

Supreme Court, U.S.
FILED

JUN 01 2020

OFFICE OF THE CLERK

No. 19-1341

In the Supreme Court of the United States

RICHARD A. VAN AUKEN, TRUSTEE AND
RICHARD A. VAN AUKEN, BENEFICIARY,
PETITIONERS,

v.

FLETCHER R. CATRON, ESQ.;
PETER F. WIRTH, ESQ.; AND
KAREN AUBREY, ESQ.,
RESPONDENTS.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW MEXICO COURT OF APPEALS*

PETITION FOR A WRIT OF CERTIORARI

RICHARD A. VAN AUKEN,
TRUSTEE AND BENEFICIARY
pro se

223 North Guadalupe Street, #605
Santa Fe, New Mexico 87501
917/216-0523
sftrustcase@swcp.com

QUESTION PRESENTED

Whether, after eighteen years of litigation and multiple requests for a final judicial determination of language in a six-page express trust contract, the refusal of New Mexico State Courts to provide such a final determination of trust contract meaning and effect, a fact central to proving claims of fraudulent and deceitful taking of family property held in trust, represents judicial denial of due process under the Fifth and Fourteenth Amendments to the Constitution of the United States.

PARTIES TO THE PROCEEDING

Petitioner is Richard A. Van Auken, both as the Trustee and as a Beneficiary (one of seven such beneficiaries presently alive) under the terms of the Seton Family Trust Agreement, a Trust Contract entitled *Burr E. Lee, Jr. and Ruth C. Lee Self-Declaration of Trust No. 10331J*.

Respondents are Fletcher R. Catron, Esq.; Peter F. Wirth, Esq.; and Karen Aubrey, Esq..

PROCEEDINGS IN DIRECTLY RELATED CASES

[Rule 14(B)(iii)]

2002 Probate Proceeding

Court: N.M. First Judicial District Court

Caption: *In Re Burr E Lee Jr*

Docket No.: D-101-PB-**2002** 00163

Filing: Fletcher R. Catron, Esq., for Marie Harrison,
Personal Representative on July 18, 2002

Presiding Judges: Carol Vigil, Barbara J. Vigil

Date of Final Probate Order: July 21, 2003

2003 Post-Probate Proceeding

Court: N.M. First Judicial District Court

Caption: *Alexander et al. v. Harrison*

Docket No.: D-101-CV-**2003** 01861

Filing: Jon Diener, Esq., for Trustee Gretchen Van
Auken and Beneficiaries Judith Alexander,
Betsy Lee Joppe, Gretchen Van Auken, Susan
Van Auken and Richard VanAuken on
October 7, 2003

Presiding Judge: Carol Vigil

Date of Order of Dismissal: November 18, 2004

2006 Probate Fraud Proceeding

Court: N.M. First Judicial District Court

Caption: *Van Auken v. Catron et al.*

Docket No.: D-101-CV-**2006** 01509

Filing: Richard VanAuken, *pro se*, on July 10, 2006
as Trustee and as Beneficiary

Presiding Judges: James A. Hall, Sarah Singleton,
David K. Thomson, et al.

Dates:

Order of Dismissal with Prejudice: March 31, 2011

Final Order Denying Plaintiff's Rule 1-060(B)(6)

Motion to Set Aside March 31, 2011 Order of

Dismissal: June 7, 2016

Court: N.M. Court of Appeals (2007)

Caption: *Van Auken v. Catron et al.*

Docket No. 27,554 - Consolidated

Plaintiff's Appeals of District Court Orders

No. 27,554: Order Denying Plaintiff's Motion for
Partial Summary Judgment

No. 27,555: Order Dismissing Claims of Trustee

No. 27,556: Order Dismissing Claims Against
Peter F. Wirth With Prejudice

No. 27,557: Summary Judgment Dismissing Claims
Against the Estate of William A. Sawtell, Jr.

No. 27,558: Order Granting Motion to Dismiss
(presented by Karen Aubrey)

Dates:

Filing by Richard A. Van Auken *pro se*: July 2, 2007

Order of Consolidation and Limited Remand: July 31, 2007

First Calendar Notice: January 7, 2008

Second Calendar Notice: April 15, 2008

Memorandum Opinion: June 27, 2008

Court: N.M. Court of Appeals (2016)

Caption: *Van Auken v. Catron et al.*

Docket No. A-1-CA-35704

Date of Memorandum Opinion: September 11, 2019

Date of Denial of Rehearing: October 8, 2019

Court: N.M. Supreme Court

Caption: *Van Auken v. Catron et al.*

Docket No.: S-1-SC-38001

Date Certiorari Denied: December 6, 2019

Date of Denial of Rehearing: January 3, 2020

2007 Attorney Malpractice and Fraud Proceeding

Court: N.M. First Judicial District Court

Caption: *Lee v. Catron et al.*

Docket No.: D-101-CV-2007 01162

Filing: Bill Gillstrap, Esq. and Daymon Ely, Esq., on
behalf of the Burr E. Lee and Ruth C. Lee Trust
and Trustee Richard A. Van Auken

Filing Date: May 15, 2007

Presiding Judge: James A. Hall

Date of Order of Dismissal: March 18, 2008

Court: N.M. Court of Appeals

Caption: *Lee v. Catron et al.*

Docket No.: Ct. App. 28,590

Dates:

Calendar Notice: July 23, 2008

Opinion: September 16, 2008

Order Denying Motion for Rehearing: October 21, 2008

Court: N.M. Supreme Court

Caption: *Lee v. Catron et al.*

Docket No.: Sp. Ct. 31,410

Dates:

Certiorari Denied: December 30, 2008

Rehearing Denied: February 13, 2009

Court: United States Supreme Court

Caption: *Richard A. Van Auken v. Catron, et al.*

Docket No: USSC 08-1421

Dates:

Petition Filed: May 14, 2009

Petition Denied: October 5, 2009

Rehearing Denied: November 30, 2009

2008 Fraud and Conspiracy Proceeding

Court: N.M. First Judicial District Court

Caption: *Seton v. Wirth et al.*

Docket No.: D-101-CV-2007 01162

Filing: Richard VanAuken, *pro se* on July 14, 2008

As Trustee and As Beneficiary

Presiding Judge: James A. Hall

Date of Final Dismissal Order: March 23, 2009

Court: N.M. Court of Appeals

Caption: *Seton v. Wirth et al.*

Docket No.: 30,215

Date of Memorandum Opinion: August 18, 2010

Date of Rehearing Denial: September 23, 2010

Court: N.M. Supreme Court

Caption: *Van Auken as [Seton] Trustee v. Wirth et al..*

Docket No.: 32,650

Date of Denial of Petition: January 3, 2011

Caption: *Van Auken as [Seton] Beneficiary v. Wirth et al..*

Docket No.: 32,651

Date of Denial of Petition: January 3, 2011

Date of Denial of Rehearing: January 25, 2011

Court: United States Supreme Court

Caption: *Richard A. Van Auken, Trustee, Petitioner
v. Peter Wirth, et al.*

Docket No.: USSC 10-1217

Dates:

Petition Filed: April 4, 2011

Petition Denied: October 3, 2011

Rehearing Denied: November 28, 2011

Caption: *Richard A. Van Auken, Beneficiary,
Petitioner v. Peter Wirth, et al.*

Docket No.: USSC 10-1325

Dates:

Petition Filed: April 25, 2011

Petition Denied: October 3, 2011

Rehearing Denied: November 28, 2011

2011 Declaratory Proceeding

Court: N.M. First Judicial District Court

Caption: *Seton et al. v. Catron et al.*

Docket No.: D-101-CV-2011 01917

Filing: David Standridge, Esq. On behalf of Seton
Family Trust Interests, Richard A. Van Auken,
Trustee and Beneficiaries Judith Alexander,
Betsy Lee Joppe, Carol Lee Doeden, Jeff
Neuman-Lee, Gretchen Van Auken, Susan Van
Auken and Richard VanAuken on June 14, 2011

Presiding Judge: Barbara J. Vigil

Date of Final Dismissal Order: October 23, 2011

Date of Injunctive Relief Order: November 1, 2011

Court: N.M. Court of Appeals

Caption: *Van Auken v. Catron*

Docket No.: Ct. App. 31,961

Date of Final Opinion: January 7, 2013

Court: N.M. Supreme Court

Caption: *Seton Trustee et al. v. Catron*

Docket No.: Sp. Ct. 34,019

Date Certiorari Denied: March 14, 2013

Caption: *Seton Beneficiary et al. v. Catron*

Docket No.: Sp. Ct. 34,021

Date Certiorari Denied: March 14, 2013

Court: United States Supreme Court

Caption: *Richard A. Van Auken, Beneficiary,*
Petitioner v. Fletcher R. Catron

Docket No.: USSC 12-1476

Dates:

Petition Filed: June 12, 2013

Petition Denied: October 7, 2013

Rehearing Denied: December 2, 2013

Caption: *Richard A. Van Auken, Trustee,*
Petitioner v. Fletcher R. Catron

Docket No.: USSC 12-1477

Date Petition Filed: June 12, 2013

Date Petition Denied: October 7, 2013

TABLE OF CONTENTS

Questions Presented	i
Parties to the Proceeding	ii
Proceedings in Directly Related Cases	iii
Table of Contents	viii
Index to Appended Documents and Authorities	ix
Table of Authorities	xiii
Opinions below	1
Jurisdiction	2
Statutory and Constitutional Provisions	3
Statement of Case and Petition	4
Review of Litigation Record	6
<i>State Court Failure to Review Trust Contract</i>	7
<i>Opposing Opinions on Language and Effect</i>	10
<i>Trust Contract Suppressed in Probate</i>	11
<i>Pro Se Trustee Used to Block Contract Review</i>	12
<i>Dismissals Without Contract Review Non-Final</i> ..	17
<i>Injunctive Relief and Rule 60 Motion</i>	19
Reasons for Granting the Petition.....	20
I. State Courts Refused to Provide Meaning	20
and Effect of Trust Contract Language	
II. State Courts Obstructed Due Process	21
III. Due Process and Equity Theft Trends	23
Conclusion	24

Index to Appended Documents and Authorities

<u>Pet. App. No.</u>	<u>Document/Authority</u>	<u>Page</u>
-----------------------------	----------------------------------	--------------------

SECTION A

RECENT APPELLATE RECORD

• September 11, 2019 through January 3, 2020 •

Judicial Opinions and Orders

(in reverse chronological sequence)

1. N.M. Supreme Court *Order Denying Motion 2a*
for Rehearing
(by Joey D. Moya, Chief Clerk of the
Supreme Court of the State of New
Mexico)
Entered: January 3, 2020
2. N.M. Supreme Court *Order Denying Petition ... 3a*
(by Madeline Garcia, Chief Deputy Clerk)
Entered: December 6, 2019
3. N.M. Court of Appeals *Order Denying Motion 5a*
for Rehearing
(by Court of Appeals Judge M. Monica
Zamora)
Entered: October 8, 2019
4. N.M. Court of Appeals *Memorandum Opinion .. 6a*
(by Chief Judge M. Monica Zamora)
Entered: September 11, 2019

Pleadings and Notices

(in chronological order)

5. Plaintiff-Appellants' *Motion for Rehearing 15a*
(by Richard A. Van Auken, as Trustee
and as Beneficiary)
Entered: September 26, 2019

6. Plaintiff-Appellants' *Petition for a Writ of 31a*
Certiorari
 (by Richard A. Van Auken, as Trustee
 and as Beneficiary)
 Entered: November 7, 2019
7. N.M. Supreme Court *Notice of Filing 45a*
 (by Zelda Abeita, Deputy Clerk)
 Entered: November 7, 2019
8. N.M. Supreme Court *Notice of Recusal 46a*
of Justice Barbara J. Vigil
 (by Madeline Garcia, Chief Deputy Clerk)
 Entered: November 27, 2019
9. N.M. Supreme Court *Notice of Recusal 47a*
of Justice David K. Thomson
 (by Madeline Garcia, Chief Deputy Clerk)
 Entered: November 27, 2019
10. Plaintiff-Appellants' *Motion for Rehearing 48a*
 (by Richard A. Van Auken, as Trustee
 and as Beneficiary)
 Entered: December 21, 2019

SECTION B
 SETON FAMILY TRUST AGREEMENT
 "Burr E. Lee Jr. and Ruth C. Lee
 Self-Declaration of Trust No. 10331J"

11. *Trust Contract: Burr E. Lee, Jr. and Ruth 55a*
C. Lee Self Declaration of Trust No. 10331J
 (by William J. Joost, attorney and witness)
 Signed by Settlers: May 9, 1979
12. Trust Language Advice in March 15, 2000 66a
Letter to Trustee
 (Issued by Fletcher R. Catron, Esq.)
 Entered in Court: January 30, 2007

13. *Warranty Deed* Transferring Seton Family..... 69a
Property Held by Trustee to Marie
Harrison, Ruth Lee's 1992 Hospice Nurse
(prepared and filed by Fletcher R. Catron,
attorney and witness)
Signed by Burr E. Lee, Jr.: June 12, 2000
14. *Letter* Describing Probate Representation 72a
(Catron, Harrison/Estate; Aubrey, Trustee)
By Fletcher R. Catron: September 25, 2002
15. District Court *Order* on Extrinsic Evidence ... 73a
(by Judge Carol Vigil in related case)
Entered: April 11, 2004
16. *Affidavit* of Fletcher R. Catron on Attorney- ... 74a
Client Relationship with Trustee (excerpts)
(filed by Peter F. Wirth in related case)
Entered: July 10, 2004
17. District Court *Order* on Trust Ambiguity 75a
(by Judge James A. Hall)
Entered: February 8, 2007
18. Expert *Affidavit* on Trust Language 76a
(by James F. Beckley, attorney)
Entered: April 2, 2007
19. Supporting Affidavit on Trust Language 86a
(by William J. Joost, Settlers' 1979 attorney)
Entered: October 31, 2008

SECTION C
STATUTORY AND CONSTITUTIONAL PROVISIONS

- [Rule 14.1(i)(v)]
20. U.S. Code: Judiciary and Judicial 90a
Procedure 28 U.S.C. §1654,
Appearance personally
Current as of: May 29, 2020

21. N.M. Statutes Annotated (1978), Attorneys ... 90a
NMSA §36-2-17, Attorney deceit or collusion
Current as of May 29, 2020
22. N.M. Misc. Civil Law, Declaratory Judgments .. 90a
NMSA §44-6-2, Scope; NMSA §44-6-4, Power
to Construe; NMSA §44-6-14, Construction
Current as of May 29, 2020
23. New Mexico Probate Code 91a
NMSA §45-1-102(B), Underlying purposes
NMSA, §45-1-106(A), Effect of Fraud
Current as of May 29, 2020
24. N.M. Trust Code: NMSA §46A-3-303 92a
Representation by fiduciaries,
Current as of May 29, 2020
25. U.S. Constitution, Amendment XIV, Sec. 1 93a
Equal protection and due process
Enacted: July 9, 1868
26. U.S. Constitution, Amendment V 93a
Due process
Enacted: December 15, 1791

SECTION D MISCELLANEOUS ITEMS

25. N.M. Court of Appeals *Memorandum Opinion* .. 95a
(by Judge A. Joseph Alarid)
Entered: June 27, 2008
26. N.M. Court of Appeals *Order* on Trustee101a
(*Lee v. Catron*, by Judge Jonathan B. Sutin)
Publication Date: March 17, 2011
27. District Court *Hearing Transcript*105a
(Case Dismissal by Judge Sarah Singleton)
Hearing Date: March 17, 2011
28. District Court *Order Granting Injunctive Relief* ..127a
(Issued by Judge Barbara J. Vigil)
Date Entered: November 1, 2011

TABLE OF AUTHORITIES

Cases:

- Lee v. Catron*, 2009-NMCA-018 .. 14, 15, 21, 22, 101a
- Mark V., Inc. v. Mellekas*, 1993-NMSC-001, 8, 18
¶ 13, 114 N.M. 778
- Martinez v. Roscoe*, 2001-NMCA-083, 131 14
131 N.M. 137 P.3d 887

Statutes:

- New Mexico Statues Annotated 1978
 - New Mexico Statute on Attorneys
 - NMSA §36-2-17 *Attorney* 3, 5, 14, 16, 90a
deceit or collusion
 - New Mexico Declaratory Judgment Act
 - NMSA §44-6-2, Scope 3, 8, 18, 90a
 - NMSA §44-6-4, Power to Construe ... 3, 7, 91a
 - NMSA §44-6-14, Construction 3, 91a
 - New Mexico Probate Code
 - NMSA §45-1-102(B) *Purposes of Act* 3, 91a
 - NMSA §45-1-106(A) *Effect* 3, 5, 14, 16, 92a
of Fraud or Evasion
 - New Mexico Trust Code
 - NMSA §46A-3-303, Representation .. 3, 15, 92a
- U.S. Code, Judiciary and Judicial Procedure
 - 28 U.S.C. §1654, Appearance 3, 14, 90a
personally
 - 28 U.S.C. §1257(a), State courts, certiorari 2
- Constitution of the United States:
 - Amendment V: Due Process 3, 6, 93a
 - Amendment XIV, Section 1: Due 3, 6, 93a
Process

In the Supreme Court of the United States

RICHARD A. VAN AUKEN, TRUSTEE AND
RICHARD A. VANAUKEN, BENEFICIARY,
PETITIONERS

v.

FLETCHER R. CATRON, ESQ.;
PETER F. WIRTH, ESQ.; AND
KAREN AUBREY, ESQ.,
RESPONDENTS

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW MEXICO COURT OF APPEALS*

PETITION FOR A WRIT OF CERTIORARI

Richard A. Van Auken, Trustee of the Burr E. Lee, Jr. and Ruth C. Lee Self-Declaration of Trust No. 10331J and Richard A. Van Auken, Beneficiary under this same Trust Contract respectfully petition this Court for a writ of certiorari to review a *Memorandum Opinion* of the New Mexico Court of Appeals.

OPINIONS BELOW

The full record of recent appellate activity, with the exception of a motion (granted) to make minor text corrections in one pleading, is found in Section A of the Appendices to this Petition. The September 11, 2019 *Memorandum Opinion* of the New Mexico Court of Appeals (Pet. App. 6a-14a) was not selected for publication in the New Mexico Appellate Reports. The October 8, 2019 *Order* of the New Mexico Court of Appeals (Pet. App. 5a) denying Petitioners'

September 26, 2019 *Motion for Rehearing* (Pet. App. 15a-30a) is also not reported. The December 6, 2019 New Mexico Supreme Court *Order* (Pet. App. 3a-4a) denying Petitioners' November 7, 2019 *Petition for a Writ of Certiorari* (Pet. App. 31a-44a) and its January 3, 2020 *Order* (Pet. App. 2a) denying Petitioners' December 21, 2019 *Motion for Rehearing* (Pet. App. 48a-53a) are also not reported. Two Justices of the New Mexico Supreme Court recused themselves. (Pet. App. 46a and 47a).¹

JURISDICTION

The state appellate court's *Memorandum Opinion* was entered on September 11, 2019 and the final *Order* of the state supreme court denying Petitioners' *Motion for Rehearing* of certiorari was entered on January 3, 2020. The jurisdiction of this Court is invoked through 28 U.S.C. §1257(a) for rights and privileges claimed under United States statutes and the Constitution. Submission of this Petition and its printed format are in accordance with recent United States Supreme Court orders. A request for extension of time to file this Petition was made on March 19, 2020 but the request was made moot by an administrative order of this Court entered that same day extending all filing deadlines by 60 days.

¹ Justice Barbara J. Vigil joined the NMSC in 2012 after presiding over the disputed 2002 Probate Proceeding and issuing an *Order for Injunctive Relief* against Petitioners in 2011; Justice David K. Thomson joined the NMSC in 2019 after denying Petitioners' Rule 1-060(B)(6) motion now under appeal.

STATUTORY AND CONSTITUTIONAL PROVISIONS

Section 1654 of the U.S. Code, Judiciary and Judicial Procedure - 28 U.S.C. §1654, Appearance personally or by counsel - is set out in Section C of the Petition Appendices (Pet. App. 90a).

Several parts of New Mexico Statutes Annotated (1978) are also set out in Section C of the Petition Appendices starting with Chapter 36 for Attorneys, Article 2 - NMSA §36-2-17, Attorney deceit or collusion (Pet. App. 90a); followed by three sections from the New Mexico Declaratory Judgment Act, Article 6 - NMSA §44-6-02, Scope, (Pet. App. 90a) NMSA §44-6-04, Power to construe, (Pet. App. 91a) and NMSA §44-6-14, Construction (Pet. App. 91a); followed by two statutes from the New Mexico Probate Code, Chapter 45, Article 1 - NMSA §45-1-102(B) Purpose of Act (Pet. App. 91a) and NMSA §45-1-106(A) Effect of fraud or evasion (Pet. App. 92a); followed by Section 303 of the State of New Mexico Uniform Trust Code, Article 3 - NMSA §46A-3-303(D), Representation by fiduciaries (trustee) (Pet. App. 92a).

Section 1 of Amendment XIV to the Constitution of the United States (due process) is set out in the Petition Appendices (Pet. App. 93a) along with Amendment V to the Constitution of the United States (due process) (Pet. App. 93a).

STATEMENT OF CASE AND PETITION

It is estimated that approximately \$1.5 trillion in personal wealth is transferred from an aging older generation to a younger generation each year in the United States.² Members of the legal profession benefit greatly from these transfers because a large amount of billable work results from the need for wills, deeds, trust arrangements and other forms of estate planning and execution.

Over time, however, certain predatory attorneys backed by cooperative judges throughout the United States have substantially increased their financial returns by redirecting to themselves and others some parts of this wealth being transferred each year denying the intended recipients legal possession of family assets and/or their inheritance.

Operating through equity documents like wills and express trusts, predatory attorneys find loopholes or develop schemes whereby such redirection can be accomplished with little or no risk. Using the unappealable equity powers of the state courts, cooperating judges shield these *equity theft* schemes from immediate claims for restitution and/or damages. In many cases the intended recipients are completely unaware that valuable equity rights have been wiped out or "stolen" until well after possession of or title to the wealth intended for them has been legally redirected to others.

In 2002 Petitioner-Beneficiary and his six siblings, each named as a beneficiary in a family Trust

² Center for Estate Administration Reform: www.cearjustice.org

Contract, learned that they had been victimized by one such equity theft scheme. It would many years before the details about the scheme, a multi-year effort spanning two generations of the Petitioners' family, would become apparent. Both of the valuable real property assets held under the terms of the Trust Contract, the Seton Family Trust Agreement, were lost as each had been redirected to another person years before the intended beneficiaries knew that such property transfers had taken place.

The statutory claims of probate fraud and attorney deceit or collusion in this Case filed by Petitioners both as the trustee and as a beneficiary in 2006 arise from the record of an apparently corrupted probate proceeding for the estate of Petitioners' step-father, Burr E. Lee, Jr. in 2002-2003 and from a belief that the Trust Contract could be enforced against those who arranged its breach.

Petitioners' attempts to enforce the terms of Trust Contract have turned out thus far to be a seemingly impossible legal task for the simple reason that state court judges cooperating with the perpetrators of the equity theft scheme have ignored, side-stepped, suppressed, blocked, and, ultimately, refused to make any sort of final determination of the meaning and effect of the language in the six-page 1979 Seton Family Trust Agreement. The multi-year denial of Petitioners' many requests for such final judicial determination, **the key fact needed to prove the culpability of the equity theft schemers by demonstrtating a breach-of-contract**, has been denied Petitioners.

Equity and good conscience guide many of the judicial rulings made under the equity powers of the

state courts used in trust and estate matters but interpretation and enforcement of a valid contract is not a matter of equity but a matter of law. Equity rulings cannot violate law.

The Fifth Amendment to the United States Constitution states that "No person shall . . . be deprived of . . . property, without due process" (Pet. App. 93a) and the Fourteenth Amendment goes a little further and says "No State shall . . . deprive any person of . . . property, without due process of law." (Pet. App. 93a) Valuable family property has been taken by stealth and the state courts of New Mexico have refused to provide a key fact that it is their duty to provide, the key fact that subjects this act of "taking" family property to due process under the laws of New Mexico and the United States.

The state courts of New Mexico, in support of the Respondents to this Petition, appear to have violated the Constitutional due process rights of the Petitioners.

This Petition seeks the power and authority of this Court in correcting the failure and refusal of the state courts of New Mexico to provide a final determination of the meaning and effect of language in the Petitioners' family Trust Contract.

REVIEW OF LITIGATION RECORD

All of the key facts and arguments supporting this Petition are to be found in the major rulings, pleadings and other documents from the extensive, fourteen-year record of litigation in this Case that are appended to this Petition. Many items appear in the Recent Appellate Record entered between September 11, 2019 and January 3, 2020. (Pet. App.

Section A: 1a-53a) Highlights in the overall record of suppression and denial of Petitioners' due process rights in opinions and actions large and small by state court judges since 2002, are reviewed in the following six sections of this Petition.

State Court Failure to Review Trust Contract

The Recent Appellate Record as reproduced in Section A of the Appendices (Pet. App. 1a-53a) contains everything needed to understand not just the failure, *but the multi-case, multi-year refusal* of the state courts to provide a final judicial review of the meaning and effect of the language in the six-page 1979 Seton Family Trust Contract. All orders, pleadings and notices entered into this Recent Appellate Record from the September 11, 2019 *Memorandum Opinion* of the N.M. Court of Appeals (affirming the lower court dismissal) to the January 3, 2020 Order of the N.M. Supreme Court (denying Petitioners' *Motion for Rehearing*) are appended to this Petition. (Pet. App 1a-53a) The record demonstrates with considerable finality that the state court system does not feel obligated to provide any final determination of the meaning and effect of Trust Contract language. Unable to point to any final determination or even a final order establishing ambiguity, the appellate record shows a summary judicial conclusion that all of Petitioners' extensive pleadings for such review "Are Without Merit." (Pet. App. 13a §III). The state courts of New Mexico are apparently refusing to do their duty under NMSA §44-6-4, the Declaratory Judgment Act, Power to construe (Pet. App. 91a), and other statutes.

It has taken nearly fourteen years of litigation in this Case since 2006 to reach this conclusion that the

state courts are refusing, i.e., feeling no obligation, to provide a final determination of the meaning and effect of language in the Trust Contract.

The long-standing obstruction of review of trust contract language by the Respondents and the failure of the judiciary to have conducted a review, when required under *Mark V., Inc. v. Mellekas*, 1993-NMSC-001, ¶ 13, 114 N.M. 778, shows that the fundamental relief sought by Petitioners was never factually addressed. The Petitioners have been denied access access to **the one fact needed to prove all of the original claims in this Case.**

A significant portion of all major pleadings cited in the New Mexico Court of Appeals *Memorandum Opinion* denying Petitioners' Rule 1-060(B)(6) motion consisted of argument presented by one or both Petitioners regarding the need for the state courts to provide, as specified in the New Mexico Declaratory Judgment Act, a final determination of the meaning and effect of language in the six-page Seton Family Trust Contract. The Rule 1-060(B)(6) motion underlying the appeal in this Case led with the need for a final determination, and the two Rule 1-059 motions for reconsideration referenced in the *Memorandum Opinion* both highlighted this issue. (Pet. App. 7a, §3, lines 5-7) Both of the major documents submitted by the Petitioners in the appeal process, the Docketing Statement and the Brief-in-Chief, led with the issue of Trust Contract language.

There can be no doubt that the three judge panel assigned to this Case by the New Mexico Court of Appeals was well aware of this fundamental issue. Yet they determined these arguments to be "without

merit." (Pet. App. 14a, ¶ 3) One of the reasons given was that the appellate court is not a fact-finding body. (Pet. App. 13a, §15) However, the "four-corners" of the Trust Contract likely contain all that is needed to render a final determination as a matter of law. New Mexico trust authority James Beckley, Esq. testified in a sworn statement that the trust language "is unambiguous" (Pet. App. 78a, ¶ 14) meaning that the appellate court could review the language as a matter of law with no need for fact finding.

Although the ability of the higher state courts to make a determination was presented in detail by Petitioners three times again in (i) the September 26, 2019 *Motion for Rehearing*, in (ii) the November 7, 2019 *Petition for a Writ of Certiorari* to the New Mexico Supreme Court, and, most recently, in (iii) the December 21, 2019 *Motion for Rehearing*; all such requests were denied. See all these decisions and pleadings in the Recent Appellate Record in Section A of the Appendices to this Petition.

All hope for state court review of the Trust Contract has been exhausted. The state courts are refusing to do such a review and this leaves the Petitioners with no means of enforcing clear Trust Contract terms against those involved in the "property-taking" scheme that breached the lawful terms set forth in the Trust Contract. This position of the state courts to avoid review of the Trust Contract, likely present from the very beginning of the litigation record in 2002, is a clear violation of the due process rights of the Petitioners and the other six vested beneficiaries named in the Seton Family Trust Contract.

Opposing Opinions on Language and Effect

Early avoidance of Trust Contract review by cooperative state court judges turned to suppression and denial once the two opposing views of the meaning and effect of Trust Contract language were put into the record of this Case in 2007.

Two opposing opinions of Trust Contract language, one allowing property transfer to non-beneficiaries and the other not and neither viewing the language as ambiguous, appear in the Appendices to this Petition in Section B, Seton Family Trust Agreement. (Pet. App. 54a-88a) General suppression of the Trust Contract began in the 2002 probate case but by the time both of these opinions became part of the litigation record in 2007, the only realistic means for the Respondents to avoid accountability for the equity theft scheme and the probate fraud claims of the Petitioners was for cooperating state court judges to prevent any judicial review of the meaning and effect of Trust Contract language.

One of the two opinions, issued by Respondent Fletcher R. Catron, Esq. (Pet. App. 66a, ¶ 2), says the Trust Contract can be revised and property redirected to others provided that successor beneficiaries are not changed in the revision. "[Y]ou may amend and modify the trust however you want except that the successor beneficiaries must not be altered." (Pet. App 66a, ¶ 2)

The other opinion, authored by New Mexico trust authority James F. Beckly, Esq., says that upon the death of co-settlor Ruth C. Lee in 1992, the Trust Contract could no longer be revoked (Pet. App. 79a, ¶¶17, 18) and the seven children of Burr and Ruth

Lee "became vested remainder beneficiaries." (Pet. App. 79a, ¶¶17, 19)

Major documents pertaining to review of Trust Contract language taken from the litigation record in this Case are reproduced in Section B of the Appendices to this Petition. (Pet. App. 54a-88a) In addition to the two opinions cited above, these documents include (i) the Trust Contract itself; (ii) an early district court order preventing the use of expert witnesses on contract language in a related case; (iii) sworn testimony³ by Defendant Fletcher R. Catron, Esq., submitted by Defendant Peter F. Wirth, Esq. in that related case; (iv) the district court finding on Trust Contract "ambiguity" in this Case; and (v) an affidavit corroborating the Beckley opinion on language in the Trust Contract from William Joost, Esq., author of the 1979 Trust Contract and witness to its execution by the co-settlers.

Trust Contract Language Suppressed in Probate

The probate proceeding *In Re Burr E Lee, Jr.* (2002) included a successful effort by licensed attorneys representing each of the parties (the three Respondents to this Petition) to sideline the Trust Contract and avoid any review of its language.

³ Oddly, this sworn testimony by Respondent Catron provided Petitioners and other family members with the first indication of improper professional conduct as it demonstrated that Mr. Catron had advised the successor trustee Burr E. Lee, Jr. prior to his death and then, in Mr. Lee's probate case, switched sides to represent the interests of the personal representative (who ended up with title to both family properties) in opposition to the new successor trustee. This submission set the start date for the two year statutory limit on filing probate fraud claims.

Correspondence between (i) Karen Aubrey, Esq. (representing the successor trustee and beneficiaries named in the Trust Contract) and both (ii) Fletcher R.. Catron, Esq. (representing Marie Harrison in her capacity as personal representative of the estate of Burr E. Lee, Jr.) (Pet. App. 72a) and (iii) Peter F. Wirth, Esq. (subsequently retained to represent Marie Harrison's personal interests in the Seton family property that had been transferred to her prior to Mr. Lee's death) established for family members receiving copies of this correspondence the primary element of the then secret Catron opinion that property transfer to Ms. Harrison, a non-beneficiary, was allowed. When one of the family members asked Ms. Aubrey to challenge Mr. Catron's role in the property transfers, she moved to withdraw saying such a challenge would be "unprofessional." The presiding Judge in the probate proceeding at that time, March 2003, was Judge (now Justice) Barbara J. Vigil who allowed Ms. Aubrey's withdrawal and ultimately issued a final order closing the probate case without any review of the Trust Contract.

Pro Se Trustee Used to Block Contract Review

The September 11, 2019 *Memorandum Opinion* of the N.M. Court of Appeals misstates the record by saying that "Plaintiff persisted in attempting to represent the Trust despite repeated rulings that he could not do so because he was not an attorney." (Pet. App. 10a, §8, lines 17-19).

Petitioner-Trustee has always argued as an individual person operating under the terms of the family Trust Contract representing nobody else other than himself burdened, as trustee, with (i) legal

responsibility for all property conveyed to him under the contract and (ii) the duty to understand, loyally follow, and legally enforce the language in the contract. This duty has included fourteen years of attempts to enforce this language against predatory attorneys who directed or assisted in the removal of property from the trustee's possession in a clear breach of the Trust Contract.

From July 2006 through September 16, 2008 Petitioner-Trustee (Van Auken acting in the capacity of Trustee under the Trust Contract) correctly asserted his standing as a trustee to appear in New Mexico courts *pro se*. From September 16, 2008 through the completion of a United States Supreme Court appeal of new case law requiring fiduciaries to appear through counsel, Petitioner-Trustee continued to act on a *pro se* basis. With the denial of a USSC *Petition for Rehearing* on November 30, 2009, Petitioner-Trustee retained counsel and has maintained an attorney-client relationship with just two different New Mexico attorneys continuously since then to the present day.

One of the most effective means used to block full review of the Trust Contract arose from an early defense strategy adopted at the beginning of this Case by all Respondents and subsequently embellished by cooperating state court judges. The strategy was to attack the *pro se* status of the Petitioner-Trustee as a litigant who, it was asserted, had no standing to appear in a New Mexico courtroom. Not only did this defense block full consideration of the Trust Contract for five years, it ultimately led to two dismissals in this Case: (i) the dismissal of the 2007 consolidated appeal by Judge A. Joseph Alarid in a June 27, 2008

Memorandum Opinion (Pet. App. 95a-100a) and (ii) Judge Singleton's March 31, 2011 *Order of Dismissal with Prejudice*.

The five years of *pro se* argument is clear evidence of suppression of Petitioners' due process rights for several reasons some presented in Petitioners' September 27, 2019 *Motion for Rehearing* (Pet. App. 21a-22a, ¶4) and all summarized here.

1. The two statutory claims in this Case of probate fraud and attorney deceit or collusion were properly brought in 2006 by both Petitioners, trustee and beneficiary, without licensed legal counsel each acting in and for his own interests, legal interests for the trustee and equitable interests for the beneficiary, so no counsel should have been required⁴;

2. During the two years 2007 and 2008, in this Case and two others, Petitioner-Trustee's *pro se* appearances led to three state court dismissals and to two separate appeals by Petitioner-Trustee attacking the basis of these rulings that the "Trust" was an entity like an LLC that was required by law to appear in court through an attorney;⁵

3. Petitioner-Trustee's second appeal resulted in a September 16, 2008 *Opinion* by Judge Jonathan B. Sutin of the N.M Court of Appeals in *Lee v. Catron, et al.* admitting that the "Trust" was not an entity and that the "Trustee" was the proper party to sue

⁴ U.S.C. §1654, Appearance personally or by counsel (Pet. App. 90a)

⁵ All three dismissals were based on established New Mexico case law for Limited Liability Companies (LLCs) found in *Martinez v. Roscoe*, 2001-NMCA-083

and be sued. (Pet. App. 102a-103a, §§2-3) This *Opinion* removed all legal support from two earlier dismissals by district court Judge James A. Hall and one earlier ruling by appellate court Judge A. Joseph Alarid;

4. On his own initiative, appellate court Judge Sutin extended his *Opinion* in *Lee* to include two sections that set forth new case law for New Mexico requiring that all (non-attorney) fiduciaries act through counsel when representing the interests of beneficiaries because, in representing these "others" without an attorney, the fiduciary such as a trustee of a family trust is "practicing law without a license." (Pet. App. 103a-104a, §§4-5) This new case law equating a trustee's "representation" of a beneficiary with an attorney's "representation" of a client seems in conflict with the New Mexico Trust Code. (Pet. App. 92a)

5. Petitioners' have noted the uncertain effect the *Lee Opinion* has on claims filed two years earlier (Pet. App. 24a, ¶7) but one thing that is clear is that the basis for Judge A. Joseph Alarid's *Memorandum Opinion* of June 27, 2008 was entirely removed by *Lee*. This likely invalidated the effect of his final ruling on each of the five 2007 appeals made by Petitioners in this Case for orders entered by Judge James A. Hall on February 8, 2007: four dismissals and an ambiguity finding on language in the Trust Contract.

6. The entire *Memorandum Opinion* of Judge Alarid is reproduced in Section D of the Appendices to this Petition. (Pet. App. 95a-100a) This ruling has colored the legal framework of this Case in two important ways related to the broad obstruction of Petitioners'

due process rights in this Case. The first way, one of obstruction, subtly and incorrectly extends the impact of the attacks on Petitioner-Trustee's *pro se* standing to appear in Court.

7. In a section titled "Background" of the September 11, 2019 *Memorandum Opinion* affirming the district courts's dismissal of Petitioners' Rule 1-060(B)(6) Motion, there appears this odd line: "Plaintiff on behalf of the Trust (as trustee) and personally (as beneficiary) is seeking to recover an asset – the house referred to as the Timberwick Property – for the Trust so that it can be distributed to himself as beneficiary." (Pet. App. 11a, §9) This piece of background information came directly from Judge Alarid's 2007 *Memorandum Opinion* (Pet. App. 98a, lines 2-5) and it is demonstrably not true. Petitioners' never sought return of family property but rather made statutory claims of probate fraud and attorney deceit or collusion that provide money damages including treble-damage forfeiture.

8. Where this bogus background information came from is not clear but its effect on the due process obstruction in this Case is very clear since it links the claims of the Petitioner-Beneficiary in this Case to those of the Petitioner-Trustee when in fact each has standing under the statutory claims for damages, equitable damages and legal damages, independent of the other. In his *Memorandum Opinion* Judge Alarid improperly invoked the "indispensible party" rule⁶ (Pet. App. 99a, ¶2) and

⁶ NMRA Rule 1-019(B) Joinder of persons needed for just adjudication, Determination by court whenever joinder not feasible

the Repspondents and cooperating district court judges have improperly run with it ever since.

9. The entire transcript for Judge Sarah Singleton's March 17 hearing that produced her dismissal of all claims in this Case is also reproduced in this Petition in Section D of the Appendices. (Pet. App. 105a-126a) The transcript shows throughout that the dismissal was based on Judge Alarid's *Mandate* (of uncertain legal force) and the (made-up) requirement to join an indispensable party.

Dismissals Without Contract Review Non-Final

The other way in which Judge A. Joseph Alarid's work has colored the framework of this Case actually supports arguments presented in this Petition demonstrating judicial obstruction of due process. This support can be summarized in a single concluding sentence from Judge Alarid's first Calendar Notice⁷ of January 7, 2008 for Petitioners' consolidated appeal:

"Since all the issues in this case must be resolved by the trial court before any judgment related to the Trust becomes final, and since, as a matter of policy, this Court does not favor piecemeal appeals, we are not inclined to allow this case to be appealed on a piecemeal basis, and therefore propose to dismiss Plaintiff's appeals from all of the district court orders as non-final."

Judge Alarid viewed Judge Hall's ruling on trust ambiguity as a non-final order (Pet. App. 75a) and,

⁷ This Calendar Notice or Proposed Summary Disposition as it is titled is not reproduced in this Petition but its thinking on "not final" orders is referenced in the Alarid *Memorandum Opinion* that is appended. (Pet. App. 98a, ¶2, lines 1-3)

since all issues relating to the trust are "inextricable interwoven," suggests that the district court reach a final determination of the meaning and effect of the language in the Trust Contract as a pre-requisite to review of all other matters including any dismissal of claims against Respondents.

This principle of requiring resolution of the language in the Trust Contract *before* all other rulings in this Case is exactly what Petitioners' have unsuccessfully argued throughout. It is a principle that has been violated by the district court three times.

(i) In 2004, Judge Carol Vigil in *Alexander v. Harrison*, dismissed the entire case with prejudice without ever reviewing any of the pleadings on Trust Contract language after signing a *Stipulated Order* citing use of *Mark V* on the language; (Pet. App. 73a)

(ii) In 2007 Judge James A. Hall in this Case dismissed claims against Respondents Aubrey and Wirth without having made any final determination of the directly pertinent meaning and effect of Trust Contract language; and

(iii) In 2011 Judge Sarah Singleton in this Case dismissed all claims with prejudice indicating during the hearing that Petitioners could determine the meaning and effect of language in the Trust Contract in a separate proceeding sometime later.

In each of these instances the district court suppressed or denied Petitioners' due process rights in civil legal proceedings to hold to account people involved in sidelining an apparent breach-of-trust issue in the 2002 Probate Proceeding *In Re Burr E Lee Jr* leaving the issue of the "taking" of family property without due process for this Case.

Injunctive Relief Order and Rule 60 Motion

In the eighteen year record of this Case and related cases there is no single act of the state courts of New Mexico that better exemplifies obstruction and outright denial of Petitioners' due process rights than the November 1, 2011 *Order for Injunctive Relief* issued by then-Judge (now Justice) Barbara J. Vigil. (Pet. App. 127a-128a) In spite of statutory law prohibiting objections to those requesting judicial determination of a "writing,"⁸ Petitioners' were severely sanctioned for asking for such a determination too many times after filing, through counsel and together with all of his siblings, a Declaratory Proceeding on June 4, 2011. Judge Barbara J. Vigil was the presiding judge in the corrupted 2002 probate proceeding at issue in this Case, a proceeding that took place nine years earlier in the same First Judicial District Court in Santa Fe as the Declaratory Proceeding.

Through an attorney, Petitioners have, since 2011, carefully prepared, filed and argued an *NMRA Rule 1-060(B)(6) Motion* to set aside the March 31, 2011 final dismissal of this Case on the basis of "exceptional circumstances" in a manner that fully conforms to the severe terms of the *Order for Injunctive Relief*, including requesting permission of the district court to do so and allowing Respondent Fletcher R. Catron, Esq, pre-emptive review. The record of this motion shows that the presiding judge,

⁸ New Mexico Declaratory Judgment Act, NMSA §44-6-2 Scope: "No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. (Pet. App. 90a, No.20)

then-Judge (now Justice) David K. Thomson, prior to his June 7, 2016 denial of the *Motion*, granted only partial review; denied a deposition request to memorialize the testimony of the author and witness to the 1979 Trust Contract, attorney William Joost, Esq. then in ill health; and struck most of the argument and evidence on "extra-ordinary circumstances" from the official court record in this Case.

REASONS FOR GRANTING THE PETITION

The reasons for granting this Petition are, first, to provide "due process" relief for the refusal of the N.M. state courts to provide a final construction of the Seton Family Trust Agreement so that the original claims against the Respondents can be pursued by Petitioners; second, to set forth precedent for equity cases such as this one that court failure to recognize the legal authority of end-of-life contracts such as wills and trusts obstructs the proper procedure for resolving disputes by **infringing** on the due process Constitutional rights of the litigants; and thirdly, that the legal community itself is threatened by the growth in equity theft activity similar to that presented in this Case.

I. State Courts Refused to Provide Meaning and Effect of Trust Contract Language

State courts are given considerable latitude in exercising their equity powers. Probate courts have difficult judgment calls every day of the week, calls that somebody must make in a civil society.

However, when valid end-of-life contracts such as wills and express trusts are ignored, suppressed or intentionally breached without consequence, a line

must be drawn and the practice stopped. Civil society cannot function if written agreements between parties cannot be legally enforced. Buildings would not be built, manufacturing would not occur, financial relationships would collapse. Does the fact that one of the parties to a trust contract is deceased make it any less enforceable? It shouldn't. A trustee, one of the living parties to a trust contract, has the principal duty of faithfully and fully executing the lawful intentions of the settlor(s), the other party(ies) to the contract, who have set these intentions down in writing in language that appears in the contract.

The record in this Case and in five related cases shows a trustee and a beneficiary using the courts to enforce a mother's intent as expressed in a six-page contract. Three related cases have already been the subject of petitions to this Court. Each has sought review of due process violations along with other matters. In this Case, the fourth to request review by this Court, Petitioners address only the single issue of due process denial and there is no better evidence of the denial of due process in a state court system than its refusal - not just failure but refusal - to make a final judicial determination of the meaning and effect of a valid contract. Contract construction is not an equity matter. It is a matter of law. The state courts of New Mexico should be ordered to do their job as required by law and by civil society.

II. State Courts Obstructed Due Process

As the contents of this Petition make clear, the state courts due process infringements of Petitioners' Constitutional rights were not limited to just the refusal to determine the meaning of the Trust Contract essential to the claims in this Case. Many

other preliminary judicial acts of due process suppression or denial also occurred. The three most significant of these other acts were the subject of earlier petitions to this Court.

In 2008 this Court was asked to review new case law, *Lee v. Catron*, 2009-NMCA-018, created in a directly related case to thwart Petitioner-Trustee's ability to appear in court *pro se* on the basis that the trustee was a fiduciary acting for "others" (the beneficiaries) and that appearing *pro se* was "practicing law without a license." Petitioner-Trustee's arguments that this new case law was "*ad hoc*, conflicted, and unconstitutional" were not reviewed.

In 2011 this Court was asked to review the dismissal of a related case for fraud and conspiracy, a case not linked to the 2002 Probate Proceeding, where the district court dismissed the claims of both trustee and beneficiary on the basis of the newly minted case law in *Lee v. Catron* that only had legal effect on fiduciaries such as trustees, not on beneficiaries. Trustee and beneficiary arguments were presented in separate petitions to this Court. Neither was accepted for review.

In 2013 this Court was asked to review the dismissal and injunctive relief granted in the 2011 Declaratory Proceeding and, again, trustee and beneficiary arguments were presented in separate petitions to this Court. Again neither was accepted.

It is time for this Court to review the entire record in this Case at the intersection of equity and law curtailing thereby, through precedent, similar practices involving due process violations in many other equity theft cases..

III. Due Process and Equity Theft Trends

It is estimated that by 2030 the amount of wealth transferred each year from the older generation to a younger generation will increase from the current \$1.5 trillion to approximately \$2.5 trillion. Petitioner is not aware of any formal study or assessment of these wealth transfer numbers but the fact that they are very large and growing appears to be common knowledge among banking, real estate, and general wealth management professionals.

On one hand, this situation presents a substantial and growing opportunity for members of the legal profession to provide legal advice and documentary deliverables in support of these transfers; but, on the other hand, to the extent that predatory attorneys and cooperating state judges predictably engage in equity theft that improperly redirects the assets being transferred, these trends will stifle any serious interest in end-of-life legal services. Who would spend money on an estate plan that could be compromised by predators when it was most needed?

Unless they are stopped, the predators and their illicit “revenues” will become the center of a network of equity theft racketeering involving whole law firms, state judges, healthcare agencies, lawmakers and other elected officials.

The equity theft problem presents itself beyond the boundaries of New Mexico in most if not all other states. A great many groups around the country have dedicated themselves to reforming the end-of-life legal practices involving transferrable assets particularly in the area of involuntary guardianship where assets are stripped from a ward “for the

benefit of the ward” many times in direct violation of the terms of estate plan contracts.⁹

This appeal and this Case present an opportunity for this Court to draw a line in the sand: individual estate contracts must be honored or, if not, the reasons why clearly stated and judicially approved.

CONCLUSION

For each and for all of the above reasons, this *Petition for a Writ of Certiorari* should be granted.

Respectfully submitted

Richard A. Van Auken, Trustee, *pro se*, and
Richard A. Van Auken, Beneficiary, *pro se*

223 North Guadalupe Street, #605

Santa Fe, New Mexico 87501

917/216-0523

sftrustcase@swcp.com

⁹ KasemCares Foundation, The Law Project, Elder Justice Coalition, AARP, and Center for Estate Administration Reform