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# PNC Can't Shield Talk With Attys Over \$660M Mellon Trust

By **Matthew Santoni**

Law360 (May 23, 2022, 5:55 PM EDT) -- The PNC Bank administrators of a trust established by a late heiress to the Mellon fortune can't shield their communications with their attorneys from disclosure to the \$660 million trust's beneficiaries, after a Pennsylvania Superior Court panel ruled Monday that there can be a "fiduciary exception" to privilege under state law.

The three-judge panel **said** that PNC and other trustees for the fund established in 1963 by Sarah Mellon Scaife had a duty to be open with the trust's beneficiaries about how the trust was handling their money, and in the absence of litigation motivating any attorney-client conversations, that duty outweighed their attorney-client or work-product privilege.

"We conclude a fiduciary exception to the attorney-client privilege is consistent with Pennsylvania law," Judge Mary P. Murray wrote for the unanimous panel. "Although the attorney-client privilege is codified, so too is a trustee's duty to inform beneficiaries regarding a trust's administration."

The Superior Court affirmed an order from the Orphans' Court of Allegheny County telling the trustees to disclose certain communications they'd had regarding the administration of the Scaife trust.

The case stemmed from a dispute over whether the trustees should have split the \$660 million 1963 trust between two of Sarah Mellon Scaife's grandchildren. Prior to her death in 2018, Jennie Mellon Scaife had wanted her share of the fortune to go to charity, but it instead reverted to her estranged brother, David N. Scaife, and his children, as the only living beneficiaries of the trust.

David Zywiec, representing Jennie's estate, filed suits in state and federal court; the federal court **deferred to the state court proceedings** and the state court paused the case while awaiting a Supreme Court of Pennsylvania ruling over the extent of attorney-client privilege in another trust case, *In Re: The Estate of William K. McAleer*.

But when one justice abstained, the **rest of the Supreme Court split 3-3** in the McAleer case over whether to apply a "fiduciary exception" to attorney-client privilege.

Following the McAleer decision, the Allegheny County orphans' court granted several motions from Zywiec to compel the trustees to turn over communications they had about the administration of the Scaife trust. PNC Bank, which had been the corporate trustee for the Scaife money, appealed to the Superior Court.

PNC argued that state law didn't expressly permit such an exception to privilege, and most jurisdictions had come out against similar exceptions.

Zywiec, David Scaife's family and the Pennsylvania Attorney General's Office — stepping in to the case as part of its power to oversee charitable trusts — all argued for some application of the exception, which the Superior Court had said should be upheld in the McAleer case before it was appealed to the Supreme Court.

"The estate asks this court to adopt McAleer's stated basis for favoring the fiduciary privilege over that of the attorney-client privilege and the work product doctrine: the critical importance of transparency in a fiduciary relationship," Judge Murray wrote.

The panel pointed to state law that says trustees should promptly respond to beneficiaries' requests for information about the administration of their trusts, and the pro-exception opinion of the state Supreme Court that said where privilege conflicts with the "weightier obligations," it must yield to those obligations.

But the panel also said the privilege exception would not apply if the communications being sought pertained to litigation. For the time period that Jennie Scaife's estate sought records, there was no such litigation.

"A trustee is privileged from disclosing to beneficiaries or co-trustees' opinions obtained from, and other communications with, counsel retained for the trustees' personal protection in the course, or in anticipation, of litigation," Judge Murray wrote. "The balancing of interests affords the greatest protection to beneficiaries, trustees and counsel. ... Our review discloses no litigation pending against trustees during the accounting period."

Jay Freiberg of Elman Freiberg, representing Zywiec and Jennie Scaife's estate, said the decision was rightly made and based on reasoning that went back to the state Supreme Court's 1964 ruling in *In re Estate of Rosenblum*, which had said trust beneficiaries were different from other litigants because they had an interest in how the trust's property was spent.

"My guess is that the Supreme Court will not hear [an appeal from this] — not a lot of time has elapsed since McAleer," Freiberg told Law360. "We thought this was a well-reasoned and thoughtful opinion."

Counsel and representatives for PNC did not immediately respond to requests for comment Monday.

Senior Judge James Gardner Colins and Judges Mary P. Murray and Megan Sullivan sat on the panel for the Superior Court.

PNC Bank NA is represented by Hara K. Jacobs and Thomas W. Hazlett of Ballard Spahr LLP.

David Zywiec is represented by Jonathan D. Marcus, Robert M. Barnes and Daniel J. Stuart of Marcus & Shapira LLP, and Jay W. Freiberg, Yosef Rothstein, David Barres and Hillary A. Frommer of Elman Freiberg PLLC.

The case is *In Re: Trust Established Under Agreement of Sarah Mellon Scaife, Deceased Dated May 9, 1963*, case number 722 WDA 2021, in the Superior Court of Pennsylvania.

--Editing by Patrick Reagan.