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Steve Leimberg's Estate Planning Email Newsletter - Archive Message #2438

Date: 20-Jul-16
From: Steve Leimberg's Estate Planning Newsletter
Subject: **Gary Flotron and Randy Whitelaw: A Comprehensive Perspective on the Four UPIA-TOLI Cases, Plus One That Includes the UTC, and Their Astounding Implications for ILIT Trustees, Part 2 of 2**

In Estate Planning Newsletter #2428, **Gary Flotron** and **Randy Whitelaw** discussed in detail the first of the four Uniform Prudent Investor Act (UPIA) and trust-owned life insurance (TOLI) cases – namely the *Cochran v. KeyBank, N.A.,*which is more formally known as *In re Stuart Cochran Irrevocable Trust*, and in which co-author **Randy Whitelaw** was the lead expert witness for the plaintiffs.

In Part 2, the authors will describe and do a comprehensive analysis of each of the subsequent three UPIA-TOLI cases – namely *Paradee v. Paradee*, *French v. Wachovia Bank*, and *Rafert v. Meyer*. The *Rafert v. Meyer* case also applies the Uniform Trust Code (UTC) in addition to UPIA to TOLI. Each of these cases has provided guidance to trustees – both professional and amateur – and astonishing implications as to what constitutes prudent trustee behavior. Of course, there will undoubtedly be more cases in the future which will provide us with further refinements in the drafting, duties of trustees, administration and operation of ILITs and TOLI.

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TAC provides counseling and expert witness litigation support to individual and business policy owners, professional advisers, affluent family groups, and trustees, skilled and unskilled, of irrevocable life insurance trusts seeking both life insurance and fiduciary practices counseling. TTC provides policy owners, fiduciaries, professional advisors, affluent families and businesses with a service-based life insurance plan administration and policy risk management platform. He lectures nationwide on life insurance planning, suitability and dispute defensible risk management, and regularly authors in-depth peer-reviewed articles on the same topics. He is also the co-author with Henry Montag of the soon to be published book by the American Bar Association titled **The Life Insurance Policy Crisis - The Advisors and Trustees Guide to Managing Risk and Avoiding a Client Crisis**. Mr. Whitelaw was the lead expert witness for the plaintiffs in the *Cochran* case discussed in this newsletter. In 2013, he was inducted into the NAEPC Estate Planning Hall of Fame® and awarded the Accredited Estate Planner® (Distinguished) designation.

Now, here is Part 2 or their commentary:

Paradee v. Paradee[1]

EXECUTIVE SUMMARY:

This case involves breach of trust and disregard for fiduciary duties by three non-professional ILIT trustees. A single premium, second-to-die, blended whole life policy was the primary trust asset during most of the period in question, thus making it one the four UPIA-TOLI cases. However, an abuse of fiduciary duties might have easily have occurred in this case if the trust corpus was made up of other assets.

FACTS:

W. Charles Paradee, Sr. had an estranged relationship with his son, W. Charles Paradee, Jr. partially due to his remarriage after the death of his first wife and the mother to Charles, Jr. In 1978, at the age of 71, Paradee, Sr. married Eleanor Clement Paradee, who was age 54. However, Paradee, Sr. maintained a close and loving relationship with his only grandchild, W. Charles "Trey" Paradee, III. In December 1989, Charles Sr. created an irrevocable life insurance trust for the benefit of his grandson Trey naming his life insurance agent, Eugene N. Sterling, with whom Charles, Sr. and Eleanor had been longtime clients, as trustee. The trust was structured to take advantage of the so called "Gallo Exemption," which was to expire at the end of 1989, and funded with contributions from Charles, Sr. and Eleanor of $183,089 and $183,000, respectfully.[2] The contributions were used to purchase the single premium second to die whole life policy mentioned above on the lives of Charles Sr. and Eleanor, with a death benefit of $1,150,700. At the time of the trust creation, Trey was nine years old. Under Article I of the trust, Trey had the power to remove the existing trustee and appoint himself as trustee once he turned age 30.

Eleanor's influence over Charles Sr. and over the family finances steadily increased. In 1991, Charles, Sr. almost died of heart failure and began to deteriorate mentally as well. At that time, Eleanor despised Charles, Jr. and, at best, had apathy towards Trey. In July 1993, Eleanor sent a letter to Sterling, the trustee, instructing him to revoke the trust and return the cash value to the senior Paradees. Sterling sought counsel from the attorney who drafted the trust. Eleanor sought counsel from that same attorney who informed her that the trust was irrevocable. She made it clear that "irrevocable" meant "Irrevocable," and the Paradees could not access the cash value by revoking the trust. However, the attorney and Eleanor investigated the possibility of a trust loan, and the attorney discussed this idea with Sterling who sought counsel from another attorney on the structure of the loan. Sterling ignored the advice of the second attorney, and borrowing $150,000 from the cash value of the policy at an 8.75% variable loan interest, made an unsecured loan with fixed interest at 8.0% per year, without specifying whether the interest was simple or compounded, to the corporation owned by Charles, Sr.[3] Additionally, Sterling ignored the terms of the loan which required interest to be paid monthly and made no effort to collect the interest on a monthly basis. Instead, he established a practice of writing to the Paradees and requesting that interest be paid annually in February. Such interest was paid annually in 1994 through 1997.

One year after receiving the loan, Eleanor again instructed Sterling to revoke the trust and pay out the policy cash value to the Paradees. Sterling replied to Eleanor that the trust was irrevocable and the prior year's loan "was really stretching it." In December 1997 Eleanor again tried unsuccessfully to terminate the life insurance policy by having the family accountant contact the attorney who apparently then contacted Sterling directly. In February 1998, Eleanor informed Sterling that the Paradees could not pay the interest on the trust loan and, again, requested that Sterling surrender the insurance policy for its cash value. Sterling wrote to the second attorney stating: "I need guidance on what to do. Can I comply with the wishes of the Senior Paradee's [sic] without jeopardizing my position?" The second attorney responded with a letter, ostensibly written to Sterling but intended for the Paradees, advising Sterling of his personal liability and strongly urging him *not* to comply with Eleanor's request. Upon reading the letter, the Paradees paid the interest.

Charles, Sr. passed away on July 1, 1998. Under the terms of the loan, the trust had the right to recover the principal and interest at the death of Charles, Sr. or Eleanor. Sterling made no effort to collect. Trey turned 30 on July 18, 1999. Article1 Section C of the trust provided that "after my [Charles, Sr.] death, and upon reaching age 30, my grandson, W. Charles Paradee III, shall be entitled to serve as trustee hereunder…." Sterling did not notify Trey. On September 24, 1999, Manufacturers Life Insurance Company, the insurer of the trust-owned policy, demutualized and distributed shares of stock to eligible policy owners. Because of the policy loan, the trust received less shares of the now Manulife Financial Corporation (Manulife) than it would have been entitled to without the policy loan.

In early 2003, Eleanor asked the attorney to contact Sterling to find out the current face value of the policy, whether it was paid up and whether there was "[a]nything we can do about it." Sterling died on April 2, 2003 and the attorney reviewed the trust to determine who would become the successor trustee. The attorney advised Eleanor that Trey could serve as his own trustee, having reached the age of 30. Once again on April 21, 2003 Eleanor asked her advisers to look into how she could access the remaining trust funds. Ignoring her attorney's advice, Eleanor somehow managed to appoint herself as trustee. In 2003, for the first time, the corporation which was now controlled by Eleanor and to whom the trust loan was actually made, failed to pay the interest due on the loan. Similarly, interest was not paid in 2004 and 2005 resulting in March 2005 policy lapse. At that time, the trust assets consisted of the promissory note for the loan, the Manulife stock from the demutualization, and a cash bank account consisting of the dividends paid on the stock and on the stock dividends accumulated in the trust bank account. During Eleanor's tenure as trustee, the attorney advised Eleanor that (1) she had a duty to notify Trey about the trust, (2) the trust was obligated to pay income to Trey, and (3) she should use trust assets to maintain the policy. Eleanor declined to follow the attorney's advice.

In July 2007, Eleanor resigned as trustee and appointed William J. Smith, the family's longtime handyman and general domestic helper, as trustee. Smith did not understand his role as trustee nor his obligations to Trey, and initially viewed the trust as just another one of Eleanor's accounts. Like Eleanor, he initially did not inform Trey of the trust's existence or that Trey was the sole beneficiary of the trust, or inform Trey that he had a right to act as his own trustee. Furthermore, Smith did not distribute the trust income to Trey. Sometime later in 2007, Smith came to understand Trey's interest in the trust and told the attorney he wanted "to do what is right," and requested a letter instructing him on what to do. For some unknown reason,[4] it took the attorney two years to get around to that task. On August 18, 2009, Trey received a letter from the attorney informing him about the trust. Trey promptly exercised his right to become trustee and demanded that the loan be paid. On the last day in September of 2009, the corporation controlled by Eleanor paid the trust the principal and interest on the loan. Trey subsequently sued Eleanor and Smith, as trustees and as individuals, for breach of trust.

Court Opinion and Decision. Not surprisingly, given the above facts and total disregard for the interest of the trust beneficiary, lack of loyalty to the beneficiary, lack of prudence by all of the trustees to one extent or another, and disregard for fiduciary duties – all tenants of UPIA and common law – the court found in favor of Trey and assessed damages against the surviving former trustees along with particularly heavy damages against Eleanor that included her payment of Trey's attorney costs and expenses due to her egregious behavior and influence over the actions of the first and third trustees.

COMMENT:

Besides demonstrating egregious and flagrant behavior that should not be emulated by any trustee, this case highlights the perils of appointing sole, or only, non-professional, amateur, accommodation trustees who are unfamiliar with the fiduciary duties and responsibilities that accompany trusteeship. In all probability, these results could have been avoided by appointing either a professional trustee or a co-professional trustee and non-professional trustee.

***French v. Wachovia Bank*[5]**

EXECUTIVE SUMMARY:

This case deals with the broad issues of the duty of loyalty and prudence, and specifically, with a trustee engaging in self-dealing and acting in bad faith. Although in reading the case from the district and appellate courts, one cannot help but conclude that James "Jim" French, the trust settlor, and, perhaps, the four French children and trust beneficiaries, were difficult to please and had a lot of *chutzpah*. Or, to use a spaghetti western analogy[6], the French family had *a fistful of dollars* and were after *a few dollars more*. (Not certain how to assign *the good, the bad and the ugly* roles.)

FACTS:

Jim French founded the J. L. French Company, a manufacturing firm located in Sheboygan, Wisconsin in 1968 and sold it in 1996 for approximately $200 million. This sale netted French more than $100 million, individually and through his late wife's estate, and each of the four French Children realized more than $17 million. In 1991 he executed two interlocking irrevocable trusts for the benefit of his four children. Kathy Gray, an estate planning attorney and partner of Quarles and Brady, LLP, in Milwaukee, Wisconsin advised the family on estate planning matters and drafted the trust. Irrevocable Trust 1 holds a variety of investments, including two life insurance policies, and provides no distribution during French's lifetime but only upon his death. Irrevocable Trust 2 provided that all income of the trust to be paid to Trust 1 and that, upon French's death, the assets of Trust 2 would be distributed to Trust 1. At the end of 2004, Trust 2 held primarily stocks and bonds and was valued at approximately $24 million. Trust 1 was valued at more than $5 million, not counting the value of the life insurance policies. The only trust that is relevant to this matter is Trust 1 that held the two life insurance policies; hence, all further references to the trust will be for Trust 1.

As the grantor of an irrevocable trust, Jim French was not the trustee and had no authority over the trust or the trustee. However, he exercised authority as the consensus spokesperson for the French family and his children, the trust beneficiaries, and they deferred to him on trust matters. The law firm of Quarles & Brady, Jim French's attorneys, were also counsel to the beneficiaries with respect to the trust.

Initially, a Sheboygan attorney was the independent trustee of this trust. After losing confidence in the attorney's stewardship, French moved the trust to First Bank, and subsequently to Northern Trust Company. By 2004 French had grown dissatisfied with Northern Trust's conservative investment philosophy and modest rate of return. Of particular concern were the two life insurance policies held by the trust. One policy was a $ 5 million death benefit issued by Pacific Life Insurance Company with an annual premium of $164,000. The other policy was a $5 million death benefit issued by Prudential Life Insurance Company. The Prudential policy was described in the case as a "second-to-die whole life policy" having a premium scheduled to increase by more than $40,000.[7] As of May 2005, the existing policies had a cash value of approximately $2.2 million dollars.

In 2004, French began looking for a new trustee with a better investment strategy. French's daughter, Paula, urged French to talk to her stockbroker at Wachovia Securities, in Sheboygan, about moving the trust to Wachovia Bank. In early 2004, French held an initial meeting with Fred Church, a vice president of Wachovia Bank, at French's vacation home in Naples, Florida. Kathy Gray was also present at that meeting. Besides indicating he was looking to move his trusts, French requested that Church investigate the insurance policies held in Trust 1. Church and his associate, Steve Schumacher, an insurance broker with Wachovia Insurance Services in Tampa, Florida, subsequently commenced an evaluation of the trust portfolio, including the life insurance policies, to identify potential areas for improved profitability. On July 22, 2004 Church wrote to Gray confirming Wachovia's willingness to serve as trustee and identified options to improve the trust's insurance assets.

On August 3, 2004, Gray and her partner John Bannen, an attorney and insurance specialist at Quarles & Brady, met with Church in Milwaukee to discuss the range of insurance policy options. Because of a communication snafu, French did not have adequate notice and could not attend the meeting. He was upset and remained so even after Bannen summarized the meeting in a detailed memorandum. In September, French instructed Gray to discontinue the insurance analysis, and for a time Bannen and Church did nothing further. The case facts mention that "French is considered a 'difficult client,' one who keeps his own counsel and who seems afraid of being taken advantage of by professional advisors."

In mid-October, Church received word from Gray that French wanted to retain Wachovia as trustee, and Wachovia took over as trustee on December 29, 2004. According to Church, French called him in January 2005 asking him to resume investigations of options on the insurance policies as well as stating that he was looking for a "better deal" on the insurance in the form of either more insurance for the same premium or the same coverage for less premium. French denies that this conversation took place. Also, according to Church, he and Schumacher met with Jim French in his Naples vacation home on January 2005 to discuss insurance. French advised that he was interested in lower insurance premiums. At the close of the meeting, Church advised French that, if the purchase of new policies would proceed through Wachovia Insurance Services, a conflict waiver would be necessary.

Working extensively with Bannen, Church and Schumacher identified several options that Bannen summarized to French in a memo dated March 31, 2005. One option was to replace the existing policies with new no-lapse life insurance policies issued by John Hancock Life Insurance Company. This type of policy had a guaranteed death benefit with a substantially lower premium. Banner, in his memo, highlighted the pros and cons of the proposed replacement. The pros of the proposed arrangement were that the trust would get the same insurance for far less money. The lower, fixed premiums for the two proposed John Hancock policies would have an estimated savings to the trust of $620,000. The no-lapse guarantee ensured that the contracts would pay the promised death benefit as long as the premiums were paid timely.

The cons of the proposed arrangement were that the trust would lose the flexibility of the Pacific Life and Prudential policies, which accumulated cash value that could be recouped if the policies were surrendered before French's death. But Bannen and Church could not foresee any scenario under which early surrender would be necessary or desirable. The trusts had $30 million in other assets and were well diversified, made no distributions during French's lifetime, and the beneficiaries already were very wealthy. Church deemed the loss of flexibility unimportant to the trust's overall goals. The main point of having life insurance in the investment mix was to reap the death benefit, not the cash surrender value, that would never exceed the death benefit in any event.

In March, Bannen discussed insurance issues with Wachovia Bank representatives at least six times. During this process, Bannen found Wachovia Bank to be responsive in providing him with all of the requested information. Church concluded that Bannen was providing the French family with a level of analysis and due diligence that they had not experienced with other trust cases.

Church and Schumacher met with French on March 31, 2005 to discuss the options, and Bannen participated by phone. The following week French signed the John Hancock applications as the insured. On April 12, 2005 the managing director of Wachovia's Trust Department signed the applications and executed the required IRS forms documenting the exchange[8]. Schumacher submitted the applications to John Hancock but held back on authorizing the surrender of the Pacific Life and Prudential policies pending final approval from French. The new John Hancock policies were issued at the end of the month.

Meanwhile, Church sent Gray a proposed conflicts waiver identifying Wachovia Insurance Services, an affiliate of Wachovia Bank, as the insurance broker for the exchange, and also disclosing that Wachovia Insurance would receive a commission on the transaction, although it appears the amount of the commission was not disclosed. Bannen understood that Wachovia Insurance would earn a commission on the proposed 1035 exchange and advised French of the same. Gray also understood there would be a commission. A discussion ensued between Bannen, Gray and Church about the possibility of rebating the commission, or, alternatively, commensurate fee concessions by the trustee. It was determined that neither of these options was legally feasible. French balked at the terms of the conflicts waiver, which included a broad release of "any claim" arising out of the Wachovia's purchase of new insurance on behalf of the trust. French refused to sign, and instructed his children the beneficiaries of the trust also to refuse to sign.

Wachovia determined, after a review by legal counsel of the terms of the trust instrument, that it did not need either French's authorizations to proceed with the exchange, or the conflicts waiver. On May 18, 2005 the transaction proceeded as planned, and, on behalf of the trust, Wachovia surrendered the Pacific Life and Prudential policies. Wachovia received a commission of $512,000 from the transaction, which included the redeemed cash value of the surrendered policies, plus 2% of the annual premium for the next nine years, resulting in an additional commission of $36,000. No party disputes that the commission, though sizable, is consistent with industry standards.

Over the summer of 2005, French and his children, through counsel, complained to Wachovia about the process surrounding the insurance exchange. The family retained a different Milwaukee law firm, and on November 4, 2005 the new lawyers asked Wachovia to reverse the transaction. Of course, by then it was too late. After another change of counsel, the French children, as trust beneficiaries, sued Wachovia[9] for breach of fiduciary duty. They contended that Wachovia breached its fiduciary duties by engaging in prohibited self-dealing that violates the prudent investor rule as codified in Wisconsin via the Uniform Prudent Investor Act; and, if the prudent investor rule does not apply, acting in bad faith with regards to the insurance replacement. Not surprisingly, the trusteeship was changed to M & I (Marshall & Ilsley Corporation, now part of BMO Harris Bank) with the commencement of the lawsuit against Wachovia.

Court Opinion, Analysis and Decision. Both the U.S. District Court and the U.S. Court of Appeals for the Seventh Circuit found for the defendant/appellee Wachovia and, under Wisconsin law that was applied, ordered the plaintiffs/appellants to pay court costs and legal fees of the defendants.

Both courts cited the common law, statutes and other authorities on the duty of loyalty and the prohibition against self-dealing before examining the terms of the trust. It was noted that the trust instrument may waive the general rule and authorize the trustee to engage in transactions that involve self-dealing. The courts found that this was the case with the trust instrument and the language was quite clear. As the district court aptly stated in its decision about the applicable trust clause, the clause "specifically allows the trustee to deal "without regard to conflicts of interests." It is hard to imagine how the authorization to self-deal could be described more clearly." In an effort to avoid the clarity of this clause, the Frenches tried to focus on other general clauses in the trust instrument but both courts rejected their contentions. Thus, both courts rejected the claim that the trustee violated the duty of loyalty and engaged in self-dealing because of the specific clause in the trust authorizing the trustee to deal without regard to conflicts of interest.

The court next addressed the acted in bad faith allegation. Again citing common law, statues and other authorities, but this time on the standard of prudence and the prudent investor rule, and other sections of UPIA, and noting, that the trustee is always obligated to administer the trust in good faith because exculpatory clauses in trust instruments do not remove breaches of trust committed in bad faith, the court examined the process of the insurance exchange and found that there was no evidence of Wachovia acting in bad faith. "Indeed, all the evidence points in the opposite direction: The insurance exchange was undertaken in good faith, and indeed Wachovia satisfied the higher standard of the Uniform Investor Act, as the district court held."

Lastly, the Frenches argued that they were entitled to know the exact size of the commission before the transactions were consummated. The court noted "that the trustee has a duty to keep the beneficiaries "reasonably informed….about other significant developments concerning the trust and its administration, particularly material information needed by beneficiaries for the protection of their interests." However, the court noted, there are no hard and fast rules to determine when a development is sufficiently "significant" to trigger the duty to notify the beneficiaries. Rather, the trustee is obligated to "exercise reasonable judgment in determining what matters have such significance." Also, noting only "important adjustments being considered in investment or other management strategies" need to be disclosed.

The court concluded that the transaction of the insurance exchange was not so significant that the bank had a duty to provide detailed information about it in advance. The exchange of one insurance policy for another that maintains the identical death benefit is not a significant adjustment in investment strategy. Regardless, Jim French specifically instructed Wachovia to look for other insurance options, and the Frenches were kept in the loop from start to finish in the analysis of the transaction. The French family lawyers worked hand in hand with Church and Schumacher over many months to evaluate the proposed exchange. The court noted "Jim French signed the application forms and was kept informed in every step of the way, and the Frenches had notice that Wachovia Insurance would earn a commission. Indeed, their lawyers negotiated before the fact for a rebate or a reduction in Wachovia's fees. The record does not support a finding of fiduciary breach based on Wachovia's failure to give the beneficiaries advance notice of the size of the commission."

COMMENT:

Frankly, the authors find it hard to believe that French did not know a commission was going to be paid on the insurance transaction. Jim French had obviously purchased other insurance policies during his lifetime and had to know that life insurance brokers do not work for free. If the commission paid on the sale was going to be a concern for him, he should have inquired about this sooner when he could have, perhaps, taken other steps. But suppose the transaction was not completed though the Wachovia Insurance Services affiliate, but through an outside independent insurance broker. UPIA would require the trustee to perform due diligence and act prudently in selecting the insurance broker and monitoring the transaction including the commissions paid. Nevertheless, the insurance replacement in this case appears to have met the goals stated for the transaction. While the transaction was clearly self-dealing by the trustee, without the conflicts of interest waiver there would have been a breach of trust; hence, it was the specific language of the trust instrument authorizing the transaction to be completed through an affiliate of Wachovia that saved Wachovia from breach of the fiduciary duty of loyalty.

Summary. There are two lessons to be learned from the *French v. Wachovia* case. First, avoid any possible conflict of interest and self-dealing, even if allowed by the trust instrument. Second, when the trustee lacks life insurance management and evaluation skills, these tasks should be delegated to a competent, skilled, independent and outside provider. If there is a third lesson from the *French v. Wachovia* case it is to try to avoid difficult clients.

Rafert v. Meyer,[10] the Fourth and Latest UPIA-TOLI Case and the First to Apply the UTC

EXECUTIVE SUMMARY:

The *Rafert v. Meyer* case raised the bar, as a minimum, in states that have adopted the Uniform Trust Code and/or have common law cases with similar provisions contained within the UTC, and have not adopted exculpation statutes for unfunded ILITs, meaning that terms of a trust cannot prevail, restrict or eliminate the duty of the trustee to act in good faith and in accordance with the terms and purposes of the trust and the interest of the beneficiaries. This, undoubtedly, includes the duty to monitor and manage trust assets and to keep qualified trust beneficiaries reasonably informed concerning trust administration and material facts necessary for them to protect their interests. Additionally, it confirms that an exculpatory term drafted or caused to be drafted by the trustee is invalid unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor. The case also raises the issues of oversight liability for the ILIT drafting attorney when that attorney remains involved either as trustee or in trust administrative functions.

FACTS:

Jlee Rafert directed attorney Robert J. Meyer to prepare and draft an irrevocable trust that named Meyer as trustee of the trust. The corpus of the trust consisted of three life insurance policies insuring Rafert totaling $8.5 million in face amount. The life insurance policies were payable on Rafert's death to the trustee for the benefit of Rafert's four daughters. Article II of the trust instrument provided:

> The Trustee shall be under no obligation to pay the premiums which may become due and payable under the provisions of such policy of insurance, or to make certain that such premiums are paid by the Grantor or others, or to notify any persons on noon-payment [sic] of such premiums, and the Trustee shall be under no responsibility or liability of any kind in the event such premiums are not paid as required…..

Furthermore, Article IV of the trust instrument provided:

> … The Trustee shall not be required to make or file an inventory or accounting to any Court, or to give bond, but the Trustee shall, at least annually furnish to each beneficiary a statement showing property then held by the Trustee and the receipts and disbursements made.

The case facts specifically mentioned that "Meyer did not meet with Rafert to explain the provisions of the trust or who would be responsible for monitoring the insurance policies owned by the trust." Rafert executed the trust on March 19, 2009 and the trustee subsequently signed three applications for life insurance that named Rafert as the insured and the trust as the owner of the policies. In each of the applications, Meyer gave the insurers a false address in South Dakota for Meyer as trustee. Since the creation of the trust, Meyer was a resident of Falls City, Nebraska,[11] and never received mail at the South Dakota address. No reason in the facts of the case is disclosed or given for the South Dakota address. In 2009, Rafert paid initial premiums on the policies totaling $262,006. No mention in the case facts about Crummey withdrawal provisions or rights in the trust but the case facts imply that Ms. Rafert paid the premiums directly to the insurers as opposed to contributing the money to the trust for the trust to pay premiums on the policies.

In 2010 the policies lapsed for nonpayment of premiums due. TransAmerica, one of the insurers, sent notices in 2010 to Meyer at the false address in South Dakota of premiums due and a subsequent notice that the policies were in danger of lapsing. TransAmerica sent a final notice and letter to Meyer in November 2010 stating that the policy had lapsed effective August 11, 2010, but that the policy allowed for reinstatement. Similarly, Lincoln Benefit, another one of the three insurers, sent a notice to Meyer at the South Dakota address that a premium was due on May 26, 2010 and a subsequent letter that the policy was in its grace period and was in danger of lapsing. On February 23, 2011, a final notice was sent to Meyer stating that the grace period had expired but that the policy could be reinstated. The Raferts – Jlee Rafert and her four daughters who were beneficiaries of the trust – assert that Lincoln National, the third of the three insurers, would have sent similar notices to the false address.

Jlee Rafert, her four daughters and Meyer did not receive notice of the policy lapses from the insurers until August 2012. How they actually received notice at that time is unclear and not stated in the case facts. At that time, Jlee Rafert paid $252,841 for premiums by issuing checks to the corporation owned by the insurance agent. However, the premiums were never forwarded to the insurers by either the agent or his corporation.

Jlee Rafert and her four daughters sued Meyer for breach of his duties as the trustee and for damages that occurred as a result of the breach. They alleged that Meyer breached his fiduciary duties as trustee, and that as a direct and a proximate result of the breach of Meyer's duties, the policies lapsed, resulting in the loss of the initial premiums. Furthermore, the Rafert daughters, as qualified beneficiaries, had an immediate interest in the premiums paid by Rafert. As a result of Meyer's providing the insurers with a false address, the grantor and beneficiaries did not receive notices of the lapses of the three policies until August 2012.

Meyer responded by moving to dismiss the Raferts' complaint "asserting that he did not cause the nonpayment of the premiums, that he had no notice from the insurers of nonpayment, and that his failure to submit annual reports to the beneficiaries had no causal connection to the damages claimed, because the lapses had occurred after his report would have been submitted." The district court dismissed the complaint with prejudice, finding that pursuant to the terms of the trust, Meyer did not have a duty to pay the premiums or to notify anyone on the nonpayment of the premiums; nor, did he have any responsibility for the failure to pay the premiums. The lower court concluded the pleadings failed to allege how Meyer's actions had caused the policy lapses.

The Raferts appealed stating the district court erred in granting Meyer's motion to dismiss their complaint. They claimed the court erred in concluding that the Raferts had not stated a plausible claim that Meyer had breached his mandatory duties as trustee under the Nebraska Uniform Trust Code (Code) to act in good faith and in the interest of the beneficiaries. Furthermore, they claimed the court erred in finding that the Rafert Appellants did not state a plausible claim that Meyer breached his mandatory duty to keep the qualified beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.

Nebraska Supreme Court Opinion and Analysis. The Nebraska Supreme Court reversed the decision of the district court, which dismissed the Appellant's complaint against Trustee Meyer, and remanded the case for further proceedings back to the lower district court consistent with the Supreme Court opinion. Justice Wright cited various provisions of the Nebraska Uniform Trust Code (Code) and Nebraska court cases in his analysis. Among the summary findings of the pertinent court cases and relevant sections of the Code cited are the following:

> As a general rule, the authority of a trustee is governed not only by the trust instrument but also by statutes and common-law rules pertaining to trusts and trustees. [*Wahrman v. Wahrman*, 243 Neb. 673, 502 N.W.2d 95 (1993).] A trustee has a duty to fully inform the beneficiary of all material facts so that the beneficiary can protect his or her own interests where necessary. [*Karpf v. Karpf*, 240 Neb. 302, 481 N.W.2d 891 (1992).] "[A] trustee owes beneficiaries of a trust his undivided loyalty and good faith, and all his acts as such trustee must be in the interest of the [beneficiary] and no one else." [Id. At 311, 481 N.W.2d at 897.] Every violation by a trustee of a duty required of him by law, whether willful and fraudulent or done through negligence, or arising through

mere oversight or forgetfulness, is a breach of trust. [*Johnson v. Richards*, 155 Neb. 552, 52 N.W.2d 537 (1952).] A violation by a trustee of a duty required by law, whether willful, fraudulent, or resulting from neglect, is a breach of trust, and the trustee is liable for any damages proximately caused by the breach. [*Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004).] It is generally held that an exculpatory clause will not excuse the trustee from liability for acts performed in bad faith or gross negligence. [George Gleason Bogert & George Taylor Bogert, The Law of Trusts and Trustees § 542 (2d rev. ed. 1993).]

Code Section 30-3805 (UTC 105) (Reissue 2008) Default and mandatory rules.

> (a) Except as otherwise provided in the terms of the trust, the … Code governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.
>
> (b) The terms of the trust prevail over any provisions of the [C]ode except:
>
> ………
>
> (2) the duty of the trustee to act in good faith and in accordance with the terms and purposes of the trust and the interest of the beneficiaries;
>
> ……..
>
> (8) the duty under subsection (a) of section 30-3878 to keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests, and to respond to the request of a qualified beneficiary of an irrevocable trust for … information reasonably related to the administration of a trust; [and]
>
> (9) the effect of an exculpatory term under section 30-3897.
>
> ……

Code Section 30-3866 (UTC 801) (Reissue 2008) Duty to administer trust.

> Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with the … Code.

Code Section 30-3878 (UTC 813) (Reissue 2008) Duties to inform and report.

> (a) A trustee shall keep the qualified beneficiaries of a trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. ……
>
> …….

Code Section 30-3897 (UTC 1008) (Reissue 2008) Exculpation of a trustee.

> (a) A term of trust relieving a trustee of liability for breach of

> trust is unenforceable to the extent that it:
>
> > (1) Relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or
> >
> > (2) was inserted as the result of an abuse by the trustee for a fiduciary or confidential relationship to the settlor.
>
> (b) An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor.

The Raferts alleged that Meyer breached his duties as trustee by providing a false address to the insurers, failing to keep the Appellants informed of the facts necessary to protect their interests, failing to furnish annual statements, failing to communicate the terms of the trust to Jlee Rafert, and failing to act in good faith and in accordance with the terms and purposes of the trust and in the interests of the beneficiaries.

Meyer contended that his duties were limited by Articles II and IV of the trust and that providing a false address to the insurers and failing to furnish annual reports did not cause the premiums not to be paid. Meyer claimed that he had no obligation as trustee to monitor or notify any person of the nonpayment of premiums and that the district court correctly relied upon the language of Article II in dismissing the Appellants' action.

The Supreme Court disagreed. It noted that the Code provides deference to the terms of the trust, but this deference does not extend to all the trustee's duties, and those duties to which the Code does not defer are described above in Section 30-3805. Furthermore, the court noted that in drafting the trust Meyer could not abrogate his duty under Section 30-3805 to keep Appellants reasonably informed of the material facts necessary for them to protect their interests.

The court observed that notice of nonpayment of the premiums would have profoundly affected Appellants' actions to protect the policies from lapsing. Notice that the policies had lapsed would have affected the subsequent payment by Jlee Rafert as settlor to the insurance agent. Meyer admittedly provided a false address on each of the insurance applications. This had the obvious result that the insurers' notice regarding premiums due would not reach any of the parties. Despite this fact, Meyer took the position that Article II limited his liability for any claims related to the nonpayment of premiums. Further, Meyer went on to suggest that he did not have the duty to inform Appellants even if he had received notices of the nonpayment of premiums.

The court succinctly stated:

> Such a position is clearly untenable and challenges the most basic understanding of a trustee's duty to act for the benefit of the beneficiaries under the trust. Perhaps the most fundamental aspect of acting for the benefit of the beneficiaries is protecting the trust property. Article II cannot be relied upon to abrogate Meyer's duty to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

Citing Code Section 30-3897(a) the court stated its conclusion remained the same whether Article II of the trust was treated as an exculpatory clause or as a term limiting Meyer's duties of liabilities. Meyer acted in bad faith and reckless indifference to the purpose of the trust or the interests of the beneficiaries by providing a false address to the insurers.

The court observed and mentioned:

> This is not a situation where a gratuitous trustee, who had no involvement in the drafting of the trust or the administration of the insurance policy, undertook only to distribute insurance proceeds after the insured's death. The trustee's duties must be viewed in the light of the trustee's alleged involvement in these matters. If there was none, the result might be different.

Noting the alleged facts of the case by the Appellants that Meyer drafted the trust agreement but never met with Rafert or explained the terms of the trust and the respective duties of each party and citing Code Section 30-3897(b), the court concluded that if Article II of the trust is an exculpatory clause, it was invalid because Meyer failed to adequately communicate its nature and effect to Rafert.

The court then considered Meyer's duty to furnish annual reports to the beneficiaries. Although Meyer argued that the lapse of the policies occurred before the time such reports were due, the court stated that annual reporting was a minimum requirement in the ordinary administration of the trust. "A reasonable person acting in good faith and in the interests of the beneficiaries would not wait until such annual report was due before informing the beneficiaries that the trust assets were in danger of being lost. Meyer's duty to report the danger to the trust property became immediate *when the insurers issued notices of nonpayment of the premiums*." Citing Code Section 30-3805(b)(8) the court stated "[a]s trustee, Meyer had a statutory duty 'to keep the qualified beneficiaries of the trust reasonably informed … of the material facts necessary for them to protect their interests.'" The court then noted "[h]ere, again, according to the allegations, Meyer was not an otherwise uninvolved and gratuitous trustee."

Finally, the court noted that Meyer's action prevented the Raferts from knowing the premiums had not been paid, and it was reasonable to infer that Meyer's actions prevented the Appellants from acting to protect their interests. It can reasonably be inferred that a false address given to the insurers caused the notices of the defaults in payments not to reach the Raferts, and, it was reasonable to infer that had they known of the lapses they would have taken the necessary action to protect their interests. The court then reiterated that Meyer had a statutory duty to inform Appellants of the material facts necessary for them to protect their interests, and, the duty arose when the insurers issued the notices of nonpayment of the premiums.

COMMENT:

The first observation that one can gleam from this case is that the Uniform Trust Code (UTC) trumps the Uniform Prudent Investor Act (UPIA) Section 1(b). UPIA Section 1(b) – or the Nebraska Uniform Trust Code equivalent Section 30-3883 – states "[t]he prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of the trust, a trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust." However in states like Nebraska that have either adopted the Uniform Trust Code (UTC)[12] and/or have common law cases with similar affects to provisions contained within the UTC, and have not adopted exculpation statutes[13] for unfunded ILITs, there are certain trustee duties that cannot be restricted or eliminated by the provisions of the trust.

Among the duties that cannot be restricted or eliminated by the terms of the trust are "the duty to act in good faith and in accordance with the terms and purposes of the trust and the interest of the beneficiaries;" [UTC Section 105(b)(2) and Nebraska UTC Section 30-3805(b)(2)]; and, that "[a] trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests" [UTC Section 813(a) and Nebraska UTC Section 30-3878(a)].

Furthermore, "[a] term of trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it: (1) relieves a trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interest of beneficiaries;" and, "[a]n exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor." [UTC Section 1008 and Nebraska UTC Section 30-3897.]

The purpose of an unfunded ILIT prior to the death of the settlor, or the settlor and the settlor's spouse, is to maintain a life insurance policy, or policies, on the life of the settlor or the life of the settlor and the settlor's spouse. Thus, a trustee acting in good faith and in accordance with the terms and purposes of the trust and the interest of the beneficiaries would, clearly, have a duty to monitor and manage the life insurance policy or polices which are the only asset(s) of the trust. Furthermore, UPIA Section 2, or Nebraska UTC Section 30-3884, requires a trustee to "invest and manage trust assets as a prudent investor would," and, "as a part of an overall investment strategy." In the opinion of the authors, how can an ILIT trustee have an overall investment strategy that is "dispute defensible" without some type of written plan such as a trust-owned life insurance investment policy statement?

The "prudent investor" standard is a relative term. Thus, a professional trustee's prudent standard would be compared to other professional trustees, and, an amateur, or accommodation trustee, prudence would be compared to other amateur trustees. Justice Wright in ***Rafert v. Meyer*** made it clear that attorney Meyer was not a "gratuitous trustee" and thus Meyer was being held to a higher standard. While Justice Wright described a gratuitous trustee as one "who had no involvement in the drafting of the trust or the administration of the policy, undertook only to distribute insurance proceeds after the insured's death," and, stated "[t]he trustee's duties must be viewed in the light of the trustee's alleged involvement in these matters," noting "[i]f there was none, the result might be different," it is left thoroughly unanswered how the results might have been different in the case if a gratuitous, amateur or accommodation trustee who had not drafted, nor had any part in drafting, the trust instrument.[14]

While the case addresses Meyer's role as a drafting attorney of an ILIT who serves as trustee performing administrative functions, it did not explicitly address the issue of liability of an attorney who drafts the ILIT and remains involved by performing trust administration services, direction and oversight to the amateur, accommodation trustee named in the trust instrument. However, the Supreme Court of Nebraska opinion clearly implies that a drafting attorney, who provides various trust administrative services beyond the pure drafting of the trust, will become responsible for these oversights and held liable for properly informing the amateur trustee of his or her duties and how these duties should be performed.

Regarding UTC Section 1008(b) and Nebraska UTC Section 30-3897(b) which provides "[a]n exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor" begs the questions as to what is fair under the circumstances. The comment to UTC Section 1008 Subsection (b) states that: "[in] determining whether the clause was fair, the court may wish to examine: (1) the extent of the prior relationship between the settlor and trustee; (2) whether the settlor received independent advice; (3) the sophistication of the settlor with respect to business and fiduciary matters; (4) the trustee's reasons for inserting the clause; and, (5) the scope of the particular provision inserted."

Meyer never discussed or explained Article II of the trust to Jlee Rafert but how would the case have turned out if he did? Would the exculpatory Article II clause have been fair in the circumstances? Given that the court stated its conclusion remained the same whether Article II of the trust was treated as an exculpatory clause or as a term limiting Meyer's duties of liabilities, one could possibly infer that Meyer would have abrogated his duties to act in good faith and in accordance with the terms and purposes and the interests of the beneficiaries. Thus, Article II would not be fair under the circumstances. The broader question is how can any trust term or clause that restricts the duty of a trustee of an ILIT to monitor and manage the trust's life insurance policy or policies be fair?

The court held Meyer to a high standard in determining that he acted in bad faith and reckless indifference to the terms and purposes of the trust by failure to notify the beneficiaries of the trust of the premiums due on the policy. On the other hand, one wonders how Jlee Rafert could not have known that further premiums would have been required on the polices owned by the trust on her life. Furthermore, while Meyer negligently gave a false address to the insurers, the insurance agent who took the applications had to have met with Jlee Rafert and Meyer and would have known both of their Nebraska addresses and phone numbers. As agent-of-record on the policies, he would have received notices of premium nonpayments and pending policy lapses. It is puzzling that the agent did not contact Rafert or Meyer in Nebraska.

Unlike the higher standard of duties to beneficiaries which was applied to Meyer, the duties of an insurance agent or broker are limited to using reasonable care, diligence, skill, good faith and judgment in procuring the insurance requested.[15] In the June 25, 2014 decision of the Court of Special Appeals of Maryland in *UBS Financial Services, Inc. v. Thompson*,[16] the court essentially concluded that an insurance agent or broker has no post-sales duties to the policy owner, stating "… either Mr. Witherspoon [the broker] or UBS [the insurance brokerage corporation] had a duty to inform appellees that the premiums were not being paid. On the contrary, the circumstances indicate that the ultimate responsibility to pay the premiums on the life insurance policy rested on the parents and appellees, as owners of the policy."[17]

It is interesting to note that the facts of the case in the opinion mentioned that "Meyer did not meet with Rafert to explain the provisions of the trust or who would be responsible for monitoring the insurance policies owned by the trust." While the court certainly commented on the necessity to communicate the exculpatory provisions, the court may have indirectly addressed the question of "who would be responsible for monitoring the insurance policies" by stating that "the most basic understanding of a trustee's duty [is] to act for the benefit of the beneficiaries under the trust." The court continued by saying "[p]erhaps the most fundamental aspect of acting for the benefit of the beneficiaries is protecting the trust property." Obviously, to protect the trust property, the trustee needs to monitor and manage the trust property.

The facts of the case noted that Jlee Rafert paid premiums to the corporation owned by the insurance agent of $252,841 sometime in August 2012, or shortly thereafter, to reinstate the policies. However, reinstatement of life insurance policies requires more than just the payment of premiums, and sometimes interest. Evidence of insurability must also be furnished in order to reinstate life insurance policies. Also, there is generally a time limit from the time of lapse to reinstate a life insurance policy, usually three years, and if the policies lapsed in 2010 the reinstatements could have been accomplished in 2012 with the payment of the premiums and the providing of evidence of insurability. Again, what happened to the life insurance agent and why had he not contacted Jlee Rafert and Meyer about the need to provide evidence of insurability?

Finally, the court remanded the case back to the lower court for proceeding consistent with the Supreme Court decision. Essentially this means to assess the damages from Meyer's breach of his fiduciary duties to the beneficiaries of the trust by his actions, or lack of his actions, as trustee of the trust. The Appellants claimed that as a direct and that as a proximate result of Meyer's breach of fiduciary duties the policies lapsed, resulting in the loss of the initial premium. However, the bulk of the first year premiums paid into a life insurance policy go toward the heavy first year policy expenses, including commissions and other marketing and underwriting costs. There is, generally, no cash surrender value in the first policy year. If the policy could be reinstated there would be no loss in the initial premiums and the first year expenses absorbed by the first year premiums. Meyer had no duty to pay the premiums on the policies. His only duty was to keep the beneficiaries informed of the status of the policies, which he failed to do.

As grantor of the trust Jlee Rafert would have paid the premiums on the policies, either to the insurance company directly or by gifting the premiums to the trust. So if the policies could have been reinstated, the only direct damage would have been interest on lost policy earnings for the policies. If Jlee Rafert could not reinstate the policies but was insurable, then it would seem the damages would be the costs associated with taking out new policies at an older age and the lost policy values that would have accrued if the policies did not lapse. If, on the other hand, Jlee Rafert was uninsurable, the damages from the breach of fiduciary duties would be substantially higher than if she had been insurable, possibly as high as the total face amount of the lapsed policies. Of course, there could be other damages accessed, including punitive damages, other than the direct loss resulting from the lapse of the policies.

Summary. The ***Rafert v. Meyer*** case raised the bar, at least in states that have adopted the Uniform Trust Code and/or have common law cases with similar affects to provisions contained within the UTC, and have not adopted exculpation statutes for unfunded ILITs, in that terms of a trust cannot prevail, restrict or eliminate the duty of the trustee to act in good faith and in accordance with the terms and purposes of the trust and the interest of the beneficiaries. This, undoubtedly, includes the duty to monitor and manage the assets of the trust and to keep qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Additionally, it confirms that an exculpatory term drafted or caused to be drafted by the trustee is invalid unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor. The case also raises the issues of oversight liability for the ILIT drafting attorney when that attorney remains involved either as trustee or in trust administrative functions.

Conclusion

There are now four cases involving UPIA and TOLI each of which gives us guidelines regarding administration of ILITs. There will, undoubtedly, be more cases in the future which will provide us with further refinements in the drafting, duties of trustees, administration and operation of ILITs and TOLI.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Gary Flotron

Randy Whitelaw

CITE AS:

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[1] W. Charles Paradee, III v. Eleanor Clement Paradee et al., No, CA NO.4988-VCL (In the Court of Chancery of the State of Delaware, October 5, 2010).

[2] While not mentioned in the case facts, this appears to be a split-gift transaction. Whether it was to take advantage of two annual exclusions because of Crummey withdrawal rights, because of previously split-gifts for the year, or, to reduce and preserve remaining applicable gift tax exclusion amounts and generation skipping transfer tax exemptions for Charles, Sr. and Eleanor is, again, not disclosed in the case facts. Note, also, that the Gallo exemption was $2,000,000 per person.

[3] Interestingly, the attorney who had originally drafted the trust, and who was first consulted by Sterling and Eleanor, was asked by Sterling to document the trust loan. The attorney had one of her law partners take care of it.

[4] Full disclosure, one of the authors personally knows – although not well - the attorney and family accountant mentioned in the case. While a little shocked at their behavior in this case, since both are extremely knowledgeable and experienced professionals, it should be noted that in the early years of 2000 the attorney's spouse, who was also her partner in a small law firm at the time, came down with terminable cancer. Thus, the attorney was spending considerable time as care taker for the spouse during these years.

[5] French v. Wachovia Bank, N.A., 2011 U.S. Dist. LEXIS 72808 (E.D. Wisconsin 2011), 2013 U.S. App. LEXIS 14399.

[6] Apologies to **Keith Schiller** who has written a number of excellent commentaries for **LISI** with the theme of demonstrating legal and estate planning lessons derived from the movies and titled "Estate Planning at the Movies."

[7] It is unclear from the facts of the case whether or not the Prudential Insurance Company policy was really a whole life policy as described in the

case. Whole life policies, generally, have guaranteed level premiums that do not increase. The facts of the case indicated that "[t]o maintain the policy the trust had to pay increasingly steep premiums." If the policy was a whole life policy, the policy was probably a blended policy with a combination of a base whole life policy, with a face amount smaller than $5 million, with dividends applied to purchase term insurance to equal the total face amount of $5 million, less the base whole life face amount and less the amount of paid-up additional insurance from dividends, with the balance of any dividends used to purchase paid-up additions. Although not specifically stated in the case facts, it is implied that at the time French's wife was deceased; thus making her the first-to-die of the insureds in the second-to-die policy. The issued date of the policy is not specified in the case facts. But assuming the policy was issued at the time of the creation of the trust, or shortly thereafter, the policy would be 12 to 13 years old. The issue age for French and his wife were also not specified. More than likely, the dividend scale used in the original illustration for the policy did not hold up, making the dividends in the later years insufficient to purchase the required amount of term insurance to maintain the total $5 million death benefit, thus, requiring the steeply increasing premium contributions.

John Bannen, an attorney with Quarles & Brady with particular expertise in life insurance, in his analysis of the Prudential policy described the policy as "volatile," which is a term more commonly used to describe variable universal life insurance policies.

[8] The 1035 exchange of the second-to-die Prudential policy to a single life John Hancock policy is permissible as a tax-free exchange because Mr. French was the surviving life on the second-to-die policy. See Private Letter Rulings 9248013 and 9330040.

[9] Wachovia Bank served as trustee though 2007 when the French family moved the trusts to M & I.

[10] *Rafert v. Meyer*, N.W.2d, 209, 2015 WL 832590 (Neb. Feb. 27, 2015).

[11] Falls City, Nebraska is located near the southeast corner of Nebraska not far from the southern border with Kansas and close to the border with Missouri. South Dakota is located above the northern border of Nebraska.

[12] According to the Uniform Law Commission of The National Conference of Commissioners on Uniform State Laws, Legislative Fact Sheet – Trust Code, as of June 22, 2015, 30 states and the District of Columbia have enacted the Uniform Trust Code (UTC) either in whole or modified. The 30 states are Alabama, Arizona, Arkansas, Florida, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin and Wyoming.

[13] 14 states have enacted statutes exculpating trustees of irrevocable life insurance trusts (ILITs). These statues either limit the liability for management of life insurance policies and/or waive the duty of diversification. These statutes may be limited to life insurance only on the grantor, the grantor or the grantor's spouse as joint insureds, or both policies on the grantor or the grantor's spouse. The implication is that the statutes only apply to unfunded ILITs or ILITs that received premium contributions for the insurance policies as gifts to the trust. The 14 states are Alabama, Arizona, Delaware, Florida, Maryland, North Carolina, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Virginia and Wyoming. All of these states with the exception of Delaware and South Dakota have adopted the Uniform Trust Code. West Virginia had adopted an exculpatory statue for ILITs but repealed the statute in 2011. See Trent S. Kiziah, "Statutory Exculpation of Trustees

Holding Life Insurance Policies," 47 Real Property, Trust and Estate Law Journal, Fall 2012, pages 327–365.

[14] It should be pointed out that while the issue in *Rafert v. Meyer* revolved around the trustee acting in bad faith and reckless indifference to the terms and purposes of the trust by failing to monitor payments due on the life insurance policies, UPIA Section 9, UTC Section 807 and Nebraska UTC Sections 30-3872 and 30-3888, provide for the prudent delegation of trustee functions by the trustee of a trust that a prudent trustee of comparable skills could properly delegate under the circumstances. Thus, matters that require life insurance expertise can be delegated to qualified individuals as was done in *French v. Wachovia* and *Cochran v. KeyBank*.

[15] See *Mark Tanner Constr., Inc. v. HUB Int'l Ins. Services, Inc.*, 224 Cal. App. 4th 574, 584 (2014), and, *Indiana Restorative Dentistry, P.C. v. Leaven Ins. Agency, Inc.*, 999 N.E.2d 922, 933 (Ind. 2013), as reference in *USB Financial Services, Inc., Et Al v. Nancy Lee Kathryn Thompson, Et Al*, No. 0352, September Term, 2013, Court of Special Appeals of Maryland (June 25, 2014).

[16] *UBS Financial Services, Inc., Et Al v. Nancy Lee Kathryn Thompson, Et Al*, No. 0352, September Term, 2013, Court of Special Appeals of Maryland (June 25, 2014).

[17] Id., page 13.

0 Comments Posted re. *Gary Flotron and Randy Whitelaw: A Comprehensive Perspective on the Four UPIA-TOLI Cases, Plus One That Includes the UTC, and Their Astounding Implications for ILIT Trustees, Part 2 of 2*

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