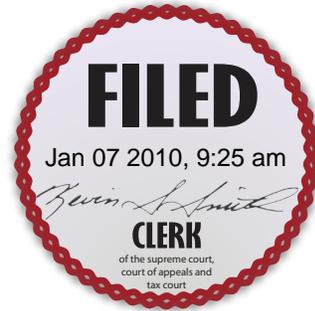


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

UNSUPERVISED ESTATE OF ETHEL M.)
FREYER,)
)
Appellant-Petitioner,)
)
vs.)
)
CATHY E. DRAKE,)
)
Appellee-Respondent.)

No. 30A05-0903-CV-126

APPEAL FROM THE HANCOCK CIRCUIT COURT
The Honorable Jack A. Tandy, Special Judge
Cause No. 30C01-0510-EU-56

January 7, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Estill Wesley appeals the trial court's order on the objections of brothers Estill Wesley ("Estill") and George Tully ("George"), both trust beneficiaries, to the trust accountings filed by their sister, Cathy Drake ("Cathy"), as successor trustee of the Robert D. Freyer and Ethel M. Freyer Revocable Living Trust ("the Joint Trust") and the Ethel M. Freyer Revocable Trust, as amended ("the Ethel Trust").

We affirm.

ISSUES

1. Whether the trial court erred in its findings and conclusions as to a lot in Florida.
2. Whether the trial court erred in its attorney fee award to Estill.¹
3. Whether the trial court erred when it failed to find that certain attorney fees incurred by Cathy were damages sustained by the trust beneficiaries and required her reimbursement thereof to the Ethel Trust.

FACTS

Robert ("Robert") and Ethel ("Ethel") Freyer were married in 1958. Ethel had four children: George, Estill, Cathy, and Jack Wesley ("Jack"). On October 10, 1996, Robert and Ethel created the Joint Trust, of which they were the grantors, initial trustees, and primary beneficiaries; and which provided that the surviving spouse would become both the trustee and beneficiary of the trust. The Joint Trust named George, Estill, and

¹ The \$40,000.00 attorney fee that was awarded to Estill and George was "for reimbursement of their attorney fees," but only Estill has filed an appellate brief and argued this matter on appeal. (Estill's App. 41).

Cathy as residuary beneficiaries,² and named Cathy to succeed as trustee upon the death of the survivor of Robert and Ethel.

Robert died on October 28, 1999. Thereafter, Ethel was the trustee and sole beneficiary of the Joint Trust until her death on July 1, 2005.

On May 25, 2001, Ethel created the Ethel Trust, which she amended on October 15, 2001. She was the grantor, initial trustee, and primary beneficiary thereof; Cathy, George, and Estill were the trust's residuary beneficiaries,³ and Cathy was named to succeed as trustee upon Ethel's death.

Also on May 25, 2001, Ethel executed her last will and testament. Therein, she nominated Cathy to serve as personal representative of her estate, and made the Ethel Trust the residual beneficiary of her will.

On July 1, 2005, Ethel died, and Cathy assumed the role of successor trustee of the Joint Trust and of the Ethel Trust. On October 3, 2005, Cathy filed a petition for probate of Ethel's will, and she was appointed personal representative of the Indiana estate.

On July 7, 2006, Jack filed a petition in the probate court asking to be determined an omitted heir. On July 19, 2006, Estill and George filed a petition to docket the Ethel Trust, to determine heirs of the estate and interests in the trust, and for an order to require an accounting by Cathy of her actions as successor trustee of the Ethel Trust. On April 3, 2007, an order was issued, and Cathy filed the Ethel Trust documents with the trial court.

² A granddaughter of Ethel and a great-granddaughter of Robert were also named as residuary beneficiaries of the Joint Trust.

³ Four granddaughters of Ethel were also named as residuary beneficiaries of the Ethel Trust.

She subsequently filed an accounting for the period from July 1, 2005, to March 20, 2007.

On May 30, 2007, Estill and George filed a petition seeking an order for Cathy to file an accounting for her actions as successor trustee of the Joint Trust; to remove her as personal representative of Ethel's estate and as successor trustee of both trusts; and to set a hearing on their objection to the accounting filed by Cathy for the Ethel Trust. On July 9, 2007, Cathy filed the Joint Trust and an accounting therefor for the period from July 1, 2005, to May 31, 2007. On August 13, 2007, Cathy filed her resignation as personal representative of Ethel's estate and as trustee of both trusts.

On October 29, 2007, the trial court appointed the National Bank of Indianapolis to serve as successor personal representative and as successor trustee for both trusts. On November 28, 2007, Cathy filed supplemental accountings for both trusts. On December 21, 2007, Estill and George filed objections to both accountings.

On September 2, 2008, the trial court heard evidence on the objections of Estill and George to the accountings filed by Cathy. Cathy, Estill, and George all testified. The trial court heard evidence as to the following with respect to the Florida lot, Estill's attorney fees, and Cathy's attorney's fees.

Florida Lot

In 1979, Robert and Ethel bought an undeveloped lot in Florida; the warranty deed listed Robert, and Ethel – “his wife” – as owners. (Estill's App. 316). On October 10, 1996 (the same date they created the Joint Trust), Robert and Ethel executed a quit claim

deed transferring the lot to the Joint Trust. The quit claim deed was not recorded. After Robert's death in October of 1999, and pursuant to the provision of the Joint Trust as to a credit shelter trust, Ethel executed an "Allocation of Assets to Credit Shelter Trust for the Robert D. Freyer Credit Shelter Trust" on December 1, 1999; it listed the Florida lot as an asset of the Joint Trust. Further, the "United States Estate (and General-Skipping Transfer Tax Return)" filed for Robert's estate reported the Florida lot as an asset of the Joint Trust.

On April 26, 2001, as trustee of the Joint Trust, Ethel sold the Florida lot to Cathy's husband, Gary Drake ("Gary"), for \$3,000.00, and executed a trustee's deed in that regard. Also on April 26, 2001, Ethel executed as trustee a "Florida Department of Revenue Return for Transfer of Interest on Real Property," affirming under oath her sale of the Florida lot to Gary. The trustee's deed was recorded in Florida on April 30, 2001.

On May 12, 2001, Gary executed a quit claim deed transferring title of the Florida lot to himself and Cathy. This quit claim deed was recorded in Florida on May 25, 2001. Thereafter, Gary and Cathy paid the annual property taxes due on the lot for the ensuing years. Gary visited the Florida lot on at least two occasions after purchasing it from Ethel, and George accompanied him on one visit. Gary testified that George was "aware that [Gary] had purchased the lot from Ethel." (Tr. 142).

In 2005, Gary and Cathy decided to sell the Florida lot. When preparing for the closing of the sale, the title company reported a problem with the title. As noted above, the deed from Robert and Ethel to the Joint Trust had not been recorded in Florida. The

title search confirmed Gary's purchase of the property from Ethel, but suggested that "the property was actually owned by Mrs. Freyer individually at the time she executed the trustee's deed." (Tr. 90). Hence, it appeared that the deed from the Joint Trust to Gary was invalid.

Cathy consulted her attorney, Steven Robinson, who recommended employing a Florida attorney to resolve the title problem. She hired Robert Klingbeil, a Florida attorney, who then advised her to petition for ancillary administration of Ethel's estate in Florida and means of "correct[ing] the conveyance." *Id.* Attorney Klingbeil prepared a Petition for Summary Ancillary Administration for Cathy to sign; however, the petition erroneously stated that the lot was an asset of Ethel's estate at the time of her death, thereby passing to her trust. Attorney Klingbeil further advised Cathy to deed the lot, in her official capacity as successor trustee of Ethel's Trust, to herself and Gary. Relying on her attorney's advice, Cathy signed the petition and the trustee's deed -- accordingly conveying the lot from the Ethel Trust. Indiana attorney Robinson assisted Cathy in preparing the trust accountings, and therein, Cathy did not identify the Florida lot as an asset of Ethel's estate in her trust accountings. She also did not notify the beneficiaries of the Ethel Trust of the ancillary administration in Florida, or notify the beneficiaries of the trustee's deed purporting to transfer the Florida lot to herself and Gary.

Estill's Attorney Fees

Allen Wellman McNew ("AWM") filed Jack's petition on July 7, 2006, seeking to have him determined to be an omitted heir. AWM also filed the petition for Estill and

George on July 19, 2006, to docket the Ethel Trust for probate purposes. AWM continued to represent both Estill and George until August 11, 2008 -- three weeks before the September 2, 2008 evidentiary hearing. On August 11, 2008, AWM withdrew its appearance on behalf of George, and attorney David P. Murphy entered his appearance on behalf of George.

Attorneys from AWM represented Estill at the September 2, 2008 evidentiary hearing. At the hearing, AWM attorney Kevin Harvey submitted an affidavit and billing statements in support of Estill's claim against Cathy for attorney fees. The affidavit stated that Estill and George agreed to pay attorney fees "at the hourly rate of \$250.00." (Estill's App. 269). For their representation of Estill from July 6, 2006 through August 27, 2008, and of George from July 6, 2006 until August 11, 2008, AWM's "total time for attorney work" was 193.55 hour. *Id.* at 271. The affidavit then concluded that Estill and George were "responsible" for paying AWM attorney fees "of \$53,226.25 (\$275 x 193.55)." *Id.* at 272. The agreement, however, was for an hourly rate of \$250.00. Thus, the total should have been \$48,387.50 (\$250 x 193.55).

No evidence was submitted regarding fees incurred by George for his representation by Murphy from August 11 – September 2, 2008. After the hearing, Harvey submitted an affidavit stating that since August 27, 2008, AWM attorneys had performed additional work, "a total of 56.5 . . . hours," for "additional attorney fees" of \$14,125.00, *id.* at 88, but no supporting documentation in that regard was submitted to the trial court.

Cathy's Attorney Fees

Robinson represented Cathy in her capacity as successor trustee of the Joint Trust and of the Ethel Trust, and as personal representative of Ethel's estate. Robinson assisted Cathy in preparing accountings for both trusts. There was no challenge by Estill to the accountings with respect to the trusts' payment of Robinson's attorney fees.

Cathy was also represented by the law firms of Drewry Simmons Vornehm ("DSV") and Cohen Garelick & Glazier ("CGG") in defending against the allegations filed by Estill and George as to her administration as successor trustee of the trusts. The Ethel Trust accountings reflected payment of fees to DSV and CGG therefor in the sum of \$33,741.23, and deposition costs of \$686.20 until October 7, 2007.

None of the foregoing fees were for Cathy's representation subsequent to filing the trusts' accountings. Thereafter, Cathy incurred "significant legal expenses," which she personally paid and did not claim as trust obligations. (Tr. 85). Cathy also testified that although both trusts included provisions authorizing compensation to the successor trustee, and the administration of the trusts had consumed "at least" several hundred hours of her time, she had neither received nor sought any compensation for her work. *Id.* at 87.

Other Evidence.

The trial court also heard evidence establishing that Cathy had failed in various regards to comply with Indiana's statutory and trust term requirements for providing notice and annual accountings to the beneficiaries. Cathy testified that she had attempted

to administer the trust according to her understanding of “what Robert and Ethel had planned.” (Tr. 39). Specific payments reflected in the trust accountings were found to have been mistakenly made, but Cathy admitted these errors and asked that the amounts be “charged [to her] personally.” (Tr. 35).

Trial Court’s Order

On November 3, 2008, the trial court issued its thirty-page findings of fact, conclusions of law, and judgment, and made certain revisions thereto on January 16, 2009. It ordered Cathy to reimburse the Ethel Trust \$18,368.81 and the Joint Trust \$2,100.00, and to pay \$40,000.00 to Estill and George “for reimbursement of their attorney fees.” (Estill’s App. 41).

As to the Florida lot, the trial court found that because the conveyance by Robert and Ethel to the Joint Trust in 1996 was not recorded, “it appeared that Ethel owned the lot at the time of her death.” (*Id.* at 46). It further found that Ethel’s action in executing the trustee’s deed before her death evidenced her “desire to sell the lot to Gary.” *Id.* In addition, it found that “upon the advice of” her Indiana and Florida attorneys, Cathy had filed the ancillary estate administration in Florida to “clear up” the title confusion. *Id.* The trial court concluded that the lot had been previously transferred to the Joint Trust, “even though the deed was not recorded”; the sale “was an arm’s length transaction made at the discretion of Ethel, who had the discretion to dispose of it if she wished”; and the ancillary administration was undertaken on the advice of counsel, and did not “have the legal effect of causing the lot to be an asset of Ethel’s Trust.” *Id.* at 47, 48. It concluded

that Ethel’s “intent should be honored,” and that although “Cathy breached her duties” as trustee of the Ethel Trust

by failing to notify the beneficiaries of the Florida ancillary administration and failing to obtain Court permission for the transfer of the Florida lot from the Trust to herself and her husband[,] [t]he breach is tempered by the facts that Cathy was acting on the advice of attorneys, that no financial harm came to the beneficiaries of either Ethel’s Trust of the Joint Trust, and that Cathy’s explanations would have likely not been accepted by George and Estill due to their strained relationship.

Id. at 48.

With respect to the award of attorney fees to Estill and George, the trial court concluded that they had incurred attorney fees “to force Cathy” to provide them with information to which they were entitled as beneficiaries, “successfully proven” that she “mismanaged the trusts and the estate,” and “successfully forced [her] to resign” as successor trustee of the trusts and personal representative of the estate. *Id.* at 38. However, despite the brothers’ claim that Cathy “owe[d] more than \$100,000 back to the trusts,” the trial court found she owed approximately 20% of that amount.⁴ *Id.* at 39. The trial court then found \$40,000.00 to be

a reasonable amount of attorney fees to award Estill and [George]. In determining the amount of reasonable fees, the Court has taken into account the size of the trust assets,⁵ the actions of Cathy . . . in necessitating the action, the fact that some but not all of the claims by Estill and [George] have been proven to be true, and the fact that Estill and [George]’s counsel also represent brother Jack Wesley in his pretermitted heir claim against the trusts and estate.

⁴ Specifically, \$20,468.81.

⁵ It found the assets for the three entities to total approximately \$357,800.00 as of August 27, 2008.

Id.

Finally, the trial court found that “Cathy had a right to defend the unfounded allegations of Estill and [George].” *Id.* at 39. The trial court concluded that representation by DWR and CGG was “necessary for Cathy as successor trustee of the trusts to help resolve the numerous issues surround the administration of the trusts and the estate,” and were “legitimate expenses of the trusts up to the time of litigation.” *Id.* at 40.

DECISION

We most recently described our posture when reviewing an order entered with findings of fact and conclusions of law by the trial court, pursuant to Indiana Trial Rule 52(A), as follows:

We may not set aside the findings or judgment unless they are clearly erroneous. First, we consider whether the evidence supports the factual findings. Second, we consider whether the findings support the judgment. Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference. A judgment is clearly erroneous if it relies on an incorrect legal standard.

In conducting our review, we give due regard to the trial court’s ability to assess the credibility of witnesses. While we defer substantially to findings of fact, we do not do so to conclusions of law. We do not reweigh the evidence; rather, we consider the evidence most favorable to the judgment with all reasonable inferences drawn in favor of the judgment.

In re Stuart Cochran Irrevocable Trust, 901 N.E.2d 1128, 1135 (Ind. Ct. App. 2009)

(internal citations omitted), *trans. denied*.

1. Florida Lot

Estill argues that the trial court erred in concluding that the ancillary estate administration in Florida was conducted to fulfill Ethel's intent in transferring the Florida lot prior to her death and, thus, was not an asset in the Ethel Trust. He reminds us that Cathy had represented to the Florida court that the lot was in fact an asset of Ethel's estate. The trial court took this fact into consideration, however, and it concluded the representation – taken upon the advice of Florida counsel – did not “have the legal effect of causing the lot to be an asset of Ethel's Trust.” (Estill's App. 48). Estill directs us to no authority that bars such a conclusion by the trial court, and we do not find it to be clearly erroneous.

In a similar vein, Estill cites to Cathy's representation to the Florida court that the lot was an asset of Ethel's estate, and argues that when the lot thereby became part of the Ethel Trust, Cathy violated the statutory trust provisions by her further actions to execute a trustee's deed. As Cathy properly responds, however, the trial court found that she had breached her trustee duties by not following the Indiana statutory requirements, but then it concluded that Estill (and George) had not been harmed by such breach because the Florida lot had never been an asset of the estate. Again, Estill directs us to no authority that bars the conclusion that the trial court reached, and we do not find it to be clearly erroneous.

Estill also argues that the trial court committed reversible error by failing to give full faith and credit “to the judgment of the Florida probate court and violated the principles of *res judicata*.” Estill’s Br. at 18. This contention also fails.

In his brief to the trial court, Estill argued Cathy failed to include the lot as an asset “titled in [the Ethel] Trust” and then improperly transferred the lot to herself and Gary. (Estill’s App. 51). At trial, however, Estill argued that Cathy had “admit[ed] [the lot] [was] part of the estate by the pleading she filed in Florida.” (Tr. 112). A party may not change its theory on appeal and argue an issue that was not properly presented to the trial court. *Pardue v. Smith*, 875 N.E.2d 285, 290 (Ind. Ct. App. 2007); *see also Carter v. Estate of Davis*, 813 N.E.2d 1209, 1213 (Ind. Ct. App. 2004).

Neither at trial nor in his motion to correct error did Estill argue the full faith and credit clause. In order to preserve a constitutional issue for appeal, it must first be presented to the trial court. *Endres v. Indiana State Police*, 809 N.E.2d 320, 322 (Ind. 2004). Further, although as Estill correctly notes, “Full faith and credit means that ‘the judgment of a state court should have the same credit, validity, and effect, in every other court of the United State, which it had in the state where it was pronounced,’” (Estill’s Br. at 19, quoting *N. Ind. Commuter Transp. Dist. v. Chicago South Shore and South Bend R.R.*, 685 N.E.2d 680, 685 (Ind. 1997)), Estill did not offer into evidence the judgment from the Florida court. Thus, there was no Florida judgment before the trial court for consideration.

Estill did argue *res judicata* in his motion to correct error, but he did not argue that the Florida judgment was *res judicata* as to the lot being an asset of the estate. Again, because this argument was not presented to the trial court, it was not preserved for appeal. *Pardue*, 875 N.E.2d at 290.

2. Estill's Attorney Fees

Indiana Code section 30-4-3-11(b)(4) provides that if the trustee “commits a breach of trust,” she is liable to the beneficiary for “reasonable attorney fees incurred by the beneficiary in bringing an action on the breach.” Noting the statute’s use of the word “reasonable,” we have held that when we review an award of attorney fees pursuant to this statute, “we do not reweigh the evidence presented and substitute our judgment for that of the factfinder.” *Adamson v. Norwest Bank Indiana, N.A.*, 633 N.E.2d 293, 295 (Ind. Ct. App. 1994) (affirming attorney fee award of \$11,136.05 in connection with estate valued at \$300,000.00).

Estill directs our attention to the trial court’s reference to AWM’s representation of Jack Wesley, and asserts that no evidence indicates that fees for representation of Jack “were included in Estill and George’s attorney fee request to the trial court in the instant matter.” Estill’s Br. at 22. Therefore, according to Estill, there was “no evidence for the trial court to have lowered the fee request of Estill and George,” and the trial court erred when it did not award them attorney fees in the amount of \$53,226.25 and \$14,125.00, for a total of \$67,351. 25.

Estill cites no authority to support his argument, and we are not persuaded. Further, we are disturbed that even in his reply brief, he fails to acknowledge that the Harvey affidavit improperly sought fees of \$53,226.25 based on a calculation that did not use the hourly rate to which the parties had agreed. Based upon AWM representation through August 27, 2008, attorney fees earned at the agreed \$250 hourly rate for the 193.55 documented hours of work would be \$48,387.50 – a difference of \$4,838.75. In its petition requesting additional attorney fees, AWM used the correct \$250 hourly rate in claiming an additional 56.5 hours of work, but it failed to submit documentation in support of its request.

Further, the trial court expressly found that although Estill and George claimed Cathy owed the trusts more than \$100,000.00, it found that the amount of her improper application of trust funds was approximately 20% of that amount. For prevailing on only 20% of their claims, Estill and George were awarded \$40,000.00 for attorney fee expenses. We find the amount of this award to be within the range of the evidence presented, and further find that the award of that amount as reasonable attorney fees is not clearly erroneous.

3. Attorney Fee Damages

Finally, Estill argues that the trial court erred when it did not order Cathy to reimburse the Ethel Trust for the \$33,741.23 in attorney fees paid to DSV and CGG and \$686.20 in deposition costs to defend her actions as successor trustee in the litigation brought by Estill and George. Without authority, he essentially contends that because the

trial court found that Cathy had breached her fiduciary duties in numerous ways, “it was clear error for the trial court not to have included” those attorney fees and costs “as part of the damages suffered by the beneficiaries” of the Ethel Trust. Estill’s Br. at 26.

Estill’s argument fails to acknowledge the undisputed evidence that the attorney expenses he challenges were incurred only up to October 8, 2007, just before the filing of the supplemental accounting. The challenged fees were not incurred in defending Cathy between that date and the trial on September 2, 2008. Moreover, as noted earlier, Cathy spent several hundred hours working as successor trustee of the trusts and as personal representative of Ethel’s estate, and she never sought any compensation for this work – although the terms of the trusts authorized such. Finally, although the trial court found Cathy had breached her fiduciary obligations as trustee, it also found that she ultimately prevailed on the great majority of the allegations lodged by Estill and George.

The trial court concluded that Cathy had the right to defend against the allegations lodged against her administration of the trusts and the estate, and that the DSV and CGG attorney fees she incurred in this regard “were necessary to help resolve the numerous issues and [were] legitimate expenses of the trusts up to the time of litigation.” (Estill’s App. at 40.). We do not find the trial court’s conclusion in this regard to be clearly erroneous. Therefore, it was within the trial court’s discretion to not require Cathy to reimburse Ethel’s Trust for the funds paid to DSV and CGG to represent her.

Affirmed.

MATHIAS, J., concurs.

ROBB, J., concurs in part and dissents in part with separate opinion.

**IN THE
COURT OF APPEALS OF INDIANA**

UNSUPERVISED ESTATE OF)	
ETHEL M. FREYER,)	
)	
Appellant-Petitioner,)	
)	
vs.)	No. 30A05-0903-CV-126
)	
CATHY E. DRAKE,)	
)	
Appellee-Respondent.)	

ROBB, Judge, concurring in part and dissenting in part.

I respectfully dissent from the majority’s conclusion that the trial court did not err in declining to order Cathy to reimburse the Ethel Trust for the attorney fees the Ethel Trust incurred to resolve the disputes arising from Cathy’s numerous breaches of her fiduciary duties to the beneficiaries.⁶

Following the death of Ethel, and until April 16, 2007 – a span of nearly two years – Cathy did not disclose to the beneficiaries of the Ethel Trust or the Joint Trust that they

⁶ However, I agree with the majority that the trial court’s findings and conclusions regarding the Florida lot were not clearly erroneous and the trial court did not abuse its discretion in its award of attorney fees to Estill.

were beneficiaries. During this time, Cathy did not provide the beneficiaries of either the Ethel Trust or the Joint Trust with the annual accounting required by the terms of the trusts. The disclosure and accounting were provided only in response to the trial court's order to do so obtained by George and Estill. Further, even as of May 11, 2007, when Cathy filed her accounting, she failed to comply with the trust provision requiring the division of the Ethel Trust into separate and equal shares. During the time that Cathy, as trustee, omitted to take these actions that were clearly required by the terms of the Ethel Trust and the Joint Trust, she undertook an ancillary administration in which the Florida lot, represented to be part of Ethel's estate at the time of her death, passed to the Ethel Trust and by deed from the Ethel Trust to Cathy and her husband. Yet Cathy did not notify the Ethel Trust's beneficiaries of the ancillary administration or the transfer of the Florida lot from the Ethel Trust to Cathy and her husband.

With respect to the Joint Trust, Cathy made distributions to herself, Connie Hyde, and George, but knowingly failed to make a distribution to Estill because of her personal animosity toward him. Estill "lost his home due to financial circumstances that could have been possibly avoided had he received his distribution from the Joint Trust." Appellant's Appendix at 22-23. Further, during the period covered by Cathy's belated accounting regarding the Ethel Trust, Cathy improperly charged to the Ethel Trust \$15,625.05 in "personal expenses, disallowed expenses, and misapplied attorney fees." Id. at 28. Cathy acknowledged she knew, between the date of her May 29, 2007, deposition regarding the accounting and the September 2, 2008, hearing, that a significant

portion of these expenses were in fact personal expenses not properly chargeable to the Ethel Trust, yet she did not file any amended accountings to correct the misrepresentations.

In light of these facts found by the trial court, it concluded Cathy committed numerous breaches of her fiduciary duties as trustee, including: (1) failing to administer either the Ethel Trust or the Joint Trust according to their terms; (2) using trust funds to pay her personal expenses; (3) filing an accounting that contained false representations about the utilization of trust assets for herself; (4) “failing to notify the beneficiaries of the Florida ancillary administration and failing to obtain Court permission for the transfer of the Florida lot from the [Ethel] Trust to herself and her husband,” *id.* at 48; and failing to treat the multiple beneficiaries of either the Ethel Trust or the Joint Trust impartially by (5) “intentionally refraining from keeping the other beneficiaries [besides herself] informed” of matters pertaining to the trusts, (6) “distributing assets to herself prior to distributing assets to other beneficiaries,” and (7) distributing assets of the trusts to some beneficiaries but not others. *Id.* at 34.

In considering whether a trustee can properly use trust funds to pay for the trustee’s defense in litigation, Indiana courts consider not merely the result of the litigation, but whether the trustee is “acting reasonably and in good faith,” whether the issue in litigation “is of little or momentous consequence to the estate or its beneficiaries,” whether the facts are undisputed or so controversial as to require determination in an adversary proceeding, whether the legal questions are simple or

complex and unsettled, “and any other matters that bear upon the reasonableness or the necessity for the litigation and the multiple employment of attorneys therein.” Malachowski v. Bank One, Indianapolis, N.A., 682 N.E.2d 530, 533 n.3 (Ind. 1997) (quoting Zaring v. Zaring, 219 Ind. 514, 39 N.E.2d 734, 737 (1942)). Applying these factors leads to the conclusion that the Ethel Trust should not bear the cost of Cathy’s attorney fees because Cathy, as trustee, was not acting reasonably and in good faith, there were no complex factual or legal disputes requiring court resolution, and the necessity of litigation resulted entirely from Cathy’s acts of misconduct and her neglect of her fiduciary duties. If Cathy had administered the Ethel Trust and the Joint Trust impartially and according to their terms, there would have been no need for George and Estill to initiate litigation to compel Cathy to docket the trusts and render an accounting, force Cathy to admit her misrepresentations in the accounting and make a distribution to Estill, and ultimately force Cathy to resign as trustee. Consequently, but for Cathy’s numerous breaches of her fiduciary duties, there would have been no need for Cathy to pay for attorneys to defend her actions and “help resolve the numerous issues surrounding the administration of the trusts and the estate.” Appellant’s App. at 40; see Malachowski, 682 N.E.2d at 534 (affirming trial court’s decision that trustee could not obtain reimbursement of attorney fees from trust, when “trustee committed significant and substantial misconduct” and “the beneficiaries’ legal action was reasonably necessary due to the trustee’s misrepresentations”); Haas v. Wishmier’s Estate, 99 Ind. App. 31, 190 N.E. 548, 549 (1934) (concluding trustee could not use trust funds to pay attorney fees

for his defense because “these proceedings were actuated because of the misconduct of [the trustee] It was because of the misconduct and negligence of the [trustee] that these proceedings became necessary.”).

The trial court and the majority rely largely on the fact that Cathy ultimately prevailed on several of the allegations of misconduct lodged against her by Estill and George, chiefly, the accounting regarding the Florida lot. However, there would have been no need for Estill and George to challenge Cathy’s accounting regarding the Florida lot had she properly informed them of the ancillary administration and properly obtained Court permission to proceed with the transfer. Cathy did neither, leaving Estill and George with the impression, after the fact, that she was trying to hide some impropriety. Even though Cathy’s legal position regarding her ownership of the Florida lot ultimately prevailed, her accounting was false in crucial other respects, and her bad-faith conduct significantly increased the cost of litigation for both the Ethel Trust and its beneficiaries. See Appellant’s App. at 36-37 (trial court concluding “Cathy Drake’s false accounting, her fallacious deposition testimony, and her failure to correct her accounting . . . before forcing this matter to trial caused undue and unfair delay to the beneficiaries in the receipt of the trust funds due to them, caused damage to the beneficiaries and unnecessarily and significantly increased the costs of resolving these matters as to her accounting.”) (emphasis added). Further, despite the trial court’s conclusion Cathy’s misconduct was mitigated by her reliance on legal counsel, the trial court also found Cathy was fully liable for the acts or omissions of her attorney Robinson because she “(1)

directed or permitted Steve Robinson's actions; (2) failed to exercise proper supervision over his conduct; [and] (3) approved of, acquiesced in, or concealed his actions" Id. at 40. For these reasons, I would reverse that part of the trial court's judgment concluding that none of the attorney fees paid from the Ethel Trust to represent Cathy as trustee were damages to the Ethel Trust, and would remand with instructions to order Cathy to reimburse the Ethel Trust for those attorney fees in the amount of \$33,741.43.