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IN THE SUPREME COURT OF THE STATE OF IDAHO

MICHAEL D. FERGUSON,

Appellant,

v.

LOIS C. FERGUSON, WADE FERGUSON,
J. XARISSA KOENIG in their capacities as co-
trustees of the Roger and Sybil Ferguson Family
Revocable Trust and as co-personal
representatives of the Sybil Ferguson Estate and
STEVEN J. HART, in his capacity as a co-
trustee of the Roger and Sybil Ferguson Family
Revocable Trust,

Respondents.

Supreme Court Docket No. 46731-2019

Madison County Case No. CV-16-516

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Seventh Judicial District
of the State of Idaho, in and for the County of Madison;
Honorable Gregory W. Moeller, District Judge, Presiding.

Dale W. Storer, ISB #2166
D. Andrew Rawlings, ISB #9569
Holden, Kidwell, Hahn & Crapo, P.L.L.C.
1000 Riverwalk Drive, Suite 200
P.O. Box 50130
Idaho Falls, ID 83405
Telephone: (208)523-0620
Facsimile: (208) 523-9518
Email: dstorer@holdenlegal.com
arawlings@holdenlegal.com
Court eService: efilings@holdenlegal.com

Attorneys for Appellant Michael D. Ferguson

Craig G. Taylor, ISB #4248
Craig Taylor Law Offices, PLLC
58 East First North
P.O. Box 723
Rexburg, ID 83440
Telephone: (208) 356-0180
Facsimile: (208) 356-0238
Email: craig.taylor.law@gmail.com

Attorney for Respondents Lois C. Ferguson,
Wade Ferguson, J. Xarissa Koenig, and
Steven J. Hart

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Appellant, Michael D. Ferguson (“Michael”), by and through his attorneys of record, Holden, Kidwell, Hahn & Crap, P.L.L.C., hereby submits Appellant’s Reply Brief.

ARGUMENT

I. The Successor Trustees Breached Their Fiduciary Duty to Allow Michael Access to “Relevant” Information Concerning Administration of the Trust.

At first glance, this case appears to be somewhat complex and requires consideration of numerous legal issues and facts. In fact, it is not complex at all. The pivotal facts concerning the Successor Trustees’ breach of their duty to provide relevant information concerning the administration of the Trust are not disputed. Specifically, without dispute, the Successor Trustees refused and continue to refuse to allow Michael access to Trust records relating to Trust administration prior to the date of Sybil’s death on May 25, 2015.¹ The Successor Trustees admit as much in their Respondents’ Brief.² Upon Roger’s death, Sybil’s community and separate property was to be allocated to a separate Trust referred to as the “Survivor’s Trust” and was to be administered as provided in Article 8 of the Trust Agreement; on the other hand, Roger’s property was allocated among the Marital Trusts. (R., pp. 271, 274). As a beneficiary of the Survivor’s Trust only, it is essential for Michael to be able to verify that a proper allocation had been made between the Survivor’s Trust and the Marital Trusts. Without a starting point reflecting the identity, nature and value of the property transferred into the Survivor’s Trust at Roger’s death, it is impossible for Michael to determine the amount of his share of the Survivor’s Trust and if the Survivor’s Trust had

¹ See R., pp. 133, 135-38 (¶ 10 of the Successor Trustees’ Answer and their Third, Fourth, Fifth, Seventh, Eighth, and Ninth Affirmative Defenses); see also R., p. 440 (¶ 7 of the Successor Trustees’ Responses and Objections to Plaintiff’s Interrogatories); R., pp. 245-47 (¶¶ 19-22); R., pp. 342-45 (the Successor Trustees’ Interim Accounting); Tr. p. 46, ll. 4-10.

² See Respondents’ Brief, p. 7 (“All of the information provided to Michael by the Successor Trustees was for the period from and after Sybil’s death”); see also R., pp. 241-42 (Aff. of Michael Ferguson, ¶¶ 11-12).

been administered properly.³ Moreover, what Sybil did with those assets after the initial allocation is also critical for determining the identity and value of assets remaining in the Survivor's Trust at her death.

The Successor Trustees argue that they fulfilled their duty by providing Michael with copies of Sybil's estate tax return and an interim inventory of the Survivor's Trust at Sybil's death, along with copies of various bank statements kept by Sybil.⁴ However, by their own admission, the initial inventory and interim accounting only reflected Trust administration after Sybil's death⁵, and provided no information concerning the administration of the Trust prior to her death. Moreover, the bank statements provided to Michael prior to the initiation of this action reflected only cash transactions and disbursements from Trust bank accounts after Sybil's death and contained no information whatsoever concerning sales, dispositions or transfers of real property or other investments held by the Survivor's Trust prior to Sybil's death.⁶ The estate tax return was apparently prepared by the Successor Trustees and they did not provide Michael any supporting documentation regarding the basis for the values placed on assets included therein or any explanation for its omission of certain assets known to be owned by Roger and Sybil at or before Roger's death.⁷ The Initial Inventory prepared by the Successor Trustees did not include any of the supporting documents or Trust records kept by Sybil prior to her death or reflect any information from before Sybil's

³See R., pp. 206-07 (Aff. of David Smith, ¶¶ 7-9); R., p. 241 (Aff. of Michael Ferguson, ¶ 11).

⁴See Respondents' Brief., p. 7.

⁵*Id.*; see also R., p. 246 (Aff. of Michael Ferguson, ¶ 20).

⁶See R., p. 246 (Aff. of Michael Ferguson, ¶ 20).

⁷See R., pp. 238-53 (Aff. of Michael Ferguson, ¶¶ 6-29).

death.⁸ By refusing to provide Michael access to any records or information from prior to Sybil's death, the Successor Trustees have deprived Michael of any ability to verify whether or not the Initial Inventory was accurate or complete. In essence, the Successor Trustees' position was "trust us,"⁹ notwithstanding that there was an inherent conflict of interest created by the fact that the sibling trustees were beneficiaries of both the Survivor's Trust and the Marital Trusts, whereas Michael was only a beneficiary of the Survivor's Trust. Without access to any records relating to the time prior to Sybil's death, Michael has no way of determining if assets in the Survivor's Trust had been improperly sold, transferred or gifted to the Sibling Trustees or persons in violation of express Trust dispositive provisions.¹⁰

On appeal, the District Court reversed the Magistrate's conclusion that Michael did not become a beneficiary until Sybil died. (R., pp. 865-66 (Decision on Appeal, pp. 5-6)). Specifically, the District Court held that the Magistrate's conclusion that Michael's interest in the Survivor's Trust did not arise until Sybil's death was incorrect. (R., p. 865 ("Michael became a 'beneficiary' under the terms of the Survivor's Trust *when Sybil executed her Last Will and Testament on October 3, 2015.*" (emphasis added)). The Successor Trustees have not appealed from that holding. Thus, as

⁸See R., p. 340 (Inventory).

⁹In fact, the Successor Trustees continue to assert this point, stating: "Michael refuses to believe the information the Successor Trustees already have provided, although he has no evidence indicating that the information is not accurate." (Respondents' Brief, p. 24). But why is Michael—or any beneficiary—required to accept without reservation a trustee's word for anything without being able to review the underlying records and documents? Why is Michael being accused of trying to "pressure and intimidate" the Successor Trustees" (Respondents' Brief, p. 24), just for enforcing his rights as a beneficiary to receive relevant trust records? How is Michael's demand that the Successor Trustees comply with their fiduciary duties "unreasonable"? (Respondents' Brief, p. 24).

¹⁰For example, one of the Successor Trustees' claims is that before her death Sybil had verbally gifted her interest in a large, expensive residence in Bonneville County, Idaho, (the Quail Ridge property) to Xarissa — an asset which otherwise would have been an asset in the Survivor's Trust. See § 2.01 of Sybil's Will. R. p. 310. After Sybil died, the sibling trustees transferred Sybil's interest in such residence following their appointment as personal representatives of Sybil's estate in Arizona, apparently based solely upon such undocumented verbal gift. See ¶¶ 14-17, Aff. of Michael Ferguson. R. pp. 242-245.

a beneficiary of the Trust, both before and after Sybil’s death, Michael was entitled to be “reasonably informed of the trust and its administration,” to “a copy of the terms of the trust” and with “relevant information about the assets of the trust and the particulars relating to the administration.” Idaho Code § 15-7-303(b). Moreover, § 18.10 of the Trust requires the Trustee to make “financial records and documentation of the Trust available to beneficiaries at reasonable times and upon reasonable notice.” (R., p. 294). In sum, the Successor Trustees’ breach of their duties to allow Michael access to Trust records—including those from before Sybil’s death—is crystal clear.

In its Memorandum Decision, the Magistrate held that Michael’s request for access to Trust records was not relevant based upon the erroneous premise that Michael did not become a beneficiary until Sybil died.¹¹ Upon appeal to the District Court, the District Court ignored Michael’s request for a reversal of the Magistrate’s determination concerning the relevancy of Michael’s request for records access, despite the fact that the underlying premise of the Magistrate’s decision was reversed (*i.e.*, that Michael did not become a beneficiary until Sybil’s death). The District Court skipped all of the analysis relating to Michael’s right to access Trust records or the Successor Trustees’ breaches and instead concluded that Michael forfeited his interest in the Survivor’s Trust even though it was undisputed that the Arizona Petition was filed solely to prevent the running of the Arizona limitations period on filing a claim. From the District Court’s eager leap to consider the forfeiture question without considering Michael’s rights or the Successor Trustees’ breaches, springs all of the subsidiary issues upon which the Respondents’ arguments here are based.

¹¹It should be noted here that even under the Magistrate’s erroneous interpretation of the Trust, Michael was still entitled access to those records because he was most certainly a beneficiary at the time of Sybil’s death. (*See R.*, p. 693).

Had the District Court properly recognized Michael's entitlement to access to Trust records, it would have been clear that the Successor Trustees breached their fiduciary duties and were using their own breach as a means to facilitate their argument that the Forfeiture Clause was called into play by Michael's actions. Further, the District Court also ignored Michael's argument that he was entitled to discovery concerning the existence of probable cause in order to defend against the Successor Trustees' probable cause argument. Thus, notwithstanding that the Successor Trustees first raised the alleged lack of probable cause as a basis for their claim for application of the Forfeiture Clause, they still refused to provide Michael access to Trust records that would have enabled him to defend against the Successor Trustees' new defense. The Successor Trustees cannot have it both ways—that is, they cannot raise the issue of a lack of probable cause as a basis for claiming the applicability of the Forfeiture Clause and then refuse Michael's discovery request for information necessary to defend against the Successor Trustees' claim.

In sum, District Court erred in refusing to consider the validity of Michael's claim for access to Trust records and in refusing to consider his discovery request for Trust documentation concerning the administration of the Trust prior to Sybil's death. The District Court should have deferred considering the enforceability of the Forfeiture Clause until after Michael had been given fair opportunity to review Trust administrative documentation, thereby affording him with a meaningful opportunity to consider whether to pursue his Arizona Petition.

II. By Breaching Their Fiduciary Duties, the Successor Trustees Impeded the Administration of the Trust, Thereby Precluding Their Resort to the Forfeiture Clause.

Under the common law, a provision in a trust that relieves a trustee of liability for breach of trust is not enforceable to the extent it purports to relieve the trustee from liability for breach of trust

in bad faith or with indifference to the fiduciary duties of the trustee or the terms or purposes of the trust or the interest of the beneficiaries. Furthermore, to the extent that such clause interferes with enforcement or proper administration of the trust, such clause is likewise not enforceable. These principles of law are stated in Restatement (Third) of Trusts as follows:

(1) A provision in the terms of a trust that relieves a trustee of liability for breach of trust, and that was not included in the instrument as a result of the trustee's abuse of a fiduciary or confidential relationship, is enforceable *except to the extent that it purports to relieve the trustee:*

(a) *of liability for a breach of trust in bad faith or with indifference to the fiduciary duties of the trustee, the terms or the purposes of the trust, or the interest of the beneficiaries, or*

(b) *of accountability for profits derived from a breach of trust.*

(2) *A no contest clause shall not be enforced to the extent that doing so would interfere with the enforcement or proper administration of the trust.*

Restatement (Third) of Trusts § 96 (2007) (italics added). In its Memorandum Decision, the District Court gave only a token acknowledgment of these limitations on the enforceability of the Trust's Forfeiture Clause and hastily skipped to the question of whether or not there was probable cause for Michael's commencement of the Arizona Petition. Specifically, the District Court stated that:

[T]he record is clear that neither the Original Trust, the Shelter Trust nor the Will imposed any fiduciary duty on Sybil towards Michael prior to her death. Absent a fiduciary duty, it would not be reasonable for Michael or his lawyers to conclude that he would be entitled to an accounting of the Trust's financial records before Sybil's death.

(R., p. 872). From that erroneous premise, the District Court then found that Michael had not demonstrated there was probable cause for filing the Arizona Petition.¹² Specifically, the District

¹²See Appellant's Brief, pp. 19-24, for a discussion of common law fiduciary duties imposed upon trustees of a trust, as well as a discussion of express fiduciary duties set forth in the Trust.

Court ignored the Successor Trustees' breaches of their fiduciary duties to Michael regarding his entitlement to review Trust records and also ignored the Successor Trustees' refusal to respond to Michael's discovery requests that were necessary to defend against the Successor Trustees' claim that no probable cause had been shown. The District Court's conclusion is particularly glaring since the Successor Trustees raised this issue some ten months after this action was commenced and they were the ones who first who put the probable cause question in issue.

The Successor Trustees entirely gloss over their own breach of duties and mis-characterize Michael's claims regarding his entitlement to access to Trust records. Specifically, they infer that the Forfeiture Clause is enforceable since the, "Trust Agreement imposed no obligation on either Roger or Sybil to ensure that any particular asset or any particular value of assets remained in the Survivor's Trust or went to any particular person at the survivor's death." (Respondents' Brief, p. 18). Michael has never argued that Sybil was duty-bound to leave assets in the Survivor's Trust and Respondents' claim that Michael's argument was so based is misleading.¹³ Likewise, the Successor Trustees' enumeration of the general purposes of the Forfeiture Clause to support the conclusion that the clause is not void against public policy is also misleading. (Respondents' Brief, p. 19). It is not the text of the Forfeiture Clause nor the purposes listed by the Successor Trustees that are violative of public policy—rather, it is the Successor Trustees' invocation of the Forfeiture Clause here, where their own feet-dragging and breaches of fiduciary duties precipitated Michael's need to file the Arizona Petition in order to prevent the running of the Arizona statute of limitation.

Michael takes strong issue with the District Court's conclusion that, "The forfeiture provision does not interfere with enforcement or proper administration of the Shelter Trust because Sybil owed

¹³See Respondents' Brief, pp. 18-19.

no fiduciary duty to any of the beneficiaries.” (R., p. 874). As noted in Michael’s Appellant’s Brief, as long as there were assets in the Survivor’s Trust, Sybil owed duties to all Trust beneficiaries and access to Trust records concerning such administration is necessary in order to determine whether or not Sybil had properly performed her duty to properly allocate Trust assets and administer the Trust. Michael also takes issue with the District Court’s sweeping inference that Sybil’s right to invade Trust assets for her own purposes negated any and all duties owed to the Trust beneficiaries.¹⁴ In sum, Michael has never contested Sybil’s right to use Trust assets for her own purposes and Respondents’ mischaracterization of Michael’s arguments is very misleading.

The District Court’s conclusion that no duties were owed to Michael or any of the other beneficiaries based upon Sybil’s right to invade the Trust corpus is patently erroneous. Michael has never contested Sybil’s right to use Trust assets for her own purposes nor ever asserted that such right was violative of public policy or that Sybil had a duty to leave assets in the Survivor’s Trust at her death. Rather, Michael’s only argument is that the Successor Trustees’ refusal to allow him access to Trust records impeded proper administration of the Trust. The Successor Trustees should not be allowed to sandbag Michael’s right to access relevant records and then assert the Forfeiture Clause when Michael takes steps to preserve his right to determine if the Survivor’s Trust was properly administered.

¹⁴In its Decision on Appeal the District Court makes the following erroneous inference concerning the effect of Sybil’s right to use Trust assets for her purposes: “*Had there been a duty to preserve any portion of the corpus of the Trust . . . then such forfeiture provision might be troublesome; however this is not that kind of Trust.* Michael’s interests were strictly limited to his share of the remaining assets, if any, that were designated for him. Anything else he might have expected to receive — but now believes was missing from the estate — was Sybil’s to use and dispose of how she saw fit.” Decision on Appeal, p. 14, R. p. 874. (Italics added)

III. The Court Should Reject the Successor Trustees' Argument That There Is No Probable Cause Limitation upon the Enforcement of Forfeiture Clauses in Revocable Trust Agreements.

The Successor Trustees argue that the Forfeiture Clause should be enforced against Michael because he submitted no evidence of probable cause for commencement of the Arizona Petition. (See Respondents' Brief, pp. 21-23). They premise this argument on the fact that Idaho Code § 15-3-905 applies only to wills and not to trusts. The Successor Trustees again misconstrue Michael's argument in that regard. Michael's argument is not now and never was based upon Idaho Code § 15-3-905, rather it was based upon common law principles and upon substantial case law in other jurisdictions which have imposed a "probable cause" limitation upon enforcement of *in terrorem* clauses in trusts. Michael has consistently acknowledged that I.C. § 15-3-905 is limited solely to wills and the Successor Trustees distort Michael's argument when they suggest his argument is based solely upon I.C. § 15-3-905.¹⁵

The Successor Trustees also urge this Court to reject a probable cause limitation based upon the singular Wyoming case of *EWG v. First Federal Savings Bank of Sheridan*, 413 P.3d 106, 110-111 (Wyo. 2018). (See Respondents' Brief, p. 22). However, the Successor Trustees did not make this argument in the proceedings below and in fact expressly acknowledged and relied upon the probable cause requirement in their own arguments.¹⁶ As such, they cannot now raise this issue for the first time on appeal, especially where they have not appealed the District Court's finding that

¹⁵See R., pp. 753-755 (incorporated herein by reference).

¹⁶See Respondents' Brief, pp. 28-29; see also R., pp. 633, 637 (Successor Trustees' assertions of a lack of probable cause to the magistrate); R., pp. 660, 662 (Magistrate's acknowledgment that *in terrorem* clauses are generally enforceable "unless the beneficiary had probable cause to bring the proceeding" (citing Restatement (Third) of Property (Wills & Don. Trans.) § 8.5 (2003)); R., pp. 871 (District Court's decision on appeal finding a probable cause exception—which finding has not been appealed by the Successor Trustees).

probable cause is required. See *Barmore v. Perrone*, 145 Idaho 340, 343, 179 P.3d 303, 306 (2008) (“The longstanding rule of this court is that we will not consider issues that are raised for the first time on appeal” (citations omitted)). Further, they should be judicially estopped from contravening their own prior argument that a probable cause limitation should be applied here. See *McCallister v. Dixon*, 154 Idaho 891, 894, 303 P.3d 578, 581 (2013) (“Judicial estoppel precludes a party from advantageously taking one position, then subsequently seeking a second position that is incompatible with the first” (citations omitted)). Here, the Successor Trustees expressly advocated that Michael had no probable cause for bringing the Arizona Petition since Sybil owed him absolutely no duties, which position was adopted by the District Court (obviously to the Successor Trustees’ advantage). Judicial estoppel is designed “to prevent abuse of the judicial process by deliberate shifting of positions to suit the exigencies of a particular action,” *Heinze v. Bauer*, 145 Idaho 232, 235, 178 P.3d 597, 600 (2008) (citations omitted).

In any event, the Wyoming case is a minority position and is not followed by other jurisdictions which *do* impose a probable cause limitation upon enforcement of *in terrorem* clauses. (See Appellant’s Brief, pp. 28-29). Moreover, the Successor Trustees assiduously avoid acknowledgment that their own breach of fiduciary duty precipitated the need to file the Arizona Petition and impeded proper administration of the Trust by, thereby impeding Michael’s ability to ascertain the nature, identity and value of assets in the Survivor’s Trust and his ability to ascertain whether or not Sybil had properly allocated Trust assets following Roger’s death and whether she had properly administered such allocated assets consistent with her express duties under the Trust Agreement. The Successor Trustees also totally ignore and do not respond to Michael’s argument that he was entitled to discovery concerning the Successor Trustees’ assertion of a lack of probable

cause. The District Court’s refusal to consider Michael’s argument in this regard constitutes reversible error.

Finally, the Successor Trustees assert the District Court correctly held that, “Sybil owed no fiduciary duty to Michael concerning the Survivor’s Trust before her death—no duty to account and no duty to preserve any assets in the Trust” and that “no probable cause exist for Michael to bring a breach of fiduciary duty action against Sybil’s estate.” (Respondents’ Brief, p. 23). As noted above, Michael has never asserted that Sybil had a duty to ensure assets would remain in the Survivor’s Trust at her death and the Successor Trustees mislead the Court by suggesting that Michael made or is now making that argument. Rather, Michael has consistently argued that the existence of duties to beneficiaries is an inherent and fundamental component of all trusts and that a trust without any duties is pure fiction.¹⁷ As argued in Appellant’s Brief, a trustee has many duties—a duty to keep proper records, a duty to act fairly with respect to the interest of beneficiaries and a duty to keep trust beneficiaries reasonably informed, among others—and all of these duties exist as long as there are assets in the trust. The Successor Trustees argue that, “[t]aken to its logical conclusion, Michael’s arguments would take away the ability of grantors of revocable living trusts to retain broad discretion over trust assets during their lifetime.”¹⁸ They also argue implicitly that Sybil’s right to invade the trust corpus for her own support and personal needs absolved her of her duty to avoid self-dealing contrary to the terms of the Trust and of her duty to act impartially with

¹⁷“A settlor who attempts to create a trust without any accountability in the trust is contradicting himself.” *Bogart and Bogart, The Law of Trust*, § 673 (Rev. 2d. Ed. 1993).

¹⁸Respondent’s Brief, p. 20.

respect to the rights of all trust beneficiaries.¹⁹ Stripped to its essence, the Successor Trustees are arguing that Sybil owed no duties to any of the Trust beneficiaries and that she was free to deal with Trust assets as she pleased, regardless of her express and inherent duties in the Trust. If Sybil had the right to ignore all of her Trust duties, then the Trust would be pure fiction. Sybil's right to invade Trust corpus for her own purposes did not in any way absolve her from the duty to act fairly toward the Trust beneficiaries or from her duty to avoid self dealing in a manner that was inconsistent with the terms of the Trust. The Trust beneficiaries' rights were subject to the terms and conditions set forth in the Trust, including Sybil's right to invade the Trust corpus for her own purposes. Sybil's resort to the Trust corpus for her own personal needs was expressly permitted by the Trust and her exercise of that right would not in any way have contravened the interests of the beneficiaries that were subject to such rights.

Did Sybil have the fiduciary duty to avoid self-dealing in a manner contrary to the express terms of the Trust? Of course she did. A simple hypothetical will illustrate the point. Suppose Sybil disagreed with the Trust dispositive provisions pertaining to the Marital Trusts (*i.e.*, Roger's share of the community property and his separate property). Did she, as the Successor Trustees argue, have "absolute discretion to modify the terms of her will to change the recipients of the assets of the trust at any time?"²⁰ Following the Successor Trustees' argument, Sybil had the "absolute discretion" to ignore § 5.02 of the Trust and allocate all assets of the Trust to the Survivor's Trust, based upon her ability to alter her Will. In fact, had Sybil done that, it would have been a clear breach of her

¹⁹Ibid.

²⁰Respondents' Brief, p. 21.

duty to avoid self dealing and to act fairly with respect to the rights of the beneficiaries of the Trust.²¹

In sum, Roger and Sybil did not intend to create a fictional or illusory trust. The Successor Trustees' arguments that no duties were owed to the Trust beneficiaries based upon Sybil's "absolute discretion" to use Trust assets as she pleased flies squarely in the face of § 20.05(p) of the Trust which recognizes the existence of Trustee fiduciary duties.²² Once again, the District Court's conclusion that no duties were owed to any of the beneficiaries is reversible error.

IV. Based upon the Successor Trustees' Breach of Their Duties to Provide Access to Relevant Information, They Should Be Estopped from Enforcement of the Forfeiture Clause.

Under the equitable maxim that, "He who seeks equity must do equity," the Successor Trustees should be barred from asserting application of the Forfeiture Clause because of their breach of duty to provide Michael with relevant information concerning administration of the Trust. In response, the Successor Trustees claim that they "provided him [Michael] an inventory of the Trusts assets as of Sybil's death and an interim accounting *from the time the Successor Trustees became Trustees* and a large amount of underlying financial records, from which the information for the inventory and accounting were drawn."²³ By their own admission, the inventory and interim accounting related only to the period after Sybil's death. As noted above, the record is undisputed that the Trustees would not disclose or allow access to any financial records concerning Trust administration prior to Sybil's death. They also argue that they and their counsel met with Michael

²¹Under § 8.05 of the Trust Sybil's power of appointment was limited to assets remaining in the Survivor's Trust on her death.

²²R. p. 307

²³*See* Respondents' Brief, pp. 23-24 (italics added).

and his attorney to “answer any other questions Michael might have concerning financial matters relating to the Survivor’s Trust “*since the Successor Trustees became Trustees.*” (Respondent’s Brief, p. 24). Further, their claim that they provided Michael a “significant amount of records and financial information about the Survivor’s Trust and its records were drawn”²⁴ is belied by their admission that all such information related solely to the period after Sybil’s death. Specifically, they acknowledge that, “All of the information provided to Michael was for the period from and after Sybil’s death.”²⁵ Paradoxically, they claim that, “Michael has admitted he has no evidence that Sybil breached any fiduciary duty owed to him,”²⁶ when in fact they denied him access to Trust records kept prior to Sybil’s death from which Michael could determine if Sybil had properly allocated Trust assets or had otherwise properly fulfilled her duties as a trustee. They also claim that, “Michael initiated court action to try to pressure and intimidate the Successor Trustees into complying with his unreasonable demands despite the fact that he has no legal or equitable claim related to the Trust before Sybil’s death.”²⁷ Such statement also has no support whatsoever in the record. In fact the evidence before this Court is directly to the contrary. Without dispute the Record reflects that the Arizona Petition was filed solely to prevent the Arizona limitation period from running during the pendency of this action and that the Successor Trustees stipulated to a stay of the Arizona proceeding pending the resolution of this action.²⁸ Having no support in the Record, their

²⁴See Respondents’ Brief, p. 7.

²⁵*Ibid.*

²⁶Respondents’ Brief, p. 23.

²⁷See Respondents’ Brief, p. 24.

²⁸See R., p. 598 (Aff. of Robert Farnam, ¶ 5); *see also* R., p. 602.

argument that Michael initiated court action to pressure and intimidate the Trustees into complying with his unreasonable demands borders upon bad faith. Moreover, the Successor Trustees did not dispute Mr. Farnam's Affidavit stating that the sole purpose for bringing the Arizona Petition was to prevent the running of the Arizona statute of limitations pending the resolution of this action.²⁹

The Successor Trustees inconsistently argue that Michael's action in filing the Arizona Petition, "is precisely the kind of action that Roger and Sybil sought to discourage when they included item (c) in the Forfeiture Provision."³⁰ If the Successor Trustees' argument is correct, then why would Roger and Sybil include numerous provisions in the Trust expressly imposing fiduciary duties on the Trustee if they intended the Forfeiture Clause could be used to undermine or prevent enforcement of those very same duties. Yet, that is exactly what the Successor Trustees have done here.

Further, they make the statement that, "Michael refuses to believe the information that the Successor Trustees already have provided although he has no evidence indicating that the information is not accurate."³¹ Michael in fact has the right to challenge the Trustees' Inventory and Initial Accounting—such right is inherent within Trust and statutory provisions preserving access to Trust Administration records.³² Such access rights would be totally meaningless if there was no right to contest the Trustees' claims. The reason Michael has only limited evidence of Sybil's

²⁹ See R., p. 599 (Aff. of Robert Farnam, ¶ 8).

³⁰ See Respondents' Brief, pp. 14-15.

³¹ See Respondents' Brief, p. 24.

³² See Idaho Code § 15-7-303; *Bogert, George T., TRUSTS*, § 141 (6th ed. 1987) ("The trustee is under a duty to furnish to the beneficiary on demand all information regarding the trust and its execution which may be useful to the beneficiary in protecting his rights, and to give to the beneficiary facts which the trustee knows or ought to know would be important to the beneficiary.") (emphasis added).

administration of the Survivor's Trust is because the Successor Trustees wrongfully refused and continue to refuse to grant Michael access to relevant Trust administrative records kept and maintained prior to Sybil's death. The Successor Trustees' argument here is hypocrisy at its worst. Inherent within the statutory provisions and clauses in the Trust regarding access to relevant information is the notion that beneficiaries *are* entitled to disbelieve and challenge inventories and accountings prepared by trustees. It is particularly so in this case, because the Successor Trustees have an inherent conflict of interest because they were beneficiaries of both the Marital Trusts and the Survivor's Trust, whereas Michael was a beneficiary only of the latter.

Finally, in response to the Successor Trustees' contention that, "Michael will continue to engage in such conduct (*i.e.*, requesting access to "relevant" Trust records?), to the detriment of all other Trust beneficiaries,"³³ Michael would ask how his request to review relevant Trust records is detrimental to the interest of Trust beneficiaries when he has that right, as do all other beneficiaries? How is Michael's insistence that Sybil owed fiduciary duties to all beneficiaries detrimental to their interests? Roger and Sybil clearly intended to allow such access and to impose fiduciary duties upon the trustee and the Successor Trustees are now attempting to subvert those rights by their resort to the Forfeiture Clause.

V. The District Court Erred in Holding That Sybil Owed No Fiduciary Duty in Her Capacity as Trustee of the Survivor's Trust.

Michael will not here repeat his argument that a trust which imposes no fiduciary duties on the trustee is illusory and no trust at all.³⁴ Yet the District Court essentially made that erroneous

³³ See Respondents' Brief, p. 24.

³⁴ "A settlor who attempts to create a trust without any accountability in the trust is contradicting himself." *Bogart and Bogart*, THE LAW OF TRUST, § 673 (Rev. 2d. Ed. 1993).

conclusion when it conflated the difference between a will and a trust in order to justify its conclusion that the Trust imposed no fiduciary duties upon the Trustee (in this case Sybil). Admittedly, a will does not impose fiduciary duties upon the testator; however the same is not true relative to a trust, which inherently imposes fiduciary duties upon its trustees.

The foregoing aside, Michael will respond to the Successor Trustees' argument that the *Carl H. Christensen Family Trust v. Christensen*, 133 Idaho 866, 993 P.2d 97 (1999) supports their "no duties" argument. In *Christensen*, Carl and Lenna Christensen established a revocable living trust into which a substantial amount of real property as well as their bank accounts, farm equipment, livestock and personal effects were placed. *Christensen*, 133 Idaho at 868, 993 P.2d at 1199. Approximately three years after the trust creation, one of the sons, Forest Christensen, approached his parents about buying the 900 acre family farm which included their personal residence. *Id.* Carl and Lenna's attorney, Steve Fuller, drew up a contract of sale providing for a sale of the family farm to Forest and Byron Kelly who was the Christensen's family dentist. *Id.* at 868-69, 993 P.2d at 1199-1200. Several days after the closing, Lenna advised Fuller that she was unhappy with the deal because she did not realize that Byron was receiving a fifty percent interest in the farm or that farm equipment was included in the sale. *Id.* at 869, 993 P.2d at 1200. She also testified that she did not realize that Fuller had represented her at the closing of the sale. *Id.* Approximately seven months after the closing, Lenna and five of her other children commenced an action to set aside the contract, alleging that husband, Carl, was incompetent and incapable of giving an intelligent consent to the transaction. *Id.*

Following a motion for summary judgment by Forest, the District Court granted summary judgment in Forest's favor on the basis that Lenna and her five other children were not real parties

in interest to the Contract of Sale under I.R.C.P. 17(a). *Id.* at 869-70, 993 P.2d at 1200-01. The co-plaintiffs asserted that as beneficiaries of the family trust they were entitled to pursue such action. *Id.* at 870, 993 P.2d at 1201. The Supreme Court rejected that contention on the basis that the co-plaintiffs were merely contingent beneficiaries and they were not entitled to challenge the enforceability of a contract of sale to which they were not parties. *Id.* at 870-71, 993 P.2d at 1201-02.

There are some rather obvious differences between the case at hand and *Christensen*. First, and most importantly, *Christensen* was not a case involving an alleged breach of fiduciary duty by a trustee. Rather, it was a case brought by the contingent beneficiaries of a trust seeking to set aside a transaction between one of the grantors' sons and the co-trustees, Carl and Lenna Christensen. Thus, the case did not in any way address the rights of a residual beneficiary to enforce trust provisions included in a trust of which they were a specific beneficiary. *Christensen* stands only for the proposition that contingent beneficiaries have no standing to challenge a duly constituted Trustee's administrative actions while their interest is still contingent. However, in this case when Michael filed his Arizona action, his interest was not contingent—rather his residual interest in the Trust at that time was fully vested and absolute.

Thus, the *Christensen* case is wholly inapposite because the issue at hand here involves the rights of a fully vested residual beneficiary to enforce provisions of a trust of which he is a named beneficiary against the trustees. Furthermore, unlike *Christensen*, Michael became a fully vested beneficiary upon Sybil's death unlike the beneficiaries in *Christensen* who held only contingent, hypothetical interests. Michael became a residual beneficiary of the Trust immediately upon his mother's execution of her power of appointment and such residual interest became absolute once

Sybil died. On appeal, the District Court here correctly recognized Michael's status as a beneficiary and the Successor Trustees have not challenged that determination. Michael's claim against Sybil, if ultimately brought, would be based upon his rights as a fully vested beneficiary of the Survivor's Trust. Unlike *Christensen*, where the siblings were not parties to the contract of sale at issue, Michael was a fully vested beneficiary of the Trust at the time the Arizona action was filed and as such any action against Sybil's estate would necessarily be based upon his rights as a fully vested beneficiary under the Trust instrument.

Once again, the Successor Trustees' arguments are specious because they are in essence arguing that Sybil, as trustee of the Trust, owed no duties to the beneficiaries of the Trust—a proposition which would make the Trust illusory, as has been pointed out previously. Michael's claim, if ultimately brought, would not be based upon a claim of a specific interest in Trust assets, rather his claim would be based upon a breach of fiduciary duty under the express terms of the Trust—a Trust of which he was without dispute a named beneficiary. The Successor Trustees' reliance upon the *Christensen* case is therefore wholly misplaced.

VI. The District Court Erred in Failing to Address Michael's Contention That He Was Entitled to Pursue Discovery in Order to Defend Against the Successor Trustees' Claim That He Had No Probable Cause to Commence the Arizona Petition.

As previously noted in Michael's Appellant's Brief, the District Court failed to address Michael's assertion that he was entitled to pursue discovery concerning Trust administration in order to respond to the Trustees' affirmative defense that he had no probable cause to commence the Arizona Petition. The District Court simply ignored that argument and held that since he had no probable cause to bring the Arizona action, the Forfeiture Clause was applicable. The District Court erred in failing to recognize that the Successor Trustees put the probable cause question into issue

when they amended their Answer and that the Successor Trustees' subsequent refusal to respond to the discovery concerning their own affirmative defense wrongfully deprived Michael of the ability to defend against their contentions.

Here the Successor Trustees essentially follow the District Court's approach—ignore the discovery issue and hope that it will go away. Specifically, they ignore the fact that they raised the probable cause issue themselves and that it was their refusal to allow discovery which precipitated Michael's inability to respond to their new defense. The Trustees cannot have it both ways—if they are going to raise the probable cause issue as a defense to Michael's claim of entitlement to review Trust records, they cannot then deprive Michael of the right to pursue discovery relevant to the Successor Trustees' probable cause claims.

CONCLUSION

By now it should be clear that the Successor Trustees breached their duty to allow Michael access to relevant Trust records. Had the Successor Trustees fully complied with their duty, the Arizona Petition may or may not have been warranted, depending upon whether or not Sybil complied with her fiduciary duties owed to all of the beneficiaries, including Michael. The Successor Trustees should not be allowed to breach their duties as Trustees to provide access to relevant information and then claim the Forfeiture Clause is applicable because Michael has no probable cause to commence the Arizona Petition. The Successor Trustees are speaking out of both sides of their mouths.

Michael would again ask the question that goes to the heart of this action: What are the Successor Trustees trying to hide? Is it their fraudulent transfer of the Survivor's Trust's interest in

Sybil's Quail Ridge lot and residence?³⁵ What happened to Sybil's interest in the real estate holding company known as Interchange Holdings, LLC? Why did the Successor Trustees fail to include the Interchange Holdings, LLC, investment in the Initial Inventory and what was the basis for their valuation of such investment in Sybil's federal estate tax return?³⁶ Why do the Successor Trustees refuse to explain what happened to Sybil's interest in Four Peaks Properties, LLC, which was another real estate investment company with vast real estate holdings in Arizona and which was once owned by Roger and Sybil as community property?³⁷ Why won't the Successor Trustees explain the reason for their payment of \$20,264 for "Kathy Williams car" out of the assets of the Survivor's Trust, when Kathy Williams was not even a beneficiary of the Survivor's Trust.³⁸

All of these assets and others were part of Roger and Sybil's vast financial empire that Michael estimates was valued at over seventy million dollars in 1986.³⁹ What happened to these assets? Although these looming questions focus primarily upon the Successor Trustees' actions following Sybil's death, without knowing how Sybil allocated such assets between the Survivor's Trust and the Marital Trusts or what she did with such assets once so allocated, Michael has no way of knowing whether or not such assets were part of the Survivor's Trust of which he is a beneficiary. Such allocation and Sybil's subsequent administration is quite clearly "relevant information" and the Successor Trustees' refusal to provide such information, under the circumstances, is very suspect.

³⁵See R., pp. 242-45 (Aff. of Michael Ferguson, ¶¶ 14-17).

³⁶See R., pp. 247-49 (Aff. of Michael Ferguson, ¶¶ 22-23).

³⁷See R., pp. 249-50 (Aff. of Michael Ferguson, ¶¶ 24-25).

³⁸See R., p. 252 (Aff. of Michael Ferguson, ¶¶ 27).

³⁹See R., p. 239 (Aff. of Michael Ferguson, ¶¶ 8).

As pointed out in Michael’s Affidavit, there are many reasons to question the accuracy of the Initial Inventory prepared by the Successor Trustees.⁴⁰ Only full and complete access to all Trust administrative records will resolve those questions and the Trustees’ refusal to provide such access casts grave doubt as to whether or not the Trust here has been properly administered. One of the most fundamental duties owed by a trustee to a beneficiary is the right to review trust administrative records.⁴¹ The Trustees’ actions in this case here fly squarely in the face of that right.

The matter should be remanded to the Magistrate Court with an order to allow inspection of all relevant Trust records consistent with Idaho Code § 15-7-303(b) and § 18.10 of the Trust, as well as I.R.C.P. 26(b)(1).

RESPECTFULLY SUBMITTED this 17th day of September, 2019.

/s/ Dale W. Storer
Dale W. Storer, Esq.
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

/s/ D. Andrew Rawlings
D. Andrew Rawlings, Esq.
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

⁴⁰See R., pp. 246-52 (Aff. of Michael Ferguson, ¶¶ 21-28).

⁴¹Restatement (Third) of Trusts, § 82, cmt. (d) (2007) (“Disclosure [of trust records and information] is fundamental to sound administration of the trust and to both the trustee’s performance and the beneficiaries’ monitoring of associated fiduciary obligations”).

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of September, 2019, a true and correct copy of Appellant's Brief was properly mailed in the United States mail with postage prepaid and also served via email and fax, pursuant to the Idaho Rule for Electronic Filing and Service 17(c)(1) (as the attorney listed below has failed to designate a service contact); Idaho Rule of Civil Procedure 5(b)(2)(C), -(E), and -(F); and Idaho Appellate Rule 20, on the following:

Craig G. Taylor, ISB #4248
CRAIG TAYLOR LAW OFFICES, PLLC
58 East First North
P.O. Box 723
Rexburg, ID 83440
Telephone: (208) 356-0180
Facsimile: (208) 356-0238
Email: craig.taylor.law@gmail.com

Attorney for Respondents Lois C. Ferguson,
Wade Ferguson, J. Xarissa Koenig, and Steven J. Hart

/s/ D. Andrew Rawlings

D. Andrew Rawlings
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

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