Client Alert: Ohio Appellate Court Interprets OTC and UPOAA; Allows New Claim for Treble Damages by Vested Beneficiaries

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On July 3, the Second District Court of Appeals issued an opinion in *Cartwright v. Batner,* 2014-Ohio-2995 (Ohio App. 2 Dist.), which interprets both the Ohio Trust Code and Ohio's Uniform Power of Attorney Act, recognizes a new claim for treble damages by vested beneficiaries, and provides guidance on a variety of issues important to estate planners, fiduciaries, beneficiaries and those who represent them.

Synopsis

This case confirms the general understanding and application of the OTC sections concerning trustee accounting, provides additional support for the somewhat surprising holding of the 2005 *Stephenson* case that the "declaration" that a bank account is a trust asset trumps its titling with the bank, confirms the UPOAA's provision of broad relief for misuse of powers of attorney, provides what could be a potent new claim for vested trust beneficiaries for treble damages against a trustee, and confirms the OTC provision for attorneys' fees "as justice and equity may require."

Fact Summary

This appeal from the Montgomery County Court of Common Pleas involved a dispute between two siblings over their deceased mother's assets. Lorraine Batner died in 2009, at the age of 86, leaving two children, David Batner and Kimberly Cartwright. Her estate plan consisted of an irrevocable trust (for Medicaid planning), a revocable trust, and a will, and provided equally for her two children. Lorraine had been diagnosed with Alzheimer's and dementia before 2004 when she updated her estate planning documents for the last time, but had received a medical opinion of competence before execution of those documents.

David was the sole trustee of Lorraine's irrevocable trust and the holder of her power of attorney. David and Lorraine were co-trustees of Lorraine's revocable trust until Lorraine was placed in a nursing home in 2007, at which time David assumed the role of sole trustee. Although Lorraine's checking account (the primary asset in dispute) was titled in Lorraine's name until 2007, Kimberly argued this account had become a trust asset in 2004 as a result of its alleged inclusion on a Schedule A attached to the irrevocable trust.

The evidence showed that between 2005 and 2009 Lorraine's checking account had declined in value from $337,731 to $1,000, while Lorraine had very few personal expenses and David had unfettered access to the account. Expenditures included payments to David's mortgage company, Sam's Club, Cingular and Henn Marine (David owned a boat; Lorraine did not). David failed to provide any accounting for this account until March 2011.

Decision

Trustee Accounting

A trustee's duties to account to beneficiaries are governed by the Ohio Trust Code, sections RC 5808.10 and 5808.13. The court cited RC 5811.03 for the proposition that these OTC sections are applicable to trusts executed before the enactment of the OTC in January 2007.

Under RC 5801.01(F), Kimberly became a "current beneficiary" of both the revocable and irrevocable trusts at her mother's death in 2009. As a current beneficiary, she was entitled to "at least annually" and without demand, "a report of the trust property, liabilities, receipts and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets, and, if feasible, the trust assets' respective market values." The court also referred to RC 2109.303(A) for further guidance on "how to construct an accounting." This section requires "itemized disbursements and distributions to be verified by vouchers or proof."

The appellate court concluded that David had failed to provide any accounting until March 2011, in violation of his duties as trustee, and failed to provide itemized disbursements that were verified by receipts or proof.

David had admitted, however, that he made improper expenditures from the trust for his own benefit in the same amount that his tardy accounting showed and that Kimberly claimed. The appellate court, therefore, found that the trial court's decision that the untimely accounting was "adequate" did not constitute an abuse of discretion.

Ownership of the Checking Account

Kimberly argued that the trial court erred in excluding the time period of 2005 to 2007 from David's required accounting. Lorraine's checking account was transferred from her own name into David's name as trustee of the revocable trust in 2007. Before 2007, David held Lorraine's power of attorney and had access to the account. There was some factual dispute concerning whether Lorraine had listed the checking account on the Schedule A of her irrevocable trust. The court noted that if it had appeared on Schedule A to the trust, this would have been sufficient to make the checking account a trust asset, citing RC 5804.01 ("declaration by the owner of property that the owner holds identifiable property as trustee" is sufficient to create a trust) and *Stephenson v. Stephenson*, 163, Ohio App 3d. 109, 2005-Ohio-4358 (9th Dist.) (formal transfer with a bank or investment company is the preferred method to transfer ownership of intangible property to a trust, but not strictly necessary).

The court concluded, however, that the evidence showed that Lorraine had changed her mind and rejected the transfer of the checking account into her name as trustee, and that the account did not, therefore, require an accounting by David, *as trustee*, until 2007.

POA Abuse Claim

But David did have to account for the funds in Lorraine's checking account as her attorney-in-fact. The court agreed with Kimberly that she had standing to challenge David's actions as POA and overruled the trial court's determination that David had not breached his fiduciary duties.

The Second District applied RC 1337.36, a section of the Ohio's Uniform Power of Attorney Act adopted in March 2012, and RC 1337.64 concerning its retroactive application to find that Kimberly had standing to bring an action to review an agent's conduct and grant relief as:

- The principal's spouse, parent or descendant;
- An individual who would qualify as a presumptive heir of the principal;
- A person named as a beneficiary to receive any property, benefit or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate.

The court also analyzed the statutes and case law in effect prior to March 2012 and found that Kimberly had standing to sue concerning David's POA abuses prior to enactment of the UPOAA because of her vested interest in the trusts and the allegations of theft, bad faith and fraud. The Second District reversed the trial court's decision on the standing question, and also clarified that the Court of Common Pleas had concurrent jurisdiction with the probate court over the question.

Finally, the court concluded that the trial court had abused its discretion when it held that David was not liable for breach of fiduciary duties as POA. It held that a presumption of undue influence in the transactions had arisen and that David had failed to rebut that presumption with evidence that his conduct was not fraudulent.

Adding to David's losses on appeal, the Second District reversed the trial court's decision and found David liable to the trust for rent for living in his mother's condominium after her death and denying access to his sister.

Treble Damages

In an unprecedented decision, by the court's own admission, the Second District held that Kimberly was a "property owner" under RC 2307.61 and could seek treble damages from David, the trustee, for his theft of her property. The trial court had held that, as a beneficiary under a trust, Kimberly was not a "property owner." But the Second District disagreed, noting that under the terms of these trusts, the assets vested immediately in the beneficiaries upon the death of the settlor: "The remedy of a civil action for treble damages for "property owners" who have been deprived of property due to theft is consistent with actions for an accounting and to obtain relief pursuant to a POA. . . . Accordingly, we see no reason why RC 2307.61 would not apply to the situation before us."

Attorneys' Fees

Citing RC 5810.04, which provides for payment of attorneys' fees from a trust that is the subject of controversy "as justice and equity may require" to any party, the Second District reversed an award of attorneys' fees to David. The court also noted that attorneys' fees for misuse of power of attorney are permissible if David is found to have acted in bad faith, citing *Schiavoni v. Roy*, 2012-Ohio-4435 (Ohio App. 9th Dist.).

With the amount in controversy under $300,000, it remains to be seen whether either party seek further appeal. Please contact your Vorys attorney for further updates.