

COURT OF COMMON PLEAS OF PHILADELPHIA  
ORPHANS' COURT DIVISION

Trust Established Under Trust Agreement of  
Sidney B. and Frances K. Golub, Settlers  
Dated September 24, 1986, as amended  
No. 620 IV of 2004  
Control No. 040792

O P I N I O N

**Factual Background**

On September 24, 1986, Sidney and Frances Golub entered into a “Joint Living Trust Agreement” (hereinafter “Trust Agreement” or “Trust”), which was amended on February 27, 1992, June 28, 1994 and December 13 1995. The accountant, PNC Bank, is the successor by merger of the original trustee Provident National Bank. PNC filed its account of the Trust on April 19, 2004, covering the period September 24, 1986 through January 6, 2004.

One reason for filing the account was the death of the settlors: Sidney Golub died on March 26, 2003 and Frances Golub died on June 5, 2003. Another reason was to obtain an adjudication of the issue of whether the distribution of \$100,000 set forth in the Third Trust Amendment to Zena Shultes, the settlors' granddaughter and one of the beneficiaries of the trust, should be withheld and treated as an “advance” because she allegedly misused a power of attorney that had been granted to her by the settlors by gifting herself trust assets when the power of attorney expressly prohibited such gifts.<sup>1</sup>

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<sup>1</sup> The documentation of this issue in PNC's petition for adjudication is problematic. Paragraph 13 of the petition is vague as to which settlor's power of attorney is at issue. The only power of attorney that was attached was by Sidney Golub, but in the parties' subsequent memoranda it appears that the power of attorney that is actually at issue was granted by Frances Golub. The petition is also vague as to the sums that were withdrawn. It references page 36 of the account which does not deal with this issue. Instead, page 38 of the account indicates that Zena Shultes withdrew money pursuant to a power of attorney to “Sidney and Frances Golub” (\$210,000) and “Frances Golub under power of attorney of Zena Shultes

After having certain funds withdrawn from the trust to the accounts of her grandparents, PNC asserts that Zena Shultes improperly used approximately \$182,261 to pay off a mortgage on her own house. Ms. Shultes, in contrast, maintains that “the transfer and use of the funds was made at the express direction of Frances Golub.”<sup>2</sup>

Zena Shultes filed objections to the petition asserting (1) that this court lacks in personam jurisdiction over her due to PNC’s failure to file a citation directed to her and (2) that this court lacks subject jurisdiction over the alleged misuse of the power of attorney because that issue should be raised by the Executor of the Estate of Frances Golub.<sup>3</sup> At the June Audit, counsel requested that the issue be resolved on the briefs. Hence, a briefing schedule was established and the parties filed memoranda of law. In the interim, PNC, as Trustee, and Edward Golub, as Executor under the Will of Frances Golub obtained a citation directed to Zena Shultes, individually and as agent under the power of attorney of Frances Golub, to show cause why she should not be required to return \$182,261 to Edward L. Golub, Executor of Frances Golub’s will.<sup>4</sup>

Ms. Shultes filed a separate petition denominated as a “Petition to Strike PNC, Trustee, as a party and to transfer the petition to the appropriate docket.” In essence, in this petition Ms. Shultes argues that PNC, as Trustee, was not the proper party to file a citation seeking relief on behalf of the Estate, which is represented by an Executor. Consequently, she argues that this court lacks subject matter jurisdiction to resolve the issues raised by the citation in the current procedural posture. PNC responded by

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(\$220,000).” The distribution at issue, however, seems to have taken place in April 2003 for Frances Golub. See PNC and Edward Golub Petition for Citation, ¶ 7.

<sup>2</sup> Shultes Memorandum at 8.

<sup>3</sup> PNC’s Petition for Adjudication (¶13) noted that Frances Golub’s will has not yet been probated, but it believed the residue would flow into the trust.

<sup>4</sup> Although the petition stated that a copy of Frances Golub’s will was attached, in fact it was not.

asserting that the interests of judicial economy would be served by raising this issue in the context of the account filed for the Trust. PNC noted that Ms. Shultes had conceded that the trust, as a residuary beneficiary under Frances Golub’s will, would benefit from any recovery by that Estate against Ms. Shultes since any recovery by the Estate would “end up” in the Trust.<sup>5</sup> For the reasons set forth below, this court concludes that it is in the interest of judicial economy and equity to defer any adjudication of the Trust Account until the issue of Ms. Shulte’s withdrawal of funds pursuant to a power of attorney from Frances Shultes is resolved.

### **Legal Analysis**

#### PNC, as Trustee, has Standing to Raise the Issue of the Proper Distribution to A Beneficiary of the Trust, Zena Shultes

As a threshold argument, Ms. Shultes asserts that PNC lacks standing to raise the issue of her use—or misuse—of the power of attorney granted to her by Frances Golub. In so doing, she focuses on the Golub trust provisions relating to powers of attorney. She thus emphasizes that “the Trust expressly authorizes, and the Accountant acknowledges, that the attorney-in-fact may act in Settlor’s stead under the Trust Agreement.”<sup>6</sup> Ms. Shultes is correct that the trust agreement does permit an attorney-in-fact to act in the settlors’ stead. Moreover, it relieves the Trustee of liability for any reduction in the value of the Trust due to the use of this power:

#### Powers of Attorney

For the purpose of this Joint Living Trust, the Attorney-in-Fact named in a Durable Power of Attorney, shall in all respects, stand in the place of, and may act for, the person who granted the power [hereinafter called ‘Principal’]. Trustee is relieved of any liability to anyone, including us, or the survivor of us, and the respective legal representatives, heirs, legatees, successors and assigns thereof, for

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<sup>5</sup> See PNC’s 10/21/04 Answer to Shultes’s Petition to Strike.

<sup>6</sup> Shultes Memorandum at 3.

any reduction in the value of the Trust, or any action or inaction of Trustee, resulting from any direction given by, or action, or failure to act, of the Attorney-in-fact. Trustee shall, without liability whatsoever, recognize the aforesaid Durable Power of Attorney, until written notice of the revocation thereof, signed by the Principal, is received by Trustee or until such time Trustee has actual knowledge of the death of the Principal. Trust Agreement, para. H

In light of these provisions, Ms. Shultes seems to argue that the Trustee cannot establish the requisite “direct interest” to establish its standing as to the power of attorney issue. Citing Estate of Briskman, 2002 Pa. Super. 287, 808 A.2d 928 (2002), Shultes argues that PNC cannot have standing unless it can show that it is an aggrieved party with a substantial or direct interest which “requires a showing that the matter claimed of caused harm to the party’s interest.” Shultes Memorandum at 3, (quoting Estate of Briskman, 808 A.2d at 933). In this case, she argues, it is the Estate of Frances Golub that suffered harm due to Ms. Shultes’s use of the power attorney. Consequently, “the Trust’s interest, as a beneficiary of the Estate, is not sufficient to provide standing where the Estate is represented by the properly appointed personal representative.” Shultes Memorandum at 4.

This argument misstates or obscures certain essential facts. The Trust—and especially the beneficiary of the Trust “balance” or residue--has a direct interest in the sums that were withdrawn from it. Under the terms of the Trust Agreement, as amended, at the death of the settlors, certain discrete sums were to be paid to Temple Beth Zion-Beth Israel as well as certain named individuals, with the disputed \$100,000 bequest to Zena Shultes. The Trustee was then required “to hold the balance of the Trust for the benefit of our son, Edward L Golub, and shall pay to him out of income, or principal if necessary, the sum to three thousand (\$3,000) dollars per month until he arrives at the age of sixty-five (65) years, at which time Trustee shall distribute to him the then remaining

balance of the Trust.<sup>7</sup> If, as PNC alleges, sums in excess of \$100,000 were improperly withdrawn from the trust by Ms. Shultes, the Trust suffered the direct harm required for standing by Briskman. Its harm is not solely as a beneficiary of the Estate of Frances Golub.

Merely because the Trust Agreement immunizes the trustee PNC from liability for any actions through a power of attorney that might reduce the value of the trust, this would not negate the trustee's duty to properly administer the trust according to its terms. The duties of a trustee and his powers are conferred by the specific words of a trust Agreement. Delaware Valley Factors, Inc. v. Donald Ronca, 442 Pa. Super. 609, 612, 660 A.2d 623, 625 (Pa. Super. 1995). In addition, Pennsylvania Courts have recognized that "the primary duty of a trustee is to preserve the trust assets and ensure the safety of the trust principal." In the Matter of the Estate of Mary Campbell, Deceased, 692 A.2d 1098, 1102 (Pa. Super. 1997). See also Speare Estate, 349 Pa. 76, 80, 36 A.2d 489, 491 (Pa. 1944). The trustee also owes certain duties to the beneficiaries since it "has long been the law of this Commonwealth that a trustee must administer the trust solely in the interest of the beneficiary" and when "there is more than one beneficiary of the trust, the trustee is under a duty, in administering the trust, to deal impartially with the several beneficiaries." MacGregor v. Wall, 75 Pa. D & C. 2d 425, 428 (Bucks Cty. 1976)(citing Bolton v. Stillwagon, 410 Pa. 618, 190 A.2d 105 (1963); Restatement 2d Trusts, §§ 170, 183). Consequently, just because the Trust Agreement immunizes PNC for any liability for loss to the trust corpus through the actions of a power of attorney does not negate PNC's standing, as fiduciary, to seek a proper administration of the trust for the benefit of the beneficiaries, and to prevent overreaching by one of those beneficiaries.

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<sup>7</sup> See Third Trust Amendment

This Court Has Subject Matter Jurisdiction to Resolve Issues Raised by PNC, as Trustee, as to the Proper Distribution of Trust Assets

Ms. Shultes also challenges this court's subject matter jurisdiction over the issues raised by the Trustee. It is fundamental that a "trustee is entitled to apply to the court for instructions as to the administration of the trust if there is reasonable doubt as to his duties or powers as trustee." Estate of Sewell, 487 Pa. 379, 386, 409 A.2d 401, 404 (Pa. 1979)(noting availability of declaratory judgment actions). The local rules, in fact, provide for the filing of a petition for adjudication when an account is filed, and a main purpose of this petition is to allow the fiduciary to raise questions concerning the trust administration. Phila. Orphans' Ct. Rule 6.9.A. After an account is filed, the "proceeding in the Orphan's Court contemplates distribution of the testator's estate, and as a preliminary to such distribution, it is the duty of the court to settle all questions of advancements or debts that are to stand for advancements." Alexander's Estate, 214 Pa. 369, 371, 63 A. 799 (1906). In fact, once an accountant establishes a debt to an estate, he should be able to invoke the assistance of the court. Id., 214 Pa. at 372. See also Callery's Estate, 333 Pa. 258, 3 A.2d 407 (Pa. 1939)(an administrator may set off against a legacy the amount of indebtedness due an estate by a legatee).

Under the Probate Estates and Fiduciaries Code, the Orphans' Court has jurisdiction to decide questions relating to the distribution of a trust. 20 Pa.C.S. §§ 711(3) & 762. See Springer's Appeal, 29 Pa. 208 (Pa. 1857)(Orphans' Court has jurisdiction to decide issues of distribution and advancement but it may not go further and decide that an heir owes more than his share).

In resolving issues of distribution from an estate or trust, the Orphans' court has particular jurisdiction over the issue of advancements to an heir or beneficiary. Long's Estate, 254 Pa. 370, 98 A. 1066 (Pa. 1916). Consequently, this court has jurisdiction over the issue as to what distributions are appropriate from the Golub trust. This conclusion, however, is not dispositive as to the Trustee's standing to obtain ultimate relief by bringing an action as to Zena Shultes's alleged misuse of the power of attorney granted by Frances Golub. That action must be pursued by the Executor of Frances Golub's Estate.<sup>8</sup> Consequently, because of the unique interrelationship between the Golub Trust and the Estate of Frances Golub, a final resolution of the issue raised by the Trustee must be coordinated with an action brought by the Executor of Frances Golub's estate.

Whether the Power of Attorney Granted by Frances Golub Was Misused by Zena Shultes Must Be Raised by the Executor of Her Estate

Although PNC has properly raised the issue of the distributions that should be made to Zena Shultes under the Golub Trust, which under the Third Trust Amendment would award to Zena Shultes \$100,000, resolution of this issue requires an analysis of key facts involving the scope of the power of attorney and the exercise of it by Ms. Shultes. Pennsylvania courts have concluded that this inquiry must be initiated by the person who granted the power or by the executor of her estate and not by beneficiaries whose interests might be hurt by its exercise. Shearer Estate, 23 Fid. Rep. 2d (Center

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<sup>8</sup> As Ms. Shultes properly notes, where an estate is represented by a duly appointed personal representative, a beneficiary cannot maintain an action on behalf of the estate. Shultes Memorandum at 4 (citing Kilpatrick's Estate, 368 Pa. 399, 84 A.2d 339 (1951); Bartlett Estate, 22 Fiduc. Rep.2d 341 (Allegh. O.C. 2002); Flick Estate, 24 Fiduc. Rep. 376 (O.C. Montg. 1974); Shive v. Snyder, 45 Pa.D & C 2d 375 (York 1968). If, as PNC suggests, the Will of Frances Golub provides that the residue of her estate would flow into the Golub Trust, the Trust would be a beneficiary of any recovery obtained against the Frances Golub Estate, and hence must rely on the initiatives of the executor to recoup any losses to the Trust due to misuse of the power of attorney by Ms. Shultes.

Cty. 2003). See also Rosewater Estate, 25 Fid. Rep. 2d 83, 85 (Monty. Cty. 2005).<sup>9</sup>

Moreover, any analysis of this issue is impossible on the present record because PNC failed to attach a copy of the power of attorney granted by Frances Golub to its account and petition. Instead, it attached the power of attorney granted by Sidney.

There is, however, a practical solution to these complex procedural distinctions. In the interest of resolving the issues raised by PNC in their entirety while protecting the interests of all beneficiaries to the trust and the Estate of Frances Golub, an adjudication of the trust account will be deferred until the executor of the Frances Golub Estate initiates efforts to resolve the disagreements concerning Ms. Shultes's use of the power of attorney. The executor of Frances Golub's estate is Edward L. Golub, and he has already demonstrated his interest in this issue by obtaining a citation directed to Zena Shultes, individually and as agent of the power of attorney of Frances Golub, to show cause why she should not be required to return \$181,261 to Edward L. Golub, as Executor. At this point, the Executor should proceed vigorously with this power of attorney action and a conference will be scheduled to provide for the coordination of these two assaults on the same issue. Ultimately, a hearing of the factual issues seems necessary.

The Spendthrift Provisions of the Trust Agreement Do Not Limit the Trustee's Efforts to Properly Distribute the Trust Assets

A final issue of law raised by Ms. Shultes is that PNC as trustee is not entitled to withhold her distribution because by so doing it would be acting as a judgment creditor which is not permissible because the Trust agreement contains an express spendthrift

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<sup>99</sup> The procedural posture of Rosewater is distinguishable since the petitioners were the beneficiaries of a marital trust established by their deceased mother. They filed a petition to turn over assets against, inter alia, the estate of their mother's deceased husband who had withdrawn all the trust assets by letter signed by him and his children acting pursuant to a power of attorney. In contrast, PNC, as trustee, has filed an account and is responsible for making a proper distribution of assets.



provision.<sup>10</sup> As Ms. Shultes notes, the Trust Agreement contains the following provisions:

Protective Provision:

All principal and income shall, until distribution to the beneficiary, be free of the debts, contacts, alienations, and anticipations of any beneficiary, and the same shall not be liable to any levy, attachment, execution or sequestration while in the possession of the Trustee. Trust Agreement, para. L.

In analyzing spendthrift trusts, Pennsylvania courts have emphasized that the fundamental objective is to respect the right of the testator or settlor to protect his gift until it reaches the beneficiaries. See Heyl's Estate, 50 Pa.D & C. 357, 360 (Phila. Common Pleas 1944), aff'd, 352 Pa. 407, 43 A.2d 130 (Pa. 1945). See also In re Ware, 2002 Pa. Super. 407, 814 A.2d 725, 731 (2002)(“When a spendthrift trust is at issue, the courts of this Commonwealth will uphold the spendthrift provisions as a means to enforce the settlor’s right to dispose of his property as he so chooses”).

Typically, a primary purpose of a spendthrift clause is to protect the trust assets from the claims of creditors. Sproul-Bolton v. Sproul-Bolton, 383 Pa. 85, 117 A.2d 688, 690 (Pa. 1955)(“There is no question but that a spendthrift trust may validly be created to protect from creditors and from alienation the income to be paid to a beneficiary during a period of life or years”). As the Pennsylvania Superior Court recently observed, a “truism of the law with respect to spendthrift trusts, which is that a spendthrift clause ‘insulate[s] the assets of the trusts from the incursions of creditors until such time as those assets either as principal or income, are delivered into the hands of the beneficiary.” In re Ware, 814 A.2d at 732. The scope of the spendthrift trust is determined by the settlor’s intent. Riverside Trust Co. v. Twitchell, 342 Pa. 558, 20 A.2d 768, 770 (Pa. 1941).

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<sup>10</sup> Shultes Memorandum at 7.

Ms. Shultes argues that PNC is acting as a judgment creditor in the event that the Estate recovers. Shultes Memorandum at 7. PNC disagrees, maintaining that it is not acting as a creditor. Rather, it argues that the focus should be on the wrongful taking of trust funds by Zena Shultes under the power of attorney, which would constitute an advancement. PNC Memorandum at 5. Although both PNC and Ms. Shultes cite authority to support their respective positions, neither precedent is on point.<sup>11</sup> In the dearth of relevant precedent on the issue of whether spendthrift provisions apply to distributions of trust assets to a beneficiary who is accused of previous wrongful withdrawal of trust assets, the Restatement (Second) of Trusts offers guidance. Section 255, for instance, suggests that while a spendthrift trust may prevent the transfer of a beneficiary's interest to his creditors, her interests would nonetheless be "subject to a charge for advances made to him out of the trust property unless the settlor has manifested a different intention." Restatement (Second) of Trusts § 255 (f).<sup>12</sup> In addition, Section 256 suggests that if a beneficiary participates in a breach of trust which causes loss to the other beneficiaries, he would be liable for any loss to the other beneficiaries even if the trust contained a spendthrift clause.<sup>13</sup>

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<sup>11</sup> Ms. Shultes relies on Widener and Bigelow Trusts, 16 Fid. Rep. 2d 159 (Monty. Cty 1996), which concluded that creditors could not garnish a beneficiary's income from a spendthrift trust. The facts are distinguishable since the creditors had obtained default judgments against the beneficiary and sought to enforce writs of attachment against the beneficiary's assets in the possession of the trustee. PNC invokes Gillepsie Estate, 273 Pa. 227 (1922), ostensibly for the proposition that spendthrift provisions do not offer protection against wrongful takings of trust assets. A close reading of Gillepsie, however, reveals that the court concluded that the terms of the spendthrift clause at issue did not embrace the errant fiduciary.

<sup>12</sup> This section provides:

*Spendthrift trust.* Although the interest of the beneficiary is not transferable by him or subject to the claims of his creditors, his interest is subject to a charge for advances made to him out of the trust property unless the settlor has manifested a different intention.

Restatement (Second) of Trusts §§255(f).

<sup>13</sup> See Restatement (Second) of Trusts, § 256 Comment on Subsection (4), (e) and (f).

In the instant case, PNC seeks to credit as a advancement against the \$100,000 bequest to Zena Shultes, the sums that she allegedly improperly withdrew from the trust pursuant to the power of attorney. If, as PNC alleges, her withdrawals were improper, the residue of the trust would have been decreased to the detriment of the residuary beneficiary, Edward Golub. Under the rationale of the above cited Restatement Sections, Ms. Shultes would not be able to rely on the spendthrift provisions of the Trust to immunize her from efforts to recoup these sums as advancements or payments for losses suffered by the other trust beneficiary through her alleged fraud or malfeasance towards the trust.

Conclusion

For these reasons, this court concludes that in the interest of equity and judicial economy, adjudication of the issues raised by the Trustee should be coordinated with action initiated by the Executor of Frances Golub's estate as to the alleged misuse of the power of attorney she granted to Zena Shultes.

Date: \_\_\_\_\_

By the Court:

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John W. Herron