

2011 IL App (2d) 101137-U  
No. 2-10-1137  
Order filed December 2, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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*In re* ESTATE OF ROBERT F. BRANTMAN, ) Appeal from the Circuit Court  
SR., Deceased ) of Lake County.  
)  
(The McDermott Foundation, )  
)  
Petitioner-Appellee, )  
)  
v. ) No. 01-P-786  
)  
Robert F. Brantman, Jr., Katie Anderson, )  
Michelle Byers, Adam Brantman, Annie )  
Brantman, Chris Brantman, Frank Brantman, )  
James Brantman, Kelly Brantman, n/k/a )  
Kelly Roles, Laura Brantman, Maria G. )  
Brantman, Matthew Brantman, Maureen )  
Brantman, Peter Brantman, Robert John )  
Brantman, Thomas Brantman, William )  
Brantman, Janet Bucior, Kristin Colberg, )  
Dorothy Elmgren, Allyson Fregoso, Kathy )  
Krumnauer, Marie Neuman, Colleen Pacholski, )  
Beatrice M. Pekkarinen, Michael J. Pekkarinen, )  
Robert Pekkarinen, and Debbie Trykoff, )  
)  
Respondents-Appellants, )  
)  
Claretian Missionaries, and The People *ex rel.* )  
Lisa Madigan, Attorney General, )  
)  
Respondents-Appellees, )  
)  
Diocese of Rockford, Misericordia Home, )

The Lord's Place, Charles Brantman, William )  
Ensing, and B.M. Brantman, Inc., ) Honorable  
Respondents.) ) Diane E. Winter,  
 ) Judge, Presiding.

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JUSTICE ZENOFF delivered the judgment of the court.  
Justices Bowman and Birkett concurred in the judgment.

### ORDER

*Held:* Trial court erred in entering summary judgment in favor of petitioner trust beneficiary on its count seeking imposition of a constructive trust over allegedly improper distributions made to respondent trust beneficiaries by former trustee; petitioner lacked standing to pursue equitable claim on behalf of trust against respondent trust beneficiaries where successor trustee was in office who had exclusive authority to pursue claims on behalf of the trust, and where trial court entered order finding that successor trustee had not breached his fiduciary duties as trustee and had acted at all times in the best interests of the trust.

¶ 1 Respondents (family members<sup>1</sup>), who were relatives of decedent, Robert F. Brantman, Sr., and beneficiaries of the Robert F. Brantman Trust (trust), appeal from the entry of summary judgment in favor of petitioner, the McDermott Foundation (McDermott), also a beneficiary of the trust, on count II of McDermott's petition seeking to impose a constructive trust over allegedly improper trust distributions made to the family members. For the reasons that follow, we reverse and enter summary judgment in favor of the family members on count II of McDermott's amended petition.

¶ 2 BACKGROUND

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<sup>1</sup>We refer to respondents-appellants as the "family members," rather than as "respondents," because the Diocese of Rockford; three charities; The People *ex rel.* Lisa Madigan, Attorney General; Charles Brantman; William Ensing; and B.M. Brantman, Inc., were also named respondents in this matter.

¶ 3 The following undisputed facts are taken from the record. Robert Brantman, Sr., died testate on January 31, 2001. He was survived by the family members, consisting of a sister, 11 children, and 21 grandchildren. Prior to his death, Brantman created the trust and named as beneficiaries the family members, the Catholic Archdiocese of Chicago, the Diocese of Rockford, and four charities, including McDermott. Brantman's will directed the executor of his estate to transfer his entire estate into the trust upon his death. The trust, in turn, directed the trustee to distribute the trust *res* to the beneficiaries. The will designated Charles Brantman, one of the children, as executor of the estate, and the trust document designated Charles as trustee of the trust.

¶ 4 The trust document specified how Charles was to distribute the trust *res*. The document directed Charles to give Brantman's residence to the Catholic Archdiocese of Chicago, and to distribute his tangible personal property among the children. After paying taxes and expenses, Charles was then to make the following specific distributions:

- “(a) \$100,000 to my sister, DOROTHY ELMGREN, of Geneva, Illinois, \*\*\*;
- (b) \$150,000 to the Diocese of Rockford, Illinois, c/o Bishop THOMAS G. DORAN, or his successor as Catholic Bishop of Rockford. It is my wish that these funds be used on projects or institutions devoted to the care of the needy;
- (c) \$200,000 to the Misericordia Home \*\*\* if then in existence.
- (d) \$200,000 to the Claretian Missionaries \*\*\* if then in existence.
- (e) \$200,000 to the McDermott Foundation \*\*\* if then in existence.
- (f) \$100,000 to the Lord's Place \*\*\* if then in existence.
- (g) \$100,000 to my son, The Reverend THOMAS E. BRANTMAN, if he survives me.

It is my hope that this will be invested in a manner that will produce income to assist

in meeting on-going expenses of his personal upkeep and welfare and also assist in the expense of his retirement. \*\*\*

- (h) \$100,000 to my son, JAMES D. BRANTMAN, if he survives me. It is my hope that this will be invested in a manner that will produce income to assist in meeting on-going expenses of his personal upkeep and welfare and also assist in the expense of his retirement. \*\*\*
- (i) \$50,000 to the surviving spouse of any child of mine who predeceases me \*\*\*.
- (j) \$250,000 to my son, CHARLES G. BRANTMAN, as trustee, for the benefit of my son, PETER M. BRANTMAN, if he survives me, to be held and disposed as follows:
  - (i) Commencing with my death, the trustee shall pay to or for the benefit of my son, PETER M. BRANTMAN, such sums from the income and principal of the trust, not to exceed \$2,000 per month, as the trustee in its sole discretion deems necessary and desirable from time to time for his health and maintenance in reasonable comfort, considering his income from all sources known to the trustee. \*\*\*”

Charles was then to distribute to himself, as trustee, \$10,000 for each of the 21 grandchildren, to be held in trust for each grandchild until that grandchild reached age 30. Finally, Charles was to distribute the residual balance of the trust in equal shares to the 11 children.

¶ 5 The trust document also provided that “[t]he trustee shall hold, manage, care for and protect the trust property,” and granted the trustee certain powers, among which was the power “[t]o compromise, contest, prosecute or abandon claims in favor of or against the trust.” The trust document further provided that “[e]very successor trustee shall have all the powers given to the originally named trustee.”

¶ 6 On August 30, 2001, Brantman's will was admitted to probate. Other than a single status report filed by Charles in March 2003, there was little activity in the matter for over three years, and the estate remained open. Then, on March 22, 2005, nine of the children filed a complaint in the probate case<sup>2</sup> against Charles; Eugene Brantman, one of the children; and B.M. Brantman, Inc., a corporation of which Charles was the sole shareholder. The complaint alleged the following. At the time Charles became executor and trustee, the estate and trust had a combined net value of approximately \$7,421,592. Charles did not provide the other children with an accounting of his acts as executor and trustee until February 2005. The accounting revealed that Charles had converted a total of approximately \$2 million from the estate and trust for his own personal benefit, the benefit of Eugene, and the benefit of B.M. Brantman, Inc. The accounting also revealed that Charles had made the following distributions to specific beneficiaries: \$100,000 to Dorothy Elmgren; \$10,000 to each of the 21 grandchildren; and \$60,041.83 to Peter Brantman. Charles also made distributions to 9 of the 11 children of \$40,000 each, even though the children were residual beneficiaries. Charles did not make distributions to remaining specific beneficiaries, including Reverend Thomas Brantman, James Brantman, the Diocese of Rockford, or the four charities. At the time of the accounting, only approximately \$128,700 remained in the estate and trust.

¶ 7 Charles resigned as executor and trustee. The trial court appointed Robert Brantman, Jr., one of the children, administrator to collect of the estate and trustee of the trust. In his roles as administrator to collect and trustee, Robert obtained a consent judgment against Charles for \$2

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<sup>2</sup>The suit against Charles and the two other defendants was a supplemental proceeding brought under same comprehensive proceeding (No. 01-P-786) that includes McDermott's petition against the family members.

million, which the court approved. The court also approved the sale of B.M. Brantman, Inc., which netted \$175,000 for the trust. No judgment was entered against Eugene because he died in March 2006.

¶ 8 On April 13, 2007, Robert filed the following: (1) an inventory, (2) a petition to close the estate, (3) a petition for approval of attorney fees for administrator to collect and trustee, (4) a petition for approval of administrator and trustee fees, and (5) the final accounting of administrator to collect and trustee. In the final accounting, Robert credited the proceeds of the sale of B.M. Brantman, Inc., towards the \$2 million judgment against Charles and designated the remaining \$1,825,000 “uncollectible.” After accounting for all receipts and expenses during his term as administrator to collect and trustee, Robert reported that the combined balance of the estate and trust was approximately \$280,000.

¶ 9 In his petition to close the estate, Robert reported that, although there would have been sufficient funds in the estate and trust to make full distributions to all of the specific beneficiaries had Charles not converted \$2 million from the trust, there were now insufficient funds to do so. Robert also proposed that it would not be in the best interests of the trust to pursue recovery of the distributions to the family members. He contended that the cost of pursuing claims against the family members would outweigh any benefit ultimately recovered. Robert alleged that, at the time Charles distributed the funds to the family members, he had shown them a copy of Brantman’s federal estate tax return, which revealed that there were ample funds in the estate and trust to make full distributions to all of the specific beneficiaries and to distribute approximately \$118,00 to each of the children as residual beneficiaries. Robert further alleged, upon information and belief, that the family members had spent the funds they had received and would challenge any attempts to recover them. Consequently, Robert requested that the trial court enter an order relieving him and

any successor trustee from an obligation to pursue recovery of the distributions to the family members.

¶ 10 On May 21, 2007, McDermott filed objections to all of Robert's petitions. McDermott argued that the estate should not be closed, and that Robert was not entitled to attorney fees or administrator and trustee fees, because he had breached his fiduciary duties as trustee by failing to pursue recovery of the distributions to the family members. McDermott asserted that the distributions were improper because, to the extent that the trust had insufficient funds to make full distributions to all of the specific beneficiaries, the trustee should have distributed the funds to the specific beneficiaries on a pro rata basis and made no distributions to the residual beneficiaries. McDermott further contended that Charles had favored the family members to the detriment of the other specific beneficiaries, and that Robert's decision not to pursue recovery of the distributions to the family members was therefore not in the best interests of the trust as a whole.

¶ 11 Contemporaneously with its objections, McDermott filed a petition for citations to recover assets against the family members.<sup>3</sup> McDermott contended that the family members should be

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<sup>3</sup>McDermott also named as respondents the Diocese of Rockford, Misericordia Home, Claretian Missionaries, The Lord's Place, and The People *ex rel.* Lisa Madigan, Attorney General. Presumably, this was because, generally, all beneficiaries are necessary parties to any claim involving the beneficiaries' interests in a trust (*Hartshorne Motors, Inc. v. Kennedy*, 340 Ill. App. 371, 374 (1950)), and the Attorney General is a proper party to any claim involving a charitable trust (*In re Estate of Laas*, 171 Ill. App. 3d 916, 920 (1988)). The Attorney General represents the People, who have been deemed the ultimate beneficiaries of any charitable bequest in all actions concerning the enforcement or administration of a charitable trust. *Laas*, 171 Ill. App. 3d at 920.

required to return the distributions and requested that the court issue citations to recover assets towards that end. The Attorney General filed its own objections and petition for citations to recover assets, in which it merely adopted the contents of McDermott's objections and petition.<sup>4</sup>

¶ 12 On June 15, 2007, the trial court entered an order directing that the citations to recover assets be issued. The court subsequently stayed the issuance of the citations on the family members' motion to reconsider the order. The court then appointed a special administrator to review the propriety of the citations. On October 18, 2007, the special administrator filed the following report:

“3. It appears that the original Executor, Charles Brantman, made premature distributions, which at the time were most likely improper, if for no other reason, because he failed to treat all beneficiaries equally and he made residuary distributions before satisfying the specific gifts. He clearly had no right to favor certain family members over the charitable and other specific legatees.

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6. The current Executor asserts that he has fully and impartially investigated the merits of the [r]ecovery [c]itations and has determined that, for the variety of reasons set forth in his [p]etition to [c]lose [the] [e]state, the cost of litigation outweighs the likely recovery.

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<sup>4</sup> On December 16, 2008, the court granted the Attorney General's motion for leave to intervene *nunc pro tunc* as an interested party and to have the previously filed pleadings be considered properly before the court. However, the Attorney General also was a named respondent in McDermott's petition and had timely filed its appearance on May 24, 2007.

7. The recipients of the premature distributions claim innocence, good faith reliance and an inability to repay the distributions. Based on the current value of the Estate, I believe the residuary beneficiaries would be entitled to nothing.

8. However, the charities are also innocent, have acted in good faith, and in addition, they have not received any distribution from the Estate.

9. Therefore, it seems to me that the charity (or charities) should have an opportunity to pursue recovery at their own expense. If the charities are successful and obtain a recovery on behalf of the Estate, then it would seem that their reasonable fees incurred in obtaining the recovery could be paid from the fund their efforts generated and the balance would be distributed among the charities under Court approval and [d]irection.

10. If the charities were free to pursue the [r]ecovery [c]itations, it seems that all interests would be represented before the Court, namely the beneficiaries can represent their positions and the charities can represent the position that the funds should be returned to the Estate. If so, it seems that the executor need not be involved. \*\*\*

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12. Additionally, the Executor wishes to be discharged, but it seems to me for him to be replaced at this point would create additional unnecessary expense. Hopefully, an arrangement can be reached whereby the Executor's actions to date are approved in a final manner and he is excused from any action in relation to the citations. \*\*\*

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14. Finally, the current Executor is one of the family members who received a \$40,000 advance distribution, which at this point would not be paid. He is also requesting approximately \$50,000 in Executor's fees. It seems to me that his position is different from

that of the other beneficiaries who are not asking for any more money from the Estate, and that his premature distribution should be offset against the Executor fees that would otherwise be paid to him.”

Following the filing of the special administrator’s report, the court lifted the stay and again directed that the citations to recover assets be issued.

¶ 13 On May 5, 2008, the trial court entered an order approving Robert’s final accounting as administrator to collect and trustee, his petition for attorney fees, and his petition for administrator and trustee fees, as well as supplements to the petitions that he had filed. The court did not grant Robert’s petition to close the estate, however. In the same order, the court discharged Robert as administrator to collect and trustee, and made the following findings:

“(A) The evidence clearly demonstrates that Robert F. Brantman, Jr., acted at all times in his capacity as administrator, trustee, and individually, in good faith and consistent with the best interests of the estate and trust; and

(B) Robert F. Brantman, Jr., has not breached his fiduciary duty as administrator, trustee or otherwise as claimed by the various objections raised in this matter or otherwise.”

Among the various objections that had been raised was McDermott’s objection that Robert had breached his fiduciary duties as trustee by declining to pursue recovery of the distributions to the family members. The court also ordered that Robert’s attorney fees and administrator and trustee fees be held in escrow pending resolution of the citation to recover assets issued against him. The trial court did not appoint a successor trustee.

¶ 14 On October 24, 2008, the trial court entered an order modifying the duties of the previously appointed special administrator. The order directed the special administrator to hold all estate and trust funds pending resolution of McDermott’s petition. The order further stated:

“The Court has previously deferred any decision as to the disbursement of the aforementioned remaining Estate cash, the [j]udgment [against Charles,] and any amounts that may be recovered as a result of the recently filed [c]itations to [r]ecover [a]ssets until said proceedings have culminated \*\*\*.

The Special Administrator shall continue to oversee the [c]itation proceedings, but is to continue to limit his involvement to only facilitating the process, and shall not become involved in the merits of the litigation as long as he reasonably believes the Estate’s interests are adequately represented by the [c]itation [p]etitioners’ counsel.”

¶ 15 On January 5, 2009, McDermott filed an amended petition. Count I of the petition again sought citations to recover assets. Count II was a new count seeking imposition of a constructive trust based on the doctrine of unjust enrichment. The new count alleged that Charles’ distributions to the family members were improper, that the charities and other specific beneficiaries were entitled to distributions on a pro rata basis, that it would be unjust to allow the specific beneficiaries to retain their distributions to the extent that they exceeded their pro rata shares, and that it would be unjust to permit the residual beneficiaries to retain any of their distributions. McDermott sought imposition of a constructive trust over the distributions, and requested that they be redistributed on a pro rata basis to the specific beneficiaries.

¶ 16 The parties filed cross-motions for summary judgment on McDermott’s amended petition. In their motion, the family members argued, in part, that McDermott, as a trust beneficiary, lacked standing to sue the family members, who were also trust beneficiaries. McDermott argued in response that it had standing—McDermott relied heavily on comment “e” to section 254 of the Restatement (Second) of Trusts, which states that, under certain circumstances, a claim against a

beneficiary to recover an overpayment of trust funds “can be enforced by or on behalf of the other beneficiaries.” Restatement (Second) of Trusts § 254 cmt. e (1959).

¶ 17 The Attorney General joined in McDermott’s motion for summary judgment and in its response to the family members’ motion. In addition, the special administrator filed a response to the cross-motions for summary judgment, in which he asserted that the “underlying concept” of his report as special administrator and of the trial court’s orders dated May 5, 2008, and October 24, 2008, was “that the [p]etitioners were acting indirectly on behalf of the Estate and Trust to recover improper distributions to [the family members] so that they could be properly distributed among all of the beneficiaries.” The special administrator asked that the trial court’s decision on the motions for summary judgment “be consistent with the foregoing.”

¶ 18 The trial court heard oral argument on the parties’ cross-motions for summary judgment and took the matter under advisement. On March 31, 2010, the court entered a written order granting summary judgment in favor of the family members on count I of the amended petition, which sought the issuance of citations to recover assets, and in favor of McDermott on count II, which sought the imposition of a constructive trust. The trial court gave no explanation for its rulings. The court set the matter for status on May 3, 2010, for calculation of the specific beneficiaries’ pro rata shares. The family members filed a motion to reconsider the order, which the trial court denied on September 23, 2010. The family members filed this timely appeal.

¶ 19 ANALYSIS

¶ 20 The family members contend that the trial court erred when it entered summary judgment in favor of McDermott on count II of its amended petition. The family members raise two main issues on appeal: (1) whether McDermott, as a trust beneficiary, lacked standing to pursue its claim against the family members, who were also trust beneficiaries; and (2) whether the trial court erred

in finding as a matter of law that McDermott was entitled to a constructive trust over the distributions to the family members. Because we reverse on the standing issue, we need not address the merits of McDermott's constructive trust claim.

¶ 21 The family members argue that McDermott, as a trust beneficiary, lacked standing to sue the other beneficiaries of the trust. They assert that, under Illinois law, a trustee has exclusive authority to pursue claims on behalf of a trust. They further contend that McDermott's claim was made on behalf of the trust, because McDermott sought to have the family members return their distributions for pro rata distribution to all of the specific beneficiaries.

¶ 22 McDermott initially argues that the family members forfeited the issue of standing by failing to raise it before the trial court. McDermott contends that lack of standing is an affirmative defense, and that it was the family members' burden to plead and prove the defense, or else forfeit it. McDermott then argues that, looking beyond the forfeiture issue, it had standing to sue the family members under either of two exceptions to the general rule that a trustee has exclusive authority to pursue claims on behalf of a trust. Under the first exception, McDermott contends it had standing because Robert, the trustee who succeeded Charles, improperly declined to pursue recovery of the distributions to the family members. As it did before the trial court, McDermott argues that Robert breached his fiduciary duties as trustee by declining to pursue recovery. Under the second exception, McDermott contends it had standing because the trial court removed Robert as trustee on May 5, 2008, and appointed no successor trustee. With no trustee in office to pursue recovery of the distributions, McDermott contends it had standing. Finally, McDermott argues that, under section 254 of the Restatement (Second) of Trusts, it had standing to sue the other trust beneficiaries for overpayment of trust funds regardless of the general rules regarding trustee and beneficiary standing. As it did in its motion for summary judgment, McDermott cites comment "e" to section

254, which states that, under certain circumstances, a claim against a beneficiary to recover an overpayment of trust funds “can be enforced by or on behalf of the other beneficiaries.” Restatement (Second) of Trusts § 254 cmt. e (1959).

¶ 23 In their reply brief, the family members argue that neither of the two exceptions apply here. They contend that McDermott is precluded from arguing that it had standing under the first exception, because the trial court found that Robert had not breached his fiduciary duties as trustee and had acted at all times in the best interests of the estate and trust. The family members further argue that McDermott lacked standing under the second exception, because a court must measure standing at the time an action was initiated, and, at the time McDermott filed its original petition, Robert was still trustee. Finally, the family members assert that no Illinois case has adopted section 254 of the Restatement (Second) of Trusts, and that, at most, the section would give McDermott standing to sue on its own behalf, not to sue derivatively on behalf of the trust.

¶ 24 This case comes to us on appeal from an order resolving the parties’ cross-motions for summary judgment. A motion for summary judgment is properly granted where the pleadings, depositions, admissions, and affidavits on file establish that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (West 2008); *Gaylor v Village of Ringwood*, 363 Ill. App. 3d 543, 546 (2006). When parties file cross-motions for summary judgment, they agree that the matter presents no genuine issues of material fact and request judgment as a matter of law. *Haake v. Board of Education for Glenbard Township High School District 87*, 399 Ill. App. 3d 121, 131 (2010); *Gaylor*, 363 Ill. App. 3d at 546. However, even when a trial court has entered judgment on cross-motions for summary judgment, a reviewing court may determine that a genuine issue of material fact existed and that summary

judgment was improper. *Haake*, 399 Ill. App. 3d at 131; *Gaylor*, 363 Ill. App. 3d at 547. Our review of an order granting summary judgment is *de novo*. *Haake*, 399 Ill. App. 3d at 131.

¶ 25 Before we reach the merits of the standing issue, we must address McDermott's forfeiture argument. McDermott is correct that lack of standing is an affirmative defense, which was the family members' burden to plead and prove, and which may be forfeited. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252-53 (2010). However, "[a] party may assert, without forfeiture concerns, affirmative defenses in a summary judgment motion, even after failing to file them in an answer." *Falcon Funding, LLC v. City of Elgin*, 399 Ill. App. 3d 142, 156 (2010). Here, the family members raised the issue of McDermott's lack of standing in their motion for summary judgment, and McDermott responded to their arguments. Accordingly, the family members raised the issue of standing before the trial court and did not forfeit it for purposes of appeal. See *Stahulak v. City of Chicago*, 291 Ill. App. 3d 824, 829 (1997) (holding that the defendants did not forfeit for purposes of appeal the affirmative defense of lack of standing where they raised the issue in their motion to dismiss and motion for summary judgment). Notably, the trial court could have granted the family members leave to amend their answer to add the affirmative defense. See *Rognant v. Palacios*, 224 Ill. App. 3d 418, 422 (1991) ("The circuit court may allow a defendant to file an amended answer containing affirmative matter at any time prior to final judgment.")

¶ 26 Regarding the merits of the standing issue, the initial issue with which we are presented is whether the general rule that a trustee has exclusive standing to pursue claims on behalf of a trust applies to a situation where, as here, following the appointment of a successor trustee, a trust beneficiary seeks to pursue an equitable claim against other trust beneficiaries to whom a former trustee allegedly distributed trust property in breach of the trustee's fiduciary duties. We have found no Illinois case that has addressed this precise issue.

¶ 27 The general rules regarding trustee and beneficiary standing do not readily apply to this situation. On one hand is the general rule that trustees, not beneficiaries, have standing to sue third parties on behalf of a trust. *Axelrod v. Giambalvo*, 129 Ill. App. 3d 512, 519 (1984); *Ready v. Ready*, 33 Ill. App. 2d 145, 152 (1961) (“The right to sue in the ordinary case vests only in the trustee.”); see also *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 567 (1990) (“In most cases, a trustee has the exclusive authority to sue third parties who injure the beneficiaries’ interest in the trust [citation], including any legal claim the trustee holds in trust for the beneficiaries [citation].”). On the other hand is the general rule that trust beneficiaries do have standing to pursue equitable claims against persons to whom a trustee in breach of trust has transferred trust property. *Jackson v. Callan Publishing, Inc.*, 356 Ill. App. 3d 326, 334 (2005); *Sadacca v. Monhart*, 128 Ill. App. 3d 250, 256 (1984); 4 Austin W. Scott & William F. Fratcher, *Scott on Trusts* § 294.1 at 100 (4th ed. 1989). The rationale underlying the latter rule is that it would be nonsensical to conclude that the very trustee who transferred trust property to another in breach of trust had exclusive authority to pursue a claim for recovery from the transferee. Scott & Fratcher, *Scott on Trusts* § 294.1 at 100 (“because the trustee has already committed a breach of trust in making the transfer, it is unnecessary for the beneficiaries to call upon him to undo what he has done”); see also *Fuller Family Holdings, LLC v. Northern Trust Co.*, 371 Ill. App. 3d 605, 615 (2007) (“By virtue of the fiduciary relationship of the trustee and beneficiary, it is the trust beneficiary who has the right to bring an action for damages based on breach of fiduciary duty by the trustee.”).

¶ 28 At least one Illinois case has recognized that the existence of a successor trustee is critical in determining whether a trust beneficiary has standing to pursue a claim on behalf of a trust. In *Axelrod*, the Illinois Appellate Court, First District, held that the plaintiff trust beneficiaries lacked

standing to sue former trustees on behalf of a trust, where the successor trustees had filed an affidavit in the case stating that they believed that dismissal of the lawsuit would be in the best interests of the trust. *Axelrod*, 129 Ill. App. 3d at 514-15, 519-20. The court reasoned that, as holders of “no direct title to any trust property,” the beneficiaries’ interest in the trust was “purely derivative.” *Axelrod*, 129 Ill. App. 3d at 518. The court further reasoned that the trust document empowered the successor trustees to represent the trust and to pursue claims on its behalf. *Axelrod*, 129 Ill. App. 3d at 518. Because the successor trustees’ decision to conclude the litigation was an exercise of their powers as trustees, the court held that the successor trustees’ decision was binding on the plaintiff beneficiaries, such that they lacked standing to pursue their claim. *Axelrod*, 129 Ill. App. 3d at 518-19.

¶ 29 The court in *Axelrod* supported its conclusion with a citation to section 282 of the Restatement (Second) of Trusts (1959), which provides that “ ‘[w]here the trustee could maintain an action at law or suit in equity or other proceeding against a third person if the trustee held the property free of trust, the beneficiary cannot maintain a suit in equity against the third person \*\*\*.’ ” *Axelrod*, 129 Ill. App. 3d at 519 (quoting Restatement (Second) of Trusts § 282 (1959)). The court reasoned that, since the defendant former trustees stood as third parties in relation to the trust, the successor trustees had exclusive standing to pursue claims against them, and it was within their discretion whether to pursue the claims. *Axelrod*, 129 Ill. App. 3d at 519.

¶ 30 We think that the court’s reasoning in *Axelrod* can be extended to the facts of our case. Although McDermott is not suing a former trustee, as the plaintiff beneficiaries in *Axelrod* were attempting to do, we believe that the existence of a successor trustee is nonetheless critical in determining whether McDermott had standing to pursue its equitable claims against the family members. A key consideration is that, once a blameworthy trustee has been removed from office

and a successor trustee appointed, the rationale for permitting a beneficiary to pursue an equitable claim against a transferee who has received trust property in breach of trust no longer applies. See Scott & Fratcher, *Scott on Trusts* § 294.4 at 104-05 (“If \*\*\* the trustee is thereafter removed as trustee or otherwise ceases to be trustee and a successor is appointed, the successor trustee can maintain a bill in equity against the third person. In such a case it would seem that the beneficiaries cannot maintain a suit against the transferee unless the successor trustee has refused to sue or is unavailable.”). Instead, the appointment of a successor trustee fully restores the trustee and beneficiary relationship, with a successor trustee in place who is charged with the duty to “ ‘carry out the trust according to its terms and to act with the highest degrees of fidelity and utmost good faith.’ ” *Fuller Family Holdings*, 371 Ill. App. 3d at 615 (quoting *In re Estate of Muppavarapu*, 359 Ill. App. 3d 925, 929 (2005) (reasoning that a trustee’s fiduciary obligations flow “not from the trust instrument but from the relationship of trustee and beneficiary, and the essence of this relationship is that the trustee is charged with equitable duties toward the beneficiary”)). Illinois is not the only state to have concluded that the existence of a successor trustee is critical in determining whether plaintiff trust beneficiaries have standing to pursue claims on behalf of a trust. See *Turner v. Trust Company of Georgia*, 105 S.E.2d 22, 23-24, 27-28 (Ga. 1958) (holding that the trial court properly enjoined a group of trust beneficiaries from pursuing a claim that a successor trustee had declined to pursue); *Hart v. Citizens’ National Bank*, 105 P. 1, 1-3 (Kan. 1919) (holding that the successor trustee’s failure to initiate a claim within the statute of limitations against a former trustee and a defendant to whom the former trustee had transferred trust property in breach of trust was binding on the plaintiff trust beneficiaries, who were barred from pursuing the claim).

¶ 31 Based on the foregoing, we conclude that the general rule that a trustee has exclusive standing to pursue claims on behalf of a trust applies to a situation where, as here, following the

appointment of a successor trustee, a trust beneficiary seeks to pursue an equitable claim against other trust beneficiaries to whom a former trustee allegedly distributed trust property in breach of the trustee's fiduciary duties. Accordingly, we conclude that McDermott lacked standing to pursue its equitable claims against the family members unless an exception to the general rule of exclusive trustee standing was satisfied.

¶ 32 Illinois courts have recognized a limited exception to the general rule of exclusive trustee standing. Under the exception, if a trustee improperly refuses to pursue a claim against a third party on behalf of a trust, then a trust beneficiary may pursue a claim against both the trustee and the third party. See *Axelrod*, 129 Ill. App. 3d at 519 (citing Restatement (Second) of Trusts § 282 cmt. e (1959)); *Ready*, 33 Ill. App. 2d at 152 (“If the trustee refuses to bring the action after demand, or refuses to act, the beneficiary may bring an action making the third party and the trustee parties defendant.”). A trustee's refusal to pursue a claim on behalf of a trust is “improper” only where it was a breach of the trustee's fiduciary duties not to pursue the claim. *Axelrod*, 129 Ill. App. 3d at 519 (“If the trustee does not commit a breach of trust in failing to bring an action against the third person, as for example where it is prudent under the circumstances to refrain from bringing an action \*\*\*, the beneficiary cannot maintain a suit against the trustee and the third person.” (quoting Restatement (Second) of Trusts § 282 cmt. e (1959))).

¶ 33 We agree with the family members that, because the trial court's May 5, 2008, order discharging Robert as trustee and finding that he had not breached any fiduciary duties was a final and immediately appealable order from which McDermott did not appeal, McDermott is now precluded from arguing that it had standing under this exception. The order was final and immediately appealable under Supreme Court Rule 304(b)(1). Ill. S. Ct. R. 304(b)(1) (eff. Jan. 1, 2006) (making final and immediately appealable “[a] judgment or order entered in the administration

of an estate, guardianship, or similar proceeding which finally determines a right or status of a party”); *In re Estate of Russell*, 372 Ill. App. 3d 591, 593 (2007) (holding that an order removing co-trustees and appointing a successor trustee was a final and immediately appealable order under Rule 304(b)(1)). McDermott had 30 days in which to file a notice of appeal from the order. Ill. S. Ct. R. 304(b) (eff. Jan. 1, 2006) (“The time in which a notice of appeal may be filed from a judgment or order appealable under this Rule 304(b) shall be as provided in Rule 303.”); *In re Estate of Jackson*, 354 Ill. App. 3d 616, 619 (2004). McDermott failed to do so, and is now barred from appealing the order. *Jackson*, 354 Ill. App. 3d at 619; see also *In re Will of Hartzell*, 43 Ill. App. 2d 118, 132 (1963) (holding that trust beneficiaries who did not appeal from an order approving trustee’s report were bound thereby).

¶ 34 As the family members argue, when the trial court approved Robert’s final accounting and discharged him as trustee, the court found that he had not breached his fiduciary duties as trustee and that he had at all times acted in good faith and in the best interests of the trust. The trial court made these findings over McDermott’s objection, in which McDermott argued that Robert had breached his fiduciary duties as trustee by declining to pursue recovery of the allegedly improper distributions to the family members. McDermott chose not to challenge this finding by filing an appeal, and instead continued to pursue its previously filed petition against the family members. McDermott cannot now argue that it had standing to pursue its claim against the family members because Robert breached his fiduciary duties in not pursuing recovery of the distributions.

¶ 35 McDermott argues that the trial court discharged Robert as trustee “only because the court had approved [McDermott’s] recovery citations.” McDermott argues that the court “conditioned” its discharge of Robert as trustee on the availability of McDermott’s lawsuit, directing in its May 5, 2008, order that Robert’s administrator and trustee fees “be retained by the trust in escrow

pending resolution of the citation to recover issued against [him].” While we agree with McDermott that the trial court appeared to take conflicting positions—finding, over McDermott’s objection, that Robert had not breached his fiduciary duties as trustee while also permitting McDermott to pursue its claims against the family members—we decline to interpret this conflict as providing McDermott with an end run around the general rule that a trustee has exclusive authority to pursue claims on behalf of a trust. The proper course for McDermott was to bring an action to compel Robert as trustee to pursue recovery of the distributions to the family members, or to establish grounds for its own standing to pursue the claim on behalf of the trust. See *Axelrod*, 129 Ill. App. 3d at 519; *Ready*, 33 Ill. App. 2d at 152 (“If the trustee refuses to bring the action after demand, or refuses to act, the beneficiary may bring an action making the third party and the trustee parties defendant.”); see also Restatement (Second) of Trusts § 282 cmt. e (1959) (“If the trustee fails to perform his duty to bring an action at law or a suit in equity \*\*\*, the beneficiary can maintain a suit in equity against the trustee to compel him to perform his duty.”). McDermott initially pursued this course by objecting to Robert’s final accounting and petition to close the estate. However, McDermott failed to continue down this path when the trial court, over McDermott’s objection, found that Robert had not breached his fiduciary duties as trustee.

¶ 36 Our conclusion is supported by the fact that the trust document provided that “[e]very successor trustee shall have all the powers given to the originally named trustee. Accordingly, Robert, as successor trustee, had full powers to “hold, manage, care for and protect the trust property,” and “[t]o compromise, contest, prosecute or abandon claims in favor of or against the trust.” McDermott’s beneficial interest in the trust was fully represented by Robert as trustee, and it was an exercise of Robert’s power as trustee to decide whether or not to pursue recovery of the

distributions to the family members. See *Axelrod*, 129 Ill. App. 3d at 519; Scott & Fratcher, *Scott on Trusts* § 294.4 at 104.

¶ 37 McDermott next argues that it had standing to pursue its claims against the family members under a second exception to the general rule. McDermott cites section 282(3) of the Restatement (Second) of Trusts, which provides that “[i]f the trustee cannot be subjected to the jurisdiction of the court or if there is no trustee, the beneficiary can maintain a suit in equity against the third person, if such suit is necessary to protect the interest of the beneficiary.” Restatement (Second) of Trusts § 282(3) (1959). McDermott cites no case that has applied this exception, and our research has uncovered no Illinois case—and only one case nationwide—that has applied this second exception. See *City of Dubuque v. Iowa Trust*, 519 N.W.2d 786 (Iowa 1994) (holding that the trust beneficiaries had standing to sue a third party on behalf of a trust where the trustee had already been removed for breaching fiduciary duties, and receiver with limited duties had been appointed in place of successor trustee, such that, in effect, there was no trustee).

¶ 38 We agree with the family members that McDermott lacked standing under this second exception. Standing must be determined as of the date a lawsuit is filed. *23-25 Building Partnership v. Testa Produce, Inc.*, 381 Ill. App. 3d 751, 755 (2008); *CSM Insurance Building, Ltd. v. Ansvar America Insurance Co.*, 272 Ill. App. 3d 319, 323 (1995) (“The rights of the parties are determined as of the date the lawsuit is filed.”); *People ex rel. Lee v. Kenroy, Inc.*, 54 Ill. App. 3d 688, 692 (1977) (“standing to sue must be determined from the allegations of [the] complaint and as of the date when [the] action commenced”). Here, on May 21, 2007, the date on which McDermott originally filed its petition for recovery citations against the family members, Robert was still trustee. The trial court did not discharge Robert as trustee until May 5, 2008. Because

standing must be determined as of the date a lawsuit is filed, McDermott did not have standing under the second exception at the time it filed its petition against the family members.

¶ 39 Finally with respect to standing, McDermott argues that one trust beneficiary always has standing to sue another trust beneficiary to recover an overpayment of trust funds. McDermott relies on section 254 of the Restatement (Second) of Trusts, which provides:

“If the trustee has made a payment out of trust property to one of several beneficiaries to which the beneficiary was not entitled, such beneficiary is personally liable for the amount of such overpayment, and his beneficial interest is subject to a charge for the repayment thereof, unless he has so changed his position that it is inequitable to compel him to make repayment.” Restatement (Second) of Trusts § 254 (1959).

McDermott cites no case that has adopted section 254, and our research has uncovered no Illinois case that has cited section 254 in any capacity.

¶ 40 Looking beyond McDermott’s failure to support its argument with citation to authority, we disagree with McDermott that section 254 stands for the proposition that one trust beneficiary always has standing to sue another beneficiary to recover an overpayment of trust funds. Comment “e” to the section states that, ordinarily, the trustee is the one entitled to maintain a suit against a beneficiary to recover an overpayment:

“If the trustee makes an overpayment out of the trust estate to one of several beneficiaries, the trustee is entitled to maintain a suit against the beneficiary who is overpaid and is entitled to a charge upon the beneficiary’s interest for the amount of the overpayment, and he is under a duty to the other beneficiaries to maintain such a suit or to enforce such a charge, unless he has himself made good to the other beneficiaries or has paid into the trust the amount of the overpayment, for which he is himself personally liable. The fact that the

trustee was himself at fault in making the overpayment does not preclude him from maintaining such suit or enforcing such charge. By so doing he benefits the other beneficiaries and since he is thereby relieved of personal liability he benefits himself also. Even if he has himself made good the amount of the overpayment, he is not ordinarily precluded from maintaining such suit or enforcing such charge.” Restatement (Second) of Trusts § 254 cmt. e (1959).

The comment notes two exceptions under which a trustee would be barred from pursuing such a claim: (1) where the trustee made the overpayment dishonestly, or (2) where the beneficiary who was overpaid has changed positions such that recovering the overpayment would be inequitable. Restatement (Second) of Trusts § 254 cmt. e (1959). The comment states that, where the trustee is barred from pursuing a claim against the overpaid beneficiary, this “would not prevent such recovery or the enforcement of such charge by or on behalf of the other beneficiaries where the trustee has not made good the amount of the overpayment and is insolvent.” Restatement (Second) of Trusts § 254 cmt. e (1959).

¶ 41 McDermott ignores the important qualifications that comment “e” to section 254 places on one beneficiary’s right to pursue a claim against another beneficiary to recover an overpayment of trust funds. Comment “e” permits such claims only where (1) the trustee is barred from pursuing the claim, and (2) the trustee “has not made good the amount of the overpayment and is insolvent.” Restatement (Second) of Trusts § 254 cmt. e (1959). This suggests that, were a trustee solvent, a trust beneficiary would have standing to sue the trustee only, not the overpaid beneficiary. Similarly, if a trustee had “made good the amount of the overpayment,” a beneficiary would not have standing to sue either the trustee or the overpaid beneficiary.

¶ 42 Given the qualifications that comment “e” to section 254 places on one beneficiary’s right to sue another beneficiary to recover an overpayment of trust funds, we do not interpret section 254 as overriding the general rules of beneficiary standing discussed above. Under section 254, as under the general rules of beneficiary standing, one trust beneficiary can maintain a claim against another trust beneficiary only when the trustee is unavailable to do so (and only when the trustee is also insolvent, in the case of section 254). Restatement (Second) of Trusts § 254 cmt. e (1959). Here, there was a successor trustee in place who was available to pursue claims against the family members, so McDermott did not have standing to do so.

¶ 43 Based on the foregoing, we conclude that McDermott lacked standing under either of the two exceptions to the general rule that a trustee has exclusive authority to pursue claims on behalf of a trust, and we decline to conclude that section 254 provided McDermott with an alternative route to standing.

¶ 44 **CONCLUSION**

¶ 45 For the foregoing reasons, we reverse the portion of the trial court’s March 31, 2010, order that entered summary judgment in favor of McDermott on count II of its amended petition, and, exercising our authority under Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994), we enter summary judgment in favor of the family members on count II.

¶ 46 Reversed.