IN THE CIRCUIT COURT OF MADISON COUNTY, ALABAMA

OUIDA DICKINSON AS TRUSTEE OF THE HOMER DANIEL FAMILY TRUST; OUIDA DICKINSON; HOMER CLIFTON DANIEL, JR.;

Plaintiffs,

VS. CIVIL ACTION NO.: CV04-2100

JOHN BUTLER, JR., AS ADMINISTRATOR OF THE ESTATE OF MILBRA GRAYCE SMALLWOOD LAMB DANIEL; ESTATE OF MILBRA GRAYCE SMALLWOOD LAMB DANIEL; A, B, or C, the Administrator(s) and/or Personal Representative(s) of the Estate of MILBRA GRAYCE SMALLWOOD LAMB DANIEL; F. MICHAEL LAMB; F. MICHAEL LAMB As Trustee of the MILBRA DANIEL FAMILY TRUST; PATRICK LAMB; JACKSON BURWELL; JACKSON P. BURWELL, P.C. and MARY G. LAMB

Defendants.

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

COME NOW the Plaintiffs, by and through undersigned counsel, and submit the following brief in support of partial summary judgment. As grounds in support thereof, Plaintiffs state as follows:

I. INTRODUCTION

The case at bar involves a trust created by Homer Daniel, Sr., and its subsequent depletion and use by the Defendant F. Michael Lamb, a non-beneficiary. The facts of this case are extensive and the Defendant F. Michael Lamb's conduct was especially egregious. This conduct involves a Defendant who systematically began, shortly after his

step-father's death, to deprive this trust of its assets to the detriment of its beneficiaries. These actions included personally terminating the estate planning services of the professionals who assisted Homer Daniel, Sr.; personally speaking with other attorneys until he could find one who would sanction his wishes despite statutory Alabama law to the contrary; taking his elderly mother suffering dementia and Alzheimer's disease into banks and financial institutions to deplete the trust of its funds; spending by his own admission $200,000.00 of the trust funds on his own pleasures such as expensive dinners and college football tickets; personally transferring the remaining funds out-of-state and then moving them between accounts before finally placing them solely in his wife's name where they would not be located; claiming he had no knowledge when the true beneficiaries inquired about the trust; and finally, although he actively participated in the removal of all the trust assets, having his attorney write the trust beneficiaries to inform them that he only discovered his mother completely used the trust assets upon reviewing, post-mortem, her papers. During his deposition, the Defendant's recollection of events changed from one moment to the next. The undersigned believes the Defendant's conduct is among the most egregious and intolerable in society.

However, for purposes of the present motion, the simple undisputed facts of the trust terms at issue warrant summary judgment. The present motion simply addresses the illegality of the fund transfers themselves. As such, counsel will attempt to provide sufficient factual background concerning the parties, trust terms, and transfers at issue.

II. NARRATIVE SUMMARY OF UNDISPUTED, MATERIAL FACTS

A. THE DANIEL AND LAMB FAMILIES

1. HOMER DANIEL, SR., AND HIS CHILDREN

In 1940, Homer Clifton Daniel, Sr., married Wilma Potts Daniel. Together they had 3 children. (See, affidavit of Ouida Dickinson). They are, Ouida Daniel Dickinson;

Homer Daniel, Jr. ("Danny"); and Scott Daniel. (Id.). Ouida Dickinson lives and works in Huntsville, Alabama.[1] Danny Daniel is a pastor, living in Kansas where he ministers a congregation. Scott Daniel suffers autism as well as severe mental retardation and lives in a local home where he receives daily care. Scott has required special care since childhood. During his lifetime, Homer Daniel, Sr., was a very active volunteer with The Wallace Center and other homes where Scott resided. (Id.).

During their marriage, both Homer and Wilma Daniel experienced long careers. Homer Daniel served for many years in the Army. Upon retirement, he took a similar civilian job. Wilma Daniel spent many years as an employee for the phone company. Because of their two jobs, they saved significant portions of Wilma Daniel's paychecks. These savings formed much of the family's assets. (Id.).

Wilma Daniel passed away in 1979, leaving her 3 grown children. She died after suffering brain cancer. (Id.).

2. MILBRA GRAYCE SMALLWOOD LAMB AND HER CHILDREN

Milbra Grayce Smallwood was born on March 28, 1917. (Dep. Mike Lamb, p. 165). She first married Frank Lamb. Together, they had 2 children. These children were F. Michael Lamb ("Mike") and Patrick Lamb ("Pat"). Mike and Pat Lamb are her only children. (Dep. Mike Lamb, pp. 165-166).

Frank Lamb passed away in 1975. (Dep. Mike Lamb, p. 159). Thereafter, Milbra Lamb married, briefly, a second time. (Dep. Mike Lamb, p. 165-166). She had no children from this second marriage. She subsequently married a third time, to Homer Daniel, Sr., in 1980. (Dep. Mike Lamb, p. 159).

[1] Ouida Dickinson is hearing-impaired and may need special accommodations at trial.

3. THE MARRIAGE OF HOMER DANIEL, SR., AND MILBRA LAMB

In 1980, Homer Daniel, Sr., and Milbra Lamb married. Both were senior citizens when they married. (Dep. Mike Lamb, p. 162). Both were retired and had accumulated significant, separate assets. *Id.* Both had separate children, all now grown. *Id.* Moreover, Milbra Lamb received a government pension due to her many years of federal employment as well as separate social security payments due to Frank Lamb's lifetime of private employment. (Dep. Mike Lamb, pp. 167-169). Milbra Daniel also received payments from the sale of her home as she moved into Mr. Daniel's home upon their marriage. (Dep. Mike Lamb, pp. 169-170).

B. THE CREATION OF RECIPROCAL FAMILY TRUSTS

At the time of their marriage, Homer Daniel and Milbra Lamb were both of advanced age, retired, and with separate adult children. During their working lives, both had accumulated separate assets and estates. Both had their own homes prior to the marriage. (Dep. Mike Lamb, pp. 169-170).

In 1994, after marrying, Homer Daniel and Milbra Lamb contacted Estate Security Trust ("EST"). EST is a company that provides services related to estate planning and trusts.[2] (See, Affidavits of Barry Bynum and Steven Foutch).

After being contacted by Homer and Milbra, two EST professionals traveled to their residence and met with both of them. At this meeting, Homer and Milbra both explained that they each had children from a prior marriage. Both Homer and Milbra explained their estate planning needs and desires to the EST officers. Homer Daniel

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[2] EST maintains an affiliation with Redstone Credit Union ("Redstone") in Huntsville. Through Redstone, EST works primarily with retired military officers and government personnel to assist in estate planning. This planning frequently involves the special needs of blended families. Homer and Milbra had been referred to EST by a friend who was a retired military officer.

initially expressed concern with meeting the needs of his mentally handicapped adult son, Scott. Homer Daniel explained to EST that Scott was mentally handicapped, needed assistance, and lived in a group home. Because Scott received government assistance, Mr. Daniel could not pass assets to him through a will or estate. However, Mr. Daniel also expressed the importance of preserving his assets and arranging his separate affairs so that someone would have funds after his death to meet the lifetime needs of his handicapped son, Scott. (See, Affidavits of Barry Bynum and Steven Foutch).

Both Homer and Milbra also explained to EST that since each of them had children from a prior marriage, it was their specific intent to preserve their individual, separate assets for their own children upon their death. Both Homer and Milbra expressed to EST their intent that each person's separate assets be preserved for their own children. (See, Affidavits of Barry Bynum and Steven Foutch).

At first, EST proposed to Homer and Milbra a single trust designed so that precisely one-half of the couple's joint assets would pass to each person's separate children. Homer and Milbra declined this single trust option, specifically telling EST they wanted separate trusts preserving their separate, individual assets for their separate children. In short, each of them wanted their own children to inherit their individual assets. (See, Affidavits of Barry Bynum and Steven Foutch).

Based upon the intent expressed by Homer and Milbra, EST prepared separate, reciprocal trusts for each of them. Homer and Milbra executed these two reciprocal trusts in December, 1994. (See, Exhibits to Affidavit of Barry Bynum). Other than the names of the trustor, trustees, and beneficiaries, both trusts are practically identical. During their lifetimes, the two trusts were revocable. Homer was the initial trustee of his trust, The Homer Daniel Family Trust. Milbra Daniel was the initial trustee of her trust, The Milbra Daniel Family trust. Each trust became irrevocable upon the death of its trustor. Each trust designated the surviving spouse as initial successor trustee. (*Id.*).

Each trust allowed the trustee to use funds for the health, education, maintenance or support of the surviving spouse and the deceased's own, separate children.[3] However, regardless of any power or discretion provided the trustee, each trust contained the following express limitation which, by its terms, controlled any contrary provisions of the trusts. This limiting provision is as follows:

> Notwithstanding anything to the contrary contained herein, during such time as any beneficiary of any trust created hereunder (other than the Trustor) may be acting as a Trustee hereunder, such person shall be disqualified from exercising any power to make discretionary distributions of income or principal to himself or to make discretionary allocations in his own favor or receipts or disbursements as between income and principal. [4]

(Homer Daniel Family Trust, Art. 9).

In January, 1995, Homer Daniel amended his trust, adding additional language to express his intent that his trust be utilized for his disabled son Scott's care. (See, Affidavit of Barry Bynum and Steven Foutch). In 1997, Homer Daniel corresponded again with EST. (See, Affidavit of Barry Bynum and Steven Foutch). In that correspondence, Mr. Daniel requested that EST prepare an additional amendment to his trust adding additional successor trustees to insure that "this trust is to remain in effect until the death of my [disabled] son Scott Clay Daniel and I want to be sure that the trust is administered by a competent person until the trust can be dissolved." (See, Affidavits

[3] Under Federal law, this language creates an ascertainable standard and does not create a "general power of appointment." A trust can only act through its trustee and if that trustee has complete and unfettered discretion to take the proceeds then they will be included in the trustee's personal estate for tax purposes.

of Barry Bynum and Steven Foutch). In other words, Mr. Daniel clearly intended that his separate assets be preserved for the remainder of his son Scott's life.

C. THE DEATH OF HOMER DANIEL AND THE DESTRUCTION OF THE HOMER DANIEL FAMILY TRUST

On November 15, 1998, Homer Daniel, Sr., passed away. (See, Affidavit of Ouida Dickinson). Under the terms of his trust, Milbra Daniel became successor trustee. (See, Exh. 2 to Dep. Mike Lamb). Thereafter, Milbra Daniel remained trustee of The Homer Daniel Family Trust until her death in December, 2003. (Dep. Mike Lamb, p. 328). In 1999, shortly after Homer Daniel's death, Milbra Daniel, then trustee, listed the assets in The Homer Daniel Family Trust as having a value of at least $403,090.55. [5] (See, Exh. 5 to Dep. Mike Lamb).

Although not a trustee or even a beneficiary of The Homer Daniel Family Trust, Mike Lamb immediately began working to influence its affairs. Promptly after Homer Daniel's death, Mike Lamb personally contacted EST, terminated their services, and told these trust professionals that they were going to go in a different direction. (See, Affidavits of Barry Bynum and Steven Foutch). [6]

Also, immediately after Homer Daniel's death, Mike Lamb personally contacted his "old friend" Gary Huckaby. (Dep. Mike Lamb, pp. 24-25). [7] Although Huckaby's firm (Bradley, Arant, Rose & White) has numerous trust, estate, and tax attorneys, they did not undertake to assist Mike Lamb. Subsequently, Mike Lamb has admitted to

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[4] This language is generally published by West's Forms to include in trusts to insure that no general power of appointment could ever be interpreted to exist. This overriding and absolute language presents a very important bar to trustee conduct.

[5] Counsel believes this listing is not complete and has retained an accountant to evaluate the trust. Moreover, this value does not include the trust's real property.

[6] In his deposition, Mike Lamb admitted that he had several telephone conversations with EST during this time period. (Dep. Mike Lamb, p. 147). In an effort to re-direct attention from his plan to take over the trust assets, Lamb now falsely claims EST was trying to sell his mother an annuity; and thus, they decided to terminate their services. (Dep. Mike Lamb, pp. 146-147). However, EST does not sell insurance or investment products. EST works to provide limited trust/estate-related services.

speaking with several additional attorneys, none of whom undertook to assist him in the trust's affairs. (Dep. Mike Lamb, pp. 30-32). [8]

According to Mike Lamb, Huckaby directed his Mother to attorney Jackson Burwell. (Dep. Mike Lamb, p. 29). [9] In 1999, Milbra Daniel first met with Jackson Burwell concerning The Homer Daniel Family Trust. (Exh. 11 to Dep. Mike Lamb). It is unclear whether Mike Lamb attended this meeting. Jackson Burwell testified that Mike Lamb attended the meeting and participated in the discussions related to The Homer Daniel Family Trust. (Dep. Burwell, p. 106). Indeed, Burwell expressed that he was "positive" as to who attended this meeting. *Id.* Mike Lamb claims he did not attend the meeting. (Dep. Mike Lamb, pp. 30-34). Yet, he eventually admitted that Jackson Burwell promptly telephoned him in Nashville right after his mother left from this meeting. (Dep. Mike Lamb, pp. 30-36). [10] According to Jackson Burwell, he informed Milbra Daniel and Mike Lamb at this initial meeting, that they could turn over the trust assets to Ouida Dickinson and Danny Daniel but received no response to this proposal. (Dep. Burwell, p. 137). Burwell also testified that he advised Milbra Daniel and Mike Lamb the trust could be amended to protect Ouida and Danny's inheritance while still ensuring no estate tax liability for Milbra Daniel. (Dep. Burwell, p. 146). [11] Again, he received no response to his proposal. (Dep. Burwell, pp. 146-147).

Although the exact events of the meeting with Burwell are unclear as both he and Mike Lamb provide differing versions of events, shortly after the initial meeting, Burwell

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[7] Counsel understands that Gary Huckaby and Mike Lamb were college roommates.
[8] Indeed, by his own admission, Mike Lamb has discussed his efforts to deplete The Homer Daniel Family Trust with at least 7 different attorneys. (Dep. Mike Lamb, pp. 30-32).
[9] The undersigned believes the evidence will show that Huckaby, in fact, directed Mike Lamb. In his deposition, Burwell could not recall whether Mike Lamb actually scheduled their first meeting. (Dep. Burwell, p. 101).
[10] Burwell and Lamb testified very differently concerning this, and subsequent, meetings and conversations. The testimony of the two reveals many contradictions. Indeed, Mike Lamb attempted to distance himself from events despite his intimate involvement and attendance throughout. Jackson Burwell consistently placed Mike Lamb in the middle of events and clearly indicated that he offered Mike Lamb advice that would have protected the inheritance of Ouida Dickinson and Danny Daniel. By contrast, Mike Lamb attempted to swear, under oath, that he had no knowledge, "none whatsoever" of The Homer Daniel Family Trust at this time. (Dep. Mike Lamb, pp. 214-215). This story changed throughout the deposition.
[11] Based on clear Federal and State law, neither this trust nor Mrs. Daniel were ever subject to estate tax issues.

prepared an amendment to The Milbra Daniel Family Trust. (Dep. Burwell, pp. 160-161). Milbra Daniel executed this amendment to her trust on September 1, 1999. (See, Plaintiff's Exh. 4 to Dep. Mike Lamb). By this amendment, Milbra Daniel purported to take Morgan Stanley account number 638-046-153-204 (which had been in The Homer Daniel Family Trust) and simply move it to her own trust. (Id.). [12] According to a handwritten document prepared by Milbra Daniel, just 3 months prior to the amendment, this account held $104,993.72. (See, Plaintiff's Exh. 5 to Dep. Mike Lamb). [13]

In February or March, 2000, Milbra Daniel moved to Somerby. [14] At this time, Milbra Daniel sold the home where she and Homer Daniel had lived during their marriage (The "Thornton Acres Residence.") [15] For a period of time thereafter, Mrs. Daniel resided, independently, at Somerby.

After moving to Somerby, Mrs. Daniel's health continued to deteriorate. In September, 2002, Milbra Daniel moved to assisted living at Somerby. (Dep. Mike Lamb, p. 437). In his deposition, Mike Lamb initially swore, under oath, that the reason assisted living became necessary was only due to Mrs. Lamb's physical decline and not her mental condition. (Dep. Mike Lamb, pp. 40-41).

> Q. Okay. Why was your mother going into assisted living?
>
> A. Because she was getting old.
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> Q. Was she having any health problems?
>
> A. Well, she had pernicious anemia and required a lot of medicine.

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[12] According to Jack Burwell's billing statements, he engaged in at least 3 extended telephone conversations with Mike Lamb in 1999 surrounding the initial removal of at least $100,000.000 from The Homer Daniel Family Trust. (Exh. 11, Dep. Mike Lamb). Yet, Mike Lamb still claimed no knowledge of The Homer Daniel Trust at this time.

[13] According to Milbra Daniel's handwritten summary, The Homer Daniel Trust held in excess of $400,000.00 in assets prior to the illegal transfers.

[14] Somerby is a retirement community consisting of both independent and assisted living communities.

[15] The Thornton Acres residence had been Mr. Daniel's separate home prior to their marriage. The funds from this sale are also unaccounted for.

Q. Okay

A. Her eyes were getting bad, she needed a walker, incontinence.

Q. Okay. Any other physical or mental problems?

A. No.

Q. Okay.

A. None that I'm aware of. That's the everyday stuff that I dealt with her.

Q. Those physical problems you listed to me?

A. Yes.

Q. Okay. And that's all you were aware of; is that right?

A. Right, just what I saw firsthand with her.

Id. Mr. Lamb even went so far as to proclaim that his mother was "sharp as a tack" until just a few weeks prior to her death. (Dep. Mike Lamb, p. 132). However, the medical records tell a different story. According to the medical records:

1. Dr. Peak diagnosed Milbra Daniel with memory loss on March 27, 2002, and had a 25 minute telephone conversation with Mike Lamb to discuss the problem. (Medical Records of Dr. Brenda Peak). Yet, Mike Lamb denies any memory of this conversation. (Dep. Mike Lamb, pp. 376-377).

2. In July, 2002, Dr. Peak completed a form for Somerby in which she specifically responded "No" to the question "are the applicant's thought processes sufficient to manage applicant's own personal and business affairs." (Medical records of Dr. Brenda Peak; Dep. Mike Lamb, pp. 380-382).

When shown this document "I don't know what the doctor meant." (Dep. Mike Lamb, p. 382).

3. On July 23, 2002, Dr. Peak noted that Mrs. Daniel was having fainting episodes. (Dep. Mike Lamb, pp. 382-384).

4. On July 26, 2002, Dr. Peak wrote in her notes "the family doesn't know where to go from here, help." (Medical Records of Dr. Peak).

5. On September 5, 2002, Dr. Peak noted that she held a meeting with Mike Lamb, Pat Lamb, and both their wives. In her note, Dr. Peak indicated that she was "here with both sons and daughters-in-law to discuss her severe memory loss." (Medical Records of Dr. Peak; Dep. Mike Lamb, pp. 390-394). Yet, Mike Lamb could not recall any specifics of the meeting. *Id.*

6. In that same September 5, 2002, visit, Dr. Peak noted "senile dementia." (Medical Records of Dr. Peak). Again, Mike Lamb does not recall "those words" being spoken. (Dep. Mike Lamb, p. 394).

7. On October 3, 2002, Dr. Peak noted her impression that Mrs. Daniel suffered Alzheimer's' disease. Dr. Peak also indicated in her record that Mike Lamb and his wife were present at the appointment. (Medical Records of Dr. Peak). Yet, Mike Lamb testified that the first time he ever heard this

term used was "when I read it on her death certificate." (Dep. Mike Lamb, pp. 404-405). [16]

As noted previously, as of September, 2002, Mrs. Lamb required assisted living. Promptly after Mrs. Lamb's move into assisted living, the remaining assets were removed from The Homer Daniel Family Trust.

In October 2002, right after her move to assisted living, Mike Lamb returned to Jack Burwell's office. (Dep. Mike Lamb, p. 39). He did not take his mother with him. (Dep. Mike Lamb, p. 39). In this meeting, Mike Lamb and Jack Burwell discussed the transfer or removal of the remaining assets in The Homer Daniel Family Trust. (Dep. Mike Lamb, pp. 38-45). Again, this discussion involved a trust in which Mike Lamb possessed no legitimate beneficial interest. [17]

Mike Lamb's initiatives and conversations to transfer the remaining trust assets were not confined to Jack Burwell. Promptly thereafter, still in October 2002, Mike Lamb actively discussed these assets with employees of Morgan Stanley, a brokerage holding the bulk of the remaining assets. Specifically, Mike Lamb testified:

Q. Did you talk to anyone else other than your mother or Burwell about it?

A. Well, of course, we talked to Morgan Stanley, talked to employees at Morgan Stanley.

Q. What did you talk to them about?

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[16] At trial, the undersigned believes the evidence will reveal that Mr. Lamb and his wife were actively managing Mrs. Lamb's affairs in the months prior to her move into assisted living, including paying her bills, operating her checking accounts, and scheduling her appointments.

[17] In his interrogatory response, Burwell completely omitted any reference to this meeting. (See, Burwell's response to discovery). Understandably, no competent attorney would want to reveal that they had provided advice to a non-trustee/non-beneficiary concerning the administration of a specific trust.

A. Transferring the Homer Daniel trust to her trust. When I say "we," I mean Mother and I now. She was the one that instructed them to do that.

Q. When did your mother and you have this conversation or these conversations with Morgan Stanley?

A. At that time. About the time that happened.

Q. Was it before the transfer was made, same day, days before, weeks before?

A. It was before.

Q. Same day of the transfer or --

A. I don't know what day it was, but --

Q. Okay. Let me see if I can --

A. No, let me back up again.

Q. Because I want to make sure I've got it right.

A. Okay. Around October 2002.

(Dep. Mike Lamb, pp. 222-223). After some type of conversations with Morgan Stanley, Mike Lamb drove his elderly mother to the brokerage's local office in Huntsville. (Dep. Mike Lamb, p. 439). He then walked her inside. Although Mike Lamb claims his mother made this transfer and he simply accompanied her, the new Milbra Daniel account registered for special internet access. (Dep. Mike Lamb, pp. 440-441). [18] Yet, Mike Lamb admits Milbra Daniel did not use the internet. (Dep. Mike Lamb, pp. 438-439). Not surprisingly, although he denies accessing her account by internet, Mike Lamb had been using the Internet for quite a while.(Dep. Mike Lamb, p. 440). [19] [20]

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[18] According to the brokerage records which will be admitted at trial, Mrs. Daniel even agreed to an extra fee for internet access.

[19] Over $150,000.00 in assets were transferred out of this account in October, 2002. Prior to this time, periodic withdrawals had been made on the account.

[20] In his deposition when asked if he signed any of the account transfer documents, Mike Lamb initially responds, "I don't think they would let me." (Dep. Mike Lamb, pp. 440-441). Then, he apparently realizes his error and re-states that he "played no role in it at that point." *Id.*

On November 26, 2002, Milbra Daniel first signed a statement resigning as trustee of The Milbra Daniel Trust. [21] (The November 26, 2002, resignation was not produced by the Defendants in discovery but was obtained elsewhere. As will be noted subsequently, a second resignation was prepared several months later, signed, and produced during discovery. Under the terms of her separate trust, Mike Lamb now became its trustee). [22] (Exh. 8 to Dep. Mike Lamb).

Thereafter, Mike Lamb personally cashed multiple certificates of deposit ("CD") located at both Regions Bank and AmSouth Bank. (Dep. Mike Lamb, pp. 458-459). According to Mike Lamb, he personally drove to the AmSouth branch on Drake Avenue in Huntsville to cash out the CDs in that bank. (Dep. Mike Lamb, p. 458). As for the CDs at Regions, he simply went to a branch in Nashville where he lived. (Dep. Mike Lamb, p. 459). According to Mike Lamb, the approximate value of the CDs he cashed was over $150,000.00. (Dep. Mike Lamb, p. 463). In his deposition, Mike Lamb testified all the CDs were originally part of the Milbra Daniel Family Trust. (Dep. Mike Lamb, p. 460). (However, the bank records produced by subpoena and which will be admitted at trial, reveal otherwise. According to the bank records, some of the CD's Mike Lamb cashed actually belonged to Homer's trust.) The cashing of these CDs occurred in the time frame of December 2002 through mid-January 2003. (Dep. Mike Lamb, pp. 458-464; 474).

On January 21, 2003, a second resignation as trustee of The Milbra Daniel Family Trust was purportedly signed by Milbra Daniel. (Exh. 7, Dep. Mike Lamb). It was this second resignation, dated, for certain, after Homer Daniel's trust had been completely depleted of assets, that Mike Lamb produced through discovery in this litigation. Interestingly, when asked directly and initially in his deposition, when Milbra Daniel

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[21] The timing of this resignation is significant. It occurred after the Morgan Stanley transfer of assets to Milbra Daniel's trust and effectively gave Mike Lamb control over all the combined assets. Quite clearly, at this point, Lamb believed the Homer Daniel Trust had been completely depleted.

[22] Counsel believes the Defendant suppressed this resignation and created a later one because he learned the Homer Daniel Trust still held some valuable assets. Any resignation as trustee of her trust while still purporting to act as trustee of Homer's trust would raise inevitable questions concerning her competency as trustee.

resigned as trustee of her trust, Mike Lamb specifically stated January, 2003. (Dep. Mike Lamb, p. 59). Indeed, he omitted any mention of the earlier resignation until directly confronted with it later during his examination. (Dep. Mike Lamb).

In the months after Milbra Daniel entered assisted living, all the remaining assets were systematically removed from The Homer Daniel Family Trust. These assets were first moved to The Milbra Daniel Family Trust. Promptly, after these transfers were completed, Milbra Daniel resigned as trustee of her trust. (Dep. Mike Lamb). Now, Mike Lamb became trustee of The Milbra Daniel Family Trust, gaining control of all assets. (Exh. 3 to Dep. Mike Lamb).

What did Mike Lamb do with all the assets once he gained control? First, between January and April, 2003, Mike Lamb moved all the Milbra Daniel Family Trust accounts from Huntsville to Nashville and switched them to an entirely different brokerage (Merrill Lynch). (Dep. Mike Lamb, pp. 270-271). Next, he took the assets in the new Milbra Daniel Family Trust account at Merrill Lynch in Nashville and moved them to two new separate accounts just in his personal name. (Dep. Mike Lamb, pp. 271-273). One of these personal accounts was at Merrill Lynch and the other at Suntrust Bank. *Id.* During this time, Mike Lamb spent considerable sums of this money on his own personal pleasures. (Dep. Mike Lamb, pp. 274-277). By his own estimates, in this short period of time, he spent about $200,000.00 on himself. (Dep. Mike Lamb, pp. 274-277). [23]Finally, Mike Lamb transferred the remaining assets out of his name completely and into an account solely in his wife's name. [24]

In addition to the considerable financial assets, as well as the family home, the Homer Daniel Family Trust also held a lot in Bell Mountain Heights, in Huntsville. (The

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[23] The brokerage records reveal that these lavish personal expenses, included steak dinners at Morton's, football tickets, golf outings, etc.

[24] Interestingly, this final transfer occurred as the true beneficiaries began to seek information concerning the trust in 2004.

"Bell Mountain" property). (Dep. Mike Lamb, p. 358).[25] On March 27, 2003, six months after Milbra Daniel entered assisted living, Jack Burwell prepared a deed conveying this property to The Milbra Daniel Family Trust. (Dep. Jack Burwell, p. 249). According to Burwell, Mike Lamb personally called him to arrange for the preparation of this deed. (Id.).

In his Interrogatory answers, Jack Burwell discussed preparing this deed for Milbra Daniel, claiming "that she seemed in good health" at that time. (See, Burwell's Answers to Interrogatories.). Then, in his deposition, Burwell specifically testified that Milbra Daniel (who had been in assisted living over 6 months at this point) came to his office and signed this deed. (Dep. Burwell, p. 253). However, when confronted by the fact that this deed was actually notarized by someone outside his office, Mr. Burwell promptly changed his testimony. (Dep. Burwell, pp. 318-320). Thereafter, Burwell began to claim "I most likely mailed it to Mike." (Dep. Burwell, p. 320). Burwell then testified Mike Lamb probably had it executed and mailed it back to him for recording. (Dep. Burwell, pp. 323-324).

Milbra Daniel died on December 3, 2003. (Dep. Mike Lamb, p. 172). On the day of Mrs. Daniel's funeral, Ouida Dickinson graciously invited the mourners to her home. According to Mike Lamb, a lot of guests were present. (Dep. Mike Lamb, p. 66). During this occasion, Mike Lamb, Pat Lamb, Ouida Dickinson, and Danny Daniel, began talking. (*Id.*). During the conversation, someone mentioned The Homer Daniel Family Trust. *Id.* Mike Lamb does not remember what questions were asked. *Id.* However, his response is clear. He replied "I'm not prepared to talk about that now. I don't -- I can't give you any reasons right now." (Dep. Mike Lamb, p. 68). Of course, Mike Lamb knew all the assets had been removed from Homer Daniel's trust. (Dep. Mike Lamb, p. 68-69). He met with the lawyer. He took his mother to a financial institution to make a large transfer. He went by himself to the banks. He moved the money around. He spent much of it on

[25] Although Mike Lamb admits this property was part of The Homer Daniel Family Trust, Jack Burwell testified he was unaware of this ownership. (Dep. Jack Burwell, p. 251).

himself. Yet, he did not tell Homer's children, Ouida or Danny, these facts. *Id.* Mike Lamb did tell Ouida and Danny, however, that "I couldn't discuss the Homer Daniel trust, I didn't know much about it." (Dep. Mike Lamb, p. 70).

Afterwards, on the same day as his mother's funeral, Mike Lamb called Jack Burwell and asked to meet with him. (Dep. Mike Lamb, p. 47). Mike Lamb and his wife, alone, then met with Burwell. *Id.* In his deposition, Mike Lamb could not remember the specifics of his meeting with Burwell after his mother's funeral. (Dep. Mike Lamb, pp. 47-48). However, obviously something, most likely the trust inquiry, prompted him to rush down to Burwell's office.

In late January, 2004, Rev. Danny Daniel called Mike Lamb. (Dep. Mike Lamb, pp. 72-73). In this telephone conversation, Danny inquired as to whether Mike knew anything about his father's trust. (Id.). Mike Lamb responded, "I need to talk to legal advice to see where I stand in all of this." (Dep. Mike Lamb, pp. 72-73). Mike Lamb did not tell Danny that all the assets had been removed from the trust. (Dep. Mike Lamb, pp. 74-75). [26]

After Danny called him, Mike Lamb then called Jack Burwell again. (Dep. Mike Lamb, p. 76). In that telephone conversation, Mike Lamb asked Burwell to write a letter to Ouida Dickinson, not Danny, as she was the successor trustee of Homer Daniel's trust. (Dep. Mike Lamb, pp. 76-78).

In March, 2004, Mike Lamb again met with Jack Burwell. (Dep. Jack Burwell, pp. 360-361). At this meeting, Burwell prepared a deed transferring the Bell Mountain property from the Milbra Daniel Family Trust to Mike and Pat Lamb individually. (Dep. Burwell, p. 360).

Thereafter, on March 26, 2004, Jack Burwell wrote to Ouida Dickinson. (Exh. 6, Mike Lamb). In that letter, Burwell wrote that Mike had "determined from his mother's records" that she removed all the assets from the Homer Daniel Family Trust prior to her death. *Id.*

At present, Mike Lamb has fully removed all the assets from The Homer Daniel Family Trust. Next, he removed all the assets from his mother's trust. He and his wife have kept all the assets except one, the Bell Mountain property, which he concluded was worthless. He shared only the Bell Mountain Property, he took, with his brother. (Dep. Burwell, pp. 360-361). However, in deposition, he claimed "[i]t's not a very good place" and he was having to pay property taxes on it. (Dep. Mike Lamb, p. 360). The remainder of Homer Daniel's assets, as well as mother's assets, he either spent on his personal pleasure or placed in his wife's name. Indeed, he has not even shared his gains with his own brother. [27]

III. ARGUMENT

A. STANDARD

Under well-settled Alabama law, summary judgment is proper when there is no genuine issue as to any material fact and the movant is entitled to a judgment as a matter of law. *See, Berner v. Caldwell*, 543 So. 2d 686 (Ala. 1989). The case at bar, a trust case, is appropriate for summary judgment. The existence of the trust is undisputed. Its undisputed terms bar the transfer at issue. Finally, both Alabama statutory law and case law unequivocally bar the transfers by the Defendants. As such, partial summary judgment concerning the illegality of the trust transfers is appropriate.

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[26] Of course, Mike Lamb could have told Danny that he had taken his elderly mother to financial institutions, transferred money, and then moved it all to Nashville.

[27] During the course of this litigation, the Plaintiffs were able to enjoin the further use of the account now held by Mike Lamb's wife.

B. THE DEPLETION OF THE HOMER DANIEL FAMILY TRUST ASSETS AND USE OF THOSE ASSETS BY F. MICHAEL LAMB WAS ILLEGAL UNDER ALABAMA LAW

1. THE TAKING AND SUBSEQUENT USE OF TRUST FUNDS WAS CONTRARY TO THE INTENT OF HOMER DANIEL AND THE SPECIFIC TERMS OF THE RECIPROCAL TRUSTS AT ISSUE

In the case at bar, Homer Daniel and Milbra Lamb married late in life. Each had separate children. Each had their own assets. Naturally, a responsible and reasonable person in such a situation would act with intent to protect and provide for their own children.

Indeed, this is precisely what Homer and Milbra did. In an effort to provide for their separate children, they contacted EST to prepare trusts for them. Had they desired for the children of the last surviving spouse to obtain all the family assets to the exclusion of the other children, they could and would have taken no action. That is precisely the result that would have occurred in the absence of any estate planning under Alabama's laws of intestate succession. Moreover, had they decided for just one child, F. Michael Lamb, to gain all family assets, they could have written wills accordingly.

Instead, they acted prudently. They contacted specialists. They met with those specialists. They explained their needs. They expressed, to those trust professionals, their intent to preserve their separate assets for their own children clearly, unequivocally, and without dispute. After meeting with EST, Homer and Milbra specifically elected not to combine their estates. Instead, they executed reciprocal trusts.

Alabama law concerning trusts is well-settled:

> In any case before this Court involving the construction of wills or trusts, the cardinal rule is to ascertain the

> testator's/grantor intent. *City National Bank of Birmingham v. Andrews*, 355 So. 2d 341 (Ala. 1978). We have repeatedly referred to this intent as the polestar that guides us. *Wiley v. Murphree*, 228 Ala. 64, 151 So. 869 (1933).
>
> In order to arrive at that intention, we must look to the instrument(s) as a whole rather than construing any one paragraph separately. *Perdue v. Perdue*, 294 Ala. 194, 314 So. 2d 280 (1975). Furthermore, we recognize that we should reconcile all the provisions of the instrument, if at all possible, to form a harmonious whole that effectuates the testator's intent. *Davis v. Davis*, 289 Ala. 313, 267 So. 2d 158 (1972).

Gafford v. Kirby, 512 So. 2d 1356, 1360 (Ala. 1987). Moreover, "all other rules of construction, are subordinate to the cardinal rule that the intention of the testator must be ascertained and given effect." *Id.* at 1363 (quoting *Achelis v. Musgrove*, 212 Ala. 47, 49 (1924)). In the present case, the intent of Homer Daniel can clearly be derived from the fact that he and his wife acted to establish separate reciprocal trusts as well as from the very terms of those trusts.

The evidence concerning Homer and Milbra's intent when they created their trusts is undisputed. They clearly expressed their intent to EST. (See, Affidavits of Barry Bynum and Steven Foutch). Through the original trust and its amendment, Homer Daniel specifically expressed the intent that it be maintained beyond Milbra's life, for his own children. In deposition, even Jack Burwell admitted that Ouida and Danny "certainly had an expectation that they were going to get something..." (Dep. Burwell, p. 118). Indeed, Burwell himself admitted he was "uncomfortable" that Homer's children did not inherit anything. (Dep. Burwell, p. 169). So, what trust provisions are at issue?

In an effort to excuse their taking of the trust assets, the defendants now argue, and mis-construe, a single sentence as justification, while ignoring the entirety of the trust's terms. The defendants now contend that a sentence stating "[t]he trustor's wife shall have the right to receive such portions of the principal of this trust as she from time to time may demand" provided Milbra Daniel the unfettered right herself to transfer all the trust's assets. (See, Art. Third). However, the defendants have ignored the plain meaning of the specific verbs in this sentence, ignored the paragraph containing this sentence, ignored the complete trust provisions at issue, and ignored Alabama's rules concerning the construction of a trust. The complete paragraph at issue states:

> Upon the death of the Trustor, the Trustee shall hold, manage, invest and reinvest the Trust fund, shall collect the income therefrom, and shall pay the net income to or for the benefit of the Trustor's wife and children, for their health, education, maintenance or support, in such amounts and proportions as the Trustee may deem advisable. In addition, the Trustee may pay to or for the benefit of the Trustor's wife and children, for their health, education, maintenance or support, any part or all of the principal of this trust, as the Trustee may determine in its sole discretion, without considering other resources available to the Trustor's wife and children. The Trustor's wife shall have the right to receive such portions of the principal of this trust as she from time to time may demand. Any commission payable with respect to principal so withdrawn shall be charged against such principal.

(Art. Third).

Again, under Alabama law the provisions of a trust instrument must be read in their entirety and interpreted as a harmonious whole to effectuate the trustor's intent. *See*,

Gafford, supra. What does the paragraph say as a whole? First, we know a trust can only act through its trustee. (Dep. Burwell, pp. 49-51). The paragraph contains great detail concerning Milbra Daniel's duties as successor trustee to The Homer Daniel Family Trust. The paragraph explicitly limits the trustee's activities by stating that the trustee holds and uses the proceeds "for the benefit of the Trustor's wife and children, for their health, education, maintenance or support. . ." It is for these purposes, and these limited purposes only, that the trustee possesses discretion to distribute principal or income from the trust. The defendants argue that these clear limiting clauses are completely negated by the next sentence providing Mrs. Daniel a right to receive trust funds. However, all these provisions are contained in one paragraph. The defendants' position that the first two sentences prevent Mrs. Daniel from taking trust property but the third sentence allows unfettered removal of trust property, presents an inconsistent interpretation of the instrument. It is absolutely inconsistent for an instrument in two sentences to specifically limit the trustor's wife to discretionary amounts for only limited purposes and then in a third sentence to grant complete discretion. Although the previous sentence states the defendants' position, it is not an accurate interpretation of the trust language. Indeed, it presents an inconsistent interpretation of the trust, i.e., the trustor's wife is limited specifically but at the same time she's not limited at all.

Alabama law is well-settled that the "we should reconcile all the provisions of the instrument, if at all possible, to form a harmonious whole that effectuates the testator's intent." *Davis v. Davis*, 289 Ala. 313, 267 So. 2d 158 (1972). While the defendants' constrained interpretation of Article Third presents a clear inconsistency and is contrary to the known intent of Mr. & Mrs. Daniel in creating these reciprocal trusts, a close look at the actual language allows an accurate interpretation of the instrument. What the trust actually states in great detail is that the successor trustee can actively provide trust funds for the trustor's wife and children for certain important, but limited, needs, i.e., health, education, and maintenance. It is undisputed that a trust can only act through its trustee. The first two sentences of this paragraph establish the limitations upon the trust in

distributing principal or income. The sentence cited by the defendant does not grant any affirmative right to actively manage, invade, take, or distribute trust property or funds. A reading of its plain language reveals that the trustor's wife is granted no affirmative rights over the trust in that sentence. She can, however, make requests and can legally receive money. Both these verbs clearly contemplate communication with the trustee. Both contemplate a decision and ultimate action or inaction by the trustee. If the trustor's wife made any demand for trust property, it would clearly be made to the trustee as the trustee is the only person who can act for the trust. Simply making a demand does not mean one has the right to actively take what they wish. It is incumbent upon the trustee, upon receiving any demand or request, to then operate within the confines of his/her duty under the instrument. That duty is clearly confined to certain limited reasons for distributions. Once the trustee acts within his/her duties, the trustor's wife legally can receive such funds as the trustee provides. The ability to receive, again, does not provide any rights to self-distribute property. Instead, the ability to receive merely provides the trustor's wife with the passive ability to accept safely and legally the discretionary decisions of the trustee to pay funds under the trust. At all points, it is the trustee who hears a demand and possesses discretion to meet such a demand for certain, limited purposes. Such is the only consistent application of Article Third of The Homer Daniel Family Trust. Such is also the only interpretation consistent with the undisputed intent of Homer Daniel in creating the instrument.

In an effort to excuse their conduct, the defendants ignore the consistent interpretation of Article Third that although the trustor's wife can make requests, it is the trustee who determines and distributes assets. It is the trustee who must act for the trust and is guided by clear standards. This consistent application is highlighted by the language in Article Fourteenth which states:

> No beneficiary shall have any right, power or authority to assign, transfer, encumber or otherwise dispose of such

> income or principal or any part thereof until the same shall be paid to such beneficiary by the Trustee.

(Art. Fourteenth) (Underline added). Again, the defendants' position is clearly inconsistent with the above provision that denies any beneficiary an unfettered right to dispose or transfer trust proceeds. The only consistent interpretation of the instrument is that the trustee must make a decision as to whether to meet any demands for proceeds, consistent with the instrument's limitations upon his/her duties.

As will be discussed shortly, additional provisions of the Trust, which have been completely ignored by the defendants, unequivocally bar Mrs. Daniel and her sons from simply taking trust proceeds. However, prior to discussing these provisions, it is important to note that Alabama law has long been settled that language similar to Article Third of this trust does NOT allow an unfettered right for the surviving spouse to simply take all the trust assets. In *McDonald v. McDonald*, 92 Ala. 537 (1891), our Supreme Court addressed reciprocal instruments among spouses and resolved this issue under Alabama law. In that case:

> Mrs. Cynthia A. McDonald died in Jefferson County in this state in January, 1882. By her will she left all her property, real and personal, to her husband, W.J. McDonald, "in trust and as trustee for the following purposes; that is to say: I give, devise, will, and bequeath all of my said property unto my husband, in trust and as trustee, to be held and managed and controlled by him for his comfort and support during his life, and for the comfort and support and education of the children of the body of the undersigned testatrix and said husband, W.J. McDonald, *giving my said husband full and complete authority and power to collect and receive and*

> *dispose of the rents, income, and profits of my said property* in such manner as he may think best in carrying out the purposes of this trust.

(Emphasis added). The will further provided that upon the death of the husband/trustee all the trust property would be vested in the children of the testatrix and her husband. *Id.* At 195. Thereafter, several children of the testatrix filed suit against the husband/trustee concerning his administration of the trust. In examining the extent of the husband/trustee's authority, our Supreme Court aptly presented the trustee's position:

> It is contended, however, that the words in the will giving the husband authority and power to dispose of the rents, income, and profits 'in such a manner as he may think best,' leave the matter absolutely to his determination, and vest in him a discretion which may not in any manner be interfered with or controlled by the court; in other words, that he may deal with the property as if it was his own, and unembarrassed by any trust obligation.

Id. At 195. In the case at bar, no words of the Homer Daniel Family Trust grant unfettered authority over the disposition of trust proceeds. As such, the *McDonald* case is much different factually. The language in *McDonald* specifically grants a broad authority. However, in analyzing trusts in that case, our Supreme Court addressed settled Alabama law concerning the construction of trusts and the issue of a power of disposition. In that regard, our Supreme Court stated:

> A court of equity will NEVER favor a construction that confers upon a trustee absolute and uncontrollable powers.

Id. At 195 (emphasis added). Moreover, the Court held that:

> If it appears from the conduct of the trustee that he is disposing of the rents, income, and profits, not in carrying out the purposes of the trust, but in selfish disregard of the claims of other beneficiaries, so that the design of the testatrix is defeated, then it is the duty of the court to interfere.

Id. At 196. In the case at bar, the intent of the reciprocal trusts is clear. Moreover, the language lends itself to a consistent interpretation in light of the clear purposes of the documents. At the same time, the defendants' strained position is not only inconsistent with the creators' intent and inconsistent with the surrounding sentences, it would negate the trust in its entirety. Indeed, if correct, then there is no purpose at all for the trust since Mrs. Daniel would have similarly obtained all assets if Mr. Daniel died with no trust or no will instructing otherwise.

As stated earlier, any arguments by the defendants that Mrs. Daniel could take or distribute funds totally as she pleased are clearly inconsistent with the articles concerning the trustee's duties as well as the rights of the beneficiaries to the trust assets. However, the preceding clauses do not contain the full scope of these duties in their entirety. In Article Ninth the issue of whether Milbra Daniel (or her son utilizing his mother during her state of dementia) could take the trust proceeds is answered in a clear and unequivocal negative. This Article contains the following provision:

> Notwithstanding anything to the contrary contained herein, during such time as any beneficiary of any trust created hereunder (other than the Trustor) may be acting as a Trustee hereunder, such person shall be disqualified from exercising any power to make any discretionary distributions of income

> or principal to himself or to make discretionary allocations in his own favor of receipts or disbursements as between income and principal.

(Article Ninth). In the case at bar, Milbra Daniel became trustee of the Homer Daniel Family Trust upon the death of Homer Daniel in 1998. She served as trustee until her death in December, 2003. She also was a beneficiary of the trust. During her joint tenure as both trustee and beneficiary, she oversaw the complete destruction of the trust. During this time, her son Mike Lamb terminated the professionals who wrote the reciprocal trusts, spoke with at least 7 attorneys in an effort to find support for his plans, drove his elderly mother to financial institutions to withdraw trust funds, altered and hid resignation documents, spent the trust funds on himself, hid the remaining funds out-of-state in his wife's name, and finally, directly lied to Ouida and Danny when they inquired about their father's trust. As trustee, Milbra Daniel accompanied her son to the various financial institutions and signed over the trust's assets to her own trust. She then promptly resigned as trustee of her trust (but never resigned from Homer Daniel's trust), allowing her son to assume control of all assets.

The clause in Article Ninth is clear. It expressly begins with the overriding phrase "[n]otwithstanding anything to the contrary contained herein. . . ." In other words, there is absolutely no doubt that this clause clearly and intentionally trumps any other provisions of the trust. The phrase then continues by defining its application to "any beneficiary" possessing trustee duties. Finally, it expressly provides that "such person shall be disqualified" from exercising any power in their own favor. Quite clearly, Milbra Daniel was that person. It leaves no doubt that her conduct was prohibited. Moreover, by stating "such person shall be disqualified" it leaves no room to claim the person acted in one capacity but not another when they removed trust property.

In the case at bar, the defendants have premised their position upon a complete failure to interpret consistently all the trust provisions together. The defendants'

arguments are even more illogical when one considers their legal position that Milbra Daniel had a general power of appointment over the trust proceeds that would include all the assets of the Homer Daniel Family Trust in her estate, i.e., that she possessed authority to take whatever she wanted. If a general power of appointment exists, the subject property would be included in the gross estate of the power holder for estate tax purposes. *See*, 26 U.S.C. Sec. 2041. First, the Federal statute at issue specifically precludes from the definition of "general power of appointment," (1) any power limited by an ascertainable purpose to health, education, support, or maintenance, such as the Homer Daniel Family Trust; or, (2) any power exercisable only in conjunction with a person having a substantial interest in the property adverse to the holder. *Id.* In the present case, the express prohibition in the trust of any person holding dual trustee/beneficiary roles from exercising any discretionary power clearly creates a situation requiring two different people with substantially adverse interests to act together in the distribution of trust assets. In fact, the specific prohibition contained in Article Ninth is taken directly from *West's Legal Forms* language to prevent the creation of a general power of appointment. As such, it is beyond question that the intent of this language was to insure that no general power of appointment was created. In the present case, the terms of the Homer Daniel Family Trust, when consistently reviewed as a whole, are clear. Milbra Daniel (or her son influencing her) lacked the authority to take for themselves the trust property.

2. THE DEFENDANTS ILLEGALLY REMOVED THE ASSETS FROM THE HOMER DANIEL FAMILY TRUST IN VIOLATION OF ALABAMA STATUTORY LAW

In the case at bar, the Homer Daniel Family Trust expressly forbade Milbra Daniel (or those influencing her, since she was suffering mental problems) from exercising any discretion to remove trust assets. However, the actions by the defendants not only defied the terms and intent of the trust, they were patently illegal under specific Alabama statutory law.

In 1995, our Legislature enacted a statutory prohibition directly applicable to The Homer Daniel Family Trust. The statute, in pertinent part, reads:

> **Actions trustee who is also beneficiary may not perform; powers of person who has right to remove trustee; parties in interest.**
>
> (a) Due to the inherent conflict of interest that exists when a trustee is also a beneficiary, unless the terms of a trust refer specifically to this section and provide to the contrary, a trustee shall not perform any of the following on behalf of or for the benefit of a beneficiary who is also a trustee:
>
> (1) Make discretionary distributions of either principal or income for the benefit of the trustee, except to provide for the health, education, maintenance, or support of the trustee as described under Internal Revenue Code Sections 2041 and 2514, as amended.
>
> (2) Make discretionary allocations of receipts or expenses as between principal and income, unless the trustee has no power to enlarge or shift any beneficial interest except as an incidental consequence of the discharge of the fiduciary duties of the trustee.
>
> (3) Make discretionary distributions of either principal or income to satisfy any legal or support obligations of the trustee. Nothing in this section shall be construed as a general power of appointment for any trustee.

(Ala. Code §19-3-324 (1995)). In this statute, our Legislature specifically recognized the conflict existing where an individual is a trustee as well as one of the trust's beneficiaries.

That is precisely the position in which Milbra Daniel found herself after the death of her husband. Indeed, her conflict was magnified by the facts that (1) the remaining beneficiaries were not her natural children, (2) the trust contained significant assets, and (3) her separate children were not beneficiaries or entitled to any of the assets.

In cases such as the present one, Alabama statutory law expressly forbade the trustee/beneficiary from making any discretionary distributions to themselves or for their benefit, such as allowing their son who was not a beneficiary to take all the money. The statute leaves no doubt in its absolute prohibition of this conduct by using the clearly mandatory phrase "shall not."

The only statutorily allowed method by which a trustee/beneficiary could legally exercise any discretion to take trust funds would be if the trust itself referenced the statute specifically and then expressly waived its bar. *See, Ala.Code Sec.* 19-3-324, *supra*. The Homer Daniel Family Trust contained no such required reference and waiver.

Our Legislature also expressly applied the statutory bar to trusts created prior to 1995, unless all parties in interest elected otherwise in writing or the trust was amended to provide specifically that it would not be subject to the statute's prohibition. *Ala.Code Sec.* 19-3-327 (1995). All parties in interest would include not only the trustee but also all the beneficiaries, Homer Daniel's children. In the case at bar, the trust was not amended in this manner. Moreover, the parties in interest did not make any election to avoid the statute. As such, Alabama's prohibition on trustee/beneficiary discretion clearly applied.

As an aside, our Legislature amended this important trust provision, effective January 1, 2007. The new amendment further clarifies and states this important bar to the destruction of a trust by an unscrupulous trustee/beneficiary, in even stronger terms. *See, Act 2006-216, § 1.* First, the new amendment codifies the long standing requirement that

any discretionary power, if exercisable at all, must be used "in good faith and in accordance with the terms and purposes of the trust and the interest of the beneficiaries."[28] Second, the statute states that regardless of the breadth of discretion provided a trustee/beneficiary, such a person can never exercise the power except in accordance with an ascertainable standard. *Id.* Quite clearly, the new statute similarly presents an absolute bar to a trustee/beneficiary who simply takes the trust's assets.

In the case at bar, Mike Lamb claimed that he was told directly by Jack Burwell to take the trust assets because they would be included in his mother's estate upon her death.[29] In short, Burwell and Lamb attempt to justify the taking of all the trust assets, and the complete disregard of the true trust beneficiaries, by contending that Milbra Daniel had a general power of appointment over the trust assets. That is, she could do what she wanted to the assets and they were really part of her estate. This, however, is simply false.

This advice, if actually provided and not merely an afterthought by Burwell and Lamb to excuse their culpability, is clearly erroneous. Alabama's statute in effect at the time of these transfers, *Ala. Code* § 19-3-324, specifically prevented the trustee/beneficiary from holding a general power of appointment. On this issue, our law is well-settled. According to the United States Supreme Court:

> While it is the federal law that designates what rights or interests shall be taxed after they are created, creation of legal rights and interests in property (such as the breadth and scope of a power of appointment over the corpus of a testamentary trust) is a matter of state law.

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[28] This requirement, also violated by the Defendants, has long been part of Alabama's common law.

[29] Burwell was not the first professional consulted for advice. Shortly after Homer Daniel's death, Mike Lamb (who was not even a trust beneficiary) terminated EST's services and told the EST professionals he was going to go a different direction. Thereafter, Mike Lamb contacted his college roommate Gary Huckaby. The undersigned has had Huckaby interviewed and does not believe he provided advice sanctioning Lamb's conduct.

United States v. Pelzer, 312 U.S. 399 (1941); Morgan v. Commissioner, 309 U.S. 78 (1940). Thus, the creation, prevention, and/or existence of a power or an interest in property is an issue of state law, in this case Alabama law. If the law of the particular state prohibits a taxpayer from exercising a power in their favor, then no general power of appointment exists for Federal tax purposes. *See, Sheedy v. U.S.,* 691 F.Supp. 1187 (E.D.Wis. 1988). If Alabama law does not grant, or in fact prevents, the creation of a power of appointment, then no such power exists for Federal tax purposes. Quite clearly, a plain reading of Alabama's statute prevents the creation of such a power in situations like that presented by The Homer Daniel Family Trust.

Although the legal principles at issue are simple and clear, one should also note that Florida has a virtually identical statute. That statute reads in pertinent part as follows:

> (4)(a) Due to the inherent conflict of interest that exists between a trustee who is a beneficiary and other beneficiaries of the trust, unless the terms of a trust refer specifically to this subsection and provide expressly to the contrary, any power conferred upon a trustee (other than the settlor of a revocable or amendable trust or a decedent's or settlor's spouse who is the trustee of a testamentary or an inter vivos trust for which a marital deduction has been allowed):
>
> 1. To make discretionary distributions of either principal or income to or for the benefit of such trustee, except to provide for that trustee's health, education, maintenance, or support as described under Internal Revenue Code ss. 2041 and 2514; [FN1]

2. To make discretionary allocations of receipts or expenses as between principal and income, unless such trustee acts in a fiduciary capacity whereby such trustee has no power to enlarge or shift any beneficial interest except as an incidental consequence of the discharge of such trustee's fiduciary duties;

3. To make discretionary distributions of either principal or income to satisfy any legal support obligations of such trustee; or

4. To exercise any other power, including the right to remove or to replace any trustee, so as to cause the powers enumerated in subparagraph 1., subparagraph 2., or subparagraph 3., to be exercised on behalf of, or for the benefit of, a beneficiary who is also a trustee,

cannot be exercised by such trustee. Any of the foregoing proscribed powers that are conferred upon two or more trustees may be exercised by the trustees who are not so disqualified. If there is no trustee qualified to exercise such power, any party in interest, as defined in paragraph (c), may apply to a court of competent jurisdiction to appoint an independent trustee and such power may be exercised by the independent trustee by the court.

Fla.Statute Sec. 737.402. In examining this practically identical Florida statute, the IRS has aptly concluded the trustee/beneficiary will not possess a general power of

appointment over the trust for federal transfer tax purposes by virtue of his fiduciary power to distribute corpus. Rev.Proc. 94-44; 1994 WL 271076 (This has been affirmed in IRS Private Letter Rulings which cannot be cited as precedent such as PLR 9516051, 1995 WL 233997,(IRS PLR Apr 21, 1995)). [30]

If Burwell really told Mike Lamb that the trust property could be removed, he clearly ignored both Federal and Alabama law on this issue. Additionally, the IRS has a procedure if a question of interpretation arises, i.e., if Burwell really thought the trust or state law were unclear he could have sought a private letter ruling from the IRS.

Moreover, although the defendants erroneously attempt to justify their taking of trust assets by arguing they would have been included in Milbra Daniel's estate, such an issue did not absolve Milbra Daniel from fulfilling her duties as a trustee under Alabama law. Milbra Daniel's duties as a trustee required her to honor Homer Daniel's intent and to act with complete loyalty to the trust and its beneficiaries.

In the case at bar, Alabama law is clear and absolute. It was clear and absolute at the time Mike Lamb helped his mother move all the money out of The Homer Daniel Family Trust. It was clear and absolute when Mike Lamb spent that same money lavishly on himself. It was clear and absolute when Mike Lamb transferred the money to different accounts, finally placing it in his wife's name in Nashville. It is clear and absolute today. The taking, transfer, and use of The Homer Daniel Family proceeds by Milbra Daniel and her son was, and is, illegal pursuant to unequivocal statutory law in Alabama.

3. THE DEFENDANTS CANNOT DEFEAT THE PURPOSES OF THE RECIPROCAL TRUSTS AT ISSUE THROUGH INTERVIVOS TRANSFERS OF ALL TRUST PROPERTY

In the present case, Homer Daniel and Milbra Daniel executed reciprocal trust instruments in December, 1994. The two trusts are identical with the exception of the

[30] Counsel would also note that in October, 2002, the time of Burwell's alleged advice to take the money, the exemption was $1,000.000.00, and thus, greater than the combined assets of both trusts. As such, no estate tax issue could have existed.

names of the settlor, successor trustee, and beneficiaries. Again, it is important to remember that both Homer and Milbra had spent a lifetime accumulating separate assets and raising separate children. Naturally, each had an intent to insure that the surviving spouse received sufficient care to live the remainder of their lives. Both also intended and desired that the remaining assets in their separate estates pass to their own children. Both Homer and Milbra clearly expressed this intent to the professionals at EST who created their trusts. Both executed identical trusts to effectuate these purposes. As such, it is essential that their intent be honored and enforced.

In *Humphries v. Whiteley*, 565 So.2d 96 (Ala. 1990), our Supreme Court addressed estate planning with reciprocal instruments. That case involved reciprocal wills. However, the Court aptly noted that the rules established in that case applied to other reciprocal instruments as well. In Humphries, the Supreme Court summarized the estate issue as follows:

> This appeal involves reciprocal wills made by a husband and wife, each of whom had children by a former marriage, and whose children were made beneficiaries of the estate of the surviving party. The trial judge found that the surviving spouse had violated the provisions of the reciprocal will by *inter vivos* transfers to her own children to the exclusion of her stepchildren.

Id. At 97. In *Humphries*, both spouses executed reciprocal wills that left their separate estates to the surviving spouse but made all their children remainder heirs of both wills. Thereafter, the husband died. The surviving wife took title to all the property in accordance with the wills. During her remaining life, she made substantial gifts to her own children. *Id.* At 97. After her death, her children moved for a declaratory judgment to determine the estate rights while her deceased husband's separate children sued to set aside the substantial gifts she had made out of the total estate to her own children.

The issues in *Humphries* are distinguishable to the extent that the case involved reciprocal estates transferring assets in fee simple as opposed to trusts with specific language prohibiting the transfer or gifting of the subject property. As such, in *Humphries*, intervivos gifts were not "per se" prohibited. Indeed, the Supreme Court held, based on those facts, that the gifts were not made in good faith, and were due to be set aside. Although the facts differ from the present case, the legal standards are instructive. In that regard, our Supreme Court held:

> Where two parties contract to make a joint, mutual and reciprocal will, each pledges to the other that he will execute a mutually agreeable will, and will have that will in full force and effect at the time of death. The parties may express such contract in a separate document, state in the joint will that it is a contract, or the fact of contract may be conclusively presumed from the fact of the joint will being executed. Such contract becomes partially executed upon the death of one of the parties to the agreement and the acceptance by the survivor of properties devised or bequeathed under the will and pursuant to the agreement to make such joint will. At this point the contract becomes irrevocable, the survivor having received the consideration promised.' [*In Re Estate of Chayka,* 47 Wis.2d 102, at 106, 176 N.W.2d 561, at 563-64 (1970).]

> Indeed, all of the cases cited by defendants are consistent on one point: once the survivor probates the will of the first to die, *and accepts the benefits of that will,* that person cannot thereafter defeat the purposes of reciprocal wills through *inter vivos* transfers. Only one exception to that general rule has

been noted: good faith transfers or sales of property which are for the purpose of meeting the daily needs and necessities of the surviving spouse are not prohibited. Those same cases also demonstrate that, in situations involving instruments similar to those in this case, courts will infer the intent of the parties from the instruments themselves, and, from the circumstances of the case. Based upon both the language of the instruments at issue here (leaving the remainder of the estates to the couple's children 'in equal shares'), and, the facts established at trial, this Court concludes that Mrs. Bernice Whiteley's *substantial inter vivos* transfers of property to her own children were unreasonably large, and were not made in good faith (because they were not related to Mrs. Whiteley's daily needs or necessities, but instead were intended to defeat the purpose of the Whiteleys' reciprocal wills). Hence they violated the couple's written agreement, and should be set aside. *Wagar v. Marshburn,* supra.

A conveyance of property merely for the purpose of defeating a contract to make a joint will, or separate wills, with mutual and reciprocal provisions, is not to be upheld. Equity does not permit one of the parties to a contract to make a joint will, or separate wills, with mutual and reciprocal provisions, to rescind the contract by his own act in conveying the property. A conveyance made by a party to the contract for the purpose of defeating the contract may be set aside in equity as fraudulent, especially where it is of a testamentary character.' [79 Am.Jr.2d *Wills* § 787, at 844-845 (1975). *See also id.* § 792, at 849.]

Id. At 101. In the case at bar, the parties executed reciprocal trust instruments. It is incredible to imagine that Homer Daniel would create a reciprocal trust attempting to preserve his separate assets to care for actual needs of his wife and then to pass to his own children, only to have one son of his surviving spouse take his mother to various financial institutions where she could sign over each and every asset to him. Such actions are abhorrent and intolerable. Moreover, such large intervivos gifts from Milbra Daniel to one of her children from her husband's reciprocal trust were clearly illegal in Alabama. They violated the trust terms. They violated Alabama statutory law. And, they violated clear common law. These transfers are due to be set aside and returned to Mr. Daniel's children in accordance with the reciprocal trusts and intentions of Homer Daniel, Sr..[31]

WHEREFORE, PREMISES CONSIDERED, the Plaintiffs respectfully request that this Honorable Court issue partial summary judgment holding that the transfers of assets from The Homer Daniel Family Trust during Milbra Daniel's tenure as trustee were illegal.

Respectfully submitted,

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[31] In the case at bar, the Plaintiffs have frozen an account in Nashville holding the remaining assets of The Homer Daniel Family Trust. As many of those assets were lavishly consumed by Mike Lamb, the account does not contain all stolen assets. Counsel subsequently intends to seek an equitable Order returning those remaining assets to The Homer Daniel Family Trust.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon counsel of record on this the 16th day of March 2007, by mailing same in the United States mail, postage prepaid and addressed as follows:

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