

## **THE *BLEEKER* PETITION: A NEW PROCEDURE UNDER OKLAHOMA PROBATE AND TRUST LAW**

In September 2007, the Oklahoma Supreme Court announced a new procedure that provides some flexibility for persons other than the personal representative or trustee to pursue claims on behalf of an estate or trust. Specifically, in *Estate of Bleeker*, 2007 OK 68, \_\_\_ P.3d \_\_\_ (mandate issued), the Oklahoma Supreme Court held that “in circumscribed circumstances[,] persons other than the estate’s court-appointed fiduciary [may be granted] leave to pursue litigation for recovery of estate assets.” *Estate of Bleeker*, 2007 OK 68, ¶ 14. This ruling allows a probate court to grant the authority to an estate’s beneficiary (heir, devisee, legatee) to pursue claims on behalf of the estate in the event that the personal representative chooses not to pursue the claims.

The *Bleeker* Court did not provide detailed guidance as to the circumstances that will support the appointment of a *Bleeker* representative. But the Court did identify the factors to consider. First, the *Bleeker* Court determined that the trial court’s record contained insufficient evidence regarding the personal representative’s refusal to pursue the claim. *Bleeker*, 2007 OK 68, ¶¶ 19-20. This indicates that, on a *Bleeker* petition, the parties will need to offer proof regarding the beneficiary’s request that the personal representative pursue the claim and the personal representative’s response. As discussed further below, it does not appear wholly necessary that the personal representative flatly refuse to pursue the claim, so long as the decision and its basis are shown in the trial court record.

Second, the *Bleeker* Court found insufficient evidence on the issue of whether the beneficiary had offered to pursue the claim at his or her own expense. *Id.*, 2007 OK 68, ¶¶ 21-23. Thus, economics plays an important part. It does not appear necessary that the

beneficiary must pay the costs of pursuit of the claim entirely or concurrently, so long as the economic impact of pursuing the claim, including the risks, potential benefits, and the beneficiary's ultimate financial responsibility for the costs (whether concurrent or delayed) is fully developed in the trial court's record.

Third, the *Bleeker* Court determined that the request for the appointment of a *Bleeker* representative must fall within the "recognized common-law exceptions." *Id.*, 2007 OK 68, ¶¶ 24-25. These common-law exceptions appear to fall generally within three categories: fraud, collusion, and failure or refusal to act. *Id.*, 2007 OK 68, ¶ 13 & nn.19, 20. If a personal representative appears to be in collusion with the estate's debtor or tortfeasor, or has committed fraud in preventing the pursuit of such a claim, then it certainly makes sense for someone else to pursue the claim. The more interesting component here, though, is the failure or refusal to act. These days, the typical corporate trustee or personal representative may be too risk-averse to pursue claims for personal injury, fraud, and the like. While a corporate personal representative may believe in the merits of a claim, the corporate trustee may still be unconvinced of the economic merits of pursuit of the claim. Similarly, if a beneficiary's counsel has expended the time in working up the claim to present it to the corporate trustee, the corporate personal representative may rightly view the beneficiary's counsel's investment of time as an important investment to preserve. These reasons may well support a decision to allow a beneficiary's counsel to pursue the claim rather than the personal representative's counsel. If we were in the bankruptcy setting, the Bankruptcy Code would provide the option of the appointment of special counsel for the bankruptcy estate under 11 U.S.C. § 327(e). But in the state-law arenas of probate and trust proceedings, no such special-

counsel procedure exists. The *Bleeker* procedure answers this need by authorizing the appointment of the beneficiary as a *Bleeker* representative of the estate.

The *Bleeker* Court did not address the application of this procedure to trusts. It appears, though, that the equitable reasoning of the *Bleeker* decision and the “American common-law” doctrines applicable to trust administration would support the application of the *Bleeker* procedure to trust actions brought under Okla. Stat. tit. 60, § 175.23. The trust instrument and applicable statutes generally would control the ability of a trustee to delegate the power to pursue and collect the trust’s claims against third parties. Oklahoma statutory law authorizes the employment of an agent “reasonably necessary in the administration of the trust estate.” Okla. Stat. tit. 60, § 175.24(A)(9). Absent a contrary rule, the trustee is under a duty not to delegate the doing of acts that the trustee would be reasonably required personally to perform. *Restatement (Second) of Trusts* § 171. Once the trustee has retained an agent or otherwise delegated its powers to another, the trustee owes a duty to supervise the performance of the delegated duties. *Id.* cmt. k. (It must be noted in this context that the delegation of investment powers is more strictly controlled by the subsequently-enacted Oklahoma Uniform Prudent Investor Act, Okla. Stat. tit. 60, §§ 175.60-175.72.) With these general constraints upon the trustee’s authority to delegate tasks and the fulfillment of a trustee’s duties, it would be advisable for a trustee to seek court guidance in delegating the task of pursuing a trust’s claims against a third party. That is where the *Bleeker* procedure would come into play in trust administration. Now that the Oklahoma Supreme Court has announced the procedures for a *Bleeker* petition in the probate context, it can be expected that the Supreme Court will insist upon similar procedures in the trust context.

Recently, the District Court of Tulsa County was presented with dual *Bleeker* petitions in companion probate and trust administration actions. These two *Bleeker* petitions were based upon the procedure outlined above, and showed that the corporate personal representative and trustee had engaged in the analysis identified above – specifically, the personal representative and trustee had determined that, while it did not doubt the merits of the claims, it was concerned about the financial risks of pursuing the claims and believed that it would be more economical for the trust and estate for the beneficiary and his counsel to pursue the claims rather than requiring the personal representative and trustee to retain separate counsel for this purpose. In the absence of objections, the District Court of Tulsa County granted the two *Bleeker* petitions.

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