3-2023

New Fiduciary Decisions: Monthly Account Statements are Sufficient to Begin Running of Statute of Limitations

William P. LaPiana

New Fiduciary Decisions

Author: WILLIAM P. LAPIANA

WILLIAM P. LAPIANA is the Dean of Faculty and Rita and Joseph Solomon Professor of Wills, Trusts and Estates at New York Law School. He is an academic fellow of the American College of Trust and Estate Counsel and has served on the New York City Bar Association's Surrogates Court and Trusts and Estate Committee since 2011. Prof. LaPiana has been a frequent speaker at continuing legal education events.

Monthly Account Statements are Sufficient to Begin Running of Statute of Limitations

[pg. 19]

Adopting language from the Uniform Trust Code, Michigan statues establish a one-year statute of limitations on actions for breach of trust by beneficiaries against trustees. The limitation period begins to run on the date the trustee sends the beneficiary “a report” that adequately discloses the existence of a potential claim and informs the beneficiary of the one-year limitations period. The same statute also defines adequate disclosure as the provision of sufficient information so that the beneficiary knows of the potential claim or “should have inquired” about the claim's existence.[1] In the absence of an adequate report containing the required notice, a beneficiary has five years after the removal, resignation, or death of a trustee to bring a proceeding.[2]

The contingent beneficiaries of a trust of which their sibling is lifetime beneficiary of income and principal and has an annual “5 and 5” power of withdrawal brought an action alleging breach of fiduciary duty by the former corporate trustee. The trust held the majority interest in a resort. The contingent beneficiaries owned minority interests outright. The allegations included failure to keep adequate records of expenses, failure to keep current the valuation of the resort real estate, and that the true financial condition of the resort was concealed from the plaintiffs because some of the resort's maintenance expenses were paid personally by the life beneficiary. The contingent beneficiaries maintained that they had five years from the resignation of the trustee in October 2017 to bring a proceeding related to the trustee's actions before November 2013, the date of the first account statement containing the notice of the one-year statute of limitations.

The trial court granted the trustee's motion for summary judgment on the grounds that trust terms in effect before the effective date of the statute on April 1, 2010 created a valid limitations period for objections that had run long ago and that the account statements adequately disclosed the existence of a potential claims for the period from April 1, 2010 to the date of the November 2013 statement. The plaintiffs appealed and the intermediate Michigan appellate court affirmed in *Kilian v. TCF National Bank.*[3]

First, the court held that the statute's reference to “a” report means that the one-year statute of limitations begins to run whenever a beneficiary receives a report that makes adequate disclosure of the potential claims and contains the notice of the one-year limit, even if previous and subsequent reports did not. The court bases that holding both on the use of the indefinite article and the statutory purpose to simplify and clarify the law.[4] To hold otherwise would make different limitations periods apply depending on whether any one report contained the required notice which would not promote simplicity and clarity.

Second, the statements did adequately disclose the existence of potential claims. The reported value of the resort real estate remained constant for periods of up to five years which the court found adequately informed the plaintiffs that the trustee was not “frequently” updating the value. The exercises of the “5 and 5” power were shown on the statements and their propriety could be determined by “simple multiplication.” Finally, the statements provided “a detailed line-item list of income

[pg. 20]

and expenditures” which gave the plaintiffs enough information to inquire about the management of the resort. The life beneficiary's alleged payment of some expenses personally only meant that expenses were reported as accrued but without any corresponding payment which “would have led a reasonable person” to ask questions.

The message of the opinion in *Kilian* is that the standard monthly account statement seems generally to be enough to put beneficiaries on notice of potential claims and if the statement includes the notice of the one-year limit on bringing an action the statue of limitations begins to run as to all claims based on what is reported on the statement. It is worth noting that the court rejected the testimony of the plaintiff's expert stating that the statements should have included more information, including benchmarks against which to evaluate the content of the report and additional information on why decisions were made as well as projected gains and losses. The court noted that such additions might reflect best practices, but are not required by the statute.

No Jurisdiction over Trustee Where Conduct Not Directed Toward Forum State

Paul Baugauer died in 2003, a resident of Illinois. Paul's surviving spouse, Margaret Baugauer, became the beneficiary of a marital trust created from the revocable trust which Paul had created. The couple's son, Steven, became trustee. In 2012, Steven and Margaret moved to Florida and the trust purchased a house for Margaret there. Margaret and Steven's relationship deteriorated and Margaret relocated to Las Vegas to live with her other son, James. In 2018 Margaret filed a petition in the Nevada court seeking, among other relief, the removal of Steven as trustee, the appointment of a successor trustee, and an accounting.

Steven sought dismissal of the petition on the grounds of lack of personal jurisdiction which was denied. The court cited a Nevada statute giving the court in rem jurisdiction over a trust when one or more beneficiaries reside in the state[5] and its “confirmation” of Steven as trustee which

[pg. 21]

gave it personal jurisdiction over Steven. The court did not engage in a due process analysis.

Eventually, the district court ordered distribution of the trust property to Margaret and granted an order to show cause holding Steven in contempt. The court also for the first time addressed the due process issues and held that it had personal jurisdiction because Steven had committed intentional torts against Margaret, that he had directed his conduct toward Nevada, and that Margaret's causes of action had arisen conduct or activities “in connection with Nevada.”

Steven appealed and the intermediate appellate court found that the district court lacked personal jurisdiction over Steven. The Supreme Court granted Margaret's petition for review and affirmed in *Matter of Paul D. Burgauer Revocable Living Trust.*[6]

The high court held that the proper constitutional test for determining if Steven has sufficient contacts with Nevada to satisfy due process is the “effects test” set out by the United States Supreme Court in *Calder v. Jones*[7] because Margaret's claims all sound in intentional tort. Were

this a contract case, then the test would be the "purposeful availment test." In other words, the test is not whether Steven purposefully took advantage of acting in Nevada but rather whether he purposefully directed his conduct to Nevada.

Under the effects test, there is no personal jurisdiction. The court explains that Steven's contact with Margaret is not the same as contact with Nevada. The actions Margaret points to include communications Steven directed to her, but she could not show that those communications were received by other Nevada residents. The injuries she alleges—conversion of over $600,000 and ceasing to make trust distributions to her—had effects in Nevada, but only because Margaret was resident there not because of "any independent action that occurred in Nevada." Margaret did not provide prima facie evidence of Steven's minimum contacts with Nevada and therefore the Nevada courts did not have personal jurisdiction over Steven.

Foreign Will of U.S. Person Admitted to Probate in State where Real Property Located

In 2006, Marilyn Sweet, a domiciliary of the State of Maryland, executed a will while in Portugal. The will was written in Portuguese. It was signed and its execution overseen by a Portuguese notary and bore the notarized signatures of two additional witnesses. The primary beneficiary of the will was the testator's spouse; the testator's two children by a prior marriage were contingent beneficiaries who would take if the spouse did not survive the testator.

The testator died in 2020 in Nevada and the sole asset of the estate was a home in Las Vegas. The surviving spouse petitioned the Nevada court for a decree admitting the will to probate. One of the children filed an objection, contending that the will could not be admitted to probate in Nevada because it was signed in a foreign country and that in any event the will disposed only of the testator's property in Portugal.

A hearing before the probate commissioner resulted in a recommendation that the will be admitted because the will was a valid international will under Nevada's codification of the Uniform International Wills Act[8] and even if it were not, it was properly executed under the statutes governing execution of wills in Nevada.[9] The commissioner also found that the will disposed of the all of the testator's property wherever situated.

A hearing in the district court then affirmed the probate commissioner in every respect. The objectant appealed to the intermediate appellate court in *Matter of Estate of Sweet*, which affirmed in part.[10]

The appellate court found, first, that the district court did not err in ruling that the will was a valid international will under the Nevada's codification of the uniform act. The minimum requirement for a valid will under the act is signing by the testator in the presence of two witnesses and of a

person “authorized to act in connection with international wills.”[11] The statute defines an authorized person as a person admitted to practice in Nevada or a person authorized by the laws of the United States, including members of the diplomatic and consular services.[12] The court finds, however, that the identification of an authorized person must be made under the law of the nation where the will was executed and concludes that under Portuguese law a notary is such a person.

The court disagreed with the district court's finding that the will could be admitted under the statutes governing execution of wills in the state but found that the will was entitled to probate under Nevada's conflict of law rules which apply even if the will fails as an international will. The statute,[13] like almost all such statutes, provides that a will may be admitted to probate if it is in writing, subscribed by the testator, and executed outside of the state “in the manner prescribed by the law” of the state

[pg. 22]

where executed or of the testator's domicile. The objectant did not dispute the validity of the will under the law of Maryland where the testator was domiciled at the time of execution or under the law of Portugal where it was executed.

Finally, the court agreed that that the will disposed of all of the testator's property. The will is ambiguous on this point: the phrase “in Portugal” appearing in the disposition to the surviving spouse could refer to the entire clause preceding it—“all assets, rights and shares” in one translation and “all goods, right, and actions” in another—or only to the two words immediately preceding it. Construction is therefore necessary and is guided by the presumption against intestacy which is particularly strong when the will contains a residuary clause. Here, the will makes the surviving spouse the testator's “universal heir,” a civil law concept under which the entire estate passes to the designated person. The testator's intention that the spouse receive the entire estate is therefore clear and the presumption against intestacy justifies ignoring the words “in Portugal.” In addition, the alternative gift to the testator's children should the spouse not survive does not include the words “in Portugal” and that absence strengthens the presumption against intestacy.

Sweet illustrates the issues that can arise when a United States domiciliary executes a will in another nation and resolves those issues through a thorough analysis of the statutory framework, one part of which applies to will executed outside of the United States, the other to wills executed anywhere outside of the State where the will is offered for probate.

---

1 MCL 700.7905(1)(a), (2), identical to UTC section 1005(a), (b).

[2] MCL 700.7905(3)(a), identical to UTC section 1005(c)(1).

[3] ___ N.W.2d ___, WL 12073427 (Mich. Ct.App.).

[4] MCL 700.1201(a) (incorrectly cited in the opinion as MCL 700.1202(a)).

[5] NRS 164.010.

[6] ___ P.3d ___, WL 17827948 (Nev.).

[7] 465 U.S. 783 (1984).

[8] NRS Ch. 133A, 133a.050 through 133A.100.

[9] NRS 133.040 and -.050.

[10] 520 P.3d 827 (Nev. Ct.App. 2022).

[11] NRS 133A.060(2).

[12] NRS 133A.120, 133A.30.

[13] NRS 133.080.

END OF DOCUMENT -