

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

IN RE: : **No. 41-92-0379**
WALTER SMITH TRUST, :
: **ORPHAN'S COURT DIVISION**
:
: **Opinion and Order re: Petition to Invade**
: **Principal**

OPINION AND ORDER

This matter came before the court on the petition to invade principal filed by Peggy (Keiss) Miller. The relevant facts follow.

Petitioner Peggy (Kiess) Miller is a 70-year old resident of Bullhead City, Arizona. Respondent is Muncy Bank and Trust, the successor trustee under a trust established by the Last Will and Testament of Walter Smith, Petitioner's father. After the death of Petitioner's father and his wife, a portion of the trust was paid to certain charities and the remainder was held in trust for the children of decedent and the children of his wife. Since there were three children, the trust was divided into three equal shares pursuant to the terms of the Will. At the time the petition was filed, Petitioner's trust share was valued at approximately \$284,000.

The relevant trust provision states:

Any share set aside for a living child of mine or my wife's shall be held for such child on the following terms:

(1) One-half the income shall be paid to the child at least quarterly. The balance of the income shall be accumulated and added to principal.

(2) After considering other available resources and economies of taxation, Trustees may use principal for the support, education and health care of the child and his or her issue.

Last Will and Testament of Walter Smith, Paragraph C(1) and (2), which is attached to the Petition as Exhibit A. The provisions of the trust also indicate that if Petitioner dies without issue, her trust share gets distributed to certain charities listed in Paragraph B of the Will.

Last Will and Testament of Walter Smith, Paragraph C(4).

Petitioner has made repeated requests for Respondent/Trustee to invade principal for the purpose of paying her rent, paying medical bills, purchasing a vehicle and other items. The only payments that have been made have been for medical bills.

Respondent/Trustee has denied the other requests.

On September 14, 2012, Petitioner filed her petition to invade principal, in which she claims Respondent/Trustee is unreasonably denying or withholding principal payments for her support. She seeks an order from the court to direct the Respondent/Trustee to distribute principal to pay Petitioner's rent annually from this point forward,¹ and to purchase a 2013 Toyota Highlander and service contract at a cost of \$55,917.53 (see Petitioner's brief, Exhibit C). Petitioner takes the position that these are items of maintenance and support. She also cites In Re Demitz Estate, 417 Pa. 316, 208 A.2d 280 (1964) and In Re Estate of Tashjian, 375 Pa. Super. 221, 544 A.2d 67 (1988) for the propositions that the existence of an independent estate is not justification to refuse principal for maintenance and support and that, by establishing a testamentary trust, the testator intended to relieve the beneficiary of the need to pay for living expenses out of her own funds. Respondent argues that these cases are distinguishable in that there was no language in the trust documents requiring the trustee to consider other available resources.

¹ According to the court's calculations, Petitioner's annual rent would be \$8,700 ($\$725 \times 12 = \$8,700$).

Given the express language of the trust in this case, the Court must reject Petitioner's argument that Respondent/Trustee should have simply invaded principal to pay for the requested items without consideration of Petitioner's resources. Although the cases cited by Petitioner state the general rule that the existence of an independent estate is not sufficient justification for a trustee's refusal to pay principal for maintenance and support, this is not an iron-clad rule that must be applied in all cases without exception. The Superior Court aptly noted in Tasjian that:

[T]he general rule described in Demitz' Estate, should not be rigidly or mechanically applied. In any case involving the interpretation of a testamentary trust, the primary goal of the court is to effectuate the intent of the testator. Moreover, in order to ascertain testamentary intent, a court must focus first and foremost on the precise wording of the will, and if an ambiguity exists, on the circumstances under which the will was executed. Only if the testator's intent remains uncertain may the court then resort to general rules of construction.

544 A.2d at 70. The language of the will is clear that Respondent/Trustee must consider "other available resources and economies of taxation." Therefore, Respondent/Trustee did not abuse its discretion simply because it considered Petitioner's Franklin Templeton Investments account. While there may be some ambiguity regarding what the testator meant by the term "other available resources" and how he expected the trustee to consider them, it is clear to the Court that the testator wanted Trustee to consider Petitioner's resources and not to follow the general rule described in Demitz' Estate.

Petitioner seems to argue that even if one considers the Franklin Templeton Investments account as well as her income, Trustee abused its discretion by failing to invade principal. The Court, however, cannot determine Petitioner's income and assets due to the

lack of an adequate record in this case.

The parties declined an evidentiary hearing in this case, electing instead to rely on the facts as set forth in their briefs. Unfortunately, there are discrepancies in the parties' briefs regarding Petitioner's monthly income and the value of the Franklin Templeton Investments account.

Petitioner's brief states: "Petitioner's monthly income is approximately \$734.00 per month. She has an investment account with Franklin Templeton, from selling her home, with an approximate balance of \$54,000. Every month she withdraws \$600 from this account for additional support. This is her sole source of income. Respondent has no retirement or other types of investments.... Petitioner's rent is \$725.00 per month. She lives a modest lifestyle as can be observed by reviewing 'Exhibit A.' Petitioner is married. Her spouse has an income of approximately \$1700.00 per month in Social Security. This is his only income."

Respondent accepted Petitioner's recitation of facts subject to the following exceptions: "(1) the Petitioner's Franklin Templeton Investments account had a June 30, 2012 Total Account Value of \$116,823.12... and not \$54,000 as the Petitioner has alleged; and (2) the Petitioner's monthly distributed dividend is approximately \$625 and her monthly "Systematic Withdrawal" is \$275.00. It is noteworthy that Paragraph 7 of the Petitioner's September 14, 2012 Petition states that the Petitioner 'lives on Social Security retirement only' but her Brief states that her Franklin Templeton Investments account 'is her sole source of income....(and that she) has no retirement...'"

The Court has no difficulty in concluding that the value of Petitioner's

investment account with Franklin Templeton was approximately \$116,823 as of June 30, 2012.² See Petitioner's Brief, Exhibit B. It appears that Petitioner inadvertently listed her "total shares" as the account value in her brief. Exhibit B also shows that Petitioner receives a dividend from this account of approximately \$625 per month and she withdraws an additional \$275 from this account each month. Each time she makes a systematic withdrawal, however, it reduces her monthly dividend, because the dividend is calculated based on her total number of shares multiplied by the dividend rate, which in 2012 was .0115 per share.

Due to discrepancies between the petition, Petitioner's brief, and Exhibit B, it is unclear what Petitioner's total monthly income actually is. Her petition indicates that Petitioner "lives on social security income only," however her brief states she has no retirement or other types of investment. Her brief also indicates that her monthly income is \$734 per month and she withdraws \$600 from her Franklin Templeton Investments account for additional support. Exhibit B, however, indicates that Petitioner receives a monthly dividend of approximately \$625 and she withdraws an additional \$275 per month from the Franklin Templeton Investments account. The Court cannot discern whether Petitioner

² Although this asset must be considered, the Court does not believe it automatically precludes the trustees from invading principal. Since Respondent has invaded principal for medical bills, it appears that Respondent also shares this belief. The Court also believes due consideration should be given to the fact that the dividends from this asset are part of Petitioner's income stream and the decrease in her dividend income that results from withdrawals could be as significant a factor to Petitioner's long term financial well-being as the dollar amount or total account value, if not more so.

receives \$734 in social security or other income, \$625 in dividends and \$275 in systematic withdrawals or if the \$625 in dividends is included in the \$734 amount and Petitioner inadvertently listed her withdrawal as \$600 instead of \$275. Furthermore, neither party mentions the amount of interest income Petitioner receives at least quarterly from the trust. Therefore, the Court is unable to determine the amount of Petitioner's income.

Petitioner also seeks a vehicle at a cost of nearly \$56,000, which does not include any trade allowance. Petitioner's expense statement, however, lists a car payment of \$494 per month. Thus, one can infer that Petitioner already has a vehicle. There is nothing in the record to indicate the year, make and model of Petitioner's current vehicle or the reason that she needs either a new vehicle or a second vehicle. Such information could have an impact on whether a vehicle would be considered an item of support or maintenance in this case.³

Based on the record, or the lack thereof, the Court cannot conclude that Respondent/Trustee abused its discretion in this case.

³In accordance with paragraph 1 of the Order dated November 16, 2012, Respondent and two individual trustees considered Petitioner's requests to invade principal for rent and a vehicle. Although the trustees declined to invade principal for Petitioner's requests, they indicated a willingness to revisit the requests upon receipt of personal financial statements for both Petitioner and her husband, which would disclose all assets, including vehicles, investment accounts, IRAs and pension plans. The Court would encourage Petitioner to avail herself of this opportunity. As is probably evident from the Court's discussion regarding Petitioner's income and her request for a vehicle, the Court was left with more questions than answers based on the lack of a record in this case. Perhaps these questions, or even this litigation, could have been avoided if financial statements were completed and there was some brief statement regarding the reasons for or rationale behind the vehicle request.

ORDER

AND NOW, this ____ day of March 2013, the Court DENIES the petition to invade principal.

By The Court,

Marc F. Lovecchio, Judge

cc: Denise Dieter, Esquire
Peter Facey, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)