

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

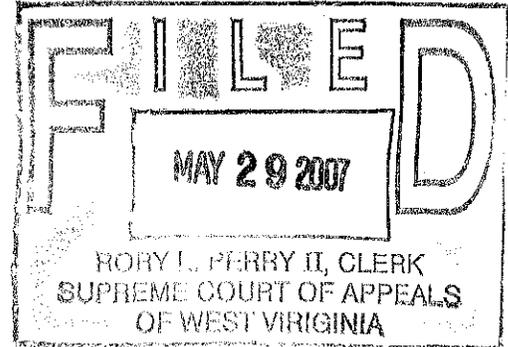
NANCY B. PARKER, TRUSTEE OF  
THE HARTFORD E. BEALER FOUNDATION,

*Appellee.*

Civil Action No: 03-C-89  
Circuit Court of Hampshire County

THE ESTATE OF HARTFORD E. BEALER, by  
U.S. TRUST COMPANY OF FLORIDA S.B.,  
as Executor of the Estate of Hartford E. Bealer and  
U.S. TRUST COMPANY OF FLORIDA S.B., as Trustee  
of the Hartford E. Bealer Amended and  
Restated Declaration of Trust, SALLY B. KIRCHIRO,  
Trustee, and KATHLEEN K. STONE,

*Appellants,*



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BRIEF OF APPELLEE

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*Appellants,*

**BRIEF OF APPELLEE**

COMES NOW, the Appellee, Nancy B. Parker, Trustee of the Hartford E. Bealer Foundation, by counsel, Trump & Trump L.C., in responsive opposition to the Appellants' brief on Appeal and respectfully argues as follows:

**I. NATURE OF PROCEEDING AND RULING IN LOWER COURT**

This action was brought in the Circuit Court of Hampshire County, West Virginia by Nancy B. Parker, Trustee of the Hartford E. Bealer Foundation, on or about the 28<sup>th</sup> day of August, 2003. On the 2<sup>nd</sup> day of June, 2006, the Circuit Court of Hampshire County, West Virginia granted summary judgment in favor of the Appellee. The ruling below is as follows:

“By granting the Plaintiff’s Motion for Summary Judgment, this Court ruled that the Foundation was never lawfully revoked and remained in tact when Mr. Bealer, as sole Trustee, breached the Foundation instrument by deeding the Foundation’s asset, the farm,

back to himself and therefore found that the farm rightfully belongs to the Foundation and not to the Bealer estate.”

## II. STATEMENT OF FACTS

On April 27, 2000, Hartford E. Bealer as Settlor, established the Hartford E. Bealer Foundation, a charitable *inter vivos* trust. On May 3, 2000, Bealer, by deed, conveyed 277.42 acres of real estate to Bealer and Ellis J. Parker as Co-Trustees of Foundation. The real estate is situated in Capon Bridge, Hampshire County, West Virginia, being more particularly described in the Deed of conveyance made of record in the Office of the Clerk of the County Commission of Hampshire County, West Virginia in Deed Book 399 at page 292. In accordance with the declaration of consideration, Bealer paid no transfer tax on the conveyance as the deed was “in the nature of a gift and transfer to a voluntary, charitable, non-profit corporation.” *See* Deed, Exhibit “B” to Plaintiff’s Motion for Summary Judgment.

Bealer funded the Foundation by and through the Hampshire County acreage, an insurance policy for the trust issued by Farmer’s and Mechanic’s, and a bank account opened and established at the Bank of Romney. *See* Statements, Exhibits “C” and “D” to Plaintiff’s Motion for Summary Judgment.

On June 16, 2000, the Internal Revenue Service recognized the Foundation as a charitable organization under § 501(c)(3) of the Internal Revenue Code and as a private foundation under § 509 (a) of the Internal Revenue Service Code. Said recognition by the Internal Revenue Service provided certain tax exemptions to the Foundation.

In September 2000, the Foundation was continuing to explore preservation options for the Foundation property. The Potomac Conservancy and Cacapon and Lost Rivers Land Trust were

contacted regarding the conveyance of conservation easements to preserve the property. Through the proposed preservation activities of the Bealer Foundation, generations of West Virginians as well as the Potomac Conservancy and Cacapon Lost Rivers Land Trust would be benefitted.

On November 30, 2000, Bealer removed Ellis J. Parker as co-trustee of the Foundation. Subsequent to the removal of Ellis J. Parker as co-trustee, Bealer took no further action to appoint a replacement trustee and remained as the sole trustee of the Foundation until his death. In hind sight, the removal of the co-trustee was required to ensure that there was no impediment to Bealer's removal of the real estate from the Foundation's trust corpus through his contemplated act of self-dealing.

On December 11, 2000, just ten (10) days after the removal of Ellis J. Parker, as co-trustee, Bealer, acting as sole trustee, conveyed the 277.42 acres back from the Foundation to himself, in his individual capacity, without consideration. The transfer was by Deed made of record in the Office of the Clerk of the County Commission of Hampshire County, West Virginia in Deed Book 403 at page 435. (Again, the reason Bealer chose to use a different attorney to prepare and record the deed transferring the property out of the Foundation is obvious. An attorney with knowledge of the trust instrument would know it was irrevocable and know of the prohibition against self-dealing.)

Among others, the act of conveyance violated Paragraph 2.2 of the Foundation. Paragraph 2.2 of the Foundation reads in part:

2.2 Restrictions on Activities: The Trustee is prohibited from: (1) engaging in any act of self-dealing as defined in Code Section 4941(d);...

On January 9, 2003, Bealer died. The Foundation named Nancy B. Parker and Sally B. Kirchiro as successor trustees. This was the first point in time that Nancy Parker became aware of

the unlawful transfer from the Foundation and the first opportunity for anyone within the Foundation to challenge the transfer.

The Appellants want to blur the lines between this litigation and the probate proceedings now pending in Florida. It is true that Nancy Parker, in her individual capacity, is a party to a probate proceeding **initiated by the executor** of Bealer's estate in Florida. The probate court is examining some Seven Million Dollars (\$7,000,000.00) of alleged gifting to grandchildren in the two (2) years immediately prior to Bealer's death. Bealer went to Florida to temporarily reside with a grandchild in November of 2000, while recovering from cancer and other infirmities. Also, being explored by another judicial body, is Bealer's financing of the sale of his Chevy Chase Maryland home to Kathlene Stone for less than its assessed value after it was placed into a Qualified Personal Residence Trust.

Both Nancy Parker and Sally Kirchiro asked the executor to look into the validity of portions of these gifts and transfers. Allegations of undue influence and the like are indeed pending.

Bealer was a frail man and in declining health. He required assistance in grooming, bathing, eating and ambulating. *See* Walker Deposition pg. 56-59, 106. Was Nancy Parker upset by these discoveries? Naturally, as would any daughter who learned their father had been cheated and stripped of his wealth in his last years.

But, this action is not about challenges to Bealer's Will or his other diverse Trusts. This action is about a valid Irrevocable *Inter Vivos* Charitable Foundation which was intended to serve as a vehicle through which 277.42 acres of river front property would be preserved from development. Through this action Nancy Parker, as Trustee, has nothing personal to gain. Nancy Parker, as Trustee, ensures only that the Foundation's purpose and her Father's hopes are fulfilled.

### III. PROCEDURAL POSTURE, RULING BELOW AND STANDARD OF REVIEW

On August 28, 2003, Nancy B. Parker, as a successor trustee of the Foundation, filed her Complaint. The Estate of Hartford Bealer and U.S. Trust Company of Florida, S.B., filed timely answers on or about November 6, 2003. On May 12, 2004, the Estate of Hartford Bealer and U.S. Trust Company of Florida, S.B., filed a Motion to Dismiss. On September 22, 2004, the court below denied the motion and found service of process had been effectuated on Sally Kirchiro and Kathleen Stone and that they would be bound by the findings and rulings of the court.

On June 2, 2006, the Circuit Court of Hampshire County, West Virginia entered an Order granting the Appellee's Motion for Summary Judgment. Said Order set forth specific Findings of Fact and Conclusions of Law, including (1) Florida law applies to the Substantive Issues; (2) the Circuit Court of Hampshire County has jurisdiction over the matter; (3) the Foundation was a valid trust; (4) the Foundation instrument governs the actions of trustees; and (5) no grounds have been established to void or revoke the Foundation. The standard of review for a Circuit Court's entry of summary judgment is well established. The Circuit Court's entry of summary judgment is reviewed *de novo*. See Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994). A summary judgment should be granted when it is clear there is not genuine issue of fact to be tried. See Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994); Fayette County National Bank v. Lilly, 199 W.Va. 349, 484 S.E.2d 232 (1997).

In Hanlon v. Chambers, 464 S.E.2d 741, 195 W.Va. 99 (1995), this Court observed that:

"To be sure, summary judgment has a special niche in civil litigation. Its role is to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether a trial is actually required. The device allows courts and litigants to avoid full blown trials in unwinnable cases, thus

conserving the parties' time and money and permitting courts to husband scarce judicial resources.”

It has been long established by this Court that “an order granting summary judgment engenders plenary review. This Court may consider all the facts contained in a summary judgment record.” See Haga v. King Coal Chevrolet Co., 151 W.Va. 125, 150 S.E.2d 599 (1966). See also Hines v. Massachusetts Mut. Life Ins. Co., 43 F.3d 207, 209 (5th Cir.1995). This Court may affirm a Circuit Court's decision on any adequate ground even if it is other than the one on which the circuit court actually relied. Williams v. Precision Coil Inc., 194 W.Va. 52, 459 S.E.2d 329 (1995) (quoting) Parks v. City of Warner Robins, Ga., 43 F.3d 609 (11th Cir.1995); Bolden v. PRC Inc., 43 F.3d 545 (10th Cir.1994).

#### **IV. RESPONSIVE ARGUMENT**

##### **A. THE BEALER FOUNDATION IS A VIABLE AND IRREVOCABLE TRUST**

##### **1. NO GENUINE ISSUE OF MISTAKE IN THE EXECUTION OF THE FOUNDATION EXISTED FOR CONSIDERATION BY A TRIER OF FACT**

In the present matter, the express provisions of the deed conveying the 277.42 acres from Bealer, individually, to the Foundation, unequivocally verify the conveyance as a gift and transfer to a voluntary, charitable, non-profit *inter vivos* trust. The Deed was duly and properly recorded in the Office of the Clerk of the County Commission of Hampshire County, West Virginia in Deed Book 399 at page 292.

As Trustees of The Foundation, Bealer and Ellis J. Parker accepted the acreage as a gift, and took steps to secure tax exempt status for the Foundation, and secured a hazard insurance policy covering the acreage and the improvements thereon. Upon transfer of the acreage from Bealer,

individually, to the Foundation, a gift *inter vivos* was accomplished.

Recognizing the irrevocable and binding nature of the deed gifting the 277.42 acres to the Foundation and the trust instrument's prohibitions against self dealing and/or the gifting of any asset to a noncharitable entity, the Appellants were left with no alternative but to seek to void the entire trust from inception in order to excuse the reconveyance of the 277.42 acres back to Bealer individually.

The Appellants argue that the Foundation was a "mistake" and thus under §737.206 of the Florida Code, the Foundation is void from inception. The Appellant's application of this statute is overly broad, as it is only a mistake in the execution of a trust that is addressed by the statute.

Section 737.206 of the Florida Code as first passed by the Florida legislature read:

*A trust is void if the execution is procured by fraud, duress, mistake, or undue influence. Any part of the trust is void if so procured, but the remainder of the trust not so procured is valid if it is not invalid for other reasons. An action to contest the validity of all or part of a trust may not be commenced until the trust becomes irrevocable.*

FLA. STAT. § 737.206, 1992 Act (emphasis added).

In other words, the legislature, by statute, gave a right or remedy to persons aggrieved by a trust, the opportunity to set aside that portion of the trust signed under fraud, duress, undue influence or mistake. Such an action could only be brought after the trust became irrevocable. In 2000, the legislature amended the statute to remove the requirement that the trust be irrevocable before suit was initiated, leaving the statute as it appears today. It now reads:

*A trust is void if the execution is procured by fraud, duress, mistake, or undue influence. Any part of the trust is void if so procured, but*

*the remainder of the trust not so procured is valid if it is not invalid for other reasons.*

FLA. STAT. § 737.206, 2000 Act (emphasis added).

Effective July 1, 2007, the entire statute has been repealed by an act of the 2006 legislature. When a remedy is statutory, the legislature can abrogate that right as easily as it was granted. "When the statute is repealed, the right or remedy created by that statute falls with it". Yaffee v. Int'l Co., 80 So. 2d 910, 912 (Fla. 1955); Patchen v. Florida Dep't of Agriculture and Consumer Services, 906 So. 2d 1005 (Fla. 2005).

Even if the statute remained a viable one, its scope and application are limited to a trust's execution. For example, in the case of Fitzgerald v. Terry, 190 Okla. 310, 123 P2d 683 (1942), a mistake in the execution of a trust occurred when the settlor mistakenly signed a trust instrument believing it to be his last will and testament. Similarly, when the trust instrument's content was not disclosed to the settlor by the settlor's attorney (who had named herself as Trustee and further failed to properly inform the client of the substantive consequences of the same), the court set the trust aside based upon a special rule applicable to the execution of contracts. Greene v. Greene, 56 NY2d 86, 436 N.E.2d 496 (1982).

In this instance, however, there is no mistake in the execution of the trust instrument by Bealer. Bealer knew he was signing an *inter vivos* trust instrument. Bealer asked for the Trust document creating the foundation to be drafted by his Florida attorneys:

- Q. Were there specific correspondence which addressed the Hartford E. Bealer Foundation?
- A. All those correspondence dealt with the Hartford E. Bealer Foundation, and then she - - Jonna Brown brought to my attention that the Foundation was, initially, when they met with Mr. Bealer, that it was just going to be part of his testamentary plan, not to

take effect until his demise and then subsequently, very shortly thereafter the - - he requested that the Foundation be established during his lifetime.

Q. Did she tell you why he made that request or changed his mind?

A. She said that he had decided to move – decided to establish the foundation now.

*See* Deposition of Trent S. Kiziah, pg. 140, ln. 13 - 25; pg. 141, ln. 1-2.

His knowledge of the documents purpose and immediate effect is further evidenced by the fact that he thereafter signed a deed of conveyance gifting the 277.42 acres in Hampshire County to the Foundation in order to fulfill its charitable and preservation purpose.

Bealer was the Foundation's settlor and was a well educated and knowledgeable man. The Maryland Court, in Peter v. Peter, put great emphasis on the fact that the settlor of the trust was similarly educated and had been a lawyer for nine years. *See* Peter v. Peter, 136 Md 157, 110 A 211 (1920). In Peter, the Court concluded that there was little likelihood that he did not understand the trust instrument which he executed and thus revocation of the trust was denied. *See* Peter v. Peter, 136 Md 157, 110 A 211 (1920). Moreover, the court looked at the time the document was executed and determined the same was not executed on the day it was first presented, and therefore the settlor knew or had full opportunity to know its contents. *See* Peter v. Peter, 136 Md 157, 110 A 211 (1920).

The same is true here. In the present matter, not only did Bealer have the benefit of being a well respected banker with two law degrees, he also had ample opportunity to review the trust documents prior to the execution of the same. Upon his review, Bealer even changed the name of the same from the Hartford E. Bealer Charitable Trust to the Hartford E. Bealer Charitable Foundation. *See* Depo. of Ronald L. Fick, Esquire, pg. 73, ln. 4-19.

These undisputed facts leave no room to argue that Bealer executed the trust instrument by mistake. Thus, the Appellants try and extend the statute's application into a realm far beyond the **execution** of the trust instrument. They argue that Bealer simply failed to appreciate the consequences of the Internal Revenue Service's requirement that all charitable foundations contribute five percent (5%) of their value each year to a qualified charitable entity in order to preserve their charitable/tax status. The record says otherwise.

The deposition testimony of Bealers' Florida counsel unequivocally evidences Bealer's knowledge and awareness of the five percent distribution requirement:

- Q. What knowledge or information do you have that Nancy Parker and her husband procured the creation of the Trust without full disclosure?
- A. It's my understanding that Mr. Bealer was aware of the five percent distribution requirement but had the impression that it did not apply to the subject property and to the subject Foundation.
- Q. So Mr. Bealer knew that private charitable foundations had a five percent distributional requirement?
- A. Yes, ma'am.
- Q. And he was aware of that before he created the Hartford E. Bealer Foundation?
- A. Yes.

*See* Deposition of Trent S. Kiziah, pg. 132, ln. 21-25; pg. 133, ln. 1-2.

In fact, Bealer was advised by his attorney of the five percent distributional requirement and chose to continue with the creation of the Foundation regardless of the legal opinion presented to him and understood by him.

- Q. What do you remember telling Mr. Bealer the results of your research were?
- A. I remember telling Mr. Bealer that based on our research it appeared that there was not an exception to the five percent minimum distribution rule, and that, you know, based on that

we were concerned that the private foundation as he described was, you know, that there could be penalties as a result of this minimum annual required distribution if it wasn't met. . . .

Q. What reaction did Mr. Bealer have to the information you shared with him concerning the five percent distributional requirement?

A. He very politely said, "I understand what you're saying, but Jay Parker has been working with the Internal Revenue Service and the State of West Virginia. This is his baby, and I'm going to let him run with it."

Q. Did he make any other comment that you can recall?

A. Not that I can recall at this time.

Q. And from his response did you believe that Mr. Bealer understood your advice to him that you believe the five percent distributional requirement would be applicable, and that he nevertheless wanted you to proceed with the preparation and creation of the Foundation?

A. Yes.

*See Deposition of Jonna S. Brown, Esquire, Volume 1, pg. 67, ln. 21-25; pg. 68, ln.1-5, ln. 18-25; pg. 69, ln. 1-10.*

Q. And how did you relay that information to him?

A. We told him that we had done the research, and that we were now more certain than ever that there was no way around the five percent distribution rule, and that was it.

*See Deposition of Ronald L. Fick, Esquire, pg. 45, ln. 7-12.*

Not only did Bealer have knowledge of the five percent distributional requirement, Bealer was advised by counsel as to how the requirement would apply to the Foundation at issue herein.

A. Yes, the five percent minimum distribution is calculated based upon the fair market value of the assets in the Foundation each year, I believe.

Q. And was Mr. Bealer aware of that?

A. Yes.

*See Deposition of Jonna S. Brown, Esquire, pg. 86, ln. 8-14.*

Q. Did you or anyone at the Dunwody firm ever tell Mr. Bealer how he could satisfy the five percent distributional

requirement of the Foundation?

A. Yeah.

Q. What did you tell him?

A. We told him that in order to satisfy the minimum required distribution he could contribute additional funds to the Foundation that could then be distributed to charity.

Q. Did you tell him any other alternatives?

A. Yes, we also told him that a portion of the property could be sold to raise funds to satisfy the minimum distribution requirements.

Q. Did you give him any other options or alternatives that would satisfy the five percent distributional requirement for the Foundation?

A. Not that I recall.

Q. Was it your firm's opinion and advice to Mr. Bealer that there were only two ways he could satisfy the five percent distributional requirement; that would be to either contribute money each year or to sell a portion to get funds raised?

A. Yes.

*See Deposition of Jonna S. Brown, Esquire; pg. 114, ln. 3-25.*

Q. Did you discuss at all with Mr. Bealer the methods or means by which the five percent requirement could be satisfied by the Foundation that he was seeking to create?

A. Yes, ma'am.

Q. What alternatives or methods did you advise him that were available?

A. We told him there were really only two. One he could sell the farm or sell portions of the farm on an annual basis perhaps, so basically lump that together. He can either sell the farm or he can make additional contributions annually which would be turned around and distributed to charities.

Q. Those were the two options?

A. The two options - - those were the only two options we knew of, and the one, he could make additional contributions, or he could sell within the Foundation the farm or portions of the farm on an annual basis in order to - in order to raise the required five percent.

*See Deposition of Ronald L. Fick Esquire; pg. 48, ln. 4-24.*

Ronald L. Fick, Esquire, Bealer's Florida counsel, later admitted during his deposition testimony that at least one other viable option existed which would satisfy the Internal Revenue Service five percent distributional requirement. Coincidentally, it was the option that Bealer had explored even prior to the trust's formal inception. It was the option which allowed Bealer to gift conservation easements or land in amounts equal to five percent of the trust corpus (5%) to a charitable land preservation trust each year, ensuring the river front's preservation in perpetuity.

Ronald Fick testified:

- A. I don't know of any other way to make the contribution to a charity other than in cash, possibly via a marketable security.
- Q. What about the transfer of the asset itself to a charitable Foundation?
- A. Out of this Foundation into another Foundation?
- Q. To a charity, yes, designed to preserve land.
- A. Okay.
- Q. Is that possible?
- A. I guess it is.
- Q. If five percent of the real estate holdings were conveyed to a charitable Foundation designed to preserve and prevent development, would that satisfy the requirements of the IRS?
- A. I believe it would.

*See Deposition of Ronald L. Fick Esquire; pg. 49, ln. 11-25; pg. 50, ln. 1-2.*

The Foundation, by and through the actions of the original co-trustees, worked on conservation easements to be gifted in satisfaction of these yearly distributions. *See Exhibits "F" and "G" to Plaintiff's Motion for Summary Judgment; Exhibit "Y" to Plaintiff's Opposition to Defendants' Memorandum of Law Regarding Bealer's Legal Authority.* Such exploration included contact with both the Potomac Conservancy and Cacapon and Lost Rivers Land Trust regarding the conveyance of conservation easements to preserve the property and fulfill the IRS five percent

distributional requirement. These contacts were made before Bealer's move to Florida and his decision to try and make other uses of the property.

Appellants seem to be arguing that Bealer did not know that he had to make additional monetary contributions to the Foundation or sell the acreage outright to generate income to meet the distributional requirement mandated by the IRS each year and that this constituted a mistake sufficient to void the Foundation. In reality, Bealer was not required to do either. To the contrary, it was a mistake for him to believe such a thing, if he in fact ever did. Might it have been Bealer's counsel's failure to remind/advise Bealer of the conservation easement option (given his age and failing health) that caused the sudden removal of the property from the Foundation? After all, at the time of the trust's creation, Bealer, a well educated man with many years of business experience, knew of the distributional requirement and that it could be fulfilled with conservation easements and without further monetary contributions or a public sale of the property.

Bealer's own counsel acknowledged that Bealer possessed both a knowledge and awareness of the potential "problem areas" with the Foundation and with that knowledge and awareness he chose to proceed.

- A. We--we didn't advise him. We set forth the problem areas in transferring the Foundation - - the Millrace Farm into the Foundation.  
He did what he darn well wanted to do, and he's always done what he wanted to do, and he went ahead and did it anyway. We told him we didn't think it worked from day one. He did.

*See* Deposition of Ronald L. Fick, Esquire; pg. 196, ln. 10 -17.

- Q. Did you ever tell him whether he could or could not accomplish that objective by forming this Foundation?  
A. Yes, we told him that we did not think that he would be able to keep this property in the Foundation because of the -- that there was going to be issues because of the five percent

minimum distribution requirement.

Q. And you told him that before you had him sign the Hartford E. Bealer Charitable Foundation document, correct?

A. Yes.

Q. And you told him that before he conveyed the real estate in Hampshire County into that Foundation; correct?

A. Yes.

*See* Deposition of Jonna S. Brown, Esquire; pg. 112, ln. 20-25; pg. 113, ln. 1-10.

Making an educated decision that you later regret is not the equivalent of a legal mistake. Such an interpretation would allow every trust to be set aside. Settlers and beneficiaries alike could unilaterally complain that the trust failed to meet their expectations or present objectives and terminate it. If this were the case, there would never be an irrevocable trust.

Bealer simply *changed his mind*. His change of mind is evidenced by the letter accompanying the Removal of Trustee forwarded to Ellis J. Parker on or about November 30, 2000. Bealer's legal counsel writes: "Mr. Bealer has decided to pursue another course of action with the West Virginia Property". *See* Exhibit "H" to Plaintiff's Motion for Summary Judgment. In fact, the Appellants' own representative testified the letter reflects Bealer "changed his mind" in regard to the property at issue herein.

Q. And it indicates that Mr. Bealer has changed his mind and wants to pursue another course of action with the West Virginia property, correct?

A. That's what the second sentence says, yes.

*See* Deposition of Trent S. Kiziah, pg. 159, ln. 19-22.

This Notice of Removal is also inconsistent with the Appellants' argument that the Foundation never took effect. Appellants contend that Bealer was of the opinion that no trust was in force and thus Bealer's unilateral removal of the property was a mere act of restoring the record to reflect the real situation at hand. If that were in fact the case and Bealer genuinely believed no

trust had been formed or was in place, why did he compel his legal counsel to remove the Foundation's co-trustee with the formal written notice required under Section 3.3 of the trust instrument just ten (10) days before he conveyed the property back to himself? The answer is simple. Bealer and/or his counsel knew and recognized that an irrevocable trust had been put in place on April 27, 2000, and funded on May 3, 2000, and a co-trustee would object to his later act of self dealing.

## **2. FLORIDA STATUTE §737.4031 IS NOT AN AVAILABLE REMEDY**

Section 737.4031 of the Florida Code permits the court to consider modifying an irrevocable trust; provided however, that: 1) the application for the modification is submitted by the trustee or a beneficiary of the trust; **and** 2) the trust purpose has been or can no longer be substantially fulfilled. Neither condition is met in this case.

The Estate of Bealer is neither the trustee of the Foundation nor a beneficiary thereof. Sally Kirchiro, has refused to act as trustee and has always maintained a position that no trust exists for her to preside over. Thus, the Appellants are not parties with standing to file an application seeking the relief afforded by the statute and neither has ever filed such an application, which would necessarily require that all future potential beneficiaries be joined as Respondents to any such action.

Moreover, the Foundation's purpose can still be met. The Foundation's purpose is unequivocally set forth in the trust instrument. Section 1.1 reads as follows:

1.1 Purpose of Trust. The trust held under this instrument shall be established and shall be operated exclusively for charitable, religious, medical, educational, scientific, or literary purposes, including the making of distributions to Charitable Organizations.

It is impossible to fathom any scenario where this trust purpose cannot be fulfilled in today's

society. Rather than analyze the Foundation's purpose as spelled out in the trust instrument, the Appellants want to focus upon the intent of Bealer's Last Will and Testament. They, nor the courts, have the liberty of re-writing the Foundation's purpose as spelled out in the trust instrument because it doesn't conform to Bealer's Will.

Not only can the Foundation's purpose be fulfilled under numerous scenarios, but Bealer's preferred manner of fulfillment can still be accomplished. As the letters and affidavits of record from the Cacapon Land Trust and Potomac Conservancy (both charitable entities) acknowledge, conservation easements or lands equal to five percent (5%) of the trust corpus can be gifted to them each year, fulfilling the Foundation's purpose, the IRS distributional requirement, and Bealer's original goal of preservation.

The Appellants can not honestly represent to this Court that the only way to fulfill the Foundation's purpose and prevent its public sale is to return it to Bealer's estate. If the Foundation is set aside for any reason and the 277.42 acres are removed forever from the trust corpus, the land would vest in Kathy Stone pursuant to Bealer's Last Will and Testament, subject to divestment by Bealer's Estate or his creditors. This divestment would in fact be compelled by law in order to pay outstanding estate taxes and debts. *See* W.VA. CODE § 44-8-7.

Florida Code § 737.4031 does not permit a rewrite of this trust as its terms are in the best interests of its beneficiaries. The people of West Virginia benefit from the preserved beauty of the riverside property.

The parties to this matter are in agreement that the intent and purpose of the Bealer Foundation is charitable with the settlor's hope being that it could be used to protect and preserve the property conveyed to it from development. The Appellants' *only* argument regarding impairment of the stated charitable purpose of the Foundation and Bealer's hope of preservation is

that the five percent distributional rule would require the property be sold. Ronald Fick, Esquire and Jonna Brown, Esquire, Bealer's legal counsel, testified otherwise. Both recognized, that in lieu of sale, additional contributions could be made on a yearly basis to the Foundation to satisfy the five percent distributional rule. Ronald Fick, Esquire also admitted and acknowledged a conveyance of a portion of or all the Trust assets (by conservation easements or fee simple title) to another charitable foundation ( a land preservation trust) would satisfy the distributional requirement. Bealer was aware of this option prior to and at the time of its formation.

While a court possessing equitable powers may modify the terms of a trust to preserve it and carry out the trustor's intent, such power must be exercised cautiously and only where necessary. The power of the court in exercising the power to modify a trust is not to defeat or destroy the trust, but to **preserve it** or the estate. *See St. Louis Union Trust Co. v. Blue*, 353 S.W.2d 770 (Mo. 1962). The exercise of the power to modify can be justified only by some exigency or emergency which makes the action of the court in a sense indispensable to the **preservation** of the trust, and the condition or emergency asserted must be one not contemplated by the trustor and which, had it been anticipated, would undoubtedly have been provided for. *Wachovia Bank & Trust Co. v. Johnston*, 269 N.C. 701, 153 S.E.2d 449 (1967).

A trust will not be modified, in violation of the settlor's intention, merely because the interest of the parties will be served by doing so. *See In re Estate of Traung*, 207 Cal. App. 2d 818, 24 Cal. Rptr. 872 (1st Dist. 1962). In the present action, only the Appellants' interests will be served by terminating or modifying the Foundation. Either Appellant Stone stands to inherit the property free of any encumbrances or restrictions prohibiting its public sale or development, or the Bealer Estate acquires a valuable asset to assist with its mounting debt.

**3. THE BEALER FOUNDATION RECEIVED AN EXEMPT ORGANIZATION  
DETERMINATION LETTER AS A 501(C)(3) CHARITABLE TRUST**

On May 5, 2000, Bealer submitted form 1023 to the IRS to acquire an Exempt Status Organization Letter, recognizing the Foundation as a viable and private charitable trust. *See* DunWoody, White & Landon letter, May 5, 2000, (bates number 0000379-382) attached hereto as Exhibit "B". It was accompanied by a check in the amount of Five Hundred Dollars (\$500.00) representing the filing fee and displayed the employer identification number previously requested and assigned to the trust entity. This ten (10) page application clearly restates the intended purpose of the Foundation on page two (2). *See* 1023 Application, page Two (2) (bates number 0000384) attached hereto as Exhibit "C".

On June 16, 2000, the IRS bestowed tax exempt status upon the foundation and declared it to be a private charitable foundation under § 509(a) of the United States Code, making Bealer eligible for federal gift and estate tax deductions equal to the amount of the gifted property and other donations made by him. *See* IRS Letter, June 16, 2000, Exhibit "E" to Plaintiff's Motion for Summary Judgment.

**4. THE FOUNDATION WAS FUNDED**

If the Foundation had not been funded, we would not be here today. Bealer in fact transferred 277.42 acres within the boundaries of the State of West Virginia to the Foundation. As such, the law of West Virginia applies to the transfer of this real estate. In the present matter, the express provisions of the deed conveying the parcels of property at issue herein from Bealer, individually, to the Foundation, unequivocally mandates the conveyance as a gift and transfers to a voluntary, charitable, non-profit *inter vivos* trust. The deed was duly and properly recorded in the Office of

the Clerk of the County Commission of Hampshire County, West Virginia in Deed Book 399 at Page 292.

The conveyance of the 277.42 acres was an *inter vivos* gift to the Foundation. Thus, no consideration is required. Under black letter law, a gift is a transfer of property gratuitously, without consideration, as distinguished from a sale which imports a transfer for consideration. There are three (3) general requirements for a gift *inter vivos*. See Miller v. Miller, 428 S.E.2d 547 (W.V. 1993). First, there must be an intention on the part of the donor to make a gift. Id. This requirement is met by the deed's declaration transferring the property from Bealer to the Foundation. (Under the laws of the State of West Virginia, excise tax on the privilege of transferring real property is not assessed on "gifts to or transfers from or between voluntary charitable or educational associations or trustees of voluntary charitable or educational associations and like nonprofit corporations having the same or similar purposes." W.VA. CODE § 11-22-1.) Second, there must be a delivery or transfer of the subject matter. Miller, 428 S.E.2d at 547. This requirement is evidenced and satisfied by the executed deed of May 3, 2000. Finally, there must be acceptance by the donee. Id. This requirement is evidenced and satisfied by the recordation of the deed and the actions of the trustees in obtaining a tax exempt letter following that recordation. The conveyance was a gift *inter vivos*. Gifts *inter vivos* go into effect immediately. See e.g. Rogers v. Rogers, 399 S.E.2d 664 (W.V. 1990); Brewer v. Brewer, 338 S.E.2d 229 (W.V. 1995); Price v. Moran, 129 S.E. 472 (W.V. 1925).

Florida law also recognizes that if a gift *inter vivos* is to operate, it must do so in the donor's lifetime, immediately and irrevocably. Just as in West Virginia, Florida recognizes that the essential elements of a gift *inter vivos* are present donative intent, delivery, and acceptance by donee. See

Sullivan v. American Telephone and Telegraph Company, Inc., 230 So. 2d 18 (Fla. 1970); *See also* 15 Fla. Jur., Gifts, s 11; CJS Gifts, Section 42.

The Florida courts have determined that “a gift, made with intent that it shall take effect immediately and irrevocably, and fully executed by complete and unconditional delivery, is good and valid as a gift *inter vivos*, although at the time the donor is in extremis, and dies soon after.” Stigletts V. McDonald, 135 Fla. 385, 186 So. 233 (1938). In Mattox v. Mattox, the Florida court held that recordation of a deed is effective as legal delivery of a deed in the absence of fraud on the grantor and found that the public policy of Florida is that one should be able to rely on the public records of a county to determine title and that a recital in a recorded deed that consideration and delivery was made should be conclusive of the fact of delivery in the absence of fraud. *See Mattox v. Mattox*, 777 So.2d 1041, 26 Fla. L. Weekly D177 (2001).

Hence, the immediacy of the gift and the funding of the Foundation are recognized under both Florida and West Virginia law. It too was recognized by Bealer and his counsel. On June 2, 2000, Bealer’s counsel sent a letter to the IRS advising that the trust was effective and funded by the transfer of the subject real estate on May 3, 2000. *See* Dunwoody, White & Landon letter, June 2, 2000, attached hereto as Exhibit “A”.

Bealer further funded the Foundation by obtaining and paying the premium for an insurance policy with the Foundation as the named insured and establishing a bank account in the name of the Foundation at the Bank of Romney subsequently placing in excess of Thirteen Thousand Dollars (\$13,000.00) in it. *See* Declarations Page, Exhibit “C” to Plaintiff’s Motion for Summary Judgment; *See* Record of account and bank statements, Exhibit “D” to Plaintiffs Motion for Summary Judgment.

## 5. BEALER'S CONVEYANCE OF THE PROPERTY TO

### HIMSELF CONSTITUTES SELF-DEALING

Paragraph 2.2 of the Hartford E. Bealer Foundation Trust states as follows:

**2.2 Restrictions on Activities: The Trustee is prohibited from: (1) engaging in any act of self-dealing as defined in Code Section 4941(d); (2) retaining any excess business holdings as defined in Code Section 4943(c) that would subject the trust to tax under Code Section 4943; (3) making any investments that would subject the trust to tax under Code Section 4944; and (4) making any taxable expenditures as defined in Code Section 4945(d).** (*emphasis added*).

Section 4941(d) of the United States Code defines self-dealing in pertinent part as the: (A) sale or exchange, or leasing, of property between a private foundation and a disqualified person; (B) lending of money or other extension of credit between a private foundation and a disqualified person; (C) furnishing of goods, services, or facilities between a private foundation and a disqualified person; (D) payment of compensation (or payment or reimbursement of expenses) by a private foundation to a disqualified person; (E) transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a private foundation. *See* 26 USCA 4941. West Virginia Code § 44-5A-3(ee)(2) recognizes that the Trustee of a charitable ["private foundation"] is prohibited from engaging in any acts of self-dealing as defined by 4941§ (d) of the Internal Revenue Code. *See* W.VA. CODE § 44-5A-3.

The undisputed material facts of this case evidence Bealer engaged in self-dealing to the detriment of the trust he created and in violation of the express terms of the trust. On December 11, 2000, Bealer, acting as sole trustee, conveyed the property at issue in this matter back from the Foundation to himself, in his individual capacity, without consideration, by deed made of record in

the Office of the Clerk of the County Commission of Hampshire County, West Virginia in Deed Book 403 at Page 435.

The Florida courts have examined the concept of self-dealing and have determined that fiduciary obligors cannot, either directly or indirectly, in their dealings on behalf of the fiduciary beneficiary with others, or in any other transaction in which they are under a duty to guard the interests of the fiduciary beneficiary, make any profit or acquire any other personal benefit or advantage, not also enjoyed by the fiduciary beneficiary, and if they do, they may be compelled to account to the beneficiary in an appropriate action. See Stedt v. Southern Laundry, Inc., 149 Fla. 402, 5 So.2d 859 (1942); See Tinwood, N.V. v. Sun Banks, Inc., 570 So.2d 955 (Fla. 5th DCA 1990).

In Cohen v. Hattaway, the Florida Court of Appeals upheld a cause of action against corporate officer/director when the facts of the case alleged the officer/director took money belonging to the corporation, bought certain real property with this money, titled the property in his own name, never returned the money to the corporation, sold the property and kept the proceeds of the sale for himself. Cohen v. Hattaway, 595 So.2d 105 (Fla.App. 5 Dist., 1992). The facts correlate to the facts of the civil action pending before this Court in so much as Bealer, as sole trustee, conveyed the property at issue herein back from the Foundation to Bealer, individually, without consideration. Bealer, by and through his acts of self-dealing, acquired a personal benefit to the detriment of the Foundation.

Moreover, a breach of undivided loyalty has been recognized where a trustee purchases trust property. The general rule is that the sale by a trustee of trust property to himself is prohibited, even though it was made in good faith and for reasonable consideration because of the conflict inherent in the trustee's actions as both buyer and seller in the same transaction; therefore, strict application

of the rule is generally applied. *See e.g. Schug v. Michael*, 310 Minn 22, 245 N.W.2d 587 (1976); *Steves v. United Services Auto. Asso.*, 459 S.W.2d 930 (Tex Civ App 1970); *In re Estate of De Planche*, 65 Misc 2d 501, 318 NYS2d 194 (1971); *In re Estate of Garwood*, 272 Ind. 519, 400 N.E.2d 758 (1980).

The concept of self-dealing encompasses not only transactions in which a trustee directly buys from or sells to the trust estate, but also any transaction in which a trustee manages or deals with trust property in a manner that places the trustee's personal interests in conflict with the interests of the trust and its beneficiaries. *See In re Estate of McCredy*, 323 Pa Super 268, 470 A2d 585 (1983) (test of self-dealing is whether trustee has substantial personal interest in subject transaction). Self-dealing includes any transaction in which a trustee has either a present or contingent interest which is adverse to the interest of a beneficiary. *See Manikowske v. Manikowske*, 136 N.W.2d 457 (ND 1965); *See also In re Estate of Van Deusen*, 37 AD2d 131, 322 NYS2d 951 (1971) (neither trustee's intention nor advantage gained by trustee determines whether transaction involves self-dealing). Bealer's act of conveying the property to himself in his individual capacity, without consideration, gives rise to a breach of the duty of loyalty. This unequivocally proves self-dealing.

The Appellants' designee admits that such self-dealing is prohibited under the Internal Revenue Code and the express provisions of the Foundation as well:

- Q: Are you familiar with the term "self-dealing" as defined in Section 4941 (d) of the Internal Revenue Code?
- A: Yes, ma'am.
- Q: Under Section 2.2 of this document the trustee is prohibited from engaging in any act of self-dealing as defined in that code section; correct?
- A: That's correct.
- Q: Would that prohibition also include the active transferring of property from the Foundation back out to oneself?

A: You're asking from my general understanding of that code provision?  
Q: Yes.  
A: Yes, it's my understanding that that would – that would apply, yes.  
Q: And so it would be a prohibited act?  
A: Yes.

See Deposition of Trent S. Kiziah, Esq., page 154, lines 5-23.

**B. THE CIRCUIT COURT'S RULING GIVES EFFECT TO BEALER'S INTENT AND FULFILLS THE TRUST PURPOSE**

**1 and 2. THIS IS NOT A WILL CONTEST SUIT:**

**IT IS THE FOUNDATION'S PURPOSE AND NOT BEALER'S SUBSEQUENT TESTAMENTARY INTENT THAT CONTROLS**

The Appellants' argue the circuit court failed to give consideration to Bealer's intent. They argue: "It is crystal clear that Bealer intended to remove the farm from the Foundation and return it to his estate...he wanted it passed through his estate to his granddaughter, Kathlene Stone..." See Appellants' brief, page 25. This argument is fatally flawed. Obviously, at the time Bealer made his last Will, he decided that Kathlene Stone should receive it. That is not the "intent" element that the law focuses upon in determining whether to modify or revoke an inter vivos trust. It is not a question of whether Bealer changed his mind (regardless of the reason, advice, or influence) and intended to find a way to strip the Foundation of the property so he could devise it to another; But, rather a question of the Foundation's intent or purpose and Bealer's right to undo it.

The court considered the Foundation's purpose and Bealer's intent in forming the Foundation. It is discussed and set forth in the circuit court's order.

Therein, the circuit court detailed its review of the Foundation's purpose and Bealer's intent as follows:

"...a valid trust must also have a specific purpose to be carried out by the trustees. In determining a trust's purpose, the court turns to the trust instrument and the provisions therein. In construing the provisions of a trust, the cardinal rule is to try and give effect to the grantor's intent, if possible. Pounds v. Pounds, 703 So.2d 487, 488 (Fla. App. 5Dist., 1997). The terms of the trust are determined by the provisions of the instrument as interpreted in the light of all the circumstances and such other evidence of the intention of the settler with respect to the trust. REST. 2d TRUSTS, 4... The phrase "terms of the trust" includes the manifestation of intention of the settler at the time of the creation of the trust, whether expressed by written or spoken words or may be determined by interpretation of the words or conduct of the settler in light of all the circumstances. The manifestation of the intention of the settler is the external expression of his intention as distinguished from his undisclosed intention. *Id.* The record is clear and the parties do not dispute that at the time the Foundation was created, Mr. Bealer wished his farm to be preserved forever and to be used for educational purposes. Both the Foundation instrument itself and the record established in this case reflect Mr. Bealer's intent. ... George Constantz, the manager of the Research and Development Program at the Canaan Valley Institute, testified that in 1998 Mr. Bealer discussed with him the possibility of donating his farm to the organization for purposes of conservation. Nancy Ailes, a representative of the Potomac Conservatory and Cacapon and Lost Rivers Land Trust, a charitable organization, testified that Mr. Bealer wanted to gift his land to a non-profit organization ...to protect it from development.

These extrapolations of the record are only several of many instances proving Mr. Bealer's intent at the time the foundation was created. The record is convincingly clear that Mr. Bealer wanted his farm to be preserved, undeveloped, and used for charitable purposes. Mr. Bealer created the foundation to preserve his farm and therefore the foundation's purpose is identical to Mr. Bealer's intentions regarding his farm.

*See Order Granting Plaintiff's Motion for Summary Judgment, June 2, 2006.*

The court also gleaned a sense of Bealer's true understanding of the irrevocable nature of the trust he implemented from the steps he took and the steps he did not take to accomplish the removal of the 277.42 acres from its corpus.

Under Florida Code § 737.4031, Bealer always had the right to petition the court to allow him to terminate the trust or to declare it void from inception. He did neither. Appellants argue it is because Bealer never thought it valid in the first instance. Nonsense! If there was never a foundation, Bealer would not have expended additional monies to have it recognized as a charitable foundation by the IRS, nor procure an insurance policy for its benefit, nor fund a trust bank account for its use, nor see to the formal removal of a co-trustee.

Bealer knew that the trust agreement contains no reservation of the power of revocation or modification; thus making the same irrevocable. The Restatement (Third) of Trusts § 63 (2003) provides that, "[t]he settlor of an inter vivos trust has power to revoke or modify the trust to the extent the terms of the trust so provide." *See Restatement (Third) of Trusts* § 63 (2003); *See also Grand Lodge of Independent Order of Odd Fellows v. Gunnoe*, 154 W.Va. 594, 177 S.E.2d 150 (1970) (except as otherwise provided by statute, a voluntary trust containing no reserved power of revocation or modification cannot be revoked or modified without consent of the beneficiaries or persons beneficially interested.); *See Stoehr v. Miller*, 296 Fed. 414 (1923) (It is a longstanding general rule that where a valid and effective voluntary trust has been created, and no power of revocation has been reserved, it cannot be revoked by the creator without the consent of the beneficiaries thereunder.); *Roberts v. Taylor* 300 Fed. 257 (1924). The only termination power granted unto the trustee in the present agreement is reflected as the trustee's power to terminate the trust by and through distributing the trust assets to charitable organization or organizations as the trustee determines in the exercise of discretion.

Paragraph 1.4 of the Foundation provides as follows:

1.4 Duration of Trust. The trust created hereby shall terminate when the whole of the trust estate and the net income therefrom shall have been distributed. The trust shall continue forever unless the Trustee terminates it and distributes all of the principal and income, which action may be taken by the Trustee in the exercise of discretion at any time. On such termination, assets shall be distributed by the Trustee to and among such Charitable Organization or Organizations as the Trustee determines in the exercise of discretion.

The Foundation did not come to an end as permitted under paragraph 1.4. Bealer, as trustee, did not convey the real estate from the Foundation to a charitable entity. He conveyed it to himself, in his individual capacity, without consideration.

The court was well aware that Bealer established the Foundation as an irrevocable one to preserve the 277.42 acres:

Q: What was the purpose if you know, for the establishment of the Hartford E. Bealer Foundation.

A: It's my understanding it was Mr. Bealer wanted to preserve the property as a – preserve the property. I can't remember whether it was for a farm or to prevent it from being developed or the like, but to preserve it.

*See* Deposition of Trent S. Kiziah, Esq., page 142, lines 13-19.

The trustees had in fact researched several options of satisfying the stated purpose of the Foundation which included the granting of conservation easements or land over a period of time to those charitable preservation entities in existence and focusing upon preservation of the Cacapon riverfront.

However, after moving to Florida and residing with his grandchildren, Bealer, according to the grandchildren, changed his mind and decided to bestow his estate upon them during his lifetime through millions of dollars of gifting and the further altering of his estate plan to leave the 277.42 acres to one of them as well. Just one thing stood in his way, that being the irrevocable Foundation and its Co-trustee.

Hence, Bealer retained the services of Dunwoody, White & Landon, P.A. to prepare the Notice of Removal of Trustee and forward the same to Ellis J. Parker. Bealer's, legal counsel informed Ellis J. Parker that Bealer was removing him as co-trustee because Bealer had decided to *pursue another course of action* with the West Virginia property. At no time prior to the removal of Ellis J. Parker as co-trustee did Bealer express any dissatisfaction with the services of Parker.

Q: You agree with me that that document does – indicates and expresses appreciation for Mr. Parker's assistance through that date of November 30, 2000, does it not.

A: This states that, yes.

Q: And it indicates that Mr. Bealer has changed his mind and wants to pursue another course of action with the West Virginia property; correct?

A: That is what the second sentence says, yes.

Q: Would you agree with me that the letter in no way indicates that Mr. Bealer is dissatisfied with Mr. Parker or his service?

A: Doesn't show any dissatisfaction, that's correct.

*See* Deposition of Trent S. Kiziah, Esq., page 159, lines 14-25; page 160, lines 1-2.

It was not until *after* Bealer removed Parker as co-trustee that the property was wrongfully removed from the Foundation and conveyed to Bealer, individually. A mere ten (10) days elapsed between Bealer removing Parker as co-trustee and the conveyance of the property from the Foundation to Bealer, individually. Further, Bealer retained new counsel to prepare the deed conveying the property out of Foundation to himself. The original deed transferring and conveying the property to the Foundation and declaring said conveyance to be a gift was prepared by H.

Charles Carl, III. However, instead of again retaining Carl to prepare the deed conveying the property from the Foundation to Bealer, individually, Bealer chose to retain Ralph W. Haines. Haines prepared said deed without the benefit of a title examination or report. Any title exam would have required the reading of the trust instrument to ascertain the signatures needed for transfer and any prohibitions upon transfers would be brought to light. By using new counsel, one not familiar with the trust instrument, that cat would remain in the bag until after Bealer's death. The intent behind the steps Bealer took to remove the trust property from the foundation were also all taken into account by the circuit court and all support the finding that the irrevocable charitable *inter vivos* trust and its purpose should be fulfilled through a return of the 277.42 acres to the Foundation's corpus.

**C. BEALER'S WILL IS NOT BEING SET ASIDE IN THIS PROCEEDING**

Neither the probate or validity of Bealer's Last Will and Testament is not at issue in this action. At best, a specific bequest within Bealer's Will has elapsed in light of the fact that Bealer did not own the 277.42 acres he attempted to devise. A lapsed bequest is not a unique or unusual event. One cannot give away or bequeath that which belongs to another.

**D. THE ANCILLARY ADMINISTRATOR IS NOT AN INDISPENSABLE PARTY AND THE CIRCUIT COURT HAD JURISDICTION**

The Petitioners argue that the Circuit Court was without jurisdiction because it failed to require the joinder of an indispensable party, to wit: the West Virginia ancillary administrator. The fact is that the court was never asked to compel its joinder. The Bealer Estate has been a Defendant in this matter since its inception in August of 2003. During the pendency of this civil action, the Appellants filed a Motion to Dismiss the action alleging only the failure to join the indispensable

parties of Kathleen Stone and Sally Kirchiro.(Both Stone and Kirchiro were named Defendants in the original Complaint, but they were disputing service of process.) At no time, did the Appellants raise or otherwise preserve the right to assert the failure to join the West Virginia ancillary administrator as a defense under Rule 19.

Perhaps the issue was not immediately raised because there was no ancillary estate opened in West Virginia when this action was commenced in August of 2003. It was almost a year later on July 27, 2004, when the Appellants herein decided to forge ahead with the process of opening an ancillary estate. To believe that the Estate would have retained separate counsel for the ancillary administrator is unthinkable. It is just as unthinkable to believe that the ancillary administrator would have raised different defenses to the action.

Even if an ancillary estate existed and had a unique right to assert a different position or defense that was not otherwise available to the Estate at large, it is not an indispensable party to this proceeding.

The West Virginia Supreme Court of Appeals has set forth guidelines for the determination of whether a party is “indispensable”. The Court has held that “[t]here is no precise or universal test to determine when a person’s interest is such to make him an ‘indispensable party’” State ex. rel. One-Gateway Associates, LLC. v. Johnson, 208 W.Va. 731, 542 S.E.2d 894 (2000) (quoting Dixon v. American Industrial Leasing Co., 157 W.Va. 735, 205 S.E.2d 4 (1974)).

“Rule 19(a) of the West Virginia Rules of Civil Procedure requires two (2) general inquiries for joinder of a person who is subject to service of process. First, is his presence necessary to give complete relief to those already parties? Second, does he have a claim that, if he is not joined, will be impaired or will his non-joinder result in subjecting the existing parties to a substantial risk of

multiple or inconsistent obligations? If the absent person meets the foregoing test, his joinder is required. However, in the event that the absent person cannot be joined, the suit should be dismissed only if the court concludes that the 19(b) criteria cannot be met." See Glover v. Narick, 184 W.Va. 381, 400 S.E.2d 816 (1990) (citing Wachter v. Dostert, 172 W.Va. 93, 303 S.E.2d 731 (1983)).

Under Rule 19(b), several factors may be considered when determining whether a party is indispensable:

[First,] to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

See W.Va. R. Civ. Pro. 19(b).

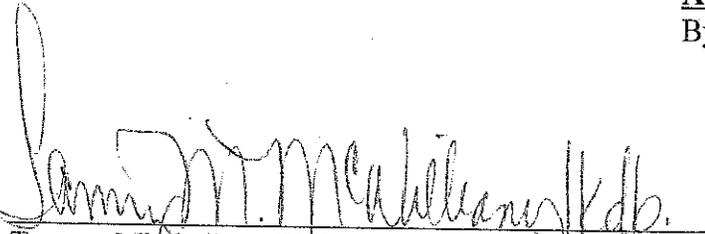
An analysis of Rule 19(b) factors reveals that the ancillary administrator of the Estate of Hartford Bealer is not an indispensable party in this matter. The Appellants have neither shown nor alleged unfair prejudice to any present claim of interest in the property. There are no new or unique facts or defenses to be raised by the ancillary administrator. There is only great cost and prejudice to the Appellee in relitigating the issues.

Moreover, title to the 277.42 acres vested in Kathleen Stone upon the death of Bealer, not in Bealer's estate. Bealer's Last Will and Testament bequeaths the acreage to Stone and thus at the time of Bealer's death, title of the same passed to Stone subject to divestment by either the Estate and/or its Creditors under the provisions of West Virginia Code § 44-8-7. West Virginia Code § 44-8-7 permits the Executor/Administrator of an Estate or its creditors to subject the real estate owned by a decedent at the time of death to the payment of debts. No language within said statute requires the opening of an ancillary estate to prosecute such an action. In the truest sense, therefore, neither

the Bealer estate at large or in the ancillary fashion is a necessary party as neither has a present interest in the real estate. See O'Daniels v. City of Charleston, 200 W.Va. 711, 716, 490, S.E.2d 800,805 (W.Va. 1997).

**NOW WHEREFORE**, based upon all of the foregoing, the Appellee, Nancy Parker, respectfully requests this Honorable Court to affirm the Order of June 2, 2006, entered by the Circuit Court of Hampshire County.

**APPELLEE**  
By Counsel



Tammy Mitchell McWilliams, Esquire, WVSB# 5779  
Joanna L-S Robinson, Esquire, WVSB# 9142  
Trump & Trump, L.C.  
307 Rock Cliff Drive  
Martinsburg, WV 25401  
(304) 267-7270

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NANCY B. PARKER, TRUSTEE OF  
THE HARTFORD E. BEALER FOUNDATION,

*Appellee.*

Civil Action No: 03-C-89  
Circuit Court of Hampshire County

THE ESTATE OF HARTFORD E. BEALER, by  
U.S. TRUST COMPANY OF FLORIDA S.B.,  
as Executor of the Estate of Hartford E. Bealer and  
U.S. TRUST COMPANY OF FLORIDA S.B., as Trustee  
of the Hartford E. Bealer Amended and  
Restated Declaration of Trust, SALLY B. KIRCHIRO,  
Trustee, and KATHLEEN K. STONE,

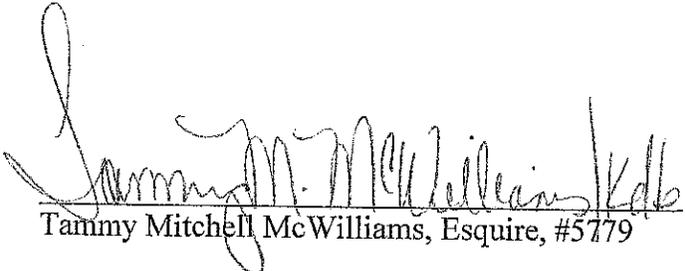
*Appellants,*

CERTIFICATE OF SERVICE

I, Tammy Mitchell Bittorf, Esquire, do hereby certify that a true copy of the foregoing *BRIEF OF APPELLEE* has been served upon the following individual(s) via United States, First-Class, Mail, postage prepaid on this 23<sup>RD</sup> day of May, 2007.

Richard G. Gay, Esquire  
Law Office of Richard G. Gay, L.C.  
202 Congress Street  
Berkeley Springs, WV 25411

V. Alan Riley, Esquire  
68 East Main Street  
Romney, WV 26757

  
Tammy Mitchell McWilliams, Esquire, #5779

**DUNWODY  
WHITE &  
LANDON, P.A.**

**ATTORNEYS AT LAW**

JONNA S. BROWN  
JACKSON M. BRUCE, JR.  
DANIEL K. CAPES  
NEIL R. CHRYSTAL  
JACK A. FALK, JR.  
RONALD L. FICK  
JOHN J. GRUNDHAUSER  
DAVID M. HALPEN

ROBERT D. W. LANDON, II  
PATRICK J. LANNON  
THOMAS J. MATKOV  
WILLIAM T. MUIR  
MITCHELL E. SILVERSTEIN  
ROBERT A. WHITE, P.A.  

---

ATWOOD DUNWODY (1912-1996)

June 2, 2000

**Via Facsimile (513) 263-3695**

Ms. Julie Chen  
Internal Revenue Service  
TE/GE Division  
F.O.B. Room 5122  
550 Main Street  
Cincinnati, OH 45202

**Re: *The Hartford E. Bealer Foundation - EIN 65-6333586***

Dear Ms. Chen:

Enclosed herewith please find a copy of your letter dated May 22, 2000 and revised page 8 of Form 1023 for the above-referenced Foundation. With respect to your first question, the effective date of the foundation is May 3, 2000. Real property with a value of approximately \$960,000 was transferred to the foundation by deed on May 3, 2000.

If you should have any questions concerning the foregoing or the enclosed, please do not hesitate to contact me.

Sincerely yours,



David M. Halpen  
*For the Firm*

**Enclosures**

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MIAMI  
550 Biltmore Way • Suite 810  
Coral Gables, Florida 33134  
Telephone 305/529-1500  
Fax 305/529-8855

NAPLES  
4001 Tamiãmi Trail North • Suite 200  
Naples, Florida 34103  
Telephone 941/263-5885  
Fax 941/262-1442

PALM BEACH  
239 South County Road • Suite  
P. O. Box 3165  
Palm Beach, Florida 334  
Telephone 561/655-21  
Fax 561/655-2168

**EXHIBIT**

**A**

0000400

**DUNWODY  
WHITE &  
LANDON, P.A.**

ATTORNEYS AT LAW

JONNA S. BROWN  
JACKSON M. BRUCE, JR.  
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WILLIAM T. MUIR  
MITCHELL E. SILVERSTEIN  
ROBERT A. WHITE, P.A.  
ATWOOD DUNWODY (1912-1996)

May 5, 2000

**Via Certified Mail-Return Receipt**

Internal Revenue Service

PO Box 192

Covington, KY 41012-0192

**Re: The Hartford E. Bealer Foundation – EIN 65-6333586**

Dear Sirs:

Enclosed herewith please find the following documents with respect to the Exempt Organization Determination Letter Request for the above-referenced Foundation:

- (1) Form 8718 (User Fee for Exempt Organization Determination Letter Request) with check number 1695 in the amount of \$500 attached thereto;
- (2) Form 1023 (Application for Recognition of Exemption); and
- (3) Form 2848 (Power of Attorney and Declaration of Representative).

If you should have any questions concerning the foregoing or the enclosed, please do not hesitate to contact me.

Sincerely yours,

  
David M. Halpen  
For the Firm

Enclosures

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MIAMI  
550 Biltmore Way • Suite 810  
Coral Gables, Florida 33134  
Telephone 305/529-1500  
Fax 305/529-8855

NAPLES  
4001 Tamiami Trail North • Suite 200  
Naples, Florida 34103  
Telephone 941/263-5885  
Fax 941/262-1442

PALM BEACH  
239 South County Road • Suite 3  
P.O. Box 3165  
Palm Beach, Florida 33480  
Telephone 561/655-2120  
Fax 561/655-2168

**EXHIBIT**

**B**

Form **8718**

(Rev. January 1998)  
Department of the Treasury  
Internal Revenue Service

# Use Fee for Exempt Organization Determination Letter Request

▶ Attach this form to determination letter application.  
(Form 8718 is NOT a determination letter application.)

For IRS Use Only

Control number \_\_\_\_\_  
Amount paid \_\_\_\_\_  
User fee screener \_\_\_\_\_

1 Name of organization  
**THE HARTFORD E. BEALER FOUNDATION**

2 Employer Identification Number  
**65-6333586**

Caution: Do not attach Form 8718 to an application for a pension plan determination letter. Use Form 8717 instead.

### 3 Type of request

- a  Initial request for a determination letter for: Fee
- An exempt organization that has had annual gross receipts averaging not more than \$10,000 during the preceding 4 years, or
  - A new organization that anticipates gross receipts averaging not more than \$10,000 during its first 4 years . . . ▶ **\$150**
- Note: If you checked box 3a, you must complete the Certification below.

**Certification**

I certify that the annual gross receipts of \_\_\_\_\_  
name of organization  
 have averaged (or are expected to average) not more than \$10,000 during the preceding 4 (or the first 4) years of operation.

Signature ▶

Title ▶

- b  Initial request for a determination letter for:
- An exempt organization that has had annual gross receipts averaging more than \$10,000 during the preceding 4 years, or
  - A new organization that anticipates gross receipts averaging more than \$10,000 during its first 4 years . . . ▶ **\$500**
- c  Group exemption letters . . . . . ▶ **\$500**

### Instructions

The law requires payment of a user fee with each application for a determination letter. The user fees are listed on line 3 above. For more information, see Rev. Proc. 98-8, 1998-1, I.R.B. 225.

Check the box on line 3 for the type of application you are submitting. If you check box 3a, you must complete and sign the certification statement that appears under line 3a.

Attach to Form 8718 a check or money order payable to the Internal Revenue Service for the full amount of the user fee. If you do not include the full amount, your application will be returned. Attach Form 8718 to your determination letter application.

Send the determination letter application and Form 8718 to:  
Internal Revenue Service  
P.O. Box 192  
Covington, KY 41012-0192  
If you are using express mail or a delivery service, send the application and Form 8718 to:  
Internal Revenue Service  
201 West Rivercenter Blvd.  
Attn: Extracting Stop 312  
Covington, KY 41011

**DUNWODY, WHITE & LANDON, P.A.** 12-95  
255 S. COUNTY RD.  
PALM BEACH, FL 33480

1695

PAY TO THE ORDER OF Internal Revenue Service

May 5, 2000 \$ 500.00

63-643/670  
00836

Five Hundred and 00/100 \* \* \* \* \* \$ 500.00

 **First National in Palm Beach**  
FIRST UNION'S PRIVATE BANK  
Palm Beach, Florida

DOLLARS 

FOR EIN: 65-6333586

*Ronald L. Felt*

⑈001695⑈ ⑆067006432⑆ 209000120346⑈

# Power of Attorney and Declaration of Representative

OMB No. 1545-0150  
 For IRS Use Only  
 Received by: \_\_\_\_\_  
 Name \_\_\_\_\_  
 Telephone \_\_\_\_\_  
 Function \_\_\_\_\_  
 Date \_\_\_\_\_

▶ See the separate instructions.

**Part I** Power of Attorney (Please type or print.)

**1 Taxpayer information** (Taxpayer(s) must sign and date this form on page 2, line 9.)

Taxpayer name(s) and address <b>THE HARTFORD E. BEALER FOUNDATION</b> <b>9 CHATEAU RAMBOUILLET, 2165 IBIS ISLE RD</b> <b>PALM BEACH FL 33480</b>	Social security number(s) _____ _____ _____	Employer identification number  <b>65-6333586</b> Plan number (if applicable)
Daytime telephone number <b>561-582-7272</b>		

hereby appoint(s) the following representative(s) as attorney(s)-in-fact:

**2 Representative(s)** (Representative(s) must sign and date this form on page 2, Part II.)

Name and address <b>RONALD L. FICK, ESQ.</b> <b>239 S. COUNTY RD., SUITE 300</b> <b>PALM BEACH, FLORIDA 33480</b>	CAF No. <b>6500-58708R</b> Telephone No. <b>561-655-2120</b> Fax No. <b>561-655-2168</b> Check if new: Address <input type="checkbox"/> Telephone No. <input type="checkbox"/>
Name and address <b>DAVID M. HALPEN, ESQ.</b> <b>239 S. COUNTY RD., SUITE 300</b> <b>PALM BEACH, FLORIDA 33480</b>	CAF No. <b>6505-84157R</b> Telephone No. <b>561-655-2120</b> Fax No. <b>561-655-2168</b> Check if new: Address <input type="checkbox"/> Telephone No. <input type="checkbox"/>
Name and address _____ _____ _____	CAF No. _____ Telephone No. _____ Fax No. _____ Check if new: Address <input type="checkbox"/> Telephone No. <input type="checkbox"/>

to represent the taxpayer(s) before the Internal Revenue Service for the following tax matters:

**3 Tax matters**

Type of Tax (Income, Employment, Excise, etc.)	Tax Form Number (1040, 941, 720, etc.)	Year(s) or Period(s)
TAX EXEMPT APPLICATION	FORM 1023	N/A

**4 Specific use not recorded on Centralized Authorization File (CAF).** If the power of attorney is for a specific use not recorded on CAF, check this box. (See instruction for Line 4 — Specific uses not recorded on CAF.)

**5 Acts authorized.** The representatives are authorized to receive and inspect confidential tax information and to perform any and all acts that I (we) can perform with respect to the tax matters described on line 3, for example, the authority to sign any agreements, consents, or other documents. The authority does not include the power to receive refund checks (see line 6 below), the power to substitute another representative unless specifically added below, or the power to sign certain returns (see instruction for Line 5 — Acts authorized).

List any specific additions or deletions to the acts otherwise authorized in this power of attorney: \_\_\_\_\_

*Note: In general, an unenrolled preparer of tax returns cannot sign any document for a taxpayer. See Revenue Procedure 81-38, printed as Pub. 470, for more information.*

*Note: The tax matters partner of a partnership is not permitted to authorize representatives to perform certain acts. See the instructions for more information.*

**6 Receipt of refund checks.** If you want to authorize a representative named on line 2 to receive, BUT NOT TO ENDORSE OR CASH, refund checks, initial here \_\_\_\_\_ and list the name of that representative below.

Name of representative to receive refund check(s) ▶ \_\_\_\_\_

For Paperwork Reduction and Privacy Act Notice, see the separate instructions.

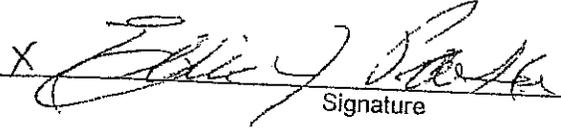
7 Notices and communications. Original notices and other written communications will be sent to you and a copy to the first representative listed on line 2 unless you check one or more of the boxes below.

- a If you want the first representative listed on line 2 to receive the original, and yourself a copy, of such notices or communications, check this box
- b If you also want the second representative listed to receive a copy of such notices and communications, check this box
- c If you do not want any notices or communications sent to your representative(s), check this box

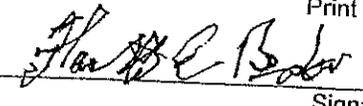
8 Retention/revocation of prior power(s) of attorney. The filing of this power of attorney automatically revokes all earlier power(s) of attorney on file with the Internal Revenue Service for the same tax matters and years or periods covered by this document. If you do not want to revoke a prior power of attorney, check here  **YOU MUST ATTACH A COPY OF ANY POWER OF ATTORNEY YOU WANT TO REMAIN IN EFFECT.**

9 Signature of taxpayer(s). If a tax matter concerns a joint return, both husband and wife must sign if joint representation is requested, otherwise, see the instructions. If signed by a corporate officer, partner, guardian, tax matters partner, executor, receiver, administrator, or trustee on behalf of the taxpayer, I certify that I have the authority to execute this form on behalf of the taxpayer.

▶ IF NOT SIGNED AND DATED, THIS POWER OF ATTORNEY WILL BE RETURNED.

X  Signature 5/3/00 Date TRUSTEE Title (if applicable)

ELLIS J. PARKER  
Print Name

 Signature 5/3/00 Date TRUSTEE Title (if applicable)

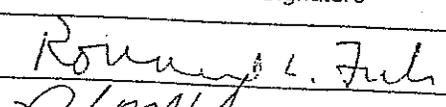
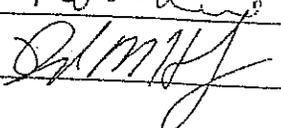
HARTFORD E. BEALER  
Print Name

**Part II Declaration of Representative**

Under penalties of perjury, I declare that:

- I am not currently under suspension or disbarment from practice before the Internal Revenue Service;
- I am aware of regulations contained in Treasury Department Circular No. 230 (31 CFR, Part 10), as amended, concerning the practice of attorneys, certified public accountants, enrolled agents, enrolled actuaries, and others;
- I am authorized to represent the taxpayer(s) identified in Part I for the tax matter(s) specified there; and
- I am one of the following:
  - a Attorney — a member in good standing of the bar of the highest court of the jurisdiction shown below.
  - b Certified Public Accountant — duly qualified to practice as a certified public accountant in the jurisdiction shown below.
  - c Enrolled Agent — enrolled as an agent under the requirements of Treasury Department Circular No. 230.
  - d Officer — a bona fide officer of the taxpayer's organization.
  - e Full-Time Employee — a full-time employee of the taxpayer.
  - f Family Member — a member of the taxpayer's immediate family (i.e., spouse, parent, child, brother, or sister).
  - g Enrolled Actuary — enrolled as an actuary by the Joint Board for the Enrollment of Actuaries under 29 U.S.C. 1242 (the authority to practice before the Service is limited by section 10.3(d)(1) of Treasury Department Circular No. 230).
  - h Unenrolled Return Preparer — an unenrolled return preparer under section 10.7(c)(viii) of Treasury Department Circular No. 230.

▶ IF THIS DECLARATION OF REPRESENTATIVE IS NOT SIGNED AND DATED, THE POWER OF ATTORNEY WILL BE RETURNED.

Designation — Insert above letter (a - h)	Jurisdiction (state) or Enrollment Card No.	Signature	Date
a	Florida		5/5/00
a	Florida		5/5/00

**Part II** Activities and Operational Information

1 Provide a detailed narrative description of all the activities of the organization — past, present, and planned. Do not merely refer to or repeat the language in the organizational document. List each activity separately in the order of importance based on the relative time and other resources devoted to the activity. Indicate the percentage of time for each activity. Each description should include, as a minimum, the following: (a) a detailed description of the activity including its purpose and how each activity furthers your exempt purpose; (b) when the activity was or will be initiated; and (c) where and by whom the activity will be conducted.

The organization was created under an Agreement of Trust dated April 27, 2000. The organization will make gifts, grants and contributions for charitable, scientific, literary or educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986, as amended (the "Code"), primarily to organizations that are both described in Section 170(c)(2) of the Code, and which are "public charities" within the meaning of Section 509 of the Code. If the organization makes gifts, grants and contributions for such purposes to any other persons, the organization will exercise expenditure responsibility with respect to such transfers to the extent required by Section 4545 of the Code. It is expected that the organization will benefit primarily charities of a similar type to those which the Settlor benefitted during his lifetime and charities in which the individual Trustees of the organization have an active and personal interest.

2 What are or will be the organization's sources of financial support? List in order of size.  
Contributions by the Settlor

3 Describe the organization's fundraising program, both actual and planned, and explain to what extent it has been put into effect. Include details of fundraising activities such as selective mailings, formation of fundraising committees, use of volunteers or professional fundraisers, etc. Attach representative copies of solicitations for financial support.  
None

**EXHIBIT**  
C