

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-002040-MR

THE ADVISORY COMMITTEE UNDER THE  
LAST WILL AND TESTAMENT OF  
JAMES B. ALLEN, DECEASED;  
ANNE D. ALLEN and JANE A. DEVAN

APPELLANTS

v. APPEAL FROM CLARK CIRCUIT COURT  
HONORABLE JULIA HYLTON ADAMS, JUDGE  
ACTION NO. 98-CI-00196

PNC BANK, N.A., INDIVIDUALLY AND AS  
EXECUTOR UNDER THE WILL OF JAMES B. ALLEN  
AND  
BANK ONE, N.A., EXECUTOR UNDER THE WILL OF  
EDITH ALLEN; and DONNA MILLER

APPELLEES

OPINION  
AFFIRMING  
\*\* \*\*

BEFORE: BUCKINGHAM, HUDDLESTON, AND JOHNSON, JUDGES.

BUCKINGHAM, JUDGE: The Advisory Committee under the will of James B. Allen appeals the Clark Circuit Court's decision denying the Committee's request to remove PNC Bank, N.A., as the executor of Allen's estate pursuant to KRS<sup>1</sup> 395.510. Although its claim below alleged acts of mismanagement, neglect, and breach of fiduciary duties requiring the removal of PNC, the Advisory

---

<sup>1</sup> Kentucky Revised Statutes.

Committee now claims that the case is only about conflicts of interest. We discern no error by the trial court and thus affirm.

James B. Allen died testate on October 18, 1997. He was survived by his wife, Edith Allen, and three daughters from a previous marriage: Anne Douglas (Penny) Allen, Jane Allen DeVan, and Donna Allen Miller. These daughters comprised the Advisory Committee. This committee was established by Allen's will to "consult with and advise [the] Executor and Trustee regarding all important matters affecting [the] estate . . . ." However, Donna resigned her position shortly after the will was probated and stated that she did not want to participate with her sisters in a "vendetta" against Mrs. Allen.

The Clark District Court admitted Mr. Allen's will to probate on November 6, 1997, and appointed PNC Bank, N.A., as executor. On November 7, 1997, Mrs. Allen renounced Mr. Allen's will. After a summary judgment finding the renunciation valid, this court confirmed the renunciation's validity. See The Advisory Committee v. PNC Bank and Bank One, No. 1999-CA-000482-MR, rendered April 21, 2000, not to be published.

Disputes and litigation surrounding Mr. Allen's wealth characterized the period of time immediately before his death and all the years following. Before his death, a dispute arose concerning Mrs. Allen's expenditures as his guardian. She had been appointed guardian after he suffered a debilitating stroke in 1993. While his guardian, she made many expenditures of his funds which were questioned, and she requested a large guardian

fee in the settlement. As the dispute over Mrs. Allen's guardian expenditures and fee festered, a dispute arose in Wisconsin over the negligent construction and design of a yacht Mr. Allen had commissioned. Mr. and Mrs. Allen were named defendants in a lawsuit filed in that state.

After much litigation, the Wisconsin and the guardianship disputes were settled. Included in the settlements were standard releases from liability arising from the subject matter of the disputes. Mrs. Allen had sought \$2 million for her services as guardian, but she settled with the estate for \$35,000 plus the payment of her attorney's fees relating to the Wisconsin dispute. In addition, the estate settled with the Wisconsin plaintiff for \$100,000. By this point, litigation related to Mrs. Allen's renunciation had commenced with vigor.

After Mr. Allen's death, another dispute arose between Mrs. Allen and the members of the Advisory Committee; this one concerned the distribution of personal property contained in a home included in the estate. After lengthy negotiations and PNC's suggestion that court intervention might be sought to reach a resolution, the members of the Advisory Committee and Mrs. Allen settled the issue and executed a standard release from liability concerning the subject matter of that dispute.

Meanwhile, another dispute began to simmer; this one concerned differing valuations of the most valuable asset in Mr. Allen's estate - his 57% ownership interest in The Allen Company. An initial appraisal suggested a date-of-death valuation of \$13.3 million. However, the Advisory Committee, Mrs. Allen, and PNC

believed that estimate to be low. Moreover, a concern arose over the effect a low appraisal might have on efforts to sell the stock. PNC then commissioned another appraisal. This second appraisal determined that the value of the ownership interest was \$16.3 million as of October 22, 1998. An IRS audit and a dispute over estate taxes ensued.

Mr. Allen's will provided that his daughters would be responsible for the estate tax liability while they would share responsibility for capital gains tax liability with Mrs. Allen. Thus, while the daughters sought a low date-of-death valuation of the estate, Mrs. Allen sought a high one. Accordingly, each party argued for their respective position: the daughters argued that The Allen Company stock increased in value after Mr. Allen's death from \$13.3 million to \$16.3 million, and Mrs. Allen argued that The Allen Company stock's value was always \$16.3 million or more. Nevertheless, before the second appraisal was received, the deadline for filing the estate tax return arrived. PNC filed the estate tax return and assigned the value to the stock from the first appraisal, \$13.3 million.

Finally, the stock was sold to Leonard Lawson for \$18 million plus a \$2 million control premium. In addition, the terms of the sale provided that Lawson would pay Mr. Allen's daughters \$400,000. Hugh Gabbard, the president of The Allen Company and a former "advisory director" of PNC Bank's Lexington and Richmond locations, participated in the purchase of The Allen Company stock with Lawson.

After the stock sale, PNC invested the proceeds in the Black Rock Municipal Money Market Fund. It was a liquid, tax-free investment. PNC held an equity interest in the company that managed the investment fund, but it did not own it.

Over a year after the stock sale and the investment in Black Rock, the Advisory Committee filed a motion in the Clark Circuit Court seeking PNC's removal. After amending a previous complaint and providing a "More Particular Statement," the Advisory Committee provided the basis for its complaint: it alleged acts of mismanagement, neglect, and breach of fiduciary duties by PNC that necessitated removal pursuant to KRS 395.510.

The trial court considered all of the Advisory Committee's allegations concerning PNC's activity as executor. It found the Advisory Committee "failed to show by even a preponderance of the evidence that PNC . . . committed acts of mismanagement, misrepresentation, neglect, fraud or breach of its duties . . ." Thus, it concluded that PNC's removal pursuant to KRS 395.510 was not proper and denied the Advisory Committee's request. The trial court's order was entered on June 21, 2001, and this appeal followed.

Now, the Advisory Committee claims the only issue in this case is conflicts of interest - "nothing else." It argues that conflicts of interest existed between PNC and the estate mandating removal of PNC as executor. However, the trial court did not find the conflicts alleged by the Advisory Committee.

"An execut[or] is a fiduciary" holding the testator's estate as trustee. Lucas v. Mannering, Ky. App., 745 S.W.2d 654,

656 (1987). He represents the testator, heirs, legatees, and distributees. Id. He fulfils his duty to them by executing the wishes of the testator impartially, Hurst v. First Kentucky Trust Co., Ky., 560 S.W.2d 819, 821 (1978), and by preserving and maximizing the value of the estate. Moberley's Guardian v. Mt. Sterling Nat. Bank, 187 Ky. 403, 410, 219 S.W. 423 (1920).

When a testator names an executor, the testator's wishes should be followed if possible. Nunn v. Hamilton, 233 Ky. 663, 672, 26 S.W.2d 526 (1930). Nonetheless, circumstances may exist where the named executor is apparently unable to faithfully execute his duty. See Ewald v. Citizens Fidelity Bank & Trust Co., Ky., 305 S.W.2d 533, 534-536 (1957), for an analysis of cases considering circumstances where an executor appeared unable to fulfil his duty. For instance, a court properly refuses to qualify the named executor when he holds a personal claim against the estate. Id. However, when the testator's choice for executor is qualified by the court, a presumption that the executor will faithfully discharge his duty to the testator, heirs, legatees, and distributees arises. See Kuechler v. Rubbathen, 266 Ky., 390, 395, 200 S.W.2d 74 (1936), where the court denied appellant's request to disqualify an executor for hostility or a lack of sympathy toward the legatees of the will; the court noted "that the law presumes honesty and fair dealings among people until the contrary has been shown, and the court cannot anticipate or presume dishonesty and unfair dealings until such has been clearly established." Id.

A party seeking the executor's removal must overcome the burden posed by the presumption. This may be done by establishing one of the grounds for automatic removal listed in KRS 395.160. Pursuant to KRS 395.160, a party may be removed for failure to designate a process agent if he moves out of state; for bankruptcy or insolvency or "failing circumstances;" for becoming insane; or if he is "otherwise incapable to discharge the trust." Id. These grounds must be presented in district court, KRS 395.160, and the proceeding is nonadversarial. See Ewald v. Citizens Fidelity Bank & Trust Co., Ky., 305 S.W.2d 533, 534-535 (1957), where the court recognized that the nature rather than the merits of an alleged conflict of interest is to be considered when deciding whether to remove or disqualify an executor for an inability to "discharge the trust." Cf. Morris v. Brien, Ky. App., 712 S.W.2d 347 (1986). Thus, when removal is sought for an executor's conflict of interests, the trial court need only view the circumstances surrounding the alleged conflict to determine if the executor can faithfully discharge his duties. If the court concludes that the executor cannot, it properly removes him or refuses to qualify him. See Ewald, supra.

Another method for overcoming the presumption is through an action for settlement under KRS 395.510(1). The party seeking the removal must prove that the executor committed acts of mismanagement, fraud, deceit, breach of fiduciary duties, or the like while administering the estate. See Priestley v. Priestley, Ky., 949 S.W.2d 594, 597 (1997). Unlike removal actions for alleged conflicts of interest, this action is

conducted in circuit court and is adversarial in nature: the trial court considers the nature as well as the merits of the allegations. See Priestly, supra, and Lee v. Porter, Ky. App., 598 S.W.2d 465 (1980).

In the instant case, an action to remove an executor was prosecuted pursuant to KRS 395.510 in Clark Circuit Court against PNC Bank, the executor of James B. Allen's estate. The Advisory Committee of the estate - which is comprised of the estate's primary beneficiaries, Mr. Allen's daughters - alleged acts of mismanagement, neglect, and breach of fiduciary duties by PNC. On March 8, 2001, the trial court conducted a hearing at which each side presented its evidence and arguments for or against PNC's removal. The court entered its order denying the Advisory Committee's request to remove PNC and finding that the Advisory Committee failed to show evidence of mismanagement, fraud, misrepresentation, and breach of fiduciary duties sufficient to warrant PNC's removal.

The Advisory Committee claims that the circuit court mistook the claim for PNC's removal. It insists that the case is only about conflicts of interest. However, the Advisory Committee neither challenges the findings of the circuit court nor cites to evidence in the record that might demonstrate the findings were clearly erroneous.

The parties tried the case to the court without a jury. The appropriate standard of review for such findings was discussed by this court in Cole v. Gilvin, Ky. App., 59 S.W.3d 468 (2001). The court stated:



Since this case was tried before the court without a jury, its factual findings "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." A factual finding is not clearly erroneous if it is supported by substantial evidence. Substantial evidence is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people. "It is within the province of the fact-finder to determine the credibility of witnesses and the weight to be given the evidence."

Id. at 472-73. (citations omitted). Thus, the reviewing court need only inquire whether substantial evidence supports the trial court's findings. If so, they should not be overturned.

The district court is a court of limited jurisdiction, and its original jurisdiction is limited to those matters provided by the General Assembly. Kentucky Constitution § 113. Furthermore, when the General Assembly grants jurisdiction over any matter to the district court, its jurisdiction is exclusive unless the statute "specifically states that the jurisdiction shall be concurrent." KRS 24A.020.

The General Assembly provided the district court with original jurisdiction in all matters specified in KRS 24A.110 to 24A.130. KRS 24A.010 (1). Thus, as KRS 24A.120 provides, the district court has jurisdiction in probate matters except those probate matters "contested in an adversary proceeding." KRS 24A.120 (1) (b). The General Assembly deemed a matter "nonadversarial . . . and therefore . . . within the jurisdiction of the district court" if it is a probate matter and a statute does not provide for it to be commenced in circuit court. KRS 24A.120 (1) (c). Thus, the district court enjoys exclusive

jurisdiction over the removal of an executor for conflicts of interest - that is, when an executor is "incapable to discharge the trust," Morris, supra - since the General Assembly did not also grant such jurisdiction to the circuit court. KRS 395.160 (1); KRS 24A.020. Accordingly, to the extent the Advisory Committee sought the removal of PNC Bank for grounds specified or covered by KRS 395.160, the district court and not the circuit court had jurisdiction. See Lee, supra, where the court noted that the district court will have jurisdiction over actions to remove personal representatives when the grounds for removal are those provided in KRS 395.160. However, as the trial court noted in the instant case, it would be unreasonable to confine the remedy of removing a personal representative to district courts when it might be the appropriate remedy for a personal representative's mismanagement, fraud, or breach of fiduciary duties proven in a circuit court action. See Priestly, supra, for support of this theory.

KRS 395.160 (1) includes grounds for automatic removal, such as when the personal representative fails to designate a process agent if he moves out of state; when the personal representative is bankrupt or insolvent or is in "failing circumstances;" when the personal representative becomes insane; or when the personal representative is "otherwise incapable to discharge the trust." Id. The concept of "incapable to discharge the trust" includes conflicts of interest. See Morris, supra. Thus, a personal representative's removal solely for conflicts of interest does not fall within the circuit court's

jurisdiction. See Lee, 598 S.W.2d at 467. However, if a conflict of interest manifests in the form of mismanagement, neglect, fraud, deception, misrepresentation, or breach of fiduciary duties and an action for settlement pursuant to KRS 395.510 is instituted, the circuit court will have jurisdiction to consider the alleged matters and may remove the personal representative for the alleged bad acts. KRS 395.510. See Priestly, supra; see also Lee, supra. Thus, a party may use KRS 395.160 or KRS 395.510 to effect the removal of a personal representative. However, the basis for removing and the court in which the action for removal must be brought is different in each instance.

When a party seeks the removal pursuant to KRS 395.160 for conflicts of interest, the merits of the alleged conflict need not be considered by the court. KRS 395.160; see Ewald, supra; Morris, supra; and Lee, supra. Accordingly, the courts and the General Assembly demonstrated that removal pursuant to KRS 395.160 is nonadversarial and to be dealt with in district court. KRS 395.160 and KRS 24A.120 (1) (b) & (c). Conversely, the courts and the General Assembly demonstrated that removal pursuant to KRS 395.510 is adversarial and to be dealt with in circuit court. KRS 395.510; see Lee, 598 S.W.2d at 467, and Priestly, 949 S.W.2d at 597. Accordingly, once the Advisory Committee brought its claim pursuant to KRS 395.510 alleging mismanagement, neglect, and breach of fiduciary duties by PNC, the circuit court properly exercised jurisdiction of the matter and considered the bad acts alleged by the Advisory Committee.

This matter was tried to the court on March 8, 2001, and the court entered its order on June 21, 2001. The appropriate standard of review gives deference to the trial court's findings since, as fact-finder, the trial court viewed the evidence first-hand and may more accurately evaluate the weight and credibility it deserves. Indeed, only when the reviewing court can say the trial court's findings are clearly erroneous should those findings be overturned. Thus, if substantial evidence supports the trial court's findings, they should be affirmed.

In the instant case, the trial court considered five interwoven yet distinct fact situations that comprised the Advisory Committee's claims of mismanagement, neglect, and breach of fiduciary duties by PNC. First, the trial court considered PNC's actions concerning Mrs. Allen's renunciation of Mr. Allen's will. Second, the trial court considered PNC's actions concerning the disposition of Mr. Allen's personal property. Third, the trial court considered PNC's actions concerning the sale of The Allen Company stock. Fourth, it considered PNC's actions concerning the valuation of the estate and the IRS inquiry. Finally, the trial court considered PNC's actions concerning the investment of the proceeds from the sale of The Allen Company Stock in Black Rock Municipal Money Market Fund. After considering each one, the trial court found that PNC did not act in a manner warranting its removal as executor or warranting an order for a settlement of the estate. Finally, the trial court found the Advisory Committee failed to show by even a

preponderance of the evidence any "acts of mismanagement, misrepresentation, neglect, fraud or breach of its fiduciary duties so as to award relief under KRS 395.510 . . . ."

Now, the Advisory Committee claims this case is only about conflicts of interest. Yet, it admitted in its brief that removal for pure conflicts of interest is nonadversarial. Nonadversarial probate matters are the domain of district court, KRS 24A.120 (1) (b), and the General Assembly made removal for conflicts of interest the exclusive province of district courts. KRS 395.160. Thus, if this case were solely about conflicts of interest, the Advisory Committee sought removal in the wrong court. The Advisory Committee's filings and the manner in which it prosecuted the case in circuit court contradict its assertion that the case is about conflicts of interest only. The Advisory Committee alleged acts of mismanagement, neglect, and breach of fiduciary duties by PNC, and it characterized these acts as the basis for the relief it sought.

First, the Advisory Committee claims PNC acted improperly when it refused to oppose Mrs. Allen's renunciation of the will. An executor has a duty to maximize the value of the estate. Moberley's Guardian, supra. Thus, the Advisory Committee argues PNC had a duty to oppose the renunciation since the renunciation had the effect of diminishing the estate that would be available for distribution to the members of the Advisory Committee.

The trial court reviewed the parties' actions surrounding the renunciation. It found that the Advisory

Committee actively opposed the renunciation by litigating its validity vigorously and thoroughly and that PNC effectively preserved estate resources by avoiding the legal costs that would accompany joining in the litigation. In addition, PNC had concluded that the renunciation was validly made, and its conclusion was confirmed, first by the circuit court's summary judgment finding the renunciation valid, and then by this court's decision affirming the trial court's judgment. A review of the record reveals substantial evidence supporting the trial court's findings concerning the renunciation litigation. Thus, those findings should not be overturned.

Second, a controversy arose during the administration of the Allen estate concerning the distribution of personal property contained within a home included in the estate. The Advisory Committee claims that PNC concluded property purchased by Mr. Allen was not solely Mr. Allen's property but the joint property of Mr. and Mrs. Allen and suggested that if the parties could not reach a resolution concerning the distribution of the personal property it would seek court intervention to do so. Consequently, the Advisory Committee argues that it was forced to enter into an inequitable settlement concerning the personal property by PNC's insistence upon seeking court intervention if a resolution was not reached.

The trial court addressed PNC's actions surrounding the personal property dispute and the settlement entered by the Advisory Committee. It noted that the dispute concerning the personal property raged for quite some time with many revisions

being made to the property listing. Finally, after several unsuccessful efforts to resolve the dispute, the parties executed a property settlement. The court found the Advisory Committee was represented by able counsel during all aspects of the dispute including the execution of the settlement. Furthermore, it found that PNC properly refused to take dispositive action concerning the personal property since it was faced with competing claims. The court concluded that no evidence supported a finding of "coercion, fraud or misrepresentation as it related to PNC's duties regarding the . . . personal property." Substantial evidence supports the trial court's findings, and the Advisory Committee fails to cite to evidence reflecting "coercion, fraud or misrepresentation" by PNC that the trial court may have overlooked. Accordingly, the court's findings should be upheld.

Several appraisals of The Allen Company stock were made. The first appraisal valued the stock at Mr. Allen's death at \$13.3 million. All parties agreed at that time that the appraisal undervalued the stock, so the second appraisal was commissioned. It valued the stock as of October 1998 - several months after Mr. Allen's death - at \$16.3 million. Since the will provided that taxes attributable to increases in the value of the estate should be shared by Mrs. Allen and Mr. Allen's daughters while the estate taxes should be paid only by the daughters, the Advisory Committee argued that the value of the stock increased after Mr. Allen's death from \$13.3 million. Conversely, Mrs. Allen, then her estate, argued that the value of

the stock at death was actually \$16.3 million or more rather than \$13.3 million.

Meanwhile, the estate tax return deadline arrived, so PNC filed the return. However, the second appraisal had not arrived, so PNC used the value estimated by the first appraisal - \$13.3 million. Then, the IRS sent notice that it planned to audit the estate. To clarify the date-of-death value of The Allen Company stock in light of the disparity between the first two appraisals and the \$20 million sales price, PNC requested an additional appraisal; this third appraisal valued the stock at \$19.7 million as of Mr. Allen's death.

The Advisory Committee claims that PNC sought a third appraisal of the estate's largest asset knowing it would provide a higher date-of-death value than the other appraisals, in turn causing the estate's position in negotiations with the IRS to be weakened and the estate tax to be increased. According to the Advisory Committee, seeking the third appraisal breached PNC's duty to maximize the estate by minimizing taxes.

The trial court addressed PNC's actions surrounding the appraisal. After finding the above facts, the court concluded that "no evidence of fraud, mismanagement or breach of fiduciary duty related to the tax issue" existed in the record. Since the record supports the court's findings and the Advisory Committee failed to point to facts showing the existence of some bad act by PNC that the court may have overlooked, the trial court's findings should be upheld.



After PNC sold The Allen Company stock, it invested a large portion of the proceeds into a Black Rock Tax Free Municipal Money Market Fund. The Advisory Committee claims this was improper since PNC was the majority interest holder in the fund's parent company and derived a benefit from the income of the parent company.

The trial court addressed PNC's actions concerning the investment in Black Rock. It noted that PNC attempted to follow the Advisory Committee's recommendation concerning the investment of the proceeds from the stock. The fund provided desired liquidity and tax-free status. The trial court concluded that the evidence failed to demonstrate that PNC was negligent in the administration of the stock proceeds or that other specific investments were superior to the return of PNC's investments when considering risk, economic instability, liquidity, long-term issues, expense of acquisition, and tax-free status. Finally, the court recognized that KRS 287.272 serves as statutory authority permitting PNC's investment in Black Rock Funds. Moreover, it concluded that evidence did not support a finding of fraud, mismanagement, or breach of a fiduciary duty by PNC as it relates to investment of estate assets. Since substantial evidence supports the trial court's findings and the Advisory Committee failed to show that the trial court's findings were clearly erroneous, they should not be overturned.

The largest asset of the estate was the stock in The Allen Company. It was valued by various appraisals from \$13.3 million to \$19.7 million. The interested parties deemed a sale

of the stock followed by a distribution of the cash as the best method for handling this particular estate asset. Thus, PNC began a process aimed at selling the stock. However, the Advisory Committee charges that during this process PNC endeavored to benefit PNC insiders to the detriment of the estate by offering the stock to them at a lower price than an auction would have provided and by stalling an ongoing auction to sell the stock. Thus, it argues that PNC breached its fiduciary duty to maximize the estate.

The trial court carefully reviewed the Advisory Committee's allegation concerning PNC's efforts to sell the stock, and contrary to the Advisory Committee's assertions, it did not find PNC's efforts lacking or a breach of its fiduciary duty. However, the court did find the Advisory Committee members through their efforts to manipulate the stock sale process hampered PNC's efforts to effect an auction of the stock at its highest possible price.

To achieve the highest possible price for the stock, PNC proposed an auction-type marketing effort to potential buyers in The Allen Company industry. PNC distributed sales announcements and information packets to potential buyers and several responded. However, unknown to PNC, other efforts had been made by the Advisory Committee and by certain members of The Allen Company senior management to negotiate a sale of the stock.

The Advisory Committee negotiated with Leonard Lawson for the purchase of the stock. It agreed to approve his purchase of the stock in exchange for \$18 million, plus a \$2 million

control premium in addition to \$400,000 and the attempted transfer of season tickets to University of Kentucky football and basketball games to Mr. Allen's daughters for certain real property and non-compete agreements. Moreover, the Advisory Committee, along with Mrs. Allen and Donna Miller, informed PNC that they desired the sale to Lawson.

While Lawson conducted negotiations with the Advisory Committee, he executed an agreement with Hugh Gabbard and Rich Monohan - senior managers, directors, and stockholders of The Allen Company. The agreement provided that Lawson, Gabbard, and Monohan would purchase The Allen Company with Gabbard and Monohan owning in the aggregate forty-nine percent of the equity. After full disclosure to the other directors of the dealings between Lawson, Gabbard, and Monohan, the directors approved the sale to Lawson and waived the corporation's rights under a buy/sell agreement.

After the Lawson sale was approved, the parties executed an Acquisition Agreement that detailed the parties' rights and responsibilities. It included each shareholder's waiver of rights under the buy-sell agreement; an acknowledgment by all parties indicating they received copies of correspondence concerning the purchase of The Allen Company; the Advisory Committee's and Mrs. Allen's express approval of the sale to Lawson; and an "Acknowledgment, Release and Settlement" in which all parties acknowledged receipt of a copy of the agreement between Lawson, Gabbard, and Monohan and satisfaction with the

answers to questions concerning the agreement. Finally, the waiver provided:

Each party hereto waives, releases and relinquishes unto each of the other parties hereto, in both individual and fiduciary capacities, if any, each and every claim, liability, obligation, cause of action, right and every other matter of any kind or description, however denominated, whether vested or contingent, realized or inchoate, known or unknown, sounding in tort, contract or otherwise, including (without limitation) fiduciary obligations, arising out of or related to the subject matter of this Agreement or in any manner from the sale of the Shares by virtue of this Agreement ("Claim"). . . . The parties hereto further acknowledge that: (a) the consummation of the transactions contemplated by this Agreement are in settlement of any Claim against the other; (b) this Section 2.10 specifically waives, releases and settles (without limitation) any claim against any party hereto for executing this Agreement and for any action or inaction of such party related to the sale of the Shares; and (c) the matters waived, released and settled herein are also waived, released and settled with respect to and for the benefit of all officers, directors, employees, members, attorneys, accountants, agents and other persons advising and/or participating with any person or entity which is a party hereto, or any party described in Sections 2.5 and 2.6 hereto.

The trial court addressed PNC's actions surrounding the sale of the stock. It recognized that The Allen Company senior management and the Advisory Committee attempted to intervene in the bid process and acted to secure the interests that were important to them but that were not necessarily effective to maximize the estate. In addition, the court found no evidence that PNC coerced the Advisory Committee during the stock sale process, that the Committee was represented by competent counsel

during the process, and that the waiver and release was valid. Finally, the trial court concluded that there was insufficient evidence "to support a claim in reliance on KRS 395.510."

The Advisory Committee raised conflict of interest concerns regarding Hugh Gabbard, a director, stockholder, and president of The Allen Company. Gabbard served on PNC's Lexington and Richmond bank advisory boards. The Advisory Committee alleged that PNC colluded with Gabbard to his benefit and to the detriment of the estate during the stock sale process. However, the trial court found that the Advisory Committee failed to develop evidence of any collusion or undue influence. The court found that Gabbard acted independently as did the Advisory Committee when negotiating with Lawson, each to the frustration of PNC and its efforts to achieve the highest price through an auction process. The trial court's findings are supported by substantial evidence and should be upheld.

James B. Allen's wealth and the acts of parties interested in it spawned seemingly limitless controversy. Mr. Allen's daughters and widow squared-off before Mrs. Allen's death. Then, after her death, her estate continued the battle.

The dispute involved in this case concerns the actions of PNC Bank, the executor of Mr. Allen's estate. While the Advisory Committee to the estate that sought PNC's removal now attempts to claim that pure conflicts of interest rather than bad acts are the focus of the case, the pleadings and arguments presented to the circuit court reveal otherwise. This case was filed in circuit court seeking removal of PNC Bank pursuant to

KRS 395.510 for its bad acts, including mismanagement, neglect, and breach of fiduciary duties.

The trial court conducted a hearing, and each of the Advisory Committee's allegations concerning PNC's actions as executor was addressed. In turn, the trial court entered an order addressing them. It found in each instance that PNC did not commit the bad acts alleged by the Advisory Committee. Substantial evidence supports these findings. Subsequently, the trial court concluded that "the plaintiffs have failed to show by even a preponderance of the evidence that PNC . . . has committed acts of mismanagement, misrepresentation, neglect, fraud or breach of its fiduciary duties so as to award relief under KRS 395.510 including the equitable remedy of removal of the executor." Because relief pursuant to KRS 395.510 necessitates finding the personal representative committed bad acts of some sort or another in its role as representative, the trial court's refusal to award relief under KRS 395.510 was proper since no such bad acts by PNC were found.

The order of the Clark Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Robert S. Miller  
Lexington, Kentucky

BRIEF FOR APPELLEE, PNC BANK,  
N.A., INDIVIDUALLY AND AS  
EXECUTOR UNDER THE WILL OF  
JAMES B. ALLEN:

David Tachau  
Louisville, Kentucky

BRIEF FOR APPELLEE, BANK ONE  
KENTUCKY, N.A., EXECUTOR UNDER  
THE WILL OF EDITH ALLEN:

David T. Royce  
Lexington, Kentucky

BRIEF FOR APPELLEE, DONNA  
MILLER:

Kevin G. Henry  
Lexington, Kentucky