

IN THE DISTRICT COURT OF KINGFISHER COUNTY  
STATE OF OKLAHOMA

OKLAHOMA DEPARTMENT OF SECURITIES )  
ex rel. IRVING L. FAUGHT, Administrator, and )  
DOUGLAS L. JACKSON, in his capacity as )  
Court-appointed Receiver for Marsha Schubert and )  
Schubert & Associates, )

Plaintiffs, )

v. )

Case No. CJ-2009-202

THE WILCOX FAMILY REVOCABLE TRUST )  
Dated September 23, 2002, MARVIN L. WILCOX, )  
Individually and as Trustee of THE WILCOX )  
FAMILY REVOCABLE TRUST; SCOTT A. )  
WILCOX, as a Beneficiary of THE WILCOX )  
FAMILY REVOCABLE TRUST; and, LARRY )  
M. WILCOX, as a Beneficiary of THE WILCOX )  
FAMILY REVOCABLE TRUST, )

Defendants. )

Kingfisher County, Oklahoma

**FILED**

**JAN 27 2012**

**YVONNE DOW, COURT CLERK**

BY \_\_\_\_\_

DEPUTY

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT  
AND BRIEF IN SUPPORT

Plaintiffs, Oklahoma Department of Securities, ex rel. Irving L. Faught, and Douglas L. Jackson, in his capacity as court-appointed Receiver for the creditors and claimants of Marsha Schubert and Schubert and Associates, move the Court for summary judgment in their favor and against Defendants pursuant to Rule 13 of the Rules for the District Courts of Oklahoma, OKLA. STAT. ANN., Tit. 12, Ch. 2, App. 1.

This Motion is based on the grounds that the pleadings, trust instruments from the Wilcox Family Revocable Trust dated September 23, 2002 ("Trust") and discovery documents show that there is no substantial controversy over the material facts that Marion and Julia Wilcox are deceased; that the taxes due, excluding penalties and fines, and other expenses have been paid and that the Trust, including the spendthrift provision, has terminated according to the express

provisions of the Trust document. The undisputed facts also demonstrate that Marvin Wilcox ("Defendant Trustee or Defendant Wilcox") has already made distributions to all of the three beneficiaries of the Trust. Therefore, Plaintiffs are entitled (1) to a declaratory judgment establishing that the Trust has terminated and that the provisions contained in the Trust, including the spendthrift clause, do not survive or have effect beyond the termination of the Trust; and, (2) to an order requiring Defendant Trustee to pay or turn over all money and property constituting his remaining share of the Trust to Plaintiffs in partial satisfaction of their judgment obtained against him in the District Court of Oklahoma County, Case No. CJ-2005-3796.

#### BACKGROUND

From approximately January of 2000 to October of 2004, Marsha Schubert, individually and doing business as Schubert and Associates, (collectively, "Schubert"), operated a securities fraud in and from Crescent, Oklahoma, wherein she promised large financial returns and accepted funds in excess of Two Hundred Million Dollars (\$200,000,000) for purported investment. The Department sued Marsha Schubert for violations of the Oklahoma Securities Act and sought injunctive relief and a receivership. The Logan County District Court appointed Douglas Jackson as the Receiver (Receiver) and charged him with recovering assets for the benefit of Schubert's creditors and claimants.

The Receiver conducted a financial analysis of Schubert's business and determined that she had conducted a "Ponzi" scheme wherein she paid some investors with money from other investors. The "Ponzi" scheme had also been supported by a check exchange scheme wherein certain individuals allowed Schubert to control their bank accounts and create a consistent movement of funds between their bank accounts and bank accounts owned by Schubert. The

scheme created a “float” that Schubert utilized to pay purported investment returns to other investors.

The Receiver determined that approximately 100 persons lost in excess of Nine Million Dollars (\$9,000,000) in the scheme, and that approximately 160 persons netted in excess of Six Million Dollars (\$6,000,000) through the scheme. See Accounting, Exhibit A.

The Receiver instituted a claims process whereby all potential creditors could make claims against the receivership estate. The Logan County District Court approved the claims as recommended by the Receiver, including the claims submitted by the Trust.

The Department and the Receiver then sued the individuals who received more money in the Schubert Ponzi Scheme than they originally gave to Schubert. One of these individuals was Defendant Wilcox. Between December 2002 to October 2004, Defendant Wilcox, individually, received the net amount of Five Hundred Nine Thousand Five Hundred and Five Dollars (\$509,505) from Schubert. This amount was one of the largest amounts that Schubert gave to any single participant and considerably more than what she gave to most of the others. See Accounting of Marvin Wilcox, Exhibit B. Such favoritism likely resulted from Defendant Wilcox’s participation in the check exchange scheme. Between December 12, 2002 and October 6, 2004, there were over six hundred fifty (650) bank transactions between the accounts of Schubert and Defendant Wilcox. See Exhibit B. The deposits to Schubert from Defendant Wilcox totaled in excess of Seventy-Seven Million Dollars (\$77,000,000). Disbursements from Schubert to Defendant Wilcox totaled in excess of Seventy-Eight Million Dollars (\$78,000,000). As a result, the Department and the Receiver obtained a judgment in the amount of Five Hundred Nine Thousand Five Hundred and Five Dollars (\$509,505) against Defendant Wilcox.

STATEMENT OF MATERIAL FACTS  
AS TO WHICH NO GENUINE ISSUE EXISTS

1. Plaintiffs are judgment creditors with respect to Defendant Wilcox having obtained judgment against him on December 17, 2010, in a case styled *Oklahoma Department of Securities, ex rel. Irving L. Faught, Administrator, et al., v. Robert W. Mathews, et al.*, Case No. CJ-2005-3796, District Court of Oklahoma County, State of Oklahoma. See 12/17/2010 Order of Judgment attached as Exhibit C (State Court Judgment).

2. The State Court Judgment against Defendant Wilcox is for the amount of \$509,505, plus \$188,698.30 of prejudgment interest, plus post-judgment interest at the statutory rate, and \$75 as costs. See Exhibit C.

3. Defendant Wilcox is the trustee and one of three beneficiaries of the Trust. The other beneficiaries are Larry Wilcox and Scott Wilcox. See copy of Wilcox Family Revocable Trust dated September 23, 2002, attached as Exhibit D at section 3.2.

4. The Trust contains a provision stating that the trust terminates on the death of the surviving spouse, or upon the death of Trustor if there is no surviving spouse. See Exhibit D at section 3.2.

5. Marion Wilcox died in July of 2008, Julia Wilcox preceded him in death. See excerpt of deposition of Marvin Wilcox, dated January 13, 2010, attached as Exhibit E, at 6:23-25.

6. State and federal tax returns have been prepared and filed on behalf of the Wilcox Family Revocable Trust. See U.S. and Oklahoma tax returns for 2009 and 2010 for Wilcox Family Revocable Trust attached collectively as Exhibit F.

7. The taxes due to the Internal Revenue Service and the State of Oklahoma relative to the Wilcox Family Revocable Trust, excluding penalties and taxes were paid. See copies of checks attached hereto as Exhibit G.

8. The trustee for the Trust, Defendant Wilcox, has made distributions from the Trust to himself and Defendants Scott Wilcox and Larry Wilcox. See Exhibit H, Letter from Jeffrey Trent and attached accounting dated June 29, 2011.

9. On January 4, 2010, Plaintiffs filed a Motion for Temporary Injunction in this case to restrain Defendant Wilcox from dissipating or distributing any remaining assets of the Trust that Plaintiffs were entitled to recover in connection with their State Court Judgment. On January 5, 2010, this Court entered a temporary injunction prohibiting Defendant Wilcox, as Trustee, from further dissipating or distributing assets of the Trust.

10. On January 5, 2010, this Court authorized Defendant Wilcox to distribute real property to Scott Wilcox and Larry Wilcox pursuant to the express terms of the Trust.

11. As of July 2011, the Trust assets included a cash balance in a bank account with NBC Bank, a certificate of deposit with NBC Bank, and mineral interests. By the terms of the Trust, Defendant Wilcox is entitled to an undivided one-third share of those assets. See Exhibit H, Letter from Jeffrey Trent and attached accounting dated June 29, 2011.

#### ARGUMENT AND AUTHORITIES

Under Oklahoma law, the language of the Trust instrument controls when the Trust terminates. Where there is no ambiguity and the language of a trust is clear and plainly susceptible of only one construction, the plain provisions of the trust instrument must determine its construction. See *House of Realty, Inc., et al. v. City of Midwest City*, 2004 OK 97, ¶36, 109

P.3d 314, 325. Furthermore, the Oklahoma Supreme Court has provided that interpretation of the language used in a trust agreement to express the intention of the parties is a question of law for the court and not for the jury. See *Evans v. First Nat'l. Bank of Stillwater*, 1948 OK 92, 192 P.2d 666, 667. As such, the Court in the instant case should look to the provisions of the Trust instrument itself to determine, as a matter law, when the Trust terminates.

The provision in question is found in section 3.2, which provides in pertinent part as follows:

3.2 Upon the death of the SURVIVING SETTLOR, in the event the SURVIVING SETTLOR shall fail to exercise the foregoing power of appointment, or insofar as any part of the THE WILCOX FAMILY REVOCABLE TRUST shall not be effectively appointed, the remaining Trust Estate (including any additions from the estates of DECEASED SETTLOR or SURVIVING SETTLOR or otherwise), as then constituted, shall be distributed as follows:

(1) Any and all interest of the trust estate in the surface only of Lots 5, 6, and 7 of Section 28; and Lots 5 and 6 of Section 29; and the N/2 n/2 of nw/4 of Section 33 all in Township 17 North, Range 5 West I.M., Kingfisher County, State of Oklahoma, shall be distributed to SCOTT A. WILCOX or his issue, per stirpes.

(2) Any and all interest of the trust estate in the surface only the W/2 SW/4 of Section 15, Township 17 North, Range 5 West I.M., Kingfisher County, State of Oklahoma, shall be distributed to LARRY M. WILCOX or his issue, per stirpes.

(3) Any and all interest of the trust estate in the surface only of the southeast 110 acres of the SE/4 of Section 32, Township 18 North, Range 4 West I.M. sometimes described as the southeast 30 acres and the W/2 of the SE/4 of said Section 32; shall be sold and the proceeds shall be distributed as hereinafter set forth.

(4) Any and all interest of the trust estate in any oil, gas and other minerals shall be divided into equal shares so as to provide one (1) share for the benefit of each of SETTLORS' then living children and one (1) share for the benefit of each of SETTLORS' deceased children who shall leave issue then living. Upon creation of such shares, each share provided for the benefit of a living child of

SETTLORS shall be distributed to such child, and each share provided for the benefit of a deceased child of SETTLORS, who shall leave issue then living, shall be distributed per stirpes to such issue.

(5) The rest, residue and remainder of the trust estate shall be divided into equal shares so as to provide one (1) share for the benefit of each of SETTLORS' then living children and one (1) share for the benefit of each of SETTLORS' deceased children who shall leave issue then living. Upon creation of such shares, each share provided for the benefit of a living child of SETTLORS shall be distributed to such child, and each share provided for the benefit of a deceased child of SETTLORS, who shall leave issue then living, shall be distributed per stirpes to such issue.

See Exhibit D.

Applying the above trust provisions to the undisputed facts in this case, the Trust terminated upon the death of Marion Wilcox on July 19, 2008. Because Marion Wilcox's spouse pre-deceased him, and section 3.2 of the Trust so provides, the Trust terminates upon his death as the Trustor, with assets to be distributed as prescribed. Therefore, the Trust at issue in this case terminated on July 19, 2008, the date of Marion Wilcox's death.

In addition, because the Trust terminated upon the death of Marion Wilcox in July of 2008, the spendthrift provision ceased to be applicable from that point forward. There has been a reasonable amount of time for the Trustee to wind up the Trust as evidenced by the fact that the Trustee made distributions to all three Trust beneficiaries in April of 2010 and again in November of 2010. Real estate has been deeded by Defendant Trustee out of the Trust to beneficiaries Larry Wilcox and Scott Wilcox. The state and federal tax returns have been prepared and filed on behalf of the Trust. In sum, the winding up activities relative to this Trust have been performed and the Trust has terminated by its express terms.

In a recent unpublished opinion, the Tenth Circuit Court of Appeals, applying Kansas law, addressed the similar issue of terminating a trust. See *In re Hilgers*, 279 Fed. Appx. 662, at \*667, 2008 WL 2127657 at \*\*5 (unpublished opinion). The Tenth Circuit noted that when the trusts terminated upon the death of the last surviving trustor, the trustees had a duty to expeditiously wind up the estates and make distributions to the remainder beneficiaries. *Id.* The court went on to state as follows:

From the record before us, we are unable to conclude that there was any justification in the Trusts' provisions or the KUTC for their failure to make the distributions and a "reasonable" time had more than elapsed between Jack Hilgers' death in January, 2001 and March, 2004, when the Debtor filed for bankruptcy protection. Therefore, under the KUTC, the Debtor's creditors could have reached the distributions from the Trusts that were then due him. The spendthrift provisions of the trust had ceased to be effective, and the debtor's interests in the trust became property of the estate under 11 U.S.C. §541(a) and (c)(2), subject to Turnbull's [Turnbull Oil, Inc. was a defendant creditor] lien rights. As property of the estate the debtor's interests were subject to turn over to the bankruptcy trustee under 11 U.S.C. §542(a). See *id.* (emphasis added).

The ruling and reasoning of the Tenth Circuit Court of Appeals in the above case is in accord with the general rule of law set forth in *American Jurisprudence*. There, it is provided that "[i]n an action against the beneficiary, a dry, passive, or executed trust -- that is, one in which nothing remains to be done by the trustees -- is, as a rule attachable, especially where it is deemed to vest a legal title in him or her." See 6 Am. Jur. 2d Attachment and Garnishment §156.

This Trust is a dry, passive trust that has terminated, and the spendthrift provision no longer has any force or effect. Therefore, the Trust is attachable for purposes of the Plaintiffs' State Court Judgment.

## CONCLUSION

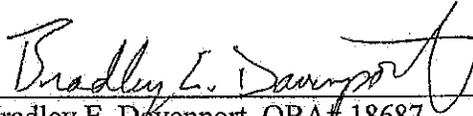
There is no genuine issue of fact that the Wilcox Family Revocable Trust has terminated pursuant to its own unambiguous terms. As a matter of law, the Trust has terminated and the spendthrift provision in the Trust has ceased to have any force or effect.

In *First Nat'l Bank & Trust Co. v. Kisse*, the Supreme Court of Oklahoma stated the following regarding summary judgment proceedings:

When the movant has shown there is no genuine issue as to any material fact, the opposing party has the obligation of showing some probative evidence, formulated as specific facts, to justify a trial of the issues. A party cannot merely rely upon conjecture or suppositions, and assert "that facts exist or might exist, [because such] is not sufficient to create a substantial controversy when the party moving for summary judgment has introduced evidence showing the existence of facts which would preclude recovery by the party against whom the motion was made." 1993 OK 96, 859 P.2d 502, 505.

Based on the foregoing facts and legal authority, this Court should grant summary judgment in favor of Plaintiffs and against Defendants declaring that the Wilcox Family Revocable Trust has terminated pursuant to its own terms and that the spendthrift provision contained in the Trust has ceased to have any force or effect; and, ordering Defendant Trustee, Marvin Wilcox, to pay and/or turn over his share or distribution from the Trust to Plaintiffs in partial satisfaction of their judgment against him, and for any other relief the Court deems just and equitable. Plaintiffs request also that this Court order Defendants to produce a current accounting of the Trust assets to assist Plaintiffs in confirming the amount owed, and to set a further hearing to resolve the amount.

Respectfully submitted,



Bradley E. Davenport, OBA# 18687  
GUNGOLL JACKSON, COLLINS, BOX & DEVOLL, P.C.  
3030 Chase Tower  
100 North Broadway Ave.  
Oklahoma City, OK 73102  
Phone: (405) 272-4710 / Fax: (405) 272-5141  
Attorney for Plaintiff, Douglas L. Jackson, in his  
capacity as court-appointed receiver

And



Amanda Cornmesser, OBA #20044  
Gerri Stuckey, OBA #16732  
Oklahoma Department of Securities  
120 N. Robinson, Suite 860  
Oklahoma City, OK 73120  
Phone: 405-280-7700 / Fax: (405) 280-7742  
Attorneys for Plaintiff, Oklahoma  
Department of Securities