IN THE SUPERIOR COURT OF PENNSYLVANIA

Docket No. 61 WDA 2017

IN RE: JOHN E. JACKSON AND SUE M. JACKSON CHARITABLE TRUST

APPEAL OF: POLLY J. TOWNSEND AND WILLIAM R. JACKSON, JR.

BRIEF OF THE LEADERSHIP INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

Appeal from the Orders of the Orphans' Court Division, Court of Common Pleas of Allegheny County, Pennsylvania Docketed December 8 and 21, 2016 at 3999 of 1988

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STATEMENT OF THE INTEREST OF *AMICUS CURIAE*

The Leadership Institute is a not-for-profit corporation, incorporated in the Commonwealth of Virginia in 1979, exempt from federal income taxation under Internal Revenue Code section 501(c)(3), and a "public charity," with its headquarters located at 1101 North Highland Street, Arlington, Virginia 22201.[1]

As detailed in Section I.B., *infra*, *amicus curiae* The Leadership Institute ("LI") has received annual grants from the John E. and Sue M. Jackson Trust for two decades. LI was designated by the Individual Trustees to receive a grant in 2016, and would have received that grant, but for the change in policy by PNC Bank ("PNC"), leading to PNC's refusal to issue that grant, as well as grants to dozens of other nonprofit organizations historically supported. Accordingly, LI has a financial interest in the subject matter of this litigation. However, LI is deeply concerned about the adverse precedent for charitable trusts that could be established by the decision in this case.

No person or organization other than LI "(i) paid in whole or in part for the preparation of the *amicus curiae* brief or (ii) authored in whole or in part the *amicus curiae* brief." *See* Pa. R.A.P. 531(2).

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[1] The Leadership Institute's programs and activities are discussed in Section I.C., *infra*.

ARGUMENT

I. THE LEADERSHIP INSTITUTE IS A CHARITABLE AND EDUCATIONAL ORGANIZATION THAT PROPERLY HAS RECEIVED ANNUAL GRANTS FROM THE JACKSON FAMILY TRUST FOR TWO DECADES.

A. The Trust Instrument Specifies that the Beneficiary Class Is IRC § 501(c)(3) Public Charities.

On February 6, 1950, John E. Jackson and Sue M. Jackson, husband and wife, established the "charitable trust" which is the subject matter of this litigation. Known as the "John E. and Sue M. Jackson Trust" (hereinafter "Jackson Family Trust"), the trust was established:

> solely for charitable purposes, and the income and principal of the trust estate is to be used for the sole benefit of **public charities** in the manner hereinafter set forth. [*See* PNC Petition Exhibit A at 1, ¶ 4 (emphasis added).]

More specifically, the trust specified that distributions were to be made to:

> **public charities** created for religious, educational or other charitable purposes.... [*Id*. at 2, ¶ 6 (emphasis added).]

When the Jackson family business went out of existence, the Trust was reformed by the Orphans' Court in Allegheny County on May 24, 2005. The only change made to the trust instrument was to paragraph 2 of Article 7, relating to the naming of the Individual Trustees. There were no changes made to the class of beneficiaries to which grants could be made by the Trust. *See* Petition Exhibit B.

A "public charity" is an organization that: (i) the IRS has recognized as having tax exempt status under Internal Revenue Code ("IRC") § 501(c)(3); and (ii) is publicly supported under IRC § 509(a). IRC § 501(c)(3) gives favored tax status to a diverse class of charitable organizations, as follows:

> Corporations, and any community chest, fund, or foundation, organized and **operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes**, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, **no substantial part** of the activities of which is **carrying on propaganda**, or otherwise attempting, to **influence legislation** (except as otherwise provided in subsection (h)), and which **does not participate** in, or intervene in (including the publishing or distributing of statements), **any political campaign** on behalf of (or in opposition to) any candidate for public office. [26 U.S.C. § 501(c)(3) (emphasis added).]

Organizations that have IRC § 501(c)(3) status are further divided into two groups, either: (i) "private foundations" — such as the Jackson Family Trust; or (ii) "public charities" — such as *amicus curiae* The Leadership Institute. The distinction between the two types of IRC § 501(c)(3) organizations is described in IRC § 509. "Public charities" are those publicly supported entities to which private foundations may make grants, and to which individuals may contribute and receive the maximum deduction for federal income tax purposes.

Viewing the language of the Jackson Family Trust against the backdrop of federal tax law governing "Exempt Organizations," it is evident that the trust instrument grants the trustees complete discretion to make grants to any nonprofit entity exempt from federal income taxation under IRC § 501(c)(3), so long as that organization is a "public charity."[2]

B. The Leadership Institute Qualifies to Receive Grants from the Jackson Family Trust and Has Received Such Grants for Two Decades.

The Leadership Institute ("LI") is clearly within the class of beneficiaries to which grants can be made by the Jackson Family Trust, in that it is both exempt from federal income tax under IRC § 501(c)(3), and a public charity. Indeed, its eligibility to receive grants is confirmed by the fact that, since 1996, The Leadership Institute has been the grateful recipient of no fewer than 20 annual grants from the Jackson Family Trust.[3] These 20 grants varied from $3,000 to $40,000 and, for all years prior to 2016, totaled $364,137.[4]

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[2] In requiring that recipients be public charities, the Jackson Family Trust language mirrors the restrictions on grant making by private foundations set out in IRC § 4942(g).

[3] No contribution was received by LI in 2006 but, perhaps to make up for that missed year, two contributions were received in 2008.

[4] *See* Jackson Family Co-Trustees' Second Revised 2016 Donation Proposal (Dec. 6, 2016).

From the point that PNC began serving as the Corporate Trustee of the Jackson Family Trust in 2009, until PNC abruptly refused to approve grants to "conservative charities" in 2016, all contributions received by LI from the Trust were necessarily approved and processed by PNC, based on its understanding that these grants were lawful and proper, both under the terms of the Trust and under federal tax law. Nothing has changed since 2009 with respect to the legal and tax status of LI. Therefore, PNC's 2016 pejorative and inaccurate declaration that "conservative organizations"[5] such as LI are "political advocacy groups," and therefore are not "worthwhile charities,"[6] is wholly inconsistent with the position taken by PNC from 2009 through 2015, as well as the position taken by PNC's predecessors serving as Corporate Trustee.

C. The Leadership Institute Has a Commendable Record as a Charitable Nonprofit Organization.

The Leadership Institute is among the leading organizations in the country training young people to be good citizens who are interested in and able to participate fully in the public affairs of our Constitutional Republic. To that end,

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[5] The terms "conservative charities" and "conservative organizations" have been used throughout the proceedings below, both in filings and at hearings, seemingly to be synonymous with what PNC labels as "political advocacy groups." *See e.g.,* Answer and New Matter (Dec. 1, 2016) at 11, 14; Hearing of Dec. 19, 2016 Tr. at 3, 5.

[6] *See* PNC Petition at 8.

in 2016, LI conducted 293 training schools on 40 different subjects to educate and train youth leaders. Some of the topics of these LI schools are:

- Digital Engagement;
- Communications Workshop;
- Debate Workshop;
- Journalism Career School;
- On Camera Television Workshop; and
- Comprehensive Fundraising Training.

During the litigation below, PNC has stressed the importance of charities that provide services in Pennsylvania, particularly Western Pennsylvania.[7] Although that standard is not imposed by the Trust instrument, LI has conducted the following schools in Pennsylvania, including three in Pittsburgh, in the last few years:

- Pennsylvania Leadership Conference, Harrisburg, PA (April 1, 2017);
- Young Americans for Liberty Activism Training, Pittsburgh, PA (April 1, 2017);
- Student Publications Workshop, State College, PA (March 17, 2017);
- Student Publications Workshop, Pittsburgh, PA (October 7, 2016);
- Student Publications Workshop, Gettysburg, PA (April 26, 2016); and
- Young Americans for Liberty Conference Training, Pittsburgh, PA (March 14, 2015)

Additionally, LI runs its "Campus Leadership Program" designed to foster effective student organizations on U.S. college campuses. This work includes

[7] PNC Petition at ¶ 21.

conducting leadership schools for members of these groups and other students, and helping students begin newspapers on their campuses.

Lastly, LI runs "CampusReform.Org" which acts as a watchdog to the nation's higher education system, exposing bias and abuse on the nation's college campuses. This program brings together student journalists with professional journalists, so that the students can learn skills from that collaboration. Additionally, the program exposes violations of constitutional liberties and academic freedom on college campuses.

Despite the fact that LI: (i) is within the designated class of permissible beneficiaries; (ii) has been funded by the Trust for two decades; and (iii) continues to do important and excellent work, PNC rejected two separate proposals to donate funds to *amicus curiae* LI in 2016, a first proposal to donate $25,000, and then a Second Revised 2016 Donation Proposal that included a $20,000 donation.[8] This refusal to issue a grant to LI was part of PNC's blanket refusal to make contributions to any of the so-called "conservative charities" designated by the Individual Trustees that year.[9]

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[8] *See* Jackson Family Co-Trustees' Second Revised 2016 Donation Proposal (Dec. 6, 2016).

[9] Litigation involving family charitable trusts frequently involves disputes between family members serving as Individual Trustees, requiring the Court to intercede to resolve a dispute. *See, e.g.*, Rosenfeld Foundation Trust, 2006 Phila. Ct. Com. Pl. LEXIS 394 (2006),

Unfortunately, the trial court did not bother to conduct an evidentiary hearing, at which time LI would have been willing and able to provide the court with any information it may have needed to support its eligibility for a grant.

For the reasons set out below, it should not be necessary for the Individual Trustees to persuade the Corporate Trustee that the charities which the Jackson Family chooses to fund meet some arbitrary standard established by PNC based on its corporate philosophy, or by PNC personnel based on their personal philosophies — other than that they are lawful beneficiaries. PNC's role in beneficiary selection should be minimal.[10]

II. THE REASON PNC HAS GIVEN THE COURT FOR ITS CHANGE OF POSITION IN REFUSING TO MAKE CERTAIN GRANTS IS ILLEGITIMATE.

As discussed in Section I, *supra*, PNC's refusal to fund "conservative charities" in 2016 constituted an abrupt change in how PNC has viewed its role as Corporate Trustee. In its Petition to Resolve a Deadlock, filed on November 21,

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affirmed in part and reversed in part *sub nom.* Trust Estate of Rosenfeld, 2008 Pa. Super. LEXIS 1529 (2008). By contrast, in this case, the Jackson Family Individual Trustees have always acted with a unified voice. Here, the dispute was caused by PNC's abrupt policy change in 2016 — certainly no fault of the Individual Trustees.

[10] For example, should PNC learn that an Individual Trustee-designated beneficiary is no longer eligible to receive contributions, such as where an organization has lost its federal income tax exemption status, PNC should share that new information with the Individual Trustees who would be responsible to address the issue, such as by selecting an alternative beneficiary.

2016, PNC reveals exactly what changed — albeit seven years into PNC's service as Corporate Trustee.

> In years past, to avoid the imposition of excise taxation, your Petitioner has been forced to **reduce** distributions to **worthwhile charities** in order to reach a **compromise** on the individual trustees' desire to benefit **political advocacy groups**. Your Petitioner believes such action is inconsistent with the past giving practices of John and Sue Jackson, as manifested in the contribution history of the Charitable Trust during their lifetimes, and your Petitioner is no longer willing to jeopardize the **long-term viability** of the Charitable Trust for the sake of the short-term expediency of reaching an agreement with the individual trustees. [PNC Petition at ¶ 27 (emphasis added).]

This is a remarkable and revealing statement by PNC. In it, PNC makes four flawed allegations, each of which is addressed below:

A. PNC Usurpation of Beneficiary Selection. PNC believes that, as Corporate Trustee, it should have control over which organizations receive grants (termed "worthwhile charities") — or at least should have a veto power over charities selected by the Individual Trustees (which it describes as "political advocacy groups").

Rebuttal: PNC is seeking to seize near-total control over the Jackson Family Trust by usurping the role of the Individual Trustees to make decisions as to the disposition of grant funds. When larger charitable trusts are established, it is common for Settlors of those

trusts to select dual trustees, usually referred to as Individual (or Family) Trustee(s), and an Institutional (or Corporate) Trustee. While both Individual and Institutional Trustees share responsibility to the Trust, historically the role of the Institutional Trustee is to take the lead with respect to administrative matters in which it is presumed to have some expertise and capabilities, for which the Institutional Trustee is paid a fee.[11] Such services include:

- bookkeeping/accounting;
- investments[12];
- tax returns; and
- processing checks for grants.

These administrative functions are quite different from the function served by the Individual Trustee(s), which certainly includes a degree of oversight of the Institutional Trustee, but primarily is to designate the beneficiaries of grants.

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[11] Some trusts provide for payment of a fee to the Individual Trustee(s), and some do not. In this case, it appears that the Individual Trustee(s) have never accepted any compensation for their service. The original Trust instrument specified that the fee for the Institutional Trustee would be 5 percent of the trust's gross income but no less than $50 per year (Petition, Appendix A, at 3), but the formula used to pay the Institutional Trustee apparently has changed over the years. For the most recent tax year available, 2015, PNC Bank was paid a fee of $41,724 for administrative fees, and $9,590 was paid for legal services. *See* 2015 IRS Form 990-PF.

[12] The case of Rosenfeld Foundation Trust, *supra*, illustrates an Institutional Trustee exercising its proper role, seeking to ensure that the trust investments were diversified.

A Settlor of a Charitable Trust frequently has strong preferences as to which charities should be funded. These preferences may be expressed either by specifying a narrow group of permissible charitable beneficiaries, or by granting discretion to a family member who can be trusted to have the same values and beliefs as the Settlor. In this case, the two Settlors of the Trust, John E. Jackson and Sue M. Jackson, took the second approach, and designated a close family member as Individual Trustee — Settlor John E. Jackson's brother and Settlor Sue M. Jackson's brother-in-law, W.R. Jackson, Sr. The Individual Trustee worked with the Settlors in their family business, and they entrusted all grant making to his discretion as the sole Individual Trustee of the trust. Although the 67-year-old Trust instrument is, by today's standards, a "bare bones" document, not detailing the historic role of the Individual Trustee to make decisions as to charities to be benefitted, the trust instrument listed the Settlor's close relative W.R. Jackson, Sr., first,

to serve as the Individual Trustee, and only second, the Commonwealth Trust Company of Pittsburgh as Corporate Trustee.[13]

One portion of the Trust instrument was reformed in 2005 due to the fact that the Jackson family business — from which future trustees were to be drawn — had closed. Although it is true that the reformed Article 7 of the trust instrument gave equal voting power to the Individual and Institutional Trustees, there is no indication whatsoever that the historic roles of the Individual Trustees and the Institutional Trustee were being changed (as PNC apparently contends), to give PNC the near total control over the Trust that it now claims. Indeed, the Individual Trustees explained that:

> For nearly sixty years, every corporate co-trustee acknowledged the Jackson Family Co-trustee(s)' right and authority to fully direct the Trust's donations as well as their own limited corporate Co-trustee role.... [Answer and New Matter at 15-16.]

Because PNC is a late-comer to the Jackson Family Trust, not having been selected to serve as the Corporate Trustee by the Settlors, nor any Jackson family member, there is every reason to believe that

[13] The Settlors of the Jackson Family Trust also had a close relationship with this original Corporate Trustee. *See* Answer and New Matter at 15-16.

PNC is not in a position to know the type of charitable organizations that the Settlors of the Trust would have wanted to fund. On the other hand, there is good reason to believe that the Jackson family members would have that orientation and sensitivity.

PNC derides the current Individual Trustees for attempting to make grants in a manner which is faithful to the conservative values of the original Individual Trustee, W.R. Jackson, Sr., their father, based on PNC's theory that the views of their father is irrelevant as compared to the views of the Settlors of the Trust. *See* PNC Petition at 3, ¶ 8. This argument is nonsensical, as it was the Settlors of the Trust who entrusted to W.R. Jackson, Sr. the complete power to select recipients of funds. Therefore, the conservative views of W.R. Jackson, Sr. are precisely the views that the Settlors of the Trust would want to guide decisions as to beneficiaries. Surely, PNC — which had no connection to the Jackson family or the Jackson Family Trust until 2009 — cannot begin to compete with Jackson family members for an understanding of the Settlors' plan for the Trust.

Lastly, if usurpation by one of the trustees of the role of other trustees is to be sanctioned by the Court, the negative consequences must be considered, of which there are at least three.

First, if the Individual Trustees lose control over the selection of beneficiaries, there would be no reason for them to continue to be involved with the Trust. Unlike PNC, which earns a fee for its service, the Individual Trustees earn no fee at all.[14] The Court must consider whether a precedential decision for PNC will encourage PNC and other Corporate Trustees to usurp control over other trusts, resulting in the resignations of innumerable Individual Trustees of those other trusts.

Second, if the (uncompensated) Individual Trustees are to lose control over the selection of beneficiaries, then why should the (compensated) Institutional Trustee not lose control over administrative tasks? If the Institutional Trustee is allowed to usurp the role of the Individual Trustees, then what is good for the goose should be good for the gander. The Individual Trustees then could

[14] Of course, that is not to say that the Individual Trustees would want any fee, but simply to show that they have no financial motivation that could motivate their involvement.

usurp administrative functions — either themselves or with the assistance of other professionals — and then reduce compensation to the Institutional Trustee accordingly. The dual-trustee formula works only if each trustee performs his own role without usurpation of the role of the other trustee.

Third, should the Corporate Trustee be permitted to wrest control over beneficiary designation from the Individual Trustees, no lawyer drafting a future charitable trust in good conscience could recommend that his client designate an Institutional Trustee. Even if a particular financial institution is trusted at the time the trust instrument is signed (as Settlors in this case trusted Commonwealth Trust Company of Pittsburgh), mergers and acquisitions create a real and present danger that a successor Institutional Trustee with no understanding of or loyalty to those establishing the trust could try to take over the trust (as PNC has attempted here). No doubt, such avoidance of the use of Institutional Trustees would then lead to additional problems that would need to be addressed by the courts, or even the Attorney General's office, wasting charitable assets due to

mistakes that could be avoided by the assistance of a professional Institutional Trustee.

B. PNC Mischaracterization of Beneficiaries. PNC characterizes the nonprofit organizations that it favors as "worthwhile charities," while it labels many of the nonprofit organizations chosen by the Individual Trustees as undeserving "political advocacy groups."

Rebuttal: The reason that PNC refused in 2016 to allow the Individual Trustees to designate a grant to The Leadership Institute, as well as to all other "conservative organizations," was that PNC labeled LI a "political advocacy group" — a baseless charge. It must be pointed out that the term "political advocacy groups" is not used in federal tax law. The term "political advocacy group" is the term that PNC invented to demean the conservative charities that it disfavors — regardless of their purposes or programs — with the transparent purpose of implying that these groups are partisan political organizations and therefore not deserving of support. Nothing could be further from the truth. Federal tax law imposes an absolute prohibition on IRC § 501(c)(3) organizations from engaging in

political campaign activities. A nonprofit organization exempt from federal income tax under IRC § 501(c)(3) is one:

> which **does not participate** in, or intervene in (including the publishing or distributing of statements), **any political campaign** on behalf of (or in opposition to) any candidate for public office.

The IRS interprets this statutory prohibition to require that it apply a zero-tolerance standard. Therefore, any violation of this prohibition can result in the IRS revoking the tax-exempt status of the organization and possibly imposing excise taxes (under IRC § 4945(d)(2)) as well.[15] Thus, it is a legal and practical impossibility for a § 501(c)(3) organization to be a "political advocacy group."[16]

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[15] *See* IRS, "The Restriction of Political Campaign Intervention by Section 501(c)(3) Tax-Exempt Organizations" (last updated Sept. 13, 2016).

[16] It indeed would be unfortunate if PNC were attempting to give the impression that what it categorizes as "political advocacy groups" are ineligible for grants because they are "action organizations." The IRS uses the term "action organizations" to describe activities of certain nonprofit organizations which do not qualify to retain their status under IRC § 501(c)(3). *See* IRS "Exemption Requirements - 501(c)(3) Organizations" (last updated Jan. 26, 2017) and "Action Organizations" (last updated June 10, 2016) Under the Internal Revenue Code, no "action organization" may be an IRC § 501(c)(3) organization, and the reverse is true — no IRC § 501(c)(3) organization may be an "action organization." Quite obviously, LI is not an "action organization."

C. PNC Invention of a Permanent Trust. PNC asserts its view that the Jackson Family Trust must be kept operational on a "long-term" basis.[17]

Rebuttal: In fact, PNC has even gone much further than "long-term" when it represented to the Court in its petition that the Jackson Family Trust was "a **permanent** legacy to the generosity and memory of the Grantors, John and Sue Jackson." Petition at 3, ¶ 9 (emphasis added). However, the word "permanent" appears nowhere in the Trust instrument. Instead, Article 7 of the Trust envisions both depletion of trust assets and an eventual end to the trust — terminating "three years after the date when its assets have been entirely depleted."[18] Also, Article 6 gives the Trustees the unlimited power to distribute from both the income and the principal — which clearly indicates that permanency of the Trust was not the Settlors' goal.

Nevertheless, the petition claims that appellants' recommended distributions "would jeopardize the long term viability of the

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[17] Similarly, at the December 2, 2016 hearing, PNC described that the reason for its petition was for "the long-term management of the Trust." Dec. 2, 2016 hearing Tr. at 6, ll. 16-17 and l. 21; *see also id.* at 10, ll. 15-16.

[18] Nothing in the May 24, 2007 Order reforming the Trust changed this first paragraph of Article 7.

Charitable Trust ... that would exhaust the trust corpus in a matter of years." *Id*. at 5, ¶ 15. *See also* Petition at 8, ¶ 27. PNC expressly states that its foremost "desire [is] to grow and preserve the Trust." *Id*. at 6, ¶ 20. PNC's desire to perpetuate its source of revenue is clear, but it is in no way based on the Settlors' intent as expressed in the Trust instrument.

PNC's petition also mischaracterizes the lower court's May 24, 2007 Order which denied a request by the Individual Trustees to terminate the trust at that time. PNC characterizes the proposal of the Individual Trustees, to make grants which exceed the IRS-mandated minimum of 5 percent of net assets, as a violation of the court order "that the governing trust agreement did not contain an intention to provide for an early termination of the Charitable Trust...." *Id*. at ¶ 11. However, there is a significant difference between an early termination of a trust when funds remain, and there being no termination of a trust ever, the latter being what PNC apparently seeks. The May 24, 2007 Order in no way ruled that the trust was to be a permanent trust. The Petition misconstrues that Order when it alleges that, if the level of distributions recommended by the

appellants is followed, "the Trust will eventually be exhausted in circumvention of Judge Kelly's Order." Petition at 7, ¶ 23. PNC continues to mischaracterize the trial court's May 24, 2007 Order, which in no way prohibited above-statutory minimum distributions, even at a level which could potentially lead to the exhaustion of the trust corpus. *See also* Hearing of December 2, 2016, Tr. at 22, ll. 2-8.

Furthermore, PNC erroneously described the depletion of the trust assets as something "never contemplated by the Grantors." *Id*. at 7, ll. 16-17. Twice, PNC erroneously described appellants' proposed distributions as "a de facto attempt ... to terminate the Trust." *Id*. at 8, ll. 11-12; 16, ll. 22-23. Counsel for Appellants correctly pointed out that, under the trust agreement, "the Trustees could give it all away today if they decided." *Id*. at 13, ll. 10-12.[19]

Lastly, the Court should be aware that PNC's opposition to distributions by the Trust may be grounded in an undisclosed

[19] The Supreme Court of Pennsylvania provided some guidance on this issue when it held that a trust which was created to run for 400 years before the corpus was paid out to the beneficiary was considered "unreasonable and void as being unnecessary, charitably purposeless and contrary to public policy." James Estate, 414 Pa. 80, 89 (1964). It concluded that "gifts and the accumulation of income for unreasonably long periods offer many opportunities for disservice to immediate charitable needs as well as to those of remotely future generations." *Id*. at 90.

financial interest of the Corporate Trustee. PNC's primary interest in the Trust now appears to be growing the trust with the effect of increasing the annual fees charged by PNC to the Trust. As discussed, *supra*, PNC's fees in 2015 alone were $41,724 (and legal fees were $9,590). PNC's annual fees likely have grown since then.[20] PNC's fees apparently increase as the corpus of the Trust grows, causing PNC to have a direct financial motivation to restrict grants, and to accumulate funds in the Trust. On the other hand, the Individual Trustees receive no fees from the Trust. Unlike PNC, the views of the Individual Trustees about the amount of grants to be made each year are not colored by self-interest.

D. PNC Pretends to Be a Victim. PNC contends that from 2009, when it became the Corporate Trustee, through 2015, it participated in making distributions to organizations which should not have been funded, because it was "forced" to do so.

Rebuttal: In truth, PNC was never "forced" to do anything. If PNC truly believed that distributions to the "conservative charities"

[20] The 2014 IRS Form 990-PF reported compensation of $41,073 in fees to the Corporate Trustee, and $6,340 in legal fees.

selected by the Individual Trustees were illegal in 2016, it would have had a fiduciary duty to bring the matter to the attention of the court beginning in 2009, which it violated. If PNC is correct, it constitutes an admission to having violated its fiduciary duty as Corporate Trustee and should resign forthwith, and likely also should refund to the Trust the significant annual fees it has received, dating back to 2009.

III. PNC HAS DEMONSTRATED A LACK OF CANDOR WITH THE COURT.

A. PNC Has Sought to Mask Its Hostility to Making Grants to Conservative Charities.

To persuade the court below to defer to its control over trust distributions, PNC divided all of the charities recommended by the Individual Trustees into two categories: (i) "political advocacy groups," chosen by the Individual Trustees, and (ii) "worthwhile charities," chosen by PNC. As discussed in Section II.B., *supra*, these categories do not exist under federal tax law or state law. By creating these artificial categories, PNC simultaneously reveals its hostility toward: (i) conservative organizations; (ii) carrying out the intent of the settlors of the Trust as expressed by the current family trustees; and (iii) control over trust disbursements by the Individual Trustees. Yet to avoid having its motivations

scrutinized, PNC has danced around this issue, making conflicting statements to the court.

PNC's Petition complained that the Trust's distributions to what it termed "political advocacy groups" had increased substantially over the years. *See* Petition at 4-5. Furthermore, PNC alleged, *inter alia*, that it "ha[d] been forced to reduce distributions to **worthwhile charities** in order to reach a compromise on the individual trustees' desire to benefit **political advocacy groups**." *Id*. at 8 (emphasis added). Moreover, in Exhibits G and H to the petition, appellee categorized the family trustees' recommended nonprofit organizations into classes, designating a large portion of the organizations as "A" — advocacy groups (*see* Exhibit G). Exhibit H set out PNC's reasons for rejection of specific organizations on the list, frequently identifying the policy orientation of the proposed organizations, or whether they were associated with a sister IRC § 501(c)(4) social welfare organization.

However, at the hearing on December 2, 2016, counsel for PNC tried to mask his client's hostility to conservative charities when he denied any aversion to "political advocacy groups," claiming that "It's not the political advocacy of these particular organizations. It's indifferent to us." Hearing, Dec. 2, 2016 Tr. at 17, ll. 1-3. Yet at the December 19, 2016, hearing, counsel for PNC once again

argued against making contributions to those groups PNC opposes, asserting that, under the first 40 years of the trust, giving to "advocacy groups counted less than 5 percent." Hearing Dec. 19, 2016 Tr. at 40, ll. 21-22.

At one point PNC grounded its opposition to contributing to "political advocacy groups" on the theory that distributions to those groups, on top of contributions to "worthwhile charities" favored by PNC, would cause total distributions to result in early exhaustion of the corpus. PNC Petition at ¶ 27. However, if PNC's concern was truly with total contributions, PNC could have proposed a proportional reduction in the level of distributions to the complete list of recipients, but it did not, choosing instead to object to any and all grants to conservative charities, defying the views of the Individual Trustees.[21]

B. PNC Misrepresented Pennsylvania Law to the Court.

At the hearing on December 2, 2016, PNC represented to the court that it operated under two constraints. First, under federal tax law, it must make contributions of at least 5 percent of its net assets. And second, it represented that Pennsylvania law provided a second constraint as:

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[21] Even the Attorney General's office, which has not been critical of PNC, disclaimed any aversion to funding conservative charities. The Attorney General's office advised the court at the Hearing on Reconsideration that "Our office does not choose one charity over another." Hearing Dec. 19, 2016 Tr. at 11, ll. 19-20.

> under Act 141, a statutory expression by the legislature as to what is an appropriate distribution percentage for a **charitable trust** or for an endowment fund [that] **distributions have to be** between 2 percent and 7 percent[22].... [*See* Hearing Dec. 2, 2016 Tr. at 6, ll. 4-21 (emphasis added).]

As Appellants have pointed out, the December 2 hearing was the first time this issue was raised, as it was not alleged in PNC's Petition. *See* Motion for Reconsideration or Clarification at 6-7 (Dec. 14, 2016). Appellants explained to the court below that the Pennsylvania statute referred to by PNC as "Act 141," 20 Pa.C.S.A. § 8113, does not even apply to the Jackson Family Trust:

> Thus, as a private foundation the [Jackson Trust] is not covered by § 8113 and the only applicable statutory requirement regarding annual distributions is in 10 P.S. § 201 which requires the [Jackson Trust] to comply with the IRS-mandated 5%/year *minimum* distribution requirement. Section 8113 is contrary to the Trust instrument itself, which provides that there is "no limitation" on the amount of principal or income that can be distributed from the Trust. *See* Trust ¶ 6. Moreover, even if it might apply, PNC made no showing that that [sic] the Trust ever made the required "election" to apply § 8113 to the [Jackson Trust]. *See* § 8113(a). [Motion for Reconsideration at 7 (footnote omitted).]

Nevertheless, the court below summarily denied the motion for reconsideration on December 20, 2016, and never addressed the Individual Trustees' counter-argument in its opinion of May 2, 2017.

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[22] Counsel for PNC went on to express his discomfort even with distributions in the 7 percent range. *Id*.

In sum, PNC's representations to the lower court about the constraints imposed by § 8113 were made for the first time during an oral hearing, when that court was under pressure to decide the issue quickly before the end of the year so that the Trust could make the minimum distributions required by the IRS to avoid an excise tax. PNC has demonstrated a pattern of lack of candor to the court below both in making this argument that Pennsylvania law mandates low levels of distributions from the Jackson Family Trust, and in offering inconsistent reasons for rejecting appellants' suggested distribution list.

IV. PENNSYLVANIA LAW RECOGNIZES THAT PROBLEMS CAN ARISE WITH SUCCESSOR TRUSTEES.

It is impossible to read the history of the litigation involving the so-called "stalemate" between the Institutional Trustee and the Individual Trustees without sensing PNC's hostility to (i) the Settlors' purposes, (ii) the conservative philosophy of the Individual Trustee named in the Trust (W.R. Jackson, Sr.), and (iii) the same views shared by the Settlors' niece and nephew now serving as Individual Trustees. Fortunately, Pennsylvania has not been insensitive to the problems posed by accidental, but aggressive, Corporate Trustees.

Not just in this case, but through countless mergers and acquisitions, family banks and trust companies have morphed into large impersonal bureaucracies.

Oftentimes, trusts are treated as commodities, with "today's banking industry ... engaged in ... large volumes of trust asset transfers and sales from bank to bank...." In short, modern institutional trustees "certainly ... no longer regard their 'contracts' with the average settlor as sacrosanct." R. Chester and S.R. Ziomek, Removal of Corporate Trustees Under the Uniform Trust Code and Other Current Law, 67 MO. L. REV. 241, 246-47 (Spring 2002). On the other side of the coin, the increasingly impersonal nature of Institutional Trustees means that such trustees are essentially fungible, with numerous financial institutions able to do a comparable job. Thus, in recent years, many have come to the realization that legal rigidity in the identity of the Corporate Trustee is not the best way to give effect to the intent of the settlor. *See id*. at 243.

In 2006, the Pennsylvania legislature enacted § 7766 of Title 20 which, as amended in 2010, provides for removal of a trustee by the court upon request by a "settlor, a cotrustee or a beneficiary." In addition to the typical reasons such as for breach of fiduciary duty, § 7766 provides for removal when a "**lack of cooperation among cotrustees** substantially impairs the administration of the trust," or if "there has been a **substantial change of circumstances**."[23] Both of

[23] (Emphasis added.) Previously, 20 Pa.C.S.A. § 7121 followed the antiquated rule that "essentially required a determination of fault or misdeed on the part of the trustee in order for the trustee to be removed." C. Avalli, "New Way to Remove Trustee," Probate & Trust Law Section

those criteria could be said to have been met in this case. Not only do the Jackson family trustees and PNC disagree over whether the Trust is a permanent trust and over designation of beneficiaries, but PNC's 2016 change in position about beneficiaries also constitutes a "substantial change of circumstances" — by suddenly attempting to veto grants to long-supported conservative charities.

The Superior Court of Pennsylvania applied § 7766 in a case entitled In re McKinney, 67 A.3d 824 (Pa. Super. Ct. 2013). Reversing the lower court, the Superior Court granted the petition of trust beneficiaries to replace none other than PNC Bank as Institutional Trustee. PNC had refused to resign as Institutional Trustee when asked by the trusts' beneficiaries. As in this case, PNC had become the Institutional Trustee not through any merit of its own, but rather "through approximately six corporate mergers leading to entirely different bank officers involved in administering the trusts." *Id*. at 826. Recognizing that "corporate fiduciaries often undergo significant restructuring that affects the administration of the trust, in ways unforeseeable to settlors," the court set forth a new rule that "loyalty is to individuals, not institutions...." *Id.* at 826 n.3.

Additionally, the Superior Court pointed out that "the settlor's confidence in the judgment of the particular person whom the settlor selected to act as trustee is

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Newsletter, Philadelphia Bar Association, Feb. 2013, no. 132, p. 11.

entitled to considerable weight." *Id.* Applied to this case, the settlors John and Sue Jackson selected W.R. Jackson to be the Individual Trustee, and in turn he selected Polly Townsend to replace him, and the Court below selected W.R. Jackson, Jr., the original Individual Trustee's son and namesake, as the second family trustee. These are the people who could be said to have "the settlor's confidence," and those best suited to carry out their intent. By contrast, PNC was selected by no one, coming to the Jackson Family Trust by happenstance — being an entity that swallowed up another entity, that swallowed up another entity, and so on.

CONCLUSION

For the foregoing reasons, the lower court's orders resolving the deadlock should be vacated and an appropriate remedial order issued.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 2135(d)

The *Brief of Amicus Curiae of The Leadership Institute in Support of Appellant*s complies with the word count limitation of Pa. R.A.P. 531(b)(3) because this Brief contains 6,389 words, excluding the parts exempted by section (b) of this Rule. This Certificate is based upon the word count of the word processing system used to prepare this Brief.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing BRIEF OF THE LEADERSHIP INSTITUTE AS *AMICUS CURIAE* SUPPORTING APPELLANT was served this 19th day of July, 2017, via the method indicated upon the following:

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