

=====  
This opinion is uncorrected and subject to revision before  
publication in the New York Reports.  
-----

4                   No.    122  
In the Matter of the Estate of  
Burton Wallens, Deceased.  
Maggie Wallens,  
                                  Appellant;  
Charles Wallens,  
                                  Respondent.

Timothy A. McCarthy, for appellant.  
Bruce S. ZefTel, for respondent.

PER CURIAM:

          In this proceeding seeking judicial settlement of  
accounts of a co-trustee, we conclude that an issue of fact  
exists concerning whether the co-trustee breached his fiduciary  
duty to the trust beneficiary. Accordingly, we direct  
Surrogate's Court to conduct an evidentiary hearing on this

matter.

In March 1992, testator Burton Wallens executed his last will and testament that, among other things, provided for the establishment of a \$200,000 testamentary trust for the benefit of his granddaughter, petitioner Maggie Wallens (Maggie), then age 10. The will designated Maggie's father, respondent Charles Wallens (father), and the testator's cousin, attorney Richard D. Yellen, as co-trustees. In relevant part, the trust stated that

"the Trustees may distribute to [Maggie] or apply for her sole benefit so much of the income at any time and from time to time such amount of the principal thereof per year of her Trust Estate as the Trustee shall deem advisable for her proper support, education, maintenance and general welfare or may, in the Trustee's discretion, accumulate so much of the income not so distributed or applied. Any income so accumulated may be invested or reinvested or may thereafter be distributed to aid [Maggie] or applied for her benefit."

The trust further provided that it would terminate when Maggie turned 30 years old with any remaining principal and accumulated income being distributed to her.

In March 1995, after the execution of the testator's will, but prior to his death, Maggie's mother and father divorced. At that time, Maggie was 13 1/2 years old and attending a private school. A year earlier, the parents had entered into a separation agreement in which father agreed to pay mother child support and certain education and health care costs for Maggie, including the cost of the private school education.

The 1995 judgment of divorce, which incorporated, but did not merge, the provisions of the separation agreement, required father to pay, among other things, (1) "all educational expenses for [Maggie] at Elmwood-Franklin School, Nichols, and/or any other private day school the child shall attend, and at college and/or university" and (2) "any and all uninsured medical and dental expenses for the child."

In March 1997, the testator died. The will was admitted to probate and father was appointed co-trustee of the testamentary trust, together with Richard Yellen (who later resigned in 2002). At this time, father, as co-trustee, began distributing payments out of the trust for Maggie's private school education expenses. These payments were authorized by co-trustee Yellen. After Maggie began living with her father, he petitioned for a reduction/elimination of his child support obligations. In August 2000, Supreme Court issued an order relieving father of his child support obligations and directing that "the trust established by the [testator] for the benefit of the child shall be used to pay for normal and customary college costs and expenses."

In April 2003, pursuant to a petition for an accounting filed by Maggie, Surrogate's Court directed father to judicially settle his account as co-trustee. Father filed his account and Maggie objected, as pertinent to this appeal, to father's payment of her secondary school education and certain health care

expenses from the trust. In her objections, Maggie alleged that the 1995 judgment of divorce required father to personally pay for certain educational and medical expenses, rather than use trust funds that would be distributed to her on her 30th birthday.

In March 2005, Surrogate's Court directed an evidentiary hearing, but a review of the record reveals that no such hearing was held. The court nevertheless sustained Maggie's objections to the use of trust funds for her private secondary school education, health care expenses and reimbursements for her personal allowance and ordered repayment to the trust. It rejected, however, her claim that the expenditures related to her college education were improper, finding that such expenditures were authorized under the August 2000 Supreme Court order.

On appeal, the Appellate Division modified the order, dismissed the objections in their entirety, and remitted the matter to Surrogate's Court for further proceedings consistent with its decision. The Appellate Division concluded that "[father] did not engage in self-dealing, in breach of his fiduciary obligations to [Maggie] by his use of trust funds in precisely the manner authorized by the testator in the will provision establishing the trust" (Matter of Wallens, 30 AD3d 962, 965 [4th Dept 2006]). Upon remittal, Surrogate's Court approved the account. For the reasons that follow, we conclude that a remittal is, once again, necessary for Surrogate's Court

to conduct a hearing as to whether father carried out his fiduciary duty as a co-trustee to act, in good faith, in his daughter's interests.

To determine whether a trustee's distribution of trust assets was proper, the settlor's intent controls (see Matter of Chase Manhattan Bank, 6 NY3d 456, 460 [2006]). "[T]he trust instrument is to be construed as written and the settlor's intention determined solely from the unambiguous language of the instrument itself" (id., quoting Mercury Bay Boating Club, 76 NY2d at 267).

It is also well settled that "a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect" (Birnbaum v Birnbaum, 73 NY2d 461, 466 [1989], citing Meinhard v Salmon, 249 NY 458, 463-464 [1928] [other citation omitted]). As Chief Judge Cardozo famously stated, "[a] trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior" (Meinhard, 249 NY at 464). "This is a sensitive and 'inflexible' rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty" (id. [internal citations omitted]). We have recognized that a "trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary"

(Matter of Heller, 6 NY3d 649, 655 [2006], quoting Restatement [Second] of Trusts § 170 [1]; see also Mercury Bay Boating Club v San Diego Yacht Club, 76 NY2d 256, 270 [1990] ["(T)he trustee must administer the trust for the benefit of the beneficiaries and cannot compete with the beneficiaries for the benefits of the trust corpus"]).

In this case, we agree with the Appellate Division that the education and medical expenditures at issue fall within the class of expenditures authorized by the trust since the terms of the trust explicitly permit trust funds to be used for Maggie's "support, education, maintenance and general welfare." But even when the trust instrument vests the trustee with broad discretion to make decisions regarding the distribution of trust funds, a trustee is still required to act reasonably and in good faith in attempting to carry out the terms of the trust (see Matter of Bruches, 67 AD2d 456 [2nd Dept. 1979]; In re Abert's Estate, 118 NYS2d 864 [Sur Ct, New York County 1950]). Although father sought and obtained court approval to access the trust for Maggie's college expenses, he did not secure judicial approval to use trust assets to pay his obligation regarding her secondary school tuition and certain medical expenses. Thus, we remit the matter to Surrogate's Court for a hearing to determine whether the expenditures were authorized in good faith and in furtherance of the beneficiary's interests.

Accordingly, the judgment of Surrogate's Court

appealed from and order of the Appellate Division brought up for review should be reversed, without costs, and the matter remitted to Surrogate's Court for further proceedings in accordance with the opinion herein.

\* \* \* \* \*

Judgment of Surrogate's Court appealed from and order of the Appellate Division brought up for review reversed, without costs, and matter remitted to Surrogate's Court, Erie County, for further proceedings in accordance with the opinion herein. Opinion Per Curiam. Chief Judge Kaye and Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

Decided October 18, 2007