

**COURT OF COMMON PLEAS
PROBATE DIVISION
HAMILTON COUNTY, OHIO**

TRUST U/W OF	:	CASE NO. 745884
A.J. WOLTERING, deceased	:	
	:	
	:	<u>OPINION AND ENTRY</u>
	:	<u>SUSTAINING EXCEPTIONS</u>
	:	<u>TO TRUSTEE'S ACCOUNTS AND</u>
	:	<u>SETTING TRUSTEE'S FEES</u>
	:	
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This matter came before Judge Wayne F. Wilke on April 17th, 1997 and was continued in progress to June 9th and June 10th, 1997. At issue were exceptions to the Eighth and previous Trustee's Accounts and an application for Trustee's Fees in the amount of \$23,264.62. The Trustee, Joseph A. Woltering, was represented by Stephen L. Black and Michael R. Miller. The Exceptors, Barbara Woltering, Anne Woltering and Martha Woltering, were represented by Beth A. Myers and Barbara F. Applegarth.

FACTS

A.J. Woltering, the decedent herein, held the controlling stock interest in Crown Industries, Inc. ("Crown Industries") and was the settlor of the testamentary trust before the Court. A.J. Woltering died in 1970 and was survived by his wife, Anne H. Woltering and two adult children, Joseph A. Woltering and Thomas F. Woltering. The decedent bequeathed and devised the residue of his estate to his wife for her lifetime and upon her death, the residue was to be divided into two equal parts. One part was to be distributed to Joseph A. Woltering outright while the other was to be distributed to Joseph A. Woltering as trustee in trust for the benefit of Thomas F. Woltering. Joseph A. Woltering was appointed Trustee of the trust on September 10, 1974 and after his mother's death, he

individually owned 361 of the 461 shares of outstanding shares of Crown Industries stock. The other 100 shares were held by the Trust described above.

As Trustee, Joseph A. Woltering was directed to pay such amounts of the income and principal necessary for Thomas F. Woltering's support, maintenance, medical care and welfare. Thomas F. Woltering suffered massive head injuries in the late 1950's and was unable to support himself. Upon the death of Thomas F. Woltering, Item IV(b) of the decedent's will requires that the remaining principal and all undistributed income be divided into three equal parts, one for each of Thomas F. Woltering's daughters, the Exceptors herein.

Among other notable provisions of the decedent's will, Item VI purports to empower the fiduciaries to change investments and securities without liability for loss or depreciation provided unreasonable risks are avoided. It also provides that the fiduciaries may make these decisions without "court order or other legal formality". Furthermore, Item VI provides that the decedent's wife and sons may deal with the trusts "as though they were strangers thereto".

The testator nominated Anne H. Woltering, Joseph A. Woltering, Thomas F. Woltering and Marc A. Fiehrer to serve as members of a committee to conduct the business affairs of Crown Industries, Inc. The testator's will provides that "[i]f any business is continued by my Committee, it may be done without liability to my Committee for any losses to my estate or trusts arising therefrom, so long as my Committee acts in good faith, and no application to any court for authority to do so is required."

The evidence showed that in the late 1980's, management at Crown Industries was faced with either liquidating the corporation or infusing \$2 million in capital contributions. Simultaneously, Thomas F. Woltering was receiving less income from the trust assets as Crown Industries was not paying appreciable dividends. The Sixth Current Account, filed on February 6, 1991, contains the notation that all 100 shares held by the Trust were “[r]edeemed by the Company on October 31, 1990 (sic) for cash and promissory notes collateralized by reissued shares of stock held in escrow with First National Bank of Southwestern Ohio.” The Trustee relied heavily upon the appraisal of Mr. David McCoy at determining the per-share purchase price of \$2,600 for this redemption.

Following the account described above, the Trustee filed two subsequent accounts: the Seventh Current Account, which was filed on November 16, 1993, and the Eight Current Account, which was filed on June 25, 1996. The three remaindermen were notified of the filing of the Eight Current Account on July 5, 1996, and they filed exceptions to the Eighth and prior current accounts on October 4, 1996.

Trustee Joseph A. Woltering attempted to make the redemption, documented in the Sixth Current Account, an arm's length transaction.¹ The Trustee obtained an appraisal of the stock. He hired counsel to represent Thomas F. Woltering's interest in the stock. The Committee referred to in the testator's will to conduct the business affairs of Crown Industries also ratified the redemption plan. Nevertheless, the Exceptors believe the Trustee breached his fiduciary duty in redeeming the Trust's shares of Crown

¹ The redemption actually transpired during the period documented by the Trustee's Seventh Current Account. That account covered transactions during the period from January 1, 1990 through January 12, 1993.

Industries stock. They allege that the Trustee failed to obtain court approval of this transaction and that the purchase price was based upon an inaccurate and stale appraisal that was made nearly two years prior to the date of actual purchase. The Exceptors also allege that the appraiser improperly applied a 30 percent discount to the value of the stock bought by the Trust.

While fifteen of the one-hundred shares were purchased by Crown Industries for cash, the remaining eighty-five shares were purchased for notes. The Exceptors allege that the interest rates charged on those notes were significantly lower than the prime interest rate at the time of purchase.

Furthermore, the Exceptors alleged that the Trustee made improper payments characterized as “advances” from Thomas Woltering. They also questioned payments made by the Trustee for medical expenditures, for the Trustee’s credit card and for an automobile owned by Thomas Woltering. For the record, all of these exceptions have been dismissed so that with respect to the Exceptors’ concerns, the Court need only address the Trustee’s sale of Crown Industries stock back to the corporation.

The Court, however, must also examine the Trustee’s application seeking an order fixing and allowing payment of Trustee’s fees. On February 28, 1997, the Trustee filed an application seeking fees of \$23,264.62 for the period from September 10, 1974 through January 10, 1996, a period of over twenty-one years.

CONCLUSIONS OF LAW

At the outset, the Court must address the threshold issue of whether the Exceptors may object to events which happened prior to the period covered by the Eighth Current Account. The Eighth Current Account covers the period from January 13, 1993 to

January 10, 1996, and the redemption of the Trust's stock occurred in December of 1990. The redemption occurred during the reporting period of the Trustee's Seventh Current Account but was first noted in the Trustee's Sixth Current Account. The Trustee believes that the effect of this court's prior orders approving and settling Trustee's Accounts One through Seven is *res judicata* on the Exceptors. For the reasons described below, this is not an accurate interpretation of the law.

Two interrelated statutes impact the ability of the Exceptors to raise their objections and to complicate matters, both have been amended since the events in dispute have occurred. Revised Code §2109.35, which was amended in June of 1994, provides that the order of a probate court upon the settlement of a fiduciary's account may be vacated only for fraud or for good cause shown other than fraud, upon motion of any person affected by the order who was not a party to the proceeding in which the order was made and who had no knowledge of the proceeding in time to appear in it.

Under R.C. §2109.33, any person interested in an estate or trust may file exceptions to previous accountings even though they were not parties to those prior accounts.

Revised Code §2109.33 states that

[i]f the person to be notified was not a party to the proceeding in which any prior account was settled, the notice, for the purpose of barring any rights possessed by that person, may include and specify the prior accounts and the periods of time covered by them. In that event, the notice shall inform the person notified that the approval of the account filed most recently will terminate any rights possessed by him to vacate the order settling each prior account so specified... and shall further inform the person that, under penalty of losing those rights, he forthwith shall inquire into its contents, and, if he deems it necessary to

protect his rights, shall take the action with respect to his rights that is permitted by law.

In order to determine whether the Exceptors have the ability to object to prior accounts, the substance of the notice sent to them by the Trustee must be examined.

It is uncontroverted that while the accounts filed in this trust were matters of public record, none of the Exceptors received actual notice of the filing of any of the accounts until the Eighth Current Account was filed. The Exceptors presented enough evidence to raise the question of whether the Trustee breached his duties as a fiduciary. The First District Court of Appeals has held that in such instances, the Exceptors should have the opportunity to inquire into the previous accountings. *In re Estate of Kissel* (Dec. 20, 1995), Hamilton App. No. C-950080, unreported.

The Trustee further argues that the Exceptors have not demonstrated that they had no timely knowledge of the previous accounts in order to appear in the prior proceedings. While the Trustee published notice of the filing of the previous seven accounts, such constructive notice has been constitutionally denounced. See, e.g. *Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 70 S.Ct. 652; *Palazzi v. Estate of Gardner* (1987), 32 Ohio St.3d 169. Although it took over forty years since *Mullane* was decided, the Ohio General Assembly finally recognized the constitutional deficiency of R.C. §2109.33 and therefore amended that statute in 1994. Under the amended R.C. §2109.33, the first accounting that the remainder beneficiaries received actual notice of the filing of the account was the Trustee's Eighth Current Account. That the remaindermen objected to the Eighth and previous accounts after they received actual notice of the filing of the Eighth account demonstrates the wisdom behind the

amendments to R.C. §2109.33. The Exceptors were simply never aware of the Trustee's activities. Had they received notice of the Trustee's Sixth Current Account, the Court would not be addressing their objections today. Consequently, the Court finds that neither the lapse of time nor the fact that the Court approved and settled prior accounts prohibits the Exceptors from bringing their objections.

Joseph A. Woltering took several commendable steps to diminish the conflict of interest which existed as a consequence of his individual ownership of all of the outstanding shares of Crown Industries. The Crown Industries Committee approved the purchase and the life beneficiary was represented by counsel. However, as Trustee who sold the Trust's stock back to the corporation which he owned, he failed in one major respect by not obtaining this court's approval. Revised Code §2109.44 prohibits a fiduciary from buying or selling to themselves and "shall not have in their individual capacities any dealings with the estate, except as expressly authorized by the instrument creating the trust and then only with the approval of the probate court in each instance." Despite the Trustee's attempts to negate the applicability of R.C. §2109.44 to this case by distinguishing his role as individual shareholder from that of Trustee and from that as the C.E.O. of Crown Industries, such a demarcation cannot be made. Certainly, the sale of stock increased the amount of income available to the income beneficiary of the Trust. However, it also directly and indirectly benefited Joseph Woltering individually in his capacity as his brother's sole heir and as the sole shareholder of Crown Industries.

The Trustee further defends his conduct on the grounds that the express language in the trust instrument authorized the sale of the Crown Industries stock. The testator plainly wanted his wife or sons to be able to deal with the trust "as though they were

strangers thereto” and that they be able to sell, exchange, transfer or convey any property held by them without “court order or other legal formality”. It is well settled that a probate court should use the express language of an instrument to ascertain and effectuate the intent of a settlor or testator. *Fifth Third Bank v. Crosley* (Hamilton Co. 1996), 79 Ohio Misc.2d 10, 15. Under the terms of A.J. Woltering’s will, it is clear that he intended for his trustee and the Crown Industry Committee to act independently and he attempted to minimize their exposure to liability. However, there is an exception to the general rule that a testator’s intent should be effectuated. That is, if the testator’s intent is contrary to law or public policy, then it may not be fulfilled. *Volkema v. Hanover* (1968), 15 Ohio App.2d 23. Because of the mandatory provisions of R.C. §2109.44, the Trustee was required to obtain court approval despite the purported authority granted in the trust to act independently. Consequently, the Trustee breached his fiduciary duty by self-dealing with the trust without this court’s approval.

Having established that the Court should hear the Exceptors’ objections and that the Trustee did breach his fiduciary duty by allowing Crown Industries to purchase the Trust’s holdings in that company, the Court shall now turn to an examination of what damages may be assessed. As the Exceptors’ own expert witness testified, an appraisal of a closely held corporation is an inexact science. Further, as acknowledge in Rev. Rul. 59-60, 1959-1 C.B. 237, an appraiser will find wide differences of opinion as to the fair market value of a closely held corporation’s stock. The Exceptors, however, have narrowed their objections to the price obtained for the stock and the interest rate that was used to finance the purchase. The Court finds the interest rates used to finance the purchase were fair and reasonable and shall not be set aside. With respect to the price of

the stock sold, however, the Court finds that the price was undervalued so that Crown Industries shall pay to the Trust the difference as described below.

Even though the Exceptors challenged the Trustee's appraisal, they did not attack the actual figures used by the appraiser. The Exceptors' expert witness was not an appraiser and the Court recognizes that fact. However, the Court finds that a more reasonable per-share price should be \$4,229.00.

In appraising a closely held corporation, Rev. Rul. 59-60 states that numerous factors should be considered, including the corporation's book value. If that were the sole criteria, a reasonably accurate value per share would be \$5,822.00. According to Rev. Rul. 59-60 however, book value is but one factor to consider. The evidence showed that based upon Crown Industries' history and economic outlook, the sale price should be less than book value but more than what the corporation actually paid.

The Exceptors believe a 30 percent minority discount was inappropriate. The evidence, however, showed that the converse is true and that such a discount is appropriate. On the other hand, the appraisal relied upon to establish the sale price was two years old at the time of the purchase. While it is clear a more timely appraisal is needed to accurately establish a sale price, it is less clear how that defect should be remedied. The evidence indicated that by adjusting for capital improvements that were not made, but which the appraiser used in his calculation, and by adjusting for receivables which the company had little trouble collecting, the per-share sale price of \$2,600.00 would have to be increased to more accurately reflect market value. The Court finds a more reasonable price per share is \$4,229.00, which includes a 30 percent

discount. Accordingly, Crown Industries must repay to the Trust the difference of \$1,629.00 for each of the 100 shares it redeemed in December of 1990.

The last issue to address concerns the Trustee's application for Trustee's fees in the amount of \$23,264.62 for the period from September 10, 1974 to January 10, 1996. According to Hamilton County Probate Court Local Rule 43.1(B), a trustee may charge fees on the same basis as is currently being charged by the banking institution with which the trust is doing business. According to the fees charged by the First National Bank of Southwestern Ohio, the fees charged to the trust during the period in question would amount to those requested by the Trustee. However, the rules in effect for this court from 1975 to 1982 would limit the requested fee by \$1,398.95 to \$21,865.67. The Court finds that the accounting fees paid by the trustee in the amount of \$2,116.00 were proper and reasonable. Accordingly, the amount requested by the Trustee is not unreasonable. But for policy reasons, the total fee cannot be granted.

The Trustee should be barred from receiving the full fee under the equitable doctrine of laches. Under that doctrine, a party may be denied relief *inter alia* when there has been an unreasonable delay or lapse of time in asserting a right and the absence of an excuse for the delay. *State ex rel. Meyers v. Columbus* (1995), 71 Ohio St.3d 603, 605. Since the Trustee has been represented by counsel since the inception of the trust, there is no reasonable explanation why the Trustee has not previously applied for such fees. However, because the Court is setting aside the stock redemption which occurred during the period of the Seventh Current Account, the Trustee may receive reasonable fees from that date forward. Accordingly, the Court grants Trustee's fees for the period of January

1, 1990 to December 31, 1995 in the amount of \$9,205.11, said amount exclusive of that paid for professional accounting services described above.

SO ORDERED.

WAYNE F. WILKE, JUDGE

cc: Lawrence Kyte
Beth Myers
Stephen Black
Michael Miller
William Baechtold