneficiaries consent to a proposed termination of the trust, the modification or termination may be approved by the court if the court is satisfied that (1) all of the beneficiaries had consented and the trust could have otherwise been terminated under Section 14-10411; and (2) the interests of a beneficiary who does not consent will be adequately protected. Ariz. Rev. Stat. Ann. § 14-10411(c).

Holding

The appellate court disagreed with Rose's argument that Jane's motion was untimely, and agreed with the trial court's granting of Jane's motion to dismiss.

The appellate court determined that Jane had properly exercised her power of appointment under the terms of trust B, because the agreement required only that she designate such appointment in a writing, delivered to the trustee, and because she was only limited to appointing "one or more" of the settlors' descendants as a beneficiary or beneficiaries. The fact that Jane, as trust B's trustee, issued the writing satisfied the delivery requirement of the exercise of the power of appointment. Interestingly, the court further noted that Jane memorialized this exercise of her power of appointment in the writing, but also in her petition to terminate, suggesting that the power could have been exercised in the petition and still satisfied the requirements of trust B's terms.

Because Jane's exercise of the power removed Rose, Rose was no longer a beneficiary of trust B, and she did not have the ability to withhold consent to trust B's termination.

In response to Rose's argument that Jane's removal of Rose as a beneficiary and subsequent termination altered the intent of trust B, the court disagreed, noting that the terms of trust B allowed the surviving spouse to divest any of the descendants' remainder interest in trust B. Had trust B included language that the original trust was intended to irrevocably benefit each child, the surviving spouse would not have been able to designate less than all of their children as beneficiaries. However, this was not the language of the original trust, and Rose was properly removed through the exercise of the power of appointment.

Newsome v. Peoples Bancshares Inc., 328 So.3d 87 (November 4, 2021)

A bank was not liable for breach of contract where it reasonably relied on the apparent authority of an attorney to authorize disbursements from a conservatorship account.

Facts

Marilyn Newsome was appointed conservator of her daughter, Victoria Newsome, stemming from a medical malpractice claim. The Mississippi chancery court ordered that a portion of Victoria's settlement proceeds be deposited in a separate account for all costs related to constructing a special needs home for Victoria. The chancery court then placed McNulty (the attorney who petitioned to open the conservatorship) in charge of overseeing the construction.

McNulty informed Peoples BancShares Inc. that her client would like to create an account that would be court-administered so disbursements could be made only pursuant to court orders. She advised the bank that she, as the attorney for the conservatorship, would present the court orders to the bank for disbursements by cashier's checks made out to the client in the amount specified in the order.

Shortly thereafter, the conservator went to the bank and set up the conservatorship account designating herself as the sole authorized signer for the account. For the disbursements at issue, the attorney drafted and filed the order, delivered it to the bank, and the bank issued the cashier's check pursuant to the order — without the conservator's signature.

The conservator brought a breach of contract action against the bank and bank employee for failing to require the conservator's approval or signature as account holder when it issued court-ordered cashier's checks from the conservatorship account.

The Mississippi chancery court found that "the Bank reasonably relied on [her attorney]'s apparent authority to its detriment," and it dismissed the claim against the bank. The Mississippi Supreme Court affirmed.

Law

Under Mississippi law, "[a]pparent authority exists when a reasonably prudent person, having knowledge of the nature and the usages of the business involved, would be justified in supposing, based on the character of the duties entrusted to the agent, that the agent has the power he is assumed to have." *Newsome v. Peoples Bancshares*, 269 So. 3d 19, 35 (Miss. 2018).

The elements to determine the existence of apparent authority under Mississippi law are: (1) acts or conduct by the principal indicating the agent's authority; (2) a third party reasonably relied upon those acts or conduct; and (3) a detrimental change in position by the third party as a result of such reliance. *Id*. at 29-30.

Holding

Where an attorney possesses apparent authority to authorize disbursement from a conservatorship account on behalf of the conservator, the bank can reasonably rely on such attorney's apparent authority in dispersing funds without the conservator's signature.

The Mississippi Supreme Court found that the conservator engaged in acts or conduct indicating that the attorney had the authority to act as conservator's agent; the bank reasonably relied upon its assumption that the attorney was the conservator's agent; and the bank relied to its detriment on its reasonable assumption that the attorney was the conservator's agent.

The Mississippi Supreme Court rejected the conservator's argument that the bank did not act reasonably in following its in-house procedures because the deposit agreement identified her as the only authorized signer, because the chancellor found that the bank was reasonable in adhering to its normal procedure of operating a court-administered conservatorship account, which did not require a client signature and was guided by the authority of the court orders and her attorney's apparent authority.

Van Horn, Metz & Co., Inc. v. Crisafulli, No. 21-01128 (FLW), 2021 WL 4317186 (D. N.J. Sept. 23, 2021

Imposing a constructive trust as a preliminary injunction on the wife of a deceased husband who allegedly embezzled funds from the plaintiff.

Facts

The plaintiff sought to impose a constructive trust and preliminary enjoin and restrain the defendant from spending, transferring or otherwise disposing of funds she claimed the defendant's late husband (a prior employee of the plaintiff) had misappropriated, totaling over $4.3 million.

The defendant put forth no evidence to dispute the embezzlement allegations.

The plaintiff claimed that the defendant aided and abetted her husband's breach of fiduciary duties by spending and dissipating money stolen from the company and took additional steps after her husband's death to conceal the theft and misappropriation of company funds.

Law

A party seeking a preliminary injunction must establish the following: (1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief. *Kos Pharms. Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004).

A constructive trust is an equitable remedy and not an independent cause of action. See Flanigan v. Munson, 175 N.J. 597 (2003); *Bergen–Eastern Pension Trust v. Sorensen*, No. BER–L–7669–03, 2007 WL 283440, at *2 n. 3 (App. Div. Jan 11, 2007).

The essential elements for the imposition of a constructive trust are unjust enrichment and a finding that there was some wrongful act, usually, though not limited to, "fraud, mistake, undue influence ... which has resulted in a transfer of property." *Stewart v. Harris Structural Steel Co., Inc.*, 198 N.J. Super. 255, 265 (App. Div. 1984)

Holding

A constructive trust may be imposed as a preliminary injunction where the moving party has shown a likelihood of success on the merits of the constructive trust claim.

The court held that a constructive trust was necessary to prevent irreparable harm to the plaintiff because it was the only way to prevent the consumption, dissipation or fraudulent conveyance of the assets. The defendant's conduct to date showed a likelihood that she would consume, dissipate or fraudulently convey the assets at issue. The defendant had already purchased a home and sold it since the lawsuit commenced. She used the proceeds from the sale to pay creditors. The plaintiff also alleged she gave jewelry and money to her children and she did not dispute this. Thus, the court found her "pattern of behavior in the months following her husband's death suggests a likelihood that Defendant will continue to dissipate the assets which are subject to a potential judgment in this case" (p. 4).

The court also found that the plaintiff was likely to succeed on the merits of his unjust enrichment claim seeking a constructive trust.

> Plaintiff has shown a reasonable probability of establishing all three elements required to succeed on its unjust enrichment claim, as well as a wrongful act committed by defendant's husband, i.e., misappropriating more than $4.3 million belonging to Plaintiff. Indeed, the evidence produced during the parties' limited expedited discovery, as well as the forensic accounting reports provided by Plaintiff's expert demonstrate a connection between the money stolen from Plaintiff and Defendant.

The court further held that the defendant's late husband appears likely to have misappropriated funds from the plaintiff through improper means — a wrongful act — and those misappropriated company funds were commingled with his wife's personal finances.

The court found that "an injunction and imposition of a constructive trust are necessary to preserve the status quo and, more importantly, preserve Plaintiff's ability to recover any potential future judgment" (p. 9).

The court ordered that "accounts and assets amount[ing] to approximately $1,976,443 … shall be placed in a constructive trust in accordance with the findings contained herein. To the extent that Plaintiff discovers additional bank accounts containing sums certain of commingled funds and it seeks to add those accounts to the constructive trust, it is directed to apply to the Court, in writing, with a certification providing proof of the funds and the basis for their inclusion in the constructive trust."

Nelson V. Burr, 492 P.3d 1234 (Ct. App. Nevada. 2021)

The Nevada Court of Appeals held that the statute of limitations for legal malpractice claims arising from negligent estate planning advice begins to run when the plaintiff suffers actual damages.

Facts

In the early 1990s, Lynita Nelson and her then-husband Eric Nelson consulted a Nevada attorney, Jeffrey Burr, to create an estate plan that would insulate a portion of their assets from potential creditors. On Burr's advice, the couple transmuted their community property assets into separate property by a separate property agreement (SPA) and moved those assets into their separate revocable trusts.

In 2001, Burr advised the couple that they could further protect their assets by moving them from their separate revocable trusts into individual self-settled spendthrift trusts (SSSTs). On such advice, Lynita and Eric converted their separate property trusts into and funded their respective SSSTs with the separate property previously held in their respective revocable trusts. Both trusts contained the provision that "[a]ny property held in trust and any income earned by the trusts" would be the separate property of the trustee and distinct from "community property" or "marital property."

Thereafter, during their marriage, Lynita allowed Eric to transfer, without compensation, millions of dollars' worth of property from Lynita's trust into Eric's trust, allegedly based on Burr's advice that the couple should routinely equalize or "level off" assets between the two SSSTs, so that at any given time, half of the couples' assets would be protected from third-party creditors.

In 2009, Eric filed for divorce. During the divorce proceedings, Lynita and Eric disagreed on how the assets held in their individual SSSTs should be distributed. In 2013, the district court issued a divorce decree in Lynita's favor by equalizing the value of the assets between Lynita's trust and Eric's trust, and by ordering that the lump sum payments awarded to Lynita for alimony and child support be paid directly from Eric's trust (the 2013 divorce decree). Eric appealed and in 2017, the Nevada Supreme Court reversed the district court in part, concluding that the court erred in equalizing the assets between Lynita's trust and Eric's trust and in ordering alimony and child support to be paid from Eric's trust (the 2017 divorce order).

Within two years of the 2017 divorce order, Lynita filed a professional negligence complaint against Burr. Lynita alleged that Burr failed to properly advise her of the legal ramifications of executing the SPA and creating the SSSTs, as well as how the creation of these trusts would ultimately affect the distribution of her and Eric's assets at the time of divorce.

Burr moved to dismiss the complaint, arguing that Lynita's legal malpractice action was time-barred by the statute of limitations because either (1) Lynita sustained damages when the SPA and the SSSTs were drafted or (b) Lynita sustained damages and was put on inquiry notice of her claims during the earlier divorce proceedings.

The Eighth Judicial District Court of Nevada agreed with Burr that Lynita was put on inquiry notice of her claims during the earlier divorce proceedings and dismissed the case. Lynita appealed.

Law

Nevada Revised Statute 11.207(1) provides that a legal malpractice action must be "commenced within 4 years after the plaintiff sustains damage or within 2 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the material facts which constitute the cause of action, whichever occurs earlier." Therefore, the statute of limitations does not commence until a cause of action has accrued and a suit may be maintained thereon.

As actual loss or damages is one element of a legal malpractice cause of action, a plaintiff must sustain actual damages, whether under the two-year or four-year period of limitations, for the statute of limitations for a legal malpractice claim to commence.

Actual damages, synonymous with compensatory damages, are an amount awarded to compensate for a proven injury or loss. Actual damages must be "appreciable" and not "speculative," which depends on when legal damage has been sustained as a result of the alleged negligence.

Holding

The Court of Appeals of Nevada reversed the Eighth Judicial District Court of Nevada, concluding that the lower court erred in finding that Lynita sustained damages and was put on inquiry notice of her legal malpractice claims during the divorce proceedings.

The court first recognized the distinction under Nevada law between litigation and transactional malpractice. In the transactional context, the statute of limitations begins to run when the plaintiffs knew or should have known of damages sustained even though the underlying litigation continued. On the other hand, in the litigation context, the statute of limitations does not begin to run until the underlying litigation is concluded, because until such time, damages are merely speculative and not appreciable.

The court recognized that the case at hand did not neatly fall within either category. The alleged malpractice occurred when Burr advised Lynita and Eric regarding the SPA and the SSSTs, which was transactional in nature. However, the ongoing divorce proceedings, unequivocally of a litigation-based nature, would ultimately determine the certainty of Lynita's damages as a result of the alleged malpractice.

The court reasoned that following the 2013 divorce decree in Lynita's favor, and until the 2017 divorce order, Lynita had not actually incurred any damages as a result of Burr's alleged legal malpractice and any such future damages were at best speculative. The court reversed the Eighth Judicial District Court of Nevada's dismissal and held that the date of the 2017 divorce order was the earliest possible date that Lynita incurred damages as a result of the alleged legal malpractice, and therefore, Lynita's complaint had been timely filed.

In dicta, the court dismissed any argument that Lynita sustained actual damages when she incurred legal fees in relation to the earlier divorce proceedings because such legal fees were related to the divorce action and not directly related to Burr's alleged malpractice. The court also noted that Lynita could not have known of her legal malpractice claims during the divorce proceedings because Burr himself testified in those proceedings that the SPA and the SSSTs were never intended to alter the parties' rights upon divorce and he believed that the SSTs "would not — should not be relied upon for dissolution rights."

Dae v. Traver, 69 Cal. App. 5th 447, 284 Cal. Rptr. 3d 495 (Cal. App. 2021)

The Second Appellate District of the Court of Appeal of California held that a trustee provided sufficient evidence that his no-contest petition had "minimal merit" to defeat a trust beneficiary's anti-SLAPP motion because, under the former no-contest law applicable to the trust, a petition challenging a trustee's investment decisions can amount to a contest since it seeks to impair provisions in the trust giving the trustee discretion to manage trust assets.

Facts

Erin and Jean Walsh established a family trust designed to provide for themselves and Jean's three children from a prior marriage: Joan, William and Robert.

Under the terms of the family trust, the residuary trust was created and funded upon Erin's death in 1995. The residuary trust was irrevocable and Jean and Robert were named as trustees with the authority to "grant, sell, assign, convey, exchange, convert, manage, … invest, reinvest, loan, or reloan" trust property and to "borrow money for any trust purpose upon such terms and conditions as may be determined by the trustees, and to obligate the trust property for the repayment of money so borrowed." The trustees were also generally given "all powers that are necessary or convenient to make fully effective the purposes of the trust."

Jean was entitled to income from the residuary trust during her lifetime. Following her death, the residuary trust would be divided equally among her three children. If a child died before Jean, the child's share of the assets would be distributed to the child's issue by right of representation. If no issue of that child was then living, the child's share would be divided between the other children's shares.

Jean and Robert, as co-trustees of the residuary trust, entered into a series of "split-dollar" arrangements that ultimately gave the residuary trust an interest in life insurance policies in return for the residuary trust's financing of the premiums for those policies. In furtherance of such plan, the co-trustees also established new trusts that entered into a series of transactions with the residuary trust, the net effect being that the new trusts held the bulk of the assets of the residuary trust. Robert, as trustee of the residuary trust claimed that the investments were done to avoid estate taxes.

The new trusts gave the lifetime beneficiary a testamentary power of appointment to designate the remainder beneficiaries. Joan, the lifetime beneficiary of one of the new trusts (Joan's trust), died July 12, 2016. Joan exercised her power of appointment and directed that the remaining assets of her trust be distributed to various charities and individuals other than her son, Dae, effectively removing Dae as a beneficiary of the family trust.

Jean died three months later, on Oct. 15, 2016.

Dae filed petitions challenging the trustee's conduct in connection with the split-dollar arrangement, as well as Dae's removal as a beneficiary. Dae alleged that Robert, as trustee, breached his fiduciary duties by diverting residuary trust assets in a way that benefited himself and disinherited Dae.

The trustee then filed a petition seeking a declaration that Dae's petitions triggered the family trust's no-contest clause. In relevant part, the no-contest clause provided: "any beneficiary who attacked ... or sought to 'impair any provisions'" of the family trust would take nothing from any trust created thereunder, including the residuary trust.

Dae then filed an anti-SLAPP motion to strike the entirety of the trustee's no-contest petition arguing that his petition was a protected activity under California strategic lawsuit against public participation (SLAPP) law and that the trustee's petition did not have "minimal merit."

The probate court found that the trustee provided sufficient evidence of the trustors' intent to allow a change of beneficiary to make a *prima facie* showing of probability of prevailing on Robert's contention that Dae's claims are a "contest." Accordingly, the probate court held that the trustee's no-contest petition met the "minimal merit" standard applicable to anti-SLAPP motions to avoid being stricken as a SLAPP.

Dae appealed.

Law

The California anti-SLAPP laws broadly protect speech made in connection with a public issue.

Analysis of an anti-SLAPP motion to strike has two prongs. First, the moving defendant must make a "threshold showing" that the challenged claims arise from protected activity, including the right to petition in connection with a public issue. Second, if the moving defendant makes such a showing, the burden shifts to the responding plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. To meet its burden as to the second prong, the responding plaintiff must meet the "minimal merit" standard by making a showing based upon admissible evidence that, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment.

The common law of California traditionally balanced the tension between a donor's intent to discourage litigation by use of a no-contest clause and the policy interests of avoiding forfeitures and promoting full access of the courts to all relevant information concerning the validity and effect of a will, trust or other instrument by strictly construing no-contest clauses and enforcing them so long as they were not prohibited by law or opposed to public policy.

Under statutory no-contest law prior to 2010, unless a statute provided otherwise, a no-contest clause is enforceable against a beneficiary who brings a contest within the terms of the no-contest clause. However, common law continues to govern enforcement of a no-contest clause to the extent statutory law does not apply.

Holding

The Second Appellate District of the Court of Appeal of California affirmed the lower court holding.

It was undisputed that petitioning the court to redress the trustee's actions effectively disinheriting Dae through the creation of a split-dollar investment trust was protected activity.

In considering the second prong of the anti-SLAPP analysis, the court applied pre-2010 no-contest law because the residuary trust became irrevocable before 2001. The court found that the trustee demonstrated "minimal merit" to show that Dae had filed a contest, because Dae specifically challenged his removal as a beneficiary of the trusts that the settlor had established for life insurance proceeds, and also challenged related decisions by the trustee.

Because Dae sought to limit the discretion of the trustee by challenging the use of residuary trust assets to purchase life insurance and to fund other trusts with the proceeds for the purpose of avoiding estate taxes (which was explicitly within the scope of the trustee's authority under the trust), and other evidence Robert provided supported a reasonable inference that the Erin and Jean, as settlors of the family trust, intended that the property of the residuary trust pass to certain beneficiaries excluding Dae, there was at least a probability that Dae's petition constituted a contest. Accordingly, the motion was properly denied. The Court of Appeal was careful to note that it was not deciding whether the no-contest petition itself should be granted, but merely that it should not be stricken for lack of minimal merit.

Dissent

Justice Ashman Gerst dissented, concluding that the trust was unambiguous that Dae had an irrevocable remainder interest in the residuary trust. Further, the dissent argued that the family trust did not authorize the trustee to alter, revoke or modify the gift to Dae and therefore, Dae seeking redress for the trustee's effectively disinheriting Dae did not constitute a contest.

Skarsten-Dinerman v. Milton Skarsten Living Trust, 2021 WL 6109571 (Minnesota 2021) (Nonprecedential Opinion)

A petition to modify the terms of an irrevocable trust, which would have allowed the sale of certain real property owned by the trust, was denied because a material purpose of the trust was to hold the real property in trust to provide stable income to the beneficiaries of the trust.

Facts

In 2003, Milton Skarsten established the Milton Skarsten Living Trust for the benefit of his six adult children (the beneficiaries). The terms of the trust provided that it was to be divided into equal shares for the beneficiaries. The trust assets originally included four parcels of land, some of which Milton, as initial trustee, sold before his death in 2017.

Pursuant to the trust, upon Milton's death and after payment of funeral costs, estate taxes and other debts, the remaining trust assets were to be retained in trust for the benefit of the beneficiaries or their issue, with equal shares of the trust's net income to be distributed to the beneficiaries or their issue no less frequently than annually. Further, the trust provided that such distributions of net income continue until the three of the beneficiaries are deceased, at which time the trustee of the trust would distribute the remaining trust assets to the three surviving beneficiaries and the issue of the deceased beneficiaries. If a deceased beneficiary is not survived by issue, such deceased beneficiary's share would be distributed to the surviving beneficiaries or their issue.

The terms of the trust included restrictions regarding the sale of the land owned by the trust. First, Paragraph IX of the trust agreement provided that no real property owned by the trust was to be sold after Milton's death, unless necessary to provide liquid assets to pay the funeral cost, estate taxes and other debts resulting from Milton's death. Second, Paragraph VII of the trust agreement provided one of Milton's daughters the right to occupy an existing residence located on one parcel of land owned by the trust, rent-free, and further prohibited selling such parcel without the same daughter's consent. Finally, the trust agreement required that the trustee exercise prudent judgment and care "[i]n acquiring, investing, reinvesting, retaining, selling, and managing" trust property.

In 2019, three of the beneficiaries established special needs trusts for themselves and assigned their respective interests in the trust to their respective special needs trusts. Mary Skarsten-Dinerman, one of the beneficiaries, was appointed as trustee of each of the three special needs trusts.

In 2020, Mary filed a petition with the Swift County, Minnesota, District Court to modify the trust to allow certain farmland owned by the trust to be sold and for the proceeds to be distributed to the beneficiaries. All six beneficiaries were living at the time Mary filed the petition. Mary brought her petition under Minn. Stat. §§ 501C.0411(b) and .0412(a), which allow courts to modify trusts under certain circumstances. Mary's reasons for petitioning the District Court were:

(1) the value of the farmland held by the trust had decreased due to “the farming economy [suffering] over the last several years”;

(2) this decrease in value would “predictably result” in reduced rent payments for the farmland and reduced income to the beneficiaries; and

(3) the terms of the trust requiring distribution after the first three beneficiaries pass away would create an unequal outcome, because the first three beneficiaries to pass away would “realiz[e] very little benefit” while the surviving beneficiaries would benefit substantially.

Further, Mary asserted that this modification would not be inconsistent with Milton’s intent or a material purpose of the trust, and that all beneficiaries consented to the modifications. Finally, the petition sought to recover costs, expenses and attorney’s fees from the trust.

Later, Mary filed an amended petition asking the District Court to permit and instruct the trustee of the trust to distribute the real property owned by the trust. The amended petition provided that all beneficiaries supported this proposal.

The trustee of the trust objected to the modification, arguing that Milton’s intent was to preserve the land for the beneficiaries and to ensure that it would provide a source of income for the beneficiaries.

The District Court denied Mary’s petition, concluding that the material purpose of the trust was for all real property in the trust to remain unsold and to provide annual payments to the beneficiaries. Further, the District Court held that the trust should not be ordered to pay Mary’s costs, expenses or attorney’s fees. Mary appealed to the Court of Appeals of Minnesota.

Mary’s first argument on appeal was that the District Court abused its discretion by denying her petition to modify the trust. Mary’s second argument, as an alternative to her first argument, was that the District Court erred by failing to hold an evidentiary hearing to consider extrinsic evidence related to Milton’s intent. Finally, Mary argued that the District Court abused its discretion by denying her request for the trust to cover Mary’s costs, expenses and attorney’s fees.

Law

A court may modify a noncharitable irrevocable trust if all of the beneficiaries consent and the court concludes that “modification is not inconsistent with a material purpose of the trust.” Minn. Stat. § 501C.0411(b). In determining a material purpose of a trust, a court looks to the plain language of the trust document. See *In re Tr. of Boright*, 377 N.W.2d 9, 12 (Minn. 1985) (finding that the terms of the trust instrument and its amendment revealed the purpose of that trust). A trust’s material purpose is a reflection of the settlor’s intent. *In re Tr. of Tufford*, 145 N.W.2d 59, 64 (Minn. 1966). A court may also modify a trust if, “because of circumstances not anticipated by the settlor,” modification will “further the purposes of the trust.” Minn. Stat. § 501C.0412(a). The modification “must be made in accordance with the settlor’s probable intention.” *Id*.

The goal in interpreting a trust document is "to ascertain and give effect to the [settlor]'s intent" by looking at the document as a whole. *In re Stisser Grantor Tr.*, 818 N.W.2d 495, 502 (Minn. 2012). When a trust document is unambiguous, the court must ascertain the settlor's intent from its language, without looking to extrinsic evidence. *Id*. When a trust document is ambiguous, courts may consider extrinsic evidence to resolve the ambiguity. *Bolander v. Bolander*, 703 N.W.2d 529, 550 (Minn. App. 2005), rev. dismissed (Minn. Oct. 28, 2005). Language is ambiguous if it is subject to more than one reasonable interpretation. *Id*. at 554.

Appellate courts generally will not consider matters not previously presented to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

When a trust document is unambiguous, courts ascertain the settlor's intent from its language, without looking to extrinsic evidence. *Stisser*, 818 N.W.2d at 502.

Under Minn. Stat. § 501C.1004 and common law, litigation fees are awarded according to the district court's discretion and not paid to trust beneficiaries as a matter of right. Minn. Stat. § 501C.1004; *In re Campbell's Trs.*, 258 N.W.2d 867 (Minn. 1977).

While a party need not prevail to be awarded attorney's fees, the district court's discretion in making that decision still "depends in part on the reasonableness of the party's arguments," which may be reflected in the outcome of the litigation. *In re Van Dusen Marital Tr.*, 834 N.W.2d 527 (Minn. App. 2013). To justify awarding attorney's fees to the beneficiary, the trust document must be sufficiently ambiguous to require litigation to establish its meaning and effect. *Campbell's Trs.*, 258 N.W.2d at 868.

Holding

The Court of Appeals agreed with the District Court's conclusion that Mary's proposed modification was inconsistent with a material purpose of the trust, stating, "we conclude that the trust document is unambiguous with regard to both the sale of the real estate held by the trust and that a material purpose of the trust was to provide annual payments to the trust beneficiaries until three of them passed away."

The Court of Appeals went on to state that Mary's alternative interpretation ignored the specific manner in which Milton wished the real property to benefit the beneficiaries, as the trust explicitly required certain real property to be retained by the trust in order to provide income to the beneficiaries, and further, the trust explicitly prohibited the sale of certain real property.

Furthermore, the Court of Appeals disagreed with Mary's contention that the trust did not prohibit the sale of any real property if such sale would provide a superior financial benefit to the beneficiaries. The Court of Appeals determined that none of the provisions in the trust worked to contradict the provision expressly prohibiting the sale of the real property, regardless of the reason for sale.

Next, the Court of Appeals disagreed with Mary's argument that unanticipated circumstances justified modifying the trust. The Court of Appeals determined that no provision of the special needs trusts established by three of the beneficiaries made the establishment of such special needs trusts a circumstance justifying modification. Mary contended that, under the terms of the special needs trusts, the trust assets could not be distributed as originally contemplated by Milton. The Court of Appeals viewed this as speculative, as it depended on which of the beneficiaries died first. Moreover, the fact that three of the beneficiaries assigned their interest in the trust to special needs trusts did not interfere with Milton's intent for the trust, which was to provide annual income distributions to or *for the benefit of* the beneficiaries.

Finally, Mary's contention regarding the decrease in the value of the real property was not persuasive to the Court of Appeals. The Court of Appeals noted that Milton would have understood that the real property was prone to a decrease in value and established the trust anyway. Further, the Court of Appeals determined that the value of the real property could fluctuate upward, which would nullify Mary's contention.

As to Mary's argument seeking an evidentiary hearing to review extrinsic evidence, the Court of Appeals found that Mary did not request an evidentiary hearing or argue that an evidentiary hearing was required. Nor did Mary argue that the District Court should look beyond the provisions of the trust to determine Milton's intent. As the matter of an evidentiary hearing was not previously presented to or considered by the District Court, the Appellate Court declined to consider it on appeal. Further, even if Mary had presented the matter of an evidentiary hearing to the District Court, the Court of Appeals determined that the trust provisions were unambiguous and therefore, there was no requirement to look beyond the trust provisions to determine Milton's intent.

Finally, as to Mary's challenge of the District Court's determination that the trust should not be required to pay Mary's costs, expenses and attorney's fees, the Court of Appeals held that the District Court did not abuse its discretion in declining to require the trust to pay Mary's costs, expenses and attorney's fees as the District Court could have reasonably determined that justice and equity did not require the trust to pay Mary's costs, expenses and attorney's fees. Further, the District Court could have reasonably determined that under the common law standard, Mary's litigation was not essential to the administration of the trust.

Galiotos v. Galiotos, 300 Va. 1, 858 S.E.2d 653 (Virginia 2021)

The Supreme Court of Virginia held that two brothers serving as co-executors of their mother's estate were appropriately removed where each brother showed a pattern of acting in his own self-interest and obstructed the administration of the estate. For the same reason, neither brother received compensation from the estate or reimbursement for attorney's fees.

Facts

In her will, Irene Galiotos appointed two of her three sons, Steve and Tasos, to serve as co-executors of her estate. Irene's will provided that "if either is or becomes unable or unwilling to serve as co-Executor hereunder, the other shall continue to serve without the necessity of a successor co-Executor." Irene died in 2016, and Steve and Tasos qualified as co-executors of her estate. Irene died and was survived by three sons, Steve, Tasos and Paul.

Steve and Tasos had numerous disputes and conflicts with each other in the course of administering the estate. Counsel for the estate informed Steve and Tasos that she could not represent either brother in any legal disputes against the other. Further, counsel for the estate advised that, in her opinion, both were permitted to hire their own legal counsel at the expense of the estate, to represent them separately as fiduciaries. The brothers proceeded to hire separate counsel.

The disagreements between Steve and Tasos became so commonplace and numerous that Tasos filed a petition in the Circuit Court of the City of Virginia Beach seeking to remove Steve as co-executor of the estate. Tasos' petition claimed that Steve had failed to fulfill his fiduciary duties as co-executor and had obstructed the administration of the estate. Tasos's complaint listed examples of Steve's detrimental conduct.

Steve filed an answer and counterclaim. In Steve's counterclaim, he alleged that Tasos had breached his fiduciary duties by not allowing for payment of administration expenses and should be removed as co-executor. Steve also alleged that, over Steve's objection, Tasos bought a piece of real property (referred to as "Executive Cove") from the estate that was co-owned with Tasos at a below-market value. In his counterclaim, Steve sought a declaratory judgment that (1) Tasos' conduct in relation to Executive Cove was improper and unauthorized; (2) the estate pay the fees it owed to Steve and his attorneys; (3) Tasos breached his fiduciary duties; and (4) removed Tasos as co-executor for his disregard for the estate's interests.

In October 2019, the Circuit Court of the City of Virginia Beach held a bench trial on Tasos' and Steve's claims.

The Circuit Court of the City of Virginia Beach found that both brothers acted in their own interests and that it was unlikely the brothers would ever reconcile their differences. The Circuit Court removed the brothers as co-executors and ordered that a disinterested party serve as administrator of the estate. The Circuit Court did not set aside the sale of Executive Cove but noted in its ruling that Steve should consider litigating this matter separately. The

Circuit Court finally held that neither brother was entitled to payment of attorney's fees by the estate, nor compensation for their service as co-executors.

Both Steve and Tasos appealed.

Tasos argued that the Circuit Court committed a "clear error of judgment" because Steve was responsible for any deadlock and Steve committed a breach of trust. Steve argued that the Circuit Court erred because an executor may be removed only if he commits fraud, breach of trust, was grossly negligent or breached his fiduciary duty, and none of his conduct was grounds for removal.

Both brothers contended that counsel for the estate advised them that the estate would be responsible for attorney's fees if litigation against the other ensued. Further, both brothers argued that they exercised good faith when performing their fiduciary duties and, therefore, they should be compensated for their service as co-executors.

As to Executive Cove, Steve argued that the Circuit Court erred in declining to set aside the estate's sale of Executive Cove to Tasos, or otherwise ruling that the estate should somehow be compensated for the below-market deal that Tasos pushed through. Steve noted that the Circuit Court found that Tasos did breach his fiduciary duty by unilaterally effectuating the sale of Executive Cove, which necessitated that the Circuit Court set aside the sale. In fact, the Circuit Court did not rule in its written comments that Tasos breached his fiduciary duty, and Steve's belief that the Circuit Court had ruled as much was based on the judge's verbal comments at trial.

Law

A trial court is afforded considerable latitude when facing the decision of whether to remove an executor. Clark v. Grasty, 210 Va. 33, 37, 168 S.E.2d 268 (1969). Such latitude is necessary in those situations because the trial court, having heard from the parties and witnesses itself, is best suited to make determinations regarding the facts and whether an executor's continued service would benefit the estate. See Reynolds v. Zink, 68 Va. (27 Gratt.) 29, 31-32 (1876).

A Circuit Court having discretion means that "the [circuit] court has a range of choice, and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law." Landrum v. Chippenham and Johnston-Willis Hosps., Inc., 282 Va. 346, 352, 717 S.E.2d 134 (2011) (internal quotation marks omitted).

A circuit court may revoke and annul the powers of an executor for any cause, as long as the removal of an executor appears proper. Code § 64.2-1410(A). The critical inquiry is whether it is in the best interest of the estate that the executor, or executors, be removed. Clark, 210 Va. at 37, 168 S.E.2d 268. To that end, removal of an executor who is guilty of fraud, breach of trust or gross negligence would surely benefit the estate. See id. at 38, 168 S.E.2d 268. However, those are not the only justifications that would warrant removal of an executor. Friction between individuals can justify the removal of an executor when removal would achieve some beneficial end. Id. at 37-38, 168 S.E.2d 268. Ultimately, the determination of whether the removal of an executor would be in the best interest of the estate is left to the broad discretion of the trial court.

A trial court's decision to refuse attorney's fees is reviewed for abuse of discretion. Lynchburg Div. of Social Servs. v. Cook, 276 Va. 465, 484, 666 S.E.2d 361 (2008). An executor is entitled to "any reasonable expenses incurred by him in his capacity as a fiduciary," which may include attorney's fees. Clare v. Grasty, 213 Va. 165, 170, 191 S.E.2d 184 (1972). While "[a]n executor may, in good faith, seek the aid of counsel in the [e]xecution of his duties," he is not entitled to attorney's fees and legal costs simply because they were incurred in good faith. Id. The attorney's fees and costs must be for services that aid the executor in the performance of his duties and are beneficial to the estate. Id.

"It is well settled that the allowance of a commission is within the sound discretion of the trial court." Clare, 213 Va. at 170, 191 S.E.2d 184. An executor is entitled to a commission only "when the executor has faithfully discharged his duties to the estate in his charge" because his commission "is based upon the services he has rendered on behalf of the estate." Id.

Holding

The Supreme Court of Virginia affirmed the Circuit Court's decision to remove both brothers, holding that the disputes between the brothers and the ensuing gridlock in administration of the estate was well-documented. The Circuit Court used this as a basis for concluding that it was in the best interest of the estate to remove both brothers and the Supreme Court's review of the record provided no basis for overturning the Circuit Court's decision.

Next, the Supreme Court ruled that the Circuit Court did not err in refusing to award attorney's fees or fiduciary compensation to either brother because there was evidence to support that the Circuit Court made such determinations based on the belief that both brothers acted predominantly in their self-interests in hiring counsel and performing the specific acts they did as co-executors rather than acting in the best interest of the estate.