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July 30, 2004

Martha T. Starkey
STARKEY LAW GROUP, PC
30 South Meridian Street, Suite 850
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FIRST CLASS MAIL
AND FACSIMILE 705-8884

RE: [In the Matter of the William C. Roettger Trust dated December 31, 1992,
Cause No. 82D07-0110-TR--539](#)

Dear Mrs. Starkey:

In my opinion the trustee of the William C. Roettger trust, Mr. Thomas D. Roettger, violated numerous fiduciary duties which damaged the beneficiaries.

Pertinent Documents

I have reviewed the following documents:

1. Irrevocable Trust dated December 31, 1992
2. Sunset Tower Associates Partnership Agreement dated December 31, 1992
3. Sunset Tower Associates 1999 Form 1065
4. Arbitration Award dated September 26, 2001
5. Trust Annual Report for 1993
6. Trust Form 709s for 1992 and 1997
7. Plaintiff's Reply To Trustee's Counterclaim
8. List of exhibits on Joint Exhibit Notebook (5 pages)
9. Mr. Eric A. Manterfield's Expert Report dated December 11, 2002
10. Trustee's proposed findings in first trial

11. William's Second Amended Petition dated June 10, 2004
12. Trustee's Answers, defenses and counterclaim
13. Copy of note and letter from Trustee to William and FedEx Airbill.
14. Email from Settlor to Trustee dated February 9, 1997
15. Chart depicting total amounts distributed by Trustee
16. Chart depicting percentage of irrevocable trust distribution vs. time
17. Chart delineating trust distributions for the 1992 Irrevocable trust
18. Transcript of Trial held February 24-5, 2003
19. Deposition of Thomas Roettger on March 16, 2002
20. Deposition of John H. Langbein on June 9, 2004
21. Trustees' Crummey letters sent on March 4, 1999 for gifts to the trust in 1993, 1996 and 1997

The Interested Persons

Concerning the family members involved in the trust: William C. Roettger signed his Irrevocable Trust Agreement on December 31, 1992. Beneficiaries included his wife, Joy Roettger, his children and grandchildren.

The Settlor appointed his son, Thomas Roettger, as trustee. Thomas has three children, Sarah born in February 1996, and twins Samuel and Michaela born in May 1999.

The Trust also named the Settlor's two other children: Constance Sanders (whose children include Kelsey born in October 1987, and Megan born in October 1993); and the plaintiff, William Roettger, Jr. (who has one son, Aaron, specifically excluded by the trust).

Chronology

The facts in this case appear largely undisputed. I gathered the following from the documents and testimony:

- | | |
|-------------------|--|
| 1972 | Trustor creates Sunset Towers Partnership. |
| December 31, 1992 | Trustor signed Irrevocable Trust.
Funded with 49% interest in Sunset Towers.
Trustee mails Crummy letter to beneficiaries. |

- January 1, 1993 Trustor gives Trust additional 13% of his interest in Sunset Towers. Trustor's children each own 12.1111% interest in Sunset Towers.
- 1993 Trust received \$60,000 from Sunset. Trustee distributed \$19,000 to Trustee, Connie, and Bill Jr. Trustee sends statement of account to Trustor, but not Bill Jr., to whom he sent a K-1.
- 1994 Trust receives \$72,000 from Sunset. Trustee distributes \$23,100 to Trustee, Connie, and Bill, Jr. Trustee sends statement of account to Trustor, but not Bill Jr., to whom he sent a K-1.
- 1995 Trust receives \$60,000 from Sunset. Trustee distributes \$19,500 to Trustee, Connie, and Bill, Jr. Trustee sends statement of account to Trustor, but not Bill Jr., to whom he sent a K-1.
- 1996 Trust receives \$69,000 from Sunset. Trustee distributes \$21,700 to Trustee, Connie, and Bill, Jr. Trustee sends statement of account to Trustor, but not Bill Jr., to whom he sent a K-1.
- December 26, 1996 Trustor made gift of marketable securities to the Trust.
- February 4, 1997 Bill Jr.'s wife and Trustor argue about property in Florida.
- February 9, 1997 Trustor sends letter to Trustee telling him to include the grandchildren (Sarah, Megan, and Kelsey) in distributions.
- February 20, 1997 Trustee advises Bill Jr. that he may get zero if he "give(s) dad ultimatums" after Bill Jr. declared he would get a third or nothing. Trustee and Connie discuss Connie giving Bill Jr. money so that he would still receive a third.
- June 26, 1997 Trustor made gift of marketable securities to the Trust.
- July 24, 1997 Trustor made gift of marketable securities to the Trust.
- August 14, 1997 Trustor made gift of marketable securities to the Trust.
- December 30, 1997 Trustee sends letter to Bill Jr. and Connie stating that the Trustor's wishes to include the grandchildren are consistent with the GST considerations of Article 4 of the trust document. Further states intention to include grandchildren and notifies beneficiaries of Trustor's gifts in 1996 and 1997.

- December 1997 Trustee includes grandchildren in distribution, making equal distributions of \$11,400. Trustee sends statement of account to Trustor, but not Bill Jr., to whom he sent a K-1.
- (Early) 1998 Connie gives Bill \$7,000 to allow him to receive a 1/3 share.
- 1998 Trustee makes equal distributions to 6 beneficiaries of \$15,000. No annual statement to Bill Jr. No equalization payment from Connie.
- Feb. 5 & 16, 1999 Bill Jr. requests copy of trust agreement. Trustee tells him he will have to obtain a copy from Trustor, and that he did not have the right to distribute copies of the trust document.
- March 4, 1999 Trustee sends Bill Jr. and Connie copies of the 1992 Trust document, annual reports from 1993 through 1998 and Crummey letters for gifts made by the Trustor to the trust in 1993, 1996 and 1997. (The 1993 Crummey Notice concerned the 13% interest of Sunset; the 1996 Crummey Notice concerned a gift of CSX stock; the 1997 Crummey Notice concerned numerous gifts of stock.)
- December 1999 Bill Jr. attempts to exercise right of withdrawal for the Trustor's gifts in 1993, 1996, and 1997. The Trustee rejected this, stating that the 30 day period for withdrawal had lapsed.
- 1999 Trustee distributes \$10,000 to Trustee, Connie, Bill, Jr., and 5 grandchildren (Trustee's 3 children and Connie's 2 children.)
- 2000 Trustee distributes \$7,200 to Trustee, Connie, Bill, Jr., and 5 grandchildren (Trustee's 3 children and Connie's 2 children.) Also, Trustee and Connie lend trust \$31,300 each, without advising Bill Jr.
- November 10, 2001 Trustee distributes \$13,000 to each of the 5 grandchildren and none to the Trustor's children. Trustee informed Bill Jr. that he would consider a written request for distribution and wanted to review Bill Jr.'s financial situation.
- September 26, 2001 Arbitration award in partnership matter.
- November 10, 2001 Trustee sends letter to beneficiaries stating his desire to resign in near future.

2002 Trustee distributed to Trustee, Connie, Bill, Jr., and the 5 grandchildren \$1,000.

Distributions Not Proper

ARTICLE 4 of the Trust contains the following pertinent provision:

“A. During the Trustor’s lifetime, the Trustee shall pay to one or more of the Trustor’s wife and descendants, without any duty of equalization, so much or all, if any, of the net income ... and principal of the trust as the Trustee determines to be advisable ... considering resources otherwise available, to provide for their respective health, education, maintenance and support in the manner of living to which accustomed.” (Emphasis added).

From a review of the facts in this case, it appears that the Trustee did not inquire into whether any beneficiary needed trust property for “their respective health, education, maintenance and support.” In my opinion this is an exclusive list of reasons that permits the Trustee to distribute any trust income or principal. There is no showing that any beneficiary needed the money. Until December of 1997 the Trustee distributed equal amounts to the Trustor’s three children.

The primary complaint in this case is that after December 1997 the Trustee distributed property to the Trustor’s grandchildren, which had the effect of providing the least to the plaintiff, a little more to Connie’s family, and the most to the Trustee’s family. These excess distributions were improper for several reasons:

1. In response to the petition the Trustee has the burden to prove that Connie and the Trustee’s families needed funds for “their respective health, education, maintenance and support.” The record does not show facts to support this.

2. In response to the petition the Trustee has the burden to prove that Connie and the Trustee’s families did not have “resources otherwise available”. The record does not show facts to support this. On November 10, 2001 the Trustee requested the plaintiff’s financial status. The Trustee now argues that he did so under the requirement that no distributions occur if the plaintiff had “resources otherwise available”. The Trustee thus admits that what resources any beneficiary has available is a necessary inquiry before any distribution is made to any qualified beneficiary.

3. The Trustee had zero discretion to distribute trust property to the Trustor's grandchildren while they are minors, and from what I have reviewed Connie's and the Trustee's children were under 18 years of age when they received distributions, and are still minors. Connie and the Trustee have an unqualified obligation to provide for their children's "health, education, maintenance and support". Concerning the Trustor's grandchildren, only if the grandchildren and their parents had no "resources otherwise available" could the Trustee make the distributions, and even then not to any grandchild directly.

4. ARTICLE 14 of the Trust states:

"This Agreement is absolutely irrevocable ... the Trustor shall have no right, power or authority to revoke, alter, change, amend, terminate, cancel or annul all or any part of this Agreement or any trust herein established ... nor shall the Trustor have the right, alone or in conjunction with any other person, directly or indirectly, to designate the persons who shall possess or enjoy all or any part of the trust property and estate, or the income therefrom ..." (Emphasis added).

The Trustor's letter dated February 9, 1997 to the Trustee violated this Trust provision by telling the Trustee to include the grandchildren in future distributions. The Trustee obviously obeyed, given his advice to the plaintiff that he may get nothing in the future if he continues to give the Trustor ultimatums. The Trustee's breach of this portion of the Trust does not simply damage the beneficiaries of this Trust. Permitting the involvement of the Trustor risks adverse tax consequences.

One of the more common reasons for a Trust such as this one is to provide the Trustor with an opportunity to distribute property to his family that would not have to be included in his estate. The Trustor could give not only \$10,000.00 per person per year to the family members, but also get the future appreciation of any gifts out of his estate as well. By allowing the Trustor to impact distributions is commonly referred to as an "incident of ownership" that would cause the Internal Revenue Service not to recognize the transfers as gifts.

Obviously the Trustor considered the tax benefits as important in this case. See ARTICLE 8(A)(22). If the Trustor loses the tax benefit because of the Trustee permitting his participation in the distributions, ARTICLE 7(B) would require the payment of all trust property to the Trustee of the William C. Roettger Trust dated February 10, 1987, as amended. The Trustee's actions have thus placed at risk the entire Residuary Trust provisions of ARTICLE 7.

5. As a fiduciary the Trustee has an obligation to exercise discretion. At a minimum a Trustee must act as would a reasonably prudent person in managing his or her own property. The Trustee has obtained an expert opinion that relies on the word “discretion” as a word with many faces. One face does not include a Trustee doing what he wishes or is told and then in hindsight argue that whatever happened fell within a discretionary standard.

In this case the record does not contain any evidence that the Trustee exercised appropriate discretion. He did not review the Trust document, inquire into the circumstances facing the beneficiaries as they might permit Trust benefits, employ an Indiana attorney to assist him, seek prior Court approval, nor document anything that might support his decisions. The Trustee on occasion described his actions as on “auto pilot”, which confirms that he exercised no discretion.

Conflict of Interest

The Trustee should not have made distributions that best benefited himself, and should not have offered to borrow money at favorable interest rates from certain beneficiaries and not also the plaintiff. The Trustee argues that the conflict of interest should be excused first because the Trustor named him as trustee when an obvious conflict existed. I have not reviewed anything in the documents or testimony to support this allegation. No law permits a court to infer that a Trustor waives a conflict of interest in an irrevocable trust by naming a beneficiary as Trustee. No facts in the record show that the Trustor accurately assessed a conflict of interest. Even if he did, the law recognizes no waiver.

It is common practice for a Trustor to name certain family members as trustee(s). The primary circumstance is that the named family member is the most wealthy, the most experienced in investments, and/or is not expected to benefit from the trust. In this case the Trustee has benefited the most from the prior distributions, yet every indication is that neither the Trustee nor his children (which he has an obligation to support) need any property for their “health, education, maintenance and support”. If the Trustor had expected this, he should have chosen a different trustee (or the Court would need to appoint one).

As to any cash flow problem, if a Trustee must borrow money in most cases the Trustee uses his or her individual funds (without interest charges) to cover for a problem caused by the Trustee’s having been responsible for placing the Trust property in a disadvantaged position. If the Trustee must obtain a loan, borrowing the funds from some beneficiaries, especially himself, is never permissible. Had the Trustee borrowed the funds from an independent source, the interest payments would have been an expense.

Trustees have an obligation to reduce such expenses whenever possible. In this case, however, the Trustee used the opportunity as a source of income for he and his sister, personally. In my experience Trustees can borrow from all beneficiaries equally only when he or she cannot borrow on the open market, and only after court authorization.

In this case the Trustee has argued that the interest he paid to himself and his sister was the same had he obtained a loan from an independent source. The record in this case does not show this. In my experience as an executor and trustee, I also do not believe the Trustee can show this. The most prudent action when faced with a cash flow problem is to pledge the trust property (e.g., securities you do not wish to sell for tax reasons) and borrow against the funds, which usually costs no more than 1.5% from the Trust's own investment manager.

The Trustee argues that the Trust, ARTICLE 8(B) exonerated any conflict of interest. The Trust speaks to the contrary. ARTICLE 8 specifically states that "all administrative powers shall be fiduciary powers". ARTICLE 8(B)(2) specifically states that "No trustee shall ... make any determination with respect to ... Any payment to ... the Trustee personally". The Trustee violated these Trust terms. The Trustee argues that the Trust terms contain an exception where the Trustee believes he is entitled to receive trust property under a "reasonably fixed or ascertainable standard which is set forth in this instrument". The only standard mentioned in the Trust is "health, education, maintenance and support". Even if the Trustee could satisfy this standard (and all indications from the record indicate he cannot), then the Trust, ARTICLE 8(B) final paragraph, describes how the Trustee must have another "acting Trustee" make the decision, or "add a Trustee", or obtain the consent of the "adverse party".

As stated earlier, no facts suggest the Trustee needed trust property for "health, education, maintenance and support". If he did, no facts suggest that he received the property by the decision of an independent trustee or permission of the plaintiff.

The Trustee also cannot overcome the Trust Code provision that with a conflict of interest he may only exercise "any power with court authorization". Indiana Code Section 30-4-3-5. To the extent that the Court finds the terms of the Trust and the Trust Code conflict, "the terms of the trust shall control unless the rules of law clearly prohibit or restrict the article which the terms of the trust purport to authorize." Indiana Code Section 30-4-1-3. In this case, the Trust required the Trustee to receive property only from a disinterested Trustee or permission of all other effected heirs. He did not do that. In any event, the Trust Code specifically required the Trustee to obtain court authority to distribute property to himself, no matter the language of the trust, which he did not do.

Late Notice of Contributions

The Trustor made contributions to the Trust in 1993, 1996, and 1997. The Trust required the Trustee to notify the beneficiaries of these contributions and, in pertinent part, to permit the plaintiff to require the Trustee to distribute to him \$10,000.00 in each of those years. I understand that the Trustee has admitted breaching the Trust by not having informed the plaintiff when the Trustor made contributions to the Trust until March 4, 1999.

The Trustee has asserted that his breach should be excused because he sent the plaintiff letters on March 4, 1999 providing him an opportunity to receive the \$30,000.00 if the plaintiff requested it within 30 days. In December 1999 the plaintiff requested the \$30,000.00 distribution but the Trustee refused, asserting that the plaintiff waited too long.

The Court should reject the Trustee's current position for several reasons:

1. The Trustee admits to breaching the Trust terms by not having sent the proper information letters to the plaintiff in 1993, 1996 and 1997. The plaintiff thus has shown a breach of fiduciary duty and may recover damages for the breach. Nothing in the Trust authorized the Trustee to attempt to cure his mistake by sending the March 4, 1999 letter. The Trustee had no standing to require the plaintiff to accept the Trustee's version of how to resolve a dispute by requiring compliance under a late letter. Because a breach had occurred, any resolution or settlement required Court approval under the Adjudicated Compromise of Controversies. Indiana Code Section 30-4-7-1, et seq.

2. The Trustee refused to pay the plaintiff the \$30,000.00 because he waited until December 1999 to request it. As an equitable matter the Court might criticize the irony of a Trustee refusing to distribute property to a beneficiary for being 8 months late, after the Trustee himself was 6 years late. But the Court should also consider that the Trustee had no authority to require the plaintiff to request the \$30,000.00 within 30 days. The letters themselves did not advise the plaintiff of any such deadline. The Trust also does not require a beneficiary to respond within 30 days.

The Trust language concerning a 30 day window reflects standard language of an irrevocable life insurance trust. ARTICLE 4(C) merely requires the Trustee to "hold each such addition intact for not less than thirty (30) days". The Trustee then has discretion to use the money to pay insurance premiums (which he did not do in this case). The Trust makes no other pertinent reference to a 30 day requirement. Contrary to the Trustee's argument in this case, nothing in the Trust permits him to require that a beneficiary notify the Trustee within 30 days of an intent to withdraw \$10,000.00 of a contribution or lose such an option for all time.

ARTICLE 4(B)(2) states that *“With respect to all additions from all sources made during any calendar year during the Trustor’s lifetime, to distribute to each of them, annually and on a noncumulative basis ...”* (Emphasis added). This appears to show an intention that the beneficiary can request and the Trustee can distribute the \$10,000.00 any time during the calendar year.

3. The record does not contain any information as to the damages the plaintiff suffered as a result of not having access to \$10,000.00 in each of the years 1993, 1996 and 1997. At a minimum the plaintiff lost the time value of money by not having the opportunity to receive the funds until at least March 4, 1999. The record is devoid of the Trustee offering to pay the \$30,000.00, plus damages, interest, attorney fees, and/or expenses.

Failure to Account

In addition to failing to provide the plaintiff with notice of the Trustor’s contributions, the Trustee did not provide proper accountings as required by the Trust under ARTICLE 13. The Trustee has obtained an expert opinion that his “failure to adhere religiously to two administrative duties has been corrected with no damage” to the plaintiff. I respectfully disagree.

First, as shown above, the Trustee has not paid the plaintiff the amounts due him. Second, Indiana Code Section 30-4-3-6(a) requires a Trustee “to administer a trust according to its terms.” The Trust Code does not define or have a separate standard of review for “administrative” duties. The law does not excuse “administrative” breaches of trust. In my experience the failure to timely and properly account is one of the primary reasons Courts remove trustees and award damages. Such scenarios can lead to missing funds, judgment proof trustees, and expensive litigation because of the need to reconstruct records.

Incorporation of Opinions by Mr. Langbein

I have reviewed the deposition of Mr. John H. Langbein and concur with his opinions. Although he cites to several cases outside of Indiana, and to several Restatement sections, his opinions accurately reflect Indiana law.

Relief

The facts I reviewed in this case support the Court removing the Trustee and appointing an independent one. In addition to removal for cause because of the breaches of trust described above, this case obviously displays more animosity than found in the case of Estate of Jaworski v. Jaworski, 479 N.E.2d 89 (Ind.App. 1985), which justified the removal of an executor and the appointment of a special administrator. An independent Trustee can also assist in preventing substantial fees, expenses, and years of protracted litigation. See, e.g., Malachowski v. Bank One, 570 N.E.2d 65 (Ind.App. 1991), opinion vacated at 590 N.E.2d 559 (Ind. 1992), appeal after remand, 667 N.E.2d 780 (Ind.App. 1996), opinion vacated at 683 N.E.2d 579 (Ind. 1997), with opinion at 682 N.E.2d 530 (Ind. 1997).

The facts I reviewed in this case also support the Court holding the Trustee personally liable to the Trust for property wrongfully distributed; awarding damages incurred by the plaintiff; and paying all of his attorney fees and expenses for providing the trust a benefit.

A short Vita is attached. In addition, I regularly represent executors and trustees in the administration of estates and trusts, focus primarily in the area of estate, trust, and tax litigation, and have experience serving as a fiduciary in many capacities – as trustee for irrevocable life insurance trusts, for charitable remainder trusts, revocable and irrevocable client trusts (including minors), testamentary trusts, as an executor, and as a court appointed special administrator. I have testified as an expert witness in numerous cases involving these matters.

If you need anything further, please contact me.

Yours very truly,

Curtis E. Shirley