NO. 4-10-0681 Order Filed 3/28/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

JENNIFER ANNE CARTER-BERNAL and JOHN ROBERT CARTER, Plaintiffs-Appellants, v. EDWARD R. CARTER, Individually and as Trustee of the Irrevocable Trust Under an Agreement Dated July 23, 1986, Defendant-Appellee.	)	Appeal from Circuit Court of Sangamon County No. 07CH288 Honorable Leo J. Zappa, Jr., Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Turner and Pope concurred in the judgment.

ORDER

Held: Where the evidence indicated that defendant trustee engaged in self-dealing, he breached his fiduciary duty owed to plaintiff beneficiaries and therefore plaintiffs were entitled to damages.

After a May 2010 bench trial, the trial court held that plaintiffs, Jennifer Anne Carter-Bernal and John Robert Carter, had knowingly, voluntarily, and with sufficient consideration, conveyed their respective interests in real property to their father, defendant, Edward R. Carter. Jennifer and John were beneficiaries in a trust created by their grandfather, defendant's father. Defendant was named trustee. Both plaintiffs executed a quitclaim deed of their individual interest in the trust property to defendant. Plaintiffs appeal the court's decision, claiming Jennifer's conveyance was invalid as violative of the trust agreement and John's conveyance was invalid as a product of defendant's breach of his fiduciary duties as trustee. Based on the record before us, we reverse the court's judgment and remand for further proceedings.

I. BACKGROUND

On July 23, 1986, Luke E. Carter created a trust for the benefit of his grandchildren/defendant's children: Jennifer Anne Carter-Bernal, Joshua Luke Carter, Douglas Duane Carter, and John Robert Carter. The trust consisted entirely of an approximate 100-acre tract, the majority of which was wooded land with some improvements made after the trust was created in the form of a house, horse barn, riding arena, and a sawmill. Defendant, Luke's son, was named trustee. The trust was to terminate on December 8, 2005, the twenty-first birthday of the youngest grandchild, John. Three years before the trust terminated, in July 2002, Jennifer signed a quitclaim deed conveying all of her interest in the trust property to defendant. On August 19, 2002, Jennifer signed a corrected quitclaim deed which included defendant's name as the grantee, as it had been omitted from the July 2002 document. Also in 2002, Joshua and Douglas executed quitclaim deeds of their respective interest in the trust property to defendant; however, they are not parties in this action. On December 10, 2005, two days after termination of the trust, John executed a quitclaim deed of his interest in the trust property to defendant.

In April 2007, plaintiffs Jennifer and John filed a lawsuit against defendant, alleging he breached his fiduciary duty as trustee and claiming their quitclaim conveyances were void based on, in Jennifer's case, certain provisions within the trust agreement, and in John's case, misrepresentations made by defendant.

Pertinent sections from the trust agreement are set forth as follows. First, section 2.01 of the trust provided:

> "This Trust shall be administered as one Trust until no

living child of our son Edward R. Carter is under the age of twenty-one (21) years. Until that time the Trustee shall apply the net income and principal of the Trust as follows:

> A. The Trustee shall pay to or apply for the benefit of each of his then living children, in monthly or in other convenient installments, so much of the net income as the Trustee in his discretion deems necessary.
>
> B. When the youngest of the Trustee's children reaches the age of twenty-one (21) years, the Trust shall terminate and the Trustee shall immediately distribute the balance of the Trust Estate in equal shares to his then living children."

Second, section 4.02 of the trust provided as follows:

> "No beneficiary of the Trust shall have any right, power, or authority to alienate, encumber, or hypothecate his or her interest in the principal or income of the Trust in any manner, nor shall such interest of any beneficiary be subject to claims of his or her creditors or liable to attachment, execution, or other process of law."

In January 2008, plaintiffs filed a motion for partial summary judgment, relying on section 4.02, claiming Jennifer's August 2002 conveyance was void, as she was without any power and/or authority to convey the trust property before the trust

terminated in December 2005. In April 2008, the trial court entered an order denying plaintiffs' motion for partial summary judgment, holding that each beneficiary held a vested remainder interest in the trust property and each had a right to "deal with the remainder interest outside of the trust." The court held that section 4.02 of the trust did not prevent the beneficiaries from conveying their interest prior to the termination of the trust as long as the remainder was not disturbed until the termination. In support of its decision, the court cited *Crowley v. Engelke*, 394 Ill. 264 (1946).

On May 24, 2010, the trial court conducted a bench trial. Plaintiffs first called defendant as an adverse witness. After identifying the trust agreement marked as plaintiffs' exhibit No. 1., he explained that he and his sister had drafted the agreement and then took it to a lawyer who "put all the legal formalities in it." Defendant made himself trustee and understood that, as trustee, he was to distribute the income as he saw fit. During his tenure as trustee, he never sought legal advice. He said the trust property is "just flood ground" with approximately six acres that can "be walked on." Defendant said he used approximately three acres of the property for hay rides in the fall--an activity which generated income. However, defendant never paid the income to the trust. On this issue, the following exchange occurred:

> "Q. Okay. Is there anything in that document that says that you could use that property for your benefit rather than the benefit of the beneficiaries?
>
> A. As Trustee, yes.
>
> Q. Okay. What--as a Trustee, did you have the [power] to decide what was going to happen with the property?

A. Yes.

Q. So you could sell the property?

A. No.

Q. You could transfer the property?

A. It was the land trust, it was established to protect the property, to keep it intact.

Q. Let me understand this, you couldn't sell the property?

A. Exactly.

Q. You--you couldn't mortgage the property?

A. No.

Q. Okay. You couldn't transfer the property?

A. I couldn't transfer it, but I could transfer it to me as long as–

Q. You could transfer it to you?

A. Yes.

Q. Where in that document does it say that you have the authority to transfer that property to yourself?

A. As Trustee. That's what Daniel Greer instructed us.

Q. Oh, so Dan Greer did give you instructions?

A. He told my father that.

Q. What did he tell you?

A. He told me that as Trustee I could do with the

property what I want.

Q. Whatever you wanted to?

A. Yes, as long as I did not sell, mortgage or get a loan against it, yes.

Q. But you could transfer it to yourself?

A. To myself, or into another trust, which I have. I've created a new trust, that was the purpose of the quitclaim deeds is to go into another trust to protect the property."

Defendant testified that his attorney set up a "new" trust which encompassed a home, boarding stables, a feed store, and a sawmill that were constructed on the property after the establishment of the original trust. He admitted he earned income from the businesses, yet he never paid any money to the trust as rent for use of the property. He never provided the beneficiaries with an accounting or kept them informed regarding the use of the property.

Referring to the quitclaim deed signed by Jennifer, defendant testified that the purpose of the document was "[t]o sign this property, or her share, back over to [him]" individually, not as trustee. The following exchange occurred:

"Q. And did you give Jennifer any money for that?

A. Well, I bought her a $60,000 house.

Q. Is that the same $60,000 house you tried to take back?

A. Exactly.

Q. Okay, so you paid her $60,000 for her to sign this

document?

A. I didn't pay her, I helped her with the house.

Q. But that was a consideration for this?

A. Either that and several other dollars exchanged over the years.

Q. I just want to be clear that at the time she signed that you gave her consideration for her signing this document?

A. Yes.

Q. Okay, and what you're saying is it's that $60,000 piece of property?

A. I was helping them, we wasn't trading it out. It wasn't payment.

Q. It wasn't payment?

A. No.

Q. So there was no consideration for her signature?

A. No, other than the ten dollars I guess."

Defendant acknowledged that the corrected quitclaim deed included the following sentence: "All rights under the trust are given to Edward R. Carter." Defendant said he explained to Jennifer that she would be "signing the property over to [him] that was in the trust."

"Q. Now, even though that document, that trust agreement, says that you can't do any transfer, or anything with the property, you went ahead and did it anyway?

A. I was the trustee. I could do what I wanted.

Q. You could do what you want?

A. That's right.

Q. And you had no obligation to tell the beneficiaries what you were doing?

A. They knew what I was doing.

Q. How did they know what you were doing?

A. I told them what I was doing. I was dissolving this trust, creating a new trust. They was going to end up with a whole lot more property than this old junk 110 acres."

Defendant explained that he created the new trust under his authority as trustee of the original trust. He acknowledged there were four beneficiaries of the original trust: Joshua Luke Carter, Douglas Duane Carter, Jennifer Anne Carter, and John Robert Carter. The older three signed their respective quitclaim deeds in 2002. Defendant could not recall why John's was not signed until 2005, except to say that "Johnny had been going through some troubles." Defendant had advanced the money for John's January 2005 purchase of a 2002 Pontiac Grand Prix. Defendant said the car was not a gift, but a loan. John did not repay the loan, so defendant put a lien on the car. He had listed himself as first lienholder on the title. Defendant testified that he had consulted the Illinois Secretary of State regarding how to legally repossess the car.

Defendant testified that Joshua and Douglas did not receive consideration for assigning him their rights to the property. He admitted that he "took all the property that [he was] there to protect for the benefit of the beneficiaries, and [he] conveyed it to

[himself]" and he gave no consideration for the conveyance. He "absolutely" believed he acted in good faith.

On cross-examination, defendant explained that in 1986, he owned the 110-acre property, as he had purchased it from his father, Luke. Defendant owned several businesses and became concerned about potential lawsuits arising from those businesses. In order to protect the 110 acres, he asked his father to put the property back in his name, but his father refused, indicating that he did not want the property to become part of his estate that would be subject to taxation. Defendant and his sister decided to put the property in defendant's children's names in order "to protect it."

Defendant testified that after the children conveyed the property to him, he transferred it into a separate trust. (The record indicates that the "new" trust was not created until March 2007. In that trust, defendant is the trustee and the beneficiary. It includes the 1986 trust property. The paragraph in the 2007 trust which describes the disposition of the trust property upon defendant's death is blacked out with a marker.) Defendant also testified that he bought a house on Stanford Avenue at an auction for $60,000 in 2002, within a week or two of Jennifer's conveyance by quitclaim deed to him. Defendant said he "titled" the house in his name during his life, but to Jennifer upon his death. For several months, Jennifer made payments to him toward the house. He said he paid the real estate taxes for two years but since then, the taxes have not been paid. After the purchase of the house, defendant loaned Jennifer $6,000 to pay off credit cards.

Defendant said in the past he had also helped John with several cars and personal loans. John had two convictions for driving under the influence of alcohol (DUI) and had lost his driver's license several times. Defendant repossessed the Grand Prix, but

told John he would help him with another car if he "straightened up." In November 2005, defendant paid John a $5,000 cash bonus because defendant thought John "did really good" working for defendant during the hay-ride season. In December 2005, John signed the quitclaim deed. Defendant said that the trust dissolved upon John's twenty-first birthday and therefore, to "protect the land," defendant created the subsequent trust.

Next, plaintiff called Barry Taft, a real-estate appraiser, who testified that the 95-acre property in question is wooded land with a horse barn, riding arena, and sawmill with a total market value of $300,000. The home, also included in the trust property, appraised at approximately $205,000. Thus, the trust property had a total market value of $505,000.

Jennifer testified that she first learned of the trust soon after the Stanford Avenue home was purchased. In July 2002, defendant contacted her and said he had purchased a home for her and her husband. After they toured the home with defendant, he presented Jennifer with a document that, according to her, defendant said would transfer ownership of the home to her upon defendant's death. She said she did not take time to read the document because "he was in my face and talking to me about various, you know, various things." She said she felt pressured to sign the document. Jennifer did not realize she was signing anything related to the trust property, as she was not aware that the trust even existed. She believed she was signing a document related to the Stanford Avenue home. She said she did not ask to have the document reviewed by an attorney because she "ultimately trusted [defendant] to do what was right" for her. She said she "felt that whatever was going on was in [her] best interest."

Jennifer testified that on August 19, 2002, defendant gave her a new

document to sign. He explained that she needed to re-sign the document as Jennifer Anne Carter instead of Jennifer Anne Carter-Bernal, as she had signed earlier. Defendant presented her with only the signature page and not the first page of the document. She assumed this document was just correcting her signature and was pertaining to the ownership of the Stanford Avenue home--that ownership would pass to her upon defendant's death. She said she did not ask to see the first page because she trusted defendant. She said it was not until after she had signed this document (the quitclaim deed) that was she advised of the existence of the trust.

John testified that he had learned of the existence of the trust after Jennifer had signed the quitclaim deed in August 2002. Defendant had never mentioned the trust to him. Counsel tendered to John a copy of the quitclaim deed he had signed. He said the first page of the document that he signed was different than the one presented at trial, in that the language "All rights under the Trust are given to Edward R. Carter" was not included in the document he had signed. John said in December 2004, he spoke with his grandmother about getting a new vehicle. She advised that he should speak with defendant to try "to mend past experience." John said he signed the deed at that time in his father's office with his brother Doug present as well. After signing, John began working again for defendant on the property because defendant had advised that he would "start to distribute the assets of the Carter property" to the children. Defendant then purchased the Grand Prix in December 2004 or January 2005. John was unaware at the time of the purchase that defendant was listed as a lienholder on the car. He said he ran into some "problems with [his] driver's license" so he stopped driving and defendant "illegally" repossessed the car.

John said he continued to work for defendant through 2005. After the hay-

ride season, in November, defendant "promised [him] that he would pay me equal to what [his] yearly salary would have been on top of my yearly salary." John had estimated the bonus would have been approximately $14,000. Instead, defendant paid him $5,000. John confronted defendant and told him he was going to move to Minnesota because he could not continue to work for defendant if defendant "was going to continually go back on his word."

John testified that he signed the quitclaim deed in December 2004, not December 2005. He remembered it was 2004 because they purchased the Grand Prix less than three weeks after signing the document. John had moved to Minnesota on November 16, 2005. He and his ex-girlfriend, Sarah Shaw, returned to Springfield to visit his family for the holidays, but he did not see defendant on December 10, 2005, the date that had been written on the quitclaim deed.

John said defendant never provided him with an accounting of the trust or ever advise him about "what he was doing with the property." Defendant never told John he was a beneficiary of the trust. The first time John saw the entire trust agreement was soon after he and Jennifer filed the instant lawsuit.

On cross-examination, John testified that the document he signed did not mention conveying, assigning, or transferring any property to defendant. When asked what he believed he was signing, John stated:

> "My father instructed me that document would ensure that ownership stayed within the family and that we would not be able to lose it. Not that it would transfer to him, not that he could do with the property whatever he wanted, he stated that

> the sole purpose of my signing was to ensure the property would stay within our ownership, whether it be us together, or me solely, I'm not sure what he meant, but he threw so much at me at once, with all the leather-bound old documents and how I had to sign this document or there would be consequences."

John testified that "at no time" did he and Shaw ever visit defendant during December 2005. John alleged that defendant changed the date on the document from December 12 to December 10. On December 12, John was not in Illinois, but was in Minnesota. On December 10, John was in Illinois. On the quitclaim deed that John signed, it appeared that the date of December 12 was altered to December 10, as it appeared that a zero was written over a two. The year had also been changed from 2002 to 2005, with a five written over the two. The notary public signed the document on December 10, 2005, and defendant signed the tax-exempt provision on December 12, 2005.

On redirect examination, John testified that defendant did not provide him a copy of the document after he signed it, nor allow him to have an attorney review it before he signed it. John said: "He told me I either sign the document and I can stay, or I leave the document, and I could never come back to the property, along with several other friends."

At the close of John's testimony, plaintiffs rested. Defendant testified on his own behalf. He was presented with defendant's exhibit No. 3, the deed for the Stanford Avenue home conveying ownership to defendant and Jennifer as joint tenants. Defendant's exhibit No. 4 was a copy of the divorce decree between plaintiffs' mother, Patricia Carter,

and defendant entered in June 2001. In that decree, the home located on the trust property was awarded to defendant. In exchange for the home, defendant was to pay $110,000 to Patricia. Defendant's exhibit No. 5 was a quitclaim deed for the home from Patricia to defendant. Defendant never formally adopted Jennifer, Patricia's daughter, but he "took her in when she was four."

Defendant testified as to his recollection of the meeting with Jennifer regarding the first quitclaim deed in July 2002 at her house with defendant's mother present. Defendant explained the terms of the deed to Jennifer. He testified that he told her the following: "she was signing her interest away in the property out there in order for me to put it into another trust to keep the property intact. I was afraid that if the children couldn't all get along, and something happened to me, it would have to be sold off and split up." The meeting with Jennifer in August 2002, when she signed the corrected deed, occurred somewhere "out there on the property." Defendant explained to Jennifer at that time that the attorney had left off defendant's name and she had to sign a second one to "fix it." Defendant testified that he explained to John the nature of the document and what he was giving up.

On cross-examination, defendant testified that under the subsequent trust agreement, he could sell the property, borrow against the property, or use it in any way he desired just as he could, according to him, under the 1986 trust agreement. Defendant also testified that he was granted the house, which was part of the trust property, in the divorce proceedings because the divorce court "pulled that out" of the trust property.

On redirect examination, defendant testified that Jennifer and John were "very aware" of what they were signing because "it all surfaced through [the] divorce." They

knew the assignment and the deed were placing the property in defendant's name only. Defendant said the plaintiffs' signatures occurred "right after" defendant had paid $60,000 for Jennifer's home, and "right after" he had paid a $5,000 cash bonus and bought a $13,000 vehicle for John. He had also explained to each of them that he was going to preserve the property for their later benefit.

Joshua, plaintiffs' brother, testified and acknowledged that on July 12, 2002, he executed a quitclaim deed conveying property from him to defendant (defendant's exhibit No. 6). Before Joshua signed the deed, defendant explained to him that he would be releasing his rights to the trust property and conveying those rights and interests to defendant. On August 19, 2002, Joshua signed a corrected deed because defendant's name was "not on the first one." Defendant had offered Joshua the opportunity to read and review the document before signing. Joshua said he did not have a conversation with John prior to him turning 21 regarding the 1986 trust. He said he did speak with John in November 2006 on the telephone when John asked if he wanted to take legal action against defendant regarding the trust property. He also spoke with Jennifer at her home. Jennifer had initially told Joshua that she felt that what John and their mother was "up to" was wrong. Jennifer told Joshua that she felt she did not have any right to any of the property. However, according to Joshua, the second conversation with Jennifer was "a complete flip." She had since obtained an attorney and now felt that she had been "screwed." Joshua's third conversation with Jennifer was different yet, in that Jennifer said it did not matter how she felt, she had already obtained an attorney, and she would "see where it went. She wasn't sure."

On cross-examination, Joshua testified that his grandfather and defendant

provided him a copy of the trust, but he did not know if his siblings had received a copy. When asked why he was willing to convey his interest in the trust property to defendant, Joshua replied: "Because I didn't feel that the property was even mine. He owned it, he worked it. Why would I question that?"

After the presentation of the evidence, the trial court requested that each party submit a trial memorandum in lieu of closing arguments. After each party submitted their memorandum, the court entered the following order. The court found (1) the August 2002 corrected quitclaim deed signed by Jennifer was a knowing and valid conveyance and was signed in the same form as it was recorded; (2) Jennifer's conveyance was exchanged for good and valuable consideration in the form of a joint tenancy deed of the residence on Stanford Avenue; (3) John knowingly executed the quitclaim deed on December 10, 2005, in the same form as recorded; (4) John's conveyance was exchanged for good and valuable consideration in the form of purchases of vehicles, attorney fees and court costs related to his DUI cases, and providing him employment and bonuses; and (5) plaintiffs failed to prove that defendant committed waste of the trust assets, failed to maintain the trust property, or failed to make discretionary payments from the trust to meet the needs and requirements of the beneficiaries. The court entered judgment in favor of defendant. This appeal followed.

II. ANALYSIS

Plaintiffs first challenge the trial court's decision that Jennifer's conveyance was valid. On this issue, the court held that defendant had fully explained the nature and purpose of the quitclaim deed and that Jennifer signed the deed knowing she was assigning all of her right, title, and interest in the trust property to defendant. And, in exchange for

her conveyance, she received substantial consideration. Plaintiff claims the court's decision was in error because, based on either (1) the specific language of the spendthrift provision of the trust or (2) the fact that she (and the other beneficiaries) held a contingent remainder interest in the trust property, Jennifer had no authority to assign or convey her rights to the trust property in 2002, during the life of the trust. Defendant counters this argument with the claim that, despite the spendthrift provision, Jennifer's interest constituted a vested remainder interest, which according to Illinois case law, is an interest that can be freely dealt with by an adult beneficiary, including the ability to convey such interest to defendant.

We begin our analysis by noting the applicable standard of review. "Generally, a reviewing court will not reverse a trial court's decision in a bench trial regarding whether the plaintiff has proved the elements [of the alleged cause of action] unless that decision is against the manifest weight of the evidence. This is so because whether the plaintiff has proved those elements usually constitutes a question of fact." *Kirkruff v. Wisegarver*, 297 Ill. App. 3d 826, 839 (1998). In reviewing the court's decision, we accept its factual determinations. Thus, because only the court's legal conclusions drawn from those facts are at issue, we review those conclusions *de novo*. *Kirkruff*, 297 Ill. App. 3d at 840.

Although we accept the trial court's factual determinations, we disagree with its application of the law to those determinations. We conclude that whether each plaintiff's respective interest was a vested or a contingent interest, or whether the spendthrift provision in the trust prohibited his or her conveyance of the trust property to defendant, makes little difference in light of the overall conclusion that defendant engaged in a plethora of self-dealing conduct throughout the life of the trust. Of primary concern is

defendant's act of encouraging or ensuring that each beneficiary conveyed his or her interest in the trust property to himself personally.

A trustee owes each beneficiary a duty of the utmost trust, fidelity, good faith, and loyalty. *In re Estate of Halas*, 209 Ill. App. 3d 333, 344 (1991). The rules regarding a trustee's duty of loyalty set forth in section 78 of the Restatement (Third) of Trusts provides as follows:

> "(1) Except as otherwise provided in the terms of the trust, a trustee has a duty to administer the trust solely in the interest of the beneficiaries, or solely in furtherance of its charitable purpose.
>
> (2) Except in discrete circumstances, the trustee is strictly prohibited from engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests.
>
> (3) Whether acting in a fiduciary or personal capacity, a trustee has a duty in dealing with a beneficiary to deal fairly and to communicate to the beneficiary all material facts the trustee knows or should know in connection with the matter."
>
> Restatement (Third) of Trusts § 78 (2007).

Accordingly, a trustee may not encourage the beneficiaries to convey their interest in the trust property to himself personally for less than fair market value. By doing so, the trustee has acted in his own self interest and contrary to the interests of the beneficiaries.

"Generally, a trustee owes a fiduciary duty to a trust's beneficiaries and is

obligated to carry out the trust according to its terms and to act with the highest degrees of fidelity and utmost good faith. [Citation.] Further, a trustee owes a fiduciary duty to serve the interest of the beneficiaries with total loyalty, excluding all self-interest, and is prohibited from dealing with the trust's property for her individual benefit." (Internal quotation marks omitted.) *In re Estate of Muppavarapu*, 359 Ill. App. 3d 925, 929 (2005), quoting *Gragnono v. Emmett C. Torkelson Trust*, 292 Ill. App. 3d 318, 325 (1997).

In *Rennacker v. Rennacker*, 156 Ill. App. 3d 712, 715 (1987), the Third District stated:

> "A trustee must use care and diligence in the discharge of his powers and duties, is held to a high standard of conduct, and must exercise the utmost or highest good faith in the administration of the trust. [Citation.] The trustee must keep in mind the beneficiary's interest and the trustee cannot do any act inconsistent with the beneficiary's interest irrespective of the trustee's good or bad faith. Further, good faith in the administration of a trust means the trustee must act honestly and with undivided loyalty to his trust, not merely with the standard of the workaday world, but with the most sensitive degree of honor."

From the facts of this case, it is readily apparent that defendant personally benefitted from a breach of his fiduciary duty. According to the terms of the trust, ownership of the trust property was to be divided into four equal shares upon the termination of the trust on John's twenty-first birthday. Defendant was not one of the four

owners. However, he testified that he used the trust property for his own benefit without considering the trust or the interests of the beneficiaries. He earned personal income from the use of this trust property without authorization and without compensating the trust. He built a residence and several buildings on the property and thereafter resided in the home and used the buildings for his own personal gain without notification, authorization, or compensation to the trust. He admittedly treated the trust property as his own personal property throughout the life of the trust.

However, he did acknowledge the beneficiaries' individual interests in the trust property when he encouraged each to convey his or her interest in the property to himself personally. As a result of the conveyances, he became the sole owner of the property valued at approximately $505,000 without paying appropriate consideration to each beneficiary. Instead, he testified, that he intended to safeguard the property for his children by creating a subsequent trust. However, after the 2002 conveyances from three of the beneficiaries, defendant maintained a three-fourths personal interest in the property for five years. John maintained his interest until December 2005. In March 2007, defendant created the subsequent land trust in which he placed the property. The names of the beneficiaries of the new trust are blacked out on the copy of the trust in the record and thus, we are unable to discern whether defendant carried through with his intentions to maintain the trust property for the benefit of his children.

Without a provision in the trust agreement that would have either excused or exonerated defendant's self-dealing (see Restatement (Second) Trusts §170(1), comment a (1959)) or indicated that this trust should have been treated differently than any other trust (see *In re Estate of Allison*, 140 Ill. App. 3d 183, 187 (1986)), defendant's conduct can

only be characterized as that which breached his fiduciary duty as trustee. As a result, plaintiffs are entitled to a remedy and/or damages.

As for damages, section 205 of the Restatement (Second) of Trusts provides as follows: If the trustee commits a breach of his duty of loyalty, he is chargeable with any loss or depreciation in value of the trust property resulting from the breach of duty, or any profit made by him through the breach of duty, or any profit which would have accrued to the trust estate if there had been no breach of duty. Restatement (Second) of Trusts § 205 (1959). Section 206 provides: "The rule stated in § 205 is applicable where the trustee in breach of trust sells trust property to himself individually, or sells his individual property to himself as trustee, or otherwise violates his duty of loyalty." Restatement (Second) of Trusts §206 (1959). In other words, the profits earned by a fiduciary as the result of a self-interested transaction belong to the beneficiaries. *Allison*, 140 Ill. App. 3d at 187. In order to establish damages, defendant should provide to plaintiffs and the trial court an accounting. The beneficiaries are entitled to learn from the trustee "what property has come into his hands, what has passed out and what remains therein, including all receipts and disbursements in cash, and the sources from which they came, to whom paid and for what purpose paid." *Wylie v. Bushnell*, 277 Ill. 484, 491 (1917).

In this case, the trial court must determine at an evidentiary hearing the value of the property placed in trust, the amount of income earned by use of the trust property, the value added to the trust property by reason of the defendant's efforts, and the allocation of the increased value of the property by reason of the fixtures paid for by defendant or due to his efforts. The court should then either fashion an equitable remedy and/or award damages in an amount that would place the beneficiaries in the position in which they

would have occupied if no breach of duty had been committed. We are not unmindful that two of the beneficiaries are not parties to this action and are not within the jurisdiction of either the trial court or this court. However, upon remand, the trial court may obtain jurisdiction over them if they so desire, or recognize a settlement between defendant and them.

III. CONCLUSION

In light of our conclusion that defendant engaged in self-dealing and other violations of his fiduciary duty as trustee, we reverse the trial court's judgment and remand for a full accounting and further proceedings consistent with our decision herein and as the trial court and the parties deem appropriate.

Reversed and remanded.