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***Linthicum v. Rudi*, 122 Nev. Adv. Op. No. 120 (Dec. 28, 2006)¹**

PROPERTY – TRUSTS

Summary

Appeal from an order of the Second Judicial District Court, Washoe County, dismissing plaintiffs' action regarding an amendment to a revocable inter vivos trust. Moreover, plaintiffs appeal the Second Judicial District Court's denial of their motion to be appointed as guardians ad litem and the award of attorney fees to the defendant.

Disposition/Outcome

Affirmed. Nevada statutes do not allow beneficiaries of a revocable inter vivos trust to challenge the trust until the settlor's death. In addition, beneficiaries who challenge the amended trust create a conflict of interest if they become guardians of the settlor.

Factual and Procedural History

In 2002, Claire Linthicum-Cobb (Cobb), the settlor, executed a will and revocable inter vivos trust. She named herself as the trustee and reserved the power to revoke or amend the trust without notifying the beneficiaries. Cobb named her brother and sister-in-law, Ernette and Myrna Linthicum (Linthicums), appellants, as the primary beneficiaries and as the successor trustees upon death or incapacity.

In 2004, Cobb executed a new will and an amendment to the trust. The amended trust still named the Linthicums as successor trustees but also named Arnold Rudi (Rudi), the nephew of her deceased husband, as a successor trustee and as the sole beneficiary. Cobb retained the right to revoke the trust thereby preserving the trust as a revocable inter vivos trust.

Subsequently, Rudi and Guardianship Services of Nevada petitioned for co-guardianship of Cobb and her estate due to her possibly diminished mental capacities. The Linthicums objected to the petition, which Rudi then withdrew, however, the district court granted guardianship to Guardianship Services of Nevada.

The Linthicums filed a complaint seeking to cancel the amended trust alleging that Cobb only amended the trust because of Rudi's undue influence and participation in amending the trust. Rudi motioned to dismiss their complaint under NRCP 12(b)(5) alleging that they lacked standing to challenge the amendment. Rudi claimed the Linthicums did not have a present legal interest in the trust or will and therefore could not challenge the will or trust until Cobb's death.

Responding to Rudi's motion, the Linthicums filed a motion requesting the court to appoint them as guardians ad litem. Further, the Linthicums claimed to have legal standing because the trust was operative and that in order to preserve Cobb's desires the trust must be challenged while she was alive.

The district court granted Rudi's motion to dismiss finding that the Linthicums lacked standing while Cobb was alive. The court also denied the Linthicums' motion to be appointed as guardians ad litem. Denying a rehearing motion, the court held that the Linthicum's interest was,

¹ By Robert Stephens

at most, contingent and would only vest upon them surviving Cobb. The court awarded Rudi attorney fees and costs.

Discussion

Under NRS 164.015 and NRS 153.031, the Linthicums claimed that beneficiaries could challenge revocable inter vivos trusts while the settlor is alive. NRS 164.015 allows “an interested person”² to challenge “internal affairs”³ of “nontestamentary trusts”⁴ and obtain relief under NRS 153.031.⁵ The Linthicums specifically sought relief under 153.031(1)(a) and 153.031(1)(d), which define a trust’s existence and the validity of the trust’s provisions. The Nevada Supreme Court disagreed with the Linthicums’ claims because neither of the previously mentioned statutes applies to revocable inter vivos trusts, which is the type of trust at issue in the present case. Further, the Linthicums are not “interested persons,”⁶ because at most they have a contingent interest that has not vested.

The Nevada Supreme Court’s decision aligns itself with other jurisdictions. In *Lewis v. Star Bank*,⁷ an Ohio case, the beneficiaries of a revocable inter vivos trust sued the trustee for a breach of fiduciary duty for failing to advise the settlor on “pre-death tax and estate planning.”⁸ In *Lewis*, the living settlor reserved the right to revoke the trust. The Ohio Court of Appeals concluded that “beneficiaries [do] not have an absolute entitlement to any portion of the trust”⁹ while the settlor is living.

In addition, a Florida appellate court concluded that Florida statutes prohibit beneficiaries from contesting revocable trusts before the settlor dies.¹⁰ The court reasoned that beneficiaries of revocable trusts have no ownership until the settlor dies because the settlor can terminate the trust at a future date.¹¹ The Florida court held that a revocable trust is “a unique instrument which has no legal significance until the settlor’s death.”¹²

The Linthicums supported their position of having sufficient standing with a California case, *Conservatorship of Estate of Irvine*.¹³ In *Irvine*, a California appellate court invalidated an amendment to a revocable inter vivos trust, because the settlor failed to give personal written notice to the trustee as the trust required.¹⁴ Because Cobb placed no restrictions on her ability to amend or revoke the trust *Irvine* is distinguishable from the present case.¹⁵

The Linthicums request to become guardians ad litem under NRS 159 creates a conflict of interest because they will they will be representing Cobb to challenge her amendment to the

² NEV. REV. STAT. § 164.015(1) (2005).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ 630 N.E.2d 418 (Ohio Ct. App. 1993).

⁸ *Id.* at 419.

⁹ *Id.* at 420-21.

¹⁰ *Ullman v. Garcia*, 645 So.2d 168, 169 (Fla. Dist. Ct. App. 1994).

¹¹ *Id.*

¹² *Id.* at 170.

¹³ 47 Cal. Rptr. 2d 587 (Ct. App. 1995).

¹⁴ *Id.* at 594-95.

¹⁵ It might also be noted that Nevada does not have a statute like California which permits the settlor to bind himself by requiring written notice to the trustee before amending or revoking a trust.

trust that excluded them as beneficiaries. The Court permitted the Linthicums to challenge guardianship in a separate action as proscribed by NRS 159 if concerned with Cobb's capacity.

Because Rudi prevailed he is entitled to attorney fees and costs.

Conclusion

The Nevada Supreme Court held that the Linthicums interest is contingent at best and therefore have no standing to challenge Cobb's amendment to the trust while she is alive. Moreover, to become guardians they must follow the proper procedures enacted by the Nevada Legislature. The Nevada Supreme Court awarded Rudi with attorney fees.