

FIDUCIARY WATCH

Case Update for Trust & Estate Professionals

November 2017

Court Rejects Effort at “Back Door” Trustee Removal by “Portability” Amendment

Practitioners across the country are taking note of a much anticipated July 2017 opinion from the Pennsylvania Supreme Court regarding whether trust beneficiaries, under Pennsylvania’s modified enactment of the Uniform Trust Code (UTC), could agree among themselves to modify a trust’s terms to add a “portability clause,” permitting them to simply replace the corporate trustee without cause or judicial approval. In the case of Trust Under Agreement of Edward Winslow Taylor, the Pennsylvania Supreme Court ruled that they could not, in a thoughtful opinion weighing a number of competing considerations. Of course, the involvement of a national, bank trustee has increased attention on the case.

The trust at issue in Taylor did not contain any provision specifically addressing the standards or procedures for trustee removal. But Pennsylvania’s Uniform Trust Act (UTA) does contain such a provision – its section 7766 (based on UTC section 7.06) includes specific, strict requirements for trustee removal, including Orphans’ Court (trial court) approval. The proposed portability clause would have permitted those requirements to be bypassed by agreement among the beneficiaries. Even though Pennsylvania’s UTA also has a statutory provision allowing beneficiaries to modify a trust by consent, the Taylor Court determined that the beneficiaries could not use that modification-by-agreement provision as a “back door” way to remove a trustee without meeting the strict requirements the Pennsylvania legislature imposed in UTA section 7766.

The Court stated “it clearly was not the manifest intention of the Pennsylvania legislature to allow beneficiaries to remove a trustee based upon their agreement and without satisfying the requirements of section 7766 where the settlor made no provision for trustee removal.”

The Taylor opinion has generated significant buzz among practitioners, both those that commonly represent corporate trustees, and those that more regularly represent beneficiaries. Practitioners commonly representing trustees may herald the Court’s unanimous decision as protecting the intent of settlors, and protecting corporate trustees from the whims of disgruntled beneficiaries. For their part, lawyers commonly representing beneficiaries may view Taylor as unfortunate, making beneficiaries powerless to change the bank trustees originally named by settlors, even in cases where bank acquisitions and the passage of time have resulted in the current trustee being wholly unrelated to the settlor (and perhaps not even in existence when the settlor established the trust). These advocates have pointed out that settlors have often signed trust instruments drafted by the very banks named trustee in the instrument, and often without counsel. They will likely argue that Taylor gives corporate bank trustees protection, even when their service, fee structure, or job performance may be lacking.

Ultimately, the Pennsylvania Supreme Court’s opinion appears to have been driven by statutory construction and the emphasis the Pennsylvania legislature put on the burden of proof required for removal of a trustee. The Court noted that Pennsylvania has a long history of strictly limiting trustee removal and replacement, to circumstances in which the trial court finds good cause. The Court discussed the substantial evidentiary hurdles placed by UTA section 7766 on beneficiaries seeking trustee removal/replacement, including required findings of fact and conclusions of law, and consideration of factors such as the interests of the beneficiaries, costs, convenience and efficiency, location of the

trustee, trustee experience and qualifications, personal relationships and – not the least of the considerations --the seller's intent as expressed in the trust instrument. The Taylor Court reasoned that allowing beneficiaries to add a portability clause to a trust instrument by beneficiary agreement would effectively nullify the effectiveness of UTA section 7766, and all of its substantial evidentiary and procedural hurdles and protections. The Court refused to allow beneficiaries such an avenue to accomplish trustee removal much more easily and without the oversight of the trial court.

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