

Pesky and Persistent Issues in Fiduciary Litigation

Judicial Discretion in Consolidated Matters
Judge Pamela White, Circuit Court for Baltimore City

1. Hypothetical Case: *Graham et al. v. Thornton*

- a. In last 3 months of father's life, father is suffering from moderate dementia and being cared for at home by private caregivers and his adult son Thornton. His existing estate planning (a simple will) leaves all assets to his 3 children equally.
- b. One month before death he purportedly executes a new will and revocable trust. The will leaves certain cash bequests to his two children other than Thornton, which are capped at a percentage of his "gross estate," a term not defined by the will. The remaining assets "pour over" into the revocable trust. 75% of the trust estate is held in trust for Thornton, with the remaining 25% divided equally between the other two children, also in trust. Thornton is the sole successor trustee and personal representative under the will. Additionally, father (purportedly) executes account documents adding the son as a joint owner on his investment account. He also (purportedly) executes a deed conveying a joint tenant interest in the residence to Thornton; the residence had previously been held by the father as a life tenant with power of sale, with his three children as equal remaindermen.
- c. Thornton maintains that the father told him that he intended to leave most of the estate to the son because of the time and effort he spent caring for the father during the last years of the father's life. Thornton further maintains that the father wanted to help him with his own business, which was struggling at the time, and that the father told him this. The father purportedly made these statements before and after the estate planning changes.
- d. The plaintiff Graham, one of Thornton's siblings (both of whom are plaintiffs), maintains that Thornton kept the father's checkbook with him at all times, blended his own finances with the father's, and ultimately that the account changes were the product of fraud, duress, or undue influence, or that their father lacked capacity to make the changes.
- e. Thornton is also alleged to have misappropriated funds from the father's trust after the father's death by making large unsecured loans to his business, which later filed for bankruptcy. Graham and the other children are beneficiaries of the trust along with the son. Thornton maintains that his father told him he was permitted to make such loans with the trust, although the trust document does not expressly address the issue.

2. Claims Involved

- a. Will caveat – filed in Orphans’ Court with factual issues transmitted to Circuit Court for trial by jury (see Md. Code Ann., Estates & Trusts § 2-105).
- b. Unjust enrichment & constructive trust – Filed in Circuit Court with respect to the real property and investment account
- c. Declaratory judgment – Filed with respect to the trust and deed in Circuit Court, asking to void the trust and deed or, in the alternative, declare Thornton’s actions in making the loans from the trust unlawful and contrary to the terms of the trust; also seeks construction of the term “gross estate” with respect to the specific bequests under the will
- d. Breach of trust – Filed in Circuit Court against Thornton, as Trustee of father’s (formerly) revocable trust which became irrevocable at the father’s death
- e. Removal action – Graham, one of the other siblings, seeks to remove Thornton as the Personal Representative of father’s estate; this is filed in Orphans’ Court and the factual issues are transmitted to the Circuit Court for trial by jury

3. Evidentiary Issues

- a. Dead Man’s Statute applicability – The Dead Man’s Statute would apply in the will caveat action and will construction matter. Depending on whether the decedent’s estate has an interest in the outcome of litigation, it may apply in the unjust enrichment & constructive trust case and declaratory judgment with respect to the deed, investment accounts, and validity of the trust (as the parties’ interests are derived from decedent). *See Sheeler v. Sheeler*, 207 Md. 264, 269 (1955) (Dead Man’s statute not applicable in lawsuit between current and prior life insurance beneficiaries). It would probably not apply to removal action or breach of trust action brought in parties’ own right for fiduciary misconduct.
- b. Extrinsic evidence – Oral statements by father may be admissible to prove terms of trust; extrinsic evidence can be introduced to resolve latent ambiguity in a will; “surrounding circumstances” evidence can be used in any will contest.
- c. State-of-mind exception to hearsay – Statements of memory or belief made by the decedent in relation to his will are admissible; may, or may not, apply to other estate planning depending on the nature of the statement and whether the instrument at issue is sufficiently “testamentary” in nature to qualify under the rule; present- and future-looking statements may also be admissible on all counts.
- d. Burden of proof – If a confidential relationship existed between father and Thornton, then Thornton bears the burden of proving fairness of any lifetime gifts by clear and convincing evidence. However, this burden shift does not apply to testamentary transfers.
- e. Jury vs. non-jury claims: A jury trial is available on the issues relating to the will caveat and other issues transmitted from Orphans’ Court. Md. Code Ann., Estates

& Trusts § 2-105. A jury trial is probably not available on the issues relating solely to the trust claims or the unjust enrichment and constructive trust claim. The availability of a jury trial for a declaratory judgment claim depends on the historical nature of the relief sought. *Himes v. Day*, 254 Md. 197, 206 (1969). Note that the right to a jury trial on a transmitted issue is statutory (Md. Code Ann., Estates & Trusts § 2-105), whereas the availability of a jury trial in a *de novo* appeal from the Orphans' Court would depend on whether there exists a jury trial right with respect to that claim under the Maryland Constitution. *Bernikowicz v. Porter*, No. 40, September Term, 2009 (Unreported by Court of Special Appeals).

4. Case Scheduling – Circuit Court Differentiated Case Management Systems (DCMs) and Scheduling Orders (Note: Information from Clerks' Offices)

- a. Transmitted issues from Orphans' Court – filed in Orphans' Court and transmitted to Circuit Court:
 - i. Baltimore City – Track 1 (expedited) no scheduling order, little to no discovery. Per Clerk's office, this includes both transmitted issues and appeals.
 - ii. Baltimore County – Track 1 (expedited) 50 day discovery window, trial 90-135 days after filing
 - iii. Anne Arundel County – Case management forwards appeals from the Orphans' Court to the assignment office. Anecdotally, appeals set in on a short docket (approx. 90 days from transmittal to hearing); transmitted issues receive scheduling order (typically 18 months until Case Time Standard Deadline)
 - iv. Howard County – No time limits except for trial which should be between 30 and 270 days from the date of filing.
- b. Declaratory judgment (Note: Per Cts. & Jud. Proc. § 3-409(e), “[a] court may order a speedy hearing of an action of a declaratory judgment and may advance it on the calendar”).
 - i. Baltimore City – Track 2 (Civil short): scheduling order, 4 month discovery deadline, trial 210 days from first answer.
 - ii. Baltimore County – Track 1 (Expedited) 50 day discovery window, trial 90-135 days after filing
 - iii. Anne Arundel County – Usually given 9 months from service/answer until trial.
 - iv. Howard County
 1. Track 2 (expedited, trial is ½ to 1 days. This is the default unless there is an information form selecting a track): No scheduling

conference, but discovery deadline 181 days from filing, trial 211-271 days from filing.

2. Track 3: Discovery deadline 212 days from filing, trial 272-362 days from filing.

c. Regular Civil Claim (jury or non-jury)

i. Baltimore City – Likely track 3 (civil standard). Scheduling order, 8 month discovery deadline, trial 360 days from first answer.

ii. Baltimore County – Track 2: 180 day discovery deadline, trial 330 days after filing.

iii. Anne Arundel County: Usually 8-9 months from service/answer.

iv. Howard County – Depending on the complexity of the matter, these could be on tracks 2 through 5.

1. Track 2: Discovery deadline 181 days after filing, trial about 211-271 days from filing.

2. Track 3: Discovery deadline 227 days after filing, trial about 272-362 days after filing.

3. Track 4: Discovery deadline 271 days after filing, trial about 356-416 days after filing.

4. Track 5: Discovery deadline 331 days after filing, trial about 391-481 days after filing.

5. Modification of Order: The scheduling order controls but “shall be modified by the court to prevent injustice.” Md. Rule 2-504(c).

6. Multiple Claims and Parties – Joinder, Consolidation, and Severance

a. Joinder

i. Parties

1. Rule 2-211 (mandatory joinder) – A person subject to service of process “shall be joined as a party” if in the person’s absence, (1) complete relief cannot be accorded among those already parties, or (2) disposition of the action may impair or impede the person’s ability to protect a claimed interest relating to the subject of the action or may leave persons already parties subject to a substantial risk of incurring multiple or inconsistent obligations by reason of the person’s claimed interest

2. Rule 2-212 (permissive joinder)- Can join all persons in one action (as plaintiffs or defendants) if a right to relief is being asserted based on the same “transaction, occurrence, or series of transactions or occurrences” and there is “a question of law or fact common to all persons” that will arise in the action.
- ii. Claims: Rule 2-301 *et seq.* (claim joinder) – There is one form of action, known as a “civil action.” “All complaints, whether seeking equitable relief, declaratory relief, legal relief, damages, or any combination of them, take the same form, and demands for relief of all types may be combined into one complaint.” Niemeyer, Paul & Linda M. Schuett, MARYLAND RULES COMMENTARY Rule 2-301 (4th ed.). However, the historical nature of the claim (legal or equitable) dictates whether certain defenses are available, and only claims historically “legal” in nature are triable by jury.
 - iii. *Res judicata* –A failure to join a party or claim in a civil action can forever bar later claims against the same party (and its privies) under *res judicata*. For a judgment to have a preclusive effect, it must arise from the same “transaction, or series of connected transactions, out of which the action arose.” *Kent County Board of Education v. Bilbrough*, 309 Md. 487, 499 (1987) (adopting transactional approach contained in RESTATEMENT (SECOND) OF JUDGMENTS § 24)
 - iv. *Collateral estoppel* - A fact that was actually litigated and determined in a prior lawsuit can be binding in future suits against a party (or its privy) from the prior adjudication. *Mostofi v. Midland Funding, LLC*, 223 Md. App. 687, 704–05 (2015).
- b. Consolidation; Separate Trials
- i. Md. Rule 2-503.
 1. Permissive consolidation of all claims, issues, or actions when actions involve common question of law or fact or a common subject matter. The court “may enter any order regulating the proceeding. . . that will tend to avoid unnecessary costs or delay.” Can give rise to joint or separate verdicts. Md. Rule 2-503(a).
 2. Court can order that claims, cross claims, third party claims, or factual issues be tried separately if it will “further[] convenience” or “avoid prejudice” Md. Rule 2-503(b).
 3. Decisions made under Rule 2-503 are “procedural” in nature and therefore subject to an “abuse of discretion” standard on appellate review. *Jenkins v. City of College Park*, 379 Md. 142, 164 (2003) (decision to consolidate); *St. Joseph Medical Center, Inc. v. Turnbull*, 432 Md. 259 (2013) (decision to bifurcate trials); *Myers*

v. Celotex Corp., 88 Md. App. 442, 448–49 (1991) (decision to try issues separately)

4. Md. Rule 2-503 is based both on practice of former Maryland rules and is “similar” to Fed. R. Civ. P. 42(a), so “case law under both the former Maryland Rules and Fed. R. Civ. P. 42 is persuasive in construing this rule.” MARYLAND RULES COMMENTARY 2-403 (4th ed.).
- ii. Factors to consider when determining whether to consolidate claims (primarily taken from Wright & Miller, FEDERAL PRACTICE & PROCEDURE §§ 2381–2392 (3rd Ed.))
1. “The critical question for the district court in the final analysis was whether the specific risks of prejudice and possible confusion were overborne by the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives.” *Arnold v. Eastern Airlines*, 681 F.2d 186 (4th Cir. 1982); *Cantrell v. G.A.F. Corp.* 999 F.2d 1007, 1011 (6th Cir. 1993); *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2^d Cir. 1990).
 2. Whether the common issue is “central” to the resolution of the cases. *Williams v. Gavin*, 640 Fed. Appx. 152, 155-156 (3^d Cir. 2016); *Molever v. Levenson*, C.A.4th, 1976, 539 F.2d 996, *certiorari denied* 97 S.Ct. 643, 429 U.S. 1024, 50 L.Ed.2d 625 (trial court erred in consolidating derivative and libel actions against shareholders).
 3. Prejudice resulting from evidence being admissible in only some but not all of the consolidated cases. *Capstraw v. New York Cent. R. Co.*, 15 F.R.D. 267 (D.C.N.Y. 1954) (consolidation would not be ordered when evidence admissible in one case would not be admissible in the other case and might be seriously prejudicial). A limiting instruction will be deemed to mitigate the prejudice of evidence in many circumstances. *See e.g. Ryan v. City of Salem*, 2017 WL 2426868 (D. Or. 2017) (denying bifurcation).
 4. Different burdens of proof for different claims. *Associated Indem. Corp. v. Davis*, 51 F.Supp. 835 (D.C. Pa. 1943) (the fact that the burden of proof rested on different parties in each case would result in confusion).

5. Whether consolidation would circumvent jury trial waiver. *New West v. City of Joliet*, 2012 WL 384574, *7 (N.D. Ill. 2012). *In re Prudential Sec. Inc. Ltd. Partnerships Litigation*, D.C.N.Y.1994, 158 F.R.D. 562, 570, *citing Walton v. Eaton Corp.*, C.A.3d, 1977, 563 F.2d 66, 71.
6. Delay of one or more consolidated cases: *Kimberly-Clark Worldwide, Inc. v. First Quality Baby Prods., LLC*, 2011 U.S. Dist. LEXIS 67623 (noting that “[r]are is the situation where consolidation will not cause some degree of delay to one of the consolidated cases . . .” but that without undue prejudice such delay is insufficient to justify denying a motion to consolidate); but see *Prudential Ins. Co. of America v. Marine Nat. Exchange Bank*, 55 F.R.D. 436 (D.C. Wisc. 1972) (denial of request to consolidate cases sharing common question of law when cases were at substantially different stages of preparation).
7. Cases in different procedural phases (e.g., one case still in discovery; discovery concluded in the other case): *Perry v. Equity Residential Mgmt., L.L.C.*, 2014 WL 4198850 (2014) (consolidating two cases where one had completed discovery already and the other had just started the discovery process); *Internet Law Library, Inc. v. Southridge Capital Management*, 208 F.R.D. 59. (D.C.N.Y. 2002)

7. Conduct of Trial

- a. Procedure on Jury & Non-Jury Claims: In cases involving both equitable and legal claims, a party may demand a jury for the legal claims. *Higgins v. Barnes*, 310 Md. 532, 551–52 (1987). Whenever practicable, the jury first hears and determines the issues common to both the legal claims and the equitable claims, and the court then determines the issues unique to the equitable claims. *Id.* at 552. *See also Ross v. Bernhard*, 396 U.S. 531 (1970); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962).
- b. Separate Trials (Md. Rule 2-503(b)): In furtherance of convenience or to avoid prejudice, the court, on motion or on its own initiative, may order a separate trial of any claim, counterclaim, cross-claim, or third-party claim, or of any separate issue, or of any number of claims, counterclaims, cross-claims, third-party claims, or issues. The decision lies within the sound discretion of the trial court. *Connor v. Celanese Fibers Co.*, 40 Md. App. 452 (1978); *St. Joseph Med. Ctr. Inc. v. Turnbull*, 432 Md. 259 (2013). Severance of portions of a case for the purpose of trying them separately does not convert the case into separate suits and, consequently, a judgment as to part of the case does not have a *res judicata* effect as to other claims. *Blades v. Woods*, 338 Md. 475 (1995). *See generally* MARYLAND RULES COMMENTARY Rule 2-504.

- c. Limiting Instructions (Md. Rule 5-105): “When evidence is admitted that is admissible as to one party or for one purpose but not admissible as to another party or for another purpose, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.” It is presumed that juries will follow limiting instructions. *Berry v. State*, 155 Md. App. 144, 172 (2004) *cert. denied*, 381 Md. 674.
- i. Form of limiting instructions: Limiting instructions can take the form of “affirmative” (the evidence shall be used for X purpose only), “prohibitive” (the evidence shall not be used for Y purpose), or both. Some courts have held that a prohibitory instruction is required. *Sprynczynatyk v. General Motors Corp.*, 771 F.2d 1112, 1117 (8th Cir. 1985) (instruction that stated the permissible use of evidence but failed to warn of the prohibited use was insufficient under Rule 105); *Walker v. State*, 300 S.W.3d 836, 851 (Tex. App. Fort Worth 2009) (not enough to tell jury evidence could be used for impeachment without telling them that was the only permissible use).
 - ii. Persuasive authority suggests that testimony otherwise barred by the Dead Man’s Statute may be admitted, with an appropriate limiting instruction, for purposes other than proving the truth of the matter asserted; however, when the probative value of such testimony is largely tied to proving the truth of the matter asserted, a limiting instruction is far less likely to cure the prejudice. *Meadows v. Meadows*, 468 S.E.2d 309, 316 (Sup. Ct. App. W. Va. 1996); *Hardee v. Hardee*, 309 S.E.2d 243, 248 (Sup. Ct. N.C. 1983) (quoting *In re Will of Ricks*, 231 S.E.2d 856, 863 (Sup. Ct. N.C. 1977)).
- d. Note on Advisory Juries: In matters for which a jury trial is not available, federal courts are authorized to submit issues to an advisory jury. Fed. R. Civ. Proc. 39(c). Many states follow this practice, but in Maryland, Rule 2-511(d) states that “[i]ssues of fact not triable of right by a jury shall be decided by the court and may not be submitted to a jury for an advisory verdict.” Md. Rule 2-511(d); *Leet v. Totah*, 329 Md. 645, 668 (1993); *Kao v. Hsia*, 309 Md. 366, 373 (1987). The language of the rule refers to issues of fact “not triable of right by jury,” and arguably does not preclude use of an advisory jury in matters where a jury trial right would normally exist but has been waived. The parties may apparently consent to the submission of a non-jury issue to a jury, and if no objection is made at trial to the jury submission then it is waived for appeal purposes. *Cushwa v. Burgess & Commissioners of Williamsport*, 117 Md. 306, 392 (1912); *Hartlove v. Maryland School for the Blind*, 111 Md. App. 310, 339–40 (1996); *but see Kann v. Kann*, 344 Md. 689, 713 (1997) (holding that there is no universal legal cause of action for breach of fiduciary duty triable by jury and overruling *Hartlove* to the extent it expresses a contrary view)

Questions:

- The defendant moves to consolidate all claims at the Circuit Court level, and the plaintiffs oppose consolidation of the breach of trust and removal claims with the other claims. They argue that defendant will seek to testify about his father's statements about his intention regarding the trust funds (that they should be used to help the defendant's business) that would not otherwise be admissible (due to relevance and Dead Man's Statute) on the issues of confidential relationship, undue influence, fraud and duress. How might a court analyze this request to consolidate, and what measures could be taken at trial to avoid the prejudicial effect the father's statements?
- The plaintiffs move to consolidate all claims at the Circuit Court level, and the defendant opposes consolidation of the transmitted caveat and removal actions with unjust enrichment/constructive trust, declaratory judgment, and breach of trust claims, arguing that the plaintiffs are attempting to improperly bring those non-jury claims before a jury. How might a court analyze this request to consolidate, and assuming the matters are consolidated, what measures (if any) could or should be taken to segregate the matters that are triable by jury?
- The plaintiffs move to consolidate all claims at the Circuit Court level. The defendant opposes consolidation of the claims relating to the deed and investment account with the other claims. He argues that with respect to the common factual issues, the different burdens of proof (assuming those transfers are assumed to have been present gifts from the decedent to the defendant, thereby shifting the burden to the defendant to prove the gifts' fairness) will be confusing to a fact-finder and he will be prejudiced. How might a court analyze this request to consolidate, and what measures could be taken at trial to avoid the confusing effects of the varying standards of proof?

See Figure 1 (next page) for visual aid.

Figure 1. Visual Aid for Questions (Note: Does not encompass all claims in *Graham, et al. v. Thornton*)

	Jury	Equitable/Non-Jury
Dead Man's	<p>Will Caveat</p> <p><u>Factual Issues:</u></p> <p>Mental Capacity</p> <p>Undue Influence – <i>Moore v. Smith</i>, 321 Md. 347 (1990) factors, including confidential relationship, susceptibility, role of Thornton in procuring will, prior estate planning</p> <p>Fraud/Duress</p>	<p>Constructive Trust (Investment Account*)</p> <p>Declaratory Judgment (Trust and Deed*)</p> <p>Will Construction</p>
No Dead Man's	<p>Removal Action</p>	<p>Constructive Trust (Deed*)</p> <p>Breach of Trust</p>

* Denotes claim where, if plaintiff establishes the existence of an *inter vivos* gift and a confidential relationship between donor and donee, burden shifts to defendant to prove fairness (by clear and convincing evidence)