

COMMENTARY

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Special to the Law Weekly

TRUSTS AND ESTATES

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Free Agent Season Open for Pennsylvania Trust Beneficiaries

For decades, Major League Baseball contracts contained a standard “reserve clause” that gave team owners exclusive rights to a player until he was traded or released. In 1969, St. Louis Cardinals centerfielder Curt Flood challenged the status quo when he refused to report to the Philadelphia Phillies after a trade. Flood’s stand, along with a subsequent arbitration determination declaring the reserve clause was incompatible with the economic freedoms of modern society, led to the adoption of free agency as we know it today in the professional sports world.

In the world of personal trust administration, with billions of dollars held in Pennsylvania trusts, a similar fight over free agency has been playing out in Pennsylvania’s courts. At stake is trust “portability” — the ability of trust beneficiaries to remove a trustee where the trust document does not provide an express mechanism for removal. Trust beneficiaries saddled with unresponsive corporate trustees, high fees or concerns with the quality of trust administration services faced a difficult challenge. While trust instruments drafted in recent years are likely to contain express portability provisions, many older trust instruments are silent on this issue, leaving judicial intervention as the last resort to remove a recalcitrant trustee.

Similar to Flood and other frustrated major league baseball players in the late

1960s and early 1970s, the current beneficiaries of the McKinney family fortune, now held in two trusts, sought free agency to choose their own corporate trustee rather than be “held hostage” by the trusts’ current corporate fiduciary.

On May 21, the state Superior Court in the matter of *In re McKinney*, 2013 Pa. Super. 123 (Pa. Super., May 21, 2013) (NO. 204 WDA 2012, 205 WDA 2012), held that the McKinney beneficiaries were permitted to remove their current corporate trustee where the trusts, created decades ago, were silent on portability. The *McKinney* court reversed the trial court ruling from the Crawford County Orphans’ Court and may have set in motion an era of beneficiary free agency.

The analysis focused on 20 Pa. C.S.A. §7766(b)(4), amended in 2006 to a “no fault” provision, allowing a trustee to be changed because of a “substantial change of circumstances.” In *McKinney*, the original corporate trustee named in a testamentary trust established in 1964, as well as the original corporate trustee named in an inter vivos trust created in 1989, were both long gone because of a series of bank mergers and acquisitions. In fact, the current bank was the sixth trust company to administer the trusts. Many trust officers and administrators came and went over the four decades of trust administration. The bulk of the beneficiaries now resided in a state far away from the current bank’s corporate headquarters.

The Superior Court’s decision applies statutory authority under Section 7766 of the Pennsylvania Probate, Estates and Fiduciary Code (the PEF code), which adopted, in part, Section 706 of the Uniform

Trust Code. The *McKinney* court explained that removal of a trustee was warranted under these statutory provisions where the beneficiaries provided clear and convincing evidence that removal:

- Best serves the interest of the beneficiaries of the trust.
- Is not inconsistent with a material purpose of the trust.
- A suitable co-trustee or successor trustee is available.
- There has been a substantial change in circumstances.

REMOVAL OF THE CURRENT TRUSTEE

In its analysis, the Superior Court focused on several questions, the first being whether a removal of a corporate fiduciary served the best interests of the beneficiaries. In so doing, the court looked to other states’ removal statutes and judicial interpretations, identifying the following factors:

- Personalization of service.
 - Cost of administration.
 - Convenience to the beneficiaries.
 - Efficiency of service.
 - Personal knowledge of the trusts and the beneficiaries’ financial situations.
 - Location of trustee as it affects the trust’s income tax.
 - Experience and qualifications of the proposed trustee.
 - Personal relationship with beneficiaries.
 - Settlor’s intent as expressed in the trust document.
 - Any other material circumstances.
- No one factor outweighs the others.

In siding with the McKinney family, the *McKinney* court focused on a key fact: Individuals who once serviced the trust no

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longer did so because of corporate mergers and acquisitions leading to the erosion of personalized service. In addition, the McKinney beneficiaries complained that new personnel installed by the current corporate fiduciary were “ineffective and unresponsive.” The McKinney beneficiaries also argued they had a better connection with the proposed corporate trustee, as the beneficiaries’ chosen company was administering other trusts for the family, was knowledgeable of the family’s financial situation and had a local presence. Thus, the court held that the McKinney beneficiaries demonstrated by clear and convincing evidence that removal, under these circumstances, served the best interests of the beneficiaries.

IS THE TRUSTEE A MATERIAL PURPOSE OF THE TRUST?

The *McKinney* court’s analysis then focused on whether the designation of the trustee is a material purpose of a trust. Generally speaking, a settlor’s choice of trustee should be given some deference, particularly where the settlor chooses an individual to serve as the trustee. For the McKinney trusts, the court pointed out that the settlors did not personally choose an individual to act as trustee and, moreover, the bank the settlors appointed as trustee years earlier was no longer in business. The McKinney family’s personal, business and community ties with the original institution did not survive the series of acquisitions. “With each merger, the trusts became farther removed from the original trustee. The process of attenuation [was] complete,” according to the opinion.

The court explained that “to read the absence of an express intention to permit portability as disallowing portability would render Section 7766(b)(4) a nullity.” The court ruled that the designation of a corporate trustee in this case was not a material purpose and stated as follows:

“There is no evidence that the settlors ever even contemplated [the current fiduciary] serving as trustee. When the chosen trustee no longer exists, the only material purpose that can be served through designating a trustee is that the trustee effectively administers the

trusts. Where both the trustee and the proposed successor trustee are qualified to serve that purpose, we will not find that removal violates a material purpose of the trust.”

McKinney provides a roadmap and balanced standards for beneficiaries and co-trustees seeking judicial removal of unsatisfactory corporate trustees.

IS A SUITABLE SUCCESSOR TRUSTEE AVAILABLE?

Although the current corporate fiduciary in *McKinney* asserted that the proposed successor trustee lacked experience administering trusts governed by Pennsylvania law, the *McKinney* court found this argument unconvincing. The court also found unpersuasive the current fiduciary’s argument that the McKinney family’s “friendly” relationship with the proposed successor trustee would cause the family to influence the successor trustee, such that this trustee would administer the trusts according to the family’s wishes at the expense of the settlor’s intent. The court found that the trust beneficiary’s best interests would be served by replacing the current corporate trustee with a corporate trustee that would offer more personalized service, greater convenience and a better understanding of the McKinney family’s overall financial picture. The Superior Court in *McKinney*, on remand, directed the Orphans’ Court to make a definitive finding as to the suitability of the proposed successor corporate fiduciary.

HAS THERE BEEN A SUBSTANTIAL CHANGE IN CIRCUMSTANCES?

Under Section 7766(b)(4), a merger or corporate reorganization, in itself, does

not constitute a substantial change of circumstances. Nevertheless, the court’s final analysis focused on the significant changes that occurred in trust administration resulting from successive bank mergers. Notwithstanding the language in the statute, the *McKinney* court found that the long string of bank mergers that occurred over many years resulted in a change in the character of the service provided by the corporate trustee. Further, the court held that the loss of key bank officers that the beneficiaries had developed close relationships with over many years, as well as the family’s move from Pennsylvania to Virginia, constituted a substantial change in circumstances. The court further explained that “the series of mergers not only caused a change in the character of service provided by the [current] trustee, but also weakened the family ties to the original trustee to the point of dissolution.”

WELCOME RELIEF

Consider the bleak prospects for addressing unsatisfactory performance by incumbent corporate trustees prior to the Superior Court’s reversal in *McKinney*. Despite a statutory no-fault provision since 2006 and a strong factual record of changed circumstances, the McKinney beneficiaries lost in Orphans’ Court and the incumbent corporate trustee also recovered its considerable legal fees. Where the trust instruments failed to provide for portability, the balance of power between beneficiaries and incumbent corporate trustees weighed strongly in favor of incumbency.

Although the scope of its application is hard to predict, we expect *McKinney* will provide welcome relief to remedy captive Pennsylvania trusts. It provides a roadmap and balanced standards for beneficiaries and co-trustees seeking judicial removal of unsatisfactory corporate trustees. Like free agency in baseball, *McKinney* will lead to increased portability and market competition in trust administration by corporate trustees. We expect that its well-reasoned and balanced approach will improve corporate trust administration services in ways that benefit the overall client experience for beneficiaries of Pennsylvania trusts. •