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No Fault Removal of a Trustee Based On Change in Circumstances: Pennsylvania Decision of First Impression Interpreting Section 706(b)(4) of the Uniform Trust Code

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On May 23, 2013, the Pennsylvania Superior Court in the matter of *In re McKinney*, 2013 PA Super 123, 2013 Pa. Super. LEXIS 736, for the first time interpreted provisions of the Uniform Trust Code which permit removal of trustee if a court determines that (1) removal of the trustee serves the best interests of the beneficiaries; (2) removal is not inconsistent with a material purpose of the trust; (3) a suitable successor trustee is available; and (4) there has been a “substantial change in circumstance” (except for a corporate reorganization, merger or consolidation, which “is not itself a substantial change in circumstance”).¹ The Court’s decision expansively interpreted the law in a manner that may result in expanded efforts by trust beneficiaries to replace institutional trustees; promote competition among institutional trustees; and pose challenges for estate planners who wish to ensure that the wishes of settlors regarding the selection of trustees are honored.

The litigation involved two family trusts, created by the father and mother of the primary named beneficiary. Both trusts named the beneficiary’s children and their descendants as secondary beneficiaries, and limited distributions to the income generated by the trusts. One trust was created by the beneficiary’s father in 1964 and named as trustee a northwestern Pennsylvania bank which the trial court described as the “source of the family fortune.” The trust expressly provided that the bank, and its successors in the event of any mergers or acquisition, would serve as trustee. The second trust was created by the beneficiary’s mother in 1971, and named a bank into which the original trustee had merged as trustee, but did not expressly provide that subsequent successor institutions should also serve as trustee. The primary beneficiary acknowledged, however, that it was her mother’s intent that successor institutions to the originally designated trustee should continue to administer her mother’s trust, and out of deference to the wishes of her mother, waited until after her mother’s death to petition for removal and replacement of the trustee. In addition to the two trusts in dispute, four other family trusts had also been established for the beneficiaries administered by the same trustee, but which contained portability clauses allowing replacement of the trustee by the beneficiaries.

¹ The Court interpreted the provisions of 20 Pa.C.S. § 7766(b)(4) which are substantially equivalent to § 706(b)(4) of the Uniform Trust Code.

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After transferring the administration of the four trusts containing portability clauses to a new trustee without objections from the originally designated bank, the beneficiaries initially requested that the bank dissolve the two remaining trusts and distribute the corpus of the trusts to the beneficiaries. After the bank trustee rejected these requests on the advice of counsel who cautioned such distributions would have undesirable tax consequences and could expose the bank to liability under the spendthrift provisions of the trusts, the beneficiaries petitioned the Crawford County Court of Common Pleas to remove the trustee and replace it with the same trustee to which administration of the other four trusts had been transferred. The petitioners claimed that replacement of the trustee was justified because of changed circumstances, namely the relocation of the beneficiaries to the Hampton Roads area of Virginia, and because the trustee had failed to properly serve the needs of the beneficiaries. The petitioners alleged that a new trustee would better serve their interests because of greater familiarity with their financial needs, more convenient locations, and benefits arising out of the consolidation of the administration of two trusts with the administration of other family trusts and investment advisory services provided by the proposed replacement trustee.²

The Court of Common Pleas denied the petition to remove the trustee based on a finding that the beneficiaries had failed to provide “clear proof of the need for removal.” Relying on *Matter of Sylvester*, 555 A.2d 1202, 1204 (Pa. 1989), and a series of earlier similar decisions by the PA Supreme Court, the trial court held that to remove a trustee it must be presented with “testimony that is so clear, direct, weighty and convincing as to enable the trier of fact to come to a clear conviction, without hesitation of the truth of the precise facts in issue.” The trial court also concluded that the best interests of the beneficiaries must be defined based on the terms of the trust instrument, and not based upon the mere convenience of the beneficiaries.

Based on these standards, the trial court found that (1) the petitioners failed to produce any credible evidence that the trustee had not properly administered the trusts; (2) the best interests of the beneficiaries would be better served by incumbent trustee, which had more extensive experience in the administration of trusts under Pennsylvania law than the proposed successor trustee, which had very little such experience; (3) removal of the trustee would be inconsistent with a material purpose of both trusts, namely administration by a trustee with experience in the administration of trusts under Pennsylvania law; and (4) no evidence of changed circumstances had been presented sufficient to justify removal of the trustee. The trial court held that a change in circumstances must be based on the “changes related to the trusts themselves,” other than a series of bank mergers and combinations, and cannot be based solely on changes in the circumstances of the beneficiary and her children. Instead, the court determined that had the settlors intended that the trustee be subject to removal for the mere convenience of the then living and known beneficiaries at any given time, they would have authorized such action as they had done in the other four family trusts that contained portability clauses.

The Superior Court, in a decision authored by Judge David Wecht, reversed the trial court’s decision as based on errors of law and not supported by substantial evidence.

² While it is not reflected in either the trial court or the Superior Court’s decision, neither the incumbent nor the replacement trustee is organized under Pennsylvania law. The incumbent, however, had an extensive number of general purpose branch offices throughout Pennsylvania and nine branches in the Norfolk, Newport News and Virginia Beach area. The proposed successor trustee has no branches in Pennsylvania, but operates approximately 20 branches in the Norfolk, Newport News and Virginia Beach area. The Superior Court opinion states that the only office of the incumbent trustee offering trust services in Virginia is located in Northern Virginia, but does not identify where trust services are provided by the proposed successor trustee.

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In analyzing whether removal of a trustee is in the best interests of the beneficiaries, the Superior Court concurred with the trial court's conclusion that "best interests" are defined according to the trust terms and not according to the subjective will of the beneficiaries. Where a trust instrument fails to provide any guidance regarding how the best interests of beneficiaries are to be determined, the Court observed that "it would seem that the only interests provided for in the trust are the maximization of the income for the beneficiaries and remainder interests." The Court further observed, however, that when "presented with two competent trustees, both capable of administering the trust to achieve maximum financial growth, without factoring any other interests in the analysis, courts would be at a loss as to how to determine which trustee best serves the beneficiaries' interests." In such circumstances, as were apparently present in this dispute, the Court could have found that no grounds exist for the no-fault replacement of a trustee in the absence of evidence to a successor can better maximize trust income. Instead, the court looked for guidance regarding how other states have interpreted "best interests" as used in § 706(b)(4) of the Uniform Trust Code.

Based upon judicial decisions interpreting § 706(b)(4) of the Uniform Trust Code in Connecticut, Missouri and Utah, the Court found that "implicit in the best interests analysis is a comparison between the current trustee and the proposed successor trustee," and the removal of a trustee may be in the best interests of beneficiaries if "there is another entity that, for some reason, may perform better or provide different and more desirable benefits as administrator, or is otherwise better suited to serve as fiduciary for a particular trust." The Court noted that decisions in Connecticut, Missouri and Utah identified as factors relevant to such an analysis closer proximity of a successor trustee to the beneficiaries' homes; the ability to avoid out-of-state trust income tax through the use of a trustee based in the beneficiaries' home state; a more complete understanding of "the beneficiaries' unique personal financial situation" by a successor trustee; lower fees charged by the successor lower fees; and the transfer by bank personnel who have become the beneficiaries' trusted financial advisors to new institution. As a result, the Superior Court held that:

[C]ourts should consider the following factors when determining whether a current trustee or a proposed successor trustee best serves the interests of the beneficiaries: personalization of service; cost of administration; convenience to the beneficiaries; efficiency of service; personal knowledge of trusts' and beneficiaries' financial situations; location of trustee as it affects trust income tax; experience; qualifications; personal relationship with beneficiaries; settlor's intent as expressed in the trust document; and any other material circumstances. No one factor in this non-exhaustive list will outweigh the others. Rather, the trial court is to consider these factors if the parties present evidence thereof, on a case-by-case basis.

The Superior Court ruled that the trial court's failure to consider such factors constituted an error of law.

While the Superior Court's elucidation of what constitutes the "best interests" would appear to have called for the case be remanded back to the trial court for a determination of whether removal of the trustee is in the best interests based on the factors identified by the Court, instead the Superior Court based on the trial court's record concluded that the petitioner had demonstrated based on "clear and convincing evidence" that replacement of the trustee was in their best interests. The Court found the designation of a successor trustee to be in the best interests of beneficiaries because the successor "offers the beneficiaries personalized service, greater convenience due to their co-location in Virginia, more efficient service due to the administration of several family trusts, and greater personal

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knowledge of the overall financial service needs of the beneficiaries.” The Court rejected as unconvincing the trial court’s determination that the successor trustee lacked experience in administering trusts governed by Pennsylvania law. Instead, the Court determined that, “Pennsylvania trust law now poses no distinct peculiarities setting it apart from that of other states, and requiring highly specialized and localized knowledge.”

With respect to the question of whether the selection of the incumbent trustee was a material purpose of the trust, the Court recognized that where an individual is designated as a trustee, the selection “represents an expression of trust and confidence, and removal of a personally chosen individual is thus considered to be a drastic remedy.” On the other hand, when an institution selected as a trustee no longer exists as a result of a series of mergers and combinations, the Court found that “the only material purpose that can be served through designating a trustee is that the trustee effectively administers the trusts.” As a result, “[w]here both the trustee and the proposed successor trustee are qualified to serve that purpose, we will not find that removal violates a material purpose of the trust.”

The Superior Court rejected the trial court’s finding that a material purpose of the trusts was that they be administered by an institution with substantial experience in the administration of trusts under Pennsylvania law because the trust instruments designated that the trust be administered under Pennsylvania law, not by a Pennsylvania bank, and because prior to the death of the primary beneficiaries mother, between 2006 and 2009, she did not object to the trusts being administered by a bank organized under the laws of Ohio as a result of one of the mergers involving successors of the original trustee. In arriving at this conclusion, the court appears to have characterized the trial court’s finding that the settlors intended the trusts to be administered by a bank with substantial experience under Pennsylvania law as a determination that the settlors intended that the trusts be administered by a “Pennsylvania bank.”

Finally, with respect to whether there was a change in circumstance sufficient to justify replacement of the trustee, the Superior Court concluded that “a string of mergers over several years, resulting in the loss of trusted bank personnel, coupled with the movement of a family from Pennsylvania to Virginia, constitutes a substantial change in circumstances.” In arriving at this conclusion, the Court did not consider the relevance of the relocation of the primary beneficiary to Virginia in 1964, i.e., at the time the first of the two family trusts in question was created, which would appear to suggest that the relocation of the beneficiaries to Virginia was not a change in circumstance, but instead represented the status quo at the time the trusts were created.

Based upon these determinations, the Superior Court remanded the matter back to the trial court for the purpose of determining whether the proposed successor trustee is a “suitable successor.”

The Superior Court’s decision illustrates that while corporate reorganizations, mergers and consolidations in themselves do not constitute a change in circumstance sufficient to replace a trustee, when combined with other factors, the loss of personal relationships with settlors and beneficiaries resulting from mergers and consolidations may provide a sufficient change in circumstance to justify removal. The case also illustrates that the use of a particular institutional trustee may cease to be a material purpose of a trust where personal relationships between a settler or beneficiaries and trust officers are lost through the resignation or reassignment of personnel.

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