The Uniform Transfer to Minors Act [UTMA] allows an adult to transfer to a minor many types of property to be held by the adult-custodian for the benefit of the minor until the age of 18 or 21. The custodian has all the powers over the custodial property that an unmarried adult owner would have over their own property, subject to fiduciary obligations. Virginia has adopted the UTMA and it can be found at Code of Virginia 331-37 - 59.

There are very few cases interpreting the Uniform Transfer to Minor's Act. This Spring the Virginia Supreme Court issued an opinion in *Carson v Wells*, 281 Va. 173, 705 S.E. 2d 101 that addressed the proper investment standard for a custodian under the Virginia UTMA, clarified that it is the custodian who has the burden of proof in tracing funds when the custodian commingles the custodian's personal funds with the funds of the minor, and set standards for when attorney's fees can be awarded under the UTMA.

The Facts

Jon C. Carson and Valerie Wells were married from 1984-2000. They had three children and established UTMA accounts for each child. Jon was the Custodian for the majority of the UTMA accounts. James Carson, Jon's brother, was the trustee for the remaining accounts.

In December 2003, Eric Carson, the eldest son, was preparing to go to college. His father, Jon Carson, informed Eric that the money saved in the UTMA accounts for education would not be available.

Eric accessed the UTMA accounts on line and noted that funds had been withdrawn from the account. Jon Carson ignored repeated requests by Eric and his mother to examine the financial records.

Eric and his mother, Valerie Wells, filed a complaint in circuit court to remove the Carsons as custodial trustees of the UTMA accounts. Additionally, they sought a full accounting, compensatory and punitive damages, attorney's fees and costs.

In May 2004, Jon Carson paid the Plaintiff's $190,571.40, and the Carsons resigned as custodial trustees. The Carsons asserted that the amount tendered to the Plaintiffs represented the balance of the funds in the various UTMA accounts.

In March of 2005, Jon Carson provided an accounting that revealed that he closed the UTMA accounts and transferred the funds from the various UTMA accounts to a single bank account in his name and the name of all of his children. From this bank account Jon Carson reimbursed himself for expenses he incurred or paid on behalf of his children and made investments purportedly for the benefit of his children. Additionally, Jon Carson used UTMA funds to reimburse himself for child support payments he made to Valerie Wells.

Using UTMA funds, Jon Carson purchased $40,000 in US Airways stock in his name. Jon Carson worked as a pilot for US Airways and knew of the company’s financial problems.

In April 2005, the circuit court referred the case to a commissioner in chancery who heard six days of testimony on the matter. Jon Carson claimed that his purchase of the US Airways stock was prudent speculation and did not violate his fiduciary duty under the UTMA.

In April 2009, the commissioner issued his report in which he found that the Plaintiffs received a full accounting in March 2005. In addition, the commissioner reported that Jon breached his duty as a custodial trustee only in failing to allow Valerie Wells and Eric Carson to inspect the financial records and his brother, James Carson, did not breach any fiduciary duty. The commissioner also said that the children were entitled to $3,600.00 in compensatory damages, and that the Plaintiffs were entitled to attorney’s fees only to the date they received the accounting in March 2005.

The parties filed exceptions to the report of the commissioner and the case was heard in circuit court.

The circuit court ruled that both Carsons had breached their custodial duties. James abdicated his duties and Jon breached his duties. The court ruled that Jon failed to keep proper financial records and failed to act with the care of a prudent person in purchasing the US Airways stock. The court further ruled that Jon bore the burden of untangling the financial mess because his very conduct prevented a precise accounting. The court awarded the Plaintiffs damages, attorneys fees, court costs and commissioner’s fees.

Trustee's Standard of Care

At the time of the events at issue in this case, the Prudent Person Rule applied. The Supreme Court clarified that in 2005 the standard of care that a UTMA custodian must observe is the standard of care that would be observed by a prudent person dealing with such person's own property. This standard requires the custodian to make only such investments as a prudent person would make of his own property having in view the preservation of the estate. The standard applies to each individual investment rather than to the performance of the investment portfolio as a whole.

In 2007 the Virginia General Assembly amended the UTMA standard of care for custodians at the Prudent Investor Rule under the Virginia Uniform Prudent Investor Act. This standard looks to the performance of the portfolio as a whole, not individual investments. This is the standard that applies to custodians under the UTMA today.

Burden of Proof When the Trustee Commingled Funds

The Supreme Court for the first time ruled that the UTMA custodian has the burden of tracing commingled funds. Because Jon commingled all the children's UTMA funds into a single bank account, he bore the burden to establish that each transfer from the account was for a proper purpose under the UTMA.

Award of Attorney's Fees

The Virginia Supreme Court affirmed the award of attorney's fees to the Plaintiffs, who were the substantially prevailing party. The Plaintiffs were successful in obtaining the relief sought in their petition. This relief included an accounting from the Carsons, removal of the Carsons as custodians, and compensatory damages.