IN THE DISTRICT COURT OF APPEAL
SECOND JUDICIAL DISTRICT
STATE OF FLORIDA

SHIRLEY FINTAK, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF EDMUND P. FINTAK,

Appellant,

v.

THOMAS S. FINTAK and JOHN B. FINTAK, individually and as Co-Trustees, and KATHLEEN F. DUNN, DAVID P. FINTAK and MATTHEW P. FINTAK, individually,

Appellees.
_____/

Lower Tribunal No. 2007-CA-9355-SC
Appeal No. 2D12-3407

INITIAL BRIEF

On Appeal from the Circuit Court of the Twelfth Judicial Circuit
in and for Sarasota County, Florida.

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STATEMENT OF THE CASE

The Appellant, SHIRLEY FINTAK, Personal Representative of the Estate of Edmund P. Fintak, appeals the Final Summary Judgment as to Counts I and II, including non-final orders entered prior thereto, which granted Final Summary Judgment on Appellant's claims of Undue Influence and Lack of Testamentary Capacity in the execution of a certain Trust on the basis that the Grantor and primary beneficiary, Edmund P. Fintak, failed to renounce the benefits of the Trust, and, by accepting the benefits under the Trust, is estopped from challenging its validity.

Appellant appeals the Final Summary Judgment primarily on the grounds that estoppel does not apply, and the common law rule requiring a beneficiary to renounce the benefits of a bequest or gift from a decedent in order to challenge an instrument conferring the benefit does not apply, and indeed has never been applied, to a settlor of a self-settled grantor Trust that was funded by the settlor's own assets.

References to the record on appeal are designated (Vol.__, p.__) or (1st Supp.Vol.__, p.__). References to the pages in the Transcript of the hearing are designated using the page numbers therein (Tr.__). Documents contained in the tabbed Appendix for the Court's convenience are designated by tab number using the page numbers therein (App.Tab__, p.__).

JURISDICTION

Florida Rule of Appellate Procedure 9.110(k) permits appellate review of partial final judgments. However, an appeal of a partial final judgment relating to a fewer than all counts of a multi-count complaint may be taken only if counts disposed of constitute separate and distinct causes of action that are not interdependent with other surviving claims. Bermont Lakes, LLC v. Rooney, 980 So.2d 580, 585 (Fla. 2d DCA 2008).

In this case, Counts I and II of the Complaint disposed of by the appealed order concern the facts and circumstances preceding and leading up to the execution of the subject Trust by the Grantor. The remaining counts in the Complaint relate to issues concerning either modification (Count III), administration (Count IV), or construction (Count V) of the Trust as established subsequent to its execution.

Similarly, Defendants' counterclaims relate to events, facts, and circumstances subsequent to the execution of the Trust; to wit: reformation of the Trust, declaratory judgment to construe the Trust, conversion of assets in the Trust, removal of a Trustee, quieting title to real property allegedly in the Trust and slander of title of the same. Like the surviving counts in the Complaint, the counterclaims involve different facts than Counts I and II, and would require proof of different facts and circumstances than those required to establish Counts I and

II. Accordingly, as compared to the surviving counts and counterclaims, Counts I and II could be maintained as an independent action.

In this case, the parties hereto agreed in open court, and the Court specifically found in the Final Summary Judgment on Counts I and II, that Counts I and II of the Complaint could be maintained independently and that there is a "distinct set of facts and circumstances which pertain to Counts I and II, as opposed to the remaining Counts in Plaintiff's Complaint and Counts in Defendants' Counterclaim." (1st Supp.Vol. 10, p.3080; see also App.Tab. 1.)

Additionally, the Court stayed the remaining claims by Order dated June 21, 2012, finding that

> there are separate and distinct facts which must be proven to sustain Counts I and II . . . which concern the facts and circumstances preceding and leading up to the execution of the Edmund P. Fintak, Sr., Irrevocable Trust Agreement . . . as opposed to the remaining Counts and Defendants' Counterclaims which relate to issues concerning either funding of the trust, operation of the Trust and actions subsequent to its execution.

(1st Supp. Vol. 10, p.3078.)

Accordingly, this Court has jurisdiction to hear this appeal. Bermont Lakes, LLC v. Rooney, 980 So.2d 580 (Fla. 2d DCA 2008).

STANDARD OF REVIEW

Review of a summary judgment is *de novo*, requiring a two-pronged analysis. First, a summary judgment is proper only if there is no genuine issue of

material fact, viewing every possible inference in favor of the party against whom summary judgment has been entered. Poe v. IMC Phosphates MP, Inc., 885 So.2d 397, 400 (Fla. 2d DCA 2004). Second, if there is no genuine issue of material fact, a summary judgment is proper only if the moving party is entitled to a judgment as a matter of law. Id. at 400-401.

A movant is entitled to summary judgment if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as would be admissible in evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Laurencio v. Deutsche Bank Nat. Trust Co., 65 So.3d 1190, 1192 (Fla. 2d DCA 2011). The moving party bears the burden of showing conclusively the absence of any genuine issue of material fact. Id. Because the trial court must draw every possible inference in favor of the nonmoving party, summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law. Id.

Inasmuch as the entry of summary judgment was premised on the moving party's entitlement as a matter of law, which is reviewed *de novo,* the summary judgment order does not enjoy the usual presumption of correctness generally applicable to all orders subject to appellate review. See e.g. Poe v. IMC Phosphates MP, Inc., 885 So.2d 397, 401 (Fla. 2d DCA 2004).

STATEMENT OF THE FACTS

A. Introduction and Execution of the Relevant Instruments.

Edmund P. Fintak ("Ed Fintak") and Shirley Fintak ("Shirley") married in 1998. (Vol. 3, p.456.) Ed Fintak had six children from a previous marriage. (Vol. 3, p.455-56.) On or about February 16, 1999, Ed Fintak executed the Edmund P. Fintak Sr. Revocable Family Trust (the "Revocable Trust"), prepared by his attorney, Michael Reiter. (Vol. 3, p.472).[1] Ed Fintak was subsequently diagnosed with Parkinson's Disease.

On September 6, 2006, during a visit with two of Ed Fintak's sons, Thomas Fintak ("Tom") and John Fintak ("John"), Ed Fintak went with Tom and John to Michael Reiter's office, where Ed Fintak executed, among other things, an amendment to the Revocable Trust (the "Amendment") that provided for less of a distribution to Shirley and more of a distribution to Ed Fintak's children, including John and Tom. (Vol. 1, p.24; 1st Supp.Vol. 8, pp.2605-06; 1st Supp.Vol. 9, pp.2822-23.) Also on the morning of September 6, 2006, Tom met with Peter Collins, Esq., a divorce attorney to discuss divorcing Ed Fintak from Shirley. (1st

[1] In his Revocable Trust, Ed Fintak provided, among other things, that principal invasions from the Revocable Trust were discretionary and to be based on the "Grantor's intent that [Shirley] be enabled to maintain substantially the same standard of living to which she was accustomed at the time of Grantor's death." (Vol. 3, p.474-75.) The Revocable Trust provided that upon Shirley's death, or upon Ed Fintak's death, if Shirley predeceased Ed, the assets in the trust were to be distributed equally to Ed's seven children and Shirley's two daughters from a previous marriage. (Vol. 3, p.479.)

Supp.Vol. 9, pp.2886-89.) Ed was not present during that meeting. (Id. at 2888-89.) Tom claimed that Ed Fintak requested that Tom find him a divorce attorney. (Id. at 2818.)[2]

On September 8, 2006, two days after Ed Fintak executed the Amendment, John, Tom, and Ed Fintak met with Jason DePaola ("DePaola"), a Bradenton lawyer, selected by Tom. (1st Supp.Vol. 3, p.1640-41; 1st Supp.Vol. 9, pp.2829, 2831, 2833.) Subsequently, although DePaola had several communications with Tom and John between September 8th and September 27th, DePaola was not in communication with Ed Fintak during that time. (1st Supp.Vol. 3, pp.1690,1699-1701,1679,1725; 1st Supp.Vol. 10, p.2970-71.)

At some point, DePaola advised Tom that DePaola had documents for Ed Fintak to sign. (1st Supp.Vol. 10, p.2971-72.) Tom and Ed Fintak returned to DePaola's office on September 27, 2006, where Ed Fintak executed, among other things, a document titled "Irrevocable Trust of Edmund P. Fintak u/a/d September 27, 2006" (the "Trust"). (1st Supp.Vol. 3, p.1711; Vol. 3, pp.489-511; App.Tab 3.)

The Trust is self-settled (that is, created by Ed Fintak for the benefit of Ed Fintak) and was initially funded entirely by the assets of Ed Fintak, who transferred a substantial portion of his life savings into the Trust. Years later, in June of 2010, $49,000.00 was paid into the Trust by Wachovia Bank, N.A.,

[2] No Petition for Dissolution of Marriage was ever filed.

pursuant to a settlement of a lawsuit initiated by Tom and John, styled: *Fintak v. Wachovia Bank, N.A.,* Case No. 8:08-cv-02558-SDM-TGW in the United States District Court, Middle District of Florida in June of 2010. (Tr. 110-111.)

B. The Relevant Terms of the Trust.

The Trust named Ed Fintak, Tom Fintak, and John Fintak as Co-Trustees.[3] The Trust mistakenly omits any distribution to Ed Fintak's son, Michael. (1st Supp.Vol. 3; pp.1722-23; App.Tab. 3, pp.3-4.) The Trust makes no provision for, and no mention of, Shirley Fintak.[4]

Article III of the Trust governs the administration of the Trust during the Grantor's lifetime. (App.Tab. 3, p. 1.) Article III(A) of the Trust, titled "Payment and Application of Income and Principal", provides, among other things, that during the lifetime of Ed Fintak, the Trustee "shall pay to or apply for the benefit of the Grantor such part of the principal of the trust as the Grantor shall request in writing from time to time." (Id.) Article III(A) also mandates that the Trustee "shall pay to or apply for the benefit of the Grantor" the entire net income of the Trust in installments. (Id.)

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[3] Upon motion by Tom and John, Ed Fintak was removed as co-trustee on October 22, 2008. (Vol. 2, pp.329-30.)

[4] In Appellant's Response to Tom and John's motion for summary judgment, Appellant details numerous facts and conflicting deposition testimony that substantiate the allegations that Ed Fintak, who has Parkinson's and is medicated for the same, was unduly influenced by Tom and John to execute the Trust drafted by DePaola, who was selected by Tom to prepare an irrevocable trust. (1st Supp.Vol. 7, p.2544 – Vol. 8, p.2549.)

Article III(B) of the Trust provides that if at any time or times the Grantor is under a legal disability, or is, in accordance with the provisions of the Trust, determined to be unable to properly manage his affairs, the Trustee has discretion on the use of the income and amount of the principal of the trust as the Trustee deems necessary or advisable for the care, support and comfort of the Grantor or for any other purpose the Trustee deems to be for the Grantor's best interest. (Id.)

Article XXI of the Trust is titled "Determination of Incapacity" and provides that a person is "incapacitated" if such person is adjudicated legally incapacitated with respect to rights to contract or to manage property or assets, or if a medical doctor certifies in writing that such person is unable to properly manage his or her financial affairs. (App.Tab. 3, p. 18.)

Article X of the Trust is titled "Discretion of Trustees." (Id. at p. 6.) Article X provides discretion to the Trustee for payments of income or principal if the payments are to be made to a minor, to a person under legal disability or to a person not adjudicated legally incapacitated but who, by reason of illness or mental disability, is in the opinion of the Trustee unable to properly administer such amounts. (Id.) Article X further provides that if a beneficiary is under a disability, such amounts are to be used by the Trustee for such beneficiary's health, education (including college and professional education) and support in reasonable comfort, or shall be paid out by the Trustee in several enumerated ways, at the discretion of

the Trustee. (Id. at pp. 6-7.) Article X does not mention the Grantor. Article X is consistent with the preceding provisions of the Trust that govern the continuing trusts created under the Trust for the contingent remaindermen; to wit: Article VII, Article VIII, and Article IX. (Id. at pp. 4-6.)

DePaola testified at his deposition that the only condition Ed Fintak would have to satisfy to receive any part of the principal of the Trust under Article III(A) was that his request must be in writing. (1st Supp.Vol. 3, pp.1733-34.) DePaola testified that refusal by the Trustees to honor Ed Fintak's written request could be considered a breach of trust. (Id. at p. 1738.) DePaola further testified that the phrase in Article III(B) "in accordance with the provisions of Irrevocable Trust, determined to be unable to properly manage his affairs" was defined in Article XXI. (Id. at p. 1735.) Article XXI, testified DePaola, "speaks to the determination of incapacity" and is the provision referred to in Article III(B) (Id.).

When directed to Article X in his deposition, DePaola thought that Article X "went too far" but applies to persons not adjudicated incapacitated. (Id. at pp. 1735-36). DePaola testified that Article X "could" apply to the Grantor. (Id. at p. 1736). DePaola was "not exactly sure" whether Article III(B) and Article X meant that John or Tom have the ability to refuse to give Ed Fintak any funds based on their own opinion that Ed Fintak cannot handle his money (Id. at pp. 1736-37.)

C. Events Subsequent to the Execution of the Trust.

A few months after signing the Trust, in January of 2007, Ed Fintak told Tom that he wanted to invalidate the Trust. (1st Supp.Vol. 9, p.2907-8; Tr.33.) Tom testified that it was at that point Tom suspected that Ed Fintak was incompetent. (1st Supp.Vol. 10, pp.2980-81.) In February of 2007, Tom and John, joined by Ed Fintak's other children, initiated incapacity and guardianship proceedings against Ed Fintak in Sarasota County (the "Florida Incapacity Action"). (1st Supp.Vol. 10, p.2982.) In May of 2007, after a trial, the Court dismissed the petitions, finding that Ed Fintak had capacity. (1st Supp.Vol. 7, p.2522.)

Thereafter, in August of 2007, Ed Fintak filed the Complaint in this action seeking, among other things, to compel a distribution of principal under Article III(A) of the Trust and to invalidate the Trust. (Vol. 1, pp.2-65.) The Complaint was eventually amended to include Undue Influence (Count I); Lack of Testamentary Capacity (Count II); Judicial Modification (alternative Count III) Breach of Trust (Count IV); and Declaratory Action (alternative Count V). (Vol. 3, pp.453-511.)

In 2008, Tom and John initiated an action against Wachovia Bank, N.A. ("Wachovia") for claims related to certain funds titled in the Trust which Ed Fintak withdrew from Wachovia (the "Wachovia Withdrawals"), which withdrawals Tom

and John alleged were impermissible under the Trust. Predictably, Wachovia impleaded Ed and Shirley Fintak in that action, which was pending in the United States District Court, Middle District of Florida, under case number 8:08-cv-02558-SDM-TGW (hereinafter, the "Federal Action"). (Tr. 107-09.) The Federal Action was settled in June of 2010 by the payment of $49,000.00 into the Trust by Wachovia and the payment of $10,000.00 into the Trust by Ed Fintak (the "Wachovia Funds"). (Tr. 110-111.) The settlement provided that the settlement funds would not be used for attorney fees or litigation costs, pending the outcome of the instant case. (Tr. 111.) Tom and John expended over $100,000.00 in Ed Fintak's Trust funds to prosecute the Federal Action. (Id.)

After Ed and Shirley Fintak relocated to Michigan, Tom filed another action, this time in Luce County, Michigan, seeking to have Ed Fintak declared incapacitated (the "Michigan Incapacity Action"). On March 2, 2010, the Probate Court in Luce County dismissed the petitions for incapacity and conservatorship, finding that Ed Fintak had capacity.[5] (1st Supp.Vol. 7, pp.2528, 2530.)

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[5] Ed Fintak continually maintained that he wanted to invalidate the Trust. In the Michigan incapacity examination in 2009, Ed Fintak told one examiner, Julianne Kirkham, Ph.D., that he had entered into a Trust, that he had not realized that he could not access the money in the Trust, and that he felt "foolish" and "tricked". (1st Supp.Vol. 6, pp.2218-20.) Dr. Kirkham's impression was that Ed Fintak was confused, frustrated, and upset that he had "somehow given up control of his assets." (Id. at p. 2268.) In a subsequent competency examination on December 18, 2009 by Dr. Michael Koval, Ed Fintak expressed that his money was tied up in a Trust, that he could not access it, and that he did not have any control over his own money. (1st Supp. Vol. 6, p. 2320.)

One day later, on March 3, 2010, in an abundance of caution, Ed Fintak executed a Codicil that exercises a power of appointment under the Trust to bequeath the remainder of the trust assets to Shirley. (1st Supp.Vol. 10, p.3064.) The Codicil states:

> I hereby exercise a power of appointment granted to me pursuant to Article VI of a certain irrevocable trust known as the Edmund P. Fintak, Sr., Irrevocable Trust Dated September 27, 2006 (the "Trust). I hereby exercise that power of appointment by granting and bequeathing all the rest, residue and remainder of the Trust to my wife, Shirley A. Fintak, if she survives me. If my said wife fails to survive me, then, in that event, this power of appointment shall be null, void and of no further force and effect. Similarly, in the event that a court of competent jurisdiction decides that the Trust is not valid or enforceable for any reason, or if any agreement is made between myself and the beneficiaries to dissolve the Trust, or the Trust is otherwise no longer in existence at the time of my death, then, in that event, this provision shall be null, void, and of no further force and effect. (Id.)

On July 11, 2011, Ed Fintak died. Probate proceedings were initiated in Luce County, Michigan, Case No.: 2011-3742-DE (the "Michigan Probate"), and Shirley is seeking to probate the March 3, 2010 Codicil. Tom Fintak, individually, is objecting to the probate of Ed Fintak's Codicil.[6]

D. Distributions of Income and Principal from the Trust.

Ed Fintak received distributions from the Trust in the form of monthly

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[6] Shirley, as Personal Representative of Ed Fintak's estate, has been substituted for Ed Fintak in these proceedings. (Vol. 5, p.824.) Aside from noting Shirley's references to the Trust in the Michigan probate proceedings, no party changed their argument or analysis of the issues presented in Tom and John's motions for summary judgment based on the death of the grantor, Ed Fintak.

interest payments. Notably, no principal payments were made upon Ed Fintak's written request under Article III(A) of the Trust. Since the Trust was signed Ed Fintak has requested in writing at least seven (7) requests for principal distributions from the Trust. Only after Ed Fintak filed his Complaint in August of 2007 seeking a distribution of $30,000 in principal under Article III(A) did Tom and John finally pay, in November of 2007.

John testified at his deposition that the Trust provides that Ed Fintak's requests for principal under Article III(A) could be denied if John and Tom believed that Ed Fintak could not handle his finances (1st Supp.Vol. 8, pp.2682-87.) In fact, John stated that any request for principal would be subject to a determination by John and Tom as to whether they believed Ed Fintak was of sound mind. (Id. at 2684-85.)

Unsuccessful in both the Florida Incapacity Action and the subsequent Michigan Incapacity Action to have Ed Fintak declared incapacitated, Tom and John testified that they are nevertheless permitted to withhold distributions from Ed Fintak under the Trust because the examining report filed by Dr. Slocum on March 27, 2007 in the Florida Incapacity Action triggered the Trustees' discretion under Article III(B) to only pay what is necessary and advisable for Ed Fintak (1st Supp.Vol. 9, pp.2929-30; 1St Supp.Vol. 8, pp.2621-23,2686-87).

Tom and John cling to Dr. Slocum's examining report as a certification of

Ed Fintak's incapacity under Article XXI of the Trust, despite the fact that Ed Fintak's own physician, Dr. Ramon Gill, testified on May 21, 2007 that Ed Fintak had the capacity to manage his own property; despite the fact that the Florida Court found, on May 21, 2007, that Ed Fintak had capacity; despite the fact that Julianne Kirkham, Ph.D, and Michael J. Koval, M.D., who examined Ed Fintak in 2009 pursuant to the Michigan Incapacity Action, both reported that Ed Fintak had capacity; and despite the fact that the Michigan court on March 2, 2010 found that Ed Fintak had capacity. (1st Supp. Vol. 10, p. 2992-95.)

As just one example, Tom and John refused a written request from Ed Fintak, dated February 10, 2010, seeking $100,000.00 from the Trust under Article III(A). (Vol. 5, p.1042.) On February 10, 2010, the instant action, the Michigan Incapacity Action, and the Federal Action were all pending. One week after the Michigan court found that Ed Fintak had capacity, Tom and John denied, by letter dated March 9, 2010, Ed Fintak's request for funds. (Vol. 5, p.1043.) On March 22, 2010, twenty days after the Michigan court found that he had capacity, Ed Fintak sent another written request for funds from the Trust, which Tom and John also denied. (Vol. 5, p.1045.) By contrast, Tom and John, by the end of that same year, 2010, paid their attorneys nearly $190,000.00 in attorney fees and costs from Ed Fintak's Trust to pay their fees for their pending actions *against* Ed Fintak.

Tom and John have paid from the Trust $28,575 for Ed Fintak's medical

expenses pursuant to his initial Complaint, approximately $4,000 to the county property appraiser for Ed Fintak, $13,260 in interest for year 2007, and $13,881 in interest for year 2008. (Vol. 3, pp.591-93.) From the year 2008 until Ed Fintak died, Tom and John paid an additional approximately $16,500 in interest payments to Ed Fintak, and paid from the principal an additional approximately $50,000 from the Wachovia Funds for medications and to the facilities where Ed Fintak resided before he died.

Not including the Wachovia Funds, Ed Fintak received an approximate total of $75,000 in interest and principal from his Trust. (Tr. 23; Vol. 3, p.593.)

By way of contrast, as of late September 2011, Tom and John had paid from the Trust approximately $230,000.00 for their own attorney for fees and costs in legal battles against Ed Fintak, expending over 80% of the cash assets held as of 2008 in Ed Fintak's Trust (Vol. 5, pp.908-909.)[7]

E. The Summary Judgment Motions.

In 2010, Tom and John moved for summary judgment on Counts I and II of the Complaint on the ground that Ed Fintak is estopped from maintaining Counts I and II because Ed Fintak failed to renounce the benefits of the Trust. (Vol. 3, pp.587-600; Vol. 4, p.604.) Ed Fintak argued in response that renunciation is not required for a self-settled Trust since there is no gift or devise. (1st Supp.Vol. 7,

[7] The propriety of these expenditures in light of Ed Fintak's claim for breach of trust is the subject of a Petition for Writ of Certiorari, pending before this Court at Case No. 2D12-3263.

pp.2535-39.) Ed Fintak also argued that Tom and John's motion is based on estoppel, an affirmative defense that they have not pled and there exists disputed issues of material fact precluding summary judgment. (Id. at pp. 2533-35.) Following a hearing, the Honorable Rick DeFuria granted summary judgment. (Vol. 4, pp.627-28.) Ed Fintak moved for rehearing, filing a brief surveying all renunciation cases in Florida and in the United States to show that not one court applied the requirement of renunciation to a grantor seeking to invalidate his own self-settled Trust. (Vol. 4, pp.629-640.) Judge DeFuria granted the rehearing. (1st Supp.Vol. 10, pp.3051-3052.)

Prior to the rehearing, Ed Fintak died, and Shirley initiated probate proceedings in Luce County, Michigan, seeking to probate Ed Fintak's March 3, 2010 Codicil. (1st Supp.Vol. 10, p.3056-57). Shirley dutifully listed the Trust on the Petition for Probate as an heir/devisee/interested party in addition to the children, since the Trust was not yet determined invalid. (Id. at p. 3056.) On her Inventory, Shirley listed the assets held in the Trust as part of the estate she would receive under the Codicil.[8]

Tom and John filed a supplemental motion for summary judgment prior to the rehearing, arguing that Ed Fintak is estopped from challenging the Trust because he accepted the benefits of the Trust and acted under the Trust by suing

[8] No payments were made from the Trust after Ed Fintak's death, except to pay Tom and John's legal fees.

under the Trust, demanding payment under the Trust, and exercising a Power of Appointment under the Trust, and by his estate listing the assets of the Trust on the inventory in the Michigan probate case. (Vol. 5, p.941.) Tom and John argued that, by those actions, Ed and Shirley Fintak have ratified the Trust, waived any right to rescind the Trust, and are further estopped from denying the validity of the Trust. (Id.). Shirley Fintak, individually and as Personal Representative of the Estate of Ed Fintak ("Shirley") filed a response in opposition. (Vol. 5, pp. 968-985.)

Following a hearing on Tom and John's Motions for Summary Judgment, the Honorable Lee Haworth sought and received proposed orders from both parties, and thereafter entered Tom and John's proposed order finding that the rule requiring renunciation applies and is a pre-condition to a beneficiary's trust challenge, and that Shirley, by acknowledging the existence of the Trust in the probate proceeding pending in the State of Michigan is estopped from challenging the Trust's validity (hereinafter, the "Summary Judgment Order"). (Vol. 6, pp.1120-26; see also App.Tab. 2) The Court subsequently entered a Final Summary Judgment on Counts I and II of Ed and Shirley Fintak's Complaint, which is the Judgment on appeal. (1st Supp.Vol. 10, pp.3080-81; see also App.Tab 1).

SUMMARY OF ARGUMENT

The rule requiring that a party must renounce a gift under a will or

instrument before a party can challenge the instrument (the "Renunciation Rule") only applies if there is a bequest or gift from a third party. The language of and rationale for the Renunciation Rule reveals its inapplicability to a grantor seeking to challenge his own self-settled *inter vivos* Trust, and in fact, no court in Florida or anywhere in the United States has applied the Renunciation Rule to a grantor seeking to challenge his own self-settled *inter vivos* Trust.

Even under the cases that apply the Renunciation Rule, courts recognize an exception; to wit: if the contestant would be entitled to the benefit conferred by the challenged instrument even in the absence of the instrument. A grantor of a self-settled trust funded with his own assets would be entitled to his own assets in the absence of the trust.

A similar exception exists for the "acceptance of benefits" rule, which holds that a party cannot maintain an action to rescind or reform an instrument if that party has accepted and retained the benefits under the instrument ("Acceptance Rule"). However, like the Renunciation Rule, the Acceptance Rule does not apply if the party is entitled in any event to the benefits received. The Acceptance Rule applies only to those benefits conferred solely by the instrument being challenged.

Judicial estoppel or the doctrine of inconsistent positions, based on Shirley's acknowledgement to the Michigan court of the existence of a Trust, does not preclude a challenge to the invalidity of the same in this action. Estoppel generally

does not preclude Ed Fintak from suing for breach of trust, since litigants are permitted to sue in the alternative. Moreover, simply acting under the terms of the Trust until it has been determined invalid and unenforceable does not constitute an impermissible taking of inconsistent positions or a ratification of the instrument.

Finally, failure to comply with a condition precedent of renouncing benefits, estoppel, waiver, and ratification are all affirmative defenses not plead by Tom and John. Accordingly, procedurally, granting summary judgment on any one of those bases is in error.

ARGUMENT

I. GRANTING SUMMARY JUDGMENT IN THIS CASE ON THE BASIS OF THE RENUNCIATION RULE IS REVERSIBLE ERROR.

A. The Language of, and Rationale for, the Renunciation Rule Demonstrates its Inapplicability to a Grantor Challenging His Own Self-Settled *Inter Vivos* Trust.

By its plain language, the Renunciation Rule does not apply to the instant case. "[T]he general rule on the subject of renunciation, it is that one who receives and retains a gift under a deed, will or other instrument is estopped to contest the validity of the instrument **under which he derives his interest**." Barnett Nat. Bank of Jacksonville v. Murrey, 49 So. 2d 535, 536 (Fla. 1950) (emphasis added). The Murrey court explained the Renunciation Rule via Hamblett v. Hamblett, 6 N. H. 333, as follows:

It has been repeatedly held in the English ecclesiastical courts, that a

> **legatee, who has received a legacy by virtue of a will,** must bring in the legacy before being permitted to contest the will.
> Therefore, before the plaintiff will be permitted to contest the trust agreement **through which he has derived this interest** he must do equity-which is something more than merely offering to do equity-by renouncing his interest by some method or means sufficient in law to operate as a divestiture.

Murrey, at 536-37 (emphasis added).

The cases in Florida that involve a discussion about the necessity of the renouncing in order to maintain a challenge to an instrument (and are oft-cited for the same) are as follows: In re Filion's Estate, 353 So. 2d 1180 (Fla. 2d DCA 1977); In re Harby's Estate, 269 So. 2d 433 (Fla. 2d DCA 1972); Carman v. Gilbert, 641 So. 2d 1323 (Fla. 1994); Barnett Nat. Bank of Jacksonville v. Murrey, 49 So. 2d 535 (Fla. 1950); Pournelle v. Baxter, 151 Fla. 32, 9 So.2d 162 (Fla. 1942); and In re Pellicer's Estate, 118 So.2d 59 (Fla. 1st DCA 1960).

The plain language of the Renunciation Rule as articulated by these cases makes it clear that the Renunciation Rule applies to gifts and devises conferred solely by an instrument executed by a third party. "One who seeks to revoke the probate of a will must renounce the benefits accruing to him under that will." See In re Filion's Estate, 353 So.2d 1180, 1181 (Fla. 2d DCA 1977). "One who receives and retains a gift under a deed, will or other instrument is estopped to contest the validity of the instrument under which he derives his interest." See e.g. Barnett Nat. Bank of Jacksonville v. Murrey, 49 So.2d 535, 536 (Fla. 1950); In re

Harby's Estate, 269 So.2d 433 (Fla. 2d DCA 1972). "It is well settled that a beneficiary under a will who desires to contest that will must first divest himself of any beneficial interest which he has under the will." See e.g. Carman v. Gilbert, 641 So.2d 1323, 1325 (Fla. 1994); Pournelle v. Baxter, 151 Fla. 32, 9 So.2d 162, 163 (Fla. 1942); and In re Pellicer's Estate, 118 So.2d 59, 60 (Fla. 1st DCA 1960).

Accordingly, by its language, the Renunciation Rule is limited to contestants who receive benefits solely under an instrument executed by a third party. Not only does the language limit the application of the Renunciation Rule, but the reasoning behind the Renunciation Rule shows why it does not apply to grantors challenging their own self-settled *inter vivos* trusts.

In Barnett Nat. Bank of Jacksonville v. Murrey, 49 So. 2d 535, 536 (Fla. 1950), the Court articulated the rationale for the Renunciation Rule as follows:

> On [sic] reason for requiring the divestiture is to protect the trustee in the event the trust is held invalid. . . . Another reason is that the bringing in of the property will demonstrate the sincerity of the contestant and prove the suit to be not merely vexatious, inasmuch as in a proper case the property may be held as security for costs. . . A third reason is that when the property is brought in it will be readily available for disposition under a decree of court, free from third-party claims or demands which might possibly attach if the property were permitted to remain the property of the contestant during the course of the litigation.

Murrey at 537 (internal citations omitted).

Citing to its decision in Murrey, the Florida Supreme Court restated the

three-fold purpose of the Renunciation Rule in Carman v. Gilbert, 641 So.2d 1323 (Fla. 1994): (1) to protect the executor in the event the will is held invalid; (2) to demonstrate the sincerity of the contestant and prove that the suit is not merely vexatious; and (3) to have the property readily available for disposition under a decree of court. Id. at 1325.

As Murrey repeatedly articulated, renunciation after receipt of benefits is accepted if it appears that the contestant's temporary receipt of benefits resulted in no prejudice to third persons whose interests are affected by the instrument. Murrey at 536. In other words, the contestant must show that the rights of **claimants** under the instrument have not been adversely and injuriously affected from his temporary retention of benefits. Murrey at 538. Accordingly, the Renunciation Rule is required by devisees, legatees or donees; that is, those who receive a "gift" or "devise" from a decedent.[9]

Thus, the rationale for the Renunciation Rule reveals why the Renunciation Rule is inapplicable to an action in which a settlor and current beneficiary of a trust is seeking to invalidate the same: any assets received under the trust are, in the absence of the trust, the settlor's own assets. There is no gift or devise in this case

[9] Under the applicable definition, a "devise" when used as a noun, means a testamentary disposition of real or personal property and, when used as a verb, means to dispose of real or personal property by will or trust. See § 731.201(10), Fla. Stat. The term "devise" includes "gift," "give," "bequeath," "bequest," and "legacy." Id.

that may be subject to claims of third parties or may need to be disposed of otherwise depending on the outcome of the challenge to the Trust. There can be no claimants under Ed Fintak's Trust whose interests may be adversely and injuriously affected by Ed Fintak's receipt of his own assets from the Trust. There is no reason to have the "property readily available for disposition under a decree of court", Carmen at 1325, because whether it is declared invalid or not, the benefits from the assets, whether held in Trust or not, go to Ed Fintak.

The "benefits" of Ed Fintak's Trust are nothing more than distributions of income and principal from Ed Fintak's assets that are held in the Trust. The distributions from the Trust are spelled out in the terms of the Trust as a way for Ed Fintak to benefit from his own money that funded the Trust. The distribution scheme under this self-settled *inter-vivos* grantor trust is no more a gift to Ed Fintak than a withdrawal from Ed Fintak's checking account is a gift to Ed Fintak. The Trust does not confer the benefits to Ed Fintak; the assets that funded the Trust confer the benefits, and those assets were Ed Fintak's assets. No third parties can claim a right or interest superior to Ed Fintak to the "benefits" of the Trust, whether the court holds the Trust invalid or not.

Citing to this Court's statement in Hansen v. Bothe, 10 So.3d 213, 216 (Fla. 2d DCA 2009) that, with a trust, "the legal title is held by the trustee, but equitable title rests with the beneficiary", Tom and John argued below that the Renunciation

Rule applies to this case because Ed Fintak's assets in the Trust are the property of the Trust, and no longer his property, making distributions from the assets held in Trust "benefits" Ed Fintak must renounce (Tr. 23-24.) Tom and John's attempted analogy fails because there are no claimants under Ed Fintak's Trust that have or will be adversely and injuriously affected from his retention of distributions under the Trust.

Again, the Murrey court's rationale for requiring renunciation was to protect other beneficiaries and creditors, which are the two classes of interested parties in nearly every probate case. In the instant case, Ed Fintak's creditors can seek an order to levy on the Trust because Ed Fintak is the sole grantor/beneficiary and the Trust provides him with the right to withdraw any amount of principal at any time.

Additionally, with regard to the establishment of a trust, the transfers of Ed Fintak's assets into the Trust are not considered a completed gift under the law. In order that a gift be complete, *inter vivos*, it is necessary for the donor to divest himself of it. Murrey v. Barnett Nat. Bank of Jacksonville, 74 So.2d 647, 649 (Fla. 1954). A transfer of assets into a trust does not constitute a completed gift for tax or other legal purposes if the Grantor can simply request all or some of the Trust res at any time, as in the instant case. Id.

In this case, Article III(A) of the Trust permitted Ed Fintak to withdraw any amount from the principal of the Trust upon written request. This also means that,

under the Florida Trust Code, Ed Fintak's creditors can reach all of Ed Fintak's assets in the Trust since Ed Fintak, under Article III(A), can reach all of his assets. See § 736.0505(1)(b), Fla. Stat. (2006).[10]

Moreover, the drafter of the Trust specifically included a Limited Special Testamentary Power of Appointment in Trust Article IV(A) in order to avoid the characterization of any transfers into the Trust as completed gifts. (1st Supp.Vol. 3, pp.1739-40.) Accordingly, Ed Fintak did not cede complete dominion of his assets held in the Trust, and thus, there is not a completed gift.

Likewise, distributions to a grantor/sole beneficiary of his own assets held in a self-settled *inter vivos* trust are not "gifts" from the trust. In the instant case, the Trust was established in favor of the Grantor with the Grantor's own assets. The distribution terms in Article III do not constitute "gifts" to the Grantor of his own assets. For tax purposes, distributions of interest are treated as income, not as gifts. See John G. Grimsley, FLORIDA LAW OF TRUSTS § 10-4 (4th ed. 1993).

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[10] Accordingly, the Trust, although titled as an irrevocable one, does not enjoy two of the common characteristics of irrevocable trusts, tax protection and asset protection; to wit: (1) the exclusion of the trust assets in the gross estate for tax purposes, and (2) the protection of the assets from creditors. Although the Lower Court's Summary Judgment Order states that Appellant argued that the Trust was revocable rather than irrevocable, Appellant's argument is actually that the Trust, although styled as irrevocable, operated **in effect**, as a revocable trust, due to the terms of Article III(A): Ed Fintak did not cede dominion since he could withdraw any assets from the Trust, the Trust did not benefit from the tax advantages of an irrevocable trust, and the Trust was not protected, as irrevocable trusts are, from creditor's claims. (App.Tab. 3, p. 1.)

Revealingly, at the end of the hearing, Tom and John could only articulate to the court the applicability to a grantor trust of only one of the three reasons offered by Murrey and Carman for the Renunciation Rule: whether the lawsuit is proper. (Tr. 70.) Tom and John certainly cannot argue that Ed Fintak's receipt of his own cash assets from the Trust resulted somehow in prejudice to any third person, such as a claimant, whose interests are affected by the instrument, whereas Tom and John's expenditure of over 80% of Ed Fintak's cash assets held in the Trust for their legal fees in actions against Ed Fintak resulted in no similar prejudice. See Murrey at 536.

Based on the foregoing, the language and the rationale of the Renunciation Rule reveals why the rule does not apply to a grantor seeking to challenge his own self-settled *inter vivos* trust funded with his own assets. A survey of cases involving the Renunciation Rule shows that courts in Florida have only applied the Renunciation Rule in cases involving a gift or legacy to a contestant by a decedent, and no court, in Florida or in other jurisdictions, has ever applied the Renunciation Rule to benefits received by a grantor seeking to challenge his own *inter vivos* self-settled trust.

B. No Court Has Applied the Renunciation Rule to a Grantor Challenging a Self-Settled *Inter Vivos* Trust.

Not one reported case in the State of Florida mentions, even in dicta, that

renunciation is required before the grantor/sole beneficiary can challenge the validity of a self-settled, *inter vivos* trust. The two cases that involve the requirement of renunciation of trust benefits are specific to challenges by beneficiaries after the death of the grantor. Barnett Nat. Bank of Jacksonville v. Murrey, 49 So.2d 535 (Fla. 1950), involved a beneficiary's challenge to an *inter vivos* trust following the death of the settlor, and In re Pellicer's Estate, 118 So.2d 59 (Fla. 1st DCA 1960), involved a beneficiary's challenge to a testamentary trust.

There are seventeen reported published cases in the State of Florida that involve the requirement of renunciation of benefits as a condition to challenging the instrument from which the benefit is derived. The seventeen cases, spanning 143 years of Florida jurisprudence from 1851 to 1994, all involve rights under a decedent's estate or rights to a decedent's property.

Of those seventeen cases, seven (7) cases involve actions to revoke or cancel probate [11]; five (5) cases involve will contests or suits under a will [12]; two (2) cases

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[11] Carman v. Gilbert, 641 So.2d 1323 (Fla. 1994); In re Estate of Watkins, 572 So.2d 1014 (Fla. 4th DCA 1991); In re Filion's Estate, 353 So.2d 1180 (Fla. 2d DCA 1977); In re Stein's Estate, 301 So.2d 120 (Fla. 3d DCA 1974); In re Harby's Estate, 269 So.2d 433 (Fla.2d DCA 1972); In re Pellicer's Estate, 118 So.2d 59 (Fla. 1st DCA 1960); Pournelle v. Baxter, 151 Fla. 32, 9 So.2d 162 (Fla. 1942).

[12] In re Purdy's Estate, 54 So.2d 112 (Fla. 1951); Jones v. Neibergall, 42 So.2d 443 (Fla. 1949); Efstathion v. Saucer, 158 Fla. 422, 29 So.2d 304 (Fla. 1947); Young v. McKinnie, 5 Fla. 542, 1854 WL 1286 (Fla. 1854); Ponder v. Graham, 4 Fla. 23, 1851 WL 1091 (Fla. 1851).

involve widow's rights[13]; and the remaining three (3) cases involve actions by a devisee under a will for a resulting trust in an interest in decedent's property, an action to set aside decedent's testamentary trust, and a foreclosure of a mortgage in decedent's name that decedent gave to her daughter.[14]

A survey of case law elsewhere in the United States reveals that other jurisdictions also limit the application of the Renunciation Rule to donees or devisees of decedents. Citing to decisions in Florida and in Texas, American Jurisprudence, Second Edition, also recognizes that the Renunciation Rule is limited to decedents' donees:

> Under some authority, a beneficiary under a will who desires to contest the will must first divest himself or herself of any beneficial interest which he or she may have under the will by renouncing the will and disclaiming any interest under the will. On the theory that the law presumes the acceptance of a beneficial gift by a testamentary donee, the rule is that if the contestant is a legatee, he or she is required to plead a renunciation or disclaimer of the bequest in his favor. However, it has been held a timely petition to revoke probate may be valid, even if the renunciation is not expressly made until after the period for filing the petition expired. Moreover, it has been held that acceptance of benefits under a will is a form of estoppel and an affirmative defense to a will contest that must be specifically pleaded [by] the other party.

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[13] In re Estate of Gaspelin, 542 So.2d 1023 (Fla. 2d DCA 1989); Griley v. Griley, 43 So.2d 350 (Fla. 1949).

[14] Medary v. Dalman, 69 So.2d 888 (Fla. 1954); Barnett Nat. Bank of Jacksonville v. Murrey, 49 So.2d 535 (Fla. 1950); Florida Nat. Bank & Trust Co. of Miami v. Brown, 47 So.2d 748 (Fla. 1950), respectively.

80 Am. Jur. 2d Wills § 823 (updated 2010). American Law Reports published a lengthy annotated article titled "Estoppel to Contest Will or Attack its Validity by Acceptance of Benefits Thereunder", which discusses the Renunciation Rule in detail. Randy R. Koenders, Annotation, *Estoppel to Contest Will or Attack its Validity by Acceptance of Benefits Thereunder*, 78 A.L.R. 4th 90 (2010) (the "Estoppel Article"). The Estoppel Article omits any mention of *inter vivos* trusts.

An electronic nationwide search does reveal an American Law Reports article titled "Renunciation of Beneficial Interest Under Inter Vivos Trust as Condition of Right to Contest its Validity." That article states as follows:

> Although the right of one who takes under a will to attack its validity has frequently arisen, the analogous question of renunciation of a beneficial interest under an *inter vivos* trust of the right to contest its validity appears to have been directly passed upon in only one case.

V. Woerner, Annotation, 21 A.L.R. 2d 1457 (2010). The case to which that Article refers is the Florida case of Barnett Nat. Bank of Jacksonville v. Murrey, 49 So.2d 535 (Fla. 1950), referred to *supra*. Tom and John below also rely on Murrey for the proposition that the Renunciation Rule does indeed apply to trust challenges. (Tr. 28.) However, like all the other cases in Florida requiring renunciation, Murrey involved a donee under an instrument executed by a deceased third party.

Specifically, Murrey involved a challenge to a trust that was *inter vivos* when executed by the settlor, but the challenge was by a beneficiary following the

death of the settlor, unlike the instant case where the challenge is actually by the settlor of the trust. Murrey at 536. Accordingly, under the **one** case that discusses the Renunciation Rule vis-à-vis an *inter vivos* trust, the Renunciation Rule applied to a beneficiary challenging the *inter vivos* trust following the death of the third-party Grantor.

Based on the foregoing, the Renunciation Rule has only been applied to challenges to gifts or devises under instruments executed by a decedent only. No case in Florida or elsewhere requires renunciation by a grantor/beneficiary of the income he receives from his own assets held in a self-settled *inter vivos* trust as a condition of right to contest the same. Ed Fintak's Trust does not confer benefits to Ed Fintak that would not have otherwise received from his own assets. If the Trust were not in existence, Ed Fintak would be entitled to receive all of those assets since those assets are, in fact, his assets.

C. The Inapplicability of the Renunciation Rule to Ed Fintak's Trust is Illustrated by an Exception to the Renunciation Rule.

Although the Renunciation Rule is inapplicable under the plain wording of the Rule, the rationale for the Rule, and the application of the Rule over 143 years of jurisprudence in Florida, the Renunciation Rule would not apply in this case under an exception articulated in Medary v. Dalman, 69 So.2d 888 (Fla. 1954), which illustrates the inapplicability of the Rule to this case.

One of the distinguishing characteristics of the circumstances requiring renunciation and the instant case is that, in every renunciation case, the benefit or gift to the contestant that must be renounced was conferred on the contestant by sole virtue of the instrument being contested. Medary held that a contestant is not estopped for failure to renounce the benefits under an instrument when the contestant was entitled to the benefits in any event, even in the absence of the instrument. Id. at 890.

In Medary, the appellant appealed an order dismissing his complaint, which alleged that appellant, the devisee of a one-fourth interest in a certain property under his wife's will, was entitled to a resulting trust in the whole property since he supplied the funds for the purchase of the same, he did not intend a gift, and his wife took title for convenience only. Id. at 889. The question for the Florida Supreme Court was whether the lower court erred dismissing the complaint for failure to renounce the devise.

The Supreme Court, after determining that the complaint alleged sufficient facts to establish a cause of action for a resulting trust, concluded that the appellant was not required to renounce his interest in the one-fourth devise prior to bringing suit because the appellant was entitled to either one-fourth of the property under his wife's will or to the entire property. Id. at 890. In other words, appellant was entitled in any event to the property. The Court reasoned as follows:

> The appellant either owns the entire property, or title to one-fourth of it has vested in him by virtue of his wife's will. This is a case where 'the donee would not receive under the will a benefit to which he would not be entitled except for the will,' in which event no election is required. . . .A renunciation in such a case would be more of form than of substance, for even if he lost in his suit to establish a resulting trust on the theory that the property is not a part of the wife's estate and consequently not subject to devise, he would still be entitled to take under the Will.

Medary at 890 (citing to American Jurisprudence, America Law Reports and Barnett Nat. Bank of Jacksonville v. Murrey, 49 So. 2d 535, 536 (Fla. 1950)).

This exception to the Renunciation Rule is recognized nationally as well. As the above-referenced A.L.R. Estoppel Article notes:

> Although it is the general rule that one who accepts the benefits under a will is estopped to contest the will's validity, one cannot be estopped by accepting that which he would be legally entitled to receive in any event.

78 A.L.R. 4th 90 §16, citing to In re Will of Smith, 582 S.E. 2d 356 (N.C. Ct. App. 2003). The Estoppel Article cites to various cases in which courts held that a contestant was not estopped for failure to renounce the benefits under an instrument when the contestant was entitled to the benefits in any event:

> a. In Re Estate of Burrough, 154 App DC 259, 475 F 2d 370, *on remand* (DC Dist Col) 360 F. Supp. 1354 (1973), which held that a will beneficiary's acceptance of $17,000 under a will did not estop her from contesting the will where the amount she received was less than she would have received in intestate succession, where there were no other beneficiaries who would be affected by a will contest, and there was, therefore, no prejudice.
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> b. Ford v Yost, 299 Ky 682, 186 SW 2d 896, 162 ALR 149 (1944), in which it was noted that, in the State of Kentucky, the doctrine of estoppel by

acquiescence or by the acceptance of benefits under a will was not freely applied, said that, as a general rule, one could not be estopped by reason of accepting that which he was legally entitled to receive in any event. The court noted that the beneficiary would be entitled to the benefit received whether the will was sustained or overthrown.

c. In Re Will of Peacock, 18 NC App 554, 197 SE 2d 254 (1973), in which the court held that Renunciation Rule did not apply where an heir accepted that which he would be legally entitled to receive in any event. Thus, under circumstances where, if the will were set aside, the beneficiary who received benefits under the will would be entitled to a full one-third of his mother's estate, the court said that his acceptance of a check for less than that amount, which had occurred in the case at bar, could in no way prejudice other beneficiaries of the will in the event probate of the will was subsequently set aside.

d. In Scoby v Sweatt, 28 Tex 713 (1866), in which it was alleged that a beneficiary who had accepted benefits under a will after attaining the age of majority was estopped to contest the will, the court held that a case of election to take under the will was not presented because the beneficiary accepted much less than he was unconditionally entitled to under the law.

In the instant case, Ed Fintak does not receive any benefit under the Trust to which he would not be entitled but for the existence of the Trust. Ed Fintak would be entitled to income from his assets and the use of his assets in any amount even in the absence of the Trust. Whether or not the Trust existed, Ed Fintak is entitled to those assets, since the assets in the Trust are his own assets and were not received as a result of a gift or bequest.

The Lower Court's Summary Judgment Order notes the exception as illustrated by Medary, but observes that "no appellate opinion has established such an exception in the case of a settler-created trust." (App.Tab 2, p.5.) What that

observation fails to recognize is that no court has reached the exception to the Renunciation Rule for a settlor challenging his own settlor-created trust because, as detailed above, no appellate opinion in Florida or elsewhere in the United States has applied the Renunciation Rule to a settlor challenging his own settlor-created trust.

Even if the Renunciation Rule applied to self-settled, *inter vivos* trusts established for the benefit of the grantor, the Renunciation Rule does not estop Ed Fintak from challenging the Trust's validity because Ed Fintak is entitled to the assets he has received under the Trust in any event, even in the absence of the Trust. As detailed above, the purposes of the Renunciation Rule set forth in Murrey and Carman, *supra*, are inapplicable to parties who are entitled to those benefits in the absence of the challenged instrument.

Additionally, applying the Renunciation Rule to Grantors seeking to invalidate their own *inter vivos* Trust would lead to an absurd result. Since the Florida Trust Code allows the trustee to pay legal fees from a trust in any proceeding (sec. 736.0802(10)), if a Grantor initiates a proceeding to invalidate a trust into which the Grantor transferred substantially all of his assets, requiring the Grantor to renounce and return all of the assets received under the trust leaves the Grantor without his own assets to pay legal fees while the trustee funds the

litigation *against* the Grantor with the Grantor's assets in the trust.[15]

Accordingly, because the language of, and the rationale behind, the Renunciation Rule does not apply to a grantor challenging his own self-settled *inter vivos* trust; because no case in Florida or elsewhere applies the Renunciation Rule to a grantor challenging his own self-settled *inter vivos* trust; and because Ed Fintak would be entitled to the assets in the Trust in the absence of the Trust, Ed Fintak is not required to renounce his distributions under his Trust in order to maintain an action to invalidate the same.

II. GRANTING SUMMARY JUDGMENT UNDER THE VARIOUS ESTOPPEL THEORIES IS REVERSIBLE ERROR.

In their Supplemental Motion for Summary Judgment, Tom and John argued various equitable theories for summary judgment, including that (1) Ed Fintak accepted income and principal payment from the Trust in "direct contradiction" to his pleadings as to the invalidity of the Trust (Vol. 5, p.938); (2) Ed Fintak has exercised a Power of Appointment under the Trust (id. at p. 941), (3) Ed and Shirley Fintak made demands for performance of the Trust (id.); (4) Ed and Shirley Fintak have maintained an action for breach of Trust (id.); and (5) in Michigan, Shirley has petitioned to probate a Codicil that exercises a Power of Appointment under the Trust, listed the Trust as a beneficiary and on the Inventory (id. at pp.

[15] In fact, these are the facts of the instant case. Tom and John have repeatedly refused to make distributions under the Trust to Ed Fintak for his legal fees while depleting, as of September of 2011, over 80% of the cash assets Ed Fintak's Trust for their legal fees for litigation **against** Ed Fintak.

938-39), thereby acknowledging "the validity and enforceability" of the Trust (Id. at p. 941). Tom and John argue generally that the above actions by Ed and Shirley Fintak amount to ratification of the Trust, waiver of the right to rescind, or estoppel against denying the validity of the Trust. (Id.)

In the Summary Judgment Order, in addition to the Renunciation Rule, the Lower Court's reasoning for granting summary judgment included estoppel based on the following: (1) Ed Fintak's receipt and acceptance of benefits; (2) Ed Fintak's demand for principal invasion under the Trust; and (3) the admissions by Ed Fintak's Estate "as to the validity of the Trust contained in the Estate's filings in the Michigan probate proceeding." (App.Tab 2, p.6.)

The Summary Judgment Order further finds that the Trust was irrevocable as a matter of law, and, even if it is not irrevocable as a matter of law, the Order states that Shirley is judicially estopped from claiming that the Trust is not irrevocable because she adopted a contrary position in the Michigan probate proceeding. (App.Tab 2, p.6.) The above theories of estoppel ("Estoppel Theories") are substantively and procedurally infirm. Accordingly, summary judgment on these bases was in error.

A. The "Acceptance of Benefits" rule is Inapplicable to this Case.

Estoppel by reason of accepting and retaining benefits under a will or a trust is known as the failure to renounce the benefits (the "Renunciation Rule" referred

to *supra*). The general rule is that one "who receives and retains a gift under a will is estopped to contest its validity. Accordingly, a beneficiary must renounce or divest him or herself of benefits under a will or trust agreement in order to contest the validity of the instrument." See e.g. 18 Fla. Jur 2d Decedents' Property § 252, titled "Effect of acceptance of benefits under will, or of having interest thereunder" (Updated August 2012) (citing to Murrey, *supra*; In Re Pellicer's Estate, *supra*; In re Harby's Estate, *supra*; and Carman v. Gilbert, *supra*)). As established in the previous section, the Renunciation Rule does not apply to a grantor challenging his own *inter vivos* Trust.

In order to use the "acceptance of benefits" rule (the "Acceptance Rule") as an additional ground beyond the Renunciation Rule to estop Ed Fintak's challenge to the Trust, Tom and John rely on contract law principles for the proposition that "a person by the acceptance of benefits may be estopped from questioning the validity and effect of a contract; and, where one has an election to ratify or disaffirm a conveyance, he can either claim under or against it, but he cannot do both, and having adopted one course with knowledge of the facts, he cannot afterwards pursue the other." (Vol. 5, pp. 939-40, citing to Scocozzo v. General Development Corp., 191 So.2d 572 (Fla. 4th DCA 1966).)

Tom and John also rely on contract law principles for the proposition that "where a party seeking rescission has discovered grounds for rescinding an

agreement and either remains silent when he should speak or in any manner recognizes the contract as binding upon him, ratifies or accepts the benefits thereof, he will be held to have waived his right to rescind." (Id. at p. 940, citing to AVVA-BC, LLC v. Amiel, 25 So.3d 7 (Fla. 3d DCA 2009).) These principles do not apply to trusts.

The Acceptance Rule is applied to cases where a party is seeking the "harsh remedies" of cancellation or rescission of a contract. Scocozzo, *supra,* at 579. Rescission and cancellation of a contract are not favored by the courts and so courts of equity will not grant the remedy unless it clearly appears that the claimant is entitled thereto and has not by his own conduct waived his right to the relief claimed. Steinberg v. Bay Terrace Apartment Hotel, Inc., 375 So.2d 1089, 1092 (Fla. 3d DCA 1979). These contract law principles do not apply to a grantor challenging the validity of his own Trust based on undue influence and lack of testamentary capacity.

In the first place, the creation, termination, and invalidation of trusts are governed by the Florida Trust Code, not general contract law principles. As just one example, creation of a trust is governed by sections 736.0401 and 736.0402. Creation of a trust has nothing to do with the basic contract law principles that govern creation of contracts: offer, acceptance and consideration.

In the second place, any and all cases discussing the Acceptance Rule vis-à-

vis contracts are referring to a party accepting benefits *under* a contract; that is, the benefits referred to are conferred solely by the contract. See e.g. AVVA-BC, LLC v. Amiel, 25 So.3d 7 (Fla. 3d DCA 2009); Steinberg v. Bay Terrace Apartment Hotel, Inc., 375 So.2d 1089, 1092 (Fla. 3d DCA 1979); Scocozzo v. General Development Corp., 191 So.2d 572 (Fla. 4th DCA 1966), and the cases cited therein. In this case, Ed Fintak would have been entitled to the income and any use of the principal from his own assets if the Trust did not exist.

Tom and John also cited to Taplin v. Taplin, 611 So.2d 561, 563 (Fla. 3d DCA 1992) for the Acceptance Rule. (Vol. 5, pp. 940-41.) In Taplin, the Third District Court of Appeal reversed an order voiding a certain addendum to a marital settlement agreement because, among other reasons, the Court found that the Former Wife accepted payments and reimbursements under the addendum for two years and thus was estopped from denying its validity, even though (as the Former Wife argued) the copy she signed may not have been the original. Id. at 563.

Like the contract cases cited by Tom and John, Taplin involved a party's acceptance of benefits that were conferred solely by the instrument that party was challenging. The Acceptance Rule simply does not apply where, as in the instant case, a party would have been entitled to the benefits in the absence of the challenged instrument. See e.g. Dance v. Tatum, 629 So.2d 127, 129 (Fla. 1993); Grant v. Wester, 679 So.2d 1301 (Fla. 1st DCA 1996); and Giltex Corp. v. Diehl,

583 So.2d 734 (Fla. 1st DCA 1991), all discussing this exception to the Acceptance Rule with respect to judgments.

In this case, the funds Ed Fintak received as interest and principal disbursements from the Trust would have been payable to Ed Fintak if the Trust did not exist, since the Trust was funded with Ed Fintak's own assets. Similarly, Ed Fintak's exercise of the power of appointment contained in the Trust was not a preclusive acceptance of benefits because, in the absence of the Trust, Ed Fintak could have left the rest, remainder and residue of his assets to Shirley. The Trust did not confer the ability of Ed Fintak to bequeath his assets to Shirley no more than the Trust conferred the use of Ed Fintak's assets to Ed Fintak. In the absence of the Trust, Ed Fintak would have been entitled to use and benefit from his assets and dispose of his assets as he liked.

B. Judicial Estoppel is Inapplicable to the Facts of This Case.

In arguing against the application of the Renunciation Rule, Shirley argued below that the Trust, by allowing Ed Fintak to withdraw any amount of the principal operated, in effect, like a revocable trust. That is, the Trust was not protected from creditors' claims and exclusion of the trust assets in the gross estate for tax purposes. Accordingly, Shirley argued that there was no completed gift into the Trust. Although not an issue for summary judgment, the Summary Judgment Order reaffirms that the Trust, as a matter of law, is irrevocable and that Shirley,

by her filings in the Michigan probate proceedings is judicially estopped from claiming otherwise now. This is an error of law.

Judicial estoppel is an equitable doctrine that prevents litigants from taking inconsistent positions in separate judicial or quasi-judicial proceedings. Zeeuw v. BFI Waste Systems of North America, Inc., 997 So.2d 1218, 1220 (Fla. 2d DCA 2008 (citing to Blumberg v. USAA Cas. Ins. Co., 790 So.2d 1061, 1066 (Fla. 2001)). This Court explained in Crawford Residences, LLC v. Banco Popular North America, 88 So.3d 1017, 1020 (Fla. 2d DCA 2012) that:

> At its core, judicial estoppel requires a showing that a litigant successfully maintained a position in one proceeding while taking an inconsistent position in a later proceeding, and that the other party was misled and changed its position in such a way that it would be unjust to allow the litigant to take the inconsistent position.

Moreover, to trigger the doctrine, the positions must be inherently inconsistent. South Florida Coastal Elec., Inc. v. Treasures on Bay II Condo Ass'n, 89 So.3d 264, 269 (Fla. 3d DCA 2012). The elements of judicial estoppel are the same as equitable estoppel, with the added elements of successfully maintaining a position in one proceeding, while taking an inconsistent position in a later proceeding, in which the same parties and questions are involved. Bueno v. Workman, 20 So.3d 993, 997 (Fla. 4th DCA 2009).

The elements of estoppel are as follows: (1) the party against whom estoppel is sought must have made a representation about a material fact that is contrary to a

position it later asserts; (2) the party claiming estoppel must have relied on that representation; and (3) the party seeking estoppel must have changed his position to his detriment based on the representation and his reliance on it. In re Estate of Sterile, 902 So.2d 915, 922 (Fla. 2d DCA 2005). Judicial estoppel as applied to this case fails for several reasons.

First, disclosing the existence of the Trust and the interest the Trust will or may claim in the proceedings to the probate court in Michigan is nether "inherently inconsistent" nor inconsistent at all. Shirley listed the Trust by its name, "Irrevocable Trust of Edmund P. Fintak u/a/d September 27, 2006" as a interested party in her Petition for Administration, on the Inventory as holding assets, and in reference to the Codicil she sought to probate in Michigan. Accurately representing that there is a Trust in existence and calling the Trust by its title does not indicate a ratification of the enforceability of the Trust, nor are those actions inherently inconsistent.[16]

Parties are not obligated to act as though an instrument they are challenging has no force and effect to their detriment. A party is certainly not permitted to ignore an instrument's existence simply because that party is challenging the validity of that instrument. When Shirley filed for probate in Michigan, no court had ruled that Ed Fintak's Trust was invalid and unenforceable, and Shirley could

[16] As Tom and John's counsel represented at the hearing, the Michigan court is aware of the instant trust litigation and has conferred with counsel herein regarding the same. (Tr. 65.)

not proceed as though a court had so determined. Merely naming the Trust by its name ("Irrevocable Trust...." etc.) does not constitute an admission or an allegation that the Trust does not, in fact, operate like a revocable trust.

Second, Tom and John cannot establish that Shirley successfully maintained a position in an earlier proceeding. "Judicial estoppel applies only when the position assumed **in the earlier proceeding was successfully maintained.**" Crawford Residences, LLC. at 1020 (emphasis added.) Shirley has not successfully maintained the invalidity (or, for that matter, the effective revocability) of the Trust in this proceeding, such that even if the representations in the Michigan court were totally inconsistent (which they are not), she would be judicially estopped.

Fourth, Tom and John have not established, nor have they claimed, that they were misled by and have changed their position in reliance on Shirley's allegedly inconsistent positions. This is fatal to a claim of judicial estoppel and estoppel generally. See e.g. Crawford Residences, LLC at 1020.

Fifth, there is not a mutuality of parties that would work a judicial estoppel. Only Tom, individually, is contesting the probate of Ed Fintak's codicil in Michigan.

Sixth, assuming *arguendo*, that there existed mutuality of parties **and** that Shirley had successfully maintained in this litigation that the Trust was invalid **and** that Shirley's disclosure to the Michigan court of the existence of the Trust was

"inherently inconsistent" with her position in this litigation, judicial estoppel would only work to estop Shirley from claiming **in Michigan** that the Trust was valid.

C. The Doctrine of Inconsistent Positions Does Not Apply.

In addition to judicial estoppel, Tom and John argued that there is a general rule that litigants are not permitted to take inconsistent positions in judicial proceedings and that a party cannot allege one state of facts for one purpose and at the same action or proceeding deny such allegations and set up a new and different state of facts inconsistent thereto for another purpose. (Vol. 5, pp.939-40.) For this proposition, Tom and John cited to Federated Mut. Implement & Hardware Ins. Co. v. Griffin, 237 So.2d 38 (Fla. 1st DCA 1970) in their motion, and Hodkin v. Perry, 88 So.2d 139 (Fla. 1956); Montero v. Compugraphic Corp., 531 So.2d 1034 (Fla. 3d DCA 1988) at the hearing. (Id. and Tr. 42-44.)

Similar to the doctrine of judicial estoppel, the doctrine of estoppel against inconsistent positions states that "where a party to a suit has assumed an attitude on a former appeal, and has carried the case to an appellate adjudication on a particular theory asserted by the record on that appeal, he is estopped to assume in a pleading filed in a later phase of that same case, or another appeal, any other or inconsistent position toward the same parties and subject matter." Kaufman v. Lassiter, 616 So.2d 491, 493 (Fla. 4th DCA 1993).

Even if this doctrine is a separate and distinct form of estoppel from judicial

estoppel, the elements of estoppel are not met: Shirley's positions are not inherently inconsistent and Tom and John have not changed their position on Shirley's allegation that the Trust is invalid (or, for that matter, effectively revocable).

Tom and John's cited cases illustrate the level of inconsistency required for the doctrine to apply. In Federated Mut. Implement & Hardware Ins. Co. v. Griffin, the wife of deceased employee, Griffin, obtained judgment against Griffin's co-employee in a wrongful death action on the theory that Griffin, when he died, was engaged in the course of his employment. Mrs. Griffin then brought garnishment proceedings against the employer's liability insurer on the theory that Griffin was not engaged in the course of employment so as to avoid exception in the liability policy. In other words, Mrs. Griffin pursued the **exact opposite** theories of recovery in the two cases.

Similarly, Hodkin v Perry involved a medical doctor (Hodkin) who sued the defendants, members of the Board of Commissioners of the South Broward Hospital District, to reinstate Hodkin as a medical staff member after the defendants refused to reappoint Hodkin because Hodkin had become disqualified pursuant to a by-law that had been recently passed prescribing medical staff member qualifications. Id. at 139. In the reinstatement action, Hodkin argued that the by-law in question was invalid. Id. The Supreme Court held that Hodkin was

estopped from denying the validity of the by-law when Hodkin himself actively supported and voted for the adoption of the by-law in question. Id. at 140.

Montero involved suit for fraudulent inducement, rescission, and return of property under a contract. Defendant moved for summary judgment arguing both that there was no contract and that a time-limiting provision in the contract barred the action. The Third District Court of Appeal reversed summary judgment entered for the defendants, holding that a "litigant cannot, in the course of litigation, occupy inconsistent and contradictory positions." Id. at 1036.

To the extent that Tom and John argue that the Doctrine of Inconsistent Positions applies to Ed Fintak's cause of action for breach of trust, the Doctrine of Inconsistent Pleadings does not apply to pleadings in the alternative. Palm Beach Co. v. Palm Beach Estates, 110 Fla. 77, 148 So. 544 (1933), cited in Griffin, for the Doctrine of Inconsistent Pleadings, has been abrogated, at least insofar as it applies to pleadings, by Ed Ricke & Sons, Inc. v. Green, 609 So.2d 504 (Fla. 1992), in which the court recognized that Palm Beach was an equity case, decided "in a different era and under different rules" before pleadings could be amended. Id. at 506. "The present philosophy, as expressed in our Rules of Civil Procedure, is to allow both plaintiff and defendant to plead alternatively in presenting their claims and defenses." Id. at 506. Accordingly, Shirley can maintain a breach of trust claim, as well as alternative counts for judicial modification and declaratory

judgment.

Tom and John have argued that the Doctrine of Inconsistent Positions preclude any allegation that the Trust operates in effect like a revocable trust, on the basis that Ed and Shirley Fintak have referred to the Trust as irrevocable in the pleadings in the instant action, sued for judicial modification of an irrevocable trust, and because Shirley Fintak has referred to the trust as irrevocable when identifying the trust in court filings in Michigan. If the Grantor can withdraw any or all of the principal in the Trust, as Article III(A) of the Trust permits, the trust as detailed above does not have the characteristics, or advantages, of an irrevocable trust. The name of the trust does not render the trust irrevocable. The Trust is governed by its provisions.

It is acknowledged that Ed Fintak could never exercise the power to revoke the trust since no term of the Trust reserved to Ed Fintak that power. However, under the terms of the Trust, Ed Fintak could withdraw all assets save a dollar in the Trust, effectively revoking the Trust as to all assets withdrawn. This ability was confirmed by DePaola, the drafter, at his deposition. (1st Supp.Vol. 3, pp.1734-35.)

III. SUMMARY JUDGMENT BASED ON DEFENSES NOT PLEAD IS IMPROPER.

Affirmative defenses that have not been pled can "not lawfully constitute issues in the case upon which the parties could submit evidence either at a trial or

in a summary judgment proceeding." Meigs v. Lear, 191 So.2d 286, 289 (Fla. 1st DCA 1966). A summary final judgment entered by the lower court in effect sustained an affirmative defense that was never plead and is thus improper. Strahan Mfg. Co. v. Pike, 194 So.2d 277 (Fla. 2d DCA 1967).

In Tom and John's Supplemental Motion for Summary Judgment, they argued for summary judgment under various defenses: waiver, ratification, and estoppel. These defenses must be properly pled to be a basis for summary judgment. Wolowitz v. Thoroughbred Motors, Inc., 765 So.2d 920, 923 (Fla. 2d DCA 2000). Of Tom and John's fourteen purported affirmative defenses, only estoppel is pled, but the defense is directed to Ed Fintak's reimbursement for expenses, alleging that Ed Fintak's allegedly impermissible withdrawal of funds from Wachovia estops these claims. (Vol. 3, p.526.)

Since Tom and John have failed to plead waiver, ratification, or estoppel on the grounds they argued for summary judgment, those defenses "should not have been considered by the trial court, much less used as the basis for granting summary judgment." Wolowitz v. Thoroughbred Motors, Inc., 765 So.2d 920, 923 (Fla. 2d DCA 2000).

Relying on this Court's statement in In re Filion's Estate, 353 So.2d 1180, 1181 (Fla. 2d DCA 1977) that the Renunciation Rule is "more nearly a condition precedent to the remedy rather than to the cause of action", Tom and John argued

the failure to renounce need not have been plead as an affirmative defense. (Tr. 24-25.) However, the failure to perform a condition precedent is a special matter that must be pleaded with particularity, under the Rules of Civil Procedure Rule 1.120(c). By failing to plead that Ed Fintak had not performed a condition precedent to the suit, Tom and John have waived this defense. Dickerson v. Escambia County Board of County Commissioners, 536 So.2d 1065, 1066 (Fla. 1st DCA 1988). Accordingly, summary judgment on this basis was improper for procedural reasons as well as for the substantive reasons set forth above.

WHEREFORE, Appellant prays that this Honorable Court reverse the Summary Judgment Order entered on May 25, 2012 and the Final Summary Judgment entered on June 21, 2012, as to Counts I and II of Plaintiff's Second Amended Complaint, and remand the case to the Lower Court for proceedings consistent therewith.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was delivered by regular U.S. Mail to Adam Mohammadbhoy, Esq., Harllee & Bald, P.A., 202 Old Main Street, Bradenton, FL 34205, attorney for Appellees, on this 26th day of October, 2012.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing is submitted in Times New Roman 14-point font, which satisfies the requirements of Florida Rules of Appellate Procedure 9.100(*l*) and 9.210(a)(2).

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