

relationship with the decedent. Mr. Robertshaw is also a beneficiary of this trust. Those that occupied a fiduciary relationship with the decedent are presumed to have committed fraud concerning any property received from the decedent. Wade v. Wade, 768 N.E.2d 957 (Ind.App. 2002); Villanella v. Godbey, 632 N.E.2d 786, 962 (Ind.App.1994) (“a presumption of fraud attaches to transactions entered into during the existence of a fiduciary relationship regardless of whether the fiduciary actually used his fiduciary powers to complete the transactions”). So any benefit Mr. Pfister or Mr. Robertshaw are to receive from the decedent’s trust is presumed to be the product of undue influence, constructive fraud, and conversion.

The named beneficiaries of the decedent’s trust have filed a petition asking the court to appoint U.S. Bank as executor to defend the will contest and as successor trustee to defend the trust contest. These beneficiaries have not addressed who would have responsibility for filing actions on behalf of the estate as a plaintiff. Giving them a voice on that question is akin to letting the wolf decide who watches the hen house.

Mr. Harlow filed an action to contest the decedent’s trust at the same time he filed his petition to resist probate. At the last hearing trustee’s counsel (Mr. Manterfield) argued that only a special administrator could file a lawsuit to upset the decedent’s trust. If this is true, the same bank cannot serve as both the special administrator and successor trustee because of the apparent conflict of interest. That is, the special administrator has a fiduciary obligation to collect all assets that could belong to the estate – this includes any property in

a trust that should belong to the estate; an executor charged with increasing the size of the estate cannot serve as successor trustee charged with defending the trust that hopes to exclude property from the estate.

Executors in General

The personal representative is regarded as a trustee appointed by law for the benefit and protection of creditors and distributees. *Fall v. Miller*, 462 N.E.2d 1059, 1061 (Ind.App. 1984). The fiduciary character of the relationship extends to all legatees. *Fall*, at 1063.

The personal representative bears a heavy burden in this regard for it is his duty to guard against error in the distribution by exercising the greatest possible care to see that all available evidence is fully and truthfully presented to the court in a hearing on the approval of its final accounting. *Diaz v. Duncan*, 406 N.E.2d 991, 1002 (Ind.App. 1980). The personal representative owes a duty to all interested parties to administer an estate impartially. *Ind. Dept. of Rev. v. Estate of Cohen*, 436 N.E.2d 832, 836 (Ind.App. 1982).

The Probate Code specifically charges the personal representative with the responsibility of collecting and preserving all assets of the estate. *Indiana Code Section 29-1-13-1*; *Fall*, 462 N.E.2d at 1063. The language of Indiana Code Section 29-1-13-1 is mandatory: the personal representative "shall" take possession of all of the decedent's property.

The personal representative has a duty to file a complaint against those that owe the decedent money or those that harmed the decedent prior to her death. *I. C. §§ 29-1-13-1; 29-1-13-10; 29-1-16-1; 29-1-1-3* (personal

property includes “choses in action”, defined as a right to bring an action to recover a debt, money or thing); Inlow v. Henderson Daily, 787 N.E.2d 385, 391 (Ind.App. 2003) (“In short, Indiana Code section 29-1-13-1 gives a personal representative the right to the decedent’s contract and tort claims, along with the decedent’s other property interests”); Estate of Banko, 602 N.E.2d 1024, 1028-29 (Ind.App. 1992) reversed on other grounds, 622 N.E.2d 476 (Ind. 1994); Fall, 462 N.E.2d at 1061; Diaz v. Duncan, 406 N.E.2d 991, 1002 (Ind.App. 1980); Ind. Dept. of Revenue v. Cohen, 436 N.E.2d 832, 836 (Ind.App. 1982); Oberting v. Jutte, 150 N.E. 796 (Ind.App. 1926).

If the personal representative does not file a complaint that could increase the value of the estate, then any interested person can object to the final accounting. I.C. §§ 29-1-11-10; 29-1-14-11; 29-1-16-1. Williamson v. Williamson, 714 N.E.2d 1270 (Ind.App. 1999); Inlow v. Henderson Daily, 787 N.E.2d 385, 393 (Ind.App. 2003) (“the heir may seek the removal of the personal representative altogether, petition for the collection of indebtedness and the appointment of a special administrator if necessary, or sue the personal representative for loss to the estate”); Estate of Burmeister v. Burmeister, 621 N.E.2d 647 (Ind.App. 1993) (executor surcharged for not selling stock that rapidly declined in value). This is commonly referred to as a “trial within a trial”.

In this case, however, there is no personal representative charged with general administration matters. Mr. Denmure has part; but wants no part in suing people. Now the trust beneficiaries want the court to appoint

fiduciaries to protect their interests but leave the Harlows hanging out to dry. The Harlows believe the court should consider everyone's interests.

Legal Standards

The Indiana Constitution, Article 1, section 12, states as follows:

“All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.”

If alive, Gladys Ender would have standing to file a civil complaint against any defendant that she believed caused her damage. *Finney v. Johnson*, 179 N.E.2d 718 (Ind. 1962). At her death, her personal representative should have standing to file the same complaint. The Harlows have property interests in the amount they might inherit from Gladys, either by way of gift, trust or will. Whether they have standing in their individual capacity to file a complaint on behalf of the decedent is a bit more complicated. There are cases which hold that the Harlows do not have standing to file a complaint on behalf of the estate, leaving any such lawsuit up to the personal representative or special administrator to file:

Inlow v. Inlow, 797 N.E.2d 810 (Ind.App. 2003); *Inlow v. Henderson Daily*, 787 N.E.2d 385 (Ind.App. 2003); *Inlow v. Ernst & Young, LLP*, 771 N.E.2d 1174 (Ind.App. 2002) (vacated by the Indiana Supreme Court and then settled); *Newton v. Hunt*, 103 N.E.2d 445 (Ind.App. 1952) (administrator of estate can bring action to recover assets of estate for distribution to beneficiaries); *Umbstead v. Preachers' Aid Society*, 58 N.E.2d 441 (Ind. 1944) (noting that personal property of the decedent and the right to any action passes to the personal representative); *Baker v. State Bank of Akron*, 44 N.E.2d 257 (Ind.App. 1942) (only personal representative can bring action to recovery money or personal assets of the decedent necessary to administer the estate); *Smith*

v. Massie, 179 N.E. 20 (Ind.App. 1931) (the right to sue to recover money and personal property belongs to personal representative and not surviving widow or widower); Magel v. Milligan, 50 N.E. 564 (Ind. 1898) (heirs have no right to sue to recover debts owed to the estate); Holland v. Holland, 30 N.E. 1075 (Ind. 1892) (unless given permission by administrator, legatee has no standing to bring action to recover estate assets from third party); Clegg v. Bamberger, 9 N.E. 700 (Ind. 1887) (administrator can bring action for conversion against attorney hired by decedent); Henry v. State ex rel. Franklin, 98 Ind. 381 (1884) (administrator represents creditors in collection against estate and may bring action for conversion to secure assets due the estate); Schee v. Wiseman, 79 Ind. 389 (1881) (personal property of decedent and right to cause of action for trespass passes to administrator); Smith v. Dodds, 35 Ind. 452 (1871) (administrator is proper person to bring action for conversion and trespass to protect property of decedent); Walpole's Administrator v. Bishop, 31 Ind. 156 (1869) (only administrator may bring cause of action on behalf of estate); Grimes v. Blake, 16 Ind. 160 (1861) (administrator of estate may bring suit to recover overpayment to creditor).

This is the position of the trust beneficiaries.

Conversely, there are cases which hold that the Harlows do have standing to file a complaint against those they believe owe something to the estate:

Ohlfest v. Rosenberg, 71 N.E.2d 614, 616 (Ind.App. 1947) (The real estate is in the name of the heirs, subject only to the claims of creditors and the spousal allowance); Graves v. Summit Bank, 541 N.E.2d 974 (Ind.App. 1989) (non-probate property does not involve the personal representative); McCoy v. Like, 511 N.E.2d 501, 502 n.1 (Ind.App. 1987) and Blake v. Blake, 391 N.E.2d 848 (Ind.App. 1979) (interested persons have standing); Umbstead v. Preachers' Aid Soc., 58 N.E.2d 441 (Ind. 1944) (heirs and legatees are the proper parties to maintain an action to set aside deeds and other transfers involving undue influence or fraud, and the executor need not even be made a party); Hutchinson's Estate v. Arnt, 1 N.E.2d 585 (Ind. 1936) (the wife's duty to preserve her husband's estate assets was to the remainderman, not to the estate of her husband. "Any right of action for conversion is in the remainderman. They are the real persons in interest."); Leazenby v. Clinton County Bank, 355 N.E.2d 861, 863 (Ind.App. 1976) (electing spouse may sue to collect "such property as would have

passed under the laws of descent and distribution"); Barkley v. Barkley, 106 N.E. 609 (Ind. 1914) (the father had conveyed real estate to son in 1900, and much later the grandchildren allowed to sue and collect their one third intestate share of what should have passed to their mother who died in 1901); Villanella v. Godbey, 632 N.E.2d 786, 788-89 (Ind.App 1994) (heirs of the estate sued executor in his individual capacity on grounds of undue influence where the unlawful transfers purportedly occurred in 1987 and 1988 where the decedent died in 1991); Hunter v. Milhous, 305 N.E.2d 448 (Ind.App. 1973) (wife permitted to sue to set aside deeds although the Court had appointed a non-relative guardian of the estate); Keys v. McDowell, 100 N.E. 385 (Ind.App. 1913) (heirs of the estate of decedent who died in 1907 sued church trustees for alleged undue influence in obtaining real estate deeds in 1902); Folsom v. Buttolph, 143 N.E. 258 (Ind.App. 1924) (mother died intestate in 1920 and thereafter decedent's daughter sued decedent's son alleging undue influence in procuring deeds to real estate in 1917); Banko v. National City Bank, 602 N.E.2d 1024, 1030 (Ind.App. 1992) (even after an investigation convinces an executor not to pursue an action, any person interested in the estate has standing to pursue a claim, in this case for possible conversion of estate assets), vacated on other grounds, 622 N.E.2d 476 (Ind. 1993).

In Darlage v. Cheryl Drummond, 576 N.E.2d 1303 (Ind.App. 1991), the decedent's sister was appointed executrix and failed to request a proper accounting of the decedent's partnership assets. The executrix was found to have misappropriated estate property in concert with the decedent's surviving partner and father (Darlage). The decedent's prior spouse (Cheryl) was a creditor of the estate and also *guardian ad litem* of her children as beneficiaries. Darlage argued that a non-executor does not have standing as the real party in interest. The Court disagreed:

“While Indiana Code Sections 23-4-1-42 and 29-1-13-3 do provide for a deceased partner's estate to pursue claims against the continuing partner, these statutes in no way foreclose enforcement of the deceased partner's rights by other persons. The legislature could not have intended to prevent enforcement of

such rights where, as here, the executrix has failed to act on behalf of the estate for many years, and enforcement remains doubtful.

“We further note that the likelihood of Jane ever enforcing the estate's rights against her father is slim. . . . Cheryl, as creditor of the estate and as guardian of the estate's devisees, not only has standing to assert this claim, but is the only one affected thereby who is willing to assert such a claim. We find Cheryl has standing).”

Darlage, 576 N.E.2d at 1308.

Whether or not the Harlows, individually, have standing to file a complaint on behalf of the decedent, the parties do not dispute that the personal representative or a special administrator does.

Special Administrator

In addition to the Harlows filing a complaint individually or objecting to the final accounting, the Probate Code provides another option. Indiana Code Section 29-1-13-16 states as follows:

“Whenever any interested person files with the court having jurisdiction of an estate a petition showing that such person has reason to believe and does believe that the personal representative of the estate or any other person is indebted to the estate, or that any property is in the possession of the personal representative of the estate or of any other person, and that diligent effort is not being made to collect such indebtedness or to secure possession of such property for the estate, the court shall hold a hearing upon such petition and shall determine what action, if any, shall be taken. Should the court decide that there is sufficient merit in the petitioner's claim to warrant action, it shall direct the personal representative to take such action as the court deems necessary; provided, however, where the person claimed to be indebted to the estate or having in his possession property belonging to the estate is the personal representative or where the court is of the opinion that the personal representative would not or could not for any reason prosecute such action with sufficient vigor, it shall appoint a special administrator to take such action as it shall direct.”

See Darlage v. Drummond, 576 N.E.2d 1303 (Ind.App. 1991); McCoy v. Like, 511 N.E.2d 501, 502 n.1 (Ind.App. 1987); I.C. 29-1-13-16; Powell v. Jackson, 111 N.E. 208 (Ind.App. 1916); Estate of Swank, 375 N.E.2d 238, 241 (Ind.App. 1978) (allegations of fraud, unlawful influence or incompetency justify the appointment of special administrator).

In assessing whether to appoint a special administrator, the court should consider “the strength of a claim, the costs to the estate in pursuing it, and the desirability of closing the estate before certain assets depreciate in value.” Inlow v. Inlow, 797 N.E.2d 810, 819 (Ind.App. 2003) (Baker, J., concurring), citing Inlow v. Henderson Daily, 787 N.E.2d 385, 391 (Ind.App. 2003).

“First, the probate court--not the litigant--determines whether a petitioner's claim of a person's indebtedness has merit. Second, unless the personal representative either is the indebted person or will not prosecute an action with "sufficient vigor," he is presumed the proper party to collect the indebtedness. Third, if the presumption of personal representative fitness is overcome, then the probate court appoints a special administrator to prosecute the action.”

Inlow, 787 N.E.2d at 393.

The question for the court is whether the Harlows should be appointed to investigate or have already established a *prima facie* case. Estate of Banko v. National City, 602 N.E.2d 1024, 1029 (Ind.App. 1992), vacated on other grounds, 622 N.E.2d 476; Inlow v. Inlow, 797 N.E.2d 810, 818 (Ind.App. 2003) (“Our review of the record shows that the Inlow Children fail to present a *prima facie* case with regard to either court of conversion against Anita”).

In reviewing whether the Harlows have or can present facts with sufficient merit for the appointment of a special administrator, the court should consider any and all evidence in the light most favorable to the Harlows, and which evidence if believed or left uncontradicted, would lead to a judgment in favor of the estate. Mullins v. State, 646 N.E.2d 40, 51 (Ind. 1995); Mariah Foods v. Indiana, 749 N.E.2d 646 (Ind.Tax 2001); Earl v. American States, 744 N.E.2d 1025 (Ind.App. 2001). Contradiction of *prima facie* evidence merely creates a question of fact that a Judge or Jury must resolve by way of a separate lawsuit. Mullins, 646 N.E.2d 40, 51 (Ind. 1995); Ramsey v. Madison County, 707 N.E.2d 814, 816 (Ind.App. 1999).

The court should review the evidence as if it were ruling on a motion to dismiss or motion for directed verdict; that is, can the Harlows present enough evidence to support a judgment or verdict? Indiana CPA Society v. GoMembers, 777 N.E.2d 747 (Ind.App. 2002); Dominiack v. Dunbar, 757 N.E.2d 186 (Ind.App. 2001); City of New Haven v. Allen County, 694 N.E.2d 306, 311 (Ind.App. 1998) (allegations taken as true, and question is whether any set of facts entitle the plaintiff to relief).

Concerning the timing, if the court appoints a special administrator, the Harlows' allegations in their complaints against Mr. Pfister and Mr. Robertshaw (and possibly others) will be addressed by the trier of fact in a speedy fashion. The law promotes disputes being filed and resolved at the earliest possible moment, not the latest. Justice is best served by a more prompt resolution of these matters, before documents are lost or witnesses'

memories have faded. As the court is well aware, Mr. Pfister died recently. The Estate of Gladys Ender has three months from the first published notice to creditors to file a claim in the Estate of William Pfister. Because time is of the essence, the Harlows requests that the court appoint them to file any claims and then report to the court after further investigation.

The Court May Assign the Claims

Undoubtedly the trust beneficiaries asking for the appointment of U.S. Bank believe that what the Harlows seek to bring into the Estate does not have any merit. If so, the Harlows ask that the court order the Estate to abandon the claims and related causes of action which the Harlows seek to pursue and assign them to the Harlows. I.C. § 29-1-13-8 (Abandonment of property), states “When any property is valueless, or is encumbered, or is in such condition that it is of no benefit to the estate, the court may order the personal representative to abandon it.” The Probate Code Study Commission Comments to I.C. § 29-1-13-8 further indicate that the Court may order the Estate to distribute the claims and related rights of action, “If the rights involved have any prospective value, they may be transferred by way of distribution to the beneficiaries who will succeed to all rights of the deceased.”

The trust beneficiaries may not even object to this, considering that such an assignment to the Harlows would allow them standing to file actions on behalf of the Estate; yet the estate or trust would not have to pay any of the Harlows’ attorney fees or expenses.

Conclusion

Mr. Harlow is a qualified person willing to serve as special administrator in this Estate. Given that Indiana Code Section 29-1-10-16 permits the administration of an estate consistent with distributions listed in the purported Will, and the laws of intestacy, he has the most interest in reducing the expenses of administration and completing the administration in a timely manner.

Mr. Harlow believes the court needs to appoint a special administrator to investigate and file lawsuits against Mr. Robertshaw, and investigate and file claims in the Estate of Mr. Pfister for damages they caused the decedent. The court should also charge him with the responsibility of investigating whether anyone owed Gladys any money, whether anyone had caused her damage, and whether the Estate has any other causes of action. This is part of any fiduciaries' role under the Probate Code and Trust Code, and right now there is no one charged with this responsibility.

Should the Estate run out of funds to afford such an endeavor, the trust has a provision to compensate the Estate for this. When the trust beneficiaries object to the court appointing Mr. Harlow as a special administrator, he believes they are really objecting to the decedent's wishes that he get paid for it. Avoiding the expense is no reason to let the defendants off the hook.

WHEREFORE the Court should appoint a special administrator in this Estate for the purpose of investigating and filing any actions that the estate may have against anyone, and grant such further relief the Court deems proper.

Respectfully submitted,

Curtis E. Shirley, #15845-49