

FRANCIS J. HARNEY AND ROBERT G. NAUGHTON

Order (public reprimand) entered by the Board February 21, 2008.

SUMMARY<sup>1</sup>

The respondents Naughton and Harney and a third individual, Joseph F. Lyons, were appointed successor trustees in 1984, 1992, and 1995, respectively, of seven trusts under the will of Lotta M. Crabtree, who died on September 25, 1924. The largest of the trusts was known as the Lotta Agricultural Fund (agricultural fund trust). In her will, Lotta Crabtree created eight testamentary charitable trusts. Seven are currently active. Each of the Crabtree trusts is a separate entity with a distinct charitable purpose, requiring separate administration and the filing of separate probate accounts.

The stated purpose of the agricultural fund trust is to provide loans to graduates of what is now the University of Massachusetts, as well as financial assistance to needy and meritorious students for their studies at the university. As of December 31, 1999, the assets of the agricultural fund trust had a market value of \$4,082,766.05. The other six trusts had fewer assets, with market values as of December 31, 1999, ranging between \$159,120.02 and \$1,050,052.34. The combined market value of the other six trusts as of December 31, 1999, was \$3,806,730.26.

The trustees did not keep itemized records of the time they spent on trust business. Their compensation was not based on the time spent, but rather was calculated as a percentage of principal under management and of income periodically. Under the formula adopted by the trustees, each trustee was paid a flat fee of \$3,500 per month, which in total was approximately one-half of one percent of the principal assets, plus about \$1,000.00 per quarter, which represented approximately one-third of the three trustees' share of 6% of earned income. The percentage fee was paid on a quarterly basis. The trusts also generated administrative expenses, primarily for rent, accounting services, and a part-time secretary.

The assets of the trusts were held in separate investment accounts at a brokerage firm, where each trust also had its own checking account. However, and in breach of their fiduciary obligation as trustees, the trustees' practice was to pay the administrative expenses for all seven trusts, as well as the flat monthly portion of the trustees' fee, from the agricultural fund trust account alone. At the end of each year, the six other trusts reimbursed the agricultural fund trust, without interest, for their respective share of administrative expenses incurred. The six trusts did not reimburse the agricultural fund trust for their respective portion of the flat monthly trustees' fee.

The trustees also acted in breach of their fiduciary obligations by impermissibly establishing and making supplemental yearly contributions to an endowment fund at the University of Massachusetts, using income from the agricultural fund trust. This endowment was not authorized by the terms of the trust and its existence was not disclosed in accountings filed by the trustees.

On May 25, 2000, the three trustees filed accounts of the Crabtree trusts for the calendar year 1999. The third trustee, Lyons, died on July 5, 2000. On November 29, 2000, the respondents as remaining trustees filed their final accounts of the Crabtree trusts for the period January 1, 2000, through July 5, 2000 (the date of Lyons's death). In these accounts, the respondents as trustees charged fees and expenses to the trusts that were clearly excessive and substantially exceeded the range of fees that other Boston area trust management entities charged for managing accounts similar in size to the accounts at issue.

On May 17, 2001, a judge of the Probate Court ordered the trustees to file a detailed written statement of time spent administering the trusts and to explain the basis of their fees. On the same day, the court also appointed a guardian ad litem. On July 24, 2004, after receiving the report of the GAL and after hearing and trial on the fifth account of the agricultural fund trust, and the sixth accounts of all seven trusts, the judge ordered removal of the trustees for breaches of their duties as fiduciaries, including in relevant part, breach of fiduciary duty to the agricultural fund trust (both by using the agricultural fund trust account to pay certain of the trustees' fees for all of the trusts, and by using that account as an operating account for the other trusts) and the breach of fiduciary duty inherent in the unauthorized and undisclosed creation and maintenance of an endowment not countenanced by the will.

The judge surcharged and required the two respondents to repay the amounts of excessive fees received by all three trustees over and above the amounts calculated by the court as reasonable, together with interest. The repayments were made to the agricultural fund trust in relation to its account for 1999, and to all seven Crabtree trusts in relation to their final accounts for 2000. The judge also appointed successor trustees.

On appeal by the respondents to the Supreme Judicial Court, the full bench upheld the findings of breach of fiduciary duty and the removal of respondents as trustees, as well as the order surcharging the respondents for the excessive fees. *In re Will of Crabtree*, 449 Mass. 128 (2007).

The respondents' conduct in charging clearly excessive fees as trustees is conduct in violation of Mass. R. Prof. C. 1.5(a). Their conduct in charging fees and administrative expenses to the agricultural trust that were in fact the obligations of the other six separate trusts is conduct in violation of Mass. R. Prof. C. 1.15(a) and (b) as in effect prior to July 1, 2004. Their conduct in using income from the agricultural trust to fund an endowment at the University of Massachusetts, in breach of the terms of the trust and in violation of their obligations as fiduciaries, and their failure to disclose the existence of this endowment in their accountings, is conduct in violation of Mass. R. Prof. C. 1.1 and Mass. R. Prof. C. 1.15(b) as in effect prior to July 1, 2004.

In mitigation, the respondents paid all fee surcharges and other costs assessed by the Probate Court.

This matter came before the Board on a stipulation of facts and disciplinary violations and a joint recommendation for discipline by public reprimand. The Board accepted the parties' recommendation and imposed a public reprimand.

<sup>1</sup> Compiled by the Board of Bar Overseers based on the record of proceedings before the Board.

