

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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REPLY BRIEF FOR APPELLANT

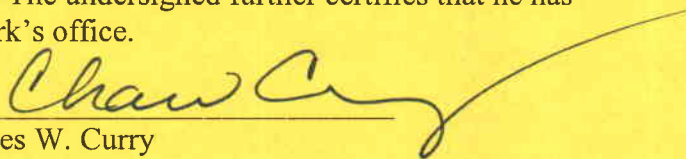
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CERTIFICATE OF SERVICE

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 13<sup>th</sup> day of October, 2006. The undersigned further certifies that he has not removed the record in this matter from any clerk's office.

  
Charles W. Curry

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STATEMENT OF PURPOSE OF THE BRIEF  
AND THE ARGUMENTS TO WHICH  
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The purpose of this brief is to respond to the following arguments newly made in the Appellees' Brief, not raised by the Appellant: (i) that this court should look only to actions occurring after Mr. Boose was appointed trustee in order to determine whether the Boyle Circuit Court may exercise long arm jurisdiction over him as trustee, and (ii) the assertion that, even if this court does have personal jurisdiction over Mr. Boose in his capacity as Trustee of the Betty Kern Miller Trust, it has no jurisdiction over the trust itself.

ARGUMENT

- I. THIS COURT SHOULD CONSIDER ALL OF MR. BOOSE'S ACTIONS IN KENTUCKY IN DETERMINING WHETHER HE HAD MINIMUM CONTACTS WITH KENTUCKY.

The appellant, R. Andrew Boose ("Mr. Boose") spends a great deal of time and effort slanting the few facts that have been disclosed in discovery up to this point in his favor. However, this appeal is a review of an order of the Boyle Circuit Court granting a summary judgment dismissing this action against Mr. Boose only in his capacity as trustee. The facts as to the merits of the case have not been well developed, and the plaintiff and appellant, Mrs. Linda Kern Cummings ("Mrs. Cummings"), is entitled to the benefit of any doubt. The question is whether Mrs. Cummings raised a genuine issue of material fact as to whether the Boyle Circuit Court was authorized to exercise personal jurisdiction over Mr. Boose in his capacity as trustee. None of the factual statements in

Mr. Boose's brief undercut the facts set out in the Appellant's Brief, which show that a sufficient factual basis exists for that court to assert personal jurisdiction under Kentucky's long-arm statute, KRS 454.210.

Mr. Boose makes the argument that only those actions taken by Mr. Boose in his capacity as trustee should be considered by this court in determining whether minimum contacts exist to subject him, in his capacity as trustee, to the personal jurisdiction of the Boyle Circuit Court, and whether he availed himself of the privilege of doing business in Kentucky.

Mr. Boose's entire argument is based on a legal dichotomy, between himself as individual and himself as trustee, for which no authority exists. Mr. Boose claims that this court should separate his activities in Kentucky prior to Mrs. Miller's death in April 1996, and those thereafter, based on whether he acted as attorney or trustee.<sup>1</sup> Mr. Boose effectively argued that, upon Mrs. Miller's death, and his appointment as trustee, he became a new legal entity, and that all that went before is irrelevant to his current status as trustee.

This argument must fail logically under every tenet of the law. A "fiduciary" is defined in Kentucky law as a "trustee, guardian, executor, administrator, conservator or other individual or corporation holding funds or otherwise acting in a fiduciary capacity." KRS 386.010. The logical extension of Mr. Boose's argument is that if he had acted in capacities as a trustee, a guardian, executor, administrator, or conservator, or held any other fiduciary capacity, his entire course of conduct would be divided into separate

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<sup>1</sup> Mr. Boose chides Mrs. Cummings, at p. 8 of his Appellee's Brief, for making it impossible for him to find a suitable co-trustee of the Miller Trust because no co-trustee would want to be named as a defendant in this action. He fails to mention, of course, that no co-trustee was appointed from the time of Mrs. Miller's death on April 5, 1996, and the institution of this action in April of 1998

segments for purposes of determining his presence before a court which he has admitted may exercise personal jurisdiction over him.

Mr. Boose's analysis is based on a narrow and flawed reading of the causes of action set out herein. The appellant and plaintiff, Mrs. Linda Kern Cummings ("Mrs. Cummings"), has alleged that Mr. Boose engaged in a pattern of conduct beginning with his conduct as attorney for Mrs. Betty Kern Miller ("Mrs. Miller") during her life, continuing through his preparation<sup>2</sup> and execution of the trust instrument creating the Miller Trust and the preparation and execution of the codicil which funded the trust, through his assumption of duties as trustee. Obviously the facts leading up to his appointment as trustee are as important in determining Mr. Boose's ultimate liability as are those which occurred after that appointment. The allegation is of one unitary plan on the part of Mr. Boose, the culmination of which was his appointment as trustee.<sup>3</sup>

Mr. Boose's reliance on the holding in *Hanson v. Denckla*, 357 U.S. 235 (1958) is particularly misplaced. In *Hanson*, a settlor set up a trust in Delaware, and then moved to Florida. The trustee was not alleged to have engaged in any wrongful conduct in Florida, or to have had any connection with Florida. The United States Supreme Court correctly ruled that Florida had no personal jurisdiction over the Delaware trustees. That case is not factually similar to this one. Here, Mrs. Miller was a resident of Kentucky at the time she received legal advice, in Kentucky, from Mr. Boose. Mr. Boose came to Kentucky and

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<sup>2</sup> The Appellees' Brief, at p. 6 quibbles that Mr. Boose did not personally prepare the trust instrument and codicil under which he became trustee of the Miller Trust. However, the brief admits that the instruments were prepared by his law firm in the manner he requested: The point is not whether he wrote the words, but that he directed the content of the documents.

<sup>3</sup> The course of conduct also led to his being retained as attorney for the trust as well. Mr. Boose's brief notes that between Mrs. Miller's death on April 5, 1996, and August of 2002, he and his law firm were paid over \$250,000 in legal and trustee's fees, of which almost \$200,000 consisted of legal fees. Appellee's Brief, p. 11. He fails to advise the court as to how he was able to determine what portion of his work was compensable as an hourly rate of over \$500.00 an hour and what work he provided to earn his trustee's fees. Only Mr. Boose reviews the amounts of all trustee's fees and legal fees, of course.

purposely availed himself of the privilege of doing business in Kentucky through his execution of the trust instrument in Kentucky, and his signing the codicil as a witness, again in Kentucky. The trust agreement created the trust, and the codicil funded it. Here, the connections with Kentucky far exceed those in *Hanson*. The facts in *Laura Love Rose et al v. First Star Bank*, 819 A.2d 1247 (R.I. 2003), and *Matter of Estate of Ducey*, 787 P.2d 749 (Mont. 1990), are similar to those in *Hanson* and dissimilar to those here in exactly the same way: In each case, a settlor set up a trust in a particular state. Then the settlor moved to another state. In these cases, there was no allegation that the trustee had gone into the forum state, engaged in a wrongful pattern of conduct, and by so doing become trustee, or caused any damage. Here, the trust was set up in Kentucky, and funded by a Kentucky codicil to a Kentucky will probated in a Kentucky probate court. In order for the facts of this case to fall within the rule in *Hanson*, *Rose*, and *Ducey*, Mrs. Miller would have had to have been a New York resident who set up a trust in New York, with a New York trustee, then moved to Kentucky, having never lived there before, then attempt to sue her trustee in Kentucky. These facts are substantially different and dictate a different result.

The *Hanson*, *Rose*, and *Ducey* cases all involve contact by the trustee with the forum state that were far less substantive than those in this case. Here, the very pattern of conduct giving rise to the causes of action also constitutes minimum contacts sufficient to allow the Boyle Circuit Court to exercise long-arm jurisdiction over Mr. Boose as trustee.

Mr. Boose has conceded that the Boyle Circuit Court has personal jurisdiction over him in his individual capacity. Appellee's Brief, p. 13. The same facts that give rise to the jurisdiction of that court over him as an individual are the facts that also support its

assertion of personal jurisdiction over him as trustee. This court should overturn the opinion of the court of appeals, hold that the Boyle Circuit Court can properly assert personal jurisdiction over Mr. Boose in his capacity as trustee, and remand this action to that court for further proceedings.

II. THE BOYLE CIRCUIT COURT'S JURISDICTION OVER MR. BOOSE, AS TRUSTEE, ALSO CONFERS JURISDICTION OVER THE MILLER TRUST.

In a jurisdictional sleight of hand, Mr. Boose argues that even if the Boyle Circuit court has long-arm jurisdiction over him in his capacity as trustee, the Miller Trust, as a separate entity, would still not be subject to the jurisdiction of that court. However, a trust is not a separate legal entity under Kentucky law. Under Kentucky law, the trustee is the individual legal owner of all trust property, and to have personal jurisdiction over him is to have personal jurisdiction over the trust.

As one case noted:

At the outset, we must recognize that the W. F. Foster estate is not a separate legal entity. As stated by Judge Cardozo in *Whiting v. Hudson Trust Co.*, 234 N.Y. 394, 138 N.E. 33, 25 A.L.R. 1470, 1478 (1923):

It is only a form of words when we speak of him (the trustee) as the representative of an "estate." The "estate" had no separate existence. It was not a legal person. The only person was the trustee.

*Kentucky Farm Bureau Mut. Ins. Co. v. Cook*, Ky.App., 590 S.W.2d 885 (1978);  
overturned in part on other grounds, Ky., 590 S.W.2d 875 (1979).

This is in complete harmony with the cases cited at pp. 18-20 in the Appellant's Brief, which hold that under Kentucky law, there is no distinction between suing a trustee in his individual capacity and as trustee. As is set out in full in the Appellant's Brief, the



allegations made in this action are that Mr. Boose engaged in a series of actions that resulted in his appointment as trustee of the Miller Trust. The actions preceding his appointment as trustee are far more relevant to this claim than his actions as trustee.

At pp. 35-40 of his brief, Mr. Boose argues that this action, to the extent it is against the Miller Trust, is barred by KRS 386.685, which provides that certain actions concerning the administration of foreign trusts may not be brought in Kentucky's state courts<sup>4</sup>. This argument is not properly before the court. Mrs. Cummings has not sued the New York trust, to the extent that it has a separate legal identity from that of Mr. Boose as trustee. However, Mrs. Cummings will counter this argument lest it mislead the court. Mr. Boose's reliance on KRS 386.685 is misplaced. This statute, by its own terms, applies only to causes of action specifically described in KRS 386.675. The causes of action pled herein are not among those set forth in KRS 386.675; therefore, the terms of KRS 386.685 do not apply to them. KRS 386.675 states that it applies to civil actions "initiated by interested persons concerning the internal affairs of trusts." It goes on to describe the subject matter of such suits as "those concerning the administration and distribution of trusts, the declaration of rights and the determination of other matters involving trustees and beneficiaries of trusts." It specifically applies to suits to:

- (a) Appoint or remove a trustee;
- (b) Review trustee's fees and to review and settle interim or final accounts;
- (c) Ascertain beneficiaries, determine any question arising in the administration or distribution of any trust including questions of construction of trust instruments, to instruct trustees, and determine the

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<sup>4</sup> Interestingly, this is a mere statutory prohibition, that is, it goes not to the constitutionality of the extension of jurisdiction to foreign trusts, merely to the subject matter jurisdiction of circuit courts in Kentucky. One Kentucky Federal court held that Kentucky's long-arm statute, KRS 454.210, was sufficient to allow a plaintiff beneficiary to sue a New York trust in Kentucky. *Woodford Health Care, Inc. v. Bank of New York*, 247 F.Supp.2d 830 (E.D.Ky.,2003).

existence or nonexistence of any immunity, power, privilege, duty or right; and

(d) Release registration of a trust.

KRS 386.675(1)(a-d)

This section was, by its terms, meant to apply to actions seeking relief for internal trust matters, such as those relating to specific transactions and investment matters. This action goes not to the conduct of the trust's business after the appointment of Mr. Boose as trustee, but to the manner in which he was appointed to a position of great profit to himself. If this matter pertained to an allegation of improper or hazardous investments, or failing to make proper use of trust assets, Mr. Boose would be right. KRS 386.685 would bar that action. And the reason is clear. The witnesses, records, documents, and evidence in that type of case would always be where the trustee does business, here New York.

However, the statute applies only to matters regarding the administration of the trust, not the causes of action set out against Mr. Boose, which relate to the manner in which he was appointed as trustee, through instruments he prepared and one of which he executed in Kentucky, as co-trustee of an inter vivos trust. Mr. Boose witnessed the other document, the codicil to Mrs. Cummings' will, which ultimately funded the trust, in Kentucky personally.

The reason for this distinction is clear. Mr. Boose is correct to point out in his brief that he has transacted business on behalf of the trust in New York. He is also correct that most of the documents concerning those transactions is in New York. However, these are not the primary documents relevant to the case. This case is far more concerned with the beginning of Mr. Boose's appointment as trustee than the end. The factual issues to be tried here will revolve around questions regarding Mr. Boose's undue influence on

Mrs. Miller surrounding the time in which she executed the codicil to her will and trust instrument effectively appointing him as trustee over the bulk of her estate.

Witnesses on this issue will be in Kentucky. They may include those who knew Mrs. Miller in her last years, and her health care providers. All documents relevant to this claim, including Mrs. Miller's medical records, will be in Kentucky. And on this claim, Kentucky has the most interest in protecting the rights of one of its citizens. It makes sense that KRS 386.675 applies to actions involving the internal operation of a trust, but not to an action that goes to the very validity of the trust agreement itself. As Mr. Boose's own brief summarizes Mrs. Cummings' argument: "To the extent that Plaintiff can prove her allegations against Boose for undue influence, the Codicil, and therefore the Miller Trust, would be invalid and Boose would no longer be trustee." Appellee's Brief, p. 12. Mr. Boose is effectively suggesting that a court with jurisdiction to invalidate a trust agreement prepared at the direction of, and executed by, an individual, because of that individual's actions, has no jurisdiction over that individual as trustee. This would produce an unjust and ridiculous result: A person held to have obtained a position of trust and profit by his own wrongful actions is not subject to the jurisdiction of the very court making that judgment.

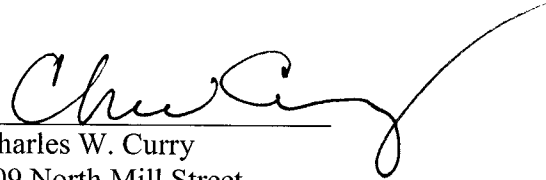
This court should overturn the opinion of the court of appeals, hold that the Boyle Circuit Court may properly assert personal jurisdiction over Mr. Boose in his capacity as trustee, and remand this matter to that court for further proceedings.

#### CONCLUSION

The facts alleged by Mrs. Cummings show a course of conduct on the part of Mr. Boose beginning with his representation of Mrs. Miller, through his planning of her estate

and trust, and culminating in his appointment as trustee of the Miller Trust. This course of conduct established minimum contacts with the Commonwealth of Kentucky such that the Boyle Circuit Court was authorized to exercise its long-arm jurisdiction over Mr. Boose as trustee. Therefore, this court should overturn the opinion of the court of appeals, hold that the Boyle Circuit Court may assert personal jurisdiction over Mr. Boose, and remand this matter to that court for further proceedings.

Respectfully submitted,



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