2012 WL 4839350 (Ill.App. 4 Dist.) (Appellate Brief)
Appellate Court of Illinois, Fourth District.

Sherwood DIXON, Anne Dixon Best, Drake Dixon, Ridgway Ryan, Rosalie Ryan, Walker Ryan and Diller Ryan, Plaintiffs-Appellees,

v.

Barbara WEITEKAMP-DILLER, Individually and as Trustee of the William Hughes Diller, Jr. Revocable Trust dated July 28, 2010, Judith Ann Neal, Brenda Bruce, Susan Weitekamp, and Margaret Weitekamp, Defendants-Appellants.

and

UNITED COMMUNITY BANK, as Successor Trustee of the Trust created under Item Second of the Will of William Hughes Diller, Sr., JP Morgan Chase Bank, N.A. formerly Springfield Marine Bank, as Trustee of the 1927 Ida Payne Trust, and as Trustee of the 1949 William Hughes Diller, Sr. Trust, Heartland AG Group of Springfield, Inc, and Diller Ryan, Defendants.

No. 4-12-0209.
July 6, 2012.

Appeal from the Circuit Court of Sangamon County, Illinois Chancery Division
No. 2010-CH-1014
Honorable Leo J. Zappa, Judge Presiding
Oral Argument Requested

Brief of Appellees Sherwood Dixon, Anne Dixon Best, Drake Dixon, Ridgway Ryan, Rosalie Ryan, and Walker Ryan

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*1 ISSUES PRESENTED FOR REVIEW

Defendants list five issues presented for review. The first four are all aspects of the central question in this case, which can be simply stated as:

I. Did the trial court correctly rule that the adoptions of Barbara Weitekamp's adult daughters do not divest the Diller descendants of their interests in the three Diller family trusts?

The fifth issue listed by Defendants presents a second question, which Plaintiffs consider can be better framed as:

II: Did the trial court correctly rule that Barbara Weitekamp must return the 63-acre tract to the Franklin Farm trust?

STANDARD OF REVIEW

The standard of review on both questions is *de novo,* as this is an appeal from the trial court's ruling on cross-motions for summary judgment. *Robson v. Electrical Contractors Assn.,* 312 Ill.App.3d 374, 380 (1st Dist. 2000), *as modified on denial of rehearing.*

***2 STATEMENT OF FACTS**

Plaintiffs submit the following complete statement of facts. These facts are largely omitted from Defendants' statement, but are considered necessary to an understanding of the case.

The Diller Family of Springfield

William Hughes Diller, Jr. died on June 4, 2011 at age 94 (R. Vol. VI, 1211). Mr. Diller, known as "Hughes," was a descendant of a well-known Springfield family that traces its roots back to the time of Abraham Lincoln. Indeed, as reported in the Illinois State Register on July 14, 1935, Hughes' grandfather Isaac R. Diller was then the "only living person to have been photographed with the 'Great Emancipator"' (R. Vol. VI, 1216). The article goes on to recount how 6-year old Isaac was a playmate of Lincoln's sons William and Tad, and was photographed with the Lincoln family in 1860 (R. Vol. VI, 1216). Hughes' obituary (R. Vol. VI, 1212) also recounts this story and notes that Hughes donated Abraham Lincoln's desk, which had been in the family's possession, to the Old State Capital. As the obituary notes, "the Diller Family of Springfield is a remarkable family in Illinois history" (R. Vol. VI, 1213).

Hughes was one of three children. His two sisters, Corinne Diller Ryan and Jane Diller Dixon, both predeceased him. While Hughes never had children (and was never married until he was age 87), Corinne and Jane both left descendants. Plaintiffs and Diller Ryan are the descendants of Corinne and Jane, and the only remaining blood descendants of the Diller family.

***3** Isaac Diller sold the family business in 1901 and then began the family's investment in real estate, particularly farmland (R. Vol. VI, 1216). Hughes had a lifelong interest in the Diller family farms (R. Vol. VI, 1213). In addition to large farm tracts which he individually owned, Hughes was an income beneficiary of the following three Diller family farm trusts:

(1) the Franklin Farm trust, which was created under Item Second of the Will of Hughes' father, William H. Diller Sr. (herein "William Sr."), who passed away in 1977 (R. Vol. I, 9-13) [1] ;

(2) the William H. Diller Sr. trust, a separate intervivos trust created by William Sr. in 1949 (R. Vol. VI, 1226-30); and

(3) the Ida Payne trust, created by Hughes' maternal grandmother in 1927 (R. Vol. VI, 1234-41).

The Franklin Farm Trust

The Franklin Farm trust originally consisted of 1453 acres which William Sr. placed in trust under Item Second of his Will (R. Vol. I, 9). The acreage was located near Franklin, Illinois, in Morgan County. William Sr. named Hughes as trustee and provided that all of the income from the trust would be paid to Hughes during his lifetime (R. Vol. I, 10). William Sr. made the following disposition of the trust assets upon Hughes' death:

Upon death of my son, William Hughes Diller, Jr., if he shall leave him surviving a wife or any child or children or descendants thereof, this trust shall continue so long as said wife shall live and until the youngest of his ***4** children attains majority... Net income shall be distributed one half to the wife of my son and one half to his descendants per stirpes and upon death of such wife or if his wife shall predecease him all income to his descendants per stirpes, or if there be no descendants of my son or such descendants shall die before termination of this trust one half of all net income shall go to my son's wife and the remaining

one half of the net income to my daughters, Corinne Diller Ryan and Jane Diller Dixon, or their respective descendants per stirpes then living... Upon death of the wife of my son and attainment of majority of my son's then youngest living child, this trust shall terminate and the trust property shall vest in the children of my son and the descendant of any deceased child then living, such descendants taking the share per stirpes their parent would have received if living... If my son shall die without any wife or child or children or descendants of a deceased child or children surviving him, or if none of my son's descendants shall live to attain their majority, this trust shall terminate and the trust property shall vest in my daughters, Corinne Diller Ryan and Jane Diller Dixon, or if either be not then living in their respective descendants per stirpes then living, or if either has no descendants then living shall vest in the descendants of the other.

(R. Vol. I, 10-11). In this manner William Sr. directed that the trust assets would ultimately be distributed to his grandchildren through his son Hughes, or if he had no grandchildren through Hughes, then to his grandchildren through his daughters, Corinne and Jane (Id).

Hughes retained Gene Meurer, first through Springfield Marine Bank's farm management department and later through Heartland Ag Group, to manage the Franklin Farm, and the association of these two men continued for some 30 years (R. Vol. V, 1164, 1166, 1171). Springfield attorney Ed Cunningham testified that Gene was one of Hughes' “best friends” (R. Vol. 5, 1032).

The 1949 William Hughes Diller Sr. Trust

William Sr. created this trust in 1949 and it consists of 712 acres of farmland in Sangamon and Logan Counties (R. Vol. VI, 1226; R. Vol. IV, 727-33). William Sr. named ***5** Springfield Marine Bank (now JP Morgan Chase Bank) as trustee, and the bank continues to serve in that capacity (R. Vol. VI, 1226).

William Sr. made the following disposition of the trust assets:

All income not required for maintenance, repairs, taxes, farm expenses, interest, cost and fees incident to the management of this trust shall be distributed not less than annually to my children, William Hughes Diller, Jr., Corinne Diller Ryan and Jane Diller Dixon, in equal shares, and in the event of death of any of my children such share of income shall be payable to his or her descendants per stirpes, or if there be no such descendants then surviving or upon their subsequent death, such shares of income shall be given to my surviving children equally, or to their respective descendants per stirpes. This trust shall terminate upon the death of the last survivor of my three children... Upon termination, the principal of this trust shall be distributed to the beneficiaries in the proportions in which they are then receivin trust income.

(R. Vol. VI, 1227). In this manner, William Sr. directed that the trust assets would ultimately be distributed to his grandchildren through whichever of his children had children of their own. Hughes was the last of William Sr.'s children to survive. At issue is the one-third interest which was payable to Hughes during his lifetime.

The 1927 Ida Payne Trust

Hughes' grandmother Ida Payne created this trust in 1927 and it consisted of 167 acres of farmland in Christian County (R. Vol. VI, 1234-35; R. Vol. IV, 727-33). Ida Payne named Springfield Marine Bank (now JP Morgan Chase Bank) as trustee, and the bank continues to serve in that capacity (R. Vol. VI, 1234). Ida Payne had three children, including a daughter who was the mother of Hughes, Corinne and Jane. Ida Payne provided that after she and her husband passed, the income would be paid to her six grandchildren. ***6** The trust terminates upon the death of her last surviving grandchild, and is then distributed to each of their descendants (R. Vol. VI, 1237-40). Ida Payne made the following disposition of the trust assets:

To pay one of said one-third parts to William Hughes Diller, Corinne Payne Diller and Jane Louise Diller, grandchildren of the Grantor and being the children now living of Corinne Payne Diller, deceased daughter of the Grantor, said payments to be made to said grandchildren in equal parts during their respective lifetimes.

Upon the death of either of said grandchildren in this item mentioned, prior to the termination of this trust, leaving lawful issue him or her surviving, said Trustee shall pay to the said lawful issue of said deceased grandchild per stirpes, that part of said income to which said deceased grandchild would have been entitled if living.

If either of said grandchildren die leaving no lawful issue him or her surviving, or if such grandchild die leaving issue him or her surviving but such issue shall die prior to the termination of this trust, then said Trustee shall pay to the other of the said grandchildren in this item mentioned, if living or if dead, leaving issue him or her surviving, then to said issue, per stirpes, that part of said income to which said first mentioned grandchild would have been entitled if living...

Upon the death of the survivor of the said grandchildren... said trust shall cease and the Trustee shall convey said trust estate... to those persons who may at the termination of said trust estate be entitled to receive the income therefrom in the proportions to which they are then respectively entitled to the income of said trust estate.

(R. Vol. VI, 1238-40). One of the three family branches died off leaving no descendants, as a result of which the trust income was split equally between the Diller grandchildren (Hughes, Corinne and Jane) and the Thomas grandchildren (through Ida Payne's daughter Nanette Payne Thomas) (Id). In the foregoing manner, Ida Payne directed that the trust assets would ultimately be distributed to her great-grandchildren through whichever of her grandchildren had children of their own. Hughes was the last of the grandchildren to survive. At issue is the one-sixth interest which was payable to Hughes during his lifetime.

***7 Barbara Weitekamp Becomes Hughes' Housekeeper and then Bookkeeper**

Hughes resided with his father until William Sr.'s death in 1977 (R. Vol. V, 1025, 1122). Following his father's death, Hughes continued to reside in the same home on Columbine Drive in Springfield (R. Vol. V, 951). A few years earlier, in 1972, Howard and Barbara Weitekamp, along with their seven children, moved to a home across the street from Hughes (R. Vol. V, 1122). Defendants include Barbara's four daughters: Judith Ann Neal, Brenda Bruce, Susan Weitekamp, and Margaret Weitekamp (R. Vol. V, 1070-71, 1151). Margaret testified that Barbara helped Hughes with cleaning his house (R. Vol. V, 1122). Sometime after 1977, Barbara started doing bookkeeping work for Hughes (R. Vol. V, 1035). Barbara testified that she was paid by Hughes (R. Vol. V, 954).

Barbara is Named Agent under Hughes' Power of Attorney

In 1997, Hughes named Barbara as his agent under a power of attorney (R. Vol. VI, 1246-47; Vol. V, 953). This document was prepared by Springfield attorney Fred Hoffmann, who together with two generations of Hoffmanns before him, had represented the Diller family since as far back as the 1920s (R. Vol. V, 955, 1062-63).

Barbara Becomes Hughes' Executor

In April 1999, Hughes, then age 82, was seriously injured in a fire at his home and spent several weeks in the hospital (R. Vol. V, 952-53, 1055). Fred Hoffmann, during a hospital visit to see Hughes, had a confrontation with Barbara about her actions on behalf of Hughes (R. Vol. V, 958-62). Hoffmann testified Barbara told him she was charging Hughes ***8** $130 to $150 per hour to sit with Hughes at the hospital, and he strongly complained to her that such charges were grossly excessive (R. Vol. V, 1056-57). According to Hoffmann, Barbara's rationale was that she did not expect Hughes to survive his injuries and she felt “entitled to it” (R. Vol. V, 1063).

Hoffmann testified that Barbara “wasn't interested in taking any guidance from me” (R. Vol. V, 1057). Hoffmann felt so strongly that Hughes was being financially victimized by Barbara that he took steps to bring it to the court's attention in order to get her power of attorney revoked (R. Vol. V, 1058). However, Hoffmann was then “dismissed” as Hughes's attorney (R. Vol. V, 1054). Hoffmann recalled that Hughes was frail and needed the help Barbara was providing, and “the basic situation was that

my relationship with Barb declined to the point that Hughes had a choice, either fire me or she was going to leave him" (R. Vol. V, 1060).

Barbara replaced Hoffmann as executor of Hughes' will (R. Vol. V, 962-63). Later in 1999, Hughes retained Ed Cunningham to represent him (R. Vol. V, 1034-35).

Barbara's Daughter Judith is Paid to Assist Hughes

Hughes returned home after several weeks in the hospital. Barbara's daughter Judith, and Judith's husband, moved into Hughes' home for about a year and helped with his recuperation (R. Vol. V, 1071-72). Judith received pay during this year from Hughes' insurance company (R. Vol. V, 956, 1191).

***9 Barbara Marries Hughes**

Barbara's husband Howard Weitekamp died on September 28, 1999 (R. Vol. V, 1123). In early 2000, Barbara's friendship with Hughes shifted to something more (Id).

In 2004, Hughes, age 87, married Barbara, age 71, in a hotel room in Naples, Florida (R. Vol. V, 951, 1040, 1126-27). Hughes had never been married before (R. Vol. V, 1127). Ed Cunningham testified that Hughes and Barbara "struck a deal, you know, Hughes was very lonely... she was taking care of him, and he was going to take care of her so to speak" (R. Vol. V, 1039).

Hughes and Barbara lived in a home in Panther Creek subdivision in Springfield (R. Vol. V, 969). In 2005, Hughes and Barbara bought a second home in The Villages, Florida (R. Vol. V, 948-49). Judith remarried in 2002 and moved to the same area in Florida in 2007 (R. Vol. V, 1070, 1073).

Barbara Moves Hughes to a Nursing Home

In May 2010, Hughes fell and injured his head as he was leaving his home in Springfield on an errand with Ed Cunningham (R. Vol. V, 1027). Ed got a towel to stop the bleeding until Barbara returned home (R. Vol. V, 1028). Barbara stated, "when I came home there was blood everywhere in my house" (R. Vol. V, 967). Ed testified this was characteristic of Barbara: "she came in and sort of balled him out for falling, like speaking down to a little child, and she had done that before" (R. Vol. V, 1041).

Barbara moved Hughes to Oak Terrace nursing home upon his release from the hospital on May 28 (R. Vol. V, 967). Barbara acknowledged that Hughes wanted to be at ***10** home, not in an assisted living facility (R. Vol. V, 968). Ed Cunningham testified that Hughes' nieces and nephews expressed concern to him about Hughes being confined to a nursing home when he wanted to be home and could easily afford to be at home [2] (R. Vol. V, 1036). When Cunningham raised this issue with Barbara, she "went ballistic" (R. Vol. V, 1036). This conversation occurred on June 10, 2010 (R. Vol. V, 966, 1044). Cunningham talked to Barbara about getting a driver for Hughes and someone to stay with Hughes in the home, but Barbara "rejected that" (R. Vol. V, 1042).

Cunningham testified that Barbara told him that if she didn't get her way on the nursing home issue, she would walk out on Hughes and the family could take care of him (R. Vol. V, 1043). "She said it a number of times" (R. Vol. V, 1043). Cunningham testified, "Barb dominated Hughes in the last years... you would try and get conversation going with him, and Barb would always be responding to it and answer the questions... There is no question in my mind that she did dominate his life" (R. Vol. V, 1041). Ernie Moody also testified that Barbara manipulated and intimidated Hughes (R. Vol. V, 1186-87). Barbara acknowledged "people can manipulate" Hughes (R. Vol. V, 979).

Barbara Removes Hughes from Illinois

Cunningham testified that he assured Barbara the nieces and nephews were only concerned about Hughes' well-being and living arrangements (R. Vol. V, 1036). Barbara however testified that Cunningham told her "the nieces and nephews wanted ***11** everything...they wanted the houses, and wanted everything" (R. Vol. V, 965). Regardless of what was said, Barbara was worried about people getting Hughes to change his estate plan, and felt threatened by the Diller family (R. Vol. V, 965, 971). Two days later on June 12, Barbara removed Hughes from Oak Terrace, and had Judith fly to Illinois to get Hughes and take him to Florida (R. Vol. V, 967, 972-73). When asked whether she gave any notice to Oak Terrace staff, Barbara stated she told them "what was happening... that they wanted everything" (R. Vol. V, 973). Cunningham testified that Hughes "left the nursing home rather abruptly" (R. Vol. V 1030). Cunningham stated that the sudden move to Florida left the Diller family and Gene Meurer upset because "they didn't know where he was" (R. Vol. V, 1031). Barbara then drove to Florida a few days later (R. Vol. V, 1081).

Hughes stayed with Judith in Florida until Barbara moved him on June 21 to Prestige Manor, an assisted living facility (R. Vol. V, 1080, 1082-83). During this period, Barbara signed a document to delegate her agency under Hughes' power of attorney to Judith, so that Judith could act as Hughes' agent in her absence (R. Vol. V, 1078-79). Hughes stayed at Prestige Manor through July (R. Vol. V, 1085-86). During the latter part of 2010, Barbara paid Judith $2000 per month for helping out with Hughes (R. Vol. V 1088).

Heartland Ag Warns the Diller Family about Barbara's Actions

On July 21, Ernest Moody of Heartland Ag sent an email to the Diller family members alerting them of Barbara's actions and warning that they should go to Florida and attempt to talk to Hughes (R. Vol. VI, 1250). Barbara found out about the email on July 22, from her attorney (R. Vol. V, 977-78). Judith testified that the email made Barbara upset (R. ***12** Vol. V, 1087). Barbara removed Hughes from Prestige Manor the next day, July 23: "He was removed and we took him out" (R. Vol. V, 978).

Barbara's Attorney Terminates Heartland Ag

On July 22, the day Moody's email was received, Barbara's Florida attorney Plappert sent a "Notice of Termination" to Heartland Ag signed by Hughes and by Barbara as power of attorney for Hughes, terminating their 30-year relationship (R. Vol. VI, 1253-54).

Barbara Thwarts Efforts of Hughes' Family to See Him

Alerted by Ernie Moody's July 21 email and alarmed by Hughes' sudden removal from Illinois and their inability to contact him, several of the Diller nieces and nephews went to Florida to attempt to see Hughes. Sherwood Dixon called Barbara on her cell phone on July 25 to try to arrange a visit with Hughes (R. Vol. V, 983). Barbara testified that although she told Sherwood she would get back to him with a time and place, she never did (R. Vol. V, 983). Sherwood tried again repeatedly to contact Barbara, but Barbara stated she did not take any of his calls (R. Vol. V, 984). Barbara testified she was attempting to avoid the Diller family members: "I don't deny it" (R. Vol. V, 982).

Barbara Learns of the Provisions in the Three Diller Trusts

Hughes' nieces and nephews filed this action, originally to appoint a successor trustee, on August 25, 2010 (R. Vol. I, 1). The complaint had a copy of William Sr.'s will attached (R. Vol. I, 9-17). Barbara testified that she was then aware of the terms of the ***13** Franklin Farm trust (R. Vol. V, 988), which leaves the farmland to Hughes' children, if any, or if none, then to Plaintiffs and Diller Ryan, William Sr.'s other descendants. Also in August 2010, Barbara's attorneys Plappert and Rutherford called JP Morgan Chase Bank trust officer Heather Smith and requested copies of the 1949 Diller trust and the 1927 Ida Payne trust (which both contain similar provision for Hughes' descendants, if any), and Ms. Smith mailed copies to each of them (R. Vol. VI, 1257-58).

Barbara and her Attorney Arrange the Adoption of Judith

On September 8, 2010, just two weeks after this action was filed, an adoption petition and consents prepared by Barbara's attorney Plappert were signed for Hughes to adopt Judith in Florida (R. Vol. VI, 1261-67). Hughes was then 94 years of age (R. Vol. V, 1070). Judith, then age 55, had an adult child and a grandchild (R. Vol. V, 1070, 1075). Barbara testified that she first discussed the idea of the adoption with Hughes when "we were driving in the car and we were on our way to our attorney's office" (R. Vol. V, 987). This happened sometime around August 2010 when Barbara received the complaint in this case (Id). Judith testified she first learned of the proposed adoption in August or September 2010, when Barbara and Hughes "had just come from Stanley's [Plappert's] office" (R. Vol. V, 1094, 1101-02).

Barbara testified that at the time the adoption petition was filed, she was aware of the terms of the Franklin Farm trust (R. Vol. V, 988). Barbara attended the adoption hearing, which took place on September 29 and lasted about fifteen minutes (R. Vol. V, 1100, 1102), whereupon the adoption order was entered (R. Vol. VI, 1270-71). No mention was made at ***14** the hearing of this pending Illinois proceeding or the effect the adoption might have on the Diller trusts (R. Vol. V, 1100-01). Mr. Plappert represented both Hughes and Judith (R. Vol. V, 1096).

On November 4, 2010, 36 days after the adoption order was entered, Defendants first informed Plaintiffs (and the trial court) of Judith's adoption, by asserting in a motion filed in this case that the "now concluded" Florida adoption proceeding eliminated Plaintiffs' inheritance interests (R. Vol. I, 113).

Barbara and her Attorneys Thwart Efforts to Depose Hughes

Beginning in December 2010, Plaintiffs attempted to schedule Hughes' deposition. On December 21, the trial court ordered the deposition to be set in February (R. Vol. I, 224). In January 2011, as counsel for Hughes had not committed to a date, the court ordered Hughes' deposition to take place on February 7 (R. Vol. II, 354).

A few days before Hughes' deposition, his counsel moved to cancel it, submitting a doctor's affidavit stating that Hughes "could not participate in the deposition in a meaningful manner" (R. Vol. II, 363-68). In a phone conference on February 3, the court directed the deposition to proceed as scheduled. On February 4, Attorney Hines advised that Hughes was going to resign as trustee and therefore would not appear for his deposition.

On February 6, the day before the deposition was to take place, Hughes was taken to a local hospital (R. Vol. V, 1109). Hughes was discharged from the hospital on February 8, the day after the scheduled deposition (R. Vol. V, 1113).

***15** Despite the doctor's affidavit that was filed on February 3, Margaret testified that she had conversations with Hughes while he was at the hospital on February 6-8, and that Hughes "was able to converse," "always had been able to converse," and that neither she nor Hughes had "any trouble understanding" each other (R. Vol. V, 1129).

Barbara Again Thwarts Efforts of Hughes' Family to Speak to Him

Judith testified that on February 7, 2011, when the depositions of Hughes and Barbara were scheduled, all of her sisters flew down to Florida to "support mom" (R. Vol. V, 1110). Hughes' nephew Diller Ryan, who had traveled to Florida for the scheduled deposition of Hughes, attempted to visit Hughes in the hospital after Hughes did not appear for his deposition. Susan testified that Hughes' relatives "were not supposed to be there" (R. Vol. VI, 1205). She said Diller did not try to force his way into Hughes' room, but "there was enough people there to hold him back if he did" (R. Vol. VI, 1205-06). Present in the room were Barbara's three attorneys, Susan, Brenda, Margaret, Judith and Susan's boyfriend (R. Vol. V, 1206). Barbara acknowledged she tried to get the hospital to place a restriction so that the Diller family members would not be able to contact Hughes there (R. Vol. V, 986).

Barbara and her Attorney Arrange the Adoption of Barbara's Other Daughters

Upon discharge from the hospital in February 2010, Hughes was placed in several assisted living facilities, and never returned home (R. Vol. V, 1112-13, 1128).

Margaret testified that Barbara called her in December 2010 and discussed her being adopted by Hughes (R. Vol. V, 1130-32). This was also the first she learned of Judith's ***16** adoption (R. Vol. V, 1130). Margaret had never heard the word "adoption" in connection with Hughes before December 2010 (R. Vol. V, 1133). Although Margaret was present in Florida with Hughes over the Christmas holiday later in December 2010, she recalled no discussions about her adoption (R. Vol. V, 1136).

Susan also learned of the adoption idea from Barbara (R. Vol. VI, 1194). Brenda first heard about it in late November 2010 (R. Vol. V, 1003). She did not know why she and her other sisters were not adopted at the same time as Judith (R. Vol. V, 1006-07).

On April 6, 2011, a second adoption order was entered for Brenda, Margaret and Susan (R. Vol. VI, 1342-43; Vol. V, 1142-43). Barbara drove her three daughters to the court hearing, stopping at the nursing home to pick up Hughes on the way (R. Vol. V, 1143, 1147). Margaret testified the hearing took about 15 minutes, but she could not recall whether she was asked any questions nor whether she said anything (R. Vol. V, 1144-45). When asked what was said at the hearing, Susan stated, "I don't have a clear vivid picture of that" (R. Vol. VI, 1196). As with Judith's hearing, there was no mention at this hearing of the pending Illinois action or the possible effect the adoptions might have on the three Diller family trusts (R. Vol. V, 1013-14, 1147-48; Vol. VI, 1199-1200). Mr. Plappert represented Hughes and all three sisters (R. Vol. V, 1010). At the time of the hearing, Brenda, Margaret and Susan were all in their 50s (R. Vol. V, 1000, 1121; Vol. VI, 1193). Susan and Brenda have adult children (R. Vol. V, 1001; Vol. VI, 1193).

Although all her sisters were present in Florida for the adoption hearing in April 2011, neither they nor Barbara told Judith about it (R. Vol. V, 1106). Judith did not learn of her sisters' adoptions until after Hughes' death (R. Vol. V, 1103-04, 1106, 1115). Judith ***17** testified she didn't know why Hughes adopted her sisters (R. Vol. V, 1107). Susan testified she has never spoken to Judith about Judith's adoption (R. Vol. VI, 1195). Susan is unaware whether her brothers even know about her adoption, because it "just never came up" in conversation (R. Vol. VI, 1202-03).

Hughes Dies in Florida

Two months after the adoption hearing, Hughes passed away on June 4, 2011 (R. Vol. V, 1111).

Additional Facts Concerning the 63-Acre Tract

The Franklin Farm trust provides that the trustee "shall have the power to purchase additional land adjacent to my farm [so] that the land purchased can be operated in connection with my farm" (R. Vol. I, 9). The trust further provides the trustee may "register property in his name individually... as my trustee shall deem for the best interests of the trust" (R. Vol. I, 12).

In 1992, Hughes purchased a 63-acre tract directly adjacent to the 1453-acre trust acreage, taking title in his name individually (R. Vol. VI, 1274-75). The deed stated that the real estate tax bill was to be sent to "Bank One," the trust's farm manager (Id). Heartland Ag, the successor manager, included this tract in the trust, and for 18 years the Franklin Farm trust was operated as a single 1515-acre property (R. Vol. V, 1169-73, 1185). The 1996 trust farm management agreement reflects that the trust acreage included the 63-acre tract (R. Vol. VI, 1278-80). The 2010 Franklin Farm trust report shows that the trust was paying the real ***18** estate taxes on the 63-acre tract (R. Vol. VI, 1283-1311). On October 28, 2010, a farm tenant termination notice, prepared by Mr. Plappert and signed by Hughes as trustee, was sent to the farm tenant on the Franklin Farm (R. Vol. VI, 1314-16). Attached to the notice is the "William Hughes Diller, Sr. Trust Farm - Legal Description," which describes all 1515 acres, including the 63-acre tract (R. Vol. VI, 1316).

On December 13, 2010, a deed (R. Vol. VI, 1319-23) prepared by attorney Rutherford was recorded to transfer the 63-acre tract into a Florida trust (R. Vol. II, 304-20) of which Barbara is the trustee and primary beneficiary. This trust left over 1000 acres of Hughes' separate Sangamon and Logan County farmland to Barbara and her family (R. Vol. II, 318).

*19 ARGUMENT

I. Summary Judgment Standard

Summary judgment should be allowed when the right of the moving party is clear and free from doubt. *Colvin v. Hobart Brothers*, 156 Ill.2d 166, 169-70 (1993). Summary judgment is proper where the pleadings, depositions, admissions, affidavits and exhibits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Busch v. Graphic Color Corp.*, 169 Ill.2d 325, 333 (1996).

II. The Trial Court's Judgment

The trial court granted summary judgment for Plaintiffs, finding first the adoptions of Barbara's adult daughters did not divest the Diller family of their interests in the three Diller trusts. The court ruled in accordance with *Cross v. Cross*, 177 Ill.App.3d 588 (1st Dist. 1988), that the adoption of an adult solely for the purpose of making her an heir of an ancestor under the terms of a testamentary instrument known and in existence at the time of the adoption is an act of subterfuge that cannot be condoned. The court also ruled in accordance with *Cross* that William Sr. and Ida Payne did not intend for the remainder interests to pass to adopted adults who were never raised in the Diller family, overcoming any statutory presumption.

The court also ruled that Barbara must return the 63-acre tract to the Franklin Farm trust, because such tract had been acquired and held for the benefit of the trust.

*20 III. Summary of Argument

First, the undisputed facts show that the adoptions were done solely to make Barbara's adult daughters “descendants “ under the three trusts, and were a subterfuge to divest the Diller family members of nearly 2000 acres of farmland that had been acquired by the Diller family over the course of 100 years. The *Cross* ruling, refusing to allow such subterfuge adult adoptions to upset established inheritance rights, has remained good law in Illinois for 24 years. *Cross v. Cross*, 177 Ill.App.3d 588 (1st Dist. 1988). The statute governing the inheritance rights of adopted children has never supported such subterfuge adult adoptions, and the Illinois legislature has now codified Cross into that statute. Plaintiffs make these arguments in Section IV below.

Second, the three Diller trusts express a clear intent to exclude adopted adults who were never raised in the Diller family. The restrictions placed on Hughes' income interest were intended to keep the farmland intact for successive generations of the Diller family. If Hughes could simply select by adoption any willing adult to take the remainder interests, then his father and grandmother would have given him a general power of appointment. This argument is made in Section V below.

Third, Barbara Weitekamp was correctly ordered to return the 63-acrre tract to the Franklin Farm trust because the undisputed evidence shows Hughes purchased the tract on behalf of the trust, in accordance with the trust's instructions, and for 18 years consistently treated the tract as part of the Franklin Farm trust. This argument is made in Section VI below.

*21 IV. The Adoptions Do Not Divest Plaintiffs' Remainder Interests.

Regardless of whether the adoptions of Judith, Brenda, Susan, and Margaret are valid in Florida, they are ineffective in Illinois to divest Plaintiffs' remainder interests in the three Diller trusts, because they were undertaken as a subterfuge to divert the remainder interests from William Sr.'s grandchildren (and Ida Payne's great-grandchildren). This is the holding of *Cross v. Cross*, 177 Il.App.3d 588 (1st Dist. 1988), discussed in Section A, below. The undisputed facts in this case show the adoptions were undertaken solely to make Barbara's daughters "descendants" of Hughes under the three Diller family trusts (see Section B, below). *Cross* has never been overruled or challenged in Illinois (see Section C, below). The Illinois statute governing the inheritance rights of adopted children has never supported adoption subterfuge, and indeed, the Illinois legislature has now codified the *Cross* decision into that statute (see Section D, below). Decisions from other states follow *Cross* (see Section E, below).

A. Cross was Correctly Decided on Similar Facts.

Cross involved the will of Mary Cross and the provisions she made for her son David. *Cross v. Cross*, 177 Ill.App.3d 588 (1st Dist. 1988). Mary left her estate in trust with David receiving the income. *Id* at 589. Mary gave David a power of appointment to distribute the trust upon his death to such of Mary's descendants, their spouses, and charities, as David named in his will. *Id.*

For 17 years prior to Mary's death, David had been living with another male, Gilbert Perry. A month after his mother's death, David, age 49, adopted Gilbert, age 36, in Texas. ***22** *Id* at 590. David then promptly made a will appointing the trust principal to Gilbert as one of Mary's "descendants." *Id.* Holding that Gilbert could not inherit Mary's estate, the court stated:

> The adoption of an adult solely for the purpose of making him an heir of an ancestor under the terms of a testamentary instrument known and in existence at the time of the adoption is an act of subterfuge. (Citation omitted) This practice does great violence to the intent and purpose of our adoption laws, and should not be permitted. If there had been no trust, there would undoubtedly have been no adoption.

Id at 591.

In *Cross*, Gilbert argued that his adoption by David was motivated by reasons other than disrupting Mary's testamentary intent. The court found "this argument is not persuasive" when David and Gilbert lived together for 17 years without ever attempting an adoption. *Id* at 592. The court stated, "we cannot condone such a use of the adoption process." *Id* at 591.

B. Like Cross, the Undisputed Facts Here Show an Adoption Subterfuge.

The court in *Cross* found it significant that David and Gilbert had been acquainted for 17 years but the idea of adoption had never come up until David went to see an attorney after his mother's death. Here, Hughes had been acquainted with Barbara and her daughters for over 30 years. He had been married to Barbara for six years. Yet the idea of adoption never came up until (a) Barbara removed Hughes from Springfield and retained Illinois and Florida attorneys in June 2010 (R. Vol. V, 973), and (b) Barbara and her attorneys received copies of the three Diller family trusts in August 2010, revealing that Hughes' interests ***23** ultimately passed to his "descendants" if any (R. Vol. V, 988; Vol. VI, 1258). Judith first heard of the adoption idea when Barbara and Hughes had just come from Mr. Plappert's office (R. Vol. V, 1101) (see, *Matter of Griswold's Estate*, 140 N.J. Super. 35, 61 (1976), where the court noted that the testator's son got the adoption idea from his attorney).

The ink was hardly dry on Judith's adoption decree when Barbara asserted her family's claim to the Diller trusts. Waiting just over 30 days to announce the "now concluded" adoption, Barbara's counsel asserted in a pleading filed in this action on November 4, 2010 that the adoption had eliminated Plaintiffs' remainder interests (R. Vol. I, 113). On December 17, 2010, Mr. Plappert filed a lawsuit on Judith's behalf as the "presumptive lineal heir to the William Hughes Diller, Sr. Trust."[3] It is utterly transparent that these adoptions were undertaken solely for the purpose of making Judith and her sisters "descendants" and divesting the Diller family of their rightful inheritance from their grandfather William Sr. and their great-grandmother Ida Payne.

The trial court correctly noted additional undisputed facts that support its finding. Hughes was 94 when these adoptions took place; Barbara's daughters were all in their 50s, and one of them was herself a grandmother (R. Vol. V, 1000, 1070, 1075, 1121, Vol. VI, 1193). The second adoption occurred less than two months before Hughes died, and after Barbara's attorneys had filed a Florida doctor's affidavit in this proceeding that Hughes "could not participate in [a] deposition in a meaningful manner" (R. Vol. II, 368).

***24** The adoptions occurred following a period of time where Barbara acknowledged she felt threatened by the Diller family members' attempts to contact Hughes (R. Vol. V, 965, 971) and Barbara's abrupt removal of Hughes from Illinois. When Barbara learned that Ernest Moody had suggested the Diller family members try to visit Hughes in Florida, Barbara immediately removed Hughes from Prestige Manor, and the Diller family members were unable to see him (R. Vol. V, 978). Barbara during this time was trying to keep the Diller family away from Hughes, testifying, "I don't deny it" (R. Vol. V, 982). Ed Cunningham testified that during Hughes' last years, "Barb dominated Hughes" (R. Vol. V, 1041).

Like Judith, her three sisters were unaware they were to be adopted until shortly before their adoption proceeding took place. It was Barbara who suggested the idea to Margaret and Susan (R. Vol. V, 1130-32; Vol. VI 1194). Both of the adoption hearings were perfunctory, lasting about 15 minutes (R. Vol. V, 1100, 1144-45), and neither Margaret nor Susan could even recall what was said (R. Vol. V, 1144-45, Vol. VI, 1196). Strangely, although Judith was the only sister who lived in Florida, she was unaware that all of her sisters had come to Florida, and been adopted, until months later (R. Vol. V, 1103-04, 1106, 1115).

All of the present parties were fully engaged in this Illinois proceeding when the two adoption hearings took place. Barbara had filed pleadings and through her counsel argued matters in the trial court in this case, and her same counsel Mr. Plappert represented all of the parties in both adoption proceedings. Yet neither Barbara nor her counsel made any mention of this case to the Florida court in either adoption proceeding (R. Vol. V, 1100-01, ***25** 1013-14, 1147-48).

In view of the undisputed facts in the record, it is clear the adoptions here were undertaken solely for the purpose of making Barbara's daughters "descendants" of Hughes under the three Diller family trusts, which had been established years earlier in 1927, 1949, and 1977. Barbara sought to divest the Diller family members of nearly 2000 acres of family farms in these multi-generational trusts that had been acquired and held by the Diller family over the course of 100 years. The use of the adult adoption process for this purpose, as Cross held, cannot be condoned.

C. Cross has been the Law of Illinois for 24 Years.

Defendants discuss Cross on pages 19-21 of their brief. Cross v. Cross, 177 Ill.App.3d 588 (1st Dist. 1988). Defendants acknowledge on page 20 that Cross found the adult adoption to be a subterfuge and refused to allow the adoption to be used to divest Mary Cross' descendants from her estate. Defendants also acknowledge Cross is frequently cited for this finding.

Indeed, the *Cross* decision has never been questioned by a subsequent Illinois decision. Defendants state at page 20 that no mention was made of Cross by the Illinois Supreme Court in *First National Bank of Chicago v. King,* 165 Ill.2d 533 (1995). But that is because *King* did not involve an adult adoption. As the lower court decision makes clear, *King* involved the adoption of a 14-year-old minor by her stepfather. *King,* 263 Ill.App.3d 813, 816 (1st Dist. 1994). Therefore, the concept of an adult adoption subterfuge was not present in King.

***26** Defendants cite at pages 21-23 *Faville v. Burns,* 2011 IL App (1st) 110335, where on a motion to dismiss the court properly held that the 1997 amendment adding Section 2-4(a) to the adoption statute (755 ILCS 5/2-4) applied only prospectively. As discussed below in Section E, the present case involves 2-4(e) and (f), which express the same rule applied in *Cross. Faville* simply involved the issue of whether 2-4(a) could be retroactively applied. That claim is not even made here. *Faville* does not involve summary judgment findings as in Cross that a particular adoption scheme is a subterfuge, or violates a trust settlor's intent. The court in *Faville* remanded the case for further proceedings.

Defendants cite several other cases, most notably this court's decision in Martin v. Gerdes, 169 Ill.App.3d 386 (4th Dist. 1988), all in support of the argument that various terms such as “per stirpes,” “lawful descendants,” “issue,” and “heirs of the body,” have been found not to overcome the statutory presumption that adopted children are treated the same as natural born children. Defendants do not cite, but see also In re Estate of Roller, 377 Ill.App.3d 572 (4th Dist. 2007). These cases have nothing to do with the issue of an adult adoption being undertaken as a subterfuge, and in Martin and Roller, for example, there was no suggestion that an adult adoption was involved.

There is an adult adoption case decided after Cross, which Defendants do not cite, but it also is consistent with Cross. *In re Estate of Britton,* 279 Ill.App.3d 512 (5th Dist. 1996), involved an adult adoptee who had been raised by his adopting parent since he was 3 years old. In that case, the court properly held the adoptee and his children could inherit from the adopting parent's kindred. Clearly, no issue of subterfuge is present where the adopted child has been raised in the family from a young age.

***27 D. The Illinois Statute Has Never Supported Adoption Subterfuge.**

Section 2-4 of the Probate Act covers the inheritance rights of adopted children. Presently, the law provides that an adult adoptee, who never resided with the adopting parent while a minor, is “not a descendant of the adopting parent for the purposes of inheriting from the lineal or collateral kindred of the adopting parent.” 755 ILCS 5/2-4(a). Under this statute, Barbara's daughters would have no inheritance rights in the Diller trusts. None of them lived with Hughes while a minor and none of them were adopted until they were in their 50s. This provision was added to the statute in 1997 and is effective as to all instruments executed in 1998 and thereafter. [4]

For instruments executed prior to 1998, the statute provides in Section 2-4(e) and (f) that the former rule applies, which was that “an adopted child is deemed a child born to the adopting parent unless the contrary intent is demonstrated by the terms of the instrument by clear and convincing evidence.” 755 ILCS 5/2-4(e) and (f). This is the statutory language applicable to the three Diller trusts, which were executed in 1971, 1949 and 1927. This is also the statutory language which was applicable in the 1988 *Cross* case, which involved an instrument executed in 1978. *Cross v. Cross,* 177 Ill.App.3d 588 (1st Dist. 1988). Indeed, the 1997 amendment was enacted specifically to codify the *Cross* decision, as noted in the transcript of the daily Senate debates when the amendment came up for final reading on May 13, 1997:

> SENATOR DILLARD: Thank you, Madam President and Ladies and Gentlemen of the Senate. House Bill 1186 amends the Probate Act. It is a ***28** bill suggested by the Chicago Bar Association, and it provides that an adopted child who is adopted after attaining the age of eighteen and who has never lived or resided with the adopting parent before obtaining the -- that age is a child but is not a descendant of the adopting parent for purposes of inheriting from an adopting parent's kindred. It comes from, and codifies, a First District court case, Cross versus Cross... I would appreciate a favorable roll call. I know of no opposition.

Transcript of Senate debate on H.B. 1186, May 13, 1997, pg. 86.

Section 2-4(a) is mandatory as to instruments executed after 1997, but it also confirms the correctness of Cross which applied the former statute that is applicable here. When a common law decision is codified, “the common law remains not only good law, but a valuable touchstone for interpreting the statute... [if it is intended] for legislation to change the interpretation of a judicially created concept, it makes that intent specific.” *Costar Group, Inc. v. Loopnet, Inc.,* 373 F.3d 544, 553 (4th Cir. 2004), citing *Midlantic Nat'l Bank v. NJ. Dep ‘t of Envtl. Prot.,* 474 U.S. 494 (1986). Likewise, in *Carle Foundation v. III. Dept. of Revenue,* 396 Ill.App.3d 329, 342 (4th Dist. 2009), this court quoted the following with approval:

> Where statutes are enacted after judicial opinions are published, it must be presumed that the legislature acted with knowledge of the prevailing case law... It is a general rule in the construction of statutes, that they are not to be presumed to alter the common law further than they expressly declare. Statutes are to be

> construed in reference to the principles of the common law; and it is not to be presumed that the legislature intends to make any innovation upon the common law further than the case absolutely requires.

Obviously, the Illinois legislature did not intend to alter or overrule Cross by codifying it. Rather, the legislature wanted to ensure going forward that no decision would reach a contrary result.

***29** The public policy of a state is reflected in its constitution, statutes, and judicial decisions. *Schultz v. III. Farmers Ins. Co.*, 237 I11.2d 391, 400 (2010). Public policy has been defined as the customs, morals, and notions of justice which may prevail in a state. *Marchlik v. Coronet Ins. Co.*, 40 I11.2d 327, 332 (1968). *Cross* expresses the public policy of Illinois that a life tenant should not be allowed, through an adult adoption, to divert the remainder, and thereby divest the donor's intended beneficiaries of their inheritance. The Illinois legislature has now confirmed such public policy, in codifying Cross.

Defendants argue that the adoption statute creates a presumption that an adult adoptee is a descendant, and the three Diller family trusts express no clear contrary intent to overcome such presumption. Defendants assert at page 13 that the ruling in this case ignores the statute. But it is the public policy of Illinois that such a statutory presumption will not be applied in cases where the adoption has been undertaken as a subterfuge.

Other jurisdictions with similar statutes follow this same rule. *See In re Nowels Estate*, 128 Mich. App. 174 (1983), where the trust settlor's daughter, a life tenant, tried to adopt her adult cousin to defeat the gift over to her nieces and nephews, the settlor's grandchildren. The court stated at 178: “this Court is convinced that it should not enforce the statutory presumption where there has been an **abuse** of the adoption process.” *See also, Matter of Griswold's Estate*, 140 N.J. Super 35, 41 (1976), where the court found that an adult adoption by a testator's son (who had a life estate) to prevent the estate from passing to the son's nieces and nephews was “an **abuse** of the adoption process.” The court stated that enforcement of a statutory adoption presumption without consideration of the circumstances surrounding the adoption would be “an open invitation” to fraud. *Id*, at 55.

***30** Plaintiffs' position is not contrary to *Martin v Gerdes*, 169 I11.App.3d 386 (4th Dist. 1988), which Defendants cite at page 19 to argue that a court may not consider anything other than the language within the four corners of a will to determine a testator's intent. In considering evidence that an adult adoption has been undertaken as a subterfuge, courts are not construing specific terms in a will or trust. Indeed, evidence which makes clear an adult adoption has been undertaken as a subterfuge often arises long after the testator or settlor has died, as in this case.

E. Other Jurisdictions Follow Cross.

Just as in *Cross*, cases from other jurisdictions have refused to permit an adult adoption to be used to defeat a testator's intent, where there is no parent-minor child relationship. As one commentator has noted, “adult adoptions are frequently motivated by a desire to manipulate succession... these attempts to redirect the original donor's bounty through adoption invariably take place long after the donor has died.” *Relatives by Blood, Adoption, and Association*, 37 Vand.L.Rev. 711, 751 (1984).

Iowa. In *First National Bank of Dubuque v. Mackey*, 338 N.W.2d 361 (Ia. 1983), Viola James created a trust for her daughter Mary for life, then to Mary's descendants. If Mary had no descendants, the trust assets would pass to Mary's nieces and nephews, just as in the present case. Mary had no descendants, so after her mother died, she adopted her adult roommate Evelyn. The Iowa Supreme Court held that Evelyn could not inherit and stated the case invoked the “conscious use of adoption as a means of upsetting the transferor's normal expectation. The adoption of adults is susceptible to **abuse** as a means of affecting ***31** succession.” *Id* at 364. The court found, at 365: “A transferor's normal expectation, moreover, is that an adopter and an adopted adult will have had an in loco parentis relationship.”

Kentucky. Alfred Minary had a life estate under his mother's will. The remainder went to his children but he had no children, so he adopted his wife. The court held that “when an adult is adopted for the sole purpose of making him or her an heir... under the

terms of a testamentary instrument known and in existence at the time of the adoption... this practice [is] an act of subterfuge which in effect thwarts the intent of the ancestor... and cheats the rightful heirs." *Minary v. Citizens Fidelity Bank & Trust Co.*, 419 S.W.2d 340, 343 (Ky. App. 1967).

Ohio. The Supreme Court of Ohio in *Solomon v. Central Trust Co.*, 63 Ohio St.3d 35, 41-42 (1992), acknowledged, citing *Cross*, that other jurisdictions consistently "prohibit adoptions in unusual circumstances where it would defeat the intent of the testator" such as where no "child-foster parent or child-stepparent relationship [was] established during the adoptee's minority."

New Jersey. As noted above in Section D, a New Jersey court found that an adoption by a testator's son (who had a life estate) to prevent the estate from passing to his nieces and nephews was "an **abuse** of the adoption process." *Matter of Griswold's Estate*, 140 N.J. Super 35, 41 (1976). The court noted that while the testator might not have drawn a distinction between a natural child and an adopted child taken into the home as a child and reared as part of the family, he would have "strongly disapproved" of "diverting the remainder, which would otherwise pass to the Griswold family, by adopting an adult." *Id.* ***32** at 47. "The adoption of children and the adoption of adults involve quite different considerations." *Id* at 51. Allowing the diversion of a remainder interest to an adult adoptee, the court found, would be "an open invitation to the diversion of remainders, treasure hunts and even the sale of filiations to obtain the benefit of remainders in trusts established many years ago." *Id* at 55.

Pennsylvannia. The Supreme Court of Pennsylvania held that the rule of construction treating adopted children the same as natural children "does not apply where adoptees were adults at the time of adoption," and allowing a life tenant to use an adult adoption to prevent a gift over in default of "children" amounts to "rewrit[ing] the testator's will." *Estate of Tafel*, 449 Pa. 442, 454 (1972).

Michigan. As noted above in Section D, a Michigan court held that the statutory presumption that "child" and similar terms include adopted persons should not be enforced "where there has been an **abuse** of the adoption process and where the end result would violate the settlor' s probable intent and normal expectations." *In re Nowels Estate*, 128 Mich. App. 174, 178 (1983).

***33 V. The Diller Trusts Express a Clear Intent to Exclude Adopted Adults.**

Entirely aside from the undisputed evidence of an adoption subterfuge in this case, the statutory presumption in favor of adoptees' inheritance rights is overcome where the instrument expresses a clear contrary intent. In construing a will, the court must try to seek and effectuate the intent of the testator. *Daly v. Daly*, 299 Ill. 268, 272 (1921).

In *Cross*, the court reasoned that if Mary had intended that David have complete discretion to appoint the remainder to anyone he chose, the words "my descendants" would be mere surplusage. *Cross v. Cross*, 177 Ill.App.3d 588, 590 (1st Dist. 1988). The will demonstrated that Mary intended that her estate remain in her family unless they chose to give it to charity. *Id.* The court found that to permit David to choose by adoption who would take Mary's estate under the trust, when she clearly never contemplated such a result, would require the court to completely disregard the intent of the trust language. *Id* at 591.

The *Cross* reasoning applies with equal force to the three Diller family trusts. If Hughes could simply select by adoption any adult he wished to take the remainder interests, and conclude the matter with nothing more than a 15-minute hearing in Florida, William Sr. and Ida Payne would have simply given the farms outright to Hughes. Defendants' argument requires the court to write into the three Diller trusts an unrestricted general power of appointment, which is not there. Defendants' position would defeat the multi-generational family estate plan so meticulously laid out in these trusts.

The Franklin Farm trust is specific in designating how the trust assets will pass upon Hughes' death. Provision is made if Hughes "shall leave him surviving any child or children or descendants thereof." The trust continues "until the youngest of his children attains ***34** majority." The trust makes an alternative provision "if there be no descendants of my son or such descendants die before termination" so that the assets pass to William Sr.'s other grandchildren. In ascertaining the probable intent of William

Sr., there is no question that an adopted adult was not intended to take. Like *Cross,* had William Sr. intended that beneficiaries could, by adoption, make anyone a "child," his use of "descendants," "child," and "children" would be surplusage.

In addition, William Sr.'s will shows a clear intent to pass the farm assets on to successive generations of the Diller family. By referring to children of Hughes who "attain majority," the will evinces two intentions: (1) that "children," whether natural or adopted, means minors raised by Hughes to majority, and (2) that "children," whether natural or adopted, means people raised within the Diller family. Clearly, under William Sr.'s will, an adopted adult, who was never Hughes' child as a minor, cannot be a beneficiary because such person did not "attain majority" as Hughes' child. For an adult adoptee to take would require re-writing the will to read, "If at my son's death my son has an adopted child who attained majority prior to becoming my son's child..."

In *Matter of Griswold's Estate,* 140 N.J. Super 35, 52-53 (1976), the court noted that adopted minor children "most likely would be closer to family traditions, history and affections than would adult adoptees" and in such cases, where the adopting parent has taken on a duty of support in raising the child, "it can then be ascertained that the motive of the adopter is not that of cutting down a remainder which has been left to children." But an adult adoption presents the life tenant the opportunity to defeat a remainder interest "simply by adoption of willing adults." *Id* at 53. The court noted such could not be the testator's ***35** probable intent, or else he would have simply given his life tenant an unrestricted power of appointment. *Id.*

See also, *In re Nowels Estate,* 128 Mich. App. 174, 180 *fn.* 2 (1983), where the court notes that the "differing motivations and considerations surrounding adult adoptions as opposed to child adoptions are relevant to our determination of the settlor's probable intent."

The same arguments apply to the 1949 trust. This too is multi-generational trust where the clear intention is to keep assets in the family line and not allow the immediate generation with the lifetime interests to pass the land outside of the family. In the 1949 trust, William Sr. provided that "no beneficiary shall have the power to assign [the assets]" and "no beneficiary may convey [the assets]" (R. Vol. VI, 1230). The trustee had the power of sale, but was required to reinvest the proceeds "preferably in other farm lands." All this was to ensure his farms would pass down to the ensuing Diller generations.

Similarly, Ida Payne provided that her trust would not end until all of her named grandchildren had died, and none of them "shall have any power to sell" (R. Vol. VI, 1240). Ida Payne further provided that if by operation of law, such as bankruptcy, a beneficiary's income was diverted to "some other person" than the beneficiary she named, that interest "shall immediately cease and determine... as if such beneficiary... should have died."

In the present trusts, Hughes had only a lifetime interest. He was not given the right to sell his interest, nor to bequeath it, nor to appoint to whom it would pass upon his death. To allow Hughes' adoption of an adult to cut off the rightful inheritance of the Diller family members defeats the clear intent to restrict the rights of the life tenants in these trusts.

***36 VI. Hughes' Conveyance of the 63-Acre Tract was a Breach of Duty as Trustee.**

Under Illinois law, a fiduciary may not "place himself in a position in which his personal interests conflict with those of the trust's beneficiaries." *Childs v. National Bank of Austin,* 658 F.2d 487, 490 (7th Cir. 1981). A trustee's fiduciary duty is one of "total loyalty, excluding all self-interest." *Giagnorio v. Emmett C. Torkelson Trust,* 292 Ill.App.3d 318, 325 (2nd Dist. 1997). This duty applies "irrespective of the trustee's good or bad faith." *Laubner v. JP Morgan Chase Bank,* 386 Ill.App.3d 457, 464 (4th Dist. 2008).

In 1992, Hughes purchased a 63-acre tract of land directly adjacent to the 1453-acre Franklin farm (R. Vol. VI, 1274-75). William Sr. in his will had given Hughes as trustee "the power to purchase additional land adjacent to my farm [so] that the land purchased can be operated in connection with my farm" (R. Vol. VI, 1219). There is no question that had Hughes usurped that trust opportunity for himself, he would have breached his fiduciary duty of "total loyalty, excluding all self-interest." In *Matter of Estate of Hawley,* 183 Ill.App.3d 107 (5th Dist. 1989), the court made that very ruling in connection with a farm purchase.

The trial court found that while the purchase of the farmland was within the trustee's broad powers, when these powers were used in a way such that the trustee and his family would be materially benefitted, the trustee's fiduciary duty was compromised. *Id.* at 109. The appellate court affirmed, stating that while there were no allegations the trustee had acted in bad faith, "the duty of a trustee is such that it will suffer not the remotest possibility of a conflict of interest, nor the faintest appearance of impropriety."*Id* at 110. See also, *Bogert, Trusts and Trustees,* 2d Rev.Ed., Sec. 543(R): "It would seem elementary that a trustee who has a duty to purchase property for the trust but instead buys for himself and with his own funds, is ***37** guilty of disloyalty." Thus, it is clear that Hughes could not have acquired the 63-acre tract for himself, as Defendants suggest.

The undisputed facts show Hughes did not attempt to purchase the 63-acre tract for himself. Rather, he purchased the 63-acre tract on behalf of the trust, in accordance with his father's direction. This is apparent not only because to do otherwise would have been a breach of his duty, but also from the fact that upon purchasing the tract, Hughes added it to the trust operation which was managed by Gene Meurer. Hughes noted on his purchase deed that he wanted the real estate taxes billed to Bank One, which was the trust farm manager (R. Vol. VI, 1274-75). The trust farm management agreement was thereafter amended to cover all 1515 acres (R. Vol. VI, 1278-80). There is no dispute that for the next 18 years, Hughes treated this tract as part of the Franklin farm trust. The 2010 Franklin Farm trust report shows that the trust was paying the real estate taxes on all of the 1515 acres, including the 63-acre tract (R. Vol. VI, 1283-1311). And when Hughes set up his revocable trust (R. Vol. VI, 1326-39) in July 2010, neither he nor his attorneys thought to include the 63-acre tract; that was only done months later in November 2010, after Barbara and her attorneys learned that this tract was nominally titled in Hughes' name. [5]

Defendants argue that Hughes acquired the 63-acre for himself and that the trust countenanced such a conflict of interest. The will permits the trustee to "register property in his name individually... as my trustee shall deem for the best interests of the trust" (R. ***38** Vol. I 12). This provision is not a waiver of the trustee's fiduciary duties, as Defendants suggest. Rather, this is a standard provision, and indeed is applicable to all Illinois trusts under 760 ILCS 5/6. Even the Florida trust Mr. Plappert prepared for Hughes in July 2010 contains this universal provision: "the Trustee... shall have the following powers... to hold... trust property... in the Trustee's own name" (R. Vol. VI, 1332, Section 5.01(4)). Hughes' actions, in holding trust property nominally in his own name but for the benefit of the trust, were completely consistent with his father's directions and his fiduciary duties as trustee.

Nothing about this arrangement changed for 18 years, until (a) Barbara removed Hughes to Florida in June 2010, (b) Barbara retained attorneys to represent her interests, (c) Barbara became aware of the terms of the Franklin Farm trust in late August 2010, and (d) Mr. Plappert obtained titlework on the Franklin Farm sometime after August 25, 2010. [6] It was only upon Barbara and her attorney learning that the 63-acre tract was nominally titled in Hughes' name that Barbara's attorneys by letter dated September 8, 2010 first asserted the personal claim of Hughes to the 63 acres (R. Vol. I, 60). Only then did Barbara's attorneys prepare a deed (R. Vol. VI, 1319-23) for Hughes to transfer the 63-acre tract into his Florida trust (R. Vol. VI, 1326-39), of which Barbara was trustee and beneficiary. Notably, when Mr. Plappert set up Hughes' Florida trust in July 2010, he did not include the 63-acre tract. It does not matter whether Hughes decided in September 2010 to change his position, or more likely, his position was changed for him by Barbara. As trustee, Hughes did not have ***39** the legal right to assert individual ownership over an asset he had purchased for the trust and had treated as part of the trust for 18 years.

The trial court had jurisdiction and authority to impose a constructive trust on the 63-acre tract. *Ridgely v. Central Pipe Line Co.*, 409 Ill. 46, 53-54 (1951) (constructive trust may be raised whenever a fiduciary duty is **abused**); *White Gates Skeet Club, Inc. v. Lightfine*, 276 Ill.App.3d 537, 541 (2nd Dist. 1995) (courts are "inveterate and uncompromising in application of the constructive trust remedy to fiduciaries who have usurped [trust] opportunities"). The trial court correctly compelled Barbara, as trustee of Hughes' Florida trust, to reconvey the 63-acre tract. Bevans v. Murray, 251 Ill. 603, 624 (1911); *Jones v. Hodges*, 2 Ill.App.2d 509, 519 (3rd Dist. 1954).

VII. Conclusion

For the foregoing reasons, Plaintiffs request the Court affirm the trial court's judgment.

Footnotes

1 A copy of William Sr.'s 9-page Will is found at several locations in the record, but all citations herein are to the copy attached to the Complaint as several of the copies at other locations in the record are missing some pages.

2 Hughes then owned over 1000 acres of farmland of his own in addition to his interests in the Diller trusts (R. Vol. V, 989).

3 Mr. Plappert filed suit in Florida federal court on behalf of Hughes, Barbara and Judith against Heartland Ag, Ernest Moody and Gene Meurer, seeking damages for alleged breach of contract, breach of fiduciary duty, negligence, tortious interference with contract, and **elderly** financial **abuse** (R. Vol. VI, 1346-Vol. VII, 1441).

4 Plaintiffs do not suggest this section should be retroactively applied to the Diller trusts. As noted above in Section C, the court rejected such an argument in *Faville v. Burns.*

5 Defendants incorrectly state at page 25 that this deed is dated July 17, 2010 and the conveyance occurred on July 28, 2010. The deed is dated November 17, 2010 and was recorded December 13, 2010.

6 The titlework (R. Vol. VII, 1444-49) is not dated, but it states that the 2009 taxes were fully paid, and the 2010 trust farm report (R. Vol. VI, 1302-03) shows that those taxes were not fully paid until August 25, 2010.

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