WHITHER THE REMAINDERMAN

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The First District, Second Division Appellate Court decision in *Carter v. Carter*, 2012 IL App (1st) 110855 , breaks new ground in its treatment towards trust remaindermen.

On February 7, 2012, the Court held that the Trustee, who was also the sole income beneficiary, and who had no power to invade corpus, could in fact make investments solely to increase income, to the detriment of the trust remaindermen. How this case is reconciled with the Prudent Investor Rule is murky at best. Hopefully, it is its unique fact pattern that caused the decision to come out the way it did.

Luther Reynolds Carter created a Living Trust that provided for three separate trusts: a marital trust, a GST trust, and a family trust; the marital trust was the only trust at issue in the case. Audrey Carter, Luther's wife, was named trustee of the marital trust, and her son from a previous marriage was named as successor trustee of the marital trust, as well as trustee of both the GST and family trust. Under the marital trust, Audrey was to receive all of the income during her lifetime, but none of the principal. Upon her death, the principal of the marital trust was to go Luther's daughter Tiffany. Tiffany and her descendants were also the sole beneficiaries of Luther's other trusts.

The marital trust provided Audrey with the power to invest "regardless of diversification and regardless of whether the property would be considered a proper trust investment." Audrey, a sophisticated investor, proceeded to invest in tax-free municipal bonds which generated interest over time, but did not increase the value of the principal. She chose these bonds as they provide "a good safe income in a highly fluctuating and problematic marketplace."

Tiffany filed a complaint for breach of fiduciary duty and unjust enrichment, as well as punitive damages, because the trust, which was funded with $2 million in 2003, was currently worth approximately $300,000 less due to inflation. The trial court granted Audrey's motion for summary judgment on all counts, over Tiffany's cross-motion for summary judgment, finding that "although Tiffany does receive a distribution when the trust fund terminates, this allocation does not appear to be for her benefit, but rather guidance of where the money should go when the trust ceases to exist."

How the Court differentiated this remainder beneficiary as being a "guide" upon trust termination as opposed to any other interested beneficiary is difficult, if not impossible, to comprehend. Tiffany's role as a mere guide of distribution when the trust ends appears to be in stark contrast of case law mandating consideration of remainder beneficiaries' interests; the Court effectively "considered" Tiffany's interests not as compelling as Audrey's, particularly in light of the overall estate plan. Under *Chicago City Bank and Trust Co. v. Lesman,* 186 Ill. App. 3d 697, 701, 542 N.E. 2d 824, 826 (1st Dist. 1989), remainder beneficiaries to a trust are "interested persons" who have an interest in maintaining the assets of the estate. Apparently, the Court found Tiffany's interests to be subservient to those of Audrey's. We also know from the Restatement (Second) of Trusts § 183 that a trustee is obligated to treat its beneficiaries impartially.

Tiffany appealed under 304(a), claiming the lower court (1) misinterpreted her father intent in creating the marital trust and (2) Audrey breached her fiduciary duty of impartiality and prudence in her investment choices. She argued under *Bornstein v. First United*, 232 Ill. App. 3d

623, 629 (1st Dist. 1992) that "where there are multiple beneficiaries named in a trust, a trustee is under a duty to deal impartially with each of them." However, in the analysis of the grantor's intention, the Court examined the plain language of the trust and the estate plan as a whole. The Court upheld the lower court's ruling, finding that because 1) Tiffany benefited from the other trusts to the exclusion of Audrey, 2) a trustee's discretion provided under the trust instrument cannot be subject to court interference absent proof of fraud, abuse of discretion, and bad faith, and 3) the marital trust only comes into existence if Audrey survived Luther, Luther only intended Tiffany's right to corpus upon trust termination as a "guidance of where the money should go when the trust ceases to exist." Furthermore, because the trust provides that Audrey can invest "regardless of diversification and regardless of whether the property would be considered a proper trust investment," the court will not disturb the plain language interpretation of this provision.

The Court then analyzed the impact of the fiduciary duties under the Prudent Investor Rule. Tiffany argued under *Northern Trust Co. v. Heuer*, 202 Ill. App. 3d 1066, 1070 (1990), "[A] trustee has a duty to deal impartially with all beneficiaries and to protect their interests." The Court acknowledged that based on the language of the instrument, Audrey could very well invest to the detriment of the principal; however, Audrey's authority with respect to income was Luther's intention under the marital trust. Moreover, based on the entire portfolio and Luther's other trusts, the Court would not disturb Audrey's discretion unless she invested in a "wholly unreasonable and arbitrary manner." *Faville v. Burns*, (2011) IL App (1st) 110335, citing *Laubner v. JP Morgan Chase Bank, N.A.*, 386 Ill. App. 3d 457, 464 (2008). Interestingly enough, while Audrey was required to be mindful of Tiffany's interests, and prohibited from acting inconsistently with them, that is precisely what she did. However, she was able to do this based on the Court's finding that Tiffany actually had no genuine interest in the Trust other than as a guide upon its termination.

At first glance, this case's treatment of trust remaindermen appears to fly in the face of the Prudent Investor Rule. After considering the estate plan as a whole and that Tiffany would receive distributions from other trusts, her role as a "guide" to the marital trust's termination was not as detrimental to her interests as had there been no other trusts established for her exclusive benefit. What is more interesting to consider is the plain language of the trust authorizing the trustee to make investments without regard to diversification, which would not otherwise be considered proper trust investments. Would the ruling come out the same way if there were no other trusts at play? How the Courts will reconcile trust language that goes against the Prudent Investor Rule with the ultimate distributions to beneficiaries under an estate plan is likely to be a heavily fact-dependent decision. While a trustee must act impartially, it may be the case that all trust beneficiaries are equal; some are just more equal than others.