

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN RE: AMENDED AND RESTATED
LIFETIME REVOCABLE TRUST
AGREEMENT OF RICHARD M. MARCKS, A
DECEASED PERSON

IN THE SUPERIOR COURT OF
PENNSYLVANIA

APPEAL OF: LINDA G. HOLMAN MARCKS

No. 1816 MDA 2013

Appeal from the Order Entered September 24, 2013
In the Court of Common Pleas of Lancaster County
Orphans' Court at No(s): 36-2012-1289

BEFORE: PANELLA, OLSON and MUSMANNO, JJ.

MEMORANDUM BY OLSON, J.:

FILED JUNE 19, 2014

Appellant, Linda G. Holman Marcks, appeals from an order entered on September 24, 2013 in the Orphans' court of Lancaster County. We vacate in part and affirm in part.

The Orphans' court summarized the facts in this declaratory judgment action as follows.

On May 27, 1998, Richard M. Marcks (hereinafter "Decedent") executed a Lifetime Revocable Trust Agreement. The Lifetime Revocable Trust Agreement was amended and restated in its entirety on November 22, 2010. Also on November 22, 2010, Decedent executed a [w]ill. Decedent died on September 30, 2011, at which time the Lifetime Revocable Trust Agreement became irrevocable. Decedent was survived by his wife, [Appellant], two adult daughters from a prior marriage and one daughter from his marriage to [Appellant]. Article THIRD of the [w]ill poured the assets from Decedent's estate into the Lifetime Revocable Trust Agreement (hereinafter "the Trust").

The Trust appointed Susquehanna Trust and Investment Company as Trustee [(hereinafter "Trustee")] of all trusts

created by the Trust. On December 13, 2011, [Appellant] elected to serve as a co-Trustee in accordance with Article TWENTY-SIXTH of the Trust. The pertinent provision of the Trust is as follows:

SIXTH: RESIDUARY TRUST: After my death my trustee shall hold, invest and distribute the residue of this trust as follows:

- A. If my wife, [Appellant], survives me by more than thirty (30) days, the trustee shall hold all such property in further trust and,
 1. During her lifetime:
 - a. The net income shall be paid to her in quarterly or more frequent installments; and
 - b. As much of the principal as my trustee, in my trustee's sole discretion, shall think appropriate for any reason, including, but not limited to the health, education, maintenance and support of my wife shall be paid to her or applied for such purposes; and in addition
 - c. My wife shall have the right in each calendar year to withdraw from the principal up to Five Thousand Dollars (\$5,000[.00]) at any time and, in addition, if she is living on December 31 of a year, to withdraw up to five percent (5%) of the fair market value of the principal as determined on December 31 of that year (the amount subject to withdrawal as of December 31 to be reduced by any other withdrawals during that year, and any rights of withdrawal for a particular year shall lapse if not exercised during that year).

I intend my trustee to apply principal liberally for my wife in order to allow her to maintain the lifestyle to which she has become accustomed during my lifetime even if that leads to the exhaustion of the trust. I specifically authorize my trustee, pursuant to Paragraph A.1.b. of this Article, to distribute principal to my wife or for her benefit to enable or assist her to purchase, expand, improve or replace one or more homes for her, whether or not any such home is her principal residence and to give consideration to other resources available to my said wife as the trustee shall deem appropriate.

Trial Court Opinion, 9/24/13, at 1-2.

On January 24, 2013, Appellant filed a petition for declaratory judgment pursuant to 20 Pa.C.S.A. § 7711(c) of the Pennsylvania Probate, Estates and Fiduciary Code ("PEF Code"). Appellant's petition asked the Orphans' court to declare that sections A.1.a, A.1.b., and A.1.c. of the Trust should be interpreted separately and independently of each other. Specifically, the petition alleged that, pursuant to A.1.c., Appellant should be permitted, within any calendar year, to withdraw up to \$5,000.00 and, thereafter, up to five percent of the fair market value of the Trust as of December 31st (less any amount previously withdrawn by Appellant during that year). Appellant asserted that withdrawals made under section A.1.c. are not subject to limitation or reduction by principal payments made by the Trustee pursuant to section A.1.b. or the language of the residual paragraph found at the conclusion of the SIXTH Article.

The Trustee answered Appellant's petition on March 7, 2013. In its answer, the Trustee claimed that Appellant's withdrawal rights under section A.1.c. should be reduced by the amount of discretionary payments made to her, or for her benefit, under section A.1.b. In addition, the Trustee asked the Orphans' court to declare that, under the language of the residual paragraph found at the end of paragraph A of the SIXTH Article of the Trust (in particular the clause beginning with the words "and to give consideration"), it could take "other resources" of the Appellant into

consideration in making discretionary payments under section A.1.b., rather than only those payments made for the purpose of purchasing, expanding, improving, or replacing a home.¹

On September 24, 2013, the Orphans' court issued its opinion on Appellant's petition for declaratory judgment. The court held that Appellant's right to withdraw five percent of the principal during any calendar year must be reduced by all other prior principal payments received during that year. Specifically, the court stated that, "the [five percent withdrawal] shall be reduced by [Appellant's] withdrawal of [up to] \$5,000.00 under A.1.c and also by all discretionary payments provided to [Appellant] under A.1.b." Trial Court Opinion, 9/24/13, at 4. In addition, based upon the structure of the SIXTH Article of the Trust, the court determined that the terms of the residual paragraph applied to all three sections of A.1 and that, therefore, the Trustee may consider other resources of Appellant (beyond discretionary payments made for the purpose of purchasing, expanding, improving, or replacing a home) when distributing principal for the health, education, maintenance, and support of Appellant under section A.1.b. ***See id.*** at 7. This appeal followed.

¹ Appellant's petition did not ask the Orphans' court to construe the residual paragraph found at the end of paragraph A of the SIXTH Article of the Trust. By stipulation filed on September 16, 2013, however, the parties agreed that the declaratory judgment action initiated by Appellant would encompass a construction of the residual paragraph as if the Trustee had filed its own declaratory judgment action.

Appellant's brief raises the following questions for our review:

Whether the Orphans' [c]ourt erred when it concluded that the amount[] [Appellant] is entitled to withdraw under A.1.c. of Article SIXTH of the Trust should be reduced by discretionary payments of principal to her by the Trustee under A.1.b.?

Whether the Orphans' [c]ourt erred when it concluded that the Trustee could give consideration to [Appellant's] "other resources" when making discretionary payments of principal to her under A.1.b. of Article SIXTH of the Trust?

Whether the Orphans' [c]ourt's interpretation of Article SIXTH of the Trust ignores the Settlor's direction to the Trustee to apply principal liberally for [Appellant] to allow her to maintain the lifestyle to which she has become accustomed even if that leads to the exhaustion of the Trust?

Whether this Court should reverse the Orphans' [c]ourt's interpretation of Article SIXTH of the Trust where it is contrary to the stated intent of the Settlor as set forth in the plain and unambiguous language of the Trust and violates established principles of [t]rust interpretation under Pennsylvania law?

Appellant's Brief at 4.²

Appellant challenges the Orphans court's construction of Decedent's Trust. Under 20 Pa.C.S.A. § 7711(c), "[a] judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for declaratory judgment." 20 Pa.C.S.A. § 7711(c). "Under the Declaratory Judgment Act, 42 Pa.C.S.A. §§ 7531–7541, the [Orphans'] court

² Our examination of Appellant's first two claims raised on appeal incorporates a consideration of Decedent's intent, as expressed in the terms of the Trust. Accordingly, in our discretion, we shall forego independent discussion of claims three and four in Appellant's statement of questions involved in this appeal.

has the ability to declare the legal rights, status, and legal relations of persons interested under a will or trust and to determine any question arising in the administration of a decedent's estate or trust, including questions of construction of wills and other writings." ***In re Mampe***, 932 A.2d 954, 958 (Pa. Super. 2007), *appeal denied*, 944 A.2d 758 (Pa. 2008). We review such a case as a decree in equity, and, therefore, we may set aside the court's factual conclusions only where they are not supported by adequate evidence. ***Budtel Assocs., L.P. v. Cont'l Cas. Co.***, 915 A.2d 640, 643 (Pa. Super. 2006). We exercise *de novo* review over the court's legal conclusions drawn from those facts. ***In re Mampe***, 932 A.2d at 959.

We apply the following principles in construing the terms of a trust under Pennsylvania law:

"A trust is a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person...." ***In re Trust of Hirt***, 832 A.2d 438, 447-[4]48 (Pa. Super. 2003) (*citing* Restatement (Second) of Trusts, § 2). The settled law in Pennsylvania is that "the pole star in every trust ... is the settlor's ... intent and that intent must prevail." ***Estate of Pew***, 655 A.2d 521, 533 ([Pa. Super.] 1994) ("Pew") (*quoting In re Trust Estate of Pew*, 191 A.2d 399, 405 (Pa. 1963)). The settlor's intent may be divined by considering the trust document as a whole. ***Farmers Trust Co. v. Bashore***, 445 A.2d 492, 494 (Pa. 1982) ("A settlor's intent is to be determined from all the language within the four corners of the trust instrument, the scheme of distribution and the circumstances surrounding the execution of the instrument. Only if a settlor's intent cannot be ascertained with reasonable certainty will a court apply canons of construction, to attribute a reasonable intention to the settlor in the circumstances."); ***In re Walton's Estate***, 186 A.2d 32, 36 (Pa. 1962) (stating that the testator's intentions "must be ascertained from the language and

scheme of his [entire] will [together with the surrounding facts and circumstances]" (alteration in the original)).

In re Estate of Warden, 2 A.3d 565, 574 (Pa. Super. 2010) (parallel citations omitted), *appeal denied*, 17 A.3d 1255 (Pa. 2011).

After careful review of Decedent's Trust, we conclude that the Orphans' court erred in concluding that Appellant's withdrawals under section A.1.c. of the Trust must be reduced by discretionary principal payments made by the Trustee pursuant to section A.1.b. Several factors, including the express language and structure of the Trust, lead us to this conclusion. Paragraph A of the SIXTH Article of the Trust contemplates three distinct distributions that may be made to Appellant. Under section A.1.a., Appellant is entitled to mandatory payments of net income from Trust principal on a quarterly or more frequent basis. Under section A.1.b., the Trustee may make unlimited payments of principal to (or on behalf of) Appellant which, in the Trustee's sole discretion, are deemed appropriate for any reason, including the health, education, maintenance, or support of Appellant. Finally, under section A.1.c., Appellant enjoys the right to withdraw from Trust principal, in each calendar year, up to \$5,000.00. In addition, if Appellant is living on December 31st of a particular year, she has the right to withdraw up to five percent of the fair market value of the Trust principal as determined on December 31st of that year. This latter withdrawal right is, however, subject to reduction by "any other **withdrawals**" made during the year. ***See supra*** (emphasis added).

As used in the SIXTH Article of the Trust document, the terms “withdraw” and “withdrawal” refer to Appellant’s right to request nondiscretionary disbursements of Trust principal pursuant to section A.1.c. For this reason, we conclude that the amount subject to withdrawal as of December 31st should be reduced only by previous nondiscretionary distributions made at the request of Appellant under section A.1.c. during a particular calendar year. This interpretation compels the related conclusion that, contrary to the Orphans’ court’s determination, a December 31st withdrawal is not subject to reduction by the amount of discretionary payments made by the Trustee pursuant section A.1.b. In reaching the conclusion challenged on appeal, the Orphans’ court reviewed the parenthetical qualifier found in section A.1.c. which states, “the amount subject to withdrawal as of December 31 [is] to be reduced by any other withdrawals during that year.” **See** Trial Court Opinion, 9/24/13, at 5. Based upon this language, the court reasoned that Decedent’s use of the term “any” extended the qualifier beyond the confines of A.1.c. to include all other prior principal payments received by Appellant in a particular year. However, the employment of the term “withdrawals” in defining the scope of a qualifying reduction clearly overrides or, at the very least, modifies the term “any” and, as such, limits the scope of a December 31st reduction

under section A.1.c. to nondiscretionary disbursements previously requested by Appellant under that provision.³ Because the Orphans' court's construction conflicts with the Decedent's intent as expressed in the plain terms of the Trust document, Appellant is entitled to relief on her first claim.

In her second claim, Appellant asserts that the Orphans' court erred in concluding that the Trustee could consider Appellant's other resources when making discretionary payments of principal under the SIXTH Article of the Trust. Referring to the language of the residual paragraph found at the end of paragraph A, Appellant acknowledges that the Trustee may take into account her other resources when making principal payments under A.1.b. for the purchase, expansion, improvement, or replacement of a home because such expenditures would almost certainly be much greater than

³ Building upon the Orphans' court's construction of the Trust, the Trustee asserts that it does not make distributions under section A.1.b. on its own accord. Instead, the Trustee points out that Appellant initiates all distributions of Trust principal, regardless of whether they are characterized as "withdrawals," "payments," or "disbursements." Trustee's Brief at 9. Principal distributions under A.1.b. are distinguishable from nondiscretionary withdrawals under A.1.c. only because A.1.b. payments are made after the Trustee has exercised its discretion. Accordingly, in the Trustee's view, the Trust requires that the Trustee consider "any withdrawals" in calculating the December 31st reduction, regardless of whether the "withdrawal" emerges from a request made by Appellant under A.1.c. or a demand she initiates under section A.1.b. We disagree with the Trustee's reading of the Trust instrument. In particular, after careful review of the relevant provisions, we conclude that the use of the term "withdrawals" in describing the scope of a December 31st reduction leads to the conclusion that the Trustee may only consider nondiscretionary distributions (those in which its discretionary function does not come into play) in calculating the deduction from its year-end five percent principal payment.

everyday living expenses. Appellant's Brief at 25. Nevertheless, Appellant maintains that the Orphans' court erred in extending the "other resources" clause beyond housing expenditures to all principal payments under section A.1.b. We disagree.

We have previously summarized the legal principles governing such claims as follows:

The question of whether a trustee should consider the independent resources of a trust beneficiary has been frequently litigated in Pennsylvania and in other jurisdictions. **See generally** Annotation, Other Means: Propriety of Considering Beneficiary's Other Means under Trust Provision Authorizing Invasion of Principal on Behalf of Life Beneficiary, 41 A.L.R.3d 255 (1972). In the majority of cases, Pennsylvania courts have concluded that by establishing a testamentary trust, the testator intended to relieve the beneficiary of the need to pay for living expenses out of her own funds. **See, e.g., Greenwald's Estate**, 26 A.2d 918 (Pa. 1942); **Baylor's Estate**, 94 A. 442 (Pa. 1915); **Swinson's Estate**, 74 A.2d 485 (Pa. Super. 1950); **Minnich v. Peoples Trust, Savings and Deposit Co.**, 1905 WL 3840 (Pa. Super. 1905). In **Demitz' Estate**, 208 A.2d 280 (Pa. 1965), the Pennsylvania Supreme Court summarized the case law on this subject by stating that: "Where a trustee has been given discretionary power to invade principal, the general rule is that the existence of an independent estate by a wife is not sufficient justification for a trustee's refusal to pay principal for her maintenance and support." 208 A.2d at 282. Thus, in the absence of evidence of a contrary intent, an ambiguous trust provision should ordinarily be viewed as authorizing the invasion of trust principal even where the beneficiary has access to substantial income from other sources.

Nevertheless, the general rule described in **Demitz' Estate** should not be rigidly or mechanically applied. In any case involving the interpretation of a testamentary trust, the primary goal of the court is to effectuate the intent of the testator. **See Pearson's Estate**, 275 A.2d 336, 339 (Pa. 1971). Moreover, in order to ascertain testamentary intent, a court must focus first and foremost on the precise wording of the will, and if an

ambiguity exists, on the circumstances under which the will was executed. **See Taylor's Estate**, 391 A.2d 991, 994 (Pa. 1978). Only if the testator's intent remains uncertain may the court then resort to general rules of construction. **Id.**

In **Lang v. Department of Public Welfare**, 528 A.2d 1335 (Pa. 1987), the Pennsylvania Supreme Court recently clarified the standard used in determining when a trust beneficiary may compel distribution of trust assets. In **Lang**, the testator established a trust to pay the costs necessary for the support of his mentally disabled son. The Department of Public Welfare withheld medical assistance payments from the son on the grounds that trust assets were available to pay for the cost of his care at a state mental retardation center. On appeal, the Court held that the trust funds could not be counted as an available resource. In reaching this decision, the Court noted that:

We must ... determine whether a settlor, here the testator, intended that trust assets be used to support a beneficiary, regardless of the availability of other resources, including state assistance. A settlor's intent must be determined "from all the language within the four corners of the trust instrument, the scheme of distribution and the circumstances surrounding the execution of the trust instrument." **Farmers Trust Co. v. Bashore**, 445 A.2d 492, 494 (Pa. 1982).

Lang, 528 A.2d at 1342. The Court carefully reviewed the text of the trust, which specifically granted the trustee complete discretion to withhold payments of trust principal, and considered extrinsic evidence concerning the son's receipt of state assistance during the testator's lifetime. Under these circumstances, the Court concluded that the trust was not designed to pay costs which could be paid from other sources.

As **Lang** illustrates, the fact that a will establishes a trust for the beneficiary's support does not create an irrebuttable presumption that all of the beneficiary's living expenses must be funded from the trust. **See also Seachrist's Estate**, 66 A.2d 836 (Pa. 1949) (interpreting will as providing that beneficiary must prove dependency before tapping trust principal). In every case where the trust is ambiguous, the court must conduct an individualized inquiry in order to ascertain the intent of the settlor. This case by case approach is consistent with

Pennsylvania precedent and reflects the majority rule in other jurisdictions. As one commentator has noted:

It is a question of interpretation whether the beneficiary is entitled to support out of the trust fund even though he has other resources. Where the trustee is directed to pay to the beneficiary or to apply for him so much as is necessary for his maintenance and support, the inference is that the settlor intended that he should receive his support from the trust estate, even though he might have other resources. The settlor may, however, manifest an intention that the trust property should be applied to his support only if and to the extent that he is in actual need, in which case he is not entitled to support out of the trust fund if he has other sufficient resources.

2 A. Scott, *The Law of Trusts*, § 128.4 at 353-55 (4th ed. 1987). **Cf.** Restatement (Second) of Trusts § 128 comment i (1959) (whether trustee may properly use principal for beneficiary's support where beneficiary has property of his own depends upon language of trust instrument as interpreted in light of the circumstances).

In re Estate of Tashjian, 544 A.2d 67, 72 (Pa. Super. 1988) (parallel citations omitted).

We are satisfied in the present case that the Orphans' court correctly concluded that the Trustee could consider Appellant's other resources in making discretionary payments under section A.1.b. of the Trust.⁴ Notwithstanding the provisions directing the Trustee to apply principal liberally, the Trust expressly conveyed broad latitude to the Trustee to act in

⁴ Since Appellant has not identified an ambiguity in the Trust documents, there is no need for us to consider the circumstances under which Decedent executed the Trust, nor is there any need for us to resort to general rules of construction in interpreting the relevant provisions.

its sole discretion in deciding whether to invade principal to provide support and maintenance to Appellant. In addition, the residual paragraph at the conclusion of section A of the SIXTH Article of the Trust affirmatively empowered the Trustee to consider other resources available to Appellant when considering discretionary payments under section A.1.b. We agree with the Orphans' court that the Trustee may consider such resources when distributing principal for any purpose under section A.1.b. and not simply for Appellant's housing needs. As the Orphans' court aptly observed:

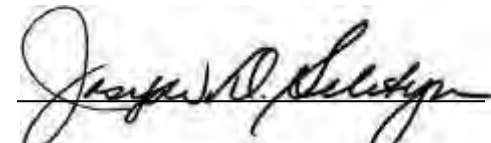
Furthermore, [t]he [Orphans' c]ourt interprets the final sentence [of the residual paragraph of the SIXTH Article] to be a confluence of two distinct directions given by the [D]ecedent. The Trustee, in its discretion, is authorized by the [D]ecedent to distribute unlimited principal for the purchase, expansion, improvement or replacement of one or more homes for [Appellant], up to the exhaustion of the [T]rust. The Trustee is also directed to give consideration to [Appellant's] other available resources as the Trustee deems appropriate to making discretionary distributions.

Trial Court Opinion, 9/24/13, at 7. For each of these reasons, we conclude that Appellant is not entitled to relief on her second claim.

Order affirmed in part and vacated in part. Case remanded.

Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/19/2014