

# Recent Cases of Interest to Fiduciaries: Part 5 – Amendment, Modification and Termination of Trusts

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***In the Matter of Trust D Created under the Last will and Testament of Harry Darby, 2010 Kan. LEXIS 427 (June 25, 2010)***

Under his will and codicil, Harry Darby created a trust for the benefit of his daughter, Marjorie, and her three daughters. Under the trust terms, Marjorie was to annually receive \$24,000 from the trust net income, along with discretionary principal. Each of Marjorie's three daughters was to annually receive \$8,000 from the trust net income.

Marjorie petitioned the court to modify the trust by increasing her annual distribution to \$40,000, adjusted for inflation, and giving herself a power of appointment over the trust assets. Marjorie alleged in support of her petition that: (1) the trust was her sole source of income and \$24,000 per year was insufficient to cover her basic needs; and (2) modification was proper due to circumstances not anticipated by the settlor, necessary to achieve Harry's tax objectives by avoiding the imposition of generation-skipping transfer taxes, and not inconsistent with a material purpose of the trust. The district court allowed the modification, and Marjorie sought review by the highest court of Kansas to render the modification binding on the IRS.

On appeal, the Supreme Court of Kansas reversed the district court and rejected each of Marjorie's reasons for modification under the Kansas Uniform Trust Code (K.S.A. 58a-101 *et seq.*) on the following grounds: (1) there was insufficient evidence that Harry intended to create a support trust for Marjorie; (2) because Harry did not intend to create a support trust and rather specified fixed sums for his daughter and each of his granddaughters, increasing the amount payable to Marjorie would violate a material trust purpose by decreasing the funds available for Harry's granddaughters; (3) modification to enable distributions in excess of the specific monthly amounts set forth in the trust would be inconsistent with the material purpose manifested by the spendthrift provision; (4) no evidence in the record indicated that Harry failed to anticipate the potential devaluation of future distributions by inflation; (5) increasing the distributions to Marjorie would inherently frustrate the growth of the trust principal and reduce later distributions; and (6) Harry just as likely intended exposure to the GST tax for his grandchildren and avoidance of federal estate tax on Marjorie's death, and therefore the court refused to modify the trust provisions to achieve tax benefits when it would alter the dispositive provisions of the trust.

***Montegani v. Cassinerio, 2011 Cal. App. Unpub. LEXIS 1594 (March 2, 2011)***

In 1993, Lena Cassinerio established the Lena M. Cassinerio Family Trust naming her children, Bernadette, Peter, Karon, and Agnes, as beneficiaries of the trust. That year, Bernadette's son, Gerald, a certified financial planner and investment management analyst, began advising Lena on money management and investments. In 1999, Lena told Gerald that she wanted her estate plan rewritten so that her children would not have to pay estate taxes upon her death. Gerald referred Lena to an attorney, Mr. Larsen, who prepared a number of estate planning documents for Lena including an amended and restated trust (the 1999 Trust).

In January 2001, Lena was diagnosed with a brain tumor and underwent several surgeries. During this time, she told Gerald that she wanted to name additional trustees, and Gerald relayed the message to Mr. Larsen. Instead of summoning Mr. Larsen while Lena was in and out of the hospital, Lena's daughter Agnes summoned an insurance agent and notary, Mr. Dryssen, to notarize Lena's signature on documents. During this visit Mr. Dryssen agreed to look over Lena's estate planning documents.

Mr. Dryssen had no legal or tax planning training, nevertheless, on February 28, 2001, Lena executed several documents prepared by Mr. Dryssen including revocation of the

1999 Trust and a new revocable trust (the 2001 Trust) naming her four children as beneficiaries and reserving the power to amend the trust by a signed writing. Sometime after February 28, 2001, Mr. Dryssen removed pages three and five from the 2001 Trust and substituted new pages that deleted Bernadette as a trust beneficiary. The pages were initialed by Lena but not dated.

Lena died in November 2001 and Bernadette filed a petition for construction of the trust and a determination of the beneficiaries. The probate court ruled that the purported amendments of the 2001 Trust were invalid and that the version including Bernadette as a beneficiary was valid. The court held that the trust required amendments to be made by a “signed writing” and that Lena’s initials at the bottom of the substitution pages did not meet California statutory requirements for a signature. The probate court also found that Lena intended that all of her children inherit equally based on a videotape of a conversation between Lena and Mr. Dryssen on March 26, 2001. Lena’s other children appealed.

On appeal, the California Court of Appeal reversed the probate court’s finding as to Lena’s signature on the grounds that: (1) the California statute relied on by the probate court applied only to “signature by mark” when a person cannot write; (2) Lena was capable of signing her name at the time of the amendments, rendering the signature by mark requirements inapplicable; (3) the trust terms required amendment by a writing but did not require a particular form of signature for the signature and amendment to be valid; and (4) Lena’s use of initials constituted a valid signature for the amendment.

Nonetheless, the court affirmed the probate court’s finding that the amendment was invalid on the alternative grounds that: (1) the 2001 Trust’s requirement that the amendment be by a signed writing implied that the amendment must be distinguishable from the original trust; (2) the method of “swapping out” pages of the document without a date served to cast doubt on the integrity of the document and led to ambiguity regarding when and how many times the pages were swapped out; and (3) Lena intended to leave her estate equally to all four of her children as evidenced by the video.

### ***Bruner v. Bruner*, 2011 Mass. LEXIS 17 (January 27, 2011)**

Leslie Gould created a trust in 1992 that she completely amended and restated in 2006. The trust provided that after her death the trust assets would be divided by a formula between a marital trust and a family trust, with the family trust funded with the amount that could pass free of both federal and Massachusetts estate taxes and provisions for funding the marital trust that were intended to accomplish this result. Leslie died in July 2007 and her estate tax return was filed in October 2008.

After filing the estate tax return, the value of the trust assets declined significantly and unexpectedly. As a result, if the marital trust were funded according to the formula no assets would remain to fund the family trust. The trustee brought an action seeking to reform the trust to remedy the funding problem by funding the family trust first and using the remaining assets to fund the marital trust.

The court appointed a guardian *ad litem* to represent the interests of the minor, unborn, and unascertained trust beneficiaries, and permitted the reformation based on: (1) its finding by clear and decisive proof that the proposed reformation effectuated Leslie’s intent; (2) the consent of the spouse, all other adult beneficiaries, and the guardian *ad litem*; and (3) the fact that Leslie’s dominant intent was to minimize the combined estate tax paid by both spouses.

***Jarvis et al. v. National City and PNC Bank National Association*, 2011 Ky. App. LEXIS 20 (February 4, 2011)**

On December 20, 2008, National City Bank and PNC Bank filed a complaint for declaratory judgment against the beneficiaries of three testamentary trusts for which the banks were serving as trustees, alleging that the trustees had been deprived of reasonable compensation for their services. In support of their claim, the trustees cited the repeal of Kansas statute KRS 386.180 that had previously provided fixed percentages for the compensation for testamentary trustees.

The beneficiaries moved for summary judgment alleging that: (1) under quasi-contract principles the trustees were not relieved of obligations they knowingly accepted simply due to the later repeal of the statute (an equitable estoppel argument); (2) other Kentucky statutes demonstrated a legislative intent to treat testamentary trusts differently from *inter vivos* trusts; and (3) all necessary parties had not been joined to the action. The trustees also moved for summary judgment and the trial court granted summary judgment in favor of the trustees.

On appeal, the Kentucky Court of Appeals affirmed the trial court on the grounds that: (1) the plain language of the repeal statute and the lack of provisions in place of KRS 386.180 indicated that the legislature intended to remove any form of statutorily imposed guidelines regulating the fee habits of trustees of testamentary trusts; (2) the trustees of testamentary trusts are entitled to apply a reasonable fee commensurate with the performance of their duties; and (3) the repeal was likely an attempt by the legislature to diminish the divide in treatment between *inter vivos* trusts and testamentary trusts.

The court rejected the beneficiaries' arguments, holding that: (1) a justiciable issue existed because the parties had to take some action with regard to payment; (2) quasi-contract theories were inapplicable where no written contract was the subject of dispute; (3) no law exists requiring that private parties abide forever by the law that existed at the inception of their relationship; and (4) all necessary parties were present in the action under the doctrine of virtual representation.

***Shepard v. Barrell*, 2010 Mass. App. Unpub. LEXIS 1146 (October 22, 2010)**

Between 1923 and 1931, William and Annie Barrell created six trusts for the benefit of their descendants and funded the trusts with stock in their manufacturing company, the Adams Innersole Company. In the mid 1950s, the company sold its manufacturing operations and the sale proceeds were added to the trusts. Each of the trusts provided that half of the principal be held for the benefit of the Barrell's daughter and her descendants and the other half for benefit of the Barrell's son and his descendants.

The trusts were to terminate and the principal distributed to then-living issue 20 years after the death of the last of the named beneficiaries who were living when the trusts were created. One of the Barrell's great granddaughters died in 1989 (although her death did not cause the termination of the trusts), and her share of the income of the trusts passed to her children, including her son, John.

John and his daughters petitioned for early termination of the trusts and outright distribution of their share of the assets alleging that: (1) the trusts had no remaining purpose; (2) John's interest in the principal of the trusts had vested; (3) John's interest could be severed from the other interests; (4) all of the beneficiaries consented to the termination of his portion of the trusts; and (5) there was a risk that John's share of the principal of the trusts would be subject to generation-skipping transfer taxes and that

risk could be avoided if his share were distributed in 2010 (during temporary repeal of the generation-skipping transfer tax under the 2010 Tax Act). The trustee filed a motion for summary judgment dismissing the complaint. The trial court granted the trustee's motion, and John and his daughters appealed.

On appeal, the Massachusetts Court of Appeals affirmed the trial court's decision denying termination on the grounds that: (1) the settlors fixed the time for termination and required the trusts to remain intact until that time; (2) the spendthrift provisions in five of the trusts indicated the intent to provide continuous financial support and stability for their descendants until termination; and (3) because of this clear intent for continued financial support, a valid purpose for each of the trusts remained rendering termination improper.

The court also rejected the argument that the interests had vested, and noted that the beneficiaries' interests in the principal had not yet vested because the trust was to terminate 20 years from the death of the named beneficiaries, several of whom were still living. Consequently, the trust property would not vest in the beneficiaries for at least another 20 years. Because John's interest in the trusts was not severable and not vested, his consent alone was not enough to terminate his interest in the trusts. Further, not all beneficiaries had consented to termination (including unborn and unascertained beneficiaries) and several named beneficiaries expressly denied their consent.

Lastly, the court noted that because the trusts were created prior to September 25, 1985, the trusts were grandfathered as exempt from the GST tax, and therefore there was no reason to terminate the trusts for the purpose of avoiding the GST tax.

***The Fundamentalist Church of Jesus Christ of Latter-Day Saints v. The Honorable Denise P. Lindberg, Third District Court Judge, 2010 Utah LEXIS 115 (August 27, 2010)***

In 1942, the predecessor to the Church of Jesus Christ of Latter-Day Saints formed the United Effort Plan Trust (UEP Trust) for charitable and philanthropic purposes, but conditioned membership in the UEP Trust on consecration of real and mixed property to the trust. Consecration was an act of faith by which members deeded their property to the UEP Trust to be managed by church leaders who were also trustees.

The UEP Trust was amended in 1998 to qualify as a charitable trust by benefitting "those that consecrate their lives to the ... establishment of the Kingdom of God on Earth under the direction of the presidents of the church," rather than specifically to the trust's founders. After sexual abuse and fraud scandals involving the church's president and trustee of the UEP Trust, the court appointed a special fiduciary for the UEP Trust. The special fiduciary filed a memorandum with the court recommending that the UEP Trust be reformed.

The district court concluded that the UEP Trust should be reformed so that the special fiduciary could administer the UEP Trust to meet the needs of the beneficiaries according to neutral nonreligious principles. The district court also found that the trustees had breached their fiduciary duties of loyalty and prudent trust administration and that several of the UEP Trust provisions were fundamentally flawed and unworkable justifying application of the doctrine of *cy pres* to reform the trust.

The district court reformed the UEP Trust to: (1) allow the trust property to be used only in furtherance of legitimate trust purposes as identified by the court; (2) allow the FLDS leaders to offer their nonbinding input, but granting the board of trustees the ultimate authority to determine who would be allowed to live on the trust property and to asses

the trust property residents' wants and needs; (3) limit the board's powers to order relocation or property sharing among trust property residents to situations where the relation arrangement was necessary for legitimate UEP Trust administrative reasons; (4) delete the trust's requirement that the occupants of the trust land live in accordance with church doctrine; and (5) removing from the FLDS Church president several powers under the UED Trust.

The district court retained jurisdiction over the UEP Trust and instituted a process that allowed the UEP Trust participants to petition to have the houses they lived in distributed to them.

In 2009, the FLDS Association petitioned the Utah Supreme Court for an extraordinary writ, alleging that the district court wanted to transform FLDS culture, liberate people it felt belonged to a dangerous cult, and suppress the FLDS Church's role as the spiritual and economic center of the community.

The FLDS Association asked the Supreme Court to: (1) find that the district court's actions violated the FLDS Church members' First Amendment rights and their rights under Utah's constitution; (2) declare that certain sections of Utah's Uniform Trust Code were unconstitutional as applied to the FLDS Association; (3) enjoin the district court from taking further action in the underlying UEP Trust litigation; (4) declare the district court's reformation of the UEP Trust unconstitutional; (5) terminate the reformed trust; (6) overturn the district court's authorization to sell certain trust property deemed sacred by the FLDS Association; (7) terminate the appointment of the special fiduciary; and (8) provide other appropriate relief.

The Utah Attorney General, the Arizona Attorney General, and the UEP Trust, through the special fiduciary, opposed the petition alleging that the FLDS Association lacked standing, that other plain remedies existed, and that laches barred the FLDS Association's claims.

On review, the Utah Supreme Court found that: (1) because the FLDS Association had waited nearly three years from the date of the trust modification and other parties relied on the modification, the FLDS Association claims were barred by the equitable doctrine of laches; and (2) the one claim not barred by laches (a claim that the court would disfavor current and practicing FLDS members in the trust administration) was not ripe for adjudication.

### ***Perosi v. LiGreci*, 2011 N.Y. Misc. LEXIS 341 (February 14, 2011)**

Nicolas LiGreci (Mr. LiGreci) created an irrevocable trust in 1991. Mr. LiGreci's brother, John, was named as the trustee of the trust and his accountant was named as successor trustee. Upon Mr. LiGreci's death, the trust proceeds were to be distributed in equal shares to his three children, John, James, and Linda. The sole trust asset was a \$1 million life insurance policy on Nicolas's life.

In 2010, Mr. LiGreci executed a New York statutory short form power of attorney designating his daughter, Linda, as agent, and his grandson, Nicolas, as successor agent, along with the major gifts rider to the power of attorney. Shortly thereafter, Linda as agent under the power of attorney executed a trust amendment removing her uncle John and the accountant as trustee and successor trustee, and in their place appointing her son, Nicholas Perosi, and Ericalee Burns as trustee and successor trustee, respectively. Each of the trust beneficiaries executed the required statutory consent to the trust amendment. Mr. LiGreci did not personally sign the amendment and died 15 days after its execution.

Linda and Nicolas petitioned the court for an order directing uncle John and the accountant to: (1) turn over all records in their possession relating to the trust or its assets; (2) submit to examinations before trial concerning the nature and value of the trust corpus when received, any income received, disbursements and commissions paid, the locations of all records relating to the trust; (3) account for the trust; (4) account to the court for all the trust property and effects which were received by John as trustee from the date of creation of the trust to the date of such accounting. Uncle John and the accountant moved the court to deny the validity of the amendment removing them as trustees.

The court found that: (1) the trust was irrevocable and could only be amended by the statutory mechanism allowing the creator of an irrevocable trust to revoke or amend a trust by obtaining the consent of all persons beneficially interested in the trust property; (2) the statutory right did not extend to Linda as agent under the power of attorney; (3) the statutory right to revoke is a personal right which may only be exercised by that individual absent language in the trust indicating otherwise; and (4) even construing the terms of the power of attorney at its broadest, the authority granted the agent with regards to trusts and estate instruments extended only to actions taken prospectively. Accordingly the court denied Linda's and Nicolas's petition, and vacated the trust amendment.

### *In re Trust of Hrnicek, 2010 Neb. LEXIS 142 (December 3, 2010)*

Leo Hrnicek and his wife had six children. Leo loaned one of his daughters, Brietzke, and her husband \$85,000 with an interest rate of 7%. The loan was to be repaid over 15 years beginning on April 1, 1995, and ending in March 1, 2010. Leo died on November 2, 1997 and gave all of his property, including the note, to a trust. After contentious family litigation, the court approved a settlement that provided that: (1) Brietzke and her co-trustee would resign as trustees of the trust and be replaced by First National Bank North Platte (FNBPN); (2) Brietzke acknowledged her debt to the trust; and (3) Brietzke agreed to repay the debt in full pursuant to the terms of the note.

Despite the settlement, Brietzke made no payments under the note, and FNBPN as trustee filed a motion asking the court to approve the retention of a trust distribution otherwise owed to Brietzke on the grounds that she had not repaid amounts due under the court's April 23, 2003 order approving the settlement. FNBPN also asked the court to find Brietzke in contempt of court. Brietzke objected.

The court found Brietzke in contempt of court and allowed FNBPN to retain sufficient funds from any future distributions to fully satisfy the outstanding balance owed the trust. Brietzke appealed.

On appeal, the Nebraska Supreme Court affirmed on the grounds that: (1) even though the Nebraska Uniform Trust Code did not allow for the retention of funds to satisfy the unpaid amounts owed on the loan, the Nebraska probate code did allow for retention of funds and codified the common law remedy; (2) the Nebraska Uniform Trust Code provides that the common law of trusts and principles of equity supplement the Nebraska Uniform Trust Code except to the extent modified by the trust code or other Nebraska statute; (3) the retention remedy of the Probate Code is equally applicable to trusts and retention of the trust funds was appropriate; and (4) Brietzke's acknowledgement of the debt in the 2003 settlement precluded her asserting a statute of limitations defense, because the court's order and the court's exercise of its contempt powers were not subject to any statute of limitations.

***Zagorski v. Kaleta (In re Estate of Michalak), 2010 Ill. App. LEXIS 869 (August 20, 2010)***

On November 6, 2006, Bozenna Michalak, an 83-year-old Polish immigrant, created a revocable trust and funded it with her home. Her attorney reviewed and translated the entire document into Polish, and according to his testimony, Bozenna did not have diminished capacity at the time she executed the trust and understood its terms. Under the trust, Robert Kaleta would become the trustee on Bozenna's incapacity. The trust provided for the distribution of the trust assets at Bozenna's death to her neighbors, the Kaletas.

In January of 2007, Bozenna's niece Jacqueline Zagorski, was alerted by the Chicago police of a potential exploitation of Bozenna's financial affairs. Jacqueline visited Bozenna and had her name added to several of Bozenna's bank accounts. During her visit, Jacqueline observed several conversations between Bozenna and the Kaletas but because she did not speak Polish could not understand the conversations. In June of 2007, Jacqueline visited Bozenna again because further attempts had been made on her accounts. Jacqueline applied for guardianship of Bozenna. Bozenna was evaluated by a doctor for the guardianship proceedings and was diagnosed with Alzheimer's disease; however, the doctor did not indicate whether Bozenna had capacity in 2006 when she had executed the trust. Marcella Horan was appointed as Bozenna's guardian *ad litem*. Bozenna was adjudicated a disabled adult and Jacqueline was appointed her plenary guardian.

Thereafter, Jacqueline discovered that Bozenna's home was titled in the name of the trust and, according to Jacqueline, Bozenna indicated that she did not know any details about the trust. On Jacqueline's motion, Marcella was reappointed as Bozenna's guardian *ad litem* and ordered to conduct further investigation into Bozenna's assets. Marcella presented a report containing interviews with nine people and ultimately advocating invalidation of Bozenna's trust and alleging undue influence by the Kaletas. The court entered an order allowing Jacqueline to petition to amend the trust.

In 2008, Jacqueline petitioned to amend the trust and gave notice to the successor trustees and the Kaletas, alleging that Bozenna was under diminished capacity when she executed the trust. The Kaletas moved to dismiss the petition.

At trial, the Kaletas testified that: (1) they had been Bozenna's neighbors and helped her with chores, yard work, getting around, and had invited her to spend holidays with them; and (2) they had no knowledge that Bozenna had intended to create a trust naming them as the remainder beneficiaries and that it was not until they were presented with the trust document that they knew of the trust.

Jacqueline testified that: (1) the house was a mess; (2) Bozenna called Mr. Kaleta an "old crook"; and (3) Bozenna had specifically stated that she wanted her house to go to Jacqueline. Marcella testified consistent with Jacqueline's testimony, and indicated that at various times Bozenna seemed to have diminished capacity and that certain factors pointed to undue influence over Bozenna by the Kaletas.

The trial court granted Jacqueline's petition to amend the trust to substitute: (1) Jacqueline as successor trustee; and (2) Bozenna's heirs at law as beneficiaries. The trial court also granted Jacqueline permission to seek a reverse mortgage on the trust property. The Kaletas appealed.

On appeal, the Appellate Court of Illinois affirmed the trial court on the grounds that: (1) the guardian had the authority under state law to amend the trust; (2) Marcella had acted properly as guardian *ad litem*; (3) the procedural objections to the proceedings

were without merit; (4) Marcella's report as guardian *ad litem* was properly admissible over objections about hearsay in the contents of the report, and the statements in the report were not offered to prove the truth of the matter asserted, but rather to show Bozenna's mental capacity to gift her residence to the Kaletas; (5) Jacqueline had the burden of establishing intent by a preponderance of the evidence only, a burden that she had carried; (6) there was sufficient competent evidence to support the trial court's decision; (7) the trial court had authority to approve the reverse mortgage while the appeal was pending.

### ***Reid v. In re Estate of Sonder*, 2011 Fla. App. LEXIS 4035 (March 23, 2011)**

On May 17, 2000, Edgar Sonder created a trust with himself as trustee, and later amended the trust to name Cecelia Reid, his nurse, as successor trustee. The trust provided: (1) pecuniary gifts totaling \$31,000 to 10 charities; (2) a \$125,000 endowment gift to the Hebrew Union College Jewish Institute of Religion after the payment of the pecuniary gifts; (3) after the pecuniary gifts and the endowment gift, a number of specific gifts to enumerated individuals including a \$25,000 gift and a gift of an apartment to Cecelia.

Edgar died in 2005. Finding the trust assets insufficient to pay all of the gifts provided for in the trust, Cecelia (who was both personal representative and trustee) moved the court to abate the pecuniary gifts proportionately, and claimed that the apartment was a devise not subject to abatement. The motion to abate was denied and affirmed by the Florida Court of Appeals.

Cecilia then petitioned the court to reform the trust under the Florida Uniform Trust Code for a unilateral drafting mistake, claiming that the trust instrument did not evidence the settlor's intent which was to give his apartment to Cecilia not subject to abatement. The probate court denied the petition finding that Cecilia had not meet her burden of proving by clear and convincing evidence that the trust as written did not reflect the settlor's intent. Cecilia appealed the probate court's denial of reformation and granting of appellate attorneys' fees in the prior appeal to Hebrew Union College.

On appeal, the Florida Court of Appeals affirmed the probate court on the grounds that: (1) even though the scrivener of the trust testified that Edgar had never instructed him to create priority between the gifts and that the inclusion of the terms "after giving effect to" in paragraph 2 and 3 were his doing, because Edgar had read the trust and approved the language, he had adopted its terms rendering amendment improper; (2) Edgar ratified the language in two subsequent amendments making the gift of the apartment subordinate to the other gifts; (3) nothing in the record explained why Edgar, an articulate and precise businessman, would have approved the plain and simple trust terms if they did not reflect his intent; and (4) Cecilia offered no testimony establishing that Edgar would have preferred the gift to Cecilia over the endowment gift in the event both could not be satisfied.

The court dismissed the portion of the appeal regarding the award of appellate attorneys' fees for lack of jurisdiction. One judge issued a dissenting opinion.