

**In the Superior Court  
Allen County, Indiana**

WILLIAM G. BERGHOFF; et al.	)	CAUSE NO. 02D01-0210-PL-499
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
TOWER BANK & TRUST COMPANY, et al.	)	
	)	
Defendants.	)	

**VERIFIED FIRST AMENDED COMPLAINT**  
**TO CONTEST WILLS AND TRUSTS;**  
**FOR CONVERSION AND RICO;**  
**BREACH OF TRUST;**  
**BREACH OF FIDUCIARY DUTY;**  
**TORTIOUS INTERFERENCE WITH EXPECTANCY;**  
**FRAUD; and**  
**REQUEST FOR JURY TRIAL**

Come now the plaintiffs, WILLIAM G. BERGHOFF, MICHAEL BERGHOFF, ANDREW BERGHOFF, JOHN BERGHOFF, WILLIAM F. BERGHOFF, and DANIEL BERGHOFF, and state the following as their verified first amended complaint in this matter.

**BACKGROUND FACTS**

1. On August 31, 1966 JUNE BERGHOFF MILLER (now the “decedent”) signed an irrevocable Trust Agreement with Fort Wayne National Bank.
2. In short, the 1966 Trust gave the Trustee certain discretion concerning the distribution of net income and principal. After June’s death the Trustee was to

distribute 10% to the Catholic Church and the remainder equally between her siblings, WILLIAM G. BERGHOFF (the plaintiff, “William”) and MARTHA RYAN (a defendant, “Martha”). At the decedent’s death the 1966 Trust contained approximately \$5,000,000.00.

3. June’s mother, Betty Noll Berghoff, signed a Will on February 11, 1953. Betty died on December 19, 1961. Betty’s Will established a trust that gave June a testamentary power to appoint any remaining assets among family members. If June did not exercise the power of appointment in her Will, then her siblings, William and Martha, would divide the inheritance. At the decedent’s death the 1961 Trust contained approximately \$1,500,000.00.

4. June’s father, Norbert G. Berghoff, signed an Irrevocable Living Trust on April 14, 1989 for the benefit of June. The Trust gave her a general power to appoint the remaining assets (to anyone). If June did not exercise the power of appointment in her Will, the Trustee would distribute the assets one half to William’s children and one half to Martha’s children. At the decedent’s death the 1989 Trust contained approximately \$3,000,000.00.

5. In a prior trust case and a guardianship case the Probate Court appointed attorney STEPHEN J. WILLIAMS as *guardian ad litem* for June. After the trial court dismissed a guardianship petition on March 3, 1992, Mr. Williams purported to represent June and drafted numerous documents for her signature.

6. June did not have sufficient strength of mind to manage her property. She had a very low intelligence quotient (I.Q.), and always lacked the ability to understand the nature and extent of her property. On October 29, 1991 this led

Fort Wayne National Bank to file a petition for guardianship over June. Therein David Fee, an officer at the bank and later an employee of Mr. Williams, verified in the petition that June could not manage her property. As early as November 14, 1991 Mr. Williams wrote a memo to file that June needed a guardian to protect her from unscrupulous individuals and to permit estate planning transfers.

7. At the time Mr. Williams first drafted any estate planning document for June, he was of the opinion that William would contest June's estate planning documents. He then orchestrated numerous Wills and Trusts to disinherit the Berghoff family in favor of the Ryan family.

8. Mr. Williams wrote numerous "memos to file" concerning June yet never copied anyone on them. June never made a single change to anything Mr. Williams drafted. None of the signings were videotaped. Mr. Williams never recommended that a physician examine June concerning her mental condition prior to signing any Will or Trust (yet did recommend she do this before signing a prenuptial agreement – which she did not).

9. It is not disputed that Mr. Williams never saw June read any of the documents she signed. It is not disputed that during the time period he represented June he also represented the trustees of her trust (Fort Wayne National Bank, National City Bank and Tower Bank) in matters involving a conflict of interest; for example, by negotiating releases for June to sign involving the Banks as trustees. June never signed any document other than what Mr. Williams prepared. All of her documents were witnessed only by Mr. Williams, his and the Bank's employees

(those being paid from June's property). June never called a meeting. She never contacted Mr. Williams to draft or change her estate plan.

10. June signed whatever documents any defendant put in front of her, just as any child would that had a third grader's understanding of how to manage one's property. Mr. Williams charged June approximately \$10,000 per year; yet she never saw any invoices – rather the Banks paid for everything.

11. Prior to the guardianship, June never signed any estate planning document. After the trial court ruled that she did not need one, Mr. Williams had June sign at least 18 estate planning documents.

12. June signed Wills on July 9, 1992, January 13, 1994, September 11, 1995, January 25, 1996, May 11, 1998, October 15, 1999, July 21, 2000, and February 9, 2001. She signed a revocable trust on July 9, 1992, an irrevocable life insurance trust on December 22, 1992, two partial releases of powers of appointment on September 11, 1995, an irrevocable life insurance trust on December 30, 1997, a first amendment to her 1992 revocable trust on May 11, 1998, a charitable remainder annuity trust on May 11, 1998, a second amendment to her 1992 revocable trust on June 1, 1999, a third amendment to her 1992 revocable trust on October 15, 1999, the William Miller 1998 Marital Trust on July 21, 2000, a fourth amendment to her 1992 revocable trust on July 21, 2000, and a fifth amendment to her 1992 revocable trust on February 9, 2001.

13. June's revocable trust contains approximately \$150,000 for the benefit of William Miller. Her 1992 irrevocable life insurance trust contains approximately \$1,200,000 for the benefit of Martha Ryan's children. June's 1997 irrevocable life

insurance trust contains approximately \$1,500,000 for the benefit of William's grandchildren and \$3,250,000 for the benefit of Martha's grandchildren. June's 1998 charitable trust provides a lifetime annuity benefit to Dorothy Koch valued at approximately \$165,000, with the remainder to Ms. Ault and then to St. Joseph Hospital.

14. Had June signed no Will or Trust, all of her property would be divided equally between William and Martha, (except Norbert's 1989 trust that would have gone to their children). Instead, after the payment of taxes according to the latest financial statements the Ryan family stands to inherit over 9 million dollars; the Berghoff family may receive less than 3 million.

15. June appointed Martha as her attorney in fact on November 20, 2000. Thus any property she or her family received is cloaked with a presumption of undue influence and constructive fraud.

16. During her lifetime June (or her attorneys in fact or trustees) gave William and Martha each approximately \$246,000. William's children divided approximately \$105,000, and Martha's children divided the same. Charity received \$50,000. Although William objects to the manner in which these gifts were made, the complaint does not seek the return of gifts only to distribute them to the same families.

17. June's irrevocable life insurance trusts signed in 1992 and in 1997 were funded with insurance policies sold by Martha's husband, Richard Ryan. Again, any fees he received from such an arrangement is cloaked with a presumption of undue influence and constructive fraud.

18. From 1992 until the decedent's death, Mr. Williams, Martha, her children, and the Banks conspired to prevent anyone in the Berghoff family from having any knowledge of June's Wills and Trusts, including the 1992 irrevocable life insurance trust that benefited Martha's children. (The only exception to this was the 1997 irrevocable life insurance trust.)

19. June died on July 29, 2002. Tower Bank opened her estate the next day, in Cause No. 02D01-0207-EU-618.

20. On July 30, 2002 the trial court probated the decedent's Will dated February 9, 2001, which the plaintiff timely contested. The plaintiffs bring the lawsuit in their individual capacities, as beneficiaries of the decedent's estate, various trusts, and as administrators or assignees of any claims or causes of action as the Court permits.

### **WILL AND TRUST CONTESTS**

21. Pursuant to Indiana Code Section 29-1-7-17, the plaintiff contests the probate of the decedent's Will dated February 9, 2001, and objects to and contests the probate of any other Will of the decedent (dated July 9, 1992, January 13, 1994, September 11, 1995, January 25, 1996, May 11, 1998, October 15, 1999, and July 21, 2000).

22. Other than the 1966 Trust which is not being contested, the plaintiffs also contest and seek to set aside all trusts and/or amendments that June purportedly signed on July 9, 1992, December 22, 1992, December 30, 1997, May 11, 1998, June 1, 1999, October 15, 1999, July 21, 2000, and February 9, 2001.

23. Concerning all of her wills and trusts (except the one she signed on August 31, 1966), the plaintiffs allege:

- a. the unsoundness of mind of the decedent;
- b. the undue execution of the documents;
- c. that the wills and trusts were executed under duress or obtained by fraud; and/or
- d. any other valid objection to the document's validity or the probate of the will.

WHEREFORE, the plaintiffs request that the Jury revoke the probate of the February 9, 2001 Will, set it aside, and for such further relief deemed proper.

WHEREFORE ALSO, the plaintiffs request that the Jury declare that June did not have sufficient soundness of mind at any time since July 9, 1992 to sign any will or trust. All of the purported Wills and Trusts can be set aside in a single trial, especially where they involved a concerted plan to benefit the Ryan family over the Berghoffs. Such relief is proper under Trial Rule 57 and the Uniform Declaratory Judgments Act, Indiana Code Section 34-14-1-1, *et seq.*. Indeed, Indiana Code Section 34-14-1-2 specifically permits jurisdiction over any and all "will[s] ... and obtain a declaration of rights, status, or other legal relations thereunder."

**CONVERSION AND  
RACKETEERING INFLUENCED AND CORRUPT ORGANIZATIONS ACT**

24. During her lifetime Martha, Marilyn Stonebraker, Kathleen Purlee, Fort Wayne National Bank, National City Bank, Tower Bank, and Mr. Williams had a confidential and fiduciary relationship with the decedent.

25. These defendants controlled the decedent's property, and used the United States Mail to further their unlawful actions.

26. These defendants received property from the decedent under the guise of “gifts” or “fees” or “expenses”, and improperly caused others to receive property at the expense of the decedent and at the expense of the plaintiffs.

27. In violation of Indiana Code Sections 35-43-4-1, 35-43-4-2, and 35-43-4-3, 18 U.S.C. Sections 1961, *et seq.* (and 18 U.S.C. Section 1341), and of such other legal and equitable grounds for relief as may be appropriate, these defendants knowingly and intentionally exerted unauthorized control over the decedent’s property, with the intent to permanently deprive her of its value and use, and caused her and the plaintiffs to suffer pecuniary loss:

- a. Without June’s real consent;
- b. By obtaining her purported consent through undue influence;
- c. By creating and confirming false impressions upon June;
- d. By failing to correct a false impression that the defendants knew was influencing June, while standing in a relationship of special trust;
- e. By promising performance that the defendants knew would not be performed; and
- f. Such other reasons as discovery may disclose.

28. Pursuant to Indiana Code Section 34-24-3-1 and 18 U.S.C. Section 1964(c), these defendants are liable for actual damages, plus an amount three (3) times the actual damages, the costs of this action, attorney fees, travel expenses, reasonable amounts to cover the time expended on behalf of June, all direct and indirect expenses, and all other reasonable costs of collection.

WHEREFORE the plaintiffs request that the Jury award damages from these defendants, jointly and severally, as deemed proper.

## BREACH OF TRUST

29. The defendants Fort Wayne National Bank, National City Bank, and Tower Bank breached their duties as Trustee of all of the trusts in which the decedent and the plaintiffs had an interest, negligently performed their duties, failed to follow trust terms, failed to act in the best interest of the beneficiaries, acted under a conflict of interest in favor of the Ryan family, and otherwise breached their fiduciary obligations.

30. Concerning the decedent's 1966 trust, on December 31, 1999 it had a fair market value of approximately \$9,437,000.00. On September 30, 2002 it had a fair market value of approximately \$5,095,000.00. Since 1966 the banks have never accounted for this trust.

31. Concerning the Betty Noll Berghoff testamentary trust, on December 30, 2000 it had a fair market value of approximately \$2,350,000.00. On June 30, 2002 it had a fair market value of approximately \$1,738,000.00. Since 1961 the banks have never accounted for this trust.

32. Concerning the 1989 Irrevocable Trust signed by Norbert Berghoff, on December 31, 2000 it had a fair market value of approximately \$5,035,000.00. On June 30, 2002 it had a fair market value of approximately \$3,536,000.00. Since 1989 the banks have never accounted for this trust.

33. Concerning the decedent's revocable trust dated 1992, on December 31, 2001 it had a fair market value of approximately \$550,000.00. On September 30, 2002 it had a fair market value of approximately \$147,000.00. Since 1992 the banks have never accounted for this trust.

34. In all, the trusts in which the decedent had an interest dropped in value approximately \$6,856,000.00 over the course of the two years before her death. The banks caused the losses in the accounts in part because they did not properly diversify the portfolio and made improper investments. The banks also collected improper fees.

35. The banks violated their fiduciary duty by not keeping the beneficiaries informed of the account values and distributions. For example, since 1995 the banks did not send any financial statements to June concerning any of her trusts.

36. June had a unconditional right to the income from the 1966 trust; yet the banks refused to pay for items that June wanted to purchase. The Banks also took direction from Martha.

37. The Banks violated multiple provisions of the Trust Code: *Indiana Code Section 30-4-3-6(b)(1)* (trustee has a duty to administer the Trust solely in the interests of the beneficiaries); *Indiana Code Section 30-4-3-6(b)(3)* (trustee must maintain control over Trust property); *Indiana Code Section 30-4-3-6(b)(5)* (a trustee shall make the Trust property productive for both the income and remainder beneficiary); *Indiana Code Section 30-4-3-6(b)(9)* (trustee must take whatever action is necessary to realize on claims constituting part of the Trust property); *Indiana Code Section 30-4-5-1* (a Trust shall be administered with due regard to the respective interests of income beneficiaries and remainderman). *Indiana Code Section 30-4-3-6(a)*; *Indiana Code Section 30-4-3-6(b)(6)* (a trustee

must keep the Trust property separate from the trustee's individual property and from property subject to another Trust).

WHEREFORE the plaintiffs request that the Jury award damages from these defendants, jointly and severally, as deemed proper.

### **BREACH OF FIDUCIARY DUTY**

38. The Probate Court appointed Tower Bank to serve as personal representative of the decedent's estate.

39. Tower Bank has breached its fiduciary duty to the estate by not pursuing actions against Martha, Marilyn Stonebraker, Colleen Carstens, Fort Wayne National Bank, National City Bank, Tower Bank, and Mr. Williams for conversion, breach of trust, malpractice, breach of fiduciary duty, and/or fraud.

40. The banks served as the decedent's trustee. Martha served as her attorney in fact. Marilyn Stonebraker and Kathleen Purlee served as the decedent's health care power of attorney. Mr. Williams served as her attorney. They all had fiduciary relationships with the decedent.

41. On February 9, 2001 the decedent purportedly signed a deed of gift concerning her jewelry. In fact, June did not have sufficient capacity to sign this, and Martha and also unduly influenced her into signing it. In addition to these gifts, the decedent signed wills and trusts that greatly favored the Ryan family over the Berghoff family. The banks and Mr. Williams also improperly received property.

42. Mr. Williams had a duty to act in the best interests of the decedent. He breached that duty by not providing the proper representation that a client should expect from her attorney, and his negligence proximately caused damage to the decedent, and the plaintiffs.

WHEREFORE the plaintiffs request that the Jury award damages from these defendants, jointly and severally, as deemed proper.

### **TORTIOUS INTERFERENCE WITH EXPECTANCY**

43. Martha, Fort Wayne National Bank, National City Bank, Tower Bank, and Mr. Williams tortiously interfered with the plaintiffs receiving their proper inheritance.

44. These defendants controlled and received the decedent's property. In 2000 June had said that "She was gonna cut the Ryan's out. She wasn't giving them another damn dime." These defendants prevented the decedent from accomplishing her wishes, and coerced her with false facts; for example, that she needed to leave the Ryans in for tax purposes. If June had the capacity to sign a valid Will or Trust, she would have designated the plaintiffs to inherit her wealth.

WHEREFORE the plaintiffs request that the Jury award damages from these defendants, jointly and severally, as deemed proper.

### **FRAUD**

45. In 1995 at the time June was about to marry, Martha approached William about having June and her future husband sign a prenuptial agreement.

Martha would not permit June to marry without one. Martha, the trust officers at the Bank, and Mr. Williams all communicated with William concerning the need for a prenuptial agreement under the auspices of protecting June and her property from any undue influence by a future husband and to prevent any future husband from electing against any estate assets. One of the statements made to William was that a lack of a prenuptial agreement would diminish his future inheritance. Given the estate planning documents at the time, however, this was not true. Had June married without a prenuptial agreement, William's interest in June's 1966 irrevocable trust was not at risk.

46. Martha, the Banks, and Mr. Williams had already orchestrated the plaintiffs' disinheritance from all assets that could be obtained by a future spouse that might unduly influence June or elect against her estate, although the plaintiffs had no knowledge of this at the time. Had these defendants told William the truth, he would not have participated in June's signing of the prenuptial agreement and would have filed a petition with the trial court to oversee her estate planning and gifts.

47. In 1997 at the time June was about to fund an irrevocable life insurance trust, Martha, the trust officers at the Bank, and Mr. Williams all communicated with William concerning the advantages of allowing the income from June's 1966 trust to fund tax free gifts to his grandchildren. One of the statements made to William was that they needed his participation and consent to June's estate planning. (Of course these defendants had already done quite a bit of estate planning behind his back.) They also discussed the issue of the taxes that June's

estate and beneficiaries would have to pay after her death, and specifically mentioned the plaintiffs' equal status as beneficiaries with Martha and her children.

48. Again, Martha, the Banks, and Mr. Williams had already orchestrated William's disinheritance from his mother's trust, his father's trust, June's 1992 life insurance trust, her charitable trust, and her revocable trust, although William had no knowledge of this at the time. Had these defendants told William the truth, he would not have participated in June's signing of the 1997 life insurance trust and would have filed a petition with the trial court to oversee her estate planning and gifts.

49. When the Berghoff family received cash gifts from June, the Ryan family received equal amounts. Again, these distributions that involved the Berghoff family were done at a time when Martha, the Banks, and Mr. Williams told William that the decedent's estate would pass equally to each family. In short, when the defendants needed William's cooperation they fed him enough information to obtain what they wanted.

WHEREFORE the plaintiffs request that the Jury award damages from these defendants, jointly and severally, as deemed proper, including punitive damages.

### **REQUEST FOR JURY TRIAL**

50. The plaintiffs request trial by Jury on any and all issues in this case.

I affirm under the penalty of perjury that foregoing statements are true and correct, this April \_\_\_\_\_, 2004.