NEW YORK STATE BAR ASSOCIATION
Trusts and Estates Section
Fall Meeting 2016

Roundtable Discussion
Section of Executors, Trustees, Guardians and Trust Protectors

Moderated by Christine Woodcock Dettor, Esq.,
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Trust Protector

- Trust protector originated with offshore trusts that required trustee could not be American – Settlors uncomfortable and included familiar person as "trust protector". ALI-ABA seminar "Trust Protectors: What Role Do They Play."

- UTC (adopted in ~ 28 states, not NY) § 808
  - Where trust is silent, trust protector = fiduciary (so long as not beneficiary); fiduciary responsibility can be negated by terms of the trust

- Restatement of Trusts 3d § 75
  - protector is fiduciary, so long as not a beneficiary

- Other states:
  - AK: trust protector as fiduciary, subject to terms of the trust

- NY:
  - no statute

- EPTL 11-2.3(c) allows trustee to delegate investment responsibility and proposed EPTL §11-2.2A (Directed Trusts) will permit an "investment trustee", (fiduciary) but no statute deals with non-trustee protector

Matter of Rubin

Key holdings:

1. Trust "advisor" permissible: "The simple explanation for the validity of the use of Special Trustees and Directors is another maxim: A grantor may give his gift subject to any terms and conditions he chooses, unless the terms are contrary to public policy or some such restriction applies. Therefore, certain powers can be withheld from the

Principal Trustee and delegated to others." Matter of Rubin, 143 Misc.2d 303, 305, 540 N.Y.S. 2d 944, 946 (Surr. Ct. Nassau Co. 1989)(internal citations omitted).

"…[S]uch provisions designating advisors and directors to fiduciaries can serve a useful purpose in implementing estate plans selected by testators." Id.

2. Relationship is that of a fiduciary: "Insofar as the status of an advisor is concerned, the courts have generally considered him a fiduciary, somewhat in the nature of a co-trustee." Id at 306-07, 947.

3. Fiduciary responsibility is inverse to that of named trustee (i.e. as advisor increases responsibility and gains fiduciary, trustee is relieved of liability, and vice versa): "Since the relationship between fiduciary and advisor is that of a co-trustee, with the advisor having the controlling power, the fiduciary is justified in complying with the directives and will not generally be held liable for any losses unless the instructions given him are improper or in violation of fiduciary duties owing to the beneficiaries." Id. at 307, 947. "The Restatement of Trusts (2d), section 185, provides that while ordinarily the fiduciary is under a duty to carry out the instructions of the advisor, if the trustee has reason to suspect the advisor is violating a fiduciary duty, the trustee is not under a duty to comply and may be liable if he does, and if the holder of the power insists upon compliance, the trustee is required to apply to the court for instructions." Id.

4. However, the court will only review the actions of an advisor upon proof of bad faith or improper motives. Id. at 308, 947.

In re Rivas

- Cites Matter of Rubin
- Holds that the named Advisory Committee in charge of investing the assets of the trust is "a de facto co-trustee…" based upon Rubin. In re Rivas, 30 Misc.3d 1207(A), 2011 WL 32792 at *5 (Surr. Ct. Monroe Co. Jan 5, 2011). "The members of the Advisory Committee, with a conferred fiduciary status, owe a duty of undivided and undiluted loyalty to those who interests [ ] the fiduciary is to protect. This rule is sensitive and inflexible." Id. (internal citations omitted).

- Only other reference in NY: New York State Law Revision Commission 2007 Recommendation on Proposed Revisions to the General Obligations Law Powers of Attorney, which states that "[t]he concept of a monitor is analogous to the concept of a 'trust protector.' A trust protector can be appointed by the settlor of a trust for a number of purposes, including to ensure that the settlor's wishes and intent are honored and/or to protect the interests of the beneficiaries of the trust." However, when the Commission's recommendation to add the option of a monitor to the Statutory Short Form Power of Attorney, the law specifically stated that the monitor is not a fiduciary. N.Y. Gen. Oblig. Law §5-1509 (McKinney's 2011).

Commentators:

- Drake L.R. Article – distinguishes trust advisor (investment decisions) and trust protector (any number of responsibilities). "[A] trust advisor is very likely a type of trust protector; a trust protector, however, is not always a trust advisor." 75.
    - "As a rule, if the protector is a beneficiary or a person who would be likely to be an object of the settlor's bounty; the presumption would be the power is personal to the extent it could benefit the protector. When the protector is someone to whom the settlor would be unlikely to direct a benefit of the trust, and when the protector serves primarily in an advisory role, it is likely the power is fiduciary in nature." 82.
    - Recommends including language in document regarding the nature of the power, although that is likely not dispositive, particularly if disinterested protector and/or maintains powers parallel, and perhaps exceeding those of the trustee. A Harvard Law Review article cited notes that "Exculpatory provisions will not receive a fiduciary of liability if the provision (1) does not cover the breach of duty involved, (2) is against public policy, or (3) was inserted in the instrument without knowledge and consent of the settlor." 93.

- Overwhelming authority indicates trust protector will likely be held to have fiduciary duty and therefore liability, but seems to be entirely a fact-based determination in New York State.

Sample Trust Protector Provision

(a) The "Protector" of each trust under this Agreement shall be _____. The Protector may be one or more individuals or corporations. Multiple Protectors shall act by majority.

(i) The Protector may appoint one or more persons to be successor Protector to take office upon the death, resignation, or incapacity of the Protector or any person serving as Protector.

(ii) After the death of the first of the Settlors to die, the Protector shall have the right to remove any Trustee of a trust under this Agreement, whether that Trustee is currently serving or named to serve in the future, other than the Surviving Spouse or a descendant of the Settlors. The Protector shall have the right to appoint an individual or corporation with fiduciary powers to replace the removed Trustee or whenever the office of Trustee of a trust becomes vacant.

(iii) Any person serving as Protector may resign.

(iv) The Protector's authority is not conferred in a fiduciary capacity, and the Protector shall not be liable for any action or inaction with respect to any trust hereunder. Furthermore, Protector shall be under no duty or requirement to monitor any Trustee of any trust hereunder, and shall be under no duty or requirement to

exercise these powers.

(v) No discretionary distribution shall be made from any trust that would discharge or substitute for a legal obligation of any person serving as Protector even if such a distribution otherwise would be authorized under the terms of the trust.

(vi) The Protector may release the Protector's power to remove a particular Trustee and such release may be limited to the releasing Protector or made binding upon any successor Protector.

(vii) If either Settlor is serving as the Protector, then the Protector shall not appoint as Trustee an individual or corporation that is related or subordinate to either Settlor within the meaning of Code Sec. 672(c) unless that individual or corporation would be an Interested Trustee. Additionally, no Protector shall appoint an individual or corporation that is related or subordinate to the Protector within the meaning of Code Sec. 672(c) when the Protector is an Interested Trustee, or would be an Interested Trustee if the Protector were serving as Trustee, unless that individual or corporation would also be an Interested Trustee. If more than one person is serving as Protector, the preceding sentence shall prohibit the appointment of any Trustee that could not be appointed by each such person if serving alone as Protector.

Sample Independent Trustee Provision

(a) Each individual Trustee (including successors) shall have the right to appoint a Co-Trustee and a successor individual Trustee by an instrument, in writing, such appointment to take effect upon the death, resignation or incapacity of the appointing Trustee. An appointment may be changed or revoked until it takes effect. If I have named a successor or successors to the appointing Trustee in this Will, the appointment of a successor under this paragraph shall take effect only if and when all Trustees that I have appointed fail to qualify or cease to act. In such an event an "Independent Trustee," as defined below, must be appointed.

(b) As used in this Will, the term "Independent Trustee" shall mean, collectively, all persons, corporations, partnerships or associations who have no beneficial interest vested or contingent in the property of the trust of which they are Trustees, who, with respect to an individual holding the power of appointment, are not "related or subordinate parties" as that term is defined in Section 672(c) of the Code. In addition, each must be one who can possess the powers vested in him or her without causing income or principal to be attributable to a trust beneficiary for federal income, gift or estate tax purposes prior to the actual distribution of such income or principal to such beneficiary.

(c) Designations of Co-Trustees and successor Trustees shall be by a notarized writing, submitted to Court having jurisdiction of the trust. Designations may be revoked until they become effective. Designations not revoked shall be effective in

the order of the date filed.

(d) Upon acceptance of the trust by a Co-Trustee or a successor Trustee, title to the trust property shall vest in the new and old Trustee (or in the new Trustee alone if there be no old Trustee then acting) without any conveyance or further formality. Any Trustee may resign at any time by a written instrument duly acknowledged and delivered to the beneficiaries.

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143 Misc.2d 303 (1989)

In the Matter of The Estate of Eliahou Rubin, Deceased.

Surrogate's Court, Nassau County.

April 14, 1989

Donald J. Farinacci for petitioner. Farrell, Fritz, Caemmerer, Cleary, Barnosky & Armentano for respondent.

C. RAYMOND RADIGAN, J.

This is a proceeding for a construction of article SECOND of the codicil to decedent's will which in effect provides that if at any time the coexecutors should disagree with respect to the administration of the estate, they are to consult with two named individuals whose directions they are to follow, provided the named advisors agree, and if they cannot, then the court is to decide the matter.

The decedent was survived by a daughter and son, each of whom is named executor. Included as assets of the decedent's estate are five commercial properties of which the decedent and his son were equal tenants in common. Following the decedent's death, the son requested a direction from the 304*304 advisors that he be given the sole right to sign checks and manage the five parcels of realty. In a somewhat lengthy document referred to as an "arbitration award", the two advisors, one Robert S. Breitbart, the decedent's attorney and draftsman of the will, and a Louis Brinn, a physician and apparently longtime friend of the decedent, came to the conclusion that since the son had been intimately involved in the day-to-day management of the five parcels of realty ever since they were purchased with the decedent, he was uniquely qualified to manage them for the benefit of the estate, and accordingly they granted him the right of management over the five parcels of realty. With regard to the power to sign checks, the son was given the sole right to sign "business checks", but with regard to estate checks they determined that the signature of both executors would be required. The closing paragraph of these directions concludes with the statement that "It is our fervent hope and desire that this brother and sister will, in the future, work in harmony and with none of the ill will that has been evidenced up to this point in time."

It is the daughter's position that she is entitled to an equal management and decision-making role with respect to all of the assets of the estate, including the real estate, and that the advisors proceeded with a determination without there being any specific dispute between the coexecutors as to the administration of the estate. She also claims that the attorney, Mr. Breitbart, being the attorney for her brother, is in a conflict of interest position, favoring her brother in the determination made. However, rather than seeking a review by this court of the directions given by the advisors, she has made a motion for summary judgment seeking to declare article SECOND of the codicil, insofar as it creates advisors with directory powers, as an invalid infringement upon her authority as a coexecutor and an impermissible delegation of that authority.

The court would agree with the petitioner that ordinarily coexecutors have a joint and entire authority over all the property so that any one of them may act in the administration of the estate (*Geyer v Snyder*, 140 N.Y. 394, 399; *Matter of Hammer*, 237 App Div 497, *affd* 261 N.Y. 677; *Pearse v National Lead Co.*, 162 App Div 766). However, it is equally true that the earliest common-law cases and texts recognize the right of a testator to limit, qualify, or condition the authority granted his fiduciary (1 Williams, Executors, at 141 [2d ed]). The appointment of an executor may be qualified by limitations 305*305 as to time (when the appointment shall begin or end), or place (different executors may be appointed in different geographic areas), or subject matter (one executor may be given exclusive authority over a particular asset or group of assets).

Williams (Executors, at 143 [2d ed]) also refers to appointments of executors as being conditional and refers to the common-law writer Godolphin (The Orphan's Legacy [2d ed]) which contains an entire chapter 2 devoted to conditional executors. In point of fact, the entire subject matter of qualified, limited or conditional executors has its foundation in the law of conditional bequests which is premised on the law that an individual may generally do what he wishes with his own assets. As Judge Cardozo stated in *Oliver v Wells* (254 N.Y. 451, 459), "[t]he legacies and devises were acts of bounty merely. The testator was free to withhold them altogether, or to subject them to conditions, whether sensible or futile. The gift is to be taken as it is made or not at all." (*See also*, *Matter of Tourneau*, 4 Misc 2d 941.)

While qualified or conditional appointments of executors may have a long history, the imposing of restrictions on executors and trustees which require them to follow the directions of third persons, sometimes referred to as advisors or directors, is a much more recent phenomenon which is not dealt with extensively by the cases. These situations raise questions by the courts among which are: what duty does the fiduciary have to follow the direction of the advisor or director; what is the status of the advisor or director; what judicial control is the advisor subject to; what responsibility does the executor or trustee have in following the directions given; and, finally, as argued here, whether this is an impermissible delegation of authority by the executor or trustee.

The answer to the initial question is that generally the fiduciary is required to follow out the directions of the advisor or director for the same reasons that the testator may impose upon gifts made by him conditions which are neither unlawful nor against public policy. One commentator in referring to advisors employs the term "Special Trustees and Directors" and urges the same reasoning in validating provisions employing advisors. "The simple explanation for the validity of the use of Special Trustees and Directors is another maxim: A grantor or testator may give his gift subject to any terms and conditions he chooses, unless the terms are contrary to public policy or some such restriction applies. Therefore, certain powers can be withheld from the Principal Trustee and delegated 306*306 to others. Only one court has stated that the appointment of a Special Trustee in a case where the Special Trustee is competent is against public policy. The authors believe that this case is incorrect." (Cohen and Frimmer, *The New Breed of Quasi-Fiduciaries — Splitting Duties and Personal Liability for Wrongdoing*, 6 U Miami Inst on Est Plan ¶ 72.1400.)

The court is in agreement with the above commentators that there is nothing invalid or contrary to public policy concerning such restrictions. Rather than being against public

policy, such provisions designating advisors and directors to fiduciaries can serve a useful purpose in implementing estate plans selected by testators. The two commentators in the above article point out that while there is no limit to the situations where a special trustee or advisor may be used, several typical areas are particularly suited to such use. One would be where the testator divides the fiduciary functions between a primary fiduciary and an advisor on investments. Another situation would be employing a sprinkling trust where the advisor is to direct the fiduciary or trustee with regard to distributions of income and principal to the beneficiaries, and a third situation might involve the use of a surviving business partner selected to direct the fiduciary as to the management of the business asset since the surviving partner in many cases would be in the best position to make decisions regarding the business. In the present situation, the directive of the advisors in giving the son control of the five parcels of real property states as the reason that the son is "uniquely qualified to manage them in the most effective manner for the benefit of all the owners." While this is only a motion for summary judgment, it is possible that the advisors' decision may have been an exercise of prudent judgment under the circumstances.

Several cases and the Restatement (Second) of Trusts specifically deal with the appointment of advisors to fiduciaries. While the Restatement and the cases generally involve trustees, the same fiduciary principles should be applicable to executors.
In *Gathright's Trustee v Gaut* (276 Ky 562, 124 SW2d 782), the court held that an advisor to trustees may be appointed whose consent to certain acts is a prerequisite to the execution of the trust. Again the Restatement (Second) of Trusts § 185 states that where a person has power to control a trustee, the trustee is ordinarily under a duty to comply with the directions and ordinarily liable if he fails to do so.

Insofar as the status of an advisor is concerned, the courts 307*307 have generally considered him a fiduciary, somewhat in the nature of a cotrustee (*Lewis v Hanson*, 36 Del Ch 235, 128 A2d 819, *affd* 357 US 235, *reh denied* 358 US 858; *Gathright's Trustee v Gaut*, *supra*, 124 SW2d, at 783). Another term employed is that of a quasi-trustee or special trustee (Cohan, *Splitting Powers Between Fiduciaries*, 8 Real Prop Prob & Tr J 588, 589-590). Since the relationship between the fiduciary and advisor is that of a cotrustee, with the advisor having the controlling power, the fiduciary is justified in complying with the directives and will not generally be held liable for any losses unless the instructions given him are improper or in violation of fiduciary duties owing to the beneficiaries.

In *Matter of Sanford* (149 NYS2d 500), the executors and trustees were restricted to obligations of the United States and the State of New York, but were exempt from liability for any investment *or for any other action taken by them* with the consent of Stephen Sanford, a beneficiary. The court held that with regard to any investment beyond those authorized, Stephen regulated the investments and the executors and trustees were automatically exempt from liability in carrying out his instructions.

The Restatement (Second) of Trusts § 185 provides that while ordinarily the fiduciary is under a duty to carry out the instructions of the advisor, if the trustee has reason to suspect the advisor is violating a fiduciary duty, the trustee is not under a duty to comply and may be liable if he does, and if the holder of the power insists upon compliance, the trustee is required to apply to the court for instructions.

An analogous situation appears in *Matter of Langdon* (154 Misc 252). There a corporate executor and trustee had been appointed together with a sister. The will provided that "In the event of a difference of opinion between my executors and trustees in the interpretation and carrying out of the provisions of this my Will, it is my wish and I hereby direct that the preference of my sister * * * shall prevail" (*supra*, at 253). There the court held that the sister was the final arbiter in the event of a difference of opinion between the two fiduciaries, and that she should file her decision in writing with the corporate fiduciary following any dispute "to the end that the trust company may be relieved from any responsibility" (*supra*, at 254). The court, however, did indicate that the corporate fiduciary would not be relieved from liability if fraud or gross negligence were present, and that in that event the corporate fiduciary was required to seek instructions from the 308*308 court (*see also*, Note, *Directory Trusts and the Exculpatory Clause*, 65 Colum L Rev 138, 147).

Naturally, should the fiduciary seek instructions from the court, the question arises as to what control, if any, the court may exercise over the advisor. In *Chase Natl. Bank v Chicago Tit. & Trust Co.* (246 App Div 201, *affd* 271 N.Y. 602, *rearg denied*271 N.Y. 659), the trustee could allocate stock dividends pursuant to the consent of a five-person committee either to principal or income. The court held that the committee could allocate dividends either to principal or income *regardless of the source*, and that the court would not review the actions of the committee except perhaps upon proof of improper motive.

Again in *McFerran v Paterson Natl. Bank* (125 NJ Eq 456, 6 A2d 403), a brother of the income beneficiary was given the power to direct the trustee in regard to invasion of principal on behalf of the beneficiary. There the court held the refusal of the brother to authorize an invasion was not reviewable by the court absent bad faith or improper motives.

Finally, the primary argument advanced by the daughter here is that the designation of advisors is an improper delegation of her authority as an executor. Generally a fiduciary may not delegate discretionary powers (1A Nossaman & Wyatt, Trust Administration and Taxation § 27.17 [1] [2d ed rev]). However, this is to be distinguished from a situation where the fiduciary is required to act under the direction of some specified individual or agency (*ibid.*, § 27.17 [2]). Since a testator may properly restrict the powers of his fiduciary by designating an advisor, it follows that no question of delegation arises of a power which one does not hold in the first place (Cohan, *Splitting Powers Between Fiduciaries*, *op. cit.*, at 590). If a nominated fiduciary does not wish to be subject to such restrictions they need not qualify to act.

The court accordingly holds that the designation of advisors in article SECOND of the codicil to make directives controlling the actions of the coexecutors in any disputes is a valid limitation upon the powers of such executors, and the motion for summary judgment by the petitioner declaring such conditions invalid is denied.

Insofar as the petition seeks to attack the directives made by the advisors, those allegations contain questions of fact which will require a hearing. Following the parties' preparation for trial, a note of issue and statement of readiness should be filed.

2011 NY Slip Op 30002(U)

In the Matter of the Trust under the Agreement of HELEN RIVAS, as donor, the UNIVERSITY OF ROCHESTER, as donee, and BANK OF AMERICA, N.A. (successor to Security Trust Company of Rochester), as Trustee, under a Trust Agreement dated January 25, 1945.

File No. 2000 LT 00007/B.

Surrogate's Court, Monroe County.

January 5, 2011.

Chamberlain, D'Amanda, Oppenheimer & Greenfield, LLP (Edward C. Radin, Esq. of Counsel) attorney for Bank of America, N.A., Trustee and Petitioner herein.

Wolford Law Firm (Michael R. Wolford, Esq. of Counsel) attorney for University of Rochester, Trust Donee and Respondent herein.

Office of New York State Attorney General (Audrey Cooper, Esq. Asst. Attorney General) pursuant to EPTL §8-1.4.

DECISION AND ORDER

EDMUND A. CALVARUSO, Judge.

Bank of America as Trustee seeks a determination by this Court as to whether the Agreement, established to benefit the Psychiatry Department at the University of Rochester, permits the investment of Trust assets in the University of Rochester's long term investment pool (LTIP). For the reasons set forth below, this Court finds that the proposed investment of Trust corpus in the LTIP would frustrate the intent of the settlor, contradict the terms of the Agreement, and violate the standards and provisions set forth in the Prudent Investor Act (EPTL § 11-2.3).

BACKGROUND

The subject trust was established by Helen Rivas pursuant to a Deed of Trust and Agreement (hereinafter referred to as the Agreement) dated January 25, 1945 in which Security Trust Company of Rochester was named as Trustee and the University of Rochester as the donee. Bank of America, N.A., as the successor in interest to the Security Trust Company of Rochester, presently serves as Trustee. On the same date that the settlor executed the Agreement, she also made an outright gift of $2,153,934 to the University of Rochester (hereinafter, the University). These gifts were interrelated and resulted in the establishment of the Helen Woodward Clinic at the University and provided dedicated space that to this day house the many teaching, research, education and support programs that take place under the auspices of the Department of Psychiatry.

Under the terms of the Agreement, the settlor directed that income generated from the Trust be used to operate and maintain the Clinic. By a Decree of this Court February 24, 2000, the Trustee was authorized to annually pay out to the donee an amount equal to the greater of net accounting income of the Trust or 5% of the net fair market value of the principal trust assets. Additionally, the Court, by a decree dated May 26, 2006, allowed for the invasion of principal of $2,400,000 for the purchase of additional physical space as in keeping with the settlor's intention to establish a clinic to deliver quality mental health services to the community.

Additionally, paragraph Seventh of the Agreement created an Investment Advisory Committee consisting of three individuals, two to be named by the University and one by the Trustee. Article Seventh of the Trust Agreement further provides:

The Committee shall have sole and exclusive power and control over the investments making up this trust fund, the sale of securities, and the reinvestment of any funds at any time in the trust estate, and shall communicate its decisions and directions with respect to sales, investments and reinvestment of trust funds to the Trustee in written form as above provided. The Trustee shall be charged with no responsibility or duties with respect to the investment or reinvestment of trust funds, other than to carry out the written directions or communications received by it from the Committee.

Additionally, Article Eighth provides:

The Committee may direct the Trustee to continue to hold any securities deposited herewith or such portions of them as it may from time to time deem advisable in its sole discretion, and the Committee may direct the Trustee to invest in any forms of property, income producing investments, stocks or securities, in such amounts and in such proportions as the Investment Advisory Committee may determine proper and desirable, without restriction to investments which are legal to trust funds.

Since 1945, it is apparent that the Trustee and Investment Advisory Committee have worked together in the stewardship of the corpus and perpetuation of the Trust. However, during a meeting held on April 20, 2009, the Advisory Committee adopted a motion (that passed by a majority, not unanimously) in which the Advisory Committee directed the Trustee to invest all of the trust assets in the University's long-term investment pool (LTIP).

In response to the stated concerns of the Trustee, the University drew up a contract between itself and the Trustee that outlined the terms and responsibilities of the parties pursuant to the proposed investment in the LTIP. The proposed contract confers sole discretion upon the University for the investment of all trust assets, limits the withdrawal of assets by the Trustee to 10% as of the effective date, provides for a mandatory contractual term, allows for the University to dictate the custodian of the assets, and in the event either side terminates the contract, provides for a 3- year scaled remittance of the assets back to the Trustee.

The Trustee seeks an interpretation of the Agreement to determine whether the proposed investment is consistent with the settlor's intent and the provisions of the Agreement.

The Trustee asserts that investing with the University's LTIP would frustrate the settlor's intent in her creation of the Trust. Furthermore, the investment would necessitate the transfer of custody of Trust assets from the Trustee to another trust company with which the Trustee does not and would not have either a contractual or fiduciary relationship. In addition to violating EPTL §11-2.3, the Trustee also argues the proposed investment and contract is effectively an impermissible delegation of fiduciary responsibilities from the Trustee to the University.

In its Answer, the University agrees that the settlor's intent is paramount and avers that the proposed investment is not only consistent with the provisions of the Agreement, but also within the statutory standards imposed upon the Trustee. While the proposed investment in the LTIP is a departure from the historic allocation of trust assets, the University maintains the Advisory Committee is not bound to specific guidelines and has the authority under the Agreement to direct changes to the allocation of trust assets at any time. What is more, the University alleges the decision by the Advisory Committee is not irreversible and can be modified.

The University states its LTIP contains its own endowment and assets from approximately 15 other charitable remainder trusts of which the University is the sole remainder beneficiary and other investors include several charitable foundations whose sole beneficiary is the University. According to the University, the LTIP invests in a wide array of assets, is well diversified, and managed by 85 firms. Investors are given individual accounts from the University's custodian bank, the Northern Trust Company. Additionally, the University does not charge a fee to any entity that invests in the LTIP other than the pro-rata management costs and the University does not receive a financial incentive through new investments or returns. A breakdown offered by the University suggests that as of June 30, 2009 and net of all fees, the LTIP outperformed the Trust in both three-year (-1.5% for the LTIP and -5% for the Trust) and five-year ranges (4.2% and .8% respectively).

The Office New York State Attorney General, in its role as representative for charitable beneficiaries pursuant to EPTL §8-1.1(f) filed a notice of appearance, however did not submits papers for consideration.

DECISION

The Deed of Trust and Agreement names the Trustee, creates the Advisory Committee, and designates the University as beneficiary of the Trust. Under Articles Seventh and Eighth of the Agreement the Advisory Committee wields considerable control over the assets of the trust. This qualification of the Trustee's fiduciary authority has been found permissible on the principal of a donor may generally do what he wishes with his own assets. As Judge Cardozo eloquently stated, "the gifts and devises were acts of bounty merely. The testator was free to withhold them altogether, or subject them to conditions, whether sensible or futile. The gift is to be taken as it is made or not at all." *Oliver v. Wells,* 254 N.Y. 451 (1930); quoted by*Matter of Rubin,* 143 Misc. 2d 303 (Sur. Ct. Nassau Co. 1989). The Restatement 2nd of Trusts states that a trustee is ordinarily under a duty to comply with the directions of an advisor. The advisor, in turn, is conferred the status of a co-trustee and fiduciary obligations attach, a point conceded to by the University. Restatement 2nd § 105; *Matter of Rubin* 143 Misc. 2d 303 (Sur. Ct. Nassau Co. 1989). If there is reason

to suspect the advisor is violating its fiduciary duty, the trustee is not under a duty to abide by the advisor and may be liable if it does. *Matter of Langdon,* 154 Misc. 252 (Surr. Ct. Westchester Co. 1935).

Despite the settlor's declaration that "the Trustee shall be charged with no responsibility or duties with respect to the investment or reinvestment of trust funds, other than to carry out the written directions or communications received by it from the Committee," accountability is an essential element of all fiduciary relationships which cannot be waived. EPTL § 11-1.7, which has been held to apply to inter vivos trusts such as the one before this Court, recognizes that an attempt to render a fiduciary completely unaccountable is inconsistent with the nature of a trust and void as such exoneration is against public policy. *Matter of Malasky,* 290 A.D. 2d 631 (3rd Dept. 2002); *Estate of Frances E. Francis,* 239 N.Y.L.J. 50 (Surr. Ct. Westchester Co. 2008).

As the Trustee is now concerned that following the directions of the Advisory Committee may result in a breach of fiduciary duty, the Trustee is required to come before the Court for instruction, just as in a case where two fiduciaries do not agree upon how to administer an estate. *Matter of Rubin* 143 Misc. 2d 303 (Sur. Ct. Nassau Co. 1989). It is worth noting that the Trust has been in existence for more than 60 years and this is the first occasion wherein a controversy has arisen from a power-sharing arrangement that is rather unconventional, even by today's standards of Trust and Estate practice.

It is clear from the instrument that the settlor established the Trust to build and equip the Clinic and to apply the trust income toward funding its operation and maintenance. Both parties agree as to the purpose, but differ on effectuating that purpose and roles of the Trustee and Advisory Committee in carrying out the Trust. Therein lies the need for construction of the Trust; to determine whether the proposed investment in the University's LTIP, as directed by the Advisory Committee, would frustrate the intent of Helen Rivas.

There is ample authority for the proposition that a court, in the exercise of its equitable powers, may control the administration of a trust so as to effectuate its avowed purpose, particularly when changing circumstances would otherwise defeat it. *In re Herzog,* 301 N.Y. 127 (1950); SCPA §209(6).

In a construction proceeding, the efforts of the court should always be directed toward the discovery of the intent of the settlor as it is expressed in the instrument.*Matter of Thall,* 18 N.Y. 2d 186 (1966). When such intent is ascertained and it is adequately expressed in the language of the document, it is to be carried out unless contrary to public policy or law. Only in the event that the language is ambiguous, vague, or unclear, will the Court report to the canons or rules of construction in determining the intent of the testator at the time he made the will. *Matter of Hoffman,*201 N. Y. 247; *Matter of Barrett,* 141 Misc. 637(Surr. Ct. Jefferson Co. 1931).

Notwithstanding Paragraphs Seventh and Eighth, it is a cardinal rule of construction that Helen Rivas' intent must be collected from the whole Agreement taken in its entirety, in view of all the facts and circumstances under which the provisions of the Agreement were framed, not in detached portions alone. *Matter of Title Guarantee & Trust Company,* 195 N.Y. 339 (1909). Stated differently, the substance of the Agreement must not be destroyed

in deference to the naked word. *In re Herzog,* 301 N.Y. 127 (1950). If the Court were to allow for the University's argument that Articles Seventh and Eighth are dispositive and control the entire Agreement, there would be little sense in having Bank of America serve as trustee, only be subservient to an Advisory Board dominated by representatives named and employed by the University, and directed to invest the entire corpus in an investment vehicle controlled by the University. Helen Rivas could have gifted the securities as an accompaniment to her other monetary gift made the same day as the Trust was established; instead, she chose to execute a Deed in Trust with her gift of the securities to be held in trust by the Trustee, with input on investment of principal to be provided the Advisory Committee. The Trust Agreement should not be read to contradict itself. *Crozier v. Bray,* 120 N.Y. 366 (1890).

Upon reading the entire Agreement, the Court construes that the Advisory Committee and Trustee must work in concert to promote the goals of Helen Rivas, i.e., fund the operation of the Psychiatric Department. *Matter of Fabrii,* 2 N.Y. 2d 236 (1957). Any other construction would defeat the Trust.

While the Agreement confers broad authority upon the Advisory Committee, that power is not unlimited and must not be used in contravention of the state purpose of the Trust. *Carrier v. Carrier,* 226 N.Y. 114 (1919). The Trustee and the Advisory Committee, as a de facto co-trustee (see *Matter of Rubin,* supra), have a shared responsibility to invest and manage the assets while maintaining an allegiance to Helen Rivas' desire to have income from the trust fund the Psychiatry Department.

Allowing for the investment of the Trust assets in the LTIP would effectively remove both the Trustee and the Advisory Committee from having any role in administering the Trust. The custody of the funds would be transferred to the University's custodian bank, who would have no fiduciary obligation to the Trust. The Trust funds would be managed by some 85 different investment management firms situated throughout the world and overseen not by any party to the Agreement, but rather by a subcommittee of the University's Board of Trustees who would have unfettered control and discretion as to the investment of the Trust corpus. Once the Trust's funds are placed in the LTIP, neither the Advisory Committee nor Trustee would have input as to asset allocation, nor would they have the discretion to select, retain or sell off any individual assets, those decisions would effectively be made by the University.

Additionally, the proposed limitation on withdrawal of principal from the LTIP (not exceed 10%) may impede the goal of the Agreement. While Trustee does not have ability to invade principal, it has sought and received permission from this Court to pay out principal in the past to effectuate the intent of Helen Rivas of providing adequate funding for the Psychiatry Department. With a value of $1.5 billion, the investment of the Trust corpus (estimated at $28,000,000) would be less than 2% of the holdings of the LTIP.

As two of three members of the Advisory Committee are employed by the University of Rochester, there may be an occasion whereupon the loyalties to the University's Department of Psychiatry, as the beneficiary, and to the University are conflicted, or at the very least divided. The members of the Advisory Committee, with a conferred fiduciary status, owe a duty of undivided and undiluted loyalty to those whose interest's interest the

fiduciary is to protect. This rule is sensitive and inflexible." *Milea v. Hugunin,* 24 Misc. 3d 1211A (Surr. Ct. Onondaga Co. 2009); see also *Meinhard v. Salmon,* 249 N.Y. 458 (1928). However, those two members of the Advisory Committee also have a duty of loyalty to their employer, the University. *Compsolve, Inc. v. Neighbor,* 2007 NY Slip Op 52403U (Sup. Ct. Erie Co. 2007) citing Restatement [Second] of Agency § 387.

This is not so say the current arrangement viz a viz the make-up of the Advisory Committee is unworkable. However, if the proposed investment in the LTIP were allowed, the majority of the Advisory Committee would be placed in a tenuous position should they ever question the handling of the funds by the LTIP or discover that the needs of the Rivas Trust are being subsumed by the larger purpose of the LTIP. "The fundamental rule of undivided loyalty to a trust nor of the rule that a trustee shall not *place itself* in a position where its interest *may be* in conflict with its duty." *In re Title Guar. & Trust Co.,* 291 N.Y. 376 at 404 (1943). Otherwise, any circumstance where even a scintilla of divided loyalties among the majority of the Advisory Committee is evident will result in voiding any transactions in which they may appear. *In re Sanford,* 297 N.Y. 64 (1947); *City Bank Farmers Trust Co. v. Cannon,*291 N.Y. 125 (1943).

The Court of Appeals stated in *Meinhard v. Salmon:*

"Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."

Meinhard v. Salmon, 249 N.Y. 458 (1928). Therefore, this Court would be hard pressed to allow for the two-person majority of Advisory Committee to direct Trust holdings be managed exclusively by their employer's LTIP. This Court is also not unmindful of possibility of a conflict of interest of the minority member of the Advisory Committee as he/she is employed by the Trustee. However, any possible conflict is presently mitigated by the member's minority status on the Advisory Committee. As the Trust is ongoing, the Court may review the status and composition of the Advisory Committee in future proceedings and exercise its discretion accordingly.

Finally, the Court finds that the proposed investment of the Trust assets in the University's LTIP would run afoul of the Prudent Investor Act. Even if this Court were to accept the assertion by the University that Paragraph Seventh of the Agreement exonerates the Trustee from any investment activity, (which it does not, see above and EPTL §11-1.7) the Advisory Committee is still bound to the provisions and standards of the Prudent Investor Act. EPTL §11-2.3(e)(1), (2); *Matter of Rubin* 143 Misc. 2d 303 (Sur. Ct. Nassau Co. 1989).

By its very nature and composition, the Advisory Committee is held to the higher standard enunciated in EPTL 11-2.3(b)(6) to exercise diligence in investing as would be expected of a prudent investor with special investment skills. *In re Witherill,* 37 A.D. 3d 879 (3rd Dept. 2007). While EPTL §11-2.3 (c) allows for delegation of the investment and management of Trust assets, the scope of the proposed delegation to the controlling entities of the University's LTIP is too broad and inconsistent with the Agreement. In handing over the entire corpus of the Trust to a different custodian, to be managed by 85 different investment

firms taking directives from another governing body, the Trustee and the Advisory Committee would be breaching their duties imposed by the Prudent Investor Act insomuch as upon their delegation, they would be unable to monitor the managers of the LTIP. *In re Petition for Judicial Settlement of Intermediate Account of Proceedings by Bankers Trust Co. of New York,* 2 Misc. 3d 1004(A) (Surr. Ct. New York Co. 2004). Furthermore, and as stated above, delegating the complete and absolute responsibility of investing the Trust corpus to the University's LTIP is inconsistent with the Agreement. EPTL §11-2.3(c)(1)(B).

Moreover, and equally troubling, upon investing the Trust assets with the LTIP, the University would not be held to the standards of the Prudent Investor Act that govern trustees, but rather to the lesser prudent person standard set forth in N-PCL§ 717 and most recently articulated in the newly enacted Prudent Management of Institutional Funds Act. N-PCL §552(b); see also EPTL §11-2.3(1) (as amended effective 9/17/10 which specifically excludes institutional funds from the Prudent Investor Act). While the three and five year returns of the LTIP are modest, it is not the performance of the investments, it is the fiduciary's compliance to the Prudent Investor Act that matters most, to hold otherwise "would be in effect be to assure fiduciary immunity in advancing markets." *In re Bank of New York,* 35 N.Y. 2d 512 (1974); see also *Matter of Janes,* 223 A.D. 2d 20 (4th Dept. 1996).

For the reasons set forth above, this Court cannot allow the proposed investment of the Helen Rivas Trust corpus, as such investment in the LTIP is contrary to the Agreement and the intent of the settlor, may give rise to an impermissible division of fiduciary loyalties among the majority of the Advisory Committee, and would also violate the Prudent Investor Act. The provisions of the Trust shall be executed as set forth by the clear wording of the Agreement, with any future disputes to be brought before this Court for disposition and additional consideration.

This Decision shall constitute and Order of the Court.