

A Survey of the Common Types of Fiduciary Litigation

**University of
Baltimore
Law Forum
2018 Symposium
*Trusts & Estates:
Trust Us, It's
Important!***

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Fiduciary Litigation: In General

- “[A] person in a fiduciary relationship to another is under a duty to act for the benefit of the other as to matters within the scope of the relationship” Restatement (Third) of Trusts, § 2, cmt.b.
- Fiduciary relationships exist in various settings: trustee-beneficiary, guardian-ward, agent-principal, attorney-client, and in partnership relations. The nature and extent of the duties imposed differ somewhat depending on the relationship.
- The term “fiduciary litigation” generally refers to disputes involving the exploitation by a fiduciary or someone in another confidential relationship with persons with diminished capacity or disputes involving trusts or estates.

Fiduciary Litigation: A Guardianship (Pre-Mortem)

- Purpose of a Guardianship:
 - Conveys legal standing to the guardian to sue (or be sued) on behalf of the ward. Md. Rule 2-202.
 - Gives constructive notice of ward's inability to enter into legal contracts. *Seaboard Surety Co. v. Boney*, 135 Md. App. 99 n.3 (2000). (The notice is effective "even though the other party to a particular transaction may have no knowledge or reason to know of the guardianship".)
 - Subordinates any agent serving under a power of attorney to the guardian. E&T § 17-105 (e).
- Once a guardian is appointed, the guardian may sue to enforce the ward's rights and pursue claims, including:
 - Contract claims (declaratory judgments and/or rescission)
 - Equitable claims (including unjust enrichment and imposing constructive trusts).
 - Breach of fiduciary duty actions.

Fiduciary Litigation: The Maryland Power of Attorney Act (Pre-Mortem)

- The Act imposes duties that include (E&T § 17-113(a)):
 - Act in accordance with principal's reasonable expectations, to extent known, otherwise in principal's best interest; Act with care, competence, and diligence for the principal; Act only within the scope granted in the power of attorney.
- Unless the power of attorney "opts out," duties also include:
 - Act loyal for principal's benefit and attempt to preserve the principal's estate plan to the extent known.
- The Act creates a broad class of persons who may sue an agent for improperly acting (E&T § 17-103):
 - The principal's spouse, parent, or descendant.
 - An individual who qualifies as a presumptive heir of the principal.
 - A person named as a beneficiary to receive property or other benefit upon the principal's death or who has an interest in a trust created by or for the principal's benefit.

Fiduciary Litigation: The Maryland Trust Act Treatment of Revocable Trusts (Pre-Mortem)

- While competent, the trustee exclusively owes all fiduciary duties to the settlor. (E&T § 14.5-603).
- If the settlor of a revocable trust becomes incapacitated, an income beneficiary shall have the right to enforce the trust as if it's irrevocable. (E&T § 14.5-603(b)).
- Disabled settlor can be represented by other individuals in a trust dispute: a guardian, an agent having specific authority to act with respect to trust matters, and parents and other ancestors. (E&T § 14.5-303).
- The Maryland Rules permit an “interested person” to petition a court to assume jurisdiction over the fiduciary estate of a minor or disabled person. Md. Rule 10-501. “Interested person” has a broad definition and includes the disabled person’s heirs at law. Md. Rule 10-103.

Fiduciary Litigation: The Maryland Uniform Declaratory Judgements Act (Pre-Mortem and Post- Mortem)

- Authorizes a court to determine “rights or legal relations in respect to the trust or the estate of [a] decedent, minor, disabled person, or insolvent” by ordering a fiduciary to do or abstain from doing something, or to determine “any question” arising in the administration of the estate or trust. (Cts. & Jud. Proc. § 3-408).
- Permits intervention by “[a]ny person interested as or through a personal representative, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or beneficiary of a trust, in the administration of a trust, or in the estate of a decedent, a minor, a disabled person, or an insolvent.” (Cts. Jud. Proc. § 3-408).

Fiduciary Litigation: Caveat/Will Contest (Post-Mortem)

- Caveat actions **must** be filed prior to 6 months following the first appointment of a personal representative under a will. (E&T § 5-207).
 - The petition cannot be amended after the limitation to add an additional ground. *Hegmon v. Novak*, 130 Md.App. 703 (2000). (The court did not permit the petition to be changed to add an undue influence ground to the caveat).
- The grounds for will contests are (1) lack of due execution, (2) lack of testamentary capacity, (3) that the will, or part of the will, was the product of an insane delusion, (4) that the will, or part of the will, was the result of undue influence, (5) that the will, or part of the will, was made as a result of fraud.
- Although primary jurisdiction is in the Orphans' Court, a party may transmit factual issues to be determined by the Circuit Court. (E&T § 2-105; Md. Rule 6-434). The transmittal of factual issues does not just apply to caveat but to any controversy before the Orphans' Court.

Fiduciary Litigation: The Maryland Trust Act (Post-Mortem)

- By statute, it does not completely supplant the common law of trusts and the principles of equity which supplant the MTA. (E&T § 14.5-106).
- The MTA codifies certain common law duties of the trustee and clarifies who is eligible to intervene in the administration of a trust. Certain duties, such as the duty of loyalty, are codified. (E&T § 14.5-802).
- Judicial intervention: on invocation of the court's jurisdiction by an interested person, on the court's own motion, or as otherwise provided by law, the court may intervene actively in the administration of the trust, fashioning and implementing remedies as the public interest and the interest the beneficiaries may require. (E&T § 14.5-201(a)).
- Unlike many other states, the probate court has no jurisdiction over trusts in Maryland.

Fiduciary Litigation: The Maryland Trust Act (Post-Mortem)

- Representative Types of Cases:
 - Construction: to determine the “terms of the trust” which means “the manifestation of the intent of the settlor...as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.” (E&T § 14.5-103(2)(emphasis added)).
 - Trust reformation which includes reformation to achieve a tax objective (E&T § 14.5-414), to reform the trust in order to further the purposes of the trust (E&T § 14.5-411), to conform the trust to the true intentions of the settlor even if contrary to the unambiguous language of the instrument (E&T § 14.5-413).
 - Removal of trustee and appointment of a successor trustee.

Fiduciary Litigation: Litigation Concerning Administration of Estates (Post-Mortem)

- Breach of fiduciary duty cases including breach of the duty of loyalty, improper investment decisions and charges, unauthorized self-dealing by a trustee.
- Suit over the accuracy of accountings, to stop or force a sale of an asset, to account for assets not otherwise revealed by the fiduciary.
- Effective July 1, 2018, the Orphans' Courts may develop alternative dispute programs and order parties to mediate disputes. (Md. Rule 17-601 through 17-605). Interested persons may agree to alter the dispositional pattern in the Will. *Brewer v. Brewer*, 386 Md. 183 (2005).

Fiduciary Litigation: Elective Share Cases (Post-Mortem)

- A surviving spouse has a statutory right to elect against the net estate of the deceased spouse. (E&T § 3-203).
- The statute provides that the surviving spouse has a right to take instead of under a will:
 - 1/3rd if there is also surviving issue.
 - 1/2 if no surviving issue.
- This election applies by the explicit terms of the statute to probate assets only.

Fiduciary Litigation: Structural Shortcomings of the Maryland Elective Share Statute (Post-Mortem)

“The Traditional Elective Share Method of spousal protection is insufficient for many reasons. For example, it fails to protect the spouse from complete disinheritance, which can be accomplished through non-probate arrangements – such as living trusts, life insurance, joint ownership, and retirement – to people other than the surviving spouse. Additionally, this Method gives a windfall to the surviving spouse of a short-term marriage, in a marriage with unequal premarital wealth, or when the surviving spouse inherits through non-probate arrangements.” Angela M. Vallario, SPOUSAL ELECTION: SUGGESTED EQUITABLE REFORM FOR THE DIVISION OF PROPERTY AT DEATH, 52 Cath.U.L.Rev. 519, 536 (2003).

Fiduciary Litigation: Elective Share Cases (Post-Mortem)

- The Maryland common law expanded the elective share from the probate assets to include non-probate assets over which the decedent retained control on a case by case basis under the general principles of equity.
- The courts used a theory based on a fraud on the spousal election: “The doctrine of fraud on marital rights represents an effort to balance the social and practical undesirability of restricting the free alienation of personal property against the desire to protect the legal share of a spouse.” *Whittington v. Whittington*, 205 Md. 1, 11 (1954).
- The *Whittington* court developed factors to consider: the completeness of the transfer, the motive of the transferor, the participation by the transferee in the transfer, the degree to which the surviving spouse is stripped of his or her interests in a marital part of the decedent’s property.
- In 1990, the Court of Appeals seemed to create a “super” factor: the control over the asset. *Knell v. Price*, 318 Md. 501 (1990).

Fiduciary Litigation: Elective Share Cases (Post-Mortem) cont.

- In 2008, *Karsenty v. Schoukroun*, 406 Md. 469 (2008)(Harrell, J.) recharacterized the case as a balancing of equitable principles rather than shoehorning the analysis into a template of “fraud.”
- The *Schoukroun* court held that “a decedent’s intent to defraud her or his surviving spouse is not the proper focus of the analysis of the issue. While left mostly unspoken, this Court consistently has looked at the nature of the assailed inter vivos transfer, regardless of the authority.” *Schoukroun* at 509.
- The *Schoukroun* court established three considerations: whether the deceased spouse continue to enjoy the transferred property, whether the transfer was a reasonable and legitimate estate planning arrangement, and looking at the *Whittington* factors.

Fiduciary Litigation: Elective Share Cases (Post-Mortem) cont.

- In *Schoukroun*, the Court saw the determinative factor providing for the decedent's only child who was the product of an earlier marriage and that he and the surviving spouse were only married for a period of four years.
- Accordingly, the current rule applies a balancing of equitable factors: "These cases call for the discriminating exercise in judicial discretion." *Schoukroun* at 503 quoting from a 1949 Maryland Law Review article by Melvin Sykes of Baltimore.
- The planning community, however, would prefer a brighter line by statute. H.B. 0777 (Del. Dumais) is the response to that concern.

Fiduciary Litigation: Elective Share Cases (Post-Mortem) cont.

House Bill 777 (2018) (Del. Dumais)

- The elective share would be based on an “augmented estate.” Generally, the augmented estate consists of the probate estate, the revocable trust, all property over which the decedent could name beneficiaries (IRAs, Insurance, TOD Accounts), the decedent’s share of joint accounts, and certain life time gifts.
- Amounts passing to the surviving spouse reduce the elective share amount. This includes credit for a percentage of amounts passing in trust for the surviving spouse.
- A court may modify the amount determined by the formula based on criteria set out in the statute. These criteria include motivation of the decedent, the family relationship to the transferee, and the duration of the marriage.