

2006 WL 4821637 (Me.) (Appellate Brief)
Supreme Judicial Court of Maine.

In re: Estate of Alice J. SILSBY.

No. HAN-05-625.

April 21, 2006.

On Appeal from Hancock County Probate County

Brief for Petitioner

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*4 Statement of the Facts

This case involves the Will of one Alice J. Silsby, (ALICE), late of Aurora, Maine. (Ap. 41)

Alice was a registered nurse (never married or a biological parent) who contacted tuberculosis and resided in family homestead in Aurora, Maine. Because of lack of medication in the 30's, the hope and treatment was plenty of open air. After her father's death, Alice provided care for her deaf and ailing mother. The practice at that time was a child would accept a nomination by her siblings (no longer the practice) and accept the responsibility.

Christmas time was joyous occasion at the Aurora homestead as nieces, nephews, grandnieces, nephews and others celebrated the holiday.

Alice approached her nephew to prepare Will and Attorney Herbert Silsby (HERBERT), drafted a Last Will and Testament.

The Will was signed on May 23, 1973 naming Herbert as Executor and Merrill Trust Company and Herbert as Trustees. In 1975 by Codicil, Merrill Trust Company was removed as Trustee. Sometime before Alice's death, Herbert and/or his late father, Attorney William, Sr., discussed the professional cost of a bank acting in fiduciary capacity for an Estate namely 5% fee. The fee was not split with Trustee.

Alice died on September 29, 1975, survived by a brother, William Sr., two elderly sisters, Frances S. Bridges and Mary S. Burrill, nieces and nephews. Two (2) other brothers died prior to making of Will.

The Will after granting personal property also made bequests to the lawyer/scrivener Herbert (money and a safe), as well as money to the Amherst-Aurora Congregational Church and *5 other beneficiaries with \$1,000.00 to each of my nieces and nephews who survive me (but not to descendants of any of them). (Ap. 41-43)

The Will's introduction provides any omission for any relative of mine or any descendant of a relative of mine is intentional. (Ap. 41)

The Will's Residuary Clause created two (2) Trusts to provide income and principal for Mary and Frances (who died on 3-31-88). Upon death of survivor, the Trust(s) was to end and (a) 1/5 in equal shares to the children who survive me of my sister, Frances, but not to any of descendants of any of them who do not survive me. (Ap. 42-43)

Items (b), (c), (d), and (e) of Will each provided for brothers William, Charles and Samuel, sister Mary, including language, but not to any of descendants of any of them who do not survive me. (Ap. 43)

The Will was filed and allowed with Herbert appointed Executor and Trustee. (Ap. 1) Probate Inventory was filed and allowed. Executor filed First and Final Account dated June 30, 1976 reflecting payment of \$1,000.00 to Frances, Mary, Donald E. Bridges (son of Frances) and grand-nephew to Alice, as well as to Charles S. Silsby, Jr., et al who likewise was a grandnephew. (Ap. 53) The account further disclosed Executor's fee of \$6,804.62 and attorney's fee of \$2,500.00 and the account was allowed in 1976. (Ap. 51-54)

After being appointed, the Trustees' inventory reflected real estate, personal property and stock totaling \$66,692.41 later amended excluding real estate, but adding cash, for total of \$92,734.89. (Ap. 56-58)

Trustee from 1976 to December 31, 1991 or so increased the assets to \$367,046.39 (Ap. 59) and in 1990 made partial distribution (none to Donald E. Bridges who died 2-06-88 or his *6 Estate) (Ap. 64) and in 1992 to Donna Ames and Robert Ames (children of late Donald E. Bridges), each \$1,527.28 based on lapsed legacy intestate theory. (Ap. 64)

In June 1992 Donna Ames objecting filed a Petition to Construe Alice's Will, review of Trustee's reasonableness fee and Declaratory Judgment. (Ap. 40-42)

After discovery, amendment of pleading hearings, Judge Richard M. Morton, who was specially assigned, on October 4, 2001, decided:

1. Trustee Silsby though author erred in misconstruing the Will to his advantage, by omitting distribution to Donald E. Bridges (as he survived Alice). (Ap. 26)
2. Trustee was unable to justify his fee of \$18,641.68 and denied, but Court kept the door open to submit evidence as to reasonableness. (Ap. 1-15) There was no appeal of the Judgment. (Ap. 31)

In April 2002, Dorothy A. Bridges as Personal Representative of Estate of Donald E. Bridges, commenced an Action to Surcharge Trustee Herbert requesting award of attorney's fees. (Ap. 65-66) Responsive pleadings were filed and after procedural delays by Trustee Herbert, a hearing was held on April 6, 2004, with Court deciding:

1. Trustee was found liable and personally surcharged for \$49,866.07±, less \$3,054.56 paid to children of Donald E. Bridges. (Ap. 77)
2. Approval without documentation or time sheets (though Answers to Interrogatories suggested work) Trustee's fee of \$18,641.68. (Ap. 34)
3. Ordered 5% interest paid on Judgment from July, 1990. (Ap. 35)
4. Ordered limited attorney's fees and costs.(Ap. 36)

Trustee appealed and Petitioner's cross-appeal was filed in timely manner.

***7 Statement of the Issues of Appellee's Cross Claim**

1. THE PROBATE COURT ERRED IN APPROVING TRUSTEE'S FEES OF \$18,641.68.

See discussion on fees under Issue No. I of Appellee's response.

2. THE PROBATE COURT ERRED IN ALLOWING A PART OF ATTORNEY'S FEES OF \$937.50 VERSUS REQUESTED \$11,361.05.

See discussion on fees under Issue No. 1 of Appellee's response.

***8 ISSUE NO. 1**

THE PROBATE COURT ERRED IN SURCHARGING THE TRUSTEE IN THE AMOUNT OF \$46,811.51 AND ENTERING A JUDGMENT AGAINST THE TRUSTEE IN FAVOR OF THE ESTATE OF DONALD BRIDGES IN THAT AMOUNT.

This action was instituted by Petitioner following the Judgment dated October 4, 2001 (not appealed) of Judge Morton that Trustee improperly interpreted his drafted Will for Alice, meaning Estate of Donald E. Bridges was owed \$49,866.07, interest and request for Petitioner's attorney's fees, objecting to Trustee's fee of \$18,000.00*. The precise issue was based on:

A) Upon death of survivor between herself and Frances, the principal and interest to be distributed:

a) One-fifth (1/5) in equal shares to the children who survive me of my sister, Frances, but not to any of descendants of any of them who do not survive me. Article III, § (1)(a)(1)(a)

The Will further provided the omission of any provision in Will for any relative of mine is intentional. Article I, § 2. Trustee testified as to Alice's intent but Court usually excludes but Petitioner's attorney requested her intent to prove Will as drafted failed to comply with her request. (Ap. 4143)

Factually Donald E. Bridges died before Frances and Trustee argued that the devise lapsed.

The Trustee was faced with 3 options as to distribution of \$49,000.00--:

A) Class Gift - Court ruled not applicable because one-fifth (1/5) directed to a different family with each niece/nephew surviving Alice (Ap. 24) and distribution uneven to each group.

***9 See 18 U. Maine Law Rev. 215.**

B) Scrivener's Error - Author Trustee of Alice's Will was not as Alice intended and Trustee attempted to correct and increase income to self. (Ap. 23-24)

C) Lapsed Legacy - Intestacy - *18-A MRSA, § 2-606(b)* provides when a residuary devisee fails, the residue passes to other residuary devisees. Because Donald E. Bridges predeceased Frances, Trustee failed to follow statute and there were no limitations as to each family taking only one-fifth (1/5).

Canal Nat. Bank vs. Old Folks' Home Assn., Brunswick, 347 A2d 428. (ME, 1975).

The Court in 2005 surcharged Trustee, awarded interest and attorney's fees and approved Trustee's fees. (Ap. 32)

Petitioner claimed Trustee was personally liable for surcharge in his failure to observe standard of care under *18-A MRSA, § 7-306 (b)(C)(D)*.

A Trustee is personally liable if at fault. *18-A MRSA, § 7-306(b)* and Probate Code authorizes the filing of petition to determine liability *18-A MRSA, § 7-306(d)*.

Normally Trustee's exercise of judgment is protected and no liability follows. See *18-A MRSA, § 7-703 and 18-A MRSA, § 7-302(a)(f) and 7-306(b)*.

However, the Court on November 3, 2005 found Trustee (retired Superior Court Judge) is liable for surcharge (Ap. 32), to wit:

A) Self dealing - Conflict of interest;

B) Trustee lacked understanding and a totally unwillingness to seek advice from Court, professional accountant and lawyer;

C) Trustee (although admitting mistake) being a beneficiary of Alice's Will twisted the ***10** facts to benefit himself;

D) Failure to follow Maine Probate Code as of 1981;

- E) Failed to provide yearly accounting to Trust beneficiary, Donald E. Bridges, and did not account until death of two (2) lifetime beneficiaries;
- F) Trustee based on 1990 Petitioner's Petition failed to seek reimbursement from other beneficiaries when objection presented;
- G) Trustee did not understand the IRS rules on "life estates";
- H) Distributed all assets leaving a nominal amount (less than \$500.00) in Trust account.
- I) 5% interest on Judgment since 1990;
- J) Ordered limited attorney's fees;

The Petition in June 1992 to construe Alice's Will included objection to payment by Trustee of \$18,641.68 to self as a fee. (Ap. 40) At the hearing on October 4, 2001, Trustee Silsby was given opportunity to substantiate the fee by time sheets and memos outlining the "work". The Trustee testified that the fee comprised 5% of principal and income before/after Court decided *Estate of Davis*, 509 A2d 1175 (ME. 1986), during the 16* year period. The Probate Judge raised issue of lack of documentation though Trustee in Answers to Interrogatories reflected 17 years of tax returns, investment *analysis* and life tenant income. (Ap. 14 and Answers in evidence) The Trustee however made no attempt to comply with Court to present written data including time expended between clerical and substantive fiduciary analysis and performance. (Ap. 33)

Trustee cites *Estate of Tessier*, 468 A2d 590 (ME. 1983) as a contract between Trustee and bank. Additionally time slips - sheets were in evidence with an expert witness providing *11 customary fee for similar services. However in Silsby, no expert testified and the Court denied approval of the fee giving Trustee opportunity to submit in writing with Trustee not complying.

The Court in *Estate of Rosen*, 520 A2d 700 (ME, 1987) approved the fee as the Trustee presented detailed problems in administration and estimated the time involved.

There is no question Trustee is entitled to reasonable compensation but not in violating Maine law *Davis*, *supra* from 1981 to present.

Trustee testified as to 5% agreement with Alice but no data was explained to Alice by Trustee's father. Trustee lacked writings between parties.

Additionally Trustee **neglected** to comply written information and failed to comply with *18-A MRSA, § 7-205*.

Judge Morton in 2001 continued by saying that the errors or omissions by Trustee called into question the reasonable fee and denied the paid fee of 18,641.68, but kept door open to meet his burden.

In the hearing to Surcharge on April 6, 2004, the Trustee did not comply with Court's order of written fee statement and testified as to services for 16 years or so by investing, tax accountings, tax returns and general Trust administration including investments of some 1920 hours and additional time for partial and final distributions. The Court found some 960 hours at \$19.50 and approved the fee. (Ap. 34)

The Court erred because it approved the 5% fee on income and principal against the rule set forth in *Davis*, *supra*. Also *§ 7-205, supra* permits any party to request review of compensation paid with factors of:

- (a) After notice to all interested persons, on petition of an interested person or *12 on appropriate motion if administration is supervised, the propriety of employment of any person by a personal representative, including the employment of any attorney, auditor, investment advisor or other specialized agent or assistant, the reasonableness of the compensation of any person so

employed, or the reasonableness of the compensation determined by the personal representative for his own services, may be reviewed by the court. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds.

(b) Factors to be considered as guides in determining the reasonableness of a fee include the following:

- (1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the service property;
- (2) The likelihood, if apparent to the personal representative, that the acceptance of the particular employment will preclude the person employed from other employment;
- (3) The fee customarily charged in the locality for similar services;
- (4) The amount involved and the results obtained;
- (5) The time limitations imposed by the personal representative or by the circumstances;
- (6) The experience, reputation and ability of the person performing the services.

See Commentary [18-A MRSA § 7-205](#) wherein a Trustee and attorney may fix own fees.

See *Maine Bar Rules*. §3.3 (Fees)

The general rule is proceeding not conducted to benefit estate attorney's fees are not awarded. 2) [Estate of Stowell, 636 A2d 440 \(ME, 1994\)](#). (For Clarity, Petitioner named earlier Stowell as 1) and 2.) However, Petitioner objected to Trustee's fee and if recovery, Estate shall benefit. Petitioner brought action because Trustee refused to pay Personal Representative bequest. Why should the Petitioner be deprived of Bridges' share when surcharge granted *13 and after extensive hearing(s), Court approved. 1) [Estate of Stowell, 595 A2d 1022 \(ME, 1991\)](#) Trustee shall not be rewarded for surcharge.

Court found Trustee's conflict of interest because of benefit by Trustee distributing partial assets to self and others to detriment of Petitioner. *Stowell, supra at P1025*.

[18-A MRSA, Sec. 7-205](#) allows Court to review compensation paid with Court having authority to make appropriate refunds.

Probate Court erred in allowing a part of Petitioner's attorney's fees of \$937.50 versus requested \$11,361.05. (Ap. 37)

[18-A MRSA, Sec. 1-601](#) allows Judge to award attorney's fees and costs, as justice requires. (Ap. 36)

Petitioner's attorney requested award of attorney's fees in prosecution of action. Judge Morton found because of Trustee's dilatory and lateness, conduct caused the Petitioner's money spent for prosecution. It's unjust for Trustee to interpret the clear Will (which he drafted) to his benefit (Intestacy) not seeking Court instructions, finding surcharge, good faith by Petitioner in commencing the action denying the award of Petitioner's attorney's fees. See [Estate of Deschenes, 818 A2d 1026 \(ME, 2003\)](#), 1031.

Though the Court awarded Petitioner's attorney some \$937.50 and costs, Court abused its discretion not awarding \$11,000.00* and costs. (Ap. 36)

It's argued the Trusts because of distribution lack assets. Trustee knew Probate Code permits actions against beneficiaries. Trustee **neglected** to pursue though a retired Superior Court Justice reviewing distribution issues to some of family lawyers who are also beneficiaries, disobedience of order to submit written time records to detriment of Petitioner.

***14** Trustee in the administration of Trust, made beneficial investments, prepared and filed tax returns, made distributions in 1990 and 1992, attempting to close the Trust.

Trustee displayed a lack of understanding and experience and because of “pigheadedness” refused seeking Court instructions, conferences with experts “Learned in Law” though the family lawyers benefit from intestacy theory continuing down the path.

Trustee admitted making a mistake in drafting and administering of Alice's Will to his benefit. The Will was clear on its face that “Me” referred to Alice and not Frances. Trustee's interpretation deprived the Estate of Donald E. Bridges by conditioning Donald E. Bridges (sole son of Frances) to outlive Frances. Donald died some 6 weeks ± or so before his mother with Trustee opting to treat the \$39,000.00± as intestate property paying Donald's issue \$1,500.00 x 2 (\$3,000.00*) to grand-niece Donna and grand-nephew Robert.

The Court found that Trustee ignored plain language of Will which benefits Trustee by misapplying the law, lacked knowledge as to probate law, failed to realize a “life estate” is a taxable entity, proceeded down the path without consultation with professional accountant or attorney. (Ap. 32)

Trustee failed to provide interim accountings though receiving a 5% fee. The Will directed that upon death of survivor of either Mary or Frances, a distribution was to be paid. (Ap. 33)

Learning the 1990 position of Petitioner, Trustee failed to contact all beneficiaries, explaining the Bridges issue requesting recovery of payment. (Ap. 33) The 1992 payment disposed of balance of \$39,330.32 (leaving few hundred dollars in account). (Ap. 64)

The Court without hesitation found in favor of Estate of Donald E. Bridges against ***15** Trustee. (Ap. 33)

***16 ISSUE NO. 2**

THE PROBATE COURT ERRED IN FINDING THAT INTEREST SHALL BE INCLUDED AS PART OF THE SURCHARGE AGAINST THE TRUSTEE AND IN ENTERING JUDGMENT FOR THE INTEREST AGAINST THE TRUSTEE AND IN FAVOR OF THE ESTATE OF DONALD BRIDGES.

Trustee objects to award of interest in addition to surcharge judgment. *18-A 3-90* provides the award of interest 1 year after appointment of Personal Representative at 5% per year on the pecuniary devise. The Estate of Donald E. Bridges was deprived of \$46,81 1.51 and 5% interest from July 5, 1990 to date.

Maine law allows interest on a devise. See *Palmer vs. Estate of Palmer 106 ME, 25 (1909)*.

14 MRSA, Sec. 1602-C(B) permits award of interest on a judgment at 1 year Treasury Bill Rate * 6% on a judgment.

The Court granted interest in fairness to Estate of Donald E. Bridges at a lesser sum, namely 5%.

***17 ISSUE NO. 03**

THE PROBATE COURT ERRED IN ITS INTERPRETATION AND CONSTRUCTION OF THE WILL OF ALICE J. SILSBY AND IN ITS FINDING THAT THE ESTATE OF DONALD E. BRIDGES WAS ENTITLED TO A ONE-FIFTH OF THE RESIDUARY SHARE FROM THE TRUST ESTABLISHED UNDER THE WILL OF ALICE J. SILSBY.

The Trustee failed to appeal Judge Morton's Judgment of October 4, 2001, and now cannot complain against Wills' interpretation: "(a) One-fifth in equal shares to the children who survive me of my sister, Frances S. Bridges (but not to any), etc." *Doctrine of Res Judicata, ME, Rules of Court 8(c)*.

Alice's Will was crystal clear meaning if any child survives Alice, he/she/they are entitled to the devise even though Donald E. Bridges died before mother, Frances.

Trustee argues the correct Will interpretation was Donald E. Bridges had to survive his mother, Frances, which was in error though Trustee testified this is what Alice wanted.

There is presumption against intestacy and Court lacks power to make new Will in its interpretation. *Estate of Leighton, 638 A2d 723 (ME. 1994)* Testator's intent must be found from "Language" in Will and Court cannot rewrite. See *Doherty v. Grady, 72 A 809, 105 ME. 36 (1908)*. Court cannot make new Will for Testator *Cady v. Tuttle, 127 ME. 104 (1928)*.

Maine law provides where there is no ambiguity in 4 comers of Will, Court shall not allow testimony as to Testator's intent, by Trustee that he goofed in making improper distribution. See, *Estate of Utterback, 521 A2d 1184 (M. 1987)*.

In *Maine National Bank vs. Petalik, 283 A2d 660, ME. 1971*, without ambiguity in Will Court must not allow into evidence what Testator sought.

The Maine Probate Code permits an action by one who has standing as the fiduciary must *18 exercise reasonable care in his administration. (Ap. 32) The Personal Representative is identical. *18-A MRSA, § 3-712*

Trustee has duty of loyalty to beneficiary and must exclude self interest. See *Bogert Trusts and Estates, 2nd Edt., § 543*. A Trustee who breaches the Trust compensates by paying money, restoring property or other means.

Trustee Silsby though learned in the law lacked understanding, experience and because of "pigheadedness" refused seeking Court instructions, hiring professional accountant and lawyer. (Trustee spoke to family lawyers who agreed with his position, but who gained in Will's interpretation.)

In absence of clear and unalterable provision in Trust instrument to contrary, Court may add rules to carry out charitable purpose.

Estate of Rowland Burdon-Muller, 456 A2d 1266 (ME 1983) Court permitted reformation as opposed to disposition to qualify for Charitable Trust.

The Trustee has no authority to change Trust terms by own conduct where instrument makes no provision for such action. *Bogert, § 992 Supra*.

If due to a mistake in drafting a Trust, the document does not contain the terms as intended by Settlor and Trustee, Settlor or other interested party may sue in equity to reform instrument containing terms agreed upon. However reformation will not be granted where the mistake was as to legal effects of the wording of instrument. But to obtain reformation, the evidence must be clear, precise and convincing. *Bogert, § 991 Supra*

When a Court does not use extrinsic evidence to find an ambiguity, the Law Court reviews the finding de novo.

***19** Where there is a latent ambiguity in Will (case concerns with filings, petition for instruction and mistake in drafting), Law Court reviews the facts for clear error and application of law de novo. *Estate of Lord, 2002 ME. 71.795 A2d 700 (ME. 2002)*

***20 Conclusion**

Alice signed a Will after giving instructions to attorney nephew beneficiary, Herbert. The initial sections set limits as beneficiary of nieces and nephews and at death of two (2) lifetime beneficiaries, Mary and Frances (Mother of Donald E. Bridges), Donald E. Bridges, a grandnephew, dying six (6) weeks or so before mother, the 1990 distribution omitted any residuary income to his Estate and in 1992 some \$3,054.00 split to Donald's two (2) children, Donna and Robert.

The Trustee made an erroneous calculation omitting the children per the Will, but because Trustee treated some \$39,000.00* as passing intestate, the children ought to receive \$49,000.00* less \$3,550.00, the latter paid

The Probate Court in 2001 found the error in distribution per position of Petitioner, with interest, but kept door open as to \$18,000.00* taken by Trustee which was in error.

In November 2005, Judge Morton correctly in part found:

Trustee responsible to pay surcharge, with interest though incorrect that some \$937.00 was awarded as partial attorney's fees against requested \$11,000.00* and Trustee awarded his fee of \$18,000.00*, both in error.

WHEREFORE, Petitioner moves this Court to affirm the award to Petitioner including award of attorney's fees.