deLone Trust

Trust inter vivos — Interpretation — Divorce Code

Language in trust inter vivos not interpreted under case law involving Divorce Code. (Hunter — Trusts Inter Vivos 10).

In the Orphans' Court Division of the Court of Common Pleas of Montgomery County. Trust estate of H. Francis deLone, deceased settlor. Objections to first and final account and amendments thereto. No. 08-0737.

Samuel T. Swansen and *William H. Bradbury*, for accountant.

Jennifer D. Gayle, for Aleda L. deLone.

H. Francis deLone, Jr., objectant in propria persona.

ADJUDICATION BY OTT, J., FEB. 3, 2010:

The account is filed because of the death of the settlor on November 22, 2006. The trust terminates.

The account is stated from November 22, 2006 to December 31, 2007. At the time of hearing, counsel for the accountant presented an addendum to the account covering the period from January 1, 2008 to September 30, 2009. The addendum was filed of record on December 4, 2008, and shows a balance of principal and income in the amount of $755,085.30, composed of a certificate of deposit, a loan, cash and cash equivalents as set forth on pages 4 and 6 of the addendum.

All parties having or claiming any interest in the trust of whom the accountant has notice are stated to have received written notice of the audit in conformity with the rules of court.

The settlor was survived by three children — his daughter, who is the accountant, and two sons. One son, H. Francis deLone, Jr., filed ten objections (numbered incorrectly to total only nine) and one supplemental objection to the account. He also filed objections to the petition for adjudication. The objections numbered 2 and 4 and the supplemental objection to the account were stricken by Court order dated September 22, 2008. The objections numbered 1 and number 3 were styled as challenges to the validity of the trust, but, in reality, challenged the right of the objectant's former wife to

receive any portion of the trust. The issue of Mrs. deLone's interest is discussed at length *infra*. In light of the objectant's repeated insistence that the trust is invalid, however, we make a specific finding that the restated and amended trust agreement was valid and enforceable, and dismiss the objections numbered 1 and 3. The objections numbered 5 and 9 were withdrawn or are moot. Before discussing the remaining issues, we must set forth the pertinent background information.

The subject trust agreement provided, in Item II, for the trust to be distributed after the settlor's death:

> A. In equal shares to such of my children, H. Francis DeLone, Jr., Pamela DeLone Rosner and Austin DeLone, who are then living; provided that:
>
> 1. Any gift to H. Francis DeLone, Jr. shall be a gift to him and his wife as tenants by the entirety or, if that is not possible, as joint tenants with right of survivorship; . . .

The trust also provided, in Item VI, that the remaindermen had to survive the settlor by ninety days to receive a share of the trust. At the time of the settlor's death on November 22, 2006, and for the preceding five years, H. Francis deLone, Jr., and his wife, Aleda L. deLone, had been "living separately" (as that phrase is used in family law) in their marital residence. Mrs. deLone removed herself from the home in January of 2007. The parties were divorced by decree dated August 8, 2008.

The objectant maintains that, because the date of the couple's "final separation" (January of 2007) occurred during the 90-day survival period set forth in the instant trust, Aleda L. deLone is not entitled to any share of the trust. He bases this argument on the decision in *Teodorski v. Teodorski*, 857 A.2d 194 (Pa. Super. 2004) which was an equitable distribution case. The Superior Court analyzed the section of the Divorce Code that defines "marital property" that is subject to equitable distribution, and specifically excludes "property acquired after final separation until the date of divorce:" 23 Pa. C.S.A. §3501(4). The objectant's reliance on the statute and *Teodorski* is misplaced because this is not an equitable distribution case. The crucial point is that the deLones were still married on February 22, 2007 (the expiration of the survival period) when Mrs. deLone's rights vested. Also futile is the objectant's argument that his ex-wife's withdrawal of her claims to marital property in the divorce action constituted a waiver of any claims to the assets presently before the Court. This

trust was established by the objectant's father and is unrelated to the couple's marital assets. Thus, Aleda L. deLone's waiver of claims in the divorce proceeding was irrelevant to this matter. We therefore determine that Aleda, who was the wife of H. Francis, Jr., on February 22, 2007, is entitled to a share of the trust, and dismiss the objections setting forth the contrary proposition.

As to the nature of Aleda L. deLone's interest, at the time the instant account was called for audit, the deLones were not yet divorced. In her petition for adjudication, the accountant proposed to pay one-third of the trust to Aleda deLone and the objectant either as tenants by the entireties or as joint tenants with right of survivorship, if the divorce should go through before distribution. At the audit of the account. Aleda filed four objections, all relating to this proposal, and requested that the Court sever the tenancy and award a one-sixth share separately to her and another one-sixth share to the objectant. The accountant has withdrawn her objection to Aleda's request, and the Court approves this distribution.

Turning to specific items in the account, objection number 6 (the first of two so numbered) relates to the accountant's handling of advances to the beneficiaries during the settlor's lifetime. The objectant challenged the accountant's characterization of a $10,000 transfer of funds[1] in November of 2003 from the settlor to the objectant. The accountant contends this money was an advance; the objectant contends it was an investment. In support of this claim, the objectant introduced a Xeroxed copy of an undated document, written by him in pencil, which reads as follows:

> 1,000 inv. =
> 1,250 return
> within one year
> Return comes
> each time
> Sandy gets
> payment if a
> fee on a
> contingent fee
> case — ~~I would~~
> I would get
> 20% of each
> fee until I
> reached the total
> maximum return.

1. The objectant introduced a photocopy of a Wachovia Bank form showing the transfer of funds (Exh. OD-9, p.2); and the accountant introduced the original. (Exh. A-25.)

(page 1 of Exh. OD-9.[2]) The "Sandy" referenced in the document is the objectant. In an attempt to clarify the cryptic note, the objectant testified that the settlor paid him $10,000 with the understanding that the objectant (who is an attorney) would repay the settlor if he was successful in a contingent fee law suit. When a contingent fee was received, the objectant would keep 20% and pay the balance to the settlor, up to a certain maximum return ($1,250 on each $1,000 invested.) The objectant testified that the investment related to one particular law suit and the settlor lost everything in the deal because the objectant was unsuccessful in the case and received no fee.

Regarding the objectant's proof on this issue, the document on which he relied made no specific reference to the amount which was allegedly invested, and appeared to be a *post hoc* explanation ("I would get 20% . . . until I *reached* the total maximum") rather than a contemporaneous memorialization of an agreement. For these reasons, we can conclude nothing about its relevance to the money transferred from the settlor's account to the objectant in November of 2003. The writing and the objectant's testimony were clearly insufficient to support the objection by a preponderance of the evidence; and we determine that the accountant was correct in handling this payment as an advance to the objectant. On the other hand, we are not persuaded by the trustee's argument that the handwritten note established a principal debt of $12,500 on which interest is due at the statutory rate of 6%. We therefore dismiss the objection, with the clarification that the amount of the advance to be deducted from the objectant's distributive share is a flat $10,000.

The second objection number 6 relates to the accountant's commissions. She provided a summary of the services she rendered and testified to her duties. Unlike many individual trustees who assume a totally passive role and rely on their counsel to perform the necessary tasks, this accountant took an active role in the trust administration. We find her time and services justify payment in the amount of 1% of the gross per year for three years ($23,000.00). Accordingly, these commissions are approved, and the objection is granted only to any amounts in excess thereof.

In his objection number 7, the objectant challenged the accountant's counsel fees. Samuel T. Swansen, Esquire, was retained by the accountant to administer the trust. He is a highly experienced estate

2. The original of this exhibit appears on back of the accountant's Exh. A-12.

planner and trust and estate administrator. He knew the settlor personally, as they had been partners together at the Dechert firm in Philadelphia at one time. He had served as counsel for the settlor in his capacity as trustee of another trust before his death. Attorney Swansen testified about and produced the engagement letter agreed to by the accountant as well as the bills for services rendered, and the hourly rates charged by him and his paralegal. Attorney Swansen explained that William H. Bradbury, III, Esquire, was retained by the accountant to handle the civil litigation pursued by the objectant against the accountant in the civil division of this Court. He stated that attorney Bradbury was paid in that matter by the accountant personally and her husband, not with trust funds. Attorney Bradbury also provided litigation support to the accountant in this matter. Attorney Swansen testified that this trust administration would have been simple, but for the problems created by the objectant.

Attorney Bradbury, litigation counsel, testified regarding services rendered on behalf of the trust. He explained that his fees are included within Exh. A-23. He produced and testified about the bills he provided to attorney Swansen. He noted one erroneous entry for $39 on August 11, 2008, which related to the above-mentioned civil litigation and should have been billed to the accountant and her husband, rather than to the trust.

The account shows fees that have been paid totaling $10,091.56, and fees "to be paid" in the amount of $6,940.10. A review of the invoices submitted in support of these charges reveals bills relating to the former number, but no underlying documentation relating to $5,000 of the "to be paid" entries on page 11 of the account. This was likely counsel's good faith estimate of the fees that would be incurred in winding up this matter. We must disallow this amount and deal with the real numbers. The addendum to the account shows additional fees paid in the amount of $18,628 and fees "to be paid" in the amount of $4,000. The former number is supported by the invoices introduced at the hearing. The latter appears to have been another estimate for future services and can not be allowed. The objection to fees is therefore proper to the extent of the $39 error pointed out by Mr. Bradbury and the undocumented $5,000 and $4,000 amounts set forth in the account and the addendum. Beyond this, we find the hourly rates and the time spent by counsel on behalf of the trust were reasonable, and the services rendered necessary and appropriate. The approved fees total $30,660.06.

Objection number 8 alleges the trustee should be disqualified for breach of her fiduciary duties, which is denied because 1) it is a moot point since the trust is terminating and 2) there was no proof of any breach of duty.

The accountant requests permission to retain a tax reserve, any unconsumed portion of which will be paid to the beneficiaries without further accounting. The reserve in the amount of $1,000 is herewith approved. * * *