Recent Cases of Interest to Fiduciaries

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Raths v. First Interstate Bank, No. DA 15-0547 (May 31, 2016)

Beneficiary precluded from filing suit for breach of fiduciary duty where he signed a Receipt of Distribution Agreement acknowledging that he had no objections to management of the trust and releasing the trustee from all claims.

Facts: Nicholas Raths created a trust under his will naming his wife, Marie, and his three sons as beneficiaries. Raths named Marie and First Interstate Bank as co-trustees of the trust. The trust held an interest in a 6,300 acre ranch. Marie lived on the Ranch and primarily controlled decisions regarding its management and operations. Upon Marie's death in 2011, the trust terminated and First Interstate Bank was directed to distribute the trust assets in equal shares to Raths' three sons.

In April 2013, a trust officer from First Interstate Bank met with David Raths regarding termination of the trust and distribution of the trust assets. At the meeting, David Raths was presented with a Receipt of Distribution and Agreement stating that he had no objection to First Interstate Bank's management of the trust. David Raths was given the opportunity to ask questions and signed the receipt.

In 2014, David Raths filed suit against First Interstate Bank for breach of the trust agreement, breach of fiduciary duty and punitive damages. David Raths alleged that First Interstate Bank had mismanaged the trust and that the ranch should have generated more income so that he did not receive the full potential distribution. First Interstate Bank moved for summary judgment on all of Raths' claims. The District Court granted First Interstate Bank's motion and found that by singing the receipt, David Raths had ratified any alleged mismanagement of the trust property thereby estopping him from pursuing his claims and that Raths had not established a prima facie claim for fraud. David Raths appealed.

Law: Under Montana Code Ann. Section 72-38-804, trustees have a duty to administer the trust prudently by considering the purposes, terms, distributional requirements and other circumstances of the trust. Under Montana Code Ann. Section 72-38-813 trustees have a duty to keep beneficiaries reasonably informed regarding the administration of the trust and material facts necessary to protect their interests. However, under Montana Code Ann. Section 72-38-1009, a trustee is not liable to a beneficiary for breach of trust if the beneficiary consented, released or ratified the conduct constituting the breach of trust unless the consent, release or ratification was induced by improper conduct of the trustee or at the time of the consent, release and ratification, the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach.

Holding: The Supreme Court of Montana affirmed the District Court's decision finding that before signing the Receipt, David Raths had all of the information upon which he later relied for his contention that the ranch should have generated more income. Before signing the receipt, David Raths was given an appraisal of the ranch and several years of trust tax returns and statements. The court agreed that Raths had ratified the transaction in which he received his final distribution. Further, Raths did not show that he was induced to sign the receipt by improper conduct on First Interstate Bank's part or that he was unaware of his rights and the material facts underlying his allegations of breach when he signed the receipt. The Supreme Court affirmed the District Court's finding that "the very information upon which [David Raths] decided that the ranch should have generated more income was readily provided by [First Interstate Bank] and if First Interstate Bank was attempting to defraud David Raths, providing this information would seem to be, at a minimum, counterproductive to its efforts."

Practice Points: When seeking discharge by private agreement rather than a court-approved accounting, a trustee should provide sufficient information to disclose all material facts and any potential breach of trust to ensure that the beneficiary's consent, release and ratification is provided with informed consent. Similarly, while court proceedings often require additional time and expense, a beneficiary should carefully review all information the beneficiary deems necessary to evaluate a trustee's administration of the trust before signing a release agreement in lieu of a formal review of the trustee's accounts by the court.

Woodward v. Woodward, 192 So. 3d 528 (Fla. Ct. App. 4th Dist. May 4, 2016)

Beneficiary's 2012 suit for breach of fiduciary duty against a trustee was not barred by the 2003 dismissal of the beneficiary's 1996 suit against the same trustee because the facts and events were different, involved different periods of time, and the final trust accounting was not provided until 2011.

Facts: In 1996, Gregor Woodward, a beneficiary of the Mary T. Woodward Trust, sued Orator Woodward, the son of the settlor and trustee of that trust. In the 1996 action, Gregor sought removal of Orator as trustee, claiming that Orator had failed to account since the trust's inception, improperly mortgaged property in the trust, and used the trust to pay education expenses.

In 2002, while the 1996 action was pending, Orator terminated the Mary T. Woodward Trust and transferred the assets of that trust into two trusts for which Gregor was not a beneficiary. In 2003, the trial court dismissed Orator's 1996 action with prejudice because Orator and another beneficiary had allegedly stolen privileged documents from Orator's home, and the dismissal was affirmed on appeal. During the dismissal proceedings, Orator had mentioned the asset transfers into the new trusts in a court filing.

In October 2011, Orator served an accounting for the Mary T. Woodward Trust on Gregor and the other beneficiaries. In this accounting, the balance of the Mary T. Woodward Trust was listed as $0, and the 2002 asset transfer was disclosed in a footnote. The accounting also stated that actions for breach of trust based on matters contained in the accounting must be brought within six months.

In April 2012, Gregor brought another suit for breach of trust against Orator, claiming that terminating the Mary T. Woodward Trust and assigning the assets to the two new trusts was a breach of Orator's fiduciary duties. Gregor thus sought removal of Orator as trustee (among other remedies).Orator moved for summary judgment on the ground of *res judicata* (i.e., that the claims in the 2012 action were presented to the court and adjudicated in the 1996 action) and *laches* (i.e., that Gregor was aware of the asset transfer by January 2003 at the latest, but did not bring his claim within the four-year statute of limitations). Gregor submitted an affidavit in opposition to Orator's motion, in which he claimed that he received the accountings in 2011, that he had not known that the Mary T. Woodward Trust was terminated, and that he was not a beneficiary of the two new trusts.

The trial court granted Orator's motion for summary judgment, holding that *res judicata* and *laches* barred Gregor's 2012 claims. Gregor appealed.

Law: *Res judicata* bars the re-litigation of a claim decided in an earlier final adjudication if four elements are established: (1) "identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties of the action; and (4) identity of the quality in the person for or against whom the claim is made." In determining whether there is identity of the cause of action (the second factor), courts examine whether the facts or evidence needed to maintain the cause of action are the same in both cases. Under Florida law, *laches* will bar any claim brought outside of the applicable statute of limitations.

In Florida, a beneficiary must bring a breach of trust claim against a trustee within six months of receipt of an adequate disclosure document issued by the trustee that discloses the matter at issue. However, if the beneficiary does not receive an adequate trust disclosure, a breach of fiduciary duty claim is subject to a four-year statute of limitations. This four-year statute of limitations does not begin to run until either (1) the beneficiary receives a final trust accounting and notice of the availability of the trust records for inspection or (2) the beneficiary has actual knowledge of the facts upon which the claim is based. Actual knowledge must be established by clear and convincing evidence.

Holding: The District Court of Appeal for the Fourth District (the Court) held that the trial court erred in holding that *res judicata* barred Gregor's 2012 action. The Court determined that the facts and events underlying the 1996 action and the 2012 action were different, and thus there was no "identity of the cause of action." The Court further noted that Gregor could not have brought his 2002 claims in the 1996 action, because the asset transfer did not occur

until 2012. The Court emphasized that *res judicata* cannot apply where, as here, the two actions at issue involve different time periods.

The Court further held that the trial court erred in holding that *laches* barred the current suit. The Court held that even though Orator terminated the Mary T. Woodward Trust in 2002, the statute of limitations did not begin to run until he provided an accounting for that trust to Gregor in October 2011. Because Gregor commenced the 2012 suit within six months of that time, the action was timely and *laches* was not a bar. The Court recognized that there was evidence that Gregor was aware of the transfer as early as January 2003, but reasoned that determining whether evidence met the clear and convincing standard would require the weighing of facts and witness credibility, which cannot be done on summary judgment. The Court further emphasized that there was no evidence that Gregor knew that he was not a beneficiary of the two new trusts in 2003.

Practice Point: Trustees should consider making periodic, detailed written disclosures as to trust activity to all ascertainable trust beneficiaries, even if not specifically required to do so by law or requested to do so by the beneficiaries. In addition, while communicating in real time over every transaction is likely impractical, trustees should carefully evaluate whether they are adequately communicating major events in the trust to all interested parties. Doing so could insulate the trustee from claims arising out of all but the most recent events. Conversely, failure to do so could result in technically timely claims arising from events that occurred many years before.

First State Fiduciaries LLC v. Morgan Stanley Smith Barney LLC, C.A. No. 9472-MA (July 11, 2016)

Putative trustee denied award of attorneys' fees because the trust was found to be *void ab initio*.

Facts: A settlor's conservator created a Delaware trust agreement designating the Bryn Mawr Trust Company of Delaware as trustee. In Connecticut litigation, the trust was held to be *void ab initio* because it had been improperly established by the conservator. Bryn Mawr had accepted the trusteeship and, as such, was required to participate in the litigation and incur legal fees. In Delaware Chancery Court, Bryn Mawr sought an award of its legal fees to be paid from the assets of the trust.

Law: Under Delaware law, a trustee typically is entitled to be reimbursed for litigation expenses from the trust corpus when the attorney's services are necessary for the proper administration of the trust or where the legal services benefit the trust.

Holding: The Master in Chancery recommended that, even though Bryn Mawr may have been an innocent party in the litigation, payment of its legal fees would not be appropriate because there was never a trust for it to administer (given that the trust was void) such that the legal fees could not be deemed necessary for the administration of the trust.

Practice Point: Fiduciaries considering accepting a trusteeship, particularly in potentially contentious circumstances, should be prepared to pay their own costs if circumstances lead to the revocation or termination of the trust as void from the outset.

Heathman v. Lizer, 2016 WL 3753328 (Cal. Ct. App. July 8, 2016)

Beneficiary's petition to modify trustee compensation provision did not trigger no-contest clause.

Facts: Actor/singer Dean Martin executed a trust on December 14, 1995, and died on December 25, 1995. Gina Martin Heathman, one of Martin's daughters, is one of nine current income beneficiaries entitled to net income from the trust. The trust contains a no-contest clause disinheriting any "devisee, legatee or beneficiary … any legal heir" who contests or challenges the trust, Martin's will, or provisions of the trust or his will. The trust sets minimum trustee compensation at 1 percent of the average net value of the principal of the trust each year.

In October 2014, Heathman filed a safe harbor application seeking a determination that the petition she was about to file with the consent of all beneficiaries would not trigger the trust's no-contest clause. Her petition sought to amend the trust's trustee compensation provision. The petition sought to limit the compensation of the trustees to a maximum of the market rate charged by corporate trustees managing similar trust estates.

This application stated that due primarily to an increase in value of the assets managed by paid investment advisers other than the trustees, the trust principal had grown nearly sevenfold (from roughly $11 million to over $81 million) in the 19 years since Martin created the trust and that in this same time period the trustees' compensation had thus grown from $113, 866 to $812,307. This latter amount was nearly four times more than a large corporate trustee would have charged to administer the trust and was significantly more than the income beneficiaries of the trust received.

The petition argued that the significant increase in the value of trust assets, without a proportionate increase in trust income, had not been anticipated by Martin, and that continuing under the 1 percent trustee compensation formula would defeat or substantially impair the trust's primary purpose — to benefit Martin's family members (the beneficiaries).

The trial court granted Heathman's safe harbor application, holding that her proposed petition would not constitute a contest under the trust's no-contest clause. The trustees appealed.

Law: In deciding the merits of an application for safe harbor (i.e., whether the proposed action would trigger the no-contest clause), a trial court may not consider the merits of the action itself.

In response to a petition of a trustee or beneficiary, a court may modify or terminate a trust if due to unknown or unanticipated circumstances, the continuation of the trust under its current terms would defeat or substantially impair the accomplishment of the purposes of the trust.

The court may, upon proper showing, fix or allow greater or lesser trustee compensation than could be allowed under the terms of a trust where the compensation, in accordance with the terms of the trust, would be inequitable or unreasonably low or high.

The beneficiaries of an irrevocable trust may, by unanimous consent, compel modification or termination of the trust upon petition to the court, unless the court, in its discretion, determines that continuance of the trust without modification is necessary to carry out a material purpose of the trust.

Holding: The California Court of Appeals (the Court) affirmed the trial court's judgment. The Court held that a petition brought for the purpose of advancing the grantor's intent to benefit all the trust's beneficiaries cannot be regarded as a contest, notwithstanding that it will reduce the fees paid to the trustee, because it is generally recognized that grantors create trusts to benefit their beneficiaries — not their trustees.

Weighing two competing policy interests, the testator's intent and the desire to avoid forfeitures, the Court also held that the proposed petition to modify the trustee compensation provision was not a prohibited contest. Because California law only recognizes the enforceability of no-contest clauses that are not contrary to law or public policy, the Court concluded that enforcement of the clause in this situation would be contrary to public policy in precluding a petition seeking a reduction in the trustees' compensation as inequitable or unreasonable — a petition that is specifically authorized under the laws of California.

Specifically, the Court found that the district court's authority to modify trusts (1) to address unforeseen circumstances to accomplish the grantor's intent and (2) to change trustee compensation that would be inequitable or unreasonable, reflects important public policies. These policies are (1) to advance the grantor's implicit intent to accomplish the trust's primary objectives in the face of changed circumstances and (2) to favor court supervision of trust administration to ensure that the interests of beneficiaries are protected over enforcement of a no-contest provision that would lead to an outcome contrary to the purpose of the trust.

Practice Point: While enforceable, no-contest clauses are strictly construed and are not enforceable if the condition is not prohibited by law or contrary to public policy.

Matter of Kermit Gitenstein Foundation, 357003A, NYLJ 1202758893277 (Surr., NA, May 26, 2016)

Facts: In 2007, a New York surrogate appointed Steven Schlesinger as receiver of the assets of the Kermit Gitenstein Foundation. The foundation's purpose was to distribute assets for general charitable purposes. Schlesinger was ordered to sell the foundation's marketable securities and reinvest the proceeds in bank accounts, money market accounts, and certificates of deposit. The court also ordered Schlesinger to comply with state corporate law and federal tax law.

Schlesinger petitioned the court for approval of several distributions to comply with federal tax law. The court granted approval and Schlesinger made the distributions accordingly. However, Schlesinger failed to obtain court approval for other distributions. Eventually, the court issued a show cause order removing Schlesinger as receiver, which Schlesinger challenged.

Law: A receiver of a nonprofit corporation derives authority from statutes and judicial orders. The statutes grant the receiver the power to bring lawsuits on behalf of the corporation, sell assets, settle demands by or against the receivership, and take other actions. Additionally, a court may order the receiver to comply with specific bodies of state and federal law. Unless authorized by a court, a receiver's powers do not include continuing the corporation as a going concern.

Holding: The court found that Schlesinger had exceeded his powers as receiver of the foundation. The court held that authorizing Schlesinger to cause the foundation to comply with New York corporate law and federal tax law did not permit Schlesinger to continue making distributions from the foundation. Therefore, Schlesinger was required to petition the court to approve distributions in advance of over $8 million. Schlesinger acted without statutory or judicial authority when he continued making distributions from the foundation without the court's prior approval.

Practice Point: Receivers must understand the powers they have and do not have. Receivers should seek judicial approval of any action not expressly authorized by statute or judicial order.

Garrett v. First State Bank Central Texas, No. 10-14-00344-CV (Tx. Ct. App. May 5, 2016)

Court refused to find the existence of fiduciary duty in an arm's-length banking transaction absent a prior business and personal relationship between the parties.

Facts: A dispute arose between Carmen Garrett (decedent John Alexander's caregiver) and Alexander's estate over a certain money market account containing $362,000. The account was opened in Alexander's name, but Garrett was later added as a signatory. First State Bank Central Texas filed an interpleader action naming Garrett and the estate as defendants. Garrett filed a counterclaim against the bank for breach of fiduciary duty and constructive fraud, claiming that Alexander had intended for Garrett to be a beneficiary of the account after his death.

An account representative for the bank, Beverly Rohde, had prepared a signature card for Garrett (which she signed) as well as documentation that initially indicated that the account was a single-party account (to which Garrett would have no entitlement). Rohde admitted that she later changed the documentation and the designations in the bank's systems to indicate that the account was a multiparty account with right of survivorship.

Rohde testified at trial that she changed the account designation to set up the account like a multiparty account with right of survivorship because Alexander had expressed a wish for Garrett to be able to pay his bills, even after his death and a single-party account would not accomplish Alexander's desire. Rohde also testified that Alexander never told her that he wanted Garrett to be a beneficiary of the account. Garrett testified, however, that Alexander specifically requested a multiparty account with right of survivorship.

At trial, Garrett argued that the bank owed her a fiduciary duty arguing that a relationship of trust and confidence existed between her and the bank. In Texas, what would otherwise be an arm's-length dealing with no creation of a fiduciary duty can be transformed into a fiduciary relationship only where that party is accustomed to being guided by the judgment or advice of the bank and there exists a long association in a business relationship as well as personal friendship.

The jury found that there was no fiduciary relationship between Garrett and the bank. An appeal followed in which Garrett argued that the instruction to the jury improperly included language requiring a long association in a business relationship as well as personal friendship to transform an arm's-length relationship into a fiduciary one. Garrett also appealed the sufficiency of the evidence of the jury's finding that Alexander changed the account designation for the sole purpose of allowing Garrett to pay Alexander's bills.

Law: In addition to the widely recognized fiduciary relationships (trustee/trust, attorney/client, etc.), Texas law recognizes the possibility of "informal" fiduciary relationships, depending on the circumstances of each case. However, under Texas law, one party's subjective trust and feelings alone do not transform arm's-length dealings into a fiduciary relationship. Rather, a party must be justified in placing his confidence in the other party. That only occurs where he is accustomed to being guided by the judgment or advice of the other party where there has been a long association in a business relationship as well as personal friendship.

Holding: The Waco Court of Appeals overruled Garrett's appeal, holding that the charge to the jury, which stated that a long association in a business relationship as well as personal friendship was required to find that a fiduciary duty existed between the bank and Garrett, was not an abuse of discretion. The court emphasized that this statement was an accurate summary of Texas law on the subject and that "informal" fiduciary relationships are not created lightly. After reviewing all the evidence, the court held that the jury's finding was not against the overwhelming weight of the evidence and it overruled Garrett's challenge.

Practice Point: Generally speaking, courts will not find that fiduciary duties arise in the context of ordinary arm's-length transactions. However, it is important to be aware that depending on the circumstances of the case, longstanding, preexisting business and personal relations can transform an otherwise arm's-length relationship into a fiduciary one (or, at minimum, create an issue of fact to be submitted to a jury for determination).

In re Wilma G. James Trust, 487 S.W.3d 37 (Mo. Ct. App. May 3, 2016)

Despite the trustee's alleged breaches of fiduciary duty, the lack of any evidence proving actual harm to the beneficiaries led the court to reject the beneficiaries' claims.

Facts: Wilma G. James created a trust in 1983 and amended it in 2001 and 2007. At her death in June 2012, she was survived by two of her three sons, Darei James and Charles James. Wilma named Darei as trustee of the trust. After Wilma's death, Darei, Charles and their respective wives purchased a farm the trust owned at a previously appraised value. Darei, as trustee, also paid $14,000 to a mortuary that his brother Charles owned to cover Wilma's funeral expenses. The trustee sent a schedule of proposed distributions to the beneficiaries on September 15, 2012.

Two of Wilma's grandchildren (whose father, George, had predeceased Wilma) filed a lawsuit against Darei, as trustee. The lawsuit claimed that Darei's purchase of the farm from the trust on conditions more favorable to himself than those prescribed in the trust document, was a breach of his fiduciary duty to administer the trust properly. The lawsuit asserted that this breach unjustly enriched the trustee, his brother Charles and their respective wives. The grandchildren also claimed that Darei breached his fiduciary duties by failing to send reports to them between the time of his accepting the trusteeship and the date of Wilma's death. They further challenged the validity of some charitable donations, the $14,000 in funeral expenses and the schedule of proposed distributions. The trial court found in favor of the trustee, Charles and their respective wives on all claims. The grandchildren appealed.

Law: To prevail on a breach of fiduciary duty, a plaintiff must show: (1) the existence of a fiduciary duty; (2) a breach of that fiduciary duty; (3) causation; and (4) harm.

Holding: The Missouri Court of Appeals (the Court) affirmed the trial court's judgment on all claims.

Although the Court found that the trustee's purchase of the farm was not in strict compliance with the terms of the trust document (i.e., the terms of the purchase were more favorable to the trustee than those dictated by the trust document), the grandchildren had not demonstrated that they suffered any damages or harm. The grandchildren failed to show that the sale of the farm at the appraised value had caused them any actual harm or monetary loss.

The Court found that the trustee had failed to account to the grandchildren as required in the trust document; however, because an accounting was eventually made and the grandchildren failed to provide any evidence that they had suffered damages or harm due to this delay, the Court held that they were not entitled to relief.

The Court found that the trustee's payments of charitable donations and funeral expenses did not constitute a breach of duty, deferring to the trial court's findings of fact and pointing out that the grandchildren did not provide any explanation as to how the trial court erred and why any error was material.

The Court also agreed with the trial court's finding that the grandchildren waived their right to challenge the form and amount of distributions by failing to object to the schedule of proposed distributions within the statutorily prescribed limitations period.

Practice Point: To prevail in a claim of a trustee's breach of fiduciary duty, a plaintiff must provide proof of actual harm or direct monetary loss and not merely through conjecture, speculation or inferences.

Gadaire v. Orchin, 133 F. Supp. 3d 138 (D.C. Dist. Ct., Sept. 30, 2015)

In a suit against the trustee for breach of fiduciary duty, the court denies the beneficiary's motion for summary judgment on grounds that the trustee failed to pay insurance policy premiums and caused the insurance policy to lapse.

Facts: In 1993, Dr. Eugene C. Gadaire transferred a group life insurance policy to an irrevocable life insurance trust for the benefit of his spouse, Elizabeth Gadaire. Eugene named a close friend, Dr. Jeremy D. Orchin, as trustee. From 1993 to 2009, Jeremy paid all of the required semi-annual premiums on the policy in response to premium invoices sent by the insurance company, Great-West.

In April 2009, Jeremy moved to a temporary residence and submitted change of address forms with the U.S. Postal Service. He did not alert Great-West directly of his change of address and did not receive the premium notice for the payment due on July 1. After a 31-day grace period, Great-West sent a notice of termination, which provided another 31-day reinstatement period. Jeremy did not receive this notice. Coverage on the policy terminated on August 1, 2009. Eugene died on January 15, 2010.

Following Eugene's death, Jeremy sought to have Great-West reinstate the policy without telling Great-West that Eugene was deceased. Great-West agreed to reinstate the policy, but later denied payment on the policy upon learning that Eugene died three days before the insurance was reinstated.

Elizabeth sued Jeremy for breach of fiduciary duty, negligence and breach of contract. Both Jeremy and Elizabeth also asserted five breach of contract claims against Great-West. The parties sought summary judgment on their claims.

Holding: The D.C. District Court denied Elizabeth's motion for summary judgment on her claims against Jeremy. The court found that it was undisputed that Jeremy had not notified Great-West of his change of address and had instead only filed change of address forms with the U.S. Postal Service. The insurance trust document contained a general provision protecting the trustee from liability for actions taken related to the trust property so long as the trustee "exercised good faith and ordinary diligence in the exercise of his duties."

The court determined that the issue of whether Jeremy had exercised such ordinary diligence was a question for the trier-of-fact because "determining the applicable standard of care is a question of fact for the jury." Jeremy also

asserted defenses, such as Elizabeth's contributory negligence in not making additional contributions to the trust to pay insurance premiums. The court declined to consider Jeremy's defenses when denying Elizabeth's summary judgment motion against him.

The court did, however, grant summary judgment in favor of Great-West on Jeremy's and Elizabeth's claims. The court found that the policy had properly lapsed according to its terms and applicable law, and that Great-West did not owe a further duty to notify either party. The court further found that the reinstatement of the policy that Jeremy sought was unenforceable because Eugene was deceased at the time of the reinstatement.

Practice Point: Serving as a trustee of an irrevocable life insurance trust can be a demanding and often uncompensated assignment. Nevertheless, such fiduciaries bear real risk in performing their duties as trustees. Trust provisions protecting trustees from liability cannot be relied on in all circumstances. The simple act of the trustee's change of residence, and failing to notify the insurance company of the trustee's change of address, led to this challenging situation for both the beneficiaries and the trustee.

In re Marvin M. Schwan Charitable Foundation, 880 N.W.2d 99 (S.D. May 18, 2016)

> **Individual members of a trust succession committee are not "fiduciaries" under applicable South Dakota law and lack standing to petition a court for supervision of the trust. However, these individual members of the committee are "interested in the trust" and thus are "beneficiaries" who have standing under South Dakota law to petition a court for supervision of the trust.**

Facts: In 1992, Marvin M. Schwan used a trust agreement to found the Marvin M. Schwan Charitable Foundation. The trust instrument provides that the trustees operate the foundation exclusively to support or benefit seven named charities (the charitable beneficiaries).

The governing document of the foundation also provides for a succession committee. The succession committee has certain powers, such as the power to remove existing trustees with or without cause and the power to request an accounting from the trustees. Initially, the succession committee includes seven total members: Mark Schwan and Paul Schwan, who are Marvin's sons; three members who also are trustees; and two other members.

Mark and Paul began to question certain investment decisions made by the foundation's trustees after the value of the assets of the foundation decreased from approximately $1 billion to roughly $600 million. Mark and Paul believed that the trustees had refused to provide them with appropriate information regarding the foundation, and also believed that the trustees had failed to respond to their concerns regarding the foundation's operations.

In 2014, Mark and Paul petitioned a South Dakota court to assume supervision of the foundation and to take certain other actions, pursuant to a South Dakota statute, SDCL § 21-22-9.

In the meantime, the trustees, the charitable beneficiaries, and the attorney general of South Dakota had reached a settlement regarding the administration of the foundation.

The trustees, joined by the charitable beneficiaries and the attorney general, argued that court supervision was unnecessary, and they moved to dismiss Mark and Paul's petition to supervise the foundation. Generally, the motion to dismiss argued that Mark and Paul lacked standing to petition the trial court for supervision, as Mark and Paul were only two members of the succession committee, and they were not one of the trustees or charitable beneficiaries.

The trial court found that Mark and Paul lacked standing under South Dakota law as either fiduciaries or beneficiaries, and dismissed the petition for court supervision. Mark and Paul appealed.

Law: SDCL § 21-22-9 provides that "[a]ny *fiduciary*, trustor, or *beneficiary*" (*emphasis added*) of a trust may petition the court to exercise supervision over a trust. The statute further provides that following a hearing on a

petition to exercise supervision, the court is to order supervision of the trust, "unless good cause to the contrary is shown."

Holding: The Supreme Court of South Dakota (the Court) reversed the trial court. The Court concluded that Mark and Paul were not "fiduciaries," but because they (as members of the succession committee) had an interest in the foundation, they were "beneficiaries" and they had standing to petition the court for supervision.

First, the Court agreed with the trial court that Mark and Paul were not "fiduciaries" as SDCL § 21-22-9 contemplated. The Court noted that the statute recognized that a "trust committee" was a "fiduciary," and thus the succession committee could be a "fiduciary" that would have standing to petition the Court. But the Court concluded that because the succession committee had to act by majority vote, and because Mark and Paul were only two individual members of the succession committee, Mark and Paul were not "fiduciaries" in the relevant sense.

Second, however, the Court found that a "beneficiary" could also petition the court under SDCL § 21-22-9. The Court noted that, in other contexts in South Dakota law, a "beneficiary" was defined to include an individual with a "present or future beneficial interest" in a trust, or "an income or remainder beneficiary." But the Court found that under the definitions applicable to SDCL § 21-22-9, a "beneficiary" included "any person in any manner interested in the trust." The Court concluded that because Mark and Paul had a "fiduciary responsibility" as members of the succession committee, they each had an interest in the trust, and therefore they each had standing to petition the court for supervision.

Interestingly, on procedural grounds the Court declined to consider the trustees' argument that the charitable beneficiaries had consented to and ratified the trustees' actions, thereby making moot any claim to review the trustees' prior actions.

Finally, the Court reasoned that there was insufficient evidence to determine whether "good cause" existed that would allow the trial court to decline to exercise supervision based on Mark and Paul's petition. The Court remanded the case to the trial court, with instructions for the trial court to hold a hearing and to order supervision, unless the trial court concluded that the trustees, charitable beneficiaries, or attorney general could show good cause existed to deny such court supervision.

Practice Point: In many cases, a settlor of a trust names a third party, such as a "trust protector" or "trust adviser," to oversee certain actions by the trustees. Several states now expressly allow a third party to be given certain powers over a trust. However, as this case illustrates, the standing and powers of these third parties in a legal sense — including whether those third parties are fiduciaries who might be subject to fiduciary duties and liability — remains unclear. We have addressed these cases in prior alerts. *See, e.g.*, *Mclean Irrevocable Trust v. Ponder*, 418 S.W.3d 482 (Mo. Ct. App. 2013) (holding that trust protector is not liable for breach of duty where he failed to remove the trustees who allegedly wasted trust assets), available here.

Attorneys, advisers, and corporate fiduciaries who confront such a third party in a trust document should consider the extent to which the powers granted to the third party are enforceable, what duties and liabilities those third parties might have, and how the powers and duties of those third parties interact with applicable law.

LVAR, L.P. v. Bermuda Commercial Bank Ltd., et al. 2016 WL 2865612 (2d Cir. May 17, 2016)

Forum selection clause governed and required claims to be litigated in Bermuda in suit against trustee and investment adviser for mismanagement of funds.

Facts: On May 22, 2009, LVAR, L.P., a family limited partnership organized in New York (LVAR), established the LVAR Trust, containing $7 million in assets. The purpose of the trust was to provide for the living expenses of LVAR's partners in this family limited partnership. The trust agreement appointed BCB Paragon Trust (BCB), a Bermuda-based corporation, as trustee and LVAR as the sole beneficiary. BCB later engaged investment advisers for the trust.

LVAR filed suit against BCB as trustee and the investment advisers. The lawsuit alleged that in October 2009, BCB and the investment advisers colluded to reallocate over 80 percent of the assets of the trust into two speculative and high-risk investment funds, in violation of the trust agreement, the agreed-upon investment strategy for the trust and for their own benefit.

LVAR argued that the investment advisers earned substantial fees for placing clients into the investment funds but they failed to disclose this potential conflict of interest to LVAR. LVAR alleged that BCB and the investment advisers provided false and misleading materials that misrepresented the risk and diversification of the funds, which, as a result, convinced one of LVAR's limited partners to authorize the reallocation. After the restructuring was approved, LVAR claimed that the trustee and advisers repeatedly misrepresented the status and value of the trust assets with false financial statements. As a result, LVAR alleged that the trustee and advisers' actions harmed the trust and depleted nearly all of its assets.

LVAR brought suit in the U.S. District Court for the Southern District of New York. The trustee and advisers moved for dismissal based on a forum selection clause in the trust agreement designating Bermuda courts as the forum for administration of the trust.

The trial court determined that the forum selection clause deserved a presumption of enforceability because (1) it was reasonably communicated to LVAR, (2) it was mandatory, and (3) it governed the claims at issue. Furthermore, this presumption was not rebutted by a sufficiently strong showing that enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching.

The trial court held that, because the investment advisers worked in close concert with BCB, they were "closely related" to BCB, and, thus, the forum selection clause applied to them, as well, despite the fact that they were not signatories to the trust agreement. For these reasons, the trial court granted the motion to dismiss. LVAR appealed.

Law: The plaintiff bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted; a valid forum-selection clause should be given controlling weight in all but the most exceptional cases.

Holding: The 2nd U.S. Circuit Court of Appeals affirmed the trial court's judgment, holding that the forum selection clause was mandatory and governed the claims at issue, and thus deserved a presumption of enforceability. The 2nd Circuit then stated that LVAR's argument that the majority of its members were elderly, ill or incarcerated did not sufficiently justify why others of its partners could not travel to Bermuda to prosecute the suit.

Practice Point: Forum selection clauses that are reasonably communicated and mandatory and govern the claims at issue will be presumed enforceable against parties to the agreement and closely related non-signatories, unless a party can rebut this strong presumption. Rebutting this presumption requires a showing that enforcement of the clause would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching.

Alioto v. Manalo, 2016 WL 3610878 (Cal. Ct. App. June 28, 2016)

California court admits as evidence grantor's statements to drafting attorney to resolve ambiguity in terms of subtrust.

Facts: Frank Alioto created a revocable trust agreement in 1999, creating a trust for the benefit of Alioto's two adult children, his ex-wife (to whom he owed alimony payments), and his long-term companion, Maria Manalo. The trust agreement also created two subtrusts to hold Alioto's business interests. Alioto amended the trust agreement in 2010, 2011 and 2012. However, Alioto's 2012 amendment contained a drafting error, and the terms of one subtrust in the 2012 trust agreement were ambiguous.

The terms of the subtrust in the 2010 trust agreement provided that Manalo would receive minimum support payments from the subtrust of $50,000 annually for life. A subsequent paragraph in the trust agreement provided that Alioto's children would receive the net income from the subtrust after Manalo's death and the expiration of the alimony payments.

The terms of the subtrust in the 2012 trust agreement provided minimum distributions of $75,000 per year to Manalo for five years after Alioto's death. After the five years ended, Alioto's children were entitled to the entire net income of the subtrust. The 2012 trust agreement also increased immediate payments to Manalo from sources outside the subtrust. However, in drafting the 2012 trust agreement, Alioto's drafting attorney failed to amend the subsequent paragraph providing that the children were entitled to the net income from the subtrust only after Manalo's death and the expiration of the alimony payments. As a result, it was unclear whether Manalo was entitled to receive $75,000 for her lifetime, or only for five years after Alioto's death, with the children receiving the entire net income at the end of the five years.

The trustee discovered the ambiguity in the terms of the subtrust after Alioto's death. The trustee filed a petition to modify the trust agreement to provide that Manalo's payments from the subtrust would end after five years and that the children would then receive the entire net income. The petition included a declaration from Alioto's drafting attorney stating that Alioto intended that Manalo receive payments from the subtrust only for five years after his death.

Manalo opposed the petition, arguing that the trustee lacked standing to petition to modify the trust, the attorney's declaration was inadmissible, and Alioto did not intend to limit Manalo's minimum distributions to five years after his death. Instead, Manalo argued, she was entitled to the minimum distributions for her lifetime.

The trial court disagreed with Manalo and granted the trustee's petition to modify the trust to correct the drafting error. Manalo appealed this ruling to the California Court of Appeals for the First District (the Court).

Law: California law provides that a trustee or beneficiary may petition a court for an order concerning the internal affairs of the trust. A trust's internal affairs include modifying or terminating the trust. Additionally, a testator's oral declarations to the scrivener may be admitted to resolve an ambiguity in the document.

Holding: The Court held that the trustee had standing to file the petition to modify the trust agreement. The Court specifically recognized the trustee's power to petition to reform a trust where a drafting error defeats the grantor's intentions. This power exists even after a trust becomes irrevocable.

The Court admitted as evidence the declaration from Alioto's drafting attorney. The Court also recognized that California law permits admitting evidence of a testator's statements to the scrivener of a will to resolve an ambiguity in the document. The Court applied this principle to construction of trust agreements and admitted the declaration as evidence of Alioto's intent.

Finally, the Court concluded that Alioto's intent was to limit Manalo's distributions from the subtrust to five years after his death. The Court cited the increase in annual payments as evidence that Alioto intended to provide Manalo higher payments for a shorter period of time. The Court modified the trust agreement to allow the children to receive the net income from the subtrust beginning five years after Alioto's death.

Practice Point: Drafting attorneys must ensure consistency in estate planning documents and ensure that later amendments work in harmony with other provisions in a will or trust agreement. Fiduciaries can add significant value for clients by working with drafting attorneys to ensure a client's documents are consistent and correctly reflect the client's wishes and directions.

Shriners Hospital for Children v. First Northern Bank, 373 P. 392 (Wyo. May 18, 2016)

Wyoming court holds that rule against perpetuities does not apply to trust where interest is fully vested upon the death of the grantors.

Facts: Alfred and Pegge Cooksley created a revocable trust to hold title to their 1,620-acre Wyoming ranch and other property. The trust agreement named the Cooksleys as beneficiaries during their lifetimes, with Shriners Hospital for Children and Kalif Children's Travel Fund as the remainder beneficiaries. First Northern Bank was named the successor trustee after the Cooksleys' deaths.

The trust agreement directed the trustee to pay the net income of the trust to the beneficiaries until the year 2100, then distribute the assets outright to the remainder beneficiaries. The trust agreement also required the trustee to use the net income to maintain the ranch. The trust agreement directed the trustee to withhold net income from the beneficiaries if necessary to pay for the maintenance of the ranch.

Pegge died in 2007 and Alfred died in 2011. Following Alfred's death, First Northern Bank became the trustee and filed a petition to amend the trust. The First Northern Bank petition alleged that the trust agreement violated Wyoming's rule against perpetuities and sought to have the trust terminate 21 years from the date of Alfred's death. Shriners opposed the First Northern Bank petition and filed its own petition to terminate the trust immediately. Shriners also later filed a separate complaint against First Northern Bank alleging that First Northern Bank had breached its fiduciary duties of loyalty and prudent investment of trust assets, and had failed to diversify the trust's investments. Shriners sought the removal of the trustee, an award of damages for itself and disgorgement of all the trustee's fees paid from the trust.

In June 2012, the trial court conducted a hearing on Shriners' petition to terminate the trust and the First Northern Bank petition to amend the trust. After this hearing, the trial court held that the trust was a charitable trust to which the rule of perpetuities did not apply and denied the Shriners' petition to amend the trust and the First Northern Bank petition to terminate the trust. Set for a subsequent hearing was the issue of whether the trust should be terminated because the trust was no longer practicable or economical.

After a later evidentiary hearing on this remaining issue, the trial court denied this final part of Shriners' petition to terminate the trust. The trial court concluded that termination of the trust would defeat the trust's dominant material purpose of retaining the ranch in operation until the year 2100. The trial court also held on Shriners' separate breach-of-fiduciary-duty claims that First Northern Bank had not breached any of its fiduciary obligations. Subsequently, the trial court found that Shriners had filed its litigation in bad faith and ordered Shriners to pay First Northern Bank's legal fees — over$48,000.

Shriners appealed each of these rulings to the Wyoming Supreme Court (the Court).

Law: The rule against perpetuities prevents a property owner from indefinitely retaining an interest in property after death. However, the Wyoming rule against perpetuities does not apply to property interests that have already "vested" in the grantee. A property interest has vested in the grantee when it is certain that the grantee will eventually receive the property.

A trustee owes fiduciary duties of loyalty and care to beneficiaries of a trust. However, the trustee's duties are further defined by the trust agreement. The trustee must exercise its fiduciary duties subject to the purposes expressed in the trust agreement.

Holding: The Court held that the trust agreement did not violate the rule against perpetuities regardless of whether the trust is charitable or not, or whether there is an exception under the rule for charitable trusts. When the trust agreement became irrevocable, Shriners was certain to receive the ranch in the year 2100, creating a fixed and vested interest to which the rule of perpetuities does not apply. Therefore, the trust agreement was valid, even though the trust would hold the property for over 80 years.

The Court also upheld the trial court's rejection of Shriners' petition to terminate the trust, finding that continuance of the trust was necessary to carry out the material purpose of the trust. Specifically, the Court agreed that retention of the ranch and the trust until the year 2100 was the material purpose of the trust. On potentially alternative grounds justifying termination of the trust, the Court ruled that retention of the ranch was not unlawful, contrary to public policy or impossible to achieve.

The Court also held that First Northern Bank did not breach its fiduciary duties of care and loyalty. The Court noted that a trustee's fiduciary duties are shaped by the terms and purposes of the trust agreement; the trustee has an obligation to carry out the trust according to its terms and to carry out the settlor's intentions. The Court agreed with the trial court that none of the Shriners' numerous breach-of-fiduciary-duty allegations had any basis to them and, in fact, "completely ignored the expressed desires of the man who was so generous as to bequeath Shriners with a

charitable contribution." In trying to terminate the trust and force the sale of the ranch against the settlor's express wishes, the Court concluded that Shriners had "acted in bad faith." Thus, the Court upheld the award of attorneys' fees against Shriners for its "utter disregard" of the settlor's intentions which are of "paramount importance" under the laws of Wyoming.

Practice Point: Trusts provide a powerful tool for clients to achieve their goals and preserve their interests even after death. In administering trusts, trustees must balance their duties to the trust and the beneficiaries and their duty to carry out the grantor's wishes as expressed in the trust agreement. A trustee should communicate with the grantor to understand the grantor's intentions, and then enforce the grantor's intentions as set forth in the trust agreement. This case also illustrates the risks a beneficiary runs in seeking termination of a trust and asserting a trustee has breached its fiduciary duties.

In re Sinzheimer, 2016 WL 1598764 (N.Y. Sur. April 14, 2016)

Court denies jury trial for action seeking construction of a trust instrument and delivery of trust assets.

Facts: Bank of America was serving as co-trustee of the Ronald and Marsha Sinzheimer family trust. The individual co-trustee purported to remove the corporate trustee and sought delivery of the trust assets. The co-trustees disputed whether the trust agreement required a corporate trustee and Bank of America declined to deliver the trust assets to the individual trustee until that issue was determined.

The individual trustee brought suit in New York Surrogate's Court seeking a declaration that the removal was valid and a delivery of the trust assets to the individual trustee. The individual trustee added a breach-of-fiduciary-duty claim and a conversion claim. The individual trustee demanded a jury trial.

Law: Parties have a right to a jury trial when the substance of the relief sought is legal in nature, but do not have a jury right when the claim is equitable in nature. The nature of the relief demanded is based on the facts pled.

Holding: The court ruled the individual trustee is not entitled to a jury trial because the action is equitable in nature. Because the primary relief demanded sounded in equity, there is no right to a jury trial. Although the individual trustee sought damages and added a conversion claim, which is legal in nature, the gravamen of the lawsuit was a request for a construction of the trust instrument, an equitable proceeding.

Practice Point: Fiduciaries often prefer bench trials to jury trials. Even when damages are sought, fiduciaries should emphasize the traditional equitable nature of trust matters in order to minimize the risk of jury trials.

Simon v. Sheedy (In re Sheedy) 2015 WI App 52 (Wis. Ct. App. May 28, 2015)

Court construes competing trust agreements to determine that later trust revoked the first and that the subsequent amendments were valid.

Facts: Patrick and Margaret Sheedy created a joint revocable trust in 1995 for the benefit of themselves and their six children. They deeded their lake house to the 1995 trust. Under the terms of the 1995 trust, at the death of the surviving spouse, the assets of the trust, including the lake house, were to be divided evenly among the Sheedys' four daughters. In 2004, the Sheedys signed a new joint revocable trust agreement. Under the 2004 trust, after the death of the surviving spouse, the lake house was directed by specific gift to one daughter, Molly, to the exclusion of the other siblings.

After Margaret's death, Patrick amended the 2004 trust on several occasions. In one relevant amendment, Patrick removed the specific gift of the lake house to Molly, so the daughters would share the lake house equally. After Patrick's death in 2012, Molly filed suit alleging she should take the entire interest in the lake house. The circuit court for Milwaukee County granted summary judgment to Molly's siblings under the theory that the 1995 trust governed the disposition of the lake house. Molly appealed.

Law: The goal of construing trust instruments is to give effect to the intent of the settlor, as determined within the four corners of the trust instrument. If two trust instruments inconsistently dispose of property, the latter is deemed to revoke the former.

Holding: The Wisconsin Court of Appeals (the Court) held that the 2004 trust revoked the 1995 trust because the 2004 trust differently disposed of the lake house and other property. The Court determined that the deed, evidencing ownership by the 1995 trust, was merely an indicator of ownership but was not determinative. Next, the Court held Patrick's amendments to the 2004 trust after his wife's death were valid because the trust instrument was not clear that both settlors were required to amend the trust. Thus, the Court confirmed the lake house would be owned by all four sisters in equal shares per the amendment to the 2004 trust.

Practice Point: Fiduciaries and trust professionals should inquire about the history of a client's estate plan. To avoid confusion or litigation, obsolete wills and trusts should be properly revoked. Further, this case shows the substantial value of the proper titling of assets.

Kilmer v. Sposito, --- A.3d ---- (2016), 2016 Pa. Super. 141 (July 1, 2016)

Attorney who negligently advised surviving spouse to take a one-third elective share when she was entitled to a one-half share can be sued for malpractice.

Facts: James Sposito represented Janet Kilmer in matters concerning the settlement of her late husband's estate. Sposito advised Kilmer to file an election to take against her husband's will, which entitled her to one-third of her husband's estate. Kilmer followed Sposito's advice and filed such an election in the Pennsylvania Orphans' Court. Kilmer claimed that Sposito's advice was negligent because, as a surviving spouse who married after her husband executed his will, she was entitled to half of the estate, not one-third. Kilmer fired Sposito and hired a new attorney, who filed objections to the executors' accounting and challenged the validity of her election. Kilmer (through her new attorney) and the executors later reached a settlement through which Kilmer took 41.5 percent of the estate. In 2015, Kilmer filed a malpractice suit against Sposito in the Court of Common Pleas of Susquehanna County. Sposito filed preliminary objections (Pennsylvania state court's equivalent of a motion to dismiss), arguing that the Pennsylvania Supreme Court's decision in *Muhammad v. Strassburger*, *McKenna, Messer, Shilobod and Gutnick* barred Kilmer's claim, and that Kilmer could not show an actual loss because she elected to settle for a 41.5 percent share of the estate. The trial court sustained Sposito's preliminary objections and dismissed the suit. Kilmer moved for reconsideration, which the trial court denied. Kilmer then appealed.

Law: In the *Muhammad* case, the Pennsylvania Supreme Court held that a client may not bring a malpractice suit based in contract or in negligence where the client enters into a settlement to which he or she agreed. The client may only bring a claim sounding in fraud against the attorney (i.e., that the client was fraudulently induced to settle).

In *McMahon v. Shea*, the Pennsylvania Supreme Court (in a non-precedential decision) further clarified the impact of *Muhammad*, affirming a Superior Court *en banc* holding that *Muhammad* does not apply where an attorney neglects to advise his client of well-established principles of law and the consequences of the written settlement agreement. Instead, *Muhammad* only bars malpractice claims where the client accuses the attorney of negligently advising of the amount to be paid or accepted in the settlement.

Holding: After reviewing the trial court's order *de novo*, the Superior Court reversed the trial court's order and remanded the case. The Superior Court held that *Muhammad* was inapposite to the facts of this case and thus did not bar Kilmer's claims. The Court reasoned that *Muhammad* focused on the conduct of the attorney representing the client at the time the settlement was accepted. Here, however, the client took issue not with the conduct of the attorney representing her at the time of settlement, but rather the conduct of the attorney previously representing her.

The Superior Court emphasized that the impact of *Muhammad* was to prevent attorneys from being unfairly penalized where they appropriately relied on their clients' assent to settlement terms and to underscore the finality of settlements. The Superior Court held that these principles were not implicated in Kilmer's claims. The Superior Court also rejected Sposito's argument that Kilmer failed to plead (and could not establish) actual loss, noting that

Kilmer pled that she settled for a lesser amount than that to which she would have been entitled if Sposito had properly advised her.

Practice Point: An attorney's failure to properly advise a surviving spouse as to the correct elective share that spouse is entitled to receive can give rise to a valid malpractice claim against that attorney.

Franklin Templeton Bank & Trust v. Butler, 2016 WL 3129141 (D. Utah June 2, 2016)

Arbitration agreements do not require arbitration of a directed trustee's claim for indemnification by the beneficiaries, when beneficiaries sue the directed trustee and investment adviser.

Facts: Franklin Templeton Bank & Trust (FTB&T) was appointed as directed trustee of certain trusts, and National Asset Management (NAM) was named as investment adviser. Under the terms of the trusts, NAM had certain powers to direct FTB&T regarding investments of the trusts, and FTB&T was relieved of certain duties and liabilities regarding investments.

FTB&T, in its capacity as trustee, signed certain trading authorization agreements and investment monitoring agreements with NAM and National Securities Corporation (NSC), a broker-dealer, regarding the trusts, each of which required arbitration for claims arising from those agreements.

In 2011, the beneficiaries of the trusts removed FTB&T as trustee and removed NAM as investment adviser. During that process, the beneficiaries signed release and indemnification agreements, whereby the beneficiaries released FTB&T, individually and as trustee, from certain claims regarding the trusts, and agreed to "indemnify, defend and hold harmless FTB&T, individually and as Trustee," from certain claims related to the trusts.

In March 2015, the trusts filed a claim with FINRA against NAM and NSC, for mismanagement of the assets of the trusts. The trusts also brought a claim against FTB&T for breach of fiduciary duty. FTB&T did not consent to submit this claim to arbitration.

FTB&T then brought the present action. FTB&T cited the release and indemnification agreements, and sought to require that the beneficiaries and the trusts indemnify FTB&T regarding the FINRA claims. NAM and NSC filed a motion to compel arbitration and to stay proceedings pending arbitration; the beneficiaries and the trusts joined in the request.

Holding: The court held that the Federal Arbitration Act (FAA) governs the arbitration agreements in this case. While the FAA generally favors arbitration, the parties must agree to have their agreements submitted to arbitration.

The court concluded that the arbitration provisions of the trading agreements did not require FTB&T to submit its indemnification claim to arbitration. FTB&T was a signatory to the trading agreements, but FTB&T entered into those agreements only in its capacity as trustee, whereas it was later sued in its individual capacity.

The court noted that FTB&T, individually, and not as trustee, could have been bound as a non-signatory through principles of equitable estoppel, if it sought to enforce the trading agreements. The court concluded that because there was no evidence that FTB&T was seeking indemnification based on the trading agreements, there was no basis to conclude that equitable estoppel would apply the arbitration provisions to FTB&T's indemnification action.

Lastly, the court reasoned that the arbitration provisions also could have bound FTB&T, individually and not as trustee, as a third-party beneficiary, if the trading agreements were intended to provide a direct benefit to FTB&T, individually and not as trustee. Again, the court concluded that, because FTB&T entered into these agreements individually, and not as trustee, the arbitration provisions were not applicable to FTB&T's indemnification action.

Practice Point: Many financial agreements contain arbitration clauses that would require certain disputes to be submitted to arbitration. These agreements might also be entered into between a trustee and an investment adviser. Recent cases, regarding directed trustees and arbitration clauses, address the enforceability of these arbitration

clauses in various contexts. *See, e.g., Pinnacle Trust Co., L.L.C. v. McTaggart*, 152 So.3d 1123 (Miss. 2014) (holding that an arbitration provision in a wealth-management agreement between the trustee and trust adviser does not bind trust beneficiaries)

In this case, the court found that, based on the specific facts and claims at issue, FTB&T was not required to arbitrate its claim. On several occasions, the court noted, FTB&T had signed certain agreements only in its capacity as trustee, and not in its individual capacity. The beneficiaries' and trusts' case to bind FTB&T to arbitration might have been stronger if FTB&T had signed the arbitration agreements also in its individual capacity.

This case also underscores the protection that an indemnification agreement offers. Even though the beneficiaries had signed a release, the trusts still brought an action against FTB&T. But because the beneficiaries had signed an indemnification agreement with FTB&T, FTB&T could bring an action to require the beneficiaries to indemnify it against those claims. The protection that type of release and indemnification agreement offers and the types of claims that it might cover depend on the particular facts and circumstances of each case.

In re Estate of Thomas F. Shelton, 2016 IL App (3d) 140163 (Ill. App. Ct., Aug. 1, 2016)

Case of first impression in Illinois; appellate court held that, in general, a successor agent designated in a power of attorney does not owe fiduciary duties to the principal simply by virtue of being designated as successor agent.

Facts: In 2005, Thomas Shelton executed an Illinois statutory power of attorney naming his wife Doris as his initial agent and his son Rodney as successor agent. Doris executed a similar power of attorney naming her husband Thomas as her initial agent and their son Rodney as successor agent. Each power of attorney gave the agent standard powers to manage the financial affairs of the principal, including the power to transfer real property. In 2011, Thomas conveyed his interest, in a farm he owned jointly with Doris, to Rodney and Rodney's wife. At the same time, Thomas, acting as Doris's agent under her power of attorney, conveyed Doris' interest in the farm to Rodney and Rodney's wife. Thomas separately conveyed a second farm Thomas owned individually to Rodney and Rodney's wife.

Following the deaths of both Thomas and Doris, Rodney's sister Ruth, acting as executor of the estates of Thomas and Doris, respectively, filed separate suits against Rodney. In the first action, Ruth sought to recover the individually owned farm Thomas conveyed to Rodney. Ruth asserted that Doris was incompetent at the time of the conveyance, and therefore, the conveyance to Rodney, as Thomas' successor agent, was presumptively fraudulent. In that action, the trial court granted Rodney's motion to dismiss, holding that no doctor had certified that Doris was incompetent at the time of the conveyance and thus Rodney had not become Thomas' agent. In the second action, Ruth sought damages from Rodney, alleging that he breached a fiduciary duty he owed to Doris under her power of attorney. The trial court held that Rodney did not become Doris' agent and therefore never owed her a fiduciary duty. Ruth appealed both rulings.

Law: The appellate court reviewed the dismissal of the first action de novo. The appellate court cited the general rule that "any conveyance of the principal's property that either materially benefits the agent or is for the agent's own use is presumed to be fraudulent." The court considered, for the first time in Illinois, whether a designated successor agent under a power of attorney owes a fiduciary duty to the principal before such successor agent becomes the acting agent.

Holding: In affirming the decision of the trial court, the appellate court held that a successor agent does not owe the principal a fiduciary duty, unless and until the power to act on behalf of the principal is triggered. In this case, since the initial designated agent (Doris) was living and not found to be incompetent at the time of the conveyance in question, Rodney did not owe fiduciary duties to his father as his father's successor agent. The court further found that Ruth's subsequent introduction of medical records and expert testimony in an attempt to establish Doris' incompetency two years after the transaction occurred could not retroactively establish Doris' incompetency.

However, the appellate court reversed the dismissal of Ruth's claim against Rodney for damages for his alleged breach of the fiduciary duty Rodney owed to Doris and remanded this case to the trial court. The court found that, by

statute, Illinois law imposed a limited duty on successor agents: (a) to not participate in a breach of fiduciary duty committed by another agent; (b) to notify the principal of a potential breach by another agent; and (c) where the principal is incapacitated, to take reasonable actions to protect the principal's interests. Thus, in cases where the successor agent has knowledge of the agent's breach, the successor agent owes limited fiduciary duties to the principal.

Practice Point: Powers of attorney for property are common and useful estate planning tools, but this case contains lessons for both principals and agents alike. Principals and their families need to be vigilant in monitoring the actions of the principal's agents. Moreover, initial and successor agents acting under powers of attorney, even if acting in good faith, must always proceed with the utmost caution and expect to be required to account for any action the agent takes on behalf of the principal, or anything an agent receives from the principal that could benefit the agent and/or the agent's family.