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SUPREME COURT OF KENTUCKY  
No. 2005-SC-000861

LINDA KERN CUMMINGS,

APPELLANT

VS.

APPEAL FROM  
KENTUCKY COURT OF APPEALS  
NO. 2004-CA-001185-MR

JOHN BROOKS PITMAN,  
Executor of the Estate of Betty Kern Miller;  
R. ANDREW BOOSE, Individually and as Trustee;  
THE GUIDE DOG FOUNDATION FOR THE BLIND, INC.; and  
STEVEN KERN SHAW,

APPELLEES

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BRIEF FOR APPELLANT


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of this brief was served by United States Mail, First Class, postage prepaid, on Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601, Hon. Darren W. Peckler, Boyle Circuit Judge, Courthouse, 321 W. Main Street, Danville, Kentucky 40422; Hon. Ashley W. Ward, 250 West Main Street, Ste. 2300, Lexington, Kentucky 40507; Hon. Ephraim W. Helton, 237 W. Main St., Danville, Kentucky 40423; Hon. Charles R. Hembree, 200 West Vine Street, Ste. 810, Lexington, Kentucky 40507; Hon. Kevin L. Nesbitt, 102 S. Fourth Street, Danville, Kentucky 40423; and to Hon. Mark S. Kosak, 610 Broad Hollow Road, Ste. 306, Melville, New York 11747, on this the 1<sup>st</sup> day of August, 2006. The undersigned further certifies that he has not removed the record in this matter from any clerk's office.

  
Charles W. Curry

## **INTRODUCTION**

Appellant Linda Kern Cummings filed this action against, inter alia, New York attorney R. Andrew Boose, alleging that Mr. Boose, while legal counsel to her mother, used undue influence to have himself appointed as trustee of the trust created by her mother to hold and collect royalties from the intellectual property created by Ms. Cummings' grandfather, the famous composer Jerome Kern. The Boyle Circuit Court and Kentucky Court of Appeals ruled that Mr. Boose was not subject to personal jurisdiction in the courts of Kentucky in his capacity as trustee, though he is subject to such personal jurisdiction in his individual capacity. In this appeal, Ms. Cummings argues, first, that Kentucky law does not recognize a distinction between the actions of a person individually and as trustee, and second, that even if such a distinction were proper, Mr. Boose's actions as trustee would also subject him to the personal jurisdiction of the courts of Kentucky.

## **STATEMENT CONCERNING ORAL ARGUMENT**

The Appellant, Linda Kern Cummings respectfully requests that this court conduct an oral argument, because she believes that an oral argument would be helpful in assisting the court in understanding the facts and issues on appeal.

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## STATEMENT OF THE CASE

Appellant Linda Kern Cummings is the daughter of Betty Kern Miller, who was the only child of the composer Jerome Kern (1885-1945), one of the most famous composers of Hollywood, who composed songs for numerous movies during the "golden age" of movie musicals in the 1930s and '40s. Kern is best known for the music from the musical "Showboat," and for his composition of many popular songs, including "Smoke Gets In Your Eyes," and "The Way You Look Tonight." According to an affidavit of the Appellee, R. Andrew Boose ("Boose Affidavit"), R Vol. 2, at 173,<sup>1</sup> his body of work is represented by more than 800 individual copyrights and income producing royalty agreements. This intellectual property has a continuing financial value, because though Mr. Kern died on November 11, 1945, his works have continued to be performed to the present day; one internet source lists eight separate Broadway productions featuring his music since 1986 alone,<sup>2</sup> and the Internet Movie Data Base ([www.imdb.com](http://www.imdb.com)) lists 46 movies and television shows made since 1994 in which Mr. Kern's music has appeared.<sup>3</sup>

In the late 1970s, or early 1980s, Ms. Miller moved to Danville, Kentucky, where she lived out her life, and died testate there on April 5, 1996. Ms. Miller had, for many years, been represented by Ms. Harriet Pilpel, a prominent New York attorney, in connection with the intellectual property she inherited from her father. Ms. Pilpel passed away in 1991. Boose

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<sup>1</sup> The record on appeal will be referred to by the abbreviation "R," followed by the volume and page number to which reference is made.

<sup>2</sup> These are listed as: "Jerome Kern Goes to Hollywood" (1986); "Big Deal" (1986); "Something Wonderful" (1995); "Paul Robeson" (1995) (This is a play portraying the life of Robeson; Kern was featured as the composer for "Ol' Man River.") "Dream" (1997); "Swing!" (1999); "Elaine Stritch and Liberty" (2002); "Never Gonna Dance" (2003)(This is a musical consisting solely of songs composed by Kern, with lyrics by nine different writers.). Wikipedia Internet Encyclopedia, available at [www.wikipedia.org](http://www.wikipedia.org); this specific reference is to [http://en.wikipedia.org/wiki/Jerome\\_Kern](http://en.wikipedia.org/wiki/Jerome_Kern).

<sup>3</sup> "Jerome Kern," available at <http://www.imdb.com/name/nm0006153/#himself>. Mr. Kern's music, particularly his better known works, have become such a part of American culture that they have appeared not only in recently made movies set in the past, such as "Tea With Mussolini," "L.A. Confidential," and "October Sky," but also in movies set in contemporary times, such as the Woody Allen movie "Deconstructing Harry," and the comedy "Four Weddings and a Funeral." His standard "The Way You Look Tonight" even appeared in a 1999 episode of the science fiction television series "Star Trek: Deep Space Nine," set in the future.

Affidavit, ¶ 10(b). After Ms. Pilpel's death, Appellant R. Andrew Boose ("Mr. Boose") began to represent Ms. Miller. In his affidavit, Mr. Boose testified that he had made no effort to solicit Ms. Miller's legal business, but that she sought him out after Ms. Pilpel's death:

Ms. Pilpel passed away in 1991, and Mrs. Miller contacted me about representing her. I did not solicit her business, but only talked with her after she made the effort to contact me. At her request, I traveled to Kentucky in 1991 to answer Mrs. Miller's questions about my representing her in connection with the copyrights in [sic] royalties from her father's music. Mrs. Miller did engage me and my firm to represent her.

Boose Affidavit, ¶ 10(b), R Vol. 2, at 173.

Obviously, Ms. Miller, having died in 1996, is not available to testify about her first contacts with Mr. Boose, and therefore nothing in the record contradicts his version of the events. However, the documentary evidence is not quite as neat. For example, on April 25, 1991, a scant two days after Ms. Pilpel's death,<sup>4</sup> one of Mr. Boose's associates, Jeremy Nussbaum, wrote Ms. Miller a letter asking her to send a "relatively simple letter" to Ms. Pilpel's law firm, Weil, Gotschal & Manges, requesting that her files be transferred to Mr. Boose's firm, Kay, Collyer & Boose. Appendix No. 4 On April 29, 1991, Attorney Robert G. Sugarman, of the Weil, Gotschal firm, wrote a letter to Ms. Miller noting that "I was glad we had the opportunity to talk today and want to reiterate our enthusiasm about the prospect of continuing to represent you." Appendix No. 5. The letter notes that "a number of our associates were significantly involved in assisting Harriet in the conduct of your affairs." On the next day, Mitchell A. Salem, also of the Weil, Gotschal, firm, wrote a letter to Ms. Miller, dealing with various copyright

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<sup>4</sup> According to a biographical sketch contained on the web site cataloguing Ms. Pilpel's collection of professional papers, Ms. Pilpel "died in her sleep on April 23, 1991." Biographical Sketch, available at [http://asteria.fivecolleges.edu/findaids/sophiasmith/mnsss155\\_bioghist.html](http://asteria.fivecolleges.edu/findaids/sophiasmith/mnsss155_bioghist.html). This collection evidences the wide interests and high accomplishments of Ms. Pilpel, consisting largely of papers relating to her first amendment work and work for women's reproductive rights; she filed amicus curiae briefs in both *Roe v. Wade*, 410 U.S. 113 (1973) and *Griswold v. Connecticut*, 381 U.S. 479, (1965). The sketch also notes that Ms. Pilpel was born in 1911, which means that she was 80 years old at the time of her death; once again, she is no longer able to testify about the level of day to day input she had in legal work for Ms. Miller in 1991. One could reasonably imagine that an 80 year old would not necessarily be involved in the routine management of copyrights.

matters. Appendix No. 6. There is no hint in either of the letters from the Weil, Gotschal firm that they have been informed that their representation of Ms. Miller had ceased, and appeared to be moving forward with that representation. Ms. Miller was born on December 16, 1918; therefore, she was 72 years of age at the time of Ms. Pilpel's death, 76 years old at the time of the execution of her second codicil and trust agreement, and 77 years of age at her death.

During the course of his representation of Ms. Miller, Mr. Boose prepared, or caused to be prepared, a trust agreement and a codicil to Ms. Miller's will to fund the trust on her death.

Boose describes this process as follows:

(c) While I was representing her as an attorney in 1994, Mrs. Miller called me at my New York office to discuss what would happen to her copyrights and royalties after her death. Only after she initiated this discussion, I explained that some persons who own copyrights and royalties establish a trust so that a Trustee or Trustees can manage the copyrights for the benefit of their family members. Mrs. Miller asked me to form such a trust. I explained that this would permit centralized management and would avoid splintering of the ownership of the copyrights. I told her that often such trusts have more than one Trustee, ideally one professional trustee and one family trustee. She indicated she did not want a family Trustee after her death, and asked that she and I be the only Trustees at the outset of the Trust.

(d) A partner in my firm prepared such a trust agreement, the Miller Trust Agreement, and a Codicil to Mrs. Miller's will distributing the copyrights and royalties to the Miller Trust upon her death. The preparation of those legal documents was done in New York, New York.

(e) I contacted an attorney in Danville, William Barnett, to review the Miller Trust and Codicil for compliance with Kentucky law. We discussed those documents by telephone on April 27, 1995.

(f) Mrs. Miller was physically unable to travel, and therefore on April 28, 1995, I traveled to Kentucky and met with the Kentucky attorney, William Barnett. After he reviewed the Miller Trust Agreement and Codicil, I went to Mrs. Miller's house, where she signed the Codicil before witnesses and where she and I signed the Miller Trust Agreement.



(g) No assets were transferred to the Miller Trust at that time.<sup>5</sup> Indeed, no assets were transferred to it until Mrs. Miller's death.

(h) At Mrs. Miller's request, I took originals of the Miller Trust Agreement and the Codicil to my office in New York, and obtained the originals of her will and an earlier codicil from her prior attorneys, who sent them to us in New York.

(i) As the Miller Trust was not funded until Mrs. Miller's death, I took no action as Trustee between the date that Mrs. Miller signed it (April 28, 1995), until after her death on April 5, 1996.

Boose Affidavit, ¶¶ 10(c)-10(i) R Vol. 2, at 173

Mr. Boose signed the codicil as a witness himself. (R Vol. II, at 174-75) This action was brought by Ms Miller's daughter, Linda Kern Cummings ("Ms. Cummings"), who, along with her brother Steven Kern Shaw ("Mr. Shaw") are the primary beneficiaries of the Miller Trust. The opinion of the Kentucky Court of Appeals below correctly describes the gravamen of the complaint:

On April 14, 1998, Cummings filed a complaint in the Boyle Circuit Court against, inter alios, Boose, individually and as trustee of the Betty Kern Miller Literary Trust. Cummings alleged that Miller suffered from diminished capacity and that Boose exercised undue influence over Miller causing her to execute a codicil "transferring all her right, title and interest to literary works, including management thereof, to this Trust in which [Boose] was to have sole authority." Cummings further alleged that Boose engaged in the unauthorized practice of law and that his actions constituted a conflict of interest. Boose filed an answer and admitted that the court had personal jurisdiction over him in his individual capacity. Boose denied that the court had personal jurisdiction over him as trustee. Boose subsequently filed a motion for partial summary judgment. Therein, Boose argued that there is a distinction between the claims against him in his individual capacity concerning the services he rendered as Miller's attorney and the claims against him in his capacity as trustee. Boose asserted that the court lacked personal jurisdiction over him as trustee.

Opinion, Court of Appeals, pp. 3-4.

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<sup>5</sup> As the Court of Appeals noted in its opinion, the trust instrument itself provides that Ms. Miller deposited a token sum into the trust at the time of its creation. Opinion, Court of Appeals, p. 7, FN 6. While this fact is economically insignificant, it does demonstrate that the Miller Trust was an inter vivos trust, fully operational upon its creation; it has largely been treated as a testamentary trust by the courts below, but this characterization, while economically sound, is not true as a matter of law.

These facts are largely not in dispute.<sup>6</sup> The question to which they lead is, may the courts of Kentucky adjudicate the disputes which have arisen out of Mr. Boose's transaction of business within Kentucky?

The court of appeals and Boyle Circuit Court have split the person of R. Andrew Boose, individually, into two entities: Mr. Boose in his individual capacity, in which he, as an attorney, represented the interests of Mrs. Miller and her trust, and those of Mr. Boose in his capacity as trustee of the Miller Trust. These courts held that while Mr. Boose, in his individual capacity, is subject to personal jurisdiction in Kentucky, he is not subject to personal jurisdiction in Kentucky in his capacity as trustee. As shown below, this division is neither supported by applicable law, nor reasonably calculated to lead to a just result. As Mr. Boose himself testified in the affidavit quoted above, he is the central figure in this dispute: He traveled to Kentucky in both 1991 and 1995 to meet with Ms. Miller, he proposed the salient terms of the trust agreement which is complained of here, and he agreed to serve, first, as co-trustee with Ms. Miller, and later as sole trustee upon her death. Mr. Boose not only prepared (or supervised the preparation of) the codicil and trust, but actually signed the codicil as a witness, and signed the Miller Trust Agreement, thereby immediately becoming a co-trustee of the inter vivos trust. (R Vol. II, at 174-75) This action alleges a continuous pattern of actions which was not interrupted by Mr. Boose's becoming sole trustee of the Miller Trust upon Ms. Miller's death; rather, his assumption of powers as sole trustee allowed him to enjoy the fruits of the scheme that he had put in place through the execution of the Miller Trust Agreement, and through his preparation of the second codicil to Ms. Miller's will, which "poured over" the intellectual property owned by the estate into the trust.

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<sup>6</sup> Of course, one reason that the facts are not in dispute is that, because Ms. Miller is no longer alive to testify; only Mr. Boose remains to testify concerning his transactions with her during her last days.

It is these actions, all of which either took place in Kentucky, or were accomplished by contacts with Kentucky, that form the basis of the claims asserted by Ms. Miller's daughter, Ms. Cummings, in this action. The action alleges a conflict of interest in drafting and participating in the execution of these documents, a continuing conflict of interest in serving as both trustee and attorney for the trust, practicing law in Kentucky without a license, as forbidden by KRS 524.130, and the violation of the Kentucky ethical rules prohibiting lawyers from acting in a manner such as to cause a conflict of interest. See SCR 3.130(1.8). The suit attacks the validity of the codicil, alleging that it was obtained by the use of undue influence and that the Testator lacked capacity to execute it. Mr. Boose admitted that the court could assert in personam jurisdiction over him individually, but denied that it could assert personal jurisdiction over him in any manner in his capacity as trustee.

Mr. Boose moved that the trial court enter a summary judgment adjudging that the court lacked personal jurisdiction over him in his capacity as trustee. By Order dated July 10, 2003,(Appendix No. 2), the Boyle Circuit Court sustained Mr. Boose's motion, and dismissed him as a party in his capacity as trustee of the Miller Trust. By so ruling, the court effectively attempted to segregate the conduct of Mr. Boose as lawyer (and co-trustee under the inter vivos trust, which was not effectively funded until Ms. Miller's death) from his conduct as sole trustee, after Ms. Miller's death on April 5, 1996. The Circuit Court further ruled that his admission of jurisdiction as an individual did not cover his subsequent actions as trustee. The net effect of this ruling was to leave in doubt the extent and duration of Mr. Boose's liability, if any, to Mrs. Cummings.

The problem with segregating Mr. Boose's actions, as the trial court, and ultimately court of appeals, attempts to do, is that, according to the allegations in this case, Mr. Boose acted in his

individual capacity as attorney for Mrs. Miller in setting up the scheme whereby he would continue to profit BOTH as attorney for the estate and as trustee under the Miller Trust. The preparatory work was done in his capacity as an attorney for Mrs. Miller, and the payoff came as attorney to the trust and eventually as co-trustee. This was not a series of unconnected acts done by disinterested persons: This was one coherent scheme perpetrated by Mr. Boose in his individual capacity, from which he now improperly profits both as attorney and trustee.

Ms. Cummings has consistently argued, and argues herein, that there is no distinction between the actions of Mr. Boose as attorney and those as trustee, and that all such actions are part of one continuous scheme. Remember that all actions taken by Mr. Boose in Kentucky were for one purpose and one purpose only: Setting up an estate plan which had as one of its central components the insertion of Mr. Boose as trustee and attorney into the transaction, and giving him an essentially unchecked ability to profit from the operation of the trust. By admitting that the Boyle Circuit Court was authorized to assert personal jurisdiction over Mr. Boose in his individual capacity, he should be deemed to have admitted such jurisdiction for all purposes related to his individual actions with regard to the subject matter of his dealings with Ms. Miller and the Miller Trust.

Ms. Cummings also argues that, even if there is an artificial distinction in the law between Mr. Boose in his individual capacity and his capacity as trustee, Mr. Boose's actions in Kentucky would be sufficient to allow the Boyle Circuit Court to assert personal jurisdiction over him in that capacity as well. Each step in the setting up of the Miller Trust either took place in Kentucky or was the result of either contacts initiated by a Kentucky resident or decisions made by a Kentucky resident:

- Ms. Miller is alleged to have first contacted Mr. Boose from Kentucky in 1991, and she never left the state to engage in any actions regarding the Miller Trust, or her dealings with Mr. Boose.
- Mr. Boose traveled from New York to Kentucky in 1991 solely for the purpose of “answering questions” concerning his potential representation of Ms. Miller concerning her father’s intellectual property.
- In 1994, Ms. Miller called Mr. Boose from Kentucky to discuss her estate and specifically to seek his professional advice about the appropriate disposition of that intellectual property upon Ms. Miller’s death.
- Mr. Boose made specific recommendations to Ms. Miller while Ms. Miller was in Kentucky, which culminated in the preparation by his law firm of the Miller Trust Agreement and the second codicil to Ms. Miller’s will, directing assets to be transferred to the Miller Trust.
- Mr. Boose made a second trip to Kentucky on April 28, 1995, specifically because Ms. Miller was, by that time, unable to travel. The purpose of this trip was to, first, consult with Mr. William Barnett, a Danville attorney, concerning the legality of the codicil and trust agreement under Kentucky law, and ultimately to see that the codicil was executed by Ms. Miller and that the trust agreement was executed by Ms. Miller and Mr. Boose himself.
- While on this second trip to Kentucky, Mr. Boose personally signed the second codicil as witness, along with his execution of the Miller Trust Agreement.
- Ms. Miller died, testate, a resident of Kentucky, on April 5, 1996.

- Ms. Miller's will and both codicils were admitted to probate in the Boyle District Court, which approved the transfer of the intellectual property to the Miller Trust.
- All significant parties to this transaction, other than Mr. Boose, are, or have been, Kentuckians: Mr. Pitman, the executor of Ms. Miller's estate, resides and practices in Kentucky, and has retained the services of Mr. Boose's firm in representing the estate in intellectual property matters, and Ms. Cummings is a Kentucky resident. Her brother, Mr Shaw, was a Kentucky resident until approximately four years ago.

It is clear from these facts that all actions which took place prior to the death of Ms. Miller either took place in Kentucky, or were the direct result of events in Kentucky. In apparent agreement with this, Mr. Boose has agreed and admitted that the Boyle Circuit Court has in personam jurisdiction over him as an individual. However, he asserts that, because the Miller Trust itself is a New York trust, and, he asserts, has no minimum contacts with Kentucky, the Boyle Circuit Court may not assert personal jurisdiction over him as trustee.

Even if Mr. Boose's admission of jurisdiction as an individual is not sufficient to bring him before the circuit court in his capacity as trustee, the undisputed facts show that he had at least minimum contacts with Kentucky as trustee. Mr. John Brooks Pitman ("Mr. Pitman"), of Lexington, serves as executor of Ms. Miller's estate. Mr. Pitman has retained Mr. Boose as special counsel to the estate, under the terms of a letter agreement dated June 6, 1996. As executor, he has paid attorneys' fees directly to Mr. Boose for work performed by Mr. Boose, and more importantly, he has transferred significant sums from Ms. Miller's estate to Mr. Boose as trustee.

Mr. Pitman testified in discovery that he paid Mr. Boose or his law firm approximately \$64,500 during 1996 in work related to the estate. (Pitman Answers to Interrogatories, June 11,

2002, R Vol. II, at 189-90.). This is work performed as an attorney for an estate being probated in Boyle County, Kentucky, under a will and two codicils executed in Kentucky. In addition, Mr. Pitman has distributed substantial funds from his accounts in Kentucky to the Miller Trust by transfers directly to Mr. Boose as trustee. Those transfers began on May 27, 1997, with a transfer of \$147,868 (R Vol. II, p. 190). They have continued on a regular basis since that time, with the latest transfer reported in discovery having been made on or about August 29, 2002. Transfers have been made since that date, but are not the subject matter of discovery, and thus do not appear in the present record. Through April of 2002, these transfers totaled approximately \$3,141,000 (R Vol. II, pp. 190-91). These transfers, remember, were made from an executor of the estate of a Kentucky decedent, appointed by a Kentucky court, from a Kentucky bank account to a trustee of the trust created by the Kentucky decedent, and authorized by a codicil executed in Kentucky with Mr. Boose present in Kentucky.

Mr. Boose collects these amounts, of course, solely as trustee of the Miller Trust. The beneficial owners of these funds are the beneficiaries of the trust. The two beneficiaries are Ms. Miller's children, Ms. Cummings, and her brother, Mr. Shaw. Ms. Cummings has been a resident of Kentucky continuously since the execution of the Miller Trust Agreement, and Mr. Shaw was a Kentucky resident from that point until about four years ago. Therefore, the work that Mr. Boose has done in New York is for the direct benefit of one Kentuckian, and until recently for the benefit of a second Kentuckian as well.

Mr. Boose has asserted that he does not have minimum contacts with Kentucky in his capacity as trustee of the Miller Trust. In fact, if anything, his involvement with Kentucky has increased since Ms. Miller's death and his becoming sole trustee of the trust. In addition to other payments he may have received as trustee or attorney, beginning on May 1, 1996 (immediately

after Ms. Miller's death), he began representation of Ms. Miller's estate as special counsel, and from that date through November 7, 1996, was paid \$72,800 (R Vol. II, pp. 259-60. His contacts with Kentucky as trustee have not all been financial. Since May 8, 1996, Mr. Boose has written over 90 letters to Mr. Pitman, as executor. All of these letters were written on Mr. Boose's law firm letterhead, and signed by him individually. From April 1996 through August 2002, Mr. Boose or his firm received \$199,170 in fees (R. Vol. II, p. 262). Other fees, of course, have been paid since that date, but do not appear of record.

Likewise, since August 5, 1997, Mr. Boose has corresponded with Ms. Cummings and her brother, Mr. Shaw, at least twenty times, again, all on Mr. Boose's law firm letterhead, signed by him individually. Substantially all of this correspondence dealt with the income paid to the Kentucky residents and the business affairs of the trust being carried on for their benefit. (R. Vol. II, p. 242).

As set forth below, Ms. Cummings has alleged a unified and uniform pattern of conduct begun by Mr. Boose in his capacity as attorney for Ms. Miller individually, and continued later as counsel for the Miller Trust and Miller Estate, AND as sole trustee of that trust. Each act is built on the preceding actions, so that one cannot be separated from the rest. Had not Mr. Boose been counsel to Ms. Miller, he would not have been named, first, co-trustee of her trust, and then sole trustee at her death. It so happens that the nature of this beast is such that the preparation work begun by Mr. Boose in his individual capacity and as attorney for Ms. Miller has come to fruition (at least for his benefit) in his assumption of the duties (and benefits) of sole trustee for the Miller Trust. The trial court and the court of appeals did not recognize the fact that absent all of the planning and preparatory work done by Mr. Boose as attorney for Ms. Miller, and in particular his firm's preparation of her second codicil and her trust agreement, he would never



have become trustee, and therefore, would not have been in a position to commit the acts he committed as trustee. Any distinction between the actions of Mr. Boose individually and his actions as trustee is without a difference, because his actions are all part of a single unified enterprise or scheme. This court should overturn the opinion of the court of appeals and the Boyle Circuit Court, and remand this matter to the Boyle Circuit Court so that this action may proceed against Mr. Boose for his actions committed individually, as trustee, and in any other capacity in which he may have acted.

## **ARGUMENT**

### **I. A TRUSTEE'S DUTY TO HIS BENEFICIARIES IS INDIVIDUAL, AND NO SEPARATE LEGAL ENTITY IS CREATED BY ONE'S BECOMING A TRUSTEE UNDER A TRUST.**

#### **A. Under Kentucky Law, a Trustee Owes a Duty of Utmost Fidelity to the Beneficiaries.**

Under Kentucky law, a trustee is always individually liable for any fraud, excess charges, or any other legally cognizable wrongs in the management of a trust or in the acceptance of trust assets. KRS 386.730(2)<sup>7</sup> A trustee owes the highest possible duty to his beneficiaries:

The first duty is with respect to the relationship existing between the trustee and the beneficiary. This duty is, in effect, that of uberrima fides, or utmost fidelity. As trenchantly stated by the distinguished jurist, Chief Judge Cardozo, in *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545, 546, 62 A.L.R. 1: 'Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.'

The duty has been defined and described in many ways. It is well expressed in 26 *Bogert, Trusts and Trustees*, § 543, as follows: 'One of the most fundamental

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<sup>7</sup> "A trustee is personally liable for obligations arising from the ownership or control of the property of the trust or for torts committed in the course of administration of the trust only if he is personally at fault." KRS 386.730(2). Here, individual fault is alleged against Mr. Boose.

duties of the trustee is that he must display throughout the administration of the trust complete loyalty to the interests of the cestui que trust. He must exclude all selfish interest and also all consideration of the welfare of third persons. This duty grows out of the fact that the trustee is a representative and out of the well-known inability of human beings to serve two masters at once or to act satisfactorily when faced with conflicting interests.'

*Bryan v. Security Trust Co.*, 296 Ky. 95, 176 SW2d 104, 107 (1943).

In *Bryan*, the old Security Trust Company of Lexington acted both as underwriter of the corporate stock of a local manufacturing company (that is, it "made a market" in, or bought a quantity of the company's stock for resale at a commission; it was effectively acting as a stockbroker to sell the company's stock) and as trustee of a particular trust. The Trust Company sold some of the stock to the trust, and the company ultimately failed, causing a loss to the beneficiaries of the trust. The court held that the beneficiaries could repudiate the transactions in which the Trust Company acted both as trustee and as underwriter.

This repudiation specifically included the repudiation of any commissions earned by the Trust Company on the sale of stock to the trust. *Bryan*, supra at 111. This is because the trustee's duty to refrain from conflicts of interest requires him to refrain from receiving indirect profits or income from a transaction as well as direct benefits:

Illustrative of a breach of such duty, or an example of disloyalty, is for the trustee to sell his own property to the trust estate. The fairness of the transaction is not relevant. In such a case the beneficiary may elect to repudiate the deal and require the trustee to restore the purchase price or hold him liable for the amount of the investment, with interest, or recover whatever profit he may have made in the transaction. [citations omitted]. This rule is sufficiently broad to embrace transactions with trust funds resulting in indirect profit to the trustee, such as commissions or compensation as brokers or bankers or for other professional or business services. [citation omitted] Our statutes require a fiduciary to account for all interest or profit received.

*Bryan*, supra at 108.

**B. Kentucky Law Recognizes No Distinction Between A Person's Individual Capacity and His Capacity as Trustee.**

As the parties have explored below, there is no case, statute, or other legal authority under Kentucky law for the proposition that an individual's contacts with Kentucky may be divided into those done in his capacity as an individual and attorney and those in his capacity as trustee of a trust. In *Cook v. Holland*, Ky.App., 575 SW2d 468 (1978), the Kentucky Court of Appeals held that there was NO distinction between a person in his or her individual capacity and that same person as trustee:

L. G. Cook as "executor and trustee" is the same person as L. G. Cook "individually." The designation of Cook "individually" rather than as "executor and trustee" does no more than indicate the source out of which any judgment was to be satisfied. Indeed, had a judgment been rendered against Cook "as executor and trustee," the words "as executor and trustee" might be considered surplusage to be ignored in enforcing the judgment against the personal assets of Cook.

*Cook*, supra at 477.

To set up its holding, the court first reaffirmed the traditional common law rule that a trustee is personally liable to the beneficiaries for any wrongs committed as trustee:

A trustee is personally liable for torts committed by an agent or employee in the course of the administration of the trust. The principle of respondeat superior is applied to the trustee just as though he were the owner of the trust property free of the trust. His liability is the same as it would be if he were not a trustee. It is immaterial that the trustee receives no benefit from the trust. Restatement (Second) of Trusts s 264, Comment B ; Bogert, Op. cit., s 731 at 534-35; H. Stone, "A Theory of Liability of Trusts Estates for the Contracts and Torts of the Trustee," 22 Colum.L.Rev. 527, 540-41 (1922); Annot., 7 A.L.R. 408 at 411 (1920), supplemented in 123 A.L.R. 458 at 462 (1939).

Professor Scott has given the following explanation for the rule imposing personal liability on the trustee under the doctrine of respondeat superior:

It may seem to impose a hardship upon the trustee that he should be held personally liable, and it is arguable that where he is not at fault he should be liable only to the extent to which he can obtain indemnity out of the trust estate. On the other hand, there is no

reason why the victim of the tort should be denied relief merely because the trust estate is insufficient to indemnify the trustee. The risk of personal liability in tort is a risk which the trustee runs in undertaking the administration of the trust. Ordinarily he can protect himself by taking out liability insurance and paying the premiums out of the trust estate.

Scott, Op. cit., s 264 at p. 2243.

*Cook*, supra at 472.

Having established this principle, the court further held there to be no distinction in law between a trustee in his capacity as trustee and the same person acting individually:

Under the orthodox common law rule, an action at law cannot be maintained for a tort against the trustee in his fiduciary capacity. Bogert, Op. cit., s 732; Louisville Trust Co. v. Morgan, supra ; Annot., 44 A.L.R. 636 at 640, supplemented in 127 A.L.R. 687, at 688. The general rule has been justified primarily on two grounds: (1) that courts of law do not recognize the trustee in his fiduciary capacity as a legal person distinct from the trustee in his individual capacity; and (2) that the trust estate ought not to be dissipated by the wrongful acts of the trustee. Bogert, Op. cit., s 732 at 537. We shall consider whether either reason for the rule is sound when applied to the facts of this case.

We cannot justify application of the rule on the theory that Cook in his fiduciary capacity had no separate identity distinct from Cook in his individual capacity. First, such a rule was applied only by the courts of law. Courts of equity recognized the difference between a trustee's acting in his fiduciary capacity and his acting in his individual capacity. So long as a distinction was made between actions at law and suits in equity, there was a theoretical basis for refusing to permit direct actions against a trustee in his fiduciary capacity for tort liability. [citations omitted] The theoretical basis for the rule disappears with the merger of law and equity. CR 2. Even when the distinction is maintained between law and equity, the rule is applied illogically. The tort creditor recovers a personal judgment against the trustee because the law does not recognize the trustee as having a separate identity in his fiduciary capacity. Nevertheless, the law then immediately recognizes the existence of the trust by refusing to permit the tort creditor to levy execution on the trust property. C. Fulda & W. Pond, "Tort Liability of Trust Estates," 41 Colum.L.Rev. 1332, 1334-35 (1941).

*Cook*, supra at 474.

Thus, under Kentucky law, there is no distinction between a trustee in his fiduciary capacity and a trustee individually. Likewise, in *Anderson v. Columbia Finance and Trust Co.*,

20 Ky.L.Rptr. 1790, 50 SW 40 (Ky., 1899), Columbia Finance argued that it was not individually responsible for costs resulting from its abuse of process, on the ground that it brought suit solely as trustee; this argument was thoroughly rejected by the court:

It is contended for appellee that no recovery can be had against it, because the attachment was sued out by it as trustee of the New Farmers' Bank, and that, therefore, it is only liable as trustee, and not individually. He who abuses the process of the court is personally liable for the consequences of his acts, and it is immaterial whether this abuse was committed in a suit brought in his own name as plaintiff or in his name as trustee of another. It is wrong done by him, for which he must answer.

*Anderson*, supra at 40.

Here, likewise, the wrong was done by Mr. Boose individually, and he (not the trust corpus) should be responsible for that wrong: This is the rule set down in *Cook* and *Anderson*, and is the only just rule.

Mr. Boose was far more than a "passive participant" in the affairs of the Trust, and availed himself of Kentucky law, as is set out more fully below. The point of this case, is simply that one may act in more than one capacity, and if one does so, the courts will sort out the consequences of that person's actions in each such capacity. Here, Mr. Boose clearly acted both as trustee and in his individual capacity in his dealings with Kentucky, and this court should overturn the opinion of the court of appeals, and remand this matter to the Boyle Circuit Court for further proceedings on the merits.

**II. MR. BOOSE, AS TRUSTEE, HAS SUFFICIENT MINIMUM CONTACTS WITH KENTUCKY TO ALLOW THE BOYLE CIRCUIT COURT TO ASSERT PERSONAL JURISDICTION OVER HIM.**

The law governing the circumstances under which a state may exercise personal jurisdiction over an out of state resident has both state and federal components: Each state is free

to create a "long arm" statute under the terms of which that state will allow its courts to assert personal jurisdiction over non-residents; however, such an exercise of extraterritorial jurisdiction must pass federal constitutional muster. Kentucky's long arm statute is KRS 454.210, which states in relevant part:

(2) (a) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's:

1. Transacting any business in this Commonwealth;
2. Contracting to supply services or goods in this Commonwealth;
3. Causing tortious injury by an act or omission in this Commonwealth;
4. Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth, provided that the tortious injury occurring in this Commonwealth arises out of the doing or soliciting of business or a persistent course of conduct or derivation of substantial revenue within the Commonwealth . . .

KRS 454.210(2)(a)(1-4)

This statute has been held to be constitutional, and to evidence an intent on the part of the legislature to extend the personal jurisdiction to the maximum extent allowable under federal law, effectively making the inquiry not one of state law, but of federal constitutional law:

When a federal court sits in diversity, it may exercise personal jurisdiction over an out-of-state defendant only if a court of the forum state could do so. See *Kerry Steel v. Paragon Indus., Inc.*, 106 F.3d 147, 148 (6th Cir.1997). Often this rule requires the court to determine whether both the state's long-arm statute and the Due Process Clause of the United States Constitution permit the exercise of jurisdiction. But when a state's long-arm statute reaches as far as the limits of the Due Process Clause, the two inquiries merge and the court "need only determine whether the assertion of personal jurisdiction ... violates constitutional due process." *Nationwide Mut. Ins. Co. v. Tryg Int'l Ins. Co.*, 91 F.3d 790, 793 (6th Cir.1996). Because Kentucky has construed its long-arm statute to extend as far as the Due Process Clause, see *Wright v. Sullivan Payne Co.*, 839 S.W.2d 250, 253 (Ky.1992), we may confine ourselves to this single inquiry.

*Aristech Chemical Intern. Ltd. v. Acrylic Fabricators*, 138 F.3d 624 (6<sup>th</sup> Cir. 1998).

Because Kentucky's statute has been held to extend as far as allowed under the United States Constitution, the analysis shifts to the issue of whether the assertion of long arm jurisdiction over any particular out of state resident passes constitutional muster, under the line of federal cases initiated by the famous opinion in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The principles laid out in *International Shoe* have most recently been construed by Kentucky courts in *Friction Materials Co. v. Stinson*, Ky.App., 833 S.W.2d 388 (1992), which held:

Whether specific<sup>8</sup> jurisdiction exists depends on three criteria. First, AFL must have purposefully availed itself of the privilege of acting in Kentucky or purposefully caused a consequence there. Second, the cause of action must arise from AFL's actions in Kentucky. Finally, the exercise of jurisdiction must be reasonable. See *Southern Machine Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 381 (6th Cir.1968).

*Friction Materials*, supra at 628.

Thus, we are left with three factual tests to be applied to defendants as to which Kentucky courts desire to exert long-arm jurisdiction:

- Did Mr. Boose, acting as trustee, purposefully avail himself of the privilege of acting in Kentucky or purposefully cause a consequence there?
- Do the causes of action against Mr. Boose arise out of his activities in Kentucky?
- Is the exercise of jurisdiction by a Kentucky court reasonable?

As set forth below, each of these questions must be answered in the affirmative.

Therefore, even if Kentucky recognized Mr. Boose, in his capacity as trustee, as a different entity

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<sup>8</sup> *Friction Materials* recognizes the distinction, first set out in the *Mohasco* case, between "general" personal jurisdiction, which requires that a defendant have contacts with the forum state so extensive that it may almost be considered to be a domiciliary thereof, and "specific" personal jurisdiction, that is, the exercise of jurisdiction based on contacts which have a specific connection to the causes of action in the complaint, the so-called "co-nexity" requirement. *Friction Materials*, supra at 627.

from Mr. Boose as an individual (which, as noted above, it does not), a Kentucky court is authorized to exercise long-arm jurisdiction over him.

**A. Mr. Boose, As Trustee, Purposefully Availed Himself Of The Privilege Of Acting In Kentucky And Purposefully Caused A Consequence In Kentucky.**

The single biggest myth proposed by Mr. Boose is that he has had essentially no contact with Kentucky since becoming sole trustee of the Miller Trust. Above, Ms. Cummings has described Mr. Boose's contacts with Kentucky, AFTER becoming trustee, and these consist of at least the following contacts:

- First and foremost, Mr. Boose obtained his appointment as trustee and more importantly, the property to be administered by the trust, as a direct result of the contents of a will and two codices, admitted to probate in the Boyle Circuit Court.
- Mr. Boose not only had the second codicil to Mrs. Miller's will prepared, but he personally signed it as a witness while in Kentucky in 1995. This codicil was done solely for the purpose of funding, at Ms. Miller's death, the inter vivos trust created by the other instrument prepared by Mr. Boose's firm and executed that day. He, of course, became co-trustee of the inter vivos trust upon its creation; at Ms. Miller's death, the two final pieces of the puzzle fell into place: The trust was funded with property and funds from Ms. Miller's estate, AND Mr. Boose became sole trustee of the trust.
- Mr. Boose, as trustee, has received over three million dollars' worth of property and funds directly from Kentucky, through distributions from Mr. Pitman, the executor of the estate of Ms. Miller. Each of these transfers was approved, directly or indirectly, by order of the Boyle District Court, sitting as a probate court.



- Mr. Boose, as trustee, has been required to be in constant contact, first, with Mr. Pitman, the executor of the estate of Ms. Miller, and with both Ms. Cummings, who has been a resident of Kentucky at all relevant times, and with her brother, Mr. Shaw, who was a resident of Kentucky for much of the time during which Mr. Boose has served as trustee. As noted above, Mr. Boose has written or received well over 100 letters to and from Kentucky, dealing with substantive aspects of his trust management.

The second component of this test is whether Mr. Boose's actions have caused a consequence in Kentucky. The pleadings assert that Ms. Cummings, a resident of Kentucky, and Mr. Shaw, while a resident of Kentucky and thereafter, were financially damaged by Mr. Boose's actions as trustee, and particularly by the trustees' fees and other compensation he has wrongfully received. The merits of this claim are not before the court; therefore, the allegations of the pleadings must be taken as true.

Mr. Boose, in his capacity as trustee, has voluntarily availed himself of the privilege of doing business in and causing financial consequences in Kentucky. Therefore, even if Kentucky recognized a distinction between Mr. Boose as an individual and Mr. Boose as trustee (which, as noted above, it does not), Kentucky law would still support the extension of long-arm jurisdiction to him.

**B. The Causes Of Action Against Mr. Boose Arise Out Of His Activities In Kentucky.**

It is clear that the causes of action against Mr. Boose arise out of his activities in Kentucky, both before and after he became trustee. The crux of the complaint here is that Mr. Boose, practicing law in Kentucky without authorization, and using undue influence on Ms.

Miller, effectively made himself trustee of her trust, with no effective checks or balances on his authority or his ability to generate profits for himself from that trust.

These causes of action are directly related to Mr. Boose's activities in Kentucky, and in particular, to his acceptance of the trust corpus and investment thereof, and his disbursements of the proceeds of these investments to the beneficiaries, both of whom were residents of Kentucky during most of the time since Mr. Boose's appointment, and one of whom (Ms. Cummings) remains a Kentucky resident.

The seminal case on long-arm jurisdiction in the Sixth Circuit is *Southern Mach. Co. v. Mohasco Industries, Inc.*, 401 F.2d 374 (6<sup>th</sup> Cir. 1968), which takes a transactional view of the connection between the contact and the cause of action: "Only when the operative facts of the controversy are not related to the defendant's contact with the state can it be said that the cause of action does not arise from that contact. [citations omitted]," *Mohasco*, supra at 384, n. 29. Here, clearly the "operative facts" alleged by Ms. Cummings directly arise from the actions of Mr. Boose in Kentucky, the state in which he was appointed first as co-trustee of the Miller Trust, and second as sole trustee of that trust, all of which was accomplished under the terms of documents his law firm had prepared and which were executed and witnessed in Kentucky. The funding of the trust from property of Ms. Miller's estate was allowed by orders of the Boyle District Court.

Clearly, the causes of action pled herein arise directly from the actions of Mr. Boose in Kentucky, whether those acts are characterized as arising out of his capacity as trustee or his individual capacity.

### C. The Exercise Of Jurisdiction By A Kentucky Court Is Reasonable.

The third prong of the test is whether the exercise of jurisdiction by a Kentucky court is reasonable. This test is normally considered pro forma; that is, as the *Aristech* case notes:

Whether the exercise of jurisdiction is reasonable ultimately depends on whether Kentucky has an interest in resolving the dispute between *Aristech* and AFL. See *Mohasco*, 401 F.2d at 384. This circuit has already observed that where the first two criteria are satisfied, “only the unusual case will not meet this third criterion.” *Theunissen*, 935 F.2d at 1461 (citing *American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1170 (6th Cir.1988)); see *Mohasco*, 401 F.2d at 384.

*Aristech*, supra at 628.

The *Mohasco* opinion expresses the concept as a function of the interest of the forum state in resolving the dispute:

Ultimately, our decision must depend upon a determination of whether Tennessee has an interest in resolving the conflict at issue; but, once the first two questions have been answered affirmatively, resolution of the third involves merely ferreting out the unusual cases where that interest cannot be found.

*Mohasco*, supra at 384.

What are Kentucky’s interests in seeing this dispute resolved? They consist of, at least, the following:

- Kentucky has an interest in protecting its citizens from damage caused by the use of undue influence, whether that undue influence is exercised by a Kentucky resident – or a New York lawyer who has been appointed trustee of a trust funded by a Kentucky will and two codicils, which have been admitted to probate in Kentucky.
- Kentucky has an interest in protecting its citizens who are beneficiaries of trusts funded by assets originating in Kentucky and transferred by order of a Kentucky probate court from suffering damages caused by the wrongful and unlawful charging of fees and commissions by a trustee appointed at the nomination of a Kentucky resident.

As the *Mohasco* court eloquently points out, the subjection of a defendant to the personal jurisdiction of a state is not a pre-judgment that the defendant is liable to the plaintiffs, or that he has done anything wrong; rather, it is a necessity for the deciding of a dispute by a state with an interest in deciding the dispute:

To suggest that *Mohasco* should not be joined in this action because it has been guilty of no breach of contract or bad faith conduct places the emphasis on the wrong consideration. In personam jurisdiction is not assumed as punishment for the commission of a tort or the breach of a contract. Its assumption is not based on the fault of the defendant but on the interest of the state. A state has as much interest in resolving business differences before they cause damage as it has in providing a remedy once the damage has occurred.

*Mohasco*, supra at 384.

Here, Kentucky has an interest in deciding the ENTIRE controversy between Mr. Boose and Ms. Cummings. The Boyle Circuit Court and Court of Appeals has agreed that Kentucky may decide those portions of Ms. Cummings' claims which arise from Mr. Boose's actions as an individual and as an attorney, but may not decide that portion of the dispute which arises out of Mr. Boose's actions as trustee of the Miller Trust. This distinction would be nearly impossible to parse out, because of the nature of the wrongs alleged. The gravamen of the allegations is that, as legal counsel to Ms. Miller, Mr. Boose set the stage to become trustee of her trust, with no effective checks or balances to his ability to charge both legal fees against Ms. Miller's estate AND trust, and trustee's fees as trustee, then profited from his scheme upon Ms. Miller's death, when he became sole trustee of a trust that was funded by transfers from her probate estate in Kentucky. Mr. Boose's actions are part of a single scheme and course of conduct; Kentucky has as much interest in scrutinizing Mr. Boose's actions as trustee as it does in scrutinizing his actions as attorney in taking the actions that resulted in his becoming trustee.

Another way of expressing this concept was adopted by the United States Supreme Court in *Burger King v. Rudzewicz*, 471 U.S. 462 (1985), which held that ultimately due process considerations can be summed up as whether a party has had “fair warning” that it might be sued in a particular venue:

Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this “fair warning” requirement is satisfied if the defendant has “purposefully directed” his activities at residents of the forum, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S.Ct. 1473, 1478, 79 L.Ed.2d 790 (1984), and the litigation results from alleged injuries that “arise out of or relate to” those activities, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 104 S.Ct. 1868, 1872, 80 L.Ed.2d 404 (1984). Thus “[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State” and those products subsequently injure forum consumers. *World-Wide Volkswagen Corp. v. Woodson*, supra, 444 U.S., at 297-298, 100 S.Ct., at 567-568. Similarly, a publisher who distributes magazines in a distant State may fairly be held accountable in that forum for damages resulting there from an allegedly defamatory story. *Keeton v. Hustler Magazine, Inc.*, supra; see also *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984) (suit against author and editor).

And with respect to interstate contractual obligations, we have emphasized that parties who “reach out beyond one state and create continuing relationships and obligations with citizens of another state” are subject to regulation and sanctions in the other State for the consequences of their activities. *Travelers Health Assn. v. Virginia*, 339 U.S. 643, 647, 70 S.Ct. 927, 929, 94 L.Ed. 1154 (1950). See also *McGee v. International Life Insurance Co.*, 355 U.S. 220, 222-223, 78 S.Ct. 199, 200-201, 2 L.Ed.2d 223 (1957)

*Burger King*, supra, 472 U.S. at 473-74.

Here, Mr. Boose has clearly “reached out” to Ms. Miller in Kentucky, both in his capacity as individual and attorney and in his capacity as trustee. Having reached out to her, he is under notice that his legal actions in the entire transaction could be reviewed by courts in Kentucky, in which most of the consequences of his actions have occurred.

The defendant in *Burger King*, executed a franchise agreement that became immediately operative. Mr. Boose executed an agreement under which he *immediately* became a co-trustee of the Miller Trust, which is an inter vivos trust (the agreement, of course, provided that upon Mrs. Miller's death, he would become the sole trustee of what would become a fully funded trust), and both prepared the codicil to Mrs. Miller's will under the terms of which the trust he had helped form would be funded, and signed the codicil as a witness to its execution.

This court, in construing the *Burger King* case, noted:

Although the defendant had not physically entered within the state, he conducted demonstrative correspondence directed to the state, which the Supreme Court determined sufficient minimum contacts for the exercise of in personam jurisdiction over the defendant by the Florida court. There was also included within the parties' contract documents from which there was fair notice that in the course of dealings, the parties might be subject to suit in *Burger King's* forum state.

*Wright v. Sullivan Payne Co.*, Ky., 839 S.W.2d 250 (1992).

Mr. Boose appears to argue that, other than the trip to Kentucky in which signed the second codicil to Mrs. Miller's will as a witness, and executed the agreement forming the Miller Trust, he has not been physically present in Kentucky, and argues that his duties as trustee do not involve Kentucky. As the *Wright* case notes, *Burger King* held that "demonstrative correspondence" to and from the forum state will legitimately form a part of the basis for the exercise of personal jurisdiction by the forum state. No correspondence would appear more "demonstrative" than that between Mr. Boose and the beneficiaries of the Miller Trust, and that between Mr. Boose and Mr. Pitman, the executor of the Miller estate.

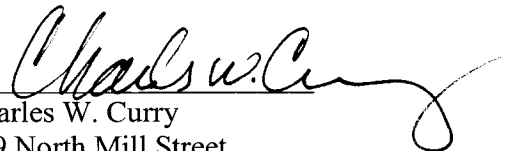
Under any reasonable test, Mr. Boose, both acting as trustee and otherwise, has voluntarily and purposefully availed himself of the privilege of doing business in Kentucky, and the extension by the Boyle Circuit Court of long-arm jurisdiction over him is proper. This court

should overturn the decision of the Kentucky Court of Appeals and remand this matter to the Boyle Circuit Court for further proceedings on the merits.

### CONCLUSION

Mr. Boose engaged in a unified, consistent, pattern of conduct in preparing the second codicil to Ms. Miller's will, which funded a trust, to be administered by him, as trustee, under the terms of a trust agreement that his law firm prepared, and the salient terms of which he suggested to Ms. Miller. Kentucky law does not recognize a distinction between a person in his individual capacity and that same person as trustee. Kentucky clearly has an interest in resolving the entire dispute between Ms. Cummings and Mr. Boose. Therefore, this court should overturn the opinion of the Kentucky Court of Appeals, and remand this matter to the Boyle Circuit Court for proceedings on the merits.

Respectfully submitted,



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