

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

**O.C. No. 1039 ST of 1952
Control No. 181402**

Augustus Trask Ashton, Testamentary Trust



In re: AUGUSTUS TRASK ASHTON, Testamentary Trust

OPINION SUR APPEAL

Trustee PNC Bank, N.A. (hereinafter referred to as “Appellant” or “PNC”), appeals the Orphans’ Court’s Order dated July 9, 2018, sustaining in part and overruling in part the Preliminary Objections of PNC as to whether Beneficiary Elizabeth Ashton Reed and Contingent Beneficiary Meemie Sullivan have standing to raise Objections to Appellant’s Account filed on January 3, 2018.

Facts and Procedural History

Augustus Trask Ashton (“Settlor”) died on October 9, 1951. In his Will dated January 20, 1950, Settlor created the Augustus Trask Ashton Trust (the “Trust”), which was initially funded with \$2,638,798.23.¹ The Will named Land Title Bank and Trust Company (“Land Title”), Appellant’s corporate predecessor, as trustee.² A Codicil dated May 8, 1951 changed the Article naming solely Land Title as trustee

¹ Petition for Adjudication/Statement of Proposed Distribution filed 1/3/2018 (“Petition”), pp. 3, 18 (“Rider to Item 14”).

² Will, Article ELEVENTH, attached as Exhibit 4 to Preliminary Objections of PNC Bank, N.A.

to naming both Land Title and Clement W. Bowen as co-trustees.³ Mr. Bowen passed away in 1971, and a successor co-trustee was never named.⁴

The Will mandates that the Trust pay a number of lifetime annuities to named parties, including Elizabeth Ashton Reed (hereinafter “Reed”) and Margaret Maddock Sullivan, mother of objectant and contingent beneficiary Meemie Sullivan. The annuities terminate “upon the death of the [named annuitant’s] last surviving grandchild” born in her lifetime, within the limits of the rule against perpetuities.⁵ The Will also provides that the balance of net income of the Trust be “perpetually available for scholarships to Students of the University of Pennsylvania”.⁶ Scholarship students are to be chosen by the University of Pennsylvania, in accordance with criteria specified in the Will.⁷

Appellant filed the Fourth and Interim Account for the Trust Established Under the Will of Augustus T. Ashton Deceased Stated by PNC Bank, National Association (Formerly Provident National Bank) Trustee (the “Account”) on January 3, 2018. The Account spanned November 18, 1983 to December 14, 2017.⁸ The accompanying Petition for Adjudication raised two questions. The first involves

³ Codicil, attached as Exhibit 5 to Preliminary Objections of PNC Bank, N.A.

⁴ Objections to the Fourth and Interim Account of PNC Bank, N.A., Trustee, filed by Reed on April 2, 2018. ¶67.

⁵ Will, Article SIXTH(a)(6).

⁶ Will, Article SIXTH(c).

⁷ *Id.*

⁸ Account, p.1; Petition, p.3.

the division of the Augustus Trust into two trusts, “Trust A”, which would be used to make the annuity payments, and “Trust B” which would be solely charitable and used to fund the University of Pennsylvania scholarships.⁹ The second question raised by Appellant is approval of a new fee agreement entered into with the University of Pennsylvania which provides for a significant lump commission and increase in fees to PNC. On March 23, 2018, Lawrence Barth, Esquire, Senior Deputy Attorney General for the Commonwealth of Pennsylvania, issued a “no objection” letter to the Account and proposed fee agreement.¹⁰

The Account was called for Audit on April 2, 2018. Reed filed Objections to the Fourth and Interim Account of PNC Bank, N.A., Trustee, on April 2, 2018. Meemie Sullivan (hereinafter “Sullivan”), contingent beneficiary under the Trust, filed Meemie Sullivan’s Objections to Petition for Adjudication/Statement of Proposed Distribution Pursuant to Pa. O.C. Rule 2.7 and to the Fourth and Interim Account of PNC Bank, N.A. Trustee on April 2, 2018.

Appellant filed Preliminary Objections of PNC Bank, N.A. on April 23, 2018 to Reed’s and Sullivan’s Objections. Reed then filed her Response of Elizabeth Ashton Reed in Opposition to Preliminary Objections of PNC Bank, N.A., Trustee to Objections on May 14, 2018. Appellant filed its Reply Memorandum in Support of Preliminary Objections on June 1, 2018.

⁹ Petition for Adjudication/Statement of Proposed Distribution, Rider to Item 14, Question #1.

¹⁰No Objection Letter, attached to Preliminary Objections of PNC Bank, N.A. as Exhibit 13.

An off-the-record conference was held on June 6, 2018, at which counsel for all parties (PNC, Reed, Sullivan, the Attorney General’s Office as *parens patriae*, and the Trustees of the University of Pennsylvania) were present.¹¹

The Orphans’ Court issued a Decree sustaining in part and overruling in part Appellant’s Preliminary Objections on July 9, 2018. The Orphans’ Court’s Decree sustained all of the Preliminary Objections with respect to the standing of Sullivan to raise objections to the Account. Further, the Orphans’ Court’s Decree sustained the Preliminary Objections with respect to the issues of reporting failures by Trustee PNC, the administration of “Ashton Scholarships” at the University of Pennsylvania, and the ownership of the Philadelphia Stock Exchange membership contained in the Trust raised by Reed. Said Decree *overruled* the Preliminary Objections to the following issues raised by Reed: the appointment of a successor co-trustee for the

¹¹ On June 29, 2018, Reed filed a Petition to Modify the Trust Under Will of Augustus T. Ashton, Deceased Under 20 Pa. C.S.A. § 7740.2. Responses were filed by both Appellant and the Trustees of the University of Pennsylvania. The Trustees of the University of Pennsylvania filed Preliminary Objections to the Petition, which were joined by the Attorney General for the Commonwealth of Pennsylvania as *parens patriae*. This Petition is currently pending before this Court.

Additionally, on September 18, 2018, Reed filed the Petition of Elizabeth Ashton Reed for the Appointment of a Trustee *Ad Litem*. Responses and Preliminary Objections were filed by both Appellant and the Trustees of the University of Pennsylvania. The Preliminary Objections of the Trustees of the University of Pennsylvania were joined by the Attorney General for the Commonwealth of Pennsylvania as *parens patriae*. The Commonwealth later filed its own Preliminary Objections. The Preliminary Objections to the Petition to Appoint a Trustee *Ad Litem* is currently pending before this Court.

Trust, the fees charged by PNC for administration of the Trust, financial management of the Trust by PNC, and the proposed division of the Trust.¹²

On August 8, 2018, Appellant filed an Application to Amend Interlocutory Order Dated July 9, 2018 to Permit Immediate Appeal. The Orphans' Court, by Decree dated August 14, 2018, denied said Application to Amend.

Appellant timely filed a Petition for Review with the Superior Court of Pennsylvania, Eastern District, seeking a permissive Interlocutory Appeal of the Orphans' Court's July 9, 2018 Decree, pursuant to 42 Pa. C.S. § 702(b) and Pa. R.A.P. 1311 and 1312.

Said Petition for Review was granted by the Honorable Superior Court on December 20, 2018, ordering that the matter "shall proceed before this Court as an appeal from the order entered July 9, 2019. . ."

¹² July 9, 2018 Decree.

Issue

Whether the Orphans' Court properly determined that Objectant Reed, as a vested beneficiary of the Trust, has standing to raise Objections to Trustee PNC's Account on the issues of the appointment of a successor co-trustee, the fees charged by PNC for its administration of the Trust, the financial management by PNC of the Trust, and the proposed division of the Trust?

This issue has been divided into four separate sections for discussion below.

Discussion

- 1. The Orphans' Court properly determined that Reed has standing as a vested income beneficiary, and thus it is unnecessary for Reed to establish special interest standing.**

Appellant, in its Petition for Review, stated the question of law for which it sought review of the overruled Preliminary Objections as follows: "Does an annuitant under a trust have standing to challenge aspects of trust administration that are unrelated to her annuity when there is no threat that her annuity will not be paid?" Appellant's framing of the issue involved is based on the assumption that trust administration is not related to Reed's annuity due to its amount and that because Reed's annuity has always been paid, there is no threat to its payment in the future.

Appellant's reliance on *In re Milton Hershey School*, 911 A.2d 1258 (Pa. 2006) for the proposition that "an annuitant lacks standing to object to aspects of trust administration that are unrelated to her annuity, including, but not limited to,

aspects of administration relating to a charitable beneficiary” is misplaced.¹³ Not only does this case not stand for such a proposition, but it is easily distinguishable from the case at hand. *In re Milton Hershey School* involved the question of whether a school’s alumni association had “special interest standing” to maintain an action against a solely charitable trust for which the association was not a beneficiary and was not involved in the trust’s administration. The alumni association “was not named in the deed of trust and is not an intended beneficiary of the Trust.” *Id.* at 1260.

Reed is a specifically named, current, vested income beneficiary of the Trust, and thus her position with respect to the Trust is clearly distinguishable from that of the alumni association in *In re Milton Hershey School*. 20 Pa.C.S. § 7703 defines a current beneficiary of a trust as “[a] person 18 years of age or older to or for whom income or principal of a trust must be distributed currently . . .” 20 Pa.C.S. § 8102 defines an income interest as “[t]he right of an income beneficiary to receive all or part of net income” and an income beneficiary as “[a] person to whom or which net income of a trust is or may be payable.” As Reed has the current right to receive her annuity, her interest is vested, not contingent. Thus, Reed is a current vested income beneficiary under Pennsylvania law. The standing claimed by the alumni association in *In re Milton Hershey School* was based on its “special interest” because it was not

¹³ PNC’s Petition for Review, ¶21.

a beneficiary of the trust.¹⁴ In contrast, Reed is a named, vested income beneficiary of the Trust, and thus need not rely on a special interest to establish standing.

Reed asserts that she has special interest standing in the Trust due to her familial relationship with Settlor. The Orphans' Court found Reed to have standing based on her position as a vested income beneficiary, and thus Reed's reliance on special interest standing is wholly unnecessary, and any counterarguments by PNC in relation to such special interest are irrelevant. The Orphans' Court found that Reed, like those who assert special interest standing, is clearly in a different position than the general public. However, her difference in position need not be based on any role in trust administration, but on her role as a vested income beneficiary of the Trust. There is no case law supporting special interest standing of someone in her position because vested trust beneficiaries inescapably have standing with respect to administration of a trust. Their interest is ordinary and automatic, not "special".

PNC additionally cites *Schaffer Estate*, 29 Fiduc. Rep. 2d 121 (Mont. O.C. 2009) and *Yorlets Estate*, 10 Fiduc. Rep. 2d 1 (York O.C. 1989) to liken the instant matter to the administration of an estate, in which the beneficiary of a particular bequest does not have standing to challenge said administration when there is no

¹⁴ Special interest standing involves creating standing where there normally is none. It has been applied to charitable trusts, where the party claiming standing has no direct interest in the trust, but is in some meaningful way in a different position than the general public with respect to the trust. Such interest has often been found where there is involvement in the administration of the trust. *In re Francis Edward McGillick Foundation*, 642 A.2d 467, 469-470 (Pa. 1994).

basis to conclude that the bequest will not be paid in full. The Orphans' Court found the facts of the instant matter to be distinguishable, and PNC openly admits that "no Pennsylvania appellate court has addressed the specific issue of whether an annuitant to a trust with a charitable beneficiary has standing to object to aspects of trust administration"¹⁵. Reed does not have an interest in one particular payment, but in ongoing payments for life. Whether an estate is solvent or can pay a specific bequest is a question that can be answered immediately. In contrast, the viability of payments that could go on for many years is not yet ascertainable. Reed has an interest in the administration of the Trust because she, as a trust beneficiary, has an interest in the Trust as a whole and has a real financial interest in her annuity being paid in the future. Unlike in cases of a single specific bequest, that Reed's annuity can be paid today does not guarantee those future payments. The Trust, unlike an estate, is ongoing. The matters Reed objects to regarding compensation of and financial management by PNC are issues that directly impact the fiscal health of the Trust and therefore her interest in it.

¹⁵ PNC's Petition for Review, ¶21.

2. The Orphans' Court properly determined that Reed has standing, as a named beneficiary of the Trust, to seek the appointment of a successor co-trustee for said Trust.

The Trust document appoints Land Title Bank and Trust Company of Philadelphia, Pennsylvania (corporate predecessor of PNC) as trustee. The duly executed May 8, 1951 Codicil makes only one change to the Will. It amends the clause appointing solely Land Title Bank and Trust Company to appoint Land Title Bank and Trust Company and Clement W. Bowen as *co-trustees*. It is evident from the Codicil that naming a co-trustee was important to Settlor, as it was the only purpose of executing the Codicil. Thus, it is arguable that Settlor evidenced clear intent that there be two trustees at all times.

Appellant's argument that Reed has no standing to demand appointment of a co-trustee because the Trust has paid the annuities since its inception and the size of the Trust has grown substantially in that time, evidences a clear lack of knowledge of the fiduciary duties of trustees to trust beneficiaries.¹⁶ Appellant argues "no harm, no foul", in essence claiming that because the Trust has grown substantially, it has free reign to engage in self-dealing, excessive fees, and other abhorrent practices unchecked.

The Supreme Court of Pennsylvania has consistently held that for a party to have standing, they must meet a three-prong test: substantial, immediate, and direct

¹⁶ Preliminary Objections of PNC Bank, N.A., ¶80, 82.

interest in the outcome of the litigation. While an interest may be pecuniary, it is not a necessity. *In re McCune*, 705 A.2d 861, 865 (Pa. Super. 1997). Generally, only beneficiaries of a trust or their representatives can sue a trustee to enforce the trust or enjoin or obtain redress for a breach of trust. *In re Francis Edward McGillick Foundation*, 642 A.2d 467, 469 (Pa. 1994).

A party has a substantial interest in the outcome of litigation if his interest surpasses that of all citizens in procuring obedience to the law. The interest is direct if there is a causal connection between the asserted violation and the harm complained of; it is immediate if that causal connection is not remote or speculative.

Fumo v. City of Philadelphia, 972 A.2d 487, 496 (2009) (internal citations and quotations omitted).

The Orphans' Court found that Reed has standing to seek appointment of a co-trustee to protect against breaches of fiduciary duty by PNC. A trustee, as a fiduciary, owes each trust beneficiary a basic duty of loyalty, and each trust beneficiary has standing to sue for a breach of this duty. *See In re Noonan's Estate*, 63 A.2d 80 (Pa. 1949). As a trust beneficiary, Reed's interest in the outcome of this litigation is substantial because it differs from that of the general public. She is a beneficiary of the Trust, which is managed by Appellant, and thus (unlike all citizens) she has an interest in how the Trust is managed, who it is managed by, and their fees.

Reed's interest is direct because she alleges that PNC, acting as sole trustee, engaged in self-dealing and other breaches of its fiduciary duties to trust beneficiaries. She seeks appointment of a co-trustee to protect the Trust from further abuses. Reed's interest in appointment of a co-trustee is immediate because the breaches she asserts are against her as a beneficiary. Any breach of fiduciary duty by a trustee, especially self-dealing, causes harm to the interests of trust beneficiaries, and thus Reed's interest in appointment of a co-trustee is immediate due to the continued breaches that will likely occur if a co-trustee is not appointed. Consequently, the Orphans' Court found that Reed has standing to raise Objections to the Account on the issue of appointment of a successor co-trustee.

3. The Orphans' Court properly determined that Reed has standing, as a named beneficiary of the Trust, to challenge the new fee arrangement and retroactive fee increase proposed by PNC, and PNC's administration of the Trust.

The law does not draw a line based on the monetary amount of interest as to whether a party has standing. "[E]ven when the interest is 'pecuniary' there is no minimum threshold on its magnitude." *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 282 (1975). The party either has an interest or they do not. PNC cites no authority to support its assertion that a named, vested beneficiary of a trust lacks standing to raise objections to a trust account. PNC simply argues that because Reed's interest in the Trust is limited to a yearly annuity of \$2,400.00,

she lacks standing to challenge its fees, as the amount of said fees does not, at this juncture, directly threaten the payment of her annuity. Because her annuity is small relative to the whole of the Trust, Appellant labels her interest “*de minimus*”. Under this logic, no beneficiaries would have standing to object to any aspects of a trust which has many smaller distributions and no large distributions, because the interest of all of the trust beneficiaries would be “*de minimus*”. Fiduciaries like PNC would, in this case and in many others, be given absolute discretion to do as they please, including ignoring their obligations as fiduciaries, without fear of repercussion or challenge. The Orphans’ Court found that not allowing Reed standing due to the relative size of her annuity would be a dangerous precedent to set.

As stated above, the Orphans’ Court found that Reed has a substantial interest in the Trust which surpasses the common interest of all citizens. Her interest is direct because the additional fees and commissions proposed by Appellant could cause harm to her interest by depleting the Trust. The value of the Trust could be reduced to almost nothing, and the fees of Trustee PNC could, at some juncture, threaten the payment of Reed’s annuity. Just because her annuity is not currently threatened does not cause Reed to lose standing to object to increased payments to the trustee. Reed’s primary interest in the Trust is financial, she has an interest in her annuity being paid into the future. Any payments made from the Trust affect those interests, and thus she has standing to challenge such payments. Paying the trustee

significantly increased commissions and additional compensation is a threat to her financial interest, and thus her interest therein is immediate.

Appellant argues that, as Reed's annuity has always been paid, she has no standing to challenge the management of the Trust, since she has not yet suffered monetary harm due to such management. With this argument, Appellant attempts to bypass its inherent duties as a fiduciary. The Orphans' Court found such an argument unavailing. Reed has averred specific facts which if substantiated show breaches of duty by the Appellant and which could indicate that her financial interest is in jeopardy. Trustees owe beneficiaries of a trust a basic duty of loyalty, and trust beneficiaries have the right to sue for a breach of this duty. *Pinecrest Lake Community Trust ex rel. Carroll v. Monroe County Bd. of Assessment Appeals*, 64 A.3d 71 (Pa. Cmwlth. 2013). No matter the size of her annuity, Appellant owes Reed a duty of loyalty to the same extent that it owes this duty to the University of Pennsylvania scholarship recipients. Breach of this duty by self-dealing is enough to surcharge a trustee. No showing of financial or actual harm is required. *See In re Estate of Harrison*, 745 A.2d 676, 679 (Pa. 2000). Thus, the Orphans' Court found that Reed's standing to object to Appellant's management of the Trust, which is based on allegations of breach of its duty of loyalty and other fiduciary duties, is unambiguous.

- 4. The Orphans' Court properly determined that Reed has standing to challenge the proposed division of the Trust because said division would counter the stated intent of Settlor that the lifetime beneficiaries are favored over the University of Pennsylvania and that their annuities be payable from the *entirety* of Trust income.**

PNC proposes to divide the Trust into two separate trusts, with "Trust A" to be used to make the annuity payments listed in the Will and "Trust B" to be a solely charitable trust used for University of Pennsylvania scholarships. PNC claims that the purpose of this proposed division is so Trust B can take advantage of the benefits afforded solely to charitable trusts that are fully exempt from Federal income taxes. Trust A would be funded with \$5,000,000.00, and Trust B would be funded with the remainder of the Trust (which was \$72,290,077.79 as of December 14, 2017).

As an annuity beneficiary of the Trust, Reed has a clear interest in the division of the Trust. As written, the Trust favors the annuity beneficiaries over the charitable beneficiary. The annuitants receive their distributions first, before any other money is paid.¹⁷ Second in priority, any deficit in original gross value of trust principal is to be restored before any further payments from income.¹⁸ Third, any shortfall from prior years in which there was insufficient income to pay all of the annuities is made

¹⁷ Will, Article SIXTH(c).

¹⁸ *Id.*

up for.¹⁹ Settlor explicitly stated that the University of Pennsylvania is the last to receive a distribution from trust income.²⁰

The proposed division, on the other hand, strongly favors the University of Pennsylvania by allotting to it approximately 93% of the Trust corpus, essentially giving it priority with respect to trust income.²¹ The proposed division would take priority of the income from the annuitants and give it to the University of Pennsylvania, thereby harming the annuitants. Reed's interest in maintaining the priority of trust income is thus, on its face, substantial, direct, and immediate.

Additionally, and importantly, dividing the Trust into two separate trusts would defeat the settlor's stated purpose of having the whole of the Trust available to pay the annuities before any amounts are paid to the University of Pennsylvania.²² "The polestar in the construction of every will is the testator's intent." *In re Sowers' Estate*, 119 A.2d 60, 62 (Pa. 1956). "A Court has no power to rewrite a will . . . to cover circumstances or conditions or contingencies which he apparently did not foresee or provide for." *In re Lifter's Estate*, 103 A.2d 670, 673 (Pa. 1954). Thus, it would be against a main tenet of the law of wills to allow such division. The

¹⁹ *Id.*

²⁰ *Id.*

²¹ Account, p. 18.

²² Will, Article TENTH "it is my wish that my Trustee, in the allocation of expenses and receipts, favor the life tenants of my residuary trust to whatever extent is permitted under the law." Also see Section Sixth(d) "I direct that all deficits in such payments shall first be paid before any income shall be available to the University of Pennsylvania."

Orphans' Court thus rightfully found that Reed, as a beneficiary, has the right to object to an act in contravention of settlor's intent regarding her annuity.

5. The Orphans' Court has inherent authority to challenge administration of the Trust.

Appellant contends that the Pennsylvania Office of Attorney General, as *parens patriae*, has primary oversight over charitable trusts.²³ However, it is well-established that Orphans' Court has jurisdiction over testamentary trusts and their trustees, and also bears the burden of overseeing charitable trusts. *Wilson v. Bd. of Directors of City Trusts*, 188 A. 588, 590 (Pa. 1936); *In re Pew Memorial Trust No. 2*, 5 Pa. D. & C. 3d 698, 704 (O.C. Phila. 1977). It has further been held that testamentary trustees, like PNC, are officers of the court, and thus are "subject to control of the court to which they must account, which may surcharge them for dereliction in office and determine whether such dereliction has taken place." *Id.*; *Laverelle's Estate*, 101 Pa. Super. 448 (Pa. Super. 1931). "[T]he orphans' courts of Pennsylvania have exclusive jurisdiction over the control, administration, and management of all trust estates created by will and is responsible for the proper management, administration, and preservation by the trustees of the trust res." *Wilson* at 591.

²³ Preliminary Objections of PNC Bank, N.A., ¶8.

Accordingly, laying aside the issue of Reed's standing to pursue her objections to the Account, the Orphans' Court itself has authority to raise these same issues. Any attempt by Appellant to avoid challenge of its administration of the Trust by contesting Reed's standing is futile.

Conclusion

In finding that beneficiary Elizabeth Ashton Reed has standing to raise Objections to Appellant's Account and in thereby overruling its Preliminary Objections, the Orphans' Court not only followed accepted legal principles well-established within the Commonwealth, but also insured that Appellant's past as well as future conduct towards the Trust will be subject to the review of those most interested in the fulfillment of the purposes and integrity of the Trust.

Therefore, it is respectfully submitted that the Appeal in this matter be denied, and the Orphans' Court's decision be affirmed.



CARRAFIELLO, A.J.

Dated: 2/25/2019

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