

**SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

Accounting of

**ALVIN J. BURNETT and THE ESTATE OF
ARCHIBALD A. HILL, DECEASED,**

as Trustees under the Will of
JESSICA M. HILL,

Deceased.

File No. 2197/1951

STATEMENT OF ISSUES

**Hon. Renee R. Roth,
Surrogate.**

The within document represents a Statement of Issues, pursuant to Uniform Rule 207.30 of the Surrogate's Court of the State of New York. This Statement includes those issues which it is believed will affect in some manner the Respondent Alvin J. Burnett (the "Respondent") and the Estate of Archibald A. Hill, Deceased ("Professor Hill"), a Co-Trustee of the Respondent and the sole income beneficiary of the Trust created under the Will of Jessica M. Hill, Deceased (the "Decedent").

FACTS

Jessica M. Hill died on July 25, 1951. Her Last Will and Testament was submitted to probate in Surrogate's Court, New York County. A trust was established under the Will as follows (the "Trust"):

THIRTEENTH: I give, devise and bequest all the rest, residue and remainder of my estate of whatsoever kind and nature and wheresoever the same may be situated and over which I at the time of my death may have any power of disposition, to my trustee hereinafter nominated and appointed, IN TRUST NEVERTHELESS, upon the following uses and purposes: to hold, manage, invest and reinvest the

same and after deducting all proper and necessary charges and expenses incurred in the administration thereof including trustee's commissions, to pay over the net income therefrom to my nephew, PROFESSOR ARCHIBALD ANDERSON HILL of Charlottesville, Virginia, during his life in semi-annual installments or oftener in the discretion of my trustee, and upon the death of my said nephew the trust created hereby shall terminate and come to an end, and the corpus or fund remaining on hand together with any accrued income shall be paid over to the children of my nephew him surviving, in equal parts, share and share alike; and in default of such children him surviving, the corpus or fund remaining on hand together with any accrued income shall be paid over to the ASSOCIATION FOR CHILDHOOD EDUCATION, corporation organized and existing under the laws of the district of Columbia, to be used by said corporation for its lawful corporate purposes and to be designated as the "PATTY SMITH HILL FUND." The term "children of my nephew" shall be construed to refer and include any legally adopted child or children.

Letters of Trusteeship under Decedent's Will were issued to Samuel Mann on September 7, 1951. Mr. Mann died on September 6, 1958. On January 7, 1959, successor Letters of Trusteeship were issued to Professor Hill, the income beneficiary under the Trust, and to the Respondent herein.

The Hill Foundation was incorporated in the State of New York in 1942 (the "Foundation") and its initial shareholders were Patty S. Hill and the Decedent. The Foundation's primary asset was the right to receive income from royalties for the copyrighted song "Happy Birthday." Upon the death of Decedent, Samuel Mann, as Trustee under the Decedent's Will, became the shareholder. Upon the death of Samuel Mann, Professor Hill and the Respondent, as successor trustees, became shareholders. Respondent was also the President of the Foundation.

Pursuant to a 1959 written agreement between Respondent and Professor Hill, Respondent was given the right to receive from the Foundation an amount equal to 15% of all

income received by the Foundation for fees payable to Respondent. This agreement was subsequently modified by Professor Hill when he later granted Respondent additional percentages of income to increase the fees paid. Professor Hill, as life beneficiary to the income under the Decedent's Will, had the legal right to dispose of Trust income as he saw fit. When income was received by the Foundation, Professor Hill decided how it was distributed. Income was held by the Foundation solely for payment at the direction of the Professor Hill as income beneficiary. Since Professor Hill and Respondent were the only shareholders (as Trustees), and they agreed as to the disposition of the monies, there was no need to have the formality and expense of declaring formal dividends.

Professor Hill was the Decedent's primary beneficiary, the person whom, first and foremost, she desired to provide for most generously. The Association received only a \$2,500 bequest, with a contingent remainder as to principal of the Trust. Muriel Wright, although not legal issue of Professor Hill, is the sole beneficiary of Professor Hill's estate. She was treated by Professor Hill and his wife as one of their own. It was only in the event that Professor Hill died without issue that the Association was to benefit as remainderman. Muriel Wright renounces her interest in all Trust income other than undistributed income which she asserts should be distributed to her.

Accountings of the Trust were prepared and furnished by Respondent for the periods 1961 to 1971, for which period the Association for Childhood Education International (the "Association") executed a release; and 1971 to 1981. These Accountings were sent to Professor Hill and the Association, the contingent remainderman under the Trust. At no time did Professor Hill or the Association ever make any claims that Respondent wrongfully or improperly administered the Trust. Professor Hill died on March 21, 1992, without legal issue, leaving Respondent as his executor and sole surviving Trustee. Muriel Wright is the sole residuary beneficiary of the Estate of

Professor Hill.

In response to objections interposed by the Association during the course of this litigation, full accountings were prepared and filed for the Foundation for the period July 2, 1962 to July 31, 1995 and for the Trust for the periods July 1, 1961 to March 31, 1994 and April 1, 1994 to July 31, 1995. Payment of \$400,000 was made by the Trust to the Association in October 1995. Additional payment of \$250,000 was made by the Trust in July 1996 and \$700,000 was paid by the Foundation. Securities held as principal by the Trust valued at approximately \$370,000 were distributed to the Association on or around May 23, 1995.

On or around May 1998, Muriel Wright, the sole residuary beneficiary of the Estate of Archibald Hill, moved this Court for an order requiring distribution of income accrued but undistributed since the death of Professor Hill. The Association cross moved for an order for final distribution of all funds in the Trust and for supplemental accountings of the Trust and the Foundation. Pursuant to the Order of this Court dated June 15, 1998, the Trust and Foundation transferred the following sums to an escrow account for the benefit of the Association: \$198,753.88 and \$95,835.49, respectively, representing undistributed accumulated and/or accrued income; and \$15,000 as a reserve for administrative expenses. The Trust and Foundation also transferred to the Association all its remaining assets, including issued and outstanding shares of the stock of the Foundation. At that time, Respondent resigned as President of the Foundation. On or around August 3, 1998, the Respondent filed and served supplemental accountings for the Trust and the Foundation for the period August 1, 1995 to June 30, 1998.

OBJECTIONS TO ACCOUNTINGS

The Association and the Attorney General assert the following objections to accountings of the Trust and the Foundation:

A. Trust: March 1992 to March 1994

1. Legal fees paid to Respondent
2. Commissions paid to Respondent: objectants claim that Respondent's agreement with Professor Hill which allotted him 15% of Trust income is a waiver of regular commissions.
3. Fees paid to Daniel Taub, CPA.
4. Legal fees paid to Sonnenschein Nath.
5. Taxes paid after Professor Hill's death: objectants state that Trust passed to Association upon Professor Hill's death, and as a charity, the Association would not have had to pay these taxes.
6. Tax refund after Professor Hill's death: objectants state that Trust passed to Association upon Professor Hill's death, and as a charity, the Association would not have had to pay these taxes. Therefore, refund belongs to the Association. Respondent asserts that it represents payment from income received prior to death and therefore belongs to the Estate of Professor Hill.
7. Income accruing after Professor Hill's death: objectants assert that it belongs to the Association.

F. Trust: August 1995 to June 1998

1. Commissions paid to Respondent.
2. Fees paid to Diamant Katz & Kahn, CPAs.
3. Cherry Hill CD deposit error: funds were deposited to Trust account instead of Foundation.
4. Ownership of copyright on "Happy Birthday" not listed as an asset; royalties earned on "Happy Birthday" not listed as income on hand.
5. Transfers between the Foundation and the Trust.
6. Federal and state tax payments: objectants assert that if Foundation had been liquidated, taxes would not have been due.

ISSUES

Respondent propounds the following in opposition to the Association's and the Attorney General's (collectively "Objectants") objections to all accountings of the Trust and Foundation and the Objectants' Petition for removal of Respondent as Trustee. Respondent refers to his motion to dismiss, dated February 3, 1997, which was withdrawn without prejudice, and Respondent reserves his right to resubmit this motion.

1. The Accountings are accurate and complete;
2. The Petition for removal of the Respondent as Trustee is moot since the assets have been distributed;
3. The fees paid the attorneys and accountants are reasonable and properly paid;
4. The Association, as remainderman of the Trust, lacks standing to object to

alleged improper payments to Respondent, the bulk of which were charged to and paid out of income, and not affecting principal.

5. To have liquidated the Foundation in 1986 would have dwarfed the amounts available to the Trust, the Foundation, and ultimately, the Association. The Respondent provided the affidavits of Ira Stechel, Esq. and William Stevenson, Esq. in his motion to dismiss, which details the tax consequences of liquidation;

6. There was no need to have formal dividends declared from the Foundation;

7. To the objections that the Association is entitled to any income resulting from the disallowance of any fees paid during Professor Hill's life, Respondent asserts the following points:

Professor Hill was the Decedent's primary beneficiary, the person whom, first and foremost, she desired to provide for most generously. The Association received only a \$2,500 bequest, with a contingent remainder as to principal of the Trust. Muriel Wright, although not legal issue of Professor Hill, is the sole beneficiary of Professor Hill's estate. She was treated by Professor Hill and his wife as one of their own. It was only in the event that Professor Hill died without issue that the Association was to benefit as remainderman.

Under the Will, Muriel Wright, as sole beneficiary of the Estate of Professor Hill, is entitled to the income on hand but not distributed prior to Professor Hill's death. Such a construction follows the intention of the Decedent as ascertained from the reading of the entire Will. Under the Association's theory, the Will provides them a windfall--the income distributed over the past 37 years in which it has no interest.

The Will provides that the "corpus or fund remaining on hand together with

any accrued income shall be paid over to the children of my nephew him surviving, in equal parts, share and share alike; and in default of such children him surviving, the corpus or fund remaining on hand together with any accrued income shall be paid over to the ASSOCIATION FOR CHILDHOOD EDUCATION." The Respondent concedes that the Association is entitled to the principal of the Trust and any accrued income as of the date of Professor Hill's death, but not to income received by the Trust before the date of Professor Hill's death. Under the Will, the Association has no interest in any other income. All income other than accrued income passes through the Estate of Professor Hill to Muriel Wright.

Respondent will provide affidavits by professionals involved in the administration of the Trust as to the necessity of their work on behalf of the Trust and the Foundation and their fees. All other objections to accountings, other than those previously presented herein, pertain to the methods of accounting or are requests for clarification of certain entries.

BURDEN OF PROOF

Under Matter of Ilene L. Flaum, 177 A.D.2d 170, 183, 582 N.Y.S.2d 853, 861 (4th Dep't. 1992), a case arising out of the misappropriation of estate assets by a fiduciary, the accounting fiduciary has "the burden of proving the fairness, reasonableness and uprightness of all his dealings vis-a-vis the estate and the estate property.

Matter of the Estate of Ernastine Schnare, 191 A.D.2d 859, 594 N.Y.S.2d 827 (3d Dep't. 1993) follows the above rule but supplements it. An executor who was compelled to file an accounting petitioned for voluntary judicial settlement of the account pursuant to SCPA 221 1. In response, decedent's children filed objections and cross-petitioned for executor's removal

claiming misfeasance, breach of fiduciary duties, and conversion of estate assets. The Third

Department stated:

In an accounting proceeding, the party submitting the account has the burden of proving that he or she has fully accounted for all the assets of the estate. *Vinlis Constr. Co. v. Roeck*, 30 A.D.2d 668, 291 N.Y.S.2d 924, mod 27 N.Y.2d 687, 262 N.E.2d 215, 314 N.Y.S.2d 8, see generally, 29 Carmody-Wait 2d, Surrogate's Court & Estate Prac, 166.181, at 418-420), and this evidentiary burden does not change in the event the account is contested. While the party submitting objections bears the burden of coming forward with evidence to establish that the account is inaccurate or incomplete, upon satisfaction of that showing the accounting party must prove, by a fair preponderance of the evidence, that his or her account is accurate and complete (cf., *Matter of Mann*, 41 A.D.2d 861, 342 N.Y.S.2d 617, lv denied 33 N.Y.2d 517; 29 Carmody-Wait 2d, Surrogate's Court & Estate Prac, 166.181 at 418).

Respondent seeks to have the trial before the Surrogate. The trial is expected to last

3-4 days.

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