

HULL&HULL

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Dear Sirs:

Re: Gilbert. Estate of Bruce Laney

As you are aware, on May 14, 2003, we attended before the Court on an Application to determining whether or not the Education Trust set out in the Last Will and Testament of Bruce Laney Gilbert is a valid Trust to be applied for the eligible group; or whether it failed as a Trust and thus would be distributed on an intestacy to the next-of-kin.

The Representative for the next-of-kin group agreed to consent to a Judgment determining that the Trust provided for in clauses 12, 13, 14 and 15 of the Last Will and Testament of Bruce Laney Gilbert, constitutes a valid non-charitable or private trust for the benefit of the eligible group.

The Court further declared that there is a valid gift-over to the charities, being such post-secondary educational institutions that you shall from time-to-time appoint, at the period referred to in clause 15 of the Will.

Further the Court declared and ordered that you are to divide any remaining capital amongst post-secondary institutions at the end of the period referred to in clause 15 of the Will.

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I will review the particulars of the Judgment in more detail further. Suffice to say you are now in a position where you need to carry out the terms of the Trust set out in the Will of the late Bruce Laney Gilbert.

DISPOSITION OF THE ESTATE

Besides being appointed as Trustees of the Gilbert Education Trust Fund, we also wish to point out that you were also named as Executors of the Estate of Bruce Laney Gilbert, and we understand you dealt with solicitor Alan French in terms of the administration of the Estate matters, such as making the Application for Certificate of Appointment of Estate Trustee with a Will, determining the debts owed by the deceased at the time of death and arranging for payment of them, looking after the deceased's tax returns and paying all taxes of the deceased, and accounting to the beneficiaries for your actions in the administration of the Estate. If it is the case that you have not received such advice from solicitor French, please advise.

BRUCE GILBERT EDUCATION TRUST

The residue of the Estate is to be held by you and invested in the Bruce Gilbert Trust, to be known as the "Bruce Gilbert Education Trust" ("the Trust").

Bruce Laney Gilbert appointed you as the Trustees of the Trust. He has set out his intention that there always be three Trustees of the Trust, therefore if one of you dies or is unable or unwilling to act, the continuing Trustees are to appoint a replacement. Furthermore, you do not need a Court Order either removing or appointing an Estate Trustee in order to effect a change in Trustee.

If at any time you are unable to agree regarding any matter in connection with the Estate, a decision of the majority of you is final and binding upon all concerned.

As the Trustees of the Bruce Gilbert Education Fund, you are the persons primarily responsible for the administration of same, and without giving you an exhaustive list, your work includes the following, some of which you have already attended to:

- I. Determining the names and addresses of those members of the eligible group and notifying them of their interest in the Gilbert Education Fund;
2. Determining the full nature and value of the assets of the Fund, and compiling a list of same; and
3. Investing the trust funds in a prudent manner.

The "eligible group" is defined in the Will as being the issue (children and more remote descendants) of the deceased's nieces and nephews. They do not need to be alive at the date of the Will. Accordingly, as you have indicated you are aware, the eligible group will continue to grow with each new birth from the issue of the deceased.

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You have provided us with lists of the family tree and who might be potential members of the eligible group. You have further advised that you sent them regular newsletters updating them as to the status of the Court proceedings.

As Trustees, the Will entitles you to compensation for acting as such, although it limits you to compensation based on the time expended in relation to the Estate and at a reasonable rate. As we have discussed, you should be keeping track of the hours of your time spent in administering both the Estate and the Education Trust. The compensation of the Trustees, and the approval of your accounts as a whole, is sufficiently approved if approved by a majority of the number of nieces and nephews who are alive from time to time. In this regard, despite what the Will says, it would be our suggestion that you pass your accounts before the Court every two years, as this protects you from any allegations of wrong doing by any members of the eligible group.

As one of your jobs as Trustees, you must apportion benefits among present and future members of the eligible group. This obviously will be a difficult balancing job. The deceased expressly states he intends no liability to be incurred by you by virtue of the fact that you should have been more generous or less generous to those of the eligible group who received benefits at an earlier date than other members.

You have advised that it is your intention to circulate application forms to the members of the eligible group. If they wish to receive income from the Trust, then they must fill out those application forms and return them to you.

You are further directed to pay the income derived from the Trust, and the Capital of the Trust, as you consider appropriate for the education of the members of the eligible group. In doing so, you are to take into account the personal, parental and other resources that are or may be available from other sources. You are to add any unspent income to the capital of the Trust.

You are to pay these monies for the "education" of the members of the eligible group. The Will defines education in a very broad manner. It is to include all aspects of the development of career skills (not just the degree granting) and incidental expenses such as accommodation, travel and materials, and is intended to anticipate that the form in which education is obtained may transform over time. For example, a person may receive an education by means of a computer network. You are free to give the term the most liberal interpretation in the circumstances you face.

Because of the terms of the Will, the Trust set out in the Will may continue for many years and probably until 21 years after the death of last surviving niece or nephew who is alive at the Testator's death.

Throughout the duration of the administration of the Trust, you, as the Trustees are personally exposed to claims and complaints with respect to the ongoing administration of the assets. If it turns out for example, that you invest the assets in an inappropriate fund and do not invest the assets as a "prudent investor" would invest them, you may be subject to complaint and criticism at the passing of your accounts. The accounts can be reviewed and potentially criticized by any surviving niece or nephew at the time of the Testator's death.

The fundamental duty of a Trustee is to adhere to the terms of the Trust, and to act in order to best fulfill those terms. Regardless of the individual Trust, the common law imposes basic and general duties of good faith, and branching out of these are more specific duties.

The following might well be called the canons of Trusteeship:

1. The Trustee shall obey the directions of the settlement or trust instrument unless the Court authorizes changes or the beneficiaries consent to them pursuant to the rule in *Saunders v. Vautier*;
2. The Trustee shall act impartially between the beneficiaries;
3. The Trustee must exercise ordinary care and prudence;
4. The Trustee shall be loyal to her trust by not trafficking with her trust and shall not profit from her administration or permit her interest to conflict with that of the trust;
5. The Trustee shall be ready with her accounts.

If the Trustee fails to meet the standard of care referred to above, he or she will be generally held accountable and liable for any loss resulting from the breach, and must place the Trust Estate in the same position as it would have been in if no breach had been committed.'

The Trust will continue until 21 years after the death of the issue of the last surviving niece or nephew who is alive at the Testator's death. In Ontario, if a Trustee is found to have improperly acted and damage should be awarded against that Trustee, then the liability with respect to payment of those damages is personal and in the appropriate circumstances, the assets of the Estate will not fund payment of such damages. In short, the Trustees are personally exposing their assets if they proceed without the benefit and assistance of some direction from the Court.

Trustees must look to sections of the *Trustee Act* (Ontario) which govern investments by Trusts. Some of them are as follows:

s. 27 (1) Standard of care - In investing trust property, a trustee must exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments.

(2) Authorized investments - A trustee may invest trust property in any form of property in which a prudent investor might invest.

I Margaret O'Sullivan, "Breach of Trust and it's Consequences". Woodfield, *Executors and Trustees* (6th ed.), (Carswell): Toronto, 2002) at 10-1.

(3) Mutual funds - Any rule of law that prohibits a trustee from delegating powers or duties does not prevent the trustee from investing in mutual funds.

(4) Common trust funds - If trust property is held by co-trustees and one of the co-trustees is a trust corporation as defined in the *Loan and Trust Corporations Act*, any rule of law that prohibits a trustee from delegating powers or duties does not prevent the co-trustees from investing in a common trust fund, as defined in that Act, that is maintained by the trust corporation.

(5) Criteria - A trustee must consider the following criteria in planning the investment of trust property, in addition to any others that are relevant to the circumstances:

1. General economic conditions.
2. The possible effect of inflation or deflation.
3. The expected tax consequences of investment decisions or strategies.
4. The role that each investment or course of action plays within the overall trust portfolio.
5. The expected total return from income and the appreciation of capital.
6. Needs for liquidity, regularity of income and preservation or appreciation of capital.
7. An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

(6) Diversification - A trustee must diversify the investment of trust property to an extent that is appropriate to,
 (a) the requirements of the trust; and
 (b) general economic and investment market conditions.

(7) Investment advice - A trustee may obtain advice in relation to the investment of trust property.

(8) Reliance on advice - It is not a breach of trust for a trustee to rely on advice obtained under subsection (7) if a prudent investor would rely on the advice under comparable circumstances.

(9) Terms of trust - This section does not authorize or require a trustee to invest in a manner that is inconsistent with the terms of the trust.²

In summary, the Will and the Judgment provide that the residue is to be invested and held in trust by yourselves as Trustees on the following terms:

² *Trustee Act*, R.S.O. 1990, c~T. 23 as amended 1998, c-18 Schedule B. I

- a. The income and capital may be encroached upon to provide for the education of the issue of the Testator's nieces and nephews (the "eligible group");
- b. Any undistributed income is to be accumulated and added to capital;
- c. Eventually, you are to distribute the capital of the Trust among such post~ secondary educational institutions as you may select. The distribution is to take place on the earlier of the 21st anniversary of the death of the last niece or nephew who is alive at the date of the Testator's death, and when you determine there are no "eligible" persons who may benefit from the Trust.
- d. If income is still being accumulated after 21 years, you are to add that income to the capital to be divided among such post-secondary educational institutions as you may select.

You have asked whether you could dip into the capital to pay for the current eligible group so as to deplete the Trust within five to ten years. If you were to set up a program to deplete the capital as suggested, this might amount to a variation of trust. Trustees, without the consent of all beneficiaries, for court of approval where minor and unborn beneficiaries are concerned, is not permitted. Furthermore, to do so could be a delegation of the responsibility of the Trustees to exercise their discretion in accordance with the Will. We would be happy to discuss this issue further with you.

Hopefully this letter is of some assistance to you in terms of your duties as Trustees of the Education Trust. We would be happy to discuss any of these issues with you, at your convenience.