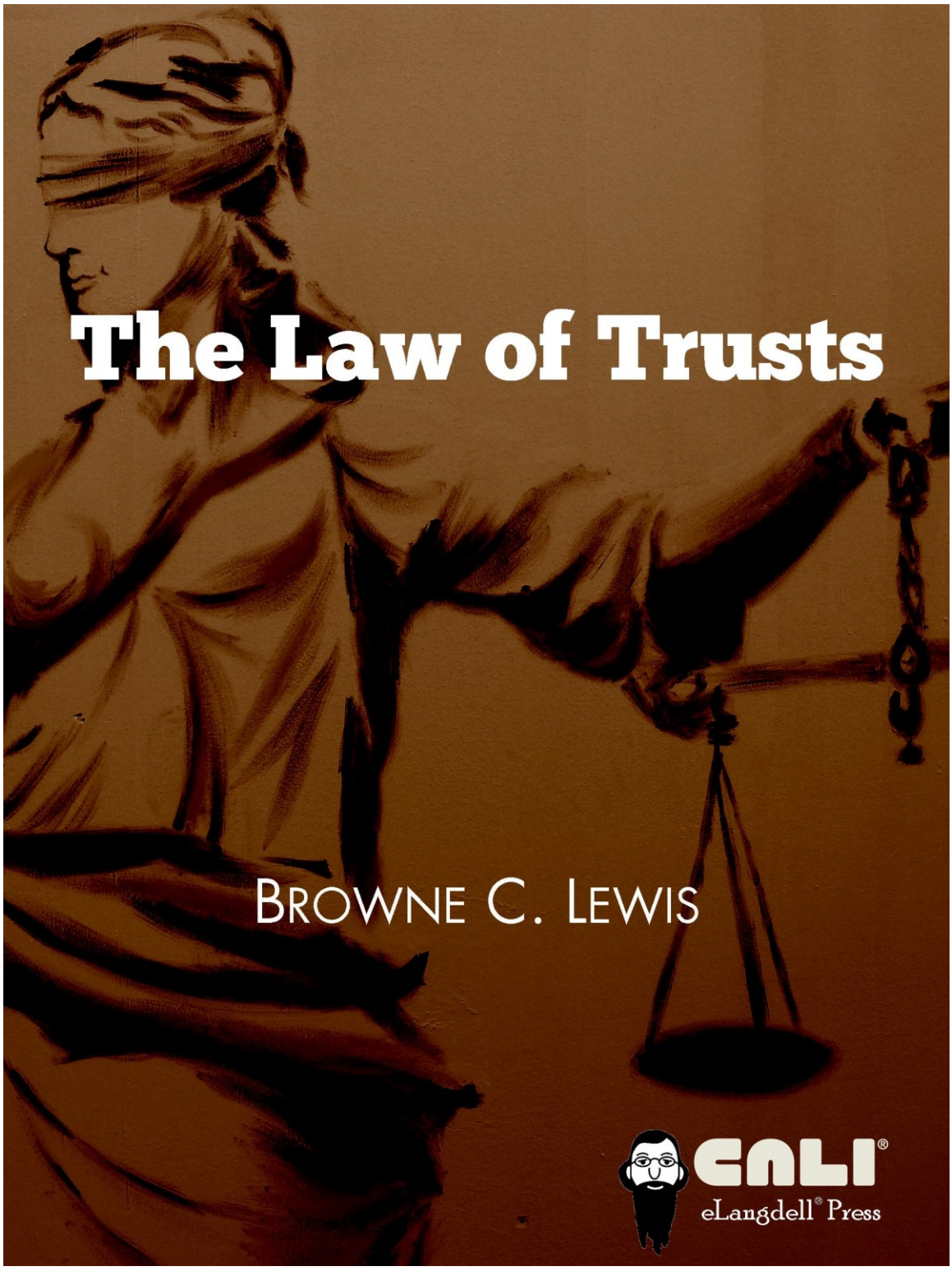
The Law of Trusts
Browne C. Lewis
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The Law of Trusts

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eLangdell® Press 2013

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ISBN: 979-8-89904-013-9

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Table of Contents

About the Author ..... **iii**
Notices ..... **iv**
About CALI eLangdell Press ..... **v**
Preface ..... **viii**
Chapter 1 - The Capacity to Create a Testamentary Trust **1**
1.1. Parties Involved in a Trust Arrangement 2
1.2. Testamentary Capacity 4
Chapter 2 - Creation of a Private Trust **46**
1.2 Intent to Create a Trust 46
2.2 Requirement of Trust Property 53
Edwards v. Edwards 54
2.3 Necessity of Trust Beneficiaries 63
Chapter 3 - Categories of Private Trusts **71**
3.1. Private Expressed Trusts 71
3.2. Trusts Created By Operation of Law 93
Chapter 4 - Discretionary and Support and the Rights of the Beneficiary's Creditors **122**
4.1 Discretionary Trusts 125
4.2. Support Trust 131
Chapter 5 - Spendthrift Trusts and Creditors **140**
5.1 Expressed Spendthrift Trust 141
5.2 Implied Spendthrift Trust 142
5.3 Creditors 149
Chapter 6 - Modification and Termination of Trusts **174**
6.1 Termination 175
6.2 Claflin and Material Purpose 182
6.3 Deviation and Changed Circumstances 186
6.4 Removal of the Trustee 194
Chapter 7 - Creation and Modification of Charitable Trusts **201**
7.1 Creation of the Charitable Trust 201
7.2 Modification/Cy Pres 207
Chapter 8 - Supervision/Enforcement of Charitable Trusts **237**
8.1 Donor Standing 237
8.2 Beneficiary Standing 248
Chapter 9 - Treatment of Trust Property **254**
9.1 The Duty to Collect and Protect Trust Property 254
9.2 The Duty to Earmark Trust Property and to Not Comingle Trust Funds 254
9.3 The Duty Not to Delegate 260
9.4 Duty of Prudence 261
Chapter 10 - Duty of Loyalty **282**
Chapter 11 - Duty of Impartiality **302**
Chapter 12 - Duty to Account and Inform **323**
12.1 To Account 324
12.2 To Inform 346

12.3 The Trustee's Liability 358

Preface

Recently, the public waited patiently to find out the contents of Whitney Elizabeth Houston's will. People were entertained by her music and fascinated by her death. Thus, it is no surprise that they were on the edge of their seats to discover how much money she had in her estate. Inside Edition and other entertainment shows teased the public with previews stating that they had received a copy of the will and planned to reveal its contents. The big reveal fell short when the public realized that Houston had left everything to her daughter using a testamentary trust. Wills are public documents, but trust instruments are not. Therefore, the public will never know the specific provisions contained in the trust document. Privacy is one of the reasons why more and more people are disposing of their property using testamentary trust created in their wills. The reasons people establish trusts are as varied as the lawyers who draft them. Traditionally, trusts were vehicles wealthy people used to provide for their love ones. Currently, people from all economic classes establish trusts. Thus, for students desiring to practice in the probate or elder law arena, it is crucial that they have a basic understanding of the law of trusts.

The standard four-credit Wills & Trusts courses taught at most law schools do not spend a sufficient amount of time on the law of trusts. Professors teaching such courses have the daunting task of teaching intestacy, wills, non-probate transfers, estates, and trusts. The semester is not long enough to give detail coverage to all of the important topics. Consequently, professors have to decide what material to omit. Typically, the material on the law of trusts is either omitted or severely shortened. One obvious reason for the treatment of the trust information is the fact that the chapters on trusts are in the latter part of most casebooks. It is difficult to predict the pace at which the material will be covered. Thus, most professors have to adjust their reading assignments. Those adjustments usually require the professors to cut assigned materials. Frequently, by the time the decision to reduce the reading assignments needs to be made, the only significant material left to be covered are the chapters on the law of trusts. Hence, that material is routinely omitted.

The use of testamentary trusts is becoming an important part of estate planning. As a result, students who want to make a living as probate attorneys will need to know how trusts fit into estate planning. In addition, bar examiners realize that it is important for students to have a basic knowledge of trust law. That realization will result in bar examination questions

that test that knowledge. *The Law of Trusts* is designed for use as a supplementary text for a course on wills and trusts and the primary text in a seminar or course exploring the law of trusts.

Since the settlor is dead when the testamentary trust becomes effective, the testamentary trust is an irrevocable trust. The main focus of this book is on that type of trust. However, the revocable inter vivos trusts will be briefly mentioned as it relates to the testamentary trusts. Most of the legal issues surrounding the law of trusts come from challenges to the creation and implementation of the trusts. In addition, even if the testamentary trust is deemed to be valid, the actions of the trustee may lead to litigation. This book is divided into two components to address the issues that arise in those two types of litigation.

Part I explores the legal issues involved in the creation, modification and implementation of private and charitable trusts. In order to have a trust invalidated, the opponent must successfully challenge the capacity of the settlor or the procedure used to create the trust. Part I contains a chapter that examines the level of mental ability a person must have to create a trust. Other chapters in this part explains the steps that must be taken to create, modify and terminate a trust and compares the various types of private trusts.

Part II discusses the administration of private and charitable trusts. In particular, the part focuses upon the numerous duties of the trustee. Trusts are usually created to protect a person who is vulnerable in some way. In a lot of respects, that person is at the mercy of the trustee. Any decision that the trustee makes, good or bad, directly impacts the beneficiary. In order to protect the beneficiary from the actions of the trustee, the law imposes a fiduciary duty on the trustee. Chapters in Part II analyze the trustee's duties and the remedies available to the beneficiary in the event of the trustee's breach of any of those duties. Part II also includes a discussion of powers of appointments and their relevancy to trusts. This discussion is necessary because bar examinations frequently contain questions dealing with powers of appointment.

In additional to cases, the book contains problems, notes and questions. The cases are designed to give the student a clear understanding of the law. The problems are included to permit the student the opportunity to apply the law. The notes and questions are provided so the student will think critically about the policies behind the law and the outcome of the cases.

Chapter 1 - The Capacity to Create a Testamentary Trust

This chapter is divided into two parts. Part I introduces students to the parties that are involved in the creation of a trust. Further, that part discusses the function of each of the parties. Most trusts are testamentary in nature, so they are created as a part of a will. In order for a testamentary trust to be valid, the testator must be legally capable of executing the trust. Thus, in Part II of the chapter, I discuss the mental capacity the testator must possess to be deemed competent to create a trust. In addition, the students will be introduced to the other legal theories that may be used to attack the testator's ability to establish a trust.

The primary purpose of a trust is to provide a source of income for a person who is not capable of managing his or her resources. For instance, Barbara's son, John has a gambling problem. Barbara wants to make sure that John always has a place to live. If Barbara gives John a house outright, he would probably lose it in a card game. Barbara cannot give John the house and forbid him from transferring it because a direct restraint on alienation is invalid. Thus, the court would ignore the condition and give John the house without the restriction. Barbara can give John a life estate in the property, so that he would have a place to live until he died. Granting John a life estate may not be a good idea for several reasons. A legal life tenant has a duty to pay taxes and to maintain the property in good repair. However, that duty is limited because the life tenant only has to fulfill that obligation to the extent the income from the property is sufficient to cover those expenses. It is unlikely that the house will produce any income, so John would not be obligated to pay the property taxes or to keep the house in good repair. Even if John has such a duty, he is probably too irresponsible to do so. Thus, giving John a life estate in the house may cause more problems than it cures. Moreover, if the life tenant accrues debt, that person's creditor can legally seize the life estate and sell it. The creditor would probably realize very little from the sale. But, the sell of the life estate will defeat Barbara's purpose of providing John with a place to live. Barbara's best option is to put the house in trust for John. This means that Barbara would give the legal title of the house to a third party. That person would be responsible for maintaining the house for John. As the beneficiary of the trust, John would have equitable title of the house. Since John would not have legal title, he would be unable to

sell or gamble away title to the house. Thus, the creation of a trust would enable Barbara to achieve her objectives.

1.1. Parties Involved in a Trust Arrangement

Usually, at least three parties are involved in the creation of a trust. Those parties are the settlor/trustor, the trustee, and one or more beneficiaries. In cases involving testamentary trusts, the settlor is referred to as the testator. Three different individuals do not have to be involved in the transaction in order for a valid trust to be established. For example, one person can serve as the settlor and the trustee. If a self-settled trust is involved, it is possible for one person to serve in all three capacities. However, for the trust to be valid, the trustee must owe equitable duties to someone other than herself. Thus, if the settlor is also the trustee, she cannot be the only trust beneficiary. The settlor/trustor is the person who creates the trust. Since she is the person who established the trust, Barbara is the settlor or trustor.

The third party who manages the trust is the trustee. The trustee may be an individual or a corporation. The settlor may select one trustee or several trustees to manage the trust. The trustee may be appointed by the trust instrument or by the court. The person or entity appointed as trustee must affirmatively accept the role. Once the trustee accepts the appointment as trustee, the person can be released of the obligation only with the consent of the beneficiaries or by a court order. The trustee is entitled to receive reasonable compensation. A trust will not fail for lack of a trustee. If the trustee dies and no successor trustee is named in the trust instrument, the court will appoint a successor in trustee. However, if the trust instrument or other facts indicate that the settlor chose the person to act as trustee because of the nature of their relationship, the court may conclude that the settlor would not want the trust to continue without that trustee. As a result, the court may dissolve the trust on the death or resignation of the trustee. If the trust is created as a part of a will, the executor can also serve as the trustee.

The trust instrument must give the trustee some active duties to perform. A settlor who gives the trustee no managerial responsibilities creates a dry trust. As a result, the court will not recognize the creation of the trust, and the beneficiary will receive legal title to the trust property. The following example illustrates a dry trust:

Example-Utilizing an instrument entitled "Trust For the Benefit of Roberto and Marianna" Sophia placed one million dollars in an irrevocable trust for her two children, Roberto and Marianna. She selected Vincent to serve as trustee. Under the terms of the trust, $100,000 would be automatically paced in the respective bank accounts of Roberto and Marianna each month. Sophia never informed Vincent that he was to serve as trustee.

The above-referenced transaction did not result in a valid trust because the funds were automatically dispensed to Roberto and Marianna. Vincent had no managerial duties. The fact that the trust could function without Vincent's knowledge further indicates that it was a passive or dry trust. Consequently, the court would invalidate the trust and Roberto and Marianna would have the right to split the million dollars and obtain it without restrictions.

The trustee has legal title to the trust property, and the beneficiary has equitable title. Consequently, the trustee has the managerial authority over the property. Nevertheless, the beneficiary is the one who suffers the consequences of the trustee's good or bad decisions. In the example put forth at the beginning of the chapter, the trustee has legal title to the house and manages it for the benefit of John. Although the trustee has legal title to the house, a personal creditor of the trustee has no recourse against the house. If the trustee acquires an obligation on behalf of the trust, the creditor has recourse against the house, but not against the trustee's personal property.

Example 1-Keisha devises Purpleacre in trust to Robert to pay income to Gary for life and the remainder to LaNitra on Gary's death. Robert accidentally hits April with his car. April files suit against Robert and receives a judgment for $300,000. Although Robert has legal title to Purpleacre, April cannot place a lien on Purpleacre to satisfy her judgment.

Example2-Gloria devises Blackacre in trust to Tamera to pay income to Ali for life and the remainder to Patrick on Ali's death. Tamera contracts with Jason to make repairs to Blackacre. Jason submits a bill to Tamera for $40,000. Tamera refuses to pay the bill. Jason can go to court and get a mechanic's lien on Blackacre. However, Jason cannot sue Tamera personally for the debt.

The beneficiary of the trust is the person who receives the benefit of the trustee. John is the beneficiary of the trust because it was created so he would have a place to live.

John has the equitable title to the house. John's equitable interest entitles him to sue the trustee personally for breach of trust. Moreover, equity gives John, as beneficiary, the right to live in the house. Thus, if the trustee wrongfully disposes of the house, John can recover the house unless it has come into the hands of a bona fide purchaser for value. In addition, if the trustee disposes of the house and acquires other property with the proceeds of the sale, John can enforce the trust on the newly obtained property.

> **Example**-Ivana devises Brownacre in trust to Jessica for George for life and the remainder to Katherine on George's death. Jessica sells Brownacre to Robin, a BFP, and buys Blueacre. George can sue to receive equitable title to Blueacre.

In the above example, since Robin, a BFP, acquired legal title to Brownacre, George is unable to maintain his equitable interest in the property. George's remedy is to sue to get the proceeds Jessica received from the sell of Brownacre or to obtain an equitable interest in Blueacre.

1.2. Testamentary Capacity

1.2.1. Mental Capacity

In order to create a testamentary trust the testator must be an adult and must be of sound mind. A person who is 18 years of age or older is considered to be an adult. It is difficult to determine if the person was "of sound mind." The level of mental ability the testator needs is really low. For instance, a person suffering from dementia or Alzheimer's disease may be competent to establish a testamentary trust as long as the person has lucid moments. In order to have the necessary mental capacity to create a valid testamentary trust, the testator must know the following: (1) the nature and extent of his property; (2) the persons who are the natural objects of his bounty: (3) the disposition he is making; and (4) the manner in which those facts relate so far as to form an orderly plan for the disposition of his property.

To be found to be mentally competent, the testator does not have to have actual knowledge of every piece of property that will be included in the trust. The testator also does not have to be able to name every relative that may be a beneficiary of the trust.

***In the Matter of the Estate of Gallavan*, 89 P. 3d 521**

Opinion by Judge CARPARELLI

In this formal testacy proceeding as to the estate of Donna L. Gallavan (decedent), Joseph James Verce, Jr. (contestant), as personal representative of decedent's sister, Carla M. Verce, appeals the trial court's judgment denying his petition for adjudication of intestacy. Phillips R. McClendon, as decedent's personal representative, and Shriners Hospitals for Children, as a devisee, opposed the petition. We affirm.

Decedent was a protected person under conservatorship when she executed a will that contained a testamentary trust for the benefit of her sister and brother during their lives. Upon the death of both beneficiaries, the trust was to terminate, and trust proceeds were to be distributed to Shriner's Hospitals.

Decedent died in July 1999. Her personal representative submitted the will to informal probate. Decedent's sister survived decedent, but died in September 1999. Her brother also survived her but died in October 2011 while the estate was in probate. Contestant later filed the petition for adjudication of intestacy at issue here, alleging that decedent lacked testamentary capacity to execute the will.

Contestant urges us to conclude that the will is invalid because decedent lacked testamentary capacity. We perceive no basis for such a conclusion.

A person has testamentary capacity if he or she is an "individual eighteen or more years of age who is of sound mind." Section 15-11-501, C.R.S. 2003. The soundness of a testator's mind may be evaluated under either the *Cunningham* test or the insane delusion test. *See Breeden v. Stone*, 992 P.2d 1167 (Colo. 2000); *Cunningham v. Stender*, 127 Colo. 293, 255 P. 2d 977 (1953).

Under the *Cunningham* test, a person has testamentary capacity when (1) she understands the nature of her act; (2) she knows the extent of her property; (3) she understands the proposed testamentary disposition; (4) she knows the natural objects of her bounty; and (5) the will represents her wishes. *Cunningham v. Stender, supra.*

A.

Contestant contends that the judicial appointment of the conservator establishes that decedent was "incapacitated" and, thus, that she lacked testamentary capacity. We are not persuaded.

Contestant first points to the language of § 15-14-401(1)(b), C.R.S. 2003, which allows appointment of a conservator for one who is unable to manage property and business affairs because of inability "to effectively receive or evaluate information or both or to make

or communicate decisions" affecting her assets. He then points to the statutes that allow appointment of a guardian for an "incapacitated persons," defined in § 15-14-102(5), C.R.S. 2003, as, in pertinent part, one who is unable "to satisfy essential requirements for physical health, safety, or self-care," because of inability "to effectively receive or evaluate information or both or make or communicate decisions." He argues that the provisions include similar phrases and that, as a result, the appointment of decedent's conservator establishes that decedent was "incapacitated" when she wrote the will. This argument is contrary to the explicit language of the statutes.

When the meaning of a statute is plain and free from ambiguity, we may conclude the legislature made a deliberate choice that was "calculated to obtain the result dictated by the plain meaning of the words," *Hendricks v. People*, 10 P.3d 1231, 1238 (Colo. 2000) (quoting *City & County of Denver v. Gallegos*, 916 P.2d 509, 512 (Colo. 1996), and we give effect to that meaning without resorting to rules of statutory interpretation. *In re Estate of DeWitt*, 554 P.3d 849 (Colo. 2002).

Section 15-14-401 pertains to the appointment of a conservator to ensure that assets a person needs for her own support, care, education, health, and welfare, or for that of others who are entitled to her support, are not wasted or dissipated. The appointment of a conservator does not include a finding of "incapacity." In fact, when decedent wrote her will, the version of § 15-14-408 (6) then in effect provided that "[a]n order …determining that a basis for appointment of a conservator…exists, has no effect on the capacity of the protected person." Colo. Sess. Laws 1979, ch, 451, § 153-5-408(6) at 1626 (repealed effective January 1, 20000. Similarly, under the current statute, § 15-14-409(4), C.R.S. 2003, states that appointment of a conservator "is not a determination of incapacity."

Thus, the statute explicitly states that findings that warrant appointment of a conservator do not equate to a determination of testamentary incapacity.

Here, the trial court reached the same conclusion based on the holding in *In re Estate of McCrone*, 106 Colo. 69, 101 P.2d 25 (1940), and contestant argues that reliance was error. However, contestant also argues that the court should have applied the current statutes. Because we conclude that the court's ruling was correct under those statutes, we need not address contestant's argument concerning *McCrone. See People v. Gresl,* 89 P.3d 499, 2003 WL 23095411 (Colo. App. No. 00CA1170, Dec. 31, 2003).

B.

Contestant also asserts that the trial court erred when it held that decedent had testamentary capacity. We disagree.

Findings of fact will not be set aside unless they are clearly erroneous. C.R.C.P. 52; *Mesa County Valley Sch. Dist. No. 51 v. Kelsey*, 8 P.3d 1200 (Colo. 2000); *In re Estate of Heyn*, 47 P.3d 724 (Colo. App. 2002); *In re Estate of Perry*, 33 P.3d 1235 (Colo. App. 2001).

Here, the trial court applied and made findings appropriate to the Cunningham and insane delusion tests, and there is substantial evidence in the record to support the court's findings. We perceive no basis for overturning this ruling.

C.

Contestant also argues that the will or, in the alternative, the trust is invalid because a protected person cannot execute a valid will that includes a trust. Again, we are not persuaded.

When a court appoints a conservator, the protected person's assets are vested in the conservator. As a result, the protected person cannot transfer assets to others, including an inter vivos trust. *See* § 15-14-421, § 15-14-422, C.R.S. 2003. Here, however, decedent had testamentary capacity and, as a result, could bequeath assets to others, create a testamentary trust, and bequeath some or all of her estate to such a trust. Because she did not transfer any assets during her lifetime, the conservatorship was not implicated. Therefore, we conclude that, even if appointment of a conservator prevents a protected person from creating an inter vivos trust, it does not prevent a protected person who has testamentary capacity from creating a testamentary trust.

The judgment is affirmed.

Notes, Questions and Problems

1. In *Gallavan*, the contestant appeared to want the court to establish a presumption of lack of mental capacity based upon the appointment of a conservator. If the court had ruled in favor of the contestant, the decision might have negatively impacted persons with disabilities. For instance, a mentally disabled person who receives SSI has to have a representative payee. Should that status be enough for the person to be presumed mentally incompetent to execute a will or a testamentary trust? What about persons who have been diagnosed with severe dementia?

2. The will in *Gallavan* was submitted to informal probate. An increasing number of states have statutes permitting informal probate. Informal probate allows the personal

representation to administer the decedent's estate without probate court supervision. The estate is closed when the representative files a sworn statement certifying that the decedent's debts, expenses, and taxes have been paid and distributions have been made to the persons entitled to them.

3. In *Gallavan*, the Court indicates that a person who is under a conservatorship may not have the capacity to establish an inter vivos trust. Nonetheless, that same person may be legally capable of creating a testamentary trust. What are some arguments that support the difference in treatment?

4. What are the pros and cons of requiring a testator to be of "sound mind"? Does the *Gallavan* case give any insight into determining when a person is of sound mind?

5. Problems

In which of the following cases may the testator lack mental capacity to execute a will or trust?

a) Sally had two daughters, Grace and Amanda. Sally's will contained the following language "I leave 80% of my estate in trust for my daughter Grace and the remaining 20% in trust for my step-daughter, Amanda." Both Grace and Amanda were Sally's biological children.

b) Frederick executed a will stating "I leave my entire estate to my three children, Darlene, Mason and Paul." Frederick only had two children, Darlene and Mason. Paul was Frederick's pet monkey.

c) Joshua inherited his family's farm located at 1120 Gates Mill Road. In 1997, the city seized the farm because Joshua failed to pay the property taxes. Joshua claimed that he had receipts showing that he had paid the taxes. Thus, he filed suit to regained ownership of the farm. Joshua lost his case, but vowed to never stop fighting. In 2009, Joshua executed a will containing the following provision, "I leave the farm located at 1120 Gates Mill Road to my son, Theodore."

d) Elvira was the victim of a scam in which she purchased the Golden Gate Bridge. In her will Elvira stated, "I leave the Golden Gate Bridge to my son, Huey.

1.2.2. Insane Delusion

A person may be mentally competent to create a testamentary trust. Nonetheless, the testamentary trust may be invalid because it was the product of an insane delusion. In order to convince a court to invalidate a testamentary trust based on the testator's insane delusion, the contestant must prove (1) the testator was suffering from a delusion that was insane and (2) the trust was a consequence of the insane delusion.

An insane delusion that may prevent a person from having the capacity to execute a testamentary trust is a false belief based upon incidents that exist solely in the imagination of the person suffering from the delusion. The "insane' in insane delusion does not refer to a medical condition. Thus, the testimony of a psychologist or psychiatrist is not necessary to prove it. For instance, one court has stated, "An 'insane delusion' or 'monomania insanity' is not a general defect of the mind, for the purposes of determining whether the delusion operated to invalidate a will; it is an insanity directed to something specific, that is, a particular person or thing, and the testator can be laboring under the influence of an insane delusion while otherwise acting or appearing competent." *Dougherty v. Rubenstein*, 914 A.2d 184 (Md. App. 2007). A delusion is insane even if there is some factual basis for the belief if a rational person in the testator's position could not have drawn the conclusion the testator reached. *See* Restatement (Third) of Property: Wills and Other Donative Transfers § 8.1, cmt. s. (2003). The testator's insane delusion must impact the manner in which she distributes her property. If an insane delusion is shown, but the delusion did not affect the dispositions, the will and the testamentary trust stand.

Consider the following example. After Maxwell's wife died in child birth, he believed that the baby girl, Amanda, was the devil incarnate, so he sent her away to boarding school. Maxwell's priest and friends tried to convince him that Amanda was a good, well-behaved child. However, Maxwell held on to his belief that Amanda was evil. Maxwell was delusion with regards to his views about Amanda. That delusion had the potential to impair his capacity to create a testamentary trust. If Maxwell told the lawyer creating his testamentary trust to exclude Amanda as a beneficiary of the trust because Maxwell thought Amanda would use his property to worship the devil, the one Maxwell regarded as Amanda's true father, a court would probably decide that Maxwell's testamentary trust was a product of an insane delusion. Thus, it would be invalidated because he lacked the necessary testamentary

capacity to establish a trust. However, if Maxwell told the lawyer to exclude Amanda as a beneficiary of the trust because Maxwell had already provide sufficient lifetime support for Amanda, the court would probably conclude that Maxwell's delusion did not influence his decision to exclude Amanda as a beneficiary of the trust. Therefore, the trust would be declared valid.

A Mistake vs. An Insane Delusion

An insane delusion is different from a mistake. An insane delusion is a belief that is not susceptible to correction by showing the testator evidence indicating that his or her belief is false. A mistake is a belief that is susceptible to correction if the testator is presented with the truth. Courts usually do not reform or invalidate a testamentary trust because of a mistake, but courts do invalidate entire trusts or their provisions that result from an insane delusion.

> **Insane Delusion**: Nicholas believes that his daughter, Taylor, is dead. Taylor comes to Nicholas' house to show him that she is still alive. Nicholas believes that someone is impersonating Taylor, so he intentionally excludes her as a beneficiary of his testamentary trust.
>
> **Mistake:** Nicholas believes that his daughter, Taylor, is dead. Taylor is alive, but Nicholas does not discover that fact. Nicholas intentionally excludes Taylor has a beneficiary of his testamentary trust.

Taylor will be able to successfully challenge the validity of the trust created as a result of the insane delusion. However, the trust created as a result of the mistake will be validated.

***In re Estate of Squire*, 6 P.3d 1060**

CARL B. JONES, Chief Judge:

This will contest involves a "pour over" will and a revocable trust executed by Betty Louise Squire six years before her death. The decedent had never married and was childless. The contestants to this will and trust are the decedent's first cousins. In 1990, the decedent executed a living trust naming WestStar Bank of Bartlesville, Oklahoma (Bank) as Trustee and leaving the bulk of the decedent's residuary estate to three charities: the Washington County SPCA, the American Diabetes Association and Washington County Elder Care, Inc.

The decedent also executed a "pour over" will which provided that any assets remaining in the decedent's name at death would pass to the Trust for administration and distribution.

The first cousins filed a petition for letters of administration and determination of heirs asserting that the decedent had died intestate. WestStar filed its objection to the petition attacking the will executed by the decedent. The cousins contested the will and sought to set aside the Trust, claiming both documents to be the products of undue influence and an insane delusion. After a two-day trial, the trial court denied the cousins' petition contesting the will and trust. The cousins appeal.

Issues presented on review are: 1 whether the decedent had testamentary capacity at the time she executed the will and trust; 2) whether the trust and will were a product of undue influence; and 3) whether the decedent was acting under an insane delusion at the time she executed the will and trust. Probate proceedings are of equitable cognizance. While the appellate court will study the whole record and weigh the evidence, the trial court's findings will not be disturbed on review unless they are clearly against the weight of the evidence or some governing principle of law. When a will is offered for probate, the singular concern of the court is: (a) whether the will has been executed with the requisite statutory formalities, (b) whether the testatrix was competent to make a will at the time it was made, and (c) whether it was the product of undue influence, fraud or duress. The significance of this entire process is to ascertain and effectuate the decedent's intentions regarding the disposition of her property. *Matter of the Estate of Sneed,* 953 P.2d 1111, 1151 (Ok., 1998).

The cousins assert that the decedent lacked testamentary capacity at the time she executed her will and trust. Relying on *In re Estate of Lacy*, 431 P.2d 366 (Ok. 1967) the cousins assert that the decedent made an unnatural disposition as she failed to mention the "objects of her bounty" which in this case would have been her cousins. Although *Lacy* does not hold that this alone is conclusive of no testamentary capacity, the cousins contend that coupled with this failure is the medical evidence introduced that the decedent was a mentally ill person and had been for many years.

Testamentary capacity exists when a person has, in a general way, the faculty to appreciate the character and extent of the devised property, comprehends the nature of the relationship between themselves and the objects of their bounty and perceives the nature and effect of the testamentary act. Whether one possesses testamentary capacity is a question of fact. When a person contests a testator's soundness of mind, the burden of persuasion

rests upon that person. When a court ascertains a decedent's testamentary capacity, it is appropriate for it to consider evidence of the testator's mental capacity, appearance, conduct, habits and conversation both before and after the will is executed. *In re Estate of Lacy, supra.*

The record reflects that the decedent remained in her family home until approximately six months prior to her death. One of the reasons the decedent was able to stay in her home was because pursuant to the trust the Bank paid the decedent's bills and arranged for caretakers. She suffered from multiple health problems including diabetes and partial blindness. In addition, the decedent was treated for anxiety and depression by a psychiatrist in Bartlesville. In the psychiatrist's notes, references were made to a "falling out" with the decedent's cousins for various reasons during the late '80s. Approximately one month before the execution of the will and trust, the decedent was hospitalized for an insulin reaction and was confused. She was discharged to a geriatrics center until she could return to her home. At the time she executed the will and trust, October 30, 1990, she was still at the geriatrics center. The medical records reflect from October 16, 1990 to November 17, 1990, that the decedent was alert, oriented and frequently went out of the building for social activities. The record is devoid of anyone testifying that the decedent did not know her relatives, did not understand her property, or in any way appeared incompetent. After a review of the record, we find that the trial court's decision that Betty Louise Squire was possessed of testamentary capacity at the time she executed her will and trust is not clearly against the weight of the evidence.

Relying on *In re Estate of Maheras*, P.2d 268 (Ok., 1995) and *In re Estate of Gerard*, 911 P.2d 266 (Ok., 1995) the cousins assert that they were entitled to a presumption of undue influence. They contend that the decedent did not have independent advice and that the trust officer from WestStar used her influence over the decedent to benefit the bank. We do not agree. The Oklahoma Supreme Court held in these two cases that a two-prong test must be used to decide whether undue influence has tainted a will. First, there must be a relationship which would induce a reasonably prudent person to repose confidence and trust in another. Second, the stronger party in the relationship must have assisted in the preparation of the testamentary instrument. It is undisputed that a confidential relationship existed between the trust officer with WestStar and the decedent. However, the distinguishing factor here is that the decedent approached WestStar and requested assistance in setting up the appropriate documents to manage her affairs. In fact, the decedent brought

an unsigned will document dated 1987 to WestStar to assist in drafting the trust and will. This unsigned document provided that she wanted to leave the majority of her estate to the three charities. The trust officer opined at trial that the decedent's previous attorney had drafted the unsigned will. No contradictory evidence was presented on the authorship of this unsigned will. Further, the trust officer testified that the decedent provided all instructions regarding the disposition of her assets. As previously stated, this Court will not disturb the factual findings of a trial court unless they are clearly contrary to the weight of the evidence. We find that the trial court correctly found that the will and trust were not the product of undue influence.

Finally, the cousins assert that the decedent suffered from an insane delusion which materially affected the execution of the will and trust. The cousins contend that the decedent believed that people were stealing from her and that her cousins were after her money. An insane delusion connotes a belief in things which do not exist and which no rational mind would believe to exist. *Winn v. Dolezal*, 355 P.2d 859 (Ok., 1960). Such a delusion is a false belief, which would be incredible in the same circumstances to the victim if she were of sound mind and from which she cannot be dissuaded by any evidence or argument. We must determine whether the decedent's condition at the time of the execution of the will and trust was such to show that the disposition which she made was caused by a delusion and but for the delusion the disposition of the property would have been otherwise. This delusion, if it existed, must have existed at the time of the execution of the will. *Lynn v. Ada Lodge No. 146*, 398 P.2d 491, 496 (Ok., 1965)

The cousins emphasize that until 1983 the decedent had a very good relationship with her cousins. After the decedent and one of her cousins took a trip together, the decedent began to withdraw from this relative. The discord between this cousin arose from a misunderstanding over the transfer of the decedent's funds shortly before the 1983 trip. The decedent discussed this with her psychiatrist who noted that rifts between relatives occur all the time. No notation was found in his notes referring to an insane delusion. None of her doctors ever noted on her charts that she suffered insane delusions. In fact, one doctor in 1987 specifically stated that while the patient was depressed and anxious, she did not suffer from hallucinations or insane delusions. We find that the trial court correctly found that the decedent was not suffering from an insane delusion at the time she executed her will and trust. Accordingly, the trial court is affirmed.

AFFIRMED

Notes, Questions and Problems

1. In *Squire*, the Court stated that the testator's behavior before and after the execution of the will was relevant to her mental capacity. Why should behavior after the execution of the will matter?

2. A pour over will is used in conjunction with an inter vivos trust to avoid probate. The settlor creates the trust during her lifetime and places very little assets in it. Then, she executes a pour over will that bequests money or property to the existing trust. When the testator dies, the money or property from the will pours over into the trust.

3. If a person executes a will when he is young and healthy, it is difficult for the court to set it aside because of an insane delusion. Prior to committing suicide, Roger Bauer wrote a letter to his girlfriend containing the following statement, "My primary reason for doing this is a near complete lack of family love. It is something that will always be missing from my life. I will never be able to compensate for it no matter what." In the last sentence of the letter Bauer left everything to his girlfriend who submitted the letter for probate as a holographic will. Bauer's sister contested the will claiming that his belief that he lacked the love of his family was an insane delusion. The Court found that Bauer had not suffered from an insane delusion. *Bauer v. Estate of Bauer*, 687 S.W.2d 410. If the Court concluded that Bauer was suffering from a delusion with respect to his family, would that be sufficient to invalidate the will under the doctrine of insane delusion.

3. Problems

In which of the following cases is the court likely to invalidate the will based upon an insane delusion?

a) Mary heard voices telling her that her son, Billy, was poisoning her. Thus, Mary disinherited Billy and left all of her money to charity.

b) Simon thought that his daughter, Maude, was stealing from him. When Simon confronted Maude, she denied the accusations. Simon could not find evidence of Maude's stealing, but he believed that she was a thief because she had red hair. Simon established a trust on behalf of his two other children and excluded Maude as a beneficiary. After Simon died, his executor discovered that Maude had been stealing from Simon.

c) Craig and Lucy were married for over 50 years. When Craig suspected that she was having an affair, Craig told his friends that he planned to disinherit her. Craig claimed that Lucy was

slipping men down the chimney and having sex with them in the attic. Lucy was injured in a car accident and received a large case settlement. Then, Craig told his friends that Lucy did not need his money, so he was not going to leave her any thing. Craig also stated that if Lucy was broke he would not leave her a penny of his money to spend on her men.

d) Rufus had black hair and brown eyes. Rufus married Shelley, who also had black hair and brown eyes. When Shelley gave birth to a little boy, Danny, who had blonde hair and blue eyes, Rufus was convinced that he was not the father of the child. In order to convince Rufus that Danny was his son, Shelley went on a talk show and had a DNA test conducted. The DNA test proved that Rufus was Danny's father. However, Rufus believed that the DNA test had been rigged to increase the show's television ratings. Shelley was never able to convince Rufus that Danny was his child, so the couple divorced. Rufus executed a will stating, "Since I am childless, I leave my entire estate to the Red Cross."

1.2.3. Undue Influence

The requirements that the testator is mentally competent and not suffering from an insane delusion are designed to insure that the testator's will or trust is a product of a sound mind. However, a person who has a sound mind is still susceptible to being influenced by other people. Estate planning is often a family affair. Thus, persons who stand to benefit from the testator's actions may intentionally or inadvertently influence the manner in which the testator disposes of her property. The law permits the testator to be influenced by the actions and opinions of others. Nonetheless, if that influence causes the testator to make a disposition that the testator would not otherwise have made, the law considers that influence to be undue. Courts will strike the terms of a testamentary trust that results from undue influence, and allow the remaining terms to stand if they can be reasonably separated from the invalid terms without destroying the testator's intent or interfering with the testamentary plan.

The test for undue influence is whether someone exercised so much control over the testator's mind that the person overcame the testator's free will and caused the testator to do what he would not have otherwise done but for the person's influence. The person contesting the testamentary trust has the burden of proving the following: (1) that the testator was susceptible to undue influence or domination by another; (2) that the persons alleged to have committed the undue influence had the opportunity to exercise it; (3) that

such person had a disposition to influence for the purpose of personal benefit; and (4) that the provisions of the trust appear to be unnatural and the result of such influence. Undue influence is often difficult to prove. In some cases, the burden of proof shifts to the proponent of the testamentary trust. Once the burden shifts, that persons must show a lack of undue influence. The factors that cause the burden of proof to shift include (1) the existence of a confidential relationship; (2) a testator with a weakened intellect; and (3) a trust that gives the person with the confidential relationship the bulk of the estate. Confidential relationships like attorney-client and caretaker-patient are usually enough to shift the burden of proof. In fact, many courts have held that, if an attorney, who is not related to the testator, benefits from a testamentary trust, a presumption of undue influence occurs. The attorney must present clear and convincing evidence to rebut the presumption.

***In re Estate of Johnson*, 340 S.W.3d 769**

CATHERINE STONE, Chief Justice.

Appellants' motion for rehearing is denied. This court's opinion and judgment dated December 1, 2010 are withdrawn, and this opinion and judgment are substituted. Our prior opinion contained an incorrect reference to Laura Johnson serving as co-trustee of a foundation as opposed to Laura Johnson serving as co-trustee of a management trust. We substitute this opinion to delete the erroneous factual reference which does not affect this court's prior analysis.

This appeal arises from a probate proceeding in which a jury found Belton Kleberg Johnson ("B") executed certain wills and trusts as a result of undue influence. The trial court entered judgment on the verdict, denying probate of certain wills and admitting B's 1997 will to probate. Additionally, the judgment invalidated certain trust documents. On appeal, the independent executor of B's estate, B's widow, and a co-trustee of a trust created by B, challenge the sufficiency of the evidence to support the jury's finding of undue influence. We affirm the trial court's judgment.

BACKGROUND

A. The Family Members

B was a descendent of famed King Ranch heritage. He and his first wife, Patsy, whom he divorced in 1987, were the parents of three children: Cecilia McMurrey ("Ceci"), Sarah Pitt ("Sarah"), and Kley Johnson ("Kley"). Kley, who died in a car accident in 1991, was married to Cecilia Hager ("Hager"). Alice Truehart Johnson and Henry Kleberg

Johnson are Kley and Cecilia's children. Sarah married Steven Pitt, and Sarah Spohn Kleberg Pitt, Stephen McCarthy Pitt, Jr., and Allegra Elizabeth McCarthy Pitt are their children. Ceci married Mark McMurrey, and Harry Bennett McMurrey, Belton Kleberg McMurrey, and Estella Lewis McMurrey are their children.

Lynne Johnson was B's second wife. They were married in February of 1991, and Lynne died of cancer in January of 1994.

Laura Johnson was B's third wife. B met Laura in Hong Kong in January of 1994 within days after Lynne's death. At the time, Laura was still married to her first husband, who also was her business partner; however, they had been separated for several years. Laura's divorce from her first husband was final in January or April of 1996, and she married B on November 8, 1996.

B. The Estate Planning Documents

Over the course of at least four decades, B engaged in extensive estate planning activity with the aid of various professionals. The following individuals were involved at varying times in B's estate planning: (1) Ed Copley—an estate planning attorney B hired in 1991; (2) Robert Phelps—a generational planning specialist with J.P. Morgan who was also an attorney; (3) Stacy Eastland—another estate planning attorney B hired in 1997; and (4) Peter Milton—a loan officer with J.P. Morgan who subsequently became an investment advisor for B's foundation.

Following B's death in 2001, Copley obtained an order admitting to probate B's 1999 will and 2000 Codicil and was named as the independent executor of B's estate. B's children and grandchildren challenged that order in the suit giving rise to this appeal. A review of B's estate planning documents for the decade preceding his death is helpful to understanding the parties' claims.

B's 1991 will created a life estate for his second wife, Lynne, with the remainder going into trust for B's grandchildren. The 1991 will list three specific charities as contingent beneficiaries in the event all of B's descendants predeceased him. B's 1993 will was similar to his 1991 will; however, a subsequent codicil changed the remainder beneficiaries from B's grandchildren to his children. B's 1995 will left $1 million net of tax in trust to each grandchild with the remainder going to five specific charities.

B's 1997 will left his estate to a 1997 Management Trust. In the 1997 Management Trust, $1,000,000 net of tax was left in trust for each grandchild. The remainder of the estate

was to be held in trust for Laura for her life. Laura had a power of appointment and could leave up to one-half of the remaining estate to any or all of B's descendants, and the other one-half of the remaining estate (or the entire remainder if Laura did not exercise the power of appointment) was to be distributed to the same five specific charities listed in the 1995 will.

In 1989, B created Johnson Properties. B was the general partner of Johnson Properties, and the trusts of B's children were limited partners. Johnson Properties owned a limited partnership interest in SA–2000, which owned the Hyatt Hotel on the San Antonio River Walk. Upon the dissolution of Johnson Properties in 1998, B and the trusts individually owned the partnership interests in SA–2000. B formed a new family limited partnership, BKJ Interests, to which he transferred his King Ranch royalties and the interest in SA–2000 which he formerly owned through Johnson Properties. The record is replete with evidence that the effect of the dissolution of Johnson Properties on B's estate plan was intentionally kept secret from Ceci and Sarah until B's death.

Around the same time as the Johnson Properties dissolution, B created the 1998 Family Trust, which eventually obtained a portion of B's interest in BKJ Interests. B's 1998 will left his estate to a 1998 Management Trust. In the 1998 Management Trust, an aggregate of $7 million was left in trust for B's grandchildren; however, that amount was offset by the fair market value of the assets held in the 1998 Family Trust. The remainder of the estate was held in trust for Laura for her life. Laura then had a power of appointment similar to the power contained in the 1997 will, except the remaining one-half (or the entire remainder if Laura did not exercise the power of appointment) was distributed to the Belton Kleberg Johnson Foundation. Although the trust lists some organizations which B desired to be the primary focus of distributions from the foundation, the trustee of the foundation ultimately controlled the distributions.

B's 1999 will left his estate to the 1998 Management Trust as amended and restated in 1999. The 1998 Management Trust as restated no longer mentioned a distribution in trust for the grandchildren. The entire estate is instead held in trust for Laura for her life, and the provisions upon her death regarding the remainder were unchanged from the 1998 Management Trust.

C. The Attorneys and the Claims

The Lawter Firm represented the following plaintiffs during the course of the

underlying controversy: (1) B's daughter Sarah, individually and as a beneficiary of her 1962, 1970, 1976, and 1990 trusts; (2) B's daughter Ceci, individually and as a beneficiary under her 1962, 1970, 1976, and 1996 trusts; (3) B's daughter-in-law Hager, individually, as successor-in-interest to Kley, as executrix of Kley's estate, as co-trustee of Kley's 1970 trust, and as beneficiary of the trusts created under Kley's will; (4) B's granddaughter Alice, individually and as next friend for her brother Henry; (5) Houston Trust Co., as trustee of the 1962 trusts of Sarah and Ceci and their descendants, as co-trustee of the 1970 trusts for Sarah and Ceci and their descendants, and as trustee of the 1990 and 1996 management trusts; and (6) Carper Capt, as co-trustee of the 1970 trust for Hager and Kley's descendants. The Hartnett Firm represented all of B's grandchildren with the exception of Alice and Henry.

Each of the individual plaintiffs and all of the trustee plaintiffs sued B for breach of his fiduciary duties in relation to the children's trusts and the dissolution of Johnson Properties. Each of the individual plaintiffs also sued B's widow Laura for tortiously interfering with their inheritance rights and contested the validity of the will and codicil admitted to probate. They further sought to probate several alternative wills and codicils. B's grandchildren also sued J.P. Morgan for breaching its fiduciary duties arising from the 1998 Family Trust. Finally, Sarah and Ceci contested the management trusts. All of the plaintiffs will collectively be referred to herein as "Appellees."

UNDUE INFLUENCE—SUFFICIENCY OF THE EVIDENCE

A. Law on Undue Influence

"[U]ndue influence implies the existence of a testamentary capacity subjected to and controlled by a dominant influence or power." *Rothermel v. Duncan,* 369 S.W.2d 917, 922 (Texas 1963). *Rothermel* [is] the seminal Texas will contest case" in which the Texas Supreme Court established a three-part test to determine whether undue influence exists. *Estate of Davis v. Cook,* 9 S.W. 3d. 288, 292 (Tex. App.-San Antonio 1999, no pet). To prevail on an undue influence claim, the contestant must prove: (1) the existence and exertion of an influence; (2) the effective operation of such influence so as to subvert or overpower the mind of the testator at the time of the execution of the testament; and (3) the execution of a testament which the maker thereof would not have executed but for such influence. *Rothermel,* 369 S.W. 2d at 922; *Estate of Davis*, 9 S.W. 3d at 292-93. The burden of proving undue influence is upon the party contesting its execution. *Rothermel*, 369 S.W.2d at 922; *Estate of Davis*, 9 S.W. 3d.at 293. It is, therefore, necessary for the contestant to introduce

some tangible and satisfactory proof of the existence of each of the three elements. *Rothermel*, 369 S.W.2d at 922; *Estate of Davis*, 9 S.W. 3d at 293.

Not every influence exerted by a person on the will of another is undue. *Rothermel*, 369 S.W.2d at 922; *Estate of Davis*, 9 S.W. 3d.at 293. Influence is not undue unless the free agency of the testator was destroyed and a testament produced that expresses the will of the one exerting the influence. *Rothermel*, 369 S.W.2d at 922; *Estate of Davis*, 9 S.W. 3d.at 293. One may request or even entreat another to execute a favorable dispositive instrument, but unless the entreaties are shown to be so excessive as to subvert the will of the maker, they will not taint the validity of the instrument with undue influence. *Rothermel*, 369 S.W.2d at 922. "Influence that was or became undue may take the nature of, but is not limited to, force, intimidation, duress, excessive importunity[,] or deception used in an effort to overcome or subvert the will of the maker of the testament and induce the execution thereof contrary to his will." *Id.*

The exertion of undue influence is usually a subtle thing, and by its very nature usually involves an extended course of dealings and circumstances. *Id.* Undue influence may be shown by direct or circumstantial evidence, but will usually be established by the latter. *Id.; Estate of Davis*, 9 S.W. 3d.at 293 "[A]ll of the circumstances shown or established by the evidence should be considered; and even though none of the circumstances standing alone would be sufficient to show the elements of undue influence, if when considered together they produce a reasonable belief that an influence was exerted that subverted or overpowered the mind of the testator and resulted in the execution of the testament in controversy, the evidence is sufficient to sustain such conclusion." *Rothermel*, 369 S.W.2d at 922. Circumstances relied on as establishing the elements of undue influence must be of a reasonably satisfactory and convincing character, and they must not be equally consistent with the absence of the exercise of such influence. *Id.; Estate of Davis*, 9 S.W. 3d.at 293. "This is so because a solemn testament executed under the formalities required by law by one mentally capable of executing it should not be set aside upon a bare suspicion of wrongdoing." *Rothermel*, 369 S.W.2d at 922-23.

B. Evidence on Elements of Undue Influence

Although the parties cite cases in support of their respective positions, no two cases involving undue influence are alike, and each case must stand or fall depending upon the sufficiency of the facts proven. *Id* at 921. Attempting to analyze each item of evidence relied

upon by the parties would unnecessarily lengthen an opinion. *Id.* That is especially true in this case which took four months to try and resulted in a voluminous record. Although we do not attempt to summarize all of the evidence, we discuss at length some of the evidence supporting the jury's finding as to each of the three elements necessary to prove undue influence.

1. Overpowering the Testator's Mind

Where there is competent evidence of the existence and exercise of undue influence, the issue as to whether undue influence was effectually exercised necessarily turns the inquiry and directs it to the state of the testator's mind at the time of the execution of the testament, since the question as to whether free agency is overcome by its very nature comprehends such an investigation. *Id* at 923. "The establishment of the subversion or overpowering of the will of the testator is generally based upon an inquiry as to the testator's mental or physical incapacity to resist or the susceptibility of the testator's mind to the type and extent of the influence exerted." *Id.* "Words and acts of the testator may bear upon his mental state." *Id.* "Likewise, weakness of mind and body, whether produced by infirmities of age or by disease or otherwise, may be considered as a material circumstance in establishing this element of undue influence." *Id.*

Conflicting expert testimony was presented regarding B's susceptibility to undue influence. The evidence established that B was an alcoholic, and psychological and medical tests showed that the alcohol had an adverse effect on his mental state. Although B received both in-patient and out-patient alcohol rehabilitation services several times before his marriage to Laura, the record contains no evidence that Laura made any effort to stop B's drinking, which he admitted was on-going when he was hospitalized in 2000 and diagnosed with pancreatic cancer.

Dr. Christopher Ticknor, a psychiatrist called by the Appellees, met B while Dr. Ticknor was treating B's son, Kley. Ticknor described the medical tests performed on B in 1990 during one of his rehabilitation efforts. The tests showed organic brain syndrome/memory dysfunction. Hospital records from 1997 showed a history of continued drinking, including a two-week binge just a few days before the hospitalization. The 2000 medical records also included evidence of an on-going history of drinking. Although the psychiatrist who saw B in 2000 did not recommend in-patient treatment, his notes reflect a concern about B's drinking, recommending B stop drinking or seek treatment.

Richard Coons, another psychiatrist called by the Appellees, testified that B feared abandonment, having lost his mother while he was young. Dr. Coons opined that B feared abandonment by Laura. Dr. Coons further opined that B's permanent cognitive defects, continued drinking, and personality features caused him to be vulnerable to undue influence.

Finally, William Dailey, a neuropsychologist called by the Appellees, testified that the 1990 tests showed B had significant memory deficit. Dailey opined that the testing was valid and that the decline in B's cognitive function increased his vulnerability to undue influence.

Richard Fulbright, a clinical neuropsychologist called by the Appellants, did not provide an opinion on undue influence. Edgar Nace, a psychiatrist called to testify by the Appellants, testified that B was not unduly influenced. Nace's testimony, however, did not differentiate between an expert medical opinion regarding undue influence and a jury's finding of undue influence. An expert's medical opinion is based on a person's mental susceptibility to undue influence independent of the facts, while a jury's finding of undue influence takes into consideration the actual facts of the case in determining whether a person was, in fact, unduly influenced. Moreover, at his deposition, Nace was asked hypothetically whether Laura could have unduly influenced B by putting a gun to his head. In his deposition, Nace responded that he was unsure; however, at trial, Nace testified the gun example would be an example of undue influence based on common sense. The jury could consider these conflicts in Nace's testimony in weighing his credibility.

The jury was required to weigh the foregoing expert testimony and determine the credibility of the testimony based on the experts' challenges to each others' opinions and extensive cross-examination challenging each expert's opinion. *See City of Keller*, 168 S.W. 3d at 819 (jurors may choose to believe one witness and not another and determine the weight to be given the evidence). Based on the expert testimony, the jury could have found that B was susceptible to undue influence, and given his on-going history of alcoholism, ample opportunity existed to unduly influence B while he was drinking.

2. Existence & Exertion of an Influence

"[T]he establishment of the existence of an influence that was undue is based upon an inquiry as to the nature and type of relationship existing between the testator, the contestants[,] and the party accused of exerting [the] influence." *Rothermel*, 369 S.W.2d at 923. Similarly, establishment of the exertion of such influence is generally predicated upon an inquiry about the "opportunities existing for the exertion of the type of influence or

deception possessed or employed, the circumstances surrounding the drafting and execution of the testament, the existence of a fraudulent motive, and whether there has been an habitual subjection of the testator to the control of another." *Id.*

Although several business associates testified that B made his own decisions and could not be controlled, the vast majority of those business associates testified that B either never drank or was never intoxicated in their presence. As a result, these associates were unaware of how B would respond to influence exercised while he was drinking or intoxicated. The jury would have the right to consider whether in a period of intoxication B's otherwise strong intellect yielded to unduly exerted importunities. *See Craycroft v. Crawford,* 285 S.W. 275, 278 (Tex. 1926).

Evidence was presented that B drank alcoholic beverages during his taped interviews with Martin Booth, who was writing a book about B's life. In one interview excerpt in which the jury could infer B was intoxicated, the following exchange occurred:

> MARTIN BOOTH: You were officially engaged in the eyes of the world. Everybody knew about it.
>
> LAURA JOHNSON: A tiny—tiny, tiny diamond, as you can see.
>
> MARTIN BOOTH: Yes, a minute diamond. And then you set a wedding date, presumably.
>
> LAURA JOHNSON: Yes.
>
> MARTIN BOOTH: Which was when?
>
> LAURA JOHNSON: Which was the 8th of November, with 8 being the lucky Chinese number, 8th of November, nineteen ninety—what year, Darling?
>
> B JOHNSON: What—when was it?
>
> LAURA JOHNSON: When was it Darling?
>
> B JOHNSON: I don't—
>
> LAURA JOHNSON: You have two strikes and you're out.
>
> B JOHNSON: It was three—three from '97, wasn't it?
>
> LAURA JOHNSON: No. Two strikes and you're out.
>
> B JOHNSON: '96
>
> LAURA JOHNSON: Oh, good boy, you can stay in the game. You can come home with me.

At trial, this clip was played for Howard Nolan, the president of United Way of San

Antonio at the time B was asked to serve as chair of the United Way campaign. Nolan stated that he was uncertain if B was drinking during the taping, but it did not sound like the B he knew. The jury was free to conclude from this taped excerpt that B was intoxicated.

Several of the employees who worked in B's office, including Rita Sullivan and Madeleine Sandefur, testified regarding B's on-going drinking, as did his daughters and sons-in-law. Ceci testified that B would disappear for weeks when he was on a binge and could wind up in a different county, state, or country. Testimony was introduced that any flight B chartered was stocked with vodka, and in a nine-month period in 1999, B spent almost $7,000 on liquor and wine. Evidence was also introduced about B's mental abilities while intoxicated. For example, several witnesses testified that B would call late at night or early in the morning after he had been drinking and want to have long, rambling conversations. Rita Sullivan testified that B called her at 2:00 a.m. to ask her how to use the remote control to the television. Sullivan also called B's attorney for advice when B called Sullivan while intoxicated to obtain a $200,000 nonrefundable check to purchase a house. Martin Booth testified that B called him one night while intoxicated to report an improvement in his health and then called again the following day and repeated his report. Ceci testified that following his drinking binges, B would be depressed and contrite. The book written by Booth stated that B's drinking caused him problems, recounting that his fellow directors on AT & T's board of directors became concerned about his drinking, and B missed a party in his honor after he became intoxicated while drinking on a train on his way to the party. One time B ordered an employee to purchase tickets to Santiago, Chile, but when the employee called B about going to the airport, B had no recollection of requesting the trip. In contrast to this evidence of B's significant drinking and its effect on his conduct, Laura denied that B had a drinking problem or was ever intoxicated in her presence.

Ceci also testified that before B married Laura the family was traditionally informed of B's estate planning. Ceci testified that B did not keep his estate plan a secret, and they approached the plan as a team. After B met Laura, however, the evidence established that a decision was made during the course of the estate planning meetings not to tell Ceci and Sarah about the dissolution of Johnson Properties or the formation of the 1998 Family Trust. Notes from estate planning meetings and telephone conferences contained numerous statements by the estate planning professionals reassuring and encouraging B not to disclose the estate plan to Ceci and Sarah.

Evidence was admitted that when Stacy Eastland was first considering the family limited partnership structure for the estate, the children were included in the partnership. However, in mid-July of 1997, the estate planning notes reflect that Ceci and Sarah were to be left out because they were "turning against" B. B was admitted to a hospital in Hong Kong on July 23, 1997. The hospital records reflect that B had been on a two-week drinking binge only days before his admission into the hospital. Around this same time, Eastland testified that B's comments during a telephone conference were not ordinary, and he could have been intoxicated, so they decided to re-do the phone call. Peter Milton from J.P. Morgan previously had told Eastland to call B in the morning because of his excessive drinking.

Appellees contend the evidence also established a habitual subjection of B to Laura's control. Although B had a prenuptial agreement with his second wife, Lynne, Laura refused to consider a prenuptial agreement, and B expressed concern that his insistence on a premarital agreement would seriously interfere with their relationship. B discussed his estate plan with Laura prior to their marriage, and Laura attended numerous estate planning meetings. Although Laura testified that she did not pay attention and was not engaged during the meetings, other estate planning professionals at the meetings testified that Laura was attentive and made comments.

Laura also tried to suggest to the jury that she was not a businesswoman as a reason for her lack of involvement, but several witnesses who were B's business associates testified that she was a smart businesswoman. Laura owned or co-owned several businesses in Hong Kong before she met B, and she helped run those businesses. One of those businesses was a pub called Mad Dogs. B invested with Laura to open a Mad Dogs at the Hyatt in San Antonio, and B loaned the business $1.4 million. After B died, a settlement was reached in which B's estate was paid only approximately $.50 for each dollar loaned and B's estate relinquished the ownership interest B had in the business. While negotiating the settlement, Milton sent an email noting the loan was unsecured. In the email, Milton stated, "Believe me B Johnson screwed this up to a fair-thee-well as we used to say up east." In another email, Milton commented, "I am a little annoyed that I didn't know how well financed Mad Dogs was. On the other hand I think that we have done more than B Johnson would have done to protect his assets; he was not good about separating his love from his assets. That is a direct quote from him." Although Laura denied negotiating the compromise with regard to Mad

Dogs, another email from Milton to Copley discussing the negotiation of the compromise refers to a meeting with Laura and another person. In the email, Milton stated, "B should never have given this kind of money to Mad Dogs of San Antonio. I think it was love not sense."

Prior to B and Laura's marriage, one note by Copley stated that Laura wanted to know what the children were getting under the estate plan. One letter summarizing certain estate planning documents had writing in the brown felt tip pen B traditionally used, but also had writing in a red pen. The jury could infer from the evidence and testimony that Laura had reviewed the document and made comments.

On a few occasions, B requested that Copley investigate whether the King Ranch royalties and a house in Cabo San Lucas could be left to his children, but subsequently called and stated that he changed his mind. The jury could infer that B changed his mind after discussions with Laura. With regard to the house in Cabo San Lucas, Laura testified that B immediately rejected Sarah's request that the house be left to the daughters/grandchildren for tax reasons; however, the evidence established that B asked Copley to research the issue and had not made an immediate decision. With regard to the King Ranch royalties, evidence was presented that B stated in a conversation with his children in 1999 that the King Ranch royalties were to be kept in the family, and that Laura, who overheard the discussion, stated she would never take a family heirloom. By 1999, however, the King Ranch royalties had been transferred to BKJ Interests, and under the estate plan, the King Ranch royalties would not remain in the family but would eventually be controlled by the foundation. Evidence was presented that in 2000 B again broached Copley with the idea of leaving the King Ranch royalties to the children. Copley sent an email regarding his conversation with B about this request in which Copley stated leaving the King Ranch royalties to the children "would require an audit of his estate, whereas, at the present time, it is a non-audit." At trial, however, Copley stated that a "slight chance" existed that leaving the King Ranch royalties to the children would enhance "the possibility of an audit." Moreover, in his letter to B regarding the manner in which such a transaction could be structured, Copley spent considerable time discussing the tremendous tax consequences of the transaction and concluded, "the tax cost is heavy." When Eastland was asked, however, whether there would have been "tax efficient ways" to transfer the King Ranch royalties to the children, he responded that there were, and he would never have told B not to leave the King Ranch

royalties to the children. Moreover, evidence was presented from which the jury could find that Copley represented Laura on several legal matters and could have a conflict of interest in providing advice that would result in assets being left to the children, thereby diminishing the assets in the life estate left to Laura.

Laura also retained the family scrapbooks and photo albums, claiming that B did not want Ceci and Sarah to have them until after Patsy died; however, the evidence established that Laura did not return the family scrapbooks and photo albums even after Patsy died, but kept possession of them for the duration of the trial. Evidence also was presented that Laura refused to give B's granddaughter, Alice, a silver spoon set that B wanted her to have. Although Laura testified that the attorneys had told her not to give away any of the estate assets because of the pending litigation, evidence established that she gave items belonging to the estate to other non-family members.

Prior to meeting Laura, B was an avid hunter and often hunted with his children and grandchildren. As the book on B's life stated, "B lived to hunt." After meeting Laura, B rarely hunted. In one of his notes to his employee Madeleine Sandefur, B stated that dove hunting continued to be a problem for Laura. B was scheduled to hunt on property belonging to his ranch manager, Claude Johnson; however, the hunt did not occur after Claude expressed his concerns about offending Laura. Although B issued a press release and was quoted in a newspaper saying that he purchased Black Creek Ranch intending to continue its commercial hunting operations, to continue the tradition of South Texas hunting, and to hunt with his grandchildren, no hunting was permitted on Black Creek after the first year's commercial commitments were fulfilled. Although Laura testified that B and she agreed before Black Creek was purchased to end the hunting, Laura's testimony was inconsistent with the newspaper accounts of B's remarks. Moreover, a passage in the book about B's life also states Laura put an end to the hunting.

B had expressed to Ceci that he was glad Laura was older and would not want children. The record contains evidence that B underwent sperm testing in 1995 prior to his marriage to Laura. Laura subsequently underwent in vitro fertilization. The evidence was conflicting as to whether at some point Laura became pregnant. Laura testified that home pregnancy tests taken in November of 1998 showed that she was pregnant. Although Laura subsequently went to a hospital to be checked, the testing did not show anything in her uterus, but a hormone that becomes elevated during pregnancy was in fact elevated. There

was some suggestion, however, that the elevated level could have been caused by the in vitro procedure. When B called Ceci and Sarah to tell them they lost a baby, Ceci and Sarah were shocked and reacted negatively. Ceci sent a letter apologizing, which Ceci testified would normally reopen communications. The evidence contained a letter that B had drafted accepting the apology; however, the letter that was actually sent did not accept the apology. Only after a letter was written specifically apologizing to Laura was communication reopened. Sarah testified that when she met B in his office after this incident, B told her that he did not want to have a child, but Laura insisted.

One expert testified that relationship poisoning can be a tool to unduly influence a person, including making negative remarks about a person's children and re-interpreting historical events in a negative manner. Although several people were interviewed for the book about B's life, Ceci, Sarah, and Hager were not interviewed. Instead, Laura was extensively interviewed about events that occurred before she met B. The book contained a suggestion that Kley had committed suicide based on Booth's interview of Laura; however, Laura had no proof that Kley committed suicide, and other evidence established that he was killed in a car accident, likely driving while intoxicated. In the early 1990's, before B met Laura, B was having financial trouble; B and Laura's interviews for the book conflict as to whether Ceci and Sarah knew of the extent of the financial trouble. Laura said they did; B said they did not. B sold the Chaparrosa ranch to alleviate the financial trouble. The children's' trusts, which also owned an interest in the ranch, sued B because the sales agreement had money going to J.P. Morgan before the trusts, and the trustees did not believe the trusts were receiving the amount they were entitled to receive from the sale. Laura stated in an interview that Ceci and Sarah filed the lawsuit to bury B financially; however, B had stated Ceci and Sarah did not know the extent of his financial trouble. The jury could consider Laura's reinterpretation of these historical events in a negative manner as evidence of relationship poisoning.

The jury also heard evidence that Laura made negative remarks about Ceci and Sarah. Laura's friend, Reverend Zbinden, was interviewed by Booth and stated Laura had told him that Ceci and Sarah were greedy and ungrateful. During his deposition, Reverend Zbinden testified it was not unusual for Laura to speak negatively of Ceci and Sarah. Laura told Copley in a telephone conversation that Sarah was vile, not smart, and had the attention span of a gnat. Based on the evidence presented, the jury could infer that Laura also spoke

negatively of Ceci and Sarah to B.

Having reviewed the record, we conclude the evidence is legally and factually sufficient to support a finding that undue influence existed and was exerted.

3. No Execution "But For" the Influence

"Finally, the establishment of the fact that the testament executed would not have been executed but for such influence is generally predicated upon a consideration of whether the testament executed is unnatural in its terms of disposition of property." *Rothermel,* 369 S.W. 2d at 923. During oral argument, the Appellants placed great emphasis on one sentence in this court's decision in *Estate of Davis v. Cook*, 9 S.W.3d 288 (Tex. App.-San Anonio 1999, no. pet). In that case, when describing a jury's consideration of unnatural disposition, we stated, "In this respect, only where *all reasonable explanation for the devise is lacking* may the trier of facts consider the disposition as evidence of disorder or lapsed mentality." *Id.* at 294. (emphasis added). Based on the italicized portion of this statement, the Appellants argued that the standard of review for no-evidence claims in undue influence cases is different than in other types of cases. In short, Appellants contend the evidence could not support a finding of undue influence because evidence was presented establishing a reasonable explanation for B's disposition of his estate. We cannot accept Appellants' interpretation of the quoted portion of the *Davis* opinion because it ignores the standard of review established by the Supreme Court in *City of Keller v. Wilson*, 168 S.W. 3d 802, 827-30 (Tex. 2005), and establishes a totally different standard of review in undue influence cases. Tracing the source for the statement made in *Davis* reveals the fallacy of Appellants' position. The source for the statement in question is *Craycroft v. Crawford*, 285 S.W. 275, 278-79 (Tex. 1926), in which the court stated, "If all explanation be lacking, the trier of fact may take the circumstance as a badge of disordered or lapsed mentality or of its subjugation; if some explanation be advanced, the jury may pass upon its adequacy and attribute to the circumstance and its explanation such weight as may be thought proper, having in view all other relevant evidence." Accordingly, evidence of a reasonable explanation for an unnatural disposition does not prevent a jury from finding undue influence. Instead, where such evidence is preferred, the jury must determine which explanation should be given more weight and which explanation is more credible. In this case, the jury disbelieved the explanation proffered by the Appellants in finding undue influence.

Considering whether the disposition was unnatural, we must consider evidence of

B's stated desires and actions. The evidence established that B made several comments about the interest in the Hyatt being passed to the children/grandchildren. Similarly, evidence established that B was very proud of his heritage and wanted his descendants to inherit the King Ranch royalties. The majority interest in both of those assets, however, was not inherited by the grandchildren. Instead, Laura initially would benefit from the income from those assets during her life, and the interest would then pass to the foundation. Although the Appellants contend Laura did not receive any greater interest in B's estate than B's prior wives, the inclusion of the majority interest in these two assets in Laura's life estate greatly increased its value and was contrary to evidence that B wanted his descendants to inherit those assets. All of the estate planning documents that the jury found were the result of undue influence were executed after the dissolution of Johnson Properties and in connection with the creation of BKJ Interests.

Perhaps more importantly, the 1997 Management Trust expressly lists five charities as the remainder beneficiary after Laura's life estate consistent with the charities B had listed in his prior documents, which included: (1) United Way of San Antonio & Bexar County; (2) Cornell University; (3) National Cowboy Hall of Fame; (4) Trinity University; and (5) Trustees of Deerfield Academy. The evidence established that B had strong ties with these five charities. The documents found to be the product of undue influence eliminate a mandatory distribution to these favored charities. Instead, the remainder beneficiary after Laura's life estate became a perpetual foundation. Although the trust document listed charities that B wanted to be the primary focus of distributions from the foundation, the trustee of the foundation had complete control over the selection of the charities that would benefit from foundation distributions. In addition, the list excluded the National Cowboy Hall of Fame with which B had strong ties, but included a foundation with which B had no ties and which Eastland admitted was mistakenly included. Finally, the list included "[a]ny other organization benefiting conservation, environmental causes, protection of animals, [and] protection of nature or the environment," which described causes supported by Laura, not B. Similarly, the remainder beneficiary of the grandchildren's trust under the 1997 trust document are the five charities B selected, as opposed to the foundation which was the remainder beneficiary in the 1998 trust documents.

The evidence presented was legally and factually sufficient to support a finding that the wills and trusts rejected by the jury would not have been executed but for the undue

influence.

CONCLUSION

After full consideration of the Appellants' claims, we conclude the record supports the jury's finding that Belton Kleberg Johnson executed certain wills and trusts as a result of undue influence. Accordingly, we affirm the judgment of the trial court.

***Wright v. Roberts*, 797 So.2d 992**

COBB, Justice, for the Court:

¶ 1. In December of 1995, attorney Armon Lee prepared wills, a deed, and powers of attorney for Emma Jane Wright and her husband, Homan Wright. Homan signed his will and power of attorney on December 28, 1995, at Lee's law office. Emma Jane signed the deed, her will, and her power of attorney on January 2, 1996, while on her eventual death bed.

¶ 2. The deed conveyed, to the exclusion of her husband Homan, Emma Jane's two-thirds interest in 200 acres of timber in fee simple to Mamie Roberts, a cousin by marriage, and reserved a life estate in a house and one acre of land surrounding the house for Emma Jane and Homan. Emma Jane's will conveyed all of her remaining property to Roberts, in trust for the care of Homan, then to Roberts and to Roberts's children upon Homan's death. Homan's will had parallel provisions. The attorney was not present when Emma Jane signed the instruments. One of the attesting witnesses to Emma Jane's will was the attorney's secretary. The other attesting witness noted on her affidavit that neither the secretary nor Emma Jane identified the document she signed as a will, rather it was referred to as "papers to take care of Homan Wright". She also marked through on the affidavit the part which said "Emma Jane was of sound and disposing mind."

¶ 3. The powers of attorney gave Roberts complete power to run the Wrights' affairs. Attorney Lee had been Roberts's attorney over the years, having done extensive land transaction work for Roberts and her son. Attorney Lee predeceased Emma Jane.

¶ 4. Emma Jane died on January 22, 1996, and a week later, Homan filed suit to set aside the deed and to contest the will which Emma Jane executed. On May 27, 1997, Roberts presented the will for probate and the cases were later consolidated The matter was continued twice because Roberts was hospitalized, and it eventually was heard in August of 1998.

¶ 5. The Chancellor issued his opinion on December 30, 1998, finding the following:

1. A confidential relationship did not exist between Roberts and the Wrights.

2. Even if a confidential relationship existed, Roberts's action of taking all of Emma Jane's real property did not over-reach or abuse her authority as the dominant party to the relationship.

3. Although Emma Jane stated specific items which were inconsistent with the instruments which were executed, she knew the objects of her bounty and the quantity of her estate and had testamentary capacity.

4. Although Dr. Coghlan examined Emma Jane shortly before the execution of the documents and stated her condition at that time as "senile" and suffering from other ailments, such did not meet the legal criteria of lack of capacity.

5. There were no suspicious circumstances surrounding the execution of the documents.

Aggrieved, Homan Wright brings this appeal raising the following six issues:

I. The Chancery Court manifestly erred in not finding specifically that a fiduciary or confidential relationship existed between Emma Jane and Homan Wright and Mamie Roberts and that powers of attorney signed by them interposed no confidential relationship because they were set up only to protect the attorney in fact, Mamie Roberts.

II. The Chancery Court manifestly erred in failing to apply the correct standard, in that the existence of a confidential relationship required independent counseling for both Homan Wright and Emma Jane Wright.

III. The Chancery Court manifestly erred in finding that Mamie Roberts did not overreach or abuse her authority and that the only things done were for Emma Jane's benefit.

IV. The Chancery Court manifestly erred in finding that no "suspicious' facts exist surrounding the execution of the documents.

V. The Chancery Court manifestly erred in finding that the only evidence of lack of capacity was the testimony of Dr. Coughlan and that did not rise to the requisite level of proof.

VI. The Chancery Court manifestly erred in finding that Emma Jane knew the quantity of her estate.

¶ 6. Because we determine that the chancellor abused his discretion and committed manifest error, we reverse and render in part and remand in part.

FACTS

¶ 7. Emma Jane and Homan Wright lived in an old frame house which she had

inherited from her father. They did not have the amenities of an air-conditioner, hot water, telephone or bathroom (only an outhouse). They had married late in life and had no children. Emma Jane managed their finances. At her death, they had been married for twenty-four years. Homan is a retired saw mill and chicken farm worker. He had only attended a few days of school in the first grade, and his literacy was limited to signing his name.

¶ 8. Mamie Roberts was married to one of Emma Jane's cousins and had known Emma Jane for fifty-eight years. When Emma Jane's health declined, Roberts provided her with transportation to the doctor and helped her in other ways. On December 9, 1995, when Emma Jane's medical condition worsened, Roberts took Emma Jane to the hospital where she was admitted. By that time Roberts had begun assisting Emma Jane in paying bills.

¶ 9. Armon Lee, the attorney who prepared the documents, had done extensive work for Roberts and her son. Roberts stated in her deposition that she had chosen Armon Lee to prepare the power of attorney because he was a good attorney. In court she refuted that she had selected the attorney, but stated that she had driven Homan to Armon Lee's office on December 28, 1995 where he signed his power of attorney. Roberts's son was present at the attorney's office when Roberts and Homan arrived. Roberts's son testified that his presence was just a coincidence. Homan was never consulted regarding his wishes. No one identified the instrument as a broad power of attorney, and Homan thought he was signing something which would allow Roberts to take care of his mail. Homan testified that he would not have signed otherwise. Roberts testified that she requested that the Wrights execute powers of attorney in her favor to facilitate her helping them with their affairs and to protect herself.

¶ 10. Roberts testified that her son was fairly sophisticated concerning real estate and that he had "owned a good bit, and his dad before him owned a good bit." When asked if her son had ever met with Armon Lee to discuss how the documents were to be prepared, Roberts replied, "Not about that, I don't think. But now he was with Mr. Lee. He's, he's a busy man, and Mr. Lee did his work."

¶ 11. Roberts conceded that Lee was an attorney with whom Emma Jane had never had prior dealings. She asserts that Armon Lee first came into contact with Emma Jane when he brought a deed unconnected with the Wrights' property to the hospital for Roberts to sign when she was visiting Emma Jane.

¶ 12. Roberts's brief states "[i]t was Emma Jane who talked to Attorney Lee about

the deed, and it was Emma Jane who was in contact with Attorney Lee by phone as to the other instruments." Yet Roberts testified that within a few days of having the power of attorney drafted, she had the deed and will made in her favor. It is undisputed that the powers of attorney, the deed and wills were prepared at the same time.

¶ 13. Emma Jane, already very ill, had a particularly bad night of January 1, 1996. Around noon the next day, Roberts visited Emma Jane and Homan at the hospital. During that visit, Roberts called Lee's secretary to ask if the documents were ready and to request that someone bring them to the hospital because Emma Jane was "ready to sign her papers." Although Lee was at lunch, his secretary brought the documents immediately. Five or six relatives, including Roberts, were in Emma Jane's hospital room when the secretary arrived. There was testimony of a general confusion in the room and that Roberts was telling jokes. There was conflicting testimony concerning whether the documents were actually read word for word. After approximately one and one half hours of coaxing Emma Jane signed the instruments. There was testimony that she was confused during the process, apparently thinking she was writing a check and that she had asked for, but was not given her glasses. *After* executing the documents, Emma Jane told the secretary of several bequests that she would like for her will to contain. These bequests included a gift of the one-half acre of land that she had just deeded to Roberts and Roberts's son. None of the requested changes were made prior to her death three weeks later.

STANDARD OF REVIEW

¶ 14. A chancellor's findings of fact will not be disturbed unless they are manifestly wrong or clearly erroneous, or unless the chancellor applied an erroneous legal standard. If the Chancellor's findings are supported by substantial, credible evidence in the record, this Court will not reverse. *In re Estate of Grantham*, 609 So.2d 1220, 1223 (Miss. 1992).

¶ 15. Homan Wright's six assignments of error in essence claim that the chancery court committed manifest error by not finding that Mamie Roberts and Emma Jane had a confidential relationship and that Roberts exerted undue influence over Emma Jane through this confidential relationship. Because of this alleged undue influence, Homan argues that both the will and deed in question must be voided.

¶ 16. The law in this state on fiduciary or confidential relationships and undue influence is well settled. Its application has been made to both inter vivos and testamentary transactions. *Murray v. Laird*, 446 So.2d 575, 578 (Miss. 1984). With both gifts testamentary

and gifts inter vivos, once the presumption of undue influence has been established, the burden of proof shifts to the beneficiary/grantee to show by clear and convincing evidence that the gift was not the product of undue influence. *In re Estate of Dabney*, 740 So.2d 915, 921 (Miss. 1999).

I. Did a Confidential Relationship Exist Between Emma Jane and Roberts?

¶ 17. This Court has long held that a confidential relationship does not have to be a legal one, but the relation may be moral, domestic, or personal. The confidential relationship arises when a dominant, over-mastering influence controls over a dependent person or trust, justifiably reposed. *Murray v. Laird*, 446 So.2d at 578. Whenever there is a relation between two people in which one person is in a position to exercise a dominant influence upon the other because of the latter's dependency upon the former, arising either from weakness of mind or body, or through trust, the law does not hesitate to characterize such relationship as fiduciary in character. *Madden v. Rhodes*, 626 So.2d 608, 617 (Miss. 1993).

¶ 18. This Court has enumerated several factors to consider in determining whether a confidential relationship exists: (1) whether one person has to be taken care of by others, (2) whether one person maintains a close relationship with another, (3) whether one person is provided transportation and has their medical care provided for by another, (4) whether one person maintains joint accounts with another, (5) whether one is physically or mentally weak, (6) whether one is of advanced age or poor health, and (7) whether there existed a power of attorney between the one and another. *Dabney*, 740 So.2d. at 919.

¶ 19. Emma Jane and Roberts's relationship had become confidential in nature even before the powers of attorney were signed. Emma Jane had relied on Roberts's son for advice regarding the sale of timber off her land. He had negotiated oil leases for her. He had also arranged for repairs and maintenance on the Wrights' home. When Emma Jane became ill in 1995, Roberts began taking her to the doctor. Roberts admitted her to the hospital in December of 1995. By that time, Emma Jane had entrusted her purse to Roberts who assisted the Wrights in paying their bills. This arrangement continued throughout Emma Jane's hospitalization.

¶ 20. Clearly, Emma Jane was of advanced age, in poor health, physically and mentally weak and was dependent on Roberts for transportation and medical care. They were related by marriage and had been friends for fifty-eight years. Considering the *Dabney* factors, Homan proved by clear and convincing evidence that Roberts had a confidential

relationship with Emma Jane.

II. Did Roberts Abuse Her Confidential Relationship with Emma Jane?

¶ 21. Having ascertained that a confidential relationship existed between Roberts and Emma Jane, the next inquiry is whether Roberts abused that relationship. With regard to the deed, there is a presumption that it is a product of undue influence, which Roberts must rebut by clear and convincing evidence. With regard to the will, additional proof is required in order to raise the presumption of undue influence and shift the burden of proof to Roberts.

> [A]lthough the mere existence of confidential relations between a testator and a beneficiary under his will does not raise a presumption that the beneficiary exercised undue influence over the testator, as it does with gifts *inter vivos,* such consequence follows where the beneficiary 'has been actively concerned in some way with the preparation or execution of the will, or where the relationship is coupled with some suspicious circumstances, such as mental infirmity of the testator;' or where the beneficiary in the confidential relation was active directly in preparing the will or procuring its execution, and obtained under it a substantial benefit.

Croft v. Alder, 237 Miss. 713, 723-24, 115 So.2d 683, 686 (1959).

When there is a fiduciary or confidential relation, and there is a gift or conveyance of dubious consideration from the subservient to the dominant party, it is presumed void. This is not because it is certain the transaction was unfair; to the contrary, it is because the Court cannot be certain it was fair. *Estate of McRae*, 522 So.2d 731, 737 (Miss. 1988). Given the finding that a confidential relationship does exist between beneficiary and the testatrix and that the beneficiary has been actively concerned in some way with the preparation or execution of the will, the law raises a presumption that the beneficiary exercised undue influence over the testatrix, and casts upon the beneficiary the burden of disproving undue influence by clear and convincing evidence. *Dabney*, 740 So.2d. at 920.

¶ 22. While Emma Jane was in the hospital, Roberts took Homan to the law office of Armon Lee. Neither Emma Jane nor Homan had any prior dealings with Armon Lee, nor had Homan ever met him prior to this time. Further, Homan did not ask to be taken to Lee. Roberts conceded that she selected Armon Lee to prepare the powers of attorney, the deed and the wills. Roberts's son was meeting with Lee when Mamie Roberts and Homan arrived at Lee's office. After Roberts's son left, Homan was asked to sign "a paper" which he

believed would only allow Roberts to take care of his mail. Instead, the instrument was a broad power of attorney for Roberts to conduct *all* of Homan's affairs. Further, Lee's secretary testified that she had first learned about someone wanting these documents prepared from Mamie Roberts.

¶ 23. There is substantial evidence in the record to demonstrate that the beneficiary of the will, Mamie Roberts, had been actively involved with both the preparation and execution of the will. Therefore, there is a presumption that Roberts exercised undue influence over Emma Jane, and the burden of proof shifts to Roberts to rebut.

[Once] the circumstances give rise to a presumption of undue influence, then the burden of going forward with the proof shifts to the grantee/beneficiary to prove by clear and convincing evidence of: (1) good faith on the part of the grantee/beneficiary; (2) grantor's[/testator's] full knowledge and deliberation of his actions and their consequences; and (3) [independent consent and action by the grantor/testator]. *Murray,* 446 So.2d at 578.

III. Did Roberts Rebut the Presumption of Undue Influence by Clear and Convincing Evidence?

A. Did Roberts prove she exercised good faith by clear and convincing evidence?

¶ 24. This Court has previously stated that the important factors for the appellate court to consider in determining whether the grantee/beneficiary used good faith are:

> "(a) the determination of the identity of the initiating party in seeking preparation of the instrument, (b) the place of the execution of the instrument and in whose presence, (c) what consideration and fee were paid, if any, and (d) by whom paid, and (e) the secrecy or openness given the execution of an instrument." *Id.*

¶ 25. Roberts and her son had both tried to buy Emma Jane's land on several occasions. With Emma Jane's permission, Roberts's son had put a cabin built by their grandfathers on the land in the 1970's. He stated that it was his desire that the property with which he had been familiar all his life, and on which he had hunted over the years, remain in his family. He testified that he offered to buy the land from Emma Jane, but that she "definitely" did not want to sell it. He later testified that he never "tried to buy Mrs. Wright's part," rather the remaining one-third interest owned by Emma Jane's closest blood relatives in Birmingham, Alabama. Roberts herself testified: "I went out there, and it was hot, it was hot as it could be. And I said, 'Emma, why don't you sell me this land and let me help you get somebody to put you in a bathroom and things that you need and an air conditioner.' "

Homan testified, regarding the land, that "[e]ver time, Mrs. Mamie Roberts tried to buy it."

¶ 26. Roberts stated that she did not consider Homan capable of caring for himself and that she had arranged for him to be admitted to a personal care home while Emma Jane was in the hospital. Yet at the time of trial (three years later) Homan was still living independently ... even gardening.

¶ 27. Emma Jane's primary concern was that Homan was cared for after her death. Regarding her power of attorney over the Wrights' affairs, Roberts testified that she had believed she "might have to sell some of the timber to take care of Homan, because he needed eye surgery." Nevertheless, her attorney prepared documents giving *her* Emma Jane's timber. In her brief she stated: "There was no need for either of them, especially Homan, to own any land beyond the reserved life interest." Additionally, Lee was never paid for his services, nor was anyone ever billed.

¶ 28. Roberts's only evidence of good faith was her testimony that she intended only to do what was in Homan's best interest, since she had promised Emma Jane she would take care of Homan for the rest of his life. This testimony is insufficient to rebut the undisputed evidence to the contrary.

¶ 29. Roberts selected the attorney, arranged for the preparation of the documents in which she was a beneficiary, and attended their signing. Emma Jane was presented the documents while lying sick in her hospital bed. Any consideration given by Roberts was dubious, at best, consisting primarily of an illusory promise to take care of Homan in the future.

¶ 30. Roberts has failed to prove by clear and convincing evidence that she acted in good faith in her dealings with Emma Jane.

B. Did Roberts prove Emma Jane had full knowledge and deliberation of her actions and their consequences by clear and convincing evidence?

¶ 31. This Court has not hesitated to set aside instruments where there were suspicious circumstances regarding their execution. In one such case involving an elderly couple, no consideration was given for a deed, the grantors thought they were signing a will, the wife was physically exhausted by caring for her husband, both lacked mental capacity, and one thought they could still sell the property. *Ladner v. Schindler,* 457 So.2d 1339 (Miss. 1984). This Court has stated:

> Factors important to address the grantor/testator's knowledge, at the time of

> execution of any instrument are (a) his awareness of his total assets and their general value, (b) an understanding by him of the persons who would be the natural inheritors of his bounty under the laws of descent and distribution or under a prior will and how the proposed change would legally affect that prior will or natural distribution, (c) whether non-relative beneficiaries would be excluded or included and, (d) knowledge of who controls his finances and business and by what method, and if controlled by another, how dependent is the grantor/testator on him and how susceptible to his influence. *Murray*, 446 So.2d at 578.

¶32. Emma Jane's physician, Dr. Coghlan, had seen her near the time she signed the documents. He testified: (1) Because she was in congestive heart failure she might not have been getting adequate oxygen to her brain, and it may have affected her mental ability some; (2) She would not take the oxygen which would affect her ability to remain conscious to a certain extent; (3) In noting that he would not rely on her ability to understand the effect of signing a deed conveying real property on that date, he stated, "... if I were dealing in some kind of business deal with her, I would not have thought she was competent to make the business arrangement ... I had a problem with the decisions that she made in regard not to eat, not to take her medication, and not to do anything along that line that would have been contributing to her health."

¶33. During that period of time, Dr. Coghlan noted that she was probably unable to concentrate due to the state of her health. It was his impression that Emma Jane was senile prior to and including the time during which she signed the documents.

¶ 34. In addition to Dr. Coghlan's testimony, there was other evidence of Emma Jane's lack of capacity. Testimony by Roberts and the lawyer's secretary showed lack of capacity. Roberts conceded Emma Jane seemed confused and believed that she was writing a check for legal services. The lawyer's secretary testified that after signing away her real property by deed, Emma Jane then attempted to convey by will land which she had just deeded away.

¶35. Roberts also admitted that Emma Jane asked for, but was not given, her glasses. Regarding the documents, Roberts stated, "She couldn't read 'em very well. She wanted her glasses.... They were in the drawer right there by her, in her bed, in the stand...." Emma Jane's confusion at the time of signing clearly created doubt as to whether she knew the

quantity of her estate.

¶ 36. Roberts has failed to present clear and convincing proof that Emma Jane exhibited full knowledge and deliberation of her actions.

C. Did Roberts prove Emma Jane had independent consent and action?

¶ 37. We have previously stated that "[t]he participation of the beneficiary/grantee, or someone closely related to the beneficiary, arouses suspicious circumstances that negate independent action. *Harris v. Sellers*, 446 So.2d 1012, 1015 (Miss. 1984).

¶ 38. This third prong of the *Murray* test for rebutting the presumption of undue influence, was formerly stated by this Court as, "Advice of (a) competent person, (b) disconnected from the grantee and (c) devoted wholly to the grantor/testator's interest." *Murray*, 446 So.2d at 578. However, three years later this Court revised the third prong, stating:

> The independent advice prong of Murray has been read too strictly. Considering the heavy burden placed upon one seeking to overcome the presumption of undue influence, we find it necessary to redefine the third prong of the Murray test. This we do to the end that the power our law vest in property owners to make bona fide inter vivos gifts not be practically thwarted by often impossible evidentiary encumbrances. We declare that the appropriate third prong of the test is a requirement that the grantee/beneficiary prove by clear and convincing evidence that the grantor/testator exhibited independent consent and action. *Mullins v. Ratcliff*, 515 So.2d at 1193.

¶ 39. There is no proof that Emma Jane or Homan spoke with any other attorney independent of Armon Lee, the Roberts's attorney, before or after signing the documents. When Roberts was asked if she were aware of whether Emma Jane or Homan had ever talked to any attorney other than Armon Lee regarding the documents, she stated that she was not. Roberts and her son used Armon Lee extensively as their attorney. Roberts testified that neither Emma Jane nor Homan had ever contacted Armon Lee to perform legal services.

¶ 40. Roberts in one instance stated that she procured the preparation of the documents, but in another she denied this. It appears that the documents were prepared before the Wrights were consulted, because Lee's secretary, based upon personal knowledge, believed that Homan could not write his name and had typed spaces for his mark to be

attested by witnesses. It was Roberts's son who brought to the secretary's attention the fact that Homan could sign his name. If the Wrights had, in fact, consulted the lawyer, he would have likely determined such information. Furthermore, the documents were prepared in early December, and some were not signed until the next month. Lee's secretary testified that Emma Jane was hesitant in signing the will. Even Roberts stated: "I didn't know whether she was [going to sign] or not. She wanted to think about it, and she wanted to think about selling the place...." Roberts told Emma Jane that if they kept the secretary too long, it would cost them money. In an attempt to convince Emma Jane to sign, Roberts told her that if she did not sign, her property would go to the state and the lawyers. Roberts's brief unconvincingly states that this was not an effort to coax Emma Jane, rather, merely an "expression of frustration."

¶41. It is clear from the record that Roberts failed to prove by clear and convincing evidence that Emma Jane exhibited independent consent and action.

CONCLUSION

¶42. Homan showed by clear and convincing evidence that a confidential relationship existed between Emma Jane and Roberts, thereby creating a presumption that the deed was the product of undue influence. Homan has further shown that Roberts abused that confidential relationship by being involved in the preparation and execution of Emma Jane's will, under which Roberts was the main beneficiary, raising a presumption that the will was the product of undue influence. In order to rebut this presumption of undue influence, Roberts had to prove by clear and convincing evidence (1) good faith on her part, (2) full knowledge and deliberation of her actions and their consequences on the part of Emma Jane, and (3) independent consent and action by Emma Jane. Not only did Roberts fail to prove each and every element as required by Mississippi law, she failed to prove even one of the three elements.

¶43. The chancellor was manifestly in error in his decision. For the reasons set forth herein, this Court reverses and renders with regard to the validity of the will and deed executed by Emma Jane Wright, which are void. We remand this case to the chancery court for further action, consistent with this opinion, with regard to administration of the estate of Emma Jane Wright in the absence of the will.

¶44. Reversed and remanded; remanded in part.

Notes, Questions and Problems

1. In the *Wright* case, the court emphasized that a confidential relationship was created when Roberts started doing things like taking Emma Jane to the doctors. As a society, we want to encourage people to help the elderly and the disabled. Will people be discouraged from assisting persons in those populations if that assistance may lead to a fiduciary duty? When a person with a confidential relationship receives a bequest from the person they are helping, there is a presumption of undue influence. The purpose of that presumption is to protect vulnerable people from being taken advantage of by their caregivers. However, people often develop friendships with the persons who take care of them. This is especially true if they are neglected by their relatives. Is it fair to invalidate gifts to caregivers, and give the property to relatives who did not bother to assist the testator?

2. When deciding whether to invalid a testamentary distribution based upon undue influence, the court starts by focusing upon the testator's state of mind and not on the actions of the person who received the contested bequest. A person may go to great lengths to influence the testator. However, if the testator's will was not a result of the influence, the will is valid. Thus, the first thing to determine is whether the testator was susceptible to being influence. A person's age, mental capacity, and health are usually factors the court considers when resolving this issue.

3. Problems

In which of the following situations is the court likely to conclude that the person was susceptible to undue influence?

a) An 85 year old man becomes severely depressed after his wife of 57 years dies.

b) A 45 year old attorney is addicted to alcohol and prescription drugs.

c) A 37 year old woman is suffering from brain cancer.

d) A 27 year old man is permanently disabled after he is injured in a motor cycle accident.

e) A 55 year old woman with low self-esteem who desires to please people, so she can have friends.

4. Another factor the courts consider to be relevant is the opportunity that the alleged influencer had to influence the testator. In determining whether or not someone had the opportunity to exert undue influence, the courts evaluate the relationship that existed between that person and the testator. The existence of a special or confidential relationship indicates that the person had the chance to exert undue influence.

5. Problems

In which of the following situations is the court likely to conclude that a confidential relationship existed?

a) Allie took her grandmother, the testator, to pay her bills once a month and to buy groceries once a week.

b) Shepherd mowed his seventy-eight year old neighbor, the testator's yard for free.

c) Tyler was the pastor of the church that the testator attended.

d) William was the testator's law school professor.

1.2.4. Fraud and Duress

Courts will invalid a provision of a testamentary trust that is obtained by fraud. The other terms of the trust will be enforced unless the fraud pervades the entire trust instrument or the provisions nullified by fraud are indivisible from the valid parts. In order to proof fraud sufficient to invalidate a trust, the contestant must show that a person made a misrepresentation with the intent to deceive the testator for the purpose of influencing the testamentary disposition. The two types of fraud are fraud in the inducement and fraud in the execution. Fraud in the inducement occurs when a person's misrepresentation causes the testator to make a disposition he would not have made if he had not been deceived. The person making the misrepresentation must intend to deceive the testator. Fraud in the execution happens when a person deliberately causes the testator to sign a testamentary instrument that does not achieve the testator's intent. See the following examples:

> **Example:** Cory omits his son, Benjamin as a beneficiary of his testamentary trust because his daughter, Diane, tells him that Benjamin has taken a vow of poverty. At that time, Diane knows that her statement is untrue, but she wants to receive a larger portion of her father's estate. This is fraud in the inducement because Diane's misrepresentation caused Cory to remove Benjamin as a beneficiary of the trust. If Cory knew that Diane's statement was false, he would have not omitted Benjamin. However, if Diane mistakenly thought that Benjamin had taken a vow of poverty, no fraud would be involved because she did not have an intent to deceive.
>
> **Example:** Whitney was seventy years old, illiterate and the mother of four sons. Whitney had her son Juan bring her the document prepared for her as a testamentary trust for her four sons so that she could sign it. Without

Whitney's knowledge, Juan inserted a clause in the trust giving himself half of the proceeds of the trust. Whitney signed the trust document believing that it contained the provision she had discussed with her attorney. This is fraud in the execution because Juan's deception caused Whitney to sign a document that did not carry out her intent.

Duress is the equivalent to aggressive undue influence. In order to insure that the testamentary follows his wishes, the culprit uses severe physical or emotional pressure. The test for duress is whether the wrongdoer threatened to perform or performed a wrongful act that coerced the testator into making a disposition that the testator would not otherwise have made. Testamentary trusts that are the product of duress of invalid. See the following examples:

Example: Eighty-five year old Elvira had three children. Elvira lived with her daughter, Barbara. Elvira's late husband Joseph left her a substantial estate. Elvira created a testamentary trust for the benefit of her three children. Barbara thought that she deserved to receive a bigger portion of the trust than her siblings. Thus, Barbara told Elvira that if she did not amend the trust instrument and grant Barbara a 50% interest in the trust, Barbara would have her put in a nursing home. Elvira was terrified of going to a nursing home, so she complied with Barbara's demands. The terms of the trust granting Barbara a 50% interest should be invalidated because they are the product of duress.

Class Discussion Tool I.

Nova wanted to establish a trust for the benefit of his children, Nicole and Jeremy. Jeremy convinced Nova that Nicole was abusing drugs. Nova confronted Nicole and insisted that she enter a rehabilitation program. Nova told her that if she did not obey his command, he would disinherit her. Nicole did not have a drug problem, so she refused to enter a rehabilitation program. Thus, Nova executed a will stating, "I leave my entire estate in trust for my son, Jeremy. I am disinheriting Nicole because she refuses to give up the drugs." Based upon the facts, what legal arguments could Nicole make to get the trust invalidated?

Class Discussion Tool II.

Anna was diagnosed with breast cancer. Her doctor treated the cancer with radiation and chemotherapy. In order to combat the side effects of the treatment, Anna got a prescription for medical marijuana. Anna smoked three joints a day to alleviate her pain and nausea. Anna moved in with her only child, Jean, so she could take care of her. Jean believed in natural healing, so she put Anna on a regiment of organic food, herbal supplements and yoga. Maggie, Anna's best friend, told Anna that Dr. Oz said that some herbal supplements increased the growth of cancer cells. In fact, Dr. Oz stated that some herbal supplements might decrease the growth of cancer cells. On the day she watched the show, Maggie was having trouble with her hearing aide. Anna refused to take the herbal supplements. Jean got tired of fighting with Maggie over the supplements, so she started slipping them into her food. One day, Anna saw Jean open up a capsule and sprinkle it over her pasta. After that, Anna became convinced that Jean was poisoning her. Anna shared her concerns with Maggie. Maggie told her pastor, Donald, that Anna was in danger. Maggie took Anna to the church to meet with Donald. After the meeting, Anna was so grateful that she gave the church a $500 donation. When he discovered that she had money, Donald convinced Anna to move into an apartment complex owned by his church. Donald and the other members of the church prevented Jean from visiting Anna. Eventually, Donald took Anna to the church's attorney and had her create a testamentary trust leaving all of her money in trust for the benefit of the church. A few months later, Anna read in a magazine that Dr. Oz stated that some herbal supplements might decrease the growth of cancer cells. Consequently, Anna told Donald that she was wrong about Jean. Anna told him that she planned to return home to Jean and to modify her testamentary trust to leave her entire estate in trust for the benefit of Jean. In response, David placed guards, so that Anna could not leave the apartment. One night, Maggie helped Anna escape from the apartment and reunite with Jean. Anna died a few days later before she could amend her testamentary trust. Jean plans to challenge the validity of the trust. What are her strongest arguments?

Chapter 2 - Creation of a Private Trust

The two major categories of trusts are private trusts and charitable trusts. This chapter set forth the elements necessary to create a valid private trust. The creation of charitable trusts will be discussed in Chapter Eight. There are no magic words that the settlor has to use in order to establish a trust. If it looks like a trust and functions like a trust, it is a trust regardless of what the testator calls it. First, the testator must manifest the intent to create a trust by vesting the beneficial ownership of property in a third party or in the settlor for the benefit of another. Second, the trust instrument must name ascertainable beneficiaries. The class of beneficiaries must be so described that some person might reasonably be said to answer the description. Third, the trust must be funded with property. There must be an identifiable trust res or corpus. Any form of property, including stocks, real property, mortgage securities, easements, causes of actions, can be the corpus of a trust as long as the settlor has an interest in the object. In general, a trust does not have to be in writing to be valid. Thus, the settlor can create an oral trust. However, the Wills Act mandates that a testamentary trust be in writing, and the Statutes of Fraud requires an inter vivos trust of land to be in writing. As a result, the only trust that can be oral is a trust that disposes of personal property. Proving the existence of such a trust is difficult because the parole evidence rule limits the extrinsic evidence that can be admitted to prove the terms of the trust.

1.2 Intent to Create a Trust

It is not enough just for the settlor to use the word trust. The test is whether the settlor indicated that she intended to establish a trust relationship. Consider the following illustrations.

(a) "I leave my lake cabin to Tresmal in trust provided that he pays his brother, Alonzo, $50,000." The testator has not established a trust. He has created an equitable charge. If a testator grants property to a person, subject to the payment of a specific sum of money to a third party, the testator has created an equitable charge. An equitable charge is similar to a trust in that in each case the legal title to the property is vested in one person and the other

persons has an equitable interest in the property. However, the equitable imcumbrancer has only a security interest in the property; the beneficiary of a trust is the equitable owner of the property. Further, the holder of the equitable charge does not owe a fiduciary duty to the third party. In the trust situation, the trustee owes such a duty. The relationship between the holder of the equitable charge and the beneficiary is more in the nature of a debtor and secured creditor. In this case, Tresmal is not holding the lake cabin or the $50,000 for the benefit of Alonzo. Alonzo has a security interest of $50,000 in the lake cabin. Thus, if Tresmal fails to pay Alonzo the $50,000, Alonzo can file suit to force Tresmal to sell the lake cabin to get the money to pay him the $50,000. If a trust was created, Alonzo's remedy would be to sue Tresmal for a breach of his fiduciary duty.

(b) "I leave my house located at 215 Chestnut Street in trust to LaNitra with the hope that she will provide her sister, Kaylan, with a place to live during her lifetime." The testator has not established a trust. The testator lacked the intent to create a trust because she did not impose legally enforceable duties on LaNitra. She has made an outright gift of the house to LaNitra. Kaylan has no interest in the house. This is not a legally valid trust because the language "with the hope" is precatory language which creates a presumption that the testator intended to imposed only an unenforceable moral obligation on LaNitra. Kaylan can overcome the presumption by presenting clear and convincing evidence that the testator intended for LaNitra to have a legal obligation to let Kaylan live in the house. Courts have held that words like hope, wish and desire are precatory words.

(c) "I leave $400,000 to Emma in trust provided that she repays me in two years." The testator has not established a trust. Her intent was to create a debtor-creditor relationship between herself and Emma. A trustee is obligated to hold specifically defined property for the benefit of a third party. The trust property must be kept separate from the trustee's own funds. A debt involves a personal obligation to pay a sum of money to another. The crucial factor in distinguishing between a trust relationship and an ordinary debt is whether the recipient of the assets is entitled to use the property as his own and to comingle the property with his own assets. In this case, Emma has no obligation to use the money for the benefit of a third party. Her only obligation is to repay the money. Thus, instead of owing a fiduciary duty to a third party, Emma's sole duty is to repay the testator.

(d) "I leave $300,000 in trust to Bernie to pay the income to Jeremy for life and upon Jeremy's death to divide the principle between Jeremy's surviving children." Testator has

established a trust. Bernie is not permitted to use the money and repay it. Thus, this is not an equitable charge or a debt. Moreover, Bernie has a mandated duty to abide by the terms of the trust with regards to Jeremy and Jeremy's children. It is clear that the testator intended Bernie to manage the trust funds for the benefit of those persons.

***Marzahl v. Colonia Bank and Trust Company*, 364 A.2d 173**

BOGDANSKI, Associate Justice.

This appeal arises from an action brought by the plaintiff against the defendant bank as executor of the estate of the plaintiff's deceased mother. The plaintiff sought damages alleged to have resulted from the mother's failure to distribute to the plaintiff a portion of the income received by the mother from a testamentary trust established in the will of the plaintiff's father. On motion by the defendant, and after having considered an affidavit and a counter-affidavit filed by the parties, the court granted summary judgment for the defendant. From that judgment, the plaintiff has appealed, claiming that the court erred in concluding that the fourth article in the will did not require the decedent mother to disburse portions of the trust income received by her for the plaintiff's maintenance, health and comfort.

The affidavits submitted by the parties to the trial court revealed that no material facts were in issue. *See Rathkopf v. Pearson*, 148 Conn. 260, 170 A.2d 135. W. Marnahl, the plaintiff's father, died on July 8, 1967, leaving a will in the fourth article of which he created a trust from which the income and principal were to be disposed of as follows: 'My Trustees shall pay in income to my wife, Margaret, during her lifetime in quarter annual payments or in more frequent payments in the discretion of my Trustees, together with such sums out or (sic) principal as my Trustees in their sole discretion shall deem proper from time to time for her suitable maintenance, health and comfort and for the suitable maintenance, health and comfort of my daughter, Anne.'

The plaintiff contends that article four of the will established the mother as a trustee of a portion of the income received by her, and subjected her to a fiduciary duty to use that portion for the maintenance, health and comfort of the plaintiff. She argues that the circumstances surrounding the testator when the will was executed evidenced his intent to create such a trust; that that intent would become manifest in the language of the fourth article if a comma were to be inserted after the phrase 'from time to time'; and that such a comma should have been supplied by the court since punctuation should not be allowed to obscure the true intent of a testator.

One of the basic elements necessary for the creation of a trust is a manifestation of intention to create it. Effect must be given to that intent which finds expression in the language used. *Fidelity Title & Trust Co. v. Clyde*, 143 Conn. 247, 253, 121 A.2d 625; *Conway v. Emeny*, 139 Conn. 612, 618, 96 A.2d 221. In *Peyton v. Wehrahane*, 125 Conn. 420, 425, 6 A.2d 313, 315, *citing Loomis Institute v. Healy*, 98 Conn. 102, 114, 119 A. 31, we stated: '(W) hen property is given absolutely and without restriction, a trust is not lightly to be imposed, upon mere words of recommendation or confidence.' The plain and unambiguous language used by the testator in the fourth article of his will does not give the slightest indication that he intended that his wife be subjected to a fiduciary duty to share the trust income with her daughter. The plaintiff is mentioned only with respect to the provision for payment of principal.

Moreover, even if we assume, arguendo, that the insertion of a comma after the phrase 'from time to time' would render the provision susceptible to the interpretation urged by the plaintiff, the circumstances surrounding the testator at the time the will was executed, as disclosed by the plaintiff's counter-affidavit, afford no basis for making such an insertion. Punctuation may be inserted or deleted where a provision does not lend itself to a clear interpretation of the testator's intent and when 'the result would be a clear and sensible statement, not out of accord with other provisions of the instrument and the testator's intent thereby manifested.' *Simmons v. Simmons*, 99 Conn. 562, 568, 121 A. 819, 821. The counter-affidavit points out that when the will was executed, the father knew that the plaintiff was almost destitute, and that he also knew that his wife was well provided for. In his will the testator provided for the plaintiff during the lifetime of her mother by allowing the trustees the discretion to provide portions of the principal of the trust for the maintenance, health and comfort of the plaintiff. It appears, however, that the plaintiff never requested the trustees to pay over any of the principal. Upon her mother's death, the entire principal was to be given to the plaintiff free from any trust. The will further provided that all property would go to the plaintiff in the event her mother predeceased her father. Article four lends itself to a clear interpretation of the testator's intent with respect to the method of providing for his wife and daughter after his death. Nothing suggested by the plaintiff's affidavit is inconsistent with that expressed intention.

If a comma were to be inserted, the result would not be a 'clear and sensible statement' and would be 'out of accord with other provisions of the instrument.' *Simmons v.*

Simmons, supra. The clarity which pervades this will would be muddled by the question of whether the phrase 'for the suitable maintenance, health and comfort of my daughter, Anne' referred to the income as well as to the principal of the trust. Moreover, the sixth article of the will nominates two named trustees 'as Trustees of the trust herein created.' To hold that the testator intended to create still another trust and to nominate another trustee would be completely out of accord with that provision.

The trial court's conclusion that the fourth article of the will could not be construed as establishing the decedent mother as the trustee of a trust for the benefit of the plaintiff cannot be disturbed.

There is no error.

***In re Estate of Brooks*, 579 P.2d 1351.**

DORE, Judge.

This is an appeal from a King County Superior Court ruling that certain language in a will created a trust.

Eloise Brooks, a divorced woman, died September 21, 1974, survived by her two minor children. She left a will dated March 14, 1974 which named her sister, Sharon Morton, as executrix. The will left certain specific property to her two children and appointed Sharon Morton to be guardian and have actual custody of the children. Paragraph VI of the will provided:

> I hereby give, devise, and bequeath unto my sister, Sharon Nelson Morton, all the rest, residue and the remainder of my estate, for her to use in her own discretion and in whatever manner she deems appropriate for the benefit of my children.

The will was admitted to probate October 11, 1974 and proceedings ensued normally until August 19, 1976 when the natural father moved, on behalf of the children, for an accounting of a trust allegedly created by paragraph VI. Although Sharon Morton contended that no trust had been created the court found that all property passing under paragraph VI of (the will) is held in trust for the benefit of said minor children and further that there is a conflict of interest for the Executrix to serve also as Trustee . . . Thereupon the court appointed a new trustee and ordered him to make an accounting.

It is well established that in construing a will a court must attempt to give effect to the intent of the testator. *Matter of Griffen's Estate*, 86 Wash.2d 223, 543 P.2d 245 (1975). The will should be construed as a whole. *In re Estate of Price*, 75 Wash.2d 884, 454 P.2d 411

(1969). Where there is room for construction, that meaning will be adopted which favors those who would inherit under the laws of intestacy, *In re Estate* of *Price, supra; In re Lambell's Estate*, 200 Wash. 200, 226, 93 P.2d 352 (1943), and a sole surviving natural heir who is a minor is favored. *Cotton v. Bank of California*, 145 Wash. 503, 216 P. 104 (1927).

Before a trust will be found to exist, there must be a clear manifestation of an intent to create a trust and not to do something else. *Hoffman v. Tieton Methodist Church*, 33 Wash. 2d 716, 207 P.2d 699 (1949). A testamentary trust will not be declared, unless such a trust is clearly intended by the testator. *In re King's Estate*, 144 Wash. 281, 257 P.848 (1927). It has generally been held that an imperative command to dispose of the property for the benefit of another is required to create a testamentary trust. *In re Morton's Estate,* 188 Wash. 206, 61 P.2d 1306. Precatory words are not enough to create a trust and if the grantee has discretion to use the property for herself the court will not find a trust. *Lanigan v. Miles,* 102 Wash.82, 172 P. 894 (1918).

The issue is whether Eloise Brooks manifested an intention to impose duties upon Sharon Morton which are enforceable in the courts. *See* Rest. (Second) Trusts, s 25. If so, there is a trust.

The language of paragraph VI which conveyed the estate to Sharon Morton "for her to use . . . for the benefit of my children" is strongly suggestive of a trust. Other language in the clause, however, suggests that Sharon Morton was to hold the property free and clear with the option to comply with the wish of the testator only if she desired to do so. When necessary, extrinsic circumstances may be considered as an aid in determining intention. *In re Mac Adam's Estate*, 545 Wash.2d 527, 531, 276 P.2d 729 (1954). *In re Quick's Estate,* 33 Wash.2d 568, 573, 206 P.2d 489 (1949). Restatement Second, Trusts s25, comment b sets forth circumstances pertinent to this inquiry:

> In determining the intention of the settlor the following circumstances among others are considered: (1) the imperative or precatory character of the words used; (2) the definiteness or indefiniteness of the property; (3) the definiteness or indefiniteness of the beneficiaries or of the extent of their interests; (4) the relations between the parties; (5) the financial situation of the parties; (6) the motives which may reasonably be supposed to have influenced the settlor in making the disposition; (7) whether the result reached by construing the transaction as a trust or not a trust would be such

as a person in the situation of the settlor would naturally desire to produce. *In re Mac Adam's Estate, supra; In re Quick's Estate, supra.*

Considering these circumstances along with the language of the will we believe that a trust was intended. The language "for her to use . . . for the benefit of my children" is more imperative than precatory. Although Morton was given apparent uncontrolled discretion in using the funds for the benefit of the children, this fact neither defeats the trust nor gives Morton unlimited power. *See* Rest. Second Trusts, s 187, comment j.; *In re Sullivan's Will*, 144 Neb. 36, 12 N.W.2d 148, 150-1 (1943). Other considerations control. The property and beneficiaries are definite. *See In re Hochbrunn's Estate*, 138 Wash. 415, 244 P. 698 (1926). Most significant is the readily ascertainable motive of Eloise Brooks. By her will she was providing for the welfare of her children, not for her sister. Sharon Morton was given the property of the estate, not for her own use, but to use in raising the two children. It is inconceivable that the testator intended Sharon Morton's discretion to include the discretion not to use the property to benefit the children. We therefore adopt the construction most favorable to the children, *In re Estate of Price, supra; In re Lambell's Estate, supra; Cotton v. Bank of California, supra,* and concludes there was a trust. Cf. Rest. Trust Second s 25, comment Illustration 6. Duties were imposed on Sharon Morton which are enforceable in the courts.

However, we feel that the trial court erred in removing Sharon Morton as trustee. There is no doubt that Brooks intended Morton, who was to be physically raising the children, to use the money as she saw fit to benefit the family unit of Morton and the two children. Absent a showing of an abuse of discretion or a breach of fiduciary duty we hold it was error to remove Sharon Morton as trustee and we reverse the order of the trial court insofar as it removed Sharon Morton as trustee.

Affirmed in part; reversed in part.

Notes, Questions and Problem

1. In order to ascertain the testator's intent with regards to the creation of a trust, courts often look to the plain language of the testamentary instrument. Although it is not necessary for the testator to use the word trust, the use of that word usually leads to the conclusion that the testator intended to create a trust. If the language of the testamentary instrument is unhelpful, courts will admit extrinsic evidence to determine the testator's intent. That evidence frequently includes the testimony of disinterested parties.

2. It has been noted that the use of precatory rather than mandatory language does not

create a trust. Nonetheless, that is not the end of the story. The court may permit a trust to be established from precatory language if the words taken in connection with other portions of the will and in light of all the circumstances indicate that the testator intended to place a legal obligation on the potential trustee. What factors should be considered to determine if a precatory trust was intended?

3. Problems.

In which of the following circumstances did the testator intend to create a trust.

a). Geoff had two children, Alice and Denise. Denise was permanently disabled. Geoff's will contained the following provision: "I leave half of my estate to my daughter Alice. I leave the other half in trust for the benefit of my daughter, Denise. Alice can serve as trustee if she promises to take care of her sister."

b). When he was a young man, Steven inherited a house from his grandfather. Steven wanted to make sure that the house remained in his family. Steven's will contain the following language: "I leave my grandfather's house to my son, John in trust for himself and my two other children, Nancy and Peter, provided that John promises to pay $4,000 a year to the city property tax department."

c). Angela had seven minor children. In her will, Angela stated, "I leave my entire estate to my oldest son, Benjamin in trust in exchange for his promise to take care of his younger siblings."

d). Greta did not have any children, but she was close to her nieces and nephews. In her will, Greta stated, "I leave my entire estate to my sister, Brenda, in trust provided that she pays each one of my living nieces and nephews $400 per month."

e). Brian and Cynthia were best friends. Brian was the Godfather to Cynthia's daughter Briana. In his will, Brian stated, "I leave the residuary of my estate to Cynthia in trust for my Goddaughter, Briana. Before she assumes the role as trustee, Cynthia should repay the $100,000 that she owes me."

2.2 Requirement of Trust Property

A valid trust cannot be created without trust property which is referred to as res. If the trust is created using a deed of trust, the property must be delivered to the trustee. Any interest in property can serve as the res of a trust. Consider the following examples.

a) On the beneficiary designation on her pension plan Carmen wrote "To Rodney Gates, in trust, for my children, Peter, Paul, and Mary." This transaction creates a trust because any right to receive benefits under a pension plan can serve as trust property.
b) Stephanie created a trust for the benefit of her minor child, Yasmine. The trust consisted of a house Stephanie will inherit under her father, Clinton's will and the profits she anticipates earning next month when she sells her antique bedroom set. This transaction creates a valid trust because the profits Stephanie anticipates making can serve as trust property because she actually owns the antique bedroom set. However, the house cannot serve as trust property because she does not yet have an interest in it. She only has an expectancy because Clinton can change his will at any time.

***Edwards v. Edwards*, 459 P.2d 422**

PEARSON, Judge.

Plaintiff appeals from a dismissal of a declaratory judgment action in which he sought to invalidate the trust provision of the last will and testament of Lonnie Leota Edwards, deceased.

The facts were not disputed. The matter was brought to issue by plaintiff's motion for summary judgment. Both counsel agreed that only issues of law were involved.

Lonnie Leota Edwards died testate in Tacoma, Washington on February 26, 1963. Her husband, Leon R. Edwards, was appointed executor of her estate. Paragraphs 3 and 4 of her will, which are here under attack, provided:

> I give, devise and bequeath to my husband, Leon R. Edwards, a life estate in all the rest, residue and remainder of my estate, subject to the conditions and limitations set forth herein, of every kind, nature and description and wheresoever situated, or which I may die seized, for his own use during his life without bond and without liability for impeachment for waste, provided, however, that in the event he is unwilling or physically unable to manage and administer said estate, then and in that event it is my desire and intent that all of my estate then in his possession shall be placed in trust with the Puget Sound National Bank * * *
>
> In the event my husband, Leon R. Edwards, should perish with me in a common disaster or as the result of a common disaster or should die within six months following my death, or upon the subsequent death of my

> husband, I give, devise and bequeath all the rest, residue and remainder of my estate not specifically devised herein to the PUGET SOUND NATIONAL BANK, Tacoma, Washington, TRUST DEPARTMENT, to be held in trust for the benefit of my grandchildren, SHARON EDWARDS KNAPP, St. Helens, Oregon, GRETCHEN EDWARDS, JANE EDWARDS, and WENDY SUE EDWARDS, of Bellevue, Washington, and my son, MARION C. EDWARDS, for the following uses and purposes and upon the following terms and conditions.

The plaintiff, Marion C. Edwards, is the son of he deceased, Lonnie Leota Edwards, and brought this action individually and as guardian ad litem for his children, all of whom are beneficiaries of the aforementioned trust. The named defendants were Leon R. Edwards, individually and as executor, and the Puget Sound National Bank, named trustee in the will.

Plaintiff claims that no valid trust was created by the provisions of this will because the trust would not come into existence until the life tenant died or became 'unwilling or physically unable to manage and administer (the) estate.'

Plaintiff asserts that a trust is not and cannot be created without the actual transfer of legal title to the trustee as of the date of death of the trustor. He seeks to have the trust provisions invalidated, so that the remainder after the life estate passes by intestacy.

The trial court denied this relief, upheld the trust, dismissed the action, and allowed both defendants' costs and attorney's fees.

To simplify the first legal problem presented by the appeal, we state the issue: Where A devises her estate to B for life, with power to consume and at his death the remainder to C in trust for D, is a valid trust of that remainder established?

Plaintiff contends that it is invalid because (1) title to the remainder does not reach the trustee at the time of testator's death but is postponed until the intermediate estate terminates, and (2) the power to consume in the life tenant and the words, 'all of my estate then in his possession' makes the trust res so uncertain and indefinite as to render the trust invalid.

To understand the first contention is to reject it. We are told, in effect, that if testator had used these words: To C in trust for D, subject to a life estate in B, the trust would stand, but because she used these words: To B for life and at his death to C in trust for D, the trust is invalid.

We are told that the reason for this distinction is that in the former case legal title reposes immediately in the trustee while in the latter it awaits the termination of the intermediate estate. Thus, testator has not made a present and unequivocal disposition of both legal and equitable ownership at her death, which is one of the requirements of an express trust.

The rule relied upon by plaintiff is stated in 54 Am.Jur. Trusts s 34 (1966) at 45:

> It is essential to the creation of an express trust that the settlor presently and unequivocally make a disposition of property by which he divests himself of the full legal and equitable ownership thereof. He may make himself the trustee or one of the trustees, thus retaining the legal title in whole or part, or by making himself the beneficiary or one of the beneficiaries of the trust, he may retain the equitable ownership in whole or part, but he cannot retain the full legal and equitable ownership. The legal title must be definitely reposed in the trustee, whether he is the trustor or another. Such present and unequivocal disposition of the property in trust must constitute an actual carrying out and execution of the settlor's intention to create a trust by some proper transaction or mode, and it does not suffice to create a trust that he merely intends or manifests an intention to create a trust in the future or conditionally directs or gratuitously promises a disposition of property in trust in the future.

This rule and the cases cited as authority for it involve inter vivos trusts. The issue in many of them was whether or not the trust should fail as an attempted testamentary disposition, without compliance with the statute of wills. Others were cases where the settlor had declared a trust but had conveyed no property to the trustee on which a trust could operate. A testamentary trust is distinguishable. Such a trust looks to the future and does not, as of the time of its execution, divest the trustor of his property or any interest therein or vest a present property interest in the beneficiaries. *Johnson v. Weldy*, 79 N.D. 80, 54 N.W.2d 829 (1952).

We believe that plaintiff's attempted application of that rule to a testamentary trust and to the trust in question is erroneous.

Assuming arguendo that a valid testamentary trust must At death divest the trustor of full 'legal and equitable ownership,' it is our view that testatrix intended to and did

accomplish that end in this case. To ascertain the type of interests which came into being at her death, we look to the law of future interests.

In the case of *In re Estate of Gochnour,* 192 Wash. 92, 93, 72 P.2d 1027 (1937) the will under consideration provided:

> 'I give, devise and bequeath all my property, owned by me at the time of my death, both real and personal * * * to my husband, Jacob B. Gochnour, * * * with full power to alienate the same for his use and benefit during his natural life, and I direct that at the death of my said husband, Jacob B. Gochnour, all of my said property, real and personal, or the proceeds thereof, then remaining, go and be distributed to my nieces and sister * * *.'

At 93, 72 P.2d 1027 the court stated:

> By the terms of the will, under the great weight of authority, Jacob B. Gochnour takes a life estate, with vested remainder to the decedent's sister and nieces, notwithstanding his absolute power of disposal during his lifetime.

Admittedly the remainder given in that case was not placed in trust. However, the interest created in the remaindermen is identical with the interest placed in trust in the case at bar. Accordingly, we hold that testatrix created a life estate and a future interest denominated a vested remainder, both interests of which came into being at the time of her death.

In *Shufeldt v. Shufeldt*, 130 Wash. 253, 227 P. 6 (1924), at 262 P. at 9 the court stated:

> If the postponement of the payment of the legacy or the enjoyment of the devise is for the purpose of letting in intermediate estates only, then the remainder shall be deemed vested at the death of the testator and the legatees **a**nd devisees are to be determined as of that date, for under those circumstances no futurity is annexed to the substance of the conveyance, but only to the time of its enjoyment.

This interpretation is consistent with Restatement (Second), Trusts s 77 (1959), where Illustration 4 at 198 provides:

> 4. A, the owner of Blackacre, transfers Blackacre to B for life, remainder to C and his heirs and directs that C hold his interest in trust for D. C holds a vested remainder in trust for D.

Plaintiff next contends that the trust should fail because the trust res is too indefinite and uncertain.

The creation of a valid testamentary trust requires (1) the intention by the testator by will to create a trust, (2) designation of the trust property, and (3) the designation of beneficiaries, and the terms on which the trust is to operate.

Plaintiff contends that the second element of a valid trust is not satisfied because the term 'all of my estate then in his (Leon R. Edwards') possession' is too uncertain a designation of the trust res. Furthermore, where there is no 'liability for impeachment for waste' it is uncertain that there will ever be a trust estate. Therefore, the trust should be held invalid. We reject this argument.

1 G. Bogert, Trusts and Trustees s 112 (2d ed. 1965), at 571 describes the following as proper subject matter of trust estates:

> The trust property may consist of an interest which is absolutely vested, or one which is vested but subject to being divested, as in the case of gifts on condition subsequent or determinable interests. It may be a contingent interest which is not to vest until the happening of a condition precedent or is uncertain as to the person to take.
>
> The res may be a present estate or interest, or one entitling the trustee to possession and enjoyment at a future date, as in the case of reversions and remainders.

On this point, we find in 1 A. Scott on Trusts s 74.1 (3d ed. 1967) at 679:

> Whatever may be the subject of an executed gift may be given in trust; and a person can declare himself trustee of whatever he can give to another in trust. Whatever interest he can devise or bequeath, he can devise or bequeath in trust. *See also United States Trust Co. of N.Y. v. Commissioner of Int. Rev.,* 296 U.S. 481, 56 S.Ct. 329, 80 L.Ed. 340 (1936).

Again, in Scott on Trusts, Supra, s 76 at 685:

> A trust can be created although the parties do not know precisely what the subject of the trust is, if it can be ascertained from circumstances existing at the time of the creation of the trust. Thus a trust created by will of the residue of the testator's estate is of course valid although the amount of the residue cannot be ascertained until the amount of his assets and of his

liabilities has been determined.

Speaking of the uncertainty created by the power to consume by a life beneficiary, Scott states:

> A trust does not fail for uncertainty of the subject matter even though the life beneficiary is entitled to receive so much of the principal as he may demand and it is therefore uncertain how much will be left for the remainderman. *Scott on Trust, Supra*, s 76 at 686.

Restatement (Second) Trusts, s. 77 (1959) at 197 provides:

> An interest in a thing may be held in trust although the interest is not the complete property in the thing.
>
> c. Future Interests. The interest may be a future interest either vested or contingent. * * * The interest may be contingent as to its extent.

Plaintiff relies on *Wilce v. Van Anden*, 249 Ill. 358, 360, 94 N.E. 42, 43 (1911).. In that case the 'entire part or portion of my estate remaining after the death or remarriage of my said wife * * *' was placed in trust. The court apparently held that the power to consume by the wife (life tenant) rendered the bequest void for uncertainty as to subject matter.

However, we note that two later Illinois cases, if not expressly overruling that decision, did so by implication. In *Burke v. Burke*, 259 Ill. 262, 267, 102 N.E. 293 (1913) the wife was given a life estate with the power to sell any of the estate in order to supply her comforts and necessities. The remainder over was placed in trust. In upholding the validity of that trust, the court distinguished the Wilce case by commenting that it was not the uncertainty created by the power to consume which rendered the trust void, but another provision of the trust which placed discretion in the trustees 'to give to the brothers and sisters of the testator such portion of the trust fund as they might think best and devote the rest to charity.'

The same distinction is made in *Dean v. Northern Trust Co.*, 266 Ill. 205, 107 N.E. 186 (1914) where the court upheld the validity of a trust of a remainder following a life estate with power to consume in the life tenant.

The case of *Burke, supra*, gives the rationale which we believe should control the case before us, 259 Ill. at 268, 102 N.E. at 295:

> Every kind of vested right which the law recognizes as valuable may be transferred in trust. *Perry on Trusts,* ss 67, 68. The law is well settled that an estate

> may be given to a person for life, with power to sell and convey the fee, and that a remainder may in such case be limited in fee after the termination of the life estate. * * * A remainder so limited is vested, though subject to be defeated by the exercise of the power by the life tenant. The uncertainty as to the amount of the reduction because of the disposition of the estate, or a part of it, for the comfort or necessities of the life tenant, and the consequent uncertainty as to the amount of the estate which may be undisposed of, does not render the remainder contingent. * * *

We consider this rule applicable to the case at bar.

This precise issue has not been decided by the Supreme Court of this state. We believe, however, that our determination of the validity of the trust is consistent with previously enunciated principles of future interest in property. *In re Estate of Gochnour, Supra.*

In the case of *In re Estate of Ivy*, 4 Wash. 2d 1, 3, 101 P.2d 1074, 1075 (1940) the court was also faced with a community estate placed in trust for the surviving spouse with the power to consume as much of the corpus as 'the trustors saw fit to withdraw' together with the right to amend or revoke the trust agreement. Upon the death of the survivor, the estate was to be distributed to the remaindermen. Subsequent to the husband's death, the surviving trustor amended the trust by eliminating the remaindermen and making herself the sole beneficiary of the trust.

In determining that the power to consume and revoke did not change the character of the remainder so as to save the remaindermen from the inheritance tax laws, the court stated at 8, 101 P.2d at 1077.

While there is confusion among the authorities in drawing a distinction between a vested remainder and a contingent remainder, the rule is settled in this state that a life estate, with the right to invade the principal, and remainder over, creates a vested remainder and not a contingent remainder.

While it is not essential to characterize the type of estates created by testator's will, it seems clear that she created a life estate in her husband of all of her estate with the power to consume and the remainder to the Puget Sound National Bank in trust for her son and grandchildren.

Under the rationale of the foregoing decisions, she granted to the trustee a vested remainder, notwithstanding the power to consume. *Shufeldt v. Shufeldt, Supra; In re Estate of Ivy,*

Supra.

We believe that such a future interest is and should be the proper subject matter of a testamentary trust.

In considering instruments creating trusts, the sole object of the courts is to ascertain the purpose of the settlor and to effectuate the purpose insofar as it is consistent with rules of law. *Old Nat'l Bank & Union Trust Co. etc. v. Hughes*, 16 Wash. 2d 584, 134 P.2d 63 (1943); *Seattle First Nat'l Bank v. Crosby*, 42 Wash.2d 234, 254 P. 2d. 732 (1953)..

In the case at bar, the intentions of the testator are clear. To declare an intestacy under these circumstances solely because the extent of the trust res is uncertain is in our judgment unsound. It may be that no assets will be available to make the trust operative. We do not deem this obstacle of sufficient importance that we should frustrate the testator's intention as to the remainder, if any, by declaring an intestacy. The presumption against intestacy is particularly strong where the subject of the gift is the residuary estate. *In re Estate of Quick*, 33 Wash.2d 568, 206 P.2d 489 (1949).

Plaintiff also seeks to have the trust invalidated by urging that several of its provisions relating to the administration and distribution are vague and ambiguous. We have reviewed the will in its entirety and agree with the defendant executor that the terms of the trust are workable. In any event, if the trustee finds it necessary, it may at any time apply to the court for assistance. *Old Nat'l Bank & Union Trust Co. etc. v. Hughes, Supra.*

Plaintiff also complains of the award of $150 as attorney's fees to the defendant, Puget Sound National Bank, but does not complain of the award in favor of the executor. We believe the award to the defendant bank was within the discretion of the trial court. This case was in the nature of a will contest.

RCW 11.24.050 provides that reasonable attorney's fees may be assessed against the contestant where the will is upheld, unless the contestant acted with probable cause and in good faith.

The trial court undoubtedly reasoned that since the defendant, Puget Sound National Bank, had not accepted its trust duties, and would not be required to do so until the intermediate estate terminated, it was not a necessary party to the litigation. Consequently, the plaintiff did not act with probable cause and in good faith in its action against the bank. We are unable to say that the trial court abused its discretion in awarding attorney's fees under these circumstances.

Accordingly, the judgment of the trial court is affirmed, with costs on appeal awarded to respondent

Notes, Questions, and Problems

1. The property used to fund a trust must be in existence or ascertainable at the time that the trust is created. More specifically, the testator's interest in the property must be in existence or ascertainable when he attempts to create the trust.

2. A will does not speak until death. Thus, at the time the will is executed that testator does not have to own the property he or she seeks to devise in the will unless he or she intends that property to be the corpus of a testamentary trust. For example, at the time she executes her will, Betty anticipates inheriting a house from her mother. Betty can devise that house in her will to Veronica. If Betty has not inherited her mother's house when she dies or if she inherits the house and sells it before she dies, the house does not become a part of her estate. Thus, under the doctrine of ademption by extinction, Veronica would not inherit the house. However, the devise would not invalidate Betty's will. Since a testamentary trust is not intended to take effect until the testator's death, why should the law mandate that such a trust contain property in order to be valid? Should the trust be valid when created and fail for lack of property at the time that it comes into existence?

3. A testator does not have a property interest in a life insurance policy because the proceeds are not payable until the testator's death. Thus, life insurance proceeds cannot be the res of a testamentary trust. Nonetheless, those proceeds can be the property of an inter vivos trust. All the testator has to do is to create a revocable inter vivos trust and name that trust as the beneficiary on the life insurance policy. A life insurance policy can be the res of an inter vivos trust even though the insured person reserves the right to change the beneficiary on the policy.

4. Problems

In which of the following cases is there a valid trust res?

a). George was diagnosed with cancer. The doctor told him that the treatment would make him sterile. Since he wanted children, George stored some of his sperm in the Fertility Sperm Bank. While he was under going treatment, George executed a will that stated, "I leave my sperm to the Fertility Sperm Bank in trust for my girlfriend, Kayla."

b). While he was riding his bicycle, Peter was hit by a car driven by Jenny. As result, Peter suffered severe injuries. Peter filed a lawsuit against Jenny. While the suit was pending, Peter

executed a will that contained the following language: "I leave any monetary judgment I receive from my lawsuit against Jenny Armstrong to my brother, Marshall, in trust for my son, Jacob."

c). Jack, a compulsive gambler, is convinced that he is going to some day win the lottery. When the mega million lottery reached four hundred million dollars, Jack purchased $10,000 worth of lottery tickets. The day before the lottery drawing Jack executed a will containing the following provision: "I leave my lottery tickets purchased on June 7, 2011 to my Aunt Jean in trust for my cousin, Timothy."

d). Patrick accepted a job at a large retail store. As a part of his benefit package, Patrick will receive stock options after he has worked at the store for ninety days. A month after he started working at the store, Patrick executed a will stating "I leave my stock options to Stephanie in trust for Trenton."

2.3 Necessity of Trust Beneficiaries

There must be ascertainable beneficiaries who have the authority to enforce the terms of the trust by suing the trustee if he violates any of the fiduciary duties. The beneficiaries do not have to be specifically enumerated in the trust instrument, but they must be readily identifiable. In some cases, the beneficiaries may be persons who are not yet born. There must be a beneficiary or a class of beneficiaries indicated in the trust that is able to come into court and claim the benefit of the bequest. Consider the following examples.
a) "I leave $150,000 in trust to Carlos for the benefit of any of my friends who Carlos thinks is worthy to have the money." The testator has not created a valid trust because Carlos is given too much discretion to choose the beneficiaries of the trust. Even if the trust had obligated Carlo to hold the money for the benefit of the testator's friends, the trust would still fail because the term "friends" is too broad. Carlos is not given enough guidance to identify testator's friends. Thus, the trust does not have ascertainable beneficiaries.
b) "I leave $35,000 in trust to Ronnie for the benefit of my snake, Jake." The testator has not created a valid trust. The trust has an ascertainable beneficiary, Jake. Nonetheless, Jake does not have the ability to hold the trustee accountable. The main reason the law requires a trust is to have beneficiaries is to ensure that there is someone to whom the trustee owes fiduciary duties. In this case, if Ronnie misappropriates the money, he has no consequence. Since this is a testamentary trust, the settlor will be dead when the trust takes effect. Thus, the only one

who could hold Ronnie accountable is Jake, and he is unable to file a lawsuit. In Chapter Three, we will discuss the options available to the testator if she wants to make sure that Jake is protected.

c) "I leave $375,000 in trust to Paul for the benefit of the members of my church choir." The testator has not created a valid trust. Whenever there is a transfer in trust for members of an indefinite class of persons, no enforceable trust is created. In this case, the class, "members of my church choir" is too indefinite because membership in the choir changes. This is different from leaving money in trust for a class that consists of "sisters" because that title refers to a finite class of people.

d) "I leave $50,000 in trust to Anne for the benefit of my nieces and nephews. The testator has created a valid trust because the class of nieces and nephews is readily identifiable. Regardless of the number of persons that may answer to the description, the trustee has a way of determining if the person has the correct blood relationship to the testator."

***In the Matter Estate of Boyer*, 868 P.2d 1299**

OPINION

DONNELLY Judge.

Appellants, George A. Morrison, Roger Brastrup, and Lyle Speer, appeal from a judgment determining certain provisions of the Last Will and Testament of A. James Boyer, deceased, were without legal effect, and ordering that Morrison be removed as personal representative of the decedent's estate. We discuss whether the trial court erred in determining that the provisions of the decedent's will were insufficient to create a testamentary trust.

FACTS

The decedent died on September 23, 1991, at the age of ninety-one years. On September 7, 1991, sixteen days before his death, he executed a last will and testament (the will). An order approving Morrison's petition for admission of the will to informal, unsupervised probate was entered on October 3, 1991, and Morrison, an attorney and personal friend of the decedent, was appointed as personal representative of the decedent's estate pursuant to the provisions of the will. The 1991 will of the decedent expressly revoked all prior wills made by him, including a will executed in 1977.

On November 20, 1991, the decedent's intestate heirs, Edward G. Boyer, John R. Boyer, and Mildred B. Harbaugh (Appellees), filed a petition to set aside the will, alleging

that it was the product of undue influence and fraud; that the will and purported testamentary trust provisions were invalid; and that Morrison's act of preparing the will and designating himself as both a trustee and beneficiary violated rules governing the practice of law. Appellees' petition requested that the trial court declare the decedent's will to be void, that they be declared the decedent's intestate heirs, and that they be awarded attorney fees.

Appellees subsequently moved for summary judgment, asserting that the distributory provisions of the will were legally insufficient, and that the Second and Third Articles of the will were invalid. These Articles stated:

> SECOND: I give, devise and bequeath all of my estate and property, real, personal and mixed, wheresoever situated, of which I may be possessed, or to which I may be entitled at the time of my death, to my Trustee, George A. Morrison, in Trust.
>
> THIRD: I direct my Trustee to distribute all of my estate according to my instructions which I may give to him from time to time in my own handwriting or otherwise, but nonetheless signed or initialed by me. In the event, by whatever circumstance, I fail to leave such instructions to my Trustee, then I direct my Trustee to distribute my estate according to his discretion, bearing in mind the many conversations we have had together in which I have named those who are the objects of my generosity.

The motion for summary judgment was accompanied by Appellants' response to Appellees' request for admissions. The response admitted that the decedent was a client of Morrison's and that Morrison had drafted the decedent's will; that apart from the will itself, "no written trust agreement executed by [the decedent] ... nam[es] ... Morrison as trustee"; and that there are no written instructions from the decedent to Morrison "of the kind referred to in the [Third] Article of the last Will," except for the will itself. Morrison's response to the request for admissions also stated that "I do have notes and notes of Donald Hardesty regarding [the decedent's] wishes as to who is to receive his estate."

Appellants' response to the motion for summary judgment contended that the trust created by the will and the will itself were valid because the beneficiaries were ascertainable; that the will was sufficient to give Morrison a power of appointment, thus permitting him to select the persons who should be the beneficiaries of the decedent's estate; that the persons to be eligible beneficiaries of the testamentary trust were capable of being ascertained; that the testamentary trust did not violate the rule against perpetuities; and that Morrison's

preparation of the will and his agreement to serve as trustee of the testamentary trust did not violate any rules governing the practice of law. Appellants also denied that Morrison was a devisee under the will.

Shortly after the filing of Appellees' motion for summary judgment, Morrison filed a proposed schedule of distribution pursuant to his claim that the Third Article of the decedent's will created a valid power of appointment. The schedule named the individuals that he had selected as beneficiaries of the decedent's testamentary trust.

A hearing on the motion for summary judgment was held on February 28, 1992. At the hearing on their motion for summary judgment, Appellees abandoned that portion of their motion which sought to have the trial court declare the decedent's will void in its entirety. Instead, Appellees argued that the trial court should invalidate only those portions of the will that attempted to create a testamentary trust, or that purportedly gave Morrison a power of appointment.

On March 19, 1992, the trial court entered a judgment disposing of Appellees' motion for summary judgment, and ordered that the provisions of the decedent's "Will so far as they attempt to set up a trust or to create a power of appointment are insufficient as a matter of law"; that "the Second and Third Articles of [the decedent's will] ... are ... insufficient as a matter of law to create a trust, to establish a power of appointment or otherwise to provide for the distribution of the Estate of the decedent[,] and ... the Estate should be distributed as subsequently determined by this Court[.]" The judgment also provided that Morrison should be removed as the personal representative of the decedent's estate.

Appellants' motion for reconsideration was denied on April 10, 1992.

VALIDITY OF TESTAMENTARY TRUST

The judgment entered below found, among other things, "that the provisions of [the decedent's 1991] Will so far as they attempt to set up a trust or to create a power of appointment are insufficient as a matter of law[.]"

Appellants argue that the trial court erred in determining that the provisions of the Second and Third Articles of the decedent's will were insufficient to create a testamentary trust. Appellants contend that a testamentary trust can be valid even though the beneficiaries were not named in the will itself, and that the provisions of our Probate Code do not limit testamentary trusts "to those which name the beneficiary [or beneficiaries] on the face of the

will[.]"

It is undisputed that, apart from the language of the will itself, the decedent left no written or initialed instructions describing his intended beneficiaries. Moreover, the provisions of the will are devoid of any language that would permit the trial court to ascertain with any degree of reasonable certainty the prospective beneficiaries of the attempted testamentary trust. Under these circumstances we conclude that the trial court correctly determined that a valid testamentary trust did not exist.

The elements of a valid trust include a competent settlor and trustee, intent by the settlor to create a trust, ascertainable trust res, a sufficiently ascertainable beneficiary or beneficiaries, a legal purpose, and a legal term. (citations omitted) Because the identity of the persons intended to be "the objects of [the decedent's] generosity" are not capable of reasonably being ascertained, we agree with the trial court that the provisions of the decedent's will attempting to create a testamentary trust were not effective to establish an express trust. *See In re Estate of Liginger*, 14 Wis.2d 577, 111 N.W.2d 407, 409 (1961) (will leaving money to executor and directing executor to pay sums in his sole discretion to persons whom the decedent had previously indicated created a trust; however, trust failed because oral declarations of the decedent could not be admitted); *see also* Restatement (Second) of Trusts §§ 112, 122 (1959) [hereinafter Restatement of Trusts]; 2 Austin W. Scott & William F. Fratcher, *The Law of Trusts* §122 (4th ed. 1987); *see also In re Will of Coe*, 113 N.M. at 360, 826 P.2d at 581 (elements of a valid trust include sufficiently ascertainable beneficiary or beneficiaries); *In re Estate of Kradwell*, 44 Wis.2d 40, 170 N.W.2d 773, 774 (1969) (trust held not to have been created where uncertainty existed as to identity of beneficiaries and no one was in position to enforce trust). *See generally* George E. Palmer, *The Effect of Indefiniteness on the Validity of Trusts and Powers of Appointment,* 10 UCLA L.Rev. 241, 280-81 (1963); B.P. de R. O'Byrne, Annotation, *Disposition of Property of Inter Vivos Trust Falling in After Death of Settlor, Who Left Will Making No Express Disposition of the Trust Property*, 30 A.L.R.3d 1318 (1970).

In evaluating the arguments of Appellees that the attempted testamentary trust failed to identify the decedent's intended beneficiaries, we also find the reasoning of Restatement of Trusts, *supra.* Section 122 comment a, persuasive. Comment a notes:

> *When class is indefinite.* A class of persons is indefinite within the meaning of the rule stated in this Section if the identity of all the individuals comprising its

> membership is not ascertainable. The class may be such that it is possible to determine that certain persons fall within it and that other persons do not fall within it.... Thus, the "friends" of the settlor or of another person constitute an indefinite class. So also, the class is indefinite where it includes any natural person other than the transferee himself or his estate.

The provisions of the Second and Third Articles of the decedent's will specified that the beneficiaries of his estate were to be selected by Morrison. However, the identity of the individuals eligible to be selected as beneficiaries were not capable of being drawn from any specifically identifiable class or category specified by the decedent. Under this posture the attempted trust was unenforceable.

Appellants, relying in part upon *Granado v. Granado*, 107 N.M. 456, 760 P.2d 148 (1988), and *In re Estate of Shadden*, 93 N.M. 274, 599 P.2d 1071 (Ct. App.), *certs. denied,* 93 N.M. 172, 598 P.2d 215 (1979), also argue that the trial court erred in not permitting them to introduce extrinsic evidence to clarify the decedent's intended trust beneficiaries. The record, however, fails to reflect that Appellants pursued this contention at the hearing on Appellees' motion for summary judgment. Nor do we find either *Granado* or *In re Estate of Shadden* dispositive here.

Granado dealt with an order finding that the circumstances of that case were sufficient to give rise to the creation of an equitable trust, not an express trust. 107 N.M. at 459, 760 P.2d at 151. Although the court in *In re Estate of Shadden* held that extrinsic evidence may be admissible under certain circumstances to clarify an ambiguity in a will, that decision does not aid Appellants here. 93 N.M. at 278-79, 599 P.2d at 1075-76. Since it is undisputed that the decedent failed to leave written, signed instructions identifying his intended beneficiaries, extrinsic, oral testimony was not admissible to rectify defects in the will itself or to overcome the decedent's failure to leave proper written instructions concerning his beneficiaries. *Cf. Portales Nat'l Bank v. Bellin*, 98 N.M. 113, 117, 645 P.2d 986, 990 (Ct. App. 1982) (unless will itself is ambiguous, extrinsic evidence is not admissible to supplement language of will); NMSA 1978, § 45-2-510 (Repl.Pamp.1989) ("Any writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification."); NMSA 1978, § 45-2-513 (Repl.Pamp.1989) (permitting testator to dispose of tangible personal property, other than money, by reference in will to written statement or list, if

statement or list is signed by testator and describes items and devisees with reasonable certainty).

Appellants' brief-in-chief appears to also argue that in the event the provisions of the decedent's will are insufficient to establish a valid testamentary trust, this Court should determine whether a resulting or constructive trust should be imposed. We need not consider this argument because the questions of how the decedent's estate should be distributed or the determination of the decedent's heirs at law, have not yet been addressed by the trial court.

CONCLUSION

The order of the trial court granting Appellees' motion for summary judgment and holding that the Second and Third Articles of the decedent's 1991 will are insufficient to create a trust or establish a power of appointment is affirmed.

IT IS SO ORDERED.

Notes, Questions and Problems

1. It makes sense that a trust cannot be valid without beneficiaries. From a practicable perspective, the purpose of a private trust is to benefit a particular person or class of persons. Without beneficiaries, the trustee has no role to play. Thus, the creation of a trust is unnecessary. As the next part of the book will indicate, the trustee has to fulfill numerous duties. At the time the trustee accepts his role, the testator is deceased. Thus, the only person that can hold the trustee accountable is the beneficiary. Thus, the trust instrument must name someone who has the authority to ensure that the trustee is abiding by the terms of the trust. Problems arise in two situations. First, the testator names beneficiaries whose identities cannot be determined. This is especially true when the beneficiaries are a part of a class without a defined membership. Second, the testator identifies the beneficiaries, but they are not capable of enforcing the trust.

2. If it is clear that the testator meant to create a trust and a class is named in the trust, should extrinsic evidence be presented to prove the members of the class? Instead of taking a "one size fits all" approach, should the courts evaluate the existence of the beneficiaries on a case by case basis? For instance, if the testator leaves money in trust for her best friends. Might it be easy to ascertain the names of the persons who fit that description?

3. Problems

In which of the following situations might the trust fail for lack of beneficiaries?

a). Roger executed a will stating, "I leave my house to Alexander in trust for my favorite nephew."

b). Alicia executed a will stating, "I leave the residuary of my state to Shannon in trust for the man I have been dating for the last ten years."

c). Mesha executed a will stating, "I leave my apartment complex to Keisha in trust for the benefit of the nonprofit corporation she plans to establish."

d). Melanie executed a will stating, "I leave my entire estate in trust to Feed The Children for the benefit of the two little girls I started sponsoring on March 7, 2011."

Class Discussion Tool

Gloria was a third grade teacher. Gloria was childless and had never married. Nonetheless, she constantly referred to the students in her class as her foster kids. At the beginning and end of every school year, Gloria gave gifts to all of the children in her third grade class. Gloria made a good salary, so she annually placed 10% of her salary into a 401k account. As with most retirement accounts, some of the money Gloria placed in her 401k account was invested in the stock market. In 1998, Gloria executed a will containing the following provision: "I leave the profits I will make on my 401k in 1999 to my sister, Delores in trust for my foster children that are enrolled in my class during the 2000-2000 academic year. After I die, it is my hope that Delores will do the right thing and take care of the kids." Has Gloria created a valid testamentary trust? If not, create a valid trust that achieves Gloria's objectives.

Chapter 3 - Categories of Private Trusts

Trusts fall in to two broad categories—private and charitable. The creation of charitable trusts will be discussed in Chapter Eight. The focus of this chapter is upon the different types of private trusts. This chapter is divided into two parts. Part I introduces expressed trusts. These are trusts that are expressly created by the settlor in a written instrument. In this part, two types of private expressed trusts will be compared—inter vivos trusts and testamentary trusts. Inter vivos trusts are established during the settlor's lifetime, and are a part of the nonprobate system. To the contrary, a testamentary trust is created by will. The testamentary trust does not come into existence until the will is probated. Part II consists of a discussion of trusts that are created by operation of law. These are really implied trusts that are established by courts. Therefore, those trusts do not have to conform to the requirements needed to create valid trusts. The implied trusts that will be discussed are the constructive trust, resulting trust, and the honorary trust.

3.1. Private Expressed Trusts

3.1.1. Inter vivos Trusts vs. Testamentary Trusts

The focus of this book is on testamentary trusts. Thus, the manner in which testamentary trusts are created was discussed in Chapter Two. A basic knowledge of the law governing inter vivos trusts is helpful because those types of trusts are one of the most commonly used will substitutes. The property in both the inter vivos and the testamentary trusts is not distributed to the third party beneficiary until after the settlor's death. Inter vivos trusts are created during the settlor's lifetime. They can be revocable or irrevocable. If the inter vivos trust does not involve an interest in real property, it may be created orally. The testamentary trust can only be created by a written instrument that satisfies the Wills Act. The moment the inter vivos trust is created the beneficiaries become equitable owners of the trust corpus. The beneficiaries of the testamentary trust do not receive any interest in the trust property until after the death of the settlor. An inter vivos trust may be created by a declaration of trust or a deed of trust. In order to create the inter vivos trust by a declaration of trust, the settlor must declare that he holds certain property in trust and manifest an intent

to hold the property as such. When creating a trust by declaration, the settlor declares that she is the trustee of the property for the benefit of herself during her lifetime and that the remainder of the trust property will be distributed to a third party when she dies. The third party will be receiving property from the trust and not the will. While she is alive, the settlor has the power to revoke the trust and the right to the trust income. Since the settlor is also the trustee, she has the right to manage the trust property. The beneficiary receives a vested interest in the trust property until it is revoked. In some cases, the settlor gives up her control and makes the inter vivos trust irrevocable. An irrevocable inter vivos trusts looks a lot like a testamentary trust. The testamentary trust is revocable until the testator dies. The settlor may also establish an inter vivos trust by a deed of trust. A deed of trust transaction involves three parties—the settlor, the trustee, and the beneficiary. The settlor transfers the property to be held in trust to a third party who is to act as the trustee. When the settlor dies, the trustee distributes the property to the beneficiaries or hold it in further trust. While the settlor is alive, she is the only person that is reaping the benefits of the trust. One of the most litigated issues is the nature of the interest that the beneficiary has in a revocable inter vivos trust.

***Cate –Schweyen v. Cate*, 15 P.3d 467**

Justice JAMES C. NELSON delivered the Opinion of the Court.

¶ 1 This is an appeal from an Order and Rationale entered by the Eleventh District Court, Flathead County, on December 14, 1998, denying Personal Representative JoAnn Cate's (JoAnn) motion for summary judgment and granting a motion for summary judgment in favor of Shannon Cate Schweyen, individually, and as Conservator of Sara Cate, a minor (collectively referred to herein as Shannon). The Order provided that JoAnn would convey various assets to Shannon and take other actions with respect thereto, and also awarded Shannon her costs.

¶ 2 We reverse and remand for further proceedings consistent with this opinion.

¶ 3 On appeal, JoAnn raises the following issues:

1. Whether the District Court erred in finding that the 1988 document represents a testamentary trust as opposed to an *inter vivos* trust which failed for lack of delivery of the document or the trust property to the trustee.

2. Whether the District Court erred in finding that a testamentary trust is not subject to the homestead allowance, exempt property, family allowance, rights of creditors, elective share

of the surviving spouse, and to expenses of administration.

We conclude that the first issue is dispositive, and therefore decline to address the second issue.

FACTUAL AND PROCEDURAL BACKGROUND

¶ 4 The focus of this controversy is a handwritten document drafted by Jerome J. Cate (Jerry), a practicing attorney in Montana for nearly 30 years and now deceased, entitled "Irrevocable Trust Reserving Income For Life." The document was signed by Jerry and dated January 2, 1988. Jerry died intestate on April 4, 1995.

¶ 5 The trust document purported to "sell, assign and convey" various mineral interests, which Jerry had inherited from his mother and her brother, to a trust for the benefit of his daughters from his first marriage, Shannon, Kristin, and Sara, with Shannon serving as trustee. Jerry reserved a life interest for himself, and then, upon his death, the three daughters would receive a term of years interest for 20 years, and then the corpus would be distributed outright to the daughters or their heirs pursuant to a "per stirpes" declaration. The trust document apparently was drafted by Jerry in anticipation of his remarriage to the Appellant, JoAnn, in February of 1988. The document reflects this, providing that "bearing in mind specifically that I intend to marry again on the 14th of February, 1988, [I] do hereby sell, assign and convey ..." The undisputed facts show that Jerry never transferred or conveyed the named mineral interests to the trust or otherwise delivered the trust property to Shannon, the named trustee.

¶ 6 At the time of his death, JoAnn, in her capacity as personal representative of Jerry's estate, refused to convey the alleged trust property upon the request of the daughters. Consequently, Shannon, acting individually and as conservator for her youngest sister, Sara, filed a petition in September of 1997, requesting that the District Court declare that either an express or resulting trust in the mineral interests existed. (The eldest daughter, Kristin, is not a party to this action.) At that time, the handwritten document had not been located; rather, a 1993 bill of sale document executed by Jerry indicated the existence of the trust.

¶ 7 The 1993 bill of sale was executed to convey Jerry's assets to a "joint revocable *inter vivos* trust" which he drafted in 1990. The bill of sale provided: "This Bill of Sale and Assignment does not include any mineral interests owned by Jerome J. Cate, a/k/a Jerry Joseph Cate, which have heretofore been placed in trust for the benefit of Shannon and Sara Cate." Kristin's name was apparently omitted from this reference due to a rift between her

and Jerry. Thus, Shannon pursued the legal theory that the referenced trust was testamentary in nature, and therefore JoAnn, as personal representative of Shannon's father's estate, must fund the testamentary trust with the mineral interests owned by Jerry at the time of his death.

¶ 8 Once the 1988 trust document was found, Shannon did not alter her legal theory, maintaining that the handwritten trust document was testamentary as well.

¶ 9 In response to Shannon's petition, JoAnn contended that the handwritten document was not a valid testamentary trust. She argued that the document intended to create an *inter vivos* trust, which Jerry never executed by conveying or otherwise transferring the interests to the trust or Shannon. Therefore, according to JoAnn, the handwritten trust document is unenforceable, and the identified mineral interests should be included within Jerry's estate.

¶ 10 Both parties moved for summary judgment. Following a July 29, 1998 hearing, the District Court denied JoAnn's motion for summary judgment and granted summary judgment in favor of Shannon.

¶ 11 The District Court concluded that to qualify as a testamentary disposition, the document need only comply with Montana's statutory requirements for a will. The court concluded that the handwritten trust document was testamentary. The court stated that "[t]he fact that Decedent chose to reserve income for life when he created the trust is not inconsistent with an intention to create a testamentary disposition." The court further concluded that the "evidence is clear, convincing and overwhelming that the intent of Decedent Jerome J. Cate was to establish a testamentary trust with his daughters to be the beneficiaries thereof." The court also ruled that "Respondent's contention that the instrument is a failed attempt to create an *inter vivos* transfer of the property is belied by the holographic nature of the instrument."

¶ 12 JoAnn filed a motion to amend the order so that it would reflect that the subject trust properties, if indeed testamentary, should first be subject to probate, meaning the property potentially would be reduced by various statutory allowances and exemptions. This motion was deemed denied.

¶ 13 JoAnn appealed.

STANDARD OF REVIEW

¶ 14 This Court reviews an order granting summary judgment *de novo,* using the same

rule 56, M.R. Civ. P., criteria applied by the district court. *Se Calcaterra v. Montana Resources,* 1998 MT 187, ¶9, 289 Mont. 424, ¶9, 962 P.2d 590, ¶9. This Court looks to the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits to determine the existence or nonexistence of a genuine issue of material fact. *See Erker v. Kester,* 1999 MT 231, ¶17, 286 Mont. 123, ¶17, 988 P.2d 1221, ¶17.

¶ 15 Here, no material facts remain in dispute. Rather, both parties contend that they are, respectively, entitled to judgment as a matter of law, in light of the District Court's conclusion that the trust document in question was testamentary, rather than *inter vivos.* As with the judicial interpretation and construction of any instrument, the question of whether any particular language creates an express trust, given the circumstances under which the trust was executed, is a question of law for the court to decide. *See Estate of Bolinger* (1997), 284 Mont. 114, 118, 943 P.2d 981, 983 *(*citation omitted). Thus, accepting the facts found by the District Court, we will proceed to determine if either party was entitled to judgment as a matter of law.

DISCUSSION

Whether the District Court erred in finding that the 1988 document represents a testamentary trust as opposed to an inter vivos trust which failed for lack of delivery of the document of the trust property to the trustee.

¶ 16 JoAnn argues that the trust document in dispute is *inter vivos,* rather than testamentary, and is therefore unenforceable because no property was ever transferred or conveyed to it by her deceased husband, Jerry, as required by law. Thus, the named trust property should remain in Jerry's estate, and she should be entitled to judgment as a matter of law.

¶ 17 Shannon contends that the District Court's conclusion that the trust document was testamentary is correct, and therefore the trust is valid because her father intended that the trust would remain "dry" until his death at which time his estate would transfer the mineral interests. Alternatively, Shannon argues that even if an express trust technically cannot be enforced, then an involuntary trust should be imposed to achieve an equitable result based on her father's clear intent expressed in the document.

¶ 18 The theories set forth by both parties comport with statutory law governing creation of trusts in Montana. Under §72-33-203, MCA, a trust is created "only if there is trust property ." Under §72-33-201(2), MCA, a valid *inter vivos* trust requires that the owner

transfer the subject property to a trustee during the owner's lifetime. In contrast, under subsection (3), a valid trust may be created when the property is identified as a "testamentary transfer" to a trustee. Under §72-33-216, MCA, a court may exercise its equitable powers and impose a "resulting trust" to fulfill the manifest intent of the trustor if the trust fails to fulfill this intent.

¶ 19 Further, Montana's statutory requirements generally comport with the Restatement (Second) of Trusts (1959), which often has been relied on by this Court, and has been presented as persuasive authority by the parties here. *See, e.g., McCormick v. Brevig,* 1999 MT 86, ¶ 63, 294 Mont. 144, ¶ 63, 980 P.2d 603, ¶ 63. *See also* §72-33-201, MCA, Official Comments; Restatement (Second) of Trusts § 17 (identifying five methods of creating trusts similar to subsection (1) through (5) under §72-33-201, MCA).

¶ 20 As a preliminary matter, we shall first dispense with the fundamentally flawed argument that the trust document at issue was testamentary. We conclude that as a matter of law the trust document clearly and convincingly expresses an intent to create an *inter vivos* trust that would take effect during Jerry's lifetime, notwithstanding whatever alleged misunderstandings or intentions the he may have expressed or exercised at a later date.

¶ 21 Our examination of the construction of the trust in question here is guided by several steadfast rules that were recently consolidated in this Court's decision in *Estate of Bolinger* (1997), 284 Mont. 114, 120-22, 943 P.2d 981, 985. First, we must seek out the trustor's "intent," so far as possible. Second, we must look to the language of the trust agreement itself to ascertain this intent. Third, the words used in the instrument are to be taken in their ordinary and grammatical sense unless a clear intention to use them in another sense can be ascertained. Finally, the burden of proof to establish the existence of a trust-or in this case a particular "kind" of trust-is upon the party who claims it, and must be founded on evidence which is unmistakable, clear, satisfactory, and convincing. *See Bolinger* (1997), 284 Mont. at 120-22, 943 P.2d at 985. (citations and internal quotations omitted).

¶ 22 Removing superfluous verbiage, the handwritten document, identified as an "Irrevocable Trust Reserving Income For Life" provides:

> I Jerome J. Cate ... do hereby sell, assign and convey all of my oil gas and mineral interests ... to my daughter, Shannon Cate, to hold in trust for her benefit and the benefit of her sister Kristin Cate and her sister Sara Cate, as Shannon in her sole discretion shall see fit, for a period of time twenty years

> subsequent to the date of my death, at which time she shall distribute those mineral interests in equal shares ... reserving, however, to myself the income from this trust for my lifetime.

¶ 23 Shannon argues at length that the foregoing writing technically satisfies statutory requirements for a holographic will, and is therefore "testamentary." *See* §§72-2-522 and 531, MCA (providing rules for holographic wills and testamentary additions to trusts).

¶ 24 A testamentary trust, however, not only must comply with the statutory requirements for a will, but also must take effect "only upon the testator's death." *See* Black's Law Dictionary at 1475 (6th ed.1990); Restatement (Second) of Trusts § 26, Comment a., and § 56, Comment b. (stating that in order for a disposition to be "testamentary," the owner of property who transfers property or deed of conveyance to trustee *inter vivos* must manifest an intention that the conveyance shall not be effective until his death). Further, in order for a document to be deemed "testamentary," generally, it also must be revocable, and the settlor or trustor must retain the property under his control during his life. *See* Black's Law Dictionary at 1474 (6th ed.1990). Although disputed by Shannon, these general definitions actually concur with the Restatement definition which she recites in her brief: "[a] testamentary disposition of property is a disposition to take effect upon the death of the person making the disposition and as to which he has substantially entire control until his death." Restatement (Second) of Trusts § 53, Comment a. This Restatement section adds that such a disposition is testamentary "whether made by a will or a document which purports to be a will or made by a transaction *inter vivos,* as by a deed, unsealed writing or parole declaration or transfer."

¶ 25 Thus, in order to be construed as "testamentary," a trust document must first and foremost express a clear and unmistakable intent that the trust will not take effect until the testator's death. Following this rule generally requires that the trustor retains the power of revocation, and expresses no intention to pass a present interest. *See In re Gasparovich's Estate* (1971(, 158 Mont. 21, 23-24, 487 P.2d 1148, 1150 stating "common sense" rule that the true test of the character of an instrument is not the testator's realization that it is a will, but his intention to create a revocable disposition of his property, to accrue and take effect only upon his death, and passing no present interest). Therefore, a "testamentary" disposition is usually incompatible with a trust established by a trustor who retains a life interest, as a beneficiary of the trust, although a new beneficiary or beneficiaries acquire an

interest upon the trustor's death. *See generally* Restatement (Second) of Trusts §§ 56, Comment f. and 57; 76 Am. Jur. 2d §§ 33 and 88 (1992) (stating that a " reservation of a life estate or interest does not make a disposition in trust a testamentary disposition").

¶ 26 Suffice to say, to construe the foregoing document as "testamentary" would require an alchemist's crucible. While not nimbly drafted, the document nevertheless expresses a clear and convincing intent that it would take effect *inter vivos,* or during Jerry's lifetime. Rather than anticipating a future testamentary transfer by such common language as "give, devise, and bequeath," the transfer is that of an ordinary, present conveyance: "I ... do hereby sell, assign and convey ..." Further, there is no preceding or subsequent qualification of this transfer language by other language such as "upon my death" or "when I die" or "in the event of my death." Rather, the "twenty years subsequent to the date of my death" language which appears later merely serves as a fixed termination date-rather than a commencement date-for the trust itself. Although Jerry did in fact retain legal title over the trust property, he did not name himself as trustee; rather, this duty is expressly accorded to his daughter, Shannon, meaning the document expresses a clear intent that Jerry planned to divest himself of legal title over the named trust property and thereby transfer a present interest. In turn, the "income from this trust for my lifetime" language indicates that the trust would come into existence during Jerry's lifetime, and he would become the trust's first beneficiary. Finally, the document itself is identified as "irrevocable," which in light of the accompanying language indicates an unmistakable intent to pass legal title to the trust during Jerry's lifetime, and thereby remove the property from his estate.

¶ 27 Taken as a whole, the evidence that the trust document is testamentary does not rise to the level of being unmistakable, clear, satisfactory, or convincing. Rather, the opposite is true: the trust document convincingly displays all the attributes of an *inter vivos* transaction that the trustor intended would take place at the time the document was drafted or soon thereafter. We therefore hold that the District Court erred in concluding that Jerry Cate's handwritten trust document was testamentary.

¶ 28 Pursuant to JoAnn's summary judgment argument that was denied by the District Court, we next turn to the issue of "delivery" to determine whether the trust in question was ever made legally effective, or instead remained a "phantom" or "dry" trust and therefore unenforceable. *See generally McCormick v. Brevig,* 1999 MT 86, 294 Mont. 144, 980 P.2d 603.

¶ 29 This Court has concluded that, under the common law, in order to establish an *inter vivos* trust, there must be a transfer of property. *McCormick,* ¶ 63 (quoting Restatement (Second) of Trusts § 17 and 32). We quoted from the Restatement of Trusts that "if the owner of property makes a conveyance *inter vivos* of the property to another person to be held by him in trust for a third person and the conveyance is not effective to transfer the property, no trust of the property is created." *McCormick,* ¶ 63 (quoting §32). *See also* Am. Jur. 2d § 49 (1992) (stating general rule that a separation of legal title and equitable ownership of the trust property is necessary to the formation of an express trust); Am. Jur. 2d § 52 (1992) (stating general rule that in order to create a valid trust, there must be an actual conveyance or transfer of property).

¶ 30 The undisputed facts clearly reveal that Jerry never delivered, or conveyed, or otherwise attempted to transfer the identified trust property to the named trustee, his daughter Shannon, or to the trust itself with or without her knowledge.

¶ 31 Further, the trust document itself is insufficient to serve as an instrument of conveyance. Although the property is clearly identified in the handwritten document, we concluded under the similar circumstances described in *McCormick* that in order for a trust document to serve as an instrument of conveyance, the person executing the trust document must subsequently redeliver, confirm, ratify, or adopt the transfer. *See McCormick,* ¶ 66 (requiring "some further indication of the grantor's intent to divest himself of valuable real property" and concluding that express trust was invalid as a matter of law because there was "no proper conveyance into the trust of trust property").

¶ 32 The reasons for Jerry's omissions, as JoAnn indicates in her brief, are known only to Jerry. That the undisputed facts clearly show that Jerry intended to create some form of a trust that would benefit only his three daughters unfortunately does not alter the fact that he never took the affirmative legal steps necessary for the trust to become enforceable as either a testamentary or *inter vivos* trust.

¶ 33 Thus, we have two options, pursuant to our *de novo* review: to either agree with JoAnn and conclude that no trust existed, and therefore the property should remain in Jerry's estate, or that an involuntary or "resulting" trust, one that would carry out Jerry's intent, should be enforced, which Shannon argues would achieve a correct, equitable result. We conclude, however, that the underlying "resulting trust" equitable doctrine is entirely incongruous with the factual circumstances presented here.

¶ 34 An involuntary trust is a creature of equity, where a court imposes or creates a trust to work an equitable result. *See Eckart v. Hubbard* (1979), 184 Mont. 320, 326, 602 P.2d 988, 991. Under §72-33-216, MCA, a court may exercise its equitable powers and impose a "resulting trust" to fulfill the manifest intent of the trustor if the trust fails to fulfill this intent. However, as a matter of law, such a "resulting trust" creates an equitable reversionary interest whereby the original transferor or his heirs become the beneficiary of the trust. *See Eckart v. Hubbard* (1979), 184 Mont. at 327, 602 P.2d at 992. *See also* Restatement (Second) of Trusts § 404 and Chapter 12 Introductory Note (stating that the beneficial interest "springs back or results to the person who made the disposition or to his estate, and the person holding the property holds it upon a resulting trust for him or his estate"). To illustrate, Jerry could have created a trust as specified in his handwritten document and properly transferred the property. Upon his death, if the beneficiaries did not survive him and left no issue, the trust would have "failed" pursuant to its own terms because no subsequent beneficiaries were named. *See* §72-33-216, MCA,. As an equitable remedy, the "resulting" remainder would revert to Jerry's estate, although this specific transfer of interest was not expressed in the trust document.

¶ 35 Thus, even if we were to impose a resulting trust, as Shannon argues, the property would nevertheless revert to Jerry's estate. This result is no different, therefore, than if we concluded that no trust exists. *See Eckart v. Hubbard* (1979), 184 Mont. at 328, 602 P.2d at 992 (describing identical circumstances and concluding that trust property must be returned to trustor's estate).

¶ 36 The other type of a involuntary trust, the constructive trust, which is based on the equitable remedy of unjust enrichment-i.e., the plaintiff brings a suit to enforce a constructive trust seeking to recover specific property-was not argued by Shannon, and is therefore not available as an equitable remedy. *See* §72-33-219, MCA (providing that a constructive trust arises when a person holding title to property is subject to an equitable duty to convey it to another on the ground that the person holding title would be unjustly enriched if he were permitted to retain it).

¶ 37 Accordingly, we conclude that the *inter vivos* trust document at issue failed due to the lack of a transfer of property to the trust during Jerry Cate's lifetime, and therefore no enforceable trust existed. Based on this conclusion, we hold that the District Court erred when it determined that Shannon was entitled to judgment as a matter of law, and denied

JoAnn's motion for summary judgment.

¶ 38 This matter is reversed and remanded for further proceedings consistent with this opinion.

Chief Justice J.A. TURNAGE, dissenting.

¶ 39 I respectfully dissent from the majority opinion.

¶ 40 The District Court concluded that the handwritten trust document executed by Jerome Cate met the requirements of the Montana Statute of Wills and would be valid as a holographic will. It further concluded that JoAnn Cate had produced no persuasive authority that an otherwise valid testamentary disposition which was never revoked is invalid simply because the testator chose to designate the disposition as "irrevocable."

¶ 41 Under long-settled rules of construction of testamentary instruments, including trusts, the testator's intent controls. *See, e.g., Estate of Bolinger* (1997), 284 Mont. 114, 120-21, 943 P.2d 981, 985. On this record, Jerome Cate's intent is crystal clear-to create a testamentary trust for his daughters. The reason for that intent is also clear-to pass on to his blood descendants mineral interests which he himself had inherited from his mother and her brother as part of his family legacy. If the majority cannot discern that intent, then their vision is fogged.

¶ 42 I would affirm the decision of the District Court.

Justice W. WILLIAM LEAPHART, dissenting.

¶ 43 I join in the dissent of Chief Justice Turnage and add the following considerations as bearing upon my conclusion that the District Court was correct in concluding that this document was a valid holographic testamentary trust:

¶ 44 1. The author, in typical precatory and testamentary fashion, characterizes himself as being of "sound and disposing mind[.]"

¶ 45 2. Cate was cognizant that he was about to marry a woman whom he had known for less than a month and that by his marriage to her he would have stepchildren whom he barely knew.

¶ 46 3. The language "twenty years subsequent to the date of my death," indicates both a commencement date (date of death) and a fixed termination date, twenty years thereafter.

¶ 47 4. Cate, an experienced attorney, knew how to fund an inter vivos trust but did not do so here.

¶ 48 5. Cate used a testamentary reference to the distribution of the mineral interests to his daughters "or their heirs per stirpes[.]"

¶ 49 6. Cate died leaving no formal last will and testament.

¶ 50 7. The beneficiaries of the testamentary trust were his daughters; his natural heirs and expected recipients of the mineral interests he had inherited from his mother and uncle.

¶ 51 8. As typical with holographic documents, the document is handwritten and not notarized.

¶ 52 Although there are certainly other provisions in the document which lend themselves to a contrary interpretation, when the document is read as a whole and in light of the circumstances under which it was executed, it is clear to me that Cate intended it to be testamentary in nature. Accordingly, I respectfully dissent.

***Johnson v. Kotyck*, 90 Cal. Rptr. 2d 99**

BOEN, P.J.

Is a beneficiary of an inter vivos trust entitled to receive trust accountings while the trustor is under the care and custody of a court-appointed conservator? We conclude that the beneficiary is not entitled to an accounting for a trust that remains revocable despite the infirmity of the trustor and the ensuing conservatorship.

FACTS

Elisabeth Frudenfeld is the trustor and original trustee of an inter vivos trust created on December 7, 1987 (the Trust). On August 30, 1996, the superior court appointed a professional conservator to manage Frudenfeld's affairs after finding that Frudenfeld is unable to care for herself. The court also appointed legal counsel to represent Frudenfeld in all conservatorship proceedings. The successor trustee of the Trust is respondent Karla Kotyck, one of Frudenfeld's daughters.

The Trust and its April 9, 1992 amendment contain the following clause regarding revocation: "This declaration of trust, and the trusts evidenced thereby, may be revoked at any time by the Trustor, during the lifetime of the Trustor, by the Trustor delivering written notice of revocation to the Trustee." The Trust also provides that it shall become irrevocable upon the death of the trustor.

A petition was brought under Probate Code section 17200 by appellant Laurie Cook Johnson, Frudenfeld's daughter and a Trust beneficiary. Johnson asked the probate court (1)

to order the trustee to prepare a report and accounting for the Trust and (2) to review the trustee's activities. Trustee Kotyck demurred to Johnson's petition, maintaining that Johnson has no right to receive accountings or to question the trustee's actions with regard to the Trust. The probate court sustained Kotyck's demurrer to the petition without leave to amend and dismissed the petition with prejudice. This timely appeal followed.

DISCUSSION

Trial Court's Jurisdiction

A trust beneficiary may petition the probate court regarding matters affecting the internal affairs of a trust, unless the trust instrument expressly withholds authority to proceed. Among other powers, the court has jurisdiction (1) to interpret the terms of the trust, (2) to determine the existence or nonexistence of any power, privilege, duty or right, (3) to instruct the trustee, and (4) to compel the trustee to report information about the trust or account to the beneficiary. (§17200, subds. (b)(1), (2), (6), (7); *Estate of Heggstad (*1993) 16 Cal. App. 4th 943, 951-952, 20 Cal. Rptr.2d 433).

The probate court's jurisdiction extends to the type of trust involved in this appeal. "Section 17200 makes no distinction between inter vivos trusts (i.e., living trusts) and testamentary trusts (i.e., trusts created by a will). Further, case law supports a probate court's jurisdiction under section 17200 to consider petitions regarding inter vivos trusts [citation], and nothing in the statutory scheme indicates any legislative intent to restrict the jurisdiction of the probate court to only those matters arising after the death of a trustor." *Conservatorship of Irvine* (1995) 40 Cal. App.4th 1334, 1342, 47 Cal. Rptr.2d 587)

3. Rights of a Beneficiary of an Inter Vivos Trust

Appellant Johnson asks this court to determine only one disputed point of law, to wit: Does the Probate Code give Johnson the right to receive trust accountings from her sister Kotyck, so long as their mother is alive and her affairs are being administered by a conservator? The short answer is "No" and the explanation follows.

Johnson agrees at the outset that the trustee of a revocable trust generally has no duty to report or account to the trust beneficiaries and that the beneficiaries have no right to receive such accountings. (*See* § 16964). However, she goes on to argue that "since the settlor has been declared incompetent, she no longer has the power to revoke." Johnson reasons that the beneficiaries of the Trust obtained the right to an accounting once Mrs. Frudenfeld became a conservatee, because "No one has the power to revoke" and Johnson's rights to

take from the trust are now vested. As we shall see, it is untrue that no one has the power to revoke the conservatee's inter vivos trust.

Under the Probate Code, the legal rights of a conservatee—including the right to revoke a trust—pass to the conservator, under the close scrutiny of the superior court. The conservator may petition the court for an order "Exercising the right of the conservatee (i) to revoke a revocable trust or (ii) to surrender the right to revoke a revocable trust ...." (§2580, subd.(b)(11)) The court is, in this situation, "the conservatee's decisionmaking surrogate" because "[i]n essence the statute permits the court to substitute its judgment for that of a conservatee." *Conservatorship of Hart* (1991) 228 Cal. App.3d 1244, 1250, 279 Cal. Rptr. 249). The court must satisfy itself that it is "fully and fairly informed" about the proposed exercise of the conservatee's legal rights. *Id.* at p. 1254, 279 Cal. Rptr. 249).

The only limitation on the court's ability to authorize the revocation of a conservatee's revocable trust is if the trust instrument "(i) evidences an intent to reserve the right of revocation exclusively to the conservatee, (ii) provides expressly that a conservator may not revoke the trust, or (iii) otherwise evidences an intent that would be inconsistent with authorizing or requiring the conservator to exercise the right to revoke the trust." (§2580, subd.(b)(11). We have examined the Trust in this case and all of its amendments. There is nothing in the Trust or its amendments which expressly or impliedly prevents the conservator from revoking the Trust or which reserves the right of revocation exclusively to Frudenfeld. Thus, the limitations listed above do not apply here.

Johnson relies primarily on section 15800, which postpones the rights of trust beneficiaries "during the time that a trust is revocable and the person holding the power to revoke the trust is competent." Contrary to Johnson's reading of it, this provision does *not* mean that a trust automatically becomes irrevocable when the trustor becomes a conservatee. The Law Revision Commission comment to section 15800 explains: "This section has the effect of postponing the enjoyment of rights of beneficiaries of revocable trusts until the death or incompetence of the settlor *or other person holding the power to revoke the trust.*" (Italics added.) It is clear from section 15800 that a conservator, working together with the superior court as the conservatee's decisionmaking surrogate, is a "person holding the power to revoke the trust."

The reading of section 15800 proposed by Johnson would undermine the statutory scheme relating to revocable trusts. So long as a trust is revocable, a beneficiary's rights are

merely potential, rather than vested. The beneficiary's interest could evaporate in a moment at the whim of the trustor or, in the case of a conservatorship, at the discretion of the court. Giving a beneficiary with a contingent, nonvested interest all the rights of a vested beneficiary is untenable. We cannot confer on the contingent beneficiary rights that are illusory, which the beneficiary only *hopes* to have upon the death of the trustor, but only if the trust has not been previously revoked and the beneficiary has outlived the trustor. For this reason, we conclude that section 15800 does not give a beneficiary such as Johnson any right to a trust accounting so long as a conservator retains authority under section 2580 to have the trust revoked and to abrogate Johnson's interest in the trust proceeds.

Johnson's primary concern is that the court-appointed professional conservator may be doing an inadequate job of supervising Frudenfeld's estate, including the Trust, thereby enabling Kotyck to engage in mismanagement or misappropriation of Trust assets. Mistrustful of the conservator's abilities or diligence, Johnson wants to oversee Frudenfeld's estate herself to ensure proper Trust management.

There are two ways to address Johnson's concerns, both falling within the Probate Code's conservatorship provisions.

First, the conservator is accountable to Johnson and is responsible for preventing the misappropriation of the conservatee's assets. The conservatorship statutes and the substituted judgment statutes in the Probate Code are designed to protect the conservatorship estate for the benefit of the conservatee *and* for the benefit "of the persons who will ultimately receive it from the conservatee." *Conservatorship of Hart, supra.* 228 Cal. App.3d at p. 1253, 279 Cal. Rptr. 249). In other words, the conservatorship is designed to protect persons like Johnson as well as Frudenfeld. If the conservator is concerned that estate's assets are being wasted or misappropriated, the conservator is empowered to ask the court to compel "a person who has possession or control of property in the estate of the ward or conservatee to appear before the court and make an account under oath of the property and the person's actions with respect to the property." § 2619, subd. (a).) Kotyck, as trustee of Frudenfeld's inter vivos trust, is a person in control of property in the conservatorship estate and must therefore account for her actions with respect to the Trust property.

The Probate Code requires that the conservator account for the property of the conservatee. The conservator must file an inventory and appraisal of the conservatee's estate

within 90 days after the initial appointment. (§2610.) The conservator must thereafter account to the court, showing receipts, disbursements, transactions and the balance of property on hand. . (§2610.). Failure to account subjects the conservator to the risk of punishment for contempt. (§2629.) When an account is filed, "any relative" of the conservatee may file written objections to the account. (§ 2622.) Thus, there is already a mechanism in place through which Johnson, as the daughter of the conservatee, can monitor the outflow from Frudenfeld's estate and ensure the diligent performance of the conservator's duties by simply scrutinizing the conservator's accountings and objecting when appropriate. Further, if the conservator breaches its fiduciary duty to Frudenfeld by allowing her estate to be frittered away, the conservator is chargeable for "[a]ny loss or depreciation in value of the estate," with interest. (§§ 2101, 2401.3.) In other words, the conservator ignores misappropriations of the conservatee's property at its own peril.

During oral argument, Johnson asserted that the provisions of section 2585 "immunize" the conservator from liability for wrongdoing. This is not correct. Section 2585 only states that the conservator is not required to propose any action under section 2585; i.e., the conservator is not required, for example, to propose the creation or revocation of a trust for the conservatee, or to enter a contract on behalf of the conservatee, or to provide gifts to charity, relatives, or friends on behalf of the conservatee. §2580, suds. (a)(3), (b)(4), (5), (11).) However, Johnson as an "interested person" may file a petition of her own in the probate court under section 2580 to compel the conservator to take action. (*See* Cal. Law Revision Com. com., reprinted at 52 West's Ann. Probate Code, foll. § 2585 (1991), p. 829[: "The remedy for a person who believes that some action should be taken by the conservator under this article is to petition under Section 2580 for an order requiring the conservator to take such action with respect to estate planning or making gifts as is set out in the petition."].) section 2585 does not immunize the conservator from wrongdoing or permit the conservator to look the other way if the conservatee's assets are being misappropriated by others.

Second, the conservatorship statutes provide a direct means for a prospective beneficiary like Johnson to investigate wrongdoing by a person holding the conservatee's property. Section 2616 authorizes the filing of a petition concerning a conservatee's assets by an "interested person, including persons having only an expectancy or prospective interest in the estate." (§ 2616, subd. (a)(3).) Johnson is an interested person within this definition. If

she chooses, Johnson may charge that Kotyck "has wrongfully taken, concealed, or disposed of property of the ward or conservatee." (§ 2616, subd. (b)(1).) The court may then order that Kotyck answer interrogatories or appear in court to be examined under oath, or both. (§§ 2616, 2617.) In particular, a trustee who has wrongfully misappropriated the funds of a ward is subject to citation and examination under section 2616. (*In re Ochoa* (1942) 50 Cal.App.2d 457, 458-459, 123 P.2d 106 [applying former § 1552, the predecessor statute to § 2616].) Anyone who wrongfully takes the property belonging to a conservatee, including a trustee, is personally liable for twice the value of the misappropriated property. (§ 2619.5.)

In short, there are satisfactory means by which Johnson can monitor the Trust and the trustee's activities during the pendency of the conservatorship. Much as Johnson would like to have a court declare the Trust to be irrevocable during Frudenfeld's lifetime, contrary to the terms of the Trust, it is unnecessary to do so to protect Johnson's interest. The Legislature has devised the methods we have described above to protect the rights of persons interested in the estate of a conservatee. The Legislature has also determined that the conservator should retain the right to seek revocation of an inter vivos trust during the conservatee's lifetime. Johnson cannot be accorded all the rights of a vested beneficiary before the death of the trustor.

DISPOSITION

The judgment is affirmed.

***Linthicum v. Rudi*, 148 P.2d 746**

HARDESTY, J.

In this appeal, we consider whether revocable inter vivos trust beneficiaries have the right to challenge amendments to the trust, when made by the settlor during the settlor's lifetime. Because we conclude that a beneficiary's interest in a revocable inter vivos trust is contingent at most, we hold that, generally, these beneficiaries lack standing to challenge the settlor's lifetime amendments. Instead, to challenge the settlor's capacity to make amendments, revocable inter vivos trust beneficiaries must follow the procedures set forth in Nevada's guardianship statutes, NRS Chapter 159. Accordingly, we affirm the district court's dismissal of the underlying complaint challenging revocable inter vivos trust amendments.

FACTS

Appellants Ernette and Myrna Linthicum are the brother and sister-in-law, respectively, of Claire Linthicum–Cobb. In 2002, Cobb executed a will and a revocable inter

vivos trust. As settlor, Cobb named herself trustee and reserved the power to revoke or amend the trust throughout her lifetime without having to notify any beneficiary. Cobb named Ernette and Myrna the primary beneficiaries of the trust upon Cobb's death. Additionally, Cobb named Ernette and Myrna successor trustees upon Cobb's death or incapacity. Finally, the trust stated that the trust would become irrevocable upon Cobb's death.

In 2004, Cobb executed a new will and a restatement/amendment to the trust. The amended trust replaced Ernette and Myrna as successor trustees with respondent Arnold Rudi, the nephew of Cobb's deceased husband. Also, the amended trust allegedly named Rudi as the sole beneficiary. Under the amended trust, Cobb remained the current trustee and retained the power to revoke the trust. Thus, the amended trust was still a revocable inter vivos trust.

After Cobb named Rudi the sole successor trustee, Rudi and Guardianship Services of Nevada petitioned for co-guardianship of Cobb's person and estate because Cobb was possibly delusional and paranoid. Ernette and Myrna objected to Rudi's appointment as a co-guardian; Rudi's petition for guardianship was later withdrawn. The district court granted Guardianship Services' petition for guardianship because it found that some of Cobb's actions had resulted in self-neglect and potential self-harm.

Subsequently, Ernette and Myrna filed a complaint alleging that the amended trust was a product of incapacity and/or undue influence, and they sought a constructive trust and/or cancellation of the amended trust. As to undue influence, Ernette and Myrna alleged that Rudi had a confidential relationship with Cobb and participated in executing the amended trust.

Rudi filed a motion to dismiss the complaint…asserting that Ernette and Myrna had failed to state a claim upon which relief could be granted because they lacked standing to challenge the amended trust. Specifically, Rudi argued that a will contest cannot be maintained until the testator dies, and since Cobb was still alive at the time, Ernette and Myrna lacked a present legal interest in the will and the trust. Rudi also argued that Ernette and Myrna could not assert any damages resulting from the amended trust.

Ernette and Myrna simultaneously filed an opposition to Rudi's motion to dismiss and a motion for the appointment of themselves as guardians ad litem. Ernette and Myrna argued that they had standing because the amended trust was presently operative and

effectual. Moreover, they argued that even if they could not challenge Cobb's will until after her death, it was necessary to challenge the amended trust during Cobb's lifetime to ensure that her wishes for the administration of her estate were observed while she was incapacitated. Finally, if the court concluded that they did not have standing, they asked that they be appointed as guardians ad litem.

The district court granted Rudi's motion to dismiss, without prejudice, finding that Ernette and Myrna lacked standing to challenge the amended living trust because Cobb was still alive; the court also denied Ernette and Myrna's motion to be appointed guardians ad litem. In denying a subsequent rehearing motion, the district court explained that Ernette's and Myrna's interest was at best contingent and would only vest if they survived Cobb. The district court also granted Rudi's motion for attorney fees and costs. Ernette and Myrna appealed.

DISCUSSION

Ernette and Myrna argue that Nevada statutory law allows them to challenge Cobb's revocable inter vivos trust during Cobb's lifetime*1455 and that the district court erred by granting Rudi's motion to dismiss. Specifically, Ernette and Myrna argue that NRS 164.015, NRS 153.031 (1)(a) and NRS 153.031(1)(d) allow interested persons to challenge the validity of a revocable trust while the settlor is still alive. We disagree.

If a motion to dismiss is made under NRCP 12(b)(5) and "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." The district court did consider matters outside the parties' pleadings, such as the guardianship order. Thus, we review Rudi's motion to dismiss as a motion for summary judgment. This court reviews an order granting summary judgment de novo.

NRS 164.015(1) permits "an interested person" to petition the court for proceedings "concerning the internal affairs of a nontestamentary trust" and to obtain "any appropriate relief provided with respect to a testamentary trust in NRS 153.031." NRS 153.031 (1)(a) and NRS 153.031 (1)(d) allow a trustee or beneficiary of a trust to petition the court to determine the existence of the trust and the validity of a trust provision, respectively. However, neither of these statutes directly addresses revocable inter vivos trusts, such as the trust in this case. Moreover, these statutes specifically refer to petitions by interested persons. Because the trust at issue is a revocable inter vivos trust and Cobb retained the ability to revoke the trust

during her lifetime, Ernette and Myrna have at most a contingent interest that has not yet vested. Consequently, Ernette and Myrna are not interested persons within the meaning of NRS 164.015 and NRS 153.031.

In so concluding, we embrace the holdings of other jurisdictions that have considered the matter. In a case from Ohio, *Lewis v. Star Bank, N.A., Butler County,* the beneficiaries of a revocable inter vivos trust sued the trustee for an alleged breach of fiduciary duty for failing to give pre-death tax and estate-planning advice to the settlor. The Ohio Court of Appeals determined that while the settlor was alive, pursuant to the terms of the trust itself, she had reserved the right to modify or revoke the trust. The court further concluded that as long as the settlor had that right and other "indicia of retained ownership" during her lifetime, the beneficiaries did not have an absolute entitlement to any portion of the trust while the settlor was alive. Since the beneficiaries' interests were subject to complete divestment while the settlor was alive, the court held that the beneficiaries were not in privity with the settlor or the trustee and could not maintain their lawsuit.

Similarly, in *Ullman v. Garcia,* a Florida appellate court cited a Florida statute that prevented revocable trusts from being contested before the settlor's death. Although the court relied in part on a statute, it also elaborated upon the reasoning behind this rule, much of which underlies our holding today. The Florida court noted that the devisee of a revocable trust does not enjoy any control over ownership of the trust until the settlor's death. Because the settlor has an absolute right to terminate the trust at any time and distribute the trust property as he or she sees fit, named beneficiaries to a revocable trust are only "potential devisees." The court also observed that a revocable trust is "a unique instrument" that has "no legal significance until the [settlor]'s death."

Ernette and Myrna cite a California case, *Conservatorship of Estate of Irvine,* to support their argument that they have standing to challenge Cobb's revocable inter vivos trust. In *Irvine*, a California appellate court upheld a lower court's order invalidating an amendment to a revocable living trust. However, *Irvine* is distinguishable from the present case. In *Irvine*, the trust allowed the settlor to amend the trust only upon written notice personally served upon and accepted by the trustee. The court noted that under a California statute, a settlor could bind himself to a specific method of amendment by providing for that method in the trust itself. Since the settlor in the case had not served the trustee with notice of the amendment, the court held that the requirements of the trust had not been satisfied and that the

amendment never became effective.

Unlike the situation in *Irvine*, in the present case, Cobb's trust does not contain a notice requirement or similar provision that would grant standing to Ernette and Myrna to challenge the trust *1457 amendment, nor does Nevada have a statute similar to the California statute. Consequently, *Irvine* does not lend support for Ernette and Myrna's position.

Nevada statutes do not contemplate beneficiaries to a revocable inter vivos trust challenging the trust until the settlor's death. Furthermore, such beneficiaries have only a contingent interest, at most, while the settlor is still alive. That interest does not vest until the settlor's death. Other jurisdictions addressing the issue have held similarly. For these reasons, we conclude that Ernette and Myrna lack standing to challenge Cobb's revocable inter vivos trust while Cobb is still alive.

After filing their complaint, Ernette and Myrna requested that the district court appoint them as Cobb's guardians ad litem, under NRS Chapter 159, so that they could prosecute an action against Rudi and the trust on Cobb's behalf. For Ernette and Myrna to serve as Cobb's guardians ad litem under these circumstances—namely, in a matter in which they challenge Cobb's actions in amending her trust to exclude themselves as beneficiaries—would create a conflict of interest. Accordingly, the district court properly denied their request. To the extent that Ernette and Myrna's concerns center on Cobb's capacity, those concerns are more appropriately addressed under Nevada's guardianship statutes, NRS Chapter 159, in the separate action brought under those statutes, rather than through their appointment as guardians ad litem in the litigation against Cobb's trust.

Finally, Ernette and Myrna also argue that the district court erred in awarding costs and attorney fees to Rudi as the prevailing party. We have considered the argument, and based on our holding today, we conclude that it is without merit.

CONCLUSION

Because we conclude that a beneficiary's interest in a revocable inter vivos trust is contingent at most, we conclude that Ernette and Myrna lack standing to challenge Cobb's revocable inter vivos trust during Cobb's lifetime. Additionally, we conclude that Ernette *1458 and Myrna must follow the procedures created by the Legislature when it modified Nevada's guardianship statutes in 2003, if they wish to pursue a remedy in this matter. Accordingly, we affirm the district court orders.

Notes, Questions and Problems

1. In order for there to be a valid inter vivos trust created by a deed of trust, the trust property must be delivered to the trustee. The settlor usually retains the power to revoke the trust. Thus, the trustee cannot do any thing with the property until the settlor dies. Unlike an inter vivos trust that is created by a declaration of trust, the courts require the settlor to deliver the trust property to the trustee. There are three types of delivery: actual, constructive and symbolic. Courts require the trust property to be actually delivered unless that is impossible or impracticable. Actual delivery may not be feasible based upon the nature and/or location of the property and/or the condition of the settlor. Constructive delivery exists when the settlor gives the trustee something that permits him to obtain possession of the property. For example, the settlor can satisfy constructive delivery by giving the trustee the keys to the safe deposit box where the trust property is located. In order to satisfy the symbolic delivery requirement, the settlor could give the trustee something that symbolizes the trust property. For instance, the settlor could send the trustee a list of expensive paintings that she wants to be the property of the trust if it is not convenient for her to deliver the paintings in a timely manner.

2. A revocable declaration of trust is created when the settlor states, "I declare myself trustee of my family's farm for the benefit of myself during my lifetime. Upon my death, the farm will pass to my sister to be held in trust for my grandchildren." How does this differ from a testamentary trust? Since this trust does not comply with the Wills Act, should it be enforceable?

3. Problems

Assuming that actual delivery is not possible, in which of the following cases has the property been effectively delivered?

a). Elizabeth wants to place her collection of twelve antique cars in trust for the benefit of her children. Elizabeth delivers the automobile insurance policies to the trustee.

b). Egypt wants to place her collection of two hundred rare books in trust for the benefit of her children. Egypt gives the trustee a memorandum listing the titles of the books.

c). Daniel wants to place his stocks in trust for the benefit of his children. The stock certificates are in his safe deposit box. Daniel gives the trustee the keys to the desk where the keys to the safe deposit box are located.

d). Kevin wants to place his bed and breakfast in trust for the benefit of his children. Kevin

gives the trustee the deed to the property.

3.1.2. Totten/Tentative Trust

Another type of trust that the law recognizes is the *Totten* trust. The *Totten* trust is referred to as the poor man's trust because it can be created without expense or formalities. This type of savings account trust was recognized in the landmark case of *In re Totten,* 71 N.E. 748 (N.Y. 1904). In order to transfer property after death, a person has to execute a will. If A places her daughter's name on her bank account with the intention that the daughter is only to remove money from the bank account after A dies, it is clear that A has testamentary intent with regards to the money. A is attempting to make a testamentary disposition of the money without executing a will. This transaction like most payable on death transactions is invalid. Nevertheless, the *Totten* trust is an exception to this rule. The *Totten* case involved the following transaction. A deposited money into a savings account in the name of "A, as trustee for B." While she was alive, A maintained the right to revoke the trust by taking all of the money out of the account at any time. B was only entitled to the money that remained in the savings account after A died. The *Totten* court concluded that the transaction was not testamentary in nature. The court reasoned that, at the time A made the deposit, a "tentative " revocable trust was established. Hence, as beneficiary of that trust, B was legally entitled to any money left in the account when A died.

3.2. Trusts Created By Operation of Law

3.2.1 Resulting Trust

In some contexts, courts will imply a trust. A resulting trust is an implied trust that equity requires the law to establish when it can be inferred from the character of the transaction that the person who holds the legal title to the property was not intended to have the beneficial interest. Thus, a resulting trust is really an equitable reversionary interest in property. The trust is created by operation of law in the following contexts: (1) a private expressed trust fails or makes an incomplete disposition; (2) the property of the trust proves to exceeds what is required to satisfy the trust purpose; (3) one person pays the consideration for a transfer of real property, but the title has been taken in the name of another person. Consider the following examples:

> **Example 1-**Betty Jo devises property to Billy Bob in trust to pay the income to Denver for life, and on Denver's death to distribute the remaining

property to Betty Jo's friends. After Denver dies the trust would be dissolved for lack of ascertainable beneficiaries. In order to avoid letting Billy Bob retain the trust property, the court would place a resulting trust on the property for the benefit of Betty Jo's heirs or devisees.

Example 2-Beyonce purchases Blueacre with money supplied by Kelly. Unless Beyonce can show that Kelly intended to make a gift of Blueacre to Beyonce, Beyonce holds title to Blueacre on resulting trust for Kelly.

***Sahagun v. Ibarra*, 90 S.W.3d 860**

KAREN ANGELINI, Justice.

This appeal arises from a dispute over a house in which Maria M. Guadalupe Sahagun possesses legal title. The trial court determined that a resulting trust was created at the inception of title in Enrique Ibarra, Sr.'s favor and that this equitable title was superior to Sahagun's legal title. Sahagun brings four issues on appeal. We overrule all issues and affirm the judgment of the trial court.

BACKGROUND

In 1991, Ibarra and Sahagun were romantically involved despite the fact that Ibarra was married to another woman. Ibarra moved into Sahagun's home. Sahagun then sold her home, and she and Ibarra moved into a rental property. In 1996, Sahagun bought a house in her name for $89,000.00. That house is the subject of this appeal. Ibarra contributed $10,000 in earnest money. Sahagun paid an additional $15,000.00 as a down payment. Ibarra contends that he and Sahagun intended to buy the house together. According to Ibarra, the reason that the title was in Sahagun's name was because he and Sahagun did not want his wife to know about the purchase. Sahagun disputed Ibarra's version of events and testified that Ibarra gave her the money, because he had "lived with me for so long off [sic] of me." Sahagun claims that Ibarra knew that the house was hers and that it would eventually belong to her daughter. Ibarra and Sahagun lived in the house together as a couple. Ibarra and Sahagun later separated, and Ibarra moved out of the home. When Sahagun put the house up for sale, Ibarra filed a *lis pendens*. He then filed suit against Sahagun. Later, Ibarra filed a motion to dismiss without prejudice, claiming that the parties had settled their dispute. According to Sahagun, she and Ibarra agreed that she would repay him $10,000.00. This agreement, however, was not reduced to writing. The trial court granted the motion to dismiss and entered an order of dismissal without prejudice. In March of 1998, Ibarra and

Sahagun went to the law office of Ibarra's divorce attorney. Sahagun gave Ibarra a check for $2,000.00 with a notation "partial pymt. on loan" in the memo section. Sahagun claims that she made this payment in accordance with their settlement agreement. Ibarra disputes Sahagun's assertion and contends that Sahagun paid him the money so that he could get a divorce and that he never saw the notation on the check. Ibarra refiled his lawsuit against Sahagun, requesting that the trial court impose a constructive trust in his favor. The case was tried to the bench. At trial, Ibarra sought an amendment to add a claim for a resulting trust. The trial court found in Ibarra's favor and imposed a resulting trust, awarding Ibarra an undivided interest of 43/100 in the house.

JURISDICTION AND RES JUDICATA/COLLATERAL ESTOPPEL

In her first and second issues, Sahagun argues that the trial court had no jurisdiction to enter its judgment. Sahagun contends that the prior order of dismissal without prejudice is substantively an order dismissing the cause with prejudice and thus, bars Ibarra's refiling his suit against her pursuant to the doctrines of res judicata and collateral estoppel. Indeed, a dismissal with prejudice functions as a final determination on the merits, *Mossler v. Shields*, 818 S.W.2d 752, 754 (Tex. 1991), and orders dismissing cases with prejudice have full res judicata and collateral estoppel effect, barring any subsequent suit arising out of the same facts brought by the same party against the same respondent. *Lentworth v. Traham,* 981 S.W.2d 720, 722 (Tex. App-Houston [1st Dist.] 1998, no pet).

Sahagun urges that we should look to the substance of the motion and not to its title. Because the motion to dismiss without prejudice states that "the parties have settled their dispute," Sahagun argues that we should interpret the substance of the motion as requesting dismissal with prejudice. Similarly, Sahagun contends that because the order of dismissal without prejudice states that the trial court determined the motion to be "meritorious," we should interpret the order as dismissing the case with prejudice. For support, Sahagun cites *De La Rosa v. Vasquez,* 748 S.W.2d 23 (Tex. App.-Amarillo 1988, no writ), which arose out of a suit to establish paternity. In that case, although the parties entitled their joint motion a "motion for nonsuit," they requested that the court dismiss their suit with prejudice as they had fully settled their dispute. *Id.* at 26. On appeal, Vasquez argued that the trial court should not have entered judgment with prejudice, because their joint motion was entitled a motion for nonsuit. *Id.* The appellate court disagreed and after reviewing the substance of the motion, determined that the motion, despite its title, was a motion seeking dismissal with

prejudice based upon the compromise and settlement of the parties. *Id.* Sahagun asks that we interpret this holding to extend to any motion seeking dismissal because the parties have settled their dispute. We decline to do so.

Here, Ibarra moved for dismissal *without prejudice* on the grounds that the parties had settled their dispute. The trial court then ordered that the cause be dismissed *without prejudice.* The clear intent of the motion and the order was that the cause be dismissed without prejudice. As the cause was dismissed without prejudice, res judicata and collateral estoppel did not bar Ibarra's suit. We overrule Sahagun's first and second issues.

RESULTING TRUST

In her third issue, Sahagun argues that there was no evidence to impose a resulting trust against her. A resulting trust arises by operation of law when title is conveyed to one person but the purchase price or a portion of it is paid by another. *Tricentol Oil Trading, Inc. v. Annesely*, 809 S.W.2d 218, 220 (Tex. 1991). To create a resulting trust, the payment must be made at the time of purchase and the person seeking to impose a resulting trust must have paid the money in the character of a purchaser. *Lifemark Corp. v. Merritt,* 655 S.W.2d 310, 317 (Tex. App.-Houston [14th Dist.] 1983, writ. ref'd n.r.e. No resulting trust exists in favor of one who pays the purchase price by way of mere loan to another and the conveyance is taken in the name of the borrower. *Id.*; *Jordan v. Jordan*, 154 S.W. 359, 361 (Tex. Civ. App.-Texarkana 1913, writ. ref'd) (citing *Boehl v. Wadgymar,* 54 Tex. 598 (1881). Thus, if A loans money to B, B purchases property with that money, and the conveyance is taken in B's name, no resulting trust arises in favor of A. However, if A pays the purchase price and causes the deed to the property to be placed in B's name, a resulting trust does arise in favor of A. *See Atkins v. Carson*, 467 S.W.2d 495, 500 (Tex. Civ. App.-San Antonio 1971, writ ref'd n.r.e.).

In reviewing a legal sufficiency challenge on appeal, all the record evidence and reasonable inferences from that evidence are reviewed in a light most favorable to the findings, and the finding is upheld if it is supported by anything more than a scintilla of evidence. *Formosa Plastics Corp. USA v. Presidio Engineers & Contractors, Inc.,* 960 S.W.2d 41, 48 (Tex. 1998). Anything more than a scintilla of evidence is legally sufficient to support the finding. *Id.*

Sahagun argues that Ibarra was required to prove a fiduciary relationship citing language in *Tricentrol Oil Trading, Inc. v. Annesley*, 809 S.W.2d 218, 220 (Tex. 1991), for

support. In *Tricentrol* , the supreme court explained that "[w]hen title to property is taken in the name of someone other than the person who advances the purchase price, *a resulting trust is created in favor of the payor.*" *Id.* (emphasis added). Once this resulting trust is created, the "trustee of a resulting trust stands in a fiduciary relationship with the beneficiary insofar as the trust property is concerned." *Id. Tricentrol* stands for the proposition that once a resulting trust is created, the trustee (in this case, Sahagun) stands in a fiduciary relationship with the beneficiary (in this case, Ibarra). For the evidence to be legally sufficient, there must be some evidence that a resulting trust was created. There need not, however, be evidence of a fiduciary relationship between Ibarra and Sahagun prior to the creation of the resulting trust. The creation of the resulting trust, itself, establishes the fiduciary relationship.

At trial, Ibarra testified that he and Sahagun decided to buy a house because "they were just throwing money away" by renting a house. A real estate agent had told him about the house that is the subject of this suit. According to Ibarra, he and Sahagun liked the house and Ibarra put $1,500.00 of his separate money down as earnest money. Ibarra testified that he and Sahagun decided to purchase the house in her name because Ibarra was not divorced and they wanted to protect Sahagun from his wife and children. Because he and Sahagun wanted to "expedite things," Ibarra put $8,500.00 more down as earnest money. Thus, according to Ibarra's testimony, he and Sahagun agreed to purchase the house together. Although Sahagun's testimony contradicts Ibarra's, his testimony is more than a scintilla of evidence that a resulting trust was created at the time of inception of title. We overrule Sahagun's third issue.

CONCLUSION

Having overruled all issues, we affirm the judgment of the trial court.

3.2.2. Constructive Trust

A constructive trust is an equitable remedy designed to prevent unjust enrichment or to punish fraud. The court places a trust over the property to prevent the wrongdoer from benefitting from its use. The moment the constructive trust is created the wrongdoer loses all interest in the trust property. Constructive trusts are different from resulting trusts because courts impose constructive trusts in situations where no trust was ever anticipated. For instance, if a person named in the testator's will causes the testator's death, the slayer statute will usually prevent the person from inheriting. Since the probate court is a limited

jurisdiction court, it has to honor the terms of the testator's will and give the slayer the bequest. In order to prevent the slayer from benefitting from his crime, the court can imposed a constructive trust on the property he receives under the will. Thus, the slayer never takes an interest in the property. He holds the property in trust for the testator's next of kin. Once the property is converted into a constructive trust, the holder of the property must transfer it to the constructive beneficiary.

***Rawlings v. Rawlings*, 240 P.2d 754**

AMENDED OPINION

On Certiorari to the Utah Court of Appeals

DURRANT, Associate Chief Justice:

INTRODUCTION

¶1 We granted certiorari in this case to determine whether the court of appeals erred in reversing the district court's imposition of a constructive trust. The parties in this case are siblings who dispute the ownership of farm land transferred by their father. The oldest sibling, Donald, received the land as the grantee under a warranty deed. He contends that his father transferred the land to him in exchange for payments he made on some of his father's debts. The family's four other siblings and their spouses (collectively, the "siblings") contend that their father deeded the land to Donald in an attempt to create a family trust. During the time period surrounding this transfer, their father had been diagnosed with cancer and owning the land made him ineligible for welfare assistance. The siblings contend that their father placed the property in their older brother's name so that he could act as trustee over the land and hold it for the benefit of the family. The siblings also contend that, in the decades since the transfer, the land was treated as a family farm and that they have contributed to its care, maintenance, and profitability.

¶2 The district court credited the testimony of the siblings and found that the oldest brother had been unjustly enriched by accepting the siblings' years of contributions to the success of the farm. Accordingly, the court exercised its equitable power to award a constructive trust in favor of the siblings. The court of appeals reversed. Concluding that certain of the district court's findings of fact were inconsistent with its award of a constructive trust, the court of appeals held as a matter of law that the siblings could not prevail on any theory of constructive trust. We exercised our jurisdiction pursuant to Utah Code section 78A-3-102(3)(a) (2008) and granted the siblings' petition for certiorari. We

reverse the judgment of the court of appeals.

BACKGROUND

¶3 Because the parties do not dispute any of the trial court's findings of fact, we recite the facts in accordance with those findings.

¶4 The parties in this case are siblings whose father, Arnold Rawlings, owned twenty-two acres of land near Orem, Utah. In 1957, a few years before the events giving rise to this case occurred, Arnold transferred approximately twelve acres to a third party while retaining approximately ten acres that he operated as a family farm. Between 1960 and 1967, Arnold transferred portions of this farm land to his two oldest sons, Donald and Dwayne Rawlings. The end result of these transfers was that both Donald and Dwayne received parcels approximately one acre in size on which to build their homes. Arnold retained half an acre in the northeast corner of the property where his house was located. Except for these assorted parcels of land, the remainder of Arnold's property remained undivided until March 24, 1967. On that day, he transferred to Dwayne a small parcel approximately half an acre immediately south of Donald's land-which Dwayne has held in trust for the other members of the family. On the same day, Arnold transferred the remaining farm property to Donald, in one undivided parcel, via a general warranty deed. In contrast to the siblings' claims that Donald took the land as a trustee, Donald contends that this transfer was compensation for his having paid certain debts on his father's behalf.

¶5 The March 24 land transfers happened at a time when Arnold's health had substantially deteriorated. In October of the year before, he was diagnosed with cancer. Later that year he underwent surgery to remove a large tumor. Although he labored to recover from this surgery, Arnold began radiation treatments in January of 1967. He was hospitalized twice in the coming months, and by March 24, his health was very poor.

¶6 The siblings contend that the purpose of transferring the farm property to Donald was to facilitate his eligibility for welfare assistance. Sometime prior to December 16, 1966, Donald had contacted the State Welfare Department to discuss Arnold's eligibility, and it became apparent that Arnold would receive assistance only if the farm property was not held in his name. Thus, shortly before the March 24 transfers, Arnold discussed with LaRell, his third oldest son, the need to take the property out of Arnold's name. They discussed the best means to effect this, and LaRell suggested that the property be transferred to Dwayne because LaRell believed Dwayne would be fair in his dealings with the family. Ultimately,

Arnold decided to transfer the land to Donald instead. Arnold met once with LaRell and Donald, and later with Dwayne and Donald, to discuss these plans. The trial court credited this testimony and found that Donald offered no evidence to rebut it.

¶7 Around the time of the transfer, Donald and the siblings also conducted other business relevant to the farm property. First, in January of that year, Donald began telling Dwayne that Arnold needed approximately $1,000 to pay off the taxes on the farm. Dwayne borrowed the funds to pay these taxes on his father's behalf and gave the money to Donald. But it was not until the March 24 transfer was complete that Donald used this money to pay off the back taxes. Second, on the same day that Arnold transferred the farm property to Donald, the siblings and their spouses relinquished their interests in the farm property to Donald via a quitclaim deed. Over time, the siblings also transferred neighboring parcels of land to Donald to add to the trust property.

¶8 In the years after the transfer, Arnold continued to struggle with his health, but also continued to manage and collect the profits from the farm property until his death in 1971. Indeed, in the fall of 1969, Arnold struggled to complete the harvest on his own. So, the next spring, Arnold began corresponding with LaRell's commanding officers in the military in the hopes of having LaRell temporarily released from his duties so he could return and help with the maintenance of the farm. Arnold submitted notarized affidavits to this effect, and had a number of people write letters in support of this effort. These documents uniformly refer to the property as Arnold's Farm and refer to Arnold's efforts to harvest crops and maintain the farm, and given his health, the difficulty he faced doing it alone.

¶9 In addition to managing the property as a farm, Arnold also managed family affairs on the farm: when Arnold's youngest son, Bryce, sought to locate a mobile home on farm property, it was Arnold's permission he sought, and it was Arnold who decided the best location for the trailer. And less than a month after Arnold's death in 1971, Arnold's widow, Cleo-not Donald-paid the property taxes on all of the farm property.

¶10 For years after Arnold's death, the farm property was managed in a manner consistent with it being held in trust for the family. Bryce continued to live on the land for four or five years after Arnold's death. Donald consistently represented to his siblings that income from the farm property was being used to support their mother. Because of these representations, all of the siblings, except Donald, worked in the orchard and helped to maintain the farm property. When Donald was asked during his deposition which of the

siblings contributed to the operation of the farm property, Donald answered, "All I know is that I didn't."

¶11 Arnold's 1957 transfer of twelve acres south of the farm property led to a boundary dispute regarding the southern border of the farm property. During this dispute, Donald's representations to the family reinforced the idea that this land was being managed for the benefit of the family. Specifically, by 1974 a dispute had arisen over the location of the border between the farm property and the land that Arnold had transferred in 1957. Donald enlisted Dwayne to help erect a fence at the boundary line in the hopes of settling this dispute and protecting what Donald referred to as "Mother's farm." Donald also induced his siblings to sign a quitclaim deed for the farm property. He told them that the quitclaim deed encompassed only the land being disputed, but it actually described the entire farm property. The trial court found that this quitclaim deed would have been unnecessary if Donald had owned the property by virtue of the 1967 conveyance. Thus, it rejected Donald's contention that the purpose of the quitclaim deed was to clear up the title problems on the southern boundary. When Donald settled the boundary dispute for $52,000, he paid $500 each to Bryce and Carol Lynn (Arnold's only daughter), and $600 to Dwayne. He offered $500 to LaRell, but LaRell refused to accept the money. Donald also spent $5,000 to prepay burial funds for Cleo and to buy her a car.

¶12 Not until after 1993 were the siblings made aware that Donald considered the land to be his own property. A dispute arose regarding a piece of the farm property that formed part of the basis for a land exchange that Donald and Dwayne had undertaken in 1978. In exchange for a piece of industrial property valued at approximately $45,000, the two brothers each contributed $15,000. A small piece of the farm property, valued at approximately $15,000, constituted the remainder of their contribution. The industrial property they received was eventually divided into northern and southern halves, with each brother responsible for one of the halves. In 1993, Donald brought suit to establish himself as the owner of two-thirds of this property. He alleged that he alone held title to the farm property that formed part of the basis of the exchange. Alleging that Dwayne had no interest in the farm property, Donald contended that his share of the industrial property should reflect the fact that he contributed $15,000 worth of land and $15,000 in cash, whereas Dwayne only contributed $15,000 in cash. The district court found that this suit, filed in 1997, was the first repudiation by Donald of his trust responsibilities. In response to

Donald's suit to quiet title, Dwayne and the siblings filed counterclaims seeking imposition of a constructive trust.

¶13 Donald's version of events surrounding the 1967 transfer of farm property differs from that of the siblings. He contends that Arnold had mortgaged the farm property prior to being diagnosed with cancer and that Donald rescued the land from foreclosure by paying off his father's indebtedness. Thus, he contends that the deed transferring the land is exactly what it purports to be on its face: a general warranty deed transferring fee simple ownership. He contends that Arnold, prompted by Donald's payments of this indebtedness, intended to give him the farm property free of any implicit trust obligation.

¶14 The trial court explicitly discredited this testimony for a number of reasons. First, Donald had his own indebtedness with the same bank, and during the time when he would have been paying off his father's debts, his payments to the bank did not increase in a manner consistent with making additional payments. Second, after this litigation began, Donald's wife, Jeanette, altered the cancelled checks to the bank by inserting notes on the memo line to make it appear as though the checks were written to pay Arnold's mortgage. Third, the evidence was not consistent with the possibility of imminent foreclosure, because the bank had neither sent any notices of default (as it would have been required to do) nor attempted to foreclose on two vehicles that were also part of the security for the loan.

¶15 Ultimately, the district court found the testimony of the siblings persuasive and rejected Donald's version of events. It concluded that the purpose of the transfer was to accommodate Arnold's attempts at becoming eligible for welfare, not in exchange for payment of Arnold's debt and not to transfer ownership. It concluded the siblings had presented clear and convincing evidence to support an "equitable need to impose a constructive trust on the property." It also concluded that Donald and Jeanette had been unjustly enriched by keeping the $1,000 that Dwayne paid toward the property taxes, by keeping the bulk of the $52,000 received from the settlement of the boundary dispute, and by keeping "other benefits from the use and negotiations relative to the trust property." Thus, the trial court entered judgment in favor of the siblings, concluding that the March 24 conveyance to Donald, along with the relevant quitclaim deeds, created a constructive trust on the property described therein.

¶16 The court of appeals reversed this judgment. It began by comparing the two different theories under which a constructive trust may be imposed. One theory, which it

called a "legal constructive trust," requires no showing of unjust enrichment. Instead, it concluded that in some cases a constructive trust is imposed to give effect to a grantor's attempt to create an oral express trust. The court of appeals contrasted this sort of constructive trust with "equitable constructive trusts," which are imposed to remedy unjust enrichment. It then determined that the trial court had failed to properly distinguish the two and had essentially used unjust enrichment as a substitute for proof of an oral express trust. It concluded that the siblings' case must succeed or fail based on whether they had proven Arnold's intent to orally impose trust obligations. According to the court of appeals, either Donald had violated Arnold's express wishes-which would make a legal constructive trust the only appropriate remedy-or the farm property belonged to Donald, in which case he had not been unjustly enriched by his years of ownership.

¶17 Having come to this conclusion, the court of appeals acknowledged that it would normally be required to remand the case for factual findings regarding the elements of a legal constructive trust. It did not do so, however, because such a claim requires the party challenging a warranty deed to prove the intent to create a trust. But here, one of the trial court's findings stated that "Arnold did not consider the conveyance to be a transfer of his ownership rights in the property." Relying on this finding of fact, the court of appeals concluded that the siblings' claim must fail as a matter of law. It reasoned that if Arnold did not intend to transfer ownership at all, then he could not have intended to create a trust because creation of a trust requires that title to the property be transferred to a trustee. Thus, it dismissed the siblings' claims as a matter of law and instructed the trial court to enter judgment quieting title to the property in favor of Donald.

¶18 We granted certiorari to determine whether the court of appeals correctly applied Utah's law of constructive trusts. Before us, the siblings argue that the court of appeals erred in two ways. First, they argue that the court of appeals erred by interpreting the trial court's finding of fact in isolation and in a manner inconsistent with its judgment. They contend that the finding of fact regarding Arnold's intent to transfer ownership can, and should, be interpreted to mean that Arnold intended to transfer bare legal title while maintaining the beneficial interest in the land. They argue that such an interpretation would support a constructive trust and that the court of appeals erred when it held that they could not prevail on this claim. Second, the siblings argue that the success of the farm was based on years of effort and contribution by everyone in the family. They rely on the trial court's

findings regarding Dwayne's payment of back taxes, the contribution of labor by all of the siblings to keep the farm operational, and the siblings' assistance during the 1978 boundary dispute. All of these contributions, they contend, support a finding of unjust enrichment because their efforts were undertaken in reliance on their belief that the land was being held in trust for their benefit.

¶19 We conclude that the district court's findings were sufficient to support imposition of a constructive trust. In deciding that the findings of fact regarding Arnold's intent foreclosed the siblings from prevailing on a claim of unjust enrichment, the court of appeals erred. The trial court acted within the bounds of its discretion in imposing a constructive trust. Therefore, we reverse the judgment of the court of appeals.

STANDARD OF REVIEW

¶ 20 When reviewing cases pursuant to a writ of certiorari, this court reviews the decision of the court of appeals, not that of the district court. The court of appeals' holding that the siblings could establish neither an oral express trust nor unjust enrichment is a legal determination that we review for correctness.

¶ 21 With regard to the imposition of a constructive trust, the availability of such a remedy is also a question of law reviewed for correctness. But if such a remedy is available, the " 'trial court is accorded considerable latitude and discretion in applying and formulating an equitable remedy, and [it] will not be overturned unless it [has] abused its discretion.' "

¶ 22 Finally, because "[u]njust enrichment must remain a flexible and workable doctrine.... we afford broad discretion to the trial court in its application of unjust enrichment law to the facts."

ANALYSIS

¶ 23 The siblings contend that the trial court was correct in imposing a constructive trust, either as a means of giving effect to an oral express trust, or as a means of remedying unjust enrichment. Thus, they argue that the court of appeals erred in two ways. First, they argue that the court of appeals misinterpreted the trial court's findings of fact and that these findings actually demonstrate Arnold's intent to create a trust to benefit the family. Second, they argue that the trial court was correct in finding that Donald had been unjustly enriched and that the court of appeals erred in holding otherwise. As such, they claim that the trial court had discretion to award a constructive trust under either theory.

¶ 24 In addressing the siblings' claims, we keep a number of important principles in

mind. First, we affirm our prior statement that "'the forms and varieties of these trusts ... are practically without limit.' " We also note that, in cases involving transfers of land, imposing a constructive trust will often "alter a deed or other writing which is regular in form and is presumed to convey a clear and unambiguous title." We have recognized that altering deeds in this way may make it difficult for a landowner to "rest in the security of his title to property, however solemn might be the instrument on which it was founded." To mitigate this effect, we require that the evidence offered to overcome a deed must be "clear and convincing."

¶ 25 Even given this elevated burden of proof, we agree with the siblings with regard to their claim for unjust enrichment. First, we hold that the court of appeals incorrectly determined that the siblings must succeed or fail based solely on the intent underlying Arnold's transfer of land. Rather, a claim for an oral express trust is independent from a claim for unjust enrichment, and either claim may support imposition of a constructive trust. Second, because unjust enrichment is a flexible doctrine and because trial courts have broad discretion in fashioning remedies for unjust enrichment, we hold that the court of appeals erred in reversing the trial court's award of a constructive trust. Because we affirm the trial court's finding of unjust enrichment and its imposition of a constructive trust on that basis, we need not determine whether the siblings also could have prevailed in their attempt to establish an oral express trust. In order to explain our conclusions, we find it useful to articulate the legal standards for the types of constructive trust at issue in this case.

I. Constructive Trusts Are a Remedy That May Be Imposed Where a Party Has Been Unjustly Enriched or Where Necessary To An Oral Express

¶ 26 The siblings argue that a constructive trust may be imposed under either of two distinct causes of action. One is a cause of action to establish an oral express trust. The other is a claim for unjust enrichment. Oral express trusts have "certain fundamental characteristics" in common with traditional trusts because, like traditional trusts, they are the manifestation of a settlor's intent with regard to property. The main such characteristic is the imposition of obligations on a trustee "to act for the benefit of [beneficiaries] as to matters within the scope of the [trust]." Like trusts created by a valid writing, constructive trusts imposed to give effect to oral express trusts are adequately characterized as " 'a fiduciary relationship with respect to property, arising as a result of a *manifestation of an intention to create it* and subjecting the person in whom the title is vested to equitable duties to deal with it for

the benefit of others.' "

¶ 27 Where a transfer of land was made with the intent to create such a trust, the trust will generally fail unless evidenced by a writing that complies with the Statute of Frauds. Because oral express trusts do not meet these requirements, they will only be given effect in "certain circumstances." In these instances, the constructive trusts are deemed to "arise[ ] by operation of law and [are] not within the statute of frauds."

¶28 We have recognized that constructive trusts may be imposed in the circumstances set forth in section 45 of the Restatement (Second) of Trusts (the "Restatement of Trusts"). This section applies when the transferor of land intends for the transfer to benefit someone other than the transferor or the transferee:

> (1) Where the owner of an interest in land transfers it inter vivos to another in trust for a third person, but no memorandum properly evidencing the intention to create a trust is signed, as required by the Statute of Frauds, and the transferee refuses to perform the trust, the transferee holds the interest upon a constructive trust for the third person, if, but only if, (a) the transferee by fraud, duress or undue influence prevented the transferor from creating an enforceable interest in the third person, or (b) the transferee at the time of the transfer was in a confidential relation to the transferor, or (c) the transfer was made by the transferor in anticipation of death.

In short, the imposition of a constructive trust under this section of the Restatement of Trusts requires proof that the transferor of land intended to create a trust and that one of the three identified circumstances existed at the time of the transfer. And where proving this intent will be contrary to an otherwise valid deed, the evidence of the trust must be clear and convincing.

¶ 29 As with claims based on an oral express trust, claims of unjust enrichment can support the imposition of a constructive trust. To this end, we have *763 adopted the formulation set forth at section 160 of the Restatement of Restitution: "a constructive trust may arise 'where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it....' " A claim for unjust enrichment in Utah requires proof of three elements:

> "(1) a benefit conferred on one person by another; (2) an appreciation or knowledge by the conferee of the benefit; and (3) the acceptance or retention

> by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value."

We have also noted that unjust enrichment plays an important role as a tool of equity: "[u]njust enrichment law developed to remedy injustice when other areas of the law could not," and therefore "must remain a flexible and workable doctrine."

¶ 30 Because of the flexible nature of the unjust enrichment doctrine, a constructive trust is an available remedy even in cases where a plaintiff might assert alternative legal theories to support imposition of a constructive trust. Nothing about the constructive trust that is imposed to give effect to an oral express trust does anything to preclude the imposition of a constructive trust as a remedy to prevent unjust enrichment.

¶31 Indeed, in *Parks v. Zions First National Bank*, the plaintiff brought claims under section 44 and 45 of the Restatement of Trusts, as well as a claim for unjust enrichment. Although the trial court found the plaintiff's claim was not one for an oral express trust, we affirmed the trial court's finding of unjust enrichment and its decision to impose a constructive trust as a remedy. We also explicitly rejected the notion that a party seeking to prove the existence of an oral express trust could not, where the facts would support it, also seek recovery under a theory of unjust enrichment. Thus, our cases establish the availability of both types of constructive trust sought in this case. And where the facts and law will support it, a plaintiff may alternatively pursue both kinds of constructive trust within the same lawsuit.

¶32 Having articulated the law as it relates to the siblings' claims, we now address the issue presented in this case: whether the court of appeals erred in reversing the trial court's imposition of a constructive trust. Because of the manner in which the court of appeals resolved the issue, we first turn to the court of appeals' conclusion regarding oral express trusts, and then examine the court of appeals' conclusion regarding unjust enrichment.

II. The Court of Appeals Erred in Basing Its Conclusion Solely On Whether Arnold Intended to Create An Oral Express Trust

¶ 33 The court of appeals incorrectly concluded that, because the trial court's findings did not support an oral express trust, the siblings could not prevail on a theory of unjust enrichment. As discussed, our prior cases reveal two distinct legal causes of action that the siblings were free to pursue in this case. To the extent they have alleged that Arnold

intended to create a trust that would inure to their benefit, they have stated a claim consistent with the cause of action set forth at section 45 of the Restatement of Trusts. If the siblings successfully proved this case, the trial court could have imposed a constructive trust on the farm property to give effect to Arnold's intent. To the extent that the siblings have argued that Donald wrongfully retained the benefits of their contributions to the farm property, they seek a remedy for unjust enrichment. Where a party has successfully proven its case for unjust enrichment, the trial court has authority to impose a constructive trust as a remedy.

¶ 34 In reviewing our prior cases and the court of appeals' opinion in this case, we are satisfied that the court of appeals articulated these legal standards correctly, but that it misconstrued the relationship between these causes of action. It determined that the siblings had attempted to use the law of unjust enrichment as a substitute for the law of oral express trusts. As such, it determined that the law imposed upon it a binary choice: either Arnold intended that Donald take the land as trustee, or the actions Donald took during his years of ownership were not unjust.

¶35 In fact, there is the potential for significant overlap in this case. If Arnold intended that Donald take the land as trustee, then it was both inequitable *and* a violation of the intended trust for Donald to retain for himself benefits that should have flowed to the trust. In such a case, a constructive trust imposed to give effect to the oral trust would also have remedied the related unjust enrichment. But even if the siblings could not prove Arnold's intent to create such a trust, Donald's actions, as found by the trial court, are the sort that would also support a claim of unjust enrichment. Assuming the siblings prevailed on this theory, the constructive trust would not be imposed to give effect to Arnold's intent; it would be imposed to give effect to the judgment of a court, sitting in equity, regarding how best "to remedy injustice when other areas of the law [can] not."

¶ 36 The court of appeals' departure from our case law appears to be the result of its reliance on a single finding of fact interpreted in isolation. In its findings of fact, the trial court states that "Arnold did not consider the conveyance to be a transfer of his ownership rights in the property." In its conclusions of law, the trial court reinforces this point: "The deed transfer was for accommodation and not intended to transfer ownership rights to Donald." The court of appeals equated this finding with a finding that Arnold "did not intend to transfer the farm into trust." Thus, it concluded that this finding precluded any oral

express trust and that a constructive trust therefore could not be imposed.

¶ 37 The siblings argue that the court of appeals simply misinterpreted this finding of fact, and that it should be understood to mean that Arnold intended to transfer only legal title to Donald, while establishing a beneficial interest for the family. The siblings' urged interpretation is consistent with general trust principles: "The fundamental nature of a trust is the division of title, with the trustee being the holder of legal title and the beneficiary that of equitable title." Thus, every time a settlor creates a trust there is some interest in the trust res that is *not* transferred to the trustee. In fact, if ever the trustee also becomes the sole beneficiary, all interests in the trust property will reside in the trustee and legal and equitable title will merge. So, for Arnold to have intended to create a trust, he necessarily would have intended to convey to Donald something less than his full ownership rights. Otherwise, no equitable interest would be held on behalf of the beneficiaries.

¶38 The siblings also urge that the court of appeals' interpretation of this finding of fact is an unreasonable construction of the trial court's judgment. After all, the siblings note, the court of appeals' disposition of the case upheld Donald's ownership of the land. The siblings argue that this is absurd because it is directly contrary to the finding of fact on which the court of appeals relied. Given the alternative, they argue that the court of appeals had a duty to interpret the trial court's findings in a manner favorable to its judgment.

¶39 Regardless of the merits of these arguments, if the siblings are to prevail on the theory that Arnold intended to create an oral express trust, the siblings must not only overcome this ambiguous finding of fact, they must also establish one of the other circumstances set forth in section 45 of the Restatement of Trusts. They urge us to find that Donald stood in a confidential relationship with respect to Arnold. There are some findings of fact-relating to Arnold's deteriorating health, his anxiety regarding welfare coverage, and Donald's role in the property transfer-that may support the conclusion that Donald and Arnold had a confidential relationship. But there are also findings of fact that suggest otherwise-LaRell and Dwayne both occupied positions of trust vis a vis their father and participated in discussions about how best to handle the land transfer. The trial court's conclusions of law do not address whether Donald's relationship with his father met our standard for a confidential relationship. Further, unresolved issues remain regarding the terms of the trust, including how Arnold's interest would have descended after his death.

¶40 We decline to address these questions for the first time on appeal. It is sufficient

for our purposes to say that the court of appeals erred when it concluded that the siblings' failure to prove an oral express trust necessarily precluded a finding in their favor under a theory of unjust enrichment. Because the two claims may be pursued independently, we need not determine whether the trial court's findings might support a claim under section 45 of the Restatement of Trusts. Rather, as will be discussed below, the court of appeals erred in reversing the trial court's finding of unjust enrichment and its imposition of a constructive trust as a means of remedying this unjust enrichment.

III. The Court of Appeals Erred in Holding That Donald Was Not Unjustly Enriched By the Contributions His Siblings Made To the Farm Property Over Several Decades

¶ 41 The court of appeals held that because Donald was the transferee under a deed, his acceptance of his siblings' contributions to the land could not be unjust. In so holding, the court of appeals erred. The standard for determining whether a person has been unjustly enriched requires a court to determine whether the defendant accepted and retained benefits conferred by the plaintiff under such circumstances as to make it inequitable for the defendant to retain those benefits without compensating the plaintiff.

¶ 42 The court of appeals' conclusion does not adequately take into consideration the circumstances under which Donald accepted many of the benefits conferred by his siblings. As found by the trial court, the reason the siblings continued to work on the trust property after Arnold's death was that Donald led them to believe it was their "Mother's farm." Dwayne paid $1,000 in property taxes with the understanding that *Arnold* needed the money. He did not intend to pay off taxes on land that would soon be owned by Donald. And when the siblings relinquished their interests via the 1978 quitclaim deed and contributed other parcels of land to the farm property, they did so with the understanding that they were assisting in clearing up title problems so that Donald could litigate the dispute on their behalf. The trial court found all of these benefits, along with "other benefits from the use and negotiations relative to the trust property," to be conferred under circumstances that gave rise to unjust enrichment.

¶ 43 We hold that these findings were sufficient to support the trial court's imposition of a constructive trust. The first element of a claim for unjust enrichment-that the siblings confer a benefit on Donald-has clearly been met. Further, as to the second element, there can be no doubt that Donald was aware of these benefits. He acknowledged

in his testimony that he knew that all of the siblings were contributing to the maintenance of the farm property even though he was not. He redistributed small amounts of the settlement proceeds to his siblings while keeping the bulk for himself. And he prompted Dwayne to pay $1,000 toward the property taxes and made no attempt to return the money after Arnold executed the deed purporting to transfer the land to Donald.

¶ 44 The dispute in this case centers on the third element of a claim for unjust enrichment. The trial court found that, for decades, Donald represented to his siblings that the farm property was being used to support their mother. Their contributions to the farm's operation were made because they believed these representations. Arnold's management of the farm in the years prior to his death reinforced the idea that the farm was considered a family farm.

¶ 45 In a manner consistent with our precedent, we decline to weigh for ourselves the relative equities of these actions. In *Jeffs v. Stubbs*, we announced our rationale for granting trial courts broad discretion in imposing constructive trusts to remedy unjust enrichment. The reasons for granting broad discretion articulated in *Jeffs* play an important role in this case. First, determining whether the circumstances surrounding the parties' interactions were inequitable is a fact-intensive process for which trial courts are uniquely suited. The nature of this equitable determination requires balancing the ramifications of an entire course of conduct. The trial court, having heard all of the evidence in context, is in the best position to undertake this balancing. Second, cases of unjust enrichment require the trial judge to "observe[ ] 'facts,' such as a witness's appearance and demeanor, relevant to the application of the law that cannot be adequately reflected in the record available to appellate courts." We are keenly aware that trial courts are in the best position to make determinations about credibility and veracity. This is especially the case where, as here, the legal standard being applied requires the court to determine what is equitable. We are also mindful that all of these observations will not necessarily be included in the record on appeal.

¶ 46 The court of appeals' decision does not appropriately defer to the trial court's judgment with regard to the claim for unjust enrichment. Specifically, the court of appeals concluded that the trial court had grafted equitable considerations into its inquiry regarding Arnold's intent to create an oral express trust. But in so concluding, the court of appeals rejected the theory of unjust enrichment as a valid, alternative, and independent theory on which the trial court's imposition of a constructive trust could legitimately rest.

¶ 47 Further, the court of appeals concluded that "the only wrongful act alleged by the Siblings is [Donald's] failure to comply with Arnold's expressed intentions." But this clearly conflicts with the trial court's findings regarding the siblings' contributions to the farm property and their understanding that Donald was acting in their interests. Even if Donald was the legitimate owner of this property at all times after the 1967 transfer, he was not unequivocally entitled to retain the fruits of his siblings' labor on the farm, the amount of tax payments Dwayne made with the understanding they would be used for Arnold's benefit, the value of the property transferred under the siblings' quitclaim deeds, the settlement proceeds from the 1978 dispute that were retained by Donald, and contributions by the siblings of other property to Donald.

¶ 48 *Jeffs* is instructive on this point as well. In that case, the United Effort Plan Trust (the "UEP") owned title to land. Members of a religious group affiliated with the trust were permitted to occupy the land. The UEP encouraged these occupants to make improvements to the land by leading them to believe they could occupy the land for their lifetimes. After they were removed from the land, the occupants brought a number of claims, including claims for unjust enrichment, against the UEP. The UEP defended on the grounds that, because the occupants knew the UEP held title to the land when they made improvements, it was not unjust for the UEP to keep those improvements even after the occupants were no longer permitted to reside on the land. Relying on the Restatement of Restitution, we rejected the UEP's position, and held that "an owner 'cannot retain a benefit which knowingly he has permitted another to confer upon him by mistake.' " The Restatement position carries even more force in this case because here, unlike in *Jeffs* the siblings did not know for decades that Donald claimed title to the land. Put simply, even if the court of appeals correctly concluded that Donald owned the farm property, this did not insulate Donald's conduct from being inequitable.

¶ 49 Thus, the court of appeals erred in reversing the trial court's judgment that Donald had been unjustly enriched. The trial court found that a number of benefits had been conferred on Donald by the siblings because of the siblings' understanding that the land was being used as a family farm. Rather than assert his ownership of the land, Donald accepted and retained these benefits. Given the broad discretion that we afford trial courts when they apply the law to the facts in unjust enrichment cases, we hold that the court of appeals erred in reversing the trial court's judgment. The trial court's legal conclusion was

not absolutely precluded as the court of appeals determined, but was adequately supported. We therefore reverse the judgment of the court of appeals, and affirm the trial court's imposition of a constructive trust in favor of the siblings.

CONCLUSION

¶ 50 We hold that the trial court acted within the bounds of its discretion in imposing a constructive trust in favor of the siblings. Unjust enrichment is a cause of action separate from an attempt to prove the existence of an oral express trust. Thus, even if the siblings have failed to prove the existence of an oral express trust in this case, something we assume without deciding, they were still free to pursue their claim of unjust enrichment as an independent cause of action. The trial court explicitly found that Donald had been unjustly enriched, and numerous of its factual findings support that judgment. Given the broad discretion that must necessarily be afforded trial courts when they apply the law of unjust enrichment to the facts of a given case, we disagree with the court of appeals' conclusion that imposition of a constructive trust was not an available or appropriate remedy in this case. The judgment of the court of appeals is therefore reversed.

Notes, Questions and Problems

1. Students often confuse resulting trusts with constructive trusts. Both types of trusts are remedial. One way to distinguish the types of trust is to focus upon the testator's intent. In a case involving a resulting trust, the court's focus is on the actions of the trustee. If the trustee acted as if he intended to create a trust, the court will act to carry out that intent. Once the court finds a resulting trust, the trustee must surrender the property to the beneficial owner upon demand. When deciding whether or not to establish a constructive trust, the court evaluates the actions of the person who is in possession of the disputed property. If that person has wrongfully acquired the property the court will create a constructive trust. The court deems the property to be held in trust. The court considers the person unjustly holding the property to be the trustee, and the person to whom the property rightfully belongs to be the beneficiary.

2. Some courts hold that the constructive trust arises at the time the property is unjustly obtained. Other courts have concluded that the constructive trust occurs only after the beneficiary seeks a constructive trust and the court grants the relief. What are the pros and cons of each approach?

3. Problems

Label each of the following examples as a resulting trust or a constructive trust.

a). Olivia texted Thomas and told him she wanted to give him her house to hold in trust for the benefit of her daughter, Melinda. Thomas texted her back and agreed to serve as the trustee.

b). Paige executed a will containing the following language, "I leave the residuary of my estate to Milena in trust for the benefit of my favorite actor."

c) When Gail was a teenager, she put her baby girl up for adoption. Twenty years later, Rosalinda came to Gail and claimed to be her birth daughter. Gail and Rosalinda developed a relationship. Thus, Gail executed a will containing the following provision, "I leave $500,000 to First Bank to hold in trust for my daughter, Rosalinda." After Gail's death, her children received evidence that Rosalinda was a con woman who had lied about being Gail's birth daughter.

d) Raymond believed that his daughter, Lisa, was possessed by the devil because she liked to gamble. Consequently, Raymond executed a will containing the following provision: "I leave my entire establish to City Bank in trust for the benefit of the Church of Peace in order that the demon can be cast out of my daughter, Lisa. After Lisa is demon-free, I would like her to become a beneficiary of the trust."

NOTE: Secret and Semisecret Trusts

Under some circumstances, courts have used constructive trusts to rectified unjust enrichment that may result from a secret trust. For example, in her will, the testator makes an outright gift to a third party and does not indicate the existence of a trust. However, prior to the execution of the will, the third party agrees that he would hold the property in trust for another person. This is considered a secret trust, so the court will admit outside information to enforce the trust and prevent unjust enrichment. The facts of a semisecret trust are different. In that case, in her will, the testator makes an outright gift to a third party, and indicates in the will that the third party is to keep the gift in trust, but does not name the beneficiaries in the will. This semisecret trust will fail for lack of beneficiaries. Since the trust would fail, the third party would have no interest in the gift. Thus, a constructive trust is unnecessary to prevent the third party from being unjustly enriched.

> **Example 1-**Ruth'swill contained the following language: "I leave $100,000 to Peter." Ruth told her friend, Bonnie that she was leaving $100,000 to Peter to keep in trust for Bonnie. The court will allow in oral testimony to prove

the trust, so that Peter will not be unjustly enriched.

Example 2- Ruth's will contained the following language: "I leave $100,000 to Peter in trust for people I told Bonnie about." The court will not allow in Bonnie's oral testimony because the trust has been proven by the will, so there is no danger of unjust enrichment. The trust fails for lack of beneficiaries and money reverts back to Ruth's estate to be distributed accordingly.

***Olliffee v. Wells*, 130 Mass. 221**

GRAY, C. J.

Upon the face of this will the residuary bequest to the defendant gives him no beneficial interest. It expressly requires him to distribute all the property bequeathed to him, giving him no discretion upon the question whether he shall or shall not distribute it, or shall or shall not carry out the intentions of the testatrix, but allowing him a discretionary authority as to the manner only in which the property shall be distributed pursuant to her intentions. The will declares a trust too indefinite to be carried out, and the next of kin of the testatrix must take by way of resulting trust, unless the facts agreed show such a trust for the benefit of others as the court can execute. *Nichols v. Allen*, 130 Mass. 211. No other written instrument was signed by the testatrix, and made part of the will by reference, as in *Newton v. Seaman's Friend Society*, 130 Mass. 91.

The decision of the case therefore depends upon the effect of the fact, stated in the defendant's answer, and admitted by the plaintiffs to be true, that the testatrix, before and at the time of and after the execution of the will, orally made known to the defendant her wish and intention that the residue should be disposed of and distributed by him as executor of her will for charitable uses and purposes, according to his discretion and judgment, and directed him so to dispose of and distribute it, especially expressing her desire as to the objects to be preferred, all which objects, taking the whole direction together, may be assumed to be charitable in the legal sense.

In any view of the authorities it is quite clear, and is hardly denied by the defendant's counsel, that intentions not formed by the testatrix and communicated to the defendant before the making of the will could not have any effect against her next of kin. *Thayer v. Wellington*, 9 Allen 283 *Johnson v. Ball,* 5 De Gex & Sm. 85. *Moss v. Cooper,* 1 Johns. & Hem. 352. But assuming, as the defendant contends, that all the directions of the testatrix set forth

in the answer are to be taken as having been orally communicated to the defendant and assented to by him before the execution of the will, we are of opinion that the result must be the same.

It has been held in England and in other States, although the question has never arisen in this Commonwealth, that, if a person procures an absolute devise or bequest to himself by orally promising the testator that he will convey the property to or hold it for the benefit of third persons, and afterwards refuses to perform his promise, a trust arises out of the confidence reposed in him by the testator and of his own fraud, which a court of equity, upon clear and satisfactory proof of the facts, will enforce against him at the suit of such third persons. (citations omitted).

Upon like grounds, it has been held in England that, if a testator devises or bequeaths property to his executors upon trusts not defined in the will, but which, as he states in the will, he has communicated to them before its execution, such trusts, if for lawful purposes, may be proved by the admission of the executors, or by oral evidence, and enforced against them?? *Crook v. Brooking,* 2 Vern. 50,106. *Pring v. Pring,* 2 Vern?? 99. *Smith v. Attersoll,* 1 Russ. 266. And in two or three comparatively recent cases it has been held that such trusts may be enforced against the heirs or next of kin of the testator, as well as against the devisee. Shadwell, V. C., in *Podmore v. Gunning,* 5 Sim. 485, and 7 Sim. 644. Chatterton, V. C., in *Riordan v. Banon,* Ir. R. 10 Eq. 469. Hall, V. C., in *Fleetwood's case,* 15 Ch. D. 594. But these cases appear to us to have overlooked or disregarded a fundamental distinction.

Where a trust not declared in the will is established by a court of chancery against the devisee, it is by reason of the obligation resting upon the conscience of the devisee, and not as a valid testamentary disposition by the deceased. *Cullen v. Attorney General,* L. R. 1 H. L. 190. Where the bequest is outright upon its face, the setting up of a trust, while it diminishes the right of the devisee, does not impair any right of the heirs or next of kin, in any aspect of the case; for if the trust were not set up, the whole property would go to the devisee by force of the devise; if the trust set up is a lawful one, it enures to the benefit of the *cestuis que trust;* and if the trust set up is unlawful, the heirs or next of kin take by way of resulting trust. *Boson v. Statham,* 1 Eden, 508; *S. C.* 1 Cox Ch. 16. *Russell v. Jackson,* 10 Hare, 204. *Wallgrave v. Tebbs,* 2 K. & J. 313.

Where the bequest is declared upon its face to be upon such trusts as the testator has otherwise signified to the devisee, it is equally clear that the devisee takes no beneficial

interest; and, as between him and the beneficiaries intended, there is as much ground for establishing the trust as if the bequest to him were absolute on its face. But as between the devisee and the heirs or next of kin, the case stands differently. They are not excluded by the will itself. The will upon its face showing that the devisee takes the legal title only and not the beneficial interest, and the trust not being sufficiently defined by the will to take effect, the equitable interest goes, by way of resulting trust, to the heirs or next of kin, as property of the deceased, not disposed of by his will. *Sears v. Hardy*, 120 Mass. 524, 541, 542. They cannot be deprived of that equitable interest, which accrues to them directly from the deceased, by any conduct of the devisee; nor by any intention of the deceased, unless signified in those forms which the law makes essential to every testamentary disposition. A trust not sufficiently declared on the face of the will cannot therefore be set up by extrinsic evidence to defeat the rights of the heirs at law or next of kin. *See Lewin* on Trusts (3d ed.) 75.

By the statutes of the Commonwealth, no will (with certain exceptions not material to be here stated) "shall be effectual to pass any estate, whether real or personal, nor to charge or in any way affect the same," unless signed by the testator and attested by three witnesses. Rev. Sts. *c.* 62, § 6. Gen. Sts. *c.* 92, § 6.

In *Thayer v. Wellington*, 9 Allen 283 the testator by his will bequeathed to Hastings and Wellington $15,000 "in trust to appropriate the same in such manner as I may by any instrument under my hand direct and appoint," and nominated Hastings executor, and made a residuary bequest to him in trust for the benefit of certain persons named. The testator also signed a paper, dated the same day as the will, referring to it, and addressed to Hastings and Wellington, directing them to pay over the $15,000 to the city of Cambridge for the support of a public library; and they, after the death of the testator, signified in writing to the city their intention of so paying it when they should receive it from the executor. After the death of Hastings, upon a bill in equity by the administrator *de bonis non* for instructions, to which Wellington, the city, the *cestuis que trust,* and the heirs at law of the testator, were made parties, the court held that the clause in the will, the paper signed by the testator but not attested as required by the statute of wills, and the assent in writing of the trustees, gave the city no right to the fund; and that the heirs at law or next of kin would have been entitled to it, but for its being included in the residuary bequest.

It appears in the report on file, upon which that case was reserved for the

determination of the full court, that an attorney at law testified that he drew up both the will and the paper at the request of Hastings, and delivered both drafts to him; and that Wellington testified that the paper was handed to him by Hastings after the testator's death. Those facts would, according to the cases of *Crook v. Brooking* and *Smith v. Attersoll,* above cited, and which were relied on in the argument for the city of Cambridge, have been sufficient evidence of an assent by Hastings before the execution of the will, and, according to the decision of Vice Chancellor Wood in *Tee v. Ferris,* 2 K. & J. 357, would have entitled the city to enforce the trust against both trustees. Yet the court did not treat them as of any weight as between the surviving trustee and the city on the one hand, and the next of kin or the residuary legatees on the other, but merely observed that it did not appear at what time the paper was placed by the testator in the hands of Hastings. 9 *Allen* 288.

Decree for the plaintiffs.

3.2.3. Honorary Trusts

An honorary trust arises when a testator attempts to leave a large sum of money to a pet. This money is not left to someone to care for the pet. The testator actually leaves the money directly to the pet. Since a pet is incapable of inheriting, the court invalidates the bequest to the pet. However, in order to carry out the testator's intent to make sure that the pet is take care of properly, the court will create an honorary trust over the property that was left to the pet. Unlike a charitable trust for a group of animals or a bequest to the SPSA, a honorary trust comes into play when a bequest is made to provide for a specific animal or object. In addition to the care of a pet, honorary trusts may be created for the preservation of tombs, monuments, or graves, and for the saying of masses or the erecting of a statutes. This trust is deemed to be honorary because it is binding on the conscience of the trustee. The beneficiary is unable to demand an accounting from the trustee, so the trustee must act on his or her honor. The honorary trust is not enforceable by an identifiable beneficiary, but it is treated as valid so long as the trustee chooses to carry out the trust purpose. As the next case illustrates, when and if the trustee no longer wishes to do so, the trust terminates and the court will create a resulting trust.

***Phillips v. Estate of Holzmann*, 740 So. 2d 1**

GERSTEN, J.

Jo Ellen Phillips ("appellant") appeals an order requiring her to return $25,000.00,

paid to her under Marie M. Holzmann's (the "testator") will, to the testator's estate. We affirm because the appellant received the $25,000.00 in trust for a specific non-charitable purpose and that purpose no longer exists.

In her will, the testator left $25,000.00 to her "beloved friend," the appellant, "for the care and shelter of [her] two dogs, Riley and Shaun." Shortly after the testator's death, however, Riley and Shaun were put to sleep for health reasons. Due to this turn of events, the testator's parents petitioned to have the $25,000.00 returned to the estate.

The trial court concluded that the appellant received the $25,000.00 as an "honorary trust" and that the honorary trust failed when the dogs were put to sleep. Upon failure, the court determined, the trust became a "resulting trust" for the benefit of the estate's residual beneficiaries. We agree with the trial court's analysis.

The polestar in construing any will is to ascertain the intent of the testator. *See West v. Francioni,* 488 So.2d 571 (Fla.3d DCA 1986); *Hulsh v. Hulsh*, 431 So.2d 658 (Fla.3d DCA 1983), *review denied,* 440 So.2d 352 (Fla. 1983). Here, the testator unambiguously directed that the money was for the benefit of her dogs, not the appellant. She, thus, intended to establish an honorary trust. *See In re Searight's Estate.; Dep't of Taxation of Ohio v. Miller,* Ohio App. 417, 95 N.E. 2d 779 (1950); Restatement (Second) of Trusts § 124 cmt. d (1959); John G. Grimsley, Florida Law of Trusts 18-2 (4th ed.1993).

A trust of this sort is not a true trust. *See e.g. The Fidelity Title and Trust Co. v. Clyde,* 143 Conn. 247, 121 A.2d 625 (1956). It does not conform to the time-honored requirement that there be a beneficiary capable of enforcing its terms. *See The Fidelity Title and Trust Co. v. Clyde,* 121 A.2d at 630. Nonetheless, the American Law Institute takes the position that the transferee has the power to apply the property to the designated purpose, but cannot be compelled to do so. *See* Restatement (Second) of Trusts § 124 (1959). If the transferee does not apply the property to its designated purpose, she holds it upon a resulting trust for the settlor or the settlor's estate. *See* Restatement (Second) of Trusts §§ 124 b; 418 cmt. b (1959). We adopt the American Law Institute's position regarding honorary trusts.

Because the testator's dogs were put to sleep, the appellant/transferee could not apply the $25,000.00 to the designated purpose. A resulting trust was thereby created and the trial court properly ordered the appellant to return the property to the estate. The judgment is affirmed in all respects.

NOTE: STATUTORY HONORARY TRUSTS

Honorary trusts were the common law solution to the 'rich pet" dilemma. Currently, many states have codified the honorary trust. The following statute is a typical example.

McKinney's EPTL § 7-8.1 Trusts for Pets

(a) A trust for the care of a designated domestic or pet animal is valid. The intended use of the principal or income may be enforced by an individual designated for that purpose in the trust instrument or, if none, by an individual appointed by a court upon application to it by an individual, or by a trustee. Such trust shall terminate when the living animal beneficiary or beneficiaries of such trust are no longer alive.

(b) Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the benefit of all covered animals.

(c) Upon termination, the trustee shall transfer the unexpended trust property as directed in the trust instrument or, if there are no such directions in the trust instrument, the property shall pass to the estate of the grantor.

(d) A court may reduce the amount of the property transferred if it determines that amount substantially exceeds the amount required for the intended use. The amount of the reduction, if any, passes as unexpended trust property pursuant to paragraph (c) of this section.

(e) If no trustee is designated or no designated trustee is willing or able to serve, a court shall appoint a trustee and may make such other orders and determinations as are advisable to carry out the intent of the transferor and the purpose of this section.

Class Discussion Tool

Stacie and Abigail met while they were in medical school and became best friends. Years later, Stacie and her husband, Robert, were involved in an ugly divorce. Stacie wanted to make sure that Robert did not get an interest in her vacation home. Thus, Stacie quitclaimed the vacation home to Abigail. Abigail promised to return the vacation home to Stacie once the divorce was final. At that time, Stacie also put $500,000 and a house in a revocable trust for the benefit of her children, Mitchell and LaTrell. Stacie selected Abigail to be trustee of the revocable trust. Stacie kept the $500,000 in her bank account. Stacie mailed Abigail a picture of the house that was to be part of the corpus of the trust. After Stacie's divorce was final, she discovered that Abigail was having an affair with Robert. The women

had a big fight, and Abigail refused to return the vacation home to Stacie. What are the legal issues that arise from the fact pattern?

Chapter 4 - Discretionary and Support and the Rights of the Beneficiary's Creditors

There are several types of private trusts. In this chapter, I will discuss several of the most common types. One of the primary legal issues that arises as a consequence of the existence of trust is whether the beneficiary's creditors can attach the funds in the trust. Frequently, distributions from the trust may be the beneficiary's only source of income. Therefore, getting access to the trust funds may be the sole way for the creditor to get paid. In this chapter, I will describe the types of trusts in relation to the creditor's ability to get paid. A mandatory trust is one that mandates the trustee to distribute all the income and does not give the trustee the discretion to choose either the beneficiaries or the amount to be distributed. The trustee's sole job is to manage and disperse the trust funds. An example would be: T leaves $500,000 in trust to X to distribute $20,000 of the income to A and B annually. A and B can go to court to force the trustee to give them the promised amount. The money in a mandatory trust is similar to earned income, so the beneficiary's creditor can file an action against the trust for the amount of the debt.

***Lineback v. Stout*, 339 S.E.2d 103**

WELLS, Judge.

Respondent argues that it was the testator's intention in Article IV of his will to create a discretionary trust wherein payments to petitioner were to be in the sole discretion of the trustee and that the superior court erred in ruling to the contrary. A discretionary trust is a trust wherein the trustee is given the discretion to determine whether and to what extent to pay or apply trust income or principal to or for the benefit of a beneficiary. Bogert, *The Law of Trusts and Trustees* § 228 (rev. 2d ed. 1979); Scott, *The Law of Trusts* §§ 128.3, 155 (3d ed. 1967). *Accord* N.C. Gen. Stat. § 36A-115(b)(1) (1984). Under a true discretionary trust, the trustee may withhold the trust income and principal altogether from the beneficiary and the beneficiary, as well as the creditors and assignees of the beneficiary, cannot compel the trustee to pay over any part of the trust funds. Bogert, *supra;* Scott, *supra,* at § 155. A trust

wherein the trustee has discretion only as to the time or method of making payments to or for the benefit of the beneficiary is not a true discretionary trust. Bogert, *supra;* Scott, *supra.*

Whether a trust is a discretionary one naturally depends upon the nature of the powers conferred upon the trustee, that is, whether the powers are mandatory or discretionary, and if discretionary, the extent of the discretion afforded the trustee. In determining the nature of the powers conferred upon a trustee, we are guided by the following:

The powers of a trustee are either mandatory or discretionary. A power is mandatory when it authorizes and commands the trustee to perform some positive act.... A power is discretionary when the trustee may either exercise it or refrain from exercising it, ... or when the time, or manner, or extent of its exercise is left to his discretion. [Citations omitted.] *Woodard v. Mordecai*, 234 N.C. 463, 67 S.E.2d 639 (1951).

The court further explained:

The court will always compel the trustee to exercise a mandatory power. ... It is otherwise, however, with respect to a discretionary power. The court will not undertake to control the trustee with respect to the exercise of a discretionary power, except to prevent an abuse by him of his discretion. The trustee abuses his discretion in exercising or failing to exercise a discretionary power if he acts dishonestly, or if he acts with an improper even though not a dishonest motive, or if he fails to use his judgment, or if he acts beyond the bounds of a reasonable judgment. [Citations omitted.] *Id.*

Whether a power is mandatory or discretionary depends upon the intent of the settlor as evidenced by the terms of the trust. *See* Bogert, *supra,* at § 552; Scott, *supra* at § 187. The intent of a settlor is determined by the language he chooses to convey his thoughts, the purposes he seeks to accomplish and the situation of the parties benefitted by the trust. *Davison v. Duke University,* 282 N.C. 676, 194 S.E.2d 761 (1973). Use by the settlor of words of permission or option, or reference to the discretion of the trustee, in describing the trustee's power indicates that the settlor intended that the power be discretionary, whereas use of directive or commanding language indicates that a mandatory power was intended. *See* Bogert, *supra,* at § 552. *Compare Woodard v. Mordecai, supra,* and *First National Bank of Catawba County v. Eden*, 55 N.C.App. 697, 286 S.E.2d 818 (1982) (discretionary power) *with Kuykendall*

v. Proctor, 270 N.C. 510, 155 S.E.2d 293 (1967) (mandatory duty). Where the power is discretionary, the extent of the discretion given the trustee may be enlarged by use of adjectives such as "absolute" and "uncontrolled." *Davison v. Duke University, supra.*

The language of the testamentary trust in the present case clearly indicates that the testator intended for the power given respondent as trustee to be discretionary. The testator, in granting respondent the power to distribute the trust income or principal, referred to the "sole judgment" or "discretion" of respondent *six* times. Such language is used both with reference to the net income and the principal of the trust, thus indicating that the testator intended for respondent to have discretion regarding the distribution of both. This is made particularly clear by the fact the testator referred to respondent's discretion twice in the first sentence of the trust provisions-the first time possibly referring only to the trust principal but the second time apparently referring to both the net income and the principal of the trust. That respondent's power is discretionary is also shown by the fact the testator authorized respondent to pay the trust income or principal to or for the benefit of petitioner but did not command or require her to do so. Rather, the testator directed respondent to exercise her discretion regarding the distribution of the trust funds. The testator's use of the adjectives "absolute" and "uncontrolable" [sic] to describe the discretion vested in respondent further emphasizes the discretionary nature of the power granted respondent and evidences the testator's intent to vest wide discretion in respondent. To hold that respondent's power to distribute trust income or principal to petitioner is mandatory, as did the superior court in effect, we would have to ignore totally the references made by the testator to respondent's discretion in setting forth that power. This we cannot and will not do.

The language and terms of the trust further show that the discretion vested in respondent extends to whether and to what extent to pay the trust income or principal to or for the benefit of petitioner. The amount of trust income or principal to be expended for petitioner's benefit is to be determined by respondent in her sole discretion. We emphasize, however, respondent's duty to exercise her judgment reasonably to carry out the intent of the testator. *Woodard v. Mordecai, supra.*

The terms of the trust also show that the testator intended for the trust funds to be used to supplement, rather than supplant, the financial assistance which petitioner was

receiving from the Department of Social Services. Petitioner was receiving the Department's financial assistance at the time the testator executed his will. The testator was apparently referring to that assistance when he provided for respondent's consideration of "income available to [petitioner] from other sources" in determining whether to distribute trust principal to petitioner. Such provision certainly tends to show that the testator did not intend for the trust funds to be used as a substitute for the public assistance. *Accord Zeoli v. Commissioner of Soc. Serv.,* 179 Conn. 83, 425 A.2d 553 (1979). The creation of the trust for "the lifetime" of petitioner and the provision for the distribution of the trust corpus remaining upon petitioner's death also reveal the testator's intent that the trust funds be used to provide supplemental, rather than total, support for petitioner. *Accord Tidrow v. Dir., Mo. State Div. of Fam. Servs.,* 688 S.W.2d 9 (Mo.App. 1985). These terms of the trust show that the testator intended and anticipated that the trust corpus might not be completely exhausted during petitioner's lifetime. *Id.* In order to effectuate this intent, respondent's power to distribute the trust funds to petitioner must be interpreted as discretionary. If respondent's power is interpreted as mandatory, the trust fund will be rapidly depleted and the testator's intent will be thwarted.

We conclude that the testamentary trust is a discretionary one and that therefore the superior court erred in requiring respondent to expend funds from the trust for the general welfare, support, maintenance and benefit of petitioner. The judgment of the superior court is

Reversed.

4.1 Discretionary Trusts

The testator who has more confidence in the trustee may give that person more discretion. Under the terms of a discretionary trust, the trustee has discretion over payments of either the income or the principle or both. In some cases, the trustee has the discretion to choose the specific beneficiaries from a group that the trustee indicates. Unlike the mandatory trust beneficiaries, the beneficiaries of a discretionary trust cannot force the trustee to pay out any of the trust funds. This is an important distinction because if the beneficiary has no right to a payment from the trust, neither does the beneficiary's creditors. Thus, a creditor of the beneficiary cannot by judicial order, compel the trustee to pay him. Nonetheless, the creditor is not without a remedy because of the existence of the cutting off

income rule. According to that rule, if the trustee exercises his discretion and pays the beneficiary, the trustee must pay the creditor who stands in the beneficiary's shoes. The lien attaches the moment in time between when the trustee exercises his discretion to pay the beneficiary and the time the property is transferred to the beneficiary. This rule also applies when the trustee pays money on the beneficiary's behalf.

***Wilcox v. Gentry*, 867 P.2d 281**

MCFARLAND, Justice:

Ron and Nancy Wilcox appeal from the district court's judgment holding that any payments made by the trustee of the Frank Gentry Trust (Trust) which are made for the benefit of Isabella Gentry and not paid directly to Isabella, are not subject to garnishment. The Court of Appeals affirmed the judgment appealed from, but reversed, *sua sponte,* a continuing garnishment order entered by the district court relative to payments made by the trustee directly to Isabella. Gentry 18 Kan.App.2d 356, 853 P.2d 74. The matter is before us on petition for review.

In 1985, Frank Gentry created a revocable Trust. During his lifetime, Frank was the beneficiary of the Trust. Upon Frank's death certain trust property was to be distributed to named individuals. The residue of the Trust's assets was to be divided into five equal shares. Four of these shares were to be distributed to the four individuals designated as their recipients. This action concerns the fifth share. The applicable Trust provision in Article III, Section D.5, is as follows:

> "(e) One share shall remain in trust until the death of Isabella Gentry. The trustee, in his sole discretion, may make such distributions of income and principal to her or on her behalf as the trustee deems advisable after giving due consideration to all sources of funds available to her. Upon the death of Isabella Gentry, the trust shall terminate and the balance of the trust and accumulated income shall be distributed to the then surviving beneficiaries in proportion to the beneficial interests they would have been entitled to, under D. 5.(a), (b), (c) and (d) above, had Grantor died on the actual date of Isabella Gentry's death. In the event Isabella Gentry should predecease the Grantor, this share shall be equally divided between Mary Margaret Gentry and Eric Gentry, or pass fully to the survivor."

The district court and the Court of Appeals characterized the Trust provisions

applicable to Isabella Gentry in (e) as being discretionary in nature. This determination is unchallenged herein and we agree we are dealing with a discretionary trust. The Trust contains no spendthrift provision.

Ron and Nancy Wilcox obtained a judgment against Isabell Gentry for fraud in the sale of a residential property. Their judgment was for $40,000 actual damages and $11,667.35 punitive damages. They garnished the Trust to seek satisfaction of their judgment. Frank Gentry, grantor and sole beneficiary during his lifetime, had died previously, thereby activating section 5(e) relative to Isabell.

The district court held that any trustee payments directly to Isabell were subject to garnishment but that trustee payments for Isabell's benefit were not. The propriety of the district court's determination relative to payments made for Isabell's benefit is the only aspect of the judgment from which an appeal was taken.

The Court of Appeals' affirmance of the district court was based, in part, upon our case of *State ex rel. Secretary of SRS v. Jackson*, 249 Kan. 635, 822 P.2d 1033 (1991). Reliance on *Jackson* is misplaced. *Jackson* involved an action by SRS, pursuant to K.S.A. 39-719b, to compel the Jackson Trust beneficiary to reimburse SRS for public assistance benefits she had received. The Trust was not a party to the action, and the trustee was not being asked to pay anything to SRS. The issue was whether or not the trust had been an "available resource" to Jackson at the time she was receiving public assistance funds for purposes of determining her eligibility for such SRS benefits. Thus, the spendthrift provisions of the Jackson Trust were irrelevant. The case involved only Jackson's interest in the trust. We held that the trust was discretionary as to payments of principal but not discretionary as to income. Thus, as Jackson had the right to receive the trust income, such income was an available resource to Jackson in determining her eligibility for public assistance.

In *Jackson* we cited Restatement (Second) of Trusts § 155(1) (1957) and comment (b), which provide:

> "(1) Except as stated in § 156, if by the terms of a trust it is provided that the trustee shall pay to or apply for a beneficiary only so much of the income and principal or either as the trustee in his uncontrolled discretion shall see fit to pay or apply, a transferee or creditor of the beneficiary cannot compel the trustee to pay any part of the income or principal.
>
> "Comment b: "A trust containing such a provision as is stated in this Section

> is a ‘ discretionary trust’ and is to be distinguished from a spendthrift trust, and from a trust for support. In a discretionary trust it is the nature of the beneficiary's interest rather than a provision forbidding alienation which prevents the transfer of the beneficiary's interest. The rule stated in this Section is not dependent upon a prohibition of alienation by the settlor; but the transferee or creditor cannot compel the trustee to pay anything to him because the beneficiary could not compel payment to himself or application for his own benefit.”

Section 155(1) was pertinent to *Jackson* as we were concerned with the interest of the beneficiary to the trust and her concomitant ability to compel payment to her.

In the case before us, the issue is not whether the trustee can be compelled to pay income or principal. The issue before us is, if the trustee exercises its discretion and makes a payment on behalf of the beneficiary, whether such payment is subject to the creditors' garnishment.

This makes Restatement (Second) of Trusts § 155(2,) rather than (1), the applicable statement, as it provides:

> “(2) Unless a valid restraint on alienation has been imposed in accordance with the rules stated in §§ 152 and 153, if the trustee pays to or applies for the beneficiary any part of the income or principal with knowledge of the transfer or after he has been served with process in a proceeding by a creditor to reach it, he is liable to such transferee or creditor.”

As previously stated, there is no valid restraint on alienation (spendthrift provision) involved herein. This section makes no distinction between payments directly to the beneficiary or on the beneficiary's behalf.

Pertinent comments to subsection (2) are found therein as follows:

> “*h. Effect of payment by trustee to beneficiary after assignment.* Although in the case of a discretionary trust a transferee or creditor of the beneficiary cannot compel the trustee to pay over any part of the trust property to him, yet if the trustee does pay over any part of the trust property to the beneficiary with knowledge that he has transferred his interest or after the trustee has been served with process in a proceeding by a creditor of the beneficiary to reach his interest, the trustee is personally liable to the transferee or creditor for the

amount so paid, except so far as a valid provision for forfeiture for alienation or restraint on alienation has been imposed as stated in §§ 150, 152 and 153.

"*i. Effect of applying property by trustee for beneficiaries after assignment.* If the trustee applies for the benefit of the beneficiary income or principal, he is liable to an assignee of the beneficiary's interest or to a creditor of the beneficiary, if he makes such application after he has knowledge of the assignment or after he has been served with process in a proceeding brought by a creditor of the beneficiary to reach the beneficiary's interest."

In IIA Scott on Trusts § 155.1, p. 160-61 (4th Ed.1987), the following pertinent discussion

appears: "Although the trustee need not pay any part of the trust fund to the beneficiary or to his creditors, but may withhold it entirely, but if he does determine to pay part of it to him, he should pay it to the creditors who now stand in his shoes. The English courts, however, have here made a distinction. They have held that the trustee can properly *apply* the trust fund for the use of the beneficiary even though he is bankrupt or his creditors have brought a proceeding to reach his interest.

In *In re Smith* [,(1928), 1 Ch. 915, 919], Romer, J., said:

'Where there is a trust to apply the whole or such part of a fund as trustees think fit to or for the benefit of A., and A. has assigned his interest under the trust, or become bankrupt, although his assignee or his trustee in bankruptcy stand in no better position that he does and cannot demand that the fund shall be handed to them, yet they are in a position to say to A.: "Any money which the trustees do in the exercise of their discretion pay to you, passes by the assignment or under the bankruptcy." But they cannot say that in respect of any money which the trustees have not paid to A. or invested in purchasing goods or other things for A., but which they apply for the benefit of A. in such a way that no money or goods ever gets into the hands of A.' The distinction thus drawn between payment to the beneficiary and applying trust funds for his benefit seems to be arbitrary and without any sound basis in public policy. The result is that the beneficiary is enabled to enjoy the benefit of the trust in spite of his insolvency, as long as the trustee is willing to apply the trust estate for his benefit."

In Bogert, Trust and Trustees § 228, pp. 524-32 (Rev.2d Ed. 1992), distinctions between discretionary and spendthrift trusts are discussed, and the following is stated relative to a creditor's ability to reach trust funds:

> "If the trust is a true ' discretionary' trust, the nature of the interest of the beneficiary, rather than any expressed restraint on his power to alienate or the rights of his creditors, determines questions of voluntary or involuntary alienation. The beneficiary cannot secure the aid of a court in compelling the trustee to pay or apply trust income or principal to him since the terms of the trust permit the trustee to withhold payments at his will. Until the trustee elects to make a payment the beneficiary has a mere expectancy. Nor can a creditor compel the trustee to exercise his discretion to make payments. If the beneficiary attempts to transfer his interest, or his creditors seek to take it, before the trustee has made an election to pay or apply, the transferee or creditor has no remedies against the trustee because he stands in the shoes of the beneficiary.
>
> "If, however, the trustee exercises his discretion by making a decision to pay to or apply for the beneficiary, then the beneficiary can force the trustee to confer such a benefit on him, and he can transfer his right and his creditors can take advantage of it, if the trust does not have a spendthrift clause. If the trustee receives notice of an attempted voluntary transfer, or is served with process by a creditor of the beneficiary, before the making of his decision to allocate trust property to the beneficiary, he will be liable to the assignee or creditor if he thereafter uses his discretion and elects to pay to the beneficiary. In such a case his duty is to pay to the assignee or creditor if he decides to pay or apply, unless the discretionary trust instrument contains a spendthrift clause, or a statute gives rights to the creditor as in the case where the surplus of income over that needed for support is made liable to creditors."

The above-cited treatises are persuasive. We see no valid reason for treating payments to a beneficiary differently from payments made on behalf of the beneficiary as far as creditors are concerned. If the creditor has the right to reach payments made to the beneficiary excluding payments made on behalf of the beneficiary serves only to encourage circumvention of that right. We adopt Restatement (Second) of Trusts § 155(2) and find it

determinative of this issue. The district court and the Court of Appeals erred in holding that only funds paid directly to a discretionary trust beneficiary are subject to garnishment by a creditor.

In their petition for review, Ron and Nancy Wilcox object to the Court of Appeals' reversal, *sua sponte,* of the district court's continuing order of garnishment as to funds paid directly to the beneficiary.

The Wilcoxes did not appeal from this part of the judgment as it was in their favor. No cross-appeal was filed.

The order of continuing garnishment entered herein as to funds paid directly to the beneficiary was in no way an inherent part of the sole issue on which the appeal was taken or necessary to the determination of that issue. Even if such had been the situation, the parties should have been afforded the opportunity to brief the *sua sponte* issue.

The judgment of the Court of Appeals is reversed. The judgment of the district court is reversed, and the case is remanded for further proceedings.

Notes, Questions and Problems

1. Like the beneficiary of any other trust, the beneficiary of a mandatory trust is a person who may be vulnerable. Further, the money in the trust belongs to the settlor. Consequently, should the beneficiary's creditors be able to touch the funds in the trust?

2. The cutting off rule is designed to insure that the beneficiary of a discretionary trust is unable to avoid paying his creditor once he receives trust funds. Once the funds are in the beneficiary's hands, the creditors should be able to be paid.

3. Problems

In which of the following cases is the cutting off income rule triggered:

a). The trustee pays the beneficiary's electricity bill using the trust funds.

b). The trustee buys the beneficiary an American Express gift card using the trust funds.

c). The trustee buys the beneficiary a diamond ring using the trust funds.

d). The trustee gives the beneficiary's $20,000 from the trust.

4.2. Support Trust

The purpose of a support trust is to ensure that the beneficiary's financials needs are met. The support trust can be either pure or discretionary. A pure support trust is one that requires the trustee to use the funds in the trust to support the beneficiary by paying specific

bills. The trustee's discretion is limited. He must use the trust funds only for the beneficiary's support. Under the terms of a discretionary support trust, the trustee has the discretion to decide how much of the trust funds are needed to support the beneficiary. The trustee's discretion may be limited by a support standard. For instance, the trust instrument may require the trustee to provide the beneficiary with a reasonable standard of living or to enable the beneficiary to maintain the lifestyle to which he has become accustomed. When exercising his discretion with regards to distributing money to the beneficiary, the trustee has a duty to inquire to determine the amount of support that the beneficiary needs. Since the purpose of the trust is to provide support for the beneficiary, he cannot alienate his interest in the trust. Thus, the beneficiary's creditors cannot attach the funds in the trust. However, creditors who supply the beneficiary with necessaries like medicine may recover from the trust. In a growing number of jurisdictions, the children and spouses of the beneficiary of a support trust may enforce claims for child support and alimony.

***In the Matter of the Barkema Trust*, 690 N.W. 2d 50**

CADY, Justice.

In this appeal, we must decide if the corpus of a support trust is included in the estate of the beneficiary of the trust upon death for purposes of a claim for recovery of Medicaid benefits provided to the trust beneficiary during her lifetime for nursing home care. The district court found the trust was included within the estate. Upon our review, we affirm.

I. Background Facts and Proceedings

George Barkema established a trust in his will. He left one quarter of the residue of his estate to three of his children, Richard, Doris, and Rose, to hold in trust for his fourth child, Lois. His will directed, "If possible, only the income from said share shall be used for Lois, however, if necessary for her proper support and maintenance, then the corpus of said trust may be invaded to the extent said trustees deem necessary." George's will failed to specify what was to become of the remainder of the trust corpus after Lois's death. After George died, his children entered into an agreement providing that in the event of Lois's death, the trust corpus was to be distributed in equal shares to Lois's children, Dianne Gille and Gayle Torgenson. This agreement was filed with the court in 1978.

Years later, Lois began living in a nursing home. In 1998, Richard helped her apply for Title XIX Medicaid to pay for her medical expenses. Between the time when Lois began

receiving Medicaid benefits and her death on April 14, 2003, the State Medicaid program paid approximately $55,000 for her care. However, the State never attempted to obtain income payments from the trustee or compel the trustee to invade the corpus for Lois's support during Lois's lifetime.

On June 2, 2003, Richard, as trustee, filed a final report, recommending that the remaining corpus of the trust (approximately $18,000) be distributed to Dianne and Gayle, pursuant to the 1978 agreement between the siblings. On June 25, 2003, Health Management Systems, Inc., on behalf of the Iowa Department of Human Services (hereinafter the Department), filed both a claim in the trust and an objection to the final report. It claimed it was entitled to the remaining corpus of the trust under Iowa code section 249A.5(2) (2003). On October 8, 2003, the district court granted the Department's claim and ordered Richard to pay to it the remaining corpus of the trust and interest thereon. The district court based its decision on policy reasons and on what it perceived to be George's intent. Dianne and Gayle appeal.

II. Standard of Review

This case was tried by the probate court in equity. *See In re Roehlke's Estates*, 231 N.W.2d 26, 27 (Iowa 1975) ("A hearing on objections to a fiduciary's final report is an equitable proceeding." (Citations omitted.)); *see also* Iowa Code § 633.33 (2003) (stating that all matters are tried by the probate court in equity other than will contests, involuntary proceedings to appoint guardians or conservators, and establishment of contested claims). Accordingly, our scope of review is de novo. Iowa R .App. p. 6.4.

III. Discussion

Iowa Code section 249A.5(2) provides:

> The provision of medical assistance to an individual who is fifty-five years of age or older, or who is a resident of a nursing facility, intermediate care facility for persons with mental retardation, or mental health institute, who cannot reasonably be expected to be discharged and return to the individual's home, creates a debt due the department from the individual's estate for all medical assistance provided on the individual's behalf, upon the individual's death.

Thus, the Medicaid benefits provided by the Department to Lois created a $55,000 debt due to the Department upon her death. This debt is payable from Lois's "estate," which is

defined as any real property, personal property, or other asset in which [she] ... had any legal title or interest at the time of [her] death, to the extent of such interests, including but not limited to interests in jointly held property, retained life estates, and *interests in trusts. Id.* § 249A.5(2)(*c*) (emphasis added).

The Department argues the $18,000 remaining corpus of the trust is an "interest in [a] trust[]," *Id.* and is part of Lois's estate, from which it can collect its $55,000 debt. Dianne and Gayle, however, contend that the trust terminated upon Lois's death and that she therefore had no interest in the trust "at the time of her death." *See Id.*

Our first task is to classify the trust at issue. Because the corpus of the trust could only be invaded "if necessary for [Lois's] proper support and maintenance," the corpus of the trust was held in a form of support trust. *See* Austin Wakeman Scott, *Abridgement of the Law of Trusts* § 154 (1960) [hereinafter *Scott on Trusts*] (defining a support trust as one in which the trustee is directed to distribute so much "as is necessary for the education or support of the beneficiary"); *accord Strojek v. Hardin County Bd. of Supervisors*, 602 N.W.2d 566, 570 (Iowa Ct. App. 1999) ("The terms of a support trust require the trustee to pay or apply so much of the trust's income or principal as necessary for the beneficiary's care or education." (Citation omitted.)). There are two types of support trusts: (1) pure support trusts, and (2) discretionary support trusts. *See* George Gleason Borgert & George Taylor Bogert, The Law of Trusts and Trustees § 229 (2d. ed. 1993) [hereinafter *Bogert on Trusts*]; *see also Strojek* 602 N.W.2d at 570; *Smith v. Smith*, 246 Neb. 193, 517 N.W. 2d 394, 398 (1994); Evelyn Ginsburg Abranavel, *Discretionary Support Trusts,* 69 Iowa L.Rev. 273, 278-80 (1983) [hereinafter Abranavel].

A settlor creates a pure support trust "[i]f a trustee is directed to pay or apply trust income or principal for the benefit of a named person, but only to the extent necessary to support him, *and only when the disbursements will accomplish support.*" *Bogert on Trusts* § 229 (emphasis added). In contrast, a settlor creates a discretionary support trust if "the stated purpose of the trust is to furnish the beneficiary with support, and the trustee is directed to pay to the beneficiary whatever amount of trust income [or principal] the trustee deems necessary for his support." *Bogert on Trusts* § 229; *see also Smith,* 517 N.W. 2d at 398 *(*describing a discretionary support trust as a hybrid of a pure support trust and a pure discretionary trust). Generally, if the trust is a discretionary support trust, the beneficiary has a right that the trustee pay him the amount which in the exercise of reasonable discretion is

needed for his support ...; and the beneficiary can transfer this interest or his creditors may reach it, unless it is protected by a spendthrift clause. *Bogert on Trusts* § 229; *see also Bureau of Support v. Kreitzer,* 16 Ohio St.2d 147, 243 N.E.2d 83, 86 (1968) (stating that "the words 'care, comfort, maintenance and general well-being' are to be deemed an enforceable standard of a fiduciary's conduct to the extent of providing minimal support for a destitute cestui que trust" and that the state, as a creditor having provided support to the beneficiary, "may be considered to stand in [her] place to pursue whatever right, claim or remedy she may have, including such as she may have as a destitute cestui que trust"); *Scott on Trusts* § 187 (stating that although a trustee has discretion whether to make distributions, "if he is directed to pay as much of the income and principal as is necessary for the support of a beneficiary, he can be compelled to pay at least the minimum amount which in the opinion of a reasonable man would be necessary"); Lawrence A. Frolik*, Discretionary Support Trusts for a Disabled Beneficiary: A Solution or a Trap for the Unwary?,* 46 U. Pitt. L. Rev. 335, 342 (1985) (explaining that when a trust is a discretionary support trust, "the trustee can be required to distribute sufficient income to the beneficiary to provide at least a minimum level of support").

The language used by George Barkema created a discretionary support trust. The trust agreement contained a support provision and provided directions for the trustee to use the trust corpus if necessary for Lois's support and maintenance. By using the words "to the extent said trustees deem necessary," it gave the trustees some discretion as to whether to invade the corpus, *see Bohac v. Graham,* 424 N.W.2d 144, 146 n.3 (N.D. 1988)(finding a discretionary support trust when the trust allowed the trustee to invade the corpus as he "may deem necessary" for the beneficiary's support; stating that "inclusion of the support language suggests an enforceable standard requiring the trustee to provide a minimum level of support to the beneficiary" (citations omitted)).

Having determined that the trust at issue was a discretionary support trust, we must next determine whether Lois's interest in the discretionary support trust is the kind of interest encompassed by section 249A.5(2)(c). In construing a statute,

> [o]ur goal is to determine the intent of the law, gleaned generally from the statutory language. We also consider the statute's "subject matter, the object sought to be accomplished, the purpose to be served, underlying policies, remedies provided, and the consequences of the various interpretations."

Cox v. State, 686 N.W.2d 209, 213 (Iowa 2004)(citations omitted). Thus, we begin by

examining the statutory language.

The phrase "interests in trusts" is not defined in chapter 249A. *See* Iowa Code ch. 249A. However, the legislature clearly intended to define "estate" broadly, and to include more than legal title, because it defined it to include any "legal title *or interest*." *Id.* § 249A.5(2)(*c*) (emphasis added). It also chose to define "estate" more broadly than the federal Medicaid law. The federal statute provides that "estate" "shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law." 42 U.S.C. § 1396p(b)(4)(A) (2000). However, the federal statute provides that "estate" "*may* include, at the option of the State ..., any other real and personal property and other assets in which the individual had any legal title or interest at the time of death." *Id.* § 1396p(b)(4)(B). It appears our legislature sought to exercise its option by including interest in addition to legal title.

We next consider the purpose of the Medicaid recovery statute. As one court explained,

> Congress mandated that [states participating in the Medicaid program] adopt estate recovery provisions and permitted states to adopt an expansive definition of "estate" to address the increased demand for Medicaid benefits from the nation's aging population. In doing so, Congress intended to give states "wide latitude" in seeking estate recoveries. "Allowing states to recover from the estates of persons who previously received assistance furthers the broad purpose of providing for the medical care of the needy; the greater amount recovered by the state allows the state to have more funds to provide future services."

Estate of DeMartino v. Div. of Med. Assistance & Health Servs., 373 N.J. Super. 210, 861 A.2d 138, 144 (2004)(citations omitted). The Medicaid program is designed to serve "individuals and families who do not possess adequate funds for basic health services. It is " 'the payer of last resort.' " " *Strand v. Rasmussen*, 648 N.W. 2d 95, 106 (Iowa 2002) (citations omitted).

With this in mind, we find that a person has an "interest" in the trust to the extent the assets of a trust are actually available to a trust beneficiary, as that term is used in section 249a.5(2)(c) *Cf. Linser v. Office of Attorney Gen.,* 672 N.W. 2d 643, 646 (N.D. 2003) ("Under both federal and state law, an asset must be 'actually available' to an applicant to be

considered a countable asset for determining Medicaid eligibility." (Citation omitted.)). "In order for an asset to be considered an actually available resource, an applicant must have a legal ability to obtain it." *Hecker v. Stark County Soc. Serv. Bd.* 527 N.W.2d 226, 237 (N.D. 1994) (citations omitted). This approach is consistent with the purpose of the recovery statute and the broad language used by our legislature.

The Barkema Trust was a discretionary support trust that contained enough of a distribution standard to create an interest of the beneficiary in the corpus. The trustee was required to pay Lois, during her lifetime, "the amount which in the exercise of reasonable discretion [was] needed for [her] support." *Bogert on Trusts* § 229. This gave Lois the legal ability to compel the trustee to invade the corpus of the trust and make distributions to her for her support. Consequently, she had an "interest" in the corpus of the trust. We next consider whether the interest was present at the time of her death.

Under the Medicaid recovery statute, the Department can collect its debt from Lois's interest in the trust that she had "at the time of [her] death." Iowa Code § 249A.5 (2)(*c*). Gayle and Dianne argue that "at the time of her death" means "at the precise moment she died." They claim Lois had no interest at the time of her death because the corpus passed to them upon her death by operation of law. We reject this argument for the reason expressed by the Minnesota Court of Appeals: "'[A]t the time of death' must be construed to mean a point in time immediately before death. Any other reading of this phrase would render the estate recovery statute meaningless because upon death, property immediately passes to beneficiaries." *In re Estate of Gullberg*, 652 N.W. 2d 709, 713 n. 1 (Minn. Ct. App. 2002) (citation omitted). For example, besides interests in trusts, the Medicaid recovery statute includes jointly held property in the definition of "estate." *See* Iowa Code § 249A.5 (2)(*c*). Under property law, joint tenancy property passes by operation of law to the other joint tenant when one joint tenant dies. 20 Am. Jur.2d *Cotenancy and Joint Ownership* § 3 (1995). If "at the time of death" meant "at the moment of death," the jointly held property would already have passed to the decedent's joint tenant at the time when the decedent's "estate" is to be defined for purposes of the Medicaid recovery statute. This interpretation of "at the time of death" would render the legislature's inclusion of jointly held property in the definition of "estate" meaningless. "In interpreting statutes, we will assume that the legislature intends to accomplish some purpose and that the statute was not intended to be a futile exercise." *State v. Reed*, 596 N.W.2d 514, 515 (Iowa 1999) (citing *State v. Horton,* 509

N.W.2d 452, 454 (Iowa 1993); *Mallory v. Paradise*, 173 N.W.2d 264, 268 (Iowa 1969)). Accordingly, we conclude the phrase "at the time of death" means the time immediately before the Medicaid recipient's death.

Thus, the Department acquired Lois's "right that the trustee pay [her] the amount which in the exercise of reasonable discretion is needed for [her] support." *Bogert on Trusts* § 229. Richard, the trustee of the trust, conceded that the Medicaid benefits the Department provided to Lois were necessary for her support. Accordingly, the Department's $55,000 debt may be collected from the remaining corpus of the trust.

IV. Conclusion

For the foregoing reasons, we affirm the ruling of the district court.

NOTE-Medicaid and Trust Assets

The *Barkema* case involved a trust beneficiary who received government assisted. In that case, the court permitted the government to be reimbursed from the remaining corpus of the trust. The question is whether a person with a trust fund should be eligible for government benefits in the first place. In making that determine the first step is to classify the trust as self-settled or created by a third party. The second step is to ascertain whether the funds in the trust are deemed to be the resource of the beneficiary receiving the state support. For Medicaid purposes, the trust is considered to be self-settled if the person's money was used to fund all or part of the corpus of the trust and the trust is established by him, his spouse or a person or court with the legal authority to act on his behalf or at his request or his spouse's request. If the trust is categorized as a revocable self-settled trust, both the corpus and the income of the trust are considered to be resources available to the state-supported beneficiary. When the case involves an irrevocable self-settled trust, any income or corpus that under any circumstances could be paid to or applied for the benefit of the state-supported person could be viewed as a resource. Any resource will impact the person's eligibility for Medicaid.

With regards to trusts created by third parties, a trust will not be considered a resource available to the person if it is established for a disabled individual from his property, by a parent, grandparent or guardian, or by a court and the trust provides that the sate will receive upon the persons' death all amounts remaining in the trust up to the amount equal to the total medical assistance paid by the state. Discretionary trust created by the will

of one spouse for the benefit of the surviving spouse is not deemed a resource available to the surviving spouse.

Chapter 5 - Spendthrift Trusts and Creditors

A spendthrift is a person who squanders money. If the testator wants to provide for a person who she knows is wasteful, her best option is to create a spendthrift trust or to place a spendthrift provision in any other type of private trust. The beneficiary of a spendthrift trust cannot voluntarily alienate his or her interest in the trust. In the case of a mandatory trust with a spendthrift clause, the beneficiary can waste the money that he receives from the trustee. However, the beneficiary cannot transfer his interest in the trust. Likewise, the beneficiary's creditors cannot force the trustee to pay his debts from the funds in the trust. This type of trust is created by placing a disabling restraint upon the beneficiary and his creditors. No specific language is needed to create a spendthrift trust as long as the testator manifests an intent to create one. Thus, a spendthrift trust may be created by implication based upon the totality of the circumstances involved in the trust's creation. All jurisdictions have enacted statutes permitting spendthrift trusts. Most of those statutes are similar to the Uniform Trust Code's provision that is set out below.

Uniform Trust Code (2000)

§502. Spendthrift Provision

(a) A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest.

(b) A term of a trust providing that the interest of a beneficiary is held subject to a "spendthrift trust," or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest.

(c) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this [article], a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.

§503. Exceptions to Spendthrift Provision

(a) In this section, "child" includes any person for whom an order or judgment for child support has been entered in this or another State.

(b) Even if a trust contains a spendthrift provision, a beneficiary's child, spouse, or former

spouse who has a judgment or court order against the beneficiary for support or maintenance, or a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust, may obtain from a court an order attaching present or future distribution to or for the benefit of the beneficiary.

(c) A spendthrift provision is unenforceable against a claim of this State or the United States to the extent a statute of this State or federal law so provides.

Problems

Answer the following questions based upon the UTC.

1. Ryan, a compulsive gambler, borrowed $50,000 from his friend Mario to pay off his gambling debts. In exchange for the loan, Ryan signed a contract agreeing to repay him out of the funds in a spendthrift trust created for him by his mother. Ryan went to the trustee and ask for $50,000, so he could repay Mario. What result?

2. Nina established a spendthrift trust for the benefit of her son, Ivan. While he was married, Ivan had an affair with Jennifer. As a result of that affair, Jennifer gave birth to a son, Elliot. Ivan refused to provide financial support for Elliot. Elliot had to have emergency surgery that cost $150,000. Jennifer sued the trust seeking assistance to pay off the hospital bill. What result?

3. Sheldon created a spendthrift trust for the benefit of her daughter, Maria. Maria accumulated over $30,000 in credit card debt. One of the credit card companies obtained a $20,000 judgment against Maria. That company sued to attach the trust funds. The trustee hired Julius, an attorney, to defend the trust. After Julius successfully protected the trust assets, he submitted a $15,000 bill for attorney fees. The trustee thought that the attorney fees were too high, so he refused to pay it. Julius sued the trust to recover the attorney fees. What result?

4. Jessie established a spendthrift trust for the benefit of her niece, Paula. Paula did not pay income taxes on the income that she earned from a part-time job. As a result, the Internal Revenue Service obtained a $11,000 judgment against her. The IRS filed suit against the trust seeking to satisfy the judgment. What result?

5.1 Expressed Spendthrift Trust

The following is an example of the creation of an expressed spendthrift trust: Louise devises property to Samuel in trust to pay the income to James for life. The trust instrument

contains a clause stating: "As beneficiary of this trust, James is hereby restrained from alienating, anticipating, encumbering, or in any manner assigning his or her interest or estate, either in principal or income, and is without the power so to do, nor shall such interest or estate be subject to his or her liabilities or obligations not to judgment or other legal process, bankruptcy proceedings or claims of creditors or others." By inserting this language in the trust, Louise ensures that James' creditors cannot obtain an interest in the trust.

5.2 Implied Spendthrift Trust

***Morrison v. Doyle*, 582 N.W. 2d 237**

GARDEBRING, Justice.

We are asked to determine whether the trust at issue in this case is a "spendthrift trust." If so, the assets of the trust are protected from attachment by the primary beneficiary's judgment creditors; if not, the creditors, whose judgment against the primary beneficiary William Doyle (appellant) arises from a business deal, are entitled to attach the assets in the trust, as the trial court and court of appeals have held. We reverse the court of appeals, holding that the settlor's intent in creating the trust was to protect the trust funds from the primary beneficiary's creditors and that the powers afforded to Doyle, as trustee, by the trust instrument do not defeat that intent.

The business relationship underlying this case began in 1977 when respondents Michael Morrison and others loaned substantial funds to a corporation, in which Doyle and his brother claimed to be the only shareholders. Doyle personally guaranteed the loans, but later defaulted on the guarantee. Respondents commenced suit against Doyle and his brother in 1979, alleging breach of contract; they received a judgment against Doyle in 1993 in the amount of $55,954.19 After various other attempts to enforce the judgment, in 1996 respondents sought a preliminary order of attachment of certain trust assets, for which Doyle was both the trustee and the beneficiary, and a temporary restraining order to prevent Doyle transferring any of the trust assets. The Morrisons alleged that Doyle had fraudulently transferred money and property from the trust to defraud the respondents. The trial court granted the Morrisons' motion for an order of attachment, stating that "[d]ue to extraordinary circumstances, claimant's interests cannot be protected pending hearing by an appropriate order of the court other than by directing a pre-hearing seizure of property."

After a hearing on the issue, the trial court concluded that the trust at issue was not a

spendthrift trust and was therefore subject to attachment by Doyle's creditors. The trial court also found that the underlying claim against Doyle sounded in contract, but was premised on Doyle's having committed an intentional fraud against the Morrisons, thereby providing a basis for the attachment under Minn. Stat. § 570.02, subd. 1(4) (1996). Pursuant to these findings, the trial court granted the Morrisons' application for attachment and a temporary restraining order.

Doyle appealed to the court of appeals and it affirmed the judgment of the trial court, concluding that the trust was not an implied spendthrift trust because "Doyle, as trustee, * * * has the discretion to distribute both the income and the principal of the trust to himself as he sees fit." *Morrison v. Doyle*, 570 N.W.2d 692, 697 (Minn. App., 1997). The court of appeals further held that there is ample evidence in the record to support the trial court finding that Doyle "assigned, secreted and disposed of non-exempt property with intent to delay and defraud his creditors, the Morrisons," and that Doyle committed an intentional fraud against the Morrisons. *Id.* at 699. The court of appeals relied upon these findings of fact as the basis justifying the issuance of the order of attachment to provide security for satisfaction of the Morrisons' judgment against Doyle. *Id.* at 699-700.

The facts regarding the creation of the trust at issue here are undisputed. Veronica Doyle, mother of appellant Doyle, died on February 12, 1988, and in her will she left one-sixth of her residual estate to her daughter-in law, Lois Doyle, Doyle's wife. Veronica Doyle stated in the will that she intentionally did not provide for her son as she had otherwise provided for him in her lifetime. Lois Doyle died on May 14, 1988, and left a will in which she devised the residue and remainder of her estate into a trust that she had previously created on January 5, 1988. The probate court found that Lois Doyle's will was a "pour-over" will. Therefore, the money inherited by Lois Doyle from Veronica Doyle was transferred into the trust at issue in this case.

The trust instrument itself named Lois Doyle as both the grantor and the trustee; Doyle was designated as "attorney-in-fact" and given the power to act for Lois Doyle for purposes of the trust agreement only. He was also named as the primary beneficiary. Doyle's four children were named as residual beneficiaries. Upon Lois Doyle's death, all of the beneficiaries of the trust signed a consent agreement and stipulation appointing Doyle as the successor trustee to the trust. This stipulation stated that "it was the intent of Lois M. Doyle, and all of the [beneficiaries] that upon Lois M. Doyle's death that William G. Doyle would

succeed her as Trustee of the Trust;" it was approved by the district court. Therefore, Doyle became both the primary beneficiary and the trustee of the Lois Doyle trust.

The trust instrument did not contain a specific "spendthrift clause," but did contain the following provisions, which have a bearing on today's decision:

> 3. The trust shall continue upon the death of the Grantor for the benefit of WILLIAM DOYLE lasting his lifetime. The trustee shall pay the income and such amounts of the principal as the Trustee in its discretion may determine for the beneficiary's education, support, health, and maintenance.
>
> * * * * * *
>
> 6. Early Termination of the Trust. If at any time the principal of the Trust should fall to a value which would make the Trust uneconomical in the opinion of the Trustee, the Trustee may in its sole discretion terminate the Trust and pay over the remaining principal and income to the Grantor if he is living (and in such event the Trustee will notify the other beneficiaries of the Trust's early termination), and if not living, then to, or for the benefit of, any one or more of the income beneficiaries designated in Article 3 above, or, if there are none such to take, as provided in Article 4 above.
>
> 7. Powers and Duties of Trustee. The Trustee shall have the full power, subject to direction of Grantor, and without prior authority from any court to do everything necessary for the proper administration of this trust.
>
> * * * * * *
>
> 12. Payment to Beneficiaries. The Trustee may make any payments of income or principal directed to be made to any beneficiary under any provision of this Agreement, including any distribution on termination, or resignation.
>
> 1. by paying the same directly to any beneficiary or to his spouse, parent, adult sibling, legally appointed guardian, committee, conservator, or custodian, or
>
> 2. by depositing same in any savings account in the name of any of the beneficiaries, whether alone or in joint names including any person designated by the Grantor in accordance with the provisions of Article 11.

> and upon making any such payment or deposit the Trustee shall have no further responsibility with respect to the same or to the application or disposition of the moneys so deposited.

In order to resolve this matter, we must determine whether the language of this trust document and the manner in which it was implemented require its designation as a "spendthrift trust," replete with all of the legal protections afforded to the beneficiary of such a trust.

The underlying legal principles are not novel. A spendthrift trust is a trust in which the power of alienation has been suspended. *In re Moulton's Estate*, 233 Minn. 286, 290, 46 N.W.2d 667, 670 (1951). The validity of a spendthrift trust is upheld on the theory that the owner of property, in the free exercise of his will in disposing of it, may secure such benefits to the objects of his bounty as he sees fit and may, if he so desires, limit its benefits to persons of his choice, who part with nothing in return, to the exclusion of creditors and others. *Id.* Minn. at 290-91, 46 N.W.2d at 670 (citations omitted).

Generally, to create a spendthrift trust, the trust agreement must simply include a spendthrift clause. *See, e.g., In re Trust Created Under Agreement with McLaughlin*, 361 N.W.2d 43, 45 (Minn. 1985). The following is an example of a spendthrift clause:

> Neither principal nor income of any trust nor any beneficiary's interest therein, while undistributed in fact, shall be subject to alienation, assignment, encumbrance, appointment or anticipation by the beneficiary, nor to garnishment, attachment, execution or bankruptcy proceedings, nor to claims for alimony or support or any other claims of any creditor or other person against the beneficiary, nor to any other transfer, voluntary or involuntary, from the beneficiary.

Id. However, we have also provided the asset protections afforded in a spendthrift trust when the trust agreement did not include an express spendthrift provision. *See Moulton's Estate*, 233 Minn. at 302-03, 46 N.W.2d at 675-76; *see also First Nat'l Bank of Canby v. Olufson*, 181 Minn. 289, 291, 232 N.w. 337, 338 (1930). "No particular form of words is necessary to create a spendthrift trust. It is sufficient if by the terms of the trust the settlor manifests an intention to impose the restrictions common to such trust." *Moulton's Estate*, 233 Minn. at 291, 46 N.W.2d at 670.

In cases such as this one, where the trust agreement does not contain a specific

spendthrift clause, we look to the settlor's intent as evidenced by the language used in the trust agreement. *Id.,* 233 Minn. at 295, 46 N.W.2d at 672. In that determination we are to be guided by the well-known principle that the entire instrument must be considered, aided by the surrounding circumstances, due weight being given to all its language, with some meaning being given, if possible, to all parts, expressions and words used, discarding and disregarding no parts as meaningless, if any meaning can be given them consistently with the rest of the instrument. *In re Watland*, 211 Minn. 84, 91, 300 N.W. 195, 198 (1941) (quotation omitted).

What indications of the settlor's intent are present in this case? We may begin with the death of Doyle's mother and her decision to disinherit her son William, apparently in order to protect him from his creditors. The record here includes deposition testimony of William Seltz, who prepared Veronica Doyle's will, to the effect that she intended for her estate to be equally divided between all six of her children, but that she wanted to protect Doyle's share from his creditors. Therefore, according to Seltz, she asked him to structure her will so that William's "share" passed instead to his wife. It is primarily this one-sixth portion of Doyle's mother's estate that became the corpus of the trust at issue here.

Next, we may look to the language of the trust document itself, because the settlor's intent can be determined by looking to the restrictions placed upon the trustee as to distribution of income and principal to the beneficiaries of the trust. *See Moulton's Estate*, 233 Minn. at 291, 46 N.W.2d at 670 (stating that intent can be inferred by looking to the terms of the trust to determine whether the settlor imposed the restrictions common to such trust). Here the settlor provided that the trustee "shall pay the income and such amounts of the principal as the Trustee in its discretion may determine for the beneficiary's education, support, health, and maintenance." While many spendthrift trusts contain more explicit limitations, we conclude that these restrictions represent the kind of ascertainable standards that are sufficient to guide the actions of the beneficiary and against which his conduct can be measured. Furthermore, the specific language at issue has been, since the time the trust was created, actually mirrored in the legislative scheme that governs distribution of trust assets:

> No trustee may exercise or participate in the exercise of * * * any power of the trustee to make discretionary distributions of either principal or income to or for the benefit of the trustee as beneficiary, unless by the terms of the

> will or other written instrument those discretionary distributions are limited by an ascertainable standard relating to that trustee's health, education, maintenance, or support * * *.

Minn. Stat. § 501B.14, subd. 1 (1996). The trust language also tracks the Internal Revenue Service's statutory provisions on the creation of ascertainable standards that limit distribution of trust assets. *See* I.R.C. § 2041(b)(1)(A) (1994).

We also conclude that the type of language used in the trust document at issue here is consistent with language to which we have attached significant meaning in our older trust cases. *See In re Tuthill's Will,* 247 Minn. 122, 76 N.W.2d 499 (1956); *see also McNiff v. Olmsted County Welfare Dep't.* 287 Minn. 40, 176 N.W.2d 888 (1970). Thus, based upon the past cases that direct us to act on the manifest intent of the settlor, we hold that the trust at issue here is a spendthrift trust, thus defeating the claims of the Morrisons to attach the trust assets.

Further, although we disagree with the conclusions of the lower courts, we are not unmindful of the concerns they raise. The trial court and the court of appeals relied on three bases to conclude that the trust at issue here is not a spendthrift trust: (1) that there was a merger of Doyle's legal interest as trustee and his beneficial interest; (2) that Doyle, as trustee, had the authority to distribute both income and amounts from the principal at his discretion pursuant to Paragraph 3 of the trust agreement, and that Doyle may have distributed trust funds in violation of the trust agreement; and (3) that Doyle, as trustee, has the authority to terminate the trust pursuant to Paragraph 6 of the trust agreement. *See Doyle,* 570 N.W. 2d at 697-98. In addition, the Morrisons rely heavily on their assertions that Doyle, as trustee, has violated the terms of the trust agreement by distributing trust monies to himself and the other beneficiaries and by attempting to conceal the fact that he has received money from the trust.

However, none of these bases defeats the critical provisions of the trust that make it a spendthrift trust. First, there is no merger of Doyle's legal and beneficial interests simply because he is both the trustee and the primary beneficiary of the trust. The Minnesota legislature has spoken to this issue: "No trust is invalid or terminated, and title to trust assets is not merged, because the trustee or trustees are the same person or persons as the beneficiaries of the trust." Minn. Stat. § 501B.13, subd. 1 (1996). And we assume that if the trust is not made utterly invalid by virtue of the trustee and the beneficiary being the same person, its "spendthrift" characteristics are not defeated either.

Further, the Restatement (Second) of Trusts § 99 discusses the ramifications of having a primary beneficiary also act as the trustee of a trust. It states:

> There can be a trust in which one of several beneficiaries is the sole trustee. The trustee holds the legal title to the trust property, and the beneficiaries, including the beneficiary who is also the trustee, have equitable interests the extent of which is determined by the terms of the trust. There is no partial merger of the legal interest and the equitable interest. *The beneficiary who is also trustee does not hold any part of the property free of trust.* A creditor of this beneficiary can reach his interest only by a proceeding appropriate for reaching an equitable interest, and, *if it is a spendthrift trust, a creditor cannot reach his interest.*

Restatement (Second) of Trusts §199 cmt. (2) (1959) (emphasis added). Thus, we attach no special importance to the fact that Doyle has been both trustee and primary beneficiary.

Second, although Doyle can make distributions from both the income and the principal of the trust, as noted above, the trust agreement does provide limitations on the purposes for which distributions from both income and principal can be made. Article 3 of the trust agreement limits distribution to the purposes of "education, support, health, and maintenance." Therefore, there are limits to Doyle's power of distribution, contrary to the court of appeals' conclusion that Doyle "has the discretion to distribute both the income and the principal of the trust to himself *as he sees fit*." *Doyle*, 570 N.W.2d at 697 (emphasis added). Similarly, the power to terminate the trust is not determinative because article 6 of the trust agreement limits that power to the occasion when the trust is uneconomical. Therefore, Doyle as trustee does not have unlimited authority.

Finally, the alleged improper actions of Doyle as trustee are irrelevant to the question of whether the trust is a spendthrift trust. There are five different ways that a court of law may remedy a trustee's abuse of discretion, none of which include eliminating the spendthrift nature of the trust.

The beneficiary of a trust can maintain a suit for one of the following: (a) to compel the trustee to perform his duties as trustee; (b) to enjoin the trustee from committing a breach of trust; (c) to compel the trustee to redress a breach of trust; (d) to appoint a receiver to take possession of the trust property and administer the trust; [or] (e) to remove the trustee. Restatement (Second) of Trusts § 199. While it is true that these remedies are

generally available only to other beneficiaries, and not to third-party creditors, that is precisely the point of the creation of a spendthrift trust: the assets contained within it are not available to persons outside the trust relationship. Given these basic concepts of trust law, we conclude that it would be inappropriate to allow Doyle's judgment creditors to gain an attachment to the trust simply because Doyle, as trustee, may have abused his discretion in distributing trust funds.

Because we conclude that Lois Doyle, the settlor of the trust at issue, intended to create a spendthrift trust, we reverse the judgment of the court of appeals and hold that the instant trust is an implied spendthrift trust and, for that reason, the Morrisons cannot obtain an attachment to the trust.

Reversed.

NOTE

A person cannot shield his assets from creditors by placing them in a trust for his own benefit. Thus, the law gives creditors recourse against the entire interest in a self-settled trust. Thus, protection from creditors is available only to a recipient of inherited wealth, not a person who creates a self-settled trust using earned money. This rule has been codified in the majority of jurisdiction. For example, a California statute provides: "(a) If the settlor is a beneficiary of a trust created by the settlor and the settlor's interest is subject to a provision restraining the voluntary or involuntary transfer of the settlor's interest, the restraint is invalid against transferees or creditors of the settlor. The invalidity of the restraint on transfer does not affect the validity of the trust." Cal. Probate Code §15304.

5.3 Creditors

Brian is the beneficiary of a spendthrift trust. Brian takes his American Express card to the mall and goes on a shopping spree to the tune of $80,000. If Brian does not pay his credit card bill, American Express cannot reach any of the money in the trust fund. American Express is considered to be a voluntary creditor because the company gave Brian a credit card. Nonetheless, a person who furnishes necessary services or support to the beneficiary can reach the beneficiary's interest in a spendthrift trust. This exception applies to people like doctors and grocers. In the majority of jurisdictions, involuntary creditors like spouses and children are permitted to attach spendthrift trust funds to satisfy the beneficiary's alimony and child support obligations. Nonetheless, tort victims who are

involuntary creditors are precluded from receiving money from a spendthrift trust

***Child Support-Drevenik v. Nardone*, 862 A.2d 635**

OPINION BY POPOVICH, J.:

¶ 1 Appellant Dominick Nardone, Jr., trustee for John Nardone, his brother, appeals the order entered on April 12, 2004, in the Court of Common Pleas of Luzerne County, that directed Appellant to pay Mr. Nardone's child support arrears from the principal and income of the spendthrift trust established for Mr. Nardone's benefit by their mother's will. Upon review, we affirm.

¶ 2 The relevant facts and procedural history of this case are set forth in the trial court's opinion of June 14, 2004, as follows:

This matter originated on February 12, 1996, when the [c]omplainant, [Appellee] Nicole Drevenik, filed a civil [c]omplaint for support against [Mr. Nardone] for the support of their two children, Joseph Drevenik, born September 18, 1986, and Jason Drevenik, born November 29, 1987. After a support conference and [hearing] before a [master in support], an [o]rder was entered for the support of the minor children on August 15, 1997, in the amount of $200.00 per month. Later modification petitions reduced this amount by [o]rder of March 16, 2000, to $140.00 per month in support and $20.00 per month on arrears.

Subsequently, because [Mr. Nardone] did not pay any child support for more than a year, a petition was filed to show cause why the assets of a trust held for [Mr. Nardone] should not be used for support payments of his children. On March 3, 2004, Mr. Nardone appeared before [the trial court] owing child support in an amount just over $2,411.00. Mr. Nardone acknowledged that he owed child support, that he wished to pay off this amount, and was willing to cooperate with the Commonwealth to the fullest extent. Counsel for [Appellant] explained that a [s]pendthrift [t]rust, of which [Mr. Nardone is the beneficiary] was at the heart of the problem. Inez L. Nardone, [Mr. Nardone's mother (decedent)], died on April 20, 2002, in Luzerne County. By her [l]ast [w]ill and [t]estament, she left fifty percent of her net estate to [Appellant] and fifty percent to [Appellant] in trust for [Mr. Nardone]. Item III of decedent's will states in part:

> [...] I give, devise, and bequeath my entire estate, whether real, personal, or mixed, of every kind, nature, and description whatsoever and wherever situated, as follows:
>
> * * *
>
> B. Fifty (50%) percent to my son, [Appellant], in trust for my son,

> [Mr. Nardone]. [Appellant] shall serve without bond. [Appellant] shall have total control over this [t]rust and apply such amount of income and principal as he, in his sole discretion, deems proper for the support, education, and welfare of my son, [Mr. Nardone]. I direct that this sum be invested safely and wisely in the sole discretion of [Appellant]. I further direct that my son, [Mr. Nardone] shall have no right to withdraw any funds from this trust.

Although the complete and total amount of the trust assets [has not been calculated and is, therefore, unknown], records from the Luzerne County Recorder of Deeds Office indicate that on August 19, 2000, [decedent's] home was sold for $94,900.00. Therefore, approximately half of this amount was placed in trust for [Mr. Nardone].

By order of April 12, 2004, [the trial court] found Mr. Nardone] in arrears of his child support obligation in the amount of $2,456.34. [Appellant] was directed to make immediate payment of all arrearages and to make continuing monthly payments of $140.00 by the 28th of each month. Furthermore, [Appellant] was ordered to provide a complete account of the assets and expenditures of the trust held by [Appellant] on behalf of [Mr. Nardone].

¶ 3 Appellant filed a timely notice of appeal from the trial court's April 12, 2004 order. Thereafter, Appellant filed an ordered statement of matters complained of on appeal. The trial court did not file a corresponding opinion after Appellant filed his statement of matters, but it did so upon the direction of this Court. *See Drevenik v. Nardone,* 644 MDA 2004 (Pa.Super. filed 6/16/2004) (unpublished order).

¶ 4 The sole issue Appellant present for our review is whether the principal of a trust may be invaded by a trial court in order to satisfy outstanding child support arrears.

¶ 5 Our review of Appellant's issue is governed by the following standard: In our appellate review of child support matters, we use an abuse of discretion standard. A support order will not be disturbed on appeal unless the trial court failed to consider properly the requirements of the Rules of Civil Procedure [g]overning [a]ctions for [s]upport ...or abused its discretion in applying these Rules. An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will ... discretion is abused. This is a limited role and, absent a clear abuse of discretion,

the appellate court will defer to the order of the trial court. A finding of abuse is not lightly made but only upon a showing of clear and convincing evidence. *Dennis v. Whitney*, 844 A.2d 1267, 1269 (Pa.Super 2004) (citations omitted).

¶ 6 Appellant contends that the trial court abused its discretion when it ordered that the trust's principal and income be invaded to pay Mr. Nardone's child support arrears because the Pennsylvania Supreme Court's holdings in *Humphreys v. DeRoss*, 567 Pa. 614, 790 A.2d 281 (2002), and *Maher v. Maher*, 575 Pa. 181, 835 A.2d 1281 (2003), instruct that trust principal cannot be utilized as "income" for support purposes. We disagree.

¶ 7 It is clear that the holdings of *Humphreys* and *Maher* are inapplicable to the present case. *Humphreys* and *Maher* held that the corpus of an inheritance could not be included as "income" by the trial court when it calculates a support obligation pursuant to the Support Guidelines. *Humphreys,* at 624, 790 A.2d 287-288 *see also* . *Maher*, 575 at 189-90, 835 A.2d at 1286-87. In the present case, as noted by the trial court, Appellee is not seeking a greater support award or a re-calculation of Mr. Nardone's income in light of his trust assets. Rather, Appellee seeks payment of accrued support arrears. Accordingly, neither *Humphreys* nor *Maher* offer guidance in this case. Therefore, Appellant's argument fails.

¶ 8 We acknowledge that the corpus of the inheritance in question is in the nature of a spendthrift trust, and, as such, the assets of the trust are insulated from incursions by creditors until such time those assets are delivered into the hands of the beneficiary, in this case, Mr. Nardone. 10 Summary of Pennsylvania Jurisprudence 2d. Probate, Estates and Trusts § 31:7. Nevertheless, we are satisfied that the trial court did not abuse its discretion when it ordered Appellant to distribute trust assets to pay Mr. Nardone's support arrears.

¶ 9 Reference to the testamentary language indicates that the spendthrift trust was established for the "support, welfare, and education" of Mr. Nardone. Clearly, the idea of providing support in the spendthrift trust, *i.e.,* payment of daily living expenses, includes *all* reasonable living expenses that one would occur in the course of daily living, such as those involved in rearing children. Of course, children in our society can never be characterized as an "expense," but the very existence of the Support Guidelines makes it clear that parenthood carries with it an obvious economic responsibility to care for a child's daily needs, which responsibility is coterminous with the parent's need to support himself or herself. As such, it becomes clear that the language of the trust permits the use of both trust principal and income to support Mr. Nardone's children, because, if they lived with him,

trust assets would be used to meet their daily needs as well. Therefore, we are satisfied that the trial court did not abuse its discretion.

¶ 10 Our reasoning is buttressed by the seminal case of *Moorehead's Estate*, 289 Pa. 542, 137 A. 802 (1927). In *Moorehead's Estate,* Gertrude F. Moorehead (Gertrude) filed a petition in the Orphans' Court of Allegheny County seeking support for herself from the assets held for her estranged husband, H. Watt Moorehead (Watt), in the spendthrift trust established by Watt's grandmother, Mary Moorehead (the testatrix). *Moorehead's Estate*, at 544, 137 A. at 803. The trial court ruled that the assets should be available for Gertrude's support, and both parties appealed.

¶ 11 Writing for a unanimous Court, Mr. Justice Frazer opined that, at the time of the writing of the testamentary trust, the testatrix's intent was to protect Watt from wasting his income by extravagance and dissipation but not to deliberately enable Watt to avoid the responsibility of support to his family placed on him by the law of this Commonwealth. *Moorehead's Estate*, at 547-48, 137 A. at 804-05. As support for his conclusion, Mr. Justice Frazer noted that the codicil that established the spendthrift trust was authored after Watt's marriage to Gertrude and that there was no indication of animosity toward Gertrude by the testatrix evident in her will and codicil or in the record. *See Id.,* at 547-48, 137 A. at 804-05. Moreover, even if a technical reading of the language of the spendthrift trust would permit Watt from avoiding his responsibilities to his family by virtue of the creation of the spendthrift trust, such a result was forbidden by the public policy of this Commonwealth. *Id.,* at 551, 137 A. at 806. Lastly, Mr. Justice Frazer reasoned that the nature of a support obligation was not a "debt" because it was not founded upon a legal contract but, rather, a societal obligation. *Id.,* at 553, 137 A. at 806. Thus, an instrument that places a testamentary gift out of bounds from creditors for the collection of "debts" had no effect to preserve that property from the incursion of family members seeking payment of a support obligation. *See Id.,* at 533, 137 A. at 806. Therefore, our Supreme Court affirmed the order of the Orphans' Court.

¶ 12 We observe that society places an even greater obligation on a parent to support his or her children than on a spouse to support another spouse. Therefore, the rationale of *Moorehead's Estate* applies with even greater force to the present case. Inasmuch as our Supreme Court has concluded that the term "debt" does not encompass support obligations, the spendthrift trust cannot act to shield the assets of the trust from collection by Appellee

for the benefit of Mr. Nardone's children. *Moorehead's Estate,* at 553, 137 A. at 806. Further, similar to the facts in *Moorehead's Estate,* the decedent lived long after the birth of Mr. Nardone's children, and no animosity was evident toward them or their mother, Appellee, in the will that established the spendthrift trust. However, even if it was the decedent's intent to deprive her grandchildren of the assets within the trust, the public policy of this Commonwealth would forbid such a result. *Cf. Moorehead's Estate,* at 551, 137 A. at 806. It is also evident from the record that Mr. Nardone recognizes his responsibility to his children and agrees that Appellant should release the assets held in trust for him to them for their support, which assets would, in any event, be available for the children's support were they to reside with Mr. Nardone. Accordingly, we are satisfied that the trial court did not abuse its discretion, and we affirm its order.

¶ 13 Order affirmed.

***Tort Claim-Duvall v. McGee*, 826 A.2d 416**

BELL Chief Judge.

The issue presented for resolution by this case is whether a tort judgment may be satisfied by invading the principal of a spendthrift trust held for the benefit of the tortfeasor. The Circuit Court for Anne Arundel County, recognizing that Maryland law only allows invasion of a spendthrift trust by a narrow class of creditors, and, only in limited circumstances, declined to expand the class or the circumstances. It opined that to hold that tort judgment creditors are among the class of creditors that have traditionally been allowed to invade a spendthrift trust in satisfaction of a judgment, would be to "rewrite" Maryland law. Such a revision of Maryland law, it pointed out, is properly addressed by the Maryland General Assembly or this Court. We shall affirm the judgment of the Circuit Court.

I

James Calvert McGee ("McGee"), one of the appellees in the case *sub judice,* was convicted of felony-murder for his participation in a robbery that resulted in the killing of Katherine Ryon. Robert Ryon Duvall,the appellant, is the Personal Representative of the Estate of Katherine Ryon. He brought suit, in that capacity, in the Circuit Court for Anne Arundel County against McGee, seeking both compensatory and punitive damages, plus costs of the suit, for the battery of Katherine Ryon and the conversion of her personal property. The parties settled this action, negotiating and executing an Agreement for Entry of Judgment/Partial Release of Claims ("Settlement Agreement"), pursuant to which, in

satisfaction of the conversion count, the parties agreed to the entry of judgment against McGee, and in favor of the appellant, for $100,000.00 in compensatory damages and $500,000.00 in punitive damages. The Settlement Agreement acknowledged that McGee is the beneficiary of a trust established by his deceased mother, which, at the time of the settlement, was valued at approximately $877,000.00, exclusive of early withdrawal penalties and taxes. Under the terms of the trust, periodic monetary payments are to be made to McGee, and to others on his behalf, by Frank B. Walsh, Jr., the Trustee of the trust ("the Trustee)," the other appellee in the case *sub judice*. Another provision of the trust established what is commonly referred to as a "Spendthrift" Trust. That provision prohibited McGee from alienating the trust principal ("corpus") or any portion of the income from the trust while in the hands of the Trustee, and specifically shielded both the corpus and the income from claims of McGee's creditors. The trust instrument also gives broad discretion to the Trustee to terminate the Trust at any time and pay the trust assets and any undistributed income to McGee or to any of the remaindermen to which the trust referred. The Settlement Agreement also provided that:

> "The [appellant] hereby forever releases, waives, relinquishes and abandons any rights he may have to satisfy or have paid any portion of the above-mentioned judgment by way of attachment, garnishment or any other post-judgment collection efforts directed against any periodic payments made by the Trustee of the Trust to [McGee] as the beneficiary of the Trust, or directed against any periodic payment made to any other person or entities for the benefit of [McGee]. The amount of any periodic payments which are immune to such post judgment collection efforts hereunder shall not exceed the amount of the periodic payment previously made during the preceding three (3) years, exclusive of payments made for legal fees. The parties understand and specifically agree that the Trustee will continue to pay the legal fees on behalf of [McGee] and such payment of legal fees shall be immune to any post-judgment collection efforts as outlined above. [McGee] agrees that he shall provide an annual accounting in August of each year beginning in the year 2002 outlining the periodic payments received by him or made to others on his behalf (exclusive of legal fees) during the preceding year."

Thus, it prohibited the appellant from attaching or garnishing any of the periodic payments the Trustee made to McGee from the Trust.

Having surrendered all rights to attach McGee's periodic payment from the Trust, but armed with the judgment entered pursuant to the Settlement Agreement, the appellant sought to satisfy the judgment by invading the corpus of the trust. Thus, the appellant served a Writ of Garnishment on the Trustee. Answering the Writ, the Trustee defended on the grounds that the trust was a spendthrift trust; the Trustee was not indebted to McGee; and the Trustee was not in possession of any property belonging to McGee.

Both parties moved for summary judgment. Although acknowledging that this Court, in *Smith v. Towers,* 69 Md. 77, 14 497 (1888), upheld the validity of spendthrift trusts in Maryland and, thus, prohibited their invasion for the payment of debt, the appellant maintained that, over time, this Court has carved out, on public policy grounds, exceptions to the spendthrift doctrine, pursuant to which some classes of persons are permitted to invade spendthrift trusts. Noting one of the rationales of the *Smith* decision-that because "[a]ll deeds and wills and other instruments by which [spendthrift] trusts are created are required by law to be recorded in the public offices ... creditors have notice of the terms and conditions on which the beneficiary is entitled to the income of the property," 69 Md. 77, 14 499 the appellant argued that tort-judgment creditors should be included among those excepted, since such creditors had no opportunity to investigate the credit-worthiness of the tortfeasor prior to suffering from the tortious conduct giving rise to the claim. Furthermore, the appellant continued, the public policy of this State dictates that tort-judgment creditors be deemed a special class of creditors entitled to invade a spendthrift trust.

The trial court held: "Maryland law is what governs this case, however, and Maryland law is clear. A spendthrift trust may not be reached in order to satisfy the judgment in the case *sub judice.* Although the facts involving the murder of the late Ms. Ryon, and the further facts relating to the beneficiary status of the Defendant McGee, a felony murderer, are very tempting, this Court may not rewrite the law; the Maryland Legislature has the responsibility of that task, or the Appellate Courts of this State must further interpret the law.... This Court has a responsibility to apply and uphold the laws of the state as its interprets they now exist, not create new law."

Thus, the appellant's motion for summary judgment was denied and the appellees' cross-motion, granted. The appellant noted a timely appeal to the Court of Special Appeals. This Court, on its own initiative, issued the writ of certiorari to address this novel issue of Maryland law, prior to any proceedings in the intermediate court. *Duvall v. McGee*, 369 Md.

570, 801 A.2d 1031 (2002).

In this Court, the appellant argues that the public policy of this State favors a rule allowing a tort-judgment creditor's claim to be satisfied by invading the corpus of a spendthrift trust. He directs our attention to Maryland precedent, reflecting the recognition of spendthrift trusts, the rationale for that recognition and the development of exceptions to the spendthrift trust doctrine. More particularly, the appellant relies on Maryland's public policy against permitting criminals to benefit financially from their crimes. As to that, he relies on the Maryland statute, known as the "Son of Sam" statute, enacted to prevent criminals from profiting from their own crimes through "notoriety of crimes contracts," *Curran v. Price,* 334 Md. 149, 154, 638 A.2d 93, 96 (1994), and the like, *see* Md.Code (1957, 1992 Repl.Vol., 1993 Cum.Supp.), Article 27, § 854; this Court's creation in the common law of this State of a "slayer's rule," pursuant to which a person who kills another is prohibited from being tangibly enriched by the death. (citations omitted)

By way of rebuttal, the appellees counter that accepting the appellant's argument would require and, thus, constitute a change in Maryland law and, in any event, the public policy goals argued by the appellant will not be advanced by allowing garnishment of a spendthrift trust by a tort-judgment creditor under the circumstances of the case *sub judice.* As to the former, the appellees emphasize that the obligations, for the satisfaction of which this Court has allowed invasion of the corpus and income of a spendthrift trust have not been simple or ordinary contract debt; rather they have been "... dut [ies], not ... debt." *Safe Deposit & Trust Co. of Baltimore v. Robertson*, 192 Md. 653, 662, 65 A.2d 292, 296 (1949). *See Zouk v. Zouk,* 204 Md. 285, 298, 104 A.2d 573, 579-80 (1954) (equating a contract for child support to "the decree of a court awarding support to the child or alimony to a wife."). With respect to the latter, they argue that the public policy against a criminal benefitting from his or her crime is simply inapplicable to the case *sub judice.* The payments that McGee receives, they maintain, are in no way related to the crime that he committed. As important, the appellees point out, those payments are not even involved in the case, the parties, by their settlement agreement, having expressly exempted them from attachment.

II.

In Maryland, it is well settled that "spend-thrift trusts" may be created. (citations omitted). This Court first recognized the validity of "spendthrift" trusts, in *Smith v. Towers, supra,* concluding that the income from, and corpus of, such trusts are not subject to

attachment or garnishment in the hands of the trustee. It is useful to review the rationale of that case.

In *Smith,* one of the judgment debtors was beneficiary of a trust, which provided for the trustee to collect the rents and the profits of the real estate that formed its corpus, for payment to him, "into his own hands, and not into another, whether claiming by his authority or otherwise," *Id.* at 83, 14 A. at 497, and, upon his death, to convey the real estate to the beneficiary's surviving children. *Id.* The appellant, having obtained a judgment against the beneficiary of the trust and another, sought to satisfy the judgment by attaching the income from the trust.

Perceiving that the case presented two issues: whether the testator intended to give the income of the property to his son to the exclusion of his creditors and, if so, whether the terms and provisions of the will effected that intention, 69 Md. at 83, 14A. at 497, the Court had little difficulty resolving the first. As to that, we held:

> "He not only gives the legal estate to the trustee, but he directs in express terms that he shall pay the income into the hands of his son and not into the hands of any other person, whether claiming by his authority, or in any other capacity. Here then, is an express provision, that the income shall be paid to his son, and an express prohibition against paying it to any other person. If the income in the hands of the trustee is liable to the claims of creditors, the trustee it is plain could not carry out the trust. So construing this will as we do, and it is not we think susceptible of any other construction, the testator meant beyond all question that the income should be paid into the hands of his son, to the the [sic] exclusion of all other persons, whether claiming as alienees or as creditors."

Id. at 84, 14 A. 497.

Turning to the next issue, we acknowledged that the English decisions and, indeed, those of a majority of the States deciding the issue, held that a necessary incident to the holding of an equitable estate, or an interest for life, was the right of alienation by the beneficiary, with the result that, without regard to provisions by way of limitation or otherwise, such estates are "liable for the payment of [the beneficiary's] debts." *Id.* This Court rejected the two grounds on which those decisions rested, *i.e.,* "that the right of alienation is a necessary incident to an equitable estate for life, and any restraint upon this right is against the policy of the law which favors the ready alienation of property; and ... that

public policy forbids that one should have the right to enjoy the income of property, to the exclusion of his creditors," *Id.* at 84, 14 A. 498. and, concluding that "the gift of an equitable right to the income from property for the life of the beneficiary, to the exclusion of his alienee," *Id.* at 84, 14 A. 499, is neither a restraint on the right of alienation nor against public policy, reached the opposite result.

Our reasoning is instructive on the issue *sub judice.* Acknowledging the rule favoring the free and ready alienation of property and that "the right to sell and dispose of property ... is a necessary incident of course to the absolute ownership of ... property," *Id.* at 84, 14 A. 498, we pointed out that "the reasons on which the rule is founded do not apply to the transfer of property in trust," *Id.* at 84, 14 A. 499, and that "[t]he law does not ... forbid all and any restraints on the right to dispose of [trust property], but only such restraints as may be deemed against the best interests of the community." *Id.* at 84, 14 A. 499. With regard to the policy issue, we said:

> "Now common honesty requires, of course, that every one should pay his debts, and the policy of the law for centuries has been to subject the property of a debtor of every kind which he holds in his own right, to the payment of his debts. He has as owner of such property the right to dispose of it as he pleases, and his interest is, therefore, liable for the payment of his debts. But a *cestui que trust* does not hold the estate or interest in his own right; he has but an equitable and qualified right to the property or to its income, to be held and enjoyed by the beneficiary on certain terms and conditions prescribed by the founder of the trust. The legal title is in the trustee, and the *cestui que trust* derives his title to the income through the instrument by which the trust is created. The donor or devisor, as the absolute owner of the property, has the right to prescribe the terms on which his bounty shall be enjoyed, unless such terms be repugnant to the law. And it is no answer to say that the gift of an equitable right to income to the exclusion of creditors is against the policy of the law. This is begging the question. Why is it against the policy of the law? What sound principle does it violate? The creditors of the beneficiary have no right to complain, because the founder of the trust did not give his bounty to them. And if so, what grounds have they to complain because he has seen proper to give it in trust to be received by the trustee and to be paid to another, and not to be liable while in the

hands of the trustee to the creditors of the *cestui que trust.* All deeds and wills and other instruments by which such trusts are created, are required by law to be recorded in the public offices, and creditors have notice of the terms and conditions on which the beneficiary is entitled to the income of the property. They know that the founder of the trust has declared that this income shall be paid to the object of his bounty to the exclusion of creditors, and if under such circumstances they see proper to give credit to one who has but an equitable and qualified right to the enjoyment of property, they do so with their eyes open. It cannot be said that credit was given upon such a qualified right to the enjoyment of the income of property, or that creditors have been deceived or mislead; and if the beneficiary is dishonest enough not to apply the income when received by him to the payment of his debts, creditors have no right to complain because they cannot subject it in the hands of the trustee to the payment of their claims, against the express terms of the trust."

Id. at 88-89, 14 A. 499-500.

The appellant relies on that portion of the Court's reasoning that indicates that the contract creditors are on notice, at least constructively, of the terms of the spendthrift trust prior to extending credit, along with the fact that this Court, on public policy grounds, has exempted certain obligations of the beneficiary of a spendthrift trust from the rule against attachment or garnishment of the corpus or of the income in the hands of the trustee. He also takes comfort from the position that treatise writers take with respect to the right of tort judgment creditors to satisfy their judgments from a spendthrift trust; they agree with him that it should be permitted.

In Scott on Trusts, Fourth Edition, § 157.5, while acknowledging the paucity of authority on the subject, it is stated:

> "In many of the cases in which it has been held that by the terms of the trust the interest of a beneficiary may be put beyond the reach of his creditors, the courts have laid some stress on the fact that the creditors had only themselves to blame for extending credit to a person whose interest under the trust had been put beyond their reach. The courts have said that before extending credit they could have ascertained the extent and character of the debtor's resources. Certainly, the situation of a tort creditor is quite different

from that of a contract creditor. A man who is about to be knocked down by an automobile has no opportunity to investigate the credit of the driver of the automobile and has no opportunity to avoid being injured no matter what the resources of the driver may be. It may be argued that the settlor can properly impose such restrictions as he chooses on the property that he gives. But surely he cannot impose restrictions that are against public policy. It is true that the tortfeasor may have no other property than that which is given him under the trust, and that the victim of the tort is no worse off where the tortfeasor has property that cannot be reached than he would be if the tortfeasor had no property at all. Nevertheless, there seems to be something rather shocking in the notion that a man should be allowed to continue in the enjoyment of property without satisfying the claims of persons whom he has injured. It may well be held that it is against public policy to permit the beneficiary of a spendthrift trust to enjoy an income under the trust without discharging his tort liabilities to others.

"There is little authority on the question whether the interest of the beneficiary of a spendthrift trust can be reached by persons against whom he has committed a tort. In the absence of authority it was felt by those who were responsible for the preparation of the Restatement of Trusts that no categorical statement could be made on the question. It is believed, however, that there is a tendency to recognize that the language of the earlier cases to the effect that no creditor can reach the interest of a beneficiary of a spendthrift trust is too broad, and that in view of the cases that have been cited in the previous sections allowing various classes of claimants to reach the interest of the beneficiary, the courts may well come to hold that the settlor cannot put the interest of the beneficiary beyond the reach of those to whom he has incurred liabilities in tort."

Bogert on Trusts and Trustees, Second Edition, Rev'd § 224, p. 478 to like effect:

"[A] person who has a claim for damages against a spendthrift trust beneficiary, based on the commission of a tort or other wrongful act (not including a mere breach of contract) should be allowed to secure satisfaction from the interest of the beneficiary, apparently on the ground that the

> contrary result would be against public policy. It is true that a tort creditor has no chance to choose his debtor and cannot be said to have assumed the risk of the collectability of his claim. The argument for the validity of spendthrift trusts, based on the notice to the business world of the limited interest of the beneficiary does not apply. It may be argued that the beneficiary should not be permitted to circumvent the case and statute law as to liability for wrongs by taking advantage of the spendthrift clause."

A similar sentiment is expressed in Comment a to § 157 of the Restatement Second of Trusts, wherein it is said:

> "The interest of the beneficiary of a spendthrift trust ... may be reached in cases other than those herein enumerated [alimony, child support, taxes], if considerations of public policy so require. Thus, it is possible that a person who has a claim in tort against the beneficiary of a spendthrift trust may be able to reach his interest under the trust."

Neither the argument advanced by the appellant, nor the support offered for it is persuasive.

To be sure, this Court has refused to hold, and on public policy grounds, spendthrift trusts inviolate against indebtedness for alimony arrearages, *Safe Deposit & Trust Co., Robertson, supra*. 192 Md. at 662-63, 65 A.2d at 296, and for child support. *Zouck v. Zouck, supra.* 204 Md. at 299, 104 A.2d at 579. Earlier, the United States District Court for the District of Maryland had reached the same result, permitting a spendthrift trust to be attached for the payment of United States income taxes. *Mercantile Trust Co. v. Hofferbert*, 58 F.Supp. 701, 705 (D.Md. 1944). Although decided on policy grounds, *see,* Article III, Section 38 of the Maryland Construction (providing that no person shall be imprisoned for failure to pay a debt, but expressly excluding from the definition of debt valid court decrees for the payment of support or alimony); *Robertson, supra.* 192 Md. at 663, 65 A.2d at 296 ("We rest our decision upon grounds of public policy, not upon any interpretation of the instruments in question, which are not broad enough to authorize payments by the trustee for the benefit of a divorced wife."; *Zouck, supra.* 204 Md. at 299, 104 A.2d at 579 (noting that "a contract by a father to support a child, found by a court to be fair and reasonable, and so, judicially decreed to be enforced, is the equivalent of the decree of a court awarding support to the child or alimony to a wife, and as such, comes within the rule of public policy announced and followed in the *Robertson* case"); *Hofferbert*, 58 F.Supp. at 705 (observing that the public

policy involved when claims of creditors are pitted against the validity of a spendthrift trust is "quite different" when the claim is by the government for taxes); none of these cases was premised on there having been a lack of notice given to the claimants as to the trust beneficiary's limited interest in the trust. Rather, the courts recognized a fundamental difference between these obligations and those of ordinary contract creditors.

In *Robertson,* we, like 1 Scott, Trusts, § 157.1, recognized, and clearly stated, that the dependents of a spendthrift trust beneficiary " 'are not 'creditors' of the beneficiary, and the liability of the beneficiary to support them is not a debt.' " 192 Md. at 660, 65 A.2d at 295, quoting Scott. Scott explained that these dependents, the beneficiary's wife and children, could enforce their claim for support against the trust estate, because "it is against public policy to permit the beneficiary to have the enjoyment of the income from the trust while he refuses to support his dependents whom it is his duty to support, *Id.* at 661, 65 A.2d at 295, their claim being "in quite different position from the ordinary creditors who have voluntarily extended credit." *Id.* Focusing specifically on alimony, at issue in that case, the Court opined:

> "We think the view expressed in the Restatement is sound. The reason for the rejection of the common law rule, that a condition restraining alienation by the beneficiary is repugnant to the nature of the estate granted, was simply that persons extending credit to the beneficiary on a voluntary basis are chargeable with notice of the conditions set forth in the instrument.... This reasoning is inapplicable to a claim for alimony which in Maryland at least, is 'an award made by the court for food, clothing, habitation and other necessaries for the maintenance of the wife....' The obligation continues during the joint lives of the parties, and is a duty, not a debt."

Id. at 662, 65 A.2d at 296 (citations omitted). *See, also McCabe v. McCabe,* 210 Md. 308, 314, 123 A.2d 447, 450 (1956). ("This Court has held that alimony represents a duty and not a debt."); *Oles Envelop Corp. v. Oles*, 193 Md. 79, 92, 65 A.2d 899, 905 (1949) ("The obligation to pay alimony in a divorce proceeding is regarded not as a debt, but as a duty growing out of the marital relation and resting upon sound public policy."). Compare *Hitchens v. Safe Deposit & Trust Co. of Baltimore*, 193 Md. 62, 67, 66 A.2d 97, 99 (1949) (specifically declining to apply the rule announced in *Robertson* to claims for support that were not judicially-decreed alimony, but arose pursuant to a contractual agreement to pay money).

Similarly, in *Zouck,* the Court drew a distinction between the considerations underlying the balance when the monetary obligation sought to be satisfied is a contract or ordinary debt and when it is child support. It noted that the monetary claim in that case was "based, in essence, upon the statutory obligation of the father, declaratory of the common law, to support his child." 204 Md. at 298, 104 A.2d at 579, *See Walter v. Gunter*, 367 Md. 386, 398, 788 A.2d 609, 616 (2002) ("This Court historically has recognized a distinction between a standard debt and a legal duty in domestic circumstances, specifically with respect to child support, and subscribes to the theory that child support is a duty not a debt."); *Middleton v. Middleton*, 329 Md. 627, 629-33, 620 A.2d 1363, 1364-66 (1993) (analyzing the debt/duty distinction with respect to parental child support obligation). Moreover, pointing out that in this case, the father agreed to meet the parental obligation to support his child by the payment of $ 25.00 a week, and to this extent, exonerated the child's mother from her obligation, the Court was emphatic:

> "The fact that the father has recognized his obligation and has agreed in writing to meet it in a specified amount, does not change his duty to a debt nor does it create the relationship of ordinary contract debtor and creditor between the father and the child, or the father and the mother, as the representative of or trustee for the child.... His obligation remains the same whether it be calculated and required by original order of **426 court, by voluntary agreement, or by voluntary agreement specifically ordered to be performed by order of court. Nor is it significant that the mother for some years has met the obligation which the father violated, so that the money he promised to pay week by week, would now be paid, under court order, in a lump sum.... The fundamental nature of the support looked for by the agreement is not changed because the husband is now required to pay at one time what he should have paid week by week."

Zouck, supra. 204 Md. at 298-99, 104 A.2d at 579 (citations omitted). We also made the point that, "[i]n the case of a child, the obligation of the father to support, imposed by law, cannot be bargained away or waived." *Id.* The Court concluded, "the agreement by a parent to support a child, declared to be reasonable and proper, and so, enforceable by a court, constitutes an obligation which justifies the invasion of a spendthrift trust for its fulfillment." *Id.* at 300, 104 A.2d at 580.

Similarly, the obligation to pay taxes and, thus, tax arrearages, is not to be considered debt, nor is the government to be viewed as a mere creditor. Addressing and resolving this very point, the *Hofferbert* court distinguished the public policy underlying the tax obligation and that underlying ordinary or contract debts:

> "The reasons which have actuated some courts, as in Maryland, to uphold spendthrift trust against the claims of a creditors do not necessarily apply to tax claims of the government either federal or State. The public policy involved is quite different. In the one case the donor of the property has the right to protect the beneficiary against his own voluntary improvident or financial misfortune; *but in the other the public interest is directly affected with respect to collection of taxes for the support of the government.* The imposition of the tax burden is not voluntary by the beneficiary."

Hofferbert, supra. 58 F.Supp. at 706 (emphasis added).

Ms. Ryon's estate is a mere judgment creditor of McGee, the beneficiary. The Trust simply has no legal duty to Ms. Ryon's estate and certainly no obligation to provide support. Thus the rationale underlying the decisions permitting the invasion of a spendthrift trust for the payment of alimony, child support or taxes have absolutely no applicability to the obligation in this case. Indeed, to permit the invasion of the Trust to pay the tort judgments of the beneficiary, in addition to thwarting the trust donor's intent by, in effect, imposing liability on the Trust for the wrongful acts of the trust beneficiary, is, as the appellees argue, to create an exception for "tort victims" or "victims of crime."

By equating, for purposes of determining whether to permit invasion of a spendthrift trust, the tort judgment creditor with the dependents of a trust beneficiary, to whom the beneficiary has a duty of support, or to the government, that is owed a duty to pay taxes, we would create a distinction between debts and creditors and a basis for exempting such creditors from the impediment to recovery that spendthrift trusts present. The appellant offers a rationale for drawing the distinction, whether the interests of the creditor are "great enough" to permit invasion of the trust. He relies on a portion of our discussion of the validity of spendthrift trusts in *Hoffman Chevrolet Inc. v. Washington County Nat. Sav. Bank,* 297 Md. 691, 467 A.2d 758 (1983). After acknowledging that Maryland generally recognizes the validity of spendthrift provisions, which prevent creditors from reaching trust funds and concluding that, by "logical extension ... a spendthrift trust can effectively protect retirement

benefits," *Id.* at 706, 467 A.2d at 766, we commented: "The employer makes contributions to the trust to provide for the employee upon retirement. The creditor's interests are not great enough to permit an invasion of this trust." *Id.* From this comment, the appellant concludes: "... the Court accepted the concept that certain creditors' interests *can be* great enough to ignore the ' spendthrift' terms of a trust." (Appellant's Brief at 7).

We are not convinced. This is a very slender reed on which to base such an important concept. Moreover, given the context of the Court's comment, it is not at all inconsistent with *Robertson* or *Zouck*.

To be sure, the Supreme Court of Mississippi quite recently held that, "as a matter of public policy ... a beneficiary's interest in spendthrift trust assets is not immune from attachment to satisfy the claims of the beneficiary's intentional or gross negligence tort creditors." *Sligh v. First National Bank of Holmes County*, 704 So.2d 1020, 1029 (Miss. 1997). There, the plaintiff and his wife brought suit against an uninsured and intoxicated motorist/defendant for injuries arising from a traffic accident which resulted in the plaintiff's paralysis. The defendant was the beneficiary under two spendthrift trust established by his late mother. Having obtained a default judgment for $5,000,000 in compensatory and punitive damages in their action alleging gross negligence, the plaintiffs sought to attach the defendant's interest under the spendthrift trusts.

In arriving at its holding, the court acknowledged the four exceptions to the rule prohibiting the invasion of a spendthrift trust enumerated in the Restatement, *i.e.,* claims: for support of child or wife; for necessaries; for "services rendered and materials furnished which preserve or benefit the interest of the beneficiary; for State or federal taxes, *Id.* at 1026, quoting Restatement (Second) of Torts §157, and a fifth, when the trust is 'a self-settled trust, i.e., where the trust is for the benefit of the donor,' it had itself recognized *Id.,* citing *Deposit Guaranty Nat'l Bank v. Walter E. Heller & Co.*, 204 So.2d 856, 859 (Miss. 1967).. Conceding that § 157 of the Restatement does not list an exception for involuntary tort creditors, the court found support for its position in Comment a to that section, which, as we have seen, admits of the possibility of a tort claimant with a claim against the beneficiary of a spendthrift trust being able to reach that beneficiary's interest. *Sligh, supra.* 704 So.2d at 1026. It also was persuaded by those portions of Scott, The Law of Trusts and Bogert, Trusts and Trustees, quoted herein and to which the appellant referred us. *Id.* at 1027. Finally, the court rejected the three public policy considerations it identified from its own

precedents upholding the validity of spendthrift trust provisions: "(1) the right of donors to dispose of their property as they wish; (2) the public interest in protecting spendthrift individuals from personal pauperism, so that they do not become public burdens; and (3) the responsibility of creditors to make themselves aware of their debtors' spendthrift trust protections." *Id.* at 1027.

This is the minority position, which the *Sligh* court admitted. (citations omitted). In *Mintzer,* the issue was whether a spendthrift trust could be attached for the payment of a judgment for alimony awarded to the wife of the trust beneficiary. 100 Pa. at 154. Answering in the negative, the court stated, broadly:

> "The attachment issued on a debt of record fixed by judgment and decree. Whether the judgment be for a breach of contract or for a tort, matters not. The testator recognized no such distinction. He impressed on the fund exemption from all kinds of legal process against the trustee, not only for debts, but also for 'all liabilities whatever' of [the beneficiary]."

Id. at 154-55. In *Kirk,* the monies due to the beneficiary of a spendthrift trust were attached to enforce the payment of a tort judgment. Although recognizing exceptions for alimony and child support, the court held that the beneficiary's income from the trust could not be attached prior to its receipt by him. 456 P.2d at 1010.

Other than language in *Gibson v. Speegle,* 494 A.2d 165, 1984 Del. Ch. Lexis 475, characterizing as sound the conclusion of the authors of several respected treatises on trusts, i.e., Scott, Bogert and Griswold, that "tort claimants should not be considered 'creditors' for purposes of a spendthrift trust provision" and an approving reference to Comment a to § 157 of the Restatement (Second) of Trusts in *Helmsley-Spear, Inc. v. Winter*, 101 Misc.2d 17, 20, 420 N.Y.S.2d 599, 601 (1979), and statutes codifying the result, Sligh is the only case we have found, and the only case that the appellant has cited, which holds expressly that a spendthrift trust may be invaded to pay the judgment of an intentional or gross negligence tort-judgment creditor. *See also St. Paul & Marine Ins. Co. v. Cox,* 583 F.Supp. 1221, 1228-29 (N.D. Ala. 1984), *aff'd.* 752 F.2d 550 (11th Cir. 1985), in which the insurer of an employer, who had been defrauded by his employee, a beneficiary under an ERISA trust, was permitted to reach that employee's entire interest in the trust and, notwithstanding that the employee was entitled to only periodic payments, to receive payment immediately.

Sligh is no longer the law of Mississippi. A mere five months after the decision in

Sligh, by ch. 460, § 2, Laws, 1998, effective March 23, 1998, the Mississippi Legislature passed the Family Trust Preservation Act of 1998. Miss Code Ann. §91-9-503 (2003), relevant to this case, provides:

> "Beneficiary's Interest not subject to transfer; restrictions on transfers and enforcement of money judgments
>
> "Except as provided in Section 91-9-509, if the trust instrument provides that a beneficiary's interest in income or principal or both of a trust is not subject to voluntary or involuntary transfer, the beneficiary's interest in income or principal or both under the trust may not be transferred and is not subject to the enforcement of a money judgment until paid to the beneficiary."

In addition, while a New York State trial court in *Helmsley-Spear, Inc. v. Winter*, *supra* , 101 Misc.2d 20, 20, 420 N.Y.S.2d at 601, had held that, because of his disloyalty, the interest of a beneficiary, who had been convicted of stealing from his employer, in an employment trust, was not exempt from attachment, despite the spendthrift provision applicable to it, on appeal, the Appellate Division modified that decision, holding that the employee's interest was exempt from the claims of tort creditors. 74 A.D.2d 195, 199, 426 N.Y.S.2d 778, 781 (1980), *aff'd,* 52 N.Y.2d 984, 438 N.Y.S.2d 79, 419 N.E.2d 11078 (1981). And in *Speegle,* despite the Chancellor's favorable inclination toward tort-judgment creditors, a statute prevented him from adopting the view he clearly favored. 1984 Del. Ch. Lexis 475, *6-7.

We are not persuaded, in any event, by the reasoning of the *Sligh* court. It is true that the court acknowledged the exceptions for alimony and for child support. Missing from the court's opinion, however, is any analysis of the basis for those exceptions. The Mississippi Supreme Court, although noting the donor's intention as, perhaps, the most important public policy consideration it addressed, concluded that, because the law has generally recognized exceptions, i.e., for support, alimony, taxes, to the spendthrift doctrine, the rights of trust donors to dispose of property as they wish are not absolute. 704 So.2d at 1028. This statement, although accurate, does not analyze why the law carved out these particular exceptions, which, as the court recognized, effectively takes precedence over the trust donor's intent.

To be sure, a contract creditor is on notice as to the terms of a spendthrift trust and, on that account, is able to regulate his or her conduct in light of that information. That is not the critical basis for the exception of alimony and support from the rule, however. *Robertson*

and *Zouck,* as our opinions make clear, relied heavily on the fact that the obligation was a duty and not a debt. *Robertson supra,* 192 Md. at 660, 65 A.2d at 295; *Zouck, supra.* 204 Md. at 298-99, 104 A.2d at 579. That is also the theme that runs through *Hofferbert*, 58 F.Supp. at 705. In none of these cases was notice mentioned as a basis for the decision. That a tort-judgment creditor is not on notice that he or she will be injured and thereby will incur a loss goes without saying, but, with due respect to the near unanimous commentators, that fact alone does not make the claim he or she makes in respect of the loss anything other than a debt or make its exemption from the bar of a spendthrift trust, a matter of public policy.

There is another reason that we reject the appellant's attempt to obtain an exemption from the bar of the spendthrift trust. Our case law reflects, as the appellant points out, that this Court has, over time, expanded the class of persons permitted to invade a spendthrift trust in satisfaction of obligations owed by beneficiaries, and, as a natural consequence of that expansion, frustrated, in some cases, the intent of the trust settlors. The exceptions to the spendthrift doctrine were recognized by this Court based on clear public policy considerations. The public policy that the appellant identifies and on which he relies is that of prohibiting criminals from benefitting financially from their crimes. As indicated, to establish the existence of the public policy, he points to the "Son of Sam" statute, the Slayer's Rule and the Prisoners' Litigation Act. Proceeding from that premise, he argues that McGee, a convicted felony murderer, should not be allowed to receive benefits from the trust to the exclusion of his creditors.

Certainly, the public policy of this State does not countenance a system wherein criminals are allowed to derive a financial benefit from their illegal activity, thus putting the lie to the oft stated admonition, "crime does not pay." In fact, this State has announced, it is true, a clear public policy in that regard. We, however, agree with the appellees that the public policy goals on which the appellant's arguments are based, as strong and clear as they are, have no applicability to the case *sub judice* and, thus, do not, and cannot, inform our decision. McGee is not, in any discernible manner, benefitting from the crime for which he was convicted and ultimately imprisoned. Clearly, any benefit McGee receives from the Trust vested prior to the commission of his criminal acts and is completely independent of, and separate from, his criminal conviction. As the appellees point out, "McGee's situation is not in any way analogous to one where a criminal is 'rewarded' for his criminal acts by means of book, television, or movie royalties, or by inheriting from his victim's estate." Unlike the

criminal at whom the "Son of Sam" legislation and the Slayer's Rule are aimed, the benefit McGee derives from the Trust and the criminal acts he committed are not related at all. The technically and legally more accurate statement is that McGee is benefitting from his status as a life beneficiary under a trust established by his deceased mother. It is simply incorrect to say that McGee is, in any manner, benefitting from his crimes. Consequently, we decline to frame our analysis on the public policy goals set forth by the appellant.

Judgment Affirmed, With Costs.

BATTAGLIA, J., Dissenting.

Katherine Ryon was beaten to death during the course of a robbery that occurred in her home. After James Calvert McGee was convicted of felony-murder for his participation in the robbery and murder of Ms. Ryon, a money judgment was entered against him pursuant to a settlement agreement, in which McGee compromised civil claims brought against him by Robert Duvall, the Personal Representative of the Estate of Ms. Ryon. The majority today concludes that Ms. Ryon's estate cannot enforce its judgment against McGee's interest in an $877,000.00 spendthrift trust established for him by his deceased mother. The majority acknowledges that claimants seeking alimony, child support, and unpaid taxes may attach a beneficiary's interest in a spendthrift trust, but concludes that the victim of a violent tort may not, reasoning that such a victim is only "a mere judgment creditor." For the reasons expressed herein, I respectfully disagree.

A spendthrift trust is a trust that restrains the voluntary or involuntary transfer of a beneficiary's interest in the trust. *See* Restatement (Second) of Trusts § 152(2)(1959). As the majority points out, this Court first acknowledged the validity of spendthrift trusts in *Smith v. Towers*, 69 Md. 77, 14 A. 497 (1888). In that case, our predecessors recognized that although "the right to sell and dispose of property ... is a necessary incident ... to the absolute ownership of ... property," the "law does not ... forbid all and any restraints on the right to dispose of [trust property]." *Id.* at 87-88, 14 A. at 498-99. The law forbids, "only such restraints as may be deemed against the best interests of the community." *Id.* at 88, 14 A. at 499. "The donor or devisor" of trust, the *Smith* court stated, is "the absolute owner of the property" and "has the right to prescribe the terms on which his bounty shall be enjoyed, unless such terms be repugnant to the law." *Id.* at 88-89, 14 A. at 499. The *Smith* court reasoned that the gift of an equitable right to the exclusion of creditors is not "repugnant to the law" because "[a]ll deeds and wills and other instruments by which such trusts are

created, are required by law to be recorded in the public offices, and creditors have notice of the terms and conditions on which the beneficiary is entitled to the income of the property." *Id.* Thus, if creditors choose to extend credit to such debtors, "they do so with their eyes open." *Id.*

Ms. Ryon, of course, did not have the luxury of assessing the extent and character of McGee's financial resources before he robbed her and she died. For this reason, most legal scholars agree that tort creditors should not be precluded from recovering against a tortfeasor's interest in a spendthrift trust. According to Scott on Trusts,

A man who is about to be knocked down by an automobile has no opportunity to investigate the credit of the driver of the automobile and has no opportunity to avoid being injured no matter what the resources of the driver may be.... [T]here seems to be something rather shocking in the notion that a man should be allowed to continue in the enjoyment of property without satisfying the claims of persons whom he has injured. It may well be held that it is against public policy to permit the beneficiary of a spendthrift trust to enjoy an income under the trust without discharging his tort liabilities to others.

Similarly, and significantly, in Bogert on Trusts and Trustees, it is emphasized that, "the validity of spendthrift trusts ... does not apply" and that the beneficiary should not, therefore, "be permitted to circumvent the case and statute law as to liability for wrongs by taking advantage of the spendthrift clause."

The majority concedes that tort creditors do not have the benefit of notice, which, as was discussed in *Smith, supra,* is a primary purpose for not allowing the invasion of spendthrift trusts. Despite this, the majority concludes that Ms. Ryon's estate cannot reach the corpus of the spendthrift trust because its claim is nothing other "than a debt" and that "its exemption from the bar of a spendthrift trust" is not "a matter of public policy." The majority, in my opinion, is wrong.

This Court has held that a beneficiary's interest in a spendthrift trust may be attached to satisfy claims for alimony arrearages and for child support. (citations omitted) Also, a spendthrift trust was attached for the payment of federal income taxes in *Mercentile Trust Co. v. Hofferbert*, 58 F.Supp. 701, 705-06 (D.Md. 1944). "[N]one of these cases," the majority states, "was premised on there having been a lack of notice.... Rather, the courts recognized a fundamental difference between these obligations and those of ordinary contract creditors." The fundamental difference is essentially that these obligations were premised upon judicial

intervention and determination of sound public policy.

Just as it is sound public policy to permit the attachment of a spendthrift trust for alimony, child support, and taxes, it is also as sound to permit invasion to make victims of tortious conduct whole. Indeed, a tortfeasor may be liable not only for compensatory damages, but also punitive damages, which we allow in order to "punish the wrongdoer and to deter such conduct by the wrongdoer and others in the future." *Caldor, Inc. v. Bouden*, 330 Md. 632, 661, 625 A.2d 959, 972 (1993). Consequently, to equate victims of tortious conduct with contract creditors and distinguish them from recipients of alimony, child support, and tax claims, is without merit.

As the majority concedes, spendthrift trusts are considered valid in Maryland in large part because, by virtue of filing requirements, creditors are put on at least constructive notice of the limited interest of the beneficiary of such a trust. Such notice allows creditors to protect themselves, something that Ms. Ryon could not have done. Moreover, the "duty-debt" distinction set forth by the majority as the basis for its holding is unavailing. The obligation to restitute a wrong is commensurate with the obligations to pay alimony, child support, and taxes. I agree with the commentators that "it is against public policy to permit the beneficiary of a spendthrift trust to enjoy an income under the trust without discharging his tort liabilities to others." *See* Scott on Trusts, *supra.* Consequently, I respectfully dissent.

Class Discussion Tool

Henry created a trust for the benefit of his son, Marvin. Henry told all of his friends that he was creating the trust because he was afraid that Marvin would end up living on the street. He told his friend, Maggie, "If I give that loser son of mine any money, he would be broke in a month. He never met a credit card he didn't like." The language of the trust stated, "I leave my entire estate in trust to Oscar for the benefit of my son, Marvin." After Henry died, Oscar assumed his role as trustee. Marvin was depressed over his father's death, so he went on a shopping spree for a week. As a result, he ended up owing $40,000 to American Express. American Express got a $40,000 judgment against Marvin. Oscar felt sorry for Marvin, so he gave him $10,000 in cash to go to a spa. Marvin placed the $10,000 in his checking account. Then, Susan, Marvin's ex-wife agreed to lend Marvin the money to pay $15,000 of his American Express bill. Susan took the money from their son Kenneth's college fund. When Kenneth found out about the loan, he sued his father's trust to recover the money. American Express attempted to attach the money in Marvin's checking account.

Marvin also signed a contract to pay Dr. Roberts $80,000 to give his girlfriend, Peggy breast implants. After Marvin refused to pay him, Dr. Roberts sued the trust based upon the contract. Please analyze all of the relevant legal issues.

Chapter 6 - Modification and Termination of Trusts

A trust may be modified or terminated in several different ways. First, the terms of the trust may dictate the duration of the trust. For instance, O may give Blackacre in trust to A for the benefit of B for life. The trust will end when B dies. Further, language in the trust instrument may indicate the manner in which the trust may be modified. Consider the following example. O gives a certain sum of money in trust to A for the benefit of B. A is instructed to pay B $1000 per month. In the event that B becomes incapacitated, B has the power to modify or terminate the trust. The testator could also give an independent third party the authority to modify or terminate the trust. With regards to an inter vivos trust, the settlor can revoke the trust if she has retained the right in the trust instrument. If the settlor and all of the beneficiaries consent, an irrevocable inter vivos trust may be modified or terminated. A testamentary trust can be terminated by consent of all of the beneficiaries as long as a material purpose of the trust does not exist. For instance, if the testator establishes a trust to pay for her children's education, the trust cannot be terminated as long as one of the testator's children have not received the requisite education.

Under the doctrine of merger, a trust is terminated if the legal and equitable title to the trust property ends up in the hand of one person. For example, Mary created a trust naming Peter and Paul as trustees of Brownacre. Peter and Paul conveyed their legal title to John, the only beneficiary of the trust. As a result, the trust terminates and John receives fee simple title to Brownacre. In order for Peter and Paul to become the owners of the Brownacre free of the trust, John could convey his equitable interest in Brownacre to Peter and Paul. John's equitable interest would merge with Peter and Paul's legal interest to give them the fee simple title to Brownacre. A trust may also be terminated if it runs out of property. For instance, if the testator places a certain amount of money in trust, the trust will cease to exist once the trustee has spent all of the money. According to the terms of the testamentary trust included in Whitney Houston's will, her daughter, Bobbi Christina, is to receive all of the money in the trust when she reaches the age of 30. Once the trustee disburses the money to Bobbi Christina, the trust is extinguished.

6.1 Termination

***In the Matter of the Estate of Bonardi*, 871 A.2d 103**

PARRILLO, J.A.D.

This is an appeal from a judgment of the Superior Court, Chancery Division, certified as final, *Rule* 4:42-2, permitting termination of a testamentary trust. For the following reasons, we reverse.

William Bonardi died testate on March 9, 2002, survived by his wife, Donna, and his two daughters, Danielle and Jessica. At the time of his death, Danielle was eighteen-years old and Jessica was sixteen-years old. Although decedent's Will included some specific bequests to other individuals, his wife and two daughters were the primary beneficiaries under separate testamentary trusts, each made up of one-half of the residuary estate. Stephen F. Pellino, decedent's friend, was named Executor of decedent's estate and Trustee of the two testamentary trusts.

The first trust named plaintiff, Donna Bonardi, as the income beneficiary and devised the remainder to Danielle and Jessica. The second trust named the daughters as the only beneficiaries. In both instances, the daughters were not entitled **105 to outright distribution of their interest before they reached the age of twenty-five.

Under the first trust, plaintiff's interest was subject to several terms and conditions. Paragraph TENTH of decedent's Will reads, in pertinent part:

> For the duration of the life of my wife, DONNA, the Trustee shall pay her or apply towards her benefit, all of the net income of this trust. In addition, the Trustee may pay to her or apply to her benefit such amounts of the principal of the Trust as the Trustee, in the exercise of the Trustee's absolute discretion, deems advisable for her welfare. In deciding to make such distributions of principal to or for DONNA'S benefit, the Trustee shall be guided by the following statement of my purposes and intentions: *It is my expectation that the trust income and principal will not be made available to provide primary support for the beneficiary,* as I expect that DONNA in complete or large measure will support herself. *I further direct that my Trustee shall, to the extent possible, not make payments to DONNA out of principal unless necessary, and that he rather seek to preserve the corpus, to the extent*

> *possible, for ultimate distribution to my children or survivor of them.* My Trustee shall have complete authority to make these determinations which I direct shall not be subject to legal challenge. In making determinations as to distributions of principal for DONNA'S benefit, I ask that my Trustee be mindful of the standard of living that we maintained during my lifetime.

[emphasis supplied.].

Explaining the limitations imposed pursuant to this paragraph, Pellino certified that decedent had expected his wife, who had gone to school and obtained a nursing degree during the marriage, to work in the nursing field on a full-time basis after his death. According to Pellino, decedent was also concerned about "his wife's inappropriate use of alcohol" and feared "that if the estate's assets were left to Donna outright, she would continue to lead this lifestyle which he felt was inappropriate, unhealthy and against his wishes." Further, decedent "did not want the proceeds of his hard work to be used for the benefit of any future boyfriend or husband that Donna might choose." None of these concerns, however, was expressly addressed by a spendthrift provision in the trust or anywhere else in the Will.

Even so, decedent evidenced his intent elsewhere in the Will. Notably, paragraph ELEVENTH, which concerned the daughters' trust, provided that "the trust income and principal will not be made available for primary support for the beneficiary as I expect that my wife will contribute to their support...." Further, paragraph TWELFTH granted the Trustee the exclusive right to "deal with [the] corpus and the income of such trusts." Only if the accumulated income from the trust was insufficient could the Trustee invade the principal.

A dispute eventually arose between plaintiff and the Executor/Trustee over the amount necessary for plaintiff's support. Plaintiff claimed that because she was only able to work part-time due to chronic medical problems, her living expenses exceeded her income, including the amounts made available to her by the Trustee under the first testamentary trust. Essentially, she complained that Pellino was improperly withholding principal necessary for her support and requested immediate distribution of all principal in the trust.

While acknowledging that plaintiff's payments from the trust had decreased over

time, Pellino insisted the reductions were necessary to preserve the corpus and carry out the trust's purpose. He explained that he initially allowed plaintiff to control all the finances in order to ease the transition after her husband's death, and that he paid her $8,000 per month when he first took over as Trustee, but that she was advised the payments would be reduced because she was expected to work and contribute towards her own support. As significantly, Pellino certified that the net monthly income from Donna's trust was only $2,845, yet he was paying plaintiff $4,545 per month, thereby depleting the principal by as much as $1,700 per month. Pellino also disputed plaintiff's assertion that she could only work part-time, stating that she had "resisted any discussion of where she works, how much she earns, how many hours she works, and why she is unable to earn more."

On account of this impasse, on December 16, 2003, plaintiff filed an action in the Chancery Division to compel formal accountings of her husband's estate and the testamentary trust created on her behalf, and to direct the immediate distribution to her of all net income as well as principal held pursuant to that trust necessary to maintain the marital standard of living. Simultaneously, decedent's two daughters filed a separate complaint, also seeking a formal estate accounting and distribution of income and/or principal from the second trust created under their father's Will for their exclusive benefit. On the return date of the orders to show cause, the trial judge issued a consolidated order requiring the Executor to provide an informal accounting by March 15, 2004, and to examine the financial requests of the beneficiaries "in the context of their needs and the intent of the testator." Pursuant to that order, Pellino rendered a timely accounting, and plaintiffs' counsel was given an opportunity to examine all of the estate's financial records. Sometime thereafter, the two complaints were consolidated and the action proceeded on the respective claims for distribution under a single docket number

On May 12, 2004, Danielle and Jessica Bonardi executed a waiver of their remainder interest in the trust established on behalf of their mother so that the corpus could be immediately distributed to her. Pellino, however, refused to accept the waiver. As a result, the daughters filed a motion to terminate the testamentary trust, supported by certifications stating they understood they would inherit one-half of the trust principal upon their mother's death, but believed it was in their best interest if the trust were terminated and the corpus made immediately available to their mother. At the time, both daughters were living with

their mother and under the age of twenty-five: Danielle, being only twenty years old, and Jessica, eighteen.

Following oral argument, the judge granted the motion and terminated the testamentary trust, directing distribution of the daughters' remainder interest in trust principal to plaintiff, Donna Bonardi. Mistakenly believing that "all beneficiaries [were] at least twenty-one years old," the judge reasoned in part:

> New Jersey permits the termination of a trust upon consent of all beneficiaries (even if the trust is discretionary) where the income beneficiary is different from the remainder beneficiary. 6 Clapp. *New Jersey Practice: Wills and Administration* §543 (3d ed. 1982). This is so because the testator did not establish the trust because of an especial lack of confidence in the income beneficiary's ability to manage the fund. *Id.* Instead, the testator may possibly have wished to save estate and inheritance taxes on the income beneficiary's death, or he may have had some other motive. *Id.* In any event, there being no other manifestation of intention in the Will bearing on the subject, the testator probably would not object if all the beneficiaries consent to the termination of the trust. 3 Scott, Trusts § 337.1.

On appeal, the Executor/Trustee maintains, among other things, that termination of the testamentary trust frustrates and defeats the express intent of the testator and is, therefore, impermissible. He further argues that the judge's finding that the testator's probable intent was to the contrary was unsupported by the evidence and constituted error. We agree with those contentions and reverse.

It is well-settled that a court's primary function is to enforce the testator's expressed intent with respect to a testamentary trust. *Fidelity Union Trust Co. v. Margetts*, 7 N.J. 556, 566, 82 A.2d 191 (1951); *In re Ransom Testamentary Trust*, 180 N.J.Super. 108, 117, 433 A.2d 834 (Law Div. 1981); *Cinnaminson Tp. v. First Camden Nat'l Bank & Trust Co.*, 99 N.J.Super. 115, 127, 238 A.2d 701 (Ch. Div. 1968). Our duty is to "uphold testamentary dispositions of property, made through the medium of trusts, instead of searching for reasons for avoiding them, or dealing with them with any degree of disfavor." *Fidelity Union, supra.* 7 N.J. at 565, 82 A.2d 191 (internal citation omitted). In this regard, the whole will must be examined to ascertain the purpose of the testator. *Ibid.*

To be sure, all the beneficiaries of a testamentary trust can consent to the trust's termination if none of them is under an incapacity and continuance of the trust is no longer necessary to carry out a material purpose of the trust. *Fidelity Union, supra.* 7 N.J. at 566, 82 A.2d 191; *In re Ransom Testamentary Trust*, *supra.,* 180 N.J.Super. at 120, 433 A.2d 834; Restatement (Second) of Trusts § 337 (1959). Thus, if all of the purposes of the trust have been carried out, or if the only purpose remaining unfulfilled is to confer upon certain beneficiaries interests successively in possession and in remainder, then all persons in interest, if they are *sui juris,* may jointly compel termination of the trust. *Bd. Of Dir. of Ajax Electrothermic Corp.v. First Nat'l Bank of Princeton,* 33 N.J. 456, 465, 165 A.2d 513 (1960). *Ajax II*); 6 Alfred C. Clapp et al., *New Jersey Practice Series* § 542 (3d Ed.1982).

On the other hand:

> If a trust is created for successive beneficiaries and it is not the only purpose of the trust to give the beneficial interest in the trust property to one beneficiary for a designated period and to preserve the principal for the other beneficiary, but there are other purposes of the trust which have not been fully accomplished, the trust will not be terminated merely because both of the beneficiaries desire to terminate it, or one of them acquires the interest of the other.

[*Restatement (Second) of Trusts, supra.* § 337 comment g.].

Indeed, one of the conditions which must exist before a trust will be accelerated or terminated, even upon application of all the parties in interest, "is that every reasonable ultimate purpose of the trust's creation and existence has been accomplished and that no fair and lawful restriction imposed by the testator will be nullified or disturbed by such a result." *Fidelity Union, supra.* 7 N.J. at 570, 82 A.2D 191.

Even where the beneficiary is the sole party in interest and of full age, and the trust is not a spendthrift trust, the beneficiary may not automatically have it terminated, irrespective of the creator's intention. Where, for instance, the trustee has active duties, the trust is not terminable as a matter of right at the demand of the beneficiary, even though the beneficiary is given the disposition at death. *Id.* at 564, 82 A.2d 191.

Further, spendthrift trusts, trusts for support of a beneficiary, and discretionary

trusts cannot be terminated by consent of the beneficiaries. *Restatement (Second) of Trusts, supra,* § 337 at comments l, m, and n. This is because the material purpose of a spendthrift trust is to prevent anticipation or control of future income or corpus by the protected income beneficiary and, therefore, acceleration of the trust would directly contravene the testator's intent. *Heritage Bank North N.A. v. Hunterdon Medical Center,* 164 N.J. Super. 33, 36, 395 A.2d 552 (App. Div. 1978). Moreover, "even if not of an express spendthrift nature, a trust nevertheless created for the primary purpose of ensuring the beneficiary's support and maintenance is not terminable by consent since such termination would obviously also contravene testamentary intent." *Ibid.* And, the fact that a trustee has the power to invade the corpus for the beneficiary's benefit does not negate a testator's intent to establish such a trust. *Id.* at 37, 395 A.2d 552. In short, "[t]he question for determination is whether the settlor had any other purpose in mind than to enable the beneficiaries to successively enjoy the trust property." *Baer v. Fidelity Union Trust Co.*, 133 N.J. Eq. 264, 266, 31 A.2d 823 (E & A 1943).

Here, a material purpose of the trust not only still remains, but would be soundly defeated by the daughters' renunciation of trust corpus in favor of their mother, the income beneficiary whose right to principal was expressly limited under the terms of the trust. First and foremost, the request is not simply to terminate the trust and accelerate distribution to the intended successive beneficiaries, but quite the opposite, to divest the remaindermen of their interest and divert the trust corpus instead to the income beneficiary. This, however, is directly contrary to the express testamentary plan, evident from the face of the language of the Will itself. As stated in paragraph EIGHTH and provided for in paragraph TENTH, the clear purpose of the trust is to preserve the corpus for the ultimate benefit of decedent's daughters "per stirpes and not per capita." Thus, if one or both of the daughters were to predecease plaintiff, their children-decedent's grandchildren-would acquire their mother's interest in the trust. However, if the relief requested were to be granted, not only would Danielle and Jessica be divested of their remainder interest, but the rights of the putative grandchildren would be defeated as well, *cf. In re Estate of Branigan,* 129 N.J. 324, 609 A.2d 431 (1992), hereby frustrating the testator's clear intent. Plainly, in this instance, acceleration and termination of the trust would have resulted in a distribution to a person other than those intended by the testator. *Cf. Ajax Electothermic Corp. v. First Nat. Bank of Princeton,* 7 N.J. 82, 87-88, 80 A.2d 559 (1951)(*Ajax I*).

Another purpose of the trust, evidenced in paragraph TENTH, was to provide supplemental support and maintenance for plaintiff without making trust income and principal "available to provide primary support." Rather, the announced expectation was that plaintiff would "in complete and large measure" support herself and "contribute to [the daughters'] support as may be appropriate to their age and circumstance from time to time." In fact, payments out of principal were not to be made to plaintiff unless absolutely necessary for her welfare. And, in making this determination, the trustee was vested with "absolute discretion." Indeed, the express terms of the Will divested plaintiff of actual control over the estate's assets. Thus, the creation of a trust with "complete authority" in a trustee evidences testator's plain intent to deny plaintiff immediate distribution of, or control over, distribution of trust corpus. *See Heritage Bank, supra.* 164 N.J. Super. At 37, 395 A.2d 552.

It also demonstrates the testator's intent to insulate trust principal from any control exerted by the daughters during their mother's lifetime. The language of paragraph EIGHTH, which states that neither Danielle nor Jessica is entitled to her respective remainder share before she reaches the age of twenty-five, supports this construction. By selecting a specific age as the earliest time at which his daughters may receive outright distribution of principal, the testator implicitly negated their ability to affect the trust before then. Yet, when Danielle and Jessica made the mutual decision to renounce their respective remainder interests, they were only twenty and eighteen years of age respectively, living with their mother, and presumably still under her influence. *Cf. Archard v. Mesmer,* 110 N.J.Super. 560, 562, 266 A.2d 314 (App. Div. 1970)(holding that mutual promises, unsupported by valuable consideration, to equally divide expected interests in an estate will ordinarily not be enforced because they thwart the plain wishes of the testator and are fraught with opportunities for fraud). Clearly, such decision-making by those otherwise ineligible under the explicit terms of the Will contravenes the testator's plain intent. And, the expressed wishes of the testator to preserve trust corpus for the benefit of his children or their survivors simply cannot be reconciled with the family settlement struck in this case that achieves diametrically opposite results. The named remaindermen not having yet attained the age to exert control over the trust corpus, a material purpose of the trust still exists and would be completely frustrated by its premature termination and distribution of principal to plaintiff, an unintended beneficiary.

Plaintiff's reliance on *Ajax II, supra,* to justify the relief sought in this case is misplaced. *Ajax II* dealt with a situation exactly opposite of that presented herein, involving not a renunciation by the remaindermen, but rather a waiver by a life tenant who was entitled to a fixed monthly disbursement. 33 N.J. at 460, 163 A.2d 513. In return for her release of her $150 per month life interest in the trust, the corporate remainderman established an annuity that provided the life tenant with a benefit greater than that which she was receiving under the testamentary trust. *Ibid.* The Court found this circumstance consistent with the testator's intention and, therefore, sufficient to justify acceleration and termination of the trust so that the intended beneficiaries could immediately receive distribution of the corpus *Id.* at 469, 165 A.2d 513. Here, of course, the relief requested would not result in an accelerated distribution of trust corpus to the intended beneficiaries, but rather a diversion of principal to someone expressly ineligible under the trust.

We disagree with the trial court's construction of the Will to the contrary. We find no basis in the record, or in the rather plain language of the testamentary instrument, for the judge's conclusions that the testator "did not establish the trust because of an especial lack of confidence in the income beneficiary's ability to manage the fund[,]" and that "the testator may possibly have wished to save estate and inheritance taxes on the income beneficiary's death, or he may have had some other motive." The former, in fact, is belied by the record evidence and the latter amounts to no more than rank speculation. Although we are sensitive to the deference to which the trial court's findings are entitled, that deference is predicated upon adequate evidentiary support for those findings. *Rosa Farms Resort. Inc. v. Investors Ins. Co.* 65 N.J. 474, 483-84, 323 A.2d 495 (1974). Our review of the record constrains us to conclude that the evidence did not warrant the determination that "the testator probably would not object if all the beneficiaries consent to termination of the trust."

We are convinced of just the opposite. The relief requested here defeats the testamentary plan, evidenced from the face of the instrument itself, and contravenes the expressed wishes of the testator.

Reversed.

6.2 Claflin and Material Purpose

In *Clafin v. Clafin*, 20 N.E. 454 (Mass. 1889), the testator created a trust to benefit her

son. According to the terms of the trust, the trustee was to terminate the trust and pay the principal to the son when he reached the age of thirty. When he turned twenty-one, since he was the only beneficiary of the trust, the son went to court to have the trust terminated, so he could receive the money. The court ruled against the son establishing the rule that a trust cannot be modified or terminated early if a material purpose of the trust has not been accomplished. This rule referred to as the *Clafin* doctrine is still applicable. Consequently, it is important for the court to determine the purpose of the trust. That task is usually easy because the purpose is often stated in the trust instrument.

***In re Estate of Brown*, 528 A.2d 752**

GIBSON, Justice.

The trustee of a testamentary trust appeals an order of the Washington Superior Court granting the petition of the lifetime and residual beneficiaries of the trust to terminate it and to distribute the proceeds to the life tenants. We reverse.

The primary issue raised on appeal is whether any material purpose of the trust remains to be accomplished, thus barring its termination. The appellant/trustee also raises the closely related issue of whether all beneficiaries are before the court, i.e., whether the class of beneficiaries has closed.

Andrew J. Brown died in 1977, settling his entire estate in a trust, all of which is held by the trustee under terms and conditions that are the subject of this appeal. The relevant portion of the trust instrument provides:

> (3) The ... trust ... shall be used to provide an education, particularly a college education, for the children of my nephew, Woolson S. Brown. My Trustee is hereby directed to use the income from said trust and such part of the principal as may be necessary to accomplish this purpose. Said trust to continue for said purpose until the last child has received his or her education and the Trustee, in its discretion, has determined that the purpose hereof has been accomplished.
>
> At such time as this purpose has been accomplished and the Trustee has so determined, *the income from said trust and such part of the principal as may be necessary shall be used by said Trustee for the care, maintenance and welfare of my nephew, Woolson S. Brown and his wife, Rosemary Brown, so that they may live in the style and manner to which they are accustomed, for and during the remainder of their natural lives.* Upon their demise, any remainder of said trust, together with any accumulation thereon, shall be paid to

their then living children in equal shares, share and share alike. (Emphasis added.)

The trustee complied with the terms of the trust by using the proceeds to pay for the education of the children of Woolson and Rosemary Brown. After he determined that the education of these children was completed, the trustee began distribution of trust income to the lifetime beneficiaries, Woolson and Rosemary.

On June 17, 1983, the lifetime beneficiaries petitioned the probate court for termination of the trust, arguing that the sole remaining purpose of the trust was to maintain their lifestyle and that distribution of the remaining assets was necessary to accomplish this purpose. The remaindermen, the children of the lifetime beneficiaries, filed consents to the proposed termination. The probate court denied the petition to terminate, and the petitioners appealed to the Washington Superior Court. The superior court reversed, concluding that continuation of the trust was no longer necessary because the only material purpose, the education of the children, had been accomplished. This appeal by the trustee followed.

Ordinarily, a trial court's conclusions will be upheld where they are supported by its findings. *Darmouth Savings Bank v. F.O.S. Associates*, 145 Vt. 62, 66, 486 a.2d 623, 625 (1984. Here, the superior court's conclusion that the trust could be terminated because the material purpose of the trust had been accomplished has an insufficient basis in its findings, and this conclusion cannot stand.

An active trust may not be terminated, even with the consent of all the beneficiaries, if a material purpose of the settlor remains to be accomplished. *See, e.g., Ambros v. First National Bank*, 87 Nev. 114, 117, 482 P.2d 828, 829 (1971); *Sundquist v. Sundquist*, 639 P.2d 181, 187 (Utah 1981); Restatement (Second) of Trusts § 337 (1959); 4 A. Scott, Scott on Trusts § 337 at 2655 3d ed. 1967). This Court has invoked a corollary of this rule in a case where partial termination of a trust was at issue. *In re Bayley Trust*, 127 Vt. 380, 385, 250 A.2d 516, 519 (1969).

As a threshold matter, we reject the trustee's argument that the trust cannot be terminated because it is both a support trust and a spendthrift trust. It is true that, were either of these forms of trust involved, termination could not be compelled by the beneficiaries because a material purpose of the settlor would remain unsatisfied. *See* Restatement (Second) of Trusts § 337.

The trust at issue does not qualify as a support trust. A support trust is created where

the trustee is directed to use trust income or principal for the benefit of an individual, but only to the extent necessary to support the individual. 2 A. Scott, Scott on Trusts § 154, at 1176; G. Bogert, Trusts and Trustees § 229, at 519 (2d ed. Rev. 1979). Here, the terms of the trust provide that, when the educational purpose of the trust has been accomplished and the trustee, in his discretion, has so determined, "the income ... and such part of the principal as may be necessary shall be used by said Trustee for the care, maintenance and welfare of ... [Rosemary and Woolson Brown] so that they may live in the style and manner to which they are accustomed...." The trustee has, in fact, made the determination that the educational purpose has been accomplished and has begun to transfer the income of the trust to the lifetime beneficiaries. Because the trustee must, at the very least, pay all of the trust income to beneficiaries Rosemary and Woolson Brown, the trust cannot be characterized as a support trust.

Nor is this a spendthrift trust. "A trust in which by the terms of the trust or by statute a *valid restraint on the voluntary and involuntary transfer of the interest* of the beneficiary is imposed is a spendthrift trust." Restatement (Second) of Trusts § 152(2). (Emphasis added.) While no specific language is needed to create a spendthrift trust, *id.* at comment c, here the terms of the trust instrument do not manifest Andrew J. Brown's intention to create such a trust. *See Huestis v. Manley*, 110 Vt. 413 419, 8 A.2d 644, 646 (1939).

The trustee cites *Barnes v. Dow,* 59 Vt. 530, 10 A. 258 (1887), for the proposition that a gift of support for life must be deemed a spendthrift trust. In fact, in *Barnes,* the terms of the will gave the testator's sister "support during her natural lifetime out of my estate." *Id.*, at 541, 10 A. at 261. This Court construed the will as establishing a trust for support and held that an interest arising under such a trust is inalienable. *Id.* The mere fact that an interest in a trust is not transferable does not make the trust a spendthrift trust. *See* Restatement (Second) of Trusts § 154 comment b. In any event, *Barnes* is inapplicable here because a support trust is not at issue.

Although the issue as to whether a material purpose of the trust remains cannot be answered through resort to the foregoing formal categories traditionally imposed upon trust instruments, we hold that termination cannot be compelled here because a material purpose of the settlor remains unaccomplished. In the interpretation of trusts, the intent of the settlor, as revealed by the language of the instrument, is determinative. *In re Jones*, 138 Vt. 223, 228, 415 A.2d 202, 205 (1980) citing v *Destitute of Bennington County. v. Putnam Memorial*

Hospital, 125 Vt. 289, 293, 215 A.2d 134, 137 (1965).

We find that the trust instrument at hand has two purposes. First, the trust provides for the education of the children of Woolson and Rosemary Brown. The Washington Superior Court found that Rosemary Brown was incapable of having more children and that the chance of Woolson Brown fathering more children was remote; on this basis, the court concluded that the educational purpose of the trust had been achieved.

The settlor also intended a second purpose, however: the assurance of a life-long income for the beneficiaries through the management and discretion of the trustee. We recognize that, had the trust merely provided for successive beneficiaries, no inference could be drawn that the settlor intended to deprive the beneficiaries of the right to manage the trust property during the period of the trust. *Estate of Weeks*, 485 Pa. 329, 332, 402 A.2d 657, 658 (1979), (quoting Restatement (Second) of Trusts § 337 comment f). Here, however, the language of the instrument does more than create successive gifts. The settlor provided that the trustee must provide for the "care, maintenance and welfare" of the lifetime beneficiaries "so that they may live in the style and manner to which they are accustomed, *for and during the remainder of their natural lives.*" (Emphasis added.) The trustee must use all of the income and such part of the principal as is necessary for this purpose. We believe that the settlor's intention to assure a life-long income to Woolson and Rosemary Brown would be defeated if termination of the trust were allowed. *See* 4 Scott, Scott on Trusts § 337.1, at 2261-64; *see also Will of Hamburger*, 185 Wis. 270, 282, 201 N.W. 267, 271 (1924) (court refused to terminate trust since testator desired it to continue during life of his wife).

Because of our holding regarding the second and continuing material purpose of the trust, we do not reach the question of whether the trial court erred in holding that the educational purpose of the trust has been accomplished.

Reversed; judgment for petitioners vacated and judgment for appellant entered.

6.3 Deviation and Changed Circumstances

The doctrine of deviation allows a court to modify or terminate a trust by court order if the trust is no longer necessary because the purposes of the trust have been fulfilled, have become illegal, or are impossible to fulfill. Additionally, the court may permit the trustee to deviate from the testator's instructions as contained in the trust if the court is convinced that the testator would have agreed to the change had he or she foreseen the

current situation. There are two main types of deviation-administrative and equitable. Administrative deviation lets the trustee deviate from the administrative directions in the trust instrument because of changed in circumstances if compliance with those directions would defeat or substantially impair the accomplishment of the purposes of the trust. This doctrine applies to actions like when and how to invest trust property. Under the doctrine of equitable deviation, trustees are permitted to deviate from the distributive terms of the trust because of change in circumstances. Thus, the trustee may modify the time and manner he distributes the trust property.

***In re Trust of Riddle*, 157 P.3d 888**

PENOYAR, J.

¶ 1 The Trustee of a consolidated trust, Ralph A. Riddell, appeals the trial court's denial of his motion to modify the trust and create a special needs trust on behalf of a trust beneficiary, his daughter, Nancy I. Dexter, who suffers from schizophrenia affective disorder and bipolar disorder. Ralph's deceased father and mother each established a trust. The trusts were consolidated by the court. Upon Ralph's death, the trust will terminate and Nancy will receive payment of her portion of the trust proceeds. Ralph argues that the trial court has the power to modify the trust; that his daughter's disabilities are a changed and unanticipated condition; and that the purpose of the settlor will be preserved through the modification. We agree and remand to the trial court to reconsider an equitable deviation in light of changed circumstances and the settlors' intent that the beneficiaries receive both medical care and general support from the trust's funds.

FACTS

¶ 2 George X. Riddell and Irene A. Riddell were husband and wife with one child, Ralph. George's Last Will and Testament left the residue of his estate in trust for the benefit of his wife, his son, his daughter-in-law, and his grandchildren. George also created an additional trust (the Life Insurance Trust) for their benefit. Irene's Last Will and Testament left the residue of her estate in trust for the benefit of her son; her son's wife, Beverly Riddell; and her grandchildren.

¶ 3 The trusts contained a provision in which, upon the death of Ralph and Beverly, George and Irene's grandchildren would receive the trust's benefits until the age of thirty-five when the trusts would terminate and the trustee would distribute the principal to the grandchildren. Ralph is currently the Trustee. George and Irene are both deceased.

¶ 4 Ralph and Beverly have two children, Donald H. Riddell and Nancy. Both Donald and Nancy are more than thirty-five years old. Donald is a practicing attorney and able to handle his own financial affairs. Nancy suffers from schizophrenia affective disorder and bipolar disorder; by 1991 she received extensive outpatient care; and by 1997 she moved to Western State Hospital. She is not expected to live independently for the remainder of her life.

¶ 5 Both Ralph and Beverly are still living. Upon their death, the trusts will terminate because Nancy and Donald are both over the age of thirty-five; Nancy will receive her portion of her grandparents' trust principal, which is approximately one half of $1,335,000.

¶ 6 The Trustee, Ralph, Ralph, filed a petition in superior court, asking the trial court to consolidate the trusts and to modify the trust to create a "special needs" trust on Nancy's behalf, instead of distributing the trust principal to her. Clerk's Papers (CP) at 4. He explained that, under the current trust, when her parents die, Nancy's portion of the principal will be distributed to her and the trust will terminate. He argued that a special needs trust is necessary because, upon distribution, Nancy's trust funds would either be seized by the State of Washington to pay her extraordinary medical bills or Nancy would manage the funds poorly due to her mental illness and lack of judgment. He argued that the modification would preserve and properly manage Nancy's funds for her benefit.

¶ 7 The trial court granted the motion to consolidate the trusts but denied the motion to modify. It stated that it did not have the power to modify the trust unless unanticipated events existed that were unknown to the trust creator that would result in defeating the trust's purpose. The trial court found that the trust's purpose was "to provide for the education, support, maintenance, and medical care of the beneficiaries" and that a modification would only "permit[ ] the family to immunize itself financially from reimbursing the State for costs of [Nancy's medical] care." CP at 54, Report of Proceedings (RP) at 4. Relying on the Restatement (Second) of Trusts, it stated that it would not allow a modification "merely because a change would be more advantageous to the beneficiaries." CP at 53; Restatement (Second) of Trusts § 66(1) cmt. b (2001). It did not issue factual findings or legal conclusions with its order but incorporated its reasoning from its oral ruling into the order.

¶ 8 Ralph moved for reconsideration, arguing that the Trust and Dispute Resolution Act, chapter 11.96A RCW (TEDRA) and the Restatement (Third) gave the trial court

plenary power to handle all trusts and trust matters and the authority to modify the consolidated trust into a special needs trust. Ralph argued that, because the grandparents directed the trust proceeds to be distributed to their grandchildren when they reach the age of thirty-five, the settlors intended that their grandchildren attain a level of responsibility, stability, and maturity to handle the funds before receiving the distribution. He also argued that due to Nancy's mental illness, allowing a distribution to her would defeat the settlors' intent and the trust's purpose.

¶ 9 The trial court denied the motion for reconsideration. It again issued no factual findings or legal conclusions, but it stated that its decision was based on the findings and conclusions articulated in its oral ruling on the motion for reconsideration. On reconsideration, the trial court agreed that the Restatement (Third) of Trusts-allowed the court to modify an administrative or distributive protection of a trust if, because of circumstances the settlor did not anticipate, the modification or deviation would further the trust's purpose. It then stated:

> I believe that there is a showing here that there is a circumstance that was, perhaps, not anticipated by the original settler [sic]; however, the purpose of the trust is to provide for the general support and medical needs of the beneficiaries. I think that modifying the trust in a fashion that makes some of those assets less available for that purpose than they would be under the express language of the trust presently is not consistent with the purpose of the trust.

CP at 107. The trial court reasoned that because the trust was written to provide for "medical care" and because creating a special needs trust would make some money unavailable for medical care expenses, the modification was inconsistent with the trust's purpose. CP at 101. Ralph now appeals.

ANALYSIS

I. STANDARD OF REVIEW

¶ 10 Ralph contends that the standard of review in this case is de novo. He is partially correct. Whether equitable relief is appropriate, or whether the trial court should have modified the trust, is a question of law, which we review de novo. *Niemann v. Vaugh Cmty. Church*, 154 Wash.2d 365, 374, 113 P.3d 463 (2005)(citing *Puget Sound Nat'l Bank of Tacoma v. Easterday*, 56 Wash. 2d 937, 943, 350 P.2d 444 (1960); *Townsend v. Charles Schalkenbach Home for Boys, Inc.*, 33 Wash.2d 255, 205 P.2d 345 (1949).

¶ 11 But determining the parties' intent in regard to a trust is a factual question. We review findings of fact under a substantial evidence standard, determining whether the evidence was sufficient to persuade a rational fair-minded person the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wash.2d 169, 176, 4 P.3d 123 (2000). If this standard is satisfied, we will not substitute our judgment for that of the trial court even though we may resolve a factual dispute differently. *Croton Chem. Corp. v. Birkewald, Inc.,* 50 Wash.2d 684, 314 P.2d 622 (1957). Therefore, this case presents a mixed question of law and fact. We give deference to the trial court's factual findings in regard to the trust, but we review the trial court's decision to deny equitable relief and not modify the trust de novo. *Niemann*, 154 Wash.2d at 375, 113 P.3d 463.

II. TRUST MODIFICATION

¶ 12 Ralph asserts that the trial court had the authority to modify the trust under both the equitable deviation doctrine and under the plenary power granted by TEDRA. TEDRA states that it is the Legislature's intent to give courts full and ample power to administer and settle all trust matters. RCW 11.96A.02. On reconsideration, the trial court agreed that it possessed the power to modify a trust. It stated that it could modify an administrative or distributive protection of a trust if, because of circumstances the settlor had not anticipated if the modification would further the trust's purpose. The trial court understood that it possessed the ability to modify the trust.

¶ 13 Next, Ralph contends that the trial court erred in declining to modify the trust. He explains that a modification would further the trust's purpose because, if George and Irene had anticipated that Nancy would suffer debilitating mental illness requiring extraordinary levels of medical costs and make her incapable of managing her money independently, they would not have structured the trust to leave a substantial outright distribution of the trust principal to her. He contends that the settlors instead would have established a special needs trust to protect the funds because Nancy's medical bills would be extraordinary and covered by state funding.

¶ 14 Ralph explains that the settlors conditioned the distribution of trust assets on her being at least thirty-five years old, indicating that they intended that their grandchildren have a level of maturity and stability before receiving the trust distribution. Ralph asserts that given Nancy's medical conditions and inability to handle her finances independently, she will never attain a level of maturity to handle the distribution of funds; therefore a special needs

trust is appropriate.

¶ 15 *Niemann* is very instructive in this case. In *Niemann,* our Supreme Court held that trial courts may use "equitable deviation" to make changes in the manner in which a trust is carried out. *Niemann*, 154 Wash.2d at 378, 113 P.3d 463. The court outlined the two prong approach of "equitable deviation" used to determine if modification is appropriate. *Niemann*, 154 Wash.2d at 378, 113 P.3d 463. The court "may modify an administrative or distributive provision of a trust, or direct or permit the trustee to deviate from an administrative or distributive provision, if [(1)] because of circumstances not anticipated by the settlor [(2)] the modification or deviation will further the purposes of the trust." (*Niemann*, 154 Wash.2d at 381, 113 P.3d 463. Restatement (Third) of Trusts § 66(1) (2001).) In *Niemann,* the court adopted the Restatement (Third) of Trusts and noted that the Restatement (Third) requires a lower threshold finding than the older Restatement and gives courts broader discretion in permitting deviation of a trust. *Niemann*, 154 Wash.2d at 381, 113 P.3d 463.

¶ 16 The first prong of the equitable deviation test is satisfied if circumstances have changed since the trust's creation or if the settlor was unaware of circumstances when the trust was established. Restatement (Third) of Trusts § 66 cmt. a (2001). Upon a finding of unanticipated circumstances, the trial court must determine if a modification would tend to advance the trust purposes; this inquiry is likely to involve a subjective process of attempting to infer the relevant purpose of a trust from the general tenor of its provisions. Restatement (Third) of Trusts § 66 (cmt. b (2001).

¶ 17 The reason to modify is to give effect to the settlor's intent had the circumstances in question been anticipated. Restatement (Third) of Trusts § 66 cmt. a (2001). Courts will not ordinarily deviate from the provisions outlined by the trust creator but they undoubtedly have the power to do so, if it is reasonably necessary to effectuate the trust's *primary* purpose. *Niemann*, 154 Wash.2d at 382, 113 P.3d 463. A trust settlor may possess a myriad of intentions in settling a trust, but the trial court must concern itself with their *primary* objective. *Niemann*, 154 Wash.2d at 382, 113 P.3d 463.

¶ 18 As stated above, we defer to the trial court's factual findings. *Niemann*, 154 Wash.2d at 375, 113 P.3d 463. In this case, the trial court did not issue formal factual findings, but it stated in the oral ruling that there was a showing of a changed circumstance in this case. This meets the first prong. The settlor's intent is also a factual question. *Niemann*, 154 Wash.2d at 374-75, 113 P.3d 463. The trial court found in its oral ruling that the "stated"

purpose of the trust is to provide for the beneficiaries' education, support, maintenance, and medical care. CP at 54. Thus, it found that this trust's primary purpose was to provide for Nancy during her lifetime. Because the trust was to terminate at age thirty-five, it was also the settlors' intent that Nancy have the money to dispose of as she saw fit, which would include any estate planning that she might choose to do.

¶ 19 There is no question that changed circumstances have intervened to frustrate the settlors' intent. Nancy's grandparents intended that she have the funds to use as she saw fit. Not only is Nancy unable to manage the funds or to pass them to her son, but there is a great likelihood that the funds will be lost to the State for her medical care. It is clear that the settlors would have wanted a different result.

¶ 20 In 1993, as part of the Omnibus Budget Reconciliation Act, Congress set forth a requirement for creating special needs trusts (or supplemental trusts), intended to care for the needs of persons with disabilities and preserve government benefits eligibility while allowing families to provide for the supplemental needs of a disabled person that government assistance does not provide. Marla B. Karus, *Special Issue: Special Needs Children in the Family Court,* 43 FAM. CT. REV. 607, 610 (Oct.2005) (emphasis removed). The Act exempted certain assets from those assets and resources counted for the purposes of determining an individual's eligibility for government assistance. Pub.L. 103-06, § 13611(b), *codified at* 42 U.S.C. § 1396p(d)(4)(A). A supplemental needs trust is a trust that is established for the disabled person's benefit and that is intended to supplement public benefits without increasing countable assets and resources so as to disqualify the individual from public benefits. *See* Jill S. Gilbert, USING *Trusts in Planning for Disabled Beneficiaries,* Wisconsin Lawyer (Feb.1997); *Sullivan v. County of Suffolk*, 174 F.3d 282, 284 (2nd cir. 1999).

¶ 21 In this case, the trial court was concerned with fashioning a trust for Nancy that would allow the family to shield itself for "reimbursing the State" for the costs of her medical care due to her disability. RP at 4. But in 1993, Congress permitted the creation of special needs trusts in order to allow disabled persons to continue to receive governmental assistance for their medical care. Marla B. Karus, Special Issue: Special Needs Children in the Family Court, 43 Fam. Ct. Rev. 607, 610 (Oct. 2005); Pub. L. 103-66, § 13611(b), *codified at* 42 U.S.C. § 1396p(d)(4)(A). Special needs trusts were created in order to allow disabled persons to continue receiving governmental assistance for their medical care, while allowing extra funds for assistance the government did not provide. Given this legal backdrop, the

trial court should not have considered any loss to the State in determining whether an equitable deviation is allowed. The law invites, rather than discourages, the creation of special needs trusts in just this sort of situation. The proper focus is on the settlors' intent, the changed circumstances, and what is equitable for these beneficiaries.

¶ 22 George and Irene both died without creating a special needs trust but did not know of Nancy's mental health issues or how they might best be addressed. They clearly intended to establish a trust to provide for their grandchildren's general support, not solely for extraordinary and unanticipated medical bills.

¶ 23 A special needs trust may be established by a third party or by the disabled person that would be benefited by the trust. *See* Barbara A. Isenhour, *Medicaid Eligibility for Long-Term Care Coverage and Special Needs Trusts,* Isenhour Bleck, P.L.L.C. (Feb. 2006). Trusts established or funded by the disabled person are subject to 42 U.S.C. § 1396p(d)(4)(A), which entitles the State to receive all remaining trust amounts upon trust termination for medical assistance paid on behalf of the disabled beneficiary. *See* Clifton B. Kruse, Jr., *Third Party and Self-Created Trusts Planning for the Elderly and Disabled Client,* ABA Publishing (3rd Ed.). However, the State is not entitled to receive payback upon termination of a third party special needs trust for medical assistance provided for the disabled beneficiary. *See* Barbara D. Jackins, *Special Needs Trusts A Guide for Trustees Administration Manual* (2005 Ed.). Here, the trust was established and funded by George and Irene Riddell for the beneficiary Nancy Dexter. It is a third party special needs trust. The trust is not subject to State assistance payback and is not required to have a payback provision.

¶ 24 We remand to the trial court to reconsider this matter and to order such equitable deviation as is consistent with the settlors' intent in light of changed circumstances.

Class Discussion Tool

Juanita created a trust for the benefit of her two children, Wayne and Connie. The terms of the trust were as follows: "I leave my entire estate in trust for my two children, Wayne and Connie. The purpose of the trust is to provide Wayne and Connie with a college education and to provide support for them for life. After Wayne and Connie die, the proceeds of the trust are to be paid to my grandchildren, who are then living." In 2005, after Juanita died, Corporate Trust assumed its role as trustee. At that time, Wayne was a freshman in college. Connie had graduated from college with a degree in nursing. Connie had two children, April and Robin. In 2007, Wayne was hit by a drunk driver while riding

his bicycle. As a consequence, Wayne suffered permanent brain damage. Connie was so angry that she shot and killed the drunk driver. Consequently, Connie was given life in prison. In 2011, Robin was diagnosed with kidney disease. Robin needs $100,000 to get her name place on the transplant list. Connie would like to have the trust modified to create a special needs trust for Wayne and to get the $100,000 that Connie's needs for treatment. What result?

6.4 Removal of the Trustee

Another way to modify the trust is to have the trustee replaced. Courts are reluctant to substitute their judgment for the testator's judgment with regards to the trustee. This is especially true where the trustee is an individual that has been specifically chosen by the testator. Thus, courts will not remove a trustee unless it is for unfitness or other good cause.

***In re the Matter of Trust Established by Baird*, 204 P.3d 703**

Justice JIM RICE delivered the Opinion of the Court.

¶ 1 Donald Baird, the beneficiary of a trust established by his parents, petitioned the Ninth Judicial District Court, Teton County, to remove N. Kay Goulet as trustee on the grounds that she breached her fiduciary duties. Baird appeals the District Court's denial of his petition. We affirm.

¶ 2 The issue presented is whether the District Court abused its discretion by denying the beneficiary's petition to remove the Trustee of the Trust.

FACTUAL AND PROCEDURAL BACKGROUND

¶ 3 On October 30, 1981, Allan and Catherine Baird (Trustors) signed a Trust Agreement establishing a trust for their son, Donald Baird (Baird). The Trust Agreement named Kay Goulet (then Kay Hagen), as trustee. The corpus of the trust consisted of real property, including a home, in Choteau, Montana, and mineral interests in Blaine County, Montana. The purpose of the Trust is to benefit and provide a home for Baird, and the remainder beneficiaries of the Trust are Goulet and Zina Druesdow, the designated successor trustee. The Trust Agreement also indicated that certain real property in Great Falls was to be a part of the trust, but the property was never transferred into the Trust. It was sold in 1989.

¶ 4 Donald Baird is one of the Trustors' biological children, and Goulet was raised by them as a foster child. Donald Baird was hit by a train and suffered severe injuries in

1970. His mother, Catherine Baird, lived with him in the house on the trust property in Choteau until her death in January 2005.

¶ 5 In October 2005, Goulet petitioned the District Court seeking modification of the Trust Agreement to allow her to sell the Trust property and invest the proceeds. She asserted that the Trust property in Choteau was dilapidated and dangerous, and that the Trust did not have the resources to maintain the house. Baird opposed the petition and counter-petitioned the court to remove Goulet as Trustee and replace her with Druesdow, the successor trustee. The District Court, Judge Buyske presiding, conducted a hearing on Goulet's modification petition and issued an order denying the petition in February 2006. The court ruled that the Trust property was not in such a condition that it needed to be sold to preserve the corpus of the Trust or accomplish the purposes of the Trust.

¶ 6 In October 2007, the District Court, Judge McKinnon presiding, conducted a hearing on Baird's counter-petition to remove the Trustee, and thereafter issued an order denying the petition. Additional facts will be discussed herein.

STANDARD OF REVIEW

¶ 7 "We review a district court's findings of fact to determine whether they are clearly erroneous. We review a district court's conclusions of law to determine whether that court's interpretation of the law is correct." *In re Estate of Berthot*, 2002 MT 277, ¶21, 312 Mont. 366, 59 P.3d 1080 citations omitted). As discussed below, we review a district court's denial of a petition to remove a trustee under an abuse of discretion standard.

DISCUSSION

¶ 8 **Did the District Court abuse its discretion by denying the beneficiary's petition to remove the Trustee of the Trust?**

¶ 9 Baird argues that the District Court should have removed Goulet as trustee for breaching fiduciary duties because she (1) failed to provide Baird with an annual accounting, (2) did not pay the property tax and insurance premiums on the property and blocked Baird from paying the taxes, and (3) did not preserve the trust property and make it productive. The parties argue over what grounds require removal of a trustee and whether a district court has any discretion in removing a trustee. Baird asserts that any breach of the Trust requires removal and that the District Court did not have the authority or discretion to determine otherwise. Goulet argues that not every breach of the Trust requires removal and the District Court had discretion to determine whether removal of the Trustee is

appropriate.

¶ 10 Section 72-33-618, MCA, states in part:

> (1) A trustee may be removed in accordance with the trust instrument or by the court on its own motion or on petition of a cotrustee or beneficiary.
>
> (2) The grounds for removal of a trustee by the court include the following:
>
> (a) if the trustee has committed a breach of the trust;
>
> (b) if the trustee is insolvent or otherwise unfit to administer the trust;
>
> (c) if hostility or lack of cooperation among cotrustees impairs the administration of the trust;
>
> (d) if the trustee fails or declines to act; or
>
> (e) for other good cause.

¶ 11 The official comments to § 72-33-618, MCA, explain that this statute is based upon the *Restatement (Second) of Trusts* § 107 (1959), the California Probate Code, and the Texas Trust Code. The comments in the *Restatement (Second) of Trusts* explain that a court "may remove a trustee if his continuing to act as trustee would be detrimental to the interests of the beneficiary. The matter is one for the exercise of reasonable discretion by the court." *Restatement (Second) of Trusts* § 107 cmt. a; *see also Restatement (Second) of Trusts* § 37 cmt. d (2003) ("The matter is largely left to the discretion of the trial court, but is subject to review for abuse of discretion.") We agree with these comments and will apply an abuse of discretion standard of review to examine a district court's denial of a request to remove a trustee, in addition to reviewing findings of fact and conclusions of law under the usual standards of review stated earlier herein.

¶ 12 Concerning the grounds for removal of a trustee, the official comments to §72-33-618, MCA, refer to comment b of the *Restatement (Second) of Trusts,* which provides that "the commission of a serious breach of trust" constitutes grounds for removal of a trustee. *Restatement (Second) of Trusts* § 107 cmt. b. As suggested by the *Restatement (Second) of Trusts* § 37 cmt. e, this can include the "repeated or flagrant failure or delay in providing proper information or accountings to beneficiaries." However, "[n]ot every breach of trust warrants removal of the trustee ... but serious or repeated misconduct, even unconnected with the trust itself, may justify removal." *Restatement (Second) of Trusts* § 37 cmt. e. Consistent with our recognition that a district court possesses discretion in determining whether or not to

remove a trustee, we also conclude that not every breach of the trust requires removal of the trustee as a matter of law, but is subject to the trial court's discretionary review. Upon these principles, we turn to Baird's challenges.

¶ 13 Baird challenges Goulet's failure to provide annual accountings. Both the Trust Agreement and statutory law require annual accountings. The Trust Agreement states that the "Trustee shall keep books of accounts and shall render an annual accounting of the Trust to the Beneficiary." Section 72-34-126, MCA, states that "[e]xcept as provided in 72–34–127, the trustee shall annually mail each income beneficiary an itemized statement of all current receipts and disbursements of both principal and income." None of the exceptions of §72-34-127, MCA, apply to this case.

¶ 14 The District Court found that Goulet had never provided an annual accounting to Baird, but accepted Goulet's argument, likewise made on appeal, that because the trust had no income or disbursements, there was " nothing to account for." In concluding that good cause did not exist for Goulet's removal, the District Court reasoned that "[w]hile an annual accounting is required, there has been nothing in the trust except for the property for which to provide and [sic] accounting. The oil and gas leases are not income producing at this time."

¶ 15 Other states have reached similar conclusions. The Supreme Court of Iowa held that failure to provide annual accountings does not always require removal of the trustee. *Schildberg v. Schildberg*, 461 N.W.2d 186 (Iowa 1990). In *Schildberg* the court recognized that the trustee breached the trust by failing to provide annual reports. *Schildberg v. Schildberg*, 461 N.W.2d at 191. Nonetheless, the court stated that "[t]here is no evidence to indicate that the omission to report resulted from a motive on the part of Dennis to take advantage of the beneficiaries. Nor do we find evidence to suggest that the effectiveness of the trust has been impaired, despite this technical violation, or that the intent of the settlor has been thwarted." *Schildberg v. Schildberg*, 461 N.W.2d.

¶ 16 Similarly, the Supreme Court of Minnesota has upheld the denial of a petition to remove a trustee where the trustee failed to provide annual accountings. *Matter of Gershow's Will,* 261 N.W.2d 335, 340 (Minn. 1977) ("While these important and necessary statutory provisions requiring annual accounting were violated, the trial court did not abuse its discretion in failing to remove the trustee for inconsequential deviations from legal requirements in the past.").

¶ 17 On this record, we conclude that the District Court did not abuse its discretion in determining not to remove Goulet as trustee for failure to file annual accountings. Nonetheless, it should be emphasized that failing to file an annual accounting is a violation of the statute and the Trust Agreement. As a matter of course, annual accountings must be completed by the Trustee. The parties' briefing disputes whether the Great Falls property referenced above was part of the trust corpus, and whether its 1989 sale should have been part of an accounting. Although the District Court did not find this property to be part of the trust, an annual accounting would have identified this issue long ago, and perhaps resolved the matter between the parties, instead of allowing it to linger for many years. Further, the beneficiary is entitled to know whether there has been any activity with regard to the trust's mineral interests. Thus, we agree with the conclusion reached by the *Gershow* court: "[w]hile there are some deviations from the required statutory requirements in the preparation of these accounts, we are satisfied that, if they are corrected in the future, the rights of all parties can be adequately protected." *Matter of Gershow's Will,* 261 N.W.2d at 340 (quotation omitted). In the future, the Trustee is to file annual accountings for the Trust. This will serve to protect the rights of the parties.

¶ 18 Baird also claimed in the District Court that Goulet should be removed as Trustee because she failed to pay insurance premiums and certain taxes in a timely manner. On appeal, Baird does not dispute the District Court's conclusion that Goulet was not obligated to use her personal funds to pay the taxes and insurance premiums, but challenges Goulet's interference with his attempts to pay the taxes himself.

¶ 19 The record shows that between the first and second hearings in this case the parties disagreed as to whom the county should send the tax statements. At the hearing, Goulet testified that as Trustee she should receive the tax statements but has no problem with letting Baird pay the taxes. After the hearing, the District Court entered an order allowing Baird to pay taxes on the property. Thus, the issue of whether Baird may pay the taxes is settled, and neither party challenges it. Goulet's interference with Baird's efforts to pay taxes was temporary, apparently done in good faith, and does not require a conclusion that the District Court's resolution was an abuse of discretion.

¶ 20 Baird raises several other issues that do not merit a detailed discussion. Baird challenges several factual findings, but he has not established that they were clearly erroneous. Also, Baird asserts that the District Court should have removed Goulet for

failure to preserve the trust property and make it productive by being unaware of mineral interests in the trust. However, Baird has not factually demonstrated an error by Goulet necessitating her removal.

¶ 21 We conclude that the District Court, after considering all of Baird's claims, did not abuse its discretion by denying his request to remove Goulet as Trustee.

¶ 22 Affirmed.

Notes, Questions and Problems

1. The court will not remove a trustee simply because he has a dispute with the beneficiary of the trustee. Moreover, the trustee usually will not remove a trustee because he is a bad actor unless his behavior negatively impacts the beneficiary.

2. When a beneficiary sues the trustee claiming a breach of trust, the trustee's attorney fees are paid out of the trust funds. If there is bad blood between a beneficiary and a trustee, the beneficiary might constantly challenge the trustee's actions. In that case, most of the trust funds could end up in the hands of attorneys. Would it make sense to permit the court to remove a trustee for having irreconcilable differences with the beneficiary?

3. Problems

If which of the following cases might the court remove the trustee?

a). Jackson, a former slave, established a trust for the benefit of his children. After Jackson died, Main Bank assumed its role as trustee. A few years later, Main Bank was acquired by New Bank. Jackson's children found out that New Bank is suspected of financing the genocide in Dafur,

b). Albert established a trust for the benefit of his grandchildren. After Albert died Zelda assumed her role as trustee. A few years later, Zelda started having financial problems and had to file bankruptcy.

c) Yolanda established a discretionary support trust for the benefit of her sisters, Kelly and Tiffany. After Yolanda died, Peyton assumed his role as trustee. A few years later, Peyton started having an affair with Kelly.

d) Velma established a trust for the benefit of her nieces and nephew. After Velma died, Otis assumed his role as trustee. A few years later, Otis became a tax protester and refused to pay

his state and federal taxes.

Chapter 7 - Creation and Modification of Charitable Trusts

In order to create a charitable trust the testator must satisfy all of the requirements to create a private trust (intent, beneficiaries, res and writing) and intend for the trust to be used for a charitable purpose. Courts have more flexibility when it comes to modifying the terms of a charitable trust. In some cases, courts can even repurpose the funds in the trust.

7.1 Creation of the Charitable Trust

To qualify as a charitable trust, the trust must have a valid charitable purpose that benefits an indefinite class of persons. Charitable purposes include: (1) the relief of poverty; (2) the advancement of education; (3) the advancement of religion; (4) the promotion of health; (5) government or municipal purposes; and (6) other purposes the accomplishment of which is beneficial to the community.

Problems

Which of the following trusts have a charitable purpose?

a). A trust to establish a museum to display the love letters the settlor wrote to his wife.

b). A trust to conduct stem cell research.

c). A trust to provide gym memberships to residents that are at least fifty pounds overweight.

d). A trust to plant a community garden.

e) A trust to build a house for the minister of a church.

f) A trust to send the members of a church choir on an annual vacation.

g) A trust to pay the salary of a law professor.

h) A trust to send Tina to college if she promises to teach in the testator's hometown.

***Marsh v. The Frost National Bank*, 129 S.W.2d 174**

Opinion by Justice Rodriguez.

This is a declaratory judgment action. Appellants, Anna Spohn Welch Marsh, Noel Marsh, and Holly McKee, appeal from a probate order that modified a provision in the will of Charles Vartan Walker, deceased. Appellants raise four issues on appeal: (1) whether the trial court properly applied the *cy pres* doctrine to reform a will provision and (2) whether the trial court correctly ruled that tract 3 with its associated income, rather than the proceeds of

the sale of that land, should be conveyed to the charitable beneficiary based on the *cy pres* reformation; We reverse and remand.

I. Factual Background

Charles Walker died on March 13, 2000, leaving a holographic will. The will named appellee, Frost National Bank (Frost Bank), as independent executor. On July 11, 2000, Frost Bank filed an original petition for declaratory judgment for clarification of several probate matters including the construction of Article V of the Charles Walker will, the provision at issue in this appeal. Article V reads in relevant part:

> I hereby direct my Executor to sell tract 3 of the V.M. Donigan 456.80 Partition for cash and to invest the proceeds in safe and secure tax-free U.S. government bonds or insured tax-free municipal bonds. This trust is to be called the James Madison Fund to honor our fourth President, the Father of the Constitution. The ultimate purpose of this fund is to provide a million dollar trust fund for every American 18 years or older. At 6% compound interest and a starting figure of $1,000,000.00, it would take approximately 346 years to provide enough money to do this. My executor will head the Board of Trustees.... When the Fund reaches $15,000,000 my Executor's function will cease, and the money will be turned over to the Sec. of the Treasury for management by the federal government. The President of the U.S., the Vice President of the U.S., and the Speaker of the U.S. House of Representatives shall be permanent Trustees of the Fund. The Congress of the United States shall make the final rules and regulations as to how the money will be distributed. No one shall be denied their share because of race, religion, marital status, sexual preference, or the amount of their wealth or lack thereof....

Appellants filed an answer to the petition for declaratory judgment alleging that Article V of the will is void under the rule against perpetuities. Appellee, John Cornyn, Texas Attorney General, intervened in this action pursuant to section 123.002 of the Texas Property Code alleging that a general charitable intent could be found and that Article V of the will created a charitable trust. *See* Tex. Prop. Code Ann. § 123.002 (Vernon 1995). The Attorney General then moved for the application of the *cy pres* doctrine to Article V. After a hearing on this issue, the trial court found in relevant part that: (1) the will evidenced a

general charitable intent; (2) Article V of the will established a valid charitable trust not subject to the rule against perpetuities; (3) the Attorney General's request to have the court exercise its *cy pres* powers should be granted; and (4) attorney's fees should be awarded to the Attorney General. The order was signed with the modification of the trust and charitable beneficiary to be determined after a second hearing. The second hearing was held before a different judge. After reconsidering the previous order, the second judge confirmed and ratified that order and signed a final judgment establishing the modifications of Article V. This appeal ensued.

II. Interpretation of Article V

In their first issue, appellants argue that Article V does not show a charitable intent and therefore is not subject to reformation under the *cy pres* doctrine. Furthermore, appellants argue that because Article V violates the rule against perpetuities and cannot be legally reformed, it is void, and the proceeds of the land that would fund the trust should pass through intestate succession.

In Texas, under the rule against perpetuities, an interest is not good unless it must vest, if at all, not later than twenty-one years after some life in being at the time of the creation of the interest, plus a period of gestation. *Id.* § 112.036; *see Foshee v. Republic Nat'l Bank,* 617 S.W.2d 675, 677 (Tex. 1981). Both perpetual trusts and trusts for an indefinite duration violate the rule against perpetuities and are void. *Atkinson v. Kettler*, 372 S.W.2d 704, 711 (Tex. Civ. App.-Dallas 1963), *aff'd,* 383 S.W.2d 557 (Tex. 1964). The rule against perpetuities does not, however, apply to charitable trusts. *See* Tex. Prop. Code Ann. . § 112.036 (Vernon 1995); *Foshee*, 617 S.W.2d at 677. Therefore, we must first address whether Article V of the will establishes a trust for a charitable purpose.

Whether or not a given purpose is "charitable" is a question of law for the court to decide. *Frost Nat'l Bank v. Boyd.,* 188 S.W.2d 199, 206 (Tex. Civ. App.-San Antonio 1945), *aff'd,* 145 Tex. 206, 196 S.W.2d 497 (1946). When an issue turns on a pure question of law, we apply a de novo standard of review, *Tenet Health Ltd. V. Zamora*, 13 S.W.3d 464, 468 (Tex. App.-Corpus Christi 2000, pet. dism'd w.o.i. (citing *State v. Heal*, 917 S.W.2d 6,9 (Tex. 1996), and we are not obligated to give any deference to legal conclusions reached by the trial court *Id.* at 468-69.

Where the question of whether a given purpose is or is not charitable arises, the words "charitable purpose" have a definite ascertainable meaning in law, and a judicial determination may be made with satisfactory certainty in every case. *See Boyd v. Frost Nat'l Bank,* 145 Tex. 206, 196 S.W.2d 497, 501-03 (1946). Legal concepts of what are "charitable purposes" are categorized in section 368 of the Restatement Second of Trusts. *Id.* at 502, Section 368 provides as follows:

> Charitable purposes include (a) the relief of poverty; (b) the advancement of education; (c) the advancement of religion; (d) the promotion of health; (e) governmental or municipal purposes; (f) other purposes the accomplishment of which is beneficial to the community.

Restatement (Second) of Trusts § 368 (1959); *see Boyd.*, 196 S.W.2d at 502.

Article V of the will clearly states that the purpose of the fund is to provide a million dollar trust fund for every American eighteen years or older with no one being denied his share due to race, religion, marital status, sexual preference, or the amount of his wealth. Thus, it is clear from the language of Article V that if the purpose is to be found charitable, it must fall under the broad category (f) of section 368 of the Restatement; other purposes the accomplishment of which is beneficial to the community. Restatement (Second) of Trusts § 368 (1959). To be included in category (f), the purpose set out in Article V must go beyond merely providing financial enrichment to the individual members of the community; the purpose must promote the social interest of the community as a whole. *See* Restatement (Second) of Trusts § 374 cmt. a, f (1959). The Restatement provides this Court with the following illustration applicable to the facts of this case:

> [I]f a large sum of money is given in trust to apply the income each year in paying a certain sum to every inhabitant of a city, whether rich or poor, the trust is not charitable, since although each inhabitant may receive a benefit, the social interest of the community as such is not thereby promoted.

Id. § 374 cmt. f. Furthermore, trusts created to distribute money out of liberality or generosity, without regard to the need of the donees and the effect of the gifts, do not have the requisite public benefit necessary to a charity. *See* G. Bogart, The Law of Trusts and Trustees § 379 (1991). With these concepts in mind, we analyze Article V.

Charles Walker expressly states in Article V that "[t]he ultimate purpose of this fund is to provide a million dollar trust fund for every American 18 years or older." From this language, it is obvious Walker intended nothing more than to financially enrich the American public. While this act is generous and benevolent, it is not necessarily beneficial to the community. There is no evidence referenced or argument made by appellees to persuade us that the effect of the trust contemplated by Walker would promote the social interest of the community. *See* Restatement (Second) of Trusts § 374 cmt. a (1959). Article V does not place restrictions or limitations on the beneficiaries of the trust, which would allow them to use the funds for any purpose, whether it be one that benefits the community or one that burdens it. The trust would provide a personal, individual benefit to each beneficiary but would fail to promote the social interest of the community as a whole. *See id.* § 374 cmt. a, f. Furthermore, the trust is established without regard to the need of the beneficiaries or the effect of the trust and as a result lacks the requisite public benefit necessary to a charity. *See* G. Bogart, The Law of Trusts and Trustees § 379 (1991). The trust created by Walker is nothing more than a generous distribution of money with no contemplation or recognition of public benefit. We conclude the trust established by Walker is devoid of any charitable intent or purpose and is therefore not charitable as defined by law.

Appellees argue that Texas courts have a long history of favoring charitable bequests and use liberal rules of construction to fulfill the intent of the testator. They also urge that where a bequest is open to two constructions, the interpretation that gives the charity effect should be adopted, and that which will defeat the charity should be rejected. In support of their arguments, appellees cite *Boyd; Blocker v. State*, 718 S.W.2d 409 (Tex. App.-Houston [1st Dist.] 1986, write ref'd. n.r.e.); *Taysum v. El Paso Nat'l Bank*, 256 S.W.2d 172 (Tex. Civ. App.-El Paso 1952, writ ref'd; and *Eldridge v. Marshall Nat'l Bank*, 527 S.W.2d 222 (Tex. Civ. App.-Houston [14th Dist.] 1975, writ. ref'd n.r.e.). We agree with appellees' contentions and the cases cited in support thereof. However, we find these cases distinguishable and the specific propositions stated inapplicable. In the cases cited, the courts, after finding an existing charitable intent as defined by law, used liberal rules of construction to sustain the charitable trust. In this case, however, we find no charitable intent or purpose. Therefore, these rules of law do not apply. Appellees would have us use these rules to create a charitable intent where none exists. We decline to do so.

Having concluded Article V of the will does not establish a charitable trust, the rule against perpetuities is applicable. In this case, the trust is of indefinite duration and therefore violates the rule against perpetuities. *See Atkinson*, 372 S.W.2d at 711. Accordingly, appellants' first issue is sustained.

III. Reformation of Noncharitable Trusts

When a noncharitable trust is in violation of the rule against perpetuities, a trial court is authorized to reform the trust pursuant to section 5.043 of the Texas Property Code Tex. Prob. Code Ann § 5.043(b) (Vernon Supp.2004). (Vernon Supp.2004). A court has the power to reform or construe the trust according to the doctrine of *cy pres* by giving effect to the general intent of the testator within the limits of the rule. *Id.,* section 5.043 (b). It is clear from the language in Article V that Walker's general intent in creating the trust was to financially enrich the American public. Therefore, application of section 5.043 requires the court to reform or construe Article V within the limits of the rule against perpetuities and consistent with this intent. If reformation is not possible however, the trust is void as being in violation of the rule.

Appellants contend in their second issue that the court erred in not selling tract 3 of the V.M. Donigan 456.80 partition for cash as stated in Article V. Because of the disposition of appellants' first issue, we need not address their second issue. However, as noted above, reformation under section 5.043, if possible, provides for the court to give effect to the general intent and specific directives of the creator. Tex. Prob. Code Ann § 5.043(b) (Vernon Supp.2004). The selling of the land provided for under Article V would constitute a specific directive and should be given effect in any reformation contemplated by the court.

Therefore, we remand this case to the trial court to consider the feasibility of reformation of Article V under section 5.043.

IV. Conclusion

Accordingly, we reverse the trial court's judgment to the extent it established a charitable trust and remand this case for further proceedings consistent with this opinion. We also reverse the trial court's award of attorney's fees and remand this issue to the trial court for further consideration.

7.2 Modification/Cy Pres

If property is given in trust to be applied to a particular charitable purpose and it is or becomes impossible, impracticable or illegal to carry out the particular purpose, and if the testator manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will rely on the cy pres doctrine to direct the application of the property to some charitable purpose which falls within the general intention of the testator. The three main questions that must be resolved to determine if cy pres is appropriate are the following: 1) Can the original charitable purpose be fulfilled?; 2) Did the testator have a general charitable purpose in mind?; and 3) Will that purpose be carried out by permitting the modification?

***Petition of Pierce*, 136 A.2d 510**

DUBORD, Justice.

This case is before us upon petition of Lillian S. Sturgis, trustee under the will of Joseph How, asking for a new construction of the will and for instructions concerning the administering of the trust fund under the cy pres doctrine.

The administration of an estate is usually a prosaic procedure. However, the history of this case, throughout the eighty-seven years which have elapsed since the death of Joseph How, is most interesting and presents a set of facts, which one might expect to find in a romantic novel, rather than in the true story of an estate, the assets of which, at the outset and for more than forty years, were considered too small to be worth-while, and which have now grown to a value too large to permit of the administration of the trust in accordance with the seeming directions of the testator.

The testator, Joseph How, was a man of the sea. He was master of the bark known as the Ellen Stevens. Records indicate that he was commissioned master in 1862 and his name appears as captain of this bark in 1869. For the benefit of the uninitiated, a bark is described in Webster's unabridged dictionary as a three-masted vessel having her foremast and mainmast, square-rigged, and her mizzenmast fore-and-aft rigged. Joseph How was born on July 22, 1820 and died on October 26, 1870. His home was in Portland and he is buried there.

On October 25, 1870, just the day before his death, he executed his last will and

testament.

Under the first paragraph of this will he bequeathed the possession and use of all his personal property, including money, bonds, vessels, choses in action and furniture to his wife, Alice W. How. By the second paragraph he bequeathed to his wife the income from all of any real estate of which he may have been seized. Under the provisions of the third paragraph he directed that his real estate as well as his interest in the bark, 'Eben Stevens,' be sold and that the proceeds of said sale be invested and the income from said investment paid to his wife, for and during her natural life.

At this point it may be well to point out, that the record copy of the will as we have it, describes his ship as the 'Eben Stevens.' This may be a typographical error. The correct name of the shop was the 'Ellen Stevens' as indicated by records of the American Ship Masters' Association. However, this discrepancy is of no moment at this particular time.

Under the provisions of the fourth paragraph of his will, he directed that at the decease of his wife, his executor should pay the entire income to his mother, Eliza How, if she should then be living, for and during her life, and in cash his mother should not be living, then the income was to be paid to his brother, James L. How, for and during his natural life.

The record in the case does not give us the information, but it is assumed that these directions on the part of the testator were carried out.

The controversy now before us, arises under the fifth paragraph of the will which reads as follows:

> 'I request and direct that after the decease of my said wife, mother and brother, my said estate, real and personal shall be appropriated to the founding of a home for indigent seamen, and I authorize and empower my executor to invest the said property and the income thereof and to use and employ the same in such manner as will do the most good to the class of indigent seamen.'

The will was filed in the Probate Court within and for the County of Cumberland and on the third Tuesday of November, 1870 duly allowed. The executor named in the will, James P. Baxter, was appointed. He later resigned, and on June 15, 1875, Lewis Pierce was appointed administrator de bonis non with the will annexed.

The inventory shows that the entire value of the estate was only about $1,500. There is nothing in the record to indicate how long the widow lived, nor when the mother or the brother named in the will, as contingent beneficiaries, died. All we know is that the matter remained in abeyance until at the April Term, 1912 of the Supreme Judicial Court for Cumberland County, a bill in equity was filed by Lewis Pierce, the administrator, asking the Court to construe the fifth paragraph of the will and to determine the ownership of the assets in the estate. This bill was reported to the Law Court for determination upon bill and answer.

It was contended by the heirs at law, that the attempted trust under consideration had failed, both for indefiniteness and because the amount available was so small as to render it impossible to carry out the provisions of the trust even if one were created.

In an opinion dated November 15, 1912, written by then Associate Justice Cornish, later to become Chief Justice, this Court held that the bequest constituted a good public charitable trust. The opinion provided that a trustee appointed to administer this trust was to invest the residuum of the estate and employ the income for the benefit of indigent seamen. It was stated that the trustee could do this directly, or he could turn over the income to some worthy society or association organized for that purpose. The manner in which the money was to be expended was left to the sitting Justice who was to determine to whom the income should be paid and through what channel this kindly gift could be made most effective. This case is reported in 109 Me. 509, 84A. 1070.

Although the mandate of the Law Court directed that a decree should be entered in accordance with its opinion, no such decree was written and again the matter remained in abeyance for a long period of years. Eventually this case was dismissed from the docket. For twenty-five years the estate was apparently forgotten, probably because the available amount was too small to really be worth-while.

Now we come to a very interesting part of the story. It appears that a short time before his death, Captain How had invested the reported amount of $3,000 in a new corporation, which was then being organized by a friend of his in Chicago. Subsequent developments indicate that the captain probably did not place must value upon this investment, and if the certificate representing his stock ownership in this corporation ever came into the possession of the executor, administrator or trustee, they too probably felt

there was little value attached to this item, as such poor care was given to the certificate that it became lost, misplaced or destroyed. However, the corporation which was engaged in the leather business prospered to an extent never dreamed of by its founder, and through a series of stock dividends and accretions in value, the estate of Captain How now amounts to more than $300,000, with more than $100,000 of income ready to be expended for the purposes provided for in his will.

When the Court was apprised as to the situation, the case was restored to the docket and a decree, pursuant to the opinion of the Law Court in the Pierce case, to be found in 109 Me. 509, 84 A. 1070, was entered nunc pro tunc on December 12, 1938, and this decree holds that the bequest contained in the fifth paragraph of the last will and testament of Joseph How is in its terms a good public charitable trust; that the purpose of this public charitable trust is definite in its objects, is lawful and is to be regulated by the trustee of the estate of Joseph How, who has been or may be appointed and qualified in the Probate Court within and for the County of Cumberland. The trustee was ordered to invest the residuum of the trust fund and employ the income thereof for the benefit of indigent seamen, doing this directly or turning over the income to some worthy society or association organized for that purpose, but before so doing, the trustee was ordered to apply to a Justice of the Supreme Judicial Court for determination to whom and in what amounts the income should be paid. On April 8, 1937, a trustee was appointed. He subsequently resigned, and on March 8, 1944, Lillian S. Sturgis, the petitioner herein was appointed as successor trustee.

On December 29, 1954, Lillian S. Sturgis filed a petition in the Supreme Judicial Court in Equity in Cumberland County in the name of Lewis Pierce, Administrator, asking the Court to determine to whom and in what amounts the income of the trust estate should be paid.

On July 16, 1956, the sitting Justice of the Supreme Judicial Court in Equity instructed the trustee to pay to the Portland Seamen's Friend Society the amount of $10,000, to be used exclusively by it for assistance for the indigent, needy and destitute seamen, and for no other purpose, this money to be expended under the supervision of the Attorney General under the provisions of Section 4, Chapter 20, R.S.1954, which provides that the Attorney General shall enforce due application of funds given or appropriated to public charities within the state and to prevent breaches of trust in the administration thereof.

On August 13, 1956, the trustee filed another petition in the Supreme Judicial Court in Equity for a new construction of the will and for instructions concerning the administering of the fund under the cy pres doctrine. It seems to have been assumed by all parties that the beneficiaries of the trust were supposed to be seamen of the class to which Captain How belonged. Based upon this assumption, in her petition, she alleged that after paying the amount of $10,000 to the Portland Seamen's Friend Society, in accordance with decree of Court, she still has income of over $100,000 in her possession, which she is unable to expend for the benefit of indigent seamen, for the reason that there are not a sufficient number of this class to allow for the expenditure of the money available, and she further asked for instructions as to whether or not she may be permitted to expend the funds under the cy pres doctrine for the benefit of seamen of other classes such as fishermen, lobstermen, and others.

Various organizations claiming to have been organized for the purpose of rendering assistance to indigent seamen, or who throughout the years have been rendering such assistance, filed appearances and were heard by the sitting Justice at the time of the hearing. The heirs-at-law of Captain How who comprise grandnephews, grandnieces, great-grandnephews, and great-grandnieces also appeared.

The State of Maine because of the provisions of Section 4, Chapter 20, R.S.1954, previously referred to, was represented by the Attorney General. The trustee, and those who appeared, with the exception of the heirs-at-law, take the position that the fund now available should be administered under the cy pres doctrine, and the class of beneficiaries extended to include seamen of types other than that to which Captain How belonged.

The heirs-at-law argue, first that the trust has failed; second, that there was no general charitable intent on the part of Captain How; and third, that the matter has been judicially settled and is res judicata by reason of the decree of the Supreme Judicial Court in Equity dated July 16, 1956, at which time the trustee was instructed to pay the sum of $10,000 to the Portland Seamen's Friend Society. The heirs-at-law, therefore, contend that a resulting trust has arisen in the entire fund for their benefit.

Before passing to a discussion of the cy pres doctrine, and its applicability to the instant case, we can readily dispose of the third argument advanced in behalf of the heirs-at-law, to the effect that the matter has been judicially settled by the decree of the Supreme

Judicial Court previously referred to. One of the essential elements of the doctrine of res judicata is identity of issue. It is clear that the issue for our determination at this time is not at all the issue which was concluded in the hearing which culminated in the decree of July 16, 1956. Consequently, it is our opinion that there is no strength to this argument in behalf of the heirs-at-law.

The words 'cy pres' are Norman French for 'as near.' The phrase when expressed to its full implication was 'cy pres comme possible' which means 'as near as possible.'

The doctrine of cy pres is the principle that equity will, when a charity is originally or later becomes impossible or impractical of fulfillment, substitute another charitable object which is believed to approach the original purpose as closely as possible. It is the theory that equity has the power to mold the charitable trust to meet emergencies.

Where property is given in trust for a particular charitable purpose, the trust will not ordinarily fail even though it is impossible to carry out the particular purpose. In such a case the court will ordinarily direct that the property be applied to a similar charitable purpose. The theory is that the testator would have desired that the property be so applied if he had realized that it would be impossible to carry out the particular purpose. The theory is that although the testator intended that the property should be applied to the particular charitable purpose named by him, yet he had a more general intention to devote the property to charitable purposes. The settlor would presumably have desired that the property should be applied to purposes as nearly as may be like the purposes stated by him rather than that the trust should fail altogether. The principle under which the courts thus attempt to save a charitable trust from failure by carrying out the more general purpose of the testator and carrying out approximately though not exactly his more specific intent is called the doctrine of cy pres.' Scott on Trusts, Vol. 3, §399.

> 'Cy pres means 'as near to,' and the doctrine is one of construction, the reason or basis thereof being to permit the main purpose of the donor of a charitable trust to be carried out as nearly as may be where it cannot be done to the letter.' 14 C.J.S. Chapter § 52 a., p. 512.

The cy pres doctrine is properly applied in a case where there is a general charitable purpose, but a literal compliance with the terms of the trust becomes impossible or

impracticable in which case the court directs the administration of the trust as nearly as possible in conformity with the intention of the donor or testator.' 14 C.J.S. Charities § 52 c., p. 514. The doctrine of cy pres does not apply to private trusts.

A very fine exposition of the prerequisites to the application of the doctrine of cy pres can be found in Chapter 5, of the book entitled The Cy Pres Doctrine in the United States by Edith L. Fisch.

The author points out that before the cy pres doctrine will be applied three prerequisites must be met. First, the court must find that the gift creates a valid charitable trust. Second, it must be established that it is to some degree impossible, or impractical to carry out the specific purpose of the trust, for the cy pres doctrine is inapplicable when the particular purpose of the settlor can be effectively carried out. The third prerequisite is the requirement of a general charitable intention, and it is this prerequisite which has given rise to most of the litigation in cy pres cases. This requirement of general charitable intent grew up as a result of the theory that the cy pres doctrine is a device to carry out the intent of the settlor of the trust.

The first prerequisite, :-That the gift creates a valid charitable trust, has been taken care of by the decision of this Court in509, 84A 1070, *Petition of Pierce*, 109 Me. 509, 84A. 1070, in which the Court held that the bequest in the How will is in terms a good public charitable bequest.

Passing now to the second prerequisite, that it must be established that it is to some degree impossible or impractical to carry out the specific purpose of the trust, we find a situation where all the interested parties are agreed, and this statement applies to the heirs-at-law as well, that while the number of indigent seamen of the class seemingly intended by the testator has become substantially reduced, it has not entirely disappeared. Moreover, the record clearly indicates that there are still indigent seamen in existence, even of the class to which the testator belonged. Consequently, the trust has not entirely failed. However, it is also clear that the trust fund now available is in an amount too large to permit its application for the relief of indigent seamen of the class to which the testator belonged. It has, therefore, become impossible to carry out the specific purpose of the trust, if the specific purpose was to render assistance only to indigent seamen of the class to which the testator belonged.

The important issue, therefore, for determination is whether or not the testator expressed in his will a general charitable intent. If so, then the application of the cy pres doctrine would be in order and the scope of the beneficiaries seemingly covered in the trust can be broadened and enlarged. In other words, seamen of a type different from that to which the testator belonged can be included as beneficiaries.

We give our attention, therefore, to the issue of determining whether or not Captain How manifested a general charitable intention when he created the trust which is now before us for construction.

Legal authors all describe this general charitable intention as a desire to give to charity generally, rather than to any one party, object or institution.

The question of whether or not a testator is making a charitable bequest has evinced a general charitable intent or is making a specific bequest to a specific beneficiary for a specific charitable purpose is a question of interpretation of the particular will under consideration. To attempt to formulate a general rule which would solve all such cases would be an attempt to achieve the impossible. Nor do the cases from our own or other jurisdictions materially aid in deciding the particular question of interpretation with which we are here concerned, as distinguished from a decision of the fundamental principles of law from which the authority of the Court to apply the cy pres doctrine arises.' *First Universalist Soc., Bath v..Swett,* 148 Me 142, 150, 90 A2d 812, 817.

Authors on the subject of trusts are all in accord that if property is given in trust to be applied to a particular charitable purpose, and at the time when the property is given it is possible and practical and legal to carry out the particular purpose, but subsequently owing to a change of circumstances it becomes impossible or impractical or illegal to carry out the particular purpose, it is easier to find a more general charitable intention of the settlor than it is where the particular purpose fails at the outset.

A review of the cases decided by this Court in which the principle of the cy pres doctrine was involved may be of interest. The doctrine was discussed in *Allen v. Trustees of Nasson Institute*, 107 Me. 120, 77 A 638. In this case, the Court pointed out that the doctrine applies only when two prerequisites exist, viz., when the court may see in the instrument a general charitable purpose as well as a specific gift, which has failed. In deciding that the cy

pres doctrine did not apply, the court found that neither of these prerequisites existed. The trust had not failed and there was no evidence of a general charitable intent.

In *Brooks v. Belfast*, 90 Me. 318, 38 A. 222, the Court found that there was a gift for a specific purpose with no general charitable intent and so the doctrine was not applied. Again in *Doyle v. Whalen*, 87 Me. 414, 32 A. 1022, 31 L.R.A. 118, it was held that the trust created in this instance was for the benefit of definite persons who could be identified, and so the doctrine was not applied.

The doctrine was applied in *Manufacturers National Bank v. Woodward*, 141 Me. 28, 38 A.2d 657; in *Stevens v. Smith,* 134 Me. 175, 183 A. 344; in *Snow & Clifford v. President and Trustees of Bowdoin College*, 133 Me. 195, 175 A. 268 and in *Lynch v. South Congregational Parish of Augusta*, 109 Me. 32, 82A. 432..

The doctrine was not applied in *Dupont v. Pelletier*, 120 Me. 114, 113 A. 11; *Bancroft v. Maine State Sanatorium Association*, 119 Me. 56, 109 A. 585; *Gilman v. Burnett*, 116 Me. 382, 102 A. 108, L.R.A. 1918A, 794 in *Merrill v Hayden*, 86 Me. 133, 29 A. 949.

In the case of *Merrill v. Hayden, supra*, a testator had left all of his property to one of his two daughters, to hold during her lifetime, and at her death the residue was to go to the Maine Free Baptist Home Missionary Society. During the lifetime of the testator this society was dissolved by act of the Legislature and all its property transferred to another Association created for a different purpose. It was held that the legacy lapsed and the cy pres doctrine not applicable.

In *Gilman v. Burnett, supra*, and *Bancroft v. Maine State Sanatorium Association, supra*, the cy pres doctrine was not applied because the Court found no evidence of general charitable intent.

In the case of *Lynch v. South Congregational Parish of Augusta*, *supra*, the Court found that after reading the will in the light of existing conditions, the testator had evinced a general charitable intention and the doctrine of cy pres was applied.

In the cases of *Snow & Clifford v. President and Trustees of Bowdoin College, supra*, and *Stevens v. Smith, supra*, the Court reached the conclusion that the testators had evinced a general charitable intention and upon inability to comply with the original purpose of the trust, the doctrine of cy pres became applicable.

Two cases from other jurisdictions where the doctrine was applied are of interest. In the case of *Society for Promoting Theological Education v. Attorney General*, 135 Mass. 285, a trust was set up providing that indigent students in theology who should be deemed worthy of assistance would be paid sums not exceeding one hundred or one hundred fifty dollars a year for three years. The trust income increased substantially and there was not a sufficient number of indigent students to exhaust the income. The court ruled that under the cy pres doctrine the payments could be increased.

In the case of *Hoyt v. Bliss*, a Connecticut case, 93 Conn. 344, 105 A. 699, a trust was set up providing for the support of one student. A surplus of money developed and the court ruled that the trustee could use the money to support additional students.

While, as previously stated, it seems to have been assumed by all interested parties that the beneficiaries of the trust created by Captain How were indigent seamen of the class to which he belonged, we are not thoroughly convinced that this is so. At times much earlier than the year when Captain How's will was executed, our Court had described crewmen of other types of vessels as seamen.

It seems apparent that even in 1870, the term 'seamen' was not limited to mariners of the type who manned vessels such as the Ellen Stevens.

That this is so, is shown by a decision of this Court in *Lewis v. Chadbourne*, 54 Me. 484; a case decided prior to 1868, in which fishermen in the mackerel industry were described as seamen. Another is *Holden v. French*, 68 Me. 241, decided in 1878, in which this Court described the crewmen of a fishing vessel as seamen.

If we endeavor to project ourselves into the past and contemplate upon the intention of Captain How, we may well suppose that while he was perhaps primarily interested in crewmen of ships such as he was master of, he nevertheless had in mind that wider group of men whose major means of livelihood was gained from the sea. He used the expression, in his will 'the class of indigent seamen.' Webster describes the word 'class' as 'a group of individuals ranked together as possessing common characteristics or as having the same status;' and also 'a group of persons, having common characteristics or attributes.'

Webster defines the word 'indigent' as follows: 'Destitute of property or means of comfortable subsistence; needy; poor; in want; necessitous'; and Joseph Addison the English

poet and essayist said: 'Charity consists in relieving the indigent.'

After making provision for those most dear and close to him, his wife, mother and brother, Captain How gave all of his estate for a public charity. The will neither provides for forfeiture or limitation over. We are convinced that when he executed his will on the day before he died, he was imbued with a deep charitable intent, and that he intended all of his wordly goods and effects to be devoted forever to the relief of indigent seamen, not only of the class to which he belonged, but to all classes of indigent seamen.

It is, therefore, our opinion that the scope of the beneficiaries of this kindly gift should be widened and enlarged. We reach this conclusion not necessarily through the application of the cy pres doctrine, but rather through an interpretation of the intention of the testator at the time be executed his will. *See Guilford Trust Company v. LaFleur (Inhabitants of Gulford),* 148 Me. 162, 91 A.2d 17.

The trustee is, therefore, authorized to use and employ the income for the benefit of indigent seamen not only of the class to which Captain How belonged, but to other classes, by way of illustration and not of limitation, such as crewmen of merchant vessels, oil tankers and fishing vessels.

In the determination of who shall be classed as indigent seamen, the trustee may give consideration to the modern laws and latter day adjudications as to the interpretation of what a 'seaman' is.

A good definition is to be found in 79 C.JH.S. Seamen §, (a.) p. 490.

> 'While the word 'seaman' is a flexible word, the meaning of which ordinarily depends on the circumstances in which it is used, in the broad sense of the word a seaman is a mariner of any degree, including one who does any sort of work aboard a ship in navigation.'

In her petition, the trustee requested instructions as to whether or not lobster fishermen may be included among the beneficiaries. We are of the opinion that lobster fishermen are not seamen within the meaning of the foregoing definition, nor within the intention of the testator.

The trustee is given the right to employ agents for the purpose of investigating

cases, and to pay such agents reasonable compensation for their services and charge the same to the trust fund. The trustee in using and employing the income for the benefit of indigent seamen of the classes above described, may do this directly or she may turn over the income to some worthy association or associations organized for that purpose; the exact details to be left to a Justice of the Supreme Judicial Court who is to determine to whom the income shall be paid and through what channel the gift can be made most effective.

Associations to whom any portion of the income is paid may charge a reasonable commission for expenses of administration, the amount of such commission to be determined by the trustee, subject to the approval of a Justice of the Supreme Judicial Court. Any association to whom any of the income is paid shall file at least annually an account of its disbursements with the trustee. The Portland Seamen's Friend Society to whom the sum of $10,000 has already been paid shall forthwith file an account of its disbursements with the trustee. Copies of all accounts of the trustee which are filed in the Probate Court, as well as copies filed by associations to whom any portion of the income has been paid are to be filed with the Attorney General of the State of Maine.

Case remanded to the sitting Justice for a decree in accordance with this opinion.

***In the Matter of the Lucas Charitable Gift*, 261 P.3d 800**

Opinion of the Court by LEONARD J.

Petitioner–Appellant Hawaiian Humane Society (HHS) appeals from the following judgment and orders of the Circuit Court of the First Circuit, sitting in Probate (Probate Court): (1) Order Denying Petition to Approve Land Exchange Free and Clear of Use Restrictions (Order Denying Petition), filed on May 18, 2009; (2) Order Denying Petition for Relief from Order Denying Petition to Approve Land Exchange Free and Clear of Use Restrictions and for Entry of Final Judgment, filed on December 21, 2009 (Order Denying Relief); and (3) Judgment Pursuant to Order Denying Petition to Approve Land Exchange Free and Clear of Use Restrictions (Judgment), filed on December 21, 2009. In this case, the Probate Court declined to apply the doctrine of *cy pres* to modify a charitable gift of land. The position of all parties on appeal is that the Probate Court erred in failing to apply *cy pres* to approve the proposed land transaction. We agree and, accordingly, vacate the Judgment and remand with instructions.

I. BACKGROUND

A. *The Charitable Gift*

The underlying petition in this case stems from HHS's acquisition of an interest in certain land in the Niu Valley, obtained through a charitable gift. On December 28, 1976, Elizabeth J.K.L. Lucas (Mrs. Lucas) granted HHS a 50.6183968% undivided interest in the land by way of deed. On December 30, 1982, she conveyed an additional 1.4% undivided interest in the land to HHS by way of a second deed. Both deeds contain the following use restriction:

> [F]or and as a charitable gift, [Mrs. Lucas] does hereby grant, bargain, sell and convey the property hereinafter described unto the HAWAIIAN HUMANE SOCIETY ... so long as the same shall be used for the benefit of the public for the operation of an educational preserve for flora and fauna, to be made accessible as an educational experience for the public under the control and administration of said Hawaiian Humane Society and its successors and assigns, and, if not so used, then to State of Hawaii and its successors and assigns, for and as a public park.

Upon Mrs. Lucas's death in 1986, her remaining 47.981603% interest in the land passed through her estate to her daughter, grandchildren, and great-grandchildren (the Thompsons), all of whom have resided on the land for many years. The Thompsons formed a Hawai‘i general partnership, Respondent–Appellee Tiana Partners, to which they transferred their interest in the land.

B. *Attempts to Use the Gifted Land*

After receiving the land, HHS made numerous attempts to plan a feasible use for the land in furtherance of the deed restrictions. In consultation with Tiana Partners, HHS considered many different ideas for effectuating the purpose stated in the deeds, but ultimately rejected them as physically or economically unfeasible.

In 2003, HHS commissioned a feasibility study for a proposed low-intensity development that would be accessible to the public. The study led HHS to conclude that using the land for a public educational preserve would be extremely expensive and impractical. It would require disrupting the Thompson residences and surrounding

neighborhood.

During 2004 and 2005, HHS and Tiana Partners conducted a series of meetings with various community organizations, including the Honolulu Zoo, the Hawai'i Nature Center, and the Department of Education. The purpose of the meetings was to identify potential uses for the land that would be consistent with the intent of the gift, beneficial to the community, and physically and economically feasible. Due to the residential character of the surrounding neighborhood, an overriding consideration was maintaining peaceful coexistence with the Thompsons and other residents in the area. Access to the property was also a key consideration. The land is remote; much of it is steep; and it is accessible only by two residential roads. Using either road for public access would have a disruptive impact on the neighboring residents.

The State of Hawai'i (State) Department of Land and Natural Resources (DLNR) likewise determined that the land was not suitable for use as a public park. However, it determined that a portion of the land, Parcel 2, was best-suited for watershed and forest reserve purposes.

C. *Land Exchange Agreement*

HHS and Tiana Partners began considering other ways to further the intent of the original gift. On September 11, 2006, after extensive negotiations, they signed a Memorandum of Understanding (MOU). The MOU contemplates a three-way land exchange and sale between HHS, Tiana Partners, and the State. HHS and Tiana Partners agreed to convey their interests in Parcel 2 to the State. In exchange, the State would release its executory interest in the remaining parcels. HHS also agreed to convey its interest in the remaining parcels (1, 20, and 21) to Tiana Partners, free and clear of the use restriction, for $1,082,850. HHS would use the proceeds to establish a segregated fund known as the "Charles and Clorinda Lucas Educational Fund" (Educational Fund). The principal and interest would be dedicated exclusively to HHS's educational programs. These programs are designed to foster compassion and caring for all life, focusing on the interdependent relationship between animals, humans, and the environment and our role as stewards and caregivers.

The MOU conditioned the proposed land exchange upon: (1) the agreement of the

State Board of Land and Natural Resources (BLNR); (2) the approval of the Hawai'i Legislature, pursuant to Hawaii Revised Statutes (HRS) § 171-50 and (3) the approval of the Probate Court. At board meetings on December 8, 2006 and December 14, 2007, the BLNR approved in principle the land exchange transaction. In December of 2007, the Legislature also approved the transaction.

D. *Petition to Approve Land Exchange*

On October 28, 2008, HHS filed a Petition to Approve Land Exchange Free and Clear of Use Restrictions (Petition) with the Probate Court. The Petition sought an order approving the proposed land transaction and eliminating the use restriction on the land. HHS maintained that the Probate Court had authority to modify the terms of the charitable gift because its stated purpose was impracticable and could not reasonably be accomplished.

The Attorney General, acting as *parens patrie,* filed a response to the Petition on November 19, 2008. He stated no objection to the relief sought and affirmed that the use restriction "has been proven demonstrably impracticable or impossible and ... the relief sought in the petition is fair and reasonable and is consistent with the doctrine of cy pres." The State filed a joinder in the Petition on November 21, 2008. The Administrator of the Division of Forestry and Wildlife of the DLNR filed a declaration attesting that the DLNR had inspected and reviewed the properties described in the Petition. The DLNR "determined that these properties are not presently suitable for use as a public park, and in particular that Parcel 2 is best used for watershed and forest reserve purposes."

Laura Thompson (Thompson), Mrs. Lucas's daughter, filed a declaration attesting that Mrs. Lucas would have fully supported the land exchange "as a compromise necessary to further her deep interest in all things natural and her strong commitment to education, which can be accomplished far better through the broad reach of the Hawaiian Humane Society than in a narrow urban valley." She attested that Mrs. Lucas "was actively involved with the Hawaiian Humane Society throughout her life" and served on its Board of Directors. Mrs. Lucas fully supported its mission "to promote the bond between humans and animals and to foster the humane treatment of all animals." Thompson believed her mother was not aware of the obstacles preventing development of the land in accordance with the deeds. She believed her mother's original intent in gifting the land was "to benefit the people of Hawai'i through the work of the Hawaiian Humane Society" and to "help the

Society provide an educational experience for the public."

E. *Probate Court Order and Judgment*

Following a hearing, the Probate Court entered the Order Denying Petition on May 18, 2009. The court stated the following grounds as its basis for the denial:

> 1. The deeds provide, "... for and as a charitable gift, does hereby grant, bargain, sell and convey the property hereinafter described unto the Hawaiian Humane Society, ... so long as the same shall be used for the benefit of the public for the operation of an educational preserve for flora and fauna, to be made accessible as an educational experience for the public under the control and administration of said Hawaiian Humane Society, ... and if not so used, then to State of Hawaii, its successors and assigns for and as a public park, ..."
>
> 2. Even if the Court finds that the deeds create a charitable trust, the Memorandum of Understanding does not involve the use of the properties as stated in the deeds. The Memorandum of Understanding states that the Petitioner will receive cash in exchange for conveying its interest in the properties and will use the cash "... to establish a segregated fund to be known as the 'Charles and Clorinda Lucas Educational Fund,' the principle [sic] and interest of which fund shall be used exclusively to pay the costs associated with educational programs designed to foster compassion and caring for all life, focused on the interdependent relationship between animals, humans and the environment and on our roles as stewards and caregivers."
>
> 3. Mrs. Lucas' charitable purpose as stated in the deeds is to use the properties for the operation of an educational preserve for flora and fauna, to be made accessible as an educational experience for the public. The deeds also provide that if the petitioner does not use the properties for the stated charitable purpose, the properties would go to the State of Hawaii.
>
> 4. The doctrine of *cy pres* does not apply to the Petitioner since the deeds provide for an alternative if the properties are not used by the Petitioner as

Mrs. Lucas intended.

On August 3, 2009, HHS filed a petition for relief from the Probate Court's Order Denying Petition. The Attorney General and Tiana Partners filed joinders in the petition for relief, and the State filed a memorandum of no opposition. All interested parties agreed that the Probate Court misconstrued the *cy pres* doctrine and that it should have approved the transaction.

On December 21, 2009, the Probate Court entered the Order Denying Relief and the Judgment. HHS timely appealed.

II. POINTS OF ERROR

On appeal, HHS argues that the Probate Court erred in denying the Petition and refusing to modify the terms of the charitable gift to approve the proposed land exchange. Tiana Partners filed an Answering Brief in support of HHS's position. The State filed an Answering Brief expressing its non-opposition and joinder in HHS's request for relief.

III. STANDARDS OF REVIEW

Hawai'i courts have not addressed the applicable standard of review for a lower court's refusal to apply the doctrine of *cy pres*. In applying an analogous doctrine to reform the terms of a private trust, the supreme court analyzed the issue as a question of law. *In re Estate of Chun Quan Yee Hop*, 52 Haw. 40-45, 46, 469 P.2d 183, 186-87 (1970). Other jurisdictions have held that whether *cy pres* applies is a question of law, reviewable *de novo*. *See, e.g., Koln v. City of Storm Lake,* 736 N.W.2d 546, 552-53 (Iowa 2007); *In re R.B. Plummer Memorial Loan Fund Trust,* 266 Neb. 1, 661 N.W.2d 307, 311 (2003); *Puget Sound Nat'l Bank of Tacoma v. Easterday,* 56 Wash.2d 937, 350 P.2d 444, 447 (1960); *ABC for Health, Inc. v. Comm'r of Ins.,* 250 Wis.2d 56, 640 N.W.2d 510, 515 (Wis. Ct. App. 2001). Accordingly, we hold that the issue of whether the doctrine of *cy pres* is applicable is a question of law, reviewable *de novo*. Once *cy pres* is determined to be applicable, the lower court has discretion in determining the appropriate modification of the charitable gift. *Obermeyer v. Bank of America, N.A.,* 140 S.W.3d 18, 22 (Mo. 2004).

IV. DISCUSSION

A. *Cy Pres Generally*

The doctrine of *cy pres* "permits a gift for a charitable purpose which cannot, for one reason or another, be carried out as directed by the donor, to be applied 'as nearly as may be' to the fulfillment of the underlying charitable intent." 15 Am. Jur.2d *Charities* §149 (2011)(Am.Jur.2d). Under the doctrine's traditional formulation, three elements are required: (1) there must be property given in trust for a charitable purpose; (2) it must be impossible, impracticable, or illegal to carry out the specified charitable purpose; and (3) the settlor must have manifested a general intent to devote the property to charitable purposes. *Id.*

Hawai'i courts have not directly addressed or applied the *cy pres* doctrine. However, the supreme court has recognized the doctrine in dictum. *Chun Quan Yee Hop*, 52 Haw. at 45, 469 P.2d at 186. It noted that "[i]f it is impossible, impractical or illegal to carry out the specific terms of a charitable trust in which the settlor has indicated a general charitable purpose, many courts will authorize the substitution of another charitable scheme within the testator's general purposes." *Id.* The court went on to apply an analogous doctrine to save a private trust from failing due to its contravention of the Rule Against Perpetuities. *Id.* 45-46, 469 P.2d at 186-87.

Cy pres is only applicable to charitable trusts. Restatement (Third) of Trusts § 67, cmt. a (2003) (*Restatement 3d*); Am.Jur.2d §149. Various policy considerations underlie its application. First and foremost, the doctrine stems from the inability of charitable settlors to foresee the future. *Restatement 3d,* Reporter's Notes, cmt. a (recognizing that without *cy pres,* "many charities would fail by change of circumstances and the happening of contingencies which no human foresight could provide against"). Circumstances change and contingencies frequently arise that the settlor did not or could not anticipate. This is particularly true for charitable trusts, as they may be perpetual in duration. *Id.;* Ronald Chester, George Gleason Bogert, and George Taylor *Bogert, The Law of Trusts & Trustees* § 431, at 117 (3d. ed. 2005)(*Bogert on Trusts*). The "needs and circumstances of society evolve over time," impacting the potential benefit of the trust. *Restatement 3d* § 67, cmt. a. Rather than allowing the trust to fail, *cy pres* preserves the settlor's charitable intent by conforming the trust to the contingencies that arise. Thus "[j]ust as it is against the policy of the trust law to permit wasteful or seriously inefficient use of resources dedicated to charity, trust law also favors an interpretation that would sustain a charitable trust and avoid the return of the trust property to the settlor or successors in interest." *Id.* at cmt. b. Similarly, because charitable trusts

impact a broad spectrum of the public and "are allowed by the law to be perpetual," they often merit a greater exercise of judicial discretion than a private trust. *Id.* at Reporter's Notes, cmt. a.

Courts widely recognize that the charitable purpose need not be impossible to warrant applying *cy pres*. It is sufficient that achieving the settlor's stated purpose would be impracticable or unreasonable to effectuate. *Restatement 3d* § 67, cmt. c ("The doctrine of *cy pres* may also be applied, even though it is *possible* to carry out the particular purpose of the settlor, if to do so would not accomplish the settlor's charitable objective, or *would not do so in a reasonable way*.") (second emphasis added); *Bogert on Trusts* § 438, at 194-96 (recognizing insufficiency of funds as basis for doctrine); *Scott on Trusts* § 39.5.2, at 2717–20; § 39.5.4, at 2740–41; Am.Jur.2d § 151 (doctrine is applicable where donor's directions "*cannot beneficially* be carried into effect") (emphasis added; punctuation altered). "An impractical restriction is one that is not capable of being carried out in practice." Am.Jur.2d § 157. If literal compliance would "defeat or substantially impair" the purposes of the trust, *cy pres* is applicable. *Restatement 2d* §399, cmt. a. The purpose of the trust becomes impaired if "the application of [trust] property to such purpose would not accomplish the general charitable intention of the settlor." 88 Am. Jur.. *Proof of Facts* 3d 469, § 10 (2006) (Am.Jur. *Proof of Facts* 3d).

Thus, *cy pres* is applicable where a settlor creates a charitable trust of real property to be used for a particular purpose, but the property turns out to be unsuitable for that purpose. *See Scott on Trusts* § 39.5.2, at 2724–25; *Roberds v. Markham*, 81 F.Supp. 38, 40 (D.D.C. 1948) (recognizing that courts may order sale of gifted land if conditions have drastically changed or land otherwise becomes unsuitable for its dedicated purpose); *Bd. of Educ. Of Rockford v. City of Rockford*, 372 Ill. 442, 24 N.E.2d 366, 369-73 (1939) applying *cy pres* to allow sale of land in charitable trust where its dedicated use as school became impracticable due to shifting populations, deterioration of existing building, and existence of another school that met needs of the area). In one case, for example, a settlor gifted certain land to a charity for the purpose of building a public library upon the land. *Bosson v. Woman's Christian Nat'l Library Ass'n*, 216 Ark. 334, 225 S.W.2d 336, 337 (1949). The land turned out to be unsuitable for constructing a library. *Id.* The charity reached an agreement with a county library board under which it would sell the land and use the proceeds to build a

public library upon property owned by the county board. *Id* . The board agreed to operate the library for the benefit and use of the public. *Id* at 337-38. On appeal, the court applied *cy pres* to approve the transaction. *Id* at 338-39. It noted that *cy pres* applies where the circumstances "have changed to such an extent that in order to carry out properly the charitable intention of the donor, it is necessary to dispose of the trust property and devote the funds to the acquisition of a more suitable location[.]". *Id* at 338. (internal quotation marks and citation omitted).

Similarly, a California court applied *cy pres* where the stated purposes of the gifted properties became impracticable. *In re Estate of Zahm*, 16 Cal. App.3d 196, 93 Cal.Rptr. 810 (1971). There, the testatrix left two residential properties to the Salvation Army. . *Id* at 811. She directed the Flower Street property to be used as a home for Christian women, and the Keniston Avenue property as a music home. *Id.* After her death, the Flower Street property was taken pursuant to eminent domain and the Keniston Avenue property was deemed unsuitable for development due to zoning issues. . *Id* at 813. The Salvation Army proposed to use the funds from the Flower Street property to erect and furnish a new building on a different site. *Id.* It further proposed to sell the Keniston Avenue property and use the proceeds to either construct a music conservatory on another site or endow a music room under construction at another Salvation Army center. *Id.*

The court confirmed that *cy pres* was applicable. . *Id* at 814. It concluded that because neither property was suitable for carrying out the testatrix's declared intentions, the lower, court "properly directed that her charitable purposes be given effect at some other suitable locations." *Id.; see also Bogert on Trusts* § 439, at 218-20 (noting that *cy pres* is applicable where trust property is taken under eminent domain).

The third element—general charitable intent—has been a source of uncertainty and reform. Under the traditional rule, *cy pres* may only be applied if the settlor possessed a general charitable intent. Am.Jur.2d § 153. His or her intent must have encompassed "something beyond the specific terms used in designating the beneficiary or purpose of the gift or how it shall be carried into effect." *Id.; see also Restatement 2d* §399; *Bogert, on Trusts* § 431, at 119; § 436, at 157–60. The donor must have had a general charitable intent, as opposed to a narrow intent to benefit only a "particular project, objective, or institution[.]" Am.Jur.2d § 153. For example, where a settlor's dominant intent is to restrict the charitable

gift to the *exact* purpose specified, courts may presume that the donor would not have wanted the property to be applied to any other purpose, however closely related, even if the original purpose fails. *Restatement 2d* §399, cmt. d. / In such situations, *cy pres* is not applicable because the settlor did not have a general charitable intent. *Id.; see also Shoemaker v. Am. Sec. & Trust Co.,* 163 F.2d 585, 588 (D.C. Cir. 1947) (noting that *cy pres* does not apply if settlor's "dominant purpose has become altogether impossible of achievement"). In contrast, if the settlor's designation of a particular property or site is incidental to the dominant charitable purpose, then courts will presume that the settlor's primary intent was to dedicate the property to charitable purposes. *Shoemaker,* 163 F.2d at 589; *see also In re Wilkey's Estate,* 337 Pa. 129, 10 A.2d 425, 428 (1940) (recognizing that *cy pres* applies where "the physical location of the edifice or institution provided for in a charitable trust has been held to be of secondary importance in comparison with the general purpose for which the erection of the building or the carrying on of the charitable activity was designed"). In such cases, *cy pres* is readily applicable to effectuate the settlor's general charitable intent. *Shoemaker,* 163 F.2d at 589.

Increasingly, the "general charitable intent" requirement has shifted to an "opt-out" framework under which the settlor is presumed to have a general charitable intent unless the terms of the trust provide otherwise. *See Restatement 3d* § 67, cmt. b; Reporter's Notes, cmt. b; Unif. Trust Code §413(a). 7C U.L.A. 509 (2006); *Bogert on Trusts* § 436, at 160 (noting that "it would seem preferable" either to employ presumption in favor of general intent or apply *cy pres* regardless of whether settlor's charitable intent was general or specific); *but see* Am.Jur. *Proof of Facts* 3d § 6 (noting that "presumption of general charitable purpose has not yet been discussed in the reported decisions"). Commentators have noted that the "general intent" requirement is vague and difficult to apply consistently. Ronald Chester, *Cy Pres or Gift Over?: The Search for Coherence in Judicial Reform of Failed Charitable Trusts*, 23 Suffolk U.L. Rev. 41, 45-46 (1989); *accord Bogert on Trusts* § 436, at 183-89; § 437, at 183–89 (noting widespread inconsistency in applying this requirement). It turns on a fine, and often subjective, distinction between a settlor's dominant and incidental or subsidiary objectives. *See Bogert on Trusts* § 437, at 183-89. In contrast, the opt-out rule provides a clearer delineation that avoids guesswork as to the subtleties of the settlor's intent.

Finally, in applying *cy pres,* courts must generally seek a purpose that conforms to the

donor's objective "as nearly as possible." Am.Jur.2d § 157. This may be attained by limiting or modifying the objective; by diverting the funds to another use in the "same generally contemplated field"; or by directing sale of the subject property. *Id.;* Am.Jur. *Proof of Facts* 3d § 10; *Restatement 2d* §399, cmt. p (*cy pres* allows sale of land even if "the settlor in specific words directed that the land should not be sold and that the institution should not be maintained in any other place"). In the case of a sale, the proceeds may be applied to purchase a new, more suitable site, or to further the settlor's charitable intent in another manner. *See* Am.Jur. *Proof of Facts* 3d § 21. Where a charitable gift of property is subject to use restrictions, the court may apply *cy pres* to modify or eliminate those restrictions. *Id.* at § 22; *Bogert on Trusts* § 431, at 115; *Scott on Trusts* § 39.5.2, at 2716.

In determining the appropriate modification, courts must consider a variety of factors and evidence to ascertain what the settlor's wishes would have been had he or she anticipated the circumstances. *Restatement 3d* § 67, cmt. d. Chief among them is the settlor's probable intent. *Id.* Where the settlor is deceased, this intent may be discerned from extrinsic evidence as well as the language of the trust instrument. Such evidence includes the interests and attitudes that motivated the settlor's gift; his or her involvement or interest in particular charitable institutions; and the settlor's "relationships, social or religious affiliations, personal background, charitable-giving history, and the like." *Id.; accord Bogert on Trusts* § 442, at 257-58. The language of the trust instrument is also pertinent. *Restatement 2d* § 399, cmt. d.

The modern approach to *cy pres* also emphasizes considering the efficiency and beneficial impact of the proposed use. *Restatement 3d* § 67, cmt. d. As the settlor's intent cannot be known for certain, applying *cy pres* necessarily involves some level of speculation. *Id.; accord Scott on Trusts* § 39.5.2, at 2709 (noting that courts must make "an educated guess" as to settlor's wishes). Thus, it is generally "reasonable to suppose that among relatively similar purposes, charitably-inclined settlors would tend to prefer those most beneficial to their communities. R*estatement 3d* § 67, cmt. d (emphasis omitted; punctuation altered). To an increasing extent, courts thus seek to apply the trust property toward "a scheme which on the whole is best suited to accomplish the general charitable purpose of the donor." *Restatement 2d* § 399, cmt. b. Finally, the wishes of the trustees, the Attorney General as *parens patrie,* the beneficiaries, and other interested parties also warrant consideration. *Id.* at cmt. f; *Bogert on Trusts* § 442, at 258.

B. *Gift over Rule*

Having established the broad contours of the *cy pres* doctrine, we now turn to the heart of the issue on appeal: whether the Probate Court erred in concluding that *cy pres* is not applicable in this case. The Probate Court reasoned that *cy pres* does not apply because the deeds provide an alternative distribution in the event that the primary charitable purpose fails. It concluded that "if [HHS] does not use the properties for the stated charitable purpose, the properties would go to the State of Hawaii."

The Probate Court's rationale appears to invoke the gift over rule. A gift over is a provision that sets forth an alternative distribution in the event that the primary purpose of the charitable gift fails. Am.Jur.2d § 151. The presence of a gift over provision may potentially preclude application of *cy pres* in two ways: (1) by negating the existence of a general charitable intent, and (2) by providing an alternative distribution in the event that the settlor's original purpose fails. *Restatement 2d* § 399, Reporter's Notes, cmt. c; Am.Jur.2d § 151; *Scott on Trusts* § 39.5.2, at 2710–13; § 39.7.5, at 2795–97; 14 C.J.S. Charities § 56 (2011).

The first application of the gift over rule is only relevant to the traditional requirement that the settlor exhibit a general charitable intent. Under this reasoning, the gift over confirms the settlor's narrow and specific intent. 14 C.J.S. Charities § 56. This is especially true where the gift over is to a non-charity, such as a possibility of reverter. *Nelson v.Kring*, 225 Kan. 499, 592 P.2d 438, 444 (1979); *In re Goehringer's Will*, 69 Misc.2d 145, 329 N.Y.S.2d 516, 521 (N.Y. Surr. Ct 1972) (noting that presence of gift over provision "is a clear manifestation that [the] testator had a particular rather than general charitable intention"); *Roberds*, 81 F.Supp. at 40-42 (concluding that because deed contained possibility of reverter if land ever ceased to be used for its prescribed purpose, settlor's intent was specific to that purpose). Such a provision indicates that the settlor only wished to dedicate the property to a specific purpose and, if that specific purpose failed, to not dedicate it to charity at all. *In re Goehringer's Will*, 329 N.Y.S.2d at 521 ("[A] specific gift over will almost conclusively preclude any determination that he had other than an intent to benefit the particular charity.").

In contrast, where the gift over is to another charity or charitable purpose, many courts recognize that it confirms a general charitable intent. *See Bogert on Trusts* § 437, at 165-70; *Scott on Trusts* § 39.5.2, at 2713; *First Nat'l Bank of Chicago v. Elliott*, 406 Ill. 44, 92 N.E.2d

66, 74 (1950). Such a provision illustrates the settlor's intent to dedicate the property to charity, even if the original purpose fails. *Bogert on Trusts* § 437, at 165-70.

Here, the deeds provide an alternative charitable purpose: for the land to be used by the State as a public park. Under the traditional formulation of the charitable intent requirement, the gift over in this case confirms Mrs. Lucas's general charitable intent. Thus, regardless of the continuing viability of the general intent requirement, the gift over provision does not prevent application of *cy pres* under the first rationale.

In any event, it does not appear that the Probate Court applied the first rationale of the gift over rule. The Order Denying Petition contains no mention of general charitable intent. Instead, the Court's reasoning conforms to the second rationale. It concluded that because the deeds direct an alternative distribution, *cy pres* is inapplicable.

This second application of the gift over rule provides that *cy pres* is inapplicable as the trust property should be applied toward its alternative purpose. 14 C.J.S. Charities § 56. The rule reasons that the settlor foresaw the potential failure of the first purpose and accordingly provided an alternative purpose. *Id.* Thus, effectuating the alternative distribution matches the settlor's intent more closely than applying *cy pres* to maintain the first, failed purpose.

A number of cases affirm the straightforward application of this rule. In *Roberdss v. Markham*, for example, the settlor conveyed property in trust to a church for its continuing operation as a church or place of worship. 81 F.Supp. at 39. The deed provided that if the property ever ceased to be used for church purposes, it would revert to the settlor's heirs and assigns. *Id.* Many years later, when the character of the surrounding neighborhood had changed and the church's population had shifted, the trustees sought to sell the property and re-erect the church at another, more suitable location. *Id.* The court concluded that because the deed contained a possibility of reverter, the settler had intended the land to revert to her heirs and assigns if its use as a church ever became impracticable or impossible. . *Id* at 40-42. It therefore did not apply *cy pres* to permit the sale. *Id* at 42; *see also First Nat'l Bank of Chicago v. Am. Bd. of Comm'rs for Foreign Missions*, 328 Ill. App. 481, 66 N.E.2d 446, 448-49 (1946) declining to apply *cy pres* where will impliedly provided for substitute distribution); *accord Conn. Bank & Trust Co. v. Cyril and Julia C. Johnson Mem'l Hosp.,* 30 Conn. Supp. 1, 294 A.2d 586, 591-93 (1972); *Hail v. Cook*, 294 S.W.2d 87, 88-89 (Ky. 1956).

Yet this application of the gift over rule is subject to an important caveat. Where the alternative distribution is unfeasible, impracticable, or impossible, then the gift over rule does not preclude the application of *cy pres* to save the first charitable purpose. Am.Jur. *Proof of Facts* 3d § 19; 14 C.J.S. Charities § 56; *Restatement 3d* § 67, cmt. b. In such cases, applying the alternative purpose would likewise frustrate or substantially impair the settlor's intent. *Cy pres* is thus necessary to save the trust from failure.

It appears that only one reported case has addressed this relatively rare scenario. *Burr v. Brooks*, 75 Ill. App.3d 80, 30 Ill. Dec. 744, 393 N.E.2d 1091 (1979), *aff'd, Burr v. Brooks,* 83 Ill.2d 488, 48 Ill. Dec. 200, 416 N.E.2d 231 (1981). In *Barr,* the testator bequeathed certain real property and funds to the City of Bloomington for the construction and operation of a memorial hospital. *Id.* at 1093. The will directed the hospital to be constructed on the site where the testator had resided. . *Id.* It was to be operated especially for the benefit of indigent accident victims. *Id.* The will also directed an alternative distribution in the event that the City declined the bequest. *Id.* The substitute purpose required the trustees to construct and maintain an "Industrial School for Girls" on the site of his former residence. *Id.*

The City adopted a resolution purporting to accept the bequest. *Id.* at 1094. However, it determined that the site was not suitable for construction of a hospital, that there were already sufficient hospitals in the area, and that it could not obtain the requisite permission from governing authorities. *Id.* It thus sought to sell the real property and apply the proceeds and remaining funds toward three related purposes that were more suitable to the City's present needs: (1) to provide health care for indigent persons; (2) to establish a memorial family care and diagnostic center that would offer free services to indigent persons; and (3) to establish an emergency medical services program. *Id.*

The intervenors, the city school district and a non-profit successor to the county Women's Industrial Home, opposed application of *cy pres* on the basis that the will provided for an alternative charitable distribution. *Id.* They maintained that because the first purpose was impracticable, the court should apply the funds toward housing and educational programs in conformance with the alternative distribution. *Id.*

The parties agreed that neither proposed use of the property effected literal compliance with the will; both the primary and alternative distributions were impracticable

or impossible. *Id.* at 1095. Because the alternative distribution was also impracticable, the presence of the gift over provision did not defeat application of the *cy pres* doctrine. *Id.* at 1095, 1097. The court noted that it would "make[ ] no sense" to apply the gift over rule in cases where the alternative distribution, like the primary one, is incapable of literal performance. *Id.* at 1097. It concluded that *cy pres* is applicable where a trust instrument "(1) provides for a primary and alternate charitable gift, neither of which can be carried out, and (2) also indicates a strong desire that the charitable interest of the document be followed." *Id.* at 1097 (punctuation altered). The appellate court thus held that the trust property should not be summarily redirected to its alternative distribution because the alternative beneficiaries, "like the City, would be unable to comply with the terms of either charitable gift and could also make only a [c]y pres use of the property." *Id.* It remanded for the lower court to apply *cy pres* and determine which proposed use "most nearly follow[s] the interest of the [testator]." *Id.* at 1098.

Burr v. Brooks thus recognizes that where the settlor provides for an alternative charitable distribution, but that secondary purpose is also impracticable or impossible, *cy pres* may apply to save the first. *See* Am.Jur. *Proof of Facts* 3d § 19 ("Where the donor provides that on failure of the primary charitable purpose the gift shall be used for a second charitable purpose, but makes no provision concerning the failure of the second purpose, and both purposes fail, cy pres may be applied.") (citing *Burr v. Brooks*); *accord* 14 C.J.S. Charities § 56 ("Where the donor provides that on failure of the primary charitable purpose, the gift will be used for a second charitable purpose, but makes no provision concerning the failure of the second purpose, and both purposes fail, cy pres may be applied.") (citing *Burr v. Brooks*). As one commentator recognized, if the alternative distribution "requires cy pres in order to be viable, the presumption for saving the initial gift is strengthened. This is because the second gift's only practical advantage over the first—that it can be plugged in automatically—no longer remains." Chester, *Cy Pres or Gift Over*?, 23 Suffolk U.L. Rev. at 62 (citing *Burr v. Brooks*). The Third Restatement of Trusts has also expressly adopted this approach:

> A trust provision expressing the settlor's own choice of an alternative charitable purpose will be carried out, without need to apply the cy pres doctrine, assuming not only that the initially specified purpose cannot be given effect or continued *but also that the alternative purpose is one that properly can be given effect.*

Restatement 3d § 67, cmt. b (emphasis added).

The approach expounded in *Burr v. Brooks* comports with the policies underlying *cy pres*. Fundamentally, the doctrine exists to save a charitable trust from failure while preserving the settlor's original, charitable intent. *Restatement 3d* § 67, cmt. b. Thus where both the primary and alternative charitable distributions are impracticable, courts may presume that the settlor would have intended one or both purposes to survive under application of *cy pres*.

Here, the deeds provide that if the first purpose—an educational nature preserve operated by HHS—fails, the property passes to the State "for and as a public park." This secondary purpose, however, is likewise impracticable. The DLNR determined that the land was unsuitable for use as a public park, and that only a portion of the land could be used as a forest preserve and watershed. Thus, the Legislature approved the proposed land exchange, and the State filed a joinder in HHS's Petition. Redirecting the land to the State would not effectuate Mrs. Lucas's charitable intent. Rather, it would result in the failure of the trust. As in *Burr,* both the primary and alternative purposes of the gift are impracticable, as the land cannot feasibly be used for either purpose. *Burr,* 30 Ill. Dec. 744, 393 N.E.2d at 1095. The Probate Court therefore erred in concluding that the gift over rule precludes application of *cy pres*.

HHS, Tiana Partners, and the State request this court to remand the case with instructions to apply *cy pres* to approve the proposed land exchange free and clear of the use restrictions. We agree that *cy pres* so applies in this case.

As discussed above, *cy pres* applies where: (1) property is given in trust for a charitable purpose; (2) it is impracticable to carry out the specified charitable purpose; and (3) the settlor manifested a general intent to devote the property to charitable purposes. *Supra* part IV(A). Here, those elements are met. Mrs. Lucas conveyed the land to HHS for charitable purposes for the use and benefit of the public. The parties do not dispute, and the evidence readily establishes, that Mrs. Lucas's specified purposes for the land are both impracticable.

The conveyance also satisfies the traditional requirement of general charitable intent. In determining whether the settlor possessed a general charitable intent, courts consider the language of the instrument, the nature and duration of the gift, the character of the recipient

organization, the presence or absence of a reversionary clause, and the mode for effectuating the gift. Am.Jur.2d § 154. Courts may also consider extrinsic evidence of the settlor's probable intent. Am.Jur. *Proof of Facts* 3d § 20; *accord Bogert on Trusts* § 437, at 160-73. If the settlor intended the gift to "be continued within the limits of its general purpose" rather than cease upon the failure of its specific purpose, this constitutes a general intent. *Obermeyer*, 140 S.W.3d at 24. Gifts in support of educational goals often demonstrate a general charitable intent because there is a perpetual need and use for them. *Id.; accord Bogert on Trusts* § 436, at 157.

In this case, the deeds convey the land "for and as a charitable gift" for the purpose of educating the public. They specify an alternative means of achieving the charitable purpose in the event the first method fails. The deeds thus confirm that Mrs. Lucas did not intend the trust to fail should use of the land become impracticable. *See Bogert on Trusts* § 437, at 165-70 (gift over to another charitable purpose confirms general charitable intent); *accord Scott on Trusts* § 39.5.2, at 2713; *First Nat'l Bank of Chicago*, 92 N.E.2d at 74. The declaration of Mrs. Lucas's daughter, evidencing Mrs. Lucas's probable wishes regarding the property had she been alive, further supports a general charitable intent.

Finally, the proposed land exchange closely conforms to Mrs. Lucas's original purpose. The deed restriction contemplates a nature preserve to function "as an educational experience for the public." Mrs. Lucas's daughter attested that her mother intended to generally benefit the people of Hawai'i by enabling HHS to provide "an educational experience for the public." The Educational Fund preserves those goals by promoting educational programming that focuses on the natural environment. This use of the funds also comports with Mrs. Lucas's lifelong interest and involvement with HHS. It accomplishes her probable wishes regarding the use of the land had she been aware of the obstacles preventing its development. Unlike in *Burr v. Brooks*, the interested parties all agree that the proposed land exchange effectuates Mrs. Lucas's charitable intent as nearly as possible. *Cf. Burr,* 30 Ill. Dec. 744, 393 N.E.2d at 1095. This unanimous accord further supports applying *cy pres* to approve the transaction. *See Restatement 2d* 399, cmt. f; *Bogert on Trusts* § 442, at 258 (recognizing that wishes of trustees, beneficiaries, attorney general, and other interested parties warrant consideration). There is no evidence, either extrinsic or in the deeds themselves, to support a contrary conclusion.

V. CONCLUSION

For these reasons, we conclude that the Probate Court erred in concluding that *cy pres* is not applicable to approve the proposed transaction on the basis that the deeds provide for an alternative distribution. Accordingly, we vacate the Judgment and remand to the Probate Court to apply *cy pres* consistent with this Opinion.

Class Discussion Tool One

Aaron's will contains the following provision:

> "The rest, residue and remainder of my estate, real, personal, intangible and mixed, of whatsoever kind and wherever situated I leave in trust to my wife Diane for her life. After Diane dies, the funds in the trust are to go to State Bank in trust to be used to send five members of my church choir a year to the Oak River Wellness Center. The trustee is to use the annual net income of the trust property to fund the trips, and has the discretion to select the five members. The trustee must select the five members by May 1st of each year. The trust is to continue until the death of Pastor Ben Franklin and Choirmaster Joy Williams. Then, the trust corpus is to be divided between any of my living blood descendants."

After Diane died, the trustee started following the terms of the trust. A few years later, the church choir decided to go in another direction, so the church discharged Williams. The church hired Kirk, Pastor's Franklin's son. Kirk recruited younger members. Thus, the average age of the choir went from 58 to 24. Given the youngness of the choir and the congregation, Kirk decided to start performing hip hop gospel music. He added other instruments, including drums and cymbals, to accompany the piano and organ.

During a storm, the roof of the church started leaking. As a result, the church's piano and organ were damaged. The church does not have the money to replace the equipment. The members of the church believe that, in order to make a joyful noise unto the Lord, they need music. Therefore, they refuse to continue performing without music. The choir requested that the trustee use some of the annual trust income to purchase new musical equipment.

The town of Play, located 45 minutes away from the church, recently opened up a new age spa. Oak River is a resort town located four hours away from where the church is located. The members of the choir asked the trustee to send members to the new spa instead of the wellness center. It would be cheaper to go to the new spa than the wellness center, so more than five choir members would be able to attend.

Pastor Franklin was injured in a car accident and is in a coma. It is unclear when, or if, he will regain consciousness. He is not brain dead.

The trustee would like to know what he should do. Please analyze all of the relevant legal issues.

Class Discussion Tool Two

Judy was a practicing vampire priestess. During her lifetime, she spent a great deal of money supporting activities sponsored by members of the local vampire temple. Judy believed that vampires had evolved and were able to live normal lives. As a consequence, Judy and the members of the temple believed that modern vampires could walk in sun light without being injured. The members of the temple also believed that, although vampires were immortal, they aged. In her will, Judy created the following trust. "I leave one million dollars in trust to the town of Bloodville in order for them to build a retirement home for aging vampires."

After Judy died, the City Council of Bloodville accepted the trust funds. At that time, the vampire temple had been destroyed by fire and most of the practicing vampires had left the area. The City Council voted to use the million dollars in the trust to build an apartment complex for low-income senior citizens who lived in the town.

After the apartment complex was partially built, the executor of Judy's estate sued to get an injunction to prevent the City Council from using the trust money to build the apartment complex. What result?

Chapter 8 - Supervision/Enforcement of Charitable Trusts

The charitable trust is considered to be a public trust. Instead of the beneficiary of the trust being a specific ascertainable person, the trust must be meant to benefit a particular organization or class of persons. Since a charitable trust is a public trust, unlike the case involving a private trust, the beneficiary of the charitable trust does not have standing to force the trustee to live up to his fiduciary duties. The state attorney general or another government official has the authority to enforce the provisions of a charitable trust. Unless the trust provides otherwise, the donor does not have authority to enforce the charitable trust.

8.1 Donor Standing

***Russell v. Yale University*, 737 A.2d 941**

LAVERY, J.

The plaintiffs, an heir of the settlor of a charitable trust, alumni donors and students of the named defendant, Yale University (Yale), appeal from the judgment of dismissal rendered by the trial court in granting the Yale's motion to dismiss, which asserted that the trial court lacked subject matter jurisdiction on the ground that the plaintiffs lacked standing. On appeal, the plaintiffs claim that the trial court improperly granted Yale's motion to dismiss because, where the attorney general elects not to participate in a proceeding involving a charitable trust, a person with a "special interest" may appear on behalf of the trust to protect the interests of the beneficiaries and that the plaintiff heir, alumni donors and students have the special interest necessary to confer standing on them. We affirm the judgment of the trial court.

The following facts are necessary for our resolution of this appeal. Yale is a nonprofit corporation organized pursuant to a 1745 charter, which was reconfirmed in article eighth, § 3, of the constitution of Connecticut in 1965. The settlor, John W. Sterling,

died in 1918. At that time, he left, in trust, money for the erection of a building or buildings that would constitute a fitting memorial reflecting his gratitude and affection for his alma mater, Yale. The trustees were given broad discretion in the disposition of these funds and directed, if their discretion made it advisable, to consult with Sterling's sisters with regard to the use of the funds. The will directed that the money not be used for the purchase of land or as part of Yale's general fund. In 1930, the Sterling trustees voted to contribute money for the erection and maintenance of the divinity school quadrangle that bears Sterling's name. No other restrictions existed in the will and no property rights were reserved for Sterling's heirs by the will.

The divinity school is one of Yale's graduate professional schools, which educates men and women for the Christian ministry and provides theological education for persons engaged in other professions. Prior to the commencement of this action, the president of Yale appointed a committee to undertake a comprehensive study of the divinity school and its future. In late 1996, the Fellows of the Yale Corporation approved certain recommendations, as made to them by the president and dean of the divinity school, calling for the reorganization of the divinity school, including the demolition of large portions of the Sterling Divinity Quadrangle.

The plaintiffs took exception to the reorganization and instituted this action seeking a temporary and permanent injunction enjoining Yale from carrying out the reorganization, a declaratory judgment that Yale's reorganization plan constitutes an abuse of discretion as a trustee of a public charitable trust, and an accounting of all gifts and donations Yale received for the benefit of the divinity school and of charges against the divinity school's endowment. Yale moved to dismiss the complaint on the ground that the plaintiffs lack standing to bring suit. The trial court granted the motion to dismiss and the plaintiffs appealed. Additional facts will be addressed as necessary.

"It is a basic principle of our law ... that the plaintiffs must have standing in order for a court to have jurisdiction to render a declaratory judgment.... A party pursuing declaratory relief must ... demonstrate, as in ordinary actions, a justiciable right in the controversy sought to be resolved, that is, contract, property or personal rights ... as such will be affected by the [court's] decision.... When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue and not

whether the controversy is otherwise justiciable, or whether, on the merits, the plaintiff has a legally protected interest that the defendant's action has invaded....

"Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved.... The fundamental test for determining aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action].... The determination of aggrievement presents a question of fact for the trial court and a plaintiff has the burden of proving that fact.... The conclusions reached by the trial court cannot be disturbed on appeal unless the subordinate facts do not support them.... Where a plaintiff lacks standing to sue, the court is without subject matter jurisdiction." (Citations omitted; internal quotation marks omitted.) *Steeneck v. Univeristy of Bridgeport*, 235 Conn. 572, 578-80, 668 A.2d 688 (1995).

"A motion to dismiss admits all facts well pleaded and invokes any record that accompanies the motion, including supporting affidavits that contain undisputed facts *Barde v. Board of Trustees*, 207 Conn. 59, 63, 539 a.2d (1988).. A motion to dismiss raises the question of whether a jurisdictional flaw is apparent on the record or by way of supporting affidavits. *Bradley's Appeal from Probate*, 19 Conn. App. 456, 461-62, 563 A.2d 1358 (1989)." *Carl J. Herzog Foundation Inc. v. University of Bridgeport*, 41 Conn. App. 790, 793, 677 A.2d 1378 (1996), *rev'd on other grounds*, 243 Conn. L. 699 A.2d 995 (1997).

Although Carl J. *Herzog Foundation, Inc. v. University of Bridgeport*, 243 Conn. 1, 699 A.2d 995 (1997) concerns the interpretation of a statute, in that case, our Supreme Court set out, at length, the common-law rule with regard to standing to bring suit against a charitable entity, which controls the issues here. "At common law, a donor who has made a completed charitable contribution, whether as an absolute gift or in trust, had no standing to bring an action to enforce the terms of his or her gift or trust unless he or she had expressly reserved the right to do so. Where property is given to a charitable corporation and it is directed by the terms of the gift to devote the property to a particular one of its purposes, it is under a duty, *enforceable at the suit of the [a]ttorney [g]eneral,* to devote the property to that purpose.... At

common law, it was established that [e]quity will afford protection to a donor to a charitable corporation in that *the [a]ttorney [g]eneral may maintain a suit* to compel the property to be held for the charitable purpose for which it was given to the corporation.... The general rule is that charitable trusts or gifts to charitable corporations for stated purposes are [enforceable] at the instance of the [a]ttorney [g]eneral.... It matters not whether the gift is absolute or in trust or whether a technical condition is attached to the gift." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Id.*, at 5-7, 699 A.2d 995; *see also* 4A A. Scott, Trusts (4th Ed. Fratcher 1989) §3481.

"[T]he donor himself has no standing to enforce the terms of his gift when he has not retained a specific right to control the property, such as a right of reverter, after relinquishing physical possession of it.... As a matter of common law, when a settlor of a trust or a donor of property to a charity fails specifically to provide for a reservation of rights in the trust or gift instrument, neither the donor nor his heirs have any standing in court in a proceeding to compel the proper execution of the trust, except as relators.... There is no such thing as a resulting trust with respect to a charity.... Where the donor has effectually passed out of himself all interest in the fund devoted to a charity, neither he nor those claiming under him have any standing in a court of equity as to its disposition and control." (Citations omitted; internal quotation marks omitted.) *Car J. Herzog Foundation, Inc. v. University of Bridgeport*, 243 Conn. at 7-8, 699 A.2d 995.

The trial court found the facts noted previously in this opinion and concluded that if Sterling were alive today, he would have no right to enforce conditions of his gift, and that, therefore, his heir and successor lacks standing to bring this suit, as well. We agree. *See id.* at 5-6, 699 A.2d 995.

For the same reasons, the trial court also concluded that the plaintiff alumni donors also lack standing as contributors of unrestricted charitable gifts to their alma mater and nothing about the fact that they are graduates of the divinity school gives them standing. We agree with that conclusion as well. *See id.*

With regard to the third group of plaintiffs, the students, the trial court determined that they also lack standing. We agree with the trial court and hold that, absent special injury to a student or his or her fundamental rights, students do not have standing to challenge the manner in which the administration manages an institution of higher education. *See Trustees of*

Dartmouth College v. Woodward, 17 U.S. 518, 641, 4 L.Ed. 629 (1919), *Miller v. Alderhold*, 228 Ga. 65, 184 S.E.2d 172 (1971). The plaintiff students lack standing because they alleged no injuries to themselves or to any of their fundamental rights, collectively or individually.

We hold, therefore, that the trial court properly concluded that, although the plaintiffs are sincere in their efforts to maintain the divinity school as a leader in theological education and preparation for the Christian ministry and they acted in good faith based on motives that are beyond question, the plaintiffs, as a matter of law, lack standing to adjudicate the equitable remedies they seek.

The judgment is affirmed.

***Hatdt v. Vitae Foundation*, 302 S.W.3d 133**

KAREN KING MITCHELL, Judge.

Edwin Hardt and Karl Hardt ("the Hardts") appeal from the circuit court's judgment dismissing for lack of standing their petition to enforce their charitable gift and the conditions thereon to the Vitae Foundation, Inc. ("Vitae"). We affirm.

Factual and Procedural Background

Appellants Edwin Hardt and Karl Hardt are executors of the estate of Selma J. Hartke. Pursuant to Ms. Hartke's will, they were given discretion to distribute the remainder of her estate to charitable organizations of their choosing. The Hardts determined to use a large portion of the estate to support the pro-life cause. In January 2001, the Hardts requested a meeting with Vitae, a non-profit charitable corporation describing itself as an "advertising campaign for life ... [that] research[es], produce[s] and purchase [s] airtime in an effort to encourage a greater respect for human life, restore traditional values in our American culture, and reduce the number of abortions by using mass media education." The Hardts requested that Vitae submit a proposal for a possible grant.

In March 2001, the Hardts met with Sandra Faucher, Vitae's then-National Project Director, and Vitae's President Carl Landwehr. Vitae presented a grant proposal to the Hardts at that meeting, which focused on ten of the top twenty-five media markets in the United States. The proposal stated that Vitae planned to air media campaigns in all twenty-five media markets by 2003 but that Vitae lacked the funding to effectuate this goal in the

ten markets contained in the proposal. Vitae stated that airing media campaigns in all of the top twenty-five markets was vitally important because television advertising was the most effective way of reaching women most vulnerable to abortions. The proposal set out a dollar figure for funds needed in each of the ten markets in order to fulfill Vitae's goals of airing media campaigns there. To illustrate why the Hardts' gift was needed, the proposal also contained a brief description of each market's importance, the type of broadcast to be used, the relative cost of broadcasting there, and the current status of local financial support.

Ms. Faucher suggested at the March 2001 meeting that any gift from the Hardts be used as a "matching gift," to be spent in equal proportions to funds raised by Vitae in each of the ten markets. By utilizing this 50/50 matching concept, the grant would entice other donations in the various markets to ensure a lasting donor base for future media campaigns.

On March 9, 2001, following the meeting and proposal, the Hardts granted to Vitae $4,242,000 ("2001 gift"), the total amount identified in the proposal as needed to air media campaigns to the ten specified markets. A letter of intent accompanied the grant to Vitae, which stated the grant was given:

> to permit the development of Florida, Oregon, Ohio, Maryland, Texas, Arizona, and Washington and Generation Y in San Francisco and Los Angeles as set forth in the proposal prepared for Ed Hardt dated March 2001. It is their understanding that the Foundation will use these funds as a challenge gift so that the funds will not be fully consumed in the initial media campaign but will be the basis for establishing an ongoing presence in these markets.

On March 12, 2001, receipt of the gift was acknowledged and the letter of intent was signed by Landwehr as "agree[ing] to the terms and conditions of the gift."

In November of 2002, the Hardts granted an additional $4,000,000 from the estate to Vitae ("2002 gift"). Of this gift, $3,000,000 was to be used as matching funds for media campaigns in markets of Vitae's choosing. The additional $1,000,000 was to be used by Vitae for the continued development of a website aimed at teens without mention of matching funds. This additional $1,000,000 is not at issue in this suit.

In August of 2003, Ms. Faucher contacted the Hardts' counsel and informed him

that some portions of the Hardts' grant to Vitae were not being used in accordance with the conditions placed on the gifts but, instead, were being expended for administrative expenses, including the hiring of significant new staff members, and were being spent without the receipt of matching funds. She also told the Hardts' counsel that Vitae's promised expansion of media campaigns in new markets was not occurring.

On September 8, 2003, the Hardts requested an accounting from Vitae with respect to both gifts. On September 26, 2003, Landwehr sent a letter to the Hardts indicating that subsequent to their gifts, Vitae had adopted a new development strategy. The Hardts later learned that little money was being used for media campaigns at all.

On January 13, 2004, Landwehr sent a letter to the Hardts describing a "radically different" development strategy that he had implemented subsequent to the Hardts' gifts. The new strategy "scaled back" Vitae's plans to enter additional media markets and, instead, focused on building relationships with "high level influential leaders" in the various markets and building an "operational support team" to assist with new fundraising.

The Hardts claim that the last accounting provided to them by Vitae, dated June 30, 2005, evidences extensive misuse of the 2001 gift as:

> (a) nearly half of the funds expended have been spent on administrative expenses, in fact, in multiple markets no media expenditures have been made whatsoever,
>
> (b) the gift has been spent in the absence of the receipt of matching funds, and (c) funds have been spent in markets not part of the terms of the 2001 gift.

The Hardts also claim that they have not received sufficient information from Vitae to ascertain whether Vitae has fully complied with its restrictions in regard to the 2002 gift.

On August 6, 2008, the Hardts filed a petition in the Cole County Circuit Court seeking: (a) a detailed accounting of both the 2001 and 2002 gifts, (b) the restoration of any part of either gift spent in contravention of conditions placed on the gifts, (c) an injunction preventing any future expenditure of funds from either gift in any manner inconsistent with the applicable conditions, or (d) in the alternative, the transfer of the 2001 gift to another charitable organization of the Hardts' choosing.

On September 22, 2008, Vitae filed a motion to dismiss the Hardts' petition. The

motion was heard by the trial court on November 25, 2008. On December 5, 2008, the trial court granted the motion to dismiss and held that the Hardts lacked standing to bring their claims.

Standard of Review

When reviewing the trial court's granting of a motion to dismiss, "we engage in an essentially de novo review of an issue of law." *In re Swearingen*, 42 S.W.3d 741, 745 (Mo. App. W.D. 2001) (internal quotation marks omitted). We assume all of the facts alleged in the plaintiffs' petition are true. *Id.* However, "it is not enough that the plaintiff alleges a cause of action existing in favor of someone; he must show that it exists in favor of himself, and that it accrued to him in the capacity in which he sues." *Voelker v. Saint Louis Mercantile Library Ass'n*, 359 S.W.2d 689, 693 (Mo. 1962) (internal quotation marks omitted).

Legal Analysis

At common law, only the Attorney General had standing to enforce the terms of a charitable gift. *Id.* at 695. This rule applied to gifts both to charitable trusts and charitable corporations and was made primarily to prevent potential beneficiaries without a "special interest" in the gift from "vex [ing]" public charities with "frequent suits, possibly based on an inadequate investigation." *Id.* Since the Attorney General represents the public at large, he can enforce the terms of the charitable donation on behalf of all of the beneficiaries, which for public charities means the general public.

Donors were also prevented from enforcing their gifts in court, because non-trustee donors retained no interest in the gift, "except the sentimental one that every person who contributed" to the charity would be presumed to have. *Id.* at 694.. Accordingly, the donor was left with no ability to make sure the charitable organization used the gift according to the gift's terms and conditions.

An exception to this rule existed, however, when the donor specifically made the charitable gift subject to a condition subsequent to the donation. In these cases, if the charitable trust or charitable corporation failed to perform the specified act, the gift would revert back to the donor or to a designated third party. *L.B. Research & Educ. Found v. UCLA Found*, 130 Cal.App. 4th 171, 29 Cal.Rptr.3d 710, 713 (2005). The donor of such a gift had standing to enforce the conditions placed on the gift because it retained an interest in the

property. *Id.* at 714. The parties agree that this exception does not apply in this case.

Recently, there has been a trend in the law to give donors more control over the enforcement of the terms of their charitable gifts. In 2005, Missouri adopted the Uniform Trust Code ("MUTC"). This law specifically granted settlors of *charitable trusts* the ability to "maintain a proceeding to enforce the trust." § 456.4-403.3 RSMo. The law was also made retroactive to apply to trusts created before its enactment. 456.11-1106 RSMo The law, on its face, clearly applies *only* to trusts.

The Hardts do not claim that their gift was made in trust, constructive or otherwise. They simply contend that the MUTC also applies to gifts made, absent a trust, to charitable corporations. To support this contention, they cite *Voelker,* a case from 1962. In *Voelker,* the court specifically held that only the Attorney General had standing to sue but did remark that "many of the principles applicable to charitable trusts are applicable to charitable corporations." 359 S.W.2d at 694. (internal quotation marks omitted).

The Hardts argue that because common law charitable trust principles have often applied to charitable corporations, newly enacted statutes addressing only charitable trusts must also apply to charitable corporations. The extension of common law charitable trust principles to gifts to charitable corporations is not enough to authorize this court's extension of the MUTC, a statutory provision that on its face applies only to charitable trusts, to gifts made outright to charitable corporations.

Where the language of a statute is clear and unambiguous, there is no room for construction. *In re Brams Trust #2 v. Haydon*, 266 S.W.3d 307, 312 (Mo. App. W.D. 2008).. If a term is defined within a statute, a court must give effect to the legislature's definition. *Jones v. Dir. of Revenue*, 832 S.W.2d 516, 517 (Mo. Banc. 1992). Not only does the MUTC grant only the settlor of a charitable trust the right to maintain an action to enforce conditions of a trust, it also defines "charitable trust" and "settlor." A "charitable trust" is "a trust, or portion of a trust, created for a charitable purpose," and a "settlor" is "a person, including a testator, who creates, or contributes property to, a trust." *See* §456.1-103 RSMo. As such, the MUTC is limited by its unambiguous terms to charitable trusts, and this court lacks the authority to apply common law precedent to construe the legislation in a manner that is inconsistent with the express language of the MUTC.

Moreover, just this year, Missouri adopted the Uniform Prudent Management of Institutional Funds Act ("UPMIFA"), which expressly applies to both charitable trusts and nonprofit corporations. This law grants charitable organizations more discretion than they may have had under the common law to make prudent investment decisions regarding charitable funds and endowments. While the UPMIFA stresses that charitable fund managers give primary consideration to the donor's intent as expressed in the gift instrument, it does not expressly grant the donor standing to enforce this intent as the MUTC does in the case of charitable trusts. On the contrary, the prefatory note explicitly acknowledges that "the [A]ttorney [G]eneral *continues* to be the protector both of the donor's intent and of the public's interest in charitable funds." National Conference of Commissioners on Uniform State Laws, Preferatory Note, Uniform Prudent Management of Institutional Funds Act, at 4 (2006) (emphasis added). The UPMIFA is retroactive and does, therefore, apply to the Hardts' gifts. Thus, the two statutory schemes are inconsistent with respect to the enforcement of donor intent. A comment to the UPMIFA specifically acknowledges this possibility, stating, "[t]rust precedents have routinely been found to be helpful but not binding authority in corporate cases." In fact, the drafters of the UPMIFA reportedly considered an amendment granting standing to donors, and yet the amendment is absent from the final version adopted by the drafting committee. *See* Marion R. Freemont–Smith, *The Search for Greater Accountability of Nonprofit Organizations: Recent Legal Development and Proposals for Change,* 76 Fordham L.Rev. 609, 621-22 (2007). For these reasons we find no statutory authority granting standing to the Hardts to enforce the restrictions of their gift.

The Hardts' second argument is that even if there is no statutory authority giving them standing to sue, Missouri should follow New York, which recently expanded the common law to allow donors to sue to enforce the terms of charitable gifts. In *Smithers v. St. Luke's-Roosevelt Hospital Center*, 281 A.D.2d 127, 123 N.Y.S2d 426, 427 (N.Y. App. Div. 2001), a man made a charitable gift to a hospital over the span of many years. His gift was subject to many restrictions on how the money could be spent, and the hospital expressly agreed to his restrictions. *Id.* at 428. The donor kept a close watch on the hospital's actions, withholding future installments of the gift until he was satisfied that the hospital was complying with his wishes. *Id.* at 427-28.

Years after the gift was complete, the donor passed away. His widow became

concerned that the hospital was not using the charitable gift pursuant to the restrictions. She notified the Attorney General, who became involved with the enforcement of the restrictions. *Id.* at 429. Not satisfied with the vigilance of the Attorney General, the widow sued to enforce the restrictions. *Id.* at 430-31. The court noted that New York statutes rested standing to enforce restrictions with the Attorney General. This was true for both charitable trusts and absolute gifts. *Id.* However, the court found that the common law granted the donor standing as well, stating, "[t]he donor of a charitable gift is in a better position than the Attorney General to be vigilant and, if he or she is so inclined, to enforce his or her own intent." *Id.* at 434. There was a vigorous dissent, which argued that the majority impermissibly expanded the common law. *Id.* at 440.

Arguing that "public policy" favors granting donors standing to enforce restrictions on charitable gifts, the Hardts urge this court to follow New York's example. They claim that the donor's interest is distinct from that of the Attorney General and hint that the Attorney General might not be vigilant or might even have a conflict of interest in enforcing the restrictions of the gift. This argument is not persuasive. In this case, unlike in *Smithers*, there is no indication in the record that the Attorney General was even notified of Vitae's failure to comply with the conditions. The Hardts apparently did not attempt to involve the Attorney General in the matter, taking it directly to court based upon their own interests. While it is conceivable that there may be times when the Attorney General does not sufficiently represent a donor's interest, it has not been shown to be the case here, and we find no reason to expand the common law to give standing to the Hardts. Indeed, in light of the legislature's passage of the UPMIFA, it would not be appropriate for us to do so.

Finally, the Hardts claim that the trial court erred in dismissing their action because the cy pres doctrine could be used to transfer their gift to another charity that will act consistent with the conditions they placed on the gift. The trial court's order stated that "Missouri law is clear that the cy pres doctrine applies only to trusts." This is a misstatement of Missouri law. *Obermeyer* plainly states, "[w]hile acknowledging the historical limitation of the cy pres doctrine to trusts, the doctrine is appropriate in certain cases involving gifts to charitable corporations." 140 S.W.3d at 23. The *Obermeyer* court then goes on to apply the doctrine to facilitate the completion of a charitable gift. *Id.* at 24-27.

Despite the trial court's misreading of *Obermeyer* we do not find the doctrine of cy

pres applicable to this case. Cy pres "is based on the concern of equity to protect and preserve charitable bequests." *Id.* at 22. Cy pres means "as near as possible" to the intent of the donor and is used to prevent, if possible, charitable gifts from failing. *Id.* at 23. The *Obermeyer* case is typical of those to which cy pres applies. In that case, a donor left a portion of his estate to his nieces and nephews for the duration of their lives, with the residue to go to a particular fund at the dental school of Washington University. *Id.* at 20. By the time the nieces and nephews were all deceased, neither the fund nor the dental school was in existence. *Id.* The court found, looking to both the gift instrument and extrinsic evidence, that the donor had the general donative intent to give the money to Washington University to be used for the support of dental education and so allowed the gift to be completed to the University.

This case is nothing like *Obermeyer* or any other case the Hardts cite using or considering the cy pres doctrine. Here, the gift was completed. The donee did not cease to exist. There was not a substantial separation of time between the granting of the gift and its completion. The Hardts simply feel that Vitae is not using the gift pursuant to the restrictions imposed when the gift was given. Accordingly, cy pres is not applicable. Furthermore, if cy pres were appropriate, the Hardts would still face their standing challenge.

Assuming the Hardts' gift to Vitae is subject to legitimate, enforceable restrictions and that Vitae is not using the gift appropriately pursuant to those restrictions, the Hardts' course of action should be to notify the Attorney General and to ask him to enforce the restrictions. Therefore, and for all of the above reasons, we affirm the judgment of the trial court.

8.2 Beneficiary Standing

***Warren v. Board of Regents of the University System of Georgia*, 544 S.E. 2d 190**

MILLER, Judge.

Plaintiff-appellants Carl S. Warren and Earl Davis contributed money to a charitable trust establishing the Herbert E. Miller Chair in Financial Accounting, an endowed chair in the Terry College of Business at the University of Georgia. They subsequently sued the Board of Regents of the University System of Georgia, the University of Georgia Foundation, and Russell Barefield as the Director of the J.M. Tull School of Accounting at

the University of Georgia, alleging a breach of fiduciary duty under the terms of the trust. In essence, plaintiffs claimed the Miller Chair was harmed when Barefield, allegedly ignoring both appointment criteria under the trust and university hiring procedures, named an unqualified, non-certified Public Accountant personal friend as the first holder of the Miller Chair in Financial Accounting and caused more than $135,000 to be improperly paid to that holder between **192 1992 until his resignation in 1996. Plaintiffs prayed for an accounting, the return to the trust of all money paid to the chairholder, and the disqualification of Barefield as administrator or trustee.

Defendants admitted the chronology while denying the material allegations regarding breach of fiduciary duty and immediately moved to dismiss the complaint. The trial court granted these collective motions, concluding that standing to enforce the terms of the charitable Miller Trust is granted exclusively to the Attorney General under OCGA § 53-12-115. The trial court further determined that there was no just reason for delay and made the dismissal final under OCGA § 9-11-54(b).

Plaintiffs appealed directly to the Supreme Court of Georgia, which transferred the case to the Court of Appeals. They contend dismissal was erroneous because they have a special interest that confers standing to enforce the trust and because the Attorney General ought to be disqualified. We affirm the dismissal due to lack of standing.

1. Plaintiffs argue that the Attorney General is not the only entity authorized to bring suit to enforce the terms of a charitable trust where the plaintiffs have a special interest.

It is undisputed that the Miller Trust is a charitable trust, in that it promotes human civilization through the advancement of education by paying a salary supplement to the holder of the endowed chair. Since 1952, Georgia law has provided,

> [i]n *all cases* in which the rights of beneficiaries under a charitable trust are involved, the Attorney General ... *shall represent* the interests of the beneficiaries and the interests of this state as parens patriae *in all legal matters* pertaining to the administration and disposition of such trust.

Scott's treatise on trusts explains:

> It is frequently said in the cases that the Attorney General alone has [the] power to maintain suits for the enforcement of charitable trusts. This,

> however, is not strictly true. It is clear, for example, that where there are several trustees, one of them may maintain an action against the others to enforce the trust or to compel the redress of a breach of trust.

In such a case, or where suit is brought by others to invalidate a charitable trust, the Attorney General is a necessary party. The language of OCGA § 53-12-115 does not address "special interests" and does not forbid co-trustees from bringing suit to enforce the charitable trust. Nor does that Code section expressly make the Attorney General (or district attorney) the sole or exclusive representative of the beneficiaries. Its mandatory language clearly makes that officer the primary or presumptive representative and so a necessary party. We note that the Restatement provides:

> A suit can be maintained for the enforcement of the charitable trust by the Attorney**193 General or other public officer, or by a co-trustee, or by a person who has a *special interest* in the enforcement of the charitable trust, but not by persons who have no special interest or by the settlor or his heirs, personal representatives or next of kin.

The Restatement is consistent with Georgia law allowing certain individuals who have a special interest in a charitable trust to maintain an action to enforce its provisions. Since the General Assembly is presumed to enact legislation with full knowledge of the existing condition of the law, including decisions by the courts, we conclude that the 1952 act as amended does not make the Attorney General (or district attorney) the exclusive entity authorized to initiate a suit to enforce a charitable trust, where individuals can demonstrate a special interest.

2. Nevertheless, we conclude that plaintiffs, either as contributors to the trust or as faculty members who might be eligible to be named to the Miller Chair, fail to demonstrate that special interest.

The rule is settled that an individual member of the public has no right, as such, to maintain a suit to enforce or administer a benevolent or charitable trust. While a person having a special interest is sometimes permitted to maintain a suit to enforce a charitable trust, the mere possibility that one may be a beneficiary of a charitable trust does not give him standing to maintain a suit to enforce the trust. Thus, those who can enjoy the status of

beneficiaries *only when selected by the trustees* are generally held to have no right to initiate a suit for the enforcement of a charitable trust. The reason is that if any third person were permitted to sue as a matter of right it would ... subject the charity to harassing litigation.

Similarly, the comments to the Restatement confirm that "[t]he mere fact that a person is a possible beneficiary is not sufficient to entitle him to maintain a suit for the enforcement of a charitable trust." To authorize an individual to enforce a charitable trust in Georgia, the plaintiff must have some pecuniary interest in it or show that she is a beneficiary or else show in some way she may avail herself of its educational advantages.

A charitable trust for the promotion of education may provide that particular persons shall be entitled to a preference to benefits under the trust, in which case any such person can maintain an enforcement suit. But the selection criteria of the trust agreement in this case do not identify either plaintiff, by name, position, or association, as a member of a class of potential beneficiaries entitled to a preference. Indeed, the trust specifies that the "first chairholder will be a new appointee to the University of Georgia faculty," thus excluding a current or former faculty member. Plaintiffs have no standing to enforce this charitable trust by virtue of their positions as faculty members arguably eligible to be selected by Barefield to hold the Miller Chair.

3. A suit for the enforcement of a charitable trust cannot be maintained by the settlor or his heirs or personal representative as such. Thus, the fact that they contributed money to the trust does not confer upon plaintiffs any "special interest" in the enforcement of the trust that the Attorney General cannot adequately represent. The trial court did not err in failing to rule that plaintiffs had standing on these bases.

4. The second enumeration contends the Attorney General should be disqualified as the representative of the beneficiaries because he also represents the Board of Regents. In our view, this contention is without merit.

Under the Disciplinary Standards of the State Bar of Georgia, the term "client" does not include a public agency when represented by a full-time public official, such as the Attorney General. Nothing in the Code of Professional Responsibility prohibits a full-time public lawyer, representing this State or its agencies, from taking a position adverse to the State, its agencies or officials, when such action is authorized or required by the Constitution

or statutes of this State. Moreover, the remedy for a conflict of interest is to involve the district attorney or appoint a Special Assistant Attorney General. Such conflict certainly would not mandate that persons with no "special interest" (such as plaintiffs here) be granted standing to enforce a charitable trust.

Judgment affirmed.

Note-Beneficiaries With Special Interests

A beneficiary who has a special interest has standing to sue to enforce the provisions of a charitable trust. That person is required to demonstrate that he is entitled to receive a benefit under the trust that is not available to the general public or to an average beneficiary.

Problems

In which of the following situations might a beneficiary be deemed to have a special interest in the trust?

a). Garlock left money in trust to build a dental school at a local university. The university took the money and constructed the dental school. Ten years later, when Joe was in his second year at the dental school, the university announced that it was closing the dental school and using the money to open up a nursing school. Does Joe have standing to sue the university on behalf of the trust?

b). Thelma left money in trust to build a charitable home for low-income senior citizens. The facility was built and a board of trustee was created to operate it. Twenty-years later, the Board decided to relocate the home to a new neighborhood. Bertha, a resident of the home, was upset about the proposed relocation because it would take her far away from her family, her doctor and her church. Does Bertha have standing to sue the Board on behalf of the trust?

c). Warren left money in trust to construct a new building for his church. The church took the money, but instead of erecting a new building the board decided to use the money to renovate the old building. Claire, a member of the church, suspected that the pastor and the board were misappropriating the trust money. Does Claire have standing to sue the Board on behalf of the trust?

e). Gilbert left money in trust to provide scholarships for law students. The dean of the law

school decided to use the money for faculty writing grants instead of for scholarships. Clifford, a scholarship recipient, cannot afford to attend law school without the scholarship. Does Clifford have standing to sue the Board on behalf of the trust?

Chapter 9 - Treatment of Trust Property

The most important aspect of the trust is the trust property. The primary purpose for creating a trust is to provide for the needs of the beneficiaries. That goal cannot be accomplished if the trust property is destroyed or depleted. The trustee is responsible for collecting and protecting the trust property. He or she has the legal title to the property and owes a fiduciary duty to the beneficiary of the trust to preserve the property. In addition, the trustee has a duty to prudently invest the trust property in order to ensure that the income is sufficient to meet the needs of the beneficiaries.

9.1 The Duty to Collect and Protect Trust Property

When the testator dies, the testator is legally obligated to obtain possession of the trust assets from the executor of the estate as soon as it is feasible. After he receives the property, the trustee is required to examine the property tendered to make sure it corresponds with the property listed in the trust instrument. In the event there is a problem with the trust property, the trustee has duty to challenge the executor, including filing a law suit to make sure that the trust property is restored. For instance, O leaves $400,000 to A in trust for the benefit of B. After O dies, O's executor notifies A and B about the existence of the trust, and delivers the money to A. If A receives $300,000 instead of the $400,000 mentioned in the trust instrument, A has a duty to resolve the discrepancy with O's executor. Once the trustee receives the trust property, that person has a duty to protect the property. The steps the trustee must take to preserve the trust property depend on the nature of the property. If the property in the trust is a house, the trustee has duty to do things like keeping the house in good repair and paying the necessary taxes. For trusts that are funded by money, the trustee has the duty to invest the principle in order to make enough money, so that the beneficiary receives the necessary income.

9.2 The Duty to Earmark Trust Property and to Not Comingle Trust Funds

Once the trustee obtains the trust property, he has a duty to earmark the property as belonging to the trust. For example, if A receives a house to hold in trust for B, A must put

the trust's name on the deed instead of his own name. The purpose of this requirement is to prevent the trust property from being attached by the trustee's creditors. Thus, the trustee must make it clear that he owns the house as trustee and not as an individual. The trustee is not obligated to earmark certain types of securities. If the trustee fails to earmark the trust property, he is only liable for any losses that result from his failure to earmark. Consider the following example: O gives A an apartment building to hold in trust to pay the income from the rents to B for life. A records the deed to the apartment building in his name. A few years later, the main employer in the area goes out of business, so people leave the area to find new jobs. As a result, the vacancy rate in the apartment building rises to 90% and the trust loses substantial revenue. The trustee is not liable for the loss because it was a result of the general economic conditions in the area. On the other hand, if one of A's creditor is able to attach a lien to the property, A would be responsible for any loss that occurs.

The duty to not comingle is similar to the duty to earmark. The trustee must keep the trust property separate from his own property. Consequently, if O leaves $400,000 in trust to A for the benefit of B, A cannot legally place that money in A's bank account. Instead, A is obligated to place the money in a separate trust account. Nonetheless, A is only liable for the loss the trust suffers as a result of the comingling. Thus, if A places the money in his bank account and his creditors are able to get it, A is liable to the trust for the amount of the loss. Nonetheless, if the trust loses money because the bank goes out of business or some one steals the fund, the trustee is not responsible for the loss. Litigation over breaches of the duty not to comingle usually involves individual trustees. Some jurisdictions permit corporate trustees to comingle trust funds by statute or common law. The rationale behind this position is to encourage corporate entities to manage small trusts by being able to pool trust resources.

Earmarking vs. Comingling

The students often confuse violations of the duties to earmark and to not comingle. The simple way to look at is to focus upon the trustee's actions. When the trustee fails to earmark, he treats the trust property like it is his property. Since it is registered or titled in his name, legally the property does belong to the trustee. However, a trustee who comingles trust funds acknowledges that the property belongs to the trust. The difficulty lies in determining which property belongs to the trustee and which property belongs to the trust.

Problems

In the following cases determine whether the trustee has violated the duty to earmark or the duty not to comingle.

1. Albert leaves a large number of expensive jewels in trust for the benefit of his children. The trustee lists the jewels on his homeowner's insurance policy and stores them in his safe deposit box.

2. Bernard leaves twenty Arabian horses in trust for the benefit of his children. The trustee places the horses in the stable with his collection of Arabian horses.

3. Collin leaves an art collection in trust for the benefit of his children. The trustee registers the art collection in his name.

4. David leaves a million dollars in trust for the benefit of his children. The trustee deposits the million dollars in his bank account.

5. Ellen leaves a collection of antique cars in trust for the benefit of her children. The trustee records the titles to the cars in his name.

***In re Dommerich's Will*, 74 N.Y.S.2d 569**

HECHT, Justice.

This is a motion by trustees made pursuant to Article 79 of the Civil Practice Act for a judicial settlement of their account. The only question presented is one raised by the guardian ad litem appointed by the court to protect the interests of the infant beneficiaries. He objects to the trustees' investment in and holding as part of the trust fund, certain municipal and United States Treasury bonds in bearer form when registered bonds of the same issue are available.

It has been stated by leading authorities on trust law that bonds payable to bearer are a proper investment, and need not be registered. In Scott on Trusts, Vol. 2, Par. 179.3, the rule is stated as follows:

> 'A trustee does not commit a breach of trust by investing trust funds in bonds payable to bearer, instead of registering the bonds in his name as trustee. It is arguable, of course, that a trustee should not invest in bonds payable to bearer and that he should have the bonds registered in his name as

trustee for the particular estate for which he holds them, since otherwise they are not earmarked as property of the trust. It would seem, however, that long established practice permits trustees to invest in bonds payable to bearer.'

The rule is similarly stated in the Restatement of the Law on Trusts at par. 179, p. 458:

'd. Duty to earmark trust property. Ordinarily it is the duty of the trustee to earmark trust property as trust property. Thus, title to land acquired by the trustee as such should be taken and recorded in the name of the trustee as trustee. Certificates of stock should be issued in the name of the trustee as trustee. If bonds held in trust are registered, they should be registered in the name of the trustee as trustee. If a bond is otherwise a proper trust investment, however, the mere fact that it is payable to bearer does not render it an improper trust investment, unless the terms of the trust prohibit holding securities payable to bearer.'

In considering the obligation of a fiduciary to register bonds pursuant to the provisions of Section 231, Surrogate's Court Act (applicable to testamentary trusts), Mr. Surrogate Foley in *Matter of Erlanger's Estate*, 183 Misc. 607, 49 N.Y.S.2d 819, 820-821 said:

'Since the enactment in 1916 of the predecessor section of the Code of Civil Procedure to Section 231, Surrogate's Court Act, and for a period of twenty-eight years the practical construction accorded to the terms of the section has been that a fiduciary was permitted to invest in and retain bearer bonds.

'By a coincidence, the author of this decision drafted and introduced as a member of the State Senate the legislative measure which became the predecessor section of the Code of Civil Procedure referred to above (Section 2664–a.)

'The pertinent part of Section 231 reads: 'Every executor, administrator, guardian or testamentary trustee shall keep the funds and property received from the estate of any deceased person separate and distinct from his own personal fund and property. He shall not invest the same or deposit the same with any person, association or corporation doing business under the

banking law or other person or institution, in his own name, but all transactions had and done by him shall be in his name as such executor, administrator, guardian or testamentary trustee. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.'

'Under these terms a fiduciary is not compelled to register bonds in the name of the fiduciary of the estate as such. He may retain bearer bonds taken over at the death of the testator and any fiduciary may invest in new bearer bonds.

'The section prohibits him from mingling the bearer bonds with his own property. They must be kept in a safe deposit box or other form of earmarked custody in the name of the fiduciary of the specific estate as such. The fiduciary must purchase such bonds in his name as fiduciary. They cannot be bought in his individual name. Sales likewise are required to be made in the name of the fiduciary as such.

'The construction referred to above, which has been uniformly followed by the Surrogates' Courts, by trustees and their attorneys and by special guardians, was confirmed by the Legislature in the explanatory note to the amendment of Section 231 made by Chapter 343 of the Laws of 1939. That amendment was recommended by the Executive Committee of the Surrogates' Association of the State of New York. The explanatory note printed in the legislative bill read: 'The changes proposed by this amendment relate only to registered securities. It is not intended to compel the fiduciary or the depository to register bearer bonds or to prohibit their retention without registration so long as such bearer bonds are identified, earmarked and segregated as assets of the estate."

The amendment of Section 231 referred to in the above opinion authorized nominee registration by trustees. Nominee registration was likewise authorized in the case of inter-vivos trusts by Section 25 of the Personal Property Law, added by L. 1944, C. 215, effective March 21, 1944.

While there are conflicting decisions at Special Term, New York County, on this subject, it appears to me that the weight of authority permits retention of bearer bonds by

trustees. In *Cooper v. Illinois Central R.R., First Department* 1899, 38 App. Div. 22, 57 N.Y.S. 925, the court affirmed a judgment on the opinion of the referee who held (page 27 of 38 App. Div. page 927 of 57 N.Y.S.):

> 'There is no rule that I am aware of that requires a trustee, if trust funds are invested in such securities, (bearer bonds) to have the securities registered. The new trustees had the right to have the registration in the name of the deceased executor canceled. They were not bound to have the bonds re-registered in their own names, but might restore them to their original negotiability by having them transferred to bearer.'

Matter of Halstead, Surr. Ct. Dutchess County, 44 Misc. 176, 89 N.Y.S. 806, affirmed on the opinion of the Surrogate in 110 App. Div. 909, 95 N.Y.S. 1131, affirmed Court of Appeals in 184 N.Y. 563, 76 N.E. 1096, presents a direct holding on the question. In that case the beneficiaries sought to hold a surviving trustee liable for failing to require that securities belonging to the trust consisting of unregistered railroad and municipal bonds, be payable to or registered in the names of the trustees jointly and for failure to examine the safe deposit box where the securities were kept. The court (page 181 of 44 Misc., page 809 of 89 N.Y.S.) held that it was not negligent of the surviving trustee to permit the bonds to remain negotiable, nor to purchase others in such form, and stated:

> 'It has been urged that the surviving trustee was negligent in permitting the securities to remain of the same negotiable character as they were at the death of the testator, and in purchasing other securities without requiring that they be made payable to or registered in the names of the trustees jointly. The beneficiaries have failed to show and circumstance which tended to arouse the suspicion of the surviving trustee or themselves, or that there was the slightest reason to believe that the safety of the fund was endangered. No American authority has been cited to sustain this contention, and, in view of the situation outlined in this case, it was not, in my judgment, negligent for Halstead to permit the continuance of the methods which the testator had established and assented to. Wilkinson resided in Poughkeepsie, while Halstead lived in Brooklyn, and, owing to the circumstances referred to and the situation of the trustees, it would have been expensive and unusually cumbersome if the fund was so controlled

that every detail of the administration required the joint action of the trustees.'

The guardian ad litem argues that the decision of the Court of Appeals in *Matter of Union Trust Company (Hoffman Estate)* 219 N.Y. 514, 114 N.E. 1057 is authority for his contention. That case involved mortgage participations, a type of security which, by its very nature, must be registered in someone's name. The court stated (page 521 of 219 N.Y., page 1059 of 114 N.E.):

> 'It is suggested that corporate or municipal bonds in which a trustee is authorized to invest trust funds may be payable to bearer, and consequently lack any stamp of ownership by the trust. While this is so of securities payable to bearer, the lack of any stamp of ownership on such securities arises from the peculiarity of the investment, and it does not affect the rule in regard to investments that can properly be made distinctive and bear upon their face evidence of their ownership.'

However, the question of the right of the trustees to hold bearer bonds was not before the court. It seems to me, in the light of the court's affirmance in the Halstead case, *supra*, that it was referring to all bearer bonds, whether capable of registration or not, as a peculiar and distinct type of investment which need not be registered, as contrasted with other types of securities which, by their very nature, have to be put in someone's name, and consequently must be registered in the name of the trustee as such. Accordingly the objection of the guardian is overruled. Settle order at which time allowances will be fixed.

9.3 The Duty Not to Delegate

A settlor expects the trustee to administer the trust. The settlor selected the trustee because the settlor had confidence in that person's judgment and ability to carry out the settlor's instructions. The settlor did not want someone else to manage the trust property. Thus, traditionally, the trustee was obligated not to delegate his discretionary duties to a third party. However, it would be too burdensome to force a trustee to personally perform all acts necessary to administer a trust. Therefore, the trustee may delegate ministerial duties but not delegate discretionary acts. For instance, the trustee of a discretionary support trust cannot let a third party make the decision about if and when to distribute money to the beneficiary. The main duty of a trustee is usually to invest the trust

property to ensure that there is enough income to pay to the beneficiary. The law recognizes that the trustee may not have enough expertise to make investment decisions. Therefore, a trustee who delegates his investment duties to a stockbroker does not breach his duty not to delegate. In fact, the duty of prudence requires the trustee to delegate such tasks. However, the trustee is obligated to monitor the activities of the stockbroker. He cannot simply turn over the management of the trust funds to that person. He has a duty to exercise reasonable care in selecting and monitoring the person to whom he delegates his trust duties.

9.4 Duty of Prudence

At common law, when dealing with trust funds, the trustee had a duty to exercise such care and skill as a prudent man would exercise when dealing with his own property. This was similar to the "reasonable man" standard applicable in tort cases. Thus, the trustee's actions were evaluated based upon the totality of the facts. Currently, the trustee has a duty to invest trust property in a manner consistent to that of a reasonable prudent investor. The duty of prudence includes the duty to be sensitive to risks and return of investments, to diversify and to delegate when appropriate. A portfolio may be undiversified when special circumstances warrant it. The trustee has a duty to diversify unless he decides that because of special circumstances the purposes of the trust would be better served without diversifying. The cases in which courts find special circumstances justifying the failure to diversity are few in number. The special circumstances usually occur when the trust consists of family property. The trustee must monitor the actions of the person to which the trustee delegates investment responsibility. The prudent investor standard is based upon the Uniform Prudent Investor Act and the Restatement (Second) of Trusts. The standard has been codified in the majority of American jurisdictions.

***Estate of Cooper*, 913 P2d 393**

SWEENEY, Chief Judge.

Washington's prudent investor rule requires a trustee to "exercise the judgment and care under the circumstances then prevailing, which persons of prudence, discretion and intelligence exercise in the management of their own affairs...." RCW 11.100.020(1). This exercise of judgment requires, among other things, "consideration to the role that the

proposed investment or investment course of action plays within the overall portfolio of assets." RCW 11.100.020(1). In this case of first impression, we are asked to decide whether the prudent investor rule limits the court's consideration to the overall performance of the trust, or whether, instead, the court may consider the performance of specific assets in the trust. We hold the prudent investor rule focuses on the performance of the trustee, not the results of the trust. The trial court here then appropriately considered individual assets, and groups of assets, in finding that the trustee had improperly weighed trust assets in favor of himself, the income beneficiary. We affirm that portion of the court's judgment which required the trustee to reimburse the trust corpus for the loss caused by that investment strategy.

FACTS

The Estate

De Anne Cooper died on March 6, 1978. In her will, she provided that her one-half of the community property would be held in trust during her husband Fermore B. Cooper's lifetime, and that Mr. Cooper and The Old National Bank of Washington (ONB) would serve as co-trustees of the testamentary trust. The trust required payment of income to Mr. Cooper and distribution of the corpus to her children after Mr. Cooper's death. The nonintervention will named Mr. Cooper personal representative. At the time of her death, Mrs. Cooper had two children, Joyce Johnston and Richard Cooper. Her one-half of the community property was worth about $800,000.

Mr. Cooper filed his wife's will and started a probate. But he took no further steps to conclude the probate until Joyce filed this action. He did not keep a separate estate account and continued to manage all of the former community property as his own.

In 1986, Mr. Cooper asked Joyce to approve the substitution of Richard for ONB as co-trustee of the trust. Joyce refused and asked about Mr. Cooper's management of the estate. At that point, Mr. Cooper funded the trust by depositing in ONB assets valued at approximately $2,000,000. Joyce then petitioned the court to remove Mr. Cooper as personal representative of the estate and trustee of the trust, and for an accounting and a declaration that Mr. Cooper's second wife had no interest in the trust property. Her petition included a request for attorney fees and costs.

The Inventory

In March 1989, Mr. Cooper filed an inventory of estate assets. The asset mix set out in that inventory generates the primary dispute in this case. The inventory included (1) an unsecured note from Gifford-Hill, Inc., with a balance of $1,200,000 owing on the date of Mrs. Cooper's death; (2) partnership interests in Eight-O-One Investment Company and Hillside Investment Company, which owned interests in the Deaconess Medical Building; and (3) substantial holdings in income-producing assets including tax-exempt bonds. The inventory did not include shares in Comtrex, Inc. Mr. Cooper's son, Richard, was the chief executive officer of Comtrex. After Mrs. Cooper's death, Mr. Cooper bought shares in the company and also loaned it approximately $824,000, which Comtrex never repaid.

Before Mr. Cooper compiled the inventory, he had sold the community's share of stock in a closely held corporation, Western Frontiers. The corporation owned the North Shore, a hotel and restaurant in Coeur d'Alene. Its shares were valued for estate tax purposes in 1978 at 75¢ a share, for a total value of $21,750. Mr. Cooper sold both his and the estate's shares in 1983 to Duane Hagadone at a profit of about $1 million. The stock had appreciated largely because of a bidding war between Mr. Hagadone and Robert Templin. Both wanted control of the company. The purchase gave Mr. Hagadone a majority interest. Mr. Cooper reinvested the proceeds in stocks and bonds.

An accounting filed along with the inventory calculated the current value of Mrs. Cooper's estate at $1,279,433. Mr. Cooper's accountant compiled the accounting from estate tax returns and transaction sheets supplied by Mr. Cooper's stockbroker. The accounting summarized (1) purchases and sales of assets listed in the 1978 estate tax return, (2) capital gains, and (3) income.

On December 26, 1989, the superior court appointed John Cummins "as special master/referee to assist [it] in resolving various disputes that [had] arisen in connection with [the Cooper] estate." At the time, Mr. Cummins was a vice-president of Seattle-First National Bank and manager of its trust department. The court asked Mr. Cummins to contact the trust department of U.S. Bank (ONB's successor) to "review what has transpired in connection with the assets" deposited by Mr. Cooper in 1987 to fund the trust. The court also asked Mr. Cooper to forward to Mr. Cummins a copy of the estate accounting. After consulting with Mr. Cummins, the court found that "the accounting as accomplished to date

in connection with the trust estate is not in accordance with generally recognized format and principles." It then instructed Mr. Cooper's accountant, James McDirmid, "to confer with Mr. Cummins as to what is contemplated to comply with those standards."

Mr. Cooper filed a revised inventory accounting in May 1990 based on Mr. McDirmid's calculations (McDirmid accounting). It set the 1987 fair market value of the inventoried assets at $1,835,821.50. The value of the assets Mr. Cooper had transferred to fund the trust in 1987 had a value of $1,959,113. Thus, the trust was overfunded by $123,291.50. The accounting also valued the partnership interests in Eight-O-One and Hillside, half of which the estate owned, at $192,000 and $86,000, respectively. These values reflected a 60 percent discount because Mr. Cooper's interest was a minority interest and therefore not easily marketable.

Mr. Cummins concluded the amended accounting revealed "no improprieties." The court refused Joyce's request to discover the basis for Mr. Cummins' opinions. It stated Mr. Cummins was appointed "solely for the purpose of deciding whether or not F. Bert Cooper should be removed as Personal Representative."

The Litigation

On December 12, 1990, the court directed the parties to proceed to a hearing on the final report and petition for distribution. At the hearing, the principal issues were the accuracy of the McDirmid accounting and the propriety of Mr. Cooper's investment strategy. Mr. Cooper and Joyce presented expert opinion testimony in support of their respective positions.

The Ruling

On December 15, 1992, following the hearing, the court found Mr. Cooper had commingled income from estate assets and proceeds from the sale of estate assets with his own funds. It found the accounting prepared by Mr. Cooper's accountant adequately traced the estate's assets. The court further found, based on the McDirmid accounting, that Mr. Cooper "had more than sufficient funds in his own right as his separate property to make gifts and other distributions to and for the benefit of his children."

The court agreed with Mr. Cooper's valuation of the Eight-O-One and Hillside partnerships. And it held he had acted prudently in negotiating the sale of the Western

Frontiers shares. It found that Mr. Cooper had, however, "maintained a policy of investment ... which maximized the income of the estate ... to the detriment of the growth of the corpus of the estate." It valued the loss to the remainder interest at $342,493 as of July 1987. It ordered Mr. Cooper to contribute that additional amount, along with $115,840 of expected appreciation from July 1987 to entry of the judgment.

The court also found that Mr. Cooper had overfunded the trust by $123,292. It credited that sum against the $458,333 surcharge it had levied against Mr. Cooper to compensate the trust for losses it suffered as a result of his investment strategy ($342,493 + $115,840). It held estate taxes, attorney and accounting fees, and expenses of administration were properly charged by Mr. Cooper to the estate. The court set 1984 as the outside date by which Mr. Cooper should have closed the estate. It then awarded him a fee for serving as personal representative from 1978 through 1984. It also awarded him a fee as co-trustee from July 1987 to the date of the judgment. It ordered the trust divided between Richard and Joyce and discharged Mr. Cooper as the trustee over Joyce's half because of the "mutual distrust, conflict, and dissension" between Joyce and Mr. Cooper.

The court further found that "[a]ll parties to this cause have succeeded to some degree herein and have worked for the benefit of the estate and of their respective clients." It therefore awarded all parties a portion of their attorney and accountant fees. Joyce received $45,600 in attorney fees and $12,421.67 for her accountant's fees. The court awarded Mr. Cooper $46,400 of the $115,000 in attorney fees he had requested, and $48,802.50 for his accountant's fees. It awarded Richard $18,400 in attorney fees and $220.47 in costs. The court approved Joyce's additional attorney and professional fees of $156,975, but ordered them charged to her share of the trust.

DISCUSSION

The Appeal

Prudent Investor. The question presented is whether the trial court improperly applied the prudent investor rule. Mr. Cooper and Richard argue the court should have evaluated Mr. Cooper's performance based on the performance of the trust as a whole rather than focusing on specific assets, or groups of assets. They point out that the return on total trust assets exceeded that of the ONB trust department.

The trust's favorable performance, as compared to that of the ONB trust department, was largely due to the gains from Mr. Cooper's sale of the estate's Western Frontiers stock. The balance of the trust assets were weighted heavily toward current income rather than capital appreciation. Common stocks represented 13 percent of the trust's marketable securities; bonds and bond equivalents represented 87 percent. The estate's gain attributable to increases in the value of the securities was only $226,313. This figure represented a 22.23 percent return on those investments, or a 2.15 percent increase per year between 1978 and 1987. Inflation averaged 6 percent a year during that same period. The purchasing power of these assets decreased then just under 4 percent a year.

Overall trust performance is a factor in evaluating the performance of the trustee. But it is not by itself controlling. "The court's focus in applying the Prudent Investor standard is conduct, not the end result." J. Alan Nelson, *The Prudent Person Rule: A Shield for the Professional Trusts*, 45 Baylor L. Rev. 933, 939 (1993). The American version of the prudent investor rule began with the *Harvard College* case:

All that can be required of a trustee to invest, is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion, and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested.

Nelson, 45 Baylor L. Rev. at 939 (quoting *Harvard College v. Amory*, 26 Mass. (9 Pick), 446, 460-61 (1830)). In *Harvard College,* the court recognized that trust assets could never be fully protected from the uncertainties of the market place; thus, the prudent investor standard was necessarily flexible. Nelson, 45 Baylor L. Rev. at 938.

In the recent New York case of *In re Lincoln First Bank, N.A.,* 165 Misc.2d 743, 630 N.Y.S.2d 472 (Sur.Ct. 1995), the court interpreted its own version of the prudent investor rule and made two observations which are helpful here. First, "whether an investment is prudent or not is a question of fact." *Lincoln First Bank, N.A.,* 165 630 N.Y.S.2d at 474 (citing *In re Clarke's Estate*, 12 N.Y.2d 183, 188 N.E.2d 128, 237 N.Y.S.2d 694 (1962); *In re Yarm*, 119 A.D.2d 754, 501 N.Y.S.2d 173 (1986)). Second, the prudent investor standard requires "that the fiduciary maintain a balance between the rights of income beneficiaries with those of the remainderman." *Lincoln First Bank,* 630 N.Y.S.2d at 474. This state's

version of the rule also requires that the trustee consider income as well as the safety of the capital and the requirements of the beneficiaries. RCW 11.100.020(2). Clearly, the focus is on the trustee's performance, not simply on the net gain or loss to the trust corpus. Nelson, 45 Baylor L. Rev. at 939.

The trial court here properly applied the prudent investor standard, as set forth above, and its findings of fact on that issue are supported by substantial evidence. *Coviche Canyon Conservancy v. Bosley,* 118 Wash.2d 801, 819, 828 P.2d 549 (1992).

Both parties rely on *Baker Boyer Nat'l Bank v. Garver*, 43 Wash. App. 673, 719 P.2d 583, *review denied,* 106 Wash.2d 1017 (1986). There, the trust beneficiaries sued for damages resulting from imprudent investments made by Baker Boyer, the trustee bank. They argued the bank had breached a duty to diversify when it invested primarily in fixed-income securities. The bank responded it had no duty to diversify under the prudent investor rule, as codified in former RCW 30.24.020 (now RCW 11.100.020.). Even if such a duty existed, the bank contended diversification between fixed-income securities and equity investment in real property satisfied the duty under a "total asset" management approach.

The court agreed with the beneficiaries that the prudent investor standard includes the duty to diversify trust assets. But it found it unnecessary to decide whether former RCW 30.24.020 incorporated the "total asset" approach. The evidence supported the trial court's finding "the Bank had *not* weighed the investment in securities against the investment in the farmland for purposes of diversification." *Baker Boyer*, 43 Wash. App. 673, 719 P.2d 583 (emphasis added).

Likewise, Mr. Cooper did not weigh his investment in income-producing securities against his investment in Western Frontiers. The overall trust performance was boosted dramatically by the sale of the Western Frontiers stock in 1983. But Mr. Cooper's investment strategy could not have anticipated the gain from the sale of the stock before it occurred. By 1983, when the stock was sold, he had been administering the estate for five years. Furthermore, after the sale, he invested the estate assets almost exclusively in marketable securities, 87 percent in bonds, favoring again the income beneficiary-him. There was no other asset or group of assets which Mr. Cooper could have balanced against this investment.

SUMMARY

In Mr. Cooper's appeal, we affirm the trial court's finding that his management of the estate's marketable securities breached his duty to act as a prudent investor.

***In re Matter of the Stuart Cochran Irrevocable Trust*, 901 N.E.2d 1128**

BAKER, Chief Judge.

Appellants-petitioners Chanell and Micaela Cochran (the Beneficiaries) appeal the trial court's order entering final judgment in favor of appellee-respondent KeyBank, N.A. (KeyBank), on the Beneficiaries' petition seeking an accounting and alleging that KeyBank had breached its obligations as Trustee. The Beneficiaries argue that the trial court erroneously concluded that KeyBank did not violate the prudent investor rule and or breach its duties as trustee. Finding no error, we affirm.

FACTS

On December 28, 1987, Stuart Cochran created an irrevocable trust (the Trust) and named his two daughters, Chanell and Micaela, as the Beneficiaries. At that time, the Beneficiaries were two and four years old, respectively. In 1989, Stuart's wife, now Mary Kay Vance, filed for divorce and was awarded full custody of the children.

Stuart funded the Trust with life insurance policies and was assisted by an insurance advisor, Art Roberson. Elkhart National Bank was the initial trustee; subsequently, Pinnacle Bank (Pinnacle) was named as a successor trustee. Pinnacle served as the trustee until 1999. In January 1999, Pinnacle called Vance and informed her that it no longer wished to serve as trustee because of Stuart's insistence on having third parties—specifically, himself, his sister, and Roberson—involved in the trustee's decisionmaking process. Pursuant to the terms of the Trust, Vance was required to appoint a successor trustee. Vance retained an attorney, and in January 1999, they met with a KeyBank representative to discuss moving the Trust to KeyBank. On February 3, 1999, Vance appointed KeyBank as successor trustee.

The 1999 Exchange and the VUL Policies

At approximately the same time she received notice that Pinnacle intended to resign as trustee, Vance received a call from Roberson, who provided new recommendations regarding the insurance policies held by the Trust. Specifically, Roberson recommended that

the three life insurance policies and one annuity then held by the Trust be replaced with two new life insurance policies—a ManuLife Variable Universal Life policy and an American General Variable Universal Life policy (collectively, the VUL policies).

At the time KeyBank assumed the duties of successor trustee, the Trust's assets consisted of three life insurance policies and one annuity and with a collective net death benefit of $4,753,539.00. As noted above, however, Roberson had recommended an exchange of policies, replacing these policies with the two VUL policies. When KeyBank assumed its duties, the underwriting for the exchange of policies had been approved and Stuart had already submitted to the physical exams. In February and March 1999, KeyBank approved the transaction and the exchange of policies took place (the 1999 Exchange), with a new total death benefit of $8 million.

Following September 11, 2001, the stock markets took a dramatic decline. The downward trend in the markets had an adverse effect on the value of the mutual fund investments contained in the VUL policies. In fact, in 2001, the policies lost money, meaning that the cost of insurance and the carriers' administrative charges were greater than the income generated by the investments; in 2002, the losses were even greater.

The Oswald Review

In the spring of 2003, KeyBank retained Oswald & Company (Oswald), an independent outside insurance consultant, to audit the VUL policies. At that time, Stuart was fifty-two years old and the VUL policies had a combined death benefit of $8,007,709.

Therefore, in the trial court's words, "[t]he Oswald review indicated that it was likely that the two existing policies would lapse before [Stuart] reached his life expectancy of 88 years." Appellants' App. p. 16. Moreover, because Stuart's "financial fortune had also taken a negative turn by this point in time, he had no financial wherewithal to supplement the trust with additional resources or through the purchase of additional policies of life insurance." *Id.* at 17.

As Oswald conducted its review of the VUL policies, Roberson completed his own review of alternative policies. Roberson eventually proposed to KeyBank that a John Hancock policy be purchased to replace the two VUL policies. The John Hancock policy offered a lump sum death benefit of $2,787,624 that was guaranteed to age 100.

KeyBank requested Oswald to review the John Hancock policy. Representatives of those companies exchanged some emails, in which an Oswald employee noted that the John Hancock policy "drastically reduces" the expected death benefit, asking, "[i]s this ... what [your] client wants to do?" *Id.* at 318. The KeyBank representative replied in the affirmative, stating that "[i]t is [Stuart's] intention to reduce his life insurance coverage to the amount seen on the John Hancock illustrations." *Id.* at 317. Oswald reviewed the John Hancock policy and compared it to the two VUL policies. *Id.* at 334–35. In an email, an Oswald employee summarized its conclusion:

> We're sure the guarantees in this John Hancock product have a lot of appeal to [Stuart] given the fact of his substantial investment losses in his current [VUL] policies.
>
> Given the facts that he is moving to a fixed product with the death benefit guaranteed to age 100 and $0 future outlay, our recommendation would be to move forward with the proposed John Hancock coverage if the client is comfortable with the reduction in death benefit.

Id. at 317.

After reviewing Oswald's analyses of the respective policies and considering the recommendations contained in the reports, in June 2003, KeyBank decided to retire the VUL policies and purchase the John Hancock policy in their stead (the 2003 Exchange). After Stuart underwent a medical exam, John Hancock underwriters rated him as a preferred risk rather than a super preferred. That classification resulted in the guaranteed benefit being $2,536,000 rather than $2,787,624. The Oswald employee who had performed the analysis testified that this change would not have altered Oswald's ultimate recommendation. In January 2004, Stuart died unexpectedly at the age of 53. The Trust received $2,536,000 in life insurance proceeds for the Beneficiaries' benefit.

On April 2, 2004, the Beneficiaries filed a petition to docket the Trust and to require KeyBank to account. On March 7, 2005, KeyBank filed a petition to reform the trust and for approval of its accounting. The Beneficiaries filed a counterclaim and claim for surcharge, arguing, among other things, that KeyBank had breached its fiduciary duties as Trustee. A bench trial was held on August 28–30, 2007, on the issues raised in the Beneficiaries'

counterclaim and claim for surcharge, with all other issues being reserved for a later time. On May 29, 2008, the trial court entered findings of fact and conclusions of law, ruling in KeyBank's favor. Among other things, the trial court concluded as follows:

CONCLUSIONS OF LAW AND ANALYSIS

* * *

(20) The ultimate question facing this Court is whether the actions of the Trustee, KeyBank, were consistent with the Settlor's intent as expressed in the Trust document and met its fiduciary duties to the Beneficiaries. In essence, based on the circumstances facing the Trust in 2003, was it prudent for the Trustee to move the trust assets from insurance policies with significant risk and likelihood of ultimate lapse into an insurance policy with a smaller but guaranteed death benefit? This Court concludes that this conduct was consistent with the standard established by the prudent investor rule.

(21) KeyBank and its representative acted in good faith to protect the corpus of the Trust based on the downturn in the stock markets and the prospect that the existing policies would lapse before the expected life expectancy of the Settlor.

(22) In hindsight, due to the unexpected demise of the Settlor at age 53, KeyBank's decision resulted in a significant reduction in the death benefit paid to the beneficiaries. However, from the perspective of the Trustee at the time of its decision, it was prudent to protect the Trust from the vagaries of the stock market and from predicted lapse of the existing policies. It might also have been prudent to take a "wait and see" approach, however, the prudent investor standard gives broad latitude to the Trustee in making these types of decisions.

(23) Had the insurance policies lapsed, the Beneficiaries would have received no distribution from the Trust. Certainly, that outcome was not within the intent of the Settlor at the time he established this Trust.

(24) Frankly, financial trends outside of the control of the Trustee or the Beneficiaries were the direct and proximate cause of the problem facing the Trust in 2003. While it would have been preferable for the Trustee to provide regular accountings to the Beneficiaries, the receipt of timely financial reports by the Beneficiaries would not have changed the negative financial condition of the Trust.

(25) The Beneficiaries want this Court to focus on the defects in KeyBank's decisionmaking process, and while the Court recognizes that this process was certainly less than perfect with respect to the Cochran Trust, the Court concludes that it would need to engage in sweeping conjecture, which is not supported by the evidence, to find that damages resulted to the Beneficiaries based on the circumstances presented here.

(26) Accordingly, this Court concludes that KeyBank did not breach its fiduciary responsibility to the Trust or the Beneficiaries, and the lack of financial reporting to the Beneficiaries and the decision to the [sic] reinvest the corpus of the Trust in a guaranteed insurance policy was not the proximate cause of damages to the Beneficiaries.

(27) In conclusion, by insuring [sic] that the Trust was funded by a guaranteed death benefit in the sum of $2,536,000.00, KeyBank acted in good faith to protect the interests of the Beneficiaries and to comply with the directives of the Settlor as contained in the Trust document.

Id. at 22–24. The Beneficiaries now appeal.

DISCUSSION AND DECISION

I. Standard of Review

The trial court entered findings of fact and conclusions of law pursuant to Indiana Trial Rule 52(A). We may not set aside the findings or judgment unless they are clearly erroneous. *Menard Inc. v. Dage-MTI. Inc.,* 726 N.E.2d 1206, 1210 (Ind. 2000). First, we consider whether the evidence supports the factual findings. *Id.* Second, we consider whether the findings support the judgment. *Id.* "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference." *Quillen v. Quillen*, 671 N.E.2d 98, 102 (Ind. 1996)..A judgment is clearly erroneous if it relies on an incorrect legal standard. *Menard*, 726 N.E.2d at 1210.

In conducting our review, we give due regard to the trial court's ability to assess the credibility of witnesses. *Id.* .While we defer substantially to findings of fact, we do not do so to conclusions of law. *Id.* We do not reweigh the evidence; rather, we consider the evidence most favorable to the judgment with all reasonable inferences drawn in favor of the judgment. *Yoon v. Yoon*, 711 N.E.2d 1265, 1268 (Ind. 1999).

II. The Prudent Investor Act

The Beneficiaries first argue that the trial court erroneously concluded that KeyBank's actions leading up to the 2003 Exchange did not violate the Indiana Uniform Prudent Investor Act (PIA). Ind. Code §30-4-3.5-1 et. seq. In relevant part, the prudent investor rule, as set forth in the PIA, provides as follows:

> (a) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.
>
> (b) A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.
>
> (c) Among circumstances that a trustee shall consider in investing and managing trust assets are those of the following that are relevant to the trust or its beneficiaries: (1) General economic conditions, (2) The possible effect of inflation or deflation, ***(5) The expected total return from income and the appreciation of capital, (6) Other resources of the beneficiaries, (7) Needs for liquidity, regularity of income, and preservation or appreciation of capital.
>
> * * *
>
> (d) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.
>
> * * *
>
> (f) A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use the special skills or expertise.

I.C. §30-4-3.5-2.

A. Delegation

The Beneficiaries first argue that KeyBank violated the PIA by imprudently and

improperly delegating certain decisionmaking functions to Roberson and Stuart. Initially, we observe that the PIA contemplates the delegation of functions by a trustee under certain circumstances:

> A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in: (1) selecting an agent; (2) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and (3) reviewing the agent's actions periodically in order to monitor the agent's performance and compliance with the terms of the delegation.

I.C. §30-4-3.5-9(a)..

Here, it is evident that Roberson chose to monitor the Trust throughout its existence. He helped to create it and, in 1999, recommended an exchange of policies. Then, in 2003, KeyBank began its own review of the viability of the current structure of the Trust, engaging Oswald to analyze the current VUL policies. Simultaneously—and of his own volition, apparently —Roberson conducted his own review. Roberson eventually proposed to KeyBank that a John Hancock policy be purchased to replace the two VUL policies.

After Roberson made his proposal, KeyBank again hired Oswald to conduct an independent review of the John Hancock policy. The fact that Roberson submitted the policy for review does not constitute a delegation of KeyBank's decisionmaking duties. Oswald was an outside, independent entity with no policy to sell or any other financial stake in the outcome. Under these circumstances, we do not find that KeyBank delegated any investment or other duties to Roberson. Although the Beneficiaries direct our attention to evidence in the record supporting their contention that there was, in fact, a delegation, this is merely a request that we reweigh the evidence—a request we decline.

B. Oswald's Recommendations

The Beneficiaries next argue that KeyBank violated the PIA by disregarding Oswald's recommendations. As noted above, KeyBank first asked Oswald to review the existing VUL policies. After comparing the policies' respective hypothetical performances given hypothetical interest rates, Oswald rated both policies as a Category Three on a scale from one to five, noting that "additional future premiums may be required" and that the

policies "should be audited every two to three years or more often" under certain circumstances. Appellants' App. p. 312–13, 315. KeyBank then asked Oswald to review the proposed John Hancock policy. Oswald found that no further premiums would be required to maintain that policy until Stuart reached the age of 100. Ultimately, Oswald recommended the purchase of the John Hancock policy, rating the policy as a Category One on a scale from one to five, with one being the best. No further audits would be necessary. *Id.* at 334–35.

Having reviewed these reports, it is evident that Oswald found both options—the existing VUL policies and the John Hancock policy—to be palatable. Each had their own sets of pros and cons. The existing VUL policies may have lapsed before Stuart reached the age of 60 and would likely have required additional premiums to finance—money that Stuart no longer had. The John Hancock policy, on the other hand, offered a significantly reduced death benefit but was guaranteed to remain in force until Stuart reached the age of 100 and would require no additional financing. Oswald found the John Hancock policy to warrant the highest rating and concluded that no further audits would be necessary. Under these circumstances, we cannot say that KeyBank's decision to exchange the VUL policies for the John Hancock policy parted ways from Oswald's advice and recommendations. KeyBank merely chose between two relatively acceptable options—a decision it was entitled to make as trustee. We do not find that it acted imprudently on this basis.

C. Investigation of Alternatives

The Beneficiaries next fault KeyBank for failing to investigate alternatives aside from retaining the existing VUL policies or exchanging them for the John Hancock policy. It is very likely that, no matter what the circumstances, a trustee could always do more. Investigate further, engage in more brainstorming, expand the scope of its queries, etc. It is difficult, if not impossible, to draw a bright line demarcating the point at which a trustee has done enough from the point at which it must do more. Here, KeyBank was concerned about the state of the economy, the stock market, and Stuart's limited financial resources. It examined the viability of the existing policies and investigated at least one other option. Of course it could have done more, but nothing in the record leads us to second-guess the trial court's conclusion that, while KeyBank's "process was certainly less than perfect," it was adequate. Appellants' App. p. 22–24. Thus, it was not clearly erroneous for the trial court to

conclude that KeyBank did not act imprudently for this reason.

The Beneficiaries also argue briefly that KeyBank's conduct surrounding the 1999 Exchange violated the PIA. As noted above, at the time KeyBank assumed the duties of successor trustee, the underwriting for the exchange of policies had been approved and Stuart had already submitted to the physical exams. Indeed, the exchange had been contemplated since the summer of 1998. Furthermore, the transaction nearly doubled the total death benefit available under the trust. At trial, the Beneficiaries' experts testified that they had originally committed a calculation error with respect to the 1999 Exchange and, once the error was corrected, they believed that the risk factors associated with the 1999 Exchange were within the range of defensible possibilities. Appellee's App. p. 412–17. Under these circumstances, there is no evidence supporting the Beneficiaries' argument that KeyBank violated the PIA with its conduct in 1999.

D. No Hindsight

The PIA cautions that "[c]ompliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight." I.C. §30-4-3.5-8. Here, at the time KeyBank was evaluating its options before the 2003 Exchange, it was working with the following facts and circumstances: (1) a rapidly declining stock market; (2) the most recent two years, in which the Trust had lost progressively more money, with every reason to believe that further erosion would occur with every day it held the VUL policies; (3) a grantor in his early 50s with a life expectancy of 88 years; (4) a grantor who had lost a great deal of money because of the economic decline and, consequently, had no further funds to invest in the trust; and (5) a trust that consisted of two life insurance policies that an independent expert estimated could lapse within approximately five years if no further funds were invested.

Under these circumstances, KeyBank's decision to exchange the VUL policies for the John Hancock policy was eminently prudent, reduction in death benefit notwithstanding. That a "wait and see" approach may also have been a prudent course of action does not alter the propriety of the exchange. We now know, in hindsight, that the economy improved and Stuart died unexpectedly less than a year after the 2003 Exchange took place—given those facts, of course, we understand that the Beneficiaries wish that KeyBank had made a different decision. But keeping in mind only the facts and circumstances at the time

KeyBank made its decision, we cannot say that its decision violated the PIA.

III. Trustee's Duties

The Beneficiaries next argue that even if KeyBank did not violate the PIA, it breached a number of its duties to them. A trust is a fiduciary relationship between a person who, as trustee, holds title to property and another person for whom, as beneficiary, the title is held. I.C. § 30-4-1-1(a). A "breach of trust" is a violation by the trustee of any duty that is owed to the beneficiary, with the duties being established by statute and by the terms of the trust. *Davis v. Davis*, 889 N.E.2d 374, 380 (Ind. Ct.App. 2008). In relevant part, Indiana Code section 30-4-3-6 provides as follows:

> (a) The trustee has a duty to administer a trust according to its terms.
>
> (b) Unless the terms of the trust provide otherwise, the trustee also has a duty to do the following: (1) Administer the trust in a manner consistent with [the PIA]. * * * (3) Preserve the trust property. (4) Make the trust property productive for both the income and remainder beneficiary. As used in this subdivision, "productive" includes the production of income or investment for potential appreciation. * * * (7) Upon reasonable request, give the beneficiary complete and accurate information concerning any matter related to the administration of the trust and permit the beneficiary or the beneficiary's agent to inspect the trust property, the trustee's accounts, and any other documents concerning the administration of the trust.* * * (10) Supervise any person to whom authority has been delegated....
>
> Furthermore, a trustee owes its beneficiaries a duty of accounting, which requires the trustee to deliver an annual written statement of the accounts to each income beneficiary or her personal representative. I.C. § 30-4-5-12(a). Finally, it is well established that a trustee "shall invest and manage the trust assets solely in the interest of the beneficiaries." I.C. § 30-3-5-5.

A. Relationship to Beneficiaries

1. Annual Reports

The record reveals that when the Beneficiaries were minors—as they were for most of the relevant period of time—KeyBank sent its annual reports to Stuart, their father. This

was not a perfect solution, inasmuch as it was Vance, their mother, who was the custodial parent. But it establishes KeyBank's good faith, at the least. *Cf. Davis,* 889 N.E.2d at 383-84 (finding a breach of trust where trustee willfully withheld information from the beneficiaries and engaged in self-dealing).

At some point before the 2003 Exchange, one of the Beneficiaries turned eighteen. KeyBank inadvertently failed to send her a copy of the annual report at that time. Following her birthday, she requested documents from KeyBank. A KeyBank representative contacted the Beneficiary and Vance and indicated that the documents were ready at a local KeyBank office to be picked up. Yet again, therefore, we cannot conclude that there is any evidence that KeyBank willfully withheld information from the Beneficiary.

The Beneficiaries also argue that KeyBank breached its duties by failing to provide sufficient information regarding its plan to carry out the 2003 Exchange. We cannot agree, inasmuch as the Trust itself gave the trustee the power to surrender or convert the policies without the consent or approval of anyone: "The Trustee shall have all of the rights of the owner of such policies and, without the consent or approval of the Grantor *or any other person,* may sell, assign or hypothecate such policies and may exercise any option or privilege granted by such policies, including ... the right to ... surrender or convert such policies...." Appellants' App. p. 455 (emphasis added). There was no requirement, therefore, that KeyBank notify the Beneficiaries of the impending exchange, inasmuch as neither their consent nor approval were required to carry out the transaction.

Even if we were to find that KeyBank's actions herein constituted a breach of its duty to the Beneficiaries, we cannot countenance the Beneficiaries' argument that the lack of receipt of an annual report or failure to provide information about the exchange, without more, supports an award of compensatory damages. For damages to be warranted, we can only conclude that causation must be established. The trial court found that "the receipt of timely financial reports by the Beneficiaries would not have changed the negative financial condition of the trust" and that the "lack of financial reporting to the Beneficiaries was not the proximate cause of damages to the Beneficiaries." Appellants' App. p. 22–24. There is certainly evidence in the record supporting those findings. We agree with the trial court that "financial trends outside of the control of the Trustee or the Beneficiaries were the direct and proximate cause of the problem facing the Trust in 2003," *id.,* and would add that

another contributing problem beyond everyone's control was Stuart's tragic, untimely death. We simply cannot conclude that KeyBank's shortcomings vis a vis the provision of annual reports and other information to the Beneficiaries was a proximate cause of any damages to the Beneficiaries.

2. Duty of Loyalty

Next, the Beneficiaries argue that KeyBank somehow breached its duty of loyalty to them. The only evidence they point to in support of this argument is the fact that KeyBank had various contacts and communications with Stuart between 1999 and 2003. According to the Beneficiaries, this evidence supports an inference that KeyBank was loyal to Stuart rather than to the Beneficiaries, as required by law. We cannot agree. A trustee must, as a practical matter, have contacts with the settlor. Appellee's App. p. 474. For example, if changes are going to be made to an insurance policy, those changes generally require that the settlor submit to a physical exam; therefore, such a change cannot be effectuated without communication between a trustee and settler. *Id.* Nothing in the law prohibits contact between a trustee and settlor, nor should it. Here, nothing in the record leads us to conclude that KeyBank breached its duty of loyalty to the Beneficiaries.

B. Delegation

The Beneficiaries also argue that KeyBank breached its duties to them by delegating certain decisionmaking functions to Roberson without adequate oversight. As discussed above, however, the record supports a conclusion that, in fact, no such delegation occurred. Furthermore, KeyBank engaged its own independent expert to evaluate the VUL policies and the John Hancock policy that was suggested by Roberson. Under these circumstances, we do not find that KeyBank breached its duties to the Beneficiaries in this regard.

C. Grantor's Intent

Finally, the Beneficiaries argue that the trial court erroneously concluded that the 2003 Exchange was consistent with Stuart's intent. The primary goal in construing a trust document is to ascertain and effectuate the intent of the settlor, which may be determined from the language of the trust instrument and matters surrounding the formation of the trust. *Malachouski v. Bank One*, 590 N.E.2d 559, 565-66 (Ind. 1992). The Beneficiaries suggest that the trial court was improperly considering Stuart's acts or requests made after the trust

was executed in reaching that conclusion. We cannot agree, however, inasmuch as the trial court explicitly concluded as follows: "Had the insurance policies lapsed, the Beneficiaries would have received no distribution from the Trust. Certainly that outcome was not within the intent of the Settlor *at the time he established the Trust.*" Appellants' App. p. 22–24 (emphasis added). Nothing in the record suggests that the trial court was clearly erroneous in reaching that conclusion, and we decline to disturb its ruling for this reason.

CONCLUSION

In sum, we find that the trial court did not erroneously conclude that, while KeyBank's decisionmaking process and communication with the Beneficiaries was not perfect, it was sufficient. Although it is tempting to analyze these cases with the benefit of hindsight, we are not permitted to do so, nor should we. KeyBank chose between two viable, prudent options, and given the facts and circumstances it was faced with at that time, we do not find that its actions were imprudent, a breach of any relevant duties, or a cause of any damages to the Beneficiaries.

The judgment of the trial court is affirmed.

Class Discussion Tool

Glover Washington placed his entire estate in trust for the benefit of his seventy-five year old wife, Sarah for life, with the remainder to be distributed to his five children. The primary corpus of the trust consisted of a stock portfolio. The portfolio contained the following: 60% Washington Computer stock; 10% Apple Computer stock; 5% Dell Computer stock; and 5% Microsoft stock. The 60% Washington Computer stock represented a 58% ownership interest in the company. The Washington Computer Company had been in the Washington family for over fifty years and Glover made it clear that he wanted his descendants to always have the controlling interest in the company. In 2000, Glover died and City Bank assumed its role as trustee. At that time, Washington Computer stock was selling for $123 per share. In 2004, the Washington Computer stock was selling for $80 per share. The stock continued to sell as follows: 2005 ($72); 2006 ($108); 2007 ($94). When Sarah died in 2008, the Washington Computer stock was selling for $85 per share. At no time did City Bank discuss selling the trust's shares of Washington Computer stock. In 2009, when City Bank made its accounting to Glover's five children and prepared

to distribute the remaining trust funds, the children objected to the accounting. The children sued City Bank for breaching the duty of prudence. What result?

Chapter 10 - Duty of Loyalty

The trustee must administer the trust solely in the interest of the beneficiaries. This is similar to the exclusive benefit rule under ERISA that requires retirement funds to be managed for the exclusive benefit of the retirees. The two main indicators of disloyalty occur when the trustee engages in self-dealing or ignores a conflict of interest. Self-dealing occurs when the trustee buys or benefits from the sell or purchase of trust property directly or indirectly. If the trustee engages in self-dealing, good faith and fairness to the beneficiaries are not enough to save the trustee from liability. In case of self-dealing, the court makes no further inquiry. Therefore, the trustee's good faith and the reasonableness of the transaction are irrelevant. The beneficiaries have several remedies when the trustee engages in self-dealing. First, the beneficiaries can hold the trustee accountable for any profit he made on the transaction. In the alternative, if the trustee purchased the property from the trust, the beneficiary can sue to compel the trustee to restore the property to the trust. In the event the trustee has sold his own property to the trust, the beneficiary can sue to make the trustee return the purchase price and take back his property. The trustee is not without defenses when it comes to self-dealing. In order to avoid liability, the trustee must prove that the settlor authorized the self-dealing or that the beneficiaries consented to the transaction after he made full disclosure. Nonetheless, the transaction must be fair and reasonable.

A conflict of interest occurs when the trustee facilitates the sell or purchase of trust property to a person or entity to which the trustee also owes a fiduciary duty. For example, if an attorney who is acting as trustee sells trust property to one of his clients, a conflict of interest arises. The court will evaluate the transaction to see if was fair and reasonable to the trust. In that case, the trust pursuit rule provides a remedy for the beneficiary. Under that rule, if the trustee wrongfully disposes of trust property and acquires other property, the beneficiary is entitled to enforce a constructive trust on the newly acquired property so acquired. Hence, the new property becomes a part of the trust assets. In the event that the trust property ends up in the hands of a third party, there are two possible results. If the third party is not a bona fide purchaser (BFP))(one who pays value and takes without notice of the breach of trust), he does not hold the trust property free of

the trust. If the person is a BFP-he holds the trust property free of the trust and is under no liability to the beneficiary.

Problems

1. Karlowba established a support trust for the benefit of her son Kahn. The corpus of the trust was a collection of antique cars valued at $200,000 and other property. After Karlowba died, Cory assumed his roll as trustee. The trust needed cash in order to pay monthly income to Kahn. Thus, Cory decided to purchase the antique car collection from the trust. In order to avoid the appearance that he was taking advantage of the trust, Cory purchased the car collection for $350,000. Later, the car collection appreciated to a value of $800,000. Kahn sued Cory to recover the profits from the appreciation of the car collection. What result?

2. Alberto established a trust for his daughter Isabella. The corpus of the trust was an apartment complex valued at two million dollars. Lionel was appointed as trustee over the Isabella trust. Lionel was also trustee over a second trust that had been created by Bradford for the benefit of his son, Carlton. For tax reasons, the Carlton trust needed to make an investment. Lionel purchased the apartment complex from the Isabella trust for the Carlton trust. Lionel used two million dollars from the Carlton trust to purchase the apartment complex. Later, the apartment complex was worth three million dollars. Isabella sued Lionel to recover the profits from the appreciation of the apartment complex. What result?

3. Please label the following situations as self-dealing or conflict of interest.

a). Elaine's brother Chris purchased property from a trust over which she is trustee.

b) Joseph gives property from a trust over which he is trustee to his mistress, Arlene.

c) Galvin sells land owned by his medical practice to a trust over which he is trustee.

d). Melvin, a psychologist, sells property from a trust over which he is trustee to one of his patients.

e) Zach sells property from a trust over which he is trustee to City College. Zach is on the board of trustees of City College.

***Boyce Family Trust*, 128 S.W.3d 630**

WILLIAM H. CRANDALL, Jr., Judge.

Defendant, Robert B. Snyder, appeals from the judgment, entered in a court-tried case, in favor of plaintiffs, the John R. Boyce Family Trust, John R. Boyce, Mary Ann Boyce, Daniel P. Boyce, M. Elizabeth Boyce, Emily Ann Boyce, and Stephen Pallen Boyce, in their action for removal of the trustee and for damages for the trustee's breach of fiduciary duty. We affirm in part and reverse in part.

In a court-tried case, the judgment of the trial court will be affirmed unless there is no substantial evidence to support the judgment, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. Banc. 1976. We accept all evidence and inferences favorable to the judgment, and disregard all contrary evidence and inferences. *Central Dist. Alarm, Inc. v. Hal-Yuc. Inc.,* 886 S.W.2d 210, 211 (Mo. App. E.D. 1994. The trial court is in the best position to judge the credibility of the witnesses. *VanBooven v. Small*, 938 S.W.2d 324, 327 (Mo.App. W.D. 1997).

The evidence established that the John R. Boyce Family Trust (hereinafter "family trust") was created by the Henrietta Boyce Revocable Living Trust upon the death of Henrietta Boyce in February 1994. The beneficiaries of the trust were John R. Boyce, Henrietta's son; Mary Ann Boyce, Boyce's wife; and their four children, Daniel P. Boyce, M. Elizabeth Boyce, Emily Ann Boyce, and Stephen Pallen Boyce. Henrietta named Anthony Ribaudo as trustee of the family trust; and in the event Ribaudo resigned, designated defendant, Snyder, as successor trustee.

For years, plaintiff, Boyce, and defendant, Snyder, were close personal friends and business associates; and Boyce, an attorney, represented Snyder in legal matters. Snyder began working in the family grocery store as a teenager. In 1962, at the age of 22, he acquired his first ownership interest in a grocery store. He later formed Arnold Discount Foods, Inc. (hereinafter "ADF"), a corporation that owned and operated several small grocery stores. He converted the stores to Save–a–Lot stores, which were part of a chain of discount grocery stores. He also bought grocery stores which had failed or were failing. In 1983, he acquired a store in Eureka, Missouri, forming a second corporation, Eureka Discount Foods, Inc. (hereinafter "EDF"), to own and operate the store as a Save–a–Lot store (hereinafter "Eureka store"). After 1983, Snyder opened additional Save–a–Lot stores and placed them in ADF corporation.

Snyder was also an owner and director of First Exchange Bank (hereinafter "the

bank"), which failed and was taken over by the FDIC. At Snyder's urging, Boyce had placed several loans with the bank. After the bank's failure, the FDIC called Boyce's loans. When Boyce was unable to obtain financing elsewhere, the FDIC obtained a judgment against him.

In the fall of 1994, Boyce met with Snyder several times to discuss Boyce's financial problems. During the meetings, Boyce learned that Snyder was interested in selling the Eureka store. Snyder's reasons for selling the Eureka store, as stated by him, were that he wanted to lessen his workload, to reduce the number of stores he owned, and to work with his son under only one corporation, ADF.

Boyce expressed an interest in purchasing the Eureka store not only as an investment opportunity for the family trust but also as a way of providing a job for his son, Daniel. Boyce expressed concern to Snyder, however, that neither he nor Daniel had any experience in the grocery business. Snyder assured Boyce that Daniel could be trained to operate the store. Snyder and Boyce were both aware that a Wal–Mart super center was planning to open in Eureka.

Snyder provided Boyce with the past financial records for the Eureka store and introduced him to Save–a–Lot executives. The Save–a–Lot representatives told Boyce that the stores were so easy to run that a "chimpanzee could run one." On the basis of their experience, they predicted that the opening of the Wal–Mart super center would cause an initial drop in sales of ten to 15 percent, but that the Eureka store would recover the loss within six months. Snyder concurred in that opinion.

Boyce determined that the family trust should purchase the Eureka store and agreed with Snyder on a purchase price of $403,000.00. The sale was structured as a sale of the common stock of EDF, so that Snyder could offset the capital gain from the sale of the store against the capital loss he incurred when the bank failed. No date was set for closing. Boyce agreed to close when Snyder felt that Daniel was sufficiently trained to operate the Eureka store successfully.

In January 1995, Daniel began working at one of Snyder's stores located in Fenton, Missouri. Snyder told his general manager to train Daniel to take over the Eureka store. The Fenton store manager started Daniel at an entry level position and after two months moved him into a management trainee program when he became aware that he was training Daniel

to take over the management of the Eureka store. In May 1995, Daniel continued his training at the Eureka store under Bob Heaton, the manager of the Eureka store who had been interested in purchasing the Eureka store but had decided against it. Snyder's general manager continued to monitor Daniel's training several times per week and told Daniel to contact her whenever necessary. Daniel was also free to contact the manager of the Fenton store for guidance. Heaton and Daniel, however, did not get along. Heaton eventually left employment at the Eureka store at Daniel's request. Daniel was left to manage the Eureka store on his own, with occasional help from Snyder and his two managers. Snyder's own store managers had years of experience in the grocery business before they were promoted to store manager.

The Wal–Mart super center was scheduled to open in the mid-summer of 1995. Snyder was anxious to close on the sale of the Eureka store. In May 1995, Snyder told Boyce that Daniel was ready to manage the Eureka store. Boyce relied on Snyder's representation in deciding to proceed with the closing. When the purchase of the Eureka store was proposed to the trustee of the family trust, Anthony Ribaudo, he resigned as trustee because he did not have any experience in the grocery business. As the designated successor trustee, Snyder agreed to serve as trustee.

On May 30, 1995, Snyder signed documents accepting the trustee position. On May 31, 1995, the closing on the sale of the Eureka store took place. Boyce drafted the terms of the purchase agreement, which provided as follows: $265.00 to purchase one share of EDF from Snyder and $265,000.00 to redeem the remaining shares from Snyder, with the result that the family trust owned the only share of EDF corporation; $13,000.00 to Snyder for ADF corporation to provided consulting to EDF corporation, payable in monthly installments; $125,000.00 to Snyder for a non-compete agreement to prohibit him from owning or operating a grocery store within 10 miles of the Eureka store for a period of five years, payable in monthly installments. The family trust guaranteed EDF's loan of $175,000.00 from Rockwood Bank and loaned EDF an additional $75,000.00. Snyder signed the documents for the sale and financing on his own behalf and as successor trustee of the family trust.

For the first fiscal year the Eureka store was in business, after the opening of the Wal–Mart super center, the figures reflected an average decline in sales of 17 percent per

week. In addition, shortly after closing, the Eureka store's refrigeration equipment needed extensive repairs and in some cases replacement. In the fall of 1995, Snyder acquired an interest in real property within a ten-mile radius of the Eureka store, with the intent of opening another grocery store with his son. Snyder and his son formed a new limited liability company to operate the new store and opened the store in May 1998. Rockwood Bank renewed EDF's loan in August 1997, August 2000, and August 2001. At the time of trial, the family trust remained liable on its guaranty of the EDF loan; and the family trust's loan to EDF remained unpaid and had increased to $160,676.27.

In 2000, plaintiffs brought the present action against Snyder. Their petition against Snyder was in six counts: Count I for his removal as trustee; Count II for breach of his fiduciary duty; Count III for his ultra vires acts; Count IV for avoidance of the ultra vires acts; Count V for fraudulent misrepresentation; and Count VI for imposition of a constructive trust. In their action, they sought money damages, a rescission of the sale of the Eureka store, and the imposition of a constructive trust on the proceeds of the sale of the Eureka store for the benefit of the family trust. Plaintiffs also brought one count for negligent misrepresentation (Count VII) against Moran Foods, Inc. d/b/a Save–a–Lot, Ltd.; but dismissed that count without prejudice before trial. Snyder counterclaimed, seeking indemnification from the family trust for his attorney's fees and a declaratory judgment that he was entitled to indemnification. During the pendency of this action, Snyder resigned as trustee and the court appointed Daniel as interim trustee.

After a bench trial, the court entered judgment in favor of plaintiffs and against Snyder on Count I for the removal of Snyder as trustee. On Count II for breach of fiduciary duty, the court awarded total damages of $285,000.00: $185,000.00 for the family trust's purchase of the Eureka store; and $100,000.00 for the monies loaned by the family trust, which the trial court determined was a total loss. On Count VI, the court imposed a constructive trust in the amount of $285,000.00 on the proceeds of the sale of the Eureka store. The court dismissed as moot plaintiffs' claims in Counts III, IV, and V and entered judgment in favor of plaintiffs on Snyder's counterclaims. Snyder appeals from that judgment.

In his first point, Snyder contends that the trial court erred in entering judgment in favor of plaintiffs because his challenged conduct did not amount to misrepresentations, but

were merely expressions of opinion or predictions. In addition, he argues that the conduct occurred prior to his assuming the role of trustee and that he became trustee only after the deal was fully negotiated and set for closing.

A trustee is a fiduciary of the highest order and is required to exercise a high standard of conduct and loyalty in administration of the trust. *Ramsey v. Boatmen's First Nat'l Bank of K.C., N.A.*, 914 S.W.2d 384, 387 (Mo. App. W.D. 1996). Although the trustee has many duties emanating from the fiduciary relationship, the most fundamental is the duty of loyalty. *Id.* As part of this duty, the trustee is to administer the trust solely in the interest of the beneficiary. *Id.* This duty precludes self-dealing, which under most circumstances is a breach of the fiduciary duty. *Id.*

Here, Snyder's argument that he merely expressed opinions and predictions in lieu of misrepresentations is without merit. He was very familiar with the grocery business, having worked in the business for well over 40 years in varying capacities. During that time, he had negotiated for and purchased several failed or failing grocery stores. There was evidence that Snyder had no personal experience regarding the impact a Wal–Mart super center would have on the sales of the Eureka store, although he admitted at trial that he was concerned about the competition from a Wal–Mart super center. Yet, he assured Boyce that the decline in store sales would be minimal and would be recovered six months after the opening of the Wal–Mart super center. He also was anxious to close on the Eureka store and pushed for closing, presumably because he was worried about the increased competition from the Wal–Mart super center. At trial, he was unable to explain his eagerness to close the sale of the Eureka store. He withheld information from Boyce about the true value of the store, especially as it faced competition from a Wal–Mart super center. Knowledge of the value of the Eureka store was particularly within his province, in light of his experience in purchasing grocery stores experiencing financial difficulty. Snyder was under a duty to inform the beneficiaries of all facts known by him so that they could make an informed decision about whether to proceed with the purchase of the Eureka store.

In addition, Snyder represented to Boyce that Daniel was ready to assume management of the Eureka store. He did this, despite the fact that Daniel did not have any prior grocery store experience and had been in a management-trainee program for less than six months. Further, his own store managers had many years of experience in the grocery

business before he promoted them to managerial positions.

Finally, Snyder misrepresented his reasons for selling the Eureka store, as evidenced by his subsequent conduct. His stated motives for selling were his desire to lessen his workload, to reduce the number of stores he owned, and to work with his son under one corporation. Yet, after selling the Eureka store, he opened an additional store in violation of the non-compete agreement and even formed a new business entity to operate that store.

The trial court was not obligated to believe Snyder's proffered reasons for selling the Eureka store. Nor was the court required to believe Snyder about what facts were known to him at the time of closing. In a court-tried case, the court is free to disbelieve the testimony of a witness. *See Ford Motor Credit Co. v, Freihaut,* 871 S.W.2d 129, 131 (Mo. App. E.D. 1994).

Boyce testified that, had Snyder apprised him of Daniel's lack of readiness to manage the Eureka store successfully and of Snyder's true reasons for wanting to sell the Eureka store, Boyce would not have recommended that the family trust purchase the store.

Snyder's argument that the transaction was for all practical purposes completed prior to his assuming the position of trustee draws a distinction without a difference. Snyder was acting in his capacity as trustee at the time of closing the sale of the Eureka store. At that time, he had the duty not only to disclose any information relevant to the sale but also to avoid engaging in a financial transaction beneficial to his interests and detrimental to the interests of the family trust. The trial court did not err in finding that Snyder breached his fiduciary duty to the family trust. Snyder's first point is denied.

In his second point, Snyder asserts that the trial court erred in entering judgment in favor of plaintiffs because they not only consented to the transaction prior to closing but also ratified the transaction after the fact by operating the Eureka store for five years before filing the present action.

When a competent beneficiary who has full knowledge of the facts and of his legal rights consents to a transaction, he cannot thereafter seek redress against the trustee even though the transaction would otherwise be a breach of trust. *Ramsey,* 914 S.W.2d at 387. The consent of the beneficiary, however, does not preclude him from holding the trustee liable for a breach of trust, (1) if when he gave his consent, the beneficiary did not know of his rights and of the material facts which the trustee knew or should have known and which the

trustee did not reasonably believe that the beneficiary knew or (2) if the consent of the beneficiary was induced by improper conduct of the trustee. *Id.* (citing Section 216 Restatement (Second) of Trusts). When a transaction involves a trustee, it must be fair and open, and consent must be informed with all parties holding equal knowledge of material facts and rights and otherwise free of influence. *Ramsey,* 914 S.W.2d at 388.

Here, as discussed above, Boyce did not have full knowledge of all of the material facts and did not have knowledge equal to Snyder's. Boyce had never been involved in the grocery business, unlike Snyder who had been in the business for over 40 years. Boyce relied on Snyder's estimate of the impact of the Wal–Mart super center on the Eureka store's sales. Boyce relied on Snyder's representations that Daniel was ready to assume management of the Eureka store. Snyder was aware that his knowledge regarding the sale of the Eureka store was superior to Boyce's, yet he induced Boyce to proceed with the sale by representing that Daniel was ready to manage the store. Under these circumstances, Snyder breached his fiduciary duty to the trust.

Further, Snyder's argument that the plaintiffs' continuing to operate the Eureka store was tantamount to a ratification of the sale after the fact is specious. Plaintiffs, once they purchased the Eureka store, had no choice but to continue to operate it to protect their investment as much as possible. That conduct did not amount to ratification of the sale. Snyder's second point is denied.

In his third point, Snyder contends that the trial court erred in imposing a constructive trust on the proceeds of the sale of the Eureka store. He first argues that there was no underlying breach of fiduciary duty to warrant the imposition of a constructive trust. His second argument is that there was no evidence that there were identifiable proceeds remaining on which to impose a constructive trust. We only discuss Snyder's second claim, because it is dispositive of this point on appeal.

A constructive trust is a device employed by a court of equity to provide a remedy in cases of actual or constructive fraud or unjust enrichment. *U.S. Fidelity and Guaranty Co. v. Hiles*, 670 S.W.2d 134, 137 (Mo. App. 1984). It may be imposed where, as the result of the violation of confidence or faith reposed in another, or fraudulent act or conduct of such other, the plaintiff has been deprived wrongfully of, or has lost, some title, right, equity, interest, expectancy, or benefit, in the property which, otherwise and but for such fraudulent

or wrongful act or conduct, he would have had. *Id.* The plaintiff may seek to impose the constructive trust on the specific property after it has left the wrongdoer's hands, until it reaches the hands of a bona fide purchaser. *Id.* The plaintiff may also seek to impose the constructive trust on, or to trace his property into, the proceeds of the property which are in the hands of the wrongdoer. *Id.* In this latter event, the plaintiff may recover any profit or increase in value that has accrued. *Id.* The plaintiff is limited, however, to a proportionate interest in the proceeds, if other separate property is commingled with wrongfully taken property to produce the price paid for the proceeds. *Id.* The plaintiff must prove his claim, both the fact of wrongful taking and any tracing, by clear, cogent and convincing evidence. *Id.*

Snyder posits that the essence of a constructive trust is the identification of specific property or fund as the res upon which the trust may be attached. *See Blue Cross Health Services, Inc. v, Sauer,* 800 S.W.2d 72, 76 (Mo.App. 1990). Plaintiffs did not allege and did not establish that any such identifiable property or fund existed to which the proceeds from the sale of the Eureka store could be traced.

The appropriate action to enforce a constructive trust is an action for money had and received. *Campbell v. Webb*, 363 Mo. 1192, 258 S.W.2d 595, 602 (1953). Notwithstanding the fact that plaintiffs prayed for the equitable remedy of a constructive trust and for an accounting for all the proceeds of the sale, in the absence of any allegation of the existence of specific property or fund constituting the res upon which the trust might be imposed, their petition failed to invoke equity jurisdiction. *See Blue Cross,* 800 S.W.2d at 76. Nothing in the record shows that plaintiffs are entitled to more than a money judgment. The trial court erred in imposing a constructive trust on the proceeds of the sale.

Under the circumstances of this case, however, it does not follow that Snyder is entitled to a new trial because of this error. *See id.* The case was fully tried with ample opportunity for all parties to present evidence on all issues framed by the pleading. There was sufficient evidence that plaintiffs are entitled to have Snyder removed as trustee and to be awarded an amount which represented the money wrongfully taken by Snyder as a result of his breach of his fiduciary duty to the family trust. The second part of Snyder's third point is granted.

In his fourth point, Snyder asserts that the trial court erred in entering judgment for

plaintiffs for money damages, because plaintiffs lacked standing to assert those claims, which could only be brought by the successor trustee.

The beneficiaries have standing to bring the equitable actions for removal of the trustee, disqualification of the successor trust, and for an accounting. *Deutsch v. Wolff*, 994 S.W.2d 561, 566 (Mo. Banc. 1999 (citing Restatement (Second) of Trusts, section 177, 197-199). The trustee, however, should bring the claims for money damages. *Deutsch*, 994 S.W.2d 566. In *Deutsch,* Missouri Supreme Court recognized that several factors justified an exception to the general rule. *Id.* In the instant action, there are factors similar, although not identical, to those in *Deutsch* that mitigate against the application of the rule requiring the successor trustee to bring the present action. *See Id.* First, Snyder was actively involved in administering the family trust during the pendency of this action. Although he resigned as successor trustee, he did so 13 months after the action began. In addition, the court required the interim trustee, who was appointed to serve during the litigation, to submit monthly income and expense reports to Snyder and any withdrawals had to be submitted to Snyder five days in advance of the proposed withdrawal. Second, Snyder denied that his conduct justified removal. Plaintiffs were required to prove their right to removal by establishing that Snyder had breached his fiduciary duty to the family trust and that the trust had been damaged. Thus, the fact issues on the legal and equitable claims were identical. Third, Snyder did not make any claim before the trial court that the proper party to assert the claim was the successor trustee, but instead undertook a defense of the legal claims on their merits, including raising affirmative defenses and pleading counterclaims. Fourth, in addition to all the beneficiaries, the family trust itself was a party-plaintiff. Fifth, the pleading alleged a breach of Snyder's fiduciary duty to the trust. Sixth, the money judgment was entered in favor of all plaintiffs, which included the family trust itself. To allow actions at law to be prosecuted with the equitable actions is also consistent with the doctrine that once equity acquires jurisdiction, it will retain it so as to afford complete justice between the parties. *Id.* at 567. Thus, under the facts of this case, the beneficiaries had standing to bring this action. Snyder's fourth point is denied.

In his fifth point, Snyder challenges the award of damages of $285,000.00, because the award was not supported by the evidence.

The trial court's findings relating to actual damages are entitled to great weight on

appeal and will not be disturbed unless the damages awarded are clearly wrong, could not have been reasonably determined, or were excessive. *Williams v. Williams*, 99 S.W.3d 552, 557 (Mo.App. W.D. 2003). If an award of damages is within the range of the evidence, an award of a particular amount may be considered responsive even though it does not correspond precisely with the amount claimed. *Id.*

Here, Boyce testified that the actual value of the Eureka store at the time of sale was about $150,000.00. The measure of damages for misrepresentation is the difference between the actual value of the thing sold and the value as represented. *Smith v. Tracy*, 372 S.W.2d 925, 938 (Mo. 1963). The difference between the purchase price of $403,000.00 and actual value was $253,000.00. The court's award of $185,000.00 for this element of damages was within the range of the evidence.

Plaintiffs also claimed damages for the money the family trust loaned in conjunction with the Eureka store. The evidence was that at closing the family trust loaned $75,000.00 of the purchase price and throughout the years of operation the family trust loaned additional monies, with the result that the amount loaned increased to $160, 767.27. The court's award of $100,000.00 for this element of damages was within the range of the evidence. The trial court did not err in awarding damages. Snyder's fifth point is denied.

That part of the judgment imposing a constructive trust on the proceeds of the sale of the Eureka store is reversed. In all other respects, the judgment of the trial court is affirmed.

***Edwards v. Edwards*, 842 P.2d 299**

WALTERS, Chief Judge.

This is a family dispute involving two agreements to develop real property located in the vicinity of the Cascade Reservoir. Franklin Edwards (Frank), a real estate developer, brought this action against his children and the estate of his deceased mother, seeking a declaratory ruling on the enforceability of a 1964 joint venture agreement and a 1977 contract to develop property held in trust. Following a trial, the district court decreed the joint venture dissolved as a result of Frank's wrongful conduct, and further held the subsequent contract voidable as a consequence of Frank's breach of his duty as trustee. We affirm.

Facts and Procedural Background

Charles and Ora Edwards had one child, Frank. In 1937, Charles and Ora bought 1,350 acres of land near Donnelly, in Valley County. The federal government purchased the land in 1940 as part of the development of the Cascade Dam and Reservoir. After the dam was completed, the government deeded part of the land back to Charles and Ora, which they thereafter held as community property. The area soon began developing into a location for summer homes, enhancing the economic potential of the Edwards' property. In 1964, Charles, Ora, and Frank entered into an agreement (the 1964 Agreement) to develop a portion of the land known as the Edwards Ranch Subdivisions I and II. Under the terms of the agreement, Charles and Ora agreed to make these two tracts available for promotion and sale, and Frank agreed to make the improvements necessary to develop the property, to promote and sell individual lots, and to oversee the performance of sales contracts. Specifically, the agreement recited that Frank promised to proceed with plans to develop the ... property for purposes of its sale, to construct the necessary roads, ditches and other improvements necessary for the development of the area, and to promote and sell the lots in the two subdivisions. He further agrees to be responsible for the sale of the lots.

The parties also agreed that Frank would receive one-half the net profit from each lot sold, and that the parties would share expenses equally. The agreement further provided that it was to remain in effect until all the lots were sold, and that its terms would be binding on the parties' administrators, executors, and heirs.

Between 1964 and 1974, Frank sold all of the lots in the Edwards Ranch Subdivision I, and all but eleven of the lots in Edwards Ranch Subdivision II. Frank purchased a waterfront lot in Subdivision II for himself where he built his home. The eleven unsold lots lie immediately adjacent to his home, shielding it from some of the other development in the area.

In March, 1974, Charles Edwards died. With a few exceptions not germane to this case, Charles left his entire estate, which included his one-half interest in his and Ora's real property, in trust for the benefit of Ora and his four then-living grandchildren—Frank's four older children: William, Roger, Dawn, and Alexandra, and named Frank as its trustee. Pursuant to the terms of the testamentary trust (the Trust), Ora received a life interest in the trust income, and upon her death the trust corpus was to be divided among the four

grandchildren. The document authorized the trustee to invade the trust corpus as necessary to provide for Ora's support, maintenance and health. Charles' will additionally contained the following request:

> Although I am not directing the Trustee not to sell this property [the land adjacent to the reservoir], I urge that he retain it as long as possible for the reason that it will continue to appreciate in value.

With the single exception of an offer in 1989—which precipitated this litigation and is discussed below—Frank made no attempt to sell any of the remaining lots in Subdivision II after 1974. During 1976 and 1977, Frank and Ora discussed developing and selling other property to fund the Trust, notwithstanding the fact that there remained unsold lots in the Edwards Ranch Subdivision II. In April, 1977, Frank and Ora entered into a written contract (the 1977 Agreement) to develop and sell lots from a twenty-five acre tract within the original Edwards property, known as the Margot Subdivision. Ora and the Trust each owned an undivided one-half interest in this property. Under the terms of the 1977 Agreement, Frank would receive fifty percent of the net profit from each sale, the Trust twenty-five percent, and Ora twenty-five percent. Frank executed the agreement in his individual capacity, and also as trustee on behalf of the beneficiaries.

Ora died in July, 1988, terminating the trust. The trust corpus, which included a one-half interest in the eleven unsold lots in the Edwards Ranch Subdivision II and a one-half interest in the unsold lots remaining in the Margot Subdivision, was distributed directly to the four named grandchildren. In her will, Ora named William, the eldest grandchild, the personal representative of her estate. Over Frank's objection, the will was admitted to probate.

Shortly after Ora's death, Frank learned that, in 1986, Ora had executed and recorded a document unilaterally renouncing the 1964 Agreement and declaring it to be of no further effect. In November, 1989, while the will contest was pending, Rufus and Rona Gillette offered to buy two of the remaining lots in the Edwards Subdivision II, plus a small additional parcel outside of the subdivision, for $100,000. Frank was willing to make the sale, but when he asked William to proceed with the transaction on behalf of Ora's estate, William refused. The family dispute has also prevented the completion of other proposed sales in the Margot Subdivision.

In February, 1990, Frank filed this action against his children and Ora's estate, seeking a declaration that the 1964 and 1977 agreements were valid and binding upon all of them, and that Ora's unilateral renunciation of the earlier agreement was without effect. The three eldest children, William, Roger and Dawn, filed an answer and counterclaim. They admitted that the 1977 Agreement was still valid and enforceable. They alleged, however, that the 1986 renunciation was a valid exercise of Ora's rights, and asked the court to declare the 1964 agreement no longer in effect. Alexandra Edwards filed a separate answer alleging that Frank executed the 1977 Agreement in violation of his duties as trustee, rendering the agreement voidable, at least as to her interest.

Without ruling on the validity or effect of Ora's unilateral renunciation of the 1964 Agreement, the court concluded that the joint venture had been dissolved, prior to the time of the renunciation in 1986, because Frank had willfully and persistently breached his duty to promote and sell the remaining lots under the Agreement. In ruling on the enforceability of the 1977 Agreement, the court concluded that, notwithstanding Frank's good faith or the fairness of the agreement's terms, Frank's dual role as trustee and developer created an impermissible conflict of interest, and absent Alexandra's consent or authorization by a court, the agreement was voidable as to her interest.

On appeal, Frank asserts that the district court erred by finding that his conduct constituted a willful breach of his duties under the 1964 Agreement, and therefore the decree of dissolution must be reversed. He also avers that the court erroneously held he had breached his fiduciary duty to Alexandra, and that its declaration that the 1977 Agreement was voidable as to her interest must also be overturned. We will address these issues in turn.

Standard of Review

The role of this Court in reviewing findings of fact is limited. We do not weigh the evidence, nor do we substitute our view of the facts for that of the fact finder. *Alumet v. Bear Lawk Grazing Co.*, 119 Idaho 946, 949, 812 P.2d 253, 256 (1991). Findings made by the trier of fact will not be disturbed on appeal unless clearly erroneous. I.R.C.P. 52(a). Findings are not clearly erroneous if they are supported by substantial, even though conflicting, evidence in the record. *Sun Valley Shamrock v. Travelers Learning*, 118 Idaho 116, 118, 794 P.2d 1389, 1391 (1990). Evidence is "substantial" if a reasonable trier of fact would accept and rely upon it in determining whether a disputed point of fact has been proved. *Weaver v. Millard*,

120 Idaho 692, 698, 819 P.2d 110, 116 (Ct.App. 1991). However, we freely review any statements of law and the trial court's application of the law to the facts properly found. *Carr v. Carr*, 116 Idaho 747, 750, 779 P.2d 422, 425 (Ct.App. 1989).

Dissolution of the Joint Venture

A joint venture is a relationship analogous to, but not identical with, a partnership. *Brummet v. Ediger*, 106 Idaho 724, 727, 682 P.2d 1271, 1274 (1984); *Stearns v. Williams*, 72 Idaho 276, 284-85, 240 P.2d 833, 839 (1952). Accordingly, the law relating to the dissolution and termination of partnerships generally applies to joint ventures. *See* 46 AM JUR.2d Joint Ventures § 30, at 51 (1969The Uniform Partnership Act, as adopted in Idaho). , enumerates the legal causes of dissolution. *See* I.C. § 53-331. Section 53-331(6) provides for dissolution by decree of a court. The grounds upon which a party is entitled to a judicial decree of dissolution are set forth in I. C. § 53-332. Specifically, the court will decree a dissolution whenever a partner willfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him. I. C. § 53-332(1)(a).

Frank does not contest the applicability of the Uniform Partnership Act to the issues presented. Rather, his appeal challenges the district court's finding that he "willfully and persistently breached his duties under the 1964 agreement to the extent it became totally impracticable to carry on the purpose of the joint adventure—to develop and sell the remaining lots in Edwards Subdivision II." Frank maintains that the court's ultimate finding of a willful and persistent breach is premised on two underlying erroneous findings:

(1) that during the fifteen-year period between 1974 and 1989, Frank did nothing to promote or sell the eleven remaining lots under the 1964 Agreement; and (2) that Frank intended to use the lots for his own benefit. He claims that the first finding is clearly erroneous in light of evidence that he staked lots, graded a road, and orally listed the lots with realtors in the area. However, it does not appear from the record that these efforts to improve and promote the lots took place after 1974. Furthermore, the record indicates that Frank failed to establish any road to some of the lots as required by the original plat. The record also indicates that two realtors with whom Frank had listed other Edwards properties did not know that the lots adjacent to Frank's home were for sale. According to Frank's own testimony, the eleven remaining lots were not advertised after 1974. Frank also argues that

septic tank restrictions imposed in 1970 and 1972 impeded the further sale of lots in the Edwards Ranch Subdivision II. Notwithstanding the imposition of the sewage covenants, however, Frank was able to purchase for himself a lot in that subdivision, and to sell another lot in 1974, and to attempt to sell the two lots to the Gillettes in 1989.

Frank argues that his inactivity was justified because it furthered the parties' profit motive and his father's will that he "retain the property as long as possible for the reason that it will continue to appreciate in value." Admittedly, the property had increased in value. However, the trial judge considered Frank's explanation and the evidence supporting it, but ultimately rejected it, being persuaded that "the most reasonable and rational explanation for Frank's lack of effort on behalf of the joint adventure is that he intended to use the lots for his own benefit, to provide a buffer zone between his own house and other residences." This finding is supported by evidence of Frank's active development of other Edwards property around the reservoir, most notably, the lots in the Margot Subdivision. As Frank acknowledges, the provision in his father's will applied to *all* of the Edwards property near the reservoir, including lots in the Margot Subdivision. Furthermore, the evidence indicates that Frank proposed the development of the Margot Subdivision in 1977 after telling his mother there were no more lots left to sell, even though the eleven lots next to his own home remained unsold. The district court also heard testimony from Frank's former wife, who had lived with him at Edwards Ranch Subdivision II from the time their house was built in 1972 until 1988. According to her, Frank was not inclined to develop the surrounding lots and he told her he wanted to preserve his privacy from neighbors.

We conclude that the record contains ample evidence, even if conflicting, to support the district court's finding that Frank's fifteen years' inaction under the 1964 Agreement constituted a willful and persistent breach of his duties. Accordingly, the district court's declaration that the joint venture was dissolved as a result of Frank's conduct is affirmed.

[9][10] As a final note on the subject, we mention that the effective date of a dissolution is the date of the first effective act of dissolution; subsequent acts or causes of dissolution are irrelevant. *See* 59A AMJUR2D Partnership § 814, at 638 (1987). Thus, although a dissolution by judicial decree generally dates from the date of the court decree, the date of dissolution may be deemed to have occurred earlier, where, as here, the partnership is dissolved on the basis of findings that relate back to a prior date. 59A

AMJUR2D Partnership § 881-883, at 670-71. In view of the court's finding that Frank's willful and persistent breach predated Ora's 1986 renunciation, the renunciation was a superfluous act, and a ruling on its validity or effect was unnecessary.

The 1977 Agreement

[11] Next, we turn to the declaration that the 1977 Agreement was voidable as to Alexandra. Frank seeks to overturn this decision, arguing that the court erroneously held that his execution of the agreement violated his fiduciary duty of loyalty. As noted above, Frank contracted to develop the Margot Subdivision—property owned jointly by Ora Edwards and the Trust. Under the terms of the agreement he was to receive fifty percent of the net profit from all sales. Frank entered into the agreement on his own behalf and also as trustee on behalf of the Trust's beneficiaries. Alexandra Edwards, a beneficiary of the Trust and still a minor in 1977, never consented to the agreement at the time of its making, nor has she ratified it subsequently. These facts are not disputed.

Although Frank acknowledges that his dual role as trustee and developer generally would create a conflict of interest, he argues that under the circumstances, the fact that he placed himself in a position of potentially conflicting loyalties did not constitute a breach of his fiduciary duty to the beneficiaries. We disagree.

The Uniform Trustees' Powers Act, I .C. § 68-104 through 68-113 describes the powers that may be exercised by a trustee. The Act specifically recognizes the trustee's powers to invest the trust assets and to develop, improve and convey them. *See* I .C. § 68-106(c). However, these powers are expressly made subject to the trustee's duty to act with due regard to his or her obligation as a fiduciary. I .C. § 68-106(b). Although the obligations of a fiduciary are not enumerated in the statute, they are well established in the law. Often deemed its first duty, the trustee owes a duty of loyalty

The trustee owes a duty to the beneficiary to administer the trust in the interest of the beneficiaries alone, and to exclude from consideration his own advantages and the welfare of third persons. This duty is called the duty of loyalty. If the trustee engages in a disloyal transaction, the beneficiary may secure the aid of equity in avoiding the act of the trustee or obtaining other appropriate relief, *regardless of the good faith of the trustee or the effect of the trustee's conduct on the beneficiary or benefit to the trustee.*

In enforcing the duty of loyalty the court is primarily interested in improving trust administration by deterring trustees from getting into positions of conflict of interests, and only secondarily in preventing loss to particular beneficiaries or unjust enrichment of the trustee.

G.G. Bogert & G.T. BOGERT, Law of Trusts §95 (5th ed. 1973) (emphasis added); *see also* Restatement (Second) of Trusts §§ 170, 206 (1959); A. Scott, Abridgment of the Law of Trusts § 170, 1960). "Fidelity in the agent is what is aimed at, and as a means of securing it the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal." *Jensen v. Sidney Stevens Implement Co.*, 36 Idaho 348, 353, 210 P. 1003, 1005 (1922). Furthermore, the Uniform Trustees' Powers Act specifically provides that if the fiduciary duty of the trustee and his individual interest conflict in the exercise of a trust power, the power may be exercised *only* by court authorization. I..C. § 68-108(b).

By contracting to develop and sell the trust property at a profit to himself, Frank clearly was not acting for the sole benefit of the trust beneficiaries, but for his own interest as well, therefore creating a conflict of interest. Pursuant to the provisions of the Trustees' Powers Act, I..C. § 68-108(b). Frank was prohibited from entering into the contract without court authorization. Although Frank admits he never obtained judicial authorization, he suggests that the conflict of interest created here ought to be exempted from his duty of loyalty, arguing that his actions were in accord with the presumptive intent of his father, the trust settlor, to develop and sell the properties in order to fund the trust corpus. To support his position, Frank relies on two cases, *In re Kellogg's Trust,* 35 Misc.2d 541, 230 N.Y.S.2d 836 (1962) and *In re Steele's Estate*, 377 Pa. 250, 103 A.2d 409 (1954). These cases lend little support, however, because they present situations in which the trustee's conflict of interest was either passive or was the direct creation of the trust settlor. Here, by contrast, Frank himself created the conflict by contracting to develop the trust property at a profit to himself. Although the trust scheme arguably countenanced the development of the trust properties, their development by way of a specific arrangement involving self-dealing was neither inherent in the trust scheme nor authorized by the trust instrument. Thus, even if otherwise applicable in this jurisdiction, the reasoning of the cases cited by Frank is inapposite to the factual situation here.

As correctly concluded by the district court, Frank executed the 1977 Agreement in violation of his duties as trustee. Because Alexandra had neither consented to the agreement at the time nor ratified it since, she was entitled to equitable relief. The judgment declaring the 1977 Agreement voidable as to her interest is, therefore, affirmed.

CONCLUSION

The judgment of the district court declaring the 1964 joint venture dissolved and the 1977 agreement voidable as to Alexandra is affirmed.

Class Discussion Tool

Donald and his wife, Minnie, were in poor health and unable to look after their own affairs. In 1970, Donald, then age 82, executed a power of attorney naming his sons, Roy and David, as his agent. A few months later, Minnie, age 79, executed her power of attorney naming her sons, Roy and David, as her agent. In 1970, Donald and Minnie owned real and personal property of a value estimated to be between $375,000 and $500,000.

During the following three years, Roy sold his parents' vacation home for $150,000. He used the money he received from the sale of the home to buy a lake cabin for him and his wife. Further, Roy misappropriated great sums of money from his parents to pay debts and living expenses for himself and his family. Roy sold his parents' art collection to Mystic Art Gallery. Stanley, the gallery's owner thought that the art collection belonged to Roy. Roy also bought a house and gave it to his best friend, Fred, who was having financial problems. Fred did not know that the house had been purchased with Roy's parents' money. David signed off on all of Roy's actions because he thought they have been approved by his parents.

Donald and Minnie executed a will leaving all of their property in trust for their grandchildren. National Bank was the trustee. After Donald and Minnie died, National Bank discovered the misappropriations made by Roy. The trustee filed an action against Roy and David to recover the trust assets. Please analyze all of the relevant legal issues.

Chapter 11 - Duty of Impartiality

Most trustees are accountable to two types of beneficiaries—present and future. The present beneficiary relies on the income from the trust. Typically, the future beneficiaries are paid the principal remaining in the trust after the present beneficiary dies. For instance, O could execute a will containing the following language: "I leave the residuary of my estate in trust for the benefit of my daughter for life. After the death of my daughter, the remaining assets are to be held in trust for my then living grandchildren." O's daughter has a life estate in the first trust; O's grandchildren have a contingent remainder in the second trust. The trustee has to make sure that the trust produces enough income to meet O's daughter's needs. In addition, the trustee has to act to ensure that there will be enough money left in the trust to create the second trust for O's grandchildren. There is tension between the interests of beneficiaries entitled to income and those who may later be entitled to the principal. According to the duty of impartiality, a trustee has a duty to deal with both the income beneficiary and the remainderman impartially. Consequently, the trustee must make sure that the trust property produces a reasonable income while being preserved for the remaindermen. In order to accomplish that goal, the trustee must preserve the trust property and make it productive so he will have the resources to meet the needs of both the present and future beneficiaries. The decision often comes down to investing in income-producing property that does not appreciate or investing in property that increases in value that produces little income.

***Pennsylvania Company For Insurance on Lives and Granting Annuities v. Gilmore*, 43 A.2d 667**

SOOY, Vice Chancellor.

This is a bill filed by the trustee of the estate of Frederick Hemsley, deceased, in part asking for instructions as to its duty with respect to certain 'tax free' securities held by it in its capacity as trustee.

The bill was filed May 15, 1944, final hearing was held on December, 6, 1944, and final briefs on July 2, 1945. This history of the litigation is not intended as showing any lack of diligence on the part of the litigants under the circumstances of this case but to make

record of the fact that there has been no delay on the part of the Court.

That which gives rise to the request for instructions by the trustee is the question as to whether it should sell all or part of certain 'tax exempt' securities now held by it as a part of the residuary trust in its hands for a 'profit' of approximately $212,381.25 over par, and also certain Government Bonds which are partially tax exempt on which there is a profit of approximately $19,000 over par. These securities constitute somewhat over 50% of the original 'residuary' trust estate, which aggregated $3,075,000.

This Court uses values that were fixed as of November 27, 1944 but it is conceded that any variances which have or will result is of small importance 'because the Court is asked to adjudicate upon policy and not upon precision and upon the effect generally upon the life tenants and the remaindermen respectively and not upon the precise dollars which either will gain or lose.'

While this Court is not called upon to execute the trustee's discretion (3 Bogert on Trusts and Trustees § 559, page 1787), it would seem that on the facts presented herein the trustee was amply justified in asking for the Court's aid. The trustee had advised the life tenants and vested remaindermen of the possibility of the sale of the tax exempts at a price which would augment the corpus of the trust fund and the life tenants and vested remaindermen objected to such a sale. The contingent remaindermen are infants and not in position to voice their wishes. The trustee was in duty bound to consider the interests of these minors and the only avenue for a full and fair determination of the question was the filing of the bill and the appointment of the guardian and counsel to represent the infants, with the resultant decree as to the rights of all parties. This course has not been resisted by the life tenants or remaindermen and the guardian ad litem for the infants has requested the Court's determination, and the Court having assumed jurisdiction without objection, should be very hesitant of its own motion to deny the trustee the protection a decree will afford on a question which the trustee could not answer in safety.

It is argued by counsel for the life tenants and vested remaindermen that the position of the trustee is that of stakeholder and that it has assumed the attitude of a champion for the sale of the tax exempts. I do not so find. True, it has presented its approach to the solution of the problem and the result of its consideration of that problem, but in so doing has only given to the Court the benefit of the picture as it sees it, conceding at the same time

that there is another side to that picture which it leaves for the Court to determine. This is the proper procedure and it would be improper for the trustee to supinely submit to a decree at the dictation of some of its cestuis.

Testator died March 15, 1915, leaving a will dated January 12, 1905, with 2 codicils dated respectively February 20, 1911 and February 11, 1914. Decedent, by his will and codicils, created 5 separate trusts but the only one we are now considering is that denominated by the parties as the 'residuary trust,' with assets amounting to $3,075,000 at its inception, which was in the form of cash received by the trustee from the executors of the estate over a period from 1919 to 1928. This residuary trust, as provided by the decedent, gave a life estate of two-thirds of the income to the widow, Mrs. Hemsley, and as to one-third of the income, to decedent's only child, Mrs. Gillmore. On Mrs. Hemsley's death her two-thirds of the income passes to Mrs. Gillmore and on the death of Mrs. Gillmore and Mrs. Hemsley the entire principal of the trust vests in Mrs. Gillmore's children equally, if living, the issue of any deceased child to take per stirpes. These great grandchildren of testator are herein referred to as contingent remaindermen. It should be here noted that under the terms of the will the vesting in the children of Mrs. Gillmore is determined by the mother's death, so that if she predeceased Mrs. Hemsley her children's interest becomes absolute even though the question of the quantum of that interest will be later increased by the death of the grandmother, Mrs. Hemsley.

Mrs. Hemsley (87 years of age) and Mrs. Gillmore (60 years of age) are living. Mrs. Gillmore has 3 children, all of whom are of full age.

It thus appears that the parties in interest are first, the life tenants, secondly, the vested remaindermen, they being the living children of Mrs. Gillmore, and thirdly, the issue of the grandchildren, the contingent remaindermen. In other words, the interest of the great grandchildren of decedent is conditioned upon their parent predeceasing Mrs. Gillmore. The great grandchildren are a minor child of testator's grandson, born June 2, 1936; another grandchild has 2 children, a minor son born July 7, 1931 and a minor daughter born May 22, 1933; and another grandchild has 2 children, a minor daughter born February 12, 1940, and another minor daughter born August 19, 1942. These 5 minor children, the contingent remaindermen of the residuary estate, were represented at the final hearing by guardian ad litem duly appointed by this Court, as well as by counsel also so appointed.

The life tenants, Mrs. Hemsley and Mrs. Gillmore, as well as the remaindermen, the adult children of Mrs. Gillmore, protest against the sale of any of the securities in question. Counsel for the infant contingent remaindermen says: 'If the reinvestment of the moneys secured from such a sale is limited to the purchase of new U. S. Government securities then this respondent can offer no objection on behalf of the infant defendants who are contingent remaindermen since the security of the corpus has not been lessened. Neither can this respondent object to the reinvestment of said moneys at a later date in municipal securities provided said municipal bonds are of equal security with those now held. * * * It is the opinion and contention of the Guardian ad litem for the aforesaid contingent remaindermen that the Court should follow the line of conduct expressed in the above cited case of *Bliss v. Bliss*, 126 N.J.Eq. 308, 8 A.2d 705[706], 'It is the duty of the court to protect the remaindermen as well as the life beneficiary [under a trust.] Such is also the duty of the trustees. It is not the province of [the Court of Chancery] to allow trustees to speculate in stocks which might result in a loss to the remaindermen,' and should not by its order lend its aid to the trustee in speculating in stocks which might result in a loss to the contingent remaindermen but should, if such order is entered, instruct the complainant to confine its investments to investments having equal security with these that complainant now holds.'

The basis for the position of the life tenants and vested remaindermen is generally that the requested sale of the tax exempt securities would discriminate against and result in great loss of income to them and that it would also eventually depreciate the value of the corpus.

It may be well, before considering the evidence adduced at final hearing, to note the applicable law.

Both sides agree that the rule is correctly set up in Section 232 of the Restatement of the Law of Trusts, as well as comments following that rule:

> 'If a trust is created for beneficiaries in succession, the trustee is under a duty to the successive beneficiaries to act with due regard to their respective interests.
>
> 'If by the term of a trust the trustee is directed to pay the income to a beneficiary during a designated period and at the expiration of the period to

> pay the principal to another beneficiary, the trustee is under a duty to the former beneficiary to take care not merely to preserve the trust property but to make it productive so that a reasonable income will be available to him, and he is under a duty to the latter beneficiary to take care to preserve the trust property for him.
>
> 'Although the trustee is not under a duty to the beneficiary entitled to the income to endanger the safety of the principal in order to produce a large income, he is under a duty to him not to sacrifice income for the purpose of increasing the value of the principal.'

Professor Bogert, in his work on Trust and Trustees, Vol. 4, § 801, says:

> 'The trustee who holds for successive beneficiaries owes a duty to them to conduct the trust with equal consideration for the interests of all the beneficiaries. He should not unnecessarily show a preference either for the present cestuis or those who are to take income or capital later. * * * 'A trustee has no right to take sides as between the life tenants and remaindermen. If he has an election of taking one of several courses, he must take, if possible, that which will not benefit one at the expense of the other."

Professor Pomeroy, 4th Edition, Vol. 3, Sec. 1071, says:

> 'It is the trustee's duty to use diligence in investing the trust property so that it may produce as much income as possible, and also to use care and prudence in investing it in such securities as will render its loss highly improbable, even if not virtually impossible.'

And again in Section 1072:

> 'It is the trustee's imperative duty to render the trust property as productive as possible consistent with its security and with the demands of ordinary business prudence and judgment.'

Reference is also made to Restatement of the Law of Trusts, Section 227, , pages 651 and 652.

In *McCracken v. Gulick*, 92 N.J.Eq. 214, 112 A. 317, Mr. Justice Swayze said:

> 'The fundamental principle is to carry out the intent of the testator. Clearly when he has created a trust fund and directed that the income be paid a beneficiary for life, he *57 intends to secure that income to the life tenant; that is the very object of the fund.'
>
> 'To withhold all dividends would strengthen the corpus of the estate, but the testator can hardly mean to starve the life tenant for the benefit of remaindermen, whom he often has never seen.'

The McCracken case was followed by *Graves v. Graves*, 115 N.J.Eq. 547, 171 A. 681 and reference is also made to *National Newark & Essex Banking Co. v. Work*, 109 N.J.Eq. 468, 158 A. 109, 110::

> 'There is another phase of this matter which should be borne in mind, that is, the intent of the testator. I have no doubt that he wished his children to enjoy a reasonable income during their lives. His grandchildren, the remaindermen, some of whom were not in existence when the will was drawn, could not have interested him particularly. * * * To hold the entire proceeds of the Meadowbrook income would prevent his children from living in the manner to which they have always been accustomed, and deprive them of the ability to care for their own children, the remaindermen, during their minority; and I believe would defeat the intent of the testator as I gather it from the will. The trustees admit such a construction would be a hardship upon the life tenants.'
>
> 'My conclusion is that the dividends which were received by the testator through Meadowbrook be considered as income and paid to the life tenants. If it be true that this procedure will deplete the estate, it is unfortunate, but it is no concern of this court. The testator clearly desired his children to enjoy a proper income, and it is no fault of any one, if, in the problematical future, this income diminishes or ceases.'

If it were possible to gather testator's intent as to the solution of the problem before the Court from the context of the will and codicils the result would be a decree in conformity therewith. But the Court is not permitted to speculate as to what testator would

do were he confronted with these problems. The question of intent must be answered by the language used by testator, but it is obvious that in 1905, 1911 and 1914 testator was not contemplating a situation brought about by conditions all of which arose long after these years. At the time of his death income taxes had been imposed, it is true, but these taxes financed necessities of the Government as they then existed and these necessities had not brought about the high income tax impost of later years. Since the making of the will and codicils and testator's death the depression of the late 20s and early 30s and 2 World Wars have ensued. All we gather from a reading of the will is that testator's first consideration was for his widow and daughter. He evidently desired them to have an income befitting the manner and style of living to which they were accustomed. To accomplish this he devoted a greater portion of his entire estate, giving them an income amply sufficient. His grandchildren were a secondary consideration. He did not, until 1914, create any separate trust for them. He made them remaindermen after the life estates. But as conditions were at the time of the execution of the will and codicils and at the time of Mr. Hemsley's death, he had a right to believe and evidently did, that he had amply provided for his widow and daughter for their lives and for his grandchildren thereafter, and under certain contingencies, his great grandchildren.

The trustee rightfully says that testator's choice of the life tenants as the main object of his bounty cannot be urged as evidence that he intended 'to extend to them an ease and insurance against conditions which he could not have visualized or contemplated at the time he made his will and codicils.'

The question before the Court must therefore be decided on its legal aspects and the question is, what is the duty of the trustee of this residuary trust? That duty, as laid down in the Restatement of the Law of Trusts, is 'to deal impartially' as between the successive beneficiaries, and to act 'with due regard to their respective interests.' To accomplish this result where, as in this case, the trustee is directed to pay income for life to one set of beneficiaries and at the end of that period pay over the principal to the remaindermen, 'the trustee is under a duty' to the life tenants 'to take care not merely to preserve the trust property but to make it productive so that a reasonable income will be available for the life tenants,' and it is under a duty to the remaindermen to 'take care to * preserve the trust property for them.' The trustee 'is not under a duty to the life tenants to endanger the safety

of the principal in order to produce a larger income,' but he is under a duty 'not to sacrifice income for the purpose of increasing the value of the principal.'

I think it is generally conceded that a sale of the tax exempts and the purchase of 2% Governments, as contemplated by the trustee, would not endanger or in any way jeopardize the value of the trust estate.

Would the plan of sale of tax exempts sacrifice income? It will be demonstrated hereafter that the loss of income to the life tenants would be great and that it would also be detrimental to the interests of the vested remaindermen.

The duty of the trustee, as I see it, is to act with due regard to the respective interests of the successive beneficiaries, to deal impartially as between them. To do this, it seems to me, requires the trustee to view the overall picture as it is presented from all the facts, and not close its eyes to any relevant facts which might result in an excessive burden to the one class in preference to the other. To say the trustee may blind itself to the fact that the income of the life tenants bring them within the high brackets of income tax payments would be unjust. That fact must be taken into consideration with all other facts and with them in view, the question of fairness must be answered. The trustee also has a duty to see that the increase to corpus goes to the contingent remaindermen who may never take, and while the interest of these contingent remaindermen must be zealously guarded, the trustee's duty to the life tenants may not be served by saying-we have nothing to do with the question of income tax and its effect on your interest as life tenants if the sale is made-nor may the trustee say that the income remaining after the payment of tax if the tax exempts are sold is sufficient for your needs. It is the duty of the trustee to return the highest income to the life tenants consistent with the safety of the corpus, and not an income which the trustee may deem to be sufficient for their purposes.

It is said by counsel for the trustee, 'if income changes impose new burdens they should be shared proportionately and not added expense for the one for the alleviation of the others.' If the sale is made of the tax exempts the benefit is an increase of corpus for the contingent remaindermen and not for the benefit of the life tenants. The sale would be to the sole detriment of that life tenants and vested remaindermen, with no benefit to them at all, and all benefit to the contingent remaindermen.

The trustee, as well as the life tenants and the guardian ad litem, each produced experts to testify as to their opinion as to the propriety of the sale of the whole or a part of the tax exempts. Each one of these expert witnesses are men of ability, integrity and wide experience and each gave his expert opinion from his own individual standpoint and experience.

The trustee's investment officer on trusts, Mr. Ashbridge, disclosed that it was his opinion that a sale should be had. Mr. Boyd, for the trustee, advocates a sale and reinvestment in 2% Government Bonds for a period of time and then a sale of the 2% Bonds and reinvestment in new municipal tax exempts as opportunity offers. Mr. Boyd did exclude from the sale tax exempts of very short maturity. He said, however, that he was not considering the duty of the trustee toward the life tenants insofar as protection of income was concerned. Mr. Collings, for the guardian ad litem, was of the opinion that it was unwise to sell. He was viewing the matter more from the interest of the life tenants. He said, however, disregarding the life tenants' interests and only considering the remainder interest, a sale should be had. The final question to Mr. Collings was: 'Now having in mind the life tenants' interest, also having in mind the remainder interest, are you able to form a judgment as to whether the plan is good or not?' Answer: 'If you consider both interests then I think I wouldn't sell the bonds.' Mr. Brombach for the life tenants and remaindermen, from whose testimony the result of the sale of the interest of the life tenants and remaindermen is taken, though it unwise to sell. General Gillmore for the life tenants and vested remaindermen likewise thought it unwise to sell.

From the above very sketchy reference to the evidence adduced at final hearing it would seem that the Court has before it the testimony of men of wide experience in the financial world and that there is a divergence in the opinion arrived at by these experts, and that that divergence might be said to leave the weight of the expert testimony in equipoise. I think it may be fairly said, however, that if the client of any one of these experts happened to be an individual seeking advice from the standpoint of an investor of his own funds that the answer would have been a unanimous opinion that the tax exempts should be sold, this depending, of course, on the income bracket of the individual investor who might be seeking advice. I think it may also be said that the testimony of the experts, in some instances at least, displayed a failure to comprehend the trust aspect involved in the question, to the

extent that it was necessarily involved for a fair solution as between the divergent interests of the life tenants and remaindermen to those interests of the contingent remaindermen.

Counsel for the life tenants and vested remaindermen have attached to their brief tables to show the result of a sale of all or half of the tax exempts on the life tenants during their joint lives, and also on Mrs. Gillmore in the event she survives her mother, which tables, generally speaking, show, as stated by counsel, 'that if the sales are made on the basis as requested in the bill of complaint, and then reinvested on a 2% basis as now suggested, Mrs. Hemsley will sustain a 58% loss in her retained income after payment of income tax; Mrs. Gillmore will sustain a 46% loss, and in the event of Mrs. Hemsley's death, Mrs. Gillmore's loss would soar to 64%. The comparable figures, if only one-half were sold as suggested at the hearing, would be a 28% loss for Mrs. Hemsley; a 22% loss for Mrs. Gillmore and a 31% loss for Mrs. Gillmore following Mrs. Hemsley's death.' These figures, according to counsel, were on the basis of data produced at the time of the hearings and are not necessarily the correct percentages as of the date of the filing of briefs. However, it is suggested that the percentages will not very materially change.

Counsel for the defendants concede that as the tax exempts mature, and assuming that it is impossible to replace them with new and comparable tax exempts, the foregoing percentages will change, but alleges that allowing for maturities at the earliest possible dates on the various tax exempt issues, a sale at the present time would, at the end of 5 years, result in a loss of approximately $210,000 of tax free income to the life tenants, and at the end of a 10 year period a loss of approximately $366,000 of such tax free income. These are minimum figures, assuming payment at the earliest possible maturity dates of the bonds, and it is alleged that there would be a substantial loss to the 3 grandchildren, but at a greatly reduced percentage because these grandchildren are in lower tax brackets.

We have before us a picture where if all tax exempts are sold a profit over cost of approximately $231,000 or a premium over par of over approximately $240,000 may be gained, which will be added to the corpus of the trust. Such gain, of course, would be subject to reduction by capital gain tax. This profit would be added to the corpus and be invested so that the annual income yield would be less than if they were not sold. If sold, we have as heretofore set forth, a very substantial shrinkage of the yearly income of the life tenants and a smaller reduction as to the vested remaindermen. From this it is obvious that considering

the interest of these two classes of beneficiaries alone, a sale of the tax exempts should not be made. We can readily see that the beneficiaries of the result of the sale will be the contingent remaindermen by the increase of corpus. The result of a sale, insofar as these contingent remaindermen are concerned, considered alone, would be for their best interest. But the proposed plan of sale and repurchase of other securities out of the proceeds of sale will not add to the security of the corpus as it now exists. These tax exempts are 'blue chip' investments and while the contemplated purchase of bonds to replace those sold carries with it the intent to purchase Government securities of like character, there may arise a contingency not now foreseen which would render these repurchased bonds less desirable, and the duty of the trustee of the contingent remaindermen does not carry with it a requirement that the corpus be augmented unless that result may be accomplished in fairness to the interest of the life tenants and vested remaindermen. It is, of course, plainly the duty of the trustee to in no wise speculate with the trust funds.

In view of the facts as the Court sees them, as heretofore outlined, the instructions to the trustee will be that it is not its duty to sell all or any part of the securities herein referred to as tax exempts in order that it may capture for the corpus of the residuary trust the profit now realizable upon said municipal and Government bonds.

***Sturgis v. Stinson*, 404 S.E.2d 56**

LACY, Justice.

In this will construction case, we determine whether the testator placed restrictions on the amount of income which the income beneficiary was to receive and, if not, whether the executor was required to administer the assets of the trust created by the will in a manner which did not discriminate between successive beneficiaries and which produced a reasonable level of income in relation to the value of the trust assets.

Dr. William J. Sturgis, Jr., died testate in 1986, leaving an estate valued at $1,140,462 consisting of an automobile, approximately $300,000 in various stocks and bonds, and two parcels of real estate-Bush Hill Farm (the farm), valued in the estate inventory at $708,500, and a one-third undivided interest in another parcel of land with a value of $126,000. His will provided that his widow, Anne Sturgis, receive all the income from his estate for her lifetime. At her death, or if she were to renounce the income, the residue of the estate was to pass to

his children, Susan Sturgis Stinson and Christopher S. Sturgis (the remaindermen).

The testator named his wife and Robert C. Oliver, Jr., as co-executors. Upon the wife's election not to serve, Oliver qualified as executor of the estate. In 1989, he filed a bill of complaint stating that the income beneficiary, Mrs. Sturgis, had complained that "the income derived from the estate is insufficient based upon the value of the assets of the estate" and asked that property of the trust be sold and so reinvested as to derive greater income. The remaindermen opposed the sale of the property and maintained that the trust assets could not be sold without their consent. The executor sought the guidance of the chancellor.

After an *ore tenus* hearing, the court entered a final decree holding that the will "created a trust;" that the executor had the obligation to deliver all the net income of the trust to Mrs. Sturgis and to invade the trust corpus when he determined the income therefrom was insufficient to meet the needs of the income beneficiary; that the executor had the "authority, but not the obligation, to convert assets of the estate ... including real estate, to forms other than those in which he received them, so long as he behaves consistently with the 'prudent man' rule;" and that the executor "has performed properly under the terms of the will." We awarded Mrs. Sturgis, the income beneficiary, an appeal from this decree.

The primary controversy here revolves around a single, but valuable, asset of the trust-Bush Hill Farm. This farm constitutes approximately 75% of the corpus of the trust and, at the time of trial, had a fair market value of $1.5 million. The maximum annual net income generated by this asset and paid to Mrs. Sturgis was $1,265.99 in 1988.

Mrs. Sturgis asserts that this return on the property, representing eighty-four one-thousandths of one percent of its fair market value, classifies this property as an unproductive asset and that, under general trust principles, the executor has an obligation to sell it and reinvest the proceeds. The executor and remaindermen contest Mrs. Sturgis' assertion that selling the farm is required in this case.

Under general trust law principles, where, as here, a trust is created for successive beneficiaries, the trustee has a duty to * deal impartially with them. *Shriner's Hospitals v. Smith*, 328 Va. 708, 710, 385 S.W.2d 617, 618 (1989); *Patterson v. Old Dominion Trust Co.*, 139 Va.

246, 257, 123 S.E. 549, 552 (1924). The parties agree that the executor's duties in relation to trust assets set out in the Restatement (Second) of Trusts embody sound and appropriate principles:

The trustee is under a duty to the beneficiary to use reasonable care and skill to make the trust property productive. Restatement (Second) of Trusts Code § 181 (1959).

Unless it is otherwise provided by the terms of the trust, if property held in trust to pay the income to a beneficiary for a designated period and thereafter to pay the principal to another beneficiary produces no income or an income substantially less than the current rate of return on trust investments, and is likely to continue unproductive or under-productive, the trustee is under a duty to the beneficiary entitled to the income to sell such property within a reasonable time. *Id.* at § 240.

The executor and remaindermen assert that the trial court was correct in declining to apply these principles and require sale of the farm because the disposition and management of the farm and other trust assets were "otherwise provided by the terms of the" will. The remaindermen argue** that the testator intended that the farm not be sold unless necessary to meet the needs of the income beneficiary. The executor argues that as long as the income beneficiary is receiving income sufficient to meet her needs, his discretion as to the management of trust assets should not be disturbed.

In contrast, Mrs. Sturgis argues that the will places no condition or limitation on the amount of income she is to receive and contains nothing to support the inference drawn by the chancellor that the testator wished to retain the farm as a family heritage.

Resolution of the dispute rests upon the testator's intention as reflected in the will. The chancellor held that Mrs. Sturgis was entitled to "all net income of the trust," but he also found that the testator intended that she receive income necessary to provide her with "comfortable maintenance and welfare according to her standard of living." Therefore, the trial court concluded, in effect, that the executor was not required to manage the trust assets in a manner designed to provide income in excess of that amount.

As a general rule, the factual determinations of the trial court are accorded substantial deference on review and will be reversed only if plainly wrong or without evidence to support them. However, that standard is inapplicable here because the trial

court's conclusions regarding the testator's intent and its construction of the will were opinions based solely on the will, and on testimonial evidence and other documents not in material conflict. *Hankerson v. Moody*, 229 Va. 270, 274, 329 S.E.2d 791, 794 (1985); *Durrette v. Durrette*, 233 Va. 328, 332, 288 S.E.2d 432, 434 (1982); *Rinehart & Dennis Co. v. McArthur*, 123 Va. 556, 567, 96 S.E. 829, 833 (1918). We begin our review by examining the relevant portions of the will.

Paragraph Four of the will consists of three sections. The first declares that Mrs. Sturgis is to receive "[a]ll of the income of my estate, of every nature and wheresoever situate," during her lifetime.

The second section of Paragraph Four provides that:

> If at any time, ... in the opinion of my Co-Executor, ... the income of my estate together with such other income available to my wife is insufficient to meet any unusual expense ... or to provide for her comfortable maintenance and welfare, then such Co-Executor may pay to my wife ... such amounts from the principal or corpus of my estate as such Co-Executor deems necessary for such purposes.

The final section of Paragraph Four provides that when Mrs. Sturgis dies or "if she should decide that she has no need for such income" the estate devolves upon Christopher Sturgis and Susan Stinson.

Paragraph Six provides in pertinent part:

> It is my will, and I direct that my Executors and their successors have, in addition to all other powers granted by law, the powers set forth in Section 64.1-57 of the Code of Virginia (1950), as in force on the date of the execution of this will, together with the right to sell, pledge, or hypothecate real estate and other property.

Contrary to the argument advanced by the executor and the remaindermen, the second section of Paragraph Four imposes no limitation on the first section of that paragraph. Indeed, the second section confers a separate benefit upon the widow; in the event the income otherwise available to her "is insufficient to meet any unusual expense ... or to provide for her comfortable maintenance and welfare," the executor is empowered to

invade and deplete the corpus of the trust for her benefit. Consideration of the widow's need is of concern to the executor and a precondition to his actions only for depletion of the trust corpus. The power to deplete the corpus for that purpose is irrelevant to the issues framed in this appeal.

The power of the executor to convert and reinvest corpus assets is granted by Paragraph Six, in which the executor is given the right to dispose of property and to exercise all powers and rights afforded a fiduciary under general law and as set forth in Code § 64-1-57. The will does not specify any criteria of need or other preconditions for the executor's exercise of these powers. Nor is there any indication that the income beneficiary would receive anything less than all the net income, regardless of amount, and irrespective of need, generated from the executor's exercise of his investment and management authority.

This interpretation is consistent with certain actions of the executor. As he testified, he had converted a number of the stocks in the trust corpus to investments that generated more income, including some stocks which would have appreciated in value but which did not generate much income. His conversion of the trust corpus was not limited to personality; the executor had also agreed to the sale of a portion of the real estate in which the trust held a one-third undivided interest. There is no indication in the record that the executor sought the remaindermen's consent for this sale, that the conversion was required due to Mrs. Sturgis' unusual expenses, or that the payment to Mrs. Sturgis of the income the new assets produced was based on the executor's determination of her need.

Furthermore, there is nothing in the will or the record to suggest that the executor was required to treat Bush Hill Farm in a different manner than other trust assets. Although the testator easily could have addressed the disposition of the farm, he did not. Indeed, the will does not even refer to the farm specifically. While Bush Hill Farm had been in the Sturgis family for many years, neither the remaindermen, Dr. Sturgis, nor his parents had ever lived on the property. The only dwellings on the property were tenant farmers' shacks which had burned prior to Dr. Sturgis' death. This record does not reflect any connection the testator had with this piece of property which would support the conclusion that the testator intended to distinguish its treatment from that to be accorded other real or personal property in the trust.

We conclude, therefore, that the testator intended that Mrs. Sturgis, the income

beneficiary, receive unconditionally all the income generated by the trust's assets. Additionally, if, in the opinion of the executor, the income from the trust and any other income available to her should become insufficient to meet her needs, the executor would be required to provide payments to her directly by depleting the corpus of the trust. Furthermore, we conclude that the testator did not intend to, and did not, direct or restrict the executor's management of the trust's assets, including Bush Hill Farm, except as provided under general law.

We have not previously addressed the duty of a fiduciary regarding the level of productivity of trust assets in circumstances where there are successive beneficiaries and no explicit instruction by the testator concerning that duty. *Cf. Patterson v. Old Dominion Trust Co.,* 149 Va. 597, 612-13, 140 S.E. 810, 814-15 (1927) (explicit instruction). We agree with the parties that the trust principles expressed in the Restatement and quoted above are appropriate, and we adopt them here.

Except for the directive on depletion of the corpus occasioned by Mrs. Sturgis' needs, the will contains no other directions regarding the management of the trust assets. Although the management discretion afforded a trustee under the Code of Virginia is extensive, *see* Code §§ 64-1-57 and 55-253 *et seq.,* that discretion is subject to the requirements of the "prudent man rule," Code § 26-45.1. The Restatement principles adopted above define a trustee's obligations under the "prudent man rule" regarding productivity of trust assets. These principles are applicable to the executor in this case as the return generated by Bush Hill Farm is so disproportionate to its value, the farm is rendered an unproductive asset.

In a second assignment of error, Mrs. Sturgis asserts that the chancellor erred "by failing to require the Trustee to sell unproductive trust assets and to allocate a portion of the proceeds of such sale to the income beneficiary as required by the Uniform Principal and Income Act, Va. Code §§ 55-253, *et seq.*" That Act provides that whenever any asset of a trust, real or personal, is unproductive, the income beneficiary "shall be entitled to share in the net proceeds received from [conversion of] the property as delayed income." Code § 55-263(1). The term "delayed income" is defined as

> the difference between the net proceeds received from the property and the amount which, had it been placed at simple interest at the rate of five per

> centum per annum for the period during which the change was delayed, would have produced the net proceeds at the time of the change....

Code § 55-263(2) The period of delay is calculated "from the time when the duty to make [a change] first arose, which shall be presumed, in the absence of evidence to the contrary, to be one year after the trustee first received the property if then unproductive, otherwise one year after it became unproductive." Code § 55-263(3). We think these principles are also applicable here.

We will reverse the judgment of the trial court and remand the case for further proceedings consistent with this opinion, including the allocation to the income beneficiary of any delayed income to which she reasonably may be entitled.

Reversed and remanded.

RUSSELL, Justice, with whom STEPHENSON, Justice, joins, dissenting.

The principles of law that govern cases of this kind are well settled: the testator's intention, if legal and ascertainable, controls. All refinements of the law must yield to the testator's power to dispose of his property as he pleases. When this intention is ascertained, the quest is ended and all other rules become immaterial. *Picot v. Picot*, 237 Va. 686, 689, 379 S.E.2d 364, 366 (1999) (quoting *Wornom v. Hampton B. & A. Inst.,* 144 Va. 533, 541, 132 S.E. 344, 347 (1926). In ascertaining the testator's intention, the court must examine the will as a whole, giving effect to all its parts if that can be done. *Thomas v. Copenhaver*, 235 Va. 124, 128, 365 S.E.2d 760, 763 (1988). The intention to be considered is that which is spoken by the words of the will, not an intention deduced from speculation as to what the testator would have done had he anticipated a change in the circumstances surrounding him *540 at the time of its execution. *Christian v. Wilson's Ex'rs,* 153 Va. 614, 632, 151 S.E. 300, 305 (quoting *Compton v. Rixey's Ex'ors,* 124 Va. 548, 553, 98 S.E. 651, 654 (1919), *cert. denied,* 282 U.S. 840, 51 S.Ct. 21, 75 L.Ed. 746 (1930).

The will of Dr. Sturgis is unambiguous and his overall intention is clear from its words. He wanted his widow to enjoy all income arising *from his estate* during her lifetime. If she should experience unusual expenses, or if the income of *his estate,* together with any "other income available to [his widow]" should prove insufficient to provide for her "comfortable maintenance and welfare," then the co-executor was authorized to invade the

corpus to the extent necessary, in the co-executor's discretion, to bring the widow's income up to that standard. At the widow's death, if she should not sooner renounce the income, the corpus of the estate was to pass to his two children. That, in a nutshell, is the intent of Dr. Sturgis as expressed in his words, and that is the way the trial court construed his will.

Unfortunately, the majority opinion appears to be based upon the notion that when Dr. Sturgis wrote paragraph six, he had forgotten paragraph four. The opinion considers the two provisions in isolation, rather than construing the will as a whole. Indeed, the opinion goes so far as to say that the executor's power to invade the corpus "has nothing whatever to do with the issues framed on this appeal."

When Dr. Sturgis executed his will, he knew what his assets were. He knew that some parts of his estate produced substantial income, which would primarily benefit his widow, and that other parts would produce little income, but would constitute a substantial inheritance for his children. When he spoke of "my estate," he necessarily contemplated that combination of income-producing and non-income-producing assets. If he had intended that his executors convert all his assets into investments producing high income, he could easily have said so. Rather, he provided that his widow receive "the income of my estate."

Land is not fungible. It is idle to speculate as to the testator's reason for retaining the farm as a part of his estate, for his children's benefit, rather than directing his executors to convert it into income-producing investments. The fact remains, however, that for his own reasons, he did so. He could have sold it during his lifetime, as his parents before him might have done, but he did not. Despite its deficiency as a producer of income, the farm was a part of the estate which passed under the will and which he contemplated as one of the sources of income for his widow.

Construed according to the testator's clear intentions, the co-executor had authority to sell timber from the farm, or to sell or encumber the land, in whole or in part, as might be necessary to maintain the widow comfortably, *but not otherwise*. That view is reinforced by the circumstances surrounding the testator at the time of execution of his will. Mrs. Sturgis was not the mother of Dr. Sturgis' children; they were the children of a prior marriage. Mrs. Sturgis came into the marriage with income-producing assets of her own, and it was not apparent that it would ever become necessary to invade the corpus to maintain her comfortably. As it turned out, the co-executor determined that she did need additional

income by the time this suit was instituted, and the trial court ruled that the co-executor should invade the corpus as necessary for that purpose.

In my view, paragraph six of the will merely arms the executors with all the powers requisite to carry into effect the intent expressed in paragraph four. Paragraph six does not require the executors to do anything. It certainly does not authorize them, or us, to disregard the clear intent of the testator, to treat land as if it were stocks and bonds, or to require conversion of the land into income-producing assets to the detriment of the testator's children.

Accordingly, I would affirm.

Notes, Questions, and Problems

1. In order to avoid violating the duty of impartiality, the trustee has to carefully balance the interest of both the income beneficiary and the beneficiary who will ultimately receive the principle. Nonetheless, the trustee often intentionally or unintentionally favors the remainderman over the life beneficiary for several reasons. First, the trustee may be reluctant to give the life beneficiary a lot of income because he anticipates that the life beneficiary may need more income later in his or her life. This is a valid concern because as people age they have increased medical and other expenses. However, if the life beneficiary dies sooner than the trustee expected, the remaindermen will receive a greater portion of the trust assets. Second, the trustee may be concern about his liability. If the income beneficiary successfully sues the trustee for not distributing enough money, the trustee can simply take the money from the trust. On the other hand, if the remainderman successfully sues the trustee for diminishing the corpus of the trust, the trustee may be personally liable for the loss. Once the money has been paid out of the trust, the trustee cannot recoup it from the life beneficiary. Finally, the trustee may favor the remaindermen over the life beneficiary because he think that the testator so intended. That belief comes from the fact that the remaindermen are usually minors or persons who need more financial support. If the trust instrument clearly expresses the testator's intent that the trustee not deal equally with the two different types of beneficiaries, the trustee can act impartially and not violate his trust duty.

2. The duty of impartiality does not appear to take into consider factors like the age, financial resources and vulnerability of the present beneficiary and the future beneficiary of the trust. Should those factors be relevant to a determination or whether or not the trustee has violated the duty of impartiality?

3. Problems

In which one of the following cases has the trustee violated the duty of impartiality?

a). Bonita stated the following in her will: "I leave my tree farm in trust for the benefit of my son, Gordon, for life. After Gordon's dies, the tree farm is to be held in trust for the benefit of my grandson, Adam." After Bonita died, Jacob assumed his role as trustee. Jacob entered into a contract to have all of the trees cut down and sold, so he could have enough trust income to pay Gordon.

b). Leonard placed his apartment complex in trust for the benefit of Edna for life. After Edna's death, the apartment complex was to be sold and the proceeds paid to Isaac. When Leonard died, Rachel assumed her role as trustee. Rachel used the rents from the apartment complex to pay the income to Edna. In order to save money, Rachel did not do major repairs on the apartment complex.

c) Jillian placed the residuary of her estate in trust for the benefit of Antonio for life. After Antonio's death, the remaining funds were to be held in trust for the benefit of Antonio's children. When Jillian died Stefano assumed his role as trustee. Instead of investing the trust funds in the stock market, Stefano placed them in a savings account. As a result, he was only able to pay Antonio six hundred dollars a month.

d). Curtis placed his entire estate in a discretionary support trust for the benefit of Selma for life. After Selma died, the remaining principal was to be held in trust for Selma's children. When Curtis died, Brooklyn assumed his role as trustee. Brooklyn decided that since Selma's children were young, they needed the money more than Selma. Thus, he reduced the distribution of the income, so he could preserve the principal for her children's trust.

Restatement (Third) of Trusts § 79

(1) A trustee has a duty to administer the trust in a manner that is impartial with respect to the various beneficiaries of the trust, requiring that:

(a) in investing, protecting, and distributing the trust estate, and in other administrative functions, the trustee must act impartially and with due regard for the diverse beneficial interests created by the terms of the trust; and

(b) in consulting and otherwise communicating with beneficiaries, the trustee must proceed in a manner that fairly reflects the diversity of their concerns and beneficial interests.

Class Discussion Tool

Sonia left her art collection in trust to Melissa for the benefit of Shirley and Tonya. Melissa was to use the money made from the sell and rental of the art collection to pay income to Shirley for life. The trust was to terminate on Shirley's death. At that time, Melissa was instructed to distribute the art collection and any trust money to Tonya. Melissa did not have any expertise in the art world, so she periodically contacted Noah, an art collector, for advice. In order to show her gratitude to Noah, Melissa gave him one of the paintings from the trust's art collection. The art industry suffered an economic downturn, so Melissa was having a difficult time renting the paintings. Thus, she started selling more paintings to have money to pay to Shirley. Melissa met with Noah and told him that she planned to sell a painting call "The Rain." Noah advised Melissa not to sell the painting until the article, Rayne, died. At that time, Rayne was suffering from terminal cancer. The trust was strapped for cash, so Melissa ignored Noah's advice and sold the painting for $300,000. A week later, Rayne died. Then, "The Rain" was worth one million dollars. The trust continued to lose revenue. In order to save money, Melissa reduced the amount of insurance she had on the painting. A few years later, Shirley died. Unfortunately, before Melissa could turn the paintings over to Tonya, the paintings were destroyed in a fire. The insurance proceedings only covered 75% of the value of the destroyed paintings. Tonya sued Melissa for a breach of the duty of impartiality. Please analyze the legal issues that arise from the facts in a jurisdiction that has adopted Restatement (Third) of Trusts § 79.

Chapter 12 - Duty to Account and Inform

As the previous chapters have indicated, the trustee has a lot of responsibilities. Some of the trustee's duties are mandated by law; others are imposed by the provisions of the trust instrument. In order for the beneficiary to hold the trustee accountable, the beneficiary must have information about what the trustee is required to do and what the trustee actually does. Thus, the trustee has a duty to account and to inform. These duties are related because the purpose of the accounting procedure is to provide the court and the beneficiary with information. The accounting may be mandated by the trust instrument or the law or requested by a beneficiary who suspects that the trustee has violated the terms of the trusts instrument.

The accounting protects the interests of the trustee and the beneficiary. After the trustee makes an accounting that is accepted by the beneficiary and the court, the trustee is protected from liability to the extent that the factual basis for a later claim by the beneficiary was disclosed in the accounting and accepted by the beneficiary. Consider the following example. A leaves his house to B in trust for the benefit of C. The house declines in value after B assumes his role as trustee. At an accounting, B informs C that since the house is depreciating, B has decided to reduce the insurance coverage on it. C fails to object to B's accounting and the court approves it. If the trust suffers a loss because of the lack of full insurance coverage, C might be inclined to sue B for breaching his duty of prudence. However, A may be relieved of liability because the accounting was accepted by the beneficiary and approved by the court. Nonetheless, an accounting will not protect a trustee who misrepresents vital facts. The beneficiary's consent to the accounting must be informed. Thus, a beneficiary who lacks the capacity to understand the information presented at the accounting will not be prevented from later challenging the court's approval of the accounting.

When a beneficiary requests an accounting she is usually seeking some type of damages. Therefore, this chapter includes a brief discussion of the remedies available to the beneficiary when the trustee is found to have breached one or more of his duties.

12.1 To Account

***Raak v. Raak*, 428 N.W.2d 778**

PER CURIAM.

Respondents, former trustees of Berdena Raak's revocable trust, appeal as of right from an order of the probate court requiring them to render an accounting as to trust property. We affirm.

Petitioner Berdena Raak is a widow in her late seventies who lives by herself. Respondents are Berdena's children. Throughout their marriage, Berdena's husband was the exclusive manager of the couple's assets, so that Berdena had no experience in financial management. Berdena was the sole beneficiary under their joint will. Shortly after her husband's death in 1981, respondents began to assume control over Berdena's assets which apparently totaled approximately $104,591.82, exclusive of her home and antique doll collection.

In September, 1983, Berdena and respondents entered into a written trust agreement appointing respondents as trustees. Pursuant to the terms of the declaration of trust, Berdena conveyed to herself and respondents as joint tenants with rights of survivorship her real property, personal property, and intangible personal property. Along with the trust agreement, Berdena also granted respondents a durable power of attorney.

In September, 1984 Berdena, revoked the power of attorney. In November, 1984, she petitioned the probate court for the appointment of a conservator and revoked the declaration of trust. The probate court granted the petition and named petitioner FMB-First Michigan Bank conservator. Respondents subsequently delivered to the conservator $32,579.12 in assets.

On September 9, 1985, Berdena and FMB filed a petition for an order to show cause in the probate court alleging that, as trustees, respondents converted items of personal property, failed to make payments on a promissory note to Berdena, used the power of attorney to transfer title to Berdena's assets without her knowledge and consent, and refused to reconvey her real and personal property. The petition requested that the court order respondents to render an accounting of the property while it was held in trust in order to determine the whereabouts of the $70,000 in missing assets.

On March 13, 1986, the probate court granted petitioners' motion for partial summary disposition and ordered respondents to reconvey to Berdena her real property. The court further ordered respondent Robert Raak to prepare an accounting of all Berdena's assets over which he had obtained control or title pursuant to the durable power of attorney. The court, however, reserved the question of whether respondents were under a duty to render an accounting of the trust property. This was because respondents claimed that under paragraph 7 of the declaration of trust they had no obligation to account for the trust assets. Paragraph 7 provided:

> "7. ACCOUNTING. So long as [Berdena Raak] lives and is not disabled, Trustees need keep no accounts because of the control which she has retained. However, in the event of the disability or death of Berdena Raak, Trustees shall keep an account of receipts and disbursements and of property on hand at the end of the accounting period and shall deliver copies to the beneficiaries or, if one is a minor, to one with whom he makes his home."

In the meantime, Berdena decided that she no longer wanted an accounting of her assets, that it did not matter where her $70,000 went, and that she no longer required a conservator. The court subsequently refused to dismiss the conservatorship, ruling: "I can't think of a situation that requires one more than this one."

Following a hearing on the issue whether respondents had an obligation to render an accounting, the court ruled that respondents were legally obligated to do so. On respondents' motion for reconsideration, the court stated:

> "This Court's appointing of a fiduciary, a [sic] official fiduciary, a conservator, I think places that fiduciary in the shoes of Berdena Raak, and I think that even this provision of the trust would allow that conservator to ask for an accounting. I can't conceive of a situation where someone would make someone a trustee and not be able to change their minds on an account situation. I think that's, as I've said before, the responsibility of a fiduciary. To hold otherwise would mean that Berdena Raak five years down the road could wonder what happened to her money and have no ability to get answers to those questions. That's not the way I construe that provision of the Trust Document.

> "Formal accounts, perhaps. An idea of what happened to the money? No, I cannot believe that that is included in that or that the law would recognize that situation. The restatement of law, I think, points out the very difficulties we are dealing with here. It says a provision in the terms of the trust that there shall be no liability to account, however, may manifest an intention not to create a trust in the first place. And I think that indicates what I'm saying. Fiduciaries commonly have a duty to account to the persons they are responsible to. And I find nothing else in the brief supplied that would change my mind on that issue. There is a duty to account by all fiduciaries, and nothing in the law that I'm aware of or has been presented to me would change that."

On appeal, respondents contend that this ruling was erroneous and that the terms of paragraph 7 of the trust document, relieving them of the duty to account, should control. We disagree.

It is a strict duty of a trustee to keep and render a full and accurate record and accounting of his trusteeship to the cestui que trust, and the duty is strictly enforced by the courts. 76 Am. Jur.2d Trusts, § 505, pp. 725-726. In Michigan, the duty to account is codified a M.C.L. § 700.814; M.S.A. § 27.5814. Under a trust agreement relieving the trustee from the necessity of keeping formal accounts, while a beneficiary cannot expect to receive reports concerning the trust estate, the trustee may be required in a suit for an accounting to show that he faithfully performed his duties, and is liable to whatever remedies may be appropriate if he was unfaithful to the trust. *See* 76 Am. Jur.2d Trusts, § 505, p. 726. This is because a trust instrument may relieve a trustee from the necessity of keeping formal accounts, but cannot legally relieve him from his duty to account in a court of equity.

As explained in Bogert, The Law of Trusts & Trustees (rev 2d ed), § 973, pp 462-464, 467:

> "If the settlor attempts to eliminate any accounting duty of the trustee, by providing that it shall not be necessary for his trustee to account to anyone at any time, it would seem that the clause should be invalid and the duty of the trustee unaffected. The settlor ought not to be able to oust the court of its inherent equitable, constitutional or statutory jurisdiction, or to override the

> acts of the legislature concerning information to be furnished by trustees to their beneficiaries. Provisions of this sort in deeds and wills would seem against public policy and void, just as contract clauses to like effect are declared null. There is a small amount of authority on the subject. The better reasoned decisions hold that the trustee still must account to the proper court.
>
> "A settlor who attempts to create a trust without any accountability in the trustee is contradicting himself. A trust necessarily grants rights to the beneficiary that are enforceable in equity. If the trustee cannot be called to account, the beneficiary cannot force the trustee to any particular line of conduct with regard to the trust property or sue for breach of trust. The trustee may do as he likes with the property, and the beneficiary is without remedy. If the court finds that the settlor really intended a trust, it would seem that accountability in chancery or other court must inevitably follow as an incident. Without an account the beneficiary must be in the dark as to whether there has been a breach of trust and so is prevented as a practical matter from holding the trustee liable for a breach."

The case law of other states is consistent with the above authorities. In *Wood v. Honeyman*, 178 Or. 484, 566, 169 P.2d 131, 166 (1946), the Oregon Supreme Court stated:

> "We are completely satisfied that no trust instrument can relieve a trustee from his duty to account in a court of equity. We are, however, [satisfied that when] a provision is found in a trust instrument [relieving a trustee from the necessity of keeping formal accounts] a beneficiary can not expect to receive reports concerning the trust estate. But even when such a provision is made a part of the trust instrument, the trustee will, nevertheless, be required in a suit for an accounting to show that he faithfully performed his duty and will be liable to whatever remedies may be appropriate if he was unfaithful to his trust. Such being our views, it follows that, so far as the Educational Trust [relieving the trustee from all obligation to account to the beneficiaries of this trust, or to anyone] is concerned, the defendant was not required to maintain formal records and supply information to the beneficiaries concerning the

> condition of the corpus of the trust. The provision under consideration did not, however, relieve him from the accounting which the circuit court exacted of him."

Accord*: Ferguson v. Mueller*, 115 Colo. 139, 169 P.2d 610 (1946) (every trust beneficiary is entitled to a court accounting from his trustee, and this right cannot be barred by a term of the trust instrument); *Salter v. Salter*, 209 Ga. 90, 70 S.E.2d 453 (1952) (a provision in a trust instrument that the trustee need not account or file an inventory does not relieve the trustee from accounting in a court of equity); *In re Porter's Estate,* 164 Kan. 92, 187 P.2d 520 (1947). (clause stating that trustees for charity are not to give bond or be under obligation to account to any person or court does not deprive the court of jurisdiction to hold the trustees to account).

It is the tendency of the courts to construe narrowly clauses in trust instruments relieving the trustee from the duty to account. 76 Am. Jur.2d Trusts, § 505, p. 726. Applying the above principles to the instant case, we find no error necessitating reversal in the probate court's order requiring respondents to prepare an accounting of the trust assets. Petitioners have alleged the respondents breached their fiduciary duties to Berdena by converting items of personal property, failing to make payments on a promissory note, and removing papers and records. Paragraph 7 may relieve respondents from the necessity of keeping formal accounts but it does not relieve them of their duty to account in the probate court.

AFFIRMED.

***Jacob v. Davis*, 738 A.2d 904**

ADKINS, Judge.

Appellant William H. Jacob (Bill) is the sole remainderman of two trusts established under the last will and testament of his father, John B. Jacob (John). Appellant sued Michael W. Davis, the surviving trustee of those trusts, and Davis's law firm, Ahlstrom & Davis, P.A., appellees, alleging numerous violations of appellees' fiduciary duties as trustees, and seeking an accounting, other equitable relief, and damages. The complaint included the following counts: 1) breach of fiduciary duty; 2) declaratory relief; 3) injunctive relief; 4) breach of contract; 5) tortious breach of covenants of good faith and fair dealing; 6) negligence; 7) trover and conversion; and 8) an accounting and establishment of a

constructive or resulting trust. Ruling on a motion made by appellees at the end of appellant's case, the trial court entered judgment pursuant to Maryland Rule 2-519 in favor of appellees on all eight counts. This appeal was timely filed from that judgment.

FACTS

John died on January 22, 1994, leaving an estate valued at $853,164, and a will that created two trusts known as the Marital Trust, and the Family Trust, respectively (collectively, "the Trusts"). John's surviving wife, Harriett Bell Jacob (Harriett) was the income beneficiary of the Trusts, and appellant was the remainder beneficiary. Harriett, appellant's stepmother, had the right to make certain withdrawals of principal from the Family Trust, limited in amount and timing, and Davis, as independent trustee, had the authority to make discretionary distributions of principal from the Trusts to Harriett "as, in the sole and absolute discretion of [Davis], are necessary, desirable or appropriate for the health, education and support of [Harriett] in [her] accustomed manner of living." The will directed that "in exercising such discretion, the Trustee may take into account other financial resources of the beneficiaries under consideration." Harriett was prohibited from participating in the discretionary decision to distribute principal to her.

John bequeathed his residuary estate to the Marital and Family Trusts. The size of each trust was determined by a formula, which directed that the Family Trust receive an amount equal to the maximum amount that could pass free of federal estate taxes by utilizing the credit against estate and gift taxes ("unified credit") available to John, and the Marital Trust receive the remainder. Application of this formula resulted in zero federal estate tax payable by John's estate, because his available tax credit allowed $600,000 to pass to the Family Trust free of tax. Further, there were no taxes payable with respect to the assets passing to the Marital Trust, because the trust qualified for the federal estate tax marital deduction ("marital deduction"), and thus any tax was deferred until the death of Harriett.

Appellee Davis and Harriett were designated as personal representatives of John's estate. The personal representatives were required to make an election on his federal estate tax return identifying what portion of the Marital Trust they elected to qualify for the marital deduction. Although all assets passing to the Marital Trust *could* so qualify, an election was required to effectuate the marital deduction.

The personal representatives were required to show on the estate's Administration Account filed with the Orphans' Court the exact amount passing to the Marital Trust The First and Final Administration Account for John's estate, filed November 7, 1994, showed that $80,223 was to be distributed to the Marital Trust. This was consistent with the $80,476 elected by the personal representatives to qualify for the marital deduction on John's federal estate tax return. In fact, however, no assets were distributed to the Marital Trust, and this trust never was funded. John's entire residuary estate was distributed by appellee Davis and Harriett, personal representatives, to the Family Trust. The discrepancy between 1) the amount designated as passing to the Marital Trust on the distribution account for John's estate ($80,476), which is consistent with the federal estate tax return, and 2) the actual amount distributed (zero), is one subject of appellant's complaint.

Another subject of appellant's complaint is the refusal of appellee Davis to provide appellant with an accounting for the Trusts. Appellant first requested an accounting in May of 1996, by letter to a paralegal at Ahlstrom & Davis, P.A., who assisted Davis in estate and trust matters. Responding in a May 28, 1996 letter (May 28 letter), Davis told appellant:

> Your letter raised an interesting point regarding my duties to you under the Trust Agreement for the aforesaid Trust. As you know, I am a co-Trustee with your stepmother, Harriett Bell Jacob, of this Trust. Pursuant to the provisions of the Trust, the Trustee is to render an annual account to the "current income beneficiaries" of the Trust. At present, your stepmother is the only income beneficiary. Thus, I as Trustee, have no obligation to provide to you an accounting for the Trust.
>
> If you wish, I will forward a copy of your letter to [the paralegal] to your stepmother for the purpose of obtaining her approval to give you an accounting for the Trust. Since she and I are co-Trustees, and since she is the sole income beneficiary, if I were to provide such an accounting to you without obtaining her consent first, I would be breaching my fiduciary obligations to her. Please let me know if you wish for me to do this.... Your stepmother is very active in the administration of this Trust, and, in fact, makes all decisions regarding any distributions from the Trust. My only role at this point is to facilitate her administration and to provide to her any

counsel that she may wish regarding the Trust.

After receiving this letter, appellant called Harriett to request her permission for an accounting, but she declined. Harriett died in January 1997, leaving an estate valued at approximately $1,500,000.

On April 17, 1997, almost a year after his first request, appellant again requested by letter an accounting of the Trusts, this time through his attorneys, Christopher Wheeler and Gene C. Lange (collectively, "Wheeler"). In the letter Wheeler asked that the accountings "cover all assets, property, receipts, expenditures, distributions, trustee and other commissions, attorneys' and other professional fees, and any and all payments or transfers to and from the two trusts and [Harriett's] Estate." The letter also requested all "books, records, tax returns, court filings or other information" concerning these items. Wheeler requested that the information be furnished by April 25, 1997. In response to this letter, Davis wrote to Wheeler on April 18, 1997, and said, *inter alia:*

> [P]lease be advised that the John B. Jacob Marital Trust was never established since the total assets that were available from the Estate of John B. Jacob to be distributed to his Testamentary Trust did not exceed $600,000.

Davis enclosed in his letter copies of the following documents: 1) inventory and distribution account for John's estate; 2) statements from the brokerage firm of Ferris, Baker Watts for the Family Trust; 3) the check register for the Family Trust checking account; 4) 1995 and 1996 balance sheets, prepared by the accountant for the Family Trust; 5) 1995 and 1996 "general ledgers," prepared by the accountant, showing income and other deposits received, disbursements, plus sales of stocks; 6) income tax returns for 1995 and 1996 filed by the Family Trust; 7) a summary of profits and losses for 1995 and 1996 showing $143,543 in total distributions to Harriett over the two-year period; and 8) John's will and First and Final Accounting for John's Estate. Davis also provided a two-page document, unsigned, titled "John Jacob Family Trust, Recap of Transactions." Pertinent portions of this recap are reproduced below:

JOHN B. JACOB FAMILY TRUST

RECAP OF TRANSACTIONS

1. *JAN. '95*

2 taxable GNMA/FNMA bonds (35,000/ea.) transferred to Harriett's individual account, as well as 6,000 in cash

This transfer was to satisfy the following: $30,000 specific bequest under Mr. Jacob's Will, the family allowance of $5,000, and all income and interest earned by the Estate during the time of administration

* * *

2. *MAR. '95*

400 shares of Pfizer, 100 shares of United Technology transferred to Harriett as reimbursement for living expenses she paid out-of-pocket during the course of Estate administration ($28,997 rent to Vantage House, $12,830 other living expenses and medical expenses paid on behalf of Mr. Jacob)

3. *APR. '95*

Balt. Co. MD RFDG, 5.7% ($15,000) bond sold to provide cash for expenses

4. *MAY '95*

100 shares of AT & T ($5600) transferred to Harriett's account—per JD Ring, this was Trust income due to Harriett and she took the shares of AT & T rather than cash. Trust income thru May was approx. $9,290. $4,000 was transferred directly from FBW, and the remainder was taken in stock.

* * *

5. *DEC. '95*

$10,000 check requested from FBW to put cash into First National Trust checking for expenses.

6. *DEC. '95*

5% of the value of the Trust to go to Harriett pursuant to her 5/5 powers—she elected to take the $20,000 Md. 1st Ser. 6.5% bond and the $10,000 P.G. Co. MD IDA 6.65% bond. These were then transferred into her account.

* * *

7. *DEC. '96*

5% of the value of the Trust to go to Harriett pursuant to her 5/5 powers—she elected to take $10,000 Md. St. Dept. Trans. 6.375%; $15,000 MD CDA 6.3%, and 142 shares of Southern Co. ($3,159 value)

8. *JAN. '97*

$4,750 cash transferred from the Ferris, Baker Watts into First National Bank Trust account (in anticipation of having to pay medical bills)

There have been a total of 26 checks written from the Trust checking account since it was opened. 21 of the 26 checks were written to Vantage House for the monthly rental. The other checks were as follows:

1. Ahlstrom & Davis, P.A. 12/95—$1,931.40 (fees)

2. Harriett Jacob 6/96—$10,000 (repayment of loan—no interest requested)

3. Jeffrey D. Ring & Co. 10/96—$1,350 (fees)

4. Ahlstrom & Davis, P.A. 1/97—$3,095.63 (fees)

5. IRS 1/97—$327.73 (taxes due on '94 return)

The recap summarizes distributions to Harriett, but often does not designate whether they were principal or income. For example, Harriett's monthly expenses at Vantage House were paid in March 1995 from the Family Trust, but not designated as either principal or income. In addition to the Vantage House payments, stocks, bonds, and cash with an approximate value of $143,000 were transferred to her during the two-year period. According to the Family Trust checkbook, payments to Vantage House totaled $49,572.67. These distributions to Harriett or for her benefit substantially exceeded the Family Trust income during this period.

With respect to the other information requested by Wheeler, Davis said:

> With such short notice, the above is the best that we can do to comply with your request that we provide you information by April 25, 1997. From these documents, you should be able to understand the relationship between the Estate of John B. Jacob, the John B. Jacob Family Trust, and Harriett Bell

> Jacob. I think you will find that there were no distributions from the Trust that did not comply with both the intent and the provisions of the Last Will and Testament of John B. Jacob.

Davis did not provide any further information to explain the discrepancy in accounting regarding the Marital Trust funding. Nor did he provide information as to how the expenses of the trust, such as trustees' commissions and accountant fees, were allocated between the income beneficiary and the remainderman. Further, no information was provided to show how in kind distributions of stock to Harriett were valued, *e.g.,* at inventory value or fair market value.

Davis did offer to meet with appellant and counsel and the accountant for the estate to discuss their concerns. On May 5, 1997, Wheeler replied that "a meeting would probably be beneficial, but [we] would prefer that we have a little longer to digest the information you provided." In that letter Wheeler also said: "We have noted an omission in the documents you provided. As a result we hereby request a complete accounting of (including all documents related to) the transfer of assets owned by John B. Jacob at his death, to the Family Trust, for the period October, 1994, through January, 1995." Wheeler also requested the federal estate tax return for John's estate.

Davis responded to Wheeler's letter on May 7, and enclosed the Ferris, Baker Watts statements for the period requested and the federal estate tax return. With respect to the statements, appellee Davis commented: "[p]lease note that there may be discrepancies between these statements and the accounting that was filed in the Orphan's Court.... The Accounting does not provide a means to show changes in the prices of the equities during the time from when the estate is opened until the time the estate is closed." He also said:

> Please advise Mr. Jacob that we are currently in a position to wind up his father's trust and make the final distributions as required under [his father's] Last Will and Testament. Until any potential claims that Mr. Jacob wants to make are resolved, however, we cannot wind up the trust. We await Mr. Jacob's pleasure with regard to the timing of this process.

On May 23, 1997, Wheeler again wrote to Davis, and requested that he "explain the justification for the removal of" five stocks and seven bonds from the trust, as well as other

specific items, suggesting that these items "could only be removed from the Family Trust pursuant to the terms and intent of the Family Trust established by Mr. Jacob." The record does not reflect Davis's response to this letter. Bill testified that he never received any explanation or accounting from Davis regarding the trust principal that was distributed to Harriett. Appellees took the position at trial and on appeal that they had no obligation to account to Bill.

Although the letters refer to several telephone conversations between counsel, there is no indication that the parties ever had a meeting. Appellant filed suit on July 3, 1997.

DISCUSSION

We must determine the validity of the trial court's entry of judgment on all eight counts of the complaint in favor of appellees at the end of appellant's case. Our major focus in this opinion will be on Counts I, II, and III, all of which rest on the equitable claim that appellees violated their fiduciary duties as trustees. We vacate the judgment entered on these counts, and remand the case to the circuit court for further proceedings on these counts. We affirm the lower court's judgment on Counts IV through VIII.

I.

Count I—Breach of Fiduciary Duty

Appellant alleged several breaches of fiduciary duty by appellees, and included repetitive allegations in his complaint.

We have distilled the alleged breaches into three separate categories, and discuss each separately.

A.

Entitlement to Accounting

Appellant complains that appellees never provided a full accounting of the Trusts created under John's will. Appellees contend that they had no obligation to provide an accounting to appellant either during the lifetime of Harriett or after her death. Alternatively, they claim that the documents they provided to appellant in April 1997, after her death, were a sufficient accounting of the Trusts.

Appellees rely on section 10.02 of John's will, which provides:

> My Trustee shall be excused from filing any account with any court; however, my Trustee shall render an annual (or more frequent) account and may, at any other time, including at the time of the death, resignation, or removal of any Trustee, render an intermediate account of my Trustee's administration to such of the then current income beneficiaries who are of sound mind and not minors at the time of such accounting. The written approval of such accounting by all of such income beneficiaries shall bind all persons then having or thereafter acquiring or claiming any interest in any trust, and shall be a complete discharge to my Trustee with respect to all matters set forth in the account as fully and to the same extent as though the account had been judicially settled in an action or proceeding in which all persons having, acquiring, or claiming any interest were duly made parties and were duly represented.

The trial court held that under the terms of the Trusts and applicable law, the trustees had no obligation to account to a remainderman such as appellant during the lifetime of the income beneficiary. The trial court seemingly agreed with appellant that an accounting was due after death, but found that the documents provided by appellees after Harriett's death sufficed. Specifically, the court said:

> [T]he Ferris, Baker Watt statements certainly show with respect to the stock portfolio [of] which much of this estate was comprised, indicates the transactions that took place, and also shows at the end [sic] of the taxable income. So there certainly is a reference as to what income was derived in a particular year.

We do not agree with appellees' view that appellant is not entitled to request and obtain an accounting of the Trusts. The leading authorities on trusts are unequivocal in their articulation of the right of the remainder beneficiary to an accounting during the lifetime of the income beneficiary and after his or her death. Austin W. Scott and William F. Fratcher, *The Law of Trusts,* (Vol. IIA 4 th ed.1987) § 172 explains:

> A trustee is under a duty to the beneficiaries of the trust to keep clear and accurate accounts. His accounts should show what he has received and what he has expended. They should show what gains have accrued and what losses

> have been incurred on changes of investments. If the trust is created for beneficiaries in succession, the accounts should show what receipts and what expenditures are allocated to principal and what are allocated to income.
>
> If the trustee fails to keep proper accounts, all doubts will be resolved against him and not in his favor ...
>
> Not only must the trustee keep accounts, but he must render an accounting when called on to do so at reasonable times by the beneficiaries. Where there are several beneficiaries, any one of them can compel an accounting by the trustee. The fact that a beneficiary has only a future interest ... does not preclude him from compelling the trustee to account.

Id. (emphasis added).

George Bogert, *The Law of Trusts and Trustees,* (Rev.2d ed.1983) § 961 takes a similar view:

> [T]he beneficiary is entitled to demand of the trustee all information about the trust and its execution for which he has any reasonable use....

If the beneficiary asks for relevant information about the terms of the trust, its present status, past acts of management, the intent of the trustee as to future administration, or other incidents of the administration of the trust, and these requests are made at a reasonable time and place and not merely vexatiously, it is the duty of the trustee to give the beneficiary the information for which he has asked.

Both Scott, *supra,* and Bogert, *supra,* cite numerous cases in support of the rule that a remainder beneficiary is entitled to an accounting. Scott, *supra,* § 172 at 454; Bogert, *supra,* § 973.

Restatement (Second) of Trusts §172, comment (b) states the rule in like terms:

> The beneficiary may by a proper proceeding compel the trustee to render to the proper court an account of the administration of the trust.... The trustee may be compelled [to] account not only by a beneficiary presently entitled to the payment of income or principal, but also by a beneficiary who will be or may be entitled to receive income or principal in the future.

Maryland law is consistent with the law of other states. The Court of Appeals liberally construed the class of those beneficiaries who have a right to an accounting in the case of *In Re Clarke's Will*, 198 Md. 266, 81 A.2d 640 (1951). There, a remainder beneficiary sought an accounting and declaratory relief and alleged that the trustee planned to sell a farm that was a trust asset and apply the proceeds for the benefit of her husband, an income beneficiary of the trust. The Court held that the contingent remainderman had standing to seek an accounting, and explained: "If the petitioner has any interest at all he is entitled to invoke the court's protection." *Id.* at 273, 81 A.2d 640; *see also Baer v. Kalm,* 131 Md. 17, 101 A. 596 (1917).

In *Shipley v. Crouse*, 279 Md. 613, 370 A.2d 97 (1977). the Court of Appeals articulated the general rule:

> While ... in the ordinary case, beneficiaries are entitled to receive 'complete and accurate information as to the administration of the trust' and 'to know what the trust property is and how the Trustee has dealt with it,' this is not absolute, if the trustee renders periodic reports showing collection of income and disbursements, if the trustee is acting in good faith and is not abusing his discretionary powers.

Id. at 625, 370 A.2d 97 (citations omitted). The *Shipley* Court did not indicate that the rights of the plaintiffs, who were remaindermen, were more restricted because they had no immediate possessory interest. The statement of the rule in *Shipley,* however, was *dictum* because the plaintiffs did not obtain the disclosures they desired. The Court held that a trustee's duty to account did not require that the trustee disclose the specifics of delicate negotiations with a potential buyer regarding the sale of a business owned by the trust, especially when remaindermen had previously expressed their agreement that the business be sold. *Id.* at 625-26, 370 A.2d 97.

Appellees argue that section 10.2 of the will relieves them from any obligation to account to a remainder beneficiary. This section allows the trustee to provide an accounting at any time, and provides that if such accounting is approved in writing by the then income beneficiaries, then the trustee is discharged with respect to the matters covered by the account. Appellees would have us apply this section to modify the common law obligation of a trustee to account.

To our knowledge, no Maryland appellate decision has addressed the extent to which a decedent or testator may limit the common law duty of a trustee to account in a court of equity. Nor do we find any statute or rule, addressing this point. Bogert, *supra,* asserts that a trust beneficiary has a right to an accounting, notwithstanding language in the trust purporting to limit its obligation to account:

> A [testator] who attempts to create a trust without any accountability in the trustee is contradicting himself. A trust necessarily grants rights to the beneficiary that are enforceable in equity. If the trustee cannot be called to account, the beneficiary cannot force the trustee to any particular line of conduct with regard to the trust property or sue for breach of trust. The trustee may do as he likes with the property, and the beneficiary is without remedy. If the court finds that the settlor really intended a trust, it would seem that accountability in chancery or other court must inevitably follow as an incident. Without an account the beneficiary must be in the dark as to whether there has been a breach of trust and so is prevented as a practical matter from holding the trustee liable for a breach.

Bogert, *supra,* § 973 at 467. In the present case we need not decide this interesting issue because we do not interpret section 10.02 in light of the will as a whole, to limit the trustees' obligation to account under the present circumstances.

When interpreting a will, we must gather the intention of the testator from the language of the entire will. *See LeRoy v. Kirk,* 262 Md. 276, 280, 277 A.2d 611 (1971). Further, we must construe the provisions of a will to be consistent, rather than to be in conflict. *See Veditz v. Athey,* 239 Md. 435, 448, 212 A.2d 115 (1965).

When section 10.02 is considered in light of section 10.08, the former cannot reasonably be construed to deny appellant an accounting based on Harriett's consent to some prior accounting. Section 10.08 provides:

> Notwithstanding any other provision hereunder, no Trustee hereunder shall have a vote or otherwise participate in any decision regarding whether, and to what extent, any discretionary payment of principal or interest shall be made or allocated to or for such Trustee's personal benefit or to or for the benefit of any

person for whose support such Trustee may be legally obligated. Any such decision shall be made by the co-Trustee then serving, or if there is no such co-Trustee, then the Trustee shall appoint a co-Trustee to make such decision.

Clearly, if Harriett cannot participate in a decision to distribute principal to her, then her consent to such distribution cannot be considered binding upon a remainderman whose interest is adversely effected. *Cf. Madden v. Mercantile-Safe Deposit & Trust Co.,,* 27 Md. App. 17, 339 A.2d 340 (1975) (any laches which could have been chargeable to income beneficiary regarding misconduct of trustee cannot be binding upon the remaindermen). Since appellant's claim for accounting is based upon his contention that principal amounts were improperly distributed to Harriett, section 10.02 of the will does not bar his suit. *See also* discussion in Section IB of this opinion.

Nor do we interpret the provision in section 10.02 of the will that the trustees "shall be excused from filing any account with any court" to mean that the testator intended to remove the jurisdiction of a court of equity to require an accounting upon the reasonable request of a beneficiary. *See Salter v. Salter,* 209 Ga. 90, 70 S.E.2d 453, 458 (1952). *See also* Bogert ,*supra,* § 973.

Appellees suggested at oral argument that appellant was not entitled to an accounting in this proceeding because a court can only require an accounting if it assumes jurisdiction over the trust, and appellant did not follow the procedure under Maryland Ruel 10-501 to request that the court do so. We do not agree that a petition for assumption of jurisdiction pursuant to Rule 10-501 is required in order that a court order an accounting, and find *Baer, supra,* instructive. In *Baer* the Court held that the trustee's mere refusal to account did not justify his removal, but that if an accounting were necessary in order to ascertain whether the trustee is executing the trust fairly and without abuse of the discretionary power reposed in him, a Court of Equity, upon being applied to, should order such information to be given; but until that is done and it is found that the trustee is not administering the trust in good faith, or is abusing the discretionary power granted him under the will, the Court should not against his wishes, assume supervisory jurisdiction of the trustee's discretionary powers. *Baer,* 131 Md. At 29, 101 A. 596. What we glean from *Baer* is that seeking and obtaining an accounting will sometimes precede a request for a court to assume jurisdiction over a trust, and the results of the accounting may be the "reason for seeking the assumption of

jurisdiction by the court ..." required under Rule 10-501. Thus, we hold that appellant was not required to petition pursuant to Rule 10-501 in order to obtain an accounting.

In sum, we hold that appellant was entitled to an accounting during the life of Harriett and at her death, notwithstanding the language in section 10.02 of John's will.

B.

The Information Furnished by the Trustees

The trial court found that the documents provided by appellees in April 1997, were sufficient to meet any obligation to account because they provided the recap, brokerage statements from the firms holding the estate's securities, and a list of payments and receipts for the two-year period of the Family Trust. We do not agree with the trial court's conclusion that this information sufficed, because appellees still failed to provide certain critical information. This information is separated by category and discussed below.

i.

Allocations of Expenses and Receipts Between Income and Principal

One of appellant's complaints about the information furnished by appellees is that there was no allocation of receipts and expenses to either trust income or trust principal as required under Md.Code (1974, 1991 Repl.Vol.), §§ 14-201 *et seq.* of the Estates and Trusts Article ("Principal and Income Act"). Appellant's expert witness testified that, based on the records provided, it appeared that the trustees had made no allocation; and therefore, the burden of all expenses was borne by the remainder interest. Section 14-202 of the Principal and Income Act provides in pertinent part:

> (a) A trust shall be administered with due regard to the respective interests of income beneficiaries and remaindermen. A trust is so administered with respect to the allocation of receipts and expenditures if a receipt is credited or an expenditure is charged to income or principal or partly to each: (1) In accordance with the terms of the trust instrument, notwithstanding contrary provisions of this subtitle; (2) In the absence of any contrary terms of the trust instrument, in accordance with the provisions of this subtitle; ...

Id. at § 14-202. The remaining sections of the Principal and Income Act set forth detailed

rules as to how a trustee should allocate receipts and expenses between the income beneficiary and the remaindermen.

The parties have not directed us to, nor have we found, any clause in John's will that would make the Principal and Income Act inapplicable. Further, a trustee's obligation to make allocations between income beneficiaries and remaindermen is an obligation well recognized in common law. *See Berlage v. Boyd,* 206 Md. 521, 532, 112 A.2d 461 (1955); Scott, *supra,* § 172 at 452, and cases collected therein ("If the trust is created for beneficiaries in succession, the accounts should show what receipts and what expenditures are allocated to principal and what are allocated to income."); Bogert, *supra,* § 970 at 377–78.

The documents that appear in the record do not make any allocations of receipts or expenses to principal or income. Income tax returns do not suffice for this purpose because federal law regarding what is taxable income, and what expenses are deductible from income, differs from determination of income and principal under the Principal and Income Act. Calvin H. Cobb, III, a lawyer specializing in estate and trust law, testified that he had reviewed all of the documents furnished by appellees, and was unable, based on that information, to reconstruct an accounting that made allocations between income and principal. Mr. Cobb testified that he "tried to recreate based on this information a proper accounting that would allocate income and principal [but there was] information that didn't reconcile...." He observed that "it appears that rather than distributing net income to [Harriett], there was no effort to charge expense to income. They instead distributed gross income to [Harriett]."

A major theme advanced by appellees in defense is that appellant, in presentation of his case, was unable to demonstrate precisely where and how the trustees failed to follow their obligations under applicable law or John's will. "[T]he burden of proof on the issue of breach of trust is not initially on the fiduciary...." *Goldman v. Rubin*, 292 Md. 693, 713, 441 A.2d 713 (1982). The burden, however, shifts to the trustee once the beneficiary has introduced a certain quantum of proof:

> [T]he person who challenges the conduct of a trustee, must first allege that the trustee has a duty and has been derelict in the performance of this duty, and offer evidence in support of this allegation. Then, and not until then, does the trustee have the burden of rebutting the allegation. In the absence of such proof, there is

> no duty on the trustee to prove a negative: *i.e.,* that he has not been derelict in the performance of his duties.

Id. (quoting *Lopez v. Lopez,* 250 Md. 491, 501, 243 A.2d 588 (1968); *see also Md. Nat'l Bank v. Cummins,* 322 Md, 570, 581-82, 588 A.2d 1205 (1991); *Wood v. Honeyman,* 178 Or. 484, 169 P.2d 131, 162 (1946*)*; Scott, *supra,* § 172 at 452 ("If the trustee fails to keep proper accounts, all doubts will be resolved against him and not in his favor.").

We have reviewed all of the documents provided by appellees to appellant in response to appellant's request for an accounting. Based on our review, in conjunction with the testimony of Mr. Cobb, we conclude that appellant met his initial burden to show that appellees breached their fiduciary duties by failing to make any allocations between principal and income. Accordingly, it was incumbent upon appellees to come forward and explain this apparent failure. Without such explanation, the trial court should not have granted the motion for judgment on Count I.

ii.

Failure to Account for Non–Funding of Marital Trust: Marital Trust Bequest of $80,223 Pursuant To Formula In Will

Another deficiency asserted by appellant regarding the information furnished by appellees relates to the Marital Trust. The documents initially provided to appellant showed a $80,223 distribution to the Marital Trust from the estate, but nothing about a Marital Trust thereafter. After a second request by appellant's counsel, appellees advised counsel that this trust "was never established since the total assets that were available ... to be distributed from [John's estate] did not exceed $600,000." No explanation was then offered regarding the discrepancy between appellees' non-funding of the Martial Trust and the $80,223 distribution shown on both the estate's administration account and John's federal estate tax return.

The assets held in John's estate may well have decreased in value between the date of John's death and the date assets were distributed from his estate. If such occurs, however, the personal representative must follow the funding formula set forth in the will to determine how the decrease is allocated between the Trusts. We explain below.

The size of the bequests to the Marital Trust and the Family Trust is determined by

formula. The formula is tied to the amount of assets that can pass free of tax to a decedent's heirs under federal estate tax law by application of an individual's "unified credit." I.R.C. § 2001 (1998). Expressed in non-technical terms, the federal tax law allows an individual to pass to his or her heirs, free of tax, assets totaling no more than $600,000 in value. For purposes of the federal estate tax, the value of each asset is determined as of the date of the decedent's death. When the values of the assets change during estate administration, at the time of distribution, the personal representative must look to the will for instructions regarding how to value those assets. In the absence of instructions, a Maryland statute governs. *See* Md.Code (1974, 1991 Repl.Vol.), § 11-107(2) of the Estates and Trusts Article ("E & T").

John's will did provide such instruction—section 7.02 requires the assets distributed to the Marital Trust shall be selected in such manner that the cash and other property distributed will have an aggregate fair market value fairly representative of the distributee's proportionate share of the appreciation or depreciation in the value to the date or dates of distribution of all property then available for distribution. Any property assigned or conveyed in kind to satisfy the aforegoing bequest shall be valued for that purpose at the value thereof as finally determined for Federal Estate Tax purposes.

John's personal representatives held the responsibility to determine how to allocate the residuary estate between the Marital Trust and the Family Trust. Under the funding formula set forth in section 7.02, if the estate assets decrease in value, the Marital Trust would be diminished on a pro rata basis with the Family Trust and would absorb no more than its pro rata share of such decrease. In light of this mandatory directive we do not see how the Marital Trust could be legitimately "wiped out" by a decrease in overall value, when the Family Trust bequest remained intact.

The discrepancy regarding the funding of the Marital Trust is not explained by appellees' assertion that the "total assets that were available ... to be distributed ... did not exceed $600,000." Proof of the discrepancy was sufficient to place the burden on the trustees to offer a better explanation and accounting with regard to this issue. Accordingly, it was error for the trial court to enter judgment in favor of appellees in appellant's suit for such accounting.

Appellees suggest that the discrepancy regarding funding of the Marital Trust is only

of theoretical concern because appellant is the remainderman under both the Marital and Family Trusts. We do not agree with this analysis because the terms of John's will differ with respect to principal distributions authorized to be made from each of the Trusts. Under section 8.03 of John's will, Harriett could withdraw annually the "greater of (a) Five Thousand Dollars ($5,000) or (b) Five Percent (5%) of the value of the principal of the Family Trust." By contrast, she had no right of withdrawal from the Marital Trust. Thus, if the Family Trust were funded with assets that properly belonged to the Marital Trust, then the five percent of the trust subject to Harriett's withdrawal right became correspondingly larger. The record suggests that Harriett exercised this right in full. Thus, it appears that some assets that should have remained in trust for Bill were, in fact, distributed to Harriett.

The trial court rested its decision on the Marital Trust issue in part upon the following language in John's will:

> [The trustee] shall have the power to make any election required to be made to qualify the Marital Trust for the federal estate and/or gift tax marital deduction. If the federal estate tax laws applicable to my estate permit a partial election to be made or permit such an election with respect to a specific portion of the Marital Trust, my Trustee may in its discretion make such election with respect to less than all the Marital Trust, and such portion shall be treated for all purposes as a specific portion of [the Marital] Trust and as a separate Trust share. My Trustee shall not be liable for any decision made in good faith and with reasonable diligence with respect to such election.

The discretion accorded the trustees by this section to make a "partial election" allows the trustees to "qualify the Marital Trust for the federal estate tax marital deduction." Such partial election will have an impact on the amount of the Marital Trust that qualifies for the marital deduction, but it does not cause any portion of the Marital Trust to be merged with the Family Trust. As the clause indicates, if a partial election is made, the portion elected to so qualify, "shall be treated for all purposes as a specific portion of this Trust and as a separate Trust share." The trustees' power to create two separate trusts which together comprise the Marital Trust is not equivalent to the power to transfer assets from the Marital Trust to the Family Trust. Harriett's power to withdraw principal extends only to the Family Trust, and does not extend to the Marital Trust, even if divided.

Appellees also suggest that because Harriett bequeathed her estate to trusts for the benefit of Bill's children, appellant's concern about the size of the Trusts is only theoretical. Regardless of any emotional appeal that this contention may have, it has no legal merit in its own right. To the extent that assets were improperly distributed to Harriett, and passed to trusts under her will, Bill is denied the right to those assets, even though his children receive an interest as trust beneficiaries.

Although we have expressed our disagreement with appellees' explanation, offered in their April 18, 1997 letter to appellant, for why the Marital Trust was not funded, we do not now hold that John's estate was distributed improperly. We think that such decision must be reserved until appellees provide a full accounting of how they applied the formula in the will to distribute assets to the Marital Trust and Family Trust, respectively. We do hold that, in the absence of a better explanation, the trial court should not have granted the motion for judgment on Count I.

Summary Regarding Count I

In sum, we conclude that appellant produced sufficient evidence to meet his initial burden to show a specific breach of duty by appellees regarding their failure to account, their failure to fund the Marital Trust, and improper delegation of their discretionary power to distribute principal and to select assets to satisfy Harriett's right of withdrawal. Therefore, the trial court erred in granting judgment against appellant at the end of his case. Rather, the trial court should have required appellees to present their case and rebut or explain the evidence presented by appellant. We remand for that purpose.

12.2 To Inform

***Cook v. Brateng*, 262 P.3d 1228**

BRIDGEWATER, P.J.

¶ 1 A. Diane Brateng appeals the trial court's division of Elmer Cook's trust property. We hold that Diane, who was both a beneficiary and trustee of Elmer's trust, did not breach her fiduciary duties when she: (1) did not inform John Cook, her brother and also a beneficiary of Elmer's trust, that she decided to claim and defer charges against Elmer's estate for providing Elmer's care; and (2) decided not to encumber Elmer's house to pay for his care. We reverse the trial court's finding that Diane breached her fiduciary duties, hold

that she is entitled to reasonable compensation for providing Elmer's care, and remand to determine her compensation and to redistribute the property. We hold that Diane is entitled to funds she spent to repair and remodel a portion of Elmer's home, and we do not disturb the trial court's use of a 2007 appraisal it used to determine the value of Elmer's home.

FACTS

¶ 2 The following facts are undisputed. Diane and John are siblings. In November 1995, their father, Elmer, executed a living trust, naming himself and Diane as trustees. Elmer's health deteriorated; two years later, in November 1997, he was declared incompetent, and Diane became sole trustee of his trust.

¶ 3 With Elmer declared incompetent, the trust required Diane, the sole remaining trustee, to apply all trust property exclusively for Elmer's benefit. Specifically, the trust required Diane to "provide as much of the principal and net income of [the] trust as is necessary or advisable, in [Diane's] sole and absolute discretion, for my health, support, maintenance, and general welfare." CP at 36. The trust also required Diane to make information available to the beneficiaries:

> My trustee shall report, at least semiannually, to the beneficiaries then eligible to receive mandatory or discretionary distributions of the net income from the various trusts created in this agreement all of the receipts, disbursements, and distributions occurring during the reporting period along with a complete statement of the trust property.

CP at 60.

Upon Elmer's death, the trust directed Diane, as the trustee, to divide all remaining trust property among herself, John, the Salvation Army, and the Finnish Assembly of God Church. The trust allocated to each Diane and John a 9/20th share and to each charity a 1/20th share. The trust also directed Diane to distribute the home to herself, "AS PART OF, AND NOT IN ADDITION TO, that share of [the] trust distributed to [Diane]." CP at 46.

¶ 4 In November 1997, after Elmer was declared incompetent, Diane decided to move Elmer from his home in Ilwaco, Washington, into her home in Kirkland, Washington, where she could more easily care for him. Elmer died in January 2000.

¶ 5 During the time Diane cared for Elmer from November 1997 to January 2000, she used $59,176.67 from the trust's liquid funds to pay for Elmer's medical expenses and personal expenses, as well as maintaining, repairing, and remodeling the Ilwaco home. Diane spent $20,319.75 of the trust funds to repair water damage to the Ilwaco home and to remodel its kitchen. At the time of Elmer's death, the trust had $16,439.62 in liquid funds remaining. The only other remaining trust asset was Elmer's Ilwaco home.

¶ 6 Diane kept meticulous records of her time and expenses related to caring for Elmer and her time and expenses related to driving from Kirkland to Ilwaco. She carefully recorded her time spent caring for him from 1996 to 1997—before she moved him to Kirkland—and she recorded her time spent caring for him while he lived with her in Kirkland as "24 hour In-home Care." Ex. 26. She also kept track of the fuel used to drive to Ilwaco, her meals along the way, and the cost per mile. Finally, she recorded bills that she personally paid for Elmer, recording the exact amount and method of payment. Diane's claim against the estate for acting as Elmer's care giver totaled $142,171.10.

¶ 7 Although Diane kept these meticulous records, she did not disclose her intention to claim reimbursement to John until he filed suit and requested an accounting. Before Elmer's death, Diane never discussed with John her expenses as a care giver, the value of her services as a care giver, or her decision not to encumber Elmer's Ilwaco house to pay for his care.

¶ 8 John filed suit against Diane in October 2001, which led to mediation and arbitration under the "Trust and Estate Dispute Resolution Act". John appealed the arbitrator's decision and requested a trial de novo. The trial court issued a memorandum opinion on June 20, 2008, followed by findings of fact and conclusions of law on May 26, 2009.

¶ 9 The trial court concluded that Diane, as trustee of her father's estate, had a duty to inform John that (1) she decided to claim and defer charges against Elmer's estate for providing Elmer's care, and (2) she decided not to encumber Elmer's Ilwaco house to pay for Elmer's care. The court further concluded that she breached her fiduciary duties and, thus, could not compensate herself for providing Elmer's care. The trial court awarded the Ilwaco house to Diane, but gave John a 9/20th interest in its 2007 appraised value. The court also awarded Diane a credit for one-half the value of a property adjacent to the Ilwaco

house that is not part of this appeal.

ANALYSIS

I. DUTY TO INFORM

¶ 10 Diane argues that she did not have a duty to inform John that she was claiming and deferring her charges for providing Elmer's care until his death because neither the trust nor the applicable statutes required her to provide her brother with accounting statements. She also argues, for the same reason, that she did not have a duty to inform John that she decided to refrain from encumbering the Ilwaco house to pay for Elmer's health costs. We agree.

¶ 11 A trustee, as a fiduciary, owes beneficiaries the "highest degree of good faith, care, loyalty and integrity." *Esmieu v. Schrag*, 88 Was. 2d 490, 498, 563 P.2d 203 (1977). "It is the duty of a trustee to administer the trust in the interest of the beneficiaries." *Tucker v. Brown*, 20 Wash.2d 740, 768, 150 P.2d 604 (1944). A trustee's duties and powers are determined by the terms of the trust, by common law, and by statute. *In re Estate of Ehlers*, 80 Wash.App. 751 757, 911 P.2d 1017 (1996). At common law, Washington courts have defined a trustee's duty of care, skill and diligence to be that degree of care, skill and diligence that an ordinary prudent man exercises in similar affairs. *In re Nontestamentary Trust of Parks*, 39 Wash.2d 763, 767, 238 P.2d 1205 (1951); *Monroe c. Winn*., 16 Wash.2d 497, 508, 133 P.2d (1943).

¶ 12 Diane first contends that the trust did not require her to provide John with an accounting during Elmer's life. Without any analysis, she cites the following language of the trust to support her contention:

> My Trustee shall report, at least semiannually, to the beneficiaries *then eligible to receive mandatory or discretionary distributions* of the net income from the various trusts created in this agreement all of the receipts, disbursements, and distributions occurring during the reporting period along with a complete statement of the trust property.

CP at 60 (emphasis added); Br. of Appellant at 14. The crux of her argument is that the trust language does not require Diane to provide John with an accounting because he was not "eligible" as a remainder beneficiary to receive distributions. CP at 60.

¶ 13 We ascertain a settlor's intent and purpose from the four corners of the trust instrument, construing all of its provisions together. *Templeton v. Peoples Nat'l Bank*, 106 Wash.2d 304, 309, 722 P.2d 63 (1986). Here, Diane had sole and absolute discretion to use the trust assets to provide for Elmer if he was incapacitated, as article four, section 3 of the trust stated:

> My Trustee shall provide as much of the principal and net income of my trust as is necessary or advisable, in its sole and absolute discretion, for my health, support, maintenance, and general welfare.

CP at 36. Only the trust property not distributed to Elmer during his lifetime was to be divided between Diane and John as beneficiaries. Neither Diane nor John was eligible to receive their distributions during Elmer's lifetime, as the clear intent of the trust instrument was to provide for his needs. Therefore, any mandatory accounting was primarily intended to benefit Elmer, as the sole income beneficiary; we agree with Diane that the trust did not *require* her to report receipts, disbursements, and distributions to John while Elmer was still living. The trust required Diane to provide Elmer, as the sole income beneficiary, with an accounting only upon distribution. John does not argue that Diane failed to report to Elmer.

¶ 14 Diane also correctly notes that the law did not *require* her to provide John with an accounting. Under RCW 11.106.020, a trustee must provide at least an annual accounting to "each adult income trust beneficiary ... of all current receipts and disbursements." In contrast, any beneficiary, including one holding only a present interest in the remainder of a trust, may petition the court for an accounting. RWC 11.106.040*, see Nelsen v. Griffiths*, 21 Wash.App. 489, 493, 585 P.2d 840 (1978); *see.* Lastly, a trustee has a common law duty to give a beneficiary, upon his reasonable request, complete and accurate information about the nature and amount of trust property. *Tucker,* 20 Wash.2d at 769, 150 P.2d 604. Here, because John was not an income beneficiary, RCW 11.106.020 did not compel Diane to provide him with an accounting. Because John never petitioned the court for an accounting, RCW 11.106.040 did not compel Diane to provide an accounting. And, finally, because John never requested an accounting from Diane, she did not have a common law duty to provide him with such accounting.

¶ 15 But determining that Diane was not required to provide an accounting is not dispositive of John's issues because a mandatory accounting would not have disclosed

Diane's decision to defer charges and to refrain from encumbering the Ilwaco house during her father's lifetime. Here, any accounting would have revealed only those receipts and disbursements actually made. RCW 11.106.020. The plain language definition of these terms suggests that a trustee need only provide an accounting for transactions actually paid from the trust. Future contemplated transactions that have not yet occurred would not be shown on an accounting. Thus, because mandatory accounting would not have disclosed Diane's decisions to defer payment for her services rendered on her father's behalf, we turn to the more general question of whether Diane had a duty to inform John of how she was managing the costs associated with Elmer's care.

¶ 16 A trustee's duty "includes the responsibility to inform the beneficiaries fully of all facts which would aid them in protecting their interests." *Allard v. Pac. Nat'l Bank*, 99 Wash.2d 394, 404, 663 P.2d 104 (1983) (citing *Esmieu*, 88 Wash.2d at 498, 563 P.2d 203). "That the settlor has created a trust and thus required the beneficiaries to enjoy their property interests indirectly does not imply the beneficiaries are to be kept in ignorance of the trust, the nature of the trust property, and the details of its administration." *Allard*, 99 Wash.2d at 404, 663 P.2d 104. A trustee's duty includes the responsibility to inform the beneficiaries periodically of the status of the trust, its property, and how the property is being managed. *Allard*, 99 Wash.2d at 404, 663 P.2d 104. "If the beneficiaries are able to hold the trustee to proper standards of care and honesty and procure the benefits to which they are entitled, they must know of what the trust property consists and how it is being managed." *Allard*, 99 Wash.2d at 404, 663 P.2d 104.

¶ 17 *Allard* holds that a trustee has a duty to inform beneficiaries about management of the trust that significantly affects their interest or, put differently, that a trustee breaches its duty to inform when it withholds information that would prejudice the beneficiaries. *Allard*, 99 Wash.2d at 404-05, 663 P.2d 104. In *Allard*, Pacific Bank held in trust for certain beneficiaries a quarter block of property in downtown Seattle. *Allard*, 99 Wash.2d at 396, 663 P.2d 104. The property was the sole trust asset. *Allard*, 99 Wash.2d at 396, 663 P.2d 104. Under the trust provisions, Pacific Bank had full power to manage trust assets according to the judgment and care that "prudent men exercise in the management of their own affairs." *Allard*, 99 Wash.2d at 396, 663 P.2d 104. In 1978, Pacific Bank sold the downtown property before informing the beneficiaries of the sale more than a month later. *Allard*, 99 Wash.2d at

397, 663 P.2d 104.

¶ 18 The beneficiaries brought suit against Pacific Bank for breach of its fiduciary duties, arguing on appeal that Pacific Bank had a duty to inform them before selling the property. *Allard*, 99 Wash.2d at 401, 663 P.2d 104. Our Supreme Court agreed with the beneficiaries and held that Pacific Bank had a duty to inform them of the sale. *Allard*, 99 Wash.2d at 405, 663 P.2d 104. The court reasoned that, although Pacific Bank could manage trust assets without seeking the beneficiaries' consent, and although the trust provisions required Pacific Bank to furnish only an annual statement for the prior year's investments, Pacific Bank, as part of its fiduciary duties, had to inform the beneficiaries of all material facts of the downtown Seattle property transaction before the sale because such a sale was a nonroutine transaction that significantly affected the trust estate and the beneficiaries' interests. *Allard*, 99 Wash.2d at 403-05, 663 P.2d 104; *cf. In re Estate of Ehlers, 80 Wash.App.* 751, 758-59, 911 P.2d 1017 (1996). (holding that a trustee does not breach her duty of care in failing to provide timely mandatory accounting when the trustee eventually provides accounting and the untimeliness does not cause any loss to any beneficiary).

¶ 19 Here, Diane had a duty to inform John about matters that would significantly affect his interests. But unlike in *Allard* in which selling the only trust asset significantly affected the beneficiaries' interest, providing Elmer's care was a routine practice to fulfill the trust's primary purpose, which, therefore, did not significantly affect John's remainder interest. In fact, the trust specifically gave Diane authority to "provide as much of the principal and net income of my trust as is necessary or advisable, ,in [her] sole and absolute discretion, for my health, support, maintenance, and general welfare." CP at 36. John could also reasonably expect that his ailing father, declared incompetent by two physicians and aged 95 at the time of his death, would require full-time care, which care could consume substantial portions, if not all, of the trust's assets.

¶ 20 Because the trust clearly provided for Diane to spend any amount of trust assets to care for Elmer, John suffered no loss whether Diane planned to defer the costs and compensate herself in the future or hire a care giver who she paid during Elmer's lifetime; he could reasonably expect those types of expenses on behalf of his incompetent and dependent father and he knew that the trust provided that Diane could pay for those expenses in her sole discretion. We hold that Diane had a duty to inform John about

significant matters that affected his beneficial interest in the estate assets but that she did not breach her fiduciary duty in failing to inform John about how she was managing the routine expenses associated with Elmer's care, as John was not prejudiced by her conduct. Nor did Diane breach her duty to inform John of her management of the Ilwaco property when, without telling John, she decided not to encumber the Ilwaco house for the cost of their father's care.

¶ 21 The trust divided the remaining estate assets equally to Diane and John in 9/20th shares, with the Ilwaco home left to Diane "*as part of, and not in addition to* " her 9/20th share. CP at 46 (emphasis added)**1234 (capitalization omitted). If the value of the house exceeded Diane's 9/20th share of the remaining estate, Diane had the option of purchasing the house for any amount of value exceeding her 9/20th share of the entire estate, in effect, giving John cash payment for his interest in the estate. If Diane declined to purchase the house, the property would pass as if Elmer had died intestate.

¶ 22 It is inconsequential whether Diane took the money from the trust during her father's lifetime and encumbered the house at that time to pay herself or whether she deferred her claim for reimbursement and refrained from encumbering the house. Diane and John each had a remainder interest in the estate. If Elmer's needs during his lifetime exceeded the trust's liquid funds, Diane would necessarily have had to encumber the Ilwaco home to pay his additional expenses. If the liquid trust funds were depleted, John and Diane would be entitled to a 9/20th share of the remainder of their father's estate, here, the Ilwaco house, and Diane could purchase the house and pay John his 9/20th interest. Thus, depleting the trust's liquid funds during her father's lifetime or delaying her payment until after his death did not change the fact that, with those funds depleted, Diane would have only the option to purchase the house.

¶ 23 Further indication that John did not suffer any prejudice is that he failed to object to Diane's decisions at any point before Elmer's death, even though he had reason to know that she was maintaining the Ilwaco home, that she was Elmer's care giver, and that she would charge the estate for her care giving. John lived on property adjoining Elmer's Ilwaco home and saw Elmer visit when Diane took him there. Diane also generally maintained the Ilwaco home and undertook repairs for water damage.

¶ 24 John also was on inquiry notice that Diane would charge the estate for caring

for Elmer, as she had absolute authority to pay for his "health, support, maintenance, and general welfare." CP at 36. The trust had paid a nurse to care for Elmer before Diane took him into her home and care. When Diane started caring for him, it was certainly foreseeable that she would reasonably charge for the personal services she rendered. But John never took care of his father and never inquired about whether Diane was going to charge the estate for her care. John's failure to object, even though he had reason to know that Diane was caring for Elmer and that she would reasonably charge the estate for her services, belies his assertion now that he suffered harm as a result of her decisions.

¶ 25 We hold that Diane did not have a duty to inform John that she decided to claim and defer charges against Elmer's estate. Nor did she owe him a duty to inform him that she decided to refrain from encumbering the Ilwaco home to pay for Elmer's care.

II. CARE–GIVING COMPENSATION

¶ 26 Diane next argues that under both the trust and the applicable statutory authority, she had authority to pay herself "as trustee" for providing Elmer's care. Br. of Appellant at 17, 29. Although Diane conflates being compensated as a trustee with being compensated as Elmer's care giver, we agree that she can recover her care-giving expenses from the trust.

¶ 27 Diane's confusion arises from the following trust language:

> My trustee shall pay itself reasonable compensation for its services as a fiduciary as provided in this agreement, and shall reasonably compensate those persons employed by my Trustee, including agents, auditors, accountants, and attorneys.

CP at 68. Diane understands this language to mean that a trustee may be paid reasonable compensation for fiduciary services, and she assumes that personal care giving is within the scope of a trustee's services. Her understanding ignores the language "as fiduciary," which distinguishes Diane's ability to pay herself in her fiduciary capacity from paying those who she employs. CP at 68. Diane conflates her dual role. On one hand, she was a trustee, with duties that included managing trust funds for Elmer's benefit and managing his needs. On the other, she was Elmer's care giver.

¶ 28 A fiduciary is "required to act for the benefit of another person on all matters within the scope of their relationship ... who must exercise a high standard of care in

managing another's money or property." Black's Law Dictionary 702 (9th ed. 2009). While managing Elmer's trust funds, managing his personal affairs, and managing his other needs were within the scope of Diane's fiduciary duties as his trustee, actually providing Elmer's personal care was not.

¶ 29 Diane's confusion of her dual roles is not fatal, however, as the trust also requires her to "reasonably *793 compensate those persons [she] employ[s]." CP at 68. If Diane had hired a full-time nurse to provide Elmer's health care, the trust would have required her to use trust funds to reasonably compensate the nurse. Notably, the trust does not prohibit Diane from compensating herself as an employee in addition to her role as trustee. The trust's only requirement is that the compensation be "reasonable." CP at 68. We hold that Diane, as trustee, could compensate herself as an employee who provided for Elmer's personal needs.

¶ 30 In addition to Diane's reasonable expenses related to caring for Elmer, she is also entitled to reasonable compensation for her services as trustee. The trial court awarded her $5,000 for her services as trustee. She does not challenge this finding on appeal; therefore, we do not disturb that award. We hold that Diane is entitled to reasonable compensation as Elmer's caregiver and remand to the trial court to evaluate

the reasonableness of the costs of the services she rendered in providing his care.

III. REPAIR OF PROPERTY

¶ 31 Diane next contends that the trial court erred in subtracting $10,000 from the roughly $20,000 she spent to repair and remodel the Ilwaco house kitchen. We agree that there was no reason to deduct this expenditure, as it was within her discretion to make.

¶ 32 Under the trust's express language, Diane could "hold property which is non-income producing ... if the holding of such property is, in the sole and absolute discretion of [Diane], in the best interests of the beneficiaries." CP at 71. Diane also, had authority to take any action "reasonably necessary for the preservation of real estate and fixtures comprising a part of the trust property." CP at 74. Based on the trust's plain language, Diane had authority not only to keep the Ilwaco house but also to preserve it and its fixtures.

¶ 33 Webster's defines "preservation" as "the act of preserving or the state of being preserved," and it defines "preserve" as "to keep safe from injury, harm, or destruction ... to

keep alive, intact, in existence, or from decay." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1794 (2002). In the context of real estate, the plain meanings of "preservation" and "preserve" indicate that Diane could not only maintain the Ilwaco house, but also could use trust funds to improve the house. Preserving a house entails keeping it as an appreciating asset.

¶ 34 Here, even though Elmer was only visiting from time-to-time, the costs associated with maintaining the property contributed to its valuation's increase from $90,000 in 2001 to $217,000 in 2007. This increase reflects the reasonableness of expending trust funds to maintain the asset, possibly for future use if it had to be sold or mortgaged to provide funds to care for Elmer. Therefore, under the express trust language, we hold that Diane had authority to repair water damage and to remodel the kitchen and the trial court erred in reducing her interest in the remaining estate by $10,000.

IV. CONCLUSION

¶ 35 Diane did not breach any duty to inform John of how she was managing their father's trust estate because his lack of knowledge did not cause him prejudice. She is therefore entitled to reasonable compensation for her fiduciary actions as well as her personal care of their father. We affirm the trial court's approval of the $59,176.67 Diane used of the liquid trust funds during Elmer's life for her personal care and, although the trial court may have found Diane's accounting of her personal care expenses adequate, the court did not determine whether the total of her claimed expenses were "reasonable." Accordingly, we remand to the trial court to reexamine and determine whether her remaining claimed expenses were reasonable and to award her further compensation for personal care she provided, in accord with the terms of the trust.

¶ 36 We hold that Diane is entitled to funds she spent to repair and remodel the Ilwaco kitchen after water damage. And we hold that the trial court properly used the 2007 appraised value of $217,000 for the Ilwaco house.

Reversed and remanded.

Problems

1. Henry's will stated, "I leave the residue of my estate to Carrie in trust to provide for the education of my nieces, Creola and Pandora. I trust Carrie completely, so she does not have

to keep any accounts." A few years after Carrie assumed her duties as trustee, Creola suspected that Carrie was misappropriating the trust funds. Thus, Creola filed an action for an accounting. In response, Carried stated that she was not required to give an accounting. What result?

2. During his marriage Kevin had an affair that resulted in the birth of a child, Camille. Kevin's wife, Bertha, knew about Camille, but Kevin's and Bertha's child, Zeno was not aware that she had a half-sister. In his will, Kevin left his entire estate in trust for the benefit of Camille and Zeno. After Kevin died, his business partner, Mateo, assumed his role as trustee. When Zeon discovered that her father had left Camille trust money, she became suspicious. Hence, she asked Mateo to see a copy of the trust instrument. Mateo complied with Zeno's request, but he redacted the portions of the trust instrument referring to Camille. Zeno filed an action claiming that Mateo had violated his duty to inform. What result?

3. Gary's will stated, "I leave my entire estate to Max in trust for the benefit of my wife, Dena. If Dena's remarries, the remaining trusts funds are to be held in trust for the benefit of the Animal Rights Society." After Gary died, Max assumed his role as trustee. Two years after Gary died, Dena married Curtis. However, Max continued to give Dena money out of the trust. Seven years later, the director of the Animal Right's Society discovered that Dena had been remarried for over nine years. The director sued Max to recover the trust money he wrongfully paid to Dena. Max responded by pointing out that he had fulfilled his duty to account and inform because he informed the director of all the payments he made to Dena. According to Max, since the director did not object to his accountings in a reasonable time, he was not liable for breaching any of his trust duties. What result?

4. Theresa was suffering from mild memory loss. Thus, Byron, Theresa's husband, established a trust for her benefit. According to the terms of the trust, the trustee was to provide enough money to support Theresa. After Bryon died, the Main Bank assumed its role as trustee. The Main Bank gave yearly accountings. Theresa signed off on all the accountings. Later, Theresa's friend suspected that Main Bank was not paying enough to support Theresa. Thus, the friend hired a lawyer for Theresa to sue Main Bank for violating its duty to support Theresa. What result?

12.3 The Trustee's Liability

In re Wilson, 930 N.E.2d 646

BAKER, Chief Judge.

The trust at issue herein held certain real estate that the settlor intended to be sold, with the proceeds to be distributed to the beneficiaries. For a time, the trustee delayed selling the real estate for valid reasons. He continued to delay to sell the property, however, until over a year past the point at which those reasons no longer existed. His inaction constituted a breach of fiduciary duty. His breach may have caused the corpus of the trust to suffer significant financial harm, and his general reluctance and/or refusal to communicate with the beneficiaries forced them to resort to litigation to find that out. Under these circumstances, we find that the trial court did not err by ordering the trustee to pay the beneficiaries' attorney fees, by reducing the requested trustee fees, or by reducing the amount of the trustee's attorney fees to be borne by the trust.

Appellant-respondent Fred Monroe Wilson (Trustee) appeals the trial court's order entering judgment in favor of appellees-petitioners Marcia Wilson Barker (Marcia), Carol Perrine (Carol), Nicholas Barker (Nicholas), Christopher Barker (Christopher), and Sarah Barker (Sarah) (collectively, the Objecting Beneficiaries) sustaining the Objecting Beneficiaries' objections to the Trustee's final accounting. The Trustee argues that the trial court erred by (1) finding that the Trustee committed multiple breaches of fiduciary duty; (2) ordering the Trustee to pay the attorney fees of the Objecting Beneficiaries; (3) reducing the fiduciary fees requested by the Trustee from $140,000 to $75,000; and (4) ordering that a portion of the Trustee's attorney fees be paid by the Trustee personally.

We find that the Trustee breached duties owed to the Objecting Beneficiaries and that the trial court properly ordered the Trustee to pay the Objecting Beneficiaries' attorney fees, reduced the Trustee's requested fiduciary fees, and ordered that the Trust only be responsible for a portion of the Trustee's attorney fees. We also find, however, that it was error to order that the Trustee bear the remaining portion of his attorney fees personally. Therefore, we affirm in part and reverse in part.

FACTS

On May 15, 1997, Elizabeth F. Wilson executed a Revocable Trust (the Trust).

Elizabeth's three children—the Trustee, Marcia, and Carol—are the Majority Beneficiaries of the Trust, receiving a combined 89.75% interest therein. Elizabeth's nine grandchildren, including Nicholas, Christopher, and Sarah, share the remaining 11.25% interest equally. The Trustee was Co–Trustee with Elizabeth until she died on July 31, 2005, at which time he became the sole Trustee.

The Property

At the time of Elizabeth's death, the Trust held the following assets: (1) tangible personal property, the distribution of which was governed by a list that had been prepared by Elizabeth and incorporated into the Trust; (2) a checking account and an investment account; and (3) an 82.795% ownership interest as a member of Wilson–Hussey Lane, LLC (the LLC).

The LLC's primary asset was approximately 17.5 acres of real estate located in Carmel (the Real Estate). The Trustee became the Manager of the LLC at the time of Elizabeth's death.

At the time of Elizabeth's death, the Majority Beneficiaries also owned, as tenants in common, Elizabeth's former residence in Carmel (the TIC Property), which is adjacent to the Real Estate. The TIC Property held, among other things, the tangible personal property included in the Trust.

The Loans

Almost immediately after Elizabeth's death, the Trustee was faced with issues regarding the payment of real estate taxes and other necessary expenses on behalf of the LLC and the TIC Property. During her lifetime, Elizabeth had personally paid these obligations. The Trustee presented Marcia and Carol with options as to how to handle those expenses but did not receive a response. The Trustee was concerned about protecting the Trust's tangible personal property located in the TIC Property and the Trust's interest in the Real Estate owned by the LLC. Accordingly, the Trustee facilitated the payment of TIC Property and LLC expenses from the Trust's assets and accounted for and verified those payments as loans totaling over $100,000 made by the Trust. Although the Trustee had no promissory notes documenting the loans, he accounted for all payments in his Final Accounting.

The Fire

The Trust's tangible personal property was sorted and inventoried by the Trustee to facilitate distribution to the Majority Beneficiaries pursuant to Elizabeth's list. The Trustee also obtained an appraisal of the property. On November 17, 2005, the Majority Beneficiaries met and the majority of the Trust's tangible personal property was distributed at that time.

On January 23, 2006, the Objecting Beneficiaries filed a Petition for a Trust Accounting.

On March 16, 2007, the TIC Property and remaining undistributed portion of the Trust's personal property were destroyed as the result of a fire. The Majority Beneficiaries submitted an insurance claim and received insurance proceeds for the damage to the residence and the property therein.

The Real Estate

The Trust's primary asset was the Real Estate, and the Majority Beneficiaries desired, ultimately, to sell the Real Estate and the adjacent TIC Property as a single parcel. Pursuant to his fiduciary duty to handle all transfer tax matters arising from the Trust's assets, the Trustee obtained an appraisal of the Real Estate and a valuation opinion from a certified valuation analyst to propose a discounted fair market value of the Trust's ownership interest in the LLC, primarily due to the lack of marketability in that interest.

The Trustee was concerned that the Trust would have to pay an additional 47% federal estate tax on proceeds received in excess of the appraisal value if the Real Estate was sold prematurely. Additionally, the Trustee was counseled not to sell the Real Estate before the insurance claim stemming from the fire at the TIC Property was resolved. Therefore, the Trustee decided not to distribute the Trust's LLC units to the beneficiaries or market the Real Estate for sale until the audit review of the Trust's federal estate tax and Indiana inheritance tax returns were finalized and the insurance claims were resolved. The IRS issued a clearance letter in January 2007, the Indiana Department of Revenue issued a clearance letter in May 2007, and the insurance claim was satisfied in August 2007. Shortly thereafter, the Majority Beneficiaries met to discuss the sale of the Real Estate, at which time the Trustee agreed that he would begin to compile marketing packets and begin the process of

selling the Real Estate. The Trustee did not begin marketing the Real Estate for sale until July 2008, a few weeks before a scheduled July 29, 2008, hearing on the Objecting Beneficiaries' objections to the Final Accounting.

The Final Accounting

On March 4, 2008, the Trustee filed the Final Accounting and in March and April 2008, the Objecting Beneficiaries filed objections to the Accounting. Following a hearing that concluded on September 19, 2008, the parties stipulated that the Final Accounting met the burden required under Indiana Code section 30-4-5-13 (a), meaning that the burden of persuasion regarding the alleged instances of impropriety shifted to the Objecting Beneficiaries. On July 6, 2009, the trial court entered an order sustaining many of the Objecting Beneficiaries' objections. Among other things, the trial court found and concluded as follows:

> • The Trustee's use of Trust funds to pay TIC Property expenses constituted improper commingling of assets and was a breach of trust. The trial court specifically found fault with the lack of documentation that the payments made from the Trust were loans.
>
> • The Trustee's decision to loan Trust Assets to the TIC Property and the LLC without documenting the loans violated the Statute of Frauds.
>
> • The loans to the TIC Property and the LLC without approval of the beneficiaries or a court order constituted self-dealing and improper conflict of interest, resulting in a breach of trust.
>
> • The delay in the sale of the Real Estate constituted a violation of the Trustee's duty to preserve trust property and make trust property productive.

Appellant's App. p. 11–25.

Having found those breaches of duty, the trial court ordered the Trustee to pay the attorney fees of the Objecting Beneficiaries, which totaled $50,375. Although the Trustee requested trustee fees totaling $140,000, the trial court ordered that he receive only $75,000 because of the multiple breaches of duty. Furthermore, much of the time for which he requested payment was spent defending against the objections, which he precipitated and

which would not otherwise have been necessary to administer the trust. Finally, the trial court found that the Trustee's attorney fees, totaling $280,000, were reasonable but that the Estate should not have to bear the entire burden of those fees because the Trustee's failure to communicate with his family caused much of the litigation, and the fees would not otherwise have been necessary to administer the trust. Thus, the trial court ordered that the Estate pay $175,000 of the Trustee's attorney fees, with the remainder to be borne by the Trustee personally. The Trustee now appeals.

DISCUSSION AND DECISION

I. Standard of Review

When, as here, the trial court has entered an order containing findings of fact and conclusions of law, we apply a two-step review. First, we consider whether the evidence supports the findings, and second, whether the findings support the judgment. *Hardy v. Hardy*, 910 N.E.2d 851, 855 (Ind. Ct. App. 2009). We will neither reweigh the evidence nor assess witness credibility, considering only the evidence most favorable to the judgment. *Id.* We will set aside the trial court's findings and conclusions only if they are clearly erroneous, that is, if the record contains no facts or inferences supporting them. *Id.* We apply a de novo standard of review to conclusions of law. *Id.*

II. Breach of Trustee's Duties

A trust is "a fiduciary relationship between a person who, as trustee, holds title to property and another person for whom, as beneficiary, the title is held." Ind. Code § 30-4-1-1(a). A breach of trust is "a violation by the trustee of any duty that is owed to the settlor or beneficiary." Ind. Code § 30-4-1-2(4).

Generally, a trustee bears the burden of justifying the propriety of items in a trust account. *Matter of Willey's Trust*, 443 N.E.2d 1191, 1193 (Ind.Ct. App. 1982). But when, as here, a trustee files specific accounts and makes a prima facie showing that the accounts are proper, the burden of persuasion shifts to the beneficiaries to show specific instances of impropriety. *Id.* at 1193-94.

Solely for argument's sake, we will assume that the Trustee is correct that his decision to loan money from the Trust to the LLC and the TIC Property was not a breach of duty. We will turn immediately, therefore, to the trial court's conclusion that the Trustee's

decision to delay the sale of the Real Estate breached his duties to preserve the trust property and make the trust property productive for both the income and remainder beneficiaries.

The record here reveals that the Trustee elected to wait to sell the Real Estate until he received clearance letters from federal and state government agencies in an effort to avoid incurring substantial additional transfer tax liability. Furthermore, he elected to wait to sell the Real Estate until the insurance claim on the TIC Property was processed in an effort to ensure that the Majority Beneficiaries received the full amount of their claims. We find that these actions were prudently taken, well considered, and taken upon the advice of counsel.

That said, we agree with the trial court's implicit conclusion that while the Trustee was waiting for the clearance letters and the settlement of the insurance claim, he should have begun the process of selling the property by, among other things, taking steps to find potential buyers and putting together marketing information about the property. Even more compelling, the insurance claim had been settled and all clearance letters received by August 2007, but it was not until July 2008, more than a full year after receiving the last tax clearance letter and shortly before a scheduled court hearing, that the Trustee began marketing the Real Estate for sale. He could point to no significant steps he had taken during the intervening months to prepare to sell the Real Estate.

Although the Trustee is correct that the Trust does not mandate the Trustee to sell any asset, it is evident from the way in which the Trust is structured that Elizabeth intended that the Trust assets be relatively quickly distributed and/or sold. Moreover, the Objecting Beneficiaries made it abundantly clear to the Trustee starting in August 2005 that they desired a quick wrap-up of the Trust and hoped that the Real Estate would be sold in a timely fashion. Although we find that the Trustee's decision to delay the sale until after the tax clearance letters were received and the insurance claim was settled was prudent and did not constitute a breach of fiduciary duty, we agree with the trial court's conclusion that his failure to prepare the Real Estate for sale during the waiting period and the extra delay of over one year after the clearance letters were received was a breach of his fiduciary duties to comply with the settlor's intent and to preserve the value of the Trust property.

The Trustee notes that the Trust does not actually own the Real Estate. Instead, it owns a majority interest in the LLC, a separate entity, which owns the Real Estate. The

Trustee argues that he could not have a duty to sell an asset the Trust does not actually own. We find this to be a distinction without a difference. He is both the Trustee of the Trust and the Manager of the LLC. Regardless of which proverbial hat he was wearing, it was his responsibility to sell the Real Estate or, at least, the Trust's interest in the Real Estate. Thus, we do not find this argument to be compelling.

III. Damages

Although the trial court did not award any specific damages to the Objecting Beneficiaries based upon the Trustee's breaches, it ordered the Trustee to pay the Objecting Beneficiaries' attorney fees, reduced the fees requested by the Trustee, and ordered the Trustee to pay a portion of his attorney fees personally. The Trustee argues that all of these actions were erroneous.

If a trustee commits a breach of trust, the trustee is liable to the beneficiaries for: (1) any loss or depreciation in the value of the trust property as a result of the breach; (2) any profit made by the trustee through the breach; (3) any reasonable profit which would have accrued on the trust property in the absence of a breach; and (4) reasonable attorney's fees incurred by the beneficiary in bringing an action on the breach. I.C. § 30-4-3-11(b). If the trust is not harmed by any breach of trust committed by the trustee, the beneficiaries may not complain of the breach of trust. *Gavin v. Miller*, 222 Ind. 459, 467, 54 N.E.2d 266, 280 (1944).

Here, the trial court found that the Objecting Beneficiaries failed to offer evidence establishing that they suffered a financial harm—i.e., that the Real Estate depreciated in value during the delay—as a result of the Trustee's breach. The only evidence in that regard came from the testimony of Marcia, who is not an expert but testified that in her personal opinion, the real estate market in Indiana was not as good as it had been three years earlier. The trial court determined that Marcia's testimony was insufficient to establish damages, and we agree with that conclusion.

Although we conclude that the Trust corpus, itself, suffered no harm as a result of the Trustee's breach, the Trustee's actions, including a general reticence or refusal to communicate with the Objecting Beneficiaries, compelled the Objecting Beneficiaries to solve these problems in court. Put another way, the Trustee's behavior forced the Objecting

Beneficiaries to enlist the aid of attorneys and a trial court to determine that, in fact, they had not sustained financial harm as a result of his inaction. Under these circumstances, we find that the trial court did not err by ordering the Trustee to pay the Objecting Beneficiaries' attorney fees or by reducing the fees the Trustee requested based upon the breach of duty.

As for the Trustee's attorney fees, we likewise find that the trial court did not err by ordering that the Trust pay only $175,000 of those fees. To the extent that the trial court ordered the Trustee to personally pay the remainder of his attorney fees, however, we disagree. Neither the trial court nor we have jurisdiction over the relationship between the Trustee individually and his attorneys. The way in which the Trustee's attorneys choose to collect the remainder of their fees, if at all, is not at issue in this proceeding, and we reverse the trial court's order to the extent that it orders the Trustee to bear that burden personally.

The judgment of the trial court is affirmed in part and reversed in part.

REVIEW

The following fact pattern is included as a means of reviewing all of the issues that arise in a trust transaction. In particular, the student should focus upon identifying all of the breaches of trust duties.

Collaborative Learning Exercise

A codicil to Judy's will established a trust naming her brother, Richard, as the life time beneficiary. The will directed the trustee to terminate the trust, upon Richard's death, and distribute the balance of the principal and accumulated income to Judy's three children, their heirs and assigns.

The only asset placed in the trust was an installment real estate contract executed between Judy and Howard in 1992 for the sale of three multi-family dwellings. Under the installment contract, Howard was to purchase the three properties for $250.000. The three parcels of real estate were commonly known as 155 Third Avenue South, 215 Turtle Lane, and 122 Madison Street North. The three parcels contained twenty apartment units.

The trust instrument also directed the trustee to use $250,000 of the funds in the estate to acquire additional rental property to add to the corpus of the trust. Judy's will

directed the trustee to pay Richard during his lifetime "monthly, all of the net income of the trust, or $3000.00, whichever is greater."

During her life time, Judy had a management company to maintain the rental property. At that time, the property was considered to be in good condition. Judy died in 1995. A few months later, the trustee, Benjamin Taylor, accepted the duty of trustee. Benjamin immediately began making monthly payments to Richard.

Benjamin took the $250,000 from the estate and placed it in his savings account while he looked for rental property to purchase. Benjamin did not have experience in real estate investment, so he asked his friend, Katherine, a real estate broker, to find property to purchase. Katherine identified several properties and mailed Benjamin information on them.

Six months later, Benjamin met Katherine for lunch and told her that he did not have time to sift through information about real estate. Benjamin gave Katherine a blank check written on his account, and told her to buy the property that she felt was most suitable. His only condition was that Katherine purchase property with high income return. He stated, "I don't care what the property is worth in 10 years. Richard needs the money now."

Katherine purchased a four-unit apartment building located at 1022 Weaver Street for $200,000. Benjamin recorded the title to the Weaver Street property in his name. He transferred $200,000 from his savings account into his checking account to cover the purchase price. He left the remaining $50,000 trust money in his savings account. At the time of the purchase the fair market value of the Weaver Street property was $150,000. The neighborhood was revamped and the market value of the property steadily increased. Benjamin made income payments to Richard out of the rents the trust received from the Weaver Street property.

In 1999, Howard assigned his interest in the real estate contract to Larry. A few months later, Larry assigned his interest to Benjamin's daughter, Susan. The contract called for monthly payments of $7500, and obligated Susan to make timely payments of taxes and insurance. She was required to keep the property in good repair. When the properties were sold to Susan, Benjamin did not personally inspect them. In addition, at that time, neither an official inspection nor appraisal was made on the properties.

When Susan purchased the properties, the Third Avenue and Turtle Lane properties were deteriorating. Susan made no efforts to improve the properties. In March 2000, city housing inspections began issuing notices of intent to "placard" the dwellings for housing violations. Five units of the Third Avenue property were deemed unfit for human habitation in July 2001; the entire building was cited for violations in April 2002. In September 2002, the Turtle Lane property was placarded as uninhabitable due to problems ranging from missing windows to leaking ceilings, exposed wiring and peeling paint. A storm blew the roof off of the Madison Street building, but it was never repaired. Benjamin received all of the notices, but took no action to address the problems.

Susan made the contract payments on time, but she failed to pay real estate taxes from 1999 to 2003. In April 2003, when Benjamin was notified of the tax delinquencies, he contacted Susan and she promised to pay the back taxes. As a result of Susan's failure to pay the back taxes, the Third Avenue, Turtle Lane, and Madison Street properties were sold at a tax sale in September 2003. Benjamin received the notices of the tax sale and expiration of the right to redeem. Benjamin took no action to redeem the property and did not insist that Susan redeem the property.

Katherine advised Benjamin that, if he sold the Weaver Street property, he would have enough money to redeem and repair the three properties. Benjamin rejected Katherine's advice because rents from the Weaver Street property were sufficient for him to pay Richard's monthly income. However, in February of 2004, a highway construction project made the Weaver Street property undesirable as a rental property. The monthly rents received from the property decreased to $800. To cut back on expenses, Benjamin allowed the fire insurance policy on the building to lapse. In October 2004, the Weaver Street property was destroyed by fire. In addition to the total property loss, the city assessed the demolition costs against the trust.

In November 2004, Benjamin notified Richard that the trust's assets were depleted, and issued him a final monthly payment of $2000. Benjamin sold the Weaver Street lot for $50,000. After paying off outstanding liens and expenses, he issued a lump sum payment to Richard of $1500 in March 2005. Richard died in November 2005.

Judy's three children did not find out about the dissolution of the trust until after Richard's death.

Judy's children have contacted your firm seeking advice about their rights and remedies. Please analyze the relevant legal issues that arise from the facts.

Chapter 13 - Power of Appointments

The testator can leave property as a gift outright to a person or the testator can leave property to a person to hold in trust for another person. Finally, the testator can leave property to a person and give the person the authority to select the new owner of the property. That authority is called a "power of appointment." A power of appointment is the right to designate the new owner of property. A power of appointment is created by stating, "I leave my property to A in order that he may have the right to appoint the new owner."

It is important to identify the parties to the transaction. The donor is the original owner of the property. If a trust is involved the donor is the settlor or the testator. The person who receives the power of appointment is the donee. The donor remains the owner of the property until the donee exercises his power of appointment and names a new owner of the property. Objects of the power are the pool of potential new owners of the property. The persons the donee appoints as the new property owners are called appointees. Even though the donee designates the appointees as the new owners of the property, those persons take title to the property from the donor. The default takers are those persons who take the property if the donee does not exercise the power of appointment. The property is referred to as the appointive property. Consider the following example. In his will, Mandy stated, "I leave my house to my son, William for life. When William dies, the house will go to any one of my children William appoints as the new owner. If William does not appoint a new owner of the house, the house will go to my cousin, Janice." In the example, Mandy is the donee; William is the donor; Mandy's children are the objects of the power; and Janice is the default taker. In the event the donor does not name a default taker and the donee fails to exercise the power, the property reverts to the donor's estate. Once the property reverts to the donor's estate, it goes to the takers of the donor's residuary estate.

The two main types of powers of appointment are the general power of appointment and the special power of appointment. When the donor creates a general power of appointment, he does not place any restricts or conditions on the donee's exercise of the

power. Therefore, the donee can appoint the power to any one, including himself. There is no specific language needed to create a general power of appointment. The trustee just has to make sure that the exercise of the power is unrestricted. For instance the donor could state, "I leave my house to Paul to give to any one that he chooses." On the other hand, a donor who creates a special power of appointment specifics certain individuals or groups as the objects of the power or conditions the exercise of the power on certain factors. A special power cannot be exercised in favor of the donee, the donee's estate, the donee's creditors or the estate of the donee's creditors. A special power of appointment is created when the donor states "I leave my property to Ben to appoint to any one of my sisters that he so chooses." Both the general and the special power of appointment may be inter vivos or testamentary. An inter vivos power of appointment must be exercised during the donee's life. The testamentary power of appointment must be exercised by the donee's will.

Notes and Problems

1. A special power of appointment may be exclusive or non-exclusive. If the power is non-exclusive, the donee may exclude entirely one of more objects of the power. Thus, the donee has the option of appointing all the property to one member of the class of permissible objects, and excluding the rest. When the case involves a non-exclusive power, the donee must appoint some amount to each of the permissible objects. The illusory appointment rule requires that each permissible object receives a substantial portion of the appointive property.

2. Problems

a) Gus' will stated, "I leave the residue of my estate in trust for the benefit of Mae during her life, the remainder as Mae shall appoint by will to any one or more of her children." Mae had four children, Bill, Sam, Gail, and Frank. Mae appointed all of the trust property to Gail. Is this permissible?

b) Thomas' will stated, "I leave my house in trust for the benefit of Billy during his life, the remainder as Billy shall appoint by will to his children." Billy had two children, Crystal and Polly. Billy appointed all of the trust property to Polly. Is this permissible?

c) Penny's will stated, "I leave my apartment complex in trust for the benefit of Sandra for life, the remainder as Sandra shall appoint my will to my sisters." Penny had three sisters,

Gloria, Evon and Emma. Sandra appointed all of the trust property to Sandra's daughter, Josie. Is this permissible?

3. Problems

In which of the following cases has a power of appointment been created.

a) "I leave my ranch to Joe in order for him to decide to whom to give it."

b) "I leave my hotel to Joe for the benefit of any one of my sons that he chooses

c) "I leave the residue of my estate to Joe, so that he can provide for my children."

d) "I leave my entire estate to Joe as long as he gives it to one of my nieces."

e) "I leave my art collection to Joe, so that he may appoint it to whomever he chooses."

4. In most jurisdictions, a power of appointment cannot be exercised in the residuary clause of a will. Instead of exercising the power of appointment, the donee can release the power. The power has been released when the donee gives up the right to exercise the power by written instrument. Once the power is released the property goes to the default taker or reverts back to the donor's estate.

***Doggett v. Robinson*, 345 S.W.3d 94**

WILLIAM J. BOYCE, Justice.

Robert R. Doggett, Florence E. Pollard, Paul R. Doggett, Paul Randolph Doggett, Jr., Mark Edward Doggett, and Matthew Joseph Doggett appeal the trial court's summary judgment in favor of Mary Robinson,*96 as independent executor of the estate of John M. Robinson. We reverse and remand.

BACKGROUND

I. John Doggett's Will

John Doggett executed a will prepared by attorney John M. Robinson. John Doggett was married to his second wife, Sylvia, when he executed the will in 1983. John had four children from his first marriage—John III, Robert, Florence, and Paul. Sylvia had one child from a prior marriage—Beverly Longuet.

John's will directs that Sylvia receive his personal effects and distributes his

remaining assets to two trusts: the Unlimited Marital Deduction Trust ("Marital Trust") and the Family Trust. The will names John M. Robinson as the trustee of both trusts.

The will directs that Marital Trust income be paid to Sylvia during her lifetime, with the principal available for her support if necessary. Section 3.4 of John's will grants Sylvia testamentary power of appointment over the Marital Trust principal by "specific reference" in Sylvia's will. John's will provides in section 3.6 that any unappointed Marital Trust assets will be distributed upon Sylvia's death as specified.

The will also states that Family Trust assets may be distributed during Sylvia's lifetime to Sylvia or to John's descendants as necessary for their support. In section 4.3, John's will grants Sylvia a lifetime power of appointment over the Family Trust income and principal, as well as a testamentary power of appointment by "specific reference" in her will. John's will states that the Family Trust will terminate "when my wife dies or when no child of mine is living and under age 40, whichever is later." John's will directs any unappointed Family Trust assets existing upon termination to be distributed according to the same schedule as the unappointed Marital Trust assets.

With respect to both the Marital Trust and the Family Trust, John's will places an express limitation on Sylvia's power of appointment. Section 3.4 of John's will, which governs the Marital Trust, states that Sylvia "shall not have the power to appoint trust principal to herself, her estate, her creditors or the creditors of her estate." Section 4.3 of John's will, which governs the Family Trust, states that Sylvia "shall not appoint trust property to herself, her creditors, her estate, or the creditors of her estate."

John Doggett died in 1987. His will was probated, and Sylvia was appointed executor of his estate. It is alleged that neither trust was funded during Sylvia's lifetime or after her death. John M. Robinson died in 2002.

II. Sylvia Doggett's Will

Sylvia executed a will in 2002. After she died in 2006, her will was admitted to probate and Beverly was appointed executor of Sylvia's estate.

This appeal focuses in significant part on sections 2.1 and 2.4 of Sylvia's will. These sections provide as follows:

> *2.1* I give, devise and bequeath all of my property, real, personal and mixed, of every kind and character and description, and wherever situated, and any other property over which I may have a power of appointment or power of testamentary disposition, according to the provisions of this Article II.
>
> * * *
>
> *2.4* I give, devise and bequeath all the rest, residue, and remainder of my estate and property to my daughter, Beverly Ann Longuet.

Sylvia's will also provides in section 2.3 for the distribution of Sylvia's personal effects, and makes three monetary bequests in section 2.2 to persons other than John's children, John's grandchildren, or Beverly.

III. Suit by John Doggett's Children and Grandchildren

John's surviving children—Robert Doggett, Florence Doggett Pollard, and Paul R. Doggett—sued Beverly individually and in her capacity as executor of Sylvia's estate in 2007. They alleged, among other things, that (1) Sylvia failed to establish and operate the trusts properly; and (2) Beverly failed to provide an accounting of the assets in Sylvia's estate and information about assets that should have been used to fund the trusts. Three of John's grandchildren—Paul, Mark, and Matthew Doggett—filed a petition in intervention. We refer collectively to the original plaintiffs and intervenors as the "Doggett claimants."

The Doggett claimants also sued Mary Robinson in her capacity as executor of John M. Robinson's estate. The Doggett claimants alleged that John M. Robinson accepted appointment as trustee of the Marital Trust and the Family Trust under John's will. They further alleged, among other things, that John M. Robinson failed to fulfill his obligations as trustee; assisted Sylvia in taking assets belonging to the trusts; failed to require assets to be segregated; made misrepresentations; and breached his fiduciary duties as trustee. The Doggett claimants contend that, as a result of this alleged conduct, Beverly improperly obtained trust property intended for them under John's will. The Doggett claimants sought actual damages, punitive damages, costs and attorney's fees, interest, the imposition of a constructive trust, and declaratory relief.

Beverly settled with the Doggett claimants on behalf of herself and Sylvia's estate in 2008, leaving Robinson's estate as the only defendant.

Robinson's estate filed a traditional summary judgment motion under Rule 166a(c), arguing that it was not liable to the Doggett claimants because Sylvia in her will properly exercised her power of appointment in favor of Beverly. The Doggett claimants also filed a traditional summary judgment motion, arguing that (1) John's will authorized Sylvia to exercise her power of appointment only in favor of John's "descendants" as that term is defined in section 9.3 of John's will; and (2) Beverly is not among John's defined "descendants."

The trial court granted partial summary judgment in favor of Robinson's estate and denied the Doggett claimants' motion. The trial court held: "As a matter of law, Sylvia Doggett validly exercised her power of appointment in favor of John Doggett's descendant, Beverly Longuet; and ... [b]ecause of the valid exercise of the power of appointment, [the Doggett claimants'] claims fail as a matter of law." The summary judgment was interlocutory because attorney's fees were not adjudicated.

After a one-day bench trial, the trial court signed a final judgment on November 4, 2009 that (1) incorporated its prior partial summary judgment; and (2) awarded attorney's fees to Robinson's estate. Robinson's estate filed a motion to modify the final judgment, which the trial court granted in part and denied in part. The trial court signed an amended final judgment on December 1, 2009, and the Doggett claimants timely appealed.

ANALYSIS

This appeal turns on the interplay between John's will and Sylvia's will. The Doggett claimants contend that the trial court erred by denying their motion for summary judgment, and by granting summary judgment based on the trial court's conclusion that Sylvia properly exercised her power of appointment in favor of Beverly. In their first issue, the Doggett claimants assert that Sylvia's will did not validly exercise the power of appointment under sections 3.4 and 4.3 of John's will. In their second issue, the Doggett claimants contend that Beverly is not among the defined "descendants" to whom Sylvia was allowed to appoint trust property under section 9.3 of John's will. They also challenge the award of attorney's fees in their third issue. Robinson's estate raises one issue on cross-appeal, arguing that the trial court should have awarded costs and post-judgment interest in the final judgment.

I. Standard of Review

An appellate court applies *de novo* review to a traditional summary judgment under Rule 166a(c), using the same standard that the trial court used in the first instance. *Duerr v. Brown*, 262 S.W.3d 63, 68 (Tex.App.-Houston [14 Dist.] 2008, no pet.) (citing *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

The defendant as movant must disprove at least one essential element of each of the plaintiff's causes of action in order to prevail on summary judgment., *Wright v. Greensberg*, 2 S.W.3d 666, 670 (Tex.App.-Houston [14th Dist.] 1999, pet. denied) (citing *Lear Siegler Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991)). This burden requires the movant to show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. *Id.* (citing *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985)). In determining whether a material fact issue exists to preclude summary judgment, evidence favoring the nonmovant is taken as true, and all reasonable inferences are indulged in favor of the nonmovant. *Id.*

II. Exercise of the Appointment Power

All rules of will construction must yield to the basic intention and purpose of the testator as reflected by the entire instrument. *Wright*, 2 S.W.3d. at 672 (citing *Shriner's Hosp. for Crippled Children of Tex. V. Stahl*, 610 S.W.2d 147, 151 (Tex. 1980)). The testator's intent must be ascertained from the language used within the four corners of the instrument. *Id.* The question is not what the testator intended to write, but the meaning of the words actually used *Id.*. In the absence of ambiguity, we must construe the will based on the express language used. *Id.* If the court can give a certain or definite meaning or interpretation to the words of an instrument, it is unambiguous and the court may construe it as a matter of law. *Id.* (citing *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983)). If, however, the meaning of the instrument is uncertain or reasonably susceptible to more than one meaning, it is ambiguous. *Id.* at 671. If it is ambiguous, then its interpretation presents a fact issue precluding summary judgment. *Id.*

A. Standards Governing Exercise of the Appointment Power

The interpretation issue addressed in this appeal focuses on a power of appointment. It is helpful to describe at the outset what the power of appointment entails.

"A power of appointment is a power of disposition given to a person over property

not his own, by [someone] who directs the mode in which that power shall be exercised by a particular instrument." *Republic Nat'l Bank of Dallas v. Fredericks*, 155 Tex. 79, 283 S.W.2d 39, 46 (1955) (internal quotation omitted). "It is an authority to do an act which the owner granting the power might himself lawfully perform." *Id.* (internal quotation omitted). This power enables the donee to designate, within such limits as the donor may prescribe, the transferees of the property or the shares in which it shall be received. *Id.*

It also is helpful to describe what the power of appointment is *not*. "A power of appointment is neither property nor an estate, but is a mere right or power." *Krause v. Barton*, 430 S.W.2d 44, 47 (Tex.Civ.App.-Houston [1st Dist] 1968, writ. ref'd nre). "The authority given to the donee of a power of appointment does not vest in him any estate, interest, or title in the property which is the subject of the power." *Id.*

To exercise the appointment power granted in sections 3.4 and 4.3 of John's will, Sylvia's will "must refer to the power of appointment or the property subject to such power;" alternatively, Sylvia "must have owned no other property to which the will could have attached and thus the will have been a vain and useless thing except it be held to be an exercise of such power." *Republic Nat'l Bank of Dallas*, 283 S.W.2d at 47. Robinson's estate does not rely on the second or third bases to argue that Sylvia validly exercised her power of appointment in favor of Beverly. Therefore, we address the reference in Article II of Sylvia's will to a power of appointment and examine whether Article II validly exercises the power granted in John's will.

The inquiry in this case goes beyond the mere existence of a reference to the appointment power. "The general rule is that in order for a will or deed to constitute the exercise of a power of appointment*100 the intent to exercise such power must be so clear that no other reasonable intent can be imputed under the will." *Id.* "'If, from the circumstances or the instrument executed, it be doubtful as to whether it was the intention to execute the power possessed by the grantor, then it will not be held that by such act or conveyance that power was in fact executed.' " *Id.* (quoting *Hill v. Conrad*, 91 Tex. 341, 43 S.W. 789, 791 (1897)).

We note another hurdle that must be cleared in this particular case. Sections 3.4 and 4.3 of John's will provide that Sylvia's testamentary power of appointment over Marital Trust and Family Trust assets must be exercised by "*specific reference*." Robinson's estate contends

that Sylvia exercised this power by "specific reference" in sections 2.1 and 2.4 of Sylvia's will. The Doggett claimants contend that Article II's reference to "any other property over which I may have a power of appointment" is not precise enough to be a "specific reference."

With these standards as a backdrop, we examine whether Sylvia's will validly exercised the appointment power granted in John's will.

B. Application of the Standards to Sylvia's Will

According to Robinson's estate, Article II of Sylvia's will exercised the appointment power granted to her in sections 3.4 and 4.3 of John's will. Robinson's estate contends in its appellate brief that Article II of Sylvia's will "bequeathed to her daughter 'any other property over which I may have a power of appointment.' " To make this argument, Robinson's estate reads sections 2.1 and 2.4 of Sylvia's will together.

Section 2.1 states Sylvia's intent to give, devise, and bequeath "all of my property ... and any other property over which I may have a power of appointment." This language by itself does not appoint property to any identified recipient. Therefore, Robinson's estate cannot rely solely upon section 2.1 as the vehicle by which Sylvia appointed trust property to Beverly.

Robinson combines this language from section 2.1 with language from a residuary clause in section 2.4 to formulate an appointment of trust property to Beverly. Section 2.4 states, "I give, devise and bequeath all of the rest, residue and remainder of my estate and property to my daughter, Beverly Ann Longuet."

The formulation posited by the Robinson estate's brief—under which Sylvia "bequeathed to her daughter 'any other property over which I may have a power of appointment' "—omits section 2.4's reference to "*my estate and property*." As discussed more fully below, this omitted phrase is significant.

The Doggett claimants contend as a threshold matter that section 2.1's language does not constitute the "specific reference" demanded by John's will because section 2.1's language does not explicitly refer to John's will, the power granted in John's will, or the trusts. We assume without deciding that Sylvia's stated intent in section 2.1 to dispose of "any other property over which I may have a power of appointment" satisfies the "specific reference" requirement in sections 3.4 and 4.3 of John's will. But that is only the first hurdle.

Even with this threshold assumption, Robinson's estate still must establish that section 2.1's reference to "any other property over which I may have a power of appointment" can be read in conjunction with section 2.4's residuary clause to accomplish a valid exercise of the appointment power in favor of Beverly. Evaluating this latter proposition requires a close examination of the phrase "*my estate and property* " because that is what Sylvia gave "all of the rest, residue and remainder of" to Beverly in section 2.4.

Ordinary grammar and usage precepts teach that section 2.4's reference to "my estate and property" means Sylvia's "estate" and Sylvia's "property." *Se McIntyre v. Ramirez,* 109 S.W.3d 741, 746 (Tex. 2003) (interpreting phrase "a person who would ordinarily receive or be entitled to receive" in statute to mean a person who would "ordinarily receive" or "ordinarily be entitled to receive"); *Cent. Power & Light Co. v. Bradbury,* 871 S.W.2d 860, 863-64 (Tex. App.-Corpus Christi 1994, writ. denied)(interpreting phrase "ambulatory devices and services" in statute to mean "ambulatory devices" and "ambulatory services"); *see also S. & P. Consulting Eng'rs. P.L.L.C. v. Baker,* 334 S.W.3d 390, 401-02 (Tex.App.-Austin 2011, no pet) (acknowledging authority "preferring [the rule] that a single adjective preceding a list of nouns modifies each of the nouns" in statutory interpretation cases); *Bonilla v. State*, No. 14-08-00289-CR 2010 WL 2195440 at 9n.18 (Tex.App.-Houston [14th Dist.] June 3, 2010, no pet.) (mem.op.) (interpreting phrase "written order or grant of permission" in criminal statute to mean "written order" or "written grant of permission" according to "rules of grammar and common usage"). Robinson's estate did not argue otherwise in the trial court.

Under this reading of "my estate and property" as Sylvia's "estate" and Sylvia's "property," section 2.4's residuary clause accomplished an appointment of trust property to Beverly if Sylvia "intended that the appointive estate become part of her residual estate, and that it pass ... under the terms of her will" to Beverly. *See Krause,* 430 S.W.2d at 49. Such a reading comports with an understanding of the appointment power as "neither property nor an estate" by itself, which did not vest in Sylvia "any estate, interest, or title" in the trust property. *See id* at 47. The property subject to the appointment power would not become part of Sylvia's "property" or Sylvia's "estate" unless that property first was appointed to Sylvia or to Sylvia's estate. *See id* at 49.

In short, the approach illustrated by *Krause* contemplates a two-step process. The property first is appointed to the testator's estate and then reaches the recipient named in the

residuary clause. *See id.* This court's decision in *Wright* illustrates the same two-step process. *See Wright,* 2 S.W.3d at 673. ("Having found that Jacob did exercise the power of appointment, we further hold that by the terms of his will, Jacob intended that his appointive estate become part of his residual estate, and that the appointive estate under Lurine's will passed to the trustee of the Jacob Greenberg Family Trust."). But this mechanism was not available to Sylvia.

In regard to the Marital Trust, section 3.4 of John's will unambiguously states: "My wife shall have the special testamentary power to appoint ... provided, however, she shall not have the power to appoint trust principal to herself [or] her estate...." In regard to the Family Trust, section 4.3 of John's will unambiguously states: "My wife shall not appoint trust property to herself ... [or] her estate...."

If Sylvia could not appoint trust property to herself or to her estate, then section 2.4's residuary clause bequeathing to Beverly "all the rest, residue and remainder" of Sylvia's "estate" and Sylvia's "property" could not capture the trust property. If section 2.4's residuary clause could not capture the trust property, then that clause cannot be read in conjunction with section 2.1 of Sylvia's will to bequeath to Beverly "any other property over which I may have a power of appointment." Such an interpretation impermissibly contravenes the unambiguous limits in sections 3.4 and 4.3 of John's will on Sylvia's exercise of the appointment power. *Cf. Krause,* 430 S.W.2d at 48. ("The will of William H. Wilson authorized Mrs. Wilson to appoint her own estate...."). Therefore, as a matter of law, Robinson's estate cannot rely on the two-step mechanism illustrated by *Krause* and *Wright* to establish that section 2.1 of Sylvia's will worked in conjunction with section 2.4's residuary clause to accomplish a valid exercise of Sylvia's appointment power in favor of Beverly.

To address the limits established in sections 3.4 and 4.3 of John's will, Robinson's estate contends in a post-argument brief that "the trust principal need not—and does not—pass through Sylvia's estate." Instead, "Sylvia expressed her intent that the power of appointment be exercised and the property given in the same manner as her estate property, but not that it be appointed to her estate." Robinson's estate further argues that "[t]here is no need to treat the trust property as part of Sylvia's estate" when construing sections 2.1 and 2.4.

Without expressly saying so, this alternative argument reads the residuary clause's key

phrase—"my estate and property"—to bequeath Sylvia's "estate" along with "property [including property over *103 which I have a power of appointment]." This argument does not effectively circumvent the appointment power limits established in John's will for two reasons.

First, the Robinson estate's alternative argument requires this court to perform major surgery on section 2.4's residuary clause by grafting the bracketed phrase [including property over which I have a power of appointment] onto "my estate and property." *Cf. Krause,* 430 S.W.2d at 48-49 (residuary clause specifically disposed of all other property "which I may own or claim at the time of my death or over which I then shall have power of testamentary disposition"). We cannot do so because "courts may not redraft the will, vary or add provisions under the guise of construction of the language of the will in order to reflect some presumed intention of the testatrix." *Shriner's Hosp.*, 610 S.W.2d at 151.

Second, the Robinson estate's alternative argument requires choosing between multiple meanings of the word "property" when it is used in section 2.4's residuary clause. As discussed above, the most natural reading of section 2.4 is one in which "my estate and property" means Sylvia's "estate" and Sylvia's "property." Even if the Robinson estate's interpretation is plausible, it is at best an alternative interpretation. Robinson's estate cannot prevail merely by offering an alternative interpretation because the intent to exercise the appointment power "must be so clear that no other reasonable intent can be imputed under the will." *Republic Nat'l Bank of Dallas*, 283 S.W.2d at 47.

It bears emphasizing that section 2.1 by itself appoints no property to Beverly or to any other identified recipient. The Robinson estate's argument depends on combining section 2.1 with the phrase "my estate and property" in section 2.4's residuary clause. Therefore, the burden of demonstrating a sufficiently "clear" intent to exercise the appointment power must be borne in significant part by section 2.4's residuary clause.

Section 2.1 encompasses at least two distinct types of "property." Sylvia refers to "my property" in section 2.1, which by definition does not include any property over which she had power of appointment. *See Krause,* 430 S.W.2d at 47. Sylvia also refers in section 2.1 to "any other property over. which I may have a power of appointment." Because section 2.4's reference to "property" reasonably could mean "my property" exclusive of appointive property, Sylvia's intent to exercise the appointment power via section 2.4's residuary clause

is not "so clear that no other reasonable intent can be imputed under the will." *Republic Nat'l Bank of Dallas*, 283 S.W.2d at 47. These circumstances create doubt "as to whether it was the intention to execute the power possessed by the grantor" and militate against a holding that the appointment power "was in fact executed" by "such act or conveyance" in section 2.4. *See id.* *i* (citing *Hill*, 43 S.W. at 791

For these reasons, the trial court erred in granting summary judgment based on a conclusion that "Sylvia Doggett validly exercised her power of appointment in favor of ... Beverly Longuet." The trial court therefore erred in granting summary judgment based on a conclusion that "[b]ecause of the valid exercise of the power of appointment, [the Doggett claimants'] claims ... fail as a matter of law." As a matter of law, Robinson's estate cannot establish that Sylvia validly appointed trust property to Beverly via sections 2.1 and 2.4 of Sylvia's will. We sustain the Doggett claimants' first issue with respect to the grant of summary judgment and the award of attorney's fees in favor of Robinson's estate.

CONCLUSION

We reverse the trial court's final judgment and remand this case for proceedings consistent with this opinion.

***Schwartz v. Baybank Merrimack Valley N.A.,* 456 N.E.2d 1141**

GREANEY, Justice.

This case involves a testamentary power of appointment, the terms of which called for its exercise by specific reference to the power in the donee's will. A judge of a Probate Court concluded, after trial, that the power had not been exercised by the residuary clause of the donee's will which neither referred to the power nor purported to exercise any power of appointment. We conclude that the judge's decision was correct and affirm his judgment.

The facts are drawn from the judge's findings. On April 1, 1957, Mary F. Cox executed a will which provided that the residue of her estate be held in trust for the benefit of her daughter Dorothy Cox during Dorothy's lifetime. Upon Dorothy's death, the trustee of Mary's trust was directed to pay the trust principal to such person or persons, including the executor of Dorothy's will, as Dorothy "shall appoint by her will specifically referring to the power herein given to her." If Dorothy failed to exercise her general power of appointment, the trust principal was to be paid to the New England Deaconess Hospital.

Mary's will was admitted to probate on August 5, 1968, and, on July 17, 1970, BayBank Merrimack Valley, N.A. (BayBank), was appointed to succeed the original trustee under the will.

On May 6, 1977, Dorothy Cox executed a will, prepared by the plaintiff Maurice Schwartz, an attorney. The will, insofar as relevant, gave to a friend a life estate in her home and its contents, created a trust to maintain the home, and left specific cash bequests to a niece and a nephew and three charities. The residuary clause of Dorothy's will read as follows: "The said residue of my estate will be held in trust by my said Trustee ... to pay the income thereof, to my ... niece, *LOUISA GILBERT,* during her lifetime. Upon her death, said residue and any accrued income thereof, shall go to ... *BEAVER COLLEGE,* of Glenside, Pennsylvania, outright, and said Trust will terminate." Dorothy died on January 4, 1980, never having married and leaving no issue. Her will was allowed and, on March 26, 1980, Mr. Schwartz was appointed as her executor and trustee. Dorothy had insufficient assets at the time of her death to fund all the bequests in her will.

In addition, Mr. Schwartz, the sole witness at trial, testified as to the circumstances attendant upon his drafting of the will. He indicated that he had asked Dorothy about her assets and the funding of legacies, and that she had made reference to money in BayBank which could be used to pay the legacies. He also testified that he did not ask to see Mary's will before he prepared Dorothy's will, that he first became aware of Mary's trust after Dorothy's death, and that Dorothy never requested that her will exercise her power of appointment. Finally, Mr. Schwartz testified that Dorothy received substantial sums from another trust created by her father and administered by The First National Bank of Boston as trustee, that Dorothy knew that the residue of the estates of both her parents were managed by trustees, that she received income from both trusts of about $20,000 annually, and that Dorothy had a checking account at a BayBank office.

1. The facts require examination in light of several general principles pertaining to the exercise of powers of appointment and two Massachusetts decisions.

Generally, when the donor of a power of appointment prescribes a specific formality for the exercise of the power, there will be no effective appointment in the absence of the donee's compliance with the formalities dictated by the donor. *National Shawmut Bank v. Joy,* 315 Mass. 457, 462, 53 N.E.2d 113 (1944). Restatement (Second) of Property §18.2 (Tent.

Draft No. 6 1983. This rule, however, is not absolute. Failure to satisfy the formal requirements imposed by a donor will not cause the appointment to fail if the donee's action reasonably approximates the prescribed manner of appointment, especially where the appointee is a member of a favored class. Restatement (Second) of Property, *supra* § 18.3. 5 American Law of Property § 23.44 (1952). *See Shine v. Monaha*, 354 Mass. 680, 682, 241 N.E.2d 854 (1968). A donor's requirement of specific reference ordinarily negates any presumption that a general residuary clause may exercise the power and mandates, for effective exercise of the power, an affirmative act by the donee at least approximating the indicated formality.

The reasons behind these rules are simple enough to discern. The donor of the power presumptively intends by the specific reference requirement that the donee (a) focus on the consequence of the appointive act and consider the donor's wish with respect to the trust remainder if there is a default in exercise of the power, and (b) make an unambiguous written statement expressing a wish to exercise the power. With proper compliance, the specific reference device provides for the reasoned disposition of property by means of written and proven instruments which help to establish an unimpeachable record of title and serve to discourage unnecessary litigation.

These principles underlie two decisions of the Supreme Judicial Court within the last fifteen years which, while not directly on point, instructively discuss the subject of successful exercise of powers of appointment.

In *Shine v. Monaha*, 354 Mass. 680, 241 N.E.2d 854 (1968), the donor of an inter vivos trust required that a general power of appointment be exercised "by specific reference in her [donee's] will to the full power hereby created." The donee's will provided for the distribution of "[a]ll the rest, residue and remainder of my property, including all property of which I have a power of appointment by virtue [of] any will or testament or inter vivos trust executed by my husband [the donor]." An effective exercise of the power was found, under the principles of approximation, because the donor's purpose (to prevent inadvertent exercise of the power) had been satisfied by the donee's deliberate references to all powers of appointment given by her husband, the donor. Not to be overlooked in the decision, is the court's careful distinction from the case before it of situations, as in *National Shawmut Bank v. Joy, supra,* where the donor required a specific reference and the donee simply

referred in general terms to any power of appointment the donee might possess. 354 Mass. 680, 241 N.E.2d 854.

In *McKelvy v. Terry*, 370 Mass. 328, 346 N.E.2d 912 (1976), the donor conferred on the donee a limited testamentary power of appointment to be exercised "by reference [in the donee's will] to the limited power of appointment herein given to him." The donee's will provided for distribution of "[a]ll of the residue of my estate, including lapsed legacies and devises (and also including any property over which I may have a power of appointment under any instrument, it being my intention to exercise all such powers which I may have at my death)." The court found this residuary provision to be a sufficient exercise of the power, commenting (at 332) that "the meaning or design of the relevant clause of the [donee's] will sufficiently matches any requirement of the [donor's] trust instrument. That instrument calls for a 'reference' to the power, *not a specific reference,* and we think ... that the residuary clause of the will is an adequate reference although it is inclusive of any power created by any instrument in the donee's favor" (emphasis supplied). Referring to *Shine v. Monahan,* the court said (at 333): "We thought that there need not be exact compliance with the formality indicated by the donor where the approximation would satisfy his basic purpose. Less indulgence may be needed in the present case because the donor did not in terms require a specific reference." These excerpts from the *McKelvy* case imply the special nature of a specific reference requirement and emphasize that compliance with such a requirement cannot be easily circumvented.

These principles and decisions provide the guidelines necessary to dispose of this case. The general testamentary power of appointment granted to Dorothy by Mary's will expressly required that it be exercised by Dorothy's will "specifically referring to the power." The critical inquiry is "not whether [the] donee intended to appoint but rather whether [the] donee *manifested* her intent in the manner prescribed by [the] donor, *i.e.,* by making specific reference 'in her will' to the power granted by [the] donor's will" (emphasis original). *Holzbach v. United Virginia Bank*, 216 Va. 482, 485-486, 219 S.E.2d 868 (1975). *See also* Restatement (Second) of Property, *supra,* § 17.1. Unlike the situations in the *Shine* and *McKelvy* cases, the residuary clause of Dorothy's will made no reference at all to any power. Lacking any attempt at compliance with the requirement of specific reference, there is simply no testamentary framework which will allow application of a rule of approximation. We

conclude that Dorothy's will fails to exercise the power of appointment given to her by her mother.

2. Some brief comment is in order on the plaintiff's several arguments seeking to avoid the conclusion that there has been a default in the exercise of the power.

(a) The plaintiff's reliance on the decision in *Amory v. Meredith*, 7 Allen 397 (1863), is misplaced. The rule in *Amory* provides that a general testamentary power of appointment will be deemed to have been exercised by a general residuary clause in the donee's will, unless a contrary intention is demonstrated. The rule does not apply where the donor requires that the power be exercised by means of specific reference. *See McKelvy v. Terry*, 370 Mass. At 331-332, 346 N.E.2d 912. *See also National Shawmut Bank v. Joy*, 315 Mass. at 462, 53 N.E.2d 113.

(b) The fact that Dorothy's will includes several pecuniary bequests which in total may have exceeded her assets at the time of death does not, in these circumstances, imply that the power has been exercised by implication. *See Boston Safe Deposit and Trust Co., v. Prindle*, 290 Mass. 577, 584, 195 N.E. 793 (1935).

(c) The plaintiff's argument that property subject to a donee's general power is actually the donee's property is misplaced. Mary's will clearly did not grant a general power of appointment exercisable without restriction. We find the plaintiff's assertion to the contrary both untenable on the facts and unsupported by any authority dealing with a requirement of specific reference.

(d) While the testimony of Mr. Schwartz may have been properly admitted to show the circumstances attendant upon the execution of Dorothy's will, *see* 2 Newhall, Settlement of Estates § 361 at 470 (1958), the pertinent texts of the wills of Mary and Dorothy, when laid side by side and read together, manifest no ambiguity. Extrinsic evidence is not admissible to contradict or control unambiguous language in a will. *See Gustafon v. Svenson,* 373 Mass. 273, 275, 366 N.E.2d 761 (1977); *Gove v. Hammond*, 385 Mass. 1001-1002, 430 N.E.2d 822 (1982). Nor is it admissible to correct an inadvertent omission by Dorothy or a mistake by the attorney who drafted the will. *See Gustafson* and *Gove, supra.* Finally, extrinsic evidence, in the absence of an ambiguity, is not admissible to show Dorothy's intent, even if the result is the failure of the intended gift. *Ibid. See also First National Bank v. Shawmut Bank of Boston*, 378 Mass. 137, 144, 389 N.E.2d 1002 (1979).. *See generally*, Liacos, Handbook of

Massachusetts Evidence at 390-392 (5th ed. 1981 & Supp.1983).

Judgment affirmed.

Problems

1. In which of the following cases, has the power been exercised?

a) Bethany's will stated, "I leave my rental properties in trust for Greg for life, the remainder as Greg shall appoint by will to any one that he chooses." Greg appointed the rental properties to Donna. Then, Greg dies intestate.

b) Karen's will stated, "I leave my computers in trust for Jim for life, the remainder as Jim shall appoint." In his will, Jim stated, "I leave my entire estate, including property over which I have an appointive power to my friend, Jane."

c) Rita's will states, "I leave my entire estate in trust for Mitchell for life, the remainder as Mitchell shall appoint by will to any one of my children that he chooses." Mitchell sent a note to Rita's children telling them that he planned to leave Rita's money to them.

d) Frances' will states, "I leave my stocks in trust for Leonard for life, the remainder as Leonard shall appoint by will." In his will, Leonard stated, "I leave the residue of my estate to Lisa."

Class Discussion Tool 1

In her will, Stella stated, "I give my son Mark the rents from my apartment complex for the span of his life, and upon Mark's death the apartment complex goes to whomever he appoints in his will." Mark is a gambler and he loves to play high stakes poker. One night Mark lost all of his money, but he wanted to continue to play the game. Mark asked his friend Stan to borrow $50,000. Stan is a real estate developer. In exchange for the $50,000, Mark gave Stan a written promise to appoint him as owner of the apartment complex in his will. A few moths later, Mark was killed when he was found cheating in a poker game. Mark will reads, "I leave all of my property including property of which I have a power of appointment to Rachel." When Stan heard about the will, he sued Mark's estate. He asked the court to give him the apartment complex or $50,000 plus interest. What type of power does Mark have? Can Stan get the apartment complex? Can Stan get the $50,000?

Class Discussion Tool 2

In her will, Olivia stated, "I give my son Jeremy the income from my retail store for life, and upon Jeremy's death the store goes to whomever he appoints in his will. If Jeremy fails to exercise his power of appointment, the retail store will go to Jack." Jeremy became ill and needed someone to take care of him. Jeremy told his cousin, Annie, that if she took care of him, he would appoint her as owner of the retail store. Jeremy and Annie put there agreement in writing. In his will, Jeremy stated, "I leave all of my property to Jenny. I leave all of the property over which I have a power of appointment to Annie in accordance with our written agreement." Jack filed an action to have the contract declared void and unenforceable. What result?