

# *Ch-Ch-Ch-Ch-Changes...*

Oklahoma Society of CPAs

Riley Carbone Kern, Attorney  
Tallgrass Estate Planning, LLP



**Modifying Irrevocable Trusts: It Can Be Done**

# Trust Modification

If you aren't already, you will service an irrevocable trust that “doesn't work”

- Law has changed
- Circumstances have changed
- Relationships have changed
- And modification becomes necessary



TALLGRASS

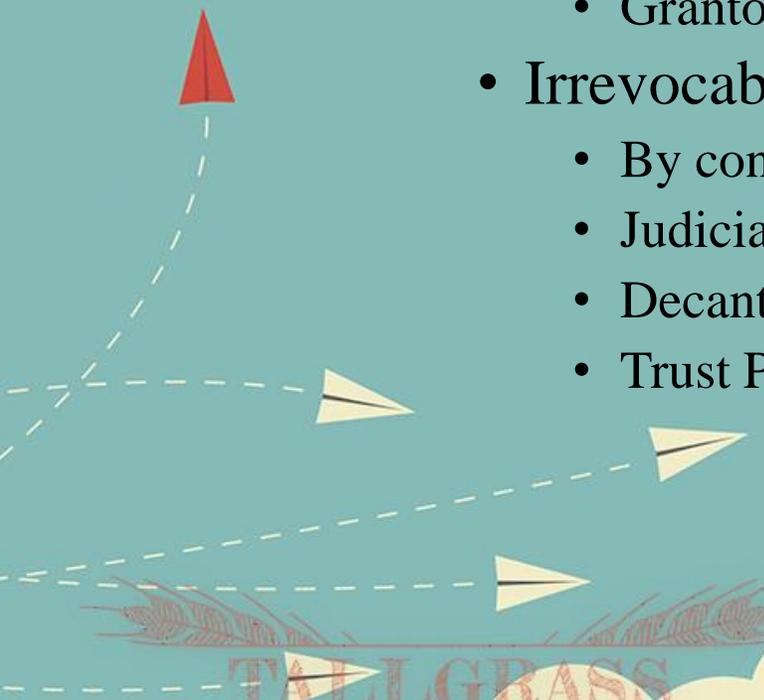
ESTATE PLANNING

**Modifying Irrevocable Trusts: It Can Be Done**

# Amend, Restate, or Revoke

Who gets to do it?

- Revocable trust:
  - Grantor(s)
- Irrevocable Trust:
  - By consent (of the Grantor and all of the beneficiaries)
  - Judicial Reformation
  - Decanting
  - Trust Protector



TALLGRASS

ESTATE PLANNING

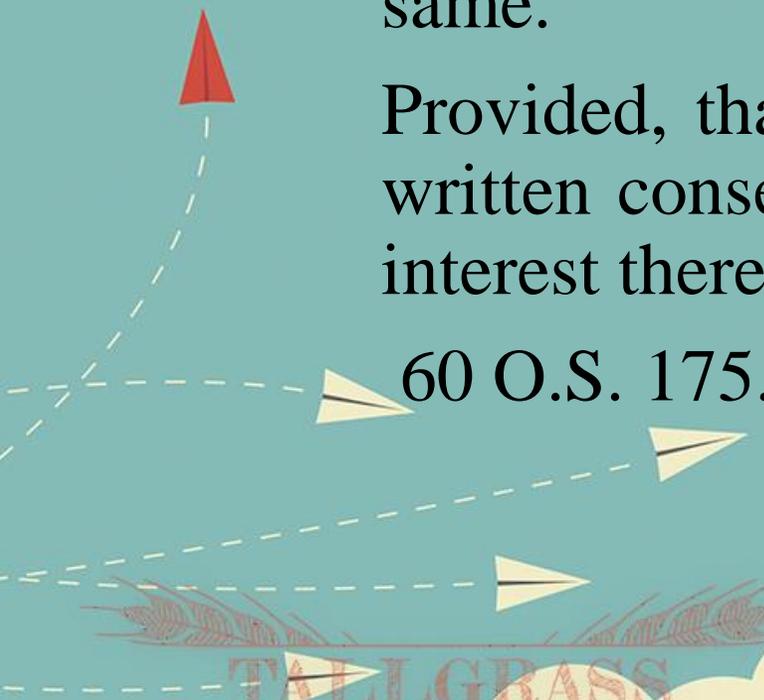
**Modifying Irrevocable Trusts: It Can Be Done**

# Amend, Restate, or Revoke: Authority

Every trust shall be revocable by the trustor, *unless expressly made irrevocable* by the terms of the instrument creating the same.

Provided, that *any* trust may be revoked by the trustor upon the written consent of all living persons having vested or contingent interest therein.

60 O.S. 175.41



TALLGRASS

ESTATE PLANNING

**Modifying Irrevocable Trusts: It Can Be Done**

# Modification by Consent: Pop Quiz

- Situation

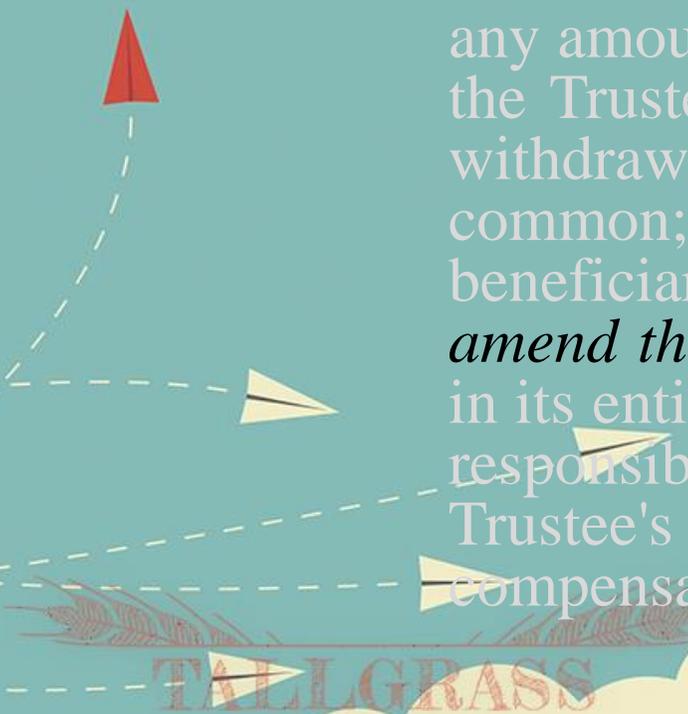
- Husband and wife execute a joint revocable trust
- Wife predeceased husband
- After wife's death, husband's relationship to children changed
- Husband amends trust to disinherit a child and change trustees

- Is the amendment valid?

# Modification by Consent: Pop Quiz

- *Trust Language:*

- *Both Settlers may, during their joint lives, by signed instruments delivered to the Trustee:* (1) withdraw the joint estate from this Trust in any amount and at any time upon giving reasonable notice in writing to the Trustee; provided, however, that all or any part of the joint estate withdrawn by the Settlers shall be delivered to the Settlers as tenants in common; (2) add joint property to the Trust; (3) change the beneficiaries, their respective shares and the plan of distribution; (4) *amend this Trust Agreement in any other respect;* (5) revoke this Trust in its entirety or any provision therein; provided, however, the duties or responsibilities of the Trustee shall not be enlarged without the Trustee's consent nor without satisfactory adjustment of the Trustee's compensation.



TALLGRASS

ESTATE PLANNING

**Modifying Irrevocable Trusts: It Can Be Done**

# Amend, Restate, or Revoke

If a Grantor wants something to be irrevocable or to become irrevocable, the trust should say so explicitly.

Just use the word **“irrevocable.”**



TALLGRASS

ESTATE PLANNING

**Modifying Irrevocable Trusts: It Can Be Done**

# Modification by Consent: Pop Quiz!

- Situation:

- Testamentary Trust (when did it become irrevocable?)
- Beneficiary of the trust develops Alzheimer's and the costs of her care are significant
- Three of the beneficiary's four children sign consents to amend the trust to allow for Medicaid qualification

- Is the amendment valid?

# Modification by Consent: Pop Quiz!

- As a general rule a trust, even though it is a 'spendthrift' trust, or one declared by the trust agreement to be irrevocable, *may be revoked by mutual consent of the settlor and all persons beneficially interested in said trust. Hurst v. Taubman, 275 P.2d 877 (Okla. 1954)*
- A beneficial interest in a trust, within the meaning of the rule that a trust may be revoked by mutual consent of the settlor and all persons beneficially interested therein, is an interest taken by purchase under the terms of the trust, and if the interest is taken by descent it is not such an interest as to require that person's consent in order to revoke the trust.

*Hurst v. Taubman, 275 P.2d 877 (Okla. 1954); Reed v. JP Morgan Chase Bank, NA, 270 P.3d 140, 2011 OK 93 (Okla. 2011)*

TALLGRASS

ESTATE PLANNING

**Modifying Irrevocable Trusts: It Can Be Done**

# Judicial Reformation

- Facts:

- Adult children file for guardianship over dad
- Dad and his lawyer object and instead suggest creating a trust and appointing children as trustees
- Trust (revocable) is created and funded
- Children dismiss the guardianship
- Dad revokes trust
- Children seek Court reformation

*Hilpirt v. O'Brien's Estate (In re O'Brien's Trust Estate)*, 1946 OK 225, 172 P.2d 607

TALLGRASS

ESTATE PLANNING

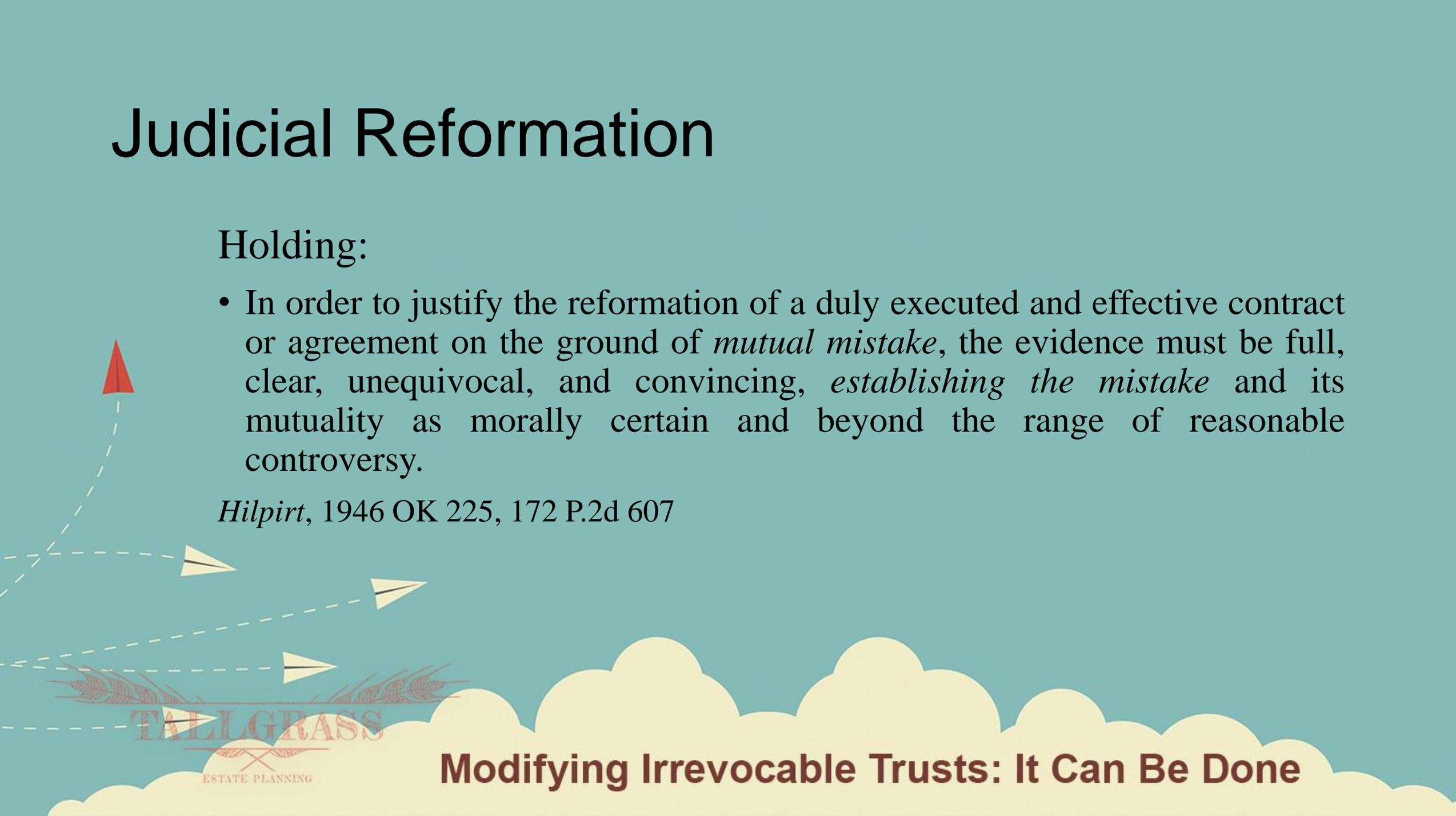
**Modifying Irrevocable Trusts: It Can Be Done**

# Judicial Reformation

## Holding:

- In order to justify the reformation of a duly executed and effective contract or agreement on the ground of *mutual mistake*, the evidence must be full, clear, unequivocal, and convincing, *establishing the mistake* and its mutuality as morally certain and beyond the range of reasonable controversy.

*Hilpirt*, 1946 OK 225, 172 P.2d 607



TALLGRASS

ESTATE PLANNING

**Modifying Irrevocable Trusts: It Can Be Done**

# Judicial Reformation

- Facts:

- Grantor amends his trust to take advantage of a change in tax law.
- He worked with his trust attorney to draft and execute the amendment.
- Widow filed the estate tax return, and the IRS finds that a sentence in the trust means that new tax law may not be utilized.
- Widow petitions Court for reformation.
- A draft of the amendment in the law firm's file has the words the IRS was now objecting to struck through and the note "get rid of this" written beside them.

*Griffin v. Griffin*, 832 P.2d 810 (Okla. 1992)

TALLGRASS

ESTATE PLANNING

**Modifying Irrevocable Trusts: It Can Be Done**

# Judicial Reformation

## Holding:

- The theory of reformation requires the plaintiff to show:
  1. some instrument representing an antecedent agreement the terms of which instrument should be reformed,
  2. mutual mistake or mistake on the part of one and fraud or inequitable conduct on the part of the other, as a result of which the instrument reflects something neither party had intended, and,
  3. proof of these elements by clear and convincing evidence. . . .The remedy of reformation is appropriate where, by reason of *an unintentional mistake by scrivener or draftsman, the written agreement, such a trust does not accurately reflect the intent of the grantor.*

*Griffin v. Griffin*, 832 P.2d 810 (Okla. 1992)

**Modifying Irrevocable Trusts: It Can Be Done**

TALLEN

ESTATE PLANNING

# Decanting

Big Idea: Pouring assets out of one irrevocable trust and into another.

- Essentially a “do-over” for the trust
- Trust must have situs in a state that allows decanting
- Oklahoma does not have a decanting statute (yet)
  - Choose a co-trustee in a state that does allow decanting
- Nevada, South Dakota, Tennessee, New Hampshire, Delaware do have very generous decanting statutes (as well as about 20 other states)

# Decanting

- Can be expressly forbidden or permitted in the trust
- Different states allow different things:
  - Extend term of trust (opt out of rule against perpetuities)
  - Eliminate mandatory distributions
  - Substitute beneficiaries
  - Change distribution standards
  - Allow power of appointment not previously given
  - Notice to interested parties required

# Decanting

- Sidley.com has compiled a summary of decanting statutes' provisions and ranked them on favorability



**Modifying Irrevocable Trusts: It Can Be Done**

# Trust Protector

- When you can't:
  - Modify by consent
    - Grantor deceased or incapacitated
    - Beneficiaries and/or trustees do not consent
  - Judicial Reformation
    - No mistake
  - Decant
    - Not cost effective or other obstacle
- Cue the Trust Protector!

# Trust Protector

- What is a Trust Protector?
  - Neither a beneficiary or a trustee
  - Should not be “related or subordinate to” a Grantor, Trustee, or Beneficiary
    - See IRC 672(c)
  - Not a requirement of any trust

# Trust Protector

- What is a Trust Protector?
  - Has limited/specifically granted authority to make modifications to a trust if and when it becomes irrevocable
    - During Grantor's incapacity
    - Following Grantor's death
    - Irrevocable Grantor or Non-grantor trust

# Trust Protector

- What is a Trust Protector?
  - Quasi-Trustee/Quasi-Judge
    - Remove/appoint trustees
    - Amend trust (broad or limited authority)
    - Interpret ambiguities
    - Request accountings
    - Reject investments or additions to trust property
    - May act as a fiduciary or not (may be defined by statute)

# Trust Protector

- Oklahoma doesn't have a specific statute creating a Trust Protector
- However, 60 O.S. 175.84(3)(c)(2) acknowledges they exist

# Termination

- Trusts terminate when assets are exhausted or distributed
- BUT, there may be good reasons to terminate a trust at other times
  - “When the purpose for which an express trust was created ceases, the estate of the trustee also ceases.” (60 O.S. § 175.49)

# Termination: Pop Quiz!

## Facts:

- Trust provides for the distribution of income to the grantor during her lifetime and the balance to be distributed to her son after she had died and he had attained 25 years of age.
- Grantor/children begin to experience medical issues.
- Grantor petitions the courts to terminate the trust, “alleging, *inter alia*, that it was in the best interest of the trust estate and its beneficiaries to do so.”
- The appointed Guardian ad Litem opposed the revocation, but agreed to a reformation allowing the trustee to invade the trust principal for medical purposes.
- Trial court interprets § 175.41 as *only* allowing modification by consent if the trust was created solely, exclusively, for the benefit of the grantor.

*Edwards Irrevocable Trust, Matter of*, 966 P.2d 810, 1998 OK CIV APP 144 (Okla. Civ. App., 1998)

# Termination: Pop Quiz!

## Facts:

- A testamentary trust had been divested of certain assets prior to its creation.
- The ensuing administration of the trust was more costly than the income it was supposed to distribute to the beneficiaries.
- The beneficiary petitioned for the trust to be terminated and the courts agreed.
- “The fact that the performance of a trust becomes impossible is ground in a proper case for the termination of the trust. *Thus, it is generally recognized that if the continuance of a trust becomes so pecuniarily profitless, expensive, or hopeless as to result in a condition justifying the conclusion that the purposes of the trust are impossible of accomplishment, the trust may properly be terminated by an equity decree.*”

*In re Dowell's Estate*, 270 P.2d 1098 (Okla., 1954)

TALLGRASS

ESTATE PLANNING

**Modifying Irrevocable Trusts: It Can Be Done**

# Termination

Example Trust Language:

- *If our Trustee, in its sole, absolute, and unreviewable discretion, determines that the beneficiary is no longer dependent on others and is able to independently support himself or herself, our Trustee shall distribute or retain the remaining property according to the other provisions of this trust as though the provisions of this Section had not been effective.*
- This example comes from Special Needs Trust

TALLGRASS

ESTATE PLANNING

**Modifying Irrevocable Trusts: It Can Be Done**

# Constructive Trusts

## Nacho money!

- Embezzled funds to pay for a life insurance policy and then killed yourself? To the extent that policy was paid for with embezzled money, constructive trust! *G & M Motor Co. v. Thompson*, 567 P.2d 80, 1977 OK 142
- Joint award for damages and attorney fees paid to the plaintiff? Those attorney fees are held in a – constructive trust! *Nichols v. Nichols*, 222 P.3d 1049, 2009 OK 43

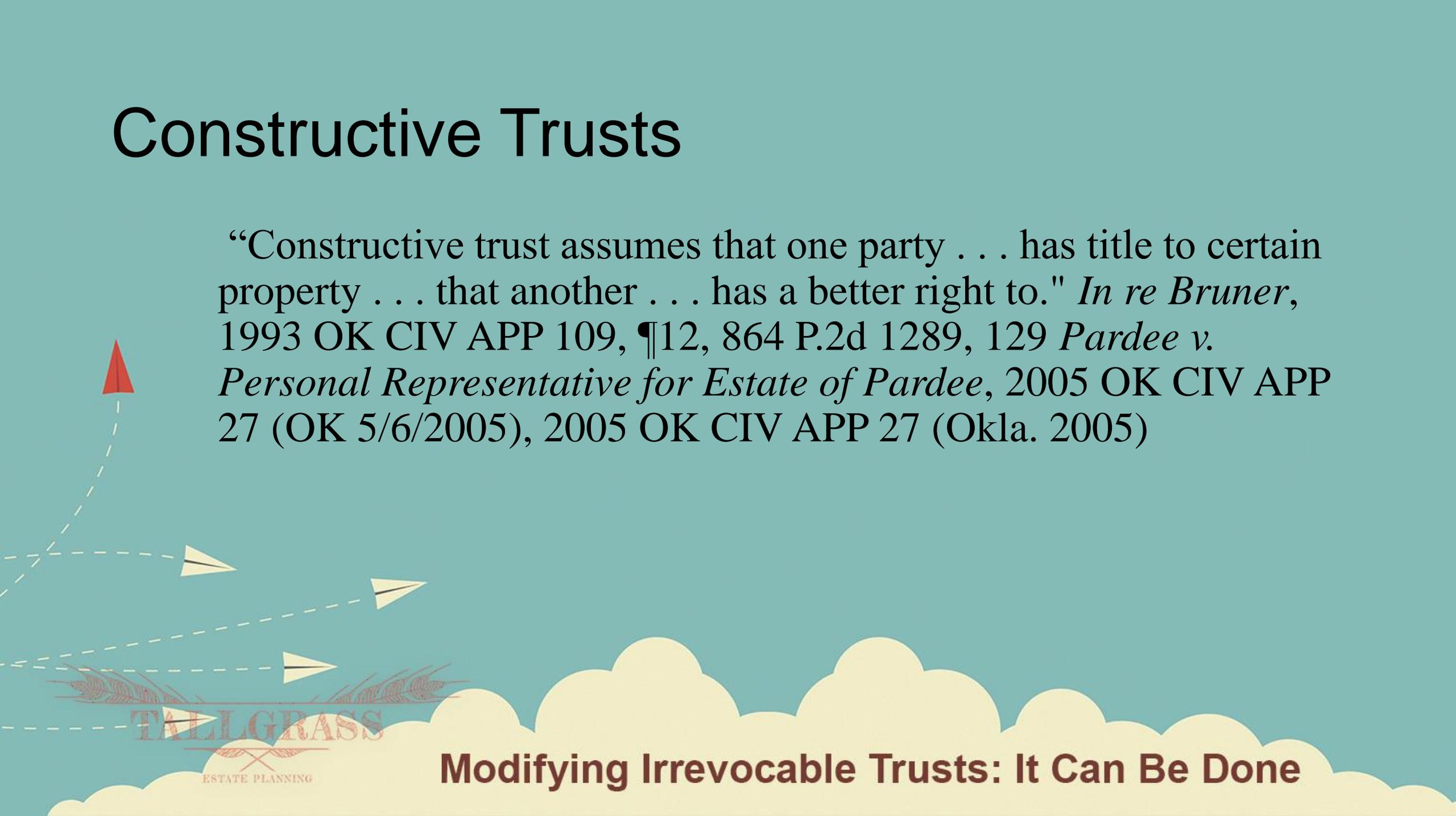
TALLGRASS

ESTATE PLANNING

**Modifying Irrevocable Trusts: It Can Be Done**

# Constructive Trusts

“Constructive trust assumes that one party . . . has title to certain property . . . that another . . . has a better right to.” *In re Bruner*, 1993 OK CIV APP 109, ¶12, 864 P.2d 1289, 129 *Pardee v. Personal Representative for Estate of Pardee*, 2005 OK CIV APP 27 (OK 5/6/2005), 2005 OK CIV APP 27 (Okla. 2005)



TALLGRASS

ESTATE PLANNING

**Modifying Irrevocable Trusts: It Can Be Done**

Thank you!

Questions?



**Modifying Irrevocable Trusts: It Can Be Done**