

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

IN THE MATTER OF Trusts Created)
Under Articles V and VII of the James M.)
Barker Trust Agreement Dated April 19,) C.A. No. 20455
1973, as Amended May 3, 1974, September)
25, 1973, March 20, 1974, and April 18,)
1974, FBO Hugh and Ralph Barker.)

MEMORANDUM OPINION

Submitted: January 20, 2005

Decided: February 7, 2005

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LAMB, Vice Chancellor.

The trustee of certain trusts seeks instructions as to the proper beneficiaries under two of those trusts that were created upon the death of the settlor of an original *inter vivos* trust. Ultimately at issue is whether the adoption of an adult stepson by the current income beneficiary of one of those separate trusts brings the adopted person within the class of persons described as “descendents” of either the settlor or the beneficiary. If so, then the adoptee is entitled to take under the will of his adoptive father’s deceased brother and also is a person in whose favor the adoptive father may exercise a specific testamentary power of appointment.

While the resolution of these ultimate issues remains in litigation, the trustee has moved for an interim determination related, indirectly, to the funding of this litigation. Evidently, the trustee, in exercising its discretionary power to make distributions to the adoptive father under the trust created for his benefit, has distributed to him additional sums of money in consideration of the legal expenses he is incurring in this action. Certain of the respondents (who have potential remainder interests in the adoptive father’s trust) object to this practice and are threatening to hold the trustee liable for breach of trust.

In this opinion, the court considers the trustee’s “Motion For Determination” of the issue of current distribution levels and concludes that it is within the broad discretionary powers of the trustee to make distributions to the current beneficiary

that take into consideration that beneficiary's need to pay his attorneys' fees in this litigation.

I.

The following, very brief, factual overview is helpful to understand the issues now before the court.

The Wilmington Trust Company, acting as trustee,¹ filed the instant civil action seeking instructions as to the proper beneficiaries under certain trusts created under an April 1973 trust agreement (the "Agreement") settled by James M. Barker (the "Settlor"). The respondents are Hugh Barker, Jerry Burnett-Barker (Hugh's stepson), the James M. and Margaret R. Barker Foundation (the "Foundation") and various other members of the Barker family (the "Barker Respondents").² The Agreement established an *inter vivos* trust for the benefit of the Settlor and, upon his death, established various trusts for his children. When the Settlor died, four trusts of equal value were created, one for each of the Settlor's children. Hugh is the current beneficiary of one of those trusts. The Foundation and the Barker Respondents are possible remaindermen under that trust and also under the trust created for the benefit of Hugh's deceased brother, Ralph.

¹ James R. Barker and Wilmington Trust are currently co-trustees of the trusts. James delegated all of his powers to Wilmington Trust, except for his power and discretion to participate in any "investment decisions," as that term is defined in 12 *Del. C.* § 3313(d). As such, Wilmington Trust is the sole trustee with authority to take action on behalf of these trusts with respect to this suit.

² The Barker Respondents include James R. Barker, Ann S. Barker, W. Benjamin Barker, Margaret B. Clark, Jeanne C. F. Montgomery, Beatrice M. Finley, and William B. Finley.

The Foundation and the Barker Respondents are at odds with Hugh and Jerry over all of the issues presented in this litigation.

The Agreement provides that the trustee of Hugh's trust is to make discretionary payments to Hugh for his support, care, and best interests. The Agreement also grants Hugh a power of appointment, to designate by will one or more "descendent" of the Settlor and/or the Foundation as the remaindermen of Hugh's trust. If Hugh fails to exercise this testamentary power of appointment, the trustee is to distribute the trust corpus to the Foundation.

Hugh has no biological children. However, on July 30, 1998, he filed a petition to adopt Jerry. At the time, Hugh was 82 years of age and Jerry was 58. The adoption was not disclosed to the trustees or to any of the Barker Respondents. At the time of the adoption, Hugh also executed a new will exercising the power of appointment in favor of Jerry, thereby making Jerry the expected remainderman of Hugh's trust.

Hugh's brother Ralph passed away some time after the putative adoption. In his will, Ralph exercised his power of appointment (which was identical to Hugh's) to distribute the remainder of his trust in such a manner that Jerry is entitled to a portion thereof if Jerry is considered a "descendent" of Hugh. No share was set aside for Jerry at that time, however, because Hugh's trustees (including Wilmington Trust) were unaware of the putative adoption.

When Wilmington Trust, the Foundation, and members of the Barker family learned about Jerry's adoption, a dispute arose over the legitimacy of the adoption and Jerry's entitlement either to take under Ralph's will or to be appointed by Hugh's will as the remainderman under Hugh's trust. In addition to this litigation, the dispute has also given rise to a lawsuit in Florida state court seeking to nullify the putative adoption. On December 1, 2004, the Florida court denied Hugh and Jerry's motion to dismiss.

II.

During the course of this litigation, the Foundation and the Barker Respondents learned that, in response to a request from Hugh for additional funds, Wilmington Trust increased the normal periodic distributions from Hugh's trust to Hugh. To date, Hugh has received an additional \$23,000 which has served to reimburse him for his attorneys' fees in this case. The Foundation and the Barker Respondents voiced objection to the payment of these amounts and to any further payments to Hugh on account of his attorneys' fees in advance of the final resolution of this matter. In light of these objections, Wilmington Trust filed the Motion For Determination that is now before the court. That motion seeks an order determining that: (1) its past conduct as trustee of Hugh's trust in considering the legal expenses Hugh incurred in connection with this suit for purposes of setting past distributions to Hugh from Hugh's trust was proper, and

(2) as trustee, it has the power to consider Hugh's legal expenses in this matter for purposes of setting future distributions to Hugh from Hugh's trust.

III.

The Foundation and the Barker Respondents seemingly frame their objection in terms of the normal "American Rule" that requires each side to a litigation to bear its own attorneys' fees.³ In this connection, they ask the court to regard the decision by Wilmington Trust to augment current distributions to Hugh from Hugh's trust as the equivalent of court-ordered fee shifting. In addition, they argue that the payment of legal fees out of trust corpus is appropriate only where "the attorneys' services otherwise resulted in a benefit to the trust."⁴ Finally, they contend that Delaware law provides that the appropriate time to determine whether legal fees should be paid from a trust is at the conclusion of litigation, citing *In re Couch Trust*⁵ and *In re Trust of McKinley*⁶ for this proposition.

Wilmington Trust's decision to increase the level of distributions to Hugh from his trust does not, however, involve any court-ordered fee shifting. Nor does it involve the situation of a trustee using trust assets to defend itself from a claim of breach of trust. Thus, the cases cited are inapposite. In *McKinley*, for example, the court dealt with a post-trial motion by a trustee seeking an award of its attorney's

³ See *McNeil v. McNeil*, 798 A.2d 503, 514 (Del. 2002).

⁴ *Bankers Trust Co. v. Duffy*, 295 A.2d 725, 726 (Del. 1972).

⁵ 723 A.2d 376, 385 (Del. Ch. 1998).

⁶ 2002 WL 31934411, at *3 (Del. Ch. Dec. 31, 2002).

fees incurred in connection with the administration of a trust and the litigation.⁷ In *Couch*, the court rejected the beneficiary's argument that the self-help payment by the trustee to itself from trust principal to reimburse it for its attorney's fees incurred in contesting that suit constituted a breach of the trustee's fiduciary duty, but noted that "the better practice" for a fiduciary is to petition for an allowance of fees after the conclusion of the litigation.⁸

The Agreement provides a broad grant of discretion to the trustee of Hugh's trust. It states: "The Trustee shall pay to my son [Hugh] so much of the net income and principal as the Trustee from time to time considers advisable for his comfortable support, medical care, welfare and best interests, adding any unpaid net income to principal."⁹ Nothing in this broad grant of discretion prohibits the trustee from distributing money to Hugh to help defray any particular class of Hugh's expenses, including expenses incurred by Hugh in connection with litigation over the trust itself.

In analyzing whether a trustee properly has exercised its discretionary powers, the court will not substitute its own judgment for that of the trustee, unless the court finds that the trustee acted in bad faith or in an arbitrary or unreasonable manner.¹⁰ Furthermore, the court may not substitute its judgment for the business

⁷ *Id.* at *1.

⁸ *Couch*, 723 A.2d at 384-85.

⁹ Paragraph 1(a) of Article V of the Agreement.

¹⁰ *Couch*, 723 A.2d at 382-83.

judgment of the trustee.¹¹ Instead, to the extent to which a trustee has discretion, the court will not control that trustee's exercise of discretion so long as the trustee does not exceed its limits.¹²

The Foundation and the Barker Respondents do not argue that Wilmington Trust acted in bad faith or that it acted unreasonably in increasing the current distributions to Hugh. Nor have they argued that the trustee has exceeded the broad discretion granted to it by the Agreement. Wilmington Trust has apparently made the decision that the best interests of Hugh were served, and may continue to be served, by increased distributions to him from the trust created for his benefit, to defray litigation costs. Because there is no evidence that Wilmington Trust made this decision in bad faith, or that it did so unreasonably, the court will not disturb it.

IV.

For all the foregoing reasons, the Motion for Determination will be granted. Counsel shall submit an order in conformity with this opinion, upon notice, within 10 days.

¹¹ *Id.* (citing *Wilmington Trust Co. v. Coulter*, 200 A.2d 441, 449 (Del. 1964)).

¹² *Couch*, 723 A.2d at 383 (citing 3 SCOTT ON TRUSTS § 187 (4th ed. 1988)).