

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

[Filed: January 28, 2019]

AMITAI VARDI, HAGIT VARDI, SHIRA VARDI, ORIT VARDI, TRAGASH, HAVA SHAUL, IZHAR SHAUL, NADAV SHAUL, OPHER SHAUL, YAEL SHAUL, RACHEL RIKLIS, VERED BEN ARI, MICHAL RIKLIS HAZAN, NILI RIKLIS DAYAN and TAMAR GISPAN,

Plaintiffs,

VS.

C.A. No. PC-2014-4637

URI BAR-ZEMER, in his capacity as TRUSTEE OF THE TRUST OF ERNEST WEIL,

Defendant.

DECISION

SILVERSTEIN, J. (Ret.) This matter is before the Court for decision following a nonjury trial brought by Plaintiffs Amitai Vardi, Hagit Vardi, Shira Vardi, Orit Vardi, Tragash, Hava Shaul, Izhar Shaul, Nadav Shaul, Opher Shaul, Yael Shaul, Rachel Riklis, Vered Ben Ari, Michal Riklis Hazan, Nili Riklis Dayan and Tamar Gispan (collectively, Plaintiffs)—beneficiaries of the subject Trust—against Defendant Uri Bar-Zemer (Defendant or Bar-Zemer), the Trustee.¹ The dispute focuses on whether Defendant breached his fiduciary duties in the administration of the Trust during his time as Trustee. This Court exercises jurisdiction pursuant to G.L. 1956 §§ 8-2-14 and 9-30-1.

¹ Throughout its Decision, the Court will refer to several individuals using their first or last names. In doing so, the Court seeks to improve clarity and intends no disrespect.

I

Facts and Travel

Ernest Weil (Weil) created the Declaration of Trust by Ernest Weil (the Trust) on April 16, 1985. Weil nominated himself as Trustee, his long-time companion Birgitta Aker (Birgitta) as beneficiary² and successor Trustee upon his death, and Defendant, his nephew, also a beneficiary, as second successor Trustee upon Birgitta's death. Weil named Plaintiffs—other nieces and nephews—and Birgitta's issue as beneficiaries of the Trust upon Birgitta's death. Upon creation of the Trust, Weil transferred assets to the Trust including \$104,000 worth of liquid assets and a twenty-five percent interest in Hilltowne Properties, a California general partnership (the Partnership) formed in 1963, which owns a fifty-eight unit apartment complex in Fremont, California.

Weil died in May of 1986. Upon his death, Birgitta accepted her role as successor Trustee and began to administer the Trust. Birgitta's son, Eric Aker (Eric), periodically assisted Birgitta with her administration of the Trust. He performed a number of tasks in assisting Birgitta, such as reviewing financial statements from the brokerage accounts and the Trust's real estate partnership holding; assisting with the preparation of taxes; and, later, writing checks from the Trust account to Birgitta.

In April of 2012, Plaintiff Hagit Vardi (Hagit), in an email to Defendant, requested a loan from the Trust for the purpose of paying for her daughter's educational expenses. Defendant assisted in contacting Birgitta on Hagit's behalf through Eric. Hagit's request for a loan was

² Birgitta, pursuant to Section 1.A. of the Trust, was to receive the entire net income of the Trust's real estate interest and the balance of the net income of the Trust estate. The Trust also provides, however, that Birgitta, as Trustee, shall provide income payments to Weil's sister, Thea Marcus, in an amount equal to the annual rental expense for her residence and permits payment of a portion of the net income of the Trust as the Trustee deems necessary to Weil's two sisters, Greta F. Samet and Thea Marcus.

denied. Defendant explained via email that he “had a quite long conversation with Eric [regarding] an early distribution . . . After hemming and haughing [sic] a bit he came up with a negative answer saying that no one else enjoyed such early distribution and that it would be inappropriate to start now. Pls.’ Ex. 5. Hagit interpreted this correspondence as an indication that Eric was acting as Trustee in place of Birgitta and expressed her concern to Defendant in her response to his email. Pls.’ Ex. 6.

Shortly after Birgitta’s death in December 2012, Defendant accepted his nomination as Trustee and traveled to California to meet with Eric, as well as the Trust’s portfolio and property managers. Following his trip to California, Defendant placed a phone call to Hagit in which he informed her that he was now serving as Trustee and provided her with a general description of the Trust’s assets. He further indicated that he was concerned about immediately selling the Trust’s real estate interests due to tax concerns and inquired as to Hagit’s opinion on adding Weil’s niece as a beneficiary. Following their phone conversation, Hagit obtained an informal opinion from an attorney regarding adding a beneficiary and the dissolution of the Trust. Hagit later sent the opinion she received from the attorney to Defendant and discussed her conversation with Defendant and other beneficiaries. Pls.’ Ex. 7. Defendant responded to Hagit’s message indicating that he understood that the process of adding a beneficiary was an “ethical” decision, as opposed to legal consideration, to be decided among all beneficiaries. Pls.’ Ex. 8. Moreover, he reiterated his concerns about the ramifications of an immediate sale of the real estate interest. *Id.* Defendant and Hagit exchanged a series of email messages in which each party expressed their frustrations. Pls.’ Exs. 9-13. Ultimately, Defendant indicated that he was seeking the advice of an attorney in order to navigate his responsibility as Trustee. Pls.’ Ex. 12. Hagit indicated that she approved of Defendant’s decision to employ counsel. Pls.’ Ex. 13.

Hagit also indicated that she would like to receive a detailed and official accounting of the Trust assets. *Id.* Defendant replied that he would be disseminating information that week regarding the real estate interest as it becomes available and regarding the liquid assets. *Id.* He further stated that he would be traveling to Israel to meet with other beneficiaries. *Id.*

On February 4, 2013, Defendant sent an email to several—but not all—beneficiaries informing them that the Trust was under legal and financial review and that he would forward information as it became available. Def.’s Ex. A. On February 6, 2013, Defendant sent another email to several—but not all—beneficiaries detailing approximate valuations of the liquid assets and the real estate interest held by the Trust. Pls.’ Ex. 14. Defendant stated in this message that “Eric, [Birgitta’s] son . . . handled the trust in her latter years” *Id.* On February 12, 2013, Defendant communicated via email to Hagit that counsel was in the process of drafting a consent form for the liquidation of the Trust’s liquid assets. Pls.’ Ex. 15.

On February 18, 2013, Hagit’s husband, Uri Vardi, asked for a timeline in which Hagit would receive (1) the consent form and (2) a check for Hagit’s share of the Trust. Pls.’ Ex. 16. He also requested advance copies of any documentation that Defendant would be bringing with him to the meeting in Israel with the other beneficiaries. *Id.* Defendant responded the following day indicating that he expected the letters of release to be delivered shortly and that no distributions could be completed until all twenty-one releases had been signed and returned. Pls.’ Ex. 17. He further stated that he did not have any documentation, other than bookkeeping records, but he was working with a CPA to analyze the tax implications of selling the Trust’s real estate interest. Pls.’ Ex. 17.

In March of 2013, Defendant traveled to Israel in order to meet with three beneficiaries at the home of Plaintiff Nili Riklis Dayan (Nili) in Beit Nir, Israel. Defendant provided the

beneficiaries with a copy of an advertisement of the California apartment complex and described the real estate interest, the Trust portfolio, and his plans for liquidating and distributing the portfolio. Nili took notes of the meeting and later sent them to Defendant to translate them from Hebrew to English for distribution to all beneficiaries. The notes purport to detail the expected relationship between the Trustee and beneficiaries as well as the objectives of the parties and indicate, *inter alia*, that the real estate interest should be sold within a year, but grants leeway in order to maximize its value. Pls.' Ex. 18. The notes further indicate that Defendant would be paid twenty-five percent of the yearly rental income from the real estate interest as a Trustee fee. *Id.*

Defendant sent another email to some of the beneficiaries on April 30, 2013, detailing the dissolution plan relating to the liquid assets held by the Trust. Pls.' Ex. 21. The plan notes that each beneficiary would receive a distribution while the Trust would retain a portion of the funds for tax-related purposes; if residual funds remained following any tax-related payments, a second distribution would then occur. *Id.* Defendant further detailed his fee for serving as Trustee, as previously outlined in the notes stemming from the meeting in Israel. *Id.*

From March to May of 2013, Hagit and Defendant remained in contact via email. Def.'s Exs. B-E. In their exchanges they discussed the distribution of checks from the Trust account, including the signing and return of the release documents. *Id.* Defendant also communicated with other beneficiaries during this time period and forwarded a copy of the release for each of the beneficiaries to sign and return. Def.'s Ex. C. The parties communicated with some regularity throughout 2013. Def.'s Exs. F, G, L-O, and Q.

In June of 2013, Nili sent an email to Hagit asking her to translate the notes from the March meeting in Israel. Def.'s Ex. H. Nili expressed an interest in pressing Defendant to sign

the document and capping his administration fee to \$12,500 for a maximum of two years and adding language requiring the delivery of regular, official reports. *Id.*

In July of 2013, Defendant sent the real estate “owner report for 2012” to Nili. Def.’s Ex. L. In response, Nili requested the Trust’s accountant report for 2012. *Id.* On January 13, 2014, Nili sent another email to Defendant requesting official financial statements for the Trust signed by an accountant. She further indicated that, as previously discussed by the parties, she was serving as a point-person for beneficiaries in Israel and has received several requests for this information. Pls.’ Ex. 22. In his response, Defendant expressed frustration regarding the expanding pool of beneficiaries that had been designated as point-persons and what he described as movement toward “trust by committee” and a team of coordinators. Pls.’ Ex. 23. On January 16, 2014, Nili again requested from Defendant official financial statements of the Trust for 2011 and 2012, via email. Pls.’ Ex. 24. Defendant responded indicating that he would be having a conversation with his attorney and would distribute the accounting documents pending that discussion. Pls.’ Ex. 25.

In February of 2014, Defendant responded to a document request by Plaintiff Rachel Riklis (Rachel) and her husband Shmuel Riklis (Shmuel) by expressing his frustration with the growing number of individuals requesting regular updates. Pls.’ Ex. 29. Defendant further asked Rachel and Shmuel to “point out where it says in the trust document that [he is required] to take action beyond” his actions up to that point. *Id.* Defendant also states that he “was about to run the trust in a very open manner but that it did not take long for [him] to recognize that [that method] would not work” *Id.*

In March of 2014, Attorney Bernard Jackvony (Attorney Jackvony) wrote to Defendant’s counsel, Attorney Marvin Homonoff (Attorney Homonoff), requesting information regarding the

Trust. Pls.' Ex. 30. Attorney Jackvony listed four questions and seven document requests in his letter. Specifically, the requested documents include: (i) items evidencing Birgitta's involvement as successor Trustee; (ii) any and all tax returns from 2011 to 2013; (iii) documents concerning the Trust's real estate holding; (iv) a copy of the Partnership Agreement; (v) any and all tax returns for the Partnership from 2011 to 2013; (vi) financial statements and/or bookkeeping records relating to the Trust's portfolio; and, (vii) documents evidencing expenses incurred by the Trust. In response to Attorney Jackvony's letter, Defendant, through Attorney Homonoff, provided tax returns for the Trust, an owner's report for the real estate owned by the Partnership, documentation of the loan for the real estate through Chase Bank, and an "Agreement and Plan of Merger" for the Partnership. Pls.' Exs. 47-48, 53-54.

Plaintiffs filed the instant Complaint on September 19, 2014. *See* Compl. In the Complaint, Plaintiffs alleged that Defendant breached his fiduciary duty as Trustee by, *inter alia*, failing to provide the beneficiaries with information and accountings. To remedy the situation, Plaintiffs seek the termination of the Trust or, in the alternative, removal of Defendant as Trustee and appointment of Plaintiff Amitai Vardi (Amitai) as successor Trustee. Compl. Following Plaintiffs' Motion for Equitable Relief, and two in-chamber conferences with counsel for the parties, this Court entered two Orders on March 31, 2015 and April 6, 2015. In essence, the first Order implemented a "gag order" which prohibited the Plaintiffs from contacting partners in the Partnership and otherwise interfering with any negotiations related to the sale of the real estate interest. The second Order removed the "gag order" and required Defendant to "promptly provide the plaintiffs such reasonable documentation in relation to both the prospective sale and operations of the limited liability company as the plaintiffs may request, to the extent the defendant is in possession of said information." Defendant testified at trial that he did not see the

Court's Orders until shortly before trial. He also testified, however, that he was aware of certain provisions contained within the March Order, but was not aware of the April Order.

Defendant testified that while he was unaware of the Court's Orders, he informed Attorney Homonoff of his actions regarding the real estate and, prior to the sale of the real estate interest, he attempted to contact the beneficiaries residing in Israel. Upon their refusal to meet with him, he contacted Gadi Hazan (Gadi), the ex-husband of Plaintiff Michal Riklis Hazan, and informed him of the sale of the real estate interest. Defendant testified that he requested that Gadi pass along the information regarding the sale and that he was in possession of the sale's proceeds amounting to \$1.75 million. On June 25, 2015, Plaintiffs' counsel inquired of Attorney Homonoff via email as to whether the real estate interest had been sold. Pls.' Ex. 38. After receiving no response, Plaintiffs' counsel sent a second inquiry on July 7, 2015. Pls.' Ex. 39. Defendant informed Plaintiffs' counsel about the sale of the real estate on July 13, 2015, the day before his deposition was to occur. Defendant's counsel was then able to confirm the sale with Plaintiffs' counsel.

The assets of the Trust were held by Defendant in Certificates of Deposit until being transferred to an investment account with Charles Schwab. This Court entered an Order dated April 20, 2018 which, *inter alia*, provided for the distribution of \$600,000 in equal shares among all of the beneficiaries. The equal share designated for Defendant as a beneficiary was to be held in a separate account within the Trust, and together with the remaining assets of the Trust, was made subject to further Order of this Court.

II

Standard of Review

Under the Uniform Declaratory Judgments Act (UDJA), this Court possesses the “power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.” Sec. 9-30-1. A decision to grant or deny relief, however, is purely discretionary under the UDJA. *Sullivan v. Chafee*, 703 A.2d 748, 751 (R.I. 1997). The stated purpose of the UDJA is “to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations.” Sec. 9-30-12; *see also Millett v. Housing Eng’rs’ Licensing Div. of Dep’t of Labor*, 119 R.I. 285, 291, 377 A.2d 229, 233 (1977) (“The purpose of declaratory judgment actions is to render disputes concerning the legal rights and duties of parties justiciable without proof of a wrong committed by one party against another, and thus facilitate the termination of controversies.”). Factors to be considered when determining whether declaratory judgment relief is appropriate include “the existence of another remedy, the availability of other relief, the fact that a question may readily be presented in an actual trial, and the fact that there is pending, at the time of the commencement of the declaratory action, another action or proceeding which involves the same parties and in which may be adjudicated the same identical issues that are involved in the declaratory action.” *Berberian v. Trivisono*, 114 R.I. 269, 273, 332 A.2d 121, 123-24 (1975).

III

Discussion

Plaintiffs advance several arguments in support of their cause. The primary contention is that Defendant breached his fiduciary duty to the beneficiaries during his time as Trustee. Additionally, Plaintiffs maintain that Defendant is liable for improper acts committed by his

predecessor Trustee and improperly required the beneficiaries to sign release of liability forms prior to making distributions required pursuant to the Trust.

Defendant contends, however, that he has not breached his fiduciary duties to Plaintiffs. Rather, he asserts that he acted reasonably and in good faith as Trustee through his consistent communication with the beneficiaries and, later, through counsel. He further contends that Birgitta, as the prior Trustee, did not breach her fiduciary duty by receiving assistance in administering the Trust from her son—and beneficiary—Eric. Moreover, even if Birgitta and Eric’s actions did constitute a breach, Defendant asserts that, pursuant to the language of the Trust, he cannot be held liable for the actions of a predecessor Trustee. Finally, Defendant asserts that the release he required to be signed by the beneficiaries was merely a waiver of tax liability and not a breach of trust.

A³

“The elements of a cause of action for breach of fiduciary duty are: (1) the existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach.” *Williamson v. Brooks*, 7 Cal. App. 5th 1294, 1300 (2017). Specifically, Plaintiffs argue that Defendant breached the duties of loyalty and impartiality, as well as the duty to provide requested information to the beneficiaries.

³ Section 3.G. of the Trust specifies that the “validity, construction, interpretation, and administration of this trust shall be governed by the laws of the State of California . . .” The parties do not dispute this choice of law provision, and the Court will analyze the present issues accordingly.

Liability of Defendant

Defendant first argues that he is excused from liability under California law and the express language of the Trust itself. California Probate Code § 16440 states that “[i]f the trustee has acted reasonably and in good faith under the circumstances as known to the trustee, the court, in its discretion, may excuse the trustee in whole or in part from liability under subdivision (a) if it would be equitable to do so.” Moreover, Section 6E of the Trust states that “[a] non-corporate Trustee shall not be liable to any beneficiary or to any heir of the testator and surviving spouse for his/her acts or failure to act, except for willful misconduct or gross negligence.” Both gross negligence and willful misconduct have been previously defined by California courts. *See Van Meter v. Bent Constr. Co.*, 46 Cal. 2d 588, 594 (1956) (“Gross negligence has been said to mean the want of even scant care or an extreme departure from the ordinary standard of conduct.”); *Morgan v. S. Pacific Transp. Co.*, 37 Cal. App. 3d 1006, 1011 (1974) (Willful misconduct is “an aggravated form of negligence, differing in quality rather than degree from ordinary lack of care.”).

In interpreting a trust instrument, the Court first examines the “trust’s ‘plain language.’” *Lazarus v. Sherman*, 10 A.3d 456, 462 (R.I. 2011) (quoting *Fleet Nat’l Bank v. Hunt*, 944 A.2d 846, 851 (R.I. 2008)); *see also Prince v. Roberts*, 436 A.2d 1078, 1081 (R.I. 1981) (“When construing the trust instrument words should be given their primary, ordinary, and common meaning unless it plainly appeared that they were used in some other sense.”). Here, the Court is satisfied the plain language of the Trust indicates that the clear intention of the Settlor—Weil—was to limit the liability of the Trustee except for instances of gross negligence or willful

misconduct. Accordingly, the Court will employ this standard in assessing Plaintiffs' allegations.

2

Duties of Loyalty and Impartiality

Plaintiffs contend that Defendant has held an adversarial relationship to the beneficiaries since the inception of his time as Trustee. Rather than providing requested information to the beneficiaries, as required pursuant to California law, Plaintiffs argue Defendant interpreted their requests as attempts to micromanage his administration of the Trust. Plaintiffs' allegations include, *inter alia*, Defendant's refusal to provide requested information; obstruction of Plaintiffs' attempt to take Eric's deposition in California; acquiescence to Eric's administration of the Trust during Birgitta's illness; failure to object to Eric's writing of checks from the Trust account; loss of Trust documentation; irregular communication with beneficiaries; misrepresentation of the instant litigation; and, continual withdrawal of Trustee's fees despite the Trust's assets being held in three Certificate of Deposit accounts (CDs) requiring virtually no action on behalf of Defendant.

Conversely, Defendant maintains that Plaintiffs have failed to produce any evidence indicating a breach of either the duty of loyalty or impartiality. He argues that throughout his tenure as Trustee, he has consistently been in contact with the beneficiaries and has not used Trust assets to benefit either himself or select beneficiaries at the expense of the beneficiaries as a whole.

California Probate Code § 16002 explicitly states that a "trustee has a duty to administer the trust solely in the interest of the beneficiaries." The duties of loyalty and impartiality require a trustee to (1) administer the trust without engaging in self-dealing or contrary to the interest of

the beneficiaries and (2) act impartially with regard to managing and investing the trust's assets while considering the differing interests of the beneficiaries. *See* Cal. Prob. Code §§ 16002, 16003. Here, Plaintiffs allege a number of transgressions which they believe show the Defendant's breach of the above duties. The evidence before the Court and presented at trial, however, indicates that despite his obvious frustration with Plaintiffs' numerous attempts to get specific documentation regarding the Trust, Defendant initially strove to communicate with the beneficiaries in order to update them regarding the steps being taken to distribute the Trust assets and sell the Trust's real estate interest. Moreover, this Court is not satisfied that the acts cited by Plaintiffs rise to the level of gross negligence or willful misconduct. Accordingly, the Court does not find that Defendant has breached either his duty of loyalty or impartiality in this instance.

3

Duty to Provide Information

Plaintiffs argue that as beneficiaries of the Trust, they are entitled to request and receive information related to their interest in the Trust. They assert that Defendant's refusal to provide them with information after numerous requests, as well as his failure to comply with this Court's April Order, constitute a breach of this duty. Moreover, Plaintiffs contend that Defendant cannot circumvent liability through his purported reliance on counsel. Conversely, Defendant maintains that Plaintiffs have failed to show that his alleged breach has caused harm to the Trust. He further argues that Plaintiffs have not objected to the amount received for the sale of the Trust's real estate interest. Defendant also contends that despite Plaintiffs' assertions, he consistently provided the beneficiaries with updates regarding the dissolution of the Trust, and any confusion regarding the specific documents requested was the result of Plaintiffs' actions. Finally,

Defendant asserts that he ought not be held liable for his failure to abide by the Court's April Order because at that time, litigation had commenced and he relied upon his counsel to communicate with and disseminate information to Plaintiffs' counsel.

California Probate Code § 16061 provides that "on reasonable request by a beneficiary, the trustee shall report to the beneficiary by providing requested information to the beneficiary relating to the administration of the trust relevant to the beneficiary's interest." Further, California Probate Code § 16060 states that "[t]he trustee has a duty to keep the beneficiaries of the trust reasonably informed of the trust and its administration." Here, while the evidence and testimony before the Court indicates that Defendant initially strove to update the beneficiaries regarding his actions on behalf of the Trust, following several requests by beneficiaries Defendant began to exhibit frustration and withhold information from the beneficiaries. In particular, Plaintiffs requested an official account of the Trust's assets on a number of occasions and did not receive any documents to that effect.

With regard to Defendant's assertion that he ought not be held liable for any breach of his fiduciary duty or noncompliance with the Court's April Order because he had relied upon his retained counsel, the Court does not find this argument compelling. California Probate Code § 16012(b) states that "[i]n a case where a trustee has properly delegated a matter to an agent, co-trustee, or other person, the trustee has a duty to exercise general supervision over the person performing the delegated matter." Here, while Defendant prudently employed counsel and effectively delegated oversight of the instant litigation to said counsel, he failed to "exercise general supervision" over his attorney. Had Defendant exercised general supervision over the ongoing litigation he would have learned of both of the Court's Orders in this matter, barring an omission by his attorney. Accordingly, the Court finds that Defendant cannot avoid liability as a

result of his purported reliance on counsel. Therefore, the Court finds that Defendant's failure to provide information to the beneficiaries following their multiple requests and subsequent failure to comply with this Court's Orders constitutes willful misconduct resulting in a breach of his duty to Plaintiffs.

B

Liability for Acts of Predecessor Trustee

As stated above, in interpreting the Trust document, the Court looks to the "trust's plain language." *Lazarus*, 10 A.3d at 462. Plaintiffs argue that Defendant ought to be held liable for what they deem to be breaches committed by the predecessor Trustee. Section 6.E. of the Trust document, however, provides that "[n]o Trustee shall be liable or responsible for any act, omission, or default of any other Trustee." Moreover, Section 6.F. states that "[n]o successor Trustee shall be liable for any act, omission, or default of a predecessor Trustee. Unless requested in writing by an adult beneficiary of the trust, no successor Trustee shall have any duty to investigate or review any action of a predecessor Trustee, and may accept the accounting records of the predecessor Trustee, showing assets on hand without further investigation and without incurring any liability to any person claiming or having an interest in the trust."

In the instant matter, Hagit, in her early correspondence with Defendant, asked him to "look into" Eric's involvement with his mother's administration of the Trust. Pls.' Ex. 6. The Court is satisfied that Defendant contemporaneously communicated with Eric regarding his assisting Birgitta with her administration of the Trust during the final years of her tenure as Trustee and ultimately concluded that there was no wrongdoing by either Birgitta or Eric. Moreover, it is clear by the express language of the Trust that the intention of the Settlor was to excuse successor Trustees for any transgressions committed by preceding Trustees.

Accordingly, the Court finds that the Defendant is not liable for any breaches that may have been committed by Birgitta during her time as Trustee.

C

Liability for Requiring Release

Plaintiffs argue that California Probate Code § 16004.5(a) explicitly prohibits a trustee from requiring a beneficiary to execute a release as a condition to making a distribution required by the trust. Cal. Prob. Code § 16004.5(a) (“A trustee may not require a beneficiary to relieve the trustee of liability as a condition for making a distribution or payment to, or for the benefit of, the beneficiary, if the distribution or payment is required by the trust instrument.”). Defendant, however, contends that the release document specifically sought to indemnify the Trustee and the Trust from any potential tax consequences resulting from the initial distribution and asked the beneficiaries to return any portion of their disbursement necessary to satisfy any government liability.

Here, neither party has provided the Court with a copy of the release document sent to Plaintiffs by Defendant. While Section 16004.5(a) does prohibit the Trustee from requiring the execution of a release, Section 16004.5(b) outlines five exceptions to that prohibition. In particular, § 16004.5(b)(3) states that subsection (a) does not prohibit a trustee from “[requiring] indemnification against a claim by a person or entity, other than a beneficiary referred to in subdivision (a), which may reasonably arise as a result of the distribution.” This exception is in line with Defendant’s representations of the release document drafted by Defendant’s counsel. As the actual release document has not been produced, the Court cannot, with certainty, decide whether Defendant’s conduct constituted a violation of the California Probate Code.

Accordingly, the Court chooses to exercise its discretion and refuses to issue a declaration regarding this specific issue. Plaintiffs have failed to carry their burden of proof as to this issue.

D

No Contest Clause

Defendant argues that Plaintiffs' actions in the present litigation constitute a breach of the Trust's "No Contest Clause," as provided in Section 3.I. of the Trust instrument. This section provides, in full, that:

"In the event any beneficiary under this trust shall, singularly or in conjunction with any other person or persons, contest in any court the validity of this trust of mine, or shall seek to obtain an adjudication of any proceeding in any court, that this trust, or any of its provisions of such trust, or any of its provisions is void, or seek otherwise to void, nullify, or set aside this trust or any of its provisions, then the right of that person to take any interest given to him/her by this trust shall be determined as it would have been determined had the person predeceased the execution of this trust without surviving issue."

The Court, however, is not satisfied that the instant matter constitutes such a proceeding as contemplated by the Trust. In particular, Plaintiffs here brought the current suit as a result of what they deemed to be Defendant's breaches of his fiduciary duty. Plaintiffs were not seeking to invalidate any specific provision of the Trust, but rather sought to enforce the Trust as written. Accordingly, the Court declines to apply this Section of the Trust.

IV

Conclusion

For the foregoing reasons, the Court finds that Defendant has breached his fiduciary duty to the beneficiaries through his willful failure to provide them with prompt information in violation of this Court's April Order. Accordingly, the Court declares that the Trust must terminate and distribute its remaining assets to the beneficiaries, as outlined in Section 1.D. of

the Trust instrument. In addition, the Defendant must expeditiously provide all of the beneficiaries with a full and accurate accounting of the Trust's assets for the period of time whereby he has served as Trustee. The Court, having found Defendant in willful violation of his duty to Plaintiffs, is precluded from paying to himself—unless ordered by the Court—any further Trustee's fees.

To the extent that Plaintiffs or any of them claim to have been damaged by Defendant's failure to provide information to the beneficiaries as found by the Court (*see* Section IIIA3), they shall within, thirty (30) days of the filing of this Decision, set forth in writing their respective claims as to damages (copies to all parties and to the Justice in charge of the Providence County Business Calendar).

Promptly following the 30th day after the filing hereof, counsel for the parties will meet with the Court for the purpose of scheduling such further proceedings, if any, as may be appropriate under the circumstances.

Counsel for Plaintiffs shall present an appropriate Order consistent with the provisions hereof (and with the provisions of the Court's Order entered herein on April 20, 2018), to be settled upon notice to counsel for Defendant.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Amitai Vardi, et al. v. Uri Bar-Zemer, in his capacity as
Trustee of the Trust of Ernest Weil

CASE NO: PC-2014-4637

COURT: Providence County Superior Court

DATE DECISION FILED: January 28, 2019

JUSTICE/MAGISTRATE: Silverstein, J. (Ret.)

ATTORNEYS:

For Plaintiff: Bernard A. Jacvony, Esq.; Rebecca M. Murphy, Esq.

For Defendant: Neal J. McNamara, Esq.; Steven N. Richard, Esq.; William H.
Wynne, Esq.