AGENDA: ACTEC FIDUCIARY LITIGATION COMMITTEE

ACTEC 2025 Annual Meeting– La Quinta, California
Thursday, March 20, 2025, 3:30 P.M. to 6:00 P.M.
Chair: Brian J. Felcoski

3:30-3:45 P.M. Committee administration

Call Meeting to Order
Appointment of Secretary
Sign-in procedure
Approval of Minutes from the Prior Meeting
Introductions and Acknowledgment of New Fellows
Sponsor Recognition
Report of Chair, Brian J. Felcoski

3:45 P.M. - 4:15 P.M. Open discussion

Any relevant topic including national trends, hot topics, interesting cases (old or new) or subject matters that anyone may wish to bring to the attention of the Committee that may directly or indirectly impact our fiduciary litigation practices.

1. *Newell v. Superior Court of Los Angeles County*, 328 Cal. Rptr. 3d 322 (Cal. App. Ct. 2024);
2. *Reeves v. Gross*, 2025 WL 322326 (Fla. 3d DCA 2025);
3. *Matter of Estate of Beck*, 557 P.3d 1255 (Mont. 2024).

4:15 P.M. - 5:00 P.M. Subcommittee Meetings and Reports

Choice of Law and Situs of Property – Chair: M. Travis Hayes

Construction, Instruction & Reformation – Co-Chairs: Eric W. Penzer and Cynthia Lamar-Hart

ESI (formerly E-Discovery) – Chair: Craig M. Frankel; Vice Chair: Lee McElroy, IV

Evidence – Co-Chairs: Jamie G. Pressley and William ("Bill") Boyes

Fiduciary and Attorney Compensation – Chair: Jordan S. Weitberg; Vice Chair: Peter Matwiczyk

Fiduciary Responsibility – Chair: Deborah J. Tedford; Vice Chair: Shari A. Levitan

Fiduciary Surcharge and Damage Remedies – Co-Chairs: Alan I. Silver and Steven K. Mignogna

ADR – Chair: Erin Donovan

Malpractice & Ethics – Chair: Edward Downey

Will and Trust Contests – Co-Chairs: Brian D. Bixby and James ("Jim") C. Milton

5:00 –6:00 P.M. Presentation and discussion

The Fiduciary Litigation Committee will feature a fascinating and timely program from the Evidence subcommittee. The panelists Amanda K. D'Arcy, Eric Virgil, Lawrence J. Miller, and Mark E. Swirbalus will present "Houston, we have a conflict: How to identify and address conflicts of interest in virtual representation."

6:00 P.M. Adjournment

REMINDER: Please support your ACTEC Foundation: actecfoundation.org/DonateNow.

ACTEC
THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL

ACTEC Executive Committee Liaison Report
2025 Annual Meeting

1. Thanks to the Program Committee chaired by Stephanie Loomis-Price (WA), all the Committee members, show-runners and speakers for an impactful line-up of Professional Programs (CLE) for this Annual Meeting.

2. The *L. Henry Gissel, Jr. Spirit of ACTEC Lecture* is Friday, March 21, 10:15 a.m. to 11:15 a.m., presented by Past President, Ann B. Burns, examining the importance of collaborative relationships in our profession. Saturday's schedule features *The Annual Joseph Trachtman Memorial Lecture*, 9:45 a.m. to 10:45 a.m., Counting Down, Counting Up: Flourishing, presented by Past President Stephen (Steve) R. Akers, exploring well-being and how estate planners can help clients and families thrive.

3. As ACTEC Fellows are aware, there is a current shortage of law school graduates pursuing careers in trust and estate law. On behalf of the College, President Susan D. Snyder has reached out to the directors of law school career centers in the U.S., with an invitation to arrange an ACTEC presentation for students about the exceptional career prospects in the trust and estate practice. This initiative is coordinated by the Long Range Planning Committee.

4. Please take a moment to reach out and thank the sponsors supporting this Annual Meeting. The sponsor display area is in the Flores Ballroom Foyer.

5. Following the conclusion of the Annual Meeting, a survey seeking feedback on your meeting experience including the program schedule, opportunities to network, tours, special events and the meeting venue will be sent to all attendees.

6. The 2025 Summer Meeting is scheduled **June 18-22, Montreal, Quebec, Canada at the Le Centre Sheraton.** The Summer Meeting Schedule of Events will be available after the conclusion of the Annual Meeting.

7. The 2025 Fall Meeting dates in Austin, TX have changed. New dates were announced in January and are **October 20-23, 2025.**

8. To be considered at the 2025 Fall Meeting at the Fairmont Austin in Austin, TX, nominations must be received by the national office, ready to poll by these deadlines: Nominations for **International Fellows Monday, June 23, at 4:30 p.m. Eastern Time** and Nominations for **Fellows and Academic Fellows Monday, July 28, 4:30 p.m. Eastern Time**. Nominations received after these deadlines will be held over for the 2026 Annual Meeting at the JW Marriott Water Street & Tampa Marriott Water Street in Tampa, FL.

9. See the *Meetings Announcements* sent each Monday for the list of upcoming National, State, Regional, and ACTEC Fellows Institute Meetings.

10. Keep up with the news, educational opportunities, webinars plus resources of the College and read the *Weekly Update* issued each Friday.

THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL

ACTEC

FOUNDATION

ACTEC Foundation Liaison Report
2025 Annual Meeting

1. The ACTEC Foundation welcomed the 10th Class of Dennis I. Belcher Young Leaders in September 2024. To date, fifteen former Young Leaders have been elected to the College through this Foundation grant-funded program of ACTEC's Diversity, Equity and Inclusivity Committee.

2. Stop by the Foundation's booth for a copy of The ACTEC Foundation's 2025 Annual Meeting Newsletter.

3. The Foundation-funded ACTEC Trust and Estate Talk Podcast has had over 633,000 total podcast downloads from 2018 to 2024.

4. The ACTEC Foundation website has a brand new look! Check it out, and get updates on the programs the Foundation supports and the stories of the people the Foundation has impacted: www.actecfoundation.org

5. The 2025 Mary Moers Wenig Student Writing Competition is now open. 2L and 3L students in ABA-accredited law schools should submit papers by June 30, 2025, and winners will be announced by July 15, 2025.

6. The Foundation is reviewing a new Mission Statement. Come to the Board of Directors meeting on Saturday, March 22 at 1:15 pm Pacific to hear the discussion. The Foundation will also be considering several interesting grant proposals.

Please support your ACTEC Foundation with a donation at actecfoundation.org/DonateNow.

MINUTES OF LAST MEETING AND ATTENDANCE SHEET

ACTEC FIDUCIARY LITIGATION COMMITTEE

Minutes for ACTEC Fall Meeting – Chicago, Illinois
Saturday, September 21, 2024; 2:45 P.M. to 5:15 P.M.

I. Committee administration

The Chair, Brian Felcoski, called the meeting to order at 2:45 p.m.

The Chair appointed Grier Pressly as secretary to take the minutes for the meeting.

The Chair reminded committee members and visitors to record their attendance through the ACTEC app.

The Chair reminded attendees of the ACTEC Code of Conduct.

The Chair reminded attendees that the meetings are not recorded to facilitate free discussion.

The Chair directed attention to the ACTEC Executive Committee Liaison Report and the ACTEC Foundation Liaison Report in the meeting materials and encouraged members to support the ACTEC Foundation.

The Committee approved the minutes from the prior meeting in Toronto on June 20, 2024.

Red dots and Blue dots in attendance introduced themselves.

The Chair thanked all meeting sponsors. Peak Trust Company was in attendance and was recognized.

The Chair provided his report. The Committee has been invited to produce a joint ACTEC/ALI webinar and members were encouraged to contact the Chair or John Challis if interested. The Chair commended the subcommittees for their productivity and encouraged members to find a subcommittee to participate on.

II. Subcommittee Meetings and Reports

The subcommittees broke out to meet together.

Choice of Law and Situs of Property – Chair: M. Travis Hayes – the subcommittee will present in Montreal on Uniform Conflict of Laws and present a case study on contested jurisdiction.

Construction, Instruction & Reformation – Co-Chairs: Eric W. Penzer and Cynthia Lamar-Hart – the subcommittee will present at the Spring 2026 meeting, the tentative title is, "My lawyer made me do it, now undo it."

ESI (formerly E-Discovery) – Chair: Craig M. Frankel; Vice-Chair: Lee McElroy, IV – the subcommittee hopes to present in Montreal on an artificial intelligence related topic.

Evidence: Co-Chairs: Jamie Pressly and William ("Bill") Boyes – the subcommittee will present at the next meeting in Palm Springs with three 30-minute presentations on (ir)relevant evidence, conflicts in virtual representation, and evidentiary factors in trust situs cases.

Fiduciary and Attorney Compensation: Chair: Jordan S. Weitberg; Vice-Chair: Peter Matwiczyk – the subcommittee will present on fiduciary commissions in Montreal or the following meeting.

Fiduciary Responsibility: Chair: Deborah J. Tedford; Vice-Chair: Shari A. Levitan – the subcommittee presented at the meeting.

Fiduciary Surcharge and Damage Remedies: Co-Chairs: Alan L. Silver and Steven K. Mignogna – the subcommittee thanked Dom Campisi for his leadership – the subcommittee has identified ten potential damage areas to present on, will divide them up, and present at a future meeting.

ADR: Chair: Erin Donovan – the subcommittee will present at the Austin meeting.

Malpractice & Ethics – Chair: Edward Downey – the subcommittee will next present on the ethics issues involved with the preparation of advanced directives and testamentary instruments for clients who are potentially incapacitated.

Will and Trust Contests: Co-Chairs: Brian D. Bixby and James ("Jim") C. Milton – the subcommittee is considering several different topics to present at a future meeting.

III. Open discussion

The Chair directed attention to new ABA Formal Opinion 512 which provides guidance on the ethical challenges involved with generative artificial intelligence tools. The Chair directed attention to Delaware Chancery Court opinion in the Matter of Niki and Darren Irrevocable Trust involving a flawed decanting, and Tood A. Flubacher provided additional context to the case. Discussion continued regarding potential gift tax issues involved with beneficiary consent or failure to object to a flawed trust decanting or modification. Further discussion was held regarding a recent case (cite: 313 A.3d 1090, March 2024) involving the owner of

the Philadelphia Phillies on the issue of settlor standing to participate in a trust administration dispute.

IV. Presentation and discussion

The Fiduciary Responsibility subcommittee (Deborah Tedford, Shari Levitan, Todd Flubacher, Jared Cloud, Clary Redd, Steve Hearn, Robert Knee, and Charlie Pieterse) presented a case study skit, "*Too Little, Too Much, or Just Right,"* and led an interesting discussion focused on the following issues: How much and what type of notice and reporting a trustee or other fiduciary should or should not provide in a variety of circumstances. When can a trustee limit information to beneficiaries, and is it possible to provide too much? If a trust owns all or part of a closely held business, must a trustee obtain and provide information to beneficiaries on the operation of that business – and to what extent? How do you handle a beneficiary who tries to use notice and reporting obligations to harass a trustee?

V. Adjournment

The meeting was adjourned at 5:15 p.m.

ACTEC 2024 Fall Meeting

Chicago, Illinois

Fiduciary Litigation Committee

Saturday, September 21, 2024
2:45pm - 5:15pm

Chair	Brian J. Felcoski
Member and EC Liaison	Margaret G. Lodise
Member and Foundation Liaison	John T. Rogers Jr.
Member	Mary A. Akkerman
Member	Paul J. Barulich
Member	Steven A. Benefield
Member	Brian D. Bixby
Member	David C. Blickenstaff
Member	Robert D. Borteck
Member	William E. Boyes
Member	Steven P. Braccini
Member	Gerard G. Brew
Member	Cynthia D.M. Brown
Member	James J. Brown
Member	Frayda L. Bruton
Member	Gerald I. Carp
Member	Joseph J. Cassioppi
Member	John M. Challis
Member	T. Jack Challis
Member	Jerry B. Chariton
Member	Jared R. Cloud
Member	Brian P. Corrigan
Member	Christine Socha Czapek
Member	Melissa Osorio Dibble
Member	Amanda K. DiChello
Member	Melissa L. Dougherty
Member	Edward Downey
Member	Jack A. Falk Jr.
Member	Mr. Timothy M. Ferges
Member	John R. Fitzpatrick
Member	Todd A. Flubacher
Member	Stanbery Foster Jr.
Member	Craig M. Frankel
Member	Jay Freiberg
Member	Elizabeth A. Garlovsky
Member	Lauren Garner
Member	Adam R. Gaslowitz
Member	Adam T. Gusdorff
Member	Robert M. Harper
Member	Travis Hayes

ACTEC 2024 Fall Meeting

Chicago, Illinois

Fiduciary Litigation Committee

Member	Steven L. Hearn
Member	William Thomas Hennessey III
Member	Mr. Steven H. Holinstat
Member	Michael P. Kaelin
Member	Thomas M. Karr
Member	Rohan Kelley
Member	Shane Kelley
Member	Robert A. Knee
Member	Cynthia G. Lamar-Hart
Member	Shari A Levitan
Member	David T. Lewis
Member	David E. Lieberman
Member	Bridget A. Logstrom Koci
Member	Pamela Lucina
Member	R. David Marchetti
Member	Gail E. Mautner
Member	Robert Lee McElroy IV
Member	John F. Meck
Member	Julia B. Meister
Member	Steven K. Mignogna
Member	James C. Milton
Member	John C. Moran
Member	Hung V. Nguyen
Member	Jeffery T. Peetz
Member	Eric W. Penzer
Member	Charles W. Pieterse
Member	Ray Prather
Member	J. Grier Pressly III
Member	James G. Pressly
Member	Charles A. Redd
Member	Thomas Anthony Rodriguez
Member	Ms. Stacy Beth Rubel
Member	T.J. Ryan
Member	Robert N. Sacks
Member	Margaret E.W. Sager
Member	Mario Santilli Jr.
Member	Jon Scuderi
Member	Kathleen R. Sherby
Member	Caitlyn B. Sikorski
Member	Alan I. Silver
Member	Mr. Eddy R. Smith
Member	Mr. Barry F. Spivey

ACTEC 2024 Fall Meeting

Chicago, Illinois

Fiduciary Litigation Committee

Member	Mark E. Swirbalus
Member	Deborah J. Tedford
Member	Matthew Triggs
Member	Eric Virgil
Member	Elizabeth E.W. Weinewuth
Member	Gregory J. Weinig
Member	Michael D. Whitty
Member	Geraldine A. Wyle
Member	Julian C. Zebot
Visitor	Frank T. Adams
Visitor	Beth Anderson
Visitor	Jeffrey Baskies
Visitor	Carole Bass
Visitor	Sarah Butters
Visitor	Tami Conetta
Visitor	Ben Diamond
Visitor	Mark Doyle
Visitor	John Furniss
Visitor	Heather Galvin
Visitor	Angelo Grasso
Visitor	Ellen Harrington
Visitor	John Hartog
Visitor	Amy Morris Hess
Visitor	Jennifer Hillman
Visitor	Mark House
Visitor	Jared Kawashima
Visitor	George Kern
Visitor	Sharon Klein
Visitor	Theo Kypreos
Visitor	Heather Lange
Visitor	Jonathan Lasley
Visitor	Jeff Loew
Visitor	Stephanie Loomis-Price
Visitor	Robin Miskell
Visitor	Phoebe Moffatt
Visitor	Janet Montgomery
Visitor	Walter Morris
Visitor	Suma Nair
Visitor	Hilary Newcomb
Visitor	Abigail O'Connor
Visitor	Tara Pleat
Visitor	William H Pokorny

ACTEC 2024 Fall Meeting

Chicago, Illinois

Fiduciary Litigation Committee

Visitor	Les Raatz
Visitor	Andrew Rothstein
Visitor	Victor Schultz
Visitor	Marshall Senterfitt
Visitor	Tanya Shunnara
Visitor	Anita Siegel
Visitor	Gregg Simon
Visitor	Brett Sovine
Visitor	Dale Stone
Visitor	Alex Tanouye
Visitor	Laura Walker Plunkett
Visitor	Richard Wehrle

OPEN DISCUSSION

NEWELL V. SUPERIOR COURT OF LOS ANGELES COUNTY

107 Cal.App.5th 728
Court of Appeal, Second District, Division 7, California.

Lucy Mancini NEWELL, Petitioner,
v.
The SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;
Neneth D. Rollins, Real Party in Interest.

B339383
|
Filed December 20, 2024

Synopsis

Background: Daughter, who had filed petition challenging validity of trust amendments that had changed the trustee and sole beneficiary of her parents' trust from her to father's caregiver, recorded a lis pendens against real property that caregiver had purchased with trust assets and amended her petition to include, among other things, a request to impose a constructive trust on the property. Caregiver moved to expunge the lis pendens. The Superior Court, Los Angeles County, No. 23STPB02659, Jessica A. Uzcategui, J., granted the motion to expunge and awarded caregiver attorney fees and costs. Daughter petitioned for writ of mandate.

[Holding:] The Court of Appeal, Segal, J., held that the lis pendens concerned a real-property claim.

Peremptory writ of mandate issued.

Procedural Posture(s): Petition for Writ of Mandate; Other.

West Headnotes (13)

[1] Mandamus Specific acts

A petition for writ of mandate is the exclusive means of obtaining review of an order granting or denying a motion to expunge a lis pendens.

[2] Lis Pendens Notice of Pendency of Action

A "lis pendens" is a recorded document giving constructive notice that an action has been filed affecting title to or right to possession of the real property described in the notice. Cal. Civ. Proc. Code § 405.20.

[3] Lis Pendens Notice of Pendency of Action

Purpose of a lis pendens is merely to furnish means of notifying all persons of pendency of action and thereby to bind any person who may acquire interest in property, subsequent to institution of action, by any judgment which may be secured in action affecting property. Cal. Civ. Proc. Code § 405.20.

[4] Lis Pendens Actions in which notice is authorized

A lis pendens may be filed by any party in an action who asserts a real-property claim. Cal. Civ. Proc. Code § 405.20.

[5] Lis Pendens Cancellation, discharge, or modification

Review of a pleading for whether it states a real-property claim, as is relevant to statute that provides that a court must expunge a lis pendens if the court finds the pleading on which the lis pendens is based does not contain a real property claim, involves only a review of the adequacy of the pleading and normally should

not involve evidence from either side, other than possibly that which may be judicially noticed as on a demurrer. Cal. Civ. Proc. Code §§ 405.30, 405.31.

[6] **Lis Pendens**🔑Cancellation, discharge, or modification

Review of an expungement order under statute that provides that a court must expunge a lis pendens if the court finds the pleading on which the lis pendens is based does not contain a real property claim is limited to whether a real-property claim has been properly pled by the claimant. Cal. Civ. Proc. Code §§ 405.30, 405.31.

[7] **Lis Pendens**🔑Cancellation, discharge, or modification

The party opposing a motion to expunge a lis pendens has the burden of showing the existence of a real-property claim. Cal. Civ. Proc. Code §§ 405.30, 405.31.

[8] **Lis Pendens**🔑Cancellation, discharge, or modification

The party opposing a motion to expunge a lis pendens has the burden of showing by a preponderance of the evidence the probable validity of the real-property claim. Cal. Civ. Proc. Code §§ 405.30, 405.31, 405.32.

[9] **Lis Pendens**🔑Cancellation, discharge, or modification

As is relevant to the burden of the party opposing a motion to expunge a lis pendens to show by a preponderance of the evidence the probable validity of the real-property claim, "probable validity" means that it is more likely than not that the claimant will obtain a judgment against the defendant on the claim. Cal. Civ. Proc. Code §§ 405.30, 405.31, 405.32.

[10] **Lis Pendens**🔑Actions in which notice is authorized
Lis Pendens🔑Cancellation, discharge, or modification

Lis pendens that daughter, who was challenging validity of trust amendments that had changed the trustee and sole beneficiary of her parents' trust from her to father's caregiver, had asserted against real property that caregiver had purchased with trust assets concerned a real-property claim, and thus expungement of the lis pendens was not warranted; by statute, amendments naming caregiver as sole beneficiary were presumed to be the product of fraud or undue influence, but until probate court resolved the issue of fraud or undue influence, caregiver remained trustee, and if the claim underlying lis pendens turned out to be meritorious, the court would have to designate a new trustee to hold title to the property in his or her name as successor trustee. Cal. Civ. Proc. Code §§ 405.4, 405.20, 405.30, 405.31, 405.32; Cal. Prob. Code § 21380(a).

[11] **Trusts**🔑Nature and essentials of trusts

Unlike a corporation, a trust is not a legal entity; rather, a "trust" is a fiduciary relationship with respect to property.

[12] **Trusts**🔑Extent of Estate or Interest of Trustee
Trusts🔑Express Trusts in General

When property is held in trust, there is always a divided ownership of property, generally with the trustee holding legal title and the beneficiary holding equitable title.

[13] **Trusts**🔑Extent of Estate or Interest of Trustee

Trusts do not own property; trustees do.

***323** ORIGINAL PROCEEDINGS in mandate. Jessica A. Uzcategui, Judge. Petition granted. (Los Angeles County Super. Ct. No. 23STPB02659)

Attorneys and Law Firms

Fuller & Fuller, Bruce Fuller, Woodland Hills, and Joshua Maldonado for Petitioner.

No appearance for Respondent.

The Burbank Firm, James G. Morris, Burbank, and Diana Lam for Real Party in Interest.

SEGAL, Acting P. J.

*324 INTRODUCTION

Lucy Mancini Newell was supposed to be the trustee and sole beneficiary of her parents' trust. But after her father, Arthur Mancini, died in his early 90's, Newell learned he had amended the trust to name his 56-year-old caregiver, Neneth Rollins, as the trust's trustee and sole beneficiary.

Newell filed a petition challenging the validity of the trust amendments that changed the trustee and beneficiary of the trust from Newell to Rollins. And when Newell discovered Rollins used trust assets to purchase real property, Newell recorded a lis pendens against the property and amended her petition to include, among other things, a request to impose a constructive trust on the property.

Rollins moved to expunge the lis pendens under Code of Civil Procedure section 405.31.[1] The probate court granted the motion, ruling Newell's petition did not contain a "real property claim," within the meaning of section 405.4. Because Newell's petition, if successful, would affect title to the property, she pleaded a real property claim. Therefore, we grant Newell's petition for writ of mandate, direct the probate court to vacate its order granting the motion to expunge, and direct the court to enter a new order denying the motion.

FACTS AND PROCEDURAL BACKGROUND

Arthur and Julia Mancini created the Mancini Family Trust in 2002 and named Newell and her two siblings as the beneficiaries following the surviving parent's death. Julia died in 2009. Some years after Julia died, Arthur amended the trust and named Newell the successor trustee and sole beneficiary of the trust following his death.

Rollins began working as Arthur's caregiver in July 2020, when Arthur was 89 years old. Rollins was 56. Six months later, in January 2021, Arthur executed a second restatement of the trust that designated an attorney named Edgardo Lopez (whom Rollins had recommended to Arthur and who drafted the second restatement)[2] as the successor trustee upon Arthur's death and that gave Lopez 9 percent of the trust's gross assets as trustee compensation. The restatement directed the trustee to distribute 51 percent of the trust assets to Rollins and 40 percent to Newell.[3] Arthur amended the second restatement in April 2021 to increase Lopez's compensation to 15 percent of the trust's assets, to name Rollins as the sole successor trustee ***325** (to serve without compensation) if Lopez could not serve, and to distribute 100 percent of the remaining trust assets to Rollins, leaving Newell with nothing.

Arthur stopped communicating with Newell in May 2021. He died in November 2022. Because Lopez had died in October 2022, Rollins became the successor trustee upon Arthur's death. Newell learned of the January 2021 second restatement and the April 2021 amendment in December 2022, when an attorney for Rollins sent Newell

a notice under Probate Code section 16061.7.

Newell filed a petition in probate court to determine the validity of the January 2021 second restatement and the April 2021 amendment, naming Rollins and Lopez (and later Lopez's estate) as respondents. Citing Probate Code section 21380, which provides that a donative transfer to a care custodian of a transferor who is a dependent adult is presumptively the product of fraud or undue influence, Newell alleged Rollins and Lopez obtained the January 2021 second restatement and the April 2021 amendment through fraud and undue influence. Newell also alleged Rollins and Lopez committed financial elder abuse, within the meaning of Welfare and Institutions Code section 15610.30, subdivision (a). Newell asked the court to suspend and ultimately remove Rollins as trustee of the trust, appoint Newell as trustee, order Rollins to account for all trust assets during the period she worked for Arthur, and require Rollins to post a $2 million bond. Newell also sought damages, attorneys' fees, and costs under Probate Code section 859.

After learning Rollins had used trust assets to purchase real property in Van Nuys, California, Newell filed a second supplement to the petition. Newell alleged Rollins held title to the Van Nuys property as trustee of the trust and asked the court to impose a constructive trust on the property. Newell also recorded a notice of lis pendens.

Rollins filed a motion to expunge the lis pendens under section 405.31, which provides the "court shall order the notice [of lis pendens] expunged if the court finds that the pleading on which the notice is based does not contain a real property claim." Rollins argued Newell's petition did not contain a real property claim because Newell was challenging the validity of trust documents and claiming to have a beneficial interest in the trust, not claiming an interest in the Van Nuys property. In opposition to the motion to expunge Newell argued her petition, as supplemented, included a real property claim because the result of the petition "will clearly affect title to and the right to possession of the real property subjected to the lis pendens" and because she was asking the court to impose a constructive trust on the property. In reply Rollins argued Newell was not asserting a real property claim because the petition sought to change the trustee of the trust, not to recover real property from, or on behalf of, the trust. Rollins also argued Newell's request for a constructive trust was not valid because the Van Nuys property belonged to the trust and had not been transferred to a third party.

The probate court granted the motion to expunge the lis pendens. The court ruled that the petition did not state a claim that affected title to or possession of real property because Newell sought only to invalidate the January 2021 second restatement and the April 2021 amendment. The court stated that, because Rollins purchased the Van Nuys property after Newell filed her petition, none of the causes of action in the petition implicated the property. The court also ruled Newell's request for a constructive trust on the Van Nuys property was not a real property claim, but was merely ***326** an effort to preserve trust assets during the pendency of the litigation. The court awarded Rollins $5,500 in attorneys' fees and costs.

[1]Newell filed a petition for writ of mandate,[4] and we issued an alternative writ. The probate court subsequently held a hearing, decided not to vacate its order, and again ruled Newell's petition did not contain a real property claim. The court stated that, if Newell succeeded in invalidating the disputed trust documents, "the ownership of the real property in question would continue to be held by the trustee." The court also ruled Newell's request for a constructive trust did not state a real property claim because it was designed to preserve trust assets rather than obtain title to specific property.

DISCUSSION

A. *Applicable Law and Standard of Review*

[2] [3] [4]" 'A lis pendens is a recorded document giving constructive notice that an action has been filed affecting title to or right to possession of the real property described in the notice.' " (*Kirkeby v. Superior Court* (2004) 33 Cal.4th 642, 647, 15 Cal.Rptr.3d 805, 93 P.3d 395 (*Kirkeby*); see § 405.20; *Shoker v. Superior Court* (2022) 81 Cal.App.5th 271, 275, 296 Cal.Rptr.3d 743 (*Shoker*).) "The purpose of a lis pendens is merely to furnish a means of notifying all persons of the pendency of an action and thereby to bind any person who may acquire an interest in property, subsequent to the institution of the action, by any judgment which may be secured in the action affecting the property." (*Deutsche Bank National Trust Co. v. McGurk* (2012) 206 Cal.App.4th 201, 213-214, 141 Cal.Rptr.3d 603, italics omitted; see *De Martini v. Superior Court* (2024) 98 Cal.App.5th 1269, 1274, 317 Cal.Rptr.3d 441 (*De Martini*) [a lis pendens "notifies 'prospective purchasers, encumbrancers and transferees that there is litigation pending that affects the property' "].) " 'In effect, a notice of lis pendens " 'republishes' " the pleadings. [Citation.]

Thus a potential buyer of the property should be able [to] go the courthouse and look up the documents (the pleadings) in the court proceeding which might affect title or possession of the real property he or she is thinking of buying or lending money on.' " (*Estates of Collins & Flowers* (2012) 205 Cal.App.4th 1238, 1254, 141 Cal.Rptr.3d 227, italics omitted; see *Behniwal v. Mix* (2007) 147 Cal.App.4th 621, 638, 54 Cal.Rptr.3d 427 [" 'The whole idea of a notice of lis pendens is to give constructive notice of the legal proceeding affecting title to a specific piece of property.' "].) "A lis pendens may be filed by any party in an action who asserts a 'real property claim.' " (*Kirkeby*, at p. 647, 15 Cal.Rptr.3d 805, 93 P.3d 395.)

[5] [6] [7]Section 405.30 allows a property owner to remove an improperly recorded lis pendens by filing a motion to expunge. A "lis pendens may be expunged if the action does not contain a real property claim or the claimant fails to establish the probable validity of the real property claim." (*De Martini*, *supra*, 98 Cal.App.5th at p. 1275, 317 Cal.Rptr.3d 441.) In particular, section 405.31 provides the court must expunge a lis pendens if the court finds the pleading on which the lis pendens is based does not contain a real property claim. (*Kirkeby*, *supra*, 33 Cal.4th at p. 647, 15 Cal.Rptr.3d 805, 93 P.3d 395; *Shoker*, *supra*, 81 Cal.App.5th at p. 275, 296 Cal.Rptr.3d 743.) In determining whether ***327** a pleading contains a real property claim, the court engages in "a demurrer-like analysis." (*Kirkeby*, at pp. 647-648, 15 Cal.Rptr.3d 805, 93 P.3d 395.) " 'Rather than analyzing whether the pleading states any claim at all, as on a general demurrer, the court must undertake the more limited analysis of whether the pleading states a real property claim.' [Citation.] Review 'involves only a review of the adequacy of the pleading and normally should not involve evidence from either side, other than possibly that which may be judicially noticed as on a demurrer.' [Citation.] Therefore, review of an expungement order under section 405.31 is limited to whether a real property claim has been properly pled by the claimant." (*Id.* at p. 648, 15 Cal.Rptr.3d 805, 93 P.3d 395.) The party opposing a motion to expunge has the burden of showing the existence of a real property claim. (§ 405.30.)

[8] [9]The party opposing a motion to expunge a lis pendens also has the burden of showing "by a preponderance of the evidence the probable validity of the real property claim." (§ 405.32; see *Nunn v. JPMorgan Chase Bank, N.A.* (2021) 64 Cal.App.5th 346, 363, 278 Cal.Rptr.3d 726.) "Probable validity 'means that it is more likely than not that the claimant will obtain a judgment against the defendant on the claim.' " (*De Martini*, *supra*, 98 Cal.App.5th at p. 1279, 317 Cal.Rptr.3d 441.)[5]

B. *Newell's Petition Contains a Real Property Claim*

[10]A "real property claim" is a cause of action that "would, if meritorious, affect ... title to, or the right to possession of, specific real property ...." (§ 405.4.) Newell's petition, as supplemented, contains such a claim.

Newell alleged Rollins caused Arthur to execute a document naming Rollins as the sole beneficiary of the trust. That trust provision is presumed the product of fraud or undue influence because Rollins was Arthur's caregiver when he executed it. (See Prob. Code, § 21380, subd. (a); *Robinson v. Gutierrez* (2023) 98 Cal.App.5th 278, 281, 316 Cal.Rptr.3d 579; *Jenkins v. Teegarden* (2014) 230 Cal.App.4th 1128, 1136, 179 Cal.Rptr.3d 304.)[6] To rebut the presumption, Rollins will have to demonstrate by clear and convincing evidence the disputed trust provision was not the product of fraud or undue influence. (See Prob. Code, § 21380, subd. (b); *Butler v. LeBouef* (2016) 248 Cal.App.4th 198, 208, 203 Cal.Rptr.3d 572.) And if Rollins fails to rebut the presumption, the court may remove her as trustee. (See Prob. Code, § 15642, subd. (b)(6) [grounds for removal of a trustee include where the trustee is a care custodian and receives a donative transfer from a dependent adult, within the meaning of Probate Code section 21380, subdivision (a)]; 13 Witkin, Summary of Cal. Law (11th ed. 2024) Trusts, § 61 ["The fact that a sole trustee is a disqualified person under [Probate Code section] 21380 is a ground for removal, whether or not the trustee is the transferee of a donative transfer from the transferor, unless the court, based on 'any evidence of the intent ***328** of the settlor and all other facts and circumstances,' finds that it is consistent with the settlor's intent that the trustee continue to serve and that that intent was not the product of fraud or undue influence."].) Until the probate court resolves that issue, however, Rollins remains the trustee (or at least she was when the court granted the motion to expunge). Newell also alleged Rollins acted in her capacity as trustee of the trust when she used trust assets to purchase the Van Nuys property. And the grant deed states "Neneth D. Rollins, Successor Trustee of the Mancini Family Trust dated April 16, 2002, as amended and restated," holds title to the Van Nuys property.

The probate court ruled Newell's petition did not state a real property claim because, "[t]o the extent petitioner Lucy Newell were to succeed on this claim, the named

trustee and beneficiaries of the Mancini Family Trust may change, but the ownership of the real property in question would continue to be held by the trustee of the Mancini Family Trust." The issue, however, is whether Newell's petition would, if meritorious, affect *title* to the Van Nuys property. (§ 405.4.)

[11] [12] [13]And it would. The trustee of a trust holds title to real property. " 'Unlike a corporation, a trust is not a legal entity.' [Citation.] Rather, a trust is " 'a fiduciary *relationship* with respect to property.' " [Citation.] When property is held in trust, " 'there is always a divided ownership of property,' " generally with the trustee holding legal title and the beneficiary holding equitable title." (*Boshernitsan v. Bach* (2021) 61 Cal.App.5th 883, 891, 276 Cal.Rptr.3d 109; see *Moeller v. Superior Court* (1997) 16 Cal.4th 1124, 1132, fn. 3, 69 Cal.Rptr.2d 317, 947 P.2d 279; *Gonsalves v. Hodgson* (1951) 38 Cal.2d 91, 98, 237 P.2d 656.) Trusts do not own property; trustees do. (See *Portico Management Group, LLC v. Harrison* (2011) 202 Cal.App.4th 464, 473, 136 Cal.Rptr.3d 151 ["a trust is not an entity; it cannot ... hold title to property"]; *Greenspan v. LADT LLC* (2010) 191 Cal.App.4th 486, 521, 121 Cal.Rptr.3d 118 [" ' "a trust is not a legal person which can own property or enter into contracts" ' "; instead, it " ' "is the trustee or trustees who hold title to the assets that make up the trust estate" ' "]; *Galdjie v. Darwish* (2003) 113 Cal.App.4th 1331, 1343, 7 Cal.Rptr.3d 178 [the trustee, not the trust, is "the owner of the trust's property"].)

As stated, if Rollins fails to establish by clear and convincing evidence Arthur's donative transfer to her was not the product of fraud or undue influence, the court may remove Rollins as trustee. The court would have to designate a new trustee of the trust, who would then be entitled to hold title to the Van Nuys property in his or her name as successor trustee. In that event, Newell's petition would change the name of the titleholder. True, as the probate court stated, title would still be in the name of the trustee, but the trustee would be a different person, and the name of the title owner on the deed would be different. That's a pretty big effect on the title to the Van Nuys property. The probate court erred in ruling Newell's petition did not contain a real property claim within the meaning of section 405.4.

In denying Newell's motion to expunge the lis pendens, the probate court also suggested that a contrary interpretation of section 405.4 would lead to abuse of the lis pendens statutes. The probate court, in response to this court's alternative writ, stated that, "[i]f a change in trustee or beneficiary were sufficient to state a real property claim and support a lis pendens, countless lis pendens could be recorded in connection with trust petitions pending before the probate courts." Yet, as the Supreme Court stated in *Kirkeby*, "we cannot ***329** ignore the plain language of the statute ...." (*Kirkeby, supra*, 33 Cal.4th at p. 651, 15 Cal.Rptr.3d 805, 93 P.3d 395.) The probate court cited *BGJ Associates v. Superior Court* (1999) 75 Cal.App.4th 952, 89 Cal.Rptr.2d 693, decided five years before *Kirkeby*, where the court stated an " '[o]verbroad definition of "an action ... affecting the title or the right of possession to real property" would invite abuse of lis pendens.' " (*Id.* at p. 970, 89 Cal.Rptr.2d 693.) Subsequent cases, however, have largely rejected that concern. (See *Shoker, supra*, 81 Cal.App.5th at p. 280, 296 Cal.Rptr.3d 743 ["the *BGJ Associates* court's approach has since been discredited"]; see also *Kirkeby*, at p. 650 & fn. 6, 15 Cal.Rptr.3d 805, 93 P.3d 395.)

Moreover, the statutory scheme gives a property owner a variety of protections from lis pendens abuse. (See *Kirkeby, supra*, 33 Cal.4th at p. 651, 15 Cal.Rptr.3d 805, 93 P.3d 395 ["there are many other grounds for expunging a lis pendens"]; *Shoker, supra*, 81 Cal.App.5th at p. 280, 296 Cal.Rptr.3d 743 ["Even before *BGJ Associates* was decided, the Legislature revised the statutory scheme, in 1992, to curb potential abuse."].) For example, as stated, section 405.32 requires the court to expunge a lis pendens "if the court finds that the claimant has not established by a preponderance of the evidence the probable validity of the real property claim." (See *De Martini, supra*, 98 Cal.App.5th at p. 1279, 317 Cal.Rptr.3d 441 ["to curb abuses of the lis pendens statute," the Legislature in 1992 revised the law governing lis pendens to require "the recording party to show by a preponderance of evidence that the action is probably valid"].) Section 405.33 requires the court to expunge a lis pendens even "if the court finds that the real property claim has probable validity, but adequate relief can be secured to the claimant by the giving of an undertaking." And to provide a financial incentive against abuse, section 405.38 requires the court to award the prevailing party on a motion to expunge a lis pendens its reasonable attorneys' fees and costs, unless the losing party "acted with substantial justification or that other circumstances make the imposition of attorney's fees and costs unjust." (See *Kirkeby*, at p. 651, 15 Cal.Rptr.3d 805, 93 P.3d 395; *Shoker*, at p. 280, 296 Cal.Rptr.3d 743.) As the Supreme Court emphasized, the "availability of these statutory alternatives and the possible imposition of attorney fees and sanctions should discourage abuse of the lis pendens statute," and it is up to the Legislature—not

the courts—to address any potential lis pendens abuse. (*Kirkeby*, at p. 651, 15 Cal.Rptr.3d 805, 93 P.3d 395.)[7]

DISPOSITION

Let a peremptory writ of mandate issue directing the probate court to vacate its orders granting Rollins's motion to expunge the lis pendens and awarding Rollins attorneys' fees and costs and to enter a new order denying the motion. Newell is to recover her costs in this proceeding.

We concur:

FEUER, J.

PULOS, J.[*]

All Citations

107 Cal.App.5th 728, 328 Cal.Rptr.3d 322, 2024 Daily Journal D.A.R. 11,719

Footnotes

[*] Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[1] Undesignated statutory references are to the Code of Civil Procedure.

[2] Arthur's long-time friend and attorney Kenneth Roberts had previously represented Arthur and prepared his estate planning documents.

[3] The restatement also directed the trustee to distribute to Rollins a 2 percent membership interest Arthur at one time had in a limited liability company. The parties do not argue Arthur's interest in that company was in the trust or Arthur's estate at the time of his death.

[4] "A petition for writ of mandate is the exclusive means of obtaining review of an order granting or denying a motion to expunge a lis pendens." (*Rey Sanchez Investments v. Superior Court* (2016) 244 Cal.App.4th 259, 262, 197 Cal.Rptr.3d 575; see § 405.39; *De Martini v. Superior Court* (2024) 98 Cal.App.5th 1269, 1273, 317 Cal.Rptr.3d 441.)

[5] Rollins did not argue in the probate court, and does not argue on appeal, Newell could not establish by a preponderance of the evidence the probable validity of her claim.

[6] Probate Code section 21380, subdivision (a)(3), provides that a "provision of an instrument making a donative transfer to any of the following persons is presumed to be the product of fraud or undue influence," and one of those persons is a "care custodian of a transferor who is a dependent adult, but only if the instrument was executed during the period in which the care custodian provided services to the transferor, or within 90 days before or after

that period."

[7] Counsel for Rollins suggested at oral argument that a broad interpretation of "affect" in section 405.4 would "open the door" to "a massive amount of litigation." Our opinion addresses only the situation where, as here, a petitioner seeks to remove the trustee of a trust that includes real property, and the petition, if successful, would affect title to the property. In addition, because Newell's petition stated a real property claim within the meaning of section 405.4, we do not address the probate court's ruling Newell's request for a constructive trust did not state a real property claim.

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REEVES V. GROSS

2025 WL 322326
Only the Westlaw citation is currently available.

District Court of Appeal of Florida, Third District.

Garth Basil REEVES, Appellant,
v.
Oliver GROSS, Appellee.

No. 3D23-0856
|
Opinion Filed January 29, 2025

Synopsis

Background: Grandson, who was disinherited under grandfather's will, brought petition against estate's personal representative to revoke grandfather's testamentary documents, alleging lack of testamentary capacity. The Circuit Court, 11th Judicial Circuit, Miami-Dade County, Yvonne Colodny, J., granted personal representative's motion for summary judgment. Grandson appealed.

[Holding:] The District Court of Appeal, Logue, C.J., held that grandson failed to overcome the presumption that testator had testamentary capacity at the time he signed his will.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (9)

[1] Judgment

Summary judgment is akin to pretrial directed verdict.

[2] Wills

Burden of invalidating a will because of lack of testamentary capacity is a heavy one.

[3] Wills

Florida recognizes a presumption of testamentary capacity.

[4] Wills

To execute valid will, testator need only have testamentary capacity (i.e. be of "sound mind") which is described as having ability to mentally understand in general way (1) nature and extent of property to be disposed of, (2) testator's relation to those who would naturally claim substantial benefit from his will, and (3) general understanding of practical effect of will as executed.

[5] Wills

It is only critical that testator possess testamentary capacity at time of execution of will.

[6] Wills

Testamentary capacity is determined only by testator's mental capacity at time he executed his will.

[7] Wills

Even where person has been declared legally incompetent, his will may be recognized when evidence demonstrates that will was executed during lucid moment.

[8] Wills

Grandson failed to overcome the presumption that testator had testamentary capacity at the time he signed his will, in action seeking to revoke testator's testamentary documents; the fact that testator suffered a stroke after he signed the will, and was thereafter diagnosed with dementia, did not support a reasonable inference that testator suffered from dementia before that stroke, even if testator had dementia before his diagnosis, expert failed to testify that testator's condition prevented him from experiencing lucid intervals, and witnesses testified that testator appeared to be of sound mind when he executed will.

[9] Wills

Mere possibility that a testator lacked testamentary capacity at the time he signed a will does not satisfy heavy burden of overcoming presumption of testamentary capacity at trial.

An Appeal from the Circuit Court for Miami-Dade County, Yvonne Colodny, Judge. Lower Tribunal No. 20-977-CP-02

Attorneys and Law Firms

Kluger, Kaplan, Silverman, Katzen and Levine, P.L., and Bruce A. Katzen; Miami, Samson Appellate Law, and Daniel M. Samson, Miami, for appellant.

Kozyak Tropin & Throckmorton LLP, and Detra Shaw-Wilder, Miami, and Dwayne A. Robinson; Miami, Marva L. Willey, PA, and Marva L. Wiley, Hialeah, for appellee.

Before LOGUE, C.J., and MILLER and BOKOR, JJ.

Opinion

LOGUE, C.J.

***1** Garth Basil Reeves ("Basil") appeals the entry of a summary judgment ruling against his challenge to the final will of his grandfather, Garth C. Reeves ("Garth, Sr."). Garth, Sr. executed the will at issue on October 4, 2019, at the age of 100. He died less than two months later. The will disinherited Basil and gave the bulk of the estate to a charitable trust. Basil contends the trial court erred in entering summary judgment because material issues of fact existed concerning Garth, Sr.'s testamentary capacity. For the reasons stated below, we affirm.

Background

Garth, Sr. was the former publisher of the storied The Miami Times, Miami's most influential Black newspaper. He was also a successful businessman and real estate investor. When he died, he left a sizable estate. Throughout his life, Garth, Sr. made substantial inter-vivos gifts to his only daughter, Basil's mother, and to his only grandson, Basil. Those gifts included stock transferring total ownership of The Miami Times. In 2003, he executed testamentary documents that made Basil a major beneficiary.

In January 2015, April 2019, and finally in October 2019, however, he executed testamentary documents in which he disinherited Basil. He explained Basil had received his inheritance during Garth's lifetime. In his final will, he

left 95% of his estate to The Integrity Foundation, a charitable entity he created in 2016, which he directed to fund specific institutions including FAMU, his alma mater; Booker T. Washington High School; the Black Archives; and his church, "Church of the Incarnation." The will named Oliver Gross as the estate's personal representative.

As Garth, Sr.'s only lineal heir, Basil filed a petition against the personal representative to revoke Garth, Sr.'s October 4, 2019 testamentary documents. After substantial discovery, including over eleven depositions, the personal representative moved for summary judgment on the basis that there was no disputed issue of fact concerning Garth, Sr.'s testamentary capacity when he signed the documents at issue. In support, the personal representative submitted the affidavits of three witnesses.

The first witness was H.T. Smith, a prominent trial lawyer and law professor in the South Florida legal community. Smith testified he personally knew Garth, Sr. for over 50 years and had represented him in various legal matters. In early 2019, Garth, Sr. hired Smith as his general counsel and the two met almost every week for at least an hour. Smith testified that Garth, Sr. "knew the details about his various properties: when he purchased them, how they performed financially, and the people involved in the transactions." With his various business advisors, Garth, Sr. "led the discussion and directed the course of both his business and personal affairs."

After the death of his daughter, Garth, Sr. informed Smith that arrangements were being made to amend his will to, among other things, remove the provisions referring to the disinheritance of his now-deceased daughter. The amendments were being drafted by attorney Louis Nostro and lawyers working with him. On October 3, 2019, after receiving the new documents, Garth, Sr. met with Smith for two hours and extensively reviewed them. During the meeting, Garth, Sr. was "alert, fully understood the nature of his assets, his familial relations, and the practical effects of his will. He was clear about his wishes." In the meeting, he directed certain substantive revisions to the documents which Smith communicated in writing to Nostro and which are included in the record.

***2** On October 4, 2019, Smith met with Garth, Sr., attorney Louis Nostro, and Nostro's team. After an extensive review of the documents, Nostro presided over a signing ceremony which Smith witnessed. Smith concluded: "Based on my conversations with Garth[, Sr.] and my observations of him at the October 4, 2019 meeting, I have no doubt that he was of sound mind and possessed testamentary capacity when he executed the October 4, 2019 Will ...." Both Louis Nostro and one of his attorneys similarly testified that Garth, Sr. was alert, attentive and engaged when he signed the testamentary document.

In opposition to the motion for summary judgment, Basil submitted the testimony of Dr. Marc Agronin. Dr. Agronin is board certified in Adult and Geriatric Psychiatry. Dr. Agronin never treated or examined Garth, Sr. Instead, Dr. Agronin's opinions were based on his review of Garth, Sr.'s medical records from times bracketing the date the will was executed.

Garth, Sr.'s medical records from before the signing indicated he had suffered strokes as far back as 2002 and "[t]hese changes can be associated with both sudden neurocognitive changes at the time as well as chronic impairment over time." He noted Garth, Sr. had been hospitalized from September 21 through September 23, 2019 for a cervical injury resulting from a fall. In the course of that hospitalization, Garth, Sr. had been given medications to calm and sedate him at several points. Although Garth, Sr. was not diagnosed with dementia at that time, Dr. Agronin opined that such a circumstance "is typically associated with either acute brain impairment (delirium) and / or a major neurocognitive disorder (dementia)."

After the will was signed, on November 11, 2019, Garth, Sr. suffered a stroke and was again hospitalized. At times during this hospitalization, he exhibited anger, combativeness, and anxiousness. He was alert and oriented as to place and to persons but exhibited poor attention, concentration, and recall. At this time, he was diagnosed with dementia.

Based on the records, Dr. Agronin opined that, Garth, Sr. "was suffering from an underlying major neurocognitive disorder (dementia) with delirium from at least September of 2019 through his passing." Therefore, Dr. Agronin opined, "[w]ithin a reasonable degree of medical certainty, [Garth, Sr.] did not have the required capacity to execute an estate plan on October 4, 2019." The trial court entered a detailed, twelve-page order carefully reviewing the record and relevant law and granted the personal representative's motion. This appeal timely followed.

Legal Analysis

[1]"The trial court's ruling on a motion for summary judgment presents a pure question of law, which this

Court reviews de novo." USAA Cas. Ins. Co. v. Deehl, 49 Fla. L. Weekly D1977, —— So.3d ——, ——, 2024 WL 4341445, at *3 (Fla. 3d DCA Sept. 30, 2024) (citing Volusia Cnty. v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000)). "Properly understood, summary judgment is akin to a pre-trial directed verdict." CG Tides LLC v. SHEDDF3 VNB, LLC, 388 So. 3d 1081, 1084 (Fla. 3d DCA 2024) (citing In re Amends. to Fla. R. of Civ. Proc. 1.510, 317 So. 3d 72, 75 (Fla. 2021) (recognizing "the fundamental similarity between the summary judgment standard and the directed verdict standard")).

Under both a directed verdict and a summary judgment, "[t]he substantive evidentiary burden of proof that the respective parties must meet at trial is the only touchstone that accurately measures whether a genuine issue of material fact exists to be tried." In re Amends. to Fla. Rule of Civ. Proc. 1.510, 317 So. 3d at 75 (quoting Thomas Logue & Javier Alberto Soto, *Florida Should Adopt the Celotex Standard for Summary Judgments*, 76 Fla. Bar J., Feb. 2002, at 26). See also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255–56, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (noting, for example, that "where the factual dispute concerns actual malice, a matter requiring proof of clear and convincing evidence,] ... the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not").

***3** [2] [3]The substantive evidentiary burden at trial is significant here because "[t]he burden of invalidating a will because of lack of testamentary capacity is a heavy one ...." Hendershaw v. Est. of Hendershaw, 763 So. 2d 482, 483 (Fla. 4th DCA 2000). Indeed, Florida recognizes a "presumption of testamentary capacity." Id.

[4]Further,

> To execute a valid will, the testator need only have testamentary capacity (i.e. be of "sound mind") which has been described as having the ability to mentally understand in a general way (1) the nature and extent of the property to be disposed of, (2) the testator's relation to those who would naturally claim a substantial benefit from his will, and (3) a general understanding of the practical effect of the will as executed.

Raimi v. Furlong, 702 So. 2d 1273, 1286 (Fla. 3d DCA 1997).

[5] [6] [7]Florida also recognizes that individuals with issues of mental capacity often experience lucid moments. "Indeed, it is only critical that the testator possess testamentary capacity at the time of the execution of the will." Id. "Testamentary capacity is determined only by the testator's mental capacity at the time he executed his will." Hendershaw, 763 So. 2d at 483. See also id. at 484 ("Although there was some testimony that on some day in 1986 the decedent would not have been competent to make a will, there was no testimony that in December 1987, when the will was actually executed, the decedent lacked such a capacity."). Even where a person has been declared legally incompetent, his will may be recognized when the evidence demonstrates "that the will was executed during a lucid moment." Am. Red Cross v. Est. of Haynsworth, 708 So. 2d 602, 605 (Fla. 3d DCA 1998).

[8]Accepting Dr. Agronin's opinion as true for the purposes of summary judgment that Garth, Sr. "was suffering from an underlying major neurocognitive disorder (dementia) with delirium from at least September of 2019 though his passing," this statement does not meet Basil's burden to overcome the presumption that Garth, Sr. was lucid when he decided to disinherit Basil. In the first place, Garth, Sr. had signed testamentary documents disinheriting Basil as early as 2015, years before the three-month period when Dr. Agronin opines Garth, Sr. was suffering from a loss of capacity. In the second place, the fact that Garth, Sr. suffered a stroke on November 11, 2019, after he signed the October 4, 2019 will, and was thereafter diagnosed with dementia does not support a reasonable inference that Garth, Sr. suffered from dementia before that stroke.

Moreover, Dr. Agronin reasons that, because Garth, Sr. did not have the requisite capacity at points during his short hospitalization for his fall around September 21, 2019 and after his stroke on November 11, 2019, he did not have the requisite capacity on October 4, 2019. The problem with this broad-brush reasoning is that it does not address the fact that individuals subject to mental issues often experience periods of lucidity, as the other evidence indicates Garth, Sr. did here. In the face of that record evidence, the absence in Dr. Agronin's affidavit of a fact-based chain of reasoning explaining that Garth, Sr.'s condition prevented him from experiencing the lucid intervals reported by the other witnesses is determinative.

See Iden v. Kasden, 609 So. 2d 54, 57 (Fla. 3d DCA 1992) (noting that "expert witness' opinion based on facts or inferences not supported by evidence has no evidentiary value; the opinion cannot constitute proof of the existence of facts necessary to support the opinion") (citing Arkin Constr. Co. v. Simpkins, 99 So. 2d 557 (Fla.1957)).

***4** [9]Dr. Agronin may have established the possibility that Garth, Sr. did not have testamentary capacity at the time he signed the will. Mere possibility, however, does not satisfy the "heavy" burden of overcoming the presumption of testamentary capacity at trial. Hendershaw, 763 So. 2d at 483. It therefore is similarly insufficient at summary judgment. In re Amends. to Fla. Rule of Civ. Proc. 1.510, 317 So. 3d at 75. See also Gonzalez v. Citizens Prop. Ins. Corp., 273 So. 3d 1031, 1037 (Fla. 3d DCA 2019) (noting that "an affidavit averring a pilot had sometimes in the past allowed other persons in a plane to pilot aircrafts did not create an issue of fact as to whether the pilot was allowing another person to pilot the aircraft during a particular fatal crash").

Affirmed.

All Citations

--- So.3d ----, 2025 WL 322326

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MATTER OF ESTATE OF BECK

418 Mont. 416
Supreme Court of Montana.

In the MATTER OF the ESTATE OF: Jesse L. BECK, Deceased.

DA 24-0033
|
Submitted on Briefs: June 12, 2024
|
Decided: October 29, 2024

Synopsis
Background: Decedent's daughter filed petition for informal probate and for appointment as personal representative in intestacy to administer decedent's estate. Decedent's brother filed petition for formal probate of phone video which decedent's brother proffered as decedent's will. The District Court of the Twenty-Second Judicial District, County of Carbon, Matthew Wald, J., denied brother's petition, and brother appealed.

[Holding:] The Supreme Court, Rice, J., held that phone video recording of decedent was not a "document" which could qualify as decedent's will.

Affirmed.

Procedural Posture(s): Interlocutory Appeal.

West Headnotes (6)

[1] **Executors and Administrators**🔑Review
Wills🔑Decisions reviewable

Orders granting or refusing to grant letters testamentary and admitting or refusing to admit wills to probate are immediately appealable. Mont. R. App. P. 6(4)(a), (b).

[2] **Wills**🔑Scope and mode of review

Whether a district court properly refused to admit a disputed will to probate involves both questions of law and fact.

[3] **Appeal and Error**🔑Clear Error; "Clearly Erroneous" Standard

Supreme Court will not disturb a district court's findings of fact unless they are clearly erroneous.

[4] **Appeal and Error**🔑What constitutes clear error
Appeal and Error🔑Definite or firm conviction of mistake

A trial court's findings are clearly erroneous if they are not supported by substantial credible evidence, the court has misapprehended the effect of the evidence, or Supreme Court's review of the record convinces it that a mistake has been committed.

[5] **Appeal and Error**🔑Review for correctness or error

Supreme Court reviews a district court's conclusions of law to determine whether the interpretation of the law is correct.

[6] **Wills**🔑Mode and requisites in general

Phone video recording of decedent was not a

"document" which could qualify as decedent's will; video was not a physical paper or possibly digital file on which words were produced, and was neither written, signed, or witnessed by anyone, nor accompanied by documentation attempting to do those things. Mont. Code Ann. § 72-2-523.

**1256 APPEAL FROM: District Court of the Twenty-Second Judicial District, In and For the County of Carbon, Cause No. DP-2022-27, Honorable Matthew J. Wald, Presiding Judge

Attorneys and Law Firms

For Appellant: Ian P. Gillespie, Driggs, Bills & Day, P.C., Missoula, Montana

For Appellee: Eric W. Hinckley, Lowe Law Group, Ogden, Utah

Opinion

Justice Jim Rice delivered the Opinion of the Court.

*418 ¶1 Jason Beck (Jason) appeals a January 10, 2024 Order from the Twenty-Second Judicial District Court, Carbon County, denying his petition for formal probate of a phone video taken by his brother, Jesse Beck (Jesse), the Decedent, which Jason proffered as Jesse's Will, on the ground that the video recording was not a "document or writing upon a document" as required by § 72-2-523, MCA, for intended wills.

¶2 We consider the following issue, and affirm:

Whether a video taken by the decedent qualifies as an intended will under § 72-2-523, MCA.

FACTUAL AND PROCEDURAL BACKGROUND

¶3 On July 15, 2022, Jesse crashed his motorcycle on Highway 212 in Carbon County, Montana. While Jesse was receiving help on the side of a road from another driver, a Carbon County Sheriff's Office deputy, who was responding to the report of Jesse's accident, tragically struck and killed both Jesse and the other driver. Jesse was survived by his only child, Alexia Beck (Alexia).

¶4 Four days prior to his death, Jesse had sent Jason a phone video recording of himself, in which Jesse stated:

I, Jesse Beck, give all my possessions, if anything happens to me whatsoever, I give all my possessions, everything, to Jason Beck, my brother. Christina Fontineau does not get one thing, not one thing.

Limited detail about the circumstances surrounding the video, other than its delivery to Jason's cellphone, is set forth in the record. No witnesses appear or are apparent in the recording, and Jesse's words *419 were not reduced to written form and signed by Jesse. Christina Fontineau is stated to be a nonrelative who would not be entitled to take from Jesse's Estate (the Estate) under the laws of intestacy.

¶5 Following Jesse's death, Alexia filed a petition for informal appointment as personal representative in intestacy to administer the Estate, which was ordered on July 26, 2022. She also initiated a wrongful death action in connection with the accident in which Jesse was struck and killed. In October 2023, Jason filed a complaint seeking intervention in the wrongful death action, a petition for formal proceedings to probate Jesse's video recording as an enforceable will, which he argued would make him the sole devisee, and for appointment as personal representative of the Estate and removal of Alexia as personal representative. Alexia filed an objection, arguing the video did not qualify as a will under statute. The District Court ordered additional briefing on the question of whether the video could constitute a will.

¶6 After briefing, the District Court entered an order explaining that Jason was seeking probate of the video as a will under § 72-2-523, MCA. It noted the statute was titled "writings intended as wills," and permitted probate, in certain circumstances, of "a document or writing added upon a document," even if not executed in compliance

with other statutory requirements. The District Court ruled the statute "by its own unambiguous terms does not allow a video to be considered as a document or writing upon a document that was intended as a will." It further reasoned that, even if it accepted Jason's argument that a video could be defined as a "document in a general sense, it makes no sense within the context of [§ 72-2-523, MCA]" because the requirement of a "document or a writing upon a document impl[ies] that documents can be written on. It strains credulity to imagine that a video can have writing upon it." The District Court distinguished a video from electronic versions of writings, such as electronic notes, because ****1257** those could satisfy the definition of a writing or document that would "become indistinguishable from any other writing once printed out." Consequently, the District Court held that "a video recording of a decedent, even if it records him or her expressing testamentary intent, does not qualify as a 'document or writing upon a document' as used in [§ 72-2-523, MCA]," and denied Jason's petition to probate Jesse's video recording.

¶7 Jason appeals.

STANDARD OF REVIEW

[1] [2] [3] [4] [5]¶8 Orders "granting or refusing to grant" letters testamentary ***420** and "admitting or refusing to admit" wills to probate are immediately appealable. M. R. App. P. 6(4)(a), (b). Whether a district court properly refused to admit a disputed will to probate involves both questions of law and fact. *In re Estate of Hall*, 2002 MT 171, ¶ 9, 310 Mont. 486, 51 P.3d 1134. "We will not disturb a district court's findings of fact unless they are clearly erroneous. A court's findings are clearly erroneous if they are not supported by substantial credible evidence, the court has misapprehended the effect of the evidence, or our review of the record convinces us that a mistake has been committed. We review a district court's conclusions of law to determine whether the interpretation of the law is correct." *In re Estate of Orr*, 2002 MT 325, ¶ 12, 313 Mont. 179, 60 P.3d 962.

DISCUSSION

¶9 Sections 72-2-522 and 72-2-523, MCA, provide:

> **Execution — witnessed wills —holographic wills.** (1) Except as provided in 72-2-523, 72-2-526, 72-2-533, and subsection (2) of this section, a will must be:
>
> (a) in writing;
>
> (b) signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction; and (c) signed by at least two individuals, each of whom signed within a reasonable time after having witnessed either the signing of the will as described in subsection (1)(b) or the testator's acknowledgment of that signature or acknowledgment of the will.
>
> (2) A will that does not comply with subsection (1) is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting.
>
> (3) Intent that the document constitute the testator's will may be established by extrinsic evidence, including, for holographic wills, portions of the document that are not in the testator's handwriting.

Section 72-2-522, MCA.

> **Writings intended as wills.** Although a document or writing added upon a document was not executed in compliance with 72-2-522, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute:
>
> (1) the decedent's will;
>
> ***421** (2) a partial or complete revocation of the will;
>
> (3) an addition to or an alteration of the will; or
>
> (4) a partial or complete revival of the decedent's formerly revoked will or of a formerly revoked portion of the will.

Section 72-2-523, MCA.

¶10 Jason argues the use of the phrase "document or writing" within § 72-2-523, MCA, contrasts the "in writing" requirement for execution of wills under § 72-2-522, MCA, and "establishes the legislature's intent to allow non-written documents, such as video and audio recordings, to also qualify as intended wills." Noting dictionary definitions that incorporate electronic documents, and the statutory directive that the Uniform Probate Code (UPC) is to be "liberally construed and applied to promote its underlying purposes and policies,"

§ 72-1-101(2)(a), MCA, Jason argues that construing § 72-2-523, MCA, "to include video recordings as 'documents' would further the purpose of honoring testamentary intent and promote justice."

¶11 Alexia answers that Jason's effort to demonstrate the Legislature authorized video wills by his repeated references to the phrase "document or writing" omits critical language **1258 from § 72-2-523, MCA, which neither contrasts § 72-2-522, MCA, nor provides authorization of nonwritten wills. Under § 72-2-523, MCA, "writings intended as wills" require "a document or writing *added upon a document*." Section 72-2-523, MCA (emphasis added). Alexia argues that, while "document" is not expressly defined in the UPC, § 72-2-522, MCA, provides that a holographic will that fails to satisfy will execution requirements can still be valid "if the signature and material portions *of the document* are in the testator's handwriting," and thus, she argues a "document" must be capable of both being written upon and signed. Section 72-2-522(2), MCA (emphasis added). Alexia also argues, contrary to Jason's legislative intent argument, that "notably absent" from either of these statutes or the Official Comments to the statutes is any language whatsoever regarding usage of video or audio recordings as valid testamentary instruments.

¶12 The expansion of electronic media applications has resulted in proposed legislation to provide for and regulate their uses in commercial and legal affairs, but this has not extended to approval of a nonwritten, video will. In 2001, the Legislature enacted the Uniform Electronic Transactions Act (UETA) to "facilitate electronic transactions consistent with other applicable law" by allowing the use of electronic signatures. Section 30-18-105, MCA. However, the Legislature limited the UETA, in the context here, by "specifically exclud[ing] from its scope laws 'governing the creation and execution *422 of wills, codicils, or testamentary trusts.' " *Meyer v. Jacobsen*, 2022 MT 93, ¶ 30, 408 Mont. 369, 510 P.3d 52 (citing § 30-18-103, MCA). In recent years, the Uniform Laws Commission (ULC) has produced the Uniform Electronic Wills Act (UEWA), for the purpose of "bring[ing] estate planning into the digital age by allowing the online execution of wills while preserving the legal safeguards to ensure a will's authenticity." *See* Unif. Elec. Wills Act (Unif. L. Comm'n 2021), https://perma.cc/3ETG-FQRC, https://perma.cc/8KZF-M5HP. The Montana Legislature has not adopted the UEWA, but even so, the Act as proposed by the ULC still "requires a testator to make a will that is readable *as text* at the time the testator electronically signs the document," and the testator's signature must be witnessed by two witnesses who add their own electronic signatures. *See* Unif. Elec. Wills Act § 5(a)(1)-(2) (emphasis added). There has not been, in any state, legislative authorization of nonwritten, video wills, nor approval of such a will by any court applying the UPC. *See* Natalie Banta, *Electronic Wills and Digital Assets: Reassessing Formality in the Digital Age*, 71 Baylor L. Rev. 547, 583 (2019) ("Although statutory approval may not even be needed for documents that exist entirely in digital form saved on a computer, statutory approval would be needed for an electronic will in the form of a video or audio recording."). As the comments to the UEWA note, "[s]tatutes that apply to non-electronic wills require that a will be 'in writing.' " Unif. Elec. Wills Act § 5 cmt. "All the statutes, including the original and revised versions of the Uniform Probate Code, require a will to be in writing." Unif. Elec. Wills Act § 5 cmt. (citing Restatement (Third) of Property: Wills and Donative Transfers § 3.1, cmt. i (Am. L. Inst. 1999)).

¶13 Jason relies upon cases such as *In re Estate of Horton*, but the "document" there approved by the Court of Appeals of Michigan was an unsigned electronic note on the decedent's phone that the decedent had referenced in a separate handwritten note and described as his "farewell," and which included his instructions about where to find his will. *In re Estate of Horton*, 325 Mich.App. 325, 925 N.W.2d 207 (2018). The Court reasoned, applying Mich. Comp. Laws § 700.2503, the same uniform provision as § 72-2-523, MCA, that "a will need not be written in a particular form or use any particular words; for example, *a letter or other document, such as a deed*, can constitute a will." *In re Horton*, 925 N.W.2d at 212 (emphasis added). This ruling does not further Jason's statutory argument.

[6]¶14 Alexia's argument is consistent with construing a statute "by reading and interpreting the statute as a whole, without isolating specific terms from the context in which they are used by the *423 Legislature." *Mont. Env't Info. Ctr. v. Mont. Dep't of Pub. Serv. Regul.*, 2024 MT 56, ¶ 60, 415 Mont. 499, 545 P.3d 69. It is also consistent with the broader statutory structure. *See* **1259 *Penado v. Hunter*, 2024 MT 216, ¶ 13, 418 Mont. 167, 557 P.3d 434 ("Statutory construction is a holistic endeavor and must account for the statute's text, language, structure, and object." (citations omitted)). The statute's plain language and its structure and context clearly imply that a "document," as used in § 72-2-523, MCA, is a physical paper or possibly digital file on which words are produced, and which would be capable of being signed and witnessed, thus not extending to a video or audio recording. There is no language to suggest that the Legislature contemplated audio or video recordings. *See* §

72-2-523, MCA ("Although a *document or writing added upon a document* was not executed in compliance with 72-2-522, the document or writing is treated as if it had been executed in compliance with that section ...." (emphasis added)). The Official Comments to the section explain that the purpose of § 72-2-523, MCA, is to "allow[ ] the probate court to excuse a harmless error in complying with the formal requirements for executing or revoking a will," and was written to "reduce[ ] the tension between holographic wills and the two-witness requirement for attested wills." Section 72-2-523, MCA, *Annotations*, Off. Cmt. There is no indication that this stated purpose—to relax formal execution requirements for written documents that "harmlessly" failed to satisfy all of the requirements—was intended to authorize entirely new forms of testamentary disposition not previously contemplated by the UPC. Jason contends that § 72-2-523, MCA, authorizes courts to "dispense with formalities if it is satisfied that the decedent intended the document to constitute his or her will," but does not reconcile the statute's narrowly stated purpose to cure "harmless error" in satisfying execution requirements. Jesse's video, while undoubtedly expressing testamentary intent, comports with none of the § 72-2-522, MCA, requirements, nor attempts to. Even under the yet-to-be adopted UEWA, the video satisfies none of its legal standards to ensure a will's authenticity. Unif. Elec. Wills Act § 5(a)(1)-(2). It was neither written, signed, or witnessed by anyone, nor accompanied by documentation attempting to do those things. Thus, to the extent that the video can be considered an attempted will, the errors are not harmless or de minimis. As Alexia argues, such an expansive interpretation of the harmless error exception could "render nearly all will formality obsolete and would likely invalidate both § 72-2-522 and § 72-2-523," the exception swallowing the rules.

¶15 Jason argues that Restatement (Second) of Property (Donative ***424** Transfers) supports an expansive reading of "document" to account for changes in technology. He notes that a comment in the Restatement defines a "donative document of transfer" as one that is "a writing, or the equivalent of a writing," which is defined in part as "[a] recording of spoken words" and extends to "[a]ny other technological development that in clear and convincing manner appropriately manifests the donor's intention to make a gift." Restatement (Second) of Property: Donative Transfers §§ 33.1 cmt. a, 32.1 cmt. b. The problem is that such expansive language is used by neither the statute nor the Official Comments to § 72-2-523, MCA. Nor is there any indication that § 72-2-523, MCA, was intended to incorporate that comment of the Restatement. When the Legislature has chosen to rely on the Restatement to support other concepts within the statute, it has done so explicitly. *See* § 72-2-523, MCA, *Annotations*, Off. Cmt. ("The rule of this section is supported by the Restatement (Second) of Property (Donative Transfers) § 33.1 comment g.").

¶16 We acknowledge Jason's argument that we are required under § 72-1-101(2)(a), MCA, to "liberally construe" the UPC to promote its underlying purposes and policies, but this does not give the Court license to override express statutory language. *See Larson v. State*, 2019 MT 28, ¶ 29, 394 Mont. 167, 434 P.3d 241 ("*Except where contrary to express statutory language*, courts must liberally construe statutes enacted for remedial or beneficent purposes ...." (emphasis added) (internal quotations omitted)). The language of § 72-2-523, MCA, a UPC provision, requires a will to be a "document," and for the reasons outlined above, we find no clear basis that would permit broad extensions of that term to entirely new forms of intended wills, here a video recording lacking any form of statutory authentication, even under a liberal construction of the provision. We ****1260** thus conclude the District Court correctly denied Jason's petition.

¶17 Affirmed.

We concur:

MIKE McGRATH, C.J.

BETH BAKER, J.

LAURIE McKINNON, J.

JAMES JEREMIAH SHEA, J.

INGRID GUSTAFSON, J.

DIRK M. SANDEFUR, J.

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EVIDENCE SUBCOMMITTEE

Houston, We Have a Conflict:
How to identify and address conflicts of interest in virtual representation

Amanda K. D'Arcy
M&T Bank/Wilmington Trust
Wilmington, Delaware

Eric Virgil
Virgil & Rubel LLP
Coral Gables, Florida

Lawrence J. Miller
Gutter, Chaves, Josepher, Rubin, Forman, Fleisher, Miller, P.A.
Boca Raton, Florida

Mark Swirbalus
Holland & Knight
Boston, Massachusetts

SERVE THE CHEERLEADER – SERVE THE WORLD: REPRESENTATION IN ESTATE AND TRUST PROCEEDINGS AND UNDER MODERN TRUST CODES*

by

MARTIN D. BEGLEITER
Ellis and Nelle Levitt
Distinguished Professor Law, Drake University Law School

Presented at ACTEC Big Ten Regional Meeting, Chicago, Illinois, December 5-7, 2008

I. INTRODUCTION

A. Basic rule – In litigation affecting the internal matters of a trust (e.g., accountings, removal or appointment of trustees, construction proceedings, the propriety of investments, etc.), ALL beneficiaries are necessary parties.

B. The consequence of the basic rule is that the failure to make any of the beneficiaries parties results in, AT BEST, a judgment that will not bind the beneficiary who is not made a party or, AT WORST, a judgment that is completely void because the court lacked jurisdiction to render it.

C. This is a particular problem in estate and trust proceedings because some (or in some cases all) of the beneficiaries may be minors, persons under a disability, or persons unborn at the time of the proceeding. Such persons are unable to represent themselves.

D. Courts in such proceedings decided early that, faced with the alternative of the litigation not proceeding due to an absence of necessary parties or appointing a representative for the disabled party, the court would choose the latter alternative.

E. Two solutions to the problem were developed at common law:

1. A guardian ad litem would be appointed to represent the person under disability (see Martin D. Begleiter, The Guardian ad Litem in Estate Proceedings, 20 Willamette L. Rev. 643 (1984)), or;

2. Another person with the same or a substantially similar interest in the proceeding could represent the person under disability.

F. Because of the delay and expense caused by the appointment of a guardian ad litem, the recently enacted modern trust codes, such as the Uniform Trust Code (hereinafter UTC) and the Iowa Trust Code have focused on expanding the second method mentioned in E above, representation by another party to the proceeding. The Codes have expanded representation in two ways:

1. The types of proceedings where representation is applicable, and;

2. Allowing representation which was unknown at common law.

II. BASIC CONCEPTS OF REPRESENTATION

A. Almost all representation at common law was of two types:

1. Fiduciary representation.

2. Virtual representation.

B. Fiduciary representation is based on the idea that a fiduciary can bind the person represented by the fiduciary. An obvious example would be a claim against an estate or trust brought by a creditor. The beneficiaries of the estate or trust need not be made parties because the executor's or trustee's fiduciary duty is to act on behalf of the beneficiaries in estate or trust matters.

C. Virtual representation – In cases involving the internal workings of a trust, fiduciary representation is often unavailing since the fiduciary's duty of impartiality prevents the fiduciary from advocating the position of any beneficiary where the interests of the beneficiaries may be different. Virtual representation allows one beneficiary who is a party to the proceeding to represent another beneficiary or group of beneficiaries if the interests of the representor and representees are closely aligned and are similarly affected by the decision. The basis of virtual representation is that the representor will make every argument that would be made by the persons represented because of the self interest of the representor.

III. BRIEF HISTORY OF REPRESENTATION

A. Virtual representation in probate and trust cases originated in eighteenth century England.

B. In the years up to 1930 in the U.S., virtual representation was tightly restricted. Living remaindermen were permitted to represent unborn remaindermen (that is, if the representator was a remainderman and his children were given remainders if the representor predeceased the life income beneficiary, the parent could virtually represent his or her children).

C. The first Restatement of Property in 1936 summarized the common law rules on virtual representation. The rules were quite restrictive and can be summarized as follows:

1. A living presumptive remainderman could represent his heirs, next of kin or the members of a class related to him who were given subsequent remainders. Note that issue were not included.

2. As to unborns, representation was permitted where the relationship between the represented and representing parties was such that adequate presentation of the representor's position would constitute adequate presentation of the representee's position, the judgment would bind the representor, and the conduct of the representor constituted "sufficient protection" for the person represented (defined in the comments as a similarity of interest rule).

3. Fiduciary representation was allowed.

D. The virtual representation cases under the common law rule tended to be fairly straightforward cases. A typical example was a trust with "income to A for life, on his death to A's children, but if any of A's children predeceased A, to the issue of that child per stirpes." In such a case, each of A's children could represent the unborn issue of that child.

IV. THE MODERN DEVELOPMENT OF VIRTUAL REPRESENTATION: THE NEW YORK EXPERIENCE

A. After long study, in 1967, New York adopted the most extensive statute on virtual representation at that time. NYSCPA § 315 (together with NYSCPA 2210 and NYCPLR 7701). The statute provides for:

1. Representation of future class members by the living members of the class when class membership is determined by a future contingency.

2. Representation of a class of persons described in terms of their relationship to a party to the proceeding by that party if the class takes an interest on the occurrence of future event.

3. Unborn or unascertained persons need not be made parties unless there is no person in being or ascertained having the same interest.

4. The donee of a power of appointment may represent the potential appointees and the donee of a general power of appointment may, in addition, represent the takers in default.

5. Successive contingent interests may be represented by the holder of the first contingent interest.

6. In probate proceedings, very broad representation principles apply.

New York's experience with this statute is instructive, as it has been extensively litigated since its enactment.

B. Overall, and in broad summary, the New York courts have interpreted the statute carefully and conservatively, emphasizing the lack of binding effect of the judgment if virtual representation is allowed when it should not be.

C. Brief comparison of common law and the New York statute:

1. The common law and Restatement limits on virtual representation, such as prohibiting representation of alternative contingent remainder interests by one of the alternative

remaindermen and requiring a living person having a vested interest to be made a party, are done away with.

2. Perhaps more significant, the identity of interest test, and the test of hostility preventing virtual representation, were interpreted almost exclusively as based on the economic interests of the representative and the person represented.

D. The caution of the New York courts in allowing virtual representation are illustrated by the following cases.

1. Estate of Borax, 303 N.Y.S. 2d 739 (Surr. Ct., N.Y. Co. 1969) did not permit testator's son, who received the income from the trust until age 35, and principal at 35, to represent the testator's living grandchildren, who took the corpus if the son died before age 35. The son was age 32 at the time of the accounting proceeding and had one living child. The court noted the son (as income beneficiary) and the grandchild (as contingent remainderman) could have differing interests on whether receipts were principal or income, and whether payments should be made from principal or income. See, however, Estate of Leyshon, 324 N.Y.S. 2d 472 (Surr. Ct., N.Y. Co. 1971), for a decision allowing a contingent secondary income beneficiary-contingent remainderman to represent that beneficiary's issue (all contingent remaindermen), on an executor's accounting, reasoning that the interest of all the trust beneficiaries was to maximize trust corpus.

2. Estate of Trigger, 319 N.Y.S. 2d 792 (Surr. Ct., N.Y. Co. 1971), agreed with Borax on similar facts, quoting from a study of virtual representation that led to the enactment of the statute, which stated that a present income interest was not the same as and "is

antagonistic to" a remainder interest and that a contingent income interest, even coupled with a contingent remainder, is not the same as a "pure remainder interest."

3. Estate of Silver, 340 N.Y.S. 2d 335 (Surr. Ct. Kings Co. 1973) a proceeding to remove a trustee, refused to allow an income beneficiary – contingent remainderman to represent his issue, who had contingent remainders. The opinion contains an extensive discussion of the finality of a decree based on virtual representation and emphasizes the caution necessary by courts, since "there is never any absolute assurance that [such a] decree will not be vulnerable."

4. In Estate of Lawrence, 430 N.Y.S. 2d 533 (Surr. Ct. N.Y. Co. 1980) testator's residuary estate was poured over into two lifetime trusts, one for testator's son and one for his daughter. Each child received the income from his or her trust until age 30, when the trust terminated and corpus was payable to the child. Each child was given a special power of appointment if the child died prior to age 30. In default of exercise of the power, the trust was payable to the child's issue or, if none, to the child's sibling or, if dead, to the sibling's issue or, if none, to testator's sister, if living, or if not to the sister's issue. The question was whether the unborn issue of each child could be represented by the other child, as presumptive remaindermen or, if not, then by testator's sister. The court denied representation by either the other child (because the representation may be inadequate as the child had received income from his or her own trust) and by the sister (because such remote representation "flouts the language of the statute" and raises serious questions as to the adequacy of her representation of the unborns).

5. To be sure, some cases under the statute allowed virtual representation. In a probate proceeding, testator's children were allowed to represent testator's grandchildren where all testator's issue were discretionary beneficiaries of a residuary trust, on the ground that,

in a probate proceeding, the interests of all the beneficiaries were equally affected by the validity or invalidity of a codicil. And in Estate of Connable, 423 N.Y.S. 2d 421 (Surr. Ct. N.Y. Co. 1979), a secondary income beneficiary/presumptive remainderman was allowed to represent his infant children (contingent remaindermen) in an intermediate trust accounting on the ground that they had the same interest in the question involved (maximum funding of the trust). See also Estate of Alexander, 412 N.Y.S. 2d 546 (Surr. Ct., N.Y. Co. 1978), allowing the income beneficiaries of a trust to represent their children (secondary trust income beneficiaries) on an executor's accounting where the issue was allocation of receipts between principal and income.

E. The caution of the New York courts has also been reflected in other states. See, e.g., Thompson v. Humphrey, 101 S.E. 738 (N.C. 1919); Mennig v. Graves, 234 N.W. 189 (Iowa 1931); Matter of Herbert M. Dowsett Trust, 791 P. 2d 398 (Hawaii 1990).

V. UNUSUAL EXTENSIONS OF REPRESENTATION

A. Horizontal Virtual Representation.

1. This doctrine allows adult members of a class to represent minors (or unborn) members of the same class without making the minors (or unborns) parties. For example, suppose a trust provided for income to testator's child for life, and on his death to testator's brothers. Suppose at testator's death, he had six brothers and sisters, four of whom were adults and two of whom were minors and testator's parents were still alive (perhaps testator died at a young age). Horizontal virtual representation would allow the adult brothers and sisters to represent both their living minor brothers and sisters and the potential unborn brothers and

sisters. Notice that this doctrine violates the fundamental notion of American law that a living property owner cannot be deprived of his or her interest or be bound by a judgment unless that person is a party to the proceeding.

2. The Restatement of Property did not allow horizontal virtual representation.

3. The New York statute allows such representation if the will authorizes its use. Cases are few and the indications are that the courts will be cautious in using it. See, Estate of Dickey, 761 N.Y.S. 2d 474 (Surr. Ct. Nassau Co. 2003); Hale v. Hale, 33 N.E. 858 (Ill. 1883); Bolton v. Harrison, 108 S.E. 2d 666 (N.C. 1959); Matter of Trust Under the Will of Maxwell, 704 A.2d 49 (N.J. App. Div. 1997).

B. Releases.

1. In a unique and unusual case, Estate of Lange, 383 A.2d 1130 (N.J. 1978), the court held successors in interest bound by a release executed by their predecessors in interest under virtual representation. The case has not been much discussed by other courts in the 30 years since it was decided.

VI. REPRESENTATION UNDER THE UTC AND OTHER MODERN TRUST CODES

A. Preliminary matters. Selected sections of the UTC and the comments thereto are reprinted in the Appendix at the end of this Article.

1. UTC § 301 provides that notice to a representative is treated the same way as notice to the person. That is, the represented person need not be made a party to the proceeding.

2. In an extension of common law, representation applies to non-judicial actions and proceedings. See UTC § 301, comment.

3. A consent by a beneficiary has same binding effect as a notice, unless the person represented objects to the representation prior to the consent becoming effective. UTC § 301(b). This takes the principle of Estate of Lange (Section V B, supra) and applies it to every instance where a consent is required or provided for under the UTC. Some examples include the consent of beneficiaries to the modification as termination of trusts, to obtain the agreement of qualifies beneficiaries to appoint a successor trustee, and to release a trustee from liability.

4. The use of this expansion of representation to non-judicial actions is risky for the trustee. Estate of Lange has not been embraced by other courts. It is likely that beneficiaries who commit to a change in trustee or execute a release are neither aware of nor give any thought to the possibility that their actions will bind their successor beneficiaries. Nor do the beneficiaries necessarily have legal advice on their decisions, which they are more likely to have in the context of a judicial proceeding.

5. Even more significant, however, is the lack of a judicial arbiter to pass on the effect of a beneficiary's actions. If virtual representation is confined to judicial proceedings, the judge can decide whether virtual representation is justified. If there is no judicial proceeding, and a beneficiary executes a consent or release, there is no judge to decide if the representation is adequate. Thus, the potential for later challenge by the succeeding beneficiary is always present.

B. Representation in Termination and Modification of Trusts.

1. Under the modern trust codes, representation applies to a proceeding to terminate or modify the provisions of a trust. UTC § 301(b) and comment, Iowa Trust Code § 633A.2203.

2. At common law, all decided cases (with two exceptions discussed below) do NOT allow virtual representation in proceedings to modify the provisions of or terminate a trust. Alcott v. Union Planters National Bank, 686 S.W. 2d 79 (Tenn. App. 1985); Nickas v. Capadalis, 954 S.W. 2d 735 (Tenn. App. 1997); A.B. v. Wilmington Trust Co., 191 A.2d 98 (Del. App. Div. 1963); Wachovia Bank & Trust Co. v. Sevier, 255 S.E. 2d 636 (N.C. App. 1979); Pernod v. American National Bank & Trust Co. of Chicago, 132 N.E. 2d 540 (Ill. 1956).

3. Of the two cases allowing virtual representation, Randall v. Randall, 60 F. Supp. 308 (S.D. Fla. 1944), erroneously held that only the holders of vested interests were necessary parties, then cited the questionable proposition that a guardian of the estate of a minor could consent to the termination of behalf of the minor (an issue on which the cases are divided). In dicta (made unnecessary by the ruling described in the preceding sentence), the court held that the unborn issue of the donor were validly represented by the vested remaindermen. The Randall court appeared confused by the issues, and its decision was heavily criticized by later cases.

4. The second case, DuPont v. DuPont, 159 A. 841 (Del. Ch. 1932), cautiously allowed representation of minor remaindermen on the ground that the trustee vigorously defended the trust and that both the representatives and the persons represented would be against termination. It should be noted that a later case in Delaware (A.B. v. Wilmington Trust Co., 191 A.2d 98 (Del. App. Div. 1963)), disagreed with DuPont.

C. Representation by the Donee of a Power of Appointment of the Objects and Takers in Default.

1. The Restatement of Property originally took no position on this question, but a 1948 addition allowed representation of permissible appointees.

2. The UTC expands representation to takers in default of appointment. UTC § 302.

3. Unless the question involves trust termination, where the rules are stricter, the UTC position appears reasonable. The question should be whether the donee of the power, on one hand, and the permissible appointees and takers in default, on the other hand, have similar economic interests on the question involved.

D. Fiduciary Representation

1. The duty of a fiduciary to represent his ward, beneficiary, etc., was a traditional basis for allowing representation. See II B, supra.

2. The modern trust codes follow the case law. UTC § 303; Iowa Trust Code § 633A.6303. A conservator may represent his ward, as may a guardian, and the trustee of a trust not the subject of the action may represent the trust beneficiaries. An executor of an estate not the subject of the action may represent the estate beneficiaries.

3. An important qualification is that a conflict of interest as to the issue or dispute involved will destroy the representation.

4. The only extension made by the UTC in this area is that an agent having authority to act with respect to the question may represent the principal. UTC § 303(3). This provision is new and has no case or common law history. Other sections limit the actions of

agents in certain cases. See, e.g., UTC §§ 411, 602, 303 comment. One recent case, based on a New York statute, allowed an attorney in fact to execute a waiver and consent to probate on behalf of a disabled person with safeguards to ensure the validity and applicability of the powers of attorney and the absence of a conflict of interest. Estate of Murray, 824 N.Y.S. 2d 864 (Surr. Ct. Erie Co. 2006).

E. Representation of Minors by Parents

1. At common law, a parent was often allowed to commence an action on behalf of his or her minor child, assuming no conflict of interest existed. This was often referred to as "next friend" or "prochein ami."

2. However, no such representation was allowed at common law when the minors or unborns are beneficiaries of a trust or estate, and are named as defendants in the action.

3. This apparent discrepancy is based on the "adequacy of representation" concept. A parent has neither a fiduciary duty to her minor child, nor an interest in the trust or estate which she is expected to advance and protect which would in turn protect the minor's interest (the basis of virtual representation). Since a parent as parent is neither a fiduciary nor has an interest in the estate or trust, she was not allowed to represent her minor child in trust and estate proceedings at common law. There is no incentive (fiduciary duty or self interest) for the parent to take action to protect the interest of the minor.

4. In contrast, if the parent commences an action on behalf of a minor, the parent shows a willingness to invest economically (by paying a filing fee, hiring an attorney, etc.) in the minor's action.

5. UTC § 303(a) allows a parent to represent and bind her minor or unborn child if a conservator or guardian has not been appointed. The UTC provision is unique and the comment reveals no basis for believing that the minor or unborn will be adequately represented by the parent.

6. A second problem with the UTC provision is that parental representation precedes virtual representation. That is, a parent will be allowed to represent the child before the adequacy of virtual representation is considered. Since virtual representation has a long case law history and a well accepted rationale, the order chosen by the UTC drafters is curious.

7. Since parental representation imposes no duty to take action on the parent, it is likely to result in many cases of "do nothing" representation. This indicates that courts will view it very cautiously.

8. States considering this question should seriously consider omitting parental representation or at least subordinating parental representation to virtual representation.

F. Virtual Representation. Other than using the phrase "substantially identical interest," which is new, the modern trust codes (including UTC § 304) make little change in virtual representation from the common law and the New York experience previously described.

VIII. TESTING THE ADEQUACY OF THE PERFORMANCE OF THE REPRESENTATIVE

A. Compromises.

1. Normally the adequacy of the representation (whether the representor and representee have the same interests, hostility, conflict of interest, etc.) is tested at the beginning of the proceeding and based on the likelihood that all the arguments that could be made by the person represented will be made by the representative. However, once the decision to allow virtual representation is made, it is almost never reexamined.

2. However, the interests of the parties may change in a litigation. For example, a compromise maybe offered, giving the representatives a greater interest in the trust or estate or a more current interest.

3. In such a case, since a guardian ad litem may be appointed at any stage of a proceeding, it would make sense for a court to reexamine the representation to determine if the parties represented still have the same economic identity of interest under the compromise and, if not, to see if another representative is present or appoint a guardian ad litem.

4. Although no court has explicitly adopted this course of action, there are cases indicating that some courts are following this course of action when it becomes necessary. See, e.g., Estate of Dickey, 761 N.Y.S. 2d 473 (Surr. Ct. Nassau Co. 2003). But see, Mabry v. Scott, 124 P.2d 659, cert denied, 317 U.S. 670 (Cal. App. 1942), the leading case on this question.

B. "Do nothing" representation.

1. The concept of virtual representation assumes that, based on the identity of economic interest between the representator and the persons represented, self interest will assure that the representative will make all the arguments that the persons represented would have made had they been made parties. There is no assurance, however, that this will actually occur. Lack

of interest, lack of funds, and other factors may cause a party to fail to actively participate in a proceeding. I refer to this as "do nothing" representation.

2. This problem appears only in virtual representation and the newly authorized parental representation.

3. The cases take the view that the actual adequacy of representation is not relevant. Estate of O'Connor, 339 N.Y.S. 2d 726 (Surr. Ct. N.Y. Co. 1973) is the leading case. Even the UTC does not explicitly require testing of the actual adequacy of representation.

4. Is this attitude sufficient for protection of persons under disability? Probably not. There is no reason for a court, prior to making a decision, not to examine the adequacy of the virtual representation. Suppose, for example, that all the representative has done is file an appearance. The representative has filed no brief and made no argument. Can the court not (and should the court not) rule that the representation is inadequate (just as if there was a conflict of interest between the representative and the persons represented) and appoint a guardian ad litem for the persons under disability? The court has this power. It should exercise it. Some courts have done so without explicitly stating the ground for so doing. See Estate of Dickey, 761 N.Y.S. 2d 473 (Surr. Ct. Nassau Co. 2003); Estate of Clark, 412 N.Y.S. 2d 546 (Surr. Ct. N.Y. Co. 1978); Estate of Lawrence, 430 N.Y.S. 2d 533 (Surr. Ct. N.Y. Co. 1980); Matter of Maxwell, 704 A.2d 49 (N.J. App. Div. 1997); Ludwig v. Sommers, 202 N.E. 2d 337 (Ill. App. 1964); Mennig v. Graves, 234 N.W. 189 (Iowa 1931). See also Wogman v. Wells Fargo Bank & Union Trust Co., 267 P.2d 423 (Cal. App. 1954) (adequacy of performance of guardian ad litem).

APPENDIX – UNIFORM TRUST CODE, SELECTED SECTIONS AND COMMENTS

SECTION 301. REPRESENTATION: BASIC EFFECT.

(a) Notice to a person who may represent and bind another person under this [article] has the same effect as if notice were given directly to the other person.

(b) The consent of a person who may represent and bind another person under this [article] is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective.

(c) Except as otherwise provided in Sections [411 and] 602, a person who under this [article] may represent a settlor who lacks capacity may receive notice and give a binding consent on the settlor's behalf.

[(d) A settlor may not represent and bind a beneficiary under this [article] with respect to the termination or modification of a trust under Section 411(a).]

Comment

This section is general and introductory, laying out the scope of the article.

Subsection (a) validates substitute notice to a person who may represent and bind another person as provided in the succeeding sections of this article. Notice to the substitute has the same effect as if given directly to the other person. Subsection (a) does not apply to notice of a judicial proceeding. Pursuant to Section 109(d), notice of a judicial proceeding must be given as provided in the applicable rules of civil procedure, which may require that notice not only be given to the representative but also to the person represented. For a model statute for the giving of notice in such cases, see Unif. Probate Code Section 1-403(3). Subsection (a) may be used to facilitate the giving of notice to the qualified beneficiaries of a proposed transfer of principal place of administration (Section 108(d)), of a proposed trust combination or division (Section 417), of a temporary assumption of duties without accepting trusteeship (Section 701(c)(1)), of a trustee's resignation (Section 705(a)(1)), and of a trustee's report (Section 813(c)).

Subsection (b) deals with the effect of a consent, whether by actual or virtual representation. Subsection (b) may be used to facilitate consent of the beneficiaries to modification or termination of a trust, with or without the consent of the settlor (Section 411), agreement of the qualified beneficiaries on appointment of a successor trustee of a noncharitable trust (Section 704(c)(2)), and a beneficiary's consent to or release or affirmance of the actions of a trustee (Section 1009). A consent by a representative bars a later objection by the person represented, but a consent is not binding if the person represented raises an objection prior to the date the consent would otherwise become effective. The possibility that a beneficiary might object to a consent given on the beneficiary's behalf will not be germane in many cases because the person represented will be unborn or unascertained. However, the representation principles of this article will sometimes apply to adult and competent beneficiaries. For example, while the trustee of a revocable trust entitled to a pourover devise has authority under Section 303 to approve the personal representative's account on behalf of the trust beneficiaries, such consent would not be binding on a trust beneficiary who registers an objection. Subsection (b) implements cases such as *Barber v. Barber*, 837 P.2d 714 (Alaska 1992), which held that the a refusal to allow an objection by an adult competent remainder beneficiary violated due process.

Subsection (c) implements the policy of Sections 411 and 602 requiring express authority in the power of attorney or approval of court before the settlor's agent, conservator or guardian may consent on behalf of the settlor to the termination or revocation of the settlor's revocable trust.

SECTION 302. REPRESENTATION BY HOLDER OF GENERAL TESTAMENTARY POWER OF APPOINTMENT. To the extent there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power.

SECTION 303. REPRESENTATION BY FIDUCIARIES AND PARENTS. To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

(1) a [conservator] may represent and bind the estate that the [conservator] controls;

(2) a [guardian] may represent and bind the ward if a [conservator] of the ward's estate has not been appointed;

(3) an agent having authority to act with respect to the particular question or dispute may represent and bind the principal;

(4) a trustee may represent and bind the beneficiaries of the trust;

(5) a personal representative of a decedent's estate may represent and bind persons interested in the estate; and

(6) a parent may represent and bind the parent's minor or unborn child if a [conservator] or [guardian] for the child has not been appointed.

Comment

This section allows for representation of persons by their fiduciaries (conservators, guardians, agents, trustees, and personal representatives), a principle that has long been part of the law. Paragraph (6), which allows parents to represent their children, is more recent, having originated in 1969 upon approval of the Uniform Probate Code. This section is not limited to representation of beneficiaries. It also applies to representation of the settlor. Representation is not available if the fiduciary or parent is in a conflict position with respect to the particular matter or dispute, however. A typical conflict would be where the fiduciary or parent seeking to represent the beneficiary is either the trustee or holds an adverse beneficial interest.

Paragraph (2) authorizes a guardian to bind and represent a ward if a conservator of the ward's estate has not been appointed. Granting a guardian authority to represent the ward with respect to interests in the trust can avoid the need to seek appointment of a conservator. This grant of authority to act with respect to the ward's trust interest may broaden the authority of a guardian in some States although not in States that have adopted the Section 1-403 of the Uniform Probate Code, from which this section was derived. Under the Uniform Trust Code, a

"conservator" is appointed by the court to manage the ward's property, a "guardian" to make decisions with respect to the ward's personal affairs. *See* Section 103.

Paragraph (3) authorizes an agent to represent a principal only to the extent the agent has authority to act with respect to the particular question or dispute. Pursuant to Sections 411 and 602, an agent may represent a settlor with respect to the amendment, revocation or termination of the trust only to the extent this authority is expressly granted either in the trust or the power. Otherwise, depending on the particular question or dispute, a general grant of authority in the power may be sufficient to confer the necessary authority.

SECTION 304. REPRESENTATION BY PERSON HAVING SUBSTANTIALLY IDENTICAL INTEREST. Unless otherwise represented, a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented.

Comment

This section authorizes a person with a substantially identically interest with respect to a particular question or dispute to represent and bind an otherwise unrepresented minor, incapacitated or unborn individual, or person whose location is unknown and not reasonably ascertainable. This section is derived from Section 1-403(2)(iii) of the Uniform Probate Code, but with several modifications. Unlike the UPC, this section does not expressly require that the representation be adequate, the drafters preferring to leave this issue to the courts. Furthermore, this section extends the doctrine of virtual representation to representation of minors and incapacitated individuals. Finally, this section does not apply to the extent there is a conflict of interest between the representative and the person represented.

Restatement (First) of Property §§ 181 and 185 (1936) provide that virtual representation is inapplicable if the interest represented was not sufficiently protected. Representation is deemed sufficiently protective as long as it does not appear that the representative acted in hostility to the interest of the person represented. Restatement (First) of Property § 185 (1936). Evidence of inactivity or lack of skill is material only to the extent it establishes such hostility. Restatement (First) of Property § 185 cmt. b (1936).

Typically, the interests of the representative and the person represented will be identical. A common example would be a trust providing for distribution to the settlor's children as a class, with an adult child being able to represent the interests of children who are either minors or unborn. Exact identity of interests is not required, only substantial identity with respect to the particular question or dispute. Whether such identity is present may depend on the nature of the interest. For example, a presumptive remaindermen may be able to represent alternative remaindermen with respect to approval of a trustee's report but not with respect to interpretation of the remainder provision or termination of the trust. Even if the beneficial interests of the representative and person represented are identical, representation is not allowed in the event of conflict of interest. The representative may have interests outside of the trust that are adverse to the interest of the person represented, such as a prior relationship with the trustee or other beneficiaries. *See* Restatement (First) of Property § 185 cmt. d (1936).

SECTION 305. APPOINTMENT OF REPRESENTATIVE.

(a) If the court determines that an interest is not represented under this [article], or that the otherwise available representation might be inadequate, the court may appoint a [representative] to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown. A [representative] may be appointed to represent several persons or interests.

(b) A [representative] may act on behalf of the individual represented with respect to any matter arising under this [Code], whether or not a judicial proceeding concerning the trust is pending.

(c) In making decisions, a [representative] may consider general benefit accruing to the living members of the individual's family.

Comment

This section is derived from Section 1-403(4) of the Uniform Probate Code. However, this section substitutes " representative" for "guardian ad litem" to signal that a representative under this Code serves a different role. Unlike a guardian ad litem, under this section a representative can be appointed to act with respect to a nonjudicial settlement or to receive a notice on a beneficiary's behalf. Furthermore, in making decisions, a representative may

consider general benefit accruing to living members of the family. “Representative” is placed in brackets in case the enacting jurisdiction prefers a different term. The court may appoint a representative to act for a person even if the person could be represented under another section of this article.

Houston, We Have a Conflict!

Identifying and Addressing Conflicts of Interest in Virtual Representation

Review of Florida Decision of *Carmel v. Fleischer*, 391 So. 3d 907 (Fla. 4th DCA 2024)

ACTEC Fiduciary Litigation Committee
Presented March 20, 2025

Eric Virgil, Esq.
Virgil & Rubel LLP
201 Alhambra Circle, Suite 705
Coral Gables, FL 33134
Telephone: (305) 448-6333
Email: eric@virgillaw.com
www.virgilrubellaw.com

***Carmel v. Fleischer*, 390 So. 3d 907 (Fla. 4th DCA 2024). The Fourth District holds that, where a conflict exists between a trustee of a testamentary trust and a trust beneficiary, the beneficiary is an interested person as to probate proceedings, and is not represented by the trustee, even where there is no identity between the personal representative and the trustee.**

Carmel died in 2017 and was survived by three children, including Mark. Shortly before his death, Carmel executed a codicil to his will providing that Mark's share of the estate would be held in trust, with Mark's brother Randall, and Allen Lamberg, as trustees. Mark's children became remainder beneficiaries of the trust. Litigation ensued between the brothers over the validity of the codicil. Ultimately, a settlement was reached that included appointing Fleischer to act as personal representative and administer the estate. It is worth noting that part of the settlement agreement specified that Randall and Mark were not to communicate, even though the trust apparently continued to be in force. Unfortunately, the settlement agreement apparently did not resolve the family disputes and litigation continued over the settlement agreement.

While that litigation continued, Fleischer administered the Carmel estate. Then, in 2019, after receiving a trustee's accounting and the trustee's waiver of any accounting of the estate, Mark objected to both and demanded an inventory and accounting for both the estate and trust. The opinion does not say what happened next until it notes that in January 2023, Fleischer filed a final accounting of personal representative, and a petition for discharge. Fleischer's petition acknowledged Mark's prior filings (presumably including his "objections") but took the position that Mark lacked standing because he was not an interested person in the probate proceedings. According to Fleischer, Mark was only a qualified beneficiary of a testamentary trust, and Fleischer himself was not a trustee of that trust. Mark then filed an objection to Fleischer's petition for discharge, arguing that Fleischer was required to serve the petition and the final accounting on Mark. Mark also filed a surcharge petition against Fleischer, alleging, among other things, that Fleischer had improperly assessed estate administration expenses against the trust, and had failed to fund the trust agreement with the proper amount from the estate.

Fleischer filed a motion to strike Mark's surcharge petition. Fleischer maintained that Mark lacked standing as an interested person in the probate proceedings because Mark was not a beneficiary of the probate estate but solely the beneficiary of a testamentary trust. The trial court granted Fleischer's motion to strike Mark's petition, holding: "Mark Carmel is not a beneficiary of this Estate, rather, Mark Carmel is a beneficiary of a testamentary trust created by his father, and the trustees of the trust for the benefit of Mark Carmel are Randall Carmel and Allen Lamberg. Randall Carmel and Allen Lamberg, as co-trustees, are the real parties in interest as to the

portion of the Estate distributed to Mark Carmel's Trust." In addition, the trial court also granted Fleischer's petition for discharge, because no "real parties in interest" objected to the petition.

The Fourth District disagreed and held that, under the facts of this case, Mark was an "interested person" in the probate proceedings. The Court began by noting that Section 731.201(23), Florida Statutes (2022), defines an "interested person" as:

"[A]ny person who may reasonably be expected to be affected by the outcome of the particular proceeding involved. . . . The meaning, as it relates to particular persons, may vary from time to time and must be determined according to the particular purpose of, and matter involved in, any proceedings."

The Court then cited with approval *Richardson v. Richardson*, 524 So. 2d 1126 (Fla. 5th DCA 1988) and *In re Estate of Watkins*, 572 So. 2d 1014, 1015 (Fla. 4th DCA 1991), which both held that a contingent beneficiary of a trust under the will was an interested person who had standing to seek revocation of probate.

Fleischer argued that *Buerki v. Lochner*, 570 So. 2d 1061 (Fla. 2d DCA 1990), and *Roller v. Collins*, 373 So. 3d 35 (Fla. 5th DCA 2023), are applicable and demonstrate that the trustees of the trust have standing as to the trust's interest in the estate. The Court disagreed and held those cases distinguishable. The Court noted that those cases analyzed whether a beneficiary of a trust, rather than the trustee, could bring an action on behalf of the trust. Here, the Court held that "Mark does not seek to bring an action on behalf of his trust, but rather asserts standing to object to Fleischer's final accounting and petition for discharge based on his status as the beneficiary of his testamentary trust." In other words, the Court explained that "Mark seeks to prevent the testamentary trust for his benefit from being dissipated."

Fleischer further argued that under section 731.303(1)(b)2., Florida Statutes (2022)(the Probate Code representation statute), Mark's interests in the probate estate were represented by the trustees, supporting the trial court's ruling. The Fourth District noted that section 731.303(1)(b)2. provides that if there is no conflict of interest between the persons represented, then certain orders binding a trustee bind beneficiaries of the trust in probate proceedings. In practice, this has meant that so long as the personal representative and the trustee are not the same individual or entity, then the personal representative must only deal with the trustee as an interested party on behalf of the trust and not all the underlying trust beneficiaries. However, the Court found that section 731.303(1)(b)2. did not apply here because there was a conflict between Mark and the trustees. The conflict cited by the Court was the dispute about the settlement agreement and that trustee Randall, as a beneficiary of the

estate, stood to benefit to the extent that Mark's trust was required to incur more of the estate expenses.

Application: This case is one of the first Florida appellate decisions to address what “conflict” means in the context of virtual representation. It does not appear that the decision should be read to mean personal representatives must now serve trust beneficiaries where a trust is a probate beneficiary, even when the personal representative and trustee are not identical. Rather it likely should be read to mean that if a trust beneficiary can demonstrate a conflict with the trustee to the probate court, then the beneficiary has shown he is an interested party with standing in the probate proceedings in addition to the trustee.

Report of Florida Bar RPPTL Section Probate Litigation Committee (Interested Persons Subcommittee Report Authored by John C.W. Cherneski, Matthew L. Worsham, and Antonio P. Romano)

February 2025 Florida Bar RPPTL Meeting

VIRGIL & RUBEL LLP
201 ALHAMBRA CIRCLE, SUITE 705, CORAL GABLES, FL 33134, TELEPHONE (305) 448-6333

TO: Litigation Committee

From: John C.W. Cherneski (memo author/presenter)
Matthew L. Worsham (memo author/presenter)
Antonio P. Romano (memo author/presenter)
Cady L. Huss
Brian Felcoski
Alex Douglas
Liz Hughes

Date: February 2024 RPPTL Meetings

Re: Interested Persons Subcommittee

I. Subcommittee History and Conclusion.

This subcommittee was formed at the Breakers Meetings in 2024 to review and discuss the *Carmel v. Fleischer, 391 So. 3d 907* (4th DCA 2024) decision (summary of the decision in Section II of this memorandum). The *Carmel* court concluded that a beneficiary of a testamentary trust was an interested person in an estate with standing to object to the personal representative's petition for discharge despite being represented by trustees in the estate administration. In *Carmel,* the beneficiary objected to the personal representative's petition for discharge and claimed that he was inadequately represented because of a conflict between him and his trustee. The court determined there was a conflict and as such, the beneficiary would not be bound to orders binding the trustee.

The committee met on multiple occasions to discuss the case, the research conducted by John Cherneski, Matthew Worsham, and Antonio Romano, and whether a statutory fix is necessary given the holding of *Carmel*. Their research is outlined in this memorandum below.

The focus of the subcommittee meetings was on the broad authority provided to the probate court, through the Florida Probate Code and the Probate Rules, to answer questions in an estate administration. The court has the authority to determine whether someone is an interested person pursuant to Section 731.201(23), Fla. Stat., and whether a beneficiary is adequately represented by a fiduciary or other representative pursuant to Section 731.303(4), Fla. Stat. The *Carmel* decision does not affect the probate court's broad authority.

The subcommittee agreed that as the law stands, the personal representative can request the Court's confirmation that the beneficiaries of a testamentary trust are adequately represented by the trustee in an estate. To obtain finality, the personal representative might seek the court's decision on adequate representation or simply serve the beneficiaries of the trust if there are any questions regarding representation.

Similarly, a beneficiary could request a court order determining them to be an "interested person" for a certain purpose pursuant to Section 731.201(23) or a determination that they are inadequately represented. In *Carmel*, the beneficiary chose to object to the personal representative's petition for discharge and claimed inadequate representation due to a conflict. The subcommittee concluded that there are multiple ways to present this question to the court and an objection is one of them.

In summary, the subcommittee feels that Florida law authorizes a court to determine whether someone is an interested person or adequately represented in an estate proceeding. The subcommittee recommends that no action be taken as a result of the *Carmel* decision.

II. *Carmel* Case Summary.

The 4th DCA ruled that the beneficiary of a testamentary trust was an interested person and had standing to object to a personal representative's petition for discharge. *Carmel* at *3. The 4th DCA also held that the trust beneficiary had standing to file a petition for surcharge against the personal representative. *Id.*

In *Carmel*, the decedent was survived by three adult children: two sons, Mark and Randall Carmel, and one daughter, Caren Sichel. See Dkt. No. 577 and portions of decedent's will and codicil quoted therein.[1] Pursuant to the decedent's fourth codicil, Mark Carmel's share of the estate was to be held in trust. *Id.* Two individuals were named as trustees for Mark's trust: his brother, Randall Carmel and a third-party named Allen Lamberg. See *Id.*

On August 8, 2022, Mark filed a Request to Receive Notice by an Interested Party in the probate case. See Dkt. Nos. 576 and 611, Ex. 4.[2] In the Notice, Mark alleged that he

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[1] All references to docket numbers are to the probate case in the Circuit Court For Palm Beach County, Florida, Case No. 50-2017-CP-001695, Division IZ, *In Re: Estate of Herbert Carmel.*

[2] It is unclear whether the Request to Receive Notice was ever filed in its entirety as a separate filing. Docket Number 576 appears to only include the signature page. Presumably, the complete notice was served on the personal representative.

was an interested [person] as defined in § 731.201(23) Fla. Stat. in the probate proceedings. *Id.* Although he does not cite Rule 5.060, Fla. Prob. R. in his request for notice, Mark relied on *Hayes v. Guardianship of Thompson*, 952 So.2d 498 (Fla. 2006). *Hayes* holds that an interested person that files a request pursuant to Rule 5.060 is entitled to notice of further proceedings and copies of all subsequent pleadings in the case "as long as the requirements of the rule have been satisfied *and the trial court agrees that the person does in fact qualify as an 'interested person.'*"[3] *Hayes* 952 So.2d at 507 (emphasis added). Hayes goes on to hold that "if the person is entitled to notice or is authorized to file an objection, that person has standing to participate in the guardianship proceeding."

Although Mark filed his request for notice and alleged that he was an interested person and entitled to notice, the probate court did not make a determination at that time regarding whether Mark was an interested person. On November 7, 2022, Mark objected to a waiver of accounting filed by his sister. Dkt. No. 586.[4]

On January 12, 2023, the personal representative filed a petition for discharge and identified the persons having an interest in the proceeding as Randall Carmel, individually and as co-trustee of Mark's trust, Allen Lamberg as co-trustee as Mark's trust, and Caren Sichel. Dkt. No. 596. The personal representative's petition for discharge contains a footnote acknowledging Mark's objection to the waiver of accounting (Dkt. No. 586) and request for notice (Dkt. No. 576), but states that Mark is not an interested party because he is not a beneficiary of the estate in his individual capacity. The personal representative states in his petition that Mark is a qualified beneficiary of the testamentary trust and the personal representative is not a trustee of that trust. Dkt. No. 596.

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[3] The Supreme Court declined to provide any strict guidelines for lower courts to apply in determining whether a person is an "interested person" in the proceedings involved in *Hayes* due to the fact intensive, case specific nature of the inquiry. "And because the question of who is an 'interested person' may vary as the circumstances of the guardianship change, we cannot provide strict guidelines for the lower courts to follow in deciding whether a party who receives notice of a petition for attorney's fees pursuant to a request made under rule 5.060 is a 'person who may reasonably be expected to be affected by the outcome of the ... proceeding.' § 731.201(21), Fla. Stat." *Hayes* 952 So.2d at 508.

[4] Mark also included the personal representative's petition for discharge in his objection. However, this appears to be a typo as the personal representative's petition for discharge was filed on January 12, 2023. See Dkt. No. 596. Sichel's waiver of accounting does include a consent to discharge and may explain the title of Mark's first objection. See Dkt. No. 585. It also does not appear that Mark filed a separate objection to the waiver of accounting signed by both of the trustees to his trust (Dkt. No. 577). However, his objection to the personal representative's petition for discharge can be construed broadly to include an objection to the waiver of accounting. See Dkt. Nos. 598 & 599.

On January 25, 2023, Mark filed an objection to the petition for discharge. Dkt. No. 598.[5] On February 16, 2023, Mark filed a surcharge petition against the personal representative. Dkt. No. 604. On March 9, 2023, the personal representative filed an amended motion to strike Mark's surcharge petition. Dkt. No. 610. The personal representative's motion to strike reiterates his argument that Mark is not a beneficiary of the estate and that the trustees of the trust, Randall Carmel and Allen Lamberg, are the real parties in interest for Mark's share of the estate. *Id.*

On April 27, 2023, the probate court entered an order granting the personal representative's amended motion to strike the surcharge petition. Dkt. No. 642. The probate court held that Mark is not a beneficiary of the estate, rather he is a beneficiary of the testamentary trust and as such the co-trustees, Randall Carmel and Allen Lamberg, are the real parties in interest concerning Mark's share of the estate. *Id.* The order does not specifically address whether Mark meets the statutory definition of an interested person. See *Id.* The probate court also entered a separate order of discharge that same day. Dkt. No. 643. The order of discharge also does not specifically address whether Mark meets the statutory definition of "interested person." See *Id.*

On appeal, the 4th DCA agreed with Mark that he was an interested person in the discharge proceedings and had standing to file the petition for surcharge. *Carmel* at *3. The appellate court also held that in this case, orders binding the trustees did not bind Mark as a beneficiary pursuant to Fla. Stat. § 731.303(1), because a conflict existed between Randall, a trustee, and Mark. *Id.* at *3. The appellate court did not discuss whether a conflict exists with the other co-trustee, Mr. Lamberg, and how that impacts the analysis under 731.303. The Court reversed the order of discharge and remanded for further proceedings. *Id.* On August 21, 2024, the 4th DCA denied the personal representative's motion for rehearing and issued its mandate on September 10, 2024.

III. Questions Presented.

1. Whether other states' statutes on representation have any mechanism for a beneficiary to challenge the adequacy of a trustee's representation.

2. Whether there is any express authority for a personal representative or person claiming that he/she is an interested person to seek confirmation from the probate court of the adequacy of the

[5] Mark filed another objection to the petition for discharge on January 26, 2023. Dkt. No. 599.

representation of the trust beneficiary's interest by the trustee of that trust.

IV. Current Status of Florida Law Concerning these Issues.

A. Applicable Probate Code & Rule Provisions

1. Representation and Notice

731.303. Representation

(b) To the extent there is no conflict of interest between them or among the persons represented:

...

2. Orders binding a trustee bind beneficiaries of the trust in proceedings to probate a will, in establishing or adding to a trust...However, for purposes of this section, a conflict of interest shall be deemed to exist when each trustee of a trust that is a beneficiary of the estate is also a personal representative of the estate.

...

(3) In proceedings involving the administration of estates, notice is required as follows:

(a) Notice as prescribed by law shall be given to every interested person, or to one who can bind the interested person as described in paragraph (1)(a) or paragraph (1)(b). Notice may be given both to the interested person and to another who can bind him or her.

...

(4) *If the court determines that representation of the interest would otherwise be inadequate,* the court may, at any time, appoint a guardian ad litem to represent the interests of *an incapacitated person, an unborn or unascertained person, a minor or any other person otherwise under a legal disability, or a person whose identity or address is unknown...*

§ 731.303, Fla. Stat. Ann. (emphasis added).

Rule 5.060. Requests for Notices and Copies of Pleadings

(a) Request. *Any interested person* who desires notice of proceedings in the estate of a decedent or ward *may file a separate written request for notice of further proceedings,* designating therein such person's residence and post office address. When such person's residence or post office address changes, a new designation of such change shall be filed in the proceedings. A person filing such request, or address change, must serve a copy

on the attorney for the personal representative or guardian, and include a certificate of service.

(b) Notice and Copies. A party filing a request *shall be served* thereafter by the moving party with notice of further proceedings and with copies of subsequent pleadings and documents *as long as the party is an interested person.*

FL ST PROB Rule 5.060 (emphasis added).

2. Interested Person Definition

731.201. General definitions

(23) "Interested person" means any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved. In any proceeding affecting the estate or the rights of a beneficiary in the estate, the personal representative of the estate shall be deemed to be an interested person. In any proceeding affecting the expenses of the administration and obligations of a decedent's estate, or any claims described in s. 733.702(1), the trustee of a trust described in s. 733.707(3) is an interested person in the administration of the grantor's estate. The term does not include a beneficiary who has received complete distribution. The meaning, as it relates to particular persons, may vary from time to time and must be determined according to the particular purpose of, and matter involved in, any proceedings.

§ 731.201(23), Fla. Stat. Ann.

B. Applicable Trust Code Provisions

736.0303. Representation by fiduciaries and parents

To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

...

(3) A trustee may represent and bind the beneficiaries of the trust.

§ 736.0303, Fla. Stat. Ann.

736.0305. Appointment of representative

(1) *If the court determines that* an interest is not represented under this part, or that *the otherwise available representation might be inadequate,* the court may appoint a representative to receive notice, give consent, and otherwise represent, bind, and act *on behalf of a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown...*

§ 736.0305, Fla. Stat. Ann. (emphasis added).

C. Case Law

We have searched Florida case law for cases challenging the adequacy of a trustee's representation of a beneficiary's interest in probate proceedings. We did not identify any case law that specifically addressed this issue. However, we were able to locate some cases applying 731.303. Two of the relevant cases concerned the appointment of a guardian ad litem for a minor because the current representation was alleged to be inadequate. One case involved residual beneficiaries bringing a civil action against another estate beneficiary.

The relevant cases are: *In re Verdier's Estate,* 281 So. 2d 543 (Fla. 2d DCA 1973) (Trial court should have appointed guardian ad litem for minor because personal representative had adverse interest to minor. Minor filed a petition in the probate court seeking appointment of guardian ad litem, in addition to other relief requested); *All Children's Hosp., Inc. v. Owens,* 754 So. 2d 802 (Fla. 2d DCA 2000) (Summary Judgment affirmed for defendant because action by residual beneficiaries should be pursued by the personal representative or administrator ad litem and not small group of beneficiaries); *Tallahassee Mem'l Reg'l Med. Ctr., Inc. v. Petersen,* 920 So. 2d 75 (Fla. 1st DCA 2006) (Affirming denial of defendant's emergency motion for appointment of guardian ad litem for minor. Defendant hospital failed to demonstrate that Plaintiff parents' interests were adverse enough to child's interest to require appointment of guardian ad litem). These cases are included in the file sharing link under the sub-folder "Florida Law."

V. Other States' Statutory Approach to this Issue.

A. Statutory Mechanism / Procedure to Challenge Sufficiency of Representation

A review of other states' probate and trust codes did not reveal any state that has created a statutory process that directly addresses the questions presented here. Although many states have provisions similar to sections 731.303(4) and 736.0305(1), Florida Statutes, they limit the appointment of an alternate representative because the

representation is inadequate to persons who are a "minor, incapacitated, or unborn individual, or a person whose identity or location is unknown."[6]

Several states had similar provisions to section 731.303(b), Florida Statutes. They stated, with some small variation, that if no conflict of interest exists, orders binding the trustee bind the trust beneficiaries. No state had specific provisions dealing with what occurs if a conflict exists—presumably you must serve the trust beneficiaries.

Some states address a represented person's right to object to a representative's consent with slight variations to section 736.0301, Florida Statutes. There were a significant number of states that allow a represented person to "object to the representation before the consent would otherwise have become effective." However, the states with these provisions do not address procedural steps once the objection is made. States that have the right to object include Arizona (A.R.S. § 14-1404), Arkansas (A.C.A. § 28-73-301), California (Cal. Prob. Code § 19508), Colorado (C.R.S.A. § 15-5-301), Connecticut (C.G.S.A. § 45a-499q), District of Columbia (DC ST § 19-1303.01), Georgia (Ga. Code Ann. § 53-12-8), Hawaii (HRS § 554D-301), Indiana (IC 30-4-6-10.5), Kansas (K.S.A. 58a-301), Ohio (ORC Ann. § 5803.01), South Carolina (SC Code Ann. § 62-7-301), Tennessee (Tenn. Code Ann. § 35-15-301), and Texas (Tex. Prop. Code § 114.003).

The District of Columbia has a general statute authorizing a "beneficiary of a trust,...at any time, [to] petition the Court for an order...with or without a hearing, to resolve a question or controversy arising in the course of a supervised or unsupervised administration of a decedent's estate." DC ST § 20-107. The statute states that the request does not have to be in a particular format. The request must simply identify the issue or concern the interested person wants the court to review. *Id.* If the request is made in an unsupervised administration by an interested person, the court reviews it to determine whether a hearing is necessary and sets a hearing if it is.[7] *Id.*

Iowa has a provision in the portion of its trust code addressing nonjudicial settlement agreements that allows an interested person to request that the court "determine whether the representation provided was adequate." I.C.A. § 633A.6308. However, the statute only states that the person has the right to seek judicial review, and does not elaborate further regarding the procedure for same.

B. "Interested Person" Definitions

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[6] Most, if not all, of these other states with similar provisions are UTC states.

[7] The District of Columbia has unsupervised administration. We will need to research this more if the subcommittee wants to explore this statutory approach.

Some states did address this issue with more expansive definitions for interested person. Notably, Nevada defined interested person as "a person whose right or interest under an estate or trust may be materially affected by a decision of a fiduciary or a decision of the court." NRS 132.185. While the decision of who is "interested" is determined by the fiduciary or court on a situational basis, Nevada also provides an additional "interested person" definition based on specific circumstances. For an estate, a person is "interested" if they are an "heir, devisee, child, spouse, creditor, settlor or beneficiary." NRS 132.309(1)(b)(1). A beneficiary is further defined as "a person who has a present or future interest, vested or contingent" in a trust. NRS 132.050 Since the definition of devisee excludes trust beneficiaries, we must assume this definition of beneficiary includes trust beneficiaries. In a Nevada probate administration, an interested person may object to the petition for discharge. NRS 151.030. Accordingly, Nevada has gotten around our problem by including trust beneficiaries in the definition of interested person. By provided them with authority to participate and object in the probate proceedings, they are inherently bound by any court Order, without the need for any representative capacity.

Interestingly, Tennessee does not specifically define an interested person in its definitions section. However, the term "interested person" is defined in T. C. A. § 30-2-614, Federal estate taxes and state inheritance or estate taxes; proration, and specifically refers to a Trust, as follows: "For the purposes of this section, 'persons interested in the estate' means all persons who may be entitled to receive, or who have received, any property or interest that is required to be included in the gross estate of a decedent, or any benefit whatsoever with respect to any such property or interest, whether under a will, or intestacy, or by reason of any transfers, trust, estate, interest, right, power, relinquishment of power, gift in contemplation of death, gift taking effect in possession or enjoyment at or after death, or any other transfer inter vivos that is subject to federal death taxes, or the proceeds of any insurance policies that are subject to federal death taxes."

Several of the states include "others having a property right in or claim against a trust estate or the estate of a decedent," including Maine. Title 18-C: PROBATE CODE: §1-201(26). While Maine also has a provision whereby trustees bind beneficiaries, absent a conflict, its probate rules provide a mechanism for any interested person to receive notice of all filings, hearings, and orders in the probate proceeding. Maine Prob. Rule 4D(a). While it has little practical effect if a conflict exists, since the beneficiary is not bound, they are provided with the ability to monitor the administration. That rule could easily be modified to state that anyone who receives all filings, hearings, and orders is bound by them, absent a timely objection.

A trust beneficiary who is not directly a beneficiary of the probate estate generally does not have automatic standing to contest probate proceedings. However, if the probate process significantly impacts their interests in the trust, they might have grounds to seek court intervention or raise concerns through petitions, especially if they can demonstrate how the probate administration adversely affects their trust interests. In addition to Maine, Alabama (§ 43-8-1(14)), Alaska (AS § 13.06.050), Arizona (A.R.S. §14-1201), California (Cal. Prob. Code § 48), Colorado (C.R.S.A. § 15-10-201), Hawaii (HRS § 560:1-201), Idaho (I.C. § 15-1-201), Indiana (IC 29-1-1-3), North Dakota (§ 30.1-01-06 (2-201)), South Carolina (§ 62-1-201(23)), South Dakota (§ 29A-1-201(23)), Utah (§ 75-1-201(23)), and Vermont (§ 14 V.S.A. § 204(1)) have similar definitions for "interested person," wherein interested person can vary from time to time and be determined depending on the circumstances.

One definition statute did specifically address beneficiaries of a testamentary trust and exclude them from the definition. The District of Columbia defines an interested person to include "any legatee in being...until the legacy is paid in full". DC ST § 20-101. The statute goes on to define "Legatee" to include "a trustee of a trust created under or referred to in the decedent's will, **but not a beneficiary of the trust unless each trustee is also a petitioning party or acting personal representative**." *Id.* (emphasis added).

Similarly, Wisconsin Statute § 851.21(2)(e) specifically excludes "[a] beneficiary of a trust created under documents offered for probate as the will of the decedent upon the admission of the decedent's will to probate and the court's appointment of the trustee." However, the statute later continues to state as follows: "Additional persons interested. In any proceedings in which the interest of a trustee of an inter vivos or testamentary trust, including a trust under documents offered for probate, conflicts with the trustee's duty as a personal representative, or in which the trustee or competent beneficiary of the trust cannot represent the interest of the beneficiary under the doctrine of virtual representation, the beneficiary is a person interested in the proceedings."

C. Request for Notice

Many states allow an interested person to request notice of the probate proceedings similar to Florida's Probate Rule 5.060. In addition to providing the statutory authority for an interested person to request notice, California statutes further provide that "**[u]nless the court makes an order dispensing with the notice,** if a request has been made...for special notice of a hearing, the person filing the petition, report, account, or other paper...shall give written notice of the filing, together with a copy...and the time and place set for the hearing..." Cal. Prob. Code § 1252. (emphasis added).

Connecticut follows a similar approach and requires notice until either a party moves, or the court on its own motion, determines that the person is not entitled to notice. Ct. Prob. R. 8.

Although not directly responsive to the issues here, Idaho has a negative notice procedure in its Principal and Income Act that allows a trustee to provide notice of a proposed action to a beneficiary. The burden is then on the beneficiary to object to the proposed action. If the beneficiary does not object, the trustee can move forward with taking the action and is protected from liability for same. See I.C. § 68-10-105. Florida also has a similar negative notice procedure in its Principal and Income Act. See Fla. Stat. §§ 738.303 and 738.304. If the subcommittee decides to explore revisions to the notice statutes and probate rules to implement a mechanism to challenge a trustee's representation in a situation like *Carmel,* these statutes may be helpful exemplars of statutes shifting the burden to another, i.e. if the personal representative was required to move for a determination that the beneficiary was not an interested person in the proceedings.

391 So.3d 907
District Court of Appeal of Florida, Fourth District.

Mark CARMEL, Appellant,
v.
Norman FLEISCHER, Appellee.

No. 4D2023-1040
|
[June 20, 2024]

Synopsis

Background: Personal representative of decedent's estate filed final accounting and petition for discharge of estate. Decedent's son, whose share of estate was held in testamentary trust, filed surcharge petition against personal representative, alleging improper administration of estate. The Circuit Court, 15th Judicial Circuit, Palm Beach County, Charles E. Burton, J., granted personal representative's motion to strike son's surcharge petition and granted petition for discharge of estate. Son appealed.

Holdings: The District Court of Appeal, Warner, J., held that:

[1] son was an interested person who had standing to object to personal representative's final accounting and petition for discharge, and

[2] conflict of interest existed between son and co-trustee of testamentary trust such that any order binding trustees could not bind son.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion to Strike All or Part of a Pleading; Other.

West Headnotes (3)

[1] Appeal and Error Standing

Whether a party has standing is reviewed de novo by District Court of Appeal.

[2] Trusts Objections and exceptions to account

Son, whose share of his deceased father's estate was held in a testamentary trust, was an "interested person" who had standing to object to personal representative's final accounting and petition for discharge in probate action; son did not seek to bring an action on behalf of his trust, but rather asserted standing to object based on his status as beneficiary of trust to protect trust from being dissipated, as son could reasonably expect his legal interest to be affected if personal representative failed to properly administer estate or deliver all assets to which trust was entitled. Fla. Stat. Ann. § 731.201(23).

[3] Trusts Operation and effect of accounting

Conflict of interest existed between son, whose share of his deceased father's estate was held in a testamentary trust, and co-trustee of trust, and thus any order by probate court binding trustees could not bind son in probate proceeding to approve final accounting and discharge personal representative; son and co-trustee were brothers who had substantial disagreements about settlement agreement resolving previous estate litigation regarding son's claim co-trustee procured codicil to decedent's will, which provided son's share be held in trust, through undue influence, and co-trustee was also beneficiary of estate who stood to benefit to extent that trust was required to incur more estate expenses. Fla. Stat. Ann. § 731.303(1)(b).

***908** Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Charles E. Burton, Judge; L.T. Case No. 50-2017-CP-001695-XXXX-SB.

Attorneys and Law Firms

Mark Carmel, Wellington, pro se.

Norman A. Fleisher of Gutter Chaves Josepher Rubin Forman Fleisher Miller P.A., Boca Raton, for appellee.

Opinion

Warner, J.

Appellant, Mark Carmel, appeals an order granting a petition to discharge Norman A. Fleischer, appellee, as personal representative of the estate of Mark's father, Herbert Carmel. While Mark had filed objections to the discharge and a surcharge petition, the trial court held that Mark was not an interested person within the statutory definition and dismissed his claims for lack of standing. We reverse, as Mark was a beneficiary of a testamentary trust and was "reasonably be expected to be affected by the outcome of the particular proceeding involved." *See* § 731.201(23), Fla. Stat. (2022).

Background

Herbert Carmel died in 2017 and was survived by three children, including ***909** Mark. Shortly before his death, Herbert executed a codicil to his will providing that Mark's share of the estate would be held in trust, with Mark's brother Randall, and Allen Lamberg, as trustees. Mark's children became remainder beneficiaries.

Estate litigation between the brothers commenced over the will provisions which Mark claimed Randall had procured through undue influence. A settlement was reached which included appointing appellee, Norman Fleischer, to act as personal representative and administer the estate.

After the settlement agreement, the trial court entered an order terminating the trust, but Mark and one of his sons then moved to vacate the order with claims of forgery. The trial court ultimately vacated the order terminating the trust. Thus, Randall and Lamberg remained the trustees of Mark's testamentary trust, even though another part of the settlement agreement had specified that Randall and Mark were not to communicate.

While litigation continued over the settlement agreement, Fleischer administered the estate. In 2019, after receiving a trustee's accounting and also the trustee's waiver of any accounting of the estate, Mark objected to both and demanded an inventory and accounting of both the estate and trust. The trial court did not rule on these motions.

In January 2023, Fleischer filed a final accounting of personal representative, and a petition for discharge. Fleischer's petition acknowledged Mark's filings, but stated that Mark lacked standing because he was not an interested person in the proceedings. According to Fleischer, Mark was only a qualified beneficiary of a testamentary trust, and Fleischer himself was not a trustee of that trust.

Mark immediately filed an objection to Fleischer's petition for discharge, based on Fleischer's purported failure to serve the petition and the final accounting on Mark. Mark also filed a motion to compel Fleischer to serve Mark with a copy of the final accounting and a motion for a hearing on the same.

Mark then filed a surcharge petition against Fleischer, alleging improper administration of the estate. Mark alleged that Fleisher had acted based upon an invalid and unenforceable settlement agreement, had improperly assessed estate administration expenses against the trust, and had also failed to fund the trust agreement with the proper amount from the estate.

Fleischer filed a motion to strike Mark's surcharge petition. Fleischer maintained that Mark lacked standing as an interested person because Mark was not a beneficiary of the estate but rather the beneficiary of a testamentary trust. In response, Mark filed a "brief" explaining his position as an interested party and supporting his surcharge petition and his objection to Fleischer's final accounting and petition for discharge.

After a hearing, the trial court granted Fleischer's motion to strike Mark's petition, holding: "Mark Carmel is not a beneficiary of this Estate, rather, Mark Carmel is a beneficiary of a testamentary trust created by his father, and the trustees of the trust for the benefit of Mark Carmel are Randall Carmel and Allen Lamberg. Randall Carmel and Allen Lamberg, as co-trustees, are the real parties in interest as to the portion of the Estate distributed to Mark Carmel's Trust." The trial court also granted Fleischer's petition for discharge, because no "real parties in interest" objected to the petition. This appeal follows. [1]

***910 Analysis**

[1] Whether a party has standing is reviewed de novo. *Gordon v. Kleinman*, 120 So. 3d 120, 121 (Fla. 4th DCA 2013).

[2] Mark argues that the trial court erred in holding he was not an "interested person" as the beneficiary of the testamentary trust. Section 731.201(23), Florida Statutes (2022), defines an "interested person" as:

> **[A]ny person who may reasonably be expected to be affected by the outcome of the particular proceeding involved**.... The meaning, as it relates to particular persons, may vary from time to time and must be determined according to the particular purpose of, and matter involved in, any proceedings.

Id. (emphasis added).

In *Richardson v. Richardson*, 524 So. 2d 1126 (Fla. 5th DCA 1988), the court applied section 731.201(23) to determine that a contingent beneficiary of a testamentary trust is an interested person under the probate code. *Id.* at 1127. The Fifth District reversed an order granting the personal representative's motion to strike a beneficiary's objection to the final accounting and petition for discharge, stating:

> Appellant is a contingent beneficiary under the two testamentary trusts. Although his interest may never "vest in possession or enjoyment," it is already "vested in interest" and in legal contemplation. **Such legal interest may reasonably be expected to be affected if the personal representative has not properly administered the decendents' estate and does not deliver to the testamentary trusts all of the assets to which the trusts are entitled under the will.** Therefore appellant is "an interested person" within the meaning of those words as defined in section 731.201(21), Florida Statutes, and Fla. R. P. & G.P. 5.190(21) and is entitled to object to the personal representative's final accounting and discharge.

Id. (footnote omitted) (emphasis added).

We agreed with *Richardson* in *In re Estate of Watkins*, 572 So. 2d 1014, 1015 (Fla. 4th DCA 1991). There, a son who was a contingent beneficiary of a trust under the will, petitioned for revocation of probate, contending that his mother—who was a beneficiary of a testamentary trust as well as personal representative of the estate—had committed fraud in the procurement of the will. *Id.* We held that the son, as a contingent beneficiary, was an interested person who had standing to seek revocation of probate. *Id.*

Fleischer argues that *Buerki v. Lochner*, 570 So. 2d 1061 (Fla. 2d DCA 1990), and *Roller v. Collins*, 373 So. 3d 35 (Fla. 5th DCA 2023), are applicable and demonstrate Mark does not have standing. We disagree. Those cases are distinguishable, as both cases concerned whether a beneficiary of a trust, rather than the trustee, could bring an action on behalf of the trust. Here, Mark does not seek to bring an action on behalf of his trust, but rather asserts standing to object to Fleischer's final accounting and petition for discharge based on his status as the beneficiary of his testamentary trust. Mark seeks to prevent the testamentary trust for his benefit from being dissipated. Based on *Estate of Watkins*, the trial court erred in determining ***911** that Mark did not have standing to file objections as an interested person.

[3] Fleischer contends that section 731.303(1), Florida Statutes (2022) supports the trial court's ruling. Section 731.303(1) provides when a representative may bind another:

> (b) **To the extent there is no conflict of interest between them or among the persons represented:**
>
> ....
>
> 2. Orders binding a trustee bind beneficiaries of the trust in proceedings to probate a will, in establishing or adding to a trust, in reviewing the acts or accounts of a prior fiduciary, and in proceedings involving creditors or other third parties. However, for purposes of this section, a conflict of interest shall be deemed to exist when each trustee of a trust that is a beneficiary of the estate is also a personal representative of the estate.

§ 731.303(1)(b)22., Fla. Stat. (2022) (emphasis added).

We conclude that section 731.303(1)(b)22. does not apply. We do not read section 731.303(b)22.'s last sentence as being the *sole* ground for conflict of interest. Rather, 731.303(1)(b) provides: "To the extent there is no conflict of interest between them ... [o]rders binding a trustee bind beneficiaries of the trust ...." *Id.* Therefore, under 731.303(1)(b), a conflict may exist between a trustee and a beneficiary, and section 731.303(1)(b)22.'s last sentence does not exclude other conflicts, but rather provides a scenario where a conflict exists as a matter of law.

In this case, a conflict exists between Randall, a trustee, and Mark, the beneficiary. Not only do the brothers have substantial disagreements about the settlement agreement, but Randall, as a beneficiary of the estate, stands to benefit to the extent that Mark's trust is required to incur more of the estate expenses. Because a conflict of interest exists between Mark and Randall, orders binding the trustees cannot bind Mark.

Conclusion

The trial court erred in concluding that Mark, a beneficiary of a testamentary trust, was not an "interested person" under section 731.201(23) with standing to contest the discharge of the personal representative and to file a petition for surcharge. We reverse the order of discharge and remand for further proceedings.

Reversed and remanded.

Klingensmith, C.J., and Kuntz, J., concur.

All Citations

391 So.3d 907, 49 Fla. L. Weekly D1339

Footnotes

1 In this appeal, Mark has also sought to challenge the denial of his motion to dismiss a charging lien filed by his attorney who withdrew earlier in the litigation, as well as the denial of his motion for sanctions against the attorney. These are not properly addressed in this appeal, as the attorney is not a party to this appeal. To the extent that these were final orders on the issues, the appeal would be untimely even if Mark had joined the attorney in this appeal.