

**COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION**

**E-Filing No. 0804495
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7 September 2008

No. 1009 IV of 2008

**In Re: Trust
Estate of HERMAN J. FIRSTIN, Settlor**

**Sur account entitled First and Final Account for The Trust
Established Under Agreement Of Herman J. Firstin,
Dated October 15, 1956, stated by PNC Bank, National
Association, Surviving Trustee, and Shirlee Schachtel,
Executrix of the Estate of Walter Schachtel**

Before O'KEEFE, ADM. J.

**This account was called for audit September 8, 2008 &
November 5, 2009**

Counsel appeared as follows:

**PAUL L. FELDMAN, ESQ., of FELDMAN AND FELDMAN, LLP
- for PNC Bank, National Association, Accountant**

**KAREN CONN MAVROS, ESQ., of SCHACHTEL, GERSTLEY,
LEVINE & KOPLIN, P.C. - for Schachtel, Gerstley,
Levine & Koplin, P.C., Claimant**

**This trust arises under an irrevocable Deed of Trust dated October 15,
1956 whereby Herman J. Firstin, as the Settlor, assigned certain policies of life
insurance to his Trustees, Provident Trust Company of Philadelphia (now PNC Bank,**

National Association) and Walter Schachtel, to hold the proceeds of said insurance policies, and, such other property as might be added to the trust, in separate trusts for the benefit of the Settlor's wife, Evelyn Firstin, and his children, William Firstin and Mildred Drutt.

William Firstin is to receive the net income of the trust for his benefit, for his life, and, on his death, the principal is to be distributed, in equal shares, per capita, to such of the Settlor's grandchildren (including children adopted by William Firstin and Mildred Drutt) as shall be living on the date of William's death.

William Firstin is given the right to withdraw principal from the trust for his benefit. In each year ending on the anniversary of the Settlor's death, William may withdraw an amount or amounts which shall not aggregate more than six percent of the principal, based on the value of the principal of William's trust when the first of such withdrawals is made. Withdrawals of principal by William shall not aggregate more than sixty percent of the principal of his trust, valued as aforesaid.

The Trustees are given discretion to make distributions to William Firstin, from principal, during illness or emergency of any kind.

The Trustees are given the right to retain property for such length of time as they may deem proper. They are given the right to invest in any property which they deem suitable, including any common trust fund operated by any corporate Trustee, and, to keep cash uninvested. After the death of the Settlor, the Trustees are required to keep an amount equal to at least twenty-five percent of the book value of the trust invested in United States Government bonds, or, bonds bearing a AAA or AA Moody rating.

The compensation of the corporate Trustee shall be based on its schedule of rates in effect from time to time during its period of service. The compensation of the individual Trustee shall be in an amount equal to one-fourth of that received by the corporate Trustee.

Herman J., the Settlor, died on December 31, 1968, survived by his Wife, Evelyn Firstin, and, by his children, William Firstin and Mildred Drutt.

Evelyn Firstin, Wife of the Settlor, died on April 29, 1983.

Walter Schachtel, the individual Trustee, died on June 23, 2004.

William Firstin, Son of the Settlor, died on September 28, 2007, leaving his Daughter, Jennifer Firstin, as his only living issue. Jennifer Firstin does not have issue at this time.

Mildred Drutt, Daughter of the Settlor, is alive, and, has two children, named Michael Drutt and Carole Bryon.

The trust for the benefit of William Firstin, under the Deed of Trust of Herman J. Firstin dated October 15, 1956, terminates by its terms, and, the principal and accrued income are now payable, in equal shares, to the Settlor's grandchildren, named Jennifer Firstin, Michael Drutt and Carole Bryon.

The Register of Wills of Bucks County has granted Letters Testamentary to Jennifer Firstin who is the duly appointed and qualified Executor of the Will of William Firstin.

PNC Bank, National Association (formerly Provident Trust Company of Philadelphia), surviving Trustee, and Shirlee Schachtel, Executor of the Will of Walter, Schachtel, deceased Trustee, have filed an Account of the administration of the trust

for the benefit of William Firstin under the Deed of Trust of Herman J. Firstin dated October 15, 1956. Jennifer Firstin, as an individual and as Executor of the Will of her deceased Father, William Firstin, has filed several Objections to said Account.

On November 5, 2009, I held a Hearing to receive evidence on all issues which are raised in the aforementioned Objections. At the said Hearing, Jennifer Firstin offered her own testimony, and, eleven Exhibits which were marked “F-1” through “F-11”. At the said Hearing, PNC offered the testimony of one of its employees named Richard Yurasko, and, seven Exhibits which were marked “P-1” through “P-7”. At the said Hearing, the law firm of Schachtel, Gerstley, Levine & Koplín offered the testimony of one of its partners named Bernice J. Koplín, Esquire, and, four Exhibits which were marked “K-1” through “K-4”.

In her post-hearing brief, Jennifer Firstin alleges and argues that PNC breached its fiduciary duty of loyalty by engaging in self-dealing. At Page 4 of her Brief, Jennifer makes the following statements, to wit,

“In February 1995, PNC purchased 100% of Blackrock, a family of mutual funds, for \$ 240 million. Over the next two years, PNC reorganized Blackrock into a corporation, and then merged its entire asset management unit, including all Common Trusts Funds (CTF’s) into Blackrock. (Appendix, p.1).

In early 1988 PNC invested 100% of existing trust assets into shares of Blackrock (Exhibit F-2, p.24; p.28) — turning itself into the single largest creditor of the trust. The unit price for Blackrock shares purchased with trust assets was determined by the trustee, Blackrock’s proprietor.”

At Page 7 of her Brief, Jennifer makes the following request for a surcharge by reason of the alleged breach of fiduciary duty of loyalty by engaging in self-dealing, to wit,

“I therefore respectfully request that the court compel PNC

to pay a surcharge to the trust in the symbolic amount of \$ 54,808.00, which equals the total number of trust dollars (without interest) PNC invested in Blackrock for its own advantages and to the detriment of the trust and its beneficiaries.”

In her post-hearing brief, Jennifer Firstin alleges and argues that PNC breached its fiduciary duty of loyalty by engaging in double-dipping. At Page 7 of her Brief, Jennifer makes the following statements, to wit,

“In addition to self-dealing with trust assets for the sake of its shareholder values, PNC also used Blackrock as a means of generating additional levels of income by charging additional fees for rendering investment advisory services to the proprietary mutual funds in which it had invested trust assets – thereby unnecessarily increasing administrative costs beyond the standard management fees already in place at the account level.”

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“The investment of all trust securities into Blackrock provided PNC with additional brokerage fees (churning), wrap-fees, front – and rear-end loads, promotional fees as well as an additional advisory fee as fund manager.”

At Page 10 of her Brief, Jennifer makes the following request for a surcharge by reason of the alleged breach of fiduciary duty by engaging in double-dipping, to wit,

“As a remedy for the damages to beneficiary income resulting from PNC’s double-dipping, as well as its breaches of its fiduciary duties of loyalty and care;- I respectfully request that the court compel PNC to pay a surcharge to the trust in the amount of \$ 19,142, representing the total of PNC’s standard fees (without interest) as well as those paid to Walter Schachtel (without interest).”

In her post-hearing brief, Jennifer Firstin alleges and argues that PNC breached its fiduciary duty to make the assets of the trust productive. At Page 10 of her Brief, Jennifer makes the following statement, to wit,

“The aforementioned breaches of PNC’s fiduciary duties to

the beneficiaries contributed to and resulted in the negative investment results of this trust – thereby depriving both my father and myself of the security and comfort which a productive and loyally-managed trust could have helped to provide us with over the last forty years,”

At Page 14 of her Brief, Jennifer makes the following request for a surcharge by reason of the alleged breach of fiduciary duty to make the assets of the trust productive, to wit,

“I therefore respectfully request that the court compel PNC to pay a 280% surcharge based upon the gap between the realistic 2.86% total investment return as illustrated above, and the 8% average total investment return which competitive standards normally achieve over 243 months as indicated in Exhibit PNC-6. (“Arithmetic Average Return, Composite indices”)”

“Based upon the principal balance of \$ 30,453 on hand at the time PNC submitted its accounting for the trust to the court (Exhibit F-2, p.23), I respectfully request a 280% total principle surcharge on principal balance payable to the trust in the amount of \$ 85,268.

Based upon the total income to the trust of \$ 54,486 accrued at the time PNC submitted its accounting for the trust to the court (Exhibit F-2, p.71), I respectfully request a symbolic 100% total income surcharge on total income to the trust payable to myself (as sole heir to the previous income beneficiary) in the amount of \$ 54,486.”

At Page 15 of her post-hearing brief, Jennifer Firstin objects to the payment of the following legal fees, to wit,

\$ 5,500.00 paid to Schachtel, Gerstley, Koplin on July 3, 2008, which payment appears as a disbursement of principal for “Professional Services Rendered For Filing Account” at Page 21 of the Account;

\$ 806.00 allegedly paid to Schachtel, Gerstley, Koplin on August 12, 2008, which payment appears at Page 21 of the Account as a disbursement of principal made on July 3, 2008 to the Clerk of Orphans’ Court for “Filing Fee”;

\$ 2,668.62 allegedly paid to Feldman & Feldman, LLP, on

November 2, 2009, which payment does not appear in the Account because the Account closes on July 10, 2008; and,

\$ 4,337.75 allegedly paid to Feldman & Feldman, LLP, on March 2, 2010, which payment does not appear in the Account because the Account closes on July 10, 2008.

At Page 15 of her Brief, Jennifer makes the following request for a surcharge by reason of the aforementioned payments of legal fees, to wit,

“As PNC has....removed these assets in order to pay for legal fees accrued in defending its own multiple breaches of fiduciary duties owed to the beneficiaries, I respectfully request that the court compel PNC to reimburse to the trust the total amount of \$ 13,331.37.”

The Account now before this Court is stated for the period May 1, 1969 to July 10, 2008. In its summary and index, the Account includes the following entries, to wit:

receipts of principal totaling \$ 42,908.67;

net gains on conversions totaling \$ 44,729.78;

principal disbursements totaling \$ 23,405.80 which includes \$ 8,864.42 in compensation to PNC, and, \$ 2,045.58 in compensation to Walter Schachtel;

principal distributions to William Firstin totaling \$ 33,779.33;

principal balance on hand, being invested cash, in the amount of \$ 30,453.32;

receipts of income totaling \$ 57,486.58;

income disbursements totaling \$ 9,564.43 which includes \$ 7,091.27 in compensation to PNC, and, \$ 685.66 in compensation to Walter Schachtel;

income distributions to William Firstin totaling \$ 47,107.86;

income balance on hand, being invested cash, in the amount of \$ 814.29.

In their Account, the Trustees state that they held principal assets having a total value of \$ 35,596.66 on May 1, 1969, which sum is comprised of the following assets, to wit,:

cash in the amount of \$ 905.46;

U.S. Treasury Bills valued at \$ 19,691.20; and,

a Chrysler Credit Demand Note valued at \$15,000.00.

In their Account, the Trustees state that they received one additional principal asset on July 14, 1983, following the death of the Settlor's Wife, Evelyn Firstin, being units of PNC's Municipal Bond Fund valued at \$ 7,312.01.

In their Account, the Trustees state that they received additional principal assets, in the form of refunds of fiduciary income tax on capital gains, in 1988, 1995 and 1998, in the total amount of \$ 86.10.

In their Account, the Trustees state that they made the following cash distributions of principal to William Firstin, to wit,:

\$ 2,123.93 on March 2, 1970;

\$ 2,123.93 on October 29, 1970;

\$ 2,123.93 on October 20, 1971;

\$ 2,123.93 on January 3, 1973;

\$ 2,123.93 on January 16, 1974;

\$ 2,123.93 on October 3, 1974;

2,123.93 on October 23, 1975;

\$ 2,123.93 on November 4, 1976;

\$ 2,123.97 on October 19, 1977;

\$ 2,123.89 on October 17, 1978;

\$ 50.79 on April 24, 1985;

\$ 36.88 on May 5, 1986;

\$ 2,452.36 on April 29, 2003; and,

\$ 10,000.00 on August 9, 2004.

In deciding whether or not to impose a surcharge upon PNC and Walter Schachtel for their administration of the trust for the benefit of William Firstin under the Deed of Trust of Herman J. Firstin dated October 15, 1956, I will apply the following principles recited by Judge John Kelly, Jr., in his Opinion for a panel of our Superior Court in the matter reported as Estate of Pew, 440 Pa.SuperiorCt. 195 (1994), to wit,

“ A surcharge is the penalty imposed for failure of a trustee to exercise common prudence, skill and caution in the performance of its fiduciary duty, resulting in a want of due care. The standard of care imposed upon a trustee is that which a man of ordinary prudence would practice in the care of his own estate. If a fiduciary has greater skill than that of a person of ordinary prudence, then the fiduciary’s standard of care must be judged according to the standard of one having this special skill. Further, a trustee who obtains the appointment as trustee by representing that he or she has greater skill than a person of ordinary prudence that trustee will be held to that higher standard.” Pew, supra, at 236-237 (citations omitted)

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“ A trustee cannot be surcharged for a breach of duty unless the breach caused a loss to the trust. One who seeks to surcharge the trustee for breach of trust must bear the burden of proving the particulars of the trustee’s wrongful conduct. The propriety of an investment by a trustee must be judged as it appeared at the time it was made and not as viewed in the light of subsequent events. The mere retention of stocks which the trustee received from the settlor is not, in itself, negligence. Especially when such stocks have produced a high rate of return for the trust over an extended number of years. Hindsight is

not the test of liability for surcharge. To make after-sight the sole judge of the trustee's prudence would be manifestly unfair." Pew, supra, at 240-241 (citations omitted)

Jennifer Firstin did not testify that she had any particular experience in making investments. Jennifer Firstin did testify that she used the figures in the Account to create her Exhibit "F-10". "F-10" is headed "PNC Investments, Income & Distributions 1969-2008". Jennifer had the following things to say about the Account which is now before this Court, to wit,

".... I object first of all to an account which had \$ 34,000 in 1969, which has in 2008 about \$ 30,000. That's just not optimal management, in my mind. If you go through PNC's accounting, you see again no investments made, and this time it was from 1972 until 1998. This is not what I call active management. You know, 26 years is not really trying to get the best out of this trust for the beneficiary, and between 1998 and 2005 of the entire \$ 42,000 which was invested, every bloody cent was invested in PNC products again." NT 36

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" So, I've written everything down, and I can repeat myself a hundred times, but it's indefensible." NT 39

PNC offered the testimony of its employee named Richard Yurasko. Mr. Yurasko holds a Bachelor's Degree in finance from John Carroll University; an MBA from Duquesne University; and, Licenses issued by NASD and the Commonwealth of Pennsylvania. He worked as an Associate Broker at a firm called The Money Group before being hired by PNC. He has worked as a Portfolio Manager and a Trust Adviser for PNC. He has been the Trust Advisor on the trusts for the benefit of William Firstin since 2004. He has reviewed the files kept by his predecessors, and, is familiar with the administration of the trusts by PNC.

Richard Yurasko described a process whereby employees of PNC conducted annual reviews of the assets in the trust for the benefit of William Firstin under the Deed of Trust of Herman J. Firstin dated October 15, 1956.

Richard Yurasko testified that he created Exhibit "P-6" which is a three page document headed "Herman J. Firstin History of Asset Growth Analysis". Based upon Exhibit "P-6", Mr.Yurasko gave the following testimony concerning the performance of this trust, to wit,

" Q. What was the return of this portfolio?

A. Eight point eight eight."

Q. So, basically, at least in this portfolio, it exceeded all of those average indices?

A. Yes.

Q. And that includes those funds that were invested just in the Black Rock or the PNC common funds; is that correct?

A. Yes. In the early years, the account was invested in PNC. NT 77-78

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Q. So is it correct to say that even though there were no transactions, because you had these three various funds that were constantly monitored, that the assets were being actively managed?

A. Yes." NT 79

When asked about the effect of early withdrawals from principal upon the value of the trust, Mr.Yurasko gave the following responses, to wit,

" Q. Can you explain to the Court what the effect would be on the value today if within the first several years almost two-thirds of the principal receipt were withdrawn?

A. I guess we would have to talk about compounding, compounding returns. In the early years, there is really no difference in the returns in the early years, because you're only earning a half percent more. But after ten, 20, 30 years, those compound returns start to re-compound in a bigger magnification, so you almost get, like, a velocity of money type of a system there.

I would say that taking money out in the early years kind of restricts your ability to hit that compound, because you're working from a lower base then. You can't look at things holistically and say we got \$ 300,000, and we took all of this money, but still why isn't it – that just doesn't make any sense.” NT 80-81

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A. I would say from a return standpoint, the returns are relative. So if you are returning “X” dollars, that's your comparison point. That's apples to apples. To compare dollar amounts is not apples to apples.

Q. So it's really of no moment that we started with \$ 34,000, and we ended up with \$ 30,000, if the returning was still good?

A. Yes, you could do that. If you are taking a printout of the account, you've got to return that much more to get back to where you were. It's almost like taking two steps forward and two steps back, depending on what the distribution is. And then you have to try to get back to where you were before.” NT 82

On the questions of self-dealing and double-dipping, Richard Yurasko gave the following testimony, to wit,

“ Q. Is there any prohibition that you know of under Pennsylvania law that prevents a corporate fiduciary from investing in their own common funds?

A. No.

Q. Is there any regulation under Pennsylvania law that you know of that prevents a corporate fiduciary from investing in affiliating funds?

A. No.” NT 82-83

On the record made by the parties in this matter, I hold that the Trustees should not be surcharged for failing to make the assets of the trust productive; for self-dealing; or, for double-dipping. In so holding, I have found the testimony of Richard Yurasko and his Exhibit “P-6” to be more convincing than the testimony of Jennifer Firstin and her Exhibit “F-10”. This is because Mr.Yurasko is more experienced than Jennifer in making investments; in assessing returns on investments; and, in assessing compensation of trustees.

I find that the distributions of principal to William Firstin, in the years 1970 through 1978, deprived the trust of the benefits of compounding returns. The distributions of principal to William Firstin, in the years 2003 and 2004, further reduced the returns enjoyed by the trust. Jennifer Firstin has failed to prove that the Trustees breached their fiduciary duty by producing the total return which was enjoyed by the trust.

The Deed of Trust provides that the compensation of the corporate Trustee shall be based on its schedule of rates in effect from time to time during its period of service, and, that the compensation of the individual Trustee shall be in an amount equal to one-fourth of that received by the corporate Trustee. Mr.Yurasko testified that PNC’s standard fee schedules are competitive among other banks. They are thus presumed to be reasonable in the absence of compelling evidence to the contrary. See Section 7768 (d) of the Probate, Estates and Fiduciaries Code.

As a corporate fiduciary, PNC did not engage in self-dealing when it invested the assets of the trust in its own common trust funds, or, in the Black Rock

family of mutual funds. See Section 7209; Section 7772 (c) (4); and, Section 7772 (c) (5) of the PEF Code.

As a corporate fiduciary, PNC did not engage in double-dipping when it paid reasonable compensation to itself and its affiliate, the Black Rock family of mutual funds. See Section 7772 (h) (2) of the PEF Code.

At Page 21 of their Account, the Trustees take credit for a disbursement from principal of \$ 5,500.00 to the law firm of Schachtel, Gerstley, Koplín, Levine & Koplín, on July 3, 2008, for “Professional Services Rendered For Filing Account”. On the appearance slip of counsel, said law firm claims an additional fee of \$ 522.50.

Having considered the testimony of Bernice J. Koplín, Esquire, and the Exhibits which she identified; the principles set forth in LaRocca Estate, 431 Pa.. 542 (1968) and Wormley Estate, 359 Pa. 295 (1948); and, the \$ 4,028.75 in fees which I have allowed to the law firm of Schachtel, Gerstley, Levine & Koplín in the companion matter of the trust for the benefit of William Firstin under the Will and Codicils of Evelyn Firstin, I find that said law firm should receive the sum of \$ 2,971.25 for its services in preparing and filing the Account of the Trustees, and, for its services in successfully defending the Trustees against surcharge, in the matter of the trust for the benefit of William Firstin, under the Deed of Trust of Herman J. Firstin dated October 15, 1956. Accordingly, I will deny the claim of said law firm for additional fees, and, I will surcharge the Trustees in the amount of \$ 2,528.75.

I have allowed the sum of \$ 2,668.63 and \$ 4,446.70 in fees to the law firm of Feldman and Feldman, LLP, for its services in successfully defending PNC against

surcharge in the companion matter of the trust for the benefit of William Firstin under the Will and Codicils of Evelyn Firstin.

Having observed the efforts of Paul L. Feldman, Esquire, in successfully defending the Trustees against surcharge in the matter of the trust for the benefit of William Firstin, under the Deed of Trust of Herman J. Firstin dated October 15, 1956, I find that the law firm of Feldman and Feldman, LLP, should receive the sum of \$ 2,984.67 for its services in that regard, and, I will allow same in this Adjudication.

All Objections having been addressed, the Account of the Trustees shows a balance of Principal, after distributions, of **\$ 30,453.32**
to which add surcharge of counsel fees paid to the law firm of Schachtel, Gerstley, Levine & Koplin in the amount of **2,528.75**
making a balance of principal available for distribution of **\$ 32,982.07**

which is awarded as follows, to wit: \$ 2,984.67 in counsel fees to the law firm of Feldman and Feldman, LLP; and, the balance then remaining, or residue, in equal, one-third shares, to the Settlor's grandchildren, Jennifer Firstin; Michael Drutt and Carole Bryon.

The account shows a balance of income, after distributions, of **\$ 814.29**
which is awarded in equal, one-third shares, to the Settlor's grandchildren, Jennifer Firstin; Michael Drutt and Carole Bryon.

The above award of counsel fees of \$ 2,984.67 to the law firm of Feldman and Feldman, LLP, is made subject to the payment of \$ 2,668.62 which was made to said law firm on November 2, 2009.

The above award of counsel fees of \$ 2,984.67 to the law firm of Feldman

and Feldman, LLP, is further made subject to the payment of \$ 316.05 which was made to said law firm on March 2, 2010.

All payments of counsel fees to the law firm of Feldman and Feldman, LLP, in excess of the award of \$ 2,984.67, are disapproved.

All of the above awards are made subject to all payments and transfers heretofore properly made on account of distribution.

Leave is hereby granted to the accountant to make all transfers and assignments necessary to effect distribution in accordance with this adjudication.

AND NOW, _____, the Account, as modified by the Rulings in this Adjudication, is confirmed absolutely.

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

ADM. J.