COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION

Trust Established Under Deed dated January 1, 1999 of Rose Kogen, Deceased Settlor

O.C. No. 1787 IV of 2004
Control No. 056819

Sur First Account for the Trust Established Under Deed dated January 1, 1999 of Rose Kogen, Deceased Settlor, as Stated by Robert G. Welch, Esquire, former Trustee for the Period January 1, 1999 to December 31, 2005

The account was called for audit January 3, 2006 **Before: Herron, J.**
Counsel appeared as follows:

Jonathan B. Freedman, Esquire – for Accountant
Neil H. Meyer, Esquire – for Objector Jonathan Kogen
Charles E. Donahue, Esquire- for Office of Attorney General

ADJUDICATION

By deed of Trust dated January 1, 1999, the Rose Kogen Irrevocable Trust was executed on behalf of Rose Kogen, by Robert Welch, Esquire, under her Power of Attorney. The Deed of Trust named Robert Welch as Trustee. On October 19, 2004, one of the trust beneficiaries, Jonathan Kogen, filed for a citation to compel an account. This court issued a decree dated January 12, 2005 ordering Mr. Welch to file an account of his administration of the Rose Kogen Trust. An initial account was filed on November 21, 2005, and was scheduled for the January 3, 2006 Audit.

In the meanwhile, Jonathan Kogen also filed a petition seeking to remove Robert Welch as Trustee. After an evidentiary hearing, that petition was granted by decree dated December 19, 2005 upon a finding that Robert Welch had engaged in self dealing and breached his fiduciary duty to the trust beneficiaries. The First National Bank of Chester

County was subsequently named as substitute and successor Trustee by decree dated December 28, 2005. Because the initial account was not in the proper form, the former trustee, Robert Welch, was ordered by decree dated January 3, 2006 to file an amended account.

Objections to the Amended Account by the Commonwealth and Jonathan Kogen

Mr. Welch subsequently submitted an amended account that covered the period January 1, 1999 through December 31, 2005. Objections were filed by Jonathan Kogen on May 31, 2006 and by the Office of the Attorney General, as parens patriae on June 6, 2006. Both Mr. Kogen and the Commonwealth object to Mr. Welch's "investment" of $928,318.00 of Kogen Trust assets into Ansar Investments Group, Inc. for several reasons.[1] First, Robert Welch is the corporate President of Ansar, as well as its Managing Director,[2] and the investments of trust assets into Ansar took the form of unsecured convertible debentures at 6 percent interest. These investments, Jonathan Kogen maintains, were in reality unsecured loans to Ansar.[3] Moreover, while the amended account indicates that $928,318.00 of trust assets were invested in Ansar, by January 2006 the value of Kogen trust holdings in Ansar was listed as approximately $255,490.[4] The objectors also assert that the amended account misstated the interest that should have been paid to the Trust by $79,590.49 based on the stated 6% rate of interest

[1] 5/31/2007 Jonathan Kogen Objections, ¶¶ 4, 20-23, Wherefore (b); 6/6/2006 Attorney General Objections, ¶ 1.
[2] 5/31/2006 Jonathan Kogen Objections, ¶ 2-3; 7/19/2006 Welch Answer, ¶ 2-3 ("Admitted"). See also 6/6/2006 Attorney General Objections, ¶ 1.
[3] 5/31/2006 Jonathan Kogen Objections, ¶ 23; 7/19/2006 Welch Answer, ¶ 23 ("Admitted").
[4] 5/31/2006 Jonathan Kogen Objections, ¶ 4; 7/19/2006 Welch Answer, ¶4 ("Admitted"). See also 6/6/2006 Attorney General Objections, ¶1.

on the debentures.[5] Moreover, they object that instead of remitting the interest payments directly to the Trust, Ansar made direct payments to the beneficiaries, Alice Leibowitz and Jonathan Kogen, thereby failing to comply with the requirements of Pennsylvania Orphans' Court Rule 6.1 and Philadelphia Orphans' Court Rule 6.1.A.[6]

The objectors also challenge the validity of an alleged $582,828 "gift" Mr. Welch allegedly made over a six year period to the American Diabetes Association (hereinafter "ADA"). They attach a December 29, 2005 letter from Ronnie Mills, Manager of Estate Administration for the ADA, in which he states there was no record of any gift in any form (stock or cash) from the Rose Kogen Trust.[7] Finally, the objectors challenge the $19,350 in professional fees that Mr. Welch charged to the Kogen Trust as well as an additional $90,000 for legal and trust administration fees for a total of $109,350. They also question a total of $17,000 that was paid for professional accounting and tax fees to St. Clair, CPA during 2000.[8]

Based on these allegations, Jonathan Kogen and the Attorney General assert that Robert Welch breached his duty of loyalty to the Trust by self-dealing. They also assert that Robert Welch breached the standard of care of ordinary prudence by liquidating Rose Kogen's brokerage accounts holding a diverse portfolio of publicly traded stocks, bonds and money market accounts in order to obtain funds to invest into Ansar unsecured debentures or loans.[9] Ansar, according to Jonathan Kogen, was a high risk

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[5] In his 5/31/2006 objections, for instance, Jonathan Kogen maintains that the interest on the debentures should have been at least $246,989.32 rather than the $167,398.83 listed in the amended account. 5/31/2006 Jonathan Kogen Objections, ¶¶ 38-40. See also 6/6/2006 Attorney General Objections, ¶4.

[6] 5/31/2006 Jonathan Kogen Objections, ¶¶44-46; 6/6/2006 Attorney General Objections, ¶5.

[7] 5/31/2006 Jonathan Kogen Objections, ¶¶ 30-33 & Ex. E; 6/6/2006 Attorney General Objections, ¶ 2 & Ex. A.

[8] 5/31/2006 Jonathan Kogen Objections, ¶¶17, 41, "Wherefore" (d) ; 6/6/2006 Attorney General Objections,¶ ¶6-7.

[9] 5/31/2006 Jonathan Kogen Objections, ¶¶1-8, ¶ 29; 6/6/2006 Attorney General Objections, ¶¶ 1 & 3.

investment that was inappropriate where one of the beneficiaries is in "somewhat dire economic straits." He therefore argues:

> By failing to diversify the assets of the trust, by lending money from the Trust to a small privately held company without seeking security for its loans, by lending money from the Trust to a company developing innovative medical equipments, an industry sector which balances high risks against high returns, Trustee has breached, through at the very least his gross negligence, the standard of care imposed upon a trustee, which is the care 'which a man of ordinary prudence would practice in the care of his own estate.'[10]

Two days of hearings on the objections were held on September 18 and 19, 2006, during which testimony was presented by Robert Welch, Jonathan Kogen, and Linda Schaeffer, who is a trust and asset administrator for the substituted trustee-- First National Bank of Chester County. The parties thereafter submitted briefs and a stipulation of facts.

Genesis of the Rose Kogen Irrevocable Trust

Robert Welch, in the course of his testimony, revealed the elaborate shell game he had attempted to pull on the beneficiaries of the Rose Kogen Trust, the American Diabetes Association and even on the I.R.S. by the use of convertible debentures, conveniently transformed into stock that could not be valued because derived from a privately-held corporation. Mr. Welch has an impressive background in financial wizardry: he holds a J.D., an M.B.A in Finance, and a LLM. in taxation.[11] His recollection of when he first became enmeshed in Rose Kogen's financial affairs was somewhat vague: "A gentleman who ran a nursing home in Cherry Hill gave me a call and said there was a woman who apparently had been abandoned in a hotel and in the state of injury of some form, and that the State had come in, the State of New Jersey, and

[10] 5/31/2006 Jonathan Kogen Objections, ¶29.
[11] 9/19/2006 N.T. at 5 (Welch).

attempted to assist her, help her."[12] Jonathan Kogen had also been approached by the state to serve as his mother's guardian but he refused.[13] Welch recalled that a "Mr. Crammer called me" and said "she [i.e. Rose Kogen] was looking for someone knowledgeable in tax."[14] At that time, he recalled Rose Kogen as in her eighties, "somewhat disoriented and she was just upset."[15] According to Welch, he spoke with the "state of New Jersey" and it was suggested that "you can talk to her and if she wants you to be her power of attorney, she will make the decision."[16]

Terms of the Rose Kogen Trust

After meeting with Rose Kogen three or four times, Welch drafted a power of attorney for her to sign. Under the trust document that he prepared and then signed on Ms. Kogen's behalf as her power of attorney, Welch was named trustee—a position he maintained from January 1, 1999 until he was removed on December 19, 2005. The purpose of the trust is set forth in section 1.2: "The purpose of this trust is to manage my assets and use them to allow me to live in the community as long as possible and to manage my assets after my death."[17] Section 2.1 provides for distributions of as much of the income to Rose Kogen during her life "as it shall determine it at its sole discretion as necessary for my care and well-being."[18] The trustee was also given authority to make charitable contributions to a Public Charity as defined by Section 501(c)(3) of the IRS Code "but in no event to exceed fifty percent of the trust assets."[19] During Rose Kogen's life and after her death, the trustee was authorized to distribute trust principal to each of

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12 9/19/2006 N.T. at 6-7 (Welch).
13 Stipulation, ¶2.
14 9/19/2006 N.T. at 7 (Welch).
15 9/19/2006 N.T. at 7 (Welch). According to Ex.T, Rose Kogen was 91 years old in August 1998.
16 9/19/2006 N.T. at 7 (Welch).
17 Ex. O-3, 1/1/1999 Kogen Trust, section 1.2.
18 Ex. 0-3, 1/1/1999 Kogen Trust, section 2.1.
19 Ex. 0-3, 1/1/1999 Kogen Trust, section 2.1.

her children "as my independent trustee in its absolute and uncontrolled discretion may deem advisable." The trust document specified an "independent trustee" defined as "an individual or an institution that has no beneficial interest in the trust, that is a bank or trust company, a professional trustee, investment advisor or manager, investment bank, accountant or lawyer…"[20] Finally, under the heading "Limitations," the trust document provides that "[a]ll powers and discretion given to my trustee are exercisable only in a fiduciary capacity, in accordance with reasonable discretion." Ex. 0-3, section 4.8.

Federal and State Tax Liabilities

As power of attorney and trustee, Welch learned that Ms. Kogen had substantial assets in a Merrill Lynch account and other assets used to fund the trust in the initial amount of $1,199,839.57.[21] In explaining the genesis of his relationship with Ms. Kogen, Welch recalled that she was in need of help with her taxes.[22] He learned that she had not paid federal or state taxes for many years—and it was unclear whether she owed New York or New Jersey taxes. Welch therefore hired St. Clair CPA beginning in 1999 for a total claimed fee of $17,000 to prepare estimates of Ms. Kogen's tax liability over the course of several years. As he explained, "I believe I asked them to show me estimates. What I wanted to do is actually figure out the returns and see what the potential liability was going to be or could be."[23]

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[20] Ex. O-3, 1/1/1999 Kogen Trust, section 2.2.

[21] 9/19/2006 N.T. at 9-10 (Welch); 9/18/2006 N.T. at 50-52 (Welch). See Amended Account, at 2-5.

[22] 9/18/2006 N.T. at 180 ("From Rose Kogen's perspective—and hopefully you will let me answer this—the only reason that she, when she was abandoned—she was abandoned and looking for somebody to help her, she was looking for somebody knowledgeable in tax.")

[23] 9/18/2006 N.T. at 148. See generally id. at 148-55 (Welch). As Welch explained, "We were trying to at the time as I mentioned, figure out a liability for all the years that she hadn't filed, and I think we just may have sent money to the IRS, I'm not sure." Id. at 152 (Welch).

For 1999, a proposed federal tax return was prepared that estimated a $57,787 tax due.[24] Although Welch prepared a check for $55,151 for the IRS, it was returned for insufficient funds. When asked if he ever made this "check good to the IRS," he conceded "I don't believe we did, no."[25] New Jersey tax returns were also prepared, but never filed, for Ms. Kogen.[26] Finally, in February 2000, the New York State Department of Taxation and Finance prepared an estimate of Ms. Kogen's tax liability in New York spanning the years 1990, 1991, 1992, 1993, 1994, 1996 and 1997 for a total of $107,678.75.[27] Welch was aware of this document, but when asked if the trust had ever paid that amount, he replied: "I don't believe so."[28]

Loans or Investments to Ansar Group, Inc.

Instead of paying the taxes, Welch began liquidating the Merrill Lynch account and placing certain funds in Brinker accounts.[29] He conceded that early in the trusteeship, he steadily linked trust funds to Ansar Group Inc.[30] Ansar, according to Welch, is engaged in innovative medical technology for noninvasive evaluation of the autonomic nervous system. He traced its roots back to the early 1980's.[31] In return for the Kogen Trust assets Welch invested in Ansar, the Kogen trust was given "convertible debentures." Welch is president and managing director of Ansar, a closely-held corporation whose shares are not publicly traded. His family fortunes are closely linked

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[24] 9/18/2006 N.T. at 150; Ex. O-17.
[25] 9/18/2006 N.T. at 153; See also Ex. 0-18.
[26] 9/18/2006 N.T. at 154-55; See also Ex. 0-19 (showing a balance due of $13,818). When asked if the trust had paid this tax, Welch responded: "I'm not sure. I'm not sure." 9/18/2006 N.T. at 155.
[27] See Ex. 0-20.
[28] 9/18/2006 N.T. at 157 (Welch). In response to further questioning on this point, Welsh acknowledged that the initial rationale for his involvement with Ms. Kogen was to help with her taxes. When asked point blank if he had helped Ms. Kogen solve those tax problems, Welch stated: "No, sir." 9/18/2006 N.T. at 181. (Welch).
[29] 9/18/2006 N.T. at 64-66 (Welch); Stipulation, ¶ 9.
[30] 9/18/2006 N.T. at 72 (Welch). See, e.g. Ex. 0-4 (/12/2000 Check drawn from Rose Kogen Account to Ansar Group Inc. in the amount of $80,000).
[31] 9/19/2006 N.T. at 13-16 (Welch).

to Ansar. Fifty percent of his family trust, the Donna G. Welch Irrevocable Trust, is comprised of Ansar stock. Alternatively, forty percent of Ansar is held by the Welch family trust, with the remaining sixty percent of shares distributed among approximately 85 shareholders.[32] The only entity given convertible debentures in Ansar was the Rose Kogen Trust.[33]

Welch characterized the convertible debentures the Kogen Trust received in return for its investment in Ansar as "basically indebtedness between a corporation and the debenture holder, saying your lending us money" with the extra "kicker, or however you want to describe it, you also have the opportunity to convert the debt into equity."[34] In other words, the debenture could be converted into stock. Welch conceded, however, that the convertible debenture was basically debt with no security interest.[35] Prior to Rose Kogen's death in May 2000, Welch had invested or loaned approximately $230,000 of trust assets to Ansar. By early 2001, he had loaned—or invested-- $928,318 in trust assets to Ansar.[36] In return, the Kogen trust received thirty debenture notes at 6% interest with different dates of inception for 10 year terms.[37] The terms of the debentures were drafted by Welch himself.[38] Throughout this period, Ansar had not attempted to obtain loans from banks or other financial institutions.[39] Welch admitted that these investments in Ansar might be considered as wrongdoing by a fiduciary, but he believed he had the

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[32] 9/18/2006 N.T. at 76, 81-85 (Welch).
[33] 9/18/2006 N.T. at 103 (Welch).
[34] 9/19/2006 N.T. at 13 (Welch).
[35] 9/19/2006 N.T. at 38 (Welch).
[36] 9/18/2006 N.T. at 72-75 (Welch). See Amended Account at 10-1, 11-58 through 11-59; Stipulation, ¶ 12.
[37] 9/18/2006 N.T. at 76-77. Amended Account, at 10-1, 11-58 through 11-59.
[38] 9/18/2006 N.T. at 116-120.; Ex. 0-12; Stipulation, ¶ 13.
[39] 9/18/2006 N.T. 105-06 (Welch).

discretion to make these investments under the trust document and that investing in Ansar offered the possibility of making "a lot of money" for the beneficiaries.[40]

Ansar, however, had not initiated a public offering in the past ten years, and, according to Welch, it was unlikely to do so in the next year.[41] The parties stipulated that "Ansar experienced losses over the several years during which the Trust invested in it."[42]

Alleged Gift to the American Diabetes Association

According to the Amended Account, the Kogen Trust made contributions of $582,828 in convertible debentures to the American Diabetes Association ("ADA).[43] The Amended Account indicates that $310,000 of these donations occurred between 1999 through 2004.[44] In November 2006, while a petition to remove Welch as trustee was pending but before his removal by decree dated December 19, 2006, the Amended Account reflects a donation to ADA in the amount of $272,828.00. When asked why such a large single contribution was made to the ADA on that date, Welch responded: "The termination of the trust. To end the trust. It's a little more complicated, but the prior years involved a certain amount of tax planning, tax strategies, etc."[45] In so doing, he made no payments to the other beneficiaries of the trust, the settlor's two children.[46]

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[40] 9/19/2006 N.T. at 53-54 (Welch).
[41] 9/19/1999 N.T. at 49-51.
[42] Stipulation, ¶ 16 (citing Ex. O-5 through 0-10)(Ansar Corporate IRS returns).
[43] Amended Account, at 11-58 through 11-59. The Stipulation, in contrast, states that a total of $528,828 was donated to the ADA by the Kogen Trust. Stipulation, ¶17. The amended account on page 11-59 shows a "total disposal" of Ansar debentures to the ADA and Robert Welch of $672,828, with $90,000 to Robert Welch. The total disposal of Ansar debentures to the ADA according to the Amended Account is therefore $582,828.
[44] Amended Account, at 11-59; 9/18/2006 N.T. at 112-13 (Welch).
[45] 9/18/2006 N.T. at 113 (Welch);Amended Account, at 11-59.
[46] When asked whether—or why—no distributions were made to the settlor's children, Welch replied: "I wanted to make sure I followed through with Mrs. Kogen's wishes." 9/18/2006 N.T. at 114. The Trust, however, clearly provided that upon its termination, fifty percent of the trust property should go to a charity and fifty per cent in equal shares to the settlor's children. O-3, 1/1/1999 Kogen Trust, section 3.1.

Before making the "donations" to the ADA, however, Welch converted the debentures to shares of stock.[47] He gave various reasons for this conversion. Initially, he explained that this conversion would be more easily understood by a tax reviewer "to understand a charitable deduction in the form of shares. We are not as cognizant of what a convertible debenture is."[48] When asked to clarify, Welch suggested that "trying to communicate to different bureaucrats, different people, that it's easier to say, here is stock, here is a charitable deduction versus convertible debenture."[49] He conceded that he did not consult with the ADA in making this decision to convert from debenture to stock; that once a debenture was converted to stock, Ansar no longer had to pay the debenture, and; from the date of each conversion, Ansar no longer owed interest on the debenture that was converted.[50] Welch also acknowledged the difficulty in giving an exact value to this alleged $582,000 in privately-held stock other than its original purchase price. At one point, when asked what the best price any Ansar stockholder had received for a share in 2006, he was unable to do so stating that none had been sold in 2006;[51] at another point, he surmised that the stock had sold for "$250 to a hundred dollars to—That's probably it."[52] He conceded the difficulty in placing a value on these nonpublicly traded stocks, other than their redemption value but suggested that the ADA would have been well advised to hold onto the stocks "to wait and see if the company goes public and if they were worth it."[53]

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47 9/18/2006 N.T. at 116-17, 121 (Welch); Ex. 0-12.
48 9/18/2006 N.T. at 121 (Welch).
49 9/18/2006 N.T. at 174 (Welch).
50 9/18/2006 N.T. at 159-161 (Welch).
51 9/18/2006 N.T. at 171-73 (Welch).
52 9/18/2006 N.T. at 122-24 (Welch).
53 9/18/2006 N.T. at 122 (Welch).

In exercising the election to convert the debenture, Welch signed in his capacity as Trustee of the Kogen Trust; in redeeming the debenture, Welch signed in his capacity as President of Ansar. The debentures redeemed on November 30, 2005 as 500 shares of Ansar Group Inc. stock.[54] Welch emphasized that the stocks were transferred to ADA on Ansar's corporate books, although he did not send copies of the stock certificates to ADA until the summer of 2006 before the hearing on the objections to his amended Account—which was many months after Welch had been removed as Trustee of the Rose Kogen Trust on December 19, 2005.[55]

When asked when he first notified ADA of this contribution of Ansar stock, Welch noted that sometime in 2006 he had "a couple of conversations" with Ronnie Mills but was vague as to his exact title within the ADA.[56] Counsel for Welch stipulated, however, that the ADA was unaware of these transfers before 2006.[57] On May 1, 2006, Welsh sent the following e-mail to Natalia Soriano, Associate Manager, Individual Giving at ADA,[58] regarding shares of Ansar stock from the Rose Kogen Trust being held for ADA by the Chicago Community Trust:

> Natalia—Ansar Group Inc is a company with leading edge medical technology that helps diabetics—we are currently changing its name to Ansar Medical Technologies (Ansar stands for Autonomic Nervous System and Respiration—We are in the process of going public—prior to going public or at the time of going public, the shares would be redeemed—we are exhibiting at the American Diabetes Association in Washington—If you get a chance, stop by our booth—I appreciate your response but need some clarification—for example, acknowledgement needs to specific as to what shares—"The Chicago Community Trust is holding the Rose Kogen Trust Shares of Ansar Group Inc.

[54] 9/18/2006 N.T. at 118-21 (Welch); Ex. O-12.
[55] 9/18/2006 N.T. at 125 (Welch).
[56] 9/18/2006 N.T. at 128-29 (Welch). Ronnie Mills was Manager of Estate Administration for the ADA. A December 29, 2005 letter from him had been attached to the objections of both the Commonwealth and Jonathan Kogen. In that letter, Mr. Mills stated that the ADA had no record of any gift from the Rose Kogen Trust in any form (stock or cash).
[57] 9/18/2006 N.T. at 129-30 (Freedman).
[58] See Ex. 0-16(5/30/2006 Memorandum from Soriano to Mills).

> (CD 100 up to and including CD 117) to or for the benefit of the American Diabetes Association. These shares along with other shares being contributed to or for the benefit of the American Diabetes Association will be redeemed prior to going public or at the time of going public. At that time a check will be cut for the total amount and mailed to the American Diabetes Association's National Office.[59]

Ms. Soriano subsequently sent a memorandum to Ronnie Mills, Manager of Estate Administration at ADA, about a telephone conversation with Robert Welch on May 30, 2006. Although this was the first time she had spoken with him, "[h]is friendly manner caught me off guard but I remembered his name from the e-mail in my in-box." She asked Welch to clarify the nature of the anticipated transfer of stock:

> He explained that the shares are being held by Chicago Community Trust. I asked what Amanda Binder's role is in this process. Mr. Welch explained that Amanda works for Chicago Community Trust and would be contacting me when shares from the Trust are being held in our name at which time he requests that I notify him. He said that once all shares are transferred from the Trust and held for our benefit by Chicago Community Trust, they would be liquidated and a check would be cut for the total amount of the proceeds payable to the American Diabetes Association.[60]

Three months later, Welch suggested that Ansar—not the Chicago Community Trust—was holding the Ansar stock for ADA while setting forth a different scenario for disbursing the Ansar stock to the ADA in a letter to Charles Dewitt, Associate Director, Research Foundation of the ADA:

> As I mentioned to you, we are holding shares (shares are numbered CD 100 to CD117) in the name of the American Diabetes Association which were donated by the Rose Kogen Trust. The value of these shares is $582,829. minus $10,000 already paid to ADA. We would systematically redeem these shares by delivering cashiers checks in the amount of twelve thousand dollars at the end of every quarter.
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> Also, I stated to you that we are in a preipo status where we have retained professionals to get us ready for the IPO. If the shares become more valuable after the IPO, the ADA will receive whichever has the greater value.

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[59] Ex. 0-14 (5/30/2006 E-Mail from Welch to Soriano@diabetes.org).
[60] Ex. 0-16 (5/30/2006 (Memorandum from Soriano to Mills)).

> We are looking for the ADA to acknowledge the Rose Kogen Trust shares are being held by the corporation Ansar Inc. for the ADA.[61]

Overview of Amended Account Filed by Robert Welch

At the inception of the Rose Kogen Trust, it held $1,199,839.57 in the form of publicly traded stocks and U.S. treasury notes.[62] By 2001, the Kogen trust had loaned a total of $928,318 to Ansar.[63] In exchange for this loan, the Trust received 30 convertible debentures at 6 % interest.[64] The Amended Account shows a total donation of $528,828 to the ADA, with payments totaling $310,000 between 1999 to 2004. The amended account shows a single donation to the ADA of $272,828.00 in November 2005. Before these donations to ADA were made, Welch converted the debentures to stock.[65] While he was trustee, Welch made payments to the individual beneficiaries Jonathan Kogen and Alice Leibowitz. According to the Amended account, he made payments to Ms. Leibowitz of $26,612.33 from principal and $112,883.73 in income. Mr. Kogen received payments of principal in the amount of $1,127.67 and $52,550.73 in income. According to the parties' stipulation, "Ansar acted as a disbursing agent and made the payments directly to beneficiaries as an obligation of the trust. Many of the payments to the beneficiaries were written on checks issued by Ansar as the disbursing agent."[66]

The amended account shows that Welch was paid $109,350 for his services as trustee and agent under Rose Kogen's power of attorney. Payments of $17,000 were

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[61] Ex. 0-15 (8/31/2006 Letter from Welch to DeWitt). In his testimony at the hearing, Welch stated that the shares of Ansar stock donated to ADA were being held in Ansar's corporate safe. 9/18/2006 N.T. at 163-64 (Welch).
[62] Amended Account at 2-5; Stipulation, ¶ 9.
[63] Stipulation, ¶ 12 (citing 9/18/2006 N.T. at 72-74 and Amended Account, at 10-1, 11-58 to 11-59).
[64] Stipulation, ¶ 12.
[65] Stipulation, ¶17, 18.
[66] Stipulation, ¶8.

made to St. Clair, CPAs for the accounting services rendered to the Trust.[67] When Welch was removed as Trustee of the Kogen Trust, he was ordered to transfer all monies and property remaining in the Trust to the substituted trustee, the First National Bank of Chester Bank. According to the amended account, there was $272,828.00 combined balance on hand.[68] Linda Schaeffer, the account administrator for the substituted trustee, testified that of this $272,828.00 listed as "on hand," the substituted trustee received $270,389.[69] Welch testified that he thought this $2,500 shortfall could be located in a former Brinker account and he would do whatever was permitted by the court to retrieve it.[70]

Finally, Linda Shaeffer testified that according to her calculations, the Trust should have received $246,989.32 in interest payments from the debentures rather than the $167,398.83 listed in the amended account, resulting in a shortfall of $79,590.49.[71] Welch countered that the convertible debentures were worded so that interest is payable only if the debenture is still outstanding on December 31.[72]

Legal Analysis

This record demonstrates the unremitting self-dealing by Robert Welch, as Trustee for the Trust of Rose Kogen, that prompted this court to order his removal. By investing or lending nearly all of the assets of the Kogen Trust in a company enmeshed with his family fortune, Mr. Welch had a conflict of interest that was compounded by his role as president and managing director of that company. As a fiduciary, a trustee owes a

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67 Stipulation, ¶¶ 23, 24.
68 Amended Account, "Summary of Account" at 1.
69 9/18/2006 N.T. at 6, 9-11 (Schaeffer).
70 9/19/2006 N.T. at 31(Welch).
71 9/18/2006 N.T. at 18-19 (Shaeffer); Ex. O-2.
72 9/19/2006 N.T. at 21-22 (Welch). According to Welch, a person would only be entitled to interest if he held the debenture at the end of the year. If it was redeemed before then, he would be entitled to no interest. See also Stipulation, ¶28.

duty of loyalty to the beneficiary of a trust. Noonan Estate, 361 Pa. 26, 30, 63 A.2d 80, 83 (1949). Consequently, Pennsylvania courts have long embraced an unflinching rule against self-dealing by Trustees: "The prohibition against self-dealing is absolute; where the trustee violates it, good faith or payment of a fair consideration is not material." Downing Estate, 162 Pa. Super. 354, 360, 57 A.2d 710, 712 (1948), aff'd, 359 Pa. 534, 59 A.2d 903 (1948). The Pennsylvania Uniform Trust Act also recognizes a trustee's duty of loyalty and requires that a "trustee shall administer the trust solely in the interests of the beneficiaries" while avoiding conflicts of interest. 20 Pa.C.S. § 7772.

The prohibited self-dealing does not require a showing of fraud or bad faith by the trustee. Instead, "[t]he test of forbidden self-dealing is whether the fiduciary had a personal interest in the subject transaction of such a substantial nature that it *might* have affected his judgment in material connection." Banes Estate, 452 Pa. 388, 395, 305 A.2d 723, 727 (1973)(where trustee sold trust property without notice to beneficiaries and for her own financial benefit, the conveyance is void). Significantly, to establish improper self-dealing by a trustee, it is not necessary to establish loss. Estate of Harrison, 2000 Pa. Super. 19, 745 A.2d 676, 679 (2000)("Moreover, a finding of prohibited self-dealing need not be premised on a showing of loss to the estate"). The rule against self-dealing is based on public policy; it acts not only as "a shield to parties represented, but as a guard against temptation on part of the representative." Noonan Estate, 361 Pa. at 33, 63 A.2d at 84.

To remedy self-dealing by a trustee, courts have the option of imposing a surcharge on the trustee or of setting aside a transaction. Where an executor engaged in self-dealing in accepting an undisclosed referral fee from counsel working for an estate,

the court concluded that "[o]nce self dealing is established, a surcharge may be applied to a fiduciary, not as compensation for any loss to the estate but as punishment for the fiduciary's improper conduct". Harrison Estate, 745 A.2d at 680. Alternatively, where an executor violated the rule against self-dealing by misinforming a beneficiary as to the necessity to sell estate real property, the "remedy is a direct setting aside of the sale upon attack by one having standing to complain." Noonan Estate, 361 Pa. at 33, 63 A.2d at 84. See also Tracy v. Central Trust Co., 327 Pa. 77, 80, 192 A. 869, 870 (1937)(Where corporate trustee sold mortgages it owned to the Trust, a "beneficiary can set aside the purchase and compel the trustee to repay the amount of the purchase price with interest thereon").

The record of the instant case must therefore be analyzed in terms of the test of forbidden self-dealing which "is whether the fiduciary had a personal interest in the subject transaction of such a substantial nature that it might have affected his judgment in a material connection. *The fiduciary's disqualifying interest need not be such as 'did affect his judgment' but merely such as 'might affect his judgment.'*" Estate of Harrison, 745 A.2d at 679 (citations omitted; emphasis in original).

It is undisputed that Robert Welch had strong personal stakes in Ansar—the company in which he invested or loaned over $900,000 of Rose Kogen Trust funds. Not only is he president and managing director of Ansar since 1993, but he was also involved with its predecessor, Medic Monitor, in 1983.[73] His family trust, the Donna G. Welch Trust named after his wife for the benefit of Welch's children and grandchildren, has invested at least fifty percent of its funds in Ansar.[74] Approximately forty percent of

[73] 9/18/2006 N.T. at 81 (Welch).
[74] 9/18/2006 N.T. at 82-83 (Welch).

Ansar stock is owned by the Donna G. Welch trust.[75] Ansar, a privately held company engaged in innovative technology that Welch describes as in a "preipo" status,[76] experienced losses during the years Welch invested the trust funds in it.[77] Since Ansar is a privately-held company, Welch acknowledged the difficulty in assigning a value to Ansar stock other than its original purchase price.[78]

It was, therefore, a breach of the rule against self-dealing for Robert Welch, as trustee of the Rose Kogen trust, to have invested or loaned $928,318 in Kogen Trust assets to Ansar. Moreover, the form of these "investments"-- as convertible debentures or unsecured loans— was suspect. As Welch himself conceded, convertible debentures are "not well understood and ***it raises numerous flags.***"[79] One flag raised, for instance, is that while Ansar had 85 shareholders, the only entity given convertible debentures was the Rose Kogen Trust.[80] Another flag raised was when on at least two occasions, Welch deviated from his standard practice of writing checks from the trust to transfer funds to Ansar and instead wired funds from the trust to invest or loan to Ansar.[81] To explain the need for such hasty investments, Welch's rationale is telling: "To stop a trust. The stock market was crashing, sir."[82] The boundaries between the Kogen Trust and Ansar seemed further blurred when Ansar acted as the disbursing agent for the trust beneficiaries; many

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[75] 9/18/2006 N.T. at 85 (Welch). The parties stipulate that Donna Welch is the wife of Robert Welch. Stipulation, ¶ 11.
[76] See Ex. 0-15 (8/31/2006 Letter from Welch to DeWitt).
[77] Stipulation, ¶ 16.
[78] 9/18/2006 N.T. at 171-73 (Welch). When asked how he came up with the value of the $582,000 in stocks to the ADA, Welch responded: "The purchase, originally the purchase price which is set forth in the book." 9/18/2006 N.T. at 171 (Welch).
[79] 9/18/2006 N.T. at 174-75 (Welch)(emphasis added).
[80] 9/18/2006 N.T. at 103 (Welch).
[81] Stipulation, ¶ 14.
[82] 9/18/2006 N.T. at 79-80 (Welch).

of the payments to the beneficiaries "were written on checks issued by Ansar as the disbursing agent."[83]

With these acts, Welch improperly ignored the boundaries between his role as trustee for the Kogen Trust and as officer of Ansar. This constituted self-dealing because "[h]e that is intrusted with the interest of others, cannot be allowed to make the business an object of interest to himself; because from the frailty of nature, one who has the power, will be too readily seized with the inclination to use the opportunity for serving his own interest at the expense of those for whom he is intrusted." Noonan Estate, 361 Pa. at 31, 63 A.2d at 83 (quoting Beeson v. Beeson, 9 Pa. 279, 284).

In addition to this record of failing to respect the proper boundaries between Kogen Trust assets and Ansar, there is Welch's admitted failure to resolve Rose Kogen's tax problems that were the initial reason for his involvement in her estate. After hiring accountants to assess her tax liability, he neglected to pay those taxes while at the same time using the untaxed trust assets to fund his company.

Based on this record and the difficulty in valuing Ansar stock, let alone its convertible debentures, the most reasonable remedy would be to require Welch to set aside his total transfer of $928,318 in Kogen Trust assets to Ansar with interest at the legal rate of 6%. This remedy is also supported by the Pennsylvania Uniform Trust Act. Section 7772(b), for instance, provides that a transaction by a trustee is voidable where there is a conflict of interest, which is defined as a disposition of property by a trustee with "a corporation or other person or enterprise in which the trustee…has an interest that might affect the trustee's judgment… 20 Pa.C.S.§ 7772(c)(5).

[83] Stipulation, ¶ 8.

Welch counters, however, that his investments of trust assets into Ansar were not invalid because section 4.4 of the Kogen trust document gave him the authority to make any investments he considered financially appropriate.[84] Specifically, section 4.4(d) provides that the trustee may "invest income and principal without being subject to legal limitations on investments by fiduciaries." Ex. O-3. The prohibition on conflicts of interest in the Pennsylvania Uniform Trust Act similarly provides that such transactions are voidable "unless the transaction was approved by the trust document." 20 Pa.C.S. §7772(b)(1).

It is, of course, well established in Pennsylvania case law that "where a trust instrument is explicit as to the duty owed, it, as evidencing the settlor's (testator's) intent should govern." In re Niessen, 489 Pa. 135, 139, 413 A.2d 1050, 1052 (1980). This principle is likewise embraced by section 7705(a) of the Pennsylvania Uniform Trust Act. 20 Pa.C.S. §7705(a)("Except as provided in subsection (b), the provisions of a trust instrument prevail over any contrary provisions in this chapter"). The suggestion, however, that the Kogen trust document authorizes a trustee to invest nearly all of the trust assets in a privately-held corporation in which the trustee was as deeply enmeshed as Robert Welch in Ansar is belied by the trust document itself. Section 4.8 of the trust document, which sets forth limitations on the trustee's authority, states that "[a]ll powers and discretion given to my trustee are exercisable only in a fiduciary capacity, in accordance with reasonable discretion." Ex. 0-3.

Moreover, the precedent cited by Welch to support the contention that he had discretion under the trust document to invest trust funds as he did in Ansar is distinguishable. In particular, he invokes Estate of McCredy, 323 Pa. Super. 268, 470

[84] 4/13/2007 Welch Brief at 1.

A.2d 585 (1983), where the court concluded the individual trustee had discretion under the relevant trust document to invest in highly speculative stock. The testator in McCredy, however, had taken an active role in investments during her life and for more than thirty years relied with great success on the idiosyncratic advice of her financial adviser, whom she named trustee; in her will, she ordered and directed that he would "have complete and absolute control and oversight of the management of said trust, and during that time that the Corporate Trustee hereinafter named shall follow his directions blindly and implicitly, doing only the clerical work involved…." Id., 323 Pa. Super. at 274, 470 A.2d at 588. Based on this record, the court concluded that the testator had specifically embraced the personal investment standard of the trustee rather than the rule of prudent investment, thereby waiving the rule of undivided loyalty. Id., 323 Pa. Super. at 276-77, 470 A.2d at 589.

In the instant case, in contrast, Welch first came into contact with Rose Kogen when she was 91 years old, after he had been contacted by the state of New Jersey that she needed a guardian. He described her as being upset, and a medical report he submitted indicated that it was unclear whether she suffered from "dementia or benign senescent forgetfulness," but she "is unhappy having a state appointed attorney and would prefer to make her own selection." Ex. T-2. Moreover, their relationship was not of long duration. The trust document drafted by Welch himself was dated January 1, 1999, and Mrs. Kogen died a little more than a year later in May 2000. The Kogen trust document, moreover, in section 4.8 required that in the exercise of all "powers and discretion" the trustee was to act"only in a fiduciary capacity" and "in accordance with reasonable discretion." The Trust document also characterized the trustee as

"independent" specifically defined as "an individual or an institution that has no beneficial interest in the trust."[85] It thus cannot be interpreted to permit the self-dealing on record in this case.

While the record of self-dealing supports the remedy of setting aside Welch's transfer of $928,318 of Kogen trust assets, this solution is complicated by Welch's purported contribution of $582,828 to the American Diabetes Association, which must be analyzed based on the record.

The Purported Gift of $582,828 to the American Diabetes Association Was Invalid

The stated purpose of the trust was to manage Rose Kogen's "assets and to use them to allow me to live in the community as long as possible and manage my assets after my death."[86] The trust document provided that the trustee could make charitable contributions to a public charity "but in no event to exceed fifty percent of the trust assets." [87] Finally, it provided for distributions during Rose Kogen's life and after her death to her children in "such portions" of trust principal as the independent trustee in his absolute and uncontrolled discretion might deem advisable. Upon termination of the trust, the trustee was to distribute 50% of the trust property and undistributed income to the public charity and the remaining principal and undistributed income in equal shares to Rose Kogen's children.

According to the trust document, the trust terminated with no set event other than the distribution of all of the trust property: "If my independent trustee shall distribute all

[85] Ex. O-3, Rose Kogen Trust, ¶ 2.2.
[86] Ex. O-3, Rose Kogen Trust, ¶ 1.2.
[87] Ex. O-3, Rose Kogen Trust, ¶ 2.1.

of the trust property, the trust shall terminate."[88] In November 2005, while a petition to remove him as trustee was pending, Welch made a single donation of $272,828.00 to the ADA, which he explained he had done for "[t]he termination of the trust. To end the trust."[89] When asked why he failed to distribute 50% of the trust at that point to the settlor's children as required by the trust document, he stated: "I wanted to make sure I followed through with Mrs. Kogen's wishes."[90] Those wishes, however, as set forth in the trust clearly required a fifty/fifty distribution between the charitable and individual beneficiaries at the termination of the trust.

The issue then becomes whether Welch's donation of Kogen Trust assets totaling $582,828 to the ADA between 1999 and 2006 was a valid gift. Before the assets in the form of debentures were "transferred" to ADA, Welch converted them into Ansar stock. In his testimony, Welsh maintained that this was a valid gift under Pennsylvania law because he had transferred the shares of stock at issue to ADA on Ansar's corporate books.[91]

There are two essential elements to a valid inter vivos gift: "an intention to make the donation then and there, and an actual or constructive delivery at the same time, of a nature sufficient to divest the giver of all dominion, and invest the recipient therewith." Titusville Trust Co. v. Johnson, 375 Pa. 493, 497, 100 A.2d 93, 97 (1953). Welch suggests that ancient Pennsylvania precedent such as Appeal of Roberts, 85 Pa. 84, (1877) recognizes the "mere registration of corporate stock in the name of a donee on the books of the corporation vested the recipient with immediate legal title to the stock and

[88] Ex. 0-3, Rose Kogen Trust, ¶ 2.2.
[89] 9/18/2006 N.T. at 113 (Welch).
[90] 9/18/2006 N.T. at 114 (Welch).
[91] See 9/18/2006 N.T. at 129, 162-63, 117-121, 125-26 (Welch).

constituted a valid gift, despite the fact that the stock certificates were not delivered to the donee."[92] He also invokes the more recent precedent of Wagner v. Wagner, 466 Pa. 532, 353 A.2d 819 (1976), while conceding that the Wagner court observed that "transfers on corporate books lacking actual delivery may not always suffice to create a completed and valid gift."[93] He notes that there is precedent such as Martella Estate, 390 Pa. 255, 135 A.2d 372 (1957) and Grossman Estate, 386 Pa. 647, 126 A2d. 468 (1956) that the mere transfer of title to stock on corporate books did not suffice as a valid gift, but Welch seeks to distinguish these cases as involving joint tenants.

An analysis of the precedent dealing with gifts of stock suggests that the factual context surrounding the gift of stock—and especially the relationship of the parties—are factors to be considered as well as the registration of the stock on the corporate books. In McClements v. McClements, 411 Pa. 257, 191 A.2d 814 (1963), for instance, the court found a valid transfer of corporate ownership from father to his children based on testimony from the parties in interest as well as on the transfer of stock on the corporate books. More generally, the McClements court observed:

> Under certain circumstances, the transfer of the registration of stock ownership on the books of the corporation in itself constitutes a legal and sufficient delivery. While it is true that the Pennsylvania Uniform Stock Transfer Act of May 5, 1911, (repealed 1953) provided that a person to whom a certificate of stock is issued is to regarded as the real owner, this was not conclusive of the rights between a donor and a donee.
> McClements, 411 Pa. at 261, 191 A.2d at 815-16 (emphasis added).

In finding a valid gift of stock without actual delivery of the certificates of ownership, the McClements court emphasized the parent/child relationship in that case and concluded: "Such a gift between father and children is a natural one and less

[92] 4/13/2007 Welch Brief at 7.
[93] 4/13/2007 Welch Brief at 8.

evidence is required to establish the intention." McClements, 411 Pa. at 262, 191 A.2d at 816.

In the later case of Wagner v. Wagner, 466 Pa. 532, 537, 353 A.2d 819, 822 (1976), the Pennsylvania Supreme Court emphasized that in analyzing a gift of corporate stock donative intent was essential, which "is the intention to make an immediate gift." In concluding that a father had given his children ownership of his company, the court considered testimony by the children that their father had told them that they owned shares of the corporation, the parent child relationship, the signing of blank share certificates by the children, and the transfer of shares of stock on the corporate records. Under these circumstances, the father's retention of the stock certificates in his office was not determinative, and the gift of corporate stock was valid. Nonetheless, in its general rationale, the Wagner court observed:

> The clearest form of a delivery of corporate shares is registration of the shares in the name of the donee on the stock ledger of the company coupled with physical delivery to the donee of stock certificates in the name of the donee representing the shares so registered.
> Wagner, 466 Pa. at 540, 353 A.2d at 822-23 (emphasis added).

The facts and circumstances in the instant case, however, establish that the alleged gift of Kogen Trust Assets (in the form of Ansar stocks) to the ADA was invalid due to a lack of intention to make a donation "then and there" as well as a lack of delivery "sufficient to divest the giver of all dominion," that would "invest the recipient therewith." Titusville Trust Co., 375 Pa. at 498, 100 A.2d at 97. According to the amended account and Welch's testimony, Welch, as trustee for the Kogen Trust, began making its first contribution to the ADA of $80,000 in 1999, with donations continuing in

2000, 2001, 2002 through to 2005.[94] Before making these donations, Welsh testified that he converted the Ansar Debentures into Ansar stock. He drafted the documents for Exercising the Election to Convert as well as the share certificates. The transfer of Ansar shares to the ADA was recorded on Ansar's corporate books.[95]

Not until after he had been removed as trustee did Welch finally begin informing ADA officials about the "donations." Counsel stipulated that no one at ADA had any knowledge of these "donations" as late as December 29, 2005. No copies of the Ansar share certificates were sent to the ADA until August or September 2006.[96]

Welch's correspondence to various ADA officials about this "gift," moreover, was extremely tentative as to the ability or prudence of ADA to redeem the shares of Ansar stock allegedly donated to it. In a disjointed May 30, 2006 e-mail to Natalia Soriano, for instance, Welch states that the shares of stock from the Rose Kogen Trust are being held by the Chicago Community Trust and that "[t]hese shares along with other shares being contributed to or for the benefit of the American Diabetes Association <u>will be redeemed prior to going public or at the time of going public."</u>[97] In suggesting that the redemption of the stock be linked to Ansar's going public—which in testimony Welch admitted had not yet happened and probably would not occur in the foreseeable future—Welch was far from expressing an intent to release control over the stock or make the donation "then and there."

Similarly, in a June 2, 2006 e-mail to Ronnie Mills, Welch wrote Mills that he was looking forward to receiving "different materials on the different ways to give to the

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94 9/18/2006 N.T. at 112 (Welch); Amended Account, 11-59.
95 9/18/2006 N.T. at 116-25 (Welch); Ex. 0-12.
96 9/18/2006 N.T. at 125, 159, 163 (Welch); 9/18/2006 N.T. at 129-30 (Freedman).
97 Ex. O-14 (5/30/2006 e-mail from Welch to Soriano).

ADA," informed him that the value of the shares was $582,828 based on the Kogen Trust's purchase price, and stated that the shares will be redeemed "[p]rior to going public or at the time of going public the shares would be redeemed."[98] Although his first sentence suggested Welch's intent to learn how to effect a donation to the ADA, he followed it up with a request that ADA confirm the receipt of a gift:

> We need ADA to acknowledge the following "The American Diabetes Association acknowledges receipt of the Rose Kogen Trust shares of Ansar Group, Inc. (purchase price was $582,828.00—certificates CD 100 up to and including CD 117) by Chicago Community Trust to or for the benefit of the American Diabetes Association. These shares along with other shares being contributed to or for the benefit of the American Diabetes Association will be redeemed prior to going public or at the time of going public. At that time, a check will be cut for the total amount and mailed to the American Diabetes Association's National Office.[99]

This e-mail to Mills, like the e-mail to Soriano, does not manifest an intent to make a gift to the ADA "then and there." Not only is it searching for a method to effect the gift, but it is seeking proof that it has been received. These letters when read in the context of an amended account that notes continuous "gifts" to the ADA in 1999 (i.e. $80,000), 2000 (i.e. $100,000), 2001 (i.e. $30,000), 2002 ($30,000), 2003 (i.e. $35,000), 2004 (i.e.$35,000) and 2005($272,828.)[100] strains credulity that Welch had the intention to make his donations to ADA "then and there." The letters also show that there was no "actual or constructive delivery at the same time, of a nature sufficient to divest the giver of all dominion, and invest the recipient therewith." See Titusville Trust Co., 375 Pa. at 498, 100 A.2d at 97.

In these letters, Welsh pointedly seeks to delay redemption of these "gifts" until an event occurs that is beyond the control of the donee—i.e. Ansar's going public.

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[98] Ex. O-14 (6/2/2006 e-mail from Welch to Mills).
[99] Ex. 0-14, (6/2/2006 e-mail from Welch to Mills).
[100] Amended account at 11-59.

Finally, and perhaps most significant, it was not until after Welch had been removed as trustee of the Kogen Trust, that he "informed" the ADA of this donation. At that point, he lacked any authority to convey such a gift on behalf of the Kogen Trust.

The ADA, however, has submitted a letter brief to argue that the "gift" from the Kogen Trust was valid. First, it emphasizes the language of the Trust document, which provided for contributions to a Public Charity. But that document clearly provided that charitable contributions should not exceed "fifty per cent of the trust assets." Ex. 0-3, § 2.1. Upon termination of the trust, the assets were to be distributed 50% to the public charity with the remaining 50% to be equally divided between the 2 individual beneficiaries. In this case, in November 2005 when Welch ostensibly sought to "terminate" the trust by distributing all its assets, he distributed funds only to ADA and not to the settlor's two surviving children. In addition, as late as December 29, 2005, Ronnie Mills, Manager of Estate Administration for ADA wrote that "[o]ur records do not indicate a distribution in any form (stock or cash) with the Rosen (sic) Kogen Irrevocable Trust." Objections by Jonathan Kogen, Ex. E (12/29/2005 letter from Mills to Meyer).

Finally, in such cases as McClements and Wagner v. Wagner, where the court found a valid transfer of ownership of stock based on a change in the stock's title on the corporate books, the courts also emphasized that familial relationships made it easier to find the requisite donative intent. In contrast, in the instant case no evidence was presented to establish such a close relationship with Welch and the ADA. Welch's e-mails—and those by ADA officials—suggest that after he was removed as trustee,

Welch sought information on how to make a donation to the ADA and how to substantiate such a claim.

For these reasons, the purported "gift" to the ADA was invalid. The record suggests that the gift to ADA was part of Welch's broad scheme to enhance the value of Ansar. Welch's May 30, 2006 e-mail to Natalia Soriano of the ADA, for instance, casually links his discussion of efforts to market Ansar with a description of the "gift" of stock from the Kogen Trust.[101] In his testimony, Welch emphasized that the technology being developed by Ansar would be used, inter alia, in the treatment of diabetes.[102] In selecting ADA as the charity to benefit from the Rose Kogen Trust, Welch was once again seeking to benefit Ansar. The former trustee shall be required to return the only measure of the value of this alleged "gift"—the $582,888 purchase price—to the Kogen Trust.

The Former Trustee Shall Pay to the Kogen Trust the $79,590.49 in Interest Deficiency from the Ansar Debentures

Both objectants Jonathan Kogen and the Commonwealth assert that there was a deficiency in interest paid by the debentures to the Kogen Trust. They assert that $79,590.49 is the amount of this unpaid interest as set forth in Exhibit O-2. Although the amended account shows that Ansar debentures earned $167,398.83 during the account period, the objectants presented testimony as well as a chart (Ex. O-2) prepared by Linda Schaeffer, trust administrator for the substituted trustee, First National Bank of Chester County to demonstrate that the Ansar 6% debenture should have earned interest in the amount of $246,989.32 for the period between December 1, 1998 through December 31,

[101] Ex. 0-14.
[102] 9/19/2006 N.T. at 14-15 (Welch).

2005.[103] Based on this analysis, there was a shortfall of $79,590.49 of interest. Ms. Schaeffer's calculations were based on differing numbers of days of interest depending on how long the debentures were held "down to the number of days and the month held."[104]

The former trustee sought to impeach this testimony and chart, by emphasizing that Ms. Schaeffer had not read the terms of the debentures drafted by Welch, and in particular, the provision under the heading "obligation" that "[i]nterest payments would be made on or before the last day of each calendar year end."[105] According to Welch, under "this plain language, interest accrues as of, and only as of, December 31st of each calendar year."[106] Therefore, he argues, the Commonwealth and objectant are wrong in assuming that interest accrues daily.

While Ms. Shaeffer faltered in her testimony in initially agreeing to this interpretation of the debenture language,[107] on redirect her attention was directed to the following sentence under the heading of "Obligation:" "The Corporation further agrees to pay interest on the principal sum from September 29, 2000 at the rate of Six percent per year until payment in full of the principal."[108] This language could support an interpretation that the debentures would continue paying interest until the principal had been paid in full and that the date of payment would simply be "on or before the last day of each calendar year end."

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[103] 9/18/2006 N.T. at 12-28 (Schaeffer); Amended Account at 6-12 (Ansar interest).
[104] 9/18/2006 N.T. at 24 (Schaeffer).
[105] Ex. T-1.
[106] 4/13/2007 Welch Brief at 5.
[107] 9/18/2006 N.T. at 23-26 (Schaeffer).
[108] Ex. T-1.

But before straining too long to interpret the language of the debenture, it must be remembered that this language was drafted by the former trustee himself. Moreover, the decision of when to redeem or convert the debenture was made solely by the trustee without consultation, for instance, with the alleged donee—ADA. The evidence of self-dealing by the former trustee would thus extend to his manipulation of when the debentures were converted. In light of his total control over these decisions, it would be inequitable to deprive the trust of the $79,590.49 in deficient interest payments.

The Former Trustee Is Not Entitled to the Claimed Fees of $109,350

The former trustee has claimed legal and administrative fees of $19,350 as well as $90,000 of fees in the form of Ansar debentures.[109] Under Pennsylvania law, fiduciaries are "entitled to fair and just compensation for services they perform." Ischy Trust, 490 Pa. 71, 80, 415 A.2d 37, 42 (1980). Both an attorney and a fiduciary bear the burden of establishing the reasonableness of their fees. Estate of Sonovick, 373 Pa. Super. 396, 401, 541 A.2d 374, 377 (1988).

In response to the challenge to his fees, the former trustee merely notes his "six years of service to the trust" without specifying the specific services performed. Instead, he defensively cites case law to argue that he should be compensated absent a showing of gross negligence, willful misconduct or fraud.[110] The reason for this defensive stance is obvious, but it does not meet the burden of establishing the reasonableness of the claimed fees based on this record of self-dealing by the trustee. More generally, Welsh argues that his fees should only be diminished "to reflect any fees specifically associated with

[109] Amended Account, at 4-1, 8-1 through 8-2.
[110] 4/13/2007 Welch Brief at 7-8.

actions deemed by this court as constituting conduct in breach of a fiduciary duty."[111] This attempt to limit the damage does not work, however, since all of the investments of Trust assets into Ansar debentures constituted improper self dealing. Welch thus is entitled to no compensation.

The Former Trustee Shall Be Surcharged for the $17,000 in Trust Assets Expended to Pay for Accountant Services Where He Neglected to Pay any Taxes Based on the Accountant's Estimates

The former trustee hired St Clair, C.P.A. to determine Rose Kogen's tax liability. For those services, the accountants were paid $17,000. The accountants provided estimates for federal, New Jersey and New York taxes. Nonetheless, the former trustee failed to pay any of these taxes for inexplicable reasons. While Welch did prepare a check in the amount of $55,151 for the IRS, it was returned for insufficient funds, and the former trustee admitted to making no effort to repay that tax. When specifically asked if he had solved the tax problems of Rose Kogen, he admitted that he did not.[112]

Despite this sorry record, the former trustee maintains that he should not be surcharged for this $17,000 in accounting fees because the trust document authorized him to retain any accountants, there was confusion as to the state residency of Rose Kogen, and the fees paid the accountants were "for their work in preparing the federal and state tax returns."[113] It is this last point that is crucial: the accountants were hired to help prepare Rose Kogen's state and federal tax forms. In fact, they did so as evidenced at the hearing by a proposed federal tax form for 1999, a proposed New Jersey tax return and Welch's own testimony about the accountant's tax estimates.[114] The former trustee

[111] 4/13/2007 Welch Brief at 10.
[112] 9/18/2006 N.T. at 181 (Welch).
[113] 4/13/2007 Welch Brief at 6.
[114] Exs. O-11 & O-19; 9/18/2006 N.T. at 148-57 (Welch).

never followed through with these estimates to solve Ms. Kogen's tax problems. The trust, therefore should not be charged with this expense.

Based on the record presented at the hearing and supporting documentation, the Amended Account presented by the Former Trustee, Robert Welch, cannot be confirmed as stated. Instead, it will be returned unaudited. The relief sought by the Commonwealth and Jonathan Kogen shall be GRANTED with slight modification. In support of their briefs, the objectors attached a chart outlining the damages sought in the amount of $887,749.63 in surcharge against the Former Trustee broken down[115] as follows:

Interest Deficiency for Ansar Debentures	$ 79,590.49
Return of Attorney fees	$109,350.00
Lost interest on Attorney Fees	$ 8,948.96
Return of ADA "Donations"	$582,828.00
Lost Interest on ADA "Donations"	$ 82,002.88
Reimbursement for Accountant's Fees	$ 17,000.00
Interest on Fees Paid to Accountants	$ 5,570.30.
Deficiency in Amount Tendered to Substitute Trustee	$ 2,439.00

Although the Amended Account indicates that Welch misappropriated a total of $928,318 of Kogen Trust assets to enrich Ansar, the objectants request this lesser sum of $887,749.63, ostensibly taking into account sums claimed to have been properly spent for the benefit of Rose Kogen, Jonathan Kogen and Alice Leibowitz. This generosity—and

[115] See Exhibit attached to 3/28/2007 Commonwealth Brief and 3/26/2007 Jonathan Kogen Brief.

trust in the computations of the former trustee— are unwarranted based on the record the objectants so skillfully presented.

Therefore, to send the clear message that self-dealing by a trustee cannot be countenanced, this court shall order Mr. Welch to repay to the Rose Kogen Trust the total amount of money he wrongfully diverted[116] from the Kogen Trust to invest in Ansar which, according to the Account, is $928,318.00 with 6% simple interest.

The former trustee is hereby ORDERED to pay the sum of $928,318 with 6% simple interest to the substitute trustee, First National Bank of Chester County. Upon receipt of that sum, First National Bank of Chester County shall examine the assets, the amended account as well as the trust document to make sure that all assets have been marshaled. In their original objections, the parties sought appointment of an Auditor to investigate the Trustee's records, and if this relief is still necessary, it will be granted upon petition. Upon receipt of the sums due from the former trustee, the substituted trustee shall prepare a new account as well as a Petition for Adjudication and Proposed Statement of Distribution that deals with any taxes that may be due or owing and sets forth the proper distribution to the beneficiaries of the Rose Kogen Trust: Jonathan Kogen, Alice Leibowitz, and a public charity. The substitute trustee shall also determine what expenditures were properly made by the former trustee for the benefit of Rose Kogen, Alice Leibowitz and Jonathan Kogen and upon that determination, that sum shall be returned to the former trustee.

Exceptions to this Adjudication may be filed within twenty (20) days from the date of issuance of the Adjudication. An Appeal from this Adjudication may be taken, to the appropriate Appellate Court, within thirty (30) days from the date of issuance of the

[116] This Opinion shall be filed with the Disciplinary Board of the Supreme Court of Pennsylvania.

Adjudication. See Phila.O.C. Rule 7.1.A and Pa.O.C. Rule 7.1 as amended, and Pa.R.A.P. 902 and 903.

BY THE COURT:

Date: _____

John W. Herron, J.