

Chicago Trustee Collaboratory

Case Study: beneficiaries get so frustrated with their trustee they sue! Consideration of the court decision, and the trust administration issues, in the case of *Spencer v. Di Cola*, 2014 Ill. App. (1st) 121173, 2014 Ill app LEXIS 289 (1st Dist. 5/1/14), *rehearing denied*, August 18, 2014, *modified on denial of rehearing*, 2014 Ill. App. (1st) 121585, 16 N.E.3d 1 (August 21, 2014).

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Part One: The Lawsuit and the Legalities

Executive Summary:

- 1) It can be hard to remove a sitting trustee. A trustee's defense of his position is permitted, and not considered "self-serving" even if it goes against the family;
- 2) Drafting pointer: a trust can provide in what situations a sitting trustee may be replaced;
- 3) Court modifications of the trust are best memorialized with word-for-word changes to the trust document.

We're taking a look at both the legal and practical lessons from a trust relationship that degenerated to the point of court hearing, appeal, and re-appeal.

The background for this lawsuit and appeal is simply this. The adult beneficiaries of the trust had appointed Di Cola as trustee some ten years earlier to fill a vacancy. According to the court, they later became unhappy with her distribution and investment decisions and requested she step down. She refused. They prosecuted a lawsuit claiming the trust gave them the power to remove her. Both the trial and appellate court disagreed.

THE LAWSUIT – the law & document favors the trustee.

Several legal points in the lawsuit are worth considering, as are the larger issues of what went wrong here.

As to the lawsuit, consider these three points. First, the interplay of different types of trustees created in the trust. In interpreting the Trust Agreement in its entirety, the Court drew distinctions between the position and powers of a "sitting"

individual trustee, such as Di Cola, and what it meant to be a “successor trustee” under Article VIII (e) of the Trust Agreement.

Based on its interpretation of the Trust Agreement as a whole, the court reasoned that the “sitting” individual trustee, has overall control of trust administration, whereas a “successor trustee” under Article VIII (e) (the Substitute Trustee Clause) is a trustee with such powers as the sitting trustee delegates and who is appointed for a limited purpose(s) and a limited duration. (See e.g., ¶23 on page 12: “[R]eading [Article VIII (e)] in its entirety demonstrates that a substitute trustee is one appointed for a specific purpose and a limited duration.”)

Based on the distinctions the Court drew between the “sitting” individual trustee, a term that was not used in the Trust Agreement, and the “successor trustee” under Article VIII (e) of the Trust Agreement, the court ruled that such a substitute trustee could not be a replacement for the trustee herself. The court further noted that Article VIII (a), which dealt with appointment of an individual trustee to fill a vacancy, had been modified in an earlier court proceeding to allow a majority of beneficiaries to appoint an individual trustee where the position was vacant. However, Article VIII(a) did not deal with the issue of replacing a “sitting” individual trustee with a different individual or corporate trustee.

The court further refused to rule that the power to remove the sitting individual trustee should be implied or, as the beneficiaries had argued that, “[f]or the Substitute Trustee Clause to have any real, consequential import to the beneficiaries, the beneficiaries must be able to appoint a substitute trustee as they deem fit.” *Id.*, ¶ 25, p. 12.

- The significance: Better drafting could have helped here, although this may be a gap that’s best appreciated in hindsight. The draftsman could have provided in the Trust Agreement the conditions under which a sitting individual trustee could be replaced. In addition, the Trust Agreement could have more specifically set forth the rights and limitations of the beneficiaries with respect to the appointment and removal of successor trustees under Article VIII (e). Because these rights and limitations were not clearly delineated in the Trust Agreement, the beneficiaries had a colorable argument that a majority of the beneficiaries had the right to appoint a substitute trustee for purposes of their choosing.

Second, the impact of a prior modification of the trust. At paragraph 29 at page 14 of the Opinion, the court held a much earlier judicial modification of the trust to be

ambiguous, primarily because that earlier court did not set out the modified provision verbatim. This ambiguity required the present court to restate the modified provision. And, as it happens, this provision addressed vacancies in the trustee role, including whether the role of corporate trustee was permanently or just temporarily being eliminated and whether the “court’s order *authorized* the appointment of a successor corporate trustee” (emphasis in original). *Id.*, ¶ 31, p.15

- The significance: The early modification of the trust should have been expressly written out. Ambiguity was the result of relying on a general reference instead of writing out the modification word for word at the time of that earlier court action. Because this lack of clarity, the beneficiaries had a good faith basis to make their argument. The litigation attorney, trust attorney or the trustee could have taken care of this writing back around the time of that earlier court hearing.

Third, the court rejected the beneficiaries’ argument that if the trustee takes a position against the beneficiaries that the trust cannot pay for the trustee’s legal fees. The court stated the law as prohibiting a trustee from favoring one beneficiary over the other, which was not the case here.

- Interestingly, the court notes that because her position was authorized by the trust, defending her position as trustee was not “entirely self-serving.”

In Part Two of this series, we’ll look at this situation from the point of view of administration of this multi-generational family.