Can A Breach Of Trust Be Innocent?

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In 1996, Mr. Herjavec set up a family trust, and settled $100 into the trust. The next year, he transferred 75% of his shares in his growing company, Brak Enterprises ("Brak"), into the trust. AT&T subsequently purchased Brak for $31 million, and $21 million of the proceeds were paid into the trust. After Brak was purchased, the family's spending patterns changed drastically, and Mr. Herjavec semi-retired until 2003, when he established The Herjavec Group ("THG"). THG grew and prospered. Mr. Herjavec and his wife, Diane Plese, separated in 2014, and it was only after they separated that Ms. Plese discovered the trust had virtually no assets remaining. As a result, Ms. Plese argued that (1) Mr. Herjavec owed money to the trust; (2) Mr. Herjavec breached his fiduciary duties by taking benefits from the trust for himself and THG; and (3) the trust should be awarded an equity interest in THG. The Court was therefore faced with the daunting task of determining how the trust funds were used in the 22 years since it was settled.

With the assistance of an accountant, the Court determined that a net amount of $2.3 million went from the trust to THG. However, the Court ultimately found that the beneficiaries received the benefit of all of the trust funds, including direct payments like tuition fees for the children and day to day expenses of the family. The Court commented that "it seems outlandish to suggest that a parent or spouse who settles $21.1 million of his own funds into a trust for the benefit of his family cannot use the trust corpus for that very purpose, and is somehow abdicating his support obligations when he does not pay for family expenses directly out of his other resources."

The Court also rejected the argument that the trust had any interest in THG. The Court noted that the trust agreement itself gave Mr. Herjavec as trustee unfettered discretion to lend trust funds to a corporation, with or without interest, and with or without security. The Court further rejected Ms. Plese's expert's argument that because THG used the trust for seed capital (and described the trust as an "early stage lender"), this would have resulted in the trust receiving an equity interest, since THG was not a fledging company in those years, had conventional bank borrowing, and that the money transferred from the trust to THG was not needed primarily for THG's purposes, but rather for family expenses. With respect to Mr. Herjavec having benefited from the trust, the Court noted that Mr. Herjavec accounted for and repaid any funds improperly received.

While there was no question that Mr. Herjavec breached his fiduciary duties in comingling trust funds with both his own funds and those of THG, the Court found that the breaches were "innocent" since he did not really understand he was not a beneficiary, and thus determined the appropriate remedy was for Mr. Herjavec to bear all the legal costs, including the accounting costs, of the trust and the beneficiaries personally, which were substantial.

By

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