J-A21016-13

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

RE: IN THE MATTER OF ESTATE OF GEORGE McFADDEN, DECEASED	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
APPEAL OF: RANDOLPH HARRISON, ROBERT C. HARRISON, CO-TRUSTEES AND BENEFICIARIES, AND RANDOLPH HARRISON JR., BENEFICIARY OF THE TRUST UNDER WILL OF GEORGE McFADDEN f/b/o THE DESCENDANTS OF EMILY B. STAEMPFLI	:	No. 2872 EDA 2012

Appeal from the Decree Entered August 14, 2012,
In the Court of Common Pleas of Delaware County,
Orphans' Court at No.: 0028-1931

BEFORE: SHOGAN, WECHT and COLVILLE*, JJ.

MEMORANDUM BY SHOGAN, J.: **FILED DECEMBER 31, 2013**

In the instant appeal, Appellants challenge the orphans' court's August 14, 2012 decree that declared the residuary trust ("the Trust") contained in the will ("the 1930 Will") of George McFadden ("Decedent") terminated on February 21, 2012, twenty-one years after the death of Decedent's last surviving child, Emily Staempfli. After review, we affirm.

The orphans' court thoroughly set forth the facts of this case in its opinion, and we will not restate them in full herein, save as follows:

> [Decedent] died on January 5, 1931. The Decedent left a will dated January 6, 1930, which was probated in the Office of the Register of Wills of Delaware County. At the time of his death the Decedent was the senior partner of the firm of Geo. H. McFadden & Bro. The Decedent was survived by all four (4) of

*Retired Senior Judge assigned to the Superior Court.

> his children, being Alexander B. McFadden, George H. McFadden II, Caroline Ewing and Emily Staempfli.
>
> Under the Third Article of his will, the Decedent appointed Girard Trust Company as his corporate trustee. The Decedent also appointed George Stuart Patterson, Edward Browning, his son George McFadden and their several successors as his individual trustees. Also, the Decedent directed that at all times, there would be a corporate trustee and at least two (2) individual trustees.
>
> Under the Fourth Article of his will, the Decedent left his residuary estate in trust. The terms of the trust provide that the net income was to be paid
>
> > ...monthly, as nearly as possible, in the proportion of two parts of the balance of net income to each of my two sons, and one part thereof to each of my daughters, living at the time of my death, or to the respective issue living at the time of my death of a deceased son or daughter, such issue being entitled to their parent's share of income, for and during the life of each of such children or issue of a deceased child living at the time of my death.

Orphans' Court Opinion, 8/14/12, at 1-2. In its very comprehensive opinion, the orphans' court ultimately concluded that the Trust terminated on February 21, 2012, twenty-one years after the death of Emily Staempfli, Decedent's last surviving child. ***Id***. at 21-22.

Appellants filed an appeal and raise one issue for this Court's consideration:

> Did the [orphans'] court err in interpreting [Decedent's] will to provide that a testamentary trust created for his descendants terminated in February 2012, even though the will says that the trust should continue for 21 years after the death of certain of McFadden's grandchildren, both of whom are still alive?

Appellants' Brief at 2.

Despite Appellants' conclusory phrasing of the issue, the question presented to us is which life is the measuring life for purposes of determining when the Trust terminates.

> The findings of a judge of the orphans' court division, sitting without a jury, must be accorded the same weight and effect as the verdict of a jury, and will not be reversed by an appellate court in the absence of an abuse of discretion or a lack of evidentiary support. This rule is particularly applicable to findings of fact which are predicated upon the credibility of the witnesses, whom the judge has had the opportunity to hear and observe, and upon the weight given to their testimony. In reviewing the [o]rphans' [c]ourt's findings, our task is to ensure that the record is free from legal error and to determine if the [o]rphans' [c]ourt's findings are supported by competent and adequate evidence and are not predicated upon capricious disbelief of competent and credible evidence.

In re Scheidmantel, 868 A.2d 464, 478-479 (Pa. Super. 2005) (citation omitted). Moreover, it is well settled that when interpreting the terms of a trust,

> the polestar in every trust is the settlor's intent and that intent must prevail. The rules for determining a settlor's intent are the same for a trust as for a will. The settlor's intent must be ascertained from a consideration of (a) all the language contained in the four corners of the instrument and (b) the distribution scheme and (c) the circumstances surrounding the testator or settlor at the time the will was made or the trust was created and (d) the existing facts.

Id. at 488 (internal citations and quotation marks omitted).

Additionally, we must review the issue with an understanding of the rule against perpetuities, which states: "No interest is good unless it must

vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." ***Estate of Coates***, 652 A.2d 331, 334 (Pa. Super. 1994) (citation omitted).

> This court recently discussed the evolution of the Rule in the area of class gifts and the trend in Pennsylvania to ameliorate the harsh results of a literal application of the common law Rule. ***In Re Estate of Weaver***, 392 Pa.Super. 312, 320-21, 572 A.2d 1249, 1253-54 (1990). The early common law Rule began with the founding of Pennsylvania and lasted until 1929. During this period, this Commonwealth followed the early common law Rule. ***Id***. This early application of the Rule required use of the "possibilities test" to determine the validity of all future interests. ***Id***. Under the "possibilities test," a future interest, such as a remainder in a trust to all great-grandchildren, was void if there was even the slightest possibility that the interest might vest beyond the permissible period of a life or lives in being plus twenty-one years. ***Id***. (citing Levin, *Section 6104(d) of the Pennsylvania Rule Against Perpetuities: The Validity and Effect to the Retroactive Application of Property and Probate Law Reform*, 25 Vill.L.Rev. 213 (1980)).
>
> From 1929 to 1947, however, a transition occurred, and a new doctrine called "vertical separability" was introduced. ***Weaver, supra***. The vertical separability doctrine eliminated the harsh effect of the "possibilities test" in certain circumstances. ***Id***. Vertical separability provided that valid remainders could be separated from those that were void so that the valid remainders could still be given effect. ***Id***. Vertical separability can be applied as long as the testator's plan of distribution is not defeated. ***In Re Harrah's Estate***, 364 Pa. 451, 462, 72 A.2d 587, 592 (1950).
>
> The final stage, or modern era, of the Rule began in 1947, with the passage of the Intestate, Wills and Estates Act of 1947 ("Estates Act of 1947"). The Estates Act of 1947 replaced the common law Rule's "possibilities test" with the "actualities test." 20 Pa.C.S.A. § 6104; ***Weaver, supra***[,] 392 Pa.Super. 312, 572 A.2d 1249. Under the "actualities test" approach, Pennsylvania

> courts ascertained the validity of future interests by looking to the events which actually had occurred during the period of the common law Rule (a life or lives in being plus twenty-one years), and not by events which could possibly occur during this period. 20 Pa.C.S.A. § 6104; ***Weaver, supra***. The Pennsylvania Supreme Court subsequently interpreted the "actualities test" under the Estates Act of 1947 to be applicable to only those testamentary trusts which were created after January 1, 1948. ***See Estate of Davis***, 449 Pa. 505, 297 A.2d 451 (1972); ***In Re Lovering's Estate***, 373 Pa. 360, 96 A.2d 104 (1953); ***In Re Newlin's Estate***, 367 Pa. 527, 80 A.2d 819 (1951). In 1978, however, the legislature amended the statutory rule, by providing for the retroactive application of the statute to "all interests heretofore and hereafter created." 20 Pa.C.S.A. § 6104(d).

Estate of Coates, 652 A.2d at 334.

Here, the pertinent language is contained in the fourth article of the Decedent's will and states as follows:

> ARTICLE FOURTH: I give, devise and bequeath all the rest, residue and remainder of my estate, and I also give, devise and bequeath all estates or interests over which I have power of appointment . . . IN TRUST, for the following uses, to wit:
>
> * * *
>
> (3) And IN TRUST, as to all the rest, residue and remainder of my estate, . . . to pay and distribute the net income thereof as follows: . . . And in any event, during the lifetime of my wife, IN TRUST, to receive and apply the balance of the net income of my estate as follows: To pay monthly, as nearly as possible, in the proportion of two parts of the balance of the net income to each of my sons, and one part thereof to each of my daughters, living at the time of my death, **or to the respective issue living at the time of my death of a deceased son or daughter, such issue being entitled to their parent's share of income, for and during the life of each of such children or issue of a deceased child living at the time of my death**. . . .

The 1930 Will at 2-5 (emphasis added).

Appellants contend that the language emphasized above provides that the measuring life for the trust was that of the surviving grandchild of any grandchildren who were alive at the time of Decedent's death. Appellants' Brief at 20. Upon review, we conclude that Appellants' argument ignores the requirement that, at the time of Decedent's death, at least one of his children must have been deceased.

Because all four of his children were alive at the time of Decedent's death, the language naming alternative beneficiaries, which is emphasized above, was never made operative. Thus, the orphans' court correctly concluded that the measuring life for purposes of the trust was that of the last surviving child of Decedent, Emily Staempfli. Orphans' Court Opinion, 8/14/12, at 21-22. Ms. Staempfli was alive at the time of Decedent's death, she was the last surviving child of Decedent, and she later died on February 21, 1991. Therefore, the trust terminated on February 21, 2012, twenty-one years after the death of Ms. Staempfli.

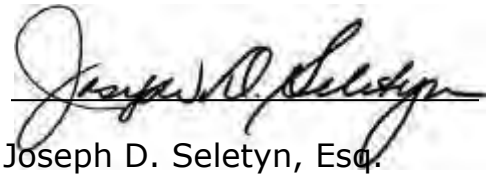
After review, we conclude that the orphans' court has provided a cogent analysis of the issue. Therefore, we affirm the decree based upon the August 14, 2012 opinion of the Honorable Joseph P. Cronin, Jr.[1]

[1] The parties are directed to attach a copy of that opinion in the event of further proceedings in this matter.

Order affirmed.

WECHT, J., files a Dissenting Memorandum.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/31/2013

J-A21016-13

IN THE DELAWARE COUNTY COURT OF COMMON PLEAS, PENNSYLVANIA
ORPHAN'S COURT DIVISION

IN RE: TRUST UNDER THE WILL : NO. 28 OF 1931
OF GEORGE MCFADDEN :

TRUST UNDER WILL OF GEORGE McFADDEN, deceased F/B/O Mary Josephine McFadden

TRUST UNDER WILL OF GEORGE McFADDEN, deceased F/B/O Elizabeth McFadden Melas

TRUST UNDER WILL OF GEORGE McFADDEN, deceased F/B/O John H. McFadden

TRUST UNDER WILL OF GEORGE McFADDEN, deceased F/B/O the descendants of Caroline B. Ewing

TRUST UNDER WILL OF GEORGE McFADDEN, deceased F/B/O the descendants of Emily B. Staempfli

No. 28 of 1931

OPINION

CRONIN, J. FILED: AUGUST 14, 2012

George McFadden (hereinafter the "Decedent") died on January 5, 1931. The Decedent left a will dated January 6, 1930, which was probated in the Office of the Register of Wills of Delaware County. At the time of his death the Decedent was the senior partner of the firm of Geo. H. McFadden & Bro. The Decedent was survived by all four (4) of

his children, being Alexander B. McFadden, George H. McFadden II, Caroline Ewing and Emily Staempfli.

Under the Third Article of his will, the Decedent appointed Girard Trust Company as his corporate trustee. The Decedent also appointed George Stuart Patterson, Edward Browning, his son George McFadden and their several successors as his individual trustees. Also, the Decedent directed that at all times, there would be a corporate trustee and at least two (2) individual trustees.

Under the Fourth Article of his will, the Decedent left his residuary estate in trust. The terms of the trust provide that the net income was to be paid

> ...monthly, as nearly as possible, in the proportion of two parts of the balance of net income to each of my two sons, and one part thereof to each of my daughters, living at the time of my death, or to the respective issue living at the time of my death of a deceased son or daughter, such issue being entitled to their parent's share of income, for and during the life of each of such children or issue of a deceased child living at the time of my death.

The terms of the trust further provide

> Upon the death of each child of mine living at the time of my death, and upon the death of each of the issue living at the time of my death of a deceased child of mine, to pay the income of such child or issue of a deceased child, in the proportions above provided, meaning thereby that whenever a descendant of mine shall die leaving male and female
>
> children, the income shall be divided in such a way that the males shall receive twice as much income as the females, to and among the child or children of each child or issue of a deceased child, per stirpes and not per capita, for a period of twenty-one years after the death of the last survivor of the children and issue of deceased children of mine living at the time of my death.

Moreover, the trust provided that it would continue until

> ...the expiration of the period of twenty-one years after the death of the last survivor of the children and issue of deceased children of mine living at the time of my death..."

The trust would then be distributed

> ...to my descendants, per stirpes, a proportion and division of the principal of my residuary estate equal to the proportion and division of income hereinbefore provided and directed for my children or issue of deceased children, namely, the proportion of two (2) shares for each male and one (1) share for each female.

By Adjudication of the Delaware County Orphans' Court dated November 9, 1970 and the Decree of the Delaware County Orphans' Court dated November 13, 1970 and an Amended Adjudication of the Delaware County Orphans' Court dated February 23, 1971, the George McFadden Trust was divided into three equal shares: the first (1st) being for the Decedent's daughter, Caroline B. Ewing; the second (2nd) being for the Decedent's daughter, Emily Staempfli; and the third (3rd) being for the descendants of the Decedent's son, Alexander B. McFadden. The Decedent's other son, George H. McFadden II died on April 19, 1953, leaving no issue surviving him.

By Adjudication of the Delaware County Orphans' Court dated September 18, 1984 and the Decree of the Delaware County Orphans' Court dated August 29, 1985, the trust for the descendants of Alexander B. McFadden was further divided for each of the three children of Alexander B. McFadden, with a two-fifths (2/5ths) share for the benefit of John H. McFadden; a two-fifths (2/5ths) share for the

benefit of George McFadden and a one-fifth ($1/5^{th}$) share for the benefit of Mary Josephine McFadden.

As a consequence of the death George McFadden on April 22, 2008, the trustees of the trust for his benefit filed with the Delaware County Orphan's Court an accounting; a petition for adjudication; and a petition to divide the trust for the benefit of George McFadden into three (3) separate trusts, one (1) for each of his three children, being Elizabeth Melas, Wilhelmina McFadden and Alexander O. McFadden. These Delaware County matters were consolidated with a second McFadden family trust matter pending before the Philadelphia County Orphans' Court. As a result of a decree from the Philadelphia County Orphans' Court dated June 15, 2009 and a clarifying decree from the same court dated September 14, 2009 the trust representing the two-fifths share for the benefit of George McFadden was further divided for the benefit of his three children with one-half for the benefit of his son, Alexander O. McFadden and one-quarter each for the benefit of George

McFadden's two daughters; Elizabeth Melas and Wilhelmina McFadden.

Presently, JP Morgan Chase Bank N.A., N. Gordon Thompson and Winfield P. Jones serve as trustees of the trusts under will of George McFadden f/b/o Alexander O. McFadden and f/b/o Wilhelmina McFadden. The trustees filed a petition seeking a declaratory judgment to determine when the trust created by the will of George McFadden dated January 6, 1930, terminates.

BNY Mellon, N. A. currently serves as a co-trustee of each of the other divided trusts with the exception of the trusts f/b/o Alexander O. McFadden and f/b/o Wilhelmina McFadden. BNY Mellon also serves with John H. McFadden as co-trustee of the trust f/b/o Mary Josephine McFadden, daughter of Alexander B. McFadden. Additionally, BNY Mellon serves with George Melas and John H. McFadden as co-trustees of the trust f/b/o Elizabeth McFadden Melas, daughter of George McFadden and sister of Alexander O. and Wilhelmina McFadden.

Similarly, BNY Mellon serves with John H. McFadden and Lisa Kabnick as co-trustees of the trust f/b/o John H. McFadden, son of Alexander B. McFadden, brother of Mary Josephine McFadden and the now deceased George McFadden and co-trustee with BNY Mellon of various divided McFadden trusts. BNY Mellon serves with Caroline B. Michahelles and Alexander John Mark Michahelles as co-trustees of the trust f/b/o of the descendants of Caroline B. Ewing, deceased daughter of the decedent and mother of Caroline b. Michahelles. Lastly, BNY Mellon serves as co-trustee with Randolph Harrison and Robert Carter Harrison as co-trustees of the trust f/b/o the descendants of Emily B. Staempfli, now deceased daughter of the decedent and mother of Randolph and Robert Carter Harrison.

BNY Mellon has likewise filed a petition seeking a declaratory judgment seeking a determination of when the trust created by the will of the Decedent dated January 6, 1930 terminates.

When the Decedent died on January 5 1931, he was survived by his four children: Alexander B. McFadden, who subsequently died on February 14, 1948; George H. McFadden II, who subsequently died childless on April 19, 1953; Caroline B. Ewing, who subsequently died on October 16, 1983; and Emily Staempfli, who subsequently died on February 21, 1991. At the time of his death, the Decedent was also survived by two (2) living granddaughters, the first being Caroline Michahelles, whose mother was Caroline B. Ewing, who was born on June 23, 1929 and the second being Josephine Evarts, whose mother was Emily Staempfli, who was born on September 3, 1930. Both Caroline Michahelles and Josephine Evarts are still alive.

In the declaratory judgment action filed by JP Morgan Chase Bank, N. A., N. Gordon Thompson and Winfield P. Jones; Wilhelmina McFadden and Alexander O. McFadden, a minor, by and through his parent and natural guardian, Carol McFadden, contend that the trusts of which they are the beneficiaries terminated on February 21, 2012,

which is twenty-one (21) years after the death of Emily Staempfli, George McFadden's last surviving child. Wilhelmina McFadden and Alexander O. McFadden are the grandchildren of George McFadden's son, Alexander who died in 1948.

Randolph Harrison, Randolph Harrison, Jr. and Robert C. Harrison contend that the trusts of which Wilhelmina and Alexander O. McFadden are the beneficiaries, terminate twenty-one (21) years after the death of the survivor of the survivor of Caroline Michahelles or Josephine Evarts, granddaughters of George McFadden, who were alive at the time of his death on January 5, 1931. Randolph Harrison and Robert C. Harrison are the sons of Emily Staempfli. Randolph Harrison, Jr. is the son of Randolph Harrison and the grandson of Emily Staempfli.

In the declaratory judgment action filed by BNY Mellon Bank, N. A., John H. McFadden, Elizabeth McFadden Melas, Caroline Michahelles and Lisa D. Kabnick, Esquire contend that the trust under the Decedent's will for the benefit of John H. McFadden; the trust

under the Decedent's will for the benefit of Mary Josephine McFadden; the trust under will the Decedent's will for the benefit of Elizabeth McFadden Melas; the trust under the Decedent's will for the benefit of the descendants of Caroline B. Ewing and the trust under the Decedent's will for the benefit of the descendants of Emily B. Staempfli terminated on February 21, 2012, which is twenty-one (21) years after the death of Emily B. Staempfli, George McFadden's last surviving child. Both John H. McFadden and Mary Josephine McFadden are the children of George McFadden's son, Alexander, who died in 1948. Lisa D. Kabnick, Esquire is co-trustee with John H. McFadden and BNY Mellon Bank, N. A. in the trust under the will of the Decedent for the benefit of John H. McFadden. Elizabeth McFadden Melas is the sister of Wilhelmina McFadden and Alexander O. McFadden and the granddaughter of George McFadden's son, Alexander, who died in 1948. Caroline Michahelles is the granddaughter of George McFadden who was alive when he died on January 5, 1931.

Randolph Harrison, Randolph Harrison, Jr. and Robert C. Harrison, the descendants of Emily B. Staempfli, contend that the aforementioned trusts terminate twenty-one (21) years after the death of the survivor of Caroline Michahelles or Josephine Evarts, granddaughters of the Decedent, who were alive at the time of his death on January 5, 1931.

With all of the foregoing in mind, the questions presented to this Court were as follows: (1) What was the Decedent's intent when he adopted the language "...upon the expiration of the period of twenty-one years after the death of the last survivor of the children and issue of deceased children of mine living at my death..."?; (2) Whom did the Decedent intend to be the measuring life, who would toll the twenty-one (21) year period?; (3) Did the Decedent intend the survivor of either Caroline Michahelles or Josephine Evarts to be the measuring life only if Caroline's mother, Caroline B. Evarts and Josephine's mother, Emily Staempfli were dead on January 5, 1931?; (4) Alternatively, did

the Decedent intend that his last surviving child, Emily Staempfli who died on February 21, 1991, be the measuring life, since all four of George's children were alive on January 5, 1931?; and (5) Did the Decedent intend that the survivor of his two granddaughters would be the measuring life, since they were both alive on January 5, 1931?

In an effort to answer the foregoing questions, this Court held a hearing on May 3, 2012, at which time it determined that it would allow extrinsic evidence to clarify, if possible, the ambiguity that this Court found to exist in the language, which defined the termination of the trusts and the distribution of the trust assets to the beneficiaries. At the time of the hearing, by agreement, the parties offered into evidence five documents: The first (1st) document was the previous will of the Decedent dated February 9, 1928. The second (2nd) document was the deed of trust executed by the Decedent on February 9, 1928. The third (3rd) document was a pre-trial memorandum in a case brought by the executors of the Estate of the Decedent against the

United States in the District Court of the United States for the Eastern District of Pennsylvania. The fourth (4th) document was Alexander B. McFadden's will dated March 10, 1942. Lastly, the fifth (5th) document was the obituary of the scrivener of the Decedent's will, John Hampton Barnes accompanied by an article in the April 1944 edition of "The Shingle" authored by then Attorney General of the United States, the Honorable Francis Biddle, commending the many professional achievements of Mr. Barnes during his lifetime and setting forth a biographical sketch of Mr. Barnes appearing in a historical publication entitled "Philadelphia, a Story of Progress".

The testator's intent must prevail in construing a will and its terms. In Re: Estate of Lewis, 407 Pa. 518, 180 A.2d 919 (1962). The pertinent principles of law governing the interpretation of a will are well and clearly settled. The Supreme Court has pronounced "It is now hornbook law (1) that the testator's intent is the polestar and must prevail; and (2) that his intent must be gathered from a consideration

of (a) all of the language contained in the four corners of his will and (b) his scheme of distribution and (c) the circumstances surrounding him at the time that he made his will and (d) the existing facts; and (3) that technical rules or cannons of construction should be resorted to only if the language of the will is ambiguous or conflicting or the testator's intent is for any reason uncertain". In Re: Estate of Lewis, *supra.*, quoting In Re Burleigh Estate, 405 Pa. 373, 175 A2d 838 (1961).

Moreover, the formula for discovering the testator's intent is a combination of the language and scheme of the entire will and the circumstances surrounding the testator at the time of execution. The will of the Decedent evidences a clear intent to benefit his wife, Josephine, with income and allowances from the residuary trust established by the will and also with the balance of the income to his children, although he skews the amount in a two to one (2-1) proportion in favor of his male children over his female children.

On page five (5) of his will, the Decedent, after discussing allowances for his wife, Josephine, depending on certain lifestyle choices that Josephine might make after his death, directs that the balance of the income generated by the trust be paid in the form of a monthly stipend to each of his children, although the proportions are two (2) parts of the balance of the net income to his sons and one (1) part of the net income to his daughters. The Decedent describes the allocation of the balance of the net income to be enjoyed by his children as follows:

> To pay monthly, as nearly as possible, in the proportion of two parts of the balance of the net income to each of my sons, and one part thereof to each of my daughters, living at the time of my death, or to the respective issue living at the time of my death of a deceased son or daughter, such issue being entitled to their parent's share of income, for and during the life of each of said children or issue of a deceased child living at the time of my death.

It is evident from the words "...or to the respective issue living at the time of my death of a deceased son or daughter, such issue being

entitled to their parent's share of income..." that the issue would not share unless their parent had predeceased the Decedent. A contrary interpretation would nullify the trust bequest to the parent of the issue.

The reasonable conclusion to be drawn from the language and scheme of the Decedent's will is that he wanted to provide for his wife and children, but protect their inheritances by having the money held and managed by a corporate trustee, Girard Trust Company; two (2) partners in the firm in which he was a senior partner, Edward Browning, Jr. and George Stuart Patterson, Esquire; and his son, George McFadden. The reason for the need to protect and preserve the Decedent's assets of his estate for the benefit of his family can been seen from the turbulent times affecting the Decedent in January of 1930, which is when he drafted his will. Specifically, the United States experienced an era of great peace and prosperity during the 1920s. On September 3, 1929, the Dow Jones Industrial Average stood at 381. By Tuesday, October 29, 1929, the Stock Market collapsed and the Dow

Jones Industrial Average stood at 230. The crash of the Stock Market ushered in what was to be known as the "Great Depression."

On October 29, 1929, the Decedent had a will, which he executed on February 9, 1928. The 1928 will as well as the January 6, 1930 will allowed for a bequest totaling Ten Thousand Dollars ($10,000.00) to be given "...to such persons or charities as my wife, Josephine shall select..." Thereafter, both wills allow for the passage of certain personal effects of the Decedent to family members. Finally both the 1928 will and the will under consideration dated January 6, 1930, "...give, devise and bequeath all of the rest, residue and remainder of my estate, and I also give, devise and bequeath all estates or interests over which I have power of appointment, to my Trustees hereinafter appointed and to their successors as Trustees, IN TRUST,..." The language in each will is identical.

On page five (5) of his 1928 will, the Decedent, after discussing allowances for his wife, Josephine, depending on certain lifestyle

choices that Josephine might make after his death, directs that the balance of the income generated by the trust be paid in the form of a monthly stipend to each of his children; the proportions being two parts of the balance of the net income to his sons and one part of the net income to his daughters. George McFadden describes the allocation of the balance of the net income to be enjoyed by his children in his 1928 will as follows:

> To pay monthly, as nearly as possible, in the proportion of two (2) shares of such balance of net income to each of my sons, and one (1) share of such balance of net income to each of my daughters living at the time of my death, or to the respective issue, living at the time of my death, of a deceased son or daughter, such issue being entitled to their parent's share of such income...".

The difference of wording between the 1928 will and the will subject to interpretation is the phrase "...for and during the life of each of said children or issue of a deceased child living at the time of my death," which appears in the January 6, 1930 will.

The intent of the Decedent becomes quite clear when the two (2) testamentary documents stand side by side. In the January 6, 1930 document, the Decedent was expressly prescribing how long the trust would operate to benefit his children and that would be for the lifetime of each of the Decedent's children or issue of a deceased child living at the time of the Decedent's death.

The generation of the Decedent's grandchildren could not be "entitled to their parent's share of such income" as long as their parents were alive at the time of the Decedent's death, since a child of the Decedent and that child's offspring cannot be entitled to the same share.

In the 1928 will, the termination provision can be found on page six (6), where the document recites:

> And IN TRUST, on the death of each child or grandchild of mine living at the time of my death, to pay over to the descendants per stirpes of such child or grandchild living at the time of my death a principal amount of my residuary estate, ascertained by and in the proportions and divisions

> of income hereinafter provided for each child or grandchild, namely, in the proportions of two (2) shares for each male grandchild and one (1) share for each female grandchild.

The above-stated provision calls for a staggered dissolution of the trust. The trust is gradually reduced or dissolved as a child or grandchild dies. That child or grandchild's proportionate share of the residuary estate is calculated and paid to his or her descendants in the proportion of two (2) shares for each male descendant and one (1) share for each female descendant.

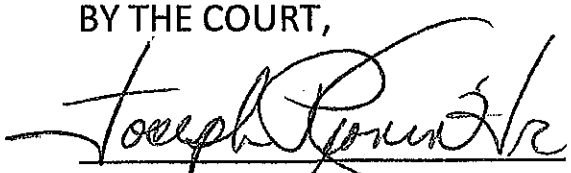
The termination provision contained in the January 6, 1930 will calls for a uniform date for the dissolution of the trust and distribution of the trust assets, thereby insuring that a share of the residuary estate is not subject to turbulent market conditions that may cause a reduction in value because of the uncertain economy. The uniform date for dissolution evens the risk of loss between all beneficiaries. Furthermore, the termination provision names two (2) classes of individuals "...children and the issue of deceased children living at the

time of my death..." If the Decedent intended that the survivor of his granddaughters would be the measuring life, he would not have uttered the word "deceased". To the contrary, the Decedent would have uttered "...children and the issue of children living at the time of my death..." The Decedent had no deceased children at the time of his death. *A fortiori,* the only reasonable interpretation is that the Decedent intended that the trust established by his will dated January 6, 1930 would terminate twenty-one (21) years after the death of his last surviving child if all of his children survived his death, which they did. The only reasonable interpretation, which would allow for the survivor of Caroline Michahelles or Josephine Evarts to be the measuring life would be if Caroline B. Ewing and Emily Staempfli died before January 5, 1931.

For the reasons stated herein, the trust established under the will of George McFadden terminated on February 21, 2012, which was

twenty-one (21) years after the death of the last surviving child of George McFadden.

BY THE COURT,



JOSEPH P. CRONIN, JR. J.