UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0257

September Term, 2013

ANTAL POST DE BEKESSY

v.

GEORGE R. FLOYD, ET AL.

Zarnoch,
Berger,
Reed,

JJ.

Opinion by Zarnoch, J.

Filed: July 13, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case comes to this Court following a complex and lengthy trial in the Circuit Court for Baltimore City involving an estate of substantial size. The complexity of this case stems from differing versions of key testamentary instruments that span many years, multiple countries and two languages. We hold that it was not error for the circuit court to reform a 2004 trust to reflect the intent of the settlor / decedent, Eleanor Close Barzin, to keep the trust's foreign assets separate from the U.S. assets and to account for required estate taxes. The court correctly held that the use by appellant, Antal de Bekessy, in a summary judgment motion of witness testimony relating to transactions with the decedent waived the protection of Maryland's Dead Man's Statute. Md. Code (1973, 2013 Repl. Vol.), Courts and Judicial Proceedings Article ("CJP"), § 9-116. Furthermore, appellees, George R. Floyd and Vivian G. Johnson, Co-Trustees of the Eleanor Close Barzin Trust ("the Trustees") sufficiently demonstrated that de Bekessy had been unjustly enriched by a $10.3 million IRS tax refund. Accordingly, we affirm the judgment and rulings of the circuit court.

FACTS AND LEGAL PROCEEDINGS

In his opinion, Circuit Judge W. Michel Pierson provided this account of the facts:

> Eleanor Close Barzin was the daughter of Marjorie Merriweather Post. She was born on December 3, 1909. She moved to Europe in 1925 and lived outside the United States for most of the remainder of her life. She owned substantial assets in the United States, and real and personal property in France and Switzerland. Prior to 2002, she owned real property in Texas; after its disposition, her U.S. assets consisted of securities maintained in an investment account, located at Crestar Bank during part of the period covered by the evidence, and later at Brown Advisory Services. She owned a residence in Paris (53 Rue Monceau), another in France (Vaux Sur Seine), and one in Fribourg, Switzerland. In addition to the assets owned by her, Mrs. Barzin was the life beneficiary of a substantial trust established by her

> mother (held at Manufacturers of Hanover and later at Chase Manhattan Bank), of which Mr. de Bekessy was the beneficiary after her death.
>
> Mrs. Barzin's cousin was David P. Close, an attorney who handled her estate planning and managed her assets in the United States. Between 1992 and Mrs. Barzin's death, there were a number of testamentary instruments prepared by Mr. Close. Close enlisted Michael Curtin, another attorney, to help him in drafting instruments. He also sought assistance and advice from several other attorneys, including Henri Gendre, Frank Reiche and Michel Degroux.
>
> David Close died on July 4, 2004. On July 26, 2004, Mrs. Barzin executed a revocable trust instrument and pour over will based on drafts that Close had sent to her before his death.[1] She named as trustees Vivien Johnson, Mr. Close's long time secretary, and George Floyd, an employee of Brown Advisory Services. The will named David Close, Michael Curtin and Vivien Johnson as co-personal representatives. The assets in the investment account became the corpus of the trust.
>
> Mrs. Barzin also left a will executed in Switzerland before Henri Gendre, a Swiss notaire, on November 20, 2001; a codicil executed before Bernard Molliere, a French notaire, on January 11, 2005; and a second codicil executed on January 25, 2005, all of which were in French.

This litigation began in 2006 when de Bekessy, Barzin's sole child, sued Floyd and Johnson, the Trustees of the July 26, 2004 *inter vivos* trust governing the United States assets. Laeititia Vere, Barzin's granddaughter, along with twenty-nine other individuals and charitable organizations were joined as defendants because they were named beneficiaries of the trust. De Bekessy sought to force the Trustees to pay all of the taxes assessed against the estate, including the taxes due on the property located in France and Switzerland. The Trustees counterclaimed, seeking reformation of the trust. They sought to have changed the language that pertained to the payment of taxes, because as written, the tax provision of the trust would cause it to be "entirely consumed by taxes."

[1] A pour-over will is defined as "a will giving money or property to an existing trust." BLACK'S LAW DICTIONARY 1630 (8th ed. 2004).

After numerous amendments to the pleadings, a bench trial was held in April, 2011 in the circuit court before Judge Pierson and resulted in a 147-page opinion. The parties asked the circuit court to decide four issues:

1. Is the trust required to make payment of succession taxes levied by foreign governments? This rests on a determination of whether the trust should be reformed.
2. Was Mr. de Bekessy unjustly enriched by the payment of the $10,38[8],013.00 estate tax refund, and is he liable for restitution to the trust?
3. Are the Trustees liable for receiving excessive compensation?
4. Has Mr. de Bekessy violated the *in terrorem* clause contained in the trust?[2]

A key focus of the litigation was the contested tax provision in the July 26, 2004 Trust (Article Fourth). In relevant part it provided that:

> Payment of Death Taxes and Satisfaction of Cash Needs: As soon as practicable following the death of the Settlor, the Trustees shall pay all estate, inheritances, transfer, succession, legacy, and other death taxes or duties, including any interest or penalties thereon, payable by reason of the death of the Settlor under any laws of the United States or any state (including the District of Columbia) or any foreign country, whether with respect to property passing under this Agreement, or under the Settlor's Will, or otherwise. . . .

The Trustees relied on the testimony of Curtin to explain that the inclusion of this provision as worded was a mistake, while de Bekessy contended that it was clear from the face of the document that Barzin intended the trust to be used to pay all of the taxes due on her estate.

Extensive evidence was presented by both sides to prove Barzin's intent regarding the payment of taxes. The circuit court reviewed correspondence between Barzin and her

[2] Issues three and four are not presented in this appeal.

attorneys and heard testimony regarding the process used to create the July 26, 2004 trust and pour-over will. Wills created in the United States in 1992 and 1994 were compared to a 2001 Swiss will and its 2005 codicils to establish Barzin's intent. A question arose over the translation of a particular phrase in the Swiss will. The parties asked the court to determine Barzin's intent with respect to the Swiss will and to take judicial notice of the translation of "ma succession" to mean either "my estate" or "my heirs."[3] Each side presented evidence to show a different interpretation of the phrase "ma succession." The circuit court relied on the testimony of Gendre and the Trustees' expert, Leigh Basha, to conclude that even though the phrase translated to "my estate," a French estate is of a different nature than a United States estate.

The Trustees also sought to have de Bekessy return a refund received from the IRS in the amount of $10,388,013.00 for overpayment of estate tax. De Bekessy claimed that the Trustees presented no evidence that he had received this money or that he was not entitled to receive the money. In the alternative, he claimed the Trustees failed to show why they were entitled to make a claim for the refund. The Trustees asserted that this

[3] Paragraph 15 and 16 contained the relevant provisions of the Swiss will. The 2001 Swiss will was drafted in French and as stated in the circuit court opinion:

> 15. Mes héritiers Antal POST DE BEKESSY et Laetitia HAMILTON ALLEN VERE seront requis par l'État français de payer des impôts successoraux pour les biens situés en France don't ils hériteront. À tite de dation en paiement- desdit impôts, je les astriens à remettre à l'État français: [a list of items follows]
>
> 16. Les droits d'enregistrement afférents aux legs que j'ordonne dans le présent testament sont à la charge de ma succession.

payment constituted unjust enrichment because the tax refund should have benefitted the trust, not de Bekessy directly.

The circuit court reserved its rulings on evidentiary issues, particularly on the hearsay objections and the relevance of certain testimony presented. These decisions were included in the written opinion issued on February 28, 2013. In analyzing the Dead Man's Statute argument presented by de Bekessy, the circuit court concluded that the rule should be applied as a procedural mechanism and not a substantive rule. The circuit court found that the Dead Man's Statute did not bar admission of the testimony of Christine Pont, personal secretary and a potential trust beneficiary, because de Bekessy had waived its protections by using Pont's deposition testimony for the purposes of summary judgment.

The circuit court reviewed the extensive amount of evidence provided by both sides to conclude:

> Count I of Mr. de Bekessy's Second Amended Complaint asks the court to declare that the trustees are obligated to pay French taxes. This claim is pretermitted by the court's determination that the provisions of the trust should be reformed. Under those circumstances, this count should be dismissed. Normally, it is inappropriate to dismiss a claim for a declaratory judgment without issuing a declaration. However, a declaration based on the terms of the trust as written would be meaningless, since the trust has been reformed. . . .
>
> Count I of the Trustees' First Amended Counterclaim and Count I of the Trustees' Second Amended Crossclaim seek judicial instruction and direction concerning their duty to pay taxes, and their actions if the trust assets are insufficient. To the extent that this claim depends on the construction of the trust as written, it is, like Count I of the Second Amended Complaint, mooted by the court's decision that the trust should be reformed. There is no other evidence before the court that suggests a need for such a determination. Therefore, Count I will be dismissed. . . .
>
> Count II of the Trustees' First Amended Counterclaim seeks restitution from Mr. de Bekessy for the tax refund payment from the IRS. In light of the court's determination of this claim, judgment for

> $10,38[8],013.00 will be entered in favor of the trustees against de Bekessy.
> . . .
> Count III of the Trustees' First Amended Counterclaim and Count II of the Trustees' Second Amended Crossclaim seek reformation of Article Fourth of the Trust Agreement. In light of the court's conclusions, an order reforming the trust will be entered.[4]

This appeal followed.

QUESTIONS PRESENTED

Appellant presented three questions to this Court for review, which we have reworded:

> 1. Was the circuit court clearly erroneous in its reliance on circumstantial extrinsic evidence to determine that there was clear and convincing proof sufficient to reform the Trust under D.C. Code § 19-1304.15?
>
> 2. Does the use of deposition testimony at the summary judgment stage constitute a waiver of the evidentiary protections of Maryland's Dead Man's Statute at trial?
>
> 3. Was the circuit court correct in ruling that appellees fulfilled their burden of proof to prove an unjust enrichment claim against appellant?

Finding no error below, we affirm the decision of the circuit court.

[4] The circuit court's ruling provided for other remedies due to certain parties which are not before this Court on appeal. These counts included claims for excessive compensation and a possible violation of the *in terrorem* clause. The court's conclusions on these claims are not included in the factual discussion above for clarity's sake because the facts relevant to those claims do not affect the disposition of the issues before this Court.

DISCUSSION

I. Reformation of July 26, 2004 Trust

A. Standard of Review

Barzin's will and trust were entered into probate in the District of Columbia, so their interpretation is controlled by D.C. law, as well as the standard for reformation of a trust, *see infra* p.8, but Maryland procedural law will govern the standard of appellate review. *See Vernon v. Aubinoe*, 259 Md. 159, 162 (1970) (stating that while a case may be tried under the law of another jurisdiction, Maryland law "controls as to the inferences to be drawn from the evidence, the sufficiency of the evidence, the inferences from it to go to the jury and other procedural matters"). Applying Maryland procedural law, this Court reviews the circuit court's reformation of a trust under Maryland Rule 8-131(c)'s clearly erroneous standard for cases tried without a jury. *See Brady v. Berke*, 33 Md. App. 27, 31 (1976) (stating that former Rule 1086 from which Md. Rule 8-131(c) is derived is "applicable in actions for reformation [and] provides that the judgment of the trial court is not to be set aside on the evidence unless clearly erroneous"). We review the case on both the law and the evidence and "will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c).

The circuit court's decision must be supported by clear and convincing evidence as defined by Maryland law. *See Finch v. Hughes Aircraft Co.*, 57 Md. App. 190, 230 (1984) (stating that under the theory of *lex fori*, the "law of Maryland determines the quantum of

proof required”).[5] Clear and convincing evidence is a “level of proof has [that] been characterized as strong, positive and free from doubt.” *1986 Mercedes Benz 560 CE v. State*, 334 Md. 264, 283 (1994). The “proof must be clear and satisfactory and be of such a character as to appeal strongly to the conscience of the court.” *Id.* Accordingly, we will not reverse the judgment of the circuit court unless it can be shown that the court erred in determining that reformation was appropriate under D.C. Code § 19-1304.15.

B. Reformation Standard

The July 26, 2004 trust can be reformed if the circuit court is convinced that the terms of the trust resulted in a mistake as to the settlor’s intent. Since the estate was probated in the District of Columbia[6], D.C. Code § 19-1304.15 controls this analysis:

> The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor’s intention if it is proved by clear and convincing evidence that both the settlor’s intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

The party seeking reformation bears the burden to show that there is a mistake of either fact or law which has affected the true intent of the settlor. *In re Estate of Tuthill*, 754 A.2d 272, 274 (D.C. 2000). In its review of the evidence, the circuit court focused on two required elements: “(1) the settlor’s intent; and (2) mistake.” Both elements must be proven by clear and convincing evidence and necessitate factual findings in support of reformation.

---

[5] Regardless, as noted by the circuit court, the standard under the D.C. law is similar: “The standard of clear and convincing proof requires evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established.” *In re T.W.M.*, 18 A.3d 815, n.2 (D.C. App. 2011) (Quotation marks and citations omitted).

[6] The petition of probate submitted by Curtin and Johnson, as personal representatives, was granted on February 15, 2008 in the Superior Court of the District of Columbia, Probate Division.

Following the outline provided by the circuit court, we will discuss the relevant law as applied to the testamentary documents and the evidence presented regarding Barzin's intent.

C. Barzin's Intent

1. Uniform Trust Code

We begin with a brief review of the Uniform Trust Code ("UTC") as applied to this litigation. The District of Columbia has adopted the UTC, which guided the circuit court's analysis as to intent and mistake.[7] The UTC explains that a mistake of expression "occurs when the terms of the trust misstate the settlor's intention, fail to include a term that was intended to be included, or include a term that was not intended to be included." UNIF. TRUST CODE § 415. The trial court is allowed to weigh a wide range of direct and circumstantial evidence when determining the presence of a mistake necessary for reformation. *See Tuthill*, 754 A.2d at 276 ("[T]he law does not require a party to produce any particular evidence to support its obligation under the clear and convincing evidence standard for reformation of a trust"). Therefore, the circuit court's reliance on extrinsic evidence to prove Barzin's intent is critical. *See* UNIF. TRUST CODE § 415 ("Because reformation may involve the addition of language to the instrument, or the deletion of language that may appear clear on its face, reliance on extrinsic evidence is essential.").

De Bekessy cites two out-of-state cases to support a different interpretation of the UTC. Neither of the cited cases persuades us. In *In re Trust Created by Isvik*, the Supreme

[7] The District of Columbia adopted the Uniform Trust Code in 2004. *See* Uniform Trust Act of 2003, 2003 District of Columbia Laws 15-104 (Act 15–286).

Court of Nebraska, in applying the UTC, found that the evidence revoking a trust was not clear and convincing to allow for reformation. 741 N.W. 2d 638, 640 (Neb. 2007). The dispute arose after Isvik became dissatisfied with a bank's management of her trust and informed the bank's trust department that she was "revoking [her] trust." *Id.* at 641. Isvik wrote a letter to the bank that stated "I am revoking my Trust as of this date. Consider this my notice to you. Make no further transactions with any of my holdings and convey all materials pertaining to and including my holdings to me immediately." *Id.* at 641–42. Three individuals testified that Isvik's use of the term "revoke" meant only that she wanted to remove the bank as a trustee. *Id.* at 642. The Supreme Court of Nebraska based its decision on extrinsic evidence:

> But even taking into consideration that the trial court saw and heard the testimony of the witnesses, we conclude that the conflicting evidence as to Isvik's intent is at least evenly balanced. Based upon our review of this record, we cannot reach a firm belief or conviction that Isvik mistakenly expressed her true intent in her letter to the Bank.

Id. at 648.

De Bekessy attempts to undermine the circuit court's interpretation by arguing that *Isvik* was a stronger case for reformation because there was direct testimony regarding the intent of the settlor. However, the Nebraska court was not convinced by the evidence. Absent a direct statement from Barzin, the circuit court here had only circumstantial evidence to rely on, but was still persuaded by the fact that the July 2004 Trust did not reflect her intent.

De Bekessy also cites *Eft v. Rogers*, in which the Court of Appeals of Arkansas did not reform a trust because the evidence showed that the settlor was competent and

understood the documents that she had extensively reviewed. 2012 Ark. App. 632, 425 S.W.3d 1, 6 (2012). *Eft*, however, is distinguishable from our case for multiple reasons. Barzin's competence has not been raised as an issue in this case and Barzin reviewed the documents extensively. However, in this case, additional evidence presented through testimony at trial was sufficient to convince the circuit court that a mistake was present in the tax provision.

Neither case draws into question the circuit court's conclusions here. The court conducted a painstaking review of the drafts and codicils of the trust, along with the numerous communications and correspondence in evidence, to find that the tax provision located in Article Fourth of the Trust necessitated reformation.

2. Article Fourth of the Trust

The contested language of Article Fourth is clear in its requirements to pay the foreign death taxes, as noted by the circuit court: "It is indisputable that the language of Article Fourth of the trust explicitly requires the payment of foreign death taxes. The Trustees seek the remedy of reformation, asserting that due to a mistake, the provisions of the trust are contrary to Barzin's intent." De Bekessy argues that Article Fourth (a) is "clear and unambiguous." However, that is not the question for review, as the circuit court was not asked to clear up ambiguity, but to reform the trust to reflect the true intent of Barzin.

De Bekessy argues that the circumstantial evidence presented by the Trustees was not sufficient to satisfy their burden under the clear and convincing standard. He contends that it was error for the circuit court to reform the trust when Barzin meticulously reviewed the testamentary instruments and the tax provision was consistent across multiple versions

of the trust. As noted above, it is essential in these situations that the court review all of the evidence presented, whether it be circumstantial or direct, to determine if a mistake is present in the final trust documents. The circuit court could permissibly rely on the wide range of extrinsic evidence provided, even if circumstantial, to conclude that the document as written contains a mistake. *See* UNIF. TRUST CODE § 415.

There was an abundance of evidence of the communications between Close and Barzin, including "no less than seventeen written communications" between 1991 and 2004, with an additional twenty-five pieces of correspondence relating to the planning of Barzin's estate. These communications contained comments made by Barzin following her review of documents, as well as advice from Close regarding how Barzin should proceed with her estate planning.

The textual history of Barzin's testamentary documents provides evidence of a mistake in expression. The first will was executed on June 24, 1992 and contained the following tax provision: "I direct that all inheritance, succession, estate and death taxes, and all other taxes levied by any State in the United States or by the Federal Government in the United States shall be paid and delivered by my Independent Executors and fiduciaries without any deduction for such taxes." The presence of the phrase "any foreign country" first appears in the 1994 draft will in Article Seventh, Paragraph (a):

> <u>Payment of Death Taxes and Satisfaction of Cash Needs.</u> As soon as practicable following my death, my Independent Executor shall pay all estate [taxes] payable by reason of my death under any laws of the United States or any state (including the District of Columbia) or *any foreign country.* (Emphasis added)

Every time Barzin received a version of the trust or will, she would read through the documents, initial every page and pose questions as to the inclusion of certain provisions. As a result of her review, there were "more than thirty changes made to Article Fourth (a)" since its creation in the 1994 will. De Bekessy argues that these changes indicate that Barzin's failure to question the phrase "any foreign country" is indicative of her intent. The circuit court noted that this argument provided some merit to de Bekessy's contentions, but was not convinced that this failure outweighed the other evidence. Particularly relevant was Curtin's testimony that he was told "by Close that the U.S. assets were to pay the U.S. taxes and the European assets were to pay the European taxes." As we cannot judge the credibility of witnesses, we agree that de Bekessy's argument is not sufficient to prove that Barzin intended for the U.S. Trust to pay foreign taxes.

Direct evidence in the form of letters between Barzin and Close supplemented the circumstantial evidence regarding the handling of the U.S. assets. The letters, presented by the Trustees suggest that Close was recommending to Barzin that she prepare individual testamentary documents for each country where she had assets. De Bekessy argues that these letters and statements about creating separate estates is "misplaced" calling the correspondence "confusing at best" and the letters "worthless to explain Mrs. Barzin's intent." We do not agree with this contention. Although the letters do not provide unequivocal substantiation as to Barzin's intent, the letters are of value to explain the expectations Barzin had regarding her worldwide estate and the availability of funds to leave behind certain gifts.

3. The Swiss Will and Codicils

The 2001 Swiss will and its 2005 Codicils provide further evidence of Barzin's intent. The Swiss will was drafted by Henri Gendre and was originally written in French. The parties' main point of contention is over the translation of the phrase "ma succession." De Bekessy contends that it means "my estate," but appellees contend that the term means "my heirs." Its literal English translation is "my estate," but it carries a different meaning in French legal terminology. Evidence as to the phrase's interpretation was provided by both sides. The circuit court reviewed the various translations, observing that "ma succession" translated to "my heirs."

However, the testimony about these documents was more critical to the court's decision due in part to the differences between the French and American legal systems. The witnesses testifying as to the Swiss will and its Codicils explained that "there is no entity under Swiss or French law that is comparable to a United States probate estate." Furthermore, Leigh Basha, the Trustees' expert witness, who the court found to be credible, testified that "the property vests in the reserved heirs, who are legally responsible for the debts and obligations associated with the property." The drafter of the Swiss will, Henri Gendre, further testified that estates in Switzerland are "held by a community of heirs." Therefore, the circuit court correctly determined that the literal interpretation of "ma succession" was a misnomer.

Furthermore, it is apparent from the Swiss will that Barzin intended that the recipients of the assets held in Switzerland and France be responsible for the estate taxes in those countries. Barzin set aside certain items to be donated to the Louvre and the French

government as partial payment for any taxes that would become due on the assets located in France and Switzerland. A conclusion that the U.S. trust was to pay for these taxes would be irreconcilable with this testamentary document. We agree with the circuit court that paragraph 15 of the Swiss will provided additional evidence that Barzin intended the US and foreign taxes to be handled differently.

4. Insufficiency of Funds in Trust

The contention that the Trust would be underfunded if appellant's position were adopted was raised at trial by the Trustees and evidence was proffered "to show that the effect of payment of foreign taxes from the trust would be to render it unable to pay the specific gifts or the residuary gifts." Calculations made by Curtin and Close estimated the amount of U.S. taxes due and included only the U.S. trust assets. Furthermore, Basha's testimony was consistent with these calculations and the tax returns in the record. De Bekessy contends that the circuit court placed too much emphasis on this particular evidence. The circuit court rightly stated "the assertion that future events could affect the availability of assets applies to every settlor and every trust (and every testator and every will), and if Mr. de Bekessy's argument is followed to its logical outcome, [it] would make estate planning pointless."

The question is not whether the beneficiaries of the trust would actually receive the benefits, but whether the trust reflected Barzin's intent.[8] The value of the trust, as both

[8] The circuit court pointed this out in its opinion:

> Insofar as this is advanced as an argument that the provisions of the trust or the will evince an awareness on Mrs. Barzin's part that the gifts provided for

parties agree, was constantly changing due to the nature of financial markets, but clearly it was Barzin's intent to provide the gifts as set forth in the trust. Furthermore, the circuit court noted and, we agree, that "it is a fair inference that Mrs. Barzin would not have dedicated so much time to revising the beneficiaries portion of her wills and trusts if she understood that it would be entirely depleted to pay worldwide taxes."

D. Evidence of Mistake

The second required element to reform a trust is a mistake of fact or law that affected the terms of the trust. *See* D.C. Code § 19-1304.15. De Bekessy contends that the trust did not contain a mistake. He rests his contention on the lack of evidence that Curtin or Close sought to "change or eliminate" the tax provision even after making more than "thirty changes to Article Fourth (a)." The evidence of mistake presented by the Trustees stems from Curtin's testimony about the "boilerplate" provision he included in the 1994 will.

The court found Curtin's testimony regarding this provision to be convincing. He stated that the language used to require payment of foreign taxes from the U.S. assets was a mistake based on the use of a standard "boilerplate" provision:

> Q: Okay. If I could direct your attention to the second page, Bates Number 106, specifically Article 4th (A). Did you draft that?

> by the trust instrument would not be made due to the payment of taxes, it is unconvincing. These provisions shed little light on Mrs. Barzin's intent or awareness. The fact that the beneficiaries could be divested of their gifts if the trust were terminated does not rebut the conclusion that she intended to make these gifts, any more than does the fact that there were provisions that covered eventualities such as the termination of the trust. And the implication in the language of the will that the taxes be paid from the trust to the extent that funds were available does not necessarily imply that she thought they would not be available. Testamentary instruments often contain language providing for a variety of contingencies.

> A: I believe I did.
> Q: What were you trying to accomplish in that revision?
> A: Recover from the mistake made in '94 Will.
> Q: And what mistake was that?
> A: That was the mistake that had to do with taxes being paid by – taxes being paid out of the U.S. Estate that may be imposed by foreign countries.

The Trustees direct us to *Agnes M. Gassmann Revocable Living Trust v. Reichert*, 2011 ND 169, 802 N.W.2d 889, 892 (2011), to support the conclusion that a mistake by the drafter is sufficient to constitute a mistake in expression.[9] In *Reichert*, a dispute arose over distribution of property held as a limited liability limited partnership ("LLLP"). In that case, the drafting attorney "submitted an affidavit alleging that there was a mistake in drafting the trusts." *Id.* at 891. As a result of this mistake, the terms of the trust misstated the party to whom the interest in the LLLP would be transferred. *Id.* The other parties argued that the trust was unambiguous and should not be reformed on the evidence of an affidavit alone. *Id.* The court ultimately reformed the trust, concluding that there was clear and convincing evidence of a mistake in expression. *Id.*

In *Reichert*, appellants argued that the court erred in reforming the trust because the "testimony was self-serving and the attorney's testimony was 'tainted' because he was

---

[9] This case is not binding on this Court but is persuasive because the language of the North Dakota statute is identical to the D.C. Code provision under discussion here. The North Dakota statute provides that:

> The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

N.D. Cent. Code § 59-12-15. *Compare with* D.C. Code § 19-1304.15.

biased and had a conflict of interest." *Id.* at 892. The North Dakota court held that the assertions raised by the appellants only challenged the credibility of the witness and that "even when reviewing findings made under a clear and convincing evidence standard, determination of the credibility of witnesses is a function of the trial court." *Id.*

Here, we face a similar scenario. The circuit court was careful to note Curtin's personal interest in the outcome of this case, but further explained that Curtin's admission of a mistake was the statement against his own interest, particularly as the drafter of the 1994 will. There was further evidence provided that showed a pattern in Close's use of "boilerplate" language and habit of using old drafts to create new ones as noted in the testimony of Johnson. The extensive correspondence between Curtin, Close, and Barzin exhibit the intention to create separate estates and the desire to depose of Barzin's assets in a particular manner. The inclusion of the "boilerplate" provision was a mistake in expression of Barzin's intent, one that warranted reformation.

E. Conclusion

The circuit court concluded that it was the intent of Barzin to create separate estates in the United States and abroad, with the respective taxes to be paid in each country. It was not Barzin's intent that the taxes due in France or Switzerland be paid from the United States trust. Barzin created a trust that was expected to benefit numerous organizations, charities and individuals. Her intent was to have "sufficient funds for the making of the

specific and residuary gifts, which [would be] inconsistent with a requirement for the trust to pay foreign taxes."[10]

The Trustees provided extensive written confirmation of Barzin's intent and this was sufficient to convince Judge Pierson that the July 26, 2004 trust contained a mistake in expression. De Bekessy's contentions on appeal are not persuasive to show that Judge Pierson's conclusion was clearly erroneous, particularly with the weight of the evidence against him.

Because we are reviewing the circuit court's ruling under the clearly erroneous standard, we are restrained, much like the *Reichert* court, from evaluating the conflicting evidence. Instead, in reviewing the record in a nonjury trial, an appellate court assumes "the truth of all evidence, and inferences fairly deducible from it, tending to support the

[10] The circuit court further explained:

> In light of all of the foregoing, the court concludes that there is clear and convincing proof that Mrs. Barzin did not intend that foreign taxes would be paid from the trust. The court is mindful of the heightened responsibility that the clear and convincing standard imposes. The court is also mindful of the fact that there is no "smoking gun" in the form of a statement from Mrs. Barzin to this effect. Nonetheless, after reviewing the mass of evidence that has been adduced, the court is left with the abiding conviction that her intent was that the trust pay only taxes imposed in the U.S. . . . She was repeatedly assured by Mr. Close that the trust dealt only with U.S. assets and (inferentially U.S. obligations). The only fact that points in the other direction is the fact that she read and did not question the provisions of the trust. That fact, alone, is not sufficient to outweigh the evidence to the contrary. . . . The court finds that Barzin's actual intent was that the trust would pay only taxes imposed by the U.S. and that taxes imposed by foreign jurisdictions would not be paid from the trust, and concludes that the trustees have established the predicate for reformation under the terms of District of Columbia law.

findings of the trial court, and, on that basis, simply inquires whether there is any evidence legally sufficient to support those findings." *Weisman v. Connors*, 76 Md. App. 488, 500 (1988). Judge Pierson concluded that there was a mistake in expression and that the evidence presented met the heightened clear and convincing standard. Based on his extensive review of the evidence and responsibility to weigh the credibility of the witnesses, we agree with his conclusion that the trust needed to be reformed.

II. Maryland Dead Man's Statute

A. Standard of Review

Appellant's second issue raises two questions: whether the circuit court employed the correct choice of law and whether that law was correctly applied. The application and waiver of a rule of evidence is a question of law to be reviewed *de novo* by this Court. Applying Maryland Rule 8-131(c), "the deference shown to the trial court's factual findings under the clearly erroneous standard does not, of course, apply to legal conclusions. We, instead, review *de novo* the trial court's legal conclusions." *Griffin v. Bierman*, 403 Md. 186, 195 (2008) (Internal citations omitted).

B. Choice of Law

In this case, the circuit court applied the substantive law of the District of Columbia and the procedural law of Maryland. As the trustees and Vere still maintain that D.C.'s Dead Man's Statute should have been applied as substantive law, it merits a discussion of the choice of law. The circuit court cited the Restatement (Second) of Conflicts of Laws § 122 (1971) to explain that "a court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state

to resolve other issues in the case." *See also Vernon*, 259 Md. at 162. If deemed to be a procedural safeguard, it would be correct to follow Maryland's Dead Man's Statute. We agree that it would be considered procedural and that Maryland's Dead Man's Statute should be applied over D.C.'s comparable statute.

CJP § 9-116 contains Maryland's Dead Man's Statute and is an exception to the general provisions of witness competency. Accordingly, this Court has interpreted this provision in "light of its history and of [§] 9-101." *Midler v. Shapiro*, 33 Md. App. 264, 276 (1976). Federal courts interpreting Maryland law adopt the same approach. *See Maltas v. Maltas*, 197 F. Supp. 2d 409, 425 (D. Md. 2002) *rev'd on other grounds*, 65 F. App'x 917 (4th Cir. 2003) (The "Court of Appeals more likely than not would determine the statute to be procedural and thus apply the state dead man's statute to all cases tried in Maryland, notwithstanding the application of the substantive law of another state.").

When applying CJP § 9-116 as a procedural safeguard, this Court has consistently employed the Dead Man's Statute as a means to "equalize the position of the parties by imposing silence on the survivors as to transactions with or statements by the decedent or at least by requiring those asserting claims against the decedent's estate to produce testimony from disinterested persons." *Reddy v. Mody*, 39 Md. App. 675, 679 (1978). The purpose of the statute "is to seal the lips of a party in a proceeding by or against a personal representative about facts that could be disputed only by the deceased." *Farah v. Stout*, 112 Md. App. 106, 114 (1996) (Internal citations omitted); *see also Balma v. Henry*, 935 N.E.2d 1204, 1209–10 (Ill. App. 2010) (stating that the Dead Man's Act is meant to create fairness by removing "the temptation of a survivor to testify to matters that cannot be

rebutted because of the death of the only other party to the conversation or witness to the event, but it is not intended to disadvantage the living"). The statute is meant to be narrowly construed allowing for the disclosure of "as much evidence as the rule will allow." *Reddy*, 39 Md. App. at 681–82.

C. Application of Dead Man's Statute to Disputed Testimony

De Bekessy contends that it was error for the circuit court to conclude that he waived the Dead Man's Statute by using certain deposition testimony in a motion for summary judgment and that the testimony of certain witnesses should have been excluded. The trustees and Vere argue the complete opposite position that the statute does not even apply to the testimony in question. We are reviewing this question of law *de novo*.

In order for the Maryland Dead Man's Statute to apply, CJP § 9-116 lays out four required elements:

> A party to a proceeding by or against a personal representative, heir, devisee, distributee, or legatee as such, in which a judgment or decree may be rendered for or against them, or by or against an incompetent person, may not testify concerning any transaction with or statement made by the dead or incompetent person, personally or through an agent since dead, unless called to testify by the opposite party, or unless the testimony of the dead or incompetent person has been given already in evidence in the same proceeding concerning the same transaction or statement.

The challenged testimony is that of Christine Pont, the personal secretary of Barzin and a potential beneficiary of the trust. This pecuniary interest in the terms of the trust clearly makes Pont a party to the proceedings. *See Reddy*, 39 Md. App. at 682 (Citations omitted) (stating that a party includes "a person having a direct pecuniary and proprietary

interest in the outcome of the case"). It is not required by the statute that she be a named party. *See Farah*, 112 Md. App. at 117–18.

The potential testimony must concern "any transaction with or statement made by the dead or incompetent person, personally or through an agent since dead." CJP § 9-116. In *Shaneybrook v. Blizzard*, 209 Md. 304 (1956), the Court of Appeals allowed testimony, arguably covered by the Dead Man's Statute, because the "word *transaction* imports a mutuality or concert of action. The word *personally* also imports more than the unilateral observations of the survivor." *Id.* at 312 (Internal quotations omitted) (Emphasis added). The Court of Appeals further explained that the test for a "transaction" under the statute was "whether, in case the witness testif[ied] falsely, the deceased, if living, could contradict it of his own knowledge." *Schifanelli v. Wallace*, 271 Md. 177, 184 (1974) (Citations omitted). In *Schifanelli*, "testimony by the surviving husband of what transpired before the shooting, including his statements of how he felt toward his wife, how the gun was fired, his denials that he intentionally shot her, and the diagram of the bedroom, was properly admissible." *Id.* at 182. The Court of Appeals concluded that these observations were not covered "transactions." *Id.* at 187.

Ultimately under CJP § 9-116, "[t]he testimony meant to be excluded by the Statute is only testimony of a party to a cause which would tend to increase or diminish the estate of the decedent by establishing or defeating a cause of action by or against the estate." *Reddy*, 39 Md. App. at 679. This element is meant to prevent "self-interested perjury." *Farah*, 112 Md. App. at 114. It is apparent that the testimony presented by Pont would be of the nature that the Dead Man's Statute was enacted to prevent. The circuit court noted:

"The trustees and Ms. Vere seek to use Ms. Pont's testimony to show that Mrs. Barzin intended for the Trust to be used to pay United States taxes only and that Mrs. Barzin had complete trust in Mr. Close to handle her affairs." The statements given by Pont in her deposition and trial testimony are of a kind that would affect the ultimate value of the estate.

From this point forward, the circuit court hesitated to apply the Dead Man's Statute: "Whether this is a proceeding that is intended to be within the scope of the statute seems questionable. On the other hand, the literal words of the statute seem to apply. Therefore, the court concludes, not without some reservation, that this element is met." The court's reservation was based on the statutory language: "by or against a personal representative, heir, devisee, distributee, or legate." Here, the case involved a trust, not a will and was brought by de Bekessy. Regardless of this distinction, it is at least arguable that testimony relating to conversations with Barzin should be excluded under the Dead Man's Statute.

D. Waiver of Maryland's Dead Man's Statute

Since we have concluded that the Dead Man's Statute arguably applies, we now determine whether de Bekessy's use of the challenged testimony in a pre-trial summary judgment motion constituted a waiver of the protection of the statute. The fourth and final requirement under CJP § 9-116 is that an individual's testimony is excluded "unless called to testify by the opposite party, or unless the testimony of the dead or incompetent person has been given already in evidence in the same proceeding concerning the same transaction or statement."

De Bekessy contends that his use of Pont's deposition in his summary judgment motion did not constitute a waiver of the protection because his use was restricted to

"framing the issue" and did not reference any particular statements that would be covered by the Dead Man's Statute. The Trustees and Vere argue that the statute does not apply to the testimony, but contend that even if it did, de Bekessy waived his objection by relying on the testimony to support his arguments. The circuit court found that once de Bekessy used Pont's testimony to support the inference that "Barzin intended precisely what is written in her testamentary documents . . . the line was crossed and the protections of the Dead Man's Statute were thenceforth waived."

This Court has previously laid out the two warring positions, explaining that the "pro-waiver jurisdictions have concluded that it is unjust to permit a party to obtain the benefits of discovery, learning the position of the adversary, and then reject the result if it is unfavorable," whereas the anti-waiver jurisdictions argue that "a personal representative should not be forced to choose between forfeiting utilizations of the dead man's statute or of discovery." *Clark v. Strasburg*, 79 Md. App. 406, 411–12 (1989) *rev'd on other grounds*, 319 Md. 583 (1990).

Accordingly, in *Rhea v. Burt*, this Court explained that the Dead Man's Statute is not to be used to restrict "appropriate pretrial discovery." 161 Md. App. 451, 458 (2005). "It is true that the Dead Man's Statute protects the decedent's estate by prohibiting the surviving *adverse* party from testifying *at trial* (with respect to facts that could only be contradicted, or corroborated, by the deceased), but that statute does not seal the lips of a non-party witness." *Id.* (Internal citations omitted) (emphasis in original). It is well established that merely citing a deposition is not sufficient to waive the Dead Man's Statute. *See Clark*, 79 Md. App. at 412. De Bekessy contends that because he did not call

for Pont to be deposed or to testify at trial, he did not waive the Dead Man's Statute by citing her deposition in his Motion for Summary Judgment. However, de Bekessy did much more than cite to the deposition. He relied heavily on its contents to support his motion and his filings.

The parties have not directed us to any controlling Maryland law to guide our decision. Therefore, we look to out of state authority. In *Bordacs v. Kimmel*, 139 So. 2d 506 (Fla. Dist. Ct. App., 1962), the court found that the dead man's statute was waived once the deposition was "used in support or defense of a motion for summary judgment." *Id.* at 507. De Bekessy contends that the reasoning of this opinion has been undercut by *Polk v. Cittenden,* 537 So. 2d 156, 158 (Fla. Dist. Ct. App. 1989). In *Polk*, the Florida District Court of Appeal chose not to follow *Bordacs*, stating that the "indiscriminate waiver approach" was not legally sound. *Id.* at 158.

However, there is a distinction to be made. In *Bordacs*, the court stated that the waiver extended to all aspects of the deposition, not just the statements used in support of the motion. This complete waiver was what the *Polk* court took issue with, not the idea of a limited waiver. *Polk*, 537 So. 2d at 158. De Bekessy used statements from Pont's deposition in support of his arguments that the trust reflected Barzin's intent, citing Pont's testimony to say that "there is no evidence that Mrs. Barzin did not understand what she was doing or did not intend to do it."

In *Taylor v. Taylor*, 643 N.E.2d 893, 895 (Ind. 1994), Indiana's highest court determined that the dead man's statute was waived after the surviving party submitted a discovery deposition in support of a summary judgment motion. The court explained that

"the mere taking of a deposition does not waive the applicability of the Dead Man's statute." *Id.* (Internal citations omitted). "Discovery, as its name suggests, exists in order for parties to explore and investigate." *Id.* Once the party

> employs a witness's deposition and/or admissions in court, the party is in fact using the information discovered for an evidentiary purpose. The party is treating, and hopes that the court will treat, the discovered information as establishing some relevant fact about the case. In such circumstances, if the deposition testimony concerns matters within the scope of the Dead Man's statute, then the party who offered the deposition testimony into evidence would have waived the incompetency of the witness, because that party has relinquished the benefit bestowed by the statute.

Id.

In *Estate of Smith v. United States*, 979 F. Supp. 279 (D. Vt. 1997), a federal district court similarly reasoned that once a deposition is submitted to the court in support of a summary judgment motion, "the party is asking the court to treat the discovered information as evidence." *Id.* at 285. Similar to de Bekessy, the plaintiff in *Smith* relied on portions of a deposition which contained discussions about conversations with the decedent and used the deposition "in support of [his] contention that the father did not intend to bestow [a certain gift] upon his son." *Id.* at 285.

In more recent decisions, the Court of Appeals of Washington and the Appellate Court of Illinois have followed similar reasoning. The Washington Court explained that "once the protected party has opened the door, the interested party is entitled to rebuttal." *Estate of Lennon v. Lennon*, 29 P.3d 1258, 1263 (Wash. App. 2001). "Engaging in pretrial discovery, including taking depositions or propounding interrogatories, does not waive a

dead man's statute unless a representative of the estate introduces the deposition or interrogatories into evidence." *Id.*

The Washington Court further explained that the use of a deposition with "all evidence of a transaction with the decedent" redacted would not be considered a waiver of the protection, but once evidence of transactions with the decedent are offered in this manner, it is considered waived. *Lennon*, 29 P.3d at 1263–64. The court explained the policy behind the waiver doctrine:

> It would, however, be palpably unjust to permit the representative of a deceased person to use the adverse party to the extent that it might aid him in defeating a claim or in establishing an independent claim in favor of the estate, and then claim the benefit of the statute when the adverse party sought to qualify or explain his testimony.

Id. at 1264–65.

If pretrial discovery, in the form of a deposition, contains transactions with the decedent that could be contradicted by the "deceased, if living," then it constitutes a waiver of the dead man's statute upon use in a summary judgment motion. *Id.* at 1264–65; *see also Balma*, 935 N.E.2d at 1209–10 (stating that "it strains logic to construe the Act in a manner that forces litigants to proceed to trial when it would be evident from an application of the Act, in the context of a summary judgment proceeding, that a litigant cannot prove his case"). We adopt the reasoning of these cases. The statements of Pont used and relied upon by de Bekessy related "transactions" within the contemplation of the Dead Man's Statute and Barzin could contradict the statements if she were alive. By using these statements in the summary judgment motion, de Bekessy waived any objection to further use of Pont's deposition testimony.

Additionally, de Bekessy relies on Pont's testimony to argue that the Trust reflected Barzin's intent and did not warrant reformation. As the circuit court noted:

> Had Mr. de Bekessy offered Ms. Pont's testimony merely to prove that Mrs. Barzin read and signed the Trust, Ms. Pont's testimony might be interpreted in light of *Schifanelli* and *Shaneybrook* as personal observations that do not waive the protections of the Dead Man's Statute. Of course, if that were the case, Ms. Pont's deposition testimony would also be uncontroversial and of minimal relevance. Mr. De Bekessy did not offer the testimony for that purpose only; he offered it to prove Mrs. Barzin's intent.

De Bekessy relied on Pont's testimony in his brief in this Court to show that Barzin regularly scrutinized the documents and reviewed the drafts. De Bekessy cites to Pont's testimony to conclude that "no one except Barzin could know her intent on July 26, 2004: it's not a question – you cannot imagine what someone has in her – in his mind at that time." This reliance on Pont's statements about Barzin's intent behind the Trust goes directly to the main issue of reformation. These same statements were submitted to the circuit court in de Bekessy's closing argument. Even if the use at the summary judgment stage did not waive the protection, de Bekessy has surely waived the Dead Man's Statute protection at this point.

Furthermore, even if the above use of the challenged testimony did not constitute a waiver, this evidence was not essential to the circuit court's decision to reform the trust. The instances where Pont's testimony was credited were minimal at best. The circuit court credited Pont's testimony about the relationship between Barzin and Close and that it was important to Barzin that Vere and the charities she designated receive some amount of money after her death.

In the circuit court's opinion, the court explicitly stated that the court did not "rely on Ms. Pont's testimony concerning discussions of payment of taxes between Mr. Close and Mrs. Barzin, and specifically the alleged statement that after being informed of the amount that de Bekessy would inherit under his grandmother's trust, Mrs. Barzin told Mr. Close that de Bekessy could afford his own inheritance taxes in France." The circuit court did not accept Pont's testimony that Barzin had requested that there be "separate wills, one in Switzerland and one in the United States" as the testimony was not supported by any detailed evidence. Based on the limited areas where the circuit court credited Pont's testimony, we believe that regardless of the question or presence of waiver, the admission of this testimony would amount to harmless error and would not warrant reversal of the decision below.

III. Unjust Enrichment Claim

A. Standard of Review

We review the claim for unjust enrichment on both the law and the evidence and "will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c). Accordingly, our task is limited to deciding whether the circuit court's factual findings were clearly erroneous and not supported by the evidence in the record. *Saxon v. Harrison*, 186 Md. App. 228, 262 (2009). However, this deferential standard does not apply to a trial court's determination of legal questions or conclusions of law based on findings of fact. *Id*. at 262–63. The legal conclusions reached by the circuit court are not accorded deference on appeal . . . and instead are reviewed *de novo*." *Hoang v. Hewitt Ave. Assocs., LLC*, 177 Md. App. 562, 576 (2007).

B. Requirements for Unjust Enrichment Claim

Because the unjust enrichment claim relates directly to funds from the D.C. governed trust, we agree with the circuit court that D.C. law applies to the claim for restitution.[11] A claim for unjust enrichment or restitution exists when "a person retains a benefit (usually money) which in justice and equity belongs to another." *4934, Inc. v. D.C. Dep't of Emp't Servs.*, 605 A.2d 50, 55 (D.C. 1992) (Citations omitted). Many jurisdictions provide a three-step test for unjust enrichment. A comment to the Restatement of Restitution provides a warning as to the rigidity of the elements stating that "[f]ormulas of this kind are not helpful, and they can lead to serious errors. They lend a specious precision to an analysis that may be simple or complicated but which at any rate is not susceptible of this form of statement." Restatement (Third) of Restitution and Unjust Enrichment § 1, cmt. d (2011).

To be entitled to restitution under the law of the District of Columbia, the party must show: that the other party "was unjustly enriched at his expense and that the circumstances were such that in good conscience [the other party] should make restitution." *News World*

[11] The parties agreed during trial that the trust was governed by the law of the District of Columbia. The Maryland law on this particular claim does not differ in any significant manner. Under Maryland law, unjust enrichment consists of three elements:

> 1. A benefit conferred upon the defendant by the plaintiff;
> 2. An appreciation or knowledge by the defendant of the benefit; and
> 3. The acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value.

Hill v. Cross Country Settlements, LLC, 402 Md. 281, 295 (2007).

Commc'ns, Inc. v. Thompsen, 878 A.2d 1218, 1222 (D.C. 2005). Explained in other terms, the "recipient of the benefit has a duty to make restitution to the other person if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for [the recipient] to retain it." *Peart v. D.C. Hous. Auth.*, 972 A.2d 810, 813 (D.C. 2009). The addition of a third party can complicate issues of restitution and unjust enrichment: "If a third person makes a payment to the defendant to which (as between claimant and defendant) the claimant has a better legal or equitable right, the claimant is entitled to restitution from the defendant as necessary to prevent unjust enrichment." Restatement (Third) of Restitution and Unjust Enrichment § 48 (2011).

C. Claim for Restitution of the $10,388,013.00 Tax Refund

The unjust enrichment claim centers around a tax refund de Bekessy received from the IRS in the amount of $10,388,013.00 payable to the Eleanor Close Barzin Estate, Antal P. de Bekessy, care of Olivier Jamet. The trial court relied on the following evidence when making its factual findings:

> On August 24, 2007, the trustees made an estimated payment of $17,500,000.00 to the Internal Revenue Service in connection with a request for extension of time to file Form 706, the federal estate tax return for Mrs. Barzin's estate. (Trst. Ex. No. 61). At the time that this payment was made, Mr. Curtin and Ms. Johnson had not qualified as executors; they received letters of administration from the Superior Court of the District of Columbia on February 15, 2008. (Trst. Ex. No. 44). An estate tax return was filed on February 27, 2008 on behalf of Mr. Curtin and Ms. Johnson as personal representatives. (Trst. Ex. No. 46). In the meantime, Mr. de Bekessy filed an estate tax return on February 20, 2008, which he signed as personal representative. (Trst. Ex. No. 45). It appears that he obtained letters by opening an ancillary estate in New York. The return filed by Mr. de Bekessy showed an overpayment of $10,38[8],013.00. According to testimony, the IRS issued a refund check in that amount on March 6, 2008.

De Bekessy contends that the circuit court improperly shifted the burden of proof from the Trustees by stating that de Bekessy failed to introduce evidence to contest or deny the presence of the check. De Bekessy's contention is that the Trustees failed to prove that he ever possessed the funds or that they ever conferred a benefit on him. The Trustees respond that "the trial court found that the Trustees met their initial burden of production and made a *prima facie* showing that Mr. de Bekessy has received the refund, thereby shifting the burden of production to him. Because he failed to produce any evidence, the Trustees met their burden of persuasion."

There was testimony presented that the IRS issued a refund check on March 6, 2008 and the details of the check were later read into evidence by Curtin. However, the physical check itself was never entered into evidence by either side. It is true that the amount of evidence presented for this claim was minimal, but unlike the reformation claim, clear and convincing evidence was not required. Here, the burden of production was on the Trustees to show that de Bekessy had been unjustly enriched and the circuit court concluded that they carried their burden. On appeal, we are not to substitute our view on the circuit court's findings of fact, unless the decision was clearly erroneous. The circuit court found that:

> The refund of $10,38[8],013.00 was paid by the U.S. Treasury to the Eleanor Close Barzin Estate, Antal P. de Bekessy, care of O. Jamet. Mr. de Bekessy was a payee of the check. Mr. de Bekessy's pleadings allege that O. Jamet was Mr. de Bekessy's notary. These facts are sufficient to show that the funds were paid to Mr. de Bekessy. Any inference that the funds went to some other person or entity is fanciful.

Appellant contends that this conclusion runs afoul of *Hill*, 402 Md. 281. There, the Court of Appeals held that as "a matter of law, the payment of the debt of another

constitutes a benefit conferred, and thus may satisfy the first element of an unjust enrichment claim." *Id.* at 298. De Bekessy cites to this case in arguing that the Trustees never conferred a benefit on him and that there was no proof that he received and retained the benefit unjustly. The circuit court found that although de Bekessy argued "that there is no evidence that he controls the funds, there is also no evidence that he does not control the funds. The evidence shows that a check was issued to him as payee, which is sufficient to show that he obtained control over the funds." Both sides contend the other does not have a right to claim the refund.

The IRS refund came from an overpayment on the federal estate tax obligation of the Eleanor Close Barzin estate, not the individuals. According to the circuit court, the trust provided for the payment of taxes and any payment of the estate tax would provide that party with "a right to repayment of those funds by the estate [since t]he trust was established by the combined effect of the trust and the pour will as the primary vehicle for the payment of estate taxes." De Bekessy was not named as a personal representative in any of instruments executed by Barzin and would not be entitled to repayment of funds due to an overpayment of estate taxes.

Even if de Bekessy was a trustee, he still would not be entitled to keep the tax refund paid by the IRS to the Eleanor Close Barzin Estate. The evidence presented did not prove conclusively that the money was used to pay estate taxes in France as presented by the Trustees, but it can clearly be inferred that the Trustees tangentially conferred a benefit on de Bekessy. The tax refund was due to Barzin's trust, not the individual trustees.

Therefore, the circuit court did not err in concluding that de Bekessy received a benefit and should not be entitled to keep funds due to the Estate.

The circuit court did not improperly shift the burden to de Bekessy to show that he never had control of the funds. De Bekessy cites to *Plitt v. Greenberg*, 242 Md. 359, 364 (1966) to explain his argument that the Trustees must show that he possesses the funds. Even though that case applies Maryland and not D.C. law, the result is no different. *Plitt* supports the fact that there is no requirement for the Trustees to directly confer the benefit on de Bekessy: "It is immaterial how the money may have come into the defendant's hands, and the fact that it was received from a third person will not affect his liability." *Id.* The Court of Appeals does require that the plaintiff bear the burden to "establish that the defendant holds plaintiff's money." *Id.* It is impossible to conclude that $10,388,013.00 just disappeared. The only evidence presented showed that the IRS issued a refund made out to de Bekessy, care of O. Jamet. It was not unreasonable or clear error for Judge Pierson to conclude that this evidence meant that de Bekessy controlled the funds.

For all of these reasons, we affirm the judgment of the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.