

File 9/11/11

ORIGINAL

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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Accounting of	: OBJECTANT ASSOCIATION FOR CHILDHOOD EDUCATION INTERNATIONAL'S STATEMENT OF ISSUES
ALVIN J. BURNETT and THE ESTATE OF ARCHIBALD A. HILL, DECEASED,	: HON. RENEE R. ROTH, Surrogate
as Trustees under the Will of JESSICA M. HILL,	: File No. 2197/1951
Deceased.	
_____ X	

Objectant, Association for Childhood Education International ("ACEI"), the charitable remainderman of the trust under the Will of Jessica M. Hill, by Morris & McVeigh LLP, its attorneys, submits herewith its Statement of Issues, pursuant to Uniform Rule §207.30.

FACTS

Jessica M. Hill (the "Decedent") died on July 25, 1951, a resident of the City, County and State of New York, leaving a Last Will and Testament which was admitted to probate by the Surrogate's Court, New York County. By Article THIRTEENTH of her Will the Decedent established a trust for the lifetime benefit of her nephew, Archibald A. Hill. The remainder of this trust, upon his death without issue, was to be distributed to ACEI.

Letters of Trusteeship were issued to Samuel Mann, as Trustee, on

September 7, 1951. He died on September 6, 1958 and on January 7, 1959 Successor Letters of Trusteeship were issued to Archibald A. Hill, the income beneficiary, and Alvin J. Burnett ("Burnett"), an attorney admitted to practice in New York. Archibald A. Hill died on March 29, 1992 without leaving any issue. The trust terminated on his death. His Last Will and Testament was admitted to probate by Probate Court No. 1 of Travis County, Texas, and Letters Testamentary thereon were issued to Burnett.

The Trustees' account for the period May 1, 1954 to September 6, 1958 and from September 7, 1958 to June 30, 1961 was settled by a Waiver of Objection and Release signed by ACEI on March 9, 1962. No further releases were signed by ACEI.

By a Petition verified March 9, 1994 ACEI petitioned the Surrogate's Court, New York County for an Order compelling the Attorney/Fiduciary to account herein. By an Order dated August 10, 1994 this Court compelled him to account.

By a Petition dated October 10, 1994 Burnett brought this proceeding.

PRELIMINARY STATEMENT

This is a trust accounting proceeding brought by the Attorney/Fiduciary, Burnett, individually and as the executor of the Will of Archibald Hill, deceased, who during his life was the income beneficiary and a Co-Trustee of the Trust under the Will of Jessica Hill. The proceeding involves an account for the Trust and two supplements thereto. It also involves an Account and two supplements for The Hill Foundation, Inc.

(the "Foundation") which at all times covered by the accountings was a New York Business Corporation wholly owned by the Trust.

Numerous objections have been filed to each of the accountings by the sole remainderman, ACEI, a charity and by the Attorney General of the State of New York on behalf of ultimate charitable beneficiaries. The basic thrust of these objections is that in just about every way available to him, Burnett misappropriated the trust assets to his own use. This case does not involve trustee errors. It involves deliberate plunder. The Co-Trustee, Archibald Hill either by omission or commission, aided and enabled Burnett to convert the assets of the trust. Archibald Hill's estate through its Executor and its primary beneficiary, have ratified this conversion after Professor Hill's death.

With respect to the burden of proof in the trial of this matter, it is stated in

Warren's Heaton on Surrogate's Courts at §96.27[7]:

"The accounting party has the burden of proving that he or she has fully accounted for all of his or her acts and all the assets of the estate. This evidentiary burden does not change in the event the account is contested. However, an objectant has the burden of proving with reasonable certainty that the account omits or undervalues estate assets."

The burden of proof is, therefore, on Burnett to show that he collected the assets due the trust and administered them in accordance with the Will of Jessica Hill and with the rules of fiduciary conduct. In this case, issues of collecting the assets have not been raised, but there are numerous substantial issues regarding violations of standards of proper fiduciary conduct. The burden is on Burnett to prove proper administration. The accounts

themselves (which are pleadings, see Matter of Schaich, 55 A.D. 2d 914, 391 NYS 2d 135 (2d Dept. 1977) demonstrate many of the Trustees' transgressions.

Simple inspection of the pleadings tells much of the tale. As set forth in detail hereafter, many of the objections filed point out obvious omissions, errors and inconsistencies in the administration of the trust. For example, during the periods covered by the accountings for the Foundation, the income beneficiary received slightly more than \$7,000 while the Attorney/Fiduciary received better than \$700,000. This speaks for itself. Matter of the Estate of Schnare, 191 A.D. 2d 859, 594 N.Y.S.2d 827(A.D.3Dept. 1993).

The Attorney/Fiduciary has made the argument that the remainderman, ACEI, does not have standing to object to any transactions occurring in the Foundation since these involved income of that corporation and were thus a matter between the Attorney/Fiduciary and the income beneficiary. This position neglects the fundamental principal of corporate law which holds that income of a corporation does not become income of the shareholders until a dividend, actual or *de facto*, is declared. The Attorney/Fiduciary has admitted that no actual dividends were declared and since no payments were made to the shareholder of the corporation, no constructive dividends are possible. As assets misappropriated from the corporation (and the Attorney/Fiduciary has admitted that there are no records to substantiate the "compensation" or legal fees he took) upon the return of these funds to the corporation, they become assets available for

distribution to the present shareholder, ACEI. This is fundamental corporate law. In re Lander's Estate, 162 Misc. 201, 294 N.Y.S. 58 (Sur., New York County 1937)

The response of the Attorney/Fiduciary to many of the objections interposed by ACEI concerning legal fees and expenses is that there are no records as to time, services performed or expenses paid. The burden of substantiating the fees and expenses is on the Attorney/Fiduciary, not on the beneficiary. Far from absolving the Attorney/Fiduciary from liability, such an assertion makes him liable to repay those items. White v. Rankin 18 A.D. 293, 46 N.Y.S. 228 (2d Dept. 1897); Matter of Estate of McCranor, 176 A.D. 2d 1026, 575 N.Y.S. 2d 181 (3d. Dept. 1991)

The Attorney/Fiduciary also makes the point that ACEI never complained about the occurrences in the Trust or the Foundation prior to this accounting proceeding. It is axiomatic that there is no obligation on a beneficiary to object to a fiduciary's actions until the fiduciary accounts. It is true that an account was informally presented to ACEI in 1971. ACEI responded to this submission by asking for explanations of various items in that account. The Attorney/Fiduciary refused to supply the requested information. This certainly does not constitute waiver, and if the Attorney/Fiduciary asserts that it does, he bears the burden of proving that assertion. Matter of Estate of Ayvazian, 153 Misc. 467, 275 N.Y.S. 123 (Sur. Kings County 1934)

The Restatement 2d on Trusts in Sections 169 through 183 lists the various duties of a Trustee. Among them are: Duty to Administer, Duty of Loyalty, Duty not to

Delegate, Duty to Render Accounts, Duty to Furnish Information, Duty to Exercise Reasonable Care, Duty to Take and Keep Control, Duty to Preserve Trust Property and the Duty to Deal Impartially with Beneficiaries. These Trustees have violated virtually all of these duties to the detriment of the remainderman.

ISSUES

I.

TRUST ACCOUNTING

1. Excessive Legal Fees Paid to Attorney/Fiduciary.

A. The Fees are Excessive on their Face.

During the period July 1, 1961 to March 29, 1992 (the date of the income beneficiary's death) the Attorney/Fiduciary paid himself \$1,416.67 in legal fees from the principal of the trust. During the period subsequent to the income beneficiary's death on March 29, 1992 to March 31, 1994 he paid himself \$25,000 from the trust principal and an additional \$112,500 in legal fees from the trust income. These fees totaling \$138,916.67 are excessive in light of the period accounted for, the size of the trust fund and the services rendered. (Objection 1 of Objections dated May 23, 1995.)

Burden of Proof. The burden of proof is on the Attorney/Fiduciary to substantiate and justify his expenditures. Matter of Shulsky, 34 AD2d 545, 309 NYS 2d 84, app. dismd 27 NY 2d 743, 263 NE 2d 391, 314 NYS 2d 993 (1970) ; In Re Taylor's Estate, 251 NY 257, 167 NE 434 (1929).

Violates Duty of: Loyalty: City Bank Farmers Trust Company v. Cannon, 291 NY 125, 51 NE 2d 674 (1943); Estate of Rothko, 43 NY2d 305, 401 NYS2d 449 (1977); Preserve Trust Property: Matter of Estate of Donner, 82 NY2d 577, 626 NE2d 922, 606 NYS2d 137 (1993).

B. The fees are excessive in light of the fact that the Attorney/Fiduciary entered into an agreement limiting his fees.

The Attorney/Fiduciary drafted and prepared an agreement dated January 20, 1959 with the income beneficiary. He also instigated its constant upward modification. Pursuant to this agreement he was to accept (15%) of the income of the Foundation: “as compensation for services rendered and to be rendered” by him as successor trustee. The percentage he received increased at his request over the years until it ultimately reached 40% of the Foundation’s income.

In addition to receiving \$429,212.02 in compensation under the agreement, the attorney/fiduciary paid himself \$137,500 in legal fees from the trust subsequent to the income beneficiary’s death on March 29, 1992. As stated in Scott on Trusts §242.7 “If there are several beneficiaries and they do not all agree, such an agreement is binding only upon such of the beneficiaries as agree.” This agreement was never approved or ratified by the remainderman and is, on its face, void as against public policy. In re Buck’s Estate, 203 NYS 2d 429 (Sur. Monroe County 1953); Matter of Baehen, 110 Misc. 2d 499, 442 NYS2d 755 (Sur. Nassau County, 1981) (Objection 1 of Objections

dated May 23, 1995.)

Burden of Proof: On Attorney/Fiduciary to substantiate and justify his expenditures. Matter of Shulsky, supra.

Violates Duty of: Loyalty: City Bank Farmers, supra, Estate of Rothko, supra, Preserve Assets: Matter of Donner, supra.

2. Commissions.

The Attorney/Fiduciary entered into an agreement with the income beneficiary to accept as compensation for his services “rendered and to be rendered as Trustee” 15% of the income of the Foundation. He drafted, prepared and had this agreement executed and instigated its constant upward modification. This agreement limited his compensation to the amounts specified. He is, therefore, not entitled to commissions. Despite this agreement the Attorney/Fiduciary paid himself principal commissions as follows:

<u>Period</u>	<u>Amount</u>
July 1, 1961 to March 29, 1992	\$ 2,909.01
March 29, 1992 to March 31, 1994	7,568.46
March 31, 1994 to July 31, 1995	25,000.00

The final supplemental account for the period August 1, 1995 through June 30, 1998 shows on Schedule H that the Attorney/Fiduciary has overpaid his commissions by \$30,638.69. He has not repaid that amount. Based upon this agreement he should be denied all commissions.

The Attorney/Fiduciary has breached every fiduciary obligation he has to the remainderman. Among other things he paid fees to others without regard to their reasonableness and paid himself excessive fees and commissions. He exhibited hostility to the remainderman and failed to provide it with requested information until forced to do so.

Because of his breach of his fiduciary obligations and conduct towards the remainderman he should be denied commissions. Scott on Trusts §243 (Objections 1, 3, 4 and 10 of Objections dated May 23, 1995, and Objections 1 and 4 of the Objections dated June 20, 1996 and Objection 16 of the Objections dated August 31, 1998.)

Burden of Proof. On Attorney/Fiduciary Matter of Schaich, supra; In re Buck's Estate, supra

Violates Duty of: Loyalty: City Bank Farmers, supra, Estate of Rothko, supra.

3. Payments to Others.

A. The Attorney/Fiduciary paid excessive accounting and legal fees to others. He paid Daniel Taub accounting fees of \$71,500 from principal for the period March 30, 1992 through March 31, 1994. During the same period he paid Taub \$19,500 from income for a total of \$91,000. He paid Taub an additional \$6,000 for the period April 19, 1994 through July 21, 1994. These fees were paid without a bill having been rendered and for duplicate services. (Objection 2 of the Objections dated May 23, 1995

and Objection 2 of the Objections dated May 24, 1996.)

Burden of Proof. The burden of proof is on the Attorney/Fiduciary to substantiate and justify his expenditures. Matter of Shulsky, supra. Warren's Heaton §101.03[5]; In re Acker 128 AD2d 867, 513 NYS2d 786. (2d Dept. 1987)

Violates Duty of: Loyalty: City Bank Farmers, supra, Exercise reasonable care: In re Hubbell's Will, 302 NY 245, 97 NE2d 888 (1951), Preserve Trust Assets: Matter of Donner, supra.

B. The Attorney/Fiduciary paid Alan Haberman \$25,000 for legal fees in connection with the account for the period July 1, 1981 to March 19, 1992. The Attorney/Fiduciary had already paid himself for legal services during this period for the same accounting. These fees were paid without a bill being rendered and without regard for the services actually rendered. (Objection 13 of the Objections dated May 23, 1995 and Objection 3 of Objections dated May 24, 1996.)

Burden of Proof. The burden of proof is on the Attorney/Fiduciary to substantiate and justify his expenditures. Citation: Matter of Shulsky, supra, 545. Warren's Heaton §101.03[5]; In re Acker supra.

C. The Attorney/Fiduciary Paid Diamant, Katz, Kahn & Co. LLP \$975 and paid Williamson and Horowitz \$975 for the Period August 1, 1995 to June 30, 1998 for additional accounting fees. These fees are not warranted since this Trust terminated on March 29, 1992 and should have been promptly distributed. Diamant, Katz, Kahn &

Co. LLP has petitioned this Court for an additional \$15,000 in fees. Not only are the fees excessive but the work product is substandard. (Objections 7 and 9 of the Objections dated August 31, 1998.)

Burden of Proof. The burden of proof is on the Attorney/Fiduciary to substantiate and justify his expenditures. Citation: Matter of Shulsky, supra. Warren's Heaton §101.03[5]; In re Acker supra. Matter of Selleck, 111 NY 284, 19NE66 (1888)

Violates Duty of: Loyalty: City Bank Farmers, supra. White v. Rankin, supra, Keep records, In Re Feinberg, 196 NYS2d 393 (Sur. N.Y. County, 1959), Exercise reasonable care, In re Hubbell, supra. Preserve Trust Property: Matter of Donner, supra.

4. Payment of Unnecessary Expenses

A. In addition to the fees discussed above the Attorney/Fiduciary paid fiduciary income taxes when no taxes were in fact due. For the period March 30, 1992 to March 31, 1994 he paid \$39,601.05 in unwarranted income taxes on the trust. This is a simple trust with a charitable remainder which vested on March 29, 1992. No income taxes should have been paid by the trust at all see §642 Internal Revenue Code of 1986. (Objection 12 of the Objections dated May 23, 1995; Objections 4 and 5 of Objections dated May 24, 1996.)

Burden of Proof. The burden of proof is on the Attorney/Fiduciary to substantiate and justify his expenditures. Citation: Matter of Shulsky, supra. Warren's Heaton §101.03[5]; In re Acker supra.

Violates Duty of: Loyalty: City Bank Farmers, supra. Exercise reasonable care: In re Hubbell, supra. Preserve Trust property: In re Rothko, supra, Matter of Donner, supra.

5. **The Attorney/Fiduciary Failed to Distribute the Trust Promptly Upon Termination Which Resulted in Losses to the Trust.**

The Trust terminated on March 29, 1992 with the death of the income beneficiary. It was not finally distributed until June 1998 (and then only under Court Order). During this period several of the securities decreased in value. Subsequent to the income beneficiary's death, the Trust lost \$68,563.79. There was no valid reason not to have distributed this Trust promptly after the death of the life income beneficiary. (Objection 7 of Objections dated May 24, 1996 and Objection 3 of Objections dated August 1998.)

Burden of Proof. On Attorney/Fiduciary to justify delay. Estate of Pearl Doles Dubens, New York Law Journal 10/28/74 p18, col 3.

Violates Duty of: Loyalty: City Bank Farmers, supra, Exercise reasonable care: In re Hubbell, supra, Preserve Trust property: In re Rothko, supra.

6. **Attorney/Fiduciary is under an obligation to fully and accurately account.**

The accounting filed herein does not balance. The final supplemental account is replete with fanciful entries which include a negative check and tax refunds on phantom tax payments, unexplained transfers between the Trust and the Foundation and

3. The Trustees Failed to Liquidate the Foundation Which Resulted in Substantial Loss to the Remainderman.

In 1986 the "General Utilities Doctrine," a tax concept, which had allowed corporations to be liquidated without incurring any capital gains tax at the corporate level was repealed. The Hill Foundation, Inc. is a closely held New York Business Corporation. There was no valid reason to keep this corporation in existence at any time covered by the accountings. During the period accounted for the corporation paid \$574,516.31 to the Internal Revenue Service for Corporate taxes, New York State was paid \$70,158.17 for Corporate Taxes and New York City was paid \$15,814.54 for Corporate Taxes. The Attorney/Fiduciary has admitted that he never considered liquidating this corporation. The objectant seeks no damage for possible capital gains taxes due for the failure to liquidate the corporation. The objectant believes that it has resolved this issue and withdraws the objections which relate to the capital gains tax. However, the failure to liquidate the corporation meant that corporate income taxes were incurred each year of the corporate existence. According to the accounting these taxes were paid from principal. (Objection 5 of Objections dated May 24, 1996 and Objection 6 of Objections dated August 31, 1998.)

Burden of Proof. Is on the Attorney/Fiduciary to show the properly managed funds. In re Hubbell's Will. 302 NY, 246 (1951).

Burden of Proof. On Attorney/Fiduciary to accurately account, Matter of Shulsky, supra; In re Steinberg, 153 Misc. 339, 274 NYS 914 (Sur. Kings County 1934)

Violates Duty of: Loyalty: City Bank Farmers, supra.

8. The Royalty Interest Owned by the
Foundation is a Wasting Asset Under the EPTL

The Foundation held an interest in the copyright to the song *Happy Birthday to You*. Pursuant to EPTL §11-2.1(j) this is an asset subject to depletion and the receipts from it should have been allocated between principal and income. The account on Schedule A-2 allocated all the payments from the copyright to income. A percentage of this should have been added to principal throughout the period accounted for. Objectant believes that the proper percentage is between 20 and 25 percent.

Burden of Proof: On the Trustees to prove that no portion of these dividends were allocable to principal and on the Objectant to prove what percentage should have been set aside.

Violates Duty of Loyalty: City Bank Farmers, supra.

Conclusion.

The Attorney/Fiduciary has the initial burden of proving his accounts are accurate and that he has fully accounted.

The issues here are primarily issues of violations of every Fiduciary Duty owed to the remainderman.

The objectant requests a trial before the Surrogate. It is believed that the trial will last at least five days.



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