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SUPREME COURT OF KENTUCKY
CASE NO. 2011-SC-000135-D
(NO. 2009-CA-002258)

KATHERINE COMBS JARVIS, et al — APPELLANTS

vs.

PNC BANK NATIONAL ASSOCIATION, et al — APPELLEES

APPEAL FROM
JEFFERSON CIRCUIT COURT
DIVISION SEVEN (7)
HONORABLE AUDRA ECKERLE, JUDGE
CASE NO. 08-CI-013731

BRIEF FOR APPELLANTS

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy hereof was served on Turney P. Berry, Virginia Hamilton Snell, Counsel for Appellees, Wyatt, Tarrant & Combs, LLP, 500 West Jefferson Street, Ste. 2800, Louisville, KY 40202; Hon. Audra J. Eckerle, Judge, Jefferson Circuit Court, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, KY 40202; Jefferson Circuit Court Clerk, 700 West Jefferson Street, Louisville, KY 40202 and Mr. Samuel Givens, Jr., Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, KY 40601-9229 this 13th day of April, 2012. The undersigned certifies that the record on appeal was not withdrawn for purposes of the preparation of this Brief.

Homer Parrent, III

INTRODUCTION

In this case the Appellants appeal from an Order of the Jefferson Circuit Court, affirmed by the Court of Appeals, which held that the repeal of KRS 386.180 applied to testamentary trusts established before the effective date of the repealing Act.

STATEMENT CONCERNING ORAL ARGUMENT

Appellants request oral argument. Appellants believe that such arguments would assist the Court in understanding the issues and their proper context.

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STATEMENT OF THE CASE

Introduction

This case involves a dispute over the proper determination of fees for trustees of testamentary trusts (i.e. those created by a decedent's probated will) in Kentucky. The issues presented do not apply to trusts created *inter vivos,* such as those commonly known as revocable living trusts.

A. The Jarvis Trusts

The Appellant, Catherine Jones Jarvis ("Mrs. Jarvis"), one of the two Defendants in the Circuit Court, is the beneficiary of two testamentary trusts under management by Appellee, National City.[1] One of those trusts was created under the will of Catherine Lovern Craf, and is referred to as the Catherine Jones Jarvis Trust. Ms. Craf's will is found in the Record at pages 63 through 68. The terms of the trust direct the trustee[2] to remit the net income of the trust to Mrs. Jarvis, or apply same for her benefit as long as she shall live. At her death, the trust is to terminate and the remainder is to be distributed to Catherine Christina Jarvis, Mrs. Jarvis' daughter, who was not named as a party to this litigation.

Mrs. Jarvis is also the beneficiary of another testamentary trust under administration by National City. This additional trust was created under the will of John Riley Craf, and is known as the John Riley Craf trust. It similarly provides that the trustee is to collect the net income of the trust and remit it to Mrs. Jarvis for her life with remainder at her death to Mrs. Jarvis' daughter, Catherine Christina Jarvis. The John Riley Craf Will appears in the Record at pages 69 through 75 inclusive.

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[1] The Appellees herein, National City and PNC, National Association have merged. The Record does not reflect the status of the merger at the date of entry of the judgment appealed from. For purposes of this Brief, Appellants will continue to address the entities separately, as the pleadings and the record also do.

[2] The named trustee in the Craf Will is First Kentucky Trust Company, a predecessor of National City.

National City accepted appointment as testamentary trustee of both of the trusts of which Mrs. Jarvis is lifetime beneficiary, on November 29, 1999, per Affidavit of Cynthia Maddox, Senior Vice-President and Trust Director for PNC Wealth Management (Record, page 56, paragraph 5).

B. The Caperton Trust

The Appellant, Hugh Caperton ("Mr. Caperton"), is the other Appellant in this case. He is beneficiary of a testamentary trust created by his father, Hugh J. Caperton, who died February 7, 1944. (Record, p.57, par.6) This trust is currently under management of Appellee, PNC National Association[3]. The senior Mr. Caperton's will appears in the record at pages 70 through 91 inclusive. Under the terms thereof, Mr. Caperton is entitled to the entire net income of his trust fund as long as he lives. At his death, his trust is to terminate and the principal is to be distributed in fee and *per stirpes* to his then living descendants, if any, and if none, then for the equal benefit of the testator's other living descendants, *per stirpes*. None of the potential or contingent remaindermen of Mr. Caperton's trust were joined as parties to this litigation

C. The Statutory Context

Testamentary trustees in Kentucky have traditionally been compensated in a two part format – receiving one fee calculated on the value of the income received, and another fee based on the value of the trust principal. The fee on trust income was usually based on the amount of income the trustee received during a given period of time; with the fee on principal based on the

[3] The testator's Will named Fidelity and Columbia Trust Company, one of the predecessors of Appellee, PNC National Association, as trustee.

value of the trust principal at specified intervals, usually annually, or upon a distribution of principal. [4]

The statute which governed the calculation of testamentary trustee's fees until its repeal in 2008 was KRS 386.180. The material portion thereof is section (1), which is set out below in full for the Court's benefit:

> Trustees of estates may receive for their services as such a commission of six percent (6%) of the income collected by them, payable as the income is collected. They may also receive an annual commission of three-tenths of one percent (.3%) of the fair value of the real and personal estate in the care of the fiduciary, or, at the option of the fiduciary and in lieu of the annual commission on principal, a commission which shall not exceed six percent (6%) of the fair value of the principal distributed, payable at the time the principal is distributed. In the absence of some provision, agreement, or direction to the contrary, the commission on income shall be paid out of the income from the estate, and the commission on principal shall be paid out of the principal of the estate.

The Court will note the statute essentially established ceilings under which testamentary trustees were required to function, at least in the absence of extraordinary or unusual services rendered.[5]

The first ceiling is the limitation on the amount of the fee which may be charged annually based on the *income* earned by a trust fund. As plainly stated, that limitation is 6% of the income so collected by the trustee.

The statute's second limitation required a trustee to make an election between two permissible calculations with respect to a fee chargeable against the *principal* of the trust fund.

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[4] In 2004, Kentucky adopted the Uniform Principal and Income Act (KRS 386.450 through 385.504), effective January 1, 2005. That Act changed the allocation of trustee's fees so that one-half of the trustee's fees (however calculated) are now charged to income and one-half to principal. This case does not concern the *allocation* of trustee's fees between income and principal, but rather the *calculation* of the total allowable fees.

[5] Subsection (2) of KRS 386.180 authorized the Court to award additional compensation to a trustee which had rendered "additional" or "extraordinary" services in the management of the trust.

The first option allowed the testamentary trustee to charge an annual commission against principal in an amount not to exceed .03% thereof. The annual commission against principal, if chosen, would apply whether the trustee distributed any of the trust principal in that year or not.

The second option, in lieu of the first, was to calculate a fee chargeable against principal, at the time of the distribution of principal, in an amount not in excess of 6% thereof. A trustee which had elected not to charge an annual commission on principal (the first option) could charge the 6% fee if it distributed principal while the trust was ongoing (as, for example, when the trustee exercised a discretionary power to distribute a portion of the principal). However, the more common example of the second option is the fee charged when the trust terminates and the trustee distributes all of the remaining principal. The second method is hence generally referred to both in the trust and estate world, and as well, for purposes of this litigation, as a "Termination Fee".

To summarize then, under KRS 386.180, prior to its repeal, a testamentary trustee had the right to charge either,

> (a) A fee not in excess of the sum of 6% of trust income, plus a fee equal to three-tenths of 1% of principal, both annually; or
>
> (b) A fee not in excess of 6% of trust income annually plus a fee not to exceed 6% of principal distributed whenever the trustee distributed principal.

KRS 386.180 was originally designated as Carroll's Statutes, § 4711-a. At the time of the creation of the Kentucky Revised Statutes in 1942, it was codified as KRS 386.180. (See Appendix C.) It continued unchanged for many years. Then, in the 1982 Legislature, the statute was amended, but only so as to make modest increases in the ceilings on commissions on both income and principal. The maximum commission on income was raised from 5% to 6%; the maximum annual commission on principal, (where that option was elected), was increased from

.02% to .03%; the maximum Termination Fee, (where that option was elected) was raised from 5% to 6%.

From the 1982 amendment through 2008, the statute remained unmodified.

D. History of Commission Practices in the Jarvis and Caperton Trusts

The Record herein is largely bereft of information regarding the exact practices of the Appellee Banks in connection with these trusts. However, the Record is clear that the administration of all three trusts by the Appellee Banks did not commence until after the codification of KRS 386.180 in 1942. Mr. Caperton did not die until 1944; the two Craf trusts came under National City's control as trustee in 1999.

Undoubtedly both institutions charged an annual fee against income, but the Record reflects neither the amounts charged, nor the methods employed to calculate the income commissions.

In the case of the Caperton trust, PNC never assessed a charge against trust principal, thereby electing to charge a Termination Fee. (Record, page 57, paragraph 10).

The Record does not reflect whether National City charged either of the Jarvis trusts any annual fees based on the trusts' principal, or, on the other hand, ever elected in any manner, expressly or implicitly, to charge a Termination Fee.

E. History of the Present Litigation

KRS 386.180 was repealed by the 2008 General Assembly as a section of HB 615. (See Appendix D.) The Governor signed the bill on April 24, 2008, and the repeal became effective July 17, 2008, (Record, page 4, paragraph 15).

On December 30, 2008, Plaintiffs filed their Verified Complaint for Declaratory Judgment with the Jefferson Circuit Court Clerk alleging, in essence, the existence of a controversy between the Plaintiffs and the two Defendants, Mrs. Jarvis and Mr. Caperton. The controversy was described as arising from a difference between the trustees and the beneficiaries over the continued applicability of KRS 386.180. Specifically the Complaint alleged that Defendant Beneficiaries had asserted that their respective trustees continued to be bound by KRS 386.180; whereas the Plaintiff Trustees, on the other hand, had asserted that the repeal of KRS 386.180 removed any restrictions which the statute would otherwise impose upon them.

Defendants, Mr. Caperton and Mrs. Jarvis, filed their Answer to Plaintiffs' Complaint on March 2, 2009, (Record page 10-12) asserting in general, that the Banks should be bound by their decisions since they had accepted the respective trusts with full knowledge of the limitations imposed by the statute. Defendants asserted that the repeal of KRS 386.180 should have only prospective application, i.e. only to trusts for which trustees were appointed after July 17, 2008.

Plaintiffs filed a Motion for Summary Judgment on July 20, 2009, supported by Memorandum (Record, pages 13 through 38). Defendants' Response was filed September 1, 2009, (Record, pages 41 through 52). Plaintiffs' filed their Reply on October 19, 2009, (Record, pages 92 through 98).

The trial court issued its Opinion and Order on November 6, 2009. (See Appendix A.)

The Appellants filed their Notice of Appeal on December 3, 2009. The case was duly briefed and submitted. The Court of Appeals issued an Opinion affirming on February 4, 2011, (Thompson, J., dissenting). (See Exhibit B.) In its Opinion the majority adopted the Opinion and Order of the Trial Court.

Appellants moved this Court for Discretionary Review. This Court granted the motion by Order entered February 15, 2012.

ARGUMENT

MAY IT PLEASE THE COURT:

Introduction

The central issues of this appeal are first, whether beneficiaries of testamentary trusts have vested rights in the statutory compensation scheme in force at the time the trustee accepts the engagement to serve as trustee, and second, if so, whether the repeal of that statutory scheme improperly impairs those rights?

I. Beneficiaries of Testamentary Trusts Have Vested Rights in the Statutory Compensation Scheme Under KRS 386.180.

A. Statutory Context of Testamentary Trusts

A testamentary trust is one created under the will of a deceased person. Testamentary trusts stand in contrast to other kinds of trusts in several respects. First, they are regulated and supervised by the district court. See, generally, KRS 395.001 (*"Fiduciary" includes testamentary trustee*); KRS 395.105 (*Fiduciary must obtain letters of appointment from District Court before entering upon execution of trust*); KRS 395.130 (*Fiduciary must furnish surety on bond, unless excused*); KRS 395.325 (*Fiduciary who resigns or is removed must settle accounts; preferences for appointment of successor trustee*); KRS 395.600 (*District Court shall make settlements with trustees*).

Second, testamentary trusts are not legally effective until after the death of the creator of the trust. KRS 394.130 (*Will not admissible until probated*); KRS 396.016 (*Executor not to act until will probated*).

Third, Kentucky law mandates specific procedures for the appointment of testamentary trustees. A person or entity, even if specifically nominated to serve as trustee under a decedent's will is required (1) to prepare and file a petition with the district court to be appointed as such, and (2) to register the trust with that court . See KRS 395.105 and KRS 386.655. Thus a person or entity desiring the office of trustee of a trust under a will must take affirmative steps to become trustee. In that respect a testamentary trust is like other kinds of trusts – the office of trustee is one which must be accepted by the nominated party. It cannot be imposed on a trustee against one's will. "No one can be compelled to undertake the burdens of trusteeship against his desire."[6]

B. Principles Governing Trustee Compensation

Like any other status or office created or regulated by law, a trusteeship entails a wide range of duties, responsibilities and obligations. These are collectively referred to as fiduciary duties. It is axiomatic that one who accepts the office of trustee is charged with knowledge of the duties thereby being assumed. Although any trustee is entitled to just compensation for services, one of the responsibilities assumed by accepting the office is to submit oneself to the rules of law governing the amount of compensation which is appropriate.

It is undisputed that throughout the lifetimes of the three trusts involved in this litigation, and specifically, at the time that the respective trustees assumed their duties, the entire matter of the trustees' compensation was governed by KRS 386.180. Of course, this litigation ensued only because that statute was repealed effective July 17, 2008.

Accordingly, the central issue of this appeal is whether, having accepted the trusteeship at a time when KRS 386.180 governed compensation of testamentary trustees, the Appellee Banks herein are no longer bound by the terms of compensation in effect at that time.

For the reasons stated below, the Appellants submit that the Appellee Banks should be deemed to be so bound.

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[6] Bogert, The Law of Trusts and Trustees, Rev. 2d Ed., § 150, p.78.

C. Consequences of Statutory Election

The Appellants submit that the Appellee Banks are bound by the consequences of their choices under KRS 386.180. Appellants base their position on the principles expressed by the Court of Appeals in *First Security National Bank v. Cognets*, 563 S.W.2d 476 (Ky.App., 1978). *Cognets,* to Appellants' knowledge, is the only case ever decided in Kentucky which bears on the question posed by the case at bar.

In *Cognets* a dispute arose between a trust beneficiary and the trustee of the subject trust on the question of whether the trustee's failure to pay itself the annual commission on principal (the first option under KRS 386.180), constituted an election to accept a Termination Fee in lieu thereof. The trustee in *Cognets* argued that it had a continuing option available to it at any time to make such an election, and that unless and until the trustee actually charged an annual principal commission, its option to elect a Termination Fee remained open. The Court of Appeals disagreed with the trustee, holding that although KRS 386.180 did not fix a specific time in which a trustee is required to exercise its option, the trustee was obligated to do so in a reasonable time. Since the trustee had not collected an annual fee for a long number of years, the Court held that it had implicitly exercised the option to receive a Termination Fee instead. Thus its tacit choice to receive a termination fee permanently precluded its right to charge annual fees on principal.

Cognets is the only authority known to the Appellants which addresses the interpretation of KRS 386.180. While the case at bar does not present the precise issue raised in *Cognets*, the teaching of *Cognets* is pertinent on the subject of the consequences of a trustee's election. In essence *Cognets* holds that whether a trustee makes its election, explicitly or not, it is bound by its choice:

> "The plaintiff concedes that a payment by the trustee of a single annual commission on principal at anytime during the life of the trust would constitute an election by the trustee and *it would thereafter be bound to follow that option.*" (Emphasis added)

The conclusions which flow from the Court's reasoning in *Cognets* are persuasive in this case. The respective trustee of each of the three trusts involved had an obligation under KRS 386.180, (which was fully operative and effective at the time that each of the trustees assumed the office of trustee), to make an election either to receive an annual principal commission or a Termination Fee. Trustees are not at liberty to waffle back and forth. A decision, whether express or tacit, once made is final. The trustee will thereafter be bound by its choice.

Applying this principle leads to the conclusion that the Appellee PNC Bank, which never charged the Caperton Trust an annual fee on principal, has irrevocably elected a Termination Fee. Hence PNC is bound by its decision under the rule in *Cognets,* with the result that while it may charge a Termination Fee when the Caperton Trust terminates, it may not now begin to charge annual fees on undistributed principal while the trust is ongoing.

So the question before this Court becomes whether the repeal of KRS 386.180 has the effect of relieving the trustees of the consequences of their choices. Under the decisions of the Courts below, PNC would be free to begin charging annual principal fees – something which *Cognets* would forbid. Moreover, the decisions of the Courts below do not necessarily prevent PNC from charging a Termination Fee as well. That is because PNC is free to craft a rationale that a Termination Fee in addition to annual principal fees is reasonable – "reasonableness" being the only remaining stricture on trustee fees in the absence of KRS 386.180. Under KRS 386.180, such a scenario would be strictly forbidden, absent a showing of unusual or extraordinary services.

Indeed, the Order of the Jefferson Circuit Court from which this Appeal is prosecuted specifically contemplated that trustees might be able to charge both annual principal fees and termination fees:

> "...and in the limited instances of testamentary trusts that are or have been subject to a termination fee, the testamentary trustee's determination of reasonable fees may also take into consideration the fees charged or deferred prior to the repeal of KRS 386.180, so that the total fee they received during administration of a trust is reasonable."

In other words, the Order appealed from specifically countenances the possibility of both types of fees on trust principal being charged, circumscribed only by the vague and variable standard of "reasonableness."

In the case of the two Jarvis trusts, the record does not reflect whether National City charged annual principal fees or not. However, the results to their beneficiaries under the rulings of the Courts below would be the same as in the case of the Caperton Trust. If so, nothing would prevent National City from seeking to charge a Termination Fee as well as annual principal fees. If not, National City would be free to begin charging annual principal fees in addition to its previously elected (under the *Cognets* rule) Termination Fee

There are a number of compelling legal reasons why the repeal of KRS 386.180 should not be interpreted or applied so as to grant testamentary trustees such latitude.

The principal point to be made is that the trustee's choice, of necessity, created enforceable legal rights in favor of the beneficiaries of the trusts. This point is easily illustrated. If a hypothetical trustee, appointed while KRS 386.180 was fully operative, announced that it elected to receive a Termination Fee instead of an annual fee on principal, but thereafter attempted to pay itself an annual commission on principal, the beneficiary of the trust would have a valid cause of action against the trustee for breach of fiduciary duty in paying itself impermissible compensation. In just the same way, a trustee who elected an annual commission on principal would be similarly liable at the suit of the beneficiary, if it thereafter attempted to charge a Termination Fee as well. Thus, the trustee's election under KRS 386.180 vested the beneficiaries with specific legal rights, enforceable by legal proceedings, to require the trustee to adhere to the mode of compensation which the trustee elected, whether tacitly or expressly.

Furthermore, in a similar context, the Court of Appeals has held that where a testator provides in his will for limits upon the compensation of his executors they are bound by such limits if they accept the appointment as such with knowledge of the provisions. See *Robinson's Executor v. Robinson*, 179 S.W.2d 886 (Ky., 1944) where the Court stated the rationale for the rule to be as follows:

> The reason supporting the rule is that the executor knowing the compensation fixed for him by the will can qualify or not as he see fit; but having qualified and performed the services of his office, he must accept the compensation provided for him in the will. (Citations omitted)

The relevance of this principle to the case at bar is plain. A fiduciary who accepts the appointment of the Probate Court to fulfill a role as executor or trustee must comply with the terms of his employment. If those terms specify a limit on compensation with which the proposed fiduciary cannot live, then there is no obligation to accept the job. But if the job is accepted, the compensation limits are deemed to be accepted as well. The only exception is, as stated in *Robinson*, if it is alleged and proved that extraordinary or unanticipated additional services were rendered. There were none in *Robinson* and the Record in the present case reflects nothing out of the ordinary for the Jarvis and Caperton trustees either[7].

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[7] The second section of KRS 386.180 addresses the subject of additional compensation for trustees who perform extraordinary duties. Appellants agree (and so advised the Trial Court) that consistent with their position generally, this provision should continue to apply to the services of trustees whose compensation continues to be governed by the statute, even after its repeal.

Robinson is also important because it implicitly demonstrates the point that beneficiaries have the right to assert the benefit of the specified limitations on the fiduciary's compensation. That is to say, a beneficiary has a vested legal right to expect appropriate compliance by a trustee with fee limitations, and an enforceable claim to compel such compliance in a court of law, if necessary. This is what occurred in *Robinson* and is the same point as is illustrated in the hypothetical examples in the discussion of *Cognets, supra.* In other words, *Robinson* confirms that beneficiaries have a vested right in fiduciary compensation limitations, if imposed by the governing instrument. There is no lesser reason why the same principle should not apply where the fee limitation is imposed by the statute in effect when the fiduciary accepts the position. Whether imposed by the governing instrument, the governing statutes, or by contract with the settlor of the trust, the principle is the same. One who accepts a job knowing what it pays cannot legitimately be heard to complain when subsequently denied a raise.

B. Quasi-Contractual Consequences

In addition to the analysis of the consequences of accepting an appointment as testamentary trustee, the obligation of such trustees to adhere to compensation limits existing at the time of appointment also arises from a theory of quasi-contract.

Like trustees, public officials seek office and if successful, take office with full knowledge of the salary which the position pays. This Court has held that by doing so, public officials enter into a quasi-contract with the people to serve for the salary applicable to the office for which they were elected. *Kentucky Association of Counties All Lines Fund Trust v. McClendon, et al,* 157 S.W.3d 626 (Ky., 2005) In *McClendon*, county magistrates were sued on the theory that they had illegally raised their own salaries. This Court declared that the Plaintiffs were correct and that the magistrates had breached their quasi-contract with the electorate. By running for an office having a fixed salary of which they were aware, the magistrates bound themselves to serve for that compensation, not for higher compensation as might thereafter be adopted.

The analogy to the case at bar is plain. By accepting appointment under Order of District Court, knowing full well the limits applicable to trustee's compensation under KRS 386.180, testamentary trustees appointed prior to July 17, 2008, are similarly parties to a quasi-contract with the beneficiaries of the trust. By their own conduct they have agreed to do the job under the existing compensation regime. Like the magistrates in *McLendon*, no one forced them to apply to become a trustee; if they found the compensation inadequate, they had the right to decline appointment just as the magistrates in *McClendon* were under no compulsion to run for office if they deemed the compensation inadequate[8].

At bottom, the beneficiaries of testamentary trusts have every legitimate right to expect that these fiduciary institutions would live by the compensation regime which they willingly entered into. This simple proposition is sustained by either the acceptance or the quasi-contractual analysis. The argument espoused by the Appellee Banks to the contrary is fundamentally an assertion that they have the right to avoid the consequences of their choices, and to thereby cancel or terminate the rights of beneficiaries.

II. Appellees' Interpretation Misreads Legislative Intent.

Appellees assert that the Legislature truly intended to terminate the vested rights of trust beneficiaries to enforce statutory fee limitations in force at the time of enactment. This argument is not well founded, but if it were, would represent a matter of constitutional gravity.

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[8] In the Trial Court, the Appellees attempted to portray the limitations of KRS386.180 as arbitrary and unreasonable. However, they fail to attach any significance that the limitations are expressed on a percentage basis, which therefore automatically raises trustee compensation, as the value of trust assets and income increase over time. Trustees have never been subjected to absolute dollar limits on compensation, as, for example, the magistrates in *McClendon* were.

A. Legislative Intent

Appellants do not believe that the Legislature, by repealing KRS 386.180, intended to retroactively impair existing vested rights held by beneficiaries of testamentary trusts. There are several reasons for this.

First, KRS 446.080(3) plainly declares that "No statute shall be construed to be retroactive, unless expressly so declared." Nothing in House Bill 615 of the 2008 Acts expresses any such intention. This Court, relying on KRS 446.080, has stated in *Magic Coal Company v. Fox*, 19 S.W.3d 88 (Ky., 2000),

> The role of the Court in construing a legislative act is to effectuate the intent of the legislature. Where that intent is not clear, we remain mindful of the principle embodied in KRS 446.080(3) that, unless the legislature clearly indicates otherwise, legislation is not intended to affect the *legal consequences of events which occurred before enactment*. (Emphasis added)

As the analysis above discloses, the actions of testamentary trustees in accepting trusteeships were events and actions occurring before enactment. Those actions created vested legal rights in the beneficiaries. Because those events occurred before the enactment of the repeal of KRS 386.180, the repeal should not be deemed to reflect an intention to affect or terminate those rights.

Moreover, according to Sutherland on Statutory Construction, (7^{th} ed.) at §23:35,

> Under common-law principles of construction, repeal of a statute or abrogation of a common-law principle divests all the rights accruing under the repealed statute or the abrogated common law, and halts all proceedings not concluded prior to the repeal. However, a right which has been vested does not depend upon the common law or the statute under which it was acquired. It has an independent existence. *Consequently, repeal of a statute or abrogation of the common law from which it originated does not erase a vested right and it remains enforceable without regard to repeal.*

> To become vested, a right must be a contract right, a property right, or *a right arising from a transaction in the nature of a contract* which has become perfected to the degree that it does not depend on the continued existence of a statute. (Emphasis added.)

Second, there is nothing in the repealing Act which expressly or by necessary implication, reflects any Legislative intent to affect the vested rights of beneficiaries to compel trustees to adhere to their choices regarding compensation, which choices are, as *Cognets* teaches, binding in nature. Rather, this Court is faced with a bare repealer, without the enactment of any clarifying or additional language. Any legislative intent to modify the existing and vested rights of trust beneficiaries would surely be plainly expressed.

In this regard, the text of HB 615 (Appendix D) is instructive. The Act consists merely of four sections. The first three sections simply delete statutory cross references to KRS 386.180, and in all other respects leave the amended statutes unchanged. The third section applies only to guardians and conservators of disabled persons and retained a statutory 6% maximum compensation allowance for those types of fiduciaries. The fourth and final section is a plain repealer of KRS 386.180 without further explanation or clarification. Looking at the Act as a whole, the only conclusions which can truly be drawn are that the legislature simply wanted to abolish the percentage limitations on compensation for trustee but desired to retain such limitations for guardians and conservators. The Act contains no reference to the vested rights of trust beneficiaries under the previous compensation regime, nor does it have an effective date. Accordingly, the repeal is equally, if not more susceptible to the interpretation that it would apply only to trustees accepting appointment after its effective date.

In essence, the proper interpretation of the repeal is that it abolished the requirement that trustees make an election, but it did not absolve trustees of elections already made when HB 615 took effect.

B. Retroactivity

Appellees' interpretation of the effect of the repeal of KRS 386.180 is necessarily retroactive in nature. This point can be illustrated by posing a simple question:

> Did trust beneficiaries have a legal right, as of July 16, 2008, (the day before repeal was effective) to compel trustees to abide by the compensation limits of KRS 386.180?

To answer this question in the negative would mean that the statutory fee limitation was always meaningless and unenforceable - clearly an absurd proposition. On the other hand, to answer in the affirmative is to concede that HB 615 impairs existing rights of trust beneficiaries because it deprives them of the benefit of a cause of action they possessed when the repeal was enacted.

Assuming, but only for purposes of argument, that the repeal of KRS 386.180 was truly intended by the Legislature to operate retroactively, such an interpretation would raise serious constitutional issues. As this Court has noted in *Louisville Shopping Center, Inc. v. City of St. Matthews*, 635 S.W.2d 307 (Ky., 1982),

> It is clear that a legislative body may not arbitrarily, or without due process, by retroactive legislation terminate or impair the judicial rights of litigants. (Citations omitted). Such rights are described and viewed as vested.

This view is consistent with the protection this Court's decisions have traditionally afforded litigants under the "jural rights doctrine" established in §14 and §54 of the Kentucky Constitution. §54 states:

> The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property.

The rights of trust beneficiaries to enforce claims for breach of trust are plainly claims for injuries to person or injuries to property[9], although no Kentucky case specifically so holding is known to Appellants.

Appellees have attempted to argue that even if the repeal is deemed retroactive, HB 615 is permissibly retroactive because it was remedial legislation. There are, however, several serious problems with Appellees' argument.

First, the Act does not state it is to be retroactive, as required by KRS 446.080(3), *supra.*

Second, there is no Legislative record to support any unstated inference of a Legislative intent to make the HB 615. As this Court stated in *Stopher v Conliffe*, 170 S.W. 3d 307 (Ky. 2005),

> This Court has a responsibility "to ascertain the intention of the legislature from words used in enacting statutes rather than surmising what may have been intended but was not expressed."

Similarly, this Court has stated in *Commonwealth v. Allen*, 980 S.W.2d 278 (Ky., 1998), that:

> To determine legislative intent, a court must refer to "the words used in enacting the statute rather than surmising what may have been intended but was not expressed."

Since section (4) of HB 615 is a bare repeal, with no other plain purpose or intention expressed, resort to extrinsic sources of intent are but "surmise" and carry no weight.

Third, the Record in this case offers no credible evidence of the supposed legislative intent. Appellees have cited the Affidavit of Cynthia Maddox as evidence that KRS 386.180 imposed an unreasonable, arbitrary and unfair level of compensation on testamentary trustees.

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[9] Apparently the long history of the law of trusts has not resolved the academic dispute whether the rights of beneficiaries in trusts are "rights in rem or rights in personam." See Bogert, Trusts & Trustees, 2d ed., § 183; Restatement, Third, Trusts, Reporter's Notes on §49. Regardless, however, of the technical niceties, a trust beneficiary has legally enforceable rights for redress for breach of trust, whether sounding in personam (as an injury to the person) or sounding in rem (as an injury to property).

With all due respect, Ms. Maddox's Affidavit is conclusory, argumentative and self serving. The fairness of compensation is not an objective fact, but rather a subjective opinion. And Ms Maddox's Affidavit does not even purport to address Legislative intent.

To buttress their assertion of a Legislative intent favoring retroactivity, Appellees relied in the Courts below primarily on *King v. Campbell County*, 217 S.W.3d 862 (Ky.App., 2006) and on *Louisville Shopping Center, Inc., supra*. Neither case affords them support.

The *King* case involved, among other issues, the constitutionality of the retroactive elimination of credits against an occupational license fee in northern Kentucky. The distinctions are obvious. In *King* the Legislature expressly intended to create a retroactive statute, unlike the case at bar. However, more significantly, *King* involved the constitutionality of tax legislation where it is well settled that a taxpayer has limited legitimate expectations in the continuity of tax policy. This is far different from the rights of beneficiaries of private trusts holding enforceable rights to hold a trustee to its choices regarding its compensation. The latter is a judicial right having no bearing on public policy or the public treasury.

Similarly, in *Louisville Shopping Center, Inc.*, a property owner was deemed not to have a vested right to avoid annexation. Again, this is a public or political question not a question of individual judicial rights, such as those properly held by beneficiaries of private trusts.

C. Not Remedial Legislation

Finally Appellees attempt to justify the retroactivity by describing HB 615 as remedial in nature. This argument likewise fails because remedial legislation cannot be enacted so as to affect vested rights, and rather, is limited to matters relating to a legal remedies, legal procedures or limitations of actions which have not yet expired.

The Court's attention is also called to *Walker v. Commonwealth*, 130 S.W.2d 27 (Ky., 1939):

> It [the legislation in question] purported to be and is purely of retrospective operation which is competent for the legislature to enact in all cases *wherein vested rights are not affected.* (Emphasis added)

This Court's attention is also called to *Unemployment Compensation Commission of Kentucky v. Consolidation Coal Company*, 152 S.W.2d 971 (Ky., 1941):

> In the latter case the court fully discussed and applied this recognized principle that while *the Legislature may not impair private rights by retroactive laws,* it may alter public rights or concerns retroactively. (Emphasis added)

The Court of Appeals correctly summarized the principle as follows in *Miracle v. Riggs*, 918 S.W.2d 745 (Ky.App., 1996):

> "…we agree with the Board that the issue becomes whether the amendment provides a remedial versus a substantive change. *When a statute is purely remedial or procedural and does not violate a vested right*, but operates to further a remedy or confirm a right, it does not come within the legal concept of retrospective law nor the general rule against the retrospective operation of statutes (authorities omitted)." (Emphasis added)

In other words, there is bright line distinction between remedial legislation, on the one hand, and legislation affecting substantive rights on the other. Because the Appellees attribute retroactive effect to HB 615, it would of necessity affect the substantive rights of trust beneficiaries. That makes it ineligible to stand as "remedial" legislation. Conversely, the only way HB 615 can be accurately portrayed as remedial, is to concede that it has no retroactive application – the very point which Appellants advocate in this appeal.

This Court's decision in, in *Central Kentucky Production Credit Association v. Smith*, 633 S.W.2d 64 (Ky., 1982), underscores this point. There this Court held that a statute affecting the rights of foreclosure Plaintiffs to recovery of attorney fees could be applied to foreclosure of mortgages executed prior to the enactment of the statute because,

"No contract rights of the parties have been impaired. "

Because HB 615 affects vested rights of trust beneficiaries, it cannot correctly be categorized as remedial.

III. Indispensable Parties Were not Before the Trial Court nor the Court of Appeals.

While it is undisputed that Ms. Jarvis is one of the beneficiaries of the two trusts for her benefit and that Mr. Caperton is one of the beneficiaries of the trust for his benefit, neither of them has an interest in the remainder of their respective trusts after their deaths. In each case there are individuals who, either by name or by class, are designated to receive the principal of the respective trusts at that time. None of these remainder persons were joined as parties to this action, either individually, as a class member or as a set of unknown Defendants.

The remainder persons have an indisputable interest in the amount of fees charged by the trustees. Under KRS 386.492(1)(a), the principal of a trust is charged that portion of the trustee's compensation not payable from income. KRS 386.490(1), states that in essence, one-half of the trustee's commission is chargeable against income. Therefore, in most instances, the principal will bear one-half of the trustee's compensation. Hence, the remainder persons, who stand to eventually receive the remaining trust principal, are persons having a direct financial interest in the matter of trustee compensation.

Under CR 19.01, a person shall be joined as a party in an action if

> "…he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest…"

The remaindermen clearly have an interest in the subject of the action - one-half of trustee's fees will come from their portion of the trust.

The rights of the non-party remaindermen are not necessarily consistent with the rights of the life tenants, who are parties. For example, denying a trustee the right to assess a Termination Fee benefits the remaindermen because such a fee is paid only after the death of the life tenant, and hence comes solely from their pockets. Likewise, annual principal fees come one-half from trust income, under present law, thus reducing current income distributions to life tenants. To be sure, there are numerous permutations on this theme, and what serves one set of life tenants in one situation may not necessarily serve all those similarly situated. And perhaps in some circumstances, life tenants and remaindermen may share a common interest. The point, however, is, that life tenants and remaindermen do not *necessarily* have a communality of interest on this subject. It is for that reason that remaindermen should have been joined. Their absence from this litigation obviously impairs their ability to protect their interests, within the meaning of CR 19.

Appellees assert reliance on the doctrine of virtual representation. However, that doctrine is only properly applicable where the absent parties share an identity of interests with those who are named as parties. See *Weinberg v. Werft*, 309 Ky. 731, 218 S.W.2d 398 (Ky., 1949); *Clark v. Wilson*, 316 S.W. 2d 693 (Ky., 1958). Because there is a significant possibility of differing interests between life tenants (whose interests are served by maximizing income) and remaindermen (whose interests are served by maximizing principal), both sets of beneficiaries are necessary in any action regarding the allocation of trustee fees. Here, only life tenants were named as parties. Under CR 19, the remaindermen should also have been named. Their absence deprives both the original Judgment and the Opinion of the Court of Appeals of binding effect.

CONCLUSION

For the reasons stated above, the Appellants respectfully submit that this Court should reverse the decisions of the Court of Appeals and the Circuit Court. If this Court finds that it was proper to pronounce judgment in the absence of the joinder of the remainder beneficiaries as parties, then Appellants submit that this Court should remand the action to the Jefferson Circuit Court with instructions to enter a judgment declaring that the repeal of KRS 386.180 applies only to fees of testamentary trustees who accepted engagement as such after the effective date of the repeal on July 17, 2008.

If this Court determines that the absence of the remainder beneficiaries is itself fatal to the decisions of the Courts below, then the case should be reversed and remanded to the Jefferson Circuit Court with instructions to join all necessary parties and, after affording such parties the opportunity to be heard, enter a judgment consistent with this Court's opinion on the merits.

Respectfully submitted,

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