SUPREME COURT OF KENTUCKY
CASE NO. 2011-SC-000135-D
(NO. 2009-CA-002258)

KATHERINE COMBS JARVIS, et al — APPELLANTS

vs.

PNC BANK NATIONAL ASSOCIATION, et al — APPELLEES

APPEAL FROM
JEFFERSON CIRCUIT COURT
DIVISION SEVEN (7)
HONORABLE AUDRA ECKERLE, JUDGE
CASE NO. 08-CI-013731

APPELLANTS' REPLY BRIEF

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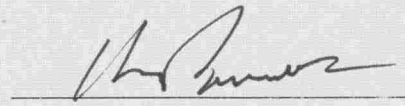
CERTIFICATE OF SERVICE

It is hereby certified that a true copy hereof was served on Turney P. Berry, Virginia Hamilton Snell, Counsel for Appellees, Wyatt, Tarrant & Combs, LLP, 500 West Jefferson Street, Ste. 2800, Louisville, KY 40202; Hon. Audra J. Eckerle, Judge, Jefferson Circuit Court, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, KY 40202; Jefferson Circuit Court Clerk, 700 West Jefferson Street, Louisville, KY 40202 and Mr. Samuel Givens, Jr., Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, KY 40601-9229 this 2nd day of July, 2012. The undersigned certifies that the record on appeal was not withdrawn for purposes of the preparation of this Brief.



Homer Parrent, III

INTRODUCTION

The Appellants respectfully submit this Reply Brief to respond to certain of the arguments made by Appellees.

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT.....1

I. *Fridenberg* Does not Support Appellees' Contentions..... 1

Fridenberg v. Commonwealth of Pennsylvania, 22 A.3d 581 (PA., 2011)..... 1

Williamson's Estate, 81 A2d 49 (1951).....1

KRS 386.180.....3

Collins v. Kentucky Tax Commission, 261 S.W.2d 303 (Ky., 1953).....4

II. Appellees' Assertions of Arbitrariness and Irrationality in the Trustee's Compensation Provisions of KRS 386.180 are Unsubstantiated in the Record.....5

KRS 386.180.....5

III. Appellees Fail to Distinguish Between Subjective Reasonableness and Objective Reasonableness.....6

KRS 386.180.....6

IV. The Repeal of KRS 386.180 has Retroactive Effect, and was not Remedial Legislation.....7

KRS 386.180.....7

King v. Campbell County, 217 S.W.3d 862 (Ky.App., 2006).....8

Louisville Shopping Center, Inc. v. City of St. Matthews, 635 S.W.2d 307 (Ky., 1982).....8

Cassidy v. Adams, 872 F.2d 729 (6th Cir. 1989).....8

73 Am., Jur.2d, Statutes §11 (1974).....9

CONCLUSION.....9

ARGUMENT

MAY IT PLEASE THE COURT:

I. *FRIDENBERG* DOES NOT SUPPORT APPELLEES' CONTENTIONS

Appellees rely upon a decision of the Pennsylvania Supreme Court, namely *Fridenberg v. Commonwealth of Pennsylvania*, 33 A.3d 581 (PA., 2011), in support of their contentions in this matter. While *Fridenberg* bears some similarities to the case at bar, Appellants submit that the factual background, statutory context and reasoning employed make it distinguishable and unpersuasive.

Fridenberg involved the estate of a Testatrix who died in 1940 leaving her estate in trust for five individuals with remainder after their deaths, for the upkeep of a surgical building at a Philadelphia hospital. Pennsylvania apparently had a peculiar limitation on commissions paid from principal of an estate or trust. That limitation prohibited a person who had served as Executor of a decedent's estate, and received a commission on principal for services as such, from receiving an additional commission on principal for services as trustee. Pennsylvania law deemed such a circumstance as the receipt of an impermissible double commission. In 1945, after the death of *Fridenberg's* Testatrix, the Pennsylvania Legislature repealed the ban on double principal commissions. In 1951, the Pennsylvania Supreme Court[1] had held that the 1945 repeal did not apply to trusts already in existence, on the grounds that the repeal was retroactive and violated beneficiaries' vested rights. Hence fiduciaries who had accepted trusts under the law as it then existed before the 1945 repeal were bound by the compensation limitations of the pre-1945 law.

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[1] In re: *Williamson's Estate*, 82 A2d 49 (1951)

In 1953, the Pennsylvania Legislature amended the statute so as to make it expressly retroactive, but also added a severability clause in the event of a determination of its unconstitutionality. The Pennsylvania Legislature again amended the statutes on trustee compensation in 1972 and in 1982, with an express provision in the 1982 act that the law would apply to all trusts regardless of when created. Finally, in 2006 the Pennsylvania Legislature adopted the trustee compensation provisions of the Uniform Trust Code, which included an express provision that a testamentary trustee who also acted as Executor was not barred from receiving compensation on that account, as to either income or principal of the trust. At the time of the enactment of the 2006 law, the Joint State Government Commission noted expressly that the latter referenced clause of the 2006 act was expressly intended to repeal the rule in the *Williamson Estate* case, *supra*, footnote 1.

In this complicated factual and statutory context, the Supreme Court of Pennsylvania decided in *Fridenberg* that the trustee's earlier service as executor did not bar it from receiving payment of trustee's commission on principal despite the fact that the law at the time of Testatrix' death was to the contrary.

However, while superficially *Fridenberg* would appear to support Appellees' arguments, upon analysis the Pennsylvania decision is not persuasive.

First, the fundamental issue involved is markedly different in the case at bar. Unlike Pennsylvania, Kentucky has never barred a trustee from receiving a commission on principal for services rendered, simply because the trustee also served as the decedent's executor. Here, the issue relates simply to how much a trustee's commission on principal should be, not whether a trustee should essentially serve without compensation at all, as the Pennsylvania law of 1941 would have compelled. It is plainly different to argue that a trustee is contractually or statutorily

bound to work for free, than it is to argue (like Appellants in this case) that trustees should receive a commission, but only in accordance with the rules in effect when the trustee accepted the job. In other words, *Fridenberg* presented the Pennsylvania Court with a far harsher rule to adjudicate than the case at bar presents to This Court.

Second, this Court will note that the Pennsylvania Acts which amended the statutes on trustee compensation, for the most part, were expressly made retroactive by the Pennsylvania Legislature, or, in the case of the most recent such statute, that legislative history plainly indicated a specific purpose of doing so. In the case at bar there is no legislative history; there is no express retroactive clause; there is no provision like that in the 1982 Pennsylvania law, which expressly made the statute applicable to all trusts whenever created. This Court is, therefore, left without any guidance as to our Legislature's intent. The Pennsylvania court would have had to expressly depart from the plain legislative intent to decide *Fridenberg* differently than it did. This Court is confronted with no such hurdle; the General Assembly's intent is far from clear in the absence of any express language in HB 615 addressing applicability, effective dates or scope of the repeal.

Third, in *Fridenberg* the Court pointed out that the primary reason for the change in the Pennsylvania law was the movement away from the use of "legal list" investments to the "prudent investor" standard. However, in the case at bar, the record lacks any reference, assertion, contention or evidence that such a factor had any pertinent bearing on the General Assembly's decision to repeal KRS 386.180.

Fourth, in *Fridenberg* neither the trust document nor any of the Pennsylvania statutes cited ever had a specific formula, such as that embodied in our former statute, KRS 386.180[2].

[2] As the Court will recall, KRS 386.180 allowed a trustee a 6% annual commission on income plus either .3 of 1% of principal annually or 6% of principal upon distribution.

Hence, the trust in *Fridenberg* was subject to neither statutory nor document-based trustee compensation provisions. The beneficiaries there thus could have had no reasonable expectations on the subject. However, as this Court well knows, the law in Kentucky at the time of the commencement of the Jarvis and Caperton trusts did impose statutorily imposed limits, upon which the beneficiaries had at least reasonable expectations of observance, if not contractual and statutory rights to compel compliance.

Finally, while the decisions of foreign Courts may be informative or even persuasive, this Court is obviously not bound by them. *Collins v. Kentucky Tax Commission,* 261 S.W.2d 303 (Ky. 1953) This point is particularly apt where statutory and legal history are significantly different, as is the case here. Furthermore, there would appear to be no other states where this issue has arisen. This Court, Appellants respectfully suggest, should consider the position expressed in *Fridenberg* by the Attorney General of Pennsylvania:

> The Attorney General submits the due process guarantees are implicated because a retroactive application of the various laws allowing multiple commissions will reduce the amount of trust principal, due to the increased payments to the trustee, and deprive the beneficiaries of their property. The Attorney General maintains in order for such a retroactive application to be constitutional, it must be reasonable and justified by a rational legislative purpose. The Attorney General argues the legislation in question is neither rational nor reasonable because: its retroactive application would abandon long-settled principles regarding trustee payment; the legislation does not limit the period for retroactive application; it is uncertain whether trustees' duties have changed as a result of changes in the law related to trust administration; trustees have the ability to request additional money from the courts for extraordinary services; and it is contrary to the public's interest in receiving the benefits of the charitable trust for as long as possible. 33 Atlantic 3d 581, 588.

Appellants would submit that all but the last phrase are equally applicable to this case, and that given the history and circumstances of this case, the reasoning of the Attorney General, even if rejected by her own Supreme Court in the peculiar facts of *Fridenberg*, ring true here.

II. APPELLEES' ASSERTIONS OF ARBITRARINESS AND IRRATIONALITY IN THE TRUSTEE'S COMPENSATION PROVISIONS OF KRS 386.180 ARE UNSUBSTANTIATED IN THE RECORD

From the very beginning of their Brief in the Statement Concerning Oral Argument, and continuing throughout the remainder of it, Appellees repeatedly describe KRS 386.180 as arbitrary, irrational, unreasonable and unfair. Nothing in the record sustains those conclusory allegations. Even Ms. Maddox's Affidavit, upon which Appellees chiefly rely, merely implies that banks are not receiving fair and reasonable compensation. Appellants would suggest that there are several good reasons why the record does not reflect the conclusions in Appellees' Brief.

One such reason is that if banks, trust companies and persons named in wills to serve as trustees found that the limits of KRS 386.180 were so oppressive, they would not have accepted the role. Yet there is nothing in the record which indicates that it is difficult to find institutions or individuals willing to accept the job of testamentary trustee.

A second point is that over time trust funds tend to increase in value, especially if well managed and well administered. Under a system where compensation is pegged to a percentage of the funds being administered, testamentary trustees, in essence, have a built-in escalator clause, and a corresponding incentive to achieve good investment performance. If a trust fund doubles in value, the trustee's compensation doubles in value as well.

Third, the mantra of unreasonableness and arbitrariness which Appellees persistently recite is in fact a two edged sword. For a trustee who does not perform as well as the esteemed

institutions which are the parties to this matter, the entitlement to the statutory percentage formulas remains in effect. An under-performing trustee could receive compensation based on trust value, not on the objective value of his services. In other words, KRS 386.180 could just as easily be faulted for being too generous to trustees as being too strict. It is, after all, a matter of perspective. There is no doubt that the Appellees are completely sincere in their belief that they are being underpaid for their work on testamentary trusts. However, human nature is such that it is very difficult to find anyone to complain about being overpaid.

The General Assembly in its wisdom has chosen to abolish the percentage of trust value as the measure of compensation for testamentary trustees. It had every right to do so, and Appellants do not challenge the demise of KRS 386.180 for trustees who accept such a position after HB 615's effective date. However, Appellants do take issue with Appellees' efforts to cast the provisions of the former statute as unreasonable and arbitrary, especially as the cornerstone of their reasoning why the protections provided for beneficiaries of pre-existing trusts should be abolished.

Accordingly, the constant repetition of undemonstrated allegations of arbitrariness, unreasonableness and unfairness should be tempered by consideration of the perspectives, point of view and self-interest of the parties so asserting.

III. APPELLEES FAIL TO DISTINGUISH BETWEEN SUBJECTIVE REASONABLENESS AND OBJECTIVE REASONABLENESS

At page 20 of Appellees' Brief, Appellees take issue with an assertion from Appellants' Brief, which attempted to point out to the Court that, if freed of the constraints of KRS 386.180, any trustee can always craft a rationale to support what it believes to be a reasonable fee for its services. Appellees argue that reasonableness is such a well defined standard that testamentary

trustees will always feel constrained in setting their fees. With all due respect, the authorities cited relate to determination of reasonable fees or reasonable conduct *set by courts*, not by private parties or institutions. Under Appellees' interpretations of the repeal of KRS 386.180, a trustee, unconstrained by statutory guidelines, will be free to set its fees on a purely subjective basis, which is the entire point. This is fundamentally different than an objective determination of reasonableness in a judicial setting.

The General Assembly has decreed that, at least until any judicial review of a trustee's compensation occurs, the subjective approach will be the rule in Kentucky hereafter. However, the shift from an objective standard to a subjective one is a material change in the rules, and one which should not be imposed on pre-existing trust beneficiaries, such as Appellants.

IV. THE REPEAL OF KRS 386.180 HAS RETROACTIVE EFFECT, AND WAS NOT REMEDIAL LEGISLATION

Appellees' argument that the repeal of KRS 386.180 was not retroactive, in effect, simply assumes the point at issue. The argument is based upon the premise that trust beneficiaries had no vested rights under KRS 386.180 prior to its repeal. They base this premise on the assertion that the repeal of KRS 380.180 removed beneficiaries' pre-existing rights. Thus, the argument is essentially circular.

Clearly, Kentucky trust beneficiaries prior to June 17, 2008, the effective date of the repeal of KRS 386.180, were entitled to enforce the statute's fee limitations against trustees who violated them. They had more than a mere expectation of the enjoyment of such a right. Because, under the Appellees' interpretation, trust beneficiaries could no longer enforce those rights, the repeal, if applied as Appellees suggest, retroactively deprives beneficiaries of vested rights.

In an effort to deflect this logical conundrum, Appellees rely upon cases which are clearly inapposite, primarily, *King v. Campbell County*, 217 S.W.3d 862 (Ky.App., 2006); *Louisville Shopping Center, Inc. v. City of St. Matthews*, 635 S.W.2d 307 (Ky., 1982) and *Cassidy v. Adams,* 872 F.2d 729 (6th Cir. 1989). These cases involve, respectively, challenges to tax legislation, city annexation and amendments to a statute of limitations. None relate to private rights arising under private trusts. None involve vested rights, and none espouse any variation from the governing principle that legislation may not generally be construed to deny private citizens' vested rights.

Appellees' fallback argument is that the repeal of KRS 386.180 was "remedial" in nature, and hence permissibly retroactive. This argument, too, is seriously flawed.

In the first place, the allegedly remedial nature of the repeal is not found anywhere in HB 615, nor is it properly deducible from anything contained in HB 615. There was no express statement to that effect. There was no enactment of a new statute to replace KRS 386.180; hence, the Legislature has simply not expressed a remedial purpose, by adopting something supposedly better in order to remedy the supposed exigency. Appellees seem to contend for the proposition that if the need for a change is particularly pressing, the Legislature may adopt retroactive legislation in the guise of a remedial act. There are several problems with this. First is the degree of urgency required. Despite Appellees' insistence about the inadequacy of their own compensation, increasing trustee's fees hardly seems to be a critical public concern or a matter of pressing urgency. If the General Assembly deemed it so, why was there no such recitation in HB 615? Second, as shown by the authorities Appellees themselves cite, the legislature cannot deprive citizens of vested rights, no matter how important the perceived need. Third, remedial legislation generally deals with procedure or technical issues, not with substantive rights.

Appellees' citation to the definition of a remedial statute as found in 73 Am. Jur.2d, Statutes §11 (1974) confirms and informs this point. As cited on page 29 of Appellees' Brief, remedial legislation is defined as that which is intended to

> "...abridge superfluities of former laws, remedying defects therein, or mischief thereof... Remedial legislation implies an intention to reform or *extend* existing rights. (Emphasis added)

With all due respect to the esteemed institutions involved, the only "superfluity" "defects" or "mischief" in KRS 386.180 is that it did not in their view at least, provide adequate compensation for their services as testamentary trustees. Furthermore, remedial legislation, as the citation demonstrates, is to reform or extend existing rights, not abolish them.

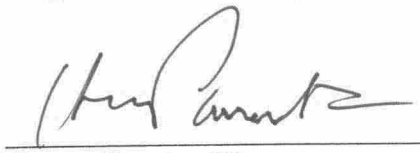
Hence, HB 615 should be interpreted as neither retroactive nor remedial.

CONCLUSION

Appellants respectfully reiterate their request for the relief sought in the conclusion of their initial Brief to this Court, namely, that the decisions of the Courts below be reversed with directions to enter a judgment declaring that the repeal of KRS 386.180 applies only to testamentary trustees who accept engagement after the effective date of HB 615 on July 17, 2008.

Alternatively, if the Court determines that the judgment should be reversed for lack of necessary parties, Appellants would ask this Court to remand the case to the Circuit Court with instructions to join necessary parties, and after affording such parties the opportunity to be heard, to enter a judgment consistent with this Court's opinion on the merits.

Respectfully submitted,



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