

In re: Lane Family Trust, No. 572-7-08 Rdcv (Cohen, J., Nov. 18, 2008)

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**STATE OF VERMONT
RUTLAND COUNTY**

IN RE: LANE FAMILY TRUST) Rutland Superior Court
 Dated February 3, 1992) Docket No. 572-7-08 Rdcv
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**DECISION ON PETITIONER’S MOTION TO PROHIBIT PAYMENT OF
ATTORNEY FEES BY TRUSTEE**

This matter is before the Court on Petitioner’s Motion Regarding Payment of Attorney Fees by the Trustee, filed August 8, 2008. A hearing was held regarding the Motion on October 30, 2008. Petitioner-beneficiaries Sue W. Lane, Michael B. Lane, Charles F. Lane, and Lynda J. Lonowski are represented by David A. Otterman, Esq. Trustee, Chittenden Trust Company, is represented by Potter Stewart, Jr., Esq.

Background

The late William C. Lane and his spouse, Sue W. Lane, created an irrevocable trust by executing a Trust Agreement dated February 3, 1992. The Trust Agreement was also executed on behalf of the Green Mountain Bank as Trustee.

Afterwards, Green Mountain Bank merged with Vermont National Bank, which in-turn was acquired by the Chittenden Trust Company. Over the years the beneficiaries became dissatisfied with Chittenden Trust Company, to the point where they petitioned for their removal as Trustee, and for the appointment of The Trust Company of Vermont as Successor Trustee.

On June 11, 2008, Chittenden Trust Company deducted \$2,542.66 from the Lane Family Trust for payment to Potter Stewart, Jr. Law Offices, P.C. for “legal fees incurred by the trust.” Presumably these are legal fees regarding the removal of Chittenden Trust Company as Trustee.

On June 30, 2008 the Rutland Probate Court issued an Order granting the beneficiaries’ request to remove the Trustee, Chittenden Trust Company, and to appoint The Trust Company of Vermont as Successor Trustee.

On July 24, 2008, Chittenden Trust Company filed a Notice of Appeal. On August 8, 2008, petitioners filed a Motion requesting that the Court issue an Order prohibiting the Trustee from using the assets of the Lane Family Trust to pay its attorney fees.

Petitioners argue that the appeal of the Rutland Probate Court Decision by the Trustee is of no benefit to the Trust or its beneficiaries. Rather, the only party who can benefit from the appeal is Chittenden Trust Company, whose alleged motive is to preserve the financial benefit it derives from serving as trustee. Petitioners conclude that since there is no benefit to the Trust or its beneficiaries, the Trustee should not be allowed to pay its attorney fees out of Trust assets without prior approval of the Court. They request that the Court issue an Order forbidding the Trustee to use Trust assets to pay its attorney fees in connection with this matter without prior approval of the Court.

Discussion

The general rule is that a trustee may use trust funds to pay for all expenses, including attorney’s fees, which are properly incurred for the administration of the trust. See Restatement (Second) of Trusts § 244 (stating “[t]he trustee is entitled to indemnity

out of the trust estate for expenses properly incurred by [it] in the administration of the trust.”); see also Restatement (Second) of Trusts § 188 cmt. c (stating “[t]he trustee can properly incur expenses in employing attorneys...so far as such employment is reasonably necessary in the administration of the trust.”).

An expense is properly incurred if it is either (1) “necessary or appropriate to carry out the terms of the trust and not forbidden by the terms of the trust,” or (2) “authorized by the terms of the trust.” Restatement (Second) of Trusts § 188. The trustee may charge the trust estate for properly incurred expenses in one of two ways – either by personally bearing the expense and then obtaining reimbursement from the trust, or by using trust funds to pay the expense directly, a procedure known as exoneration. Restatement (Second) of Trusts § 244 cmt. b.

The terms of the Lane Family Trust agreement provide for the payment of attorney fees at Article VIII, section 18, which gives the trustee the following powers: “To employ and *compensate* agents, accountants, investment advisors, attorneys-in-fact, *attorneys-at-law*, tax specialists, realtors, and other assistants and advisors deemed by the Trustee needful for the proper administration of the Trust Estate...” Lane Family Trust, Article VIII, Section 18 (emphasis added).

Under the Lane Family Trust agreement, the Trustee is authorized “absolute discretion”, without “authorization by any court,” in carrying out the powers set forth above. Lane Family Trust, Article VIII.

The petitioners contend that the Trustee’s attorney expenses in this case have not been incurred for the proper administration of the trust estate, but rather for the sole

benefit of Chittenden Trust Company to preserve the financial benefit it derives from serving as trustee.

The argument that these expenses were incurred in the Chittenden Trust Company's individual interest, and may not be charged against the Trust, "completely misses the true situation." See *Weidlich v. Comley*, 267 F.2d 133, 134 (2d. Cir. 1959).

As Judge Learned Hand wrote,

a trustee was appointed to administer the assets; the settlor selected him to do so, and whatever interferes with his discharge of his duty pro tanto defeats the settlor's purpose. When the trustee's administration of the assets is unjustifiedly assailed[,] it is a part of his duty to defend himself, for in so doing he is realizing the settlor's purpose. To compel him to bear the expense of an unsuccessful attack would be to diminish the compensation to which he is entitled and which was a part of the inducement to his acceptance of the burden of his duties.

Weidlich, 267 F.2d at 134 (applying New York law).

Vermont law comports with Judge Hand's reasoning. 14 V.S.A. § 2314(e) directly addresses the issue of attorney fees in trustee removal actions. The statute states: "A court may order trustees who are replaced pursuant to an action brought under this section to *reimburse* the trust for attorney fees and court costs paid by the trust relating to the action." (emphasis added).

By implication, in order for trustees to reimburse the trust for attorney fees, they must first have the power to pay attorney fees out of the funds of the trust. Otherwise, there would be nothing *to* reimburse.

Furthermore, by requesting that the Court issue an Order prohibiting the Trustee from paying attorney fees from the funds of the Trust, the petitioners are in essence requesting injunctive relief from the Court. An injunction is an extraordinary remedy, the

right to which must be clear. *Okemo Mountain, Inc. v. Town of Ludlow*, 171 Vt. 201, 212 (2002).

V.R.C.P 65 is substantially similar to its federal counterpart, F.R.C.P. 65. Reporter's Notes, V.R.C.P. 65.

To obtain preliminary injunctive relief a party must show: (a) that it will suffer irreparable harm in the absence of an injunction and (b) either a likelihood of success on the merits, or sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in its favor. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Callahan*, 265 F.Supp.2d 440, 443 (D.Vt. 2003).

The issue of a likelihood of success on the merits need not be addressed because the petitioners fail to show that they will suffer irreparable harm. There has been no showing that the payment of attorney fees out of the funds of the trust will cause irreparable harm to any of the beneficiaries. Furthermore, there has been no showing of maladministration to suggest that Chittenden Trust Company would not reimburse the trust if this Court should so Order under 14 V.S.A. 2314(e).

ORDER

Plaintiffs' Motion requesting the Court to Prohibit the Payment of Attorney Fees by the Trustee out of the funds of the Trust, filed August 8, 2008 is DENIED.

The Court will address the issue of attorney fees, and possible reimbursement to the Trust under 14 V.S.A. 2314(e), after a conclusion on the merits.

Dated at Rutland, Vermont this _____ day of _____, 2008.

Hon. William Cohen
Superior Court Judge