STATE OF IDAHO )
County of KOOTENAI )ss

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CLERK OF DISTRICT COURT

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Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE**

**STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

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| **ANNA MARYOTT, a single woman, and CHRISTY NELSON, a married woman,**<br><br>*Plaintiffs*,<br>vs.<br><br>**GWYNN L. MARYOTT, a single woman, Individually, and as Trustee, TRUST OF JUNE N. MARYOTT,**<br><br>*Defendant*. | Case No. **CV 2012 7147**<br><br>**MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT** |

## I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on plaintiffs Anna Maryott and Christy Nelson's (Maryott/Nelson) motion for partial summary judgment. On September 27, 2012, Maryott/Nelson filed their Complaint, alleging Gwynn Maryott (Gwynn) breached her fiduciary duties as trustee to them as beneficiaries. Complaint, p. 5. Gwynn serves as successor trustee of the "Trust of June N. Maryott" (Trust). *Id.,* pp. 2-3. June Maryott (June) was Gwynn's mother and Maryott/Nelson's grandmother. *Id.*, p. 2. June was also the mother of Douglas Maryott (Douglas). Douglas was the father of Maryott/Nelson. June died on August 25, 2008. *Id.*, p. 2. The trust identified Douglas, June's son, as first successor trustee and as contingent beneficiary. *Id.*, pp. 2-3. Gwynn was named second successor trustee and contingent beneficiary as well. *Id*. Douglas predeceased June on October 31, 2003. *Id.*, p. 2. Maryott/Nelson claim they are beneficiaries by representation and June has failed to properly distribute trust assets

and provide an adequate accounting of the Trust Estate when requested. *Id.,* p. 5. Maryott/Nelson seek to be declared beneficiaries of the Trust, to have an accounting performed and approved, to have Gwynn removed as trustee, to be distributed their share of the Trust Estate, to be awarded costs and attorney fees, to have a constructive trust imposed on accounts, investments and real estate in Gwynn's name and for sanctions imposed against Gwynn and her attorney, Henry Madsen (Madsen). *Id.*, pp. 6-7. The trust reads:

> ARTICLE 3
> Trust at June N. Maryott's Death
>
> Action at the Death of June N. Maryott: At the death of June N. Maryott but before the trust assets are allocated as set forth below, the successor trustee shall make the following distributions:
>
> June N. Maryott's Final Expenses: The successor trustee may, in the successor trustee's reasonable discretion, pay from the trust estate June N. Maryott's debts, last illness and funeral costs, and administration expenses for this trust.
>
> Allocation of Trust Estate – Remainder: The successor trustee shall distribute and allocate the remainder of the trust estate to the following share and share alike, by right of representation.
>
> Gwynn L. Maryott
> Douglas B. Maryott
>
> If no beneficiaries exist, the successor trustee shall give the remainder to the heirs of June N. Maryott, their identities and shares to be determined under Idaho law in effect on the date of execution of this instrument relating to succession of property.

Complaint, Exhibit A, p. 2. Later, the trust reads:

> ARTICLE 5
> Contest, Disinheritance, Definitions
> * * *
> Survivorship Requirement: For all gifts under this instrument, the beneficiary must survive June N. Maryott for (6) days before entitlement to such gifts.

*Id.,* p. 6.

On October 10, 2012, Gwynn filed her Answer and Counterclaim. Gwynn denied many of the allegations in the Complaint and set forth several affirmative defenses. Answer, pp. 1-4. Gwynn also makes a counterclaim alleging that Gwynn made partial distribution of some of the trust assets to Maryott/Nelson in November 2008, and such transfer was wrongfully made. *Id.*, p. 7; Affidavit of Gwynn Maryott, p. 2, ¶¶ 7-8. Gwynn demands the return of those sums and an injunction preventing Maryott/Nelson from further harassment and intimidation of Gwynn. *Id.* Gwynn also seeks attorney fees. *Id.*

On October 30, 2012, Maryott/Nelson filed their Answer to the counterclaim. Answer to Counterclaim, p. 1. In their Answer, Maryott/Nelson deny the allegations of the counterclaim and set forth a number of affirmative defenses. *Id.*, pp. 2-3.

On December 13, 2012, Maryott/Nelson filed their "Motion for Partial Summary Judgment," supporting memorandum and affidavits. Motion for Partial Summary Judgment, p. 1. The memorandum presents six issues for decision: 1) whether Maryott/Nelson are beneficiaries of the Trust Estate by right of representation, 2) whether Maryott/Nelson are entitled to a full and complete account of the Trust Estate from Gwynn, 3) whether Gwynn should be removed as trustee, 4) whether the rights and interests of Maryott/Nelson should be protected, 5) whether Gwynn and Madsen should be personally liable for any costs associated with these proceedings and 6) whether Gwynn's counterclaim should be dismissed. Memorandum in Support, p. 4.

On January 14, 2013, Gwynn filed a "Notice of Substitution of Counsel" in which Regina McCrea (McCrea) was substituted as attorney for Madsen. On March 30, 2013, Gwynn, pursuant to a stipulation between the parties and with leave from this Court, filed her "First Amended Answer, Withdrawal of Counterclaim, and Third Party Complaint." In the amended answer, Gwynn denies the allegations of the Complaint and asserts as affirmative defenses: 1) failure to state a claim upon which relief can be granted; 2) the

damages were caused in whole or in part by individuals or business entities over whom Gwynn had no control and for whose actions Gwynn is not responsible; 3) Gwynn relied on the advice of Madsen in all her actions and decisions concerning her duties as Trustee; 4) statute of limitations; and 5) estoppel, laches and/or waiver. Amended Answer, p. 5. Gwynn also formally withdrew her previous counterclaim against Maryott/Nelson. *Id.*, p. 6. In the third party complaint, Gwynn alleges four causes of action against Madsen based on Madsen's alleged legal misrepresentation: 1) negligence/breach of fiduciary duty; 2) negligent infliction of emotional distress; 3) equitable indemnity/contribution; and 4) "ABC rule/tort of another." *Id.*, pp. 11-13.

On March 28, 2013, two days past the deadline in I.R.C.P. 56(c) and this Court's pre-trial order, Gwynn filed "Defendant Gwynn Maryott's Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment" and "Affidavit of Gwynn Maryott." In her memorandum, Gwynn argues the trust document is ambiguous, as there is reference to a "right of representation" but also a "survivorship" clause. Memorandum in Opposition, p. 3. Gwynn claims the trust instrument can be reasonably subjected to conflicting interpretations, so the intent of the parties becomes an issue of fact not appropriate for summary judgment. *Id*. Gwynn also argues she is not personally at fault because she relied on Madsen's legal advice in fulfilling her obligations as trustee under I.C. § 68-106(c)(24). Memorandum in Opposition, p. 5.

On April 4, 2013, this Court granted a continuance of the motion for summary judgment hearing pursuant to Madsen's "Third Party Defendant's Motion to Continue Pursuant to IRCP 56(f)", filed April 1, 2013. The hearing was continued from April 9, 2013, to May 1, 2013.

On April 11, 2013, Maryott/Nelson filed their "Reply Memorandum in Support of Motion for Partial Summary Judgment" (4-11-13 Reply). In it, they argue the trust is not

ambiguous, that the No Contest Clause has no bearing on how the Trust should be interpreted, the Allocation of Trust Estate clause supports, rather than refutes, their position, and the language "by right of representation" is significant and not superfluous, and should be given its proper meaning. 4-11-13 Reply, pp. 2-3. They also reiterate Gwynn breached her fiduciary duty by not seeking judicial clarification if she was unsure of the terms of the Trust, and, finally, they argue Gwynn's reliance on Madsen's legal advice does not shield her from personal liability. *Id.,* p. 4.

On April 12, 2013, Madsen filed his "Third Party Defendants' Memorandum of Authorities in Opposition to Plaintiffs' Motion for Summary Judgment", "Affidavit of Michael Wytychak, III in Support of Third-Party Defendants' Opposition to Plaintiffs' Motion for Summary Judgment", and "Affidavit of Henry D. Madsen in Support of Third Party Defendants' Opposition to Plaintiffs' Motion for Summary Judgment". In his memorandum, Madsen argues the survivorship language in the Trust results in it being reasonably subject to conflicting interpretations. Madsen Memo in Opposition, p. 6. He relies on the Affidavit of Michael Wytychak (Wytychak), an elder law attorney, as well as the language contained in Article 3 regarding the right of representation and the survivorship clause in Article 5. *Id*. Madsen also claims Maryott/Nelson should be awarded attorney fees and costs because the Trust is subject to two reasonable interpretations; therefore, the defense was not frivolous. *Id.*, p. 7. Madsen argues he should not be sanctioned as he performed due diligence to determine the proper interpretation of the Trust. *Id*.

On April 15, 2013, Maryott/Nelson filed their "Reply Memorandum in Support of Motion for Partial Summary Judgment to Third-Party Defendant's Opposition" (4-15-13 Reply). In it, they first object to most of Wytychak's affidavit on the grounds of irrelevance, as well as portions of Gwynn's affidavit on the grounds of irrelevance,

incompetence and conclusory statements. 4-15-13 Reply, p. 2. Maryott/Nelson next argue Article 3 supports their position, rather than refutes it and state the whole Trust must be read together, which would include the "right of representation" language, and when done so, the Trust is unambiguous. *Id.*, p. 4. Finally, they argue they should be awarded sanctions, attorney costs and fees on the grounds that Madsen's interpretation of the Trust was unreasonable, and, further, even if the language was ambiguous, the proper advice would have been to seek judicial review, which did not occur. *Id.,* p. 5.

Oral argument was held on May 1, 2013. This case is presently set for a two-day jury trial beginning July 8, 2013.

**II. STANDARD OF REVIEW.**

In considering a motion for summary judgment, the Court may properly grant a motion for summary judgment only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court construes all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in a light most favorable to the non-moving party. *Partout v. Harper*, 145 Idaho 683, 685, 183 P.3d 771, 773 (2008). The Court draws all inferences and conclusions in the non-moving party's favor and if reasonable people could reach different conclusions or draw conflicting inferences, then the motion for summary judgment must be denied. *Zimmerman v. Volkswagen of America, Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 70 (1996).

However, if the evidence shows no disputed issues of material fact, then summary judgment should be granted. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996); *Loomis v. City of Hailey*, 119 Idaho 434,

437, 807 P.2d 1272, 1275 (1991). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2002). The non-moving party "must respond to the summary judgment motion with specific facts showing there is a genuine issue for trial." *Id*.

In ruling on the motion, the Court considers only material contained in the affidavits and depositions which are based on personal knowledge and which would be admissible at trial. *Samuel*, 134 Idaho 84, 88, 996 P.2d 303, 307. Summary judgment is appropriate where a non-moving party fails to make a sufficient showing to establish the existence of an element essential to its case when it bears the burden of proof. *Id.*

## III. ANALYSIS.

### A. Maryott/Nelson are Beneficiaries of the Trust Estate.

The crux of Gwynn and Madsen's defenses are that the terms of the Trust are *ambiguous* because of the terms of Article 3 and Article 5. As mentioned above, the pertinent portion of Article 3 which governs the "Trust at June N. Maryott's Death" states:

> Allocation of Trust Estate – Remainder: The successor trustee shall distribute and allocate the remainder of the trust estate to the following share and share alike, by right of representation.
>
> Gwynn L. Maryott
> Douglas B. Maryott
>
> If no beneficiaries exist, the successor trustee shall give the remainder to the heirs of June N. Maryott, their identities and shares to be determined under Idaho law in effect on the date of execution of this instrument relating to succession of the property.

Complaint, Exhibit A, p. 2.

The applicable portion of Article 5, which governs "definitions" states: "Survivorship Requirement: For all gifts under this instrument, the beneficiary must

survive June N. Maryott for sixty (60) days before entitlement to such gifts." Complaint, Exhibit A, p. 6.

Whether a written document is ambiguous is a question of law. *DeLancey v. DeLancey,* 110 Idaho 63, 65, 714 P.2d 32, 34 (1986). In determining whether a document is ambiguous, the Court seeks to determine whether it is "reasonably subject to conflicting interpretation." *Carl H. Christensen Family Trust v. Christensen,* 133 Idaho 866, 873, 993 P.2d 1197, 1204 (1999), *citing Bondy v. Levy,* 121 Idaho 993, 997, 829 P.2d 1342,1346 (1992). The document must be interpreted as a whole. *Christensen,* 133 Idaho 866, 873, 993 P.2d 1197, 1204; *Matter of Estate of Kirk,* 127 Idaho 817, 827 907 P.2d 794, 804 (1995). This Court finds there to be no ambiguity in June's Trust. If the testator's intention is reflected in the document, then the document is unambiguous and a court will not look at outside information to interpret it. *Matter of Estate of Berriochoa,* 108 Idaho 474, 475, 700 P.2d 96, 97 (Ct.App. 1985).

The Court turns to Idaho statutes in determining there is no ambiguity in June's trust. The Court does so because Article 3 of June's trust states that at the death of June, the remainder of her estate (after June's final expenses) shall be distributed by the trustee to two people: Gwynn L. Maryott and Douglas B. Maryott; "share and share alike, *by right of representation*"; and because Douglas died before June, he was a "beneficiary" which did not exist at June's death, Douglas' children (Maryott/Nelson) are still "heirs of June N. Maryott", "their identities and shares to be determined under Idaho law in effect on the date of execution of this instrument relating to succession of the property." Complaint, Exhibit A, p. 2. (Italics added). There are two people to whom the trust is distributed at the death of June: Gwynn and Douglas. The additional language "by right of representation" has only one meaning, and that is if either Gwynn and

Douglas die before June, and are survived by children (June's grandchildren), then those children are heirs and take Douglas' share (or Gwynn's share had she predeceased June and had children then living). There can be no other interpretation other than that Maryott/Nelson are entitled to Douglas' distribution of the remainder of June's estate upon June's death. The moment June died Maryott/Nelson are entitled to distribution.

The only qualification that *might* be applicable (*if* the residuary clause of Article 3 is a "*gift*") is that under Article 5, Maryott/Nelson must survive June by sixty days. But even if Article 5 is applicable, Maryott/Nelson have now survived June by not only sixty days, but an additional four and one-half years.

Article 5 *might* not even be applicable, because Article 5 only applies to "gifts under this instrument", and it is difficult to understand how *distribution of the remainder* of June's trust estate to two people and their heirs (by representation) is a "gift". *See, Matter of Inter Vivos Trust Established by Thomas S. Turner*, 116 Idaho 913, 916, 782 P.2d 36, 39 (Ct.App. 1989). June's Trust does not appear to define "gift." Even assuming the remainder of June's trust estate is a "gift", Maryott/Nelson have long since survived June by the requisite sixty days. And, if the distribution of the remainder of June's Trust in Article 3 is a "gift" to Maryott/Nelson, then it satisfied all the requirements of a gift. As stated in *Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Trust*, 147 Idaho 117, 126, 206 P.3d 481, 490 (2009):

> Under Idaho law, a "gift" is defined to mean "a voluntary transfer of property by one to another without consideration or compensation therefor." *Stanger v. Stanger,* 98 Idaho 725, 728, 571 P.2d 1126, 1129 (1977) (quoting *Wood v. Harris,* 201 Okla. 201, 203 P.2d 710, 712 (1949)). To effectuate a gift, a donor must deliver property to a donee, or to someone on his or her behalf, with a manifested intent to make a gift of the property. *Boston Ins. Co. v. Beckett,* 91 Idaho 220, 222, 419 P.2d 475, 477 (1966); *Williams,* 126 Idaho at 443, 885 P.2d at 1159. Delivery

> is accomplished when the grantor "relinquish[es] all present and future dominion over the property." *Williams,* 126 Idaho at 443, 885 P.2d at 1159; *see also Beckett,* 91 Idaho at 222, 419 P.2d at 477. Donative intent may be proven by direct evidence, including statements of donative intent, or inferences drawn from the surrounding circumstances, such as the relationship between the donor and donee. *Williams,* 126 Idaho at 443–44, 885 P.2d at 1159–60.

In Article 3, June clearly manifested an intent to give all of the remainder of her trust, after her death, to only two people, Gwynn L. Maryott and Douglas B. Maryott, "by right of representation."

Idaho Code § 15-2-106 addresses "representation" under the Uniform Probate Code (UPC) and states:

> If representation is called for by this code, the estate is divided into as many shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left issue who survive the decedent, each surviving heir in the nearest degree receiving one (1) share and *the share of each deceased person in the same degree being divided among his issue in the same manner.*

I.C. § 15-2-106 (emphasis added). That is the language of that statute when it was added by the Idaho legislature in 1971, and it has not been modified in the intervening forty-two years. This was the language of that statute on January 16, 1991, when June signed her trust; it was the language when Gwynn made partial distribution to Maryott/Nelson in November 2008 (Affidavit of Gwynn Maryott, p. 2, ¶¶ 7-8); it was the language when Gwynn sought Madsen's legal advice and kept the proceeds of the sale of June's house; and it is the language of the statute today.

The language of I.C. § 15-2-106 is clear on what the term "representation" means in Idaho probate law. Under that statute, the shares of the decedent are divided among the heirs, two named people, Douglas and Gwynn, and if one of those heirs, one of those two named people is deceased at the time June dies, the gift of the residual of June's trust does not lapse, but the share of that heir that pre-deceased June is divided

equally among his or her heirs. So in this case, the Trust stated Gwynn and Douglas would inherit from June's trust agreement "by right of representation" which, according to I.C. § 15-2-106, means Gwynn and Douglas would each take one-half of the Trust assets, but because Douglas predeceased June, his heirs (Maryott/Nelson) would take equally under Douglas' one-half share. Under this interpretation, Maryott/Nelson are beneficiaries of the Trust.

Gwynn and Madsen argue it is not so clear-cut, as the language of Article 5's survivorship clause, when read with Article 3, renders the Trust ambiguous. Idaho Code also has a survivorship requirement which states: "Any person who fails to survive the decedent by one hundred twenty (120) hours is deemed to have predeceased the decedent . . . and the decedent's heirs are determined accordingly." I.C. § 15-2-104. Idaho Code goes on further to state:

> A devisee who does not survive the testator by one hundred twenty (120) hours is treated as if he predeceased the testator, unless the will of the decedent contains some language . . . requiring that the devisee . . . survive the testator for a stated period in order to take under the will.

I.C. § 15-2-601.

The comments to the official text of I.C. § 15-2-104 indicate this survivorship requirement is meant to address circumstances such as when multiple family members are involved in an accident and die within days of each other in order to prevent multiple administrations of wills and to clarify who are the heirs of each decedent. I.C. § 15-2-601, 40 A.L.R.3d 359. Essentially, Idaho law requires a potential heir to survive the decedent by 120 hours in order to be deemed an heir and take under the will. If the potential heir does not survive the decedent by 120 hours, then I.C. § 15-2-104 states the heirs are determined as if the potential heir had predeceased the decedent. Idaho Code § 15-2-601 also allows the 120-hour rule to be changed, so long as the instrument

is clear in its intention to do so. That is exactly what June has done in her Trust. However, nothing in I.C. § 15-2-601 indicates that a survivorship clause will nullify an heir's right to take by right of representation.

In interpreting a trust document, unless contrary to settled principles of law, the intentions of a trust's settlor must control in actions involving the trust. *Carl H. Christensen Family Trust v. Christensen*, 133 Idaho 866, 873, 993 P.2d 1197, 1204 (1999). When the court attempts to determine a settlor's intent, it construes a trust document as a whole, considering all parts in light of the entire document. *Id*. The Court's primary objective is to discover the intent of the parties through viewing the document in its entirety. *Id.* To determine whether a document is ambiguous, the Court must determine whether it is "reasonably subject to conflicting interpretation." *Id*. (quoting *Bondy v. Levy*, 121 Idaho 993, 997, 829 P.2d 1342, 1346 (1992). If a document is clear and unambiguous, interpretation is a question of law, but if a document is ambiguous, interpretation is a question of fact. *Id*.

When analyzing the Articles of the Trust, and utilizing Idaho law discussed above, it becomes clear while the Trust must be read in its entirety under *Christensen*, Article 3 and Article 5 address two different scenarios and so do not contradict each other. Article 3 identifies June's heirs as Douglas and Gwynn, and additionally and specifically states they will inherit *by right of representation*, which under I.C. § 15-2-106 means when Douglas predeceased June, his share passed to his children, to be shared equally among them. Article 5 simply extends the mandatory minimum survivorship requirement of 120 hours to 60 days. When read together, the *only logical way* under Idaho Code both Articles would coincide is if Douglas and June had been in an accident together and Douglas died within 60 days *after* June's death. If such an event had occurred, then

Article 5 would apply insofar as Douglas, though he outlived June, would be deemed to have predeceased June (as he did not satisfy the survivorship requirement) and his share would pass to his children equally. However, it is not necessary to venture that far, as Douglas clearly predeceased June. Article 5 is not contradictory to Article 3, as Gwynn and Madsen suggest, but merely complementary to it, in the event of a particular set of circumstances (Douglas dying less than sixty days after June), and those particular set of circumstances are not present in this case. As such, the Trust is not ambiguous and Maryott/Nelson are beneficiaries under the Trust and are entitled to receive Douglas' half of the remainder of June's estate.

There are additional reasons this Court finds the Trust to be unambiguous, capable of only one interpretation.

First, Gwynn's own actions in distributing part of the estate to Maryott/Nelson in November 2008 demonstrates this was Gwynn's own interpretation of the Trust language five years ago. For Gwynn to take an entirely different position, after Gwynn had made the decision to reduce the only remaining trust asset to her own possession, is disingenuous to say the least. Such flip-flop also makes her reliance on Madsen's advice, unfounded.

Second, even Madsen's own expert, elder law attorney Mike Wytychak, agrees that this is the *current* interpretation of the trust language: "Under a modern interpretation, the right of representation would be understood to mean that the heirs of Doug need only survive by 60 days from the death of the trustor." Affidavit of Michael Wytychak, III, p. 3, ¶ 8. The opinion of Madsen's own expert is that Madsen's interpretation of Article 5 of June's Trust somehow trumping Article 3 (or at least creating an inconsistency), *is not supported under current law*. This is expert is also the attorney whom Madsen turned to for advice in construing June's Trust, immediately after this

litigation started. Wytychak communicated that fact to Madsen: "I responded that my opinion was the following:" *Id.* That fact alone causes Madsen's actions to be unreasonable. That fact also causes Madsen to not be credible, when Madsen, in his affidavit, states: "Each of the attornrey with whom I consulted confirmed the conflicting nature of the Trust provisions and concurred that the Trust document could be reasonably subject to varying interpretations as to whether the Plaintiffs would take under the terms of the Trust." Affidavit of Henry D. Madsen, p. 3, ¶ 19. Madsen's own expert directly contradicts that claim. This Court finds Madsen to not be credible in such claim.

Third, Madsen and Gwynn's reliance on Article 5 trumping Article 3 would lead to a palpably absurd result. There is absolutely no *logical* reason why June in Article 3 would give all the remainder of her trust to only two people, her son, Douglas, and her daughter, Gwynn, provided that if either of them pre-decease June then any heirs of that pre-deceased son or daughter would take the share of that pre-deceased child of June's "by right of representation", and then in a different section, Article 5, which gives a "definition" of a "gift", cause the gift to a child of June who predeceases June, to completely lapse.

For a term to be ambiguous, two different *reasonable* interpretations must coexist. *Swanson v. Beco Construction* 145 Idaho 59, 62, 1875 P.3d 748, 751 (2007). (italics added). While the Court fully understands *why* Madsen and Gwynn would argue Article 5 creates a different result regarding Article 3 (Madsen might avoid a malpractice lawsuit and Gwynn receives twice as much property to which she is entitled), Madsen's and Gwynn's desired interpretation *is not reasonable*. Madsen's and Gwynn's interpretation would cause the right of representation provision to be absolutely

meaningless. Article 3 covers all distributions of the trust in all situations after June dies. The right of representation language in Article 3 makes it mandatory that if either Douglas or Gwynn die before June, and have children at the time they die, then those children take their (Douglas or Gwynn) half of the distribution. Article 5 covers a very limited fact situation that can only take place in a very limited period of time. If Douglas died before June (which is what happened), or even within sixty days after June died, then Douglas' interest in the trust, due to the "by representation" language, goes to his heirs, his children. If Douglas died after 60 days but before distribution, then Douglas' interest vests and Douglas' estate gets the distribution.

**B. Maryott/Nelson are Entitled to an Account of the Trust Estate.**

Idaho Code § 15-7-303 sets forth the duty of a trustee to inform and account to the beneficiaries. I.C. § 15-7-303. It states in part:

> (b) Upon reasonable request, the trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect his interest and with relevant information about the assets of the trust and the particulars relating to the administration.
> (c) Upon reasonable request, a beneficiary is entitled to a statement of the accounts of the trust annually and on termination of the trust or change of the trustee.

I.C. § 15-7-303. Beneficiaries are given a statutory right to request a reasonable accounting of the Trust estate. Because this Court has above determined Maryott/Nelson are beneficiaries of June's Trust estate, they are entitled to an accounting by Gwynn.

At oral argument on May 1, 2013, it was disclosed by McCrea, Gwynn's current attorney, that Gwynn had voluntarily provided a preliminary accounting to Maryott/Nelson. This Court orders Gwynn to prepare a full and complete formal accounting and provide such to Maryott/Nelson and Madsen. Such must be prepared as soon as possible, but in any event, no later than June 1, 2013.

**C. Gwynn is Removed as Trustee.**

Idaho Code § 15-7-308 gives a number of circumstances under which a trustee may be removed including: 1) if the trustee has committed a material breach of trust; 2) if the trustee is unfit or unable to administer the trust; 3) if removal of the trustee would substantially further the trustor's purpose in creating the trust; and 4) for other good cause shown. I.C. § 15-7-308. The Court finds each of the first three criteria have been proven by Maryott/Nelson. Maryott/Nelson argue Gwynn failed her fiduciary duty to them as trustees by unilaterally determining Maryott/Nelson were not beneficiaries and instead distributing trust assets to herself alone. Memorandum in Support, p. 8. Other than arguing the Trust is ambiguous, shown above to be entirely misplaced and inconsistent with Gwynn's position when she made the 2008 distribution, Gwynn provides no other argument in opposition to her replacement as trustee. On the advice of counsel, Gwynn determined herself to be the sole beneficiary of the trust estate, to the exclusion of Maryott/Nelson, to the contradiction of her decision to distribute in 2008, and in contradiction to the express language of the Trust. Gwynn has also refused to provide an accounting to Maryott/Nelson, in violation of their statutory right as trust beneficiaries. Gwynn breached her fiduciary duty to Maryott/Nelson when she withheld their shares of the trust assets and instead declared herself sole beneficiary and used the trust assets to purchase a condominium house for herself.

Under these circumstances, this Court finds there has been a material breach of trust (as significant trust assets were involved, indeed, all remaining trust assets were involved), Gwynn is unfit or unable to administer the trust, and Gwynn's removal would substantially further June's purpose in creating the trust. Accordingly, Gwynn is immediately removed as trustee. A hearing to determine the successor trustee will be held as soon as possible.

**D. The Rights and Interests of Maryott/Nelson Must be Protected.**

Maryott/Nelson request this Court prohibit Gwynn from removing trust assets from the Trust and also order the creation of a constructive trust, into which any assets removed by Gwynn be deposited. Neither Gwynn nor Madsen have submitted an argument against such action, and given the situation, such action is appropriate. Gwynn is ordered to place any trust property, or proceeds from any trust property, into a constructive trust.

**E. Gwynn is Personally Liable for Costs of These Proceedings.**

Maryott/Nelson request an award of costs under I.R.C.P. 54(e)(1) and I.C. § 12-121, alleging Gwynn defended this case frivolously, unreasonably and without foundation. Memo in Support, p. 9. Gwynn argues she is not personally liable for trust obligations because she was not personally at fault, as required under I.C. § 15-7-306, but was merely following her attorney Madsen's advice in administering the trust. Memo in Opposition, p. 5. Gwynn also argues under I.C. § 68-106(c)(24) she had no obligation to independently investigate advice given by Madsen. *Id*.

Idaho Code § 68-106(c)(24) allows a trustee the power to "employ persons, including attorneys . . . to advise or assist the trustee in the performance of his administrative duties; [and] to act without independent investigation upon their recommendations." I.C. § 68-106(c)(24). In response, Maryott/Nelson cite *Kolouch v. First Security Bank of Idaho*, 128 Idaho 186, 911 P.2d 779 (1996). The pertinent portion of *Kolouch* states:

> . . . if the exercise of power concerning the estate is improper, the personal representative is liable to interested persons for damages or loss resulting from breach of fiduciary duty to the same extent as a trustee of an express trust. I.C. 15-3-712. "A trustee is personally liable for obligations arising from ownership or control of property of the trust estate or for torts committed in the course of administration of the trust estate only if he is personally at fault." I.C. § 15-7-306.

128 Idaho 186, 196, 911 P.2d 779, 789. In *Kolouch*, the Idaho Supreme Court held the personal representative's mismanagement of the estate property caused the trustee to accrue beyond normal fees, so the personal representative was liable to interested parties, including the trustee, for obligations arising due to her personal fault. *Id*.

However, I.C. § 68-106(c) explains certain powers of the trustees. It allows a trustee to retain the services of an attorney in administering a trust, but does not shield them from liability if their conduct results in mismanagement of the trust assets. There is no law in Idaho on this particular subject. It is far better policy to hold the trustee personally responsible for acts for which the trustee is personally at fault, even if done on the advice of an attorney, because it was the trustee's conduct which breached the fiduciary duty, and if the attorney's advice was patently incorrect, the trustee can bring a malpractice suit against the attorney. To hold otherwise would allow a trustee to hire any attorney, regardless of experience, and commit any breaches in the name of "attorney advice" and escape liability.

In this case, Gwynn mismanaged the Trust estate by selling June's house and using the proceeds to purchase a condominium home for herself, without making distributions to Maryott/Nelson. As discussed above, in doing so, she breached her fiduciary responsibility to Maryott/Nelson, and while she apparently did this on Madsen's advice, it was her conduct which caused such mismanagement. The Court is mindful that even if Gwynn did this on Madsen's improper advice, Gwynn did so more than four years after Gwynn made the *correct* distribution of a small part of the trust estate to Maryott/Nelson back in November of 2008, shortly after June's death. Either Gwynn had correct legal advice back in 2008 and chose to seek a second opinion in 2012, or Gwynn

read the trust and made the right decision in 2008 and now wishes a different outcome in 2012. Either way, Gwynn is responsible for mismanaging the trust in 2012.

Also, under *Taylor v. Maile*, 146 Idaho 705, 712, 201 P.3d 1282, 1289 (2008) and I.C. § 68-108(b), if a conflict of interest exists, such as when a trustee is also a beneficiary under the trust, power to distribute trust assets may be exercised only by court authorization. Thus, *even if Gwynn and Madsen were right about Article 5* (they are not), Gwynn mismanaged the assets simply by not seeking court approval before making the distribution *to herself* from the proceeds of the sale of June's house. Gwynn's mismanagement was conduct for which she was personally at fault. Accordingly, Gwynn is personally liable for costs and fees incurred by Maryott/Nelson.

**F. Rule 11 Sanctions are Imposed Against Madsen.**

Idaho Rule of Civil Procedure 11(a)(1) requires that "pleadings, motions, and other papers signed by an attorney or a party must meet certain criteria and failure to meet such criteria will result in the imposition of sanctions." *Slack v. Anderson*, 140 Idaho 38, 39-40, 89 P.3d 878, 879-80 (2004). Where such motions, pleadings or other papers are not well grounded in fact, warranted by existing law, or are interposed for improper purposes (such as to harass, cause undue delay, or needlessly increase the cost of litigation), imposition of sanctions results. I.R.C.P. 11(a)(1); *Slack*, 140 Idaho 38, 39-40, 89 P.3d 878, 879-80 (citing *Durrant v. Christensen*, 117 Idaho 70, 74, 785 P.2d 634, 538 (1990)). The proper focus of the trial court is whether the party "made a proper investigation upon reasonable inquiry." *Sun Valley Shopping Center, Inc. v. Idaho Power Co.*, 119 Idaho 87, 95, 803 P.2d 993, 1001 (quoting *Durrant*, 117 Idaho 70, 74, 785 P.2d 634, 638 (1990).

In *Slack*, the Supreme Court upheld the District Court's imposition of Rule 11 sanctions, agreeing that the attorney's allegations as signed and filed "were not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and resulted in unnecessary delay and needless increase in the cost of litigation", because he had not exercised reasonableness in asserting that a third party had a direct claim against an insurance company. 140 Idaho 38, 40-41, 89 P.3d 878, 880-81.

In this case, Madsen advised his client Gwynn that she was the sole beneficiary and advised she could distribute all of the proceeds of the house sale to herself. When Maryott/Nelson filed this lawsuit, Gwynn, through her attorney Madsen, defended that there was ambiguity in the Trust via Article 5. Verified Answer to Complaint and Demand for Jury Trial, p. 2, ¶ 5. As stated above, this Court finds this is not a valid legal argument under Idaho law. In support of his defense, Madsen now submits the affidavit of attorney Michael Wytychak, who opined the language of the Trust could be construed as ambiguous, though the language of the Trust was not atypical of that time period. Specifically, Wytychak states:

> a. The survivorship language used in the 1990 document would not be worded in the same manner (i.e. in terms of gifts) by a drafter today because it is ambiguous and subject to conflicting interpretations. However, I have noticed in other trusts drafted around this time period that it was the custom to use such language.
>
> b. Under a modern interpretation, the right of representation would be understood to mean that the heirs of Doug need only survive by 60 days from the death of the trustor.
>
> c. However, as indicated above, there is some ambiguity with respect to the trust agreement's survivorship requirement that is reasonably subject to conflicting interpretations. To that end, there certainly is a reasonable and persuasive argument to interpret the language to mean that since Doug didn't survive his mother by 60 days, his share, including his heirs, aren't entitled to a distribution.

Affidavit of Michael Wytychak, III, p. 3, ¶ 8. There are four problems with Wytychak's affidavit.

**First**, there is no indication by Wytychak in his affidavit that he ever looked at the actual trust document in question or that he ever read the actual language in that document which is now in dispute. In fact, Wytychak's affidavit indicates just the opposite, that he didn't read the trust language. Wytychak states in his affidavit that "On October 19, 2012, Henry Madsen *called me* regarding my opinion about a case of his that he later identified as the Maryott Trust." *Id., ip. 2,* ¶ 5. (italics added). Wytychak continues, "*Based on our conversation, I understood the facts to be the following*: a. Henry represents a daughter (Gwynn Maryott) who is the trustee of her mother's trust. b. The trust was written in the 1990's. c. Mother also had a son (Doug) who predeceased her by three (3) years. The son was survived by two children. d. The distribution of the trust at the mother's death was to Doug and Gwen, by right of representation. However, there is a survivorship clause that was written in terms of gifts (perhaps even close gifts – I don't recall clearly). e. When the mother died, Gwen made a distribution of certain accounts to one half to herself and one half to her brother's children. f. Currently (which is a substantial period of time after the mother's death) the house in trust is about to sell." *Id.,* pp. 2-3 ¶ 6. (italics added).

**Second**, there is no authority, no legal basis cited Wytychak for Wytychak's legal opinions found in paragraph 8 quoted above. Wytychak's affidavit gives no legal basis or even any argument as to why he concludes the Trust is ambiguous. Thus, Wytychak's opinion as to ambiguity is unsupported and given no weight by this Court.

**Third**, Wytychak, while concluding there is ambiguity, gives a legal opinion that interpreted today, Madsen gave the wrong advice to his client Gwynn: "Under a modern interpretation, the right of representation would be understood to mean that the heirs of

Doug need only survive by 60 days from the death of the trustor." Thus, Wytychak's opinion is that even with that ambiguity, Maryott/Nelson take their father Douglas' share under the trust.

**Fourth,** even if Wytychak created ambiguity (he didn't), nothing in Wytychak's affidavit changes the uncontradicted fact that Gwynn took actions to take all under the trust. As such, it was incumbent upon her, and incumbent upon Madsen, to seek court approval prior to doing so. I.C. § 68-108. Madsen failed to do so. Even though the Court above found that Madsen's failure to do so does not insulate Gwynn's personal liability for derogation of her duties under I.C. § 68-108, Madsen cannot use Gwynn's personal liability under that statute as a shield against Madsen's responsibilities under I.R.C.P. 11 for his failure to give Gwynn the correct legal advice

As an attorney, Madsen is responsible for his own legal analysis and advice. The above shows that if Madsen relied upon Wytychak's advice as Wytychak states in his affidavit, Madsen is not entitled to rely on such advice (if Madsen never had Wytychack read the actual text of Article 3 and Article 5, and if Wytychak gave no legal reasoning for his opinion), and even if Madsen was entitled to rely on Wytychak's advice, Wytychak's advice was that Maryott/Nelson are entitled to Douglas' share: "Under a modern interpretation, the right of representation would be understood to mean that the heirs of Doug need only survive by 60 days from the death of the trustor." Reliance on Wytychak does not allow Madsen to escape his responsibilities as Gwynn's attorney under Idaho Rule of Civil Procedure 11. Madsen's advice to Gwynn was not "…well grounded in fact and [was] warranted by existing law or a good faith argument for the extension, modification or reversal of existing law…" and was "…interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation". I.R.C.P. 11(a)(1); *Slack*, 140 Idaho 38, 39-40, 89 P.3d

878, 879-80 (citing *Durrant v. Christensen*, 117 Idaho 70, 74, 785 P.2d 634, 538 (1990)). In the instant case, the "improper purpose" was to wrongfully give all of the residual of June's trust to Gwynn, to exclusion of Douglas' heirs, and to do so after Gwynn had already made the distribution. As such, "imposition of sanctions results." *Id.*

An argument could be made by Maryott/Nelson that counsel for Madsen and current counsel for Gwynn could be responsible under I.R.C.P. 11, for taking the same legal position that Madsen has taken all along (that Article 5 of June's Trust creates ambiguity in Article 3). While this argument of current counsel for Gwynn and current counsel for Madsen are just as "not well grounded" as Madsen's legal opinions all along, there is no reason to saddle these attorneys with Rule 11 sanctions *in addition to Madsen*, when these attorneys are simply arguing the position that Madsen himself, an attorney, has put into play.

**G. Gwynn's Counterclaim Has Been Withdrawn and is Now Dismissed.**

On October 12, 2012, Gwynn counterclaimed against Maryott/Nelson, demanding the monies back which Gwynn transferred to them in November 2008. Verified Answer to Complaint and Demand for Jury Trial, pp. 5-8, ¶¶ 1-24. On December 13, 2012, Maryott/Nelson filed their Motion for Partial Summary Judgment. On March 11, 2013, counsel for Maryott/Nelson and counsel for Gwynn filed a Stipulation to Allow Filing of Amended Answer. On March 13, 2013, this Court entered its Order on Stipulation to Allow Filing of Amended Answer, and the Amended Answer was filed later that day. That Amended Answer withdraws Gwynn's counterclaim. Had it not been withdrawn, it would have been dismissed for the reasons stated above. Because Maryott/Nelson are beneficiaries of the trust estate, Gwynn's counterclaim for repayment of prior distributions must be dismissed as it fails to state a claim upon which relief can be granted. The Court discusses this issue and dismisses the counterclaim (even though it has been withdrawn),

as the counterclaim and defending such (until its withdrawal) will be an issue when addressing attorney fees and sanctions.

Maryott/Nelson make an alternative argument that even if they are not beneficiaries of the trust estate, Gwynn's counterclaim is barred by the statute of limitations, estoppel, laches and unclean hands. Memorandum in Support of Motion for Summary Judgment, pp. 11-12. Following June's death on August 24, 2008, in November 2008, Gwynn made a distribution to Maryott/Nelson. Affidavit of Gwynn Maryott, p. 2, ¶¶ 7-8. Because the counterclaim has been withdrawn, and because the Court finds Maryott/Nelson are beneficiaries of the trust estate, the Court will not address these alternative theories.

**IV. CONCLUSION AND ORDER.**

For the reasons stated above,

IT IS HEREBY ORDERED plaintiffs Anna Maryott's and Christy Nelson's Motion for Partial Summary Judgment is GRANTED in all aspects.

IT IS FURTHER ORDERED as a matter of law, under Article 3 of the trust, Douglas Maryott died before June Maryott, but because of the "right of representation" provision in Article 3, Douglas Maryott's children, Anna Maryott and Christy Nelson are Beneficiaries of the Trust Estate. Nothing in Article 5 of the Trust changes that legal conclusion.

IT IS FURTHER ORDERED plaintiffs Anna Maryott and Christy Nelson are entitled to an Account of the Trust Estate from defendant Gwynn Maryott.

IT IS FURTHER ORDERED defendant Gwynn Maryott is Removed as Trustee, effective immediately. If all parties can agree on a successor trustee, the parties can enter into a stipulation as to the identity and present the Court with a proposed order. Absent such agreement and order, the Court will determine the successor trustee at a hearing to be held on, May 8, 2013, at 2:30 p.m.

IT IS FURTHER ORDERED a full and complete formal accounting must be provided by defendant Gwynn Maryott and presented to counsel for plaintiffs Anna Maryott and Christy Nelson, and counsel for third-party defendant Madsen, and filed with the court as soon as possible, but in any event, by no later than June 1, 2013.

IT IS FURTHER ORDERED the rights and interests of plaintiffs Anna Maryott and Christy Nelson must be protected by the creation of a constructive trust, into which any assets removed by defendant Gwynn Maryott must be deposited.

IT IS FURTHER ORDERED a successor trustee shall administer the constructive trust and all assets of June Maryott's Trust. If the successor trustee can be identified by stipulation and order of all parties, the Court will sign an order as presented. Absent agreement and order, the identity of the successor trustee will be taken up at hearing to be held on May 8, 2013, at 2:30 p.m.

IT IS FURTHER ORDERED defendant Gwynn Maryott is personally liable to for the costs and fees of this proceeding incurred by plaintiffs Anna Maryott and Christy Nelson, in an amount to be determined.

IT IS FURTHER ORDERED Rule 11 Sanctions are imposed against third-party defendant Henry D. Madsen in favor of plaintiffs Anna Maryott and Christy Nelson, in an amount to be determined.

IT IS FURTHER ORDERED defendant Gwynn's Counterclaim has been withdrawn and is now DISMISSED.

Entered this 7th day of May, 2013.

_____

John T. Mitchell, District Judge

**Certificate of Service**

I certify that on the _____ day of May, 2013, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

| Lawyer | Fax # |
|---|---|
| Kimmer W. Callahan | 664-5369 |
| Henry D. Madsen | 664-6258 |

| Lawyer | Fax # |
|---|---|
| Charles R. Dean | 664-9844 |
| Regina M. McCrea | 667-1939 |
| Troy Y. Nelson | (509) 624-2528 |

_____
Jeanne Clausen, Deputy Clerk