

Trustee of Revocable Trust with Duty to Collect Trust Assets

January 11, 2024

Take-Away: A trustee has a duty to collect assets from the decedent's probate estate if unreasonably withheld.

Background: A standard estate plan often uses a pour over Will with a revocable Trust. The Will bequeaths the entirety of the decedent's probate estate to the Trust. Quite often the decedent does not fully fund the Trust until death, relying on his/her Will to complete the funding. In larger estates, completing the estate's administration can take a long time, due to litigation, creditor claims, estate taxes, etc. During this period of probate estate administration the trustee of the decedent's Trust does not have much of an obligation to do anything until the Trust is funded with the probate estate. Thus, the general view of a Trust is that the trustee only has duties with respect to assets that have funded the Trust. The limits of this 'general rule' was challenged in a recent Connecticut Supreme Court case.

Barash v. Lembo, Connecticut Supreme Court No. 20676, November 7, 2023

Facts: Here, for various reasons, the decedent's assets remained in the decedent's probate estate with a pour over Will for over a decade. A claim was made against the trustee of the revocable Trust for her failure to act affirmatively to take control of the assets held in the decedent's probate estate.

Issue: The question on appeal to the Supreme Court was whether the trustee of an inter vivos Trust that is the residuary beneficiary of the settlor's Will has a duty to protect and collect asset that have not yet been transferred to the Trust?

Trial Court: The trial court held that the trustee owed no fiduciary duty to the trust beneficiaries until there was ascertainable property held in the Trust.

Supreme Court: This trial court decision was reversed. The Court found that the trustee has formally *accepted* the Trust, as indicated by the fact that she had made 14 distributions to the trust beneficiaries totally over \$976,000. Thus, specific duties were imposed on the trustee to protect and collect assets, even though she had no control over those assets.

-Lack of Control Argument: The trustee argued that she lacked any power, and therefore, any duty to take action with respect to the estate's residuary assets because they remained in the executor's [Rubinow] control and had not been conveyed by him to the Trust. In response to this argument the Court noted:

“This argument misses the point. Although the defendant’s [Trustee] lack of legal title to the residuary assets obviously rendered her powerless to collect any income from those assets or to distribute that income to the trust beneficiaries, these circumstances do not relieve the trustee of her duty to take reasonable steps to protect and collect the trust’s interests in the residuary assets, after appropriate inquiry and investigation, and then pursue a claim or other relief against the executor if required by the standard of care applicable to her position as trustee. The fact that an executor controls the estate assets while the estate remains open is the very circumstance that triggers a trustee’s duty to take reasonable steps to ensure that the executor exercises that control in a manner consistent with the interests of the trust and its beneficiaries. A trustee has powers coterminous with her duties in this respect.”

- Expansive Trustee Duties: The obligation of the trustee to take reasonable steps to obtain property that is improperly detained by a Personal Representative is a specific application of the more general principle that a trustee has a duty to protect the rights and interests of the trust beneficiaries. 3 Scott and Ascher on Trusts, (5th Ed. 2007, Section 17.9) notes: “A trustee who fails to take reasonable steps to enforce a claim against the executor or a previous trustee, to compel them to turn over property, or to redress a breach of trust, is ordinarily liable for any resulting loss.”

Conclusion: The Michigan Trust Code contains a provision that imposes a duty on a trustee to pursue claims against a predecessor trustee, including the obligation to recover trust assets from that predecessor trustee. Consequently, it should come as no surprise that the same duty at common law might extend to recovering assets from a Personal Representative that retains indefinitely the decedent's assets that are to pass via a residuary clause in the decedent's Will to his/her revocable Trust. Unfortunately, the *Barash* decision does not tell us much about what is 'reasonable,' but I suppose a probate estate that remained open for over 10 years may be 'unreasonable' on the face of it.