

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

Control No. 062809

6 April 2006

No. 261 ST of 1941

Estate of ANNA E. FRIDENBERG, Deceased

**Sur account entitled Third Account of Wachovia Bank, N.A.,
Trustee Under The Will Of Anna E. Fridenberg**

Before O'KEEFE, ADM. J.

This account was called for audit

April 3, 2006

&

December 19, 2007

Counsel appeared as follows:

**KATHLEEN A. STEPHENSON, ESQ., of PEPPER HAMILTON LLP
- for Wachovia Bank, N.A., Trustee and Accountant**

**CHARLES E. DONOHUE, ESQ., SENIOR DEPUTY ATTORNEY
GENERAL --- for the Commonwealth of Pennsylvania,
Office of Attorney General, as Parens Patriae
for Charities, Objectant**

This trust arises under paragraph TWENTIETH of the Will of Anna E. Fridenberg, dated February 14, 1938, whereby the testatrix gave the residue of her estate in trust, to pay the net income to certain annuitants (all of whom are deceased), and, to pay the balance of the net income to the Jewish Hospital

Association (now Albert Einstein Medical Center), "...for the perpetual upkeep, maintenance, and support of the Fridenberg Memorial Surgical Building." By his Decree dated February 18, 1981, Judge Charles Klein authorized the demolition of the Fridenberg Memorial Surgical Building, and, directed that the entire surgical floor of a proposed patient care tower be designated as the "Fridenberg Memorial Surgical Floor". In his Adjudication dated March 5, 1981, Judge Charles Klein directed as follows, to wit, "Upon completion of the proposed patient care tower building, and the admission of patients to the Fridenberg Memorial Surgical Floor, the income shall thereafter be used solely for the upkeep, maintenance, and support of said floor."

Copies of the Will and Codicils of Anna E. Fridenberg are annexed to the audit papers in this matter.

Anna E. Fridenberg, the testatrix, died on March 26, 1940.

The account is of the fund awarded in trust by the aforementioned Adjudication of Judge Charles Klein, dated March 5, 1981, which Adjudication confirmed the Second Account of The Fidelity Bank and Edward Gruenberg, Trustees. The Account is filed by reason of the death of Bruce Taylor, the individual Co-Trustee, on March 16, 2005.

The Trust under the Will of Anna E. Fridenberg is a perpetual charitable trust which continues for the uses and purposes set forth in the Will of the testatrix, and, in the aforementioned Adjudication of Judge Charles Klein dated March 5, 1981.

At pages 56 to 61 of its Account, under the heading "Disbursements Of Principal", Wachovia Bank takes credit for payments, totaling \$173,080.18, for

"Commissions on Market Value."

The Commonwealth of Pennsylvania, Office of Attorney General, as Parens Patriae for Charities, has filed an Objection to payment of \$46,731.64 of the aforementioned "Commissions on Market Value" out of Principal of the Trust. In a Letter dated June 3, 2008, Charles E. Donohue, Senior Deputy Attorney General, states the Objection of the Attorney General in the following manner, to wit,

"..... the Trustee, Wachovia Bank, N.A., is barred by the Rule of Williamson's Estate from receiving principal compensation in the sum of \$46,731.64, on the approximately twenty seven percent (27%) of the present trust principal which is subject to the Rule."

Mr. Donohue's Letter of June 3, 2008, and, a Stipulation Of Facts which was enclosed with said Letter, are annexed to this Adjudication.

Resolution of the issues raised in this matter must rest upon the following background.

By the Act of March 17, 1864, P.L. 53, hereinafter the 1864 Act, the Legislature provided as follows, to wit, "That in all cases, where the same person shall, under a will, fulfill the duties of executor, and trustee, it shall not be lawful for such person to receive, or charge, more than one commission...."

The 1864 Act was re-enacted by Section 45 of the Fiduciaries Act of June 7, 1917, P.L. 447, hereinafter the 1917 Act, which provides as follows, to wit,

"In all cases where the same person shall, under a will, fulfill the duties of executor and trustee, it shall not be lawful for such person to receive or charge more than one commission upon any sum of money coming into or passing through his hands, or held by him for the benefit of other parties; and such single commission shall be deemed a full compensation for his services in the double capacity of executor and trustee: PROVIDED, that any such trustee shall

be allowed to retain a reasonable commission on the income he may receive from any estate held by him in trust as aforesaid."

The 1917 Act was in effect when Wachovia's corporate predecessor, Fidelity-Philadelphia Trust Company, received commissions, on Principal, for its services as Executor of the Estate of Anna E. Fridenberg, Deceased.

After having served as Executor, Wachovia's corporate predecessor, Fidelity-Philadelphia Trust Company, then served as Trustee under the Will of Anna E. Fridenberg.

The 1917 Act was repealed by the Act of April 10, 1945, P.L. 189. In an opinion by Justice Allen M. Stearne, dated June 27, 1951, in the matter of Williamson Estate, 368 Pa. 343, at 352, our Supreme Court said the following, to wit,

".... The Act of April 10, 1945, supra, repealing section 45 of the Fiduciaries Act of 1917, supra, which prohibited the same individual from receiving commissions both as executor and trustee may not be applied retroactively. Appellant, the corporate fiduciary, accepted this trust in 1930 under the law as it then existed. It was paid in full (except for commissions thereafter received by it on income it received and distributed). Such acceptance fixed the rights, liabilities, exemptions, defenses and expectations of both life tenant and remaindermen. Their rights were vested under what necessarily is an implied contract. Such rights having vested, and appellant having been paid in full, the imposition of additional compensation under a retroactive interpretation of this statute would be unconstitutional under the Fourteenth Amendment of the United States Constitution:" (citations omitted)

The Legislature enacted the Act of May 1, 1953, P.L. 190, 20 P.S. § 3274, hereinafter the 1953 Act, after the decision in the Williamson case. Section 2 of the 1953 Act provides as follows, to wit,

"Whenever it shall appear either during the continuance of a trust or at its end, that a fiduciary has rendered services for which he has not been fully compensated, the court having jurisdiction over his accounts shall allow him such original or additional compensation out of the trust income or the trust principal or both, as may be necessary to compensate him for the services theretofore rendered by him."

Section 5 of the 1953 Act provides as follows, to wit,

"This act shall apply: (1) To all services heretofore rendered by any fiduciary; (2) To all services hereafter rendered by any fiduciary heretofore appointed; (3) To all services hereafter rendered by any fiduciary hereafter appointed in a trust heretofore created; and (4) To all services hereafter rendered by any fiduciary of a trust hereafter created."

Section 6 of the 1953 Act provides as follows, to wit,

"If the Constitution of the United States or of this Commonwealth prevents the application of this act to services falling in one or more of the four categories listed in section 5, hereof, the act shall nevertheless apply to services falling in the other categories or category."

In the matter of Scott Estate, 418 Pa. 332 (1965), our Supreme Court was asked to determine whether or not the discussion in Williamson, on retroactive application of the 1945 Act, was dictum, and, whether or not the 1953 Act could be applied retroactively. In an opinion by Chief Justice Bell, dated June 30, 1965, in Scott, at 337-338; at 339; and, at 339-340, the Court stated the following, to wit,

" Irrespective of whether this part of the *Williamson Estate* opinion was or was not dictum, we find it persuasive and applicable. It is clear as crystal that the corporate trustee in that case, as in this case, accepted a commission at the termination of the executorship which the applicable Act of 1917, in the clearest imaginable language stated was to be '*a full compensation [on principal] for his services in the double capacity of executor and trustee' and that this provision was to apply in all cases where the same person fulfilled the duties of executor and testamentary trustee. To now allow the Act of 1945 to abrogate and nullify what the*

corporate trustee with its eyes open, had been paid and had accepted in 1941 as full compensation on principal for all its ordinary services in its dual capacity of executor and trustee, would be to make a mockery of the law and of the rights of all parties, beneficiaries and fiduciaries alike. This we are unwilling to do."

* * * *

"We hold that *Williamson* Estate directly controls the instant case and that the 1953 Act stands on the same footing as the 1945 Act."

* * * *

"...., while a corporate fiduciary can probably prove its present costs as contrasted with its costs 25 years ago,* how, *at this late date*, can such a fiduciary prove what service it rendered during a lengthy 25-50 year trust, when so many persons who handled the trust estate will have died or be unable to accurately remember details?*** Isn't it clear that the retroactive application of the Acts of 1945 and 1953, at this late date, would not only greatly increase litigation but would also open a Pandora's box?"

*** The many bank mergers which have taken place will often increase these difficulties."

Chief Justice Bell summarized the state of the law on trustee's commissions in the following language in his opinion, dated November 14, 1967, in Ehret Estate, 427 Pa. 584, 587-588, to wit,

" With respect to a trust created prior to 1945, the law has been thus clearly established: Unless a testator or settlor clearly provides otherwise--(1) a corporate or an individual fiduciary who was *both executor and* trustee was entitled, under the act of 1864 and the Act of 1917, *infra*, to only one commission on principal for its *ordinary* services in *both capacities*, and this was payable upon the termination of its services as executor; (2) the Act of April 10, 1945, P.L. 189, which specifically repealed (a) §45 of the Fiduciaries Act of June 7, 1917, as amended, and (b) §§2, 5 (1), 5 (2) and 6 of the Act of May 1, 1953, P.L. 190, 20 P.S. §3274, et seq., which permitted (under certain specified circumstances)

payment of more than one commission on principal to a fiduciary who served as both executor and trustee in wills or trusts created prior thereto, cannot Constitutionally be retroactively applied; (3) *such Constitutional limitations* as well as the statutory restrictions or prohibitions contained in the Act of 1864 and of 1917 *have no application* (a) to fiduciaries who were entitled even, before the termination of the trust, to an *interim* commission on principal for *unusual or extraordinary* services, or (b) to fiduciaries who resign or die before the termination of the executorship or trusteeship, as the case may be:" (citations omitted)

The Probate, Estates and Fiduciaries Code, hereinafter PEF Code, was enacted as the Act of June 30, 1972, P.L. 508, No. 164. As originally enacted, Section 7185 of the PEF Code read as follows, in pertinent part, to wit,

"§ 7185. Compensation

(a) When Allowed. The court shall allow such compensation to the trustee as shall in the circumstances be reasonable and just, and may take into account the market value of the trust at the time of the allowance, and calculate such compensation on a graduated percentage.

(b) Allowed Out Of Principal Or Income. Neither the fact that a fiduciary's service has not ended nor the fact that the trust has not ended shall be a bar to the fiduciary's receiving compensation for his services out of the principal of the trust. Whenever it shall appear either during the continuance of a trust or at its end, that a fiduciary has rendered services for which he has not been fully compensated, the court having jurisdiction over his accounts, shall allow him such original or additional compensation out of the trust income or the trust principal or both, as may be necessary to compensate him for the services theretofore rendered by him. The provisions of this section shall apply to ordinary and extraordinary services alike.

(c)"

By the Act of February 18, 1982, P.L. 45, No. 26, Section 7185 (b) of the PEF Code was amended to read as follows, to wit,

" (b) Allowed Out Of Principal Or Income. The fact that a fiduciary's service has not ended or the fact that the trust has not ended or the fact that the trust is perpetual shall not be a bar to the fiduciary's receiving compensation for his services out of the principal of the trust. Whenever it shall appear either during the continuance of a trust or at its end, that a fiduciary has rendered services for which he has not been fully compensated, the court having jurisdiction over his accounts, shall allow him such original or additional compensation out of the trust income or the trust principal or both, as may be necessary to compensate him for the services theretofore rendered by him. The provisions of this section shall apply to ordinary and extraordinary services alike."

Section 14 of the Act of October 12, 1984, P.L. 929, No. 182, provides that Section 7185 of the PEF Code, as amended by the Act of February 18, 1982, P.L. 45, No. 26,

"....shall apply to all trusts regardless of whether the trust was created before, on or after February 18, 1982."

Since the passage of the Federal Tax Reform Act of 1969, the Trust under the Will of Anna E. Fridenberg has not been regarded as a Private Foundation, under the Internal Revenue Code, hereinafter the IRC, and, has not filed a Form 990-PF, Return Of Private Foundation.

By the Act of December 21, 1998, P.L. 1067, No. 141, hereinafter the 1998 Act, the Legislature added Section 8113 to the Probate, Estates and Fiduciaries Code, hereinafter the PEF Code. Section 8113 of the PEF Code pertains to charitable trusts and provides, in pertinent part,

" (a) Election.--Notwithstanding the foregoing provisions of this chapter, the trustee of a trust held exclusively for charitable purposes may elect to be governed by this section unless the governing instrument expressly provides that the election provided by this section shall not be available.

(b) Eligibility for election.--To make an election under this section, the trustee shall adopt and follow an

investment policy seeking a total return for the investments held by the trust, The policy constituting the election shall be in writing, shall be maintained as part of the permanent records of the trust and shall recite that it constitutes an election to be governed by this section.

(c) Effect of election.--If an election is made to be governed by this section, the term 'income' shall mean a percentage of the value of the trust. The trustee shall, in a writing maintained as part of the permanent records of the trust annually select the percentage and determine that it is consistent with the long-term preservation of the real value of the principal of the trust, but in no event shall the percentage be less than 2% nor more than 7% per year. The term 'principal' shall mean all other assets held by the trustee with respect to the trust.

(d) Revocation of election.--The trustee may revoke an election to be governed by this section if the revocation is made as part of an alternative investment policy seeking the long-term preservation of the real value of the principal of the trust. The revocation and alternative investment policy shall be in writing and maintained as part of the permanent records of the trust.

(e) Value determination.--for purposes of applying this section, the value of the trust shall be the fair market value of the cash and other assets held by the trustee with respect to the trust, whether such assets would be considered 'income' or 'principal' under the other provisions of this chapter, determined at least annually and averaged over a period of three or more preceding years."

The Comment to Section 8113 of the PEF Code provides, in pertinent part, that,

" The above rules are necessary only in connection with trusts which state that only the income can be expended currently. Trusts which allow the application of both principal and income can be managed on a total return basis in any event. In addition, charitable trusts that are private foundations for Federal income tax purposes already have the ability to expend 'principal' to the extent provided in section 1 of the act of June 17, 1971 (P.L. 181, No. 23 (10 P.S. § 201)). Accordingly, this provision will provide needed flexibility primarily to those charitable trusts that are not private foundations."

By the Act of July 7, 2006, P.L. 625, No. 98, the legislature deleted Chapter 71 from the PEF Code, and, added Chapter 77 (the Uniform Trust Act) thereto. As part of the Uniform Trust Act, Section 7768 of the PEF Code pertains to compensation of trustees and provides, in pertinent part,

"§ 7768. Compensation of trustee - UTC 708

(a) If unspecified.--If neither the trust instrument nor a separate written agreement specifies the trustee's compensation, to trustee is entitled to compensation that is reasonable under the circumstances.

*** * * ***

(c) Entitlement not barred.--None of the following shall bar a trustee's entitlement to compensation from the income or principal of the trust:

(1) The trust is perpetual or for any other reason has not yet terminated.

(2) The trustee's term of office has not yet terminated.

(3) The trustee of a testamentary trust also acted as a personal representative of the settlor and was or might have been compensated for services as a personal representative from the principal of the settlor's estate.

(d) Court authority.--In determining reasonable compensation, the court may consider, among other facts, the market value of the trust and may determine compensation as a fixed or graduated percentage of the trust's market value. The court may allow compensation from principal, income or both and determine the frequency with which compensation may be collected. Compensation at levels that arise in a competitive market shall be presumed to be reasonable in the absence of compelling evidence to the contrary.

(e) Cemetery lots.--The authority in this section....."

The Comment to Section 7768 of the PEF Code provides, in pertinent part, that,

" This section is an amalgamation of UTC § 708 and former 20 Pa.C.S. §7185 and codifies existing Pennsylvania law. Subsection (c) (3) repeals the contrary rule of *In re Williamson's Estate*, 82 A.2d 49 (Pa. 1951), as to the few trusts that might still be affected by the rule."

Paragraphs 2 and 4 of the Stipulation Of Facts which is enclosed with

Mr.Donohue's Letter of June 3, 2008 read as follows, to wit,

" 2. In 1998, pursuant to 20 Pa.C.S.A. § 8113, the Trustees of the Anna E. Fridenberg Trust ("Fridenberg Trust") elected to adopt an investment policy that sought a 'total return' for the trust corpus without regard to whether the return was to be derived from appreciation of capital or interest and dividends. The 1998 election was effective for the calendar year 1999 and the Trustees have made annual elections thereafter."

* * * *

" 4. Since June, 1998, the corporate Trustee and deceased individual Trustee received compensation for their services as trustees based upon the corporate Trustee's schedule of fees and allocated seventy percent (70%) to principal and thirty percent (30%) to income."

It appears from the Account that commissions were calculated by applying Wachovia Bank's fee schedule to the Market Value of the Principal of the Trust, and, allocating the resultant figure seventy percent (70%) to Principal, and, thirty percent (30%) to Income.

It should be noted that the Attorney General does not object to the reasonableness of the questioned payments totaling \$46,731.64. Nor is there any suggestion that said payments were made for any services other than ordinary services.

In passing upon the Objection to payments totaling \$46,731.64 in Trustee's

commissions, on Principal, for ordinary services, I note the holding of our Supreme Court in Pruner Estate, 390 Pa. 529 (1957), at 531, that, "The beneficiary of charitable trusts is the general public to whom the social and economic advantages of the trusts accrue." Also in Pruner, at 532-533, it was held that,

".....in every proceeding which affects a charitable trust, whether the action concerns invalidation, administration, termination or enforcement, the attorney general must be made a party of record because the public as the real party in interest in the trust is otherwise not properly represented."

In passing upon the Objection to payments totaling \$46,731.64 in Trustee's commissions, on Principal, for ordinary services, I hold that the Objection of the Attorney General to said payments must be Sustained because they are barred by the decisions in the matters of Williamson Estate, 368 Pa. 343 (1951); Scott Estate, 418 Pa. 332 (1965); and, Ehret Estate, 427 Pa. 584 (1967).

At Pages 3 through 7 of its Memorandum Of Law, Wachovia argues that the statutory prohibition on the same individual receiving commissions on Principal, as both Executor and Trustee, which prohibition existed under the 1917 Act, has effectively been repealed by former Section 7185 (b) of the PEF Code, and, by current Section 7768 of the Code. I find no merit in this argument because, following the decisions of our Supreme Court in the matters of Williamson Estate, 368 Pa. 343 (1951); Scott Estate, 418 Pa. 332 (1965); Ehret Estate, 427 Pa. 584 (1967); and, in Pruner Estate, 390 Pa. 529 (1957), I hold that Albert Einstein Medical Center and the general public, who are the Beneficiaries under the Will of Anna E. Fridenberg, have vested rights, under an implied contract, and, that it would be unconstitutional, under the Fourteenth Amendment of the United States Constitution, to apply retroactively any statute which

repeals the prohibition on the same individual receiving commissions on Principal, as both Executor and Trustee, which prohibition existed under the 1917 Act. For this reason, former Section 7185 (b) of the PEF Code, as amended by the Act of February 18, 1982, P.L. 45, No. 26, and, Section 7768 of the Uniform Trust Act, as enacted by the Act of July 7, 2006, P.L. 625, No. 98, may not be applied retroactively to permit the challenged payments, totaling \$46,731.64, in Trustee's commissions, on Principal, for ordinary services.

In its Memorandum Of Law, Wachovia argues that, by failing to appear and object to the payments in question, Albert Einstein Medical Center (hereinafter AEMC) has effectively waived its constitutional right to protection under Williamson, Scott, and Ehret, supra, and, has agreed to said payments. It then cites Mitchell Estate, 2 Fiduc. Rep. 2d 178 (1982), and, Clark Estate, 20 Fiduc. Rep. 2d 438 (2000), in support of the following argument, to wit,

"..... If the beneficiary of the Fridenberg Trust decides to allow principal compensation to the Trustees, either to build a stronger relationship with the trustee or simply to allow the trustee to continue serving by compensating it at a reasonable market rate, then the court should not interfere with that decision. The Attorney General, although entitled to a voice in the proceedings, cannot have an absolute veto over the informed decision of a beneficiary."

I find no merit in the reliance upon Mitchell, supra, because that case involved a,

".....proposed settlement,to settle a claim which clearly, on its face, is not spurious and may, in fact, have validity.....",
Mitchell, supra, at 180,

whereas the questioned payments to Wachovia, in Fridenberg, are clearly and unequivocally contrary to the decisions in Williamson, Scott, and Ehret, supra., and,

should never have been made. The Legislature could not do in 1982 and 2006 what it was constitutionally prohibited from doing in 1945 and 1953. I find no merit in the reliance upon Clark, supra, because, in Clark, the Court found that,

"..... The governing body of the church apparently determined that agreeing to the terms of the Agreement would further the church's chances of surviving and flourishing as a religious organization in the community which it serves. It made that decision with the full knowledge of the facts and with the assistance of independent legal counsel, who undoubtedly informed the church that it could receive all the shares if it asserted its claim to the.Here, the church made a fully informed, well-reasoned decision, with the advice of counsel. The Attorney General's actions seek to negate that informed decision which was to forego short-term gain to obtain long-term benefits." Clark, at 441,

* * * *

"..... The church apparently concluded that accepting only would be to its long-term advantage. Undoubtedly, the church was thinking of its potential for receiving and maintaining good relations within its congregation, and with the community. It logically follows that if the course of action undertaken by the church has the expected result, the church will have more abundant assets available long-term for benevolent pursuits, In this situation, the best interest of the church equates with the best interest of the public,". Clark, at 442

I fail to see how giving money away, by failing to object to payments which are patently unconstitutional, is to the long-term benefit or advantage of AEMC. I can only speculate that AEMC has made an, ".....informed decision ... to forego short-term gain to obtain long-term benefits", as did the church in Clark, supra, because AEMC has not seen fit to have its Counsel enter an Appearance and take a position on the Record in this matter. I have only Counsel for Wachovia making arguments which are clearly in the best interest of Wachovia. It is not in the best interest of any charity, or, of the

public, to let Trustees collect commissions which are clearly and unequivocally barred by well-established law.

The Objection of the Attorney General, to payments totaling \$46,731.64 in Trustee's commissions, on Principal, for ordinary services, is Sustained; the credits totaling \$46,731.64 will be stricken from the Account; and, the sum of \$46,731.64 will be added back to the balances available for distribution.

The only remaining Objection having been addressed, the Account shows a balance of Principal, after distributions, of \$ 4,681,201.55
to which add surcharge involving principal,
per foregoing discussion, of 46,731.64
making a balance of Principal available for distribution of \$ 4,727,933.19

which is awarded to Wachovia Bank, N.A., as Trustee under the Will of Anna E. Fridenberg, for the uses and purposes set forth in the Will of Anna E. Fridenberg, and, the Adjudication of Judge Charles Klein dated March 5, 1981.

The Account shows a balance of income, after distributions, of \$ 11,260.05
which is awarded to Wachovia Bank, N.A., as Trustee under the Will of Anna E. Fridenberg, for the uses and purposes set forth in the Will of Anna E. Fridenberg, and, the Adjudication of Judge Charles Klein dated March 5, 1981.

The above awards of principal and income are made subject to all payments, assignments, transfers and conveyances heretofore properly made on account of distribution.

Leave is hereby granted to the accountant to make all payments, assignments, transfers and conveyances 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.