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Appendix A

J-A12001-25

IN RE: HESS KLINE, DECEASED
IN THE SUPERIOR COURT OF PENNSYLVANIA

APPEAL OF P.J.

No. 637 EDA 2024

2025 PA Super 295

Appeal from the Order Entered December 6, 2023 In the Court of Common Pleas of Montgomery County Orphans' Court at No: 1988 X3737

BEFORE: STABILE, J., SULLIVAN, J., & LANE, J.

OPINION BY STABILE, J.

FILED DECEMBER 31, 2025

Appellant, P.J., appeals from the December 6, 2023, order denying his petition for an accounting. We affirm.

The record reveals that decedent Hess Kline's will (the "Will") divided his residuary estate into marital and nonmarital portions, each governed by a trust. This litigation arises from the nonmarital trust. Hess died in 1985, and his wife, Helyn, died in 1988. Upon Helyn's death, the undistributed income from the nonmarital trust was divided into equal shares for the

Kline's two daughters, Barbara Ann Eldridge and Denise Jo Levy, per the instructions in the Will. Each daughter's portion is governed by a trust, as set forth in the Will. The instant action pertains to Denise Jo Levy's Trust (the "Trust"). Levy is the income beneficiary during her lifetime. Appellant is Levy's son. He is one of three contingent remainder beneficiaries of the Trust, along with his brothers, S.J. and W.J. The three brothers will divide the principal among them upon Levy's death.

Appellant's petition for an accounting was directed at Robert I. Friedman (the "Trustee"), the current successor co-trustee along with Levy. Levy, S.J., and W.J. have not participated in this action. In his petition, Appellant alleged that, since 2020, the net income of Levy's trust was $37,940.00 and the distributions to Levy were $70,650.00. Petition for Accounting, 1/30/23, at ¶ 16.[1] The question before us is whether the distributions to Levy were authorized under the terms of the governing instrument and/or the Uniform Principal and Income Act ("UPIA"), 20 Pa.C.S.A. § 8101 et. seq. Appellant claims the Trustee made distributions from the Trust's principal in violation of the express terms of the governing instrument. The Trustee denies that he made any disbursements from principal. Rather, the Trustee claims he made lawful adjustments between principal and income as authorized under the governing instrument and under the UPIA. The orphans' court, basing its ruling on the submitted record as per the

[1] The Trustee filed his answer and new matter on March 23, 2023. By order of June 27, 2023, the parties agreed to submit this matter to the orphans 'court on briefs.

parties' agreement, found in favor of Trustee and entered the order presently before us.

Appellant filed this timely appeal in which he presents two questions:

> Whether the lower court erred in ruling the power to adjust between principal and income under 20 Pa.C.S.A. §§ 8301-8304 was authorized under the trust instrument?
>
> Whether the lower court erred in approving the fiduciary's adjustment between principal and income?

Appellant's Brief at 6.

On review of a decision from an orphans' court, we must determine whether the orphans' court committed an error of law and whether the record supports the orphans' court's findings of fact. ***In re Estate of J.L.C.***, 321 A.3d 999, 1003 (Pa. Super. 2024). Because the orphans' court sits as finder of fact, we are deferential to the court's findings of fact and credibility determinations. ***Id.***

With his first argument, Appellant claims the Trust instrument expressly forbids distribution from principal except in emergencies. Appellant argues that the UPIA does not apply in this case because its terms conflict with those of the Trust instrument and because the enactment of the UPIA postdates the

creation of the Trust. Our primary goal in interpreting a trust instrument is to effect the settlor's intent. ***In re Wilton***, 921 A.2d 509, 513 (Pa. Super. 2007). We determine the settlor's intent by examining "all the language within the four corners of the trust instrument, the scheme of distribution[,] and the circumstances surrounding the execution of the instrument." ***In re Peterson Family Irrevocable Trust***, 333 A.3d 453, 458 (Pa. Super. 2025). "Only when the language of the trust is ambiguous or conflicting or when the settlor's intent cannot be garnered from the trust language do the tenets of trust construction become applicable." ***Id.*** The interpretation of a trust document is a question of law; our standard of review is de novo and our scope of review is plenary. ***Id.*** at 457. Further, the UPIA provides that a fiduciary shall administer a trust or estate "in accordance with the governing instrument, even if there is a different provision in this chapter." 20 Pa.C.S.A. § 8103(a)(1).

Thus, we begin with an analysis of the pertinent language in the governing instrument:

> 1. My Trustees shall distribute to each daughter all of the net income of her trust in convenient periodic installments.
>
> 2. My Trustees may also distribute to a daughter, or apply for her benefit, from time to time, such portion or portions of the principal of her trust as my Trustees, in their absolute

> discretion, **may deem necessary for any emergency affecting such daughter, taking into account her income and assets from all other sources. It is my intention that principal distributions be made to a daughter only under the most extraordinary circumstances and I do not anticipate the probability that any principal distributions will be required.**
>
> 3. Upon the death of a daughter (or upon the death of the survivor of my wife and myself if a daughter is not then living), the balance of principal and undistributed income, if any, then remaining of her trust shall be divided into as many equal shares as there are children of each said daughter then living and children of each said daughter then deceased who have left issue then living. [....]

Will, Article Sixth, ¶¶ (D)(1-3) (emphasis added).[2]

Appellant argues that the bold portion of Article Sixth plainly forbids invasion of the principal barring an emergency, and that no such emergency justified the principal distributions to Levy in this case.

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[2] The Will appears in the certified record as Exhibit A to Appellant's January 30, 2023 petition. The Trust instrument is included in the text of the Will.

Appellant is correct in this regard, but the Trustee does not rely on Article Sixth and does not dispute the absence of an emergency. The Trustee and the orphans' court rely instead upon language in the instrument that addresses adjustments between principal and income:

> My fiduciaries, in their absolute discretion, shall have the authority to claim items of deduction in either the income tax returns or estate tax return, as they may decide, without the consent of the beneficiaries, without liability on their part for so doing, **and, in their discretion, to make or not make adjustments or apportionments among the beneficiaries or as between principal and income.**

Id. at Article Ninth (emphasis added). The Trustee claims he made an equitable adjustment between principal and income and, therefore, that he did not make a distribution from principal.

Appellant argues that Article Ninth, in its reference to adjustment of principal and income, "must be read in context of the second paragraph's intended purposes—governing items of deduction in income tax and/or estate tax returns." Appellant's Brief at 20. According to Appellant, this provision permits an adjustment between principal and income following the sale of a trust asset that triggers capital gains tax, so that Levy's expected income distributions

do not decline in the year following the sale. Appellant's Brief at 23.

The only support Appellant offers for his proposed interpretation of Article Ninth is that the authorization of adjustments between principal and income appears in the same sentence as the authorization to claim tax deductions. But that sentence does not expressly state that principal and income adjustments are authorized **only** in the event of the sale of a trust asset. Indeed, Article Ninth does not address asset sales at all. Appellant's reading of Article Ninth requires us to read into the instrument language that is not there. Article Ninth clothes the trustee with discretion to determine when a tax deduction and/or an adjustment between principal and income is appropriate. The operative language, for purposes of the present dispute, appears in an independent clause that expressly clothes the Trustee with unqualified discretion to make, or not make, adjustments.

Finally, we observe the Trust instrument absolves fiduciaries from liability for decisions made in good faith, so long as the fiduciary obtains approval from a majority of affected beneficiaries who are then sui juris. Will, Article Twelfth. In this case, the Trustee acted with the approval of Levy, S.J., and W.J.—three of the four sui juris beneficiaries. Appellant does not dispute this fact. And, as we explain below in our analysis of the UPIA, the Trustee had a good faith basis for the adjustments in dispute. For the foregoing reasons, we conclude Appellant has failed to establish that the Trust instrument forbade the adjustments

the Trustee made here. Rather, the Trust, by its express terms, permits such adjustments.

In support of his second assertion of error, Appellant argues that the orphans' court erred in concluding that the Trustee's adjustments were an appropriate exercise of his discretion. This argument requires an analysis of the UPIA which, as we will explain, applies here even though the Trust instrument predates its enactment.[3]

"To the extent her claims present 'question[s] of law, such as the interpretation of a statute, our standard of review is de novo, and the scope of our review is plenary.'" ***Smith v. O'Brien***, 321 A.3d 1034, 1041 (Pa. Super. 2024). Our goal is to ascertain and effect the General Assembly's intent. 1 Pa.C.S.A. § 1921(a). First and foremost, we look to the words of

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[3] We observe that the practice of adjusting principal predates the UPIA, as is evident in the Restatement (Second) of Trusts:

> The trustee may be given discretion in allocating receipts or expenditures to income or principal. The extent of the discretion thus conferred upon the trustee depends upon the interpretation of the trust instrument. Thus, his discretion may be limited to situations where he is in reasonable doubt whether under the law and the facts certain receipts or expenditures should be allocated to income or principal; or discretion may be conferred upon him to make such an allocation as in his opinion is fair and reasonable. The exercise by the trustee of the power thus conferred upon him is not subject to control by the court, except to prevent an abuse by the trustee of his discretion. See § 187.

Restatement (Second) of Trusts § 233, comment p (1959). Our Supreme Court has cited to § 233 (***See Pennsylvania Envtl. Defense Found. v. Commonwealth***, 161 A.3d 911, 935 (Pa. 2017)), but has never expressly adopted it.

the statute itself. 1 Pa.C.S.A. § 1921(b). We are mindful, also, that "[n]o statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly." 1 Pa.C.S.A. § 1926.

Appellant relies on § 1926 for his argument that we should not apply the UPIA to a Trust instrument that predates it. Appellant notes that the UPIA, as codified in 20 Pa.C.S. §§ 8101-8191, is silent on its retroactive application. Appellant is incorrect. The UPIA, as drafted by our General Assembly and signed into law by our Governor, was passed into law by Act of May 16, 2002, P.L. 330, No. 50 ("Act 50"). Section 14 of Act 50 provides: "Except as otherwise provided in the governing instrument [...] this act shall apply to all of the following: (1) a trust existing on or after the effective date of this act." Act of May 16, 2002, P.L. 330, No. 50, § 14.[4] The absence of § 14 of Act 50, from

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[4] For ease of reference, the text of § 14 of Act 50 can be found in Title 20 of the bound volume of Purdon's Pennsylvania Statutes and Consolidated Statutes Annotated, immediately following §8101, under the heading "Historical and Statutory Notes." The pamphlet law version of Act 50 is available on the website of the Pennsylvania Legislative Reference Bureau: www.palrb.gov/Preservation/Pamphlet-Laws/View-Document/20002099/2002/0/act/0050.pdf. Section 14 appears on page 364 of the pamphlet law. Section 14 is the final section of Act 50; immediately following § 14, the pamphlet law notes the signature of Governor Mark S. Schweiker. We observe that the Pennsylvania Legislative Reference Bureau prepares the official publication of the Pennsylvania Consolidated Statutes and pamphlet laws, whereas Purdon's, while widely cited and highly useful, is unofficial and comes from West Publishing Company. ***See In re Appeal of Tenet Health Sys. Bucks Cty., LLC***, 880 A.2d 721,

the text of any section or subsection of Chapter 81 of Title 20 of the Pennsylvania Consolidated Statutes, does not render it inoperative. ***See Commonwealth v. Holmes***, 155 A.3d 69, 80 n.6 (Pa. Super. 2017) (en banc; plurality) (noting that Purdon's does not always contain the entirety of the bill our General Assembly passed). Section 14 of Act 50 carries the binding force of any legislation passed by our General Assembly and signed into law by our Governor. Pa. Const. art. III, § 4 (consideration of bills); Pa. Const. art. IV § 15 (approval of bills; vetoes); ***See McGinley v. Scott***, 164 A.2d 424, 430 (Pa. 1960) (explaining that "[a] law is a bill that has been passed by a majority of the members of both Houses of the General Assembly and has [...] been signed by the Governor[.]"). The terms of § 14 are clear and unambiguous. Pursuant to 1 Pa.C.S.A. §§ 1921 and 1926, therefore, the UPIA applies retroactively in this case to the Trust.

We now turn to the statutory language, beginning with § 8103(a), which mandates that a fiduciary, when "allocating receipts and disbursements to or between principal and income [...] shall administer a trust or estate in accordance with the governing instrument, even if there is a different provision in this chapter." 20 Pa.C.S.A. § 8103(a)(1). [5] Where the governing

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724-26 (Pa. Commw. 2005). The version prepared by the Legislative Reference Bureau is the legal evidence of the statutory language. ***Id.***

[5] Section 8103 provides in full as follows:

(a) Allocation.--In allocating receipts and disbursements to or between principal and income and with respect to any matter within the scope of this chapter, the following shall apply:

(1) A fiduciary shall administer a trust or estate in accordance with the governing instrument, even if there is a different provision in this chapter.

(2) A fiduciary may administer a trust or estate by the exercise of a discretionary power of administration regarding a matter within the scope of this chapter given to the fiduciary by the governing instrument, even if the exercise of the power produces a result different from a result required or permitted by this chapter. No inference that the fiduciary has improperly exercised the discretionary power shall arise from the fact that the fiduciary has made an allocation contrary to a provision of this chapter.

(3) A fiduciary shall administer a trust or estate in accordance with this chapter if the governing instrument does not contain a different provision or does not give the fiduciary a discretionary power of administration regarding a matter within the scope of this chapter.

(4) A fiduciary shall add a receipt or charge a disbursement to principal to the extent that the governing instrument and this chapter do not provide a rule for allocating the receipt or disbursement to or between principal and income.

(b) Discretionary power.--In exercising a discretionary power of administration regarding a matter within the scope of this chapter, whether granted by the governing instrument or this chapter, including sections 8104 (relating to trustee's power to adjust) and 8105 (relating to power to convert to unitrust), a fiduciary shall administer a trust or estate impartially based on what is fair and reasonable to all of the beneficiaries, except to the extent that the governing instrument clearly manifests an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with this chapter is presumed to be fair and reasonable to all of the beneficiaries.

20 Pa.C.S.A. § 8103.

instrument does not contain a provision that differs from what the UPIA requires, the fiduciary must follow the UPIA. 20 Pa.C.S.A. § 8013(a)(3) [8103(a)(3)]. In examining Appellant's first argument, we explained that the Trust instrument does not have express language cabining the Trustee's discretion to adjust. The Trustee was therefore required to follow the dictates of the UPIA in adjusting between principal and income.

Several provisions of the UPIA governed the Trustee's actions in this case. Per § 8103(b), the Trustee is required to act impartially and do what is fair and reasonable to all of the beneficiaries, unless the governing instrument expressly favors one beneficiary over the others (it does not; neither party claims otherwise). Thus, the Trustee was required to manage the Trust assets in a manner fair and reasonable to Levy, as current income beneficiary, and the three brothers who are the remainder beneficiaries.

Section 8104, in turn, governs the specifics of a trustee's management of principal and income adjustments. Per § 8104(a), a trustee

> [M]ay adjust between principal and income by allocating an amount of income to principal or an amount of principal to income to the extent the trustee considers appropriate if:
>
> (1) the governing instrument describes what may or must be

> distributed to a beneficiary by referring to the trust's income; and
>
> (2) the trustee determines, after applying the rules in section 8103(a) (relating to fiduciary duties; general principles), that the trustee is unable to comply with section 8103(b).

20 Pa.C.S.A. § 8104(a).

In applying § 8104(a), we turn to the applicable Uniform Law Comment, which synthesizes the statutory requirements of § 8104(a):

> Section 104(a) [20 Pa.C.S. § 8104(a)] authorizes a trustee to make adjustments between principal and income if three conditions are met: (1) the trustee must be managing the trust assets under the prudent investor rule; (2) the terms of the trust must express the income beneficiary's distribution rights in terms of the right to receive "income" in the sense of traditional trust accounting income; and (3) the trustee must determine, after applying the rules in section 103(a) [20 Pa.C.S. § 8103(a)], that he is unable to comply with section 103(b) [20 Pa.C.S. § 8103(b)].

20 Pa.C.S.A. § 8104, Uniform Law Comment.[6]

The first of these three requirements is met, as Pennsylvania has codified the prudent investor rule.

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[6] Our Statutory Construction Act permits reliance on official commentary:

> The comments or report of the commission, committee, association or other entity which drafted a statute may be consulted in the construction or application of the original provisions of the statute if such comments or report were published or otherwise generally available prior to the consideration of the statute by the General Assembly, but the text of the statute shall control in the event of conflict between its text and such comments or report.

1 Pa.C.S.A. § 1939. And because the UPIA is a uniform act adopted by many states, we must adhere to § 1927, which provides: "Statutes uniform with those of other states shall be interpreted and construed to effect their general purpose to make uniform the laws of those states which enact them." 1 Pa.C.S.A. § 1927. The Uniform Law Comments we consult throughout this opinion serve precisely that purpose. They are the work product of the Uniform Law Commission, also known as the National Conference of Commissioners on Uniform State Laws. They are not part of Act 50.

We observe, also, that Appellant filed a nearly identical action against the Trustee in Massachusetts regarding a trust under which Levy is the current income beneficiary and Appellant and his brothers are the remainder beneficiaries. The Supreme Judicial Court of Massachusetts rejected Appellant's arguments and upheld the Trustee's exercise of discretion under the Massachusetts UPIA. ***In re Trusts Under the Will of Kline***, 244 N.E.2d 1011 (Mass. 2024). The decision of a sister state interpreting the same provisions of a uniform act is entitled to great deference from the Courts of Pennsylvania. ***Koken v. Reliance Ins. Co.***, 893 A.2d 70, 83 (Pa. 2006). Our analysis in the main text is in accord with that of the Supreme Judicial Court of Massachusetts, and we reach the same result.

20 Pa.C.S.A. § 7201, et. seq.[7] The prudent investor rule, as with the UPIA, applies except as otherwise provided by the governing instrument. 20 Pa.C.S.A. § 7202(a). Appellant does not address the prudent investor rule and thus does not dispute that the Trustee was required to manage the Trust investments in accordance with it.

Likewise, the applicability of the second Uniform Law Comment factor (which is essentially a paraphrase of § 8104(a)(1)) is clear. The Trust instrument, as already quoted above, mandates the distribution of income to Levy: "My Trustees shall distribute to each daughter all of the net income of her trust in convenient periodic installments." Will, Article Sixth, ¶ (D)(1). Appellant's argument to the contrary rests on his unsupported assertion that the Trustee made distributions from principal in this case, rather than adjustments between principal and income.

The third Uniform Law Comment factor is a paraphrase of § 8104(a)(2). Under that subsection, the Trustee must consult with § 8103(a), which requires the compliance with the governing instrument when necessary, or compliance with the UPIA otherwise. Because the UPIA governs this case, the Trustee

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[7] "A fiduciary shall invest and manage property held in a trust as a prudent investor would, by considering the purposes, terms, and other circumstances of the trust and by pursuing an overall investment strategy reasonably suited to the trust." 20 Pa.C.S.A. § 7203(a). The prudent investor rule is governed by 20 Pa.C.S.A. §§ 7201-7214. Pennsylvania enacted its prudent investor statute in 1998, prior to the enactment of the UPIA.

needed to determine that he could not comply with § 8103(b); that is, that he could not do what is fair and reasonable to all beneficiaries without adjustments between principal and income. The Uniform Law Comment goes on to explain that the "purpose of [§ 8104] is to enable a trustee to select investments using the standards of the prudent investor without having to realize a particular portion of the portfolio's total return in the form of traditional trust accounting income such as interest, dividends, and rents." 20 Pa.C.S.A. § 8104, Uniform Law Comment. Further,

> If a trustee who is operating under the prudent investor rule decides that the portfolio should be composed of financial assets whose total return will result primarily from capital appreciation rather than dividends, interest, and rents, the trustee can decide at the same time the extent to which an adjustment from principal to income may be necessary under [20 Pa.C.S.A. § 8104]

Id.

In his answer to Appellant's petition, the Trustee explained that, in 2021, the Trust's principal increased from $840,000.00 to $995,000.00. Answer to Petition for Accounting,3/23/23, at ¶ 16. Accordingly, the Trustee explained, in an April 7, 2022, email to Appellant, that an adjustment to principal and income was warranted:

In a world in which principal values have achieved significant growth and income has remained quite low, it is not at all uncommon for trustees to exercise [the power to adjust principal and income]. And in doing so, it is also not uncommon for trustees to implement this by making an adjustment in order to provide a percentage payout to the income beneficiary.

Here, the trusts have indeed grown substantially over time while the net income of the trusts has not. For 2021, the net income was approximately 2.09% of the ending principal value of the trusts.

At [Levy's] request, and after reviewing carefully her cost of living and her other resources, and after taking into account all of the other relevant factors required by the law, I determined for 2022 to exercise this power to adjust (shifting principal to income) in order to pay out to her as income $120,000 for this year, which is approximately 3.2% of the three year average value of the trusts based on the December 31 values for the last three years. Based on advice, I believe this payout is likely to maintain the inflation adjusted value

> of the trusts over time while providing [Levy] with a more equitable payout.

Email from Trustee to Appellant, 4/7/22.[8] In other words, the Trustee did not believe Levy, as income beneficiary, was receiving her fair share as compared to Appellant and the other remainder beneficiaries, who will divvy up the principal upon Levy's death.

Likewise, the Trustee's law firm provided the following explanation to Appellant:

> One of the primary purposes of the Principal and Income Act is to allow the trust assets to be invested in the manner that is reasonably suited to the purposes of the trust, without having to realize a particular portion of the investment portfolio's total return in the form of traditional trust accounting income, such as interest, dividends, and rent. [...] Although the trusts have experienced significant growth of principal over the years, the income of the trusts has not kept pace. [...] One approach to address this circumstance would be to modify the investment strategy of the trusts by shifting from growth investments to investments that pay higher

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[8] This email appears in the certified record as part of Exhibit C to Appellant's January 30, 2023, petition for accounting.

> current income. The consequences of this could be lower long term returns and capital gains tax costs from selling equity assets. The statutory power to adjust provides an alternative approach that enables trustees to continue to invest for long term returns while providing an equitable distribution of income.

Email, 4/21/22, from Richard L. Horwitz to Appellant.[9] In other words, the Trustee believed that without adjustments, the growth of the Trust's principal would be disproportionate to the Trust's production of income, thus favoring the remainder beneficiaries at the expense of Levy.

Appellant does not directly challenge the Trustee's reasoning. Rather, Appellant expresses his dissatisfaction with the long-term growth of the Trust's principal. He argues that, from 1992 to 2024, the value of three trusts[10] the Trustee manages for Appellant's family increased in value from $1.53 million to $3.74 million. Appellant's Brief at 9. Per Appellant, if the Trustee had invested the assets of these three trusts in a Dow Jones index fund, their value would have increased, over that same span of time, to $18.66 million dollars. ***Id.*** Assuming without

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[9] This email appears in the certified record as part of Exhibit C to Appellant's January 30, 2023, petition for accounting.

[10] Here, Appellant references three trusts, the Trust currently at issue and two that were the subject of litigation under the law of Massachusetts as noted above. ***In re Will of Kline***, 240 N.E.2d 1011.

deciding that Appellant's numbers are correct, his argument misses the point. The Trustee's long-term growth strategy, viewed in isolation, is not at issue. The issue here is the growth of the Trust's principal in relation to its production of income. Appellant offers nothing to counter the Trustee's assertion that, for the years in question, the increase in value of the Trust's principal was disproportionate to its production of income, thus resulting in a disproportionate benefit to the remainder beneficiaries. The UPIA authorizes adjustments between principal and income in precisely these circumstances.

In summary, we have concluded that the Trust instrument does not preclude adjustments to principal and income, nor do the terms of the Trust instrument require a result different from the one that obtains under the UPIA in this case. The Trustee's adjustments were authorized under the applicable provisions of the UPIA, and he did not abuse his discretion in making them.[11] Appellant offered no persuasive argument to the contrary.[12] We therefore affirm the orphans' court's order.

Order affirmed.

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[11] And as noted in the main text, Levy, S.J., and W.J. signed a release and consent agreement approving of the Trustee's adjustments.

[12] Appellant also argues that the application of § 8104 amounts to an unconstitutional taking. Appellant did not raise this argument before the orphans 'court and therefore has waived it. Pa.R.A.P. 302(a).

Appendix B

COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION

IN RE: ESTATE OF HESS KLINE, DECEASED

NO. 1988-X3737

637EDA 2024

STERLING, J.

PA.R.A.P. 1925(a) OPINION

August 22, 2024

Peter Judson ("Appellant" or "Judson") appeals the trial court's December 6, 2023 order ("12/6/23 Order") denying Appellant's "*Petition to Show Cause Why Trustee Should Not File An Accounting of Their Management of the Hess Kline Testamentary Trust, Why the Distribution of Principal Should Not Be Undone and Why the Trustee Should Be Enjoined from Further Expenditure of the Principal in Violation of the Trust Instrument*" filed on January 30, 2023 ("Petition") and finding that trustee Robert I. Friedman, Esquire ("Trustee" or "Friedman")[1] had

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[1] Although Denise Jo Levy ("Denise") was a co-trustee of the Hess Kline Testamentary Trust under Will ("Trust"), she was not named as a respondent in this matter. We therefore refer herein to Friedman as "trustee", rather than "co-trustee". We

reasonably and properly exercised his power to adjust trust assets between principal and income pursuant to Pa. C.S. §8104.

For the reasons set forth below, the Superior Court should affirm the trial court's 12/6/23 Order.

PROCEDURAL HISTORY AND FACTS

Hess Kline ("Kline") died as a Montgomery County, Pennsylvania resident on August 7, 1985. Kline's will dated August 1, 1977, with a codicil dated April 28, 1982 (collectively, "Will")[2], directed his executors to divide his residuary estate into marital and non-marital portions and to establish separate trusts for each of those portions. See, Sections THIRD and FOURTH of the Will. The marital portion of the residuary estate is not relevant to the matter under appeal here. A first and final account of his estate was filed on November 30, 1988 and an adjudication was issued on January 20, 1989.

The Will directed that, upon Kline's wife Helyn's death (which occurred several years after his), the remaining principal and undistributed income of the non-marital trust was to be divided into two equal shares, one for each of their daughters Barbara Ann and Denise Jo, with separate trusts to be established

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further note that original trustee David J. Kaufman resigned that role on March 31, 2009, designating Friedman as his successor trustee. *See, Exh. 1 to Trustee's Answer to the Petition, March 23, 2023.*

[2] The will and codicil are collectively attached as *Exhibit A to the Petition.*

for each pursuant to Section SIXTH, paragraph D. According to Appellant's pre-trial memorandum of law, there were six generation-skipping trusts formed for the benefits of the daughters.[3] The trust at issue here ("Trust") is the Pennsylvania Hess Kline trust under will for Denise Jo ("Denise" or "Appellee"). The relevant portions of the Will appear below. The Will provides that net income and principal of the trusts were to be "disposed of" as follows:

> 1. My Trustees shall distribute to each daughter all of the net income of her trust in convenient periodic installments.
>
> 2. My Trustees may also distribute to a daughter, or apply for her benefit, from time to time, such portion or portions of the principal of her trust as my Trustees, in their absolute discretion, may deem necessary for any emergency affecting such daughter, taking into account her income and assets from all other sources. It is my intention that principal distributions be made to a

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[3] *See, Factual Summary, Memorandum of Law in Support of [Appellant's] Requested Relief to Undo the Trustees' Adjustments, Enjoin Further Action and Surcharge Trustees,* July 31, 2023, at (not paginated) 3 ("Appellant's Memo"). While Appellant states that six trusts were established, he only identifies four trusts: one for each daughter in Montgomery County, Pennsylvania (created under the Will) and one for each in Barnstable, Massachusetts (created under their mother's will).

> daughter only under the most extraordinary circumstances and I do not anticipate the probability that any principal distributions will be required. *Will, Section SIXTH, para. D, subparagraphs 1- 2 at 5-6.*

Section SIXTH, para. D, subpara. 3 of the Will provides that, upon the death of a daughter, the balance of her trust is to be divided into equal shares for each of her living children (or, if deceased, that child's living children, if any, *per stirpes*). Denise has three living children: Appellant Peter Judson and his brothers Stephen H. Judson and William H. Judson.

Section NINTH of the Will provides, in relevant part:

> My fiduciaries, in their absolute discretion, shall have the authority to claim items of deduction in either the income tax returns or estate tax return, as they may decide, *without the consent of the beneficiaries, without liability on their part for so doing, and in their discretion, to make or not to make adjustments or apportionments among the beneficiaries or as between principal and income.* (emphasis added).

And finally, the last paragraph of Section TWELFTH of the Will states:

> I relieve my fiduciaries from any and all liability for loss or for any other cause which results from their decisions, acts or failures to act, arrived at in good faith; and they shall be absolved of any liability whatsoever if they shall obtain the approval for any past or future action from a majority of the beneficiaries affected thereby who are then *sui juris*.

From 1989 until shortly before the Petition was filed by Kline's grandson Peter Judson on January 30, 2023, *a period of thirty-four years*, there were no further filings with the trial court.[4]

Beginning in 2022, Appellant began to question Trustee about distributions to Denise from the Trust which exceeded the net income of the Trust. See, Exhibit C to the Petition (containing written and email correspondence between Appellant and Trustee and their counsel between April 4 and August 16, 2022). Trustee explained to Judson that Pennsylvania trust law:

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[4] We note that litigation on the same issues and language as those in this matter, with respect to identical trusts created under the will of the parties' mother Helyn Kline, was decided by the Massachusetts probate court in favor of Appellee here. *See, Judgment of Dismissal* attached as Exhibit C to *Appellee's Brief in Opposition to Petition for Citation,* filed on August 31, 2023.

> ...authorizes trustees to exercise a 'power to adjust' between income and principal by allocating an amount of principal to income to the extent trustee considers it appropriate after taking into account the governing instrument, the rules relating to fiduciary duties and other considerations. In a world in which principal values have achieved significant growth and income has remained quite low, it is not at all uncommon for Trustees to exercise this power. And in doing so, it is also not uncommon for trustees to implement this by mak[ing] an adjustment in order to provide a percentage payout to the income beneficiary. Here, the Trusts have indeed grown substantially over time while the net income of the Trusts has not. *April 7, 2022 email from Trustee to Appellant.*

Trustee describes the factors he considered in making the allocation decision and goes on to say "I am confident that this plan is authorized by the applicable trust law." *Id.*

A subsequent email to Trustee from Rick Holzworth (a member of Friedman's firm) further explains the law Friedman relied upon in making his investment decisions for the Trust. Holzworth states:

The Trust under your grandfather's will is governed by Pennsylvania law. Under Pennsylvania's Principal and Income Act, a trustee has the power to 'adjust between principal and income by allocating an amount of income to principal or an amount of principal to income to the extent the trustee considers appropriate.' 20 Pa.C.S. Sec. 8104. In evaluating whether an allocation of principal to income (as Mr. Friedman has done here) is appropriate, Pennsylvania law describes the factors that may be considered by the trustee. See 20 Pa.C.S. Secs. 8103 and 8104. Among other things, trustees are permitted to consider the intent of the settlor, the actual and anticipated effect of economic conditions on principal and income, and effects of inflation and deflation...

One of the primary purposes of the Principal and Income Act is to allow the trust assets to be invested in the manner that is reasonably suited to the purposes of the trust, without having to realize a particular portion of the investment portfolio's total return in the form of traditional trust accounting income, such as interest, dividends, and rent. This is precisely the circumstances we have here. The

> purpose of the Trusts is to pay all income to your mother and principal as necessary to address an emergency situation. You and your siblings, of course, are the remainder beneficiaries. Although the Trusts have experienced significant growth of principal over the years, the income of the Trusts has not kept pace....
>
> One approach to address this circumstance would be to modify the investment strategy of the Trusts by shifting from growth investments to investments that pay higher current income. The consequences of this could be lower long term returns and capital gains tax costs from selling equity assets. The statutory power to adjust provides an alternative approach that enables trustees to continue to invest for long term return while providing an equitable distribution of income. *Email Holzworth to Appellant, April 21, 2022.*

On March 22, 2023, Denise, Stephen Judson and William Judson (three of the four residuary beneficiaries of the Trust), signed a *Release and Consent Agreement* ("Agreement") (*Exhibit C to Appellant's Memo*) acknowledging the significant growth of principal of the Trust without a concurrent growth of net income, ratifying Friedman's exercise of

his power to adjust in the past and going forward, approving all past and future distributions to Denise, and releasing Friedman from any liability for his decision to exercise the power to adjust from principal to income, as permitted by 20 Pa.C.S. §8104 and Section TWELFTH of the Will. The Agreement confirmed the distribution plan Friedman had instituted in 2022 and planned to continue "should it remain appropriate" to distribute to Denise "an amount equal to 3.2% of the three-year trailing average value of Trust principal". *Id* at 2.

Petitioner alleges that Trustee has exceeded his authority in distributing principal to the net income beneficiary in contravention to the settlor's intent and the law and beyond the scope of his authority. *Appellant's Memo* at 6 (pages unnumbered). He asked the orphans' court judge to direct Trustee to provide a complete accounting of the Trust, to preclude any further distributions from principal, to prohibit any distributions in excess of net income and to require the repayment to the Trust of all excess distributions previously made prior to making any further distributions. *Petition* at 6.

By agreement of counsel, the trial court was asked to rule on the submitted record alone without need for testimony or other documentary evidence. After review of the pleadings and exhibits, the trial court issued the 12/6/23 Order.

Appellant filed his notice of appeal of the 12/6/23 Order on January 5, 2024. On January 8, 2024, we issued our order requiring Appellant to file of record

and serve on the trial court judge, within 21 days, "a concise statement of errors complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b)". Appellant filed his concise statement on January 29, 2024. We file this opinion pursuant to Rule 1925(a),

ISSUES PRESENTED ON APPEAL

Appellant contends that the trial court erred in the following two ways:

1. The Court erred in ruling the power to adjust between principal and income, under 20 Pa. C.S. §8104 was authorized under the trust instrument.

2. The Court erred in denying [sic] approving the fiduciary's adjustment between principal and income.

Appellant's Statement of Errors Complained of on Appeal Pursuant to Pa.R.A.P. 1925(B) [sic] ("Appellant's 1925(b) Statement").

DISCUSSION

A Pennsylvania orphans' court decision will not be reversed by the Superior Court unless there has been an abuse of discretion or a fundamental error in applying the correct principles of law. *In re Estate of Luongo*, 823 A.2d 942, 951 (Pa.Super. 2003), *appeal denied*, 577 Pa. 722, 847 A.2d 1287 (2003). Our appellate courts have generally held that, once the lower court has reached its conclusion, the appellate court will only determine that an abuse of discretion has occurred "if it is so lacking in support as to be

clearly erroneous." *In re Scheidmantel,* 868 A.2d 464, 479 (Pa.Super. 2005) (internal citations omitted).

In reviewing orphans' court proceedings, the Superior Court will determine whether the orphans' court findings are based on competent and credible evidence. *In re Estate of Albright,* 545 A.2d 896 (Pa.Super. 1988), *appeal denied,* 522 Pa. 571, 559 A.2d 33 (1989). A party complaining on appeal has a heavy burden of proving that abuse of discretion occurred. *In re Paxson Trust I,* 893 A.2d 99, 112 (Pa. Super. 2006) (citations omitted). Even if an appellate court would have reached a different conclusion based on the "cold record", the appellate court is not in a position to "reweigh the evidence and credibility determinations of the trial court." *In re R.J.T.*, 608 Pa. 9, 27 (Pa. 2010). The Superior Court "will not lightly find reversible error and will reverse an orphans' court decree only if the orphans' court applied an incorrect rule of law or reached its decision on the basis of factual conclusions unsupported by the record. *Scheidmantel* at 479, citing *Estate of Harrison,* 745 A.2d at 681.

Appellant has asked the Superior Court to consider two alleged errors made by the trial court. We disagree and respond as follows.

Issue 1: The Court erred in ruling the power to adjust between principal and income under 20 Pa. C.S. §8104 was authorized under the trust instrument.

Appellant argues that the trial court should have denied Trustee's authority to exercise the

discretionary power of reallocation between principal and interest pursuant to 20 Pa.C.S. §8104 and Section NINTH of the Trust. However, a court cannot override a fiduciary's decision to exercise a discretionary power granted under the Pennsylvania Uniform Principal and Income Act (UPIA), 20 Pa.C.S. 8101, *et seq.*, unless it determines that the decision was an abuse of the fiduciary's discretion. 20 Pa.C.S. §8106(a). This is also the general rule for a discretionary power conferred upon a trustee by the trust instrument. *In re Estate of Feinstein*, 527 A.2d 1034, 1037 (Pa. Super. 1987).

Appellant relies on the trust language that controls distributions to Denise, as income beneficiary, contained in Section SIXTH, Section D, Paragraph 2 of the Will as evidence that Trustee lacked the authority to reapportion principal as income and therefore abused his discretion. However, in making this argument, Appellant ignores the language of Section NINTH Paragraph 2 which explicitly grants Trustee the authority to make "adjustments or apportionments between .. principal and income". This provision alone should be enough to justify Trustee's actions. But we will look further to the discretionary adjustment powers granted under 20 Pa. C.S. §8104.

Section 8104(a) of the UPIA states:

> Adjustment. - Subject to subsections (c) and (f), a trustee may adjust between principal and income by allocating an amount of income to

> principal or an amount of principal to income to the extent the trustee considers appropriate if:
>
> (1) the governing instrument describes what may or must be distributed to a beneficiary by referring to the trust's income; and
>
> (2) the trustee determines, after applying the rules in section 8103(a) (relating to fiduciary duties; general principles), that the trustee is unable to comply with section 8103(b).

Before applying Section 8104, we must first consider the language of Section 8103(b) which requires that, *before* exercising the discretionary power of 8104:

> a fiduciary shall administer a trust ..impartially based on what is fair and reasonable to all of the beneficiaries, except to the extent that the governing instrument clearly manifests an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with this chapter is presumed to be fair and reasonable to all of the beneficiaries.

The Uniform Law Comment to Section 8104 instructs that the §8104(a) power to adjust between principal and income applies when three conditions are met. The first is that the trustee must manage trust assets under the prudent investor rule. The general rule of the prudent investor rule states:

> A fiduciary shall invest and manage property held in a trust as a prudent investor would, by considering the purposes, terms and other circumstances of the trust, and by pursuing an overall investment strategy reasonably suited to the trust. 20 Pa. C.S. §7203(a).

The prudent investor rule applies in Pennsylvania except where the trust instrument contains limitations. 20 Pa.C.S. §7202; see also, *In re Scheidmantel*, 868 A.2d 464, 480 (Pa Super. 2005) (distinguishing between the prudent investor requirement of §7202, which existed prior to Pennsylvania's adoption of the UPIA, and the new requirement of diversification of investments under §7204). Thus, the statutory requirements contained in the prudent investor rule apply and the first condition is met.

The Uniform Law Comment to 8104 next provides that "[t]he second condition will be met when the terms of the trust require all of the 'income' to be distributed at regular intervals." This condition is met by the language of Section SIXTH paragraph D.1: "My Trustees shall distribute to each daughter all of the

net income of her trust in convenient periodic installments."

The third condition stated in the Uniform Law Comment to 8104 is met when the trustee determines that he is unable to comply with the requirement of Section 8103(b) that a trustee must administer a trust impartially based on what is fair and reasonable to all of the beneficiaries, unless the trust instrument permits favoritism, which is not applicable here. Trustee made a determination, contemplated by Sections 8103 and 8104 and the 3-part test described in the Uniform Law Comment, that it would be far more favorable to Petitioner and his siblings to continue investment of trust assets under a long term growth strategy without taking into account the negative impact that strategy would have on Denise's net income share. Therefore, he concluded, and we agree, that because he would be unable to meet the requirements of Section 8103(b), by applying Section 8104, he had the authority to make the necessary adjustments. All three conditions having been met, we must conclude that Section 8104 allows for the adjustment between principal and income.

Having completed our statutory analysis of Section 8104, we turn to the language of the Trust. Section NINTH of the Will gives Trustee the *explicit* authority to adjust between principal and income, stating:

> **My fiduciaries, in their absolute discretion, shall have the authority** to claim items of deduction in either the income tax

> returns or estate tax return, **as they may decide, without the consent of the beneficiaries, without liability on their part for so doing, and in their discretion, to make or not make adjustments or apportionments among the beneficiaries or as between principal and income.** (emphasis added.)

Appellant argues that Section NINTH does not apply because it is intended to permit adjustments for tax purposes only. *See, Appellant's Memo* at 10-12. While we do not agree with this interpretation and think the language is meant to be interpreted to give Trustee broad discretion, we note that Trustee is already protected by the language of UPIA Section 8104(f), which provides that the application of Section 8104 is not impacted by a governing instrument which limits the power of adjustment between principal and income "unless it is clear from the governing instrument that it is *intended to deny the trustee the power of adjustment conferred by subsection (a).*" (emphasis added). Nowhere in the Will can we find any intent to deny that power. In fact, looking at the specific language of Section NINTH, we note that there are two different discretionary standards: "*absolute discretion*" with respect to characterization in tax returns and "*discretion*" with respect to adjustments between principal and income. There would be no reason for these two different discretionary standards if the testator did not intend for the trustees to be able to make these adjustments.

Appellant claims that Trustee made impermissible distributions of principal to the net income beneficiary. *Appellant's Memo at 3 4.* However, we find that Appellant's argument confuses direct distributions of the principal or corpus of the Trust with distributions of income *following an adjustment or apportionment* of principal and income. While the effect of these distinct actions may appear to be facially similar, the circumstances under which the actions are permissible differ. In reviewing the propriety of a distribution of principal pursuant to Section SIXTH, paragraph D, subparagraph 2, the question is whether an emergency affecting one of the settlor's daughters exists that necessitates the distribution of principal. Conversely, in reviewing an adjustment of principal to income or vice versa, the question is whether that action is "fair and reasonable to all of the beneficiaries" of the Trust under the discretionary power of trust administration pursuant to 20 Pa.C.S. § 8103(b). The Superior Court has previously stated:

> The testator's intent is the polestar in the construction of every will and that intent, if it is not unlawful, must prevail. Also, we must focus on the precise wording of the will and view the words of the will in the context of the overall testamentary plan. We give effect to word and clause where reasonably possible so as not to render any provision nugatory or mere surplusage. Additionally, we are not permitted to determine what

> we think the testator might or would have desired under the existing circumstances, or even what we think the testator meant to say. Rather, we must focus on the meaning of the testator's words within the four corners of the will. Finally, a court may not rewrite an unambiguous will. *In re Est. of Cassidy*, 2023 Pa. Super 101, 296 A.3d 1219, 1223 (2023) (citing *In re Wilton*, 921 A.2d 509, 513 (Pa. Super. 2007).

Appellant argues that any adjustment between principal and income is prohibited by the language of the trust instrument. *Appellant's Memo at 10.* We disagree. Such a construction of the trust language would defeat the expressed intention of the testator, which, as Appellant correctly pointed out, is the "polestar" that must guide a court's interpretation of a trust instrument. *Id.* The "precise wording of the will ... in the context of the overall testamentary plan" (*Cassidy* at 1223) distinguishes between a distribution of trust principal and a distribution of net income from said principal, as may be adjusted, and so must this court in evaluating the actions of the Trustee to determine whether the Trustee has abused his discretion.

Further, if we were to apply Appellant's argument and interpret the language of Section SIXTH as precluding any consideration by the trustee of adjusting or reapportioning principal and income, then the language in Section NINTH would become

mere surplusage, contrary to the rules of construction of a trust instrument expressed in *Cassidy*.

It is the trial court's opinion that Trustee acted in accordance with the language of the Trust and property [sic] applied the relevant statutory requirements of the UPIA. Although not binding on us, we find instructional that the Massachusetts trial court (*see, fn.4 above*) held that the trustee (also Mr. Friedman) was authorized by [Section 8104] (the Massachusetts UPIA provisions are numbered differently but are substantively the same as the Pennsylvania sections we rely on here) to exercise the power of adjustment *and* that the Will [our Section NINTH] expressly grants the fiduciaries the discretionary power to make or not make adjustments between principal and income. They concluded "[t]herefore, even if the [UPIA] did not apply to Attorney Friedman's decision to shift income to principal, the Court finds that he was expressly authorized to do so under the plain language of the trusts." We wholeheartedly agree.

Issue 2: The Court erred in denying [sic] approving the fiduciary's adjustment between principal and income.

Before we begin our discussion of this issue, we must first mention what we assume was a typographical error made where *Appellant's 1925(b) Statement* says that the trial court erred by *both* "denying approving" Friedman's adjustment between principal and income. The trial court, in the 12/6/23 Order on appeal here, held that Friedman had

reasonably and properly exercised his power pursuant to 20 Pa. C.S. §8104 to adjust trust assets between principal and income. We will, therefore, ignore the word "denying" in this discussion.

Section TWELFTH of the *Will* relieves Hess Kline's fiduciaries from "any liability whatsoever if they shall obtain the approval for any past or future action from a majority of the beneficiaries affected thereby who are then sui juris." Will at 14. The trustee received such approval for the reapportionment by a majority of the affected beneficiaries in the *Release and Consent Statement* dated March 22, 2023. It is not up to this court to overturn an affirmation by and approval of the majority of the trust beneficiaries.

"A trustee may be found to have breached his duty of trust if he fails to exercise his discretion in a manner consistent with the document that created the trust." I*n re Scheidmantel* 868 A.d2d 464, 481 (Pa. Super. Ct. 2005) (citing *Restatement of Trusts §187 (1929).* Here the fiduciary is given the explicit authority to assign between principal and net income under Section NINTH of the trust instrument, and, further, to the extent that the exercise of power would otherwise constitute a breach of fiduciary duty, the trust instrument itself provides that the "[fiduciaries] shall be absolved of any liability whatsoever if they shall obtain the approval for any past or future action from a majority of the beneficiaries affected thereby who are then sui juris." Section TWELFTH paragraph 7.

The Superior Court has stated "Pennsylvania follows the view of the Restatement of Trusts that

when discretion is conferred upon a trustee with respect to the exercise of a power, its exercise is not subject to control by the courts, except to prevent an abuse by the trustee of his discretion." *In re Scheidmantel* at 481. We find no abuse of Trustee's discretion here. Rather, we find that he looked at the testator's intent, the economic impact of his investment strategy, and the UPIA, and reasonably decided that an adjustment of principal and income would lead to a fair and reasonable result for all of the beneficiaries.

Because we found no breach of fiduciary duty, we denied Petitioner's claim that Trustee should be surcharged for any distributions made to Denise. *In re Estate of Warden*, 2 A.3d 565, 578 (Pa. Super. Ct. 2010). Pennsylvania trust law provides that "[a] trustee who acts in reasonable reliance on the express provisions of the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance." 20 Pa. C.S. §7786.

CONCLUSION

Wherefore, for the reasons stated above, we respectfully request that this Court's December 6, 2023 Order be affirmed.

BY THE COURT: MELISSA S. STERLING, J.

Copies emailed on August 22, 2024 to:
Elena Baylarian, Esquire
Alexander Palmer, Esquire
Rachel A. Deenis, Judicial Assistant

Appendix C

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION

NO. 1988-X3737

IN RE: ESTATE OF HESS KLINE, DECEASED

ORDER

AND NOW, this 6th day of December, 2023, upon consideration of the Petition of Peter Judson for Citation to Show Cause Why Trustee Should Not File an Accounting of Their Management of the Hess Kline Testamentary Trust, Why the Distribution of Principal Should Not Be Undone and Why the Trustee Should Be Enjoined from Further Expenditure of the Principal in Violation of the Trust Instrument, and responses thereto, it is hereby **ORDERED** and **DECREED** that said Petition is DENIED. It is further **ORDERED** and **DECREED** that Trustee Robert I. Friedman's exercise of the power to adjust pursuant to 20 Pa.C.S. §8104 was reasonable and proper.

BY THE COURT:
MELISSA S. STERLING, J.

Order e-filed on December 6, 2023. Copy sent via Chambers to: Alexander Palmer, Esquire, Richard L. Holzworth, Esquire, Rachel A. Deenis, Judicial Assistant

Appendix D

IN THE SUPREME COURT OF PENNSYLVANIA MIDDLE DISTRICT

IN RE: H.K., DECEASED PETITION OF: P.J.

No. 64 MAL 2026

Petition for Allowance of Appeal from the Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 15th day of July, 2026, the Petition for Allowance of Appeal is

DENIED.

Appendix E

NOTICE: All slip opinions and orders are subject to formal revision and are superseded by the advance sheets and bound volumes of the Official Reports. If you find a typographical error or other formal error, please notify the Reporter of Decisions, Supreme Judicial Court, John Adams Courthouse, 1 Pemberton Square, Suite 2500, Boston, MA, 02108-1750; (617) 557-1030; SJCReportersjc.state.ma.us

SJC-13579

IN THE MATTER OF THE TRUSTS UNDER THE WILL OF HELYN W. KLINE.

Barnstable, September 9, 2024 - November 5, 2024

Present: Budd, C.J., Gaziano, Kafker, Wendlandt, Georges, Dewar, & Wolohojian, JJ.

Trust, Allocation of payments between principal and income, Distribution, Remainder interests, Construction, Trustee's discretion, Trustee's authority. Devise and Legacy, Remainder interests. Statute, Construction. Will, Construction. Intent. Practice, Civil, Summary judgment.

Petition filed in the Barnstable Division of the Probate and Family Court Department on September 30, 2022. The case was heard by Susan Sard Tierney, J., on motions for summary judgment. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Tracey L. Taylor for the petitioner.
Christopher H. Lindstrom for the trustees.

WENDLANDT, J. This case presents the question whether the Massachusetts Principal and Income Act, G. L. c. 203D, § 1-29 (MPIA or act), permitted a trustee of trusts having an income beneficiary and remainder beneficiaries to adjust between principal and income after he pursued a total growth strategy that disproportionately increased trust principal relative to trust income. We conclude that, because the trust instrument, a will, does not clearly evince the testator's intent to deny the trustee the power to adjust, the MPIA permitted the trustee to adjust between principal and income to administer the trusts based on what was fair and reasonable to all of the beneficiaries. Further concluding that the petitioner failed to create a triable issue of fact that the trustee abused his discretion in exercising the power to adjust, we affirm the Probate and Family Court judge's allowance of summary judgment in favor of the trustee.

1. Background. a. Facts. We set forth the facts in the light most favorable to the party against whom summary judgment was entered. *Boazova v. Safety Ins. Co.*, 462 Mass. 346, 350 (2012).

In 1988, Helyn W. Kline died testate. Under the terms of Kline's will, separate trusts were created for the benefit of her daughters. This case pertains to the trusts to benefit one of those daughters, Denise Jo Levy.

Levy is the income beneficiary of the trusts; as such, she is entitled to distributions of the trusts' net income.[1] In addition, the will permits the trustees to distribute to Levy such portions of principal that the trustees "in their absolute discretion, may deem necessary for any emergency affecting" Levy. Kline expressly set forth her intent that "principal distributions be made to [Levy] only under the most extraordinary circumstances." The will further states that Kline did "not anticipate the probability that any principal distributions [to Levy would] be required." Levy's three sons, Stephen Judson, William Judson, and the petitioner, Peter Judson,[2] are the current remainder beneficiaries.[3] Robert Friedman (trustee) and Levy are the current trustees of the trusts.

b. Procedural history. Peter[4] filed a petition in the Probate and Family Court alleging that, since 2020, improper distributions had been made to Levy in excess of the trusts' net income. The trustee timely filed an affidavit of objections to Peter's petition.

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[1] Article Fourth, par. D, of the will provides, in relevant part: "My Trustees shall distribute to each daughter all of the net income of her trust in convenient periodic installments."

[2] Because the petitioner and other beneficiaries share a surname, we will refer to the petitioner by his first name.

[3] Article Fourth provides that, upon Levy's death, the balance of the trusts' principal and any undistributed income is to be divided into even shares equal to the number of Levy's then-living children or deceased children who have then-living issue.

[4] Stephen and William Judson did not join the petition and have not participated in this case.

In his affidavit, the trustee averred that, since being established, the trusts had "experienced significant growth of principal"; however, the trusts' income had "not kept pace." The trustee stated that the income in 2021 was approximately two percent of the principal's value. He explained that, had he modified the investment strategy by "shifting . . . to investments that pay higher yield and rate of income" so as to benefit Levy, the income beneficiary, the likely result would have been "lower long term returns," which would be detrimental to the remaindermen, Peter and his brothers. In addition, the trustee stated, the modified strategy would likely have triggered a tax on the capital gains realized following the needed sale of equity assets. In brief, such a strategy would have favored Levy, the income beneficiary of the trusts, but not the remainder beneficiaries.

Accordingly, the trustee determined to exercise the power to adjust set forth in the MPIA.[5] He transferred some of the trusts' assets from principal to income. In doing so, the trustee averred, he considered Levy's cost of living, Levy's other income sources, and the relevant factors set forth in the MPIA, including the intent of the testator. See G. L. c. 203D, § 4 (b). Following this adjustment, he distributed $90,000 in trust income to Levy, which comprised approximately 3.2 percent of the three-year average value of the trusts. After the shift of principal to income, the distributions to Levy "increased by approximately 1.1 [percent] of the total

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[5] The trustee believed he was authorized to make this adjustment under § 4 of the MPIA, discussed infra.

value" of the trusts' principal (averaged over the past three years).

The trustee and Levy moved for summary judgment on the basis that the trustee was authorized under the MPIA to adjust between principal and income "for the benefit of all beneficiaries." Peter opposed the trustees' motion and cross-moved for partial summary judgment, contending that the will expressly precluded the trustee from invoking the MPIA's power to adjust.

In support of his opposition and cross motion, Peter averred that Levy "repeatedly advised" him that her investment portfolio contained approximately $1 million and that she had "earned about $250,000." He stated Levy "lives alone in a five (5) bedroom, 3,800 square foot apartment" that cost her "almost $6,000 per month in 2015." In short, Peter asserted that Levy was not facing the type of emergency situation required to permit the trustee to invade the trusts' principal under the terms of the will.

The Probate and Family Court judge granted the trustees' motion and denied Peter's motion. Peter timely appealed. We transferred the case to this court on our own motion.

2. Discussion. We review the judge's allowance of summary judgment and questions of statutory interpretation de novo. See *Matter of the Estate of Mason*, 493 Mass. 148, 151 (2023); *Matter of the Estate of Jablonski*, 492 Mass. 687, 690 (2023). Summary judgment is proper where there is no genuine issue as

to any material fact and a party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002). Where the party opposing summary judgment will bear the burden of proof at trial, the moving party is entitled to summary judgment if that party demonstrates the opposing party "has no reasonable expectation of proving an essential element of that party's case." *Jinks v. Credico (USA) LLC*, 488 Mass. 691, 704 (2021), quoting *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991). The opposing party must then "set forth specific facts showing that there is a genuine issue for trial." Mass. R. Civ. P. 56 (e). Where parties cross-move for summary judgment, "the evidence is viewed in the light most favorable to the party against whom judgment [has entered]." *Boazova*, 462 Mass. at 350.

Where, as here, we are called upon to construe a statute, we begin with its plain language, which, if unambiguous, is "conclusive as to legislative intent." *Six Bros., Inc. v. Brookline*, 493 Mass. 616, 622 (2024), quoting *Sharris v. Commonwealth*, 480 Mass. 586, 594 (2018).

> [A] statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to

> the end that the purpose of its framers may be effectuated (citation omitted).

Matter of the Estate of Mason, 493 Mass. at 151, quoting *Harvard Crimson, Inc. v. President & Fellows of Harvard College*, 445 Mass. 745, 749 (2006).

a. Statutory framework. i. Competing duties. Enacted in 2005, the MPIA comprehensively governs the treatment of principal and income for trusts. G. L. c. 203D, § 1-29. St. 2005, c. 129 (effective Jan. 1, 2006). One of the act's central purposes is to address the "vexing problem" faced by trustees saddled with the sometimes-conflicting aims of the duty to invest trust assets under the prudent investor rule,[6] on the one hand, and the duty to administer the trust impartially so as to treat fairly both current beneficiaries entitled to distributions from net income and beneficiaries entitled to future distributions of principal, on the other.[7] 3 M.J. Bloostein, Newhall's Settlement of

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[6] The prudent investor rule, a creature of the common law now codified in the Massachusetts Prudent Investor Act, G. L. c. 203C, § 1-11, inserted by St. 1998, c. 398, § 1, generally demands that a trustee "shall invest and manage trust assets as a prudent investor would, considering the purposes, terms, and other circumstances of the trust" and must "exercise reasonable care, skill, and caution," G. L. c. 203C, § 3 (a).

[7] See G.L.c.203C,§7("If a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries").

Estates and Fiduciary Law in Massachusetts § 37:4.50 (5th ed. Supp. May 2024).[8]

In particular, a prudent investment strategy may counsel investing to maximize the trust's total return but may result in growth in principal without a comparable growth in income. Such a strategy may comply with the prudent investor rule, but it may improperly favor remainder beneficiaries over income beneficiaries.

Similarly, an investment strategy that maximizes traditional trust accounting income such as interest, dividends, and rents may result in a lopsided win for the income beneficiary at the expense of the remainder beneficiary. The rigid characterization of investment returns as "income" or "principal" limited a trustee's ability to take advantage of an over-all investment strategy that maximized the expected total return of the trust's assets. See id.

ii. Power to adjust. The MPIA solves this conundrum by permitting a trustee who pursues a prudent investment strategy to maximize the trust's total return without regard to the characterization of

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[8] Although secondary sources are not binding in our construction of a statute, they can be informative. The drafters' comments to the MPIA -- and so far as the MPIA substantially mirrors its language, comments to the uniform act -- are particularly useful in understanding the objectives the Legislature sought to achieve in adopting the act. See *Klingel v. Reill*, 446 Mass. 80, 84 (2006) ("When the Legislature adopted the language of [a uniform act], it intended an interpretation of that term consistent with the rationale explained in the comment accompanying that language").

that return as "principal" or "income" to adjust trust assets between principal and income to administer the trust impartially based on what is fair and reasonable to all of the beneficiaries. In other words, the MPIA allows a trustee to shift what traditionally might be characterized as an increase in the value of principal to income, and vice versa, in order to maintain equitable treatment among beneficiaries while at the same time pursuing a prudent investment strategy. See Uniform Principal and Income Act § 104 comment (1997), 7A U.L.A. (Part IV) 299 (Master ed. 2017) (act "enable[s] a trustee to select investments using the standards of a prudent investor without having to realize a particular portion of the portfolio's total return in the form of traditional trust accounting income such as interest, dividends, and rents"); Ad Hoc Principal and Income Act Committee, Massachusetts Principal and Income Act Report, in Understanding and Using Trusts, Exhibit 14A, at 20 (Mass. Cont. Legal Educ. 5th ed. 2022) (discussing power to adjust, which enables "a total return approach to investing").

Specifically, § 4 (a) of the act permits a trustee to adjust between principal and income to administer the trust impartially so as to achieve fair and reasonable treatment between beneficiaries if "the trustee considers it necessary" and if three prerequisites are met. G. L. c. 203D, § 4 (a). First, the trustee must "invest[] and manage[] trust assets as a prudent investor." Id. Second, "the terms of the trust [must] describe the amount that may or must be distributed to a beneficiary by referring to the trust's income." Id.

Third, the trustee must determine, "after applying the rules in [§ 3 (a)], that the trustee is unable to comply with [§ 3 (b)]." Id. Section 3 (a), in turn, requires compliance with the trust instrument's terms and compliance with the act, absent a "different provision" in the instrument;[9] and § 3 (b) generally requires impartial administration of the trust so as to achieve fair and reasonable treatment of beneficiaries.[10] G. L. c. 203D, § 3 (a), (b). Thus, the third prerequisite is met if the trust does not contain a "different provision" barring exercise of the power to adjust, and the trustee determines he or she cannot administer the trust impartially absent an adjustment between principal and income.[11]

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[9] Pertinent here, § 3 (a) of the act provides that in determining whether to adjust trust assets between principal and income, a trustee "(1) shall administer a trust . . . in accordance with the terms of the trust or the will," even if the MPIA sets forth a different default rule; and "(3) shall administer a trust . . . in accordance with [the MPIA] if the terms of the trust or the will do not contain a different provision." G. L. c. 203D, § 3 (a). In other words, subsections 3 (a) (1) and (3) require a trustee to comply with the express terms of the trust instrument regarding the adjustment of principal and income, if there are any such terms, and also to comply with the act's rules for adjustment of principal and income, unless the trust instrument sets forth a "different provision" that expressly provides a different rule. Id.

[10] Section 3 (b) requires a trustee to administer the trust impartially so as to treat beneficiaries fairly and reasonably "except to the extent that the terms of the trust or the will clearly manifest an intention that the [trustee] shall or may favor 1 or more of the beneficiaries." G. L. c. 203D, § 3 (b).

[11] The power to adjust set forth in the act "authorizes the trustee to make adjustments between principal and income that may be necessary if the income component of a portfolio's total return is

Importantly, the MPIA identifies the type of "different provision" required to preclude a trustee from exercising the power to adjust under the act. It provides that the

> "[t]erms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of [§ 4] unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power of adjustment conferred by [§ 4 (a)]" (emphasis added).

G. L. c. 203D, § 4 (f). The Uniform Law Commission's comments to the counterpart section of the Uniform Principal and Income Act, which is identical to § 4 (f) of the MPIA, explain:

> Since the power [to adjust] is intended to enable trustees to employ the prudent investor rule without being constrained by traditional principal and income rules, an instrument executed before the

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too small or too large because of investment decisions made by the trustee under the prudent investor rule. The paramount consideration in applying [the power to adjust] is the requirement in [§ 3 (b)] that 'a fiduciary must administer a trust . . . impartially, based on what is fair and reasonable to all of the beneficiaries,'" except where the trust instrument "clearly manifest[s] an intention" to favor a particular beneficiary. Uniform Principal and Income Act § 104 comment, 7A U.L.A. (Part IV) 300.

> adoption of this Act whose terms describe the amount that may or must be distributed to a beneficiary by referring to the trust's income or that prohibit the invasion of principal or that prohibit equitable adjustments in general should not be construed as forbidding the use of the power to adjust under [§ 4 (a)] if the need for adjustment arises because the trustee is operating under the prudent investor rule.

Uniform Principal and Income Act § 104(f) comment, 7A U.L.A. (Part IV) 302-303. Thus, the act authorizes a trustee to adjust trust assets between principal and income in order to administer the trust impartially, unless the trust instrument contains a "different provision" that clearly denies the trustee that power. See G. L. c. 203D, § 3 (a) (3), 4 (a), (f); St. 2005, c. 129, § 6.

iii. Considerations in exercising power to adjust. If the trust instrument does not contain the requisite "different provision," then a trustee has the power to adjust and must determine whether and how to exercise that power. In doing so, the act requires a trustee to "consider all factors relevant to the trust and its beneficiaries." G. L. c. 203D, § 4 (b). The Legislature enumerated nine nonexclusive factors that may be relevant to a trustee's determination.[12]

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[12] Specifically, § 4 (b) sets forth the following factors that a trustee must consider "to the extent they are relevant": "(1) the

Id. A trustee's decision to adjust between income and principal, as well as the trustee's determination as to which factors are relevant to that decision and the weight to give those factors, is owed substantial deference; it may be disturbed only if the court finds the trustee abused his or her discretion. G. L. c. 203D, § 5. See Uniform Principal and Income Act § 104 comment, 7A U.L.A. (Part IV) 300, citing Restatement (Second) of Trusts § 183, 187, 232, 233, comment P (1959) ("The power to adjust is subject to control by the court to prevent an abuse of discretion").

A trustee may not, however, adjust between principal and income in the circumstances described in § 4 (c). Relevant to the present case, § 4 (c) prohibits a trustee from exercising the power to adjust where the trustee is a beneficiary of the trust. See G. L. c. 203D, § 4 (c) (7). Where this prohibition applies, and

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nature, purpose and expected duration of the trust; (2) the intent of the settlor; (3) the identity and circumstances of the beneficiaries; (4) the needs for liquidity, regularity of income and preservation and appreciation of capital; (5) the nature and character of the assets held in the trust, if an asset is used by a beneficiary, and whether an asset was purchased by the trustee or received from the settlor; (6) the net amount allocated to income under the other sections of this chapter and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available; (7) whether the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and if the trustee has exercised a power from time to time to invade principal or accumulate income; (8) the actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and (9) the anticipated tax consequences of an adjustment." G. L. c. 203D, § 4 (b).

there is more than one trustee, "a cotrustee to whom [the prohibition] does not apply may make the adjustment [between principal and income] unless the exercise of the power [to adjust] by the remaining trustee . . . is not permitted by the terms of the trust." G. L. c. 203D, § 4 (d).

b. Clear prohibition of the act's power to adjust. As set forth supra, a trustee may exercise the power to adjust under § 4 (a) when three prerequisites are met.[13] There is no dispute that the first two -- that the trustee is subject to the prudent investor rule[14] and that the trust instrument describes Levy's benefits in terms of income[15] -- are met. The parties' dispute centers on the third condition -- whether the trustee's power to adjust is barred by a "different provision" of the will.

Peter contends that the will expressly precluded the trustee from adjusting between principal and income. See G. L. c. 203D, § 3 (a) (1) (trustee "shall administer a trust . . . in accordance with the terms of the . . . will, even if there is a different provision" in MPIA). Specifically, Peter maintains that because the

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[13] The MPIA applies to the trusts at issue. See St. 2005, c. 129, § 6 ("[The MPIA] shall apply to a trust or a decedent's estate existing on [January 1, 2006,] except as otherwise expressly provided in the will or terms of the trust or in this act").

[14] See G. L. c. 203C, § 2 (a) ("a trustee who invests and manages trust assets shall owe a duty to the beneficiaries of the trust to comply with the prudent investor rule").

[15] The trust document instructs "[m]y [t]rustees shall distribute to [Levy] all of the net income of her trust in convenient periodic installments."

will limits the trustee's power to distribute the trusts' principal only where "necessary for any emergency affecting" Levy; because the will expressly sets forth Kline's intent that any such "principal distributions" to Levy would occur "only under the most extraordinary circumstances," which Kline did "not anticipate"; and because Levy was not experiencing such an emergency or extraordinary situation, the will expressly precluded the trustee from exercising the power to adjust.

The provision of the will on which Peter relies does not discuss, much less clearly preclude, the power to adjust. Instead, the provision addresses only distributions of principal; it is silent as to whether the trustee may adjust between principal and income. See G. L. c. 203D, § 4 (a) ("A trustee may adjust between principal and income if . . . the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income . . ."). [16] Thus, the will does not contain a "different provision" that clearly denies the trustee the power to adjust conferred by the act. G. L. c. 203D, § 3 (a) (3).[17]

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[16] The will distinguishes between the authority of the trustees to make "distributions" and the trustee's power to make "adjustments." Compare Article Fourth (setting forth limitations on "principal distributions" to Levy) with Article Seventh (discussing power of trustee to make "adjustments" between principal and income for tax purposes).

[17] We do not address § 3 (a) (2) of the act, which provides that a trustee "may administer a trust . . . by the exercise of a discretionary power of administration given to the [trustee] by the terms of the trust or the will, even if the exercise of that power produces a result different from a result required or

c. Exercise of discretion. Having concluded that the will does not prohibit the power to adjust, we consider Peter's arguments that the trustee abused his discretion in exercising that power.

Peter first argues that the trustee abused his discretion because, although the trustee averred that he considered the relevant factors under § 4 (b), he did not consider Kline's intent. G. L. c. 203D, § 4 (b) (2). Peter offers nothing to support this contention. Instead, he repeats his mistaken argument relying on the provision of the trust regarding principal distributions to Levy for emergencies only.[18] As set forth supra, that provision concerns distributions of principal and not adjustments between principal and income. Thus, it says nothing about Kline's intent to prohibit adjustments.

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permitted by" the MPIA, as none of the parties asserts that it controls their dispute. G. L. c. 203D, § 3 (a) (2).

[18] Peter's reliance on "Example (4)" to Uniform Principal and Income Act § 104, 7A U.L.A. (Part IV) 303-304, is likewise unavailing. The example concerns a situation involving an income beneficiary whose distributions from principal are limited to "dire emergencies only" and by an absolute lifetime cap of six percent of the trust's value. The comment concludes that the hypothetical trustee may adjust principal to income after an adjusted investment strategy that disproportionately favored the remainder beneficiaries "to the extent" the adjustment "is from only the capital appreciation" resulting from the new investment strategy. Unlike the situation posited in the example, here the will places no absolute cap on distributions and Peter adduced no evidence to support a reasonable finding that the adjustments by the trustee in this case were not from capital appreciation due to the pursued investment strategy. Nor has Peter requested additional discovery under Mass. R. Civ. P. 56.

Second, Peter asserts that § 4 (c) (7) of the act, which prohibits adjustments between principal and income "if a trustee is a beneficiary of the trust," precludes the trustee from adjusting principal to income here. Peter's argument ignores that § 4 (d) of the act permits the trustee, who is not a beneficiary, to make adjustments notwithstanding his cotrustee's status as both beneficiary and trustee. See G. L. c. 203D, § 4 (d) ("If [§ 4 (c) (7)] applies to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust"). Similarly, although the will bars a trustee "who is also a beneficiary [from] participat[ing] in any decision relating to any discretionary distributions of income or principal," it neither restricts the other trustee from acting nor prohibits Levy from asking the trustee for distributions.[19]

Judgment affirmed.

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[19] Article Ninth of the will sets forth Kline's intention that there be two trustees "acting . . . at all times"; where a trustee is also a beneficiary (beneficiary trustee), the will provides that the beneficiary trustee "shall not participate in any decision relating to any discretionary distributions of income or principal."

Appendix F

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT PROBATE AND FAMILY COURT DEPARTMENT

Barnstable Division Docket No. BA22P1993P0

in re: TRUSTS U/W OF HELYN KLINE

MEMORANDUM and ORDER

(Respondents' Motion for Summary Judgment filed on May 2, 2023) (Petitioner's Motion for Partial Summary Judgment filed on May 2, 2023)

The above-captioned matters came before the Court (Tierney, J.) for hearing on June 8, 2023. Attorney Tracey Taylor appeared on behalf of the Petitioner, Peter Judson ("Mr. Judson") Attorney Thomas Rockwell appeared on behalf of the Respondents, Attorney Robert Friedman (" Attorney Friedman") and Denise Jo Levy ("Ms. Levy"). After hearing, it is ordered as follows:

1. The Respondents' Motion for Summary Judgment is hereby *allowed.*

2. The Petitioner's Motion for Partial Summary Judgment is hereby *denied.*

Memorandum of Decision

Background

In 1977, Helyn Kline ("Ms. Kline") established generation skipping trusts for each of her daughters, including the Respondent, Ms. Levy, by way of her will ("the Will').[1] The trusts established by Ms. Kline for Ms. Levy are the subject of this action. Ms. Levy's three adult sons: the Petitioner, Stephen Judson, and William Judson,[2] are presently the equal contingent beneficiaries of the subject trusts.[3]

Attorney Friedman and Ms. Levy are the current trustees of the trusts. In 2009, Attorney Friedman was appointed as trustee of the trusts for the benefit of Ms. Levy. Article Sixth of the Will provides that "any fiduciary who is also a beneficiary shall not participate in any decision relating to any discretionary distributions of income or principal under the times [sic] of my will." The purpose of the trusts is to pay all income to Ms. Levy and principal as necessary to address emergency situations.

Paragraph 1 of Section D of Article Fourth of the Will provides that the trustees, "shall distribute to each daughter all of the Net Income of her trust in convenient periodic installments." Paragraph 2 provides that the trustees may distribute, or apply for Ms. Levy's benefit, such portion or portions of

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[1] Ms. Kline subsequently died in 1988.

[2] Ms. Levy's other two children, Stephen and William Judson, did not join in the underlying action and did not participate in this litigation.

[3] Upon Ms.Levy's death, the trusts are to be divided into as many equal shares as there are children of Ms.Levy then living and children of Ms. Levy then deceased who have issue then living.

principal, as the trustees in their absolute discretion may deem necessary for any emergency situation affecting Ms. Levy, while also taking into account her income from all other sources. Paragraph 7 of Article Seventh further provides that the fiduciaries, in their absolute discretion, shall have the authority without the consent of the beneficiaries, without liability on their part for doing so, and in their discretion, to make or not make adjustments or apportionments among beneficiaries or as between principal and income. Paragraph 11 of Article Eighth provides the trustees with the power to distribute income and principal to a beneficiary directly or to pay and apply the same for the beneficiary's support, as they may in their absolute discretion determine, without being required to apply to the Court for leave to make such payments and without any liability for doing so.

On September 30, 2022, Mr. Judson filed a general trust petition wherein he asserted that, since 2020, the trustees have distributed "well in excess" of the gross income of the trusts to Ms. Levy in violation of the terms of the trust which provide that the trustee shall only distribute all of the net income of her trust in convenient periodic installments. The petition requests that the Court: 1) order the trustees to comply with the terms of the trusts by distributing no more than the net income of the trusts to Ms. Levy; 2) order Ms. Levy to return all funds distributed to her since January 1, 2020 in excess of the net income; and 3) order the trustees to refrain from making any

further distributions until the full amount of the excess distributions has been returned.[4]

On May 2, 2023, Attorney Friedman and Ms. Levy filed a Motion for Summary Judgment. On the same date, Mr. Judson filed a Motion for Partial Summary Judgment.

Standard

Summary judgment is permissible when no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. See Mass. R. Civ. P. 56. A moving party may be entitled to summary judgment in one of two ways: first, he may submit affirmative evidence negating the nonmoving party's claim; or second, he may demonstrate that the nonmoving party cannot establish an element of his claim. See *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 715 (1991), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (White, J., concurring). "All evidentiary inferences are to be resolved in favor of the party opposing a motion for summary judgment." J.F.v.J.F., 71 Mass. App. Ct. 782, 789 (2008). "Doubts as to the existence of a genuine issue of material fact are to be resolved against the party moving for summary judgment." *Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's*, London, 449 Mass. 621, 628 (2007).

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[4] On February 1, 2023, Attorney Friedman filed an Affidavit of Objection to the petition.

"The party moving for summary judgment assumes the burden of affirmatively demonstrating that there is no genuine issue of material fact on every relevant issue, even if he would have no burden on an issue if the case were to go to trial." *Pederson v. Time, Inc.*, 404 Mass. 14, 17 (1989), citing *Attorney Gen. v. Bailey*, 386 Mass. 367, 371 (1982). If the moving party is able to demonstrate a lack of genuine issue, "the burden shift[s] to the [nonmoving party] to show with admissible evidence the existence of a dispute as to material facts." *Godbout v. Cousens*, 396 Mass. 254, 261 (1985). The nonmoving party must then go beyond the pleadings and demonstrate specific facts to show that there remains a genuine issue of material fact requiring a trial. *Slaven v. City of Salem*, 386 Mass. 885, 890 (1982), citing *Hahn v. Sargent*, 523 F.2d 461, 468 (1st Cir. 1975).

Cross-Motions for Summary Judgment

This dispute is a disagreement between the parties regarding the applicability and effect of General Laws Chapter 203D ("the Massachusetts Principal and Income Act," hereinafter "the Act), specifically Sections 3 and 4, to the trusts executed by Ms. Kline.

Section 3 of the statute, which governs fiduciary duties and general principles, provides, in relevant part, as follows:

> (a) In allocating receipts and disbursements to or between principal and income, and with

respect to any matter within the scope of this chapter, a fiduciary:

(1) shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in this chapter;...

(3) shall administer a trust or estate in accordance with this chapter if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration;...

(b) In exercising the power to adjust under subsection (a) of section 4 or a discretionary power of administration regarding a matter within the scope of this chapter, whether granted by the terms of a trust, a will, or this chapter, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor I or more of the beneficiaries. A determination in accordance with this chapter is presumed to be fair and reasonable to all of the beneficiaries. G. L. c. 203D, § 3.

Moreover, Section 4 of the statute, which governs a trustee's "power to adjust," provides, in relevant part, as follows:

> (a) A trustee may adjust between principal and income if the trustee considers it necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income, and the trustee determines, after applying the rules in subsection (a) of section 3, that the trustee is unable to comply with subsection (b) of said section 3. G. L. c. 203D, § 4.

After review of the applicable law and the relevant documents executed by Ms. Kline, and after consideration of the arguments advanced by counsel, the Court finds that the trustee, Attorney Friedman, had the authority to exercise the power to adjust for the benefit of the beneficiaries under the trusts, and therefore, the Respondents' request for summary judgment must be granted, and the Petitioner's request for partial summary judgment must be denied.

Pursuant to General Laws Chapter 203D, Section 4, a trustee may adjust between principal and income if the three conditions outlined in the statute are met: 1) "if the trustee invests and manages the trust assets as a prudent investor"; 2) "the terms of the trust

describe the amount that may or must be distributed to a beneficiary by referring to the trust's income"; and 3) the trustee determines, after applying the rules of Section 3 (a) that the trustee is unable to administer the trust impartially. See G. L. c. 203D, § 4 (a).

The Respondents assert that the first condition of the statute is met here because the trust allows the trustee to invest as they see fit and does not dictate a specific investment strategy; that the second condition is met because Article Fourth, 1.D, provides that the trustees shall distribute all of the net income in periodic installments, and that the final condition is met because Attorney Friedman is unable to meet his duty to administer the trusts impartially after abiding by the trust terms and all default rules regarding the allocation of principal and income. The Respondents assert that because the trusts do not direct the trustee to favor one or more of the beneficiaries, the trustee must administer the trusts impartially. The Respondents further contend that the ongoing investment of the trust for growth, for the benefit of the remaindermen, has resulted in a diminished production of income for the income beneficiary. The Respondents assert that given that the three conditions outlined above in Section 4 (a) have been satisfied, the power to adjust applies to the trusts. The Court agrees.

Subsection (b) of Section 4 provides that in deciding whether to exercise the power conferred by subsection (a), a trustee shall consider all factors relevant to the trust and its beneficiaries, including, but not limited to, the nature, purpose and expected

duration of the trust, the intent of the settlor, the identity and circumstances of the beneficiaries, the need for liquidity, regularity of income, the actual and anticipated effect of economic conditions on principal and income, and the effects of inflation and deflation. See G. I. c. 203D, § 4 (b). The Respondents assert that the trusts have experienced significant growth of principal since they were established, however, the income of the trusts has not kept pace. After considering Ms. Levy's cost of living, her other limited sources of income and the relevant factors under Section 4 (b), Attorney Friedman, as trustee, determined that it was necessary to exercise the power to adjust, shifting principal to income, to pay out income to Ms. Levy. After consideration of the circumstances, and after applying the relevant provisions of the statute to the language of the trusts, the Court finds that the exercise of the power to adjust by Attorney Friedman was permissible.

The Respondents further assert that none of the situations listed under Section 4 (c),[5] which would

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[5] "A trustee may not make an adjustment: (1) that diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment; (2) that reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion; (3) that changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets; (4) from any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside; (5) if possessing or exercising the power to make an

prohibit a trustee from exercising the power to adjust, exist with respect to the trusts at issue and Attorney Friedman's decision to exercise the power of adjustment. The Court agrees.

Moreover, G. L. c. 203D, § 4 (f), provides that "terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the power of adjustment by subsection (a)." Here, the terms of the trusts do not specifically deny the trustee the use of the power of adjustment. Instead, Article Seventh expressly authorizes the trustees "to make or not to make adjustments or apportionments among the beneficiaries or as between principal and income."

The Petitioner asserts that the Act does not apply to the trusts because the trusts specifically state that principal should not be distributed to Ms. Levy; that principal should only be distributed to Ms. Levy in

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adjustment causes an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment; (6) if possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment; (7) if the trustee is a beneficiary of the trust; or (8) if the trustee is not a beneficiary, but the adjustment would benefit the trustee directly or indirectly." G. L. c. 203D, § 4 (c).

emergency situations, and that no emergency exists. The Petitioner also contends that Section 3 of the Act prohibits Attorney Friedman from exercising the power to adjust under Section 4, however, Section 3 contains no such provision. Instead, Section 3 (b) authorizes the exercise of the power to adjust unless the trust or will "clearly manifests an intention that the fiduciary shall or may favor 1 or more beneficiaries." The trusts executed by Ms. Kline do not contain such a provision. Moreover, this section further provides that a "determination in accordance with this chapter is presumed to be fair and reasonable to all of the beneficiaries." G. L. c. 203D, § 3 (b).

Finally, Section 5 of the statute provides that a "court shall not change a trustee's decision to exercise or not to exercise a discretionary power conferred by this chapter unless it determines that the decision was an abuse of the trustee's discretion. A court shall not determine that a trustee abused his or her discretion merely because the court would have exercised the discretion in a different manner or would not have exercised the discretion." G. L. c. 203D, § 5 (a).

After review of all relevant sections of Chapter 203D, the Court finds that Attorney Friedman's exercise of the power to adjust is authorized by Section 4 and is consistent with the purpose of the trusts at issue. The Will expressly provides for fiduciaries "in their absolute discretion, to make or not make adjustments or apportionments among the beneficiaries or as between principal and income." Therefore, even if the Act did not apply to Attorney

Friedman's decision to shift income to principal, the Court finds that he was expressly authorized to do so under the plain language of the trusts.

In consideration of the foregoing, the Court finds that the Respondents are entitled to summary judgment as a matter of law. Accordingly, the Respondents' Motions for Summary Judgment is *allowed*, and the Petitioner's Motion for Summary Judgment is *denied*. Therefore, a Judgment of Dismissal shall enter with prejudice on the underlying petition.

August 3, 2023

Susan Sard Tierney, First Justice
Barnstable Probate and Family Court

Appendix G

United States Constitution, 14th Amendment, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix H

United States Constitution, Article IV, Section 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Appendix I

PENNSYLVANIA: 20 Pa.C.S.A. § 8103. Fiduciary duties; general principles.

(a) Allocation.--In allocating receipts and disbursements to or between principal and income and with respect to any matter within the scope of this chapter, the following shall apply:

(1) A fiduciary shall administer a trust or estate in accordance with the governing instrument, even if there is a different provision in this chapter.

(2) A fiduciary may administer a trust or estate by the exercise of a discretionary power of administration regarding a matter within the scope of this chapter given to the fiduciary by the governing instrument, even if the exercise of the power produces a result different from a result required or permitted by this chapter. No inference that the fiduciary has improperly exercised the discretionary power shall arise from the fact that the fiduciary has made an allocation contrary to a provision of this chapter.

(3) A fiduciary shall administer a trust or estate in accordance with this chapter if the governing instrument does not contain a different provision or does not give the fiduciary a discretionary power of administration regarding a matter within the scope of this chapter.

(4) A fiduciary shall add a receipt or charge a disbursement to principal to the extent that the

governing instrument and this chapter do not provide a rule for allocating the receipt or disbursement to or between principal and income.

(b) Discretionary power.--In exercising a discretionary power of administration regarding a matter within the scope of this chapter, whether granted by the governing instrument or this chapter, including sections 8104 (relating to trustee's power to adjust) and 8105 (relating to power to convert to unitrust), a fiduciary shall administer a trust or estate impartially based on what is fair and reasonable to all of the beneficiaries, except to the extent that the governing instrument clearly manifests an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with this chapter is presumed to be fair and reasonable to all of the beneficiaries.

PENNSYLVANIA: 20 Pa.C.S.A. § 8104. Trustee's power to adjust.

(a) Adjustment.--Subject to subsections (c) and (f), a trustee may adjust between principal and income by allocating an amount of income to principal or an amount of principal to income to the extent the trustee considers appropriate if:

(1) the governing instrument describes what may or must be distributed to a beneficiary by referring to the trust's income; and

(2) the trustee determines, after applying the rules in section 8103(a) (relating to fiduciary duties; general

principles), that the trustee is unable to comply with section 8103(b).

(b) Considerations.--In deciding whether and to what extent to exercise the power conferred by subsection (a), a trustee may consider, among other things, all of the following:

(1) The size of the trust.

(2) The nature and estimated duration of the trust.

(3) The liquidity and distribution requirements of the trust.

(4) The needs for regular distributions and preservation and appreciation of capital.

(5) The expected tax consequences of an adjustment.

(6) The net amount allocated to income under the other sections of this chapter and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available.

(7) The assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the settlor or testator.

(8) To the extent reasonably known to the trustee, the needs of the beneficiaries for present and future distributions authorized or required by the governing instrument.

(9) Whether and to what extent the governing instrument gives the trustee the power to invade principal or accumulate income or prohibits the trustee from invading principal or accumulating income and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income.

(10) The intent of the settlor or testator.

(11) The actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation.

(c) Prohibited adjustments.--A trustee may not make an adjustment under this section if any of the following apply:

(1) The adjustment would diminish the income interest in a trust which requires all of the income to be paid at least annually to a spouse and for which a Federal estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment.

(2) The adjustment would reduce the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a Federal gift tax exclusion.

(3) The adjustment would change the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets.

(4) The adjustment is from any amount which is permanently set aside for charitable purposes under the governing instrument and for which a Federal estate or gift tax charitable deduction has been taken unless both income and principal are so set aside.

(5) If:

(i) possessing or exercising the power to make an adjustment would cause an individual to be treated as the owner of all or part of the trust for Federal income tax purposes; and

(ii) the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment.

(6) If:

(i) possessing or exercising the power to make an adjustment would cause all or part of the trust assets to be subject to Federal estate or gift tax with respect to an individual; and

(ii) the assets would not be subject to Federal estate or gift tax with respect to the individual if the trustee did not possess the power to make an adjustment.

(7) If the trustee is a beneficiary of the trust.

(8) If the trust has been converted under section 8105 (relating to power to convert to unitrust).

(d) Permissible adjustment when otherwise prohibited.--If subsection (c)(5), (6) or (7) applies to a trustee and there is more than one trustee, a co-trustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is prohibited by the governing instrument.

(e) Release of the power to adjust.--

(1) If paragraph (2) applies, a trustee may release any of the following:

(i) The entire power conferred by subsection (a).

(ii) The power to adjust from income to principal.

(iii) The power to adjust from principal to income.

(2) A release under paragraph (1) is permissible if any of the following apply:

(i) The trustee is uncertain about whether possessing or exercising the power will cause a result described in subsection (c)(1) through (6).

(ii) The trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in subsection (c).

(3) The release may be permanent or for a specified period, including a period measured by the life of an individual.

(f) Application.--A governing instrument which limits the power of a trustee to make an adjustment between principal and income does not affect the application of this section unless it is clear from the governing instrument that it is intended to deny the trustee the power of adjustment conferred by subsection (a).

Appendix J

PENNSYLVANIA: 1 Pa.C.S.A. § 1927. Construction of uniform laws.

Statutes uniform with those of other states shall be interpreted and construed to effect their general purpose to make uniform the laws of those states which enact them.

Appendix K

MASSACHUSETTS: G. L. c. 203D, § 3

a) In allocating receipts and disbursements to or between principal and income, and with respect to any matter within the scope of this chapter, a fiduciary:

(1) shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in this chapter;

(2) may administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the will, even if the exercise of the power produces a result different from a result required or permitted by this chapter;

(3) shall administer a trust or estate in accordance with this chapter if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration; and

(4) shall add a receipt or charge a disbursement to principal if the terms of the trust and this chapter do not provide a rule for allocating the receipt or disbursement to or between principal and income.

(b) In exercising the power to adjust under subsection (a) of section 4 or a discretionary power of administration regarding a matter within the scope of this chapter, whether granted by the terms of a trust, a will, or this chapter, a fiduciary shall administer a trust or estate impartially, based on what is fair and

reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor 1 or more of the beneficiaries. A determination in accordance with this chapter is presumed to be fair and reasonable to all of the beneficiaries.

MASSACHUSETTS: G. L. c. 203D, § 4

(a) A trustee may adjust between principal and income if the trustee considers it necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income, and the trustee determines, after applying the rules in subsection (a) of section 3, that the trustee is unable to comply with subsection (b) of said section 3.

(b) In deciding whether to exercise the power conferred by subsection (a), a trustee shall consider all factors relevant to the trust and its beneficiaries, including the following factors to the extent they are relevant:

(1) the nature, purpose and expected duration of the trust;

(2) the intent of the settlor;

(3) the identity and circumstances of the beneficiaries;

(4) the needs for liquidity, regularity of income and preservation and appreciation of capital;

(5) the nature and character of the assets held in the trust, if an asset is used by a beneficiary, and whether an asset was purchased by the trustee or received from the settlor;

(6) the net amount allocated to income under the other sections of this chapter and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;

(7) whether the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and if the trustee has exercised a power from time to time to invade principal or accumulate income;

(8) the actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and

(9) the anticipated tax consequences of an adjustment.

(c) A trustee may not make an adjustment:

(1) that diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction would be allowed, in whole or in

part, if the trustee did not have the power to make the adjustment;

(2) that reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;

(3) that changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;

(4) from any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside;

(5) if possessing or exercising the power to make an adjustment causes an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;

(6) if possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment;

(7) if the trustee is a beneficiary of the trust; or

(8) if the trustee is not a beneficiary, but the adjustment would benefit the trustee directly or indirectly.

(d) If clause (5), (6), (7) or (8) of subsection (c) applies to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust.

(e) A trustee may release the entire power conferred by subsection (a) or may release only the power to adjust from income to principal or the power to adjust from principal to income if the trustee is uncertain about whether possessing or exercising the power will cause a result described in clauses (1) to (6), inclusive, of subsection (c) or clause (8) of said subsection (c) or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in said subsection (c). The release may be permanent or for a specified period, including a period measured by the life of an individual.

(f) Terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power of adjustment conferred by subsection (a).

MASSACHUSETTS: G. L. c. 203D, § 5

(a) A court shall not change a trustee's decision to exercise or not to exercise a discretionary power conferred by this chapter unless it determines that the decision was an abuse of the trustee's discretion. A court shall not determine that a trustee abused his or her discretion merely because the court would have exercised the discretion in a different manner or would not have exercised the discretion.

(b) The decisions to which subsection (a) applies include:

(1) A determination under subsection (a) of section 4 of whether and to what extent an amount should be transferred from principal to income or income to principal.

(2) A determination of the factors that are relevant to the trust and its beneficiaries and the weight, if any, to be given to those factors in deciding whether to exercise the power conferred by subsection (a) of section 4.

(c) If a court determines that a trustee has abused his discretion, the remedy shall be to restore the income and remainder beneficiaries to the positions they would have occupied if the trustee had not abused his discretion, according to the following rules:

(1) If the abuse of discretion has resulted in no distribution to a beneficiary or a distribution that is too small, the court shall require the trustee to distribute to the beneficiary an amount that the court

determines will restore the beneficiary, in whole or in part, to his appropriate position.

(2) If the abuse of discretion has resulted in a distribution to a beneficiary that is too large, the court shall restore the beneficiaries, the trust, or both, in whole or in part to their appropriate positions by requiring the trustee to withhold an amount from 1 or more future distributions to the beneficiary who received the distribution that was too large or requiring that beneficiary to return some or all of the distribution to the trust.

(3) If the court is unable, after applying paragraphs (1) and (2), to restore the beneficiaries, the trust, or both, to the positions they would have occupied if the trustee had not abused his discretion, the court may require the trustee to pay an appropriate amount from his own funds to one or more of the beneficiaries or the trust or both.

(d) A trustee may seek court determination as to whether a proposed exercise or non-exercise by the trustee of a discretionary power will result in an abuse of discretion. A beneficiary objecting to the relief sought shall have the burden of establishing that an abuse of discretion will result.