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VICE CHANCELLOR

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

COURT OF CHANCERY COURTHOUSE
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GEORGETOWN, DELAWARE 19947

Submitted: September 25, 2012
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Re: *In the Matter the Living Trust of Eleanor A. Wilson, Deceased and the Living Trust of Samuel C. Wilson, Deceased*
Civil Action No. 4474-VCG

Dear Counsel:

This matter involves the Living Trust of Eleanor A. Wilson, deceased, and the Living Trust of Samuel C. Wilson, deceased (collectively, the "Trust"). Eleanor and Samuel Wilson ("Mr. and Mrs. Wilson") were husband and wife. They created reciprocal, mirror-image trusts, into which their estates poured for the primary benefit of their two daughters, Linda Wilson ("Wilson") and Sandra Kelsch ("Kelsch"). After the death of their

parents, Wilson and Kelsch, in addition to being the beneficiaries of the Trust, were the named co-trustees as well.

The administration of the estate of Eleanor Wilson, and of the Trust, has, unfortunately, been the subject of extensive litigation. Before me are exceptions to a final post-trial report of the Master (the "Report"), dated May 30, 2012, involving the Trust. The Exceptant, Kelsch, sought review of the Report on two grounds. First, Kelsch contended that the Master erred in finding that litigation concerning the Trust and the estate in Pennsylvania, brought against Kelsch by Wilson both individually and on behalf of the Estate, did not work a forfeiture of Wilson's beneficiary interests in the Trust pursuant to the Trust instrument's *in terrorem* clause. After oral argument on this point of exception and a thorough *de novo* review of the record, I concluded in a bench decision that the Master's decision as expressed in her well-reasoned report was correct, and that no forfeiture had occurred.

The second ground of exception, the subject of this Letter Opinion, involves the cost associated with the employment of a successor trustee for the Trust. On January 27, 2010, the Master removed Kelsch and Wilson as

co-trustees and appointed a successor trustee.[1] On March 3, 2010, David T. Crossland was appointed successor trustee. In the Report, the Master determined that equity required that the cost of the successor trustee be shifted from the Trust to Kelsch. Pursuant to our Supreme Court's decision in *DiGiocobbe v. Sestak*, all aspects of a Master's Final Report are reviewed by this Court *de novo*.[2] For the reasons that follow, and after a thorough *de novo* review and oral argument, I find that the decision of the Master must be upheld and remanded for further proceedings.

The terms of the Trust as they apply here are straightforward. The Trust, upon the death of Mr. and Mrs. Wilson, was maintained for the benefit of Wilson and Kelsch. Any remainder in the Trust upon the death of Wilson and Kelsch was to pass to their issue, *per stirpes*, and if Wilson or Kelsch died without issue, to the issue of the other sister, *per stirpes*.[3] At present, only Kelsch has a child. In any event, under the terms of the Trust, it was unlikely that any contingent beneficiaries would take, because the Trust gives an unfettered right to both Wilson and Kelsch to demand the distribution of their respective shares of the Trust corpus at any time and for

[1] No exceptions were taken to that Master's Report, and it became final on March 2, 2010.
[2] 743 A.2d 180 (Del. 1999).
[3] Living Trust of Eleanor A. Wilson ("Eleanor's Trust"), Art. 12 § 2.

any reason.[4] In fact, shortly after her interest in the Trust vested, Wilson invoked this right and sought a distribution of her 50% share of the Trust assets.

Under the terms of the Trust, the Co-Trustees had to act in unison to make distributions.[5] Therefore, Wilson directed the Trustees, herself and Kelsch, to release 50% of the Trust assets to her. Kelsch refused to cooperate in this process, however. At that point, the only assets (or at least, the only substantial assets) of the Trust were two adjacent parcels of real property in northern New Castle County. Kelsch testified that she believed that her parents intended for the real property to stay in trust and to pass through Wilson and Kelsch to the next generation of the family; that is, to Kelsch's son.[6] Accordingly, she refused to permit the distribution of the property.

I accept for purposes of this analysis that Kelsch's belief as to her parents' intent is sincerely held. Nevertheless, her duty as a Trustee was to

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[4] Eleanor's Trust, at Art. 12 §§ 2(a)(2), 2(b)(2) ("My Trustee shall pay to or apply for [the beneficiary's] benefit such amounts from the principal of her trust share as she may at any time request in writing. No limitation shall be placed on [the beneficiary] as to either the amount of or the reason for such invasion of principal.").

[5] Eleanor's Trust, at Art. 16 § 8.

[6] Kelsch Dep. 15:14-18, Jul. 13, 2009 ("It is my understanding that [the properties] are not to be divided, that they are held in the family trust, and that's what I advocate. I would like to preserve the land in the trust."); *id.* at 16:11-16 ("I have an only son. He is the only child or heir to the trust, and I have concerns where he would fall into this if I were to agree to divide the trust. . . ."); *id.* at 24:18-22 (responding "Correct" when asked if her main concern was for her son to receive all the property when she and her sister passed away).

the Trust *as written*: not to carry out the cryptic intent of her parents, unexpressed in the Trust instrument. Therefore, in acting to thwart the plainly expressed right of Wilson to the distribution of one-half of the Trust assets, Kelsch breached a fiduciary duty of loyalty to Wilson and the Trust. The Master found that it was this breach of duty that led to the need to appoint a successor trustee, and that the excess costs imposed thereby should be paid from Kelsch's share of the Trust corpus. I agree.

Kelsch points out that the sisters' relationship was both disputatious and litigious, that Wilson sued Kelsch in Pennsylvania, that Wilson initiated the Petition for Instructions that led to the imposition of a successor trustee, and that Wilson rejected a settlement proposal from Kelsch before the Court appointed a successor trustee. Kelsch suggests that the cost of the successor trustee should therefore remain with the Trust.

It is abundantly clear to me that these sisters do not get along and that deciding how to distribute the Trust corpus would have required cooperation, which might not have been easily achievable, even if Kelsch had not been obdurate. Nevertheless, in breaching a clear duty to distribute the Trust assets as directed by Wilson as a beneficiary, in the hope of seeing the properties vest in her son, Kelsch breached her duty of loyalty to Wilson and to the Trust. A direct consequence of this breach was the appointment

of the successor trustee. Because it is clear from the language of the Trust that Wilson was entitled to that distribution, I can only agree with the Master that Kelsch's decision to block any distribution was a breach of fiduciary duty.

This Court has broad discretion to impose a remedy for breach of trust as equity requires.[7] This common-law power to rectify breaches of trust is codified at 12 *Del. C.* § 3581, which provides that any remedy may be imposed to rectify a breach of trust as equity requires.[8] It would not be equitable to permit costs, resulting from Kelsch's breach of duty, to be imposed on the Trust such that they would ultimately be borne equally by Wilson and Kelsch. In assessing a similar question of whether to impose (attorney's) fees and costs in the context of a finding of fiduciary disloyalty, this Court noted its general power to do equity, then stated that "where there has been a breach of the duty of loyalty, as here, potentially harsher rules come into play and the scope of recovery for a breach of the duty of

[7] *See, e.g.*, *Paradee v. Paradee*, 2010 WL 3959604, at *14 (Del. Ch. Oct. 5, 2010) (requiring a trustee to pay for lost tax benefits to a trust following the trustee's breach of trust).
[8] 12 *Del. C.* § 3581.

loyalty is not to be determined narrowly . . . . The strict imposition of penalties under Delaware law [is] designed to discourage disloyalty."[9]

The successor trustee was charged with distributing the Trust's assets. After consultation with both Kelsch and Wilson, he determined that the best way to fulfill his duty was to sell the property and distribute the proceeds. He sought Court approval for a sale of the property, which he received on December 29, 2010. The Trust corpus at present consists of the proceeds of that sale, in an amount over $500,000. If the Trust bore the cost of the successor trustee's services, that cost would ultimately be paid by Wilson and Kelsch equally from the proceeds of the sale, since 50% of the Trust corpus must be distributed to Wilson. Because the need for a successor trustee arose from Kelsch's refusal to perform her duty to distribute, the Master properly determined that equity requires that the resulting fees of the successor trustee be paid from Kelsch's share of the funds in trust. Still, the question of the quantum of the costs that equity requires be placed on Kelsch remains.

Having already found that Kelsch's breach of trust led to the imposition of the costs of the successor trustee, it is appropriate that the

[9] *Cantor Fitzgerald L.P. v. Cantor,* 2001 WL 536911, at *3 (Del. Ch. May 11, 2001)(internal quotation marks and citation omitted); *accord William Penn P'ship v. Saliba*, 13 A.3d 749, 758 (Del. 2011).

successor trustee's costs—to the extent that they exceed the costs which the Trust would have otherwise incurred—be paid from Kelsch's portion of the Trust corpus. However, had a successor trustee not been required, the Trust would still have incurred certain expenses. If the Trustees had continued to administer the Trust, their efforts in so doing would have had value, regardless of whether the Trustees requested a commission or other recompense for that effort.[10] The cost of that effort was saved by the appointment of the successor trustee. That is, equity requires only that Kelsch bear the *net* expenses of the successor trustee in excess of what would have been required if Kelsch and Wilson had administered the Trust; the remainder of the successor trustee's fees and costs must be borne by the Trust itself.[11]

The Master did not reach the issue of the amount of the successor trustee's cost to be shifted.[12] The successor trustee has not yet submitted a final request for payment, and the matter has not yet reached the stage in the

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[10] The Trustees are entitled to compensation under the Trust. Eleanor's Trust, at Art. 16 § 7.

[11] In netting out the costs to be shifted here, the Master should be cognizant that Wilson's demand to distribute the assets raised questions of the method to be used for distribution, since the corpus consisted of two undivided parcels of real property, of unequal value. To the extent that the costs associated with the successor trustee arose out of legitimate questions of how the demand for distribution should be complied with, those costs are properly an expense of the Trust, and should not be imposed on one beneficiary alone.

[12] To the extent that the Report found that all expenses associated with the successor trustee must be shifted onto Kelsch's share of the corpus, I do not adopt that portion of the Report.

proceedings where a fee request would come under the Master's review. In any event, it is my finding that equity requires a shifting of the successor trustee's fees and costs, to be paid from Kelsch's portion of the Trust assets, only to the extent those fees and costs exceed the estimated administrative costs of the estate absent Kelsch's breach of fiduciary duty.

For the foregoing reasons, I adopt the Master's Report regarding expenses arising from the appointment of the successor trustee, with modifications. The matter is remanded to the Master, to entertain a fee application from the successor trustee and to enter a final order of distribution. The parties should submit an appropriate form of order.

Sincerely,

/s/ Sam Glasscock III

Sam Glasscock III