

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

**IN RE: TRUST AGREEMENT OF** :  
**JACK D. and ARDELLA M. HEISER** : **No. 41-03-0187 and 41-94-0126**  
: **ORPHANS COURT DIVISION**

**OPINION AND ORDER**

Before this Honorable Court, is Helen L. Shaffer's (Petitioner) Petition to Remove Trustees, Appoint a Successor Trustee and for Contempt filed on January 2, 2007.

***Background***

The Trust was created by the Jack D. Heiser and Ardella M. Heiser (Settlors) Trust Agreement dated November 11, 1992. The Trust agreement provided that the Trust was to be divided into three equal parts upon the death of the Settlers, with one equal part each being paid over to the Settlers' sons and the other being held in trust. Under the Trust Agreement, Jack D. Heiser, Jr. and Robert S. Heiser, as Trustees are to pay the net income of the Trust to the Settlers' daughter, Helen L. Shaffer, for and during her life. The Trust also gives the Trustees the ability to make distributions to Petitioner out of the principal in order to provide for her adequate support, maintenance, welfare and comfort. Upon Helen L. Shaffer's death, the principal and accumulated income is to be divided into two equal parts. One part is to be distributed outright to Petitioner's daughter, Stacy R. Shaffer (Bray) and the other part is to be held in Trust for Petitioner's son, Stephen R. Shaffer. Jack D. Heiser and Ardella M. Heiser died on September 3, 1993 and February 16, 2003, respectively. Robert S. Heiser renounced his position as Trustee at some point between the creation of the Trust and the present. Jack D. Heiser, Jr. (Respondent) is the sole remaining Trustee.

On May 10, 2006, Petitioner filed a Petition by Beneficiary to Cite Trustees, Pursuant to 20 Pa.C.S.A. § 7181, to Render Account and Report of Administration. Petitioner filed this

petition after sending two letters to Respondent's counsel, one dated August 31, 2005 and the other February 8, 2006, in which Petitioner requested from Respondent an accounting. Respondent failed to provide any accounting. A hearing was held on Petitioner's motion on July 27, 2006. The Court discussed the Order it would be issuing in open court, which required the Respondent to provide a full and complete accounting of the Trust's administration for the time period beginning January 1, 2005 through July 31, 2006, on or before August 28, 2006. Respondent was also ordered to provide a copy of the Trust's tax returns for 2005. On August 30, 2006, Respondent filed his accounting. On September 15, 2006, Respondent provided Petitioner with copies of the 2005 tax returns.

On January 2, 2007, Petitioner filed a petition requesting that this Court Remove Respondent as Trustee, Appoint a Successor Trustee, and to find Respondent in Contempt. Testimony on this petition was taken on July 30, 2007. However, after an in chambers discussion, Petitioner requested that this Court defer ruling on this petition, pending a ruling on a petition yet to be filed by Petitioner to terminate the Trust. On July 30, 2007, this Court issued an Order deferring its decision on the instant Petition.

On August 1, 2007, Petitioner filed the Petition to Terminate the Trust. A hearing on this petition was held on September 20, 2007. Following this hearing, Counsel filed briefs and on December 7, 2007, this Court denied the petition. However, in its ruling, the Court provided that Petitioner could "renew its request of this Court to schedule a hearing or to rule on the evidence presented," with regard to the Petitioner's instant petition. Petitioner requested that this Court rule on the evidence of record which had been presented at the July 30, 2007 hearing.

Petitioner's fundamental position in support of the request to Remove Trustee is that Respondent has failed to properly administer the Trust. Petitioner specifically alleges that she has

not received any distributions from the Trust since March 2004, and points to Respondent's own accounting as proof thereof. Petitioner argues that when she has requested distributions from the Trust, Respondent has refused to provide such distributions until the present litigation has ended. Petitioner also alleges that Respondent has failed to provide a full and complete accounting, and therefore, fails to fully apprise her of the status and size of the Trust. Petitioner further asserts that Respondent has made improper distributions to himself. Finally, Petitioner argues that Respondent has generally been wasteful of trust assets.

In opposition, Respondent alleges that Petitioner has failed to meet her burden to prove by a preponderance of the evidence the allegations in her Petition. Respondent alleges that Petitioner has not presented sufficient evidence as to how removing the Trustee would be in her best interest. Respondent also asserts that under the Trust agreement, he was given authorization to pay over trust principal to Petitioner in his sole and absolute discretion. As such, Respondent argues that the decision of trustees to provide principal distributions upon Petitioner's request "cannot, and should not, be subject to 'second guessing' by the Petitioner, or for that matter, this Court." Further, Respondent argues that he provided a full and complete accounting pursuant to the Court's Order. Specifically, Respondent argues that he provided Petitioner with documents entitled: "Trust Income, Jan. 2005 – June 2006, Trust Expenses, Jan. 2005 – July 2006, Distributions made by the Trust to Helen Shaffer, Division of the Trust, and the 2005 Trust tax returns." Finally, Respondent asserts that under the standard for contempt set out in Pennsylvania Case Law, Respondent did not commit contempt of court.

### ***Discussion***

#### ***Removal of Trustees***

Under Pennsylvania’s Uniform Trust Act, a trustee has a duty to “administer the trust in good faith, in accordance with its provisions and purposes and the interests of the beneficiaries and in accordance with applicable law.” 20 Pa.C.S.A. § 7771. Further, 20 Pa.C.S.A § 7772(a) states that, “[a] trustee shall administer the trust solely in the interests of the beneficiaries.” Moreover, 20 Pa.C.S.A § 7774 requires a trustee to “administer the trust as a prudent person would, by considering the purposes, provisions, distributional requirements and other circumstances of the trust and by exercising reasonable care, skill and caution.” A trustee’s discretionary powers must [also] be exercised “in good faith and in accordance with the provisions and purposes of the trust and the interests of the beneficiaries, notwithstanding the breadth of discretion granted to a trustee in the trust instrument, including the use of such terms as ‘absolute,’ ‘sole’ or ‘uncontrolled.’” 20 Pa.C.S.A § 7780.4.

Also under Pennsylvania’s Uniform Trust Act, a trustee commits a breach of trust when the trustee violates a duty owed to the beneficiary. 20 Pa.C.S. § 7781(a). A court may remove a trustee upon request of a beneficiary,

if [the court] finds that removal of the trustee best serves the interests of the beneficiaries of the trust and is not inconsistent with a material purpose of the trust, a suitable cotrustee or successor trustee is available and:

- (1) the trustee has committed a serious breach of trust;
- (2) lack of cooperation among cotrustees substantially impairs the administration of the trust;
- (3) the trustee has not effectively administered the trust because of the trustee’s unfitness, unwillingness or persistent failures; or
- (4) there has been a substantial change of circumstances.

20 Pa.C.S.A § 7766(a)-(b). If the Court removes a trustee, it “may order appropriate relief under section 7781(b) . . . as may be necessary to protect the trust property or the interests of the beneficiaries.” 20 Pa.C.S.A § 7766(c). Among other remedies Section 7781(b) of the Uniform Trust Act provides that the Court can require the trustee to file an account, pay money, restore

property, or by other means remedy the breach. In this case, the Court finds that Respondent has committed several serious breaches of trust and is unfit, unwilling, and has persistently failed to effectively administer the Trust.

First, according to the terms of the trust, Petitioner is to receive “income for and during the term of her life.” The Trust provides that Petitioner is to receive the income; she does not have to make a demand for it. However, Petitioner has not received any distribution from the Trust since March of 2004. Petitioner also has requested principal from the Trust, which Respondent stated in an email that he would not pay to Petitioner until the present litigation ended. While Respondent is authorized to make principal distributions in his sole and absolute discretion, he must still exercise his power in good faith under Section 7780.4. Here, Respondent is not effectively administering the trust due to his failure to provide income to Petitioner in accordance with the terms of the Trust. Additionally, Respondent is not acting in good faith, is clearly in breach of his fiduciary duties, and is merely withholding income and principal as Petitioner argues in her brief, “in an effort to extort an end to litigation.”

Respondent has further committed a serious breach of trust and is unfit to administer the Trust due to his investment in worthless shares. As Trustee, Respondent is in a fiduciary relationship with Petitioner, “which implies and necessitates great confidence, trust, candor and the highest degree of good faith to act, and advocate, for the benefit of the other as to matters within the scope of the relationship.” Miller v. Keystone Ins. Co., 636 A.2d 1109, 1116 (Pa. 1994). Schedule D of the income tax return for 2005 shows over \$16,000.00 in losses on worthless shares. The Court finds that although the Trust document grants Respondents unfettered discretion to make foolish investments, that under Section 7772(a), the investments must still be made in the best interest of the beneficiary. As this Court finds no support either in

the law or facts to justify Respondent's investment in worthless shares, Respondent has breached his fiduciary duties to Petitioner, committed a serious breach of trust, and is unfit to administer the Trust.

In addition, the Court also finds that Respondent committed a serious breach of trust by failing to provide Petitioner with a full and complete accounting. On two separate occasions Petitioner sent letters to Respondent's counsel requesting an accounting from him. Respondent failed to provide said accounting, therefore, Petitioner filed the instant petition. At the hearing on Petitioner's Petition on July 27, 2006, in which Respondent was present, the Court clearly spelled out the terms of its Order issued July 28, 2006. The Order specifically required a "full and complete accounting", for the time period beginning January 1, 2005 through July 31, 2006, to be filed no later than August 28, 2006. The accounting was to include "all distributions made from the trust, income to the trust, administration expenses, and fees paid to the trustees [and was also to include] all information regarding the trust distribution to the trustees of their one third (1/3) share." Further, Respondent was ordered to file a copy of the Trust's tax returns for 2005. Respondent did not file the accounting until August 30, 2006 and the tax return until September 15, 2006. This Court finds that the accounting fails to fully apprise Petitioner of the state of the trust. Specifically, the accounting fails to indicate the nature of the capital gains reported, the nature of the trust expenses, and the size of the trust at the beginning of the subject period and at the end of said period. The Court finds Respondent's failure to file a full and complete accounting is a serious breach of trust and that he is unfit, unwilling, and has persistently failed to effectively administer the trust.

Finally, Respondent has committed a serious breach of Trust by making what appear to be improper distributions to himself. Testimony by the Respondent established that the Trust had

been divided as of the end of 2005. Respondent stated at the hearing on July 27, 2006 that “[a]s of the end of 2005 my brother and I have been extracted out of the trust. . . . 2006 forward the only portion of the trust remains is the third that was allocated to Helen Shaffer.” N.T. 7/27/06 p. 26. However, the “full and complete” accounting provided by Respondent shows that the Trustees received distributions in the amount of \$8,858, as late as February 2006. Although, Respondent argues in his brief that this distribution was the final distribution effectuating a trust requirement and not a share of Petitioner’s Trust, from Respondent’s own testimony the Trust was divided by the end of 2005. Therefore, the Court assumes that the distributions made to Respondent in 2006, were out of the principal and thus part of Petitioner’s share of the Trust. However, due to Respondent’s failure to provide a full and complete accounting, the Court is unable to determine the extent of the damage by Respondent in making distributions to himself and also by his investment in worthless shares.

The overriding purpose of the Trust and intent of the Settlers’ is to provide income to Petitioner for life. However, Respondent has frustrated this purpose by failing to distribute income to Petitioner, refusing to provide Petitioner with information regarding the Trust and wasting the Trust’s resources on worthless investments. The Court finds that not only has Respondent committed several breaches of trust and breached his fiduciary duties; he also has not effectively administered the Trust due to his unfitness, unwillingness, and persistent failures. Therefore, Petitioner’s Petition to Remove Trustees and Appoint a Successor Trustee is granted. As a result, Respondent will be ordered to file with this Court a full and complete accounting in compliance with Pa. Orphans’ Court Rule 6 and Lyco. Co. O.C.R. L6.1 within thirty (30) days of the date of this Order. If the Court determines after a review of said accounting that Petitioner is entitled to damages, the Court will award damages as provided under 20 Pa.C.S.A § 7781(b).

***Contempt***

“When holding a person in civil contempt, the court must undertake (1) a rule to show cause; (2) an answer and hearing; (3) a rule absolute; (4) a hearing on the contempt citation; and (5) an adjudication of contempt.” In re Cullen, 849 A.2d at 1211. In order for one to be held in civil contempt under Pennsylvania law, the complaining party must demonstrate by a “preponderance of the evidence, that the defendant is in noncompliance with a court order.” In re Cullen, 849 A.2d 1207, 1210 (Pa. Super. Ct. 2004).

In this case, the Court held a hearing on July 30, 2007 on Petitioner’s Petition to Remove Respondent as Trustee, Appoint a Successor Trustee, and to find Respondent in Contempt. Although a hearing was held, testimony in regards to the Contempt Motion was not heard because Petitioner requested that this Court defer ruling on this petition, pending a ruling on a subsequent petition to be filed by Petitioner to terminate the Trust. Accordingly, the Court issued an Order on July 30, 2007, deferring its decision on the instant Petition. The Court believes Respondent failed to comply with its Order of July 28, 2006. However, since specific testimony from the Respondent in response to Petitioner’s Petition to find Respondent in Contempt has not yet been heard, the Court cannot at this time rule on the Petition.

**ORDER**

**AND NOW**, this \_\_\_\_ day of March 2008, after hearing and argument on the Petitioner’s Petition to Remove Trustee and Appoint a Successor Trustee, the same is hereby **GRANTED**. It is **ORDERED** and **DIRECTED** that Woodlands Bank is appointed Successor Trustee of the Trust Agreement of Jack D. Heiser and Ardella M. Heiser.

Respondent is further ORDERED AND DIRECTED to file with this Court a full and complete accounting in compliance with Pa. Orphans' Court Rule 6 and Lyco. Co. O.C.R. L6.1 within thirty (30) days of the date of this Order. The accounting will serve two purposes: one, for the Court to determine if the Trust suffered any damages and if so, the extent of such damage; and two, to provide the most recent information to the Successor Trustee. Upon review of said accounting, if the Court determines that Petitioner is entitled to damages, the Court will award damages as provided under 20 Pa.C.S.A § 7781(b).

As to Petitioner's Petition for Contempt, the Court finds that complete testimony was not taken on this issue and cannot rule on the motion at this time. A hearing on the Contempt Petition will be held on **May 27, 2008, at 9:30 a.m.** in Courtroom No. 4, Lycoming County Courthouse, Williamsport, Pennsylvania 17701.

By the Court,

Nancy L. Butts, Judge

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