FIDUCIARY & RISK MANAGEMENT INSTITUTE

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TOPIC
FIDUCIARY LITIGATION
YESTERDAY, TODAY AND TOMORROW

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[1] Mac was the chief financial lawyer for the North Carolina Office of the Attorney General. His clients included the Departments of State Treasurer, Commerce, Revenue, Cultural Resources, the Housing Finance Agency, and Credit Union Administration. He was also General Counsel for the Banking Commission, principal attorney for Commissioner of Bank and lead counsel for all Justice Department fiduciary litigation. Over his career he authored and successfully lobbied more than 70 banking, trust and financial bills. Upon retirement, he was admitted to the Order of the Long Leaf Pine, the highest civilian honor given by the State of North Carolina.

His career has included the private practice of law and trust officer for two prominent North Carolina Banks. Mac earned his undergraduate and law degrees from Campbell University where he is an adjunct professor of fiduciary law and administration in the Master of Trust and Wealth Management (MTWM) Program, a joint degree initiative with the law and business schools.

He is a member of the North Carolina and United States Supreme Court Bar and currently engages in a government relations practice limited to representing financial organizations on regulatory and legislative matters. He also continues to speak throughout the country on ethics, fiduciary and financial law issues.

FIDUCIARY LITIGATION
A SELECT CASE REVIEW

1. Carter v. Carter, 2012 Ill. App. LEXIS 84 (Feb. 7, 2012).

The remainder beneficiary brought an action against the trustee (the income beneficiary) contending that her strategy of investing only in tax-free municipal bonds benefitted the trustee, but damaged the remainder beneficiary's interest in the trust principal. The trial court granted summary judgment in favor of the trustee noting that nothing in the trust's language required the trustee to make investments in a manner that ensured that the remainder interest would have been worth a certain amount upon the death of the trustee. Therefore, there was no breach of fiduciary duty by the decision to invest solely in municipal bonds. Moreover said the lower court, the trustee did not breach her duty of impartiality. The trial court did not misapply the law with respect to the prudent investor rule under Illinois law. The trustee was required to be mindful of the remainder beneficiary's interests and was prohibited from acting inconsistently with those interests. The Illinois Court of Appeals indicated that the decision to invest in municipal bonds was not arbitrary or unreasonable. Therefore, summary judgment was affirmed.

2. Ladysmith Rescue Squad, Inc. v. Newlin, 280 Va. 195 (Va. 2010)

This matter arose over an attempt to divide a charitable remainder unitrust, referred to as a CRUT. This is a trust in which no more than a specified percentage of the fair market value of the trust's assets as determined each year, for a specified period, can go to the non-charitable beneficiaries; the remainder belongs to a charity or charities designated in the trust. See, 26 U.S.C.S. § 664(d)(2).

The VA Supreme Court held that the circuit court erred in granting the motions to divide the testamentary trust and to commute and terminate the first charitable beneficiary's trust created by the division. Under Virginia law the burden is on the trustees to prove that the circumstances upon which they relied to justify modification of the trust were not anticipated by the testator, but they failed to carry that burden. The modifications made would not further the purposes of the trust. The division of the trust was merely a device to accomplish the desires of the trustees and first charitable beneficiary without having to seek the approval of the second charitable beneficiary, which was the only party expressing a desire to defend the testator's intent. Even that preliminary step adversely affected achievement of the purposes of the trust and contravened the provision of the Virginia Code that provides that <u>the common law of trusts and the principles of equity supplement the Uniform Trust Code (UTC) except when modified by statute</u>. (Emphasis added).

<u>The Virginia Trust Code provides that the express terms of a trust prevail over many provisions of the UTC, including the power to divide a trust</u>. For the protection of charitable trusts, the Attorney General is given the rights of a "qualified beneficiary." The Uniform Trust Code (UTC) has not altered the fundamental principles that in construing, enforcing and

administrating wills and trusts, the testator's or settlor's intent prevails over the desires of the beneficiaries, and that intent is to be ascertained by the language the testator or settlor used in creating the will or trust. <u>The UTC has not so altered the law as to permit beneficiaries, after the death of a testator, to defeat the terms of his will that postpone their enjoyment of his bounty, merely because they would rather have their money today than wait</u>. (Emphasis added)

3. <u>Marshall v. First National Bank of Alaska</u>, 97 P.3d 830 (2004).

The Alaska Supreme Court was asked to consider whether the superior court should have ordered the former trustee to repay fees it charged the trust for unsuccessfully opposing the beneficiary's request for a change in trustee. Under Alaska law, an "interested person" may dispute the "reasonableness" of a trustee's compensation and seek recovery of "excessive compensation" paid by the trust.

Katherine Tatiana Marshall, born in 1976, lives in Longmont, Colorado. She is the sole beneficiary of a trust her grandparents created in Alaska in 1984 and named First National Bank of Anchorage, now First National Bank Alaska (First National), as trustee. Marshall's grandfather had worked for First National for many years. The stated primary purpose of the trust is provide for Marshall's postsecondary education and making periodic distributions to her. The grantors both died in 1997, and Marshall moved from Alaska to Colorado in 1999. In October 2001 Marshall asked First National to resign as trustee in favor of Morgan Stanley Dean Witter Trust (Morgan Stanley), but First National refused.

After fruitless negotiations, Marshall brought an action to substitute the trustee and First National opposed the same. The lower court entered an order substituting the trustee. Marshall further contented that First National should be ordered to repay $15,697.18 it charged the trust for trustee's fees, and $838 it charged the trust for attorney's fees as a result of the substitution dispute, or alternatively that the matter should be remanded for a determination of the fees' reasonableness. First National argues that it is entitled to retain all of the fees because Marshall's surcharge claim is without merit. Because the superior court's apparent reasons for denying the repayment petition were legally erroneous, the matter was remanded for determination of whether the compensation was reasonable or excessive.

Alaska law allows a court to review the <u>reasonableness of compensation</u> determined by a trustee for its services, and <u>allows a court to order refund of excessive compensation</u>, In view of this, the court stated that ". . . we assume that the terms 'reasonableness of the compensation' and 'excessive compensation'- - reflect standards that are exact opposites: reasonable compensation is not excessive and excessive compensation is not reasonable in the context of this case." The court also recognized that Alaska law does not elaborate on the meanings of those terms but used the terms in this sense. The court first looked to the general duty of a trustee and stated:

- A trustee is a fiduciary of the highest order and is held to a high standard of conduct and is held to a high standard of conduct.
- A trustee must act fairly, justly, honestly, in the utmost good faith, and with sound judgment and prudence, but is not the trust property's insurer.

- In carrying out this duty, a trustee “shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another.”
- A trustee has a duty to “use reasonable care and skill to make the trust property productive, and “to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust.”
- A trustee has a duty to invest so as to obtain the largest return possible consistent with the principal's safety.
- Alaska's law reflect these general principles and requires the trustee to act with “reasonable care, skill and caution.” It also recognizes that, absent specific provisions otherwise, a trustee has “the general duty ... to administer a trust expeditiously solely for the benefit of the beneficiaries.”

More importantly, the court recognized that a trustee is under a continuing duty to administer the trust at a place appropriate to the purposes of the trust and to its sound, efficient management. If the principal place of administration becomes inappropriate for any reason, the court may enter any order furthering efficient administration and the interests of beneficiaries, including, if appropriate, release of registration, removal of the trustee and appointment of a trustee in another state. Trust provisions relating to the place of administration and to changes in the place of administration or of trustee control unless compliance would be contrary to efficient administration or the purposes of the trust. Views of adult beneficiaries shall be given weight in determining the suitability of the trustee and the place of administration.

Marshall contends that the “entire lengthy, costly, legal proceeding was necessitated by First National's failure to voluntarily resign as trustee when requested by Ms. Marshall in September, 2001.” She argues that she had a legal right to substitute a local trustee in her home state of Colorado because she was an adult and her views were entitled to weight. She asserts that the probate master's “addition of a requirement of ‘bad faith’ to the breach of duty is not warranted by the statutes. First National points out that Marshall began the litigation and contends that it acted in good faith in defending the trust.

The surcharge petition was filed only after the substitution dispute was resolved. The issues of reasonableness and excessiveness in context of a repayment claim under were not litigated previously, except to the limited extent they bore on the substitution petition. And because the surcharge petition was denied on grounds that avoided application of the statutory standards, there is no indication that the probate master thought his earlier findings resolved the merits of the statutory surcharge petition. We conclude that they did not. We think that these findings are relevant, but not dispositive.

We leave it to the court on remand to consider whether prolonged opposition to a request to change trustees was consistent with the statutes or the trust document. We assume that First National, at least at first, had legitimate reasons for opposing its removal as trustee before the court signed the May 9 substitution order. Correspondence in the record indicates that First National initially opposed Marshall's informal substitution request because it believed Marshall sought the change so she could influence the trust investment strategy in a way that would potentially defeat the trustors' purposes as expressed in the trust. Cases elsewhere provide some support for First National's initial opposition. Investment strategy remains the trustee's prerogative under terms of the trust. But First National only briefly relied on those substantive grounds in opposing Marshall's substitution petition, and its other reasons seem unpersuasive. The probate master's report recommending substitution implicitly recognizes the frailty of First National's opposition.

There is therefore an unresolved question whether First National's efforts in opposing substitution before May 9, 2002 resulted in excessive compensation. We remand for determination of whether the charges incurred before May 9, 2002 are appropriate.

4. **In Re: Eula M. Sommer v. Firstar Bank**, 277 Kan. 761, 89 P.3d 898 (2005).

Eula Somers died in 1956 leaving a testamentary trust for her two minor grandchildren. The trust was funded from the residuary estate of approximately $120,000. By January 2001, the value of the trust had increased to approximately $3,500,000. The payout provision of the Trust provided that:

> I authorize and direct my Trustee to pay, from the Trust Estate, beginning August 25, 1966, or one year after my death, whichever is the later date, the sum of $100.00 per month each to my said granddaughter, SUSAN ANN SOMERS, and to my grandson, KENT CLIFFORD SOMERS, so long as she or he shall live or until my Trust Estate is exhausted. If either of my . . . grandchildren should die before or after such monthly payments begin and before the Trust Estate is exhausted, then such deceased grandchild shall have no further interest in or right to receive monthly payments accruing after the date of her or his death, from the Trust Estate. If both of such grandchildren should die before or after such monthly payments begin and before the Trust Estate is exhausted, then there shall be no monthly payments accruing after the date of the death of the survivor of my such grandchildren made from the Trust Estate, and the remainder of the Trust Estate, after payment of the expenses of the trust, shall be distributed and paid over to the SHRINERS HOSPITALS FOR CRIPPLED CHILDREN, a Colorado Corporation, free of any trust and this trust shall terminate.

The trust also included a spendthrift provision which became of topic of concern for the Kansas Supreme Court.

The Shriners Hospitals for Children (Shriners) and the grandchildren reached an agreement to terminate the Trust. They agreed that the grandchildren would each receive a distribution of $150,000 from the Trust and that the remainder of the Trust assets would immediately be distributed to Shriners. Shriners agreed to continue the $100 monthly payments to the grandchildren.

Firstar Bank, N.A. (Firstar), the successor trustee, opposed the termination of the Trust. Shriners and the grandchildren then filed a joint petition in district court asking that the Trust be terminated immediately. Each side filed a motion for summary judgment.

This was a question was one of first impression under (what was at that time) the new Kansas version of the UTC. In the end, the Kansas Supreme determined that the UTC applied to trusts created before its enactment unless a provision of the act would "substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the party.

Among other things, the Kansas Supreme Court concluded that: "if a settlor includes a spendthrift provision in a trust to protect the assets from the beneficiaries' creditors, that purpose may not be accomplished by terminating the trust and purchasing an annuity to maintain the life beneficiaries' ongoing payments; if the continuance of a trust is necessary to carry out a material purpose of the trust, the beneficiaries cannot compel its termination; under the facts of this case, a spendthrift provision is a material purpose of the trust and the termination of the trust would frustrate a material purpose of the trust; the KUTC allows flexibility regarding the modification of long-term trusts as long as the settlor's objectives may be carried out; a court may modify a trust if, because of circumstances not anticipated by the settlor, modification will further the purposes of the trust; under the facts of this case, the trust could be modified to allow a partial distribution to the remainder beneficiary; and, unless a trust is ambiguous, the court looks to the four corners of that document to determine the legal effect of the document. The court cannot rewrite a will or testamentary trust in whole or in part to conform to a presumed intention."

The district court concluded that Eula Somers intended to provide for Shriners, that a partial distribution from the trust assets furthered her goal of providing for Shriners, and that the partial distribution was not detrimental to the payment of the grandchildren's annuity. Although the district court relied on its equity jurisdiction to order the partial distribution to Shriners, the award is proper. The Kansas Supreme Court concluded that the district court was correct in its finding that the growth of the trust and its present worth constituted a circumstance that was not anticipated by the settlor and that modification or a partial distribution of the trust assets furthers the purposes of the trust, to benefit Shriners. It therefore agreed that the order of the trial court allowing the corpus of the trust be distributed to Shriners, with the exception of $500,000 to be kept in the trust to provide for the payments to the grandchildren under the provision of the spendthrift clause.

5. In Re Hrnicek, 280 Neb. 898 (2010).

Successor trustee, First National Bank of North Platt (FNBNP), brought this action to withhold sums from trust due to beneficiary daughter Brietzke because she failed to repay a loan owed to trust. The lower court found Brietzke in contempt for failure to abide by a court order to repay the loan, and granted trustee's request to withhold distributions. She appealed.

It appears that "family drama" ensued after Dr. Hrnicek's death, and litigation followed. The lower court approved a settlement entered into by various members of the family which provided that Brietzke and her co-trustee would both resign as trustees, to be replaced by FNBNP. In addition, Brietzke, whose counsel was a signatory to this settlement, acknowledge[d] that she is indebted to [the] Trust," and that she agreed to "pay such debt in full according to the terms of the note." According to the record, payment on the loan had last been received from Brietzke on April 18, 2002.

Brietzke contended it was an error to allow FNBNP to retain, or offset, from her distribution from the trust the unpaid amount of her debt owed to the trust, plus interest. She argues that while the probate code allows for such retention, the trust code makes no specific reference to this type of remedy. The Nebraska probate code does allow for retention:

> Unless a different intention is indicated by the will, the amount of a non-contingent indebtedness of a successor to the estate if due, or its present value if not due, shall be offset against the successor's interest; but the successor has the benefit of any defense which would be available to him in a direct proceeding for recovery of the debt.

This was the common-law rule, and, as is noted by Brietzke, there is not a similar statute in Nebraska's trust code. However, the Nebraska Supreme Court noted that a part of Nebraska's trust code, provides that <u>"[t]he common law of trusts and principles of equity supplement the Nebraska Uniform Trust Code, except to the extent modified by the code or another statute of this state."</u> (Emphasis added). The court further noted that the right of retainer lies in equity.

The Restatement (Second) of Trusts also supports the conclusion of the lower court that FNBNP can retain a portion of Brietzke's distribution. Section 251A provides that "[i]f a testator leaves property in trust and a beneficiary of the trust was indebted to the testator, the interest of the beneficiary in the trust estate is subject to a charge for the amount of his indebtedness, unless the testator manifested an intention to discharge the debt, or manifested an intention that the beneficiary should be entitled to enjoy his interest even though he should fail to pay his indebtedness." Nothing in the record indicated a contrary intention.

6. <u>Pitts v. First Union National Bank</u>, 217 F.Supp2d 629 (2002).

The sole surviving beneficiary of two trusts, a Maryland resident, sued trustee, First Union National Bank, with its principal place of business in North Carolina, in state court, alleging breach of fiduciary duty and administration of trust. [The matter began in a Maryland state court but was removed by the bank to federal court. There were complex questions of jurisdiction not relevant to the questions of fiduciary law. Thus they are not discussed].

Plaintiff, a Maryland resident, is the granddaughter of George and Lillie Sergeant of Philadelphia. At the time of George's death in 1906, he left a will that established the George Sergeant Trust. Lillie, who died in 1924, also executed a will which established the Lillie Sergeant Trust. Plaintiff is the sole surviving beneficiary of both trusts, which provide that upon the death of her mother, Alva Sergeant Flanagan, Plaintiff would receive the corpus of each trust, less proper charges. Ms. Flanagan died on March 9, 2000 at the age of 104. The named trustee of both trusts was the Pennsylvania Company for Insurances on Lives and Granting Annuities. The modern-day successor in interest, Defendant FUNB (and its predecessors,) have assumed all duties and liabilities associated with the management of the trusts since they were established.

George's estate was probated in the Court of Common Pleas of Pennsylvania, Orphans' Court Division, in 1907. Accountings were filed by Defendant's predecessor and approved by the court twice, in 1940 and 1943. It is undisputed that no activity relating to the trust has taken place in that court since 1943.

In a letter dated April 23, 2001, Defendant notified Plaintiff that the George Sergeant Trust and Lillie Sergeant Trusts were being prepared for termination and distribution to Plaintiff. The letter indicated that the George’s rust had been created in 1906 with a value of approximately $122,000.00, and had grown to a present market value of approximately $518,073.00. The Lillie’s Trust had begun in 1924 with approximately $149,000.00, and is presently valued at approximately $2,588,645.00.

Upon learning of the apparent disparity in rates of growth for the two trusts, Plaintiff sued FUNB charging that Defendant breached its fiduciary duty as trustee of the George Sergeant Trust (Count 1) and acted negligently in administering that trust (Count 2). The Complaint also brings an action for accounting on the George Sergeant Trust, alleging that until her mother's death in 2000, Plaintiff had never been provided with quarterly or annual statements for the trust.

Under Pennsylvania law, Plaintiff was unable to prove an essential element of her breach of fiduciary duty claim and negligent administration - - that the trust suffered a loss. Finally, as the trustee had filed an accounting in state court, the claim was moot.

7. **<u>Russell v. Wachovia Bank</u>**, 353 S.C. 208, 578 S.E.2d 329 (2003).

Walker Scott Russell and Mildred (Mim) (Williams) Neiman, children of Donald S. Russell, Sr., Mr. Russell, deceased, brought this action to set aside his will, and both his revocable and irrevocable trusts, naming Wachovia Bank, the executor and trustee, as defendant. The Circuit Court granted summary judgment for the bank and his children appealed. The South Carolina Supreme Court held that: (1) the will was not procured by undue influence; (2) North Carolina law applied to the trusts; (3) the trusts were not procured by undue influence; and, (4) the trusts were validly funded.

Mr. Russell served as an active United States Circuit Judge for the Fourth Circuit until his death on February 22, 1998, at the age of 92. Prior to his appointment to the federal bench, he served as a governor of and United States senator from South Carolina, as well as President of the University of South Carolina. His physical condition deteriorated in his later years, and he was occasionally hospitalized. Mr. Russell executed many wills, codicils, and trusts beginning in 1959. His final will and trusts were executed on February 27, 1996, with codicils executed on May 15, 1996, November 6, 1996, October 9, 1997, and November 6, 1997. The last codicil was executed on February 20, 1998, just two days before his death. His estate totaled $33 million dollars. In general, following his death, his trust estate was to be held in trust for the benefit of his children and grandchildren with discretionary distribution of principal by the trustee.

Mim was to receive only the income from her trust, but the trustee had the discretion to distribute principal. At Mim's death, her remaining interest was to be divided per stirpes into trusts for her descendants living at the time of her death (the Williams children). The Williams children receive distributions of principal and income at the sole discretion of the trustee. They were given a power of appointment over their trusts through their wills, but could not appoint the trust property to their estates or to creditors. If the Williams children did not exercise their powers of appointment, their shares are divided per stirpes into trusts for their descendants living at the time of their death

There was evidence that the Williams children were disrespectful to Mr. Russell and frequently yelled at him about money. They engaged in physical fights in front of him and there was evidence that Cecilia, a granddaughter, monitored his telephone calls while he was in his home, and sometimes told him which clothes to wear. Cecilia would not allow him to regulate the thermostat in his house.

The Williams children spent large amounts of Mr. Russell's money, sometimes charging as much as $12,000 in a month. The Williams children had unfettered access to his office, and lived in his house. There was evidence that Thad, another grandchild, had frequent contact with Mr. Russell's attorney regarding the estate plans. Two medical doctors testified that Mr. Russell could have been susceptible to undue influence. Finally, there was evidence that grandchildren Russell and Cecilia removed records from Mr. Russell's office on the weekend of his death.

There is, however, undisputed evidence that the he was mentally competent and worked until the day he died. He drove himself to work every day. At his direction, his secretary, not the Williams' children or Thad, handled Mr. Russell's financial transactions. He frequently attended social engagements with grandsons, as well as other friends and colleagues. There is also undisputed evidence that Mim has not provided for her own children, the Williams children, in her estate plan. Finally, Mr. Russell met with his attorney alone on most occasions, and neither the Williams' children, nor Thad were present at the signing of the will, trust documents or codicils.

The will contest was governed by SC law whereas issues regarding the trust were properly determined under North Carolina (as the instruments provided for application of NC law). For a will to be invalidated for undue influence, the influence must be the kind of mental coercion which destroys the free agency of the creator and constrains him to do things which are against his free will, and that he would not have done if he had been left to his own judgment and volition. Undue influence must be shown by unmistakable and convincing evidence, which is usually circumstantial. The evidence must show that the free will of the testator was taken over by someone acting on testator's behalf. Undue influence is demonstrated where the will of the influencer is substituted for the will of the maker.

The SC Supreme Court agreed with the trial judge that there is no genuine issue of material fact to preclude the grant of summary judgment as to the validity of the will. Appellants did not present unmistakable and convincing evidence that the Williams' children or Thad utilized their relationship with Mr. Russell to substitute their will for his. The evidence presented points to the conclusion that the Williams children were churlish, spoiled children, who took advantage of Mr. Russell's generosity. While unattractive, such conduct and demeanor does not amount to undue influence.

With regard to the trusts, the SC Supreme Court applied a seven part test for undue influence under NC and found none to apply. Thus, there is no evidence to make out a *prima facie* case of undue influence under North Carolina law. Summary judgment was, therefore proper and the same was affirmed.

This is a very fact intensive case and should be carefully reviewed to more fully understand the decision.

8. Wilson v. Wilson, 690 S.E.2d 710 (N.C. Ct. App. 2010)

Defendant Lawrence Wilson, Jr., created two irrevocable trusts, one for each of his two children. He made the defendant Lawrence Wilson, Sr. the trustee for both of the trusts, and included in both instruments the provision which is at issue in this case. It is a follows: " The Trustee shall not be required by any law, rule or regulation to prepare or file for approval any inventory, appraisal or regular or periodic accounts or reports with any court or beneficiary, but he may from time to time present his accounts to an adult beneficiary or a parent or guardian of a minor or incompetent beneficiary.

The trust beneficiaries, who were the children of the settlor and grandchildren of the trustee, brought an action alleging breach of fiduciary duty and asked, among other things, that the trustee be required "to provide a full, complete, and accurate accounting of the Trusts from December 31, 1992 through the date on which the Order is entered." In support of their claims, the beneficiaries alleged that Lawrence Sr. had allowed defendant settlor, Lawrence Jr., to take control of the assets of the trusts, and that he subsequently invested the assets in his personal business ventures which were highly speculative and resulted in a substantial depreciation of assets. They further alleged that the trustee breached his statutory duty by failing to distribute income as required by the terms of the rust agreement. The defendants filed an answer and pointed to trust provision which purportedly excused the trustee from the accounting requirement and eventually filed a motion for a protective order. The trial judge granted the trustee's motion for a protective order and partial declaratory judgment; and, a summary judgment.

The trial court found that: (i) under the North Carolina Uniform Trust Code no aspect of a trustee's duty to inform beneficiaries is mandatory; (ii) the legislative commentary to North Carolina UTC at G.S. § 36C-8-813 supports the conclusion that a settlor may override, or negate, the requirement of disclosure to the beneficiaries in this matter by drafting a provision in the trust instrument providing that such disclosures are not required; (iii) the settlor has done precisely this; and, (iv) because the trust agreement did not require and accounting, and in view of the North Carolina UTC, the beneficiaries are not entitled to have defendants provide them with the information they seek in discovery or give an accounting or make reports with any court or to the plaintiffs/beneficiaries.

The trial court concluded as a matter of law that: (i) the disclosure and trust accounting provisions in the North Carolina UTC apply to all trustees unless the same are negated, or over-ridden by the express provisions of the trust instrument themselves; (ii) by reason of the operation of the trust agreement, and G.S. § 36C-1-105, the plaintiffs are not entitled to have the defendants give an accounting or make reports with any Court or to the plaintiffs/beneficiaries, and are accordingly, not required to provide the information sought by the plaintiffs in discovery; and (iii) the Wilson trust instrument eliminates the requirement that trustee provide trust accounting information of the nature and type requested by plaintiffs (because the trust does not require such disclosure).

On appeal, the North Carolina Court of Appeals indicated that (i) the N.C. Trust Code "applies to any express trust, private or charitable, with additions to the trust, wherever and however created;" a: trustee has a mandatory duty to act in good faith and that the terms of the trust cannot prevail over the power of the court to act in the interests of justice;" and a trustee generally has a duty to account for the trust property to the beneficiaries. It also recognized the power of the court to take any action and exercise any jurisdiction as may be necessary in the interests of justice. G.S. § 36C-10105(b)(9). The administrative provisions of the NC Trust Code in Article 8 (8-813) require that (a) the trustee is under a duty to: (1) provide reasonably complete and accurate information as to the nature and amount of the trust property, at reasonable intervals, to any qualified beneficiary who is a distributee or permissible distributee of trust income or principal; and (2) in response to a reasonable request of any qualified beneficiary: provide a copy of the trust instrument; provide reasonably complete and accurate information as to the nature and amount of the trust property; and, allow reasonable inspections of the subject matter of the trust and the accounts and other documents relating to the trust.

The court then engaged in a lengthy discussion of the departure of the North Carolina version of the UTC from the Uniform Trust Code generally. The North Carolina version of the UTC does allow the grantor to override the general rule and prohibit a beneficiary from receiving information. But it found in this instance, the information sought by the beneficiaries was reasonably necessary to enable them to enforce their rights under the trust. G.S § 36C-8-813 does not override the duty of the trustee to act in good faith, nor could it obstruct the power of the trial court to take such action as was necessary in the interests of justice, pursuant to N.C. Gen. Stat. § 36C-1-105(b)(2), (9) (2009), including compelling discovery where necessary to enforce the beneficiary's rights under the trust. The North Carolina Trust Code also recognizes that a trustee generally has a duty to account for the trust property to the beneficiaries. Thus, it reversed the decision of the trial court.

9. **PNC v. Snoddy,** 788 N.E.2d 433 (2003).

PNC Bank, as trustee of the John E. Mitchell Trust ("the Trust"), appealed the trial court's denial of reimbursement from the trust for attorney fees incurred in defending an action brought by brothers Robert and Mark Snoddy, the beneficiaries, to prematurely terminate the trust or to remove PNC as trustee. The Indiana Court of Appeals affirmed the trial court's decision.

The trust was established in 1974 following Mitchell's death and provided that it would pay income to Mitchell's widow for life, and to remain in existence until both Robert and Mark Snoddy, Mitchell's great-nephews, reached age fifty. At which time, it was to terminate and the Shoddy's were to receive the remainder. The original corpus of the Trust was approximately $419,000.

When Mitchell's widow died in November 2000 the trust administrator began communications with the Snoddys apparently misleading them into believe that PNC was willing to terminate the Trust prematurely, even though Mark, the youngest brother, would not turn fifty for another three years. The trust administrator also led the Snoddys to believe, alternatively, that PNC would step down as trustee if it did not prematurely terminate the trust. Ultimately, PNC was neither willing to prematurely terminate the trust nor to remove itself as trustee. In addition to these misunderstandings, the Snoddys also were dissatisfied generally with PNC's performance as trustee because of poor customer service, particularly with respect to the failure of the trust administrator and others to timely respond to inquiries regarding the Trust.

The Snoddys filed a petition to terminate the trust, which at the time had a value of approximately $2.8 million. Also, the Snoddys filed a petition to remove and replace PNC as trustee in the event the trial court decided not to terminate the trust and a petition asking that the trial court forbid PNC from recovering from the trust its attorney fees in defending against the Snoddys' petitions. The trial court entered an order denying termination of the Trust and the removal of PNC as trustee. It did, however, direct PNC to replace the trust administrator and concluded that "[u]nder the facts and circumstances of this case," PNC could not recover its attorney fees in this matter from the trust.

The trial court found that "[a]lthough the purpose of the trust has been fulfilled, the terms of the trust are clear and unambiguous in that the trust is not to terminate until such time as both Robert Snoddy and Mark Snoddy attain fifty (50) years of age." The trial court supported its decision not to remove PNC as trustee because although it found there was "a bad relationship or no relationship between [the Snoddys] and [the trust administrator] ...", "[f]rom an investment and performance standpoint, the trustee appears to have performed well." As for that paragraph of the trial court's order discussing the attorney fees issue, it simply noted that PNC would not be allowed to recover its fees from the Trust "under the facts and circumstances of this case."

After engaging in an exhaustive analysis of the recovery of trustees fees under the Indiana UTC, the appellate court concluded the trial court did not abuse its discretion in refusing to allow PNC to recover its attorney fees from the trust even though PNC prevailed on the petitions brought by the Snoddys where there was evidence presented that this litigation was at least partially prompted by PNC's actions.

10. <u>In re Trust Created by Inman</u>, 693 N.W.2d 415 (Neb. 2005)

Inman, as settlor, executed a revocable trust agreement dated March 9, 1994, naming himself as the initial trustee. The beneficiaries of the trust included Inman's two daughters and seven grandchildren, including Brackett, who was also named as successor trustee. Brackett became the trustee upon Inman's death and had served in that capacity for approximately seven years this matter began in court in August 2003.

The trust instrument directed that certain assets, not the subject of this appeal, be distributed from the trust to various beneficiaries upon Inman's death. The trust assets also included approximately 189 acres of farmland located in Washington County, Nebraska. The trust instrument directed that Elizabeth Peters, one of Inman's surviving daughters, was to receive rental income from 55 acres of this land during her lifetime and that upon her death, Brackett was to receive the income during his lifetime. The trust instrument further provided that Brackett was to receive income from the remainder of the farmland and that upon his death, it was to be divided among the other beneficiaries or their issue.

Brackett executed a real estate purchase agreement in September, 2002, whereby he agreed to purchase from ‘‘Robert Brackett as Trustee of the Inman Living Trust’’ a portion of the Washington County land held by the trust, consisting of 42 acres, of which 30 were tillable. In April, 2003, Brackett registered the trust in the county court for Douglas County and petitioned the court to approve the proposed sale of the 42 acre tract. All nine beneficiaries of the trust, including Brackett, were listed in the petition as interested parties. Brackett alleged in his verified petition that he had purchased a home and moved it ‘‘on to the real property he proposes to sale [sic] to himself.’’ He further alleged that if the court approved the sale at a price of $84,000, a reasonable rate of return on the proceeds would exceed the income being generated by the property. Five of the beneficiaries filed written objections to the proposed sale on grounds that it ‘‘serves no one’s interest but the Trustee’s, reduces the value of the residuary estate and amounts to a calloused disregard of the Trustee’s fiduciary obligation to protect the interest of the trust beneficiaries.”

At the hearing Brackett testified that the real property was the only trust asset other than a small sum of cash; the tillable portion of the 42 acres produced $1920 of rental income; that a sale price of $84,000 would improve the rate of return which he estimated at 2 1/3rd percent; and, that he would give an easement to the remainder of the property. An expert witness testified on the value of the land and indicated that the trust assets should be diversified. At least five of the beneficiaries filed written objections and another two appeared at the hearing and testified against the selling the farm land indicating is should remain in the family and that it was their grandfather’s intent to keep it in the family. In the meantime, Brackett purchased an old farmhouse and proceeded to place it on the 42 acre tract.

The trial court found that seven of the nine beneficiaries objected to the sale; that there is no persuasive evidence that the proposed sale would enhance or protect the interests of the beneficiaries; and, that there is a likelihood that the sale would lessen the value of those interests.’’ On appeal, the Nebraska Supreme Court walked through an excellent history of the UTC in that state and confirmed what is now the general rule that the code applies judicial proceeding concerning trusts commenced before January 1, 2005, unless the court finds that application of a particular provision of the code would substantially interfere with the effective conduct of the judicial proceedings or prejudice the particular provision of the code does not apply and the superseded law applies. The court determined that the code applied in this matter and that old and new law alike required a duty of loyalty and that Brackett had not met the test that the transaction was in the interest of the beneficiary. Also, while the prudent investor rule would require diversification, Brackett had presented no particular plan of investment; and thus, any potential benefit to the beneficiaries in the nature of increased income without a corresponding increase in risk to the principal is speculative. The trial court’s decision was, therefore, affirmed.

RECOMMEND READING

The following articles provide rich and informative discussions of fiduciary law topics of the day and are well worth the read.

1. **Avoiding Predatory Litigants**.

There is an excellent Article in the January, 2002, edition of the "Banking Law Journal" written by David Prince of Holland and Hart entitled, "Sutton's Law and Economics Applied to the Professional Fiduciary (Helping the Trustee to Avoid Predatory Litigants)." It examines the "Express Lanes to Litigation" and provides measures that could minimize a corporate trustee's risk of litigation. I highly recommend it as required reading for new and seasoned wealth management and compliance staff. It can be locate it on the internet at:

https://www.hollandhart.com/articles/Banking_Law_Journal.pdf

2. **Allocating Fiduciary Responsibility.**

Written by R. Hugh MaGill, Executive Vice President and Chief Fiduciary Officer of Northern Trust Corporation in Chicago, 2015 edition of "Trusts and Estate."

3. **Trust Law in the Twenty-First Century.**

An Essay by Tamar Frankel, Professor of Law, Michaels Faculty Scholar, Boston University School of Law, 91 Boston University Law Review 1289. It can be located on the internet at:

http://www.bu.edu/law/journals-archive/bulr/documents/frankel.pdf

4. **Why is Everyone Talking About Delaware Trusts.**

Peter S. Gordon Michael M. Gordon of Gordon, Fournaris & Mammarella, P.A., Wilmington. DE

McNeil Chestnut
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