

IN THE IOWA DISTRICT COURT IN AND FOR LINN COUNTY

LORIANN BUSSE and	)	
LISA CARPENTIER	)	CASE NO. EQCV083014
	)	
Plaintiffs,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
v.	)	AND JUDGMENT ENTRY
	)	
MAUREEN KENNEY; LAVERN AND	)	
AUDREY BUSSE DYNASTY TRUST	)	
F/B/O LORIANN BUSSE U/D/O	)	
OCTOBER 21, 2011, A Nominal	)	
Defendant and LAVERN AND AUDREY	)	
BUSSE DYNASTY TRUST F/B/O LISA	)	
RENEE CARPENTIER U/D/O OCTOBER	)	
21, 2011, A Nominal Defendant,	)	
	)	
AND	)	
	)	
LAVERN T. BUSSE and AUDREY	)	
BUSSE,	)	
	)	
Defendants.	)	

This case came on for trial before the Court February 9 through February 10, 2017. The parties were present and represented by counsel of record. The Court having considered the testimony, the exhibits, the pre-trial and post-trial briefs enters the following Findings of Fact, Conclusions of Law and Judgment Entry.

**FINDINGS OF FACT**

**A. Factual Background**

Defendant Maureen Kenney is the Trust Protector of three Dynasty Trusts created by Lavern and Audrey Busse on October 21, 2011, each trust designating one of their children LoriAnn, Lisa, and Jeff, the “Primary Beneficiary.” Each of the Busse children were appointed as the

Investment Trustee of their Dynasty Trust and a friend or relative was appointed as the Independent Trustee. The Investment Trustee is entitled to vote any interest held in the Dynasty Trust (Exhibit B, Article IV, A.5), and the Independent Trustee determines distributions from the Trust (Exhibit B, Article IV, B). The Dynasty Trusts held—and continue to hold—two major assets: a 7.34%<sup>1</sup> interest in Busse Family Limited Partnership (“BFLP”) and a 32.9% interest AB BI Note LP (“AB BI”), which are limited partnerships that Lavern and Audrey created to benefit the Busse family and will be discussed in greater depth below. Under the express terms of the Dynasty Trusts, the “primary concerns” of Lavern and Audrey in establishing the Dynasty Trusts are to ensure assets are grown for future generations. (Exhibit B, Article II, B.1).

In early October 2014, in the midst of an on-going family dispute, Kenney removed LoriAnn as Investment Trustee of her Dynasty Trust and replaced her with her brother Jeff Busse. Kenney also removed Leah Homeister as Independent Trustee of the LoriAnn Dynasty Trust and replaced her with Todd Reuscher. In Plaintiffs view, Kenney replaced LoriAnn with Jeff as the Investment Trustee of the LoriAnn Dynasty Trust to enact retribution against LoriAnn and Lisa and/or to ensure Jeff and Lavern would maintain or gain control of the limited partnership voting interests in other family entities. Kenney’s motive for replacing the Trustees of the LoriAnn Dynasty Trust is the principle issue the Court is left to determine in this controversy.

During the time period that Kenney considered whether to replace the Trustees of the LoriAnn Dynasty Trust, the “family empire” Lavern and Audrey created, and had entrusted to Jeff for management, was significantly threatened by LoriAnn and Lisa. The various limited liability companies, limited partnerships, grantor trusts and Dynasty trusts were operated very successfully and without controversy to the immense benefit of all concerned until disputes arose

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<sup>1</sup> The BFLP interest held in the Dynasty Trusts has since been diluted by Lavern’s March 2015 Optional Capital Contribution into BFLP.

in 2012, one of which boiled down to Lisa and LoriAnn chaffing under Lavern's decision to entrust Jeff with management. In 2012 Jeff inadvertently transferred voting control of Busse Investments, Inc. ("BI") to LoriAnn, Lisa, and Lisa's daughters under the mistaken belief that he had an effective stock option that would allow him to retain control of BI. In 2013 LoriAnn and Lisa refused requests from Lavern and Jeff to execute a new stock option that would allow Jeff to regain control of BI and rectify the mistaken transfer of control over BI. Thereafter, on August 18, 2014, LoriAnn and Lisa denied their father a seat on the board of directors of BI, the very company Lavern had built and gifted to his children and which had generated so much of the family's wealth. On August 28, 2014, LoriAnn and Lisa refused to elect Lavern to fill what was believed to be a vacant management position with Busse Financial Advisors, LLC ("BFA"), a company that was the general partner and manager of BFLP and AB BI.

Kenney replaced the Trustees of the LoriAnn Dynasty Trust shortly after an unsuccessful settlement conference. Kenney testified that she became concerned about LoriAnn as the Investment Trustee of her Dynasty Trust, in part, because of a settlement proposal LoriAnn made to liquidate and distribute the underlying assets of her Dynasty Trust—BFLP and AB BI. Kenney claims she was concerned because LoriAnn's settlement proposal would have placed liquid assets into the Dynasty Trust that could have been distributed to LoriAnn, which was contrary to Lavern's estate plan and the multigenerational purpose of the Dynasty Trust. Kenney explained this fear became more pronounced in light of LoriAnn's willingness to defy Lavern's business and estate plans relating to other family entities.

Parallel to this equity matter, Plaintiffs filed a separate law matter against Jeff and Lavern Busse relating to actions taken through the various family entities discussed above, which is Linn County Case No. LACV083022. This case was tried immediately following a thirteen day trial in

Linn County Case No. LACV083022 where the Court heard detailed testimony from LoriAnn, Lisa, Jeff and Lavern. Both Plaintiffs and Plaintiffs' counsel were Plaintiffs and counsel in LACV083022. In this case, the parties, by design and with the Court's concurrence, did not reintroduce evidence the Court heard during the thirteen days immediately prior to trial. A number of the Court's findings from the lengthy trial in LACV083022 are relevant to this case as well.

The controversy before the Court concerns: (1) whether Defendant Maureen Kenney breached fiduciary duties owing to LoriAnn, the "primary beneficiary" of the LoriAnn Dynasty Trust, when she removed Trustees of the LoriAnn Dynasty Trust and appointed successor Trustees in October 2014; and (2) whether LoriAnn and Lisa are entitled to their requested relief. Plaintiffs contend Kenney violated her fiduciary duties in her role as Trust Protector of the LoriAnn Dynasty Trust. Plaintiffs request the Court to remove Kenney as the Trust Protector of the LoriAnn Dynasty Trust and the Lisa Dynasty Trust. Plaintiffs request further that the Court appoint each of them as the Trust Protector for the Dynasty Trust for which the other Plaintiff is the "primary beneficiary."

Lavern Busse ("Lavern") and Audrey Busse ("Audrey") have three children: LoriAnn Busse ("LoriAnn"), Lisa Carpentier ("Lisa") and Jeffrey Busse ("Jeff"). Lisa has three daughters: Alexandra, Devan, and Marie-Josee. Jeff has three daughters: Monica, Anna, and Grace. LoriAnn is childless.

Defendant Maureen Kenney ("Kenney") is the Trust Protector of three Dynasty Trusts created by Lavern and Audrey Busse on October 21, 2011, each trust designating one of their children, LoriAnn, Lisa, and Jeff, the "Primary Beneficiary."

Lavern and Audrey initially designated each child as the “Investment Trustee” of their respective Dynasty Trust. The role of the Investment Trustee is “to execute documents or take other action regarding decisions about the investment of the assets of the Trusts hereunder including, but not limited to, the purchase, retention or sale of any assets held in any Trust.” (Exhibit B, Article IV, A). The Investment Trustee is authorized to “purchase non-income producing property, including real estate for the use of a beneficiary under any Trust created hereunder, which authority shall include the authority to purchase such property from a beneficiary at its fair market value...” (Exhibit B, Article IV, A.17). The Investment Trustee is also authorized to purchase a variety of assets, including: life insurance policies (Exhibit B, Article IV, A.16), stocks, bonds, partnership interests, “notes or other securities,” “any variety of real or personal property,” (Exhibit B, Article IV, A.1) and use Trust assets to secure a mortgage or as a pledge of security (Exhibit B, Article IV, A.3). In addition, the Investment Trustee is entitled to vote any interest the LoriAnn Dynasty Trust holds. (Exhibit B, Article IV, A.5).

The Dynasty Trusts all have an “Independent Trustee” as well. The role of the Independent Trustee is “to execute documents or take other action regarding the exercise of, or decision not to exercise, any discretion over beneficial payments, distribution, applications, uses or accumulations of income or principal to or for the benefit of the beneficiaries of the Trusts hereunder.” (Exhibit B, Article IV, B). Each child was allowed to select their own Independent Trustee and chose a friend or relative with whom they had a good relationship. In LoriAnn’s case, she chose her cousin Leah Homeister.

The Dynasty Trusts also provide for a Trust Protector. (Exhibit B, Article V, J). The Dynasty Trusts appointed Defendant Maureen Kenney as Trust Protector. (Exhibit B, Article V, J.1). Kenney is an attorney and is a partner at Bradley & Riley, P.C.

As Trust Protector, Kenney “may remove a Trustee at any time and for any reason, and may replace said Trustee with a Successor Trustee selected by the Trust Protector....” (Exhibit B, Article V, J.4). The Dynasty Trusts provide that “any exercise or non-exercise of powers and discretions granted to the Trust Protector shall be in the sole and absolute discretion of the Trust Protector....” (Exhibit B, Article V, J.8). As Trust Protector of the Dynasty Trusts, Kenney must exercise her rights and powers in a fiduciary capacity:

The rights and powers conferred on the Trust Protector under this instrument, including, without limitation, the power to remove Trustees, the power to appoint successor Trustees, and all rights and powers granted the Trust Protector under subparagraph 5 of this ARTICLE, shall be exercisable only in a fiduciary capacity.

(Exhibit B, Article V, J.6).

The Dynasty Trusts, however, specifically provide an exoneration clause for the Trust Protector:

Absent bad faith, the Trust Protector, in that capacity, is hereby exonerated from any and all liability for the acts or omissions of any fiduciary or any beneficiary hereunder or arising from any exercise or nonexercise of the powers and discretions conferred under this Article.

(Exhibit B, Article V, J.8). “Further, the Trust Protector, in that capacity, shall have no duty to keep informed as to the acts or omissions of others or to take any action to prevent or minimize loss.” (Exhibit B, Article V, J.8).

The Dynasty Trusts instruct Kenney to consult with the Settlers’ known estate planning advisers in determining whether and to what extent to exercise her rights and powers as Trust Protector:

“[I]t is the Settlers’ wish that the Trust Protector shall consult with Settlers’ estate planning advisers known to the Trust Protector in determining whether and to what extent to exercise his or her powers under this ARTICLE....”

(Exhibit B, Article V, J.8).

Under the express terms of the Dynasty Trusts, the “primary concerns” of Lavern and Audrey in establishing the Dynasty Trusts are to:

[M]aximize the amount of Trust principal that now or in the future may be distributed to our grandchildren or more remote descendants without generation-skipping transfer tax and to allow several generations of our descendants to benefit from protections afforded by keeping the principal in the Trust.

(Exhibit B, Article II, B.1).

The Dynasty Trusts held—and continue to hold—two major assets: a 7.34%<sup>2</sup> interest in Busse Family Limited Partnership (“BFLP”) and a 32.9% interest AB BI Note LP (“AB BI”), which are limited partnerships the Court will discuss in greater depth below. When the Dynasty Trusts were formed, Lavern gifted an equal portion of his 22.02% limited partnership interest in BFLP to each of his children’s Dynasty Trusts. If the Dynasty Trusts were properly admitted as Substitute Limited Partners into BFLP, then, following Lavern’s transfer of voting shares in BFLP, LoriAnn, Lisa, and Lisa’s daughters collectively owned 53.08% of the voting shares in BFLP, and Jeff and his children collectively owned 45.59%. In addition, if the Dynasty Trusts were properly admitted as Substitute Limited Partners in AB BI, LoriAnn and Lisa collectively owned 65.8% of the voting shares in AB BI, and Jeff owned 32.9% of the voting shares in AB BI.<sup>3</sup>

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<sup>2</sup> The BFLP interest held in the Dynasty Trusts has since been diluted by Lavern’s March 2015 Optional Capital Contribution into BFLP.

<sup>3</sup> Under the BFLP Partnership Agreement, when Lavern gifted a 7.34% interest in BFLP to each Dynasty Trust, the Dynasty Trusts were not Limited Partners of BFLP, but were “Permitted Transferees.” (Exhibit N, BFLP Agreement, Article IV, B, KK). Until the Dynasty Trusts were admitted as Substitute Limited Partners in BFLP, the Dynasty Trusts were merely “Assignees.” (*Id.* Article XIII, B, 6). An “Assignee” under the BFLP Partnership Agreement only has the economic rights of a Limited Partnership interest, but no right to vote or participate in the management of BFLP. (*Id.* Article IV, I). In 2012 and 2013, in order to admit the Dynasty Trusts as Substitute Limited Partners into BFLP, Jeff and Lavern prepared Assignment and Consent forms, and provided copies of the forms to LoriAnn and Lisa as Investment Trustees of their respective Dynasty Trusts. During the trial of LACV083022, Jeff and Lavern argued that Plaintiffs’ Dynasty Trusts were not properly admitted as Substitute Limited Partners in BFLP and AB BI because Jeff and Lavern refused to sign the Assignment and Consent forms on

BFLP was formed in 2004 and holds substantial assets (primarily marketable securities) that Lavern primarily manages. BFLP is owned by Busse family members individually, trusts benefitting Busse family members, and Busse Financial Advisors, LLC (“BFA”). BFA is the General Partner of BFLP. Under the BFLP Partnership Agreement, BFA designated Jeff and Lavern to act on its behalf as managers of BFLP. (Exhibit N, BFLP Agreement, Art. VII, p. 10). Neither Jeff nor Lavern are General Partners of BFLP. The BFLP Partnership Agreement provides: “Cash may be distributed at the sole discretion of the General Partner among the Partners pro rata in accordance with their Sharing Ratios,” subject to Article XII and other provisions of the operating agreement. (Exhibit N, BFLP Agreement, Article XI, A, p. 24). The BFLP Partnership Agreement further provides: “Because the Partnership has been formed and created to manage the Partners’ investments in a single entity, the General Partner shall have complete and absolute discretion and authority in determining whether any distribution, including Cash distributions, shall be made by the Partnership.” (Exhibit N, BFLP Agreement, Art. XII, p. 25). The BFLP Partnership Agreement further provides that the General Partner may be removed with a 70 percent vote of Limited Partners. (Exhibit N, BFLP Agreement, Article VI, p. 11). If the General Partner is removed or cannot serve, the Limited Partners may elect a successor General Partner by a simple majority. (Exhibit N, BFLP Agreement, Article X, C.4).

In 2004 BFA was formed. BFA is a manager-managed LLC, managed by a Board of Managers consisting of two managers. (Exhibit O, BFA Operating Agreement Article 5.1). The original managers of BFA were Jeff and Lavern. The original members of BFA were Lavern, Jeff, LoriAnn, and Lisa, and each member held a 25% interest. Article 4.7 of the BFA Operating

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behalf of the General Partner of BFLP and AB BI once family disputes arose. The Court rejected this argument in prior rulings. The Court has previously concluded LoriAnn’s Dynasty Trust and Lisa’s Dynasty Trust were properly admitted as Substitute Limited Partners in BFLP and AB BI prior to Lavern’s March 2015 Optional Capital Contribution into BFLP. (Court’s 1/05/17 Ruling in LACV083022 p. 45; Court’s 5/22/17 Ruling in LACV083022 p.83).

Agreement provides “The affirmative vote of Members holding a majority of the outstanding Membership Interests shall be the act of the Members...” (Exhibit O, BFA Operating Agreement Article 4.7). Pursuant to Article 5.5(h) of the BFA Operating Agreement, a simple majority of the members can dissolve BFA. (Exhibit O, BFA Operating Agreement Article 5.5(h)). BFA’s primary function is to operate and manage two other companies: BFLP and AB BI.

As noted above, AB BI was created in 2011. AB BI owns some marketable securities and also holds notes entitling it to payment on loans that it made to Busse Investments, Inc. (“BI”) and Lavern’s personal trust, the LTB 1996 Trust. The primary purpose of AB BI was to create a discountable asset that Lavern and Audrey could use in their estate planning or for potential giving. AB BI is owned by the Dynasty Trusts and by its General Partner BFA. Under the AB BI Partnership Agreement, BFA designated Jeff and Lavern to act on its behalf as managers of AB BI. Neither Jeff nor Lavern are General Partners of AB BI. Each Dynasty Trust holds a 32.9% ownership interest in AB BI and BFA holds a 1.3% ownership interest in AB BI. AB BI holds a portfolio of marketable securities. AB BI also holds notes entitling it to principal and interest payments on loans it made to Busse Investments and Lavern’s individual trust, LTB 1996 Trust. The AB BI Partnership Agreement provides: “Cash may be distributed at the sole discretion of the General Partner among the Partners pro rata in accordance with their Sharing Ratios,” subject to Article XII and other provisions of the Partnership Agreement. (Exhibit M, AB BI Partnership Agreement, p. 25, Art. XI.A). The AB BI Partnership Agreement further provides: “Because the Partnership has been formed and created to manage the Partners’ investments in a single entity, the General partner shall have complete and absolute discretion and authority in determining whether any distribution, including Cash distributions, shall be made by the Partnership.” (Exhibit M, AB BI Partnership Agreement, p. 26, Art. XII). The AB BI Partnership Agreement

provides: “If all of the General Partners cannot for any reason serve as General Partners or if there is only one (1) General Partner and that General Partner cannot serve, Partners holding 70 Percent in Interest may, within ninety (90) days after the withdrawal of the General Partners, elect a new General Partner from among the Limited Partners or any Persons not already Limited Partners.” (Exhibit M, AB BI Partnership Agreement, p. 33, Art. XVI(C)(4)).

Another entity at the core of the present controversy is Busse Investments, Inc. (“BI”). Lavern formed BI in the late-1980’s and Jeff began working with the company full-time in 1989. BI started with zero properties and grew to owning over twenty commercial real estate properties. BI is a highly successful commercial real estate business and has generated tremendous wealth for the Busse family. Until Jeff was fired after the initiation of this lawsuit and Plaintiffs’ Petition in LACV083022, Jeff managed the day-to-day affairs of BI initially together with Lavern, but since 2000 increasingly as the primary manager of BI’s day-to-day operations.

In 2002, Lavern ceased being a shareholder of BI and sold his BI stock to seven Grantor Trusts he established—one for LoriAnn and one for each of his six granddaughters. As of Lavern’s 2002 BI stock transfer, Jeff was an employee and manager of BI. Since the creation of the Grantor Trusts until the present, Jeff has been the sole trustee for the seven Grantor Trusts. As trustee of the grantor trusts, Jeff is entitled to exercise all voting rights with respect to stock and other securities held by the grantor trusts. Jeff’s voting rights as trustee for the grantor trusts combined with his personal interest allowed Jeff to exercise majority control over BI while the grantor trusts held BI voting stock.

Lavern testified that Jeff was appointed as trustee of the Grantor Trusts because Jeff had extensive experience operating BI and was a key consultant for Lavern and Audrey concerning

both business and estate planning matters. Lavern testified further that Jeff was appointed as trustee of the Grantor Trusts because Jeff “had bought into my way of thinking” and treated his sisters “very fairly.” The evidence is clear that Lavern historically had put Jeff in charge of management of the Busse business and estate planning entities.

Lavern Busse’s business acumen and hard work generated incredible wealth which he and his wife, Audrey, freely shared with their three children, Jeff, LoriAnn and Lisa, and their grandchildren. As time went on, Lavern increasingly entrusted Jeff with management and control of a number of companies, trusts and sophisticated estate planning vehicles which are essentially a small empire. Jeff was and is intelligent and hardworking and his business acumen and pursuit of sophisticated estate planning mechanisms both vastly increased the wealth of all parties and did so in such a way as to minimize taxation. Jeff shared his father’s vision for management of the companies and the tax advantaged transfer of wealth to future generations. Jeff’s efforts along with Lavern increased the family’s wealth many fold.

Lavern’s daughters, Plaintiffs LoriAnn and Lisa, neither worked in nor were they given control of any of the family businesses. This was clearly Lavern’s intent. While LoriAnn and Lisa were not given control, they shared equally in the profits. LoriAnn and Lisa’s children shared handsomely, each become multi-millionaires as the result of the hard work, business acumen and generosity of their father Lavern and the hard work and business acumen of their brother Jeff.

Lavern was very clear with his children about his philosophy for managing the businesses, his estate and the transfer of wealth to future generations. He expressed this clearly on the witness stand and had provided the same philosophy in writing to his children a number of years previously. He always gave equally to his three children. However, he did not give equal

control over the family entities to his children. His philosophy had four elements. First, he wanted to give not only to his children but to future generations and ultimately to the foundation. Second, he did not intend to pay inheritance or estate taxes. Third, he wanted to combine the management of businesses and investment accounts to make it easier to invest. Finally, he wanted to have someone running the operation that bought into his ideas. That person was clearly Jeff. Lavern testified he did not want the money to be squandered and felt that Jeff bought into his philosophy and went out of his way to be fair to his sisters. Lavern did not feel his daughters had equal buy-in to his philosophy. For instance, he testified that from time to time his daughters had expressed the desire to dissolve the Busse Family Limited Partnership and give each their proportionate share. That did not fit with Lavern's philosophy as he wanted to grow the assets.

The numerous entities involved in this case, various limited liability companies, limited partnerships, grantor trusts and Dynasty trusts were operated very successfully and without controversy to the immense benefit of all concerned until disputes arose in 2012, one of which boiled down to Lisa and LoriAnn chaffing under Lavern's decision to entrust Jeff with management.

Approximately six months before the Dynasty Trusts were created, Lavern met with LoriAnn in Arizona and told her about his intention to form the Dynasty Trusts. Lavern testified he told LoriAnn he was not going to setup a Dynasty Trust for her benefit because the Dynasty Trusts were specifically designed "for future generations and she would have no future generations" and also because she had benefitted directly from the Grantor Trusts Lavern previously established, whereas Jeff and Lisa did not personally benefit from the Grantor Trusts established for their children.

Lavern testified LoriAnn was “pretty emphatic” that she wanted a Dynasty Trust. Lavern testified LoriAnn specifically told him “I want my share of that Dynasty trust.” Lavern indicated he then told LoriAnn that he was willing to create a Dynasty Trust for her but only if she “will not touch it unless this is your last resource that you have and if you are totally out of resources” and “when I pass away, I want it to go equally to Jeff’s kids and Lisa’s kids.” Lavern testified that “[LoriAnn] agreed to that.” Lavern’s testimony regarding his conversation with LoriAnn about the Dynasty Trust was detailed, clear and convincing.<sup>4</sup> Weighed against this detailed account, the Court found LoriAnn’s testimony that she could not recall any sort of discussion with Lavern prior to the formation of the Dynasty Trusts much less convincing.

Despite Lavern’s discussion with LoriAnn regarding the Dynasty Trusts, and having received millions of dollars in gifts from her parents, LoriAnn emphatically expressed frustration with her Dynasty Trust as early as 2012. In an email dated October 3, 2012, LoriAnn told her parents and Jeff “I do NOT want either the Dynasty Trust or the LP to receive my 1/3 of any further gifts.” (Exhibit U). LoriAnn stated further that she “was EXTREMELY OPPOSED to the whole Dynasty trust plan from the beginning,” but “didn’t raise any opposition, as [she] didn’t want to make waves.” (*Id.*). LoriAnn claimed the Dynasty Trust was a “sham,” stating “I have no heirs and no interest in this plan!” and asking Lavern “right here and now to undo it.” (*Id.*).

In an email dated October 4, 2012, LoriAnn further told her parents and Jeff:

Since I have begun venting, I may as well get it all out there...Now back to the Dynasty trust... We were told we could invest the principle in assets that could be used during our lifetimes and that we were entitled to annual distributions of a certain percentage of the annual income generated by that trust.

First, let’s discuss the ability to make investments. I can make investments in assets that I never really own if: (1) I get Leah’s permission (which is nothing but

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<sup>4</sup> Lavern’s testimony is also supported by the drafter of the Dynasty Trusts, Pat Courtney, who testified that Lavern and Audrey intended the Dynasty Trusts to benefit grandchildren and succeeding generations, and not his children. (*Pat Courtney June 13, 2016 deposition, pp. 21, 30; December 7, 2016 deposition, p. 6*).

a hassle for Leah); (2) I put in place all the extra paperwork for proper titling of these assets at purchase (again, more hassle for Leah); and (3) everyone (e.g., Jeff, Dad, Aileen...) knows my business.

So, let's recap: I have received a "gift" that isn't really mine, that requires I inconvenience Leah annually for tax returns and every time I want to reinvest, and over which I have no say in its ultimate disposition upon my death. Gee, thanks....

[Jeff] [y]our goal is to attempt to control how I spend/invest in such a way that the majority of "gifts" I receive from M&D go to subsequent generations. My goal is to have some say on how I spend/invest without someone constantly looking over my shoulder AND to bequeath my assets to the Busse Foundation.

Somewhere along the line, **you (Dad and Jeff) have decided that my 1/3 of the maximum gift exclusion is somehow wasted if it is given directly to me.**

Anyone feeling like chopped liver? You better believe it.

(Exhibit V (emphasis in original)).

In an email dated October 4, 2012, Jeff told LoriAnn:

The Dynasty Trust was drafted as broadly and flexibly as possible, such that the Trust can invest in assets for your 'use,' while still maintaining the creditor protections and multigenerational tax savings benefits of holding the assets in trust...

You and Leah (and no one else) have complete control of your Dynasty Trust. The two of you could distribute all the assets from it to yourself tomorrow, if desired...

The Dynasty Trust structure (with all the "flexibilities" previously described) provided our generation with access to significantly greater assets, much sooner than previously planned, with absolutely no conditions or controls other than communication of a suggested strategy and a hope that our generation would be good stewards of the assets entrusted to them....

A couple of other points:

- 1) Much of the planning I suggest (and work I do, including BI) includes attempts to maximize value of the 'overall' family picture. The statistics tell us that a large percentage of wealth is 'lost' by the second generation (the current grandchildren), and an alarmingly large percentage by the third generation. This has contributed to my desire to 'protect' assets, especially for subsequent generations, inside partnerships and trusts. I assumed that we were all on the same page in that it generally makes sense for 'our generation' to prioritize and 'use up'

assets first that will be included in our estates. Those assets included in your estate include your personally-owned assets and your entire grantor trust. Utilizing this ‘strategy’, Dynasty Trust assets should generally be ‘consumed’ last...

- 5) Mom and dad ‘allocated’ their estate tax exemption and their generation skipping tax exemption to the transfers made to the Dynasty Trust(s). If you dissolve your Dynasty Trust, their allocation of the generation skipping exemption (but not the estate tax exemption) will have been wasted. Given my understanding of your estate plan, the net effect of distributing assets out of the Dynasty Trust is that more of your assets will go directly to the Foundation (at the second death) vs. assets that could have remained untaxed (by the estate tax system) for four or five generations of family members before ultimately going to the Foundation.

I confess that I believe non-taxable transfers to family members are more valuable than estate transfers to the Foundation, as long as some type of assurance is received that all involved understand that the ‘principal’ is to eventually go to the foundation. This is because individual transfers may allow for an income tax deduction for foundation contributions made during that individual’s lifetime – which are more valuable than estate foundation gifts.

(Exhibit 2500).

LoriAnn sent Jeff a follow-up email on October 4, 2012 stating:

Thank you for taking the time to explain this to me...It was my understanding that I could NOT distribute any Dynasty trust assets to myself, only buy/hold in the name of the trust to utilize during my lifetime...

Quite honestly, just knowing I do have the ability to distribute—and therefore, have some sense of control—makes me feel 100% better about the entire situation...

Please know that I have absolutely no intention to dissolve my Dynasty trust, thereby wasting my portion of M&D’s gift exclusion. I can’t imagine any scenario, except one related to my health and only then as a last resort, under which I will ever distribute any of those assets to myself. I certainly do not need them to be liquid at this time.

(Exhibit 2500).

While the above emails were not provided to Kenney before her decision to replace the Trustees of LoriAnn’s Dynasty Trust, they certainly were provided to Jeff and Lavern and likely

contributed to Jeff and Lavern's concern, which they did communicate to Kenney that LoriAnn did support the purposes of the Dynasty Trust.

In November 2012, Jeff, acting as trustee of the Grantor Trusts, distributed the BI voting stock in the Grantor Trusts to the Grantor Trusts' respective beneficiaries under the mistaken belief that he had an effective stock option that would allow him to retain control of BI. As a consequence of Jeff distributing the BI voting stock to the Grantor Trusts' respective beneficiaries, LoriAnn, Lisa, and Lisa's daughters held enough BI voting stock that, if voted together, allowed for majority control of BI. In 2013 LoriAnn and Lisa refused requests from Lavern and Jeff to execute a new stock option that would allow Jeff to regain control of BI and rectify the mistaken transfer of control over BI. Instead, LoriAnn and Lisa sent Lavern, Audrey, and Jeff a series of conditions upon which they would return majority voting control of BI to Jeff. LoriAnn and Lisa's conditions consisted of restructuring Lavern and Audrey's estate plan and restructuring various family entities. Thereafter, on August 18, 2014, LoriAnn and Lisa denied their father a seat on the board of directors of BI, the very company Lavern had built and gifted to his children and which had generated so much of the family's wealth. On August 28, 2014, LoriAnn and Lisa refused to elect Lavern to fill what was believed to be a vacant management position with BFA, a company that was the general partner and manager of a number of limited liability partnerships. Notwithstanding, Lavern and Audrey continued to make gifts and special distributions in Plaintiffs' favor until Plaintiffs initiated this lawsuit, which lends further support to Lavern's credible testimony that he did not ask Kenney to replace the Trustees to enact retribution against LoriAnn and Lisa.

In an effort to resolve their disputes, LoriAnn, Lisa, Jeff, Lavern and Audrey attended a settlement conference on August 27, 2014. Stan Thompson attended as attorney for LoriAnn and

Lisa. William McCartan, of the Bradley & Riley law firm, attended as attorney for Lavern and Audrey. Kenney also attended the settlement conference and sat in the settlement room during the plenary session. The settlement conference was unsuccessful.

Kenney testified that at the settlement conference, LoriAnn and Lisa made clear they wanted to have independent management of their assets. Kenney, Bill McCartan, Lavern and Jeff all testified that at the August 27, 2014 conference LoriAnn requested to liquidate and distribute the Dynasty Trusts' underlying assets—AB BI and BFLP. These witnesses further testified LoriAnn made these requests while stressing the need for further distributions to be made directly to both LoriAnn and Lisa. All four of these witnesses also testified they were concerned, based upon LoriAnn's comments, that she would liquidate and distribute the assets of her Dynasty Trust directly to herself if given the opportunity. Lavern testified he "certainly did not want that to happen." Lavern explained, "I had put that into the Dynasty trust to be illiquid asset, I had put that in there at a considerable discount, it was to be for future generations and I did not want that turned into cash where they could spend it."

Plaintiffs claim Kenney drew incorrect inferences from LoriAnn's good-faith settlement proposals. LoriAnn testified that she did not "want" BFLP and AB BI fully liquidated, but had suggested it as a "viable alternative" to her initial proposal that her and Lisa be appointed as BFA managers. Both Jeff and Kenney testified that this "alternative proposal" was in effect the same as the first option since, as controlling managers of BFA, LoriAnn and Lisa could have liquidated BFLP and AB BI. Kenney convincingly testified that the alternative proposal of BFA control was "an alternative, yes, with the same result." Jeff testified that giving LoriAnn and Lisa control of BFLP and AB BI through BFA or liquidating the limited partnerships "were one and the same as far as I was concerned."

Plaintiffs also claim that there was no risk that LoriAnn and her cousin, Leah Homeister, would liquidate and distribute the assets of the LoriAnn Dynasty Trust. Plaintiffs emphasize that distribution of BFLP and AB BI is not equivalent to distribution of the Dynasty Trusts. Kenney and McCartan agree that LoriAnn never suggested dissolving her Dynasty Trust or distributing the assets from her Dynasty Trust at the August 27, 2014 conference. Kenney admits that LoriAnn has never asked for any distribution of any kind from her Dynasty Trust, a request that must be made in writing to the Independent Trustee. Kenney also admits that she was not aware of any malfeasance on the part of Leah Homeister, the Independent Trustee, who would have had to approve any distribution request.

Although the August 27, 2014 settlement conference was unsuccessful, the parties continued to exchange settlement communications through their counsel. Kenney met with Jeff and Lavern both before and after the August 27, 2014 settlement conference. During these meetings, Kenney acknowledged Jeff and Lavern were disappointed that LoriAnn and Lisa denied Lavern a seat on the BI Board of Directors. Lavern and Jeff provided Kenney a transcript of the BI Board meeting wherein LoriAnn and Lisa denied Lavern a seat on the BI Board of Directors. (Exhibit F). In addition, Kenney learned during these meetings that LoriAnn and Lisa refused to return voting control of BI to Jeff even though their parents wanted Jeff to have voting control. Kenney also learned LoriAnn and Lisa refused to elect Lavern to fill what was believed to be a vacant management position with BFA. During these meetings, Jeff or Lavern told Kenney that they believe Plaintiffs' Dynasty Trusts may not hold fully vested voting interests in BFLP or AB BI, but Kenney "did not give much credence to that argument." Lavern and Jeff also informed Kenney that LoriAnn wanted greater control over the family entities. Lavern also expressed concerns that LoriAnn did not want to grow assets for future generations and posed a

threat to the multigenerational purpose of the Dynasty Trusts. Lavern told Kenney that he wanted to ensure assets are grown for future generations and the way he envisioned that occurring was having Jeff in control.

Prior to replacing the Trustees of the LoriAnn Dynasty Trust, Kenney testified she also consulted with her law partner, Patrick Courtney, the trust drafter, “more than once.” McCartan testified that he, Kenney and Courtney “spent a good bit of time talking...about the various family entities and the various trusts that had been established by Lavern and Audrey and the general estate plan that was in place to address their assets.” Following these various meetings and the August 27, 2014 settlement conference, Kenney testified she became concerned about LoriAnn as the Investment Trustee and Leah as the Independent Trustee, in part, because of the settlement proposal LoriAnn made to distribute or liquidate BFLP and AB BI. Kenney testified she was concerned because LoriAnn’s settlement proposal would have placed liquid assets into the Dynasty Trust that could have been distributed to LoriAnn, which was contrary to Lavern’s estate plan and the multigenerational purpose of the Dynasty Trust.

The Court found Maureen Kenney to be an extremely trustworthy and credible witness. She answered questions from both her counsel and Plaintiffs’ counsel in an equally calm, professional and forthright manner, without equivocation and with good recollection of the facts. The applicable law to be used to analyze Kenney’s actions will be discussed below. However, the Court wishes to note at this juncture that Ms. Kenney did not strike the Court as one likely to act in bad faith, with dishonesty or purposeful obliviousness to known facts.

At trial, Lavern credibly testified about the above-described events and his resulting fear that LoriAnn was “trying to destroy the plan” he had for his children and future generations. After all of the above events including LoriAnn and Lisa’s refusal to return the voting stock of

BI, LoriAnn and Lisa denying Lavern a seat on the BI Board of Directors and their refusal to elect Lavern to fill what was believed to be a vacant BFA manager position, Lavern asked Kenney to replace the Trustees of LoriAnn's Dynasty Trust. Lavern specifically requested Kenney to appoint Jeff as the successor Investment Trustee of LoriAnn's Dynasty Trust. Lavern explained that he asked Kenney to replace the trustees of the LoriAnn Dynasty Trust "because I was afraid [LoriAnn] was trying to destroy the plan that I had for her, Lisa, Jeff and further generations" concerning the Dynasty Trusts. Kenney testified it "was very important" to her that Lavern wanted to replace the Trustees of the LoriAnn Dynasty Trust because she had a duty as Trust Protector "to ensure that the grantor's intent was carried out" and this is a unique case where the grantor is alive and able to articulate "not only his purpose but his wishes."

Kenney testified Lavern also asked her to replace the trustees of Lisa's Dynasty Trust and to amend LoriAnn's special power of appointment under the LoriAnn Dynasty Trust to require LoriAnn to appoint all of the assets in her Dynasty Trust to Lisa's daughters and Jeff's daughters in equal shares. Kenney declined both of these requests. Kenney testified she did not replace the trustees of Lisa's Dynasty Trust because it appeared to her that Lisa, whose children were ultimate beneficiaries of the Trust, was not as adamant as LoriAnn that assets be liquidated and, accordingly, did not pose the same risk to the multigenerational purpose of the Dynasty Trusts as LoriAnn. Kenney testified she did not limit LoriAnn's special power of appointment under the LoriAnn Dynasty Trust because LoriAnn's special power of appointment is limited to Lavern's descendants, which promotes the multigenerational purpose of the Trust, and because limiting LoriAnn's special power of appointment could create potential estate tax inclusion issues.

On September 24, 2014, Jeff sent an email to Kenny detailing that Lavern wanted LoriAnn Busse and Leah Homeister removed as trustees of the LoriAnn Dynasty Trust, and

respectively replaced with Jeff Busse and Todd Reuscher, to which Lavern personally agreed in a separate email. (Exhibit 2512). On October 1, 2014, Jeff sent Kenney an email asking her to accomplish the trustee replacements prior to Lavern and Audrey's upcoming trip to Arizona. (Exhibit 2512). On October 3, 2014, Kenney removed LoriAnn as the Investment Trustee of the LoriAnn Dynasty Trust and appointed Jeff as the successor Investment Trustee of the LoriAnn Dynasty Trust. (Exhibit 65, p. 4). On October 6, 2014, Jeff signed an Acceptance of Appointment as Successor Investment Trustee. (Exhibit 65, p. 5). Also on October 6, 2014, Kenney removed Leah as the Independent Trustee of the LoriAnn Dynasty Trust and appointed Todd Reuscher as the successor Independent Trustee of the LoriAnn Dynasty Trust. (Exhibit 65, p. 2). On October 8, 2014, Todd Reuscher signed an Acceptance of Appointment as Successor Independent Trustee. (Exhibit 65, p. 3). On that same day, Jeff sent an email to LoriAnn, Leah Homeister, and Lavern, copying Kenney, which attached the Trustee changes. This was the first time LoriAnn was informed of Kenney's decision to replace the Trustees of the LoriAnn Dynasty Trust.

Prior to replacing the Trustees of the LoriAnn Dynasty Trust, Kenney did not communicate with LoriAnn, Leah, or LoriAnn's counsel to gain any additional information prior to her actions or to advise LoriAnn's counsel of her planned actions. Kenney did not correspond with LoriAnn in any way regarding her performance as Investment Trustee or the prospect of removing her as Investment Trustee. Kenney did not communicate with LoriAnn regarding Leah's performance or potential removal in any way prior to her removal. Kenney did not correspond with Leah in any way prior to removing her. Kenney did not talk to Todd Reuscher, the replacement Independent Trustee, and she allowed Jeff to coordinate Todd's execution of the

Acceptance of Appointment as Successor Independent Trustee. Kenney did not interview any corporate trustees for consideration to be the Investment Trustee or the Independent Trustee.

Kenney testified she removed LoriAnn as the Investment Trustee of the LoriAnn Dynasty Trust because she was concerned LoriAnn would liquidate and distributed the assets of the Trust directly to herself if given the opportunity. Kenney testified that she understood the Independent Trustee should be replaced once the Investment Trustee was replaced, because the Investment and Independent Trustees need to have a good working relationship, and she understood that Todd Reuscher would have a good working relationship with Jeff.

Jeff, as the Investment Trustee of the LoriAnn Dynasty Trust, is able to vote any interest the LoriAnn Dynasty Trust holds. (Exhibit B, Article IV, A.5). At trial, Kenney acknowledged that replacing LoriAnn with Jeff as the Investment Trustee of the LoriAnn Dynasty Trust transferred majority control of the limited partnership voting interest in BFLP and AB BI from LoriAnn and Lisa to Jeff. However, Kenney credibly testified that she was unaware appointing Jeff as the successor Investment Trustee of the LoriAnn Dynasty Trust would transfer majority control of BFLP at the time she replaced the Trustees. Kenney acknowledged that if BFA is dissolved or cannot serve as General Partner of BFLP, the BFLP Limited Partners may elect a successor General Partner by a simple majority. Kenney testified that the Investment Trustee's ability to vote the limited partnership interests held in the LoriAnn Dynasty Trust was not "a primary focus" in her decision to replace the Trustees of the LoriAnn Dynasty Trust because BFA serves as the General Partner of BFLP and AB BI and "the limited partnership interest themselves had very little...voting power."

Kenney's expert, Wayne Reames, testified that the potential transfer of majority control of the limited partnership voting interests in BFLP and AB BI would have been a relevant factor

his decision-making as Trust Protector. Mr. Reames testified further that if Kenney replaced the Trustees of the LoriAnn Dynasty Trust to prevent distributions contrary to the purpose of the Trust, Kenney could have simply removed Leah and appointed a successor Independent Trustee that was not a friend of LoriAnn's to accomplish the same result, because the Independent Trustee controls distributions under the trust. Mr. Reames testified that a Trust Protector can "act in a way consistent with their duties that may nonetheless be prejudicial to the interest of a particular beneficiary." Mr. Reames testified further that he was unaware of any facts indicating Kenney acted in bad faith, and it was evident to the Court from Mr. Reames testimony that he had extensively reviewed the entire record in this case.

Plaintiffs' expert, Robert Downer, testified that Kenney's decision to remove LoriAnn as the Investment Trustee of the LoriAnn Dynasty Trust, in and of itself, was made in good faith. According to Mr. Downer, however, Kenney's decision to replace LoriAnn with Jeff as the Investment Trustee of the LoriAnn Dynasty Trust, when Kenney was aware of their adversarial relationship, breached the fiduciary duties Kenney owed LoriAnn as the "primary beneficiary" of the LoriAnn Dynasty Trust.

## **B. Procedural Background**

Plaintiffs' Amended Petition, filed on April 29, 2015, alleges Kenney breached a fiduciary duty to LoriAnn by removing and subsequently replacing the Investment Trustee and Independent Trustee of the LoriAnn Dynasty Trust. The Amended Petition also alleges Kenney, as Trust Protector, had a conflict of interest in acting as the Trust Protector and should be removed as Trust Protector for both the LoriAnn Dynasty Trust and Lisa Dynasty Trust. Plaintiffs' Amended Petition seeks an order from the Court that Kenney breached fiduciary duties owed to LoriAnn, removing Kenney as Trust Protector of the Lisa Dynasty Trust and

LoriAnn Dynasty Trust, remove the current Investment and Independent Trustees of the LoriAnn Dynasty Trust—Jeff Busse and Todd Reuscher—and reinstatement of the initial Investment Trustee and Independent Trustee, LoriAnn Busse and Leah Hofmeister. Parallel to this equity matter, Plaintiffs filed a separate law matter against Jeff and Lavern Busse relating to actions taken through the various family entities discussed above, which is Linn County Case No. LACV083022.

Plaintiffs moved for summary judgment on the narrow question of whether Kenney owed Plaintiffs fiduciary duties as Trust Protector. Kenney moved for summary judgment arguing that, as a matter of law, she did not breach her fiduciary duties to Plaintiffs and that the Dynasty Trusts' exculpatory provisions barred Plaintiffs' suit because Kenney did not act in bad faith. Kenney also moved for summary judgment arguing she does not have a conflict of interest in acting as Trust Protector of the Dynasty Trusts because LoriAnn and Lisa are not and never have been the clients of Kenney or her law firm, and therefore the attorney conflict rules do not apply to Kenney's decisions as Trust Protector. The Court granted Plaintiffs' Motion, holding Kenney owed fiduciary duties to Plaintiffs as beneficiaries of the Dynasty Trusts. The Court Granted in Part and Denied in Part Kenney's Motion for Summary Judgment. The Court denied Kenney's Motion for Summary Judgment in Part because:

LoriAnn and Lisa identify specific facts to support an inference that Kenney replaced the Trustees of the LoriAnn Dynasty Trust for an improper purpose; namely, to effectuate Jeff and Lavern's desire to maintain or gain control of the limited partnership voting interests in other family entities and to enact retribution against LoriAnn and Lisa.

Nov. 17, 2016 Combined Summary Judgment Ruling p. 35. A bench trial was held on February 9 and February 10, 2017. The Court granted Kenney's Motion for Summary Judgment on the conflict of interest issue.

## CONCLUSIONS OF LAW

There are two issues before the Court: (1) whether Defendant Maureen Kenney breached fiduciary duties owing to LoriAnn when she removed Trustees of the LoriAnn Dynasty Trust and appointed successor Trustees in October 2014; and (2) whether LoriAnn and Lisa are entitled to their requested relief—unwinding Kenney’s Trustee removal and replacement actions for LoriAnn’s Dynasty Trust and removal of Kenney as the Trust Protector for LoriAnn’s Dynasty Trust and Lisa’s Dynasty Trust.

### I. Legal Standard Governing Kenney’s Exercise of Discretion

In the summary judgment phase of the case, the Court found Kenney’s liability as Trust Protector is limited “to actions undertaken in bad faith or in disregard of the purposes of the LoriAnn Dynasty Trust.” (Court’s November 17, 2016 Ruling, p. 26). The Court defined “bad faith” as follows:

The Court finds bad faith, in the context of a fiduciary, is measured by a subjective standard, but does not require a sinister motive or high degree of moral guilt. As recently noted by the Supreme Court of Iowa, “[i]n the context of fiduciary duty, bad faith has been described as including ‘purposeful obliviousness of the known facts suggesting impropriety.’” *De Stefano*, 879 N.W.2d at 188 (quoting *N.J. Title Ins. Co. v. Caputo*, 163 N.J. 143, 748 A.2d 507, 514 (2000)). Courts interpreting the bad faith standard in the fiduciary context “have referred to dishonesty as a guiding principle” but “have not infused the term with a high degree of corruption or evil motive.” *N.J. Title Ins. Co.*, 163 N.J. at 154 (citing *Macon v. Edgcomb*, 274 Ill.App.3d 432, 211 Ill.Dec. 136, 654 N.E.2d 598 (1995); *Trenton Trust Co. v. Western Sur. Co.*, 599 S.W.2d 481 (Mo.1980); *Guild v. First Nat. Bank*, 92 Nev. 478, 553 P.2d 955 (1976); *Manfredi v. Dauphin Deposit Bank*, 697 A.2d 1025 (Pa.Super.1997); *Research-Planning, Inc. v. Bank of Utah*, 690 P.2d 1130 (Utah 1984)). Instead, in the fiduciary context, “courts interpreting the bad faith standard characterize ‘dishonesty’ as a way of distinguishing bad faith from mere negligence, and view it as evidencing purposeful conduct.” *Id.* (citation omitted). Thus, bad faith, in the fiduciary context “is not established by negligent or careless conduct or by vague suspicion.” *Id.* at 155. However, intentional or deliberate acts alone may establish bad faith, such as “a deliberate desire to evade knowledge.” *Id.* at 156.

(Court's November 17, 2016 Ruling, p. 28).

Plaintiffs, in their post-trial brief, assert that if the Court finds Kenney replaced the Trustees of the LoriAnn Dynasty Trust with gross negligence or reckless indifference, but not bad faith, the Court could impose liability against Kenney by removing her as Trust Protector under Iowa Code section 633A.4505. The Court disagrees. The Court concludes the additional language concerning prohibited conduct in section 633A.4505 creates a distinction without a difference under Plaintiff's theory and the evidence adduced at trial. LoriAnn and Lisa do not explain how Kenney replacing the Trustees of the LoriAnn Dynasty Trust to effectuate Jeff and Lavern's desires to maintain or gain control of the limited partnership voting interests in other family entities and to enact retribution against them could satisfy only one of the standards articulated in section 633A.4505. Furthermore, because the LoriAnn Dynasty Trust instrument provides "any exercise or non-exercise of powers and discretions granted to the Trust Protector shall be in the sole and absolute discretion of the Trust Protector..." (Article V, J.8), the Court cannot remove Kenney for exercising her absolute discretion as Trust Protector unless she acted in bad faith or in disregard of the purposes of the LoriAnn Dynasty Trust:

2. Notwithstanding the use of such terms as "absolute", "sole", or "uncontrolled" in the grant of discretion, a trustee shall act in accordance with fiduciary principles and shall not act in bad faith or in disregard of the purposes of the trust or the power. Absent an abuse of discretion, a trustee's exercise of discretion is not subject to control by a court.

IOWA CODE § 633A.4214(2) (2015).<sup>5</sup>

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<sup>5</sup> In the absence of Iowa common law regarding trust protectors and Iowa statutory law regarding trust protectors, the Iowa Trust Code is persuasive authority for the Court's analysis. *See* Restatement (Third) of Trusts § 64 Reporter's Notes Comments b through d: "Unfortunately, trust law in this country shows...negligible legal development of the protector concept..." and "It would be appropriate to treat a trust protector...who has broad, 'sole and uncontrolled' and 'binding' discretion as the common law of trusts and statutory law would treat a trustee holding a similarly extended discretion."

The two sentences of Iowa Code section 633A.4214(2), read together, confirm a trustee who is granted “sole” or “absolute” discretion under a trust remains a fiduciary, must still act in accordance with the purposes of the trust, and may not act in bad faith, but absent that conduct, the trustee “is not subject to control” of the court. As a result, Iowa courts “will not interfere with the administration of a trust based simply on a difference in judgment with respect to what should be done and who in particular should benefit from the trust.” *In re Clement Trust*, 679 N.W.2d 31, 39 (Iowa 2004) (citing *In re Clark*, 174 Iowa 449, 455, 154 N.W. 759, 760 (1915)). Because LoriAnn and Lisa’s requested relief is contingent upon the Court finding Kenney exercised her discretion in bad faith or in disregard of the purposes of the trust under Iowa Code section 633A.4214(2), the Court finds that it is appropriate to limit Kenney’s liability as Trust Protector to actions undertaken in bad faith or in disregard of the purposes of the LoriAnn Dynasty Trust.

In addition to considering whether Kenney acted in bad faith or in disregard of the purposes of the LoriAnn Dynasty Trust to determine whether Kenney should be removed as Trust Protector, Plaintiffs suggest the Court separately consider whether Kenney “abused her discretion” to determine whether Jeff Busse and Todd Reuscher should be removed as Trustees of LoriAnn’s Dynasty Trust. With respect to abuse of discretion, Plaintiffs ask the Court to apply the six-factor test Iowa appellate courts have adopted for evaluation of a trustee’s exercise of discretion. Those six factors are:

- (1) the intended breadth of the trustee’s discretion under the trust instrument;
- (2) the purpose of the trust;
- (3) the nature of the power;
- (4) ‘the existence...of an external standard by which the reasonableness of the trustee’s conduct can be judged’ and the definiteness of that standard;
- (5) ‘the motive of the trustee in exercising or refraining from exercising that power’; and
- (6) whether the trustee has an interest in conflict with the beneficiaries’ interest.

*Matter of the Helen R. Macmasters Trust*, No. 15-2142, 2016 WL 7395743, at \*2 (quoting *In re Clement Trust*, 679 N.W.2d 31, 39 (Iowa 2004)). The Court declines Plaintiffs’ invitation to separately consider whether Kenney “abused her discretion” under the six factors above to determine whether Jeff Busse and Todd Ruescher should be removed as Trustees of the LoriAnn Dynasty Trust. In *Macmasters Trust* and *Clement Trust*, the trustees were granted “broad discretion,” but the trustees were not granted “sole and absolute discretion” to exercise their trustee powers. Compare *Macmasters Trust*, 2016 WL 7395743 at \*3 (“we read the trust instrument to grant the trustee broad discretion...”) and *Clement Trust*, 679 N.W.2d at 39 (“the testator gave the trustees broad discretion in determining what ‘activities and programs’ would benefit the elderly in the designated geographical areas.”) with Exhibit B, Article V, J.8 (“any exercise or non-exercise of powers and discretions granted to the Trust Protector shall be in the sole and absolute discretion of the Trust Protector...”). As outlined above, the two sentences of Iowa Code section 633A.4214(2), read together, confirm a trustee who is granted “sole” or “absolute” discretion under a trust remains a fiduciary, must still act in accordance with the purposes of the trust, and may not act in bad faith, but absent that conduct, the trustee “is not subject to control” of the court. In other words, Iowa courts cannot review a trustee’s exercise of discretion when a trustee has been granted absolute discretion, unless the trustee acted in bad faith or in disregard to purposes of the trust. This interpretation of Iowa Code section 633A.4214(2) is reinforced by the Restatement (Third) of Trusts:

Comment *j* of Restatement Second, Trusts § 187 states that the settlor may manifest an intention ‘that the trustee’s judgment need not be exercised reasonably, even where there is a standard by which the reasonableness of the trustee’s conduct can be judged.’ The Comment continues: ‘This may be indicated by a provision in the trust instrument that the trustee shall have ‘absolute’ or ‘unlimited’ or ‘uncontrolled’ discretion’—language that is ‘ordinarily construed as merely dispensing with the standard of reasonableness’ so that ‘the mere fact that the trustee has acted beyond the bounds of a reasonable judgment is not a

sufficient ground for interposition by the court.’ The Comment adds, however: ‘[T]he court will interfere if the trustee acts in a state of mind not contemplated by the settlor. Thus, the trustee will not be permitted to act dishonestly, or from some motive other than the accomplishment of the purposes of the trust, or ordinarily to act arbitrarily without an exercise of his judgment.’ *Id.*

*Restatement (Third) of Trusts* § 87 cmt. d.

Moreover, Kenney’s obligations under the Dynasty Trusts are distinct from the obligations of the trustees in *Macmasters Trust* and *Clement Trust*. Here, Kenney’s obligations are derived from her role as Trust Protector and the type of trust that was created. With respect to Kenney’s duties as Trust Protector, the Court previously held, “Kenney had multifaceted duties, and was therefore entitled to weigh the competing interests of current and future trust beneficiaries and to take actions within her power to protect the intent and purposes of Lavern and Audrey in establishing the Dynasty Trusts.” (November 17, 2016 Ruling, p. 32). In addition, the LoriAnn Dynasty Trust specifically provides the following exculpatory clause for the Trust Protector:

Absent bad faith, the Trust Protector, in that capacity, is hereby exonerated from any and all liability for the acts or omissions of any fiduciary or any beneficiary hereunder or arising from any exercise or nonexercise of the powers and discretions conferred under this Article.

(Exhibit B, Article V, J.8). Based on the language of Iowa Code section 663A.4212, the distinctions between the present case and the case law cited by Plaintiffs, and Article V, Paragraph J.8 of the LoriAnn Dynasty Trust instrument, the Court finds Kenney’s exercise of discretion to replace the Trustees of the LoriAnn Dynasty Trust is not subject to the Court’s

control unless Kenney acted in bad faith or in disregard of the purposes of the LoriAnn Dynasty Trust.<sup>6</sup>

## II. Kenney's Exercise of Discretion

Plaintiffs have no direct knowledge or evidence relating to Kenney's motive for replacing the Trustees of the LoriAnn Dynasty Trust. Instead, Plaintiffs point to reasons why the Court should discredit Kenney's proffered reasons for replacing the Trustees of the LoriAnn Dynasty Trust as pretext for harming Plaintiffs, especially LoriAnn, to benefit Jeff and Lavern. According to Plaintiffs, three reasons support a finding Kenney acted in bad faith by removing LoriAnn Busse and Leah Homeister as Trustees of the LoriAnn Dynasty Trust and respectively replacing them with Jeff Busse and Todd Reuscher. First, Plaintiffs allege the factual circumstances and timing surrounding the removal and replacement raise an inference of impropriety. Second, Plaintiffs allege the testimony supports a conclusion that Kenney understood the ongoing family dispute related to control and management over different family entities, that Jeff and Lavern were considering steps detrimental to LoriAnn and Lisa as a result of the dispute, and that her actions as Trust Protector could impact control over Busse family entities. Third, Plaintiffs allege Kenney's intentional disregard for—and refusal to learn—the full set of facts relevant to her decision-making, reveals Kenney acted in bad faith, because had Kenney taken the time to learn the full set of facts, she would not have been able to justify removing LoriAnn and Leah as Trustees of the LoriAnn Dynasty Trust.

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<sup>6</sup> The Court notes that if it were to consider the six factors enunciated in *Macmasters Trust* and *Clement Trust* to determine whether Jeff Busse and Todd Reuscher should be removed as Trustees of the LoriAnn Dynasty Trust, the Court would reach the same conclusion: Kenney's conduct as Trust Protector does not warrant her removal as Trust Protector and it would be inappropriate to reverse her decision to appoint Jeff Busse and Todd Reuscher as successor Trustees of the LoriAnn Dynasty Trust.

While Plaintiffs raise a number of objective facts they suggest point to an inference Kenney acted in bad faith, having considered all the evidence and the credibility of the witnesses, the Court finds Kenney was acting to preserve Lavern's intent in establishing the LoriAnn Dynasty Trust and the class of trust beneficiaries as a whole. Specifically, the Court finds Kenney reasonably believed LoriAnn posed a threat to the multigenerational purpose of her Dynasty Trust because she did not want to grow assets for future generations and there was a significant risk she would liquidate and distribute the assets of her Dynasty Trust directly to herself if given the opportunity. The Court also finds, based on the credible testimony of Kenney and Lavern, that there were no ulterior motives in replacing the Trustees of the LoriAnn Dynasty Trust, including either retribution against LoriAnn and Lisa or desires to effect a change in control. At its core, this case boils down to whether the Court believed Maureen Kenney's proffered reasons for her actions. Simply put, the Court believed them. Accordingly, the Court does not conclude Kenney acted in bad faith or in disregard of the purposes of the LoriAnn Dynasty Trust. For reasons discussed below, the Court concludes Kenney's removal as Trust Protector is unwarranted and that it would be inappropriate to reverse her decision to appoint Jeff Busse and Todd Reuscher as successor Trustees of the LoriAnn Dynasty Trust.

**A. Factual Circumstances and Timing Surrounding the Removal and Replacement of Trustees**

First, Plaintiffs allege the factual circumstances and timing surrounding the removal and replacement of the LoriAnn Dynasty Trust's Trustees raise an inference of impropriety. According to Plaintiffs, Kenney did not act as a neutral third party, but rather with the mindset of an advocate and as an attorney for Jeff and Lavern in deciding to replace the Trustees of the LoriAnn Dynasty Trust. Plaintiffs note that Kenney testified she first became involved in the Busse family dispute on August 19, 2014, when Jeff called her seeking advice, including issues

relating to Jeff's decision to distribute BI voting stock to the Grantor Trusts' respective beneficiaries. Kenney testified she did not read the Dynasty Trust documents prior to August 2014, and she was not involved in the drafting of the Dynasty Trust documents. Kenney testified the first time she spoke with Lavern or Audrey was in August 2014. Accordingly, all of Kenney's knowledge regarding the Dynasty Trusts was gained in the midst of an ongoing family dispute. Kenney admits the only interaction she ever had with LoriAnn, Lisa, or their attorney prior to replacing the Trustees of the LoriAnn Dynasty Trust, was at the August 27, 2014 settlement conference. Plaintiffs note Kenney did not communicate with LoriAnn, Leah, or LoriAnn's counsel to gain any additional information following the August 27, 2014 settlement conference prior to replacing the Trustees of the LoriAnn Dynasty Trust. Plaintiffs note further that Jeff was involved in Kenney's process of removing the Trustees, and Kenney replaced the Trustees of the LoriAnn Dynasty Trust based on the instructions of Jeff, as confirmed by Lavern. Finally, Plaintiffs note Kenney had been involved in the family dispute for less than two months when she replaced the Trustees of the LoriAnn Dynasty Trust.

Although all of Kenney's knowledge regarding the Dynasty Trusts was gained in the midst of an ongoing family dispute, the Court finds Kenney was capable of making a neutral and informed decision to replace the Trustees of the LoriAnn Dynasty Trust. Kenney gave the following testimony at trial:

Q. Is it fair to say that you went into that August 27, 2014, meeting with the assumption that LoriAnn wanted control of everything?

A. I don't know if that's—certainly that is what I heard at the August 19 meeting but I would hope that I would be able to go in with an open mind as to that.

Q. Did you go into that meeting assuming that LoriAnn didn't want to preserve assets for future generations?

A. No, I did not go in with that assumption.

In addition, Kenney was informed concerning the general background of Lavern and Audrey's estate plan and was generally familiar with the other family entities and estate planning vehicles Lavern and Audrey had established when she replaced the Trustees of the LoriAnn Dynasty Trust. Prior to replacing the Trustees of the LoriAnn Dynasty Trust, Kenney had several meetings with Lavern, a Settlor of the LoriAnn Dynasty Trust and family patriarch.<sup>7</sup> Kenney also met with Patrick Courtney, the drafter of the Dynasty Trust instruments and long-time estate planning attorney for Lavern and Audrey. Kenney also relied upon numerous documents and records including the materials forwarded to her in advance of the August 27, 2014 settlement conference that reflect the detailed interrelationship between the various Busse family entities. (See Exhibits E, G, H, J, K, M, N, O, P, Q, T). Prior to Kenney's decision to replace the Trustees of the LoriAnn Dynasty Trust, Kenney had also heard LoriAnn's settlement proposal to liquidate and distribute BFLP and AB BI. According to Kenney, LoriAnn's settlement proposal was very concerning, not only because it was inconsistent with Kenney's understanding of the purposes of the Trust but especially since LoriAnn and Lisa had recently taken steps to exclude Lavern from other family entities and had recently refused to return voting control of BI to Jeff and allow Jeff

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<sup>7</sup> Plaintiffs' expert, Mr. Downer's testimony that the terms of the Dynasty Trust should "stand on its own in effect to be a complete articulation of the objectives of the grantor in establishing it and the terms and conditions under which the trust will be managed, administered and eventually terminated" is unpersuasive. Iowa Code section 633A.1102(17) provides: "'Term' or 'terms', when used in relation to a trust, means the manifestation of the settlor's intent regarding a trust's provisions at the time of the trust's creation or amendment. 'Term' includes those concepts expressed directly in writing, *as well as* those inferred from constructional preferences or rules, or by *other proof admissible under the rules of evidence*." IOWA CODE § 633A.1002(17) (2015) (emphasis added). Kenney's expert, Mr. Reames testified that in construing the intent of the settlor it is important to look at information outside of the trust document itself, which is consistent with well-settled Iowa law that the trust settlor's intent is "polestar." See, e.g., *Matter of Trust of Killian*, 459 N.W.2d 497, 499 (Iowa 1990). Furthermore, the LoriAnn Dynasty Trust instructs Kenney to consult with the Settlor's known estate planning advisers in determining whether and to what extent to exercise her powers as Trust Protector. (Exhibit B, Article V, J.8). The LoriAnn Dynasty Trust instructs the Trust Protector to consult with the Settlor's known estate planning advisers because they are commonly in the best position to appreciate the purposes of the trust and understand the intent of the grantors. If Kenney was instructed to consult with the Settlor's known estate planning advisers, it was certainly reasonable for Kenney to consult directly with a Settlor while alive and competent to determine whether and to what extent to exercise her rights and powers as Trust Protector.

to resume management of BI as Lavern intended. The Court finds Kenney's failure to communicate with LoriAnn, Leah, or LoriAnn's counsel to gain any additional information prior to replacing the Trustees of the LoriAnn Dynasty Trust is overshadowed by LoriAnn and Lisa's clear disregard for Lavern's business and estate plans in other family entities. As Kenney's counsel succinctly stated in the summary judgment phase of this case:

If LoriAnn thought so little of her father's wishes that she refused to allow him a voice in the company he created and refused to return control of the company to the son that her father selected to run it, why should anyone, including Kenney, have any confidence that she would honor his wishes concerning the Dynasty Trusts?

(Kenney's 09/12/16 Reply Brief in Support of her Motion for Summary Judgment, p. 18).

Finally, the timing of Kenney's decision to replace the Trustees of the LoriAnn Dynasty Trust does not constitute bad faith. Kenney had no power to veto a Trustee's proposed action over the management or administration of the trust. Kenney's only power to nullify a perceived threat to the multigenerational purpose of the Dynasty Trust was to preemptively remove a Trustee. Kenney credibly testified she removed LoriAnn as the Investment Trustee of the LoriAnn Dynasty Trust because she was concerned LoriAnn would liquidate and distribute the assets of the Trust directly to herself if given the opportunity, contrary to her promises to Lavern and the multigenerational purpose of her Dynasty Trust. Kenney's expert, Mr. Reames, testified Kenney should not wait to remove a Trustee she "seriously doubts" will uphold the purposes of the Dynasty Trusts because Kenney has no power to unwind a distribution from the LoriAnn Dynasty Trust. Based on the foregoing, the Court finds the factual circumstances and timing of Kenney's actions do not establish Kenney acted in bad faith.

**B. Kenney's Proffered Justifications for Replacing the Trustees of the LoriAnn Dynasty Trust**

Next, Plaintiffs contend Kenney's proffered reasons for replacing the Trustees of the

LoriAnn Dynasty Trust are pretext for harming Plaintiffs, especially LoriAnn, to benefit Jeff and Lavern. In support of this contention, Plaintiffs allege the trial testimony does not support Kenney's concern that LoriAnn intended to liquidate and distribute her Dynasty Trust assets. Plaintiffs also allege Kenney was contacted as an attorney for Lavern and/or Jeff and that the focus of the representation was control over Busse family entities. The Court will address Plaintiffs' allegations in turn.

**i. Kenney's concerns regarding the LoriAnn Dynasty Trust's assets**

Plaintiffs allege the testimony at trial regarding the August 27, 2014 settlement conference is at odds with Kenney's asserted concerns for the Dynasty Trust. Plaintiffs note Kenney gave the following testimony at trial:

Q. LoriAnn never said at the settlement conference that she wanted to dissolve her Dynasty trust?

A. She did not say she wanted it dissolved.

Q. She did not say that she wanted to distribute principal from her Dynasty trust either, did she?

A. She did not specifically state that, I don't believe.

Q. I've read through your notes, I don't see any reference to dissolving the Dynasty trust in your notes?

A. There is—you are correct—with respect to actually dissolving the Dynasty trust. It was all about the distributions of assets down into the Dynasty trust where she was the trustee and would have management and control over them.

Plaintiffs emphasize that liquidation and distribution of BFLP and AB BI is not equivalent to distribution of the Dynasty Trusts. LoriAnn testified her settlement proposal was "not even close" to suggesting she would seek distributions from her Dynasty Trust. Plaintiffs also emphasize that it is undisputed LoriAnn proposed to liquidate and distribute BFLP and AB BI as an alternative to Plaintiffs being appointed as managers of BFA. Plaintiffs assert Kenney was

wrong to have assumed Plaintiffs wanted to serve as managers of BFA simply to dissolve BFLP and AB BI because Plaintiffs requested Lavern to continue managing BFLP's investment portfolio at the August 27, 2014 settlement conference. Plaintiffs note there would be no investment portfolio left for Lavern to manage if they dissolved BFLP.

However, Kenney, McCartan, Lavern and Jeff all testified LoriAnn requested the liquidation of AB BI and BFLP while stressing the need for further distributions to be made directly to both LoriAnn and Lisa. All four of these witnesses testified they were concerned, based upon LoriAnn's settlement proposal, that she would liquidate and distribute the assets of her Dynasty Trust directly to herself if given the opportunity. Kenney testified she "could think of no other reason" for LoriAnn's proposed liquidation and distribution. Kenney was "absolutely" concerned such action would imperil Lavern's "intent for the Dynasty trust which was multigenerational and not to have the assets liquidated but invested in assets that would grow overtime thereby increasing the exemption that they used increasing the benefit of that in passing more assets down to lower generations." As Trust Protector, Kenney was entitled to consider the Trust's purpose, as well as the settlor's intentions for the Trust, when determining whether a Trustee was acting contrary to the purpose of the Trust.

Lavern, the settlor of the LoriAnn Dynasty Trust, testified he remembered LoriAnn making statements at the August 27, 2014 settlement conference about liquidating and distributing AB BI and BFLP, and that he "certainly did not want that to happen." Lavern explained "I had put that into the Dynasty trust to be illiquid asset, I had put it there at a considerable discount, it was to be for future generations and I did not want that turned into cash where they could spend it." Lavern explained further that he asked Kenney to replace the Trustees of the LoriAnn Dynasty Trust "because I was afraid [LoriAnn] was trying to destroy the

plan that I had for her, Lisa, Jeff and further generations” concerning the Dynasty Trusts. Kenney’s decision was not based simply on what she heard at the August 27, 2014 settlement conference, but also on her conversations with Lavern and information she learned from other sources. Lavern gave detailed, compelling, and credible testimony about his purposes in establishing the Dynasty Trusts, LoriAnn’s earlier statements of how unhappy she was about the Dynasty Trust being set up, LoriAnn’s later promise to honor the purposes of the Trust, and his fear LoriAnn would betray those promises by seeking to liquidate and distribute the assets of the LoriAnn Dynasty Trust.

Plaintiffs also rely upon Jeff’s 2012 representations to LoriAnn that her Dynasty Trusts “was drafted as broadly and flexibly as possible” to allow for a variety of investments for her personal use. (Exhibit 2500). LoriAnn testified that her Dynasty Trust holding liquid assets was consistent with Jeff’s earlier statements that her Dynasty Trust can invest in assets for her personal use. LoriAnn testified she respected the multigenerational purposes of her Dynasty Trust and had no intention to seek distributions, but was comforted to know she could ask for distributions if necessary.

Jeff’s understanding of the Dynasty Trusts, however, does not establish Lavern intended the Dynasty Trusts to hold liquid assets. The parties’ testimony made clear that Lavern, and not Jeff, insisted the Dynasty Trusts hold illiquid assets. Before establishing the Dynasty Trusts, Lavern rejected Jeff’s initial suggestion of creating additional Grantor Trusts, and funding them with cash, because Lavern did not want to pay income tax on additional Grantor Trusts. Jeff then suggested that Lavern create Dynasty Trusts and put “a bunch of money” in the Dynasty Trusts, which would have permitted the personal investments Jeff discussed in his email to LoriAnn. With respect to this proposal, Lavern testified he

immediately squashed that also. I said, look, I want this to be illiquid funds that go in there and I want that thing to grow, I want it to be for future generations. As a matter of fact, I specifically said I do not want it to go to LoriAnn or Jeff or Lisa. It's supposed to go to generations that aren't even born yet.

Lavern testified he believed he had made his desires for the Dynasty Trusts clear to his children before the Dynasty Trusts were created and that was "definitely my intention."

When LoriAnn made statements at the August 27, 2014 settlement conference about liquidating and distributing AB BI and BFLP, Lavern testified he "certainly did not want that to happen." Lavern explained "I had put that into the Dynasty trust to be illiquid asset, I had put that in there at a considerable discount, it was to be for future generations and I did not want that turned into cash where they could spend it." Lavern then asked Kenney to replace the Independent Trustee and the Investment Trustee because "I was afraid [LoriAnn] was trying to destroy the plan that I had for her, Lisa, Jeff and further generations." Kenney testified she had arrived at the same conclusion and understood Lavern's concerns at the time he requested her to replace the Trustees of the LoriAnn Dynasty Trust. Kenney also testified she disagreed with the representations Jeff made to LoriAnn regarding the flexibility of her Dynasty Trust "because that was not the purpose [of the Dynasty Trusts] relayed to me by Lavern."

Additional witnesses who attended the August 27, 2014 settlement conference testified LoriAnn stated she wanted to liquidate the Dynasty Trusts' assets, which caused concerns that LoriAnn intended to distribute her Dynasty Trust assets directly to herself. Jeff testified LoriAnn's settlement proposal caused "significant concerns" for both him and his father. Jeff further testified Lavern was opposed to liquidating BFLP and AB BI. McCartan also recalled that at the August 27, 2014 settlement conference LoriAnn "wanted distributions out of [BFLP and AB BI] if not a complete liquidation of the two." LoriAnn's desire to liquidate BFLP and

AB BI was a concern McCartan shared and specifically identified in a letter to Plaintiffs' attorneys during the course of negotiations. (Exhibit BB).<sup>8</sup>

Plaintiffs' claim that there was no risk that LoriAnn and her cousin, Leah, would liquidate and distribute the assets of the LoriAnn Dynasty Trust, and therefore, Kenney did not need to replace the Trustees of the LoriAnn Dynasty Trust, overlooks the testimony of parties who attended the August 27, 2014 settlement conference and the broader point. LoriAnn did not simply propose liquidating and distributing BFLP and AB BI. LoriAnn proposed liquidating and distributing BFLP and AB BI while stressing the need for further distributions to be made directly to both herself and Lisa. LoriAnn also proposed liquidating and distributing BFLP and AB BI after she and Lisa had willfully defied Lavern's request to serve on the board of directors of BI, the very company Lavern had built, and after she and Lisa refused to return voting control of BI to allow Jeff to resume management of BI as Lavern intended. In addition, on the day following the settlement conference, August 28, 2014, LoriAnn and Lisa refused to elect Lavern to fill what was believed to be a vacant management position with BFA, a company that was the general partner and manager of a number of limited liability partnerships. In light of LoriAnn's request for greater distributions and her clear defiance towards Lavern's business and estate plans, the parties attending the settlement conference reasonably believed LoriAnn would liquidate and distribute the assets of her Dynasty Trust directly to herself if given the opportunity.

Plaintiffs contend that even if Kenney's concerns are accepted as reasonable understandings of LoriAnn's settlement proposal, those concerns do not justify removing

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<sup>8</sup> McCartan's December 3, 2014 letter noted that Kenney's removal was designed to resist Plaintiffs' efforts to "maximize their ability to raid Dynasty Trusts assets when that is so clearly contrary to Lavern's intent to establish a multigenerational family wealth preservation vehicle." And stated the removal was based on Kenney's "well-founded concerns about the designs of existing beneficiaries on the Dynasty Trust assets..." (Exhibit BB).

LoriAnn as the Investment Trustee of her Dynasty Trust. Plaintiffs note Kenney's expert, Mr. Reames testified that if Kenney replaced the Trustees of the LoriAnn Dynasty Trust to prevent distributions contrary to the purpose of the Trust, Kenney could have simply removed Leah and appointed a successor Independent Trustee that was not a friend of LoriAnn's to accomplish the same result, because the Independent Trustee controls distributions under the trust.

Although Plaintiffs argument in this regard has some merit, the fact that Kenney could perhaps in hindsight have replaced only the Investment Trustee and accomplished the desired objectives, it is not enough to demonstrate Kenney's decision to replace both Leah and LoriAnn was in bad faith. As outlined above, in light of LoriAnn's clear defiance towards Lavern's business and estate plans and her request for greater distributions, the parties attending the settlement conference reasonably believed LoriAnn would liquidate and distribute the assets of her Dynasty Trust directly to herself if given the opportunity. Lavern clearly and unequivocally testified distribution of the LoriAnn Dynasty Trust's assets would have been contrary to his purposes in establishing the Dynasty Trusts and LoriAnn's promise to honor those purposes. Kenney credibly testified she was concerned LoriAnn would attempt to destroy the plan Lavern established for LoriAnn and his lineal descendants by distributing the assets of her Dynasty Trust directly to herself if given the opportunity. LoriAnn testified Leah is her cousin and a close friend. While Kenney could have simply appointed a neutral party to serve as the Independent Trustee of the LoriAnn Dynasty Trust to prevent distributions contrary to the purpose of the Trust, the Court cannot conclude Kenney acted in bad faith by removing LoriAnn as the Investment Trustee of the LoriAnn Dynasty Trust when Kenney reasonably believed LoriAnn would sabotage the purpose of her Dynasty Trust if given the opportunity. By removing the root of her concern, Kenney ensured the multigenerational purpose of the LoriAnn Dynasty Trust

would be fulfilled. This conclusion is bolstered by Kenney's inability to unwind any improper distribution from the LoriAnn Dynasty Trust. This conclusion is also bolstered by Plaintiffs' expert, Mr. Downer, who agreed that Kenney's decision to remove LoriAnn as the Investment Trustee, in and of itself, did not constitute bad faith.

Plaintiffs also attack a justification Kenney provided for her decision to replace the Trustees of the LoriAnn Dynasty Trust for the first time at trial. Specifically, Kenney testified that she was concerned that LoriAnn and Lisa would use their majority control over BI to prepay loans to AB BI, so their Dynasty Trusts would have liquid cash instead of an illiquid right to loan payments over an extended period of time. According to Plaintiffs, Kenney offering a new justification for her actions at trial reveals Kenney's previous concerns relating to LoriAnn's settlement proposals were pretextual justifications to remove LoriAnn.

Relatedly, Plaintiffs note that at the time of the August 27, 2014 settlement conference, although LoriAnn and Lisa had majority control over BI, Jeff was still acting as manager of BI. As the minutes for the August 28, 2014 BI board meeting reflect, Jeff, acting as a manager of BI, prepaid a \$2.65 million debt to AB BI in August 2014. (Exhibit 3046). The minutes further show that LoriAnn and Lisa passed a resolution over Jeff's dissent barring future prepayments of loans by BI without a "recommendation for and justification of such prepayment." (Exhibit 3046, p. 4). Kenney testified that she was aware Jeff, acting as a manager of BI, prepaid a \$2.65 million debt BI owed AB BI, and she was also aware Lavern had swapped cash for the non-voting BI stock in LoriAnn and Lisa's daughters' Grantor Trusts when she replaced the Trustees of the LoriAnn Dynasty Trust. Kenney testified, however, she was unaware that AB BI loaned the proceeds from BI's \$2.65 million prepayment to Lavern, and that Lavern used the proceeds from the AB BI loan to fund his swap for the BI non-voting stock held in LoriAnn and Lisa's daughters'

Grantor Trusts. (*See* Exhibit 11). According to Plaintiffs, Kenney's failure to obtain "the whole story" from Jeff and Lavern is further evidence of her "purposeful obliviousness" in carrying out her functions as Trust Protector.

The Court finds Plaintiffs' arguments relating to Kenney's concern that LoriAnn and Lisa would prepay BI's obligations to AB BI unpersuasive. First, as Plaintiffs point out, Kenney defended her decision to replace the Trustees of the LoriAnn Dynasty Trust on the basis that she was concerned LoriAnn and Lisa would prepay BI's obligations to AB BI for the first time at trial. Thus, to the extent LoriAnn and Lisa's ability to prepay BI's obligations to AB BI actually motivated Kenney's decision to replace the Trustees of the LoriAnn Dynasty Trust, it was not the principle concern that motivated her decision. Second, as outlined above, Kenney was informed concerning the general background of Lavern and Audrey's estate plan and was generally familiar with the other family entities and estate planning vehicles Lavern and Audrey had established when she replaced the Trustees of the LoriAnn Dynasty Trust. Based on this information, there were no facts suggesting LoriAnn and Lisa would not seek distributions from AB BI in the event BI prepaid its obligations to AB BI. Indeed, LoriAnn and Lisa were specifically seeking greater distributions from the family entities. Therefore, Kenney's failure to inquire further as to whether LoriAnn and Lisa would use their majority control over BI to prepay loans to AB BI, so their Dynasty Trusts would have liquid cash instead of an illiquid right to loan payments over an extended period of time, does not constitute bad faith.<sup>9</sup>

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<sup>9</sup> In addition, the Court notes that LoriAnn and Lisa, in a separate law matter, sued Jeff and Lavern, in part, on the basis that Jeff acted oppressively by "not distributing all or part of BI's \$2.65 million dollar loan prepayment to AB BI" or by "not distributing all or part of AB BI's operating income." (*See* February 9, 2017, Verdict Form, Question No. 26 in Linn County Case No. LACV083022). The Court is not considering events following Kenney's decision to replace the Trustees of the LoriAnn Dynasty Trust as they are not relevant to whether Kenney breached fiduciary duties owing to LoriAnn when she removed Trustees of the LoriAnn Dynasty Trust and appointed successor Trustees in October 2014. Thus, this observation is not made to reject Plaintiffs' claim, but to only recognize

**ii. Kenney's role in the family dispute for control**

Next, Plaintiffs contend Kenney's proffered reasons for replacing the Trustees of the LoriAnn Dynasty Trust are pretext for harming Plaintiffs, especially LoriAnn, to benefit Jeff and Lavern, because Kenney was contacted as an attorney for Lavern and/or Jeff and that the focus of the representation was control over the various family entities. According to Plaintiffs, Kenney was first contacted by Jeff in her role as an attorney—and not as Trust Protector—to secure advice relating to control of BI, that her involvement with Jeff and Lavern focused on control of family entities, and that she should have appreciated the impact her actions would have on control.

Plaintiffs note that prior to Kenney's actions, LoriAnn and Lisa held a majority of the limited partnership interest of BFLP, with 53.08%. (*See Exhibit G*). Plaintiffs note further that after Kenney replaced LoriAnn as Investment Trustee with Jeff, it shifted the majority of BFLP's limited partnership interests to Jeff because Jeff was then able to vote the 7.34% BFLP interest held in the LoriAnn Dynasty Trust. Kenney acknowledged that if BFA is removed or cannot serve as General Partner of BFLP, the BFLP Limited Partners may elect a successor General Partner by a simple majority. At trial, Kenney acknowledged that she later learned that replacing LoriAnn with Jeff as the Investment Trustee of the LoriAnn Dynasty Trust transferred majority control of the limited partnership voting interest in BFLP and AB BI from LoriAnn and Lisa to Jeff. However, Kenney credibly testified that she was unaware appointing Jeff as the successor Investment Trustee of the LoriAnn Dynasty Trust would transfer majority control of BFLP at the time she replaced the Trustees of the LoriAnn Dynasty Trust.

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Kenney's concern that Plaintiffs would seek distributions from AB BI in the event BI prepaid its obligations to AB BI was well-founded.

According to Plaintiffs, Kenney knew control over the family entities was the driving force at issue or should have known control was the driving force at issue for four reasons. First, Plaintiffs contend Kenney interacted with Jeff and Lavern as an attorney and the focus was on control. Plaintiffs note that Kenney testified she first became involved in the Busse family dispute on August 19, 2014, when Jeff called her seeking advice, including issues relating to Jeff's decision to distribute BI voting stock to the Grantor Trusts' respective beneficiaries. A meeting was held later that day, and Plaintiffs allege it is clear from Kenney's notes that control over the family entities was the primary focus of the meeting. Kenney's notes list BFLP and AB BI, with BFA as the general, and then state "Lori wants control." (Exhibit E). Kenney's notes further reflect "have Jeff get control of AB BI so can grow Dynasty Trust for future generations." (Exhibit E). Kenney's notes also reflect that a Grantor Trust swap was discussed at the August 19, 2014 meeting. (Exhibit E). Kenney testified that part of the discussion in this meeting was "general control over everything." Kenney testified the initial meeting was focused on "gathering information" and "we did not get into that in depth discussion of any of the entities or anything that was going on." According to Kenney, the meeting was essentially "here's what's happening, here's the entities so we could start digging in."

Following the initial August 19, 2014 meeting, Kenney acted to gain additional information, which was not limited to the Dynasty Trusts. Kenney emailed Jeff asking for specific tax return information about BI, BFLP and BFA. (Exhibit 2511). Kenney acknowledged she was acting as an attorney in that email gathering information. Kenney received at least three emails of information from Jeff leading to the August 27, 2014 settlement conference. (*See* Exhibits 2511, J, K).

The Court finds Kenney's fact-finding leading to the August 27, 2014 to be entirely appropriate. The Dynasty Trusts two major assets are limited partnership interests in BFLP and AB BI. Therefore, the Dynasty Trusts are inextricably intertwined with other Busse family entities. Furthermore, it is unsurprising Jeff and Lavern had a general discussion regarding control over the various family entities with Kenney during their initial meeting on August 19, 2014. This dispute largely boils down to LoriAnn and Lisa chaffing under Lavern's decision to entrust Jeff with management. LoriAnn and Lisa's settlement proposals consisted of various plans to restructure Lavern and Audrey's estate plan and the various family entities to give themselves greater control over the family entities. (Exhibit 2507, LoriAnn's settlement proposals). In addition, LoriAnn admitted the family members "are all control freaks", which contributed to the family dispute. Finally, Jeff and Lavern discussing control over the family entities with Kenney does not mean Kenney's stated reasons for removing the Trustees of the LoriAnn Dynasty Trust are pretextual. As outlined above, although all of Kenney's knowledge regarding the Dynasty Trusts was gained in the midst of an ongoing family dispute, Kenney's testimony reveals she was capable of making a neutral and informed decision to replace the Trustees of the LoriAnn Dynasty Trust.

Second, Plaintiffs note Kenney acknowledged she was aware there was a question about whether or not Lavern had resigned as a manager of BFA. Kenney testified she was concerned about control of BFA and other family entities and that this concern factored into her decision to replace the Trustees of the LoriAnn Dynasty Trust, but "the main thing was the liquidation and distribution of that trust assets." In Plaintiffs view, this admission alone demonstrates that LoriAnn's statements at the August 27, 2014 settlement conference are pretext for the real concerns—shoring up control of family entities under Jeff.

The evidence and testimony, however, supports a finding that Kenney's concern regarding control of BFA and other family entities related to LoriAnn's willingness to defy Lavern's business and estate plans, and that this fear became more pronounced in light of LoriAnn's proposal to liquidate BFLP and AB BI. Kenney testified unequivocally that she did not replace the Trustees of the LoriAnn Dynasty Trust to assist Jeff and Lavern in obtaining or maintaining majority control of "other family entities," specifically, AB BI or BFLP. She also testified she did not discuss the subject with either Jeff or Lavern. Kenney credibly testified that the Investment Trustee's ability to vote the limited partnership interests held in the LoriAnn Dynasty Trust was not "a primary focus" in her decision to replace the Trustees of the LoriAnn Dynasty Trust because BFA serves as the General Partner of BFLP and AB BI and "the limited partnership interest themselves had very little... voting power." Kenney also testified, although it was not discussed with Jeff or Lavern, that replacing LoriAnn with Jeff as the Investment Trustee could not cause a change in control of AB BI. Kenney explained during trial that removal or replacement of a General Partner of AB BI requires a 70 percent vote, which is a level of voting control LoriAnn and Lisa have never collectively maintained.

Lavern and Jeff both testified Kenney did not consider or discuss the impact the replacement of LoriAnn with Jeff as Investment Trustee would have on control of BFLP and AB BI. Lavern specifically testified that "we never discussed voting control [of BFLP and AB BI] because that was never an issue." Both Lavern and Jeff testified control over BFLP and AB BI was never an issue because they believed Plaintiffs' Dynasty Trusts were not properly admitted as Substitute Limited Partners into BFLP and AB BI. Lavern and Jeff's testimony on this issue is corroborated by the arguments they advanced during the summary judgment phase in the related legal action.

Jeff also testified Lavern never asked Kenney to appoint him as the LoriAnn Dynasty Trust Investment Trustee in order to obtain voting rights of BFLP or AB BI. As both Kenney and Lavern explained, there were multiple reasons to appoint Jeff as the successor Investment Trustee of LoriAnn's Dynasty Trust. First, Jeff was clearly Lavern's choice. Second, Lavern historically had put Jeff in charge of management of the Busse business and estate planning entities. Third, Jeff, through BFA, had always been the manager of both AB BI and BFLP, the underlying assets of the Dynasty Trusts, and did all of the "inside work" on those assets, including tax preparation. Jeff also had fiduciary duties to the beneficiaries as a trustee, which would protect beneficiaries and provide them with remedies if Jeff breached those duties. Finally, Lavern trusted Jeff to follow his wishes and purposes in setting up the LoriAnn Dynasty Trust. The Court found this testimony credible.

In addition, Kenney testified unequivocally that Lavern and Jeff never asked her to engage in any retribution or take any action against LoriAnn for the purpose of enacting retribution. Kenney testified further that had such a request been made, she would not have agreed to engage in retribution. Kenney explained it was not her role as Trust Protector to engage in retribution, nor was it something she would consider or something from which she would benefit. Kenney's testimony on this issue was clear, consistent and credible.

All of the witnesses who had any information concerning Kenney's motivations for replacing the Trustees agreed she did not replace the Trustees to effectuate Jeff and Lavern's desire to enact retribution against LoriAnn and Lisa. Jeff testified he never heard Lavern request Kenney to take action in retribution against LoriAnn, or express vengefulness against LoriAnn in front of Kenney. Lavern similarly testified he "definitely" did not tell Kenney that he and Jeff "were going to do retribution [to LoriAnn and Lisa]." McCartan similarly testified that Kenney's

motivation for replacing the Trustees of the LoriAnn Dynasty Trust was not to enact retribution or to change voting control of BFLP or AB BI, but instead Kenney replaced the Trustees of the LoriAnn Dynasty Trust to protect the Trust from LoriAnn's desire to liquidate and distribute the Trust's underlying assets directly to herself.

Furthermore, LoriAnn, the only plaintiff whose Dynasty Trust was impacted by Kenney's actions, admitted the only information she had concerning Kenney's motivations to replace the Trustees of the LoriAnn Dynasty Trust was Kenney's deposition testimony. At no time during Kenney's deposition did she ever admit or otherwise indicate she replaced LoriAnn with Jeff as Investment Trustee to assist Lavern engage in retribution against LoriAnn and Lisa, or in order for Jeff and Lavern to obtain control over any other family entity. Although LoriAnn testified she had no intention to liquidate her Dynasty Trust's assets and that Kenney's interpretation of LoriAnn's proposal and meeting topics were erroneous, the evidence presented in this case suggests otherwise.

Third, Plaintiffs note Kenney acknowledged she knew the Investment Trustee would have control of the assets of the Dynasty Trust, but she never spoke to Jeff or Lavern about whether placing Jeff as Investment Trustee of the LoriAnn Dynasty Trust would result in a change of voting control. Plaintiffs contend Kenney's failure to talk to Jeff, Lavern, LoriAnn, or LoriAnn's counsel about the effects her decision to replace the Trustees of the LoriAnn Dynasty Trust constitutes "purposeful obliviousness." The Court disagrees. Kenney reasonably explained that the Investment Trustee's ability to vote the limited partnership interests held in the LoriAnn Dynasty Trust was not "a primary focus" in her decision to replace the Trustees of the LoriAnn Dynasty Trust because BFA serves as the General Partner of BFLP and AB BI and "the limited partnership interest themselves had very little...voting power."

Fourth, Plaintiffs assert the additional requests Jeff and Lavern made should have illustrated to Kenney that their main focus was to maintain or gain control of the limited partnership interests in other entities. Plaintiffs note Kenney acknowledged that Jeff and Lavern raised an issue about whether LoriAnn and Lisa's Dynasty Trusts were properly admitted as Substitute Limited Partners into BFLP and AB BI in August 2014. According to Plaintiffs, Kenney's knowledge that Jeff and Lavern sought to contest the voting rights of LoriAnn and Lisa's Dynasty Trusts should have alerted her that Lavern's request to change the Trustees of LoriAnn and Lisa's Dynasty Trusts was made for the purpose of ensuring Jeff's control over other family entities. The Court finds this argument unpersuasive. As outlined above, Kenney testified she considered the Investment Trustee's ability to vote the limited partnership interest held in the LoriAnn Dynasty Trust in her decision to replace the Trustees of the LoriAnn Dynasty Trust, but did not give much weight to this factor because BFA was serving as the General Partner of BFLP and AB BI and "the limited partnership interest themselves had very little...voting power." Thus, Plaintiffs' argument boils down to the weight Kenney assigned to the Investment Trustee's ability to vote the limited partnership interest held in the LoriAnn Dynasty Trust in her decision to replace the Trustees of the LoriAnn Dynasty Trust. The Court finds Kenney's explanation as to why she assigned minimal weight to the Investment Trustee's ability to vote the limited partnership interest held in the LoriAnn Dynasty Trust in deciding whether to replace the Trustees of the LoriAnn Dynasty Trust to be reasonable. In light of this reasonable explanation, the Court finds the weight Kenney assigned to this particular factor in deciding whether and to what extent to exercise her "sole and absolute discretion" as Trust Protector insufficient to constitute bad faith.

In addition, Plaintiffs argue Kenney's knowledge that Lavern and Jeff wanted her to replace the Trustees of Lisa's Dynasty Trust reveals Kenney should have known Lavern and Jeff's main focus was to maintain or gain control of the limited partnership interests in other entities. The Court finds this argument unpersuasive. Kenney testified "I did not change the trustees on Lisa's trust, I didn't view – I didn't view her in the same light as LoriAnn." Kenney explained that she didn't view Lisa in the same light as LoriAnn because it appeared to Kenney that Lisa, whose children were ultimate beneficiaries of the Trust, was not as adamant as LoriAnn that assets be liquidated and, accordingly, did not pose the same risk to the multigenerational purpose of the Dynasty Trusts as LoriAnn. Kenney's refusal to replace the Trustees of Lisa's Dynasty Trust is evidence of Kenney's independent discretion and confirms Kenney was not merely a "rubber stamp" for Lavern's decision-making.

Based on the foregoing, the Court finds Kenney did not replace the Trustees of the LoriAnn Dynasty Trust to alter control of the limited partnership voting interests in other family entities or to enact retribution against LoriAnn and Lisa. The Court accepts Kenney and Lavern's credible testimony that there were no ulterior motives in replacing the Trustees of the LoriAnn Dynasty Trust, including either retribution against LoriAnn and Lisa or desires to effect a change in control. Accordingly, the Court finds Kenney's justifications for replacing the Trustees of the LoriAnn Dynasty Trust were not pretextual, and do not support a finding Kenney acted in bad faith.

**C. Kenney's Investigation Prior to Replacing the Trustees of the LoriAnn Dynasty Trust**

Next, Plaintiffs contend Kenney remained "purposefully unaware" of facts contrary to the information she received from the August 27, 2014 settlement conference and the information

she received from Jeff and Lavern. Plaintiffs note that Kenney did not correspond at all with LoriAnn regarding her performance as Investment Trustee or regarding Kenney's consideration of Jeff's and Lavern's request to remove LoriAnn as Investment Trustee prior to her removal. Similarly, Kenney did not communicate with either LoriAnn or Leah regarding Leah's performance as Independent Trustee or regarding Jeff and Lavern's request to remove Leah as Independent Trustee prior to her removal. Had Kenney communicated with LoriAnn and Leah, Plaintiffs contend Kenney would have likely learned the following:

- That Lisa had provided her parents an attorney's opinion letter raising concerns that Kenney had a potential conflict of interest given the Bradley & Riley's law firm's role with Jeff and Lavern. (Exhibits 55, 57, 62).
- LoriAnn alleges she relied on 2011 and 2012 emails sent by Jeff explaining the terms and purposes of the Dynasty Trusts in developing her understanding of the Dynasty Trust's terms and purposes. Lavern was copied on the emails and the emails were not provided to Kenney prior to her decision to replace the Trustees of the LoriAnn Dynasty Trust. (*See* Exhibit 2503).
- LoriAnn alleges she relied on Jeff's claim the Dynasty Trusts would be "drafted broadly with as much flexibility as possible" to allow LoriAnn, Lisa, and Jeff, as Investment Trustees, to utilize assets in trust for their benefit, while maintaining the multigenerational purpose of the trusts.
- LoriAnn alleges she had "absolutely no intention to dissolve [her] Dynasty Trust thereby wasting [her] portion of mom and dad's gift exclusion."
- LoriAnn alleges she could not "imagine any scenario except related to my health and then only as a last resort under which I will ever distribute any of those assets to myself."
- LoriAnn alleges she did not want distributions from BFLP or AB BI to go into her Dynasty Trust so she could "raid" or distribute the Dynasty Trust assets directly to herself, and that the settlement proposals she offered were "not even close" to suggesting she would liquidate her Dynasty Trust.
- When LoriAnn asked Leah to be her Dynasty Trust's Independent Trustee, LoriAnn allegedly instructed Leah not to make any distributions to

LoriAnn, and that Leah, as a person of integrity and intelligence would not approve of any hypothetical request by LoriAnn to liquidate her Dynasty Trust.

Had Kenney learned these facts, Plaintiffs contend Kenney would have been able to draw the following conclusions:

- LoriAnn’s settlement proposal to liquidate and distribute BFLP and AB BI was consistent with LoriAnn’s understanding of the purpose of the Dynasty Trust as Jeff explained it to her and the terms of the Dynasty Trust—specifically:
  - Terms which give the Investment Trustee broad discretion to invest in non-income producing assets and engage in transactions with themselves. (Exhibit 78 pp. 18-21, Section IV A.)
  - LoriAnn understood that even if she could not personally access the principal and income of the Dynasty Trust, that she could still use the resources of the Dynasty Trust for some benefit.

LoriAnn’s self-serving testimony, however, does not eradicate her conduct related to BI and BFA nor does it alter the purposes for which Lavern established her Dynasty Trust. Accordingly, even if Kenney discovered the information Plaintiffs allege Kenney could have discovered, Plaintiffs offer no reason why Kenney should have found LoriAnn’s allegations that she would honor the purposes of her Dynasty Trust to be credible. As outlined above, the parties’ testimony made clear that Lavern, and not Jeff, insisted the Dynasty Trusts hold illiquid assets. Lavern credibly testified that he believed he had made his desires for the Dynasty Trusts clear to his children before the Dynasty Trusts were created and that was “definitely my intention.” Furthermore, Kenney was informed concerning the general background of Lavern and Audrey’s estate plan and was generally familiar with the other family entities and estate planning vehicles Lavern and Audrey had established when she replaced the Trustees of the LoriAnn Dynasty Trust. In light of LoriAnn’s request for greater distributions and her clear defiance towards Lavern’s business and estate plans, Kenney reasonably believed LoriAnn would liquidate and

distribute the assets of her Dynasty Trust directly to herself if given the opportunity, contrary to the purposes of the LoriAnn Dynasty Trusts and LoriAnn's promises to Lavern. Furthermore, Kenney and Lavern were not concerned LoriAnn would exercise her broad discretion to invest in non-income producing assets pursuant to the LoriAnn Dynasty Trust instrument, but rather, Lavern and Kenney were concerned that LoriAnn would liquidate and distribute the assets of her Dynasty Trust directly to herself if given the opportunity.

Based upon this concern, Kenney believed LoriAnn, at a minimum, posed a significant risk to the purposes of the LoriAnn Dynasty Trust, and she replaced the Trustees of the LoriAnn Dynasty Trust. Kenney is not alleged to have intentionally disregarded facts suggesting fiduciary misconduct, instead Kenney is alleged to have acted in bad faith because she failed to adequately explore whether exculpatory information existed that would alleviate her concern that LoriAnn would take actions contrary to the purposes of her Dynasty Trust. The Court cannot find Kenney acted in bad faith by failing to discuss with LoriAnn whether she would honor the purposes of her Dynasty Trust when LoriAnn's prior conduct and the facts within Kenney's knowledge indicated she would not. It is unsurprising LoriAnn now alleges she would honor the purposes of her Dynasty Trust. The facts Plaintiffs suggest Kenney would have learned essentially boil down to LoriAnn's personal assurance and may have provided little comfort to Kenney in light of the facts she did know. By way of analogy, if you think your bicycle may be stolen, you lock it, you don't canvass the neighborhood to ask if anyone will be tempted to run off with your bicycle. By then it will be too late.

Furthermore, Plaintiffs misconstrue the standard of "purposeful obliviousness" to suggest Kenney acted in bad faith by failing to communicate with LoriAnn, Leah, or LoriAnn's counsel to gain additional information prior to her actions as Trust Protector. A fiduciary acts with

“purposeful obliviousness” when the facts actually known suggest an impropriety, but the fiduciary deliberately fails to investigate further because of a belief or fear that inquiry would disclose the impropriety. Under this standard, a fiduciary is not required to act with perfect knowledge. Instead, a fiduciary’s duty to investigate is triggered when the facts actually known suggest an impropriety. *See Caputo*, 163 N.J. at 155-56, 748 A.2d at 514 (“where facts suggesting fiduciary misconduct are compelling and obvious, it is bad faith to remain passive and not inquire further because such inaction amounts to a deliberate desire to evade knowledge.”). Here, Kenney did not fail to investigate further because she was concerned the inquiry would expose an impropriety. Instead, Kenney reasonably suspected LoriAnn would take actions contrary to the multigenerational purpose of her Dynasty Trust and Kenney took preemptive measures to protect the Trust.

In addition, Plaintiffs provide no evidence to suggest that Kenney suspected LoriAnn would honor the purposes of her Dynasty Trust, but deliberately refrained from investigating further. The Court cannot find Kenney breached fiduciary duties she owed to LoriAnn by failing to communicate with LoriAnn, Leah, or LoriAnn’s counsel to gain any additional information prior to her actions as Trust Protector, when there are no compelling and obvious facts suggesting LoriAnn would honor the purposes of her Dynasty Trust. Indeed, LoriAnn’s prior course of conduct illustrated a clear willingness to disregard her father’s business and estate plans. Accordingly, the Court finds that Kenney’s failure to communicate with LoriAnn, Leah, or LoriAnn’s counsel to gain any additional information prior to her actions as Trust Protector does not amount to bad faith.

### **III. Kenney’s Overall Performance as Trust Protector**

Above the Court analyzed isolated instances of Kenney's conduct as Trust Protector and found Kenney's specific actions in and of themselves do not amount to bad faith. The Court now turns its attention to Kenney's overall conduct and performance as Trust Protector of the LoriAnn Dynasty Trust. In analyzing Kenney's overall conduct and performance as Trust Protector of the LoriAnn Dynasty Trust, the Court determines her removal as Trust Protector is unwarranted and that it would be inappropriate to reverse her decision to appoint Jeff Busse and Todd Reuscher as successor Trustees of the LoriAnn Dynasty Trust.

As outlined above, Kenney had no power to veto a Trustee's proposed action over the management or administration of the trust. Kenney's only power to nullify a perceived threat to the multigenerational purpose of the Dynasty Trust was to preemptively remove a Trustee. In light of LoriAnn's request for greater distributions and her defiance towards Lavern's business and estate plans, Kenney reasonably believed LoriAnn would liquidate and distribute the assets of her Dynasty Trust directly to herself if given the opportunity, contrary to the purposes of the LoriAnn Dynasty Trusts and LoriAnn's promises to Lavern. This concern created a situation where a Settlor of the LoriAnn Dynasty Trust, Lavern, who is alive and sophisticated, and Kenney, the Trust Protector, deemed it appropriate to replace the Trustees of the LoriAnn Dynasty Trust to preserve the multigenerational purpose of the Trust. The Court found Lavern and Kenney's testimony that this concern, as opposed some ulterior motive related to control or retribution, motivated Kenney's actions as Trust Protector to be consistent and credible. While Plaintiffs suggest various reasons why the Court should not believe Maureen Kenney, having weighed all the evidence and the demeanor and credibility of the witnesses, the Court in fact believed Ms. Kenney's testimony. The Court cannot find Kenney acted in bad faith when she reasonably believed LoriAnn would take actions contrary to the purposes of her Dynasty Trust,

she was informed concerning the general background of Lavern and Audrey's estate plan, and her only ability to nullify the perceived threat was to remove Trustees of the LoriAnn Dynasty Trust. Kenney's conduct as Trust Protector did not amount to bad faith. Because Kenney did not act in bad faith, her removal as Trust Protector is unwarranted and it would be inappropriate to reverse her decision to appoint Jeff Busse and Todd Reuscher as successor Trustees of the LoriAnn Dynasty Trust.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiffs' Amended Petition asserting Maureen Kenney breached fiduciary duties owing to LoriAnn Busse is dismissed at Plaintiffs' cost.



State of Iowa Courts

**Type:** OTHER ORDER

**Case Number** EQCV083014  
**Case Title** (BC)LORIANN BUSSE & LISA CARPENTIER VS MAUREEN KENNEY ET AL

So Ordered



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John Telleen, District Court Judge,  
Seventh Judicial District of Iowa