

99PR1435 (3/16/00)

PROBATE COURT CITY AND COUNTY OF DENVER STATE OF COLORADO

Case No. 99PR1435

IN THE MATTER OF

The Trust Created by

ELEANOR A. KERNS,

Grantor.

ORDER

This matter comes before the Court upon a Petition for Removal and Substitution of Trustee filed by two income beneficiaries of a trust, Shirley A. Mahan and James H. Kerns. A hearing was held on this matter on March 3, 2000. The Court has reviewed the pleadings, the Court file, and has studied the applicable legal authority.

Background

On October 22, 1986, Eleanor A. Kerns (hereinafter "decedent") executed her Last Will and Testament. She executed a codicil to her will on April 4, 1996. The will and codicil are referred to herein as "the will." The will established a trust that was divided into equal funds: one fund for each of the decedent's surviving children and one fund for each of the natural born living issue of the decedent's deceased children. The will provided that the decedent's surviving children would receive funds from the trust throughout their lifetimes for their "reasonable care, support, health, education and welfare, as the Trustee determines to be required for any of those purposes."

The will appoints Colorado National Bank of Denver, presently U.S. Bank, National Association, as trustee of the testamentary trust as well as personal representative of the decedent's estate. The will and codicil are referred to as "the will." The will creating the testamentary trust does not give any beneficiary the power to remove a trustee without cause. Pursuant to the terms of the will, U.S. Bank is currently serving as trustee, the decedent's estate has been fully administered, and the trust has been funded.

Shirley A. Mahan and James H. Kerns, the decedent's only surviving children, are the life time beneficiaries of the decedent's testamentary trust. They have initiated this action to remove U.S. Bank as trustee. Kerns and Mahan claim, among other things, that hostility and friction exist between the current trustee and them.

Summary of the Law

Under the Colorado Probate Code, the probate court has exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts, including the appointment or the removal of a trustee. C.R.S. §15-16-201(1)(b) (1999). See *In re Estate of Jefferson*, 140 Colo. 347, 344 P.2d 179 (1959) (recognizing that "the probate court is vested with full discretion in the area of removal of fiduciaries...").

One important purpose of probate is to give effect to a testator's intent. C.R.S. § 15-10-102(2)(b) (1999). Numerous authorities have recognized that a decedent's choice of a trustee is to be given deference when considering whether removal is warranted. See *Austin Wakeman Scott & William Franklin Fratcher, The Law of Trusts* § 107.1 at 117 (4th ed. 1987). Removal of a trustee is not a decision this Court makes lightly, especially where, as here, the decedent has nominated a particular trustee to the exclusion of anyone else.

There are certain circumstances, however, where it is appropriate for a court to order that a trustee be removed. Under the common law, the Court has the discretion to remove a trustee for proper cause, even if the will or trust instrument does not specifically address removal. *United States v. Boucher*, 735 F. Supp. 987, 989 (D. Colo., 1990); *In re Estate of Malone* 597 P.2d 1049, 1050 (Colo. App. 1979); *Robinson v. Kirbie*, 793 P.2d 315, 318 (Okla. 1990). See also *Stewart v. Towse*, 203 Cal. App. 3d 425, 249 Cal. Rptr. 622 (1988); *Kolles v. Ross*, 418 N.W. 2d 733 (Minn. App. 1988); *In re Estate of Winograd*, 65 Ohio App. 2d 76, 582 N.E.2d 1047 (1989). The Court may not, however, absent specific trust terms stating otherwise, remove a trustee merely because all of the beneficiaries of the trust request that the trustee be removed. *In re Bailey's Estate*, 306 Pa. 334, 159 A. 549 (1932). See also this Court's opinion *In re Estate of Fennell*, Case No. 96PR110, dated July 2, 1999.

A party seeking removal of a trustee must prove a danger to the interests of the beneficiaries and detriment to the effective administration of the trust from the trustee's continuance in office. *Boucher*, 735 F. Supp. At 989; *George T. Bogert, Trusts*, § 160 at 573 (6th Ed. 1987). Although hostility and friction between the trustee and beneficiaries that interfere with proper administration and the best interests of the trust constitute proper grounds for removal, *Malone*, 597 P.2d at 1050, mere disagreement between the trustee and beneficiaries do not constitute sufficient grounds for removal. *Jennings v. Murdock*, 220 Kan. 182, 553 P.2d 846 (1976); *Blumensteil v. Morris*, 207 Ark. 244, 180 S.W. 2d 107 (1944); *Broeker v. Ware*, 27 Del. Ch. 8, 29 A.2d 591 (1942); *Mathues' Estate*, 322 Pa. 358, 185 A. 768 (1936).

Disagreement and unpleasant personal relations between the trustee and beneficiaries are not usually enough to warrant removal. The beneficiary often conceives that he could manage the trust better than the trustee, resents failure to follow his advice, is dissatisfied with returns, thinks that the trustee is too conservative in his investment policies, and otherwise finds fault with the trustee. Thus friction develops. But the settlor has entrusted the management to the trustee and not to the beneficiary. The very fact that he created a trust showed that he did not want the beneficiary to be the controlling factor in the management of the property. However, in some instances the hostile relations between trustee and beneficiary have gone so far that the court feels a new trustee should be

appointed. Where the malicious or vindictive conduct of the trustee is the cause of disagreement and bitterness, removal is apt to be decreed.

Bogert, Trusts § 160 at 573.

Discussion

The Court was provided with four exhibits at the hearing. Three exhibits included letters written to the beneficiaries from the trustee that discussed administration and certain investment options for funds. The fourth exhibit included a demand letter written to the trustee from the beneficiaries requesting that U.S. Bank be removed as trustee and that Pueblo Bank & Trust be appointed successor trustee.

Mahan and Kerns assert that they do not have confidence in U.S. Bank's ability to continue as a trustee in this matter. They claim that another bank's posed investment plan is better suited and more appropriate for the growth and preservation of assets than the plan proposed by U.S. Bank. They accuse U.S. Bank of ignoring its fiduciary responsibilities by administering the trust for the benefit of U.S. Bank rather than the beneficiaries. The beneficiaries claim that when U.S. Bank acted as personal representative of the Estate, it failed to provide the beneficiaries with Notice of Hearings, provide copies of tax returns or fee schedules, and keep the beneficiaries informed on the status of certain proceedings. Finally, the beneficiaries assert that U.S. Bank's employees have conducted themselves in "an offensive and arrogant manner."

The Court has reviewed the beneficiaries' allegations and FINDS them unsupported by the evidence.

First, the Court FINDS that the beneficiaries have failed to demonstrate that there would be significant cost savings to the trust by transferring the assets from U.S. Bank to Pueblo Bank and Trust as successor trustee. Further, the beneficiaries have failed to demonstrate that the investment plan proposed by U.S. Bank in Petitioner's Exhibit A was not appropriate for the trust. The testimony presented to the Court at the hearing suggests that there were discussions only with Mahan and Kerns, not the remaindermen of the trust, and that the trustee advised both Mahan and Kerns that after the factual information about the beneficiaries requirements was accumulated and evaluated, the ultimate investment decisions would be made by the trustee. This does not constitute sufficient grounds for removal.

The allegation that U.S. Bank did not act properly as a personal representative is also unsupported by evidence. The Court has reviewed the file In the Matter of the Estate of Eleanor A. Kerns, Case No. 98PR755, and FINDS that except for a Demand for Notice, there were no filings or complaints by the heirs or devisees against U.S. Bank serving as personal representative and proper notice of all relevant proceedings was given when required by law. It is true that when one is serving dual roles as personal representative and trustee and violates his/her duties as personal representative, he/she may be removed not only as a personal representative, but also as a trustee even though the two positions are not inseparably connected. Scott on Trusts, § 107, at 105. Here, however, the bank was not removed as a personal representative and therefore, the Court cannot consider these vague allegations.

Finally, the claim that the trustees' employees have been "offensive and arrogant," is contradicted by evidence. The three letters of correspondence between the trustee and the

beneficiaries offered to the Court as exhibits demonstrate that the trustee acted with a businesslike and professional tone. This conclusion was supported by the Court's observations at the hearing.

The Court has also looked to the will creating the testamentary trust in order to determine the intent of the decedent. The Court recognizes that the decedent did not give funds to her children, Kerns and Mahan, as an outright gift. Instead, the funds were placed in a trust. The children's use of the funds was limited to income only. From the income, the children are to receive what they "require" and the trustee was instructed to determine how much would be "required." The decedent specifically appointed U.S. Bank to serve as a trustee, not her children or any other family member, and did not give any beneficiary the right to remove a trustee without cause. Furthermore, the decedent set up the trust so that none of her children could receive any principal; therefore, the income of the children's trust must be managed by a trustee and applied to support the purpose of the trust. The remaindermen are entitled to a trustee who carries out his intent.

Here, the evidence shows that the trustee requested financial information from Kerns and Mahan in order to substantiate any request for income distributions to them. If the trustee did not require such financial information, it would be liable to the remaindermen of the trust. As beneficiaries of the remaining trust principal, the remaindermen are absolutely entitled to an accounting regarding the details of income distribution. Their interests sharply conflict with that of the current income tenants. Here, counsel does not represent the remaindermen, they may or may not be adults, and one may be incapacitated according to the will. Therefore, it is especially imperative that the trustee carefully make income distributions and fulfill its fiduciary duties.

As previously stated, it is common for beneficiaries, particularly discretionary income beneficiaries of life time trusts, to resist providing their trustee with financial information that supports their requests for income distributions. The income beneficiaries have both testified that the trustee told them each that there would be no income distributions unless the life tenant could prove that he or she was "destitute." The Court FINDS that this testimony is contradicted by the documentary evidence and is not credible.

The Court FINDS, rather, that the documentary evidence reveals that the trustee took a reasonable stance regarding its assessment of requests for income distributions referencing "a written request for an income distribution..." "a budget reflecting income and expenses as well as supporting information..." and identifying a "conflicting interest among the different beneficiaries." The Court FINDS that these are reasonable and necessary requirements imposed upon beneficiaries by a trustee administering this trust.

Accordingly, the Court FINDS that no grounds to remove the trustee exist here. The Court does recognize that a trustee may Petition for Resignation even when trust language fails to allow such power; however, the trustee here has not petitioned to resign. The Court, therefore, DENIES Petitioner's Amended Petition for Removal and Substitution of Trustee.

March 16, 2000

C. Jean Stewart
Judge, Probate Court

