

shall remain inviolate.' As stated in trial rule 38, courts have construed this as guaranteeing the right to a trial by jury in actions which were not, prior to June 18, 1852, exclusively of equity jurisdiction. *Allen v. Anderson*, 57 Ind. 388, 389 (Ind. 1887).

On August 31, 2005 the Estate of William R. Pfister, Sr. filed a motion to strike the plaintiffs demand for a jury trial in this case. The estate cites *Fish v. Prudential*, 745 N.E.2d 57 (Ind. 1947), for the proposition that a trust contest is a suit to rescind and cancel a written instrument which is a matter entirely of equity.

In *Fish* the plaintiff filed a complaint to set aside an insurance policy, not a trust. The court resolved the case, not a jury, because of the way in which the plaintiffs framed their complaint. "The appellant, if she cared to do so, could have commenced an action at law on the policy after the death of the insured and before the time suit was instituted to rescind and cancel. If she had done this, the appellee would have been forced to plead the fraud as a defense in an action at law, and a jury trial on the issues so formed would have been proper", citing *New York Life v. Skinner*, 14 N.E.2d 566 (Ind. 1938); *Federal Life v. Relias*, 185 N.E. 319 (Ind.App. 1933); *Enelow v. New York Life*, 293 U.S. 379 (1935); and *Adamos v. New York Life*, 293 U.S. 386 (1935). Thus, the *Fish* case does not support the estate's motion to strike jury demand, which the court should deny for this reason alone.

If the estate is correct, that a suit to contest a written instrument is a matter entirely of equity, plaintiffs would have no right to a jury in a will contest. Of course, that is not the case. *Lamb v. Lamb*, 5 N.E. 171 (Ind. 1886).

Shortly after the Lamb decision the Supreme Court of Indiana had this to say on the issue of a jury trial under the probate code:

“In the recent case of Lamb v. Lamb, 105 Ind. 456, 5 N. E. Rep. 171, the precise question we are now considering, namely, the right of a party to a trial by jury in actions to contest the validity of wills, came before this court for consideration and decision, and the right to a trial by jury in such actions was fully sustained by the court. It was there said: "The issue in such an action as this was not one of exclusively equitable jurisdiction, prior to June 18, 1852, and therefore it is not within the provisions of section 409, Rev. St. 1881. The proceeding to contest a will in a court of law, under our system, is purely one of statutory creation, and the provisions of section 409 of the Revised Statutes of 1881 do not apply to such proceedings. Trittipo v. Morgan, 99 Ind. 269. In order to bring a case within the provisions of that section of the statute, it must appear that the proceeding was such as was exclusively one of equitable jurisdiction, and a proceeding cannot be of chancery jurisdiction which is the creature of a positive statute, and was unknown to the old courts of chancery. The statute of 1843 gave a right to a jury trial in express terms, and this repels the implication that an action to contest a will was of exclusive equitable jurisdiction. The right to a trial by jury is treated as not open to question by the authors who have written upon the question. 1 Redf. Wills, 49, 50; Sackett, Instructions, 432."

Deig v. Morehead, 11 N.E. 458 (Ind. 1887).

Actions to contest the validity of wills were not part of the common law. Just as the Indiana probate code is necessary to sustain a valid Will, so the Indiana trust code is necessary to sustain a valid trust; e.g., *Indiana Code Section 30-4-2-1* requires written evidence of the trust terms and the settlor's signature. Now those who sign wills and those who sign trusts need the exact same capacity, *Indiana Code Section 30-4-2-10*, and plaintiffs must file trust contests within 90 days of notice (similar to the 3 month will contest period), *Indiana Code Section 30-4-6-14*.

The appellate courts of Indiana have not addressed whether a plaintiff may

request a jury to decide a trust contest. Appellate courts around the country have rarely addressed it. The seminal case on the matter is *Estate of Tisdale*, 171 Misc.2d 716, 655 N.Y.S.2d 809 (N.Y.Sur.Ct. 1997). It is worth quoting in length:

“Although some cases have held that a proceeding to set aside an instrument is equitable in nature and thus not triable by jury, a proceeding to set aside a will may also be characterized as equitable in nature, and, as mentioned, is nonetheless triable by jury. However, to consider a revocable trust as a traditional instrument fails to recognize that it actually functions as a will since it is an ambulatory instrument that speaks at death to determine the disposition of the settlor's property. While alive, a settlor may amend his or her revocable trust (as Mrs. Tisdale did in this case) just as he or she may change his or her will, without resort to the courts for equitable relief. Significantly, judicial proceedings with respect to a revocable trust would occur only after the settlor's death at the instigation of the settlor's distributees, exactly the situation that arises in a will contest. Furthermore, the factual issues presented in such a proceeding are the same as those presented in a proceeding to set aside a will.

“Clearly, a revocable trust has little in common with instruments other than wills. Although such trust is established in the form of an "agreement", it is really unilateral in nature because the negotiation that characterizes bilateral instruments is totally absent. The trustee of a revocable trust (if not the settlor) simply acts at the behest of the settlor. If the settlor becomes dissatisfied with the trustee or with the terms of the trust, he or she simply amends the trust to suit his or her desires. There is no need to invoke the equitable powers of the court to relieve the settlor of a bilateral obligation because there is none.

“The substantial similarity between revocable trusts and wills (and the illusory concept of a revocable trust as a contract) mandates the conclusion that the nature of the relief requested in a proceeding to set aside a trust is the same as the nature of the relief requested in a proceeding to set aside a will. This alone requires the court to recognize the right to a jury trial in the instant proceeding in order to comply with the above-mentioned long-standing rule that the nature of the relief requested, rather than the forum or the label of the proceeding, determines the right to a jury. The relatively recent use of revocable trusts as substitutes for wills explains why this issue was not addressed earlier. As a result, there is uncertainty (see, *Matter of Aronoff*, supra [with which this court respectfully disagrees]) and therefore legislation on this point is suggested.

“It is further observed that a proceeding to set aside a revocable trust is like a discovery proceeding in that the relief sought is recovery of estate assets allegedly wrongfully transferred. Therefore, objectants could have been appointed limited temporary fiduciaries for the purpose of commencing a discovery proceeding against the nominated executor on the ground that such executor could not and would not pursue a claim against himself and in that way they would unquestionably be entitled to a jury trial. Alternatively, objectants could have commenced a reverse discovery proceeding under SCPA 2105 and cited controlling authority recognizing the right of persons interested in the estate to bring a proceeding where the fiduciary is not motivated to do so and to have such proceeding heard by a jury. Form would enjoy a great victory over substance if the court distinguished between a proceeding to set aside a decedent's revocable trust and a discovery proceeding, given that the same relief is sought in each, namely recovery of estate assets. Accordingly, to deny the right to a jury trial for such a proceeding might very well be unconstitutional.

“Furthermore, indorsing a distinction between wills and revocable trusts for purposes of the right to a jury trial would create a host of unproductive incentives and practical difficulties, particularly in cases such as this one where the will and the trust were executed simultaneously and have the same provisions albeit by incorporation. One such difficulty would be the commencement of separate proceedings for the will and the trust in order to avoid the issue of waiver of the otherwise indisputable right to a jury trial in the will contest. Additionally, the factual questions and the evidence in all likelihood will be almost identical with respect to both instruments, a situation which may effectively allow for only one factual determination, either abrogating the right to a jury trial in the will contest (if the trust dispute is tried first) or resolving the trust dispute by giving effect to the jury's determination in the will contest. Finally, scheming perpetrators preying on elderly or infirm people could subvert distributees' rights to a jury determination simply by utilizing a revocable trust rather than a will as a vehicle for their misdeeds.

“Based upon all the foregoing, the motion to strike the jury demand in the proceeding to set aside the revocable trust is denied.”

Tisdale, 655 N.Y.S.2d at 811-812 (citations omitted, opinion attached).

The New York court speaks about a jury being unquestioned in a discovery

proceeding where the relief sought is recovery of estate assets wrongfully transferred. The same is true for Indiana, where we call such a discovery proceeding “replevin”.

Black’s Law Dictionary defines “replevin” as “an action for the repossession of personal property wrongfully taken or detained by the defendant.”⁵ In a case of replevin, the Indiana Constitution and Trial Rule 38(A) guarantee the plaintiffs the right to a jury trial.⁶ The Supreme Court of Indiana applied this rule in a similar case, *Collinson v. McNutt*, 108 N.E.2d 700 (Ind. 1952) (also attached), the difference being the dispute involved whether or not the decedent had made a gift *causa mortis*, rather than an *inter vivos* one.⁷

Without question the Harlows have a right to a jury trial on their will contest. Yet the defendants want to prevent this because some of the documents at issue have the word “trust” at the top instead of “will”. The decedent’s revocable trust has almost everything in common with a will compared to any other kind of written instrument. Neither a will contest nor trust contest could have occurred during the decedent’s lifetime. All of the contested documents were revocable during her lifetime and none of them took effect until her death. The complaint in this case makes the exact same factual allegations as to why the will and trust documents are not valid. Evidence at trial to contest the documents would be the same. The nature of the relief is the

⁵ *8th ed.*, p.1325; *Ring v. Ring*, 174 N.E.2d 58 (Ind.App. 1961).

⁶ *Midwest Security v. Stroup*, 730 N.E.2d 163, 169-70 (Ind. 2000) (Justice Boehm, concurring).

⁷ In *Collinson* the decedent had given a box containing \$11,577 cash to a friend who drove her to the hospital. She did not survive her stay, and the case decided who got the money. Of importance here is that the case required a jury. *See also, Davis v. Schmidt*, 31 N.E. 840 (Ind.App. 1892) (example of special verdicts in a replevin case).

same; namely whether the decedent's family will receive an inheritance, rather than the defendants.

In concluding that all plaintiffs in a trust contest have a right to trial by jury, to rule otherwise the court in *Tisdale* warned that "scheming perpetrators preying on elderly or infirm people could subvert distributees' rights to a jury determination simply by utilizing a revocable trust rather than a will as a vehicle for their misdeeds." In this case the scheming perpetrator was none other than the decedent's own attorney, who knew the decedent's family would contest what the decedent signed. The attorney's estate should not attempt to benefit from such a scheme.

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