

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

**E-Filing No. 1109045872
Control No. 112682**

8 November 2011

No. 240 IV of 2009

**In Re: Trust
Estate of ALBERT J. WOOD, Settlor**

**Sur account entitled First And Final Account Stated By Lowell H.
Dubrow, Surviving Trustee, and Albert J. Wood, Deceased
Trustee (Died August 7, 2006) Presented On His Behalf
By Lowell H. Dubrow, As Executor Of His Estate**

Before O'KEEFE, ADM. J.

This account was called for audit

**November 7, 2011
and
December 5 & 6, 2012**

Counsel appeared as follows:

**LEONARD S. ABRAMS, ESQ., - for Lowell H. Dubrow,
Accountant**

**THOMAS A. BOULDEN, ESQ., of TIMONEY KNOX, LLP
- for David Wood, Beneficiary and Objectant**

**JOHN A. GUERNSEY, ESQ., of CONRAD O'BRIEN, PC
- for Eloise Wood, Beneficiary**

This trust arises under Irrevocable Indenture of Trust of Albert J. Wood dated March 1, 1989, whereby the Settlor created a Trust including the following terms and conditions, to wit,

“ III. **DISTRIBUTIONS OF INCOME AND PRINCIPAL DURING MY LIFETIME**

During my lifetime, Trustees shall distribute all of the net income to me in monthly or other convenient periodic installments. Trustees may also distribute portions of the principal to me, if my children, GERRY, DAVID and PETER, or the survivors of them, consent to such distribution, and provided such distribution shall be made only for my health, maintenance and support.

IV. **DISTRIBUTIONS OF INCOME AND PRINCIPAL FOLLOWING MY DEATH**

The balance of principal and undistributed income, if any, remaining at the time of my death, shall be distributed to and among my wife, ELE, my issue and such charities, in such amounts or proportions, on such terms and conditions, and subject to such trusts or limitations as I may appoint by my Will, making specific reference therein to this power of appointment.”

The Settlor named himself and Lowell H. Dubrow to serve as Trustees.

Albert J. Wood, the Settlor, died on August 7, 2006, leaving a Will dated August 4, 2006, which was duly probated. Albert J. Wood was married to Eloise Wood at the time of his death. He was survived by three children named Geraldine Rosenberg, David Wood and Peter Wood. He was also survived by seven grandchildren named Richard Wood, William Wood, Michael Rosenberg, James Rosenberg, William Rosenberg, Michael Wood, and, Elizabeth Bloom. He named

Lowell H. Dubrow to serve as Executor.

By Item SECOND of his Will, Albert J. Wood exercised his power of appointment under his Indenture of Trust dated March 1, 1989 by giving the sum of \$3,500,000.00 to his wife, Eloise Wood; by giving the sum of \$ 100,000.00 to his daughter, Geraldine Rosenberg; by giving the sum of \$ 10,000.00 to each of his seven grandchildren; by giving the sum of \$ 10,000.00 to each of his wife's two sons; by giving the sum of \$ 5,000.00 to each of five named individuals who survive him; and, by giving the entire balance of the assets in the Trust to his son, David Wood.

By Item THIRD of his Will, Albert J. Wood Will gave the residue of his estate to his son, David Wood.

Copies of the Irrevocable Indenture of Trust and Will are annexed to the Audit Papers in this matter.

By my Decree dated May 24, 2011, I Ordered Lowell H. Dubrow, individually; as Surviving Co-Trustee of the Trust under Indenture of Trust of Albert J. Wood, dated March 1, 1989; and, as Executor of the Estate of Albert J. Wood, Deceased Co-Trustee of the Trust under Indenture of Trust of Albert J. Wood, dated March 1, 1989, to file an Account of the administration of the aforementioned Trust. The required Account was filed on September 29, 2011 and appeared as Number 8 on my Audit List of November, 2011. The required Account is stated for the period from March 1, 1989 to August 7, 2006; shows a balance of principal, after distributions in the lifetime of the Settlor, of \$ 3,201,953.72; and, shows a deficit in income, after distributions in the lifetime of the Settlor, of (\$ 11,831.43).

David Wood, son of Albert J. Wood and residuary beneficiary under the Indenture of Trust dated March 1, 1989 and under the Will dated August 4, 2006, has filed Objections to the Account filed by Lowell H. Dubrow. In said Objections, David Wood seeks to hold Lowell H. Dubrow liable for alleged mismanagement and alleged improper distributions of principal from the Trust, including: \$ 457,556.63 plus statutory interest of \$ 341,165.74, for a total of \$ 798,732.37, for improper payments of income taxes from principal; \$ 244,277.00 plus statutory interest of \$ 102,596.38, for a total of \$ 346,873.38, for improper payments from principal to buy a condominium; and, \$ 3,459,230.60 for untraceable investments which were truly improper distributions from principal.

Facts and Procedural History

In 1985, Albert Wood sold the A.J. Wood Company for fifteen million dollars. (*N.T. Dec. 6, 2012, 34:4-7*). The proceeds were divided between Albert Wood and his two sons, Peter and David, the Objectant herein; Albert Wood received five million, Peter received six million and Objectant received four million. (*N.T. Dec. 6, 2012, 34:8-18*). Objectant claims that his father, Albert Wood, promised to make up the two million dollar difference between what Objectant received and what his brother received. (*N.T. Dec. 6, 2012, 113:19 – 114:12*). Albert Wood's daughter Geraldine received nothing from the sale of the business. (*N.T. Dec. 6, 2012, 34:19-23*).

On March 1, 1989, Albert Wood, Objectant's father, established an Indenture of Trust. *Wood Exhibit Binder, Ex. 2*. The Trust was prepared by Mr.

Dubrow who was Albert Wood's estate attorney and friend. The Trust named Albert Wood and Mr. Dubrow as Trustees. *Id. at Article XII, ¶ A.* On August 28, 1992, Mr. Dubrow sent a letter to Albert Wood stating that he was resigning as Trustee and requesting that Albert Wood sign the enclosed release and indemnification. *Id. at Ex. 7, p. 1-2.* On September 4, 1992, Albert Wood signed the release which stated:

At my request, Lowell H. Dubrow resigned as a Trustee on August 6, 1992 and in consideration therefor, I have agreed to release and indemnify him with respect to his services as a Trustee.

Id. at p. 4. The Trust provided that, upon Mr. Dubrow's death, resignation or inability to serve, certain members of his law firm would take his place. *Id. at Ex. 2, Article XII, ¶ C.* On August 26, 1992, these members, as well as the Executive Committee Chairman of Mr. Dubrow's law firm, signed a renunciation of their right to become Co-Trustees of Albert Wood's Trust that was included with Mr. Dubrow's resignation letter sent to Albert Wood on August 28, 1992. *Id. at Ex. 7, p. 5-6.* A new attorney, Joseph Yohlin, then took over as estate counsel for Albert Wood. (*N.T. Dec. 6, 2012, 8:4-9*).

Beginning in the early 1990s, Albert Wood began making monthly payments of \$2,000 to Objectant who, through a series of bad investments, had lost all the money he received from the sale of the A.J. Wood Company and who now needed help paying his living expenses. (*N.T. Dec. 6, 2012, 14:20 – 16:18*). In 1996, Mr. Dubrow left his law firm and, once again, became Albert Wood's estate

attorney.

In May, 2006, Objectant began negotiating with his father to get the money that would make up the difference in the amounts received from the sale of the A.J. Wood Company. (*N.T. Dec. 6, 2012, 49:23 – 51:3*). An agreement was made wherein Albert Wood would transfer one million dollars to a trust in Objectant's name. (*N.T. Dec. 6, 2012 50:20 – 51:3*). Papers were sent to Objectant to sign to create the trust but they were never signed. (*N.T. Dec. 6, 2012, 52:4-18*). Instead, after further negotiations between Objectant and his 95 year-old father, Albert Wood agreed to give Objectant \$1,250,000 outright instead of funding a trust with one million dollars. (*N.T. Dec. 6, 2012, 52:7 – 53:7*). The letter signed by Objectant stated:

This letter, sent in consideration of my father and Eil Wood's outright gift of \$1,250,000 to be transferred to my Wachovia account by 6/28/06, shall serve as my Agreement not to make any claim against my father, or his estate, or to in any fashion attempt to upset the provisions of his Will arising out of any agreement which I have previously maintained that my father and I made regarding sums promised to me.

Accountant's Trial Exhibits, Ex. 1.

Three months later, Albert Wood passed away and Mr. Dubrow was named Executor of his will. On February 3, 2009, Albert Wood's Will was admitted to probate and, on February 13, 2009, Objectant filed a Petition for Citation to require Mr. Dubrow to file an Account. On September 29, 2011, after several motions and Settlement Conferences, Mr. Dubrow was ordered to file an Account.

On December 30, 2011, Mr. Wood filed Objections to the Account and those Objections were the subject of a two-day trial before this Court on December 5, 2012, and December 6, 2012.

Resignation of Lowell Dubrow as Trustee

On August 6, 1992, Mr. Dubrow signed a document that stated:

I, Lowell H. Dubrow, do hereby resign as Trustee under Indenture of Trust of Albert J. Wood dated March 1, 1989, effective immediately.

Wood Exhibit Binder at Ex. 7, p. 2. This document was sent to Albert Wood, the Settlor of the Trust, on August 28, 1992, along with a renunciation signed by three members of Mr. Dubrow's law firm and a request that Albert Wood sign the enclosed Release and Indemnification. **Id. at p. 1, 5-6.** On September 4, 1992, Albert Wood signed the Release and Indemnification. **Id. at p. 4.** The resignation is objected to by David Wood for three reasons:

1. Mr. Dubrow did not provide notice of the resignation to all of the Trust beneficiaries;
2. The resignation documents were defective on their face because of a typographical error; and
3. Mr. Dubrow's continued involvement as Albert Wood's estate planning attorney.

Notice of Resignation

Objectant asserts that Mr. Dubrow's resignation was not effective because all of the beneficiaries of the Trust were not provided with notice of the

resignation. Mr. Dubrow counters that Albert Wood was the only valid Trust beneficiary who was not only provided with notice, but signed a release assenting to the resignation.

The Trust was signed on March 1, 1989. The Courts of this Commonwealth at that time relied on the Restatement (Second) of Trusts for questions regarding trusts. *In re White*, 484 A.2d 763, 766 (1984). Section 106 of the Restatement (Second) of Trusts provided the following:

A trustee who has accepted the trust cannot resign except

- (a) with the permission of a proper court; or
- (b) in accordance with the terms of the trust; or
- (c) with the consent of all the beneficiaries, if they have the capacity to consent.

Restatement (Second) of Trusts, §106 (1959). Sections (a) and (b) are inapplicable because court consent was never requested and because there is nothing in the trust that describes how a Trustee can successfully resign. The Trust does, however, contemplate a situation where Mr. Dubrow would no longer be a Trustee but it only provides that, if Mr. Dubrow were to die or resign, a member of Mr. Dubrow's law firm would be named as a Successor Trustee.

The only relevant discussion therefore becomes whether all of the beneficiaries, who had capacity to consent to the resignation of Mr. Dubrow, actually did so. Albert Wood's Trust contained the following language pertaining to beneficiaries:

"The balance of principal and undistributed income, if any,

remaining at the time of my death, shall be distributed to and among my wife, ELE, my issue, and such charities, in such amounts or proportions, on such terms and conditions, and subject to such trusts or limitations as I may appoint by my Will, making specific reference therein to this power of appointment.”

Section 127 of the Restatement (Second) of Trusts states:

The inference is that the settlor is the sole beneficiary where the income is to be paid to him for life and on his death the principal is to be paid as he may by deed or by will appoint, and in default of appointment to his heirs or next of kin.

Restatement supra. At §127 (b), ¶ 5. Additionally, Mr. Dubrow testified that, in every will that he prepared for Albert Wood, the power of appointment was exercised. (*N.T. Dec. 5, 2012, 122:13-15*).

By its terms, the language of Albert Wood’s Trust is exactly the situation envisioned by §127. Mr. Dubrow asserts, and this Court agrees, that, under the law as it existed at the time, Albert Woods was the sole beneficiary of his Trust and it was Albert Wood, and Albert Wood alone, who required notice of Mr. Dubrow’s resignation before it could become effective. Because Albert Wood unequivocally evinced his acceptance of Mr. Dubrow’s resignation, this Court holds that the resignation was effective as of September 4, 1992.

Defective Resignation Document

Objectant argues that the Release and Indemnification signed by Albert Wood was defective on its face and, thus, unenforceable. The Release and Indemnification included the following language:

“I, Albert J. Wood, established a Trust on March 1, 1989 (the “Trust”) in which I named Richard Hevner and Lowell H. Dubrow as trustee.”

Wood Exhibit Binder, Ex. 7, p. 4. Richard Hevner was listed in the original Trust as a Successor Trustee to Albert Wood after his death. Id. at Ex. 2, Article XII, ¶ B.1. Mr. Dubrow testified that this was a mistake and that the document should have read “...in which I name Lowell H. Dubrow and myself as trustees.” (N.T. Dec. 5, 2012, 68:9 – 69:19).

There are three documents related to the resignation of Mr. Dubrow as Trustee: the letter of resignation from Mr. Dubrow; the renunciation of the right to serve as successor trustee signed by the members or Mr. Dubrow’s law firm; and the Release and Indemnification signed by Albert Wood. In each of those documents it is explicit that the resignation of Mr. Dubrow is from the Trust of Albert Wood created on March 1, 1989. There was only one Trust involving Albert Wood and Mr. Dubrow that was created on March 1, 1989, and the inadvertent inclusion of Richard Hevner, a successor trustee actually named in the Trust, was not a fatal defect.

Further, the resignation information was provided to Richard Hevner in his capacity as an employee of the investment firm Prudential Securities, which later merged with Wells Fargo. (N.T. Dec. 6, 2012, 5:1-7:14). Prior to the resignation, both trustees, Albert Woods and Mr. Dubrow, appeared on the Trust account’s monthly statements. Accountant’s Trial Exhibits, Ex. 6. After the

September 4, 1992, resignation however, the monthly statements were renamed to reflect that only Albert Wood was a Trustee. *Id. at Ex. 7*. Mr. Dubrow also testified that, after he resigned, he no longer received the Trust account's monthly statements. (*N.T. Dec. 6, 2012, 40:22 – 41:15*). It appears that no one involved with the Trust of Albert Wood was confused about the effect of Mr. Dubrow's resignation documents.

Because all of the documents related to Mr. Dubrow's resignation, including the Release and Indemnification, make it unavoidably clear that it was the March 1, 1989 Trust of Albert Wood that was the subject of the resignation, this Court holds that the typographical error does not render the resignation defective.

Lowell Dubrow's Continued Involvement with the Albert Wood Trust

At the request of Albert Wood, Mr. Dubrow resigned on September 4, 1992. Mr. Dubrow testified that the resignation was requested because Albert Wood did not want to pay either Mr. Dubrow or his law firm for the work they were doing for the Trust. (*N.T. Dec. 5, 2012, 64:10 – 65:23*). In 1996, Mr. Dubrow left his law firm and restarted his legal estate planning employment with Albert Wood.

Objectant believes that, because Mr. Dubrow restarted his working relationship with Albert Wood after leaving his law firm, that his involvement subjected him to all of the potential liabilities of an actual Trustee. After beginning work for Albert Wood in 1996, Mr. Dubrow prepared multiple wills as well as handled real estate and tax issues for Albert Woods. (*N.T. Dec. 5, 2012,*

125:3 – 129:8). Pursuant to Section 7761 of the Pennsylvania Uniform Trust Act, only a person designated as a trustee can accept a trusteeship. 20 Pa.C.S. §7761(a). No evidence was ever produced that Mr. Dubrow was once again designated or appointed a Trustee of the Albert Wood Trust. Nor was there any proof offered that Albert Wood ever requested that Mr. Dubrow, once again, become a Trustee. This Court is not willing to subject an attorney to liability for simply performing and being paid for estate planning legal work.

Good Faith

In 2010, the Pennsylvania Superior Court addressed the issue of surcharging a trustee after trust beneficiaries objected to an accounting. *In re Estate of Clarence A. Warden*, 2 A.3d 565 (2010). The Court held that, before ordering a surcharge, the court must find: (1) that the trustee breached a fiduciary duty and (2) that the trustee’s breach caused a loss to the trust. *Id. at 573*, (citing *Estate of Pew*, 655 A.2d at 542 and *In re Miller’s Estate*, 26 A.2d at 321). The Court further stated that, “where there is no breach of fiduciary duty, there is no basis for a surcharge” and “[e]ven if there is a breach of duty, however, where there is no loss, there is no basis for a surcharge. *Id.* (citing *In re Mendenhall*, 398 A.2d 951, 954 (1979) (citing *Restatement (Second) of Trusts §§ 174, 176, 227, 228, 230 and 231 (1959)* and further stating “A trustee cannot be surcharged for a breach of ... duty unless the breach caused a loss.”).

Mr. Dubrow resigned as a Co-Trustee of the Albert Wood Trust and, therefore, cannot be said to have had a Trustee’s fiduciary duty between

September 4, 1992 and August 7, 2006, the date of Albert Wood's death.

Assuming, arguendo, that Mr. Dubrow violated some fiduciary duty to the Trust during that period, according to the Account prepared by Mr. Dubrow, there was no loss. Mr. Hevner testified that the investments made by Albert Wood using money from his Trust actually performed better than the Standard & Poor's total rate of return. (*N.T. Dec. 6, 2012, 21:9 – 22:23*). Because Mr. Dubrow resigned as a Co-Trustee, and, because there was no loss, Objectant's argument must fail.

Mr. Dubrow is an estate planning attorney and has greater skill and knowledge than the average man and, accordingly, that places him "under a duty to exercise a skill greater than that of an ordinary man and the manner in which investments were handled must accordingly be evaluated in light of such superior skill." *In re Warden, supra at 574 (quoting In re Scheidmantel 868 A.2d at 482 (quoting In re Estate of Killey, 326 A.2d 372, 375 (1974))*. The above standard applies only "where the trust instrument does not explicitly state a standard of care." *Id.* The Albert Wood Trust explicitly applies a good faith standard. Wood Exhibit Binder, Ex. 2, Article XII, ¶ G. Good faith "exists when something is "done honestly, whether it be done negligently or not." *In re Estate of Warden, supra at 573 (quoting Robinson Protective Alarm Co. v Bolger & Picker, 516 A.2d 299, 304 (1986))*. The Court further held that "[m]ere negligence will not negate good faith." *Id.* at 574 (quoting *Robinson Protective Alarm Co. v Bolger & Picker, 516 A.2d 299, 304 (1986)* and that "[i]n the context of an express good faith clause, bad faith 'is not simply bad judgment or negligence, but rather it implies the

conscious doing of a wrong because of dishonest purpose or moral obliquity.”

Id. (quoting *U.S. Fid. & Guar. Co. v. Feibus*, 15 *F.Supp.2d* 579, 585 (M.D.Pa.1998)).

Again, Mr. Dubrow resigned on September 4, 1992, and is not liable for any of the transactions made by Albert Wood thereafter with monies from the Albert Wood Trust. However, again assuming, arguendo, that Mr. Dubrow was negligent in his duty to the Trust, in order to be held liable for that negligence, Objectant had the obligation of proving bad faith. However, there is no mention that Mr. Dubrow ever consciously acted with a dishonest purpose in any of the pleadings, briefs or testimony. Again, Objectant’s argument in this regard must fail.

In Terrorem Clause

Mr. Dubrow asserts that Objectant’s behavior in filing for an Accounting has triggered an *in terrorem* clause included in Albert Wood’s last few wills which states:

“Notwithstanding any other provision of my Will or my Indenture, any beneficiary who takes any action intended to augment such beneficiary’s share of my estate (including my Indenture) shall thereby forfeit any provision made for such beneficiary under my Will or my Indenture.”

Accountant’s Trial Exhibits, Ex. 8, ¶ NINTH, p. 7. The Probate, Estate and Fiduciaries Code holds that *in terrorem* clauses, like the one above, are unenforceable when probable cause exists for instituting proceedings. 20 Pa.C.S. §2521. Albert Wood died on August 7, 2006. His will was not probated

until February 5, 2009. This Court finds that a two and one-half year delay in admitting the will to probate provided Objectant with probable cause to initiate proceedings. Further, at trial, Objectant claimed that he was seeking nothing other than having the Will and Trust of Albert Wood followed. (N.T. Dec. 5, 2012, 180:8 – 181:21). Objectant did not challenge any portion of either document, rather, he was seeking explanations for monies that went in and out of the Trust.

Conclusion

This Court finds that Lowell Dubrow effectively resigned as Co-Trustee of the Albert Wood Trust on September 4, 1992 and is not liable for the actions of Albert Wood after the resignation. At trial, Objectant withdrew Objections 11, 12, 14, 15, 21 and 23. (N.T. Dec. 5, 2012, 5:11-25). All of Objectant's remaining objections are dismissed. This Court also holds that the *in terrorem* clause included in Albert Wood's will is unenforceable because probable cause existed for Objectant to initiate proceedings based on Mr. Dubrow's 30-month delay in admitting the will to probate.

All Objections having been dismissed in keeping with the foregoing discussion, the account, as filed, shows a balance of principal of \$ 3,201,953.72 which, composed as indicated in the account, is awarded as requested, to wit: \$ 7,712.60 to the accountant in reimbursement of filing fees; \$ 100,000.00 to Geraldine Rosenberg; \$ 10,000.00 to each of Richard Wood, William Wood, Michael Rosenberg, James Rosenberg, William Rosenberg, Michael Wood and Elizabeth

Bloom; and, the balance then remaining, or residue, to Ele Wood.

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 filed, 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.